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## REINHARDT IS RIGHT; PERRY IS A CASE ABOUT CALIFORNIA

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In *Perry v. Brown*,<sup>1</sup> Judge Stephen Reinhardt, writing for the Ninth Circuit, reasoned that California's Proposition 8 violated the federal Equal Protection Clause because it took the right to marry away from same-sex couples.<sup>2</sup> California, unlike any other state, allowed same-sex couples to marry and then withdrew that right. According to the *Perry* Court, the fact that California took marriage away from same-sex couples is critical to the constitutional analysis and thus to the outcome. Since California is the only state to have first granted and then withdrawn the right to marry, the Court says several times, the decision is only applicable to California.<sup>3</sup>

Is the Court right about that? The answer to that question makes an enormous difference. As I'll discuss at the end of this comment, if *Perry* really only applies to California, it is a far less compelling case for Supreme Court review. Moreover, even though the Court has taken the case, the resulting decision could well be quite limited no matter which way it comes out. More on that later. First, on to the central question to which this comment is addressed: Is the *Perry* decision really limited to California?

### I.

#### THE CALIFORNIA CONTEXT *COULD* MAKE A DIFFERENCE.

There are two ways in which the unique fact that California took marriage away from same-sex couples could be critical to the constitutional analysis of Proposition 8. Context, to modify Judge Reinhardt, *may* matter.<sup>4</sup> First, the withdrawal could call-up a different constitutional rule than a denial would. To give an example, if you are arrested for protesting on public property, it makes a difference if you were protesting in a park—a “public forum”—or on the grounds of the county jail, which is not a “forum” at all. Different constitutional rules apply. On the other hand, it makes no difference in terms of the rule that applies if you protested in a park or on a sidewalk, both public forums.<sup>5</sup>

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1. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

2. *Id.* at 1096.

3. *See, e.g., id.* at 1064, 1076, 1096.

4. *Id.* at 1079–80 (“The context matters. Withdrawing from a disfavored group the right . . . is different from declining to extend that . . . [right] in the first place . . . . The action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is.”).

5. *See Perry Educ. Ass'n v. Perry*, 460 U.S. 37, 45–46 (1983) (explaining when a public

Second, the fact that California took marriage away could be a fact, which, though it does not call-up a different constitutional doctrine, makes the constitutional analysis come out differently. To take another example, if you were soliciting contributions for a charity, you might consider going door to door and you might consider approaching folks at the county fair. Both activities would be governed by the “reasonable time, place, manner” doctrine. However, a ban on door-to-door soliciting will not survive constitutional review, while a rule insisting that solicitations at a state fair happen only in a fixed booth will.<sup>6</sup> Different facts can lead to different results.

## II.

### THE CALIFORNIA CONTEXT *DOES* MAKE A DIFFERENCE: IRRESPONSIBLE PROCREATION.

The most important justification offered for Proposition 8 and for constitutional and statutory bans on marriage in other states is the inaptly named “irresponsible procreation” argument.<sup>7</sup> The idea is that society puts significant pressure on heterosexual couples to get married—more polite formulations say it provides “incentives”—and puts pressure on married couples not to divorce. The legal structure is, of course, part of these pressures as the law protects couples who marry, and divorce is complicated and scary. But the law is only part of the pressure. Ask your mother. Since heterosexual couples are pressured to get married and stay married, the odds are that when they have children—at times without planning to—the kids will be born into and raised in two parent households. Two parent households are better for kids, the argument goes, something that the research strongly supports.<sup>8</sup>

This is the most important justification for laws banning same-sex marriage because it is the rationale that most of the courts that have upheld these laws relied on or relied on most heavily.<sup>9</sup> There is also some truth to it. Society does

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space constitutes a “forum” and when it does not).

6. *Compare* *Heffron v. Int’l Soc. for Krishna Consciousness*, 452 U.S. 640 (1981) (holding that a rule prohibiting religious solicitation at a state fair was a legitimate time, place, or manner restriction and therefore did not violate the First Amendment), *with* *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980) (holding that a law prohibiting certain kinds of door-to-door solicitation by charitable organizations was overbroad and thus violated the First and Fourteenth Amendments).

7. *See* Opening Brief of Defendant-Intervenors-Appellant at 1–6, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 10-16696).

