Perry, Same-Sex Marriage, and Federal Constitutional Guarantees

*By Mark Strasser**

In *Perry v. Schwarzenegger*,[1] a California district court struck down California's Proposition 8, which amended the state constitution to preclude same-sex marriage. The opinion is of interest for a number of reasons, some of which have limited applicability outside of the California context and others of which have more general application. This essay focuses on the points in *Perry* that are of wider application, some of which would seem applicable to all states banning same-sex marriage and others of which are relevant to a subset of those states.

Perry suggests that Proposition 8 violated both due process and equal protection guarantees contained within the United States Constitution, and at least one issue involves the degree to which the analyses offered in *Perry* should or will have constitutional force in other parts of the country. It is useful, then, to consider *Perry*'s arguments in detail.

The right to privacy protects a constellation of rights connected with family—the rights to marry, procreate, and raise one's child are all included within the right to privacy. The rights thereby protected are not absolute—privacy rights can be overridden by a statute that is narrowly tailored to promote compelling state interests. Nonetheless, the state must bear a heavy burden to justify infringing on an interest protected by the right to privacy.

It might be thought, then, that the right to marry a same-sex partner can only be limited if the state can carry its heavy burden of justification, because the right to marry is one of the rights protected under the right to privacy. However, many courts have suggested that the right to marry a same-sex partner should be treated as a separate and distinct right. In contrast, the *Perry* court refused to characterize the plaintiffs as seeking to establish their "right to marry a same-sex partner" but, instead, as seeking to vindicate their "right to marry." This dispute is not merely a matter of semantics, because the plaintiffs are then not seeking to have a new right recognized but, instead, are seeking to enforce a right that has already been recognized.[2]

Consider *Loving v. Virginia*,[3] where Virginia's anti-miscegenation statute was challenged as violating federal constitutional guarantees. Richard Loving and Mildred Jeter did not seek to a have a new right recognized—"the right to marry someone of another race." Further, when the United States Supreme Court recognized that Virginia's anti-miscegenation law violated the Lovings' fundamental rights, the Court did not recognize a special right to marry outside of one's race but, instead, a more generalized right to marry.

Some commentators suggest that the right to marry recognized in *Loving* was only meant to include those who could have children though their union. But that cannot be correct, for it suggests that different-sex couples who cannot procreate through their union do not have a fundamental right to marry. Such a characterization of the right might exclude the elderly, those who are sterile, and those with certain physical handicaps. No court has held that the right to marry is contingent on individuals having the ability and desire to procreate, and Justice Scalia has recognized the implausibility of the procreation argument.[4]

Some courts have suggested that the reason people who cannot procreate nonetheless have the right to marry is that the right to privacy protects individuals from having to establish their ability or willingness to procreate. But this, too, is incorrect. In fact, some states prohibit certain people (first cousins) from marrying unless they can establish their *inability* to procreate through their union.[5] Two lessons might be learned from such statutes. First, states can and do condition marriage on procreation concerns, so it is not as if states could not do so, assuming no independent bar to the state's precluding the marriage at issue.[6] Second, the state and individual interests in marriage are not limited to those involving children, because the state is limiting first-cousin marriages to those that likely will not involve children.

Loving is important to consider for several reasons. First, the *Loving* Court was striking down a marriage prohibition that had been in existence since before the Nation's founding. Further, several states in addition to Virginia had anti-miscegenation laws, sometimes within their constitutions.[7] Thus, it could not be said that the substantive due process right to marry that was recognized in *Loving* was deeply-rooted in the Nation's history or tradition or was so rooted in the traditions and conscience of our people as to be ranked fundamental.[8] On the contrary, there was a long history in some states of prohibiting such unions, so the history and traditions test could not have been the basis of the holding.[9]

It might be argued that the right to marry is deeply-rooted in the Nation's history, even if the right to marry someone of another race is not. But an analogous point might be made here, namely, that the right to marry is deeply-rooted, even if the right to marry a same-sex partner is not. In both cases, the individuals have the right to marry, and the question is whether the Federal Constitution permits a state to limit that choice on the basis of the races or sexes of the parties.

