The Prop 8 Court Can Have it All: Justice, Precedent, Respect for Democracy, and an Appropriately Limited Judicial Role

By Rebecca L. Brown

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I. Introduction

As a general proposition, judicial minimalism leaves a lot to be desired as a theory of judicial decision-making. All too often, the euphemism of minimalism can be something of an excuse for not addressing hard, but important, questions of individual rights. Worse yet, it can offer a pretense of not resolving a conflict, while indeed masking a resolution for which accountability is lacking. This is a significant drawback to embracing too wholeheartedly Alexander Bickel's vision of a judicial role that proudly proclaims the virtues of refusing to hear and resolve potentially meritorious claims of rights deprivation in a constitutional democracy.[1] In the ordinary case, passive virtues can indeed look much less virtuous than advertised, perhaps even with a tinge of vice.

But *Perry v. Schwarzenegger* is no ordinary case.[2] In that case, the United States District Court for the Northern District of California is asked to rule on one of the major civil rights issues of this generation, the question of whether the United States Constitution requires states to permit marriage between people of the same sex. While the question is presented in this case in a direct way, squarely raising the issue in such a posture that it could lend itself to the most sweeping judicial declaration of state disempowerment since *Brown v. Board of Education*, the case also lends itself to a narrower, more modest resolution of the claims actually raised in the case.

I suggest that in this case, it would not be a dereliction of duty, indeed it would fulfill the best expectations we have of the federal judicial role, to resolve the case on strong, unassailable, time-honored, and yet narrow, grounds. The result would be that same-sex couples in California would benefit from the ruling, because it would be very precisely tailored to the unique facts of this case. Those in states with other legal landscapes would be left to continue their struggle for equality through their grass-roots efforts, their courts and their legislatures. A ruling of the kind I will advocate would not be an act of minimalism, but neither would it be an act of maximalism. Rather, this would be an exercise in judicial optimalism—using good judgment to determine just how much judicial intervention is necessary to vindicate the core and essential purposes of the

* Newton Professor of Constitutional Law, University of Southern California Gould School of Law, and Co-Chair, ACS Issue Group on Constitutional Interpretation and Change.

[1] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

[2] Perry v. Schwarzenegger, No. C 09-2292, 2010 WL 1691193 (N.D. Cal. Apr. 25, 2010).

judicial role, without unnecessarily diverting the course of more widespread social and political movements that are at the heart of healthy and lasting legal change.

II. The Context and Unique History of Proposition 8

Considered carefully in its appropriate context, *Perry* presents an issue that does not necessarily require any expansion of the equality guarantees that have been part of our common-law understanding for over a century. This argument depends on isolating the precise issue raised by Proposition 8 so that it can be understood clearly, cool-headedly, and accurately. In its own historical context, Proposition 8 presents the issue of same-sex marriage in a unique way, a way that actually presents a legal question much more settled and uncontroversial than the underlying issue of same-sex marriage itself. The uniqueness of Proposition 8 suggests both the nature of the equality issue and its resolution.

Proposition 8 originated as a reaction to a California Supreme Court decision interpreting the California Constitution to require recognition of marriage for same-sex couples.[3] Equality under the California Constitution, ruled the Court, requires that when "all or virtually all" of the legal rights and obligations traditionally associated with marriage are already provided by law to both same-sex and different-sex couples, the further opportunity to enjoy the designation of "marriage" must be offered to both groups as well.[4] For clarity, I will refer here to all of those legal rights and duties traditionally associated with marriage as the "marriage bundle."