8. *See* SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HELPS, WHAT HURTS?* (1994) (arguing, in part, that children who grow up in single-parent households are generally worse off than those who grow up with two parents; this may well reflect the economic status of single parents more than anything else, but for these purposes, that doesn’t matter). For another example of the argument, *see* Opening Brief of Defendant-Intervenors-Appellant, *supra* note 7, at 77–93.

9. *See, e.g., Hernandez v. Robles*, 855 N.E.2d 1, 5–8 (N.Y. 2006) (holding that recognizing same-sex marriage is not compelled by New York law because the New York Legislature could

pressure couples to marry and raise children. It is also on this justification that the supporters of Proposition 8 largely rested their defense of the measure.<sup>10</sup>

One of the most interesting things about this defense is a silent concession: the only way that the arguments for excluding same-sex couples from marriage could possibly be successful would be if these arguments were considered in a hypothetical world of pure logic, divorced from everything we know about same-sex relationships, raising children, and marriage. That silent concession comes in the Proponents' departure from the classic litigator's approach to an Equal Protection argument. That approach involves: 1) arguing for the type of analysis of the classification or tier of scrutiny you think the Court should apply, and 2) arguing that you win no matter what type of analysis is used.<sup>11</sup> The "upper" tiers of review—intermediate and strict scrutiny—turn on the real purposes for a law and the evidence that the classification (treating two groups differently) will help advance it. On the lowest tier, "rational basis" review, a federal court will uphold a law as long as any rational person could think the classification would help achieve some conceivable legitimate aim. No evidence is needed to defend a law. Yet, instead of arguing that they win no matter which tier of scrutiny applies, the proponents of Proposition 8 rest their entire case on convincing the Court that minimum "rational basis" review, under which discrimination against gay people is presumed to be constitutional in almost all circumstances, applies. They don't even suggest in passing that Proposition 8 could survive if any form of analysis that takes some account of the real world is used.<sup>12</sup>

This is at least partly because the most straightforward version of the "procreation" justification—that marriage was configured when no one thought about same-sex couples at all, much less about same-sex couples raising children—was not available to the supporters of Proposition 8. The days of invisible gay relationships and families were long gone by 2008, when Proposition 8 took effect. So the Proposition 8 supporters built their argument this way: 1) Society has an interest in seeing that children are raised in stable homes with two parents because when they are not, society often has to pay to support them and they do not do as well; 2) heterosexual couples have children as the "often unintended result of even casual sexual behavior" while same-sex

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find that the irresponsible procreation argument justified limiting marriage to heterosexual couples); *Andersen v. King Cnty.*, 138 P.3d 963, 968–69 (Wash. 2006) (holding that DOMA is constitutional as it is rational for the legislature to believe that limiting marriage to heterosexual couples furthers the state's legitimate interest in procreation); *Conaway v. Deane*, 932 A.2d 571, 630–31 (Md. 2006) (holding that the state has a legitimate interest in protecting marriage between heterosexual couples because only they are capable of producing biological children).

10. See Opening Brief of Defendant-Intervenors-Appellant, *supra* note 7, at 1–6, 77–93.

11. See, e.g., Plaintiff's Memorandum of Law in Support of Summary Judgment, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10-8435) (arguing that DOMA is subject to and cannot survive heightened scrutiny, and that DOMA even fails rational basis review).

12. See Opening Brief of Defendant-Intervenors-Appellant, *supra* note 7, at 70–75.

couples do not; and, therefore, 3) it would be rational for the state to “make special provision through the institution of marriage for the unique procreative risks posed by sexual relationships between men and women.”<sup>13</sup>

And it is on this justification that Judge Reinhardt most persuasively writes that, for constitutional purposes, withdrawing the right to marry is not the same as refusing to grant it in the first place. As the Court put it, arguing that it would be rational to include opposite-sex couples in marriage because opposite-sex couples are more likely to accidentally create children is, at best, an explanation of why a state might have initially defined marriage to include heterosexual couples only. But, without something more, it is not an explanation of why a state would decide to kick same-sex couples out of an institution that already included them.<sup>14</sup>

