An Argument for the Restoration of Marriage Equality in California

Law 17 Section 0322 Final Legal Writing Paper

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5/22/2012

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An Argument for the Restoration of Marriage Equality in California

Comedian Groucho Marx once said, "Marriage is a wonderful institution. But who wants to live in an institution?" Society recognizes a perceived importance and permanence to the institution of marriage and the marital relationship. The term "marriage" signifies the special recognition that our society places on enduring and intimate relationships. "[M]arriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership."[1] Therefore, marriage equality should be restored in California because Proposition 8, the voter approved initiative banning same-sex marriage, lessens the status of gays and lesbians by reclassifying their relationships and families as inferior to those of opposite-sex couples.

Proposition 8, formally known as the California Marriage Protection Act,[2] was a ballot initiative placed on the November 2008 state ballot seeking the addition of an amendment to the California Constitution.[3] The ballot measure added a new provision, § 7.5 to the Declaration of Rights[4] which provides that "[o]nly marriage between a man and a woman is valid or recognized in California."[5] Passage of Proposition 8 overturned the California Supreme Court's ruling of *In re Marriage Cases*[6] wherein the court held that same-sex couples possess a constitutional right to marry. From June 16, 2008 to November 5, 2008 the California Constitution had guaranteed the basic civil right of marriage to all Californians, both opposite-sex couples and same-sex couples alike.[7] Therefore, in this paper I will argue that Proposition 8 should be repealed because the sole availability of the state recognized designation of "domestic partnership" for same-sex couples denies the relationships of same-sex couples the dignity and respect afforded to the state recognized designation of "marriage" available to opposite-sex couples. Further, I will argue that Proposition 8 should be repealed because once a class or group of individuals is granted a civil right or protection that right cannot be taken away without a legitimate state interest in doing so. Proposition 8 should be repealed because its ultimate objective furthered no legitimate state interest.

An individual's sexual orientation, similar to an individual's race and gender, is not a legitimate basis upon which to deny or withhold legal rights. At the core of establishing an officially recognized family is a couple's right to have their relationship accorded the dignity and respect accorded to other officially recognized families. Assigning a separate and distinct designation for the relationship of same-sex couples while reserving the historic designation of "marriage" solely for opposite-sex couples denies the relationship of same-sex couples such equal dignity and respect. As pointed out by the Ninth Circuit in *Perry v. Brown*[8] "[h]ad Marilyn Monroe's film [How to Marry a Millionaire] been called *How to Register a Domestic Partnership with a Millionaire,* it would not have conveyed the same meaning … even though the underlying drama for same-sex couples is no different." The *Perry* court continued, "[t]he name 'marriage' signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships."

Proposition 8's proponents argue that same-sex couples can enter into an official state-recognized "domestic partnership."[9] A domestic partnership affords its participants "the same rights, protections and benefits" and "the same responsibilities, obligations, and duties under law … as are granted to and imposed upon spouses."[10] Registered domestic partners may, among other things, raise children together;[11] adopt each other's children;[12] share in community

property;[13] file state income taxes jointly;[14] obtain coverage under a partner's group health insurance plan; [15] make medical decisions on behalf of an incapacitated partner;[16] and sue for the wrongful death of a partner.[17] Proposition 8 did not affect the "constitutionally based incidents of marriage"[18] guaranteed to same-sex couples who enter into a registered domestic partnership. What a majority of California voters did succeed in accomplishing was the taking away of the designation of "marriage" from same-sex partnerships, state recognition of the official "marriage" status and the societal approval accorded to the status of marriage.

It is true that domestic partnership grants same-sex couples the majority of substantive components attributed to marriage, however the exclusion of same-sex couples from the designation of marriage exacerbates the disparagement historically faced by gay individuals. Excluding same-sex couples from the legal institution of marriage creates an official view that their committed relationships are of lesser stature than that of opposite-sex couples. By allowing the designation of marriage exclusively for opposite-sex couples while providing a separate and distinct designation for same-sex couples the state is perpetuating the premise that gay individuals and same-sex couples are in some way "second-class citizens" who under the law are to be treated differently from heterosexual individuals or opposite-sex couples.

