The California Proposition 8 Case: What Is a Constitution For?

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Professor Philip Frickey is an exemplar of the American Midwest, but his academic career has also flourished in California. This state has recently been the situs of the most interesting constitutional litigation sequence in the new millennium, starting with the California Supreme Court’s 2008 decision invalidating the state’s barring of same-sex marriages and culminating in the court’s 2009 decision upholding Proposition 8 (which had amended the state constitution to override the 2008 decision). These landmark decisions, discussed in Part I of this Essay, are not just about same-sex marriage. The Marriage Case and, even more, the Proposition 8 Case pose this question: What is a constitution for?

Part II discusses several different theories of constitutionalism, each reflected in the briefs filed by the primary advocates in the Proposition 8 Case. The supporters of traditional marriage, in their brief, relied on a descriptive constitutionalism that owes much to Aristotle, updated by American theories of popular sovereignty. The state took a different route, invoking a rights-based constitutionalism that can be traced back to John Locke. Finally, the supporters of same-sex marriage relied on the representation-reinforcement variation on rights-based theory developed by Dean Ely. Is the constitution best understood as a description of the life and soul of the polity? A statement of inalienable rights upon which the social contract is grounded? A guarantee of the democratic process?

A major theme of Professor Frickey’s work, explored in Part III, has been practical reasoning—a pragmatic approach to constitutionalism inspired by Jeremy Bentham and William James. On explosive issues such as gay marriage, the pragmatic judge is interested in the future costs and benefits of

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1. Phil was born and raised in Kansas, secured his undergraduate degree from the University of Kansas and his law degree from the University of Michigan, and taught at the University of Minnesota before relocating to the University of California at Berkeley.
proposed regime changes, is willing to experiment in order to create more useful information, is reluctant to close off public debate about a contentious issue, and is ultimately deferential to social norms and popular attitudes. Professor Frickey has translated this philosophy into useful doctrine that diplomatically mediates the borderline between the stable, slow-to-change polity of Aristotle and the dynamic aspirations of Locke and Ely. A Frickeyan analysis would support the California Supreme Court’s three important moves: (1) the Marriage Case usefully enforced Lockean rights under constitutional conditions where popular response was possible, (2) the Proposition 8 Case deferred to the popular reaffirmation of the Aristotelian status quo, but, (3) at the same time, gave it an Elysian nudge by construing Proposition 8 not to invalidate the several thousand same-sex marriages entered between June 16 and November 8, 2008.

I

THE CALIFORNIA MARRIAGE AND PROPOSITION 8 CASES

Since 2003, one jurisdiction after another has recognized same-sex marriages, either through judicial constructions of state constitutions (Massachusetts, Connecticut, Iowa) or through legislation (Vermont, Maine, New Hampshire). In the Marriage Case (2008), the California Supreme Court ruled that the state’s exclusion of same-sex couples from the institution of civil marriage constituted discrimination, violating Article I, Section 7, of the California Constitution. Chief Justice Ronald George’s opinion for the court held that the discrimination had to satisfy the stringent demands of strict scrutiny, both because it denied a fundamental right and because it employed a suspect classification (sexual orientation) to do so. Strict scrutiny requires that the discrimination be the only way the state can accomplish a compelling public goal. Intangible interests, such as moral disapproval and the traditional definition of marriage, have generally not met the strict scrutiny standard—and they did not in the Marriage Case.

The court’s mandate went into effect promptly: after June 16, 2008, an estimated 18,000 lesbian and gay couples were legally married in California. At the same time, supporters of traditional marriage sought to override the court’s decision. The California Constitution creates three mechanisms for formal constitutional change: (1) the amendment process, which allows the people to

2. Maine’s legislature adopted a same-sex marriage law in 2009, but the voters overrode the legislature through a popular referendum in November 2009.
3. In re Marriage Cases, 183 P.3d 384 (Cal. 2008); see also CAL. CONST. art. I, § 7(a) (“A person may not be . . . denied equal protection of the laws . . . .”); id. § 7(b) (“A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens.”).
4. In re Marriage Cases, 183 P.3d at 419–34 (applying strict scrutiny because the state has deprived same-sex couples of a fundamentally right to marry); id. at 450–54 (applying strict scrutiny also because the sexual orientation classification is suspect).
5. Compare Loving v. Virginia, 388 U.S. 1 (1967) (ruling that Virginia’s justifications for barring different-race marriage, including moral disgust and the traditional definition of marriage as racially pure, did not meet strict scrutiny), with In re Marriage Cases, 183 P.3d at 447–52 (similar ruling for California’s justifications for refusing to recognize same-sex marriages).
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alter the Constitution by a petition followed by a direct majority vote;\(^6\) (2) the revision process, which requires both legislative and popular involvement to make more fundamental constitutional changes;\(^7\) and (3) a constitutional convention, which could create a whole new document.\(^8\) The first is the easiest to use and was, as a practical matter, the only mechanism available to the advocates of traditional marriage.

