

THE CONSTITUTIONALITY OF PROPOSITION 8

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Is Proposition 8¹ unconstitutional? This straightforward question is a very difficult topic to address, particularly because the entire litigation is ill-conceived, and because I am a fairly ardent libertarian with respect to matters of personal behavior. This Essay will argue that there is a political case for gay marriage, but in the end, it concludes that the political case does not rise to the level of a constitutional case. That conclusion holds true whether this question is conceived broadly—the approach the debate between Professor William Eskridge and myself originally took²—or whether it is conceived more narrowly, in connection with the particular circumstances of Proposition 8 and the history that preceded it.

The single most salutary proposition that guides a libertarian thinker is this: An individual who is deeply offended by the personal conduct of other people has no warrant to alter or change their conduct unless and until the conduct involves the use of force and fraud against the individual.³ Interference with intimate, personal behaviors requires a powerful social warrant. It is very difficult to bring these personal behaviors within the Millian principle that proscribes harm to others,⁴ at least if harm is defined to exclude personal offense. So, for a libertarian, the difficulty with issues surrounding gay marriage de-

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1. CAL CONST. art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized in California.”).

2. See Richard A. Epstein & William N. Eskridge, Jr., Annual Rosenkranz Debate at the 2010 Federalist Society National Lawyers Convention, A Debate on the Constitutionality of Proposition 8 (Nov. 20, 2010).

3. See generally John Stuart Mill, *On Liberty*, in ON LIBERTY AND OTHER ESSAYS 14 (John Gray ed., Oxford University Press 1991) (1859).

4. See *id.*

rives not from the institution of marriage as such, but rather from the state requirement of marriage licenses.

The insistent question is this: If marriage is some kind of natural associational freedom, why may the state horn in to decide that a particular person can or cannot get a marriage license? It is possible to justify this state intervention on the grounds that some people are too young or too feeble to marry. Yet clearly these standard protective measures are not what is at stake in this debate.

As a matter of first principle, the system of state marriage licenses should be examined through the lens of the doctrine of unconstitutional conditions.⁵ If the state is going to give licenses to one group of people to engage in a certain transaction, then it must have strong reasons for denying licenses to any other group of people seeking the same privilege. This approach, under straight political theory, would mean that a limited state could not pick and choose its friends. Once various activists and religious groups recognize that marriage licenses have been taken out of politics, then they have nothing to gain from agitation. Their best response, therefore, is to insist on maintaining the integrity of their own institutions, while becoming profoundly indifferent to the behaviors of other people and their choice of whom to marry.

The great virtue would be this: If by taking offense one does not get any moral claim over other people's virtues, then agitation and distress only hurts one's self, without generating any collateral political advantage. At this point society gains the ideal position as a matter of political economy—that situation, to paraphrase David Hume, where carelessness and inattention to the foibles of other people become the dominant strategy for all individuals who wish to make their way in the world.⁶ People would not have to show mutual respect for the behaviors of others, but they would be required, at the very least, to tolerate those behaviors. Once toleration is the required norm, perhaps by degrees and over time, some mutual cordiality could develop as well, as different groups seek to forge some common

5. See generally Richard A. Epstein, *The Supreme Court 1987 Term—Foreward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5 (1988).

6. Cf. DAVID HUME, *A TREATISE OF HUMAN NATURE* 127 (L.A. Selby-Bigge ed., Oxford University Press 1975) (1739).

ground on issues of mutual concern. The libertarian's hope is that people will come to see the wisdom of a legal regime that denies all interest groups the ability to control the political process based on a deep-seated conviction of the moral superiority of their own views. Notwithstanding the ups and downs on the issue of gay marriage, the level of mutual toleration seems to have increased in the United States, so that those opposed to gay marriage are now more willing to adopt a live-and-let-live approach to one of the most divisive issues of our time.

One sign of this progress is that the present debate is not about whether the legal system should afford protection to gay couples.⁷ Contemporary dialogue is far removed from the debate in the 1960s about whether the state should remove gay and lesbian conduct from the list of criminal offenses recognized by various psychiatric groups.⁸ Most opponents of gay marriage concede that civil unions grant gay parties all of the rights and disabilities of marriage, and the dominant issue is instead the (highly important) symbolic question of whether the state should attach the label of "marriage" to civil unions.⁹ The bottom line is that we have gone very far already, but it turns out that the last five percent of this long journey is still capable of causing much grief.

How, then, should we think about the difficulties in California? The ideal approach may be to wait five years, hold another referendum, and turn the popular sentiment so that it is at least fifty-four to forty-six in the other direction, a very realistic shift in public opinion. That gradualist approach puts the constitutional debate to one side and lowers the political temperature. The supporters of gay marriage who win on this issue would then have political legitimacy squarely on their side. Although

7. California law allows same-sex couples to enter into domestic partnerships, giving these couples the same set of financial and personal benefits as heterosexual couples. See CAL. FAM. CODE §§ 297–299 (West 2011).

