Foreword: The *Marriage Cases*—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy

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INTRODUCTION

The California Supreme Court has replaced the New York Court of Appeals, the federal Court of Appeals for the Second Circuit, and the U.S. Supreme Court as the court at the cutting edge of many issues in American public law. The process of displacement probably began long ago, perhaps as early as 1948, when the California Supreme Court's decision in *Perez v. Sharp* became the first appellate decision to recognize that state bars to interracial marriage are unconstitutional.[1] That landmark decision has been followed by a steady stream of others. The latest such decision is *In re Marriage Cases*, in which a closely divided (4-3) court held that the State's exclusion of same-sex couples from civil marriage violated the state constitution's equal protection guarantee.[2]

Chief Justice Ronald George's opinion for the court in the *Marriage Cases* was significant for three reasons. First, and most important, was the holding: the State could not constitutionally bar same-sex couples from civil marriage. California was not only the second state to recognize same-sex marriage in this way,[3] but was the grand prize for the same-sex marriage

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1. 198 P.2d 17 (Cal. 1948).

2. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

3. Massachusetts was the first. *See* Goodridge v. Dep't Pub. Health, 798 N.E.2d 941 (Mass. 2003); *see also In re* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (reaffirming the court's opposition to the segregation of same-sex civil unions as established by

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movement. California is our nation's most populous state, with thirty-seven million people and fifty-five members of the federal legislative branch (more than 10 percent of the total), and it has one of the largest economies in the world.[4] Thus, California's policies have ripple effects well beyond its borders. Second, as part of its reasoning, the court held that sexual orientation is a "suspect classification," like race and (in California) sex, that cannot be the basis of discriminatory state policy without a showing of compelling state interests that can only be met by such discrimination.[5] Two other state supreme courts had suggested as much (in dictum) before 2008,[6] but the California Supreme Court was the first state supreme court to unequivocally declare sexual orientation a suspect classification. After the *Marriage Cases*, state courts all over the country will probably take these arguments more seriously.[7] Third, as an alternative basis for strict scrutiny, the court ruled that the fundamental right to marry applies to lesbian and gay couples.[8] Although this holding seems the most logically apparent, it is also the most pioneering: no appellate court in America had ever accepted the notion that the right to marry has *any* application to lesbian and gay couples. In the wake of California's actions, three state legislatures extended fundamental marriage rights to lesbian and gay couples by legislation.[9]

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legislation passed subsequent to the *Goodridge* decision). Shortly after the *Marriage Cases*, the Connecticut Supreme Court struck down that state's exclusion of same-sex couples from marriage. Kerrigan v. Connecticut Dep't Pub. Health, 957 A.2d 407 (Conn. 2008). Both *Goodridge* and *Kerrigan* were decided by 4–3 court majorities. In a unanimous opinion joined by all seven justices, the Iowa Supreme Court recently struck down its same-sex marriage ban. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

4. MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS, 144–52 (2006) (documenting California's fifty-three Representatives and two Senators and describing the state's preeminent demographic and economic position in this country).

5. *Marriage Cases*, 183 P.3d at 440–44.

6. Commonwealth v. Wasson, 842 S.W.2d 487, 499–500 (Ky. 1992) (dictum). The unpublished opinion in *Baehr v. Miike* (Dec. 9, 1999) indicated that the Hawaii Supreme Court agreed that sexual orientation is a suspect classification, but the published opinion is just a summary order. Baehr v. Miike, 994 P.2d 566 (Haw. 1999).

7. Two courts have already followed California in ruling that sexual orientation discrimination requires heightened (but not strict) scrutiny. *See Kerrigan*, 957 A.2d at 431–61; *Varnum*, 763 N.W.2d at 889–96.

8. *Marriage Cases*, 183 P.3d at 419–34.

9. In 2005 and 2007, the California legislature passed bills to implement fundamental marriage rights for same-sex couples, but in both years Governor Arnold Schwarzenegger successfully vetoed those bills. *See Marriage Cases*, 183 P.3d at 410 n.17 (discussing the 2005 and 2007 same-sex marriage bills). In 2009, the legislatures of Vermont, Maine, and New Hampshire passed marriage recognition bills. The governor of Vermont vetoed the bill, but his veto was overridden on April 7, 2009. Act No. 3, S. 115, 2009–10 Leg. Sess. (Vt. 2009). The governor of Maine signed the bill into law on May 6, 2009. L.D. No. 1020, S.P. No. 384, 124th Leg., 1st Sess. (Me. 2009), but in November 2009, the voters revoked the new marriage law in a popular referendum. After negotiation of statutory language protecting religious freedom, the governor of New Hampshire likewise signed onto same-sex marriage on June 3, 2009. H.B. 436, 161st Sess. Gen. Ct. (N.H. 2009); H.B. 310, 161st Sess. Gen. Ct. (N.H. 2009); H.B. 73, 161st Sess. Gen. Ct. (N.H. 2009).

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As in many other states, the political process in California has several avenues for responding to state constitutional decisions such as the *Marriage Cases*. One avenue is a popular vote: upon collection of the requisite number of voter signatures, the electorate can override the court through a constitutional amendment adopted by majority vote. The voters overrode the holding of the *Marriage Cases* when they adopted Proposition 8 in November 2008. Proposition 8 added language to the state constitution reserving civil marriage for one man, one woman unions.

This Foreword will examine the court's opinion and the many doctrinal issues it raises through the lens of California's pluralist-constitutional democracy. That voters can override the court through a constitutional amendment like Proposition 8 makes California's constitution self-evidently democratic—indeed, more so than the U.S. Constitution. This feature has played a pivotal role in the state's politics of gay marriage. An equally important feature of the California Constitution is its commitment to pluralism: the idea that a key role of the State is to serve as a peaceful forum in which rival social and economic groups bargain, compete, and deliberate. An institutional challenge in a pluralist democracy is to keep rival groups engaged in politics, to direct their efforts toward the public good, and to avoid feuds and other mutually destructive conflicts. This challenge is especially difficult because the pluralist balance changes, often radically, over the course of a generation. New groups, clamoring for public recognition, will emerge, upsetting a balance of alliances that worked well only ten years prior. Few groups reflect this phenomenon better than sexual and gender minorities; reviled as outlaws two generations ago, they are now part of the political process in California. Given the state's role as harbinger for the nation, this is a significant advance for these minorities.

Part I will explore the role of the California judiciary in the pluralist debates surrounding sexual and gender minorities. California's treatment of gay people can be broken into three stages. In Stage 1, "homosexuals" were rejected as *outlaws*. In Stage 2, homosexuality came to be considered a *tolerable* sexual variation, intrinsically inferior and degraded but not outlawed. In Stage 3, the current stage, homosexuality is viewed as a *benign* variation, and gay people are legally treated as (almost) full and equal citizens. At every point in this history, California's judiciary was the branch of government most responsive to the plight of sexual minorities and played an important, but limited, role in gay people's politics of recognition. The main role of judges was to *reverse the force of political inertia*. If legislators or enforcement officials sought to punish or discriminate against minorities in an overbroad or unjustified way, judges would often trim back the punishment or discrimination—but only where there was some public support for this stance and where opportunities existed for the political process to reverse the judiciary and insist upon the antigay policy. The judicially advanced ideas of privacy, nondiscrimination, and family encouraged more gay people to be politically engaged

and to metaphorically come out of their closets. The *Marriage Cases* can be viewed as the culmination of several generations of normative debate about the civil status of lesbian, gay, bisexual, and transgendered (LGBT) persons: a group that had once been rejected, and then simply tolerated, finally achieved acceptance in the eyes of the law.

Part II will situate the *Marriage Cases* in a larger conceptual framework that I have called *equality practice*.[10] An important goal of constitutional equality jurisprudence is management of the polity's evolving pluralist balance. A dynamic society carries with it the risk of social turmoil as new groups emerge and old groups decline or change. Equality jurisprudence is a key mechanism for heading off some of that turmoil. For example, once a social group emerges as a salient political force, old discriminations must be questioned and newer ones interrogated, lest the new group feel alienated and turn away from the ordinary political and legal processes. Conversely, older groups' time-tested beliefs cannot and ought not be discarded without a process of deliberation. California's *Marriage Cases* are a classic example of equality practice: the court's invalidation was only possible because of decades of political activism on other issues (sodomy laws, antidiscrimination policies, and domestic partnerships) that gradually prepared the way for judicial recognition of full marriage equality for LGBT unions.

Part III examines the pluralist-constitutional politics of states like California that have a process for constitutional change through popular initiatives. The Part begins by describing the background of Proposition 8, which overrode the precise holding of the *Marriage Cases* by amending the California Constitution to bar recognition of any but one man, one woman marriages. Part III then explains the various ways in which litigants can challenge the constitutionality of popularly adopted constitutional amendments. In the 2008 term, the California Supreme Court upheld Proposition 8 against such an attack, but with a modest pushback against the popular override.[11] Political scientists have identified a major problem posed by initiative-based constitutional amendments like Proposition 8—the phenomenon of *hyper-amendability*. In states that have experienced this phenomenon, political issues of all kinds, including fundamental constitutional issues, have gravitated away from state deliberative institutions and toward resolution by popular referenda. Part III concludes by proposing a theory of judicial review that attempts to ameliorate the negative effects of hyper-amendability in the constitutional amendment initiative context.

10. WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002).

11. Strauss v. Horton, 207 P.3d 48 (Cal. 2009).

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I

REVERSING THE BURDEN OF INERTIA: THE ROLE OF THE CALIFORNIA SUPREME COURT IN ADVANCING THE RIGHTS OF SEXUAL AND GENDER MINORITIES

California's understanding and treatment of sexual minorities has gone through a three-stage evolution that classically reflects the stages in which the pluralist democracy accommodates new groups such as gay people. In Stage 1, any kind of sexual variation (especially homosexuality) was considered *malignant*. During this stage, California law considered "degenerates," "sex perverts," and "homosexuals" to be outlaws. In Stage 2, homosexuality was considered a *tolerable* sexual variation, intrinsically inferior and degraded but not outlawed. In Stage 3, the current stage, homosexuality is considered a *benign* variation (as a matter of law), and sexual minorities are thought not to pose a danger to society. At every point in this history, California's judiciary has played a critical role in both senses of the term: it has made important rulings and has subjected legislative and executive policies to skeptical examination. Although the court's critical role has been subject to legislative or popular overrides, its interventions have, virtually without exception, formed the basis for productive state policy.

A. Stage 1: "Degenerates," "Sex Perverts," and "Homosexuals" as Outlaws

In the early decades of statehood, California law did not recognize homosexuals as a distinct social category or specifically outlaw homosexual activities. Following other jurisdictions, the legislature in 1850 criminalized "[t]he infamous crime against nature."[12] Such laws were not specifically designed to suppress gender and sexual noncomformity. Almost all of the reported cases involved sexual assault against an unconsenting man, boy, girl, or animal.[13] Moreover, the "crime against nature" was limited to anal sex and did not include oral sex, as the California Supreme Court held in *People v. Boyle*.[14] Because a person could not be convicted of sodomy based solely upon the testimony of a willing adult partner, it was practically impossible to convict consenting adults, unless the act was public.[15] For these reasons, there were very few sodomy convictions before 1890.[16]

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12. 1850 Cal. Stat. 234, § 48.

13. *See* Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, at app. 2, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) [hereinafter Cato *Lawrence* Brief] (listing the reported nineteenth-century American sodomy cases). Disclosure: I was the primary author of this amicus brief.

14. 48 P. 800 (Cal. 1897).

15. See Cato *Lawrence* Brief, *supra* note 13, at 11–12 (documenting proof requirements for nineteenth-century sodomy laws). Under nineteenth-century sodomy laws, consenting "accomplices" could not provide sufficient evidence to convict of sodomy; this made it virtually impossible to enforce such laws against consensual conduct in the home. *See id.*

16. William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880–1946*, 82 IOWA L. REV. 1007, 1014–16 (1997) [hereinafter Eskridge,

In the early twentieth century, California, like other American jurisdictions, saw a growing social anxiety regarding publicly visible communities of sexual minorities in urban areas such as San Francisco (ridiculed by some as "Sodom by the Sea") and Los Angeles.[17] Some citizens objected to "sodomites" who violated natural law and biblical admonitions against nonprocreative sexuality; others expressed disgust with people whom medical experts termed physical and mental "inverts" or "degenerates."[18] Homosexuals were widely considered threats to the fabric of society and body politic.[19] Some believed that the "degeneracy" could be passed on to future generations, both through inheritable biological characteristics and by example.[20] The degeneracy theory of this era tied racist beliefs to prejudices against sexual and gender minorities; many doctors explicitly linked "degenerate" (non-European) races with gender and sexual inversion.[21] Just as abhorrent depictions of African-Americans as apes have been shown to survive in subconscious but easily triggered stereotypes,[22] the notion of homosexuals as unclean, primitive "degenerates" is an enduring stereotype that still infects the popular imagination.[23]

Implementing these social attitudes, early twentieth-century law enforcement episodically targeted "inverts" and "degenerates." For example, police in Long Beach, California, arrested thirty-one men for being part of an oral sex ring in 1914.[24] Two undercover officers, W.H. Warren and B.C. Brown, infiltrated male sex clubs. Befriending men attracted to them, the officers lured them into compromising positions in public restrooms, bathhouses, or private apartments, where spying colleagues arrested the "degenerates." The newspapers raised an alarm against these "devils" committing "a horrible enormity besides which ordinary prostitution is chastity itself."[25] Legally, however, these

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Construction].

17. *See* NAN ALAMILLA BOYD, SAN FRANCISCO WAS A WIDE-OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO TO 1965 (2003) [hereinafter BOYD, WIDE-OPEN TOWN]; LILLIAN FADERMAN & STUART TIMMONS, GAY L.A.: A HISTORY OF SEXUAL OUTLAWS, POWER POLITICS, AND LIPSTICK LESBIANS 14–30 (2006) [hereinafter FADERMAN & TIMMONS, GAY L.A.].

18. On the transition from sodomite to degenerate, see JENNIFER TERRY, AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY (1999).

19. *See id.*; *see also* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 17–37 (1994) [hereinafter ESKRIDGE, GAYLAW].

20. *See, e.g.*, G. FRANK LYDSTON, THE DISEASES OF SOCIETY 37, 308–09, and passim (1904).

21. JONATHAN NED KATZ, GAY AMERICAN HISTORY 65–67 (1976); SIOBHAN B. SOMERVILLE, QUEERING THE COLOR LINE: RACE AND THE INVENTION OF HOMOSEXUALITY IN AMERICAN CULTURE (2000).

22. Philip Atiba Goff & Jennifer L. Eberhardt, Opinion, *A Hateful Link*, L.A. TIMES, Feb. 28, 2009, at A19.

23. ESKRIDGE, GAYLAW, *supra* note 19, at 209–11 (documenting the perseverance of popular understanding of "homosexuals" as dirty sub-humans who are predatory against youth).

24. For the story of the Long Beach arrests and prosecutions, see *Publicity Is Needed and Then More Publicity*, L.A. TIMES, Nov. 26, 1914, § 2, at 8 [hereinafter *Publicity Is Needed*]; *see also* FADERMAN & TIMMONS, *supra* note 17, at 30–37.

25. *Publicity is Needed*, *supra* note 24, § 2, at 8.

men had committed no felony, because of the court's ruling in *Boyle* that the crime against nature did not include oral sex. Thus, some of the men were charged with vagrancy, a misdemeanor. Florist Herbert Lowe was acquitted of even these charges by a jury.[26] Responding immediately to the general public outrage prompted by these "lenient" penalties, the California legislature in 1915 added to the penal code's list of serious felonies "fellatio" and "cunnilingus" (changed six years later to "oral copulation").[27]

In addition to strengthening laws aimed at "crimes against nature," state and local authorities pursued other regulatory means of suppressing same-sex intimacy and gender nonconformity. Some regulatory mechanisms addressed gender-deviant activities, most notably through criminal prohibitions on cross-dressing, which were first codified in the mid-1800s and proliferated throughout the United States in the last quarter of the nineteenth century.[28] For example, San Francisco made it a crime for anyone to appear in public "in a dress not belonging to his or her sex" in 1866. Oakland followed suit in 1879 and Los Angeles in 1898.[29] By 1930, most of the largest California cities had similar laws.[30]

More important were the new laws regulating sexual solicitation and erotic activities. Originally enacted in 1872, California's "lewd vagrancy" law (later colloquially known as the "vag lewd" law) was expanded in 1903 to make it a crime to be either an "idle, or lewd, or dissolute person or associate of known thieves" or to be a "common prostitute."[31] Another 1903 statute made "outrages [to] public decency" a crime, as well as "personif[ying] any person other than himself" for a lewd purpose.[32] These laws became the most deployed criminal sanction in California against same-sex intimacy, and were also used at least in some local jurisdictions to punish cross-dressing women and female impersonators.[33] When California's legislature adopted its oral copulation statute in 1921, it also enacted a statute making it a misdemeanor to engage in "any act . . . which openly outrages public decency."[34]

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26. FADERMAN & TIMMONS, *supra* note 17, at 33–35.

27. 1915 Cal. Stat. 1022, *repealed and replaced*, 1921 Cal. Stat. 1633 (renaming the crime "oral copulation").

28. ESKRIDGE, GAYLAW, *supra* note 19, at 27–29.

29. *Id.*

30. *Id.* at 338 (listing California jurisdictions making public cross-dressing a crime). For a description of shifting police attitudes, see LOUIS SULLIVAN, FROM FEMALE TO MALE: THE LIFE OF JACK B. GARLAND (1990) (telling the life of Elvira Mugarietta, a woman who passed as a man from 1892 to 1936 in California).

31. 1903 Cal. Stat. 97 (lewd vagrancy).

32. *Id.* at 235–36 (indecency).

33. *See generally* Arthur Sherry, *Vagrants, Rogues, and Vagabonds–Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557 (1960); *see also* Jon Gallo et al., *The Consenting Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 643 (1966) (student project).

34. 1921 Cal. Stat. 74.

As the vag lewd and public decency laws indicate, by the 1920s, almost any kind of activity deviating from standard sexual intercourse could be a crime in California. Unlike the earlier period, these crimes were sometimes vigorously enforced by the police. By the 1910s, police in the large American cities were arresting dozens of men each year for felonious sodomy, and hundreds for lesser crimes of cross-dressing, indecent exposure, lewd vagrancy, and so forth.[35] Similar arrests were regularly made in California.[36]

The volume of police harassment and arrest exploded on both coasts in the 1920s.[37] But more importantly, the pattern of arrests and prosecutions took a turn away from the previously exclusive focus on rape and abuse of minors and toward enforcement against consenting adults of the same sex.[38] For the next few decades, the so-called "homosexual" was a universal scapegoat in California. He would be blamed for waves of child molestation, for the "corruption" of youth by the sexualization of public culture, and for the decline of the family.

To enforce the law against consenting adult "homosexuals," police engaged in nosy tactics such as undercover stake-outs, posing as decoys in public restrooms and parks, and spying on people in their own homes.[39] The aggressive policing of same-sex intimacy and gender nonconformity raised the question of what should be done with the apprehended offenders. Because imprisonment might contribute to prison corruption and endanger future victims once the offenders were released, California came up with more unconventional solutions. Inspired by medical theorists who claimed that "degenerate" classes could ruin the nation's gene pool, the legislature in 1909 enacted a law providing for the sterilization of any person convicted of two or more sexual offenses if evidence indicated he or she was a "moral or sexual pervert."[40] Almost 7,000 Californians were sterilized by 1930, many of them prostitutes and "homosexuals."[41] The number of annual sterilizations peaked in 1939, with 848.[42] The United States Supreme Court discouraged this mania of sterilization and castration when, in 1943, it struck down a discriminatory

35. *See* Eskridge, *Construction*, *supra* note 16, at 1110–11 app. 1 (sodomy arrests in nine American cities, 1875–1941); *id.* at 1116–17 app. 2C (sex offense arrests in Richmond, 1875–1940); *id.* at 1123–24 app. 3 ("degenerates" arraigned in New York City, 1915–48).

36. *See, e.g.*, EDWARD STEVENSON, THE INTERSEXES (1908); Eskridge, *Construction*, *supra* note 16, at 1112–13 app. 2B (sex offense arrests in San Francisco, 1860–1912).

37. ESKRIDGE, GAYLAW, *supra* note 19, at 374 app. C1; *see also* WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003, at 63–67 (2008) [hereinafter ESKRIDGE, DISHONORABLE PASSIONS].

38. ESKRIDGE, GAYLAW, *supra* note 19, at 375 app. C2.

39. For examples of these activities from the increasing array of reported cases, see *People v. Jordan*, 74 P.2d 519 (Cal. App. 1937); *People v. Smink*, 288 P. 873 (1930); *People v. Parisi*, 261 P. 1072 (1927).

40. 1909 Cal. Stat. 1093–94.

41. CALIF. STATE DEP'T MENTAL HYGIENE, STATISTICAL RES. BUR., STERILIZATION OPERATIONS IN CALIFORNIA STATE HOSPITALS FOR THE MENTALLY ILL ETC., 1909–1960.