When Proposition 8 was enacted in reaction to that ruling, it did not affect at all the aspect of the case establishing that the "marriage bundle" was a legal requirement for all couples under the privacy, due process, and equal protection clauses of the state constitution.[5] Leaving that intact, Proposition 8 added to the state constitution a provision that "[o]nly marriage between a man and a woman is valid or recognized in California."[6] As later interpreted by the California Supreme Court when it upheld the procedural validity of Proposition 8, this new provision removed the right of same-sex couples in California to enter into the state of marriage, but did not affect the constitutional right of same-sex couples to "'choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage.'"[7] This marriage bundle has been afforded in the form of domestic partnership by state law.[8]

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[3] In Re Marriage Cases, 183 P.3d 384 (Cal. 2008).
[4] *Id.* at 398.
[5] Strauss v. Horton, 207 P.3d 48, 61 (Cal. 2009) (stating that Proposition 8 did not "fundamentally alter the meaning and substance of state constitutional equal protection principles," but "carve[d] out a narrow and limited exception").
[6] CAL. CONST. art. I, § 7.5.
[7] *Id.* at 61 (quoting *In Re Marriage Cases*, 183 P.3d at 433–34).
[8] *See* CAL. FAM. CODE §§ 297, 297.5 (2004).

Now the unique aspect of this case begins to emerge. Same-sex couples in California are guaranteed the right to enjoy the complete package of obligations and entitlements in the marriage bundle, but the right to enter into marriage, once afforded, has now been withdrawn. In a federal challenge under the Equal Protection Clause, then, the action that the state[9] must defend here is not the denial, across the board, of marriage status to same-sex couples. Rather, the action to be defended here is that, from the pool of all couples who are lawfully entitled to avail themselves of the marriage bundle in the state, the state singled out just one subgroup—those in same-sex relationships—and demoted them by relegating them to another status known as domestic partnership rather than marriage, without changing any of the underlying components of that bundle.

For analytical purposes, the project of identifying and evaluating a state interest—usually messy and intractable—is here quite pristine, because the only act the state may seek to defend is its decision to take away, from a limited group, the status of marriage from the bundle of entitlements and obligations that we usually refer to as marriage. The state is still compelled to allow same-sex couples the whole panoply of other legal accoutrements in the marriage bundle such as cohabitation, adoption, community property rights, inheritance rights, and many more. But by unpacking the bundle and isolating the status of marriage from the bundle just for some who wish to acquire it, the state reveals that its only concern is with the title and status afforded otherwise legally indistinguishable legal unions, not with the unions themselves. It is perhaps the difficult and untenable nature of this position that led the state of California to decline to substantially defend Proposition 8 in *Perry*, prompting the presiding judge to allow Proposition 8's proponents to enter the case to defend the initiative's legality.

III. Legitimate Governmental Interests: A Closer Look at Sincerity, the Invocation of Tradition, and the Equality Principle

By singling out and differentiating this one symbolic aspect of otherwise similar situations, Proposition 8 does the one thing that states are never allowed to do—demean and denigrate the status of selected persons. U.S. Supreme Court precedent has been explicitly clear since at least 1973 that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[10] Of all the numerous interests that a state may legitimately further, desire to demote and reduce status of a disfavored group is the

[9] In this Issue Brief, I often refer to the proponents of Proposition 8 as the "state" even though the specific arguments have been put forward by non-state defenders of the Proposition. Indeed, the "state" in its official capacity has had an unusual role in this case, declining to defend the constitutionality of Proposition 8. The sponsors of the Proposition, instead, have taken on the role of asserting the state interests purportedly served by the proposition.

[10] U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (finding that exclusion in federal food-stamp law was unconstitutional because it was motivated by a disapproval of "hippies").

one purpose that is unalterably denied to any state in the exercise of its police powers. This is not a rule that is peculiar to same-sex couples as a class, or to marriage as an interest; it applies across the board, resting on the age-old understanding of the police power as tied to the *common* good.

The quotation from the 1973 *Moreno* case condemning a "bare desire to harm" cannot be dismissed as a mere frolic of the Warren Court or a peculiarity of the age of hippies. Rather, it reflects a structural requirement that laws must not reflect either favoritism or hostility, but must be applicable to all. This principle is so deeply rooted in the theoretical foundations of our Constitution that it can be traced even to John Locke, whose 1690 treatise is known to have inspired the founders of the U.S. Constitution. Locke wrote that governments "are to . . . have one rule for rich and poor, for the favourite at Court, and the countryman at plough."[11] Early American theorists in the 19th Century embraced this principle, sharing a "common assumption that the rights of nonmajorities would be best protected . . . by simply insisting that laws be generally applicable or serve a real public purpose . . . ."[12] In turn, "'public purpose' as a limit on the powers of government . . . meant, by and large, . . . legislation that did not impose special burdens or benefits . . . ."[13] This principle was applied largely, of course, to market transactions, but reflected a principle that survived into present day as an understanding of legitimate state interests in observing equality obligations to all.[14]

