

LAVAR CHRISTENSEN

A PRINCIPLED UNDERSTANDING OF SAME-SEX POLITICS

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Thank you so much. What a wonderful sight. I can't help but think back on Theodore Roosevelt who said, "The first requisite of a good citizen in this Republic of ours is that he shall be able and willing to pull his weight – that he shall not be a mere passenger."¹ As I look out upon you, none of you are mere passengers. It's my sincere hope and prayer that the results of this evening will be a force for good for years and years to come. Thank you.

Tonight, we speak of "permanent things"² – fundamental principles that do not change and are vital to the public good of our communities, our state, and our nation. Principles and precedents are what I want to speak to you about this evening.

Thomas Jefferson said, "In matters of style, swim with the current; in matters of principle, stand like a rock."³ The issue of same-sex marriage and its many related entanglements are not mere questions of style. They are moral issues with profound social, cultural and legal implications. They are unmistakable matters of principle and we cannot yield. We must, and we will, "stand like a rock" and not merely "swim with the current."

From James Madison, we know that, "The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents." No. "They saw all the consequences," said Madison, "in the principle, and they avoided the consequences by denying the principle."⁴

There is nothing arbitrary, capricious or discriminatory about strictly adhering to the time-honored principles that preclude official public sanction of same-sex unions. Homosexual activists present their arguments today for same-sex marriage as a "civil rights" issue but they misappropriate such claims. They take advantage of the

widespread secularism that now suppresses meaningful public references to *The Bible* and leaves all talk of “rights” stripped of both their true origins and their fixed and eternal limitations.

There are moral and religious, social and cultural, and legal and historical reasons why we must oppose those measures which are contrary to and undermine traditional marriage and family and which also threaten freedom of expression and conscience in opposition to such changes in our laws and the norms of society.

I will summarize some of those grounds this evening. At the same time, I emphasize that we have the utmost empathy and sincere compassion for all human beings. But, our empathy and our compassion are not contingent upon, nor do they require, the redefinition of marriage. That would be a violation of all that we know to be true and hold sacred.

President John F. Kennedy said in his Inaugural Address that, “the rights of man come not from the generosity of the state, but from the hand of God.”⁵ They are not ours to give. As Edmund Burke stated, “Men do not make laws. They merely ratify or distort the laws of God.”⁶ Adoption of same-sex marriage and related legislative enactments that lead to it, are a clear distortion of the “Laws of Nature and of Nature’s God”⁷ and should be rejected by the people and their representatives.

G.K. Chesterton said, “This world is all one wild divorce court.”⁸ “In the modern world,” he said, “the virtues have gone mad because they have been isolated from each other and are wandering alone.”⁹ When this occurs, principles such as “freedom,” “equality,” “fairness,” “tolerance,” “diversity,” and “rights” are taken out of context. They lose their true meaning and are often misapplied.

They can turn into their very opposites¹⁰ and soon, as Abraham Lincoln said, some begin “reversing the divine rule, and calling not the sinners, but the righteous to repentance.”¹¹

The antidote for this is the patient and persistent recovery of lost virtues.¹² G.K. Chesterton also said, “the huge heresy of precedent is the view that because we have got into a mess we must grow messier to suit it; that because we have taken a wrong turn some time ago we must go forward and not backwards; that because we have lost our way we must lose our map also; and because we have missed our ideal, we must forget it.”¹³ It is widely accepted today that American life has tilted tragically towards becoming an increasingly “fatherless society.”¹⁴ However, rather than surrender to such a potential social and moral meltdown, let us unite in an energized and diligent effort of restoration.

While serving as an elected member of the Utah House of Representatives in 2004, I wrote those simple 33 words that amended our State Constitution to provide that:

“Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”¹⁵

The present controversy in Utah involves a package of new bills in the 2009 legislative session styled as “The Common Ground Initiative.” What is proposed, however, is actually very “uncommon.” It would be “ground-breaking” and lead to what we just witnessed in California. The bills’ supporters tell us that Utah’s Constitutional Marriage Amendment will prevent that result, but those are hollow and misleading assurances. They claim that the California experience is different than Utah be-

cause everything there occurred *before* the people of California passed their new Constitutional Amendment. But all the earlier “domestic partner” entitlements that caused the California Court to eventually equate same-sex unions with marriage still stand.

