



Repealing Rights: Proposition 8, *Perry*,
and *Crawford* Contextualized

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The N.Y.U. Review of Law and Social Change has asked how the Supreme Court should decide *Perry*³ if it goes to the Court. In the *Perry* litigation, the plaintiffs argued broadly that the federal Constitution's unenumerated but fundamental right to marry and its guarantee of equal protection bar any state law limiting civil marriage to different-sex couples.⁴ Plaintiff-Intervenor San Francisco also argued more narrowly on appeal,⁵ and the U.S. Court of Appeals for the Ninth Circuit held,⁶ that in stripping same-sex couples of the right to marry that had been extended as a matter of state law while leaving available domestic partnerships with the state-law rights and obligations of civil marriage, Proposition 8 denies equal protection, regardless of whether states might ever constitutionally exclude same-sex couples from civil marriage. For the Proponents of Prop 8 to win they must defeat both the broad and the narrow arguments pressed by the various plaintiffs. While the Proponents and some of their amici are trying to saddle the Supreme Court with the all-or-nothing position that either Prop 8 is constitutional or no state marriage restriction is,⁷ the Supreme Court can in fact invalidate Prop 8 without have to decide the broader question whether any state may ever limit civil marriage to different-sex couples.⁸ While the optimal role of the Supreme Court and conversely the definitions of improper judicial activism or abdication are much contested, there is widespread agreement that there is

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² Professor of Law, University of Southern California Gould School of Law. I am grateful to Rebecca Brown, Steve Greene, Chimène Keitner, Stephen Rich, and the audience and presenters at the N.Y.U. Review of Law & Social Change symposium Making Constitutional Change: the Past, Present, and Future Role of *Perry v. Brown* for valuable conversations and comments on drafts of this piece.

³ *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir.), *pet. for cert. filed sub nom. Hollingsworth v. Perry*, no. 12-144 (July 30, 2012).

⁴ *See generally, e.g., Perry v. Schwarzenegger*, Plaintiffs' and Plaintiff-Intervenor's Trial Memorandum, 2009 WL 4718815 (Dec. 7, 2009).

⁵ *Perry v. Brown*, Plaintiff-Intervenor-Appellee City and County of San Francisco's Response Brief, 2010 WL 4310745 (Oct. 18, 2010).

⁶ *Perry v. Brown*, 671 F.3d 1052 (9th Cir.), *pet. for cert. filed sub nom. Hollingsworth v. Perry*, no. 12-144 (July 30, 2012).

⁷ *See, e.g., Hollingsworth v. Perry*, no. 12-144, *pet. for cert. no. 12-144* (July 30, 2012) (equating rationality of Prop 8 to rationality of other states' denials of civil marriage to same-sex couples); *see also Perry v. Schwarzenegger*, Case No. 09-CV-2292 VRW, Defendant-Intervenors Motion for Summary Judgment, at 4 (N.D. Ca. Sept. 9, 2009) (asserting that *Perry* plaintiffs' arguments "effectively sweep aside the marriage laws of 43 other states and the federal government as well").

⁸ I have long believed that a correct understanding of the U.S. Constitution requires that same-sex couples not be excluded from civil marriage. *See, e.g., David B. Cruz, Same-Sex Marriage (I)*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 2307 (Leonard W. Levy, Kenneth L. Karst & Adam Winkler, eds., 2d ed. 2000).

value in the Supreme Court's not ruling on every possible issue it could, in leaving *something* undecided some times.⁹ And I here do likewise, addressing the symposium question of what the Court *should* do by focusing upon whether it *may*, consistent with its longstanding equal protection jurisprudence, rule for the *Perry* plaintiffs on narrow grounds.

Arguing against a narrow framing of the issues, Proponents claim that Prop 8 must be understood as repealing a state-law right not required by the U.S. Constitution; that a mere repeal of such 'constitutionally optional' rights cannot violate equal protection; and that the only way to hold otherwise would be for the Supreme Court to hold that the Constitution requires same-sex couples' equal freedom to marry in every state.¹⁰ This argument misses the mark in multiple ways, as both the Ninth Circuit and the Plaintiffs-side's briefs observe, though not necessarily with the same organization or emphases I'm offering.

