
THE GREAT DIVORCE: THE SEPARATION OF EQUALITY AND DEMOCRACY IN CONTEMPORARY MARRIAGE JURISPRUDENCE

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Does equality limit democracy or enable it? Two recent decisions by the California Supreme Court pose that question in a particularly dramatic fashion. In 2008, the California Supreme Court held that, under the California Constitution, same-sex couples have a fundamental right to marry and that sexual orientation is a suspect classification.¹ One year later, the same court held that limiting a fundamental right (marriage) only for the members of a suspect class (gay people) was a permissible exercise of a majority's voting power.² The court did so in its decision upholding Proposition 8, which amended the California Constitution to bar same-sex couples from marriage.³ The question presented to the court was whether an amendment that facially targets a disfavored minority constitutes a significant change in the state's governmental system. By answering no, the California Supreme Court reached the surprising conclusion that a majority can create an exception to the guarantee of equal protection for an unpopu-

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¹ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) *reh'g denied*, 2008 Cal. LEXIS 6807, at *1 (Cal. June 4, 2008).

² *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

³ CAL. CONST. art. I, § 7.5 (amended 2008). This amendment, commonly known as Proposition 8, states that "[o]nly marriage between a man and a woman is valid or recognized in California." *Id.*

lar minority without significantly altering California's system of democracy.

Across the country, marriage litigation by same-sex couples has raised important questions about the meaning of equality and the proper role of courts in a democracy. Both for the public and for most legal scholars, there is a strong tendency to view these cases as a contest between democracy and individual rights.⁴ In most (although not all) states, the majority of heterosexual people wish to retain marriage as an exclusively heterosexual institution, while lesbians and gay men wish to have the same freedom to marry that others enjoy.⁵ Increasingly, state and sometimes federal courts have been called upon to resolve the resulting conflicts. In some cases, such as the California Supreme Court's decision in the *Marriage Cases*, courts have decided that the requirements of equal protection and due process require the invalidation of laws restricting marriage to opposite-sex couples.⁶ In others, including the California Supreme Court's subsequent decision in *Strauss v. Horton*, courts have upheld the chal-

⁴ See *infra* Section I.A.

⁵ Currently, five states plus the District of Columbia permit same-sex couples to marry. See National Center for Lesbian Rights, *Marriage, Domestic Partnership, and Civil Unions: An Overview of Relationship Recognition for Same-Sex Couples in the United States* (2010), available at, http://www.nclrights.org/site/DocServer/Relationship_Recognition_Update_-_09_03_08.pdf?docID=881.

⁶ See *infra* Section II. In addition to California, high courts in Massachusetts, Connecticut, and Iowa have ruled that barring same-sex couples from marriage violates state guarantees of equal protection and due process. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). In Hawaii, the Hawaii Supreme Court held that Hawaii's marriage ban discriminated based on sex and therefore presumptively violated Hawaii's equal protection guarantee. The court remanded the case to give the state an opportunity to show that it had a compelling state reason for doing so, but the voters amended the Hawaii Constitution to permit the legislature to bar same-sex couples from marriage if it chose to do so. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993), *superseded by statute*, HAW. CONST. art. I, § 23, as recognized in *Milberger v. KBHL, LLC*, 486 F. Supp. 2d 1156, 1164 n.9 (D. Haw. 2007) (calling the constitutionality of Hawaii's marriage ban into question). In two additional states—Vermont and New Jersey—the state's high court held that same-sex couples must be provided with all of the rights and benefits of marriage, but left it up to the state legislatures whether to do so through marriage or an alternative legal status. See *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Lewis v. Harris*, 875 A.2d 259 (N.J. 2006). To date, no federal courts have struck down either a state marriage ban or the federal Defense of Marriage Act (DOMA), which permits states to withhold recognition from same-sex couples who are married in another state and also bars the federal government from providing any of the federal rights or benefits given to married persons to same-sex spouses. Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2006) & 28 U.S.C. § 1738C (Supp. 2006)). A federal constitutional challenge against Proposition 8 is pending in the United States District Court for the Northern District of California. See *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. filed May 22, 2009).

lenged marriage bans, leaving same-sex couples with no choice but to press their demands through the political process.⁷

My primary purpose in this Article is to reframe this debate. Rather than seeing marriage litigation by same-sex couples as a conflict between democracy and individual rights, I argue that we should see these cases as a powerful demand for democratic inclusion. By claiming the freedom to marry, lesbian, gay, bisexual, and transgender people are seeking to be treated as fully equal, respected, and participating members of society. Thus, even when they lose, they are realigning both their own sense of identity and the nation's sense of who they are.

Part I of this Article uses the scholarship of Alexander Bickel and John Hart Ely as springboards to compare two views of the relationship between democracy and equality.⁸ The first view, which is widely associated with Bickel, sees democracy and equality as fundamentally unrelated. Bickel equated democracy with the principle of majority rule. Thus, according to Bickel, when unelected judges invalidate laws to protect individual or minority rights, they are necessarily (and undemocratically) disregarding the wishes of the majorities who enacted them. This view, which I refer to herein as “the standard view” or “the standard account,” has come to dominate both popular culture and constitutional scholarship and jurisprudence.⁹

The second view, which I endorse, and which also has deep roots in our constitutional tradition and history, understands equality in the opposite way—as an essential condition, or component, of democracy. In Ely's well-known theory, the primary purpose of judicial review is not to enforce

⁷ See *infra* Section III. The high courts of Maryland, New York, and Washington have rejected state constitutional challenges to state laws that exclude same-sex couples from marriage. See *Conaway v. Deane*, 932 A.2d 571 (2007); *Hernandez v. Robles*, 855 N.E.2d 1 (2006); *Andersen v. King County*, 138 P.3d 963 (2006). In addition, a handful of federal courts have rejected challenges to state laws barring same-sex couples from marriage and to the federal Defense of Marriage Act (DOMA). See, e.g., *Wilson v. Ake*, 354 F. Supp.2d 1298 (M.D. Fla. 2005) (rejecting challenge to DOMA and Florida statutes barring same-sex couples from marriage brought by a lesbian couple who married in Massachusetts and were subsequently denied recognition of their marriage by Florida); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004) (rejecting DOMA challenge brought by a surviving same-sex spouse after a Washington bankruptcy court dismissed a joint bankruptcy petition filed before her partner's death, on the ground that only heterosexual married couples are eligible to file joint petitions).

⁸ For a similar analysis of these two competing views of equality, see Jane S. Schacter, Symposium, *Defining Democracy for the Next Century: Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 389–91 (1997) [hereinafter Schacter, *Democracy's Domain*]. For a discussion of Bickel and Ely, see *infra* Sections I.A and I.B.

⁹ See *infra* Section I.A.

rights, but to protect equal access to the political process. Ely believed that courts play an essential role in protecting democracy by keeping the channels of political participation open and clear, and by protecting groups whose ability to participate in the political process is hampered by prejudice.¹⁰

In the last part of Part I, I argue that we should embrace Ely's democracy-enhancing conception of equality and judicial review, but with some significant revisions. First, in contrast to Ely, I do not believe that courts enforcing equality norms can avoid substantive judgments about how to distinguish invidious discrimination from legitimate differentiation. Thus I argue that in order to gain judicial protection, marginalized groups must gain enough social visibility and political power to persuade courts and others that they should be treated as equal citizens. Second, rather than focusing exclusively on a group's ability to participate effectively in representative politics, as Ely urged, I argue that courts should also enforce equality norms in spheres that are often improperly dismissed as purely social—in particular, in the sphere of family recognition and protection.¹¹

Parts II and III use a revised Elysian framework to analyze litigation seeking the freedom to marry for same-sex couples, focusing specifically on two recent California Supreme Court decisions. These cases, *In re Marriage Cases* and *Strauss v. Horton*, mark the first time a state's high court has recognized a group's entitlement to heightened scrutiny under a state constitution but then, in short order, permitted the partial invalidation of that recognition by popular vote. In Part II, I argue that the majority decision in the *Marriage Cases* framed equality too narrowly as an individual right. Although the court's decision in the *Marriage Cases* removed a powerful impediment to the ability of gay Californians to be treated as equal

¹⁰ See *infra* Section I.B.

¹¹ Cf. Kimberlé Williams Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1686 (1998) [hereinafter Crenshaw & Peller, *The Contradictions of Mainstream Constitutional Theory*] (arguing that democratic theory has failed to acknowledge "the undemocratic character of our everyday social lives"); Ruthann Robson, *Judicial Review and Sexual Freedom*, 30 HAW. L. REV. 1 (2007) [hereinafter Robson, *Judicial Review and Sexual Freedom*] (arguing that mainstream scholarly debates about democratic theory and judicial review have largely ignored the social realities of women and sexual minorities); Schacter, *Democracy's Domain*, *supra* note 8, at 399–410 (arguing that democratic theory must explore "the role of democratic ideas and practices in social spheres of collective life beyond the political process"); Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 8–9 (1977) [hereinafter Karst, *Equal Citizenship*] (arguing that equal citizenship must include not just equality in the political realm but also full participation in "the public life of the society").

citizens, the court did not seem to fully grasp, or appreciate, that democracy-enhancing dimension of its ruling. In Part III, I argue that the majority's narrow focus in the *Marriage Cases* set the stage for the court's subsequent decision upholding Proposition 8 in *Strauss v. Horton*. Because the court in *Strauss* could not envision equal protection as more than an individual right, it failed to see the profoundly undemocratic impact of permitting the voters to create an exception to the principle of equal protection for a disfavored group. Part IV shows that despite the court's almost exclusive focus on equality as an individual right in both cases, the court's analysis of the harms caused by the marriage ban in the *Marriage Cases* at least implicitly reveals a powerful relationship between family recognition and political equality. I conclude by arguing that we need to recover an expansive vision of democratic equality that seeks recognition and protection of a truly democratic diversity of families.

I. TWO VIEWS OF EQUALITY AND DEMOCRACY

In the predominant view, equality is defined as a right that limits the principle of majority rule.¹² Individuals and minorities are understood to have a right to equal protection, just as they have a right to due process, freedom of speech, or freedom of religion. Judicial enforcement of equality is seen as similar to judicial enforcement of any other substantive constitutional right. In particular, when a court invalidates a democratically enacted measure based on equal protection, it is presumed to be vindicating a substantive constitutional value that takes precedence over popular will. The value of equality is therefore understood to be exogenous to democracy: equality imposes an external limit on what majorities may do to individuals and minorities.¹³

This standard account of the relationship between equality and democracy is tied to an equally familiar account of judicial review. By conceptualizing equality as an external limit on democracy, the standard account casts courts in a heroic, albeit oppositional, role, as a bulwark against the potential "tyranny of the majority."¹⁴ Whether enforcing equality or any

¹² See Schacter, *Democracy's Domain*, *supra* note 8, at 389 ("[T]he most standard and straightforward account of democracy and social equality is to conceive of democracy in majoritarian terms and to embrace without apology the notion that the Constitution imposes frankly antidemocratic limits on majority prerogatives, including the Equal Protection Clause.").

¹³ *Id.* (stating "[b]ecause equality norms function as a brake on democracy, . . . this [dominant] theory sees social equality as exogenous to democracy.").

¹⁴ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 250 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chicago Press 2000) (1835) (warning that unrestrained majorities

other constitutionally protected right, courts are understood to be enforcing guarantees that, by design, are not subject to popular vote. In the rousing words of former United States Supreme Court Justice Sandra Day O'Connor, the courts must ensure that there is "a haven where citizens enjoy their constitutional and civil liberties in defiance of all the powers that the state or the masses can bring to bear."¹⁵ Courts are considered well suited to play that countermajoritarian role precisely because they are supposed to be insulated from popular accountability and political pressure.¹⁶ In the standard view, the fact that federal judges are unelected and "cannot be removed or stopped by the force of popular displeasure" gives them the necessary independence to enforce rights even in the face of strenuous public opposition.¹⁷

But the same "independence" that empowers courts to enforce constitutional rights even in the face of strong public opposition also threatens to undermine the legitimacy of judicial review. In a democracy, why should the views of unelected judges trump those of the people? The more courts assert their independence from the political process and fulfill their obligation to enforce rights without regard to public opinion, the more they risk

might oppress vulnerable minorities). See also JAMES MADISON, Amendments to the Constitution, Speech to the House of Representatives (June 8, 1789), in THE PAPERS OF JAMES MADISON, 196, 207 (Robert A. Rutland et al. eds., 1973) ("Independent tribunals of justice will consider themselves in a peculiar manner the guardians of [the Bill of] [R]ights; [the courts] will be an impenetrable bulwark against every assumption of power. . . . They will naturally be led to resist every encroachment upon rights expressly stipulated for in the Constitution.").

¹⁵ SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 258 (Craig Joyce ed. 2003) [hereinafter O'CONNOR, THE MAJESTY OF THE LAW].

¹⁶ See, e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 167 (1980) [hereinafter CHOPER, JUDICIAL REVIEW] (A court must "review individual rights questions, unabated by its judgment about whether a particular result will be subject to criticism, hostility, or disobedience.").

¹⁷ O'CONNOR, THE MAJESTY OF THE LAW, *supra* note 15, at 253–54 (noting that the Supreme Court Justices who ruled in *Brown v. Board of Education* and other cases in which the court enforced the Equal Protection Clause to protect the rights of unpopular groups "would never have been able to carry out their sworn duties if they had had to win a popular vote in order to retain their positions"). See also THE FEDERALIST No. 78 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("The complete independence of the courts of justice is peculiarly essential in a limited constitution. . . . Limitations . . . can be preserved in practice no other way than through the medium of the courts of justice."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1596 (1873) ("[I]ndependence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves; and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.").

triggering popular revolt.¹⁸ That dilemma is the essence of the well-worn “countermajoritarian difficulty” most often associated with Alexander Bickel, whose scholarship on the apparent conflict between judicial review and the democratic principle of majority rule has deeply influenced many subsequent generations of constitutional scholars.¹⁹

As I explain below, there is an alternative view of the relationship between equality and democracy, and the role of the courts, that avoids this dilemma. Nonetheless, what I refer to here as “the standard account” of that relationship is deeply entrenched. The premise that judicial review is inherently undemocratic continues to dominate judicial, popular, and scholarly discourse.²⁰ Courts routinely equate deference to majoritarian enactments with fidelity to democracy.²¹ In political debates and the popular press, accusations of alleged judicial activism and overreaching abound.²²

¹⁸ Cf. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 28 (2003) (“Judicial interpretations of the Constitution are always vulnerable to attack as the mere decrees of nonelected judges, . . . the more so as judicial constitutional interpretations define themselves in opposition to the ‘ordinary’ politics that manifest democratic accountability.”). That vulnerability is enhanced by the fact that the courts have no direct means to require obedience to their decisions. They are ultimately dependent on the willingness of the other branches and the people to respect their decisions. See, e.g., CHOPER, *supra* note 16, at 129–70 (discussing “the fragile character of judicial review”).

¹⁹ BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986) (1962) [hereinafter BICKEL, *THE LEAST DANGEROUS BRANCH*].

²⁰ See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (describing the history of scholarly preoccupation reconciling democracy and judicial review); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46 (1989) (“For several decades, the scholarly literature about judicial review has been dominated by . . . a conviction that judicial review is a deviant institution in a democratic society.”); William H. Rehnquist, *In Memoriam: William H. Rehnquist: The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL’Y 401, 403–04 (2006) (“[T]hose who have pondered the matter have always recognized that the ideal of judicial review has basically antidemocratic and antimajoritarian facets that require some justification in this Nation, which prides itself on being a self-governing representative democracy.”); CHOPER, *JUDICIAL REVIEW*, *supra* note 16, at 10 (“The procedure of judicial review is in conflict with the fundamental principle of democracy—majority rule under conditions of political freedom.”). As one recent summary aptly observes, the current revival of this critique of judicial power by progressive scholars such as Cass Sunstein, Larry Kramer, and others “may be the single biggest influence on popular ideas about the Court to emerge from the academy in decades.” Josh Benson, *The Past Does Not Repeat Itself, but It Rhymes: The Second Coming of the Liberal Anti-Court Movement*, 33 LAW & SOC. INQUIRY 1071, 1073 (2008).

²¹ See, e.g., Chemerinsky, *supra* note 20, at 73 (“The Court has in effect internalized and institutionalized the majoritarian paradigm, the idea that judicial review—in particular, judicial value imposition—is in tension with American democracy.”).

²² See, e.g., Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism”*, 92 CAL. L. REV. 1441, 1442, 1443 n.8 (2004) (noting that the term had been discussed in over five thousand law reviews articles since 1990 and has appeared in hundreds of news articles in the Washington Post and New York Times); Frank B. Cross and Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*,

During Justice Sotomayor's confirmation hearings, for example, senators and commentators combed her record for evidence of "judicial activism," despite her avowed allegiance to judicial restraint,²³ and accused President Obama of endorsing "an expansive view of the judiciary in which courts create policy that couldn't pass the legislative branch."²⁴ In the legal academy, even many progressive constitutional scholars accept the premise that judicial review is inherently undemocratic and urge courts either to refrain from deciding controversial issues or to decide them as narrowly as possible, based on respect for majority rule.²⁵ And some scholars—on both the left and the right—have gone so far as to argue that judicial review is so patently antithetical to democracy that it should be abolished altogether.²⁶

In sum, by conceptualizing equality as a countermajoritarian right, the standard account of the relationship between equality and democracy leads to the somewhat paradoxical conclusion that equality—or at least judicial enforcement of equality norms to invalidate popularly enacted laws—is undemocratic. Given the preeminence of equality in the founding documents and philosophical underpinnings of American democracy, however, there is something peculiar about that conclusion.²⁷ How can a nation ded-

91 *Minn. L. Rev.* 1752, 1752–68 (2007) (summarizing popular and scholarly discussions and definitions of the term "judicial activism").

²³ Peter Baker & Neil A. Lewis, *Judge Focuses on Rule of Law at the Hearings*, N.Y. TIMES, July 14, 2009, at A1.

²⁴ Karl Rove, *'Empathy' is Code for Judicial Activism*, WALL ST. J., May 28, 2009, at A3.

²⁵ See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

²⁶ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 49 (1990) ("Being 'at the mercy of legislative majorities' is merely another way of describing the basic American plan: representative democracy. We may all deplore its results . . . but that does not empower judges to set them aside; the Constitution allows only voters to do that."); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1348 (2006) ("[J]udicial review of legislation is inappropriate as a mode of final decisionmaking in a free and democratic society.").