Those who argue that *Loving* only recognized the right to marry for individuals capable of reproducing through their union seem not to appreciate that the *Loving* opinion nowhere even mentions children. The Court's reticence on this subject is quite understandable when one considers Virginia's justification for its anti-miscegenation policy, namely, that the state wanted to preclude interracial marriage for the sake of the children that might be born of such unions.

Loving shifted the focus of the constitutional debate from the interests of children to the interests of the adults. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[10] Marriage promotes the interests of adults, and, as the *Perry* court notes, that is true whether the marital partners are of the same sex or of different sexes.[11]

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While the *Loving* Court did not focus on children, it did mention that marriage is fundamental to our existence and survival. The Court did not develop the point, although a few possible explanations might be offered. For example, a variety of benefits accrue to the partners in a marriage.[12] Insofar as the marital partners are benefited and become more productive members of society, society benefits as well.

Another way to understand why marriage is fundamental to our existence and survival involves the benefits of marriage for the next generation, which was also a point suggested in *Zablocki v. Redhail*.[13] *Zablocki* involved a challenge to a Wisconsin law by Roger Redhail, who was prevented from marrying his pregnant fiancé. Redhail had fathered a child (with a different woman) out of wedlock while he was in high school, and Wisconsin law prevented noncustodial parents from marrying if they had children from a previous relationship who were not receiving the required child support. The *Zablocki* Court commented:

> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.[14]

A few points might be made about what the Court is saying here. When describing marriage as the foundation of family, the Court is not suggesting that children are only born into marriages. Redhail had already fathered one child out of wedlock and might well be fathering another out of wedlock, given the Wisconsin law that precluded him from marrying his fiancé. Rather, the Court was suggesting that there are a variety of rights associated with family, and that it does not make sense to recognize those rights while at the same time not recognizing the right to marry. When describing marriage as the foundation of family, the Court was likely further suggesting that marriage provides a setting in which children might prosper.

The *Zablocki* Court's suggestion that marriage provides a setting in which children might flourish may also be what the *Loving* Court had in mind when saying that marriage is necessary for the survival of humankind. Neither Court believed that children are only produced within wedlock, as the facts of *Zablocki* clearly illustrate. Rather, both seemed to appreciate that marriage provides a setting in which children can be loved, cherished, taught, and helped to thrive.

Which children can be helped in such a setting? Certainly, children who are biologically-related to both parents can benefit from living in such a setting, but so can children who are biologically-related to only one or perhaps to neither of the parents. Many families in the United States, whether the parents are of the same sex or of different sexes, involve children who are not biologically-related to both adults. The children might have been adopted or might have been the product of a previous relationship of one of the adult partners. But today's demographics demand recognition that many children are being raised in such homes, and if the survival of humankind is dependent on children being raised by two parents, each of whom is biologically-related to the children, then humankind, and our Nation in particular, may be facing some difficult times.

The *Perry* court noted that same-sex couples are raising children, and that the children are doing quite well.[15] Further, gay and lesbian parents have the right to raise their children just as other parents do. But *Zablocki* suggests that this is a reason to recognize same-sex marriage—it makes little sense to recognize a right of privacy with respect to other family matters but not recognize a right to marry. Children, whether raised by same-sex or different-sex couples, can benefit from the stability that marriage can bring.

While there are no appreciable differences between children raised by same-sex parents and those raised by different-sex parents,[16] that should not be the focus of the discussion when examining the right to marry. (We do not limit marriage to those who would be optimific parents.) Whether or not same-sex marriage is recognized, children will be raised by same-sex parents. The question at hand is whether the children raised by such parents should be able to benefit from the increased stability and other benefits associated with marriage or whether, instead, they should be forced to suffer the different opportunity costs associated with their parents having been precluded by law from marrying.