Now, in Utah, *after* the fact, those who previously opposed and fought against our Marriage Amendment want to add into Utah law all of those conflicting elements and statutory predecessors leading up to formal public acceptance of same-sex partnerships. They want to do away with the important second sentence of our Amendment 3. However, that specific additional provision in our Constitution is what distinguishes our Marriage Amendment from California and other states that have left the door open for public recognition and use of synonyms and substitutes for marriage.

I remember it well. It was 2003 and the Massachusetts Supreme Court had stunned our country with its own radical and unprecedented ruling. They ordered the State of Massachusetts, based on their state Constitution, to immediately grant full, legal recognition of marriage to same-sex couples.¹⁶ Then, in California, after 4.6 million people sought to define the definition of marriage as the legal union of a man and a woman, because they didn’t have the second sentence that we have now adopted in Amendment 3, the California Legislature circumvented the will of the people. They created a parallel system of “domestic partner” legislation. Even now in California, the City of San Francisco and the opponents of “Proposition 8” are appealing the election outcome back to the same Supreme Court whose radical and unprecedented opinion prompted the overriding vote of the people in the first place. What a dizzy series of events.

We can see both the principle and the potential precedent in all this. We choose to oppose those proposals that seek to classify and treat same-sex couples as virtual equivalents of marriage and then compel the official sanctioning and public recognition of same-sex unions.

Again, we stress that all citizens, including same-sex couples, already have full freedom to make hospital visits, transfer property by deed and through inheritance by will, purchase life insurance policies, buy and sell property, and obtain employment.

California’s Proposition 8 was an important moral issue that directly affects the future of traditional marriage throughout our country. No state legislature, no elected branch of government, no direct or indirect manifestation of “We the People” has yet consciously and knowingly tried to redefine marriage and extend it to same-gender couples. However, if the people of California had chosen to ratify the earlier decision of four judges who claimed authority to set aside and disregard the prior direct vote of 4.6 million citizens of their state, that important constitutional principle and precedent would surely be in jeopardy. I am extremely grateful for the 6.8 million voters and all those who contributed so much to the success of Proposition 8 in California.

Same-sex marriage advocates never mention or acknowledge the weight of compelling judicial opinions that uphold traditional marriage nor the fact that 40 states have now adopted either constitutional amendments or statutes to limit marriage to the legal union of a man and a woman.

Nowhere in the 121-page opinion of the California Supreme Court¹⁷ will you find any reference whatso-

ever to the compelling 2004 Federal 11th Circuit Court of Appeals decision known as *Lofton vs. Secretary of the Department of Children and Family Services*.¹⁸ The California Court completely ignored that opposing legal authority. As attorneys, we would be sanctioned for walking into court and knowingly misleading the court by not revealing the known controlling authority on the very issue you were arguing before the court that day.

The Federal Court, in *Lofton*, upheld the Florida Legislature's ban on homosexual adoptions. In a 51-page opinion, they handled and rejected every conceivable argument that could be made today for the existence, or shall we say the *creation*, of a fundamental constitutional right of same-sex couples to legally marry and adopt children. The court properly applied the controlling test, which is called the "rational basis test." With a healthy respect for the separation of powers, the Court said, "We do not sit as a super legislature to award by judicial decree what was not achievable by political consensus."¹⁹

The same-sex couple in the *Lofton* case argued that they were a "psychological family" with "an emotional bond" resulting from a "shared daily life." The court rejected such claims and stated that there is simply no recognized authority or precedent for such a "novel proposition."²⁰

The *Lofton* Court found that it was a rational decision and a legitimate state interest and not at all discriminatory for the Florida Legislature to prohibit adoption of children by same-sex partners and to give preference to the placement of children in a "home anchored by both a father and a mother."²¹

The *Lofton* Court explained and cited established constitutional law regarding what is recognized as a "fundamental right." A fundamental right must be reflected in and be based upon the more than 200 years of legal precedent in this country going back to the Common Law. You must show that the thing you are advocating (such as, the alleged right to marry a person of any gender) is either expressly identified in the language of the Constitution itself, which it is not, or so deeply embedded in our tradition, in our culture, in the roots of our nation, that it would be discriminatory to rule otherwise. The Court said that there is no such tradition and no such precedent for same-sex relationships.²²

