The Power of Precedent

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WHEN POLITICIANS ATTACK THE DECISION IN *PERRY*, THEY REVEAL A FRIGHTENING MISUNDERSTANDING OF THE AMERICAN LEGAL SYSTEM.

OUR NATION'S MODEL OF jurisprudence is built on a system of precedent, meaning that the decision in one lawsuit not only resolves that case but guides future lawsuits. It also ensures that the accumulated wisdom of past decisions influences the results in those that follow.

The majority opinion in *Perry v. Brown* is squarely based on precedent, not politics. When politicians attack the decision in *Perry* as the work of "rogue judges," they reveal a frightening misunderstanding of the American legal system. Judges are bound by precedent. The Ninth Circuit judges who decided *Perry* were simply doing their job—following precedent to enforce the legal protections that the Constitution safeguards for everyone.

The precedent on which *Perry* rests most heavily is the 1996 Supreme Court opinion in *Romer v. Evans*, a ruling the *Perry* majority cites more than two dozen times. As the opinion in *Perry* points out, Proposition 8 is "remarkably similar" to Colorado's Amendment 2, which prohibited the state and its political subdivisions from providing lesbians, gay men, and bisexuals any legal protection against discrimination on the basis of sexual orientation. In *Romer*, Lambda Legal, along with the ACLU and some of Colorado's top lawyers, successfully convinced the Supreme Court to rule that Amendment 2 was unconstitutional.

As the Supreme Court explained, Amendment 2 involved government discrimination of an "unusual character." It "withdr[ew] from homosexuals, but no others, specific legal protection...and...forb[ade] reinstatement of these laws and policies" except by "enlisting the citizenry…to amend the State Constitution.'"

California's passage of Prop 8 closely parallels Colorado's passage of Amendment 2. Both amendments involved electoral backlashes to civil rights advances by the state's gay minority. Rather than modify California's marriage law, Prop 8 amended the California Constitution in an unusual way, withdrawing from gay people, but no others, the right to equal protection when it comes to marriage. Like Amendment 2, Prop 8 barred legislators from ever affording such equal treatment to the gay minority.

Citing *Romer*, the *Perry* majority explains that "Proposition 8 denies 'equal protection of the laws in the most literal sense,' because it 'carves out' an 'exception' to California's equal protection clause by removing equal access to marriage, which gays and lesbians had previously enjoyed, from the scope of that constitutional guarantee." *Perry* continues, again quoting *Romer*: "Like Amendment 2, Proposition 8 'by state constitutional decree...put[s] [gay people] in a solitary class with respect to' an important aspect of human relations, and accordingly 'imposes a special disability" on them alone.

In *Romer*, Justice Kennedy explained that one of the most fundamental principles of equal protection is that "the Constitution neither knows nor tolerates classes among citizens." The Ninth Circuit was bound to apply *Romer*'s holding to Proposition 8.

There is much one can learn from *Perry*. There is restraint in the judges' decision not to decide whether the Constitution requires all states to allow same-sex couples to marry. There is humor in the point that "Had Marilyn Monroe's film been called *How to Register a Domestic Partnership with A Millionaire*, it would not have conveyed the same meaning." There is insight in the recognition that we don't celebrate "when two people merge their bank accounts; we celebrate when a couple marries." There is wisdom in the understanding that Prop 8 cannot reasonably further any purpose other than making gay people unequal. The one thing there is not, however, is politics.