If the right to marry a same-sex partner falls within the right to marry, then it seems unlikely that the state will be able to justify refusing to recognize such marriages. Indeed, the *Perry* court held that there was no legitimate basis to refuse to recognize such marriages.[17]

To understand whether same-sex marriage bans promote legitimate state interests, it is important to consider what happens when a same-sex marriage ban is struck down by the courts or is repealed by a legislature. Traditional marriages are not thereby held unconstitutional or somehow denied legal recognition. Rather, those marriages are recognized, and other marriages are recognized as well. Indeed, it is somewhat difficult to specify what legitimate interests are promoted by refusing to recognize same-sex marriages. It is not as if such bans make it more likely that different-sex couples will marry or remain married. Instead, such bans merely impose a burden on same-sex couples and their families without bringing about any offsetting benefits for anyone else. Further, even when same-sex marriage is recognized by the state, religious groups do not have to permit such marriages to be celebrated if such unions contravene religious beliefs.[18] Of course, those religious groups that do recognize same-sex marriage would then be able to confer both religious and civil significance on those unions.

It might be thought that prohibiting same-sex marriage somehow promotes morality. But that is exactly the kind of argument that is precluded by *Lawrence v. Texas*,[19] in which the Court struck down a Texas law barring same-sex sodomy. While recognizing that some individuals sincerely believe same-sex relations immoral, the *Lawrence* Court suggested that the majority could not "use the power of the State to enforce these views on the whole society through operation of the criminal law."[20]

The *Lawrence* Court explained that the "Texas [sodomy] statute furthers no legitimate state interest which can justify its

intrusion into the personal and private life of the individual."[21] But it is helpful to look closely at the language employed. The Court did not say that the statute furthered no legitimate interest at all but, instead, that it furthered no legitimate interest that would justify the intrusion. Why mention this? Because the Court's comments are consistent with its using a rational basis test—the state had no legitimate interest implicated at all—but also consistent with a higher level of scrutiny being used—while the state had some legitimate interests implicated, those interests were not sufficient to justify the burden that the state was imposing.

There are other reasons to think that the *Lawrence* Court was using a higher level of scrutiny than rational basis, Justice Scalia's comments in dissent to the contrary notwithstanding.[22] The Court cited a variety of cases within the right to privacy jurisprudence as support for striking down the Texas law—*Griswold*, *Eisenstadt*, *Roe*, *Carey*, and *Casey*—and one might wonder why those cases would be cited in an opinion in which the right to privacy was not at issue.

Traditionally, the Court has privileged relationships such as marriage over sexual relations. In *Griswold v. Connecticut*,[23] Justice Goldberg explained in his concurrence that marriage could not be regulated even though non-marital sexual relations could be.[24] Privileging same-sex relations but not same-sex relationships inverts the traditional priorities. That said, there is reason to read *Lawrence* as recognizing that same-sex relationships themselves have value, because part of the rationale for protecting same-sex relations was that the sexual "conduct can be but one element in a personal bond that is more enduring."[25] The claim here is not that the *Lawrence* Court held same-sex marriage constitutionally protected. On the contrary, the Court expressly refused to address that issue,[26] just as it had expressly refused to address whether interracial marriage was protected when striking down a law more severely punishing interracial, non-marital relations than intra-racial, non-marital relations.[27]

A separate issue is whether same-sex marriage bans are unconstitutional because they violate equal protection guarantees. As an initial point, there is some confusion with respect to the basis of the classification at issue. Consider a statute that says, "A man can marry a woman but not a man; a woman can marry a man but not a woman." Such a statute expressly classifies on the basis of sex.[28] A separate issue is whether such a classification can be justified, but the statute itself is a facial, sex-based classification. Why is that important? Because facial sex-based classifications trigger heightened scrutiny, just as facial race-based classifications trigger strict scrutiny. When a facial race-based classification is at issue, there is no need to show in addition that one race would be adversely affected more than another in order for strict scrutiny to be imposed. For example, almost forty years before *Lawrence* was decided, the Court examined and struck down a statute more severely punishing interracial non-marital sexual relations than intra-racial non-marital sexual relations.[29] It was not necessary to show that the statute adversely impacted one race more than another in order for close scrutiny to be triggered. So, too, where a statute facially discriminates on the basis of sex, there is no need to show that one sex is adversely affected more than another.

