SAME SEX MARRIAGE

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Presented to the Cleveland Philosophical Club on February 22, 2011

On August 4, 2010, a Federal District Court in San Francisco held that California's Proposition 8 was unconstitutional as being inconsistent with the U.S. FEDERAL Constitution. That case, *Perry v. Schwarzenegger*[1], which we will refer to simply as *Perry*, the first named of the four plaintiffs – two wantna-be same sex marriage couples. That decision, by a single Federal District Court Judge[2], ordered that California must issue marriage licenses to all persons without regard to gender. That decision returned the law in California to what it was prior to the adoption by California voters of Proposition 8 and is part of a remarkably complex series of legal procedures and political actions some of which we will be discussing tonight.

Prior to 2000 California, like every other state, issued marriage licenses only to couples consisting of a man and a woman – as the state statutes defined marriage. In 2000, the voters adopted Proposition 22, a version of what is called a "Defense of Marriage Act," commonly referred to as "DOMA." In May of 2008 the California Supreme Court held that Proposition 22 was unconstitutional as being in violation of the equal protection clause of the California constitution. The holding of this case, *In re Marriage Cases*, [3]was short lived, for in November of 2008, the voters of California – encouraged by considerable financial and other support from outside foes of same sex marriage – voted in Proposition 8. Unlike Proposition 22 which the California Supreme Court had held inconsistent with the California constitution, Proposition 8 amended the California constitution itself, and had the effect of returning the law to what it was prior to 2008. During the brief period when same sex marriage was legal in California approximately 18,000 same sex marriage licenses were issued in California.

In 2003, in a case called *Goodridge v. Department of Public Health*[4], the Massachusetts Supreme Judicial Court held that the Massachusetts Constitution "forbids the creation of second-class citizens" and that under the Massachusetts Constitution Massachusetts "may not deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry." [5]

In 1996 Congress passed a statute called the Defense of Marriage Act or DOMA[6] which states, in part:

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[1] *Perry vs. Schwarzenegger*, 704 F. Supp. 2d 921 (2010)
[2] The Judge, Vaughn Walker, announced in September that he would be leaving the court this February to enter private practice. Law.Com 9/30/10
[3] 43 Cal. 4th 757 (2008)
[4] 440 Mass. 309, 798 NE 2d 941 (2003)
[5] Same sex partners in Massachusetts previously had available a legally sanctioned domestic partnership relationship with all of the attributes of marriage other than the label.
[6] Pub. L. 104-199

"[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship,"[7]

and:

"[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[8]

What's happening here? What has happened here so far?[9] What is going to happen next?

This talk arose out of a series of conversations with Marjorie. We usually agree on most things, but I sensed that while we were both sympathetic with those wanting to marry, we had some disagreements about how this might come about and whether it would happen very soon and how compelling were the legal and moral arguments for same sex marriage. As we continued our discussions over the past few months, our views on the topic largely came together. This paper truly became a joint project, and although I will be the presenter we are really co-authors. Perhaps Marjorie will want to participate in the question and answer part of the evening.

Several years ago I presented a paper entitled "Marriage as Contract". As I pointed out in that paper, marriage is at least three separate, although sometimes related things: it is a legal status granted by the state, although the person officiating at the wedding might be a member of the clergy and not a public official; it is a contract between the marriage partners, sometimes an express contract as in a prenuptial contract between two person who had previously been married to others; and it is often a religious status, granted by a religious authority without any involvement of the state.

Marriage is also a social status, as in the case of a couple who have lived together and have held themselves out as married such that the community treats the couple as if they were legally married. Not so long ago and still in some states such a couple would be automatically become legally married by virtue of having held themselves out for an extended period as being married.

[7] 28 USCA 1738C
[8] 1 USCA 7
[9] Same sex marriages are currently recognized in Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire, none by virtue of a Federal Court order.

I might add that marriage is also, in many cases, a symbol of love and of emotional commitment. It seems clear that this last dimension of marriage is what many homosexuals wanting to marry are seeking, as much as or more so than the legal status.[10]

Couples can be married in one or more or all of these dimensions. For instance, with respect to being viewed as a "married couple" by the community in which they live, some same sex couples are already married. It is important to our discussion here to keep in mind that "marriage" means different things as viewed from a legal perspective, as viewed from a social perspective or as viewed from a religious perspective.

