"When it Comes to Marriage Equality, Separate But Equal is Inherently Unequal"

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Author's note

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Part I- Case Summary

PROCEDURAL POSTURE: The California Supreme Court held in 2007 that restriction of marriage to opposite-sex couples violated the state constitution (*In re Marriage Cases*, 183 P3d384m 450-51). In response, opponents of marriage equality gathered nearly 700,000 signatures to put an initiative, Proposition 8, on the November 2008 ballot. Proposition 8 proposed a constitutional amendment reinstating the restriction of marriage to opposite-sex couples, and it passed with 52.3% of the vote (Karlan, 2010; 167). The U.S. Court of Appeals for the Ninth Circuit held in *Hollingsworth v. Perry* (12-44) (originally *Perry v. Schwarzenegger* then *Perry v. Brown*) that Proposition 8, allowing only opposite-sex couples to marry, was unconstitutional. The case is currently before the United States Supreme Court.

OVERVIEW: When discrimination against sexual orientation is analyzed under the Equal Protection Clause of the Fourteenth Amendment, the state commonly utilizes "tradition" to justify it. Part IIIa will compare the influence of tradition against homosexual couples to that of African Americans during the civil/interracial rights era. These parallels help establish a trajectory for same-sex rights as well as establish homosexual individuals as a protected class. Part IIIb evaluates tradition in light of the Equal Protection Doctrine. The question is not *whether or not* tradition serves as a legitimate state interest, rather *under what circumstances*. In some instances positive weight should be given to a law because it reflects tradition, while in other instances a law's basis in tradition may counsel against its legitimacy (Forde-Mazrui, 2011; 289). The State of California reserves the term "marriage" for opposite-sex couples, arguing that tradition is a legitimate state interest to discriminate against same-sex couples. The Court rejects this claim, viewing tradition as a manipulative tool and a "convenient justification" for illegitimate motives (Forde-Mazrui, 2011; 291).

Part II: Legal Question

Does the Equal Protection Clause of the 14th amendment prohibit CA from defining marriage as the union of a man and a woman?

Part IIIa: Public Policy and Tradition Theory: The Relationship Between Same-Sex Rights and Civil/Interracial Rights

"Tradition" as a Defense of Discrimination

In order to predict the trajectory for *Hollingsworth v. Perry* and same-sex rights as a whole, scholars have attempted to compare and contrast the movement with other human rights struggles in the past. These comparisons are important because marriage is a social construct, and challenging its definition pulls at the fabric of deeply held cultural beliefs. In fact, since same-sex marriage is a matter of social contestation, some scholars argue it should be resolved by the political legislative process rather than the courts (Dorf, 2011; 1309). Some Supreme Court Justices agree with this claim, citing the preservation of tradition as a legitimate state interest that justifies discrimination against minority groups (Forde-Mazrui, 2011; 281). For example, *Plessy v. Ferguson* (163 U.S. 537) upheld racial segregation explicitly due to the traditional and customary nature of the discriminatory laws (Forde-Mazrui, 2011; 296). Although the Court has since taken a far more skeptical view of tradition, similar rationale has been employed to prevent the recognition of same-sex marriage (Dorf, 2012; 1310). For example, the state of Iowa argued before its own Supreme Court that maintaining the ban on same-sex marriage was a legitimate interest because it preserves the "traditional understanding of marriage" (*Varnum v. Brian*, 763 NW2d862, 873, 879-99). Additionally, the state of California argued before its own Supreme Court that tradition was so sufficient a justification that it would

withstand "even heightened review" under the Equal Protection Clause (*In re Marriage Cases*, 183 P3d384m 450-51 at 39, 43-45). Therefore, in light of these parallels, it may be helpful to analyze the evolution of same-sex marriage in light of the civil/interracial rights movements that preceded it.

