

MARRIAGE EQUALITY: AN IDEA WHOSE TIME IS COMING . . .

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How ought the U.S. Supreme Court decide the appeal in the Proposition 8 Case, *Hollingsworth v. Perry*?¹ Does the state's reinstatement of the exclusion of lesbian and gay couples from civil marriage violate the Equal Protection Clause? As I have long argued, the most principled understanding of the clause's text, original purpose, and precedents requires states to afford committed lesbian and gay couples equal marriage rights.² In an ideal world, where principled constitutionalism holds sway, even where unpopular or contrary to the personal preferences of Supreme Court Justices, the exclusion of lesbian and gay couples from civil marriage would fall.

But the world we live in is one of great normative heterogeneity, and the United States, even in 2013, is a country whose citizens remain intensely divided with regard to marriage equality. Until there is greater consensus, the Court ought to avoid any broad pronouncements on the merits of plaintiffs' claim that denying marriage equality to lesbian and gay couples violates the Fourteenth Amendment. In *Perry*, the Court's best course of action would have been to deny the certiorari petition altogether. If the Court reaches the merits of the Equal Protection claim, the Justices ought to affirm the lower court decision based upon its precedent in *Romer v. Evans*.³

In 1956, political scientist Robert Dahl warned that pluralistic democracy cannot easily handle issues that both intensely and evenly divide the polity.⁴

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1. In 2008, California voters approved Proposition 8, which amended the state constitution to override the state supreme court's constitutional decision recognizing marriage equality for same-sex couples. Both trial and appellate courts in the Ninth Circuit ruled that Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144). The official defendants declined to appeal the trial court's judgment, but the proponents of Proposition 8 took an appeal. The Ninth Circuit ruled that they have constitutional standing to do so, and the proponents filed a petition for certiorari with the U.S. Supreme Court, which granted the petition in December 2012.

2. WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* chs. 5-6 (1996).

3. *Romer v. Evans*, 520 U.S. 620 (1996) (invalidating a voter initiative amending the state constitution to deny sexual minorities statutory and regulatory anti-discrimination protections).

4. ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 93-99 (1956) (suggesting that stable "polyarchy" must avoid political divisions that are both intense and evenly matched). See also ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* 36-37 (1991) (arguing that intensely divisive issues can actually be lethal for democracies because they raise the stakes of politics too much).

Indeed, such issues threaten the viability of our system because they polarize contending groups and engender politics-exiting bitterness among group members who are defeated. Examples of such high-stakes issues in our history are slavery, prohibition, apartheid, and abortion.

Same-sex marriage is now an issue that also divides the country both intensely and evenly. It is, therefore, an issue that ought not be resolved one way or the other until public preferences become more settled. This is a reason why the Defense of Marriage Act (1996) and the proposed Federal Marriage Amendment (2003-04) were unwise. They sought, prematurely, to declare victory for supporters of traditional marriage before public opinion had settled firmly in their favor. This is also why the Supreme Court ought not declare a national constitutional right supporting same-sex marriage, for that would, prematurely, declare victory for supporters of marriage equality before public opinion has settled in their favor.

As I wrote in *The Case for Same-Sex Marriage*, the legal case for such a constitutional right is an excellent one.⁵ But the legal case for a constitutional right for different-race couples to marry was an excellent one in the wake of *Brown v. Board of Education*, yet it took the Supreme Court half a generation to recognize such a right in *Loving v. Virginia*.⁶ It is easy to see why the Court waited more than a decade to decide the issue: what was too contentious in 1954 had cooled off by 1967, as the Justices could readily see. In 1954, three-fifths of the states barred such marriages; by 1967, only southern states did so.⁷ Only then, once the stakes had been lowered, was it politically prudent for the Court to announce a national resolution.

As Alexander Bickel argued, the “passive virtues” (doctrines of avoidance) enable the Supreme Court to thread the needle between a decision that would be unprincipled (i.e., refusing to apply the Court’s broad right to marry jurisprudence to lesbian and gay couples) and one that would be sharply divisive (i.e., sweeping away the laws of forty-one jurisdictions that do not recognize marriage equality).⁸ The Supreme Court ought to avoid a final judgment on the constitutionality of marriage law’s discrimination against lesbian and gay couples until the nation is more at rest on the issue. Admittedly, that moment is coming more rapidly than anyone predicted, but that moment has not yet arrived

5. ESKRIDGE, *supra* note 2.

6. *Loving v. Virginia*, 388 U.S. 1 (1967). See also *Naim v. Naim*, 350 U.S. 985, 985 (1956) (dismissing appeal challenging Virginia’s anti-miscegenation law in the wake of *Brown*).

7. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, INTIMACY, AND ADOPTION* 244–80 (2003).

