The Paradoxes of Popular Constitutionalism: Proposition 8 and Strauss v. Horton

By Anna Marie Smith*

Introduction

How should we preserve and even enrich popular sovereignty in a liberal democratic society, while protecting the rights of vulnerable minorities? As James Madison wrote: "[T]he people are the only legitimate fountain of power . . . "1 What steps should we take to ensure that our constitutions express the will of the people? What if, furthermore, we understand this concept, the will of the people, from a liberal democratic perspective?2 What if we want to promote the equal protection rights of persons belonging to vulnerable minority groups while upholding the power of the people to determine our constitutions?

In the November 2008 election, California voters gave majority support to Proposition 8, the ballot initiative to amend the State Constitution such that California shall only recognize the union of a man

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and woman as a legal marriage. The amendment was subsequently challenged before California's highest court. In a six-to-one decision, the court held in *Strauss v. Horton* that Proposition 8 was valid. The upholding of Proposition 8 is particularly interesting because, in May 2008, the same court decided in *In re Marriage Cases* to strike down a state law excluding same-sex couples from legal marriage. The court struck down the law on the grounds that Californians enjoy a fundamental due process right to the state's legal recognition of their intimate relationships and the exclusion of similarly situated same-sex couples from legal marriage constitutes an impermissible equal protection violation.

Proposition 8 and *Strauss v. Horton* raise serious questions about the rights of same-sex couples and the limits of the state's police powers where the regulation of intimacy is concerned. They also implicate, however, questions about popular constitutionalism: the supremacy of the people in establishing and amending our highest laws. In a liberal democracy, the constitution sets the terms for social cooperation. By its very nature, a liberal democratic regime is only possible in the context of a pluralist society made up of free, equal, and diverse individuals. Social cooperation in these conditions is a remarkable achievement that would not be possible without the people's consent to the constitution. By the same token, a free people can only reasonably give their consent to a constitution that is an expression of their will. However, a liberal democratic constitution must also protect the rights of individuals and safeguard the rights of vulnerable minorities. The dissenting justice in *Strauss*, Justice Moreno, argued that Proposition 8 was not a valid amendment under California’s ex-

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3. According to the official report of the California 2008 general election results, Proposition 8, titled “Eliminates Right of Same-Sex Couples to Marry. Initiative Constitutional Amendment,” was approved with 52.3% of voters selecting “yes,” and 47.7% of voters selecting “no.” DEBRA BOWEN, CA SEC’Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION, at 6, 62 (2008), http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.
5. *Id*.
7. *Id*.
existing constitutional law. He stated that the rights of vulnerable minorities should not be determined by a simple majoritarian procedure.

Proposition 8 supporters have hailed the adoption, and Strauss's upholding, of the amendment as the very quintessence of American democracy. By all appearances, the supporters complied fully with California law when they placed an initiative on the 2008 ballot establishing that legal marriage in the state would only be a union between a man and a woman. The votes were fairly counted, and Proposition 8 received majority support at the polls. On closer inspection, however, the invocations of democratic values by the supporters of Proposition 8 become much less convincing, because the campaign has perpetrated a devastating assault upon a vulnerable minority's equal protection rights.

Inspired by Justice Moreno's dissent, this Article will consider California's constitutional-amendment-by-ballot-initiative procedure from a normative perspective. Even though this procedure appears to give power to the people to determine the laws that bind all three branches of state government and protect the rights of individuals and vulnerable minorities, it is not at all clear that it can be justified in liberal democratic pluralist terms. Part I will offer a discussion of the doctrinal issues at stake in the Strauss and Marriage Cases decisions. Drawing from Bruce Ackerman's constitutional theory, this Article will attempt to identify and clarify the foundational normative values of the liberal democratic tradition and their implications for legal theory in Part II. Part III will then explore James Madison's approach to the tensions between popular constitutionalism and tyrannical majoritarianism. Madison's critique of factionalism was shaped in part by an interest in protecting the property-owning elite from the plebian majority. The form of his penetrating critique of majoritarianism was nevertheless taken up by subsequent democratic subjects, such as the

10. Id. at 130.
11. Interveners' Opposition Brief at 6, Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (No. S168047) ("Here, we the people govern, and judges and justices—even of the state's highest court—serve those to whom they are ultimately accountable. Any other result [i.e. anything other than a decision to uphold Proposition 8] would signify a gravely destabilizing constitutional revolution.").
12. See generally Bruce Ackerman, We the People: Foundations (1991) (discussing dualist democracy as a form of government).
Reconstruction Congress and the civil rights movement, and infused with an egalitarian substance. Justice Moreno's dissent arises from that complex constitutional legacy; in this sense, it is well grounded in the American liberal democratic tradition. Finally, Part IV offers a Rawlsian revision of Ackerman's constitutional theory and a proposal for a new California constitutional amendment procedure. Together, the proposed amendment procedure and the Rawlsian commentary emphasize the role of public reason, the citizen's duties of civility and reciprocity, and the necessity of a constitution that is adequate for a truly pluralist society consisting of free and equal individuals who embrace a wide variety of comprehensive views of the good and pursue highly diverse life plans. Throughout this Article, I assess various rival amendment procedures from a normative perspective, including the one established by Article V of the Federal Constitution, Ackerman's own referendum proposal, and Thomas Jefferson's periodic review model.

I. Proposition 8 and *Strauss v. Horton*

A. Proposition 8: A Brief Tour

On May 15, 2008, California’s highest court overturned the state statute that made same-sex couples ineligible for marriage. Before this decision was handed down in *Marriage Cases*, same-sex couples in California could only enter into domestic partnerships. While both members of a domestic partnership had the same rights and obligations as spouses under California's domestic partnership law, the state nevertheless fenced similarly situated lesbian and gay male couples outside of the marriage-eligible class. After the decision came into effect in mid-June, about eighteen thousand same-sex couples approached their local county clerk offices and successfully obtained legal marriage licenses.

Same-sex marriages in California were suspended four and one-half months later however. Then, on November 4, 2008, a majority
of the state's voters gave their support to Proposition 8, which amended the state constitution to read: "Only marriage between a man and a woman is valid or recognized in California." 22 Legal challenges to Proposition 8 were immediately filed in California state court after the election. 23 By a six-to-one majority, the Strauss Court upheld the validity of Proposition 8 and its resulting constitutional amendment. 24 In his dissent, Justice Moreno warned that the majority opinion places the equal protection rights of all minority Californians in jeopardy. 25

Kristin Perry and three other plaintiffs subsequently challenged the constitutionality of Proposition 8 in federal court. 26 Represented by two prominent attorneys, Theodore Olson and David Boies, the plaintiffs argued that the relegation of similarly situated lesbian and gay male couples to the institution of domestic partnership violates their due process and equal protection rights that are guaranteed under the Fourteenth Amendment of the United States Constitution. 27 The trial court overturned Proposition 8 on the grounds that it violated the due process and equal protection rights of similarly situated same-sex couples seeking to enter into legal marriages in the State of California. 28 The defendant-Interveners filed an appeal in the United States Court of Appeals for the Ninth Circuit. 29 Regardless of the final outcome in Perry v. Schwarzenegger, I would argue that Strauss v. Horton still deserves our attention, since it raises questions about the types of constitutional amendment procedures that can legitimately be defended on the basis of liberal democratic principles. 30

22. CAL. CONST. art. I, § 7.5.
24. Strauss, 207 P.3d 48 (2009). In a further section of the decision, which I do not discuss here, the Strauss court also held that Proposition 8 applies prospectively, rather than retroactively. As a result, it found that the approximately 18,000 same-sex marriages that were performed in 2008 were not rendered legally invalid by the measure. See id. at 119–22.
25. Id. at 129 (Moreno, J., concurring in part and dissenting in part).
27. Id.
30. See generally RAWLS, POLITICAL LIBERALISM, supra note 2.
B. Strauss v. Horton: Amendments Versus Revisions

In Strauss v. Horton, the petitioners pointed to the distinction between a ballot initiative that merely "amends" California's constitution and one that brings about a much more comprehensive and thoroughgoing "revision" of the Constitution. The Petitioners argued Proposition 8 amounted to a revision of the State Constitution rather than an amendment, and, because the adoption of a revision requires following special procedures, it should be considered unlawful. Under the California Constitution, the state legislature has the power to draw up a revision, but the revision only goes forward if the proposal receives two-thirds support in both chambers of the legislature. As long as the proposal receives supermajority support in the legislature, the voters at the next general election will be asked whether a constitutional convention should be held to consider the proposal. If a majority votes yes, the legislature shall set up the convention with the election of delegates, in a proportionate manner, from each of the state's districts. The proposed revision must receive majority support at the convention to be effective. By contrast, there are two possible routes for "amending" the constitution. An amendment can be adopted through the same legislative-constitutional convention procedure outlined above. Alternatively, an amendment can be adopted through a ballot initiative. In the latter case, anyone can draft an amendment. If the proposed amendment petition attracts the signatures of at least eight percent of the total number of persons who participated in the last gubernatorial election, it is placed on the ballot at the next general election or at any special statewide election held prior to that general election. At the election, the amendment-by-ballot-initiative passes if it is approved by a majority vote.

Proposition 8 was not the first ballot initiative dealing with same-sex marriage placed before California's voters. In fact, the sections of the state's family law code at issue in the 2008 court decision, *Marriage Cases*, had a mixed pedigree; some were adopted through the normal

34. Id. § 2.
35. Id.
36. Id. § 4.
37. Id. §§ 1-4.
38. Id. art. II, § 8(a), art. XVIII, § 3.
39. Id. art. II, § 8(b).
40. Id. § 10(a).
legislative process, while others were the fruit of the state’s ballot initiative procedure. In 1977, the California legislature adopted a bill designed to limit the marriages that could be lawfully performed in the state to marriages of opposite-sex couples. In 2009, when the Strauss decision was handed down, section 300 of the California Family Code embodied this 1977 statute. Same-sex marriage opponents were nevertheless concerned that if other states decided to permit gay and lesbian couples to marry, these couples could then move to California and demand legal recognition. They regarded section 308 of the California Family Code, the state’s boilerplate Full Faith and Credit clause in its marriage law, as a dangerous “loophole.” As a result, the same-sex marriage opponents sponsored Proposition 22, which stated, “[o]nly marriage between a man and a woman is valid or recognized in California.” Proposition 22 passed by a 61.4% to 38.6% margin in the 2000 election. As a result, the legislature added section 308.5 to the state’s family law: “Only marriage between a man and a woman is valid or recognized in California.” When the Marriage Cases court struck down the sections of the California Family Code excluding same-sex couples from legal marriage, it overturned the products of both the normal legislative process, section 300, and the state’s ballot initiative procedure, section 308.5. For the Marriage Cases court, however, the fact that one of the violative statutes was enacted as a result of the ballot initiative procedure was immaterial: “A California statute . . . is invalid if it conflicts with the governing provisions of the California Constitution.” Proposition 22 was a statutory ballot initiative, but unlike Proposition 8 of the 2008 ballot, it did not amend the

42. Id.
43. “A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state.” CAL. FAM. CODE § 308(a) (West Supp. 2010).
45. Strauss, 207 P.3d at 65 (quoting CAL. FAM. CODE § 308.5 (West 2004)).
47. CAL. FAM. CODE § 308.5(a).
49. Id. at 66; See also In re Marriage Cases, 183 P.3d 384, 449 (Cal. 2008).
state constitution and therefore did not require any special analysis or deference.\textsuperscript{50}

The Strauss court decided that Proposition 8 qualified as an amendment, rather than a revision, on the basis of its meaning and scope and its quantitative and qualitative effect "on the basic governmental plan or framework embodied in the preexisting provision of the California Constitution."\textsuperscript{51} Proposition 8, according to the Strauss court, merely "carves out a narrow and limited exception" to the privacy and due process rights established in Marriage Cases, and "leav[es] undisturbed" the equal protection rights of homosexual couples and their right to adequate state recognition of their family status.\textsuperscript{52} The measure, therefore, does not "fundamentally alter the meaning and substance of state constitutional equal protection principles as articulated in [Marriage Cases]."\textsuperscript{53}

1. The Marriage Cases Decision of 2008

It is particularly difficult to accept the reasoning of the court in Strauss, since a majority of the very same panel of judges handed down the Marriage Cases ruling a mere twelve months earlier.\textsuperscript{54} In Marriage

\textsuperscript{50} In re Marriage Cases, 183 P.3d at 449.
\textsuperscript{51} Strauss, 207 P.3d at 61.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} The following is a list of the seven members of the California Supreme Court who heard both In re Marriage Cases and Strauss, including the appointing governor, the date of original appointment, and the date first elected for each justice: Associate Justice Joyce L. Kennard (appointed by Gov. George Deukmejian (R) in 1989, first elected 1990), Chief Justice Ronald M. George (appointed by Gov. Pete Wilson (R) in 1991, first elected 1994), Associate Justice Marvin R. Baxter (appointed by Gov. George Deukmejian (R) in 1988 to Fifth Appellate District Court of Appeal and elevated to Supreme Court in 1991, first elected 1990), Associate Justice Kathryn M. Werdegar (appointed by Gov. Pete Wilson (R) in 1994, first elected 1994), Associate Justice Ming W. Chin (appointed by Gov. Pete Wilson (R) in 1996, first elected 1998), Associate Justice Carlos R. Moreno (appointed by Gov. Gray Davis (D) in 2001, first elected 2002), Associate Justice Carol A. Corrigan (appointed by Gov. Arnold Schwarzenegger (R) in 2005, first elected 2006). Supreme Court Justices, Jud. Council Cal., http://www.courtinfo.ca.gov/courts/supreme/justices.htm (last visited Dec. 5, 2010). In Strauss, Chief Justice George wrote the majority opinion. He was joined by Kennard, Baxter, Chin, and Corrigan; Kennard wrote a concurring opinion; Werdegar voted with the majority but wrote a separate concurring opinion; and Moreno concurred on the status of the same-sex marriages conducted in California between mid-June and November 2008, but otherwise dissented. Strauss, 207 P.3d 48. For In re Marriage Cases, Chief Justice George wrote the majority opinion. George was joined by Kennard, Werdegar, and Moreno; and Kennard wrote a concurring opinion. Baxter, joined by Chin, wrote a separate opinion, concurring in part (legal marriage in the state of California had been between a man and a woman, California domestic partnerships confer all of the substantive benefits and responsibilities belonging to married couples upon same-sex couples,
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Cases, the court determined that every Californian enjoys a fundamental right to have his or her intimate privacy respected by the state and to receive the state's official acknowledgement of, and support for, his or her family." It further decided that "sexual orientation... is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment and that [it] generally bears no relationship to an individual's ability to perform or contribute to society." For these reasons, it held that California courts would henceforth review statutes imposing differential treatment on the basis of sexual orientation under the strict scrutiny standard.

Marriage Cases was unequivocal in its equal protection analysis. Even though the legislature had granted homosexual couples the same rights and privileges afforded to their married heterosexual counterparts by allowing them to obtain domestic partnership status, California was violating the rights of same-sex couples by withholding the "marriage" signifier from them. The Marriage Cases court found that, despite the state's attempt to accommodate same-sex couples by offering them the "ostensibly equal" domestic partnership status, its prohibition of same-sex marriages stigmatized homosexuals insofar as it shunted the otherwise eligible lesbian or gay couples into a second-

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and a few minor technical points) and dissenting in part (the court should not extend the right to marriage to homosexual couples, the issue should be resolved by the legislature; rejecting that sexual orientation classifications should be subjected to strict scrutiny; the marriage/domestic partnership distinction does not violate the state constitutional right to equal protection). Corrigan wrote a separate opinion, concurring in part (marriage and domestic partnerships conferred virtually all of the same substantive legal benefits and privileges and, if the state deprived homosexuals of this virtually equal marriage-substitute, it would be violating their equal protection rights) and dissenting in part (the court cannot make homosexual couples eligible for marriage, since a 2000 ballot initiative had defined marriage as the union of a man and a woman; the state's sexual-orientation-based distinction between marriages and domestic partnerships did not constitute an equal protection violation). In re Marriage Cases, 183 P.3d 384. In between the two cases, then, it was George, Kennard, and Werdegar who were the swing voters. Moreno, the sole Democratic appointee and the only Latino on the bench, consistently voted in favor of expanding the rights for same-sex couples and for homosexuals in general; while Baxter, Chin, and Corrigan consistently voted against. With a total of four votes needed, the three consistently anti-same-sex marriage justices, Baxter, Chin, and Corrigan, only needed one ally among the swing voters, George, Kennard, and Werdegar, to prevail. In the end, however, they won all three of the swing voters, leaving Moreno as the sole champion of recognition justice. See Strauss, 207 P.3d 48; In re Marriage Cases, 183 P.3d 384; Supreme Court Justices, JUD. COUNCIL CAL., http://www.courtinfo.ca.gov/courts/supreme/justices.htm (last visited Dec. 5, 2010).

56. Id. at 444.
57. Id.
58. Id. at 444–45.
It held that “the state interest in limiting the designation of marriage exclusively to opposite-sex couples, and in excluding same-sex couples from access to that designation, cannot properly be considered a compelling state interest for equal protection purposes.” Because the state failed to demonstrate a compelling interest, the statutes did not withstand the court’s strict scrutiny test. It therefore decided to strike down section 308.5 of the Family Code, which limited marriage to opposite-sex couples, and to strike down the language in section 300 limiting marriage to a union between a man and a woman. The court decided “extending the designation of marriage to same-sex couples, rather than denying it to all couples, is the equal protection remedy that is most consistent with our state’s general legislative policy and preference.”

In Marriage Cases, the court found that the stigmatizing effect of names, labels, and categories attached by the state to family groups that are distinguished by sexual orientation raises the possibility of an equal protection violation. Marriage Cases struck down the state’s marriage law because it, effectively, caused the state to distribute respect and dignity unequally on the basis of sexual orientation.

Whether or not the name “marriage,” in the abstract, is considered a core element of the state constitutional right to marry, one of the core elements of this fundamental right is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships.

The Marriage Cases court concluded that the law’s distinction “pose[s] a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.” In Nancy Fraser’s terms, the court was not moved by the fact that California’s family law offered equal distributive rights to the heterosexual and same-sex couples; the reservation of the respected term “marriage” for heterosexual couples

59. Id. at 444–46.
60. Id. at 451.
61. Id. at 452.
62. Id.
63. Id. at 453.
64. Id. at 444.
65. Id. at 445.
66. Id. at 434.
67. Id. at 434–35.
alone and the relegation of similarly situated same-sex couples to the symbolically inferior category of "domestic partnerships" violated the same-sex couples' right to equal recognition. 69 Although nomenclature and stigma mattered a great deal in *Marriage Cases*—where the reservation of the respected and dignified marriage banner for heterosexual couples and the relegation of similarly situated homosexual couples to the much less respected, much less celebrated, and much more artificial domestic partnership banner *in itself* constituted a constitutional violation 70—suddenly, in *Strauss*, the very same linguistic difference is purportedly so insignificant that it becomes a mere "exception." 71

C. Exposing Homosexuals, Convicted Murderers, and Criminal Suspects to Unmoderated Majoritarianism

Public policy experts in California routinely fault the ballot initiative process for its placement of unreasonable limitations on the state government's authority. 72 The Governor and the legislature are constrained by dozens of statutes-by-ballot-initiative commanding the pursuit of irreconcilable objectives. 78 For the purposes of this Article, the impact of ballot initiatives on the state's constitution and the response of the state court deserve special attention. In this respect, it is important to note that the court's two-step, from *Marriage Cases* to *Strauss*, is not unique.

