No. 12-144

In The
Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

KRISTIN M. PERRY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* WILLIAM N. ESKRIDGE JR., REBECCA L. BROWN, DANIEL A. FARBER, AND ANDREW KOPPELMAN IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are law professors who have written about the history and practice of judicial review, with a special focus on issues involving sexual and gender minorities. We are committed to the orderly and fair exposition of constitutional law. Based upon our research into the original meaning of the Equal Protection Clause, as applied to newly salient social groups, we believe that the Ninth Circuit's opinion in *Perry v. Brown*, 681 F.3d 1065 (9th Cir. 2012), should be affirmed if this Court finds the controversy justiciable and reaches the merits.

SUMMARY OF THE ARGUMENT

The text and original meaning of the Equal Protection Clause bar class or caste legislation, including laws that discriminate against minorities, "not to further a proper legislative end but to make them unequal to everyone else." *Romer v. Evans,* 517 U.S. 620, 635 (1996). Part I of our *amicus* brief argues that a law segregating a minority from important institutions of state law violates the group-neutrality baseline of the Equal Protection Clause.

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[1] *Amici curiae* submit this brief pursuant to the written consent of the parties, as reflected in letters the parties have filed with the Clerk. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici curiae* has made a financial contribution to its preparation or submission.

Consistent with this original meaning, the Ninth Circuit found that Proposition 8 is illegitimate caste legislation for the same reasons this Court gave for striking down Amendment 2 in *Romer*. Like Amendment 2, Proposition 8 "is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer,* 517 U.S. at 635. Like Amendment 2, Proposition 8 "imposes a special disability upon those persons alone," *id.* at 631; takes away from an unpopular minority fundamental rights that are "taken for granted by most people either because they already have them or do not need them," *id.*; and is "unprecedented in our jurisprudence," *id.* at 633.

Petitioners seek to distinguish *Romer* on the grounds that Proposition 8, unlike Amendment 2, enjoys a stronger presumption of constitutionality because it allegedly reaffirms a long-standing understanding of marriage (Pet. Br. 5-6, 24-25), *and* withdraws no tangible legal rights from lesbian and gay couples (Pet. Br. 25-26). In Part II, we demonstrate that this Court has repeatedly invalidated long-standing classifications whose discriminatory focus becomes clear over time. *E.g.*, *Loving v. Virginia,* 388 U.S. 1 (1967); *United States v. Virginia*, 518 U.S. 515 (1996). The history of America's equality jurisprudence teaches that the worst mistake this Court can make is to sweepingly reaffirm a form of discrimination that is under serious challenge from an excluded

but mobilized minority. *E.g.*, *Korematsu v. United States,* 323 U.S. 214 (1944); *Bowers v. Hardwick,* 478 U.S. 186 (1986). That history also teaches that state discrimination is not more defensible when it is largely symbolic, especially when the minority is excluded from an institution whose "traditions and prestige" render it unique. *Sweatt v. Painter,* 339 U.S. 629, 634 (1950).

Part III explains how Proposition 8 violates the Equal Protection Clause's rule against class/caste legislation. Proposition 8 revives and rests upon the core stereotypes that formed the foundation of the anti-homosexual caste regime entrenched in this country between 1935 and 1961. Thus, Petitioners' claim that Proposition 8 did not rest on "ill will" (Pet. Br. 26-27) is beside the point. When the law segregates people into first-class and second-class regimes, this Court requires a rigorous demonstration that the segregation serves a neutral public interest. When the segregation involves a fundamental institution such as marriage, the Court's end-means scrutiny is particularly demanding. *Cf. Turner v. Safley,* 482 U.S. 78, 97-99 (1987) (applying the "reasonable relationship" standard to strike down a state bar to prisoner marriages).

Petitioners claim that Proposition 8 "advances society's vital interest in responsible procreation and childrearing." Pet. Br. 31-48. As we show in Part III.C, that line of argument recalls the core justification for the anti-homosexual caste regime. Discriminating against lesbian and gay couples does not

plausibly advance such a state interest. It undermines that state interest by excluding couples who bear and raise children and scapegoats gay persons for problems they are not responsible for. Just like Amendment 2, Proposition 8 "is at once too narrow and too broad," *Romer,* 517 U.S. at 633, if its purpose is understood as encouraging responsible procreation and childrearing within a marital household. *Cf. Turner,* 482 U.S. at 98-99 (finding illegitimate a state policy allowing inmate marriages only in cases of procreation and childrearing).

We conclude with a discussion of the options this Court has if it reaches the merits of the equal protection claim and affirms the Ninth Circuit.

ARGUMENT

I. The Original Meaning of the Equal Protection Clause Was to Bar Legal Caste Regimes Stigmatizing Minority Groups and Serving No Public Need

As the Declaration of Independence suggests, America's constitutional democracy is premised upon the notion that "all men are created equal." The Framers of the Constitution believed that "equality . . . ought to be the basis of every law," and the law should not subject some persons to "peculiar burdens" or grant others "peculiar exemptions." James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785), *reprinted in Everson v. Bd. of*

Educ., 330 U.S. 1, 63-72 (1947) (Rutledge, J., dissenting).[2] The Framers sought to create a governmental structure that would protect property owners and other "particular classes of citizens" against "unjust and partial laws," *The Federalist No. 78* at 429 (Alexander Hamilton) (E.H. Scott ed., 1898), imposed by temporary "faction[s]," *The Federalist No. 10* at 57 (James Madison) (E.H. Scott ed., 1898).

The Bill of Rights implemented the equality principle more directly, through specific protections for property owners, U.S. Const. amend. V, and for religious groups.[3] The Due Process Clause of the Fifth Amendment and analogous provisions in state constitutions were interpreted to bar government from enacting class legislation, which judges and commentators described as laws burdening or advantaging a minority without advancing a general public purpose.[4]

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[2] *See* Rebecca L. Brown, *Liberty, the New Equality,* 77 N.Y.U. L. Rev. 1491, 1512-20 (2002) (discussing survival of the pre-Constitution equality-based imperative of representation by which legislators "'can make no law which will not have its full operation on themselves and their friends'") (quoting *The Federalist No. 57* at 316 (James Madison) (E.H. Scott ed., 1898)).

[3] The Free Exercise Clause bars federal persecution of religious minorities, while the Establishment Clause prevents entrenchment of religious majorities.

