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RESPONSE[†]

ANIMUS THICK AND THIN: THE BROADER IMPACT OF THE NINTH CIRCUIT DECISION IN *PERRY V. BROWN*

Nan D. Hunter*

There is a concern among supporters of marriage equality, especially those in the legal academy, that the decision of the Ninth Circuit in *Perry v. Brown*¹ was too good to be true or, perhaps, too clever to be sustainable.² Judges Reinhardt and Hawkins crafted a decision that struck down Proposition 8³ with reasoning that applies only to California. All but ignoring Judge Walker's far-reaching trial court opinion in *Perry v. Schwarzenegger*, they grounded their analysis in an application of heightened rational basis scrutiny, derived from *Romer v. Evans*,⁴ that emphasized the significance of taking away an important right from an unpopular minority.

The only problem with this analysis for marriage equality supporters is that, despite the principle that courts should resolve constitutional disputes on the narrowest possible grounds, the "taking away" portion of the rationale

[†] Responding to William N. Eskridge Jr., *The Ninth Circuit's Perry Decision and the Constitutional Politics of Marriage Equality*, 64 STAN. L. REV. ONLINE 93 (2012).

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1. Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

2. See, e.g., David Cole, *Gambling with Gay Marriage*, N.Y. REV. BOOKS NYRBLOG (Feb. 9, 2012, 11:48 AM), <http://www.nybooks.com/blogs/nyrblog/2012/feb/09/gambling-gay-marriage/> (arguing that Perry is unlikely to evade review); Jason Mazzone, *Marriage and the Ninth Circuit: Thumbs Down*, BALKINIZATION (Feb. 7, 2012, 7:18 PM), <http://balkin.blogspot.com/2012/02/marriage-and-ninth-circuit-thumbs-down.html> (arguing that Perry is "dishonest and foolish").

3. CAL. CONST. art. I, § 7.5, held unconstitutional by *Perry v. Brown*, 2012 WL 372713, at *29, *aff'g* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

4. 517 U.S. 620 (1996).

strikes some as too outcome driven and transparently invented for the goal of providing the Supreme Court with a plausible rationale for denying certiorari.⁵ From this view, the opinion's political strength will also be its greatest doctrinal weakness.

I disagree on two counts. First, I read the opinion as being far more nuanced than it has been given credit for, and believe that its elaboration of the role of animus in judicial review is an important contribution to equal protection doctrine. Second, critics are missing a deeper point: the greatest political strength of the *Perry* opinion lies not in the short-term question of whether the Supreme Court will accept review, but in its contribution to the more enduring issue of how courts can balance their role of serving as an antimajoritarian check on populist retaliation against minorities while also preserving the values of popular constitutionalism.

A. *Refining the Role of Animus in Equal Protection Analysis*

The fundamental point of the “taking away” aspect of the *Perry* decision is that singling out a socially disfavored group for the withdrawal of an important right reeks of animus. This should not be a controversial claim. Considered together with the denigration of gay people that saturated the pro-Proposition 8 campaign, the consequence of the “taking away” sequence of events is to trigger heightened rational basis, the standard of review used by the Supreme Court in *Romer v. Evans*.⁶ In my view, sexual orientation ought to be considered fully suspect when it is used as a basis for differential treatment under law, but neither the Supreme Court nor any U.S. court of appeals has so held.

By contrast, taking a closer look at laws infused with animus is something that the Supreme Court has *done* since 1973, when it struck down a law enacted to disqualify otherwise eligible “hippies” from obtaining food stamps.⁷ However, the Supreme Court has done so rarely and, more importantly, has never *said* that it was using this device. Indeed, how to categorize and assess animus has become a recurring and unresolved question in equal protection law.

Justice Scalia raised the stakes on animus in his dissent in *Romer*, in which he attacked the majority opinion for adopting “the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.”⁸ Scalia derided the Court's suggestion that voters had “been guilty of ‘animus’ or ‘animosity’ toward homosexuality,”⁹ and characterized its “stern disapproval of ‘animosity’

5. See sources cited *supra* note 2.

6. See, e.g., Ellen E. Halfon, *A Changing Equal Protection Standard? The Supreme Court's Application of a Heightened Rational Basis Test in City of Cleburne v. Cleburne Living Center*, 20 LOY. L.A. L. REV. 921, 959 (1987).

7. See U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534, 538 (1973).

8. 517 U.S. at 636 (Scalia, J., dissenting).

