

## O learned judge

*A federal court overturns a Californian ban on gay marriage.*

AS RULINGS go, Judge Vaughn Walker's verdict on August 4th in San Francisco was relentless. The state of California, he wrote, cannot ban, even by popular vote, gays and lesbians from marrying because this would violate America's constitution by denying some couples "a fundamental right without a legitimate (much less compelling) reason." His decision is certain to be appealed, and most watchers think it will end up before the Supreme Court. But whatever happens there, it represents a huge leap forward in America's long struggle over the civil rights of homosexuals.

The background to the case is Proposition 8, a Californian voter initiative that banned same-sex marriage and was approved by 52% of voters in November 2008, after a nasty and expensive campaign that often turned blatantly homophobic. Two couples, one lesbian and one gay, went to court, insisting that this ban violated their constitutional rights to "due process" and "equal protection". Arguing their case were two of America's best-known lawyers, one conservative and one liberal, who, in a nice accident of history, had stood on opposite sides in 2000 when Al Gore fought George Bush for the presidency but who now made common cause.

During the trial in January, both sides brought witnesses to argue for and against same-sex marriage. The larger point of this exercise was to clarify and examine each individual argument against the practice.

Surgically and methodically, Judge Walker (who is himself gay) has now ruled that not a single one has any merit: the plaintiffs (ie, the gay and the lesbian couple) did not seek a "new" right, but merely the same right that heterosexuals have, and a right which in America is first and foremost a civil and not a religious matter. "Procreative capacity" has never been the basis of marriage, hence it is irrelevant, the judge found (infertile heterosexuals are allowed to marry, after all). Calling same-sex unions "domestic partnerships" unfairly disadvantages the couples. Allowing same-sex marriage "has at least a neutral, if not a positive, effect on the institution of marriage" and is good for any children involved. And so on, point by point until none was left.

The verdict will by no means silence those who recoil instinctively at the thought of two men or two women marrying. What is new is that, for the first time, any appellate court accepting the challenge must refer to the body of evidence, in the form of extensive expert testimony, that this trial has established. To overturn Judge Walker's ruling, a court would have to find a flaw in his logic. This now seems a high hurdle.

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