8. In *Lawrence v. Texas*, the Supreme Court held that states have no legitimate interest in proscribing private, consensual homosexual conduct. 539 U.S. 558, 578 (2003).

9. Judge Walker's decision invalidating Proposition 8 emphasized that same-sex domestic partnerships did not carry "the cultural meaning of marriage and its associated benefits." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 971 (N.D. Cal. 2010).

I am generally uneasy with referenda,¹⁰ in the case of California it may be best to resolve the entire matter within the framework of existing institutions.

Next this Essay will address Proposition 8 in terms of constitutional law. First of all, note that the location of the Equal Protection Clause is after the Privileges or Immunities Clause and the Due Process Clause of the Fourteenth Amendment.¹¹ As a matter of historical construction, the phrase “privileges or immunities” was intended to address the substantive rights that received explicit protection.¹² If the right to a same-sex marriage were located in the Constitution, then it would be found in the Privileges or Immunities Clause. The American Constitution reflected the dominant attitude of its time, when a people who were relatively laissez-faire with respect to a variety of economic issues were also completely dogmatic about norms relating to sexuality, gambling, and other sorts of potentially sinful behavior.¹³ But finding constitutional protection for same-sex marriage jars with the uniform historical practice of the time, which widely and unwisely treated homosexual conduct as criminal,¹⁴ subjecting it to regulation under the so-called morals head of the police power.¹⁵ If you raise the ques-

10. See Richard A. Epstein, *Direct Democracy: Government of the People, by the People, and for the People?*, 34 HARV. J.L. & PUB. POL'Y 819 (2011).

11. U.S. CONST. amend. XIV, § 1.

12. See Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 692 (“If there is any textually and historically plausible authorization for the protection of unenumerated rights, it is to be found in [the Privileges or Immunities] Clause . . .”); see also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring).

13. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 192–93 (1986) (“Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but five of the thirty-seven States in the Union had criminal sodomy laws.”).

14. *Id.*

15. For those familiar with legal history on the subject, there is a quartet of powers reserved to the States as part of their inherent sovereign powers. These are grouped together under the rubric of police powers. First and second are health and safety, which most people understand. Then there is general welfare, which is a bit amorphous, but is best understood as applying to the provisions of standard nonexcludable public goods. The last aspect of the state's police powers deals with morals. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541 (2005) (noting that a state action survives substantive due process review if it falls within the state's police power, having a “substantial relation to the public health, safety, morals, or general welfare”); see Yao Apasu-Gbotsu et al., *Survey on the Constitu-*

tion of same-sex marriage today, one can creatively re-imagine the way in which earlier Justices might have thought about same-sex marriage, but historically, until the past generation, nothing was further from their thoughts. For example, in *Pierce v. Society of Sisters*, when Justice James McReynolds referred to the rights of parents to guide the education of their children,¹⁶ it is highly unlikely that he meant to include parents that are same-sex couples. In light of these historical realities, one certainly cannot make the constitutional case for same-sex marriages through the Privileges or Immunities Clause.

But if the Privileges or Immunities Clause does not cover the issue, why propose that the gap is made up through the Equal Protection Clause? The Equal Protection Clause emphasized the word “protection” as much as it emphasized the word “equal.”¹⁷ These were rights given to all persons, a broader class than citizens.¹⁸ It was also the case that the rights granted to all persons were both fewer and more basic than those given to citizens. For example, Privileges or Immunities protected economic liberties, while Due Process (also extended to all persons) only protected against seizure.¹⁹ Privileges or Immunities gave only citizens the right to acquire property, but Due Process protected the property of all persons against expropriation.

The primary purpose associated with the Equal Protection Clause was not to deal with class or caste legislation, which would have been covered by Privileges or Immunities if covered by any part of the Fourteenth Amendment at all. Instead, the Equal Protection Clause had the great and noble purpose of addressing an ongoing evil: the perverted enforcement of the criminal law. At the time of its passage, it was not uncommon for the criminal justice system to hand down harsh penalties to black defendants, while letting white defendants go with a slap on the

tional Right to Privacy in the Context of Homosexual Activity, 40 U. MIAMI L. REV. 521, 553 (1986).

16. 268 U.S. 510, 534 (1925).

