

HEINONLINE

Citation: 37 N.Y.U. Rev. L. & Soc. Change 235 2013

Provided by:

USC Law Library



Content downloaded/printed from [HeinOnline](#)

Tue Nov 15 19:12:57 2016

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

REPEALING RIGHTS: PROPOSITION 8, *PERRY*, AND *CRAWFORD* CONTEXTUALIZED

DAVID B. CRUZ[†]

I.

INTRODUCTION: IMPROPERLY INFLATING THE STAKES IN *PERRY*

The N.Y.U. Review of Law and Social Change has asked how the Supreme Court should decide *Hollingsworth v. Perry*.¹ In brief, the Court should hold that the decision in California to take the state constitutional right to marry the person of one's choice away from lesbian, gay, and bisexual persons but not heterosexually identified persons, and to entrench that targeted partial repeal in the state constitution, while still giving same-sex couples the state-controlled legal incidents of marriage through a parallel status ("domestic partnerships"), violated the Equal Protection Clause. In the *Perry* litigation, the plaintiffs argued broadly that the federal Constitution's fundamental right to marry and its guarantee of equal protection bar any state law limiting civil marriage to different-sex couples.² On appeal, Plaintiff-Intervenor San Francisco made a narrower argument,³ which the U.S. Court of Appeals for the Ninth Circuit embraced.⁴ The argument was that 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, is a denial of equal protection, regardless of whether states might ever constitutionally exclude same-sex couples from civil marriage. For the proponents of Prop 8 to win at the Supreme Court, they must defeat both the broad and the narrow arguments pressed by the various plaintiffs. 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

[†] © David B. Cruz 2012. B.A., B.S., University of California, Irvine; M.S., Stanford University; J.D., New York University School of Law; 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.

1. *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144), *granting cert. to Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *aff'g Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

2. *See generally* Plaintiffs' and Plaintiff-Intervenor's Trial Memorandum, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292), 2009 WL 4718815.

3. Plaintiff-Intervenor-Appellee City and County of San Francisco's Response Brief at 1-4, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696), 2010 WL 4310745 at *1-4.

4. *Perry v. Brown*, 671 F.3d at 1063-64, 1076, 1079-80, 1095.

restriction is,⁵ relying on an aggressive reading of the Supreme Court's decision in *Crawford v. Los Angeles Board of Education*.⁶ The 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 a 'constitutionally optional' right cannot violate equal protection; and that the only way to hold otherwise would be for the Supreme Court to hold that the Constitution guarantees same-sex couples' equal freedom to marry in every state. This argument, however, misreads *Crawford*, and the Supreme Court can, in fact, invalidate Prop 8 without having to decide the broader question of whether any state may ever limit civil marriage to different-sex couples.⁷ While the optimal role of the Supreme Court and the definitions of improper judicial activism or abdication are much contested, there is widespread agreement that there is value in the Supreme Court's not ruling on every possible issue, in leaving *some* things undecided sometimes.⁸ I address the symposium question of what the Court *should* do by arguing that it *may*, consistent with its longstanding equal protection jurisprudence, rule for the *Perry* plaintiffs on narrow grounds, *Crawford* notwithstanding, which might well be the best course for the Court to take at this time.

II.

THE PROP 8 PROPONENTS' MISREADING OF *CRAWFORD*

Arguing against a narrow framing of the issues in *Perry*, the 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 a 'constitutionally optional' right cannot violate equal protection; and that the only way to hold otherwise would be for the Supreme Court to hold that the Constitution guarantees same-sex couples' equal freedom to marry in every state.⁹ This argument misses the

5. See, e.g., Petition for a Writ of Certiorari at 4–5, *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (No. 12-144), 2012 WL 3109489 at *4–5 (equating rationality of Prop 8 to rationality of other states' denials of civil marriage to same-sex couples). See also Defendant-Intervenors' Notice of Motion and Motion for Summary Judgment, and Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 4, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (No. 09-CV-2292) (asserting that *Perry* plaintiffs' arguments "effectively sweep aside the marriage laws of 43 other states and the federal government as well").

6. 458 U.S. 527 (1982).

7. 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).

8. See generally Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (arguing that there are benefits to leaving some questions undecided, that leaving things undecided often makes sense when courts address complex issues about which people feel deeply, and that courts should leave questions undecided in cases where doing so would improve democratic processes).

9. See *Perry v. Brown*, 671 F.3d 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.").

mark in multiple ways, as both the Ninth Circuit and the plaintiffs' briefs observe.

