

The Case for Marriage Equality: *Perry v. Schwarzenegger*

The 1967 Supreme Court case *Loving v. Virginia* ended state bans on interracial marriage in the 16 states that still had such laws. Now, 44 years later, the courts are once again grappling with denial of equal marriage rights. Two California couples have filed suit against Proposition 8, the 2008 initiative that limited marriage to opposite-sex couples. The plaintiffs in *Perry v. Schwarzenegger* won in federal district court, and the case is now on appeal. At a Cato Policy Forum held in May, co-counsels Theodore B. Olson, former U.S. solicitor general, and David Boies, chairman of Boies, Schiller & Flexner, discussed their progress with the case. As co-chairs of the American Foundation for Equal Rights advisory board, Robert A. Levy, chairman of the Cato Institute, and John Podesta, president of the Center for American Progress, also spoke on how the principle of equality transcends the left-right divide.

THEODORE B. OLSON: David Boies and I have been involved in this case for two years, as of this month. We represent two couples: two gay men who live in southern California and a lesbian couple in Berkeley. They have both been in long-term relationships, and they have wanted to be married. We went to trial in January of 2010 and had closing arguments in June. In August, the judge rendered a decision—a 134-page explanation of findings of fact and conclusions of law—that struck down Proposition 8.

When we tried the case, the judge decided that this was an important question affecting hundreds of thousands of Californians and millions of Americans. It was a constitutional challenge—going to the very core of what the Fourteenth Amendment Due Process and Equal Protection Clauses mean. The trial itself went 12 days, and it was a remarkable education. As many of you know, it was once against the law in many places to serve alcoholic beverages in public to a person who was gay—*against the law*. Both the server and the drinker could go to jail. President Eisenhower once announced that someone who was gay could not hold a federal position. In our arguments, we presented evidence on the history of marriage, and how race was once used as a basis to deny people the right to marry.

The district court very thoughtfully



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reviewed our evidence and rendered a decision that Proposition 8 denied individuals the fundamental right to marry. Fourteen times, the U.S. Supreme Court has announced that marriage is a fundamental right under the Constitution. It is a compo-

ment of liberty, privacy, association, the right to identify oneself spiritually—and it is currently being denied to a large segment of American society.

If you’re going to deny people that right, what justification exists? In fact, several times during the case, the judge asked, “What harm would it do to people of heterosexual orientation if homosexuals were married?” Our opponents didn’t want to answer and tried to avoid the question, but the judge insisted. And one of our opponents, who is a very good lawyer, paused, looked at the judge, and said, “I don’t know.”

The institution of marriage and what it means in this country isn’t simply a legal thing. It is a social construct. The example I like to use is citizenship: What if you were told by your government that because you came from a certain country, you could be all the things that a citizen could be—you could vote, travel, own property—but you couldn’t call yourself a citizen? You wouldn’t *be* a citizen, and if you can’t be married in this country, you are being left out of a very important component of what our society reveres. We are telling people that they are different—that they are not entitled to the same respect, the same dignity, the same equality—and they are therefore second-class. That is a state-based license to discriminate, and that is what the Proposition 8 case is all about.

DAVID BOIES: What exactly is going on when a state like California says that they will not permit a certain group of citizens to marry? As a thought experiment, imagine that the state simply got out of the marriage business entirely. You wouldn’t have the problems we are having, because issues of equal protection and due process only arise with state action.

In order to attack that state-sponsored discrimination, we wanted to establish three things. One, we wanted to establish that

