

IMAGINING A SAME-SEX MARRIAGE DECISION BASED ON DIGNITY: CONSIDERING HUMAN EXPERIENCE IN CONSTITUTIONAL LAW

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“Any law that uplifts human personality is just. Any law that degrades human personality is unjust.”

Martin Luther King, Jr.¹

“[T]he conceptual core of the liberty clause . . . pertains to . . . [an individual’s] [s]elf-determination, . . . dignity [or] respect.”

Justice Scalia²

“The experience of living with stigma, . . . needing to conceal your ‘authentic self’ from disapproval . . . exacerbates the pressures that everyone feels in daily life. . . . The impact of not being able to express who you are has very dangerous health effects.”

American Psychological Association³

[†] J.D., Yale Law School, 2012. This hypothetical opinion postulates how the court might consider social meaning in deciding the constitutionality of laws prohibiting same-sex marriage. Because the real opinion would be longer than word limits allow, I have not included the procedural background or facts section, nor have I included a complete discussion of the legal background. I also assume that the parties have standing.

The substance of this opinion was inspired by the work of my law school professors: Reva Siegel’s account of dignity in discourse over abortion and same-sex marriage, Reva Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates Over Same Sex Marriage*, I-CON, Vol. 10 No. 2, 355-379 (2012); Bruce Ackerman’s exploration of how socio-psychological meaning animated Supreme Court decisions during the Civil Rights Era, BRUCE ACKERMAN, *WE THE PEOPLE: CIVIL RIGHTS REVOLUTION* (forthcoming 2014); and Dan Kahan’s research on how cultural values inform perceptions of risk, as well as his discussion of judicial aporia—a mode of judicial reasoning that recognizes rather than effaces the genuine complexity of the issue at hand, and considers and values the arguments in support of the losing side of the outcome. Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011); Dan Kahan, *The Aporetic Judge*, THE CULTURAL COGNITION PROJECT BLOG, <http://www.culturalcognition.net/blog/2012/10/2/the-aporetic-judge.html>. I am very grateful for having the opportunity to learn from these teachers.

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1. Martin Luther King, Jr., *Letter from Birmingham Jail* (April 16, 1963).

2. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3054 (2010) (Scalia, J., concurring).

3. Christopher Munsey, *Psychology’s Case for Same Sex Marriage*, 41 Am. Psychol. Ass’n

California's Proposition 8 allows same sex couples to join through civil unions, which grant the legal benefits afforded to married couples but denies them the official label of "marriage." The lower court eschewed the question of whether Proposition 8 burdens any fundamental right by concluding there is not even a rational basis (the minimum standard for the constitutionality of any law) for this law, as its sole effect is to deny same sex couples the designation of marriage.⁴

We appreciate the lower court's caution not to extend our fundamental rights jurisprudence beyond precedent. However, we are positioned to elaborate fundamental constitutional rights in ways that the lower court could not. Today we conclude that Proposition 8 burdens a fundamental right. To state that this law does not offend the fundamental liberty and dignity protected by the Due Process Clause misunderstands the nature and extent of "the liberty at stake."⁵ It is apparent that denying people in same sex relationships the option of marriage, when it is a course of action available to all other individuals, impairs freedom and dignity inherent in the substantive liberty guarantees of the Constitution. The Due Process Clause protects personal liberty because it stems from the inherent worth—the dignity—that arises from each person's "capacity for self-conscious individuation."⁶ Because "the ability independently to define one's identity . . . is central to any concept of liberty,"⁷ dignified liberty requires the state to respect personal, identity-defining choices. Because Proposition 8 disrespects such choices, it must be subject to strict scrutiny; the law may only stand if necessary and narrowly tailored to achieve a compelling state interest.⁸

In evaluating the state's compelling interest in prohibiting same-sex marriage, we understand that modifying marriage creates the potential for change in traditionally defined social roles and responsibilities, presenting the possibility of unknown consequences for social stability and welfare. But there has not yet been any evidence demonstrating harmful consequences of modifying marriage. In a democracy that embraces individual freedom as well as the progress that comes from experimentation and innovation, we cannot burden constitutional liberty interests based on the mere potential for unknown consequences. We recognize that this debate involves more than the question of

Monitor on Psychol. 9, 46 (Oct. 2010), *available at* <http://www.apa.org/monitor/2010/10/same-sex.aspx> (quoting Ilan Meyer, Ph.D., Remarks at APA Annual Convention).