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 Board of Education*,¹⁰ a case they scarcely mentioned before their brief replying to the plaintiffs in the Court of Appeals.¹¹ *Crawford* is one in 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.¹² The first case, *Hunter v. Erickson*,¹³ held unconstitutional an amendment to the Akron, Ohio, city charter that required majority voter approval for any ordinance protecting against discrimination in housing "on the basis of race, color, religion, national origin or ancestry."¹⁴ The second case, *Washington v. Seattle School District No. 1*,¹⁵ held that Washington state had violated the Equal Protection Clause when the voters enacted a statute by initiative to bar school boards from assigning students to schools other than their neighborhood schools for purposes of racial desegregation, while allowing such assignment for almost any other reason. On the same day as *Seattle*, however, the Court in *Crawford* upheld an amendment to the California Constitution adopted by the voters barring state courts from ordering busing for state constitutional

10. 458 U.S. 527 (1982).

11. 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 at 13 n.4, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292), 2009 WL 4718817; Defendant-Intervenors' Trial Memorandum (Including Citations) at 14 n.4, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (No. 09-CV-2292), 2010 WL 742343. In seeking to bar discovery of certain internal communications of the proponents and ProtectMarriage.com—Yes on 8, they cited *Crawford*, but merely for the claim that the purpose of a statewide initiative is to be discerned only from the initiative itself or perhaps public communications about it. See Defendant-Intervenors' Notice of Motion and Motion for Protective Order at 7, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (No. 09-CV-2292), 2009 WL 2980721. Proponent's opening brief in the Court of Appeals does not cite *Crawford* at all. Defendant-Intervenors-Appellant's Opening Brief, *Perry v. Brown*, 671 F.3d 1052 (No. 10-16696), 2010 WL 3762119.

12. See, e.g., *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607, 636 (6th Cir. 2011) (Smith Gibbons, J., 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 minority groups to achieve beneficial legislation.' Because these cases do not prohibit 'every attempt to address a racial issue,' it is important to consider the limiting bounds of this type of political restructuring challenge." (citations omitted)). *Reitman v. Mulkey*, 387 U.S. 369 (1967), although invalidating a state constitutional amendment that repealed and banned 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.

13. 393 U.S. 385 (1969).

14. *Id.* at 387.

15. 458 U.S. 457 (1982).

desegregation purposes, except under federal court order to remedy a violation of the Fourteenth Amendment.

In rejecting the plaintiffs' equal protection challenge, the *Crawford* majority wrote broadly. The *Crawford* Court, in language quoted by Prop 8's proponents, as well as by the American Civil Rights Union, Judicial Watch, and fifteen states in their amici briefs in support of granting certiorari, 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, most assuredly does not render the Proposition unconstitutional on its face.¹⁸

Proponents contend that, unless the California Supreme Court's recognition of same-sex marriage was required by the federal Constitution in the first place, Prop 8's withdrawal of that right was, as in *Crawford*, not constitutionally problematic.

III.

CRAWFORD CONTEXTUALIZED

Proponents misread the language from *Crawford*. It cannot be read to apply

16. *Crawford v. L.A. Bd. of Educ.*, 458 U.S. 527, 535 quoted in Appellants' Petition for Rehearing En Banc at 7, 20, *Perry v. Brown*, 671 F.3d 1052 (No. 10-16696), 2012 WL 541541 at *7, *20; Reply Brief for Petitioners at 4, *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Sept. 4, 2012) (No. 12-144), 2012 WL 3866469 at *4; Brief of Amicus Curiae, American Civil Rights Union in Support of Petitioners at 11, *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Aug. 31, 2012) (No. 12-144), 2012 WL 3864340 at *11 [hereinafter Brief of Amicus Curiae of American Civil Rights Union]; Brief of Indiana, Michigan, Virginia, Alaska, Arizona, Idaho & 9 Other States Amici Curiae in Support of the Petition at 11, *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (No. 12-144), 2012 WL 3864338 at *11; Brief of Amici Curiae of Judicial Watch, Inc. & Allied Educational Foundation in Support of Petitioners at 18, *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (No. 12-144), 2012 WL 3866468 at *18; Petition for a Writ of Certiorari, *supra* note 5, at 4.

17. *Crawford*, 458 U.S. at 538, quoted in Appellants' Petition for Rehearing En Banc, *supra* note 16, at 21; Brief of Amicus Curiae of American Civil Rights Union, *supra* note 16, at 12.

