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## An Activist Jurist Strikes Again -Gay Marriage in California

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Homosexual advocates quickly jumped on the decision, characterizing it as a landmark achievement on the way to mandating same-sex marriage nationwide. The Advocate, the nation's leading homosexual newsmagazine, referred to the decision as "a legal milestone that, if upheld on appeal, would pave the way for the nation's most populous state to follow Massachusetts in allowing same-sex couples to wed."

Judge Kramer's decision shocked few observers. After all, the court considering the case is located in San Francisco County, where San Francisco mayor Gavin Newsome has emerged as one of the nation's most ardent cheerleaders for same-sex marriage. The liberal context of northern California offered homosexual advocates a friendly court located in a friendly region.

For the most part, Kramer's written decision followed the now familiar lines of argument already established by activist courts in other parts of the country. Nevertheless, his decision also reframed the issue in interesting, if not bizarre ways.

The judge's decision actually combined six coordinated cases on the issue of same-sex marriage, all of which were combined into one decision and will be appealed together.

The cases revolved around the constitutionality of two sections of the California Family Code. Section 300 states that "a marriage in this state is a union between a man and a woman." Section 308.5 provides "that only a marriage between a man and a woman is valid or recognized in California."

Kramer ruled that "both sections are unconstitutional under the California Constitution." In so doing, this judge effectively overruled the clear will of the people of California, who just four years ago passed "Proposition 22," a measure banning same-sex marriage, by a margin of 61-39 percent.

In setting forth his argument, Judge Kramer accepted the arguments offered by proponents of same-sex marriage, who asserted that the equal protection and privacy provisions of the California Constitution actually allowed same-sex unions. The judge used two different standards in order to structure his argument. He first considered the sections of the California Family Code in terms of a "rational basis test." As he explained, "The legislative classifications are presumptively valid and must be upheld so long as there exists a rational relationship between the disparity of treatment and some legitimate governmental purpose." His second standard was a "strict scrutiny test" whereby the sections would be evaluated in order to determine whether a compelling state interest justified the laws.

In terms of the rational basis test, the judge simply rejected any claim that the state had a rational purpose behind its rejection of same-sex marriage. He found that "no rational purpose exists for limiting marriage in this State to opposite-sex partners." Since this single judge presumed to determine just what might constitute a "rational" basis, he was able to

dismiss the arguments against same-sex marriage out of hand. He rejected any claim that heterosexual marriage, though “deeply rooted in our state’s history, culture and tradition,” deserves protection.

Kramer cited the 2003 U.S. Supreme Court decision, *Lawrence v. Texas*, to the effect that, “the fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding the law prohibiting the practice.” Kramer decided “that California’s traditional limit of marriage to a union between a man and a woman is not a sufficient rational basis to justify Family Code sections 303 and 308.5.”

California has already adopted domestic partnership legislation, effectively granting same-sex couples all the rights and privileges of marriage, but without recognizing the unions as marriages. In other words, California’s current distinction is more terminological than substantive. Nevertheless, this was not acceptable to Judge Kramer, who denied any “legitimate governmental purpose for denying same-sex couples the last step in the equation: the right to marriage itself.” He asserted that “marriage-like benefits” are not fully equal to marriage and instead constituted a “separate but equal” status that is constitutionally invalid.

Kramer then turned to the “strict scrutiny test” and considered arguments that procreation is central to marriage. He found that the state’s prohibition of same-sex marriage created a “suspect” class and “impinges on a fundamental human right.”

Defenders of the California statute had argued before Judge Kramer that the Family Code sections do not discriminate against persons on the basis of gender, since all persons are afforded equal access to the heterosexual union itself.

Kramer rejected this argument with a twist of judicial imagination. “The idea that California’s marriage law does not discriminate upon gender is incorrect. If a person, male or female, wishes to marry, then he or she may do so as long as the intended spouse is of a different gender. It is the gender of the intended spouse that is the sole determining factor. To say that all men and all women are treated the same and that each may not marry someone of the same gender misses the point. The marriage laws establish classifications (same gender vs. opposite gender) and discriminate based on those gender-based classifications. As such, for the purpose of an equal protection analysis, the legislative scheme creates a gender-based classification.” Are we to imagine that the framers of the California Constitution could even follow that argument?

