



Supreme Court of the United States

State of California v. Joseph Fraser

By Christopher Ballesteros

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 54-4789

STATE OF CALIFORNIA

Defendant-Appellant

v.

JOSEPH FRASER AND STEVEN BLAZE

Plaintiffs-Appellees

Prior History: Appeal from the US District Court for the Northern District of California

Disposition: Affirmed

Opinion By: GARCIA, Circuit Judge

Dissent By: LAB, Circuit Judge

BACKGROUND

Joseph Fraser and Steven Blaze are a gay couple residing in the suburbs of Sacramento, California. They have been in a committed relationship for more than ten years, and were hoping to legally marry each other after the California Supreme Court struck down the state ban on gay marriage in 2008. However, they were unable to do so after California voters narrowly approved Proposition 8, a state constitutional amendment to ban same-sex marriage, on Election Day later that year.

Since the California Supreme Court has held that Proposition 8 does not violate any state laws, Fraser and Blaze filed a lawsuit in Federal District Court, seeking to annul Proposition 8 based on the argument that it violates federal laws—specifically, the Fourteenth Amendment to the US Constitution. The United States District Court of the Northern District of Cali-

California refused to grant such an injunction, holding that Proposition 8 does not violate the Fourteenth Amendment. The petitioners then appealed their case to the Ninth Circuit Court of Appeals, where a three-judge panel reversed the District Court ruling by a vote of 2-1. The State of California asked the Ninth Circuit to rehear the case *en banc*— that is, using the entire circuit court rather than a three judge panel. The decision of the *en banc* court is recorded herein.

California's Proposition 8

After a ruling by the California Supreme Court that legalized gay marriage in the Golden State, conservative political groups began to rally support for a state constitutional amendment banning same-sex marriage. Groups for and against the resulting proposal, known as Proposition 8, spent over eighty million dollars during the campaign season, making it the most expensive state ballot measure ever. On November 4, 2008, the measure passed by a narrow margin and took effect the following day. Proposition Eight was immediately challenged in state court on both substantive and procedural grounds, although those challenges were quickly denied.

Federalism and the Supremacy Clause

Unlike most western European nations, the United States operates using a system of government known as "federalism." This means that the US has two different primary levels of government, the national (or federal) government and the state governments. In general, this means that the federal and state governments have different roles and responsibilities. For example, the federal government is responsible for things like monetary policy and foreign affairs, while the states retain power over more localized issues, such as building codes and public works laws.

The principle of federalism also extends to the judiciary. In the US, there are two separate court systems, state courts and federal courts. Each state has its own state court system—which includes a state-level supreme court—to handle cases that bring up issues of state law, such as criminal trials or lawsuits relating to state legislation. However, there is also a national, federal court system that deals with issues of federal law and the US Constitution.

These two court systems, though, are not completely independent. The US Constitution contains a provision known as the

supremacy clause, which states that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land." This means that if a state law or provision in a state constitution—such as Proposition 8—is found to be in violation of any federal law, the state law is invalid. Consequently, even though state courts have ruled that Proposition 8 is in accordance with California state law, if a *federal* court rules that it violates federal law, it will be annulled.

The Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution was originally intended to protect the rights of individuals from state governments, whereas the original Bill of Rights only restricted the federal government's power. The Fourteenth Amendment was passed shortly after the Union victory in the Civil War, in order to ensure the rights of African-American citizens in the former Confederacy. The Supreme Court has come to recognize two important clauses in the 14th Amendment—the Due Process Clause and the Equal Protection Clause. These two clauses guarantee citizens various fundamental rights and an equal protection under the law, respectively. The relevant text of the Fourteenth Amendment reads as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Not surprisingly, given the vague language of the amendment, what exactly violates the Equal Protection and Due Process clauses has become a matter of considerable controversy. The Supreme Court has devised three different ways of analyzing cases such as this one: a "Rational-basis test", "Intermediate Scrutiny", and "Strict Scrutiny". These ideas are rather complex and somewhat nuanced. The differing levels of scrutiny essentially serve to align the government's burden to prove an "interest" in the case with the type of alleged discrimination at issue.

Strict scrutiny applies when a law categorizes based on race, nation of origin, or curtails a fundamental right. This

level requires that the government demonstrate that the law is "narrowly tailored" in the interests of serving a "compelling government interest." Intermediate scrutiny is used when a law discriminates or categorizes on the basis of gender, and requires the government to prove that the law is "substantially related" to an "important government interest." The least restrictive form of scrutiny, the rational basis test, is used when the law categorizes on any other basis—income level, for example—and states that the law in question is constitutional so long as the statute is "reasonably related" to a "legitimate government interest".