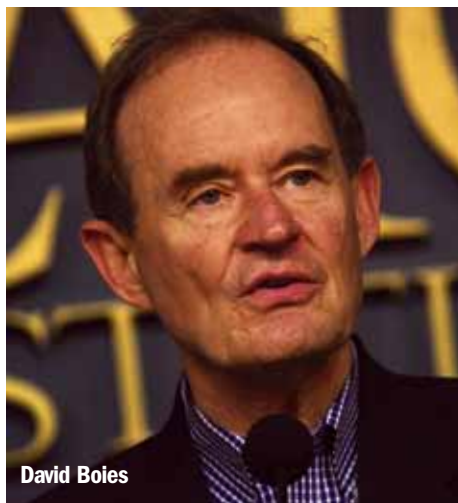
marriage is a fundamental right. Both the plaintiffs and the defendants agreed on this, and they could hardly have said otherwise. The U.S. Supreme Court has repeatedly affirmed that marriage is a fundamental right. In fact, marriage is so important to human dignity—to the rights of privacy, association, and liberty—that even when a significant interest exists, the state cannot prohibit it. Marriage is much more than any of its individual attributes. It has such significance that you cannot even deprive people who are locked away for life from entering into it. So the idea that marriage was a fundamental right was taken, I think, by both sides as a given.

The second thing we set out to prove was that depriving citizens of the right to marry seriously harmed them and their children. Hundreds of thousands of children are being raised today by gay and lesbian couples. And we proved, with a wealth of statistical and analytical data, the harm that forbidding marriage did. Our experts—child psychologists, sociologists, anthropologists, statisticians, economists—proved this, and we didn't stop there. The other side identified a number of expert witnesses, starting with eight, just like us. Six of those experts were dropped after we took their depositions because they admitted that deprivation of this right seriously harmed gay and lesbian couples and their children. In fact, in an interesting argument, our opponents objected to our playing some of the deposition tapes on the grounds that their own witnesses weren't really experts. Our opponents lost that argument.

The third thing we set out to prove was that there was no benefit to preventing gays and lesbians from marrying. The defense started out by saying that they don't really need to marry—they've got civil unions. They lost that argument. Then they fell back on the idea that it will be dangerous—it will harm the institution of heterosexual marriage. Think about that for a minute. I ask those of you who are considering marriage whether it would dissuade you if you learned that a gay or lesbian couple down the street was able to get married. Or for those of you who are married, whether you would decide to get divorced because now

gays and lesbians are able to get married. Again, we brought in a wealth of evidence that there was no harm—and again, on the cross examination, even the defendants' own expert witnesses conceded that they had no evidence of any harm.

Based on that record, the court wrote a decision—which everyone should read because it talks about the development of equality in this country and the important



David Boies

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ways in which marriage has changed over time. It talks about the fact that slaves were prohibited from marrying—and how once slavery was abolished, they immediately rushed to get married. This was part of what made their relationship dignified and respectable. It gave them a sense of belonging—a sense of equality. When something is that important to people, I think we have to ask ourselves, as a society, “What are we doing in trying to prevent others from achieving this?”

Californians had an established right to same-sex marriage that was then taken away. They now have this crazy quilt: because they could get married for a period of time, there are currently 18,000 gay and lesbian marriages recognized by the state. So you have a couple that is legally married and, next door, a couple that wants to get married but can't. Indeed, if the couple that is married gets a divorce, they can't remarry. *They can't even remarry each other.* That strikes people instinctively as not being rational.

The fundamental issue is one of civil rights—of individual rights. That is why you see people on this panel who don't necessarily agree on a range of other issues. We all have an interest in protecting individual rights against government discrimination.

JOHN PODESTA: Fifteen years ago, the thought of same-sex couples being allowed to legally marry was hard for most Americans to contemplate. You probably had to work at the Cato Institute to even wrap your head around that idea. No state offered this right. Barely 30 percent of the country thought that it should be offered—and 10 years before, that number was in the low teens. Senators and representatives who today are outright supporters of marriage equality voted for the Defense of Marriage Act in 1996. And of course, the president who signed it has not only changed his views, but is now a vocal supporter of marriage equality.

Yes, today the world looks very different. Just 15 years later, marriage equality for same-sex couples is becoming a fairly mainstream idea—embraced by liberals, conservatives, moderates, and not surprisingly, by libertarians alike. Five states have legalized same-sex marriages. Eight states offer civil unions or domestic partnerships, and three additional states recognize same-sex marriages performed legally in other jurisdictions.