New York's highest Court has similarly stated, in very significant language, what the California Court did not cite and conveniently overlooked. The New York Court said: "By limiting marriage to opposite sex couples, New York is not engaging in sex discrimination... There are rational grounds on which the Legislature could choose to restrict marriage to couples of opposite sex. Plaintiffs have not persuaded us that this long-accepted restriction is a wholly irrational one, based solely on ignorance and prejudice against homosexuals. This is the question on which these cases turn..." said the Court. "The traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind." As the New York Court went on to say, "The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who has ever lived, in any society, in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude," said New York's highest Court.²³

A careful review of the bills presented this year in the Utah Legislature by the supporters of same-sex marriage raises the question: What is their origin and where will they lead? These bills are all MADE IN CALIFORNIA. They are among the “Legislative History” cited and relied upon by the California Supreme Court as justification for their radical and unprecedented ruling that, henceforth, everyone in their state has a new “fundamental right” to marry any person of any gender and have that choice officially sanctioned and recognized by the state and the people of California, against their will.

When the people of Alaska adopted their Constitutional Amendment in support of marriage, the head of the ACLU stated, “Today’s results prove that certain fundamental issues should not be left up to a majority vote.”²⁴ Apparently, he’s not familiar with “We the People.” It’s at the beginning of the Constitution. He should read on.

Rather than accept responsibility for such bizarre judicial reasoning and activism, the California Supreme Court cited a long list of statutes adopted by the California Legislature over the course of a decade. These measures were said to be the “culmination of a gradual expansion of rights that have been granted in this State to same-sex couples...”²⁵ The Court viewed such action by the Legislature as acceptance and endorsement of same-sex marriage, which the Court was now free to officially enact.

This is not the first time we have seen the California Supreme Court trample on traditional values. When I was a California law student and a judicial law clerk, I remember the impact of the State Supreme Court’s ground breaking decision in *Marvin v. Marvin*.²⁶ The case involved a suit brought by the live-in girlfriend of Hollywood actor, Lee Marvin. They were unmarried and

upon their break-up, she sued for the equivalent of alimony normally paid to a divorced wife.

Until then, traditional morality and family law said that those who chose to spurn the institution of marriage and engaged in what was viewed as purely a sexual relationship outside of marriage were not publicly sanctioned and could not resort to the courts to litigate and enforce their private agreements.

Suddenly, the Court reversed that long-established precedent. They validated the whole “marriage is just a piece of paper” mantra from the earlier “hippie” movement and ruled that independently, on contract theory rather than family law, unmarried cohabiting couples had standing to sue in court just like married spouses.

To reassure those who complained that this was a dangerous precedent and “slippery slope,” which would lead to further erosion of the definition, meaning and protection of marriage, the Court offered this hollow explanation and feeble assurance:

“The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many. Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution.” Now listen to this: “*The joining of the man and woman*” said the Court, “*in marriage* is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.”²⁷

That is absolutely true. They just forgot it many years later.

Notice that the California Court treated marriage in 1976 as the “joining of the man and a woman.” Fast forward to 2008 and the same Court’s most recent adoption of same-sex marriage. It is more than ironic that the Court’s latest opinion on marriage actually cites and relies upon this same language from the *Marvin* decision to justify a new constitutional right to marry any “person” of any gender. This time, the Court threw in the future assurance that their newest marriage decision will not open the door for polygamous or incestuous marriages. The earlier *Marvin* experience, however, makes those assurances meaningless.

Here is what the Court said:

“We emphasize that our conclusion that the Constitutional right to marry properly must be interpreted to apply to gay individuals and gay couples does not mean that this Constitutional right similarly must be understood to extend to polygamous or incestuous relationships. Past judicial decisions,” said the Court, “explain why our nation’s culture has considered the latter types of relationships inimical to the mutually supportive and healthy family relationships promoted by the Constitutional right to marry.”²⁸

Such selective respect for and adherence to “past judicial decisions” and “our nation’s culture” is alarming but not surprising.

The California experience is again instructive as we consider the principles and potential precedents involved in the current debate. Once same-sex mar-

riage is adopted *in any form* or following the incorporation of other predecessor enactments, soon school books and class curriculum content must be altered to explain the new publicly-recognized “alternative lifestyles” and “family constellations” in a positive light. Lawsuits spring up and people are found liable for refusing to acquiesce to demands for services on grounds of conscience and religious belief. Recent examples include: a wedding photographer who was sued for declining to photograph a same-sex commitment ceremony; a Methodist camp association that lost part of its tax exemption because it would not allow a commitment ceremony between two women on its property; a doctor who was sued when he referred a woman in a same-sex relationship to another doctor for assisted reproduction services because of his strong, personal religious beliefs.