4. *Perry v. Brown*, 671 F.3d 1052, 1082 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

5. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

6. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 754 (1989).

7. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

8. *See Griswold v. Connecticut*, 381 U.S. 479, 503–04 (1965) ("[S]tatutes regulating sensitive areas of liberty . . . require 'strict scrutiny' Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.").

whether same sex marriage has been shown to pose a risk to social welfare; it also represents competing cultural values. Thus, we cannot expect to reach a solution that satisfies both sides solely by determining whether evidence shows that same sex marriage threatens welfare and social stability. We will consider the cultural values underlying both sides of this debate in our decision, so that the law may express all of the neutral public values perceived to be at stake, rather than expressing one cultural group's dominance over the other. Opponents of same sex marriage cherish legitimate cultural values such as responsibility, adherence to traditional order, and stability, which they recognize as critical to public welfare. Upon examining the testimony of experts on marriage and those seeking same-sex marriages, it is apparent that same sex couples wish to conform to, rather than reform, the values that opponents of same sex marriage cherish. Proposition 8 fails strict scrutiny because none of the evidence shows that same sex marriage threatens welfare or stability of families. Rather, same sex marriage appears to advance the respectable values of responsibility, tradition, and stability that its opponents believe integral to societal welfare.

I.

LAWS HARMING DIGNITY ARE SUBJECT TO STRICT SCRUTINY.

"History and tradition are the starting point" for determining whether a protected substantive due process right is at stake.⁹ For centuries it has been recognized that human dignity resides in each individual's ability "to be what he wills to be."¹⁰ We have recognized at least six Amendments in the Bill of Rights that protect individual dignity.¹¹ The Founders appealed to human dignity—respect for individual 'free conscience'—in support of guarantees of freedom of belief and expression.¹² Protecting life, liberty, and property, they adopted

9. *Lawrence*, 539 U.S. at 572.

10. GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF MAN (1486). See generally Aurel Kolnai, *Dignity*, 51 PHIL. 251 (1976) (discussing the various concepts of dignity); JOHN F. CROSBY, THE SELFHOOD OF THE HUMAN PERSON 177 (1996). See also William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 45, 66 (Michael J. Meyer & William A. Parent eds., 1992) ("[D]ignity is to possess the right not to be arbitrarily and therefore unjustly disparaged as a person.").

11. We have identified dignity as the basis for First Amendment freedom of expression and religion, Fourth Amendment protection to be free from unwarranted search and seizure, Fifth Amendment privilege against self-incrimination, the Eighth Amendment prohibition against cruel and unusual punishment, Equal Protection Clause, and most obviously the protection for individual "life, liberty, and property" in the Due Process clause. See generally Maxine Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006). See also Parent, *supra* note 10, at 66 (drawing a connection between human dignity and the Due Process Clause in the 14th and 5th Amendments).

12. See Thomas Jefferson, Draft of a Bill for Religious Freedom in the State of Virginia (1777) ("God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint, . . . attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion."). See also Press Release, Rep. Trent Franks, Religious Freedom Remains Critical in U.S. Foreign Relations (July

Locke's revolutionary concept that inherent human worth entitles individuals to "order their actions, and dispose of their Possessions, and Persons as they think fit."¹³ Hence, "personal dignity and autonomy[] are central to the liberty protected" by the Due Process Clause.¹⁴

