Notes

A QUEST FOR FAIR AND BALANCED: THE SUPREME COURT, STATE COURTS, AND THE FUTURE OF SAME-SEX MARRIAGE REVIEW AFTER *PERRY*

CHASE D. ANDERSON†

> Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate[,] . . . black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.
>
> – Justice John Paul Stevens[1]

ABSTRACT

Gay rights advocates and social conservatives alike have criticized the Supreme Court for its recent decisions concerning sexual orientation. An examination of those decisions reveals that, taken together, they represent a surprisingly careful balance. The result is a principle of neutrality in which the Court has effectively demanded that states refrain from taking either side in the culture war surrounding sexual orientation. The true test of that neutrality principle will arise when the Court considers the constitutionality of a same-sex marriage ban. Thus far, challenges have taken place in state

† Duke University School of Law, J.D. expected 2011; Trinity College, B.A. 2007. I am extremely grateful to Katharine Bartlett for her guidance on and commitment to this Note; to Adrienne Fulco for her mentorship; to Corinne Oshima, Karen Otto, Leslie Mahaffey, Adam Schupack, Emily Kennedy '10, and the rest of the *Journal* staff for their invaluable editing assistance; to John Inazu, Ernest Young, Kathryn Bradley, and Lisa Griffin for their helpful comments; and to my family for their love, support, and life lessons.

1. Matthews v. Lucas, 427 U.S. 495, 520–21 (1976) (Stevens, J., dissenting) (footnote omitted).

> *courts under state constitutions; those judges appear to have been guided by their own assumptions and values rather than the Supreme Court's balanced approach. The federal challenge in* Perry v. Schwarzenegger *may change the legal landscape. The district court ordered a full trial—the first court to do so—and held, based on the evidence, that the state constitutional amendment violated the U.S. Constitution because it served only to disapprove of gay persons and their relationships. This August 2010 decision provides an excellent application of the Supreme Court's state-neutrality principle and will offer the Court the chance to weigh in on same-sex marriage.*

INTRODUCTION

Gay rights advocates and social conservatives alike have criticized the Supreme Court for being too sympathetic to the other side in its recent decisions concerning sexual orientation. According to two prominent gay rights advocates, the Court is not "leap[ing] to defend full constitutional equality of gay people."[2] Vocal conservative Justice Scalia, meanwhile, maintains that the Court "has largely signed on to the so-called homosexual agenda."[3] Examining recent Court decisions, both sides appear to be right, to some extent. How is this possible? This Note examines these decisions and finds that although the Court must decide "for or against" gay rights in individual cases, its overall body of decisions represents a surprisingly careful balance. That balance is enabled by a nod to each side. Under one line of cases, employing a "more searching form of rational basis review,"[4] the Court has effectively prohibited the state from disapproving of gay persons through its official acts.[5] Under another

---

2. William N. Eskridge, Jr. & Darren Spedale, *Sit Down, Ted Olson and David Boies*, SLATE (May 29, 2009, 11:25 AM ET), http://www.slate.com/id/2219252.

3. Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

4. *Id.* at 580 (majority opinion); *see also infra* note 95 and accompanying text.

5. *See infra* Part I.A.2. This Note builds upon but makes a bolder claim than previous scholarship. One excellent article that denies that the Court imposes state neutrality is William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021 (2004). According to Eskridge,

> *Lawrence* gives us nothing less than, but also nothing more than, a jurisprudence of tolerance. This means that traditionalists can no longer deploy the state to hurt gay people or render them presumptive criminals, but room remains for the state to signal the majority's preference for heterosexuality, marriage, and traditional family values.

Id. at 1025. Though agreeing that *Lawrence* established something of a middle ground between gay rights advocates and traditionalists, this Note examines a larger body of the Court's cases and argues that under the framework these cases establish, the state cannot, without further justification, codify a preference for heterosexuality *or* homosexuality. *See infra* Part I.

line of cases, using established First Amendment doctrine, the Court has struck down antidiscrimination protections for gay persons when those protections intrude on private groups' rights to disapprove of or exclude others.[6] The result is a principle of neutrality; that is, with the convergence of both lines, the Court effectively has demanded that the state refrain from taking either side in the culture war[7] surrounding sexual orientation.

The true test of the neutrality principle will arise if—or, more likely, when—the Supreme Court considers the constitutionality of a ban on same-sex marriage. The Court has not considered a gay marriage ban since 1972, when it dismissed *Baker v. Nelson*[8] "for want of substantial federal question."[9] As one court aptly noted decades later, however, "Doctrinal developments show it is not reasonable to conclude [that] the questions presented in the *Baker* jurisdictional statement would still be viewed by the Supreme Court as 'unsubstantial.'"[10] Nevertheless, most challenges to marriage bans have taken place in the state courts, under state constitutions. The balance that has guided the Supreme Court has not heavily influenced state courts deciding same-sex marriage cases. Instead, those courts appear guided by the judges' own assumptions and values, resulting in unnecessarily divisive opinions.[11]

With no direct federal challenges brought since *Baker*, the Supreme Court has thus far stayed out of the gay marriage debate.[12] The federal question was squarely presented, however, in *Perry v. Schwarzenegger*,[13] a 2009 challenge to California's Proposition 8—a ballot initiative that amended the state constitution to ban same-sex

---

6. *See infra* Part I.A.1.

7. This Note will use "culture war" to refer specifically to the social controversy over the morality of homosexuality. It recognizes, however, that the term may refer to broader social debates as well. *Cf.* Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147, 149 (2009) ("This part will recall the terms of just one of the culture war's several frontiers: the battle over progress in the treatment of gay, lesbian, bisexual and transgender (GLBT) people and the status of same-sex erotic and domestic relations." (footnote omitted)).

8. Baker v. Nelson, 292 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (mem.).

9. Baker v. Nelson, 409 U.S. 810, 810 (1972) (mem.).

10. Smelt v. County of Orange, 374 F. Supp. 2d 861, 873 (C.D. Cal. 2005) (quoting Hicks v. Miranda, 422 U.S. 332, 344 (1975)), *aff'd in part, vacated in part, and remanded in part*, 447 F.3d 673 (9th Cir. 2006).

11. *See infra* Part II.B.

12. *See infra* notes 96–103 and accompanying text.

13. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

marriage.[14] After a full trial, the District Court for the Northern District of California held Proposition 8 unconstitutional because it could rationally serve no interest other than to discriminate against gay people.[15] The August 4, 2010, ruling may offer the Supreme Court the chance to weigh in on same-sex marriage—and bring closure to the debate in the courts.

This Note argues that the Supreme Court has struck the appropriate constitutional balance between the two sides of the culture war. It further argues that the state neutrality demanded by that balance requires the recognition of same-sex marriage, as the district court held in *Perry*. Part I examines the two lines of gay rights cases in the Supreme Court since the mid-1990s and illustrates the ways in which the Court has prohibited state laws that favor either side. Parts II and III then apply that principle of state neutrality to same-sex marriage. Part II looks at the ten state court rulings since the Supreme Court's 2003 landmark decision in *Lawrence v. Texas*,[16] identifying thematic problems with those state court rulings in light of the Supreme Court's neutrality approach. Part III then discusses *Perry*, arguing that the extensive examination of the evidence during trial—and the court's ultimate determination that the California ban served only to discriminate—was a necessary step toward laying the gay marriage debate in the courts to rest.

I. THE SUPREME COURT STRIKES A NECESSARY BALANCE IN THE CULTURE WAR

In public discourse, the debate over gay rights has occurred largely within the crosshairs of two opposing sets of claimed rights: gay individuals' and same-sex couples' claims to equal rights and other individuals' rights to disapprove of homosexuality.[17] Beginning

14. California Marriage Act, Proposition 8 (2008) (codified at CAL. CONST. art. I, § 7.5).

15. *See Perry*, 704 F. Supp. 2d at 1002 ("Here, the purported state interests fit so poorly with Proposition 8 that they are irrational . . . . What is left is evidence that Proposition 8 enacts a moral view that there is something 'wrong' with same-sex couples."). *See generally id.* at 997–1003 (applying rational basis review and rejecting the proponents' asserted interests).

16. Lawrence v. Texas, 539 U.S. 558 (2003).

17. *See* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 295 (1999) ("With the advent of laws prohibiting sexual orientation discrimination, religious liberty and sexual equality norms collide, and their collision entails a clash of constitutional commitments—between the liberty of one group to exclude and the desire of an excluded group for equal treatment." (internal cross-reference omitted)); PHYLLIS SCHLAFLY, THE SUPREMACISTS: THE TYRANNY OF JUDGES AND HOW TO STOP IT 46 (2006) ("What gays now demand is public approval and government support for a lifestyle that others believe is

in the mid-1990s, the rulings in the Supreme Court considering gay rights have struck a careful balance between the two. Far from taking an anti- or pro-gay stance on the diverse questions presented, the Court has carefully developed an approach that leaves the sides of the culture war free to vehemently disagree with each other, while seeking to ensure that the state does not bring its considerable influence to bear on either side. Accordingly, the Court has struck down *state* actions that deny basic civil rights to gay people,[18] while also striking down laws that deny *private* persons or groups the right to assert their moral viewpoints by excluding gays from their ranks.[19] Given the highly contentious nature of the culture war—fueled by competing claims of liberty, equal rights, traditional morality, and religious belief—the Court's stance is the proper and necessary equilibrium and should guide consideration of the constitutionality of same-sex marriage bans.

A. The Debate Plays Out in the Supreme Court

1. *Protecting Private Expression*. In three recent cases implicating gay rights, the Supreme Court has considered the potential collision course of antidiscrimination laws and private organizations' rights of free expression. The first was *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[20] in which a unanimous Court ruled that a state could not force St. Patrick's Day parade organizers to include an Irish-American gay group in the parade.[21] The group had sued, arguing that the parade was essentially a public accommodation and that the organizers were thus precluded from discriminating under state law.[22] The trial court agreed, citing the parade organization's generally nonexclusive criteria, and the Massachusetts Supreme Court affirmed.[23] The U.S. Supreme Court unanimously reversed, holding that, cohesive message or not, a parade put on by private organizers is inherently expressive conduct.[24]

---

immoral . . . . That amounts to the minority forcing the majority to license what it disapproves.").

18. *See infra* Part I.A.2.

19. *See infra* Part I.A.1.

20. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

21. *Id.* at 581.

22. *Id.* at 561–62.

23. *Id.* at 562–63.

24. *Id.* at 569; *see also id.* at 568 ("If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing

Accordingly, the organizers' message—including their selection of fellow marchers—is protected by the First Amendment, and neither the government nor other organizations may interfere in that decision.[25] Whatever the organizers' reasons for excluding the gay and lesbian group, the Court said, "[I]t boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."[26] The government's motivation in preventing discrimination, the Court said, would not justify the state's intrusion into the right of a private actor to control the content of its own message. As the Court explained, "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[27]

The Court further elaborated on the range of protected organizations in *Boy Scouts of America v. Dale*.[28] There, it held that although Boy Scouts of America was not typically engaged in overtly expressive conduct—like a parade—and was not a religious organization, the group's message was protected by the First Amendment. The case arose when James Dale, an Eagle Scout, was kicked out of the Boy Scouts and terminated as a volunteer assistant scout master after the organization discovered that he was "an avowed homosexual and gay rights activist."[29] Although the Boy Scouts asserted that the inclusion of Dale and other gay men as scout

any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one.").

25. *See id.* at 573 ("[T]his use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."); *id.* at 569–70 ("[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.").

26. *Id.* at 575.

27. *Id.* at 579; *see also id.* at 581 ("Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others.").

28. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

29. *Id.* at 644. Dale's alleged activism included his position as co-president of the Rutgers Lesbian/Gay Alliance; his attendance at "a seminar addressing the psychological and health needs of lesbian and gay teenagers"; and an interview with a newspaper covering the seminar, in which he advocated "homosexual teenagers' need for gay role models." *Id.* at 645. The facts of the case imply that the Boy Scouts learned that Dale was gay from the published interview and accompanying photo. *Id.*

leaders would conflict with its message,[30] the New Jersey Supreme Court was not persuaded that its "message" included asserting that homosexuality was immoral.[31] The U.S. Supreme Court rejected that approach. Consistent with its holding in *Hurley*, the Court noted that associational rights long protected by the First Amendment "plainly presuppose[] a freedom not to associate,"[32] and emphasized that it is not the role of the courts to conduct detailed inquiries into what messages private groups seek to send and whether their chosen means are sensibly related to disseminating those messages.[33] That the organization did not exist for the *purpose* of disapproving of homosexuality did not deprive it of the right to exclude gays; it was enough that the group's asserted message might be altered by their inclusion.[34]

The third case, *Rumsfeld v. FAIR*,[35] shows that the Court's protection of group expression has its limits. In *FAIR*, a group of law schools protesting the military's "Don't Ask, Don't Tell" policy sought to invoke First Amendment protections in excluding military recruiters from campus, or at least from the same level of access provided to other recruiters on campus.[36] Under federal law, any school denying military recruiters the same quality and quantity of access afforded to other recruiters would lose virtually all federal funding.[37] The group of schools challenged this policy as an

30. *Id.* at 644.

31. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1223–24 (N.J. 1999) ("We agree that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members. We are not persuaded, however, that a 'shared goal[]' of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral." (citation omitted) (alteration in original)), *rev'd sub nom.* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

32. *Boy Scouts of Am.*, 530 U.S. at 648 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

33. *Id.* at 651; *see also id.* at 653 ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

34. *Id.* at 655; *see also id.* at 656 ("The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.").

35. Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR), 547 U.S. 47 (2006).

36. *Id.* at 52–53. The Don't Ask, Don't Tell policy has since been repealed. *See infra* note 70 and accompanying text.

37. 10 U.S.C. § 983(b) (2006) (the Solomon Amendment); *see also FAIR*, 547 U.S. at 55 ("In order for a law school and its university to receive federal funding, the law school must

unconstitutional condition on federal funds, arguing that the policy violated their First Amendment rights under the same rationale as in *Hurley* and *Boy Scouts*.[38] In rejecting that claim, a unanimous Court emphasized the lack of interference—real or perceived—with any message the law schools sought to send[39] or with their freedom-of-association rights. In part, this was due to the schools' freedom to sponsor protests against the military policy or otherwise voice their disagreement,[40] refuting any suggestion of support for discrimination against gays and lesbians. The nature of the accommodation—for example, allowing recruiters to meet with students on campus and including their announcements with those of other recruiters in career service emails—also was substantially different from inclusion in a parade or as a leader in a private organization. The schools' attempt at comparison, the Court said, stretched too far;[41] though the protective wall around private organizational expression is high, it is not absolute.[42]

---

offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access.").

38. *FAIR*, 547 U.S. at 70.

39. *Id.* at 65 ("Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies.").

40. *Id.* at 69–70.

41. *Id.* at 70 (observing that the comparison has the dual effect of "plainly overstat[ing] the expressive nature of [the law schools'] activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents").

42. More recently, the Court upheld another law school equal-access policy in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010). Hastings Law School refused to recognize a chapter of a national Christian organization that, in violation of the school's antidiscrimination policy, banned openly gay students from voting membership or leadership positions. *Id.* at 2979–80. The parties entered a joint stipulation of facts, including a statement that the policy was one of open access—for all groups and all students—rather than a specific policy banning groups from discriminating based on sexual orientation. *Id.* at 2982. The five-member majority accepted the stipulation as fact and held its content neutrality saved it. *Id.* at 2978. The four-member dissent, authored by Justice Alito, refused to accept the stipulation as an accurate description of the policy as Hastings had applied it and would have held that the policy's actual application violated the organization's First Amendment rights. *Id.* at 3005, 3016 (Alito, J., dissenting).

Because the majority let the stipulation govern, it is difficult to discern how the Court would have ruled absent the "all-comers" policy, and thus difficult to take away any broader legal principles from the case. Accepting the stipulation, one can readily attack the *policy* of a law school requiring all student associations—including religious and partisan political ones—to accept members and leaders who disagree with the groups' core beliefs. But it is not clear the Court has broken any new *constitutional* ground if one accepts the stipulation, as the majority did; indeed, it appears roughly in line with the open-access principles in *Rumsfeld v. FAIR*. Absent the stipulation, proper application of the neutrality principles discussed in this Section

2. *Protecting Against the Tyranny of the Majority*. The Court's decisions give wide latitude to private organizations to determine what message they send to the public about, among other things, their views on homosexuality. Other decisions, however, plainly prevent the *state* from taking a stand in its official actions. In *Romer v. Evans*,[43] the Court articulated "a commitment to the law's neutrality" concerning the rights of gay persons.[44] At issue was Colorado's voter-approved Amendment 2, which amended the state constitution to prohibit the inclusion of gays and lesbians in antidiscrimination laws.[45] One effect of the amendment was to overturn ordinances in Aspen, Boulder, and Denver that banned such discrimination at the local level.[46] Its additional effects were a point of contention between the Justices. Justice Scalia, dissenting, found that Amendment 2 did no more than deny gay persons "special treatment."[47] The majority, however, rejected that contention[48] and found that Amendment 2 "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class" of gay persons.[49]

---

and the next would have required the Court to strike down the Hastings policy. *See id.* at 2999 (Kennedy, J., concurring) ("[T]he school policy in question is not content based either in its formulation or evident purpose; and were it shown to be otherwise, the case likely should have a different outcome."). For a good critique of the decision, see John D. Inazu, Op-Ed., *Siding with Sameness*, NEWS & OBSERVER (Raleigh), July 1, 2010, at 9A; and see also John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 195 (2010) (criticizing the *Martinez* majority's acceptance of the law school's "non-neutral policy preferences" and its "failure to take seriously [the organization's] freedom of association claim").

43. Romer v. Evans, 517 U.S. 620 (1996).

44. *See id.* at 623 ("One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.' Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake." (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

45. *Id.* at 624.

46. *See id.* at 623–24 (noting that the local ordinances prohibited sexual orientation discrimination "in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services").

47. *Id.* at 638 (Scalia, J., dissenting) (emphasis omitted); *see also id.* at 653 ("The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment.").

48. *Id.* at 626 (majority opinion).

49. *Id.* at 624; *see also id.* at 630 ("Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.").

On those findings, the Court could readily have made the case about generally applicable political process rights, as the Colorado Supreme Court had done, and struck down the law on that basis.[50] Such a disposition would have limited the holding to a narrow set of cases and broken virtually no new ground for gay rights. But the Court took the opposite approach, not only framing it as a gay rights issue but also rebuking lawmakers engaged in animus-based legislation. Purporting to apply the rational basis test, a highly permissive standard of review, the Court held that "Amendment 2 fails, indeed defies, even this conventional inquiry."[51] The amendment was "at once too narrow and too broad. It identifie[d] persons by a single trait and then denie[d] them protection across the board."[52] Given the broad disability placed on a narrow class of persons, the Court read between the lines of the amendment, finding that it existed to disparage gay persons, rather than to serve the state's asserted interests. The Court concluded, "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."[53]

The amendment at stake in *Romer* was, according to the Court, unusual. But seven years later, the Court struck down laws targeting gays that were widespread and heavily rooted in tradition: laws criminalizing homosexual conduct. With its ruling in *Lawrence v. Texas*, the Court held laws in thirteen states unconstitutional,[54] overruled its own precedent set by *Bowers v. Hardwick*[55]—which upheld a state's right to criminalize same-sex sexual relations[56] just seventeen years before *Lawrence*—and ended the widespread classification of gays as "presumptive outlaws."[57] Those

50. *Id.* at 625 ("[T]he State Supreme Court held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process. To reach this conclusion, the state court relied on our voting rights cases and on our precedents involving discriminatory restructuring of governmental decisionmaking." (citations omitted)).

51. *Id.* at 632.

52. *Id.* at 633.

53. *Id.* at 635.

54. Lawrence v. Texas, 539 U.S. 558, 573 (2003).

55. Bowers v. Hardwick, 478 U.S. 186 (1986).

56. *Id.* at 191.

57. Eskridge, *supra* note 5, at 1022; *see also Lawrence*, 539 U.S. at 584 (O'Connor, J., concurring) ("[B]ecause of the sodomy law, *being* homosexual carries the presumption of being a criminal.").

accomplishments alone would have been quite a feat, but the Court went further. The terms of the *Lawrence* opinion were hardly limited to gay sex, as the contrary *Bowers* opinion had been.[58] Nor was the case decided strictly on privacy grounds, as it likely could have been under the *Griswold v. Connecticut*[59] line of cases,[60] given that it concerned intimate conduct within the home.[61] Rather, the opinion was about broader notions of liberty and equality—and why gays were entitled to expect the same protections as straight people.[62] Sharply criticizing its prior holding in *Bowers*, the Court said that the language of *Bowers*—and principally its characterization of the claimed right—showed that the Court had failed

> to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.[63]

In both *Lawrence* and *Romer*, the Court flatly rejected the states' claims that their laws were not targeting gays for disapproval but merely furthering some legitimate interest through narrower means.

---

58. *See Bowers*, 478 U.S. at 190–91 ("[W]e think it evident that none of the rights announced in those [right-to-privacy] cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."); *id.* at 191 ("Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.").

59. Griswold v. Connecticut, 381 U.S. 479 (1965).

60. *Cf.* Adler, *supra* note 7, at 152 (noting that the now-discredited *Bowers* opinion "admonished[that] nothing in the privacy line of cases 'bears any resemblance to the claimed constitutional right' asserted" in *Bowers*).

61. *See Lawrence*, 539 U.S. at 562–63 (describing the facts of the case). Indeed, the opinion began with a discussion of privacy in the home, which is all that would have been required to decide the case. *See id.* at 562 ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."); *see also id.* at 564 ("[T]he most pertinent beginning point is our decision in *Griswold v. Connecticut*." (citation omitted)). But the Court went on to explicitly extend the holding. *See id.* at 562 ("Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.").

62. *See id.* at 574 ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right." (citations omitted)).

63. *Id.* at 567.

The Court noted, for example, that the sodomy bans at issue in *Lawrence* and *Bowers* "purport[ed] to do no more than prohibit a particular sexual act."[64] The Court found that the actual effect of the laws, however, was to deny gay persons the freedom to enter into relationships of their choosing, and that "[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice."[65]

Lawrence is powerfully instructive in the state-private dichotomy, not just because it struck down longstanding criminal penalties for homosexual conduct, but also because of the reasons it gave for doing so. The Court said that private beliefs, no matter how deeply held, cannot justify state laws discriminating against gays:

> The condemnation [of gay people] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use *the power of the State* to enforce these views on the whole society through operation of the criminal law.[66]

The Court concluded that it may not.[67] The Court reasoned that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[68] This language went well beyond condemnation of the criminal sanctions. Instead, the Court seemed to say that the real problem with the sodomy laws was that they constituted governmental action that invited discrimination against gay persons—

64. *Id.*

65. *Id.*

66. *Id.* at 571 (emphasis added). *See generally* Céline Abramschmitt, Note, *The Same-Sex Marriage Prohibition: Religious Morality, Social Science, and the Establishment Clause*, 3 FLA. INT'L U. L. REV. 113, 144–47 (2007) (discussing the Court's rejection, in *Romer* and *Lawrence*, of preserving popular morality as a stand-alone rational basis for discrimination).

67. *See Lawrence*, 539 U.S. at 578 ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."); *id.* at 579 (reversing the lower court's decision upholding the statute).

68. *Id.* at 575.

and that such an invitation was extended whenever the state officially characterized gays as immoral.

3. *A Notable Exception*. The Supreme Court refused to review the military's policy of excluding "out" gay persons from military service,[69] popularly known as "Don't Ask, Don't Tell." Congress repealed the policy on December 18, 2010.[70] Courts, however, had been reluctant to address the ban. The First Circuit upheld Don't Ask, Don't Tell in 2008 against due process, equal protection, and free speech challenges.[71] The Supreme Court refused to weigh in, denying certiorari in the case.[72] This may be seen as an exception to the Court's demand of government neutrality.

But Don't Ask, Don't Tell differs from the state laws challenged in *Romer* and *Lawrence* in one important respect: its roots in claimed military necessity. Historically, the Supreme Court has given exceptional deference to such claims. During World War II, the Court infamously held that the military's claimed need for Japanese internment overrode strict scrutiny;[73] more recently, the same claim has justified—under heightened scrutiny—exclusion of women from combat positions and the requirement that only males register for the draft.[74] The First Circuit, in considering Don't Ask, Don't Tell, recognized the "unique context" of military policies and noted that "[t]he deferential approach courts take" in reviewing challenges to such policies "is well-established."[75] It concluded that, wise or not, the

69. 10 U.S.C. § 654 (2006).

70. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing 10 U.S.C. § 654). The policy nevertheless remains in effect until sixty days after the President and others certify that "the implementation of necessary policies and regulations . . . is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces." *Id.* § 2(b). For a good description of the repeal and the response to it, see Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. TIMES, Dec. 19, 2010, at A1.

71. Cook v. Gates, 528 F.3d 42, 65 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009).

72. Pietrangelo v. Gates, 129 S. Ct. 2763 (2009).

73. Korematsu v. United States, 323 U.S. 214, 216 (1944).

74. Rostker v. Goldberg, 453 U.S. 57, 83 (1981); *see also id.* at 70 (noting that "judicial deference to such congressional exercise of authority is at its apogee"); *cf.* United States v. Virginia, 518 U.S. 515, 544–45, 555 (1996) (holding that a state military institute's male-only policy—*not* grounded in military necessity—unconstitutionally discriminated against women).