²⁷ Perhaps more than any other contemporary constitutional scholar, Kenneth Karst has demonstrated the centrality of equality in the American political and constitutional tradition. See, e.g., Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 *U. CHI. L. REV.* 20 (1975) [hereinafter Karst, *Equality as a Central Principle in the First Amendment*] ("The ideal of equality runs deep in the American tradition."); Karst, *Equal Citizenship*, *supra* note 11, at 11–21 (describing the importance of equality as a founding principle of American citizenship); Kenneth L. Karst, *Why Equality Matters*, 17 *GA. L. REV.* 245, 251 (1983) ("The roots of our attachment to the ideals of equality run deep in our national experience.")

icated to the proposition that all people are politically equal simultaneously define equality as an undemocratic value?²⁸

Not surprisingly, given the intimate relationship between equality and democracy, there is a competing view that understands equality to be an essential component of democracy. From this perspective, democracy embodies a normative recognition that all persons are entitled to participate equally in the process of self-government. Democracy thus cannot be equated with simple majoritarianism. Rather, majority rule itself is legitimate only under conditions of equality.²⁹ This view incorporates a powerful normative account of equal citizenship, understood not simply as an entitlement to formal political equality, but more broadly as an interest in “being treated by the organized society as a respected, responsible, and participating member.”³⁰

²⁸ As Bickel noted, “The premise of democracy is egalitarian.” BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 19, at 28. For Bickel, that observation served as a caution against overreaching on the part of courts, which he considered to be inherently undemocratic in their exercise of judicial review. One might just as well conclude, however, that courts must enforce the egalitarian premise of democracy to preserve the legitimacy of majority rule. For example, Rebecca Brown has argued that because “the most prominent justifications for majority rule . . . spring from a foundational commitment to equality,” judicial enforcement of equality norms “enables rather than obstructs democracy.” See Rebecca Brown, *The Logic of Majority Rule*, 9 U. PA. J. CONST. L. 23, 35, 45 (2006) [hereinafter Brown, *The Logic of Majority Rule*].

²⁹ See, e.g., Brown, *The Logic of Majority Rule*, *supra* note 28, at 35–39 (arguing that majority rule is democratically legitimate only if certain structural requirements related to equality are met); DANIELLE S. ALLEN, *TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE BROWN V. BOARD OF EDUCATION*, xix (2006) [hereinafter ALLEN, *TALKING TO STRANGERS*] (“Majority rule is nonsensical as a principle of fairness unless it is conducted in ways that provide minorities with reasons to remain attached to the polity.”); J.M. Balkin, Symposium, *Group Conflict and the Constitution: Race, Sexuality, and Religion: The Constitution of Status*, 106 YALE L.J. 2313, 2314 (1997) (“Democracy is more than a commitment to a set of procedures for resolving disputes. . . . Democratic ideals . . . require a further commitment to democratic forms of social structure and social organization, a commitment to social as well as political equality.”); Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25, 28 (2006) (arguing that democracy “is a normative idea that refers to substantive political values,” including the requirement that “persons be treated equally insofar as they are autonomous participants in the process of self-government.”). As Post shows, democracy cannot plausibly be equated solely with a particular procedure for decision making because, if it were, we would not be able to recognize that a majority vote establishing a dictatorship or a monarchy is inconsistent with democratic principles. *Id.* at 25.

³⁰ Karst, *Equal Citizenship*, *supra* note 11, at 4. This concept of equal citizenship is distinct from citizenship as a legal status. See *id.* at 5 (“The essence of equal citizenship is the dignity of full membership in the society.”). As Linda Bosniak has explained, “the idea of equal citizenship presupposes a commitment to universality, to universal citizenship, whereas the idea of status citizenship presupposes a commitment to some degree of exclusivity, to citizenship as a bounded category.” Linda Bosniak, *Citizenship and Work*, 27 N.C.J. INT’L L. & COM. REG. 497, 500–01 (2002); see also Linda Bosniak, *The State of Citizenship: Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000) (ex-

This alternative understanding of the relationship between equality and democracy also leads to a different understanding of judicial review. Rather than heroically—or hubristically—restraining the popular will, the courts in this view protect the very conditions of democracy. As Ronald Dworkin has explained:

If we understand democracy to mean not majority rule in itself, but majority rule under appropriate conditions, then it does not compromise but rather protects democracy when effective means are deployed to secure those conditions. It therefore begs the crucial question to say that judicial power undermines democracy: we must look to see whether the consequence of that power is in fact greater democracy because it has helped to achieve a more genuine realization of the conditions that genuine democracy requires.³¹

Although less prominent than the standard view, this normative view—which sees courts as enabling, rather than limiting, democracy—also has deep roots in our constitutional and political history and jurisprudence. As I suggest below, this view animates the vision of equality that motivated the drafting and ratification of the Fourteenth Amendment. It also informs the judicial enforcement of due process and many other constitutional provisions that incorporate an equality norm as part of the very substance of their meaning and application.

In the parts that follow, I argue that this alternative view of the relationship between equality and democracy provides a much-needed corrective to the standard account, which has impoverished our conception of democracy and obscured the courts' essential role in facilitating the ability of marginalized groups to be treated as equal citizens and to participate fully in the democratic process. In particular, I argue that judicial decisions enforcing the right of same-sex couples to marry are democracy-enhancing, even when they require the invalidation of popularly enacted laws, because they help to counteract the social stigma and invidious stereotypes that prevent gay men and lesbians from participating in democratic self-governance on equal terms.³² Conversely, because judicial decisions that

plaining that citizenship includes not only formal political equality and entitlement to basic political, civil, and social rights, but also a sense of equal belonging to, and identification with, a group).

³¹ Ronald Dworkin, *The Judge's New Role: Should Personal Convictions Count?*, 1 J. INT'L CRIM. JUST. 4, 10 (2003). Although Dworkin usually is considered to be a proponent of liberalism, which tends to see equality as a value external to democracy, some of his scholarship (including the provision cited above) supports the alternative view that equality norms are internal to democracy.

³² As Jane Schacter has argued, the domain of democratic self-governance must be understood expansively to include social norms and cultural meanings as well as formal electoral politics. See Schacter, *Democracy's Domain*, *supra* note 8, at 402–03 (arguing that democratic theory must include

uphold discriminatory marriage bans further marginalize lesbians and gay men as social and political outsiders, we must learn to recognize such decisions as profoundly anti-democratic.³³

A. EQUALITY AS A COUNTERMAJORITARIAN LIMIT ON DEMOCRACY

The standard account of the relationship between equality and democracy, which equates democracy with majority rule, has come to seem virtually axiomatic. In Bickel's view, majority rule is "the distinguishing characteristic of [our governmental] system."³⁴ John Hart Ely, although he took issue with Bickel in other respects, likewise assumed that "rule in accord with the consent of a majority of those governed is the core of the American governmental system."³⁵ In the standard view, the principle of majority rule is "the keystone of a democratic political system in both theory and practice."³⁶

The standard account also conceptualizes equality as a discrete constitutional right, which, like other such rights, establishes a substantive value that is not subject to the vagaries of the democratic process. Justice Jackson's concurring opinion in *Board of Education v. Barnette*, famously ex-

the social sphere in order "to take seriously the importance of creating a meaningful equality of opportunity for political influence as part of democratic practice"). In this article, and particularly in section IV below, I seek to apply this insight to litigation challenging laws that exclude same-sex couples from marriage—and in particular, to challenge the widespread perception that those cases undermine, rather than enhance, democracy's domain.

³³ Cf. Schacter, *supra* note 8, at 403 ("Social disenfranchisement and caste-like practices severely limit the way in which gay men and lesbians can participate in and influence not only lawmaking processes, but also the more diffuse, yet quite powerful, processes of collective deliberation that take place in the social sphere.").

³⁴ BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 19, at 19. One of the most problematic aspects of that claim is the implied assumption that, apart from the institution of judicial review, our democracy truly reflects majority preferences. Bickel recognized that, as an empirical matter, the decisions of elected officials and representative institutions do not necessarily reflect majority views. Nonetheless, he insisted that "nothing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process." *Id.* For a cogent critique of Bickel's inconsistency on this point, see Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 *LAW & SOC. INQUIRY* 309, 326–29 (2002) (a review of LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* (2000)).

³⁵ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 7 (1980) [hereinafter ELY, *DEMOCRACY AND DISTRUST*]. Cf. Jane S. Schacter, *Ely and the Idea of Democracy*, 57 *STAN. L. REV.* 737, 755–60 (2004) [hereinafter Schacter, *Ely and the Idea of Democracy*] (noting that despite Ely's placement of accountability at "the center of majoritarian democracy," research has cast doubt on the premise that elected representatives are truly accountable to majorities).

³⁶ CHOPER, *supra* note 16, at 4; see also Vikram Amar, *The 20th Century—The Amendments and Populist Century*, 47 *FED. LAW.* 32, 34 (2000) ("[T]he most enduring and central meaning of the republican form of government is the idea of majority rule.").

plained that “[t]he very purpose of [constitutional rights] was to withdraw certain subjects from the vicissitudes of political controversy” and “to place them beyond the reach of majorities.”³⁷ The exact scope and application of those rights may be subject to debate, but the premise that our government protects certain basic rights—even when doing so contravenes the wishes of the majority—is not.³⁸

In this view, it therefore follows that we do not live in a pure democracy defined only by majority rule. Rather, we live in a *liberal* or *constitutional* democracy—that is, a government defined by both deference to the majority on the one hand, and respect for minority rights on the other.³⁹ Former Justice O’Connor has described that “tension within the concept of democracy” as the most distinctive feature of our constitutional system. “Americans are committed to democracy,” she writes. “Nevertheless, we have placed within our democratic system a mechanism to protect a range of civil and human rights, and to ensure that the will of the majority does not run roughshod over the rights of the minority.”⁴⁰

Indeed, the notion that our constitutional system is defined by the tension between majority rule and minority rights is deeply embedded in our

³⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Justice Stone also famously embraced this view of rights as substantive limits on majority rule in the first paragraph of footnote four in *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938). See also O’CONNOR, *supra* note 15, at 259 (“We, as a people, decided to withdraw certain rights from the consideration of the legislature in order to protect them from the vagaries of politics.”).

³⁸ O’CONNOR, *THE MAJESTY OF LAW*, *supra* note 15, at 257 (“[W]hile we continue to dispute the exact contours of the rights it guarantees, we agree that our law protects certain basic rights from any governmental intrusion.”).

³⁹ The belief that our constitution establishes a liberal democracy—and that liberalism imposes external limits on democracy in order to protect individual and minority rights—is central to much mainstream constitutional scholarship and political theory. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 132–33 (1977) (arguing that our constitution is based not on simple majoritarianism, but also incorporates the liberal principle that individuals have certain rights which must be protected against the majority); JOHN RAWLS, *POLITICAL LIBERALISM* 227, 294–99 (1996) (arguing that our constitution requires that democratic majorities respect certain basic rights and liberties); (RICHARD A. POSNER, *OVERCOMING LAW* 25 (1994) (arguing that liberalism “is in tension with democracy” because “[l]iberalism implies the limited state, but democracy implies majority rule”). See generally Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 *IOWA L. REV.* 401, 460–81 (1986) (describing the tension between liberalism and democracy in American political theory and constitutional scholarship).

⁴⁰ O’CONNOR, *THE MAJESTY OF LAW*, *supra* note 15, at 258; see also Schacter, *Democracy’s Domain*, *supra* note 8, at 389 (noting that on this view, “the majority may be thwarted in enacting legislation that creates or entrenches certain inequalities, but thwarted in the name of constitutionalism, not democracy”).

constitutional ideology and jurisprudence.⁴¹ Bickel attributed this view to Lincoln, whom Bickel admired for grasping the need for both democracy and “principled government, with the countermajoritarian restraints this implies.”⁴² Bickel argued that this “Lincolnian tension” between majoritarian and countermajoritarian principles was an ineradicable and central feature of our government.⁴³

This dualistic vision gives rise to the seeming paradox that preoccupied Bickel and has dominated constitutional theory for generations.⁴⁴ On the one hand, courts must enforce individual and minority rights even in the face of popular opposition. On the other, the invalidation of laws by unelected judges appears incompatible with a commitment to democratic rule.⁴⁵ For Bickel, the resulting “countermajoritarian difficulty” could not be eluded.⁴⁶ Although he pronounced judicial review “a deviant institution in the American democracy,”⁴⁷ he also considered it a necessary feature of our system of government and struggled to justify it. Bickel believed that judicial review conflicted with democratic norms; however, he also de-

⁴¹ See, e.g., Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), in *THE COMPLETE THOMAS JEFFERSON* 384 (Saul K. Padover ed., 1943) (“All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression.”).

⁴² BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 19, at 67; See also Cass R. Sunstein, *Backlash’s Travels*, 42 *HARV. C.R.-C.L. L. Rev.* 435, 439 (2007) (“Bickel argued that the Supreme Court maintained a kind of Lincolnian tension, and that it did so through the use of the passive virtues, by which it stayed its own hand in deference to anticipated public resistance.”).

⁴³ Bickel therefore urged that we acknowledge that internal contradiction, rather than attempt to resolve it: “Democratic government under law—the slogan pulls in two opposed directions, but that does not keep it from being applicable to an operative policy. If it carries the elements of explosion, it doesn’t contain a critical mass of them.” BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 19, at 27.

⁴⁴ Bickel’s scholarship on this issue has been remarkably influential. As Erwin Chemerinsky has observed: “Most constitutional scholars for the past quarter-century have accepted Bickel’s definition of the problem and have seen the task of constitutional theory as defining a role for the Court that is consistent with majoritarian principles. Bickel’s ‘counter-majoritarian difficulty’ set the terms for the contemporary debate over judicial review.” Chemerinsky, *supra* note 20, at 71; see also Friedman, *supra* note 20, at 201–57 (detailing the prominence of Bickel’s framework and its enduring grip upon constitutional theorists).

⁴⁵ BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 19, at 16–17; see also Chemerinsky, *supra* note 20, at 70 (describing “the clash between judicial review and electorally responsible institutions”).

⁴⁶ See BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 19, at 16.

⁴⁷ *Id.* at 18.

fended it as a “principled process of enunciating and applying certain enduring values of our society.”⁴⁸

Rather than resolving the countermajoritarian difficulty, Bickel urged courts to mitigate its impact through self-restraint. He advised courts to hew closely to the “the concrete circumstances of a case,” thereby leaving maximum room for the continued evolution of democratic policymaking.⁴⁹ More broadly, Bickel advocated liberal use of the so-called “passive virtues,” the variety of procedural and jurisdictional requirements that enable courts to avoid deciding certain cases or issues.⁵⁰ He believed that by making use of such devices, courts could avoid unduly stifling the democratic process on the one hand, or legitimating an unconstitutional measure on the other. They could “allow leeway to expediency without abandoning principle.”⁵¹ Through such pragmatic measures, Bickel concluded, judicial review could achieve “a tolerable accommodation with the theory and practice of democracy.”⁵²

Following Bickel, many other constitutional scholars have accepted the inevitability of the countermajoritarian difficulty and similarly urged courts to adopt strategies of pragmatic restraint. That trend includes even many progressive scholars and commentators who fear that an assertive enforcement of constitutional rights may provoke a popular backlash and thus do more harm than good.⁵³ Criticizing this trend, Robert Post and Reva Siegel have noted:

A generation ago, progressives responded to violent backlash against *Brown v. Board of Education* by attempting to develop principles of con-

⁴⁸ *Id.* at 58. Bickel was particularly concerned with defending the legitimacy of *Brown v. Board of Education*, 347 U.S. 483 (1954) against criticism of the decision, including even by a number of progressive legal scholars, as lacking a sufficiently principled basis and constituting nothing more than a naked imposition of judicial values. Judicial review was justified, Bickel argued, because “it injects into the representative government something that is not already there: and that is principle, standards of action that derive their worth from a long view of society’s spiritual as well as material needs and that command adherence whether or not the immediate outcome is expedient or agreeable.” *Id.*

⁴⁹ *Id.* at 70. Such caution, he noted, would wisely avoid any claim “to foresee all foreseeable relevant cases and to foreclose all compromise.” *Id.* at 69.

⁵⁰ *Id.* at 70, 111–98; see also Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (urging courts to make greater use of requirements such as standing, ripeness, justiciability and other doctrines that provide a “wide area of choice . . . in deciding whether, when, and how much to adjudicate”). Bickel’s argument expanded upon the views of Justice Brandeis, who similarly urged courts to approach constitutional adjudication with great restraint. See *Ashwander v. Tenn. Valley Authority*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (listing doctrines that permit courts to avoid deciding constitutional questions).

⁵¹ BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 19, at 71.

⁵² *Id.* at 28.

⁵³ See *supra* notes 26–27 and accompanying text.

stitutional theory they hoped would justify controversial decisions. Today, there are many progressives who have lost confidence in this project. They fear that adjudication may cause backlash of the kind they attribute to *Roe v. Wade*, which they believe gave birth to the New Right. Stunned by the ferocity of the conservative counterattack, progressives have concluded that the best tactic is to take no action that might provoke populist resentments.⁵⁴

In particular, even some scholars who support the right of same-sex couples to marry have argued that lesbians and gay men should rarely, if ever, challenge marriage bans in court, and that courts presented with such challenges should take “exceedingly small steps in this controversial domain.”⁵⁵ Cass Sunstein, for example, has argued that judicial invalidation of marriage bans “could galvanize opposition,” “weaken the antidiscrimination movement itself,” and “provoke increased hostility and even violence against homosexuals.”⁵⁶ He has urged courts to “eschew broad rules and proceed in a way that complements and does not displace democratic processes.”⁵⁷ In a similar vein, William Eskridge has defended state court decisions that provide equal benefits to same-sex couples but stop short of marriage equality, noting that “a polity which is a democracy and whose citizens have heterogeneous views about important matters is one in which immediate, full equality is not always possible, practical or even desirable.”⁵⁸ More categorically, Gerald Rosenberg and Jeffrey Rosen have argued that cases seeking the right to marry have caused a national backlash

⁵⁴ Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–74 (2007) [hereinafter Post & Siegel, *Roe Rage*].

⁵⁵ CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 127–28 (2005).

⁵⁶ Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 97 (1996).

⁵⁷ *Id.* at 100. For a response that accepts Sunstein’s general premises but challenges his application of those premises to cases involving marriage for same-sex couples, see Kara M.L. Young, Comment, *Prudent Use of Judicial Minimalism: Why Minimalism May Not Be Appropriate in the Context of Same-Sex Marriage*, 27 U. HAW. L. REV. 501 (2005).