[4] *See* Rodney L. Mott, *Due Process of Law: A Historical and Analytical Treatise of the Principles and Methods Followed by the Courts in the Application of the Concept of the "Law of the Land"* 256-74 (1926); Melissa L. Saunders, *Equal Protection,*

(Continued on following page)

As Daniel Webster argued in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 581-83 (1819), a statute that does not apply generally is vulnerable to the charge that it is not the "law of the land." In an 1832 veto message, President Andrew Jackson objected that the practice of enacting class legislation was also inconsistent with the healthy functioning of our nation's pluralist democracy. Such legislation "arrayed section against section, interest against interest, and man against man, in a fearful commotion which threatens to shake the foundations of our Union." 2 *A Compilation of the Messages and Papers of the Presidents: 1789-1897*, at 590 (James Richardson ed., 1896).

The Reconstruction Amendments codified and expanded the rule against class legislation. Introducing the proposed Fourteenth Amendment, Senator Howard said that its core purpose was to abolish "all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another."[5] As Senator Howard's statement suggests, the amendment expanded the country's understanding of class legislation to include

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Class Legislation, and Colorblindness, 96 Mich. L. Rev. 245, 251-68 (1997).

[5] Cong. Globe, 39th Cong., 1st Sess. 2764, 2766 (1866). Like Congress, the state ratifying conventions understood the Fourteenth Amendment to entail a rule against class or caste legislation. William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 176-78 (1988); Saunders, *supra* note 4, at 271-93.

stigmatized social "castes" as well as economic and religious "classes."[6]

Reflecting its history, the Equal Protection Clause is a foundation for the rule of law and protects against abuses of the democratic process:

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Ry. Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

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[6] Daniel Farber & Suzanna Sherry, *The Pariah Principle,* 13 Const. Comm. 257, 265-71 (1996); Cass R. Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410, 2428-39 (1994).

II. If a Minority Group Demonstrates That a Discriminatory State Rule Entrenches Its Status as Second-Class, the Equal Protection Clause Demands Serious End-Means Scrutiny

The Equal Protection Clause's principle against caste legislation forbids the state from elevating social stereotypes regarding disparaged social groups into legal regimes that treat members of those groups as second-class citizens.[7] How this principle is applied depends on whether a legal burden on a minority social group rests upon inaccurate stereotypes or unfair stigmas and whether the burden is justified by a neutral public policy.

These constitutional inquiries rely on judgments that are context-dependent. What was regarded as a neutral state policy justified by the public interest in 1868 might, as a matter of law, be stigmatic and unjustified in 2013. What changes is not the command of the Fourteenth Amendment, but instead social policy and society's assumptions about the disparaged social group and its members. Those assumptions, in turn, have changed in response to campaigns by

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[7] *See* Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (1989); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination,* 90 Tex. L. Rev. 1, 15-41 (2011); John Harrison, *Reconstructing the Privileges or Immunities Clause,* 101 Yale L.J. 1385, 1413 (1992) (grounding the anti-caste principle in the Privileges or Immunities Clause); Sunstein, *supra* note 6, at 2410-13.

identity-based social movements to demonstrate their political relevance in the nation's pluralist system and to educate society about the inaccuracy of stereotype-driven views about their members.[8]

This Court's application of the Equal Protection Clause has been responsive to the nation's evolving pluralist democracy, and has cleared "paths to belonging" for long-excluded social groups.[9] Petitioners, therefore, are wrong to claim that long-standing rules (Pet. Br. 5-6) or symbolic discriminations (Pet. Br. 25-26) are immune from serious equal protection scrutiny. Nor are they right in urging this Court to expand the summary disposition in *Baker v. Nelson,* 409 U.S. 810 (1972), into a precedent broadly denying marriage equality (Pet. Br. 27-28). The biggest mistake the judiciary can make is to reaffirm traditional discriminations harming minorities just as their social movements are in the process of successfully transforming our nation's public culture.

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[8] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 377-79 (1985); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062, 2087-89 (2002).

[9] Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303 (1986).

A. The Equal Protection Clause Requires Serious Scrutiny of Traditional Rules Discriminating Against a Minority Group Once the Caste Effect of Those Laws Has Been Demonstrated

The Reconstruction Amendments overrode the Black Codes. After Reconstruction ended, however, southern whites created a new regime where the races were segregated by law. Upholding this regime, the Court held that laws separating the races "do not necessarily imply the inferiority of either race to the other" *and* were "generally, if not universally," recognized as measures taken to secure public goals. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896); *see also id.* at 545 (recognizing traditional support and public need for laws segregating public schools and barring different-race marriages). The Court dismissed the claim that "the enforced separation of the two races stamps the colored race with a badge of inferiority" with the argument that this was just a subjective reaction the law could not meaningfully address. *Id.* at 551.

The civil rights movement assailed the premises central to *Plessy*. Specifically, its leaders maintained that segregation was a racial caste system reinforcing traditional attitudes grounded in prejudice and stereotypes, and hence inconsistent with the Fourteenth Amendment.[10] Disavowing *Plessy*'s core reasoning,

[10] *See* David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference*

(Continued on following page)

this Court agreed with such claims in *Brown v. Board of Education,* 347 U.S. 483 (1954). Although the Framers were not targeting laws segregating public schools, *Brown* was consistent with the original point of the Fourteenth Amendment, in light of what our society had learned about the operation of segregation laws to entrench a racial caste system.[11]

Laws segregating public schools enjoyed the support of tradition, as such laws had flourished and had been upheld throughout American history. *E.g.*, *Roberts v. City of Boston,* 59 Mass. 198, 206 (1849). Once this Court understood that the social meaning and practical effect of such laws was to entrench a racial caste system, however, this Court acted to sweep away all laws segregating the races as a matter of law.[12]

(1986); Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (rev. ed. 2004).

[11] Richard A. Posner, *The Problems of Jurisprudence* 302-09 (1990); Bruce Ackerman, *Constitutional Politics/Constitutional Law,* 99 Yale L.J. 453, 531-36 (1989); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 65 (1955); Charles Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 421-24 (1960). Even critics of this Court's equality jurisprudence believe that *Brown* was correct for this reason. *E.g.*, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 74-84 (1990).

[12] Daniel A. Farber et al., *Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century* 193-206 (4th ed. 2009).

