

ISSUES IN PERSPECTIVE

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PERSPECTIVE NUMBER ONE

JUDICIAL ACTIVISM, THE CALIFORNIA SUPREME COURT AND SAME-SEX MARRIAGE

Last week (Thursday, 15 May 2008), the California Supreme Court, striking down two state laws that had limited marriages to unions between a man and a woman, ruled that same-sex couples have a constitutional right to marry. The ruling grew out of the landmark decision by San Francisco Mayor Gavin Newsom's directive to local clerks in 2004 to provide marriage licenses to same-sex couples, declaring it was unconstitutional not to do so. The state Supreme Court nullified Newsom's order, arguing that clerks lacked the legal authority without a ruling from the court. This ruling supports Newsom's contention. Few would doubt that this ruling is an egregious example of judicial activism. How should we think about it?

- First, a summary of the ruling itself. In a 4-3 decision, the court drew on a ruling 60 years ago that struck down a state ban on interracial marriage. The decision, which becomes law in 30 days unless the court grants a stay, would make California the second state, after Massachusetts, to legalize same-sex marriages. Chief Justice Ronald M. George ruled, in the 121 page majority opinion, that "In view of the substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples." [Currently, same-sex marriages are legal in Belgium, Canada, the Netherlands, South Africa and Spain.] According to census data, about 110,000 same-sex couples live in California. The state has a strong domestic partnership law that does grant such couples who register nearly all of the benefits and burdens of heterosexual marriage. The court's majority did not believe that this was enough; hence the ruling. The ban on same-sex marriage, which this opinion overturned, was based on a law enacted in 1977 and a statewide initiative approved by California voters in 2000, both of which defined marriage as a union between a man and a woman. The court's decision was rooted in two rationales, both of which come from a 1948 California court decision, *Perez v. Sharp*, which overturned a ban on interracial marriage. (1) The court argued that marriage is a fundamental constitutional right. Chief Justice George wrote: "The right to marry represents the right of an individual to establish a legally recognized family with a person of one's choice and, as such, is of fundamental significance both to society and to the individual." Even though the state has recognized that right to apply only to a man and a woman, George argued that "tradition alone" does not justify the denial of a fundamental constitutional right. For example, he contended, bans on interracial marriages were sanctioned by the state for years—and they were wrong. (2) The court also struck down bans on same-sex marriages on equal protection grounds, and in doing so

established a new standard of review in the process. The state had maintained that two interests justify reserving the term “marriage” for heterosexual unions and denying the term for homosexual unions—tradition and the will of the majority. Chief Justice George rejected both as insufficient. But, he added, this new standard does not “affect constitutional validity of the existing prohibitions against polygamy and the marriage of close relatives.” He also cautioned that the ruling does not require ministers, priests or rabbis to perform same-sex marriages. To counter this ruling, there is an initiative proposed for the November ballot that would amend the California Constitution to ban same-sex marriages and thereby overturn this decision. [Eight states and the District of Columbia, in addition to California, provide some form of spousal rights for same-sex couples, and a court challenge similar to California’s is pending in Connecticut. Twenty-six states have passed constitutional amendments banning same-sex marriages and Florida will consider one in the fall.]

