

# ESSAY

## TWO CHEERS FOR STATE CONSTITUTIONAL LAW

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### INTRODUCTION

The story of marriage equality under state constitutions is quite mixed. The story begins when the Hawaii Supreme Court in *Baehr v. Lewin* indicated that strict scrutiny should be used for the prohibition of same-sex marriage on the ground it was gender discrimination.<sup>1</sup> The court explained that it was solely a person's sex that kept him or her from marrying someone of the same sex.<sup>2</sup> The Hawaii Court remanded the case to the lower court for the application of strict scrutiny under the Hawaii Constitution's use of this test for gender discrimination. Before this could occur, though, Hawaii voters amended their constitution to prevent marriage equality.<sup>3</sup>

The Vermont Supreme Court found a right to same-sex civil unions, but not marriage for gay and lesbian couples.<sup>4</sup> The Massachusetts Supreme Judicial Court in a historic ruling interpreted its state constitution to create a

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1. 852 P.2d 44, 67-68 (Haw. 1993).

2. *Id.* at 60.

3. Article I, section 23 of the Hawaii Constitution provides: "The legislature shall have the power to reserve marriage to opposite-sex couples." HAW. CONST. art. I, § 23. This was adopted by an initiative passed by sixty-nine percent of the citizens of Hawaii on November 3, 1998. See David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19 (2000).

4. *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999).

constitutional right to marriage equality.<sup>5</sup> It rejected that civil unions could substitute for the right of gays and lesbians to marry. The New York Court of Appeals, though, rejected marriage equality under its constitution in a four-to-two decision.<sup>6</sup>

The California Supreme Court, by a four-three margin, invalidated that state's ban on same sex marriage only to have its decision overruled about six months later by an initiative, Proposition 8, to amend the state constitution.<sup>7</sup> The Iowa Supreme Court unanimously found that the prohibition of same sex marriage violated the Iowa Constitution.<sup>8</sup>

Meanwhile, over the course of the decade, voters in many states amended their state constitutions to declare that marriage had to be between a man and a woman and thus foreclose any chance of their state courts finding a right to marriage equality.<sup>9</sup> This limits the number of additional states where state supreme courts can interpret their state constitutions to create a right to marriage equality.

The conclusion which I draw from this quick review of history is that state constitutional law is a necessary, but inadequate second best to advancing individual liberties when that cannot be accomplished under the United States Constitution. Ever since the Supreme Court turned sharply to the right with the appointment of four justices by Richard Nixon early in his presidency, liberals have thought of state constitutional law as an alternative. Supreme Court Justice William Brennan in a famous article in the *Harvard Law Review* in 1977 urged this.<sup>10</sup> Brennan called upon state courts to "step into the breach" left by the U.S. Supreme Court's retreat from its commitment to the protection of individual rights in the wake of the Nixon appointments to the Court.<sup>11</sup> A wave of scholarship exalting state constitutional law developed. The late Justice Stanley Mosk of the California Supreme Court observed that turning to

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5. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

6. *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006).

7. *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008). In *Strauss v. Horton*, 207 P.3d 48, 63-64 (Cal. 2009), the California Supreme Court upheld Proposition 8.

8. *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009).

9. See Jesse McKinley & Laura Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 5, 2008, at A1 (reporting that voters in Arizona, California, and Florida passed initiatives to ban same-sex marriage); see also John L.S. Simpkins, *Structuring State Constitutional Review: Comparative Perspectives*, 3 CHARLESTON L. REV. 535, 541 n.18 (2009) ("In 2004, for example, voters approved measures banning same-sex marriage in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Oregon, and Utah."); Dan Savage, Op-Ed., *Anti-Gay, Anti-Family*, N.Y. TIMES, Nov. 12, 2008, at A31 (reporting that Arkansas voters passed a state initiative to ban gay men and lesbians from adopting children).

