**Perry v. Brown: A Subtle Erosion of Equality and Fundamental Rights**

**I. Introduction**

There are a number of cherished events that occur over the span of an individual’s life. A person buying their first car, a person receiving their college acceptance letter, or a person getting their first job, all of these events can be considered grand occasions in one’s life. Above all, however, one can argue that these events, and all others, are dwarfed by the occasion that sees another individual respond the words “I do” to a partner that is on one knee. This life-changing moment is what is at stake in this case. The moment where a person professes his or her unconditional love for the other, and his or her intention to share the rest of their life with the other, for better or for worse, in the bond of matrimony. After the California Supreme Court interpreted the state’s constitution to extend this special moment and relationship to all individuals, regardless of sexual orientation, California’s electorate voted to amend the constitution in order to withdraw this fundamental right. The constitutional amendment, Proposition 8, eliminates this life-changing moment for same-sex couples, along with the special meaning of marriage, which has survived the test of time and divorce.

The Plaintiffs, two same-sex couples, filed suit in federal court, claiming that Proposition 8 violated the Fourteenth Amendment’s Equal Protection Clause and Due Process Clause. The district court found that Proposition 8 targeted a suspect class and withdrew the fundamental right to marry from homosexuals, invoking strict scrutiny to strike down the constitutional amendment. While the Ninth Circuit affirmed the district court’s holding that Proposition 8’s ban on same-sex marriage was unconstitutional, its opinion utilized the lowest level of judicial review, rational basis. By avoiding the
question of whether an individual has a fundamental right to marry and an answer finding that sexual orientation is not a suspect class, the Ninth Circuit opted to employ rational basis review over a form of heightened scrutiny. When deciding to employ a deferential, rational basis, the Ninth Circuit failed to consider Supreme Court precedent that explicitly states a fundamental right to marry for all individuals and strongly suggests that heightened scrutiny may be appropriate for sexual orientation classifications.

This note explains how the Ninth Circuit forewent an approach rooted in Supreme Court precedent, an approach that would have struck down Proposition 8 under heightened scrutiny. Part II of this note provides a history of case law that documents the Supreme Court’s rational basis and heightened scrutiny jurisprudence when dealing with Fourteenth Amendment Equal Protection and Due Process claims. Part III chronicles Perry’s disposition before the United States District Court for the Northern District of California and its appeal to the United States Court of Appeals for the Ninth Circuit. Part IV discusses how the Ninth Circuit should have applied heightened scrutiny when striking down Proposition 8, outlining how the amendment targets a quasi-suspect class and impinges on a fundamental right. Part V reiterates how the Ninth Circuit’s use of rational basis can have a subtle, chilling effect on the constitutional rights of same-sex couples across the country.

II. Perspective: Two Constitutional Claims, Two Modes of Review

A. Due Process Claims and Judicial Review: When is Rational Basis Enough?

A court reviews legislation under rational basis review when it neither burdens a fundamental right nor targets a suspect class. The origins of rational basis jurisprudence can be traced back to *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), where the
Court upheld an Oklahoma statute against an equal protection and due process claim. The Court stated that that effect of the statute was “to forbid the optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist.” While the Court noted that the statute enacted a “needless, wasteful requirement in many cases,” it still deferred to the legislature’s judgment. In addition to reversing the district court’s judgment, the Court outlined the rational basis framework, stating how “the law need not be in every respect logistically consistent with its aims to be considered constitutional.” Furthermore, the Court reasoned that “it is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.” While the statute in Williamson survived rational basis, approximately a decade later, the Court applied a higher degree of scrutiny to a statute that restricted a fundamental right.