75. *Cook*, 528 F.3d at 57; *see also id.* ("It is unquestionable that judicial deference to congressional decision-making in the area of military affairs heavily influences the analysis and resolution of constitutional challenges that arise in this context.").

policy must be upheld because of that extraordinary deference.[76] Although not decisive in *Rumsfeld v. FAIR*, the Supreme Court similarly emphasized military necessity—there, Congress's interest in successful recruitment practices—when it upheld the open-access policy against the law schools' challenge.[77]

Even with a healthy dose of military deference, however, the tides in the lower courts began to shift against the ban just months before Congress repealed it. Within one month of each other, two federal district courts held Don't Ask, Don't Tell unconstitutional under the Due Process Clause.[78]

B. Parallel to Free Exercise and Establishment Clause Principles

Although this Note does not argue that same-sex marriage bans violate the Establishment Clause,[79] there are useful parallels between Religion Clause jurisprudence and the principles described here. Taken together, the Establishment Clause and Free Exercise Clause are perhaps best understood as a strong principle of governmental neutrality toward religion.[80] To the consternation of some religious groups, judges have ordered the removal of many signs of religion—

---

76. *See id.* at 65 ("Although the wisdom behind the statute at issue here may be questioned by some, in light of the special deference we grant Congressional decision-making in this area we conclude that the challenges must be dismissed.").

77. *See* Rumsfeld v. FAIR, 547 U.S. 47, 67 (2006) ("The issue is not whether other means of raising an army and providing for a navy might be adequate. . . . That is a judgment for Congress, not the courts.").

78. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010); Witt v. U.S. Dep't of the Air Force, No. 06-5195RBL, 2010 U.S. Dist. LEXIS 100781, at *24 (W.D. Wash. Sept. 24, 2010). The *Witt* ruling followed the Ninth Circuit's holding that *Lawrence* required subjecting the military policy to elevated scrutiny. *Witt*, 2010 U.S. Dist. LEXIS 100781, at *2–3.

79. Other works have discussed the possibility of using this approach. *See, e.g.*, Geoffrey R. Stone, *Same-Sex Marriage and the Establishment Clause*, 54 VILL. L. REV. 617 (2009) (arguing that the Court could use the Establishment Clause as one of several routes to strike down Proposition 8 and other gay marriage bans).

80. *See, e.g.*, Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275, 339 (2006) ("The Establishment Clause and Free Exercise jurisprudence of the Court appears to be converging on a standard of neutrality—one that accepts 'neutral laws of general applicability' regardless of whether they incidentally burden free exercise and advocates only the 'principle of neutrality' in allocating benefits to religious groups." (footnote omitted)). Thomas Jefferson famously described the First Amendment as "building a wall of separation between Church & State." Thomas Jefferson, Letter to the Danbury Baptists (Jan. 1, 1802), *available at* http://www.loc.gov/loc/lcib/9806/danpre.html; *see also* JAMES MADISON, WRITINGS 760 (Library of Am. 1999) (describing the separation of church and state as "[s]trongly guarded").

prayer,[81] the Ten Commandments,[82] and Christmas decorations,[83] for example—from the public square. Courts have, however, left intact symbols that, taken together, do not endorse one religion or set of beliefs over another[84]—the "religious pluralism"[85] approach, we might call it. The Courts have also protected the rights of religious groups to express their beliefs as they see fit.[86] The result has been a neutral state and a wide range of private choice.[87] Establishment Clause

81. *See* Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 294, 317 (2000) (holding that prayers at public school football games violate the Establishment Clause); Lee v. Weisman, 505 U.S. 577, 599 (1992) (holding that prayers led at public school graduation ceremonies violate the Establishment Clause); Wallace v. Jaffree, 472 U.S. 38, 40, 61 (1985) (holding that a public school's "period of silence for meditation or voluntary prayer" violates the Establishment Clause) (internal quotation marks omitted); *see also Jaffree*, 472 U.S. at 60 ("Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.").

82. *See* McCreary County v. ACLU, 545 U.S. 844, 844, 881 (2005) (affirming a preliminary injunction against a courthouse's public display of the Ten Commandments); *see also id.* at 885 (O'Connor, J., concurring) ("In my opinion, the display at issue was an establishment of religion in violation of our Constitution.").

83. *See* Allegheny County v. ACLU, 492 U.S. 573, 578–79 (1989) (holding that a nativity scene displayed on the steps of a county courthouse violates the Establishment Clause).

84. *See* Van Orden v. Perry, 545 U.S. 677, 691–92 (2005) (plurality opinion) (upholding a state capitol's display of many historical monuments, one of which featured the Ten Commandments); *Allegheny County*, 492 U.S. at 578–79 (upholding a city's display of a menorah, Christmas tree, and sign saluting liberty).

85. *See, e.g.*, Richard M. Esenberg, *You Cannot Lose if You Choose Not to Play: Toward a More Modest Establishment Clause*, 12 ROGER WILLIAMS U. L. REV. 1, 65 (2006) ("Government action becomes 'practically coercive' when it creates a substantial threat to religious pluralism or of suppressing religious differences."); Frederick Mark Gedicks, Essay, *Truth and Consequences: Mitt Romney, Proposition 8, and Public Reason*, 61 ALA. L. REV. 337, 349 (2010) (describing religious pluralism in the United States).

86. *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524, 527–28 (1993) (holding that a prohibition on religious ritualistic animal sacrifice violates the Free Exercise Clause); *id.* at 523 ("The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions."). The Court has held, however, that the state may enact religion-neutral regulations that incidentally burden the free exercise of religion. *See* Emp't Div. v. Smith, 494 U.S. 872, 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . .").

87. *See, e.g.*, Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23, 24 (2010) ("In modern Establishment Clause jurisprudence, for example, the Court for many years identified 'separation of church and state' as its guiding principle and frequently applied 'strict scrutiny' to laws that burdened the right of Free Exercise. Over time, however, dissatisfaction erupted with separationism's perceived hostility to religion, and the Court sought more neutral approaches to the Religion Clauses." (footnote omitted)).

jurisprudence in particular recognizes the state as a potentially coercive power in shaping others' beliefs and in affecting the treatment of minorities;[88] accordingly, it demands that the state stay out,[89] so that others can determine their own religious beliefs without coercion.[90]

The Court's approach to gay rights—demanding state neutrality as to the morality or immorality of homosexuality—serves essentially the same principles. It seeks to protect gay individuals from judgment at the official level, while protecting the right of private individuals and organizations to make those judgments themselves. As with the Court's Religion Clause jurisprudence, this approach removes state coercion, thus creating a more level playing field than would exist if the state were free to take sides.[91]

In both contexts, the Court has taken a fact-based approach, concentrating particularly on the practical effects of state actions and claimed rights. Therefore, although a public accommodations law protecting gay persons may be unobjectionable in general, the state may not use it to force private groups to convey a message of approval of homosexuality. An organization whose message is not altered, however, may not receive similar First Amendment protection. The state's police power, broad though it is, cannot be

---

88. *See* Wallace v. Jaffree, 472 U.S. 38, 60 n.51 (1985) ("[T]his Court has noted that '[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.'" (second alteration in original) (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962))).

89. *See Allegheny County*, 492 U.S. at 593–94 ("Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . . ."). It is worth noting that in individual cases, the Court is not always completely faithful to this general principle. *See, e.g.*, Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 156 (2004) (arguing that, "from a perspective of substantive neutrality," state-funded scholarships for theology students should be constitutional and the religious language in the Pledge of Allegiance should be unconstitutional).

90. *See* Laycock, *supra* note 89, at 244 ("Because government is very large, its influence will rarely be zero."); *id.* ("[R]eligious liberty is best protected from government influence by nondiscriminatory protection of religious and secular private speech, and by government making no statements that depend on views about religious truth. The Court has approached this ideal in the speech cases; private religious speech is fully protected and government religious speech is almost fully prohibited." (footnote omitted)).

91. *See, e.g.*, *id.* at 243 ("Minimizing government influence provides a criterion for defining neutrality: government departs from neutrality when it does things that tend to influence private religious choice.").

used to target gays and lesbians for disfavored treatment any more than it can be used to favor them. As with cases under the religion clauses, the Court's preferred balance has boiled down to state neutrality, and that neutrality depends on the circumstances of the case.[92]

II. THE FAILURES OF SAME-SEX MARRIAGE REVIEW: STATE COURT OPINIONS REPEAT ASSUMPTIONS AND DIVIDED BELIEFS

The neutrality approach developed by the Supreme Court since the mid-1990s balances equal recognition of the constitutional rights of gay persons with the rights of other individuals to disapprove of homosexuality. As described in the preceding Part, the Court has invalidated state bans on certain expressions of anti-gay sentiment—in *Hurley* and *Boy Scouts*[93]—just as readily as it has struck down laws burdening the rights of gay persons.[94] The balance is a careful one; in both lines of cases, the Court thoroughly examined the facts to determine whether the law furthered a legitimate state interest, or instead served to promote or burden a particular side. Critical to that examination was a somewhat more exacting level of scrutiny—on display in *Romer* and *Lawrence*—that failed to accept an asserted interest that did not appear to be supported by the facts.[95]

The Supreme Court has yet to apply that command of state neutrality to the most socially contentious gay rights issue yet: same-sex marriage.[96] The Court has not had occasion to consider the constitutionality of same-sex marriage bans since 1972, when it dismissed a challenge "for want of substantial federal question."[97] Instead, the action has taken place in the state courts. Since 2003, when the Court decided *Lawrence v. Texas*—widely regarded as the

92. *See generally id*. (describing the role of neutrality in religion cases).

93. *See supra* Part I.A.1.

94. *See supra* Part I.A.2.

95. *See* Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."); Romer v. Evans, 517 U.S. 620, 635 (1996) ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. . . . It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests . . . ."); *see also Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (describing the Court's analysis as "an unheard-of form of rational-basis review").

96. Recent polls suggest that the nation remains closely divided over same-sex marriage. *See infra* notes 111–12 and accompanying text.

97. Baker v. Nelson, 409 U.S. 810, 810 (1972) (mem.).

turning point in the Court's treatment of gay men and lesbians[98]—appellate courts in ten states have ruled on same-sex marriage bans.[99] This Part briefly considers the institutional role of courts when they decide controversial issues. It then looks at the decisions of these ten state courts and argues that they failed to fulfill that role. Instead of serving the ideals of neutral factfinders, those courts largely took the opposite approach, proceeding from the judges' own values and assumptions. This approach provides a sharp contrast to the approach described in Part III, in which the federal district court in *Perry v. Schwarzenegger* carefully reviewed the evidence presented after a full trial.

A. The Institutional Role of Courts in Deciding Socially Controversial Cases

This Note does not attempt to address the question of whether courts should be deciding controversial cases in general. As a normative matter, much literature has debated that question.[100] As a descriptive matter, courts do in fact take up the controversial issues of the day—school desegregation,[101] abortion,[102] and flag burning,[103] to name a few. Though the Court has taken its share of criticism for getting too involved,[104] some of the cases most criticized today are

98. *See, e.g.*, Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1616–17 (2004) ("The recognition by the Supreme Court of the United States that lesbians and gay men are human beings who have 'dignity as free persons' that is deserving of 'full' constitutional respect is itself a monumental breakthrough. *Lawrence* is the first Supreme Court decision in American history that openly acknowledges this." (quoting *Lawrence*, 539 U.S. at 578)).

99. Eight of the ten decisions came from the states' respective courts of last resort. The Indiana decision came from a three-judge panel of the state court of appeals. Morrison v. Sadler, 821 N.E.2d 15 (Ind. App. 2005). The Arizona Supreme Court declined to review a decision by a three-judge panel of that state's court of appeals. Standhardt v. Maricopa Cnty. Super. Ct., No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004).

100. *See* Adler, *supra* note 7, at 150 ("Of course, in legal discourse, the whole idea of judicial competence and its limits is routine."); Darren Lenard Hutchinson, *The* Majoritarian *Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 6 (2005) ("[C]onstitutional scholars have produced an enormity of scholarship analyzing the proper function of the federal courts in a democratic society."). *See generally* Hutchinson, *supra*, at 6 (describing theories of the role of the Supreme Court as a countermajoritarian body).

101. *E.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

102. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973).

103. Texas v. Johnson, 491 U.S. 397 (1989).

104. *See generally* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2005).

ones in which the Court merely upheld the status quo.[105] More to the point, the Court has already shown itself willing to decide gay rights cases and has established principles to guide its decisions in such cases.[106]

In controversial decisions—and in the case of same-sex marriage specifically—legislatures and courts play vastly different roles. Because legislatures are supposed to reflect the will of the electorate, legislators' main concern should be whether the people of their state or region want legalized same-sex marriage. In contrast, courts are not directly tied to popular demands. Federal court judges are constitutionally insulated from outside control.[107] Many state court judges, meanwhile, are subject to popular election,[108] but even in elected states judges serve roles distinct from legislatures. The Washington Supreme Court, for example, describes its role as "protect[ing] the liberties guaranteed by the constitution and laws of the state of Washington and the United States; impartially uphold[ing] and interpret[ing] the law; and provid[ing] open, just, and timely resolution of all matters."[109]

---

105. *See* Plessy v. Ferguson, 163 U.S. 537, 548, 552 (1896) (upholding a law mandating segregation based on race); Bradwell v. Illinois, 83 U.S. 130, 139 (1872) (upholding a state's denial to women of licenses to practice law); *see also* Korematsu v. United States, 323 U.S. 214, 216, 223–34 (1944) (holding that although strict scrutiny was required to justify internment of Japanese Americans, the government had met its burden based on military necessity).

106. *See supra* Part I.

