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# TESTING DEMOCRACY: MARRIAGE EQUALITY, CITIZEN-LAWMAKING AND CONSTITUTIONAL STRUCTURE

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## INTRODUCTION

What a spectacle it was! On November 4, 2008, voters across the country simultaneously elected the nation's first non-white male president, while voters across California took away every Californian's right to marry another consenting adult of the same sex.<sup>1</sup> Whatever else may be said about the purported dawn of a "post-racial" era,<sup>2</sup> no question exists that we remain firmly entrenched in heterosexist supremacy; at least in the area of marriage choice, California, together with most of the United States, re-

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\* Professor of Law, University of Miami. Special gratitude goes to the activists, lawyers and parties that have pioneered the controversies addressed in this special issue, and to the authors and editors who have made this timely and topical publication possible. Similar gratitude goes to the countless scholars, in addition to these authors, who in recent decades have blazed the social, political and legal trails that bring us to today. All errors are mine.

<sup>1</sup> Const. art. I, § 7.5 (amended 2008). This amendment is commonly known and referred to throughout this issue as Proposition 8. See *infra* Part I. Although outside the scope of this Introduction, it bears mention that Californians are neither alone nor unique in doing so. In recent decades, this imposition of marriage inequality through mass vote has taken place in many states and localities. See, e.g., *infra* notes 114 and 123 and sources cited therein (on similar anti-civil right referenda). And in 2008, voters in Florida and other states acted similar to those in California. See, e.g., Jesse McKinley and Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1. This increasing use of direct democracy in recent decades to deny formal equality to sexual minorities has raised many questions about the legitimacy of the procedure. See Symposium, *The Constitutionality of Anti-Gay Ballot Initiatives*, 55 OHIO ST. L.J. 491 (1994); Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905 (1993); John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153 (1993); Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993); see also *infra* notes 114 and 123 and sources cited therein (on referenda and similar devices).

<sup>2</sup> Some heralded such a dawn upon Barack Obama's election to the U.S. Presidency. See, e.g., Adam Nagourney, Elisabeth Bumiller, Marjorie Connelly, and Jeff Zeleny, *Obama: Racial Barrier Falls in Decisive Victory*, N.Y. TIMES, Nov. 5, 2008, at A1. A year later others (still) questioned it. See, e.g., Justin Ewers, *Obama and Race Relations: Civil Rights Leaders Aren't Satisfied*, U.S. NEWS & WORLD REP., Apr. 30, 2009, § Nation & World.

mains firmly mired in the separate-but-equal phase of social struggle and legal evolution.<sup>3</sup>

This issue consists of two substantive articles and a comment, all of which approach the questions raised by California's experience with marriage in/equality from several intellectual and policy angles. Despite the authors' diverse approaches, the articles all share some basic commonalities. Each author helps illustrate the cultural edge of law and policy by explicitly situating legal analysis within the appropriate social and cultural context and explaining the relevance of culture and context to legal choices. Each author also helps to illustrate both the enduring elusiveness of "equality" as a legal, social, or constitutional concept, and "democracy" as a structure for effective and just national self-governance. In doing so, the authors confirm the limitations of equality as judicially constructed, and the dangers of democracy as a formal procedure, in the United States. Finally, and certainly to be expected, each of the authors in this issue helps demonstrate the vexed state of law, lawmaking and adjudication. Each of these four overarching themes represents terrain deeper and wider than this Introduction can undertake. Instead, I aim to highlight and expand on the primary issues raised by the authors, situating them in the context of the larger socio-political landscape of our times, to encourage future work on the various aspects of the themes the authors elucidate.<sup>4</sup>

To do so, this Introduction divides into three parts. Part I summarizes the main points of the primary articles, and how they inter-relate. This discussion first takes up the themes salient in the two articles focusing most directly on law, justice and the politics of adjudication, before turning to the themes most salient in the comment, which focus more directly on discourse, culture and the politics of lawmaking. Part II then turns to the larger socio-political context for the lawmaking acts that resulted in the adoption of Proposition 8 and its amendment of the California Constitution. This larger context provides a consistent framework for the particularistic analyses of each author and allows every reader to consider each article, and this issue as a whole, within this larger setting. Part III then turns to the question of citizen-lawmaking as a purportedly democratic exercise—as reflected by Proposition 8 and similar efforts—that in recent decades has grown in use, mainly as part of the larger socio-political dynamics discussed in Part II. Part III concludes by etching a brief and basic historical

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<sup>3</sup> See *infra* note 40 and accompanying text (on "separate but equal" in the marriage policy context).

<sup>4</sup> See *infra* note 7 (on the scope and focus of this Introduction).

framework to help inform the consideration of marriage equality as public policy by judges, elected representatives and citizens lawmakers in the various states or at the federal level. In this way, I hope to support the work of the authors and editors of this issue, as well as to encourage scholars everywhere who are concerned with questions of law, justice and democracy to continue this important work in ever more potent terms.

## I. LAW AND CULTURE: REFLECTIONS ON EQUALITY AND DEMOCRACY, AMERICAN STYLE

The trio of texts comprising this issue collectively provide a timely snapshot of the workings of democracy, and into the “democratic” construction of in/equality in contemporary American society. This snapshot provides glimpses into deep and even existential questions of American nationhood or, at least, of American constitutionalism. These texts not only raise compelling questions about foundational premises and societal values that most Americans take for granted, but also compel additional questions about the future of American fundamentals regarding the Rule of Law and constitutional structure. The authors and editors of this issue provide a gritty yet timely snapshot of injustice in the making, effectively challenging all concerned citizens to do something about it.

### A. MAPPING THE MOMENT: SEXUAL MINORITIES AND DEMOCRACY, UNDER THE RULE OF LAW?

The first two articles, written by Shannon Minter<sup>5</sup> and Professor David Cruz,<sup>6</sup> focus on the judiciary’s role in the marriage equality debate. These authors delve into the convergence of both substantive and procedural legal doctrines or constructs that are most directly relevant to the processes of interpretation and adjudication in this complex set of cases. But both make clear that equality, not detail or procedure, is the matter squarely at stake here.<sup>7</sup>

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<sup>5</sup> Shannon Price Minter, *The Great Divorce: The Separation of Equality and Democracy in Contemporary Marriage Jurisprudence*, 19 S. CAL. REV. L. & SOC. JUST. 89 (2010).

<sup>6</sup> David B. Cruz, *Equality’s Centrality: Proposition 8 and the California Constitution*, 19 S. CAL. REV. L. & SOC. JUST. 45 (2010).

<sup>7</sup> Procedural questions are embedded in these cases in a peculiar if not unique manner because of the peculiarities in California law regarding constitutional change. Under California law, textual changes to the state constitution that “revise” it cannot be enacted by referendum; only changes that amount to an “amendment” can be accomplished through this procedure. Therefore, the change to the California Constitution made by Proposition 8 would be valid using this procedure only if the change is deemed an “amendment” rather than a “revision” of the document. This relationship between substantive meanings or definitions and procedural correctness inevitably commingles questions of process and of substance in complicated and technical ways.

Both Minter and Cruz review in some detail the opinions in the two California Supreme Court rulings that bracket Proposition 8, *In Re Marriage Cases*<sup>8</sup> and *Strauss v. Horton*.<sup>9</sup> In the first case, the California Supreme Court held both that lesbians and gays constitute a “suspect classification” under California Equal Protection law, and that the failure to designate same-sex unions formally as “marriage” violated the Equal Protection guarantee of the California Constitution.<sup>10</sup> Because California law already accorded same-sex domestic partnerships “virtually all” the legal and material benefits of formal “marriage,” this case and ruling focused squarely on the question of equality relating only to the formal designation of a union.<sup>11</sup>

Proposition 8 was placed on the California ballot in response to this seemingly technical but symbolic ruling. Proposition 8, framed as a single sentence, declares that “[o]nly marriage between a man and a woman is valid or recognized in California.”<sup>12</sup> Proposition 8 thereby intentionally and expressly deprives same-sex couples of the very thing at issue in *In Re Marriage Cases*: the formal, legal designation and recognition of same-sex “domestic partnerships” as “marriages” under state law.<sup>13</sup> The controversy

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While recognizing that procedural questions are inextricably intertwined with substantive or normative issues in these cases, the Introduction remains focused on this issue’s texts, which collectively center “equality” and “democracy” as the conceptual lynchpins of the controversy and situation before us. Nevertheless, as the authors make plain, any procedure that allows a simple majority to surgically remove a fundamental right from the state constitution only with respect to a single, selected minority on the basis of whimsical, frivolous, false, irrational or prejudiced grounds *must* violate substantive notions of due process. In fact, this overarching point of constitutional doctrine was presented by the California Attorney General in his *Strauss* Brief on behalf of the State, arguing that Proposition 8 was invalid both procedurally and substantively: Proposition 8 so disturbs the meaning of equality under the state constitution, the state Attorney General stated, that it cannot stand even if it is deemed to amend (rather than revise) the Constitution because it indirectly but effectively abrogates fundamental rights protected by Article I without a compelling state interest. *See* Brief of California Attorney General on Behalf of State. In other words, absent some compelling exigency, any procedure selectively imposing inequality on a historically marginalized minority cannot be reconciled with well-established constitutional concepts and doctrines relating to constitutional governance. Justice Moreno’s dissent from the *Strauss* opinion underscored this same bottom-line point, which the authors affirm below even as they focus on questions of equality, democracy and culture. *See infra* note 22 and accompanying text (on the Moreno dissent).

<sup>8</sup> 183 P.3d 384 (Cal. 2008) *reh’g denied*, 2008 Cal. LEXIS 6807, at \*1 (Cal. June 4, 2008).

<sup>9</sup> 207 P.3d 48 (Cal. 2009).

<sup>10</sup> 183 P.3d at 401.

<sup>11</sup> *See* Cruz, *supra* note 6, at 84-86.

<sup>12</sup> *See* Const. art. I, § 7.5 (amended 2008).

<sup>13</sup> *See* Minter, *supra* note 5; Cruz, *supra* note 6.

thus pivots on a narrow, yet evidently high-stakes, issue: whether California formally must recognize same-sex partnerships as marriages.<sup>14</sup>

In November 2008, fifty-two percent of California voters approved Proposition 8's reinstatement of the pre-existing "separate but equal" regime.<sup>15</sup> Through this vote, the California Constitution was amended specifically to prohibit the formal recognition of same-sex "domestic partnerships" as legal "marriages;" however, it allowed all of the benefits previously endowed under the formal designation of a union or partnership, both material and legal, to remain in place.<sup>16</sup> Thus, Proposition 8 purports to amend the California Constitution in a manner that indirectly but effectively inverts the substantive meaning of the state's Equal Protection Clause as it was interpreted by the California Supreme Court in *In Re Marriage Cases*.

Given this "democratic" constitutional reinterpretation of Equal Protection, Proposition 8 was promptly challenged in state court, and the Supreme Court agreed to an expedited resolution. In *Strauss v. Horton*, the very same judges who decided *In Re Marriage Cases* concluded that California voters may indeed "amend" the meaning (if not the text) of a particular constitutional provision, as interpreted by the State Supreme Court, such as the meaning of Equal Protection, by inserting in *another* part of the California Constitution a new provision that, on its face, does not even reference equality and whose language appears to have no relation to equal protection as a constitutional guarantee.<sup>17</sup> Yet, the majority in *Strauss* glided over this furtive approach to the alteration of "equal protection" and its well-established meanings: incredibly, the rationale for this substantively sweeping disposition boils down to a technical question of electoral procedure<sup>18</sup>—which the judges then chose to review formalistically, wrenched from its historical, conceptual, factual and constitutional moorings.<sup>19</sup>

As this background indicates, and the authors note, Proposition 8 and these two cases thus represent a unique controversy in equality law. Apart from the peculiar ways in which state law combines substance and procedure regarding textual constitutional change,<sup>20</sup> this controversy is unique

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<sup>14</sup> See *infra* notes 125–126 and accompanying text (on stigma in marriage designation inequality).