In *People v. Frierson*, for example, the court heard a challenge to a ballot initiative that amended the California Constitution to permit the death penalty. 74 *Lance W.*, another example, dealt with a challenge to a ballot initiative enhancing the State's search and seizure powers by amending the Constitution. 75 In both cases the court upheld the validity of the ballot initiative, even though the amendment in question had the effect of reducing fundamental rights established under the State Constitution—the right not to be subjected to cruel or unusual punishment in *Frierson* and the right to be protected against unlawful searches and seizures in *Lance W.* 76 In its citation of *Frierson* and

69. *In re Marriage Cases*, 183 P.3d at 444-46.
70. See *id*.
73. *Id*.
75. *In re Lance W.*, 694 P.2d 744 (Cal. 1985).
Lance W., the Strauss court notes that neither decision attempted to evaluate the relative importance of the right or the degree to which the right would be diminished by the amendment in question. According to Strauss, what matters is the qualitative and quantitative impact of the amendment-by-initiative on the government's institutional structure. Because these two ballot initiatives and Proposition 8 "did not make a fundamental change in the nature of the governmental plan or framework established by the Constitution," the court accepted them as valid laws. While the State's commission of recognition-injustice through a statute withholding equal respect and dignity for homosexual couples rose to the level of a constitutional violation in Marriage Cases, that same injustice committed by the State was deemed a permissible exception in Strauss simply because it was brought about by a constitutional amendment-by-initiative, rather than by a statute.

D. The Moreno Dissent: Recognition Injustice

From Justice Moreno's perspective, Proposition 8 is constitutionally repugnant because it retains the distinction between marriage and domestic partnership and, therefore, compared to similarly situated heterosexuals, causes the State to treat same-sex couples with less respect and to confer less dignity upon them. In Moreno's view, the Strauss majority erred when it decided that Proposition 8 merely introduces a "narrow and limited exception" and leaves California's equal protection guarantees for homosexuals otherwise intact. Moreno argues, by contrast, that Proposition 8 introduces a fundamental change in the law: "[E]ven a narrow and limited exception to the promise of full equality strikes at the core of, and thus fundamentally alters, the guarantee of equal treatment that has pervaded the California Constitution since 1849." As such, Moreno reasons, Proposition 8 is a revision, rather than an amendment, and cannot be adopted through the simple ballot initiative process.

Equal protection rights are explicitly designed to protect "disfavored minorities" from the will of the majority, Moreno notes. Quoting from a 1971 precedent, he writes:

78. Id. at 61, 94, 98, 101, 125.
79. Id. at 100.
80. Id. at 128-40 (Moreno, J., concurring in part and dissenting in part).
81. Id. at 131.
82. Id.
83. Id. at 133-34.
84. Id. at 129.
The equal protection clause is therefore, by its nature, inherently countermajoritarian. As a logical matter, it cannot depend on the will of the majority for its enforcement, for it is the will of the majority against which the equal protection clause is designed to protect. Rather, the enforcement of the equal protection clause is especially dependent on "the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority."85

Where the Strauss majority belittled the Petitioners' hypothetical questions about the limits of the court's deference towards violative amendments-by-initiative as a "parade of horrible amendments,"86 Moreno decrives the fact that Californians must rely upon the protections afforded by the Federal Constitution wherever violative amendments-by-ballot-initiative receive majority support.87 Moreno quite rightly concludes that all politically vulnerable minorities have been left exposed to violative amendments-by-ballot-initiative as a result of the Strauss decision. "The majority's holding is not just a defeat for same-sex couples, but for any minority group that seeks the protection of the equal protection clause of the California Constitution."88

E. Redemptive Moments in Strauss

The Strauss decision features numerous and lengthy direct citations from Marriage Cases.89 A cynic might suggest that in these passages the several justices who were in the majority in both decisions90 are simply trying to have their cake and eat it too and that future courts will brush away these redundant passages as they seize upon the fact that the Strauss court upheld Proposition 8.

85. Id. at 130 (quoting Bixby v. Pierno, 481 P.2d 242, 249 (Cal. 1971)). The term "countermajoritarian," invokes the work of Alexander Bickel. Bickel enlisted James Madison, John Marshall, and Alexander Hamilton to argue that judicial review only appears to be "countermajoritarian." Bickel argues that even though a court of unelected judges may strike down statutes and executive orders promulgated by elected representatives, its judicial review function is indispensable to the republic's liberal democratic system. By interpreting the constitution and insisting upon its supremacy as the highest form of law, the court is enforcing the will of the people; it is therefore acting democratically when it blocks a legislature or executive that seeks to go beyond the legal boundaries of its authority or upholds the rights of the individual against encroachment by the government. See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 1–33 (2d ed. 1986).
86. Strauss, 207 P.3d at 107.
87. Id. at 150–31 (Moreno, J., concurring in part and dissenting in part).
88. Id. at 140.
89. See, e.g., id. at 61, 63, 70–72, 77, 122 (quoting In re Marriage Cases, 183 P.3d 384 (Cal. 2008)).
90. See supra text accompanying note 54.
There are, however, other possibilities. The Strauss court clearly wants to underline the fact that most of the constitutional breakthroughs achieved in Marriage Cases remain intact. Strauss reminds us in no uncertain terms that, in upholding Proposition 8, the court is not overturning Marriage Cases; the holdings in the earlier case—such as the specification of sexuality-based differential treatment as a form of invidious discrimination that will trigger the court's most searching type of equal protection review—remain legally binding precedents. The effect of Proposition 8 is very narrowly construed: It "carves out an exception to the preexisting scope of the privacy and due process clauses of the California Constitution as interpreted by the majority opinion in the Marriage Cases."92

The Strauss court could be issuing a warning to homophobic political forces here. Those forces might be tempted, in the wake of their Proposition 8 victory, to champion a flurry of anti-homosexual bills in the legislature. Strauss sends a clear signal to them that the court will zealously submit any statute that deploys sexual orientation classifications to strict scrutiny.93 Further, Strauss underlines the fact that same-sex couples retain the right to some sort of state recognition for their family relationships under the Marriage Cases precedent; the Strauss court clearly states that Proposition 8 does not "eliminate the constitutional right of same-sex couples to enter into an officially recognized family relationship bearing a designation other than 'marriage.'"94 Proposition 8, the Strauss court decided, did not eliminate the substantive due process right enjoyed by "an individual [wishing] to establish—with the person with whom the individual has chosen to share his or her life—an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage."95 "Like opposite-sex couples, same-sex couples enjoy this protection not as a matter of legislative grace, but of constitutional right."96

Finally, it may very well be the case that the Strauss majority has bequeathed some helpful tools to gay rights advocates seeking to challenge Proposition 8 in federal court.97 Strauss characterizes Proposi-

91. Strauss, 207 P.3d at 73, 78.
92. Id. at 75.
93. Id. at 78.
94. Id. at 77.
95. Id. (quoting In re Marriage Cases, 183 P.3d 384 (Cal. 2008)).
96. Id.; see also id. at 76-78, 108 n.27.
97. My thanks to Shannon Minter for raising this point with me. For a suggestion that the Strauss majority itself anticipated a challenge in federal court, see id. at 103-06.
tion 8 as the fruit of ideological traditionalism: "[T]he ballot arguments submitted by the supporters of Proposition 8 establish that the purpose of that initiative measure was simply to restore the traditional definition of marriage as referring to a union between a man and a woman . . . ."98 On the one hand, in this passage of the decision the Strauss court is invoking the drafters' stated intentions to bolster its holding that, by dismissing the constitutional challenge to Proposition 8, it has carved out a narrow exception to the due process and equal protection rights it affirmed in Marriage Cases.99 Again, the Strauss decision does not eliminate the right of same-sex couples to obtain some sort of recognition of their families from the State of California.100

On the other hand, however, the Strauss court provides an interpretation of Proposition 8 that makes it relatively vulnerable to a federal constitutional challenge. The court is highlighting the fact that the drafters, by their own explicit admission, intended to harness the state's family law to promote traditional morals, while leaving the domestic partnership provision for same-sex couples wholly intact.101 For its part, California's highest court has already made it clear that it regards the promotion of traditional moralism as a relatively weak governmental purpose that may not survive even the most deferential form of judicial review pertaining to an equal protection or due process challenge.102 The Strauss decision strongly suggests that a statute would not withstand strict scrutiny review by California's highest court if the defendant invokes the promotion of moral tradition as its sole governmental purpose. Quoting from Marriage Cases, Strauss states that:

[A]lthough "as an historical matter in this state marriage always has been limited to a union between a man and a woman . . . , tradition

98. Id. at 76. In the final section of the decision, in which the court decides that the state must uphold and respect the California marriage licenses that same-sex couples obtained before Proposition 8 went into effect, this traditionalist definition of Proposition 8 is reiterated:

By contrast, a retroactive application of Proposition 8 is not essential to serve the state's current interest (as reflected in the adoption of Proposition 8) in preserving the traditional definition of marriage by restricting marriage to opposite-sex couples; that interest is honored by applying the measure prospectively and by having the traditional definition of marriage enshrined in the state Constitution where it can be altered only by a majority of California voters. Strauss, 270 P.3d at 122.
99. Id. at 61.
100. Id. at 76-77.
101. Id. at 77 n.9.
102. Id. at 71.
alone . . . generally has not been viewed as a sufficient justification for perpetuating, without examination, the restriction or denial of a fundamental constitutional right."\textsuperscript{103}

Indeed, same-sex marriage advocates challenging Proposition 8 along these lines in federal court have several precedents at their disposal. In \textit{U.S. Department of Agriculture v. Moreno}, the U.S. Supreme Court held that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."\textsuperscript{104} At the time of the trial, the statute governing the Food Stamp program at issue included an amendment prohibiting households including unrelated persons from receiving benefits.\textsuperscript{105} The legislative history of the amendment includes several speeches in which members of Congress expressed their intense dislike of hippie communes.\textsuperscript{106} In \textit{Moreno}, the amendment was struck down as a violation of the equal protection component of an individual's due process rights.\textsuperscript{107} The Court did not find that statutory distinctions pertaining to hippie identity are especially invidious; it applied the highly deferential rational basis review to the Food Stamp amendment.\textsuperscript{108} Even then, the fact that animus lay at the heart of the legislators' intentions meant the amendment could not survive the constitutional challenge.\textsuperscript{109} Brushing aside arguments pertaining to purported governmental interests, such as the elimination of fraud, the Court determined the amendment did not rationally advance that interest.\textsuperscript{110} With no reasonable fit between the alleged purpose (eliminating fraud) and the means (the household membership eligibility rule), the Court inferred from the Congressional Record that the actual governmental interest behind the amendment was the "bare congressional desire to harm a politically unpopular group."\textsuperscript{111} Finally, it held that such "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the . . . amendment."\textsuperscript{112}

\textsuperscript{103} \textit{Id.} (alteration in original omitted) (citations omitted).
\textsuperscript{104} 413 U.S. 528, 534 (1973). \textit{See also} \textit{Palmore v Sidoti}, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").
\textsuperscript{105} \textit{Moreno}, 413 U.S. at 530.
\textsuperscript{106} \textit{Id.} at 534.
\textsuperscript{107} \textit{Id.} at 532–33.
\textsuperscript{108} \textit{Id.} at 535.
\textsuperscript{109} \textit{Id.} at 534–35.
\textsuperscript{110} \textit{Id.} at 535–38.
\textsuperscript{111} \textit{Id.} at 534.
\textsuperscript{112} \textit{Id.} at 534–35 (alterations in original) (quoting \textit{Moreno v. U.S. Dep't of Agric.}, 345 F. Supp. 310, 314 n.11 (D.D.C. 1973)).
Similarly, in Romer v. Evans, the Supreme Court struck down a state constitutional amendment-by-initiative in Colorado even though the Court decided to conduct a rational basis review.113 The amendment at issue, Amendment 2 to the Colorado Constitution, prohibited the local governments of Colorado from enacting antidiscrimination measures offering protection to “homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships.”114 Justice Kennedy, writing for the six-to-three majority, drew an inference from the amendment’s imposition of a sweeping disability upon a single named group:

[T]he disadvantage imposed [by Amendment 2] is born of animosity toward the class of persons affected. . . . Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.115

In these decisions, neither hippies nor homosexuals constituted a suspect class for the federal court; thus, the equal protection challenges arising from these measures, which singled the groups out for differential treatment, received rational basis review.116 Moreno and Romer nevertheless hold out the promise of an enhanced rational basis review. This enhanced level of review involves the Court examining the purported governmental purpose and, where it proves not to be reasonably related to the means, searching for an implicit purpose in the legislative history,117 identifying any overly broad effects that cannot be explained with reference to a legitimate public policy, and using inferential reasoning to determine the unstated intentions of the drafters.118

In her Lawrence v. Texas concurrence, Justice O’Connor stated that Texas’s sodomy law violated the Equal Protection Clause by making a distinction between heterosexual and homosexual sodomy.119 She did so without claiming that sexual orientation classifications

114. Id. at 624 (quoting COLO. CONST. art. II, § 30b).
115. Id. at 634–35.
116. See Moreno, 413 U.S. at 533–34; Romer, 517 U.S. at 631–33.
117. Moreno, 413 U.S. at 534.
ought to be considered a suspect type of discrimination triggering
strict scrutiny. Justice O'Connor nevertheless would have struck down
the sodomy law on equal protection grounds. Because the law
criminalized sodomy only when performed by homosexuals, she rea-
soned, the statute was borne out of moral disapproval. "Moral dis-
approval of this group, like a bare desire to harm the group, is an
interest that is insufficient to satisfy rational basis review under the
Equal Protection Clause." By making only homosexual sodomy a
crime, the Texas law "brand[ed] all homosexuals as criminals, thereby
making it more difficult for homosexuals to be treated in the same
manner as everyone else."

The Lawrence majority struck down the Texas sodomy law on the
grounds that it violated the individual's due process rights. For the
purposes of this Article, however, it is intriguing that Justice Kennedy,
writing for the majority in Lawrence, pointed to the use of demeaning
and stigmatizing metaphors in the dicta to describe the violative work
being performed by Texas's sodomy law. By analogy, advocates
could argue that Proposition 8's disqualification of similarly situated
same-sex couples from marriage effectively brands homosexuals as
second-class citizens. Given the fact that domestic partnership com-
mands less respect than marriage in contemporary Californian soci-
ety, same-sex couples cannot find redress in a law that stops short,
providing them only with access to this alternative institution.

Because Proposition 8 leaves the domestic partnership option for
same-sex couples intact, advocates could argue that the State of Cali-

120. Id. at 582.
121. Id.
122. Id. at 581.
123. Id. at 578.
124. Id. at 575.

If protected conduct is made criminal and the law which does so remains unex-
amined for its substantive validity, its stigma might remain even if it were not
enforceable as drawn for equal protection reasons. When homosexual conduct is
made criminal by the law of the State, that declaration in and of itself is an invita-
tion to subject homosexual persons to discrimination both in the public and in
the private spheres.

125. See Brief of Amici Curiae American Civil Liberties Union et al. at 11–12, Perry v.
duties as married couples under state law,\textsuperscript{127} it would contradict California's legal history to say that the State has a legitimate interest in restricting child-rearing to married heterosexuals and Proposition 8 is a reasonable means for the pursuit of that objective. California's juxtaposition of a fully fledged domestic partnership option for same-sex couples with a heterosexuals-only marriage law places defenders of Proposition 8 in an awkward position. They must defend the stigmatizing work the exclusionary marriage law performs, without resorting to any argument about the fitness of same-sex couples for the substantive rights and benefits associated with marriage.\textsuperscript{128} The U.S. Supreme Court should hold that California's marking of homosexuals as an inferior group through its exclusionary marriage law is not permitted, because it violates the individual's equal protection rights and serves no permissible governmental purpose.

Further, Justice Kennedy's \textit{Lawrence} decision includes several fascinating references to the insufficient character of a tradition-oriented defense of a challenged statute.\textsuperscript{129} There are, most prominently, his references to the complexities of the Western historical record on the regulation of sodomy.\textsuperscript{130} In a more general vein, however, \textit{Lawrence} makes it clear that despite the fact that history and tradition are the starting point of the substantive due process inquiry in federal court, they are not the end of the inquiry in all cases.\textsuperscript{131} Even if a given practice is traditionally viewed as immoral by a governing majority, the mere fact of traditional majority condemnation is not in itself sufficient grounds for upholding a law prohibiting the practice: "[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack."\textsuperscript{132} \textit{Lawrence} holds that, where there is a conflict in the historical record, it is the law and tradition of the most recent decades that will receive the greatest weight.\textsuperscript{133} If recent references suggest that "an emerging awareness" is taking place in favor of reform, the Court will give the changing moral climate due considera-

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\textsuperscript{128} Brief of Amici Curiae American Civil Liberties Union et al., \textit{supra} note 125, at 13-14.
\textsuperscript{130} \textit{Lawrence}, 539 U.S. at 571-73.
\textsuperscript{131} \textit{Id.} at 572.
\textsuperscript{132} \textit{Id.} at 577-78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).
\textsuperscript{133} \textit{Id.} at 571-72. \textit{See also} City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("[W]hat once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom.").
\end{flushleft}
tion. Further, *Lawrence* signals that the Court may take recent legal developments in other countries and jurisdictions into account when it evaluates traditionalists’ claims about Judeo-Christian values and the Western tradition.135

Moreover, the defenders of Texas’s sodomy law could not demonstrate that the Court should hold fast against contemporary social change in order to protect parties who had come to rely upon the law in good faith.136 No one had made a major life decision or invested a substantial sum of money on the expectation that *Bowers* would never be overturned and that states would always be permitted by the federal courts to criminalize sodomy.137 Thus, the principle of reliance exerted no countervailing pressure on the *Lawrence* majority as it considered reversing *Bowers*.138

*Lawrence* is deeply ambivalent on the issue of same-sex marriage. On the one hand, the majority opinion carefully introduces caveats that could prove devastating in a challenge to a state law prohibiting same-sex marriage. The problem with the Texas sodomy law was that it sought “to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”139 From the perspective of the *Lawrence* majority, Texas encroached upon the liberty rights of the individual, secured under the Fourteenth Amendment’s Due Process Clause, by criminalizing protected intimate conduct.140 The *Lawrence* Court explicitly set aside questions pertaining to the duty of federal and state governments to extend formal recognition to the personal relationships that grow out of the targeted intimate conduct.141 It is, nevertheless, important to recognize that *Lawrence* endorses the liberty right of the individual in ringing tones. “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is

135. See id. at 576–77.
136. See id. at 577.
139. *Lawrence*, 539 U.S. at 567.
140. Id. at 577.
141. Id. at 578.
more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."\(^{142}\)

In *Perry v. Schwarzenegger*, the federal trial court overturned Proposition 8 on the grounds that it violated the due process and equal protection rights of similarly situated same-sex couples seeking to enter into a legal marriage in the state of California.\(^{143}\) It is possible, therefore, that an equal protection or due process challenge to Proposition 8 would receive a sympathetic hearing when the case is heard on appeal before the Ninth Circuit. As we have seen, the fact that the U.S. Supreme Court does not regard homosexuals as a suspect class for the purposes of adjudicating an equal protection challenge and the fact that the sexual orientation distinction in Proposition 8 would most likely receive some type of rational basis review,\(^{144}\) does not mean that the plaintiffs would be doomed to fail on appeal. The defenders of Proposition 8 would have to show that there is a rational basis for excluding same-sex couples from marriage; they would have to demonstrate that there is a permissible governmental interest lying behind this exclusion and that the exclusion rationally furthers the interest. Further, the exclusion must advance a governmental purpose that is separate from the classification itself; it cannot be maintained "for its own sake."\(^{145}\)

When *Lawrence* overturned *Bowers*, the *Lawrence* majority held that the earlier court had misframed the substantive due process constitutional challenge.\(^{146}\) *Lawrence* held that the *Bowers* Court had erroneously asked "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."\(^{147}\) That framing, concluded the *Lawrence* majority, "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake."\(^{148}\) Although Georgia's sodomy statute in *Bowers* purported to do no more than criminalize a specific sexual act, the consequences of that criminalization were much more far-reaching, since they "touch[ed] upon the most private human conduct, sexual behavior, and in the most private of places, 

\(^{142}\) Id. at 567.