For example, if a man is already married and marries again the second marriage is void and he has committed a crime. In that case, the man might be able to be married in the religious sense – as in the case of parties who are part of one of the break-off Mormon sects – but legally having entered into a second marriage he will go to jail and not pass go. That is an example of someone who is religiously married but not legally married. So too, if a legally divorced Catholic were to legally marry someone else, he or she would be legally married but not married in the eyes of the Catholic Church. In the present paper we will talk only about the law, the moral and religious arguments, and maybe some of the complications created by same sex marriage, especially when they are recognized only by some of the states.

Before I get to the law part I want you to begin to think about some questions that we might discuss at the end of the main presentation, and which I would like you to be thinking about in the meantime.

SOME QUESTIONS I HOPE OUR TALK WILL RAISE

Is there any reason not to recognize same sex marriage other than a moral or religious reason?

What of the argument that same sex marriage diminishes and is a threat to the traditional marriages of those of opposite sex?

What of tradition – that marriages in all times in all societies have been between man and woman?[11]

What of the state's interest in procreation and in the raising of children? What of evidence that children do best with a father and mother in a stable relationship?

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[10] This seems especially evident in Massachusetts where the couple in the *Goodridge* case already had all of the legal rights as domestic partners that the state of Massachusetts had the power to give.

[11] The late Yale historian John Boswell has claimed to document marriage like ceremonies uniting two priests in a marriage like union. "The Marriage of Likeness: Same-Sex Unions in Pre-Modern Europe" (NY Villard 1994) – rites of "adelphopoiesis"

What about the couples that marry but do not have sex? Is marriage all about sex? If not, what does that say about the arguments by the opponents of same sex marriage?

What about the complications that recognizing same sex marriage has to other areas of the law?

What of same sex divorce?
Who gets the husband's share of social security?

What of the fact that straight men are commonly afraid male homosexuality – unlike straight women.

If divorce is so common, what is so great about same sex marriage? What really is at stake here? Can it be satisfied by a domestic union statute? Why is that not good enough? Massachusetts Supreme Court thought it was not good enough.

What about the argument that because gays are discriminated against they have more difficulty in getting and keeping jobs and they will be shunned at the PTA meetings and their children will suffer social ostracism? Have we heard this all before? What about *Loving v. Virginia*?

What about gays adopting? Won't they make strange parents? And strange parents making strange, dysfunctional, maybe even gay children?

What about the "don't ask don't tell" law? While it is currently being challenged, does its existence mean anything? What about animus?

What about this argument taken from the ProtectMarriage brief to the Court of Appeals:
"State's vital interest in increasing the likelihood that children will be born and raised in stable family units by the couples who brought them into the world because it provides special recognition and support to those relationships most likely to further that interest."

Does the state have an interest in promoting stable family unites even if those units are same sex?

Now it is time to talk about the law, by which we mean the law presented by the U.S. Constitution. The *Goodridge* case in Massachusetts was based on the Massachusetts Constitution, and there are a number of cases involving same sex marriage in other states based strictly upon that particular state's constitution, all of which are relevant but which we will not deal with here.

As we see it, the U.S. Constitutional law relevant to same sex marriage starts with *Griswold v. Connecticut*[12], our first key case. *Griswold* was decided in 1965 – it is hard

[12] 381 U.S. 479 (1965)

to imagine a time when discussing or distributing contraceptives were crimes in some states and thought so shameful in the rest that they were always behind the counter. *Griswold* held that the Connecticut statute prohibiting the sale of contraceptives to married couples was unconstitutional as in violation of what we might call the marital right of privacy. This was the first case to recognize a constitutional right of privacy - the word "privacy" is not mentioned in the Constitution - in the context of sex – sex between married adults. The *Eisenstadt v. Baird*[13] case (1972) later made clear that unmarried sexual partners were also entitled to a right of privacy. Thus, at least some forms of regulation of at least some aspects of sexual behavior are subject to at least some form of limitation created by the US Constitution.[14]

Our second key case, *Loving vs. Virginia*[15], (1967) struck down the Virginia miscegenation law which prohibited the marriage of what were then called Negros and Caucasians. Without questioning the fact that marriage has always been a matter of state law, the Court held that the power of the states to control who can and who cannot marry is subject to some limitation imposed by the US Constitution.

