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**A Marriage is a Marriage is a Marriage: The Limits of *Perry v. Brown***

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## REACTION

### A MARRIAGE IS A MARRIAGE IS A MARRIAGE: THE LIMITS OF *PERRY V. BROWN*

*Robin West*

“That which we call a rose,  
By any other name would smell as sweet.”  
William Shakespeare

“A rose is a rose is a rose is a rose.”  
Gertrude Stein

“A South politician preaches to the poor white man  
‘You got more than the blacks, don’t complain.  
You’re better than them, you been born with white skin,’  
they explain.”  
Bob Dylan

The Ninth Circuit’s decision in *Perry v. Brown*, authored by Judge Reinhardt, has been widely lauded in the last few weeks by marriage equality proponents for its creative minimalism. In keeping with commentators’ expectations, the court found a way to determine that California’s Proposition 8 violated the U.S. Constitution’s Equal Protection Clause, namely that the provision took away an entitlement that had previously been enjoyed by same-sex couples — the right to the appellation of one’s partnership as a “marriage” — for no rational reason. The People of California’s categorization and differential treatment of same-sex couples as compared with opposite-sex couples, the court held, failed the test of minimal rationality required for upholding state action. The two types of couples were simply too indistinguishable to carry the weight of the difference between them that the People of California had tried to codify. Thus, the court struck down the state constitutional amendment.

The court did so, however, by relying heavily on facts peculiar to California’s political history, thereby limiting the case’s disruption of democratic processes in both California and elsewhere, and, not incidentally, minimizing the size of the target the case presents should the presumptively hostile Supreme Court review the decision. First, Proposition 8 removed an entitlement that had been granted by the California Supreme Court just a few years earlier. The case thus arose in a posture not shared by other cases involving same-sex marriage: what was at stake was the constitutionality of a referendum that took away — rather than failed to grant — same-sex marriage. Second, California, by statute, guarantees to same-sex couples a “domestic partnership” which statutorily grants all of the legal incidents of marriage, including rights of parentage and adoption. Because of the first

fact — that what the Court was faced with was the withdrawal of a preexisting right — the Court did not have to reach the question of whether same-sex couples possess a “right to marry” where it has never before been recognized. Because of the second fact — that all that was at stake in California was the appellation “marriage” since the domestic partnership laws guaranteed to same-sex couples all other incidents of marital status — there was no need for the Court to decide whether there would be a “rational basis” for a state to refuse to grant the right to marry to same-sex couples on the basis of the purported superiority of child-raising in families headed by opposite-sex partners: the case simply does not raise these questions, since California’s statutory scheme grants equal family status to both sorts of couples, and Proposition 8 did not upset that. The court did not, therefore, have to decide that there exists a “fundamental right to marry,” or that any restriction on the rights of gay people to marry would violate fundamental constitutional values. Rather, it narrowly held that Proposition 8, which stripped gay citizens only of the appellation “married” and left all other incidents of marriage intact, worked a dignitary and psychic harm on gay and lesbian partners, and did so for no defensible reason. This decision is thus of no relevance to cases challenging a state’s refusal to extend marriage to include gays and lesbians, and it is of no relevance to cases challenging a state’s withdrawal of such a right if that right is also accompanied by a denial of concrete benefits and accompanied by some explanation — such as the superiority of heterosexual parenting — for the decision to do so. *Perry v. Brown* is nothing more than a *sui generis* decision for a unique set of facts. Thus, creative minimalism.

There is, however, a less flattering sense in which the case is minimalist: the opinion perfectly exemplifies the “truncated” nature of judicial — and hence legal — liberal thought, as first described by critical legal scholars thirty years ago. Truncated reasoning, Roberto Unger and others then explained, is a form of pseudo-critical thought that proceeds from premises to a conclusion by focusing myopically on a handful of legally relevant facts, declaring  $x$  like  $y$ , finding the matter settled, and leaving out of consideration altogether whatever social, cultural, historical, linguistic, legal, and even constitutional dimensions of  $x$  rendered it of interest in the first place.

*Perry v. Brown* is a perfect example. The case turns on the injury sustained by virtue of the loss of the right to call oneself “married” rather than “domestically partnered” and to be perceived as such. Whether this is or is not an injury, then, depends crucially on the meaning of “marriage.” The court in effect holds that a rose is a rose — a rose is not a stem, petals and a bunch of thorns, but rather, a rose is a “rose,” and likewise, a “marriage” is not a “domestic partnership” with benefits attached, but rather, a “marriage” is a marriage is a marriage. A domestic partnership just does not smell as

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sweet. *Marriage* is an institution within which partners publicly commit their hearts and futures to each other, come good or ill fortune. Domestic partnership, whatever it is, is not that. Thus, one who loses the entitlement to the appellation suffers an injury. What this sentimental definition leaves out, or truncates, I suggest, are political, social, moral, and even constitutional meanings of marriage, all of which might have hugely complicated the triumphal arc of the decision. The question I will ask at the end is whether the flame of “marriage equality” wrought by the decision is worth the candle of the critical understanding of marriage that is jettisoned in order to achieve it.