\(^{145}\) Id. at 635. See also Hernandez v. Robles, 855 N.E.2d 1, 26-27 (N.Y. 2006) (Kaye, C.J., dissenting); Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 962 n.23 (Mass. 2003) ("[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.").

\(^{146}\) Lawrence, 539 U.S. at 566.

\(^{147}\) Id.

\(^{148}\) Id. at 567.
the home." Lawrence reframed the question at the proper interpretive level, without regard to the identity of the individuals seeking to assert the due process right and with a full awareness of the integral relationship between sodomy and domestic intimacy.

By doing so, the Lawrence Court, effectively, set aside the fact the plaintiffs could not demonstrate that American/British society had tolerated homosexuality over several centuries. Tradition matters, but only at a higher level of generality, wherein the court first identifies which rights are cherished by society the most and then, as a consequence, determines how to assign relative weights to the various rights at stake in the case. Lawrence holds that American society values individual autonomy as one makes intimate and personal choices crucial to her pursuit of happiness. Lawrence rejects, by the same token, the idea that we should allow tradition to dictate categorical distinctions about who should be permitted to seek the protection afforded by those rights. "[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

As Perry is heard before the appellate courts, advocates for same-sex marriage could point to the fact that the U.S. Supreme Court, like that of California, regards the right to marry as fundamental. In our constitutional tradition, then, we assign the greatest possible weight to the individual's right to marry. The Court ought to regard any traditionalist defense of an exclusionary marriage law—that is, a defense that merely establishes that similar heterosexist exclusions have often been adopted in the past—as grossly insufficient in the face of an individual's assertion of her right to marry a person of her choosing.

To be sure, Lawrence holds open the possibility that a statute resting solely upon the governmental interest in perpetuating a moral tradition might survive review if it can be shown that some parties are

149. Id.
150. See id.
151. See id. at 567, 578.
152. See id. at 577–78.
153. Id. at 579.
155. See Lawrence, 539 US at 572, 577–78.
relying upon the traditionalist law in good faith. Just as the State of Texas could not make that case in *Lawrence*, however, the supporters of Proposition 8 would be unable to show that a significant number of Californians formed reasonable expectations pertaining to the perpetuation of a heterosexuals-only definition of marital eligibility and made significant life decisions on that basis. It would therefore be difficult to argue that anyone would suffer an unconscionable loss if California returned to a marriage eligibility rule that makes no reference to sexual orientation. As Chief Judge Judith Kaye reasoned in her *Hernandez v. Robles* dissent, marriage licenses are not a scarce commodity; there are plenty to go around.

II. Ackerman's Theory of “Higher Lawmaking”

A. Plebiscitary Versus Deliberative Democracy

Bruce Ackerman, citing the works of the Founders, and *The Federalist Papers* in particular, calls the system of governance that can earn the consent of a reasonable “private citizen” a “dualist democracy.” Because our elected representatives earn only a limited mandate from the voters, they cannot legitimately determine our constitutions. The people are only partially present during an election, in the sense that they only give electoral affairs their fleeting attention and approach the contests between candidates with parochial interests in mind. The “higher lawmaking” that pertains exclusively to constitutional founding and major transformations in the existing constitutional structure requires an entirely different form of democratic presence. Constitutions can only be legitimately founded and fundamentally transformed insofar as the people are fully engaged and ascend to a superior deliberative plane, in which the people reasonably choose to prioritize the public good over self-regarding interests. In this unusual condition, the pathologies of normal legislative affairs play a muted role in setting the terms for the people’s deliberations.

Although they are chosen by the people to represent them in the legislature or in the executive, the democratic society’s elected representatives do not take the place of the people. They can only act on

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158. See generally ACKERMAN, supra note 12.
159. Id. at 6–7.
160. Id.
161. Id. at 260.
behalf of the people in a tightly restricted manner; the statutes the executive and the legislature adopt are designed chiefly to address policy-oriented problems. The Constitution has supremacy over a statute because it is a crystallized repository of the people's unmediated will; indeed, it is the only type of legal rule that has its basis in popular sovereignty. The people are directly and fully present in the public sphere only when they are swept into the extraordinary moments of higher lawmaking. In the American case, Ackerman identifies the Founding, Reconstruction, and Franklin Delano Roosevelt's ("FDR") New Deal as the only historical points at which the people have successfully made the ascent to this superior deliberative plane. The exceptional presence of the people lives on, long after the period of higher lawmaking comes to a close and the people return to their non-public pursuits, insofar as the popular will is preserved through constitutional lawmaking and reactivated by the judiciary. In a normal moment, then, the legislature would be contradicting the will of the people if it passed a statute that undermined the people's constitution. If the legislature adopts a violative statute and an aggrieved party challenges the statute's legitimacy in court, the court should defend the supremacy of the people's will by striking the statute down.

What if a social movement, such as the campaign against same-sex marriage, seeks to step outside the legislative process? What if that movement believes that the public good requires the transformation of the Constitution, such that the duties and constraints we place upon our policymakers, the executive, and the judiciary would be significantly altered? For Ackerman, it is crucial that any subject who seeks to pull the polity out of the normal period in order to cast it headlong into the exigencies peculiar to higher lawmaking be required to pass a series of demanding tests. Broadly speaking, Ackerman's distinction between "normal" and "higher" lawmaking is analogous to Dworkin's policy versus principle distinction. See Ronald Dworkin, Taking Rights Seriously 84–88 (1978) ("Policy"-oriented law is the fruit of temporary compromises reached between competing interest groups; elected officials take the public good into account only insofar as they have incentives to do so. In the case of "principle"-oriented law, by contrast, the contingent configuration of power relations between competing interest groups is largely set aside, and arguments about rights that can be brought within some enduring, comprehensive, and overarching theory of the public good are brought to the fore.).

162. Id. Ackerman's distinction between "normal" and "higher" lawmaking is analogous to Dworkin's policy versus principle distinction. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 84-88 (1978) ("Policy"-oriented law is the fruit of temporary compromises reached between competing interest groups; elected officials take the public good into account only insofar as they have incentives to do so. In the case of "principle"-oriented law, by contrast, the contingent configuration of power relations between competing interest groups is largely set aside, and arguments about rights that can be brought within some enduring, comprehensive, and overarching theory of the public good are brought to the fore.).
163. See ACKERMAN, supra note 12, at 6–7.
164. Id. at 40–41.
165. See id. at 21–24, 61.
166. See id. at 6.
man identifies three phases in this "specially onerous obstacle course."\textsuperscript{167}

Before gaining the authority to make supreme law in the name of the People, a movement's political partisans must, first, convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness that they do not normally accord to politics; second, they must allow their opponents a fair opportunity to organize their own forces; third, they must convince a majority of their fellow Americans to support their initiative as its merits are discussed, time and again, in the deliberative fora provided for "higher lawmaking."\textsuperscript{168}

If a movement seeks to change the Constitution, it must weather a series of democratic contests and secure a commanding level of support from the people.\textsuperscript{169} Only then can it "earn the authority to proclaim that the People have changed their mind and have given their government new marching orders."\textsuperscript{170}

By distinguishing between the pathologies of the electoral process and the superior type of public engagement that emerges only in the context of higher lawmaking, Ackerman is reiterating a theme with deep roots in Western political theory. Plato objected, for example, to democratic processes dominated by political rhetoric; the fatal flaw of rhetoric is that it is primarily monological in form—rendering the listener a passive consumer rather than a critical dialogical partner—and appeals to selfish interests and the lowest desires.\textsuperscript{171} As such, these inferior processes only mobilize a plebiscitary form of reason, as a mere aggregate of preferences.\textsuperscript{172}

From Ackerman's perspective, the attention of the people toward public affairs usually abates during the "normal period": the span of years, and even decades, between the moments of higher lawmaking.\textsuperscript{173} Under these conditions, representatives who appeal to factions could come to dominate the legislature.\textsuperscript{174} By and large, the statutes

\textsuperscript{167.} Id.
\textsuperscript{168.} Id.
\textsuperscript{169.} Id.
\textsuperscript{170.} Id. at 7.
\textsuperscript{173.} \textit{See Ackerman, supra note 12, at 6–7.}
\textsuperscript{174.} \textit{The Federalist} No. 10 (James Madison).
adopted by such a legislature would tend to reflect the preferences of powerful interest groups.

If Ackerman’s constitutional theory is placed into a broader political theory context, we can say that plebiscitary rhetoric overwhelmingly tends to frame public affairs during Ackerman’s normal periods. In a recent article on democratic theory, Simone Chambers writes that: “Plebiscitary rhetoric reigns when campaigns are vapid and vacuous, when voters are given no information, when the press only covers strategy and never policy, when politicians say anything to get elected, and finally and most importantly, when the audience, that is citizens, remains passive.” 175 In the normal period, then, the political candidates for executive and legislative offices usually seek to establish a one-way form of communication with the electorate. They formulate their political objectives to reflect the needs of their sponsoring interest groups; their purpose is to augment their own power and to advance the competitive positions of their supporters. They present their programs to the people in the most attractive manner possible while deflecting any profound questions, criticisms, and alternative visions. For the most part, the popular response to these campaigns is muted and somewhat incoherent. Voters’ attention, information level, and turnout are typically low across the board; this is especially the case among the least advantaged. 176 If political candidates win some degree of public support during the normal period, they generally do so by invoking popular themes and symbols that link their own favored policy solutions to the people’s existing preferences and biases. 177

With higher lawmaking, by contrast, political contestation takes on a special form. From a political theory perspective, we could say that it bears a closer resemblance to the ideal deliberative democratic process 178 than to the plebiscitary form of participation. Citizens con-

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175. Chambers, Rhetoric and the Public Sphere, supra note 171, at 337. See also Mariah Zeisberg, Should We Elect the US Supreme Court?, 7 Persp. on Pol. 785 (2009).
176. Eligible voters who were members of families with an income of less than $20,000 had a voter turnout rate of 51.9% in the November 2008 Presidential election. Their counterparts in families with incomes greater than $100,000, by contrast, had a turnout rate of 91.8%. Among eligible voters with less than a high school diploma, the turnout rate was 39.4%. Thom File & Sarah Cressey, U.S. Census Bureau, Voting and Registration in the Election of November 2008 I, 4 (2010), available at http://www.census.gov/prod/2010pubs/p20-562.pdf.
177. Chambers, Rhetoric and the Public Sphere, supra note 171, at 338–39.
178. See generally Democracy and Difference: Contesting the Boundaries of the Political (Seyla Benhabib ed., 1996); Simone Chambers, Deliberative Democratic Theory, 6 Ann. Rev. Pol. Sci. 307 (2003); Chambers, Rhetoric and the Public Sphere, supra note 171; Amy Gutmann & Dennis Thompson, Democracy and Disagreement: Why Moral Conflict Cannot be Avoided in Politics, and What Should Be Done About It (1996); John S.
front one another openly and repeatedly in a series of fairly organized dialogical engagements. Each gives reasons for his or her position, and each asks the other side to provide counter-arguments in return. Where appropriate, each individual can be held accountable to the others for her arguments; ideally, the participants take into account the criticisms of their fellow citizens and reconsider their positions in a reasonable manner.179

Chambers argues that because a deliberative democratic procedure creates a series of reason-giving opportunities, it can “enhance[ ] the epistemic status of the outcomes.”180 In a deliberative exchange, “[t]he demand for reasons brings weak arguments to light, forces interlocutors to revise indefensible claims, publicizes unacceptable premises, generally facilitates the exchange of information and knowledge, and encourages participants to be reflective.”181 In a deliberative democratic process, the participants must meet extraordinarily high civic standards. Violence, coercion, and threats of force are, of course, ruled out. Even more, each interlocutor must be reasonable. Although the Founders often characterized the best forms of deliberation, in Enlightenment terms, as the product of disinterested reason, Ackerman quite rightly does not consider higher lawmaking as a moment absolutely devoid of passion; the passions are to be channeled as a form of mass energy that will animate higher lawmaking.182 As we will see below, Madison himself certainly recognized the indispensable role that passion played during the Founding.183 It is precisely because the people feared the British Empire would win the Revolutionary War and because, seized by a great patriotic spirit, they enthusiastically turned to wise statesmen for leadership, that they were able to transcend their parochial interests and find consensus on the states’ constitutions.184 In the moment of higher lawmaking, the citi-

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179. See sources cited supra note 178.
181. *Id.* Pettit would point out, however, that we should not take for granted the possibility of forming a people that is meaningfully unified by solidaristic relations and that expresses a common will. From his perspective, the task of achieving a fully fledged people that can express its will through higher lawmaking is too demanding. Philip Pettit, *Three Conceptions of Democratic Control*, 15 *Constellations* 46, 46–49 (2008).
182. Ackerman, *supra* note 12, at 177; *The Federalist* No. 49 (James Madison).
183. *The Federalist* No. 49 (James Madison).
184. See, e.g., *id.* See also Jason Frank, *Publius and Political Imagination*, 37 *Pol. Theory* 69 (2009), on Madison’s understanding that well-crafted appeals to the imagination could promote public authority.
zen does not have to transcend her passions, but she must be prepared to disagree with others in a peaceful manner on matters that have attracted her deepest commitments.\textsuperscript{185}

In higher lawmakers the deliberative process is aimed at transforming the social contract; it, therefore, risks the total destabilization of social cooperation.\textsuperscript{186} Obviously, it would be illegitimate to take such risks for frivolous reasons. Rawls would further require any individual who seeks to question the social contract or to challenge “political conceptions such as liberty and equality”\textsuperscript{187} to be prepared to furnish arguments based upon what he calls “public reason.”\textsuperscript{188} When the citizen exercises “public reason,” she foregrounds the public good, rather than her narrowly defined selfish interest, and she offers arguments that are framed in terms of a shared commitment to fundamental rights and liberties—terms that should be acceptable to virtually any other reasonable citizen, regardless of her own religion or philosophical viewpoint.\textsuperscript{189} In other words, one must be able to offer sincere arguments supporting criticism of the existing constitution and proposed alternatives, and those arguments must appeal to a sense of justice that could be reasonably upheld by free and equal individuals, including the citizens who share only their consent to a very thin set of liberal democratic principles.

I will return to this Rawlsian argument in Part IV. For the purposes of this Article, it is appropriate to briefly note that, from the Rawlsian perspective, the individual who seeks to plunge us headlong into higher lawmaking cannot defend her actions by appealing to a religious ideal or by reciting dogmatic beliefs grounded exclusively in her own comprehensive view of the good.\textsuperscript{190}

The plebiscitary logic typical of the communication between the people and their elected representatives during the period of normal lawmaking is “monological” and instrumentalist in form, making it impossible for the people to hold their representatives accountable.\textsuperscript{191} Further, the opportunities for citizens to hold each other accountable for their positions are severely limited in the normal period. For ex-

\begin{thebibliography}{99}
\bibitem{186} \textit{The Federalist} No. 49 (James Madison).
\bibitem{187} Rawls, \textit{Political Liberalism}, supra note 2, at xxxix (liberty and equality). See \textit{id.} at xlviii n.23 (social contract).
\bibitem{188} \textit{id.} at 212–54.
\bibitem{189} \textit{id.}
\bibitem{190} Rawls, \textit{Political Liberalism}, supra note 2.
\bibitem{191} Chambers, \textit{Rhetoric and the Public Sphere}, supra note 171, at 394, 337–38.
\end{thebibliography}
ample, the privacy of the voting booth shields the vulnerable from coercion; it is entirely conceivable that private voting could be included in an acceptable democratic procedure and that it could have a legitimate role to play in both the normal and higher lawmaking moments. In the context of a plebiscitary system, however, private voting is combined with brief, superficial, and monological campaigning, in which instrumentalist appeals to self-interest are paramount. The plebiscitary system, therefore, permits individuals who harbor animus towards disempowered minorities to make careless and unexamined decisions without ever enduring a sustained confrontation with the individuals who stand to lose a great deal as a direct result of their voting decisions.

B. Article V and Ackerman’s Referendum

The amendment requirements established by the Founders in Article V of the Federal Constitution are well known. There are two routes for proposing an amendment. An amendment can be presented as a bill in Congress, and if it receives the support of at least two-thirds of each chamber, the bill goes forward. Alternatively, if Congress receives applications from at least two-thirds of the states’ legislatures, it must call a constitutional convention, where the proposed amendment is presented and can only go forward if at least three-fourths of the states ratify it. Ratification can be carried out by the state legislatures or by state conventions, and Congress has the authority to determine which of the two ratification procedures will be used.

The State of California is not, of course, required to adopt the Article V model. The federal government “guarantee[s]” to every state that it will have a “[r]epublican [f]orm of [g]overnment.” However, a state may not change its constitution such that it violates the state’s duties specified in the Federal Constitution; it must, for example, provide “Full Faith and Credit” to the public acts of the other states. As long as the state observes this restriction, it has a great deal of freedom to determine its own amendment procedure. Indeed, the Strauss court notes the wide variation among state constitutions in this re-

192. Id. at 337.
193. U.S. CONST. art. V.
194. Id.
195. Id.
196. Id. art. IV, § 4.
197. Id. art. IV, § 1.
California has one of the least burdensome types of amendment procedures, but it is hardly alone. Seventeen states permit constitutional amendments to be adopted through the initiative process. Only two of the seventeen, Massachusetts and Mississippi, prohibit initiatives that would alter designated sections of the state constitution, including the protections enumerated in their respective bills of rights.

