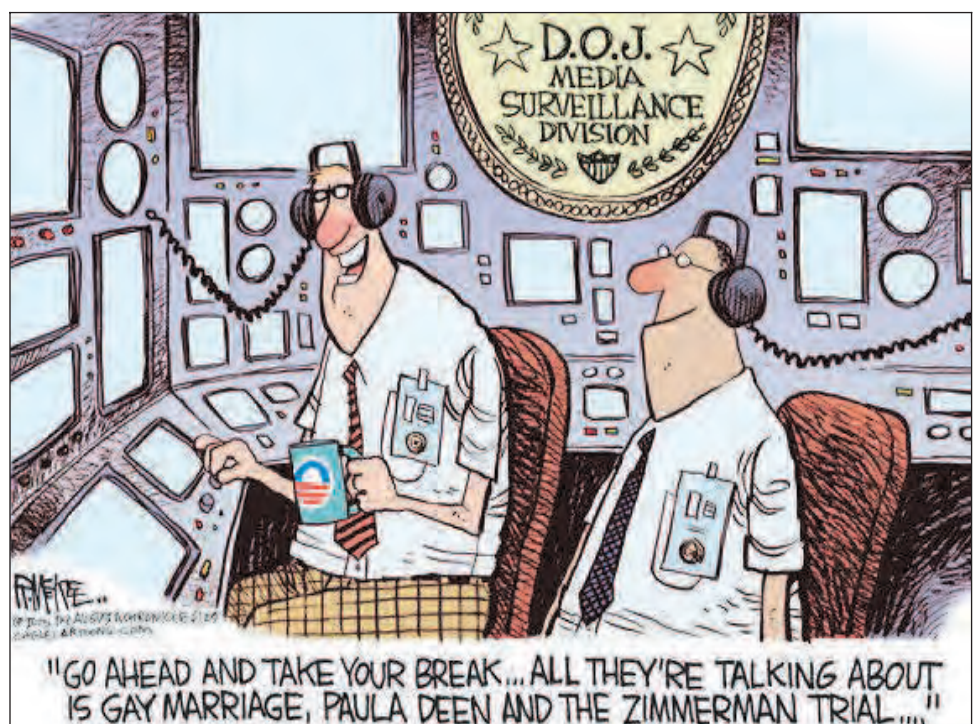


PROPOSITION 8



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POINT

THE FUTURE OF MARRIAGE EQUALITY IN CALIFORNIA

Same-sex unions are here to stay in our state.

By ERWIN CHEMERINSKY FOR THE REGISTER

Everyday, without headlines or fanfare, same-sex couples are marrying in California. Yet the litigation over the fate of Proposition 8 continues and is likely to do so for months, if not longer. Why and what does it mean for the future of marriage equality in California?

The key is to remember that the Supreme Court did not declare Prop. 8 unconstitutional. It decided the case on the procedural ground that the supporters of the initiative lacked standing to defend it. The effect of the Supreme Court's decision is to leave in place the federal district court's decision declaring Proposition 8 unconstitutional.

But the Supreme Court's resolving the case this way leaves open many issues that are now being litigated and likely will be for some time.

The district court, though, declared Prop. 8 unconstitutional and issued an injunction ordering that the governor, the attorney general and the Registrar – and all under their direction and control – not enforce Prop. 8 anywhere in California.

The defendant government officials decided not to appeal, but supporters of the initiative attempted to do so. The federal court of appeals allowed their appeal and declared Prop. 8 unconstitutional. The Supreme Court, in a 5-4 decision, held that the supporters of an initiative cannot bring an appeal to defend it when the defendant government officials refuse to do so.

In an opinion by Chief Justice John Roberts, the court explained that only those who are personally injured have standing to appeal. The supporters of Prop. 8 are not injured if marriage licenses are issued to same-sex couples. Their injury is an ideological one, and the Supreme Court long has ruled that an ideological injury is insufficient for standing.

The court's decision came down on June 26, and on June 28 the federal court of appeals said that the district court decision should be followed and same-sex couples could marry in California. Protect Marriage, a leading group supporting Prop. 8, asked Justice Anthony Kennedy to put a halt to these marriages, but on

June 30, he denied this request.

The saga is not over. On July 12, Protect Marriage asked the Supreme Court to tell county clerks throughout California to stop issuing marriage licenses to same-sex couples. It argued that the federal district court ruling applied only to the two couples who sued and that it, at most, had authority over the two counties

California Supreme Court has ruled that marriage is defined by state law, not local law. When Gavin Newsom, as mayor of San Francisco, allowed same-sex marriages, the California Supreme Court rejected that and held that marriage is entirely regulated by the state, not by local governments. Under this, the county clerks have no choice but to follow state law, which state officials



Proposition 8 lawsuit plaintiffs Kris Perry and Sandy Stier ride in a spot of honor during 43rd annual San Francisco LGBT Pride Celebration & Parade on June 30.