10. William J. Brennan, Jr., *State Constitutions and the Protections of Rights*, 90 HARV. L. REV. 489, 489 (1977).

11. *Id.* at 503; see also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 535 (1986).

state constitutions offered something for both liberals and conservatives: it is a way for liberals to have a continuation of the Warren Court's expansion of constitutional rights, while at the same time providing conservatives "the triumph of federalism."<sup>12</sup>

Of course, it is not just in the area of marriage equality that lawyers have turned to state courts and state constitutions to try and accomplish what could not be done under the United States Constitution. For example, after the Supreme Court in 1973 (with all four Nixon appointees in the majority) held in *San Antonio Board of Education v. Rodriguez* that inequalities in school funding do not violate the Constitution,<sup>13</sup> a number of states found such disparities to violate their state constitutions.<sup>14</sup> Another illustration of this is state courts recognizing a right under state constitutions to use private shopping centers for speech purposes, although the Supreme Court has rejected such a right under the United States Constitution.<sup>15</sup>

Yet, as someone who cares about civil liberties and civil rights, as a lawyer as well as an academic, I am left with a somewhat ambivalent feeling about state constitutional law. In every area where I would like to see state constitutional rights develop, I would much prefer to see it accomplished under the United States Constitution if possible. If it cannot be done that way, then I am happy to see it done via state constitutions. Even then, I am aware of the tremendous limits on state constitutional law as a way of advancing individual liberties and civil rights.

My point in this Essay is thus straightforward: the ability to protect individual rights through state constitutions is inherently limited. If the goal cannot be accomplished via the United States Constitution, then state constitutional law is a great back-up plan. But discussions of state constitutional law must include this reality; state constitutional law is a second best way to advance individual liberties and civil rights.

I divide this Essay into two parts. In Part I, I describe the inherent limits of state constitutions as a way to protect individual liberties and civil rights. In Part II, I apply this to explain why I believe that Ted Olsen and David Boies made the right choice to bring a challenge to California's Proposition 8 in

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12. Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1081 (1985).

13. 411 U.S. 1, 4 (1973).

14. See, e.g., *Serrano v. Priest*, 557 P.2d 929, 957-58 (Cal. 1977); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 189 (Ky. 1989); *McDuffy v. Sec'y of Educ.*, 615 N.E.2d 516, 555 (Mass. 1993); *Abbott v. Burke*, 575 A.2d 359, 408 (N.J. 1990); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 140-41 (Tenn. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989).

15. Compare *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (finding no First Amendment right to use privately owned shopping centers for speech purposes), with *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 79 (1980) (upholding decision of California Supreme Court to recognize a state constitutional right to use privately owned shopping centers for speech purposes).

federal court as violating the United States Constitution.

To be clear, nothing in this essay is at all critical of lawyers who turn to state courts or to state court judges to develop rights under state constitutions. I was thrilled by the decisions of the Massachusetts, California, and Iowa Supreme Courts recognizing state constitutional rights to marriage equality. Sometimes the development of rights under state constitutions is an important step to ultimately achieving national protection. I hope that is true with regard to marriage equality. But I write this Essay to urge caution in generalizing too much from a few pathbreaking decisions about the role of state constitutional law in advancing freedom and equality.

## I. THE LIMITS OF STATE CONSTITUTIONAL LAW

Some of the limits of state constitutional law are obvious, others less so. But it is important to keep them in mind in any discussion of the potential for using state constitutionalism as a way of achieving social change.

First, it must be remembered that states are limited by Supreme Court decisions which impose constitutional limits on government actions. To take an older example, during the first third of the twentieth century, the Supreme Court interpreted the Due Process Clause of the Fourteenth Amendment to protect freedom of contract and struck down state laws that protected employees and consumers, such as minimum wage and maximum hours laws.<sup>16</sup> During this so-called *Lochner* era, the Court declared almost 200 laws unconstitutional.<sup>17</sup> There is nothing that state courts and state constitutionalism could have done about this. Even a right to set a minimum wage under a state constitution would have been struck down.

A more recent example would be constitutional limits the Supreme Court has imposed on race-conscious remedies. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court held that school districts may not use race as a factor in assigning students to schools to achieve desegregation unless they meet strict scrutiny.<sup>18</sup> There is nothing any state in its constitution can do to get around this requirement which limits the ability to desegregate public schools.

