This case has been extensively abridged by the instructor and most abridgements are not noted.

KRISTIN M PERRY, SANDRA B STIER, PAUL T KATAMI and JEFFREY J ZARRILLO, Plaintiffs, CITY AND COUNTY OF SAN FRANCISCO, Plaintiff-Intervenor,
v
ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; et. al.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

704 F. Supp. 2d 921; 2010 U.S. Dist. LEXIS 78817

August 4, 2010, Filed

VAUGHN R WALKER, United States District Chief Judge

In November 2000, the voters of California adopted Proposition 22 through the state's initiative process. Entitled the California Defense of Marriage Act, Proposition 22 amended the state's Family Code by adding the following language: "Only marriage between a man and a woman is valid or recognized in California." This amendment further codified the existing definition of marriage as "a relationship between a man and a woman." In February 2004, the mayor of San Francisco instructed county officials to issue marriage licenses to same-sex couples. The following month, the California Supreme Court ordered San Francisco to stop issuing such licenses and later nullified the marriage licenses that same-sex couples had received. The court expressly avoided addressing whether Proposition 22 violated the California Constitution.

Shortly thereafter, San Francisco and various other parties filed state court actions challenging or defending California's exclusion of same-sex couples from marriage under the state constitution. These actions were consolidated in San Francisco superior court; the presiding judge determined that, as a matter of law, California's bar against marriage by same-sex couples violated the equal protection guarantee of Article I Section 7 of the California Constitution. The court of appeal reversed, and the California Supreme Court granted review. In May 2008, the California Supreme Court invalidated Proposition 22 and held that all California counties were required to issue marriage licenses to same-sex couples. From June 17, 2008 until the passage of Proposition 8 in November of that year, San Francisco and other California counties issued approximately 18,000 marriage licenses to same-sex couples.

After the November 2008 election, opponents of Proposition 8 challenged the initiative through an original writ of mandate in the California Supreme Court as violating the rules for amending the California Constitution and on other grounds; the California Supreme Court upheld Proposition 8 against those challenges. *Strauss v Horton … Strauss* leaves undisturbed the 18,000 marriages of same-sex couples performed in the four and a half months between the decision in *In re Marriage Cases* and the passage of Proposition 8. Since Proposition 8 passed, no same-sex couple has been permitted to marry in California.

[Approximately 100 pages of discussion of testimony have been cut, we move directly into the Court's findings of law]

Plaintiffs challenge Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Each challenge is independently meritorious, as Proposition 8 both unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation.

DUE PROCESS

The Due Process Clause provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." US Const Amend XIV, § 1. Due process protects individuals against arbitrary governmental intrusion into life, liberty or property. When legislation burdens the exercise of a right deemed to be fundamental, the government must show that the intrusion withstands strict scrutiny.

THE RIGHT TO MARRY PROTECTS AN INDIVIDUAL'S CHOICE OF MARITAL PARTNER REGARDLESS OF GENDER

The freedom to marry is recognized as a fundamental right protected by the Due Process Clause. See, for example, *Turner v. Safley* (1987) ("[T]he decision to marry is a fundamental right" and marriage is an "expression[Ballot box] of emotional support and public commitment."); *Zablocki v. Redhail*, (1978) ("The right to marry is of fundamental importance for all individuals."); *Cleveland Board of Education v LaFleur*, (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."); *Loving v Virginia* (1967) (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."); *Griswold v Connecticut* (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.").

The parties do not dispute that the right to marry is fundamental. The question presented here is whether plaintiffs seek to exercise the fundamental right to marry; or, because they are couples of the same sex, whether they seek recognition of a new right.

To determine whether a right is fundamental under the Due Process Clause, the court inquires into whether the right is rooted "in our Nation's history, legal traditions, and practices." Here, because the right to marry is fundamental, the court looks to the evidence presented at trial to determine: (1) the history, tradition and practice of marriage in the United States; and (2) whether plaintiffs seek to exercise their right to marry or seek to exercise some other right.

Marriage has retained certain characteristics throughout the history of the United States. Marriage requires two parties to give their free consent to form a relationship, which then forms the foundation of a household. The spouses must consent to support each other and any dependents. The state regulates marriage because marriage creates stable households, which in turn form the basis of a stable, governable populace. The state respects an individual's choice to build a family with another and protects the relationship because it is so central a part of an individual's life.

