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## PERRY'S PATH TO EQUALITY: REJECTING "GAY MARRIAGE" AND RETHINKING THE "RIGHT TO MARRY"

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### I. INTRODUCTION

The Supreme Court granted *certiorari* in *Hollingsworth v. Perry* to hear arguments on whether “the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman.”<sup>1</sup> Though the Court could extend marriage rights to same-sex couples nationwide by holding that Proposition 8 unconstitutionally discriminates on the basis of sexual orientation,<sup>2</sup> the possibility that such a sweeping opinion would provoke cultural backlash has prompted discussion of narrower ways to rule in favor of marriage equality. Alternatives include adopting the Ninth Circuit’s holding that California may not revoke from same-sex couples an already established right to marry, or deciding that states cannot withhold the word “marriage” while providing same-sex couples with most of the associated benefits and protections.<sup>3</sup>

All three of these options, however, deny the Court a unique opportunity. *Perry* is more than just a vehicle for harnessing constitutional doctrine to incrementally advance marriage equality; it is a chance for the Court to correct that doctrine and clarify its marriage jurisprudence. By examining a broader alternative basis for adjudicating *Perry*, this comment will highlight the important issues that may not be addressed in a more limited ruling. The proposed alternative approach begins not with equal protection doctrine, but instead with substantive due process and the question of whether there is a fundamental right to marriage, an issue raised in the District Court opinion but

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1. *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144), *granting cert. to Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *aff’g Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

2. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (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*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

3. See Kenji Yoshino, *Commentary on Marriage Grants: Different Ways of Splitting the Difference—The Menu of Options in Hollingsworth v. Perry*, SCOTUSBLOG (Dec. 8, 2012, 9:48 AM), <http://www.scotusblog.com/2012/12/commentary-on-marriage-grants-different-ways-of-splitting-the-difference-the-menu-of-options-in-hollingsworth-v-perry/>.

absent from the Ninth Circuit affirmance. Through this analysis, the Court can begin resolving two major doctrinal problems lurking in the background in *Perry*—how to define marriage, and how to analyze it as a constitutional right.

In Part II, I argue that the Court should resolve the definitional problem that has plagued marriage equality litigation—the false distinction between “gay marriage”<sup>4</sup> and “marriage.” This requires challenging the flawed logic underlying an approach to substantive due process doctrine, championed by Justice Antonin Scalia, that defines fundamental rights at the most specific level of generality.<sup>5</sup> In so doing, Justice Scalia has often framed rights not only by *what* they are, but also by *who* may exercise them, disregarding equality principles inherent in fundamental rights analysis.<sup>6</sup> Thus conceptualized, *Perry* is not about marriage, which has historically been limited to one man and one woman, but rather “gay marriage,” a new institution unworthy of substantive due process protection. The Court should instead use *Perry* to reject this definitional approach and reaffirm that fundamental rights are presumed fundamental for *everyone* and require compelling reasons to justify exceptions.

Having disposed of the improper characterization of the right to “gay marriage,” I argue in Part III that *Perry* provides an opportunity for the Court to correct prior attempts to frame what exactly the “right to marriage” is and how it should be analyzed. Civil marriage is not a fundamental right in the traditional substantive due process sense, but rather a fundamentally important state-created institution that, once established, must be available to all, subject to heightened equal protection scrutiny for any individuals denied access.

These two definitional problems are intertwined and require joint resolution in order for the Court to properly apply constitutional doctrine and reach a just outcome in *Perry*. Framing the newly formulated right as “access to marriage” and applying equal protection fundamental interest analysis requires the Court to reject the marriage versus gay marriage distinction (after all, neither same-sex

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4. I use the term “gay marriage,” pejorative language I often hear from marriage equality and LGBT rights opponents, rather than the phrase “same-sex marriage,” used by ostensibly more reasonable courts and commentators (and, indeed, even many marriage equality advocates). As I will argue, both terms are equally problematic in creating a separate institution distinct from hetero/opposite-sex/traditional “marriage.” I see no reason to give such discrimination a veneer of respectability.