⁵⁸ William N. Eskridge Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 871 (2001) [hereinafter Eskridge, *Equality Practice*]; see also William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L. J. 1279, 1324–27 (2005) (advocating judicial restraint in deciding marriage equality cases brought by same-sex couples). But see also William N. Eskridge, *The Supreme Court of California 2007-2008: Foreword: The Marriage Cases - Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785, 1808–21, 1843–52 (2009) (defending the California Supreme Court’s decision in *In re Marriage Cases* and arguing that the court should have invalidated Proposition 8) [hereinafter Eskridge, *Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*].

that has slowed, rather than advanced, the cause of equality for gay people.⁵⁹

These positions are based on a shared, albeit largely tacit, subscription to the standard account of equality and democracy. These scholars generally assume that same-sex couples who challenge marriage bans are seeking the enforcement of individual rights, and that judicial vindication of those rights precludes other, more democratic resolutions.⁶⁰ As I argue below, however, that view is misleadingly incomplete and partial. It fails to consider the alternative view that equality is not simply an individual right, but an essential component of democracy. Lesbian and gay couples who seek equal recognition of their families are not merely vindicating a substantive constitutional right; they are seeking to be recognized as full citizens and equal participants in society. What the standard account misses is that recognition of these families' equality under the law may itself be a critical condition for legitimate democratic government.

B. EQUALITY AS AN ESSENTIAL COMPONENT OF DEMOCRACY

1. Equality Is a Democratic Principle

While the standard, rights-based view of equality permeates constitutional jurisprudence, courts have also sometimes recognized that equality

⁵⁹ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 368 (2d ed., 2008) (arguing that litigation seeking the freedom to marry for same-sex couples has resulted in "one step forward, two steps back"); Jeffrey Rosen, *Disputations: Learning from Prop. 8: Why Over Eager Judges Don't Help the Cause of Marriage Equality*, NEW REPUBLIC, Nov. 6, 2008, <http://www.tnr.com/article/politics/disputations-learning-prop-8> (arguing that litigation seeking the freedom to marry in California triggered a backlash that led to the enactment of Proposition 8). For contrasting views, see, e.g., Laura Beth Nielsen, *Social Movements, Social Process: A Response to Gerald Rosenberg*, 42 J. MARSHALL L. REV. 674, 673–83 (2009) (arguing that Rosenberg's account of the gay movement's campaign for marriage equality is factually inaccurate and underestimates the social power of litigation); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 159 (2009) (arguing that "the backlash thesis is misleading" and fails to account for the significant legal and social gains won through marriage litigation by gay couples); Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1216–23 (2009) (arguing that we cannot assess the wisdom of marriage litigation by same-sex couples without a more sophisticated and contextually sensitive definition of backlash than that applied by Rosenberg); Carlos A. Ball, *The Backlash Theory and Same-Sex Marriage: Learning from Brown v. Board of Education and its Aftermath*, 14 WM. & MARY BILL OF RTS. J. 1493 (2006) (arguing that the gains from marriage litigation by same-sex couples have outweighed the losses).

⁶⁰ See, e.g., Eskridge, *Equality Practice*, *supra* note 58, at 855–63 (describing the struggle for marriage equality as posing a tension between the principles of liberalism, which require strict enforcement of individual and minority rights, and the compromises required by democracy). Eskridge characterizes his position as one of "pragmatic liberalism." *Id.* at 881.

can alternatively be seen as a foundational *principle* that plays a *structural* role in a democratic government. Justice Jackson captured the essence of that alternative view in his concurring opinion in *Railway Express Agency v. New York*:

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 retribution that might be visited upon them if larger numbers were affected.⁶¹

As Justice Jackson recognized, it is by forbidding partiality—“pick[ing] and choos[ing] only a few to whom they will apply legislation”—that the enforcement of equality tends to preserve liberty for all.⁶² Legislators are less likely to limit freedoms if they must impose any such limitations on all of their constituents (including themselves), not just on unpopular minorities. On this view, the purpose of the Equal Protection Clause “is largely to protect against substantive outrages by requiring that those who would harm others must at the same time harm themselves.”⁶³ Justice Scalia alluded to this concept of equality as a structural check on the abuse of majority power in his concurring opinion in *Cruzan v. Director, Missouri Department of Health*, writing that the Equal Protection Clause provides protection by “requir[ing] the democratic society to accept for themselves and their loved ones what they impose on you and me.”⁶⁴

⁶¹ *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949).

⁶² *Id.*

⁶³ ELY, *DEMOCRACY AND DISTRUST*, *supra* note 35, at 170; *see also* NOWAK & ROTUNDA, *CONSTITUTIONAL LAW* 439 (6th ed. 2000) (noting that “the government rarely takes a fundamental right away from all persons”).

⁶⁴ *Cruzan v. Dir., Mo. Dep’t. of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). The roots of this recognition that laws must apply equally to all predate the adoption of the Fourteenth Amendment. *See, e.g.*, THE FEDERALIST No. 57 (James Madison) (B. Wright ed. 1961) (asserting that members of Congress would be “restrain[ed] . . . from oppressive measures” because under “the genius” of our constitutional system, “they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society”), *quoted in* ELY, *DEMOCRACY AND DISTRUST*, *supra* note 35, at 87; JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 363 (Peter Laslett ed., Cambridge Univ. Press, rev. ed. 1988) (1690) (arguing that in a just government there must be “one rule for Rich and Poor, for the Favourite at Court, and the Country Man at Plough”), *quoted in* V.F. Nourse & Sarah Maguire, *The Lost History of Governance and Equal Protection*, 58 *DUKE L.J.* 955, 963 (2009) [hereinafter Nourse & Maguire, *The Lost History of Governance and Equal Protection*].

Seen from this perspective, the requirement of equality serves a structural purpose in our democracy that distinguishes equality from other rights. Unlike other constitutional rights, equal protection does not establish a substantive limit on what the government may do; rather, it requires that whenever the people or their representatives wish to establish a benefit or impose a burden, they must do so equally.⁶⁵ That requirement is no guarantee against oppressive measures, but it serves as an important structural check on the exercise of majority power in a way that is different than the constraints imposed by the concept of fundamental rights. Deeming certain rights “fundamental” in effect says to the people or the legislature, “You may not go beyond these substantive boundaries.” In contrast, the principle of equal protection says, “You may set the boundaries where you like, but you must set them equally for everyone.”⁶⁶

Justice O’Connor invoked this concept of equal protection as a structural check against oppressive laws in her concurring opinion in *Lawrence v. Texas*. In *Lawrence*, the Court struck down a Texas law that prohibited certain sexual conduct only for gay persons, while leaving heterosexual persons free to engage in the very same acts without penalty.⁶⁷ The majority in *Lawrence* invalidated the measure as a violation of the due process right to liberty.⁶⁸ Justice O’Connor, however, explained that she would have invalidated the law exclusively on equal protection grounds, based on her confidence “that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society.”⁶⁹

⁶⁵ See ELY, DEMOCRACY AND DISTRUST, *supra* note 35, at 100–01 (observing that, rather than “root[ing] in the document a set of substantive rights entitled to permanent protection . . . [t]he Constitution has . . . proceeded from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself[.]”). See also Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491, 1491–93 (2002) (describing this view of equality as enforcing, rather than limiting, democracy) [hereinafter Brown, *Liberty, the New Equality*].

⁶⁶ It should be noted, of course, that such a general principle of equality is far easier stated than applied. As discussed in Part I.C., *infra*, it is not possible to distinguish invidious discrimination from legitimate differentiation without recourse to substantive norms. I agree with Laurence Tribe, Pamela Karlan, Rebecca Brown, and others who have argued that the judicial enforcement of equality and liberty are necessarily intertwined. See *infra* notes 71–72 and accompanying text.

⁶⁷ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁶⁸ *Id.* The majority explained that it did so, in part, in order to prevent the state of Texas from curing the invalidity simply by amending the statute to apply to heterosexual persons as well. As the majority noted, even such a formally “equal” statute would continue to have the practical and intended effect of stigmatizing same-sex intimacy and, by association, gay people. *Id.* at 575.

⁶⁹ *Id.* at 584–85 (O’Connor, J., concurring).

It would be a mistake, however, to distinguish equal protection and due process too categorically. To the contrary, as the majority opinion in *Lawrence* recognized, “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”⁷⁰ Both equal protection and due process include a powerful equality norm, and their interdependence is “a key feature of American constitutional structure.”⁷¹ Laurence Tribe has eloquently described that interdependence as a “double helix” that lies at the foundation of democracy:

Due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. It is a single unfolding tale of equal liberty and increasingly universal dignity. This tale centers on a quest for genuine self-government of groups small and large.⁷²

Throughout the debates over the ratification of the Fourteenth Amendment, the linkage between equal protection and the preservation of “equal liberty” was well understood. For example, Fernando Beaman, a Republican congressman from Michigan, explained:

[N]o man can be sure of the preservation of his own rights unless every other man is also protected. . . . If a man may be ignored because he is black, another may be treated in the same manner because he is poor. Every man’s safety consists in the maintenance of laws that shall protect every other man.⁷³

Such sentiments were common, and they were echoed by state and federal courts construing the Fourteenth Amendment after ratification. In an 1883 case, for example, Justice Stephen Field wrote that the Fourteenth Amendment’s “principal, if not the sole, purpose . . . [was] . . . to secure to

⁷⁰ *Id.* at 575.

⁷¹ Brown, *Liberty, The New Equality*, *supra* note 65, at 1491–92 (2002); *see also* Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002) [hereinafter Karlan, *Stereoscopic Fourteenth Amendment*] (arguing that the courts have often seen liberty and equality as inextricably linked); Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 998 (2006) [hereinafter Roosevelt, *Forget the Fundamentals*] (describing “the equality norm already present within due process jurisprudence—not an anti-classification equality norm, but a norm of equal concern and respect”).

⁷² Laurence H. Tribe, *Lawrence v. Texas: The Fundamental Right that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) [hereinafter Tribe, *The Fundamental Right that Dare Not Speak Its Name*].

⁷³ *See* WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 78–79 (1988) (quoting Cong. Globe, 40th Cong., 2d Sess. 1971 (1868)) [hereinafter NELSON, *THE FOURTEENTH AMENDMENT*].

every one the right to pursue his happiness unrestrained, except by just, equal, and impartial laws.”⁷⁴

The debates over ratification of the Fourteenth Amendment also disclosed a near-universal assumption that a core purpose of the amendment was to secure equality of civil rights, regardless of the substance of those rights.⁷⁵ For example, state and federal legislators disagreed over whether Section One of the Fourteenth Amendment protected specific fundamental rights, but all agreed that it “prevent[ed] the states from discriminating arbitrarily between different classes of citizens.”⁷⁶ Expressing a commonly held view, Senator Lot M. Morrill of Maine argued that protecting equality was more central to political freedom than guaranteeing specific rights:

The peculiar character, the genius of republicanism is equality, impartiality of rights and remedies among all citizens, not that the citizen shall not be abridged in any of his natural rights. . . . The republican guarantee is that all laws shall bear upon all alike in what they enjoin and forbid, grant and enforce. This principle of equality before the law is as old as civilization, but it does not prevent the State from qualifying the rights of the citizen according to the public necessities.⁷⁷

Judicial recognition that equality is essential to the preservation of democratic liberty has not been confined to the Fourteenth Amendment’s Equal Protection Clause. For example, both before and after ratification of the Fourteenth Amendment, state and federal courts routinely prohibited “so-called unequal, partial, class, or special legislation; that is, legislation which advanced the interests of only a part of the community,” under the

⁷⁴ HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 61 (1992) (quoting *Butchers Union v. Crescent City*, 111 U.S. 746, 758–59 (1883) (Field, J., concurring)) [hereinafter GILLMAN, *THE CONSTITUTION BESIEGED*].

⁷⁵ See David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 913 (2007) [hereinafter Gans, *The Unitary Fourteenth Amendment*] (“The theme of ensuring equal citizenship for all Americans runs throughout the text of the Amendment.”); Karst, *Equal Citizenship*, *supra* note 11, at 11–17 (arguing that the primary purpose of the Fourteenth Amendment was to establish a principle of equal citizenship).

⁷⁶ NELSON, *THE FOURTEENTH AMENDMENT*, *supra* note 73, at 115. Even “opponents of the amendment never questioned its premise that the law should treat all people equally.” *Id.* at 91. As Nelson notes, those who believed that African-Americans were inferior opposed the amendment. *Id.* at 96–104 (describing the “deeply racist” nature of much opposition to the amendment). In addition, although the question of whether women were entitled to formal political equality was hotly debated, women were ultimately excluded from the amendment. *Id.* at 136–39 (describing debates over how to define equality for women). The point is not that universal equality was achieved, but rather that it existed as an ideal. *Cf.* Karst, *supra* note 11, at 17 (“What has changed in the century since the adoption of the amendment is not the principle [of equal citizenship], but our idea of what it means to be a fully participating member of the society.”).

⁷⁷ *Id.* at 116.

rubric of due process.⁷⁸ Howard Gillman and others have shown that, contrary to the conventional understanding, the due process jurisprudence of the *Lochner* era⁷⁹ did not rely exclusively on a purported substantive right to freedom of contract. Rather, the *Lochner*-era courts also understood due process to impose an equality norm, and therefore “prohibit[ed] the government from passing laws designed merely to promote the interests of certain classes at the expense of their competitors, [and imposing] special burdens and benefits on particular groups without linking these burdens and benefits to the welfare of the community as a whole.”⁸⁰

Kenneth Karst likewise has shown that throughout the *Lochner* era, the Supreme Court relied on the Due Process Clauses to invalidate racially discriminatory policies “in the service of egalitarian concerns far removed from business monopolies.”⁸¹ More broadly, courts from the founding era

⁷⁸ GILLMAN, THE CONSTITUTION BESIEGED, *supra* note 74, at 49.

⁷⁹ *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York law that set the maximum hours for bakers because it violated the due process clause). The term “*Lochner* era” describes the period, between the late 1890s and 1937, when the U.S. Supreme Court invoked the due process clause to strike down many state and federal laws regulating business and industry. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 522–31 (2d ed. 2005). Cases upholding New Deal legislation such as *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) and *United States v. Carolene Products*, 304 U.S. 144 (1938) brought an end to the *Lochner* era.

⁸⁰ GILLMAN, THE CONSTITUTION BESIEGED, *supra* note 74, at 61. *See also* Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW. & HIST. REV. 293, 318 (1985) (concurring with Gillman’s analysis); Barry Cushman, *Lochner Centennial Conference: Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 924–41, 1000 (2005) (noting “the central role that preoccupations with formal equality, generality, and neutrality played in the Court’s interpretation of the Due Process Clauses”); Roosevelt, *Forget the Fundamentals*, *supra* note 71, at 995–99 (describing equality norm within due process jurisprudence). Some scholars have argued that Gillman’s thesis provides only a partial explanation of the Court’s *Lochner*-era jurisprudence. *See, e.g.*, Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453, 495–98 (1998) (arguing that Gillman accounts only for some of the Court’s *Lochner*-era decisions); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12–13, 58–60 (2003) (arguing that “the equality component of due process” described by Gillman does not adequately account for fundamental rights jurisprudence in the *Lochner* era); Nourse & Maguire, *supra* note 64 (arguing that the prohibition on class legislation was an important doctrine of equal protection as well as due process). For my purposes, however, it is sufficient to show that equality concerns animated at least some of the Court’s *Lochner*-era due process decisions.

⁸¹ Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 107 (2007) [hereinafter Karst, *Liberties of Equal Citizens*]; *see also* Karst, *Equal Citizenship*, *supra* note 11, at 27 (noting that the framers of the Fourteenth Amendment “made no sharp distinction among the due process, equal protection, and privileges and immunities clauses,” “[n]or does it make much functional difference which clause the court uses in protecting the values of equal citizenship”). In a related argument, Hans J. Hacker and William D. Blake argue that there is a direct connection between the Court’s use of due process to enforce a vision of economic equality during the *Lochner* era and the Court’s later civil rights jurisprudence, including *Brown*. *See* Hans J. Hacker &

to the present have applied the constitutional guarantee of due process to prevent discrimination against vulnerable groups, including, among others, unmarried couples,⁸² non-white-collar criminals,⁸³ impoverished mothers,⁸⁴ and lesbians and gay men.⁸⁵ In a variety of contexts, courts have recognized that the liberty protected by due process is “equal liberty.”⁸⁶

With the demise of the *Lochner* era, the judicial protection of minorities increasingly shifted from a focus on equality to a focus on rights.⁸⁷ But despite the predominance of rights-based doctrines in contemporary constitutional law, the requirement of equality continues to inform virtually every facet of our constitutional system.⁸⁸ Equality norms are central to the protection of freedom of speech and religion.⁸⁹ They are central to the Supreme Court’s jurisprudence on education⁹⁰ and political participation.⁹¹

William D. Blake, *The Neutrality Principle: The Hidden Yet Powerful Legal Axiom at Work in Brown versus Board of Education*, 8 BERKELEY J. AFR.-AM. L. & POL’Y 5, 10 (2006) (arguing that the Court’s decision in *Brown* “poured new wine in old bottles, by maintaining the jurisprudence of government neutrality”) [hereinafter Hacker & Blake, *The Neutrality Principle*].

⁸² Eisenstadt v. Baird, 405 U.S. 438 (1972).

⁸³ Skinner v. Oklahoma, 316 U.S. 535 (1942).

⁸⁴ M.L.B. v. S.L.J., 519 U.S. 102 (1996).

⁸⁵ Lawrence v. Texas, 539 U.S. 558 (2003).

⁸⁶ Karst, *Liberties of Equal Citizens*, *supra* note 81, at 133; *see also* Karlan, *Stereoscopic Fourteenth Amendment*, *supra* note 71 (arguing that the courts have often seen liberty and equality as next-closely linked); Brown, *Liberty, the New Equality*, *supra* note 65, at 1497 (arguing that the concept of liberty protected by due process necessarily includes the principle that “all citizens [are entitled] to have their interests valued equally with those of all other citizens”).

⁸⁷ As Howard Gillman has observed, after the Court lost faith in its ability to “discern a constitutionally recognized ‘general welfare’ distinct from the interests of particular groups and classes,” it had “to develop, for the first time, some method of identifying a specific set of rights and liberties that could be asserted by individuals as a trump against the state.” GILLMAN, *THE CONSTITUTION BESIEGED*, *supra* note 74, at 202–04; *see also* Roosevelt, *Forget the Fundamentals*, *supra* note 71, at 988–93 (describing the courts’ recourse to the concept of fundamental rights in the post-*Lochner* era following the breakdown of the factual and legal assumptions that had enabled courts to have confidence in their ability to assess whether a particular law served the public interest). *See also infra* notes 94–101 and accompanying text. *But see* Hacker & Blake, *The Neutrality Principle*, *supra* note 81, at 10 (arguing that the Court continued to rely upon the principle of neutrality in its post-*Lochner* Era civil rights cases).

