

riage. I look forward to the day when conservative defenders of the value of marriage are ready to celebrate with me.

### Notes

1. George Chauncey, *Why Marriage? The History Shaping Today's Debate over Marriage Equality* (New York: Basic Books, 2005).

2. David Brooks, "The Power of Marriage," *New York Times*, November 22, 2003, <http://www.nytimes.com/2003/11/22/opinion/22BROO.html> (accessed July 4, 2009).

3. Jonathan Rauch, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America* (New York: Henry Holt, 2004); Andrew Sullivan, "The Conservative Case," in Andrew Sullivan, ed., *Gay Marriage: Pro and Con* (New York: Vintage, 1997), 146–54; David Brooks, "The Power of Marriage"; *The Economist* editorial board, "Let Them Wed," *The Economist*, January 4, 1996, [http://www.economist.com/displaystory.cfm?story\\_id=2515389](http://www.economist.com/displaystory.cfm?story_id=2515389) (accessed July 4, 2009).

## The Church's Use of Secular Arguments

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One fascinating development in the Proposition 8 debate in California was the extent to which secular arguments—involving legal, political, and sociological claims—came to take center stage, even in announcements from the Church itself. The Church's initial forays into the same-sex marriage debate are, of course, much older than Proposition 8. A decade earlier, when Hawaii temporarily instituted civil unions for same-sex couples,<sup>1</sup> the Church issued "The Family: A Proclamation to the World." The proclamation drew on ideas of divine intent and accountability, stating: "The family is ordained of God. Marriage between man and woman is essential to His eternal plan," and "We warn that individuals who violate covenants of chastity, who abuse spouse or offspring, or who fail to fulfill family responsibilities will one day stand accountable before God." While warning of relatively vague "calamities foretold by ancient and modern prophets," the proclamation made no specific political, legal, or sociological claims.<sup>2</sup>

Church statements during the Proposition 22 campaign in

2000 included the use of more secular arguments than had been deployed earlier.<sup>3</sup> The Prop 8 debate refined and built on this precedent. During the Proposition 8 debate, Church leaders and representatives made a number of political theory arguments, mostly centered on the question of democratic legitimacy; they also made a number of specific sociological arguments relating to same-sex marriage, and further made a number of legal arguments, mostly predictions of problematic legal consequences if Proposition 8 failed to pass. The extensive use of secular arguments meant that the Church necessarily gave less emphasis to moral, spiritual, scriptural, or theological claims.

There may be disadvantages to this rhetorical move. The Church's primary role in modern society has not been that of legal or political analyst or social scientist; to the extent that the Church relies on those kinds of arguments, it is working outside its expertise. In addition, a Church position based on legal, political, or sociological arguments is vulnerable to counter-arguments within each of those disciplines. Indeed, it turns out that some of the Church's secular arguments about Proposition 8 are problematic for a variety of specific reasons.

*1. Political Arguments.* In the Proposition 8 context, the Church and individual members made a number of political arguments hinging on a particular idea of democracy and the role of courts. The Church's very first official statement to congregations opened with a naked political-theory argument:

In March 2000 California voters overwhelmingly approved a state law providing that "Only marriage between a man and a woman is valid or recognized in California." The California Supreme Court recently reversed this vote of the people. On November 4, 2008, Californians will vote on a proposed amendment to the California state constitution that will now restore the March 2000 definition of marriage approved by the voters.<sup>4</sup>

The Church's "Divine Institution of Marriage" press release of August 13, 2008, made similar arguments, stating:

The people of the United States—acting either directly or through their elected representatives—have recognized the crucial role that traditional marriage has played and must continue to play in American society if children and families are to be protected and moral values propagated . . . .

In contrast, those who would impose same-sex marriage on American society have chosen a different course. Advocates have taken their case to the state courts, asking judges to remake the institution of marriage that society has accepted and depended upon for millennia. Yet, even in this context, a broad majority of courts—six out of eight state supreme courts—have upheld traditional marriage laws. Only two, Massachusetts and now California, have gone in the other direction, and then, only by the slimmest of margins—4 to 3 in both cases.<sup>5</sup>

Individual members also employed this sort of argument. Notably, author Orson Scott Card—appointed in early 2009 to the political group National Organization for Marriage<sup>6</sup>—wrote in June 2008 for the *Mormon Times* section of the *Deseret News* and published on the section’s website that same-sex marriage decisions in Massachusetts and California “[mark] the end of democracy in America.”<sup>7</sup> He elaborated: “No constitution in the United States has ever granted the courts the right to make vast, sweeping changes in the law to reform society. Regardless of their opinion of homosexual ‘marriage,’ every American who believes in democracy should be outraged that any court should take it upon itself to dictate such a social innovation without recourse to democratic process.” Card went on to label the California court “dictator-judges” and wrote that “any government that attempts to change [marriage] is my mortal enemy. I will act to destroy that government and bring it down.”<sup>8</sup>

