

THE ORANGE COUNTY
REGISTER

Ilya Shapiro: Judge right; gay marriage ban lacks rational basis

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2010-08-05 14:19:32



I haven't even begun to dig into Judge Walker's 138-page opinion that strikes down Proposition 8 on both due process and equal protection grounds, but here are three key excerpts. First, the conclusion that government lacks a "rational basis" for preventing same-sex couples from marrying:

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples.

Then the equal protection conclusion:

"Because Proposition 8 disadvantages gays and lesbians without any rational justification, Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment."

And finally the due process conclusion:

"As explained in detail in the equal protection analysis, Proposition 8 cannot withstand rational basis review. Still less can Proposition 8 survive the strict scrutiny required by plaintiffs' due process claim. The minimal evidentiary presentation made by proponents does not meet the heavy burden of production necessary to show that Proposition 8 is narrowly tailored to a compelling government interest. Proposition 8 cannot, therefore, withstand strict scrutiny. Moreover, proponents do not assert that the availability of domestic partnerships satisfies plaintiffs' fundamental right to marry; proponents stipulated that "[t]here is a significant symbolic disparity between domestic partnership and marriage." [citation omitted] Accordingly, Proposition 8 violates the Due Process Clause of the Fourteenth Amendment."

In short, the court found none of the government's asserted interests – including tradition, moving slowly on social change, and promoting different-sex parenting – to be "legitimate." This is obviously a big deal and will be appealed – and no gay marriages will be allowed until the appellate process will have run its course (most likely up to the Supreme Court). Currently, same-sex couples can only legally wed in Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and Washington, D.C.

Cato's chairman Bob Levy, also co-chair of the advisory board to the American Foundation for Equal Rights (which sponsored the suit) had this to say:

"The principle of equality before the law transcends the left-right divide that so often defines issues in this country. Today, people from across that divide came together to fight a law that cut to the very core of our nation's character. Prop. 8 attempted to deny people an indispensable right vested in all Americans. This Judge and this Court bravely confronted wrongful discrimination and came down on the right side – defending and enforcing equal protection, as demanded by the Constitution."

I too think this was the correct decision – reserving, of course, the right to criticize parts once I've done

more than skim it – though I fear it will poison our politics in a way not seen from a legal decision since *Roe v. Wade*. *Roe v. Wade* is not what today's ruling should be compared to, however – both because this was only one district judge and because *Roe v. Wade* was a tortured fabrication of constitutional law that no legitimate constitutional scholar really defends (not even Justice Ruth Bader Ginsburg). I would liken it more to one more step in the civil rights movement, giving all Americans equality under the law. If you want a court case to compare it to, try *Loving v. Virginia* (which struck down bans on interracial marriage).

I should also add that this all could have been averted if government just got out of the marriage business entirely: have civil unions for whoever wants them – which would be a contractual basket of rights not unlike business partnerships – and let religious and other private institutions confer whatever sacraments they want. If the state provides the institution of marriage, however, it has to provide it to all people.

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