5. See *Michael H. v. Gerald D.*, 491 U.S. 110, 122, 127 n.6 (1989) (requiring asserted rights to be “rooted in history and tradition” and defined at “the most specific level [of generality] at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”). See also Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1093 (1990).

6. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 593–94 (2003) (Scalia, J., dissenting) (rejecting a right to “homosexual sodomy”); *Reno v. Flores*, 507 U.S. 292, 302–03 (1993) (rejecting a right of a “child who has no available parent, close relative, or legal guardian, and for whom the government is responsible” to be released from custody to a private legal guardian); *Foucha v. Louisiana*, 504 U.S. 71, 117–19 (1992) (joining the dissent of Thomas, J. to reject a right of “insanity acquittees” to freedom from bodily restraint (emphasis in original)).

nor opposite-sex couples are currently able to get “gay married” in California). Understanding the nature of marriage as an equality-based right, in turn, illustrates how the definitional problem generally plaguing substantive due process rights disregards important equality principles inherent in the doctrine. Together, these problems highlight the important interplay between substantive due process and equal protection, and neither has been fully addressed in *Perry* or other marriage equality cases. By resolving these substantive due process and marriage jurisprudence issues, the Supreme Court could ultimately return to the question presented in *Perry* and conclude that barring same-sex couples from civil marriage violates the Equal Protection Clause of the Fourteenth Amendment. The result of this alternative broad ruling would be nationwide access to marriage for same-sex couples and a reenergized substantive due process doctrine.

## II.

### DEFINING SUBSTANTIVE DUE PROCESS RIGHTS WHILE RESPECTING EQUALITY

“Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.”<sup>7</sup>

The challenge of getting courts to properly define substantive due process rights has frustrated the LGBT rights movement for years. In *Bowers v. Hardwick*, for example, the Supreme Court framed the asserted interest not as the right to engage in private, consensual intimate conduct, but instead as the more specific right to “homosexual sodomy,” which it then promptly rejected.<sup>8</sup> *Lawrence v. Texas* overruled *Bowers* and criticized this narrow definition as a “failure to appreciate the extent of the liberty at stake.”<sup>9</sup> Yet despite recognizing this mischaracterization, the majority in *Lawrence* did not precisely define a fundamental right meriting heightened scrutiny and instead applied strong rational basis review for non-fundamental rights,<sup>10</sup> much to the chagrin of the dissent.<sup>11</sup>

The right-definition problem has continued to confound courts in recent marriage equality cases, though the *Perry* litigation has provided some clarity. Opposing parties and various state courts have struggled over whether to frame the right as “marriage” or “gay marriage.”<sup>12</sup> The *Perry* respondents have

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7. *Hernandez v. Robles*, 7 N.Y.3d 338, 382 (2006) (Kaye, C.J., dissenting).

8. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

9. *Lawrence*, 539 U.S. at 567.

10. *Id.* at 578 (striking down Texas’ law banning homosexual sodomy as infringement of a “right to liberty”).

11. *Id.* at 594, 597–98 (Scalia, J., dissenting).

12. *Compare, e.g., Hernandez*, 7 N.Y.3d at 362 (“The right to marry is unquestionably a fundamental right. The right to marry someone of the same sex, however, is not ‘deeply rooted’; it

consistently argued that Proposition 8 unconstitutionally denies same-sex couples the (gender-neutral) “fundamental right to marry.”<sup>13</sup> The District Court opinion offers insightful support for this position, summarizing expert testimony on the history of marriage and concluding that formerly widespread race and gender restrictions “were never part of the historical core of the institution of marriage.”<sup>14</sup> By rejecting gender as an essential component of marriage, the court acknowledged that same-sex couples were not seeking recognition of a new or different right to “same-sex marriage,” but rather the existing right to marry.

