

The constitutional case for gay marriage

[Jessica Lee](#) | Jun 17, 2010 | [Comments 3](#)

In November, 2008 I took a week off of work and went to San Francisco to fight Proposition 8. I was a volunteer in the No on 8 campaign and was assigned to City Hall holding the No on 8 banner. Dozens of gay and lesbian couples passed us as they were getting married at the last minute at City Hall before the threat that Prop 8 could pass that night. And it did.

That night, reflecting upon the tragic passage of Prop 8, I looked down at the No on 8 button that I was wearing, which read: "Unfair & Wrong," and thought, we need a better argument. We need an argument that is not vague and based on eliciting pity; we need an argument that is based on fundamental American and constitutional principles, including equal protection under the law. And we have been provided with that argument, eloquently, from a place that might surprise some gay people: the right.

Libertarians have adopted our cause. The Cato Institute, which is the pre-eminent libertarian think tank, has taken a strong position in favor of same-sex marriage based on constitutional principles. I have counted at least 40 articles on their web site, dating from 2004, that support marriage equality. Most notable is the white paper that Cato's chairman, Robert Levy, penned in January, 2010. It is entitled "The Moral and Constitutional Case for a Right to Gay Marriage."

Mr. Levy lays out his argument as thus:

"The primary purpose of government is to safeguard individual rights and prevent some persons from harming others. Heterosexuals should not be treated preferentially when the state carries out that role. And no one is harmed by the union of two consenting gay people.

"Regrettably, government has interceded, enacting more than 1,000 federal laws dealing mostly with taxes or transfer payments, and an untold number of state laws dealing with such questions as child custody, inheritance and property rights. Whenever government imposes obligations or dispenses benefits, it may not "deny to any person within its jurisdiction the equal protection of the laws." That provision is explicit in the 14th Amendment to the U.S. Constitution, applicable to the states, and implicit in the Fifth Amendment, applicable to the federal government."

I had the opportunity to interview Levy last week. Our conversation follows.

Washington Blade: What sparked your interest in gay marriage?

Robert Levy: My interest is in the Constitution, fighting for due process and equal protection under the law. The right to gay marriage is one among a long list of rights that I believe should be protected by the Constitution.

Blade: In the June 6, 2010 Washington Post op-ed you penned with John Podesta you note that Perry v. Schwarzenegger will likely end up at the Supreme Court. What do you think the outcome might be?

Levy: It is very difficult to predict. The conventional wisdom is that there are four conservatives and four liberals and that Justice Kennedy will be the swing vote. On this issue, the bad news is

that Kennedy more frequently sides with the conservatives than the liberals. The good news is that Kennedy wrote the opinion on *Lawrence v. Texas*, which overturned Texas' law against private and consensual gay sex.

Because the constitutional issues are compelling, I am cautiously optimistic about the outcome of the Supreme Court. But I am a realist and I recognize the fact that the conservatives on the court are reluctant to overturn the outcome of a popular vote.

Blade: Do you believe there is a constitutional right to gay marriage?

Levy: Yes, I do. Same-sex marriage is a consensual private act causing no harm to innocent non-con-consenting parties. The right to marry is protected by the 14th Amendment. Although the government is not required to dispense benefits based on marital status, it has chosen to do so. Once government gets involved, it may not extend benefits to heterosexual couples that it denies gay couples. Under the 14th Amendment, states must justify discrimination against a targeted class of citizens. They have not done so.

Blade: Conservatives often decry "judicial activism." Why do you think the courts should rule on same-sex marriage versus the legislative branch?

Levy: Majoritarian outcomes cannot trump the Constitution. Legislators can pass statutes but if they lead to outcomes that do not comply with the Constitution then it is the appropriate role of the courts to overturn them. Gay marriage is one of those instances.

Blade: Some gays have criticized *Perry v. Schwarzenegger* because they are worried it is too soon to go to SCOTUS. What is your view?

Levy: Timing is an important issue and there are always legitimate tactical concerns. But there are at least three good reasons to proceed now. First, lawyers Boies and Olson are superstars and this is a unique opportunity for the plaintiffs to get the best representation possible in the Supreme Court. Second, it is inevitable that someone will file suit against Prop 8 and the underlying facts might not be as favorable as they are in the *Perry* case. Third, if *Perry* fails at the Supreme Court, the worst that will happen is that the status quo will be maintained, meaning that states will still be free to allow gay marriage.

Levy lays out a brilliant and committed case for marriage equality. I am glad that left-leaning John Podesta has joined our cause. But Obama and Biden are still anti-marriage equality. Obama, who was quoted in the *New York Times* in the week before the Prop 8 vote that he was against same-sex marriage as it violated his Christian principles, needs to get on board.

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