In January 2010, the Supreme Court held that corporations have the First Amendment right to spend unlimited amounts of money in election campaigns.<sup>19</sup> There is nothing that can be done to change this via state constitutions because obviously they cannot limit what the Supreme Court

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16. *Lochner v. New York*, 198 U.S. 45, 53 (1905) (invalidating a state law limiting the hours that bakers could work in a week), is regarded as the paradigm case of this era.

17. BENJAMIN WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 154 (1942).

18. 551 U.S. 701, 711 (2007) (invalidating school desegregation plans in Louisville, Kentucky, and Seattle, Washington).

19. *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010).

deems to be a First Amendment right.

The point is an important one: state constitutionalism has the ability to protect rights where the Court says that none exist, but no ability to overcome decisions that restrict what governments can do.

Second, relying on state constitutions never will provide more than partial success in advancing liberties and equality because the chance of succeeding in all states, or even most states, is small. This point is illustrated powerfully by a single example: at most, how many state supreme courts across the country are likely to recognize a constitutional right to marriage equality? Even if there had been no amendments to state constitutions precluding this, it is difficult to imagine it being more than a relative handful of states. When even the New York Court of Appeals refused to recognize such a right,<sup>20</sup> would it be realistic to imagine the South Carolina Supreme Court or the Mississippi Supreme Court or the Oklahoma Supreme Court doing so?

There are structural reasons to believe that significant advancement of individual liberties is unlikely to occur in most states. In thirty-eight states, state court judges face some form of electoral accountability.<sup>21</sup> In some states, state supreme court justices run in partisan elections. In other states, justices face retention elections. The last two decades have seen a number of state supreme court justices losing their seats because of particular rulings, such as Rose Bird, Joseph Grodin, and Cruz Reynoso in California, Penny White in Tennessee, and David Lanthier in Nebraska.<sup>22</sup> Professor Devins, in an Article in this issue, points out that none of the seven states that have recognized some form of marriage equality make use of contested judicial elections.<sup>23</sup> Certainly this suggests that states with such systems are very unlikely to recognize such controversial new rights.

Unquestionably, many issues of state constitutional law, even those advancing rights, are unlikely to make much difference in elections. And some justices on state supreme courts will be courageous and pay no attention to their coming electoral review. But controversial rulings, whether equalizing educational opportunity, limiting the death penalty, or providing marriage equality, will provide a target for attack in the next electoral review. The late California Supreme Court Justice Otto Kaus said that for the judge facing the voters, electoral review is like having a crocodile in one's bathtub; it is never possible to forget that it is there.<sup>24</sup> It would thus be naïve to assume that elected

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20. *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006).

21. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 36 (5th ed. 2007).

22. Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 MO. L. REV. 573, 587 (2009) (describing defeat of incumbent justices).

23. Neal Devins, *How State Supreme Courts Take Consequences Into Account: Towards a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1675-79 (2010).

24. Dan Morain, *Kaus to Retire from State Supreme Court: Deplores Strident Attacks*

judges and those facing retention elections will be as likely as federal judges with life tenure to take controversial steps to advance liberty and equality.

Indeed, there are some areas where state constitutionalism just would never happen. The easiest example here is the desegregation of the south. If the Supreme Court had not decided *Brown v. Board of Education*,<sup>25</sup> it is unthinkable that many state courts in the south would have found that state mandated segregation of schools violated state constitutions. The implementation of *Brown* occurred entirely in the federal courts as a result of courageous federal judges.<sup>26</sup>

Also, it is important to recognize that many states do not have a tradition of using their state constitutions to provide rights greater than that in the United States Constitution. Professor James Gardner, in one of the relatively few articles criticizing state constitutionalism, conducted a careful review of the decisions of a number of state supreme courts. He concluded: "Just as striking as the infrequency of state constitutional decisions, and undoubtedly one of its causes, is what can only be characterized as a general unwillingness among state supreme courts to engage in any kind of analysis of the state constitution at all."<sup>27</sup> In fact, Professor Gardner, after surveying states, proclaimed "that state constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements."<sup>28</sup>