Advocates of traditional marriage easily secured enough voter signatures to place Proposition 8 on the November 2008 ballot. Proposition 8 proposed to add a new Section 7.5 to Article I of the California Constitution, which read: “Only marriage between a man and a woman is valid or recognized in California.”\(^9\) The ensuing campaign was expensive (the two sides spent over $70 million), but not as inflammatory as earlier anti-gay initiatives in California and other states had been.\(^10\) Although at least one spicy internet ad demonized Mormon supporters of Proposition 8,\(^11\) for the most part opponents blandly argued that the initiative was inconsistent with equality norms. Unlike earlier anti-gay initiative campaigns, which explicitly invoked images of homosexuals as predatory or lewd, most of the “Yes on 8” ads primarily claimed that “homosexual marriage” would undermine the rights of parents and children.\(^12\)

Proposition 8 prevailed among voters, with 52 percent supporting it. Gay marriage advocates immediately petitioned the California Supreme Court to overturn the initiative as inconsistent with the California Constitution’s requirement that fundamental changes be adopted through the more deliberative “revision” process, rather than through popular “amendments.”\(^13\) Responding to the petition, the Attorney General rejected the revision argument but argued that Proposition 8 was what German jurists call an “unconstitutional constitutional amendment,” because it sought to revoke an “inalienable” right.\(^14\)

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6. CAL. CONST. art. XVIII, § 3.
7. Id. art. XVIII, § 2.
8. Id. art. XVIII, § 1.
12. For the main arguments made by Yes on 8, see the proponents’ primary website, http://www.ProtectMarriage.com (last visited Apr. 16, 2010), as well as Melissa Murray, Marriage Rights and Parental Rights: Parents, the State, and Proposition 8, 5 STAN. J. C.R. & C.L. 357 (2009).
Interveners supporting Proposition 8 argued that the initiative was a proper constitutional amendment and that it did not revoke "inalienable" rights. In the Proposition 8 Case (2009), Strauss v. Horton, the California Supreme Court upheld the constitutional amendment against both lines of attack, but interpreted it to be inapplicable to the same-sex marriages celebrated between June 16 and November 8, 2008.

II
WHAT IS A CONSTITUTION FOR?

The Proposition 8 Case illustrates how state constitutional changes are subject to challenge, not only because of inconsistency with the U.S. Constitution, but also because of inconsistency with the requirements of the state constitution itself. Although the U.S. Supreme Court has not traditionally adjudicated such claims with regard to the U.S. Constitution, most modern state courts do so, including the California Supreme Court. This is striking, for it gives judges a potentially key role in determining what the authoritative constitutional text is, in addition to their traditional role of interpreting the constitutional text. Controversies such as this one demand much of judges, including philosophical reflection that is unusual for them even in high-stakes cases. Given the nature of the claims and the paucity of controlling precedent, the Proposition 8 controversy required judges and citizens to ponder the question posed by this Essay: What is a constitution for? This is a question both as old as Plato and as current as gay marriage. By coincidence, the primary briefs in the case rested upon two different meta-theories rooted in political and legal philosophy: one constitutive and another rights-oriented. Part II of this Essay will discuss these theories, and Part III will discuss a third meta-theory, one associated with Professor Frickey.

A. Plato and Aristotle: The Constitution as the Soul of the Republic (Kenneth Starr in the Proposition 8 Case)

In the Proposition 8 Case, former Judge Kenneth W. Starr represented the interveners: groups favoring traditional marriage who were the official proponents of the initiative. At every turn, Starr reminded the court that We the People had decisively rejected the court's sanction of same-sex marriage. However unjust the petitioners and some of the justices might consider


17. See, e.g., Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990) (invalidating an initiative-based constitutional amendment on the ground that it made a "fundamental" change in the role of the judiciary and therefore should have gone through the revision process); Brief of Amicus Curiae Professors of State Constitutional Law: Robert F. Williams et al. in Support of Petitioners at 3-12, Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (No. S168047) (demonstrating similar practice in other states).
18. Interveners' Opposition Brief, supra note 15, at 6-14, 28-29 (drawing from these provisions the notion that judges ought not trump popular initiatives); Interveners' Answer to Attorney General, supra note 15, at 18-19 (similar).
Proposition 8, proponents argued, the court was obliged to defer to the considered judgment of the people, as required by the positive terms of the Constitution, which allows amendment by direct vote, and by the popular sovereignty announced in its preamble.19

Starr's theme is one with deep roots, which extend at least as far back as Plato's *Crito*.20 This classic work describes Socrates' last meeting with his friends, when he declined their offer to rescue him from the death penalty imposed by a jury of Athenian citizens.21 Although he believed that his death sentence was unjust, Socrates rejected his friends' offer of escape as inconsistent with the constitutional regime that made possible his birth, his education, and his lifelong practice of public philosophy. For Socrates, defying the judgment of his peers would have violated the underlying bargain between the citizen and the state and, possibly, would have undermined the basis of political order. As Judge Starr would surely observe, the voters' judgment on Proposition 8 was not nearly as harsh as the jury's judgment on Socrates. Not only do lesbian and gay couples retain their domestic partnership rights, which are virtually the same as those of civil marriage, but they (unlike Socrates) will be able to revive the issue in a future initiative.

