A Watershed for the Left

by William J. Watkins, Jr.

During the week of December 6, the Ninth Circuit Court of Appeals will hear arguments in *Perry* v. *Schwarzenegger*. In the original decision, U.S. District Judge Vaughn R. Walker held that California's Proposition 8, which amended the state constitution to define marriage as a union between a man and a woman, violated the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution. In essence, Judge Walker ruled that there is no rational reason to limit marriage to opposite-sex couples. He redefined marriage as "a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents [*sic*]."

Considering that the Ninth Circuit is the most liberal appellate court in the country, Judge Walker's decision will likely be upheld. Whatever the result, the losing side is certain to petition the Supreme Court for *certiorari*. Although the Supreme Court is not required to grant review, it's doubtful that the Court's more liberal members will pass on an opportunity to engage in social experimentation. Judge Walker's new definition of marriage might become *de rigueur* in all 50 states.

The *Perry* opinion is a reflection of the modern judicial mind. To give himself cover, Judge Walker conducted a trial and heard testimony about Proposition 8. Fact-finding by a trial judge is subject to great deference on appeal, and hence, Judge Walker's opinion is replete with quotations from testifying witnesses. For example, gay and lesbian couples testified that traditional marriage denies them "access to the language" to describe their unions. One man explained that it was awkward to go into a bank and say, "My partner and I want to open a joint account." How much the better, the man contended, if he could refer to his partner as "my husband."

Judge Walker also heard from various expert witnesses. Psychologist Gregory Herek, whose blog is entitled *Beyond Homophobia*, testified that "homosexuality is a normal expression of human sexuality." Ilan Meyer, a social epidemiologist, opined that Proposition 8 "increases the likelihood of negative mental and physical health outcomes for gays and lesbians." Judge Walker heard from Gary Segura, a Stanford professor of political science and chair of Chicana/o Studies at the Center for Comparative Studies in Race and Ethnicity, who "identified religion as the chief obstacle to gay and lesbian political advances." Economists took the stand to report that the state has lost money "because Proposition 8 slashed the number of weddings performed in San Francisco."

Because Governor Terminator and Attorney General Moonbeam refused to defend the people's amendment to the state constitution, this task fell to private groups that intervened in the litigation. These groups faced an uphill battle, because many of the experts they sought to call did not want to appear in court for personal-safety reasons. For the brave individuals who did testify, Judge Walker simply rejected their opinions as "unreliable" and "entitled to little weight."

After taking testimony, Judge Walker moved to the legal issue: Does the 14th Amendment prohibit states from limiting marriage to a union between a man and a woman? Judge Walker purportedly subjected Proposition 8 to rational-basis review. To pass this test, a state law need only be "rationally related" to a "legitimate government interest." Under Supreme Court case law, so long as there is any reasonably conceivable state of facts that could provide a rational basis for the classification, the law must be upheld.

The most obvious legitimate government interest is the preservation of public morals. Under the Tenth Amendment, the states retain broad authority known as the "police power." Absent a state constitutional provision restraining this power, the states and localities may pass laws and regulations to promote the comfort, safety, morals, and health of the people. State laws prohibiting such matters as gambling, polygamy, prostitution, and public drunkenness are enacted pursuant to the police power. A ballot initiative limiting marriage to heterosexual couples should fall squarely within the ambit of the police power and be upheld.

Before 2003, this would have been true. In that year, a 6-3 majority of the U.S. Supreme Court invalidated a Texas statute criminalizing homosexual sodomy. The decision in *Lawrence* v. *Texas*, authored by Justice Anthony Kennedy, held that Judeo-Christian "ethical and moral principles" may not form the basis of state legislation. The fact that a majority of citizens has "traditionally viewed a particular practice as immoral is not a sufficient reason for uphold-

ing a law prohibiting the practice." All persons, according to Justice Kennedy, may define their own concepts "of existence, of meaning, of the universe, and of the mystery of human life," without regard to contrary views firmly established and ingrained in American experience.

Justice Kennedy further opined that "[p]ersons in a homosexual relationship may seek autonomy for [marriage, contraception, family relationships, childrearing, *etc.*] just as heterosexual persons do." In other words, Justice Kennedy signaled that the courts should reexamine traditional notions about marriage and strike down state laws based on ancient moral codes.

In light of *Lawrence*, Judge Walker demanded that the defenders of Proposition 8 define a secular purpose furthered by the traditional definition of marriage. They responded that Proposition 8 promotes "naturally procreative sexual relationships and channel[s] them into stable, enduring unions for the sake of producing and raising the next generation." Californians could also rationally deduce that a family structure with married (opposite-sex) parents is the best social environment in which to bear children. Californians could further conclude that the rearing of children by same-sex couples—prohibited by nature from being the biological parents of a child—cannot furnish children with a parental authority figure of each sex. At a minimum, such purposes appear rational and lack a moral component declared impermissible by *Lawrence*.