8. See Alexander M. Bickel, *Foreword: The Passive Virtues—The Supreme Court 1960 Term*, 75 HARV. L. REV. 40, 48–50 (1961) (defending the doctrines of avoidance as an essential mechanism allowing the Court to follow the example of President Lincoln, who constantly balanced principle and expediency in his efforts to preserve the Union and, ultimately, to render justice to the southern slaves).

for the nation as a whole.⁹

What does this mean for the Supreme Court's "ideal" disposition in *Perry*? In my view, the Court's best course of action would have been to deny review in the case. Because the Ninth Circuit issued a narrow ruling, the Supreme Court could easily have denied the petition for review, without throwing the country into a more intense debate on the issue. To be sure, leaving intact the Ninth Circuit's decision would have triggered numerous lawsuits—but that is an advantage under a Bickelian approach, for different courts would reach different judgments, with different reasons advanced and discussed.

Continued lower court litigation would also provide an opportunity for opponents of marriage equality to settle on a stable justification for the discrimination. The Proposition 8 Case itself reflects the astounding mobility of justifications emphasized by opponents of marriage equality. In the ballot materials provided to voters, the supporters of Proposition 8 emphasized what I call the "stamp of approval" argument: marriage equality is a bad idea because it would send a message to children that lesbian and gay families are just as good as (different-sex) marital families.¹⁰ At trial, the lawyers and witnesses supporting Proposition 8 largely abandoned stamp-of-approval arguments and claimed, instead, that marriage equality is a bad idea because it would undermine the institution of marriage. On appeal, the lawyers have emphasized yet another new argument—that discrimination against committed lesbian and gay couples can be justified by marriage's concern with responsible procreation and child-rearing.

The Court, of course, has granted review. From the perspective of Dahlian political theory, my advice would be for the Court to avoid a broad ruling. The narrowest ruling would be to dismiss the appeal as nonjusticiable: if the supporters of Proposition 8 have no constitutional standing to pursue the appeal to the Ninth Circuit or beyond, the Supreme Court could avoid any statement on the merits, which would be prudent. I have no view as to whether the Court's Article III precedents demand or even logically permit such a ruling, however. Pluralist political theory would not be eager to close off channels of judicial review for Californians adhering to traditional family values.

If the Court were to reach the merits of the equal protection claim, the Justices would be wise to follow the narrow, but just, path laid out by the Ninth Circuit's opinion, which closely tracked *Romer*. That is, the Court ought to avoid

9. As Darren Spedale and I have argued, the moment when equality practice gives way to equality simpliciter comes at different times for different jurisdictions, with states like California and New York "ready" for marriage equality in ways that Texas and Alabama are not. See WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE—WHAT WE'VE LEARNED FROM THE EVIDENCE* (2006).

10. See Plaintiff's Exhibit PX0001 (Voter Information Guide), *Perry v. Schwarzenegger*, 704 F. Supp. 921 (N.D. Cal. 2010) (No. C 09-2292) ("If the gay marriage ruling is not overturned, TEACHERS COULD BE REQUIRED to teach young children there is *no difference* between gay marriage and traditional marriage.") [hereinafter PX0001].

both the broad constitutional ruling sought by the plaintiffs in the trial court and on appeal (subjecting the marriage exclusion to strict scrutiny) and the constitutional authorization sought by the petitioners defending Proposition 8. In other words, the Court ought to avoid the Scylla of *Roe v. Wade*, which recognized too broad a constitutional right,¹¹ and the Charybdis of *Bowers v. Hardwick*, which broadly rejected any privacy protections for “homosexual sodomy.”¹² Both Supreme Court decisions were unwise in their breadth. Because each decision casually dismissed a thoughtful point of view held by half the polity, both *Roe* and *Bowers* raised the stakes of politically intense issues, to the detriment of pluralist peace.

There is a narrow alternative to the broad fundamental right to marry sought by the plaintiffs in *Perry*, and that alternative was the basis for the Ninth Circuit’s decision on appeal. Following Judge Reinhardt’s invocation of the kind of rational basis with bite the Court applied in *Romer* would avoid Scylla and Charybdis and still yield a just and fair disposition of the constitutional issues posed by Proposition 8.

While there is legitimate debate about how broadly to read the Court’s opinion in *Romer*, that precedent applies (at the very least) to cases whose facts are close to the *Romer* facts: (1) novel, ad hoc legal barriers erected by voter initiatives denying fundamental public rights to lesbians and gay men (2) cannot stand if tainted by a bare desire to lower the status of this minority (whether for reasons of anti-gay animus or religious morality) (3) rather than a rational connection to a neutral public interest.

Proposition 8 fits the facts of *Romer* snugly. First, Proposition 8 was a novel barrier to marriage rights in this country: no state but California has recognized lesbian and gay couples’ right to civil marriage as “fundamental,” and then revoked that fundamental right through a popular initiative. Second, the supporters of Proposition 8 openly defended their rights take-back as a pure status denigration. Thus, their ballot materials explained that the rights take-back was needed in order to (a) restore the discriminating feature of traditional marriage, (b) discipline “activist” judges who recognized fundamental rights for a disapproved minority, and (c) assure that schoolchildren would not be taught that gay marriage was entitled to the same civil respect accorded traditional marriage.¹³

Third, the briefs filed by the Proposition 8 proponents have been strikingly unable to tie the exclusion of same-sex couples to any neutral state interest. Their

11. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (arguing that the *Roe* opinion would have been more acceptable had it been limited to sex equality considerations and had it not seemed to sweep away all regulation of a woman’s right to choose an abortion).

