April 9, 2009

'Activist Courts,' Misleading Wedge Politics and the Tragedy of Proposition 8

M. Katherine B. Darmer
“Activist” Courts, Misleading Wedge Politics and the Tragedy of Proposition 8

By M. Katherine Baird Darmer*

Twenty-five years ago, the barometer of human rights in the United States were black people. That is no longer true. The barometer for judging the character of people in regard to human rights is now those who consider themselves gay, homosexual, lesbian.

Brother Outsider (documentary film) (quoting Bayard Rustin in 1986).

On November 4, 2008, the voters of California gained the dubious distinction of being the first to strip vested marriage rights away from a protected minority group. For several months prior to the passage of Proposition 8, gays and lesbians enjoyed the right to marry alongside their straight counterparts. Since the election, they are relegated to seeking the secondary status of “domestic partnerships” for their intimate relationships.

---

*Professor of Law, Chapman University and founding board member, Orange County Equality Coalition. A.B., Princeton University; J.D., Columbia University. This article is loosely based on talks given at Proposition 8 Symposia held at Chapman University School of Law on October 24, 2008 and February 27, 2009 and also draws on an op-ed piece and on an amicus brief recently filed by myself and other attorneys on behalf of individual Chapman organizations, faculty, staff and students, and the Orange County Equality Coalition, et al. I thank the co-signers of the op-ed piece and all amici and attorneys who worked on the brief. I particularly thank Tiffany Chang for outstanding research assistance in all projects related to Proposition 8.

1 Thus far, in other states, when majorities have passed laws defining marriage as being “between a man and a woman,” voters did so before same-sex couples were actually allowed to marry. In Florida and Arizona, for example, where voters passed constitutional amendments similar to California’s, the voters did so as a “pre-emptive” strike: their state courts had not yet recognized that same-sex couples had a right to marry.

2 See Declaration (hereinafter “Decl.”) of John Dumas (Jan. 12, 2009) at ¶ 5 (Appendix of Exhibits in Support of Brief of Amici Curiae Individual Chapman Univ. Organizations, et al. (filed Jan. 15, 2009), Strauss v. Horton (Cal. 2008) (No. S168047) (hereinafter “Chapman Amici Appendix”), Tab 5) (noting that registry of Domestic Partnership for himself and then-partner “lacked any emotional resonance and we did not inform family or friends that we had registered. Moreover, the status of Domestic Partnerships in regard to employee benefits was always murky, in one case requiring us to obtain the assistance of a lawyer to clarity a benefits issue”); cf. id. at ¶¶ 7-8 (contrasting significance and ceremonial importance of legal
For gays and lesbians, it is acutely painful to have a right “stripped away”; it is different than never having a right in the first place. Linda May, a 59 year old lesbian who has seen GLBTs struggle for rights over the years, explained that Proposition 8 “stung” more than other struggles for that reason. “Always before we were struggling to gain something, so no matter what happened, we would be no worse off than when we started,” she explained. “With Prop 8’s passage, we experienced a setback.”

May also fears that other reversals are possible: “The next question is where will that reversal stop?” This symposium article considers that question and suggests that without court intervention, the GLBT community remain peculiarly vulnerable to the tyranny of the majority.

It is an unfortunate feature of democracies that the majority can pass laws that disfavor minority groups. This country, however, was not built on the premise that majority will should always control; on the contrary, the American legal system was fashioned specifically to protect against the tyranny of the majority. Throughout this country’s history, minority groups have thus resorted to the courts to secure rights guaranteed by our federal and state constitutions. Those documents guarantee to all citizens both due process and equal protection, enduring but also flexible concepts that over time have moved society closer to realizing the guarantee in our Declaration of Independence that all people are created equal.