Sexual Conduct

When it comes to both homosexual and interracial intimacy, opponents have relied heavily on tradition to defend against changes to the existing sociopolitical order (Dubler, 2006; 1175). For example, in *Bowers v. Hardwick* (478 U.S. 186), the Supreme Court upheld a Georgia anti-sodomy law by explaining such laws were "deeply rooted in the nation's history and tradition" (478 U.S. at 191). Justice White delivered the opinion for the court, justifying the discrimination against homosexual couples by locating the case "against a background in which many states have criminalized sodomy and still do" (478 U.S. at 192). Similarly, in *McLaughlin v. Florida* (379 U.S. 184), the Supreme Court assessed the constitutionality of a Florida statute criminalizing nonmarital cohabitation between a black person and a white person of the opposite sex. Opponents of interracial intimacy saw "amalgamation" and "miscegenation" as threats to American culture, focusing on the tradition against interracial intimacy rather than the discrimination against such couples (Dubler, 2006; 1175). Despite these long-held cultural traditions, the Court struck down Florida's statute. Justice White delivered the opinion for the Court, explaining that racial classifications, like that of the Florida statute, were subject to "the most rigid scrutiny" and were "in most circumstances irrelevant to any constitutionally acceptable legislative purpose" (379 U.S. at 192). The Supreme Court also placed equal protection claims above tradition in *Lawrence v. Texas* (539 U.S. 558), which explicitly overturned *Bowers* in a 6-3 ruling. Justice Kennedy delivered the opinion, holding that the

"liberty protected by the Constitution," as a matter of substantive due process, protects gay people's intimate sexual relationships (539 U.S. at 567). Thus, it appears *McLaughlin* v. *Florida* had the same transformative shift for interracial rights that *Lawrence v. Texas* did for homosexual rights. In both instances, the Supreme Court made a bold decision to protect minority groups from discrimination (i.e. homosexuals and interracial couples), even though such decisions violated deeply embedded cultural views.

Identity

Thus, when considering the legal evolution of homosexual and interracial rights, it is important to mark the shift of focus from conduct to identity. In *Bowers*, *Lawrence*, and *McLaughlin*, the legal issue was whether or not individuals had a right to engage in a certain type of conduct. Once the state lost those battles, the legal issue became whether or not the state could discriminate against individuals who were oriented towards such conduct. For example, in the 1996 case of *Romer v. Evans* (517 U.S. 620), the Supreme Court assessed the constitutionality of a Colorado amendment that withdrew from homosexuals, but no others, specific legal protection from injuries caused by discrimination, and it imposed a special disability on those persons alone (Wolff, 1996; 248). The Supreme Court ultimately struck down the amendment as a violation of the Equal Protection Clause, recognizing claims for equal treatment and equal dignity (Wolff, 1996; 249). This decision was important because it was the first to deal with LGBT rights as civil and human rights. In other words, homosexuality became an identity, rather than an act (Wolff, 1996; 250). The infusion of identity and conduct was also evident in the "Don't Ask, Don't Tell" policy (1993-2011) which protected gays in the military from being questioned about their sexual orientation, but allowed the military to discharge them if they publicly admitted to it (Skutsch, 893). The United States Court of Appeals for the District of Columbia Circuit upheld

this policy in *Steffan v. Perry* 41 F.3d 667 (D.C. Cir. 1994), holding that a military discharge based solely on a statement of homosexual orientation was constitutional. In 2010, President Barack Obama signed a law to repeal "Don't Ask, Don't Tell," confident that the removal of the policy would "strengthen national security and uphold the ideals that our fighting men and women risk their lives to defend" (Obama, B.H., 2010). The President also expanded on the broader implications of his actions, joyful that "tens of thousands of patriotic Americans in uniform will no longer be asked to live a lie or look over their shoulder in order to serve the country they love" (Obama, B.H., 2010). From a legal perspective, this statement is important because it could signify to the courts that the country is ready to expand upon same-sex rights.

Second-Class Citizenship

A "second-class citizen" is a term used to describe a normal citizen who is discriminated against within a state or other political jurisdiction, resulting in limited legal rights, civil rights, and economic opportunities (Dorf, 2011; 1308). With regard to the civil rights movement, scholars argue the "separate but equal" doctrine established in 1896 as a result of *Plessy v. Ferguson* (163 U.S. 537) embodies the meaning of second-class citizenship. Proponents of racial segregation utilized this doctrine to enforce white supremacy until *Brown v. Board of Education* (347 U.S. 483) shed light on the psychological harm experienced by such labeling (Dorf, 2011; 1315). In other words, despite the legal mandate that "black" facilities must comply by the same standards as "white" facilities, the fact that the government distinguished between the two was enough to demonstrate inherent inequality. In light of the *Brown* ruling, it is ironic when opponents of same-sex marriage justify their discrimination by voicing support for anti-discrimination statutes. By the very act of opposing same-sex marriage, they express the view that same sex unions (and the people who enter them) are not quite the same as opposite-sex