As delegates, you will be assuming the role of lawyers and therefore have the responsibility for arguing which standard should be applied to this case. The higher the level of scrutiny that you can convince the Court to adopt, the more difficult it will be for the government to defend Proposition 8 as constitutional. The lower level of scrutiny involved, the more difficult it will be for the appellants to win a ruling that declares the statute to be unconstitutional.

United States v. Carolene Products Company

On April 25, 1938, the United States Supreme Court Ruled by a 5-4 Majority that a federal law prohibiting "filled" milk (milk combined with other compounds) from being transported across state lines. Although this ruling may seem relatively innocuous compared to other cases, it is actually quite significant. The defendant, Carolene Products Company, alleged that the law was unconstitutional on the grounds that it violated the Due Process Clause of the Constitution. The court decided that since the provision did not discriminate against a "discrete and insular minority", that the statute would be presumed constitutional, in essence creating what would later be known as rational basis review.

The most important part of this ruling is the so-called "Footnote Four", which reads as follows:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth...

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.

Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious ... or national ... or racial minorities ...: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"

In essence, in order for a provision to be challenged under a higher level of scrutiny (intermediate or strict as opposed to rational), it must meet one of the following conditions: 1) it appears to violate a provision of the constitution (known commonly as a facial challenge), 2) it distorts or manipulates the democratic process, and 3) it discriminates against minorities, especially those who cannot realistically seek redress through the traditional political process. If a prohibition on gay marriage, specifically Proposition Eight, meets any of these criteria, then it can be considered under an elevated standard of scrutiny—thereby making it easier for the Court to find the measure unconstitutional.

Loving v. Virginia

Requiring the court to evaluate the gay marriage ban at a higher level of scrutiny may involve proving that gay marriage is a fundamental right. If a statute violates a fundamental right, then it is automatically propelled beyond the first two levels of scrutiny and subjected to the most stringent constitutional test (strict scrutiny). The Supreme Court has not made an absolute distinction regarding whether gay marriage is a fundamental right, meaning that as lawyers, you have the responsibility of using existing decisions to support your position.

Loving v. Virginia was a 1967 Supreme Court decision that ruled that race-based restrictions on marriage were unconstitutional. This was a reversal of a previous decision (*Pace v. Alabama*, decided in 1883) that had held such restrictions to be valid. *Loving* was a unanimous ruling, overturning a decision of

the Virginia Supreme Court that had reviewed the same statute and reached the opposite conclusion. For the purposes of this case, the most important parts of *Loving* were the application of the Fourteenth Amendment and the Court's conclusion that marriage is a fundamental right. The court wrote as follows:

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival.... To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

The question to consider in this case is whether the precedent of *Loving* can be applied to gay marriage. The Supreme Court heard a similar case, *Baker v. Nelson* soon after *Loving*, and found that traditional marriage laws did not violate the Constitution, although the decision did not preclude the use of *Loving* as a precedent in future cases. While the Supreme Court has not made a clear determination on the extent to which *Loving* is applicable in gay marriage cases, the New York State Court of Appeals decided in *Hernandez v. Robles*—a decision that, of course, does not serve as binding precedent on the Supreme Court—that *Loving* could not be extended beyond the context of racial restrictions on marriage, stating in part that:

Plaintiff's reliance on *Loving v. Virginia* for the proposition that the US Supreme Court has established a fundamental 'right to marry the spouse of one's choice' outside the male/female construct is misplaced...Although the Court characterized the right to marry as a 'choice', it did not articulate the broad 'right to marry the spouse of one's choice' suggested by plaintiffs here...Far from recognizing a right to marry extending beyond the one woman and one man union, it is evident from the *Loving* decision that the

Supreme Court viewed marriage as fundamental precisely because of its relationship to human procreation.

Baker v. Nelson

Baker v. Nelson was a Minnesota Supreme Court ruling which held that the state's legislative ban on same-sex marriage did not violate the US or Minnesota State Constitution. It is notable because the ruling denied the plaintiff's argument that *Loving v. Virginia* could be used as a precedent for overturning traditional marriage laws. Of course, decisions from a state's Supreme Court cannot be used as precedent for the US Supreme Court, simply because they are on a lower rung of judicial authority. The most important part of *Baker* is what happened when the plaintiffs attempted to appeal their case to the United States Supreme Court in 1972. The Supreme Court refused to hear the case, dismissing it for "lack of a substantial federal question." In other words, until the Supreme Court indicates otherwise, it does not believe that the Court has the jurisdiction to reverse a state law on marriage on Equal Protection Grounds.

