CASE NOTES

Perry v. Schwarzenegger: A Large Step in the Direction of Marriage Equality in California

I. INTRODUCTION

Kristin Perry and Sandra Stier are not much different from thousands of other women their age in Burbank, California. They are both mothers to four children, both are in happy committed relationships and both wish to legally wed their significant other.[1] However, both women were denied marriage licenses by their county authorities.[2] The reason: Ms. Perry and Ms. Stier are a lesbian couple who wish to marry one another, and "were denied . . . licenses . . . on the basis of Proposition 8" (Prop. 8), a voter-enacted amendment to the California Constitution which states that "'[o]nly marriage between a man and a woman is valid or recognized in California.'"[3]

Ms. Perry and Ms. Stier, along with Jeffrey Zarrillo and Paul Katami, a gay couple that also wished to wed, but were denied on the basis of Prop. 8, sued the Governor and several other California State officials in their official capacities.[4] Plaintiffs alleged that the freedom to marry whomever one chooses is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment, and that Prop. 8 unjustifiably violates that right by disabling the plaintiffs from marrying their respective partners.[5] Plaintiffs also claimed that Prop. 8 is violative of the Equal Protection Clause of the Fourteenth Amendment because it discriminates against and disadvantages a "suspect class," namely gay men and lesbians, by preventing them from marrying, while leaving heterosexual couples free to do so.[6] The United States District Court for

1. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).
2. *Id.*
3. *Id.* (quoting CAL. FAM. CODE § 308.5 (Deering 2006)).
4. *Id.* at 928.
5. *Id.* at 929.
6. *Id.*

the Northern District of California *held* that the amendment to the California Constitution brought about by Prop. 8 violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and was thus unconstitutional. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010).

II. BACKGROUND

Section 1 of the Fourteenth Amendment of the United States Constitution provides two separate and independent, yet often interrelated, grounds upon which a plaintiff may challenge the constitutionality of a statute that limits his or her ability to exercise a right that has not been limited for others: The Due Process Clause and the Equal Protection Clause.[7] The Due Process Clause protects individuals against unjustified governmental intrusions into life, liberty or property.[8] The Equal Protection Clause, on the other hand, guarantees that no state law may make classifications for unequal treatment without being rationally related to some legitimate governmental interest.[9]

The Supreme Court of the United States first applied these doctrines in evaluating the constitutionality of a statute that limited an individual's right to choose their marriage partner in *Loving v. Virginia*.[10] In this case, two Virginia residents, a white man and a black woman, were married in the District of Columbia and subsequently punished in their home state of Virginia for violating the state's ban on interracial marriages.[11] When the case made it to the United States Supreme Court, the Court invalidated the miscegenation statutes that Virginia had adopted to prevent interracial marriages, holding that such laws violated the Equal Protection and Due Process Clauses.[12] The Court also here established that the option and ability to marry was a fundamental right, one that must not be burdened, restricted or infringed by the State.[13]

The Supreme Court contemplated the constitutionality of laws that specifically targeted the conduct of homosexuals, but not identical

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7. U.S. CONST. amend. XIV, § 1.

8. *See* Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).

9. *See* Loving v. Virginia, 388 U.S. 1, 10-11 (1967) ("[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary . . . discrimination . . . [and] [t]hey must be shown to be necessary to the accomplishment of some permissible state objective.").

10. *Id.* at 11-12 (Stewart, J., concurring).

11. *Id.* at 3.

12. *Id.* at 10-11.

13. *Id.* at 12 (Stewart, J., concurring).

behavior exercised by heterosexuals in *Lawrence v. Texas*.[14] Here, the court struck down a Texas sodomy statute that criminalized certain sexual activity between two people of the same sex, but not between two people of opposite sex, holding that it was violative of the Due Process Clause.[15] The Court found that the Due Process clause provided homosexuals, as well as (and no less than) heterosexuals, the right to engage in such conduct within the privacy of their own homes without governmental intervention, finding that the statute furthered no legitimate state interest that would justify such an intrusion.[16]