107. Federal court judges are unelected, protecting them from popular demands, and they receive life tenure and salary protection, protecting them from the other branches. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 4 (5th ed. 2007).

108. *See id.* at 4–5 ("In thirty-eight states, state court judges are subject to some form of electoral review. Some contend that this difference makes federal courts uniquely suited for the protection of constitutional rights.") (footnotes omitted). Critics emphatically assert that state judicial elections should be reformed or rejected precisely because existing electoral systems weaken judges' abilities to fulfill their intended roles. *See, e.g.*, Editorial, *Putting a Halt to Judicial Elections*, WASH. POST, Nov. 4, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/04/AR2010110407139.html (arguing that judicial elections should be rejected because judges "should not be swayed by the political whims of the day, nor should they be made to think twice about making principled but controversial decisions for fear that they could lose their jobs"); Sandra Day O'Connor, Op-Ed, *Take Justice Off the Ballot*, N.Y. TIMES, May 22, 2010, http://www.nytimes.com/2010/05/23/opinion/23oconnor.html ("When you enter one of these courtrooms, the last thing you want to worry about is whether the judge is more accountable to a campaign contributor or an ideological group than to the law."). For a brief discussion of Iowa's judicial elections after the state supreme court found that gay marriage was constitutionally required, see *infra* note 149.

109. *Your Supreme Court in Action*, WASH. CTS., http://www.courts.wa.gov/appellate_trial_courts/supremecourt (last visited Feb. 8, 2011). Washington Supreme Court justices are elected to six-year terms. *Judicial Voter Pamphlet*, WASH. CTS., http://www.courts.wa.gov/voters (last

The results in gay marriage decisions do not reflect the courts' unique institutional roles, however, as state court judges are split roughly the same way as the electorate. In public discourse, the debate over how—or whether—to legally recognize same-sex couples is a close one. In a 2010 CNN poll, 48 percent of respondents believed that homosexual relationships were "morally wrong," 50 percent said they were "not a moral issue," and 2 percent were "unsure."[110] One website collecting several nationwide polls revealed that between 44 and 52 percent of 2010 poll respondents believed same-sex marriage should be legal, when the question posed a dichotomous choice between legal and not legal.[111] The results changed markedly when civil unions were introduced as a third option, with respondents split fairly equally across the three answers: supporting marriage, only civil unions, or nothing at all.[112]

State court judges are similarly divided. Between the Supreme Court's 2003 *Lawrence* decision and the California district court's 2010 *Perry* decision, ten state appeals or supreme courts have issued gay marriage opinions interpreting their own state constitutions. Of those, five found that same-sex couples are guaranteed no formal recognition of their relationships under their state constitutions,[113] four found that their state constitutions require recognition of same-

visited Feb. 8, 2011).

110. CNN/Opinion Research Corporation Poll, conducted Feb. 12–15, 2010 (surveying 1,023 adults nationwide), *reported at* http://www.pollingreport.com/civil.htm.

111. *See* CNN/Opinion Research Corporation Poll, conducted Aug. 6–10, 2010 (surveying 1,009 adults nationwide and finding, in asking two slightly different variations of the question, that 49 or 52 percent of respondents believed in a constitutional right to same-sex marriage); Gallup Poll, conducted May 3–6, 2010 (surveying 1,029 adults nationwide and finding that 44 percent supported same-sex marriage); ABC News/Washington Post Poll, conducted Feb. 4–8, 2010 (surveying 1,004 adults nationwide and finding that 47 percent of respondents supported the legalization of gay marriage). All polls are reported at PollingReport.com, http://www.pollingreport.com/civil.htm (last visited Feb. 8, 2011).

112. *See* FOX News/Opinion Dynamics Poll, conducted Aug. 10–11, 2010 (surveying 900 registered voters nationwide and finding that 37 percent of respondents supported legalized gay marriage, 29 percent supported another legal partnership, and 28 percent supported no legal recognition); CBS News Poll, conducted Aug. 20–24, 2010 (surveying 1,082 adults nationwide and finding that 40 percent of respondents supported legalized gay marriage, 30 percent supported civil unions, and 25 percent supported no legal recognition). Both polls are reported at PollingReport.com, http://www.pollingreport.com/civil.htm (last visited Feb. 8, 2011).

113. Standhardt v. Maricopa Cnty. Super. Ct., 77 P.3d 451, 463–64 (Ariz. Ct. App. 2003); Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. App. 2005); Conaway v. Deane, 932 A.2d 571, 635 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1, 22 (N.Y. 2006); Andersen v. King County, 138 P.3d 963, 1010 (Wash. 2006).

sex marriage,[114] and one found that its state constitution requires awarding equal rights and benefits—through marriage or some other institution—to same-sex couples.[115] Despite the highly controversial nature of the claims, all ten courts reviewed the constitutionality of the bans strictly as a matter of law. None of the ten state courts held full trials,[116] and only one—the Iowa Supreme Court—had the benefit of a developed evidentiary record, in the form of depositions and exhibits submitted to the trial court before summary judgment, to inform its decision.[117]

B. State Court Decisions Fail to Reflect the Supreme Court's Balanced Approach

1. *Courts That Rejected a Right to Same-Sex Marriage Simply Deferred to the Legislatures' Asserted State Interests*. Courts in Arizona, Indiana, Maryland, New York, and Washington all reviewed the constitutionality of their states' gay marriage bans as a matter of law.[118] The five courts that upheld their states' bans all relied on the same crucial assumptions—without any critical analysis—in rejecting the plaintiffs' claims under rational basis review.[119] In defending their laws, the states claimed that restricting marriage to opposite-sex

---

114. *In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (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, 969 (Mass. 2003).

115. Lewis v. Harris, 908 A.2d 196, 200 (N.J. 2006).

116. *See infra* notes 118, 134–35.

117. *See infra* note 135.

118. *See Standhardt*, 77 P.3d at 454 (accepting special action jurisdiction without a trial); *Morrison*, 821 N.E.2d at 18 (affirming the trial court's dismissal of the complaint); *Conaway*, 932 A.2d at 584, 635 (reversing the trial court's grant of summary judgment for the plaintiffs); *Hernandez*, 855 N.E.2d at 5 (reviewing the trial courts' grants of summary judgment and affirming the appellate court's judgment for the state); *Andersen*, 138 P.3d at 971, 1010 (reversing the trial courts' grants of summary judgment for the plaintiffs). The dissenters on the Maryland court recommended remanding the case for a trial on the facts rather than issuing a decision as a matter of law. *Conaway*, 932 A.2d at 693 (Battaglia, J., dissenting).

119. The Washington court relied more heavily on the legislature's *freedom* to make those assumptions, rather than the court's own insistence that they were true. *See Andersen*, 138 P.3d at 983 ("The rational basis standard of review is 'highly deferential to the legislature.' As noted, under this standard any conceivable set of facts may be considered that support the classification drawn, and over–[ ]and under–inclusiveness generally does not foreclose finding a rational basis for legislation." (citation omitted)); *id.* ("We reiterate that the rational basis standard is a highly deferential standard."); *id.* at 984 ("And at the risk of sounding monotonous, we repeat that the rational basis standard is extremely deferential."). Nevertheless, the same assumptions were at play—without any critical analysis—throughout the opinion.

couples served the states' interests in fostering responsible procreation and child rearing. The courts willingly accepted these asserted interests, finding that the exclusion of same-sex couples was rationally related to protecting the interests asserted for opposite-sex couples.[120] In agreeing with the states, the courts made two critical assumptions, unsupported by facts: that the state-conferred benefits of marriage are enough to cabin the allegedly irresponsible behavior of heterosexual couples, and that same-sex couples would not benefit from those same rights and benefits.

These courts' first assumption defies common sense. All five of the courts, in one form or another, found it important that heterosexual intercourse—and not same-sex intercourse—may naturally produce offspring.[121] The courts further found that "accidents . . . happen"[122] all too often among heterosexuals, and that those accidents could be of particular concern to state legislatures.[123]

120. *See Standhardt*, 77 P.3d at 463–64 ("We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest."); *Morrison*, 821 N.E.2d at 35 ("[O]pposite-sex marriage furthers the legitimate state interest in encouraging opposite-sex couples to procreate responsibly and have and raise children within a stable environment."); *Conaway*, 932 A.2d at 633 ("[T]he fundamental right to marriage and its ensuing benefits are conferred on opposite-sex couples not because of a distinction between whether various opposite-sex couples actually procreate, but rather because of the *possibility* of procreation."); *Hernandez*, 855 N.E.2d at 7 ("[T]here are at least two grounds that rationally support the limitation on marriage that the Legislature has enacted. Others have been advanced, but we will discuss only these two, both of which are derived from the undisputed assumption that marriage is important to the welfare of children."); *Andersen*, 138 P.3d at 983 ("[T]he legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a 'traditional' nuclear family where children tend to thrive.").

121. *See Standhardt*, 77 P.3d at 462 ("Indisputably, the only sexual relationship capable of producing children is one between a man and a woman."); *Morrison*, 821 N.E.2d at 24 ("All that is required is one instance of sexual intercourse with a man for a woman to become pregnant."); *Conaway*, 932 A.2d at 630–31 ("This 'inextricable link' between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members . . . ."); *Hernandez*, 855 N.E.2d at 7 ("Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not."); *Andersen*, 138 P.3d at 982 (accepting the legislature's justification that only opposite-sex couples can create, without third-party involvement, children who are biologically related to the parents).

122. *Morrison*, 821 N.E.2d at 25 (internal quotation marks omitted).

123. *See, e.g.*, *Hernandez*, 855 N.E.2d at 11 ("A person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best."); *id.* at 21 (Graffeo, J., concurring) ("Since marriage was instituted to address the fact that sexual contact between a man and a woman naturally can result in pregnancy and childbirth, the Legislature's decision to focus on opposite-sex couples is understandable.").

The courts assumed that the state legislatures' provisions of marital rights and benefits would turn those instances of "casual intercourse"[124] into long-term, stable relationships.[125] The courts' hypothesized chain of events seems unlikely. It is hard to believe that many persons engaging in the sort of casual sex described by the courts—the people who don't plan ahead, who conceive children based on "momentary" fits of unprotected passion[126]—would be so motivated by the tax breaks and other state-conferred benefits of marriage[127] that they would enter into a permanent relationship with their one-night-stand partners.[128]

These courts' decisions might be more persuasive if heterosexual couples were the only ones bearing and raising children, but that is not the case. The decisions thus also assumed that although gay persons are parenting, they do not need the same incentives to stay committed after they have children together.[129] In contrast to their accident-prone heterosexual counterparts, the assumption goes, "[m]embers of a same-sex couple who wish to have a child . . . have already demonstrated their commitment to child-rearing, by virtue of the difficulty of obtaining a child through adoption or assisted reproduction, without the State necessarily having to encourage that

---

124. *Morrison*, 821 N.E.2d at 24 (internal quotation marks omitted).

125. *See, e.g.*, *Hernandez*, 855 N.E.2d at 7 (majority opinion) (finding that the state could rationally "choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other").

126. *Id.* at 21 (Graffeo, J., concurring).

127. *See, e.g.*, *id.* at 6–7 (majority opinion) (describing "significant tax advantages, rights in probate and intestacy proceedings, rights to support from their spouses both during the marriage and after it is dissolved, and rights to be treated as family members in obtaining insurance coverage and making health care decisions").

128. This argument and its variations have drawn their share of critics. One critic called the New York decision "desperate" and noted that the court apparently thought gays were "too good for marriage." Kenji Yoshino, *Too Good for Marriage*, N.Y. TIMES, July 14, 2006, at A19; *see also Hernandez*, 855 N.E.2d at 31 (Kaye, C.J., dissenting) ("[N]o one rationally decides to have children because gays and lesbians are excluded from marriage."); Dan Savage, *Same-Sex Marriage Wins by Losing*, N.Y. TIMES, July 30, 2006, § 4 (Week in Review), at 1 ("In New York, the court ruled in effect that irresponsible heterosexuals often have children by accident—we gay couples, in contrast, cannot get drunk and adopt in one night—so the state can reserve marriage rights for heterosexuals in order to coerce them into taking care of their offspring. Without the promise of gift registries and rehearsal dinners, it seems, many more newborns in New York would be found in trash cans.").

129. *See Hernandez*, 855 N.E.2d at 21–22 (Graffeo, J., concurring) ("Although many same-sex couples share these family objectives and are competently raising children in a stable environment, they are simply not similarly situated to opposite-sex couples in this regard given the intrinsic differences in the assisted reproduction or adoption processes that most homosexual couples rely on to have children.").

commitment through the institution of marriage."[130] The courts did not attempt to explain why parents would have any less interest in ongoing stability merely because their child was planned, rather than an accident. As the dissent noted in the New York case, same-sex couples in the state were already raising "tens of thousands of children," and "[d]epriving [those] children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare, as defendants do not dispute."[131] Rather than applauding same-sex couples' child planning and providing them with additional stability, these courts instead punished them for it.[132] The assertion that same-sex couples do not need any extra stability is all the more perplexing given the propensity of gay marriage opponents to attack gay couples as being *un*stable and thus unworthy of marriage.[133]

2. *Courts Striking Down Gay Marriage Bans Assumed, Rather than Showed, the Equality of Same-Sex Couples*. The supreme courts of Iowa, Connecticut, California, and Massachusetts all found that bans on same-sex marriage violated their respective state constitutions. Like the courts that upheld their states' bans, these courts considered the controversial question without the benefit of

130. Morrison v. Sadler, 821 N.E.2d 15, 26 (Ind. App. 2005); *see also Hernandez*, 855 N.E.2d at 7 (majority opinion) (finding that because same-sex couples, unlike opposite-sex couples, can only "become parents by adoption, or by artificial insemination or other technological marvels," the "rationale for marriage does not apply with comparable force to same-sex couples").