If the *Crito* is any guide, a constitution commands loyalty and respect insofar as it makes it possible for persons living under it to live morally attractive lives as part of a bonded, self-governing community. Aristotle's *Politics* made explicit what was implicit in Plato's *Crito*. Like Plato, and unlike most modern philosophers, Aristotle assumed that a polity's constitution would be unwritten. Rather than a formal document, the "constitution" is the soul of a city. More than either its territory or even its inhabitants, a city's constitution accounted for its civic identity across time. "This community is the constitution," according to the *Politics*.22 "[T]he constitution is so to speak the life of the city."23 It is the institutions and practices by which a people were governed. "A constitution is the organization of offices in a state, and determines what is to be the governing body, and what is the end of each community."24 Thus, Aristotle described Sparta's constitution as one that tilted strongly toward aristocracy because its base of citizenship was narrow and the exercise of political authority was tightly controlled. In contrast, the Athenian constitution was more democratic, for it included Solon's fundamental laws, which abolished serfdom, specified legal rights and duties for all citizens, and also guaranteed every adult Athenian the right to vote in the *ekklesia*, to serve on juries, and to act as magistrates.25

19. CAL. CONST. pmbl. (popular sovereignty); id. art. II, § 8(a); id. art. IV, § 1 (permitting popular initiative as means of changing California legal and constitutional rules).
21. Id. at 454–59.
23. Id. at 2056.
24. Id. at 2046.
25. Id. at 2000–23 (describing and analyzing various constitutions of different Greek city-states, including Sparta and Athens).
Aristotle’s constitutionalism was more than just a description of the institutions and values of the polity; it was a description with normative power. The Politics did not assume that the unwritten Athenian constitution trumped ordinary statutes, as a matter of legal hierarchy. But the constitution was nevertheless superior, as a matter of political morality, to everyday decrees and legal rules. According to Aristotle, “the laws are, and ought to be, framed with a view to the constitution, and not the constitution to the laws.” The normative force of a constitution derives from the coherence it gives the city’s identity; in modern terminology, the constitution’s power comes from its network effects rather than (or more than) from an appeal to legal hierarchy. This is more or less the same way that the British have traditionally thought about their constitution.

This deeper constitutional vision helps explain how the proponents of Proposition 8 distanced themselves from the argument that popular sovereignty could justify any kind of tyranny (a proposition for which Crito could be cited). Proposition 8’s constitutional theory wedded popular sovereignty and tradition, each having an independent legitimating force. Under an Aristotelian constitutionalism, marriage between one man and one woman is deeply constitutive of the polity: it provides a normative structure for families and a legal means by which romantic relationships and lifetime commitments can be formalized and a normative structure for families. That normative structure has been awesomely powerful because (1) the commands and exhortations of the law have interacted with (2) social norms deeply embedded in centuries of practice and (3) reinforced by religious teachings. From this point of view, the Marriage Case was a constitutional rupture: even though the court’s requirement that civil marriage be opened up to lesbian and gay couples carried the full force of law, for a few months at least, it was inconsistent with the social and religious norms that were powerfully connected to the state by the traditional definition and practice of marriage. From this deeper Aristotelian perspective, it was highly erroneous for the petitioners to argue that Proposition 8, rather than same-sex marriage, was constitutionally infirm.

B. Thomas Hobbes and John Locke: The Constitution as the Social Contract, with Retained Rights (Jerry Brown in the Proposition 8 Case)

Article I, section 1 of the California Constitution says that all people retain “inalienable rights,” and goes on to say: “[a]mong these are enjoying and

26. ARISTOTLE, supra note 22, at 2046.
27. Reviving and honing Max Weber’s distinction between rules we obey because of their hierarchical authority (U.S. Constitution, Article VI) and those we obey because they are consistent with social norms and practices, see DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION 116–22 (2008). Because Aristotle assumed that constitutions would be unwritten, it was perhaps natural for him to believe that they did not primarily derive their authority from their strict legal effect.
29. Cf. Answer Brief, supra note 14, at 75–80 (arguing that popular sovereignty, without limits, would support initiatives abrogating different-race marriage and other minority protections, which is deeply inconsistent with a Lockean constitutionalism, discussed below).
defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.\textsuperscript{30} In the \textit{Marriage Case}, the court ruled that civil marriage is one of the “basic, inalienable civil rights” that lesbian and gay citizens are guaranteed on the same terms as straight citizens.\textsuperscript{31} Because Proposition 8 took away this inalienable constitutional right and because “inalienable” means that a right cannot be taken away, Attorney General Jerry Brown argued that Proposition 8 violated the Constitution; it was an unconstitutional constitutional amendment.\textsuperscript{32}

Responding to Kenneth Starr, Attorney General Brown maintained that the popular initiative was never intended to revoke the core commitment of the Constitution to inalienable rights; this commitment to individual choice and flourishing is what constitutes us as a community.\textsuperscript{33} At bottom, the Attorney General was mobilizing a different understanding of what a constitution is for. Although his brief was explicit as to the origins of his understanding of constitutionalism—John Locke’s social contract theory\textsuperscript{34}—the brief failed to explain the theory.