Furthermore, the Article V procedure should not be unduly idealized. Although Ackerman admires the Founders’ political theory, which served as the foundation for Article V, he himself proposes a new amendment procedure. Ackerman’s proposal anticipates the threat of a President who seeks to transform the Constitution by stealth through the nomination of a host of sympathetic judges to the federal courts in general and, above all else, through the nomination of a cadre of like-minded justices to the U.S. Supreme Court. Defenders of the existing California Constitution may be cheered by the fact that Ackerman’s proposal is centered upon the device of the popular referendum. However, Ackerman embraces what he calls a “[p]roperly structured” referendum process that would “serve as a catalyst for the broad-ranging popular debate essential for the democratic legitimation of proposed constitutional initiatives.”

A social movement or interest group seeking to amend the Federal Constitution under Ackerman’s rules would face formidable obstacles.

During his or her second term in office, a President may propose constitutional amendments to the Congress of the United States; if two-thirds of both Houses approve a proposal, it shall be listed on the ballot at the next two succeeding Presidential elections in each of the several states; if three-fifths of the voters participating in each of these elections should approve a proposed amendment, it shall be ratified in the name of the People of the United States.

Although Ackerman states that he has “no vested interest in the details of this particular proposal,” the proposal’s underlying princi-
ple are consistent with his constitutional theory. For Ackerman, a constitutional amendment procedure adequate for a liberal democratic society must have the capacity to "reliably distinguish between the rare occasions upon which a mobilized majority of American citizens hammer out a considered judgment on a fundamental matter of principle, and the countless decisions of normal politics." 

Because there are two stages in the Article V procedure, the proposal and the ratification stages, and two options at each stage, there are four possible Article V procedures. The federal and state legislatures play the largest role when the amendment is proposed by Congress and ratified—after receiving a two-thirds vote in both Houses—by the legislatures of three-fourths of the states. In one alternative scenario, the proposal emerges out of the national constitutional convention, and it is ratified by conventions in three-fourths of the states. Even in this latter option, however, the legislatures are deeply involved, because the national convention is not called until Congress receives applications from the legislatures of two-thirds of the states, and it is Congress that decides ratification will proceed through state conventions instead of the state legislatures.

If we consider Article V's involvement of the federal and state legislatures in the constitutional amendment process from Ackerman's perspective, we could say that the Founders effectively safeguarded the people from maverick proposers who have nothing to lose by issuing untimely calls to engage in higher lawmaking. When an elected representative agrees with the substance of an amendment, and, just as importantly, its salience, the representative risks his or her political capital. The people may hold the representative responsible in the next election if the proposed amendment is defeated or if the people decide that the measure's legislative supporters made a poor decision by moving it to the top of the national agenda. In addition, when a legislative representative decides to support the proposed amendment, he or she is effectively consenting to a reallocation of scarce political assets away from other issues and tasks, including participation in important Congressional committees, local constituency

206. Id. at 56–57.
207. Id. at 55.
208. U.S. Const. art. V.
209. Id.
210. Id.
211. Id.
212. Id.
213. See ACKERMAN, supra note 12, at 278.
service, and preparation for upcoming elections. By requiring elected representatives to play a crucial role in the amendment process, making supermajorities necessary, and obliging representatives to cast votes in legislative sessions so rare and with such monumental importance that the glare of public attention is almost inevitable, Article V erects a very strong degree of institutional resistance against untimely calls for constitutional change. It is highly likely that a proposal will only survive the Article V procedure if: (1) a bipartisan and multi-regional consensus has emerged among legislators and the people alike; (2) the nation faces a tremendously weighty political challenge, and it is plausible to many voters that only a fundamental change in the country’s highest law would provide an adequate remedy; (3) the people were focusing on the amendment proposal with an extraordinarily high degree of political seriousness and public spiritedness; and (4) even the people who opposed the amendment at least regarded their legislators’ agenda-setting decisions as reasonable and statesmanlike.\footnote{214}{Id. at 290–94.}

Figure One. Ackerman’s Proposed Constitutional Amendment Procedure.\footnote{215}{Id. at 54–55.}

1. The constitutional amendment is proposed by a second-term President.
2. Support must be received from at least two-thirds of each chamber in Congress.
3. The proposed amendment is listed on the federal ballot in next two succeeding Presidential elections in all fifty states.
4. The amendment is adopted only if it receives support from at least three-fifths of the voters nationwide in each of the next two succeeding Presidential elections.

It is certainly true that the role of the legislative branch is somewhat diminished in Ackerman’s model; the proposal is drawn up by the President, and Congress only approves or votes down the proposal.\footnote{216}{Id.} Nevertheless, it is significant that a supermajority in both chambers is required before the President can place his or her proposal on the ballot.\footnote{217}{Id.} The people will not be called out of their normal period unless, and until, their elected representatives concur with the pro-
poser—here the President—that the issue at hand is so pressing that it deserves an extraordinary degree of popular attention. Further, the President cannot place his proposal before Congress until he or she has won two elections, meaning he or she must earn the support of the people for his or her overall political agenda before the electorate on two occasions. During the reelection campaign at the end of the first term, the President must also survive the people's scrutiny of his or her actual record of leadership. Having won reelection, the proposing President would probably have a diminished political stake in amending the Constitution. As a second-term President, he or she is also racing against the clock to usher in the major reforms that were postponed or left unfinished during the administration's first term. With the question of historical legacy looming and the rising concern of his or her party leaders about the selection of a viable nominee for the next Presidential election, the proposing President would incur serious costs if he or she suddenly veered away from the established agenda and pursued a bizarre pet project to amend the Constitution that was doomed from the start. In all likelihood, a second-term President would put a proposal to amend the Constitution forward only if he or she senses that there is widespread support for its substance and its salience.

It is, of course, possible that a second-term President might come up with a maverick constitutional amendment that bears little resemblance to his or her general policy agenda. However, if supermajority support from Congress cannot be mustered, the proposal will not be placed before the people. The dimensions of this obstacle will vary depending on the level of coordination within the President's party between the White House and Congressional leadership and the symmetry in party power between the two branches. Even if the President is not contending with a divided government, he or she would still have to convince several key members of his or her party to invest a great deal of political capital in the proposed amendment.

At the referendum stage, we have what appears to be the least mediated moment: the measure simply needs to be supported by at least three-fifths of the voters. Because it does not matter what states the voters reside in, there is a remarkable absence of regional balancing in Ackerman's proposal. It is, nevertheless, important that the referendum is placed before the voters in two succeeding Presi-

218. Id.
220. Id.
dential elections. Even though the original proposer is about to depart from the White House as the amendment is put before the nation’s voters—thanks to the Twenty-second Amendment’s imposition of Presidential term limits—it is highly likely that every serious Presidential contender will take a position on the proposal and that he or she will make every effort to account for his or her position by linking it to his or her broader political vision. The Presidential nominee from the party of the proposing (and outgoing) President will inevitably find it extremely difficult to distance himself or herself from the proposal altogether. If he or she tries to ride into office on the coattails of the outgoing President’s reputation, he or she will be obliged to embrace the measure. His or her opponents will seize upon any indication of a distancing tactic as evidence that he or she is running away from the outgoing President’s record. It is, of course, possible that the measure would garner the necessary three-fifths support while, at the same time, the Presidential nominee from the party of the proposing President is defeated in the general election. In this instance, however, it is possible that the incoming President will campaign against it when the measure comes up for its second referendum vote.

The important point is that at both of the national general elections where the proposal appears on the ballot, the amendment will probably be exposed to extensive political debate at virtually every level: federal, state, and local alike. In addition, the debating terrain might be at least somewhat conducive to open criticism; insofar as party discipline is often relatively weak in the United States, for example, the likelihood that some opposition will emerge from within the proposer’s own party is quite high. Even if one party controls the Presidency and both Congressional chambers, lively contestation would not be ruled out.

In short, Ackerman has crafted his proposal such that, even when the referendum stage is reached, the proposed amendment remains deeply intertwined with the political fortunes of leading political contenders. This is not to say that political theorists who value deliberative democracy would be entirely satisfied by Ackerman’s proposal. Even though Ackerman’s proposal alone may be insufficient, he provides a service to liberal democratic theory by placing alternative amendment

procedures on the table and inspiring us to consider their respective merits and weaknesses.

Defenders of California’s existing constitutional amendment-by-ballot initiative procedure might object strenuously to Ackerman’s proposal and his overall argument that a liberal democratic constitution should have an amendment mechanism capable of testing the ripeness of the historical moment for clear evidence that the people are prepared to enter into a new higher lawmaking phase. For the defender of California’s amendment procedure, it is a virtue of California’s amendment process that the obstacles between a proposal and a ratified amendment are quite minimal and that the time necessary for drawing up a proposal, gathering signatures, obtaining approval for the ballot, and the voters’ decision, is quite short.222 The practical implications of California’s relatively low bar for amending its constitution can be readily grasped by a quick review of the historical record. More than five hundred amendments to the California Constitution have been adopted since it was ratified in 1879.223 To place that figure in perspective, we could note that, even though the Federal Constitution was ratified almost a full century earlier in 1788, only twenty-eight amendments to the United States Constitution have been successfully adopted.224

A defender of the existing amendment procedure might claim that too many worthy proposals would be defeated if California adopted either the Article V procedure or Ackerman’s model amendment procedure and that the heavy involvement of elected representatives would inappropriately expose citizen proposers to the undemocratic pathologies specific to the legislative branch. From this perspective, California’s existing distinction between an amendment and a revision,225 and the corresponding procedural differences, already offers the people adequate protection; a proposal that would significantly change the governmental structure has to be routed through the more demanding revision procedure. A defender could point to the fact that it was the Progressives who championed the ballot initiative process—and direct democracy more generally—in the early twentieth century in order to check the power of California’s big

222. See Cal. Const. art. II, §§ 8, 10(a). The Secretary of State has to ensure that 131 days elapses between the day that an initiative qualifies, under the petition requirements, and the date of the next general election. Id. § 8(c).
224. Id.
business elites: the Southern Pacific Railroad, corrupt political bosses, and the big-city machines of Los Angeles and San Francisco. In 1911, the very year that the amendment-by-ballot-initiative procedure was first established, an initiative proposing an amendment granting women an equal right to vote garnered a sufficient number of citizen endorsements and was placed on the ballot. In the end, a substantial majority supported the initiative, and the women's suffrage amendment was duly introduced into California's state constitution, several years before the Nineteenth Amendment was ratified in 1920.

For a defender, then, a contradiction lies at the heart of Ackerman's theory. Ackerman claims that he views the Federal Constitution as the work of the people. He defends judicial review on the ground that, as long as a federal court pays close attention to the most recent wave of higher lawmaking and seeks to synthesize the different constitutional regimes—those of the Founders, the Reconstruction Congress, and FDR's New Deal—into a coherent whole, the court is actually preserving the supremacy of the people when it strikes down violative statutes. However, a defender would claim that Ackerman ends up serving as an apologist for constitutional conservatism and the elitist restriction of popular sovereignty. Ackerman's reading of the Founders, a defender would say, is insufficiently critical, and, even when he liberates himself from the task of interpreting constitutional doctrine and enters the open-ended realm of the hypothetical, he produces an overly burdensome procedure. Surely California's amendment-by-ballot-initiative process—in which the original proposal is drawn up by a citizen, approval for placement on the ballot


228. Id.

229. ACKERMAN, supra note 12, at 6–7.

230. Id. at 8–10, 60–66.

231. See, for example, id. at 17–24, for Ackerman's paradoxical enlistment of Burke's conservative political theory.

232. See generally id. at 54–55 (discussing Ackerman's proposed device, the referendum).
merely requires the signatures of a number of voters equal to eight percent of the participants in the previous gubernatorial election, and victory at the polls is declared even if the measure garners a bare majority—more democratic than Article V and Ackerman’s referendum. It may be distorted somewhat by the participation of out-of-state actors and powerful interest groups, whose injection of campaign finances remain insufficiently regulated, but a defender might point out that both of the alternatives being considered here—Article V and Ackerman’s referendum—would be equally marred by the deficiencies in the American electoral process, absent sweeping reforms.

For a defender, then, the amendment-by-ballot-initiative is at least as good as, if not superior to, both the Federal Constitution’s Article V procedure and Ackerman’s model because its relatively accessible format, compressed time frame, and majoritarian threshold guarantee a democratic result. Ackerman, by contrast, argues that an amendment procedure adequate for a liberal democratic society must ensure that it is the will of the people that determines the amendment outcome. In Ackerman’s view, this objective can only be reached insofar as the procedure establishes a reliable test for the maturation of higher lawmaking forces and insofar as the procedure possesses the capacity to repel untimely proposals. Ackerman builds up support for his case by reviewing Madison’s constitutional theory as it was expressed in The Federalist Papers. In the next section, I follow Ackerman’s lead by returning to Madison’s constitutional theory.

III. Madison, Jefferson, and Constitutional Politics

A. “Passions Most Unfriendly to Order and Concord”

Madison, writing as “Publius” in No. 49 of The Federalist Papers, congratulates the people for the “virtue and intelligence” that the founding generation has brought to bear in the course of revising their state constitutions. He nevertheless describes these procedures as “experiments” that “are of too ticklish a nature to be unneces-

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233. CAL. CONST. art. II, §§ 8(a)–(b), 10(a).
234. See id.
235. ACKERMAN, supra note 12, at 6–7.
236. Id. at 290–94.
237. Id. at 165–99.
238. THE FEDERALIST No. 49, supra note 1, at 314 (James Madison) (capitalization added).
239. Id.
sarily multiplied." 240 Although "a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions," the new federal constitution would have to close that road to political actors championing amendment proposals in ordinary circumstances. 241 The people were only able to rack up these impressive achievements in establishing their state constitutions because they had set aside their natural tendency to form divisive factions in the face of their common enemy, the English empire. 242 In this special context, "the passions most unfriendly to order and concord" 243 gave way to an extraordinary patriotic unity. They also benefited from the wise leadership of unusually public-spirited statesmen. Madison is therefore quite pessimistic about the people's ability to maintain such a virtuous form of civic participation in normal circumstances: "The future situations in which we must expect to be usually placed do not present any equivalent security against the danger which is apprehended." 244

It is Madison's distinction between the normal conditions—in which passions and factions predominate—and the "great and extraordinary occasions"—in which "ticklish" "experiments" in constitutional lawmakers could be tackled by a people readied for reason-driven participation, insofar as their otherwise dormant civic virtues are awakened by their shared emergency conditions—that lies at the basis of Ackerman's division of political cycles into the normal and higher lawmaking moments. 245 Indeed, Ackerman estimates that The Federalist Papers are "full of indications that the revolutionary impulse is on the wane—the English have gone and, with them, the anxiety for the public safety that fueled the rare mixture of mass energy and collective deliberation that could support a healthy constitutional politics." 246 The Founders were engaged in a race against time; the conditions conducive to higher lawmaking were beginning to erode.

Similarly, Ackerman notes that the other two moments of successful higher lawmaking, Reconstruction and FDR's New Deal, came in the midst of severe challenges to the Republic. 247 In the post-Civil War

240. Id.
241. Id. at 313.
242. Id. at 314.
243. Id.
244. Id.
245. ACKERMAN, supra note 12, at 176–79 (quoting The Federalist No. 49, at 314, 315 (James Madison) (Clinton Rossiter ed., 1961)).
246. ACKERMAN, supra note 12, at 178.
247. Id. at 44–50.
period, the Reconstruction Congress took up the enormous task of rebuilding the Union, while FDR had to contend with the devastating effects of the Great Depression.\textsuperscript{248} Moreover, both periods witnessed tremendous interbranch conflict.\textsuperscript{249} Once the Republicans in the Reconstruction Congress managed to substitute a more nationalistic system of constitutional amendment, thereby making an end run around the states that opposed the Fourteenth Amendment, they had to contend with President Johnson's conservative opposition to their constitutional agenda.\textsuperscript{250} FDR, for his part, had to contend with a Supreme Court that staunchly opposed the New Deal.\textsuperscript{251} To break the deadlock, the agents of change—the Reconstruction Congress and FDR, respectively—turned to the people to earn decisive popular support in the next general election.\textsuperscript{252}

Ackerman regards the people's interventions into constitutional politics, through their participation in the 1866 and 1936 elections, as extraordinary achievements.\textsuperscript{253} For the most part, Ackerman, like Madison, is quite cautious about the people’s orientation towards public affairs. From the perspectives of both thinkers, the people typically indulge in divisive interest group politics.\textsuperscript{254} Because the people only give their incomplete, fleeting, and instrumentally oriented attention to political matters during the normal period, they can be easily manipulated by calculating leaders and the political parties that are seeking short-term gains.\textsuperscript{255} Like the ancients who subscribed to a cyclical theory of political history,\textsuperscript{256} Madison and Ackerman embrace a tragic theory: a democratic society can sustain higher lawmaking for only an all-too-brief moment. The decline in civility quickly sets in as the citizen begins to ignore the public good and to prioritize, once again, his or her self-regarding interests. Divisive opinions return to

\begin{footnotes}
\item[249.] \textcite{Ackerman} supra note 12, at 48.
\item[250.] \textit{Id.} at 45–46.
\item[251.] \textit{Id.} at 48–49.
\item[252.] \textit{Id.} at 46–48.
\item[253.] \textit{Id.} at 48.
\item[254.] \textit{Id.} at 309–10; \textit{The Federalist} No. 49 (James Madison).
\item[255.] \textcite{Ackerman} supra note 12, at 309–10; \textit{The Federalist} No. 49 (James Madison).
\item[256.] See, \textit{e.g.,} Aristotle, \textit{Politics} (Ernest Barker ed. & trans., Clarendon Press 1946) (c. 335–323 B.C.E.).
\end{footnotes}
the forefront, and the corrupt forces of factions and political parties once again determine the political terrain.\textsuperscript{257}

The political structure proper to the normal period must be suited to this inevitable decline in civic virtue, as the citizen’s capacity to engage in reason-driven deliberation on public affairs returns to a largely dormant state. For Madison, this means that the Constitution must establish a system of checks and balances between the branches, multiply the number of jurisdictions, juxtapose local, regional, and national electoral districts, and set the ambition of each faction against that of the others.\textsuperscript{258} By the same token, the barriers that must be scaled by a social movement or a group of statesman before it can legitimately call the people to embark upon the “constitutional road to the decision of the people”\textsuperscript{259} must be substantial. A faction could obtain extraordinary advantages if it could carefully design a constitutional amendment to serve its special interests and dominate the amendment process to ensure a positive result. In the absence of a restrictive amendment procedure, every shrewd advocate, lobbyist, and politician would seek to fool the people into thinking that the nation had actually been plunged into an emergency and their amendment proposal constituted the only viable solution. Given these temptations for political opportunism, the amending procedure must be able to distinguish between ripe conditions and cleverly constructed simulacra. It must put the political conditions of the nation to the test in order to unmask untimely and illegitimate claims that the people had ascended to their higher lawmaking mode, in which they “channel[ ] mass energy into a deliberative politics that is \textit{more} rational and public-spirited than the norm.”\textsuperscript{260} Without this test, simulated forms of higher lawmaking would be accepted even though all of the pathologies that characterize normal lawmaking would actually remain active. Any amendment produced in these conditions would corrupt the Constitution, and a federal court would subsequently exercise its powers of judicial review on the basis of an unsound document.