We have expressed these guarantees of individual dignity through a "right to privacy."¹⁵ However, protecting personal dignity requires more than the concept of privacy can carry: Privacy suggests that personal decisions are protected only in closed, intimate spaces—what one does in her home, bedroom, or doctor's office. But a prohibition on interfering with what one does behind closed doors falls short of fully dignifying each individual's "attributes of personhood," one's "own concept of existence, of meaning, of the universe, and of the mystery of human life."¹⁶ Freedom to define oneself in these ways is incomplete if the state does not respect, validate, and embrace public manifestations of these choices. There are two distinct components of human dignity: intrinsic dignity, or the inherent, inalienable worth that stems from human ability to self-consciously create an individual identity, and extrinsic dignity, the worth that an individual imputes to themselves, based on the extent that their attributes are recognized and validated by society.¹⁷ Because dignity is comprised of these two aspects—

31, 2009), available at www.franks.house.gov/press_releases/266 (explaining the continuing importance of religious freedom); The Hudson Institute, *Why Religious Freedom?*, <http://crf.hudson.org/index.cfm?fuseaction=mission> (last visited Oct. 12, 2012) ("shared recognition of human dignity [i]s the basis for religious freedom.").

13. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, bk. II § 4. See, e.g., Edward J. Erler, *The Great Fence to Liberty: The Right to Property in the American Founding*, in LIBERTY, PROPERTY & THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 43–64 (Ellen Frankel Paul & Howard Dickman, eds., 1989) (describing Thomas Jefferson's reference to Locke in the Declaration of Independence); ANDREW ROSS, THE CELEBRATION CHRONICLES: LIFE, LIBERTY, AND THE PURSUIT OF PROPERTY IN DISNEY'S NEW TOWN 322 (2000) ("Thomas Jefferson and his peers had indeed been guided by. . . John Locke about the interlocking values of 'life, liberty, and property'. . . Locke's idea of property had more to do with self-possession and control over one's personal liberty than with material landed possessions.").

14. *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)). See also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3092 (2010) (Stevens, J. dissenting) ("[T]he liberty clause . . . enacts the Constitution's 'promise' that a measure of dignity and self-rule will be afforded to all persons.").

15. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 896 (1992) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (identifying a right to privacy in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments). See Rubinfeld, *supra* note 6, at 754 ("the definitive characteristic of human beings[,] . . . the ability . . . to construct . . . an individual personality . . . might . . . account for privacy's constitutional status [and] its 'derivation' from other enumerated Constitutional guarantees.").

16. *Lawrence* at 573–74 (quoting *Casey*, 505 U.S. at 851).

17. See Edmund D. Pellegrino, *The Lived Experience of Human Dignity*, in HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS (March 2008), available at http://bioethics.georgetown.edu/pcbe/reports/human_dignity/chapter20.html ("Intrinsic human dignity is expressive of the inherent worth present in all humans simply by

intrinsic worth and extrinsic or imputed worth—it demands both personal autonomy and societal acceptance of personal attributes that gives rise to an individual's sense of how she is valued in relation to other members of society. To fully execute the Constitution's promise of respect for individual self-definition, worth, and freedom, the state must also respect and validate public manifestations of personal identity. We must ensure that individuals are not publicly degraded for their self-defining attributes.

II.

RECOGNIZING DIGNITARY HARM.

In *Brown v. Board of Education*, we recognized that school segregation was unconstitutional in part because it was “usually interpreted as denoting the inferiority” of black children and this stigma altered their perceived self-worth and ability to learn.¹⁸ By so holding, we established that the Constitution is not blind to the way the law makes people feel or how people experience the law. In essence, fundamental values such as equality and autonomy are critical and enshrined in our Constitution because being free and feeling worthy of respect are essential to human thriving. Laws that systematically impair the feelings of self-worth and value that come from defining one's own identity impair human thriving. We cannot evaluate the constitutionality of such a law in a vacuum, blind to how the law makes people feel.¹⁹

Therefore, in determining the constitutionality of Proposition 8, we take account of how the law affects the lived experiences of its subjects. By considering the testimony of expert and lay witnesses, we are able to construct a sense of the plaintiffs' experiences and determine that Proposition 8 inflicts dignitary harm.