Similarly, although it now appears that laws barring different-race marriages were central to the philosophy of white supremacy that undergirded apartheid,[13] the illegitimacy of such laws was, for many decades, not apparent. Many states had barred different-race marriages since the colonial era. This Court legitimated such laws on the ground that they did not "discriminate": "The punishment of each offending person, whether white or black, is the same." *Pace v. Alabama*, 106 U.S. 583, 585 (1883).

In 1954, thirty states had laws barring different-race marriage, and all state courts but one had upheld those laws against equal protection attack on the authority of *Pace*. *Compare Perez v. Lippold*, 198 P.2d 17, 29 (Cal. 1948) (striking down California's law), *with id.* at 38-40 (Schenk, J., dissenting) (defending the law because it was entrenched by state tradition and universal judicial precedent, especially *Pace*). Even the civil rights movement failed to challenge these laws before *Brown*. In *Naim v. Naim,* 350 U.S. 891 (1956), with no brief from the NAACP, Inc. Fund, this Court declined to review the Virginia Supreme Court's decision upholding its miscegenation law.

In the next decade, the civil rights movement challenged such laws as an important part of the caste regime that *Brown* and subsequent cases were

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[13] Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 Duke L.J. 624, 637-51 (1985).

dismantling. At the urging of the NAACP, Inc. Fund, this Court ruled a race-based cohabitation law unconstitutional, holding for the first time that race is a suspect classification under the Equal Protection Clause. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). As officials were persuaded that miscegenation bans were integral to an illegitimate caste-based regime stigmatizing persons of color, most states revoked their miscegenation laws in the 1960s.[14] Once it was clear that there was no neutral state justification for laws barring different-race marriages, this Court ruled that the Virginia law violated the Fourteenth Amendment. *Loving*, 388 U.S. at 12.

Although *McLaughlin* and *Loving* were race cases, the original meaning of the Equal Protection Clause clearly reaches further, to monitor other legal regimes perpetuating a social caste system that does not serve legitimate public goals and that undermines democratic pluralism. Hence, for the last generation, this Court has closely interrogated state sex discriminations that reinforce the stereotype of women as domestic and has invalidated sex-based rules that "create or perpetuate the legal, social, or economic inferiority of women." *Virginia*, 518 U.S. at 534.

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[14] Brief of the NAACP as *Amicus Curiae* at 2-3 & nn.1-2, *Loving v. Virginia*, 388 U.S. 1 (1967) (1966 Term, No. 395), 1967 WL 93611; *see also* Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* 244-80 (2003) (account of miscegenation law repeals and constitutional challenges).

The original meaning of the Equal Protection Clause, updated in light of the Nineteenth Amendment, supports this Court's insistence that states dismantle the legal regime of gendered domesticity.[15] In the process, this Court has overruled long-standing state policies. *E.g.*, *id*. at 520-23, 536-46 (ruling that the 150-year exclusion of women from Virginia Military Institute violated the caste principle by entrenching the domesticity stereotype).

Indeed, the legal regime of domesticity has a more impressive pedigree than apartheid had, for it was grounded in the common law of marriage, as articulated by William Blackstone's *Commentaries on the Laws of England* (1765), the intellectual mainstay of Petitioners' Brief. As Petitioners demonstrate (Pet. Br. 33-35), Blackstonian marriage was centrally concerned with responsible procreation and childrearing by two biological parents, enforced through legal rules barring extramarital sexual activities, ensuring marriage for life by foreclosing divorce, and vesting contract and property rights with the husband.[16]

For 150 years, women's rights movements have challenged Blackstonian family law and related sex-based exclusions. Most of the common law regime of

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[15] *See* Calabresi & Rickert, *supra* note 7; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947 (2002).

[16] *See* Hendrik Hartog, *Man and Wife in America* 64-76, 103-22 (2000).

domesticity has been revoked by state legislatures,[17] and this Court has invalidated remaining discriminations based upon the new public understanding that the Blackstonian family rests upon unjust gender stereotypes and does not serve the public interest. *E.g.*, *Kirchberg v. Feenstra,* 450 U.S. 455, 461 (1981) (invalidating state law vesting husbands with authority to dispose of community property without wives' consent); *Orr v. Orr,* 440 U.S. 268, 283 (1979) (invalidating state law limiting alimony rights to wives).

In short, tradition – the central pillar of Petitioners' argument – can cut two ways in equal protection cases. Often, it is evidence of rational, workable state policy. But when a "traditional" classification is justified by stereotype-saturated reasoning and tends to produce a stigmatizing caste regime, it must be subjected to serious constitutional scrutiny. *Virginia,* 518 U.S. at 536-45.

B. The Legitimating Effect of Judicial Review Suggests Caution Before Reaffirming Traditional Exclusions Whose Justifications Have Been Seriously Challenged by a Mobilized Minority

Long-standing traditions are vulnerable to equal protection attack when their exclusionary features fall

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[17] *See* Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (2000).

upon a group able to demonstrate that its distinguishing trait (such as minority race or female sex) is one whose social stigma is the product of prejudice and stereotypes rather than the needs of public policy. Such a demonstration may require decades of educational and political effort on the part of the minority group and their allies. During that educational period, what is the proper role of this Court, given its competing commitments, to enforce the equality guarantee, while deferring to the political branches?

Consider the validity of miscegenation laws in the generation after World War II. If California had appealed the invalidation of its miscegenation law in *Perez*, this Court's best course of action would have been either to deny review, *see Naim*, 350 U.S. at 985, or to affirm the California Supreme Court on narrow grounds, *see Sweatt*, 339 U.S. at 634. The Court's worst course of action would have been to reverse the California Supreme Court, presumably applying *Pace*. To confirm the denigration of "other races" just as the country was coming to appreciate its own productive racial diversity would have been needlessly provocative to the polity and would have exposed the Court to ridicule for legitimating the segregation regime as its political and moral foundations were crumbling.[18] This Court handled the miscegenation

[18] *Cf*. Alexander M. Bickel, *The Supreme Court 1960 Term – Foreword: The Passive Virtues,* 75 Harv. L. Rev. 40, 48-50 (1961) (the "legitimating" features of this Court's ruling that a statute is constitutional).

issue deftly, by refusing to endorse state laws banning different-race marriages and then invalidating such laws once it was clear they were not justified by any neutral state policy.