Again, I refer to those simple 33 words that we have used to amend our own Constitution: *“Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”*²⁹

Shortly before our Marriage Amendment was voted on and approved by the people of Utah and when other states were about to do the same, The Church of Jesus Christ of Latter-day Saints issued this statement in 2004. It expresses and balances the morality, the respect and the compassion that should always guide and be evident in such public policy decisions. The Church said:

“We of the Church of Jesus Christ of Latter-day Saints reach out with understanding and respect for individuals who are attracted to those of the same gender. We realize there may be great lone-

liness in their lives but there must also be recognition of what is right before the Lord.

As a doctrinal principle, based on sacred scripture, we affirm that marriage between a man and a woman is essential to the Creator's plan for the eternal destiny of his children. The powers of procreation are to be exercised only between a man and woman lawfully wedded as husband and wife.

Any other sexual relations, including those between persons of the same gender, undermine the divinely created institution of the family. The Church accordingly favors measures that define marriage as the union of a man and a woman and that do not confer legal status on any other sexual relationship.”³⁰

Since 1960, roughly, we have witnessed and experienced a decline and deterioration in marriage to the point that the concept of same-sex marriage has become parasitic.³¹ It relies on the power of the state for its existence and it feeds and depends on breakdowns in traditional marriage and the natural family. Rather than have us as a society rise up and strengthen and bolster and reinvigorate marriage and the raising of children in homes anchored by both a father and a mother as the natural birthright of every child,³² we are being urged today to surrender and redefine marriage.

But, if we are true to our heritage, we will not yield. Instead, we will stand firm in our devotion to the divine command, “So God created man in his own image, in the image of God created he him: male and female created he them. And God blessed them, and God said unto them, Be fruitful and multiply and replenish the earth...., Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall

be one flesh.”³³ And Jesus added, “What therefore God hath joined together, let not man put asunder.”³⁴

The supporters of same-sex marriage would have us believe that The Church of Jesus Christ of Latter-day Saints and others who worked in support of Proposition 8 have no objection to all forms of same-sex legislation adopted in California before Proposition 8. They contend that all such measures should meet with no opposition in Utah because supporters of Proposition 8 somehow now owe same-sex couples all the lesser or incidental marriage benefits and domestic-partner entitlements they may desire. That is an unsupportable position.

Religious supporters of California's Proposition 8 did not advocate the repeal of prior law in California. That was not the issue. The issue was strictly limited to defining and protecting marriage as the legal union between a man and a woman. Utah should not now adopt the package of same-sex marriage predecessors that have been imported from California and elsewhere. They are not harmless, spontaneous proposed innovations stemming from isolated injustices witnessed in Utah. No, they are pulled directly from a national same-sex partner advocacy agenda that Utah does not need and does not support.

The whole concept of same-sex marriage falsely assumes that men and women are interchangeable and children are so adaptable³⁵ that there is no desired norm in our society anymore other than the personal pleasure of adults involved in whatever relationship they may choose to form. In reality, however, as Maggie Gallagher has stated:

“Men and women are not interchangeable units. Sex has a meaning beyond immediate pleasure. Society needs babies, children need mothers and fathers; marriage is a word for the way we join men and women together to make the future happen.”³⁶

There’s one crucial legal point that I must emphasize this evening. It puts everything into context. It explains what is at stake in today’s “same-sex politics” and the delicate ground on which this debate is waged.

The frequent use of the term “fundamental rights” and “equality” and “discrimination” by those who seek to publicly sanction and officially recognize same-sex unions are not unintentional, nor are they insignificant. They know that inclusion of “sexual orientation,” either directly or indirectly, to define and designate a separate, distinct and officially-recognized class of citizens, has serious legal consequences.

Instead of applying the traditional “rational basis” test that defers to the Legislative Branch and upholds legislation that has a “rational” or reasonable purpose, the Courts will apply a “strict scrutiny” test when fundamental rights and the need for “equal protection” are involved. This is traditionally limited to matters involving race, religion, or ethnic origin. In those cases, legislation is presumed to be invalid and will be overturned unless there is a “compelling state interest” involved.