There are serious problems with this political rhetoric in the Prop 8 context. First, this simplistic political analysis largely misses the point of courts in a democracy. Theorists from James Madison to Alexander Bickel, John Hart Ely, and Bruce Ackerman have explained the complicated role of courts in a democracy.<sup>9</sup> While there is some disagreement on specifics, most theorists accept Madison’s influential idea that minority groups must be protected from “tyranny of the majority.”<sup>10</sup> Given the danger that majority groups will overreach, the role of courts becomes a “counter-majoritarian” safety valve to protect vulnerable groups. Cases like *Brown v. Board of Education* illustrate this principle. *Brown* involved the undoing of majority-passed laws and exactly the sorts of “vast, sweeping changes” that Card decries—and it’s a damn good thing that it did.

This function of the courts is part of our constitutional system of checks and balances, which Church leaders have often called inspired. And in fact, the Church itself has drawn on exactly that understanding in the past. Brigham Young and other Church leaders made clear their views that marriage laws were not subject to simple majority definition if those laws affected minority rights. Early Church leaders repeatedly asked the courts, in cases like *Reynolds v. United States*, to override majority rules about marriage.<sup>11</sup> The recent shift to a simple majoritarianism ignores the Church's own prior understanding of courts as providing counter-majoritarian protection for minority groups.

A second problem with this political argument is its limited scope. It assumes a world where same-sex marriage is always imposed on an unwilling majority by divided courts. However, the political winds are shifting, and it is not clear how much longer that description will apply. The 2009 unanimous Iowa decision<sup>12</sup> suggests that the era of 4–3 court decisions may be a thing of the past. Even more importantly, state legislatures in New Hampshire, Vermont, and Maine recently enacted same-sex marriage laws.<sup>13</sup> And given the demographics of Prop 8 support and the huge drop between Prop 22 support (61 percent) and Prop 8 support (52 percent) just eight years later, it seems quite likely that California voters themselves will also pass a same-sex marriage law within perhaps the next half dozen years. In a world of legislatively enacted same-sex marriage, majoritarian arguments lose their bite.

2. *Sociological Arguments.* The Church also made a series of specific sociological arguments against same-sex marriage. To some extent, these echo the Proclamation on the Family's warning of calamities, but they add far more detail. For instance, the "Divine Institution of Marriage" press release cites specific findings from David Popenoe, David Blankenhorn, Maggie Gallagher, and other researchers.<sup>14</sup> However, the sociological evidence that children suffer from being raised in same-sex households is far from unanimous or conclusive, and a number of recent studies support the opposite view. Those studies have proven crucial in court decisions; for instance, the Iowa Supreme Court in *Varnum v. Brien*, after reviewing the studies cited on both sides, concluded: "The research appears to strongly support the conclusion that same-sex couples foster the same wholesome environment as

opposite-sex couples and suggests that the traditional notion that children need a mother and a father to be raised into healthy, well adjusted adults is based more on stereotype than anything else.”<sup>15</sup>

As the number of same-sex marriage increases, abundant evidence will be added. If new evidence fails to support the Church’s view—that is, if the evidence shows that children raised by married same-sex couples are not disadvantaged—such findings will further undermine the sociological arguments the Church has made against same-sex marriage.

3. *Legal Arguments.* Church leaders and members also made a number of legal claims regarding Proposition 8. For instance, the “Divine Institution of Marriage” press release included legal claims relating to adoption agencies, tax exemptions, and school curricula.<sup>16</sup> An October 8 broadcast to Church members in California went further. Elder Quentin L. Cook, a former California attorney, reiterated and detailed the claims relating to school curriculum, adoptions, and tax exemptions. Elder David A. Bednar, an educator, extended the claims still further, stating that “there could be sanctions against the teaching of our doctrine” unless Proposition 8 passed.<sup>17</sup>

These kinds of claims received even more elaboration in a widely circulated document, “Six Consequences the Coalition Has Identified if Proposition 8 Fails.”<sup>18</sup> This document was circulated at the ward and family level through email and blogs.<sup>19</sup> And of course, LDS law professor Richard Peterson of Pepperdine University made similar legal claims about school curricula in a series of extremely popular political advertisements (“Think it can’t happen? It’s already happened!”) which were widely credited with turning the tide among undecided voters.<sup>20</sup>

However, many writers, including Mormon attorney Morris Thurston, have demonstrated that those legal claims range from dubious to flat-out wrong.<sup>21</sup> For instance, popular emails (not to mention General Authority broadcasts!) claimed that Catholic Charities was forced out of Massachusetts because of same-sex marriage. The “Six Consequences” document states: “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.”<sup>22</sup> But in fact, this example is inapposite. As the *Boston Globe* has detailed, the Catholic Charities investigation dates back to 2000 (four years prior to the *Goodridge* case which legalized same-sex marriage) and was based on state anti-discrimination law, not marriage law.<sup>23</sup>