marriage (and the people who enter them) (Dorf, 2011; 1315). As a general disclaimer, scholars do not argue that discrimination against homosexuals is nearly as severe as discrimination against African Americans during racial segregation. However, by drawing parallels between the movements, they highlight similar practices and policies used to enforce dominance over minority groups (Gerstmann, 2003; 47). For example, it is ironic that "Don't Ask, Don't Tell" claimed to "protect gays" because it prohibited military personnel from discriminating against or harassing closeted homosexual service members (Skutsch, 893). Such a statement was self-contradictory because the sole purpose of the policy was to bar openly gay, lesbian, or bisexual persons from military service, and it allowed the military to discharge them if they publicly admitted to it (Skutsch, 893). Additionally, reserving the term "marriage" for opposite-sex couples signifies that one kind of relationship (and by implication the people in it) are superior to the other (Dorf, 2011; 1315). In an attempt to resolve this paradox, legislatures created laws permitting same-sex couples to form civil unions which offer most of the same tangible benefits that accompany marriage (Forde-Mazrui, 2011; 288). In a sense, since the government purposely classifies such unions as separate from marriage, it employs a tactic similar to "separate but equal." Since these statements carry the meaning of second-class citizenship, one might wonder if the Court will find in *Hollingsworth v. Perry*, as it did in Brown, that "separate but equal" is inherently unequal (Dorf, 2011; 1315).

Marriage

When it comes to interracial rights, scholars interpret the state approval of interracial conduct in *McLaughlin* as a stepping-stone towards the constitutional right to interracial marriage established in *Loving v. Virginia* (388 U.S. 1) (Dubler, 2006; 1169). As previously mentioned, one explanation is that conduct is intrinsically tied to identity. Once interracial

intimacy was accepted by the state, it proceeded logically to recognize the relationships that formed as a result of that conduct (Dorf, 2011; 1315). In *Loving*, the Supreme Court interpreted the constitutionality of Virginia anti-miscegenation statutes, which prohibited a "white person" from marrying any other person than a "white person" (Dubler, 2006; 1178). The Court ultimately stuck down the statutes, holding that marriage is one of the "basic civil rights of man, fundamental to existence and survival" (*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). Additionally, he argued "under our Constitution, the freedom to marry, or not to marry, a person of another race resides within the individual and cannot be infringed by the State" (388 U.S. at 11; 388 U.S. at 12). Scholars ultimately wonder whether same-sex marriage will follow the same trajectory. Just as *McLaughlin* paved the way for interracial marriage, so too might *Lawrence* pave the way for same-sex marriage (Dubler, 2006; 1169).

Part IIIb: Equal Protection Doctrine and Suspect Classification

Tradition as a State Interest

The discourse on tradition thus far has been largely critical. It is important to note the positive aspects of tradition, notably its influence in creating a cultural identity and sense of heritage (Forde-Mazrui, 2011; 285). Scholars often prescribe a "time tested wisdom" to traditional values, drawing on its authority in reinforcing social order (ibid; 294). In fact, to disregard tradition is to ignore the multigenerational collaboration that makes humans unique (ibid; 294). Abandoning laws may cause a degree of social and economic disruption, while respecting traditions can reinforce a sense of shared social identity and heritage (ibid; 293) In light of these beneficial aspects, scholars argue that tradition can, in fact, serve as a legitimate state interest to justify discrimination. Therefore, the question is not *whether or not* tradition serves as an important state interest, rather *under what circumstances*. When analyzing tradition

under the Equal Protection Doctrine, justices must determine the point at which it unconstitutionally discriminates against a minority group (ibid; 286). When that threshold is crossed, the state is required to advance a more substantial interest.

Scholars argue the role of tradition in the Supreme Court is undertheorized, debating over its definition and weight in the judicial decision-making process (Forde-Mazrui, 2011; 289). One framework suggests tradition is legally sufficient when it offers benefits such as time-tested unity, reinforcement of social identity, and avoiding unintended consequences (ibid; 290). Tradition is not legally sufficient, however, when it serves as a "convenient justification" for laws that burden a group toward whom there has been a "cultural shift from widespread societal disapproval in the past to substantial public tolerance today" (ibid; 281). As expressed in *Romer v. Evans*, discrimination against a minority group (in this situation, homosexual individuals) is illegitimate when it stems from "invidious","odious", or "evil" antagonism (517 U.S. at 634). Additionally, state actions are also illegitimate when they are motivated by a "arbitrary or irrational animosity, or a desire to harm a politically unpopular group (ibid). Thus, when tradition constitutes a history of discrimination, it may even counsel against its legitimacy (ibid; 289). In all cases, justices should apply skepticism towards tradition because of its "speculative rather than demonstrable utility, rhetorical appeal, and manipulability" (ibid; 291). In light of this framework, the Court will decide in *Hollingsworth* whether a) tradition of opposite-sex marriage is legally sufficient to justify discrimination against same-sex couples, or b) tradition of opposite-sex marriage is a "convenient justification" that fails to explain why it is important.