131. *Hernandez*, 855 N.E.2d at 32 (Kaye, C.J., dissenting).

132. *See* Nancy C. Marcus, *Beyond* Romer *and* Lawrence*: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 422 (2006) ("The [*Morrison*] court rather ironically concluded that, *because* same-sex couples who create families through artificial reproduction or adoption 'have invested the significant time, effort, and expense' to do so, they are more likely to provide a stable environment for their children without the protections of marriage." (quoting *Morrison*, 821 N.E.2d at 24–25)); *cf.* Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 817 (1998) ("[A] reform that favors one type of family by disfavoring another penalizes those who do not, and perhaps cannot, conform to the ideal. When those wounded are the children on whose general behalf family-standardizing reforms are most often said to be justified, this consequence seems especially indefensible.").

133. *See, e.g.*, Lynn D. Wardle, *A Response to the 'Conservative Case' for Same-Sex Marriage: Same-Sex Marriage and 'the Tragedy of the Commons*,*'* 22 B.Y.U. J. PUB. L. 441, 453–55 (arguing that same-sex families are unstable, based on their higher divorce rates in countries where they can legally marry); *id.* at 456 ("It does not appear that giving marital or marriage-like status to same-sex couples significantly alters their troubling behaviors.").

adversarial trials.[134] Only the Iowa court had a developed evidentiary record on which to base its conclusions.[135]

The decisions involved two questions. The first was whether same-sex couples had special characteristics that would justify the state treating them differently than opposite-sex couples. The Massachusetts court, the only state court that struck down a marriage ban under rational basis review,[136] held that "[t]he marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason."[137] In Connecticut, where civil unions had existed since 2005, the state supreme court simply held that the state's contention that the two groups of couples were not similarly situated "clearly lacks merit."[138] The court found that the two had the same goals for their relationships[139] and held that, in passing the civil union statute, "the legislature itself recognized the overriding similarities between same sex and opposite sex couples."[140] In California, which also had a parallel equal-rights scheme, the court reached a similar conclusion.[141]

The second question was whether the creation of parallel-rights schemes—civil unions or domestic partnerships—resolved the constitutional infirmity. All four courts held that it did not. Two of the states—Connecticut and California—had already enacted parallel schemes. The Connecticut court found the difference between

---

134. *See In re* Marriage Cases, 183 P.3d 384, 403 (Cal. 2008) (noting that the trial court "proceeded expeditiously to solicit briefing and conduct a hearing" on which it based its judgment); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 411–12 (Conn. 2008) (reversing the trial court's grant of summary judgment for the state); Varnum v. Brien, 763 N.W.2d 862, 873 (Iowa 2009) (affirming the trial court's grant of summary judgment for the plaintiffs); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 951 (Mass. 2003) (reversing the trial court's grant of summary judgment for the state).

135. *Varnum*, 763 N.W.2d at 873 (noting that "[t]he record was developed through witness affidavits and depositions").

136. *Goodridge*, 798 N.E.2d at 961.

137. *Id.* at 968.

138. *Kerrigan*, 957 A.2d at 424.

139. *See id.* (concluding, without support, that same-sex couples "share the same interest in a committed and loving relationship as heterosexual persons who wish to marry," as well as "the same interest in having a family and raising their children in a loving and supportive environment"). The court neglected to describe any evidence that led to its assertion. Oddly, in addition to quoting from the California case, the court cited the New Jersey and Vermont cases—both of which held that only civil unions were constitutionally required—in support of its holding that the couples were the same. *See id.*

140. *Id.*

141. *In re* Marriage Cases, 183 P.3d 384, 413 (Cal. 2008).

marriage and civil unions to be an "obvious fact."[142] Though a discussion of evidence supporting its view could have been illuminating, the Connecticut court eschewed that approach. Instead, it cited *Brown v. Board of Education*[143] for the proposition that separate cannot be equal[144] and moved on. Likewise, the California court—despite the overwhelming length of its opinion[145]—did surprisingly little to explain why the separate name of domestic partnership worked a harm of constitutional magnitude. It gave only an unsatisfactory conclusion that domestic partnerships "properly must be viewed as impinging upon the right of those couples to have their family relationship accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples."[146]

Massachusetts, meanwhile, had no experience with civil unions, and the court only addressed them in a second opinion, when it wrote an advisory opinion to the legislature stating that parallel schemes would not suffice.[147] But its first opinion should have been clear enough that the court demanded full marriage rights for gays:

> Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries. But it does not disturb the fundamental value of marriage in our society. Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage.[148]

---

142. *Kerrigan*, 957 A.2d at 419 n.16 ("We do not see how the recently created legal entity of civil union possibly can embody the same status as an institution of such long-standing and overriding societal importance as marriage. If proof of this obvious fact were necessary, it would suffice to point out that the vast majority of heterosexual couples would be unwilling to give up their constitutionally protected right to marry in exchange for the bundle of legal rights that the legislature has denominated a civil union.").

143. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

144. *Kerrigan*, 957 A.2d at 418–19. The court also cited the California and Massachusetts same-sex marriage cases for the same proposition. *Id.* (citing *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004)).

145. The majority opinion alone spans seventy pages in the Pacific Reporter. *In re Marriage Cases*, 183 P.3d at 384–453.

146. *Id.* at 445. The court then briefly described the uniquely celebrated term "marriage," but failed to give concrete examples—beyond conjecture—explaining why the plaintiffs would suffer harm without access to the word alone. *See id.* at 445–46.

147. *See Opinions of the Justices to the Senate*, 802 N.E.2d at 569 ("Segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or 'preserve' what we stated in *Goodridge* were the Commonwealth's legitimate interests in procreation, child rearing, and the conservation of resources.").

148. Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 965 (Mass. 2003).

The narrow majority of judges, in breaking new ground, should have taken great care to describe specifically what led them to depart from the tradition they acknowledge and to reach a different conclusion than both the legislature and their dissenting brethren on the court. They failed to do that.

The Iowa court's opinion contained the strongest reasoning.[149] It described the role of the legislature respectfully, but detailed times when the Iowa legislature had gotten it wrong, and—rather forthrightly—when the U.S. Supreme Court had blundered as well.[150] The beginning of the opinion called the case a "civil rights action" and placed the case in a historical progression of equal rights movements, contrasting historical discrimination against various groups with Iowa's avowed commitment to equality and liberty.[151] It reviewed the positions of numerous religious sects on gay marriage, found that many sects actually supported it, and explained why the courts could not pick one religious view over another.[152] The court could then have assessed whether the ban served some legitimate interest under rational basis review, or if it served only to express disapproval of gays. Instead, it turned to heightened scrutiny to invalidate the marriage ban.[153]

Although the U.S. Supreme Court has applied "a more searching form of rational basis review" to laws that show "a desire to harm a

149. Despite the court's thorough reasoning, Iowa voters either plainly disagreed with the decision or believed the justices had overstepped their roles in deciding the issue. In the 2010 midterm election, voters recalled all three justices who were up for reelection in an "unprecedented vote." A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1. Nonetheless, voters and legislators seem uninterested in amending the state constitution to invalidate the court's ruling. Jason Hancock, *One Year Later, Gay Marriage Repeal Appears to Be on Backburner*, IOWA INDEPENDENT, Apr. 1, 2010, http://iowaindependent.com/31160/one-year-later-gay-marriage-repeal-appears-to-be-on-backburner.

150. Varnum v. Brien, 763 N.W.2d 862, 877 (Iowa 2009).

151. *Id.* at 872.

152. *Id.* at 904–06.

153. *See id.* at 896 ("Because we conclude Iowa's same-sex marriage statute cannot withstand intermediate scrutiny, we need not decide whether classifications based on sexual orientation are subject to a higher level of scrutiny."). The Connecticut court also used heightened (or intermediate) scrutiny. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 423 (Conn. 2008). The California court, which does not use an intermediate level of scrutiny, *In re* Marriage Cases, 183 P.3d 384, 435–36 (Cal. 2008), adopted strict scrutiny for classifications based on sexual orientation, *id.* at 446. Only Massachusetts applied rational basis review. *Goodridge*, 798 N.E.2d at 961.

politically unpopular group"[154]—including gays and lesbians in *Romer* and *Lawrence*[155]—the Court has never said that sexual orientation is a suspect class.[156] The state courts should have exercised the same restraint. The Court has adopted a sound principle of state neutrality toward approving or disapproving of gay persons, and adoption of a heightened level of scrutiny would topple that balance. To declare sexual orientation a suspect class would place gays and lesbians in the same category as racial and ethnic minorities and women, and would "exacerbate[] the public perception that they are seeking *special rights* rather than equal rights."[157] By rejecting that approach, the Supreme Court wisely has declined to give gays and lesbians as a class the appearance of any legally favored position.[158]

3. *New Jersey's Middle Ground Provides Only a Temporary Resolution*. In contrast to the other courts discussed, the New Jersey court was eager to strike a balance between the two sides. When faced with the same question as the other courts,[159] the New Jersey

154. Lawrence v. Texas, 539 U.S. 558, 580 (O'Connor, J., concurring); *see also id.* (citing cases applying the "more searching form" of rational basis review to laws discriminating against hippies, unmarried persons, and the mentally disabled).

155. *See id.* (articulating the "more searching" standard in *Lawrence* and describing the Court's holding in *Romer*).

156. *Cf.* EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 69 (2d ed. 2008) ("For all practical purposes the constitutional doctrine regarding suspect classes is a dead letter. . . . [T]he Court has no intention of creating any new suspect classes.").

157. *Id.*; *see also id.* (arguing that the heightened scrutiny approach carries "political liabilities" for gays and lesbians, "fram[ing] their arguments in terms of special pleading rather than legal equality").

158. This Note does not dispute the notion that sexual orientation may qualify as a suspect or quasi-suspect classification. There are strong arguments that gay persons and same-sex couples fit within the Supreme Court's description of protected class, including arguments in cases otherwise criticized in this Note. *See, e.g.*, *In re Marriage Cases*, 183 P.3d at 443 (rejecting increased political acceptance as a barrier to heightened review and noting that "if a group's *current* political powerlessness were a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications"). Such recognition, however, would unnecessarily tip the existing balance between state nondiscrimination and private rights to disapprove. Because the resolution of same-sex marriage rights need not turn on heightened review, *see infra* Part III.C.2, granting protected status in the decisions is particularly unwise.

159. Like the other courts, New Jersey's court decided the case on summary judgment, without the benefit of a fully developed record. Lewis v. Harris, 908 A.2d 196, 203 (N.J. 2006). Like other courts, the New Jersey court also relied heavily on the Supreme Court's jurisprudence, rather than limiting its consideration to its unique state law. *See id.* at 207 ("In attempting to discern those substantive rights that are fundamental under Article I, Paragraph 1, we have adopted the general standard followed by the United States Supreme Court in

court determined that the state constitution required that gay couples be given all the same rights and benefits of marriage, but declined to order the legislature to adopt the name "marriage." In reaching its decision, the court took pains to describe "[t]he seeming ordinariness of plaintiffs' lives"[160]—that is, the same as heterosexual couples'—describing, for example, their jobs and family members.[161] It noted the disconnect between the "ordinariness" of their lives and "the social indignities and economic difficulties that they daily face due to the inferior legal standing of their relationships."[162] The court refused to consider arguments that heterosexual marriage—and not gay marriage—was for procreation and child rearing, as the attorney general had disclaimed those interests,[163] and accordingly found that the state had no reason to exclude same-sex couples from the rights and benefits of marriage.[164] But the court also found that history and tradition did not allow it to declare that the fundamental right to marriage applied to same-sex couples.[165]

Finally, the court determined that, because the state had no experience with civil unions or other parallel schemes, the court should not presume that those schemes would violate the state constitution.[166] It reasoned, "A proper respect for a coordinate branch

---

construing the Due Process Clause of the Fourteenth Amendment of the Federal Constitution.").

160. *Id.* at 202; *see also id.* at 201 ("In terms of the value they place on family, career, and community service, plaintiffs lead lives that are remarkably similar to those of opposite-sex couples.").

161. *Id.* at 201–02.

162. *Id.* at 200. The court also observed that gays and lesbians were fully protected against discrimination by state law, but only as individuals. *See id.* ("The statutory and decisional laws of this State protect *individuals* from discrimination based on sexual orientation. When those individuals are gays and lesbians who follow the inclination of their sexual orientation and enter into a committed relationship with someone of the same sex, our laws treat them, as *couples*, differently than heterosexual couples.").