---

married); see also Decl. of Thomas J. Peterson at ¶ 4, Chapman Amici Appendix, Tab 11 (“Referring to ourselves as domestic partners and calling our relationship a domestic partnership or civil union does not begin to express the seriousness and degree of commitment that is evident in our relationship. Although our relationship has been embedded with all of the rich characteristics of marriage, it continued to be labeled as something less than and unequal until the California Supreme Court ruling in May 2008.”); see also id. at ¶ 8 (“To insist that a different legal status be substituted for my marriage is to deny something that is so basic to my existence and so integral to who I am that it would detract from me as a human being and would discard something that is a core element of my life.”).

Moreover, even for those who legally married prior to November 4, 2008, their marriages are currently in legal limbo. The supporters of Prop 8 argue that even existing marriages should be invalidated. See Interveners’ Opp’n Brief (filed Dec. 19, 2008), Struss v. Horton (Cal. 2008) (No. S168047) at 35-41.

3Decl of Linda May (Jan. 13, 2009) at ¶ 18 (Chapman Amici Appendix, Tab 10).

4 Id.

5 See William N. Eskridge, Jr., DISHONORABLE PASSIONS 361 (2008) (acknowledging that, in 1868, no one would have thought the Fourteenth Amendment banned sodomy laws and also noting that by 2003, “the constitutional text had been enriched—or expanded, depending upon your perspective—by Supreme Court precedents applying the Fourteenth Amendment guarantees of fair notice, liberty and equal protection to state laws or polices affecting women and people of color”).
This country’s shameful history of legally sanctioned segregation, “separate but [supposedly] equal” education, and bans on interracial marriage were products of democratic institutions not yet ready to fully integrate racial minorities into society. The courts played a crucial role in both recognizing and safeguarding rights for racial minorities, just as today they are being called upon to protect the rights of GLBTs. As the opening quote from Bayard Rustin makes clear, GLBTs occupy the place in society that racial minorities once did: treated as “the other” and excluded from full participation in society. In the face of committed same-sex couples, Proposition 8 deliberately stripped away their right to marry by providing that “only marriage between a man and a woman is valid and recognized in California.” Those fourteen words devastate a core principle of the Fourteenth Amendment to the United States Constitution and the parallel provisions for equal protection contained in Article 7 of the California Constitution.

In explicitly endorsing the role of courts in our democratic system, this paper argues that the California Supreme Court’s May 15, 2008 decision in favor of marriage equality was correct, argues that the YES on 8 campaign presented false and misleading arguments that exploited negative views towards an unpopular minority group and urges court intervention to preserve equality for all.

Part I of this article draws parallels between the issue of marriage between same-sex couples and interracial marriage, in the hopes that the courts’ decisions in Perez v. Sharp and Loving v. Virginia can help contextualize the current debate. Part II makes observations about misleading tactics of the Yes on 8 campaign, cautions that Proposition 8 could be a first step in a sustained effort to marginalize GLBTs and strip them of additional rights, and explains the particular vulnerability of GLBTs in our legal system. Because of space constraints, this piece necessarily skims only the surface of what I consider to be one of the most important civil rights issues of our time. This is just a preliminary step in a longer-term project on Proposition 8 and the future of marriage equality.

---

6 See In re Marriage Cases, 183 P.2d 384 (Cal. 2008).
7 198 P.2d 17 (Cal. 1948).
8 388 U.S. 1 (1967).
Part I:

The Historic Ban on Interracial Marriage and the Current Fight for Marriage Equality

While some would try to deny them, there are obvious parallels between today’s fight for marriage equality and the historic fight for marriage rights by interracial couples.\(^9\) Opponents in both instances have relied on notions of tradition, including religious tradition, to try to keep people apart.