The right to marry represents an individual's ability to establish a legally recognized family with the person of their choice. Marriage has been described as "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."[19] The institution of marriage has also been described as "the most important relation in life."[20] Therefore, given the fundamental nature of the right to marry and an individual's right to live a meaningful life as a full member of society, all individuals and couples must be accorded the right to marry regardless of their sexual orientation. "[B]y drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and by reserving the historic and highly respected designation of 'marriage' exclusively to opposite-sex couples while offering same sex couples only the … designation of domestic partnership – pose a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry."[21]

The intent and purpose of Proposition 8 was to single out same-sex couples for unequal treatment by taking away from them and only them the right to marry. Proposition 8 "eliminat[ed] … the right of same-sex couples to equal access to the designation of marriage"[22] by "carv[ing] out a narrow and limited exception to these state constitutional rights"[23] Such a taking violated the Fourteenth Amendment because the Equal Protection Clause protects minority groups, such as homosexuals, from the depravation of an existing right without a legitimate governmental reason.[24] Further, "[f]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights."[25]

In *Perry v. Brown*[26] the Ninth Circuit held that "[t]he People may not employ the initiative power to single out a disfavored group for unequal treatment and strip them, without a legitimate justification, of a right as important as the right to marry." Proposition 8 was not the first time voters of a state utilized the initiative process to reduce the rights of gays and lesbians through

the enactment of a constitutional amendment. In 1992 Colorado voters adopted Amendment 2[27] which prohibited the state from providing any legal protections against discrimination on the basis of sexual orientation. Amendment 2 was a response to various local ordinances that had banned discrimination based upon sexual orientation with regard to housing, employment, education, public accommodations and health and welfare services. Amendment 2 repealed the local ordinances and "prohibit[ed] any governmental entity from adopting similar, or more protective statutes … in the future."[28] Amendment 2 withdrew from homosexuals, but from no other group, specific legal protections and disallowed their reinstatement. The United States Supreme Court held that Amendment 2 violated the Equal Protection Clause because "[i]t is not within our constitutional tradition to enact laws … that single out a certain class of citizens for disfavored legal status[.]"[29] Amendment 2 "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else."[30]

Similar to Amendment 2, Proposition 8 singled out one specific class of citizens, homosexuals, for disfavored legal status. Similar to Amendment 2, Proposition 8 withdrew from only homosexuals an existing legal right, access to the official designation of marriage, which had previously been available to them. Similar to Amendment 2, Proposition 8 denied homosexuals equal protection under the law because it carved out an exception to the Equal Protection Clause of the California Constitution with the removal of equal access to marriage, previously available to same-sex couples. Similar to Amendment 2, Proposition 8 "by state decree … put[s] [homosexuals] in a solitary class with respect to"[31] a fundamental human relationship, that of the marital relationship, yet imposes no such disability on any other class of citizen. Finally, similar to Amendment 2, Proposition 8 classified same sex relationships not for the purposes of furthering a proper legislative goal, but instead to make them unequal to everyone else.

Proposition 8's proponents argued that Proposition 8 simply "restor[es] the traditional definition of marriage while otherwise leaving undisturbed the manifold rights and protections California law provides gays and lesbians."[32] However, in *Perry* the Ninth Circuit held that "Proposition 8 work[ed] a meaningful harm to gays and lesbians, by denying to their committed lifelong relationships the societal status conveyed by the designation of 'marriage,' and this harm must be justified by some legitimate state interest." The Ninth circuit argued that a law which has no effect except to strip one group or class of citizens of the right to be eligible to use a state recognized and socially meaningful designation, such as "marriage," is even more so "unprecedented [and] unusual" than a law which imposes sweeping changes, and raises a stronger "inference that the disadvantage imposed is born of animosity toward the class of persons affected."[33]

Proposition 8's proponents further argued that unless the Fourteenth Amendment specifically requires that the designation of the term "marriage" be given to same-sex couples, there is no constitutional violation in taking the designation away from homosexuals. *Romer,* however forecloses upon proponents' argument. In *Perry* the Ninth Circuit believed that the relevant question in *Romer* was not whether the law after Amendment 2 was constitutional. Instead the relevant question was whether the change in the law that Amendment 2 effected could be justified by some legitimate purpose. The Supreme Court held that there was no legitimate reason to take away legal protections from homosexuals alone and to also insert the depravation of equality into the State Constitution, once such legal protections had already been provided for.

In application to Proposition 8, eliminating by amendment the right of gays and lesbians to have the state recognized designation and societal status of "marriage" while maintaining the right for opposite-sex couples must be justified by a legitimate reason.

The Equal Protection Clause requires that the state possess a legitimate reason or interest in withdrawing a right or benefit from one group or class of citizens but not another, whether or not the state is required to confer that right or benefit in the first place. When Congress decided to provide food stamps to the poor through enactment of the Food Stamp Act of 1964, later amending the Act to exclude households of unrelated individuals, such as "hippies" residing in "hippie communes," the Supreme Court held the amendment to be unconstitutional because a "congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[34] What the Supreme Court disallowed in *Romer* and *Moreno* was the targeted exclusion of a group or class of citizens from a right or benefit that they had possessed on equal terms with all other citizens.

