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# EQUALITY'S CENTRALITY: PROPOSITION 8 AND THE CALIFORNIA CONSTITUTION\*

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## INTRODUCTION

On May 15, 2008, the California Supreme Court issued its decision in a case entitled *In re Marriage Cases* (*Marriage Cases*),<sup>1</sup> becoming only the second state supreme court in the United States to interpret a state constitution to allow same-sex couples to marry on the same terms as different-sex couples.<sup>2</sup> When the decision became final on June 16, same-sex couples began doing exactly that, and an estimated 18,000 such couples wed between then and November 4,<sup>3</sup> when the window of opportunity slammed shut.<sup>4</sup> That day, fifty-two percent of the California voters who turned out at the polls voted to approve Proposition 8 (“Prop 8”).<sup>5</sup> This constitutional amendment specified in its operative provision that “[o]nly marriage between a man and a woman is valid or recognized in California.”<sup>6</sup> On November 5, the day after the election, county clerks across the state ceased issuing licenses to same-sex couples, and a number of lawsuits challenging the validity of Prop 8 on state law grounds were filed.<sup>7</sup>

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<sup>1</sup> 183 P.3d 384, 453 (Cal. 2008), *reh’g denied* (June 4, 2008).

<sup>2</sup> The Supreme Judicial Court of Massachusetts was first in 2003. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>3</sup> *See* Bob Egelko, *U.S. Walks Fine Line on Law Against Same-Sex Marriages*, S.F. CHRON., Aug. 18, 2009, at A6 (stating 18,000 couples).

<sup>4</sup> *Strauss v. Horton*, 207 P.3d 48, 68 (Cal. 2009) (explaining finality of decision and passage of Prop 8).

<sup>5</sup> *See Id.*

<sup>6</sup> *Id.* at 59.

<sup>7</sup> *Id.* at 65–66.

Because Prop 8 purported to amend the California Constitution (which formed the basis for the California Supreme Court's decision in the *Marriage Cases*), the petitioners challenging Prop 8 could not argue that it violated the substance of the state constitution.<sup>8</sup> Instead, the lawsuits contended that Prop 8 was procedurally invalid.<sup>9</sup> In California, the petition-initiative process (or simply "initiative process") can only be used to "amend" the state constitution, not to "revise" it.<sup>10</sup> For a measure (the "initiative") to qualify as a proposed constitutional amendment eligible for inclusion on a ballot, a petition must be signed by a sufficient number of registered voters. Once on the ballot, the initiative then needs approval by a majority of those casting votes on the measure to become law. Constitutional revisions, on the other hand, can only be proposed following approval by two-thirds of each house of the California legislature, or by a constitutional convention, which itself requires authorization by two-thirds of each house.<sup>11</sup> Hence, if Prop 8 amounted to a revision of the California Constitution, its proponents would have erred by resorting to the initiative process instead of the more cumbersome (and in this case politically infeasible)<sup>12</sup> procedure required for a revision.<sup>13</sup> Prior to the *Marriage Cases* and Prop 8, the California Supreme Court had developed a two-part inquiry for

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<sup>8</sup> *See Id.*

<sup>9</sup> *Id.* at 68.

<sup>10</sup> *Id.* at 88.

<sup>11</sup> *Id.* at 60.

<sup>12</sup> The California state legislature had voted twice in recent years, once in 2005 and once in 2007, to approve bills opening civil marriage up to same-sex couples. These bills were vetoed by Governor Arnold Schwarzenegger on the stated ground that, unlike the legislative majorities, he believed the bills conflicted with an earlier measure, Proposition 22, which had statutorily entrenched some marriage-recognition limitations to same-sex couples. (The legislature believed Prop 22 was restricted only to out-of-state marriages, which were the focal point for the initiative campaign in 2000.) Jill Tucker, *Governor Cites Prop. 22 as He Vetoes Leno Bill*, S.F. CHRON., Oct. 13, 2007, at B2.

Given those numbers, it is inconceivable that marriage equality opponents could have obtained a two-thirds majority in each house of the California legislature, as would be needed either for the legislature to call a constitutional convention where a state constitutional ban on same-sex marriages might be proposed, or for the legislature itself to propose such a change to the California Constitution. *See also* Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1532 (2009) ("Convincing the legislature to convene a commission or convention for . . . [the purpose of stripping same-sex couples of the right to marry] would have been impossible. . . .").

<sup>13</sup> *See, e.g., Strauss*, 207 P.3d at 79–80 ("[A]n amendment to the California Constitution may be proposed to the electorate either by the required vote of the legislature or by an initiative petition signed by the requisite number of voters. A revision to the California Constitution may be proposed either by the required vote of the legislature or by a constitutional convention (proposed by the legislature and approved by the voters). Either a proposed amendment or a proposed revision of the constitution must be submitted to the voters, and becomes effective if approved by a majority of votes cast thereon at the election. Under these provisions, although the initiative power may be used to amend the California Constitution, it may not be used to revise the constitution.") (emphasis in original).

determining whether a proposed change to the state constitution is so significant as to amount to a revision (which cannot be adopted via the initiative process).<sup>14</sup>

As the California Supreme Court explained in *Amador Valley Joint Union High School v. Board of Equalization*:

[O]ur . . . decisions mandate that our analysis in determining whether a particular constitutional enactment is a revision or an amendment must be both quantitative and qualitative in nature. For example, an enactment which is so extensive in its provisions as to change directly the “substantial entirety” of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof. However, 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 also.<sup>15</sup>

Petitioners challenging the validity of Prop 8 advanced a powerful argument for why this particular change to the state constitution constituted a qualitative revision and not merely an amendment.<sup>16</sup> Specifically, in the *Marriage Cases*, the California Supreme Court held that under the state constitution all adult Californians enjoy a fundamental right to marry the person of their choice and, accordingly, the mixed-sex requirement for civil marriage must survive strict judicial scrutiny to be upheld.<sup>17</sup> The Court further held that sexual orientation is a suspect classification under the California Constitution, such that government action discriminating on the basis of sexual orientation, including the exclusion of same-sex couples from civil marriage, is likewise subject to strict scrutiny.<sup>18</sup> Prop 8 sought to override both of those determinations, requiring discrimination against a group defined by a suspect classification with respect to a fundamental right, thus violating the foundational guarantee of equal citizenship in the

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<sup>14</sup> See *Amador Valley Joint Union High Sch. Dist. v. Bd. of Equalization*, 583 P.2d 1281, 1286 (Cal. 1978).

<sup>15</sup> *Id.*

<sup>16</sup> The argument that Proposition 8 amounted to a quantitative revision was also pressed upon the California Supreme Court. See Application for Leave to File Brief for Log Cabin Republicans as Amici Curiae Supporting Petitioners, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (Nos. S168047, S168066, S168078), 2009 WL 491801 at 2–3 [hereinafter “Log Cabin Republicans Amicus Brief”] (“Proposition 8 fails the revision/amendment analysis as a quantitative matter because it materially affects several core constitutional provisions (including the privileges or immunities clause, the right to privacy, the right to intimate association, the right to pursue and obtain happiness, the fundamental right to marry, and the equal protection clause), not just one (equal protection) as Interveners profess.”).

<sup>17</sup> See *In re Marriage Cases (Marriage Cases)*, 183 P.3d 384, 419, 453 (Cal. 2008), *reh’g denied* (June 4, 2008).

<sup>18</sup> *Id.* at 442.

California Constitution.<sup>19</sup> Prop 8 thereby rendered the judiciary incapable of performing its longstanding role of independently enforcing constitutional guarantees to protect vulnerable minority groups, particularly in their exercise of fundamental rights. Such an extreme derogation from judicially enforced equality principles should be considered a profound revision to the California Constitution, thus necessitating recourse to the more deliberative process requiring a two-thirds supermajority vote in each house of the state legislature before the measure could go before voters.

After granting the petitioners' request to be heard and setting an expedited briefing schedule, the California Supreme Court heard oral arguments in *Strauss v. Horton* (and companion cases) on March 5, 2009.<sup>20</sup> After oral arguments, some observers predicted that the Court would reject the challenges by a 5-2 vote.<sup>21</sup> In fact, on May 26, 2009, the Court rebuffed the legal challenges and sustained Prop 8 by a vote of 6-1 with Justice Carlos Moreno writing the only dissent.<sup>22</sup> Chief Justice Ronald George, who had written the 4-3 majority opinion striking down the marriage exclusion in the *Marriage Cases*, wrote the majority opinion upholding its reintroduction in *Strauss v. Horton*.<sup>23</sup>

In sustaining Prop 8, the California Supreme Court majority downplayed the significance of what the measure purported to do. The majority justices did not appreciate how their ruling operated to deprive the California Constitution of its independent legitimacy, or to at least dramatically diminish the same. Furthermore, Chief Justice George and the other four Justices who joined his opinion failed to accept responsibility for their interpretive choices, mistakenly posturing as though prior court decisions compelled the conclusion that Prop 8 was only an amendment to the Constitution.<sup>24</sup> But as Justice Moreno sagely argued in his dissent, "requiring discrimination against a minority group on the basis of a suspect classification strikes at the core of the promise of equality that underlies our California Constitution . . . ."<sup>25</sup>

Equality is central to the California Constitution and is necessary for the state constitution's independent political legitimacy. The sweeping na-

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<sup>19</sup> See Log Cabin Republicans Amicus Brief, *supra* note 16, at 15–19.

<sup>20</sup> *Strauss*, 207 P.3d at 69.

<sup>21</sup> See Mike McKee, *Prop 8 Likely to Stand: Justices Signal Wide Latitude for Voter Initiatives*, RECORDER, March 6, 2009, <http://www.law.com/jsp/PubArticle.jsp?id=1202428840409>.

<sup>22</sup> See *Strauss*, 207 P.3d at 48.

<sup>23</sup> *Id.* at 59.

<sup>24</sup> Justice Werdegard, in contrast, wrote a separate concurring opinion concurring in the judgment. *Id.* at 124–28 (Werdegard, J., concurring).

<sup>25</sup> *Id.* at 129 (Moreno, J., concurring in part and dissenting in part).

ture of the changes made pursuant to Prop 8 should have led the Court to conclude that Prop 8 represents a revision to the Constitution, rather than a mere “amendments.” Part I of this Essay illuminates the profound importance of equality in the deliberations of the delegates who framed California’s first constitution in 1849 in preparation for admission to statehood. Part II examines the text of the state constitution, evidencing the pervading character of equality in that document. Part III turns to California case law, which confirms that the state judiciary has long understood equality to be a vital part of the California Constitution, and also considers the judiciary’s role in assuring vigorous enforcement of our equality guarantees. Part IV argues that meaningful equality guarantees are crucial to the independent political legitimacy of a state constitution and that, by upholding Prop 8 as a mere amendment to the California Constitution, the California Supreme Court diminished the independent legitimacy of the state constitutional order. Finally, Part V criticizes the particular arguments deployed by the California Supreme Court majority to sustain Prop 8, contending that not only were they in many respects mistaken, but also that the majority opinion falsely denies the role that judgment and judicial agency played in the justices’ decision to embrace Prop 8 as a properly enacted part of the California Constitution.

### I. EQUALITY’S ORIGINS IN CALIFORNIA

California’s first Constitution was drafted by a Convention and adopted by voters in 1849, the year before California was formally admitted to the Union as a state,<sup>26</sup> and nineteen years before the Fourteenth Amendment to the Constitution of the United States provided the nation a general judicially enforceable guarantee of equality through its Equal Protection Clause.<sup>27</sup> As delegate Charles T. Botts of Monterey<sup>28</sup> put it, in “forming a [c]onstitution,” the delegates were “to perform the most solemn of trusts—to decide upon the fundamental principles of a [g]overnment.”<sup>29</sup> He objected to the Convention’s seeming haste in this endeavor, for he believed the California Constitution was to be for the ages:

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<sup>26</sup> See JOSEPH R. GRODIN ET AL., *THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE* 8 (1993) [hereinafter GRODIN ET AL., *THE CALIFORNIA STATE CONSTITUTION*].

<sup>27</sup> U.S. CONST., amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>28</sup> J. ROSS BROWNE, *REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849 6–7* (1850) (listing delegates).

<sup>29</sup> *Id.* at 27 (remarks of Mr. Botts).

It was true houses were built in a single night in San Francisco; it was a go-ahead place; but he feared, if this Constitution was built in the same way, it would bear about the same relation to an enduring political structure that a shanty in San Francisco bore to a great monument of architectural skill.<sup>30</sup>

From the outset, the California Constitution proved to be an enduring political structure and this “corner-stone of the [s]tate structure,”<sup>31</sup> was built upon a foundation of the judicially enforceable equal rights of minorities.

