AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Personal Freedom and Public Morality/Gay Rights

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Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012)

Kristin Perry and Sandra Stier were denied a marriage license by a county clerk in Alameda County, California, because they were a same-sex couple. The California Supreme Court in In re Marriage Cases *(2008) had declared unconstitutional a California statute that declared, "Only marriage between a man and a woman is valid or recognized in California." Later in 2008, Californians adopted Proposition 8, a constitutional amendment ratified by initiative, that declared, "Only marriage between a man and a woman is valid or recognized in California." Perry filed a lawsuit against the governor of California claiming that Proposition 8 was unconstitutional. A federal district court agreed, ruling that Proposition 8 violated the fundamental right to marry. California appealed to the Court of Appeals for the Ninth Circuit.*

The Court of Appeals by a 2–1 vote declared Proposition 8 unconstitutional. Judge Reinhardt's opinion for the court asserted that Proposition 8 was analogous to the Colorado Proposition 2 declared unconstitutional in Romer v. Evans *(1996) in that both singled out a particular class of citizens for disfavored treatment without legitimate justification. Why did Reinhardt think Proposition 8 constitutionally identical to Proposition 2? Why did the dissent disagree? Judge Reinhardt insisted that laws taking away rights are more constitutionally suspect than a status quo in which the disfavored class lacks rights. Why did he believe this? Was he correct? Judge Reinhardt does not discuss whether same-sex couples have a right to marry. Was his emphasis on* Romer *a strategic effort to gain the vote of Justice Kennedy (who wrote* Romer*) or rooted in his belief that lower federal courts should not make new law? Suppose Californians passed Proposition 8A, which took away all benefits from same sex couples? Would that law be unconstitutional under* Perry v. Brown*?*

Perry v. Brown *was one of several successes proponents of same-sex marriage enjoyed in 2012. New polls suggested that a slim majority of Americans presently believe the law should permit same sex couples to marry. Maryland, Maine and Washington became the seventh, eighth and ninth states to legalize same-sex marriage. The Obama administration declared that the Justice Department would no longer defend in court the Defense of Marriage Act, which permits states to refuse to recognize out of state same-sex marriages. On May 9, 2012, President Obama on* ABC News *declared that he personally favored extending marriage rights to same-sex couples. "I think same-sex couples should be able to get married," he told reporter Robin Roberts. President Obama continued,*

> *if you look at the underlying values that we care so deeply about when we describe family: commitment, responsibility, lookin' after one another, teaching our kids to be responsible citizens and caring for one another, I actually think that it's consistent with our best and in some cases our most conservative values, sort of the foundation of what made this country great.*[1]

Red America did not react passively to these developments. On May 8, 2012, North Carolina became the thirtieth state to pass a constitutional amendment limited marriage to a man and a woman.

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[1] "Robin Roberts ABC News Interview with President Obama," May 9, 2012. http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043#.ULlkX6xZWHQ (accessed December 1, 2012)

JUDGE REINHARDT delivered the opinion of the Court.

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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. . . .

Both before and after Proposition 8, same-sex partners could enter into an official, state-recognized relationship that affords them "the same rights, protections, and benefits" as an opposite-sex union and subjects them "to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." Now as before, same-sex partners may:

- Raise children together, and have the same rights and obligations as to their children as spouses have;
- Enjoy the presumption of parentage as to a child born to either partner, or adopted by one partner and raised jointly by both;
- Adopt each other's children;
- Become foster parents;
- Share community property;
- File state taxes jointly;
- Participate in a partner's group health insurance policy on the same terms as a spouse;
- Enjoy hospital visitation privileges;
- Make medical decisions on behalf of an incapacitated partner;
- Be treated in a manner equal to that of a widow or widower with respect to a deceased partner;
- Serve as the conservator of a partner's estate; and
- Sue for the wrongful death of a partner, among many other things.

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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."

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. . . 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. . . . 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?

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Withdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place, regardless of whether the right was withdrawn after a week, a year, or a decade. The action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is. . . .

Proposition 8 is remarkably similar to Amendment 2, [which was at issue in *Romer v. Evans* [1996]). 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.