Nevertheless, Justice Scalia would likely reject a gender-neutral approach to defining the asserted substantive due process right of same-sex couples seeking civil marriage recognition. The Court only applies heightened scrutiny to fundamental rights that are “deeply rooted in history and tradition.”<sup>15</sup> While marriage appears to qualify for heightened scrutiny, Justice Scalia insists on pinpointing the “most specific tradition available” to avoid what he views as the arbitrary judicial creation of new constitutionally protected rights.<sup>16</sup> Thus, Justice Scalia would likely look for a history and tradition of what he interprets to be the more precisely articulated (and distinct) right to “gay marriage.”<sup>17</sup> Despite recent progress,<sup>18</sup> there is clearly no such history or tradition of

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has not even been asserted until relatively recent times.”), with *Hernandez*, 7 N.Y.3d at 381 (Kaye, C.J., dissenting) (“[I]n recasting plaintiffs’ invocation of their fundamental right to marry as a request for recognition of a ‘new’ right to same-sex marriage, the Court misapprehends the nature of the liberty interest at stake.”); *In re Marriage Cases*, 183 P.3d 384, 420–21, 430 (Cal. 2008) (“[I]t is inappropriate] to define a fundamental constitutional right or interest in so narrow a fashion that the basic protections afforded by the right are withheld from a class of persons . . . who historically have been denied the benefit of such rights.”), with *In re Marriage Cases*, 183 P.3d at 462 (Baxter, J., dissenting) (“Though the majority insists otherwise, plaintiffs seek, and the majority grants, a new right to same-sex marriage that only recently has been urged upon our social and legal system.”) (emphasis in original). See also Barbara J. Cox, “A Painful Process of Waiting”: The New York, Washington, New Jersey, and Maryland Dissenting Justices Understand That “Same-Sex Marriage” Is Not What Same-Sex Couples Are Seeking, 45 CAL. W. L. REV. 139, 149 (2008).

13. Brief of Respondents in Opposition at 32, *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144) (“[I]nvalidating Proposition 8 would not require recognition of a new right to same-sex marriage. Instead, it would vindicate the longstanding right of all persons to exercise freedom of personal choice in deciding whether and whom to marry.”).

14. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (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*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

15. See *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997). See also *Lawrence*, 539 U.S. at 593 (Scalia, J., dissenting).

16. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

17. As he did in his dissent in *Lawrence*. *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting) (framing the alluded to fundamental right as “homosexual sodomy”).

18. Over the past decade, same-sex couples have gained recognition of the right to marry in Connecticut, Iowa, Massachusetts, Maine, Maryland, New Hampshire, New York, Vermont, Washington, and Washington D.C. See ME. REV. STAT. tit. 19-A, § 701 (2013) (Maine); MD. CODE ANN., FAM. LAW § 2-201 (West 2013) (Maryland); N.H. REV. STAT. ANN. § 457:1-a (2012) (New Hampshire); N.Y. DOM. REL. LAW § 10-a (McKinney 2011) (New York); VT. STAT. ANN. tit. 15, §

protecting or recognizing same-sex relationships, and thus no substantive due process right for same-sex couples to marry under Justice Scalia’s formulation.

Justice Scalia’s narrowest-definition approach, however, is constitutionally unsound, both in practice and in theory. Given the potential for its invocation in *Perry*, the Court should seize the opportunity to reject it. The basic yet fatal flaw in the logic of this approach is that, when looking to history and tradition to ascertain *what* the alleged substantive due process right is, the narrowest definition also incorporates *who* has previously enjoyed the right’s protection and *who* is seeking it in the case at hand. As Matt Coles of the American Civil Liberties Union has observed, while history arguably guides the “contours” of what liberty rights are protected, it should not serve as “a guide to who gets to exercise those rights.”<sup>19</sup>

The Court’s prior decisions belie this narrowest-definition approach. The Court has applied heightened scrutiny to protect the fundamental right to marriage even for individuals who have historically been denied state recognition of civil marriage. In other words, the right to marriage has not been limited only to those who have historically been able to marry. Were this the case, the Court may not have struck down various restrictive marriage laws:<sup>20</sup> in *Loving v. Virginia*, despite historical condemnation of interracial marriage;<sup>21</sup> in *Zablocki v. Redhail*, despite no history or tradition of protecting the marriage rights of divorced, delinquent fathers;<sup>22</sup> and in *Turner v. Safley*, despite having never before determined that the right to marriage applies to incarcerated persons.<sup>23</sup>