Level of Scrutiny

The Equal Protection Doctrine is designed to protect those traditionally excluded from full citizenship (Forde-Mazrui, 2011; 298). Traditions tend to be majoritarian, so it emphasizes

protections extended to disadvantaged minorities who face a history of discrimination. Race and gender discrimination are prevalent in American history, so the Equal Protection Doctrine specifically targets racist and sexist discrimination in an attempt to prevent further abuse (ibid; 299). This division of people into different levels of protection is known as the "suspect class" approach (Lister, 416). Strict judicial scrutiny is triggered by the employment of a suspect classification such as race or national origin, as was the case in the civil/interracial rights movement (ibid; 417). In order to justify racial discrimination, the state needs a compelling state interest, narrowly tailored, using the least restrictive means possible (ibid; 416). Since the history of gender discrimination is less severe than that of racial discrimination, intermediate judicial scrutiny is employed in such cases (ibid; 418). In order to justify gender discrimination, the nature of the discrimination must substantially relate to an important government interest (ibid; 418). For general equal protection claims, the nature of the discrimination must rationally relate to an important government (ibid; 420).

An important distinction is drawn between same-sex marriage and interracial marriage. Bars on black-white marriage were obviously a crucial component of a comprehensive racial caste system, and the cases were therefore analyzed with strict scrutiny (Lister; 417). Sexual orientation, on the other hand, is not considered a central pillar of an analogous sexual caste system (ibid; 413). However, as previously discussed, the history of discrimination based on sexual orientation does warrant additional protection for the disadvantaged minority. Thus, a main consideration in *Hollingsworth v. Perry* is whether or not homosexual individuals classify as a suspect class. On the state level, the level of scrutiny used to decide same-sex marriage cases provides mixed results. In the 1993 Hawaii Supreme Court case *Baehr v. Lewin*, the state fell in accordance with the "strict scrutiny" standard, placing a burden on Lewin to demonstrate that the

Hawaii statute "furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights" (63 Haw. 389, 392, 629 P.2d 109, 111 (1981)). Similarly, the high courts in Alaska and California also elevated analysis to strict scrutiny in the 2001 case of *Brause v. Bureau of Vital Statistics* (1998 WL 88743) and the 2007 *In Re Marriage Cases* (183 P3d384m 450-51). In the 2003 case of *Goodridge v. Dept. of Public Health*, however, Massachusetts Supreme Court decided to analyze same-sex marriage with rational scrutiny (798 N.E.2d 941). Despite the lower standard of review, the court ruled against the ban on same-sex marriage because the state justifications did not satisfy rational basis scrutiny (Dorf, 2011; 1344). Thus, although the Supreme Court currently recognizes gay rights under rational scrutiny, scholars argue that it applies it "with bite" (ibid; 1345). Even though homosexuals are not a suspect class in the same way that gender and racial minorities are, the Court still recognizes that they are an identifiable victim group. The Court also understands that laws regarding same-sex marriage brand their relationships as second-class (ibid; 1345).

Part IV: Legal Opinion From the Perspective of the Supreme Court

OUTCOME: The United States Supreme Court struck down Proposition 8 for violating the Equal Protection Clause of the Fourteenth Amendment.

OPINION BY: Kennedy, J., joined by Breyer, S., Sotomayor, S., Kagan, E., Roberts, J., Alito, S.,

The relevant issue is whether or not the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining the marriage between a man and a woman. The Supreme Court has consistently denied the constitutionality of measures which restrict the rights of citizens on account of sexual orientation. By reserving the term "marriage" for opposite-sex couples, Proposition 8 identifies same-sex relationships as second-class in

nature (Dorf, 2011; 1346). Discrimination based on sexual orientation has an extensive history in the United States, as evident in *Bowers v. Hardwick* (478 U.S. 186), *Romer v. Evans* (517 U.S. at 634), *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* (515 US 557 (1995)) and *Boy Scouts v. Dale*, (530 US 640 (2000)). The Court recognizes homosexual individuals as an identifiable victim group and heightens the level of scrutiny applied.