One of the first orders of business for the Convention, after the seating of duly elected representatives from roughly proportional populations,<sup>32</sup> was to determine whether to recommend that their eventual work product be a constitution for a new state or for a federal territory.<sup>33</sup> Delegate J.A. Carillo from Los Angeles,<sup>34</sup> who supported a territorial government, responded to remarks by delegate William M. Gwin from San Francisco,<sup>35</sup> who had stated earlier that “[i]t was not for the native Californians we were making this Constitution; it was for the great American population, comprising four-fifths of the population. . . .”<sup>36</sup> When Carillo “begged leave to say, that he considered himself as much an American citizen as . . . [Gwin],”<sup>37</sup> Gwin took what he claimed was the opportunity to clarify his intended meaning.<sup>38</sup> Although the constitution they were to draft “was for the American population. . . . [b]ecause the American population was the majority,”<sup>39</sup> Gwin explained that the California Constitution

was for the *protection* of the California population—government was instituted for the protection of minorities—this Constitution was to be

<sup>30</sup> *Id.* at 28.

<sup>31</sup> *Id.* at 8 (quoting a letter to the Convention from Henry Wager Halleck, *see id.* at 6–7).

<sup>32</sup> The Convention first met (after a day with no quorum) on Monday, September 3, 1849. *See* BROWNE, *supra* note 28, at 7. The Convention then turned to the question of fairly apportioning seats on the basis of relative populations of the districts that elected delegates. *Id.* at 7–8; *see also id.* at 10 (Mr. Sherwood from Sacramento remarking, “It was desirable that there should be a full and fair representation from each district.”).

One delegate who spoke against strict population-based representation in each house of the California legislature did so on the grounds that district-based representation, as in the U.S. Senate, protected minorities: “This has always been considered a very wholesome restraint upon majorities, in protecting the rights and interests of minorities.” *Id.* at 409 (remarks of Mr. Price). In advocating for such a system for California, Mr. Price avowed that “my object is to provide for the protection of minorities—a principle which is so generally recognized under our system of government.” *Id.*

<sup>33</sup> The Convention took up this issue on Wednesday, September 5. *See id.* at 19–20.

<sup>34</sup> *Id.* at 7 (listing delegates).

<sup>35</sup> *Id.*

<sup>36</sup> BROWNE, *supra* note 28, at 11.

<sup>37</sup> *Id.* at 22 (remarks of Mr. Carillo).

<sup>38</sup> *Id.* at 22 (remarks of Mr. Gwin).

<sup>39</sup> *Id.*

formed with a view to the protection of the minority: the native Californians. The majority of any community is the party to be governed; the restrictions of law are interposed between them and the weaker party; they are to be restrained from infringing upon the rights of the minority.<sup>40</sup>

This response “perfectly satisfied” Mr. Carillo, and no other member of the Convention disputed this understanding.<sup>41</sup>

The first substantive matter the Convention took up confirmed the view expressed by Gwin that the California Constitution was meant to protect minorities from majorities: The Convention’s first order was to draft a Declaration of Rights.<sup>42</sup> The Declaration of Rights’ draft provisions secured jury trial rights “to all”; guaranteed religious freedom “without discrimination or preference”; guaranteed “[e]very citizen” freedom of speech; assured foreigners who became residents “the same” property rights enjoyed by “native-born citizens”; and specified that “[a]ll laws of a general nature shall have a uniform operation.”<sup>43</sup> The Convention considered a provision modeled after a clause that once appeared in the New York Constitution, a provision which would have excluded clergy from the legislature, only to reject it as improperly excluding particular “classes of men.”<sup>44</sup> The Convention further served the principle of equality when it *unanimously* adopted a provision banning slavery and involuntary servitude,<sup>45</sup> even if economic concerns also played a role in that decision.<sup>46</sup>

The delegates’ egalitarianism was marred by some racial limits though, as they extended suffrage only to

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<sup>40</sup> *Id.* (emphasis added).

<sup>41</sup> *Id.* (remarks of Mr. Carillo).

<sup>42</sup> The Convention turned to this matter on the morning of Friday, September 7. *Id.* at 30.

<sup>43</sup> *Id.* at 30–31. The religious liberty provision specified:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall be allowed in this State, to all mankind; and no person shall be rendered incompetent to bear witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

*Id.* at 292.

A subsequent effort to eliminate the exclusion of protection for licentiousness and breaches of the peace was supported in part because the exclusion would leave it to courts to determine “whether the exercise of any peculiar religious belief is compatible with the public safety and morality or not.” *Id.* (comments of Mr. Botts and Mr. Hastings). But the Convention was unmoved, and left this provision in the California Constitution and this power in the California courts. *Id.* at 293 (reporting rejection of the provision).

<sup>44</sup> *Id.* at 136–37.

<sup>45</sup> See BROWNE, *supra* note 28, at 44 (recording unanimous adoption); see also *id.* at 43 (“Neither slavery nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State.”).

<sup>46</sup> GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION, *supra* note 26, at 7.

[e]very white male citizen of the United States, and every male citizen of Mexico, (Indians, Africans, and descendants of Africans excepted,) who shall have elected to become a citizen of the United States under [the Treaty of Guadalupe Hidalgo], of the age of twenty-one years, who shall have been a resident of the State six months next preceding the election, and the county or district in which he claims his vote, thirty days, shall be entitled to vote at all elections . . . .<sup>47</sup>

Such political rights were apparently distinguishable from the “certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness” that the Declaration of Rights proclaimed to belong to “[a]ll men,” who were declared “by nature free and independent.”<sup>48</sup>

On the other hand, the Convention “soundly rejected” an openly racist proposal to prohibit “free persons of color from immigrating to and settling in” California.<sup>49</sup> Prior to voting, delegate W.E. Shannon, a decided voice for legal equality,<sup>50</sup> declared with a mix of principle and pragmatism:

I am most decidedly opposed, sir, to the introduction of any thing of this kind in the Constitution, because I do contend that free men of color have just as good a right, and ought to have, to emigrate here as white men. I think, too, that the necessities of the territory require them . . . .<sup>51</sup>

Delegate Kimball H. Dimmick<sup>52</sup> objected to the unequal treatment of foreigners and U.S.–born African–American citizens that the proposed provision would inconsistently impose:

What will be said of our Constitution if we assert one thing in our bill of rights—extend the privileges of our free institutions to all classes, both from foreign countries and our own, and then in another exclude a class speaking our own language, born and brought up in the United States, acquainted with our customs, and calculated to make useful citizens.<sup>53</sup>

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<sup>47</sup> *Id.* at 74. Voting for Convention delegates had been open to “[e]very free male citizen of the United States and of Upper California, 21 years of age, and actually resident in the district where the vote is offered . . . ,” as well as “[a]ll citizens of Lower California who have been forced to come to this territory on account of having rendered assistance to the American troops during the recent war with Mexico . . . .” *Id.* at 4.

<sup>48</sup> *Id.* at 33 (remarks of Mr. W. E. Shannon); *see id.* at 7 (listing delegates); GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION, *supra* note 26, at 6–7) (introducing Section 1 of the Declaration of Rights); BROWNE, *supra* note 28, at 34 (recording adoption of Section 1).

<sup>49</sup> GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION, *supra* note 26, at 8.

<sup>50</sup> BROWNE, *supra* note 28, at 139.

<sup>51</sup> *Id.* at 139.

<sup>52</sup> *See id.* at 7 (listing delegates).

<sup>53</sup> *Id.* at 140.

The Convention delegates similarly took some action to foster gender equality in the Constitution thereby confirming that civil marriage in California was not tethered to some historical past but could move forward on a path toward greater egalitarianism.<sup>54</sup> Rather than embrace all the old common law rules of coverture, under which women's legal existence, particularly their rights with respect to property, were submerged or vested in their husbands, the new California Constitution protected married women's separate property.<sup>55</sup> California's approach was in line with legislative developments that were beginning in the mid-nineteenth century.<sup>56</sup>

On Thursday, September 27th, 1849, the Convention considered a recommendation to enshrine constitutional protection for the separately owned property of married women.<sup>57</sup> Henry A. Tefft<sup>58</sup> believed these rights needed to be "secure[d] and guarant[eed]. . . . I am not willing to trust to the Legislature in this matter."<sup>59</sup> Rejecting appeals to "[n]ature" and "the God of nature,"<sup>60</sup> and speaking in support of a measure to protect women's rights from the ordinary reach of lawmakers, Kimball Dimmick spoke eloquently, if optimistically, of the evolution in people's views of justice:

The time was, sir, when woman was considered an inferior being; but as knowledge has become more generally diffused, as the world has become more enlightened, as the influence of free and liberal principles has extended among the nations of the earth, the rights of woman have become generally recognized. At the time the common law was introduced, woman occupied a position far inferior to that which she now occupies. As the world has advanced in civilization, her social position has been the subject of increased consideration, and by general consent of all intelligent men, she is now regarded as entitled to many of the rights in her peculiar sphere which were formally considered as belonging only to man.<sup>61</sup>

Mr. Jones concurred, specifically rejecting the contrary view that civil marriage was "a sacrament" that both subordinated women's legal rights to

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<sup>54</sup> See GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION, *supra* note 26, at 6.

<sup>55</sup> *Id.* at 6, 58.

<sup>56</sup> See *Id.* at 6.

<sup>57</sup> BROWNE, *supra* note 28, at 257 ("All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.").

<sup>58</sup> *Id.* at 7 (listing delegates).

<sup>59</sup> *Id.* at 258 (remarks of Mr. Tefft).

<sup>60</sup> *Id.* at 259 (remarks of Mr. Botts).

<sup>61</sup> *Id.* at 263 (remarks of Mr. Dimmick).

men's, and could not be touched.<sup>62</sup> Despite claims that God (as supposedly recognized by Blackstone) intended this for the marital relation,<sup>63</sup> the Convention adopted the proposed constitutional protection for married women's separate property.<sup>64</sup> Thus, even though women did not serve as delegates in the Constitutional Convention, the Convention attended specifically to at least this aspect of their legal inequality and committed the California Constitution to the side of sex equality.

## II. EQUALITY IN THE TEXT OF CALIFORNIA'S CONSTITUTION

Today, as on the day the California Supreme Court decided *Strauss v. Horton*,<sup>65</sup> the California Constitution is replete with provisions demonstrating the California constitutional order's continued commitment to equality. These provisions should have helped lead the Justices of the California Supreme Court who joined the majority opinion in *Strauss* to conclude, as their colleague Justice Moreno aptly did, that "[t]he 'absolute equality of all' persons before the law is 'the very foundation principle of our government.'"<sup>66</sup>

The very first Article of California's Constitution (following the Preamble) is the Declaration of Rights, and its very first guarantee provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."<sup>67</sup> The right of privacy, one of the sources of the fundamental right to marry protected by the California Supreme Court in the *Marriage Cases*, is one of the inalienable rights declared at the beginning of the state's constitution.<sup>68</sup> It is a right enjoyed by Californians precisely because they are free and independent by nature. These clauses do not expressly state that these inalienable rights are enjoyed equally, but that is certainly implicit in their extension to "[a]ll people . . . by nature."<sup>69</sup> Without necessarily having to embrace the Attorney General's precise doc-

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<sup>62</sup> *Id.* at 265 (remarks of Mr. Jones); *see id.* at 12–13 (introducing Mr. Jones).

<sup>63</sup> *Id.* at 267 (remarks of Mr. Botts).

<sup>64</sup> *Id.* at 269 (recording adoption).

<sup>65</sup> 207 P.3d 48 (Cal. 2009).

<sup>66</sup> *Id.* at 128 (Moreno, J., concurring in part and dissenting in part) (opening his opinion by quoting the post-*Marriage Cases* decision in *Varnum v. Brien*, 763 N.W.2d 862, 877 (Iowa 2009) (in which the Supreme Court of Iowa had likewise interpreted Iowa's state constitution to require that same-sex couples be allowed to marry civilly)).

<sup>67</sup> CAL. CONST. art. I, § 1.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

trinal theory of “inalienable rights,”<sup>70</sup> the fact that these rights are implied by human nature and deemed inalienable should have caused the Justices to pause before interpreting the California Constitution to allow a simple majoritarian amendment of the state constitution to strip such rights from groups defined by suspect classifications. If a naked majority can eliminate these rights, not just generally, but from a specific subset of the population, such a radical power to impose inequality is necessarily in tension with the notion that these rights, enjoyed by “all people,” are inalienable.

Moreover, the California Constitution does not require its interest in equality to be gleaned by inference, however strong, from its first provisions. Rather, the Declaration of Rights includes distinct equality clauses. Article IV, section 16 contains a pair of guarantees tracing back to the 1849 Constitution.<sup>71</sup> Section 16(a) requires that “[a]ll laws of a general nature [shall] have uniform operation[;]”<sup>72</sup> Section 16(b) dictates that “[a] local or special statute is invalid in any case if a general statute can be made applicable.”<sup>73</sup> By ensuring uniformity, these provisions ensure equal treatment. In addition, and most generally, article I, section 7(a) provides in part that “[a] person may not be . . . denied equal protection of the laws.”<sup>74</sup> This clause, linguistically parallel to the federal Equal Protection Clause,<sup>75</sup> was added to the state constitution by voter approval of a constitutional revision in 1974.<sup>76</sup>

Even before this specific Equal Protection Clause was added, the state constitution included a Class Legislation Clause: Article I, section 7(b) of the California Constitution provides that “[a] citizen or class of citizens

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<sup>70</sup> See *Strauss v. Horton*, 207 P.3d 48, 116 (Cal. 2009) (articulating the Attorney General’s “compelling interest” limitation on amendments that abrogate fundamental rights).