Contrast the Court's handling of the constitutionality of consensual sodomy laws. Although originally aimed at rapists and child molesters, sodomy laws by 1945 were enforced most prominently against "homosexuals" and were a public justification for anti-homosexual discriminations.[19] Once gay people followed women and blacks in becoming politically mobilized, they strenuously objected to the application of such laws to their consensual activities and to the anti-gay rules aimed at persecuting presumptive "sodomites."[20]

In *Bowers*, this Court not only upheld a gender-neutral sodomy law, but announced that the only constitutional issue was whether the state could criminalize "homosexual sodomy." 478 U.S. at 188 n.2. By "misapprehend[ing]" the claim in this way, *Lawrence v. Texas*, 539 U.S. 558, 567 (2003), this Court suggested that straight couples, who engaged in most of the consensual sodomy practiced in America, might be immune from the same kind of prosecution the Court was upholding against "homosexuals." The *Bowers* majority then engaged in a historical

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[19] William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003*, at 73-108 (2008).

[20] *Id.* at 136-93.

inquiry filled with factual errors and anachronistic analyses. *See id.* at 567-71. Most disturbingly, *Bowers* held that "majority sentiments about the morality of homosexuality" were a rational basis for a law making consensual activities a felony (with a mandatory minimum punishment of a year in prison). 478 U.S. at 196.

Gay people and their families were hurt and appalled by *Bowers*. Many Americans read the majority and concurring opinions to reflect a lack of basic knowledge about the people whose lives were affected by the statute. *Cf.* John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 521-22 (1994) (personal ignorance regarding "homosexuals" led one of the majority Justices to premature conclusions that he later retracted).

This Court's decision in *Bowers* encountered immediate, near universal, criticism and outrage.[21] *Bowers* swiftly became an embarrassment, as public opinion rejected the norm that gay persons ought to be objects of legal discrimination or persecution. Seventeen years later, this Court ruled that *Bowers* was incorrect the day it was decided. *Lawrence,* 539 U.S. at 574-78 (overruling *Bowers,* in part because of the

[21] William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 149-73 (1999); Richard A. Posner, *Sex and Reason* 341-50 (1992); Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 Ga. L. Rev. 629, 645 (1990) (citing 33 law review articles critical of *Bowers*).

equality-denying effect of consensual sodomy laws on sexual minorities); *id.* at 579-80 (O'Connor, J., concurring in the judgment on equal protection grounds).

This Court's experience with miscegenation laws and consensual sodomy laws illustrates the special dangers of reaffirming (or creating) discriminatory laws in the wake of serious social movement claims that the laws reinforce a prejudice- or stereotype-based caste regime rather than advance a neutral public policy. If the Court rebukes a minority perspective that is rapidly gaining legal traction, and upholds caste legislation, the Court's reputation for neutrality is called into question, and its act of legitimation becomes a festering sore in the nation's pluralist democracy. *E.g., Korematsu*, 323 U.S. at 223-24 (upholding the detention of Japanese-American citizens during World War II); Eugene V. Rostow, *The Japanese American Cases – A Disaster*, 54 Yale L.J. 489, 492 (1945) (describing *Korematsu* and related cases as "a breach, potentially a major breach, in the principle of equality").

Because this Court has been cautious in enforcing the equality mandate, we can think of no case where the Court has applied the Equal Protection Clause to invalidate a law discriminating against a minority group or women and has stirred up the kind of enduring legal criticism and embarrassment that followed *Bowers* and *Korematsu.* Perhaps this Court was taking an institutional risk in *Loving,* for the decision struck down an interracial-marriage bar that was supported by overwhelming majorities of the

American people.[22] In our view, the risk was justified by the principled application of the Equal Protection Clause to an exemplar of caste legislation. Indeed, *Loving* illustrates the wisdom of the clause's original meaning: once it was clear that interracial couples wanted to make serious marital commitments and that there was no evidence of a neutral public need to bar such marriages, insistence on equality was wise and legally principled.[23]

C. Symbolic Denigration of Minority Persons Is Often the Worst Form of Caste Legislation Inconsistent with the Fourteenth Amendment

Applying the original meaning of the Equal Protection Clause, *Romer* struck down as class legislation a state constitutional initiative denying gay people the normal protections of anti-discrimination laws, without a demonstration that such an exclusion was required by neutral public policy. The Ninth Circuit followed *Romer* to invalidate Proposition 8. Petitioners, however, say that *Romer* is distinguishable, because the anti-gay initiative in *Romer* took

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[22] The 1968 Gallup poll revealed only 20 percent of Americans approved of different-race marriages, with 73 percent disapproving. *See* http://www.gallup.com/poll/117328/marriage.aspx (last visited Feb. 21, 2013).

[23] Support for different-race marriages has increased in every post-*Loving* Gallup poll. In 2011, nearly 90 percent of the respondents were supportive. *See id.*

away tangible legal rights and benefits, while the anti-gay initiative in this case is symbolic and has no effect on the comprehensive legal rights and benefits afforded by the state domestic partnership law. Pet. Br. 25-26.

Does this difference require a different result under the Equal Protection Clause? No. Indeed, symbolic denigration of a class of worthy citizens is in some ways the worst form of caste legislation. Slapping a scarlet letter onto a despised minority is much worse than denying its members tax credits enjoyed by the majority.

Consider *Sweatt*, which required Texas to admit blacks to the state law school. In his submission to this Court, the Texas Attorney General demonstrated that the new Texas State University for Negroes School of Law offered its students all the legal benefits enjoyed by students at the (all-white) University of Texas, facts accepted by the lower court.[24] Even though this Court remained unwilling to question *Plessy*'s separate-but-equal doctrine, Texas was held to have violated the equality mandate.[25] Notwithstanding the formal equality of resources and educational experience found by the court below, this Court

[24] Brief for Respondents at 109-14, 120-22, *Sweatt v. Painter*, 339 U.S. 629 (1950), 1950 WL 78682; *Sweatt v. Painter,* 210 S.W.2d 442, 445-47 (Tex. Civ. App. 1948).