\textsuperscript{257} The Federalist No. 49 (James Madison). See Ackerman, supra note 12, at 6–7.
\textsuperscript{258} The Federalist No. 51 (James Madison).
\textsuperscript{259} The Federalist No. 49 (James Madison).
\textsuperscript{260} Ackerman, supra note 12, at 177.
B. The Remedy is "Worse than the Disease." 261

A defender of California's existing constitutional amendment procedure might reply that if the passions of the people and factionalism constitute such formidable obstacles to constitutional amendment in non-emergency conditions, surely we should take every possible measure to lift the people to a higher state conducive to rational participation on a permanent basis. By the same token, a Rawlsian thinker would reject both the position of this defender and the position of Ackerman. Even if we could improve the outcomes of constitutional contestations by adopting better procedures, the ideal solution would be much more ambitious. Rawls, for example, calls for a radically new founding, at which we would collectively exercise both our self-interested rationality and our reason and, thereby, endorse equal liberty rights for all, fair equality of opportunity, and a just distribution of the social product. Rawls argues, as a reasonable people, we would then apply ourselves to the task of gradually establishing the liberal democratic constitution and political institutions necessary for the full realization of these values. 263 Rawls holds that in his ideal world, namely a society well-ordered by his conception of justice as fairness, we would agree to substantial reforms necessary to give full and fair value to our equal political liberties, such as, for example, strict campaign finance reform and anti-gerrymandering laws. 264

While Rawls seeks to map out a "realistic utopia" in his political philosophy, Madison aims to provide a real-world form of political theory in The Federalist Papers; the newspaper series was designed to persuade the New York State Convention delegates that they should vote to ratify the Constitution. 266 Madison also approaches the problem of conflicting interests from a minimalist and non-interventionary liberal democratic perspective. Although he never fails to mark the dangers of factionalism, he has a narrow understanding of the methods that ought to be made available to lawmakers for encouraging the people to be receptive to the call to public interest-oriented democratic deliberation. 267 As he reviews the possibilities for governmental

261. The Federalist No. 10, supra note 1, at 124 (James Madison) (capitalization added).
262. See generally Rawls, Political Liberalism, supra note 2; Rawls, Justice as Fairness, supra note 2; Rawls, Theory of Justice, supra note 2.
263. Rawls, Theory of Justice, supra note 2, at 171–76.
265. See id. at 4–7.
266. Kramnick, supra note 13, at 11.
267. See The Federalist No. 10 (James Madison).
intervention, he dismisses them one by one as either impractical, illiberal, or both.

In No. 10, for example, Madison argues that every democratic society is plagued by the "dangerous vice" of faction. Madison defines a faction as a group of citizens "united and actuated by some common impulse of passion, or of interest." Most importantly for the purposes of this Article, factions reject public spiritedness and refuse to respect the rights of others. Factions are "adverse to the right of other citizens, or to the permanent and aggregate interests of the community." It is because of factions that public councils have been besieged by "instability, injustice, and confusion." Left unchecked, factional strife will reach epidemic proportions; popular governments have "everywhere perished" as a result of these "mortal diseases." In the first days of the American republic, the nation's "most considerate and virtuous citizens" everywhere complained of tyrannical abuse: "[M]easures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."

Madison's "cure for the mischiefs of faction" is, of course, the channeling of factional energies, such that they cancel each other out, through constitutional design. For the purposes of this Article, however, Madison's arguments about the shortcomings of alternative methods are particularly interesting. The government could attempt to remove the causes of faction altogether. For Madison, however, the tragic diagnosis is the correct one: The causes of faction reside within the human condition itself. Human reason is fallible and, as long as each individual has the liberty to exercise this faculty, "different opinions will be formed."

Moreover, reason and "self-love" are deeply connected. No opinion is ever formed in a purely rational manner; on the contrary,

268. The Federalist No. 10, supra note 1, at 122 (James Madison).
269. Id. at 123.
270. Id.
271. Id. at 122.
272. Id.
273. Id.
274. Id. at 123.
275. Id.
276. Id. at 126.
277. See generally The Federalist No. 51 (James Madison).
278. The Federalist No. 10, supra note 1, at 123-25 (James Madison).
279. Id. at 123.
280. Id. at 124.
"opinions and... passions... have a reciprocal influence on each other." 281 Once an opinion is formed, it becomes the site of profound investments of the passions. The passionate believer seeks a deeper relationship with fellow enthusiasts, uncritically falls under the direction of unwise leaders, and eagerly throws himself or herself headlong into bitter disputes with the unbelievers. 282

A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. 283

Clashes between "interests" that are borne out of the unequal distribution of property are even more widespread and severe. 284 For Madison, the root cause is to be found not in property law or the economic structure but in human nature. 285 Because there is a natural "diversity in the faculties of men," 286 and because the rights of property originate in the exercise of these variables—talent, skill, discipline, thrift, and so on—the augmentation of antagonistic property-based interests is inevitable. 287

Madison's theory of inequality is hardly persuasive. Unlike Rawls, Madison fails to reflect upon the institutional obstacles to fair equality of opportunity, from the contemporary slave laws to the property law of the capitalist market. 288 In Madison's discussion of the variations in skill and discipline, for example, he does not consider whether the surplus produced by the most talented and hard-working individuals ought to be regarded as property held in common. 289

281. Id.
282. See id.
283. Id.
284. Id.
285. Id.
286. Id.
287. Id. at 123–24.
288. See generally The Federalist No. 10 (James Madison); Rawls, Political Liberalism, supra note 2; Rawls, Justice as Fairness, supra note 2; Rawls, Theory of Justice, supra note 2.
289. See sources cited supra note 288.
Indeed, Madison believed that it was a virtue of the new republic’s federal structure that its filtering functions would make it difficult for the unpropertied masses to act in concert against the property-holding elite to advance what he regarded as a pernicious leveling agenda.\textsuperscript{290}

The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. . . . A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union that a particular member of it . . . .\textsuperscript{291}

Ironically enough, Madison’s critique of majoritarian tyranny was borne, at least in large part, out of elitist concerns about the anarchic common masses. He believed that they were recklessly seizing hold of their new political liberties to improve their material conditions and to propose the redistribution of land, at the expense of the wealthy minority.\textsuperscript{292} Madison viewed the features of the 1787 Constitution, such as its enhancement of federal authority over the states and its checks against the legislature, with favor precisely because they would serve to counterbalance what he regarded as the excessively egalitarian ambitions of the common men and the unruly participatory democracies that were on the loose in the states.\textsuperscript{293} After Madison wrote No. 10, almost a century would pass before oppositional movements finally succeeded in introducing an inverted interpretation of minority rights into the Constitution.\textsuperscript{294} The Reconstruction amendments, for example, seized upon the abstract form of Madison’s critique of majoritarianism but harnessed it to protect the disempowered minority from the tyranny of the dominant majority.\textsuperscript{295}

\textsuperscript{290}. See The Federalist No. 10 (James Madison).
\textsuperscript{291}. The Federalist No. 10, supra note 1, at 128 (James Madison). Although the Anti-Federalists included several wealthy men from the finest families, many tradesmen, farmers, mechanics, and other men from humble backgrounds who enthusiastically embraced the egalitarian statutes adopted in the state legislatures between 1776 and 1787 also regarded the 1787 Constitution with suspicion. In this wave of leveling policymaking, the state legislatures established cheap paper money and extended relief to debtors, as noted here by Madison. They also extended suffrage to almost all adult white males and weakened the wealth-based eligibility rules for office holders. Kramnick, supra note 13, at 14–18, 22–25. Vermont’s legislature also overturned court decisions in cases involving disputes over land titles, contracts, and debts during this period, and its interventions largely favored the interests of the debtors over that of creditors. Id. at 25.
\textsuperscript{292}. See Ackerman, supra note 12, at 188, 201–02.
\textsuperscript{293}. Kramnick, supra note 13, at 28, 34–35.
\textsuperscript{294}. Ackerman, supra note 12, at 314–19.
\textsuperscript{295}. Id.
Turning back to Madison’s pessimistic theory of human nature and the constraints that human imperfection pose for resolving the problem of factionalism, he considers a republican model in which the popular masses would be indirectly represented by wise men from the most distinguished families, who could bring their superior minds to bear on the problems of the day and craft sound laws in the interests of the people. What if, for example, the republic were blessed with “enlightened statesmen” who could “adjust these clashing interests and render them all subservient to the public good”? Madison cautions, however, that the republic could not rely on such good fortune. Moreover, the resolution of interest-driven conflicts often requires complex negotiations. A faction might fix its sights on the capture of immediate returns from a strategy that necessitates the violation of the rights of others or that disregards the good of the whole. The best solution might require numerous and intricate governmental measures that would only yield compensatory returns for the faction on a modest scale and over the long term. It seems unlikely that the faction could be persuaded by even the most skillful statesman to abandon its short-term strategy in favor of such “indirect and remote considerations.” In any event, the introduction of these compensatory measures would inevitably contradict the interests of yet more factions, such that the statesman would be embroiled in an endless series of adjustments.

In yet another scenario, the republic could directly appeal to the citizens to act in the name of their civic virtues. Montesquieu argued that a republican form of government depended upon the civic virtue of the people. For his part, Rousseau believed that the republic could only draw the modern individual out of his selfish and competitive mode of being and awaken his dormant civic virtues if it established itself as a small, self-sufficient, and closed society. The

296. The Federalist No. 10, supra note 1, at 126–28 (James Madison).
297. Id. at 125.
298. See id. (“Enlightened statesmen will not always be at the helm.”).
299. See id.
300. Id.
301. Id. (“It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good.”).
303. See Jean-Jacques Rousseau, Discourse on the Origins of Inequality (Second Discourse): Polemics, and Political Economy (Roger D. Masters & Christopher Kelly
formation of a collective will required the leadership of a benevolent lawgiver in the republic’s origin and the strict limitation of inequality.\textsuperscript{304} The subjects of Rousseau’s ideal republic had to be exposed to carefully designed educational programs at a young age and then engaged in a virtually continuous experience of public deliberation, such that each participant would come to adopt a conception of his self-interest in harmony with the public good.\textsuperscript{305}

For Madison, the causes of factional formation are so deeply engrained in human nature, that the solutions offered by Montesquieu and Rousseau would fail to make the requisite difference. It is simply impossible, he writes, to “giv[e] to every citizen the same opinions, the same passions, and the same interests”;\textsuperscript{306} differences in opinions and wealth are inevitable.\textsuperscript{307} Later in the same paper, No. 10, Madison states, “neither moral nor religious motives can be relied on as an adequate control.”\textsuperscript{308} Madison approaches the question from a pragmatic point of view. Exhortations to public spiritedness would have a very weak effect when targeted at a large mass, that is to say, at the members of the majority who must be turned away from their self-regarding interests and factional identifications. When significant gains are in the offing, and a majority of the citizens has been whipped into the sort of frenzy in which injustice and violence become acceptable, the invocation of moral and religious virtues will fall on deaf ears.\textsuperscript{309}

Madison also considers the merits of vigorous governmental intervention designed to strike fatal blows against factions in the moment of their original formation.\textsuperscript{310} Even if antagonistic opinions, passions, and interests were inevitable, the republic could severely curb, frustrate, and isolate them. In this scenario, human nature would retain its tragic dimension, but full-blown factions would never take shape. From Madison’s perspective, however, the required restrictions would constitute an intolerable violation of the individual’s liberty.\textsuperscript{311} For example, the state could stop the circulation of divisive

\textsuperscript{304} See sources cited supra note 303.
\textsuperscript{305} See id.
\textsuperscript{306} The Federalist No. 10, supra note 1, at 123 (James Madison).
\textsuperscript{307} Id. at 125–24.
\textsuperscript{308} Id. at 126.
\textsuperscript{309} Id.
\textsuperscript{310} Id. at 123.
\textsuperscript{311} See id.
opinions by shutting down the newspapers and arresting the pamphleteers; such a solution would of course encroach upon the citizens’ right to free speech. If the members of a religious sect tended to disrupt the public order, the state could make any profession of their faith a criminal offence and disqualify its members from holding professional and public offices. The right to free expression would be impermissibly compromised, however. The police could break up public meetings in which the crafty leaders of factions were whipping their passionate followers into frenzied action. Obviously, such tactics would necessitate the violation of the right to assembly. Interest-group formation could be moderated if the state adopted absolutely leveling regulatory and taxation policies, but it could not do so without running roughshod over the individual’s right to due process.312

Even though factionalism is identified by Madison as one of the most dangerous threats to the republic, saving the republic does not justify the government’s resort to illiberal means.313 If the republic sought to remove the causes of faction “by destroying the liberty which is essential to its existence,”314 then the remedy would be “worse than the disease.”315

Liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.316 Stability would be gained, and private rights would be secured against factional encroachments, but at the cost of undermining the foundational principles of the republic.

The threat that is posed by factional conflict is even more serious “[w]hen a majority is included in a faction.”317 If a faction can only muster the support of a minority, then the public good and the rights of the individual will be protected by the republic’s majoritarian rules.318 If a majority endorses the cause of a faction, by contrast, the law could become little more than a reflection of that faction’s corrupt agenda.319

312. See generally id. at 123–25.
313. Id. at 123.
314. Id.
315. Id.
316. THE FEDERALIST No. 10, supra note 1, at 123 (James Madison).
317. Id. at 125.
318. Id.
319. Id. at 125–26.
If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.\footnote{320}{Id. at 125.}

Majoritarianism in normal legislative matters, whether in the election of representatives or in the tallying of votes on the floor of the legislature, is hardly a sufficient guarantor of a democratic outcome. Where constitutional change is concerned, however, it is essential that the law of the republic anticipate the weaknesses of the majoritarian principle. "[T]he majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression."\footnote{321}{Id. at 125–26.} Where "a majority is included in a faction," simple majoritarian procedures can allow that faction to achieve a grossly illiberal outcome, namely the "sacrifice to its ruling passion . . . [of] the rights of other citizens."\footnote{322}{Id. at 125.} Madison certainly had the interests of propertied white males in mind, rather than the status of traditionally excluded social groups, when he crafted his critique of majoritarianism. Today, we benefit from the constitutional achievements of the Reconstruction Congress, FDR, and, more broadly, generations of progressive social movements. In a sense, each of them effectively borrowed the form of Madison's critique of tyrannical majoritarianism and infused it with egalitarian substance, thereby creating out of the Founders' oligarchic discourse a constitution through which disempowered social groups, such as African Americans and women, have won "fuller citizenship."\footnote{323}{ACKERMAN, supra note 12, at 316. See generally id. at 188, 201–02, 314–17.} Viewed from the perspective of this complex constitutional tradition, the unchecked majoritarianism of California's amendment-by-ballot-initiative is unacceptable. For all its democratic appearances, the procedure erects no obstacles against a majority faction's ambitions and, thereby, leaves "both the public good and the rights of other citizens" exposed to its "schemes of oppression."\footnote{324}{THE FEDERALIST NO. 10, supra note 1, at 125, 126 (James Madison).}
A defender of California's constitutional amendment procedure could nevertheless argue that Ackerman has unfairly loaded the dice in favor of his conclusion by relying so heavily upon Madison's contributions to The Federalist Papers. Surely Thomas Jefferson, the great champion of direct democracy, could be mobilized to support California's amendment-by-ballot-initiative procedure. Jefferson deeply believed in the common man's capacity to engage in rational self-government. He regarded the individual's capacity for moral judgment as a natural endowment, at least among freemen and women. He stated on numerous occasions that the future of the republic depended upon the cultivation of each individual's moral sense through public education and civic participation.

Championing the liberty of the individual, Jefferson deplored the fact that the early draft of the Constitution did not include a Bill of Rights. In a 1787 letter to Madison, he wrote that such a Bill should, at a minimum:

[P]rovid[e] clearly & without aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal & unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land & not by the law of nations.

Jefferson's Bill of Rights would have gone much further than the first ten amendments, by virtue of its "restriction against monopolies." The people had a right to a constitution that would bind the government so as to restrict its powers. Unlike the state governments, the federal government was to be a government of enumerated powers, but for Jefferson, this protection was insufficient. "[A] bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse, or rest on inferences." This is not to say that Jefferson viewed the judiciary as the best protector of the people's liberties. Years after the adoption of the 1787 Constitution and the first ten amendments, Jefferson stated on several occasions that the federal judiciary was over-

325. THOMAS JEFFERSON, POLITICAL WRITINGS 593 (Joyce Appleby & Terence Ball eds., 1999) (capitalization added).
326. See generally id.
327. Id.
328. See id. at 231-319.
329. Id. at 361.
330. Id.
331. Id.
332. Id.
stepping its prerogative. From his perspective, the judicial branch was shaping and re-shaping the meaning of the Constitution according to its own departmental interests. For Jefferson, the Court was illegitimately asserting that it had the final word on the meaning of the Constitution: “[E]ach department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution . . . and especially, where it is to act ultimately and without appeal.”

Jefferson was such an enthusiastic defender of the common man’s right to participate in public affairs that he called for official restraint when disorder broke out in the new Republic after the Revolutionary War. While in France, Jefferson learned that the English were claiming the United States was falling into anarchy and pointing to Shay’s Rebellion in Massachusetts as evidence. Jefferson wrote that the rebellion emerged out of the destitute farmers’ ignorance, rather than any wickedness on their part. If the ignorant became discontented and yet did not rise up, their condition would be that of “lethargy, the forerunner of death to public liberty.” A small number of rebellions and a “few lives lost” were an acceptable price to pay for life in a republic populated by alert citizens who zealously guarded their freedoms. “The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is it’s [sic] natural manure.” Jefferson estimated that the drafters of the new constitution were unduly distressed by Shay’s Rebellion. They were seeking to restrict the rights of the people in the face of this perceived threat to public order. Jefferson particularly deplored the constitutional establishment of a lifelong term for the chief magistrate. His overall assessment of the Constitution can be described as mixed, at best: “There are very good articles in it: & very bad. I do not know which preponderate.”

333. Id. at 357, 453–57.
334. Id. at 379.
335. Id.
336. Id. at 110.
337. Id.
338. Id.
339. Id.
341. Id.
342. Id.
343. Id.
344. Id. at 109.
Jefferson consistently championed the periodic review of the Constitution by popular convention. Analogizing between the transfer of property between generations and constitutional law, Jefferson wrote to Madison in 1789, "the earth belongs in usufruct to the living... the dead have neither powers nor rights over it." Today's generation should not be held responsible for the debts of its ancestors, and no generation ought to be allowed to contract a debt that outstrips its own financial capacity.

Referring to contemporary demographic data on the average adult lifespan, Jefferson declared:

[N]o society can make a perpetual constitution... The constitution and the laws of their predecessors extinguished them, in their natural course, with those whose will gave them being... Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right.