42. *Id.*

Oklahoma law in *Skinner v. Oklahoma*.[43]

Just as the sterilization and castration movement was slowing down, partly in response to judicial pressure, policymakers hit upon what they considered a more effective approach to so-called "degenerates," "perverts," and "homosexuals": remove them from civil society and "cure" them of their underlying mental or physical disease. On the eve of World War II, state legislatures began to enact a series of "sexual psychopath" laws.[44] The first such laws were enacted in Michigan (1935), Illinois (1938), and California and Minnesota (1939). California's law was the most moderate, aimed only at defendants predisposed "to the commission of sexual offenses against children."[45] In 1945, however, California removed the requirement that the sex crimes had to be against children,[46] freeing the State to send men convicted of homosexual activities to hospitals for indefinite periods of time based on doctors' testimony that those men were "inverts."[47] In 1951, the legislature made failure to register as a sex offender (under a 1947 statute) one of the grounds for initiating a psychopathic offender proceeding.[48] And in 1955, the legislature explicitly provided that a "sexual psychopath" found not amenable to "treatment" could still be held indefinitely by the State.[49] After 1954, homosexuals and other sex offenders falling under the sexual psychopath regime were committed to Atascadero Hospital, known in gay circles as the "Dachau for Queers."[50] One reason for this appellation was that inmates were subjected to experimental therapies—electrical and pharmacological shock treatments in addition to lobotomies—to "cure" them of their "sex perversion."[51]

The vocabulary of the sexual psychopath laws reflected a shift in the social understanding of same-sex intimacy and gender nonconformism. Whereas in the 1880s and 1890s the perception of persons who failed to conform to traditional gender norms shifted from sinners to biological degenerates, in the first three decades of the twentieth century the medical and social science discourse began to characterize the various types of degenerates—including the homosexual—as persons who were sexually out of control and predatory as a result of derailed psychosexual development.[52] The

43. 316 U.S. 535 (1942) (striking down, on equal protection grounds, sterilization law that exempted white-collar crimes from this penalty); *see* VICTORIA F. NOURSE, IN RECKLESS HANDS: *Skinner* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS (2008) (historical analysis of *Skinner*).

44. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 37, at 94, 96.

45. 1939 Cal. Stat. 1783 § 5500.

46. 1945 Cal. Stat. 623 § 5500.

47. *E.g.*, People v. Barnett, 166 P.2d 4 (Cal. 1946) (early application of California's "sexual psychopath" law to treat a sexual "invert").

48. 1951 Cal. Stat. 4186 § 5501(a).

49. 1955 Cal. Stat. 1250.

50. John LaStala, *Atascadero: Dachau for Queers?*, ADVOCATE, Apr. 26, 1972, at 11.

51. *Id.* at 11, 13; Rob Cole, *Inside Atascadero: Life, Liberty, and the Pursuit of Treatment*, ADVOCATE, Oct. 11, 1972, at 5.

52. Estelle Freedman, *"Uncontrolled Desires": The Response to the Sexual Psychopath,*

notion of homosexuals as predatory psychopaths who threatened the well-being of society, especially children, saturated California's culture and emerged as a powerful social fear and engine for further regulation after World War II.[53]

No state better reflected the postwar antihomosexual "terror" than California. In 1945, the legislature amended its habitual offender law, adding consensual sodomy to the list of crimes for which a second offense automatically meant a life prison sentence.[54] In 1947, California became the first state to require convicted sex offenders (including people convicted of consensual oral or anal sex) to register with the police in their home jurisdictions.[55] In 1949, Governor Earl Warren called an "emergency" session of the legislature to deal with the problem of sex offenders, and in January 1950 signed legislation doubling the penalties for sodomy;[56] creating an alternate sentence for oral copulation;[57] and requiring registration (under the 1947 statute) of toilet loiterers and "lewd vagrants."[58] In 1952, Governor Warren signed a law eliminating the maximum sentence for consensual sodomy, thereby making it a potential life sentence. The maximum penalty for consensual oral sex was fifteen years in prison.[59]

Engaging in either one-time homosexual liaisons or long-term homosexual relationships not only was a serious crime in California, but also excluded the known homosexual from a variety of public rights and benefits. Under California law, persons who engaged in "immoral conduct," explicitly including sodomy and oral copulation, stood to lose state teaching jobs or teachers' certificates, or both. Because most homosexuals prosecuted for these crimes were able to plead to lesser offenses, in 1952 California expanded the bases for revoking teaching certificates to include any conviction for "lewd vagrancy" and "loitering at a public toilet," misdemeanors enforced almost exclusively against homosexuals.[60] In California, as in nearly all other states, "gross immorality" was a statutory basis for disciplinary action against a host of other licensed professionals, including lawyers, doctors, dentists, pharmacists, and embalmers and funeral directors.[61] In 1955, the legislature enacted a law

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1920–1960, 74 J. AM. HIST. 83 (1987).

53. *See* ROBERT CORBER, HOMOSEXUALITY IN COLD WAR AMERICA: RESISTANCE TO THE CRISIS OF MASCULINITY (1997); DAVID JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT (2003).

54. 1945 Cal. Stat. 1747–49.

55. 1947 Cal. Stat. 2562–63.

56. 1949 Cal. Stat. 1st Extr. Sess., 450–51 (Jan. 1950).

57. *Id.* at 512.

58. *Id.* at 476–77.

59. 1952 Cal. Stat. 1st Extr. Sess. 380–82 (April 1952).

60. 1952 Cal. Stat. chs. 389–390. *See generally* Barry Copilow & Tom Coleman, *Enforcement of Section 647(a) of the California Penal Code by the Los Angeles Police Department*, ADVOCATE, Feb. 14, 1973, at 2–3, 24 ("lewd vagrancy" law enforced almost exclusively against gay or bisexual men).

61. *See* E. CARRINGTON BOGGAN ET AL., THE RIGHTS OF GAY PEOPLE: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS 211–35 (1975) (lists of disciplinary actions).

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allowing regulators to close down bars that had become a "resort for . . . sex perverts" (or other undesirables).[62]

During this period of antihomosexual terror, California law presented homosexuals as presumptive outlaws and enemies of the family. According to the State, these people were depraved subhumans who were incapable of human relationships and ruled by uncontrolled sexual urges and animal desires. No systematic evidence existed to support any of these beliefs, which were actually inconsistent with empirical studies such as the famous Kinsey Reports on the sex lives of American men (1948) and women (1953).[63] Yet the governor, the legislature, the bureaucracy, the police, the Department of Education, and other agencies of the State embraced the stereotypes and, in doing so, helped legitimize them.

In addition, virtually no one—not Governor Warren, not the legislature, and not most citizens of the state—believed that the pervasively antihomosexual state policies constituted "discrimination" any more than laws prohibiting burglary or rape "discriminated" against burglars and rapists. Governor Warren could understand how racism was a prejudice and how apartheid constituted unsavory discrimination, but he was incapable of applying the same concept to people he considered subhuman and criminal. Of course, many southern racists saw African Americans much the same way Californians viewed homosexuals: as a subhuman group whose intermixture could "corrupt" public culture.[64] This illustrates how the concept of "discrimination" is as much a social concept as it is a legal one: in a society that considers any kind of sexual variation to be malignant, the mainstream population will not consider treatment of sexual minorities to be discrimination.

California judges, operating under the same assumptions as everyone else, did not stand up to the antigay policies of the 1940s and 1950s on discrimination grounds. The judiciary *did*, however, draw lines that protected homosexuals from some of the most extreme measures. Recall that the California Supreme Court ruled in *Boyle* (1897) that the "crime against nature" had not traditionally included oral sex and that the legislature needed to adopt targeted laws to render this a crime. In *Stoumen v. Reilly*,[65] the court ruled that the State could not close down the famous Black Cat bar in San Francisco

62. 1955 Cal. Stat. 2230, § 24200(e).

63. ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE (1948). *See* ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 37, at 109–27 (exploring the theoretical and practical implications of the Kinsey Reports for sodomy reform after 1948).

64. *See, e.g.*, Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955), *remanded*, 350 U.S. 891 (1955), *aff'd on remand*, 90 S.E.2d 849 (Va.), *appeal dismissed*, 350 U.S. 985 (1956) (upholding Virginia's antimiscegenation law on the ground that the statute was a rational means of protecting against a "mongrel breed of citizens"). The Virginia Supreme Court essentially reasoned that the state could not be compelled to "permit the corruption of blood" that would accompany marriage of a white person and a person of color. *Id.*

65. 234 P.2d 969 (Cal. 1951).

simply because it was a place where "persons of known homosexual tendencies" congregated. The legislature's 1955 statutory response was declared unconstitutional in *Vallerga v. Department of ABC.*[66] In *Bielicki v. Superior Court*,[67] the court invalidated a police practice of spying on men's private activities within enclosed toilet stalls. Finally, the U.S. Supreme Court held in *One, Inc. v. Olesen*[68] that the postmaster for the City of Los Angeles could not ban Los Angeles-based homophile literature from the mail.

None of the above decisions explicitly invoked equal protection concepts, as few judges understood gay people as a "minority" subject to "discrimination"; any *Perez*-like court decision protecting "homosexuals" would have triggered a socio-political backlash. To be blunt, so long as a society was dedicated to the view that homosexuality was a malignant and even dangerous variation from a fundamental norm, a public discourse of legal or social discrimination was not possible. Nonetheless, the California Supreme Court performed a valuable function in prohibiting some governmental abuses that, while longstanding in most cases, invaded personal liberties without any substantiated public justification. Judges were virtually the *only* public officials willing to stand up for a badly understood minority unfairly demonized by the political process. Although the most prejudiced of citizens likely grumbled about the foregoing judicial decisions, each decision applied principles that have held up well over time, including the harm principle, cautioning against criminalizing conduct that does not harm other people (as in *Stoumen*); the rule of lenity, counseling against broad interpretations of vaguely-written criminal prohibitions (as in *Boyle*); and an anticensorship norm (as in *Vallerga* and *One*).

B. Stage 2: Toleration of the Homosexual Minority

One consequence of the terror practices just discussed was that some "homosexuals" came to see their group as a "minority" whose outlaw status and state persecution were unjustified. The "homophile" movement, classically described by historian John D'Emilio, began and flourished as a modest grass-roots social movement in California in the 1950s and 1960s.[69] The homophile message was that homosexuality was a "tolerable" variation from the norm. Conceding that heterosexuality could be preferred, homophile organizations such as the Mattachine Society and the Daughters of Bilitis argued that homosexuality, even if a sad condition, was no threat to society, citizens, or the

66. 347 P.2d 909 (Cal. 1959).
67. 371 P.2d 288 (Cal. 1962).
68. 355 U.S. 371 (1958) (per curiam).
69. *See* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970 (1983); *see also* FADERMAN & TIMMONS, GAY L.A., *supra* note 17 (describing early Mattachine activists in Los Angeles); JOHNSON, *supra* note 53, at 179–214.

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family.[70] Hence, these organizations reasoned, same-sex intimacy between consenting adults should not be a crime, homosexuals should not be excluded from jobs such as teaching, and homosexuals should be able to form organizations, socialize in gay bars, and publish gay-friendly tracts and literature.[71] Theirs was primarily a plea for tolerance, not for full equality. In the 1960s, as more lesbians and gay men lived openly in San Francisco and Los Angeles in particular, the original homophile organizations were joined by larger grass-roots associations, and their message of tolerance began to have wider currency.[72]

Although most Californians still harbored intense antihomosexual prejudice, local political processes, fanned by state laws and policies that remained on the books through the 1970s, became increasingly responsive to the concerns of homophiles. For example, concerned citizens of all orientations in San Francisco formed a Committee on Religion and Homosexuality. Its signature event was a New Year's celebration that brought together a wide range of citizens, male and female, rich and working-class, straight and gay and transgendered. When the police broke up the 1965 New Year's celebration, brutalizing homosexuals and even some heterosexuals, prominent citizens were shocked by what they could see with their own eyes. The press fully reported the incident and generated a fierce public reaction.[73] The 1965 New Year confrontation created tremendous publicity for the homophile message that decent people were treated indecently by state-sanctioned bigots and bullies. The notorious San Francisco police were forced to curb their worst abuses, while gay and lesbian groups set up hotlines and other mechanisms to report and object to similar conduct.[74] When police stepped up their harassment again in 1970–71, gay groups not only protested to an increasingly receptive media, but also went to the ballot box to elect a pro-gay sheriff; after that election, antigay municipal harassment fell off.[75] The homosexual community in Los Angeles, the home of the original Mattachine Society, saw a similar pattern of success in the late 1960s and early 1970s.[76]

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70. *See, e.g.*, BOYD, WIDE-OPEN TOWN, *supra* note 17, at 173–76 (examining the tolerance-seeking philosophy of the early homophile associations after Mattachine purged its leftist founders).

71. *See, e.g.*, *Daughters of Bilitis—Purpose*, LADDER, Oct. 1956, at 1, 4; *A Report from the Legal Director*, S.F. MATTACHINE NEWSL., Dec. 1955.

72. *See* BOYD, WIDE-OPEN TOWN, *supra* note 17, at 209–12 (describing bar culture and other associations in San Francisco that were successful in garnering some local support for gay tolerance, even in light of "gayola" and other scandals revealing police corruption and abuse); FADERMAN & TIMMONS, GAY L.A., *supra* note 17, at 141–58 (providing similar account of Los Angeles, but later in time).

73. For first-hand accounts of the police raid, see ERIC MARCUS, MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS, 1945–1990, at 135–36 (1992).

74. Sasha Gregory-Lewis, *Building a Gay Politic: The San Francisco Model*, ADVOCATE, Oct. 8, 1975, at 27, 32.

75. DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 148–63 (1999).

76. William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing*

Notwithstanding political success at these local levels, reform at the state level proved impossible in the 1960s, even for an issue about which experts largely agreed: the repeal of California's consensual sodomy and oral copulation laws. The American Law Institute (ALI or the "Institute") had in 1955 voted to exclude consensual sodomy from the Model Penal Code (which the Institute ultimately adopted in 1962). The Institute's reasoning was that consensual sodomy laws inevitably engendered police corruption and arbitrary enforcement and that invading people's private consensual sexual activities did not advance the public interest.[77] Between 1964 and 1967, the California legislature's Penal Code Revision Project drew from the Model Penal Code as it drafted new sex crime provisions. Following the ALI's reasoning, project director Arthur Sherry proposed to deregulate consensual sodomy.[78] Police officers later told the legislature that the laws prohibiting consensual sodomy and oral copulation did not contribute to the public good and should be repealed.[79]

Yet the legislature made no changes to these laws. The probable reason was that sodomy reform would have been understood as "promoting homosexuality," anathema to the legislature and the governor. Accordingly, even though California's sex crime laws were some of the most outdated in the nation, antihomosexual animus prevented the legislature from acting. The discretion these laws vested in the police impelled California judges to respond. In 1966, the California Court of Appeal declared the public indecency law void for vagueness.[80] In the early 1970s, several trial court judges declared the consensual oral copulation law unconstitutional as a violation of the privacy right and the rule of law.[81]

In 1975, the legislature responded by repealing the consensual sodomy and oral copulation laws in a major revision of the state's sex crimes.[82] The legislature's action was important and revolutionary: it removed the legal basis for considering "homosexuals" as per se outlaws and did so in a democratically accountable way, after open debate and a vote by elected representatives. Other features of the legislature's deliberation are also notable. First, a unique array of political factors permitted sodomy reform to pass through the legislature,

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Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981, 25 HOFSTRA L. REV. 817, 840–42 (1997).

77. On the Model Penal Code's suggested deletion of consensual sodomy laws and its rationale, see ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 37, at 118–24.

78. Joint Legislative Committee for Revision of the Penal Code, *Penal Code Revision Project, Tentative Draft No. 1 - Division 11: Crimes Against Sexual Morality, Public Decency, and the Family* (1967).

79. *Police Opinion Questionnaire Completed—Here Are the Results*, LAW ENFORCEMENT J., July 1973 (copy available in the Assembly's Republican Caucus File for A.B. 489 [1973 Session]).

80. *In re* Davis, 51 Cal. Rptr. 701 (Cal. App. 1966).

81. *Ruling Hits California's Oral Sex Law*, ADVOCATE, Oct. 11, 1972, at 1; *San Diego Judge Strikes Felony Oral Copulation Law*, ADVOCATE, Apr. 11, 1973, at 19.

82. 1975 Cal. Stat. 131–36.

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namely, the sweeping gains made by forward-looking legislators in the 1974 election and the sponsorship of the bill by Assemblyman Willie Brown and Senator George Moscone, two heterosexual politicians who championed gay rights. Even with all these stars aligned, the bill barely squeaked through in the Senate, whose 20-20 deadlock was broken by Lieutenant Governor Mervyn Dymally, a veteran of the civil rights movement like Brown and Moscone.[83]

Second, the sponsors realized that a key to their argument would be to show how the consensual oral copulation law threatened *heterosexual* couples, not just homosexuals. Many legislators were astounded to learn that oral sex was a crime in the state, and that knowledge made it much easier for them to vote for reform, especially when their girlfriends or wives were sitting in the galleries on the day of the vote.[84]

Third, the public arguments against the bill included displays of antihomosexual stereotyping and animus. Senator Alfred Song, chair of the Judiciary Committee, was appalled at the anti-Semitic and racist (as well as homophobic) language used by Californians opposed to sex crime reform that advantaged homosexuals.[85] Some Senate opponents of the bill argued that sex crime reform amounted to state promotion of homosexuality, which one opponent described on the Senate floor as conduct that God told the Israelites should be punished by death (Leviticus 20:13). Other opponents warned that homosexuals spread venereal disease and therefore were a public health menace; that courts would extend the bill's protections to "the beaches, the bushes, and the restrooms"; and that impressionable children would receive the message that homosexuality is "okay."[86]

Ironically, the repeal of the consensual oral copulation and sodomy laws did *not* remove the primary bases for police harassment of gay men and lesbians in California, namely, the "vag lewd" law (Penal Code section 647(a)). Studies documented that the vag lewd law was almost exclusively applied against homosexuals, that it often justified police intrusions into people's private activities, and that it occasioned blackmail and other abuses.[87] There was, however, strong law-and-order opposition to repealing the vag lewd law in 1975, and so Assemblyman Brown made no effort to repeal that law in his sex

83. For an account of the legislative maneuvering, see ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 37, at 197–201.

84. Interview by Professor William N. Eskridge, Jr., with Willie Brown, former Assemblyman, in San Francisco, Jan. 10, 2005.

85. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 37, at 198–99 (providing account of the reasons advanced by opponents of sodomy repeal).

86. *Sex Bill Passes in Historic Senate Tie-Breaker*, ADVOCATE, May 21, 1975, at 4; Johanna Neuman, *Battle Over Consenting Sex Rages, Ends in Draw*, L.A. DAILY J., May 2, 1975, at 1, 20.

87. *See* Barry Copilow & Tom Coleman, *Enforcement of Section 647(a) of the California Penal Code by the Los Angeles Police Department*, ADVOCATE, Feb. 14, 1973, at 2–3, 24; LOS ANGELES POLICE DEP'T, UPDATE: ENFORCEMENT OF SECTION 647(A) OF THE CALIFORNIA PENAL CODE (1974).

crime reform bill.[88] Legislators concerned about the legality of heterosexual intimate activities (including their own) felt that the vag lewd law applied only to homosexuals, and they could defend their votes to repeal consensual sodomy by pointing to the antihomosexual provisions left in the Code. Moreover, the vag lewd law was aimed at "public" rather than "private" activities, always a more popular and better-justified basis for legal regulation.

The California Supreme Court considered the application of section 647(a) in *Pryor v. Municipal Court*.[89] Rejecting the State's argument that the vag lewd law was a longstanding and unexceptional application of its police power to maintain public order, the court ruled that its vagueness invited enforcement against consensual activities that posed no legitimate threat to public order, namely, invitations and overtures by lesbians and gay men to one another.[90] The court further found that the law was applied in a discriminatory manner, targeting gay men.[91] Rather than striking down the law on due process vagueness grounds, however, the court held that section 647(a) should be interpreted narrowly, as applying only to solicitation of sexual conduct in a public place *and* to sexual touching the actor had good reason to believe would be offensive to the other person.[92] Although at the time *Pryor* served as a stinging rebuke to local enforcement of the vag lewd law, its accommodation of public decency and private intimacy has proven to be a lasting resolution.

The legislature also did not dare support open homosexuality in the workforce, and so this issue, too, was left to the administrative and judicial branches of government. In a landmark opinion, the California Supreme Court ruled in *Morrison v. State Board of Education*[93] that the State could not discharge a teacher for once engaging in private homosexual conduct. The court restricted the statutory "immoral conduct" disqualification to activities impairing a teacher's pedagogical effectiveness, meaning there had to be a nexus between a disqualifying factor and the person's ability to do his or her job.[94] In 1977, the court extended *Morrison* to protect a teacher who had been arrested (pre-*Pryor*) for soliciting an undercover policeman and charged with violating the vag lewd law.[95]

88. *See* Letter from California Peace Officers' Ass'n et al. to Hon. Willie Brown, Jr. (Feb. 28, 1975) (objecting to sex crime reform that would allow "homosexuals" to solicit other men for sodomy); Letter from George H. Murphy, Legislative Counsel of California, to Hon. Willie Brown, Jr., (Mar. 5, 1975) (opining that Brown's bill would *not* affect the vag lewd law barring sexual solicitation). These letters come from the Senate Committee files for the 1975 sex crimes law.

89. 599 P.2d 636 (Cal. 1979).

90. *Id.* at 643–44.

91. *Id.* at 644.

92. *Id.* at 645–48.

93. 461 P.2d 375 (Cal. 1969).