One might contrast the kind of classification at issue in a same-sex marriage ban with the kind of classification at issue in *Romer v. Evans*,[30] which involved a Colorado constitutional amendment enacted by referendum that precluded affording antidiscrimination protections on the basis of sexual orientation.[31] On its face, this was orientation rather than sex discrimination, and the Court suggested that this kind of classification could not even pass the lowest level of scrutiny.[32]

Justice O'Connor suggested in her *Lawrence* concurrence that laws targeting on the basis of sexual orientation had to be given "a more searching form of rational basis review."[33] It might be noted that statutes might expressly classify on the basis of sex but be intended to target on the basis of orientation. Such statutes should receive heightened scrutiny because of their facial basis. However, if there were some way to avoid triggering heightened scrutiny notwithstanding the facial classification, one would presumably still trigger this heightened form of rational basis review that was used in *Romer* and, perhaps, was used in *Lawrence*. Or, perhaps orientation discrimination itself should receive heightened review, as some of the state supreme courts have suggested in light of their state constitutional guarantees.[34]

Whatever the appropriate level of scrutiny, states must offer some justification for the discrimination. One justification that has had some success involves the point that same-sex couples cannot conceive accidentally—they have to plan in order to have children through adoption or through the use of advanced reproductive techniques. In contrast, different-sex couples may conceive on the spur of the moment. For this reason, it is thought that states have a greater interest in encouraging different-sex couples to marry than same-sex couples to marry—that way unplanned pregnancies are more likely to occur within the context of a marriage.[35]

Yet, such an argument implies that the difficult part of parenting is in producing children rather than raising them. But, for most parents, the exact opposite is true. In any event, states that are deciding whether to permit same-sex couples to marry are not choosing between on the one hand permitting same-sex couples to marry and on the other permitting different-sex couples to marry. Rather, they are choosing between permitting different-sex couples to marry on the one hand and permitting both same-sex and different-sex couples to marry on the other. As Chief Judge Kaye pointed out in her dissent in *Hernandez v. Robles*, there "are enough marriage licenses to go around for everyone."[36] Absent reason to think that some different-sex couples would refuse to marry because same-sex couples were allowed to marry,[37] same-sex marriage bans do not encourage different-sex couples to marry (and thus have children within wedlock); all they do is prevent same-sex couples from marrying, which means that any children that they have will necessarily be out of wedlock. If children tend to do better when raised within a marriage than when raised outside of one, those supporting same-sex marriage bans do not end up helping children raised by different-sex parents (because the parents' decision to marry simply will not be affected by whether the state permits same-sex marriage), but will harm some of the children raised by same-sex parents who would

have married if they could have.

Some of *Perry* is directed toward particulars in California. For example, California recognizes domestic partnerships, so at least one question is what legitimate interests are served by creating a separate status for same-sex couples. Such a separate status seems stigmatizing,[38] for it suggests that same-sex couples would somehow sully marriage if permitted to marry.[39] Further, domestic partnerships are not treated as marriages for federal purposes,[40] so if the Defense of Marriage Act is struck down or repealed, same-sex domestic partnerships (or civil unions for that matter) would be inferior to same-sex marriages with respect to tangible benefits as well as with respect to symbolism.

California, like many states, permits second-parent adoptions, so it permits each member of a same-sex couple to be legally-related to the child whom they are raising.[41] The state is not questioning the ability of same-sex couples to parent, but is nonetheless imposing opportunity costs on the very children whom the state may have entrusted to those parents though adoption. It is difficult to understand how a state could do this and claim to be interested in the welfare of children.

Perry suggests that same-sex marriage bans do not serve a legitimate state interest. If that analysis is accepted by other courts, then same-sex marriage bans as a general matter are constitutionally vulnerable. Further, *Perry* offers reasons to suggest that such bans should be examined with heightened or strict scrutiny. If those reasons are taken seriously by other federal courts, then it is even less likely that same-sex marriage bans in other states will be held to pass constitutional muster. While it is unclear what the United States Supreme Court will ultimately say with respect to the kinds of arguments offered by *Perry*, they are careful, weighty, and worthy of serious consideration.