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named as defendants. On July 15, the California Supreme Court denied this request.

Trying another avenue to end same-sex marriages, on July 19, the clerk of San Diego County asked the California Supreme Court to rule that he did not have to issue marriage licenses to same-sex couples. On July 23, the California Supreme Court declined this request.

However, these two cases, about who is bound by the federal district court's order, remain in the California Supreme Court and will be briefed over the months ahead and then argued. Protect Marriage and the San Diego County clerk argue that county clerks are not under the direction and control of the governor, attorney general or Registrar of Records, and thus are not covered by the federal district court's decision.

The problem with this argument is that the Cali-

fornia Supreme Court has ruled that marriage is defined by state law, not local law. When Gavin Newsom, as mayor of San Francisco, allowed same-sex marriages, the California Supreme Court rejected that and held that marriage is entirely regulated by the state, not by local governments. Under this, the county clerks have no choice but to follow state law, which state officials

have said requires issuing marriage licenses to same-sex couples because Prop. 8 has been declared unconstitutional. The larger problem for Protect Marriage is that a state court cannot countermand or limit a federal court order. For example, when a federal court ordered desegregation of a school system, no state court could change that. Only the federal district court can modify its own order.

The California Supreme Court ultimately will rule against Protect Marriage, and it will have to return to the federal district court.

There, too, I think it is unlikely to be successful in putting an end to same-sex marriages in California. The bottom line is that same-sex marriage is here to stay in California.

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COUNTERPOINT

PROPOSITION 8 PROponents ARE STILL IN THE FIGHT

New court action important for our initiative process.

By AUSTIN R. NIMOCKS FOR THE REGISTER

When the U.S. Supreme Court ruled on June 26 that the official proponents of Proposition 8 lacked standing in federal court to defend marriage in California as the union of one man and one woman, it threatened the integrity of the initiative process in California.

It also rewarded the

Those directives lack legal force because state officials do not have authority to control county clerks when they issue marriage licenses.

California is in this situation because the governor and attorney general left Prop. 8 undefended and refused even to appeal the district court's judgment against the law.

By so doing, they created the current state of

as 9th Circuit Judge Stephen Reinhardt recognized, of a knowing strategic decision by the attorneys who brought that case. They could have proceeded along a different course, but they didn't. The Prop. 8 proponents are merely asking that their elected officials abide by the limited relief that the plaintiffs requested and the district court awarded.

The plain language of the district court's injunction does not support the governor's and attorney general's attempts to apply it statewide. While it is true that the injunction applies to all persons under the supervision or control of the governor, attorney general or state registrar, none of those state officials has the authority to supervise or control county clerks when they issue marriage licenses.

Because the injunction does not bind county clerks, California law requires them to continue enforcing the marriage amendment because no appellate court decision has established that the law is unconstitutional.

By significantly hampering the initiative process in California and elsewhere, the logic of *Hollingsworth v. Perry* rewards state officials for their inaction.

Many who seek to redefine marriage may revel in what they deem a watershed moment, but one wonders whether they realize the price to be paid down the road. It is almost cliché to say that Americans strive for a "government of laws and not of men," but so far, the saga of Prop. 8 threatens to turn that notion on its head. Justice Anthony Kennedy perceived this very danger in his dissent in *Hollingsworth*, reminding us that "the right to make law rests in the people and flows to the government, not the other way around."

In the new petition filed with the California Supreme Court, the official proponents of Prop. 8 seek an outcome upon which people on all sides of the marriage debate should be able to agree – that the laws of California, not the desires of its public officials, should rule the day.

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uncertainty surrounding the marriage laws in California. Now those same state officials seek, through their recent directives, to bring about the end that they have publicly championed all along: the ultimate demise of Prop. 8.

In finding that the official proponents of Prop. 8 lacked standing to defend the law, the Supreme Court left in place only the decision and injunction of the district court. Because the plaintiffs in that case did not pursue their claims as a class action, the district court's authority was limited to providing relief to them alone. And in the wake of the 9th Circuit's premature lifting of its stay, those plaintiffs obtained a marriage license. They have therefore received all the relief they requested, and no county clerk can be compelled by the injunction to stop enforcing Prop. 8 going forward.

The limited scope of this relief is the direct result,

state's governor and attorney general for their indirect attempt to veto, by inaction, the sovereign will of the people of California.

This outcome is lamentable but need not be fatal to the cause of marriage or to the future of our democratic republic because the initiative's official proponents continue to fight not only for the foundational element of family and society, but also for the freedom of Californians to govern themselves. That's why they have now filed an action with the California Supreme Court to require elected officials to enforce the state's marriage laws.

The U.S. Supreme Court did not strike down Prop. 8 and redefine marriage for all of California, notwithstanding recent directives from the governor and the attorney general ordering all county clerks to cease enforcing the state's marriage amendment and begin issuing marriage licenses in violation of state law.