Never has the state inquired into procreative capacity or intent before issuing a marriage license; indeed, a marriage license is more than a license to have procreative sexual intercourse. "[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Lawrence* [*v. Texas*] The Supreme Court recognizes that, wholly apart from procreation, choice and privacy play a pivotal role in the marital relationship. See *Griswold*.

Race restrictions on marital partners were once common in most states but are now seen as archaic, shameful or even bizarre. When the Supreme Court invalidated race restrictions in *Loving*, the definition of the right to marry did not change. Instead, the Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry.

The marital bargain in California (along with other states) traditionally required that a woman's legal and economic identity be subsumed by her husband's upon marriage under the doctrine of coverture; this once-unquestioned aspect of marriage now is regarded as antithetical to the notion of marriage as a union of equals. As states moved to recognize the equality of the sexes, they eliminated laws and practices like coverture that had made gender a proxy for a spouse's role within a marriage. Marriage was thus transformed from a male-dominated institution into an institution recognizing men and women as equals. Yet, individuals retained the right to marry; that right did not become different simply because the institution of marriage became compatible with gender equality.

Plaintiffs do not seek recognition of a new right. To characterize plaintiffs' objective as "the right to same-sex marriage" would suggest that plaintiffs seek something different from what opposite-sex couples across the state enjoy — namely, marriage. Rather, plaintiffs ask California to recognize their relationships for what they are: marriages.

DOMESTIC PARTNERSHIPS DO NOT SATISFY CALIFORNIA'S OBLIGATION TO ALLOW PLAINTIFFS TO MARRY

Having determined that plaintiffs seek to exercise their fundamental right to marry under the Due Process Clause, the court must consider whether the availability of Registered Domestic Partnerships fulfills California's due process obligation to same sex couples. The evidence shows that domestic partnerships were created as an alternative to marriage that distinguish same-sex from opposite-sex couples.

Domestic partnerships are not open to opposite-sex couples unless one partner is at least sixty-two years old. Apart from this limited exception - created expressly to benefit those eligible for benefits under the Social Security Act - the sole basis upon which California determines whether a couple receives the designation "married" or the designation "domestic partnership" is the sex of the spouses relative to one another. Thus, California allows almost all opposite-sex couples only one option - marriage - and all same-sex couples only one option - domestic partnership.

The evidence at trial shows that domestic partnerships exist solely to differentiate same-sex unions from marriages. A domestic partnership is not a marriage; while domestic partnerships offer same-sex couples almost all of the rights and responsibilities associated with marriage, the evidence shows that the withholding of the designation "marriage" significantly disadvantages plaintiffs. The record reflects that marriage is a culturally superior status compared to a domestic partnership. California does not meet its due process obligation to allow plaintiffs to marry by offering them a substitute and inferior institution that denies marriage to same sex couples.

PROPOSITION 8 IS UNCONSTITUTIONAL BECAUSE IT DENIES PLAINTIFFS A FUNDAMENTAL RIGHT WITHOUT A LEGITIMATE (MUCH LESS COMPELLING) REASON

Because plaintiffs seek to exercise their fundamental right to marry, their claim is subject to strict scrutiny. That the majority of California voters supported Proposition 8 is irrelevant, as "fundamental rights may not be submitted to [a] vote; they depend on the outcome of no elections." *West Virginia State Board of Education v. Barnette* (1943). Under strict scrutiny, the state bears the burden of producing evidence to show that Proposition 8 is narrowly tailored to a compelling government interest. Because the government defendants declined to advance such arguments, proponents seized the role of asserting the existence of a compelling California interest in Proposition 8.

As explained in detail in the equal protection analysis, Proposition 8 cannot withstand rational basis review. Still less can Proposition 8 survive the strict scrutiny required by plaintiffs' due process claim. The minimal evidentiary presentation made by proponents does not meet the heavy burden of production necessary to show that Proposition 8 is narrowly tailored to a compelling government interest. Proposition 8 cannot, therefore, withstand strict scrutiny. Moreover, proponents do not assert that the availability of domestic partnerships satisfies plaintiffs' fundamental right to marry; proponents stipulated that "[t]here is a significant symbolic disparity between domestic partnership and marriage." Accordingly, Proposition 8 violates the Due Process Clause of the Fourteenth Amendment.

EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Equal protection is "a pledge of the protection of equal laws." *Yick Wo v Hopkins* (1886). The guarantee of equal protection coexists, of course, with the reality that most legislation must classify for some purpose or another. When a law creates a classification but neither targets a suspect class nor burdens a fundamental right, the court presumes the law is valid and will uphold it as long as it is rationally related to some legitimate government interest.