The third case we need to consider, less famous but still key, is *Zablocki v. Redhail*,[16] (1978) which held that Wisconsin could not constitutionally withhold a marriage license from a man who was behind in his child support payments – because there was a Constitutionally protected "fundamental right to marry." *Zablocki* was based in part on *Cleveland Board of Education v. LaFleur*[17], which case has special interest to this Club. *LaFleur* held that Cleveland could not prevent a woman from teaching merely because she was pregnant. The case was argued in the Supreme Court by Jane Picker, the wife of a former colleague of mine on behalf of LaFleur and by Charlie Clark, spouse of our fellow member Judge Leslie Wells Clark on behalf of the Cleveland Board of Education. These cases were based on the notion that marriage is a fundamental right. Like all rights, even fundamental rights are not absolute, are subject to limitations that are …well there we get into some fuzzy but very important limitations on limitations. Important here is the notion that marriage is a right of an individual, and that right is somehow fundamental – you do not lose the right just because you have no money.

The fourth key case is *Romer v. Evans*[18] (1996), the case which might seem most closely analogous to *Perry*, but on close examination is clearly distinguishable. A number of cities in Colorado adopted local ordinances prohibiting discrimination against gay and lesbians in employment, housing and such. Then the majority of citizens of Colorado by referendum adopted a Amendment 2 to the Colorado Constitution which precluded "all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their 'homosexual, lesbian

[13] 405 U.S. 438 (1972)
[14] The famous *Roe vs. Wade*, 410 U.S. 113 (1973) of course expanded up the notion of constitutionally protected right of privacy but is otherwise not relevant, or at least not key for this talk.
[15] 388 U.S. 1 (1967)

[16] 434 U.S. 374 (1978)
[17] 414 U.S. 632 (1974)
[18] 517 U.S. 620 (1996)

or bisexual orientation, conduct, practices or relationships.'" In a challenge by certain individuals, including among others Martina Navratilova, the U.S. Supreme Court held the Colorado Constitutional provision unconstitutional as being in violation of the equal protection clause of the 14th Amendment to the U.S. Constitution. The key point here was that the majority of the voting citizens of Colorado had singled out a certain group, a group which they held in animus, and expressed that animus by denying those with the distasteful characteristic the rights that other citizens enjoyed. Commentators have pointed out that the majority of the citizens of Colorado had attempted to deprive the majority of certain Colorado cities the power to protect those individuals the cities believed needed protecting – thus the majority will was not being denied in a sense. It is the focus on animus that makes *Romer* important to our discussion here, and *Romer* is not the only or the first such case. For instance, in *Cleburne v. Cleburne Living Center*[19] (1985) the group suffering from expressions of animus, the mentally handicapped, had been effectively zoned out of a desirable neighborhood.

A fifth key case *Department of Agriculture v. Mareno*[20] really is just representative of an doctrine that may have application to same sex marriage litigation. *Mareno* involved a section of the Federal Food Stamp Act that excluded participation in the food stamp program any household containing an individual unrelated to any other member of the household. The purpose of the exclusion was apparently to deprive hippie communes from getting food stamps. The Supreme Court held this exclusion violated the equal protection clause of the 14th Amendment since the classification was "wholly without rational basis." Recall that animus toward a group is not a legally justifiable reason for singling out a particular group. "[A] bare desire to harm a politically unpopular group" is not a legitimate state interest. Along the same line and in some respects more relevant to our topic is *Moore v. East Cleveland*[21] (1977) where the US Supreme Court struck down an East Cleveland ordinance that limited occupancy of a house to members of a traditional nuclear family. Although the justices could not agree on the reason for finding the ordinance unconstitutional, I read the case as standing for the principles that there is a constitutionally protected right of freedom of choice in matters of family life, that the sanctity of the family is one of the liberties' protected by the due process clause of the 14th amendment, and that government has to have a rational basis for limiting that freedom.[22]