We have recognized that dignity is tied to how society respects particular choices that determine fundamental aspects of one's being—“personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”²⁰ We are not suggesting that the many laws that limit some degree of personal freedom impair constitutionally protected dignity. Laws that restrict economic choices, not commonly understood as identity-defining or

virtue of their being human. Intrinsic dignity cannot be gained or lost, expanded or diminished. It is independent of human opinions about a person's worth. It is the inherent grounding for the moral entitlements of every human to respect for one's person, one's rights, and one's equal treatment under the law in a just political order.* * * Extrinsic or imputed dignity, on the other hand, is the assessment of the worth or status humans assign to each other or to themselves . . . based on external measures of worth or value as perceived in a person's behavior, social status, appearance, etc. . . . Imputed dignity can be gained or lost simply by one's own self-judgment or by the judgment of others.”).

18. 347 U.S. 483, 494 (1954).

19. See Bruce Ackerman, *We The People: Civil Rights Revolution* (forthcoming 2014), for a more thorough account of how social meaning, lived experience, and stigma factored into this Court's constitutional decisions during the Civil Rights Era.

20. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

creating central attributes of personhood, pose less of a threat to individual dignity, and do not warrant the same level of scrutiny.²¹

However, it is evident that the decision to marry is viewed as identity-defining in our society: marital status is asked about on tax forms, insurance applications, doctors' office forms, Facebook profiles, and in the census and other demographic reports. The trial court observed, based on testimony of two witnesses, that "filling out a form requiring . . . marital status can be significant because the form-filler has no box to check [T]he form evokes something much larger for the person—a social disapproval and rejection."²²

Marriage is also a uniquely respected form of self-definition. An expert in psychology explained that "some of the things that come from marriage, believing that you are part of the first class kind of relationship in this country, in the status of relationships that this society most values, most esteems, considers the most legitimate and the most appropriate, undoubtedly has benefits that are not part of domestic partnerships."²³ Evidence presented to the trial court also shows that marriage actually changes the stability and likelihood of success in a relationship: it legitimizes the relationship, making partners more confident in it, and creating barriers and constraints on dissolving the relationship.²⁴

Denying some individuals access to this highly valued form of self-definition results in "structural stigma"—it is difficult for an individual to feel a positive sense of self-worth if she is not able to fulfill the values society deems most important.²⁵ One expert explained that "people in our society have goals that are cherished by all people. Again, that's part of social convention, that we all grow up raised to think that there are certain things that we want to achieve in life. And, in this case, this Proposition 8, in fact, says that if you are gay or lesbian, you cannot achieve this particular goal."²⁶

The witnesses' personal testimony further conveys the dignitary harm inflicted by Proposition 8. One witness explained that "[t]here is certainly

21. For example, in the context of protecting the freedom of intimate association, we have distinguished personal, identity-defining relations from economic relations "by such attributes as [their] relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." We observed that "these sorts of qualities" of family relationships "are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty" and a "business enterprise [...] seems remote from the concerns giving rise to this constitutional protection." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984). Therefore, "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees." *Id.*

22. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

23. *Id.* at 970.

24. *Id.* at 963.

25. *Id.* at 974.