In the landmark case, *Loving v. Virginia*,\(^{10}\) the United States Supreme Court invalidated interracial marriage bans based on federal equal protection principles. While modernly the case is entirely uncontroversial and viewed as somewhat of a historical artifact, it is instructive to review the religious rhetoric of the state trial court in clinging to anti-miscegenation laws:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.\(^{11}\)

While it may be easy to dismiss Virginia judges of the day as parochial, the United Supreme Court itself was slow to invalidate anti-miscegenation laws, even in the wake of *Brown v. Board of Education*.\(^{12}\) As one scholar hast noted, the Court “shied away from confronting the issue” until 1967. Thus, “for ten years following the Court’s explicit recognition that racial segregation in education was a form of racial oppression, the Court declined to announce that state statutes punishing interracial cohabitation likewise violated the Equal Protection Clause.”\(^{13}\) Professor William Eskridge has noted that the Court “rightly feared that striking down such a law risked a firestorm of protest.”\(^{14}\)

Fortunately, the California Supreme Court was more forward-thinking, striking down this state’s interracial marriage ban 19 years earlier in *Perez v.*

---


\(^{10}\) 388 U.S. 1 (1967).

\(^{11}\) *Id.* at 3 (quoting trial judge).


\(^{14}\) Eskridge, *supra* note ____ , at 367.
Standing on its history with regard to protecting minority rights, in 2008 the California Supreme Court became only the second in the nation to recognize the fundamental right to marry of same-sex couples.\textsuperscript{16} It also made an important finding that laws that discriminate based upon sexual orientation are subject to “strict scrutiny.” Directly at issue in the \textit{Marriage Cases} was the constitutionality of Proposition 22, a precursor to Proposition 8. In 2000, using their initiative power, Californians voted by a sixty percent majority to pass that proposition, which entered into the Family Code statutory language that “only marriage between a man and a woman is valid and recognized in California.”

Accordingly, the California Supreme Court reviewed the legality of Proposition 22, ultimately deciding that it was a violation of equal protection and the fundamental right to marry shared by all California citizens. Specifically, the court found that marriage is a fundamental right,\textsuperscript{17} that there is a history of discrimination based upon sexual orientation and that sexual discrimination is a “suspect classification” for equal protection purposes\textsuperscript{18} and that there was no “compelling state interest” that justified the law restricting the right to marry to opposite-sex couples.\textsuperscript{19}

For those who insist that courts should apply only a strict “original meaning” of constitutions, there is room to criticize courts willing to extend protections to racial minorities, women, and members of the GLBT community. The equality guarantee contained in the Declaration of Independence, for example, refers only explicitly to “men.” There were no women, racial minorities or avowed GLBTs among our Founding Fathers, and given the prejudices of the times, there is little wonder that those groups were not explicitly mentioned in the United States Constitution.\textsuperscript{20} While it may have been “self-evident” to straight white men that they were equals of other straight white men in 1776, it was evident only to later \textit{courts} that particular rights needed to be extended to racial minorities and women. And had we left

\textsuperscript{15} 198 P.2d 17 (Cal. 1948).
\textsuperscript{16} See \textit{In re Marriage Cases}, 183 P.2d 384 (Cal. 2008).
\textsuperscript{17} See \textit{id.} at 399, 419-20.
\textsuperscript{18} See \textit{id.} at 442-43.
\textsuperscript{19} See \textit{id.} at 401-02, 446-52.
\textsuperscript{20} Cf. Eskridge, \textit{supra} note ___, at 363 (noting that most framers of the Fourteenth Amendment expressed “open disgust” at interracial sexuality and would not have supported striking down anti-miscegenation laws).
it simply to state and federal legislatures to decide to grant those rights, further steps toward achieving equality would have been a long time coming.

Most people today celebrate United States Supreme Court decisions such as Brown v. Board of Education and Loving v. Virginia. But those were surely decisions of “activist courts” acting in ways explicitly contrary to the majoritarian will of the people. The California Supreme Court’s decision in the Marriage Cases rejected, on state constitutional grounds, the California citizens’ decision to define marriage as only between a man and a woman via Proposition 22. In that regard, the decision was “counter-majoritarian.” The opinion, however, thoughtfully and thoroughly analyzed the concepts of liberty and equal protection contained in our state constitution – a constitution that is more protective of individual liberties than is the federal constitution. The decision was not wrongly “activist,” but an appropriate exercise of judicial interpretation of essential constitutional guarantees.

