

HOLLINGSWORTH V. PERRY: EXPRESSIVE HARM AND THE STAKES OF “MARRIAGE”

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I. INTRODUCTION

After years of political struggle, same-sex marriage advocates initially celebrated when the Court granted a writ of certiorari in not one but two cases related to same-sex marriage this term: *United States v. Windsor*¹ and *Hollingsworth v. Perry*.² It was all but a foregone conclusion that the United States Supreme Court would review the Defense of Marriage Act; the grant in *Perry*, however, took many by surprise.³ Realization that the two cases cut against one another on important issues tempered the initial excitement.⁴ Following oral arguments, many began to speculate that the grant of certiorari in *Perry* may have come from the conservative Justices on the Court, hoping to use it to limit or counterbalance their holding in *Windsor*.⁵

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1. *United States v. Windsor*, No. 12-307 (U.S. argued Mar. 27, 2013).

2. *Hollingsworth v. Perry*, No. 12-144 (U.S. argued Mar. 26, 2013).

3. Adam Liptak, *Who Wanted to Take the Case on Gay Marriage? Ask Scalia*, N.Y. TIMES, Mar. 30, 2013, at A1.

4. Most strikingly, federalism considerations bolster opposite positions in the two cases. In *Windsor*, the federalism arguments cut in favor of same-sex marriage: The federal government should defer to the states' inclusion of same-sex couples within the definition of marriage because "Congress's establishment of a competing federal definition of family undermines the States' sovereign authority to define, regulate, and support family relationships." Brief of Federalism Scholars as Amici Curiae in Support of Respondent Windsor at 4, *United States v. Windsor*, No. 12-307 (U.S. Mar. 1, 2013). In *Perry*, the federalism argument cuts against same-sex marriage, characterizing Proposition 8's exclusion of same-sex couples from the definition of marriage as a permissible exercise of state sovereignty in an area traditionally reserved for the states. See generally Brief of Thirty-Seven Scholars of Federalism and Judicial Restraint as Amici Curiae in Support of Petitioners, *Hollingsworth v. Perry*, No. 12-144 (U.S. Jan. 28, 2013) (arguing that the Court should uphold Proposition 8 on federalism grounds).

5. See, e.g., Nan Hunter, *Why Today's Argument Could Decide the Gay Marriage Debate*,

The specific legal issue in *Perry* is whether California's revocation of the *label* but not the substantive rights of "marriage" from same-sex couples violates the Equal Protection Clause or Due Process Clause of the Fourteenth Amendment. The California law is unique in two important respects: 1) California is the only state to *rescind* the right of same-sex marriage through constitutional amendment,⁶ and 2) through California's domestic partnership laws, same-sex couples already have access to all the substantive rights of marriage.⁷ At its core, therefore, *Perry* is about the value of a word and the power of government speech to convey normative judgments; simply put, it is a case about expressive harm.

The isolation of the label "marriage" from the substantive benefits of marriage makes *Perry* divisive even among gay rights supporters. For instance, the LGBT community is largely united on the issue of substantive legal rights, but deeply divided over whether the normative goal of state-recognition through a label should be the primary political objective, or whether political energy would be better spent *challenging* such normative institutions and addressing persistent material inequalities.⁸ Expressive harm is also theoretically divisive. Constitutional scholars disagree about whether expressive harm is cognizable as a violation of the Fourteenth Amendment, or whether it is too subjective and open-ended to be recognized as a state-imposed harm.⁹

THE NATION (Mar. 29, 2013), <http://www.thenation.com/blog/173586/real-argument-today-and-luck-perry-case-could-go-away> (hypothesizing that the conservative Justices supported the grant based on an assumption that Justice Kennedy would not want to accept the Respondents' framing); Liptak, *supra* note 3, at A1 (speculating that the conservative Justices on the Court were behind the decision to hear the case out of recognition that their chances of limiting same-sex marriage would only lessen with time).

6. See *Perry v. Brown*, 671 F.3d 1052, 1069 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (U.S. Dec. 7, 2012) (No. 12-144) (highlighting the exceptional nature of California's withdrawal of the right).

7. *Id.* at 1069.

8. See Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 244 (2006) (discussing the division within the LGBT community about whether state recognition should really be the goal or whether the LGBT community should be focusing on the "creative possibilities that the middle ground between criminalization and assimilation might have offered up"); see also Lisa Duggan, *Beyond Marriage: Democracy, Equality, and Kinship for a New Century*, S&F ONLINE, ISSUE 10.2 (2012), <http://sfonline.barnard.edu/a-new-queer-agenda/beyond-marriage-democracy-equality-and-kinship-for-a-new-century/> (last visited Mar. 30, 2013) (arguing that same-sex marriage has become the focal point of the LGBT movement at the expense of other important causes that address material inequalities and discussing the conservative legacy of pro-marriage initiatives as a form of privatization of responsibility since the Reagan era).

9. While some constitutional law scholars advocate recognition of expressive harm in

Despite these internal divisions, expressive harm still offers a reasonable grounding for the Court’s holding in *Perry*. The Court has never before held that an expressive harm alone can violate equal protection,¹⁰ and therefore upholding the lower court’s decision could appear as a radical break in jurisprudence. However, when viewed through the lens of “animus analysis,”¹¹ affirming the Ninth Circuit’s holding and striking down Proposition 8 appears wholly commensurate with the Court’s recent jurisprudence.

II. FACTUAL & PROCEDURAL BACKGROUND

In early 2009, after being denied marriage licenses by the State of California, two same-sex couples, Kristin Perry and Sandra Stier, and Paul Katami and Jeffrey Zarrillo, teamed up with legal heavyweights Theodore Olsen and David Boies to file a suit alleging Proposition 8—the 2008 California constitutional amendment that had withdrawn the right to marry from same-sex couples—violated the Fourteenth Amendment of the United States Constitution.¹²

equal protection, others argue that such an approach makes the Equal Protection Clause too open-ended and subjective, and that the Constitution is not intended to protect people’s feelings. See Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1284 (2011) (characterizing the dominant mode of thinking that the only constitutionally cognizable harm is material harm as the “sticks-and-stones” baseline assumption). Critics of expressive harm theories cite First Amendment concerns that the government must be able to speak freely: “Being incidentally insulted or otherwise harmed by government speech . . . might [be] . . . part of the price each of us potentially pays for having an effective government, much in the same way that being harmed by private speech is part of the price we pay for the First Amendment.” *Id.* at 1285. And finally, critics of expressive harm approaches argue that there is no proof that discriminatory government expression leads to actual status harm for the group the government’s expression supposedly stigmatizes: “Stigma is not even sufficient, let alone necessary, for status harm.” Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1436 (2000).

10. See *Palmer v. Thompson*, 403 U.S. 217, 224–25 (1971) (“[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.”).

11. “Animus analysis” constitutes a distinct line of equal protection jurisprudence—separate from the tiers of scrutiny framework—that prohibits under rational basis review legislation enacted with no legitimate purpose other than a desire to harm a politically unpopular group. See *infra* notes 50–59. For a more complete analysis of this strain of equal protection jurisprudence, see generally Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

12. *Perry*, 671 F.3d at 1069.

A. *The Enactment and Repeal of Proposition 22*

The narrative of *Perry*, however, begins well before Proposition 8's passage. The story begins in March of 2000 when California voters passed Proposition 22, which amended the California Family Code to limit "valid and recognized" marriages in the state of California to those between a man and a woman.¹³ In response, multiple cases were filed in California state courts arguing Proposition 22 violated the California Constitution.

