Perry v. Brown

671 F.3d 1052 (2012)

In In re Marriage Cases, decided in May of 2008, the California Supreme Court invalidated an initiative statute, Proposition 22, that had been adopted in 2000 by a 61.4 percent of California voters and that read: "Only marriage between a man and a woman is valid or recognized in California." Chief Justice Ron George declared in a four to three decision that it was unconstitutional under the Equal Protection Clause of the California Constitution. Prior to that decision, opponents of same-sex marriage had already begun their efforts to qualify an initiative constitutional amendment, Proposition 8, for the ballot. The text of Proposition 8 was identical to Proposition 22: "Only marriage between a man and a woman is valid or recognized in California." Their reasoning at the time was that since Proposition 22 was only a statute, it was subject to judicial review in a way that an amendment to the constitution would not be. In re Marriage Cases *validated their worries and assisted them in securing its qualification for the ballot and passage with 52.3 percent of the vote. During the 143-day hiatus between the effective date of the* In re Marriages Cases *decision and the enactment of Proposition 8, 18,000-plus marriages of same-sex couples had been performed. After the California State Supreme Court upheld Proposition 8 under the state Constitution, plaintiffs brought suit in federal district court and successfully challenged its constitutionality under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The proponents of Proposition 8 then appealed to the Ninth Circuit Court of Appeals. The panel consisted of Judges Michael Hawkins, Stephen Reinhardt, and N. Randy Smith.*

Opinion of the Court: Reinhardt, Hawkins.

Dissenting opinion: Smith.

Opinion by REINHARDT, Circuit Judge:

Prior to November 4, 2008, the California Constitution guaranteed the right to marry to opposite-sex couples and same-sex couples alike. On that day, the People of California adopted Proposition 8, which amended the state constitution to eliminate the right of same-sex couples to marry. We consider whether that amendment violates the Fourteenth Amendment to the United States Constitution. We conclude that it does. . . .

The district court held Proposition 8 unconstitutional for two reasons: first, it deprives same-sex couples of the fundamental right to marry, which is guaranteed by the Due Process Clause; and second, it excludes same-sex couples from state-sponsored marriage while allowing opposite-sex couples access to that honored status, in violation of the Equal Protection Clause. Plaintiffs elaborate upon those arguments on appeal.

Plaintiffs and Plaintiff-intervenor San Francisco also offer a third argument: Proposition 8 singles out same-sex couples for unequal treatment by *taking away* from them alone the right to marry, and this action amounts to a distinct constitutional violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason. Because this third argument applies to the specific history of same-sex marriage in California, it is the narrowest ground for adjudicating the constitutional questions before us, while the first two theories, if correct, would apply on a broader basis. Because courts

generally decide constitutional questions on the narrowest ground available, we consider the third argument first.

Proposition 8 worked a singular and limited change to the California Constitution: it stripped same-sex couples of the right to have their committed relationships recognized by the State with the designation of 'marriage,' which the state constitution had previously guaranteed them, while leaving in place all of their other rights and responsibilities as partners—rights and responsibilities that are identical to those of married spouses and form an integral part of the marriage relationship. In determining that the law had this effect, "[w]e rely not upon our own interpretation of the amendment but upon the authoritative construction of [California's] Supreme Court. The state high court held in *Strauss* [*v. Horton* 2009)] that "Proposition 8 reasonably must be interpreted in a limited fashion as eliminating only the right of same-sex couples to equal access to the designation of marriage, and as not otherwise affecting the constitutional right of those couples to establish an officially recognized family relationship," which California calls a 'domestic partnership.'" Proposition 8 "leaves intact all of the other very significant constitutional protections afforded same-sex couples," including "the constitutional right to enter into an officially recognized and protected family relationship with the person of one's choice and to raise children in that family if the couple so chooses." Thus, the extent of the amendment's effect was to "establish a new substantive state constitutional rule," which "carves out a narrow and limited exception to these state constitutional rights," by "reserving the official designation of the term "marriage" for the union of opposite-sex couples as a matter of state constitutional law." . . .

Proposition 8 . . . simply took the designation of "marriage" away from lifelong same-sex partnerships, and with it the State's authorization of that official status and the societal approval that comes with it.

By emphasizing Proposition 8's limited effect, we do not mean to minimize the harm that this change in the law caused to same-sex couples and their families. To the contrary, we emphasize the extraordinary significance of the official designation of "marriage." That designation is important because "marriage" is the name that society gives to the relationship that matters most between two adults. A rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of "registered domestic partnership" does not. The word "marriage" is singular in connoting "a harmony in living," "a bilateral loyalty," and "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut* (1965). . . .