163. *Id.* at 205–06, 206 n.7.

164. *Id.* at 220–21.

165. *See id.* at 211 ("Despite the rich diversity of this State, the tolerance and goodness of its people, and the many recent advances made by gays and lesbians toward achieving social acceptance and equality under the law, we cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right.").

166. *Id.* at 221–22 ("Because this State has no experience with a civil union construct that provides equal rights and benefits to same-sex couples, we will not speculate that identical schemes called by different names would create a distinction that would offend Article I, Paragraph 1. We will not presume that a difference in name alone is of constitutional magnitude.").

of government counsels that we defer until it has spoken. . . . [A] court must discern not only the limits of its own authority, but also when to exercise forbearance . . . ."[167] It appears the court was staying out of the real firestorm—and saving the big question of gay marriage for another day. The decision took a careful balance, in both tone and result, and was perhaps the wisest path the court could have followed in the case. But as other cases—culminating in *Perry v. Schwarzenegger*—reveal, the separate-but-equal fix is merely a temporary one, as equal same-sex couples demand to know why they should be separate at all.

III. TRIAL BY FIRE: RATIONAL BASIS REVIEW IN *PERRY V. SCHWARZENEGGER*

Under the neutrality principle constructed by the Supreme Court, a state may neither adopt a law that exists to disapprove of or disadvantage gay persons, nor prevent private actors from expressing their disapproval of homosexuality. As argued in Part I, this principle strikes a legal balance between two sides in the culture war that disagree on whether gay persons are socially and morally equal to straight persons. A significant remaining question is how the neutrality principle applies to same-sex marriage.

All too often, those debating same-sex marriage have conflated popular approval and the right of persons—or couples—to act as they choose.[168] The defenders of Proposition 8 claimed that the ban served the legitimate interest of protecting "the First Amendment rights of individuals and institutions that oppose same-sex marriage on religious or moral grounds."[169] But the state-neutrality principle requires disentangling popular approval and civil rights. As courts have repeatedly recognized, the right to marry is fundamental.[170]

---

167. *Id.* at 222–23.

168. *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 986 (N.D. Cal. 2010) ("'Legalizing "same-sex marriage" would convey a societal approval of a homosexual lifestyle, which the Bible calls sinful and dangerous both to the individuals involved and to society at large.'" (quoting Pls.' Ex. 168, Southern Baptist Convention Resolution on Same-sex Marriage)).

169. Defendant-Intervenors' Trial Memorandum at 9, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292-VRW).

170. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right."); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("[T]he right to marry is of fundamental importance to all individuals."); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("[T]he freedom to marry has long been recognized as one of the vital personal rights essential to the

Though a state may impose some regulations that apply to all couples equally, it may not deny a marriage license to a heterosexual couple, absent a compelling justification.[171] As demonstrated in Part II, however, state courts considering states' obligations to issue marriage licenses to *same-sex* couples have come out all over the map.[172] Almost all of those courts, moreover, have issued decisions based on assumptions and unsatisfactory reasoning.[173]

In this legal landscape, two same-sex couples—represented by experienced constitutional litigators Ted Olson and David Boies—set out to settle the law under the federal Constitution.[174] The plaintiffs in *Perry v. Schwarzenegger* challenged California's Proposition 8, which amended the state constitution to ban same-sex marriage.[175] On August 4, 2010, a federal district court struck down the amendment, finding that the "[p]laintiffs have demonstrated by overwhelming evidence that Proposition 8 violates their [federal] due process and equal protection rights and that they will continue to suffer these constitutional violations until state officials cease enforcement of Proposition 8."[176]

A. The Road to Perry

The gay marriage dispute in California is a decade-long story, with *Perry* as the latest stage. In 1999, the California legislature adopted a domestic partnership law affording same-sex couples many of the same rights and benefits as married heterosexual couples.[177] The next year, voters passed Proposition 22, which amended the

---

orderly pursuit of happiness by free men."); *see also Perry*, 704 F. Supp. 2d at 992 ("The parties do not dispute that the right to marry is fundamental.").

171. *See, e.g.*, *Zablocki*, 434 U.S. at 388 (applying strict scrutiny to a state law withholding marriage licenses from single parents who were deficient on their child support payments).

172. *See supra* notes 113–15 and accompanying text.

173. *See supra* Part II.B.

174. *See* Eskridge & Spedale, *supra* note 2 ("Adversaries in *Bush v. Gore*, Ted Olson and David Boies are a power couple of super-lawyers supporting same-sex marriage. Dismayed that California voters overrode their state Supreme Court's guarantee of marriage equality for lesbian and gay couples, Boies and Olson have brought a federal constitutional lawsuit to invalidate the voters' action.").

175. *See* California Marriage Protection Act, Proposition 8 (2008) (codified at CAL. CONST. art. I, § 7.5) ("Only marriage between a man and a woman is valid or recognized in California.").

176. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

177. *See In re* Marriage Cases, 183 P.3d 384, 413 (Cal. 2008) (describing the history and protections of the 1999 legislation).

state's marriage code to explicitly define civil marriage as the union of one man and one woman.[178] In 2003, the legislature enacted a comprehensive measure providing gays with all the same rights and benefits, though without the name "marriage."[179] In 2005 and then again in 2007, the legislature approved laws recognizing same-sex marriage, both of which Governor Arnold Schwarzenegger vetoed,[180] claiming the legislature lacked the authority to override Proposition 22 without returning it to the voters.[181] Gay marriage advocates turned to the courts, arguing that separate relationship recognition for gay couples violated the California constitution.[182] The state supreme court agreed,[183] and California began issuing marriage licenses to same-sex couples in June 2008.[184]

Proposition 8 was a voter-driven response to the California Supreme Court's holding. While the case was still under consideration, opponents of same-sex marriage had already begun preparing a constitutional amendment for the November 4, 2008, ballot.[185] The amendment, Proposition 8, provided in its entirety, "Only marriage between a man and a woman is valid or recognized in

178. *See* California Defense of Marriage Act, Proposition 22 (2000) (codified at CAL. FAM. CODE § 308.5 (West 2004)) ("Only marriage between a man and a woman is valid or recognized in California."); *see also In re Marriage Cases*, 183 P.3d at 409–10 (describing voters' adoption of Proposition 22).

179. *See In re Marriage Cases*, 183 P.3d at 414 (describing the purpose and protections of the 2003 legislation).

180. *See id.* at 410 n.17 ("In 2005 and 2007, the Legislature passed bills that would have amended [state law] to permit marriage of same-sex couples . . . . The Governor vetoed both measures.").

181. *See id.* (noting that "[i]n returning the 2005 bill to the Assembly without his signature, the Governor stated he believed that Proposition 22 required such legislation to be submitted to a vote of the people," and describing Governor Schwarzenegger's statements that the issue was already pending before the California courts).

182. *Id.* at 398.

183. *See id.* at 453 ("[W]e determine that the language of [the state statute] limiting the designation of marriage to a union 'between a man and a woman' is unconstitutional and must be stricken from the statute, and that the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples.").

184. *See generally* Carla Hall, John M. Glionna & Rich Connell, *Finally, the Ritual Is Legally Theirs*, L.A. TIMES, June 17, 2008, at A3 (describing same-sex couples marrying at California courthouses).

185. *See* Maura Dolan, *Gay Marriage Ban Overturned*, L.A. TIMES, May 16, 2008, at A1 ("[T]he scope of the court's decision could be thrown into question by an initiative already heading toward the November ballot. The initiative would amend the state Constitution to prohibit same-sex unions. The campaign over that measure began within minutes of the decision. . . . Conservative and religious-affiliated groups denounced the decision and pledged to bring enough voters to the polls in November to overturn it.").

California."[186] On election day, 52.3 percent of voters approved Proposition 8,[187] and the state stopped issuing marriage licenses to same-sex couples the next day.[188] In the six months between the state supreme court's decision and the November 4 vote, approximately eighteen thousand licenses were issued to same-sex couples;[189] following another trip to the state supreme court, those licenses remain valid.[190] After Proposition 8, however, same-sex couples seeking to wed in California must now seek domestic partnership licenses instead.

In May 2009, two same-sex couples applied for and were denied marriage licenses, and filed suit in federal district court. Unlike the plaintiffs in state courts, who had argued that the bans violated their respective state constitutions, the plaintiffs in *Perry* argued that Proposition 8 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment by denying same-sex couples the right to marry[191] and by creating an impermissible classification based on sexual orientation.[192] Remarkably, though the governor and other state actors were the named defendants, they refused to defend

---

186. CAL. CONST. art. I, § 7.5.

187. *See* DEBRA BOWEN, CAL. SECRETARY OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008 GENERAL ELECTION 7 (2008), *available at* http://www.sos.ca.gov/elections/sov/2008_general/index.htm#sov (follow "SOV—Complete" hyperlink) (showing that Proposition 8 passed with 52.3 percent of the vote, with 7,001,084 voters approving the amendment and 6,401,482 voting against it).

188. *See* Complaint ¶ 29, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (2009) (No. 09-2292), 2009 WL 1490740 ("Since November 5, 2008, same-sex couples have been denied marriage licenses on account of Prop. 8.").

189. *Perry*, 704 F. Supp. 2d at 997; Strauss v. Horton, 207 P.3d 48, 121 (Cal. 2009).

190. *See Strauss*, 207 P.3d at 122 ("Proposition 8 does not apply retroactively and therefore . . . the marriages of same-sex couples performed prior to the effective date of Proposition 8 remain valid.").

191. *See* Complaint, *supra* note 188, ¶ 39 ("Prop. 8 impinges on fundamental liberties by denying gay and lesbian individuals the opportunity to marry civilly and enter into the same officially sanctioned family relationship with their loved ones as opposite-sex individuals."). The Supreme Court has recognized marriage as a fundamental right in numerous cases. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."); Loving v. Virginia, 388 U.S. 1, 12 (1967) (describing marriage as a "vital personal right[]").

192. *See* Complaint, *supra* note 188, ¶ 42 ("California law treats similarly-situated people differently by providing civil marriage to heterosexual couples, but not to gay and lesbian couples. Instead, California law affords them and their families only the separate-but-unequal status of domestic partnership. . . . By purposefully denying civil marriage to gay and lesbian individuals, California's ban on same-sex marriage discriminates on the basis of sexual orientation.").

Proposition 8;[193] the state attorney general even agreed with the plaintiffs that the amendment violated the U.S. Constitution.[194] Left without the state on their side, the principal proponents of Proposition 8 petitioned to intervene to defend the amendment and were allowed to do so,[195] "provid[ing] a vigorous defense of the constitutionality of Proposition 8"[196] in the state's absence.

B. The Trial over Proposition 8: Testing Rationality

The proceedings in *Perry* were unlike those in the state courts.[197] Before the *Perry* trial began, the defendants alone moved for summary judgment; the district court denied it, finding that "[t]he parties' positions . . . raised significant disputed factual questions."[198] As a result, in contrast to the state cases' summary proceedings, *Perry* included "significant discovery," opening and closing statements, and a ten-day adversarial presentation of the evidence.[199]

At trial, the plaintiffs presented a host of witnesses. Nine expert witnesses—historians, economists, psychologists, a social epidemiologist, and a political scientist—testified on the purpose and meaning of marriage, the effects of same-sex marriage on the institution of marriage, and the effects of *bans* on same-sex marriage on same-sex couples and their children.[200] They further testified that marriage is founded on the affection of two people—not necessarily one man and one woman,[201] that the state has an interest in marriage because it encourages stable households,[202] and that there are no

193. *See* Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 949 (9th Cir. 2009) ("The defendant Governor, state administrative officers, and county clerks declined to take any position on the constitutionality of Prop. 8."); *see also* Dolan, *supra* note 185 ("Gov. Arnold Schwarzenegger, who previously has vetoed two bills in favor of gay marriage, issued a statement saying he 'respects' the California Supreme Court's decision and 'will not support an amendment to the constitution that would overturn' it.").

194. *See Proposition 8 Official Proponents*, 587 F.3d at 949 ("The defendant California Attorney General responded that he agreed that Prop. 8 was unconstitutional.").

195. *See id.* at 949–50 ("The district court granted an unopposed motion to intervene by the Official Proponents of Prop. 8 and ProtectMarriage.com—a ballot committee under California law (together, 'the Proponents')—so that they could defend the constitutionality of Prop. 8.").

196. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 930 (N.D. Cal. 2010).

197. *See supra* note 134 and accompanying text.

198. *Perry*, 704 F. Supp. 2d at 932.

199. *Id.*

200. *See id.* at 940–44 (describing the qualifications and testimony of the witnesses).

201. *Id.* at 933.