Of great concern now is the fact that historical precedent and preserving public morality are no longer recognized by some activist judges as an acceptable justification to meet the “compelling state interest” requirement of the “strict scrutiny” test. Such is the murky

world of “strict scrutiny” law and “fundamental rights” and “equal protection” analysis that advocates of same-sex marriage are pushing to achieve their objectives.

As I mentioned, the Federal Court upheld the Florida Legislature’s restriction against homosexual adoption when it applied the “rational basis” test. On the other hand, the California Supreme Court ignored such well-settled precedent. They switched the applicable standard of review and used the much higher “strict scrutiny” test to strike down the people’s earlier vote and mandate official public recognition of same-sex marriage as a new, judicially-created Constitutional right. It all depends on whether same-sex relationships are singled out and recognized through a series of legislative enactments as a new “suspect class” of citizens who must now be treated the same as race, religion and ethnic origin under our laws.

Until recently, it has been accepted law for generations that there is not only a legitimate interest, but a “substantial government interest in protecting order and morality.”³⁷ However, the California Court ignored that principle and that precedent and stated: “History alone does not provide a justification for interpreting the Constitutional right to marry as protecting only one’s ability to enter into an officially-recognized family relationship with a person of the opposite sex.”³⁸ That is what happens when same-sex politics takes over the legislative process and when courts are free to ignore traditional morality and dismiss it all as mere “history.”

The law has become so vague in this area that a middle-tier test and level of judicial scrutiny seems to be emerging. But we should do nothing in this state that

would potentially take away the “rational basis” test and make it harder to uphold the laws passed by our elected representatives.

With all the vague references to “equality” that same-sex politics sparks and the push for new laws that mandate the type of “equality” that supporters of same-sex marriage envision, remember the cautionary wisdom expressed by Edmund Burke. He said that all compulsory equalizations – those that are forced upon us – “pull down what is above. They never raise what is below; and they depress high and low together beneath the level of what was originally the lowest.”³⁹

I know that this public policy debate is very painful and sensitive and difficult for many whose lives and loved ones are wrapped up in these public considerations in the most real and intimate ways. They may, unfortunately, mistake this overview of the principles and precedents involved as perhaps harsh, insensitive, or intolerant in their mind. I sincerely trust that the highest degree of respect and civility will always prevail for that is what I experienced every single day during my service in the Utah Legislature regardless the passion, the sacredness, and the seriousness of the debate to all of the concerned parties.

Dallin H. Oaks explained the true meaning of tolerance. He said, “Tolerance obviously requires a non-contentious manner of relating toward one another’s differences. But tolerance does not require abandoning one’s standards or one’s opinions on political or public policy choices. Tolerance is a way of reacting to diversity, not a command to insulate it from examination.”⁴⁰

These social and moral upheavals in modern times are why John Adams said at the outset of our American Re-

public, “Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”⁴¹ With the other Founders, he feared that posterity may not possess “sufficient virtue”⁴² to sustain so great a bestowal of power as independence and the right of self-government would give to the new nation. To his beloved wife, Abigail, he wrote following the signing of the Declaration of Independence:

“The new governments we are assuming in every part will require purification from our vices, and an augmentation of our virtues, or they will be no blessings. The people will have unbounded power, and the people are extremely addicted to corruption and venality, as well as the great. But I must submit all my hopes and fears to an overruling Providence, in which, unfashionable as the faith may be, I firmly believe.”⁴³

The public expression of such faith in the context of modern same-sex politics may be even more unfashionable today. But I, too, submit all my hopes and fears to that same overruling Providence and I pray that “Nature’s God” will bless us with the understanding, the wisdom, and the compassion required to wisely and fairly balance all worthy considerations and achieve a principled result for the public good without offending or violating that same Providence upon which we so firmly rely to this day.

Thank you for the opportunity to speak to you this evening.

ABOUT THE AUTHOR

LaVar Christensen is an attorney and a trustee of the Sutherland Institute. Mr. Christensen has served as a legislator in the Utah House of Representatives and was the primary author and sponsor of Utah’s Constitutional

Amendment in support of marriage, which passed and was adopted by the voters in 2004. He also successfully sponsored important legislation that recognizes and strengthens parental rights in Utah.

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Crane Building
 307 West 200 South, Suite 5005
 Salt Lake City, UT 84101
 office: 801.355.1272
 fax: 801.355.1705