Turning to state constitutions to protect rights means accepting inherently limited success across the country. These successes in the face of failures in the Supreme Court are surely better than nothing, but it would be a mistake to pretend that it is more than a distant second best. Some states found rights to educational equality in their state constitutions, but it would have been so much better if the Supreme Court had done it nationally in *San Antonio Board of Education v. Rodriguez* so that every state would have had this result.<sup>29</sup>

Third, using state constitutions to advance rights has far greater costs for litigants than using the federal constitution. Again, the example of the educational equity litigation is revealing. If the Court in *Rodriguez* would have found that inequalities in school spending violated the United States Constitution, there would have been no need to litigate this issue state by state under state constitutions. One decision by the United States Supreme Court finding a right to marriage equality for gays and lesbians would obviate the

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*on Justices in Anti-Bird Effort*, L.A. TIMES, July 2, 1985, § 1, at 1.

25. 347 U.S. 483, 495 (1954) (declaring unconstitutional segregation of public schools based on race).

26. See generally JACK BASS, UNLIKELY HEROES (1981) (describing the federal judges who implemented desegregation in the south).

27. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 781 (1992).

28. *Id.* at 763.

29. 411 U.S. 1, 4 (1973) (holding that inequalities in school funding do not violate equal protection).

need to litigate this state by state, with all of the costs inherent to such litigation.

Obviously, the extent of the costs will vary by issue. In the area of educational equity, it is reasonable to assume that even if *Rodriguez* had come out the other way, there still would have had to be litigation in individual states to implement it. Some issues, and marriage equality may be one of them, tend to be more a matter of law than fact and thus the costs of litigation are reduced. In some areas, it may be that even proceeding under the United States Constitution will require that test cases be brought in several different places around the country simultaneously, as was done in the school desegregation litigation which culminated in *Brown v. Board of Education*.<sup>30</sup>

All of this is right, but it still is undoubtedly true that litigating under state constitutions requires separate suits in each state and that is a far more expensive strategy than succeeding under the United States Constitution. In a world of inherently limited resources, especially for litigation to advance rights and equalities, this often is a significant impediment to success.

Fourth, successes via state constitutional law often can be undone via the initiative process. In most states, it is easier to amend the state constitution as compared to the United States Constitution.<sup>31</sup> Many states allow their state constitutions to be amended through the initiative process. Thus, state court decisions interpreting the state constitution to advance liberty or equality can be undone through the electoral process. The most obvious example of this is how the California Supreme Court's decision creating a right to marriage equality for gays and lesbians was overturned within six months by Proposition 8.<sup>32</sup> The same, of course, occurred in Hawaii as the voters amended the state's constitution after the Hawaii Supreme Court found that the state's law prohibiting same-sex marriage had to meet strict scrutiny.<sup>33</sup>

The initiative process also can be used to block state courts from being able to use state constitutions to advance liberty and equality. Voters in many states passed initiatives banning same sex marriages before their state courts could even consider this.<sup>34</sup> In a number of states, voters have passed initiatives to ban affirmative action by state and local governments.<sup>35</sup> In some states, initiatives passed to ban busing for school desegregation or to eliminate open housing laws.<sup>36</sup>

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30. 347 U.S. 483 (1954).

31. See THOMAS C. MARKS & JOHN F. COOPER, STATE CONSTITUTIONAL LAW 306-09 (2d ed. 2003); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 359 (2009).

32. See *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (upholding Proposition 8 as a valid amendment to the state constitution).

33. See *supra* note 3 and accompanying text.

34. These are summarized *supra* note 9.

35. Proposition 209 in California and Proposition 2 in Michigan are examples of this.

36. See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (invalidating

All of this points to a serious limit on reliance on state constitutions. State constitutions are generally more majoritarian than the United States Constitution because they are easier for the majority to change, such as through the initiative process. Advancing individual liberties and furthering equality is thus inherently more problematic under state constitutions because it puts the rights of the minority more in the hands of the majority.