202. *Id.*

relevant differences between same-sex and opposite-sex couples that justify the state separating them for purposes of marriage.[203] The expert testimony put marriage in its social context: it sought to show what marriage really is in modern America, challenging the proponents' assertion—prominently relied upon by state courts that have upheld same-sex marriage bans[204]—that marriage serves primarily to regulate natural (meaning, heterosexual) procreation.[205]

Seven lay witnesses, including the four plaintiffs (two same-sex couples), also testified for the plaintiffs.[206] While the expert testimony gave the court social context by describing the general effects of bans on same-sex marriage, the lay witnesses added the human element, describing the personal effects of Proposition 8 on their lives.[207] The couples testified in detail about the state-conferred legitimacy that marriage licenses provide to committed straight couples and about how that is absent from the parallel domestic partnerships created for gay couples. One of the plaintiff couples described their children,[208] and the other described their plans to have children after marriage.[209]

To illustrate the Proposition 8 proponents' actual motivations in pursuing passage of the amendment, the plaintiffs called Hak-Shing William Tam as an adverse witness to discuss his role in the Proposition 8 campaign.[210] In an organized partnership with the amendment's official proponents, Tam distributed information—particularly to Asian and Pacific Islander communities and through

---

203. *Id.* at 934–35.

204. *See supra* note 120.

205. *See Perry*, 704 F. Supp. 2d at 931–32 (describing proponents' argument that procreation is central to marriage).

206. *Id.* at 938–40. In addition to the four plaintiffs, the lay witnesses were a partner to another same-sex couple who testified about "her experiences with discrimination and about how her life changed when she married her wife in 2008"; the mayor of San Diego, a former opponent of same-sex marriage, who testified about "how he came to believe that domestic partnerships are discriminatory"; and a gay man who "testified about his experience as a teenager whose parents placed him in therapy to change his sexual orientation from homosexual to heterosexual." *Id.* at 939–40. The plaintiffs also called an eighth lay witness, an adverse witness who testified about the Proposition 8 campaign. *Id.* at 940; *see also infra* notes 210–13 and accompanying text.

207. *Perry*, 704 F. Supp. 2d at 932–38.

208. *See* Transcript of Proceedings at 139, ¶¶ 6–9, *Perry*, 704 F. Supp. 2d 921 (No. C 09-2292-VRW), *available at* http://www.afer.org/wp-content/uploads/2010/01/Perry-Vol-1-1-11-10.pdf (describing one couple's sons); *id.* at 141, ¶¶ 22–24 ("I want to have a stable and secure relationship with her that then we can include our children in.").

209. *See id.* at 89, ¶¶ 17–18 ("[T]he timeline for us has always been marriage first, before family.").

210. *Perry*, 704 F. Supp. 2d at 940.

the website 1man1woman.net—to encourage votes for the amendment.[211] Some of the information he distributed was that "homosexuals are twelve times more likely to molest children," that gay marriage "will cause states one-by-one to fall into Satan's hands," and that gay marriage is related to polygamy and incest.[212] The sources he cited for this information were the National Association for Research and Therapy of Homosexuality—a gay-conversion organization—and "the internet."[213]

The Proposition 8 proponents set out to show that the ban served a legitimate governmental purpose and was not, contrary to the plaintiffs' claims, adopted to discriminate against gay persons. Like the plaintiffs, the proponents of Proposition 8 were represented by experienced and accomplished constitutional counsel.[214] In opening statements, the proponents asserted that the evidence would show that marriage is for procreation and that same-sex marriage would pose a direct threat to the institution of marriage. The evidence, however, did not live up to the proponents' promises. They offered only two witnesses,[215] and the court noted that "[p]roponents' evidentiary presentation was dwarfed by that of plaintiffs."[216] The court further noted that the proponents "elected not to call the majority of their designated witnesses to testify," and that "[t]he record does not reveal the reason behind proponents' failure to call their expert witnesses."[217]

---

211. *See id.* at 937 (summarizing testimony).

212. *Id.*

213. *Id.*

214. *See Prop. 8 Trial Defense Attorney: Charles Cooper*, MERCURY NEWS (Jan. 12, 2010, 9:24 PM PST), http://www.mercurynews.com/samesexmarriage/ci_14168885 ("A former Assistant Attorney General during the Reagan administration, Charles Cooper is part of the same conservative Washington, D.C. legal establishment as Olson. He was enlisted to . . . lead the legal defense of Prop[.] 8 by the ballot measure's California sponsors, with assistance from the Alliance Defense Fund, a group aligned against gay marriage.").

215. *Perry*, 704 F. Supp. 2d at 945.

216. *Id.* at 932.

217. *Id.* at 944. The proponents initially said plans to record the trial made their witnesses "extremely concerned about their personal safety." *Id.* The court noted, however, that the "potential for public broadcast in the case had been eliminated" well before the proponents' presentation of their case began, and the proponents still did not call the planned witnesses. *Id.* The court further suggested the proponents may have had substantive reasons for withdrawing some witnesses, noting that the "[*p*]*laintiffs* entered into evidence the deposition testimony of two of proponents' withdrawn witnesses, as their testimony supported plaintiffs' claims." *Id.* (emphasis added).

The two experts that the proponents did call were the founder and president of the Institute for American Values—a think tank focusing on "marriage, family, and child well-being"[218]—and a professor of government.[219] The first expert argued that the recognition of same-sex marriage would weaken, or deinstitutionalize, marriage.[220] He testified that marriage may only be between one man and one woman and that it exists for the purpose of channeling procreation.[221] Accordingly, he argued that the state has an interest in differentiating between opposite-sex couples—many of whom can procreate naturally and choose to do so—and same-sex couples, who cannot procreate naturally.[222] The government professor testified on the relative political power of gays and lesbians,[223] primarily speaking to the level of scrutiny that the court should employ rather than to the interests furthered by the amendment.[224]

C. The District Court's Opinion

1. *Credibility Determinations.* In a social controversy in which passions, stereotypes, and misinformation abound,[225] the factfinder's responsibility to make credibility determinations is a crucial complement to the adversarial system in a court's quest to discover the truth. In contrast to the state court opinions, which often relied on the same assumptions thrown around in public discourse,[226] the *Perry* trial forced scrutiny of all of the evidence presented, through vigorous

218. *Id.* at 945.

219. *Id.* at 950–51.

220. *Id.* at 934, 949.

221. *Id.* at 933.

222. *See id.* at 947 (noting the expert's assertion that "the primary purpose of marriage is to 'regulate filiation'").

223. *Id.* at 951.

224. *See id.* at 950–52 (summarizing the testimony of an expert regarding gays' and lesbians' political power). Some state courts had held that political power defeats gays' and lesbians' claims to suspect-class status. *See, e.g.*, Andersen v. King County, 138 P.3d 963, 974–75 (Wash. 2006) ("The enactment of provisions providing increased protections to gay and lesbian individuals in Washington shows that as a class gay and lesbian persons are not powerless but, instead, exercise increasing political power. . . . We conclude that plaintiffs have not established that they satisfy the third prong of the suspect classification test.").

225. *See, e.g.*, *Perry*, 704 F. Supp. 2d at 982–83 ("Well-known stereotypes about gay men and lesbians include a belief that gays and lesbians are affluent, self-absorbed and incapable of forming long-term intimate relationships. Other stereotypes imagine gay men and lesbians as disease vectors or as child molesters who recruit young children into homosexuality. No evidence supports these stereotypes.").

226. *See supra* Part II.B.

cross examinations and the court's thorough assessments of the witnesses' credibility. The Federal Rules of Evidence distinguish between lay-witness and expert testimony. Lay witnesses must have firsthand knowledge of the subjects of their testimony but need not have specialized or technical knowledge or training.[227] In contrast, experts need not have firsthand knowledge of the particular subjects on which they testify[228]—that is, their knowledge may be obtained through reports prepared by others[229]—but the Rules require courts to screen an expert's knowledge and qualifications in his field.[230] The Rules thus prevent courts from considering mere conjecture by witnesses who are not qualified to give informed opinions.

The Proposition 8 proponents did not object to the qualifications of any of the plaintiffs' lay or expert witnesses,[231] and the court found that all of them had presented credible testimony.[232] The plaintiffs, in contrast, challenged the credibility of both of the proponents' expert witnesses.[233] Applying the federal standards for expert testimony, the court held that the proponents' first witness lacked credibility entirely.[234] The witness, the court found, failed to address alternative theories of the purpose of marriage that had been offered by other experts[235] and failed to explain the sources or methodology of the

227. *See* FED. R. EVID. 701 (limiting lay witness testimony to that which is "rationally based on the perception of the witness, . . . helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and . . . not based on scientific, technical, or other specialized knowledge").

228. FED. R. EVID. 702.

229. *See* FED. R. EVID. 703 (providing that "facts or data . . . may be those perceived by or made known to the expert at or before the hearing," but that the material must be "of a type reasonably relied upon by experts in the particular field").

230. *See* FED. R. EVID. 702 (providing that an expert may testify if "the testimony is based upon sufficient facts or data, . . . the testimony is the product of reliable principles and methods, and . . . the witness has applied the principles and methods reliably to the facts of the case"); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999) (holding that a court must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field"); *see also Perry*, 704 F. Supp. 2d at 946–47 (quoting *Kumho Tire* and describing the requirements of Rule 702).

231. *Perry*, 704 F. Supp. 2d at 938.

232. *See id.* (concluding that the "plaintiffs' lay witnesses provided credible testimony"); *id.* at 940 (finding that the "plaintiffs' experts were amply qualified to offer opinion testimony" and concluding that their testimony was credible).

233. *Id.* at 945.

234. *Id.* at 946 ("Blankenhorn's testimony constitutes inadmissible opinion testimony that should be given essentially no weight.").

235. *Id.* at 947.

research upon which his opinions were based.[236] The court found that the expert's opinion that biological parents provide better families for children than do non-biological parents was "not supported by the evidence on which he relied,"[237] and that "no credible evidence supports [the expert's] conclusion" that the legalization of gay marriage "will lead to the deinstitutionalization of marriage."[238] The court pointed out that the witness "opposes marriage for same-sex couples . . . despite his recognition that at least thirteen positive consequences would flow from state recognition" of same-sex marriage.[239]

The court likewise discounted most of the testimony offered by the proponents' second expert, the professor of government. The expert was called to testify on popular initiatives and on the political power of gays and lesbians.[240] The court noted the witness's trial testimony was "inconsistent with the opinions he expressed before he was retained as an expert," and that the witness had conceded that "gays and lesbians currently face discrimination and that current discrimination is relevant to a group's political power."[241] Questioning by the plaintiffs' attorneys also revealed that the witness's knowledge of discrimination against gays and lesbians was limited,[242] and that he had not reviewed all of the materials he relied upon in his expert report,[243] most of which were provided to him by the Proposition 8 proponents' attorneys.[244] The court therefore found that his "opinions on gay and lesbian political power are entitled to little weight and only to the extent they are amply supported by reliable evidence."[245]

---

236. *See id.* at 948 ("[N]othing in the record other than the 'bald assurance' of Blankenhorn . . . suggests that Blankenhorn's investigation into marriage has been conducted to the 'same level of intellectual rigor' characterizing the practice of anthropologists, sociologists or psychologists." (quoting Daubert v. Merrell Dow Pharm., 43 F.3d 1311, 1316 (9th Cir. 1995), and Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999))).

237. *Id.* The court found "the evidence does not, and does not claim to, compare biological to non-biological parents." *Id.*

238. *Id.* at 949.

239. *Id.* at 950.

240. *Id.*

241. *Id.* at 952.

242. *See generally id.* at 951–52 (describing the plaintiffs' voir dire of the expert).

243. *Id.* at 952.

244. *Id.* at 951.

245. *Id.* at 952.

2. *Rational Basis Review.* As described in the preceding Part, a danger of employing an elevated standard of review to same-sex marriage bans is that it perpetuates the idea that gay persons are seeking special rights—through special review standards—rather than legal equality.[246] The *Perry* court's thorough opinion articulated a number of ways in which Proposition 8 would fail heightened review—for example, as a violation of the plaintiff couples' fundamental right to marry, or as unjustifiable discrimination based on sex or sexual orientation.[247] The court avoided the heightened scrutiny dangers, however, by finding that Proposition 8 failed even the lowest standard of review.[248]

After reviewing the evidence and using it to make eighty separate findings of fact,[249] the court found that—based on "overwhelming evidence"[250]—the amendment's exclusion of same-sex couples from marriage failed to serve a legitimate interest even under rational basis review.[251]

---

246. *See supra* notes 154–58 and accompanying text.

247. In a novel approach, the court held that because the claimed right was a relational one—the plaintiffs' sexual orientation determined the sex of the person they would choose as a spouse—sexual orientation and sex were intertwined. Discrimination because of one amounted to discrimination because of the other:

> 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.

Perry, 704 F. Supp. 2d at 996. Discrimination based on sex has long demanded heightened scrutiny. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532–34 (1996) (describing and applying the heightened standard of review that is used for sex-based classifications). Based on the evidence presented at trial, the court also determined that discrimination based on sexual orientation called for strict scrutiny, *see Perry*, 704 F. Supp. 2d at 997, but did not apply it. *See infra* note 248.

248. *Perry*, 704 F. Supp. 2d at 997 ("[T]he 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."); *see also id.* at 995 (holding that "Proposition 8 cannot withstand rational basis review," nor may it "survive the strict scrutiny required by plaintiffs' due process claim").

249. *Id.* at 938–91.

250. *Id.* at 1003.

251. *Id.* at 1002 ("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.").