Judge Walker, however, still found fault with the possible secular purposes of Proposition 8. "Children," he lectured, "do not need to be raised by a male parent and a female parent to be well-adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well-adjusted." Judge Walker further determined that sex roles in marriage are an unnatural concoction of the state's previous efforts to perpetuate a patriarchal society. Now, in our more enlightened age, we know that "the exclusion [of same-sex couples from marriage] exists as an artifact of a time when the genders were seen as having distinct roles in society and marriage. That time has passed." He therefore pronounced that "[g]ender no longer forms an essential part of marriage." Men and women are much like pennies, fungible units having identical roles and functions.

Where have the common people been misled to believe that sex (not "gender") is relevant to marriage? Christ's Church, of course. It is irrational to teach that homosexuality is sinful, says Judge Walker, and therefore Christianity directly harms homosexuals. Orthodox Christian beliefs are the fountainhead of "stereotypes and misinformation" that have "resulted in social and legal disadvantages for gays and lesbians." Perhaps sensing a Christian conspiracy, Judge Walker noted that "84 percent of people who attend church weekly voted in favor of Proposition 8."

Judge Walker's reasoning leaves open many other possibilities for "marriage." His definition refers to "couples," but why should marriage be limited to two people? *Perry* teaches that marriage is only a matter of affections. If polygamists want "access to the language," how can a state use its police power to stop them from getting married? Because there is nothing magical about "gender," one can hardly argue that there is anything special about the number two. (Apologies to the late Marvin Gaye and Tammi Terrell.)

Similarly, why should consanguinity pose an obstacle to a father and daughter who desire to marry? If they believe a marital union is the mechanism for their self-actualization, then how can they be denied a marriage license? Dad and daughter must define for themselves the concepts "of existence, of meaning, of the universe, and of the mystery of human life." One cannot fall back on biblical prohibitions against these relationships, since the Bible, according to *Lawrence*, may not be used to support a statute. *Lawrence* is also clear in stating that a majority opinion which deems an act immoral may not be used to bind the minority. If the majority's moral code may not be used as a frame of reference, can any moral code be used? If not, then are there any limitations that may be placed on attempts at self-actualization?

***Perry* is a watershed** for the left. We should not be surprised if within the next two years Judge Walker's new definition of marriage is sanctioned by the Supreme Court. Of the six justices supporting the *Lawrence* opinion, three are still on the Court (Kennedy, Ginsburg, and Breyer), and the other three have been replaced by Alito, Sotomayor, and Kagan. While Alito will likely oppose *Perry*, this still leaves five votes for Judge Walker's work. And five is all that the liberal culture warriors need.

But this does not mean that all is lost. *Perry* provides the right with a weapon, though it is up to conservative grassroots and national leaders to use it. *Perry* is perhaps the greatest affront to popular sovereignty seen in decades. Judge Walker plainly averred that the fact "[t]hat the majority of California voters supported Proposition 8 is irrelevant." If the people cannot enshrine into fundamental law the traditional definition of marriage accepted by generations of Americans, then what can they do? Conservatives are fond of rhetoric about judicial dictatorships and judges acting as Platonic guardians. *Perry* provides ammunition to show that this is not hyperbole but an accurate

assessment of the federal judiciary. *Perry* shows that popular sovereignty is but a ghost and invites the people to do something about it.

Perry also offers lessons about judicial activism. Judge Walker decreed that sex has no relation to marriage and that anyone who believes otherwise is irrational. He found that there is no reasonably conceivable state of facts that could provide a rational basis for defining marriage as a covenant between one man and one woman. The dictionary defines *rational* as "having or exercising reason, sound judgment, or good sense." This is not a high mark to meet. If the promotion of childrearing in two-parent homes with a father and mother is not at a minimum rational, what is rational? For the purposes of Judge Walker, *Perry* is grounded in a worldview congruent with his own homosexual lifestyle. If anyone doubts the indictment that judges too often write their personal opinions into law, *Perry* is solid evidence to the contrary.