Fifth, there are costs and difficulties to having differences across the country in many areas of individual rights. Protecting rights through state constitutions rather than the United States Constitution thus can create significant problems. For example, if some states, but not others, recognize same-sex marriages there are countless problems. Will states that do not allow same-sex marriages have to recognize them from states that do? What about child custody decrees or rules about probating estates: how will these be handled?

I am not arguing that these difficulties are reasons not to use state constitutions. As someone who believes in marriage equality, I would rather see it in a few states with these difficulties than see it nowhere and not have the system face these problems. But it must be recognized that there are costs to using state constitutions that are avoided if a national right is recognized by the United States Supreme Court.

There are many responses to all of this. One powerful answer is that I misunderstand the value of state constitutionalism; that its virtue is *procedural* in that there is benefit to having states with their own robust constitutional traditions. From this perspective, it is no criticism of state constitutional law if it fails to find a right to marriage equality across the country. The criticism of my argument is that I am assessing state constitutions in terms of their ability to achieve particular results which I am assuming to be desirable and not recognizing the benefits of state constitutionalism from a federalism perspective.

But this criticism depends entirely on why people turn to state constitutionalism. William Brennan's seminal article on state constitutionalism looked to it as a way of advancing liberties and equality at a time of retrenchment by the United States Supreme Court. This focus on state constitutions has intensified after the state court decisions in Massachusetts, California, and Iowa finding a right to same-sex marriage. It is this aspect of state constitutionalism to which I am responding: the hope for state constitutions replacing the United States Constitution as a way of increasing the protection for rights. It is this purpose that I am saying will never be achieved as well at the state level as through the United States Constitution. I am not opposed to states having robust constitutional law and will concede that there are inherent benefits to this in terms of federalism. But it is when state

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a Washington initiative prohibiting busing); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating a state initiative repealing open housing laws).



constitutions are looked to as a substitute for protecting rights under the United States Constitution that I am skeptical of the possibility for success.

Another related criticism of what I have argued is that it ignores other benefits of state constitutionalism. For example, state constitutions can be the laboratories for experimentation that federalism often promises.<sup>37</sup> There are many examples where state courts interpreting state constitutions preceded and arguably led to the greater recognition of rights under the United States Constitution. The California Supreme Court found that a prohibition on interracial marriage violated its state constitution more than twenty years before the United States Supreme Court decided *Loving v. Virginia* and found that anti-miscegenation laws deny equal protection.<sup>38</sup>

The reasoning of the state courts can influence subsequent decisions by the Supreme Court. The experience of the states also can do this. Advocates of marriage equality have reason to hope that as the country, including the justices on the United States Supreme Court, see the experience in states like Massachusetts and Iowa, they will see that there are no ills associated with same-sex marriage.

I wholeheartedly agree with this argument, which is one of the reasons why I strongly support using state constitutions and state courts when success at the federal level is unlikely. Advocates of marriage equality surely made the right choice in starting in state courts because it was too unlikely that they could win in the United States Supreme Court at that stage and state victories could pave the way for someday winning in the high court. But none of this is inconsistent with my central point—that state constitutionalism is a second-best alternative for advancing liberty and equality.

## II. SHOULD PROPOSITION 8 BE CHALLENGED AS VIOLATING THE UNITED STATES CONSTITUTION IN FEDERAL COURT?

The choice by high profile lawyers David Boies and Ted Olsen to bring a suit in federal court challenging Proposition 8 as violating the United States Constitution caused consternation among gay and lesbian rights advocates who had carefully structured their litigation to avoid such arguments.<sup>39</sup> The marriage equality litigation was brought in state courts based entirely on state constitutions to keep the matter from being removed to federal court or ever getting to the United States Supreme Court. In conversations with some of the lawyers who litigated marriage equality cases in the states, they expressed to

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37. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . .”).

38. See *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948) (invalidating California ban on interracial marriages); see also *Loving v. Virginia*, 388 U.S. 1 (1967).

39. See Maura Dolan, *Prop 8 Foes Clash Over Federal Suit*, L.A. TIMES, Aug. 9, 2009, at A35.

me great reservations about going to the Supreme Court too early and thus risking a devastating loss. Their sense is that it would be more likely to win in the Supreme Court after a series of wins in states and the Justices would have had the chance to see that marriage equality has worked well.