The sixth, and perhaps the most important case is *Lawrence v. Texas*[23], the 2003 case that overruled the infamous *Bowers v. Hardwick*, and struck down the Texas criminal sodomy law. Again we see the Court protecting personal freedom in matters of sex and home life, as Justice Kennedy states: "Liberty protects the person from unwarranted government intrusion into a dwelling or other private places."[24] Kennedy's

[19] 473 U.S. 432 (1985)
[20] 413 U.S. 528 (1973)
[21] 431 U.S. 494 (1973)
[22] None of these cases, other than *Loving*, involved a "suspect classification" where the challenged law would be subject to "heightened scrutiny." So far homosexuals have not been considered a suspect classification, but they might be, in which case the equal protection argument would be much stronger.
[23] 539 U.S. 558 (2003)
[24] 539 U.S. 558,562 (2003)

opinion notes that many states have repealed their sodomy laws, as have other countries, and that the age of these laws is not that impressive. In any event, as Kennedy states: "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education."[25]

Even more important is the quotation from the dissent in *Bowers* that: "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice…"[26] As Scalia's dissenting opinion in *Lawrence* states, the Court, or at least Kennedy's opinion "effectively decrees the end of all morals legislation." Scalia laments that the Court has taken a side in the culture wars, and perhaps he is right. But has not Scalia done the same?

While it is true that Kennedy says that the *Lawrence* case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," one has to ask why that is true. If one puts all of the cases we have identified as key, it seems to follow that no state can avoid giving marriage licenses for same sex marriage.

Before concluding that same sex marriage will soon be the law, we do need to consider the polygamy cases. In *Cleveland v. US,* (1946) the majority opinion by Justice William O. Douglas, a noted liberal, stated "Polygamy has always been odious among the northern and western nations of Europe..." and "The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western World."[27] *Cleveland*, the case not the city, involved the criminal prosecution of several Mormons who transported one of their plural wives across state line in violation of the Mann Act. The Mann Act prohibited the transportation across state lines of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[28] The *Cleveland* court assumed, based on prior case law upholding earlier Federal prohibition of polygamy in Federal territories[29], that there was no First Amendment religious right to practice polygamy, and held that the practice was not only illegal but for purposes of the Mann Act it was "immoral". It seems clear enough to us that the Court that decided *Lawrence* would find the reasoning of *Cleveland* unpersuasive at best – which does not necessarily mean polygamy is going to be Constitutionally protected but it is not easy to distinguish the polygamy case from the same sex marriage case.

We want to make clear that there were other important, at least arguably more important cases that a court or an advocate would have to take account of. Some of these

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[25] Kennedy opinion, 539 U.S. at 574. O'Connor's concurring opinion is based on the equal protection clause, not due process.
[26] Id at ?
[27] *Cleveland vs US*, 329 U.S. 14, at 18-19 quoting from *Reynolds v. US*, 98 U.S. 145, 164 and *Mormon Church vs US*, 136 U.S. 1, 49.
[28] 18 U.S.C. Sec. 398
[29] *Reynolds v. U.S.* 98 U.S. 145 ()

we will mention in passing, and some may be relevant to the question and answer period. We also must concede that there are many who would question our reading of the cases. Moreover we may have summarized the holdings of some of the cases and the language of some the opinions in excessively glib or overly simplified fashion. Finally, if we had little sympathy toward the right of gays and lesbians to marry we probably would have found another set of key cases. But this is not intended to be a lawyers' lecture, and given the limited time available we are comfortable that we are close to the mark.

All the cases listed above are decisions of the United States Supreme Court. There are many cases decided in the state courts and the lower federal courts which are relevant but which we have to ignore.[30] For instance the challenge to the "don't ask, don't tell", still in the lower federal courts, might produce some interesting results.

To summarize what we take as the essential messages of the key cases:

1. There is such a thing as a marital right of privacy.
2. Marriage is a fundamental right.
3. We have a constitutionally protected right to be free of government invasion of our decisions relating to marriage, sex etc.
4. Governments cannot prohibit us from any activity just because a majority believes it immoral – there has to be some other justification not arising out of moral outrage.
5. The government may not constitutionally single out groups and impose upon them because of the majority's feeling of animus toward that group.
6. Excluding people from freedom of choice relating to how one lives a private life must be justified by some basis that is rational other than moral outrage or a feeling of animus.