26. Transcript of Hearing at 826, *Perry v. Schwarzenegger*, 704 F.Supp. 2d 921 (N.D. Ca. 2010) (No. 09-2292).

nothing about domestic partnership . . . that indicates the love and commitment that are inherent in marriage,”²⁷ a domestic partnership “doesn’t have anything to do . . . with the nature of our relationship and the type of enduring relationship we want it to be.”²⁸ Another stated, “I’m a 45-year-old woman. I have been in love with a woman for 10 years and I don’t have a word to tell . . . our friends, our family, our society, our community, our parents . . . and each other that this is a lifetime commitment . . . we are not girlfriends. We are not partners. We are married.”²⁹ Similarly, another witness explained “[b]eing able to call him my husband is so definitive, it changes our relationship. . . . I can safely say that if I were married to [him], that I know that the struggle that we have validating ourselves to other people would be diminished and potentially eradicated.”³⁰ These witnesses associate marriage with both intrinsic dignity, or inalienable freedom to self-define (denying marriage limits the ability to create “the type of enduring relationship we want it to be”), and extrinsic dignity, the extent that their personal attributes are worthy of social respect (marriage would ‘validate’ their relationship ‘to other people’).³¹ Based on the testimony of these witnesses, we can imagine how being denied the choice to marry would impair both intrinsic and extrinsic worth. Imagine if the state asserted some of the same rationales—i.e., promoting responsible procreation and childrearing—for restricting marriage to adults who are able to procreate naturally and prohibited marriage for someone who failed to pass a fertility test. One unable to procreate would feel confined in defining her personality—she cannot become a married person. One would also feel less worthy of societal respect—she is ineligible for a respected societal title. We have suggested that such a restriction on marriage would not stand.³² The effect of Proposition 8 is no different, and we must scrutinize it to the same extent that we would a law prohibiting marriage between people who cannot procreate naturally.

In the past we have considered the views of constitutional courts interpreting similar provisions of Bills of Rights in other nations. For instance in *Lawrence*, we took account of the fact that intimate conduct between consenting adults has been recognized as an “integral part of human freedom in many other countries.”³³ Likewise, we are behind other nations in recognizing that denying same-sex marriage impairs human dignity, and thereby violates inalienable civil

27. *Perry v. Schwarzenegger* 704 F. Supp. 2d at 963.

28. *Id.* at 972.

29. *Id.* at 933.

30. *Id.*, at 939.

31. See Pellegrino, *The Lived Experience of Human Dignity*, *supra* note 17, and accompanying discussion.

32. *Lawrence v. Texas*, 539 U.S. 558, 604–05 (2003) (Scalia, J. dissenting) (“If moral disapprobation of homosexual conduct is ‘no legitimate state interest’ for purposes of proscribing that conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution’? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.”).

33. *Lawrence*, 539 U.S. at 577.

rights.³⁴ Among these nations, Mexico's constitutional court has explained that "from human dignity, . . . the free development of the personality is derived, that is, the right of every person to choose...how to live her life, which implies, among other expressions, the freedom to contract marriage or not to; . . . as well as their free sexual option."³⁵ And similarly, South Africa's constitutional court has declared that "[t]he message [] that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected . . . constitutes a crass, blunt, cruel and serious invasion of their dignity."³⁶ Like these courts, we also observe, based on the testimony described above, that denying marriage harms the intrinsic dignity stemming from individual autonomy, and the extrinsic dignity that flows from perceived worth in society.

III.

PROPOSITION 8 DOES NOT PASS STRICT SCRUTINY.

Because we find that Proposition 8 impairs the liberty and dignity interests guaranteed by the Due Process Clause, we need not determine whether the law violates the Equal Protection clause, which would require evaluating whether the law was motivated by discrimination against homosexuals as a suspect class.³⁷

34. *Minister of Home Affairs v. Fourie* 2005 (3) BCLR 355 (CC) at para. 53-60 (S. Afr.); *Acción de inconstitucionalidad 2/2010*, Pleno de la Suprema Corte de Justicia de la Nación, *Novena Época*, 16 de agosto de 2010 at para. 263 (Mexico); *Reference Re Same Sex Marriage*, 2004 SCC 79 at para. 66-67 (Canada) (observing that lower courts in seven provinces have found that prohibiting same sex marriage violates the Canadian Charter of Fundamental Rights and Freedoms: "The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual.") (internal quotation omitted); *Halpern v. Canada* [2003], 65 O.R. 3d 161, ¶¶ 2, 107 (Can. Ont. C.A.) ("Exclusion [from the institution of marriage] perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships, [hence] offends the dignity of persons in same-sex relationships."). In *Lawrence*, we took account of the fact that freedom from intrusion into consensual intimate conduct, regardless of the sex of one's partner, has been accepted as an "integral part of human freedom in many other countries." *Lawrence*, 539 U.S. at 577.

35. *Acción de inconstitucionalidad*, *supra* note 34, at para. 263.

36. *Minister of Home Affairs*, *supra* note 34, at para. 53-60 ("To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality.").