National polls consistently show that a small but growing majority of the country supports marriage rights—including two-thirds of Democrats, almost 60 percent of independents, and more than a third of Republicans. Two-thirds of people under 40 now support marriage equality. The

change in public opinion is not only happening, it's happening quickly. In fact, most of the spike in public support for marriage equality has come in the past few years. In 2004, when marriage equality was a "game-changing" issue at the ballot box, support was only at 34 percent—not much higher than it was in 1996. Today, 53 percent of Americans support marriage for same-sex couples. Despite recent high-profile attacks, marriage equality clearly has a strong and growing momentum.

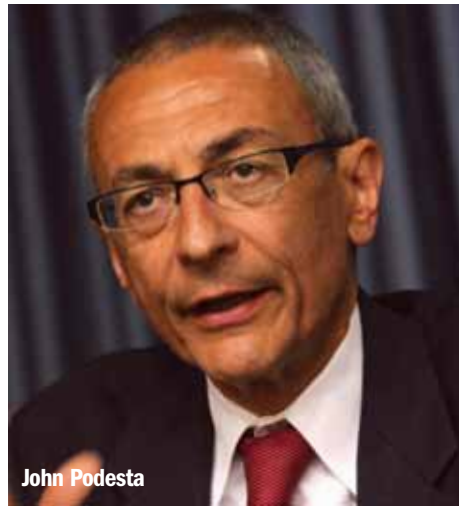
Yet across the political spectrum, it's clear that an appeal to discrimination has not completely lost its potency. We see a number of candidates seeking their party's presidential nomination attacking marriage equality. But these appeals to divide America will ultimately be rejected. What has historically made America great is our promise of freedom and equal opportunity to all of our citizens. We have failed to live up to that promise in times past. But our country is constantly evolving for the better, expanding the circle of opportunity, deepening the meaning of freedom. We're evolving because countless policymakers, activists, and lawyers—including those in this room—keep working tirelessly to root out injustice and expand America's promise to every citizen.

This is another step in our journey to form a more perfect union, and it is something even the Center for American Progress and Cato can agree on. Our partnership shows that we can transcend political labels to focus on basic rights and smart public policy—policy that is rooted in our most enduring founding principles of equality, fairness, and liberty. We both recognize that, at its heart, marriage equality is about treating our fellow citizens with dignity and respect, whether they're gay or straight.

ROBERT A. LEVY: Why do libertarians argue there ought to be a right to same-sex marriage? The purpose of government is to secure individual rights and prevent some persons from harming others. The threshold question, therefore, is this: Whose rights are being violated when two gay people get married? The answer, of course, is nobody's.

In fact, why should government be

involved at all in the marriage business? For most of Western history, marriage was a matter of private contract between two parties. Marriage today could follow that tradition, with little or no government intervention. Some institutions would recognize gay marriages; others would not. Still others would call them "domestic partnerships." No one would have to join any group, and no group would have to adopt a



John Podesta

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definition that its members found offensive. The rights and responsibilities of the partners would be governed by personally tailored contracts, like those that control most of the interactions among people in a free society.

That's the ideal. Regrettably, however, government has interceded, enacting more than a thousand federal laws dealing with issues like taxes, child custody, and inheritance. Whenever government imposes obligations or dispenses benefits, the Constitution is implicated. The Equal Protection

Clause of the Fourteenth Amendment says that no state may “deny to any person within its jurisdiction the equal protection of the laws.” That provision is the relevant constitutional issue here, and that is where conservatives and libertarians sometimes part company. I want to explore that parting of company by looking at two topics: federalism and fundamental rights.

With respect to federalism: Why don't we simply leave the same-sex marriage question up to each state? At the time of the framing, the Constitution only applied to the federal government. But we later learned that the states can be every bit as tyrannical as the Feds, slavery being the case in point. After the Civil War, however, the Fourteenth Amendment effectively made the Bill of Rights and other provisions of the Constitution applicable against the states. For the first time, the federal government could intervene if the states violated our rights. That significantly altered the balance between the national and state governments. Federalism surely allows some states to recognize heterosexual and gay marriages on an equal basis while other states opt to privatize all marriages. Still others can call all marriages “domestic partnerships.” But the states may not discriminate between same-sex and opposite-sex unions, without justification, and none has been shown.