While analytically sound, the California Supreme Court’s holding with regard to equal protection was the first of its kind. The Massachusetts Supreme Court decision favoring marriage equality found that marriage restrictions could not survive even “rational basis review,” leaving it unnecessary for the court to determine whether sexual orientation was a protected class for equal protection purposes. A third court, Connecticut, which decided the issue most recently, took a middle course and found that gays and lesbians are entitled to “intermediate scrutiny.”

Part II

The Yes on 8 Campaign and the Vulnerability of GLBTs

As has been extensively discussed, the Proposition 8 ballot initiative was the most expensive in this nation’s history. Together, the two sides spent over $80 million. The Yes on 8 campaign was well-funded and well-organized, with its ubiquitous yellow signs (depicting a traditional,

\[ \text{Cf. id. (noting that even jurists such as Scalia and Bork have not criticized or have defended Loving and Brown).} \]

\[ \text{This point has been made by many others. See, e.g., Erwin Chemerinsky, Same Sex Marriage: An Essential Step Toward Equality, 34 Sw. U. L. Rev. 579, 594 (2005) (noting that courts recognizing the right so same-sex couples to marry are no more activist than was the Court in Loving).} \]

\[ \text{See Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).} \]

\[ \text{Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 423 (Conn. 2008).} \]

\[ \text{In the interest of full disclosure, I should perhaps note that I worked on the No on 8 campaign by volunteering to do electioneering on election day.} \]
heteronormative family) littering the highways and suburban neighborhoods. Money flooded in from out of state. According to the New York Times, “conservative religious leaders from across the country are pouring time, talent and millions of dollars in support of Proposition 8,” which one lobbyist called “more important than the presidential election.” Another prominent evangelical referred to the vote in California as “Armageddon.” As discussed above, not so long ago, opponents of interracial marriage similarly deployed the apocalyptic language of religion in trying to restrict the rights of minorities.

Yes on 8 ran a tightly organized, albeit misleading campaign. Its messaging was consistent and sought to take the moral high ground by appropriating values of free speech and protection of children. While there were many features of the campaign that were offensive, I will focus here on one particularly misleading television advertisement and two other misleading campaign themes.

One of the campaign themes, effective though understated, played on the fear of “homosexual as predator.” One example was a multi-million dollar advertisement featuring children attending a lesbian wedding. One little girl looked wide-eyed and almost frightened, as if she had been forced to attend. The ad played very strongly into the notion that gays and lesbians will try to “recruit” children against their will to a “lifestyle” of homosexuality. The children, however, attended the wedding with the express permission of their parents. The YES on 8 campaign manipulated footage of the event and used the footage without the permission of the parents, who sought to have the ads removed from the air. The mother of the little girl most prominently featured noted that the field trip to share their teacher’s wedding was “about sharing a special moment with a teacher these kids love. . . . To turn around

---

27 Id. (quoting Charles W. Colson, the founder of Prison Fellowship Ministries).
28 See Eskridge, supra note ___, at 5 (noting concern by some that homosexuals will “lure naïve and innocent children into hedonistic lifestyles and away from traditional marriage”); see also William N. Eskridge, Jr. GAYLAW 214 (1999) (detailing and debunking argument by academic Lynne Wardle that gay parents are more likely to molest their children).
30 See Eskridge, supra note ___, at 5.
31 The wedding was the children’s teacher’s.
32 Press Release, supra note ___.

8
and distort images of our children is outrageous.”\(^{33}\) Despite the parents’ strong objections, however, *Yes on 8* continued to run the misleading ads.