In 2008, these cases were heard collectively as the *In re Marriage Cases*.¹⁴ The California Supreme Court struck down Proposition 22 as unconstitutional under both the due process clause and the equal protection clause of California's Constitution.¹⁵ The court also held that the State had to issue marriage licenses without regard to the gender of the applicant's intended spouse.¹⁶ In the wake of the holding, California counties issued more than 18,000 marriage licenses to gay and lesbian couples.¹⁷

B. *Proposition 8*

In response to the court's holding, five residents of California, currently Petitioners in *Perry*, began collecting voter signatures and filed petitions to place Proposition 8—an initiative to amend the State Constitution to limit recognition of marriage to that between a man and a woman—on the November 4, 2008 ballot.¹⁸ Following a forty million dollar campaign, 52.3% of California voters voted in favor of Proposition 8.¹⁹ Its passage withdrew from same-sex couples access to the legal title of "marriage," but not to the substantive benefits of marriage, which remained in tact through California's domestic partnership laws.²⁰

In early 2009, after being denied marriage licenses as a result of Proposition 8's passage, Respondents filed suit alleging that Proposition 8 violates the Fourteenth Amendment of the United States Constitution.²¹ The district court invalidated Proposition 8

13. *Id.* at 1065 (citing CAL. FAM. CODE § 308.5).

14. 183 P.3d 384 (Cal. 2008).

15. *Id.* at 451.

16. *Id.* at 453.

17. *Perry*, 671 F.3d at 1067.

18. *Id.*

19. *Id.*

20. *Id.* at 1069.

21. *Id.* at 1068.

applying strict scrutiny under the Due Process Clause,²² but also held the law could not withstand even rational basis review under the Equal Protection Clause.²³ In the face of this decision, the State refused to appeal the case to the Ninth Circuit.²⁴

C. The State’s Refusal and the Proponents’ Intervention

The five California residents who had led the campaign to get Proposition 8 on the ballot petitioned the Ninth Circuit to allow them to intervene and appeal the district court decision in light of the State’s refusal to defend the measure’s validity.²⁵ The Ninth Circuit certified to the California Supreme Court the question of whether, under California law, the proponents of Proposition 8 had Article III standing either 1) on behalf of their own particularized interest in upholding Proposition 8 (third party standing), or 2) on behalf of the State’s interest (delegated Article III standing).²⁶ The California Supreme Court held that “the official proponents of the initiative [were] authorized under California law to appear and assert *the State’s* interest in the initiative’s validity.”²⁷ In so holding, the California Supreme Court declined to address whether proponents met the requirements of third party standing under Article III.²⁸

III. LEGAL BACKGROUND

The issues facing the Court in *Perry* are standing, the standard of review, equal protection and substantive due process. Regarding standing, the Court will address whether the proponents of a ballot initiative can represent the State’s interests in defending that initiative under Article III of the United States Constitution. The other issues—standard of review, equal protection, and substantive due process—

22. *Perry v. Schwarzenegger*, 706 F. Supp. 921, 995 (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*, 133 S. Ct. 786 (U.S. Dec. 7, 2012) (No. 12-144) (holding that no compelling state interest justifies denying same-sex couples the fundamental right to marry).

23. *Id.* (holding there was no rational basis for limiting the designation of “marriage” to opposite-sex couples and excluding same-sex couples *as a class*).

24. *Perry*, 671 F.3d at 1068.

25. *Id.*

26. *Id.* at 1074 (asking whether “the official proponents of an initiative measure possess either a *particularized interest* in the initiative’s validity or the authority to assert the *State’s interest* in the initiative’s validity”).

27. *Perry v. Brown*, 265 P.3d 1002, 1007 (Cal. 2011) (emphasis added). This holding only addresses the delegation of standing as a matter of state law; this question as a matter of federal law remains open.

28. *Id.* at 1011.

overlap. Although the Court has never announced a heightened standard of review for statutes that classify individuals based on sexual orientation, recent cases addressing their treatment under the law appear to apply a heightened form of rational basis review under both equal protection and substantive due process analysis.²⁹ The equal protection analysis addresses whether gays and lesbians constitute a class that by definition warrants the greater protection that comes with heightened scrutiny. The substantive due process analysis is an alternative basis for heightened scrutiny in this case, through Proposition 8's restriction of either the fundamental right to marry or the dignity interest in allowing people to choose their own intimate life partner.

A. *The Standing Issue*

As certified by the California Supreme Court, the State's interest in upholding Proposition 8 has been properly delegated to the proponents under state law. However, it is unclear whether this delegation of authority is sufficient under federal law for Article III standing. None of the cases the United States Supreme Court has decided regarding delegation of a State's Article III standing is without ambiguity, nor is there a case precisely on point. The two most closely related are *Karcher v. May*³⁰ and *Arizonans for Official English v. Arizona*.³¹

Karcher addressed the ability of a State to delegate its Article III standing to state representatives. There, two members of the New Jersey state legislature intervened at the district court level to defend a statute that the Governor refused to defend.³² After the district court struck down the statute, but before the case was appealed, both members lost their seats in the legislature.³³ The Supreme Court ultimately affirmed that they had standing in their official capacities to defend the statute on behalf of the State; Justice O'Connor cited no textual basis for this decision.³⁴ The Court, however, denied the now

29. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (holding that moral disapproval of sodomy was not a rational basis for the State to discriminate against homosexuals); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that a state constitutional amendment's imposition of a broad and undifferentiated disability on a single group lacked any rational relation to legitimate state interests).

30. 484 U.S. 72 (1987).

31. 520 U.S. 43 (1997).

32. *Karcher*, 484 U.S. at 75.

33. *Id.* at 77–78.

34. *Id.* at 82. Instead, the Court appears to base its holding on the fact that the New Jersey

ex-legislators’ standing to appeal because the capacity for standing was retained by the positions held, not by the individuals.³⁵

In *Arizonans for Official English*, the Court addressed whether, without an explicit delegation of state interest, proponents of an initiative had standing to defend it under Article III. The Court expressed “grave doubts” that the proponents of a ballot initiative would have Article III standing to defend the State’s interest absent some express state law granting authority.³⁶ Citing *Karcher*, the Court rejected the ballot proponents’ contention that they had a “quasi-legislative interest” grounded in the nature of the initiative process.³⁷ However, because the case was held to be moot on other grounds, the Court did not fully resolve the issue of the proponents’ standing.³⁸

B. Equal Protection and Due Process Claims

The Court has not clarified the level of scrutiny for statutes that discriminate on the basis of sexual orientation.³⁹ One source of ambiguity is the degree to which the cases addressing discrimination based on sexual orientation blur the line between equal protection and substantive due process analysis. Although it appears there is some level of heightened scrutiny applied, it is unclear whether such heightened review is grounded in equal protection or substantive due process analysis. The Court’s application of “animus” analysis in *Romer v. Evans*⁴⁰ complicates the standard of review question even further.

1. Substantive Due Process and Fundamental Rights

Under the Due Process Clause, legislation that burdens the exercise of a “fundamental right” is subject to strict scrutiny.⁴¹ The Court has repeatedly recognized marriage as a fundamental right.⁴²

Supreme Court granted the legislators’ petition to intervene.

35. *Id.* at 81.

36. *Arizonans for Official English*, 520 U.S. at 66.

37. *Id.* at 44–45.

38. *Id.* at 66–67.

39. The Court directly addressed the discriminatory treatment of gays and lesbians in *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Romer v. Evans*, 517 U.S. 620 (1996), but neither opinion declared a standard of review for laws that discriminate on the basis of sexual orientation.

40. 517 U.S. 620 (1996).

41. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

42. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”).

*Loving v. Virginia*⁴³ is the most relevant precedent because it addresses the ability of a state to exclude couples from the institution of marriage.⁴⁴

In *Loving*, a 1967 decision, the Court held that Virginia's anti-miscegenation law violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.⁴⁵ Chief Justice Warren, writing for a unanimous Court, concluded that there could be no justification for the statute other than the maintenance of white supremacy.⁴⁶ Even though marriage had traditionally been considered the exclusive province of the States, the Court held that the Fourteenth Amendment prohibits state sources of "invidious racial discrimination."⁴⁷

2. Equal Protection: Tiers of Review and "Animus Analysis"

Equal Protection analysis employs a highly deferential standard (rational basis review) unless the law discriminates on the basis of a "suspect classification."⁴⁸ If a law discriminates on the basis of a suspect classification (or against a "suspect class") it is subject to heightened scrutiny.⁴⁹ The Court, however, has not recognized gays and lesbians as a "suspect class."