We set this forth because we must evaluate Proposition 8's constitutionality in light of its actual and specific effects on committed same-sex couples desiring to enter into an officially recognized lifelong relationship. Before Proposition 8, California guaranteed gays and lesbians both the incidents and the status and dignity of marriage. Proposition 8 left the incidents but took away the status and the dignity. It did so by superseding the *Marriage Cases* and thus endorsing the "official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples." The question we therefore consider is this: did the People of California have legitimate reasons for enacting a constitutional amendment that serves only to take away from same-sex couples the right to have their lifelong relationships dignified by the official status of 'marriage,' and to compel the State

and its officials and all others authorized to perform marriage ceremonies to substitute the label of 'domestic partnership' for their relationships? . . .

This is not the first time the voters of a state have enacted an initiative constitutional amendment that reduces the rights of gays and lesbians under state law. In 1992, Colorado adopted Amendment 2 to its state constitution, which prohibited the state and its political subdivisions from providing any protection against discrimination on the basis of sexual orientation. Amendment 2 was proposed in response to a number of local ordinances that had banned sexual-orientation discrimination in such areas as housing, employment, education, public accommodations, and health and welfare services. The effect of Amendment 2 was "to repeal" those local laws and "to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future." . . .

The Supreme Court held [in *Romer v. Evans* (1996)] that Amendment 2 violated the Equal Protection Clause because "[i]t is not within our constitutional tradition to enact laws of this sort"—laws that "singl[e] out a certain class of citizens for disfavored legal status," which "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." The Court considered possible justifications for Amendment 2 that might have overcome the "inference" of animus, but it found them all lacking. It therefore concluded that the law "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else."

Proposition 8 is remarkably similar to Amendment 2. Like Amendment 2, Proposition 8 "single[s] out a certain class of citizens for disfavored legal status . . . ." Like Amendment 2, Proposition 8 has the "peculiar property" of "withdraw[ing] from homosexuals, but no others," an existing legal right—here, access to the official designation of "marriage"—that had been broadly available, notwithstanding the fact that the Constitution did not compel the state to confer it in the first place. Like Amendment 2, Proposition 8 denies "equal protection of the laws in the most literal sense," because it "carves out" an "exception" to California's equal protection clause, by removing equal access to marriage, which gays and lesbians had previously enjoyed, from the scope of that constitutional guarantee. Like Amendment 2, Proposition 8 "by state decree . . . put[s] [homosexuals] in a solitary class with respect to" an important aspect of human relations, and accordingly "imposes a special disability upon [homosexuals] alone." And like Amendment 2, Proposition 8 constitutionalizes that disability, meaning that gays and lesbians may overcome it "only by enlisting the citizenry of [the state] to amend the State Constitution" for a second time. . . . *Romer* compels that we affirm the judgment of the district court. . . .

There is one further important similarity between this case and *Romer*. Neither case requires that the voters have stripped the state's gay and lesbian citizens of any federal constitutional right. In *Romer*, Amendment 2 deprived gays and lesbians of statutory protections against discrimination; here, Proposition 8 deprived same-sex partners of the right to use the designation of 'marriage.' There is no necessity in either case that the privilege, benefit, or protection at issue be a constitutional right. We therefore need not and do not consider whether same-sex couples have a fundamental right to marry, or whether states that fail to afford the right to marry to gays and lesbians must do so. Further, we express no view on those questions.

Ordinarily, "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate

end." Such was the case in *Romer*, and it is the case here as well. The end must be one that is legitimate for the *government* to pursue, not just one that would be legitimate for a private actor. The question here, then, is whether California had any more legitimate justification for withdrawing from gays and lesbians its constitutional protection with respect to the official designation of "marriage" than Colorado did for withdrawing from that group all protection against discrimination generally. . . ; otherwise, we must infer that it was enacted with only the constitutionally illegitimate basis of "animus toward the class it affects." . . .

We first consider four possible reasons offered by Proponents or amici to explain why Proposition 8 might have been enacted: (1) furthering California's interest in childrearing and responsible procreation, (2) proceeding with caution before making significant changes to marriage, (3) protecting religious freedom, and (4) preventing children from being taught about same-sex marriage in schools. To be credited, these rationales "must find some footing in the realities of the subject addressed by the legislation." They are, conversely, not to be credited if they "could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley* (1979). Because Proposition 8 did not further any of these interests, we conclude that they cannot have been rational bases for this measure, whether or not they are legitimate state interests. . . .

Proposition 8's only effect, we have explained, was to withdraw from gays and lesbians the right to employ the designation of "marriage" to describe their committed relationships and thus to deprive them of a societal status that affords dignity to those relationships. Proposition 8 could not have reasonably been enacted to promote childrearing by biological parents, to encourage responsible procreation, to proceed with caution in social change, to protect religious liberty, or to control the education of schoolchildren. Simply taking away the designation of "marriage," while leaving in place all the substantive rights and responsibilities of same-sex partners, did not do any of the things its Proponents now suggest were its purposes. Proposition 8 "is so far removed from these particular justifications that we find it impossible to credit them." We therefore need not, and do not, decide whether any of these purported rationales for the law would be "legitimate," or would suffice to justify Proposition 8 if the amendment actually served to further them.