Further, he believed the people could not depend upon the statutory repeal procedure to safeguard their rights. To appeal an offensive law, they would have to trust their elected representatives to act on their behalf. The legislatures, however, were often corrupted by bribery and controlled by factions. In the assembly, the people's representation is "unequal and vicious." Jefferson, consequently, argues that it is always preferable to build what we now call a "sunset provision" into the statute, rather than to burden the rising generation with the task of seeking statutory repeal. Even though they elect their representatives to serve them in the assembly through majoritarian elections, the people cannot express their will directly through them. Throughout the statutory repeal process, "[t]he people cannot assemble themselves." It is only in the context of the constitutional convention that the will of the people is expressed in a direct fashion.

By extension then, California's amendment-by-ballot-initiative only appears to safeguard the people's democratic right of self-determination. From a Jeffersonian perspective, it is a poor substitute for constitutional amendment through the constitutional convention.

345. Id. at 593 (internal citation omitted).
346. Id. at 594.
347. Id. at 596.
348. Id. at 597.
349. Id.
350. Id.
351. Id.
352. See id. at 593–97.
Unlike Madison, Jefferson fully embraces the idea that the people should not have to scale massive obstacles before they can put forward a proposal for an amendment. However, he envisioned the periodic review as a holistic moment in which the entire constitution would be considered anew, at one and the same time. Where the ballot initiative procedure places one single issue before the electorate, Jefferson’s periodic review encourages an integrative approach in which the whole document can be voted down in favor of an entirely different draft. His holism encourages a systematic analysis in which the interactions, combinations, and contradictions between different articles and clauses could be carefully identified and fully debated.

Moving to contemporary concerns, if a Jeffersonian constitutional convention entertained a proposal that prohibited same-sex marriage, its opponents would have ample opportunity to point out that the proposal would contradict a key principle, namely equal protection rights. Ideally, the convention would give the proposers a chance to provide special justifications, and the final convention vote on the amendment would reflect the merits of the various arguments.

Each of these two procedures, California’s amendment-by-ballet-initiative and Jefferson’s periodic review, has a distinct temporal logic. Jefferson would not have endorsed an amendment procedure that allowed proposers to bring their plans for new constitutional laws before the electorate at virtually every election. Sounding a classical theme, Jefferson strikes a mean between an amendment procedure that would be overly permissive and a legal system that would fail to reflect historical developments, empirical experience, and improvements in knowledge.

I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the

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353. Id. at 596.
354. See id.
355. See id. at 215.
change of circumstances, institutions must advance also, and keep pace with the times.\textsuperscript{357}

Jefferson would also be quite skeptical about the quality of the debates that would tend to emerge in the context of California's amendment-by-ballot-initiative procedure. While Jefferson argued that direct democracy should play a central role in the republic, he was also extremely careful to specify its precise institutional contours.\textsuperscript{358} Referring to public education and the division of counties into self-governing local governments or "wards" in an 1814 letter, he wrote, "I consider the continuance of republican government as absolutely hanging on these two hooks."\textsuperscript{359} Just as Aristotle's citizen ideally "rule[s] and [is] ruled in turn,"\textsuperscript{360} Jefferson envisioned the common man of the republic as a ruler in his own local government and as a democratic voter who chose "the able and good" to represent him in the state and federal legislatures.\textsuperscript{361}

In Jefferson's model, the ward has two distinct features that both relate to its civic pedagogical purpose. Each ward has a free public school open to every freeborn male.\textsuperscript{362} Although this restrictive eligibility rule cannot be morally defended today, it is nevertheless significant that Jefferson's ward schools would have admitted the freeborn boys from the humblest families. The freeborn male students who showed the most promise would be sent onwards for higher education at public expense.\textsuperscript{363} Their subsequent success as farmers, mechanics, craftsmen, and merchants would contribute to the security of the republic's meritocracy against the atavistic return of aristocratic privilege and the monopolization of the highest offices by the wealthiest families.\textsuperscript{364}

Secondly, the ward exercises a self-governing function in areas that Jefferson regarded as best suited to local control:

\textit{[C]are of their poor, their roads, police, elections, the nomination of jurors, administration of justice in small cases, elementary exercises of militia; in short, [the objective is to make] them little republics, with a warden at the head of each, for all those concerns

\textsuperscript{357} \textit{Jefferson, supra} note 325, at 215.
\textsuperscript{358} \textit{See generally id. at 189–90} (discussing Jefferson's proposed institutional contours regarding education and wards).
\textsuperscript{359} \textit{Id.} at 197.
\textsuperscript{360} \textit{Aristotle, supra} note 256, at 27.
\textsuperscript{361} \textit{Jefferson, supra} note 325, at 190.
\textsuperscript{362} \textit{Id.} at 189.
\textsuperscript{363} \textit{Id.}
\textsuperscript{364} \textit{See id. at 189–90}.
which, being under their eye, they would better manage than the larger republics of the county or State.\textsuperscript{365}

The educational effect of the freeborn male’s participation in the local ward government would be indispensable. The common citizen must have the opportunity to choose the best and the brightest to represent him in the legislature. The schooling and civic engagement opportunities afforded by the ward would make it much more likely that the freeborn male would make sound decisions at election time.\textsuperscript{366}

On its own, the mere extension of suffrage to the least well-off freeborn males may not awaken their natural aversion to tyranny.\textsuperscript{367} Direct participation in the affairs of the ward, however, would transform them into die-hard defenders of their rights and freedoms.\textsuperscript{368}

Where every man is a sharer in the direction of his ward-republic, or of some of the higher ones, and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day; when there shall not be a man in the State who will not be a member of some one of its councils, great or small, he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or Bonaparte.\textsuperscript{369}

By serving “in the offices nearest and most interesting to him,” the citizen would be attached “by his strongest feelings to the independence of his country, and its republican constitution.”\textsuperscript{370} When it came time for the people to elect their representatives, their choices would be collected on a ward-by-ward basis as well.\textsuperscript{371}

When each generation seizes upon its one opportunity to revise the Constitution, popular participation would also be structured by ward membership. The freeborn males would choose their delegates for the constitutional convention in ward meetings.\textsuperscript{372} Because delegates, rather than elected representatives, would represent the people at the convention, there would be a much greater chance that the people’s voice would be expressed on constitutional matters without being corrupted by the pathologies characteristic of the legislature.

Jefferson’s optimism about the virtues of direct democracy is clearly evident in his ward proposal. The daily engagement with the

\textsuperscript{365} Id. at 189.
\textsuperscript{366} See id. at 189–90.
\textsuperscript{367} See id. at 205.
\textsuperscript{368} Id.
\textsuperscript{369} Id.
\textsuperscript{370} Id. at 213.
\textsuperscript{371} Id.
\textsuperscript{372} JEFFERSON, supra note 325, at 216–17.
local issues of greatest concern to the citizen imbues him with a republic spirit.\textsuperscript{373} Because the people’s votes for the convention delegates are collected at the ward level, they take on a special character. “[T]he voice of the whole people would be thus fairly, fully, and peaceably expressed, discussed, and decided by the common reason of the society.”\textsuperscript{374} It is in the ward that deliberative democracy for the common freeborn man flourishes; it is there that he is brought into regular face-to-face meetings with his fellow ward-men, advances arguments that will be carefully assessed by others on the basis of their merits, and entertains his fellow citizens’ counter-arguments in a reasonable manner.\textsuperscript{375} “[T]he whole [of the republic] is cemented by giving to every citizen, personally, a part in the administration of the public affairs.”\textsuperscript{376}

The ward system allows Jefferson to insert a Rousseauian element of direct democracy into his vision of the republic’s ideal structure. Like in Rousseau’s ideal society,\textsuperscript{377} the people of Jefferson’s ward inhabit a small and contiguous territorial space in which virtually every member is known by all others in the community as a family member, neighbor, or participant in the market.\textsuperscript{378} Madison might have objected that these features of the ward actually would have been conducive to the rise of factions. In No. 10, he wrote: “[A] pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction.”\textsuperscript{379}

Jefferson could have replied that he envisioned the ward within a nested system of multiple jurisdictions; the state and federal governments would stand above the ward.\textsuperscript{380} Further, there is evidence that Jefferson regards the ward as an outlet for popular passions, which he regards as necessary for the maintenance of order. “If this avenue be shut to the call of sufferance, it will make itself heard through that of force, and we shall go on, as other nations are doing, in the endless circle of oppression, rebellion, reformation; and oppression, rebell-

\begin{itemize}
\item \textsuperscript{373} See id. at 205.
\item \textsuperscript{374} Id. at 217.
\item \textsuperscript{375} Id. at 215–14.
\item \textsuperscript{376} Id. at 214.
\item \textsuperscript{377} See generally Rousseau, The Social Contract, supra note 303; see also sources cited supra note 303.
\item \textsuperscript{378} See Jefferson, supra note 325, at 204–07.
\item \textsuperscript{379} The Federalist No. 10, supra note 1, at 126 (James Madison).
\item \textsuperscript{380} Jefferson, supra note 325, at 205, 214.
\end{itemize}
lion, reformation, again; and so on forever." In this sense, Jefferson could have replied to Madison that, insofar as the ward channeled potentially destructive passions into worthy forms of local participation, it would actually discourage the formation of factions.

In any event, California's amendment-by-ballot-initiative hardly resembles Jefferson's ideal. At best, California voters learn about an upcoming initiative a few weeks before the election. To the extent that they are exposed to the supporters' and opponents' cases, it is the monological corporate media that serves as the medium of transmission. The voter is not required to engage in face-to-face verbal exchanges with her neighbors; she is probably not asked to state her position before the election and to give reasons to her neighbors in support of her position. In all likelihood, she will never be required to take the arguments of her opponents seriously, and she will not be held accountable for taking her given position. If California voters do manage to gain a sufficient mastery of the terminology and the syntax of the initiative, it is entirely possible that they do so largely in isolation or in informal micro-networks of like-minded family members and friends. The dialogical exchange with intimately known friends, family, and neighbors—local people who, given Jefferson's agrarian context, hold territorially based interests in common—is typically absent in the Californian case, given the enormous diversity and complexity of the state-wide constituency. On Election Day, Californian voters have only three choices: vote "yes," vote "no," or stay home. Debates in Jefferson's model ward meetings, by contrast, would allow speakers to convey the nuances of their position, the order of their preferences, and their emerging support for alternative proposals. There would be ample opportunity for the individual to amend his position in the face of criticism, to build unusual voting coalitions that cross established lines of interest and identity, and to propose the scrapping of a draft proposal in favor of an entirely fresh motion.

Even more important, Jefferson's model includes very precise jurisdictional limitations. He believed that the ward would be particularly well suited to the task of incubating civic virtues, since it would

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381. Id.

382. Under the California Constitution, the Secretary of State must place an initiative with a qualifying number of signatures on the ballot as long as there are at least 131 days before the date of the next general election. CAL. CONST. art. II, § 8(c). Proposition 8 was qualified on April 24, 2008, 193 days before the November 4, 2008 election. Jessica Garrison, Gay Marriage Opponents Get a Surprise Boost, L.A. TIMES, July 21, 2008, http://articles.latimes.com/2008/jul/21/local/me-gaymarriage21.

383. See Chambers, Rhetoric and the Public Sphere, supra note 171, at 341–42.
deal with the concerns that are of greatest interest to the common freeborn man. For the purposes of our comparison with California's amendment-by-ballot-initiative, however, it is critical that Jefferson does not give the ward the authority to redefine the individual's liberty rights. The ward is charged with "the care of their [local] poor, their [local] roads, police, elections, the nomination of jurors, administration of justice in small cases, [and] elementary exercises of militia." Even though the ward manages the police, for example, it is the state's criminal law that the local police officer enforces. For the purposes of this Article, it should be underlined that the ward may not, through its management of the police, violate the individual's rights that are protected under the federal and state constitutions. It is not for the ward to redefine the individual's rights to free speech and due process, for example. The ward may only administer "justice in small cases"; as such, its court could only preside over misdemeanor-level cases. At most, it could mete out only the mildest forms of punishment.

Jefferson's seat of direct democracy, the ward, lacks the authority to adopt any law that would fundamentally alter the social contract and encroach upon the individual's rights. As we have seen, California's amendment-by-ballot-initiative procedure is entirely different, for it contains very weak jurisdictional limitations. It permits initiatives that constitute facial attacks on the individual's rights even after those rights have been identified as fundamental by the state's highest court, such as the right to marry. It permits initiatives that deploy a classification designed to undermine the equal protection rights of a minority, even after the state's highest court has decided that that type of classification is suspect and therefore triggers the most searching form of judicial review. It is highly unlikely that Jefferson would have endorsed the ballot initiative as an appropriate mechanism for direct democracy; the lack of a jurisdictional limitation in California's amendment-by-ballot-initiative procedure cannot be made compatible with Jefferson's careful restriction of the ward's authority.

384. See Jefferson, supra note 325, at 189, 205, 217.
385. Id. at 189.
386. Id.
387. Id.
388. See id.
From Madison's perspective, the people's power to determine the Constitution must be carefully balanced against the necessity of cultivating and preserving popular respect for the law. In 1783, Jefferson worked with a committee of revisors; together they drew up a draft constitution for the State of Virginia, which they proposed as an alternative to the existing 1776 document. Under the terms of the draft, the constitutional convention would serve as the only mechanism through which revisions could be adopted. Two of the three branches of government would have to be in agreement that, in the light of a pressing need for amendment or constitutional breaches, revision is required. Where applicable, a two-thirds supermajority in each of the two branches would have to consent to the calling of a convention. The state government would then issue writs to the local counties authorizing the election of local delegates to the convention according to the state's existing distribution of representatives to the general assembly. Jefferson routes the amendment procedure through a constitutional convention consisting of elected delegates, rather than the legislature. With this procedure, he hoped to protect constitutional deliberation from the pathologies of electoral politics, such that the outcome would more closely resemble the will of the people.

Madison refers to Jefferson's 1783 draft constitution in No. 49 of The Federalist Papers. He does so in the context of a wide-ranging discussion of the problems that arise when each governmental branch begins to encroach upon the others' jurisdictions and prerogatives and of the possibilities for blocking that encroachment through constitutional design. In this passage, Madison clearly reiterates his endorsement of popular constitutionalism.

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government, but also

391. JEFFERSON, supra note 325, at 339.
392. Id. at 348.
393. Id.
394. Id.
395. Id.
396. Id.
397. THE FEDERALIST No. 49 (James Madison).
398. Id.
whenever any one of the departments may commit encroachments on the chartered authorities of the others.399

However, Madison immediately counters with a firm rejection of the constitutional amendment procedure laid out in Jefferson’s 1783 draft. The “proposed recurrence to the people” would cause such serious difficulties that the objections to the proposed procedure were “insuperable.”400 Among other shortcomings, Jefferson’s model would undermine respect for the law and would endanger the stability of the government. “[E]very appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.”401

An individual may have a negative opinion about the government, but, insofar as he imagines that no one else shares his view, his expression of a dissenting view would not disturb the social order. However, if he believes that many of his fellow citizens hold similar dissenting opinions in common, he may become more confident and determined.402 A republic of philosophers would not have to concern itself with the irrational effects of combined opinions and passions. The government of a society of non-philosophers, by contrast, suffers greatly from any weakness in popular support.403 The “public tranquility” would be dangerously interrupted if the people were frequently called to debate constitutional matters.404 In the face of the revolutionary crisis, the people of each state had managed to repress their disorderly passions, to trust in the leadership of their best patriots, and to adopt radically new forms of republican governance.405 The drafters of constitutions should not assume that this mustering of reason among the masses could be duplicated in normal conditions.406

To put this in contemporary terms, the rule of law offers diverse individuals the guarantees they need in order to rationally choose to engage in social cooperation, thereby building up the trust and confidence in each other’s observance of the principle of reciprocity that make the perpetuation of social cooperation possible, even in times of

399. The Federalist No. 49, supra note 1, at 313 (James Madison).
400. Id.
401. Id. at 315–14.
402. Id. at 314.
403. The Federalist No. 49 (James Madison).
404. The Federalist No. 49, supra note 1, at 314 (James Madison).
405. Id.
406. Id.
socioeconomic disruption. An untimely interruption in the rule of law therefore carries with it great risks; a liberal democratic society must strike a careful balance by designing an amendment process that permits reasonable amendments without becoming so permissive that overly frequent contestations undermine the social contract and leave vulnerable individuals exposed to anarchic conditions.

Later, Madison expressed his reservations about Jefferson's proposal for a periodic review of the Federal Constitution. In his February 4, 1790 letter, Madison argues that if the periodic review proposal were taken literally, as a blueprint for an actual amendment procedure, it would be unwise and impractical. However, he concurs with Jefferson that the living generation must reflect upon the ways in which they are binding future generations to legal obligations through their political actions. In this sense, he welcomes the spirit of Jefferson's proposal for a periodic review "as a salutary curb on the living generation from imposing unjust or unnecessary burdens on their successors." Viewed properly, however, Jefferson's trans-generational justice problem becomes moot. In the absence of "positive dissent," we can assume that each subsequent generation gives its tacit consent to the constitutional decisions of their forebears.

For the purposes of this Article, it is particularly interesting that Madison once again expresses concerns about the way in which frequent changes to the Constitution would diminish the people's respect for their public institutions. "Would not a Government so often revised become too mutable to retain those prejudices in its favor which antiquity inspires, and which are perhaps a salutary aid to the most rational Government in the most enlightened age?" For Madison, the reason of the people serves as the fount of good laws. In a pragmatic gesture, he nevertheless indicates that he is not at all averse to harnessing the mystique of governmental authority for the

408. See generally supra notes 350-359 and accompanying text.
410. Id. at 609.
411. Id. at 609.
412. Id. at 606-08.
413. Id. at 606.
414. The Federalist No. 49 (James Madison).
purposes of maintaining order and tranquility.\textsuperscript{415} The people’s passionate reverence for the law could easily give way to the passion of discord, such that otherwise dormant sociopolitical tensions could be inflamed. He asks, rhetorically, “[w]ould not such a periodical revision engender pernicious factions that might not otherwise come into existence?”\textsuperscript{416}

Reverence for the law could be taken to an unsavory extreme, of course. If FDR had not stood up to the Lochnerian\textsuperscript{417} Supreme Court, and the Reconstruction Congress had not pressed ahead with its radical legislative agenda, the salutary moments of higher lawmaking identified by Ackerman would never have taken place.\textsuperscript{418} The individual, nevertheless, owes it to her fellow citizens to treat with great care the social contract that offers protections for individual rights and liberties and makes social cooperation in a complex society possible. By the same token, our political institutions should encourage its citizens to appreciate the serious implications of constitutional tinkering. The citizen’s respect for human rights law could be diminished insofar as she is frequently asked to wade through dozens of ballot initiatives at virtually every election. On a typical California ballot, constitutional amendments relating to core human rights principles are mixed haphazardly together with prosaic bond issues, tobacco taxes, and alternative fuel subsidies.\textsuperscript{419}

\textsuperscript{415} See Letter of James Madison to Thomas Jefferson, New York, February 4, 1790, supra note 409.

\textsuperscript{416} Id.