Claims that Church leaders will be sued for hate speech or that the Church will lose its tax-exempt status are also legally dubious at best. A letter from fifty-nine professors of constitutional law and family law at California law schools criticized the use of “misleading claims about the current state of the law or about what Proposition 8 would do,” and stated directly: “Prop 8 would have no effect on the tax exemptions of churches” and “Prop 8 would have no effect on teaching or the protection of parental rights already provided by state law.”<sup>24</sup>

For that matter, the *Marriage Cases* opinion itself—which established same-sex marriage in California to begin with—belies some of the more alarmist claims. It states outright: “No religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs. (Cal. Const., art. I, § 4.)”<sup>25</sup>

In addition to being of dubious veracity, the legal claims, like the sociological claims, are ultimately forward-looking in nature and thus vulnerable to being positively disproved over time. With half a dozen same-sex marriage jurisdictions, it will be easy to see whether the predicted parade-of-horribles (Church leaders sued for hate speech, tax exemptions revoked, Elder Bednar’s unspecified “sanctions against the teaching of our doctrine”) will, in fact, occur. Most legal scholars are confident that no such results will take place. Massachusetts has allowed same-sex marriage for five years now, and there have been no lawsuits against the Church for failure to marry same-sex couples, no hate speech prosecutions against Church leaders, and certainly no gay weddings in the Boston Temple.

If the predicted dire consequences do not occur, their absence will further undermine the alarmist arguments made by Church leaders and members during the Prop 8 debate which depended in part on legal claims. Indeed, some recent develop-

ments, like the passage of a same-sex marriage bill in New Hampshire with explicit protection for religious organizations,<sup>26</sup> suggest that predicted clashes between same-sex marriage and religious freedom are far from inevitable.

Overall, the use of secular arguments, whether legal, political, or sociological, was probably a winning strategy for the short term and very likely helped to pass Prop 8. But the transitory and vulnerable nature of many of these secular arguments means that they are unlikely to be effective as long-term building blocks in a Church strategy on same-sex marriage.

### Notes

1. The Hawaii timeline is complicated. The Hawaii Supreme Court first ruled in 1993 that the same-sex marriage ban might be discriminatory. This led to further court hearings in 1995 in which the Church sought to intervene. During this time, the Church and Church leaders made several statements about same-sex marriage and homosexuality, one of them being the Proclamation. The Church was not allowed to intervene in the court cases, and ultimately Hawaii ended up adopting a Reciprocal Partnership statute instead of marriage. See generally "Chronology of Mormon/LDS Involvement in Same-Sex Marriage Politics," <http://www.mormonsocialscience.org/?q=node/59> (accessed July 3, 2009).

2. This may be expected, because the proclamation is presented as a revelation or quasi-revelation. However, as this essay will discuss, the Church took a different approach in the Prop 8 debate years later.

3. See generally Robert Salladay, "Mormons Now Target California: Church Asks Members to Back State Ballot Initiative," *San Francisco Examiner*, July 4, 1999, A-1, discussing Church efforts in the Proposition 22 campaign. The Church also contributed a significant amount to the constitutional amendment campaign in Alaska. See Bob Mims, "Church Funds Initiative to Ban Same-Sex Marriages in Alaska," *Salt Lake Tribune*, October 5, 1998.

4. See "Preserving Traditional Marriage and Strengthening Families," letter from the First Presidency to be read to California congregations on June 29, 2008, <http://newsroom.lds.org/ldsnewsroom/eng/commentary/california-and-same-sex-marriage> (accessed July 3, 2009).

5. See "The Divine Institution of Marriage," Church Press Release, August 13, 2008, <http://newsroom.lds.org/ldsnewsroom/eng/commentary/the-divine-institution-of-marriage> (accessed July 3, 2009).

6. Lisa Riley Roche, "Guv Draws Scrutiny over Stance on Civil Un -

ions," *Deseret News*, April 20, 2009, <http://www.deseretnews.com/article/705298582/Guv-draws-scrutiny-over-stance-on-civil-unions.html> (accessed July 3, 2009).

7. Orson Scott Card, "State's Job Is Not to Redefine Marriage," *Mormon Times* (section of *Deseret News*), July 24, 2008, [http://www.mormontimes.com/mormon\\_voices/orson\\_scott\\_card/?id=3237](http://www.mormontimes.com/mormon_voices/orson_scott_card/?id=3237) (accessed July 3, 2009).

8. *Ibid.*

9. See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980); Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, Conn.: Yale University Press, 1986).