Proponents' 'optional rights' claim has superficial plausibility only if one follows them in ignoring the context of the Supreme Court's broad pronouncements in *Crawford v. Los Angeles Bd. of Education*,¹¹ a case they scarcely mentioned before their brief replying to the plaintiffs in the Court of Appeals.¹² *Crawford* is one of a trilogy of political restructuring cases, where the Court considered equal protection challenges to legal changes alleged to put impermissible political burdens in the way of racial minorities pursuing their interests.¹³ The first case, *Hunter v. Erickson*,¹⁴ in 1969 held unconstitutional an

⁹ Cf. Cass R. Sunstein, *Foreword, The Supreme Court, 1995 Term: Leaving Things Undecided*, 110 HARV. L. REV. 6 (1996).

¹⁰ Cf. *Perry v. Brown*, at 1083 ("Proponents appear to suggest that unless the Fourteenth Amendment actually requires that the designation of 'marriage' be given to same-sex couples in the first place, there can be no constitutional infirmity in taking the designation away from that group of citizens, whatever the People's reason for doing so.").

¹¹ 458 U.S. 527 (1982).

¹² In Proponents' Trial Memorandum, they cite *Crawford* in one footnote for the uncontested narrow claim that mere repeal of a right without more does not violate equal protection. Defendant-Intervenors' Trial Memorandum (Dec. 7, 2009), at 13 n.4, available at Westlaw, 2009 WL 4718817; Defendant-Intervenors' Trial Memorandum (Including Citations) (Feb. 26, 2010), at 14 n.4, available at Westlaw, 2010 WL 742343. In seeking to bar discovery of certain internal communications of the Proponents and ProtectMarriage.com-Yes on 8, they cited *Crawford* only for the claim that the purpose of a statewide initiative is to be gathered only from the initiative itself or perhaps public communications about it. See *Perry v. Schwarzenegger*, Defendant-Intervenors' Notice of Motion and Motion for Protective Order (Sep. 15, 2009), at 7, available at Westlaw, 2009 WL 2980721. Proponents opening brief in the Court of Appeals does not cite *Crawford* at all. *Perry v. Schwarzenegger*, Defendant-Intervenors-Appellants Opening Brief, No. 10-16696 (Sept. 17, 2010), available at Westlaw, 2010 WL 3762119.

¹³ See, e.g., *BAMN v. Regents of Univ of Michigan*, 652 F.3d 607, 636 (6th Cir. 2011, en banc review granted) (Gibbons, Julia Smith, Circuit Judge, concurring in part and dissenting in part) ("*Hunter*, *Seattle*, and *Crawford* outline the constitutional limits on a particular type of political restructuring: the enactment of comparative structural burdens on 'the ability of

amendment to the Akron city charter requiring majority voter approval for any ordinance protecting against discrimination in housing “on the basis of race, color, religion, national origin or ancestry.” Another case, *Washington v. Seattle School District No. 1*,¹⁵ in June 1982 held that Washington state violated the Equal Protection Clause when the voters enacted a statute by initiative to bar school boards from assigning students to schools away from their neighborhood schools for purposes of racial desegregation while allowing such assignment for almost any other reason. The same day as *Seattle*, however *Crawford* upheld an amendment to the California Constitution adopted by the voters to bar state courts from ordering busing for state constitutional desegregation purposes except in such circumstances where federal courts would order it to remedy a violation of the Fourteenth Amendment.