⁸⁸ As Kenneth Karst has rightly noted, equality is an “informing principle” of our constitutional system. *See* Karst, *Equal Citizenship*, *supra* note 11, at 40–42.

⁸⁹ *See* Karst, *Liberties of Equal Citizens*, *supra* note 81, at 116–19; *see also* Karst, *Equality as a Central Principle in the First Amendment*, *supra* note 27, at 26 (arguing that “the principle of equal liberty of expression is inherent in the first amendment”); ALEXANDER MEIKELJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948) (arguing that the guarantee of free speech rests on a right to democratic self-government).

⁹⁰ *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”). *But see* *Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (rejecting equal protection challenge to inequities in school funding).

They remain central to the purpose and application of due process, as *Lawrence v. Texas* confirmed.⁹² And they even inform many procedural guarantees.⁹³ In all of these contexts, the requirement of equality serves as a check against arbitrary power and promotes the normative democratic principle that all persons should be treated with equal dignity and respect.

In the next section, I argue that this normative view of equality as an essential democratic value has significant consequences for how we understand judicial review—in particular, that it avoids the seeming paradox that Bickel and others have found so troubling. From this perspective, rather than presenting an irreconcilable contradiction that undermines our commitment to democracy—Bickel’s “countermajoritarian difficulty”—the courts’ enforcement of equality norms is necessary for democracy to thrive.

2. JUDICIAL ENFORCEMENT OF EQUALITY PROTECTS DEMOCRACY

In the post-*Lochner* era, courts lost faith in the ability of the “free market” to provide a neutral baseline from which to distinguish laws serving a general public purpose from those improperly benefiting or burdening only a particular class. As a result, the courts required a new framework for determining when and why to invalidate discriminatory laws.⁹⁴ Footnote four of Justice Stone’s concurring opinion in *Carolene Products* in

⁹¹ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that Alabama’s proposed plans for the apportionment of the state legislature were invalid because the plans violated the Equal Protection Clause by not apportioning based on population); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (declaring a provision of the Virginia Constitution and implementing Virginia statutes conditioning the right to vote upon the payment of a poll tax to be an “invidious discrimination [citation] that runs afoul of the Equal Protection Clause”).

⁹² Tribe, *The Fundamental Freedom Right that Dare Not Speak Its Name*, *supra* note 72, at 1898 (“*Lawrence*, more than any other decision in the Supreme Court’s history, both presupposed and advanced an explicitly equality-based . . . theory of substantive liberty. The ‘liberty’ of which the Court spoke was as much about equal dignity and respect as it was about freedom of action—more so, in fact.”).

⁹³ See, e.g., William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002).

⁹⁴ Many scholars have described this shift. See, e.g., Crenshaw & Peller, *The Contradictions of Mainstream Constitutional Theory*, *supra* note 11, at 1690–93 (describing the realist demonstration that “the laissez-faire image of a free economic marketplace” was a myth because the so-called baseline rules of the market are constituted by policy decisions embodied in legislation and common law rules); GILLMAN, *THE CONSTITUTION BESIEGED*, *supra* note 74, at 61–99 (arguing that the explosive growth of industrial capitalism and the rise of overt class conflict in the late nineteenth and early twentieth centuries eroded the assumptions about market liberty that justified the prohibition against class legislation); Roosevelt, *Forget the Fundamentals*, *supra* note 71, at 988–93 (describing erosion of the historical context that had permitted courts to believe they could assess whether economic and social legislation served a neutral, impartial purpose).

1938 is the most well-known marker of that shift.⁹⁵ Justice Stone identified three circumstances in which, even in the judicially chastened post-*Lochner* era, courts would be justified in subjecting legislation to non-deferential review. Those circumstances are: (1) when legislation affects a right enumerated in the Constitution, “such as those of the first ten Amendments”; (2) when legislation “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” such as freedom of speech, press and assembly; and (3) when laws target racial, religious, or certain other minorities, in recognition that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”⁹⁶

Today, footnote four is most noted for its recognition of process-based justifications for judicial review.⁹⁷ But at the time, it attracted far more attention for its perceived endorsement of the concept of “preferred freedoms”—the idea that certain rights such as freedom of speech and religion are more important than others because of their “sanctity,”⁹⁸ “elevated rank in the hierarchy of values,”⁹⁹ or express enumeration in the Bill of Rights.¹⁰⁰ That view of footnote four dominated constitutional jurisprudence for many years, as courts and scholars fixated on how to identify which rights should be considered important enough to trump democratically enacted laws.¹⁰¹ Thus, by the time Bickel addressed the countermajo-

⁹⁵ See Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 165–67 (2004) [hereinafter Gilman, *The Famous Footnote Four*].

⁹⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

⁹⁷ Gilman, *The Famous Footnote Four*, *supra* note 95, at 163. Gilman notes that “[n]o one did more to create the modern view of footnote four than John Ely,” whose Democracy and Distrust “gave us the modern understanding of the footnote as a process-based theory, a meaning that was largely lost by the time he wrote his book.” *Id.* at 172. See also Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087–89 (1982) (describing footnote four as “the most celebrated footnote in constitutional law” and noting its association in contemporary scholarship with political process theory); Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 19 CAL. L. REV. 686, 691 (1991) (describing the impact of Ely’s work on our modern understanding of footnote four).

⁹⁸ Gilman, *The Famous Footnote Four*, *supra* note 95, at 179 (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

⁹⁹ *Id.* at 179–208 (citing Alpheus Thomas Mason, *The Core of Free Government, 1938–40: Mr. Justice Stone and “Preferred Freedoms,”* 65 YALE L.J. 597, 626–27 (1956)).

¹⁰⁰ *Id.* at 179 (citing Herbert Wechsler, *Stone and the Constitution*, 46 COLUM. L. REV. 764, 798 (1946)). See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (“Freedom of press, freedom of speech, freedom of religion are in a preferred position.”).

¹⁰¹ See, e.g., Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 624 (1994) (“Judges in the nineteenth and early-twentieth centuries were interested in constructing general protections for liberty

ritarian difficulty in 1962, it is not surprising that he understood his task as searching for a principled basis on which courts could determine “[w]hich values . . . qualify as sufficiently important or fundamental . . . to be vindicated by the Court against other values affirmed by legislative acts?”¹⁰²

Ely shared Bickel’s focus on the countermajoritarian difficulty.¹⁰³ But he rejected the assumption that the primary task of the courts was to enforce rights.¹⁰⁴ Instead, Ely constructed a theory, derived from the second and third paragraphs of *Carolene Products* footnote four, that reframed judicial review as a means of protecting equal access to the political process.¹⁰⁵ According to Ely, “both *Carolene Products* themes are concerned with participation: they ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political process by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.”¹⁰⁶ The function of judicial review, in Ely’s view, is not to vindicate important constitutional values, but rather to facilitate the ability of

broadly defined . . . rather than special protections for a handful of particularly important liberties.”); Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1689–90, 1705–06 (2005) (describing similar shift from the Supreme Court’s emphasis on equality to an emphasis on rights).

¹⁰² BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 19, at 55; *see also* Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205, 207 (2008) (Bickel “accepted the New Deal constitutional settlement’s distinction between matters of policy, not subject to serious judicial review, and matters of true constitutional rights, where the courts were authorized to act. But, within the domain of rights, judges were supposed to rely on the special techniques, labeled principle, that lawyers were better able than legislators to employ.”).

¹⁰³ ELY, DEMOCRACY AND DISTRUST, *supra* note 35, at 4–5. In Ely’s formulation, “the central function” of judicial review “is at the same time [its] central problem . . . : a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like.” *Id.*

¹⁰⁴ *See, e.g.,* Samuel Issacharoff, Symposium, *The Elusive Search for Constitutional Integrity: A Memorial for John Hart Ely*, 57 STAN. L. REV. 727, 731 (2004) [hereinafter Issacharoff, *The Elusive Search*] (noting that Ely’s “main effort was to try to stem the Court’s slide into simple rights jurisprudence”).

¹⁰⁵ Michael Klarman has described Ely’s theory as perhaps “the most important contribution to constitutional theory of the past generation.” Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 747 (1991). Although I share Klarman’s assessment of Ely’s enormous significance, I do not share the view that Ely succeeded in developing a purely procedural account of democracy and judicial review.

¹⁰⁶ ELY, DEMOCRACY AND DISTRUST, *supra* note 35, at 77.

individuals and groups to participate freely and equally in the political process.¹⁰⁷

Ely was primarily concerned with two types of what he termed “malfunctions” or “blockages” in the political process, which correspond to the second and third paragraphs of footnote four: entrenchment and discrimination. Entrenchment occurs when “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out,” such as by suppressing dissent, favoring incumbents, or the like.¹⁰⁸ To prevent entrenchment, courts must remove impediments to free speech, publication, and political association.¹⁰⁹

Discrimination occurs when “prejudice,” which Ely described as “a lens that distorts reality,” causes elected officials and others to undervalue the interests of certain disfavored groups.¹¹⁰ Ely thus recognized that even if a group has formal political rights, social inequality may subject the group to systemic disadvantage in the political process. Ely argued that courts should seek to intervene when irrational prejudice against particular minorities prevents those groups from being able to protect their interests because “though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.”¹¹¹

Ely did not expressly question the equation of democracy with majority rule and in fact “explicitly offered his democracy-enhancing principles in service of majoritarianism.”¹¹² Nonetheless, at least implicitly, Ely’s

¹⁰⁷ See *id.* at 87–104. As Ely noted, “unlike an approach geared to the judicial imposition of ‘fundamental values,’” Ely’s approach is “not inconsistent with, but on the contrary is entirely supportive of, the American system of representative democracy.” *Id.* at 101–02.

¹⁰⁸ *Id.* at 103.

¹⁰⁹ *Id.* at 105–34.

¹¹⁰ *Id.* at 153 (“We are a nation of minorities and our system thus depends on the ability and willingness of various groups to apprehend those overlapping interests that can bind them into a majority on a given issue; prejudice blinds us to overlapping interests that in fact exist.”).

¹¹¹ ELY, DEMOCRACY AND DISTRUST, *supra* note 35, at 103. Although Ely focused primarily on how discrimination affected the treatment of disfavored minorities by other people, Kenneth Karst has noted that discrimination also has damaging psychological effects that seriously inhibit the ability of disfavored minorities to participate in the political process. See Karst, *Equal Citizenship*, *supra* note 11, at 25–26.

¹¹² Schacter, *Ely and the Idea of Democracy*, *supra* note 35, at 741. See also ELY, DEMOCRACY AND DISTRUST, *supra* note 35, at 181 (claiming that his theory of judicial review requires that courts must be concerned “only with questions of participation, and not with the substantive merits of the political choice under attack”).

recognition that social inequality can significantly limit a group's political power suggests that majority rule is legitimate only when those bound by its determinations have equal access to the democratic process.¹¹³ Moreover, Ely recognized that "access" means more than the right to vote and to speak. Even under conditions of formal political equality, majorities may systematically oppress minorities and thus keep the "outs" on the outside. Although Ely himself did not consider the full implications of that recognition, his work at least points the way toward a broader recognition that systematic social oppression can be as much a failure of democracy as an explicit denial of formal political equality would be.¹¹⁴

C. BEYOND ELY: THE SOCIAL DIMENSIONS OF DEMOCRATIC EQUALITY.

Although I seek to build on Ely's insight that democracy is compromised by social inequality, I depart from Ely's framework in two critical respects. First, in contrast to Ely, I do not claim that an entirely procedural, value-free account of democracy (or equality) is necessary, possible, or desirable.¹¹⁵ Inevitably, claims about the meaning of democracy and equality must rely on substantive norms—for example, about how to distinguish invidious discrimination from legitimate differentiation.¹¹⁶ In the context of gay rights, courts and others must make normative judgments not only

¹¹³ Cf. Schacter, *Ely and the Idea of Democracy*, *supra* note 35, at 741–42 ("Ely's focus on the distorting lens of prejudice opens up the possibility that he saw some measure of social equality as part of political equality, or at least that his thematic emphasis on 'participation' contemplates participation by disadvantaged groups in a range of settings, not just in voting and elections.").

¹¹⁴ *Id.* at 752 (noting that despite Ely's hesitance to go beyond a concern with inadequate representation, "the principal effect of Ely's signature link between social bias and ideas about democracy is, precisely, to expand the idea of political equality beyond its formal institutional boundaries and, thus, to bring social dynamics squarely into the realm of democratic theory").

¹¹⁵ As Samuel Issacharoff has noted, Ely's reluctance to acknowledge the normative aspect of his theory does not detract from its "transcendent importance," which lies in "the attempt to develop a theory of constitutionalism grounded in the need to provide a blueprint for democratic governance." Issacharoff, *The Elusive Search*, *supra* note 104, at 730.

¹¹⁶ Although Ely presented his theory as purely procedural and value-free, a court's determination that a group is subject to invidious discrimination "always require[s] irreducibly substantive normative judgments, without which we cannot distinguish the equal protection rights of gay people from those of burglars." Kathleen Sullivan, *The Scholarship of Laurence Tribe: Law and Topology*, 42 *TULSA L. REV.* 949, 951–52 (2007) [hereinafter Sullivan, *The Scholarship of Laurence Tribe*]; see also Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980) [hereinafter Tribe, *Puzzling Persistence*] (showing that Ely implicitly grounded his account in a normative account of democratic equality); Daniel R. Ortiz, *The Allure and Failure of Process Theory*, 77 *VA. L. REV.* 721, 735–41 (1991) (arguing that there is no way to differentiate good and bad stereotyping without relying on normative judgments).

about how to distinguish gay people from burglars,¹¹⁷ but, more broadly, about whether sexual orientation is a permissible basis for unequal treatment in any context, including that of family recognition and marriage. To make those substantive determinations, courts and legislators, as well as voters, ultimately must rely on substantive norms.¹¹⁸ There is no shortcut around those normative judgments based on purportedly neutral principles, self-evident facts or—despite Ely’s claims to the contrary—a purely procedural account of fairness.

For that very reason, however, Ely’s central insight about the interconnection of equality and democracy (stripped of its claim to substantive neutrality) is even more important. For a court to recognize that a group has been the victim of impermissible discrimination, it must first recognize the group as a minority deserving of equal treatment and respect, not merely a collection of outlaws or outcasts who are properly subject to disadvantageous treatment.¹¹⁹ But to gain that judicial recognition, the group must have enough social visibility and access to rebut negative stereotypes and persuade others that its members are worthy of equal treatment.¹²⁰ Thus, somewhat paradoxically, “social movements are most likely to influence

¹¹⁷ See Tribe, *Puzzling Persistence*, *supra* note 116, at 1075–76 (arguing that we cannot differentiate between laws burdening gay people and laws burdening burglars without relying upon substantive normative judgments about the underlying conduct that defines the class); see also Sullivan, *The Scholarship of Laurence Tribe*, *supra* note 116, at 952 (describing Tribe’s argument that “hard cases always require irreducibly substantive normative judgments, without which we cannot distinguish the equal protection rights of gay people from those of burglars or the privacy right to abortion from that to feticide”); Schacter, *Democracy’s Domain*, *supra* note 8, at 396–97 (discussing the “burglar problem” identified by Professor Tribe as an example of the broader point that “courts cannot avoid making substantive distinctions by seeking refuge in value-free procedural ideas”).

¹¹⁸ Cf. Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1957 (2006) [hereinafter Goldberg, *Constitutional Tipping Points*] (“To make this determination [about whether a group merits constitutional protection], courts evaluate prevailing normative judgments regarding group members’ status or capacity.”).

¹¹⁹ See Tribe, *Puzzling Persistence*, *supra* note 116, at 1072–77 (arguing that “any determination that a law unjustly discriminates against a group” necessarily depends upon substantive normative judgments).

¹²⁰ As Danielle Allen has observed: “Political order is secured not only by institutions, but also by ‘deep rules’ that prescribe specific interactions among citizens in public spaces: citizens enact what they are to each other not only in assemblies, where they may make decisions about their mutually entwined fates, but also when, as strangers, they speak to one another, or don’t, or otherwise respond to each other’s presence.” ALLEN, TALKING TO STRANGERS, *supra* note 29, at 10. See also Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 CAP. U. L. REV. 535, 538–41 (2009) (describing the complex process by which social and political movements affect changes in legal meaning and constitutional interpretation).

subsequent judicial interpretation not when they are politically powerless, but when they are most politically powerful.”¹²¹

Accordingly, as I explain in more depth in Part IV, laws that burden a group’s ability to participate in important social institutions such as marriage are particularly damaging. In effect, such laws create a vicious loop in which groups that have been targeted by social stigma and discrimination are unable to gain the social traction necessary to challenge their disfavored legal and social status, and secure judicial protection. The exclusion of unpopular minorities from marriage and other legal protections is, initially, a result of prejudice by the majority. But the official act of labeling those groups as outlaws also serves to encourage further prejudice, which then further limits the ability of excluded groups to protect their interests in the public arena. The net result, to extend Ely’s metaphor, is to entrench the relative position of the “ins” and the “outs.”

That insight gives rise to the second respect in which I depart from Ely’s framework. Unlike Ely, who asserts that the impact of social inequality on the political process is limited and occasional, I believe that the impact is pervasive and systemic.¹²² In Ely’s vision, democracy is largely an accomplished fact rather than an aspiration. Constitutionally significant “malfunctions” exist only at the margins (and primarily with respect to

¹²¹ Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 *SUFFOLK U. L. REV.* 27, 38 (2005); see also Eskridge, *Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, *supra* note 59, at 1821 (“Only when the minority emerges from true powerlessness and is able to gain allies in the pluralist process can it hope for equality review with bite. Strict scrutiny becomes available only after judges are persuaded that the minority is finally part of the political mainstream.”); Posting of Kenji Yoshino *Convictions*, <http://www.slate.com/blogs/blogs/convictions/default.aspx> (May 21, 2008, 10:17 EST) (noting that “a group must have an enormous amount of political power before it can be recognized as politically powerless by the court”). Perhaps in part for that reason, the U.S. Supreme Court usually has recognized that a group is entitled to heightened scrutiny only after the other branches have recognized that discrimination against the group is illegitimate. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 687–88 (1973) (citing the enactment of laws prohibiting sex discrimination as confirming that women unfairly have been subject to widespread discrimination and therefore require heightened protection under the Equal Protection Clause).