17. See *infra* notes 18–19 and accompanying text.

18. The Equal Protection Clause states that “nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1 (emphases added). The Privileges or Immunities Clause states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” *Id.*

19. See Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 1096, 1096–97 (2005).

wrist.²⁰ Conversely, there were situations where, if the victim were a black person, the prosecutor would be indifferent towards bringing the guilty party to justice, whereas for a white victim the prosecutor would zealously seek out a defendant.²¹ Such travesties of justice were particularly egregious in the aftermath of the withdrawal of Northern troops from the South, as exemplified by *United States v. Cruikshank*.²² Once the purpose of the Equal Protection Clause is recognized, there is a powerful reason for wanting the clause to remain separate and distinct from issues of gay marriage, or indeed any class or caste legislation.

Cruikshank rests on *The Slaughterhouse Cases*,²³ the most disappointing opinion in the history of Western civilization in some senses, because the Court abandoned all efforts to identify the substantive commitments of the Privileges or Immunities Clause. But the aspirations to protect economic liberties resurfaced within a decade, through the Equal Protection and Due Process Clauses.²⁴ A number of statutes that could be termed class-and-caste legislation then became vulnerable to constitutional challenge. In class legislation, the modern Equal Protection jurisprudence becomes highly selective: Those individuals that can only earn two dollars an hour—when the minimum wage is three dollars an hour—may be singled out. The focus on economic liberty was used to attack this sort of class legislation, and in the *Lochner* era, circa 1905, these statutes were attacked on both liberty of contract and equal protection grounds.²⁵ The effort to increase protections for economic

20. See John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421, 445 (1972).

21. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56–59 (1955) (noting that the Thirty-ninth Congress understood equal protection to mean “the literal sense of benefiting equally from laws for the security of person and property”).

22. 92 U.S. 542 (1875).

23. 83 U.S. (16 Wall.) 36 (1872).

24. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Mugler v. Kansas*, 123 U.S. 623 (1887).

25. See, e.g., *Gulf, Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150 (1897) (invalidating on equal protection grounds a regulation that obligated railroad defendants to pay attorney's fees of successful plaintiffs); *In re Aubry*, 78 P. 900 (Wash. 1904) (invalidating on equal protection grounds a regulation requiring registration of horseshoers).

liberties is a noble endeavor,²⁶ and it would be a favorable exchange to yield the ground on Proposition 8 in return for a systematic and thoroughgoing explanation of how these challenges could simply annihilate ninety-nine percent of the current social democratic welfare state.

But in the nineteenth century there was a well-documented, completely dysfunctional attitude toward some of the key questions surrounding gay marriage. Legislation that denigrated homosexuals was often justified under the ability of the state to protect the morals of its citizenry through the state's police power.²⁷ There is no question that this attitude dominated for a very long period of time, until it was eventually reversed in *Lawrence v. Texas* in 2003.²⁸ Before *Lawrence*, the switch was that restrictions on activities that traditionally fell within the morals head of the police power now were treated as per se constitutional no matter how irrational, no matter how crazy, or how foolish. As a matter of normative political theory, this was not the high point of American constitutional jurisprudence.

The real question is why this structure lasted as long as it did. It turns out that claims for gay marriage give rise to a very complicated duet between the rational and normative approaches. Some argue that California is a special case because the state has been unable to fulfill any of the purported justifications for banning gay marriage.²⁹ Admittedly, it is not likely, for example, that anyone could successfully defend the ban on gay marriage as a way to protect children.³⁰ But the historical approach represents a different view on psychology. There is a wonderful article by Professor Jonathan Haidt about the Emotional Dog and the Rational Tail.³¹ His main point is that moral

26. See Richard A. Epstein, *The Classical Liberal Alternative to Progressive and Conservative Constitutionalism*, 77 U. CHI. L. REV. 887 (2010).

27. See, e.g., *Christensen v. State*, 468 S.E.2d 188, 190 (Ga. 1996).

28. 539 U.S. 558, 571–74 (2003) (finding an “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”).

29. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930, 934–46 (N.D. Cal. 2010); *In re Marriage Cases*, 183 P.3d 384, 401–02 (Cal. 2008).

30. See, e.g., *Perry*, 704 F. Supp. 2d at 967 (finding that “the laws of California recognize no relationship between a person's sexual orientation and his or her ability to raise children”).

31. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001).

judgments are hardwired into all human beings everywhere.³² Individuals take these judgments and then articulate a social rationalization to support them.³³ Historically, this description seems to be quite accurate as it pertains to matters of sexual behavior, reproduction, and similar family matters. Our moral intuitions are deeply held and highly authoritarian, so people in civilized society are constantly trying to figure out a way to rein in their own worst impulses while understanding the rational arguments on the other side. The conflict between tradition and rationality is most acute in this context.