In rejecting the plaintiffs’ equal protection challenge, the *Crawford* majority wrote broadly. In language quoted by Proposition 8’s Proponents as well as amici supporting certiorari the American Civil Rights Union, Judicial Watch, and fifteen states, the *Crawford* Court began its analysis by “rejecting the contention that once a State chooses to do ‘more’ than the Fourteenth Amendment requires, it may never recede.”¹⁶ *Crawford* reaffirmed “the Court’s repeated statement that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.”¹⁷ And it concluded that,

having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States. It could have conformed its law to the Federal Constitution in every respect. That it chose to pull back only in part, and by preserving a greater right to desegregation than exists under the Federal Constitution,

minority groups to achieve beneficial legislation.’ *Seattle*, 458 U.S. at 467, 102 S.Ct. 3187. Because these cases do not prohibit ‘every attempt to address a racial issue,’ *id.* at 485, 102 S.Ct. 3187, it is important to consider the limiting bounds of this type of political restructuring challenge.”). *Reitman v. Mulkey*, 387 U.S. 369 (1964), although invalidating a state constitutional amendment that repealed and entrenched a ban on racial fair housing laws in the California Constitution, may be excluded from inclusion with this trilogy because the law there was held to have a discriminatory purpose and accordingly subjected to strict scrutiny under routine equal protection doctrine, not the distinctive approach of the restructuring cases.

¹⁴ 393 U.S. 385.

¹⁵ 458 U.S. 457.

¹⁶ *Crawford*, 458 U.S. at 535, quoted in Perry v. Brown, Defendant-Intervenors’ Petition for Rehearing and Rehearing en banc, at *7, *20; Hollingsworth v. Perry, petition for certiorari, at *4; Hollingsworth v. Perry, Reply Brief, at *4; Hollingsworth v. Perry, Brief Amicus Curiae of American Civil Rights Union in Support of Petitioners, at *11; Hollingsworth v. Perry, Brief Amicus Curiae of 15 States in Support of Petitioners, at *11; Hollingsworth v. Perry, Brief Amicus Curiae of Judicial Watch in Support of Petitioners, at *18.

¹⁷ *Crawford*, 458 U.S. at 538, quoted in Perry v. Brown, Defendant-Intervenors’ Petition for Rehearing and Rehearing en banc, at *21; Hollingsworth v. Perry, Brief Amicus Curiae of American Civil Rights Union in Support of Petitioners, at *12.

most assuredly does not render the Proposition unconstitutional on its face.¹⁸

Proponents suggest that, because the California Supreme Court's recognition of same-sex marriage was not required by the federal Constitution in the first place, Proposition 8's withdrawal of that right was, as in *Crawford*, not constitutionally problematic. However, Proponents misread the language from *Crawford*. It cannot be read literally as applying in all situations regardless of the context.¹⁹ As the *Perry* plaintiffs noted,²⁰ after making these broad statements about the permissibility of mere repeals of constitutionally optional rights, *Crawford* went on to address the legitimacy of the state of California's reasons for limiting its courts' authority to impose busing,²¹ an analysis that would be wholly beside the point were *Crawford* to be read literally to exempt repeals of constitutionally optional rights from all equal protection scrutiny. Moreover, the *Crawford* majority opinion itself contradicted a literal interpretation of these pronouncements by also specifying that, "[o]f course, if the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional for this reason."²² *Crawford* thus cannot, and should not, be interpreted as categorically shielding repeals of state-conferred, constitutionally optional rights from scrutiny under the Equal Protection Clause.

The Court's broad language should be understood in the context of the trilogy of political restructuring cases of which *Crawford* is a member. In *Hunter* and *Seattle*, a facially race-neutral retraction of previously-granted benefits involved decreased access of minorities to the political process because of the entrenched repeals of equality rights. Consequently, the Court applied strict scrutiny to those initiatives using classic representation-

¹⁸ *Crawford*, 458 U.S. at 542, quoted in *Perry v. Brown*, Defendant-Intervenors' Petition for Rehearing and Rehearing en banc, at *21; *Hollingsworth v. Perry*, petition for certiorari, at *16-17; *Hollingsworth v. Perry*, Reply Brief, at *4-5; *Hollingsworth v. Perry*, Brief Amicus Curiae of American Civil Rights Union in Support of Petitioners, at *12.

¹⁹ *Accord Perry*, 671 F.3d at 1084 n.17 ("Of course, *Crawford* did not suggest that it ends the inquiry to note that the Fourteenth Amendment *generally* allows the People to exercise their state constitutional right to supersede a decision of the state supreme court by an initiative constitutional amendment. A federal court must still determine whether the constitutional amendment enacted by the People is otherwise valid under the Federal Constitution; sometimes laws passed because of disagreement with judicial decisions are not").