<sup>15</sup> See Cruz, *supra* note 6, at 45.

<sup>16</sup> See Minter, *supra* note 5, at 116–17.

<sup>17</sup> See Cruz, *supra* note 6, at 48–50; Minter, *supra* note 5, at 89.

<sup>18</sup> See *supra* note 7 (on the intertwining of substance and procedure in these cases).

<sup>19</sup> As both Cruz and Minter explain, this decontextualized approach trivialized (marriage) equality as a constitutional value and inverted established elements of Equal Protection jurisprudence. See *infra* notes 27–43 and accompanying text (on the sacrifice of equality in *Strauss*).

<sup>20</sup> See *supra* note 7 (on the role of procedure in the substantive issues of this case).

because of the way in which *formal* equality and *substantive* equality are arranged under these facts. As the national experience with race inequality demonstrates, formal equality typically precedes substantive equality; in other words, a formal declaration of equality typically precedes a substantive reallocation of social goods or opportunities. In this instance, however, California law already accords to same-sex “domestic partnerships” the same legal and material benefits bestowed on cross-sex “marriage” and thus extends substantive equality to same-sex couples even while withholding formal equality of marriage designation. In this controversy, substantive equality seems to precede formal equality. But, as this case illustrates, equality requires both. Equality, like much of law and life, is multidimensional, and “equal protection” can be violated in multiple ways; in this instance, through an express denial of formal equality.

Despite the narrow doctrinal and technical approach by the *Strauss* judges, distinguishing between a constitutional “revision” and “amendment,” Cruz and Minter conclude that *Strauss v. Horton*, on its face, is intellectually incoherent precisely because it hides behind procedure and evades entirely the substantive questions of equality and equal protection at the core of this controversy.<sup>21</sup> Specifically, Cruz and Minter cannot comprehend how these judges are able conscientiously to finesse depriving a “suspect class” a “fundamental right” merely by resorting to a particular procedure—referendum. Quoting Justice Moreno’s pointed dissent, both emphasize that, “requiring discrimination against a minority group on the basis of a suspect classification strikes at the core promise of equality that underlies our California Constitution.”<sup>22</sup> And, one might add, even more so when the required discrimination focuses on a right deemed constitutionally “fundamental” by that state’s highest court *only a short time earlier*.

But, then, where might an explanation for the divergent holdings lie? If not law and reason, what drives this result? Is it, as Tom Stoddard wrote some years ago of a similar judicial action, merely “personal predilection”?<sup>23</sup> Or, is it predilection *plus*? Perhaps predilection *plus* the politics of the moment, which, as both Cruz and Minter note, may more likely explain the judges’ choices in this second case.

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<sup>21</sup> See Cruz, *supra* note 6, at 48–50; and Minter, *supra* note 5, at 89 (approaching and reviewing the legal actions of *Strauss* and *In Re Marriage Cases* from different angles, neither author is able to harmonize the judges’ opinions and actions in the two cases).

<sup>22</sup> See Cruz, *supra* note 6, at 50; Minter, *supra* note 5, at 133 (quoting Moreno).

<sup>23</sup> Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987).

To dissect the judge's handiwork in these cases, Cruz opens the issue with a detailed recounting of the original constitutional debates of 1849 in California regarding equality as a legal concept under state law.<sup>24</sup> Building on this originalist foundation, he next turns to the constitutional text, following the "centrality" of equality in that document.<sup>25</sup> Further supporting this theory, Cruz surveys California case law to confirm the legislative history and textual commitments to equality.<sup>26</sup> With this platform in place, Cruz finally argues that *Strauss* has thrown all that to the wind and subverted the independent commitment to equality of California's constitutional order.<sup>27</sup> *Strauss*, Cruz makes clear, profoundly and structurally distorts the state's system of constitutional governance.<sup>28</sup>

Cruz explains that this profound constitutional disorder flows from judicial validation of the referendum as a device through which a simple majority can deprive a "suspect class" of a "fundamental right"—in this instance, the fundamental right to marriage designation equality as articulated by the very same judges only a few months earlier in *In Re Marriage Cases*. The court thereby licensed "unbridled majoritarianism" and "rampant majoritarianism"<sup>29</sup> in the name of "democracy", creating a hierarchy of liberty under the Rule of Law that itself brings into question the very concept of the Rule of Law, at least in California.

In addition, Cruz notes that the justices take pains to claim a lack of discretion in the ruling they issued, claiming instead that precedent compelled the outcome and controlled the court's opinion.<sup>30</sup> But, as Cruz meticulously documents in his contribution to this issue, nothing could be further from the truth; indeed, the facts and the law of this case—including the precedential value of *In Re Marriage Cases* regarding the fundamental nature of the precise right *and* suspect class in question—vested tremendous discretion in these judges, a discretion that, as Cruz points out, the *Strauss* majority elected to exercise in favor of formal inequality.<sup>31</sup> In this case, Cruz forcefully shows, the judges exercised not only agency, but willfulness.<sup>32</sup>

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<sup>24</sup> See Cruz, *supra* note 6, at 51–57.

<sup>25</sup> *Id.* at 13–19.

<sup>26</sup> *Id.* at 19–27.

<sup>27</sup> *Id.* at 27–30.

<sup>28</sup> *Id.* at 40–49.

<sup>29</sup> See Cruz, *supra* note 6, at 67–68.

<sup>30</sup> *Id.* at 41–44.

<sup>31</sup> *Id.* at 43–49.

<sup>32</sup> *Id.* at 50–55.

And it is for this very reason that Shannon Minter's incisive contribution to this issue is well understood as a striking display of equanimity. Minter, who was the lead counsel for the plaintiffs in *Strauss*, opens with the threshold query: "does equality limit democracy or enable it?"<sup>33</sup> Minter consequently proceeds to situate these recent Supreme Court holdings in the broader jurisprudential framework of the interplay between "equality" and "democracy".<sup>34</sup> Clearly, Minter's experience with this litigation has led to a profound (re)consideration of fundamental issues, and their operation, in our society today.

Using the work of Alexander Bickel and John Hart Ely for this purpose, Minter begins by applying their two views to the *Strauss* and *In Re Marriage Cases* opinions. In this analysis, Minter makes plain he agrees entirely with neither, although more so with Ely than Bickel,<sup>35</sup> using Ely's conception of equality to frame and argue the plaintiff's case in *Strauss*.<sup>36</sup> As Minter concludes, however, the judges ultimately focused on Bickelian concerns, and how they *limit* judicial review of democratic, or at least majoritarian, lawmaking in civil rights cases. In so doing, Minter effectively agrees with Cruz and his bottom line: the judges in *Strauss* devolved into a formalistic conception of marriage equality and, in the end, licensed majoritarian abuses of democracy that eviscerated equality itself.

Under the first conception, as articulated by Bickel, equality is conceived as a "brake" on democratic lawmaking; in constitutionally limited situations, majorities cannot legislate away minority rights simply because they can outnumber them.<sup>37</sup> However, under Bickel's conception, equality typically interrupts democracy, and thus is the exception to the norm in favor of majoritarianism. Hence the famous "counter-majoritarianism difficulty" that Bickel attached to judicial vindication of individual rights, like equality.

Under the second model examined by Minter, as developed by John Hart Ely, equality is conceived as a social condition that allows differently positioned citizens to compete socially, economically and politically in a "democratic" manner on leveled playing field; under this conception, equality is a precondition to a legitimate democratic process.<sup>38</sup> Under Ely's

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<sup>33</sup> See Minter, *supra* note 5.

<sup>34</sup> *Id.* at 36.

<sup>35</sup> *Id.* at 22–25.

<sup>36</sup> *Id.* at 45.

<sup>37</sup> *Id.* at 7–13.

<sup>38</sup> *Id.* at 13–22.

conception, absent equality, the processes of democracy are defective and their outcomes suspect. Thus, while Bickel looks at “equality” as an individual and counter-majoritarian right as a formal matter, Ely looks at the functional role equality plays in the conception and operation of a democracy. The first model limits “democracy” with “equality” while the second employs “equality” to enable “democracy”.

The democratic stakes in these equality cases, as Minter puts it, thereby turn on whether referenda (or direct democracy) can be deployed to establish constitutionally a “separate but equal” scheme for “different” categories of a state’s population regarding fundamental rights—in this instance, the right to equal state recognition of couples and their couplings.<sup>39</sup> Approving of such a scheme in abject deference to formal democracy, the California Supreme Court issued a Bickelian victory in these two cases, concludes Minter.<sup>40</sup> But, in so doing, Minter observes, the judges in these cases “struck directly at one of the most fundamental structures of democratic governance.”<sup>41</sup> Minter states the bottom line succinctly: “the very 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 install discrimination against such a group as a constitutional mandate is to alter the premises of democracy beyond all recognition.”<sup>42</sup>

Moreover, Minter continues, to arrive at this breath-taking bottom line, the judges literally had to ignore the case he and his clients actually presented to them. As Minter makes plain, plaintiffs pressed the Elysian model in the framing of their claims, arguments and court papers. Nonetheless, the judges simply converted their case into an opinion about Bickelian concerns. Rather than “engage” the plaintiffs, Minter writes, “the majority’s description of petitioner’s view...was misleading.”<sup>43</sup> Confirming the sense of willfulness discerned by Cruz, Minter shows the judges in fact bent on deciding a question not even presented.

Minter’s analysis thereby reveals how the judges willfully elected to stand by, under the influence of Bickelian rhetoric regarding the “counter majoritarian difficulty”, while a runaway majority stripped a traditionally subordinated minority group of a fundamental right. The internalized Bickelian “difficulty” put the judges on the defensive, causing them to scurry away from the holding and precedent they had only recently estab-

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<sup>39</sup> *Id.* at 36.

<sup>40</sup> *Id.* at 26.

<sup>41</sup> See Minter, *supra* note 5, at 144.

<sup>42</sup> *Id.* at 48.

<sup>43</sup> *Id.* at 45.

lished in *In Re Marriage Cases*: whereas in the first case the judges were able to articulate clearly how marriage designation inequality was a deprivation of the right to Equal Protection despite Bickel's famous difficulty, in *Strauss* they effectively concluded that their exercise of the judicial function in the first case could be overturned by simple mass vote on the circular grounds that majoritarian preferences should or must prevail, and despite ample evidence that the campaign and outcome were irrational—based almost wholly on fear-mongering that exploited bigotry and ignorance.<sup>44</sup> Direct democracy, as now practiced in California, seems not constrained by the same constitutional “checks and balances” as deliberative democracy,<sup>45</sup> even when it comes to the amelioration of social prejudice and inequality, to the formal vindication of formally fundamental rights.