Of course, since the case you will be arguing is being heard in front of the Supreme Court, you can assume that the Justices have decided that they do have the authority and jurisdiction. If you are arguing for the plaintiffs, you can argue that the decision to hear the case allows you to use *Loving* as a precedent in your case, while if you are arguing for the State, you can argue that this case should never have been brought before the high court in the first place.

Lawrence v. Texas

Lawrence v. Texas was a landmark Supreme Court case which, in 2003, struck down a long-standing Texas prohibition on sodomy. Like *Loving*, *Lawrence v. Texas* was a direct reversal of a previous Supreme Court decision that had upheld a similar statute in Georgia. In *Lawrence*, the Court ruled that the anti-sodomy law was unconstitutional by a 6-3 vote, citing the rights to privacy and liberty guaranteed by the Due Process clause of the Fourteenth Amendment. This ruling is especially important because it deals with a law which attempts to enforce "morality" upon the gay community. One of the most compelling arguments in the opinion of the court was essentially that morality in itself does not provide a compelling state interest. In other words, for the purposes of this case, if Proposition 8 is authored

solely for the sake of projecting religious or moral convictions, it will not survive strict or intermediate scrutiny.

The Equal Protection Clause and Suspect Classes

As the Supreme Court noted in *Carolene Products*, the violation of a fundamental right, such as the right to marriage, is not the only way a law might trigger strict scrutiny. Higher levels of scrutiny may be triggered by laws that discriminate against "discrete and insular minorities." This, of course, begs the question: what exactly constitutes a "discrete and insular" minority—or a "suspect class," as the Supreme Court has termed it? *Carolene Products* seems to indicate that such minority groups must be widely discriminated against and unable to stop that discrimination through the normal democratic process. The Court has found that very few minority groups qualify as suspect classes. Only classifications based on race, religion, or national origin trigger strict scrutiny, and only classifications based on gender trigger intermediate scrutiny.

Additionally, using racial minorities as the paradigmatic model, legal scholars have compiled a list of qualities that tend to define a group as a discrete and insular minority. These qualifications include current and historical prejudice, political powerlessness, immutability of the minority trait, and a social stigma that accompanies being a member of the minority group. Of course, just because a minority group meets some—or even all—of these qualifications does not make them a suspect class within the meaning of *Carolene Products*. For example, people with mental retardation likely meet all the qualities of a discrete and insular minority, yet the Supreme Court has found that laws which discriminate against them do not trigger any form of heightened judicial scrutiny. At the same time, the Court held that gender classifications are subject to intermediate scrutiny, even though women are a numerical majority in the United States.

Currently, sexual orientation is not a suspect class, and laws that discriminate against homosexuals are subject only to rational basis review. That said, the Supreme Court, by its very nature, often sets precedents and creates new interpretations of the law and the constitution. It is up to attorneys debating the constitutionality of Proposition 8 to argue why sexual orientation should or should not be a suspect classification.

Practical Considerations

There are two principal schools of thought on the United States Supreme Court - those who view the Constitution as a "living, breathing" document, and those who defer only to the "original understanding" of the Constitution. Generally speaking, more liberal justices fall into the former category, and more conservative justices tend towards the latter.

Most of the justices on the current Supreme Court at least acknowledge the idea that Constitution's meaning is not fixed. Consequently, you as lawyers will have to take the political atmosphere of the United States and other practical considerations into account when presenting your arguments. A Supreme Court ruling legalizing same sex marriage would have widespread consequences for the United States, most notably the immediate invalidation of all state laws and constitutional amendments banning same sex marriage. This would likely cause considerable political outcry from the slim majority of Americans who oppose gay marriage, especially from the religious right. The expansion of the meaning of the Fourteenth Amendment would also open the door to a number of other challenges, particularly laws ostensibly based on morality or other questionable "state interests".

OPINIONS OF THE NINTH CIRCUIT

GARCIA, Circuit Judge, Joined by CABALLERO, CALVENTES, WESSELL, SINGH, HERNDON, HOSODA, and ALEXANDER, Circuit Judges

The case at hand questions whether the Fourteenth Amendment can be applied to invalidate "Proposition 8", a constitutional amendment that bans same-sex marriage in the state of California.