The amendment's proponents asserted that Proposition 8 served twenty-three legitimate interests.[252] The district court condensed those interests into five: reserving marriage for one man and one woman, guaranteeing that social changes are implemented with caution, promoting heterosexual parenting over gay parenting, protecting the rights of opponents of same-sex marriage, and treating same-sex couples differently than heterosexual couples.[253] The court held that the amendment failed to reasonably advance any legitimate interest the proponents had asserted.[254] The extensive findings of fact earlier in the opinion helped shape the court's view of the relevant legal issues to be determined and the relevance of prior Supreme Court decisions. In determining the nature of the right to marry, the court rejected the view that procreation was the dominant purpose of the right.[255] The court further found that substantial changes in gender roles in society and marriage, both in California and nationwide, eroded the rationale for barring same-sex couples from marriage: "[T]he exclusion exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed."[256] The district court explained that the Supreme Court's holding in *Loving v. Virginia*,[257] invalidating interracial marriage bans, should be understood not as speaking exclusively to racial discrimination, but as showing that greater inclusion need not change the definition of marriage.[258]

---

252. Defendant-Intervenors' Trial Memorandum, *supra* note 169, at 7–8. Many of the asserted interests were redundant, including several on the general theme of preserving and strengthening the traditional institution of marriage and emphasizing the procreative elements of marriage. Two fairly unique interests asserted were "[a]ccommodating the First Amendment rights of individuals and institutions that oppose same-sex marriage on religious or moral grounds" and "[u]sing different names for different things." *Id.* at 8.

253. *Perry*, 704 F. Supp. 2d at 998.

254. *Id.* at 1001–02. The court held that Proposition 8 violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 991.

255. *See id.* at 992 ("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. . . . The Supreme Court recognizes that, wholly apart from procreation, choice and privacy play a pivotal role in the marital relationship." (citing Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965))).

256. *Id.* at 993.

257. Loving v. Virginia, 388 U.S. 1 (1967).

258. *See Perry*, 704 F. Supp. 2d at 992 ("[T]he 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.").

Taking together its findings of fact and the Supreme Court's holdings on the nature of marriage, the *Perry* court found that "[t]he right to marry has been historically and remains the right to choose a spouse and, with mutual consent, join together and form a household."[259] It concluded that the fundamental right to marry, properly characterized, must include same-sex couples:

> 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.[260]

Domestic partnerships, the court found, did not satisfy the state's obligation to afford same-sex couples the opportunity to marry. Instead, "domestic partnerships were created as an *alternative* to marriage that *distinguish*[*es*] same-sex from opposite-sex couples."[261]

The evidence presented allowed the court to analyze the arguments under the "more searching form of rational basis review" dictated by *Romer* and *Lawrence*, rather than the permissive or assumption-based review standards employed by the state courts. Finding no rational connection to any legitimate interest, the *Perry* court arrived at the only remaining conclusion: that Proposition 8 was passed to further some illegitimate interest.[262] Early in its opinion, the court noted that "[t]he state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular

---

259. *Id.* at 993.

260. *Id.*; *cf.* Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("To say that the issue in *Bowers* was *simply the right to engage in certain sexual conduct* demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." (emphasis added)).

261. *Perry*, 704 F. Supp. 2d at 993 (emphasis added); *see also id.* at 994 ("The evidence shows that domestic partnerships do not fulfill California's due process obligation to plaintiffs for two reasons. First, domestic partnerships are distinct from marriage and do not provide the same social meaning as marriage. Second, domestic partnerships were created specifically so that California could offer same-sex couples rights and benefits while explicitly withholding marriage from same-sex couples. The evidence at trial shows that domestic partnerships exist solely to differentiate same-sex unions from marriages. A domestic partnership is not a marriage . . . ." (citations omitted)).

262. *See. id.* at 1002 ("Here, the purported state interests fit so poorly with Proposition 8 that they are irrational . . . . What is left is evidence that Proposition 8 enacts a moral view that there is something 'wrong' with same-sex couples.").

purpose."[263] After rejecting the interests asserted by the proponents, the court found that the amendment could only serve those illegitimate interests instead. It held that "[t]he evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples."[264] Properly relying on the Supreme Court's statements in *Romer* and *Lawrence*—that animus or protection of certain traditional moral views, standing alone, are *not* legitimate interests—the *Perry* court concluded that Proposition 8 must fall.[265]

Against the backdrop of inclusion, marriage bans, including Proposition 8, operate as blanket disapprovals of homosexuality. In *Perry*,

> 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. . . . Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples.[266]

Although the state cannot endorse such blanket disapproval, the *Perry* court explicitly noted that individuals and private groups remain free to voice whatever moral and religious viewpoints they wish.[267] Accordingly, churches need not perform same-sex marriage ceremonies or recognize the marriages of same-sex couples.[268]

D. The Road Ahead

After the district court's decision in *Perry*, the proponents of Proposition 8 quickly appealed to the Ninth Circuit. They also moved for a temporary injunction staying the decision, which the Ninth Circuit granted,[269] placing a hold on the issuance of marriage licenses

---

263. *Id.* at 930–31.

264. *Id.* at 1003.

265. *Id.*

266. *Id.* at 1002–03.

267. The court noted that "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." *Id.* at 1001. Moreover, it "does not affect any First Amendment right or responsibility of parents to educate their children." *Id.* at 1000.

268. *Id.* at 976–77.

269. Perry v. Schwarzenegger, No. 10-16696, 2010 WL 3212786, at *1 (9th Cir. Aug. 16, 2010) (order granting appellants' motion to stay).

to same-sex couples until it could hear the case. Prominent constitutional law scholars, including Erwin Chemerinsky, raised serious questions about the proponents' standing to appeal the decision at all,[270] and the Ninth Circuit ordered the proponents to brief the issue.[271] Imperial County, California, then moved to intervene as an appellant.[272]

The Ninth Circuit sua sponte ordered an expedited review schedule[273] and heard oral arguments on December 6, 2010. It allowed two hours of argument, with the first hour dedicated to the issue of standing and the second devoted to the merits of the constitutional challenge to Proposition 8.[274] During arguments the panel was particularly focused on why a county might have standing to challenge an order directing it to issue marriage licenses—an issue of state, not local, policy. The court held on January 4, 2011, that the county did not have standing to appeal the district court's decision as an intervenor,[275] and it certified the issue of the proponents' standing to the California Supreme Court.[276]

The unique situation presented by California's refusal to defend Proposition 8 raises a strong possibility that the Ninth Circuit will dismiss the case for lack of standing without reaching the merits of the challenge. Regardless of the Ninth Circuit's ruling, if the Supreme

---

270. Erwin Chemerinsky, *Who Has Standing to Appeal Prop. 8 Ruling?*, L.A. TIMES, Aug. 15, 2010, at A30.

271. *Perry*, 2010 WL 3212786, at *1 ("In addition to any issues appellants wish to raise on appeal, appellants are directed to include in their opening brief a discussion of why this appeal should not be dismissed for lack of Article III standing.").

272. Defendant-Intervenors-Appellants' Opening Brief at 24–29, *Perry*, No. 10-16696, *available at* http://www.equalrightsfoundation.org/wp-content/uploads/2010/09/2010.09.17-Defendant-Intervenor-Filing.pdf.

273. *Perry*, 2010 WL 3212786, at *1.

274. Perry v. Schwarzenegger, Nos. 10-16696, 10-16751 (9th Cir. Nov. 15, 2010) (order setting oral arguments), *available at* http://www.ca9.uscourts.gov/datastore/general/2010/11/15/10-16696_10-16751_order.pdf.

275. Perry v. Schwarzenegger, No. 10-16751, slip op. at 13 (9th Cir. Jan. 4, 2011), *available at* http://www.afer.org/wp-content/uploads/2011/01/9th-Circuit-Imperial-County-Ruling.pdf.

276. *See* Perry v. Schwarzenegger, No. 10-16696, slip op. at 2 (9th Cir. Jan. 4, 2011) (order certifying a question to the Supreme Court of California) (inquiring whether, under California law, proponents have a "particularized interest in the initiative's validity" or may otherwise defend Proposition 8 when the state refuses to do so), *available at* http://www.afer.org/wp-content/uploads/2011/01/AFER-9th-Circuit-Standing-Question.pdf. For a good discussion of the certified question and the parties' arguments, see Lyle Denniston, *Prop. 8: Battling in New Arena*, SCOTUSBLOG (Jan. 24, 2011, 11:27 PM), http://www.scotusblog.com/2011/01/prop-8-battling-in-new-arena.

Court were to grant certiorari,[277] the thorny standing question would allow the Court—generally reluctant to reach controversial questions it does not have to reach—to decide the case on less controversial grounds, by ruling that none of the proponents have standing to appeal.[278]

Uncertainty about how the Court would dispose of a gay-marriage-ban challenge has long dissuaded gay rights advocates from launching a direct federal challenge, and some of those advocates openly displayed skepticism—and even contempt—at the challenge filed in *Perry*.[279] In deciding *Lawrence*, the Court left itself an out for such a challenge, saying that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[280] But, dicta notwithstanding, the

277. Commentators have projected that *Perry* will reach the Supreme Court and lawyers on both sides have not shied away from a Supreme Court challenge. *See, e.g.*, Jesse McKinley, *Both Sides in California's Gay Marriage Fight See a Long Court Battle Ahead*, N.Y. TIMES, June 26, 2010, at A12 (noting that "both sides expect [*Perry*] to wind its way up the federal judicial food chain, most likely all the way to the Supreme Court"); Michael C. Dorf, *A Federal Judge Strikes Down California's Proposition 8: Will the Ruling Ultimately Advance or Retard Civil Rights for LGBT Americans?*, FINDLAW (Aug. 9, 2010), http://writ.news.findlaw.com/dorf/20100809.html ("Although some of Judge Walker's opinion focused on facts and circumstances that are unique to California, the core logic of the ruling implies that gay and lesbian couples throughout the country have a federal constitutional right to marry. Thus, should the decision be affirmed by the U.S. Court of Appeals for the Ninth Circuit, the U.S. Supreme Court will come under considerable pressure to consider the case."); *Prop. 8 Foes, Backers Look to Supreme Court Showdown on Gay Marriage*, L.A. NOW (Aug. 5, 2010, 7:42 AM), http://latimesblogs.latimes.com/lanow/2010/08/prop-8-foes-backers-look-to-supreme-court-showdown-on-gay-marriage-.html ("A day after Proposition 8 was thrown out in court, both sides in California's debate over gay marriage are focusing on the next fight in a battle that is likely to end up before the U.S. Supreme Court.").

278. If the Ninth Circuit or the U.S. Supreme Court determines that the intervenors lack standing to appeal, the legal status of the district court's opinion is not crystal clear. Although a district court's final judgment stands absent an appeal, the parties disagree on the status of a decision when the defendants *cannot* appeal for lack of standing. *See Perry*, No. 10-16751, slip op. at 6 n.2 (noting the disagreement between the plaintiffs and the Proposition 8 proponents on whether the district court's order would stand if proponents' appeal was dismissed for lack of standing).

279. *See* Eskridge & Spedale, *supra* note 2 ("This is a brash, bold move to nationalize marriage equality and raise the stakes of the debate."). *See generally* Jim Carlton, *Federal Suit Divides Gay-Marriage Backers*, WALL ST. J., May 28, 2009, at A3 (describing gay rights activists' ambivalence toward the federal challenge); *Ted Olson's Supreme Court Adventure*, N.Y. TIMES ROOM FOR DEBATE (Aug. 18, 2009, 7:00 PM), http://roomfordebate.blogs.nytimes.com/2009/08/18/ted-olsons-supreme-court-adventure (describing criticism by gay marriage advocates that the *Perry* challenge was premature).

280. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

Court's analysis in gay rights cases overall indicates that the Court may be open to a gay marriage challenge—if the facts are right.

In that regard, *Perry* was a game changer. The extensive evidentiary record showed the real discrimination endured by gay couples and their children. More importantly, it showed that the proponents could muster no believable reason, aside from their personal religious and moral beliefs, for propagating that discrimination. Under the state-neutrality analysis the Supreme Court has laid out, Proposition 8 should plainly fall.

CONCLUSION

For decades, same-sex families have sought the freedom to marry. Religious and social conservatives, meanwhile, have sought the freedom to disapprove of homosexuality. The Supreme Court has struck a laudable balance between these two positions. On both ends, the Court has ordered the state to stay out of the culture war. The voluminous evidence presented in *Perry* revealed that the proponents of California's Proposition 8 acted to ban same-sex marriage for no reason other than to propagate discrimination against gay couples. Moreover, because a state's issuance of a civil marriage license is a governmental—rather than a private or religious—act, that issuance could not be said to burden individual or organizational rights to disapprove of homosexuality. Under *Romer* and *Lawrence*, the state's enforcement of Proposition 8 violates same-sex couples' rights to due process and equal protection.

In a well-known quote in *Lawrence*, the Supreme Court noted that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[281] If the Court is true to its state-neutrality approach, it will necessarily follow the lead of the *Perry* court and allow the evidence—showing that gay marriage bans have no rational basis—to carry the day.

281. *Id.* at 579.