Toward the end of his blistering dissent in the *Lawrence v. Texas* sodomy case Justice Scalia complained "Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct…It is now clear that the Court has taken sides in the culture war..." I believe that the sum of the lesson of the cases I have identified as key do indeed promote the homosexual agenda – in that the cases teach us that we each are entitled to our own life style, so long as we do not harm others.

There is a famous, familiar to the students at the Harvard Law School of my time, debate between the great British legal philosopher HLA Hart and Lord Devlin on whether

[30] Two of the most interesting cases that have for the time being have been stayed are from the Massachusetts Federal District Court. In *Gill vs. Office of Personnel Management,* 699 F. Supp. 2d 374 (Mass. 2010) the Court held the Federal DOMA unconstitutional because the "proferred rationales for [the] law are clearly and manifestly implausible" so that the only justification is animus and as we have seen, "animus alone cannot constitute a legitimate government interest." Id. at . *Massachusetts v. U.S.,* 698 F. Supp. 2d 234 (Mass. 2010) held the Federal DOMA unconstitutional on 10th Amendment grounds. We think this second case is likely to hold up, based on recent 10th Amendment and Commerce Clause cases.

it is the appropriate role of the law to criminalize private immoral behavior merely on the ground that the behavior is immoral. For now, the majority of the U.S. Supreme Court has voted with Professor Hart. It is interesting that 5 of the 9 justices who decided the *Lawrence* case were students at the Harvard Law School, 4 of them roughly at the same time I was there.

Since *Lawrence* was decided in 2003, Justices Stevens, Souter, and O'Connor have retired and Chief Justice Rehnquist has died. However, it is unlikely that the turn over in membership of the court will change the result in this area of the law. Rehnquist was replaced by Roberts, and the three retiring justices have been replaced by Sotomayor, Kagan, and Alito. In Lawrence O'Connor did dissent from the Kennedy majority opinion regarding the liberty interest protected by the due process clause, but she concurred in the result on the basis that the law discriminated against homosexuals as a group and this violated the equal protection clause. Marjorie finds O'Connor's equal protection argument unpersuasive, and one would expect that Alito would as well. That still leaves 5 on the side that one would expect to at least lean toward finding same sex marriage constitutionally required. But we still have to address the non-moralistic arguments against same sex marriage and we still have to think about whether the *Perry* case will be the vehicle by which the Supreme Court addresses the issue.

RETURN TO PERRY:

Now we want to return to where we began, the *Perry* case in the Federal District Court in California which held that there was no Constitutionally cognizable, rational basis for denying same sex marriage. As you can gather, we believe that there was enough in the precedents to permit, perhaps even to compel, a holding that California cannot deny the plaintiffs in that case the right to marry. And the case having been so decided sticks in the craw of those opposed to the homosexual agenda and same sex marriage. What will happen next in *Perry*?

The plaintiffs in *Perry* were two homosexual couples wanting to marry. The City and County of San Francisco intervened as plaintiffs – thinking that they benefited economically by being gay friendly. The defendants were the Governor and Attorney General and 4 other State or local public officials. Five individuals and an organization entitled "ProtectMarriage.com –Yes on 8", which was the official proponent of Prop 8, intervened as Defendants seeking to defend the constitutionality of Prop 8.

The curious thing was that all of the Defendants, other than the intervener ProtectMarriage, refused to defend. The California Attorney General (now the Governor) conceded that Prop 8 was unconstitutional, and the remaining defendants took no position. Having lost, they have no intention of appealing the result they agreed with. ProtectMarriage has attempted to appeal, but it is far from clear whether it has standing to appeal. The Court of Appeals for the 9th Circuit, which has a reputation of being unusually liberal, has certified a question to the Supreme Court of California as to whether the official proponents of an initiative measure, who were interveners at the trial level, can have standing to assert the interest of the state in defending the constitutionality of the initiative measure – Prop 8 in this case – when the officers of the

state, the governor and the attorney general, chose not to defend. In the meantime, the Court of Appeals has stayed District Court decision.