Respondents Fraser and Blaze, a gay couple residing in California, were planning to wed in January 2009. This was made impossible by the November 2008 passage of Proposition 8, which countered a California Supreme Court ruling legalizing gay marriage and definitively banned same-sex unions within the Golden State. Respondent Fraser, along with Respondent Blaze, filed a motion in the District Court of Northern California seeking to invalidate Proposition 8 unconstitutional on Equal Protection grounds. The District Court declined to provide an injunction to prevent the implementation of Proposition 8, and ultimately ruled that Proposition Eight did not violate the US Constitution. Respondents then appealed the decision to the Ninth Circuit Court of Appeals, where the case was heard in front of a

three judge panel. By a 2-1 decision, the panel declared that Proposition 8 was in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment, reversing the lower court's ruling. The State then petitioned for and received an *en banc* hearing in front of the full Ninth Circuit Court of Appeals.

The fundamental questions of this case can be broken down into a number of intermediate considerations:

1. Can we apply the Fourteenth Amendment to Proposition 8?
2. What level of scrutiny should be applied to this case?
3. Does Proposition 8 pass the assigned level of scrutiny?

First, we examine the applicability of the Equal Protection Clause of the Fourteenth Amendment to California's Proposition 8. We unequivocally find that the statute can be contested on these grounds, although this does not immediately resolve the question of Proposition 8's constitutionality. In order to appropriately assess Proposition 8, we must determine which level of scrutiny to apply to the case.

In *Carolene Products Co. v. United States*, the court established a framework for determining what level of scrutiny a law should be subjected to. By default, we examine laws under the rational basis test. However, if respondents can prove that they are a part of a "suspect class"—in other words one that is consistently discriminated against, represents a minority of the country, and does not have the opportunity to redress its concerns via the political process—Supreme Court precedent compels us to examine Proposition 8 under more stringent judicial scrutiny.

In this case, we find that since gay Americans constitute less than ten percent of the population, they meet the requirement of being a minority. We also find that a preponderance of anti-gay marriage and anti-gay rights laws in various states provide sufficient justification that gay Americans cannot address their concerns via the electoral process. These same laws, coupled with historically well-documented examples of discrimination against gays, are sufficient in this court's eyes to elevate the review of Proposition 8 to the level of strict scrutiny.

Yet the Equal Protection Clause is not the only constitutional provision that requires us to examine Proposition 8 under strict scrutiny. In *Loving v. Virginia*, the Supreme Court held that anti-miscegenation laws ought to be subject to strict scrutiny under the Fourteenth Amendment. The Court went on to describe the right to marry as one of the fundamental rights of a citizen guaranteed in the Due Process Clause of the Fourteenth

Amendment—a right that cannot be denied due to racism or concerns over morality. In the past, courts have been hesitant to apply *Loving v. Virginia* outside the context of race-based restrictions on marriages (see *Hernandez v. Robles*), but this court feels that historical context is critical to understanding the intent of the *Loving* Court.

At the time of *Loving*, America was in the midst of a struggle for civil rights—African Americans constituted a minority of the population, could not redress their grievances through the political process, and were consistently discriminated against. In the midst of this turmoil, the Court decided that marriage was a fundamental right and that citizens could not be denied fundamental rights because of majoritarian impulses. Today, we find ourselves in an analogous situation, with gay Americans replacing racial minorities as the affected class. While the state may find that *Baker v. Nelson* eliminated the right of the respondents to challenge the same-sex marriage ban in federal or state court, we summarily disagree with that stance. The Constitution has always been and always will be a “living, breathing document,” and enough has changed in the last three and a half decades to make this antiquated ruling entirely obsolete.

Accordingly, in keeping with the spirit of the *Loving* decision and accounting for the modern political atmosphere, we find that Proposition 8 must be examined under strict scrutiny. We then consider whether Proposition 8 is narrowly tailored to serve a compelling government interest. Pursuant to *Lawrence v. Texas*, concerns over morality alone are not sufficient to deny rights to a specific group. We hold that the state did not demonstrate any compelling government interests unrelated to an ambiguous sense of morality. In short, this court believes that the fundamental right of marriage as described by *Loving v. Virginia* cannot be denied to a suspect class of Americans over moral concerns alone. As such, we hold Proposition 8 to be null and void under the Equal Protection Clause of the Fourteenth Amendment.

We uphold the judgment of the Panel of the Ninth Circuit Court

So Ordered.