Locke’s social contract theory finds its roots in \textit{Leviathan} (1651), in which Thomas Hobbes argued that government is justified, and earns our consent, by allowing us to escape the “state of nature.”\textsuperscript{35} The civil state created by the social contract exists so that citizens can pursue their lives without fear that other citizens, or outside invaders, will interfere with their lives and their ability to operate in the world.\textsuperscript{36} To protect citizens thus, the civil state needs legislatures to enact laws serving the public interest, police to enforce those laws, and courts to adjudicate controversies without resort to private feuds. These protections, moreover, need to be made available to everyone. The state fails to do its job, according to Hobbes, when it fails to protect all of us such that we can live our lives secure from fear. If the state protects only some, or provides protection ineptly, this is a justification—and, according to Hobbes, the only justification—for civil disobedience.\textsuperscript{37}

John Locke expanded upon Hobbes’ analysis in his \textit{Second Treatise of Government} (1689). Locke argued that the civil state not only saves people from risks to life and limb, but also provides citizens with the ability to add to their liberties and possessions, and to enrich their lives beyond what they could

\textsuperscript{30} CAL. CONST. art. I, § 1 (as amended by a constitutional initiative in 1972, adding “privacy”).
\textsuperscript{31} \textit{In re Marriage Cases}, 183 P.3d at 399, 419 (recognizing marriage equality as one of the “inalienable” civil rights assured all Californians by the state constitution).
\textsuperscript{32} Answer Brief, \textit{supra} note 14, at 75–90 (general argument); \textit{id.} at 78–84 (focus on “inalienable” rights).
\textsuperscript{33} For the proposition in text, the Attorney General could have cited Aristotle’s \textit{Politics}. See Maureen B. Cavanaugh, \textit{Democracy, Equality, and Taxes}, 54 \textit{ALA. L. REV.} 415, 444 (2003).
\textsuperscript{34} Answer Brief, \textit{supra} note 14, at 81 n.19 (invoking Locke and citing JOSEPH R. GRODIN ET AL., \textit{THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE} 65 (1993) for the proposition that the California Constitution assumes Lockean inalienable rights).
\textsuperscript{35} THOMAS HOBBES, \textit{LEVIATHAN} ch. XIII (1651).
\textsuperscript{36} \textit{id.} chs. XIV–XVIII.
\textsuperscript{37} \textit{id.} Review and Conclusion; see also THOMAS HOBBES, \textit{THE ELEMENTS OF LAW NATURAL AND POLITICAL} ¶ 20.5 (1650).
possibly enjoy in the state of nature. Like Hobbes, Locke maintained that
arbitrary governmental treatment denying some citizens their fundamental
“lives, liberties, and estates” is justification for dissolving the social contract.
This is how social contract theory supports certain “inalienable” rights: they are
pre-political guarantees made to all of us as a condition of the social contract.

Locke’s theory of pre-political rights was an important justification for the
American Revolution. The colonists believed that they were treated arbitrarily
by a distant government, which violated Locke’s first maxim of governance:
“[Legislators] are to govern by promulgated established laws, not to be varied
in particular cases, but to have one rule for rich and poor, for the favorite at
court and the countryman at plough.” Locke’s notion of inalienable rights,
including the equal treatment principle, was a central feature of early American
state and federal constitutional law, starting with the Declaration of
Independence (1776), which memorably said that “all men are created equal”
and have “certain inalienable rights.” As James Madison put it shortly before
the Philadelphia Convention that drafted the U.S. Constitution, “equality . . .
ought to be the basis of every law,” and the law should not subject some
persons to “peculiar burdens” or grant others “peculiar exemptions.”

Supplementing Madison’s structural protections for the social contract’s
equality norm, the Bill of Rights (1791) codified inalienable protections the
framers considered most important. From the earliest days of the American
republic, state as well as federal judges invalidated discriminatory measures
they deemed to be “class legislation,” singling out one group for special
advantages or disabilities.

Thus, when California became a state, it was well established in American
constitutional law that government cannot adopt class legislation or measures
that deprive citizens of inalienable rights. The positive precept is that the civil
state must be neutral as to various groups in society, at least with regard to
fundamental matters such as the enjoyment of life, guarantees of property and
contract rights, and marriage. The Equal Protection Clause (1868) of the U.S.
Constitution codifies this precept at the national level, but the California
Constitution makes it even more central in its Declaration of Rights.