Instead, Coles argues, “once the Court has identified a protected right, the right belongs to everyone,” including those who have not always been able to

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8 (West 2009) (Vermont); WASH. REV. CODE § 26.04.010 (2013) (Washington); D.C. CODE § 46-401 (2010) (Washington D.C.); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 482 (2008) (Connecticut); *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (Iowa); *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 349 (2003) (Massachusetts).

19. Matthew Coles, *Lawrence v. Texas & the Refinement of Substantive Due Process*, 16 STAN. L. & POL’Y REV. 23, 24 (2005). See *Hernandez v. Robles*, 7 N.Y.3d 338, 381 (Kaye, C.J., dissenting) (“Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.”).

20. Coles, *supra* note 19, at 42. See *Hernandez*, 7 N.Y.3d at 382 (Kaye, C.J. dissenting) (“[T]he Supreme Court has repeatedly held that the fundamental right to marry must be afforded even to those who have previously been excluded from its scope—that is, to those whose *exclusion* from the right was ‘deeply rooted.’”).

21. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that anti-miscegenation laws violated the substantive due process right to marriage).

22. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[T]he right to marry is of fundamental importance for all individuals”).

23. *Turner v. Safley*, 482 U.S. 78 (1987); Coles, *supra* note 19, at 34, 49–50. See also Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 424 (2006) (noting that *Turner* and *Loving* both “affirmed a positive fundamental right to marry despite traditions to the contrary for particular classifications of persons.”).

exercise it.<sup>24</sup> The theoretical justification for such an application of fundamental rights is straightforward—equality. If a right is truly fundamental, there should be a strong presumption that everyone is equally entitled to enjoy it. Justice Scalia erroneously conflates equal protection and due process questions by narrowly “defining the underlying right by the group targeted by the law [for denial of the right],” what Professor Sharon Rush describes as the “collapsible error.”<sup>25</sup> Whatever the arguments may be for defining a right as narrowly as Justice Scalia would like, Rush argues, “the right cannot be defined in a way that subsumes the equal protection issue into the substantive due process analysis.”<sup>26</sup>

The Court should begin to correct the narrowest-definition approach in *Perry* by rejecting the false rights dichotomy of marriage and gay marriage. Failure to do so will enable Scalia and his adherents to continue to enshrine histories and traditions of selectively denying fundamental rights, perpetuating discrimination and significantly weakening substantive due process doctrine. Specifically defining the asserted right as “gay marriage” would deny a fundamental right (marriage) to a group (same-sex couples) precisely because they have historically been excluded from exercising that right (getting married), without examining the justifications for perpetuating this unequal access to the right.<sup>27</sup> Even if the Court avoids the substantive due process argument in *Perry* altogether, failure to discredit the “gay marriage” distinction could impact suspect class equal protection analysis by providing a potential rational basis to discriminate against the LGBT community. If marriage and gay marriage are distinct interests, the Court might permit states to rationally deny the latter in order to differentiate and maintain the exclusivity of the former, the traditional institution of marriage to which same-sex couples have historically been denied membership.

In order to correctly examine the fundamental right at stake in *Perry*, the Court should un-collapse the narrow “gay marriage” definitional approach and conduct a standard two-step analysis for substantive due process claims. First, it

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24. Coles, *supra* note 19, at 45–46. See also Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 133 (2007) (“In the Fourteenth Amendment, ‘liberty’ means equal liberty.”).

25. Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 689 (2008) (arguing that the Court conflated substantive due process and equal protection analyses in *Bowers* when it denied the existence of a fundamental right to “homosexual sodomy”).

26. *Id.* at 731–32.