²⁰ *See, e.g.*, *Hollingsworth v. Perry*, Brief in Opposition of Plaintiff Same-Sex Couples, at 22 ("*Crawford*, just like *Romer* and the decision below, therefore examined the purposes allegedly served by the amendment—for example, "the educational benefits of neighborhood schooling"—by looking at the state court's findings and the relevant campaign literature.").

²¹ *Crawford*, 458 U.S. at 543-44.

²² *Id.* at 539 n.21 (citing *Reitman v. Mulkey*, 387 U.S. 369 (1967)). The foregoing reasons suffice to show that *Crawford* does not preclude the animus analysis applied by the district court and court of appeals in *Perry*. The remainder of this piece provides further reasons Proponents' reliance on *Crawford* fails.

reinforcement theory.^{23,24} In *Crawford*, by contrast, the state repeal at issue involved only the withdrawal of a particular *judicial* remedy—busing—that did not itself trigger heightened scrutiny. The federally optional state constitutional right to integrated education remained in place,²⁵ and minorities remained free to seek to have local school boards or the state legislature pass what they might consider beneficial legislation adopting busing.²⁶

All three of these cases are distinguishable from *Perry*, for all three involved laws that formally repealed rights for everyone, and in *Hunter* and *Seattle* the Court applied strict scrutiny without the usual triggers of a facial classification of persons or a finding of racially discriminatory purpose. As my colleague Stephen Rich observes, this is unusual in the Court's equal protection doctrine, which despite trenchant criticism gives great, often decisive weight to the presence or absence of formal equality.²⁷ Formal equality plainly should not suffice to make laws constitutional, and it did not in *Hunter* and *Seattle*. But when a law does repeal rights not across the board but for a targeted group, that should give courts pause and lead them to demand justification. Thus the language from *Crawford* should be understood as an attempt to limit the scope of the extraordinary doctrine of *Hunter* and *Seattle* where a law repealing some right does so for everyone, its purpose is not discriminatory, and it does not heighten the political obstacles facing minority groups seeking to advance their interests before policymaking bodies.

Rather than *Crawford*'s Proposition 1, California's Prop 8 instead resembles Colorado's state constitutional Amendment 2 held unconstitutional in *Romer v. Evans*, which enacted what Professor Rich has called a "partial classification." That is, the restructuring trilogy involved "impartial" classifications, denying people of all races protection from or certain remedies for race discrimination, rather than partial classifications that eliminate or

²³ See, e.g., Stephen M. Rich, *Inferred Classifications* (2012 m.s. on file with author).

²⁴ <DELETE THIS FOOTNOTE.>

²⁵ *Crawford*, 458 U.S. at 544 ("Moreover, the Proposition simply removes one means of achieving the state-created right to desegregated education. School districts retain the obligation to alleviate segregation regardless of cause. And the state courts still may order desegregation measures other than pupil school assignment or pupil transportation.").

²⁶ *Crawford*, 458 U.S. at 535-36 ("The school districts themselves ... remain free to adopt reassignment and busing plans to effectuate desegregation."); *id.* at 536 n.12 ("Moreover, the Proposition only limits state courts when enforcing the State Constitution. Thus, the Proposition would not bar state-court enforcement of state *statutes* requiring busing for desegregation or for any other purpose.").

²⁷ Stephen M. Rich, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments after Romer v. Evans*, 109 YALE L.J. 587, 615 & n.146 (1999). In his current work, Professor Rich argues that the Supreme Court "inferred" racial classifications in *Hunter* and *Seattle* under circumstances that it might otherwise have described as race-neutral because the challenged measures contained no express language designating members of particular racial groups for unequal treatment. See Rich, *supra* note 22. No such inference would be required to identify the class of lesbian and gay persons disadvantaged by Proposition 8.

encumber rights for a minority without equally doing the same to the majority. *Romer's* Amendment 2 was partial in this sense, stripping lesbian, gay, and bisexual *but not heterosexually identified* persons of sexual orientation antidiscrimination rights and the chance to pursue such rights.²⁸ Likewise, Prop 8 takes the right to marry away from lesbigay persons but not from the heterosexually identified.