In addition to tracking the way in which these contrasting conceptions of equality flowed through the Proposition 8 litigation, Minter also shows how the very same conceptions are discernible in the political campaign behind its adoption.<sup>46</sup> Proponents of Proposition 8, to stir public indignation, railed against “activist judges” who imposed equality on the people against the will of the majority.<sup>47</sup> Meanwhile, opponents of Proposition 8 argued that marriage designation equality is a necessary condition of civil liberty to participate actively and equally—and without stigmatization—in a democratic society.<sup>48</sup> Proponents, in short, invoked Bickelian concerns about the so-called counter-majoritarian difficulty while opponents reminded the state in Elysian terms of its historic and constitutional commitment to Equal Protection. This tracking of the different equality conceptions and their deployment in the Proposition campaign thus reveals how the political rhetoric later was echoed in the judges' *Strauss* opinion and its ultimately deferential rhetorical pose to the counter-majoritarian model—a correlation that should prompt us all to wonder whether this echo is just coincidence, or whether the campaign's rhetoric induced the judges' bottom line.

Because the gaps, skews and errors in the *Strauss* opinion are so transparent, both Cruz and Minter suggest a clear linkage between the po-

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<sup>44</sup> See *infra* Part I. A. These facts are directly relevant: lawmaking driven by prejudice or animus, the nation knows, is unconstitutional even when enacted by “democratic” referenda that amend state constitutions. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating Colorado's Amendment 2 on these grounds).

<sup>45</sup> See *infra* Part III. A.

<sup>46</sup> See Minter, *supra* note 5, at 147.

<sup>47</sup> See Minter, *supra* note 5, at 131.

<sup>48</sup> *Id.* at 43.

litical vehemence and the judicial outcome: more than likely, the justices were responding to pressures other than legal argument and analysis in arriving at the doctrinal conclusions that they chose to embrace. Like Cruz, Minter concludes that this court not only failed to do justice in principled doctrinal terms, but that it also inflicted a serious institutional wound on itself and, perhaps more importantly, on the structure of constitutional democracy in the state of California. Thus, this pair of articles invites us to consider the traditional role of the courts in the constitutional democracy that we all inhabit. Both authors beckon us to undertake this reconsideration in light of the historical and contemporary role that courts play in the construction of specific legal concepts like “equality” and “democracy”—legal concepts that affect mightily material human lives and destinies. Both Minter and Cruz caution us that, in this instance, queers are the canary in the mine—and early indicator of fatal disasters to come.

Both Minter and Cruz require readers to gaze upon, and react to, the huge gaps between the ideals of the law and the realities of its administration before a deeper crisis erupts. Key among those gaps is the (perhaps concocted) elusiveness of both “equality” and “democracy” as operational legal concepts in U.S. society. In manifold sectors of law and life, this elusiveness has prevented the nation from moving forward beyond merely formal, and formalistic, constructions and applications of these foundational values: as these cases and Proposition put on display, both equality and democracy sometimes, perhaps oftentimes, are reduced with impunity to mere rhetoric—conclusory intonations that supposedly accomplish, by the very act of their utterance, what they proclaim. Thus, both Cruz and Minter invite all concerned citizens to judge the doctrinal dance of the judges, and to decide how we might counteract the destructive social consequences of their gyrations in these two cases. What, if anything, should equality advocates prioritize in the post-*Strauss* landscape? Of the many possible interventions—legal, political, cultural, social—how is the cause of social justice to be regrouped? The student comment points to some of the ways in which we might follow next.

#### B. DEFINING THE ZEITGEIST: DISCOURSE, CULTURE AND THE POLITICS OF LAWMAKING

Whereas the first two articles focus on law itself, as applied and administered by judges in the context of adjudication, the student comment by Joyce Hahn turns to the broader and larger socio-cultural frameworks in which both the voters and the justices exercise their power and make their choices. To help put Hahn’s comment in perspective, I draw on Professor

Chai Feldblum's chapter, *The Moral Values Project: A Call to Moral Action in Politics*, published in a recent and timely book, *MORAL ARGUMENT, RELIGION AND SAME-SEX MARRIAGE: ADVANCING THE PUBLIC GOOD*.<sup>49</sup> Both Feldblum and Hahn help establish the social, discursive and political backdrop for the unfolding and disposition of these two cases. Moreover, they train focus on the broader societal dynamics regarding cultural change, and the relationship of law to culture and change.

As these authors have observed, the campaign for Proposition 8 was based on the "exploitation" of "fears" related to questions that might be called "moral" (or perhaps "traditional") in nature.<sup>50</sup> The subordinating purposes and politics of these deployments do not require advocates of Proposition 8 and similar measures to define, much less justify, their claims to morality. These deployments instead aim to activate cultivated fears and mobilize political hysteria.<sup>51</sup> Rather than engage in reasoned and substantive debate over "morality", campaigns like those for Proposition 8 instead resort to hyperbolic, facile sound bites or innuendos designed to push socio-political buttons in the same way that all wedge politics tend to do.<sup>52</sup> This demagoguery, though patently false, is effective precisely, and only, because it appeals to emotions based on ignorance—in other words, acculturated and ambient prejudice.

In this volume, Hahn examines in specific detail the use of fear-mongering and wedge politics in the campaign supporting Proposition 8.<sup>53</sup> After laying out the legal history of marriage in California, Hahn turns to the key "myths" used by Proposition 8's proponents to link same-sex marriage with horrors in the corridors of public schools. These myths, according to Hahn, ranged from forced participation in same-sex marriage education to the idea that "children (will) become homosexuals themselves."<sup>54</sup>

Hahn then examines the three main areas of public education which might integrate discussion of marriage equality into the curriculum: health

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<sup>49</sup> Feldblum, *The Moral Values Project: A Call to Moral Action in Politics*, in *MORAL ARGUMENT, RELIGION AND SAME-SEX MARRIAGE: ADVANCING THE PUBLIC GOOD* (Babst, Gill & Pierceson eds., 2009) An adaptation of that chapter was originally slated to be part of this symposium volume.

<sup>50</sup> Joyce H. Hahn, *Proposition 8 and Education: Teaching Our Children to be Gay?*, 19 S. CAL. REV. L. & SOC. JUST. 151, at 154 (2010).

<sup>51</sup> See generally Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006) (describing similar dynamics).

<sup>52</sup> See *infra* Part II.

<sup>53</sup> Hahn, *supra* note 50.

<sup>54</sup> *Id.* at 160.

education, sexual education and diversity education.<sup>55</sup> Offering a careful and detailed review of these three categories, Hahn concludes that “the California Education Code does not require that students receive instruction in same-sex marriage in public schools.”<sup>56</sup> While examining the various aspects of the Code, Hahn also canvasses both case law and social science to produce an integrated substantive analysis—perhaps the sort of approach and analysis that Cruz and Minter might have expected from the judges. Hahn ends with a narrowly tailored insight: “any concerns regarding [these fears] should have been addressed specifically by changes in the school system, rather than through a flat constitutional ban on marriage equality.”<sup>57</sup>

But, if so, why were these concerns addressed through a sweeping constitutional ban rather than through specific changes in the school system? Why this choice? This question is aptly answered by linking Hahn’s comment to Feldblum’s work on morality and the law: both Hahn and Feldblum effectively ask us to consider how culture sets the stage for political debate and legal action in the construction of constitutional concepts. Hahn, like Feldblum, documents a socio-political context in which “fears” are readily susceptible to manipulation with simply a few culturally charged images or phrases.<sup>58</sup>

In response to this socio-political status quo, Feldblum’s work strives to conceptualize a project of social conscience and awareness; in other words, a consciousness-raising project focused on elevating the discourse that drove the politics and triumph of Proposition 8 last November, and of similar backlash initiatives against minority civil rights in other times and places across this country.<sup>59</sup> This project, centering on the role of “morality” in public political discourse, aims to counteract the deployment of moralistic conceptions as a bat with which to bludgeon down social justice claims pressed by sexual minorities like the plaintiffs in the two cases before us. By intervening in public discourses on sexualities and their regulation, this project aims generally to counteract the repeated deployments of “morality” as a tool and justification for oppression and to turn it, instead, into an instrument of social justice and liberation from oppression.

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<sup>55</sup> *Id.* at 160–61.

<sup>56</sup> *Id.* at 174–75.

<sup>57</sup> *Id.* at 153.

<sup>58</sup> This socio-cultural environment, of course, recalls the socio-legal framework and dynamic of unconscious racism. See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

<sup>59</sup> See *supra* note 1 and *infra* notes 114 and 131 (on reactionary uses of referenda and plebiscites to deny equality or other civil rights to targeted minority groups).

This call to engage morality in reasoned terms, and as a way of countering the politics of subordination, requires careful thought and consideration to determine how such an effort might contribute to the larger and ongoing struggle for social justice on the basis of minority sexual orientations. For example, as efforts to reclaim “queer” illustrate, initiatives that challenge heterosexist or hypocritical assertions of superior morality, or similar interventions that reframe the very meaning of a hate term, perhaps can help alter discursive patterns, political choices and material realities.<sup>60</sup> As one tool or technique among many, this project *may* help to develop a more potent and effective arsenal of antisubordination politics.<sup>61</sup> Even so, the devil, as always, remains in the details—and for these, we will have to wait for completion of Feldblum’s project.<sup>62</sup>

But with specific regard to Proposition 8, Feldblum takes on the harm-to-the-“rights”-of-others argument deployed by proponents of Proposition 8 to justify this re-imposition of formal marriage inequality. For example, “to support the traditional marriage argument, proponents of Proposition 8 claimed that marriage recognition for gay couples in California would make life harder for parents in California who wanted to shield their young children from learning about homosexuals.”<sup>63</sup> Similarly, this harm-to-others argument was extended to persons or religious entities that might be required to somehow recognize the existence of, or to interact with, fellow Californians who are not heterosexuals.<sup>64</sup> Thus, inequality advocates portrayed Proposition 8 simply as an effort to “protect people from the excesses of extending rights to gay couples.”<sup>65</sup>

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<sup>60</sup> See, e.g., Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 366–64 (1995) (discussing reclamation of “queer”).

<sup>61</sup> For this reason, various scholars have tackled similar questions relating to “morality” in constitutional analysis. See, e.g., Suzanne B. Goldberg, *Morals Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1256–57 (2004) (canvassing case law to conclude that majoritarian conceptions of “morality” have never been judicially accepted as a solely sufficient constitutional justification for lawmaking choices); Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998) (critiquing judicial acquiescence to majoritarian assertions of morality as self-legitimizing basis for public policy); Daniel Gordon, *Moralism, The Fear of Social Chaos: The Dissent in Lawrence and the Antidotes of Vermont and Brown*, 9 TEX. J. ON C.L. & C.R. 1 (2003) (discussing morality and moralism in culture wars context).

<sup>62</sup> Feldblum explains the project is in progress. Feldblum, *supra* note 49, at 228–29.