"Animus analysis" comprises a distinct line of equal protection cases, outside the traditional tiered framework. This line of cases can be traced back to *United States Department of Agriculture v. Moreno*,⁵⁰ which famously held that "a bare . . . desire to harm a politically unpopular group" could not constitute a legitimate state interest and could not withstand even rational basis review.⁵¹ In each case, the

43. 388 U.S. 1 (1967).

44. See *id.* at 12 ("Under our Constitution, the freedom to marry[] a person of another race resides with the individual and cannot be infringed by the State.").

45. *Id.*

46. *Id.* at 11.

47. *Id.*

48. *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973) ("Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest.").

49. See, e.g., *Clark v. Jeter*, 486 U.S. 456 (1988) (legitimacy); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Loving*, 388 U.S. 1 (race). In *Mississippi University for Women v. Hogan*, the Court held that unlike race, alienage, and legitimacy, which require strict scrutiny, classifications based on gender (a quasi-suspect class) need only satisfy intermediate scrutiny. See 458 U.S. 718, 724 (1982) ("[A] party seeking to uphold the statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." (citation omitted)).

50. 413 U.S. 528 (1973).

51. *Id.* at 534.

Court struck down a law affecting a politically unpopular (but not “suspect” or even “quasi-suspect”) group, such as hippies⁵² or the mentally disabled,⁵³ under rational basis review (not an explicitly higher standard). The Court in *Romer* employed the “animus analysis” framework with regard to gays and lesbians.

In 1992, in response to the passage of several local statutes prohibiting discrimination on the basis of sexual orientation, Colorado amended its state constitution to prohibit such protections.⁵⁴ Amendment 2 withdrew from homosexuals, but no other group, legal protections prohibiting discrimination.⁵⁵ In *Romer*, the Court declared the Amendment to be “at once too narrow and too broad[,]” insofar as it “identifie[d] persons by a single trait and then denie[d] them protection across the board.”⁵⁶ Because the possible justifications for Amendment 2 failed to overcome the “inference of animus” established by the deprivation of rights from a politically unpopular group, Justice Kennedy, writing for the Court, concluded that the amendment “classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else.”⁵⁷ The opinion explicitly affirmed the reasoning in *Moreno* that “[equal protection of the laws] must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”⁵⁸ Eliding a direct statement of the standard of review, the Court struck down Amendment 2.⁵⁹

Justice Scalia wrote a vigorous dissent in *Romer*, arguing that the majority had “mistaken a Kulturkampf for a fit of spite”⁶⁰ and that it was insulting for the Court to “disparag[e] as bigotry adherence to traditional attitudes.”⁶¹ In addition, he asserted that gays and lesbians do not constitute a politically disadvantaged class, but in fact “possess

52. See *id.* (striking down an amendment to the Food Stamp Act of 1964 that was intended to exclude hippies from the program).

53. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (invalidating legislation that sought to exclude the mentally disabled from the city through zoning regulations as motivated by “irrational prejudice against the mentally retarded”).

54. *Romer v. Evans*, 517 U.S. 620, 623–24 (1996).

55. *Id.* at 627.

56. *Id.* at 647.

57. *Id.* at 635.

58. *Id.* at 634–35 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

59. *Id.* The Court avoided a direct statement of the standard of review largely due to the conclusion that the bare desire to harm is never a legitimate state interest under “animus analysis.”

60. *Id.* at 636 (Scalia, J., dissenting).

61. *Id.* at 652.

political power much greater than their numbers.”⁶²

3. Blurring the Line Between Substantive Due Process and Equal Protection

Less than ten years ago, in *Lawrence v. Texas*,⁶³ the Supreme Court overruled a relatively recent precedent when it struck down a Texas sodomy law as a violation of the liberty interest inherent in the Due Process Clause.⁶⁴ Justice Kennedy, writing for the Court, blurred the line between equal protection and substantive due process analysis: “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”⁶⁵ The Court appeared to employ a form of heightened rational basis review. However, neither the standard nor its grounding was made explicit.

The *Lawrence* opinion ruled out morality as a legitimate ground for discriminating on the basis of sexual orientation.⁶⁶ Justice Kennedy characterized the liberty to choose one’s intimate partner as a dignity interest, stating that the Constitution demands the law respect the individual’s autonomy in making these decisions, and that to do otherwise “demeans the lives of homosexual persons.”⁶⁷ Although the majority in *Lawrence* declined to rely on the Equal Protection Clause, Justice O’Connor embraced it as grounds for striking down the Texas statute in her concurrence, arguing that animus analysis should be applied.⁶⁸

Recent case law thus gives the Court four distinct options for applying heightened scrutiny: 1) The Court could view this case as a straight violation of the fundamental right to marry (*Loving*); 2) the Court could apply a heightened form of rational basis review under equal protection analysis (*Romer*); 3) the Court could muddle

62. *Id.* at 646.

63. 539 U.S. 558 (2003).

64. *Id.* at 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), which only seventeen years earlier upheld a Georgia sodomy law criminalizing consensual homosexual sex).

65. *Id.* at 575.

66. *Id.* at 577 (“[T]he fact that the governing majority in a [s]tate has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” (citation omitted)).

67. *Id.* at 574–75.

68. *Id.* at 580 (O’Connor, J., concurring) (emphasizing that when the law exhibits the desire to harm a politically unpopular group the Court has used “a more searching form of rational basis review” under the Equal Protection Clause).

through both equal protection and substantive due process as they relate to sexual orientation (*Lawrence*); or 4) the Court could ground its reasoning in “animus analysis,” as the Ninth Circuit did below.

IV. HOLDING

The Ninth Circuit affirmed the district court’s holding that Proposition 8 was unconstitutional, but did so on narrower grounds than the lower court. The district court held Proposition 8 unconstitutional under *both* the Due Process Clause and the Equal Protection Clause.⁶⁹ The Ninth Circuit, in contrast, considered “the narrowest ground for adjudicating the constitutional questions”: whether “Proposition 8 singles out same-sex couples for unequal treatment by *taking away* from them alone the right to marry.”⁷⁰

Prior to reaching the merits of the case, the Ninth Circuit affirmed Petitioners’ standing. Citing *Karcher*, the Ninth Circuit stated that “[p]rinciples of federalism require that federal courts respect such decisions by the states as to who may speak for them,”⁷¹ and Petitioners’ standing was therefore necessarily a question of state law. Accordingly, the Ninth Circuit abided by the California Supreme Court’s decision and recognized Petitioners’ standing.⁷²

Moving to the merits, the Ninth Circuit considered the case as a matter under the Equal Protection Clause. The Ninth Circuit’s equal protection analysis was grounded largely in *Romer*. The court rehearsed the similarities between Proposition 8 and Amendment 2: 1) Both created a carve-out exception in the equal protection clause of their respective state constitutions; 2) both singled out one class of people for disfavored status; and 3) neither involved stripping a constitutionally protected right.⁷³ The court also acknowledged the significant difference in the breadth of the two amendments—

69. *Perry v. Brown*, 671 F.3d 1052, 1076 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (U.S. Dec. 7, 2012) (No. 12-144) (noting that the district court held Proposition 8 violated the Equal Protection Clause and the Due Process Clause for depriving same-sex couples of the fundamental right to marry and for excluding only same-sex couples from state-sponsored marriage, respectively).

70. *Id.* The Ninth Circuit’s inquiry was circumscribed by the logic of *Romer*. In *Romer*, there was no doubt that Colorado did not have to extend anti-discrimination protection to gays and lesbians, rather the relevant legal question was whether the subsequent *removal* of that protection could be rationally related to a legitimate state interest. *Id.* at 1088 (citing *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

71. *Id.* at 1071.

72. *Id.* at 1072.

73. *Id.* at 1081–82.