¹²² See Robson, *Judicial Review and Sexual Freedom*, *supra* note 11, at 2–4 (arguing that Ely disregarded the full scope of social discrimination against women and sexual minorities); Crenshaw & Peller, *The Contradictions of Mainstream Constitutional Theory*, *supra* note 11, at 1703–04 (arguing that process theories dramatically understate the extent of social inequality). Unlike Crenshaw and Peller, however, my goal is to reform Ely’s project, rather than abandon it. As Crenshaw and Peller note, “there is no analytical barrier preventing an application of process theory to constitutional law from constituting a radical critique of the undemocratic character of our everyday social lives.” *Id.* at 1686. Unlike the process theories they critique, my argument does not seek to avoid substantive controversies about the meaning or limits of equality by recourse to proceduralism, but rather to defend judicial enforcement of equality norms (including in the social arena) as an essential component of democracy.

race), and can be redressed through occasional judicial interventions to unblock the channels of democratic change.¹²³ In other words, Ely “assume[d] that status quo social reality forms a neutral baseline from which to evaluate if democracy exists,” much as *Lochner*-era courts assumed the “neutrality” of the market.¹²⁴ But, in fact, the social status quo is deeply stratified and riven with inequalities that have been powerfully shaped by the law.

Just as courts now recognize that the market is thoroughly determined by legal norms, a viable democratic theory must acknowledge that social inequalities are themselves often the product of prior state action and law. For example, just as it is not possible to separate patterns of so-called voluntary race-based segregation in housing from the history of slavery, Jim Crow, and judicial enforcement of racially restrictive housing covenants, it is also not possible to separate social antipathy toward same-sex relationships from the criminalization of same-sex intimacy and other forms of official discrimination against gay people. Both Justice Kennedy’s majority opinion in *Lawrence* and Justice O’Connor’s concurrence saw this connection, both noting that the state’s official declaration that same-sex conduct is criminal “in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”¹²⁵ Because government-sponsored discrimination and discrimination by private citizens in everyday life are so intertwined, if courts are to promote equal access to the democratic process, they must be willing to enforce equality norms in ostensibly “social” as well as political contexts.¹²⁶

That recognition is particularly significant in the context of contemporary litigation and debates about same-sex couples and marriage. Frequent-

¹²³ Crenshaw & Peller, *The Contradictions of Mainstream Constitutional Theory*, *supra* note 11, at 1686 (“Mainstream constitutional theories . . . pretend that a meaningful form of democracy exists as the backdrop to the occasional and exceptional intervention of law as symbolized by judicial review.”).

¹²⁴ *Id.* at 1700. Jane Schacter has made a similar point that any purely procedural account of democracy fails to capture the ways that “democracy can be compromised by dynamics of subordination and social exclusion.” Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment’s Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733, 734 (2004).

¹²⁵ *Lawrence*, 539 U.S. at 575; 539 U.S. at 583 (O’Connor, J., concurring) (quoting same). Practically in the same breath, however, Justice O’Connor backed away from the full implications of her recognition that government discrimination enables and perpetuates private discrimination by appearing to defend the government’s power to exclude same-sex couples from marriage. *See id.* at 585 (O’Connor, J., concurring) (referring to “preserving the traditional institution of marriage” as a presumptively legitimate state interest).

¹²⁶ As Kenneth Karst long ago noted, “the principle of equal citizenship—which is broader than the legal status of citizenship—presumptively demands the removal of legal obstacles to a wide range of types of participation as a member of society.” Karst, *Equal Citizenship*, *supra* note 11, at 25.

ly, courts and scholars assume that laws restricting marriage to heterosexual couples simply reflect extra-legal social norms that should be left to the democratic process and are not properly subject to judicial review. In New Jersey, for example, the state's highest court held that the question of whether same-sex couples must have access to the status as well as the rights of marriage was a "cultural clash," not a legal question.¹²⁷ Stating that courts cannot compel "social acceptance," the court held that any change in "the shared societal meaning" of marriage "must come about through civil dialogue and reasoned discourse."¹²⁸ Similarly, Lynn Wardle, who opposes marriage for same-sex couples, has argued that whether to permit same-sex couples to marry "is precisely the kind of issue that Jefferson and the other founders risked their lives and fortunes to secure for the people to decide by democratic processes."¹²⁹ And as I noted earlier, even some scholars who support the freedom of same-sex couples to marry have suggested that the issue is one of "social reform," and thus "best handled through democratic arenas."¹³⁰

¹²⁷ *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006). Courts often voice such sentiments in lesbian and gay parenting cases as well. See, e.g., *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004) (describing its decision to uphold Florida's ban on adoption by gay parents as refusing "to take sides in an ongoing public policy debate").

¹²⁸ *Lewis*, 908 A.2d at 222 (expressing a desire to "steer clear of the swift and treacherous currents of social policy"). Although undoubtedly inadvertent, the court's language recalls the similar statement in *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), distinguishing "social" from "political" equality. See also *Hernandez v. Robles*, 855 N.E.2d 1, 8 (2006) (upholding validity of New York statute barring same-sex couples from marriage on the ground that "the present generation should have a chance to decide the issue through its elected representatives"); *Kerrigan v. Comm'n of Pub. Health*, 957 A.2d 407, 503 (Conn. 2008), (Borden, J., dissenting) (stating that any change in marriage should be made by the people rather than the courts because marriage is "a fundamental and ancient social institution"); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 1005 (Mass. 2003), (Cordy, J., dissenting) ("While the courageous efforts of many have resulted in increased dignity, rights, and respect for gay and lesbian members of our community, the issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action.").

¹²⁹ Lynn D. Wardle, *Is Marriage Obsolete?*, 10 MICH. J. GENDER & L. 189, 195–96 (2003) [hereinafter Wardle, *Is Marriage Obsolete?*]. At the same time, Wardle inconsistently argues that courts and legislatures should privilege heterosexual marriage and punish alternatives to ensure that the traditional marital family maintains its cultural hegemony. *Id.* at 230 (arguing that the law must privilege the traditional, heterosexual marriage-based family in order to ensure social stability).

¹³⁰ Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2113, 2085 (2005). Sunstein does allow that under some circumstances the issue might be litigated in state, but not federal, courts. *Id.* at 2085; see also Cass R. Sunstein, Federal Appeal, *The New Republic*, Dec. 23, 2003, at 21–23 (applauding the ruling of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, which held that same-sex couples in Massachusetts must be permitted to marry, but arguing that a similar U.S. Supreme Court decision "at this time would be disastrous, undoubtedly causing a heated public backlash and endangering the cause of gay rights itself").

But as I argue further in the sections below, that view wrongly presumes that social norms regarding same-sex couples exist in isolation from the long history of legal discrimination against lesbians and gay men, ranging from criminalization of their intimacy to the denial of legal protections and recognition for their families.¹³¹ Historically, the law has played a major role in perpetuating the social marginalization and stigmatization of gay people, and it continues to do so in the present. Accordingly, when same-sex couples assert their right to marry, they are not seeking to undermine our commitment to democracy, but rather asserting a powerful claim to democratic inclusion and full participation as equal citizens.¹³²

II. THE TROUBLED RELATIONSHIP BETWEEN EQUALITY AND DEMOCRACY IN THE CALIFORNIA MARRIAGE DECISION (*IN RE MARRIAGE CASES*)

In both scholarship and the popular press, there is a widespread perception that marriage litigation by gay couples pits democracy (equated with majority rule) against individual rights. The California marriage case (*In re Marriage Cases*) seemed to stage that confrontation even more dramatically than prior cases brought by same-sex couples in other states. The California marriage case was unique in two respects, both of which heightened the democratic stakes of the litigation. First, no prior case had challenged a marriage ban enacted by popular initiative. In 2000, more than sixty percent of California voters approved Proposition 22,¹³³ a ballot measure that strengthened the state's existing statutory restriction of marriage to opposite-sex couples.¹³⁴ The voters' direct endorsement of the

¹³¹ But see William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy*, 1880–946, 82 IOWA L. REV. 1007, 1014–16 (1997) (detailing the history of government discrimination against lesbian, gay, bisexual, and transgender people); see also Eskridge, *supra* note 58, *Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, at 1790–96 (same).

¹³² Similarly, from our perspective today, we tend to think of *Brown v. Board of Education* and other civil rights cases not as the enforcement of a “right” against the will of a democratic majority, but as cases that finally helped to bring full democratic citizenship to African Americans after a long period of denial. It may be that enforcement of equality is often viewed in its own day as courts trumping the will of a democratic majority, but over time comes to be seen as reinforcing democracy by conferring equal citizenship on those who had been denied it.

¹³³ CAL. SEC'Y OF STATE, STATEMENT OF VOTE: 2000 PRIMARY ELECTION 1383 (2000), available at http://www.sos.ca.gov/elections/sov/2000_primary/props_summary.pdf (stating that 61.4% of Californians voting in the 2000 election approved Proposition 22).

¹³⁴ CAL. FAM. CODE § 308.5 (West 2009) (“Only marriage between a man and a woman is valid or recognized in California.”). In addition to Proposition 22, Family Code 300, which was added to California's marriage statute in 1977 in order to eliminate any possible uncertainty regarding the legislature's intention to exclude same-sex couples from marriage, contained similar gender-based restric-

marriage ban undoubtedly reinforced the popular perception that the case presented a clash between majority rule and minority rights.

Second, no prior case had challenged a marriage ban in a state that already provided most of the material benefits of marriage to same-sex couples through an alternative status such as domestic partnerships or civil unions.¹³⁵ Because California had enacted a comprehensive domestic partnership law, the California Supreme Court had to decide whether relegating same-sex couples to a separate status violated the requirements of equal protection. Courts in New Jersey and Vermont had avoided that question by declining to reach it.¹³⁶ In California, however, that minimalist option did not exist. By the time the case reached the California Supreme Court, domestic partnership law provided “virtually all” of the substantive rights and responsibilities granted to married couples by California law.¹³⁷ Thus, the constitutionality of an allegedly separate but equal family law status was squarely presented—thereby highlighting the issue of whether the law must provide same-sex couples with social, as well as material, equality.¹³⁸

tions. *In re Marriage Cases (Marriage Cases)*, 183 P.3d 384, 409 (Cal. 2008) *reh'g denied*, 2008 Cal. LEXIS 6807, at *1 (Cal. June 4, 2008).

¹³⁵ The California Supreme Court stressed this difference in the *Marriage Cases*, noting that “the constitutional issue before us differs in a significant respect from the constitutional issue that has been addressed by a number of other state supreme courts and intermediate appellate courts that recently have had occasion . . . to determine the validity of statutory provisions or common law rules limiting marriage to a union of a man and a woman.” *Marriage Cases*, 183 P.3d at 397. The only comparable decision was the advisory opinion of the Massachusetts Supreme Judicial Court in *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004), which held that a proposal to provide same-sex couples in Massachusetts with civil unions rather than marriages would violate the equal protection and due process clauses of the Massachusetts Constitution.

¹³⁶ *Baker v. State*, 744 A.2d 864, 866 (Vt. 1999) (citing Bickel and Sunstein in defense of its decision to avoid deciding whether Vermont must provide same-sex couples with marriage or a separate status); *Lewis v. Harris*, 908 A.2d 196, 221–22 (N.J. 2006) (stating that a court “must discern not only the limits of its own authority, but also when to exercise forbearance”); see also WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 152–58 (2002) (praising the Vermont decision as an example of prudent minimalism).

¹³⁷ *Marriage Cases*, 183 P.3d at 398. In 1999, the California Legislature enacted the nation’s first statewide domestic partnership registry. 1999 Cal. Adv. Legis. Serv. 588 (Deering). Initially, the registry was largely symbolic and provided few substantive protections. Quickly, however, the legislature expanded the registry to include an ever-growing bundle of important rights and responsibilities. That process culminated with the enactment of the Domestic Partner Rights and Responsibilities Act of 2003, which gave registered domestic partners substantially all of the rights and responsibilities of marriage under state law. Domestic Partner Rights and Responsibilities Act, 2003 Cal. Adv. Legis. Serv. 421 (Deering). The measure took effect on January 1, 2005, several months after same-sex couples initially challenged California’s marriage ban in Los Angeles and San Francisco Superior Courts. See CAL. FAM. CODE § 297 (West 2009).

¹³⁸ The California Supreme Court noted that if same-sex couples had challenged the statutory ban on marriage in the absence of a comprehensive domestic partnership law, “we might well have further

In 2008, the California Supreme Court struck down California's statutory marriage ban.¹³⁹ The decision was the first in the nation to hold that same-sex couples have a fundamental right to marry.¹⁴⁰ It was also the first decision by a state's high court to hold that classifications based on sexual orientation are subject to strict scrutiny under a state constitution, on par with classifications based on race, sex, and religion.¹⁴¹ In the months following the California Supreme Court's decision, high courts in Connecticut and Iowa drew upon the decision in striking down similar bans in those states.¹⁴²

Both the majority and dissenting opinions in the *Marriage Cases* largely reflected the traditional narrative about the perceived conflict between democracy and equality. The majority opinion relied on the standard view of equality as a countermajoritarian right and almost wholly ignored the implications of its holding on the ability of gay people to participate as equal citizens of a democracy. Even in its suspect classification analysis, the majority paid little attention to the relationship between equality and democracy, although its recognition that putting the court's imprimatur on

concluded—as other state courts have determined in similar situations—that the appropriate disposition would be to direct the Legislature to provide equal treatment to same-sex couples, leaving to the Legislature, in the first instance, the decision whether to provide such treatment by a revision of the marriage statutes or by the enactment of a comprehensive domestic partnership or civil union law.” *Marriage Cases*, 183 P.3d at 418 n.27.

¹³⁹ *Id.* at 384.

¹⁴⁰ The Massachusetts Supreme Judicial Court was the first to hold that same-sex couples must be permitted to marry; however, that Court did not reach the issue of whether same-sex couples have a fundamental right to marry, relying instead on a determination that barring such couples from marriage lacked even a rational basis. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Several years earlier, the Hawaii Supreme Court held that Hawaii's marriage ban was subject to heightened scrutiny because it discriminated based on sex, but as noted earlier, *supra* note 6, the voters amended the Hawaii Constitution to permit the legislature to bar same-sex couples from marriage before the case was finally resolved. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993), *superseded by statute*, HAW. CONST. art. I, § 23, *as recognized in* *Milberger v. KBHL, LLC*, 486 F. Supp. 2d 1156, 1164 n.9 (D. Haw. 2007) (calling the constitutionality of Hawaii's marriage ban into question).

¹⁴¹ *Marriage Cases*, 183 P.3d at 444 (“Because sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment and that generally bears no relation to an individual's ability to perform or contribute to society, it is appropriate for courts to evaluate with great care and with considerable skepticism any statute that embodies such a classification. The strict scrutiny standard therefore is applicable to statutes that impose differential treatment on the basis of sexual orientation.”).

Unlike the federal constitution, which subjects discrimination based on sex to intermediate scrutiny, the California Constitution subjects sex-based classifications to strict scrutiny. *See Sail'er Inn, Inc. v. Kirby* 485 P.2d 529, 541 (Cal. 1971) (en banc); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 93 (Cal. 2004).

¹⁴² *See Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 424 (Conn. 2008).

domestic partnerships would itself have a stigmatizing effect at least implicitly recognized the interplay between these two concepts. The dissent argued in response, predictably, that the issue of marriage rights for same-sex couples was a matter for the people to decide, and as such was not a proper subject for judicial review.¹⁴³

Ironically, in fact, it was the dissenters, not the majority, who explicitly invoked the democratic process theory associated with Ely's interpretation of footnote four of *Carolene Products*, claiming that gay people are not subject to sufficient bias to prevent them from defending their interests in the normal political process.¹⁴⁴ As I argue below, the dissenting opinions in the *Marriage Cases* help to illuminate the limitations of Ely's theory. Like Ely, those dissenting opinions were unable to see the extent to which inequality in the so-called "private" or "social" realm can be shaped by the law, and the corresponding extent to which social inequality can affect a group's ability to participate in the political process because it prevents them from functioning, and being seen by others, as equal citizens.¹⁴⁵

A. COMPETING CONCEPTIONS OF EQUALITY AND DEMOCRACY

The majority opinion in the *Marriage Cases* strongly embraced the standard account of the relationship between equality and democracy—namely, that the court's role is to enforce fundamental constitutional rights even when doing so requires invalidation of democratically enacted laws. The majority rejected the dissenters' argument that the court should defer to the "people's will." To the contrary, citing Justice Jackson in *Barnette*, the majority strongly endorsed the familiar view that the "very purpose" of constitutional rights "was to withdraw certain subjects from the vicissitudes of political controversy" and "place them beyond the reach of majorities."¹⁴⁶ In Justice Jackson's stirring words, the court explained that "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."¹⁴⁷ Justice Kennard's concurring opinion emphasized that a court's job is to protect "unpopular minority groups" by enforcing constitutional rights, no matter how strongly the public may dis-

¹⁴³ See *infra* notes 150–60 and accompanying text.

¹⁴⁴ *Id.*

¹⁴⁵ See *infra* notes 164–65 and accompanying text.

¹⁴⁶ *Marriage Cases*, 183 P.3d at 450 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

¹⁴⁷ *Barnette*, 319 U.S. at 638.

agree.¹⁴⁸ “Because of its importance,” she wrote, “this point deserves special emphasis.”¹⁴⁹

The majority held that by enforcing the right to marry and the right to equal protection, it was simply enforcing limits that the people had chosen to impose on themselves when they adopted the California Constitution.¹⁵⁰ By placing certain rights in the constitution, the majority reasoned, the people agreed to remove those guarantees from the ordinary political process.¹⁵¹ Accordingly, the court stressed that marriage was not simply a social institution subject to regulation by the state, but “a basic, *constitutionally* protected civil right . . . that embodies fundamental interests of an individual that are protected from abrogation or elimination by the state.”¹⁵² The court also held that, under California’s equal protection clause, the law must “guarantee this basic civil right to *all* individuals and couples, without regard to their sexual orientation.”¹⁵³

Notably, the word “democracy” is entirely absent from the majority opinion—even in the court’s analysis of why sexual orientation is a suspect classification. As noted above, both in Ely’s scholarship and in the conventional understanding of the court’s post-*Carolene Products* equal protection law, the purpose of the suspect classification doctrine is to protect groups who are (at least relatively) “politically powerless”—that is, who cannot adequately protect themselves in the ordinary democratic process because they face systematic prejudice. In the *Marriage Cases*, however, the majority seemed to reject this conventional understanding of the suspect classification doctrine. The majority opinion did not specifically find that gay people lack political power. Instead, it held that a showing of “*current* political powerlessness” is not required to establish the need for heightened scrutiny, so long as a group has suffered discrimination in the

¹⁴⁸ *Marriage Cases*, 183 P.3d at 455, (Kennard, J., concurring).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 450 (holding that “the provisions of the California Constitution itself constitute the ultimate expression of the people’s will, and that the fundamental rights embodied within that 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”). Bickel rejected this theory as an inadequate response to the countermajoritarian difficulty. See BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 19, at 16–17 (noting that Alexander Hamilton first propounded this justification and rejecting it as “an abstraction obscuring the reality that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now”).