<sup>63</sup> *Id.* at 222.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

Examining closely the campaign propaganda and related discourses, Feldblum concludes that Proposition 8 opponents failed to persuade California voters at least in part because they did not force themselves to grapple with these socio-cultural tensions in a forthright and direct fashion.<sup>66</sup> This discursive gap allowed inequality advocates to frame the public debate—and to fan the public’s “fear” of sexual minorities. Thus, Feldblum’s major contention is that advocates for LGBT equality have an obligation to address such conflicts in an open and honest manner.<sup>67</sup>

Feldblum’s work trains attention squarely on the politics of discourse and culture. Using a specific construct of “morality,” Feldblum calls for equality advocates to re-set the terms of policy debate and normative engagement. Observing how morality claims have been monopolized in majoritarian politics by proponents of inequality, Feldblum calls upon all civil rights advocates to take back the discursive initiative as a necessary element in achieving a culture of equality on democratic terms.<sup>68</sup>

Hahn similarly opens her examination of the cultural politics around marriage in/equality in California with campaign propaganda and related discourses. She begins by asking: “what is so worrisome about same-sex marriage discussion in classrooms?”<sup>69</sup> While concluding that parents’ worry is unwarranted, Hahn explains why the propaganda “struck fear into the hearts of many Californian parents” even though state law, under Hahn’s analysis, would lead informed and rational voters (or judges?) to a contrary conclusion.<sup>70</sup>

As Hahn acknowledges, marriage equality *does* entail cultural “implications” that flow from the ever-higher social visibility of sexual minorities and, more specifically, their families. Hahn therefore dives into the cultural argument focused on the “fear” that “children” may “become” homosexuals through osmosis, influence, or other exposure to the fact of queer existence on this earth. Again providing a detailed and careful review of the social science, Hahn again concludes that the generalized cultural fears, like the more specific educational fears, were and are unfounded.<sup>71</sup> For Hahn, like the other contributors, the startling bottom line is that *both* the voters and the judges were driven to their actions regarding Proposition 8

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<sup>66</sup> *Id.* at 225.

<sup>67</sup> *Id.* at 214. For more on citizens and lawmaking, see *infra* Part III.

<sup>68</sup> Feldblum, *supra* note 49, at 210-215.

<sup>69</sup> Hahn, *supra* note 50, at 152.

<sup>70</sup> *Id.* at 152-53.

<sup>71</sup> *Id.* at 175-84.

by fear-mongering—by the irrational politics of ignorance and hysteria—despite available compelling information to the contrary.

Though presented with calm, deliberation and painstaking detail, the analyses in this volume tells us that Law failed us here—Law as substance, process and institution. These analyses conclude that at least two types of lawmakers—judges and citizens—failed to honor the “Rule of Law” in rebuffing compelling claims regarding core constitutional commitments with flimsy ideology and transparent rationalizations. They also tell us that nothing, nothing at all, stands ready to rescue justice, either from the judges or from democracy itself. Under *Strauss*, rights duly adjudicated as fundamental—such as the right to marriage designation equality in this case—can later be facially and explicitly denied, in a selective manner, to a targeted minority—a historically demonized and disenfranchised minority that also has been legally proclaimed a suspect class. These analyses must leave the reader wondering about the very meaning of democracy, much less equality, as socially relevant concepts in the United States—or at least in California—today. These authors bring into question the Rule of Law itself.

## II. FRAMING DEMOCRACY: SEXUAL MINORITIES, PUBLIC POLICY AND CULTURAL CONTESTATION

In different ways, all of the contributors below link culture to law in their analyses of these two cases and Proposition 8. While the first pair of articles focuses more directly on doctrine, and in particular the adjudicatory work of the California Supreme Court in these two cases, both Cruz and Minter incorporate the role of social dynamics into their analyses as necessary elements in understanding “what happened” legally in this controversy.<sup>72</sup> In the student comment, Hahn focuses even more directly on this linkage of culture to law, examining the ways in which social dynamics may help to explain these lawmaking decisions.<sup>73</sup> In their respective ways, the contributions to this issue effectively situate these cases and Proposition in their larger social, cultural and political background. In effect, these texts, as a set, gesture to the “culture wars” as the larger context setting the stage for controversies of this sort<sup>74</sup>—controversies involving the role of sexual

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<sup>72</sup> See *supra* Part I. A.

<sup>73</sup> See *supra* Part I. B.

<sup>74</sup> The thoughts outlined in this section reflect a decade of attention to this phenomenon. See Francisco Valdes, *The Constitution of Terror: Big Lies, Backlash Jurisprudence and the Rule of Law in the United States Today*, 7 NEV. L.J. 991 (2006–2007) (examining the premises and rhetoric of cultural warfare in law and society); Francisco Valdes, “We Are Now of the View”: *Backlash Activism, Cultural*

(or other) minorities in American life, and where public pressure, if not prejudice, will dictate the policy choice in favor of civil rights retrenchment.

The culture wars, as these cases and Proposition themselves illustrate, have focused oftentimes and perhaps obsessively on sex and sexuality.<sup>75</sup> It is no coincidence, therefore, that twice in sexual regulation cases Antonin Scalia has invoked this very notion of cultural warfare—as a feature of his dissents from *Romer v. Evans*<sup>76</sup> and *Lawrence v. Texas*.<sup>77</sup> Those cases, like the ones considered here in relation to Proposition 8 and marriage equality, illustrate the high stakes and charged dynamics involved in backlash law-making through cultural warfare. Indeed, following similar scripts, these culture wars have taken on the same invocations of morality, the same kinds of exploitative wedge politics, and the same kinds of judicial misbe-

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*Cleansing, and the Kulturkampf to Resurrect the Old Deal*, 35 SETON HALL L. REV. 1407(2005) [hereinafter Valdes, "We Are Now of the View"] (surveying the political, jurisprudential and doctrinal aspects of the culture wars, as reflected in recent Supreme Court opinions); Francisco Valdes, *Afterword—Culture by Law: Backlash as Jurisprudence*, 50 VILL. L. REV. 1135 (2005) [hereinafter Valdes, *Culture by Law*] (detailing backlash interventions in liberty-privacy jurisprudence); Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341 (2004) [hereinafter Valdes, *Anomalies*] (focusing specifically on *Lawrence v. Texas* and generally on liberty-privacy as a central doctrinal terrain of social and legal retrenchment); Francisco Valdes, *Culture, "Kulturkampf" and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 271 (Austin Sarat ed., 2004) [hereinafter Valdes, *Antidiscrimination*] (focusing broadly on three theoretical perspectives—backlash jurisprudence, liberal legalisms, and critical outsider jurisprudence—to compare their approaches to equality law and policy); Francisco Valdes, *Afterword—Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship, or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409 (1998) [hereinafter Valdes, *Cultural Warriors*] (focusing on the implications of cultural warfare for sexual orientation scholarship specifically, and for all OutCrit scholars generally).

<sup>75</sup> Illustrating this point, news accounts, following the 2004 electoral cycle, reported that "abortion has become a prime target" of "[d]emocratic strategists and lawmakers" as they "[quietly] discuss how to straddle the nation's Red-Blue divide" and that lawmakers have concluded that the "issue and the message need to be completely rethought," because "along with gay marriage, abortion is at the epicenter of the culture wars, another example used by Republicans to highlight the Democrats' supposed moral relativism." Debra Rosenberg, *Anxiety Over Abortion: Pro-Choice Democrats Eye a More Restrictive Approach to Abortion as One Way to Gain Ground at the Polls*, NEWSWEEK, Dec. 20, 2004, at 38 (reporting conclusions of this reassessment were espoused and endorsed by that year's party standard-bearer, John Kerry); see also Richard Lacayo, *Abortion: The Future Is Already Here*, TIME, May 4, 1992, at 27 (observing that more than a decade ago, much of formal constitutional right to reproductive choice had been eroded in practice by constant and multifarious backlash assaults aimed at *Roe v. Wade*, 410 U.S. 113 (1973)). Whether or not these particular conclusions are sound, they serve to illustrate how sex and sexuality, along with race, nationality and ethnicity, have been positioned at the "epicenter" of backlash kulturkampf. See generally Charles P. Kindregan, Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 FAM. L.Q. 427 (2004).

<sup>76</sup> 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

<sup>77</sup> 539 U.S. 558, 586 (2003) (Scalia J., dissenting).

havior that the authors in this issue collectively identify as central to the current state of marriage inequality in California.<sup>78</sup>

These culture wars, which in the context of North American politics stretch back at least to the 1970's, express majoritarian resentment and backlash against Civil Rights gains and legacies of the New Deal and the Great Society.<sup>79</sup> Picking up steam in the late 1980's and 1990's, the formal declaration of cultural war proclaimed in 1992 that the very "soul of America" is at issue.<sup>80</sup> This backlashing, therefore, is not a simple case of rough-and-tumble majoritarian politics as usual. On its very own terms,<sup>81</sup> it amounts to a multi-year, multi-faceted conflict waged expressly for the "soul" of the nation in the name of traditionally dominant interests.<sup>82</sup>

The dynamics of backlash law and politics generally point to three interactive and mutually-reinforcing prongs of majoritarian attack against minority interests: (1) concentrating accumulated or entrenched resources to prevail in majoritarian contests and take control of public policy, both in the form of representative elections and "direct" referenda; (2) leveraging success in the first prong to pack the federal courts with ideological appointees committed to reversing despised precedents, undoing "liberal" legislation, and shielding backlash policymaking from meaningful judicial scrutiny; and (3) targeting the spending power, which is used in tandem with the other two prongs, to "starve" social lifelines to vulnerable groups, especially when the first two prongs fail to undo or reverse liberal legacies.<sup>83</sup> Rather than working in neat or linear ways, these prongs are worked in various ways and contexts to pursue consistently reactionary agendas.<sup>84</sup>

In law and jurisprudence, this culture war backlash has been spearheaded through organizations like the Federalist Society, which was

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<sup>78</sup> See *supra* Part I. A. and B.

<sup>79</sup> See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1992); JAMES DAVISON HUNTER, *BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR* (1994).

<sup>80</sup> For contemporary news accounts reporting this remarkable declaration, see Chris Black, *Buchanan Beckons Conservatives to Come "Home,"* BOSTON GLOBE, Aug. 18, 1992, at A12; Paul Galloway, *Divided We Stand: Today's "Cultural War" Goes Deeper than Political Slogans,* CHI. TRIB., Oct. 28, 1992, at C1.

<sup>81</sup> For now-classic expositions of this backlash, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) and RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977); see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971).

<sup>82</sup> See Valdes, *Cultural Warriors,* *supra* note 74, at 1434-43 (outlining these "prongs").

<sup>83</sup> *Id.*

<sup>84</sup> See *infra* notes 92-95 and accompanying text (on backlash agendas).

formed by now-prominent cultural warriors like Antonin Scalia.<sup>85</sup> In policy and politics, as recent history teaches, culture war agendas have been formed and advanced by politicians like Richard Nixon, Ronald Reagan and George W. Bush.<sup>86</sup> Using law and politics, backlash warriors slowly but surely have restructured the nation's perspective on its own values and history.<sup>87</sup> Using identity wedge politics to polarize “ins” and “outs”, they have redrawn the legal landscape in favor of power and privilege, spanning categories of doctrine from anti-trust to civil rights.<sup>88</sup> Indeed, they have aimed to restructure the very structure of power, mainly to suit themselves, their sponsors and their allies.

With this general backdrop in place, Feldblum illustrates how the regressive gap in politicized conceptions of public morality, and related popular discourses, can be understood both as a reflection and a production of cultural warfare; the deployment of particular mis/conceptions of “morality” to promote and justify social and legal inequality targeted at disfavored or demonized minorities is, in fact, a recurring feature of the culture wars.<sup>89</sup> Similarly, the entrenched and acculturated bigotry feeding generalized concerns about sexual minorities and education policy that Hahn observes is also helpfully understood as an expression and construction of cultural warfare; indeed, the “fear” that “homosexuals” will “prey” on children is one of the most hackneyed stereotypes exploited by purveyors of hate and homophobia for more than half a century in this country, including those who now do it as a practice of cultural warfare, as happened last year with the Proposition 8 campaign.<sup>90</sup> The social, cultural and political status quo that creates the framework for both the judges and the public in these cases and campaign is proximately, if not directly, the result of culture war campaigns during the past several decades—campaigns that slowly but surely have set the stage for the discourses, fears, choices, and outcomes that the authors below address and decry.