<sup>71</sup> See GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION, *supra* note 26, at 101 (discussing genealogies of CAL., CONST. art. I, §§ 16(a), 16(b)).

<sup>72</sup> CAL. CONST. art. IV § 16(a) (derived from CAL. CONST. art. I, § 11 (repealed 1974))(interpolation explained at GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION, *supra* note 26, at 101).

<sup>73</sup> CAL. CONST. art. IV, § 16(b) (adopted in 1966).

<sup>74</sup> CAL. CONST. art. I, § 7(a) (“A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . .”). Section 7(a) goes on to limit the availability of busing or other pupil assignment remedies for school desegregation. See *id.*

<sup>75</sup> U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”)

<sup>76</sup> See GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION, *supra* note 26, at 19–20. Some amici curiae argued that it was impossible for an amendment, as Prop 8 was denominated by its defenders, to override a revision in this fashion. See Brief of Amici Curiae Asian Pacific American Legal Center, California State Conference of the NAACP, Equal Justice Society, Mexican American Legal Defense and Educational Fund, NAACP Legal Defense and Educational Fund, Inc., In Support of Petitioners at 16–19.

may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.”<sup>77</sup> There is more historically recent California case law that treats this clause, more commonly termed the Privileges or Immunities Clause, as merely part of an undifferentiated equal protection guarantee.<sup>78</sup> This is a mistake. The state’s privileges or immunities clause is a related but distinct guarantee of equality,<sup>79</sup> with longstanding roots in the state constitution.

The original Privileges or Immunities Clause of the California Constitution read: “No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the [L]egislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.”<sup>80</sup> It was promulgated with almost no debate in the 1878–1879 Constitutional Convention.<sup>81</sup> In introducing the measure to the Convention, Mr. Van Dyke issued a report from the Committee on Preamble and Bill of Rights, stating: “[W]e have inserted a new section declaring against special privileges and immunities. Several propositions were referred to us bearing upon this subject, and many of the Constitutions of other States contain similar provisions.”<sup>82</sup> In arguing against a motion to strike a predecessor provision mandating that “[a]ll laws of a general nature shall have a uniform operation”<sup>83</sup>—ultimately retained by the 1878–1879 Convention—Mr. McFarland defended its inclusion in broad equality terms by stating “it is a fundamental principle in our government that no law shall be passed which affects one person and not the balance of the community. That is the principle, as I understand it, that saves all our personal rights.”<sup>84</sup>

<sup>77</sup> CAL. CONST., art. I, § 7(b).

<sup>78</sup> See, e.g., *Dept. of Mental Hygiene v. Kirchner*, 400 P.2d 321, 322 (Cal. 1965) (“It has been and is our understanding that the Fourteenth Amendment to the federal Constitution, and sections 11 and 21 of article I of the California Constitution, provide generally equivalent but independent protections in their respective jurisdictions.”) (citing no cases). “The equal protection clauses are found in the Fourteenth Amendment to the United States Constitution and section 7(a) of article I of the California Constitution. The two clauses have the same scope and effect.” *In re Evans*, 57 Cal. Rptr. 2d 314, 319 (Cal. Ct. App. 1996) (citing *Brown v. Merlo*, 506 P.2d 212, 216 (Cal. 1973)).

<sup>79</sup> CAL. CONST., art. I, § 7(a) contains California’s equal protection clause.

<sup>80</sup> CAL. CONST., art. I, § 21 (1879).

<sup>81</sup> See 1–3, DEBATES AND PROCEEDINGS OF CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA (1880) [hereinafter 1878–1879 DEBATES].

<sup>82</sup> 1 *id.* at 179 (October 24, 1878).

<sup>83</sup> CAL. CONST. art. I, § 11 (1879).

<sup>84</sup> 1 1878–1879 DEBATES, *supra* note 81, at 264 (October 31, 1878). Cf. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would

When a substantial revision to the state Constitution was proposed in 1970, this clause was redrafted into its present form, but the drafters did not intend to change its meaning.<sup>85</sup> The Report of the Revision Commission explained:

Existing section 21 [of the California Constitution] prohibits the Legislature granting [sic] special privileges or immunities to one class of citizen which are not granted to all citizens. The Commission recommends retention of this provision and the addition of a clause granting equal protection and due process of law to all persons. Although the Fourteenth Amendment to the federal Constitution assures due process and equal protection, the Commission believes that our fundamental legal document should also provide these guarantees.<sup>86</sup>

If California's Privileges or Immunities Clause really was substantially identical to the Fourteenth Amendment's Equal Protection Clause (or Due Process Clause),<sup>87</sup> the Revision Commission presumably would not have thought that California's Constitution did not "provide these guarantees." Hence, the California Class Legislation Clause (or the Privileges or Immunities Clause) is best understood as yet one more separate guarantee of equality.

The California Constitution also contains equality guarantees with regard to political rights. Article I, section 22 provides, "[t]he right to vote or hold office may not be conditioned by a property qualification[.]"<sup>88</sup> thus protecting the political rights of all, including poorer persons. Article 21, section 1(b) protects equality of representation: "The population of all congressional districts shall be reasonably equal."<sup>89</sup>

Property rights are the subject of certain equality guarantees. Article I, section 20 contains an equality guarantee concerning property rights, crafted in the original 1849 Constitutional Convention, namely: "Nonciti-

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impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("Are there, then, no reasonable and humane limits that ought not to be exceeded in requiring an individual to preserve his own life? There obviously are, but they are not set forth in the Due Process Clause. . . . Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.").

<sup>85</sup> Cal. Const. Revision Comm'n, Proposed Revision of the California Constitution Article I, Article XX, Article XXII, at 106 (Cross Reference Table) (citing Comm'n Report, pt. 5, at 29 (1971)).

<sup>86</sup> Cal. Const. Revision Comm'n, Proposed Revision, pt. 5, 29 (1971).

<sup>87</sup> See *supra* note 79 and accompanying text.

<sup>88</sup> CAL. CONST. art. I, § 22.

<sup>89</sup> *Id.* art. XXI, § 1(b).

zens have the same property rights as citizens.”<sup>90</sup> Additionally, article I, section 21 protects married women from having their property made subject to the control of their husbands.<sup>91</sup>

Other provisions in the California Constitution also provide specific equality guarantees in certain domains. For example, article I, section 8 proscribes various forms of occupational discrimination in government licensing or regulation: “A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.”<sup>92</sup> Similarly, but more broadly, article I, section 31 specifies that “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”<sup>93</sup> Although this provision limits affirmative action, which many people believe necessary for genuine substantive equality, it does so in the service of its own conception of equality and nondiscrimination.

Repeatedly, and from its inception, the California Constitution has contained a multitude of provisions guaranteeing equality. The sheer numerosity of these provisions, even if insufficient to establish with the California Supreme Court that Prop 8’s equality override amounted to a “quantitative” revision of the state constitution, should have weighed heavily in the court’s consideration of whether Prop 8 effectuated a “qualitative” revision.<sup>94</sup> These provisions all help establish that equality has always been, and indeed remains, not simply “a long-standing and fundamental constitutional principle,”<sup>95</sup> but indeed a core, *foundational* principle of the California Constitution.

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<sup>90</sup> *Id.* art. I, § 20.

<sup>91</sup> *Id.* art. I, § 21 (“Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property.”). This provision makes no reference to the gender of the property holder, and thus also protects the separate property of men.

<sup>92</sup> *Id.* art. I, § 8. Article VII, section 6(a) does allow for, but does not require, veterans’ preferences in civil service employment. *Id.* art. VII, § 6(a) (“The Legislature may provide preferences for veterans and their surviving spouses.”).

<sup>93</sup> *Id.* art. I, § 31(a). Section 31(c) does contain one of several limitations on the nondiscrimination mandate of section 31(a): “Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.” *Id.* art. I, § 31(c).

<sup>94</sup> On the distinction between quantitative and qualitative revisions and the inclusion of arguments about both in the litigation against Prop 8, *see supra* note 16 and accompanying text.

<sup>95</sup> *Strauss v. Horton*, 183 P.3d 384, 389 (Cal. 2008), *reh’g denied* (June 4, 2008).

### III. EQUALITY IN CALIFORNIA SUPREME COURT JURISPRUDENCE

Equality concerns have been a key feature of the California Constitution since it was introduced at the Constitutional Convention of 1849, as reflected in the multitude of constitutional clauses discussed above.<sup>96</sup> Moreover, constitutional equality rights have long been judicially enforceable, and the California judiciary has appreciated its most vital duty to ensure these equality guarantees. Time and again, the California Supreme Court has invalidated government actions that violate constitutional equal protection guarantees,<sup>97</sup> serving, as the court recognized more than a century ago, as “the guardians of the people” in enforcing “the fundamental law of our state.”<sup>98</sup> Indeed, the principle of equal protection was clearly articulated in the 1878–1879 California Constitutional Convention:

[I]t is a fundamental principle in our government that no law shall be passed which affects one person and not the balance of the community. That is the principle, as I understand it, that saves all our personal rights. That you shall not make a law that shall apply to me and not to the whole community; that you shall not tax my property and not the property of others equally; that the Legislature has no right to pass laws affecting a portion of the community and not the balance. . . . [T]here would be no safeguard to general personal liberty or personal rights in a Constitution that did not have some provision of that kind in it. . . . Our liberty depends upon the proposition that the Legislature shall not pass a law that will operate upon me personally and will allow you to escape.<sup>99</sup>

California courts have long prided themselves on the independent equality protections embodied in the California Constitution.<sup>100</sup> In the landmark decision *Serrano v. Priest* (*Serrano II*), the California Supreme

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<sup>96</sup> See discussion *supra* pp. 13–16.

<sup>97</sup> See *Price v. Civil Serv. Comm'n*, 604 P.2d 1365, 1384 (Cal. 1980) (Mosk, J., dissenting) (“Over the years we [the members of this court] have forthrightly condemned unfair and discriminatory treatment of all persons, regardless of racial or sexual origin, whether that bias was manifest in racial restrictive housing covenants, prohibition of miscegenous marriages, judicial proceedings, employment opportunity or school segregation. We have consistently viewed sympathetically every effort to promote the American dream of equality of rights, duties and opportunity.”). Justice Mosk was dissenting from the majority decision which upheld a race-based affirmative action program in civil service hiring in Sacramento County. *Id.* at 1383. The California judiciary’s ability to render the types of decisions cited with approval by Justice Mosk is not restricted by Proposition 209, which simply eliminated race-based governmental affirmative action (when not required by the federal constitution) without affirmatively authorizing invidious discrimination.

<sup>98</sup> *Johnson v. Goodyear Mining Co.*, 59 P. 304, 305 (Cal. 1899).

<sup>99</sup> 1 1878–1879 DEBATES, *supra* note 81, at 264 (remarks of Mr. McFarland) (speaking in defense of retaining CAL. CONST. art. I, § 11 (1849)) (“All laws of a general nature shall have a uniform operation.”) (current version at CAL. CONST. art. IV, § 16(a)).

<sup>100</sup> See discussion *supra* pp. 57–60.

Court held that the California Constitution entails obligations for equality of educational funding not imposed by the federal Constitution.<sup>101</sup> As the court explained in *Serrano II*,

our state equal protection provisions . . . are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable. . . . “Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.”<sup>102</sup>

Or, as the court put it when upholding a public law school’s affirmative action plan against both state and federal constitutional equal protection challenges, “the equal protection guarantees contained in article I, section 7, subdivision (a), of the California Constitution afford protections different from, and independent of, those extended by the Fourteenth Amendment.”<sup>103</sup>

This should not be surprising. Article I, section 24 of the California Constitution expressly provides that “[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States.”<sup>104</sup> In addition, the Supreme Court of California has observed, “[u]nlike the due process and equal protection clauses of the Fourteenth Amendment, which by their explicit language operate as restrictions on the actions of states, the California constitutional provision contains no such explicit ‘state action’ requirement.”<sup>105</sup> For these and other reasons, the justices have explained that “although our court will carefully consider federal state action decisions with respect to the federal equal protection clause insofar as they are persuasive, we do not consider ourselves bound by such decisions in interpreting the reach of the safeguards of our state equal protection clause.”<sup>106</sup>

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<sup>101</sup> *Serrano v. Priest* (*Serrano II*), 557 P.2d 929, 951–52 (Cal. 1976) (contrasting California and federal equality tests for educational financing).

<sup>102</sup> *Id.* at 950 (citation omitted).

<sup>103</sup> *DeRonde v. Regents of Univ. of Cal.*, 625 P.2d 220, 228 (Cal. 1981); *accord Price v. Civil Serv. Comm’n*, 604 P.2d 1365, 1382 (Cal. 1980) (accepting that “the state equal protection guarantee embodied in article I, section 7, subdivision (a) of the California Constitution does provide safeguards separate and distinct from those afforded by the Fourteenth Amendment”).

<sup>104</sup> CAL. CONST., art. I, § 24.

<sup>105</sup> *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 598 (Cal. 1979). The clause reads: “A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws.” CAL. CONST. art. I, § 7(a).