Even before ratification of the Equal Protection Clause in 1868, then, the principle of impartiality reiterated by the Supreme Court in *Moreno* was a key component of legitimate action under the state's police powers. The Court applied the principle again in the 1985 case of *City of Cleburne*, in which the concurrence invoked the venerable "requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."[15] The principle has been invoked explicitly on several other occasions, all to the effect that a desire to harm, devalue, disable, stigmatize, or burden a part of the population not only requires invalidation under the Equal Protection Clause, but also suggests that the state has exceeded its own powers to legislate for the common good.

The relevant inquiry in this case, then, is whether Proposition 8's removal of the status of marriage from one group of couples otherwise entitled to the entire marriage bundle can be justified by any sincere and genuine conception of the common good, or whether it must be

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[11] JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 189 (Everyman's Library ed. 1962).
[12] HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 54 (Duke Univ. Press 1993).
[13] *Id.* at 55.
[14] *Id.* at 59 ("The addition of an equal protection clause to the Constitution was in many respects just a formalization of what . . . the framers . . . had already considered the singular aim of the law, which was the protection of equality of rights and privileges").
[15] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 452 (1985) (Stevens, J., concurring).

understood as resting on a "bare desire to harm." On this question, the plausibility of the asserted state interests will be of great weight in the analysis. The goal, again, is to decide whether the measure can be said to promote any valid public purposes so that it would not be purely a stigmatizing law.

Many of the proffered state interests put forth for the purpose of justifying Proposition 8 address concerns that attach to the existence of same-sex unions under any name, and thus are largely beside the point. These include "promoting the formation of naturally procreative unions" and "increasing the probability that each child will be raised by both a father and a mother."[16] These interests are not responsive to the essential feature of Proposition 8, which is that it left the state-sanctioned unions intact but took away from them their title of marriage.

Two other asserted state interests, however, do implicate the heart of Proposition 8, which prevents the designation of a same-sex union as a marriage: an interest in "preserving the traditional social and legal purposes, functions, and structure of marriage" and in "using different names for different things."[17] These two interests are mutually dependent and so must be understood together. When the state refers to the two types of unions as "different things" deserving of "different names," it is itself relying on a tradition that once afforded same-sex couples no rights to any legally recognized relationship. Under that tradition, same-sex couples were not considered to be similarly situated with different-sex couples. But state law has superseded that tradition by granting to same-sex couples the same marriage bundle that different-sex couples enjoy in California, the similarity disrupted only by the passage of Proposition 8 itself. Thus, the justification is circular: Proposition 8 is justified by the fact that the two kinds of unions are different, and they are different because Proposition 8 renders them different. The constitutional issue thus comes down to whether tradition can be understood to afford a non-invidious basis for branding as different what the state statutes and constitution have treated as the same.

When equal status is being denied, the offer of "tradition" as justification is problematic. The story of equality's evolution in this country is a story of departing from tradition that has entrenched privilege in some, while denying it to others, and a story of bucking tradition in order to broaden opportunity and thus to increase liberty for all. The Supreme Court has long recognized that "tradition" is a helpful starting point when seeking to identify transcendent *liberty* values that can fairly be said to be "ours" as a society.[18] But it wisely has not turned to

[16] Defendant-Intervenors' Amended Response to Plaintiffs' First Set of Interrogatories at 1–2, Perry v. Schwarzenegger. Other state interests are largely variations on these, as well as "ensuring that California's marriages are recognized in other jurisdictions." *Id.* at 2.