9. *Id.* at 644 (quoting *id.* at 632, 634 (majority opinion)).

toward homosexuality” as a misreading of a “reasonable effort to preserve traditional American moral values.”¹⁰

In *Board of Trustees v. Garrett*, a case that divided the Court five to four, the dissenting opinion argued that adverse treatment resting upon “negative attitudes, fear, or irrational prejudice” necessarily violated the Equal Protection Clause.¹¹ Chief Justice Rehnquist, writing for the majority, replied that “[a]lthough such biases may often accompany irrational . . . discrimination, their presence alone does not a constitutional violation make.”¹² Justices Kennedy and O’Connor both joined the Rehnquist opinion, but also wrote separately to say that “[p]rejudice . . . rises not from malice or hostile animus alone,” but also from thoughtlessness.¹³ Clearly the concept of animus marked highly contested ground.

Justice O’Connor responded in her concurring opinion in *Lawrence v. Texas*, where she spelled out the analysis for why evidence of animus (presumably when not merely “prejudice”) should trigger tougher review under the Equal Protection Clause, even for nonsuspect classifications.¹⁴ *Perry*, however, is the first opinion with precedential weight to adopt Justice O’Connor’s approach.

When, in the next step of its logic, the Ninth Circuit applies heightened rational basis review to Proposition 8, it accepts the proposition that there might be a rational reason—i.e., apart from animus—for a state to limit the benefits linked to marriage to only those couples who might “procreate accidentally.”¹⁵ Since same-sex couples don’t have those kinds of accidents, including them in the group eligible to marry would not be necessary to advance that interest. Thus, the court reasons, a state could rationally choose to *exclude* gay couples from marriage.

In the California context, however, the proponents of Proposition 8 advanced no legitimate reason for *taking away* the right to marry and its presumed protective benefits for children from the broader group covered under a regime of marriage equality. Again, according to the Ninth Circuit, there *could* be a legitimate purpose in such a retrenchment; one could imagine that curbing state expenses could be a rational motivation (assuming that the absence of same-sex marriage would save state funds, which economists have found to be a false assumption¹⁶).

10. *Id.* at 651 (Scalia, J., dissenting) (quoting *id.* at 634 (majority opinion)).

11. 531 U.S. 356, 381 (2001) (Breyer, J., dissenting) (citation omitted) (internal quotation marks omitted).

12. *Id.* at 367 (majority opinion).

13. *Id.* at 374 (Kennedy, J., concurring).

14. *See* 539 U.S. 558, 579-85 (2003) (O’Connor, J., concurring).

15. *Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713, at *20-21 (9th Cir. Feb. 7, 2012).

16. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 941-42 (N.D. Cal. 2010), *aff’d*, 2012 WL 372713.

The difficulty with this part of the court's reasoning is that the accidental procreation argument itself is so strained. Using marriage as a state-sanctioned mechanism for enhancing the likelihood that adults who have children will legally bind themselves to each other and thereby—so the theory goes—provide a stable family dynamic for raising children is advanced as much by allowing gay couples to marry as allowing straight couples to marry, since as many as 31 per cent of lesbian couples and 8 per cent of gay male couples are raising children.¹⁷ So for the court to accept that accidental procreation is a plausible state interest, it has to accept that the state could have a legitimate interest in protecting only the children of unplanned and unwanted pregnancies. With animus having triggered a heightened rational basis test, critics see the court's crediting this argument as a weakness in its reasoning.

However, if standard jurisprudential principles are applied fairly, the court should be allowed to postpone this issue for another day. One value of encouraging courts to decide cases on the narrowest possible ground is that it allows the allocation of rights and powers among competing social factions to evolve gradually. The *Perry* court did not have to reach the question of whether the accidental procreation rationale could ever make sense, so it didn't. Beneath this hesitancy surely lay an understanding that profound shifts in social meaning occur in slow motion; that very factor justifies minimalist adjudication.

The bigger problem in sustaining the Reinhardt-Hawkins opinion on appeal comes from an entirely different factor. The strongest reason for the Supreme Court to grant certiorari is its tendency to review decisions that invalidate state laws on federal law grounds. Thus, while I think the *Perry* panel opinion creates the strongest basis for the Supreme Court to deny certiorari, I would give that result only equal odds. Ultimately, the Court's decision on certiorari may well turn on how Chief Justice Roberts and Justice Kennedy resolve the tension between the federalism concerns that arise from striking down state laws and the Court's prudence in avoiding unnecessary ventures into the heart of culture wars. That will, I believe, be a very tough choice.

B. *Animus and Elections*

Even if this opinion turns out not to mark the end of the Proposition 8 drama, I think that it makes a different and arguably more far-reaching contribution to understanding the role of a countermajoritarian judiciary in modern governance.

Voter initiatives such as Proposition 8 are particularly likely to be infected with the intent to scapegoat and retaliate against minority groups. In *Strauss v.*

17. Christopher Carpenter & Gary J. Gates, *Gay and Lesbian Partnership: Evidence from California*, 45 *DEMOGRAPHY* 573, 582 tbl.2 (2008). See also Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, *FAMILY FOCUS ON LGBT FAMILIES* F1 (Winter 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf>.