We are left to consider why else the People of California might have enacted a constitutional amendment that takes away from gays and lesbians the right to use the designation of "marriage." One explanation is the desire to revert to the way things were prior to the *Marriage Cases*, when "marriage" was available only to opposite-sex couples, as had been the case since the founding of the State and in other jurisdictions long before that. This purpose is one that Proposition 8 actually did accomplish: it "restore[d] the traditional definition of marriage as referring to a union between a man and a woman." But tradition alone is not a justification for *taking away* a right that had already been granted, even though that grant was in derogation of tradition. In *Romer,* it did not matter that at common law, gays and lesbians were afforded no protection from discrimination in the private sphere; Amendment 2 could not be justified on the basis that it simply repealed positive law and restored the "traditional" state of affairs. recisely the same is true here.

Laws may be repealed and new rights taken away if they have had unintended consequences or if there is some conceivable affirmative good that revocation would produce, but new rights may not be stripped away solely *because* they are new. Tradition is a legitimate consideration in policymaking, of course, but it cannot be an end unto itself. . . . If tradition alone is insufficient

to justify *maintaining* a prohibition with a discriminatory effect, then it is necessarily insufficient to justify *changing* the law to revert to a previous state. A preference for the way things were before same-sex couples were allowed to marry, without any identifiable good that a return to the past would produce, amounts to an impermissible preference against same-sex couples themselves, as well as their families.

Absent any legitimate purpose for Proposition 8, we are left with "the inevitable inference that the disadvantage imposed is born of animosity toward," or, as is more likely with respect to Californians who voted for the Proposition, mere disapproval of, "the class of persons affected." We do not mean to suggest that Proposition 8 is the result of ill will on the part of the voters of California. "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone." Disapproval may also be the product of longstanding, sincerely held private beliefs. Still, while "[p]rivate biases may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti* (1984). Ultimately, the "inevitable inference" we must draw in this circumstance is not one of ill will, but rather one of disapproval of gays and lesbians as a class. "[L]aws singling out a certain class of citizens for disfavored legal status or general hardships are rare." Under *Romer*, we must infer from Proposition 8's effect on California law that the People took away from gays and lesbians the right to use the official designation of "marriage"—and the societal status that accompanies it—because they disapproved of these individuals *as a class* and did not wish them to receive the same official recognition and societal approval of their committed relationships that the State makes available to opposite-sex couples. . . .

The "inference" that Proposition 8 was born of disapproval of gays and lesbians is heightened by evidence of the context in which the measure was passed. The district court found that "[t]he campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships." Television and print advertisements "focused on . . . the concern that people of faith and religious groups would somehow be harmed by the recognition of gay marriage" and "conveyed a message that gay people and relationships are inferior, that homosexuality is undesirable and that children need to be protected from exposure to gay people and their relationships." These messages were not crafted accidentally. The strategists responsible for the campaign in favor of Proposition 8 later explained their approach: "'[T]here were limits to the degree of tolerance Californians would afford the gay community. They would entertain allowing gay marriage, but not if doing so had significant implications for the rest of society,'" such as what children would be taught in school. . . .

When directly enacted legislation "singl[es] out a certain class of citizens for disfavored legal status," we must "insist on knowing the relation between the classification adopted and the object to be attained," so that we may ensure that the law exists "to further a proper legislative end" rather than "to make the [class] unequal to everyone else." Proposition 8 fails this test. Its sole purpose and effect is "to eliminate the right of same-sex couples to marry in California"—to dishonor a disfavored group by taking away the official designation of approval of their committed relationships and the accompanying societal status, and nothing more. "It is at once too narrow and too broad," for it changes the law far too little to have any of the effects it purportedly was intended to yield, yet it dramatically reduces the societal standing of gays and lesbians and diminishes their dignity. Proposition 8 did not result from a legitimate "Kulturkampf" concerning the structure of families in California, because it had no effect on family structure, but in order to strike it down, we need not go so far as to find that it was

enacted in "a fit of spite." It is enough to say that Proposition 8 operates with no apparent purpose but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships, by taking away from them the official designation of 'marriage,' with its societally recognized status. Proposition 8 therefore violates the Equal Protection Clause.

The judgment of the district court is affirmed.

N.R. SMITH, Circuit Judge, concurring in part and dissenting in part.

. . . Because I do not agree with the majority's analysis of other topics regarding the constitutionality of Proposition 8, I have chosen to write separately. Ultimately, I am not convinced that Proposition 8 is not rationally related to a legitimate governmental interest. I must therefore respectfully dissent.