12. *Bowers v. Hardwick*, 478 U.S. 186 (1986). See also WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAW IN AMERICA, 1861–2003* (2008) (documenting the overwhelming critical response to the Court’s opinion in *Bowers*).

13. See, e.g., PX0001 (Voter Information Guide).

main argument—that the exclusion of lesbian and gay couples is permissible because the point of marriage is to encourage “responsible procreation” among straight couples—brings this case even closer to *Romer*.¹⁴ That is, the anti-gay discrimination in the Proposition 8 Case is, like the anti-gay discrimination in the Colorado Initiative Case, completely “discontinuous with the reason[] offered for it.”¹⁵ The exclusion of committed lesbian and gay couples from the status of civil marriage does not plausibly advance the state policy of “responsible” procreation and child-rearing. One can imagine a number of policies that might steer potentially irresponsible straight couples toward responsible procreation, from penalties for reckless procreation to subsidies awarded to responsible couples. But it is virtually impossible to see how excluding lesbian and gay couples from marriage advances the state interest in procreative responsibility. The federal trial judge asked counsel for the defenders of Proposition 8 “how permitting same-sex marriage impairs or adversely affects” the state’s interest in marital procreation. The counsel replied, “Your honor, my answer is: I don’t know. I don’t know.”¹⁶

Indeed, the exclusion in *Perry* actually undermines the stated goal, understood in the context of official California state policy. According to the 2010 Census, more than 100,000 children are being raised by same-sex partners; thousands of those children were conceived by partners who were in a lesbian or gay relationship.¹⁷ California state policy offers these families the same legal protections as marital families, with the exception of the designation of “marriage” created by Proposition 8.¹⁸ Because California’s family law focuses on the interests of children, the state’s interest in responsible child-rearing is the same for all couples, whether gay or straight. So denying marriage to lesbian and gay couples and thereby denigrating their relationships undermines the state’s goal that petitioners try to invoke.

Are there differences between the Colorado initiative invalidated in *Romer* and the California initiative litigated in *Perry*? Yes—but the big differences cut against the validity of Proposition 8. One difference is that Colorado’s Amendment 2 denied lesbians and gay men a range of legally enforceable rights and benefits, while Proposition 8 left lesbian and gay couples with the legal rights and duties associated with marriage, but labeled their relationships “domestic partnerships.” Thus, Amendment 2 denied gay people some legal

14. Brief of Petitioners at 31–48, *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

15. *Romer v. Evans*, 520 U.S. 620, 632 (1996).

16. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

17. GARY J. GATES & ABIGAIL M. COOKE, WILLIAMS INST., UNITED STATES CENSUS SNAPSHOT: 2010 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>.

18. *Strauss v. Horton*, 207 P.3d 48, 63 (Cal. 2009) (holding that Proposition 8 applies only to access to the designation of ‘marriage,’ but not to any other basic legal rights).

rights, while Proposition 8 is purely symbolic. In one respect, the latter is a more serious equal protection concern: the proponents of Proposition 8 spent millions of dollars simply to deny lesbian and gay couples the dignitary equality associated with full (civil) marriage recognition. Certainly, no one would doubt the insult of allowing marriages only between same-race partners while affording different-race partners a parallel institution called “domestic partnerships.” The deliberate insult is just as obvious here. Carving out a class of citizens from a core civil or political status is unprecedented in our constitutional system; it is highly suspect, and perhaps a *per se* constitutional violation, under *Romer*.

Another difference between *Romer* and *Perry* is that the record in the latter is replete with open appeals to sectarian morality, to anti-gay prejudice, and to the stereotype that “homosexuals” are predators “recruiting” innocent children.¹⁹ The *Romer* Court inferred animus from the poor fit between the sweep of Amendment 2 and the rational purposes attributed to it; in the Proposition 8 Case, there is just as poor a fit, but the record in *Perry* is also saturated with direct evidence of animus (anti-gay prejudice, stereotypes, and sectarian disapproval).

Like the Warren Court in the different-race marriage cases,²⁰ the Roberts Court should *not* be in a hurry to reach the constitutional merits of the same-sex marriage cases. If the Justices reach the merits, they should craft an opinion that decides the California appeal, but goes no further. A *Romer*-based approach is the best the Court can do under those circumstances. The Justices should then join the rest of the country in observing what happens as the state-by-state debate eventually runs its course.

In an ideal world, marriage equality for committed lesbian and gay couples would be an idea whose time has come. In the world we live in, where there remains an intense division of opinion on this issue, marriage equality is an idea whose time is coming, step by step.

19. William N. Eskridge, Jr., *The California Supreme Court, 2007–2008—Foreword: The Marriage Cases, Reversing the Burden of Inertia in a Pluralist Democracy*, 97 CALIF. L. REV. 1785, 1825–34 (2009). For particularly thoughtful and informative accounts of the Proposition 8 campaign, see Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010); Douglas NeJaime, *Winning by Losing*, 96 IOWA L. REV. 941, 1004–12 (2011).

20. See *supra* note 6 and accompanying text.