I understand this argument and have great respect for the lawyers who make it. But I think that going to federal court makes sense under the current circumstances. For the reasons explained above, significant additional success under state constitutions is unlikely. Indeed, the arguments made above in Part I help to explain why it was desirable to have a federal constitutional challenge to Proposition 8 brought in federal district court. Most states now have state constitutional provisions which define marriage as being between a man and a woman and few remaining state supreme courts can or will find a right to marriage equality. Litigating state-by-state in addition to being unlikely to succeed is far more expensive than success in one case that will affect the entire country. In this way, the challenge to Proposition 8 now pending in federal court really is a case study of the limits of state constitutional litigation discussed in Part I.

Ultimately, the choice whether to go to federal court is a gamble about Justice Anthony Kennedy. The conventional wisdom, which I share and discuss more fully below, is that it is likely to be a five-to-four decision in the United States Supreme Court with Justice Kennedy being the swing Justice in the majority.

I agree with Boies and Olsen that there is good reason to believe that Justice Kennedy would be a fifth vote to strike down bans on marriage equality. In all of American history, there have been two Supreme Court decisions protecting gays and lesbians; Anthony Kennedy was the author of both of these. In *Romer v. Evans*, the Court, in a six-to-three decision, struck down a Colorado initiative that repealed all laws in the state protecting gays and lesbians from discrimination and precluded the enactment of any new such laws.<sup>40</sup> Justice Kennedy's opinion for the majority found that the Colorado initiative failed even rational basis review for failing to serve a legitimate purpose. Justice Kennedy wrote:

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.<sup>41</sup>

The Court was explicit that it could identify nothing behind the initiative except animus for gays and lesbians. Justice Kennedy stated:

[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons

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40. 517 U.S. 620 (1996).

41. *Id.* at 633.

affected. . . . Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.<sup>42</sup>

He concluded his majority opinion by declaring: “We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do.”<sup>43</sup>

The other case protecting gays and lesbians, of course, was *Lawrence v. Texas*.<sup>44</sup> In 1986, in *Bowers v. Hardwick*, the Supreme Court held that the right to privacy does not include a right of adults to engage in private consensual homosexual activity.<sup>45</sup> In *Lawrence*, the Court expressly overruled *Bowers*. Justice Kennedy wrote for a five-person majority, joined by Justices Stevens, Souter, Ginsburg, and Breyer.<sup>46</sup> Justice Kennedy’s majority opinion declared: “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”<sup>47</sup>

Justice Kennedy, writing for the Court, concluded that the Texas law prohibiting homosexual activity served no legitimate government purpose:

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. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ‘It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.’ The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.<sup>48</sup>

Admittedly, Justice Kennedy made clear that the Court was not dealing with the issue of marriage equality. He said that the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>49</sup> Nor did the Court use heightened scrutiny; the Court did not expressly say the level of scrutiny that is being applied, but instead concluded that the Texas law would fail even rational basis review because it served no legitimate purpose.

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42. *Id.* at 634-35.

43. *Id.* at 635.

44. 539 U.S. 558 (2003).

45. 478 U.S. 186 (1986).

46. Justice O’Connor, the sixth justice in the majority in *Romer*, concurred in the *Lawrence* judgment. She would not have overruled *Bowers*, but instead would have found that the Texas law was unconstitutional because it applied only to same-sex sexual activity and prohibited sex acts between same-sex couples that were allowed between opposite-sex couples. The Georgia law, in *Bowers*, prohibited oral-genital and anal-genital contacts both between same-sex and opposite-sex couples. 539 U.S. at 581 (O’Connor, J., concurring).

47. *Lawrence*, 539 U.S. at 578 (majority opinion).

48. *Id.* (internal citation omitted).