The question of whether Fourteenth Amendment protection should be extended to same-sex marriage has not yet been considered by the U.S. Supreme Court.[17] However, it is a question that has been considered by the high courts of several states.[18] A threshold issue in several of these key same-sex marriage cases has been the determination of whether the plaintiffs, in seeking the right to marry their partner, are actually pursuing the recognized fundamental right to marry, which was memorialized in *Loving* and which is clearly protected under the due process and equal protection constitutional provisions of most states, or whether they seek the creation of a *new* fundamental right, that of "same-sex marriage."[19] Indeed, this issue was discussed introductorily by the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*, which stated that barring people from marriage is to bar them from participation in one of the state's most "rewarding and cherished institutions," and accordingly made no distinction between its traditional and same-sex variations in its analysis.[20] Later, the California Supreme Court addressed the issue specifically in its original 2008 decision invalidating California's gay marriage ban, and explained that the plaintiffs were not seeking to create a "new" constitutional right of same-sex marriage, but sought only to exercise the fundamental right of marriage.[21]

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14. 539 U.S. 573-76 (2003).

15. *Id.* at 578-79.

16. *Id.* at 578.

17. *See* COURTNEY G. JOSLIN & SHANNON P. MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW 467-80 (2009).

18. *Id.*; *see* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 411 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

19. *See* JOSLIN & MINTER, *supra* note 17, at 454-56.

20. 798 N.E.2d 941, 949 (Mass. 2003).

21. JOSLIN & MINTER, *supra* note 17, at 454-56 (citing *In re* Marriage Cases, 43 Cal. 4th 757, 812 (Cal. 2008)).

In *Goodridge*, same-sex couples sued, challenging Massachusetts marriage-licensing statutes that prevented qualified same-sex couples from obtaining marriage licenses.[22] The Supreme Judicial Court of Massachusetts became the first high court in the nation to strike down statutes preventing same-sex couples from marrying.[23] The court explained that interpreting the word "marriage" within the statute to apply only to opposite-sex unions was without a rational basis, and violated the state's constitutional equal protection guarantee.[24] It further noted that the gay marriage ban at issue was based on prejudices and private biases, which the law cannot proliferate or give effect.[25] Because the court found that the statute did not even survive the rational basis test, it did not consider whether the class affected was "suspect" or if the right at issue was fundamental as a matter of law, which would have necessitated a strict scrutiny standard of review.[26]

The Connecticut Supreme Court broached the subject of the constitutionality of a same-sex marriage ban in 2008 when eight couples sued claiming that Connecticut's marriage law was violative of the Connecticut Constitution.[27] Considering federal and state precedent, as well as sociological factors, the court found that the gay population was a quasi-suspect class, and that, accordingly, laws that discriminated against them were subject to intermediate scrutiny.[28] In applying that heightened level of scrutiny, the court found that state laws that denied same-sex couples the right of civil marriage violated their constitutional equal protection rights, and were thus invalid.[29]

Most recently, Iowa joined the ranks of states that have invalidated state statutes limiting civil marriage to opposite-sex couples in the Supreme Court of Iowa's 2009 opinion *Varnum v. Brien*.[30] Like the Connecticut Supreme Court, the court here also found that sexual orientation was a quasi-suspect classification, thus requiring a heightened level of scrutiny in the analysis of the constitutionality of a law which denied homosexual couples the right to marry, while leaving the rights of

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22. 798 N.E.2d 941, 949 (Mass. 2003).
23. JOSLIN & MINTER, *supra* note 17, at 473-74.
24. Goodridge v. Dep't of Pub. Health, 798 N.E.2d at 968 (Mass. 2003).
25. *Id.* (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The Constitution cannot control . . . prejudices but neither can it tolerate them. . . . [or] directly or indirectly, give them effect.")).
26. *Id.* at 961.
27. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 411 (Conn. 2008).
28. *Id.* at 475-76.
29. *Id.* at 481.
30. 763 N.W.2d 862, 872 (Iowa 2009).

heterosexual couples intact.[31] In its equal protection analysis, the court considered a number of government objectives posed by proponents of the statute to justify the unequal protection of the marriage laws.[32] However, the court found that the statute was not adequately rationally related to any of them to justify the discriminatory treatment of a suspect class.[33] It further noted that maintaining and protecting the traditional definition of marriage as solely between a man and a woman was not an important governmental objective, and could not support the statute in question, which classified and discriminated against same-sex couples.[34]