In Loving v. Virginia, 388 U.S. 1 (1967), the petitioners, an interracial couple, appealed a verdict from Virginia’s Supreme Court of Appeals that upheld the constitutionality of an antimiscegenation statute. On appeal, the Court struck down the statute, holding that it violated the Fourteenth Amendment’s Equal Protection and Due Process Clauses. In addressing the due process violation, the Court reasoned that marriage was “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” Thus, the Court recognized a fundamental right to marriage, striking down the statute under heightened scrutiny and declaring that such a right could not be infringed by the State. Additionally, roughly a decade later, the Court reaffirmed the fundamental right to marriage and the requisite level of strict scrutiny.
Eleven years after *Loving*, the Court in *Zablocki v. Redhail*, 434 U.S. 374 (1978), remained steadfast in holding that the freedom to marry was a fundamental liberty protected by the Due Process Clause. The Court affirmed the unconstitutionality of a Wisconsin statute, which provided that “members of a certain class of Wisconsin residents may not marry…without first obtaining a court order granting permission to marry.” In reaching its holding, the Court stated how “past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, a ‘critical examination’ of the state’s interests is required.” After applying strict scrutiny, the Court found that the statute “merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant’s prior children.” Hence, the State’s denial of a fundamental right in *Zablocki* could not pass constitutional muster because the statute interfered “directly and substantially with the right to marry.”

After discussing a history of case law that would have supported the Ninth Circuit’s application of strict scrutiny to Proposition 8, one must address the contrary argument: there is no constitutional right to same-sex marriage. In support of this argument, Proposition 8’s proponents cite to *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), where Minnesota’s Supreme Court found that a same-sex couple did not have the right to marry. The state supreme court affirmed a ruling that upheld a Minnesota statute that did “not authorize marriage between persons of the same sex.” In reaching its holding, the court rejected the “assertion that the right to marry without regard to the sex of the parties is a fundamental right for all persons,” reasoning that such a notion was not grounded in the Supreme Court’s jurisprudence. Additionally, Proposition 8’s
proponents argue that such a right does not exist under the Fourteenth Amendment because the Supreme Court dismissed the case for lack of a constitutional question.\textsuperscript{24} Since \textit{Baker}, however, the Court’s precedent suggests that a fundamental right to marry exists for all individuals, regardless of sexual orientation.

In \textit{Lawrence v. Texas}, 539 U.S. 558 (2003), the Court stated how our Nation’s tradition might provide a starting point in determining whether a fundamental right exists. In \textit{Lawrence}, the Court struck down a Texas statute that criminalized homosexual sodomy.\textsuperscript{25} While the Court found that our Nation’s history was void of laws that were “enforced against consenting adults acting in private,”\textsuperscript{26} it elected to look beyond our Nation’s tradition when deciding the constitutional question at hand. In striking down the statute, the Court reasoned, “In our tradition the State is not omnipresent in the home.”\textsuperscript{27} The \textit{Lawrence} Court opted to frame the issue more broadly, noting that it was not “the right to homosexual sodomy”\textsuperscript{28} that was at stake, rather, it was the right to be free from “unwarranted government intrusions.”\textsuperscript{29} The right to homosexual sodomy in \textit{Lawrence} was not the fundamental right at issue. Similarly, the right to gay marriage should not be the fundamental right at issue here. Despite that the parties are of the same-sex, these individuals are still being deprived of one, fundamental right- the right to marry.

\textbf{B. Getting to Quasi-Suspect: Applying Heightened Scrutiny to Classifications}

Legislative classifications that target a quasi-suspect or suspect classes are subject to a form of heightened scrutiny.\textsuperscript{30} The Court first addressed the requisite level of scrutiny for sexual orientation classifications in \textit{Romer v. Evans}, 517 U.S. 620 (1996). In \textit{Romer}, the Court found an amendment to Colorado’s Constitution to be unconstitutional under the Fourteenth Amendment’s Equal Protection Clause.\textsuperscript{31} The Court held that
Amendment 2 “withdrew from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.” On its way to ruling on the amendment’s unconstitutionality, the Court allegedly applied a rational basis test. The Court reasoned that the amendment placed a “disability on a single named group” and “lacked a rational relationship to legitimate state interests.” However, other language in the majority opinion suggests that the Court may have been using a higher level of scrutiny despite its stated use of rational basis.