It would only have been possible to argue that marriage is the antidote to the risk of “procreation by accident”<sup>15</sup> and therefore permissible for the state to withdraw marriage from same-sex couples if their inclusion could rationally be thought superfluous. However, even the supporters of Proposition 8 did not make that argument because no one could rationally think that same-sex couples do not raise children who also benefit from their parents’ marriage. More tellingly perhaps, no one could rationally think that hedging the risk of accidental procreation is the only benefit of marriage. Indeed, the supporters of Proposition 8 conceded (as they really had to) that same-sex couples have and raise children, and that marriage also provides “official recognition” to the “deep emotional bonds and strong commitments” of loving adult relationships.”<sup>16</sup>

So the Defendant-Intervenors made the crux of their defense of Proposition 8 a justification, which, whatever sense it might or might not make as an explanation for not including same-sex couples in marriage initially, simply does not explain kicking them out once they were in. The justification does not explain what California actually did.

### III.

#### THE NINTH CIRCUIT’S RATIONAL BASIS ANALYSIS IS LEGITIMATE

##### *A. Rational Basis Review is Still Review.*

For the court to be right about all this, however, minimum scrutiny under

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13. *Id.* at 87. *See also* Reply Brief of Defendant-Intervenors-Appellant at 52–54, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 10-16696) (arguing that heterosexual behavior outside of marriage creates a substantial risk for irresponsible procreation and therefore limiting marriage to heterosexuals is legitimate).

14. *Perry v. Brown*, 671 F.3d 1052, 1087–88 (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. Opening Brief of Defendant-Intervenors-Appellant, *supra* note 7, at 86–87.

16. *Id.* at 6, 84.

the Equal Protection Clause must actually insist on a logical connection between the classification—here excluding same-sex couples from marriage—and a legitimate state goal. This was not always the case. There was a time when the Supreme Court suggested that rational basis really wasn't any sort of review at all and that it required little or nothing in the way of justification. *Williamson v. Lee Optical* suggests that all Equal Protection requires is that the state think there might be a difference between two groups it treats differently.<sup>17</sup> But when it decided *Williamson* and its Due Process sibling *Ferguson v. Skrupa*,<sup>18</sup> the Court was at the height of its recoil from the excesses of the activist conservative court of the early 20<sup>th</sup> Century.<sup>19</sup> Both in what it says and what it does, the Court has come back to equilibrium since. As the Court put it in *Romer v. Evans*, even using the “most deferential” of standards under the Equal Protection Clause,<sup>20</sup> there must be an explanation of how the classification the government drew could be thought to advance a legitimate purpose of the law.<sup>21</sup> That's not just rhetoric. In much of its modern Equal Protection law, the Court has taken pains to explain the rational connection between the classification and the purpose of the law—just how it could be thought the government's treatment of the disadvantaged group could promote a possible purpose of the law.<sup>22</sup> That is true even in cases involving economic regulations and tax schemes, areas where the Court says Congress, legislatures, and administrators should be given the greatest deference about where to draw lines.<sup>23</sup>

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17. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

18. *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

19. *Lochner v. New York*, 198 U.S. 45 (1905), gave its name to an era in which the Court aggressively used the idea that “liberty of contract” was implicitly protected by due process to strike down laws that regulated economic life (the “*Lochner* era”). That era came to a decisive end with *Nebbia v. New York*, 291 U.S. 502 (1934), which held that the due process clause does not implicitly protect freedom of contract, and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which upheld the kind of wage and hours law that *Lochner* and its progeny had struck down. By the early 1960s, the Court was in full retreat from *Lochner*, rejecting in *Ferguson v. Skrupa*, 372 U.S. 726, due process challenges to economic regulation with essentially no review at all. *Id.* at 730–32. Although due process was the primary doctrinal engine of the *Lochner* era, the court's retreat took in its equal protection decisions as well. *See, e.g., id.* at 732–3. Since then, however, under Equal Protection, the Court has been inclined, even under rational basis review, to insist on at least a reasoned connection between a classification and some imaginable legitimate purpose. *See infra* notes 22 and 23. That's far more than it asked in *Ferguson* and *Williamson*.

20. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

21. *Id.* at 634–35.

22. *See, e.g., Heller v. Doe*, 509 U.S. 312, 321–28 (1993) (finding that it was rational for Kentucky to use a lower standard of proof in commitment hearings for people with mental handicaps due to easier diagnoses and predictability of dangerousness, as compared with people with mental illness; after insisting it is imposing the most deferential standard, the Court takes great pains to show a connection between the classification and a legitimate purpose).