As illustrated by the Proposition 8 campaign, the “enemy” in culture war campaigns consistently has been one or more of the nation's historically marginalized and still-vulnerable social groups: racial and ethnic minori-

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<sup>85</sup> See Valdes, *Antidiscrimination*, *supra* note 74.

<sup>86</sup> See Valdes, *Beyond Sexual Orientation*, *supra* note 74.

<sup>87</sup> See Valdes, *Culture by Law*, *supra* note 74.

<sup>88</sup> See Valdes, *Anomalies*, *supra* note 74; *see also infra* notes 92–95 and sources cited therein (on backlash and retrenchment).

<sup>89</sup> See *supra* notes 50–61 and accompanying text (on “morality” or related terms and concepts as subordinating rhetoric).

<sup>90</sup> See *supra* notes 50–71 and accompanying text (on the exploitation of unfounded “fears” to promote Proposition 8).

ties, sexual minorities, women of the “feminist” type, poor persons of all colors, consumers, environmentalists, workers, immigrants from the Global South and east, Muslims and other Others.<sup>91</sup> Of course, the culture wars find “different” groups positioned “differently” vis-à-vis core constitutional commitments like formal equality and key structural issues like democracy and judicial review, and thus vis-à-vis their formal and actual retrenchment through backlash. As this very controversy illustrates, the tactic with sexual minorities often is refusing to recognize their formal equality, whereas the tactic with racial/ethnic minorities and women typically is to neutralize formal equality by denying substantive or functional equality.<sup>92</sup> These differentials mean that the specific aspects or techniques of cultural warfare have been tailored for and directed at “different” groups in group-specific ways—ways that account for each group’s standing in relationship both to formal law and to social reality.<sup>93</sup> Nonetheless, experience indicates that the overarching pattern of backlash politics (and jurisprudence) constitutes the pursuit of a self-subscribed “anti-antidiscrimination” agenda in which judicial power and majoritarian power combine to roll back “liberal” gains of the past century.<sup>94</sup> It therefore is no coincidence that legal observers of

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<sup>91</sup> See *infra* notes 92–95 and sources cited therein (on backlash and retrenchment).

<sup>92</sup> Consequently, numerous scholars have critiqued judicial willfulness or other institutional misbehaviors in the context of race/ethnicity or sex/gender. See, e.g., Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996); see also Marina Angel, *The Glass Ceiling of Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1 (2000); Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988); Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989); Richard Delgado, *Affirmative Action as Majoritarian Device: Or, Do You Really Want to be a Role Model?*, 89 MICH. L. REV. 1222 (1991); Rachel F. Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503 (1986). See also *infra* notes 93–95 and sources cited therein (providing similar critiques of judicial civil rights rollbacks).

<sup>93</sup> See, e.g., Nicolas Espiritu, *(E)Racing Youth: The Racialized Construction of California's Proposition 21 and the Development of Alternate Contestations*, 52 CLEV. ST. L. REV. 189 (2005) (focusing on cultural warfare against youth of color in California through use of proposition system in that state); Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 122 (1995) (deconstruction racialized political dynamics of that early Proposition); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650–58 (1995) (analyzing racial rhetoric and politics of Proposition 187). See generally Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509 (1995) (analyzing identity politics and social consequences of recent legal “reforms”).

<sup>94</sup> See Jeb Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (evaluating current judges’ manipulation or disregard of precedent and canons of interpretation in pursuit of their anti-antidiscrimination political agenda).

many different stripes have long been detailing and critiquing willful judicial misbehavior in furtherance of culture war agendas against minority civil rights.<sup>95</sup>

Judges, then, are most decidedly not unaffected by—nor uninvolved in—the fury swirling around and at them, as Cruz and Minter specifically illustrate and confirm in the context of this issue. Perhaps more so than the other authors, Cruz explicitly notes that the judges, “as persons who are members of California society,” cannot help but be affected by these “political facts.”<sup>96</sup> These facts and furies, Cruz indicates, drove the judges to their incomprehensible and self-contradicting approval of Proposition 8 in light of their substantive reasoning and lengthy ruling in *In Re Marriage Cases*. Minter similarly explains that the social conditions in which the judges are embedded seems to have propelled them into the patent inconsistencies that Justice Moreno’s dissent elaborates, and that he and Cruz both develop in their contributions to this issue.<sup>97</sup> Indeed, both Cruz and Minter conclude that cultural politics drove the judges here to a serious ab-

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<sup>95</sup> E.g., Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984). See generally Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL’Y J. 547 (2003) (focusing on judicial bias against plaintiffs in employment discrimination cases); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (2002) (also focusing on judicial bias against plaintiffs in employment discrimination cases); William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485 (1990) (focusing on retrenchment in that key term of the Supreme Court); Nancy Levit, *The Caseload Conundrum, Constitutional Restraints and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989) (critiquing interposition of jurisdictional and prudential barriers to deflect civil rights actions); Robert P. Smith, Jr., *Explaining Judicial Lawgivers*, 11 FLA. ST. U. L. REV. 153 (1983–1984) (surveying techniques of judicial manipulation of facts and doctrine); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293 (1992) (noting that “liberal activist judges” are the frequent targets of backlashes, who “promise that their replacements will not be so free-wheeling”); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (questioning the premises and practices of judicial review in recent decades); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677 (1984) (critiquing heightened rules of pleading that various federal judges had erected to rebuff civil rights claimants); Charles R. Lawrence, III, “Justice” or “Just Us”: *Racism and the Role of Ideology*, 35 STAN. L. REV. 831 (1983) (focusing on race and white supremacy).

<sup>96</sup> See Cruz, *supra* note 6, at 79.

<sup>97</sup> See Minter, *supra* note 5, at 137–41.

dication of their traditional role in a republican democracy, while both Feldblum and Hahn squarely devote their attention to the cultural conditions and norms that facilitated this majoritarian re-imposition of formal marriage inequality by law.<sup>98</sup> Whether directly or indirectly, each of these authors attest to the power of cultural conditions, dynamics, and agendas in shaping contemporary law and policy in this particular instance.

As these works collectively and individually help to demonstrate, cultural warfare continues to affect life and law, society and policy, in powerful and pervasive ways. And, precisely for this reason, cultural warfare provides a helpful lens through which to inspect the meaning and the consequences of these cases and Proposition.<sup>99</sup> By stepping back from the immediate controversies to situate them in the larger patterns of these culture wars, perhaps concerned citizens can better help to contextualize not only the culture wars themselves, but also the interventions that each of these authors make. By stepping back we can better see how Proposition 8 and these two cases follow now-familiar scripts of backlash law and politics in the basic form of cultural warfare, and we are better positioned to discern the reactionary agenda driving these kinds of campaigns.

Simply put, to confront and combat this multi-faceted roll-back agenda, we must first recognize it. Equality advocates and concerned citizens must understand that local skirmishes are not isolated incidents. We must recognize the patterns formed by the particularities. It is precisely because these culture wars have been conceived and launched as an interconnected series of actions or campaigns to “take back” lost or eroding privileges that we must tailor social justice practices accordingly. To do otherwise is to invite failure: without appreciating the scale and dynamics of the moment, we can hardly hope to seize it.

Situating this current controversy in the boarder context of cultural warfare consequently helps bring into sharp relief the profundity of what has occurred here. This use of the rhetoric of “democracy” to roll back even the fundamental constitutional rights of selected suspect minorities is now a newly real possibility—a new and vicious part of a political reaction blessed by confused or collusive judges. Increasingly, the incremental but accumulating effects of cultural warfare are succeeding in re-writing not

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<sup>98</sup> See *supra* Part I. B.

<sup>99</sup> See also *supra* note 92–95 and sources cited therein (on backlash and retrenchment).

only the constitutional heritage of this country but also its trajectory.<sup>100</sup> If not the soul, what may be at stake in moments like this is the very future of American constitutionalism.

Indeed, experience teaches that the real issue at stake in these times is the *structure*—political, economic and social—of this society. Will we continue to sustain “traditional” hierarchies established *de jure* over the past two centuries based on race, ethnicity, sex, sexuality and other markers of social identity? Or, will we finally begin to dismantle systems of injustice to reflect the original commitment to fundamental values like “equal justice under the law”? As recent experience attests, these are the questions in play, both locally and nationally, in each and every skirmish of the culture wars. By helping us to contextualize the profound stakes involved in this skirmish of the culture wars, this issue better equips each of us *personally* to recognize and resist the onslaught of the ongoing backlash, and to stand firm in the affirmative demand for (marriage) equality and a post-subordination society. With this collection, the authors and editors arm us with an important resource for the larger battle against pernicious inequality in our society.

### III. MARRIAGE AND EQUALITY POLICY: A BRIEF PRIMER FOR THE CONSCIENTIOUS CITIZEN-LAWMAKER

Proposition 8, like all efforts to make law and policy by direct mass voting, asks all of us—as members of a state and community—to pass judgment on the rights of our neighbors, our fellow community members. This lawmaking procedure thereby asks from each and all of us for more than just a personal judgment, applied to our individual lives. This procedure asks us to act as citizen-lawmakers; it is precisely because this procedure asks us to pass judgment as part of a lawmaking act, as part of a *public* function, that we must try to do more than merely project personal views and values—personal biases and ignorant or acculturated prejudices. At the very least, we should recall that formal deliberation in the lawmaking process was the ideal that the framers of the United States Constitution laid down at the time of the nation’s founding for persons entrusted with the power and privilege of making laws for the public at large.

Why? Why did the framers of the Constitution insist on “deliberative” over “direct” lawmaking? How does their reasoning illuminate today’s predicament with this disfavored procedure? How does their own original

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<sup>100</sup> See generally JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA’S SOCIAL AGENDA (1996) (providing a critical analysis of these developments).

record on democratic self-governance help to provide guidance in a moment when fears are exploited to deprive a suspect class of a fundamental right with explicit judicial blessing? With these background thoughts in mind, I conclude this Introduction with a few thoughts on two public institutions that converge in, and help to frame, this issue: the institution of democracy and the institution of marriage.

A. PURE DEMOCRACY VS. DELIBERATIVE DEMOCRACY: THE PROBLEM OF FACTIONS, THE TYRANNY OF THE MAJORITY, AND THE MAKING OF LAW

Prior to the adoption of the federal Constitution, the American colonies were organized in different ways. For example, under the loose system established by the Articles of Confederation, some states organized themselves as “representative” democracies while others opted for “pure” democracies.<sup>101</sup> Under this arrangement, the framers experienced a “critical period” that shaped their views and choices regarding lawmaking in a democracy, American style.<sup>102</sup>

Most significantly, the framers during this critical period experienced “law” and “democracy” as instruments of oppression or, in the words of their times, a “tyranny of the majority.”<sup>103</sup> From their perspective, this tyranny allowed majoritarian factions to use their numerical superiority over other (“minority”) factions to enact laws altering civil and legal rights, at that time relating especially to property and contract, in a way that impinged on the upper classes who, numerically, were smaller than the masses; in revolutionary America, the well-to-do were the original minority in need of constitutional protection from a powerful majority—“the people” themselves. This original experience taught—and teaches—that democracy’s equation with simple majoritarianism under the North American constitutional order is a fool’s errand.