18. *Crawford*, 458 U.S. at 542, quoted in Appellants' Petition for Rehearing En Banc, *supra* note 16, at 21; Reply Brief for Petitioners, *supra* note 16, at 4-5; Brief of Amicus Curiae of American Civil Rights Union, *supra* note 16, at 12; Petition for a Writ of Certiorari, *supra* note 5, at 16-17.

in all situations regardless of context.¹⁹ As the *Perry* plaintiffs noted,²⁰ after making these broad statements about the permissibility of repeals of constitutionally optional rights, *Crawford* went on to address the legitimacy of California's reasons for limiting its courts' authority to impose busing²¹—an analysis that would be wholly beside the point if *Crawford* literally exempted repeals of constitutionally optional rights from all equal protection scrutiny. Moreover, the *Crawford* majority opinion itself contradicted the proponents' reading by 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.

Instead, 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 minorities' enjoying decreased access to the political process because the ballot measures challenged in those cases not only repealed certain equality rights, but also entrenched those repeals in the state constitutions. This entrenchment made it more difficult for the affected minorities to secure protection in the future if they managed to persuade a majority to change its views. Consequently, the Court applied strict scrutiny to those initiatives, using classic representation-reinforcement theory.²³ In *Crawford*, by contrast, the state

19. See *Perry v. Brown*, 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., Brief in Opposition at 22, *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (No. 12-144), 2012 WL 3683450 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 why Proponents' reliance on *Crawford* fails.

23. See, e.g., Stephen M. Rich, *Inferred Classifications* 7 n.29, 14, 16–17 (Nov. 23, 2012) (unpublished manuscript) (on file with the Review) (advancing this reading of *Hunter* and *Seattle*). The idea behind representation theory is that courts should be especially vigilant to protect minorities when majorities change political processes in ways that disadvantage minorities. It can be traced back to footnote four in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."), and was extensively developed by John Hart Ely in *Democracy and Distrust: A Theory of Judicial Review* (1980).

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,²⁴ and minorities remained free to seek busing legislation from local school boards or the state legislature.²⁵

Ordinarily, laws challenged under the Equal Protection Clause are subject to strict scrutiny only if they contain a suspect facial classification of persons or if the Court makes a finding of racially discriminatory purpose. Yet neither of those doctrinal triggers was present in *Hunter* or *Seattle*. As my colleague Stephen Rich observes, this is unusual in the Court's equal protection doctrine,²⁶ 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. The language from *Crawford* relied on by proponents of Prop 8 must be understood as an attempt to limit the scope of the extraordinary doctrine of *Hunter* and *Seattle* to situations where a law repealing some right satisfies three conditions: it does so for everyone, it has a purpose that is not discriminatory, and it does not heighten the political obstacles facing minority groups seeking to advance their interests before policymaking bodies.

IV.

PERRY DISTINGUISHED FROM CRAWFORD

Rather than California's Prop 1 in *Crawford*, California's Prop 8 resembles Colorado's state constitutional Amendment 2, which was held unconstitutional

24. *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.").

25. *Id.* 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.").

26. 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 23, at 12–13. No such inference would be required to identify the class of lesbian, gay, and bisexual persons disadvantaged by Prop 8.

27. See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1473 & n.10 (2004) (citing sources in support of conclusion that most legal scholars "would agree that American equal protection law has expressed anticlassification, rather than antisubordination, commitments as it has developed over the past half-century").

in *Romer v. Evans*.²⁸ Amendment 2 enacted what Professor Rich has called a “partial classification.” That is, unlike the “impartial” classifications involved in the restructuring trilogy, which denied people of all races protection from or certain remedies for race discrimination, partial classifications eliminate or encumber rights for a minority without doing the same for the majority. *Romer*’s Amendment 2 was partial in that it stripped lesbian, gay, and bisexual persons *but not heterosexually identified persons* of sexual orientation antidiscrimination rights, and the chance to pursue such rights.²⁹ Likewise, Prop 8 takes the right to marry the person of one’s choice away from lesbian, gay, and bisexual persons but not from heterosexually identified persons. The Proponents of Prop 8 deny that the measure is partial, arguing that it takes away the constitutionally optional right to marry a same-sex partner from everyone—lesbian, gay, bisexual or straight.³⁰ 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.³¹

There is another reason that the Supreme Court should reject proponents’ *Crawford* argument. 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 his or her choice;³² Prop 8 repealed that right only for lesbian, gay, and some bisexual persons. *Crawford*’s language about the permissibility of state laws that pull back “only in part”³³ should be read in line with the facts of the case, involving an initiative adopting a facially neutral restriction on state court power. Specifically, it should be interpreted as applying to repeals of some (“part”) of the *content* of state law rights or remedies, not to state law pulling back with respect to some but not all *persons* who hold a

28. 517 U.S. 620 (1996).

29. The state constitutional amendment barred any level of government from prohibiting sexual orientation discrimination *against lesbian, gay, and bisexual* persons, though laws protecting heterosexual persons from being discriminated against because they were heterosexual remained permissible. Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 207 (1996).