In striking down the constitutional amendment, the Court stated that “[s]weeping and comprehensive is the change in legal status effected by this law.” The Court noted,

> [T]he change Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching, both on its own terms and when considered in light of the structure and operation of modern anti-discrimination laws. That structure is well illustrated by…ordinances prohibiting discrimination by providers of public accommodations.

But the *Romer* Court did not stop there. In the words of the Court, “there is more.” After describing the sweeping consequences for homosexuals in the private sphere, the Court stated that these effects were “not confined” to it. The Court described how “Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.” With this mind, one can discern that the judicial inquiry that occurred in *Romer* is a far cry from the traditional, rational basis test espoused in *Williamson*. Dissenting in *Romer*, Justice Scalia argued that the amendment could have survived rational basis because to a certain degree, Amendment 2 could have merely prohibited “all levels of state government from bestowing special protections upon homosexual conduct.” Thus, in accordance with *Williamson’s* rational basis test, this reason alone
may be enough because there is an evil at hand for correction, and Amendment 2 sought to correct it in a rational way. Aside from the majority’s language in *Romer*, other cases have also suggested that heightened scrutiny is appropriate for sexual orientation classifications.

Since *Romer*, Justice O’Connor’s concurrence in *Lawrence* has also raised the specter of heightened scrutiny for legislation that classifies on the basis of sexual orientation. In her concurring opinion, Justice O’Connor described, “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.” Additionally, Justice O’Connor noted how laws relating to “economic or tax legislation” are “scrutinized under rational basis” and “normally pass constitutional muster.” However, when a law’s objective is “a bare…desire to harm a politically unpopular group,” a state’s interest is illegitimate. Hence, while opponents of heightened scrutiny for sexual orientation classifications may point to the talismanic words of *Romer* that explicitly state the Court was using rational basis, one must look at the Court’s opinion in its entirety. The language of the *Romer* opinion as a whole, and Justice O’Connor’s concurrence in *Lawrence*, suggest that a higher form of scrutiny is applicable when legislation classifies on the base of sexual orientation.

III. A Tale of Two Standards

A. Too Much Scrutiny? *Perry v. Schwarzenegger*

In November 2000, the state of California adopted Proposition 22, which outlawed same-sex marriage. After a lengthy round of litigation in the state’s judicial system, the California Supreme Court interpreted the state’s constitution to allow same-
sex marriage, holding that “all California counties were required to issue marriage licenses to same-sex couples.”47 In November 2008, approximately five months later, a voter-enacted amendment to California’s Constitution passed.48 The amendment, Proposition 8, provided that “Only marriage between a man and a woman is valid or recognized in California.”49 The Plaintiffs, two same-sex couples, claimed that Proposition 8 violates the Fourteenth Amendment’s Equal Protection and Due Process Clauses. The district court held that Proposition 8 was unconstitutional under strict scrutiny, reasoning that it “created an irrational classification on the basis of sexual orientation” and “burdened the exercise of a fundamental right to marry.”50 On appeal, the Ninth Circuit affirmed Proposition 8’s unconstitutionality but applied a lower level of scrutiny, effectively sidestepping the question of a fundamental right to marry while finding that homosexuals are not a suspect class.

B. A Reasonable Approach? *Perry v. Brown*

In contrast to the district court’s opinion, the Ninth Circuit opted to strike down Proposition 8 under rational basis review. First, in regard to the due process argument, the Ninth Circuit reasoned that rational basis was appropriate because Proposition 8 did not deprive same-sex couples of the right to marry, only “the right to use the designation of ‘marriage.’”51 Accordingly, the Ninth Circuit sidestepped the issue of whether same-sex couples have a fundamental right to marry.52 Second, the Ninth Circuit also opted to apply rational basis to the equal protection claims, finding that the Court in *Romer* did not apply heightened scrutiny even though the amendment in that case “targeted gays and lesbians.”53 Despite the Ninth Circuit’s utilization of rational basis for both Fourteenth
Amendment claims, it still found that Proposition 8’s restrictions were not rationally related to the Proponents’ alleged state interests.54