[17] *Id.*

[18] *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (stating that due process protects a "'principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental'" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (stating that due

tradition for guidance in equality cases.[19] From the beginning of equality challenges, inequalities have sought to be justified by tradition arguments. In *Plessy v. Ferguson* itself, the Court reached its now-infamous "separate but equal" approach to equal protection precisely by insisting that the state may create classifications of persons "with reference to the established usages, customs, and traditions of the people."[20] In overruling that case in 1954 and in its subsequent development of an equal protection jurisprudence, the Supreme Court necessarily abandoned any endorsement of a defense to inequality claims based on tradition. Tradition, without more, cannot provide a justification sufficient to dispel the inference that a reduction in status of a group of persons is a breach of the state's basic obligation to act impartially, for the common good.

As an illustration of the equality principle that underlies this issue in a more familiar context, imagine that, in anticipation of the *Brown v. Board of Education* litigation in 1954, the Topeka Board of Education had ruled that Linda Brown and other black children could attend the white school, but they would have to be called "auditors" instead of "students." After all, the Board could claim, the students *are* different (in that historically they had always been treated differently), so why not reflect that difference in a different name? It is unlikely that anyone would think that this action would have made the equality challenge in *Brown* moot, or that somehow the state's provision of the underlying education to all the children justified doing so on an unequal footing. At bottom, however, this is similar to what occurred with Proposition 8: same-sex couples were granted the underlying legal rights associated with marriage, but then assigned a title suggesting they were of a less respected class, based on an asserted residual belief in their difference. The asserted state interests to preserve traditional marriage and to call different things by different names thus merge into the concern that the state is acting out of a desire to brand as inferior, and not out of an independent public purpose.

The effect of Proposition 8 is stigmatizing. The Supreme Court of California interpreted the language enacted by Proposition 8[21] as "perpetuat[ing] a more general premise . . . that gay individuals and same-sex couples are in some respects 'second-class citizens' who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples."[22] Testimony in this case contains other similar conclusions about the

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process protects liberties "'deeply rooted in this Nation's history and tradition'" (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977))).

[19] *See* Califano v. Goldfarb, 430 U.S. 199, 233 (1977) (Stevens, J., concurring) (joining judgment to strike down a preferential law although "persuaded that this discrimination . . . is merely the accidental byproduct of a traditional way of thinking about females").

[20] Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

[21] The Court was interpreting the language of Proposition 22, verbally identical to Proposition 8, but with the status of an entrenched law rather than a constitutional amendment. *See In re Marriage Cases*, 183 P.3d at 402.

[22] *Id.*

effect of Proposition 8 as stigmatizing and demeaning.[23] Thus, even without actual proof of an invidious intent, the inquiry into state interests must be especially pointed for a law having this effect. As the Court concluded of another stigmatizing referendum, "[i]t is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."[24]

In the case of Proposition 8, there is also some evidence of invidious intent. While the concept of intent is a bit elusive in the case of a public initiative, there was evidence at trial here demonstrating that much of the advertising literature supporting Proposition 8, as well as public statements said in its support, suggested a motivation of animus at some of the levels of the enactment process. As one witness acknowledged, "[m]y view is that at least some people voted for Proposition 8 on the basis of anti-gay stereotypes and prejudices."[25] Other testimony revealed that the proponents' campaign, including even the Proposition 8 Official Voter Guide, contained statements appealing to irrational fears and animus against gay and lesbian individuals, linking them to such horrors as sexual predation of children, coercion of children to become gay, polygamy, and incest.[26] Significantly, one supporter acknowledged that "[w]e believed that a campaign in favor of traditional marriage could not be enough to prevail."[27] That is a stunning repudiation of the interest that the state now claims was sufficiently profoundly embraced by the electorate of California as to justify the inequality created by Proposition 8.

To summarize, there is no state interest specifically responsive to Proposition 8's tactic of removing only the name, but not the substance, of marriage for same-sex couples. It may seem ironic that, under this argument, it appears that California has doomed itself in part by the degree to which same-sex couples in California continue, despite the passage of Proposition 8, to enjoy substantial privileges comparable to marriage. It would be natural to wonder, at this point, whether the State of California would be in a stronger position to deny same-sex marriage now if it had not already offered the full bundle of marriage rights other than status. The answer to that question is a qualified yes, at least with regard to the narrow argument offered here, which includes the stigmatizing effect of the particular history of the enactment at issue in this case. It is so for sound theoretical reasons residing in the theory underlying equal protection doctrine.