LAB, Circuit Judge, Joined by ANCHETA, ISAACS, HANLON, LEE, AG-SALUD, and DUVALL, Circuit Judges

I am both disappointed and shocked by the majority’s decision in this case. They have acted recklessly, without regard

for precedent or ramification, and against the Constitution and the will of the American public. I do not disagree with the majority's invocation of the Fourteenth Amendment as a measuring stick for Proposition 8. I and many of my colleagues do, however, believe that the majority has made a number of logical errors throughout its opinion.

We first disagree with the level of scrutiny applied to this case. The majority's decision to invoke the highest level of constitutional scrutiny is a wholly unjustified departure from legal precedent. Throughout the history of the Supreme Court, the only groups to trigger strict scrutiny have been racial and ethnic minorities. This is because they fit the three conditions mandated by *Carolene Products Co. v. United States*—they were a numerical minority, were consistently discriminated against, and lacked an avenue to improve their situation otherwise. Here, I must emphasize that these three requirements are all necessary to elevate a group to the level of strict scrutiny.

Gay Americans are indeed a minority in this country; regardless of the studies cited or figures utilized, their percentage of the population is substantially less than the requisite one-half. I cannot entirely dismiss the second contention of the majority, pertaining to the allegedly consistent history of discrimination against gay Americans, although I do take issue with the analogy drawn between the Civil Rights Movement and the Gay Rights Movement, as well as the preposterous argument that gays face the same historical discrimination that racial minorities have in this country. I strongly disagree with the majority's belief that gay Americans cannot address their concerns through the traditional political process. An examination of statutes passed in a number of states reveals that there is an increasingly powerful movement to grant gay Americans equal and even expanded rights. Even during the political battle over Proposition 8, the considerable power of the pro-gay rights lobby became apparent despite their eventual loss. The opposition to Proposition 8 gathered greater numbers during street rallies, advertised more heavily, and raised more money than groups in support of the measure. Additionally, there has never been an attempt to deny gay Americans the right to vote or participate in the political process (as was the case with racial minorities), nor any endeavor to deny them the protections of the Bill of Rights. As has been the case since *Carolene Products* was decided, two out of three conditions is not sufficient to elevate the review of this law above the lowest level.

Additionally, I consider the majority's assumption that marriage is a fundamental right in this context. Although *Loving v. Virginia* does indeed characterize marriage as a basic civil right, it makes no mention of extending this interpretation to any context beyond the male-female union. The Supreme Court has never allowed an appellant to cite *Loving* as a method of expanding the right to marry, whether to same-sex couples, incestuous relationships, or polygamous unions. There is absolutely no justification or legal precedent for moving *Loving* beyond the context of anti-miscegenation laws.

We also reject the suggestion offered at the District Court level that Proposition 8 should be reviewed at the intermediate level, the method reserved for discrimination on the basis of gender. The respondents in this case suggested that since a man cannot marry another man because of his gender, the intermediate level of scrutiny should be utilized. We reject this argument, instead advancing the theory that since both men cannot marry men and women cannot marry women, there is no difference between the genders, and therefore no reason to invoke the intermediate level of scrutiny.

This leaves only the rational basis test, requiring the state of California to only prove a reasonable relation between Proposition 8 and a legitimate government interest. The respondents argued that there was no basis for denying gays the right to marry aside from so-called moral concerns. I find this argument to be fallacious - as noted in *Loving*, the basis for deeming marriage a "basic civil right" is the procreative power of the male-female union. I agree with the argument made by the state; the preservation of traditional marriage for the sake of encouraging procreation is most certainly a legitimate government interest, and Proposition 8 has an almost direct link to addressing that concern. In short, Proposition 8 should be upheld as constitutional because it passes the rational basis test.

We would additionally like to note that the majority has failed to consider the ramifications of its decision - the precedent set by this case calls into question dozens of national and state prohibitions against certain types of behavior. This court and others around the nation will undoubtedly witness an explosion in lawsuits challenging statutes ranging from pedophilia and incest to polygamy and bestiality. The extreme over-extension of the Equal Protection Clause will also make it much more difficult for the government and private entities to maintain generally accepted forms of "discrimination", such as the

prohibition against women serving in combat roles and other similar laws.

I would like to record my belief that, in accordance with *Baker v. Nelson*, this case should have been summarily dismissed for want of jurisdiction. State and federal courts throughout the country have been bound by the precedent of *Baker* for more than thirty five years, and the majority's theory that "times have changed" is simply not good enough to reverse a ruling of the Supreme Court of the United States.

I find that the majority's decision is consistently characterized by an overreaching and incorrect deviation from precedent and current law. I do not believe that is or should be the purpose of this court and its jurisprudence.

Therefore, I respectfully **dissent**