Nevertheless, a dissenting opinion advanced the notion that Proposition 8 was rationally related to legitimate state interests. In addressing the Plaintiffs’ equal protection claim, Judge Smith argued that there is a “reasonably conceivable state of facts that could provide a rational basis” for Proposition 8’s classification.55 Thus, the dissent also advances the contention that homosexuals are not a quasi-suspect class.56 In regard to the Plaintiffs’ due process claim, Judge Smith interpreted the right at stake to be whether the fundamental right to marry includes a fundamental right to gay marriage, which does not exist in the Court’s due process jurisprudence.57 Rational basis or not, the Ninth Circuit’s majority and dissenting opinions erred in applying this low standard of review. The Ninth Circuit failed to frame the fundamental right to marry as the issue at hand while ignoring tall-tale signs from the Supreme Court that indicate heightened scrutiny is appropriate for legislative classifications based on sexual orientation.

IV. Taking a Wrong Turn: Perry v. Brown’s Rational Basis Maneuver

A. Not Exactly the Right to Marry?

Before the Ninth Circuit could invalidate Proposition 8 under rational basis, it had to explain how the fundamental right to marriage was not before the court in this particular case. The Ninth Circuit’s majority opinion begins by stating how “[b]roader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court.”58 Shortly thereafter, the Ninth Circuit abstained from addressing whether same-sex couples have a fundamental right to marry because the real issue was whether California could
withdraw the “important and legally significant designation of marriage” from the class while “leaving in place all of its incidents.” If one follows the Ninth Circuit’s rationale closely when framing the issue, then a court should review legislation under rational basis when it “withdraws” a fundamental right. Perhaps even more baffling is how the Ninth Circuit sidestepped whether the fundamental right to marry was at issue after its colorful description of the effects of Proposition 8. The court acknowledged that Proposition 8 took away from same-sex couples “the right to be granted marriage licenses and thus legally to use the designation of ‘marriage.’” If a court cannot characterize Proposition 8’s withdrawal as taking away the right to marry, then it is hard to discern what the right can possibly entail. Thus, once establishing that the fundamental right to marry was appropriately before the Ninth Circuit, the Supreme Court’s jurisprudence supports a finding that all individuals are entitled to such a right.

In *Loving*, the Court explicitly declared that the right to marriage was a “fundamental freedom” protected under the Fourteenth Amendment’s Due Process Clause. Furthermore, the *Loving* Court reasoned,

> To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.

When addressing the Lovings’ due process claim, the Court never stated that the fundamental right to marry was contingent on whether the parties were of the opposite sex. Rather, the Court held that “under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.” Thus, when applying *Loving* to *Perry*, an individual should have the
fundamental freedom to marry or not marry a person of the same sex without the State showing its regulatory head. Additionally, Proposition 8 undoubtedly fails Zablocki’s test for when to apply strict scrutiny to marriage regulations. Proposition 8 “interferes directly and substantially” with same-sex couples’ fundamental right to marry. Nevertheless, opponents of applying strict scrutiny to Proposition 8 contend that even if the Ninth Circuit considered this constitutional question, the court had to frame the issue as whether same-sex couples have a fundamental right to gay marriage.69

When determining whether a fundamental right exists under the Fourteenth Amendment’s Due Process Clause, a court must first discern whether such a right is rooted in our Nation’s history.70 Thus, when narrowly framing the constitutional question as a right to gay marriage, such a right is nonexistent in the Supreme Court’s jurisprudence.71 In fact, other state courts have also answered the question in the negative, stating how the right to gay marriage is not “deeply rooted” in our Nation’s history.72 Accordingly, when judges find such a right, opponents deem them judicial activists, accusing them of redefining marriage in order to legalize same-sex marriage.73 However, even if one frames the issue as narrowly as the right to gay marriage, those who oppose such a right forget that history is but a starting point when determining whether a fundamental right is found within the penumbras of the Due Process Clause.74

The Court in Lawrence noted how “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”75 Fittingly, the Court depicted a historical narrative that did not support the enforcement of anti-sodomy statutes against homosexuals but still held that the merits of the case turned on the petitioners’ right to privacy.76 The Lawrence Court broadly held, “It is the promise of the
Constitution that there is a realm of personal liberty which the government may not enter." However, critics may offer yet another counterargument: Lawrence is not controlling here because the right to marry is not a private matter.