Under a Lockean constitutionalism, neither the legislature nor the people may invade

38. John Locke, An Essay Concerning the True Original, Extent and End of
Civil Government \(\|\) 123–31 (1689) (commonly referred to as the Second Treatise of
Government); see id. \(\|\) 134–42 (discussing limits on government entailed by a social contract
understanding).

39. Id. \(\|\) 222; see id. \(\|\) 223–43 (elaborating on this theme).

40. Id. \(\|\) 142.

41. The Declaration of Independence para. 2 (U.S. 1776).

42. James Madison, A Memorial and Remonstrance Against Religious Assessments 5–6
(1785).

43. See Melissa L. Saunders, Equal Protection, Class Legislation, and Colorblindness, 96

44. See Cal. Const. art. 1.

45. Kenneth L. Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship
the pre-political fundamental rights of citizens. For gay Californians, that meant that neither the legislature (as the court ruled in the *Marriage Case*) nor the people (as the petitioners hoped the court would rule in the Proposition 8 Case) could exclude them from the fundamental civil institution of marriage.

**C. John Hart Ely: The Representation-Reinforcing Constitution of Retained Rights (Shannon Minter in the Proposition 8 Case)**

Representing the coalition that had secured judicial recognition of same-sex marriage in the *Marriage Case*, Shannon Minter endorsed the Attorney General’s Lockean analysis and argued that it also supported the revision-amendment distinction drawn in the petition. But Minter’s brief also responded more directly to Starr’s argument that judges ought not countermand the expressed views of the people, and Minter did so by updating Lockean constitutionalism with an institutionalist theory.

From the perspective of John Locke and James Madison, the core inalienable right was the right to property and, implicitly, contract. Consistent with that perspective, the U.S. Supreme Court’s exercise of judicial review after the Civil War was generally grounded in protecting vested property or contract rights against unreasonable state, and sometimes federal, deprivation. Some of the laws that were struck down, however, arguably served equality purposes or regulated activities with third-party effects, and were therefore regulations that were consistent with social contract theory: there was no right, much less an inalienable one, to engage in activities that harmed other citizens. In the twentieth century, lawyers and academics lost faith that the court could reliably distinguish between valid and invalid regulations under the Lockean criteria, and during the New Deal the Justices essentially abandoned judicial review of social and economic regulations. At the same time, the Justices were acutely aware that progressive lawyers were challenging southern apartheid, and they wanted to keep the federal courts open to those challenges.

A prescient statement of the new approach came in *United States v. Carolene Products Co.* Upholding a rule barring the interstate shipment of filled milk, Justice Harlan Stone’s opinion for the court abjured an activist role for judges in cases involving economic regulations. But in footnote four, Justice Stone suggested a “narrower scope for operation of the presumption of constitutionality” when legislation either “restricts those political processes [like voting] which can ordinarily be expected to bring about repeal of undesirable legislation” or disadvantages particular groups because of “prejudice against discrete and insular minorities” that disables them from protection within the political process. The *Carolene* approach to judicial review left economic rights underenforced because they were best left to the political process, but urged judges to enforce vigorously political rights (such

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48. 304 U.S. 144 (1938).
49. *Id.* at 152 n.4.
as the right to vote) and personal rights (such as the right of privacy) if the political process was not working right. This theory tends to justify the activism in the Segregation Cases of the 1950s and 1960s.\textsuperscript{50}

John Hart Ely synthesized the lessons of \textit{Carolene} in his “representation-reinforcing” theory of judicial review: even when individual rights and public values are at issue, courts should defer to the political process unless it has been dysfunctional, as when insiders seek to maintain their power by blocking political change or when majorities oppress discrete and insular minorities marginalized in the political process.\textsuperscript{51} Ely’s is an institutionalist theory for when it is most advisable for judges to enforce rights. Because this theory was devised as a direct response to the countermajoritarian difficulty with judicial review, which Kenneth Starr emphasized, Shannon Minter repeatedly invoked this theory in his briefs to the California Supreme Court.\textsuperscript{52} Buttressing Minter’s Elysian argument, an \textit{amicus} brief filed by constitutional law professors argued that some Proposition 8 supporters had explicitly injected prejudice (gay marriage is analogous to “bestiality” and “pedophilia”) and stereotyping (irresponsible gay people are anti-family) into the campaign.\textsuperscript{53} Invoking the academic literature claiming that direct democracy is stacked against \textit{Carolene} groups, the \textit{amici} urged the court to consider the malignant effect of such initiatives for minority rights generally.\textsuperscript{54}

III
PRACTICAL REASONING AND CONSTITUTIONALISM

The California Supreme Court ultimately rejected the petition in \textit{Strauss v. Horton}, but interpreted Proposition 8 to be prospective only.\textsuperscript{55} The opinion for the court focused only on judicial doctrine and said little about the broader issues of constitutionalism discussed here. Was the court’s Solomonic disposition driven solely by prior doctrine and neutral principles? Was the disposition an endorsement of Kenneth Starr’s Aristotelian vision and a renunciation of the Lockean or Elysian one? Was the court’s decision correct?