Identifying marriage as “a fundamental human right,” Kramer simply extended that right to same-sex couples. The fact that he simultaneously redefined what he claimed as the institutional form of this “fundamental human right” escaped the judge’s attention and acknowledgement.

On the issue of procreation, Kramer rejected any claim that the ability to conceive and bear children is central to the marital bond. “Under our present opposite-sex only law, marriage is available to heterosexual couples regardless of whether they can or want to procreate. As long as they choose an opposite-sex mate, persons beyond the child-bearing age, infertile persons, and those who choose not to have children may marry in California. Persons in each category are allowed to marry even though they do not satisfy any perceived legitimate compelling governmental interest in procreation. Another classification of persons, same-sex couples, also do not satisfy any such perceived interest, yet unlike the other similarly situated classifications of non-child bearers, same-sex couples are singled out to be denied marriage.”

This bizarre paragraph completely ignores the structural reality of marriage as the union of a man and a woman—the only context in which procreation can naturally take place. Those who argue that procreation is central to marriage do not argue that every legitimately married heterosexual couple is able to achieve procreation. Nevertheless, it is the heterosexual union that alone provides the context for natural procreation.

Strangely, Judge Kramer appears to have a very different understanding of procreation. Consider this footnote appended to his argument: “To be precise, same-sex couples can cause procreation. A female capable of producing children can be married to another female and become pregnant through various methods, then produce and raise the child in her same-sex union. Similarly, a same-sex male couple could cause a female to become pregnant, directly or otherwise, and later adopt and raise the child.” Is this to be taken seriously? How are we to understand what Judge Kramer means when he suggests that same-sex couples can cause procreation? They certainly cannot cause procreation on their own. One symptom of this judge’s overweening ambition to legitimate same-sex marriage is evident in the very language found in this footnote. When a judge is reduced to speaking of an ability to “cause procreation” rather than to

use the simple term, procreate, we are in big trouble.

Kramer's decision was cause for celebration among homosexual advocates. "California has always been a harbinger," said Kate Kendell, Executive Director of the National Center for Lesbian Rights. She told The Los Angeles Times, "This decision—for states committed to fairness and justice—is a perfect roadmap for how to achieve that for gays and lesbians." Sadly, she may be right.

U.S. Representative Nancy Pelosi of San Francisco, the House Democratic leader, congratulated those pushing for same-sex marriage. "I commend the city attorney, the mayor and other plaintiffs for continuing their fight against discrimination," she told The San Francisco Chronicle. "Today's decision is likely to lead to a consideration by the California Supreme Court on the extent of the equal protection clause in California's constitution. The state constitution clearly prohibits discrimination of any kind, and I believe that the anti-discrimination provision should apply to all Californians." Anyone wondering where the national Democrats stand on the issue of same-sex marriage should look closely at Pelosi's comments.

On the other side, some national observers quickly pointed to this decision as evidence of why a Federal Marriage Amendment is urgently needed. "Although this was just a lower court ruling, it's a vivid reminder that opponents of traditional marriage have not given up their effort to overturn the will of the people," said Senator John Cornyn of Texas. Senator Rick Santorum of Pennsylvania responded with similar analysis. "Today's lower court ruling in California, and other court rulings, further support the need for a constitutional amendment to protect marriage from activist judges for the good of families, children and society," he commented.

California governor Arnold Schwarzenegger was much less clear in his response, appearing to attempt a balancing act of sorts. Appearing on MSNBC's "Hardball" program on Monday night, the Governor said that he personally supports domestic partnerships and opposes gay marriage, but would not be in favor of amending California's constitution if the State Supreme Court should eventually rule a prohibition against same-sex marriage to be unconstitutional. "Whatever the Supreme Court decides, that's exactly what I will stay with," he said. With that comment, Schwarzenegger effectively shirked responsibility for the issue and ducked into the high grass of political correctness.

Observers on both sides of this issue will watch closely as this case is appealed. In the meantime, we have yet another court precedent, handed down by an activist jurist, that threatens both marriage and social sanity. Stay tuned.