94. *Id.* at 379–87.

95. *See* Board of Educ. v. Jack M., 566 P.2d 602 (Cal. 1977).

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The notion of allowing lesbians and gay men to teach in the public schools was alarming to many California parents. The voters had an opportunity to override *Morrison* in 1978. The famous Briggs Initiative would have required the discharge of any teacher who advocated or encouraged "private or public homosexual activity" if such advocacy was likely to come to the attention of schoolchildren.[96] Former governor Ronald Reagan and then-governor Jerry Brown opposed the Initiative, and it was defeated. A year later, Governor Brown issued an executive order barring sexual orientation discrimination against state employees.[97]

These were milestones in the transition of California from a state where homosexuals were degraded as outlaws to a state where lesbians, gay men, and bisexuals were tolerated. For the first time in its history, California law reflected an understanding that state persecution of gay people could be "discrimination" analogous to the State's longtime persecution of people having Japanese or Chinese ancestries. That this notion was then conceivable did not mean that most Californians or even most legislators believed that anything should be done to protect people they had learned to view with disgust and moral disapproval. Based upon a review of the legislative culture in the mid-1970s and conversations with then-assemblyman Willie Brown, I do not believe the California legislature would have enacted laws accomplishing what the California Supreme Court and Governor Jerry Brown did in this period. By protecting sexual minorities in some very basic ways, the court and the governor *reversed the burden of political inertia.* Before their actions, gay people had no rights against the operation of prejudice. That same prejudice disabled gay people from securing rights through legislation or initiatives. But after judges and the chief executive gave gay people some basic rights, popular or legislative majorities would have had to act affirmatively to return gay people to their unprotected status. This proved hard to do, as the Briggs Initiative suggested.

Moreover, by reversing the burden of inertia, the California Supreme Court and the governor created *conditions for falsification of stereotypes.* Popular fears, long expressed in the law, that homosexuals prey on schoolchildren proved unfounded in the wake of *Morrison.* Similarly, myths that homosexuals disrupted workplaces, accepted by the federal as well as state governments, failed to materialize after Governor Brown's order. By creating a tolerant space for gay people within the state itself, the California Supreme Court and the governor gave gay people opportunities to contribute to public projects, sometimes as openly gay people. This was an educational experience

96. 1978 Cal. Ballot, Proposition 6, § 3(b)(2) (operative language paraphrased in text); *see* Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1702–06 (1993) (discussion of Briggs Initiative).

97. Office of the Governor of California, Executive Order No. B-54-79 (Apr. 4, 1979).

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for all involved.[98]

The legislature was still capable of expressing positive disapproval of homosexuality and was sometimes eager to do so. After the sodomy repeal and legislative actions in 1971 made the state's domestic relations law substantially gender-neutral, the County Clerks Association became alarmed because some gay activists maintained that the law now permitted "homosexual marriages."[99] In 1977, legislators voted by overwhelming margins to amend the domestic relations law to make clear that civil marriage was limited to heterosexual adult relationships.[100] The rhetoric of the brief same-sex marriage debate was significant: opponents argued not only that same-sex marriage was inconsistent with the traditional definition of marriage, but also that state recognition would promote homosexuality and destroy marriage and the family.[101]

C. Stage 3: Equal Citizenship for LGBT Persons

By the 1960s, there were openly gay and lesbian citizens who maintained that homosexuality was not just a tolerable variation from the norm of heterosexuality. Instead, they suggested there was no single norm, and homosexuality was simply a benign variation. José Sarria, the famous waiter at the Black Cat (the gay bar the State spent millions of dollars trying to close), ran for a seat on San Francisco's Board of Supervisors in 1961. His platform was "Gay is Good."[102]

That platform reflected the thinking of emerging gay activists on both coasts of the United States. In Washington, D.C., for instance, gay-is-good activist Frank Kameny was mounting a vigorous campaign against the regime of police entrapment, distribution of arrest lists, and punitive screening of the military and public service that had ended his career in astronomy for the Pentagon.[103] Weary of police bullying, bar raids, and smears by journalists as well as police, California homosexuals in the San Francisco and Los Angeles bar cultures began to express solidarity.[104] In the limited and unstable sphere of

98. For a collection of stories accounting for the price paid by closeted lesbian and gay teachers, and the liberating effect of being free from discrimination, see ONE TEACHER IN TEN: GAY AND LESBIAN EDUCATORS TELL THEIR STORIES (Kevin Jennings, ed., 1994).

99. The documentary legislative history of the clerks' proposal to clarify state marriage law is found in Record on Appeal at 1023–1182, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (Case No. S1479990).

100. 1977 Cal. Stat. 131.

101. *See Senate Approves Measure Banning Gay Marriages*, L.A. TIMES, Aug. 12, 1977, at B33 (accounts of the legislative debate).

102. BOYD, WIDE-OPEN TOWN, *supra* note 17, at 212; Guy Strait, *The Nightingale*, S.F. NEWS, Dec. 23, 1963, at 4 (describing Sarria's campaign and his "Gay is Good" platform).

103. On Kameny's activism, see David K. Johnson, *Homosexual Citizens: Washington's Gay Community Confronts the Civil Service*, WASH. HIST., Fall/Winter 1994–95, at 45.

104. BOYD, WIDE-OPEN TOWN, *supra* note 17, at 200–36 (Gay is Good movement in San Francisco, 1950s–60s); FADERMAN & TIMMONS, GAY L.A., *supra* note 17, at 148–58 (Los Angeles, 1960s).

dialogue that the regulatory and police state afforded them at the time, emerging activists on both coasts posited a new understanding: gay men and lesbians are not degraded and abnormal, but are good and normal. The 5,613 votes cast for Sarria in the 1961 election reflected this point of view.[105]

During the 1960s, modest but increasing numbers of gay men and lesbians rejected the Daughters-Mattachine strategy of acquiescing in the inferiority of homosexuality and asserted that there was nothing wrong with being "homosexual." Experts emerged as important allies in this effort. For example, the National Institute for Mental Health's influential 1969 report concluded that homosexuality was neither a mental disease nor a defect and that it was homophobia, instead, that constituted a social menace and a threat to the public good.[106] Civil liberties groups, which began to intervene on behalf of complainants such as Kameny in police entrapment cases in the late 1950s, became significant, if sometimes reluctant, players in mediating conflicts over the scope and intensity of police intrusion into private lives.[107]

These new gay voices (mostly baby boomers), fed up with the "degrading of [their] personalities by the state," proclaimed: "Merely to live, we must assert ourselves as homosexuals," and "accept it or not, we will force our way into open society; you will have to acknowledge us."[108] The gay-is-good philosophy required lesbians and gay men to "come out" of their "closets," not only for their own emotional well-being, but also to demonstrate to an ignorant society that homosexuals were human beings with lives, serious relationships, and job capabilities. Political progress, they thought, was only possible if significant numbers of citizens participated in the public sphere as openly gay people. The political goal of the gay-is-good strategists was legal *equality*, not just tolerance and freedom from police terror.[109] Early thinkers like Harry Hay, the founder of Mattachine in Los Angeles, appropriated the civil rights movement's idea that homosexuals were a "minority group" subject to "discrimination" because of emotional prejudice and mental stereotypes.[110]

As more LGBT people came out of the closet, many left rural areas and small towns where they feared for their economic security and physical safety. They came in droves to San Francisco, Los Angeles, and other cities with sizeable gay populations. In the wake of the June 1969 Stonewall protests in New

105. Strait, *supra* note 102, at 4.

106. TASK FORCE ON HOMOSEXUALITY, NAT'L INST. MENTAL HEALTH, FINAL REPORT (1969).

107. *See* ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 37, at 152–58 (ambivalent ACLU attitude toward the rights of gay people in the 1950s evolves into an increasingly supportive stance in the 1960s).

108. Seymour Krim, *Revolt of the Homosexual*, MATTACHINE REV., May 1959, at 4–5, 9.

109. For an early formal espousal of the full equality goal for gay people, see WASH. MATTACHINE SOC'Y CONST. art. II, § 1(a)–(c) (1962).

110. Harry Hay, *Preliminary Concepts: International Bachelors' Fraternal Order for Peace and Social Dignity* (1950), *reprinted in* RADICALLY GAY: GAY LIBERATION IN THE WORDS OF ITS FOUNDER 63–76 (Will Roscoe, ed., 1996).

York City,[111] thousands of urban Californians demanded equal treatment by the State and government protection against private discrimination. In 1978, under the sponsorship of Mayor George Moscone (the senate sponsor of sodomy reform in 1975) and Supervisor Harvey Milk, San Francisco became one of the first large cities in America to adopt a law protecting against sexual orientation discrimination in employment.[112] However, the California legislature was unprepared to extend equality protections to gay people, especially after Dade County and several other local governments saw their antidiscrimination ordinances overturned by popular referenda in 1977–78.[113] On November 27, 1978, San Francisco Supervisor Dan White (the only vote against the earlier antidiscrimination ordinance) assassinated Mayor Moscone and Supervisor Milk, a political act that shocked the lesbian and gay community into greater activism.

In the wake of the Milk and Moscone assassinations, the California Supreme Court again reversed the burden of inertia, in *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*[114] Employees sued PT&T for discriminating against gay people in hiring, firing, and promotion. Although not emphasized in the plaintiffs' complaint, the court read the California Labor Code's prohibition of employer interference with employee "political activities" to include employer discipline of gay employees for being "out of the closet":

> [T]he struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity. . . . The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities. A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to "come out of the closet," acknowledge their sexual preferences, and to associate with others in working for equal rights.[115]

111. In June 1969, hundreds of LGBT people rioted in and outside the Stonewall Inn in New York City. These riots stimulated large numbers of LGBT people to "come out of the closet" and demand political rights all over the country. The best introduction is DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION (2004) (recently made into a documentary film).

112. *See* RANDY SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK (1985).

113. *See* JAMES T. SEARS, REBELS, RUBYFRUIT, AND RHINESTONES: QUEERING SPACE IN THE STONEWALL SOUTH 226–45 (2001) (detailed account of the 1977 Dade County Referendum).

114. 595 P.2d 592 (Cal. 1979).

115. *Id.* at 610.

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Although dissenting colleagues criticized the majority for stretching the statutory language to fit a progressive social vision in *PT&T*,[116] the time had come for legal recognition of the equality principle. The court led, and over the next decade the political process followed.

After *PT&T*, the city councils of Los Angeles (1979), Oakland (1984), Santa Monica (1984), West Hollywood (1984), Sacramento (1986), Long Beach (1987), and San Diego (1990) enacted new ordinances barring private job discrimination based on sexual orientation.[117] Each of these cities also prohibited discrimination in municipal employment. Governor Brown adopted a similar policy for state employees in 1979, and in 1992 the legislature amended the Labor Code to add an explicit protection for employment discrimination based on sexual orientation.[118] The same pattern followed in public accommodations discrimination. Lower courts construed the Unruh Civil Rights Act to bar sexual orientation discrimination by public accommodations,[119] and the legislature codified that principle by statute in 2005.[120]

In less than a generation, California had moved from a state where homosexuals were an outlaw class to one where both municipal and state governments decriminalized same-sex intercourse and solicitation, opened civil service and teaching jobs to openly gay people, and announced that antigay discrimination in workplaces and places of public accommodation was illegal. California's evolving policy involved all the institutions of government, with judges, administrators, legislators, and even some enforcement agencies under reined-in entrapment protocols and post-arrest due process provisions set by appellate courts contributing to the instantiation of nondiscrimination in the workplace.

To be sure, these measures had their limits. Police still harassed homosexuals; antidiscrimination laws were underenforced, especially at the municipal level; and openly gay people were subject to violence, hate crimes, and abusive harassment in schools and the workplace. Most importantly, as gay people were forming relationships and families in unprecedented numbers, they faced a family law regime whose protections were uncertain. Committed couples wanted state recognition of their relationships, and couples raising children wanted both partners to have rights as legal parents. Given the

116. *Id.* at 618 (Richardson, J., dissenting) (rejecting the majority's application of the labor code's protection of "political activity" to the "homosexuals'" complaint); *see also id.* at 613–18 (trenchant criticism of the majority's expansive interpretation of state constitutional and statutory protections as applied to "homosexuals").

117. *See* ESKRIDGE, GAYLAW, *supra* note 19, at 356 (App. B2).

118. *See* Executive Order No. B-54-79 (Apr. 4, 1979) (barring sexual orientation discrimination in state employment); CAL. LAB. CODE § 1102.1 (2003) (2009 Supp.) (barring discrimination because of sexual orientation in private as well as public workplaces).

119. *See* Rolon v. Kulwitzky, 153 Cal. Rptr. 3d 289 (1984) (interpreting Unruh Act, CAL. CIV. CODE § 51, to bar public accommodations from discriminating based on sexual orientation).

120. 2005 Cal. Stat. ch. 420 § 3.

legislature's 1977 rebuff of same-sex marriage, gay activists in San Francisco devised an alternate institution, the "domestic partnership," that would provide both recognition and some benefits for same-sex couples.[121] San Francisco's Board of Supervisors passed a domestic partnership law in 1982, but Mayor Dianne Feinstein vetoed it on the ground that it "mimicked" marriage, which she considered off-limits to homosexuals.[122]

Two years later, the Berkeley City Council adopted the first operative municipal domestic partnership ordinance, which ultimately allowed city employees to obtain health benefits for their same-sex partners.[123] Similar laws were adopted in West Hollywood (1985), Santa Cruz (1986), Los Angeles (1988), San Francisco (1989 [revoked by referendum], adopted again in 1990), Sacramento (1992), San Diego (1994), Oakland (1996), and Long Beach (1997).[124] In 1994, the California legislature passed a similar domestic partnership law, only to have it vetoed by Governor Pete Wilson, on the ground that it would be a "foot in the door" for same-sex marriage.[125] Five years after that, the legislature passed an even more extensive domestic partnership law, and this time the governor (Gray Davis, a Democrat who succeeded Wilson) signed it.[126] Although the voters adopted the Knight Initiative in 2000, which defined marriage as one man, one woman for purposes of California law, the legislature in 2003 extended the benefits of statewide domestic partnership to include almost all the legal benefits, and in some cases the legal obligations, accorded civil marriage.[127] In the proposed California Marriage License Nondiscrimination Act of 2005, the legislature recognized that the State's constitutional obligation to treat lesbian and gay couples the same as straight couples was not met by the domestic partnership law, which "den[ied] them the unique public recognition and affirmation that civil marriage confers on [heterosexual] couples."[128]

While legislators took the lead in recognizing lesbian and gay unions, judges took the lead in recognizing lesbian and gay families. A generation ago, openly lesbian and gay parents often lost custody and even visitation rights to

121. Interview by Professor William N. Eskridge, Jr., with Matt Coles, in New York City (Dec. 29, 2004) (account of the domestic partnership idea by Coles, who was an author and supporter of the idea when he was a gay rights activist in San Francisco).

122. *San Francisco Mayor Says No to Gay Marriage*, BLADE, Jan. 26, 1983, at 9.

123. City of Berkeley, Policy Establishing Domestic Partnership Registration (1984), cited and discussed in Craig Bowman & Blake Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1189 (1992).

124. *See id.* at 1189–95 (identifying and discussing these ordinances); Raymond O'Brien, *Domestic Partnership: Recognition Responsibility*, 32 SAN DIEGO L. REV. 163 (1995) (similar).

125. Daniel Weintraub & Bettina Boxall, *Ballot Fallout Expected from Wilson's Veto*, L.A. TIMES, Sept. 13, 1994, at 3.

126. 1999 Cal. Stat. ch. 588.

127. *In re* Marriage Cases, 183 P.3d 384, 409–10 (Cal. 2008) (discussing the 2000 Knight Initiative); 2003 Cal. Stat. ch. 421 (expanding domestic partnership rights, benefits, and duties).

128. A.B. 849, 2005–06 Reg. Sess. Calif. Legis. Governor Schwarzenegger successfully vetoed this bill in 2005, and a similar one in 2007. *See Marriage Cases*, 183 P.3d at 410 n.17.

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straight ex-spouses because of social stereotyping of homosexuals as irresponsible and sexually predatory.[129] For the last twenty-five years, gay and (especially) lesbian couples have been conceiving and rearing children within their committed relationships. Those couples rearing children have sought to create parental rights for both parents through "second-parent adoption," whereby the second parent adopts the child (whether biological or adoptive) of the first parent.[130] Lower-court judges in California have confirmed between 10,000 and 20,000 such adoptions.[131] The California Supreme Court ratified second-parent adoptions in *Sharon S. v. Superior Court*.[132] Justice Kathryn Werdegar's majority opinion rejected arguments that state recognition of lesbian and gay families was inconsistent with civil marital values and concluded that lesbian and gay families served the fundamental purpose of adoption law: the best interests of children.[133] Following the courts, the legislature's 2003 domestic partnership amendments recognized registered domestic partners as full coparents, just as state law has long recognized different-sex married stepparents.[134]

The *Marriage Cases*, therefore, can be viewed as the culmination of several generations of normative debate about the civil status of sexual minorities. Each of the court's three key holdings was a confirmation of gay people's near-equal citizenship. First, and most important, the ruling that sexual orientation is a suspect classification is a direct rejection of both the old view that homosexuality is a malignant variation from the norm and the newer view that homosexuality is a tolerable variation on heterosexuality, the official state norm. After the *Marriage Cases*, there was no legally preferred "norm" with respect to sexual orientation. Second, the court's ruling that the long-recognized fundamental "right to marry" applies to lesbians, gay men, bisexuals, and transgendered persons just as it does to straight persons is an important corollary and reinforcement of the first point. For the first time in American history, an appellate court found the courage—or the logic—to reject the tautological claim that a "right to marry" has no relevance to unions that most people do not consider valid marriages. Third, the court's overruling of the legislature's and Proposition 22's discrimination against same-sex couples in marriage recognition removed the biggest discrimination against gay people in the state codes.

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129. *E.g.*, Immerman v. Immerman, 1 Cal. Rptr. 248 (Ct. App. 1959) (holding that evidence of the wife's sexual relationship with another woman was relevant to determination of child custody in divorce proceedings).

130. *See* Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian and Other Non-Traditional Families*, 90 GEO. L.J. 459 (1990) (explaining the concept of "second parent adoption" and urging judges to interpret adoption laws to accommodate children raised by same-sex couples).

131. Jennifer Pizer, *What About the Children?*, ADVOCATE, Nov. 9, 2001, at 1.

132. 73 P.3d 554 (Cal. 2003).

133. *Compare id.* at 568–70, *with id.* at 582–87 (Brown, J., concurring and dissenting).

134. CAL. FAM. CODE § 9000(b), (g).

II
EQUALITY PRACTICE: EQUAL PROTECTION JURISPRUDENCE IN A PLURALIST DEMOCRACY

What motivated California judges to repeatedly protect sexual minorities from the full force of oppressive laws and practices? Why did the protections not come earlier? Why did those judges proceed so cautiously? These questions defy simple answers, but the following account is only moderately complex. The goal of a pluralist democracy is to induce all salient social groups to invest in state political and legal processes.[135] In such a system, judges can play the important role of helping to transition new or emerging groups into the legal and political system without unduly alienating existing groups.[136] One great internal danger to a pluralist democracy is primordial, high-stakes politics, where groups in the grip of emotional hysteria use the State to exclude, penalize, or hurt members of a hated or feared group.[137] This chaotic brand of politics can undermine or even destroy a democracy by fueling private feuds, intensifying inter-group animus, and inducing some groups or members to forsake politics in favor of extra-political mechanisms such as violence.[138]

Judges can ameliorate such transitions, thereby contributing to the operation of a pluralist democracy, by blocking measures that injure a salient group without a currently-justified public justification.[139] Thus, the most basic job of the judiciary is libertarian: ensure that all citizens are treated fairly as a matter of process. With regard to equal protection, this approach explains why the primary tools of analysis are heightened scrutiny when the legislature is deploying suspect classifications that tend to reflect stakes-raising animus rather than public-regarding criteria, or infringing fundamental rights (deep civic harms to the minority). On the other hand, judicial decisions themselves can raise the stakes of politics, as when judges seek closure on an issue that is of deep concern to a popular majority or significant minority.[140] This explains and justifies judges' tendency to defer to the political process on most policy issues and their disinclination to close the door on political discussion when the

135. ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1967); Nicholas R. Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734 (1983).

136. William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2005).

137. ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA 36–37 (1991); *see also* STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 202–08, 222–27 (1995) (advocating "gag rules" to lower the stakes of primordial conversations).

138. PRZEWORSKI, *supra* note 137, at 26–37; Miller, *supra* note 135, at 742.

139. *See e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (overturning segregated schools because they have the effect of impeding the ability of an important social group to benefit from public education, understood as fundamental to American democracy).

140. This is the most legitimate criticism of *Roe v. Wade*, 410 U.S. 113 (1973). *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

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population is intensely divided.[141] In short, the judicial role is to avoid the Scylla of minority persecution without running into the Charybdis of repudiating intense policy preferences of the majority. Judges navigate these waters through *equality practice*: pressing the equal treatment norm gently, in decisions that push the law just a little, with an invitation for popular feedback.[142] If the feedback is positive (gay people flourish, traditionalist worries do not materialize), then judges or other officials might push the law a little more the next time, until there is a stable equilibrium of formal equality or something close to it.