27. For further discussion of this problem, see Erwin Chemerinsky, *Same Sex Marriage: An Essential Step Towards Equality*, 34 SW. U. L. REV. 579, 590 (2005) (“The fact that traditionally, marriage has been between opposite-sex couples doesn’t tell us anything about the characteristics of marriage and why those characteristics have to be limited to opposite-sex couples.”); William M. Hohengarten, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495, 1508 (1994) (“One must look beyond the fact that same-sex couples are currently prohibited from marrying and ask whether this prohibition is reasonably connected to the broader functions and purposes of marriage as a legal relationship.”).

must determine *what* the relevant historic right is without considering *who* has enjoyed it, respecting inherent equal protection principles by defining the right in an actor-neutral manner. Thus, the fundamental right to *marriage*, not gay marriage, is the correct formulation of the asserted right. Once marriage is established as a fundamental right, the Court can apply the appropriate level of scrutiny to determine whether the state has provided compelling justifications for denying the right to the specific group seeking to exercise it.<sup>28</sup>

Were the Court to dispense with “gay marriage” and resolve the narrowest-definition problem, the key question it would then face is whether or not marriage is in fact a fundamental right meriting heightened scrutiny. This question is not as simple as it seems; nor is its answer.

### III.

#### WHAT, EXACTLY, IS THE RIGHT TO MARRIAGE?

“In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State.”<sup>29</sup>

The recognition of (correctly defined) substantive due process rights typically shields fundamentally important areas of privacy and personal autonomy from unwelcome government intrusion.<sup>30</sup> For example, the Court has protected the rights of individuals to make decisions regarding matters of private sexual intimacy and procreation,<sup>31</sup> childrearing and familial affairs,<sup>32</sup> and education<sup>33</sup> without interference by the state.

The Court has professed the importance of marriage as a foundation to many of these personal liberty interests,<sup>34</sup> several of the state high courts to hear marriage equality cases have done so as well.<sup>35</sup> The state-created institution of

28. See Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1116 (2004) (contrasting *Lawrence* with the courts’ typical approach of first asking whether a right is fundamental, and second whether the state’s interest is sufficient).

29. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (2003).

30. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 558 (2003) (declaring, in the first line of the majority opinion, that “[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places”).

31. *Id.* (private consensual sodomy); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (procreation).

32. *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494 (1997) (family living arrangements).

33. *Pierce v. Soc’y. of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) (private schooling); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (foreign language education).

34. *Cleveland Board of Ed. 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.”). See also *Moore*, 431 U.S. at 499; *Casey*, 505 U.S. at 834; *Griswold*, 381 U.S. at 486; *Skinner*, 316 U.S. at 541; *Meyer*, 262 U.S. at 399; *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

35. *Hernandez v. Robles*, 7 N.Y.3d 338, 363 (2006); *In re Marriage Cases*, 183 P.3d 384,

civil marriage, however, does not fit comfortably in a liberty-based framework of substantive due process rights. Unlike other fundamental rights that shield private activity and choices from “unwarranted government intrusions,”<sup>36</sup> the marriage right at stake in *Perry* concerns government recognition and approval of a marital relationship and access to the state-created benefits and protections that it provides. It seems logically inconsistent to argue that California must abdicate any control over such a heavily-regulated institution of its own establishment.

Furthermore, it is unclear that civil marriage need exist at all. The Court has generally avoided identifying any “affirmative obligations on the State” under substantive due process that would require it to offer civil marriage,<sup>37</sup> and Professor Cass Sunstein has argued that “the state could abolish the official institution of marriage tomorrow.”<sup>38</sup> Ted Olson, attorney for the respondents in *Perry*, conceded as much when asked by District Judge Vaughn Walker whether “the state [could] get out of the marriage license business,” replying “[y]es, I believe it could.”<sup>39</sup> It seems even more illogical that the government might *eliminate* a right considered to be fundamental, let alone interfere with it.