Proposition 8 discriminated with “surgical precision” instead of “sweeping effect.”⁷⁴ The court found that this surgical precision made Proposition 8 even more suspect because it made it less likely that its passage furthered the State’s interest.⁷⁵ Like in *Romer*, because Proposition 8 rescinded a right from a politically unpopular group, Petitioners had the burden of overcoming an inference of animus. The court held that none of the interests purportedly furthered by Proposition 8 were rationally related to the exclusion of same-sex couples from the institution of marriage, and thus Petitioners failed to overcome the inference of animus.⁷⁶

The court concluded that by stripping same-sex couples of the label “marriage,” “Proposition 8 left the incidents [of marriage] but took away the status and the dignity.”⁷⁷ Undergirding this analysis was the contention that “[t]he action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is.”⁷⁸ Framing the issue in terms of the *removal* of a right necessarily limited the holding to California, because California is the only state that has granted and then withdrawn the right to same-sex marriage. The court held that “[b]y using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause.”⁷⁹ The court never reached the broader question of whether denial—as opposed to withdrawal—of the right to “marriage” violates either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment.

V. ARGUMENTS

A. *Petitioners’ Arguments*

Petitioners advance six substantive arguments: 1) Petitioners meet the requirements for Article III standing; 2) the Court should apply rational basis review, not heightened scrutiny; 3) the Ninth Circuit, by focusing on the *withdrawal* of a right, misinterpreted *Romer*; 4) Proposition 8 furthers the State’s interest in responsible procreation; 5) Proposition 8 is rationally related to the need to proceed with

74. *Id.* at 1081.

75. *Id.*

76. *Id.* at 1095.

77. *Id.* at 1079.

78. *Id.* at 1080.

79. *Id.* at 1096.

caution before creating unforeseen social consequences; and 6) upholding Proposition 8 furthers California’s interest in democratic self-governance.

Petitioners begin by affirming their Article III standing to defend Proposition 8.⁸⁰ They argue that, in accordance with both the principles of federalism and of precedent, state law should determine who is able to assert the State’s interest. They distinguish *Arizonans for Official English*, because here California state law clearly grants them standing, as certified by the California Supreme Court.⁸¹

They next argue the standard of review should be rational basis review. Although Petitioners claim Proposition 8 could withstand any level of scrutiny—even strict scrutiny—they assert that heightened scrutiny would be inappropriate. Proposition 8 distinguishes opposite-sex from same-sex couples because biologically they are differently situated with regard to procreation.⁸² Equal protection only requires that the law treat similarly-situated persons alike; it allows the law to treat differently-situated people differently.⁸³ Therefore, they argue, same-sex couples are treated differently with regards to marriage not out of animus but because they are differently-situated with regard to the state interest in childrearing.⁸⁴

Petitioners refute the logic of the Ninth Circuit opinion as a misinterpretation of *Romer*. They argue the Ninth Circuit’s reading of *Romer* as emphasizing the inability to *withdraw* a right is fundamentally misguided because the Court “struck down Amendment 2 *on its face*,” not based on the few jurisdictions that had granted special protections to gays and lesbians prior to its passage.⁸⁵ A State is not required to maintain policies that exceed federal constitutional requirements.⁸⁶ Furthermore, the Ninth Circuit’s focus on the withdrawal of a right allows an important constitutional question to be determined by something as arbitrary as the “timing” of Proposition 8’s passage.⁸⁷ Proposition 8 merely sought to *restore* the traditional definition of marriage, and thus, the Court should not

80. Brief of Petitioners at 15–18, *Hollingsworth v. Perry*, No. 12-144 (U.S. Jan. 22, 2013).

81. *Id.* at 17.

82. *Id.* at 27–31.

83. *Id.* at 63.

84. *Id.* (“Providing special recognition to one class of individuals does not demean others who are not similarly situated with respect to the central purpose of the recognition.”).

85. *Id.* at 22.

86. *Id.* at 19 (citing *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982)).

87. *Id.*

privilege the 142 days in which same-sex couples were allowed to marry over the long history of the traditional definition.⁸⁸

Having challenged the logic of the opinion below, Petitioners focus on three state interests furthered by Proposition 8: responsible procreation, proceeding with caution, and democratic self-governance. Petitioners claim the relationship between marriage and procreation undergirds society's, as well as the Court's, recognition of marriage as a vital institution and a fundamental right.⁸⁹ They decry the transformation of marriage "from a public institution with well-established, venerable purposes focused on children into a private, self-defined relationship focused on adults"⁹⁰ that would ensue if same-sex couples were granted access to "marriage." Petitioners also contend that Proposition 8's relation to this vital interest is not undermined by the fact that under California law, same-sex partners are allowed to enter into civil unions and to parent children because it is the label of "marriage" imbued with social meaning that functions as the incentive.⁹¹ They argue reserving the word "marriage" exclusively for heterosexual couples is sufficient to further this interest: because it "provide[s] special recognition, encouragement, and support to those relationships most likely to further society's vital interests in responsible procreation and childrearing."⁹² Allowing same-sex couples access to the label "marriage" would fundamentally change what "marriage" signifies, and this change in social meaning would undermine its function as an incentive for couples who conceive a child out of wedlock to marry.

The final two state interests advocated by Petitioners are "proceeding with caution,"⁹³ and the California voters' interest in democratic self-governance.⁹⁴ They argue "proceeding with caution before fundamentally redefining a bedrock social institution" is necessary to avoid unforeseen social consequences or social backlash. Changing the institution of marriage to include same-sex couples without broad-based democratic support "could weaken that institution, which has traditionally drawn much of its strength not

88. *Id.* at 25.

89. *See id.* at 31–35 (citing some unlikely sources, from Claude Levi-Strauss to Bertrand Russell to bolster this claim).

90. *Id.* at 53.

91. *Id.* at 44–48.

92. *Id.* at 45.

93. *Id.* at 48–55.

94. *Id.* at 55–61.

from the State, but from social norms derived from and sustained by public opinion.”⁹⁵

Regarding democratic self-governance, Petitioners’ narrative is this: The California voters addressed the issue of gay marriage democratically (resulting in the passage of Proposition 22), then the court intervened and imposed its views in the *In re Marriage Cases*; the people of California responded through the democratic process to this judicial overreach by enacting Proposition 8. The passage of Proposition 8 was democracy functioning as a check on the anti-majoritarian courts.

B. Respondents’ Arguments

Respondents⁹⁶ offer six substantive arguments: 1) Petitioners do not have standing; 2) Proposition 8 should be subject to heightened scrutiny on two independent grounds: a) under the Due Process Clause because it creates unequal access to a fundamental right, and b) under the Equal Protection Clause because Proposition 8 discriminates against gays and lesbians, a “suspect class”; 3) Proposition 8 cannot survive even rational basis review; 4) the law is not rationally related to the State’s interest in “responsible procreation” because heterosexuals who are unwilling or unable to procreate are still allowed to marry; 5) “proceeding with caution” and the “interest in democratic self-governance” cannot function as legitimate state interests under equal protection analysis because they do not have limiting principles; and finally, 6) the anti-gay rhetoric of the Proposition 8 campaign “leads inexorably” to the conclusion it was enacted to make gays and lesbians feel unequal.

Like Petitioners, Respondents begin by addressing the question of standing. They argue that the California Supreme Court’s decision that Petitioners had standing on behalf of the State’s interest “does not—and cannot—alter Petitioners’ inability to meet the ‘irreducible constitutional minimum’ requirement of standing established by Article III.”⁹⁷ Petitioners must have a particularized interest in the outcome of the case sufficient for third party standing and the “mere

95. *Id.* at 49–50.