Horton,¹⁸ LGBT rights groups brought the first challenge to Proposition 8 in state court, on state constitutional grounds, using a theory focused on constitutional process rather than substance. They argued unsuccessfully that eliminating the right of same-sex couples to marry constituted a fundamental alteration of the structure of governance because it so seriously undermined the power of the judicial branch (the state supreme court) to serve its proper counter-majoritarian function as to individual rights. The California Supreme Court ruled that Proposition 8 amended, but did not fundamentally revise, the state constitution, and thus was valid.

But the *Strauss* decision left unresolved a deeper question of whether popular majorities should be able to strip constitutional protections from minorities. Because the *Strauss* plaintiffs wanted to insulate their challenge against Supreme Court review, they did not raise, and the state court thus did not rule on, the issue of whether Proposition 8 violated the federal Constitution.

Ignoring the pleas of the advocacy organizations, a group of gay and pro-gay individuals then filed the *Perry* case in federal court, arguing that Proposition 8 violated the liberty and equality rights of same-sex couples under the U.S. Constitution. This challenge focused on substantive individual-rights claims, and raised no process issues as to the validity more generally of voter initiatives that selectively target minority groups. Thus, for strategic reasons, the various litigants framed their challenges to Proposition 8 as either exclusively about process under the state constitution (*Strauss*) or exclusively about substantive liberty under the federal Constitution (*Perry*).

The Ninth Circuit opinion, albeit indirectly, applies federal constitutional analysis to the question of whether unchecked majoritarianism as exemplified by Proposition 8 must be accepted as legitimate in a constitutional democracy. The decision proffers a limited but nonetheless helpful antidote to the most egregious kind of populist smackdown of unpopular rights. It creates a barrier to using elections to eliminate protections that have been adopted through the mechanisms of deliberative democracy and that seek to rectify a clear historical pattern of discrimination. Hence, again, we see the relevance of animus.

Under the analysis in *Perry*, such a vote may or may not be constitutional, depending on a series of factors. The determination will turn on whether the retraction had a demonstrably legitimate purpose, one other than simply stigma and status denigration. The evidence relevant to that inquiry would not be a contest over the moral worth of the social group in question, such as was implicit in the trial record in *Perry*. Instead, a trial court's inquiry would be directed toward the framing of the issue, the text of the question put to voters and of the state's official explanation, and the primary campaign materials relied on to persuade voters to adopt it, all factors that Judges Reinhardt and Hawkins cited extensively in their opinion.

18. 207 P.3d 48 (Cal. 2009).

What would be the practical and productive result of such an approach to assessing the constitutionality of voter initiatives? One effect would surely be that the proponents of this kind of constitutional amendment would curtail the opprobrium quotient of their proposal and their rhetoric. To withstand a post-election challenge, they will likely try to link more carefully their initiatives to noninvidious goals.

In that way, adopting the mechanism suggested in *Perry* would encourage self-policing of some of the most hateful sorts of anti-civil rights campaigns. It would not, and consistent with the First Amendment should not, eliminate bigoted arguments in the public sphere. But the knowledge that the judiciary would serve as a check against the darker impulses of human nature might mitigate the worst of them.

A second indirect effect would be to provide a bit of shelter to state-court justices who understand that rulings benefiting unpopular minorities will almost certainly elicit backlash. In some jurisdictions, the state constitution requires both legislative and electoral votes before overturning such a decision by state constitutional amendment,¹⁹ and in those states, that process serves the same kind of deliberation-producing effect that the promise of retroactive review would provide. In other situations, backlash can take the form of targeting individual judges who face retention elections,²⁰ a device that would be unaffected by the *Perry* analysis.

Thus, although initially the panel opinion in *Perry* would affect only Proposition 8, its larger contribution may be the creative way that it addresses the persistent, intractable conundrum of America's countermajoritarian difficulty. The opinion does this in part by taking animus seriously as one of the criteria for heightened rational basis review and in part by creating a modest curb on popularly enacted state constitutional amendments. If the Ninth Circuit grants rehearing en banc, the opinion will be vacated, but one hopes that its contribution to the evolution of equal protection law will endure.

19. See, e.g., MASS. CONST. art. XLVIII, pt. IV, §§ 4-5 (requiring two successive legislative votes of at least twenty-five percent of members and a popular vote).

20. Three members of the Iowa Supreme Court who joined the opinion striking down that state's exclusion of same-sex couples from marriage, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), were turned out by voters in the state's 2010 judicial election. Patrick Caldwell, *Disorder in the Court*, AM. PROSPECT, Oct. 2011, at 44, 45, available at <http://prospect.org/article/disorder-court>.