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California Court's Judicial Activism Threatens the Institution of Marriage

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On May 15, 2008, the California Supreme Court overturned California voters' 61 percent majority, expressed in 2000's Proposition 22, in favor of affirming marriage as the union of one man and one woman. The California court's decision is the latest in a series of judicial and legislative efforts to institutionalize a social experiment in its early stages by elevating it in law to the status of the oldest of institutions: marriage.

The legislature previously passed a domestic partnership law granting same-sex couples the benefits and privileges of marriage. What is happening now is no minor adjustment, nor a slight change in degree that just extends benefits or rights to a larger class, but a substantive change in the essence of the institution. The court's decision does not expand marriage; it alters its core meaning. To redefine marriage so that it is not intrinsically related to the relationship between fathers, mothers, and children formally severs the institution from its nature and purpose, remaking the institution into a mere contract between any two individuals.

Beyond the Competence of the Judiciary. The decision is a masterpiece of judicial activism. It is long on public policy preferences, and extremely short on law. Questions like what constitutes marriage are beyond the competence and expertise of judges. Decisions like these weaken the judicial system by causing the electorate to question the legitimacy of judicial decision-making.

As with *Roe v. Wade*, this decision is troubling from three angles: on the process, on the reasoning, and on the substance.

- It was an instance of the judiciary usurping the political process.
- It was poorly reasoned, abandoning the original meaning of California's constitution in order to invent a right to same-sex "marriage."
- It was wrong on the substance, comparing support for traditional marriage to racism, disregarding the nature and purpose of marriage, and ignoring the reasons for which the state has always set marriage apart from other household forms.

The California court's decision treats the push for same-sex "marriage" as the latest wave of the civil rights movement. The decision repeatedly declares that sexual orientation is just like race or ethnicity, and traditional views about marriage are the new racism. If the other branches of government aren't moving fast enough to enshrine this new "civil right" and combat this new "discrimination," then the courts will have to do it for them.

The first court faced with this argument made the obvious point: "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex" [*Baker v. Nelson*, 191 N.W.2d 185 (Minn., 1971)].

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Overthrowing Cultural Norms. The decision isn't about "fairness." It isn't about health care benefits. It's about officially elevating homosexual relationships to the unique status of marriage. Across America, proponents of official recognition of same-sex relationships appealed to tolerance and fairness. But the California decision reveals that the push for same-sex "marriage" is not about giving same-sex couples the same health-care benefits and hospital visitation rights that married couples have. The state of California already gave same-sex couples all that. Instead, the California decision reveals that the push for same-sex "marriage" is about overthrowing cultural norms that have properly set traditional marriage apart from other household forms on the basis of tradition, legal precedent, and social-science evidence.

Government's interest in marriage has been based primarily on its interest in the welfare of the next generation. Among the many types of social relationships, marriage has always had a special place in all legal traditions, our own included, because it is the essential foundation of the intact family—a father, a mother and children—and no other family form has been able to provide a commensurate level of social security.

During the 1990s, a serious public policy debate resulted when social science data showed the consequences of several decades of experimentation with family forms. Out of this increased awareness grew a movement for policy and cultural changes to reinforce and restore marriage in America.

By contrast, the current debate over same-sex "marriage" is not anchored in sound research, and data on the consequences of children being brought up by same-sex couples remains scarce. Same-sex "marriage" advocates propose that we institutionalize a social experiment in its early stages by elevating it in law to the status of the oldest of institutions.

Changing the definition of marriage has vast cultural consequences, including religious liberty

implications. When the Massachusetts Supreme Judicial Court invented a version of same-sex "marriage," the decision had a ripple effect that significantly affected Massachusetts civil society—including forcing Catholic Charities out of the adoption business because of their religious objections to placing children with same-sex couples. Because the California court changed the legal norm to make same-sex "marriage" a fundamental right that the state is obligated to protect and enforce, it will be illegal, a violation of people's rights, to treat same-sex "marriages" as different from traditional marriages. This will alter daily life from dozens of angles.

Conclusion. The activist California Supreme Court's decision creating a constitutional right to same-sex "marriage" was a bad decision. Though supporters of same-sex "marriage" may like the outcome, by usurping the question from the political branches—which in California had been willing to compromise concerning domestic partnership for same-sex couples—the Court creates an all-or-nothing question that can no longer be answered by ordinary political means. The decision makes it all the more likely that California will ban same-sex "marriage" by means of a state constitutional amendment in November 2008 in order to take the issue back from the judiciary. California already had a law defining marriage as the union between one man and one woman, but the state Supreme Court brushed it aside, claiming that the law violated the state constitution. The California decision shows that a state constitutional amendment is vital to the protection of marriage.

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