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[23] *See* Plaintiffs' and Plaintiff-Intervenor's Annotated Amended Proposed Findings of Fact and Conclusions of Law, at 63–65 (referring to second-class citizenship and quoting the Attorney General as admitting that "the inability to marry relegates gay and lesbian relationships to second-class status"); *id.* at 66–68 (referring to stigma); *id.* at 73–77 (describing distinct social meaning of domestic partnership as opposed to marriage); *id.* at 82–83 (describing the "structural stigma" created); *id.* at 84 (referring to "special disability").

[24] Romer v. Evans, 517 U.S. 620, 635 (1996).

[25] Plaintiffs' and Plaintiff-Intervenor's Annotated Amended Proposed Findings of Fact and Conclusions of Law, at 168 (quoting Miller, Tr. 2608:16–18).

[26] *See id.* at 242–52 (quoting Miller Tr. 2608:16–18).

[27] *Id.* at 244.

IV. The Equal Protection Clause, Democratic Representation, and Proposition 8

The Equal Protection Clause has long been understood to operate particularly to reinforce the system of democratic representation in this country.[28] The majoritarian institutions of democracy work well in most cases to establish public policy and define a community with shared visions. But the built-in check on this system is that all persons must abide by the same laws. This generality requirement increases the chance that laws will be careful and reasonable, because the legislators "can make no law which will not have its full operation on themselves and their friends . . . ."[29] Once a law departs from that generality model and seeks to classify, however, such that its burdens can be said to apply only to a portion of the whole, the structural check disappears and the Equal Protection Clause is needed to "reinforce" the representative process in its promise of equality.[30]

When a law classifies, the possibility arises that the state could be acting in disregard of its obligation to recognize the equal status of all persons. That is why courts have interpreted the Equal Protection Clause to demand of states that they provide reasons for their classifications. By requiring states to offer reasons for any classifications that they employ—whether at a level designated as legitimate, important or compelling—the Court has sought to ensure that states do not arbitrarily or invidiously single out some portion of the polity to bear a burden that would not have been enacted if imposed on all.

In other words, states *may* make distinctions among people, and *may* treat people differently, but only if two things are true. First, the state has to have a good reason for doing it, a reason separate and apart from any desire to burden or oppress. Second, if there are any concerns about the sincerity of the state's asserted reasons, then the Court will look behind the fact of the state's claim. The Court has insisted that, even at the level of review designated as "rational basis," the state must show that the reason it puts forward to justify unequal treatment is a policy that the state consistently pursues and that its citizens have demonstrated to be an interest that they actually value, through their laws or other public manifestations.[31] This is the mechanism the Court uses to avoid allowing a state to resort to pretext in justifying its

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[28] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).
[29] THE FEDERALIST NO. 57, at 352–53 (James Madison) (Clinton Rossiter ed., 1961).
[30] For fuller discussion, *see* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491 (2002).
[31] *See, e.g.*, *Romer*, 517 U.S. at 630–31(dismissing proffered state justification of desire to conserve enforcement funds because no other group was asked to sacrifice in the name of enforcement savings); *cf.* United States v. Virginia, 518 U.S. 515 (1996) (using a higher level of scrutiny to reject a state proffer of "educational diversity" as justification for an all-male military academy, because the state had not demonstrated an interest in that goal in any other setting).

classifications.[32] Thus, public accountability is an important part of the theory underlying equality doctrine. The people must show themselves in fact committed to their stated goals if they wish to use those goals to justify disparate treatment of citizens.

