

Perry Et Al v Brown Et Al

No. 10-16696 & No. 11-16577

United States Court of Appeals for the Ninth Circuit

1. Reference Details

Jurisdiction: United States Court of Appeals for the Ninth Circuit

Date of decision: 7 February 2012

Link to full court judgment:

<http://www.ca9.uscourts.gov/datastore/general/2012/02/07/1016696com.pdf>

2. Facts of the case

On 4 November 2008, the People of California adopted Proposition 8, which amended the California Constitution to prevent the Californian state from recognising the union of same-sex couples with the designation “marriage”. It remained possible for same-sex couples to enter into an officially recognised family relationship (a “domestic partnership”), with the other rights and responsibilities associated with marriage.

Two same-sex couples, Kristin Perry and Sandra Stier and Paul Katami and Jeffrey Zarrillo, commenced legal proceedings in May 2009 after being denied marriage licenses. The plaintiffs alleged that Proposition 8 violated the Fourteenth Amendment to the US Constitution and sought a declaration of its unconstitutionality and an injunction barring its enforcement.

The defendants (including the Attorney General and the Governor of California) refused to argue that Proposition 8 was constitutional, and the sponsors of Proposition 8 were permitted to intervene as intervenor-defendants.

The district court held that Proposition 8 was unconstitutional under the Due Process Clause in the US Constitution because no compelling state interest justified denying same-sex couples the fundamental right to marry. It also held that Proposition 8 violated the Equal Protection Clause of the Constitution because there was no rational basis for limiting the designation of “marriage” to opposite-sex couples.

The sponsors of Proposition 8 appealed against the decision.

3. Law

Proposition 8 of the State of California Constitution.

Fourteenth Amendment to the United States Constitution (the Equal Protection Clause).

4. Legal Arguments

Arguments of the plaintiffs

The plaintiffs argued that Proposition 8 singled out same-sex couples for unequal treatment by taking away from them alone the right to marry and that this action amounts to a constitutional

violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason.

Arguments of the intervenor-defendants

The sponsors of Proposition 8 put forward two reasons to justify the enactment of Proposition 8. These reasons are as follows:

- furthering California's interest in childrearing and responsible procreation; and
- proceeding with caution before making significant changes to marriage.

In response to the plaintiffs' arguments that it is unconstitutional to single out minority groups to deprive them of an existing right without a legitimate reason, the intervenor-defendants argued that the Constitution is not a one-way ratchet that forever binds a State to laws and policies that go beyond what the Fourteenth Amendment would otherwise require. Since the State of California had gone beyond the requirements of the Federal Constitution in extending the right to marry to same-sex couples, there can be no constitutional infringement in taking the designation "marriage" away from same-sex couples.

5. Decision

The Appeals Court concluded that Proposition 8 of the California Constitution violated the Fourteenth Amendment to the US Constitution. The Court of Appeals reached this conclusion by considering only the narrow question of whether the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason. It did not consider whether gay couples enjoy the right to marry.

The Court evaluated the constitutionality of Proposition 8 "in light of its actual and specific effects on committed same-sex couples desiring to enter into an officially recognized lifelong relationship". The Court noted that Proposition 8 left the incidents of marriage, but took away the status and dignity of marriage. In analysing the impact of the provision, the Court emphasised "the extraordinary significance of the official designation of 'marriage'", which is "the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it". In taking away the designation of "marriage" the People of California took away "the societal approval that comes with it".

The Court of Appeals found the fact that the California Constitution had previously guaranteed same sex couples the right to use the designation "marriage" to be relevant in assessing the effect of Proposition 8. The Court reasoned that "[w]ithdrawing from a disfavoured group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place", because "[t]he action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is".