III. COURT'S DECISION

In the noted case, the United States District Court for the Northern District of California scrutinized the constitutionality of Prop. 8 on the basis of equal protection (like the courts in *Goodridge*, *Kerrigan*, and *Varnum*), as well as on the basis of due process.[35] First, in its due process analysis, the court held that the right to marry protected one's ability to choose a spouse, regardless of their gender.[36] Because this right was denied to the plaintiffs and because the court found that the domestic partnerships currently offered to same-sex couples did not satisfy California's obligation to allow the plaintiffs to marry, in the absence of a legitimate reason, the court held that Prop. 8 violated the Due Process Clause.[37] Second, in its equal protection analysis, the court noted that because any law that classified on the basis of sexual orientation must be viewed as "suspect," the appropriate standard of review of Prop. 8 should be strict scrutiny, however it held that because the provision failed even to stand up to a rational basis test, the heightened level of scrutiny was unnecessary.[38] Finding no rational justification for Prop. 8, which disadvantaged gays and lesbians, the court held that the amendment violated the Equal Protection Clause as well, and was thus unconstitutional.[39]

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31. *Id.* at 896; *see Kerrigan*, 957 A.2d at 476.
32. *Varnum*, 763 N.W.2d at 897-904.
33. *Id.* (holding that the marriage statute in question does not further any of the following proffered governmental objectives: "[m]aintaining traditional marriage", "[p]romotion of optimal environment to raise children", "[p]romotion of procreation", "[p]romoting stability in opposite-sex relationships", or "[c]onservation of resources").
34. *Id.* at 898.
35. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 929 (N.D. Cal. 2010).
36. *Id.* at 993.
37. *Id.* at 993-95.
38. *Id.* at 997-98.
39. *Id.* at 998-1003.

The court began its decision by addressing plaintiffs' claim that Prop. 8 violated the Due Process Clause.[40] Recognizing that the freedom to marry is a fundamental right, the court took up the threshold issue of whether the plaintiffs sought to exercise this fundamental right, or if they sought recognition of a new right, that of "same-sex marriage."[41] The court looked to the history, tradition and practice of marriage in the United States and noted the removal of race restrictions, as accomplished in *Loving*, as well as a trend towards gender equality in marriage, finding that such restrictions were never part of the core of the institution.[42] Thus, the court held that the plaintiffs were *not* seeking the creation of a new right, and that the right to marry protected ones choice of marital partner, regardless of gender.[43]

Having established that plaintiffs sought to exercise a fundamental right, the court next considered whether the current availability to same-sex couples of Registered Domestic Partnerships in California met the state's due process obligation.[44] The court noted that the only basis upon which California determined whether a couple's arrangement was deemed "marriage" or "domestic partnership" was whether it was a same-sex or opposite-sex companionship, and that the institution of domestic partnerships was created specifically to offer similar rights to same-sex couples while denying them the right of marriage.[45] Because the court found that marriage is a culturally superior institution to domestic partnership as a matter of fact, the court held that California's due process obligation to the plaintiffs was not met by offering them domestic partnership.[46] As the court had already found that marriage is a fundamental right, it held that plaintiffs' claim was subject to strict scrutiny, which required that Prop. 8 be narrowly tailored to a compelling governmental interest in order to be valid.[47] Considering the negligible evidentiary showing made by proponents in support of the interests they claimed were advanced by Prop. 8, particularly the heavy burden they faced to prove said interests were *compelling*, the court held that Prop. 8 was violative of the Due Process Clause.[48]

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40. *Id.* at 991.
41. *Id.* at 991-93.
42. *Id.* at 993.
43. *Id.*
44. *Id.*
45. *Id.* at 994.
46. *Id.*
47. *Id.* at 994-95.
48. *Id.* at 995.

Plaintiffs claimed that Prop. 8 discriminated both on the basis of sex and on the basis of sexual orientation.[49] As a precursor to the court's evaluation of plaintiffs' equal protection claim, it first considered whether the proposition in question was based on sexual orientation, sex discrimination or both.[50] The court held that because the effect of Prop. 8 would be only on those who wished to marry someone of the same sex, and in light of the evidence presented demonstrating the history of discrimination on the basis of sexual orientation, the plaintiffs' equal protection claim was based primarily on sexual orientation, but that this was equivalent to a claim of sex discrimination.[51]