Political scientist Bruce Cain and I had urged the court to use the Proposition 8 case as an occasion to announce (and enforce) limits on the


\textsuperscript{52} Amended Petition, \textit{supra} note 13, at 35–43 (after making a rights argument, Minter emphasized that it is the special role of courts to protect minorities, like gays, fighting against social prejudice); Reply Brief, \textit{supra} note 46, at 6–8 (invoking representation-reinforcing theory and citing Guido Calabresi, \textit{Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)}, 105 \textsc{Harv. L. Rev.} 77, 91, 118–19 (1991)).


\textsuperscript{54} \textit{Id.} at 41–43 (quoting Derrick A. Bell, Jr., \textit{The Referendum: Democracy’s Barrier to Racial Equality}, 54 \textsc{Wash. L. Rev.} 1, 29 (1979); Julian Eule, \textit{Judicial Review of Direct Democracy}, 99 \textsc{Yale L.J.} 1503, 1555 (1990)).

proliferation of initiative-based state constitutional amendments (a phenomenon Cain dubs *hyper-amendability*). The court did not follow our advice to give the revision-amendment distinction greater bite, but its cautious opinion finds support in the jurisprudence of Professor Frickey, one of the most insightful institutionalist scholars since Dean Ely. His is an institutionalism informed by the philosophical tradition of *practical reasoning*. As old as Aristotle, practical reasoning starts with the notion that "one can determine what is right in specific cases, even without a universal theory of what is right." Such a pragmatic approach reflects a meta-theory that best captures what the court actually did in the Proposition 8 Case.

A. Jeremy Bentham and William James: A Practical Constitutionalism (Philip Frickey, as Applied to the Proposition 8 Case)

From a Frickeyan perspective, there is no single, one-size-fits-all answer to the question: What is a constitution for? Modern constitutions are grounded in a variety of values, and not just the Aristotelian and Lockean values explored above. Practical reasoning would maintain that both the soul of the city (Aristotle) and its conscience (Locke) are social productions and not preexisting things, and so constitutionalism cannot be neatly summed up as either ratifying long-existing practices (Kenneth Starr) or enforcing rights (Jerry Brown and Shannon Minter). Constitutionalism also involves a future-oriented discussion of what would be the costs and benefits of the various opinions. Philosophically, such an understanding might rest upon the greatest-good-for-the-greatest-number philosophy of Jeremy Bentham or the pragmatic philosophy of William James. In the Proposition 8 Case, a Benthamite or Jamesian constitutionalism would examine not only the costs and benefits of same-sex marriage, but also the costs and benefits of the court’s trumping the recently expressed will of the people on that very issue. Such

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58. Eskridge & Frickey, supra note 57, at 323.
59. Neither meta-theory discussed in Part I captures what the California Supreme Court did in the Marriage Cases. The court’s insistence upon marriage recognition reflected the majority’s debt to social contractarian rights theory, while its embrace of sexual and gender minorities as full and equal citizens reflects the continuing power of natural law thinking.
61. See WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (1907). The primary exploration of a Jamesian constitutionalism is Professor Frickey’s articles cited in note 57, supra.
arguments, although not emphasized by the parties to the Proposition 8 litigation, were supplied by a variety of amicus briefs and, of course, have dominated the political debate.

The simplest yet most powerful lesson of Frickeyan practical reasoning is that different institutional contexts will lean toward different constitutionalisms, or different blends. Ironically, the most fertile ground for Lockean rights-based claims is a social movement such as the LGBT campaign for marital rights. Mobilizing large numbers of citizens who share common objections to the status quo, social movements espouse a dynamic form of Aristotelian constitutionalism but focus, increasingly in the last century, on Lockean rights. Because its members share common attitudes and, often, material interests, they are usually capable of agreeing on an articulation of rights that is broad and often quite radical. The claim of social movements is that the current legal regime is defective; they promise that their members will continue to agitate until change occurs, and they implicitly threaten Lockean resistance if their claims are not met.

Elected and accountable to a broader body politic, the legislature and chief executive are not as rights focused as social movements. Their constitutionalism typically owes more to Aristotle and Bentham, but that does not entirely negate the possibility of Lockean influence. The political branches are loath to unsettle traditional institutions and mores (Aristotle)—but they may do so if they fear they will be accountable to high costs of inaction (Bentham). Also, social-movement pressure, money, and elections can motivate legislators to create new rights (Locke). Because legislators want to accommodate as many interests as possible in a pluralist system such as ours, they will usually not ignore minority groups entirely and will work toward compromise measures, accommodating old institutions and mores with new demands. Once legislators adopt framework statutes to address social movement demands, the interpretive focus shifts to administrators, who generally follow a practical, purposive approach to implementation (James).