37. The lower court found evidence that Proposition 8 was related to animus against homosexuals, and Plaintiffs likely have a tenable Equal Protection Claim. But we need not reach their Equal Protection claim here. We have recognized that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked." *Lawrence*, 539 U.S. at 575. Put simply, dignity is linked to equality: laws disrespecting personal self-definition are harmful to individual dignity, in part, because they suggest some personality-defining choices are less worthy of respect than others. A law may harm dignity in violation of the Liberty Clause regardless of whether it violates Equal Protection, since the latter has been interpreted to prohibit laws motivated by animus against members of suspect classes. *Feeney v. Personnel Administrator of Mass.*, 442 U.S. 256, 279 (1979) ("Discriminatory purpose [means] . . . the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."). Because we subject the law to strict scrutiny for its intrusion on individual liberty and dignity, we

Even if the law were motivated by legitimate, nondiscriminatory concerns, we must evaluate whether it is necessary to serve the state's compelling interests. The state asserted several interests for prohibiting same sex marriage: promoting responsible procreation and childrearing, protecting religious freedom, proceeding with caution in change, and preventing children from being taught about same-sex marriage in schools.³⁸ The last two of these are not compelling state interests in and of themselves, but we take the defenders of Proposition 8 as more broadly asserting that resisting change in the institution of marriage is necessary to protect the stability and welfare of families.³⁹ To give Proposition 8 the benefit of the doubt, we will presume that it was enacted as a means to secure the state's compelling interest in protecting family welfare, and we will evaluate whether it necessary to accomplish this.

At the outset, we note that the regulation of same sex marriage is an issue that is infused with cultural meaning—beliefs on same sex marriage are generally understood as aligning an individual with one cultural group or another, and therefore are not only informed by the empirical evidence of whether same sex marriage is harmful to social stability or child welfare, but also by the belief-holder's cultural identity.⁴⁰ Because beliefs are taken as indicators of one's group identity, people are inclined to conform their beliefs to the group they identify with, and resist changing them when presented with evidence supporting an outcome contrary to their group's values.⁴¹ This phenomenon is

need not determine whether Proposition 8 "is born of animosity toward" a "politically unpopular" group. *Romer v. Evans*, 517 U.S. 620, 634–35 (1996). Determining the motivation behind a law is a difficult inquiry that we will avoid if the law is unconstitutional regardless of motivation. *E.g.*, *Wright v. City of Emporia*, 407 U.S. 451, 462 (1972) (stating that "it 'is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators'") (quoting *Palmer v. Thompson*, 403 U.S. 217, 225 (1971)).

38. *Perry v. Brown*, 671 F.3d 1052, 1086 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

39. Preventing children from being taught about same-sex marriage in schools is not in itself a state interest unless one assumes that some harm follows from teaching students about same sex marriage. Therefore, this interest reduces to the question at the core of this debate—whether same sex marriage threatens public safety or welfare.

40. See Dan Kahan, *The Cultural Cognition of Gay and Lesbian Parenting: Summary of First Round Data Collection*, CULTURAL COGNITION PROJECT 2, <http://www.culturalcognition.net/storage/Stage%201%20Report.pdf> (Members of "a culturally divided public, anxious about whose values will be privileged in the law, become cognitively disposed to ignore or dismiss empirical evidence."). See also Dan Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection: An Experimental Study* 31 (Cultural Cognition Project at Yale Law School, Working Paper No. 107), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2182588 ("Not all risks and policy-relevant facts have this quality; indeed, relatively few do, and on the vast run of ones that do not (pasteurization removes infectious agents from milk; fluoridation of water fights tooth decay; privatization of the air-traffic control system would undermine air safety), we do not observe significant degrees of ideological or cultural polarization.").