- Second, this case is a perfect example of raw judicial power. It overturns the will of the state legislature and the will of the people, who by a 61% majority in 2000 approved a proposition asserting that the state could only recognize “marriage” between a man and a woman. Listen to the wording of the current opinion: “[T]he core set of basic substantive legal rights and attributes traditionally associated with marriage. . . are so integral to an individual’s liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process.” One cannot find a better example of juridical arrogance than this decision. As the *Wall Street Journal* argued editorially, “It is preposterous, though, to let four judges decide this for a state of more than 36 million diverse individuals.” For centuries, Western civilization has recognized the vital role that the family plays, and the need for that institution to be protected and safeguarded. It is not an issue of civil rights or civil liberties per se; the institution is the bedrock for society and must be protected for the good of the state and for the good of civilization. These four California judges have arrogantly created a “fundamental right” out of thin air! If courts can make such wide-ranging decisions without any input from the citizens and with no accountability, we have ceased to be a democracy. Further, this case once again proves the case that judicial appointments at the national level must be a core issue for consideration in the upcoming presidential election.
- Finally, this case must be reviewed in light of Scripture. When discussing homosexuality, evangelicals usually point to the Levitical code, to Sodom and Gomorrah or to Paul’s statements in the New Testament. I believe this is an error. The proper place to begin thinking about this issue is Genesis 2, the Creation Ordinance of God. After giving clear instructions to Adam about his stewardship of the Garden, God concludes that it is not good that Adam is alone (v. 18). To prove this to Adam, God brings all the animals before him to name (vv. 18-20). Although this establishes his authority over the animals, it also served as an object lesson for Adam: He was the only creature of God truly alone. So, God creates the woman as his complement, his helper (vv. 21-23). Moses then offers a theological commentary on what God had done (vv. 24-25). First, God established the paradigm for marriage. The man is to “leave” his family with the conscious understanding that he is establishing a new family unit. Second, that means “cleaving” (like glue) to his wife. Third, by separating from parents and with the unqualified commitment to his wife, he and his wife will be in the process of “becoming one flesh.” This concept does symbolize the sexual

intercourse, but it also symbolizes the merging of two personalities, male and female, into a complementary whole. Their personalities, their idiosyncrasies and their uniqueness do not cease. Instead, these two totally different human beings merge into a perfect complement where both--now together--serve God in their integrity. In verse 25, Moses further comments that the couple is “naked” and not “ashamed.” They were so totally “other-centered” that they did not think of self, only of one another. We can properly infer that their sexual oneness was characterized by no shame or discomfort either. The wonder of romantic love was beautiful and fulfilling; no selfish or carnal lust was present in this first marriage. Theologically, what do we learn from this passage? How does this passage establish the model for a proper understanding of human sexuality and marriage? Allow me to suggest several lessons:

1. When Jesus and Paul dealt with questions of marriage or human sexuality, they always referred back to the creation ordinance (Genesis 2:18-25)—see Matthew 19:1-12, Mark 10:1-12 and 1 Corinthians 7:10-11. What is stated in these verses transcends culture and time and constitutes God’s ideal for sexuality and marriage.
2. Marriage is to be monogamous and heterosexual. From this passage it is impossible to justify polygamy or homosexuality. It is the standard, the ideal, for all marriages. Therefore, one simply cannot justify “same-sex” marriages. This is not an option for humans.

See Adam Liptak, *New York Times* (16 May 2008); Robert Barnes and Ashley Surdin, *Washington Post* (16 May 2008); *Wall Street Journal* editorial (16 May 2008); “Breakpoint” (16 May 2008); and James P. Eckman, *Biblical Ethics*, pp. 47-49.

PERSPECTIVE NUMBER TWO

ISRAEL AT 60

Last Wednesday and Thursday, (14 and 15 May 2008), Israel celebrated its 60th anniversary as a modern nation state. It was a momentous celebration, filled with meaning and significance. How should we think about Israel?

- First some important historical background. In 63 BC the Roman Empire annexed the land of Israel, making it a part of the Roman Empire. The entire area remained a thorn in Rome’s flesh and, in response to a Jewish revolt, in AD 70 Rome destroyed Jerusalem, burned the Temple and dispersed Jews throughout the empire. After crushing a second Jewish revolt in AD 135, no Jews were permitted to live in Jerusalem and Rome completed the dispersion. In the late 19th century in response to growing anti-Semitism in eastern Europe, Zionism was formed. Primarily, Zionism sought to establish a Jewish state in Palestine. In 1917, in an attempt to win Jewish support for World War I, England issued the famous Balfour Declaration, declaring England’s support “for the establishment of a national home for the Jewish people.” After World War I, Palestine was placed under the British mandate. As persecution grew in Europe under the Nazis, Jews fled to Palestine and in response Palestinian Arabs revolted against the British from 1936 to 1939. Britain thereby restricted Jewish immigration to Palestine, arousing militant Jewish resistance. After World War II,