This model of judicial decisionmaking is mainly normative: it is, I argue, what judges *should* be doing in constitutional cases. But it also has great descriptive power: this is what California judges have *actually* been doing in constitutional cases. During the long period of California's history when homosexuals were considered subhuman social outcasts and legal outlaws, they were not a salient social group or part of the pluralist political process. In that period, there was simply no equality jurisprudence applicable to gay people, although the California and U.S. Supreme Courts did apply basic liberty-protecting assurances, such as due process and free speech, to them. This libertarian jurisprudence set minimum standards of decency that even despised persons were assured. It was modestly stakes-lowering, because it offset some of the bitterness that unfairly persecuted persons and their friends and families would harbor as a result of harsh treatment. These libertarian protections also assured gay people some space—bars and clubs, the mail, journals and newsletters, and associations like Mattachine and the Daughters—in which they could begin to cohere as a social group.

Once gay people started to cohere as a visible social group and to be politically active in California cities in the 1960s, mainstream attitudes began to change and legal reform became tangible.[143] It was harder for most straight people to consider all homosexuals as subhuman, predatory, or degenerate once they knew and worked with openly gay people. The implication is that those Californians who knew and worked with gay people tended to be doubtful that antihomosexual policies really served the public interest, and many prejudiced Californians became open to the possibility that such policies "went too far." The existence of a discernible and politically engaged gay community became apparent to thoughtful observers, including judges who entertained a series of cases involving lesbian and gay citizens. Judicial decisions criminalizing police enforcement of cross-dressing, public indecency, and lewd vagrancy laws went

141. *See e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997) (Court unanimously declining to announce a constitutional right to die, as body politic is just beginning serious debate on this important issue).

142. ESKRIDGE, EQUALITY PRACTICE, *supra* note 10.

143. *See* BOYD, WIDE-OPEN TOWN, *supra* note 17, at 194–236 (San Francisco, 1960s); FADERMAN & TIMMONS, GAY L.A., *supra* note 17, at 148–218 (Los Angeles, 1964–75).

beyond the legislature's sodomy reform: they got the State off the backs of gay people for private, consensual activities and drew no rebuke from the political process. California Supreme Court decisions protecting lesbian and gay schoolteachers against arbitrary discipline drew more political attention but also survived.

After the 1979 riots in San Francisco reacting to the light criminal punishment for Harvey Milk's assassin, the California Supreme Court and the governor banned private and public job discrimination against gay people.[144] This was a direct response to a social movement that demanded an end to antigay persecution. As before, the court pushed the political process beyond the legislature. But these decisions allowed the possibility of legislative override and popular response through the increasingly used initiative process. The (failed) Briggs Initiative of 1978 was an example of this phenomenon.

The new antidiscrimination policies fuelled an increasingly assertive gay rights movement, even as the AIDS epidemic was contributing to an antigay backlash.[145] By the 1990s, many were coming out as gay couples and gay parents. Judges accommodated the parents by interpreting the state adoption law to allow two women or two men to be legal parents,[146] while local governments and the state legislature created domestic partnership laws.[147] Together, judges and legislators performed the difficult task of integrating the new social group into the state's legal structure while taking pains not to alienate traditionalist citizens who viewed gay people with unease. The 2000 Knight Initiative was significant in *not* addressing parental rights or domestic partnerships, but it did reflect a popular judgment about gay marriage: no state recognition. Yet eight years later the California Supreme Court overrode both the 1977 statute banning same-sex marriage and the 2000 initiative on constitutional grounds. This raises the question: What happened between 2000 and 2008 that motivated the court to act after having deftly avoided stakes-raising changes for the previous fifty years?

In my view, the California Supreme Court would not have required same-sex marriage in 2000, even though the exact legal arguments accepted by the

144. Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592 (Cal. 1979) (interpreting state labor code to bar private employment discrimination because of sexual orientation); Exec. Order No. B-54-79 (Apr. 4, 1979) (barring state employment discrimination because of sexual orientation).

145. On the complicated politics of antidiscrimination and AIDS, see ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 37, at 201–28 (partially attributing renewed antigay attitudes to AIDS, 1980s), 274–98 (describing easing of AIDS backlash and renewed gay-tolerant and even gay-friendly attitudes).

146. Decades of lower court opinions were confirmed. *See* Sharon S. v. Super. Ct., 73 P.3d 554 (Cal. 2003).

147. For examples of domestic partnership registries created in California, see 1999 Cal. Stat. ch. 588 (statewide, expanded in 2003 Cal. Stat. ch. 421); Bowman & Cornish, *supra* note 123, at 1189–95 (county and municipal registries).

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court in 2008 were available in a detailed analysis published in 1996.[148] The arguments had not changed, but the ability of the judicial audience to understand them or to openly agree with them had changed because the social and legal context had changed. This Part will show how the arguments accepted by the California Supreme Court (and one that was not accepted) were made possible because of the social and political changes between 2000 and 2008. By exploring this legal sociology, one can understand both the underlying jurisprudence of the *Marriage Cases* and something about the socio-legal dynamics of constitutional law.

A. The Fundamental Right to Marry: New Identities, New Rights

As a matter of jurisprudence, the precedent most analogous to the *Marriage Cases* was the California Supreme Court's 1948 decision in *Perez v. Sharp*.[149] In one of the boldest judicial decisions of the twentieth century, the court struck down an antimiscegenation statute that had been part of California's family law since statehood and that had recently been expanded to override a lower court decision allowing a Caucasian-Filipino marriage.[150] No American appellate court had invalidated an antimiscegenation law before *Perez*, and no appellate court would do so again until the U.S. Supreme Court decided *Loving v. Virginia* almost twenty years later.[151] In *Loving* and subsequent cases, the U.S. Supreme Court recognized a fundamental right to marry, applicable not only to different-race couples, but also to deadbeat dads who have not paid their legal alimony or child support obligations[152] and to convicted rapists and murderers in prison.[153]

As I have argued elsewhere, the fundamental right to marry should apply to lesbian and gay couples, putting a high burden of proof on the State to justify their exclusion.[154] In a civilized society, it is a scandal that rapists have a recognized right to marry and committed lesbian couples raising children do not. However, before the *Marriage Cases*, every American appellate court addressing this issue had ruled that the "right to marry" did not apply to same-

148. *See* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE (1996) [hereinafter ESKRIDGE, CASE FOR SAME-SEX MARRIAGE] (arguing that same-sex marriage is an idea whose time has come, and that courts ought to strike down laws barring lesbian and gay couples from getting married). The arguments accepted by the California Supreme Court in 2008 were set forth in the book. *Id.* at 123–52 (arguing that fundamental right to marry applies to lesbian and gay couples), 172–82 (arguing that sexual orientation ought to be a suspect classification and thus an independent basis for strict scrutiny).

149. 198 P.2d 17 (Cal. 1948) (Traynor, J., plurality opinion).

150. 1933 Cal. Stat. 1472–73.

151. 388 U.S. 1 (1967).

152. Zablocki v. Redhail, 434 U.S. 374 (1978).

153. Turner v. Safley, 482 U.S. 78 (1987) (no written dissent from the proposition that the fundamental right to marry applies to men in prison for life; Justice Scalia took no public position on this issue, neither dissenting nor joining the majority opinion).

154. ESKRIDGE, CASE FOR SAME-SEX MARRIAGE, *supra* note 148, at 123–52.

sex couples.[155] It is very probable that the California Supreme Court itself would have followed the uniform judicial approach in 2000, perhaps unanimously, but they did not in 2008. What had changed was perceived gay identity, the legal rights of gay people and gay couples in California, and heterosexual identity.

First, the notion of lesbians and gay men as committed spouses raising children was an idea incomprehensible to large majorities of Americans in 2000.[156] "Gay marriage" was then an oxymoron; although several Scandinavian countries had recognized "registered partnerships" for same-sex couples, no modern western state had recognized lesbian or gay unions as "marriages." By 2008, that had changed. Several countries had formally recognized same-sex marriage: The Netherlands (2001), Belgium (2003), Canada and Spain (2005), and South Africa (2005–06).[157] Notably, in the U.S. so had the Commonwealth of Massachusetts (2003).[158] Linguistically at least, for many Americans the term "gay marriage" was no longer an oxymoron—a phenomenon the importance of which Professor Mae Kuykendall has cogently argued.[159]

Normatively, marriage itself changed once there was a tangible human face for gay marriage. By January 2008, there were more than 10,000 lesbian and gay couples who were legally married in the United States—and the total was more than 80,000 if one included couples joined in civil unions, reciprocal beneficiaries, or statewide domestic partnership.[160] The existence of married (or officially partnered) lesbian and gay spouses lends critical support for persuading mainstream America that the State should recognize lesbian and gay marriages. This is partly because it is easier to deny rights in the abstract than to specific real-life couples. Perhaps more important, many skeptics probably believed that gay marriage was just an equality stunt and an exercise in political correctness. However, the existence of thousands of spouses who are clearly serious about their relationships has made it clear to many Americans that gay

155. Even courts that have struck down state bars to lesbian and gay marriages had, before the California *Marriage Cases*, either explicitly rejected the right to marry argument, *see Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (rejecting strict scrutiny based upon a fundamental right to marry but insisting on strict scrutiny because of the state's sex-based classification), or set aside that argument. *E.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (ruling that the state exclusion of lesbian and gay couples from marriage lacked a rational basis and therefore did not require an analysis of the strict scrutiny arguments).

156. In fact, of course, most lesbian and gay adults did enjoy committed relationships, and many were raising children. The gay community's self-identification had already changed somewhat by 2000, but the perception by mainstream America changed more slowly.

157. *See* Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 853–54 (2008) (documenting the recognition of same-sex marriages in the listed countries).

158. *Goodridge*, 798 N.E.2d 941.

159. Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story About Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385 (1999).

160. *See* Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 169 tbl.4 (2009).

marriage is a serious proposal that matters intensely to many LGBT persons. Americans thought differently about the issue in 2008 than they did in 2000. Some who found the notion of gay marriage inconceivable in 2000 found it merely wrongheaded in 2008; many who earlier believed gay "marriage" deeply misguided were no longer so sure; and many who were uncertain at the turn of the millennium were staunch supporters eight years later.[161]

A second post-2000 development was the general political acceptance of same-sex marriage in those jurisdictions that adopted it. Three jurisdictions that had recognized same-sex marriages did so in response to judicial insistence: Massachusetts,[162] Canada,[163] and South Africa.[164] Academics as well as practical politicians warned that judicial imposition of same-sex marriage would lead to a backlash[165]—yet these three jurisdictions dramatically falsified those predictions. In Massachusetts, an effort to override the court through a constitutional amendment was ultimately routed by a 4-1 margin in the legislature after voters reelected supporters of same-sex marriage and defeated a few opponents in elections held between 2004 and 2008.[166] In Canada, Parliament responded to provincial court decisions rejecting legislation discriminating against lesbian gay couples by adopting nationwide marriage legislation including same-sex couples.[167] Critics of that legislation were defeated in the next election; although conservatives won a subsequent election, their inclination to repeal the law has apparently faded.[168] In South Africa, parliament immediately

161. *See id.* at 167 tbls. 2 & 3 (reporting steadily rising numbers of Americans who supported same-sex marriage or civil unions from 2000 to 2008).

162. The Massachusetts Supreme Court invalidated the statutory bar to same-sex marriage (by the same 4–3 majority as California). *See Goodridge*, 798 N.E.2d at 948. In 2004, the legislature voted for a constitutional amendment recognizing civil unions but preserving marriage for different-sex couples. The 2004 election was a triumph for supporters of same-sex marriage, and in 2005 the legislature voted *against* the constitutional amendment by a vote of 157 to 39. Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES, Dec. 15, 2004, at A14.

163. After the Canadian Supreme Court ruled that the state was required to afford the same legal rights and duties to same-sex couples as to different-sex couples in *M. v. H.*, (1999) 2 S.C.R. 3, provincial courts in Ontario, Quebec, and Vancouver ruled same-sex marriage exclusions to be violations of the Canadian Charter. *See* Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985–2005) and Its Limits*, 49 MCGILL L.J. 1143 (2004).

164. In *Minister of Home Affairs v. Fourie*, 2006(3) BCLR 355 (CC), 2005 SACLR LEXIS 34, the Constitutional Court of South Africa ruled that the exclusion of lesbian and gay couples from marriage violated the constitution's equality guarantee. (The Constitution of the Republic of South Africa specifically lists sexual orientation as a suspect classification.)

165. *See, e.g.*, Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431 (2005).

166. *See* Belluck, *supra* note 162 (2004 elections turned out several opponents of same-sex marriage and returned all supporters).

167. Although it could have invoked its override power under the Charter's "Notwithstanding Clause," Parliament in 2005 responded by legislatively extending marriage to include same-sex couples. Civil Marriage Act, 2005 S.C. ch. 33 (Can.).

168. Wintemute, *supra* note 163, at 1172 (antigay party defeated in the first post-marriage

codified the Supreme Court's holding into positive law.[169]

The experience in Massachusetts, Canada, and South Africa suggests that opposition to same-sex marriage was less significant than commonly thought, at least in some jurisdictions. Under such circumstances, constitutional decisions not only reversed the burden of inertia, but also upended the *endowment effect*: before the decisions, most people were unwilling to *grant* new marriage rights to lesbian and gay couples, but after the decisions most people were unwilling to *revoke* marriage rights that lesbian and gay couples were then enjoying. Despite the 2000 Knight Initiative, opposition to same-sex marriage seemed similarly soft in California, at least until Proposition 8. The state legislature passed a same-sex marriage bill in 2005 that was vetoed by Governor Schwarzenegger. In the 2006 elections, however, no supporter of same-sex marriage lost her seat in the legislature. Likewise, the passage of the bill again in 2007 saw no fallout on affirmative votes in the 2008 election.

This apparent change in popular opinion was interconnected with legal developments. Table 1 below demonstrates that each of these jurisdictions moved in a predictable step-by-step process, slowly recognizing rights for gay people: (1) sodomy reform, resulting in homosexuals no longer being per se outlaws; (2) antidiscrimination protections, especially for workplaces that encouraged more LGBT persons to come out of the closet; and (3) recognition of lesbian and gay unions and families, which revealed a new identity for "out" gay people as parents and spouses. Once a jurisdiction had gone through each of these steps, it was possible for the judiciary to reverse the burden of inertia on the marriage issue as well as to influence the segment of public opinion that was more open-minded on the issue. As the California Supreme Court justices surely realized in 2008, their state had gone through exactly the same step-by-step process as Massachusetts, Canada, and South Africa. Under the equality practice paradigm, that meant that citizens would be more open to changing their views if the court were to reverse the normative endowment effect on the issue of same-sex marriage.

election; 57 percent of Canadians supportive of same-sex marriage).

169. Civil Union Act 2006, art. 17 (2006).

Table 1: Equality Practice in Canada, Massachusetts, and California

Rights for Gay People	Canada	Massachusetts	California
Sodomy Repeal	1969	1974 (court) 2002 (court)	1975
Antidiscrimination Law	1992 (lower court) 1996 1998 (court)	1989	1979 (court) 1992
Hate Crime Law	1985	1996	1991
Domestic Partnership/ Civil Unions	1999 (court) 2000	1992 (governor)	1999 2003
Second-Parent Adoption	1991-2001 (lower courts)	1993 (court)	1980s (trial courts) 2001 2003 (court)
Same-Sex Marriage	2003 (lower courts) 2005	2004 (court)	2008 (court)

A third, and more speculative, change had taken root well before 2000 but was, in my opinion, more pronounced by 2008: the identity of straight people was evolving. In the 1970s, when gay marriage first emerged as a public issue in California, it is likely that straight people viewed marriage as a fundamental institution, strongly associated with procreation and child-rearing. Most people's identity, especially their religious identity, was intimately tied to the notion that they were married (or expected to be married) to someone of the opposite sex, had procreated (or expected to do so), and were raising their procreated children within the marriage. This classic family pattern has steadily eroded in the last generation: the nuclear family is no longer dominant, and many straight persons do not expect to marry even after having children.[170] Many straight persons have children through artificial means or adoption. Increasingly in America, with California leading the way, procreation has been

170. On the demographics of the current American households, with record numbers headed by unmarried persons, see TAVIA SIMMONS & MARTIN O'CONNELL, U.S. CENSUS BUREAU, MARRIED COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 (2003).

divorced from marriage. By 2008, it appeared that an unprecedented number of straight people did not see their fundamental identity tied to the old notion of "one man, one woman, procreated-children" marriage.[171]

These three changes meant that a cautious California Supreme Court, trying to avoid raising the stakes of the culture wars, had the political discretion to recognize same-sex marriage in 2008. However, the foregoing did not dictate that the court would rule as it did. With a similarly receptive political climate, the New York Court of Appeals in 2005 ruled against marriage claimants.[172] One vote prevented California from following the New York court's approach, and that vote was Chief Justice Ronald George, a moderately conservative Republican appointee to the court. There are many reasons why a conservative *ought* to support gay marriage (fairness to LGBT people, support for gay marriage from big business, and the pro-commitment features of marriage), but the key reason for the chief justice was probably institutional and perhaps even personal. *Perez*, a persuasive precedent, supplied a strong rule-of-law rationale to sustain the lesbian and gay couples' constitutional challenge. Moreover, extending *Perez* to same-sex marriage would reinforce the California Supreme Court's reputation as the nation's cutting edge court, a constitutional leader rivaling or, for gay rights, superseding the U.S. Supreme Court. Chief Justice Ronald George would go down in the law books as a worthy successor to Chief Justice Roger Traynor, the visionary jurist who wrote the plurality opinion in *Perez*.

B. Sexual Orientation as a Suspect Classification: A Pluralist Inversion of Representation-Reinforcement Theory

The attorney general's defense in the *Marriage Cases* looked a lot like the State's defense in *Perez* more than half a century earlier. In both appeals, the State claimed that the California Supreme Court should defer to the legislature on a matter of social policy that had long been settled;[173] that the court should respect the definition of marriage as it had traditionally been understood by the community;[174] and that the proper remedy was with the legislature.[175] Cognizant of this unfortunate parallel, the attorney general (former governor Jerry

171. Increasing numbers of openly straight Americans, including academics, have intervened in the gay marriage debate to argue for propounding a new state institution to replace civil marriage as the repository of rights and duties for couples. *See, e.g.*, Melissa Murray, *Equal Rites and Equal Rights*, 96 CALIF. L. REV. 1395 (2008).

172. Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

173. *Compare* Perez v. Sharp, 198 P.2d 17, 35, 37–38, 41–43 (Cal. 1948) (Shenk, J., dissenting) (espousing the State's arguments), *with* Answer Brief of State of California and the Attorney General to Opening Briefs on the Merits at 43–47, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (Case No. S1479990) [hereinafter Attorney General's Answer Brief (Marriage)].

174. *Compare Perez*, 198 P.2d at 37 (Shenk, J., dissenting), *with* Attorney General's Answer Brief (Marriage), *supra* note 173, at 45–46.

175. *Compare Perez*, 198 P.2d at 45–46 (Shenk, J., dissenting), *with* Attorney General's Answer Brief (Marriage), *supra* note 173, at 48–54.

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Brown) argued in the *Marriage Cases* that *Perez* was materially different because it involved a race-based classification that triggered strict scrutiny.[176] The challengers responded that excluding lesbian and gay couples from marriage was discrimination based on sexual orientation, sexual orientation ought to be considered a "suspect" classification for the same reasons as race, and the marriage exclusion for same-sex couples should fail under strict scrutiny for the same reasons the exclusion for different-race couples fell in *Perez*.[177]

As a matter of following precedent, it was not hard for the court to rule that sexual orientation is a suspect classification. The long-established, precedent-based approach in California is that a classification (like race or sex) is "suspect" if it (1) is an "immutable" trait that (2) has "no relation to ability to perform or contribute to society" and (3) has traditionally been the basis for policies that reflect "inferiority and second-class citizenship" of stigmatized groups.[178] For sexual orientation, the second and third criteria are hard to dispute, especially in light of the history of antigay regulations and their arbitrary and harsh enforcement. As Part I of this Foreword demonstrates, California law was vigorously and increasingly antihomosexual for most of the twentieth century, but what did the State have to show for its expense? It is not clear that antihomosexual policies yielded any public benefits, beyond the satisfaction that prejudiced citizens had in the knowledge that so-called "queers" and "faggots" were announced enemies of the State and were occasionally arrested, exposed, and both personally and professionally ruined. The main tangible consequences of these policies were thousands of broken lives, decent men and women who were outed or prosecuted by the State for consensual romantic activities or overtures; thousands of bad marriages, where closeted homosexuals entered into deluded matrimony with often-unsuspecting heterosexuals of the opposite sex; and a tradition of police brutality and corruption in cities that were the main enforcers of antihomosexual rules.

In any event, the attorney general effectively conceded that stigmatizing homosexuality has had no relationship to legitimate state policies and has

176. Attorney General's Answer Brief (Marriage), *supra* note 173, at 20–21.

177. Respondents' Opening Brief on the Merits, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (Case No. S1479990); *see also id.* at 39–50 (also arguing for strict scrutiny on the grounds that the marriage exclusion is per se a sex discrimination claim and violates constitutional free speech guarantees). There were several other petitioners, each making similar arguments. *See, e.g.*, Petitioner City and County of San Francisco's Opening Brief on the Merits, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (Case No. S1479990) (arguing that the marriage exclusion of same-sex couples was unconstitutional because it lacked a rational basis and failed to satisfy strict scrutiny triggered by the sexual orientation classification and by infringements of the fundamental rights to privacy and to marriage).

178. Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 539–41 (Cal. 1971). Other courts have followed essentially these same criteria to find that sexual orientation is a suspect classification. *See* Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988), *vacated en banc*, 875 F.2d 699 (9th Cir. 1989); Tanner v. Or. Health Scis. Univ., 971 P.2d 435 (Or. 1998); M. v. H., [1999] 3 S.C.R. 2 (Can. Sup. Ct.), ¶¶ 63–74.

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traditionally been deployed to degrade a productive class of citizens. Nor did the attorney general dispute that homosexuality is "immutable" for suspect classification purposes.[179] Sidestepping the question whether homosexuality is hard-wired, the attorney general agreed that one's sexual orientation is not a matter that the State can or should make an effort to change or influence. Having conceded the three criteria announced and followed in *Sail'er Inn*, the attorney general still argued that homosexuality should not be a suspect classification, because there was an implicit fourth criterion in the test, "political powerlessness."[180] The argument for this implicit fourth criterion was taken from the representation-reinforcement theory of judicial review, classically explained by former Stanford professor and dean John Hart Ely. Under Dean Ely's theory, judges defer to the democratically accountable political process unless the system is not working, either because in-groups are blocking political change or because "discrete and insular minorities" are disabled from effective participation because of "prejudice."[181] Because gay people are now an active group with influence in California politics, the attorney general argued sexual orientation is not a classification that ought to galvanize special judicial concern.

To accept the attorney general's argument, however, the California Supreme Court would have had to reexamine or limit the reasoning of *Sail'er Inn* (where the court had held that sex is a suspect classification). Women, the group usually harmed by sex-based classifications, were not only politically powerful in 1971, but they represented a majority of the electorate. Accordingly, Chief Justice George's majority opinion in the *Marriage Cases* rejected the attorney general's proposed fourth criterion, but provided little explanation beyond the power of precedent.[182] The best explanation for rejecting a political powerlessness criterion rests in the pluralist theory that is the theme of this Foreword.

When a group is politically powerless, as blacks and gays were in the early twentieth century and as women were in the nineteenth century, courts

179. Attorney General's Answer Brief (Marriage), *supra* note 173, at 24–25. The lower court had reasoned that sexual orientation could not be a suspect classification because it was not "immutable" in the way that race and sex are.

180. *Id.* at 25–38; *see also id.* at 39–54 (arguing that homosexuality might be considered quasi-suspect, thereby triggering intermediate but not strict judicial scrutiny).

181. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); *see also id.* at 73–77, 87–103 (outlining the rationale for a representation-reinforcing theory). The quotations in the text are from *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), which was the inspiration for Ely's theory.

182. *In re* Marriage Cases, 183 P.3d 384, 442–43 (Cal. 2008). There is a more detailed explanation for why political powerlessness ought not be a requisite for heightened scrutiny of sexual orientation classifications in *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008). Justice Palmer's opinion for the divided Connecticut Supreme Court posed the powerlessness question this way: Is it fair to impose the burden of political inertia on LGBT people? *Id.* at 444.

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have some political leeway to protect members' procedural liberties but would be entering political risky terrain if they applied equal protection scrutiny with any bite to discrimination against the marginalized, socially-stigmatized out-group. One way of putting this is cognitive. Because the polity so thoroughly assimilates the perspective of the dominant group, and because the voices of the out-group are so thoroughly silenced, exclusionary or punitive treatment of the out-group will not be considered "discrimination." Thus, Californians in the 1930s probably did not regard their sterilization law aimed at "inverts" to be discriminatory, and a discrimination claim would have been laughed out of court.[183] Until very recently, few Americans believed that state marriage laws "discriminated" against gay people, in part because they considered the one man, one woman requirement of marriage to be natural, trans-historical, and inevitable.[184] Indeed, this point of view remains widespread. In the *Marriage Cases*, the dissenting justices made the remarkable claim that there was actually no "discrimination" against lesbian and gay couples when the legislature and the voters limited civil marriage to one man and one woman, because the gay couple is not "similarly situated" to the straight couple.[185]

Another way of viewing the same point is through the lens of the political process. When the out-group is truly marginalized, completely powerless, and especially when it is both invisible and threatening, judicial review striking down exclusionary measures is understood as *promoting* a group that counts for nothing in the pluralist constellation, while *disrespecting* the views of either a popular majority or a powerful minority.[186] If judges protected powerless groups through judicial review, they would be subject to significant backlash, and that is something even life-tenured federal judges avoid, presumably because it undermines their legitimacy.[187] State judges tend to be just as

183. *Cf.* Buck v. Bell, 274 U.S. 200, 208 (1927) (Holmes, J.) (sarcastically rejecting an equal protection challenge to a state sterilization law as "the usual last resort of constitutional arguments").

184. For classic articulations, see, for example, John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019 (2001); C. Sydney Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541 (1985).

185. *Marriage Cases*, 183 P.3d at 464 (Baxter, J., concurring and dissenting); *id.* at 785 (Corrigan, J., concurring and dissenting). Indeed, Justice Baxter made the remarkable argument that the marriage law does not even technically discriminate against gay people because the lesbian is free to marry a man. *Id.* at 465; *cf.* Lawrence v. Texas, 539 U.S. 558 (2003) (Scalia, J., dissenting) (arguing that Texas's "Homosexual Conduct Law" does not discriminate based on "homosexual" orientation, because it prohibits "homosexual conduct" by heterosexual people as well as by homosexual people); Loving v. Virginia, 388 U.S. 1 (1967) (rejecting Virginia's argument that its antimiscegenation law does not discriminate against people of color, because its bar applies to white people as well).

186. By holding that a despised group is "similar" to the majority for equal protection purposes, even if in a small way, a judge opens up the judiciary to incalculable rage from the majority, for the very point of discriminating against powerless minorities is to set them apart as degraded, inferior, and wholly unlike the majority.

187. For demonstrations that the U.S. Supreme Court does not stray far from public opinion, see NATHAN PERSILY ET AL., PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY

cautious, and when they are not they get into trouble. The best recent example is the Hawaii Supreme Court's opinion in *Baehr v. Lewin*, which ruled in 1993 that the exclusion of same-sex couples from marriage was sex discrimination and subject to strict scrutiny.[188] The court did not strike down the State's exclusion of same-sex couples from marriage; the case was remanded to the trial court for a hearing where the State could produce evidence that the exclusion was needed to serve a compelling public interest. The mere possibility of same-sex marriage in Hawaii created a firestorm, fomenting an effort that in 1998 led to a revision of the state constitution by ballot measure. The success of the legal and political strategy against gay marriage in Hawaii, a state of legendary pluralist and progressive electoral tendencies, immediately triggered anti-gay-marriage statutes and referenda in most other states and, in 1996, the federal Defense of Marriage Act.[189]

Thus, even if judges are themselves not captives of cognitive frames that disable discrimination claims from marginal minorities, few judges would ignore the overwhelmingly negative reaction of their audiences and invite charges that they were promoting a despised group. In some jurisdictions, especially those where there are very few openly gay persons, any liberalization of the law—from sodomy reform to the adoption of antidiscrimination measures to recognition of lesbian and gay unions—has called forth charges that the reformers were "promoting" the supposedly repulsive and unhealthy "homosexual lifestyle."[190]

The judicial calculus changes once a minority emerges with enough cohesion and political traction—voting strength, money, and allies—to become part of the pluralist process. This occurred in 1970s California for LGBT persons. Judges have incentives to recognize claims by politically relevant groups for the idealistic reason of integrating the now-emergent minority into the state's politics and law and also for the selfish reason that today's emergent minority might be part of tomorrow's mainstream. Almost any judge would prefer to be remembered as Roger Traynor, who wrote the plurality opinion in *Perez*, rather than John W. Shenk, who wrote a shrill dissenting opinion that many today would view as racist.

(2008); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Opinions*, 87 AM. POL. SCI. REV. 87 (1993).

188. 852 P.2d 44 (Haw. 1993) (plurality opinion).

189. The tremendous backlash to *Baehr* is described in GERALD ROSENBERG, HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 362–63 (rev. ed. 2008); David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning, and Fate*, 22 HAW. L. REV. 19 (2000).

190. *See* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 NYU L. REV. 1327 (2000) [hereinafter Eskridge, *No Promo Homo*].

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Mark this irony: The *Marriage Cases* illustrate how Ely's theory gets it exactly backwards.[191] A despised and truly powerless minority can hope for a few liberty-protecting and process rights, but not equal protection review with any bite from American judges. Only when the minority emerges from true powerlessness and is able to gain allies in the pluralist process can it hope for equality review with bite. Strict scrutiny becomes available only after judges are persuaded that the minority is finally part of the political mainstream.

C. The Sex Discrimination Argument for Gay Rights: Straight Logic or Legal Transvestism?

In *Perez,* the State argued that laws prohibiting different-race marriages were not discriminatory because they treated people of color and whites the same. The California Supreme Court rejected that analysis, holding that equal protection safeguards the rights of individuals, and an individual has a presumptive right not to be judged based upon the irrelevant criterion of her race or the race of her partner.[192] For example, if the State refuses to allow Joe, an African American, to marry Jane, a Caucasian American, it is race discrimination because the regulatory variable (the criterion that produces the legal discrimination) is Joe's race; if Joe were Caucasian, the marriage would be permitted. By analogy, if the State refuses to allow Joe to marry Carlos, it is sex discrimination, because the regulatory variable is Joe's sex; if Joe were a woman, the marriage would be permitted. After *Sail'er Inn*, sex, like race, is a suspect classification in California. As a matter of pure legal logic, therefore, California's exclusion of same-sex couples from marriage is sex discrimination, subject to strict scrutiny whether or not sexual orientation is a suspect classification.[193]

While Chief Justice George's opinion in the *Marriage Cases* was pioneering in its endorsement of both the right of same-sex couples to marry *and* sexual orientation as a suspect classification, it followed other state and federal courts in rejecting the sex discrimination argument for gay marriage. But the court's stated reasons for rejecting the argument are fairly weak. To begin with, the court suggested that because the marriage exclusion treats both sexes "equally" (a woman cannot marry a woman, and a man cannot marry a man), the law did not amount to sex discrimination "as commonly understood."[194] Yet this is precisely the argument that *Perez* (and later *Loving*) rejected in the race context.[195]

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191. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 4, 42–56 (1994).

192. Perez v. Sharp, 198 P.2d 17, 19–20 (Cal. 1948).

193. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 NYU L. REV. 197 (1994).

194. *In re* Marriage Cases, 183 P.3d 384, 436 (Cal. 2008).

195. *Perez*, 198 P.2d at 19–20 (rejecting the state's argument that the antimiscegenation

The court distinguished *Perez* and *Loving* on the ground that the race classification in those cases matched up with the racist ideology of white supremacy.[196] Yet California's exclusion of same-sex couples from marriage was explicitly motivated by a sexist ideology. The Bill Digest for the 1977 statutory amendment that explicitly excluded same-sex couples from marriage said that the "special benefits" of marriage were

> designed to meet situations where one spouse, typically the female, could not adequately provide for herself because she was engaged in raising children . . . . Why extend the same windfall to homosexual couples except in those rare situations (perhaps not so rare among females) where they function as parents with at least one of the partners devoting a significant period of his or her life to staying home and raising children?[197]

The Bill Digest shows how the 1977 same-sex marriage bar sought to entrench gender roles, the core justification for the court's sex discrimination jurisprudence. The legislature intended to reinforce the idea of family as necessarily involving role specialization where the female bears and raises children and the male works outside the home. This, like white supremacy, is an example of "outmoded" stereotyping.[198]

The 1977 Bill Digest also suggests a deeper way in which the legislature was trying to entrench rigid gender roles. Disallowing same-sex marriage confirms the notion that a woman's only possibility of a meaningful romance and lifetime commitment is through marriage to a man, and vice-versa. This notion is our culture's meta-narrative for gender stereotyping. Its foundational idea is *complementarity*: woman is the "opposite sex" from man (always the measure); man and woman are yin and yang, different in ways that generate and define romantic, committed love that can result in both marriage and, inevitably, children. That a woman can fall in love with, form a lifetime commitment to, and raise children with another woman, and not her "complement" (a man), is a deep challenge to this gender stereotype—and indeed to *all* gender stereotypes.[199] The California Supreme Court had itself remarked that, as long as the law "differentiate[s] sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially

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law did not discriminate because of race, as white persons were treated the same as persons of color).

196. *Marriage Cases*, 183 P.3d at 437–38; *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967) (white supremacy as stated reason for the Virginia antimiscegenation law).

197. Assembly Committee on Judiciary, Bill Digest, A.B. 607, 1977–1978 Reg. Sess., discussed in *Marriage Cases*, 183 P.3d at 440 n.58.

198. Arp v. Workers' Comp. Appeals Bd., 53 P.2d 849, 854–55 (1977).

199. There is a substantial feminist literature on the close relationship between sexism and homophobia. *See, e.g.*, SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM (1988); Claudia Card, *Why Homophobia?*, 5 HYPATIA 110 (1990); ADRIENNE RICH, COMPULSORY HETEROSEXUALITY AND LESBIAN EXISTENCE (1981). *See generally* Koppelman, *supra* note 193, at 234–57 (collecting and discussing the extensive literature).

created distinctions, the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote."[200] If *Perez* required strict scrutiny because the State denied (important) marriage rights through a (suspect) race-based classification seeking to entrench a (disapproved) racist ideology, then the *Marriage Cases* required strict scrutiny because the State denied (important) marriage rights through a (suspect) sex-based classification seeking to entrench a (disapproved) sexist ideology of rigid gender roles.

Chief Justice George's last response sounds like his worst but, under the theory of this Foreword, is actually his best. His opinion points out that previous cases, starting with *Gay Law Students* in 1979, have treated discrimination against persons attracted to others of their own sex as "sexual orientation" discrimination, distinct from "sex" discrimination.[201] The most genuine claim, the one that primarily motivated the parties in the *Marriage Cases*, was the sexual orientation claim, not the sex discrimination claim. The chief justice believed that the sex discrimination argument is a form of constitutional transvestism: it dresses up a gay rights argument in feminist garb.[202] It would be a "category" mistake for judges to accept such a secondary reason for strict scrutiny. But why is it not possible for a person to suffer discrimination for more than one reason? This is a common claim in the literature on intersectionality: discrimination against black women, for example, can be synergistic, a complicated product of *both* race *and* sex discrimination.[203] Perhaps a closer fit is the following: If an employer discriminates against a Jewish employee, is it discrimination because of "ethnicity" or is it discrimination because of "religion"? Often it is both, and the two forms of animus are so intertwined that it is sometimes impossible to separate them. So, too, it often is with discrimination against lesbians. In military witch hunts persecuting suspected lesbians, the motivation has traditionally been more sexist than homophobic: according to experts who have served in the armed forces and studied the issue, women have been discharged at higher rates than men for homosexuality, in large part because sexist soldiers and commanders resented the woman's departure from traditional gender roles (including the role of being available for dating and sex to male service personnel).[204] As I have argued elsewhere, animus against lesbians is different than animus against gay men. Antigay male

200. Koire v. Metro Car Wash, 707 P.2d 195, 201 (Cal. 1985) (quoting LEO KANOWITZ, WOMEN AND THE LAW 4 (1969)).

201. *Marriage Cases*, 183 P.3d at 437–39 (Cal. 2008).

202. This argument originated with Edward Stein. *See* Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001); *see also* ESKRIDGE, GAYLAW, *supra* note 19, at 223–28 (advancing but casting some doubt on this argument).

203. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

204. *See* Michelle Benecke & Kristin Dodge, *Military Women in Nontraditional Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215 (1990).

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prejudice is more strongly based on fears of predatory sexuality and less on gender role than antilesbian prejudice.[205] At the very least, the chief justice's view that sexual orientation and sex discrimination must be legally separate is a debatable proposition, and it is wrong in the case of antilesbian discrimination.

Indeed, a mystery of the *Marriage Cases* is why the chief justice went out of his way to address the sex discrimination argument at all. Because his opinion announced two separate bases for strict scrutiny, rejection of sex discrimination as a third basis was dictum, and the analytical problems with the chief justice's discussion might cause unnecessary trouble for his entire effort.[206] The pluralist theory advanced in this Foreword is a possible justification for the chief justice's analysis. I should like to read his opinion as an invitation for Californians to acknowledge the irrationality of antihomosexual policies and to embrace gay groups into the pluralist political process. Likewise, the opinion is an overture to LGBT Californians to consider themselves full and equal citizens, a status that progressive California leaders ranging from Willie Brown to Kenneth Karst have long advanced.[207] The chief justice underscored these messages doctrinally as well as rhetorically by (1) removing the last formal state discrimination against LGBT Californians (until Proposition 8 was passed), (2) announcing that sexual orientation is a suspect classification like race and sex, and (3) abjuring the possibility that LGBT people were securing their place at the table on the backs of feminists. Gay people have their own place at the table—and they earned it through their own efforts. Will they be able to keep it?

III
POPULAR CONSTITUTIONALISM: CAN CONSTITUTIONAL AMENDMENTS BE UNCONSTITUTIONAL?

State constitutions are by design more malleable than the U.S. Constitution. This may be a virtue, because they provide a means for state constitutions to codify America's evolving public values. For example, the California Constitution creates three mechanisms for formal constitutional change: (1) the amendment process, which allows the people to alter the constitution expeditiously by simple majority vote;[208] (2) the revision process, which requires both legislative and popular involvement to make more fundamental

205. *See* ESKRIDGE, GAYLAW, *supra* note 19, at 227–28.

206. The most appreciative audience for the chief justice's opinion is gay people and their allies. Many gays (men as well as women) are themselves strong feminists, and non-gay feminists are gay people's most powerful allies, as are leading race theorists such as Professor Crenshaw. The chief justice's simplistic argumentation rejecting the sex discrimination argument might be expected to draw sharp reactions from lesbian and other feminists, from feminist gay men such as myself, and from race and other critical theorists.

207. *See* KENNETH KARST, BELONGING TO AMERICA: FEDERAL EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).

208. CAL. CONST., art. XVIII, § 3.

constitutional changes;[209] and (3) a constitutional convention called by the legislature, which could create a whole new document.[210]

When the California Supreme Court decided the *Marriage Cases*, the justices were aware that their ruling would almost certainly be revisited by the initiative process. That awareness made it somewhat easier for the chief justice to write the sweeping opinion he issued, because it would only reverse the burden of inertia and would not end the public debate about same-sex marriage in California. As expected, that debate occurred in the 2008 general election cycle. A majority of California voters approved Proposition 8, which added a new Section 7.5 to Article I of the California Constitution: "Only marriage between a man and a woman is valid or recognized in California."[211]

The issues of constitutionalism and equality practice raised by Proposition 8 are the most interesting ones yet posed by the nationwide campaign for same-sex marriage. Proposition 8 provides a lens for examining the evolving rhetoric accompanying antigay initiatives in California and elsewhere in the last generation; the ways in which constitutional amendments can yet be unconstitutional; and the responsibility of the judiciary to police such constitutional infractions.

A. Background to Proposition 8: The Modernization and Sedimentation of Antigay Rhetoric in the Initiative Process

As philosopher Elizabeth Young-Bruehl has theorized, antihomosexual prejudice has roots in three different psychological needs of the bigoted person.[212] *Hysterical* homophobes are troubled by their own "dirty" sexual desires and need to displace those unacceptable feelings onto other persons, traditionally people of color and, more recently, gay people. *Obsessional* homophobes deal with their own personal and professional failures or disappointments by displacing blame onto another minority, such as Jews (whose "greed" causes the poverty of the jealous bigot) and "homosexuals" (who "recruit" children and therefore attack and undermine the bigot's family). *Narcissist* homophobes handle an unstable or uncertain identity by contrasting themselves against a degraded "other"; men assert their masculinity by contrasting themselves with women and "homosexuals." Whatever his or her precise motivations, the homophobe not only bears little resemblance to the drooling bigot romanticized by the civil rights movement, but in fact is a functional person partly because of his or her bigotry.

For most of the twentieth century, with its peak during Governor Earl Warren's tenure (1943–53), California and its local governments saturated

209. *Id.* art. XVIII, § 2.
210. *Id.* art. XVIII, § 1.
211. *Id.* art. I, § 7.5 (new constitutional language added by Proposition 8).
212. ELIZABETH YOUNG-BRUEHL, THE ANATOMY OF PREJUDICES 32–37, 157–58 (1996).