[25] *See* Gabriel J. Chin, Sweatt v. Painter *and Undocumented College Students in Texas,* 36 Thurgood Marshall L. Rev. 39, 45-49 (2010).

held that its "traditions and prestige" rendered the University of Texas a unique institution from which qualified applicants could not constitutionally be excluded. *Sweatt,* 339 U.S. at 634; *accord Virginia,* 518 U.S. at 553-54 (following *Sweatt* to reject the state's separate-but-equal remedy to its exclusion of women from Virginia Military Institute); *Brown*, 347 U.S. at 493-94 (following *Sweatt* to strike down segregated schools even when all tangible facilities are the same for each race).

In light of *Sweatt* and *Brown*, consider this hypothetical. After *Loving* ruled that Virginia's law banning different-race marriages violated the Equal Protection Clause, could Virginia have cured the constitutional defect by creating a special "domestic partnership" law for different-race couples, with all the legal rights and benefits of marriage, but not the name? Surely the answer to that question is "no." By withholding the "traditions and prestige" of the unique institution of marriage from the denigrated couples, the state would have been perpetuating a caste regime. While mandatory riding in the back of the bus may be better than exclusion from the bus, it is second-class treatment nonetheless.

An example from the Court's sex discrimination jurisprudence is also helpful in evaluating Petitioners' no-tangible-harm-no-legal-foul argument. Arkansas had a state constitutional rule requiring women to identify themselves by "Mrs." or "Miss" when they registered to vote. Such a rule deprived women of no rights, nor did it impose any significant burden. Yet

the three-judge court, correctly, struck down the law as a violation of equal protection. *Walker v. Jackson,* 391 F. Supp. 1395, 1402-03 (D. Ark. 1975); *accord* Office of the Comptroller General, *In re Use of Maiden Name on Payrolls by Married Women Employees,* 55 Comp. Gen. 177, 1975 WL 11562 (Aug. 28, 1975) (the Constitution requires the federal government not to follow the Blackstonian rule that the wife takes the husband's name); *see also Anderson v. Martin*, 375 U.S. 399, 402 (1964) (striking down state law requiring candidates to be identified by race).[26]

The point of *Walker* and *Anderson* is that symbolic discriminations against a long-denigrated group (women, blacks, and gays) are just as much caste legislation as more tangible discriminations (such as common law coverture for women and the criminalization of private "homosexual sodomy" between consenting adults). Thus, even if Petitioners were correct that Proposition 8 does not directly inflict tangible harms, it nevertheless inflicts symbolic harms that perpetuate a stigmatizing caste regime.

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[26] *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), upheld the common law rule requiring a married woman to use her husband's name in public. Although this Court summarily affirmed, 405 U.S. 970 (1972), *Forbush* has been abrogated by *Virginia* and other precedents – just as *Baker* has been abrogated by *Romer* and *Lawrence. Cf. Lawrence,* 539 U.S. at 604-05 (Scalia, J., dissenting) (objecting that these recent precedents logically commit the Court to require marriage equality).

Interpreting precisely the same language enacted by Proposition 8, the California Supreme Court characterized the state's earlier gay marriage ban (Proposition 22) as "perpetuat[ing] a more general premise . . . that gay individuals and same-sex couples are in some respects 'second-class citizens' who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples." *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008). As we demonstrate below, the second-class citizenship created by Proposition 8 is unjustified caste legislation violating the Equal Protection Clause.

III. Proposition 8 Is Caste Legislation Inconsistent with the Equal Protection Clause

The Fourteenth Amendment's hostility to caste regimes has been deployed most often in cases involving discrimination because of race or sex. But it clearly extends beyond those traits, especially when important or fundamental rights, such as marriage, are at stake. *E.g.*, *Zablocki v. Redhail,* 434 U.S. 374, 390-91 (1978) (striking a state bar to remarriage by spouses defaulting on their support or alimony obligations). For most of our country's history, states did not allow people with intellectual and some physical disabilities to marry.[27] Those laws were justified on

[27] As late as 1971, 39 states excluded persons with mental disabilities from marriage. *See* American Bar Foundation, *The Mentally Disabled and the Law* 226-29, 240-43 (1971).

the ground that the state should limit marriage to persons who can responsibly procreate and raise children.[28] Because disabled minorities and their allies have shown that broad marriage exclusions rest upon discredited stereotypes about persons with mental disabilities, those exclusions have all but vanished.[29] If a state revived a law barring all people with intellectual disabilities from marrying on the ground that they could not engage in what the state considered "responsible procreation and childrearing," would that not be presumptively unconstitutional as a revival of a discredited caste regime?[30]

In *Turner*, this Court struck down a state rule barring prisoners from marrying, unless there was a pregnancy or biological child who would benefit from the marriage. 482 U.S. at 81-82, 96-97. Applying the special rule for evaluating the constitutional rights of prisoners, the Court found no "reasonable relationship" between a legitimate governmental interest and a denial of the right to marry to inmates who were

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[28] Robert Matloff, Comment, *Idiocy, Lunacy, and Matrimony: Exploring Constitutional Challenges to State Restrictions on Marriages of Persons with Mental Disabilities,* 17 Am. U.J. Gender Soc. Pol'y L. 497, 510-13 (2009).

[29] Allison C. Carey, *On the Margins of Citizenship: Intellectual Disability and Civil Rights in Twentieth-Century America* 157-59, 172-73 (2009).

[30] For an argument that such laws cannot even pass the rational basis test followed in *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), see Matloff, *supra* note 28, at 507-13.

not engaged in procreative or childrearing activities. *Id.* at 97-99. Specifically, this Court found that such a broad exclusion was an "exaggerated response" to legitimate security concerns and held that the existence of "easy alternatives" rendered the denial of marriage rights unconstitutional. *Id.* at 98.

The equal protection case against Proposition 8 is even stronger than the claims in *Zablocki* and *Turner*. The anti-homosexual caste regime entrenched in American law between 1935 and 1961 was centrally grounded in the vicious stereotype that gay people are sterile, selfish, and anti-family. *Romer* and *Lawrence* have dismantled much of that caste system – but central to such a system is the exclusion of lesbian and gay couples from the institution of marriage, with its unique "traditions and prestige." Not only is Proposition 8 classic caste legislation, but Petitioners' responsible-procreation-and-childrearing justification is an invocation of the core anti-gay stereotype that *Bowers* embraced and *Romer* and *Lawrence* rejected.

