

A Commentary on the Document “Six Consequences . . . if Proposition 8 Fails”

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An anonymously-authored document titled “Six Consequences the Coalition Has Identified if Proposition 8 Fails” is currently being distributed by a coalition of churches and other organizations in support of Proposition 8, an initiative on the November 2008 California ballot. The intent of Proposition 8 is to overturn the California Supreme Court’s ruling allowing homosexuals to marry.

*Most of the arguments contained in “Six Consequences” are either untrue or misleading. The following commentary addresses those arguments and explains how they are based on misinterpretations of law and fact. My intent is to be of service in helping our Church avoid charges of using falsehoods to gain a political victory. I do **not** believe these so-called “consequences” have originated at or been approved by Church headquarters; rather, I suspect they are the result of overzealous volunteers who have misinterpreted California law and the legal cases on which the supposed consequences depend. Relying on deceptive arguments is not only contrary to gospel principles, but ultimately works against the very mission of the Church.*

The original document text is in Times Roman font; my responses are in Calibri italics font.

Six Consequences the Coalition [in Support of Proposition 8] Has Identified If Proposition 8 Fails

1. Children in public schools will have to be taught that same-sex marriage is just as good as traditional marriage.

The California Education Code already requires that health education classes instruct children about marriage. (#51890)

Therefore, unless Proposition 8 passes, children will be taught that marriage is between any two adults regardless of gender. There will be serious clashes between the secular school system and the right of parents to teach their children their own values and beliefs.

Response: This is untrue. California Education Code 51890 provides that “pupils will receive instruction to aid them in making decisions in matters of personal, family, and

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community health.” The focus is on health. The statute provides for community participation, including lectures by practicing professional health and safety personnel from the community. Things that are to be taught include, for example, drug use and misuse, nutrition, exercise, diseases and disorders, environmental health and safety, as well as “family health and child development, including the legal and financial aspects and responsibilities of marriage and parenthood.”

*Another section of the Education Code (51933) deals with comprehensive sexual health education and HIV/AIDS prevention. It provides that instruction shall be **age appropriate** and medically accurate, shall teach “respect for marriage and committed relationships,” and shall encourage a pupil to communicate with his or her parents about human sexuality.*

*Therefore, no provision of the Education Code requires any teacher to teach that same-sex marriage is “just as good” as traditional marriage. Teachers are to teach respect for marriage **and** committed relationships, and Proposition 8 will **not** change this law.²*

2. Churches may be sued over their tax exempt status if they refuse to allow same-sex marriage ceremonies in their religious buildings open to the public. Ask whether your pastor, priest, minister, bishop, or rabbi is ready to perform such marriages in your chapels and sanctuaries.

*Response: This false “consequence” is based on the misrepresentation of a case in New Jersey involving an association affiliated with the Methodist Church. In considering that case, it is important to remember that New Jersey does **not** permit gay marriage, so that case had nothing to do with Proposition 8.*

*What was the New Jersey case about? The Ocean Grove Camp Meeting Association (OGCMA), a Methodist organization, had taken advantage of a New Jersey law granting a **state property tax** exemption for a pavilion in the seaside town of Ocean Grove that was dedicated for public use. Note that the case did not involve income tax exemptions and note that the purpose for giving the exemption in the first place was to reward organizations for opening their buildings and facilities for public use.*

The property in question was a boardwalk pavilion open to the public. “Bands play there. Children skateboard through it. Tourists enjoy the shade. It’s even been used

² It should be noted that Article 51933, by its own terms “shall **not** apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.” Therefore, Church schools are not required to teach respect for the beliefs of others, although we should hope that our seminaries and institutes teach such respect nonetheless. Indeed, the Church has recently instructed us that as we decide our own appropriate level of involvement in this campaign we “should approach this issue **with respect for others**, understanding, honesty and civility. (Emphasis added.) “The Divine Institution of Marriage,” August 13, 2008, <http://newsroom.lds.org/ldsnewsroom/eng/commentary/the-divine-institution-of-marriage>.