The State of California failed to provide a compelling state interest for its ban on same-sex marriage. The Court rejects the notion that restricting marriage to opposite-sex couples promotes a traditional setting for procreation. The Courts have always recognized marriage as more than procreation and childrearing (Gerstmann, 49). Opposite-sex couples incapable of reproduction are nonetheless given the right to marry. Additionally, the Court rejects the rationale that opposite-sex marriage is optimal for child rearing. With no evidence to support the claim, it is ultimately speculative rather than demonstrable. The Court also rejects the claim that a ban on same-sex marriage conserves scarce state and financial resources. Such an overgeneralization is also speculative, rather than demonstrative. The Court does not accept financial justifications as grounds for discrimination (Dorf, 2011; 1350). Lastly, the Court rejects the claim that same-sex marriage will diminish the validity or dignity of marriage. The claim that banning same-sex marriage somehow promotes lifelong monogamy within opposite-sex marriage is practically a non sequitur (Dorf, 2011; 1345). The Court also wants to note that, in light of these claims, Proposition 8 is also unconstitutional under rational basis review.

Restricting the freedom to marry solely because of sexual orientation violates the central meaning of the equal protection clause (*Loving v. Virginia* 388 U.S. at 9). The Fourteenth Amendment requires that the freedom of choice to marry, or not marry, a person of another sex

resides with the individual and cannot be infringed by the state (*Loving v. Virginia*, 388 U.S. at 12). Therefore, it is affirmed that Proposition 8 is unconstitutional.

CONCUR BY: Ginsburg, R.

JUSTICE GINSBERG, concurring on the judgment, agrees that Proposition 8 is unconstitutional. However, this conclusion was not based on the equal protection clause, rather the asserted grounds that Proposition 8 infringes upon a fundamental right to marry implicit in the Due Process Clause. The constitutional right to marry, much like the constitutional right to privacy, is firmly rooted in the country's traditions and in uncontested court precedents (Lister, 417). It is one of the basic civil rights of man, fundamental to our very existence and survival (*Loving v. Virginia*, 388 U.S. 1). This unenumerated right is evident in cases involving marriage and the family, such as *Meyer v. Nebraska* (regarding children's language of education), *Skinner v. Oklahoma* (regarding sterilization of criminals), *Griswold v. Connecticut* (regarding the use of contraceptives), *Loving v. Virginia* (regarding interracial marriage), *Zablocki v. Redhail* (regarding court-ordered support and remarrying), and *Turner v. Safley* (regarding inmates marrying) (Gerstmann, 2004; 79-81).

The Due Process Clause prohibits states from infringing upon fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest (*Washington v. Glucksberg*, 521 U.S., at 721, 138 L Ed 2d 772, 117 S Ct 2258). The Court was correct in striking down Proposition 8, but the liberty interest at hand merits strict judicial scrutiny rather than rational-based analysis.

DISSENT BY: SCALIA, A., joined by Thomas, C.

JUSTICE SCALIA, dissenting on the opinion, expresses the view that Proposition 8 (a) did not infringe upon a fundamental right, and (b) was supported by a rational relation to a legitimate state interest in the promotion of traditional values (*Lawrence v. Texas* 539 U.S. 558 at 509). Let it be reaffirmed that the Court's opinion does not declare that homosexual marriage is a "fundamental right" under the Due Process Clause. The right to same-sex marriage is not enumerated in the Constitution, so the Court therefore has no place in creating it. Proposition 8, the validity of which is involved, was ratified through the political legislative process. Since marriage is an issue of social contestation, the court has no place in even addressing it. As I expressed in *United States v. Virginia*, the function of this Court is to preserve our society's values regarding equal protection, not to revise them (518 U.S. 515 at 541). It is not our role to prescribe, on our own authority, progressively higher degrees (518 U.S. 515 at 542). Additionally, the government maintains the "right to define" certain concepts (*Lawrence v. Texas* at 558), and it certainly maintains the right to define marriage in an benign attempt to preserve its traditional value. The Court holds that the traditional definition of marriage is not a legitimate state interest, but I argue otherwise. The institution of marriage is fundamental to our cultural identity as a nation, and the state has an interest in maintaining its tradition of ancient pedigree (Forde-Mazrui, 2011; 283). In fact, this interest is not only legitimate, but also sufficient enough to withstand heightened judicial scrutiny (Forde-Mazrui, 2011; 281). By altering the definition of marriage, the Court is launching a massive disruption of the current social order (*Lawrence v. Texas* at 591).

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