¹⁵¹ *Marriage Cases*, 183 P.3d at 450.

¹⁵² *Id.* at 426.

¹⁵³ *Id.* at 427.

past.¹⁵⁴ Although the court did not say so directly, the implication of the court's analysis is that lesbians and gay men are no longer significantly disadvantaged in the democratic process.¹⁵⁵ That implication strongly reinforced the rights-based, countermajoritarian rationale of the majority opinion. At a minimum, it certainly did nothing to suggest that judicial intervention was necessary to enforce the requirements of democracy by ensuring that gay people are able to participate as equal citizens.

In contrast to the majority opinion, which did not discuss democracy directly, both dissents focused primarily on why, in their view, the question of whether same-sex couples may marry should have been left to the "democratic process."¹⁵⁶ In particular the dissenters argued that the enactment of California's domestic partnership law showed that same-sex couples were making significant progress through their elected representatives and did not require special protection from the courts.¹⁵⁷ Both of the dissenting opinions pressed this point aggressively, taking the majority to task for rushing to the aid of a group that was already making dramatic

¹⁵⁴ *Id.* at 443 ("Indeed, if a group's *current* political powerlessness were a requisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications."). Other courts have recognized the existence of nondiscrimination laws protecting a group as evidence of the pervasiveness of discrimination against that group, not as evidence of the group's supposed political power. *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677, 687–88 (1973) (citing the enactment of laws prohibiting sex discrimination in support of finding that women require heightened protection under the Equal Protection Clause). *See also supra* notes 118–20 and accompanying text. Notably, in contrast to the court's cursory treatment of political powerlessness, the court proffered a sophisticated analysis of immutability, rejecting a simplistic biological or genetic view in favor of recognizing that "a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment." *Marriage Cases*, 183 P.3d at 442.

¹⁵⁵ Rather than current political disadvantage, the court based its suspect classification holding on its determination that lesbians and gay men had suffered a long history of discrimination, and that sexual orientation has no bearing on a person's ability to participate in or contribute to society. *Marriage Cases*, 183 P.3d at 442. In contrast, both the Connecticut and Iowa Supreme Courts held that gay people continue to suffer from political powerlessness. *See Varnum v. Brien*, 763 N.W.2d 862, 894–95 (Iowa 2009); *Kerrigan v. Comm'r of Public Health*, 289 Conn. 135, 209–13, 957 A.2d 407, 452–54 (2008).

¹⁵⁶ *Marriage Cases*, 183 P.3d at 456 (Baxter, J., concurring and dissenting); *see also id.* at 468 (Corrigan, J. concurring and dissenting) ("In my view, Californians should allow our gay and lesbian neighbors to call their unions marriages. But I, and this court, must acknowledge that a majority of Californians hold a different view, and have explicitly said so by their vote. This court can overrule a vote of the people only if the Constitution compels us to do so. Here, the Constitution does not.").

¹⁵⁷ As the majority opinion noted, "The recent comprehensive domestic partnership legislation constitutes the culmination of a gradual expansion of rights. . . ." *Id.* at 413.

strides in the political arena.¹⁵⁸ Pointedly, Justice Corrigan's dissent contrasted the legislature's positive efforts to advance equality for lesbians and gay men with the invidiousness of laws mandating racial segregation.¹⁵⁹ In her view, the court should have permitted "[t]he process of reform and familiarization [to] go forward in the legislative sphere and in society at large."¹⁶⁰

Similarly, Justice Baxter invoked the classic *Carolene Products* model to argue that courts should depart from the deference normally owed to legislative determinations only when entrenched bias prevents a group from being able to defend itself in the normal political process.¹⁶¹ In Justice Baxter's view, "[t]he rapid growth in California of statutory protections for the rights of gays and lesbians, as individuals, as parents, and as committed partners" showed just the opposite: "Advocates of this cause have had real success in the marketplace of ideas, gaining attention and considerable public support."¹⁶² Justice Baxter accused the majority of improperly substituting "its own social policy views for those expressed by the People themselves," simply because the majority was "not satisfied with the pace of democratic change."¹⁶³

In concluding that the court should have deferred to the people to decide whether to designate same-sex relationships as marriages or domestic partnerships, both dissents characterized the issue of whether gay couples should be permitted to marry as resting upon social, rather than constitutional, grounds. But even as the dissenting justices articulated that posi-

¹⁵⁸ *Id.* at 457–58 (Baxter, J., concurring and dissenting); *see also id.* at 471 (Corrigan, J., concurring and dissenting) (accusing the court of "tak[ing] one side in an ongoing political debate"). *See also* *Conaway v. Deane*, 932 A.2d 571, 611 (2007) (upholding Maryland's ban on marriage by same-sex couples in part based on finding that legislative victories secured by lesbians and gay men show that gay people do not require heightened protection in the majoritarian political process); *Andersen v. King County*, 138 P.3d 963, 974–75 (2006) ("The enactment of provisions providing increased protection to gay and lesbian individuals in [the State] shows that as a class gay and lesbian persons are not powerless but, instead, exercise increasing political power. Indeed, the recent passage of the amendment [in Washington prohibiting discrimination on the basis of sexual orientation] is particularly significant We conclude that plaintiffs have not established that they satisfy the [political powerlessness] prong of the suspect classification test.").

¹⁵⁹ *Marriage Cases*, 183 P.3d at 469 (Corrigan, J., concurring and dissenting); *see also* Eskridge, *Equality Practice*, *supra* note 58, at 864–70 (describing the analogy between civil unions and racial segregation as "inapt" and explaining why they are different).

¹⁶⁰ *Marriage Cases*, 183 P.3d at 471 (Corrigan, J., concurring and dissenting). Unlike Justice Baxter, however, Justice Corrigan agreed with the majority that "the Constitution requires this [provision of equal rights and responsibilities] as a matter of equal protection." *Id.* at 468.

¹⁶¹ *Id.* at 466–67 (Baxter, J., concurring and dissenting).

¹⁶² *Id.* at 457.

¹⁶³ *Id.* at 457–58.

tion, they could not help but acknowledge that majoritarian preferences have been, and continue to be, shaped by the differential treatment of gay couples under the law. For example, while Justice Baxter suggested that “[w]e cannot escape the reality that the shared societal meaning of marriage . . . has always been the union of a man and a woman,”¹⁶⁴ he also acknowledged that this “societal meaning” has been enforced and “passed down through . . . law.”¹⁶⁵ Similarly, Justice Corrigan contradictorily suggested that “the people are entitled to preserve [their] traditional understanding in *the terminology of the law*,”¹⁶⁶ simultaneously invoking tradition as an extra-legal source of authority, and yet acknowledging the use of official classifications to enforce a particular (discriminatory) view.

In sum, while the majority opinion focused on the court’s countermajoritarian obligation to enforce constitutional rights, the dissenting justices focused on democratic process theory. Not unlike Ely himself, however, the dissenting justices took an overly narrow view of what constitutes equal access to the political process.¹⁶⁷ Although acknowledging that discrimination may hamper a group’s political power, the dissenters contended that the ability of lesbians and gay men to enact significant legislative protections precludes any need for heightened scrutiny of laws that treat individuals differently based on their sexual orientation.¹⁶⁸ That assumption disregards the profound impact of discrimination in the family law sphere. As the majority opinion rightly held, official discrimination against same-sex couples and their families “realistically must be viewed” as furthering the invidious perception that they are not worthy of equal dignity and respect.¹⁶⁹ Thus, as I explain further in Part IV below, while the majority did not rebut the dissent’s invocation of democratic theory directly, its analysis of the stigmatizing impact of the marriage ban provides a powerful foundation for doing so. In addition, as I argue in the next section, the majority was sensitive to the danger that a decision affirming the marriage ban might actually distort the democratic process by placing the court’s imprimatur upon discrimination.

¹⁶⁴ *Id.* at 468 (quoting *Lewis v. Harris*, 908 A.2d at 222).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 469 (emphasis added).

¹⁶⁷ As Jane Schacter has noted, Ely “never really considered what effect the distorting lens of prejudice might have beyond the concern with inadequate representation.” Schacter, *Ely and the Idea of Democracy*, *supra* note 35, at 752.

¹⁶⁸ *Marriage Cases*, 183 P.3d at 457.

¹⁶⁹ *Id.* at 445–46.

B. THE IMPACT OF JUDICIAL INTERVENTION

Unlike the dissents, which assumed that affirming the existing marriage ban would have no political effect, the majority recognized that if the court were to put its affirmative stamp of approval on a separate status for same-sex couples, that action would in itself have a stigmatizing effect.¹⁷⁰ Such a decision would not simply leave the issue of whether same-sex couples can marry to the “democratic process,” as the dissenters maintained. Rather, it would influence that process profoundly.

In *The Least Dangerous Branch*, Bickel acknowledged that court decisions upholding challenged laws affect the political process by putting the court’s imprimatur on the challenged law: “[T]he Court, when it legitimates a measure, does insert itself with significant consequences into the decisional process as carried on in other institutions.”¹⁷¹ For example, Bickel noted that even though the establishment of separate schools for African-American students in the aftermath of the Civil War was “no more defensible on principle than it is now,” as a practical matter, the state’s provision of any schools at all, and the recognition of an obligation to do so, “marked a great advance.”¹⁷² Therefore, in his view, the Supreme Court’s “grave error” was not failing to strike down racial segregation at an early date, but rather “lending its affirmative sanction to the practice of segregation.”¹⁷³ The California Supreme Court in the *Marriage Cases* similarly recognized that even if comprehensive domestic partnership laws are an important practical step toward equality for same-sex couples, a judicial decision affirmatively sanctioning the practice of relegating same-sex couples to a separate status would sanction disparate treatment based on sexual orientation as a legitimate principle.

As Professor Suzanne Goldberg has noted, “where legislative and public policy shifts have eliminated most or all longstanding legal burdens on lesbians and gay men, courts that affirm the traditional negative norm in the marriage context arguably disrespect and disrupt the democratic process.”¹⁷⁴ By enacting a comprehensive domestic partnership law, the

¹⁷⁰ *Id.* at 452.

¹⁷¹ BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 19, at 70. As Robert Post and Reva Siegel note, neutrality with respect to competing constitutional visions and values is not possible once a court must rule on the merits of an issue. Post & Siegel, *Roe Rage*, *supra* note 54, at 426 (2007) (“Minimalism’s appeal to ‘respect,’ therefore, seems chiefly to serve as a covert judgment about the strength of the relevant constitutional values.”).

¹⁷² BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 19, at 71.

¹⁷³ *Id.*

¹⁷⁴ *Marriage Cases*, 183 P.3d at 418.

people of California already had determined that same-sex couples were entitled to be treated equally with respect to relationships and parenting, and that sexual orientation was not a valid basis for government discrimination. Under such circumstances, by affirming a marriage ban, a court might appear to sanction the very discrimination that the people and their representatives had disavowed—in principle, albeit not yet fully in practice.¹⁷⁵ The majority in the *Marriage Cases* expressly recognized this danger, explaining:

there exists a substantial risk that a judicial decision upholding the differential treatment of opposite-sex and same-sex couples would be understood as *validating* a more general proposition that our state by now has repudiated: that it is permissible, under the law, for society to treat gay individuals and same-sex couples differently from, and less favorably than, heterosexual individuals and opposite-sex couples.¹⁷⁶

Thus, in the *Marriage Cases*, the California Supreme Court at least implicitly recognized that by sanctioning an unequal system, the court's own actions might well derail the democratic momentum toward equality. Nonetheless, as I describe below, within a year the same court took the very action that it had warned against in the *Marriage Cases*, upholding a popular initiative reinstating the exclusion of same-sex couples from marriage—only this time with the force of a constitutional amendment.

III. THE SEPARATION OF EQUALITY AND DEMOCRACY IN *STRAUSS V. HORTON*

Despite the California Supreme Court's groundbreaking affirmation of equal protection in the *Marriage Cases*, only a year later, the court backpedaled significantly. In *Strauss v. Horton*, the court upheld the validity of Proposition 8, a voter initiative that amended the equal protection clause of the California Constitution to exclude same-sex couples from the right to marry.¹⁷⁷ In the next section, I describe the constitutional novelty of Proposition 8 and the stark ramifications of the *Strauss* decision for the future of democratic equality in California—not only for same-sex couples, but for other vulnerable groups as well. As a result of that decision, the relationship between equality and democracy in the California Constitution has been severed, and as Justice Moreno stressed in his dissent, the independent

¹⁷⁵ See Goldberg, *supra* note at 118, at 1988.

¹⁷⁶ *Marriage Cases*, 183 P.3d at 452.

¹⁷⁷ *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

vitality of California's Equal Protection Clause has been severely undermined.

A. THE UNPRECEDENTED IMPACT OF PROPOSITION 8

Proposition 8 appeared on the November 4, 2008 ballot in California and was approved by 52.3% of those voting.¹⁷⁸ The text of Proposition 8 was identical to the text previously enacted as a statutory measure in 2000 by Proposition 22: "Only marriage between a man and a woman is valid or recognized in California."¹⁷⁹ In the *Marriage Cases*, the California Supreme Court held that the language of Proposition 22 facially discriminated based on sexual orientation.¹⁸⁰ Thus, by approving Proposition 8, the voters established discrimination on a suspect basis as a constitutional mandate: Proposition 8 affirmatively requires the state to discriminate against individuals and couples based on their sexual orientation. Such a constitutional policy is dramatically at odds with the court's prior determination that "an individual's sexual orientation—like a person's race or gender—does not constitute a legitimate basis upon which to deny or withhold legal rights."¹⁸¹

Amendments similar to Proposition 8 have been enacted in other states; however, California is the only state to have adopted such an amendment after the state's high court held that same-sex couples have a fundamental right to marry and that sexual orientation is a suspect classification. As a result, the legal impact of Proposition 8 is unprecedented.¹⁸² Additionally, no prior initiative in California or elsewhere had proposed a state constitutional measure facially targeting a particular minority based

¹⁷⁸ *Id.* at 68.

¹⁷⁹ *Id.* at 66 (noting that the text of Proposition 22 and Proposition 8 are "identical").

¹⁸⁰ *Marriage Cases*, 183 P.3d at 440–41. The court rejected the argument that the statute merely had a disparate impact on gay persons. Rather, "[b]y limiting marriage to opposite-sex couples, the marriage statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation." *Id.* The court also rejected as "sophistic" the notion that that statute did not discriminate because it did not prevent a gay man or lesbian from marrying a person of the opposite sex. As the court noted, "making such a choice would require the negation of the person's sexual orientation." *Id.* at 441.

¹⁸¹ *Id.* at 400.

¹⁸² Prior California initiatives had enacted statutory measures that discriminated against particular groups. For example, in 1994, California voters enacted Proposition 187, which purported to exclude undocumented immigrants from public education and many other state benefits, although most of Proposition 187's provisions were never implemented due to a court decision finding they were preempted by federal law and a settlement reached with newly elected Governor Davis. See *League of United Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997); Evelyn Nieves, *California Calls Off Effort to Carry Out Immigrant Measure*, N.Y. TIMES, July 30, 1999, at A1.

on a suspect classification, in order to selectively strip away a right the group had previously enjoyed and that was otherwise available to all others in that state.¹⁸³

Because the constitutional stakes posed by Proposition 8 were so high, it was immediately challenged by same-sex couples, gay rights organizations, the City and County of San Francisco, and a number of other municipalities.¹⁸⁴ Representatives of groups protected by strict scrutiny under the California Equal Protection Clause based on their race, gender, and religion also sought to invalidate Proposition 8, asserting a direct interest in challenging the measure despite its ostensible impact only on lesbians and gay men.¹⁸⁵ They argued that if the court permitted Proposition 8 to stand, it

¹⁸³ The closest analogue was the proposition struck down on federal equal protection grounds in *Mulkey v. Reitman*, 413 P.2d 825 (Cal. 1966), *aff'd*, 387 U.S. 369 (1967) (discussing Proposition 14, formerly incorporated into the California Constitution as CAL. CONST. art I, § 26. It read: “Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.” The section was subsequently repealed.). Additionally, an 1894 amendment to the California Constitution, which was not enacted by initiative, a mechanism that was adopted in 1911, but was proposed by the Legislature and approved by the voters, selectively stripped the right to vote from persons who were not literate in English. *See Strauss v. Horton*, 207 P.3d 48, 104 (Cal. 2009). That amendment was not challenged on any ground until well into the next century, when the California Supreme Court struck it down as a violation of the federal constitution. *Castro v. State*, 466 P.2d 244 (Cal. 1970). Notably, even Proposition 209, which amended the California Constitution to prohibit affirmative action based on gender or race, did not *facially* target only a particular racial group or a particular gender, although a court might well find that the voters specifically intended to disadvantage women and/or non-white racial groups. *See* Stephen M. Rich, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments after Romer v. Evans*, 109 YALE L. J. 587, 615–16 (1999) (comparing measures like Proposition 209 to measures that “specifically nam[e] the minority targeted for disadvantage”).

¹⁸⁴ *Strauss*, 207 P.3d at 68–69. California Attorney General Jerry Brown represented the state of California in the case; however, rather than defending Proposition 8, the Attorney General agreed it was invalid and urged the court to strike it down, albeit on different grounds than those argued by the petitioners. *See id.* at 116. His decision to do so was not unprecedented. In *Mulkey v. Reitman*, 387 U.S. 369 (1967), a challenge to the 1964 measure that attempted to amend the California Constitution to roll back protections against racial discrimination in housing, then-Attorney General Thomas Lynch similarly refused to defend the measure, because he viewed it as unconstitutional. *See* Aurelio Rojas, *California’s Prop 8 Legal Challenge Harkens Back to 1966 Housing Measure*, SACRAMENTO BEE, Feb. 18, 2009, available at <http://www.sacbee.com/295/story/1632737.html>; Brief for the State of California as Amicus Curiae, *Reitman v. Mulkey*, 387 U.S. 369 (1967) (No. 483), 1967 WL 113956.