As Professor Frickey emphasizes, constitutionalism will work very differently in a polity, like California, where popular initiatives can make law—especially where they can override the legislature. Although We the People will consider utilitarian and rights-based arguments, an initiative-based constitution such as California's will reflect the Aristotelian approach more than other constitutional structures. When popular initiatives are a tangible trump, legislators would, theoretically, be more cautious (Aristotelian) in their constitutionalism. And so might judges, especially judges who are either elected (as in most states) or periodically subject to an up-or-down retention


vote (as in California).

A pragmatic understanding of constitutionalism, therefore, provides a persuasive account of what the California Supreme Court was doing in both the Marriage and the Proposition 8 Cases. Knowing that the voters could continue to debate the issue through constitutional initiative made it easier for moderate jurists like Chief Justice George to vote for same-sex marriage. This is because the availability of a popular response took some of the Aristotelian or Benthamite heat off of a judicial disposition. If the court’s decision created a serious Aristotelian rupture or imposed excessive psychic costs on the body politic, the voters could return state policy to the previous status quo. Accordingly, once the people, in fact, did vote to override the court, the chief justice felt the benefits of insisting on same-sex marriage were swamped by the costs, including backlash costs. Moreover, there are pragmatic benefits to LGBT individuals and their supporters to winning same-sex marriage through a subsequent constitutional initiative of their own in 2010 or 2012; such a campaign is winnable and would produce a more entrenched change in the state’s Aristotelian as well as Lockean constitutions.
Table 1: Theories of Constitutionalism and the California Cases

<table>
<thead>
<tr>
<th>Constitutional Theory</th>
<th>What is constitutionalism for?</th>
<th>Application to the Marriage Case</th>
<th>Application to the Proposition 8 Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aristotelian</td>
<td>Expresses the identity and aspirations of the polity.</td>
<td>Is traditional marriage integral to polity? Does the polity’s changing identity require gay marriage now?</td>
<td>Should the expressed will of the voters resolve the issue for now? Or is that expression tainted in some way?</td>
</tr>
<tr>
<td>Lockean (Elysian)</td>
<td>Protection of fundamental rights that are required by the social contract (judicial review can perfect democratic process).</td>
<td>Civil marriage is an important bundle of citizenship and dignitary rights, although domestic partnership provides the tangible rights. (Have gays been politically potent?).</td>
<td>In light of domestic partnership benefits, does denial of “marriage” break the social contract? Is the dignitary feature significant enough to be “inalienable”?</td>
</tr>
<tr>
<td>Benthamite or Jamesian</td>
<td>Provision of rules and norms that create significant future benefits, with lower costs, for the polity.</td>
<td>Does gay marriage benefit lesbian and gay couples more than it offends traditionalists? Does it on balance help or hurt society?</td>
<td>Same costs and benefits as before, but add backlash costs of overriding recent direct vote to the costs of marriage equality.</td>
</tr>
</tbody>
</table>
B. The Role of Courts: Reversing the Burden on Inertia

The Lockean rights-based arguments made by the Attorney General and the opponents of Proposition 8 had a natural audience in the judiciary, whose distinctive role is rights enforcement. Attorney General Brown’s brief envisioned a heroic role for judges, to enforce rights fearlessly—even against constitutional amendments denying “inalienable” rights. Kenneth Starr’s brief lampooned the Attorney General’s argument as inviting a “constitutional revolution” establishing a “judicial oligarchy.” Shannon Minter’s brief rested its pitch on the more limited Elysian theory, which advocates an activist judicial role only for those cases where democracy has failed. Kenneth Starr denied that Proposition 8 represented a failure of democracy; the debate had been fair and balanced and the voting untainted by alleged fraud. In the Marriage Case, the Attorney General had argued against strict scrutiny on the Elysian ground that lesbian and gay citizens are no longer politically marginal.

Contrary to both the Attorney General and Mr. Minter, a pragmatic understanding of constitutionalism turns Elysian theory on its head. When a minority is politically powerless because of overwhelming social prejudice, judges, as a practical matter, are not going to insist on full equal treatment of the minority. Under such conditions, the Aristotelian perspective is most powerful; judges are not likely to dislodge such a social consensus, because they lack the ability to enforce rights of minorities widely despised by most citizens (James), because the institutional costs would be overwhelming (Bentham), and because most judges would be unable to understand how exclusions and criminal sanctions actually reflect “discrimination” against the minority (Locke). These are the reasons why the U.S. Supreme Court was unwilling to insist on equality protections for people of color until the 1950s, and why the same Justices who ultimately recognized equality protections for racial minorities actually expanded federal persecution of sexual minorities.

It is only when a minority achieves some political viability and is recognized as a participant in the pluralist polity that judges will give bite to equality protections. This was the experience of racial minorities after World War II and of sexual (gay, lesbian, bisexual) and gender (transgendered) minorities after 1969, when many came out of their closets and formed organizations and coalitions challenging discriminations against them.