The court defers to legislative (or in this case, popular) judgment if there is at least a debatable question whether the underlying basis for the classification is rational. Even under the most deferential standard of review, however, the court must "insist on knowing the relation between the classification adopted and the object to be attained." The court may look to evidence to determine whether the basis for the underlying debate is rational. The search for a rational relationship, while quite deferential, "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." The classification itself must be related to the purported interest.

Most laws subject to rational basis easily survive equal protection review, because a legitimate reason can nearly always be found for treating different groups in an unequal manner. Yet, to survive rational basis review, a law must do more than disadvantage or otherwise harm a particular group

SEXUAL ORIENTATION OR SEX DISCRIMINATION

Plaintiffs challenge Proposition 8 as violating the Equal Protection Clause because Proposition 8 discriminates both on the basis of sex and on the basis of sexual orientation. Sexual orientation discrimination can take the form of sex discrimination. Here, for example, Perry is prohibited from marrying

Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex. But Prop 8 also operates to restrict Perry's choice of marital partner because of her sexual orientation.

The evidence at trial shows that gays and lesbians experience discrimination based on unfounded stereotypes and prejudices specific to sexual orientation. Gays and lesbians have historically been targeted for discrimination because of their sexual orientation; that discrimination continues to the present. As the case of Perry and the other plaintiffs illustrates, sex and sexual orientation are necessarily interrelated, as an individual's choice of romantic or intimate partner based on sex is a large part of what defines an individual's sexual orientation..Sexual orientation discrimination is thus a phenomenon distinct from, but related to, sex discrimination.

Proposition 8 targets gays and lesbians in a manner specific to their sexual orientation and, because of their relationship to one another, Proposition 8 targets them specifically due to sex. Having considered the evidence, the relationship between sex and sexual orientation and the fact that Proposition 8 eliminates a right only a gay man or a lesbian would exercise, the court determines that plaintiffs' equal protection claim is based on sexual orientation, but this claim is equivalent to a claim of discrimination based on sex.

STANDARD OF REVIEW

As presently explained in detail, the Equal Protection Clause renders Proposition 8 unconstitutional under any standard of review. Accordingly, the court need not address the question whether laws classifying on the basis of sexual orientation should be subject to a heightened standard of review.

Although Proposition 8 fails to possess even a rational basis, the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect.

The court asked the parties to identify a difference between heterosexuals and homosexuals that the government might fairly need to take into account when crafting legislation. Proponents pointed only to a difference between same-sex couples (who are incapable through sexual intercourse of producing offspring biologically related to both parties) and opposite-sex couples (some of whom are capable through sexual intercourse of producing such offspring). Proponents did not, however, advance any reason why the government may use sexual orientation as a proxy for fertility or why the government may need to take into account fertility when legislating.

The trial record shows that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation. All classifications based on sexual orientation appear suspect, as the evidence shows that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation. Here, however, strict scrutiny is unnecessary. Proposition 8 fails to survive even rational basis review.

PROPOSITION 8 DOES NOT SURVIVE RATIONAL BASIS

Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, as excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest.

Proponents put forth several rationales for Proposition 8, which the court now examines in turn: (1) reserving marriage as a union between a man and a woman and excluding any other relationship from marriage; (2) proceeding with caution when implementing social changes; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those who oppose marriage for same-sex couples; (5) treating same-sex couples differently from opposite-sex couples; and (6) any other conceivable interest.

PURPORTED INTEREST #1: RESERVING MARRIAGE AS A UNION BETWEEN A MAN AND A WOMAN AND EXCLUDING ANY OTHER RELATIONSHIP

Proponents first argue that Proposition 8 is rational because it preserves: (1) "the traditional institution of marriage as the union of a man and a woman"; (2) "the traditional social and legal purposes, functions, and structure of marriage"; and (3) "the traditional meaning of marriage as it has always been defined in the English language." These interests relate to maintaining the definition of marriage as the union of a man and a woman for its own sake.

The evidence shows that the tradition of restricting an individual's choice of spouse based on gender does not rationally further a state interest despite its "ancient lineage." Instead … the tradition of gender restrictions arose when spouses were legally required to adhere to specific gender roles. Proposition 8 thus enshrines in the California Constitution a gender restriction that the evidence shows to be nothing more than an artifact of a foregone notion that men and women fulfill different roles in civic life.