49. *Id.*

These opinions by Justice Kennedy provide a good basis for believing that he will be a fifth vote for a constitutional right to marriage equality. In both *Romer* and *Lawrence*, Justice Kennedy's majority opinions emphasized the lack of a legitimate purpose behind the laws in question. Quite similarly, it is difficult to identify any legitimate purpose served by keeping gays and lesbians from expressing love and commitment through marriage and receiving all of the benefits the law long has provided heterosexual couples who choose to marry.<sup>50</sup>

I have participated in countless debates over marriage equality, including in the campaign over Proposition 8. I am always struck by the absence of any identifiable legitimate interest for the ban on same-sex marriage. What are the arguments likely to be advanced before the Supreme Court to justify the denial of marriage equality?

One argument is that marriage is inherently between opposite-sex couples. But this is a definition, not an argument. The fact that marriage has traditionally been between opposite-sex couples doesn't reveal anything about the characteristics of marriage and why those characteristics have to be limited to opposite-sex couples. Under this form of argument, then laws that prohibited interracial marriage were also constitutional. The Virginia law that prohibited interracial marriage existed for almost three hundred years.<sup>51</sup> If a long tradition of prohibiting types of marriage is sufficient, then the Court came to the wrong conclusion in *Loving v. Virginia*.<sup>52</sup> Certainly, the existence of a practice over a long period of time doesn't tell us anything about whether that practice is legitimate or permissible. Admittedly, *Loving* used strict scrutiny and it is uncertain whether the Supreme Court would do so either under due process or equal protection in examining the ban on marriage equality for gays and lesbians. But if one thinks about all of the core characteristics of marriage, the expression of love and commitment, the benefits and responsibilities, none of these have anything to do with the sexual orientation of the individuals participating.

A second argument that is likely to be advanced in the Court is that marriage is inherently about procreation. Therefore, same-sex marriage doesn't make sense because same-sex couples can't procreate without assistance. But this argument is wrong on every possible level. Marriage, of course, isn't inherently about procreation. Couples are allowed to get marriage licenses, even if one or both of them can't or doesn't want any children. Women past the age of menopause can get marriage licenses, as can men who have been

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50. Of course, advocates of marriage equality argue that strict scrutiny is appropriate because a fundamental right, the right to marry, is at issue, and because sexual orientation discrimination warrants heightened scrutiny. Obviously, if the Court were to use strict scrutiny, then the bans on same-sex marriage would be unlikely to survive.

51. RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 19 (2001).

52. 388 U.S. 1 (1967).

sterilized or are infertile. A requirement of intent to procreate does not exist for heterosexual couples who want a marriage license, so there's no sense to impose it for same-sex couples. More importantly, same-sex couples do procreate, whether it's through artificial insemination or surrogacy or adoption. Even if marriage is about procreation, there is no legitimate reason to deny this to same-sex couples because they have children too.

A third argument that's made is that children do better when they have opposite-sex parents than same-sex parents and thus the government is justified in denying marriage licenses for same-sex couples. No less than President George W. Bush made this argument.<sup>53</sup> He said the social science data shows that children do better if they have parents of opposite gender.<sup>54</sup> At the outset, it is important to note that is not what the studies say; the studies that are pointed to are ones that talk about children with single parents often having more problems than children with two parents.<sup>55</sup> But that has nothing to do with sexual orientation. It does reflect that being a parent is enormously difficult and, as somebody who has always been lucky enough to have a partner in parenting, I can only imagine how difficult it is to be a single parent of a child. But that doesn't at all relate to the issue of whether or not same-sex couples should get marriage licenses.

But most of all, the problem with this argument is that it truly misses the point. The question is not whether same-sex couples should have children or not. The reality is that same-sex couples are going to have children. The question becomes whether children of same-sex couples are better off if their parents are married or unmarried. I know of no studies that have been done that compare children with same-sex parents who are married to children of same-sex parents who are unmarried. Same-sex marriage is so new, not only in the United States but around the world, that time is needed to do such studies. Everything that we understand about marriage and how it contributes to the stability of relationships would indicate that children with same-sex parents are better off if those parents are married than unmarried because marriage is more likely to lead to stable relationships.

The point isn't: would children do better with parents of opposite gender or same gender. The point is: given that there are children in same-sex couples, are they better off with their parents being married or unmarried? As Chief Judge Judith Kaye of the New York Court of Appeals declared:

The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. . . .