I believe that the Governor or at least the Attorney General has the obligation – moral if not legal – to defend a law adopted by the majority of the voters of the State. Marjorie disagrees with me on that point, and it is true that sometime the U.S. Attorney General will not fight to uphold an act of congress that he or she believes is unconstitutional. I also think that ProtectMarriage having been permitted to intervene at the trial level necessarily has the right to appeal, but I am aware this is not entirely clear.[31]

People who wish to use the courts to change the existing reality need to use good judgment as to when to bring a case to court and what case to bring. The history of the incremental and ultimately successful attack on segregation and the tactical and strategic decisions made by the NAACP and the other actors is wonderfully told in the book *Simple Justice* by Richard Kluger. The tactics recently used by the gun enthusiasts to persuade the Court to re-interpret the second amendment – the right bear arms cases – are another example. I have the impression that the gay rights folks may not think that this is a good time to directly face the US Supreme Court with the issue. The events in Iowa are a warning of the passion which this topic generates. After the Supreme Court of Iowa held that same sex marriage was constitutionally permitted in Iowa, three of the justices lost their election to be retained, and impeachment proceedings were brought against a fourth justice.

On the other hand, the two lead attorneys for the plaintiffs in the *Perry* case were Ted Olson and David Boies, two of the finest litigation lawyers of our time. They faced off against one another in the battle over the presidency in the case of *Bush vs Gore*. Boies was one of the lead lawyers successfully defending IBM in the 13 year antitrust case brought by the Department of Justice. Olson was a well regarded US Solicitor General. If they felt it was time to bring a case, maybe same sex marriage is like school desegregation – the subject will always give rise to passionate opposition and no time is a good time.

If the Court of Appeals were to decide, with or without the advice of the California Supreme Court, that ProtectMarriage does not have standing to appeal, then it would seem to us that the there is no live case – in constitutional terms no "case or controversy." If that is true, then maybe the district court had no jurisdiction to decide the case in the first place and that would mean that the 70 page opinion written by Judge Vaughn Walker and the long trial he conducts is for naught.

The plaintiffs in the *Perry* trial introduced a lot of evidence – primarily testimony of various experts – a lot of it designed to show that gays were demonized and subject to

[31] The day after this paper was presented the U.S. Attorney General announced that the Justice Department had been directed by the President to no longer defend the Constitutionality of the Federal DOMA, believing that DOMA is unconstitutional as in violation of the equal protection clause of the 14th amendment.

political attack reflected by and encouraged by Prop 8. ProtectMarriage, the only party defending Prop 8, introduced very little and what was introduced was not worth much. ProtectMarriage took the position that there were no factual questions and that the whole thing was a legal issue. But if the case turns on whether there are any reasons for denying same sex marriages that are not based on morality and public approbation, then it would seem evidence is called for. In any event, Judge Walker made extensive findings of fact that supported his ruling.

Some think that the findings of fact are somehow binding, and that this makes the case an easy win for *Perry*. However, there is well established legal doctrine that distinguishes "legislative facts" from "adjudicative facts." Once found by a judge or jury the adjudicative facts – e.g. the gender of Kristin Perry – are binding. But legislative facts, i.e. facts not peculiar to these particular litigants but facts relevant to deciding a legal or constitutional question, are not binding on the higher courts. So all of the critical findings by Judge Walker can be reviewed anew, or as we lawyers call it "de novo", or "plenary" review.

Nonetheless, it seems to us that it will be more difficult for the Supreme Court to reject the arguments of those seeking the right to same sex marriage than it would be to accept them. The Court, on the other hand need not accept a petition for and can delay making any decision for a long time. It is my prediction that this is what the court will do. We think that four of the current justices would happily grant cert to a challenge to same sex marriage so that they could vote to reverse the result in *Perry* – and you only need four votes to force the Court to decide a case – but those four would likely only agree to hear the case if they were confident that their views would prevail. Based on the current precedents and the current membership of the court they could not be so confident. This suggests that for some time we will have a mix of lower Federal Court cases and State high court cases, and that the U.S. Supreme Court will step in and clarify the matter only when the disparate results in the various cases and various jurisdictions becomes intolerable.

We at least think that is probably a good thing.