<sup>106</sup> *Gay Law Students Ass’n*, 595 P.2d at 598.

The independence and superior strength of California's constitutional equality guarantees have, at times, led the California Supreme Court to apply more stringent equal protection doctrines than those used by the federal courts.<sup>107</sup> Thus, even in applying "relaxed" equal protection scrutiny to government action not implicating suspect classifications or fundamental rights,<sup>108</sup> the California standard of rational basis review has often been more demanding than the federal standard.<sup>109</sup> California courts must engage in "*a serious and genuine judicial inquiry* into the correspondence between the classification and the legislative goals."<sup>110</sup> Moreover, although rational basis review under the federal Equal Protection Clause leaves legislatures quite free to proceed "one step at a time" in addressing problems, under the California Constitution's Equal Protection Clause, "when the legislative body proposes to address an area of concern in less than comprehensive fashion by striking the evil where it is felt most, its decision as to where to strike must have a rational basis in light of the legislative objectives."<sup>111</sup>

In enforcing the California Constitution's equality guarantees, the California judiciary has been appreciative of the importance of the countermajoritarian judicial role in this area.<sup>112</sup> When discussing the role of the California judiciary in California's scheme of separated powers, then Acting

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<sup>107</sup> See, e.g., discussion of *Warden v. State Bar*, 982 P.2d 154 (Cal. 1999) *infra* note 109.

<sup>108</sup> See, e.g., *D'Amico v. Bd. of Med. Exam'rs*, 520 P.2d 10, 21–22 (Cal. 1974) (articulating the "basic and conventional standard for reviewing economic and social welfare legislation" and the "more stringent test . . . applied . . . in cases involving 'suspect classifications' or touching on 'fundamental interests.'").

<sup>109</sup> See *Warden*, 982 P.2d at 176–78 (Cal. 1999) (Brown, J., dissenting) (carefully demonstrating that California Supreme Court rational basis cases not only used language less deferential than federal rational basis standard but also applied scrutiny more searching than used federally). *But see id.* at 167, n.12 (majority opinion) (minimizing "some of the analysis" in those cases as reflecting a "milieu" of a time when "there was some suggestion in the academic literature that the United States Supreme Court might be moving toward the adoption of a so-called 'newer equal protection,' which would provide a 'new bite' for the traditional 'rational basis' test") (citations omitted).

<sup>110</sup> *People v. Hofsheier*, 129 P.3d 29, 38 (Cal. 2006) (quoting *Warden*, 982 P.2d at 166 (quoting *Cooper v. Bray*, 582 P.2d 604, 608 (Cal. 1978) (quoting and adding emphasis to *Newland v. Bd. of Governors of the Cal. Cmty. Colls.*, 566 P.2d 254, 258 (Cal. 1977) (quoting *Dorrrough v. Estelle*, 497 F.2d 1007, 1011 (5th Cir. 1974), *rev'd* 420 U.S. 534 (1975)) (citations omitted) (internal quotation marks omitted).

<sup>111</sup> *Hays v. Wood*, 603 P.2d 19, 28–29 (Cal. 1979) (internal quotation marks and citations omitted). Although the U.S. Supreme Court has said something similar, *see id.* at 29 (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 208–09 (1966)), the Court, in practice, often does otherwise. *See e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (providing speculative, unpersuasive rationalizations for upholding legislation restricting opticians but not optometrists or ophthalmologists).

<sup>112</sup> By "countermajoritarian judicial role," I mean the function of the judiciary to insist upon constitutional limitations on the powers of government even in the face of actions by legislative or popular majorities that are at odds with those limitations.

Chief Justice Tobriner, one of California's most highly regarded justices, wrote for the Court:

The separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. Of such protections, probably *the most fundamental* lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority. Because of its independence and long tenure, the judiciary probably can exert a more enduring and equitable influence in safeguarding fundamental constitutional rights than the other two branches of government, which remain subject to the will of a contemporaneous and fluid majority.<sup>113</sup>

Due to its pointedly countermajoritarian nature, “the enforcement of the equal protection clause is especially dependent on” the power of independent courts to check majorities.<sup>114</sup> As the California Supreme Court explained in the *Marriage Cases*,

under “the constitutional theory of ‘checks and balances’ that the separation-of-powers doctrine is intended to serve,” a court has an *obligation* to enforce the limitations that the California Constitution imposes upon legislative measures, and a court would shirk the responsibility it owes to each member of the public were it to consider such statutory provisions to be insulated from judicial review.<sup>115</sup>

Indeed, the California Supreme Court has noted, “[i]n applying our state constitutional provisions guaranteeing equal protection of the laws,” it will not be deferential but “shall continue to apply strict and searching judicial scrutiny to legislative classifications which, because of their impact on *those individual rights and liberties which lie at the core of our free and representative form of government*, are properly considered ‘fundamental.’”<sup>116</sup>

In a case brought under the federal Equal Protection Clause, the California Supreme Court emphatically declared that, “[c]onstitutional questions are not determined by a consensus of current public opinion.”<sup>117</sup> The

<sup>113</sup> *Bixby v. Pierno*, 481 P.2d 242, 249–50 (Cal. 1971) (emphasis added) (citations omitted).

<sup>114</sup> *Strauss v. Horton*, 207 P.3d 48, 130 (Cal. 2009) (Moreno, J., dissenting).

<sup>115</sup> *In re Marriage Cases* (*Marriage Cases*), 183 P.3d 384, 448 (Cal. 2008), *reh’g denied* (June 4, 2008), (quoting *Superior Court v. County of Mendocino*, 913 P.2d 1046, 1051 (Cal. 1996)).

<sup>116</sup> *Serrano v. Priest* (*Serrano II*), 557 P.2d 929, 952 (Cal. 1976) (emphasis added).

<sup>117</sup> *Parr v. Mun. Court*, 479 P.2d 353, 359 (Cal. 1971) (citing *Muller v. Oregon*, 208 U.S. 412, 420 (1908)).

court has similarly explained, “[a] citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be.”<sup>118</sup> In 2008, when the California Supreme Court held that same-sex couples had a constitutional right to marry, the majority quoted U.S. Supreme Court Justice Robert Jackson:

[T]he fundamental rights embodied within [the California] Constitution for the protection of all persons represent restraints that the people themselves have imposed upon the statutory enactments that may be adopted either by their elected representatives or by the voters through the initiative process. . . . “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”<sup>119</sup>

In *United States Steel Corp. v. Public Utilities Commission*, a California Supreme Court case applying equal protection guarantees to shipping rate regulations,<sup>120</sup> the court, again borrowing a little eloquence from former Justice Jackson, explained the significance of judicial enforcement of equal protection:

The constitutional bedrock upon which all equal protection analysis rests is composed of the insistence upon a rational relationship between selected legislative ends and the means chosen to further or achieve them. This precept, and the reasons for its existence, have never found clearer expression than the words of Justice Robert Jackson, uttered 30 years ago. “I regard it as a salutary doctrine,” Justice Jackson stated, “that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political

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<sup>118</sup> *Westbrook v. Mihaly*, 471 P.2d 487, 509 (Cal. 1970), *vacated on other grounds*, 403 U.S. 915 (1971) (internal quotation marks omitted).

<sup>119</sup> *Marriage Cases*, 183 P.3d at 450 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

<sup>120</sup> *U.S. Steel Corp. v. Pub. Util. Comm’n*, 629 P.2d 1381 (Cal. 1981).

retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.”<sup>121</sup>

This judicial enforcement of equality is necessary, in part, because, as the California Supreme Court noted in a case involving discrimination against noncitizens, “[p]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>122</sup>

As Justice Moreno concluded in his dissent in *Strauss*, equal protection “is not so much a discrete constitutional right as it is a basic constitutional principle that guides all legislation and compels the will of the majority to be tempered by justice.”<sup>123</sup> Indeed, the California Supreme Court has stated, “the essence of a democratic society lies in its emphasis upon the rights of the individual.”<sup>124</sup> Equality is not a mere incidental guarantee that the Constitution provides, like the right to fish;<sup>125</sup> equality is instead an indispensable aspect of California’s democratic government. California’s equality guarantees were intended to assure “protection against second-class citizenship.”<sup>126</sup> As Justice Mosk once wrote: “Our nation gave its word over and over again [sic] it promised in every document of more than two centuries of history that all persons shall be treated [e]qually.”<sup>127</sup> Further, in a case invalidating a law that barred noncitizens from owning land, the California Supreme Court referred to the United Nations Charter as “express[ing] *the universal desire of thinking men for peace and for equality of rights and opportunities*. The charter represents *a moral commitment of foremost importance*. . . .”<sup>128</sup>

Thus, California jurisprudence on equality offered the California Supreme Court ample support for the conclusion that the equality of citizens and persons is a foundational aspect of the California Constitution, and en-

<sup>121</sup> *Id.* at 1386–87 (quoting *Ry. Express Agency v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring)) (italics from *U.S. Steel Corp.* omitted).

<sup>122</sup> *Purdy & Fitzpatrick v. State*, 456 P.2d 645, 654 (Cal. 1969) (quoting *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 & n.4 (1938)).

<sup>123</sup> *Strauss v. Horton*, 207 P.3d 48, 130 (Cal. 2009) (Moreno, J., dissenting).

<sup>124</sup> *Price v. Civil Serv. Comm’n*, 604 P.2d 1365, 1383 (Cal. 1980).

<sup>125</sup> CAL. CONST. art. I, § 25 (“The people shall have the right to fish upon and from the public lands of the State and in the waters thereof.”). The full clause sets forth a number of extensions and conditions of this right.

<sup>126</sup> *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 599 (Cal. 1979) (holding unconstitutional employment discrimination against lesbian persons) (internal quotation marks omitted).

<sup>127</sup> *Price*, 604 P.2d at 1390 (Mosk, J., dissenting) (emphasis omitted).

<sup>128</sup> *Sei Fujii v. State*, 242 P.2d 617, 622 (Cal. 1952) (emphases added).

forcement of these rights is one of the most important duties of the state judiciary. Enforcing equality is especially important when the fundamental rights of groups defined by suspect classifications are being threatened by discrimination. The case law, like history and text, supports an interpretation of the California Constitution in a manner consistent with the conclusion that Prop 8, by vitiating equality here and thereby compromising it in every circumstance, effects such a fundamental change to our governmental order that it constitutes a revision of, and not a mere amendment to, the state constitution.

#### IV. EQUALITY AND THE INDEPENDENT LEGITIMACY OF CALIFORNIA'S CONSTITUTION

As the foregoing Parts have shown, equality, enforceable by the judiciary, has been a core component of California's constitutional order since the original state Constitutional Convention of 1849. The history, text and precedents bearing upon equality under the California Constitution underscore the importance of equality in the state's ongoing state governance project.

The protection of equality inherent in the California Constitution is necessary for its independent political legitimacy and the political order it establishes within the United States system. I refer here not to what Malla Pollack has termed "pragmatic legitimacy[,] . . . the willingness of the population to cooperate with directives."<sup>129</sup> Rather, my concern is the California Constitution's "moral legitimacy—the quality which renders obedience an ethical imperative, even from citizens who disagree with the specific command at issue."<sup>130</sup>

My claim is that without meaningful guarantees of equality, particularly for socially vulnerable minority groups, the California Constitution cannot claim political legitimacy independent from the legitimacy of the U.S. Constitution and the U.S. governmental system in which California's government is embedded. This is a "content legitimacy" claim, as opposed to an "origin legitimacy" claim.<sup>131</sup> Such content claims are commonplace; to give but one example, Richard Fallon has argued that one factor making the U.S. Constitution legitimate is that it is reasonably just.<sup>132</sup> Although some scholars have argued that the U.S. Constitution must stake any claim

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<sup>129</sup> Malla Pollack, *Dampening the Illegitimacy of the United States' Government: Reframing the Constitution from Contract to Promise*, 42 IDAHO L. REV. 123, 129 (2005).

<sup>130</sup> *Id.*

<sup>131</sup> *See id.* at 130 (distinguishing between two theoretical kinds of bases of moral legitimacy).

<sup>132</sup> Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

concerning legitimacy on its origin,<sup>133</sup> I believe that, absent unanimity of approval,<sup>134</sup> this content-free approach to political legitimacy is misguided and inadequate.<sup>135</sup> “As rights bearers, . . . we are indeed entitled to be treated as equal members of our political community,”<sup>136</sup> and any view of political morality that does not insist upon this fundamental principle is morally obtuse. The U.S. Constitution and state constitutions must be assessed, at least in part, on the basis of their content and not merely on how they were adopted or changed. Unless such content includes meaningful equality guarantees, the constitutions are deficient and their legitimacy, to that extent, compromised. Justice Thurgood Marshall wrote of the U.S. Constitution, which did not include a general Equal Protection Clause until after the Civil War, that “the government [that the framers of the U.S. Constitution] devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today.”<sup>137</sup>

In this regard my critique in Part IV of this Article might be broadly situated within contractarian approaches to political morality.<sup>138</sup> Common to such approaches is the fundamental postulate that “our political ar-

<sup>133</sup> See Pollack, *supra* note 129, at 130–31; JEREMY WALDRON, LAW AND DISAGREEMENT 157–87 (1999)).