These inconsistencies suggest that civil marriage should not be scrutinized as a fundamental substantive due process right, at least in the sense that state and federal governments are required to recognize or support such relationships. Although this may concern marriage equality advocates, it should not be surprising—there is a strong history of debate within the LGBT rights movement over whether to advocate for marriage rights as in *Perry*, or instead fight *against* civil marriage and state-preferred relationships altogether.<sup>40</sup>

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425–26 (Cal. 2008) (“[T]he right to marry is a basic, *constitutionally protected* civil right . . . [it] embodies fundamental interests of an individual that are protected from abrogation or elimination by the state”); *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 326 (2003) (arguing that the “right to marry—or more properly, the right to choose to marry” merits heightened scrutiny).

36. *Lawrence*, 539 U.S. at 558.

37. *DeShaney v. Winnebago Cnty.*, 489 U.S. 189, 195–96 (1989) (“[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”). *See also* Patricia A. Cain, *Imagine There’s No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996).

38. Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2094 (2005).

39. Transcript of Proceedings at 19:23–25 (Plaintiffs’ Opening Statement), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-2292).

40. *See, e.g.*, Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1414 (2004) (arguing that gay rights movement, including marriage equality, “privileges [normative] privatized and domesticated rights and legal liabilities”); Jessica Knouse, *Civil Marriage: Threat to Democracy*, 18 MICH. J. GENDER & L. 361 (2012) (arguing that civil marriage, by privileging sexual partners, is undemocratic and should be abolished); Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage”*, 79 VA. L. REV. 1535, 1536 (1993) (“I believe that the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays



Given the language in prior opinions professing the importance of marriage, the Court must find another way to frame the strong interest in the civil institution, if not as a fundamental right. Professors Nelson Tebbe and Deborah Widiss offer such an alternative, defining the substantive right to marry instead as an equality-based right to "equal access."<sup>41</sup> The government, they argue, is not initially obligated to recognize civil marriages. It may choose to do so, but it need not, and could even take away marriage recognition previously granted. However, given the traditional importance and value of marriage to exercising other autonomy-based fundamental rights, if the government does offer civil marriage recognition to some members of society, it creates a right to "equal access" to the institution and its attendant government-created benefits.<sup>42</sup> Once marriage is recognized for some, the government cannot exclude others, in this case same-sex couples, from marrying "without providing an adequate justification" that meets heightened scrutiny standards.<sup>43</sup>

Reconceptualizing the right to marriage in this way requires analysis that respects the fundamental importance of the institution while acknowledging the government's discretion to deny marriage, equally, to all. Rather than engaging in the traditional substantive due process inquiry, the Supreme Court should instead analyze *Perry* and other restrictions on who can get married through the fundamental rights branch of equal protection doctrine.<sup>44</sup> As articulated in *Zablocki*,

[W]hen a statutory classification significantly interferes with the

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the promise of both lesbian and gay liberation and radical feminism."); Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 819–20 (2002) (arguing that marriage would remain an unequal institution even if gays and lesbians could marry their same-sex partners).

41. Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1377 (2010). See also Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 43–44 (1975) ("[T]he constitutional values of equality and liberty are fundamentally linked by the notion that equal access to certain institutions and services is a prime component of any meaningful liberty.").

42. As noted *supra* note 37, marriage may be relatively unique in meriting this scrutiny. Whether other government-created or regulated institutions or benefits (for example, public housing, healthcare, or voting) should be subject to similar heightened equal-access scrutiny is beyond the scope of this comment.

43. Tebbe & Widiss, *supra* note 41. See also Sunstein, *supra* note 38, at 2083 ("[S]tates are under no obligation to create the relevant institutions; but once the state creates those institutions, the Constitution imposes large barriers to government efforts to deny people access to them.").