large-scale Jewish resistance organizations began operating in Palestine and in the summer of 1946, England decided to turn the problem of Palestine over to the United Nations. When the matter came to a vote in the UN on 29 November 1947, the General Assembly endorsed a plan to create separate Jewish and Arab states, with Jerusalem as an international zone. President Harry Truman was instrumental in this decision and was the first to recognize the new state of Israel. On 15 May 1948, David Ben-Gurion read in Hebrew Israel's Declaration of Independence—"We . . . hereby proclaim the establishment of the Jewish State in Palestine, to be called Israel." For the first time in nearly 2,000 years, there was an independent Jewish state of Israel. This miracle led to the establishment of the first Jewish army since Roman times and the only recorded instance of the resurrection of a dead language—Hebrew, now the language of nearly 7 million people in the land. The historian Barbara Tuchman once wrote: "Israel is the only nation in the world that is governing itself in the same territory, under the same name, and with the same religion and same language as it did 3,000 years ago."

- Second, how has the world responded to this historic event? (1) The theme of much of the Middle East today is Palestinian dispossession. But the brutal facts are that the Jews accepted the compromise of 1947—to create a Jewish and a Palestine Arab homeland in the same territory—Palestine. The Arabs did not! Charles Krauthammer writes: "Palestinian dispossession is a direct result of the Arab rejection, then and now, of a Jewish state of any size on any part of the vast lands the Arabs claim as their exclusive patrimony. That was the cause of the war 60 years ago that, in turn, caused the refugee problem. And it remains the cause of war today." Israel has fought three additional wars for its survival after the one in 1948—1956, 1967 and 1973. It has also dealt with two major intifadas under Yasir Arafat's direction and countless homicide bombings of its civilians. The core issue for the Arab and Palestinian populations is the simple fact that they will not recognize Israel's existence. They will not compromise and they will not relent. (2) Throughout much of Europe, there is an unwillingness to accept Israel either. It is not that Europe wants to destroy Israel, but in Europe Israel is consistently portrayed as a human-rights violator. David Schwammenthal writes: "In post-Christian Europe and Germany . . . Moses' law, the foundation of Western legal codes and moral values, is hardly acknowledged on the Continent. Jews are more often seen as having contributed *to* Western civilization, rather than being an integral part *of* it, thanks to the role they played as a nation. Jews—often viewed as some kind of guest contributors—thus remain strangers in Europe, as does the Jewish state. And one can be inclined to believe bad things about strangers."
- Finally, the existence of Israel is in more peril today than in recent memory. With the fall of Saddam Hussein and the resurgence of Iran, Israel now faces an alliance of Iran, Syria and their lackeys, Hezbollah and Hamas. Iran has built a web of influence around the Middle East that makes military action against Iran virtually unthinkable, because to do so would have major implications for the very existence of Israel itself. Iran seeks to control Lebanon, through its minion Hezbollah, and threatens Israel from both the north and now the west with Hamas in Gaza. Aaron David Miller, a former Mideast negotiator under both Republican and Democratic administrations, has written: "We stumbled for eight years under Bill Clinton over how to make peace in the Middle East, and then we stumbled for eight years under George Bush over how to make war there. [The result is] an America that is trapped in

a region which it cannot fix and it cannot abandon.” The situation now is that the US cannot defeat, co-opt or contain Iran or any of the other key players of the Middle East. The US is now in the center of the Middle East, finding it impossible to leave and unwilling to stay. Iran’s power is greater than at any recent time in history. And for that reason, Israel is more vulnerable than at any time since 1967. But God’s promises of Ezekiel 36 and 37 are as true today as ever. God is restoring the Jewish people to their homeland—and even the power of Iran will not stop that.

See Tom Freidman in the *New York Times* (14 May 2008); Daniel Schwammenthal in the *Wall Street Journal* (14 May 2008); Charles Krauthammer in the *Washington Post* (16 May 2008) and *The One-Year Book of Christian History*, pp. 272-3.