<sup>134</sup> See generally Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535 (1995) (arguing that only unanimity, or procedural proxies therefore, confer constitutional legitimacy upon governments in the United States).

<sup>135</sup> See, e.g., LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 195–99, 202 (2004) [hereinafter SAGER, JUSTICE IN PLAINCLOTHES] (explicating Waldron’s errors concerning democratic legitimacy and judicial enforcement of constitutional rights).

<sup>136</sup> *Id.* at 197.

<sup>137</sup> Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987). See also *id.* at 4 (“While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of *all* persons against deprivations without due process, and guaranteeing equal protection of the laws.”).

This does not necessarily mean that the U.S. Constitution was politically illegitimate prior to the Civil War (and Nineteenth Amendment). Dean Sager has observed that “[t]he domain of constitutional justice . . . is more limited than the domain of full political justice,” and that “[f]ull realization of each of the concerns within the domain of constitutional justice[,] [including equal membership,] may . . . be a standard more demanding than political legitimacy.” SAGER, JUSTICE IN PLAINCLOTHES, *supra* note 135, at 7, 146. Even if that is true, however, “[n]o modern government could legitimately renounce any of these concerns; the failure of a government to meet these concerns fully, while possibly inevitable, is nonetheless deeply regrettable; and the chronic and blatant failure to meet any one of these concerns should cast doubt on the legitimacy of the government in question.” *Id.* at 147.

<sup>138</sup> For the archetypal contractarian argument, see generally JOHN RAWLS, A THEORY OF JUSTICE (1971) (discussing such topics of justice as fairness, distributive justice, civil disobedience, and the sense of justice).

rangements must in principle be justifiable from the perspective of each member of the political community.”<sup>139</sup> Dean Lawrence Sager has summarized contractarian political philosophy:

Common to this line of democratic thought is the starting point that members of a democratic community must treat each other as equals. From this stipulation there flow[s] [another] . . . [E]ach member of the community should support only those community choices that he or she believes are reasonable from the vantage of every other member of the community regarded as an equal.<sup>140</sup>

Sager has argued persuasively that

fundamental concerns of political justice . . . [include] *equal membership*, which requires that the interests and concerns of all groups and persons within our political community be treated with the same regard as the interests and concerns of all other groups and persons; and *fair and open government*, which requires that the processes of government be fair to all members of our political community and open to their participation and voice.<sup>141</sup>

These are “basic, urgent concerns of political membership for a plural people whose life projects are at once important to them and the source of much of their plural division.”<sup>142</sup>

Because people are not angels,<sup>143</sup> there is no assurance that any majority with power will cast votes in a way that respects the equal membership of everyone in its political community. Thus, unbridled majoritarianism across the board would not constitute a political system with much normative claim to adherence. Quite unlike this kind of rampant majoritarian democracy, the key to political legitimacy is what Ronald Dworkin has termed “the constitutional conception of democracy,” which “takes the defining aim of democracy to be . . . that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect.”<sup>144</sup> As Professor Dworkin argues, “[d]emocracy means [a] govern-

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<sup>139</sup> SAGER, JUSTICE IN PLAINCLOTHES, *supra* note 135, at 201.

<sup>140</sup> *Id.* at 204.

<sup>141</sup> *Id.* at 214–15.

<sup>142</sup> *Id.* at 146. By his use of “plural division,” I take Sager to be referring to a political body, a people, that is composed of multiple sub-groups, that is often divided in opinions, beliefs, and preferences in multiple ways.

<sup>143</sup> *Cf.* THE FEDERALIST NO. 51 (James Madison) (“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”).

<sup>144</sup> RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 17 (1996).

ment subject to conditions—we might call these the ‘democratic’ conditions—of equal status for all citizens. When majoritarian institutions provide and respect the democratic conditions, then the verdicts of these institutions should be accepted by everyone for that reason.”<sup>145</sup> Furthermore, “[t]he democratic conditions are the conditions of moral membership in a political community[,]”<sup>146</sup> “by which we mean the kind of membership in a political community that engages self-government.”<sup>147</sup> There are

relational conditions [of moral membership in a political community]: they describe how an individual must be treated by a genuine political community in order that he or she be a moral member of that community. A political community cannot count anyone as a moral member unless it gives that person . . . a stake in it, and independence from it.<sup>148</sup>

As Dworkin has rightly insisted, to satisfy the condition of giving its members a stake in the community, “the political process of a genuine community must express some bona fide conception of equal concern for the interests of all members, which means that political decisions that affect the distribution of wealth, benefits, and burdens must be consistent with equal concern for all.”<sup>149</sup> The government cannot assure the equal concern necessary for political legitimacy without a meaningful equality constraint on voting majorities.

This is not a new insight into human behavior. The framers of the U.S. Constitution appreciated that not only executives, like the much reviled King George III, but even beloved legislatures, could act in tyrannical fashion. Thus, the unamended U.S. Constitution contained important restraints on both federal and state legislatures in Article I, Sections 9 and 10 and in the Bill of Rights, which was added to alleviate anti-Federalist concerns about the vast power of the new national government including both the President and the representative Congress. James Madison, one of the architects of the Constitution, appreciated the potential for tyranny of majorities. Writing in *The Federalist* (an important propaganda piece in favor of the proposed Constitution), he located the problem in “faction[s]”:

By a faction I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 24.

<sup>147</sup> *Id.* at 23.

<sup>148</sup> *Id.* at 24 (emphasis omitted).

<sup>149</sup> *Id.* at 25.

other citizens, or to the permanent and aggregate interests of the community.”<sup>150</sup>

Madison argued that, contrary to much popular wisdom at the time, the large size of the new nation was an affirmative virtue from a governance perspective.<sup>151</sup> In *Federalist No. 10*, Madison argued that the diversity of views and the widely dispersed electoral power of the federal government—which drew its voting members from (by late Eighteenth Century standards) far-flung states—made it less likely that a faction would be able to exercise power to cause the national government to act in ways inimical to people’s rights or the public good.<sup>152</sup> Conversely,

[t]he smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.<sup>153</sup>

State governments, then, have long been understood to stand in even greater need of checks on majorities than the federal government. It is not enough, even in a state as gargantuan as California, that constitutional changes require some sort of majority approval. As Madison explained in *Federalist No. 10*, “[w]hen a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.”<sup>154</sup>

Without a meaningful equality guarantee, why would a member of a vulnerable minority group agree to majority decisions which would strip fellow minority members of rights enjoyed by the majority in California? Certainly removing equal protection guarantees from the California Constitution would eviscerate the fairly independent California judiciary’s power to protect vulnerable social minorities from transient majorities, who might run roughshod over the minority’s rights in a targeted fashion.<sup>155</sup>

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<sup>150</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> “[C]onstitutional judges are . . . impartial [in the sense that, in] . . . most modern constitutional regimes, high court judges are not elected and hence are not vicariously attached to the immediate interests—personal or political—of members of their political community.” SAGER, JUSTICE IN PLAINCLOTHES, *supra* note 135, at 199. In California, “judges of the court of appeal and the supreme court [are insulated] from contested election and [face] ‘retention elections’ after appointment by the governor and confirmation by the Commission on Judicial Appointments.” GRODIN ET AL., THE

Treating Prop 8 as an exercise of Californians' reserved amendment power, rather than as revision power, also leaves minorities vulnerable in ways that deprive the California Constitution of some measure of its independent political legitimacy. By upholding Prop 8 in *Strauss v. Horton*, the California Supreme Court effectively held that a bare majority of those who cast votes for or against a particular proposed constitutional change can—once the measure is placed on the ballot by its proponents' securing signatures of a mere eight percent of those who voted in the last gubernatorial election—change the state constitution by excising any right, no matter how fundamental, from any group, no matter how historically socially vulnerable or, in doctrinal terms, how suspect the classification that defines the disfavored group.<sup>156</sup>

While using the initiative procedure to effect a constitutional change may or may not be more difficult than obtaining a simple legislative majority in a given case, the initiative process poses little barrier between socially vulnerable minority groups and any majority determined to take away their rights. The *Strauss* majority justices attempted to bracket the question of whether they were actually setting a precedent that would sweep so broadly:

Because Proposition 8 has only limited effect on the fundamental rights of privacy and due process and the guarantee of equal protection of the laws under the state Constitution as interpreted by the majority opinion in the *Marriage Cases*, there is no need for us to consider whether a measure that actually deprives a minority group of the *entire* protection of a fundamental constitutional right . . . would constitute a constitutional revision under the provisions of the California Constitution.<sup>157</sup>

But this defensive disclaimer is unpersuasive. As former U.S. Solicitor General and attorney for Prop 8's proponents Kenneth Starr conceded at oral argument,<sup>158</sup> if Prop 8 is a mere amendment and not a profound revision to the state constitution, then *any* ballot initiative that strips *any* group of *any* right must likewise be deemed valid if enacted by a bare majority.<sup>159</sup>

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CALIFORNIA CONSTITUTION, *supra* note 26, at 129 (discussing the history of the efficacy *vel non* of these provisions at “insulating judges from the electoral process”).

<sup>156</sup> See *Strauss v. Horton*, 207 P.3d 48, 107 (Cal. 2009).

<sup>157</sup> *Id.* at 102. Justice Werdegard attempted to make a similar reservation: “Disagreement over a single, newly recognized, contested application of a general principle does not mean the principle is dead.” *Id.* at 128 (Werdegard, J., concurring in part and concurring in the judgment) (citation omitted).

<sup>158</sup> Audio tape of Oral Argument, *Strauss*, 207 P.3d 48 (argument of Kenneth Starr), available at <http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm> (follow “MP3 audio of the March 5th oral argument” hyperlink).

<sup>159</sup> *Cf. Strauss*, 207 P.3d at 138 (Moreno, J., concurring and dissenting) (“Counsel for interveners candidly admitted at oral argument that, in his view, the equal protection clause of the California Con-

After all, the Court had held in the *Marriage Cases* that the right of two consenting adults to marry (regardless of the sex of the spouses) was “fundamental,” the most judicially protected kind of right, and that discrimination against lesbian and gay people and couples was “suspect,” the most judicially condemned sort of discrimination.<sup>160</sup> Justice Moreno appreciated this consequence of upholding Prop 8. In Moreno’s *Strauss* dissent, he correctly observed: “The rule the majority crafts today not only allows same-sex couples to be stripped of the right to marry that this court recognized in the *Marriage Cases*, it places at risk the state constitutional rights of all disfavored minorities.”<sup>161</sup>

The proponents and defenders of Prop 8 argued that the Court should uphold Prop 8 and deem the Proposition a mere amendment to the state constitution, in part because,

a vital safety net remains. Despite its breadth, the people’s initiative power remains subject to the higher authority of the United States Constitution, which guarantees the fundamental rights of all Americans. Thus, the complete answer to petitioners’ parade of horrors is that the federal Constitution remains a bulwark against the tyranny of the majority.<sup>162</sup>

It is true that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution would invalidate some actions California majorities might take to deny federally defined fundamental rights to groups defined by federally suspect classifications.<sup>163</sup> However, the *Strauss* majority justices’ seeming functional reliance on this federal backstop diminishes the independent legitimacy of the California Constitution.<sup>164</sup>

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stitution could be repealed altogether by an amendment passed by a bare majority of voters through the initiative process.”).

<sup>160</sup> *In re Marriage Cases* (Marriage Cases), 183 P.3d 384, 401 (Cal. 2008), *reh’g denied* (June 4, 2008).

<sup>161</sup> *Strauss*, 207 P.3d at 129 (Moreno, J., concurring and dissenting).

<sup>162</sup> Brief for Steven Meiers as Amici Curiae in Opposition to Amend Petition for Extraordinary Relief, *Strauss*, 207 P.3d 48 (No. S168047), 2009 WL 853621 at 29–30.

<sup>163</sup> For example, were the voters to amend the state constitution to lower the prosecution’s burden of proof in criminal cases against defendants who are not U.S. citizens, this would certainly be invalidated as an unconstitutional alienage discrimination with respect to a fundamental due process right. *Cf. In re Winship*, 397 U.S. 358, 364 (1970) (“explicitly hold[ing] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”).