During this period, the employment of direct democracy by majoritarian factions to enact law and policy along these lines *directly* produced a constitutional order designed *specifically* to marginalize direct democracy and ensure a “filtering” of majoritarian preferences before they became codified as Law. This clash of economically powerful creditor factions and

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<sup>101</sup> See WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* (Rita & Robert Kimber, trans.) (1980).

<sup>102</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969).

<sup>103</sup> See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 330 (Harry Reeve, Esq., trans.) (1862).

numerically powerful debtor factions in the context of a democratic contestation for power over the law of contract and property thus set the stage for the particular configuration of democracy, American style, in the form of the “compound republic” that the federal Constitution established.<sup>104</sup> These and similar problems with direct or pure democracy, as experienced by the framers and the original generation, led to the 1787 convention in Philadelphia, which produced the Constitution that (presumably) still governs us all today.<sup>105</sup>

In and through this document the framers decisively rejected direct democracy as a reliable means for making law and policy in the public interest. The decisiveness of this choice against direct democracy is reflected in a bottom-line fact of American constitutionalism that some may deem startling, if not out of bounds, in the construction of a democratic social order: of all the officers, entities, or positions created by the framing and adoption of the Constitution, only one originally was to be staffed through direct popular election by the people as voters.<sup>106</sup> As instituted in and for this country, “democracy” was designed by the framers of the Constitution to be indirect in order to generate a deliberative, not simply majoritarian, lawmaking process.

The framers instituted this notion of a deliberative democracy generally through a series of constitutional provisions and structures familiar to most school children in the U.S. today. Among these provisions and structures, for example, are the related concepts of “separation of powers” and “checks and balances” established through the substance and structure of the Constitution.<sup>107</sup> These two fundamental concepts led to a series of similar conceptual or structural choices, all of which are calculated to produce deliberation in democratic lawmaking. Illustrative examples include bicameralism, presentment, and related practices or procedures.<sup>108</sup> But these formal constitutional choices are not the only, and perhaps not even the best, indicia of the original commitment to deliberative democracy and the corresponding suspicion of direct democracy.

The public “legislative history” of the federal Constitution provides a richer and more explicit articulation of the reasons behind this key structur-

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<sup>104</sup> See generally JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990) (surveying and detailing the complex relationship of property and democracy as embodied in the origins, text and the design of the Constitution).

<sup>105</sup> See WOOD, *supra* note 102.

<sup>106</sup> This unique institution was the House of Representatives.

<sup>107</sup> See THE FEDERALIST NO. 47 (James Madison) & THE FEDERALIST NO. 48 (James Madison).

<sup>108</sup> See generally *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating the “legislative veto” on these grounds).

al choice regarding the architecture and administration of “democracy” in the United States. Indeed, in the Federalist essays the framers of the United States Constitution spelled out in detail, and publicly, the reasons for their choices in designing “democracy” for this new nation. They attempted to teach these lessons in favor of deliberation to their posterity—us—in the following, precise words, penned by James Madison to urge ratification and adoption of this deliberative design:

Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.

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

The latent causes of faction...have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good...

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention...

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking...

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it

may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people. The question resulting is, whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter.<sup>109</sup>

In these passages, from *The Federalist No. 10*, the framers directly tell us their rationale for constitutional choices in favor of deliberative democracy.<sup>110</sup> As the passage explains, the framers' aim in the creation of this constitutional architecture was to ensure that lawmakers would *reflect* and *deliberate* so as to break the "violence of faction" and its potential grip over the lawmaking function.<sup>111</sup> The framers, in other words, rejected direct democracy to avoid exactly the miscarriage of lawmaking exemplified by Proposition 8 and the California Supreme Court's obedient validation of it: in a direct democracy, the framers warned, "there is nothing to check the inducements to sacrifice the weaker party"<sup>112</sup>—a chilling analysis in the light of California's recent choices and actions. For this reason the federal Constitution forbids federal lawmaking by plebiscite; only the deliberative process can forge national Law.<sup>113</sup>

To be sure, neither the legislative history nor the final text of the federal Constitution prohibits resort to direct democracy at the state or local level. Instead, the constitutional framework and text provide a single means by which to enact law and policy only at the national level. In sum, the Constitution does not limit citizen lawmaking at state and local levels.<sup>114</sup> However, the much-discussed original structural concerns regard-

<sup>109</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See *supra* notes 107–108 and accompanying text (on constitutional structure and its limitation of formal lawmaking).

<sup>114</sup> Thus, the origins of direct democracy at the state level begin only much later, after the adoption of the national Constitution and during the Progressive Era, due to a sense that representative democracy had been hijacked by Big Business. See generally STEVEN L. PIOTT, GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA (2003) (providing a historical overview). In 1898, South Dakota was the first state to incorporate citizen-lawmaking by referendum into its constitution, but Oregon in 1904 was the first state to enact a law in this way. See HAREL ARNON, A THEORY OF DIRECT DEMOCRACY LEGISLATION 10–12 (2008). Despite these origins, beginning in the 1970's these procedures became increasingly used to reverse recognition and protection of minority rights. See, e.g., Nathaniel Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11

ing democratic dynamics in the new nation are just as applicable at the state or local level, if not more so; indeed, if we seriously review and consider the framers' own words as applied to the state or local level, we are compelled to conclude that their concerns exist/ed with most acute danger at precisely the state or local level—a point they understood well and expressed publicly.

Therefore, the point to be understood here is not that direct democracy at the state and local levels is somehow prohibited, or should be flatly outlawed in the way that Proposition 8 purports to do with marriage equality.<sup>115</sup> Instead, the point here is more limited and more substantive: the point, simply, is that direct democracy is a hazardous procedure that calls for heightened education and awareness; it should be approached with care and after preparation, as a last resort rather than an easy device for majoritarian stampedes. The point here is not one of constitutional doctrine relating to the direct democracy but rather of structural analysis and how the insights of such an analysis might improve and inform citizen-lawmaking to avoid resurrection of a “tyranny of majority” at the state or local level.

According to the framers, the “violence of faction” is the bane of all democratic experiments in self government, and this violence is most acute specifically in situations that resemble states and localities in this country today. To the framers, the most reliable effective antidotes to factionalism resided in several structural characteristics of the new nation—characteristics oftentimes lacking at the state or local level. According to the framers of the Constitution, democratic government by mass vote is most dangerous at the state or local level *precisely* because the structural characteristics common to many states and localities tend to provide the ripest grounds for the tyranny of a self-interested or voracious majority.

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(1997) (focusing on uses of direct democracy specifically against sexual minority rights); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI., 245 (1997) (reporting results of a study comparing anti-civil rights initiatives to other kinds of issues, and reporting that majorities approve ⅔ of all anti-civil rights measures while only approving ⅓ of all other kinds of measures); *see also supra* note 1 and *infra* note 124 and sources cited therein (on direct democracy and constitutional democracy).

<sup>115</sup> In fact, the historical origins of, and rationales for, the emergence of popular referenda at the state level during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries suggests that such devices can play a legitimate democratic role in a constitutional republic. Those origins reflected a popular reaction to the cooptation of deliberative or “normal” democracy by Big Business—the “robber barons” and similar interests that, in this century, perhaps are more firmly entrenched and empowered than ever before. *See supra* note 114 and sources cited therein (on origins and reasons for state referenda in the Progressive Era about a century ago).

The framers began by framing the query and their bottom line quite explicitly: “the question...is whether small or extensive republics are more favorable to the election of guardians of the public weal; and it is clearly decided in favor of the latter.”<sup>116</sup> Summarizing their outlook, the framers explain as follows:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other...hence, it clearly appears that the same advantage which a republic has over a democracy in controlling the effects of faction is enjoyed by a large over a small republic—and is enjoyed by the Union over the States composing it.<sup>117</sup>

In this passage, the framers plainly and squarely inform us that the dangers of direct democracy are most acute in “the States composing” the Federal Union due to a pair of structural characteristics that the federal constitutional system is designed consciously to ameliorate or avoid.

The first characteristic was a large territorial “sphere”.<sup>118</sup> The framers foresaw and intended that a large expanse would render it more difficult for any faction to become sufficiently cohesive and organized to become dominant across a large national territory. As the founding generation had learned during their “critical period”, in a smaller political space like states, factions are able to operate in concert more efficiently to dominate the locality or its legislature. Thus, under this constitutional system, geography and scale matter to the substantive workings of democracy. The second characteristic described in this passage was heterogeneity—in other words, pluralism or diversity in the population as a whole.<sup>119</sup> The framers understood factions as special-interest groups “actuated by a common impulse,” and intended that heterogeneity would serve as an antidote to group-think tendencies: diversity introduces “different” categories of persons into a political sphere or unit, thus making it less likely that essentialized factions

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<sup>116</sup> See *supra* note 109 and accompanying text (quoting THE FEDERALIST NO. 10).

<sup>117</sup> See THE FEDERALIST NO. 10 (emphasis added).

<sup>118</sup> “Extend the sphere,” they wrote. *Id.*

<sup>119</sup> “Take in greater variety of parties and interests,” they continued. *Id.*

based on “sameness” will form and then sustain themselves over time.<sup>120</sup> As understood and intended by the framers in the design of the constitutional order, demographic heterogeneity, coupled with an expansive geography, should and would help to inhibit the political and lawmaking dynamics leading to the “democratic” violence or “tyranny” of majoritarian factions.

Thus, in *Federalist No. 10*, the framers expressly counted on an expansive sphere and a heterogeneous population to help foster, in tandem, the conditions necessary for “democracy” to operate in this country, and importantly, in light of the human tendency to factionalize. But that is not all. In *Federalist No. 51*, to follow up on this structural analysis of democracy and its potential for tyranny, the framers go further to illustrate their point by comparing and contrasting the new Union to the state of Rhode Island. They conclude that, “in the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of *justice and the general good*.”<sup>121</sup> Though they were too optimistic in thinking democracy could not be hijacked at the national level,<sup>122</sup> their admonition on the majoritarian temptations and structural dangers of direct democracy, at both the national and state or local levels, could not have been any clearer; as the California experience with marriage in/equality aptly illustrates yet again, their admonition was also eerily prescient.

Moreover, these original concerns have been more fully explicated in recent times by contemporary legal scholars.<sup>123</sup> Contemporary legal scholars have augmented the record of democratic or constitutional dangers and structural or social concerns articulated originally by the founding generation, elaborating original themes, such as the incompatibility of direct de-

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<sup>120</sup> *Id.*

<sup>121</sup> See THE FEDERALIST NO. 51 (James Madison).

<sup>122</sup> See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000) (preventing vote-counting in Florida to settle the 2000 Presidential election). For a ten-year retrospective, see Symposium, *How Far Have We Come Since 2000?*, 64 U. MIAMI L. REV. 425 (2000).

<sup>123</sup> See, e.g., Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1989–1990); Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293 (2007); Sylvia R. Lazos, *Judicial Review of Initiatives and Referendums in which Majorities Vote on Minorities’ Democratic Citizenship*, 60 OHIO ST. L. J. 399 (1999); see generally DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984); THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* (1989); see also *supra* notes 1 and 114 and sources cited therein (on the origins and development of referenda historically and presently).

mocracy with justice, as well as exploring additional concerns based on the lessons of history since the founding, lessons in which overbearing majorities at the state or local level act in precisely the ways predicted by the framers to “vex and oppress” vulnerable minorities.<sup>124</sup> Thus, no category of lawmaker today—whether voter, legislator or willful judge—credibly can claim a lack of knowledge. Original lessons and modern precautions have been lost only on lawmakers who elect to not know, or to ignore, the lessons of our constitutional origins and history.

