REACTION

SPLITTING THE DIFFERENCE: REFLECTIONS ON *PERRY V. BROWN*

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The latest chapter in California's long running debate over marriage equality began when the voters passed Proposition 8 in 2008. Several months earlier, the California Supreme Court had interpreted the state constitution to protect the right of same-sex couples to marry, and Prop 8 amended the constitution to eliminate that right. When the improbable duo of Ted Olson and David Boies decided to challenge the constitutionality of Prop 8 in federal court, the case looked like one that might prompt the Roberts Court — sooner rather than later — to address the question whether same-sex couples have a right to marry under the U.S. Constitution. That prospect alarmed many marriage equality litigators, who were uncertain that five votes could be won for their position and opposed going to federal court. Nothing in District Judge Vaughn Walker's 2010 decision striking down Prop 8 made the prospect of Supreme Court review any less likely. To the contrary, Judge Walker's decision supplied a blueprint for national marriage equality and the immediate demise of the thirty-nine state bans on same-sex marriage; the decision seemed like a red cape to wave at the Supreme Court's conservative Justices. Judge Walker made extensive factual findings after a lengthy trial, boldly explored the connections between sexual orientation and gender discrimination, and ultimately found that same-sex couples have a fundamental right to marry that triggers strict scrutiny under the U.S Constitution. He also found that Prop 8 violated equal protection under the rational basis standard, but noted in dicta that the doctrinal requirements for treating sexual orientation as a suspect classification had been established at trial.

Enter Judge Stephen Reinhardt, a liberal lion on the Ninth Circuit. His recent opinion in *Perry v. Brown* brilliantly split the difference between those advocates of marriage equality who favored going to federal court and those who opposed it. Writing for himself and Judge Michael Daly Hawkins, and over only the rather tepid dissent of Judge N. Randy Smith, Judge Reinhardt affirmed the district court decision

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striking down Prop 8, but proceeded on distinctly narrower grounds. Indeed, Judge Reinhardt's opinion in the case stands in stark and self-conscious contrast to the decision it reviewed. The circuit court skirted the fundamental right to marry and any analysis of heightened scrutiny. Instead, it applied only the version of rational basis derived from *Romer v. Evans*, the leading Supreme Court case on sexual orientation and equal protection and one, like *Perry*, that involved a ballot measure eliminating and precluding particular rights for lesbian, gay, or bisexual persons alone. Judge Reinhardt's opinion, moreover, pointedly grounded its reasoning in two features specific to California. First, the state had previously granted a right to marry — one exercised by some 18,000 couples — and then took it away at the ballot box. Second, the state's domestic partnership law granted virtually all the substantive rights of marriage, yet still denied same-sex couples access to the socially favored institution itself. With Prop 8 thus lacking the sort of functional justifications that might be available to a state that did not grant same-sex couples such comprehensive rights, the appellate panel found that the decision to withdraw the right to marry from same-sex couples alone did not rest on a rational basis and bore strong similarities to the Colorado constitutional amendment struck down in *Romer*.

The Ninth Circuit's opinion thus does not provide the *Perry* plaintiffs with the same prototype for national marriage equality that they had won from the district court. For that reason, it has disappointed some supporters of marriage equality. But the appellate court's limited approach is more likely than the district court's approach to either be embraced by the Supreme Court or stand unreviewed. Two aspects of the Ninth Circuit's approach support this assessment.

First, by virtue of its California-centric analysis, Judge Reinhardt's opinion restores something close to the distinctly *federalist* approach that has shaped the contemporary movement for marriage equality over most of the last twenty years. From the time that the movement began in Hawaii in the early 1990s, marriage equality litigators have proceeded on a state-by-state basis. By invoking only the state constitution in these lawsuits, the litigators deliberately avoided the quickest route to nationalizing the issue — recourse to the Supreme Court. Needless to say, that choice reflected strategic avoidance of a court perceived as hostile, not an abstract commitment to federalism. But it bears noting that, contrary to conventional political alignments, it is those litigating for same-sex marriage rights who long eschewed any prompt federal resolution of the issue, while those opposing marriage equality went national at the earliest opportunity — first with the enactment of the Defense of Marriage Act (DOMA) in 1996, and later by pressing a federal constitutional amendment (endorsed by President George W. Bush in 2004).

Perry is not the only marriage case to be filed in federal court. Several recent challenges to the constitutionality of section 3 of DOMA have also been made in federal court, and may find their way to the Supreme Court. For example, *Gill v. Office of Personnel Management* and *Massachusetts v. U.S. Department of Health & Human Services* are currently pending before the First Circuit, and Judge White of the Northern District of California recently held in *Golinski v. Office of Personnel Management* that section 3 of DOMA was unconstitutional. But these challenges are themselves consistent with the federalist approach because they do not seek to impose a national definition of marriage. Instead, they seek only to require the federal government to abandon the inequality that DOMA mandates in the administration of scores of federal programs. The federal government ought to recognize same-sex marriages granted by a state, these suits argue, just as it routinely recognizes every other marriage granted by the same state.

This state-by-state strategy has given the same-sex marriage movement its own incrementalist cast — albeit a unique one. It is admittedly somewhat ironic to brand as "incrementalist" a movement that has called comprehensive domestic partnerships and civil unions badges of second-class citizenship. But there has been a pronounced *geographic* incrementalism to the approach, and it is reflected in the patchwork marriage map of the United States today. The success has been both partial and substantial: Six states and the District of Columbia have full marriage equality. Two additional states have passed legislation legalizing same sex marriage, but the laws have not yet taken effect. Eight states have nearly comprehensive domestic partnership or comprehensive civil union protection without marriage. And three states have more limited domestic partnership rights.

This strategy of federalist incrementalism, moreover, has also corresponded with a dramatic rise in public support for same sex marriage. Indeed, a few years before the 1993 decision by the Hawaii Supreme Court ignited the contemporary marriage equality movement, polls registered little more than 10% support for same sex marriage. Today, it is not uncommon for national polls to register majority support for marriage equality. Moreover, as demonstrated by the legalization of same-sex marriage in New York, Washington, and Maryland in recent months, the institutional dynamics of the marriage equality movement are beginning to change in some parts of the country as state legislatures are becoming more likely to protect marriage equality. The advent of same-sex marriage in several states has produced no calamitous consequences, and it seems likely that the pace and character of state-by-state change have been important components of rapidly rising public support for marriage equality.

This is not to paint too rosy a picture, nor to suggest that the state-by-state strategy has produced no backlash. To the contrary, the na-

tional marriage map also shows that antimarriage equality measures are currently in effect in thirty-nine states. Some additional antimarriage measures to repeal marriage equality legislation may soon appear in New Hampshire, Washington, and Maryland. But as the polls suggest, this policy backlash has not been accompanied by a public opinion backlash. Quite the contrary. Public support is growing quickly and will likely continue on that trajectory, given the strong support for marriage equality among younger people. This solidifying public support is what is likely to matter most in the long run.

For those gay rights litigators who disagreed with Olson and Boies about the tactical wisdom of going to federal court and seeking a decision nationalizing a constitutional right to marriage equality, Judge Reinhardt's decision must have produced a great sigh of relief. By enabling a resolution of the case that is designed to address California only, the approach taken in the opinion might just be the best of both worlds for advocates of marriage equality. At a time when so many states still bar same-sex marriage, it represents a first federal decision that can advance the long-term cause of marriage equality by creating a favorable precedent on which to build. Yet, it is a precedent less likely than a broader decision to disrupt the favorable political dynamics now fueling marriage equality by triggering a full-scale national outcry or renewed calls for a federal constitutional amendment.

It remains to be seen whether the two factors particular to California that were emphasized by Judge Reinhardt — the withdrawal of an existing right to marry and the grant of the underlying rights of marriage through domestic partnership — will stand up if en banc review by the Ninth Circuit or review by the Supreme Court should be granted. For one thing, a referendum is now being organized to repeal marriage legislation in the State of Washington, which, like California, offers robust domestic partnership rights and is located in the Ninth Circuit. Thus, *Perry*'s California-only scope may have a short shelf life. A referendum is also possible in Maryland, which recently legalized marriage, but does not offer broad domestic partnerships. A successful ballot measure there could also call into question *Perry*'s reach. Moreover, it is not entirely clear why California's grant then withdrawal of marriage rights is all that different from the denial of marriage rights in states that allow comprehensive domestic partnerships or civil unions. If this first California-specific factor — the withdrawal of an existing right — drops out of the Reinhardt analysis, then Prop 8's downfall would have clearer implications for the eight domestic partnership or civil unions states that have never allowed marriage.

Although there are questions about *Perry*'s reach, a second salutary aspect of the Ninth Circuit's recent course correction offers some guidance. *Perry* captures and embodies some defining elements of the Supreme Court's major gay rights opinions, *Romer* and *Lawrence v.*

Texas. Both opinions were written by Justice Kennedy, who is widely, if speculatively, regarded as the swing vote on this issue. One animating characteristic of Justice Kennedy's opinions in *Lawrence* and *Romer* is the positively beclouded standard of review they employ. In *Lawrence*, the Court simply failed to identify the standard of review it was employing in striking down sodomy bans, thus leaving lower courts to puzzle and to divide. For example, the Ninth Circuit read *Lawrence* to trigger heightened scrutiny in a substantive due process challenge to Don't Ask Don't Tell, whereas the Eleventh Circuit came to the opposite conclusion in the course of considering the decisions's relevance to a Florida statute prohibiting same-sex couples from adoption. In *Romer*, the Court did not consider the question of heightened scrutiny at all, and employed without discussion or explanation an unusually muscular version of rational basis review grounded in the particular idea of "animus."

A related feature of these opinions is an opaqueness about the reach of their rationales. In *Romer*, the Court rejected the reasoning that the state supreme court had employed to strike down Amendment 2 and focused heavily on the unusually broad language of the measure. This left questions about what, if anything at all, the state could have done had it pursued a more carefully tailored effort to restrict antidiscrimination laws. Similarly, even as *Lawrence* repeatedly emphasized the dignity of same-sex relationships, Justice Kennedy disclaimed — without analysis — that the opinion had implications for marriage or a host of other things he listed.

Romer and *Lawrence*, in other words, reflected an approach to major gay rights questions that was idiosyncratic, even fuzzy. Yet, both cases were followed by marked social progress toward sexual orientation equality. After *Romer*, states largely abandoned Amendment 2-type measures directed at antidiscrimination protections for sexual minorities. Likewise, the legal landscape post-*Lawrence* became much more friendly to same-sex marriage. The opinions were thus incrementalist in their own way, allowing the Court to resolve the issues before it in a way that left difficult future questions undiscussed and unresolved, yet opened the door for futher change.

As crafted, the *Perry* opinion fits this *Romer-Lawrence* mold to a tee. *Perry*'s reliance on the two factors particular to California suggests a similar inclination to resolve the case on its own individualistic terms. It also aligns with *Romer* in its emphasis on the somewhat elusive concept of animus. In *Romer*, the animus found rested on the negative inference the Court derived from the poor fit between the breadth of Amendment 2 and the justifications offered to support it. But in the forgiving context of traditional rational basis review, courts typically do not police fit in any meaningful way. *Romer* thus suggested that, in at least some contexts, and perhaps in the case of exclusionary measures selectively directed at lesbian, gay, and bisexual citi-

zens, both fit and the idea of animus ought to be analyzed in a doctrinally distinct way — one different from traditional rational basis review. And here is where Judge Reinhardt's emphasis on the withdrawal of an existing right is likely to become relevant. In the context of *Romer*'s unspoken — yet unmistakable — heightening of rational basis review, Prop 8's targeted nullification of an existing legal right for only one historically disadvantaged group fuels the kind of inference of animus identified in *Romer*. True, Prop 8 does not have the horizontal breadth of Colorado's Amendment 2. But, unlike Amendment 2, Prop 8 does have the peculiar quality of selectively eliminating access to a venerated institution for one group only, without eliminating the substantive rights conferred by the institution. This odd combination strongly suggests a *raison d'être* to express *some* negative message about the same-sex relationships that it excludes. Prop 8's defenders sometimes suggest that the referendum expresses only a message of neutral difference. But similarly benign defenses about conserving resources and protecting associational freedoms — perhaps plausible on ordinary rationality review — were mustered in support of Amendment 2 and rejected under the standard of review employed in *Romer*. It is not hard to see how that same standard can spell constitutional trouble for Prop 8.

The Ninth Circuit's opinion in *Perry* is surely not all that many supporters of marriage equality had hoped to secure from the first significant foray into federal court, particularly in the wake of Judge Walker's embrace of a fundamental right to marry and his more sweeping approach. But it represents a way to reconcile federal court review with the federalist incrementalism that preceded *Perry* and helped to produce significant strides toward marriage equality over the last several years. And it does so in just the way *Romer* and *Lawrence* did — doctrinally unconventional, perhaps even hazy by design, but unquestionably equality-enhancing in effect.