44. Sunstein, *supra* note 38, at 2097. See also Tebbe & Widiss, *supra* note 41, at 1377; Franke, *supra* note 40, at 1414 ("To the extent that same-sex couples are denied the ability to marry, that denial best surfaces in law as a problem of equality."); Rush, *supra* note 25, at 698 ("Laws that classify non-suspect groups also generally must meet heightened scrutiny when the laws intersect with a fundamental right."). For more on the development of this branch of equal protection, see Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 26, 31 (1977) (arguing that marriage is a fundamental *interest* as opposed to a fundamental *right*).

exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.<sup>45</sup>

Though the Court has been remarkably unclear in its marriage decisions, an equal protection fundamental interest approach does not appear to be inconsistent with prior cases. In *Zablocki*, the Court did not articulate the distinction between a right to “marriage” and a right to “access,” and the majority and dissent disagreed about whether equal protection or substantive due process governed the case.<sup>46</sup> The majority ultimately concluded that because “the right to marry is of fundamental importance *for all people*,” equal protection heightened scrutiny applied to the restrictions placed on delinquent fathers to getting married.<sup>47</sup> The Court has engaged in similar equal protection analysis to strike down laws restricting access to marriage in prison,<sup>48</sup> as well as access to divorce for indigent married couples who could not afford court fees.<sup>49</sup> This framework could thus be used to analyze the more properly defined right to *equal access* to marriage, rather than the right to marriage in and of itself.

An equal access framework for marriage resolves the incongruity with the liberty principles of substantive due process while avoiding the potentially complex and controversial suspect status determinations required of group-based equal protection analysis.<sup>50</sup> *Zablocki* and *Turner* did not involve suspect classes, but delinquent fathers and incarcerated people nevertheless merited heightened equal protection scrutiny because the laws interfered with the fundamental interest in accessing civil marriage. Even if the Court were to reject heightened scrutiny for sexual orientation in *United States v. Windsor*, the constitutional challenge to the Defense of Marriage Act that will be argued the day after *Perry*,<sup>51</sup> it could still apply stricter scrutiny under this equal protection fundamental interest approach, increasing the likelihood that same-sex couples

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

46. *Id.* at 386. In his concurrence, Justice Stewart argues precisely because the states might regulate or eliminate marriage, there is not a substantive due process right but rather a federal “privilege.” *Id.* at 392.

47. *Id.* at 383–84 (emphasis added).

48. *Turner v. Safley*, 482 U.S. 78, 95 (1987).

49. *Boddie v. Connecticut*, 401 U.S. 371, 382–83 (1971) (arguing that States maintain “complete” power over marriage and divorce subject to equal protection principles). In his concurrence, Justice Brennan specifically argues that “this case presents a classic problem of equal protection of the laws.” *Id.* at 388 (Brennan, J., concurring).

50. For example, Justice Scalia prefers equal protection to substantive due process, *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (“Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”), and Professor Yoshino has argued that the Court suffers from “pluralism anxiety” and might be reluctant to extend heightened equal protection to gays and lesbians, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 751 (2011).

51. *United States v. Windsor*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307), *granting cert* to 699 F.3d 169 (2d Cir. 2012).

would gain access to marriage nationwide.

In order to apply an equal protection fundamental interest framework successfully, however, the definitional problem discussed in Part II must be resolved. Professors Tebbe and Widiss argue that “regardless of whether the fundamental interest in civil marriage is initially defined with greater or lesser specificity, the equality value requires exclusions from that institution to be justified.”<sup>52</sup> Perhaps they give Justice Scalia too much credit. The marriage interest in *Perry* must be framed generally enough, avoiding the pitfalls of the narrow actor-inclusive approach, so as not to automatically preclude equal protection analysis from the start.

Indeed, the equal protection fundamental interest approach makes explicit the equality principles implicit in substantive due process by giving heightened protection to fundamental rights regardless of who is asserting them. Defining the substantive right at stake in actor-specific terms precludes equality analysis and distorts both doctrines. For example, if the Court narrowly defines the right asserted as “gay marriage,” there is no longer a fundamental rights equal protection violation to scrutinize—even if gay marriage *is* determined to be such a fundamental right. In those states that forbid “gay marriage,” *no one* is allowed to marry a same-sex partner, and there is no selective exclusion from the right. The only remedy available is to find a substantive rights violation and conclude that everyone is unconstitutionally denied the right to gay marriage, a highly unlikely prospect. Instead, for the new framework to function properly, the fundamental interest must be framed in an actor-neutral way, as simply “marriage.” Only then can the Court determine whether the classification restricting same-sex couples from accessing civil marriage violates the special equality protection due this fundamental interest.