<sup>164</sup> California’s history includes attempts to use the initiative power to target racial minorities (“Proposition 14 (a state constitutional amendment, adopted in 1964, that repealed a statutory provision barring racial discrimination in the sale or rental of housing),” *Strauss*, 207 P.3d at 103) and noncitizens (Proposition 187), that were judicially invalidated (in whole or in large measure) on federal constitutional grounds. *See, e.g., Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating Proposition 14) (cited

As noted above, the rights in question, including the equality rights guaranteed by the California Constitution, are, as a general matter, independent of those provided by the federal Constitution.<sup>165</sup> The text of the California Constitution declares this foundational principle.<sup>166</sup> This independence was specifically addressed long before the 1974 constitutional revision that added this clause, which confirmed a principle long enforced by the California judiciary.<sup>167</sup> In the 1878–1879 Constitutional Convention, a committee had proposed adding a section to the California Constitution to provide: “We recognize the Constitution of the United States of America as the great charter of our liberties, and the paramount law of the land.”<sup>168</sup> This suggestion “was met with denunciation and rejection.”<sup>169</sup> On October 30, 1878, Mr. Howard defended his motion to strike the provision and to substitute a declaration of dual sovereignty.<sup>170</sup> Mr. Howard explained:

I object to this section, sir, because it practically ignores the States and the Constitutions of the States as any part of the charters of American liberties. . . . Now, sir, if we are going to talk about charter of liberties at all let us talk about the whole charter. . . . This attempt of the bill of rights to ignore the State is, to say the least, a blunder . . . . Now, sir, it was the intention of the framers of the United States Constitution to

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by *Strauss*, 207 P.3d at 103 (majority), *see supra* text accompanying note 155); *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997) (invalidating Proposition 187)). It is thus hard to understand what else would have given the majority the confidence it had to dismiss the challengers’ *principled* argument about the consequences of a decision upholding Prop 8, as mere “[s]peculation regarding a potential ‘parade of horrible amendments.’” *Strauss*, 207 P.3d at 107. That the majority may have taken reassurance from the availability of a federal “backstop” might be seen in their citation of *Romer v. Evans*, 517 U.S. 620 (1996), in their disclaimer insisting that they were not saying a larger discriminatory change would likewise have to be deemed an amendment. *See Strauss*, 207 P.3d at 102 (professing that “there is no need for us to consider whether a measure that actually deprives a minority group of the *entire* protection of a fundamental constitutional right or, even more sweepingly, leaves such a group vulnerable to public or private discrimination in *all* areas without legal recourse, would constitute a constitutional revision”) (citation to *Romer* omitted). *See also infra* text accompanying note 215 (quoting and addressing this disclaimer passage).

<sup>165</sup> *See supra* Part II.

<sup>166</sup> CAL. CONST. art. I, § 24 (“Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States.”).

<sup>167</sup> GRODIN ET AL., *THE CALIFORNIA CONSTITUTION*, *supra* note 26, at 59 (“Although the sentence did not alter existing law, courts have referred to it frequently in decisions that depart from federal precedent.”).

<sup>168</sup> 1 1878–1879 DEBATES, *supra* note 81, at 237 (remarks of Mr. Howard).

<sup>169</sup> Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 HASTINGS CONST. L.Q. 141, 142 (2004) [hereinafter Grodin, *The Early Years*].

<sup>170</sup> *See* 1 1878–1879 DEBATES, *supra* note 81, at 237 (remarks of Mr. Howard) (proposing instead “In the United States of America the powers of sovereignty are divided between the Government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.”).

maintain State rights—to maintain the sovereign character of the States as to all powers not granted to the Federal Government; and therefore when this bill of rights ignores, practically, the government of States, and sets up the Constitution of the United States, practically, as the charter of our liberties, I say that it is a mistake historically, a mistake in law, and it is a blunder all around.<sup>171</sup>

Mr. McCallum supported the motion to strike the proposed clause about the U.S. Constitution, for he “conceive[d] [the *State* Constitution] to be the charter of our liberties.”<sup>172</sup> Another delegate denied “that the Constitution of the United States is the great charter of our liberty. I believe the great charter of our liberty, sir, is the blood that was spilt and sanctified the soil before ever the Constitution was framed.”<sup>173</sup> Another delegate declared: “I do not recognize the Constitution of the United States as the great charter of our liberties. We had State charters before there was any Constitution of the United States.”<sup>174</sup> When the Constitutional Convention returned to this issue in late January 1879, Mr. Howard insisted that “the State Constitution is as much or more the charter of our liberties than the Constitution of the United States.”<sup>175</sup> As former California Supreme Court Justice Joseph Grodin observed, the delegates rejected the measure and “contented themselves with a declaration that the ‘State of California is an inseparable part of the Union, and the United States Constitution is the supreme law of the land.’”<sup>176</sup>

By allowing proponents of Prop 8 to use the initiative procedure, a procedure limited to amendments to, not revisions of, the California Constitution, the California Supreme Court effectively undermined the protections for equality that are necessary in order for the California Constitution to enjoy independent political legitimacy. Without these protections, the California government is, aside from the U.S. Constitution, one in which any majority, no matter how slim, can despoil any minority, no matter how historically socially vulnerable, of any right, no matter how important. The United States Constitution may indeed dictate that some such exercises of power are unconstitutional as a matter of supreme federal law.<sup>177</sup> But this

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<sup>171</sup> *Id.* at 238. My quotation of this argument should not necessarily be taken to signify embrace of the fairly strong view of states’ rights post Civil War.

<sup>172</sup> *Id.* at 239 (remarks of Mr. McCallum) (emphasis added).

<sup>173</sup> *Id.* at 242 (remarks of Mr. Dowling).

<sup>174</sup> *Id.* at 238 (remarks of Mr. Rolfe).

<sup>175</sup> 3 1878–1879 DEBATES, *supra* note 81, at 1182 (remarks of Mr. Howard on January 28, 1879).

<sup>176</sup> Grodin, *The Early Years*, *supra* note 169, at 142.

<sup>177</sup> See *Reitman*, *supra* note 164 (giving examples of California initiatives invalidated on federal constitutional grounds); *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997).

means that Californians can no longer rely on the state constitution to protect all of us in the equal enjoyment of our rights.<sup>178</sup> The much vaunted independent protection of rights offered by the California Constitution has been vitiated. At least to the extent that majorities exercise such power in California, as they did with Prop 8, the independent legitimacy of the California constitutional order has been diminished. And that is a cause for extreme regret, if not outrage.<sup>179</sup>

#### V. INEQUALITY AND THE OBSCUREMENT OF JUDGMENT IN *STRAUSS*

In *Strauss v. Horton*, a majority of the California Supreme Court upheld Prop 8, concluding that the measure was merely an amendment to the California Constitution and not a more profound revision as the petitioners contended; thus, the measure was adopted by a permissible procedure (petition and initiative). The Court was wrong to reject the argument that Prop 8 was a qualitative revision of the constitution, and the Court was wrong to think, or at least to say, that it was compelled to reach that conclusion;<sup>180</sup> this is true whether or not the Court should have accepted the claim that Prop 8 effected a quantitative revision to the state constitution.

The Court cursorily dismissed the argument that Prop 8 would effect a “quantitative” revision to the California Constitution.<sup>181</sup> The majority deemed it “obvious” that, “[f]rom a quantitative standpoint, . . . Prop 8 does not amount to a constitutional revision.”<sup>182</sup> These Justices apparently believed that Prop 8 only affected “two other sections of article I (§§ 1, 7) by

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<sup>178</sup> *But cf.* SAGER, JUSTICE IN PLAINCLOTHES, *supra* note 135, at 201–02 (stating “[i]t is an intrinsic aspect of the substantive logic of rights that they be available to everyone who falls within their substantive reach; in this sense, the notion of equal rights is redundant.”).

<sup>179</sup> My argument here is more limited than the argument advanced by Raymond Ku. Ku has argued forcefully that

contrary to current practices, constitutional change is legitimate only when it commands the unanimous support of the people, or, because unanimous support is practically impossible, when it is accomplished through procedural devices (i.e., representation, ratification, and supermajority support) that safeguard minority interests in an effort to determine the public good and approximate the will of the people as a whole. Ku, *supra* note 134, at 539–40.

On the other hand, my criticisms of the California Supreme Court’s decision to uphold Prop 8 as an amendment is limited to the proposition that a constitutional change requiring government to discriminate against a group defined by a suspect classification with respect to a fundamental right is not legitimately accomplished through the weakly majoritarian petition-initiative device used in California for constitutional amendments. Whether a constitution can ever be fully politically legitimate if it allows such a discriminatory measure is doubtful, but that question need not be answered to maintain that initiative measures of the form of Prop 8 are of compromised political legitimacy.

<sup>180</sup> *Strauss v. Horton*, 207 P.3d 48, 124–28 (Cal. 2009) (Werdegarr, J., concurring).

<sup>181</sup> On the distinction between “quantitative” and “qualitative” revisions, see *supra* note 16 and accompanying text.

<sup>182</sup> *Strauss*, 207 P.3d at 98.

creating an exception to the privacy, due process, and equal protection clauses contained in those two sections as interpreted in the majority opinion in the *Marriage Cases*[.]”<sup>183</sup> While the petitioners failed to press the quantitative revision argument, the amici from the Log Cabin Republicans did.<sup>184</sup> The Log Cabin Republicans’ brief identified a greater number of pertinent clauses affected by Prop 8 than the *Strauss* majority did,<sup>185</sup> provisions with which the *Strauss* majority should have grappled if they were to perform their judicial duties with the care warranted by the immense stakes of this litigation—the future of the protection of any group of people from discrimination with respect to any right, and therefore the independent legitimacy of the California Constitution.

Even more troubling is the majority’s “qualitative” revision analysis. The majority considered cases holding that certain conditions were sufficient to prove that various initiatives were actually revisions to the Constitution. The Court then wrongly deduced that these cases established that it is *always* necessary show those same conditions.<sup>186</sup> The Court falsely denied their own agency in validating the discrimination that Prop 8 wrote into the Constitution, clinging to the myth of the mechanical constitutional judge.<sup>187</sup> Even with a construction of Prop 8 that did not invalidate marriages entered before the election,<sup>188</sup> the majority justices improperly minimized the effect that Prop 8—and their decision to uphold it—would have on equality in California.

First, the majority opinion limited qualitative revisions of the state constitution to *only* such measures as would “effect...a substantial change in the governmental plan or structure established by the Constitution,” even if they make “very important substantive changes in fundamental state constitutional principles.”<sup>189</sup> The majority justices did not accept this as their own interpretive judgment of where the line between constitutional amendments and (non-quantitative) constitutional revisions should be

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<sup>183</sup> *Id.* (citation omitted).

<sup>184</sup> See Log Cabin Republicans Amicus Brief, *supra* note 16.

<sup>185</sup> See *id.* at 1–2, 10–15.

<sup>186</sup> *Strauss*, 207 P.3d at 98–99 (citing *Amador Valley Joint Union High Sch. Dist. v. Bd. Of Equalization*, 583 P.2d 1281, 1286 (Cal. 1978); *Legislature v. Eu*, 816 P.2d 1309, 1319 (Cal. 1991); *Raven v. Deukmejian*, 801 P.2d 1077, 1087 (Cal. 1990); *Brosnahan v. Brown*, 651 P.2d 274, 289 (Cal. 1982).

<sup>187</sup> See *Strauss*, 207 P.3d at 59–60 (stating “we recognize as judges and as a court our responsibility to confine our consideration to a determination of the constitutional validity and legal effect of the measure in question. It bears emphasis in this regard that our role is limited to interpreting and applying the principles and rules embodied in [sic] the California Constitution, setting aside our own personal beliefs and values.”).

<sup>188</sup> *Strauss*, 207 P.3d at 64.

<sup>189</sup> *Id.* at 99.

drawn. Rather, the justices purported to find this limitation as being *dictated* by “a fair and full reading of” precedent.<sup>190</sup>

The majority’s first argument in support of this reading of precedent observes that prior decisions upholding initiative measures as constitutional amendments “did not undertake an evaluation of the relative importance of the constitutional right at issue or the degree to which the protection of that right had been diminished,” but instead only analyzed the extent of change to the plan or framework of government.<sup>191</sup> Dismissing language from those same precedents which suggested that other types of changes might amount to qualitative revisions,<sup>192</sup> the majority again insisted that their conclusion was required by “a fair reading of those decisions in their entirety,”<sup>193</sup> decisions “that govern this court’s jurisprudence.”<sup>194</sup>

But as Justice Moreno noted in dissent, the California Supreme Court’s amendment versus revision case law establishes the *sufficiency* of a change to the basic framework or plan of government to constitute a revision to the California Constitution; the case law does not establish the *necessity* of such a change for a measure to amount to a revision, and for good reason:

The cases cited by the majority do indeed hold that a change to the Constitution that alters the structure or framework of government is a revision, but these cases do not, as the majority erroneously concludes, also stand for the inverse of this proposition: that a change to the Constitution that does not alter the structure or framework of the Constitution cannot constitute a revision and, thus, necessarily must be an amendment. The reason is simple. None of the cases cited by the majority considered this issue, because it was not raised.<sup>195</sup>

As Justice Werdegar noted in her opinion concurring in part and concurring in the judgment,<sup>196</sup> the California Supreme Court previously “never held that a constitutional initiative was an amendment rather than a revision *because* it affected only individual rights rather than governmental organi-

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<sup>190</sup> See *id.* (maintaining that “a fair and full reading of this court’s past amendment/revision decisions demonstrates” that quantitative revisions are only those measures substantially affecting the basic framework or plan of California government) (emphasis added).

<sup>191</sup> *Id.* at 100.

<sup>192</sup> *Id.* at 100–01 & 101 n.22 (rejecting petitioners’ proffered glosses on *Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991), and *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990)).

<sup>193</sup> *Id.* at 100–01.

<sup>194</sup> *Id.* at 101 (emphasis added).

<sup>195</sup> *Id.* at 134 (Moreno, J., concurring and dissenting).