From this principle of accountability, it follows that there is actually good reason why the law would look particularly skeptically on Proposition 8's effort to take away from a subgroup just one of the bundle of rights and obligations otherwise constituting marriage, especially the one that has to do only with status and dignity and has nothing to do with the underlying realities surrounding legally recognized unions. If the state truly were committed to the social concerns that Proposition 8 supporters have cited regarding the undesirability of same-sex unions, the natural question is why did the initiative not seek to eliminate domestic partnership as well as marriage for same-sex couples? The position put forward in defense of Proposition 8 would have more credibility if the state had acted on those concerns across the board, and not just when it was convenient for the Defendant-Intervenors in this case to offer post-hoc justifications for the titular denigration of that marriage.[33]

This is the political dimension of the equal protection inquiry: one effective way to tell if a state is in fact furthering a genuine public purpose is to look for other ways in which it has publicly committed itself to achieving that purpose. In the Proposition 8 case, the existence of the statutory edifice of domestic partnership entitlement for same-sex couples in California stands in strong tension with the defenders' claim that the purpose behind Proposition 8 is the concern of a broad societal threat posed by the nature of same-sex unions. The people of California, in short, have not expressed those concerns in any other arena.

At a more practical level, the facts of this case show how this accountability component of the equal protection inquiry serves a very important function. Consider what would have happened if Proposition 8 had, in fact, actually sought to repeal all domestic partnership entitlements as well as the status of marriage previously afforded to same-sex couples under California law, and had done so explicitly. The public debate on such a measure would have

[32] Of course, when classifying among interests that the Court has felt are amply able to represent themselves in the political process, the Court has not required the state to show any consistent commitment to its asserted state interests. *See* U.S. v. Carolene Products, Co., 304 U.S. 144 (1938). But when the record suggests that there may be animus at work, even the rational basis scrutiny has been more searching.

[33] This is not to suggest that such an across-the-board ban on same-sex marriage would be valid. The argument here is simply that, in such a case, the state would not be *automatically* disqualified from asserting concerns about the social consequences of same-sex marriage. Those arguments would have to be assessed and a determination made as to whether the state had met its burden to offer the requisite level of interest and the requisite level of fit to survive the appropriate equal protection analysis. Here, however, the court need not even reach that question because, by failing to garner adequate public support for the view the state now espouses in other spheres, it reveals the asserted justifications for Proposition 8 to be a pretext.

focused on whether the idea of same-sex unions was indeed viewed by the people of California as itself harmful to society, as the defenders now argue.[34]

But if that had been the issue that was debated in the public sphere, then Proposition 8, already a close popular vote, would likely have had a harder time winning passage in the initiative process. If it had been clear to the voters of California that the issue was whether people in same-sex relationships should have the same property, inheritance, parenting, financial, hospital visitation, and support rights as different-sex couples, this would have presented a different political decision altogether. Any affirmatively-inclined voters would have been forced, in a much less ambiguous way, to take a stand on a renunciation of equality for gay and lesbian people.[35] Indeed, much of the public discussion supporting Proposition 8 emphasized that it would *not* take away the basic rights of partnership to same-sex California couples, and thus invited voters to veer away from the question of whether same-sex unions really do pose some kind of policy threat to the state. This detour enabled voters to act on the basis of stereotype or fear because they could plausibly tell themselves that the people affected by the law would not be denied any *actual* rights, they would "just" have a lower status on the social and legal ladder. But that "easy out" is just what the Equal Protection Clause forbids. If a state wishes to classify, it must do so out of whole-hearted and consistent belief that the classification furthers legitimate public purposes.

Thus it turns out not to be so ironic to suggest that if the state takes away *less* from a group of its people, its action may be *more* constitutionally suspect. By taking away less—a politically easier move—the state decreases the number of relevant state interests that can legitimately be called upon in defense of its action. Under these circumstances, the likelihood that the state indeed has a sufficiently widely- and genuinely-held conception of the public good is diminished. Here, the additional fact that the state's elected government chose not to assert any such widely-held public purpose in defense of Proposition 8 merely emphasizes the already alarming likelihood that there is nothing but invidious motive behind the measure that ostensibly makes the "lesser" move.

Based on these considerations of constitutional theory, the analysis presented here suggests a rather simple resolution of this case, along the following lines:

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[34] "[A]ny regulation applicable to all . . . would require much clearer justification in local conditions to enable its enactment than does some regulation applicable to a few." Railway Express Agency v. New York, 336 U.S. 106, 113 (1940) (Jackson, J., concurring) (referring to an advertising prohibition). As Justice Jackson explained, there is "no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Id*. at 112.