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public culture with policies and messages endorsing and reinforcing all of these antihomosexual prejudices. As recounted above, the State sexualized homosexuals as "degenerate" "moral perverts" (the precise language used in the state code), mentally as well as morally defective, and just one stage up from animals. Homosexuals were reflexively grouped with child molesters; the most draconian antihomosexual legislation, such as the sexual psychopath statutes, were billed as responses to child molestation by older men against girls but were written broadly enough to include homosexual men having consensual sex with other men.[213] By demonizing homosexuals, Earl Warren's California deluded itself into believing it was purifying public culture, protecting children, and reaffirming family values. Not surprisingly, the first statewide antihomosexual initiative, Proposition 6, brought to the voters by Senator John Briggs in 1978, openly invoked these traditional prejudices.[214]

Following the successful strategy of Anita Bryant's "Save Our Children" campaign persuading voters to override Dade County, Florida's antidiscrimination ordinance in 1977, Senator Briggs (who participated in Bryant's effort) ran a campaign that demonized "homosexuals" to a far greater degree than Governor Warren had. Its primary theme was that "homosexuals" are child molesters, and homosexual teachers will molest children. The campaign's prime handout was a collection of fifteen lurid newspaper clips, ranging from "Teacher Accused of Sex Acts with Boy Students" to "Why a 13-year-old Is Selling His Body."[215] In one speech, Briggs reportedly associated "homosexuals" with adulterers, burglars, communists, murderers, rapists, child pornographers, effeminate courtesans, and Richard Nixon.[216] The message: "homosexuals" are enemies of the people, sociopaths who cannot be trusted around children. Aside from the fact that the Yes-on-Six campaign ignored lesbians, who have the lowest rate of child molestation, it ignored evidence that gay men are no more likely to assault minors than straight or bisexual men.[217]

Pursuing the "Save Our Children" theme that Anita Bryant had pioneered, Senator Briggs explained that homosexuality was not only predatory, but predatory in a way worse than molestation: "homosexuals" sought *conversion* of innocent children to dirty homosexuality. In a public debate with openly gay city official Harvey Milk, Briggs put it this way: "They don't have any children of their own. If they don't recruit children or very young people, they'll all die away. . . . That's why they want to be teachers and be equal status and have

213. *See* 1945 Cal. Stat. 623 § 5500 (amending the state sexual psychopath law, originally justified as a protection for children, to include sodomy between consenting adults as well).

214. 1978 Cal. Ballot, Prop. 6 (proposing to bar persons who advocate or practice homosexual relations from teaching in the state's public schools) (discussed in Hunter, *supra* note 96).

215. SHILTS, *supra* note 112, at 239 (quotations in text).

216. *Id.*

217. Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41 (1994) (answering the question posed by the title, "not particularly").

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those people serve as role models and encourage people to join them."[218] Elsewhere, Briggs emphasized the conspiratorial nature of homosexuality: "If you let one homosexual teacher stay, soon there'll be two, then four, then 8, then 25—and before long, the entire school will be taught by homosexuals."[219]

Because Briggs was widely disliked and his message was extreme, the Yes-on-Six campaign increasingly fell back on outlandish arguments such as those quoted above. But Briggs and his main supporters saw their campaign as a positive and not a negative one. From their point of view, the campaign was about traditional family values and the rights of parents, not about demeaning homosexuals. For example, the last debate of the campaign was sponsored by the "Pro-Family Coalition" in Orange County (represented in the legislature by Briggs), but, as before, the actual arguments marshaled at the debate were largely negative.[220]

The Briggs Initiative lost by a wide margin, but most other antihomosexual initiatives of the 1970s, 1980s, and 1990s won majorities with toned-down versions of these antihomosexual tropes.[221] One well-known example was Colorado voters' adoption of Amendment 2 to their constitution in 1992, barring the State from recognizing or enforcing *any* claim of discrimination because of "homosexual, lesbian or bisexual orientation, conduct," etc. The arguments made by proponents of Amendment 2 were very similar to those raised by supporters of the Briggs Initiative fourteen years earlier: "homosexuals" are promiscuous and consumed by venereal disease (the average lesbian lives only to about age forty-six, said the official explanation for Amendment 2); they are also predatory, seeking to invade decent people's houses and schools, take away their jobs, and recruit their children. As such, the campaign argued that Coloradans could and should reaffirm traditional family values by ending "special rights" given by some communities to "homosexuals and lesbians."[222] Although not mentioning the ballot materials, the U.S. Supreme Court in *Romer v. Evans* nonetheless reasoned that Amendment 2 was so broadly written that it lacked a connection to any state

218. SHILTS, *supra* note 112, at 230 (quoting Briggs in one of his several debates with Milk). For a video presentation of one of the debates, see THE TIMES OF HARVEY MILK (Black Sand Productions 1984).

219. SHILTS, *supra* note 112, at 239 (quoting Briggs).

220. *Id.* at 248.

221. *See* Barbra Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1998) (documenting the rising tide of antigay initiatives and their unprecedented success rate, 1959–1993); Donald Haider-Markel et al., *Win, Lose, or Draw: A Re-Examination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304–14 (2007) (documenting that 71 percent of antigay ballot initiatives prevailed in the period 1972–2005). For important normative context of antigay initiatives, see Jane Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994).

222. The Amendment 2 ballot materials are reprinted in Robert Nagel, *Playing Defense*, 6 WM. & MARY BILL OF RTS. J. 167, 191–99 (1997). They are discussed in light of Young-Bruehl's theory of prejudices. *See* ESKRIDGE, GAYLAW, *supra* note 19, at 210–11.

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policy except "animus" against gay people, which was unacceptable.[223]

Romer was a landmark in America's pluralist Constitution. It announced, in effect, that gay people could not be treated as despised outlaws and that public policy had to reflect something more than antigay prejudice.[224] *Romer*'s holding reflected the nation's normative movement (with California as a leader) away from viewing homosexuality as an inherently malignant variation and toward viewing it as a tolerable but inferior variation from normal heterosexuality.[225] Responding to the same normative movement, and probably also to *Romer*, sponsors of antigay initiatives radically altered their rhetoric, *modernizing* their arguments to move away from open denigration of gay people and toward larger civic republican values or overall social utility.[226] Yet the modernized arguments had a sedimented quality: underneath them were traditional antihomosexual tropes, especially the notion that homosexuals are selfish, antifamily, and intent on recruiting innocent children.[227]

The same year *Romer* was handed down, Congress passed and President Bill Clinton signed the Defense of Marriage Act ("DOMA"),[228] the most sweeping antigay federal statute in American history. This federal law assured states that they would not have to recognize gay marriages entered into elsewhere[229] and hard-wired into federal statutory and regulatory law the notion that "marriage" and "spouse" would only be recognized in the context of one man, one woman relationships.[230]

As the title suggests, DOMA, like Proposition 6, was not billed as an attack on gay people. Instead, its message was positive—to protect marriage against further dilution and to ensure that the nation's children would be raised in healthy family environments. Representative Canaday, a DOMA sponsor, asked: "Should the Congress tell the children of America that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same sex?"[231] Although Canaday and other

223. Romer v. Evans, 517 U.S. 620 (1996) (striking down Amendment 2 as inconsistent with the Equal Protection Clause because the amendment's extreme breadth swept well beyond its asserted rational bases and suggested that it was grounded in antigay animus, a conclusion that was amply supported by the ballot materials referenced in text but not cited by the Court).

224. Daniel A. Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMM. 257 (1996).

225. ESKRIDGE, GAYLAW, *supra* note 19, at 209–18.

226. On the modernization of justification for practices harming women or minorities, see Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2120 (1996); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127 (1994).

227. Eskridge, *No Promo Homo*, *supra* note 190.

228. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

229. *Id.* § 2, codified at 28 U.S.C. § 1738C.

230. *Id.* § 3, codified at 1 U.S.C. § 7.

231. 142 CONG. REC. H16,976 (daily ed. July 11, 1996) (statement of Rep. Canaday) (arguing for DOMA); *see id.* at H17,079 (daily ed. July 12, 1996) (statement of Rep. Canaday), (assertively uttering exactly the same words the next day).

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sponsors acknowledged that DOMA represented a "moral disapproval of homosexuality," they emphasized that theirs was a tolerant approach, emphasizing instead their "moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[232] In addition to the focus on protecting children against the allure of "morally disapproved" homosexuality, the sponsors of DOMA often revealed their underlying worldview. For example, Representative Robert Barr, the lead House sponsor, proclaimed that the country needed to reaffirm family values because the "flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundation of our society: the family unit."[233]

By the turn of the millennium, thirty states had adopted statutes or constitutional provisions explicitly barring judicial recognition of same-sex marriages. Introducing Proposition 22 for a vote in March 2000, Senator Pete Knight proposed to make California the thirty-first. Although the media suggested that Senator Knight was acting out his own antigay anxieties,[234] Knight's public pronouncements followed the DOMA script. His negative message was that homosexuals are not normal and that their agenda involved the "trash[ing]" of marriage.[235] But Knight put much greater emphasis on his positive message: "We must affirm the importance of Mom and Dad in our children's lives."[236]

The defense-of-marriage argument employed by Canaday and Knight had the virtues of (1) emphasizing traditionalists' positive case and engaging in less demonization of gay people, (2) linking their positive theory of the family to a larger traditionalist understanding of the State's responsibility for a productive definition of the family, and (3) advancing the pluralist enterprise in affirmatively conceding the decency of gay people and some rights. As a dramatic example, in 2004, Senator Knight said that he had no problem with the statewide domestic partnership law for lesbian and gay couples, even after the legislature had (in 2003) expanded the benefits and duties of that institution to come close to those afforded civil marriage.[237]

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232. H.R Rep. No. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905; *accord* 142 CONG. REC. S22,451 (daily ed. July 12, 1996) (statement of Sen. Coates) (asserting that "traditional marriage and family in our law is not intolerance" and that "[t]olerance does not require us to say that all lifestyles are morally equal").

233. 142 CONG. REC. H17,070 (daily ed. July 12, 1996).

234. The media repeatedly stressed that one of Senator Knight's sons was openly gay and that his son's coming out had created considerable tension with the father. *E.g.*, Jennifer Warren, "State Sen. Knight Laments Son's Commentary," L.A. TIMES, Oct. 15, 1999, at A3.

235. Interview with W.J. Pete Knight by Leon Worden (Apr. 1, 2004), *available at* http://www.scvhistory.com/scvhistory/signal/newsmaker/sg042504.htm [hereinafter 2004 Knight Interview] ("It's the institution of marriage that is being deliberately trashed by gay activists seeking same-sex marriage.").

236. LEAGUE OF WOMEN VOTERS, NONPARTISAN IN-DEPTH ANALYSIS OF PROPOSITION 22 (2000), *available at* http://ca.lwv.org/lwvc.files/mar00/id/prop22.html.

237. 2004 Knight Interview, *supra* note 235.

An important limitation of the defense-of-marriage argument was that it did not rest on any evidence. Further, it was inconsistent with evidence from countries (like Denmark) that legally recognized lesbian and gay partnerships and then saw marriage among straight people make a rebound[238] and subsequent evidence from Canada and Massachusetts, where legalized gay marriage had no discernible effect on the institution of marriage. The defense-of-marriage argument was, from the beginning, a lavender herring, and by 2008 this paucity of evidence rendered it an embarrassment to some traditionalists.

The limitations of the demonization-of-gays and the defense-of-marriage arguments did not mean that traditionalists were unable to advance arguments to support Proposition 8. In light of *Romer*, traditional-family-values strategists avoided demonizing gay people but still managed to express their skepticism regarding gay marriage. For example, the home page of the Protect Marriage website offered a gay-tolerant but marriage-skeptical pop-up cartoon.[239] The cartoon depicted a happy suburban family: Tom the dad, Jan the mom, two kids, and a dog. Tom mows the lawn, Jan likes to cook, and the whole family loves their minivan—and their neighbors, a male couple (Dan and Michael). The gays kept the family's pet dog when they went on vacation, and Jan (observant of traditional gender roles) brought Dan soup when he was sick. Dramatic tension comes to the cartoon when Proposition 8 is placed on the election ballot, and the family has to decide: Should we take away the matrimonial rights of our nice neighbors?

The dramatic tension eases when Jan and Tom do some research on the Internet and discover that their little gay buddies have *all the rights and benefits of marriage*, through the domestic partnership statute. Why do Dan and Michael have to have "marriage" when they already have all these rights? Then, Jan learns from her sister Nancy that when Massachusetts recognized same-sex marriage, one school forced children to learn that gay marriage was as good as traditional marriage; even though parents objected, the courts ruled that the school could do this without even notifying the parents. Jan and Tom then grew concerned that changing the definition of marriage would open a Pandora's Box: Would the public school system teach their children that gay marriage is just as good as traditional marriage? What message would we send the children? Would their church be required to perform same-sex marriages,

238. *See* WILLIAM N. ESKRIDGE, JR. & DARREN SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? (2006) (comprehensive survey of Scandinavian registered partnership laws and practices). Although traditionalists claimed that Denmark's 1989 law had meant the "end of marriage" in that society, the evidence demonstrated that in the seventeen years after lesbian and gay unions were given almost all the legal duties and rights of marriage, the marriage rate had gone up (after decades of pre-1989 yearly declines) and the divorce rate had gone down (after decades of yearly increases). *See id.* at 173–75. The nonmarital childbirth rate had stabilized (after going up fourfold from 1971 to 1989). *See id.* at 190–92.

239. The pop-up cartoon is the portal through which the viewer enters www.Protect Marriage.com, the website for the Yes-on-Eight groups.

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contrary to its teachings? The decision becomes easier and easier, the more Tom and Jan research and deliberate. They decide to support Proposition 8—and then invite the gay guys over for a barbecue. In the end, everyone seems happy in this very American story: Jan and Tom have made a responsible decision; the kids are delighted that they are being sent a good message and served tasty burgers; Michael and Dan live happily, and childlessly, ever after. It's like a trip through Wisteria Lane.

The kinder, gentler advocates of Proposition 8 certainly saw themselves as defending traditional marriage; they did not emphasize (though neither did they abandon) the rapidly degenerating argument that gay marriage would mean the end of marriage and the beginning of polygamy (etc.). Instead, the proponents modernized and cleaned up Anita Bryant's argument that more rights for homosexuals means fewer rights for parents and, especially, children. Thus, the main argument for overturning the *Marriage Cases* was that the four majority justices ("four Justices from San Francisco" according to the Tom-and-Jan pop-up cartoon) were not only forcing gay marriage onto citizens and parents, but were forcing it onto schoolchildren, even over parental objections.

Recall Jan's conversation with her sister, Nancy, who lives in Massachusetts. After that State recognized same-sex marriage, a schoolteacher read the book *King & King* to her second-grade class; the book is a love story where a young man—and not a maiden—is swooped up and married by a Prince Charming. Children told their parents they had been taught that a boy could marry another boy. When some parents objected, the courts ruled that the state antidiscrimination law gave the schools this authority, and there was no legal provision for parents to opt their children out of this instruction.[240] "It's all about the schools" was one mantra of Protect Marriage. Indeed, its main argument for Proposition 8 was that the schools and the courts would force children to read and internalize the pro-gay message of *King & King*.

Yet nothing in the *Marriage Cases* says what schools must or must not teach. Do the *Marriage Cases* interact with existing law to impose a pro-gay marriage instructional requirement? The proponents of Proposition 8 said they did, based on the following logical chain.[241] First, if a public school offers a program in health education, it is supposed to provide some instruction about "the legal . . . aspects and responsibilities of marriage."[242] Second, the Education Code further provides that "[n]o teacher shall give instruction nor shall a school district sponsor any activity that promotes a discriminatory bias

240. Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008).

241. Memorandum of Real Parties in Interest Ron Prentice et al., in Opposition to Petition for Writ of Mandate, Jenkins v. Bowen, Case No. 34-2008-00017366-CU-WM-GDS (Super. Ct., County of Sacramento, Aug. 4, 2008) [hereinafter Opposition Memorandum].

242. CAL. EDUC. CODE §§ 51890(a)(1)(D), 51933(b)(7)(2004) (stating that if a school district includes a program of sex and AIDS-prevention education, it is required to "teach respect for marriage and committed relationships").

because of a characteristic" protected by state law (including sexual orientation as well as race, sex, etc.).[243] Third, the California Supreme Court ruled that traditional marriage *must* be viewed as discriminating against gay persons on the basis of sexual orientation. Q.E.D., a school offering health instruction must teach Jan and Tom's children about marriage, and that instruction must emphasize that gay marriage is just as good as traditional marriage, lest the school violate the antidiscrimination mandates.[244]

There are several problems with the foregoing argument. First, and most important, the Education Code does not require participating school districts to say anything at all about gay marriage; exactly what schools teach about marriage is a matter of their discretion, so long as it is neutral. Thus, a teacher can tell the students that marriage is a serious commitment, though presumably he or she cannot tell the students that man-woman marriage is a serious commitment but woman-woman marriage is not. Second, the California Department of Education has instructed school districts to "work with parents and community members to decide how controversial issues such as homosexuality, abortion, and masturbation will, or will not, be addressed."[245] Third, the Education Code allows any parent "to remove his or her child from instruction that conflicts with their religious beliefs."[246]

Although the Proposition 8 proponents repeatedly invoked the experience of one group of parents in Massachusetts, who were affected primarily by that state's antidiscrimination law (and not its marriage law), California's allowance of parental opt-outs suggests that the proponents were wrong to insist that parents have no recourse were such instruction to be provided. It also did not follow that the *Marriage Cases* required schools to endorse same-sex marriage or even to equate it with different-sex marriage.[247]

In short, the primary argument for Proposition 8 (the risk that California would impose on second graders the view that gay marriage is the same as traditional marriage) was at best overstated and, when held up to legal scrutiny,

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243. *Id.* § 51500, as amended by 2007 Cal. Stat. ch. 569 (S.B. 777), § 29.

244. Opposition Memorandum, Jenkins v. Bowen, *supra* note 241, at 12–17.

245. Reply in Support of Petition for Writ of Mandate, Jenkins v. Bowen, *supra* note 241, at 9.

246. CAL. EDUC. CODE § 51240.

247. Under both the statute and the decision, schools could—and probably should—remain entirely neutral about the marriage debate. This may be an underlying problem for the primary boosters of Yes-on-Eight, namely traditionalist Mormons and Catholics. What the *Marriage Cases* would question is a school policy affirmatively teaching students that there is "real marriage" for straight couples and "phony marriage" or "second-class marriage" for homosexual couples. Such a policy could violate the constitutional rule of the *Marriage Cases*, primarily because it would be a discrimination based on sexual orientation and therefore subject to strict scrutiny. For religious traditionalists who wanted to use the schools as instruments for inculcating traditional family values (and mild denigration of lesbian and gay relationships), then their advertisement has more than a kernel of truth. But the ad goes further, to argue that the *Marriage Cases* impose upon schools an affirmative duty to endorse gay marriage and to equate it with what they consider traditional marriage. That claim seems erroneous.

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flat wrong. Worse, the argument was a direct invocation of the aforementioned "obsessional prejudice" against gay people: fears that greedy homosexuals want to impose huge costs on society to satisfy their agenda and that they want to recruit children—*your* children—for their chosen lifestyle. Because Prop 8 passed by a slender margin (52 percent to 48 percent), it is likely that this obsessional, inaccurate argument made a difference in the outcome.

Table 2 below summarizes the evolution of traditionalist arguments for antigay initiatives in California and elsewhere. On the one hand, it is remarkable that, in less than a generation, the rhetoric has abandoned open appeals to the most vicious antihomosexual prejudices. The rhetoric now emphasizes policy consequences of gay marriage rather than demonization of gay people. Indeed, it is very important that traditionalists of many different backgrounds have agreed that gay people should be tolerated and, to a certain extent, accepted as part of the body politic. This is very important for the Constitution of pluralism. On the other hand, the kinder, gentler antigay initiatives, such as Proposition 8, still make calculated appeals to obsessional and narcissistic prejudices and stereotypes about gay people. In light of the State's longtime demonization of gay people as selfish, predatory, antifamily, and prone to recruitment of vulnerable children, the reasonable and amusing Tom-and-Jan cartoon takes on a more ominous meaning, especially in light of its remarkable and knowing distortions of California law.

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Table 2. Evolving Rhetoric of Antigay Initiatives

	Representations of "Homosexuals"	The Aggressive "Homosexual Agenda"	How Society Ought to Define Itself, Opposed to Homosexuality
1977-78 (Dade County; Briggs Initiative; later, Colorado Amendment 2)	Strong Appeal to Hysterical Prejudice: "Homosexuals" are dirty, diseased, subhuman, polluted	Strong Appeal to Obsessional Prejudice: Predatory "Homosexuals" recruit and molest your *children*	Strong Appeal to Narcissistic Prejudice: Americans are pure, religious, chaste, unselfish (in contrast to impure, godless, promiscuous, selfish "homosexuals")
2000 (Knight and Other Marriage Initiatives)	Downplay Hysterical Appeals: "Homosexuals" are tolerable but selfish misfits	Mild Appeal to Obsessional Prejudice: Selfish "Homosexuals" want to "trash marriage" and imperil *children* just to secure special rights for themselves	Strong Appeal to Narcissistic Prejudice: Americans are morally straight, protect their children, and believe in procreative family values (in contrast to morally defective, sterile "homosexuals")
2008 (Proposition 8)	Reject Hysterical Appeals: Gay people are our nice, childless neighbors, and we should be nice to them, but we don't have to accept their sterile lifestyles	Mild Appeal to Obsessional Prejudice: Pushy Politically Correct Gays want to force their agenda upon vulnerable schoolchildren	Mild Appeal to Narcissistic Prejudice: Americans believe in traditional marriage with children, with serious obligations and unitive benefits (in contrast to "domestic partnership," for the gays)

B. The Proposition 8 Litigation: How Constitutional Amendments Might Be Unconstitutional

Immediately after Proposition 8 was ratified by the voters, a coalition of human rights groups filed a petition with the California Supreme Court challenging the constitutionality of the amendment.[248] The petition in *Strauss v. Horton* posed an important question: How can an amendment to the California Constitution itself be unconstitutional? Perhaps surprisingly, a state constitutional amendment can itself be invalid if it runs afoul any of three sources of legal authority: (1) the California Constitution's own rule of recognition; (2) the United States Constitution; or, perhaps, (3) the foundational constitutional

248. Amended Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief; Memorandum of Points and Authorities, Strauss v. Horton, 207 P.3d 48 (Cal. Nov. 5, 2008) (Case No. S168047) [hereinafter "Prop. 8 Petition"].

precept of individual rights. In this Section, I discuss Proposition 8's relationship to each of these concepts below.