23. *See, e.g., FCC v. Beach Commc'ns*, 508 U.S. 307, 317–20 (1993) (finding two conceivable purposes for the challenged regulation and carefully explaining how the classification could connect to a legitimate purpose); *Nordlinger v. Hahn*, 505 U.S. 1, 11–14 (1992) (finding at least two rational reasons to uphold California's system of taxing similar properties differently and

There is a legitimate debate about whether in some cases the Court has gone further, holding the government to its articulated purposes instead of exploring all conceivable purposes, and in some cases perhaps even insisting on evidence to support the rationale. The Court appears to deny that it has a more demanding form of rational basis review.<sup>24</sup> But it is difficult to argue that in some cases the Court has not at a minimum held the government to its articulated purposes when there is evidence that a classification might have been adopted *because* it disadvantages one group of people.<sup>25</sup> A powerful case can be made that the Court should not make up additional rationales for classifications once there is evidence that the classification was adopted in order to treat one group differently. Instead, classifications proven to have been adopted for a discriminatory purpose should simply be struck down. The Court has not yet decided that question though.<sup>26</sup>

As much fun as it might be to wade into this debate about the existence or legitimacy of a different rational basis analysis for a classification “undertaken for its own sake,”<sup>27</sup> *Perry* gives us no occasion to do that. The Ninth Circuit does not limit its review to the purposes and rationales offered by the supporters of Proposition 8. It takes up those offered by the legion of *amici* and nearly anything else it can get its hands on.<sup>28</sup> While the District Court compiled a huge record, the Circuit does not rely on it at all in concluding that “accidental procreation” cannot explain taking marriage away from same-sex couples.<sup>29</sup>

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taking care to explain how the difference could advance a legitimate purpose).

24. See *Heller*, 509 U.S. at 321 (asserting that in previous cases the Court did not apply a different type of rational basis review). But see *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (claiming that at times, there exists a more searching rational basis review when a law exhibits a desire to harm a politically unpopular group).

25. See, e.g., *U.S.D.A. v. Moreno*, 413 U.S. 528 (1973) (finding the Food Stamp Act's denial of benefits for households including non-family members unconstitutional because it was not rationally related to its stated purposes of maintaining adequate nutrition, stimulating the agricultural economy, or minimizing fraud); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (finding the requirement of a permit for housing for mentally ill patients unconstitutional where there was no rational basis in record for believing that group home would pose any special threat to city's legitimate interests and where the requirement appeared to rest on an irrational prejudice against mentally handicapped people).

26. Compare *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367–68 (2001) (plurality opinion) (arguing that even with evidence of a discriminatory purpose, different treatment is constitutional under rational basis review if a legitimate purpose could nonetheless be imagined), with *Bd. of Trustees of the Univ. of Ala.*, 531 U.S. at 381 (Breyer, J., dissenting) (arguing that discrimination based on a desire to harm a politically unpopular group and discrimination based on fear and negative attitudes violate Equal Protection regardless of whether a legitimate rationale could be made up), and *Bd. of Trustees of the Univ. of Ala.*, 531 U.S. at 375–76 (Kennedy, J., concurring) (expressing some reservations about the plurality opinion, but not addressing the issue of inventing rationales for purposely discriminatory laws).

27. *Romer*, 517 U.S. at 635.

28. See *Perry v. Brown*, 671 F.3d 1052, 1091–94 (9th Cir. 2012), cert. granted sub nom. 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

29. *Id.* at 1086–88.

*B. The Other Rationales' Fall Under Rational Basis.*

The Circuit relies on one outside source—the state of the law in California—to reject one of the alternative arguments offered to justify Proposition 8: that the purpose of Proposition 8 was to increase the likelihood that children would be raised by heterosexual couples. The Court rejects this “more heterosexual parents” argument because no one could rationally think that was the purpose of Proposition 8 given that California law treated same-sex and opposite-sex couples identically as parents, both before and after Proposition 8.<sup>30</sup> This is perfectly conventional rational basis analysis as well. Rational basis does not require evidence to demonstrate that the factual assumptions on which a justification rests are real. However, a justification cannot be said to be rational—even reasonably conceivable—if it relies on assumptions about the law or the world that are plainly wrong.<sup>31</sup>