Ultimately, adopting this new framework and a refined definition of the marriage right would not only correct and strengthen the doctrine—it would harness the power of both equal protection and substantive due process to provide even stronger arguments advancing marriage equality.<sup>53</sup> As the Court noted in *Lawrence*, these doctrines are inseparably linked, and a strong substantive due process decision “advances both interests,” liberty and equality.<sup>54</sup> Resolving the definitional problems of substantive due process rights would maintain protection of the traditional spheres of liberty and marital autonomy. It would also provide an equality-based, forward-looking “remedy [for longstanding] governmental deprivation of rights” to those historically left out of the institution of civil marriage, starting with, but not limited to, same-sex

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52. Tebbe & Widiss, *supra* note 41, at 1428–29.

53. See, e.g., Tebbe & Widiss, *supra* note 41, at 1391; Marcus, *supra* note 23, at 427–28 (2006) (“[T]he strongest case for marriage rights will integrate substantive due process principles [with equal protection].”).

54. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

couples.<sup>55</sup>

#### IV. CONCLUSION

Though the Court may feel practically constrained in its decision, taking advantage of the opportunity that *Perry* presents would have important doctrinal benefits. First, it would allow the Court to address the “collapsible error” endemic in Justice Scalia’s overly narrow approach to defining substantive due process rights, correcting a discriminatory practice and reaffirming the universality of fundamental constitutionally protected interests. It could then clarify muddled precedent and articulate the right at stake in government-created civil marriage—not a substantive right to recognition, but rather a right to equality of access to this fundamental social institution.

The Court can resolve the collapsible error and marriage jurisprudence problems by examining whether the exclusion of same-sex couples from state “marriage” laws violates the fundamental interest branch of equal protection doctrine. Such scrutiny would reinvigorate substantive due process doctrine, bringing together the powers of actor-neutral fundamental rights and equal protection doctrine to provide a remedy for those whose rights have historically been denied.

The result of such analysis may be nationwide recognition of marriage rights for same-sex couples. But not necessarily. The equal protection fundamental interest approach merely posits that if civil marriage is going to exist, equal access is required (subject to heightened scrutiny of exclusions). However, it need not continue to exist. When faced with the sudden prospect of recognizing the marriages of same-sex couples, states may choose to reconsider the value of government regulation of private relationships, and get out of the marriage business altogether. I suspect even those states most staunchly opposed to marriage equality would be reluctant to do so, but it is possible.<sup>56</sup>

The Court’s adoption of an equal protection fundamental interest approach in *Perry* could, however, open other avenues of litigation that might lead to marriage deregulation. By removing the “who” and subjecting marriage restrictions on same-sex couples to heightened equal protection scrutiny, other individuals might question the still limited view advanced in *Perry* of marriage as a monogamous romantic relationship between two non-related adults, same-

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55. Tebbe & Widiss, *supra* note 41, at 1382. See also Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988) (comparing the backward-looking Due Process Clause with the forward-looking Equal Protection Clause).

56. See Transcript of Proceedings at 25:4–6 (Plaintiffs’ Opening Statement), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-2292) (Ted Olson stating that California could, but is unlikely, to get out of the marriage regulation business).

sex or otherwise. States may need to defend against challenges to other marriage restrictions, and courts might ultimately reexamine whether historically compelling state interests in these other exclusions also survive heightened equal protection fundamental interest scrutiny.

As for the outcome in *Perry*—adopting the equal access approach to marriage would likely lead the Court to apply heightened scrutiny to California’s denial of access to marriage to same-sex couples, and strike down Proposition 8 as a violation of the Equal Protection Clause. Any state choosing to sanction civil marriages would thereafter be required to do so for the marriages of same-sex couples as well. After all, as the District Court noted, the *Perry* plaintiffs and thousands of same-sex couples nationwide seek nothing more than recognition of their relationships “for what they are: marriages.”<sup>57</sup>

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57. *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 993.