Nevertheless, despite the public aspect of marriage, Lawrence still suggests,

And there are other spheres of our lives and existence, outside of the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of the 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.

Lawrence compels a finding that same-sex couples have a right to gay marriage, regardless of the institution’s public nature. Thus, the Ninth Circuit should have applied strict scrutiny to Proposition 8 because it burdened the fundamental right to marriage, regardless of whether the State had previously recognized the right or not. Furthermore, even if the Ninth Circuit found that the fundamental right to gay marriage was at stake, Lawrence’s rationale would still compel an answer in the affirmative.

B. Romer’s Shackles: Saying Rational Basis but Applying Heightened Scrutiny

The Ninth Circuit’s opinion cited Romer for the proposition that rational basis review was applicable to legislation that classifies on the account of one’s sexual orientation. Nevertheless, despite the deference owed to the State’s judgment under rational basis, Romer dictated how “even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.” One can argue that the Court in Romer did more than “insist on knowing” the relation between Amendment 2 and state’s objective. The Romer Court engaged in a judicial inquiry, speculating how
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.

Furthermore, the Court specifically noted how the amendment “nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.” While the Court stated that rational basis was appropriate, the level of scrutiny that was actually applied in *Romer* appears to be significantly more critical than a more deferential, rational review.

If the *Romer* Court had remained faithful to the tenets of rational basis review, as defined by Supreme Court jurisprudence, it would have upheld Amendment 2 because “it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.” Amendment 2 may have survived constitutional muster under rational basis because “[e]vils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think.” As Justice Scalia’s dissent noted, “A State ‘does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.’ In *Romer*, Amendment 2 disadvantaged homosexuals in some respects but also eliminated any special protections they might have had under the law. Nevertheless, the Court held that the amendment was unconstitutional. Thus, in this case, while *Romer* explicitly stated the use of rational basis for sexual orientation classifications, it should have pointed out the proverbial elephant in the room: the *Romer* Court applied a form of heightened scrutiny.
V. Silent Deaths for Equality and Fundamental Rights

The Ninth Circuit erred when applying rational basis to the Plaintiffs’ claims under the Fourteenth Amendment’s Equal Protection and Due Process Clauses. First, the Ninth Circuit mistakenly concluded that the fundamental right to marry was not the constitutional question before the court. The court reasoned that because California had already extended the right to marry to same-sex couples, it only had to determine whether the withdrawal survived rational basis.90 Hence, through its artful phrasing of the question, the court punted on the issue of whether same-sex couples have a fundamental right to marriage, leaving the constitutional right of thousands of Americans on the second page of its opinion. Second, the Ninth Circuit should have found that heightened scrutiny was appropriate for legislation that classifies on the base of sexual orientation. While the Romer Court outlined its use of rational basis, the majority opinion applied a form of heightened scrutiny.

Thus, the Ninth Circuit could have held that same-sex couples have a right to marry. The Ninth Circuit could have held that such individuals deserve a heightened degree of protection from invidious discrimination, sending a strong message, “our Constitution ‘neither knows or tolerates classes among citizens.’”91 Instead, the court has left these freedoms at the doorstep of rational basis. So long as the State’s legislation is rationally related to its legitimate interests, same-sex couples will not be able to bend the knee, say I do, or enjoy the fundamental freedom that is essential in one’s “pursuit of happiness”92- marriage.
In re Marriage Cases, 183 P.3d 384 (Cal. 2008).

CAL. CONST. art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized in California.”).

U.S. CONST. amend. XIV, § 1.


Perry v. Brown, 671 F.3d 1052, 1082 (9th Cir. 2012).

Loving v. Virginia, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).

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, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.” (citing Heller v. Doe, 509 U.S. 312, 319–320 (1993))).


Id. at 487.

Id. at 487–88.

Id. at 488.

14 *Id.* at 12 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

15 *Id.* at 11–12.