A. America's Anti-Homosexual Caste Regime Rests upon the False Stereotype of Gay People as Anti-Family

There was great social anxiety about same-sex intimacy in the late nineteenth century, when the "concept of the homosexual as a distinct category of person" emerged. *Lawrence,* 539 U.S. at 568. That anxiety morphed into a nationwide anti-homosexual panic, which motivated public officials to create an

anti-homosexual caste regime between 1935 and 1961.[31] The legal regime was one that entrenched "homosexuals" as social pariahs and rendered them enemies of the people and outlaws.[32]

In 1961, "homosexual" activities with a consenting adult partner were illegal in every state of the union, and a felony in most jurisdictions.[33] If arrested in 29 states or the District of Columbia, the "homosexual" might be committed to a mental institution as a "sexual psychopath," where doctors "treated" sexual minorities with experimental drugs, therapies, and lobotomies.[34] If convicted of "the crime against nature," "homosexuals" could lose their right to vote in

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[31] Eskridge, *Dishonorable Passions, supra* note 19, at 73-108; Estelle B. Freedman, *"Uncontrolled Desires": The Response to the Sexual Psychopath, 1920-1960*, 74 J. Am. Hist. 83, 83-106 (1987).

[32] Eskridge, *Gaylaw*, *supra* note 21, at 57-80, 98.

[33] Eskridge, *Dishonorable Passions*, *supra* note 19, at 388-407 (appendix, documenting for each state the expanding "crime against nature laws" and statutory consequences, including sexual psychopath laws). On the extensive enforcement of these and related laws, see Jon J. Gallo et al., *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. Rev. 643 (1966).

[34] Jonathan Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 134-207 (1976) (assembling primary documents); John LaStala, *Atascadero: Dachau for Queers?*, Advocate, Apr. 26, 1972, at 11, 13 (first-person account of medicalized torture of "homosexuals," including a pharmacological version of waterboarding).

some states. *E.g.*, *Hunter v. Underwood,* 471 U.S. 222, 224 n.** (1985).

If exposed as a practicing "homosexual," even without a criminal conviction, the person was a presumptive outlaw. The "homosexual" could lose her or his professional license and job in the public or private sector, could not have a security clearance, could not serve in the armed forces or in local police forces, and might be deported (if an immigrant).[35] If a person dared associate with other "homosexuals" to advocate for better treatment, she or he could expect police and FBI surveillance and harassment.[36]

The law disrespected and sought to disrupt those "homosexuals" who were involved in committed relationships and families in that era. If homosexuality was suspected, such couples faced judicial refusal to

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[35] *See* Allan Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* (1990); Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (1991); David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (2004); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 50 Hastings L.J. 1015 (1999) (reprinting 1979 article).

[36] Eskridge, *Gaylaw*, *supra* note 21, at 74-76. For surveillance of gay bars, see Nan Alamilla Boyd, *Wide Open Town: A History of Queer San Francisco to 1965*, at 108-47 (2003); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940*, at 131-50, 331-51 (1994).

enforce their contracts, wills, and trust documents.[37] If either partner had children, American states stood ready to take them away based on the parent's homosexuality.[38] Courts routinely denied or restricted visitation rights of lesbian and gay parents for their own children, based upon the notion, unsupported by expert evidence, that even "exposure" to homosexuality is destructive for children. *E.g.*, *J.P. v. P.W.,* 772 S.W.2d 786, 792-94 (Mo. Ct. App. 1989) (citing cases).

The anti-homosexual caste regime was created in an era of increasing anxiety about nonmarital sexuality and the decline of traditional gender roles.[39] The concern that drove the pervasive discrimination was the view that lesbians and gay men are sex-obsessed predators who are a threat to the American family.[40] "[G]iven its concern for perpetuating the values associated with conventional marriage and the family as the basic unit of society, the state has a substantial interest in viewing homosexuality as errant sexual behavior which threatens the social fabric, and in

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[37] Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator,* 42 U. Pitt. L. Rev. 225, 232-48 (1981).

[38] Rivera, *supra* note 35, at 1102-23 (discussing cases).

[39] Eskridge, *Dishonorable Passions*, *supra* note 19, at 76-108; *cf.* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 284-85 (1994) (anti-gay prejudice is centrally a revulsion based on gender role).

[40] Eskridge, *Dishonorable Passions*, *supra* note 19, at 76-84; Faderman, *supra* note 35, at 130-50; Johnson, *supra* note 35, at 55-64.

endeavoring to protect minors from being influenced by those who advocate homosexual lifestyles." *Roberts v. Roberts,* 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985); *accord Roe v. Roe,* 324 S.E.2d 691, 694 (Va. 1985); *In re Jane B.*, 380 N.Y.S.2d 848, 860 (N.Y. Sup. Ct. 1976).

Thus, the Navy's educational materials for recruits warned: "By [homosexual] conduct a Navy woman may ruin her chances for a happy marriage" and poison relationships with her family.[41] "Butch" lesbians were susceptible to violence as well as persecution by the authorities because of the challenge they posed to companionate marriage and traditional gender roles.[42] Likewise, official violence against "fairies" (effeminate gay men) was severe because such men flouted traditional gender roles.[43]

Official public discourse was obsessed with the notion that homosexuality was the antithesis of monogamous marriage devoted to the well-being of

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[41] *Chaplain's Presentation (WAVE Recruits)* (1952)*, reprinted in* Allan Bérubé & John D'Emilio, *The Military and Lesbians During the McCarthy Years,* 9 Signs 759, 764-75 (1984) (reproducing the Chaplain's Presentation and other anti-homosexual "indoctrination and education" materials).

[42] *E.g.*, Boyd, *supra* note 36, at 153-56 (cross-dressed lesbians arrested for "homosexuality"); Leslie Feinberg, *Stone Butch Blues* (1993) (police brutality against butch lesbians).

[43] For an early example of official focus on effeminate male "fairies," see Lawrence R. Murphy, *Perverts by Official Order: The Campaign Against Homosexuals by the United States Navy* (1988).

children. Instead, "homosexuals have an insatiable appetite for sexual activities and find special gratification in the recruitment to their ranks of youth." Fla. Legislative Investigation Comm., *Homosexuality and Citizenship in Florida* 10 (1964).[44] "[H]omosexuality is unique among the sexual assaults . . . in that the person affected by the practicing homosexual is first a victim, then an accomplice, and finally himself a perpetrator of homosexual acts." *Id.*

Congress agreed: "[P]erverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert." Subcomm. on Investigations of the Senate Comm. on Expenditures in the Executive Dep'ts, Interim Report, *Employment of Homosexuals and Other Sex Perverts in Government,* S. Doc. No. 241, 81st Cong., 2d Sess., at 4 (1950).[45] Federal officials maintained that "homosexuals" were not only anti-family, but also anti-American. According to the Senate minority leader, "You can't hardly

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[44] *See* James T. Sears, *Lonely Hunters: An Oral History of Lesbian and Gay Southern Life, 1948-1968*, at 48-108 (1997) (account of the Florida Legislative Investigation Committee's activities and reports).