The last thing wise people want to do to a population that is struggling with a hard issue, but making some degree of moral progress, is to dismiss the population's deepest beliefs as completely irrational. Voters in Iowa voted according to their instincts when they removed the judges who supported gay marriage.³⁴ Even though wiser minds might have persuaded them to review the issue from scratch, the voters resented the attempt to sweep aside their traditional, deeply held values. Judge Walker was inappropriately dismissive of these strongly held popular views under the highly permissive rational basis test.³⁵ When first announced in Justice Holmes' dissent in *Lochner v. New York*,³⁶ rational basis review was intended to insulate modern legislative initiatives, such as maximum-hours laws, from being attacked as impermissible deviations from traditional common law principles. There was never a thought that the test could be turned against statutes that embodied traditional understandings.³⁷ On this question at least, the invalidation of Proposition 8 represents a genuine judicial revolution, and an unnecessary one as well. There is no need to fight the moral battle on gay marriage once it is legalized. Accordingly, it is not appropriate to tell people who have to re-

32. *Id.* at 817.

33. *Id.*

34. See, e.g., A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

35. *Perry*, 704 F. Supp. 2d at 1002–03 (“[Proposition 8’s] proponents’ purported rationales are nothing more than post-hoc justifications . . . Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians.”).

36. 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).

37. *Id.* at 76 (arguing that only statutes infringing “fundamental principles as they have been understood by the traditions of our people and our law” should be overturned).

lease their legal control over marriage that they cannot use their own moral views to justify their conduct and that of their coreligionists. It is therefore regrettable that so much misplaced erudition has been used to support false historical propositions. Thus I think that learned feminist historians, such as Professor Nancy Cott, are incorrect when they tell us that household stability, not gender, lies at the core of marriage.³⁸ Professor Cott is only correct to the extent that she believes that gender is not at the core of marriage; sex is, which is why the marriage vow speaks of “forsaking all others.”³⁹ Professor Cott’s extravagant claims falsify tradition, falsify history, and falsify any sound understanding of the past. It makes me very leery of using any form of expert witnesses in legal trials on subjects that are as sensitive as this one.

The final issue to consider is the agenda behind these constitutional innovations. A libertarian, based on his moral judgments, could make an argument sounding in freedom of association for why gay marriage should be allowed. But such a rationale tends to go much further than endorsing gay marriage only, and often extends to other types of marriages as well. For example, there is no argument that can be made against polygamy that does not apply even more strongly to gay marriage. After all, polygamy has a long history of acceptance in some groups, whereas gay marriage is of a far newer vintage. A libertarian who defends freedom of association may wish to see the polygamy ban lifted as well.

If the distinctions between types of marriages are regarded as completely irrational byproducts of personal moral judgments, then the same attitude will support an anti-discrimination law to protect gays against these irrational prejudices. My fear here is that the case for gay marriage now rests on its moral superiority, which in turn rests on whether it is possible to allow people to discriminate in their own personal associations if their preferences are so ill-formed. Should, for example, the Catholic Church be allowed to cling to what others regard as antiquated stereotypes when they refuse to ordain women as priests?

38. *Perry*, 704 F. Supp. 2d at 933 (endorsing Professor Cott’s conclusion that stability is “[t]he state’s primary purpose”).

39. See, e.g., THE BOOK OF COMMON PRAYER ACCORDING TO THE ADMINISTRATION OF THE SACRAMENTS AND OTHER RITES AND CEREMONIES OF THE CHURCH ACCORDING TO THE USE OF THE EPISCOPAL CHURCH 433–34 (1985).

Given the logic behind gay marriage, the state should surely have the right to override any claims of freedom of association and might be constitutionally obliged to do so. The new tradition is troublesome because, in times of wide social disagreement, it lacks tolerance when tolerance is needed most.

The problem with Judge Walker's approach is that it makes us so dependent on his epistemic findings about a potential parade of horrible occurrences, on constitutional grounds. Thankfully, he does not take that aggressive line, but he does something that is, in some sense, worse: He shifts the scope of the debate from whether gay marriage is guaranteed against the state under the Fourteenth Amendment to the validity of a proposition that says that if a right was once legalized but then taken away by referendum, then the right has become federally guaranteed under the Constitution (so long as parents have a right to withdraw their students from those classes that teach about gay marriage). That argument is too convoluted for its own good, and furthermore, it is a bad idea to craft an argument in favor of gay marriage that works only under the peculiar and twisted history of California.

The crux of the issue of gay marriage is whether it is a classification that should be tolerated. Half-measures are a sign of intellectual weakness in this case. I would actually respect the constitutional argument against Proposition 8 more if it frankly stated that serious scholars and lawyers do not care about this tangled history.

For all people at all times, it is unclear what path proper analysis should follow. There is a real conflict in constitutional law between that which is based on rationality and that which is based on tradition and psychology. If rationality arguments are relied upon too much, then the world is going to push back. We are all imperfect human beings. We can and should make an immense advance in this particular area, but the only way we are going to be able to do it is to pull the reins back a little bit and let the horse go at a slower pace. Whip the horse forward and you may collapse the entire carriage.