\textsuperscript{417} In \textit{Lochner}, the Court struck down New York’s labor law that established a sixty-hour maximum workweek as a violation of the right of contract; that right was held to be implicit in the due process clause of the Fourteenth Amendment. \textit{Lochner v. New York}, 198 U.S. 45 (1905). The “Lochner era” designates the period between this decision and the Court handing down its decision in \textit{West Coast Hotel Co. v. Parrish}, 300 U.S. 379 (1937). During the intervening period, the Court overturned several other regulatory statutes on substantive due process grounds. In these decisions, the Court was effectively reserving for itself a broadly defined authority to establish and defend laissez-faire regulatory policies with very little regard for executive legislative prerogative. \textit{West Coast Hotel} marked the Court’s adoption of a more deferential posture, as it began to apply the relaxed standard of rational basis review to regulatory statutes that did not implicate fundamental rights or equal protection rights, thereby deferring to the policy preferences of the executive and the legislative branches as long as the regulatory laws met a minimal threshold of reasonableness. Extrapolating from these major doctrinal shifts, we can define “Lochnerian” jurisprudence as a tendency towards extreme overreaching by the Court, to the extent that it entirely fails to give due deference to the other two branches. See \textit{Ackerman} supra note 12, at 63–66, 77, 120, 153–55.

\textsuperscript{418} See \textit{Ackerman}, supra note 12.

In the 1960s, there were only ten initiatives that qualified for placement on the California ballot.\textsuperscript{420} The procedure has become much more popular since then, with the number of initiatives appearing on the ballot increasing over the years beginning with the 1970s and continuing through 2008. Twenty-four were placed on the ballot in the 1970s, while the totals for the 1980s and 1990s were fifty-four and sixty-one respectively.\textsuperscript{421} In 2008 alone, there were twelve initiatives on the statewide ballot in the general election. A typical ballot might tuck a proposed constitutional amendment in amongst a bewildering array of relatively low-impact measures relating to public water projects, school facilities, drug treatment diversion programs, the medical use of marijuana, the limitation of recovery for drunk drivers, the state civil service retirement program, and a tax on tobacco products.\textsuperscript{422} Because the Proposition 8 amendment campaign emerged during a period that Ackerman would describe as "normal"—for all the contestation on same-sex marriage across the country, the future of the republic is not being threatened by a crisis on par with the Revolutionary War, Reconstruction, or the Great Depression—it would be understandable if the citizen approached the issue in the spirit of inflamed passions, animosity, or apathy—rather than sober and focused reason—and accepted the ideological framework offered by a powerful interest group bent on tactical victory—instead of actively seeking out more promising forms of deliberative exchange. It is precisely in these winner-takes-all conditions that the human rights of an unpopular social group seeking recognition can be easily eviscerated.

IV. Proposal: A Rawlsian Reconstruction of Madison's Theory of Popular Constitutionalism

Inspired by Justice Moreno's dissent, and drawing from the constitutional theory of Ackerman, Madison, Jefferson and Rawls, this Article has argued that California's amendment-by-ballot-initiative procedure is seriously flawed. The Interveners who championed Proposition 8 before the Strauss v. Horton court claimed that a decision to strike down the measure "would signify a gravely destabilizing constitutional revolution."\textsuperscript{423} As Justice Moreno correctly noted, however, a

\begin{itemize}
  \item \textsuperscript{420} \textit{Id.} at 11, 23–24.
  \item \textsuperscript{421} \textit{Id.} at 11–13, 24–55.
  \item \textsuperscript{422} See \textit{id}.
  \item \textsuperscript{423} Interveners' Opposition Brief at 6, Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (No. S168047).
\end{itemize}
liberal democratic society should not expose equal protection rights to a majoritarian plebiscite.424 Strauss raises profound questions concerning the equal protection rights of same-sex couples, and, more broadly, the constitutional procedures that adequately uphold and promote liberal democratic values.

This is not to say that the holdings of the Strauss majority have no basis in the law or that California's highest court should have acted as if it enjoyed an unlimited authority to review Proposition 8 on its substantive merits. The Strauss majority adopted an appropriately circumspect posture when it stated that the task of the court was "not to determine whether the provision at issue is wise or sound as a matter of policy or whether we, as individuals, believe it should be a part of the California Constitution."425 Vulnerable minorities might benefit in the short run from the rise of a Lochnerian judiciary if most judges valued equal protection rights very highly. In any event, the unleashing of a Lochnerian judicial branch would undermine the democratic power of the people over the long run.426 The Strauss court was entirely right when it rejected the Attorney General's invocation of "inalienable rights."427 Under the existing California Constitution, the Attorney General argued, there are some rights that are inalienable.428 From this perspective, these rights cannot be modified through a constitutional amendment once the California court hands down a decision establishing their judicial interpretation.429 But what if that judicial interpretation were as unjust as, say, Dred Scott v. Sanford?430

424. See Strauss, 207 P.3d at 130 (Moreno, J., concurring in part, dissenting in part).
425. Strauss, 207 P.3d at 59. See also id. at 107–08 (declaring that it the court's duty to protect the people's right to determine whether the Constitution should be amended).
426. What if California's highest court had decided against the right of same-sex couples to marry in In re Marriage Cases, and LGBT rights advocates had subsequently put forward a ballot initiative to amend the State Constitution to permit same-sex marriage? In this scenario, what would have happened if their opponents had filed suit in the California court, arguing that the successful same-sex marriage initiative was actually a constitutional revision and therefore illegitimate? If a majority on the court happened to disapprove of the substance of the ballot initiative, and if it also held the Lochnerian view that judges enjoy the power to disqualify ballot initiatives based upon their substance alone, the success of the LGBT rights advocates at the ballot box would be nullified by the court. See Strauss, 207 P.3d. at 105–06.
427. Strauss, 207 P.3d at 63.
428. Id.
429. Id.
430. 60 U.S. 393 (1857) (holding that enslaved people of African descent were not protected by the Constitution, could not sue in court, and could never be U.S. citizens; that the U.S. Congress had no authority to prohibit slavery in federal territories; and that slaves were the private property of their masters and thus could not be taken away from them without due process).
We would want to make sure the people had a chance to nullify bad decisions about the meaning of our rights and liberties. The Attorney General's argument is also problematic because it implicitly endorses the supremacy of the judicial branch.\textsuperscript{431} The solution to Proposition 8 surely does not consist of transforming judges into philosophers.\textsuperscript{432}

Instead, what is needed is nothing less than a progressive popular movement in California that would embrace a whole new approach to the State Constitution. Ideally, the movement would rally around a completely new substitute draft featuring a Bill of Rights wholly liberated from the unjust restrictions and conditions on each right currently present in the California Constitution due to the state's overly permissive amendment procedure. In the current constitutional text, for example, the individual's right to equal protection under the law is explicitly recognized.\textsuperscript{433} However, Article 1, section 7(a) also carves out an exception.\textsuperscript{434} California may not adopt a law or pursue a policy that causes the state to exceed the threshold level of legal obligations under the Fourteenth Amendment of the U.S. Constitution "with respect to the use of pupil school assignment or pupil transportation."\textsuperscript{435} One is left to wonder what the purpose of a state constitution might be if the human rights "floor" established by the Federal Constitution is, at one and the same time, the state's human rights "ceiling." The substance of the limitation makes it both offensive and unjust. In the 1970s, white majorities across the country—throughout the South and in the urban communities of the North and West—bitterly opposed the desegregation of the public schools, to the serious detriment of the African American and Latino minorities.\textsuperscript{436} 

\textsuperscript{431} Strauss, 207 P.3d at 63, 118–19.
\textsuperscript{432} See John R. Vile, \textit{The Case Against Implicit Limits on the Constitutional Amending Process, in Responding to Imperfection: The Theory and Practice of Constitutional Amendment} 191 (Sanford Levinson ed., 1995). \textit{See also Tushnet, supra note 8; Waldron, supra note 8.}
\textsuperscript{433} Cal. Const. art. I, § 7(a).
\textsuperscript{434} Id.
\textsuperscript{435} Id.
conditional construction of equal protection rights under Article 1, section 7(a) represents an odious legacy of the racist backlash against the civil rights movement. It might be quite difficult to persuade Californians to support a new draft of their state’s equal protection provision that would be utterly cleansed of this stain, but then again, the turn to justice in an imperfect world is never an easy task.

It would be equally important to ensure that the new state constitution adopted an entirely different set of amendment procedures. Ideally, a new California Constitution would require any proposer of a state constitutional amendment to scale much more formidable procedural barriers when she sought to propel the state into a fresh round of constitutional politics. In Ackerman’s terms, the amendment procedures ought to be designed as an adequate test of the people’s consent to the initiation of a fresh round of higher lawmaking. If we adopted Ackerman’s model, the proposers would have to enlist the support of a second-term Governor for their draft amendment. The Governor would be required to craft the proposal as a bill, and he or she would have to garner supermajority support from both legislative chambers before the measure even appeared on the ballot. Finally, the amendment would have to receive supermajority support from the voters in two subsequent gubernatorial elections. While Ackerman’s model might need some minor adjustments, an ideal procedure would strike a proper balance: It would be neither excessively burdensome nor excessively permissive. Further, the best state constitution would also “entrench” the Bill of Rights, making it impossible, or at least extraordinarily difficult, to alter the rights specified therein through the normal amendment process.

Historical evidence could easily be gathered to support the proposition that Madison should not have placed so much faith in the new republic’s multi-state scale. He claimed that with the massive size of the United States, “it will be more difficult for unworthy candidates to practice with success the vicious arts, by which elections are too

437. For a comparison of the California Constitution to the constitutions of the other states, many of which have provisions for ballot initiatives yet also have more restrictive amendment procedures, see Strauss v. Horton, 207 P.3d 48, 108–09 (Cal. 2009).
438. ACKERMAN, supra note 12, at 54–55.
439. See id.
440. See id.
441. See id.
442. See id. at 319–21; see also Strauss, 207 P.3d at 108–09.
often carried." With the benefit of over two centuries of hindsight, his assessment appears shortsighted and flawed.

I would also argue that the cyclical theory of civic virtue espoused by Madison and Ackerman is insufficiently attuned to the possibility for building trust among strangers in imperfect conditions. It is too pessimistic to suggest that, unless the republic is brought to its knees by great catastrophes, salutary constitutional politics lie beyond our reach. Rawls's approach to democratic deliberation offers a way to capture the enduring wisdom in Madison's theory of popular constitutionalism without becoming trapped in such a pessimistic vision of human nature. Rawls also elucidates the problems with the public debate on Proposition 8, which go much deeper than the usual criticisms.

Rawls argues that, in a liberal democratic society, the formation of multiple, diverse, and even contradictory understandings of "the good life" is inevitable. We should anticipate and welcome vigorous debates in the public sphere on difficult moral questions, such as same-sex marriage. There is a huge difference, however, between healthy public debate and the rule of the mob. In Rawlsian terms, the individuals who make up Madison's factions are failing to shoulder the duties of the liberal democratic citizen pertaining to civility and reciprocity. The individual, for Rawls, typically subscribes to a relatively stable comprehensive view of the good: a religious, philosophical, and/or moral doctrine that constitutes a consistent and coherent value system. The comprehensive view of the good operates as a framework for grasping the world in an intelligible manner, and it establishes a special set of values as particularly weighty. In this sense, the comprehensive view of the good furnishes the individual with practical guidelines for resolving otherwise impenetrable moral dilemmas.

Social cooperation and civility become particularly difficult, however, when the radical incommensurability of the various comprehensive views of the good is brought to the fore. As a liberal thinker, Rawls remains consistently attentive to the liberty rights of the individual. He distinguishes between "reasonable" and "unreasonable" compre-
hensive views of the good.\textsuperscript{447} Out of respect for the individual’s liberty of conscience, he deliberately offers a minimal definition of reasonableness.\textsuperscript{448} As long as a doctrine can support a constitutional democratic regime, it should be considered reasonable.\textsuperscript{449} The traditional religions that eschew fundamentalism—“Catholicism (since Vatican II) and much of Protestantism, Judaism, and Islam”—are deemed reasonable by Rawls on these grounds.\textsuperscript{450} A reasonable comprehensive view of the good tends to form an “overlapping” consensus with other reasonable worldviews, despite their incommensurability on many moral questions, insofar as they all support the concept of the equal dignity of all human beings and endorse fundamental rights and liberties, such as liberty of conscience and freedom of thought.\textsuperscript{451}

Rawls holds that reasonable persons would consider it indefensible to deploy political power for the purpose of repressing a comprehensive view of the good that is not unreasonable.\textsuperscript{452} Reasonable persons, he argues, grasp the enormous value of social cooperation and civility.\textsuperscript{453} In an ideal world, we would have just institutions, including a liberal democratic constitution, an economic system organized on fair terms, and racial and sexual equality.\textsuperscript{454} In that very special context, each individual would give her support to these just institutions and would give justice to her fellow citizens in turn.\textsuperscript{455} For the reasonable person, these shared final ends are assigned a great priority, given their profound value, in and of themselves, and the fact that they are the foundations for the social bases necessary for mutual self-respect.\textsuperscript{456} “[P]olitical society . . . secures . . . the equal basic rights and liberties [and] fair equality of opportunity . . . [it] guarantees the essentials of persons’ public recognition as free and equal citizens.”\textsuperscript{457} In Rawls’s ideal world, a society well-ordered by the political conception of justice as fairness, the harnessing of State authority for the purposes of attacking a reasonable comprehensive view of the good would be widely regarded as an intolerable form of arbitrariness; one that would endanger the substantial goods of social cooperation and

\textsuperscript{447} Id. at 59.
\textsuperscript{448} Id.
\textsuperscript{449} See id. at 378, 438.
\textsuperscript{450} Id. at 438.
\textsuperscript{451} Id. at 144–45.
\textsuperscript{452} Id. at 60.
\textsuperscript{453} Id. at 201–03.
\textsuperscript{454} See id. at 4–6.
\textsuperscript{455} Id. at 202.
\textsuperscript{456} Id. at 202–03.
\textsuperscript{457} Id. at 203.
plainly contradicts the liberty principles that are central to a political conception of justice.458

Although Rawls’s work is largely designed to build up an account of an ideal world, one that matures from the “original position” stage to the formation of a fully developed society well ordered by the justice as fairness principles,459 we can nevertheless use it as a point of inspiration for assessing our moral duties in the current imperfect conditions. Imagine a California citizen who generally endorses our state and federal constitutions insofar as they are informed by fundamental liberal democratic principles such as freedom of speech, due process, and equal protection. However, this voter also believes that the only blessed form of human sexuality consists in marital heterosexual intercourse and that sexually active homosexuals are violating God’s law. Imagine further that we can witness her first encounter with the lesbian, gay, bisexual, and transgendered (“LGBT”) demand for giving legal status to same-sex marriage. Say, for example, that the LGBT claims for marriage equality give rise to a new same-sex marriage bill that is introduced in the state legislature. In all likelihood, our California voter will oppose the bill on religious grounds; she might even enter the public sphere to present her arguments against the bill, and she might phrase those arguments in public forums in exclusively religious terms. From a Rawlsian perspective, she ought to be free to pursue her own way of life according to her own moral doctrine, as long as she does not violate the rights of others. She does not owe society a moral account that justifies her comprehensive view of the good: “Political liberalism never denies or questions these [comprehensive] doctrines in any way, so long as they are politically reasonable.”460 Where a mere statute is concerned, “citizens’ debates may, but need not be reasonable and deliberative, and they are protected at least in a decent regime, by an effective law of free speech.”461

To put this in another way, her public identity as a citizen would remain the same if she converted to another reasonable religious faith or stopped affirming any religious faith.462 Many of us, her fellow citizens, will always believe that it is regrettable she has felt compelled by her religious commitments to take the view that practicing homosexu-
als are violating God’s law. We have every right to challenge her viewpoint, in the most vigorous terms, in the media and in public forums. From a liberal democratic perspective, however, we also have to accept that as long as she is not violating anyone else’s rights, she is entitled to hold this particular viewpoint. We should not, for example, demand the State authorities to encroach upon her right to conscience, her right to free speech, or her right to assembly, simply because we have a very sharp disagreement with her, both on the general question of the moral status of homosexual sex acts and on the particular issue of the same-sex marriage bill that, in this imaginary scenario, is being debated in our state legislature. Moreover, because she does not owe us an account of her comprehensive view of the good, she does not have to answer to our criticisms in any particular form. Because she is merely expressing her views on a statute in the public sphere, she does not have to shoulder what Rawls calls the “duty of civility.” Strictly speaking, she would not have a duty to enter into any deliberative dialogue on the same-sex marriage statute with the citizens who took an opposing view.

It is a distinctive feature of Rawls’s liberal democratic theory, however, that when the individual citizen becomes an actor on the stage of constitutional politics, she takes on much more substantial duties vis-à-vis her fellow citizens. Indeed, her duty to think and act in an impartial manner becomes analogous to the requirements of the judiciary. Imagine that our California voter has the opportunity to cast a vote on a proposed constitutional amendment that will prohibit same-sex marriage. It is reasonable for her fellow citizens to ask her to accept limitations on the way that she frames her arguments and makes claims on others. On this elevated stage, the constitutional essentials—the fundamental principles that specify the general structure of government and the political process and the equal basic rights and liberties of the individual—are being reopened for consideration. As such, the very legitimacy of political power is at stake. “[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of princi-

463. See id. at 289–99 (discussing the basic liberties and their special priority status).
464. Id. at 382 n.13.
465. Id. at 212–54, 440–90.
466. Id. at 235–36.
467. Id. at 217.
468. Id. at 227.
ples and ideals acceptable to them as reasonable and rational."\textsuperscript{469} To preserve the liberal democratic character of our constitutional deliberations, such that political power can be exercised in a legitimate manner, each participant in the democratic deliberations on that constitutional stage must observe some basic rules.\textsuperscript{470}

Ackerman, like Madison, proposes demanding procedural rules to protect the social contract from untimely constitutional amendments.\textsuperscript{471} From a Rawlsian perspective, however, we cannot adequately address the inevitable clash between our diverse and often contradictory moral worldviews in our democratic society solely by erecting procedural prohibitions on the commencement of untimely constitutional deliberations.\textsuperscript{472} Rawls would also want us to take into account our duty to give justice to one another and, in particular, the deliberative requirements that we must satisfy when we enter into the special terrain of constitutional politics. To be sure, our highly flawed society is far removed from Rawls's ideal; in the society well ordered by justice as fairness, we would be deliberating constitutional matters in a society structured by just institutions. In that ideal world, for example, democratic procedures like elections would be protected from corruption and oligarchic tendencies by measures designed to guarantee the fair value of the political liberties.\textsuperscript{473} Our election law would feature strict limitations on campaign donations, effective checks on corruption, and stringent prohibitions of gerrymandering and vote dilution.\textsuperscript{474} Even in our imperfect conditions, however, Rawlsian theory strongly encourages us to hold ourselves accountable to each other to an unusually stringent degree when we take up the task of founding or amending our constitutions.