The Proponents of Proposition 8 deny that the measure is partial, arguing that it takes away the constitutionally optional right to marry a same-sex partner from everyone, lesbigay and straight.²⁹ This is unpersuasive for reasons similar to those Justice O'Connor gave in *Lawrence v. Texas* for rejecting the claim that that Texas's "homosexual conduct" law did not discriminate against gay men and lesbians.³⁰ Besides the Proponents' arid formalism, the Supreme Court should also reject their *Crawford* argument since the Proponents are by hypothesis talking about state law rights not required by the federal Constitution. In *In re Marriage Cases* the California Supreme Court authoritatively held that state (constitutional) law extended a right to everyone to marry the person of their choice;³¹ Prop 8 repealed that right only for lesbigay persons. *Crawford's* language about the permissibility of state law pulling back "only in part" should be read, in line with the facts of the case (an initiative adopting a facially neutral restriction on state court power) as about repeals of some ("part") of the content of state law rights or remedies, not of state law pulling back with respect to some but not all those who hold a right.³² It is one thing for a state to decide that a right has not worked out well and seek to repeal that right in whole or in part; it is a very different and constitutionally problematic matter for a state to decide giving a right to some competent adults is not working well and so to take the right away from them and not others. There, meaningful equal protection scrutiny must apply, and *Crawford* should not be read to offer categorical insulation from judicial review merely because a classification results from a repeal.

²⁸ In particular, the state constitutional amendment barred any level of government from prohibiting sexual orientation discrimination *against lesbigay* persons, though laws protecting heterosexual persons from being discriminated against because they were heterosexual remained permissible. Accord Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 207 (1996).

²⁹ See, e.g., *Perry v. Brown*, Appellants' Petition for Rehearing En Banc, at 18 (9th Cir. Feb. 21, 2012) ("*Third*, Proposition 8 does not single out a "named class" for disparate treatment. Rather, it simply preserves the definition of marriage that has prevailed throughout human history.") (citation omitted).

³⁰ *Lawrence v. Texas*, 539 U.S. 558, 581, 583 (O'Connor, J., concurring in the judgment). As with too much constitutional sexual orientation discrimination litigation, Justice O'Connor did not address the circumstances of bisexual persons. Cf. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STANFORD L. REV. 353 (2000).

³¹ 183 P.3d 384, 419 (Cal. 2008) ("[T]he right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution."); *id.* at 423 ("[T]he right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice[.]").

³² Accord *id.* at 420-23 (arguing against building right holder identity into right definition); Cruz, *supra* note 6, at 2307 (same).

Nor should Proposition 8 be seen as a “mere repeal” of constitutionally optional state law rights, as a contrast with Hawai‘i law makes clear. After the Hawai‘i Supreme Court had held their marriage exclusion subject to strict scrutiny,³³ the voters amended the state constitution to provide that “[t]he legislature shall have the power to reserve marriage to opposite-sex couples.”³⁴ Prop 8, however, not only strips the California state constitutional right to marry from same-sex couples, but also precludes the legislature or the people from extending equal marriage rights via statute or the initiative statute process. This is unlike the situation in *Crawford*, where as mentioned above the Court notes that school boards and legislatures remained free to use bussing for racial integration. Hence Prop 8 is not a mere repeal within the meaning of *Crawford*.