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. . . It is no doubt true that the "special disability" that Proposition 8 "imposes upon" gays and lesbians has a less sweeping effect on their public and private transactions than did Amendment 2. Nevertheless, Proposition 8 works 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. Proposition 8 is no less problematic than Amendment 2 merely because its effect is narrower; to the contrary, the surgical precision with which it excises a right belonging to gay and lesbian couples makes it even more suspect. A law that has no practical effect except to strip one group of the right to use a state-authorized and socially meaningful designation is all the more "unprecedented" and "unusual" than a law that imposes broader changes, and raises an even stronger "inference that the disadvantage imposed is born of animosity toward the class of persons affected," In short, *Romer* governs our analysis notwithstanding the differences between Amendment 2 and Proposition 8.

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. . . Following *Romer*, we must therefore decide whether a legitimate interest exists that justifies the People of California's action in taking away from same-sex couples the right to use the official designation and enjoy the status of 'marriage'—a legitimate interest that suffices to overcome the "inevitable inference" of animus to which Proposition 8's discriminatory effects otherwise give rise.

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We need not decide whether there is any merit to the sociological premise of Proponents' first argument—that families headed by two biological parents are the best environments in which to raise children—because even if Proponents are correct, Proposition 8 had absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised in California.

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Under *Romer*, it is no justification for taking something away to say that there was no need to provide it in the first place; instead, there must be some legitimate reason for the act of taking it away, a reason that overcomes the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." In order to explain how rescinding access to the designation of 'marriage' is rationally related to the State's interest in responsible procreation, Proponents would have had to argue that opposite-sex couples were more likely to procreate accidentally or irresponsibly when same-sex couples were allowed access to the designation of 'marriage.' We are aware of no basis on which this argument would be even conceivably plausible. There is no rational reason to think that taking away the designation of 'marriage' from same-sex couples would advance the goal of encouraging California's opposite-sex couples to procreate more responsibly.

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We in no way mean to suggest that Proposition 8 would be constitutional if only it had gone further—for example, by also repealing same-sex couples' equal parental rights or their rights to share community property or enjoy hospital visitation privileges. Only if Proposition 8 had actually had any

effect on childrearing or "responsible procreation" would it be necessary or appropriate for us to consider the legitimacy of Proponents' primary rationale for the measure. Here, given all other pertinent aspects of California law, Proposition 8 simply could not have the effect on procreation or childbearing that Proponents claim it might have been intended to have. Accordingly, an interest in responsible procreation and childbearing cannot provide a rational basis for the measure.

We add one final note. To the extent that it has been argued that withdrawing from same-sex couples access to the designation of 'marriage'—without in any way altering the substantive laws concerning their rights regarding childrearing or family formation—will encourage heterosexual couples to enter into matrimony, or will strengthen their matrimonial bonds, we believe that the People of California "could not reasonably" have "conceived" such an argument "to be true." It is implausible to think that denying two men or two women the right to call themselves married could somehow bolster the stability of families headed by one man and one woman. . . .

Proponents offer an alternative justification for Proposition 8: that it advances California's interest in "proceed[ing] with caution" when considering changes to the definition of marriage. But this rationale, too, bears no connection to the reality of Proposition 8. The amendment was enacted after the State had provided same-sex couples the right to marry and after more than 18,000 couples had married (and remain married even after Proposition 8). . . .

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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.

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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." . . . 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.

It will not do to say that Proposition 8 was intended only to disapprove of same-sex marriage, rather than to pass judgment on same-sex couples as people. Just as the criminalization of "homosexual conduct . . . is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres," so too does the elimination of the right to use the official designation of 'marriage' for the relationships of committed same-sex couples send a message that gays and lesbians are of lesser worth as a class—that they enjoy a lesser societal status. Indeed, because laws affecting gays and lesbians' rights often regulate individual conduct—what sexual activity people may undertake in the privacy of their own homes, or who is permitted to marry whom—as much as they regulate status, the Supreme Court has "declined to distinguish between status and conduct in [the] context" of sexual orientation. By withdrawing the availability of the recognized designation of 'marriage,' Proposition 8 enacts nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class.

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By using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause.

We hold Proposition 8 to be unconstitutional on this ground. We do not doubt the importance of the more general questions presented to us concerning the rights of same-sex couples to marry, nor do we doubt that these questions will likely be resolved in other states, and for the nation as a whole, by other courts. For now, it suffices to conclude that the People of California may not, consistent with the Federal Constitution, add to their state constitution a provision that has no more practical effect than to strip gays and lesbians of their right to use the official designation that the State and society give to committed relationships, thereby adversely affecting the status and dignity of the members of a disfavored class. . . .

