Perry et al v. Schwarzenegger et al
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Why Has Media Ignored Judge's Possible Bias In California's Gay Marriage Case?

By Gerard V. Bradley

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Any minute now we will hear the result of another lawsuit about same-sex marriage.

This month a federal judge in Massachusetts threw out a Congressional law which defined marriage as the union of man and woman.

Soon a federal judge in California is going to rule in a lawsuit challenging “Proposition 8," the referendum by which California’s voters kept the traditional meaning of marriage in their law.

If the pending ruling throws out Prop. 8 – as it very likely will – it would be the biggest victory so far for those promoting same-sex marriage in the United States.

These high stakes have attracted a lot of attention to the California case of *Perry v. Schwarzenegger*. But not enough attention – in fact, almost none – has been paid to one very troubling aspect of the case.

This is the question of the judge’s bias due to his possible interest in which side wins the case.

Judge Vaughan Walker has surprised just about everyone with his unorthodox handling of the Prop. 8 trial.

Supporters describe him as iconoclastic and creative. Those less enamored have charged him with turning the proceedings into a sensationalized show-trial.

Both sets of observers could probably agree with the explanation offered by conservative commentator Ed Whelan who has observed that Walker has been determined from the outset “to use the case to advance the cause of same-sex marriage.”

I do not doubt that Judge Walker made up his mind about Prop 8 before the trial began.

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But that is not the bias that has received too little attention.

Battalions of commentators have wondered about his bizarre handling of the case, and many have attributed it to Walker’s belief that it is unjust for the law to limit marriage to opposite-sex couples.

Nor is the neglected bias related to the fact that (as several newspapers have reported) the judge is openly gay.

Of course, Walker’s opinions about marriage and sexual preference could be related to his own homosexuality.

But even if they are, it does not follow that he would be incapable of being impartial and of rendering a judgment in accord with the law in the Prop. 8 case – any more than a happily married heterosexual would necessarily be.

In fact, all judges have beliefs and personal habits which intersect from time to time with the matters in dispute before them. We do not require judges to be blank slates without a personal life. Judges are not automatons.

All we ask and what we rightly expect is that judges put aside those things insofar as they might interfere with deciding a case fairly and in accord with the law.

But no one is immune to all conflicts of interest or of belief.

So our law rightly requires that public officials – judges included – stay out of matters in which they have a financial stake. It is not that everyone would be corrupted by the prospect of financial gain. Not at all.

But some people would be corrupted. And everyone can have greater confidence in the outcome of public deliberations when they know that at least one temptation towards corruption has been removed.

The neglected bias in the Prop. 8 trial has instead to do with the fact that – as reported in The Los Angeles Times last month – Judge Walker "attends bar functions with a companion, a physician."

If (as The Times suggests) Judge Walker is in a stable same-sex relationship, then he might wish or even expect to wed should same-sex marriage become legally available in California.

This raises an important and serious question about his fitness to preside over the case. Yet it is a question that received almost no attention.

When a judge is obliged to withdraw from a case due to a conflicting interest we call it "recusal."

Federal law requires that, whenever a judge knows that he has "any other interest [that is, besides a financial interest] that could be substantially affected by the outcome of the proceeding" at hand, or when "his impartiality might reasonably be questioned", he must recuse himself.

I am not saying that Judge Walker should have refused himself in *Perry v. Schwarzenegger.*

I am not saying so because nowhere (as far as I know) has Judge Walker volunteered or been made to answer questions about how the outcome of that case would affect his interest (whatever it is) in marrying, and thus his interest in the manifold tangible and intangible benefits of doing so.

That is a conversation worth having.

And, sadly, it is quite too late to have it.

Gerard V. Bradley is a Professor of Law at the University of Notre Dame.

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