If the framers thought these concerns dispositive—dispositive at the national level to the point that lawmaking is limited structurally to the deliberative process—should we not today consider their choices at least relevant to contemporary lawmaking? And if they counseled us that their concerns are most acute at the state or local levels, should we not heed their caution with extra care when acting at those levels? Should not, as citizen-lawmakers, every voter heed the framers’ constitutional concerns and examples, as they pause to reflect and deliberate on the questions of public policy raised by Proposition 8, or by any other exercise in lawmaking by mass vote? But how, one might ask: How can or should we reconcile the original constitutional commitment to deliberation with the modern-day operation of direct democracy?

#### B. THE INSTITUTION OF MARRIAGE: FROM ORIGINS TO PROPOSITION 8— THE RISE OF A POLITICS OF EXCLUSION

Proposition 8, as the authors uniformly explain, is designed to impose limitations on the voluntary intimate associations of consenting adults. It denies to every such adult the equal right to marry another adult of the same sex by mutual choice. Moreover, it seeks to deny to same-sex couples equal access to “symbolic” or dignitary benefits that flow from the social acceptance and formal recognition of a union.<sup>125</sup> It aims, in short, to stigmatize a minority through the use of law to create differentiation—to reinforce an invidious construction of “difference” within a purportedly democratic society committed to equality.<sup>126</sup> As you, or any other citizen-lawmaker pauses to reflect and deliberate on this sort of exclusionary policy proposition, you might want to do what the framers idealized: become informed, rise above your personal subjectivities, take seriously the obliga-

<sup>124</sup> See *supra* note 109 and accompanying text (quoting THE FEDERALIST NO. 10).

<sup>125</sup> For an insightful analysis of these stakes, see Marc R. Poirier, *Name Calling: Identifying Stigma and the “Civil Union” / “Marriage” Distinction*, 41 CONN. L. REV. 1425 (2009).

<sup>126</sup> *Id.*

tion to vindicate constitutional values and commitments in favor of reasoned public policy—a public policy designed to serve the *public* rather than *special* or *factional* interests at the expense of national values or fellow citizens.

To rise above the passion and prejudice of provincial or self-interested factionalism, conscientious citizens can turn once again to the original framers' example on questions of method and approach regarding law and lawmaking. As the historical record amply shows, the founding generation devoted much time to the study of history itself, so that they could learn from and avoid its lessons in the legal choices before them when crafting the constitutional order.<sup>127</sup> Perhaps we should do the same now when called upon to make legal choices in crafting the meaning of constitutional commitments, like equality in a setting like marriage.

For example, it is an extremely well-documented fact that the institution we today call “marriage” originally was a completely utilitarian invention focused on economic calculations,<sup>128</sup> and it has been understood primarily in those terms until relatively recently, when the historical shift to the “companionate” concept of marriage began to take hold.<sup>129</sup> This companionate conception of the institution “signifies marriage between at least approximate equals, based on mutual respect and affection, and involving close and continuous association in child rearing, household management, and other activities, rather than merely the occasional copulation that was the principal contact between spouses in the typical Greek marriage...The idea of companionate marriage implies the injection of feeling and sentiment into a relationship dominated up to then by considerations of male sexual desire, financial arrangements, and heirship.”<sup>130</sup> This historical lineage shows the malleability of the institution and belies present-day efforts to fix any one conception of marriage as divine, eternal or universal. This historical background thus helps to underscore the fallacy of self-righteous and self-serving claims to a natural or innate “morality” asserted on behalf of cross-sex marriage by contemporary cultural warriors, like

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<sup>127</sup> See Francisco Valdes, *What's the Fuss—Constitutionalism, Internationalism, and Original Method*, 3 FIU L. REV. 1 (2007) (on the framers' use of history as constitutional method).

<sup>128</sup> For a contemporary and pithy account that links this history to current controversies, see Stephanie Coontz, *The World Historical Transformation of Marriage*, 66 J. MARRIAGE & FAM., 929 (2004); see generally ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND* (2009) (providing a current analysis focused on the U.S. specifically).

<sup>129</sup> For a recent analysis focused on legal issues, see RICHARD A. POSNER, *SEX AND REASON* 37–66 (1992).

<sup>130</sup> *Id.* at 45.

those behind the approval of Proposition 8. This sort of historical knowledge therefore should help to advance the kind of informational and discursive project Feldblum urges.<sup>131</sup> But there is more, more that is directly relevant to contemporary comprehension of marriage equality.

This historical lineage of marriage in Western societies has been documented by many scholars, but one stands out for extending this scholarly investigation into the specific realm of same-sex marriages: in 1994, Yale Professor John Boswell provided all conscientious citizens a singularly principled and substantive basis for informed deliberation, in our public capacities as a citizen-lawmakers, before making decisions on Propositions like this one.<sup>132</sup> To produce this ground-breaking book, Boswell spent more than a decade scouring libraries and poring over ancient manuscripts to trace, in these original artifacts, the earliest origins of a formal public ceremony consecrating same-sex marriages. To contextualize this meticulously documented research, Boswell surveyed the landscape of both cross-sex and same-sex marriages, and other types of intimate relationships, in pre-Christian culture and law, focusing most extensively on Greek, and also Roman, records.<sup>133</sup>

Boswell, like many others before him, found that both types of relationships—same and cross-sex—clearly abounded in Greek and Roman civilizations.<sup>134</sup> During that time, as well as later, the historical record shows a nuanced and textured landscape, where a great variety of couplings, commitments and liaisons existed side by side in our societal precursors. Within this diverse and fluid setting, one bottom line stands out: cross-sex “marriages” did not enjoy any hegemony, either culturally or legally.<sup>135</sup>

This diversity of relationships was so entrenched and pervasive by the time of Christianity’s rise in Europe that it also proved culturally, legally and historically resilient. As Boswell explained:

Particularly in matters sexual, it would be a mistake to imagine that the theological program of ascetic Christian theologians was instituted uniformly and en masse, like legal or economic changes in the highly struc-

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<sup>131</sup> See *supra* notes 50–62 and accompanying text (on Feldblum’s project).

<sup>132</sup> JOHN BOSWELL, *SAME-SEX UNIONS IN PRE-MODERN EUROPE* (1994).

<sup>133</sup> *Id.* at 31–108.

<sup>134</sup> *Id.* at 57–108 (focusing specifically on same-sex unions); see also Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins*, 8 YALE J.L. & HUM. 161 (1996) (surveying the historical landscape and providing numerous sources); see generally DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* (1986) (providing a historical overview of same-sex relations in Western cultures).

<sup>135</sup> See *supra* notes 129, 132 and 134 and sources cited therein (on “marriage” diversity or pluralism in early Western societies).

tured bureaucracies of the industrial West. Christian practices and attitudes more resembled the rain in Mediterranean cities that fell on the population, ran off, and was redistributed to most people through the artifacts of education—in the case of Christian ethics, gradually, through law courts that were over time surrendered to Christian officers and principals.<sup>136</sup>

The gradual substitution of Christian for pre-Christian norms and practices thus produced, incrementally and over time, various admixtures of the two.<sup>137</sup> It is during this period of macro-structural change that the institution of “marriage” became formalized in Euro-Western cultures. During this period of major transitions, the general blending of pre-Christian and Christian norms into a new and consolidated socio-legal order becomes the frame for Boswell’s study of the ways and means through which same-sex unions, specifically, became originally recognized as formal marriages under the new Christianized order.

By showing us in vivid detail how multiculturalism was the origin of modern-day marriage, Boswell effectively spotlights how the institution of marriage, as it is currently known, is in fact but another social construction: there is nothing special about the version familiar to us now, despite the grandiose (and false) claims to justify exclusion and inequality in marriage policy. By providing us the means through which to learn the suppressed knowledge regarding marriage and its origins, we thus are better positioned to see how the politics of supremacy and exclusion have led to today’s rigid, ideological and reductionist construction of the institution. In this way, Boswell positions us to examine the claims and “fears” that fueled Proposition 8 with a more informed and deliberative response—a historically informed and substantively deliberate response akin to the ideal posited by the framers of the federal Constitution for any and all lawmaking acts.

Thus, by turning to history we learned, first, of the structural dangers long associated with direct democracy. We learned why the framers chose a national constitutional architecture that repudiates direct democracy as a reliable device for the administration of democratic lawmaking, while warning that tyrannical majorities pose even greater dangers at the state and local level.<sup>138</sup> By turning to history we learned also how the framers ap-

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<sup>136</sup> BOSWELL, *supra* note 132, at 109.

<sup>137</sup> See generally ROBIN LANE FOX, *PAGANS AND CHRISTIANS* (1986) (providing a historical overview of this period).

<sup>138</sup> See *supra* Part III. A.

proached and resolved similar questions of structure and process in designing a democratic order.<sup>139</sup> By turning to history, we learned fundamental lessons both about the substance and the method of constitutional democracy, American style.

But, by turning to history, we similarly can learn that the origins and development of “traditional” marriage are more pluralistic than we are accustomed to thinking in these times of backlashing politicking through cultural warfare. Using history-as-method may not yield unambiguous conclusions, but it positions all lawmakers to act conscientiously regarding both “democracy” and “marriage”. In good-willed analyses, history-as-method can help combat prevalent biases and bigotries, including those purportedly anchored in history (or “tradition”) itself.

Of course, the application of this or any other historical knowledge to a current question of public policy regarding marriage in the United States takes place against the established legal and constitutional framework. Thus, for example, we begin by recalling that “marriage” is nowhere mentioned in the Constitution; it is not a right protected by the text of that document as framed originally in 1787. Since then, none of the formal textual amendments have introduced, or even sought to introduce, the right to marry as a formal matter. Thus, it was not until the 1960’s that “marriage” (of any variety) became a recognized constitutional right by decision of the United States Supreme Court in the case of *Loving v. Virginia*.<sup>140</sup> Whatever we may opine about this textual gap and belated doctrinal history, this basic legal background sets the stage for linking current realities with historical facts in a principled, rather than prejudiced, way in situations akin to that presented by Proposition 8 and similar initiatives.

By the Middle Ages, when today’s Western socio-legal institutions were being consolidated in Europe, marriage still remained “like a commercial contract.”<sup>141</sup> This utilitarian conception is amply reflected in the literature and culture of the times.<sup>142</sup> Despite today’s normative arguments about (heterosexual) marriage and morality, this “traditional” focus on function did not distinguish obsessively or specifically between same-sex and cross-sex unions. Society, it seems, had use for—and was able to for-

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<sup>139</sup> See *supra* note 127 and accompanying text (on original lessons regarding the use of history as method).

<sup>140</sup> 388 U.S. 1, 12 (1967) (striking down Virginia’s anti-miscegenation laws). For insightful and timely discussions of *Loving* and marriage equality today, see Angela P. Harris, *Loving Before and After the Law*, 76 *FORDHAM L. REV.* 2821 (2007–2008); Mark Strasser, *Loving Revisionism: On Restricting Marriage and Subverting the Constitution*, 51 *HOWARD L. J.* (2007–2008).

<sup>141</sup> BOSWELL, *supra* note 132, at 170.

<sup>142</sup> *Id.* at 176–77.

mally recognize—both types of couplings; the actual existence and formal recognition of the former seemed not to somehow threaten the well-being of the latter.