for debates and Civil War re-enactments.”³ It was also available to be reserved for marriage ceremonies by people of any faith. Nevertheless, the OGCMA wanted to prohibit a gay commitment ceremony (**not** a marriage ceremony) from being held in the pavilion. The New Jersey real estate commission ruled that if OGCMA intended to claim a property tax exemption for a building open to the public, they could not discriminate. Seen in this light, it was a sensible ruling. Implicit in the ruling is that the group **could** discriminate if they ceased to claim a property tax exemption for a public facility. It is important to note that this ruling pertained only to the pavilion, which constituted a mere one percent of the property the OGCMA owned. The total amount of additional tax assessed was **\$200**. The OGCMA continues to receive a property tax exemption for the remaining 99% of its property.⁴

This case has nothing at all to do with any Mormon, Catholic or any other church’s chapel or sanctuary that is used for religious purposes. It has nothing to do with any church’s income tax exemption. To my knowledge, the Mormon Church has never sought to take advantage of a property tax exemption similar to the New Jersey exemption and likely never would.

The California Supreme Court ruling on gay marriage **cannot** have any federal tax consequences, and the Court so noted explicitly in its decision. The Supreme Court also noted that its ruling would not require any priest, rabbi or minister to perform gay marriages, which should be self-evident because of the First Amendment’s guarantee of freedom of religion.

3. Religious adoption agencies will be challenged by government agencies to give up their long-held right to place children only in homes with both a mother and a father. Catholic Charities in Boston already closed its doors in Massachusetts because courts legalized same-sex marriage there.

*Response: Another misrepresentation. To begin with, it should be noted that Catholic Charities in Boston was not forced to close its doors—indeed it is still very active. (See its website at www.ccab.org.) Rather, Catholic Charities voluntarily ceased providing adoption service in Massachusetts. According to the Boston Globe, Catholic Charities elected to close its doors in protest over the legalization of gay marriage in Massachusetts and because it was reluctant to undertake a lawsuit that might be lost.*⁵

³ “Examining the Consequences of Prop 8” at <http://mormonsformarriage.com/?p=33>.

⁴ See “Group Loses Tax Break Over Gay Union Issue,” New York Times, September 18, 2007.

⁵ See “Catholic Charities Stuns State, Ends Adoptions,” Boston Globe, March 11, 2006. Catholic Charities had been processing a small number of gay adoptions, despite Vatican statements condemning the practice. When Catholic Charities announced its intention to refuse to continue to place orphans with gay parents, several members of its own board resigned in protest. “Seven Quit Charity over Policy of Bishops—Deplore Effort to Exclude Same-Sex Adoptions,” Boston Globe, March 2, 2006.

LDS Family Services still operates in Massachusetts, as it does in California. There are several differences between LDSFS and Catholic Charities. LDSFS does not take federal or state funds; Catholic Charities does. LDSFS facilitates only voluntary adoptions and permits the birth mother to approve the adoptive parents. Catholic Charities handled non-voluntary adoptions (where the state seizes the children) and normally did not accommodate birth mother approval. Catholic Charities had contracts with the state and was, in effect, acting as an agent of the state. LDSFS does not. To date, LDS Family Services has never been forced to place any children with a gay couple, and has never been sued for not doing so.

*If this situation ever faces a legal challenge in California, it will not matter whether Proposition 8 passes because California already has on its books (and has for several years) laws granting **domestic partners** (homosexual and heterosexual) **the same civil rights** as married couples. This is a point that many people seem not to understand. Here is the language of just one California statute: “Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.”⁶*

Therefore, the passage or failure of Proposition 8 will have no effect on the placement of orphans with gay couples in California.⁷

4. Religions that sponsor private schools with married student housing may be required to provide housing for same-sex couples, even if counter to church doctrine, or risk lawsuits over tax exemptions and related benefits.

*Response: This claim relates to an experience at Yeshiva University in New York. Gay students were eligible for University housing, but their partners were not able to join them because they did not have marriage certificates. It should be noted that Yeshiva University (despite its name) is chartered as a **nonsectarian** institution, enabling it to receive state and federal funding. The New York court found that Yeshiva was discriminating against the students based on their sexual orientation—not their marital status. The ruling was based on New York City non-discrimination laws.⁸*

California’s existing non-discrimination laws give all registered domestic partners, whether heterosexual or homosexual, the right of equal access to family housing. To date, however, no California private religious school has been forced to comply with

⁶ 2003 Domestic Partner Act, California Family Code, Sections 297 and 297.5(a).