¹⁸⁵ Those additional petitioners included: (1) the NAACP Legal Defense and Educational Fund, Inc, the Asian Pacific American Legal Center, the California State Conference of the NAACP, the Mexican American Legal Defense and Educational Fund, and the Equal Justice Society, *see* Petition for Writ of Mandate Filed, *Asian Pacific Am. Legal Ctr., et al. v. Horton*, No. S168281 (Cal. Nov. 14, 2008), available at <http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168281-petition-mandate.pdf>; (2) Equal Rights Advocates and the California Women’s Law Center, *see* Petition

would effectively negate California's equal protection guarantee and strip politically vulnerable groups of any meaningful protection under the state constitution.¹⁸⁶ As if foreshadowing its ultimate ruling, which sought to downplay the significance of the measure, the California Supreme Court agreed to hear the petitions filed by gay rights advocates and municipalities, but declined jurisdiction of the challenges by other groups.¹⁸⁷

B. THE *STRAUSS* LITIGATION

The petitioners in *Strauss v. Horton* (as the combined cases would become known) challenged Proposition 8 on the ground that it was too far-reaching a change to the California Constitution to be enacted by a simple voter initiative.¹⁸⁸ The California Constitution distinguishes between constitutional amendments, which may be enacted by initiative, and constitutional revisions, which require a more deliberative process.¹⁸⁹ The constitution itself does not define either term, but the California Supreme Court had previously held that a measure would be deemed a revision if it "involve[d] a change in the basic plan of California government, *i.e.*, a change

for Writ of Mandate Filed, Equal Rights Advocates & Cal. Women's Law Ctr. v. Horton, No. S168302 (Cal. Nov. 17, 2008), *available at* <http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168302-petition-support.pdf>; and (3) the California Council of Churches, the General Synod of the United Church of Christ, the Episcopal Bishop of California, the Episcopal Bishop of Los Angeles, the Progressive Jewish Alliance, the Unitarian Universalist Association of Congregations, the Unitarian Universalist Legislative Ministry of California, and the Northern and Southern California Nevada Conferences of the United Church of Christ *see* Petition for Writ of Mandate Filed, Cal. Council of Churches, et al. v. Horton, No. S168332 (Cal. Nov. 17, 2008), *available at* <http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168332-petition-mandate.pdf>.

¹⁸⁶ *See*, *e.g.*, Council of Churches, Petition for Writ of Mandate, *supra* note 185 at 1–2 (arguing that Proposition 8 would nullify California's equal protection guarantees for vulnerable groups such as religious minorities).

¹⁸⁷ *See Strauss*, 207 P.3d at 69. The court invited the groups to file amicus briefs instead, which all of them did. The court also granted the proponents of Proposition 8 permission to intervene in all three cases. *Id.*

¹⁸⁸ *See id.* at 60 (“[T]he principal issue before us concerns the scope of the right of the people, under the provisions of the California Constitution, to change or alter the state Constitution itself through the initiative process so as to incorporate such a limitation as an explicit section of the state Constitution.”). The *Strauss* petitioners did not raise any federal claims; however, three same-sex couples filed a challenge to Proposition 8 in federal court shortly after the ruling in *Strauss*, alleging that Proposition 8 violated the equal protection and due process clauses of the federal constitution. *Perry v. Schwarzenegger*, 2009 WL 1490740 (N.D. Cal, May 22, 2009).

¹⁸⁹ The California Constitution permits amendment of the constitution by voter initiative. CAL. CONST. art. XVIII, § 3. A revision of the constitution may be accomplished only by the legislature's submission of a proposed revision to the voters, or through a constitutional convention and popular ratification. CAL. CONST. art. XVIII, §§ 1–2.

in its fundamental structure or the foundational powers of its branches.”¹⁹⁰ The court had also clarified previously that “even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision.”¹⁹¹

The *Strauss* petitioners contended that Proposition 8 was just such a measure. Despite its “deceptively terse language,”¹⁹² the initiative sought to alter the California Constitution in an unusual way—it “require[d] disparate government treatment of a stigmatized minority group based on a suspect classification.”¹⁹³ The petitioners argued that by establishing unequal treatment of lesbians and gay men as a constitutional policy, Proposition 8 would significantly alter California’s system of government. Rather than a democracy premised on equal citizenship, California would become a mobocracy in which a bare majority of voters could selectively strip any disfavored group of any right, without any constraints imposed by the state constitution.¹⁹⁴

The petitioners did not argue that Proposition 8 was invalid merely because it sought to limit a fundamental right. That argument would have been futile in light of the court’s previous decision in *People v. Frierson*, which permitted the voters to amend the California Constitution to reinstate the death penalty after the court held that California’s death penalty statutes

¹⁹⁰ *Legislature v. Eu*, 816 P.2d 1309, 1318 (Cal. 1991). In practice, however, the court has applied that standard to invalidate an initiative only twice. In *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990), the court invalidated an initiative amendment that would have prevented the court from construing several state constitutional protections for criminal defendants more broadly than their analogues under the federal constitution. The only other case in which the court invalidated an initiative amendment was *McFadden v. Jordan*, 196 P.2d 787 (Cal. 1948), which held that a proposed amendment that would have replaced large sections of the existing constitution was a quantitative revision. The *Strauss* petitioners did not allege that Proposition 8 was a quantitative revision; however, an amicus brief filed by state constitutional law professors argued that it should be invalidated on both quantitative and qualitative grounds. See Brief for Professors of State Constitutional Law as Amici Curiae Supporting Petitioners, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2008) (Nos. S168047, S168066, S168078), available at <http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s1680xx-amcur-prof-statelaw.pdf> (arguing that Proposition 8 quantitatively revised the California Constitution because it deprived same-sex couples of protection under multiple provisions mandating equality).

¹⁹¹ *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1286 (Cal. 1978).

¹⁹² Amended Petition for Extraordinary Relief at 15, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (No. S168047), available at <http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168047-amendedpetitionforextraordinaryrelief.pdf>.

¹⁹³ *Id.* at 26.

¹⁹⁴ *Id.* at 27 (arguing that Proposition 8 “opens the door to step-by-step elimination of state constitutional protections for lesbian and gay Californians and, indeed, for other disfavored minorities, perhaps even based on other suspect classifications”).

violated the state constitutional right to be free from cruel or unusual punishment.¹⁹⁵ Instead, the petitioners sought to shift the court away from a rights-based framework: They argued that equality is not simply a discrete constitutional right, but an animating principle that permeates both the substance and the structure of the California Constitution.¹⁹⁶ Therefore, unlike limiting the scope of a single substantive right, purporting to “limit” the principle of equal protection would have a significant effect on the system of California’s government.¹⁹⁷

The petitioners also contended that Proposition 8 stripped the courts of their traditional role as the ultimate guardians of democratic equality. The petitioners noted that unlike other constitutional rights, the sole purpose of equal protection is to prevent arbitrary discrimination.¹⁹⁸ Therefore, permitting the voters to create an exception to equal protection in order to discriminate against a disfavored group would gut the provision of any meaning. Rather than enforcing equal protection as a check on the abuse of majority power, as Justice Jackson classically envisioned in *Railway Express*,¹⁹⁹ a court’s rulings on equal protection would be no more than advisory, since a simple majority of voters could undo them simply by creating a constitutional exemption to equal protection for any group at any time.

C. THE STRAUSS MAJORITY OPINION

In *Strauss v. Horton*, the California Supreme Court upheld Proposition 8 as a valid amendment of the California Constitution by a vote of six to

¹⁹⁵ *People v. Frierson*, 599 P.2d 587 (Cal. 1979). After *Frierson*, there was little doubt that voters could use the initiative process to limit the scope even of a very significant constitutional right.

¹⁹⁶ Corrected Reply in Support of Petition for Extraordinary Relief at 8–10. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (No. 168047), available at <http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168047-corrected-reply-relief.pdf> [hereinafter Corrected Reply]. See also Brief of Professors of State Constitutional Law, *supra* note 190, at 12–16 (listing multiple provisions of the California Constitution that expressly incorporate equality norms); David B. Cruz, *Equality’s Centrality: Proposition 8 and the California Constitution*, 19 S. Cal. Rev. L. & Soc. Just. 43 (2010).

¹⁹⁷ Corrected Reply, *supra* note 196, at 8–10.

¹⁹⁸ The amicus brief filed by the NAACP Legal Defense and Education Fund, Inc. and other civil rights organizations stressed this point, explaining. “Like any constitutional provision, [equal protection] sometimes requires that a higher value trump a democratically enacted measure. But unlike most other constitutional provisions, the higher value that the equal protection clause embodies is the imperative to protect minorities from hostile majority sentiment.” Brief for Asian Pacific Am. Law Ctr., et al. as Amici Curiae Supporting Petitioners at 5–6, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (No. S168047) available at <http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168047-amcur-asianpacific-legal.pdf>.

¹⁹⁹ *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949).

one.²⁰⁰ What is most striking about the majority opinion in *Strauss* is not its rejection of the argument that equality plays a structural role in California's democracy, but its failure to engage the argument in a meaningful way.²⁰¹ In fact, if one were to read only the majority opinion, it would shed little light on the arguments actually presented to the court. According to the majority, the question before the court was whether the individual right to equal protection is so important that the voters should not be permitted to alter it.²⁰² Not surprisingly, when framed in those rights-based terms, which would have required the court to judge "the relative importance of the constitutional right at issue,"²⁰³ the majority concluded that it had no principled basis for doing so.²⁰⁴ In addition, the court's precedents "establish[ed] that the scope and substance of an existing state constitutional individual right...may be modified and diminished" by an initiative amendment.²⁰⁵ Therefore, by defining Proposition 8 simply as an amendment to an individual right, the majority effectively ensured that it would be upheld.

The *Strauss* majority also rejected the argument that Proposition 8 entailed a change in the court's fundamental role. Denying that judicial enforcement of equality serves a unique role, the majority held that the voters' alteration of California's equal protection clause to permit discrimination against a disfavored group did not substantially alter the court's responsibility: "California courts will continue to exercise their ba-

²⁰⁰ *Strauss v. Horton*, 207 P.3d 48, 48 (Cal. 2009). Justice Werdergar, who had joined the majority in the *Marriage Cases*, wrote a concurring opinion that rejected the majority's reasoning but concurred in the result. *Id.* at 124 (Werdergar, J., concurring). Justice Moreno, who also had joined the majority in the *Marriage Cases*, dissented from the majority's affirmation of Proposition 8, but concurred that it could not be applied retroactively to invalidate existing marriages. *Id.* at 128 (Moreno, J., concurring and dissenting).

²⁰¹ The California Supreme Court upheld Proposition 8 as a valid amendment of the California Constitution by a vote of six to one. *Strauss v. Horton*, 207 P.3d 48, 48 (Cal. 2009). Justice Werdergar, who had joined the majority in the *Marriage Cases*, wrote a concurring opinion that rejected the majority's reasoning but concurred in the result. *Id.* at 124 (Werdergar, J., concurring). Justice Moreno, who also had joined the majority in the *Marriage Cases*, dissented from the majority's affirmation of Proposition 8, but concurred that it could not be applied retroactively to invalidate existing marriages. *Id.* at 128 (Moreno, J., concurring and dissenting).

²⁰² *Strauss*, 207 P.3d at 99–100.

²⁰³ *Id.* at 100.

²⁰⁴ *Id.* at 103–05. In that respect, the decision in *Strauss* was similar to that in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Once the court framed the issue in *Bowers* as whether there is a fundamental right to homosexual sodomy, the decision to affirm the challenged statute was foreordained. *See id.* at 190. Similarly, once the majority in *Strauss* framed the petitioners' argument as resting on "the relative importance of the constitutional right at issue," the likelihood that the court would affirm the measure was overwhelming.

²⁰⁵ *Id.* at 105. *See also id.* at 124 (Kennard, J., concurring) (stating that the voters have the power to "enlarge or reduce the personal rights" protected by the state Constitution).

sic and historic responsibility to enforce *all* of the provisions of the California Constitution, which now include the new section added by the voters' approval of Proposition 8."²⁰⁶ In the majority's view, "Proposition 8 simply changes the substantive content of a state constitutional rule in one specific subject area—the rule relating to access to the designation of 'marriage.'"²⁰⁷

The majority also sought to minimize the significance of Proposition 8 by emphasizing that it did not "*entirely*" abrogate same-sex couples' rights of privacy, due process, and equal protection under the state constitution.²⁰⁸ Instead, the court held, "the measure carves out a narrow and limited exception" to those rights.²⁰⁹ Thus, even after Proposition 8, the court held that same-sex couples retained all of the state constitutional rights encompassed by the right to marry except for the right to be designated as "married."²¹⁰ "We emphasize," the majority opinion explained, that "it is only the designation of marriage—albeit significant—that has been removed by this initiative measure."²¹¹

D. THE STRAUSS DISSENT

In contrast to the majority, Justice Moreno's dissent recognized that equal protection "is not so much a discrete constitutional right as it is a basic constitutional principle."²¹² Justice Moreno took the majority to task for failing to acknowledge that Proposition 8 therefore did not simply chip away at the scope of a particular right, but "alter[ed] the meaning of the equal protection clause."²¹³ "[B]y its nature," he observed, equal protection is "inherently countermajoritarian."²¹⁴ Therefore, "[a]s a logical matter, it

²⁰⁶ *Strauss v. Horton*, 207 P.3d 48, 99 (Cal. 2009)

²⁰⁷ *Id.* See also *id.* at 124 (Kennard, J. concurring) ("Although the people through the initiative power *may not change* this court's interpretation of language in the state Constitution, they *may change* the constitutional language itself, and thereby enlarge or reduce the personal rights that the state Constitution as so amended will thereafter guarantee and protect.") (emphasis in original).

²⁰⁸ *Strauss*, 207 P.3d at 61.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* The court declined to reach the issue of "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 be a revision. *Id.* at 103 (emphasis in original).

²¹² *Id.* at 130.

²¹³ *Id.* at 140 (Moreno, J., dissenting and concurring) ("The majority's holding is not just a defeat for same-sex couples, but for any minority group that seeks the protection of the equal protection clause of the California Constitution.")

²¹⁴ *Id.*

cannot depend on the will of the majority for its enforcement, for it is the will of the majority against which the equal protection clause is designed to protect.”²¹⁵

Justice Moreno also criticized the contradiction between the majority’s recognition, in the *Marriage Cases*, that “[d]enying same-sex couples the right to call their relationships marriages treats them as ‘second-class citizens,’” and the majority’s subsequent holding, in *Strauss*, that the impact of Proposition 8 is “narrow and limited.”²¹⁶ As Justice Moreno observed: “Describing the effect of Proposition 8 as narrow and limited fails to acknowledge the significance of the discrimination” that the court itself had identified just a year earlier in the *Marriage Cases*.²¹⁷ In addition, Justice Moreno noted that even if the majority’s description was not directly contradicted by the court’s prior decision, the very notion of a “limited” exception to the principle of equal protection was illogical: “even a narrow and limited exception to the promise of full equality strikes at the core of, and thus fundamentally alters, the guarantee of equal treatment that has pervaded the California Constitution since 1849.”²¹⁸

Justice Moreno also concluded that Proposition 8 “usurps the judiciary’s constitutional role as protector of minority rights.”²¹⁹ By establishing that a simple majority of voters could selectively eliminate any right for the members of any group, the majority had eliminated any limits on “the power of a majority . . . to discriminate against minorities” under the state Constitution.²²⁰ As a result, Justice Moreno noted that the impact of the majority’s decision was not limited to lesbians and gay men, since any decision relying upon the state’s equal protection guarantee can be overridden by a simply majority vote:

Under the majority’s reasoning, California’s voters could permissibly amend the state Constitution to limit Catholics’ right to freely exercise their religious beliefs (Cal. Const. art. I, § 4), condition African-Americans’ right to vote on their ownership of real property (*id.*, § 22), or strip women of the right to enter into or pursue a business or profession (*id.*, § 8). While the federal Constitution would likely bar these in-

²¹⁵ *Id.*

²¹⁶ *Id.* at 130–31.

²¹⁷ *Id.* at 131.

²¹⁸ *Id.*

²¹⁹ *Id.* at 139.

²²⁰ *Id.* at 138.

itiatives, the California Constitution is intended to operate independently of . . . and in some cases more broadly than . . . its federal counterpart.²²¹

In short, Justice Moreno concluded that the majority's decision in *Strauss* "essentially strips the state Constitution of its independent vitality in protecting the fundamental rights of suspect classes."²²²

D. FROM *IN RE MARRIAGE CASES* TO *STRAUSS*

The court's well-meaning but myopic focus in *In re Marriage Cases* on equality as an individual right set the stage for its inability to recognize equality as an essential condition of democracy in *Strauss v. Horton*. The holdings in both cases are a powerful testament to the strength of the predominant view that sees equality and democracy as divorced, rather than inextricably linked. As even the dissenting opinions in the *Marriage Cases* recognized, the purpose of the suspect classification doctrine is to protect groups who are unfairly disadvantaged in the democratic process. For a court to permit a majority to compel discrimination against such a group as a constitutional mandate turns that doctrine on its head and alters the foundational premises of democratic government almost beyond recognition.²²³ And yet in *Strauss* a majority of the California Supreme Court was unable to see beyond its focus on equal protection as an individual right to discern the broader threat to democracy.

IV. MISSING LINKS: THE RELATIONSHIP BETWEEN FAMILY RECOGNITION AND POLITICAL EQUALITY

The decisions in *Strauss* and *In re Marriage Cases* generally appear to provide little support for a jurisprudence that recognizes the foundational role of equality in our governmental system and the profound effect that excluding an unpopular minority from social recognition can have on that group's ability to participate as equal citizens. In both cases, the court was unable to escape the heavy gravitational pull of the standard view of equality as a counterweight to democracy. As a result, even though the court in the *Marriage Cases* held that sexual orientation is a suspect classification

²²¹ *Id.* at 138–39.

²²² *Id.* at 139. See also Cruz, *supra* note 196; Eskridge, *Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, *supra* note 58, at 1850 (noting that under the holding in *Strauss*, a majority of California voters would be able to override the California Supreme Court's decision in *Perez v. Sharp*, striking down the state's prior ban on interracial marriage).

²²³ As the U.S. Supreme Court held with respect to a similarly discriminatory state constitutional amendment in Colorado: "It is not within our constitutional tradition to enact laws of this sort." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

under the California Constitution, it could not recognize the significant extent to which social stigma and marginalization continue to disadvantage gay people in the political process. Instead, the court implicitly assumed that gay people have adequate power in the democratic arena and justified its invalidation of California's statutory marriage ban almost exclusively as the enforcement of an individual right—not as an essential prerequisite of equal citizenship.

There is, however, one aspect of the majority decision in the *Marriage Cases* that hints at a different vision. In its discussion of the state's interest in marriage, the court seemed to recognize that exclusion from equal family recognition is not simply the denial of an important right, but a deeply stigmatizing and dehumanizing harm that profoundly affects the way same-sex couples and their families interact with others on a daily basis. The court's analysis provides a powerful lens for seeing why barring gay couples from marriage affects their ability to participate as equal citizens in the political process. Similarly, in its related analysis of why domestic partnership is not equal, the court undertook a remarkably sensitive and nuanced examination of the actual social realities of people's lives, including a frank acknowledgement of the extent to which the social meaning of marriage and domestic partnership has been shaped by official discrimination against gay people.