In a liberal democracy, it is the will of the people that is sovereign; the freedom of the individual can only be legitimately con-

\textsuperscript{469} Id. at 217.
\textsuperscript{470} See id. at 212-54, 440-90.
\textsuperscript{471} Ackerman, supra note 12, at 54-55.
\textsuperscript{472} In the long run a strong majority of the electorate can eventually make the constitution conform to its political will. This is simply a fact about political power as such. There is no way around this fact, not even by entrenchment clauses that try to fix permanently the basic democratic guarantees. No institutional procedure exists that cannot be abused or distorted to enact statutes violating basic constitutional democratic principles. The idea of right and just constitutions and basic laws is always ascertained by the most reasonable political conception of justice and not by the result of an actual political process.
\textsuperscript{473} Id. at 357.
\textsuperscript{474} Id. at 356-62.
strained by the State insofar as the State’s action is the product of the people’s will.475 As such, each individual who wishes to participate in the formation of the will of the people, especially where the constitutional essentials are at issue, must shoulder the substantial moral duty of civility: “to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason.”476 Every participant, regardless of their own moral viewpoint, must be willing to listen to others, to give her opponents’ arguments a fair-minded hearing, and to disagree, even on the issues that have attracted her passionate investments, in a reasonable and peaceful manner. At the height of a bitter dispute, she must not fail to respect the dignity of her fellow citizens, including homosexuals, on an equal basis, and she must be willing to revise her position in response to her opponents’ views.477 Commenting on the raging battles that took place between whites and blacks over desegregation in the wake of the Brown v. Board of Education478 decision, Danielle Allen writes: “Within democracies, . . . congealed distrust indicates political failure. At its best, democracy is full of contention and fluid disagreement but free of settled patterns of mutual disdain.”479

To engage in constitutional politics is to re-open the basic principles that make cooperation possible in a society made up of free, equal, and diverse individuals. The citizen who attacks one part of the Constitution and proposes a new amendment, such as Proposition 8, must be fully prepared to renew her sincere consent for the substantial remainder, namely the other parts of our social contract. In this case, the supporter of an anti-same-sex marriage constitutional amendment must renew her commitment to the rest of California’s Article I, the Declaration of Rights,480 and Article VI,481 before opening the Constitution’s position on same-sex marriage for debate. If she wishes to attack the Marriage Cases court for holding that homosexuals constitute a suspect class who, on that basis, possess the strongest possible equal protection rights that our legal system can offer, and she wishes to attack the court for holding that the right of couples to gain

475. Id. at 217.
476. Id.
477. See id.
479. ALLEN, supra note 444, at xiii.
480. CAL. CONST. art. I.
481. CAL. CONST. art. VI (establishing the state’s judicial branch and, by extension, the powers of judicial review).
access to the state-conferred status of marriage constitutes a fundamental due process right,\textsuperscript{482} then she must do so openly and must give an account of her position on judicial review, equal protection rights, and fundamental due process rights. Without judicial review, the Constitution, California's highest law—that ideally expresses the will of the people with respect to the essential dimensions of the social contract that makes cooperation possible among free, equal, and diverse strangers—is vulnerable to erosion by transient majorities or powerful interest groups.\textsuperscript{483} A citizen who opposes same-sex marriage on religious grounds could, for example, place herself in the original position, behind the veil of ignorance. She could ask herself: If I were a founding party in the original position, I did not know whether I would develop deep religious commitments after the veil was lifted, and I could not tell in advance whether my religion would constitute a powerful majority voting bloc or a tiny and precarious minority, would I endorse the principles of freedom of conscience, non-establishment, freedom of assembly, and judicial review? If she answers this question in the affirmative (Rawls clearly thinks any reasonable person would),\textsuperscript{484} then she must be willing to give an account for her refusal to continue to uphold these same principles where Proposition 8 is concerned.\textsuperscript{485}

In sum, the religiously motivated supporter of an anti-same-sex marriage amendment must defend her criticisms of the law as it stands, and she must give reasons for her support of the proposed amendment, Proposition 8. She must renew her consent to our social contract, give her criticism of the Constitution, and present her pro-

\textsuperscript{482} In re Marriage Cases, 183 P.3d 384, 440–43, 452–54 (Cal. 2008).

\textsuperscript{483} See Rawls, Political Liberalism, supra note 2, at 233–34 (“The court is not antimagoritarian [sic] with respect to higher law when its decisions reasonably accord with the constitution itself and with its amendments and politically mandated interpretations.”).

\textsuperscript{484} [R]easonable persons see that the burdens of judgment set limits on what can be reasonably justified to others, and so they endorse some form of liberty of conscience and freedom of thought. It is unreasonable for us to use political power, should we possess it, or share it with others, to repress comprehensive views that are not unreasonable.

\textsuperscript{485} It would be helpful if our religious opponent would also ask herself, "What if my whole life had turned out differently? What if I myself happened to hold religious beliefs that are inclusive towards homosexuals, and what if I were a lesbian seeking equal rights for me, both as an individual, and as a member of a family?" By participating in Rawls's thought experiment—moving behind the veil of ignorance—the individual is encouraged to adopt an impartial perspective. To the extent that she successfully suspends her self-interest, she becomes favorably positioned to view the law from the perspective of the very persons for whom she finds it most difficult to exercise liberal democratic tolerance.
posed amendment on the basis of public reason: an argument that appeals to the sense of justice that could be reasonably upheld by free and equal individuals, including homosexuals, who do not subscribe to her religious beliefs, and those who find her position on spiritual salvation absolutely foreign. She must be prepared to offer her counterparts fair terms of social cooperation, ones that are defined with reference to the basic principles of justice held in common by reasonable individuals who profess diverse and even contradictory moral doctrines.

It would be woefully inadequate if the supporter of Proposition 8 simply stated that a constitution permitting same-sex marriage would be alien to her moral doctrine, disrespect her own intimate associations and religious sacraments, and make her feel estranged from the law. In our current non-ideal conditions, in which we have not yet figured out how to live in a liberal democratic society made up of diverse strangers, such estrangement is a universal condition. In Rawls's ideal world, the citizens would arrive at an overlapping consensus on the political conception—the fundamental principles of justice—without feeling deeply alienated from the law. An overlapping consensus is independent of any single comprehensive view of the good. By the same token, however, the diverse members of the ideal well-ordered society do not regard each other like hostile nation-states who decide to enter into a truce. The overlapping consensus is not akin to an equilibrium point that ruthless competitors prudently agree to respect simply because the position reflects the balance of power and the parties know that the costs of open conflict would be great. The members of the society well-ordered by the Rawlsian principles of justice sincerely affirm their commitment to basic principles such as freedom of conscience, the right to equal liberty, freedom of speech and assembly, due process, and so on, on moral grounds.

Where a comprehensive doctrine by its very nature has an ambitious scope, the overlapping consensus is strictly limited to those questions that can be satisfactorily resolved through democratic deliberation among free and diverse individuals: (1) the basic rights and liberties of the individual; (2) the priority for these rights and

486. RAWLS, POLITICAL LIBERALISM, supra note 2, at 212–54.
487. Id. at 147.
488. Id.
489. Id.
490. Id.
liberties; and (3) the entitlement of the individual to the basic means necessary for making an intelligent and effective use of their rights and liberties. Although the overlapping consensus would not need to be affirmed on the basis of personally professed comprehensive moral doctrines, many reasonable individuals would probably be able to find some strong points of resonance between their broadly defined religious or moral philosophical viewpoints and the narrow slice of political justice matters that belong to the overlapping consensus. The overlapping consensus, which validates our core laws, would, therefore, not be perceived as a morally foreign imposition to any particular reasonable individual in the ideal well-ordered society.

Further, reasonable individuals would readily agree to restrict the scope of the problems to be addressed through constitutional deliberation. Since the basic terms of our social contract are such that each individual has the freedom to pursue her own way of life on fair terms, she is heavily inclined to favor strict rules limiting the initiation of a fresh round of deliberation on the constitutional essentials. By the same token, reasonable individuals embrace the political values belonging to the overlapping consensus on moral grounds that are independent of tactical considerations, such as a relative shift in the power of a particular social group. In this sense, Rawls makes a persuasive argument that, once it is reached, the overlapping consensus would be quite stable. Reasonable individuals in the ideal society, well-ordered by Rawls's liberal democratic principles, who espouse diverse and even conflicting comprehensive views of the good would readily agree, out of mutual respect, to "remove[ ] from the political agenda the most divisive issues, serious contention about which must undermine the bases of social cooperation." The category of "constitutional essentials" includes the measures that are specific to "the general structure of government and the political process," on the one hand, and to "the equal basic rights and liberties of citizens" on the other. In the society well ordered by Rawls's ideal principles, the former might be changed—albeit infrequently—to meet the demands of justice. Where equal basic rights and liberties are concerned, however, Rawls would permit only marginal changes. The equal basic rights and liberties of the individual "can be specified in

491. Id. at xlvi, 155–57.
492. RAWLS, POLITICAL LIBERALISM, supra note 2, at 147–48, 241–44, 244 n.33.
493. Id. at 154–58; see also id. at 144–48.
494. Id. at 157.
495. Id. at 228.
but one way, modulo relatively small variations. Since the people will have reached a strong working consensus on the meaning of those rights and liberties, and due to the necessity of giving them priority in every act of lawmaking, society would readily find just solutions for most of the issues that, in our non-ideal conditions, are most controversial.

Rawls argues that, in the society well ordered by the liberal democratic principle of justice, individuals would identify the values that are implicated by the issue in question and, with reference to the consensus on the meaning and priority of those rights, would seek a reasonable balance. The issue of same-sex marriage implicates the values of, among other things, respect for freedom of conscience and freedom of association, the right to privacy, and the equality of homosexuals as citizens. Because we value equal protection and privacy rights so highly, a reasonable balance would support legal same-sex marriage. However, we would also have a fairly permissive governmental approach to religious expression on gender and sexuality, based on our respect for the liberty of conscience. It is entirely possible that a reasonable religious organization in Rawls's ideal society would refuse to accept women into the priesthood, for example. By the same token, some religious organizations might decide to give sacramental recognition to the commitments of same-sex couples while treating them as less virtuous than the vows made by heterosexual couples. In both cases, the government would not intervene. Religious organizations would also be free to designate homosexual conduct as sinful, and would retain the option of refusing to recognize same-sex marriage as a holy sacrament, altogether. Under the same liberty of conscience principle, the individual is recognized by the State solely in her public personhood, standing entirely apart from any comprehensive view of the good. If a religious organization regarded homosexual conduct as sinful and treated its homosexual members as less devout than their heterosexual counterparts in the context of religious programs operated without governmental funding, there would be no violation of the political conception of justice. However, the State would have to ensure that these faith-based denigrations were strictly quarantined within the religious community. The court would not take them into account, and they would have no bearing on the law.

496. Id.
497. Id. at 243 n.32.
498. Id. at 29–30.
It is not necessarily the case that everyone in the ideal well-ordered society would be able to endorse equality for homosexuals on the basis of their comprehensive moral doctrines; a reasonable worldview must support most of the laws, but it may not always endorse all of them.\textsuperscript{499} However, if there were religious dissenters on LGBT rights in Rawls's ideal society, they would make a careful bimodal distinction. They would treat the constitutional foundations, such as equal protection, liberty of conscience, freedom of thought and association, due process, and so on, as a settled matter, even though they would regard legal same-sex marriage as a violation of their religious principles. They would not burst into the public sphere with root-and-branch attacks on the entire constitution, demanding its radical amendment because they could not, on the basis of their comprehensive moral doctrines, support all of the policies necessary to breathe life into the rights and liberties specified therein.\textsuperscript{500} When they think about same-sex marriage law from a religious perspective, the religious dissenters in Rawls's ideal well-ordered society might find it abhorrent. However, they would consistently and sincerely shift from their religious perspective to that furnished by public reason when they considered the constitutional grounds for this policy. Because they would perform this perspectival shift almost without fail, and because they would usually understand that their own rights and liberties were protected by the same constitution, they would, for the most part, agree to treat legal same-sex marriage as settled law, and they would consent to the exclusion of this issue from the political agenda.\textsuperscript{501}

In other words, in the ideal liberal democratic society well-ordered by Rawls's principles of justice, every individual would take a balanced approach to constitutional politics. On the one hand, the fundamental principles of justice would never be set out in absolutely final terms; fresh deliberation and revisions at the margins would not be unthinkable. At the same time, however, the stability of the overlapping consensus, given our collective valuing of the goods of social cooperation and our shouldering of the duty of giving justice to each other, would be substantial. It is only when society regards the consensus on the Constitution from the perspective of public reason and discovers, from that standpoint, that the settled law presents pressing and urgent problems of fundamental justice, that reasonable individuals

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item Id. at 244 n.32.
\item See id. at 242–43.
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would re-open the Constitution's definition of our basic rights and liberties for a new round of deliberation.\textsuperscript{502}

In our non-ideal conditions, it makes sense that our society undergoes periodic episodes of tremendous constitutional upheaval. Rawls would certainly agree with Ackerman, for example, that the initiation of higher lawmaker by the Reconstruction Congress and FDR was entirely justified. Even so, much of our existing social contract ought to be protected from unreasonable attacks. We should leave the door to higher lawmaker somewhat more open in our non-ideal conditions than it would be in the society well ordered by Rawls's ideal liberal democratic principles, but we still have very good reasons for placing substantial obstacles before the proposers of constitutional amendments.

\textbf{Conclusion}

In our non-ideal conditions, it is not at all surprising that some reasonable individuals experience the shifts in posture required of all citizens as we move from comprehensive moral doctrines to public deliberation about the constitutional essentials, as difficult and profoundly alienating transitions. In this non-ideal context, however, estrangement from the law is a virtually universal condition; no one can claim that the law is illegitimate solely on the ground that it seems utterly alien when considered from the perspective of one's religious or comprehensive moral philosophical standpoint. For all the imperfections of our liberal democratic society, we can nevertheless draw inspiration from Rawls's ideal principles and find important resonances between his ideal and our own constitutional tradition. Each and every one of us, insofar as we have been thrown into this shared history, has effectively taken an oath to abide the sense of not being fully at home with one another while we strive together toward a more perfect union.\textsuperscript{503} No faction may attempt to use the law to overcome that sense of estrangement by campaigning to bring the state's recognition of intimate relationships into perfect alignment with any particular comprehensive view of the good.

In our non-ideal conditions, where the institutions and civic ethos that could give rise to mutual trust and respect have yet to be

\textsuperscript{502.} See Rawls, \textit{Political Liberalism}, supra note 2, at 228, 237–40, 242–44.
\textsuperscript{503.} See Thomas Pogge, \textit{John Rawls: His Life and Theory of Justice} 156–60 (Michelle Kosch trans., Oxford Univ. Press 2007) (1994) (discussing how to reconcile Rawls's ideal of justice as fairness with the reality that citizens will have different comprehensive views of the good).
fully established, the law may be, at one and the same time, legitimate and yet radically "other."\textsuperscript{504} The perception of the law as alien to one's comprehensive moral doctrine in our current conditions is not necessarily a sign that the democratic process has failed. On the contrary, each of us might still experience a sense of estrangement from the law even if our democratic process was working as well as it possibly could under the current circumstances. However, demagogues like Rush Limbaugh, Glenn Beck, and Sarah Palin have reassured homophobic Christians that the law, especially abortion law and family law, ought to make them feel right at home by mimaetically reproducing their moral doctrine down to the last detail.\textsuperscript{505} Having been so badly misled as to the law that they deserve, many Californians would experience the repeal of Proposition 8 as a tremendous loss.

Ideally, and over the long run, California would both muster a supermajority behind a just Constitution and attend to that sense of loss on the part of Proposition 8's supporters, in order to build trust and civic solidarity.\textsuperscript{506} But for now, as the debate over repeal of Proposition 8 continues, we must be unswerving in our demands for adherence to adequate deliberative standards. The Proposition 8 supporter should be required to give a public reason-oriented argument\textsuperscript{507} for relegating similarly situated same-sex couples to the inferior status of domestic partnership under the law. She must be ready to be held accountable by diverse citizens and to act on terms of reciprocity, even when doing so requires her to forgo the pursuit of her own interests and to accept the experience of estrangement that is

\textsuperscript{504} Compare Bonnie Honig, Democracy and the Foreigner 39 (2001) ("Democracy is always about living with strangers under a law that is therefore alien (because it is the mongrel product of political action—often gone awry—taken with and among strangers). Even at its very best, or especially so, democracy is about being mobilized into action periodically with and on behalf of people who are surely opaque to us and often unknown to us."), with Frank I. Michelman, Ida's Way: Constructing the Respect-Worthy Governmental System, 72 Fordham L. Rev. 345 (2003) (contending that the individuals living in a pluralist liberal democratic society will inevitably disagree sharply about the interpretation of their constitution, but they may nevertheless share a deep respect for their common constitutional tradition).


\textsuperscript{506} See Allen, supra note 444, at 47.

\textsuperscript{507} See Rawls, Political Liberalism, supra note 2, at 212–54, for a thorough discussion of "The Idea of Public Reason."
inherent to the individual’s submission to the rule of law in a liberal democratic society under imperfect conditions. She must be willing to revise her views in light of a response to Proposition 8 by fair-minded advocates for homosexual rights.

Because Proposition 8 is a constitutional amendment, taking a position on this measure is not a personal choice that can be defended with reference solely to one’s religious beliefs. As Rawls argues, “There is no reason why any citizen, or association of citizens, should have the right to use state power to decide constitutional essentials as that person’s, or that association’s, comprehensive doctrine directs.” Proposition 8 concerns constitutional essentials; as such, even the most casual voter owes it to her fellow citizens to engage in a holistic deliberative exchange with diverse strangers on legal marriage, homosexual rights, judicial review, equal protection, and so on, and she must be willing to frame her position with reference to public reason arguments that she sincerely believes her opponents would reasonably accept as free and equal individuals.

In a pluralist society that has a liberal democratic form of government, the people should ensure that majoritarian procedures for constitutional lawmaking, like California’s amendment-by-ballot-initiative, are replaced with procedures that are adequate to the exercise of “constituent power”—the power of the people to establish our government—and to which free and equal individuals who uphold diverse comprehensive moral doctrines would reasonably give their consent. The adoption of more demanding rules for amending the State Constitution, along the lines proposed by Ackerman, would not by itself move us much closer to the society well-ordered by the Rawlsian principles of justice. By the same token, this reform would at least shore up the equal protection rights of vulnerable minorities against majoritarian tyranny in our imperfect conditions. Even where a given amendment-by-ballot-initiative procedure actually ends up enhancing the equal protection rights of the individuals who belong to vulnerable minorities, the frequent placement of these measures on electoral ballots threatens to normalize superficial and truncated debate, to endorse the piecemeal consideration of each human rights issue in isolation from the entire legal system, and to diminish the respect of the people for human rights law across the board. At its most dangerous moment, the amendment-by-ballot-initiative procedure can yield illiberal results; it can allow a majority faction to achieve a grossly illiberal

508. Id. at 226.
outcome, namely the "sacrific[ing]" of "the rights of other citizens" to its "ruling passion."\textsuperscript{509}

\textsuperscript{509}. \textit{The Federalist} No. 10, \textit{supra} note 1, at 57 (James Madison).