Proponents' argument that tradition prefers opposite-sex couples to same-sex couples equates to the notion that opposite-sex relationships are simply better than same-sex relationships. Tradition alone cannot legitimate this purported interest. Plaintiffs presented evidence showing conclusively that the state has no interest in preferring opposite-sex couples to same-sex couples or in preferring heterosexuality to homosexuality. Moreover, the state cannot have an interest in disadvantaging an unpopular minority group simply because the group is unpopular.

The evidence shows that the state advances nothing when it adheres to the tradition of excluding same-sex couples from marriage. Proponents' asserted state interests in tradition are nothing more than tautologies and do not amount to rational bases for Proposition 8.

PURPORTED INTEREST #2: PROCEEDING WITH CAUTION WHEN IMPLEMENTING SOCIAL CHANGES

Proponents next argue that Proposition 8 is related to state interests in: (1) "[a]cting incrementally and with caution when considering a radical transformation to the fundamental nature of a bedrock social institution"; (2) "[d]ecreasing the probability of weakening the institution of marriage"; (3) "[d]ecreasing the probability of adverse consequences that could result from weakening the institution of marriage"; and (4) "[d]ecreasing the probability of the potential adverse consequences of same-sex marriage."

Plaintiffs presented evidence at trial sufficient to rebut any claim that marriage for same-sex couples amounts to a sweeping social change. Instead, the evidence shows beyond debate that allowing same-sex couples to marry has at least a neutral, if not a positive, effect on the institution of marriage and that same-sex couples'

marriages would benefit the state. Moreover, the evidence shows that the rights of those opposed to homosexuality or same-sex couples will remain unaffected if the state ceases to enforce Proposition 8.

The contrary evidence proponents presented is not credible. Indeed, proponents presented no reliable evidence that allowing same-sex couples to marry will have any negative effects on society or on the institution of marriage. The process of allowing same-sex couples to marry is straightforward, and no evidence suggests that the state needs any significant lead time to integrate same-sex couples into marriage. The evidence shows that allowing same-sex couples to marry will be simple for California to implement because it has already done so; no change need be phased in.

Because the evidence shows same-sex marriage has and will have no adverse effects on society or the institution of marriage, California has no interest in waiting and no practical need to wait to grant marriage licenses to same-sex couples. Proposition 8 is thus not rationally related to proponents' purported interests in proceeding with caution when implementing social change.

PURPORTED INTEREST #3: PROMOTING OPPOSITE-SEX PARENTING OVER SAMESEX PARENTING

Proponents' largest group of purported state interests relates to opposite-sex parents. Proponents argue Proposition 8: (1) promotes "stability and responsibility in naturally procreative relationships"; (2) promotes "enduring and stable family structures for the responsible raising and care of children by their biological parents"; (3) increases "the probability that natural procreation will occur within stable, enduring, and supporting family structures"; (4) promotes "the natural and mutually beneficial bond between parents and their biological children"; (5) increases "the probability that each child will be raised by both of his or her biological parents"; (6) increases "the probability that each child will be raised by both a father and a mother"; and (7) increases "the probability that each child will have a legally recognized father and mother.

The evidence does not support a finding that California has an interest in preferring opposite-sex parents over same-sex parents. Indeed, the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes. Proposition 8 has nothing to do with children, as Proposition 8 simply prevents same-sex couples from marrying. Same-sex couples can have (or adopt) and raise children. When they do, they are treated identically to opposite-sex parents under California law. Even if California had an interest in preferring opposite-sex parents to same-sex parents - Proposition 8 is not rationally related to that interest, because Proposition 8 does not affect who can or should become a parent under California law.

To the extent California has an interest in encouraging sexual activity to occur within marriage (a debatable proposition in light of *Lawrence*) the evidence shows Proposition 8 to be detrimental to that interest. Because of Proposition 8, same-sex couples are not permitted to engage in sexual activity within marriage. Domestic partnerships, in which sexual activity is apparently expected, are separate from marriage and thus codify California's encouragement of non-marital sexual activity. To the extent proponents seek to encourage a norm that sexual activity occur within marriage to ensure that reproduction occur within stable households, Proposition 8 discourages that norm because it requires some sexual activity and child-bearing and child-rearing to occur outside marriage.