*Yes on 8* also tried to cloak itself in First Amendment values. Some of the campaign’s posted signs suggested that *Yes on 8* was about “free speech” and related rights. The campaign ominously predicted that churches would be sued if they refused to perform marriages between same-sex couples,\(^{34}\) despite the fact that any such lawsuits would plainly fail under the Free Exercise Clause of the First Amendment. Just as Catholic churches continue to refuse to marry even divorced persons, the Church of Jesus Christ of Latter Day Saints, the Catholic Church and other “conservative” churches would retain the right to limit church-sanctioned marriage based upon their religious tenants. No state court decision permitting marriage can trample on core First Amendment rights to freedom of religion, which are guaranteed by the United States Constitution. The decision in the *Marriage Cases* and Proposition 8 dealt exclusively with the right to civil marriage, but by importing the specter of lawsuits against churches into the debate, the *Yes on 8* campaign acted to mislead voters.

The campaign also invoked the desirability of traditional, heteronormative\(^{35}\) families. Among other things, the campaign argued that children have the right to “a mommy and a daddy.”\(^{36}\) This tactic was

\(^{33}\) *Id.* Because the advertisement was created by manipulating video footage first posted on the web site of the *San Francisco Chronicle*, the parents wrote a letter urging the *Chronicle* to issue a “cease and desist” letter to the *Yes on 8* campaign or to pursue legal action. As the mother of the featured girl noted, “‘Prop 8 claims to be about families, but we’re here to say you can’t be for families and take these children’s innocent images and flash them not only on television statewide, but on your fund raising page. This must stop right now.’” *Id.*

\(^{34}\) See Goodstein, *supra* note ___.


\(^{36}\) Indeed, many may recall the large cardboard cut-out of a cute baby, prominently displayed at the *Yes on 8* table in the law school lobby, making just that point. See Decl. of Samantha Kohler at ¶¶ 5-6, Chapman Amici Appendix, Tab 8 (“As the Prop 8 campaign wore on, bumper stickers and sign for “YES on 8” were slowly enraging me. . . . The more I saw ‘protect the kids’ I couldn’t help but think, ‘well yes, I’m a kid so let my moms get married.’ I was slowly getting more and more infuriated when one day at school, I broke. I walked out of the law school library one afternoon and saw a ‘YES on 8’ table in the lobby with a poster that caught my attention. There was a cardboard cut-out of a baby saying ‘I have a right to have a mommy and a daddy.’ Being a part of a family headed by two moms, I felt wounded to my core. I found the poster discriminatory, insensitive, and upsetting. I couldn’t imagine how it would feel to be confronted with such a table of people attacking your rights if you were gay.”). For a thorough discussion of social science literature regarding gay parenting, see
particularly insidious, however, because it was either deliberately misleading or a portent of future goals of supporters of the *Yes on 8* campaign. Gays and lesbians currently enjoy the right to adopt children in California, and by its terms Proposition 8 had nothing whatever to do with those adoption rights. Thus, the focus on the baby’s right to a “mommy and a daddy” may have just been an attempt to obfuscate the issues. Or, this advertising ploy may have been more sinister. Proposition 8 may have been a first step towards an all-out war on the rights of GLBTs in the State of California, with the removal of adoption rights seen as the next logical step. Despite attempts to run a “kinder, gentler” rhetorical campaign against GLBTs than has characterized other campaigns, many leading Proposition 8 supporters have a historic anti-gay agenda that goes far beyond simply preserving the “traditional” definition of marriage. On the same day that California voters passed Proposition 8, Arkansas voters passed Act 1, a measure preventing same-sex couples from adopting children.

By explicitly limiting the definition of marriage in the state constitution itself, Proposition 8 purported to nullify the court’s decision that the California constitution requires that same-sex couples have an equal right to marriage. By its terms, it creates an “exception” to the state’s equal protection clause.


37 *See* Decl. of Jeffrey Van Hoosear at ¶¶ 5-7, Chapman Amici Appendix, Tab 12 (describing gay couple’s adoption of a son and a daughter); *see also* Redding, *supra* note ____ at 128 (noting that “[a]s many as nine million children living in the United States have a gay or lesbian parent, and twenty-five percent of all lesbigay couples are raising children”) (footnote omitted).