96. I will use ‘Respondents’ to refer to the two same-sex couples who originally brought suit.

97. Brief for Respondents at 16, *Hollingsworth v. Perry*, No. 12-144 (U.S. Feb. 21, 2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

desire to defend” is not a sufficient interest.⁹⁸

Unlike Petitioners, and unlike the holding in the Ninth Circuit, Respondents cast the constitutional issue in very broad terms. Respondents argue that Proposition 8 should be subject to heightened scrutiny on two independent grounds: 1) because it creates unequal access to a fundamental right, and 2) because gays and lesbians constitute a minority historically subject to discrimination and therefore should be treated as a “suspect class.”⁹⁹ Beginning with marriage as a fundamental right, Respondents assert that they are not attempting to change the right (or to create a new fundamental right to same-sex marriage) but merely want equal access to a right the Court has repeatedly recognized as fundamental.¹⁰⁰ Neither the institution itself, nor the Court’s articulation of its value, has ever been limited to persons willing or able to procreate; rather, “the decision of whom to marry is at the core of individual autonomy and personal liberty.”¹⁰¹

Respondents next argue that the Equal Protection Clause is implicated because Proposition 8 denies gays and lesbians, *as a class*, a right enjoyed by everyone else. Respondents further contend that a heightened standard of review is appropriate because gays and lesbians constitute a suspect class under the factors established by the Court: a history of discrimination, immutability of the defining characteristic, relative political powerlessness, and lack of a relationship between the characteristic and one’s ability to contribute to society.¹⁰²

Even if the Court applies rational basis review, Proposition 8 cannot stand because excluding gays and lesbians from “marriage” is not rationally related to a legitimate state interest. Respondents argue that the establishment of marriage as a legal institution may have furthered the Petitioners’ proffered state interest in responsible

98. *Id.* at 13.

99. Respondents highlight a number of government forms of discrimination, including “Don’t Ask, Don’t Tell,” the recently repealed government policy prohibiting gays and lesbians from serving openly in the military. They also highlight a number of private forms of discrimination, including the fact that twenty-nine States still allow employment dismissal or denial of housing based on sexual orientation. They assert that like the other suspect classifications recognized under equal protection jurisprudence, sexual orientation is an immutable characteristic that bears no relationship to one’s ability to contribute to society. *Id.* at 28–36.

100. *Id.* at 14.

101. *Id.* at 14–15.

102. *Id.* at 28–29.

procreation and childrearing, but that this interest is not advanced by the *exclusion* of gays and lesbians from that institution. Respondents also point out that Petitioners do not even argue that prohibiting same-sex couples the right to marry will make it more likely that opposite-sex couples will marry.¹⁰³ Furthermore, procreation cannot be the primary rationale for marriage because heterosexual couples unwilling or unable to procreate are still allowed to marry.¹⁰⁴

Next, Respondents argue that the characterization of “proceeding with caution” as a state interest contains a vicious circularity: “[I]f [Petitioners] are correct that an unsubstantiated fear of negative externalities of *equality* is sufficient to justify *inequality*, then discrimination is self-justifying.”¹⁰⁵ Further, this argument, like the interest in democratic self-governance argument, has no limiting principle. Taken to their logical conclusions, both of these purported interests *by definition* could be used to eclipse the protections afforded by the Fourteenth Amendment; yet, “the judiciary’s role under the Equal Protection Clause is to protect discrete and insular minorities from majoritarian prejudice or indifference, not to yield to the majority’s preference.”¹⁰⁶

Finally, the absence of any rational basis combined with the anti-gay rhetoric used in the campaign “leads inexorably to the conclusion” that Proposition 8 was enacted with the sole purpose of making homosexuals “unequal to everyone else.”¹⁰⁷ To bolster this claim, Respondents cite literature from the Proposition 8 campaign that cautions against the “danger” that if same-sex marriage is permitted, society might come to view homosexual relationships as “just as good” as heterosexual relationships.¹⁰⁸

103. *Id.* at 40.

104. *Id.* at 41.

105. *Id.* at 47.

106. *Id.* at 50 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)) (internal quotation marks omitted).

107. *Id.* at 16.

108. *Id.* at 52.

VI. ANALYSIS

A. *Standing in the Way*

The standing question is not an easy one because the Court's precedents on delegation of a State's Article III standing appear to point in opposite directions.¹⁰⁹ *Arizonans for Official English* appears to indicate that without an express grant of authority, safeguarding the ballot initiative system is not sufficient grounding for standing. However, the Court's holding in *Karcher* suggests a textual basis is not always required for delegation of State's Article III standing.¹¹⁰

As much as supporters of gay marriage would like to see the Court reach the merits, the standing issues are not insignificant.¹¹¹ In *Perry*, if the Justices were looking for a reason to find a standing problem, they would not have to look far. The California Supreme Court's holding that California law allows for proponents of initiatives to represent the State's interest was not grounded in the text of a statute or any provision of the California State Constitution.¹¹² The holding was based instead on a history of initiative proponents' participation in state court litigation on behalf of the State's interests and a functionalist argument about "safeguard[ing] the unique elements and integrity of the initiative process."¹¹³ Dicta in *Arizonans for Official English* casts at least some doubt on whether the Court will accept the functionalist rationale underlying the California Supreme Court's conclusion because the Court expressed "grave doubts" about proponents standing absent an express delegation of the State's interest.¹¹⁴ Petitioners are private

109. For a full discussion of the standing precedents in *Perry*, see generally Marty Lederman, *Understanding Standing: The Court's Article III Questions in the Same-Sex Marriage Cases (VI)*, SCOTUSBLOG (Jan. 21, 2013) [hereinafter *Understanding Standing VI*], <http://www.scotusblog.com/2013/01/understanding-standing-the-courts-article-iii-questions-in-the-same-sex-marriage-cases-vi/>.

110. See *Karcher v. May*, 484 U.S. 72, 82 (1987) (concluding the two legislators had standing under New Jersey state law to intervene, despite citing no textual basis for this conclusion).

111. See generally Marty Lederman, *Understanding Standing: The Court's Article III Questions in the Same-Sex Marriage Cases (I)*, SCOTUSBLOG (Jan. 17, 2013) [hereinafter *Understanding Standing I*], <http://www.scotusblog.com/2013/01/understanding-standing-the-courts-article-iii-questions-in-the-same-sex-marriage-cases-i/> (noting that the Court has been "unusually attuned to some fundamental and vexing issues of Article III standing").

112. *Perry v. Brown*, 671 F.3d 1052, 1073 (9th Cir. 2012), cert. granted sub nom. *Hollingsworth v. Perry*, 133 S. Ct. 786 (U.S. Dec. 7, 2012) (No. 12-144) (citing *Perry v. Brown*, 52 Cal. 4th 1116, 1151-52 (Cal. 2011)).

113. *Id.*

114. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997) (refusing to resolve whether a plaintiff that cannot show express delegation would have standing).

individuals, not elected, and thus are not subject to the democratic checks or ethical standards of public officials; there is no indication why or in what manner Petitioners could be said to be *agents* of The People of California.¹¹⁵ Furthermore, Petitioners’ original petition for intervention did not seek to intervene on behalf of the State’s interest, but instead on behalf of their *personal* and particularized interests.¹¹⁶ Although neither of these standing issues is insurmountable, what seems like a mere hurdle in getting to the merits may appear more consequential down the road.¹¹⁷

If the Court were to hold that the Petitioners lack standing, the Ninth Circuit’s decision would also be vacated. The district court’s holding, however, would be preserved and give rise to a subsequent controversy over whether the district court judge, in issuing an injunction that extended beyond the two couples, exceeded his remedial power.¹¹⁸ It is unclear, however, who could appeal the scope of the injunction.¹¹⁹

If a majority of the Justices want to hear the case, however, the Court will likely find standing despite these issues. In recent years, the Court has tried to ensure that important cases are heard.¹²⁰ Furthermore, the initiative process argument, even if functionalist in nature, is highly logical. The initiative process creates laws that the legislature is not allowed to repeal or amend; denying proponents the right to defend the laws passed through this process would allow the executive and legislative branches to achieve what they could not do directly (repeal the statute) through the courts (by refusing to defend its validity). In addition, there was not an explicit textual basis in

115. Brief of Att’y Gen. of Cal. Kamala D. Harris as Amicus Curiae at 10–12, *Perry v. Brown*, No.10-16696 (May 2, 2011). See also *Arizonans for Official English*, 520 U.S. at 65 (expressing in dicta concerns that the proponents of an initiative are neither elected representatives nor agents of the people).

