

# Marriage for all; It's up to the courts to defeat Prop. 8

**BYLINE:** John D. Podesta and Robert A. Levy

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Nearly a century after the 14th Amendment was ratified in 1868, the Supreme Court unanimously affirmed that "marriage is one of the 'basic civil rights of man.'" That 1967 case, *Loving v. Virginia*, ended bans on interracial marriage in the 16 states that still had such laws.

Now, 43 years after *Loving*, the courts are once again grappling with denial of equal marriage rights -- this time to gay couples. We believe that a society respectful of individual liberty must end this unequal treatment under the law.

Toward that goal, we have agreed to co-chair the advisory board of the American Foundation for Equal Rights. The foundation helped launch the case of *Perry v. Schwarzenegger*, which is currently before a federal district court in California but is likely to be appealed all the way to the U.S. Supreme Court.

The *Perry* case -- scheduled for closing arguments next Wednesday -- was brought by two couples whose relationships are marked by the sort of love, commitment and respect that leads naturally to marriage. Kris Perry and Sandy Stier and their four children, and Paul Katami and Jeff Zarrillo, ask for no more, and deserve no less, than the equal rights accorded to every other American family. But they are blocked from obtaining marriage licenses under California's Proposition 8.

The plaintiffs' legal team, headed by former *Bush v. Gore* antagonists Theodore Olson and David Boies, has demonstrated that no good reason exists for the denial of fundamental civil rights under Proposition 8. We support that position.

Although we serve, respectively, as president of a progressive and chairman of a libertarian think tank, we are not joining the foundation's advisory board to present a "bipartisan" front. Rather, we have come together in a nonpartisan fashion because the principle of equality before the law transcends the left-right divide and cuts to the core of our nation's character. This is not about politics; it's about an indispensable right vested in all Americans.

Over more than two centuries, minorities in America have gradually experienced greater freedom and been subjected to fewer discriminatory laws. But that process unfolded with great difficulty.

As the country evolved, the meaning of one small word -- "all" -- has evolved as well. Our nation's Founders reaffirmed in the Declaration of Independence the self-evident truth that "all Men are created equal," and our Pledge of Allegiance concludes with the simple and definitive words "liberty and justice for all." Still, we have struggled mightily since our independence, often through our courts, to ensure that liberty and justice is truly available to all Americans.

Thanks to the genius of our Framers, who separated power among three branches of government, our courts have been able to take the lead -- standing up to enforce equal protection, as demanded by the Constitution -- even when the executive and legislative branches, and often the public as well, were unwilling to confront wrongful discrimination.

Indeed, the Supreme Court issued its Loving ruling in the face of widespread opposition. A Gallup poll taken within months of the decision found that 74 percent of the American public "disapproved" of interracial marriage. Nevertheless, the court vindicated those constitutional rights to which every American is entitled. As we look back, the Loving decision is hailed as an example of the best in American jurisprudence.

In terms of public opinion, courts addressing marriage equality have less of a hill to climb. Opposition to same-sex marriage pales next to the intense hostility the court faced before its ruling in Loving. A February Post poll showed 47 percent support for same-sex marriage (up from 37 percent support in the same poll in 2003). The Post poll also showed that the younger an individual is, the more likely he or she is to favor marriage equality, regardless of political persuasion. Among individuals ages 18 to 29, an estimated 65 percent support marriage equality.

Our history will soon be written by young people who are seizing the reins from the baby boomers. They seem prepared to reject laws that serve no purpose other than to deny two committed and loving individuals the right to join in a mutually reinforcing marital relationship.

The decision in Perry depends, of course, on values far more permanent and important than opinion polls. No less than the constitutional rights of millions of Americans are at stake. But the public appears to be catching up with the Constitution. Just a little more leadership from the courts would be the perfect prescription for a free society.