17 *Id.* at 375.

18 *Id.* at 383.

19 *Id.* at 389.

20 *Id.* at 387.


22 Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).

23 *Id.*


26 *Id.* at 569.

27 *Id.* at 562.

28 *Id.* at 586 (Scalia, J., dissenting) (“[R]espondent would have us announce…a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.” (citing Bowers v. Hardwick, 478 U.S. 186, 191 (1986))).

29 *Id.* at 562.


31 *See generally id.*

32 *Id.* at 627.

33 *Id.* at 632.
34 Id. at 627.

35 Id.

36 Id. at 629.

37 Id.

38 Id.


40 Evans, 517 U.S. at 641 (Scalia, J., dissenting) (emphasis added).

41 Lee Optical of Okla., Inc., 348 U.S. at 488.


43 Id. at 580 (O’Connor, J., concurring).

44 Id. at 579-80 (O’Connor, J., concurring) (citing Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985)).

45 Id. at 580 (O’Connor, J., concurring) (citing Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).


47 Id. at 928 (citing In re Marriage Cases, 183 P.3d 384 (Cal. 2008)).

48 Id.

49 CAL. CONST. art. I, § 7.5.

50 704 F. Supp. 2d at 991.

51 Perry v. Brown, 671 F.3d 1052, 1082 (9th Cir. 2012).

52 Id.

53 Id. at 1080 (citing Romer v. Evans, 517 U.S. 620, 630–31 (1996)).
54 Id. at 1086.

55 Id. at 1101 (Smith, J., dissenting).

56 Id. at 1100 (Smith J., dissenting) (citing High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (holding that gays and lesbians are not a suspect or quasi-suspect class)).

57 Id. (Smith, J., dissenting).

58 Perry, 671 F.3d at 1064.

59 Id.

60 Id.

61 Id. at 1078 (“Newspaper run announcements of births, deaths, and marriages. We are excited to see someone ask, ‘Will you marry me?’ whether on a bended knee in a restaurant or in text splashed across a stadium Jumbotron. Certainly it would not have the same effect to see ‘Will you enter into a registered domestic partnership with me?’”).

62 Id. at 1063.

63 Loving v. Virginia, 388 U.S. 1, 12 (1967).

64 Id.

65 Id.

66 Id.


68 Id.

69 See Morrissey, supra note 21.


71 Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).
See Morrissey, supra note 21 at 618 n. 38 (citing Hernandez v. Robles, 855 N.E.2d 1, 10 (N.Y.2006) (“finding marriage to be a fundamental right, but not same-sex marriage because it is not ‘deeply rooted’”)).


Lawrence, 539 U.S. at 569.

Id. (citing County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

See id. at 578 (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”).

Id. (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992)).

See Glenn T. Stanton & Bill Maier, Marriage on Trial: The Case Against Same-Sex Marriage and Parenting 40 (2004) (“So both church and state do have a stake in marriage, each for their own reasons. Marriage doesn’t belong just to religious institutions.”).

Lawrence, 539 U.S. at 562.

See Laurence H. Tribe & Joshua Matz, The Constitutional Inevitability of Same-Sex Marriage, 71 Md. L. Rev. 471, 484 (2012) (“By thus invoking the essential role that intimacy and love play in marriage as an institution that is simultaneously private in its personal significance and public in the face it presents to the world, Justice Kennedy
pointed beyond purely sexual intimacy to the dignity concerns that *Lawrence* safeguards and that are squarely implicated in the case for same-sex marriage.”).

81 Perry v. Brown, 671 F.3d 1052, 1105 (9th Cir. 2012).


83 *Id.*

84 *Id.* at 630.

85 *Id.* at 629.


87 *Id.* at 489.

88 *Evans*, 517 U.S. at 642 (Scalia, J., dissenting).

89 *Id.* at 642–43 (Scalia, J., dissenting).

90 Perry v. Brown, 671 F.3d 1052, 1064 (9th Cir. 2012).

91 *Evans*, 517 U.S. at 623 (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

92 Perry, 671 F.3d at 1082.

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