116. *Understanding Standing VI*, *supra* note 109.

117. See *id.* (discussing the potential problems if initiative proponents are allowed to represent the State’s interest, including: proponents’ lack of accountability or concern for how the litigation might impact the state financially or might impact other laws, the possibility of division among the proponents about whether to appeal, and lack of political accountability).

118. Marty Lederman, *The Court’s Five Options in the California Marriage Case*, SCOTUSBLOG (Mar. 1, 2013), <http://www.scotusblog.com/2013/03/the-courts-five-options-in-the-california-marriage-case/>.

119. *Id.*

120. See *Understanding Standing I*, *supra* note 111 (discussing the Court’s recent standing decision in *Camreta v. Greene*, 131 S. Ct. 2020 (2011) as “[possibly reflecting] a willingness on the part of at least some Justices to temper their usually strict Article III jurisprudence to ensure that the Court itself has an opportunity to weigh in on certain important constitutional questions”).

Karcher for allowing the intervention by state legislators on the State's behalf, and yet the Court found that New Jersey law gave them standing. And finally, at least as formulated below, the form of Article III standing at issue is in reference to representation of the *State's* interest and therefore deference to the state supreme court is warranted. Thus, despite these inconsistencies, due to the salience of the case combined with the logic of Petitioners' argument regarding the preservation of California's popular referendum, the Court will likely find standing.

B. Standard of Review

If recent jurisprudence is any indication, considering that Justice Kennedy is likely to write the opinion, it seems unlikely that the Court will *announce* a higher standard of review, even if it employs a heightened form of rational basis review.¹²¹ In both *Romer* and *Lawrence*, although apparently employing a form of heightened rational basis review, Justice Kennedy declined to articulate a new standard.¹²²

Part of the reason the Court has never explicitly announced a heightened standard may be that gays and lesbians do not fit neatly within the equal protection "suspect class" criteria.¹²³ For instance, although there is clearly a history of discrimination, questions remain whether they are a politically powerless class.¹²⁴ It was precisely this

121. See Jeffrey Toobin, *The Court's Gay-Marriage Confusion*, THE NEW YORKER (Mar. 27, 2013), <http://www.newyorker.com/online/blogs/comment/2013/03/supreme-court-prop-8-toobin-kennedy.html> (commenting that "as usual, it's probably all up to Justice Anthony Kennedy," the well-known swing vote on the Court). Toobin's assumption, echoed by many, that the outcome and the opinion will be in the hands of Justice Kennedy, is based on the idea that the four liberal Justices (Ginsburg, Breyer, Sotomayor, and Kagan) will all find Proposition 8 unconstitutional, whereas the four conservative Justices (Scalia, Roberts, Alito, Thomas) will find it to be within California's police power.

122. See *Lawrence v. Texas*, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting) (describing the majority opinion as "apply[ing] an unheard-of form of rational-basis review"); *Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (stating that Amendment 2 defies traditional judicial review).

123. This debate has evolved. Originally, it was based in a distinction between action and identity (and framed as a debate about whether sexual orientation could be considered under equal protection or whether discrimination on the basis of sexual orientation was only cognizable under the Due Process Clause). However, the Court in recent years has declined to recognize this distinction between conduct and identity as applied to gays and lesbians. See *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (stating explicitly that the Court does not recognize this distinction); *Romer*, 517 U.S. at 633 (moving away from conduct-based distinctions, and recognizing gays and lesbians as a cognizable class of citizens).

124. "Footnote Four" famously grounded the need for a heightened standard of review in the inability of certain insular minorities to take advantage of traditional political channels. It reads: "[P]rejudice against discrete and insular minorities may be a special condition, which

issue of political powerlessness that Justice Scalia took up in his *Romer* dissent, calling it “nothing short of preposterous” to label gays and lesbians a politically unpopular class because they enjoy “enormous influence in American media and politics.”¹²⁵ The recent and rapidly evolving support for same-sex marriage, as well as the Obama administration’s historic intervention on Respondents’ behalf, lends at least some credence to Scalia’s argument.¹²⁶ Perhaps anticipating this interpretation of the Administration’s intervention, the Solicitor General’s brief directly addresses this argument against granting heightened scrutiny,¹²⁷ arguing that despite recent political progress, gays and lesbians still constitute a disfavored minority subject to unjustified targeting in the democratic process.¹²⁸

The Court is even more unlikely to apply heightened scrutiny based on Proposition 8’s implication of the fundamental right to marriage because such a holding would possibly indicate a fifty-state solution; it would overturn laws in more than forty states, which, as discussed below, would violate the principle of judicial minimalism and trigger concerns about the legitimacy of the Court.¹²⁹ That said, the Court’s refusal to articulate a new standard of review does not mean the Court will exercise the highest degree of deference in its analysis or fail to weigh the importance of marriage as a fundamental right.

tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). See generally Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 *YALE L.J.* 1287 (1982).

125. *Romer*, 517 U.S. at 652 (Scalia, J., dissenting). In this discussion, Scalia cites as evidence of homosexuals’ political power that despite composing only 4% of the Colorado electorate, they managed to “get” 47% percent of the electorate to vote against Amendment 2.

126. For a comprehensive discussion of the poll numbers and this perceived political shift, see generally Nate Silver, *How Opinion on Same-Sex Marriage is Changing, and What It Means*, *NEW YORK TIMES* (Mar. 26, 2013) <http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/>.

127. Brief for the United States as Amicus Curiae Supporting Respondents at 6, *Hollingsworth v. Perry*, No. 12-144 (Feb. 28, 2013).

128. *Id.* at 9.

129. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (highlighting two “cardinal rules” of the federal courts: “never to anticipate a question of constitutional law in advance of the necessity of deciding it,” and “never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied” (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885))).

C. *Narrow Holding*

If the Court reaches the merits, it seems unlikely the Court will overturn the Ninth Circuit's narrow holding.¹³⁰ It appears equally unlikely, however, that the Court will offer a complete endorsement or a national imposition of same-sex marriage. Instead, the Court will reach a decision that implicates only California or one that affects California and the other seven states that have granted civil unions with full substantive rights to gays and lesbians. Either holding would circumscribe the harm as denial of the access to the label "marriage."

Even under rational basis review, the Court is unlikely to be swayed by interests offered by Petitioners. Petitioners' central argument that the primary purpose of marriage is to promote responsible procreation and childrearing is contrary to the Court's articulation of marriage as a fundamental right. At the same time, the Court will be more sympathetic to the other two interests, "proceeding with caution" and "respect for the democratic process." However, these principles should not stand as legitimate state interests under rational basis review because equal protection comes into play precisely when legislation has been democratically passed yet discriminates against an insular minority. Therefore, overturning discriminatory legislation is always both anti-majoritarian and disruptive of the status quo.

The image of marriage that Petitioners argue is in the State's interest to preserve runs contrary to the Court's depiction of marriage as a fundamental right and as a sacred bond between adults. Petitioners decry the transformation of marriage "from a public institution with well-established, venerable purposes focused on children into a private, self-defined relationship focused on adults" that would result from recognizing same-sex marriage.¹³¹ This approach is misguided because "a private, self-defined relationship focused on adults" is wholly commensurate with the Court's recent opinions on marriage. *Loving* characterized the institution of marriage as "a deeply public *and* private symbol that carries profound consequences touching on individual self-understanding and social mores."¹³² In other cases, the Court has described marriage as a

130. Ironically, even Justice Scalia, in his vehement dissent in *Lawrence*, acknowledged that the majority's logic would jeopardize laws banning same-sex marriage. *Lawrence v. Texas*, 539 U.S. 588, 600 (2003).