After addressing the “irresponsible procreation” and the “more heterosexual parents” arguments, the *Perry* opinion dispatches with the one other rationale offered by the supporters of Proposition 8—that it was designed to give California room to approach the issue of marriage for same-sex couples “with caution”—by explaining that a constitutional ban on something is hardly the way to “go slowly.”<sup>32</sup> It then goes on to other rationales suggested by *amici* or which it makes up, including “protecting religious freedom,” “preventing children from being taught about marriage for same-sex couples,” and “restoring the old definition of marriage.”<sup>33</sup> Because it does no more than search for a rational connection between taking marriage away from same-sex marriage couples and a legitimate governmental interest, *Perry* is, when all is said and done, a pretty conventional “minimum scrutiny, rational basis” case.

Not all of these rationales are rejected by the Court for reasons that would apply only in California. The Court’s reason for rejecting the “more heterosexual

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30. *Id.* at 1086–87.

31. For a good example, see *Nordlinger v. Hahn*, 501 U.S. 1, 14–16 (1992), where the Court upheld a tax system which revalued property only on sale, leaving comparable property valued much lower, even though it had struck down a similar scheme just three years earlier in *Allegheny Pittsburgh Coal Co. v. County Comm’n*, 488 U.S. 336, 345 (1989). Obviously, in a purely abstract sense, if a rational explanation could be imagined in California, it could be imagined in Pennsylvania as well. Yet the California county in *Nordlinger* could do what the West Virginia county in *Allegheny* could not, the Court explained, because the West Virginia constitution required property to be taxed uniformly at market value. That made it impossible to draw a “plausible inference” that the disparity in valuations was aimed at getting the benefits of an acquisition value tax scheme, a purpose allowed—in fact required—by the California constitution.

32. *Perry v. Brown*, 671 F.3d at 1089–91. For an example of a real “go slowly” amendment, see HAW. CONST., art.1, § 23 (“The legislature shall have to power to reserve marriage to opposite sex couples.”).

33. *Perry v. Brown*, 671 F.3d at 1091–93.

parents” rationale is not a California-specific rationale—it applies to all the states with full civil unions, eight at last count.<sup>34</sup> The “go slowly” and “protecting religious freedom” arguments would also apply to all other state constitutional amendments banning same-sex marriage.<sup>35</sup> So at least some of the *Perry* decision’s holdings are not unique to California. Still, since the holding on the “procreation” rationale is California-specific, the decision would not control other cases in the Ninth Circuit were it to stand. Since “procreation” is the most important rationale to both supporters of excluding same-sex couples from marriage and sympathetic lawyers and judges,<sup>36</sup> a Supreme Court decision on this “California only” analysis of the argument would have a somewhat limited effect.

#### IV.

##### ANOTHER REASON WHY PROPOSITION 8’S CONSTITUTIONAL INVALIDITY IS UNIQUE TO CALIFORNIA.

There is also an analysis of Proposition 8 that strongly suggests that it is unconstitutional under the Equal Protection Clause for reasons unique to California. This would obviate the need to look at other rationales one might be able to imagine for taking marriage away from same-sex couples. In California, the state legislature decided that for every purpose the legal institution of marriage serves, there is no difference between same-sex and opposite-sex couples.<sup>37</sup> More critically, the California Constitution, as authoritatively construed by the state’s high court, requires that the state give exactly the same treatment to the relationships of same-sex and opposite-sex couples.<sup>38</sup> That ruling was reaffirmed after Proposition 8 passed.<sup>39</sup> The supporters of Proposition 8 not only accept those determinations, in the election, they trumpeted the fact that same-sex couples would continue to be entitled to precisely the same legal

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34. *Id.* at 1086–87. In addition to California (Cal.Fam.Code § 297, et.seq.), in the Ninth Circuit, Hawaii (HRS § 572B-1, et. seq.), Nevada (N.R.S. 122A.010, et.seq.), and Oregon (O.R.S. § 106.300, et. seq.) recognize full civil unions, as do Delaware (13 Del.C. § 201, et. seq.), Illinois (750 ILCS 75/1, et.seq.), New Jersey (N.J.S.A. 37:1–28, et seq), and Rhode Island (R.I. Gen.Laws 1956, § 15-3.1-1, et. seq.).

35. *See Perry v. Brown*, 671 F.3d at 1089–91 (explaining the “go slowly” and “protect religious freedom” arguments).