Finally, conservatives can garner lessons about compromising with the radical left. California already had in place a law allowing domestic partnerships. Homosexual couples enjoyed the same legal rights and responsibilities as married (heterosexual) couples, but the homosexual unions were not called marriage. Homosexual partners, for example, had access to survivor pension benefits, access to family insurance plans, and rights of inheritance just like married couples. This did not satisfy the homosexual lobby; it only fueled efforts to eviscerate the traditional definition of marriage. *Perry* shows that the gay lobby is not concerned with toleration—the right to be left alone—but instead desires universal acceptance of homosexuality as the equivalent of heterosexuality. If you do not agree with them, you will be called irrational and disregarded—just like the experts who offered favorable opinions about Proposition 8 in court.

As a rejection of traditional boundaries and ancient truths, *Perry* is the progeny of a postmodern mind. On his own initiative, Judge Walker seeks to move Americans beyond what he views as their primitive thought and practices about marriage. By abandoning old-fashioned tenets of judicial restraint, where a jurist refrains from passing judgment on the wisdom of an act but simply measures it against the written Constitution and the intent of its ratifiers, Judge Walker elevates himself above the people. For the time being, he basks in victory from his judicial perch. Will the people suffer him to remain there?

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Going Rove

THE IDEA that the "far right" is on the cultural warpath is, like most liberal canards, the exact opposite of the truth. See, for example, the sort of treatment handed out to the victor in Delaware's GOP senatorial primary. The conservative Catholic Christine O'Donnell, a 46-year-old Sarah Palin knockoff, was immediately held up for ridicule on account of her views on . . . onanism! A video of her made more than 20 years ago, in which she advocates chastity before marriage and denounces masturbation as, well, yucky, immediately went up on MSNBC, and the left-wing blogs followed up with a frenzy of chortling. Chastity! Anti-Onanism! In Washington, D.C.? It'll never happen.

The snickering had hardly subsided when Rachel Maddow and Keith Olbermann acquired an unlikely ally: Republican grand strategist Karl Rove. Appearing on FOX News, he lashed out at O'Donnell:

> Look, she believes she's going to win, and that's what a candidate ought to believe. I think the questions about why she had a problem for five years with paying her federal income taxes, why her house was foreclosed on and put up a for sale by the sheriff, why it took 16 years for her to settle her college debt and get her diploma after she went around for years claiming she was a college graduate . . . these and other troubling sort of personal background things, she thinks she's explained them. I think a lot of voters in Delaware are going to want more than she's offering to them right now. We'll see . . . I mean 48 days from now, we'll see if these issues matter or not and if she wins, more power to her. She's right on the issues, but I think the voters of Delaware are not just going to want to know "Are you right on the issues?", but do you have the character, and record, and background that gives me the confidence you're the right person for the job.

Setting aside the merit of O'Donnell's candidacy, and the intriguing question of just why the Machiavelli of the Bushian Old Guard would go after the candidate of his own party in such grossly personal terms, let's look at what indicates a lack of "character" from the Rovian perspective.

Number one on his list: anyone who can't make his mortgage payments. That right there eliminates a large and growing segment of the population from ever running for office. O'Donnell attended a sheriff's sale of her foreclosed home and got a good friend to buy it back on her behalf—clearly an example of moral turpitude if ever there was one. As for her college loan: At least she repaid it when she could. But such arguments fall on deaf ears as far as our elites are concerned; financial problems are not part of their universe. Sure, they've heard people "out there" are having a hard time of it, and Republican insiders like Rove are perfectly willing to use this to regain power, but as for admitting these serfs to the halls of power—it's unthinkable.

In her speech to the Values Voters summit, O'Donnell lit into what she described as "the ruling class"—the D.C. "cocktail circuit," the "small elites" that expropriate our tax dollars and try to dominate our lives: "The small elite don't get us," she averred. "They call us wacky, they call us wing nuts. We call us 'we the people.'"

"We don't want to take our country back," she went on to say. "We are the country."

O'Donnell didn't mention Rove by name, but if anyone personifies the ruling class in this country it is Señor Rove, who is so out of touch with the country and what's happening in it that he thinks it's good politics to go on television and denounce someone for not making her mortgage payment. He thinks it's "smart" to go after someone who had trouble paying back her college loan. Such a man is deaf, dumb, and blind to what's going on around him: deaf to the cries of his countrymen, who are suffering through what many believe is America's Second Great Depression; dumb enough to believe his disdain will do anything but blow back on him and his cronies; and blind to the crisis of his own party, which brought on this disaster in partnership with their Democratic clones.

The Tea Partiers may not lead Americans out of the wilderness, but at least they know the country has lost its way. Our ruling elite is content to go along in the same old way, making the same mistakes and taking their cut off the top, hoping the crisis will pass. It won't. The O'Donnells of this world may not have all the answers, but they are beginning to ask the right questions—and that's an auspicious start. ◆