

IN RE MARRIAGE CASES (California): 2008

These cases present the issue of the legality of gay marriage bans, in the context of previous State “domestic partnership” (CA) or “civil union” (CT) Statutes, under the California and Connecticut State Constitutions.

Unlike *Goodridge*, the two decisions focus on the question as to whether it is legally permissible for a State (i) to permit gays to form domestic partnerships or civil unions that are legally virtually indistinguishable from civil marriages, *and* (ii) to make it impossible for gays to enter into civil marriages.

BACKGROUND

California Family Code (2008)

Section 300: “Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary.” [Adopted by the CA Legislature, 1977/1992]

Section 308.5: “Only marriage between a man and a woman is valid or recognized in California.” [Adopted through voter initiative, Prop 22, in 2000.]

In 2004, the mayor of San Francisco (Gavin Newsom) unilaterally ordered the county clerk to issue marriage licenses to otherwise qualified *homosexual* couples. (By “otherwise qualified”, I mean roughly that the two partners are consenting adults who are not related to each other, and more exactly that the two partners satisfy all the requirements that both members of a *heterosexual* couple must satisfy in order to obtain a marriage license.) After a legal challenge, the California Supreme Court ordered an end to the practice and declared all gay marriage licenses void, but reserved the right to consider a legal challenge to the California ban on gay marriage. A number of gay couples then challenged the constitutionality of Sections 300 and 308.5 of the Family Code under the DP and EP Clauses of the *California* Constitution.

California Constitution, Article I, Section 1: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”

California Constitution, Article I, Section 7: “A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.”

In recent years, most recently in 2006 and 2007, the California Legislature passed the Domestic Partner Act (DPA), creating Domestic Partner licenses for gay couples that have legal status equivalent to the legal status of Marriage licenses.

“Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law...as are granted to and imposed upon spouses.”

[For examples of rights and responsibilities incident to marriage, see *Goodridge* notes.]

DUE PROCESS

The right to liberty and the right to privacy are both protected by the CA Constitution. Both rights are fundamental, and the right to marry has been treated in past cases as a fundamental right that issues from the right to liberty and the right to privacy (construed as a right to personal autonomy).

The fundamentality of the right to marry derives from the “the nature and substance of the interests protected by” the right.

1. Societal Interests

Stable families formed by civil marriage are needed to advance three aims, (i) the welfare of children, (ii) the perpetuation of a social and political culture, and (iii) the protection of individuals who are unable to support themselves. Marriage is the “building block of society” and the “foundation of the social system”.

2. Personal Interests

The right to marry is a “subset of the right of intimate association”. It is “often of crucial significance to the individual’s happiness and well-being..., [to] the individual’s development as a person and achievement of his or her full potential.” Exercise of the right “permits the couple to join the broader family social structure that is a significant feature of community life.” The opportunity to exercise the right “is an important element of self-expression that can give special meaning to one’s life.” And the right includes the right to raise children in an environment that “affords official government sanction and sanctuary to the family unit.”

The fact that the right protects supremely important *personal* interests (rather than merely just *societal* interests) is what justifies treating it as having “independent substantive content”.

“This right embodies fundamental interests of an individual that are protected from abrogation or elimination by the state.”

CA contends that the DPA provides gay couples with the same rights and responsibilities that the law otherwise provides to married couples. So CA's system of laws relating to marriage and domestic partnership does not infringe gay couples' fundamental rights.

But the right to marry includes "the right to have [one's] official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships." The DPA is no more consistent with gay couples' fundamental right to marry than a "transracial union" statute would be consistent with interracial couples' fundamental right to marry.

EQUAL PROTECTION

1. The DPA and marriage laws, taken together, do not discriminate on the basis of *sex*.

"Persons of either gender are treated equally and are permitted to marry only a person of the opposite gender. In light of the equality of treatment between genders, the distinction prescribed by the relevant statutes plainly does not constitute discrimination on the basis of sex as that concept is commonly understood."

2. The DPA and marriage laws, taken together, discriminate on the basis of sexual orientation.

CA argues that these laws "do not prohibit gay individuals from marrying a person of the opposite sex," and hence that the laws treat homosexuals and heterosexuals equally: under the law both homosexuals and heterosexuals are permitted to marry someone of the opposite sex and are not permitted to marry someone of the same sex. The laws are therefore *facially* neutral, and merely have a *disparate impact* on homosexuals (because no homosexuals *in fact* would freely choose to marry someone of the opposite sex). But this sort of reasoning is "sophistic" (i.e., grossly fallacious).

[Note: It is worth thinking about *why* this reasoning is fallacious. The DPA and marriage statutes together *are* neutral on their face. And they are not *applied* "with an evil eye and an unequal hand," as the law was applied in *Yick Wo* (1886). The problem here is that the law permits homosexuals to do what they would never freely choose to do and prevents them from doing what they would freely choose to do, whereas the law permits heterosexuals to do what they would freely choose to do and prevents them from doing what they would not freely choose to do. In this sense, the law provides heterosexuals with meaningful opportunities, while denying the same meaningful opportunities to homosexuals.]

3. Sexual orientation is a suspect classification under the EP Clause of the CA Constitution.

The suspect status of a trait depends on four factors:

1. Whether the trait bears no relation to a person's ability to contribute to society
2. Whether persons bearing the trait have suffered legal and social disabilities in the past
3. Whether the trait is immutable
4. Whether persons bearing the trait are politically powerless

The most important factors here are (1) and (2), not (3) or (4).

Immutability is not *necessary* for a trait to count as suspect. Example: religion. Besides, sexual orientation a fundamental aspect of one's identity, and it would be inappropriate "to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."

Political powerlessness is not *necessary* for a trait to count as suspect. Examples: sex, race, and religion.

There is no doubt that (1) a person's sexual orientation bears no relation to her or his ability to contribute to society, and (2) that gays have suffered serious legal and social disabilities in the past.

THE STANDARD OF REVIEW

The proper standard of review for state laws that infringe fundamental rights or discriminate on the basis of a suspect classification is **Strict Scrutiny**: the laws must bear a necessary relationship to a compelling state interest.

There is no compelling interest that would justify denying gay couples the right to marry.

1. Permitting same-sex couples to marry "will not deprive any opposite-sex couple or their children of any of the rights and benefits conferred by the marriage statutes." ["There are enough marriage licenses to go around for everyone."]
2. Permitting same-sex couples to marry "will not alter the substantive nature of the legal institution of marriage."
3. Permitting same-sex couples to marry "will not impinge upon the religious freedom of any religious organization, official, or any other person."

It immediately follows that the system of laws governing marriage and domestic partnerships in CA violates the EP Clause of the CA Constitution.

POSTSCRIPT: PROP 8

In November 2008, a majority of the CA electorate voted to enshrine Section 308.5 of the Family Code in the CA Constitution, where it is now Section 7.5 of the Declaration of Rights (Prop 8). The Constitutionality of this Section is now under judicial review.

There are two problems with Prop 8. The first is that Section 7.5 has no place in the CA Constitution's Declaration of Rights. The reason is that this section constitutes the *denial* of rights to same-sex couples. The second and more serious problem is that Prop 8 was passed by majority vote, and there is no *point* to having a *Constitution* if the Constitution can be amended by a simple majority. Recall that the main function of the Bill of Rights, as Madison saw it, is to serve as an "impenetrable bulwark" against the oppressive designs of (a) the executive, (b) the legislature, and (c) **"the people, operating by the majority against the minority"**.