36. Opening Brief of Defendant-Intervenors-Appellant, *supra* note 7.

37. CAL. FAM. CODE § 297.5. *See also In re Marriage Cases*, 183 P.3d 384, 415 (2008) (explaining that the goal of the Domestic Partner Act was to equalize the status of registered domestic partners and married couples).

38. *See In re Marriage Cases*, 183 P.3d at 855–56 (holding that “retention of the traditional definition of marriage does not constitute a state interest sufficiently compelling . . . to justify withholding that status from same-sex couples” and therefore that excluding same-sex couples from marriage is unconstitutional.)

39. *See Strauss v. Horton*, 207 P.3d 48, 77 (2009) holding that the constitution gives same-sex couples possess the “the core set of basic *substantive* legal rights and attributes traditionally associated with marriage.”).



treatment as heterosexual married couples.<sup>40</sup> So the state of California and the supporters of Proposition 8 effectively concede that for all of the tangible purposes the legal institution of marriage serves, same-sex and opposite-sex couples must be treated the same.

The familiar formulation of what the Equal Protection Clause demands of state government is that it not treat differently “persons who are in all relevant respects alike.”<sup>41</sup> The measure of whether two persons are alike or different in “relevant respects” is whether a purpose of the law would be achieved by treating them differently or the same.<sup>42</sup> (This is the inquiry at the heart of all Equal Protection analyses—the differences between the three “tiers” of scrutiny reflecting differences in deference are dictated not by any difference in the meaning of equality, but by the proper role of the Court).<sup>43</sup> In California, every purpose of marriage law, save possibly one, is served by treating same-sex and opposite-sex couples the same. That is not a matter of assertion; it is a matter of state constitutional law.<sup>44</sup> Once the state (here the supporters of Proposition 8 acting on the state’s behalf) concedes that same-sex and opposite-sex couples are “alike in relevant respects,” different treatment is simply not allowed. One can debate whether Colorado’s Amendment 2—which prohibited civil rights laws protecting lesbians, gay men, or bisexuals—was clearly a violation of Equal Protection “in the most literal sense,” as the Supreme Court held that it was.<sup>45</sup> However, Proposition 8, which does nothing more than treat concededly similarly situated groups differently, plainly is.

The one “possible” purpose of Proposition 8 divorced from what the legal institution of marriage does is suggested by the supporters of Proposition 8 themselves. Both in the Voter Information Guide for the election and in their arguments to the Ninth Circuit, they said that the purpose of Proposition 8 is simply to give the people what they want: marriage defined as between “a man and a woman.”<sup>46</sup> But a constitutional command of equal treatment, while it may

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40. See *Argument in Favor of Proposition 8*, in CALIFORNIA GENERAL ELECTION OFFICIAL VOTER INFORMATION GUIDE, 56 (Nov. 2008) (“Proposition 8 doesn’t take away any rights or benefits of gay or lesbian domestic partnerships. Under California law, ‘domestic partners shall have the same rights, protections and benefits’ as married spouses. (Family Code sec. 297.5) There are NO exceptions.”) (emphasis in the original).

41. *Nordlinger v. Hahn*, 501 U.S. 1, 10 (1992).

42. See *id.* at 10–17 (finding that treating new and old owners differently for purposes of initial tax assessments furthers legitimate governmental purposes of the law).

43. See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (explaining that the different levels of review turn on when the Court’s duty to defer to rule-making institutions is overcome by its duty to protect individual rights).

44. See *In re Marriage Cases*, 43 Cal.4th at 855–6; *Strauss*, 46 Cal.4th at 411.

45. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (finding a Colorado state constitutional amendment that prohibited legal protections for lesbians, gay men, and bisexuals an unconstitutional violation of the Equal Protection Clause).

46. See *Argument in Favor of Proposition 8*, in CALIFORNIA GENERAL ELECTION OFFICIAL VOTER INFORMATION GUIDE (Nov. 2008) (“Because four activist judges in San Francisco wrongly

allow differences to be taken into account for legitimate purposes, simply cannot allow difference for the sake of different treatment.<sup>47</sup>

V.

IN SUM: THE NINTH CIRCUIT WAS RIGHT.