131. Brief of Petitioners, *supra* note 80, at 53.

132. Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex*

privacy right,¹³³ a right of association,¹³⁴ and a liberty right “of fundamental importance to all *individuals*.”¹³⁵ These articulations cast marriage as part of defining one’s own identity rather than simply serving the purpose of childrearing. In particular, Justice Kennedy, again the one likely to be writing for the Court,¹³⁶ has articulated the choice of one’s partner as part of the way individuals constitute their identity.¹³⁷ The Court therefore is unlikely to endorse a view of marriage as *necessarily*, or even primarily, related to childrearing. Furthermore, Petitioners’ assert the primacy of the childrearing aspect of marriage without addressing the obvious critique that heterosexual couples who are incapable of procreating (and therefore not furthering this interest) are allowed to marry.

Unswayed by the procreation argument, the Court will likely be more sympathetic to Petitioners’ “proceeding with caution” and “democratic process” arguments. Although not cognizable as rationally-related state interests,¹³⁸ Petitioners’ final two arguments will influence the Court’s decision and will limit the expansiveness of its holding. In light of federalist and institutional concerns, the Court will not hold denial of same-sex marriage to violate equal protection more generally. The likely outcome is either an affirmation of the Ninth Circuit’s logic grounded in *Romer*¹³⁹ or the eight-state solution. Either holding could appeal to those concerned about the Court’s legitimacy and matters of institutional competency, and serve as an intermediate stepping stone toward inevitable marriage equality. The Ninth’s Circuit’s holding would be limited to California. The eight-

Marriage, 71 MD. L. REV. 471, 488.

133. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (describing marital privacy as “a right of privacy older than the Bill of Rights, older than our political parties, older than our school system . . . and intimate to the degree of being sacred”).

134. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (“Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.” (internal quotation marks omitted)).

135. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (emphasis added).

136. See *supra* note 121 and accompanying text.

137. In *Lawrence*, Kennedy wrote that “our laws and tradition afford constitutional protection to personal decisions relating to marriage . . . [and] family relationships” because of “the respect the Constitution demands for the autonomy of the person in making these choices.” Brief for Respondents, *supra* note 97, at 22 (quoting *Lawrence v. Texas*, 539 U.S. 558, 574 (2003)).

138. Although these arguments draw on judicial concerns the Court weighs when considering constitutional rights claims, they cannot be considered under the rational basis test because neither has a limiting principle.

139. See *supra* notes 74–79 and accompanying text.

state solution would hold that those states that already grant all the substantive rights of marriage to gays and lesbians through civil unions cannot constitutionally withhold the label “marriage” from those unions.¹⁴⁰ At oral argument, the Justices seemed wary of the Solicitor General’s advocacy of the eight-state solution and skeptical that its reasoning had such cognizable limits.¹⁴¹

D. Expressive Harm

Perry is, at its core, a case about the power of government speech to convey normative judgments. Expressive harm refers to the negative social meaning or inferior status a law attaches to a particular group. On expressive harm grounds, the Court would be justified in holding that Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment. The Court has never held that expressive harm alone can violate equal protection; therefore holding as such could be characterized as a radical break with past jurisprudence. At the same time, such a holding would be completely commensurate with the Court’s “animus analysis” and would not actually represent a departure from past jurisprudence.

1. *Perry* is a Case About Social Meaning and Expressive Harm

Approaches to law that focus on the meaning conveyed or produced by the State’s actions are termed “expressive theories of law.”¹⁴² Expressive theories of law begin with the baseline assertion that a State’s actions convey meaning and express a point of view. The meaning a given law expresses is not solely determined by the intentions of those who enacted it, but also by how it fits within the landscape of norms and practices more generally (and is therefore

140. See Brief for the United States, *supra* note 127, at 33 (“California’s extension of all of the substantive rights and responsibilities of marriage to gay and lesbian domestic partners particularly undermines the justifications for Proposition 8.”).

141. See Transcript of Oral Argument at 42, *Hollingsworth v. Perry*, No. 12-144 (U.S. argued Mar. 26, 2013) (Kennedy, J.) (questioning the rationale of essentially “penalizing” California and those state that “ha[d] been more generous, more open to protecting same-sex couples”). Justice Alito also expressed incredulity that the eight-state solution was based on legally cognizable distinction: “[A]re you seriously arguing that . . . if the case before us now were from a State that doesn’t provide any of those benefits to same-sex couples, this case would come out differently?” *Id.* at 43. Even the liberal justices expressed reservations about the eight-state solution. For instance, Justice Sotomayor highlighted its logical inconsistency, remarking, “there is an irony in [the eight-state solution], which is the States that do more have less rights.” *Id.* at 54–55.

142. Adler, *supra* note 9, at 1364.

defined by its “social meaning”).¹⁴³ Accordingly, the State has an obligation to ensure that its actions *express* equal respect and concern for all of its citizens.¹⁴⁴ State actions that fail to do so, even without material consequences or malicious intent, are legally cognizable as state-imposed harms, known as “expressive harms.”¹⁴⁵ In essence, expressive harms are state actions that confer second-class status onto a particular group.¹⁴⁶

At oral argument, Chief Justice Roberts framed the issue as the struggle over the meaning of a word:

[I]f you tell a child that somebody has to be their friend, I suppose you can force the child to say, this is my friend, but it changes the definition of what it means to be a friend. And that’s it seems [sic] to me what the . . . supporters of Proposition 8 are saying here. . . . [A]ll you’re interested in is the label and you insist on changing the definition of the label.¹⁴⁷

In fact, both Petitioners and Respondents in *Perry* agree that this case is about the government’s role in producing the social meaning of this “label,” and both argue their case in expressive terms. The difference is that Respondents do not believe that granting same-sex couples access to the label “marriage” would diminish its value or status, just as the meaning of “marriage” did not change when interracial couples were granted the right to marry.¹⁴⁸ In contrast, Petitioners, like the Chief Justice, think that the struggle is over preserving the current meaning of the word, which would necessarily change if same-sex “marriage” were recognized.¹⁴⁹ Nonetheless, the

143. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1525 (“These meanings are a result of the ways in which actions fit with . . . other meaningful norms and practices in the community. Although these meanings do not actually have to be recognized by the community, they have to be *recognizable* by it, if people were to exercise enough interpretive self-scrutiny.”).

144. Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2 (2000).

145. *Id.*

146. See generally Jeffrey S. Helmreich, *Putting Down: Expressive Subordination and Equal Protection*, 59 UCLA L. REV. DISC. 112 (2012). An expressive approach to equal protection is not equivalent to, and should not be conflated with, the “colorblind” approach. Both the colorblind and the anti-caste approaches to equal protection incorporate expressive elements. The difference between the two approaches hinges on which categorizations convey second-class citizenship. See Hellman, *supra* note 144, at 16–17.

147. Transcript of Oral Argument, *supra* note 141, at 44–45.

148. Brief for Respondents, *supra* note 97, at 26.

149. Petitioners explicitly recognize *the State’s* role in the production of social meaning, arguing that “it matters what California or the United States *calls* marriage, because this affects how Californians or Americans come to *think* of marriage.” Brief of Petitioners, *supra* note 80,

battleground on which this case is being waged from *all* sides is undeniably an expressive one.¹⁵⁰

Respondents argue that withholding the label of “marriage” constitutes a state-imposed harm.¹⁵¹ Civil unions function as “badge[s] of inferiority, separateness, and inequality,”¹⁵² even though they have the same substantive rights as marriage, they argue, because denial of the label “marriage” is a declaration “[w]ith the full authority of the State behind it” that gays and lesbians are not good enough to marry.¹⁵³

The strongest argument in favor of a cognizable harm in *Perry* is one that proceeds by analogy and has been made by many commentators on the issue.¹⁵⁴ The analogy goes as follows: Imagine in the wake of *Loving*, Virginia immediately passed a law granting interracial couples all of the substantive rights and obligations of marriage but terming their civil arrangement something else, such as “interracial union.” If it were true that denying same-sex couples access to the label “marriage” does not convey second-class citizenship and constitute a state-imposed harm, it would have to also be true that the denial of the label to interracial couples would not constitute a state-imposed harm.¹⁵⁵ When placed in this context, it is hard to contend that denial of the label “marriage” conveys anything other than second-class citizenship.

at 50–51 (quoting ROBERT P. GEORGE ET AL., WHAT IS MARRIAGE?: MAN AND WOMAN: A DEFENSE 54 (2012) (internal quotation marks omitted)).