66. Interveners’ Answer to Attorney General, supra note 15, at 1 (“constitutional revolution”); id. at 11 (“judicial oligarchy”).
69. Compare Loving v. Virginia, 388 U.S. 1 (1967) (Warren Court opinion striking down state laws barring interracial marriage and declaring all race-based discrimination suspect), with Boutilier v. INS, 387 U.S. 118 (1967) (Warren Court opinion aggressively interpreting an immigration law excluding persons afflicted with “psychopathic personality” to include all “homosexuals”; interpretation applied to an immigrant who was apparently bisexual).
70. The connection between political mobilization and the slow process of achieving equality protections for gay people is told in William N. Eskridge, Jr., GayLaw: Challenging
Although it had provided many libertarian protections for gays and other social outcasts in the 1950s, the liberal California judiciary did not provide equality protections until after the legislature repealed the state’s consensual sodomy law in 1975. Most of the homo-equality jurisprudence came through statutory interpretations that the legislature, as well as a popular initiative, could have overridden.\footnote{Eskridge, supra note 10, at 1799–1807 (providing a history of equality protections for LGBT citizens from California judges after 1975).} Like the federal judicial role in the race cases after World War II, the state judicial role in the gay rights cases after 1975 was to reverse the burden of inertia. Judges repeatedly ruled for a baseline of non-discrimination. Although most of the decisions could have been overridden by the legislature or by popular vote, the burden was on opponents of homo-equality and no longer on gay people. For Elysian reasons, this was fair: unfairly demonized by the state, gay people were usually disabled from pushing legislation through all the vetogates of the legislative process, but they had a fighting chance when their role was to block anti-gay legislation at one of those same vetogates. The 2008 Marriage Case, therefore, can be understood as reversing the burden of inertia on the marriage issue—but opponents of same-sex marriage were able to overcome that inertia in the Proposition 8 campaign. Once the people had spoken through the political process, the court deferred.
### Table 2: Group Status and the Practical Role of Courts

<table>
<thead>
<tr>
<th>Status of Group</th>
<th>Role of Courts</th>
<th>Racial Minorities (U.S. Supreme Court)</th>
<th>Sexual Minorities (California Supreme Court)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strong Prejudice Against the Outgroup</td>
<td>Libertarian protections applicable to all persons.</td>
<td>Apartheid period (1880-1954): Criminal procedure; speech and association; voting.</td>
<td>Apartheid of the Closet (1921-75): Criminal procedure; publication; association.</td>
</tr>
<tr>
<td>Full and Equal Citizenship</td>
<td>Equal Protection Strict Scrutiny. \ <strong>Loving</strong> (1967): Race is a suspect classification; exclusionary race-based laws disappear from the statute books almost everywhere.</td>
<td><em>Marriage Case</em> (2008): Sexual orientation is a suspect classification. Does Proposition 8 Case keep the state from full equality by withholding “marriage”?</td>
<td></td>
</tr>
</tbody>
</table>
C. The Mediating Role of Constitutional Canons

As Professor Frickey has notably demonstrated, even the liberal Warren Court did much of its Elysian work through the gentle nudges of legislatively reversible statutory interpretations, rather than through the hard shoves of irreversible constitutional review.\(^{72}\) This is precisely the path that the California Supreme Court followed. The *Marriage Case* was a nudge that could have been—and was—overridden by a popular constitutional initiative. In the Proposition 8 Case, the court declined to upgrade the nudge into a harder shove; instead, the court gave another nudge when it applied the canon against retroactivity to carve out the June-November 2008 gay marriages from Proposition 8’s preemptive force. That decision illustrates Professor Frickey’s argument that constitutional canons help mediate the perils of popular constitutionalism.\(^{73}\)

The canonical approach enabled the court in the Proposition 8 Case to minimize the tensions among the different theories of constitutionalism while also playing a modest Elysian role. Specifically, the Solomonic resolution of the Proposition 8 Case gave the voters their Aristotelian due: the court bowed to their mandate that marriage remain reserved to different-sex couples, but declined to impute to the voters a preference to sweep away existing marriages, as that had not been a focus of the initiative campaign. In that latter regard, the court’s decision was also a pragmatic nudge that gave Lockean rights an opportunity to respond to popular objections. Will the legal gay marriages have the effects predicted by the supporters of Proposition 8? Or will they be admirable unions that benefit the community as well as children being raised by their lesbian and gay parents, as opponents of Proposition 8 maintained? To be sure, the small number of valid marriages, without any prospect of increasing, cannot generate a comprehensive cost-benefit analysis, but even this small experiment can provide useful information for voters considering future initiatives to reverse Proposition 8.


\(^{73}\) Frickey, *supra* note 65, at 498–505, 510–26 (arguing for the use of constitutional canons to ameliorate problems with direct democracy); cf. *id.* at 505–10 (noting difficulties with such a quasi-constitutional approach).