41. This issue differs from a neutral empirical question where cultural values are not associated with one belief or another, and there are fewer barriers to altering beliefs in accordance with empirical evidence. For instance, there are fewer consequences, in terms of social group identity, to accepting evidence that lead paint and asbestos are dangerous, pasteurization makes milk safer for consumption, and fluoride is good for dental health, than to accepting evidence that

illustrated in that cultural values unrelated to same sex relationships—for instance, whether government does too much to promote equal rights—tend to predict one’s beliefs about the threat that same sex parenting poses to child welfare. While a majority of opponents to same sex parenting report that child welfare is their primary concern, they also report that they would not change their stance even if presented with conclusive evidence that same sex parenting enhances child welfare.⁴²

As long as same sex marriage is prominent on the public agenda and divisive between competing cultural groups, we expect the dispute over its risks and benefits will persist regardless of whether scientific evidence established it is harmless (or harmful) to public welfare. Therefore, a solution that is credible and satisfying to both sides requires more than determining whether empirical evidence shows that same sex marriage threatens welfare and stability. We also must address the public welfare values that are perceived to be at stake by parties on either side of this decision, and aim for the law to affirm both groups’ secular values, so that this decision is not resented as an expression of the dominance of one cultural group over another.⁴³

The record does not contain empirical evidence demonstrating that same sex marriage is harmful to social stability, child, or family welfare. The lower court observed that the factual presentation in support of the state’s interest in Proposition 8 was “rather limited.”⁴⁴ Defenders of Proposition 8 presented one expert witness, David Blankenhorn, to testify about how same sex marriage affects family welfare and stability. Blankenhorn testified that same sex marriage is harmful because children are better off when raised by two married biological parents, and same sex couples are typically not both biological parents of their children. The court deemed this conclusion scientifically unfounded because it

same sex marriage is conducive to child welfare, because these scientific questions have not been infused with cultural meaning. Dan Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection: An Experimental Study*, CULTURAL COGNITION PROJECT 31, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2182588.

42. Kahan, *The Cultural Cognition of Gay and Lesbian Parenting*, *supra* note 40, at 15.

43. Dan Kahan, ‘More Statistics, Less Persuasion’: *The Gun Control Debate Continues, and Continues to Miss the Point*, CULTURAL COGNITION PROJECT BLOG (Dec. 15, 2012), <http://www.culturalcognition.net/blog/2012/12/15/more-statistics-less-persuasion-the-gun-control-debate-contin.html> (observing that because gun control is similarly a culturally divisive issue where public policy is understood to represent competing cultural values, the dispute to is not likely to be resolved by empirical evidence demonstrating that gun regulation threatens or enhances safety, and instead the law must be shaped by an effort to navigate between the cultural values associated with either side of the gun control debate).

44. The court observed that defenders of Proposition 8 did not rely on evidence that same sex marriage harms welfare. Instead they “argued that Proposition 8 should be evaluated solely by considering its language and its consistency with the ‘central purpose of marriage, in California and everywhere else, to promote naturally procreative sexual relationships and to channel them into stable, enduring unions for the sake of producing and raising the next generation.’” *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

was based on studies comparing children raised by married parents to those raised by single parents, unmarried mothers, step families and cohabiting parents, but none of the research compared married biological parents to married non-biological parents.⁴⁵ In fact, the finding of the studies underlying Blankenhorn's opinion, that children raised by married parents are better off than those raised by unmarried or single parents, is consistent with making marriage available to more people.

Blankenhorn also testified that same sex marriage leads to "deinstitutionalization"—"a process through which previously stable patterns and rules forming an institution (like marriage) slowly erode or change."⁴⁶ He identified symptoms of deinstitutionalization as out-of-wedlock childbearing, rising divorce rates, the rise of non-marital cohabitation, increasing use of assistive reproductive technologies and marriage for same-sex couples.⁴⁷ Blankenhorn's testimony does not indicate, and there is no basis for presuming, however, that same sex marriage would increase divorce rates or use of assistive reproductive technology. Same sex marriage would seem, if anything, to reduce out of wedlock childbearing and non-marital cohabitation. Hence, of the consequences of deinstitutionalization that Blankenhorn identified, the only one evidently linked to same sex marriage is same sex marriage itself. Thus, Blankenhorn's testimony boils down to the proposition that same sex marriage is inherently risky because it changes previously stable patterns and rules forming an institution. Blankenhorn did not identify how this change is harmful, but explained that he researched deinstitutionalization through a "thought experiment" where a group of people were presented with the prompt that "gay marriage, like almost any major social change, would be likely to generate a diverse range of consequences," and asked to postulate what these consequences might be.⁴⁸