What are those meanings? Let us start with the political. To substantiate his definition of marriage, Judge Reinhardt quotes Shakespeare, various comedic routines, and a Marilyn Monroe movie title. He does not reference other markers of the meaning of marriage: for example, the marital rape exemptions in force in all states until the 1980s, which legalized and legitimated forced sex between “husbands” and “wives,” or the definitions of the crime of abortion, up until *Roe*, which, combined with those exemptions, effectively criminalized abortions of pregnancies that resulted from rape by husbands. He does not reference the constructed definition of marriage that emerges from the Personal Work and Responsibility Acts from the 1990s and 2000s, which sought explicitly to encourage marriage among poor people by drastically reducing welfare benefits for single women with children — and which thus predicated the right and practice of parenting in poverty upon achievement of the status of marriage. He does not reference the legitimacy statutes that until the mid-twentieth century deprived “illegitimate” children of various rights of inheritances, or contemporary Second Amendment jurisprudence in which the familial home is a castle within which guns might be kept and used against intruders with impunity, and so forth. The result is simply a skewed account of both “marriage” and the “right to marry.” However hotly it may now be desired, marriage is also an institution with several centuries’ worth of history, the point of which has historically been to domesticate women’s childbearing labor, subject wives’ sexuality to the command of their husbands, channel male sexuality into familial forms, and provide a semi-privatized social welfare safety net to those who form traditional families, but not to those who remain unattached or who form non-traditional families. There is no mention of any of this in *Perry v. Brown*.

Second, let us consider social meanings. *Perry* turns crucially on the irrelevance of one of California’s purported reasons for removing the honorarium of “marriage” from same-sex domestic partnerships — what has come to be called the “responsible procreation” rationale. Extending marriage to same-sex couples, opponents say, would dilute the social “meaning” of marriage as the responsible locale for procreative sex. Opposite-sex sex leads to births, and births outside of mar-

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riage are bad for both the babies and the taxpayers that must support them. Therefore, opponents of same-sex marriage argue, society properly channels that opposite-sex sex into marriage, partly by sentimentalizing and glamorizing the institution. The state is thereby relieved of the need to serve as a provider for children, who are raised and supported by those to whom they are genetically linked, and of the need to protect or discipline wives, who are rendered economically dependent upon their children's fathers. All of this is in children's best interest, so extending the marital franchise to those for whom the message is unneeded or irrelevant muddles the social meaning of marriage, resulting in suboptimal child-raising. The *Perry* court found it unnecessary to explore this argument as well as its predicate — that heterosexual marriage is a responsible venue for parenting — because the State of California already extends to same-sex couples all incidents of traditional marriage, including parental rights. Thus, the discussion of the People's reason for their initiative was literally truncated.

This truncation is unfortunate. The responsible procreation argument importantly rests on an outdated premise, which could be, and should be, explored. Obviously, it is not the existence of same-sex couples who wish to marry that muffled the social, and disciplining, meaning of marriage — that marriage just *is* what you do first, if you want to have the kind of sex that leads to pregnancies. What muffled that message, and hence the meaning of marriage was, in short, birth control. Heterosexual sex does not lead to irresponsible procreation so long as it is contracepted. One way, then, to ensure that heterosexual sex is procreatively responsible is not to require marriage as a precursor, but — more simply and more pleasurably — to insist upon the responsible use of birth control. While the birth control revolution took place in the 1960s, the same-sex marriage revolution was not in public view until the 1990s, and by then, the social meaning of marriage as the venue within which procreative sex — meaning heterosexual sex — could be enjoyed responsibly, had already begun to sound quaint. But it was birth control, not same-sex marriage, that caused the shift: sex, post-birth control, is not by definition procreative and responsible when it is within marriage, or by definition irresponsible when outside of marriage. Rather, sex *both inside and outside* marriage is responsible if it is desired and willed by both partners (and therefore not rape or harassment) and if it is contracepted, if no child is desired. It is irresponsible if it is not desired and consented to by both or all partners or not contracepted, if a child is not desired. The opinion truncates any discussion of this issue with the glib pronouncement that the “responsible procreation” argument is irrelevant, because the state had already granted same-sex partners parenting rights. Sure, it is irrelevant — but not because of any statutory scheme granting same-sex partners rights to parent or other incidents of marriage. It is irrelevant because the social control it mandates —

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use marriage to cabin otherwise irresponsible procreative sex — is no longer necessary, if it ever was, and even from the sovereign’s perspective.

Third, let us consider the moral meaning of marriage. The opinion explicitly truncates its discussion of what it finds to be the true motivation of the People of California: animus toward gay and lesbian couples seeking to marry. But it is not clear why the court is so convinced of this, and why the declaration ends rather than begins the discussion. Why is not it at least possible that the People’s motivation is a mix of moral, physical, and emotional cues? And why should legislation not be based on that mix? And where does that animus come from?

In addressing the latter question, surely the “animus” felt by the People of California toward same-sex couples seeking to marry is at least in part based on a moral revulsion against the idea that nonprocreative sex could be or should become marriage’s central moral point. Is it so surprising that a fundamental metamorphosis in marriage’s moral meaning — from the institution legitimating the sex that creates children to the institution legitimating the nonprocreative sex that creates or strengthens affective bonds — is felt as “animus” toward the couples who so personally exemplify this shift? That an emotion is felt as animus does not mean it cannot be based or felt alongside a moral sentiment; we feel animus toward those who shoot school children at point-blank range, in part because we are revolted by their depravity. We can, and do, legislate on the basis of those sentiments, even when they are accompanied by “animus.” Why not here?

The short answer to that question is simply that the logic of the brand of liberalism that underlies mainstream constitutional thinking precludes discussion of the morality of victimless conduct, and has for several decades now. Non-neutral moralistic political decisions, whether by the legislative or judicial branch, are suspect, so we simply disallow them rather than explore their origins. Again, this truncation is unfortunate, and particularly so here. One consequence, among others, of the demand of neutrality underlying gay rights advocacy is that the straightforward moral argument that affective sex — sex which, unlike commercial or casual sex, underscores and strengthens affective bonds between persons of long-standing commitment — is *good*, and that people who engage in it within such relations are engaging in morally good conduct, simply cannot be uttered by those who are the proponents of the broadened marital franchise. This viewpoint is just too non-neutral. The result of this truncation at the heart of the argument for same-sex marriage is an argument that is formalistic in the extreme: same-sex couples are like opposite-sex couples with respect to parenting rights and responsibilities, so they must be treated similarly with respect to marriage, without the need for us to pause and ponder

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the transformations of either the moral point of marriage or the social point of sex in the movement from premise to conclusion.

Finally, the decision truncates even the constitutional meaning of marriage that is its purported subject. Predictably, the court criticizes the rationality of drawing lines around opposite-sex couples to the exclusion of same-sex couples — the latter are too much like the former to be justifiably treated differently with respect to either the appellation or the incidents of marital status. *Perry*, though, neither questions nor addresses the irrationality that this partial redrawing accomplishes. Why are we drawing lines around couples brought together by affective *sexuality* for the purposes of designating a socially superior form of adult life? What has sex got to do with it? Why do we not allow couples to declare themselves married based on friendship alone, so that they too might enjoy high social regard and access to preferential treatment from the social security system or various insurance plans? What about the grandmother helping her daughter to raise a grandchild, or the siblings living together to provide better care for a parent? Why is affective *sexuality* the heart of marriage, rather than simply affection, or genetic family ties? But why, if our concern is with the rationality of either the safety net that attaches by virtue of marital status or high social esteem, are we drawing lines around *couples*? Why do we not allow single people to declare themselves married, or groups affectively connected — or, for that matter, drawn randomly from a population? Does not everyone potentially need the benefit of someone else's health insurance, and the security that someone will serve as their executor should they die, or visit them in a hospital should they become ill? Why not assign buddies to all of us, as we enter adulthood? The Constitution demands rationality in legislation, but the demand is so easily met that the demand of rationality perversely truncates, rather than furthers, critical thought.

All of this truncation is unfortunate. *Perry v. Brown* ultimately does not advance our understanding of the political, social, moral, or even constitutional meanings of marriage or sex, and in fact it confuses both. But was the flame worth the candle? All that truncated social thought was, after all, put to an unequivocally good end: the legalist and liberal values deployed in *Perry*, however much they truncate and confuse social understanding, highlight perfectly the very real possibility that Proposition 8 is doing nothing but playing the role in our contemporary democracy of the “South politician” in Bob Dylan's eulogistic tribute to Medgar Evers. “You got more than [them], don't complain” is, at the end of the day, Proposition 8's core message: you are better because you were born with opposite-sex orientation, and you are therefore properly marriageable and in line for the concrete incidents of marriage as well as the attendant elevated social status. So do not complain. Perhaps that message is the meaning of the “animus” the Court references, and which it refuses to credit as a legitimate ba-

sis for an exercise of sovereign power. If so, we are well rid of it. It would have been all the better, though, if the Court and the lawyers who forced its hand had left the People alone to reach that decision themselves.