⁷ It seems highly unlikely that a court would require a church-affiliated adoption service that does not have contracts with the state, does not accept state or federal funds, and does not do involuntary adoptions, to place children with either gay couples or unmarried heterosexual domestic partners. But if a court is so inclined, it will not matter whether Proposition 8 passes or fails.

⁸ “Examining the Consequences of Prop 8” at <http://mormonsformarriage.com/?p=33>.

*this law. Neither the passage nor the failure of Proposition 8 will have **any bearing** on the law relating to family student housing in California.*

The gay marriage problem will not arise at BYU and other Church universities because engaging in homosexual activity is a violation of the honor code and is a basis for expulsion from the University. These rules will not be overturned merely because California recognizes gay marriage, any more than they have been because Massachusetts, Canada and many European nations recognize them.

5. Ministers who preach against same-sex marriages may be sued for hate speech and risk government fines. It already happened in Canada, a country that legalized gay marriage. A recent California court held that municipal employees may not say: “traditional marriage,” or “family values” because, after the same-sex marriage case, it is “hate speech.”

*Response: Of course, anyone can be “sued” for anything, but no minister has been convicted of a crime in Canada or the United States for preaching against same-sex marriages. The Owens case, on which this statement is based, was brought well **before** gay marriage was legal in Canada and did **not** involve a minister, but a private citizen. In that case, a man named Hugh Owens produced bumper stickers and took out an ad that depicted two stick figures holding hands, covered by a circle and a slash, along with a reference to a passage in Leviticus that says that a man engaging in homosexual activity “shall surely be put to death. Their blood shall be upon them.”⁹ The lower court ruled that this amounted to hate speech, but the decision was **overturned** on review. The current Canadian law on hate propaganda excludes any speech if it is spoken during a private conversation or if the person uttering the speech “is attempting in good faith to establish by argument an opinion on a religious subject.”¹⁰ Thus, even ministers who preach against same-sex marriages in Canada have no risk of legal liability or government fines.*

This would never be an issue in the United States because we have far more liberal freedom of speech and religion laws than does Canada.¹¹ There have been no hate speech lawsuits in Massachusetts, which has been a gay marriage state for four years.

*The description of the recent California case is another fabrication. This case is Good News Employee Association v. Hicks, which was decided **before** the Supreme Court legalized gay marriages and so it, too, has nothing to do with Proposition 8. The plaintiffs in that case were evangelical Christians (not homosexuals) who posted flyers around the offices of the Oakland Community and Economic Development Agency*

⁹ Leviticus 20:30.

¹⁰ Canadian Parliament Bill C-250, which became effective in 2004.

¹¹ Anyone who has walked the gauntlet of street preachers at General Conference will appreciate the liberality of our free speech laws.

promoting their “Good News Association” and calling on those who read the flyer to “preserve our workplace with integrity ... with respect for the natural family, marriage and family values.” In other words, this group was promoting the idea of ridding their workplace of gay people—a blatantly homophobic message and highly offensive not only to several gay people who worked there but to heterosexual co-workers as well. The supervisors removed the flyers. The Good News people sued, claiming their rights of free speech were violated. The court found that the agency was entitled to eliminate the workplace disruption the flyers were causing and noted that there were many other ways for this group to promote their message without resorting to such offensive tactics.

This case does not hold that municipal employees are prohibited from saying “traditional marriage” or “family values” and it has nothing to do with gay marriage, or ministers preaching, or Proposition 8. Indeed, the court specifically found that there were many other ways for these people to get their message out without disrupting the workplace by creating an atmosphere of persecution.

6. It will cost you money. This change in the definition of marriage will bring a cascade of lawsuits, including some already lost (*e.g.*, photographers cannot now refuse to photograph gay marriages, doctors cannot refuse to perform artificial insemination of gays even given other willing doctors). Even if courts eventually find in favor of a defender of traditional marriage (highly improbable given today’s activist judges), think of the money – your money – that will be spent on such legal battles.