The California Constitution's requirement that same-sex and opposite-sex couples be treated equally<sup>48</sup> is a crucial fact that calls for the application of a different rule of constitutional law than would be brought into play elsewhere: the literal violation rule—that a state cannot treat unequally those it concedes to be similarly situated in terms of its purposes.<sup>49</sup> Applying this rule, California cannot treat same-sex couples differently than opposite-sex couples because they are identical in all relevant respects. Alternatively, the fact that California withdrew marriage from same-sex couples is a unique fact that governs the way the rational basis test applies to Proposition 8.<sup>50</sup> Either way, the constitutional analysis of Proposition 8 will generate a uniquely “California” result. The *Perry v. Brown* court is right.

VI.

PERRY AT THE SUPREME COURT.

That *Perry* turns out to be about California has very significant consequences. It means the case might not have been a great candidate for Supreme Court review. There is no Circuit split; the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning* arises out of a very different context.<sup>51</sup>

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overturned the people's vote, we need to pass this measure as a constitutional amendment to RESTORE THE DEFINITION OF MARRIAGE as a man and a woman.”); Opening Brief of Defendant-Intervenors-Appellant, *supra* note 7, at 16 (“the United States Constitution does not require California to abandon the age-old, deeply rooted definition of marriage as the union of a man and a woman.”); Reply Brief of Defendant-Intervenors-Appellant, *supra* note 13, at 75–76 (“The California Supreme Court's decision in *In re Marriage Cases*, which briefly interrupted that practice, was overturned by the voters at the first possible opportunity. Indeed, that decision was no more final than the earlier California Court of Appeal decision upholding the State's traditional definition of marriage: It was reviewed and overturned by a higher tribunal—the People themselves.”).

47. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 448 (1985) (finding no legitimate state interest in prohibiting the building of a home for the mentally disabled); *U.S.D.A. v. Moreno*, 413 U.S. 528, 534–35 (1973) (noting that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest”). That the voters would like different treatment makes no difference. *Romer*, 517 U.S. at 635 (holding that a classification adopted for its own sake violates Equal Protection).

48. See *Strauss*, 207 P.3d at 77 (2009).

49. See *Romer*, 517 U.S. at 633. (“A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”).

50. See *Perry v. Brown*, 671 F.3d 1052, 1087–88 (9th Cir. 2012), *cert. granted sub nom.* 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

51. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006). The constitutional

Moreover, what happened in California hardly seems likely to happen again; it cannot happen in the states with constitutional bans on same-sex marriage.

Nevertheless, the Court has taken the case. But if, as the Ninth Circuit held, taking marriage away from same-sex couples is legally different than denying it to them in the first instance, a Supreme Court ruling is likely to be a limited decision either way. Since the Ninth Circuit decision has some holdings that would apply outside California, a decision affirming the Circuit across the board could as well. However, since the main defense for Proposition 8 and measures like it—"procreation"—is, as the Circuit correctly held, presented in *Perry* in a way that is unique to California, a Supreme Court decision would be unlikely to apply to this central argument outside of California.<sup>52</sup> Again, the Circuit could be affirmed on a "California only" basis; since California as a constitutional matter treats same-sex and opposite-sex couples as "similarly situated," Proposition 8 is a literal violation of Equal Protection. Even a loss could be narrow. The Court could conclude that since the California constitution requires that there be no difference in treatment, there really is no federally justiciable issue.

The greatest assurance that what the Circuit did here was right may come with a little distance from the doctrine. As John Hart Ely wrote, the real function of Equal Protection analysis is to "smoke out" laws that really are driven by a simple desire to treat some people differently.<sup>53</sup> When one sifts through the Voter Information Guide on Proposition 8, what shines through clearly is that while Proposition 8 was not designed to change the legal rights of same-sex couples, it was aimed at making it clear that in some larger social sense, same-sex and opposite-sex couples are not the same at all. That is a view they are entitled to hold, to argue, and to teach. But as the *Perry v. Brown* Court held, it is not something they are allowed to communicate by building into the law a powerful distinction that serves no other purpose.

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amendment at issue in *Citizens* prohibited any recognition of same-sex relationships, and permitted any form of recognition for opposite sex relationships. Draconian as it was—it withheld rights, it did not withdraw them—state law did not establish that the two groups were similarly situated.

52. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (arguing that the Court prefers not to address any Constitutional questions that are not necessary for deciding the immediate case).

53. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135 (1980).