[35] Although such a decision, if it were passed, might still violate the Equal Protection Clause, it would do so because the state interests advanced are simply not significant enough to meet the requisite standard of review—but not because the interests advanced are not possibly genuinely of the "common good" variety.

1. Proposition 8 removed, for same-sex couples, one element from the bundle of marriage rights previously available in the state to both same-sex and different-sex couples on an equal footing.

2. The one element removed is the opportunity to enter into a relationship designated as marriage, which relates only to the status associated with the persons enjoying their statutory rights to the marriage bundle, and not to the rights or obligations contained within the marriage bundle itself.

3. A state presumptively is not permitted to legislate in ways that single out groups for disfavor or loss of status. Any legislation must have a public purpose other than stigmatization.

4. The highest court of the state of California has interpreted the language of Proposition 8 to create a second-class status, and no public purpose that could plausibly be served by this retroactive reduction in status has been offered to dispel the usual inference that any act of stigmatization is a violation of the state's obligation to legislate impartially.

5. Thus, it is not the existence of a domestic partnership scheme alone that renders Proposition 8 invalid. Rather, the constitutional flaw in Proposition 8 arises from the unique history of marriage equality in California, which suggests a confluence of stigmatizing effect and the inference that this effect was intended.

V. Conclusion

The approach to *Perry* that I have described has many virtues, and as the title of this paper suggests, it permits fidelity to justice, precedent, democracy, and the appropriate judicial role.

It honors justice by vindicating time-honored and uncontroversial principles of equality. The state's obligation not to single out for disfavored treatment is a long-standing principle, applicable no matter what the nature of the disfavored class, and therefore part of our established equality jurisprudence.

It honors precedent by relying solely on extant cases, needing no extension or extrapolation of current Supreme Court decisions. There is no need to decide, at this time, whether differential treatment of same-sex couples should, for all purposes, be treated as suspect. Nor is there any reason to reach the question whether the fundamental right to marry can be understood in evolving terms or is tethered to traditional conceptions of marriage.

This approach respects democracy by identifying a very narrowly articulated, but critical, flaw that undermines the democratic legitimacy of Proposition 8. Proposition 8 ill-served the democratic process by asking voters to take a "cheap shot" at same-sex marriage, rather than asking voters to consider, at a profound level, whether the people of the state indeed have a deep-

seated objection to allowing individuals in committed same-sex relationships to marry, an objection sufficient to justify imposing a differential burden on their fellow Californians who wish to do so. The approach advocated here restores to democracy its proper role by insisting that states act impartially and with reasons grounded in the common good—an obligation as old as the Constitution itself. Even if this analysis were adopted by higher courts having application beyond California, it would not preempt any ongoing democratic process involving marriage for same-sex couples in situations where the dispositive attributes of Proposition 8 are absent.

Finally, this approach remains true to the appropriate judicial role because, eschewing minimalism, it vindicates one of the most important principles in our constitutional tradition—that of equal access to the privileges and obligations of public life for all people—while, eschewing maximalism, it treads as lightly as possible on the grass-roots development of attitudes and law around the issue of marriage equality more generally. Our understanding of the Constitution evolves as social movements gain hold and, over time, influence public values to embrace new practices that might have been at an earlier time unthinkable. The relationship of public opinion and politics to that evolutionary process is key to the ultimate sustainability and legitimacy of constitutional change.[36]

The solution defended here is true to that vision of incremental constitutional responsiveness to social change. It does not take the issue of marriage for same-sex couples out of the sphere of public discourse prematurely, even in California. What it does is simply declare Proposition 8 an unsuccessful compromise on the issue of marriage equality. By splitting the atom of marriage as it did, dividing that important institution against itself by parceling out portions of it to some persons and other portions to others, the State of California transgressed the basic truth that "[o]ur Constitution . . . neither knows nor tolerates classes among citizens."[37]

[36] *See* Robert Post &Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 41 HARV. C.R-C.L. L. REV. 373 (2007) (describing a process of democratic constitutionalism that mediates public opinion and court decisions).
[37] *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).