As Boswell explains,

The earliest Greek liturgical manuscript—Barberini 336, probably written in the 8<sup>th</sup> Century in Italy, where Greek liturgical offices were common into early modern times—contains four ceremonies for sacramental union: one for heterosexual betrothal, two separate ceremonies (simply called “prayers”) for heterosexual marriage and a comparable “prayer” for uniting two men.<sup>143</sup>

Moreover, Boswell continues,

All three forms of union persisted among Greek-speaking and other Christians, who often based the wording and form of union ceremonies on the Barberini. . . . There are many similarities of wording between the second heterosexual union ceremony and the ceremony of same-sex union, suggesting a substantial mutual influence or parallel development.<sup>144</sup>

Indeed, the same-sex ceremonies’ similarities to the heterosexual counterparts remain recognizable to this very day, featuring

the burning of candles, the placing of the two parties’ hands on the Gospel, the joining of their right hands, the binding of the their hands (or covering of their heads) with a priest’s stole, an introductory litany, crowning, the Lord’s Prayer, communion, a kiss, and sometimes circling around the altar.<sup>145</sup>

Concluding this brief sketch, Boswell cites to a visitor’s real-time description of a same-sex marriage ceremony from Rome, taking place in 1578, and suggesting

that Roman ecclesiastics realized perfectly well what it entailed, even to the point of legitimizing homosexual activity: “Two males married each other at mass with the same ceremonies we use for our marriages, taking Communion together using the same nuptial Scripture, after which they slept and ate together.”<sup>146</sup>

To explicitly explain the ecclesiastical rationale for this consecration of same-sex marriages within the Catholic Church, Boswell cites the historical account verbatim: “it had seemed *fair* to them [the ecclesiastics] to author-

<sup>143</sup> *Id.* at 178.

<sup>144</sup> *Id.* at 179.

<sup>145</sup> *Id.* at 185.

<sup>146</sup> *Id.* at 264–65.

ize [these] ceremonies and mysteries of the Church” because these rituals provided the sole means of legitimizing sexual relations, and were already available to cross-sex couples.<sup>147</sup> Their rationale, in other word was “fairness”—equality of “marriage” rights, a rationale quite apt for us today.

It seems clear that our “pre-modern” ancestors in Europe, responsible for the construction of the “traditions” that legal decision-makers interpret and purport to enforce today, were quite aware of their own agency—that is, of their discretion in the process of designing and constructing the formal institution of marriage in a time of great social, legal and cultural transitions. Even without the insights of postmodernism, our ancestors seemed clearly aware of their choice and power in the never-ending project of social re/construction. Unlike today’s judges (and perhaps voters), they did not claim or pretend to lack agency.<sup>148</sup>

This brief historical sketch may not provide a clear-cut blueprint to the exercise of agency or choice regarding marriage equality today, but it should help lawmakers approach their public duties and choices in a more informed, sober, rational and responsible manner. These brief doses of history should help elevate the caliber of agency at all levels of decision-making when called upon to apply fundamental values in the name of the law. This snapshot of history should nudge and help all decision-makers to articulate truthful and coherent rationales for the normative underpinnings of every legal choice we elect to enact.<sup>149</sup>

As illustrated by this eyewitness account of a (same-sex) marriage ceremony from 1578, and by the reasons given for it, the Roman Catholic clergy of Rome already has provided a substantive and straightforward normative rationale for marriage equality: the original historical record uses the exact term “*juste*”—meaning fairness (or justice).<sup>150</sup> At least in this instance, our pre-modern ancestors, apparently aware of their own agency, were driven by fundamental values like “fairness” or “justice” to choose in favor of marriage equality in their own social context. Today’s

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<sup>147</sup> *Id.* at 265 (emphasis added).

<sup>148</sup> See *supra* notes 31–33 and accompanying text (on judicial disclaimers of discretion in deciding *Strauss*).

<sup>149</sup> To be clear, this sketch does *not* purport to argue that origins, histories or traditions should trump all other values or settle all questions of law and policy. But this historical sketch need not reach out to such grand goals in order to be helpful regarding our understanding and application of legal concepts, like equality, to policy questions like those before California’s voters and judges in 2008. This brief historical sketch at least should provide a counterpoint to campaign tactics aiming to exploit ignorance, or fears based on ignorance. See *supra* notes 50–71 and accompanying text (on resort to these tactics to secure passage of Proposition 8).

<sup>150</sup> BOSWELL, *supra* note 132, at 265.

judges and voters might do well to learn not only from this historical record, but also from the normative example that this rationale sets.

This last detail, specifying *justice* as the rationale for marriage equality in 1578, provides an appropriately ironic note for concluding this Introduction. From the perspective of our historical moment, it must seem ironic if not incredible that the very principle of marriage equality argued to stop Proposition 8—the very principle that was drowned out by a campaign and culture of hysteria, in turn enabled partially by ignorance of this historical record—is the very normative principle etched in the historical record for *extending* to same-sex marriages equal recognition and protection in the so-called “Dark” ages. This norm of equality and fairness, embedded in the rationale for that 1578 ceremony, is *precisely* the principle of constitutional law rejected or sacrificed by voters, judges and other lawmakers who choose to act in favor of marriage inequality today.

As this thumbnail sketch suggests, the known historical record provides an arsenal of relevant information regarding the history and tradition of marriage in Western cultures on which this society is based. At a minimum, this record shows that marriage comes with no innate or divine heterosexual nature. At bottom, this record shows that marriage is exactly what humanity constructs it to be in any given place and time. In its totality, this record thus shows that misconceived beliefs regarding the “nature” of marriage deployed in campaigns like those behind Proposition 8, like politicized claims of morality, history and tradition, are both self serving and false. In fact, as history teaches, marriage has never taken a single or rigid form across time and space: even today marriage remains in flux, as this very controversy aptly illustrates. Because marriage is every society’s and every generation’s creature, we are free to change it in accordance with the values we profess to cherish as constitutional fundamentals today.<sup>151</sup>

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<sup>151</sup> These bottom-line points of course have been made more powerfully by various sexual minority scholars whose work has helped to pioneer legal comprehension of same-sex couples and their families. See, e.g., Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991); Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 WIS. WOMEN’S L.J. 1 (1986); Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996); Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687 (1997); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); Ruthann Robson & S.E. Valentine, *Lo(H)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMPLE L. REV. 511 (1990); John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTING L.J. 1415 (1991).

This arsenal of information therefore may and should help to contextualize and to blunt the normative claims behind Proposition 8 and similar abuses of direct democracy—claims which depend in part on a view of (same-sex) marriage that historical records show to be false. This arsenal specifically may and should help to tame among citizen-lawmakers the virulent effects of political fear-mongering that also depend in part on the same false view of marriage and sexual minorities. This arsenal of information thereby may help to address some of the concerns that Feldblum and Hahn identified and addressed. And, perhaps this kind of substantive historical information even can help steer judges to a more informed and principled appreciation of marriage equality today, so that they never again succumb to the passion and prejudice of homophobic hysteria. This arsenal of historical information thereby may help inject reason into similar cases along the lines that Cruz and Minter argue in this volume. In sum, this historical capsule can help *conscientious* citizen-lawmakers *and* judges to take their responsibilities more seriously, even when their elected representatives abdicate or corrupt constitutional rules, norms, ideals and values. Then, and only then, can direct democracy make sense. Then, and only then, will simple majoritarianism be able to make a constitutional claim to any sort of democratic legitimacy.

#### CONCLUSION

This special issue performs a key service in sounding a timely alarm that both democracy and equality are threatened, at least in California, in previously unthinkable ways. Not only have the judges and the voters of this state allowed a simple majority to strip a suspect class of a fundamental right, but they also have licensed the activation of direct democracy to accomplish precisely the evils of majoritarianism that the framers of the Constitution identified at the time of the founding, and then sought to avoid in the future through their constitutional designs. This Orwellian inversion, as the authors pointedly explain, threatens not only the sexual minorities that were targeted today, but also any other disenfranchised or disfavored minorities that might be targeted tomorrow.

Collectively, the authors reveal how and why judicial acquiescence to this abuse of democracy and imposition of inequality is little more than a kneejerk accommodation of raw majoritarianism. But in this instance, the accommodation required the judges to contradict the very words they had penned only a few months earlier. The breathtaking gyrations which judges jumped through to accomplish this momentous feat threatens not only the rights of minorities or other vulnerable Californians, but the very

legitimacy of that state's constitutional order. At the very least, this issue warns that the voters' and the judges' recent choices in favor of formal inequality bring into question the functionality of legal fundamentals, like equal protection and separation of powers, in California today.

The authors and editors thereby point our attention toward the larger socio-political framework that creates the opportunity for majoritarian abuse of democracy and judicial acquiescence thereto. The culture wars of the past several decades not only pounded, "softened up" and conditioned California voters with "fear" that could later be crassly exploited, but also produced an environment where judges upheld tyranny in the name of democracy. Once again, the theme of sexuality, and the equality of sexual minorities, was targeted for majoritarian exercises of raw power propelled by "traditional" rhetorics of normalcy and morality. Once again the world saw majoritarian backlash against a judicial ruling that touches on the social and legal themes made salient by cultural warfare.

Following now-familiar scripts, backlash warriors managed to whip up a public frenzy in which the judges themselves were complicit or cowed. Yet again, we witnessed law used to deny, not protect, equal justice. We witnessed, yet again, the use of majoritarian might to take back or roll back the rights of minority groups on the basis of sheer numerosity. Contextualizing the topic of this issue in these larger frames of law and politics ideally should help each of us to personally understand the scale and nature of the antisubordination struggle today, and the interconnections of "different" issues or fronts in this ongoing contestation for the soul or future of the nation. Ultimately, what happens next in this still-unfolding national drama depends, in part, on how each of us responds, personally, in the weeks, months and years to come.

Finally, the thumbnail sketch of the long historical tradition underlying marriage in/equality outlined here of course does not provide a complete historical account of "marriage" and its development—nor does it attempt or pretend to do so. Instead, it is designed to illustrate how lawmakers of all sorts, whether sitting in chambers and legislatures, or acting via referendum, can start to contextualize questions of law and policy regarding marriage equality. This light touch of history is enough at least to begin questioning the politics of hysteria and fear-mongering associated with Proposition 8 and similar abuses of direct democracy. At the very least, this historical sketch provides an initial substantive basis from which to question the normative claims and legal arguments in favor of marriage

inequality that these authors' recount as they analyze the recent actions of California's voters and judges.

In closing, then, today's spectacle should remind all conscientious lawmakers that it is false to assume, and it borders on lying, to assert that the institution of "marriage" is naturally, inevitably, universally limited to only cross-sex couplings. It is true only that it has been made that way, socially constructed and legally restricted in that way, in modern times through successive acts of exclusion and subordination that privilege the sexual majority and demonize sexual minorities—acts like Proposition 8 and the judges' dance in *Strauss*. The exclusionary "nature" of marriage today, however, bears no resemblance to its pluralistic origins, and much less to its actual social functions. Thus, if exclusion and subordination are the "traditional values" that you support, then perhaps you should embrace Propositions like this one—and the exploitation of ignorant fear through the device of "direct democracy" to further entrench structures and systems of oppression in and throughout American society. But if you believe in the original promise and premise of the Constitution and its framers, if you regard history and information important to policy-making, then you should pause, study, learn, deliberate, and then just say—and vote—*NO!* to subordination in the name of democracy.