

# THE ORANGE COUNTY BETA REGISTER

## Robert Levy: No constitutional case for Prop. 8

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A federal judge in San Francisco began hearing testimony Monday on whether California's ban on same-sex marriage – Proposition 8 – is a violation of the Constitution's promise of equal protection under the law.

Thomas Jefferson set the stage in the Declaration of Independence: "[T]o secure these Rights, Governments are instituted among Men."

The primary purpose of government is to safeguard individual rights and prevent some persons from harming others.

Heterosexuals should not be treated preferentially when the state carries out that role. And no one is harmed by the union of two consenting gay people.

For most of Western history, marriage was a matter of private contract between the betrothed parties and, perhaps, their families. Following that tradition, marriage today should be a private arrangement, requiring minimal or no state intervention. Some religious or secular institutions would recognize gay marriages; others would not; still others would call them domestic partnerships or assign another label. Join whichever group you wish. The rights and responsibilities of partners would be governed by personally tailored contracts – consensual bargains like those that control most other interactions in a free society.

Regrettably, government has interceded, enacting more than 1,000 federal laws dealing mostly with taxes or transfer payments, and an untold number of state laws dealing with such questions as child custody, inheritance and property rights. Whenever government imposes obligations or dispenses benefits, it may not "deny to any person within its jurisdiction the equal protection of the laws." That provision is explicit in the 14th Amendment to the Constitution and implicit in the Fifth Amendment.

The Supreme Court decades ago invalidated both interracial marital restrictions and school segregation. The court applied the plain text of the Equal Protection Clause despite contrary practices by the states for many years even after the 14th Amendment was ratified in 1868.

To pass constitutional muster, racial discrimination had to survive "strict scrutiny" by the courts. Government had to demonstrate a compelling need for its regulations, show they would be effective and narrowly craft the rules so they didn't sweep more broadly than necessary. That same regime should apply when government discriminates based on gender preference.

No compelling reason has been proffered for sanctioning heterosexual but not homosexual marriages.

Nor is a ban on gay marriage a close fit for attaining the goals cited by proponents of such bans. If the goal, for example, is to strengthen the institution of marriage, a more effective step might be to bar no-fault divorce and premarital cohabitation. If the goal is to ensure procreation, then infertile and aged couples should be precluded from marriage.

Instead, most states have implemented an irrational and unjust system that provides significant benefits to just-married heterosexuals while denying benefits to a male or female couple together for decades. That's not the way it has to be. Government benefits triggered by marriage could just as easily be triggered by other objective criteria, leaving the definition of marriage in the hands of private institutions.

Yet our politicians, unwilling to privatize marriage, seem congenitally unable to extricate themselves from our most intimate relationships. One would hope that more enlightened federal and state legislators will have the courage and decency to resist morally abhorrent and constitutionally suspect restrictions based on sexual orientation. Gay couples are entitled to the same legal rights and the same respect and dignity accorded to all Americans.

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