<sup>196</sup> See *id.* at 124 (Werdegar, J., concurring) (“I agree with the majority that Proposition 8 is a valid amendment to the California Constitution rather than a procedurally defective revision. I reject, however, much of the majority’s analysis.”) (internal citation & footnote omitted).

zation.”<sup>197</sup> The majority simply misses the point when it retorts in a footnote that “Justice Werdegar’s concurring opinion cannot escape the circumstance that there is *no* judicial authority to support its proposed reading of our past decisions. . . .”<sup>198</sup> Werdegar, like the petitioners, offered the Court a normatively attractive, permissible interpretation of precedent. The petitioners were not falsely claiming that the Court’s decisions and the California Constitution *must* be interpreted a certain way as a matter of logic and inexorable command. Instead, the petitioners argued the California Constitution *ought* to be interpreted a certain way.<sup>199</sup> Certainly the Court’s past decisions did not compel an answer either for or against the challenge to Prop 8.<sup>200</sup>

Thus, whether Prop 8 had qualitatively revised the California Constitution was still an open question, one on which the majority of the Justices should have engaged more forthrightly. Instead, Chief Justice George’s majority opinion sought refuge in the ostensibly dead hand of the past, here in the form of the putative views of the adopters of past constitutional provisions and in California Supreme Court precedent.<sup>201</sup> The majority correctly noted that “in determining whether Proposition 8 constitutes a constitutional amendment or, instead, a constitutional revision, we by no means write on a clean slate.”<sup>202</sup> Yet, although the majority occasionally noted criticism of past decisions, which at least raises the implication that perhaps the justices might not adhere to past decisions,<sup>203</sup> the majority’s decision contained no discussion of *stare decisis*. Perhaps the majority was con-

<sup>197</sup> *Id.* at 125.

<sup>198</sup> *Id.* at 101 n.23 (majority opinion) (emphasis in original).

<sup>199</sup> *See, e.g.,* Strauss v. Horton, Amended Petition for Extraordinary Relief, at 14 (“[T]his Court *should* hold that Proposition 8 constitutes an attempted revision of our state Constitution . . .”) (emphasis added); *id.* at 18 (“This case presents an issue not directly addressed in any of this Court’s prior decisions . . . . But the decisions in this Court’s other cases provide helpful guidance . . .”).

<sup>200</sup> As Justice Moreno correctly argued in his opinion concurring in part, concurring in the judgment in part, and dissenting in part:

[N]one of our prior cases discussed above, nor any other case discussed in the majority opinion, holds that a modification of the California Constitution constitutes a revision only if it alters the structure of government. None of our prior cases considered whether an amendment to the Constitution could restrict the scope of the equal protection clause by adding language that requires discrimination based upon a suspect classification. Nor did these cases consider, as in the present situation, whether a transfer of the authority to protect the equal rights of a suspect class away from the judiciary to an electoral majority is the type of structural change that can be effected by a constitutional amendment.

*Id.* at 138 (Moreno, J., concurring and dissenting).

<sup>201</sup> The majority opinion contains a lengthy—twenty pages in the Pacific Reporter—recitation of the history of the evolution of the amendment/revision distinction in the California Constitution and California jurisprudence. *Id.* at 78–98 (majority opinion).

<sup>202</sup> *Id.* at 60.

<sup>203</sup> *See, e.g., id.* at 84 n.17 (“This aspect of the *Livermore* decision was sharply criticized by legal commentary of that era . . .”).

cerned about overruling precedent in so high-profile a case, out of fear that the Court might look results-oriented. However, considering that the dissenting and concurring justices read the precedent so differently, the failure to even discuss whether to adopt a different understanding of the amendment versus revision distinction seems to reflect a determination, conscious or otherwise, to stay as far from normative inquiry and choice as the Court could. But, of course, a decision to adhere to precedent is a choice as much as a decision to depart from precedent. And in any event, as Justice Moreno observed in his dissent, no judicial precedents held that a measure discriminating against a group defined by a suspect classification, with respect to a fundamental right, was a mere amendment to the California Constitution.<sup>204</sup> Precedent simply could not carry the weight the majority professed to assign it.

The majority justices' apparent eagerness to eschew "judgment" is understandable. Had they confessed to exercising judgment and invalidated Prop 8, they would have risked alienating (or worse) the Proposition's sponsors or many of those in the voting majority.<sup>205</sup> After all, *Strauss v. Horton* was not a case of some dusty relic from a Californian past readily and comfortably dismissed as benighted. Prop 8 contemporaneously expressed voters' sentiments, rendered not even six months after a narrow four-to-three majority of the Court in the *Marriage Cases* had interpreted the California Constitution to guarantee same-sex couples the right to marry along with different-sex couples.<sup>206</sup> The *Marriage Cases* decision had itself invalidated Proposition 22, the entrenched statutory limitation of marriage to different-sex couples that the voters had adopted in 2000.<sup>207</sup> Moreover, the division in the vote on Prop 8 was very close, fifty-two percent for and forty-eight percent against, meaning that about half of those who had voted would likely be displeased regardless of how the Court ruled on

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<sup>204</sup> *Id.* at 138 (Moreno, J., concurring and dissenting) ("None of our prior cases considered whether an amendment to the Constitution could restrict the scope of the equal protection clause by adding language that requires discrimination based upon a suspect classification.").

<sup>205</sup> To be clear, I am not arguing that the majority Justices consciously chose to uphold Prop 8 out of fear of political repercussions, such as a possible "recall" campaign. I suspect they are made of sterner stuff than that. Chief Justice Ronald George and Justice Ming Chin had previously faced and weathered campaigns to unseat them following votes to strike down a law requiring parental consent for minors' abortions as violating the state constitution. But when jurisprudential materials do not clearly dictate an answer to a question of constitutional interpretation, it does not seem unreasonable to think that the fact of contemporary majoritarian support for a policy might at least subconsciously enter a justice's deliberations.

<sup>206</sup> *Strauss*, 207 P.3d at 86 (explaining the history of the *Marriage Cases* and the passage of Prop 8).

<sup>207</sup> *Id.*

its validity.<sup>208</sup> As persons who are members of California society, the Justices could not have had these “political” facts far from their minds. An approach to judging that absolved them from accountability, by purporting to leave no room for judgment and choice, would thus likely have been extremely welcome in this high-profile case, one that tested a ballot measure that had so divided the people of California.

There is an age-old tradition that treats constitutional interpretation and adjudication in just this fashion. At the confirmation hearings that led to the seating of John Roberts as Chief Justice of the United States, Justice Roberts purported to approach judging as an umpire,<sup>209</sup> as though neutral observation of facts and application of clear rules are all that are involved when any court, including the highest court in the U.S., renders a constitutional decision. This of course ignores the judges’ role in determining what rules to follow.<sup>210</sup>

A similar pretension, seen in Clarence Thomas’s confirmation hearings,<sup>211</sup> showcased what Ronald Dworkin has termed “the neutrality thesis:”

that a Supreme Court justice can reach a decision in a difficult constitutional case by some technical legal method that wholly insulates his decision from his own most basic convictions about political fairness and social justice. . . .

. . .

. . . The neutrality thesis holds that an honest justice’s opinions on issues like . . . whether the liberty of individuals to make personal ethical choices for themselves . . . is . . . so fundamental to the very idea of a free society that no community that abridges it can be called truly

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<sup>208</sup> See . Sec’y of State, Proposition 8—Eliminates Right of Same-Sex Couples to Marry, [hereinafter General Election Results], [http://www.sos.ca.gov/elections/sov/2008\\_general/maps/returns/props/prop-8.htm](http://www.sos.ca.gov/elections/sov/2008_general/maps/returns/props/prop-8.htm) (last visited Feb. 18, 2010).

<sup>209</sup> See, e.g., Jan Crawford Greenburg, *Roberts Testifies, ‘I have No Agenda’: Democrats Zero in on Civil Rights, Privacy*, CHI. TRIB., Sept. 13, 2005, at C1 (nominee contrasting having an “agenda” or “platform,” which he disclaimed, to acting like umpire to “make sure everybody plays by the rules”).

<sup>210</sup> ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 6 (1975): [L]aw is always becoming. And the judge has a legitimate role in determining what it is that the law will become. The flux in law means also that the law’s content is frequently unclear. We must speak of direction and of weight as well as of position. Moreover, the frequent lack of clarity makes possible “ameliorist” solutions.

<sup>211</sup> See DWORKIN, *supra* note 144, at 314 (recounting Thomas’s “peculiar” claim that “he had ‘stripped down like a runner,’ shedding all past opinions and convictions so that he could just apply strict, neutral legal reasoning, the way a good judge does, entirely uninfluenced by any philosophical convictions of his own about the character of democracy or the nature of the Constitution or which rights are fundamental.”).

free . . . , need not, and should not, make a difference to his decisions in constitutional cases.<sup>212</sup>

This tradition of disavowal can be seen at least as far back as 1803 when, in *Marbury v. Madison*, Chief Justice Marshall, writing for a unanimous court, implied that Supreme Court Justices do no more when deciding a constitutional case than “little old judges” do in the most routine legal dispute.<sup>213</sup> Later, in *United States v. Butler*, the Supreme Court wrote of judicial review as if it were a mechanical, objective measurement:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate[,] the judicial branch of the [g]overnment has only one duty;— to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.<sup>214</sup>

Even when it is most transparent that the idea that no judgment or choice is involved is a pretense, for example when the “conservative” majority of the Supreme Court effectively installed George W. Bush as President of the United States over the dissent of the four “liberal” Justices, the Supreme Court of the United States has been at pains to deny that they exercise judgment.<sup>215</sup>

<sup>212</sup> *Id.* at 313.

<sup>213</sup> *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803):

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

On the critique of *Marbury*'s vision of constitutional adjudication, see, e.g., Lawrence G. Sager, *The Incurable Constitution*, 65 NYU L. REV. 893, 898 (1990) (detailing “The ‘Little Old Judge’ claim—that judicial review [of the constitutionality of statutes] is about judges doing what judges have always done”).

<sup>214</sup> *United States v. Butler*, 297 U.S. 1, 62 (1936).

<sup>215</sup> In *Bush v. Gore*, 531 U.S. 98 (2000), a majority of the Court chose to exercise their *discretionary* certiorari jurisdiction to take up George W. Bush's challenge to recounts of presidential votes in Florida, despite “the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere.” *Id.* at 111. Despite that choice, the majority astonishingly concluded its opinion with this literally incredible disclaimer of choice or judgment: “When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.” *Id.*

The Supreme Court could have left responsibility for judging Florida election returns where the U.S. Constitution seemed to put it—with the U.S. Congress. See, e.g., *id.* at 129 (Souter, J., dissenting) (“The Court should not have reviewed either *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam), or this case, and should not have stopped Florida's attempt to recount all undervote ballots, see 531 U.S. 70, 102, by issuing a stay of the Florida Supreme Court's orders during the period of this review, see *Bush v. Gore*, 531 U.S. 1046. If this Court had allowed the State to follow the

Thus, in *Strauss*, the Court's stance that it was not making normative choices about how best to understand both the California Constitution and that document's distinctions between amendments and revisions, although implausible, was hardly unusual.<sup>216</sup> But, even if one accepted the California Supreme Court majority's conclusion that it had no choice but to say that only actions changing the plan<sup>217</sup> of state government constituted revisions of the California Constitution<sup>218</sup> (thereby rendering the petition-initiative procedure unavailable), Prop 8 still should have been held to be a procedurally improper revision. As California political scientists Bruce Cain and Roger Noll have argued (in support of deeming Prop 8 a revision),<sup>219</sup> "the issue of who determines whether rights can be expanded seems to fall pretty clearly into the kind of fundamental constitutional reform that was intended for the revision process."<sup>220</sup>

Equality and the constitutional protection of minorities have been persistent aims of the California Constitution from its inception, as Part I demonstrated. The text of the California Constitution contains multiple, robust equality guarantees, both general and particular, as Part II showed. The California Supreme Court's constitutional precedents have long and repeatedly recognized the centrality of equality in our constitutional scheme of government in California, as Part III illustrated. And, as Part IV argued, meaningful limitations on a majority's ability to selectively deprive vulnerable minority groups of their fundamental rights are necessary to the independent political legitimacy of the state constitution. The confluence of all these factors should have sufficed to convince the majority that equality is so central, so foundational to California's system of government, that Prop

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course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedure provided in 3 U.S.C. § 15." (string citation omitted). Justice Souter's dissent was joined, at least in part, by Justices Stevens, Ginsburg, and Breyer.

That a majority of Justices chose not to exercise restraint is a testament to the importance of the issues for the nation in their eyes. That they chose to pretend that they had no choice in the matter is a testament to the grip of the judges-as-mechanical-umpire ideology.

<sup>216</sup> See *Strauss v. Horton*, 207 P.3d 48, 60–61 (Cal. 2009).

<sup>217</sup> In her opinion concurring in the judgment, Justice Werdegard observed that, "[i]n its concluding statement, the *Brosnahan* court substituted the word 'framework' for the word 'plan' in restating the rule in *Amador Valley* that a revision must alter 'our basic governmental plan,' stating: 'For the above reasons, nothing contained in [the 1982] Proposition 8 necessarily or inevitably will alter the basic governmental framework set forth in our Constitution.'" *Strauss*, 207 P.3d at 135 (Werdegard, J., concurring) (quoting first *Amador Valley Joint Union High Sch. Dist. v. Bd. of Equalization*, 583 P.2d 1281, 1286 (Cal. 1978), and then *Brosnahan v. Brown*, 651 P.2d 274, 289 (Cal. 1982)).