Thus, just as in *Romer*, Prop 8 does not constitute an impartial, mere repeal of constitutionally optional state law rights, even if it does burden the political process for lesbian people. Hence, *Crawford*, its paean to legislative flexibility in the pursuit of equality (again, in the context of a law curtailing rights across the board), and the other political restructuring cases are inapplicable. Yet these basic distinctions may have been obscured by the focus in the Ninth Circuit opinion³⁵ and the plaintiffs' briefing emphasizing the fact that Prop 8 *took away* a right that same-sex couples had been enjoying under state law. True, the taking away is also a fact about Prop 8's background and operation. And the Court of Appeals, and the Supreme Court, could properly say, ‘we're only deciding that there is an equal protection violation on these facts without also saying that each one of these facts is *necessary* for unconstitutionality — *that* we can decide when the circumstances demand decision.’ Such temporizing is not improper, and a reflection of an understandable impulse toward judicial restraint, refusing to prejudge cases that might arise in states with different legal histories.

But the presence of a “taking away” is not a fact that distinguishes *Crawford*, and its ultimate constitutional significance has not been well established by the Supreme Court. The *facts* of equal protection precedents such as *U.S. Department of Agriculture v. Moreno*³⁶ – where Congress amended the food stamp program to exclude “hippies” – happen to show government action taking away rights that had been enjoyed, but their *reasoning*, as Proponents point out, focuses more on the legal exclusion than on drawing a distinction between *removal* of a right and *denial* of a right.³⁷ *Perhaps* that distinction matters constitutionally.³⁸ But a state that grants same-sex couples marital rights but

³³ Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

³⁴ HAW. CONST. art. I sec. 23 (added 1998).

³⁵ <<DELETE THIS FOOTNOTE.>>

³⁶ 413 U.S. 528 (1973).

³⁷ Perry v. Brown, Appellants' Petition for Rehearing En Banc, at 12 n. 2 (9th Cir. Feb. 21, 2012).

³⁸ My colleague Rebecca Brown has explained how Prop 8's ‘taking away’ rights from lesbian persons might be thought relevant to animus analysis in terms of superseded traditions and the plausibility of proffered state justifications. Rebecca L. Brown, *The Prop 8 Court Can Have it All: Justice, Precedent, Respect for Democracy, and an Appropriately*

officially relegates them to domestic partnerships, civil unions, or some other non-marriage marital status³⁹ denigrates lesbian people with no functional justification even if there had never been a time that it let same-sex couples marry, and so the Supreme Court might do well not to insist that the taking away of marriage rights that had been enjoyed was a feature of Prop 8 necessary to its unconstitutionality.

Instead, the advantage of articulating the combined sufficiency of the partiality of the repeal of the right to marry (taking it away from lesbian persons) and the entrenchment in the California Constitution of the exclusion of same-sex couples in a state that had previously allowed them to marry is that it would allow the Supreme Court to postpone definitively resolving less settled issues about “taking away,” issues that it need not decide to strike down Proposition 8. And *that* the Court should do to protect the foundational premise of, in Justice Kennedy’s words for the Court in *Romer*, “the law’s neutrality where the rights of persons are at stake.”⁴⁰

Limited Judicial Role, AMERICAN CONSTITUTION SOCIETY, 5, 10, available at http://www.acslaw.org/sites/default/files/Rebecca_Brown_Prop_8_Court.pdf (last visited November 11, 2012). A taking away could also help make sense of why the U.S. Supreme Court agreed with the California Supreme Court in a precursor to *Hunter* that Proposition 14 did not merely repeal antidiscrimination laws but authorized private racial discrimination. *Reitman v. Mulkey*, 387 U.S. 369, 376 (1964), though the Court emphasized the state constitutional entrenchment of rights to private discrimination, *id.* at 377. And it might be related to the notion of endowment effects. See, e.g., Jennifer Arlen, *Comment: The Future of Behavioral Economic Analysis of Law*, 51 Vand. L. Rev. 1765, 1771-72 (1998).

³⁹ Mary L. Bonauto & Evan Wolfson, *Advancing the Freedom to Marry in America*, 36:3 HUMAN RIGHTS 11 (Summer 2009), available online at http://www.americanbar.org/content/dam/aba/publishing/human_rights_magazine/irr_hr_hrsummer2009.authcheckdam.pdf or <http://freedomtomarry.ipower.com/pdfs/AdvFreed.pdf> (last visited Nov. 4, 2012).

⁴⁰ 517 U.S. 620, 623 (1996).