Proposition 8's proponents counter with the argument that Proposition 8 was enacted to further California's interest in child rearing and responsible procreation; proceeding with caution prior to making any significant changes to marriage; protection of religious freedoms; and preventing California's children from being taught about same-sex marriage in the State's public schools. However, Proposition 8's only effect was to take away from gays and lesbians the right to the state recognized designation of "marriage" and depravation of the societal status that affords respect and dignity to such relationships. Proposition 8 was not enacted to promote childrearing by biological parents, to encourage responsible procreation, to proceed with caution in social change, to protect religious freedom, or to control the education of schoolchildren. Proposition 8 "is so far removed from these particular justifications that … it [is] impossible to credit them."[35] Because Proposition 8 did not further any state interest purported by proponents, there was no rational bases or legitimate interest for its enactment.

In *Perez v. Sharp,*[36] the California Supreme Court's 1948 decision holding that the state statutory provisions prohibiting interracial marriage were unconstitutional, the court refrained from characterizing the constitutional right that the plaintiffs sought to obtain as "a right to interracial marriage." Instead, *Perez* focused on the substance of the constitutional right at issue, that being the importance to an individual of the freedom "to join in marriage with the person of one's choice."[37] In application to the argument for the restoration of marriage equality in California, same-sex couples are not seeking to create a new constitutional right, the right to "same-sex marriage," or to change or modify the existing institution of marriage. Instead, those fighting for marriage equality are working towards restoration of the state constitutional right to simply marry. Same-sex couples should be afforded the same rights and benefits, along with the same mutual responsibilities and obligations, as the constitutional right afforded to opposite-sex couples. Therefore, marriage equality should be restored in California because Proposition 8 lessens the status of gays and lesbians by reclassifying their relationships and families as inferior to those of opposite-sex couples. It is fundamental that every individual be given the opportunity to establish an "officially recognized and protected family,"[38] with the person they have chosen to share their life with while possessing all rights, responsibilities, respect and dignity traditionally accorded to the institution of marriage.

[1] *Griswold v. Connecticut, 381 U.S. 479, 486 (1965)*
[2] http://www.ag.ca.gov/cms_pdfs/initiatives/i737_07-0068_Initiative.pdf: "SECTION I. Title This measure shall be known and may be cited as the "California Marriage Protection Act."
[3] http://www.ag.ca.gov/cms_pdfs/initiatives/i737_07-0068_Initiative.pdf: "SECTION 2. Article I. Section 7.5 is added to the California Constitution, to read: Sec. 7.5. Only marriage between a man and a woman is valid or recognized in California."
[4] Cal. Const., Art. I
[5] Cal. Const., Art. I, § 7.5
[6] *In re Marriage Cases, 43 Cal.4th 757 (2008)* [Six consolidated appeals.]
[7] *Marriage Cases, 43 Cal.4th at 782*
[8] *Perry v. Brown, Court of Appeals (9th Cir. 2012)*
[9] California Domestic Partner Rights and Responsibilities Act of 2003 (Stats. 2003, ch. 421; AB 205)
[10] Cal. Fam. Code § 297.5(a)
[11] Cal. Fam. Code § 297.5(d)
[12] Cal. Fam. Code § 9000(g)
[13] Cal. Fam. Code § 297.5(k)
[14] Cal. Rev. & Tax. Code § 18521(d)
[15] Cal. Ins. Code § 10121.7
[16] Cal. Prob. Code § 4716
[17] C.C.P. § 377.60
[18] *Strauss v. Horton, 207 P.3d 48, 61 (Cal. 2009)*
[19] *Marvin v. Marvin, (1976) 18 Cal.3d 660, 684 [134 Cal.Rptr. 815, 557 P.2d 106]*
[20] *Maynard v. Hill, 125 U.S. 190, 205 (1888)*
[21] *In re Marriage Cases, 183 P.3d 384, 434 (Cal. 2008)*
[22] *Strauss, 207 P.3d at 61*
[23] *Strauss, 207 P.3d at 76*
[24] *Romer v. Evans, 517 U.S. 620, 634 (1996)*
[25] *In re Marriage Cases, 183 P.3d at 428* (quoting *Hernandez v. Robles, 7 N.Y.3d 338, 381 (2006) (Kaye, C.J., dissenting)*)
[26] *Court of Appeals (9th Cir. 2012)*
[27] Colo. Const., Art. II, § 30b
[28] *Evans v. Romer, 854 P.2d 1270, 1284 (colo. 1993)*
[29] *Romer, 517 U.S. at 633*
[30] *Romer, 517 U.S. at 635*
[31] *Romer, 517 U.S. at 627*
[32] *Perry v. Brown,* Proponents' Reply Br. 77
[33] *Romer, 517 U.S. at 633-34*
[34] *U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)*
[35] *Romer, 517 U.S. at 635*
[36] *Perez v. Sharp, 32 Cal.2d 711 (1948)*
[37] *Perez, 32 Cal.2d at 715*
[38] *Marriage Cases, 43 Cal.4th at 781*