1. Conflict with the California Constitution's Rule of Recognition

State constitutional amendments are invalid if they are inconsistent with the rule of recognition set forth in the state constitution they purport to amend. For example, California and most other states prohibit constitutional amendments from covering more than a single subject.[249] The purpose of single-subject requirements is to prevent the constitution from filling up with logrolls, where various groups work together to assemble a bundle of proposals, none of which would pass muster on its own but which as a group command majority support among the electorate. Proposition 8 surely met the single-subject requirement.

However, the petitioners argued that Proposition 8 did not meet another requirement of the California Constitution. Recall that Article XVIII sets forth three ways for changing the constitution: an amendment, a revision, or a whole new constitution.[250] Amendments can be proposed *either* by citizen petitions *or* by two-thirds votes of the legislature; once proposed, amendments become part of the constitution if ratified by a majority of the voters in the next election. A revision can only be proposed by a constitutional convention or a two-thirds vote of the legislature; once proposed, revisions become part of the constitution if ratified by a majority of the voters. Petitioners challenged Proposition 8 on the ground that it should have gone through the process for a legislative-constitutional-revision rather than for an initiative-constitutional-amendment. Their argument, essentially, rested upon one important state court precedent.

In *Raven v Deukmejian*,[251] petitioners challenged the validity of the Crime Victims Justice Reform Act (Proposition 115), adopted by the voters in the 1990 general election. Section 3 of this initiative-constitutional-amendment provided that certain enumerated criminal defendants' rights would be construed consistently with the U.S. Constitution and that criminal and juvenile defendants would not be afforded greater rights than those afforded by the federal Constitution.[252] Essentially, therefore, Proposition 115 placed a cap on

249. CAL. CONST., art. II, § 8, subd. (d) ("An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."); *see also* Brosnahan v. Brown, 651 P.2d 274 (Cal. 1982) (ruling that a multi-faceted initiative-constitutional-amendment passed the single-subject test because all of the provisions were "germane" to an overall, easy-to-understand constitutional goal).

250. CAL. CONST., art. XVIII.

251. 801 P.2d 1077 (Cal. 1990).

252. Proposition 115 (1990) amended CAL. CONST. art. I, § 24, to add the following:

> In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in

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the state constitutional rights of criminal defendants in state proceedings: the state courts could not add to or expand beyond the rights afforded criminal defendants by the U.S. Constitution, as recognized by the U.S. Supreme Court.

The California Supreme Court had in previous cases held or suggested that "fundamental" changes in the constitution would have to go through the more formal revision process.[253] "Fundamental" changes can be either quantitative or qualitative in nature. Thus, an initiative-constitutional-amendment that rewrote almost half the constitutional text was invalidated on the ground that it was a major *quantitative* change that had to go through the revision process.[254] This quantitative test did not imperil Proposition 115 (or Proposition 8), but other cases have suggested that a change could be *qualitatively* fundamental. The California Supreme Court has said that "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision."[255] Because the aforementioned portion of Proposition 115 went beyond a trimming back of specific constitutional rights and constituted "a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution," the court ruled that it could not be added to the constitution through the initiative process.[256] Such a fundamental realignment could only be achieved through a legislative-constitutional-revision. The petitioners in the Proposition 8 challenge argued that *Raven* should be extended to cover Proposition 8 because, like section 3 of Proposition 115 in 1990, it was a deceptively short provision working a fundamental change in the constitutional balance of private rights and state responsibilities.[257]

The attorney general of California argued that *Raven* was distinguishable because the court understood Proposition 115 to change the essential *Marbury v. Madison* role of the California Supreme Court. In contrast, Proposition 8 merely *overrode* the court on a divisive social issue and did not change the

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jeopardy for the same offense, and not to suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

253. *See* Livermore v. Waite, 36 P. 424, 425–26 (Cal. 1894) (upholding an amendment but indicating that fundamental changes can only be accomplished by revisions); McFadden v. Jordan, 196 P.2d 787 (Cal. 1948) (holding that an extensive set of new provisions amounted to a "revision" of the state constitution).

254. *Jordan*, 196 P.2d at 799.

255. Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1286 (Cal. 1978) (quoted in *Raven*, 801 P.2d 1077).

256. *Raven*, 801 P.2d at 1089 ("[I]n practical effect, the new provision vests a critical portion of state judicial power in the United States Supreme Court, certainly a fundamental change in our preexisting governmental plan.").

257. *See* Strauss v. Horton, 207 P.3d 48, 98 (Cal. 2009) (describing the petitioners' precise legal claim that Proposition 8 represented a revision rather than an amendment).

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fundamental structure of state government.[258] Intervening to oppose the petition, Proposition 8's proponents argued that Proposition 8 was entitled to a strong presumption of validity because sovereignty resides in the people, and the court is merely an agent of the people's ongoing constitutional preferences.[259] Petitioners responded that the court plays an independent, coordinate role in state constitutionalism and ought to exercise independent judgment as to whether Proposition 8 contravened the structure of Article XVIII.[260]

Raven is not as close a precedent for the Proposition 8 challenge as *Perez* was for the earlier challenge to the exclusion of same-sex couples from civil marriage. As a matter of case law, the California Supreme Court had more logical leeway in the Proposition 8 challenge than it did in the earlier appeal. There were several precedents where the court had upheld initiative-constitutional-amendments that took away important constitutional rights. In *People v. Frierson*, for example, the California Supreme Court ruled that initiative-constitutional-amendments overriding its own decisions regarding the death penalty were legitimate.[261] In *Strauss v. Horton*, five of the seven justices (including two who had voted to recognize same-sex marriage the year before) joined Chief Justice George's opinion, which followed *Frierson* and declined to expand *Raven*.[262] A sixth justice (Werdegar) concurred in the result reached by the court.[263] Only Justice Moreno dissented.[264]

As the six majority justices agreed, the state domestic partnership law left Proposition 8 a less drastic curtailment of rights than was the case in *Raven* or even *Frierson*.[265] A pluralism-based justification for a narrow reading of *Raven* and a broad reading of cases like *Frierson* is that the court would significantly raise the stakes of politics if it trumped popular opposition to same-sex marriage a second time. The marriage debate is one that intensely but evenly divides the body politic in California; when public opinion is intensely and

258. Answer Brief in Response to the Petition for Extraordinary Relief at 22–53, Strauss v. Horton, Strauss v. Horton, 207 P.3d 48 (Cal. Nov. 5, 2008) (Case No. S168047) [hereinafter Prop. 8 Answer Brief].

259. Brief for Interveners in Response to the Petition for Extraordinary Relief at 6–14, 28–29, Strauss v. Horton, 207 P.3d 48 (Cal. Nov. 5, 2008) (Case No. S168047) [hereinafter Interveners' Answer to Petition].

260. *See* Amended Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief; Memorandum of Points and Authorities at 35–43, Strauss v. Horton, 207 P.3d 48 (Cal. Nov. 5, 2008) (Case No. S168047). [hereinafter Prop. 8 Amended Petition].

261. People v. Freierson, 599 P.2d 587 (Cal. 1979) (upholding an initiative-constitutional-amendment reinstating the death penalty and overriding the Court's constitutional precedent to do so); *see also In re* Lance W., 694 P.2d 744 (Cal. 1985) (ruling that an initiative-constitutional-amendment restricting the exclusionary rule for criminal defendants was not a fundamental change in the structure of government and therefore not invalid under Article XVIII).

262. *Strauss*, 207 P.3d at 122.

263. *Id.* at 124–29 (Werdegar, J., concurring in the result).

264. *Id.* at 129–40 (Moreno, J., concurring in part and dissenting in part).

265. *Id.* at 116–19 (George, C.J., for the court).

evenly divided on an issue, a pluralist polity imperils itself by a premature resolution.[266] Because the legislature would not submit a legislative-constitutional-revision to the voters, a decision requiring a revision rather than an amendment would, like the Hawaii Supreme Court's decision in *Baehr v. Lewin*, be viewed as a judicial effort to end public debate on this issue.[267] That would produce a significant backlash against the court, and perhaps roil the body politic as well.

The pluralism-based theory advanced in this Foreword provides stronger support for the court's resolution in light of its further holding (this one unanimous) that Proposition 8 does not retroactively nullify the estimated 18,000 same-sex marriages performed in the state between June 15 and November 8, 2008, the period wherein same-sex marriage was legal in California.[268] This Solomonic disposition has several virtues. First, it is strongly consistent with precedent and the rule of law, as American courts generally presume against retroactivity of new statutes and constitutional provisions.[269] This presumption places the burden of showing retroactivity on the sponsors of legislation or initiatives, a burden the Proposition 8 proponents were unable to carry. Second, it is respectful of the popular debate about Proposition 8, reaffirming the people's expressed preference for a constitutional rule disallowing same-sex marriage, but also respectful of the interests of lesbian and gay couples who relied on the court's earlier disposition when they entered into civil matrimony. Finally, the court's preservation of already-performed marriages provides an opportunity for the LGBT minority to falsify stereotypes of gay people as irresponsible, childless, and antifamily without disregarding the popular vote revoking the right to marry for couples in the future. Same-sex marriage advocates will certainly bring the issue back to the voters in a future initiative constitutional amendment that would repeal Proposition 8, and any future debate will benefit from the state's experience with those marriages that have been legally carried out.

2. Conflict with the U.S. Constitution

State constitutional amendments are invalid if they are inconsistent with the U.S. Constitution, treaties, or other federal law.[270] *Romer v. Evans* is an example of judicial review of this sort: both the Colorado Supreme Court and the U.S. Supreme Court ruled that Amendment 2, the amendment preempting pro-gay antidiscrimination ordinances and orders, was inconsistent with the U.S. Constitution's Equal Protection Clause and therefore invalid. An earlier

266. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 93–99 (1956).

267. *See supra* Section II.B.

268. *Strauss*, 207 P.3d at 119–22 (George, C.J., for a unanimous court).

269. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); Evangelatos v. Super. Ct., 753 P.2d 585, 597–98 (Cal. 1988).

270. U.S. CONST., art. VI.

example is *Mulkey v. Reitman*.[271] California had adopted fair housing legislation to protect racial minority citizens from being unfairly excluded from leases and property sales transactions. In 1966, voters endorsed Proposition 14, an initiative-constitutional-amendment that overrode the legislature's fair housing law.[272] The California Supreme Court ruled that Proposition 14 violated the Equal Protection Clause of the U.S. Constitution, and the U.S. Supreme Court affirmed.[273]

Ironically, the Proposition 14 challenge bears striking similarities to the Proposition 8 challenge. In both instances, the State sought to protect a minority class disadvantaged by prejudice and stereotyping. In both instances, voters revoked the official protections, and civil rights groups turned to the courts to override the popular process, an up-or-down majority vote that took away fundamental rights from a disadvantaged minority group.

Notwithstanding these similarities and the *Romer v. Evans* precedent, the petitioners in *Strauss v. Horton* did not assert that Proposition 8 violated the U.S. Constitution.[274] The reasons are apparent. Doctrinally, *Mulkey* is distinguishable because race is a suspect classification at the federal level, but sexual orientation is not. *Romer* invalidated Amendment 2 under the rational basis test because, unlike Proposition 8, its antigay discrimination was open, broad, and indeed limitless. Ideologically, the U.S. Supreme Court is populated with more conservative justices. At the very least, such justices would not expand precedent to constitutionalize a broad right to same-sex marriage. Indeed, I do not think any of the justices—liberal or conservative—should do so in the near future.

Even if one believes, as I do, that the best interpretation of the federal constitutional text and precedent is inconsistent with state exclusions of lesbian and gay couples from civil marriage, the issue is far from ripe at the national level. A decision by the Supreme Court broadly addressing the constitutionality of same-sex marriage exclusions would be unwise in the near future. A decision upholding the constitutionality against any kind of challenge would risk the kind of critique and even ridicule that greeted *Bowers v. Hardwick*,[275] where the Court sweepingly upheld consensual sodomy laws based upon reasoning that was erroneous on the facts and embarrassing in its rhetoric.[276] A decision striking down such exclusions (in a country where only five states—all but one of them in New England—recognize same-sex marriages) would risk a

271. 413 P.2d 825 (Cal. 1966), *aff'd sub nom.* Reitman v. Mulkey, 387 U.S. 369 (1967).
272. 1966 Cal. Ballot, Prop. 14.
273. Reitman v. Mulkey, 387 U.S. 369 (1967).
274. *See* Strauss v. Horton, 207 P.3d 48, 78 n.11 (Cal. 2009).
275. 478 U.S. 186 (1986).
276. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003) (overruling *Bowers* and citing some of the critiques of the Court's many erroneous or factually misleading statements and assumptions).

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ferocious backlash.[277] For all these reasons, the petitioners made the right choice in deciding not to argue that Proposition 8 violates the U.S. Constitution.

3. Conflict with the Foundational Constitutional Precept of Individual Rights

Although he did not believe Proposition 8 was invalid as an improper "revision," Attorney General Brown argued that the initiative-constitutional-amendment was invalid.[278] Because Proposition 8 abrogated fundamental rights protected by Article I of the California Constitution, and did so without a compelling public justification, the attorney general reasoned that it was inconsistent with the purpose of the California Constitution, and indeed the purpose of constitutionalism more generally.[279] This form of argument is far from unprecedented, and ultimately has some basis in pluralist theory. Like the California Constitution, the first part of the German Constitution is a declaration of individual rights, including dignitary and equality rights. Reasoning from the structure of that constitution, the German Supreme Court has formulated a doctrine of "unconstitutional constitutional amendments," which holds that "even a constitutional amendment would be unconstitutional were it to conflict with the core values or spirit of the Basic Law as a whole."[280]

The basis for the attorney general's position is also consistent with the social contract theory underlying Anglo-American constitutionalism. What is the purpose of the State? The goal of the Constitution? In *Leviathan* (1651), Thomas Hobbes argued that government is justified, and earns our consent, by allowing us to escape the "state of nature."[281] The civil state exists so that citizens can pursue their lives without fear that other citizens, or outside invaders, will interfere with their lives and their ability to operate in the world.[282] Thus, to protect citizens, the civil state needs legislatures to enact laws serving the public interest, police to enforce those laws, and courts to adjudicate controversies without resort to private feuds. These protections, moreover, must be made available to *everyone*. The State's failure to preserve and protect, and to make these protections broadly available so that people can live their lives secure from fear, is for Hobbes the failure of the State to do its

277. The five states recognizing same-sex marriage are Massachusetts (2003), Connecticut (2008), Vermont (2009), Iowa (2009), and New Hampshire (2009).

278. Prop. 8 Answer Brief, *supra* note 258, at 79–82, discussed in *Strauss*, 207 P.3d at 116–19 (George, C.J., writing for the court).

279. *Id.* Thus, the attorney general maintained that an important purpose for a written constitution is to create "inalienable" rights, namely, rights that cannot be taken away by popular majorities. *Id.* at 79–80.

280. DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 55, 542 n.90 (1997) (explaining the doctrine of "unconstitutional constitutional amendments"). The "Basic Law" mentioned above is the German Constitution.

281. THOMAS HOBBES, LEVIATHAN ch. XIII (1651).

282. *Id.* chs. XIV–XVIII.

job.[283] John Locke expanded upon Hobbes's analysis in *A Second Treatise of Government* (1689).[284] Locke argued that the civil State not only saves people from risks to life and limb of the state of nature, but also provides citizens with the ability to add to their liberties and possessions, and enrich their lives beyond what they could possibly enjoy in the state of nature.[285]

The equality principle of Hobbes and Locke was a central assumption of early American state and federal constitutional law. As James Madison put it shortly before the Constitutional Convention in Philadelphia, "equality . . . ought to be the basis of every law," and the law should not subject some persons to "peculiar burdens" or grant others "peculiar exemptions."[286] During the ratifying debates, Madison justified the bicamerialism and presentment requirements for lawmaking on this basis, and Hamilton deployed a similar argument for judicial review.[287] From the earliest days of the American republic, state as well as federal judges invalidated discriminatory measures they deemed to be "class legislation," singling out one group for special advantages or disabilities without regard to the public interest.[288]

Thus, by the time California became a state, it was well established in American constitutional law that government was not authorized to adopt class legislation as defined above.[289] The positive precept is that the civil state must be neutral as to various groups in society, at least regarding fundamental matters such as the enjoyment of life, guarantees of property and contract rights, and marriage. The Equal Protection Clause (1868) of the U.S. Constitution codifies this precept, but the California Constitution makes it even more central by including the clause in its Declaration of Rights.[290] As in the U.S. Constitution, the fundamental baseline of California's Constitution is equal treatment.[291]

As *Mulkey v. Reitman* illustrates, racial minorities have been vulnerable to initiative-constitutional-amendments that take away fundamental rights (in *Reitman*, the fundamental right at stake was the right to enter into property

283. *Id.* Review and Conclusion (1651); *see also* THOMAS HOBBES, THE ELEMENTS OF LAW NATURAL AND POLITIC ¶ 20.5 (1650).

284. JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT ¶ 222 (1689) (commonly referred to as the *Second Treatise of Government*).

285. *Id.* at ¶ 222; *see also id.* at ¶¶ 223–43 (more detailed explanation and account).

286. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785).

287. THE FEDERALIST NO. 10 (James Madison) (arguing for bicameralism and presentment in order to reduce the problem of "factions"), NO. 78 (Alexander Hamilton) (arguing for an independent judiciary to assure that "unjust and partial laws" would receive a narrow construction or be invalidated through judicial review).

288. *See* Melissa Lamb Saunders, *Equal Protection, Class Legislation, and Color-Blindness*, 96 MICH. L. REV. 245 (1996).

289. *See id.* at 251–68.

290. CAL. CONST., art. I, § 7(a)–(b).

291. *See* Kenneth Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 40–42 (1977).

transactions on a nondiscriminatory basis). As minorities, people of color needed to attract mainstream allies to protect their rights in an up-or-down majority vote. But as minorities long subject to prejudice and stereotyping, people of color in the 1960s had a hard time attracting allies. Many prejudiced voters favored any measure that harmed or excluded people of color, and most moderate voters harbored racial stereotypes that made them reluctant to vote for equal treatment. In part because the California Supreme Court and the U.S. Supreme Court have insisted that citizens of color not be subject to class legislation and special exclusions, Americans have gradually accepted the principle that race ought not be a basis for exclusion in public law.

Reitman was decided in an era before gay rights rose to the upper levels of the public agenda, and today sexual and gender minorities have joined or, in some states, replaced racial minorities as a particularly vulnerable group in popular initiatives. As a minority, gay people need to attract mainstream allies to protect their rights in an up-or-down majority vote—but as a minority long subject to prejudice and stereotyping, it remains hard for this group to attract allies. Many prejudiced voters favor any measure that harms or excludes lesbians, gay men, bisexuals, or transgendered persons, and even moderate voters are often reluctant because of the antigay stereotypes (e.g., "predatory homosexuals" who "recruit" vulnerable children and destroy traditional families) that the State has long built into its state policy.[292]

As the *Marriage Cases* recognized, sexual orientation is a suspect classification for the same reasons race and sex are, and marriage is a fundamental right for lesbian and gay couples just as it is for interracial couples whose rights were protected in *Perez v. Sharp*. The whole point of a constitution—according to the social contract theory, the founders of our nation, and the terms of California's state constitution—is to entrench guarantees that *all* citizens can count on. In light of these constitutional commitments, Article XVIII can be read to require that higher hurdles be surmounted before the voters can add to the California Constitution class legislation that takes away a fundamental constitutional right from a historically prejudiced minority. If such class legislation is really needed to protect the overall public interest, then it ought to go through the screening process entailed in legislative-constitutional-revisions, at the very least, or perhaps even trigger a new constitutional convention.

Chief Justice George's opinion for the court in *Strauss* abated the foregoing concerns by injecting an argument he had dismissed in the *Marriage Cases*. Unlike most other states that have barred same-sex marriages either by legislation or popular initiatives, California has adopted a statewide institution

292. On California's long history of demonizing homosexuals as predatory against children and as antifamily, see ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 37, at 46–108. On the uphill battle the gay and lesbian minority faces in popular votes, see Haider-Markel et al., *supra* note 221, at 304–14 (documenting that 71 percent of antigay ballot initiatives prevailed in the period 1972–2005).

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(domestic partnerships) that provides virtually all of the legal rights and duties of marriage.[293] For this reason, Chief Justice George (writing for the court) and Justice Werdegar (concurring in the court's result) characterized the change wrought by Proposition 8 as a narrow rather than fundamental one.[294] All it did, according to the court, was reserve

> the official *designation* of the term "marriage" for the union of opposite-sex couples as a matter of state constitutional law, but [leave] undisturbed all of the other extremely significant substantive aspects of a same-sex couple's state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection of the laws.[295]

As before, the chief justice's reasoning is driven as much by pluralist pragmatics as by the legal precedents: given the full legal rights and duties available under the domestic partnership law, the gay marriage issue is substantially a matter of symbolic politics, and therefore a matter as to which judges ought not trump the will of the people, expressed through the duly established mechanism for constitutional amendment.