In equal protection analysis, rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." A classification "neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." . . . The government is not required to "actually articulate at any time the purpose or rationale supporting its classification"; rather, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

Additionally, the government "has no obligation to provide evidence to sustain the rationality of a statutory classification." The measure at issue "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . ." Further, a legislature's generalizations may pass rational basis review "even when there is an imperfect fit between means and ends." In sum, the measure need only have "arguable" assumptions underlying its "plausible rationales" to survive constitutional challenge. . . .

As a general rule, states may use their police power to regulate the "morals" of their population. In his dissent in *Lawrence* [*v. Texas* (2003)], Justice Scalia argued that "[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation." He then suggested that the Supreme Court has relied on morality as the basis for its decision making and states, "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of validation of laws based on moral choices."

In our case, Proponents argue that Proposition 8, defining marriage as the union of one man and one woman, is rationally related to a legitimate governmental interest for several reasons. Some of those reasons have already been discussed in the majority opinion and need no further discussion here. However, two of those reasons deserve more discussion, because they have been credited by other courts: (1) a responsible procreation theory, justifying the inducement of marital recognition only for opposite-sex couples, because it "steers procreation into marriage" because opposite-sex couples are the only couples who can procreate children accidentally or irresponsibly; and (2) an optimal parenting theory, justifying the inducement of marital

recognition only for opposite-sex couples, because the family structure of two committed biological parents—one man and one woman—is the optimal partnership for raising children.

Proponents argue that Proposition 8, defining marriage as the union of one man and one woman, preserves the fundamental and historical purposes of marriage. They argue that, if the definition of marriage between a man and a woman is changed, it would fundamentally redefine the term from its original and historical procreative purpose. This shift in purpose would weaken society's perception of the importance of entering into marriage to have children, which would increase the likelihood that couples would choose to cohabitate rather than to get married. They also argue that irresponsible procreation, by accident or willfully in a cohabitation relationship, will result in less stable circumstances for children and that same-sex couples do not present this threat of irresponsible procreation. They argue that, in the case of unintended pregnancies, the question is not whether the child will be raised by two opposite-sex parents, but rather whether it will be raised, on the one hand by two parents, or on the other hand by its mother alone (often with the assistance of the state). "Proposition 8 seeks to channel potentially procreative conduct into relationships where that conduct is likely to further, rather than harm, society's interest in responsible procreation and childrearing."

Proponents also argue the "optimal parenting" rationale serves as a rational basis for Proposition 8. The optimal parenting rationale posits that Proposition 8 promotes the optimal setting for the responsible raising and care of children—by their biological parents in a stable marriage relationship. Proponents offer many judicial decisions and secondary authorities supporting both rationales. In sum, Proponents argue that Proposition 8 is rationally related to legitimate governmental interests.

The first requirement of rational basis review is that there must be some conceivable legitimate governmental interest for the measure at issue.

The California Supreme Court in [*In re Marriages Cases*] indicated that responsible procreation is a legitimate governmental interest: . . . "*the state undeniably has a legitimate interest in promoting "responsible procreation."* . . .

With regard to the optimal parenting rationale, the California Supreme Court stated the following about "the state's interest in fostering a favorable environment for the procreation and raising of children:" . . ."[O]ur past cases have recognized that the right to marry is the right to enter into a relationship that is the center of the personal affections that ennoble and enrich human life—a relationship that is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." . . .

Although Proponents were not required to put on any evidence under rational basis review, they also produced evidence. They argue that their evidence shows that married biological parents are the optimal parenting structure. Further, they argue "Plaintiffs fail to cite to a single study comparing outcomes for the children of married biological parents and those of same-sex parents. Thus, Plaintiffs have failed to undermine, let alone remove 'from debate,' the studies showing that married biological parents provide the best structure for raising children."

After review, both sides offer evidence in support of their views on whether the optimal parenting rationale is a legitimate governmental interest. Both sides also offer evidence to undermine the evidence presented by their opponents. However, the standard only requires that the optimal parenting rationale be based on "rational speculation" about married biological

parents being the best for children. Considering "the question is at least debatable," the optimal parenting rationale could conceivably be a legitimate governmental interest. . . .

Given the presumption of validity accorded Proposition 8 for rational basis review, I am not convinced that Proposition 8 lacks a rational relationship to legitimate state interests. Precedent evidences extreme judicial restraint in applying rational basis review to equal protection cases.

Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function. . . . [R]estraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing. Defining the class of persons subject . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration. Thus, the judiciary faces a conspicuous limit on our judicial role in applying equal protection to legislative enactments. . . . The constitutional safeguard is offended only if classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. . . .

Applying rational basis review in these circumstances also requires such restraint. . . . There is good reason for this restraint.