150. In addition to the parties’ arguments and the Justices’ questions, the Solicitor General’s brief also foregrounds the expressive stakes of the issue in *Perry* by advocating the “eight-state solution,” which focuses on the isolation of the term from the substantive rights of marriage (that is what distinguishes the eight states from the others).

151. Brief of Petitioners, *supra* note 80, at 53–54 (“[W]ithholding it causes infinite and permanent stigma, pain, and isolation. It denies gay men and lesbians their identity and their dignity; it labels their families as second-rate.”).

152. *Id.* at 54.

153. *Id.* at 28.

154. See, e.g., Dorf, *supra* note 9, at 1272; William N. Eskridge, Jr., *The Ninth Circuit’s Perry Decision and the Constitutional Politics of Marriage Equality*, 64 STAN. L. REV. ONLINE 93, 96 (Feb. 22, 2012); Tribe & Matz, *supra* note 132, at 486. David Boies also made this analogy at oral argument. See Transcript of Oral Argument, *supra* note 141, at 45.

155. Dorf, *supra* note 9, at 1272.

2. Is Expressive Harm Alone Enough to Constitute an Equal Protection Violation?

The first question is whether expressive harm is sufficient to violate the Equal Protection Clause. *Palmer v. Thompson*¹⁵⁶ appears to indicate that purely expressive harm is not enough. In *Palmer*, the closing of a community pool in the face of an order to desegregate, despite its clear discriminatory intent and message, was “an *unsuccessful attempt* to violate the Constitution.”¹⁵⁷ This holding seems relatively damning to Respondent’s case because it indicates that isolated expressive harm is not legally cognizable as state-imposed harm.

However, as Michael Dorf rightly points out, the analogy between *Palmer* and the same-sex marriage context is not a neat one, and it in fact may be misleading.¹⁵⁸ The proper analogy between *Perry* and *Palmer* would be if the state of California, in the wake of the *In re Marriage Cases*, had ended “marriage” as an institution, making it unavailable to both heterosexual and same-sex couples.¹⁵⁹ *Palmer* holds that even open animosity is not enough if the law affects all members with at least formal equality,¹⁶⁰ but its holding does not preclude expressive harm from being sufficient when, like in *Perry*, it is coupled with facially discriminatory treatment of a vulnerable group.

3. How to Measure Expressive Harm: Intention or Impact?

Even if one concedes expressive harm could be sufficient to trigger Fourteenth Amendment protections, the question of how to measure expressive harm remains. The two mechanisms by which expressive harm could be measured, both with long histories in equal protection analysis, are “intention”¹⁶¹ and “impact.”¹⁶² In general, equal

156. 403 U.S. 217 (1971).

157. Dorf, *supra* note 9, at 1273 (quoting Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crimes and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 23).

158. *Id.* at 1274.

159. *Id.*

160. *Palmer*, 403 U.S. at 224–25 (holding that closing the swimming pool to avoid desegregation did not formally treat blacks differently from whites, and that “no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it”).

161. The intent-based approach to equal protection asserts that discriminatory intent should be the primary measure for invalidating laws under the Equal Protection Clause. Hellman, *supra* note 145, at 1–2.

162. The impact-based approach to equal protection asserts that discriminatory *effects*,

protection analysis tends to privilege discriminatory intent over disparate impact.¹⁶³

The Court's formulation of "animus," however, seems to constitute a third approach,¹⁶⁴ which borrows elements from both "intent" and "impact" and yet is more commensurate with expressive harm or social meaning analysis. Animus analysis adopts intention analysis's focus on the content of the message as opposed to its material consequences. However, animus analysis adopts impact analysis's objective approach rather than a subjective approach. For example, in *Romer*, the Court in finding animus did not conclude that the Colorado voters had hatred in their hearts; instead, it found that from an objective perspective, the amendment lacked any relation to a state interest and could only be understood to establish gays and lesbians as unequal to everyone else.¹⁶⁵ Animus analysis appears to embody a move to a more objective approach to meaning, and thus one closer to social meaning. The analysis therefore becomes not about whether the voters harbored ill will or hostility, but whether the message conveyed could be understood as conveying second-class citizenship. This leads inevitably to the question of whether depriving the label of "marriage" is connotative of second-class citizenship. The analogy to *Loving* certainly seems to provide the basis for such a conclusion.

By either affirming the Ninth Circuit's logic or electing the eight-state solution, the Court would in essence hold that a merely expressive harm violates the guarantee of equal protection. Although this would be in some ways a narrow holding (applying to only one or eight states, respectively), it would not be a conservative one. Many have argued that recognition of expressive harm is implicit in jurisprudence of the formalist and functionalist members of the Court alike,¹⁶⁶ but expressive harm has never been isolated in an equal protection case the way it is in *Perry*. A holding based on expressive

oftentimes referred to as "disparate impact," should be the primary measure for invalidating laws under the Equal Protection Clause. *Id.*

163. *See id.* (discussing the dominance of the intent-based approach to equal protection analysis and its historical ascendancy in the wake of *Washington v. Davis*, 426 U.S. 299 (1976), the case in which the Court first articulated that disparate impact was not sufficient to establish a prima facie violation of the Equal Protection Clause).

164. *See supra* notes 50–59 and accompanying text.

165. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

166. Dorf, *supra* note 9, at 1286 (arguing that there is "a cross-ideological consensus that social meaning alone can be the basis for limiting government speech and action when the social meaning expressed is second-class citizenship").

harm would be both completely in line with the Court’s articulation of animus analysis and a somewhat radical step forward in the Court’s recognition of the importance of social meaning.¹⁶⁷

Although the Court will adjudicate *Perry* in terms of the right to the word “marriage,” its pairing with *Windsor*¹⁶⁸ may in fact make the expressive harm reasoning more palatable to the Court insofar as it illustrates the degree to which the expressive and material are never wholly separate in the law. *Windsor* could impact the stakes of *Perry* ex post by changing the significance of state recognition. If the Court strikes down DOMA, holding that the government has to allocate federal marriage benefits to all couples legally married under their state’s laws, then how California defines “marriage” will determine whether same-sex couples in California have access to federal marriage benefits. Depending on how *Windsor* comes out, access to the word “marriage” could be the deciding line between receiving and not receiving federal marriage benefits—reminding the Court that government speech always has consequences.

VII. CONCLUSION

In the current political climate, it is hard to believe that the Court held the criminalization of homosexual conduct unconstitutional less than ten years ago. And the pace of progress on this issue is only accelerating. Within one year of President Obama’s first public acknowledgement of narrowly circumscribed support, he offered a full-throated endorsement of marriage equality in his Inauguration Speech.¹⁶⁹ Republicans who campaigned against same-sex marriage in the last election less than a year ago joined the administration among the amici curiae in support of Respondents. Despite this rapid evolution—or perhaps because of it—the Court is likely to either

167. It would admittedly be ironic that disparate impact could only be cognizable under strict scrutiny but expressive harm could violate even (heightened) rational basis. However, it is very hard to imagine that expressive harm when paired with material harm would be any easier to justify under equal protection analysis.

168. *United States v. Windsor*, No. 12-307 (U.S. argued Mar. 27, 2013) (addressing whether the Defense of Marriage Act’s denial of federal marriage benefits to same-sex couples legally married under the laws of their state violates the Fifth Amendment’s guarantee of equal protection).

169. “Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law, for if we are truly created equal, then surely the love we commit to one another must be equal, as well.” President Barack Obama, Inaugural Address (Jan. 21, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.

avoid the issue or offer a narrow holding in *Perry*. At this rate of political progress, however, playing it too safe could leave the Justices on the wrong side of history more quickly than they expect.