38 Professor Williams Eskridge of Yale, a long-time proponent of marriage equality, used this term to describe the campaign in remarks at a panel at the Association of American Law Schools annual meeting on the morning of January 9, 2009.

39 For example, Andrew Pugno, lead counsel (with Ken Starr) to Interveners in support of Proposition 8, challenged even California’s domestic partnership laws, along with the Alliance Defense Fund (“ADF”), which on its website touts its efforts to fight against “those engaging in homosexual behavior to have preferences to adopt children and be foster parents.” <http://www.alliancedefensefund.org/issues/traditionalfamily/Default.aspx>. Amicus American Center for Law and Justice has fought not only domestic partnership benefits, but even against the rights of gays to engage in adult consensual sex without fear of criminal prosecution. *See* Lawrence v. Texas, 538 U.S. 918 (2003). Andrew Pugno’s attempt to prevent gays and lesbians from obtaining the benefits of domestic partnerships in *Knight v. Superior Court*, 128 Cal.App.4th 14 (2005), can be found at 2005 WL 2396342 (Cal. June 17, 2005). The American Center for Law and Justice’s brief in *Lawrence v. Texas*, seeking to retain criminal penalties for consensual homosexual adult sex can be found at 2003 WL 367562 (Appellate Brief) (U.S. February 18, 2003).

40 *See* CAL. CONST. art. I, § 7.5 (codifying Proposition 8).
Other important features of the California Supreme Court opinion would remain controlling law, at least for now. In the course of its opinion, the court held that sexual orientation is a protected, “suspect” classification and that laws that discriminate on that basis are subject to “strict scrutiny.” Because Proposition 8 only relates to the definition of marriage, other important rights that have been secured for the GLBT community over the years in this state would continue, unless voters in future elections eliminated them through additional “amendments.” The frightening thing about Proposition 8 is that, if it is allowed to stand, “gay and lesbian Californians would enjoy their remaining ‘rights’ subject to the whim of a simple majority of the voters, rather than as a matter of secure guarantee under the California Constitution.”

The California constitution is unusual in that it can be amended by a simple majority vote via the initiative process. The federal constitution, by contrast, can be amended only by a 2/3 vote of both houses of Congress and ratification by three quarters of the states.

Despite the easy nature of constitutional amendment in California, fundamental changes to the state constitution may only be made by the more deliberative “revision” process, which requires either a constitutional convention followed by popular ratification or legislative submission to the voters. Petitioners and scores of amici in the current litigation seeking to invalidate Proposition 8 argue, among other things, that the proposition represents a “revision” in the guise of an amendment because it so fundamentally departs from equal protection norms. The proponents of Proposition 8, however, argue explicitly that equal protection rights are “not exempt” from the initiative amendment power. Should that argument be accepted, GLBTs will have absolutely no protection from the majority in California, which in the future may seek to deny them adoption rights, employment rights, housing rights or other fundamental rights.

42 CAL. CONST., art. XVIII, § 3.
43 Id. at §§ 1, 2; see also Raven v. Deukmejian, 52 Cal.3d 336, 350 (1990). In Raven, the California Supreme Court invalidated an attempted “amendment” that would have made fundamental changes to criminal procedure protections in California.
45 Preliminary Opposition Brief; see also Interveners’ Brief, Strauss v. Horton (Cal. 2008) (No. S168047).
Although groups now protected by the federal constitution (such as racial minorities) cannot have their rights stripped away by the majority of voters in California or in any other state, GLBTs are peculiarly vulnerable because they have not yet been recognized as a protected class by the federal courts. Moreover, there are currently no federal laws banning discrimination against GLBTs; protections have been accorded instead only by individual states. It is a positive feature of federalism that states like California can provide protections beyond the “floor” provided by the United States Constitution in terms of civil liberties. Without the willingness of courts to act to safeguard those rights against majority encroachment, however, there is no firm foundation for them.46

CONCLUSION

Historically, California has been at the forefront in protecting minority rights. Even before Brown v. Board of Education, a California district courts found “separate but equal” education to be inconsistent with the constitutional rights of Mexican-American students.47 In Perez v. Sharp, the California Supreme Court banned the prohibition on interracial marriage 19 years before the United State Supreme Court rejected anti-miscegenation laws in Loving.