30. See, e.g., Appellants’ Petition for Rehearing En Banc, *supra* note 16, at 18 (“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)).

31. 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 STAN. L. REV. 353, 353 (2000) (“In this article, Professor Kenji Yoshino seeks to explain why the category of bisexuality has been erased in contemporary American political and legal discourse.”).

32. 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 . . .”).

33. See *supra* text accompanying note 18.

right.³⁴ 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 that extending 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.

Nor should Prop 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 held that state’s marriage exclusion is subject to strict scrutiny,³⁵ the voters amended the state constitution to provide that “[t]he legislature shall have the power to reserve marriage to opposite-sex couples.”³⁶ By leaving the legislature with the power to open marriage to same-sex couples, the Hawai’i constitutional amendment leaves same-sex couples able to seek recognition of rights from the legislature, much as the Supreme Court understood Prop 1 in *Crawford* to leave open the possibility of legislative success. 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 busing for racial integration. Hence Prop 8 is not a mere repeal within the meaning of *Crawford*.

Just as in *Romer*, Prop 8 does not constitute a mere, impartial repeal of constitutionally optional state law rights. Hence, *Crawford* is inapplicable to *Perry*. Yet the basic distinctions between Prop 8 and *Crawford*, and the similarities between Prop 8 and both *Hunter* and *Seattle*, may have been obscured by the focus in the Ninth Circuit opinion and in the plaintiffs’ briefing on the fact that Prop 8 *took away* a right that same-sex couples had been enjoying under state law. True, the taking away is a fact of Prop 8’s history. 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 the taking away is *necessary* for unconstitutionality—that we can decide when the circumstances demand decision.” Such temporizing is not improper; a refusal to prejudge cases that might arise in states with different legal histories may well be an understandable impulse toward judicial restraint. It is, however, important to recognize that Prop 8 goes beyond anything approved by the Court in *Crawford*.

34. See *In re Marriage Cases*, 183 P.3d at 420–23 (arguing against building right holder identity into right definition); Cruz, *supra* note 7, at 2307 (same).

35. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

36. HAW. CONST. art. I, § 23.

V.

CONCLUSION: DECIDING JUST ENOUGH

Although plausibly relevant, the presence of a “taking away” is not a fact that distinguishes the law upheld in *Crawford* from Prop 8, and the ultimate constitutional significance of taking away rights has not been well established by the Supreme Court. The *facts* of equal protection precedents such as *U.S. Department of Agriculture v. Moreno*³⁷—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 Prop 8’s proponents point out, focuses more on the legal exclusion than on drawing a distinction between *removal* of a right and *denial* of a right.³⁸ Perhaps that distinction matters constitutionally.³⁹ But a state that grants same-sex couples marital rights but officially relegates them to domestic partnerships, civil unions, or some other “non-marriage marital status”⁴⁰ denigrates lesbian, gay, and bisexual persons with no functional justification, even if there had never been a time that it let same-sex couples marry. The Supreme Court, therefore, might do well not to insist that the taking away of marriage rights that had been enjoyed was necessary to Prop 8’s unconstitutionality.

Instead, the Supreme Court should find that, in taking away the right to marry from same-sex couples, Prop 8 violates equal protection. Its decision should emphasize both the partiality of the repeal of the right to marry (taking it away from lesbian, gay, and some bisexual persons but not heterosexually identified persons) and the entrenchment in the California Constitution of the exclusion of same-sex couples in a state that had previously allowed us to marry. This would allow the Supreme Court to postpone definitively resolving less settled issues about “taking away,” which it need not decide to strike down Prop 8. Holding that Prop 8 violates the Equal Protection Clause is precisely what 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

37. 413 U.S. 528 (1973).

38. See Appellants’ Petition for Rehearing En Banc, *supra* note 16, at 12 n.2.

39. My colleague Rebecca Brown has explained how Prop 8’s ‘taking away’ rights from LGBT persons might be thought relevant to animus analysis. REBECCA L. BROWN, AM. CONSTITUTION SOC’Y, THE PROP 8 COURT CAN HAVE IT ALL: JUSTICE, PRECEDENT, RESPECT FOR DEMOCRACY, AND AN APPROPRIATELY LIMITED JUDICIAL ROLE 10 (2010), *available at* http://www.acslaw.org/sites/default/files/Rebecca_Brown_Prop_8_Court.pdf. 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 (1967). The Court, though, 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).

40. Mary L. Bonauto & Evan Wolfson, *Advancing the Freedom to Marry in America*, HUM. RTS., Summer 2009, at 11, 11.

are at stake.”⁴¹

41. 517 U.S. 620, 623 (1996).