Endnotes

1 704 F. Supp. 2d 921 (N.D. Cal. 2010).

2 *Id.* at 993 ("Plaintiffs do not seek recognition of a new right. . . . Rather, plaintiffs ask California to recognize their relationships for what they are: marriages.").

3 388 U.S. 1 (1967).

4 *See* Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) (rejecting the encouragement of procreation argument, "since the sterile and the elderly are allowed to marry").

5 *See, e.g.*, Ind. Code 31-11-1-2 (only first cousins over age sixty-five may marry); Wisc. Stat. Ann. § 765.03 (first cousins may marry if woman over age fifty-five or there is a signed affidavit by a physician stating that one of the parties is permanently sterile).

6 Because there is no right to marry someone too closely-related by blood, the states can create an exception permitting some to marry among those who would otherwise be precluded from marrying because within the state's incest limitation. The state could not as a general matter limit marriage to those able (or for that matter only to those unable) to produce a child. Limitations on marriage, e.g., with respect to incest limitations, are permissible where the state has compelling interests at stake and the limitation is narrowly tailored to promote that interest.

7 *Cf. Perry*, 704 F. Supp. 2d at 957 (noting that several states had anti-miscegenation laws).

8 *See* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

9 It might be noted that the Court had refused to strike down Virginia's anti-miscegenation law a mere eleven years before the *Loving* opinion was issued. *See* Naim v. Naim, 350 U.S. 985 (1956).

10 Loving v. Virginia, 388 U.S. 1, 12 (1967).

11 *Perry*, 704 F. Supp. 2d at 962 (discussing ways that marriage benefits both partners).

12 *Id.* at 969 ("Same-sex couples receive the same tangible and intangible benefits from marriage that opposite-sex couples receive.").

13 434 U.S. 374 (1978).

14 *Id.* at 386.

15 *Perry*, 704 F. Supp. 2d at 980 ("Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted.").

16 *See id.*

17 *Id.* at 997 ("[E]xcluding same-sex couples from marriage is simply not rationally related to a legitimate state interest.").

18 *Id.* at 976 (noting that even when same-sex marriage was recognized, "no religious group was required to recognize marriage for same-sex couples").

19 539 U.S. 558 (2003).

20 *Id.* at 571.

21 *Id.* at 578.

22 *See id.* at 586 (suggesting that the Court had used "rational-basis review").

23 381 U.S. 479 (1965).

24 *See id.* at 499 (Goldberg, J., concurring).

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

26 *See id.* at 578 ("The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

27 *See* McLaughlin v. Florida, 379 U.S. 184, 195 (1964) (striking down the Florida statute but refusing to reach the "question of the validity of the State's prohibition against interracial marriage").

28 *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) ("Proposition 8 operates to restrict Perry's choice of marital partner because of her sex.").

29 *See* McLaughlin v. Florida, 379 U.S. 184 (1964).

30 517 U.S. 620 (1996).

31 *Cf. Perry*, 704 F. Supp. 2d at 996 ("Proposition 8 also operates to restrict Perry's choice of marital partner because of her sexual orientation.").

32 *See Romer*, 517 U.S. at 632 ("[I]t lacks a rational relationship to legitimate state interests. . . .").

33 *See* Lawrence v. Texas, 539 U.S. 558, 580 (2003).

34 *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (subjecting orientation discrimination to heightened scrutiny).

35 *See, e.g.*, Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).

36 *Id.* at 30 (Kaye, C.J., dissenting).

37 Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010) ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages.").

38 *Id.* at 973 ("Proposition 8 places the force of law behind stigmas against gays and lesbians.").

39 *Id.* at 971 (noting that "the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships").

40 *Id.* at 970 ("California domestic partnerships may not be recognized in other states and are not recognized by the federal government.").

41 *Cf. id.* at 968 (noting that California promotes gay and lesbian parenting).