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Is California's Gay Marriage Ban Unconstitutional?

Jacob Sullum | January 11, 2010

Today a federal judge in San Francisco began to hear arguments in a case challenging Proposition 8, California's voter-approved constitutional ban on gay marriage, as a violation of the 14th Amendment's due process and equal protection guarantees. Early on U.S. District Court Chief Judge Vaughn Walker raised a point that will resonate with libertarians:

> He stopped lawyer Ted Olson, arguing in favor of same-sex marriage, a couple of sentences into his presentation to ask if the state could simply get out of the marriage business altogether to avoid the question of discrimination.
>
> "Yes, I believe it could," said Olson.

Short of that, I agree with Olson that the government should treat all couples equally, regardless of their sexual orientation, as a matter of basic fairness. But whether that result is required by the 14th Amendment's Equal Protection Clause (the stronger of the two arguments offered by the plaintiffs) is another matter. Surely the people who wrote and ratified the amendment would not have thought so, assuming the question would even have made sense to them. They would not have perceived a homosexual couple and a heterosexual couple as similarly situated, so they would not have seen gay marriage as required by "the equal protection of the laws." By contrast, it is much less of a stretch, given the 14th Amendment's historical background, to say the Equal Protection Clause prohibits states from trying to stop interracial marriage.

Maybe it does not matter what the people who gave us the 14th Amendment thought they were doing. But if we reject the original public understanding as our guide, I'm not sure how we stop constititutional interpretation from becoming a result-oriented process in which everyone twists the text to fit his own policy preferences. That sort of approach, while it might have the effect of contracting government or expanding liberty in particular cases, ultimately undermines whatever protection a constitution offers.

I'd like to believe Cato Institute Chairman Bob Levy when he argues that the libertarian result in this case is also the one that the Constitution demands, and I'm tempted to follow the pretty reliable rule of thumb that one should always disagree with whatever legal position Ed Meese takes. But applying the Equal Protection Clause to gay marriage is not quite the same as, say, applying the First Amendment to the Internet. The latter involves

applying an existing principle to a new situation, while the former seems to involve modifying a principle so that it comports with contemporary sensibilities (and not even the majority's sensibilities, since most Americans continue to oppose gay marriage). I suppose you could say the principle is the same, while our understanding of homosexual relationships has changed. But that approach opens the door to fiddling with all sorts of constitutional provisions based on the premise that we are now more enlightened than the Framers were. (Can a new understanding of crime, drugs, or terrorism change the meaning of the Second Amendment, the Fourth Amendment, or the Suspension Clause?) And since in this case it is still a minority whose views are said to define what equal protection requires, it is not at all clear what the standard is for deciding when evolving opinion trumps the original understanding.

The plaintiffs challenging Proposition 8 make their case here. George Mason law professor Nelson Lund, who is advising the proposition's defenders, replies here. The motion for dismissal of the lawsuit is here.