In reaching its decision, the Court relied heavily on the US Supreme Court decision in *Romer v Evans*, 517 U.S. 620, 633 (1996). In that case, the Supreme Court had found that an amendment to Colorado's constitution which prohibited the state from enacting protection against discrimination on the basis of sexual orientation violated the Equal Protection Clause. The Supreme Court had found that laws which single out a certain class of citizens for disfavoured

legal status, which are not justified by a legitimate state interest, “raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected”. In order to fall foul of the Equal Protection Clause in this way, it is not necessary for the privilege, benefit or protection at issue to be a constitutional right, which made it unnecessary for the Court to consider whether same-sex couples have a fundamental right to marry.

The Court rejected the argument that the state of California, having gone beyond the requirement of the Federal Constitution by granting same-sex couples the right to marry, must be free to return to the pre-existing position. This did not mean that the Constitution is a “one-way ratchet”, but that the Equal Protections Clause requires the state to have a legitimate reason for withdrawing a right or benefit from one group but not others, whether or not it was required to confer that right or benefit in the first place. The Appeals Court examined Supreme Court jurisprudence condemning the targeted exclusion of a group of citizens from a right or benefit that they had previously enjoyed on equal terms with other citizens and concluded that the “constitutional injury” in each case “has little to do with the substance of the right or benefit from which a group is excluded, and much to do with the act of exclusion itself”.

Having identified the harm caused by Proposition 8, the Appeals Court moved on to determine whether any legitimate state interest constituted a rational basis for Proposition 8. In addition to considering the arguments put forward by the intervenor-defendants, the Court considered two potential rationales for Proposition 8 put forward by *amici curiae*:

- protecting religious freedom; and
- preventing children from being taught about same-sex marriage in schools.

The Court noted that in order to justify a difference in treatment, the reasons put forward by the defendants must “find some footing in the realities of the subject addressed by the legislation”. The Court concluded that Proposition 8, in simply withdrawing the designation of “marriage” from same-sex unions but leaving intact all other rights of same-sex couples, did not further any of the interests put forward by the defence and *amici*. For this reason, they did not constitute a rational basis for adopting the legislation, whether or not they were legitimate state interests or would constitute legitimate reasons under different circumstances.

In reaching this conclusion, the Appeals Court emphasised that its decision should in no way be taken to suggest that Proposition 8 would be constitutional if it had gone further by repealing other rights of same-sex couples, such as their equal parental rights. The Court also expressly rejected the argument that denying same-sex couples the right to call themselves “married” could bolster the stability of families headed by one man and one woman:

The argument that withdrawing the designation of “marriage” from same-sex couples could on its own promote the strength or stability of opposite-sex marital relationships lacks any (...) footing in reality.

Since no legitimate reason had been put forward for its enactment, it was necessary for the Court to consider why else the People of California might have enacted Proposition 8. One potential reason considered by the Court was a desire to return to the traditional state of affairs, whereby the definition of marriage referred to a union between a man and a woman. In considering whether this rationale would serve to justify Proposition 8, the Court was clear that

tradition alone is not a justification for taking away a right that had already been granted: "Tradition is a legitimate consideration in policymaking, of course, but it cannot be an end unto itself." Therefore, "[a] preference for the way things were before same-sex couples were allowed to marry, without any identifiable good that a return to the past would produce, amounts to an impermissible preference against same-sex couples themselves, as well as their families".

In the absence of any legitimate purpose for Proposition 8, the court was left with "the inevitable inference" that the disadvantage imposed by it was born out of disapproval of gays and lesbians as a class. The Court emphasised that its conclusion did not presuppose the existence of ill will on the part of the voters of California, since "[d]isapproval may also be the product of longstanding, sincerely held private beliefs".

The Court rejected the notion that Proposition 8 was intended only to disapprove of same-sex marriage, rather than to pass judgment on same-sex couples as people, finding that its effect was to "send a message that gays and lesbians are of lesser worth as a class – that they enjoy a lesser societal status". Therefore, the Court concluded that "Proposition 8 enacts nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class" and that disapproval of a class of people cannot constitute a *legitimate* government interest.