In the *Marriage Cases*, the majority decision considered the relationship between family recognition and democracy. The court concluded that the state has a strong interest in marriage in part because marriage plays an important role in democratic self-governance. In the court's view, marriage is the primary setting in which individuals acquire the moral qualities "required for citizenship in a self-governing community."²²⁴ Specifically, the court explained that marriage enables individuals to learn responsibility and concern for others—the same values which enable a person to participate as a responsible citizen in the public arena.²²⁵ "With this perspective, the family in a democratic society not only provides emotional companionship, but is also a principle source of moral and civic duty."²²⁶

²²⁴ *Marriage Cases*, 183 P.3d at 424 n.36 (quoting Bruce Hafén, *The Constitutional Status of Marriage, Kinship and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 477 (1983) (footnotes omitted).

²²⁵ *Id.* ("We have relied on the family to teach us to care for others, [and] to moderate . . . self-interest . . .") (alterations in original) (quoting Hafén, *supra* note 224, at 477).

²²⁶ *Id.* In the same article cited by the court, Hafén notes, "The process of learning to live in an organized but free society involves more than merely sustaining a capitalist economy. The basic

By adopting this narrative, the court was invoking a deeply culturally and legally resonant ideology in which marriage is seen to be essential to the “structure of our democratic society.”²²⁷ In this view, the marital family is the “necessary social context for the emergence of autonomous individuals who are the empirical foundation of political democracy.”²²⁸ It is “the very seedbed of democracy.”²²⁹ Despite enormous changes in the family, this narrative about democracy and the traditional family continues to exert a powerful cultural pull.²³⁰

Although the court did not seek to justify its holding on this basis, the court’s analysis shows that barring same-sex couples from marriage profoundly affects both their social and political statuses. Because marriage is widely seen as the primary venue in which individuals develop the moral values required of responsible citizens, the exclusion of gay people from

process of cultural transmission, without which the traditions and the fundamental values of the society are not passed on, depends upon the family.” Hafen, *supra* note 224, at 478.

²²⁷ *Lehr v. Robertson*, 463 U.S. 248, 257 (1983). Cf. Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997) (reconstructing Hegel’s analysis of how “monogamous marriage contributes to the development of the liberal state”).

²²⁸ BRIGITTE BERGER & PETER L. BERGER, *THE WAR OVER THE FAMILY: CAPTURING THE MIDDLE GROUND* 172 (1983). The logic of this position derives from a particular interpretation of the shift from an agrarian, status-based society to a democratic, individualist, contractually-based one. On this reading, while status-based societies depended on external restraints to control the behavior and insure the cooperation of their members, democracies are associations of self-interested individuals who must somehow be inculcated with internal moral restraints and rationality. As the most important non-contractual, involuntary social entity to survive the transition to democratic individualism, the marital family is seen as uniquely responsible for counteracting the centrifugal force of self-interest—that is, for inculcating individuals with the self-control and civic virtue necessary for a stable democracy to survive. See Hafen, *supra* note 224, at 476–79; see also, CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD* (1997) (arguing generally that the family provides a necessary refuge from the self-seeking of the market and an essential foundation for democracy).

²²⁹ Wardle, *Is Marriage Obsolete?*, *supra* note 129, at 225 (citing CHRISTINE BEASLEY, *DEMOCRACY IN THE HOME* 25 (1954)). Wardle continues: “Through marriage and raising children, most adults relearn the importance and refine the skills of sacrificing for others, caring for each other and for the next generation, looking beyond the present, and nurturing the basics of life and community.” *Id.* (concluding that the family is “an indispensable prerequisite for democracy”). See also Hafen, *supra* note 224, at 479 (arguing that by providing a stable structure that mediates between the individual and the state, the marital family provides a source of personal values and beliefs that precludes totalitarian control by the state and therefore is essential to “the structure of political freedom”).

²³⁰ See Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 355 (1997) (“Even today, despite vast changes in the structure and meaning of family during the past several decades, contemporary understandings of family continue to presume, and to be measured against, a ‘traditional’ family....”); see also *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004) (affirming Florida’s ban on adoption by gay parents based on the state’s interest in “promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society”).

marriage stigmatizes lesbians and gay men as being both morally and civically unfit.²³¹ That exclusion reinforces the pernicious stereotype that lesbians and gay men are incapable of lasting commitment or true family bonds—that, instead, they are primarily motivated by selfish adult desires and sexual self-interest.²³² Those stereotypes are then used to justify excluding same-sex couples from full legal recognition as partners or parents,²³³ thereby cementing their inferior status and impairing their credibility in both the private and public realms.

Ironically, in fact, the very conduct that many see as validating the morality of heterosexual persons—namely, a desire to marry—is often portrayed by those who oppose marriage for same-sex couples as the ultimate manifestation of selfishness on the part of lesbians and gay men. Merely by seeking the right to marry, lesbians and gay men have been condemned by conservative scholars for allegedly putting their individual rights above the good of society and of children.²³⁴ In this stereotypical discourse, the

²³¹ In making the point that lesbian and gay people are stigmatized by being excluded from marriage, I do not intend to endorse the view that marriage is the sole family structure in which individuals can develop loving, interdependent relationships or the qualities of responsibility and caring for others. To the contrary, that same-sex couples have demonstrated those qualities despite being excluded from marriage or any other form of relationship recognition for centuries constitutes powerful evidence to the contrary.

²³² See Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 293–94 (2000) (“Law tells all people that lesbians and gay men are lone individuals despite the fact that they have ‘familistic’ relationships. This story is both false and stigmatizing.” (footnote omitted)); see also Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255, 271–79 (2002) (describing social science data showing that both same-sex and interracial relationships are stigmatized by depicting them as based primarily on sexual desire rather than on love and commitment).

²³³ See Kevin G. Clarkson, David Orgon Coolidge & William C. Duncan, *The Alaska Marriage Amendment: The People’s Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 220 (1999) (arguing that same-sex relationships are based on private interests and do not provide the public benefits that heterosexual marriage provides); Wardle, *Is Marriage Obsolete?*, *supra* note 129, at 223–24 (same); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581 (1999) (same); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 897–98 (1997) (arguing that gay and lesbian parents are motivated by “personal self-gratification” rather than concern for children).

²³⁴ Even some people who support the freedom of same-sex couples to marry may inadvertently foster those stereotypes by stating or implying that same-sex unions are valuable only to the individuals involved, and not to the broader society. As Kenneth Karst long ago noted, the concept of citizenship encompasses both “participation and responsibility.” Thus in addition to being entitled to rights, “a citizen is a responsible member of the society, one who owes obligations to his fellow members.” Karst, *Equal Citizenship*, *supra* note 11, at 8. By treating gay people solely as the bearers of individual rights, but not as responsible, contributing members of society, such perspectives diminish their status as equal citizens.

very idea of marriage for same-sex couples is “the symbol of the ability to flout moral teachings in the name of individualism and choice.”²³⁵

The majority decision in the *Marriage Cases* addressed these stereotypes even more directly in its analysis of why requiring same-sex partners to enter into domestic partnerships, rather than marriages, is not equal. Implicitly rejecting the dissenters’ views that the difference between marriage and domestic partnership is purely social and thus off-limits to judicial review, the court held that it could not determine the validity of California’s bifurcated statutory scheme in the abstract, but needed to consider the actual impact of the domestic partnership laws on same-sex couples and their children. Given “the long and celebrated history of the term ‘marriage,’” the court found that withholding that designation from same-sex couples “will, as a realistic matter, impose appreciable harm on same-sex couples and their children”²³⁶ In addition, the court found that because gay people have suffered a long history of discrimination, being relegated to a separate status inevitably would be seen as stigmatizing and “a mark of second-class citizenship.”²³⁷ As the majority opinion noted, where a group suffers from “pre-existing . . . prejudice,” “[i]t is logical to conclude that . . . further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.”²³⁸

In sum, the court in the *Marriage Cases* recognized that the social status and legal status of gay people are inextricably intertwined—that relegating same-sex couples to a separate family status would inevitably hamper their ability to be seen and to participate in the broader society as equal citizens. The court did not expressly connect those insights to its ruling that anti-gay laws should be subject to heightened scrutiny. Nonetheless,

²³⁵ June Carbone & Naomi Cahn, *Judging Families*, 77 UMKC L. Rev. 267, 269 (2008). Cf. *Goodridge v Dep’t of Pub. Health*, 798 N.E.2d 941, 999 n. 20 (Mass. 2003) (Cordy, J., dissenting) (criticizing majority opinion for purportedly failing to distinguish between an individual’s interest in marriage and “society’s interest in the institution of marriage as a stabilizing social structure that justifies the statutory benefits and burdens that attend to the status provided by its laws”).

²³⁶ *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008) *reh’g denied*, 2008 Cal. LEXIS 6807, at *1 (Cal. June 4, 2008). That conclusion was not dependent on a finding of a deliberate intent to discriminate. Instead, the court focused on the actual practical impact of the statutes, noting: “even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions.” *Id.* at 451.

²³⁷ *Id.* at 445. Accord David B. Cruz, *The New “Marital Property”: Civil Marriage and the Right to Exclude?*, 30 Cap. U. L. Rev. 279 (2002).

²³⁸ *Marriage Cases*, 183 P.3d at 445 (quoting *M. v. H.* [1999] 2 S.C.R. 3, 54–55 [¶ 68].)

we can see that the political impact of those legally enforced stereotypes is profound, and fits neatly within Ely's categories of entrenchment and discrimination.²³⁹ The law privileges the legal institution of marriage and, at the same time, maintains it as a monopoly for heterosexual people. Marriage bans therefore entrench the political power of the heterosexual majority by reinforcing the stereotype that gay people are incapable of the moral values "required for citizenship,"²⁴⁰ and also by excluding them from the increased visibility and social acceptance that equal access to marriage would entail.²⁴¹

Marriage bans also discriminate by stigmatizing gay people as morally inferior in the realms of both family and public life. As sociologist Kath Weston has noted: "It is but a short step from positioning lesbians and gay men somewhere beyond 'the family'—unencumbered by relations of kinship, responsibility, or affection—to portraying them as a menace to family and society."²⁴² Marriage bans reinforce this invidious stereotype, which is itself largely a product of prior government and private campaigns to demonize gay men lesbians as dangerous sexual deviants.²⁴³ As a result, because gay people are already enmeshed in stereotypes relating to their supposed danger to children and unfitness for family life, they are especially vulnerable to political campaigns, such as Proposition 8, which deliberately exploit those false stereotypes and irrational fears.²⁴⁴ For example, it was surely no accident that the messages of the Yes on Proposition 8 campaign

²³⁹ See *supra* Part II.A.

²⁴⁰ See, e.g., Wardle, *Is Marriage Obsolete?*, *supra* note 129, at 220 ("[T]he assumption that same-sex unions are fungible with marriages in terms of social benefits is simply unsupported by evidence. The heterosexual dimensions of the relationship are at the very core of what makes 'marriage' what it is and why it is so valuable to individuals and to society.").

²⁴¹ Being barred from the opportunity to marry and to interact with others as a married couple undoubtedly has an extremely negative impact on gay people's ability to combat invidious stereotypes and assumptions about their relationships. As Ely recognized: "Increased social intercourse is likely not only to diminish the hostility that often accompanies unfamiliarity, but also to rein somewhat our tendency to stereotype in ways that exaggerate the superiority of those groups to which we belong." ELY, *DEMOCRACY AND DISTRUST*, *supra* note 35, at 161.

²⁴² KATH WESTON, *FAMILIES WE CHOOSE* 23 (Richard D. Mohr et al. eds., 1991).

²⁴³ See Eskridge, *Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, *supra* note 58, at 1790-1796 (describing "period of anti-homosexual terror" in California and nationally from the turn of the twentieth century through the early 1960s).

²⁴⁴ *Id.* at 1825-34 (describing long history of anti-gay political campaigns, including Proposition 8, that have sought to exploit invidious stereotypes that gay people are selfish, harmful and dangerous to children).

focused on alleged threats to children posed by permitting same-sex couples to marry.²⁴⁵

In the *Marriage Cases*, the majority decision seemed at least implicitly to recognize that because of the specific history of anti-gay discrimination, official discrimination against gay families is likely to be particularly stigmatizing and to be seen both by gay people and by others as a “mark of second-class citizenship.”²⁴⁶ In *Strauss*, however, the court abandoned that recognition. As a result, the court upheld a measure that not only sanctioned discrimination against lesbians and gay men as constitutional principle, but it did so in an arena—marriage and family recognition—that has a particularly severe impact on the ability of lesbians and gay men to participate as equal citizens in the political arena.

CONCLUSION

The California marriage cases are a sobering reminder of just how high the democratic stakes of contemporary marriage litigation may be. For the first time, the California Supreme Court approved an initiative amending the California Constitution to facially target the members of a particular minority group. As a result of that decision, the California Constitution no longer holds out the principle of equal citizenship as a universal guarantee. The practical consequences of that precedent for Californians remain to be seen. But, as a constitutional precedent, California’s defection from one of the most foundational principles of democratic governance should be of grave concern to anyone who cares about the future of democracy.²⁴⁷

Throughout our nation’s history, we have maintained the principle of equal citizenship as a constitutional ideal. That principle has served as America’s “cultural glue.”²⁴⁸ Because Americans lack “the homogeneities

²⁴⁵ *Id.* at 1831–33 (describing continuity between the messages used by Anita Bryant’s “Save Our Children” campaign to ban adoption by gay parents in Florida and messages used by the Proposition 8 campaign).

²⁴⁶ *Marriage Cases*, 183 P.3d at 445; see also *id.* at 401–02 (“because of the widespread disparagement that gay individuals historically have faced, it is all the more probable that excluding same-sex couples from the legal institution of marriage is likely to be viewed as reflecting an official view that their committed relationships are of lesser stature than the comparable relationships of opposite-sex couples”).

²⁴⁷ To borrow Danielle Allen’s eloquent metaphor, the California Supreme Court’s validation of Proposition 8 as a legitimate constitutional measure constitutes the type of “congealed distrust” that “indicates political failure” in a democracy. ALLEN, TALKING TO STRANGERS, *supra* note 29, at xiii.

²⁴⁸ Kenneth Karst, *The Bonds of American Nationhood*, 21 CARDOZO L. REV. 1141, 1182 (2000) [hereinafter Karst, *Bonds*].

of ancestry, language, and religion”²⁴⁹ that have unified some other political cultures, we have forged a national identity that is “bound up with universal rights.”²⁵⁰ The history of our nation is rife with inequality, from slavery to laws denying the humanity of immigrants, women and other groups. Since the country’s founding, however, the aspiration toward universal equal citizenship rights has provided marginalized groups with a fulcrum for demanding inclusion.²⁵¹ Writing of the framers, Lincoln described that aspiration, even as he acknowledged our failure to realize it:

They meant to set up a standard maxim for a free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.²⁵²

Similarly, Kimberlé Crenshaw has noted that “rights are a way of saying that a society . . . ought to live up to its deepest commitments.”²⁵³ The California Supreme Court’s decision in *Strauss* poses the question of what happens when a court permits a majority to withdraw its commitment to the *principle* of universal equality.

²⁴⁹ *Id.* at 1144.

²⁵⁰ *Id.* Karst emphasizes that we have violated those rights with distressing regularity. *Id.* at 1148 (“With little or no judicial protection, the members of racial, ethnic, or religious minorities were repeatedly beset by public policies that treated them as disloyal, excluded them from full participation in the community’s public life, or coerced them into conforming to the majority’s culture.”).

²⁵¹ For example, “civil rights protestors exposed a series of contradictions—the most important being the promised privileges of American citizenship and the practice of absolute racial subordination. Rather than using the contradictions to suggest that American citizenship was itself illegitimate or false, civil rights protestors proceeded as if American citizenship were real, and demanded to exercise the ‘rights’ that citizenship entailed.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1368 (1988) [hereinafter Crenshaw, *Race, Reform, and Retrenchment*]; see also Karst, *Bonds*, *supra* note 248, at “1159 (“From the civil rights movement to the various gay rights movements, individuals and groups have articulated their claims in the language of universal rights.”); Gans, *The Unitary Fourteenth Amendment*, *supra* note 75, at 914–15 (noting that “the vision of a polity of free and equal citizens” has repeatedly given rise to claims for democratic inclusion and equal citizenship on the part of previously marginalized groups).

²⁵² Jeffrey Leigh Sedgwick, *Abraham Lincoln and the Character of Liberal Statesmanship*, in LEGACY OF DISUNION: THE ENDURING SIGNIFICANCE OF THE AMERICAN CIVIL WAR 100, 106 (Susan-Mary Grant & Peter J. Parish eds., 2003) (quoting Abraham Lincoln’s Speech at Springfield, Illinois on June 26, 1857).

²⁵³ Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 251, at 1365–66. See also Sheldon S. Wolin, *Transgression, Equality, and Voice*, in DEMOKRATIA: A CONVERSATION ON DEMOCRACIES ANCIENT AND MODERN 63, 80 (Josiah Ober & Charles Hedrick, eds., 1996) (noting that “democracy was and is the only political ideal that condemns its own denial of equality and inclusion”).

California is often seen as a harbinger of broader trends—both “a model and antimodel for the nation and sometimes for the globe.”²⁵⁴ Despite its vindication of equal protection in the *Marriage Cases*, the California Supreme Court ultimately was unable to see equality as more than an individual right, or to weave its nascent recognition of a link between family recognition and equal citizenship into a broader recognition of equality as an essential democratic value. As a result, in *Strauss*, it was unable to grasp the profoundly undemocratic implications of validating “an exception to equal protection.” That failure underscores the urgency of recuperating an account of democratic equality that is neither an anemic proceduralism, nor an appeal to politics denuded of any meaningful constitutional dimension.

That renewed vision of equality must be broader than it traditionally has been—and in particular must include family recognition. When courts enforce constitutional equality norms in marriage and other family law cases, they are not simply enforcing individual or minority rights, as the majority decision in the *Marriage Cases* held. Nor are they improperly intruding into a social realm that should remain off-limits to judicial review, as the dissenters in the *Marriage Cases* urged. Rather the courts are clearing the channels of social, and ultimately political, enfranchisement, by opening a space in which a broader range of caring and committed relationships can be protected, and in which a truly democratic diversity of families can have the same opportunity as the traditional family to provide both a legally protected haven of privacy on the one hand, and a foundation for equal citizenship in the public arena on the other.

²⁵⁴ PETER SCHRAG, CALIFORNIA: AMERICA'S HIGH-STAKES EXPERIMENT I (UC Press 2006).