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53. See Benedict Carey, *Experts Dispute Bush on Gay-Adoption Issue*, N.Y. TIMES, Jan. 29, 2005, at A16.

54. *Id.*

55. *Id.*

The State's interest in a stable society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses.<sup>56</sup>

A fourth argument that is often made against same-sex marriage is that it will harm the institution of marriage. I confess that I don't understand the argument. No heterosexual couple's marriage is adversely affected in the slightest by virtue of gays and lesbians also being able to marry. In fact, I cannot think of anything that has been more affirming of the institution of marriage in my lifetime than the fight by gays and lesbians to be able to marry.

A related argument sometimes advanced is that there is a slippery slope, that recognizing a constitutional right to marriage equality for gays and lesbians will prevent states from imposing any limits on marriage and force states to recognize marital arrangements such as polygamy. The crucial question would be whether states can show that there is a sufficiently important government interest to justify the ban on polygamy. No such interest exists with regard to marriage between gays and lesbians. Whether such an interest exists with regard to polygamy would need to be litigated. Traditionally, the arguments against polygamy are based on the subordination of women historically attendant to it and the benefit for children in monogamous marriages. If these can be shown, then the ban on polygamy could be upheld even after the ban on same-sex marriages was deemed to violate the United States Constitution.

The lack of a plausible legitimate argument against marriage equality for gays and lesbians leads to the same conclusion that Justice Kennedy came to in *Romer*: the laws are really based on animus towards gays and lesbians and the type of moral disapproval of homosexual activity that the Court rejected in *Lawrence*. It is what convinces me not only that Justice Kennedy is likely to vote to strike down Proposition 8, but also that Justices Stevens, Ginsburg, Breyer, and Sotomayor (or replacements for them picked by President Obama) will do so.

Admittedly, the Supreme Court's five-to-four decision banning the televising of the trial over Proposition 8 in January 2010 gives some pause because Justice Kennedy joined with Chief Justice Roberts and Justices Scalia, Thomas, and Alito, sure opponents of a right to marriage equality.<sup>57</sup> This vote led some to see the ruling as a harbinger of Justice Kennedy siding with the conservatives on the issue of marriage equality and saying that it was a mistake to take the matter to federal court.<sup>58</sup> This is certainly possible, though it is also possible that his vote reflects his views about cameras in the courtroom more than about the underlying merits of the issue. There will be no way to know, though, until the Court takes and decides the case on the constitutionality of Proposition 8.

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56. *Hernandez v. Robles*, 855 N.E.2d 1, 32 (N.Y. 2006) (Kaye, C.J., dissenting).

57. *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010).

58. David G. Savage, *Prop. 8 Ruling Seen as an Omen*, L.A. TIMES, Jan. 17, 2010, at

My central point is that I think in light of the limits of state constitutionalism, Justice Kennedy's prior opinions, and the underlying merits, it was a sensible decision to bring a challenge to Proposition 8 in federal court based on the United States Constitution. The timing also makes sense because the Supreme Court is not likely to be more hospitable to such a suit for at least a decade. None of the other conservatives are likely to leave the high court before then; John Roberts is fifty-five in 2010, Samuel Alito is sixty in 2010, Clarence Thomas will be sixty-two, Antonin Scalia and Anthony Kennedy will turn seventy-four. There is every reason to believe that they could still be on the bench in 2017 even if there are two Obama terms. Rather than litigate under state constitutions for another decade, Boies and Olsen made a good gamble in light of the limits on state constitutionalism that they can win in the United States Supreme Court.

#### CONCLUSION

Over the years, I have been invited to participate in many conferences on state constitutional law and always have declined. I am not a critic of relying on state constitutions to advance liberties and equality. I hope that in countless areas state supreme courts will use their constitutions to achieve what cannot be done under the United States Constitution because of the conservative Supreme Court.

But I also always have thought of state constitutional law as a second best way to accomplish desirable results. In this article, I have tried to explain why and thus why turning to the United States Constitution to challenge Proposition 8 made a great deal of sense.