Next, the court discussed the minority status of gays and lesbians, in determining the appropriate standard of review for the plaintiffs' equal protection claim.[52] Due to evidence in the trial record of the history of gays and lesbians being victim to stereotypes and inequality, the court deemed that gays and lesbians were the type of minority a heightened level of scrutiny was meant to protect, thus making strict scrutiny the appropriate standard of review of any law which classified on the basis of sexual orientation.[53] However, the court found it unnecessary to apply that heightened standard, finding that Prop. 8 failed to even survive rational basis review.[54]

Proponents of Prop. 8 put forth several justifications that they claimed provided the necessary rational basis for same-sex marriage exclusion.[55] The court examined each of them, and dismissed them each in turn.[56] First, the court dismissed the purported interest of maintaining the definition of marriage as the union of a man and a woman because tradition alone cannot legitimate a purported interest.[57] Second, the court found that the purported interest of proceeding with caution when implementing social change had been completely rebutted by evidence in the record that showed convincingly that allowing same-sex marriage would have, at worst, a neutral effect and, at best, a positive effect on the institution of marriage.[58] Proponents put the most emphasis on a group of purported interests involving the preference for opposite-sex

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49. *Id.* at 996.
50. *Id.*
51. *Id.*
52. *Id.* at 997.
53. *Id.*
54. *Id.*
55. *Id.* at 997-98.
56. *Id.* at 998-1002.
57. *Id.* at 998 (citing Williams v. Illinois, 399 U.S. 235, 239 (1970)).
58. *Id.* at 998-99.

parenting over same-sex parenting.[59] The court found that they had each been completely rebutted by the wealth of expert testimony and evidence presented by plaintiffs which showed that Prop. 8 *disadvantaged* families and their children.[60] Fourth, proponents argued that Prop. 8 protected the First Amendment freedom of those who opposed gay marriage.[61] The court rejected this argument on the grounds that Prop. 8 had no effect on any First Amendment right, or any other right, of those opposed to same-sex marriage or homosexuality in general.[62] Fifth, the court invalidated proponents' proposed government interest in treating same-sex and opposite-sex unions differently.[63] It held that the evidence thoroughly rebutted the premise that proponents had erroneously assumed when making this argument: that rather than being different, for all purposes relevant to the State of California, same-sex and opposite-sex unions are exactly the same.[64] Finally, the court dismissed proponents' "catchall" interest argument, noting that they had had ample opportunity, but failed to identify any rational basis for Prop. 8.[65]

After finding no rational basis to support the classifications made by Prop. 8, the court looked to the record and evidence put forth by proponents to support their post hoc justifications and determined that, despite support from the majority of California voters, the only rationale for the proposition was moral disapproval of same-sex couples.[66] Because this moral disapproval alone is not a sufficient basis to support a law that disadvantages the gay and lesbian community, the court declared that Prop. 8 violated the Equal Protection Clause.[67] Because Prop. 8 violated plaintiffs' constitutional due process and equal protection rights, the court ordered a judgment enjoining Prop 8.'s enforcement, and found in favor of the plaintiffs.[68]

IV. ANALYSIS

The U.S. District Court's opinion in the noted case is a considerable victory for same-sex marriage proponents, and represents a sizeable step towards their final goal: marriage equality in California, and eventually

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59. *Id.* at 999.
60. *Id.* at 999-1000.
61. *Id.* at 1000.
62. *Id.* at 1000-01.
63. *Id.* at 1001.
64. *Id.*
65. *Id.* at 1001-02.
66. *Id.* at 1002.
67. *Id.* at 1003.
68. *Id.*

throughout the country. While the court's arguments were largely consistent with those raised in other landmark opinions in Iowa, Connecticut, and Massachusetts that arrived at the same result, the court makes a misguided argument that sexual orientation discrimination is equal to discrimination on the basis of sex.[69] With the exception of that misguided argument, which has little effect on the total thrust and effectiveness of the court's opinion, the noted case furthers the cause for same-sex marriage equality by increasing the wealth of positive case law on the subject. It will likely be quite useful as a reference for future opinions in other states, particularly because of its Due Process argument, which other states' high courts have declined to consider in their opinions.[70]

The battle over gay marriage has been hard-fought in California. It began in 2004 when the City of San Francisco started allowing same-sex couples to receive marriage licenses, which were then invalidated.[71] This eventually lead to the California Supreme Court's 2008 opinion, *In re Marriage Cases*, where it found state marriage laws unconstitutional in violation of the equal protection clause of the California constitution due to their infringement upon same-sex couples' fundamental marriage rights.[72] The passage of Prop. 8 represented the second time same-sex couples had been allowed, and then disallowed to marry, which is what makes the decision in the noted case so significant, particularly to that community. [73]