[45] *See* Johnson, *supra* note 35, at 101-18 (account of the "Hoey Committee" deliberations).

separate homosexuals from subversives," including Communists.[46]

In short, the classic stereotype about "homosexuals" – the notion that inspired the caste regime – is that they are "promiscuous recruiters and corrupters of children, who cannot have committed relationships."[47] In a draft of his concurring opinion in *Bowers,* Justice Powell wrote: "[Homosexual] Sodomy is the antithesis of family." Powell Papers, Washington & Lee University School of Law, Case Files (*Bowers*).

As we know today, the anti-homosexual caste regime was grounded in grossly inaccurate stereotypes. For example, gay men are no more likely than straight men to molest children, and lesbians are much less likely to do so.[48] And lesbians and gay men form committed relationships and raise children. Indeed, more than 100,000 lesbian and gay couples are now legally married in this country; 31 percent of them are raising children within their marital households.[49]

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[46] *Id*. at 30-38 (quotation in text and others linking homosexuality and Communism).

[47] Angela Simon, *The Relationship Between Stereotypes and Attitudes Toward Lesbians and Gays*, in *Stigma and Sexual Orientation* 62-63 (Gregory Herek ed., 1998).

[48] *E.g.*, Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?,* 94 Pediatrics 41, 42-43 (1994) (no).

[49] Gary J. Gates & Abigail M. Cooke, Williams Inst., *United States Census Snapshot: 2010* (2011), *available at* http://williams

(Continued on following page)

B. Proposition 8 Bears the Signs of Caste Legislation: Legal Segregation of a Minority Based on Traditional Stereotypes

Between 1972 and 2005, 71 percent of anti-gay ballot initiatives prevailed, an unprecedented rate of success.[50] The success is explained by the proponents' appeals to the stereotypes that undergird the anti-homosexual caste regime. For example, Anita Bryant's 1977 "Save Our Children" campaign overturned a Dade County anti-discrimination law based upon the argument that the homosexual "life-style" is "perverse and dangerous" to children and to the sanctity of the family.[51]

In 1992, Colorado voters adopted Amendment 2 to override several legal directives protecting gay people against discrimination. In their official ballot materials, proponents of Amendment 2 depicted "homosexuals" as promiscuous and predatory, seeking to invade decent straight people's schools and churches, take away their jobs, and recruit their children for

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institute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf (last visited Feb. 21, 2013).

[50] Donald P. Haider-Markel et al., *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights,* 60 Pol. Res. Q. 304, 312 (2007); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote,* 41 Am. J. Pol. Sci. 245, 251-53 (1997) (similar success rate for 1959-93).

[51] Anita Bryant, *The Anita Bryant Story* 131 (1977); *see* James T. Sears, *Rebels, Rubyfruits, and Rhinestones: Queering Space in the Stonewall South* 226-45 (2001) (describing the campaign).

homosexuality.[52] Like Bryant, the Amendment 2 proponents understood their campaign as protecting the family, but this Court in *Romer* found Amendment 2's breadth evidence of "animus" rather than family values and struck it down as caste legislation.

Like the proponents of Amendment 2, the proponents of Proposition 8 characterized their initiative as "God's way of bringing believers closer together" to "fight" for a legal regime where lesbian and gay unions are marked as inferior, the message they derived from the Bible.[53] The official ballot materials distributed to the voters announced the proponents' three arguments for Proposition 8:

> [1] "*It restores the definition of marriage*," to exclude lesbian and gay couples;
>
> [2] "*It overturns the outrageous decision of four activist Supreme Court judges,*" who "ignored the will of the people"; and
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> [3] "*It protects our children* from being taught in public schools that 'same-sex marriage' is the same as traditional marriage."[54]

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[52] The Amendment 2 ballot materials are reprinted in Robert F. Nagel, *Playing Defense*, 6 Wm. & Mary Bill Rts. J. 167, 191-99 (1997).

[53] Karla Dial, *Golden State Warriors*, Focus on the Family: Citizen, Sept. 2008, at 18, 23 (the origins of Proposition 8).

[54] California Voter Information Guide (Aug. 11, 2008) (listing arguments in favor of Proposition 8 and signed by Proposition 8's sponsors) (J.A. Exh. 56).

The Yes-on-8 campaign emphasized these arguments, especially the third. Many of the materials explicitly invoked anti-gay stereotypes identical to those of Save Our Children.[55] "[T]here were limits to the degree of tolerance that Californians would afford the gay community," boasted the Yes-on-8 publicists, and the protect-our-children theme was the time-tested means for mobilizing people's anti-gay impulses, as the publicists confirmed through focus groups.[56]

In sum, the record shows that backers of Proposition 8 sought to create a separate-and-unequal regime for lesbian and gay families in service of the stereotype that dominated the anti-homosexual caste regime of 1935-61, namely, the canard that gay people are anti-family and cannot form "enduring" personal "bond[s]." *Lawrence,* 539 U.S. at 567. It is difficult to conceive of a more striking example of caste legislation.

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[55] *E.g.*, Tam Hak Sing, *The Harm to Children from Same-Sex Marriage* (translation from Chinese) (J.A. Exh. 185-87).

[56] Frank Schubert & Jeff Flint, *Passing Prop 8: Smart Timing and Messaging Convinced California Voters to Support Traditional Marriage*, Politics, Feb. 2009, at 45 (J.A. Exh. 109).