Proponents argue Proposition 8 advances a state interest in encouraging the formation of stable households. Instead, the evidence shows that Proposition 8 undermines that state interest, because same-sex households

have become less stable by the passage of Proposition 8. The inability to marry denies same-sex couples the benefits, including stability, attendant to marriage. Proponents failed to put forth any credible evidence that married opposite-sex households are made more stable through Proposition 8.

PURPORTED INTEREST #4: PROTECTING THE FREEDOM OF THOSE WHO OPPOSE MARRIAGE FOR SAME-SEX COUPLES

Proponents next argue that Proposition 8 protects the First Amendment freedom of those who disagree with allowing marriage for couples of the same sex. Proponents argue that Proposition 8: (1) preserves "the prerogative and responsibility of parents to provide for the ethical and moral development and education of their own children"; and (2) accommodates "the First Amendment rights of individuals and institutions that oppose samesex marriage on religious or moral grounds."

These purported interests fail as a matter of law. Proposition 8 does not affect any First Amendment right or responsibility of parents to educate their children. Californians are prevented from distinguishing between same-sex partners and opposite-sex spouses in public accommodations, as California antidiscrimination law requires identical treatment for same-sex unions and opposite-sex marriages. The evidence shows that Proposition 8 does nothing other than eliminate the right of same-sex couples to marry in California. Proposition 8 is not rationally related to an interest in protecting the rights of those opposed to same-sex couples because, as a matter of law, Proposition 8 does not affect the rights of those opposed to homosexuality or to marriage for couples of the same sex.

To the extent proponents argue that one of the rights of those morally opposed to same-sex unions is the right to prevent same-sex couples from marrying, as explained presently those individuals' moral views are an insufficient basis upon which to enact a legislative classification.

PURPORTED INTEREST #5: TREATING SAME-SEX COUPLES DIFFERENTLY FROM OPPOSITE-SEX COUPLES

Proponents argue that Proposition 8 advances a state interest in treating same-sex couples differently from opposite-sex couples by: (1) "[u]sing different names for different things"; (2) "[m]aintaining the flexibility to separately address the needs of different types of relationships"; (3) "[e]nsuring that California marriages are recognized in other jurisdictions"; and (4) "[c]onforming California's definition of marriage to federal law."

Here, proponents assume a premise that the evidence thoroughly rebutted: rather than being different, same-sex and opposite-sex unions are, for all purposes relevant to California law, exactly the same. The evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples. The evidence fatally undermines any purported state interest in treating couples differently; thus, these interests do not provide a rational basis supporting Proposition 8.

In addition, proponents appear to claim that Proposition 8 advances a state interest in easing administrative burdens associated with issuing and recognizing marriage licenses. Under precedents such as *Craig v Boren*, "administrative ease and convenience" are not important government objectives. Even assuming the state were to have an interest in administrative convenience, Proposition 8 actually creates an administrative burden on California because California must maintain a parallel institution for same-sex couples to provide

the equivalent rights and benefits afforded to married couples. Proposition 8 thus hinders rather than advances administrative convenience.

PURPORTED INTEREST #6: THE CATCHALL INTEREST

Finally, proponents assert that Proposition 8 advances "[a]ny other conceivable legitimate interests identified by the parties, amici, or the court at any stage of the proceedings." But proponents, amici and the court, despite ample opportunity and a full trial, have failed to identify any rational basis Proposition 8 could conceivably advance.

Many of the purported interests identified by proponents are nothing more than a fear or unarticulated dislike of same-sex couples. Those interests that are legitimate are unrelated to the classification drawn by Proposition 8.

A PRIVATE MORAL VIEW THAT SAME-SEX COUPLES ARE INFERIOR TO OPPOSITE-SEX COUPLES IS NOT A PROPER BASIS FOR LEGISLATION

In the absence of a rational basis, what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.

Proponents' purported rationales are nothing more than post-hoc justifications. While the Equal Protection Clause does not prohibit post-hoc rationales, they must connect to the classification drawn. Here, the purported state interests fit so poorly with Proposition 8 that they are irrational, as explained above. What is left is evidence that Proposition 8 enacts a moral view that there is something "wrong" with same-sex couples. The evidence at trial regarding the campaign to pass Proposition 8 uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples. The campaign relied heavily on negative stereotypes about gays and lesbians and focused on protecting children from inchoate threats vaguely associated with gays and lesbians.

Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians. The evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples. Because Proposition 8 disadvantages gays and lesbians without any rational justification, Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional.