
REACTION

SALVAGING *PERRY*

*Andrew Koppelman**

The Ninth Circuit, in *Perry v. Brown*, deftly avoided forcing the Supreme Court's hand on the big claim that the Constitution requires recognition of same-sex marriage — a claim likely to be rejected now, though perhaps not a few years from now. Instead, it held that California's Proposition 8, which stripped same-sex couples of their right to have their unions called "marriages," was unconstitutional because it reflected a bare desire to harm a politically unpopular group. This narrowing of the legal claim is mostly good news, but the Supreme Court should be urged to affirm on grounds that are still narrower.

The Supreme Court is unlikely to impose same-sex marriage on the entire country. But the swing vote, Justice Kennedy, also worries about his place in history, and he can see as well as anyone else that the proponents of same-sex marriage are going to win in the long run.

So the challenge for advocates is to give Justice Kennedy a middle way: to frame a rationale for the Ninth Circuit's result so narrowly that it is uncertain whether it has any application beyond California. The invalidation of Proposition 8, all by itself, is a big deal. It is most likely to survive if it is absolutely clear that the Court is making no commitment to go any further.

Gay rights litigators were chagrined when the case was filed, not least because they found out about it from the newspapers. The attorneys for the plaintiffs, David Boies and Ted Olson, did not even consult Gay and Lesbian Advocates and Defenders or the Lambda Legal Defense Fund — groups that had racked up a string of victories, some in places as unlikely as Iowa, but which had been wary of the federal courts.

Those organizations feared a premature appeal to the Supreme Court, generating a decision that same-sex couples do not have the right to marry. Boies and Olsen's victory at trial only raised the stakes because the district court ruled in their favor on grounds that would legalize same-sex marriage across the United States. The court found that there was no rational basis for any state, ever, to deny same-sex couples the right to marry.

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On appeal Boies and Olsen defended their victory on many grounds: that there is a fundamental right to marry, that the law discriminated on the basis of both sex and sexual orientation, and that the law had no rational basis. They also claimed that the denial of marriage to same-sex couples “was motivated by a bare desire to make gay men and lesbians unequal to everyone else.”

Judge Reinhardt, writing for the Ninth Circuit, took a different approach (one which, I cannot resist pointing out, was proposed in the Brief of Amici Curiae Professors William N. Eskridge, Jr., Rebecca L. Brown, Bruce A. Ackerman, Daniel A. Farber, Kenneth L. Karst, and Andrew Koppelman). His opinion indicates three different defects with Proposition 8.

First, Judge Reinhardt held that “the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason.” There may not be a right to same-sex marriage, but once that right is granted, it may not be taken away. This holding is narrower than the district court’s reasoning. It does not mandate recognition of same-sex marriage across the United States. But it does mean that any state that recognizes same-sex marriage may not go back. The state is permitted to proffer a rational basis for a change in the law, but the Ninth Circuit indicates — and the Supreme Court would have to indicate, if it wanted to reach the same result by this path — that those arguments would be greeted skeptically. This is, in short, a pretty far-reaching basis, with implications in every state that now has same-sex marriage and, perhaps more importantly, every state that is considering it. It makes it marginally harder for a legislator to vote to legalize such marriages. And it may have implications beyond gay rights: who counts as a minority group, and what kinds of changes in laws violate this rule? Many legal reforms produce losers. The Supreme Court may worry about creating a new, vaguely bounded and potentially very large class of constitutional litigants.

Second, Judge Reinhardt held, relying on *Romer v. Evans*, that “[a] law that has no practical effect except to strip one group of the right to use a state-authorized and socially meaningful designation is all the more ‘unprecedented’ and ‘unusual’ than a law that imposes broader changes, and raises an even stronger ‘inference that the disadvantage imposed is born of animosity toward the class of persons affected.’” In other words, the law is more problematic than a law revoking the “incidents” of marriage for same-sex couples because it is merely symbolic. This creates *really* perverse incentives. A state acts unconstitutionally if it merely take the title of marriage away, but it is immune from constitutional attack if it hurts same-sex couples in a tangible way.

Third, Judge Reinhardt held that “[t]he ‘inference’ that Proposition 8 was born of disapproval of gays and lesbians is heightened by evi-

dence of the context in which the measure was passed.” Here, Judge Reinhardt cited the district court’s findings that the advertisements that blanketed the state in support of Proposition 8 “conveyed a message that gay people and relationships are inferior, that homosexuality is undesirable and that children need to be protected from exposure to gay people and their relationships.” This is the ground that the Supreme Court should rely on. It is as modest as it can be, focusing only on the unique facts of the California campaign, which may or may not be replicated elsewhere. This is how the desegregation decisions took their first baby steps toward overruling the separate-but-equal doctrine of *Plessy v. Ferguson*. *McLaurin v. Oklahoma State Regents for Higher Education* invalidated a state university’s requirement that a black student sit in a separate, sectioned-off area of the classroom, library, and cafeteria. The Court rejected a claim much like that of the proponents of Proposition 8 that “the separations imposed by the State in this case are in form merely nominal.” But as Richard Kluger, in a leading history of desegregation (*Simple Justice*, at 283), observes, “nothing was said that disturbed *Plessy*’s deep moorings.” We all know where *McLaurin* led. But the Court was cautious and just said that this specific, state-imposed insult crossed the line. (In modern terminology, it used fact-specific rational basis review; compare a similar, explicit deployment of such review in *City of Cleburne v. Cleburne Living Center*.) An equally modest holding is the most we should aim for here.