The California Supreme Court’s recent decision extending rights to same-sex couples is in line with a noble history that is relatively progressive compared to some sister states and even the federal government. The passage of Proposition 8 was an unfortunate departure from that history, and may condemn California to more years of shameful discrimination against the GLBT community with respect to the important right to marry the person of one’s choice. More frightening still, it may be a precursor to the systematic dismantling of other rights currently enjoyed by our GLBT neighbors.

Chapman Law student Tiffany Chang, who moved from New York to California in 2008 in part to enjoy equal marriage rights, described her reaction to Proposition 8’s passage in this way:

On November 4th, 2008, Lindsey and I walked to our polling station at 6:15 a.m. and waited to vote “yes” for the first African-American President and “no” on stripping another

46 See Petitioners’ Corrected Reply Brief, supra, at 26 (“the rights of California minorities to equality under the law, particularly with respect to fundamental rights, rest on the bedrock of our constitution, not on the shifting sands of the ballot box”).

47 Mendez v. Westminster Sch. Dist., 64 F. Supp. 544 (C. D. Cal. 1946), aff’d, 744 F.2d 744 (9th Cir. 1947).
minority group of [its] equal rights--to vote “no” on Proposition 8. . . . The next morning, we awoke to the most shocking and reprehensible news that Proposition 8 had passed.

I felt like someone punched me in the stomach and knocked the wind right out of me. . . . For a week or so after the election, both Lindsey and I found ourselves unable to look at people, especially strangers, in the eye. I would literally look down at the ground if I was passing someone on the sidewalk. Part of it was anger, but the other part was feeling ashamed and embarrassed. I felt like people might be thinking, “see, you were wrong, you are less than me,” or maybe they would actually say it to my face.

Even though our legal marriage is supposedly intact, I am now worried when Lindsey is out without me, and scared when we are holding hands in public, that people will take the passage of Proposition 8 as a societal and governmental sanction for treating people differently. Although physical and verbal assaults are illegal expressions, I know that when a person feels that they have a right to treat another group differently, it happens anyway. As every minority group knows, that is a heavy burden we must shoulder when no one should have to. 48

Bayard Rustin, a black gay advisor to Martin Luther King, recognized this burden more than 30 years ago. In 1986, he explained why gays and lesbians face particularly daunting challenges:

homosexuality remains an identity that is subject to a “we/they” distinction. People who would not say, “I am like this, but black people are like that,” or “we are like this, but women are like that” or “we are like this, but Jews are like that,” find it extremely simple to say, “homosexuals are like that, we are like this.” That’s what makes our struggle the central struggle of our time, the central struggle for democracy and the central struggle for human rights. If gay people do not understand this, they do not understand the opportunity before them, nor do they

understand the terrifying burdens they carry on their shoulders.\textsuperscript{49}

In passing Proposition 8, a majority of Californians essentially said “You are not like us, so you cannot have what we have.” Proposition 8 was a brutal attempt to enshrine a “lesser” status into the state constitution for gay and lesbian couples in a way that eviscerates the promise of equal protection contained in Article VII of our state constitution. We can only hope that the California Supreme Court will be “activist” in this case, as it appropriately was in invalidating anti-miscegenation laws more than 60 years ago.

\textsuperscript{49} Carbado and Weise (eds.), \textit{TIME ON TWO CROSSES} 273 (2003) (quoting Rustin); see also \textit{id.} at 289.