JUDGE N.R. SMITH, concurring in part and dissenting in part.

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There are several ways to distinguish *Romer* from the present case. First, in *Romer v. Evans* (1996), the Supreme Court stated that "[t]he change Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching, both on its own terms and when considered in light of the structure and operation of modern anti-discrimination laws." Here, "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." Thus, *Romer* is inapposite, because Proposition 8 eliminates the right of access to the designation of marriage from same-sex couples, rather than working a far reaching change in their legal status.

Second, Amendment 2's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects." Again, Proposition 8 "carves out a narrow and limited exception to [the] state constitutional rights" of privacy and due process. Proposition 8 therefore lacks the "sheer breadth" that prompted the Supreme Court to raise the inference of animus in *Romer*.

The effect of animus is also unclear. In *Romer*, the Supreme Court stated that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity towards the class of persons affected." The Supreme Court indicated that Amendment 2 was constitutionally invalid, because its only purpose was animus; Amendment 2 was not "directed to any identifiable legitimate purpose or discrete objective." In short, *Romer* was a case where the only basis for the measure at issue was animus. However, in a case where the measure at issue was prompted both by animus and by some independent legitimate purpose, the measure may still be constitutionally valid. The Supreme Court has stated that while "negative attitudes," "fear" or other biases "may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make." *Bd. of Trustees of Univ. of Ala. v. Garrett* (2001). If "animus" is one such bias, its presence alone may not make Proposition 8 invalid if the measure also rationally relates to a legitimate governmental interest.

Finally, gays and lesbians were burdened by Amendment 2, because it "operate[d] to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government." In contrast, "although Proposition 8 eliminates the ability of same-sex couples to enter into an official relationship designated 'marriage,' in all other respects those couples continue to possess, under the state constitutional privacy and due process clauses, the core set of basic substantive legal rights and attributes traditionally associated with marriage. . . ." Put otherwise, Proposition 8 does not burden gays and lesbians to the same extent Amendment 2 burdened gays and lesbians in Colorado.

Proponents argue that the fact that Proposition 8 withdrew from same-sex couples the existing right of access to the designation of marriage should be significant in our constitutional analysis. However, Supreme Court equal protection cases involving challenges to measures withdrawing an existing right do not indicate that the withdrawal should affect our analysis. Instead, it seems that the court has upheld legislation that withdraws, rather than reserves, some legal right. . . . In fact, in its decision in *Romer*, the Supreme Court does not base its decision on this contention. Rather, it mentioned withdrawing specific legal protections from gays and lesbians only in the context of referring to the

irrational targeting of that group when compared to the sweeping change Amendment 2 created in the law.

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

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. . . [I]t does not necessarily follow that the optimal parenting rationale is an illegitimate governmental interest, because it contradicts existing laws on parenting and the family. For example, a posited reason offered by one lawmaking body after being rejected by another lawmaking body can "provide[ ] a conceivable basis" for a measure. In *FCC v. Beach Comm'ns, Inc.* (1993), the Supreme Court accepted a posited reason for a federal agency regulation, even though Congress had previously rejected that purpose and the regulation presented a conflict in the statutory scheme. Thus, even if California's legislature previously rejected the optimal parenting rationale in its parenting laws (and Proposition 8 is inconsistent with its statutory scheme), that does not prevent the people of California from adopting Proposition 8 under that rationale.

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[B]oth 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.

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"[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." Here, the people of California might have believed that withdrawing from same-sex couples the right to access the designation of marriage would, arguably, further the interests in promoting responsible procreation and optimal parenting. "The assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the congressional choice from constitutional challenge."

Plaintiffs argue that Proposition 8 could only advance the offered rationales through encouraging opposite-sex couples to marry, who otherwise would not marry because they disapprove of same-sex couples having the right of access to the designation of marriage and the stature that comes with the designation. Therefore, Proposition 8 impermissibly gives effect to those "private biases." See *Palmore v. Sidoti* (1984). However, Supreme Court precedent does not suggest that a measure is invalid under rational basis review simply because the means by which its purpose is accomplished rest on such biases. Rather, precedent indicates that such biases invalidate a measure if they are the only conceivable ends for the measure. Again, in determining whether there is a rational relationship, one must bear in mind that rational basis review "is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause". Thus, I cannot conclude that Proposition 8 is "wholly irrelevant" to any legitimate governmental interests.