*Response: The argument concerning cost is fallacious and calculated to engender fear. In actuality, the net fiscal effect of Proposition 8 will be an influx of revenue to California because of the anticipated increase in marriage ceremonies and the related boon to the economy. The change in the definition of marriage will **not** bring a “cascade of lawsuits” because heterosexual and homosexual registered domestic partners already have all the rights of married couples in California. None of the lawsuits alluded to in this paragraph has anything to do with gay marriage.*

The wedding photographer case was in New Mexico, a state that has no gay marriage law. The medical doctor case was in California, but was based on our existing non-discrimination laws and would not be affected one way or the other by the passage of Proposition 8.¹²

¹² *It might be instructive to include the full text of relevant parts of the California’s Unruh Act, which governed the medical clinic case. These will not be changed by the passage of Proposition 8. They are, and will continue to be, the law.*

Cal. Civ. Code. 51(b): All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

In the California case, a medical clinic that provided intrauterine insemination (IUI) to its patients, refused to treat one of them because she was a lesbian. California's broad anti-discrimination laws expressly ban discrimination by any business establishment that offers to the public "accommodations, advantages, facilities, privileges, or services." This statute bans discrimination against individual heterosexuals and homosexuals alike, as well as married people and domestic partners. Therefore, the clinic had the option of either having a doctor on staff who would perform IUI services on a non-discriminatory basis, or cease performing the services at all.¹³ Whether we agree with this decision or not, the fact is that the law upon which this ruling was based will not be affected by the passage of Proposition 8, so there is no "consequence" if the proposition fails.

The gratuitous comment concerning "activist judges" seems to be framed as an appeal to fear and paranoia. In fact, however, today's justices on both the California Supreme Court and the United States Supreme Court can hardly be called "activist." Six of the seven justices of the California Supreme Court were appointed by Republican governors; seven of the nine justices of the United States Supreme Court were appointed by Republican presidents. Most legal scholars would agree that they are moderate to conservative in their leanings and have a healthy respect for constitutional principles. The California Supreme Court has a high reputation throughout the land. A recent study indicates that its decisions are approved of and followed by out-of-state courts far more than are the decisions of any other supreme court in the United States.¹⁴

Ronald M. George, the chief justice of the California Supreme Court, who wrote the opinion for the majority in the marriage cases, is a judicial moderate who was never considered to be an activist judge. He has an outstanding scholarly background (Princeton and Stanford) and worked as a prosecutor immediately after graduating from law school. He was appointed a Superior Court judge at the early age of 32 by Republican Governor Ronald Reagan. Though young, he quickly gained a reputation as fair-minded, insightful, hard working and tough on crime. He was widely praised for his handling of the difficult trial of the Hillside Strangler, Angelo Buono. He rose in

Cal. Civ. Code 51.5(a): No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.

¹³ *North Coast Women's Care Medical Group, Inc. v. Superior Court.*

¹⁴ *Jake Dear and Edward W. Jessen, "Followed Rates" and Leading State Cases, 1940-2005," 41 U.C. DAVIS L. REV. 683, 694 (2007).*

the ranks of judges until he was appointed to the California Supreme Court by Republican Governor Pete Wilson.

As Justice George considered the marriage cases, the decision “weighed heavily” on his mind. He remembered a long ago trip he made with his European immigrant parents through the American South. There, the signs warning “No Negro” or “No colored” left “quite an indelible impression on me,” he recalled. As a judicial conservative, it would have been safest for him to vote against the petitioners and avoid the backlash that he knew would come. But, as he put it in an interview with the Los Angeles Times, “I think there are times when doing the right thing means not playing it safe.”¹⁵

The function of judges is to evaluate cases before them and apply constitutional principles to assure that minorities, as well as majorities, receive justice. In controversial cases they are bound to anger some portion of the electorate regardless of how they vote. Their unenviable job is to ignore public opinion and apply the law as they see it. Some decisions are so difficult that reasonable minds can differ. The Supreme Court decision in the marriage cases was that sort of decision. Nevertheless, four of the seven justices on what is considered a moderate to conservative court agreed on the verdict that was rendered. This decision cannot be written off as merely the whim of “activist judges.”

Conclusion

In summary, the arguments used in “Six Consequences ... If Proposition 8 Fails” are false, misleading, and based on faulty logic. Almost every legal case alluded to is misrepresented. The passage or failure of Proposition 8 will not affect any of the scenarios posed by this document; none of the so-called “adverse consequences” will change for Californians whether or not Proposition 8 passes, hence they cannot properly be called “consequences.”

¹⁵ *Same-Sex Case Weighed on Chief Justice, Los Angeles Times, May 18, 2008, <http://articles.latimes.com/2008/may/18/local/me-gay18>.*