<sup>218</sup> See *Strauss*, 207 P.3d at 100.

<sup>219</sup> Cain & Noll, *supra* note 12, at 1533.

<sup>220</sup> *Id.* at 1532.

8 amounted to a revision of the California Constitution, just as it convinced Justice Moreno and informed his noble dissent.<sup>221</sup>

The majority's stated reasons for holding otherwise are not persuasive. First, the majority asserts that "[a] narrowly drawn exception to a generally applicable constitutional principle does not amount to a constitutional revision."<sup>222</sup> According to Chief Justice George,

Because Prop[] 8 has only this limited effect on the fundamental rights of privacy and due process and the guarantee of equal protection of the laws under the state Constitution as interpreted by the majority opinion in the *Marriage Cases*, there is no need for us to consider whether a measure that actually deprives a minority group of the entire protection of a fundamental constitutional right or, even more sweepingly, leaves such a group vulnerable to public or private discrimination in all areas without legal recourse, would constitute a constitutional revision under the provisions of the California Constitution.<sup>223</sup>

Thus, he argues, because California voters did not take away too much of same-sex couples' right to marry and right to equal treatment, it apparently *cannot be* a revision.<sup>224</sup>

The intuition behind this 'a little bit but not too much' notion appears to have led the Chief Justice to press challengers' attorney Shannon Minter at oral arguments in March 2009, asking him to what extent Prop 8 "is to be construed narrowly" and not affect the other holdings of the Court.<sup>225</sup> Chief Justice George suggested that Minter's "argument that ... [Prop 8] is a wholesale revision as opposed to an amendment is weakened [if Prop 8 is interpreted narrowly]."<sup>226</sup> However, as I noted in my blog, CruzLines, regarding the oral argument:

The Chief Justice's phrasing "wholesale revision" is, as he is well aware, not the terminology used by the state constitution, which simply distinguishes between a power to revise and a power to amend the constitution (without defining either or the difference). "Wholesale revision" sounds like what the Court in past decisions has called a "quantitative revision" to the constitution, one which ranges so broadly and changes or adds so

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<sup>221</sup> See generally *Strauss*, 207 P.3d at 129–40 (Moreno, J., concurring in part and dissenting in part) (articulating his dissent).

<sup>222</sup> *Strauss*, 207 P.3d at 102.

<sup>223</sup> *Id.* (citations and emphasis omitted).

<sup>224</sup> *Id.* ("Proposition 8 has only this limited effect on the fundamental rights of privacy and due process and the guarantee of equal protection of the laws under the state Constitution as interpreted by the majority opinion in the *Marriage Cases* . . .").

<sup>225</sup> *Supra* note 159 (Oral Argument of *Strauss*, 207 P.3d 48).

<sup>226</sup> *Id.*

much to the document that it cannot be judged a mere, minor perfecting “amendment.”<sup>227</sup>

Yet here, the Court purports to be addressing the qualitative revision argument, rendering its own position weakened instead. As Justice Moreno recognized in the dissent, “[t]he majority protests that it does not mean to ‘diminish or minimize the significance that the official designation of ‘marriage’ holds,’ but that is exactly the effect of its decision.”<sup>228</sup> Indeed, as Chief Justice George framed the issue in *Marriage Cases*, “our task in this proceeding is . . . only to determine whether the difference in the official names of the relationships [i.e., a ‘domestic partnership’ as the officially recognized relationship for same-sex couples and a ‘marriage’ as the officially recognized relationship for different-sex couples] violates the California Constitution.”<sup>229</sup> Thus, the establishment of separately named legal statuses was the sole constitutional violation recognized and remedied by *Marriage Cases*.

Setting aside the question of the gravity of ousting same-sex couples from the legal institution designated “marriage,” the majority opinion in *Strauss* holds out the promise, or at least the prospect, that more far-reaching eliminations of fundamental rights from groups defined by suspect classifications might amount to revisions, which could not be adopted through the initiative process.<sup>230</sup> Yet none of the parties argued that Prop 8 would not be a revision “if it only deprive[d] same-sex couples of part of the right to marry and d[id] not wholly strip gay and lesbian people of all equal protection rights,”<sup>231</sup> and that would not be a particularly persuasive interpretation of the amendment-versus-revision distinction. Either government extends to people equal protection of the laws, or it does not extend equal protection.

As I note in my blog, Chief Justice George’s opinion in *Strauss* flirts with “embracing a standard that [holds] that a proposed constitutional

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<sup>227</sup> Cruz Lines, <https://mylaw.usc.edu/blogcruz/index.cfm> (Mar. 6, 2009, 9:37 PST); see also *supra* note 159 (Oral Argument of *Strauss*, 207 P.3d 48).

<sup>228</sup> *Strauss*, 207 P.3d at 130 (Moreno, J., concurring and dissenting) (quoting *Strauss*, 207 P.3d at 61 (majority opinion)).

<sup>229</sup> *In re Marriage Cases* (*Marriage Cases*), 183 P.3d 384, 398–99 (Cal. 2008), *reh’g denied* (June 4, 2008).

<sup>230</sup> See *Strauss*, 207 P.3d at 61–63 (stating “Proposition 8 does not abrogate any of these state constitutional rights, but instead carves out a narrow exception applicable only to access to the *designation* of the term ‘marriage,’ but not to any other of ‘the core set of basic *substantive* legal rights and attributes traditionally associated with marriage . . . such as the right to establish an officially recognized and protected family relationship with the person of one’s choice and to raise children within that family.”); *id.* at 63 (quoting *Marriage Cases*, 183 P.3d at 399 (internal quotations omitted)).

<sup>231</sup> Cruz Lines, <https://mylaw.usc.edu/blogcruz/index.cfm> (Mar. 5, 2009, 23:18 PST)

change would count as a revision if, but only if, it [removes the entire] benefit a group of people might [receive] from a right[,] but not if it takes away only a portion [of an actual or potential benefit].<sup>232</sup>

If that is the standard, as appears likely from the Court's opinion, "it is a colossally bad one."<sup>233</sup> "Were that the rule, initiative drafters could always take care to preserve some application of the right they want to strip from a group and thereby bring it within the scope of the initiative-amendment power, rather than pursu[ing] the more deliberative and cumbersome revision process (which requires supermajority votes in each house of the state legislature)."<sup>234</sup> This sort of "all-or-nothing rule . . . would be readily evaded and would defeat the p[urpose underlying] the California [C]onstitution's provi[ding] different"<sup>235</sup> enactment procedures for revisions and amendments.

The argument could not really be salvaged by expressly "adopting a standard [holding that] a proposed constitutional change counts as an amendment (adoptable via initiative) if it takes away only a little bit of a constitutional right, but not if it [removes] too much of the right."<sup>236</sup> "Balancing tests may be inevitable in constitutional law, but if the California Supreme Court [believes] the doctrinal rules they adopt" should provide "at least some guidance to voters and legislators,"<sup>237</sup> their rules should "provide something less mushy than 'I know it when I see it' (former U.S. Supreme Court Justice Potter Stewart's unhelpful characterization of 'obscenity,' a content-free standard that Justice Carlos Moreno quoted in the oral arguments over Proposition 8)."<sup>238</sup>

Moreover, the observation "that gay and lesbian people still enjoy some equal protection rights after Prop 8 [does] not respon[d] to the challengers' argument. They contended that Prop 8 should be deemed a revision to the state constitution that could only originate in the legislature, not via petition-initiative [as] Prop 8 was adopted."<sup>239</sup> That petition-initiative "strip[ped] away not just any right[,] but a . . . 'fundamental' [right to marry] in our state constitution."<sup>240</sup> And Prop 8 took "that right away not just from any group but from a group (here, lesbian persons) defined by a sus-

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Egelko, *supra* note 3, at 60.

<sup>235</sup> Cruz Lines, *supra* note 231.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* (quoting from *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, concurring)).

<sup>239</sup> Cruz Lines, *supra* note 231.

<sup>240</sup> *See supra* note 199, at 12.

pect classification (here, sexual orientation).”<sup>241</sup> In so doing, it “doubly undermine[d] the historic role of the court, and denies the Court the ability to enforce the principles of equality that are at the very foundation of the California [C]onstitution.”<sup>242</sup>

“The challengers never claimed that gay and lesbian people would enjoy no constitutional equality rights if Prop 8 were a . . . part of the California Constitution. Had [the challengers] made that hyperbolic claim, . . . [Chief Justice] George’s position would . . . [be] an adequate rejoinder to the challengers’ argument.”<sup>243</sup>

Instead, their stronger argument against Prop 8 very sensibly contended that, “if Proposition 8 were a permissible exercise of the amendment power, then the [c]ourt [must] conclude that *any* law that took away *any* right from *any* group of people [must] . . . be permissible.”<sup>244</sup> Ultimately, that would mean that “any possible equal protection holding of the state supreme court could be overruled by a bare majority of voters.”<sup>245</sup> And, as Therese Stewart, arguing for the City and County of San Francisco, put it, “a guarantee of equal protection that is changeable by a majority is no guarantee at all.”<sup>246</sup>

In substance, thus, the challengers argued that “it is not just the dignitary harm that Proposition 8 inflicts upon same-sex couples and their families that renders Prop 8 a revision. Rather, it is the principle that a decision upholding Prop 8 would have to embody: Any right may be taken away from any group by a mere amendment passed by a bare majority of voters, with no filter of legislative deliberation required (as would be the case for a proposed constitutional revision.)”<sup>247</sup>

“Dean Kenneth Starr, arguing for the official proponents of Proposition 8, did not shrink from that conclusion.”<sup>248</sup> Instead, Starr’s oral argument illustrated that “he thought there was no limit in the California constitution to what voters could do to strip away any rights from any group. That might be regrettable, but it’s just the constitution we have, he basically said.”<sup>249</sup>

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<sup>241</sup> Cruz Lines, *supra* note 231.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* “[A] petition got signatures from a mere eight percent of those who voted in the last election for governor.” *Id.*

<sup>246</sup> *Id.* (citing Oral Argument of Strauss v. Horton, 207 P.3d 48 (Cal. 2009) *supra* note 158).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*; *see also supra* note 158 (argument of Kenneth Starr).

“But if that is the upshot of Prop 8, then the supreme court majority’s reservations are of no comfort here. As Ms. Stewart reminded the court at oral argument,” democratic legitimacy stems, at least in part, from a “commitment to equal protection. Proposition 8 attempts to erode that commitment, taking away the most judicially protected kind of right from a group subject to the highest level of judicial protection.”<sup>250</sup> “The fact that [Prop 8] leaves other rights or other aspects of a right intact—for now—should not be enough to obscure the pernicious way [the court’s decision essentially] says [that,] no matter how strong a constitutional ruling from the California Supreme Court, a bare majority can wipe it out with the most casual kind of constitutional change.”<sup>251</sup> “After *Strauss v. Horton*, rights and minorities are safe as a matter of California constitutional law only at the sufferance of majorities.”<sup>252</sup>

### CONCLUSION

The California Supreme Court majority was wrong to uphold Proposition 8 as a mere amendment in *Strauss v. Horton*. Chief Justice George was wrong to suggest that the gravamen of the challenges to Prop 8 was merely that “it is just too easy to amend the California Constitution through the initiative process.”<sup>253</sup> Rather, the challengers maintained that Prop 8 inflicted such a profound a change upon the California Constitution and the political order it regulates that the measure should be judged a revision to the state constitution.

History, constitutional text, precedent, and political theory all confirm that such a change to the foundation of judicially enforceable equality ought be understood as a revision of the California Constitution. The majority Justices’ choice to characterize Prop 8 as a mere amendment was in a sense as much responsible for revising the California Constitution as the initiative itself. Not all state constitutions contain the distinction between amendments and revisions that California’s boasts, but a measure as monumental as Prop 8 should count as a revision and trigger a more deliberative and challenging process for changing the California Constitution. What else are constitutions for, what else are courts for, if not to protect the rights of minority groups? That strongly felt intuition, deeply rooted in the history of constitutionalism in the United States, accounts for the amazing protests against Prop 8, held not only in California, but across the nation,

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<sup>250</sup> *Id.*; see also *supra* note 158.

<sup>251</sup> See Cruz Lines, *supra* note 231.

<sup>252</sup> *Id.*

<sup>253</sup> *Strauss v. Horton*, 207 P.3d 48, 64 (Cal. 2009).

and the world, in the wake of its passage. Perhaps such sentiments may lead a movement to amend—or revise—the California Constitution so that it once again not only guarantees all people the right to marry, regardless of the sex of their partner, but also once again reflects the limits on raw majoritarian power that the *Strauss* majority should have discerned. Should that come to pass, perhaps then the California Constitution will recover the independent political legitimacy stolen from it by both Prop 8 and the judicial ratification of the relic that Prop 8 is certain to become.