10. Madison's views are expressed most strongly in two of the *Federalist Papers*, No. 10 and No. 51.

11. See generally Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2001).

12. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

13. Edith Honan, "Power Struggle Impedes New York Gay Marriage Vote," *Washington Post*, June 29, 2009 (discussing recent developments in the legal status of same-sex marriage in different states), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/29/AR2009062903079.html> (accessed July 3, 2009).

14. "The Divine Institution of Marriage."

15. *Varnum v. Brien*, 763 N.W.2d at 899n.26.

16. "The Divine Institution of Marriage."

17. The October 8 Broadcast is available in video form at the lds.org website, in two parts. The Bednar/young adult portion is at [http://www.lds.org/ldsnewsroom/media/mediaplayer.swf?media=http://broadcast.lds.org/newsroom/video/flv/bednar\\_edit02\\_150k.flv&type=FLV](http://www.lds.org/ldsnewsroom/media/mediaplayer.swf?media=http://broadcast.lds.org/newsroom/video/flv/bednar_edit02_150k.flv&type=FLV), and the Ballard/Cook/Clayton portion is at [http://www.lds.org/ldsnewsroom/media/mediaplayer.swf?media=http://broadcast.lds.org/newsroom/video/flv/California\\_Broadcast\\_8Oct08.flv&type=FLV](http://www.lds.org/ldsnewsroom/media/mediaplayer.swf?media=http://broadcast.lds.org/newsroom/video/flv/California_Broadcast_8Oct08.flv&type=FLV) (each accessed July 3, /2009). I have not been able to locate any official transcript of the broadcasts. Various websites have published unofficial transcripts, including at [http://wikileaks.org/wiki/LDS\\_church\\_Proposition\\_8\\_broadcast\\_transcript\\_8\\_Oct\\_2008](http://wikileaks.org/wiki/LDS_church_Proposition_8_broadcast_transcript_8_Oct_2008) (accessed July 3, 2009).

18. The document as popularly circulated was not attributed to any author. The document is available online in a number of locations on both sides of the debate. See, e.g., <http://protectingmarriage>.



wordpress.com/2008/09/14/six-consequences-the-coalition-has-identified-if-proposition-8-fails/ (accessed July 3, 2009).

19. I personally received the document several times in email from family and ward members. This seems to have been a common pattern, especially in California. See also Morris Thurston, Guest Post: "Rebuttal to 'Six Consequences if Proposition 8 Fails,'" Mormons for Marriage blog, September 18, 2008, <http://mormonsformarriage.com/?p=35> (accessed July 3, 2009). He notes that the "Six Consequences" document was circulating among members, especially in California.

20. Michael Foust, "Historic Campaign Secured Prop 8's Passage in California," *Baptist Press*, November 6, 2008, <http://www.sbc Baptist Press.org/bpnews.asp?id=29277> (accessed July 3, 2009), asks, "How did supporters of Proposition 8 manage, in a mere seven weeks, to turn a 17-point polling deficit into a five-point Election Day victory?" The answer? "A number of factors, led by three main ones: a solid consistent message about the impact of gay marriage on public schools, better-than-expected fundraising and historical cooperation among various religious groups to back the measure and get out the vote." Peterson's commercials are available at [http://www.youtube.com/watch?v=cOWjhgT\\_me8](http://www.youtube.com/watch?v=cOWjhgT_me8) (school curriculum) and <http://www.youtube.com/watch?v=fNaHpHl3t8g> ("whether you like it or not"). Many Pepperdine alumni expressed discomfort with Peterson's identification as a Pepperdine professor in the ads. See Jaimie Franklin, "Proposition 8 Ad Angers Students, Pep Intervenes," *Pepperdine Graphic*, October 2, 2008, <http://graphic.pepperdine.edu/news/2008/2008-10-02-gay-marriage.htm> (accessed July 3, 2009).

21. Morris A. Thurston, "A Commentary on the Document 'Six Consequences . . . if Proposition 8 Fails,'" <http://www.mormonsformarriage.com/wp-content/uploads/2008/10/mat-responses-to-six-consequences-if-prop-8-fails-rev-1-1.pdf> (accessed July 3, 2009). Thurston's essay shows in detail how "Six Consequences" misstates fact and law in its assertions.

22. "Six Consequences."

23. See "Catholic Charities Stuns State, Ends Adoptions," *Boston Globe*, March 11, 2006; "Seven Quit Charity over Policy of Bishops—Deplore Effort to Exclude Same-Sex Adoptions," *Boston Globe*, March 2, 2006.

24. The press release was printed by a number of news organizations. See, e.g., Press Release, "Letter from Legal Scholars about Proposition 8—Leading Legal Scholars Reject Prop 8 Arguments," *San Diego Union Tribune*, October 30, 2008, <http://www.signonsandiego.com>.