Next, consider the issue of fundamental rights. Since the New Deal, the courts have rigorously reviewed government regulations only if they infringe on a fundamental right—meaning one that is either implicit in the concept of ordered liberty, or deeply rooted in our nation's traditions and culture. How that right is defined—narrowly or broadly—makes all the difference, and can even dictate the outcome of a case. Some conservatives argue that the right to same-sex marriage doesn't meet the criteria for a fundamental right and therefore the courts should defer to the legislature.

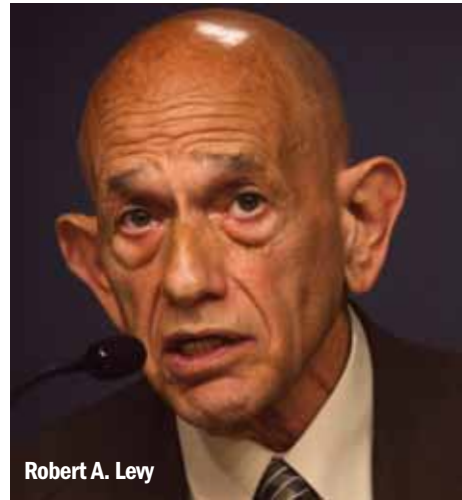
Consider the case of *Gonzales v. Raich*. A sick person with a doctor's note claimed a fundamental right to use medical marijuana in California, where it is legal. The court of appeals characterized the right as “the

use of narcotics for medical purposes.” Ms. Raich lost because medical marijuana, said the court, is not required for ordered liberty, nor is it deeply rooted in our nation’s traditions. If the court had adopted Ms. Raich’s characterization of the right—the liberty to pursue a less painful life without infringing on the rights of anyone else—she would have won that case. Which characterization is correct? Both of them are correct.

Raich was indeed trying to live with less pain; she was also using medical marijuana. Similarly, Kristin Perry’s right in *Perry v. Schwarzenegger* could be characterized as “the right to marry another woman,” which might not be considered deeply rooted in our traditions. Or it could be characterized as “choosing a spouse and forming a household,” which would be deeply rooted. So sometimes courts can rule on the basis of how they describe the right, and that is the foolishness of bifurcating our rights. All rights—enumerated, unenumerated, fundamental, nonfundamental—should be rigorously protected by the courts. That’s the view of most libertarians. Too often, it is not the view of many conservatives.

From liberals, with all due respect to Mr. Podesta, we sometimes get too much government—an enlargement of state power. From conservatives, with all due respect to Mr. Olson, we sometimes get too few freedoms—protection of some, but not all, of our constitutionally secured rights. The left and the right are selectively indignant about the proper role of government. Libertarians,

by contrast, have a consistent, minimalist view. We want government out of our wallets and out of our bedrooms. We view the



Robert A. Levy

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powers of government very narrowly and the rights of individuals very broadly—and that was precisely the vision of the Framers.

THEODORE B. OLSON: Next month is the

44th anniversary of *Loving v. Virginia*, which struck down as unconstitutional Virginia’s law prohibiting interracial marriage. The Supreme Court decided it unanimously—but that case, if it had been decided the other way, would have prevented our president’s mother and father from getting married. These days, it’s inconceivable that such a law could exist in the United States.

The polling numbers confirm this: the swing in public opinion has been 10 percent in most polls in favor of recognizing the rights of individuals to marry, irrespective of their sexual orientation. That’s in two years, since *Perry v. Schwarzenegger* was filed. That matters, because court decisions are made in the atmosphere of public opinion. When we win this case, if we do, we want people to react and say, “It’s about time.”

The American Foundation for Equal Rights has supported us very strongly, and put us out there—this so-called odd couple, which we’ve heard a thousand times now (but at least no one’s said “strange bedfellows” here). It helps us attract attention so that people will say, “How did you two get together?” It gives us a chance to talk to the American people—on radio, on television, in newspapers. We’re finding that it resonates. Little by little—actually it’s really quite fast—the American public is changing. So when this case comes out the way it should, we believe the American people are going to say, “Thank God that terrible vestige of discrimination is gone.” ■

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