C. A Theory for Judicial Review of Initiative Constitutional Amendments

The California Supreme Court's opinion in *Strauss v. Horton* is deferential to the initiative process, and that deference is consistent with the state constitutional structure. Since 1911, the California Constitution has *rejected* the assumption of the U.S. Constitution that direct democracy has no constructive role to play in republican governance.[296] "Government is instituted for [the people's] protection, security, and benefit, and they have the right to alter or reform it when the public good may require."[297] Hence, each of the mechanisms for changing the California Constitution—amendment, revision, or replacement—requires a majority vote of the electorate, and the amendment process can be initiated by the voters, completely bypassing the legislature.[298]

On the other hand, California's constitution has not rejected all of the concerns of the federal Framers, and ought not be interpreted to do so. Article XVIII creates a hierarchy of constitutional change, with a strong correlation

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293. Originally enacted in 1999 Cal. Stat. ch. 588, the Domestic Partner Act has been frequently amended and is codified at CAL. FAM. CODE §§ 297–299.6 et al. *See In re* Marriage Cases, 183 P.3d 384, 413–18 (Cal. 2008) (George, C.J., writing for the court), for a discussion of the statewide domestic partnership law in its evolution.

294. Strauss v. Horton, 207 P.3d 48, 102 (Cal. 2009) (George, C.J., writing for the court); *id.* at 127–28 (Werdegar, J., concurring in the result).

295. *Id.* at 61 (George, C.J., writing for the court).

296. *See* THE FEDERALIST NO. 10 (James Madison) (explaining why the framers of the U.S. Constitution rejected any role for direct democracy, namely, the fear that temporary "factions" would oppress minorities).

297. CAL. CONST., art. II, § 1.

298. *Id.* art. XVIII, §§ 1–3; *see also id.* art. II, § 8(b) (signature requirements for bypassing the legislature with a citizen-sponsored initiative).

between the degree of change and the depth of institutional deliberative filters through which a change must pass:

- *Amendment*, an ordinary change to the constitution, can be initiated by voter petition (or by the legislature) and then ratified by a majority of the voters in the next election;
- *Revision*, a fundamental change to the constitution, can only be initiated by two-thirds vote of the legislature and then ratified by a majority of the voters in the next election;
- *Replacement*, the creation of a new constitution, can only be proposed by a two-thirds vote of the legislature, followed by a constitutional convention, whose product must then be ratified by a majority of the voters in the next election.

This is the structure found in the California Constitution—but it is not the reality of the direct democracy seen in today's California, where the revision process has dried up and the initiative-based amendment process has become a mechanism by which losers in the judicial or legislative process take their case to the voters through initiative constitutional amendments. Political scientist Bruce Cain dubs this phenomenon *hyper-amendability*.[299]

Hyper-amendability is not limited to California, and so the argument in this Foreword can be generalized. Like California, many other states have separate procedures for simple *amendment* of their constitutions, for significant *revision*, and for complete *replacement* with a new constitution.[300] State constitutional amendment activity across the United States continues at a high and now accelerated level: there were 689 state constitutional amendments in the period from 1994 to 2001.[301] A large chunk of those initiative-based state constitutional amendments have been aimed at sexual and gender minorities—not only the anti-gay-marriage initiatives that have been adopted in California and twenty-nine other states,[302] but also initiatives depriving sexual and gender minorities of rights to adopt children and to the protections of antidiscrimination laws. In contrast, the pace of state constitutional revision or replacement has slowed to a dead stop.[303]

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299. *See* Bruce Cain et al., *Constitutional Change: Is It Too Easy to Amend Our State Constitution?*, *in* CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE (Bruce Cain & Roger Noll eds., 1995).

300. *See Strauss*, 207 P.3d at 110 n.34 (listing seventeen state constitutions that distinguish between amendments and revisions); *id.* at 111–14 (discussing gay marriage decisions in other states following the amendment-revision distinction).

301. *See* Cain, *supra* note 299 (detailed data on state constitutional amendments and revisions).

302. Thirty states have state constitutional bars to marriage for same-sex couples, all of them adopted by popular initiatives. For a current list, see Lambda Legal, Status of Same-Sex Relationships Nationwide, http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html (last visited Jan. 13, 2009).

303. There were 144 constitutional conventions and 94 new state constitutions in the nineteenth century, but only 84 conventions and 23 new constitutions in the twentieth, and none

The structure of California's and other states' constitutions suggests good reasons for the California Supreme Court and other state high courts to set limits in the face of hyper-amendability, especially as regards antiminority initiatives. Without enforceable limits, hyper-amendability will swallow up Article XVIII and negate its deliberation and filtering requirements for fundamental changes. What follows is an effort to translate the Article XVIII structure—popular initiative-amendments, legislative/popular revision-amendments, and legislative/convention/popular replacements—and its rationale into a workable set of presumptions for judicial review. The baseline presumption, also derived from the California Constitution, favors the validity of initiative-constitutional-amendments.

1. Correcting for Legislative Biases

The first structural feature of Article XVIII's distinction between amendments and revisions or new constitutions is that the former allow "We the People" to circumvent the California legislature, while the latter must be proposed by the legislature.[304] As a matter of both logic and history, the primary reason for allowing constitutional amendments by direct majority vote of the people is that the legislature is not always responsive to strong public needs and preferences.

There are three functional scenarios that inspired the 1911 addition of the constitutional initiative process to the California Constitution. First is the problem of *self-dealing*. The legislature can be expected to be biased in favor of its members' positions of power and authority. Political insiders tend toward policies that preserve their positions, power, and authority in ways that do not serve the interests of the public. In setting electoral districts and terms of office, regulating the conduct and financing of campaigns, responding to criticisms, and asserting their own jurisdiction, legislators are prone to act in their own self-interest even when such action is not in the overall public interest or favored by the electorate.[305] This problem is of constitutional dimension, because the legislature is an agent of the public and is supposed to act only in the public interest.[306]

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since 1984. G. Alan Tarr, Introduction, *in* 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM xi–xii (G. Alan Tarr & Robert F. Williams eds., 2006).

304. To be sure, an initiative-constitutional-amendment can be proposed by the legislature, but my point is that constitutional amendments need not be. Also, the *hyper-amendability* phenomenon may be marginalizing the legislative-initiative option; it is easier to pay organizations to collect signatures than to persuade the legislature to place a matter on the ballot.

305. *See* Stephen Smith, *Direct Democracy and Election and Ethics Laws*, *in* DEMOCRACY IN THE STATES (Bruce E. Cain et al. eds., 2008).

306. *See also* ELY, *supra* note 181 (arguing from the premises of constitutionalism generally (and the U.S. Constitution in particular) that there needs to be an outside monitor to offset the tendency of political "insiders" to insulate themselves at the expense of the public interest).

Second is the problem of *overregulation*. In the post–New Deal era, legislators tend to favor more taxes, bigger government, and more regulations than voters do.[307] Legislators usually view their job as solving public problems, typically through a proactive government program. Voters, too, want their representatives to solve problems, but tend to be more cost-conscious, because by and large it is voters and not legislators who bear the burdens and pay the costs of regulation. The constitutional initiative is a mechanism for the voters to place limits on or to channel legislative innovations in the direction the public prefers. Unlike the self-dealing problem, which has a constitutional dimension, the overregulation problem is one of policy balance.

Third is the problem of *special interests*. During the Progressive Era, when the initiative was added to the California Constitution, a primary justification was to short-circuit the influence of "special interests," namely, interest groups who seek favors from government or try to head off needed regulation.[308] Although an important justification for mechanisms of direct democracy, the special interests justification is the trickiest, because the key term depends on a political judgment. In the Proposition 8 campaign, proponents saw gay people as a "special interest" seeking to impose costs on parents and their children, while opponents of Proposition 8 saw its sponsors as "special interests" mobilizing antigay stereotypes and prejudice in an effort to reassert a "special exception" to the constitutional right to marry. The California Constitution weighs in on this debate in the following way: its Declaration of Rights[309] tells us that groups seeking to protect dignitary, equality, speech, and other important constitutional rights are acting in the public interest in the most serious way.[310]

As a matter of constitutional structure, Article XVIII, read together with the whole California Constitution, provides a mechanism for the voters to amend the constitution when the legislature is not likely to pursue the public

307. While the statement in text seems to be true of the post-New Deal era, in the early twentieth century, voters tended to favor more regulation in many areas. For a historical and empirical analysis along these lines, see JOHN MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY (2004).

308. For a thoughtful analysis of direct democracy and "special interests," see ALAN GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT DEMOCRACY (1999).

309. CAL. CONST., art. I. Like the German Constitution, the California Constitution's first article is its Declaration of Rights. Contrast the U.S. Constitution, whose Bill of Rights was added after the document was ratified and went into effect.

310. Such claims must be objectively plausible, for almost any issue can be expressed in terms of individual rights as well as policy. For example, contrast the equality claims of the plaintiffs in the *Marriage Cases*, which were not only plausible claims that had been accepted by other courts and were persuasive to a majority of the neutral arbiters of this Court, with the liberty claims made by the proponents of Proposition 8, such as the speculative (in my view, flatly incorrect) assertion made in some ads that marriage recognition for same-sex couples would require churches to give up their religious principles.

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interest.[311] Under direct democracy, initiatives, rather than revisions, are especially appropriate for matters of basic governance, such as the allocation of public resources and tax burdens; the rules governing lobbying, electoral districts, campaign finance, and ethics in government; and limits on the authority of government, including limits grounded in personal rights as well as allocational decisions. As for initiative-based constitutional amendments addressing any of these matters, the constitution suggests a *strong presumption of validity*. The strong presumption can be overcome by a showing that the amendment has made an overbroad and fundamental change in the constitutional authority and duties of an organ of government.

The foregoing analysis does not, however, tell us how more intangible matters of great public debate ought to be handled. Issues of interest to the voters such as the death penalty, the legal status of marijuana and other drugs, affirmative action, and aid in dying (or "death with dignity") are increasingly the subject of constitutional initiatives all over the country, including California. Are there situations in which "public values" initiative-constitutional-amendments lose that presumption of validity and ought to be pressed as revisions?

2. Supermajorities to Protect Minorities

A second distinction between Article XVIII initiative-constitutional-amendments and legislative-constitutional-revisions (or replacements) is that the latter are not only necessarily screened by the legislature, but also require two-thirds votes in both chambers of the legislature before they can be presented to the voters for approval.[312] Revisions therefore must pass through a screen that is triply difficult: (1) legislators must approve them; (2) indeed, both chambers must approve; and (3) a supermajority must approve. This is a demanding process, and the foregoing discussion of legislative bias demonstrates that this is not a process well suited for constitutional changes that involve ordinary governance issues or deregulation.

With regard to those issues, California's progressive tradition departs from the republicanism of the U.S. Constitution, but on issues requiring a constitutional revision, California has hewed to the republican arguments of the Framers at Philadelphia. Madison's *The Federalist* No. 10 is the leading statement of the reasons to fear direct democracy: temporary "factions" might adopt measures that would oppress "minorities."[313] Although Madison was thinking of economic minorities (big property owners and creditors), not racial or sexual

311. Many scholars are critical of the voters' ability to do a better job or even to figure out what is in their own interest, but for my positive argument I place those objections to one side.

312. As before, the analysis above does not apply to legislative-constitutional-amendments, which also require a two-thirds vote in the legislature to secure a place on the ballot. CAL. CONST., art. XVIII, § 1.

313. THE FEDERALIST No. 10 (James Madison).

minorities, his deliberative filters idea retains its cogency: the complex process of lawmaking prevents many measures that might oppress minorities by slowing them down, forcing the proponents to defend the measures to different audiences, and providing minorities more opportunities to defeat or ameliorate extreme measures.

From the perspective of democratic constitutionalism, the best justification for such a demanding process is to protect fundamental constitutional rights, especially those of minorities who are vulnerable in an up-or-down majority vote of all adult citizens. The supermajority requirements for a revision are also responsive to America's and California's long *equality* traditions, where *all* citizens are assured the fundamental rights guaranteed by the State. California's Declaration of Rights not only says that "[a] person may not be . . . denied equal protection of the laws,"[314] but emphasizes the converse that "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."[315] A central purpose of California's constitution is to create guarantees that *all* citizens can count on. Thus, a natural reading of Article XVIII is that voters cannot alter the California Constitution to take away a fundamental constitutional right.

This analysis is also compatible with the attorney general's position in the Proposition 8 challenge, properly understood.[316] The attorney general said that Proposition 8 deprived a minority group of an "inalienable right," and that cannot be accomplished through an initiative-constitutional-amendment.[317] The attorney general remained open to the possibility that a legislative-constitutional-revision might alter "inalienable rights," and the foregoing analysis provides some support for that possibility. In turn, however, it is possible that "inalienable rights" can only be compromised by the third option under Article XVIII: convening a constitutional convention and ultimately replacing the current constitution with a new one. As argued above, hyper-amendability has made that process, like the revision process, almost irrelevant. However, if a state supreme court were to rule that the initiative-constitutional-amendment process cannot be the basis for a sweeping change like the one wrought by Proposition 8, the decision might engender a broader constitutional conversation.

3. Deliberation to Impose Rationality Requirements

There is a third feature of Article XVIII that is relevant to drawing the amendment-revision-replacement line. The legislative-constitutional-revision

314. CAL. CONST., art. I, § 7(a).

315. *Id.* art. I, § 7(b).

316. Chief Justice George's opinion for the court dismissed the attorney general's analysis as nothing more than warmed-over natural law. Strauss v. Horton, 207 P.3d 48, 116–19 (Cal. 2009). I think there is more to be said for the attorney general's theory.

317. *See* Prop. 8 Answer Brief, *supra* note 258, at 79–82.

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process is characteristically *deliberative* in a deeper way than the initiative-constitutional-amendment process is. The amendment process involves public debate, but differs from the revision process in terms of reasons, transparency, and accountability. In the popular debate, conducted largely in the media, appeals are often emotional, and policy justifications are typically unsupported by facts or solid information. For example, the proponents of Proposition 8 centrally maintained that state recognition of same-sex marriage would *require* schools to teach children that "gay marriage" is just as good as "traditional marriage"; as demonstrated above, such a strong claim is false.[318]

Of course, emotional appeals and nonfactual claims are found in the legislative process, as well. The difference is that such claims are subject to the deliberation requirement of Article XVIII. Any legislator making such a claim is immediately subject to dispute by other legislators. Unlike voters, who can cast their vote anonymously and for any reason (including prejudice), legislators must cast their votes publicly and are accountable to defend their votes based upon public reason. If a legislator's public reason is clearly a makeweight or invokes phony stereotypes, then she or he will be subject to media and other criticism, maybe even ridicule. This process does not mean that sexual and gender minorities always win in the legislature (or that they should). What it does mean is that there is greater assurance that legislative deliberation will render a judgment that is more accountable to reason and facts than the judgment of anonymous voters in an amendment contest. Moreover, the legislative process allows public deliberation to change and shape policy proposals before they are adopted as law.

Consider this thought experiment. Assume that the U.S. Supreme Court in 1949 vacated the California Supreme Court's opinion in *Perez* because the (pre–*Brown v. Board of Education*) Court felt that such an interpretation of the U.S. Constitution would inflame half the nation. On remand, assume that the California Supreme Court reasserted its holding under the California Constitution's several equality guarantees. And in 1950, the voters added this to the California Constitution through an initiative-constitutional-amendment: "To prevent a dilution of the white race, no nonwhite person can marry a white person in this state, nor shall such a marriage be recognized." Is this an initiative-constitutional-amendment that can be added by majority vote—a vote that was surely fueled by racial prejudice and stereotypes? Or is it properly characterized as a legislative-constitutional-revision that has to go through the legislature first? Or, following the implications of the attorney general's position in *Strauss v. Horton*, is this a change that cannot be made to the existing constitution and thus would require a constitutional convention?

318. *See* Memorandum of Points and Authorities in Support of Petition for Writ of Mandate at 10–17, Jenkins v. Bowen, Case No. 34-2008-00017366-CU-WM-GDS (Super. Ct., County of Sacramento, Aug. 4, 2008) (demonstrating the inaccuracy of proponents' claims that the *Marriage Cases* would force schools to teach a specific agenda).

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The point of this thought experiment is that there ought to be limits to popular constitutional amendments that deprive a minority of a fundamental right. Allowing a minority group to be denied a fundamental marriage right by simple popular vote not only makes it too easy to inflict constitutional harm upon a minority, but it harms the community by raising the stakes of identity politics and by undermining the pluralist process. Of course, some antiminority campaigns would prevail even in the legislature, but the deliberation entailed in the legislative revision process would almost certainly have yielded more moderate language than that quoted above. Specifically, the legislature would almost certainly have deleted the prefatory clause ("To prevent a dilution of the white race") and might have removed the white supremacy gloss to yield something like this: "No person can marry another person of a different race in this state, nor shall such a marriage be recognized." However lamentable such a legislative-constitutional-revision would have been, such deliberated-upon language would have been the least offensive version of it.

Yet the majority opinion in *Strauss* suggests that the justices may no longer be willing to enforce the amendment revision line in a meaningful way. The bar is set very high:

> only if a measure embodies a constitutional change that is so far reaching and extensive that the framers of the 1849 and 1879 Constitutions would have intended that the type of change could be proposed only by a constitutional convention, and not by the normal amendment process, can the measure properly be characterized as a constitutional revision rather than as a constitutional amendment.[319]

Under this test, my hypothetical *Perez* override would be considered an acceptable amendment, a result that strikes me as contrary to the structure of the state's constitution as well as harmful to minorities and the polity. Notwithstanding the chief justice's broad endorsement of popular constitutionalism, the foregoing structural argumentation urges the California Supreme Court to remain open to a broader role, ably defended along traditional legal lines in Justice Werdegar's concurring opinion[320] and in Justice Moreno's dissenting opinion.[321]

The hypothetical popular constitutional initiative overriding *Perez* illustrates the virtues of the Werdegar-Moreno approach that holds out the possibility of meaningful judicial review of popular initiatives that go after minorities. In addition to my structural constitutional analysis above, and the reasons adduced by Justices Werdegar and Moreno, their approach has a huge pragmatic virtue, for it allows the California Supreme Court to dispose of punitive antiminority measures without setting hard constitutional limits of the sort the attorney general was proposing. Assume that Proposition 8 had not only

319. *Strauss*, 207 P.3d at 103 (George, C.J., writing for the court).
320. *Id.* at 124–29 (Werdegar, J., concurring in the result).
321. *Id.* at 129–40 (Moreno, J., concurring and dissenting).

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hardwired one man, one woman marriage into the California Constitution, but had also constitutionalized a bar against providing same-sex couples *any* of the legal benefits or duties of marriage. It is conceivable that such a measure could have secured majority votes in 2000, the year of the Knight Initiative. Such a measure would have, essentially, excluded lesbian and gay couples from an indeterminate number of legal protections. From their point of view, such an initiative would have represented a partial return to a Hobbesian state of nature. From the polity's point of view, such an initiative would have triggered a destructive civil war, certainly ramping up hatred and tensions and perhaps erupting into violence between angered gays and righteous traditionalists. Under the chief justice's approach, the California Supreme Court would have had no recourse under the California Constitution.[322]

In short, the structure of the California Constitution and the pluralist theory that underlies its process for amendment, revision, and replacement suggest the following hierarchy for evaluating the validity of amendments:

(1) Strong Presumption of Validity for Amendments Relating to Governance.

(2) Presumption of Validity for Public Values Amendments, Especially Those Limiting Government.

(3) Presumption of Invalidity for Amendments Denying Fundamental Rights to Minorities.

This hierarchy and the presumptions embedded within it are consistent with the court's ruling in *Strauss v. Horton*, but furthermore reflect greater concern for setting limits on the use of initiative-constitutional-amendments to attack minorities than the chief justice's opinion for the court did.

The *Marriage Cases* of the 2007 Term and the Proposition 8 Case of the 2008 Term show how far California has come toward recognizing the equal citizenship of sexual and gender minorities. Unlike the era of Governor Earl Warren, no one was suggesting that lesbian and gay couples were criminal or degenerate or even predatory. Unlike the more tolerant era of the 1970s, no one disputed the availability of marriagelike benefits for lesbian and gay couples, and no one was trying to break up gay and lesbian families. The debate had narrowed to these symbolic points: Are the romantic unions of LGBT Californians entitled to every bit of the same legal respect and terminology accorded traditionally straight marriages? Are gay families "normal" *or* merely "virtually normal"? For the time being, still the latter.

322. There could, of course, be a claim under the Equal Protection Clause of the Fourteenth Amendment, which was the basis for the California Supreme Court's holding in *Mulkey*. Whether the Roberts Court would extend the protections of *Romer v. Evans* to strike down a state constitutional amendment denying lesbian and gay couples all legal rights of marriage is a matter open to speculation.

The big contribution of the California Supreme Court toward marriage equality for LGBT persons is the same contribution the court made in earlier periods: the justices were able to reverse the burden of political inertia on an issue. As in the past, the justices had neither the ability nor the inclination to push the polity too hard on the equality rights of sexual and gender minorities. Thus, when the voters responded to the *Marriage Cases* with a reaffirmation of traditional one man, one woman marriage, the California Supreme Court deferred to their judgment, but the court did so knowing that it was a judgment subject to change. By recognizing and preserving the thousands of same-sex marriages lawfully entered into within the state before the November 2008 election, the court unanimously made a modest contribution to the ongoing normative debate. But the answer today might be revised tomorrow.

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