C. Petitioners' Responsible-Procreation-and-Childrearing Justification for Proposition 8 Rests upon the Stereotypes Undergirding the Anti-Homosexual Caste System and Lacks a Rational Connection to California's Current Family Law

"When a law exhibits such a desire to harm a politically unpopular group, [this Court has] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Lawrence,* 539 U.S. at 580 (O'Connor, J., concurring in the judgment); *accord Romer,* 517 U.S. at 633. Surprisingly, opponents of marriage equality are still searching for a justification for this discrimination. In the last 20 years, one post-hoc justification after another has been advanced, then replaced with a new one when it was discredited or empirically falsified.[57]

This case is a microcosm of the shifts in justification for marriage discrimination. In the ballot materials, the supporters of Proposition 8 denigrated lesbian and gay families as inferior and urged voters to reaffirm the traditional stereotype of gays as not marriage-worthy. *See Perry v. Schwarzenegger,* 704 F. Supp. 2d 921, 930 (N.D. Cal. 2010). At trial in this case, the supporters largely abandoned arguments openly denigrating these families but argued that banning gay marriage was needed to defend marriage

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[57] William N. Eskridge Jr. & Darren R. Spedale, *Gay Marriage: For Better or for Worse?: What We've Learned from the Evidence* 20-41 (2006).

against further decline, *id.* at 931, an argument that has been refuted by the experience of jurisdictions that have actually recognized same-sex marriages.[58] On appeal, they say that the discrimination can best be justified by "society's vital interest in responsible procreation and childrearing." Pet. Br. 31.[59]

Petitioners' newest post-hoc justification fails the rational basis analysis this Court performed in *Romer*. The broad exclusion is "discontinuous with the reasons offered for it." 517 U.S. at 632. Indeed, the rationale advanced by Petitioners is weaker than the rationales advanced in *Romer* and has already been rejected by this Court in the context of other marriage discriminations. *Turner,* 482 U.S. at 97-99.

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[58] Laura Langbein & Mark A. Yost, Jr., *Same-Sex Marriage and Negative Externalities,* 90 Soc. Sci. Q. 292 (2009). Petitioners' only trial witness relevant to this issue subsequently endorsed marriage equality, reasoning that the state must stop "denigrating" lesbian and gay unions as second-class. David Blankenhorn, *How My View on Gay Marriage Changed,* N.Y. Times, June 22, 2012.

[59] Petitioners also say the discrimination "serves California's interest in proceeding with caution before fundamentally redefining a bedrock social institution." Pet. Br. 48. This Court has never accepted a delay-while-we-deliberate-further justification for discriminating against a minority group. *E.g.*, *Hunter v. Erickson*, 393 U.S. 385, 392 (1969). In *Romer*, the state characterized Amendment 2 as a measured response to the "deeply divisive issue of homosexuality" and urged the Court to allow the state leeway for the issue to be handled slowly. Brief for Petitioners at 47, *Romer v. Evans*, 517 U.S. 620 (1996), 1995 WL 17008429. The Court rejected that argument out of hand.

To begin with, state promotion of "responsible procreation and childrearing" ought to support marriage equality rather than defeat it. According to the 2010 Census, more than 100,000 children are being raised by same-sex partners in California; thousands of those children were conceived by partners who were in a lesbian or gay relationship.[60] California state policy offers these families the same legal protections as marital families, apart from the institutional separation created by Proposition 8. *Strauss v. Horton*, 207 P.3d 48, 75, 102 (Cal. 2009). Because California's family law focuses on the interests of children, the state's interest in responsible childrearing is the same for *all* couples, whether gay or straight. If Petitioners are right about the commitment values inculcated by marriage, they ought to be inviting lesbian and gay couples into marriage, rather than seeking to bar the way.

Petitioners also make a narrower argument, that the overriding purpose of "traditional" marriage is to "channel" straight couples, who are prone to accidental pregnancies, "into stable, enduring relationships." Pet. Br. 36. Petitioners may be right about "traditional" Blackstonian marriage – but they are wrong about California's family law today. Unlike the

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[60] Gates & Cooke, *supra* note 49. *See also* Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?,* 72 J. Marriage & Family 3, 5-17 (2010) (surveying empirical studies and concluding that lesbian and gay couples are doing a capable job of rearing children).

Blackstonian regime, California does not criminalize sex outside marriage between consenting adults, and adoption is a common path to parenthood. Cohabiting partners enjoy the protections of law. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). Divorce is available without a showing of fault, another critical difference. In short, California family law supports responsible childrearing but has little to say about "potentially procreative" sexual activities between consenting adults. Pet. Br. 36.

Even if California preserved the Blackstonian regime that Petitioners invoke, there is no plausible link between a "responsible procreation" policy and the discrimination at issue in this case. That is, the *exclusion* of committed lesbian and gay couples from the status of civil marriage does not plausibly steer *any* straight couples toward "responsible procreation and childrearing."[61] Even Petitioners' counsel admits the argument is mystifying. *See Perry*, 704 F. Supp. 2d at 931 (district court asked Petitioners' counsel "how permitting same-sex marriage impairs or adversely affects" the state's interest in marital procreation; counsel replied, "I don't know. I don't know").

Even worse than the discrimination invalidated in *Romer*, the exclusion here not only harms rather than advances the pro-family interests invoked by the

[61] There are many state policies that might steer straight couples in that direction, such as tax exemptions or subsidies for "responsible" married parents.

Petitioners – but is blatant scapegoating. Rather than impose burdens on "irresponsible" straight couples, such as penalties for extramarital procreation, Petitioners claim that they are advancing this state policy by excluding lesbian and gay couples from civil marriage. Such an exclusion does nothing to advance a neutral public policy and has as its only effect the reinstatement of the last vestiges of the anti-homosexual caste system in California.

CONCLUSION

If this Court reaches the merits, it should affirm the judgment below. The original meaning of the Fourteenth Amendment and this Court's precedents do not tolerate Proposition 8's discrimination, which is tightly linked to the anti-gay caste regime and is not plausibly supported by a neutral public interest.

We take no position on how broad this Court's reasoning ought to be. Like the Ninth Circuit, this Court might rule narrowly, focusing on the constitutionality of a retrogressive anti-marriage equality initiative (taking back the right to marry that the state had guaranteed as a fundamental right for same-sex couples) *or* on the constitutionality of a purely separate-but-equal regime of marriage for straights and domestic partnership for gays. Like the district court, this Court might rule more broadly, emphasizing the fundamental right to marry that Proposition 8 takes away, or the fishy classification

that is the basis of its exclusion. Whatever the precise reasoning, this Court ought to make clear that Proposition 8 violates the Court's teachings in *Romer*.

Respectfully submitted,

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