In the noted case, the court puts forth a convincing case for the invalidation of discriminatory marriage statutes. However, the court makes an ineffective argument in its equal protection analysis that Prop. 8 is discriminatory not only on the basis of sexual orientation, but also on the basis of sex.[74] The noted case attempts to demonstrate how Prop. 8 is sex-discriminatory by providing an unconvincing illustration, claiming that because the person whom Ms. Perry wishes to marry (Ms. Stier) is a woman, and Ms. Perry is a woman, she is prohibited from marrying her, however if Ms. Perry were a man, she would be within her full legal

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69. *See id.* at 996.

70. *Compare id.* at 991-94, *with* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 411 (Conn. 2008), *and* Varnum v. Brien, 763 N.W. 2d 862, 872 (Iowa 2009), *and* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

71. JOSLIN & MINTER, *supra* note 17, at 455-56 (citing *In re* Marriage Cases, 43 Cal. 4th 757, 812 (Cal. 2008)).

72. 43 Cal. 4th 757, 812 (Cal. 2008).

73. *See* JOSLIN & MINTER, *supra* note 17, at 455-56.

74. *Perry*, 704 F. Supp. 2d at 996.

rights to wed Ms. Stier.[75] While this may be true, it is seemingly an argument of circular logic, and does not prove that Prop. 8 discriminates on the *basis* of sex. A more convincing argument to the contrary was put forth in *Hernandez v. Robles*, where the Court of Appeals of New York validated a law barring same-sex marriage.[76] The court rejected plaintiffs' claim that the law was sex-discriminatory, holding that the limitation imposed by the law did not put men and women in different classes and confer a benefit on one not given to the other.[77] Under both the law in *Hernandez* and Prop. 8, both men and women are prohibited from marrying someone of their same sex, and permitted to marry someone of the opposite sex, thus there is no classification and unequal treatment on the basis of sex.[78] While the noted case did find, more convincingly, that Prop. 8 discriminated on the basis of sexual orientation, which was enough for it to apply a heightened scrutiny (although it found that to be unnecessary), the argument that it was also sex-discriminatory, and that the two types of discrimination were somehow equivalent, was misguided and unconvincing.[79]

Like previous cases invalidating same-sex discriminatory marriage statutes, the noted case makes a significant contribution to the case law on the subject. Most noteworthy is its full treatment of the premise that Prop. 8 was invalid under the Due Process Clause, distinguishing it from its out-of-state "contemporaries" (*Goodridge*, *Kerrigan*, and *Varnum*), each of which invalidated discriminatory marriage statutes solely based on their violation of equal protection provisions of state constitutions.[80] While the noted case does invalidate Prop. 8 on equal protection grounds, it further invalidates it on the second, independent ground of its Due Process Clause violation.[81] This contribution to the case law provides future challengers of discriminatory marriage statutes with legal support for their due process claims, which was previously lacking, and accordingly courts may look to the decision in the noted case as persuasive authority to decide in their favor.

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75. *Id.*
76. 855 N.E.2d 1, 12 (N.Y. 2006).
77. *Id.* at 10-11.
78. *Id.*; *Perry*, 704 F. Supp. 2d at 996.
79. *See Perry*, 704 F. Supp. 2d at 996.
80. *See id.* at 995-96; Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 411 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).
81. *Perry*, 704 F. Supp. 2d at 995-96, 1003.

V. CONCLUSION

With the exception of an unconvincing argument that Prop. 8 discriminated on the basis of sex, the decision in the noted case is a significant victory for same-sex marriage proponents, as it provides precedent, on a federal level, for the holding that marriage statutes that limit marriage to opposite-sex couples are unconstitutional.[82] The United States District Court for the Northern District of California's holding that amending the California Constitution to recognize only opposite sex marriages violated both the Due Process and Equal Protection Clauses of the U.S. Constitution represents a clear victory for same-sex marriage proponents in California and nationwide. It represents a large step in the direction of permanent marriage equality in the State of California, and will serve as a useful resource for courts that decide the issue in the future.

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82. *See id.* at 1003.

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