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THE NINTH CIRCUIT'S *PERRY* DECISION AND THE CONSTITUTIONAL POLITICS OF MARRIAGE EQUALITY

William N. Eskridge Jr.*

In *Perry v. Brown*, the Ninth Circuit ruled that California's Proposition 8 violates the Equal Protection Clause.¹ Reacting to the state supreme court's recognition of marriage equality for lesbian and gay couples, Proposition 8 was a 2008 voter initiative that altered the state constitution to "restore" the "traditional" understanding of civil marriage to exclude same-sex couples. The major theme of the Yes-on-Eight campaign was that the state should not deem lesbian and gay unions to be "marriages" because schoolchildren would then think that lesbian and gay relationships are just as good as straight "marriages."

Is taking away a minority group's status as marriage-worthy constitutionally problematic? Judge Stephen Reinhardt's opinion for the Ninth Circuit panel found it so, and the court demanded that the initiative's proponents demonstrate a public interest (apart from moral condemnation) justifying this discriminatory demotion in status. The proponents' primary justification was that discrimination against lesbian and gay couples helps the state encourage "responsible [i.e., marital] procreation" by straight couples. Judge Reinhardt could not understand how taking away marriage from lesbian and gay couples can reasonably be understood to encourage straight couples to procreate within a marital union.

In the blogosphere, Judge Reinhardt's *Perry* opinion has come under heavier fire from commentators favoring marriage equality than from those opposed to equality. Some gay-friendly commentators have lamented that the Ninth Circuit did not announce a general right of lesbian and gay couples to marry all over the country and have criticized the court's narrow reasoning as "dishon-

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1. *Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713, at *28 (9th Cir. Feb. 7, 2012).

est,”² analytically “wobbly,”³ and “disingenuous.”⁴ In my view, the court got it right, as a matter of law and as a matter of constitutional politics.

Start with the role of federal courts of appeals in our rule of law system: their role is a limited one, a point these pro-gay commentators have neglected. Such courts (1) are supposed to address the particular factual context presented by the parties, (2) must follow the binding precedent of their own circuit and of the Supreme Court, and (3) ought usually to choose narrow rather than broad grounds for decision. Judge Reinhardt’s *Perry* opinion is exemplary along all three dimensions.

Proposition 8 intended that gay and lesbian couples be carved out of civil marriage and relegated to a separate institution, domestic partnerships. The court properly viewed this official status segregation with suspicion—a suspicion that was confirmed by the proponents’ open denigration of lesbian and gay marriages and their inability to tie taking away marriage rights to a genuine public interest. The original meaning of the Equal Protection Clause was that the Constitution does not tolerate class legislation—namely, laws that separate one class of citizens from the rest and bestow upon its members a less esteemed legal regime and, with it, an inferior status.⁵ This is exactly what Proposition 8 did. Hence, Judge Reinhardt was strictly enforcing the original meaning of the Equal Protection Clause, as applied to the facts before him.

Should Judge Reinhardt have gone further, to rule that lesbian and gay couples in all states enjoy a “fundamental” right to marry, resulting in strict scrutiny that would be fatal to the exclusion of such couples in the laws of the more than forty states now denying marriage equality? For two decades, I have maintained that the Constitution does assure lesbian and gay couples such a fundamental right.⁶ But I am not a court of intermediate appeal. As such a

2. Jason Mazzone, *Marriage and the Ninth Circuit: Thumbs Down*, BALKINIZATION (Feb. 7, 2012, 7:18 PM), <http://balkin.blogspot.com/2012/02/marriage-and-ninth-circuit-thumbs-down.html>.

3. Editorial, *Wobbly Justice*, WASH. POST, Feb. 9, 2012, at A16, available at http://www.washingtonpost.com/opinions/proposition-8-decision-was-just-but-wobbly/2012/02/08/gIQApOhlzQ_story.html.

4. David Cole, *Gambling with Gay Marriage*, NYRBLOG (Feb. 9, 2012, 11:48 AM), <http://www.nybooks.com/blogs/nyrblog/2012/feb/09/gambling-gay-marriage/>.

5. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 176-78 (1988); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 271-93 (1997). In the mid-twentieth century, the Supreme Court applied the Equal Protection Clause only when the state was discriminating based on a suspect classification, such as race or sex, or when the state was denying one group “fundamental” rights, such as the right to vote or travel. In the last generation, however, the Court has followed a more contextual approach, where the constitutional fate of state discriminations has turned on a functional balance involving the suspectness of the classification, the importance of the rights denied, and the quality of the state’s interest.

6. See WILLIAM N. ESKRIDGE JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 123-24 (1996).

court, the Ninth Circuit panel was right, as a matter of standard legal practice, not to engage this broader argument.

First, Judge Reinhardt's opinion focused on the particular deprivation imposed by Proposition 8, which was distinctive in several respects: it took away a right that state law had deemed "fundamental," and it did so in the context of an initiative campaign that was exclusively focused on denying lesbian and gay persons the special status associated with marriage in our society. The typical role of a court is to figure out how legal authority should be applied to particular facts. Unlike a legislature, which usually speaks in broader, generally applicable rules, a court applies general rules to particular facts.

Second, courts are supposed to prefer narrow rather than broad grounds for their rulings. Indeed, this is the genius of the common law. Rather than making broad pronouncements, courts in our legal system typically make narrow pronouncements grounded in the facts. At some point, a broad principle may emerge for an issue that recurs. The common law pragmatically believes that general principles come slowly and incrementally, through a series of modest rulings, fortified by social and political feedback, and then expanded if society moves toward the larger precept. Constitutional law operates in the same common law manner, and the issue of marriage equality is one on which the country as a whole is not at rest.⁷

Third, precedent supports the narrower reasoning of Judge Reinhardt as opposed to the more sweeping reasoning advocated by some commentators. The Supreme Court has said very little about how the Equal Protection Clause applies to gay people. In *Romer v. Evans*, the Court struck down a Colorado initiative that took away some antidiscrimination rights enjoyed by gay persons.⁸ The Court emphasized that the initiative took away from a disadvantaged minority guarantees of equal treatment that most Americans take for granted, and it did so without a clear justification based on the public interest. Proposition 8 did the same thing, and Judge Reinhardt was right to follow binding Supreme Court precedent.

To be sure, *Romer* was different from *Perry* in one respect: the Colorado initiative took away a variety of specific legal rights and benefits, while the California initiative took away a unique status (i.e., marriage). These are different kinds of deprivations, but they are qualitatively similar in their affront to the Equal Protection Clause. Consider a history-based thought experiment.

7. Judging from the largely acquiescent reaction to *Perry*, California is largely at rest on the matter of marriage equality, as is New York, whose legislature legalized lesbian and gay marriages in 2011 after a period of judicial, executive, and legislative experimentation—what I call "equality practice." See WILLIAM N. ESKRIDGE JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* (2002).

8. 517 U.S. 620, 623-24, 635-36 (1996).

In *Loving v. Virginia*, the Supreme Court invalidated state bars to interracial marriages.⁹ Assume that the opponents of marriage equality in one state responded with a law taking away from interracial spouses a dozen legal rights linked with civil marriage. And assume that opponents in another state responded with a law taking away from interracial spouses the status of being married but gave them all the legal benefits and rights under a separate institution, call it “domestic partnership.” Adhering to *Loving*, lower federal courts would have to strike down *both* laws, and for basically the same reason: both laws would violate the equality mandate by creating a subordinate class of citizens. In some respects, the latter law (like Proposition 8) is a more open status denigration, but both laws would be constitutionally problematic.

Thus, Judge Reinhardt was *required* by *Romer* to strike down California’s Proposition 8. There is no Supreme Court precedent that is as close to this case as *Romer*. If he had ruled that lesbian and gay couples have a fundamental right to marry or that sexual orientation classifications are inherently suspect, Judge Reinhardt could have reasoned from Supreme Court precedent, but there would have been no precedent as much on point as *Romer*.¹⁰

As a matter of constitutional *law*, Judge Reinhardt’s opinion was more rigorously reasoned than either the trial court’s opinion that he affirmed or the views of commentators who would have liked a more sweeping ruling. The fans of a broader ruling, of course, are more inspired by constitutional *politics* than by constitutional *law*—but they are wrong about the politics as well.

As the proverbial “least dangerous branch,” the federal judiciary (headed by the Supreme Court) is unable, and usually unwilling, to strongly challenge entrenched inequalities in this country. Judges may be willing to nudge the country in the right direction, but rarely do they give a hard shove until the balance of antiminority prejudice and prominority sympathy has shifted toward the latter.

Recall the interracial marriage bars. The Supreme Court could have invalidated them right after *Brown v. Board of Education*.¹¹ The Court decided not to do so,¹² reluctantly but wisely. The justices understood that democracy itself is threatened if forced to prematurely decide an issue that intensely but evenly di-

9. 388 U.S. 1, 2 (1967). There are many parallels between marriage equality litigation for interracial couples more than a generation ago and similar litigation for same-sex couples today. Both campaigns sought state recognition for committed couples whose relationships had traditionally not been recognized by the state. In both instances, moral attitudes as well as social prejudice inspired popular opposition.

10. For example, *Loving* recognized a constitutional right to marry, but in the context of an interracial heterosexual couple who wanted to have children. *Romer* is a tighter fit with *Perry* than *Loving*.

11. 347 U.S. 483 (1954).

12. *Naim v. Naim*, 350 U.S. 985 (1956), *dismissing appeal from* 90 S.E.2d 849 (1956) (refusing to reach the merits of an equal protection challenge to Virginia’s antimiscegenation law, whose grounding in a theory of “white supremacy” was analytically contrary to *Brown*).

vides the polity.¹³ In 1955, three-fifths of the states barred interracial marriages, and feelings ran high on the issue. By 1967, only a third discriminated in this way, and many opponents felt less strongly.¹⁴ Only then did the Court insist on marriage equality for interracial couples. Southerners bitterly criticized the Court, but the racist cause of open apartheid was lost by 1967.

The crusade against marriage equality for gays is still robust in the United States today. Only seven states (perhaps eight soon, pending the passage of legislation in Maryland) and the District of Columbia now recognize same-sex marriage. More than forty states specifically forbid it, most as a matter of state constitutional law. Americans are evenly divided on the issue, and partisans on both sides have heated feelings. Under these circumstances, the federal judicial branch ought *not* to issue broad rulings that pretend to decide the issue once and for all. This was a lesson of *Roe v. Wade*, a prematurely sweeping decision.

For this reason, the Supreme Court would be wise to deny review for the Ninth Circuit's decision or to go along with Judge Reinhardt's narrow ruling. California is ready for marriage equality in ways most of the rest of the country is not: there are thousands of openly lesbian and gay couples, many rearing children, who have persuaded their neighbors and coworkers that marriage equality would be good for their communities. Opposition remains, but its intensity has diminished.

Other states are not ready, because there are fewer openly lesbian or gay families and because opposition is more widespread and more intense. It is likely that the federal courts of appeals in the South would be reluctant to reach exactly the same result as the Ninth Circuit in *Perry*. For now, the Supreme Court should deny review of those decisions as well. This would allow individual states to deliberate further, consistent with the common law tradition and with the Court's view of the states as "laboratories of experimentation."

Marriage equality is an idea whose time has come for California, as well as for New York, whose legislature recognized marriage equality last year.¹⁵ But has its time come everywhere in the country? I fear not. The nation's constitutional culture is much more accepting of lesbian and gay couples today than at the turn of the millennium, but much of the country is still hostile to gay people generally and marriage equality in particular.

Does that mean the Ninth Circuit and the Supreme Court should cower behind a constitutional heckler's veto? Of course not. But when the hecklers are the bulk of the audience, the constitutional speaker needs to tread more care-

13. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 93-99 (1956) (suggesting that stable "polyarchy" must avoid political divisions that are both intense and evenly matched).

14. On the decline of antimiscegenation laws after *Brown*, see RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 244-80 (2003).

15. As did the California legislature in 2005 and 2007. In both instances, Governor Arnold Schwarzenegger, the same governor who refused to defend Proposition 8 in *Perry*, vetoed the bills.

fully. Courts can help put an issue on the public law agenda, and they can channel discourse into productive directions. They can also help create conditions for falsification of stereotypes and prejudice-driven arguments, such as the canard that gay marriage will undermine “traditional” marriage. But courts cannot create a national consensus on an issue about which “We the People” are not at rest. And nationally, the people are not at rest.

In the United States, as a whole, marriage equality is an idea whose time is coming. And Judge Reinhardt’s decision in *Perry v. Brown* advances the ball just a little, and not too much.