Blankenhorn's opinion is based on the speculation that change in traditional institutions (or "deinstitutionalization") is inherently dangerous to welfare and stability. This thought experiment illustrates the cultural values at the crux of the debate.⁴⁹ We understand the concerns of those keen to preserve traditional institutions. Marriage has long defined social roles at a basic level—how the parties fit into the units that form communities, what they are responsible for, and how they are expected to socialize. It might appear that changing marriage

45. *Id.* at 948.

46. *Id.* at 949.

47. *Id.*

48. *Id.*

49. Some cultural outlooks that value hierarchy perceive deviation from established order, traditional institutions, and fixed roles with stratified degrees of authority and power, as threatening to society's stability and welfare. These individuals are more likely to experience a negative emotional response to the image of two men being married, and to believe that same sex parenting has harmful effects for children. Kahan, *The Cultural Cognition of Gay and Lesbian Parenting*, *supra* note 40, at 8–12.

creates the potential that these roles will be modified, in that people with different characteristics will play them. If different people play these roles, perhaps they will no longer be performed in the same way and become unrecognizable such that individuals will not understand themselves or their own role in relation to other people. Even if there is no empirical evidence that deviating from tradition causes harm, the unknown potential for such consequences may seem destabilizing and risky enough to justify prohibiting institutional change.

While we recognize these concerns, there are two reasons that we cannot conclude that they justify Proposition 8's infringement on constitutional liberties. First, because our liberal democracy embraces the progress that comes from allowing individuals to explore and experiment with their own ideas and ways of living, the unproven *possibility* of unknown consequences is not a sufficient basis for impinging on individual freedom. Our society is willing to accept the risk of potential unknown consequences that comes along with deviant practices (after all, the Founders sought freedom to pursue religious practices that deviated from the British monarchy); and we only inhibit this personal freedom if evidence actually shows a threat to public welfare or safety.

Second, testimony from witnesses on both sides demonstrates that those seeking same-sex marriage seek to conform to the values of those who support Proposition 8. They want to respect and participate in the institution—to validate their relationships in terms of established tradition, stability, fixed responsibility and commitment—rather than reform or degrade it. Perry explained that she wants to marry before having children, “to have a stable and secure relationship with her [partner] that then [they] can include [their] children in.”⁵⁰ Indeed, Blankenhorn recognized that the same-sex marriages would be identical in what he identified as six fundamental dimensions of marriage: (1) legal contract; (2) financial partnership; (3) sacred promise; (4) sexual union; (5) personal bond; and (6) family-making bond.⁵¹ And since the trial, he has redacted his opposition to same-sex marriage and argued that a better way to promote responsible procreation is through a coalition between same-sex and heterosexual couples who endorse the traditional values of marriage: “marrying before having children is a vital cultural value that all of us should do more to embrace . . . [and] that, for all lovers who want their love to last, marriage is preferable to cohabitation.”⁵²

Blankenhorn's call for a coalition between homosexual and heterosexual proponents of marriage highlights that the law can promote stable social roles, responsibility, and family welfare, as well as preserve the institution of marriage,

50. Perry v. Schwarzenegger, 704 F.Supp. 2d at 939.

51. *Id.* at 950.

52. David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?_r=0.

without restricting freedom to marry. For instance, the state might require couples to take a course that provides information about healthy marital relationships and parenting before getting married, it might offer financial planning services to help couples plan to build a secure household and provide for a family, and resources to assist couples in resolving relationship conflicts. These measures would serve the values asserted by the proponents of Proposition 8 without inflicting the dignitary harm that results from denying individual freedom to marry. Proponents of Proposition 8 may envision this measure as a necessary means of preserving stability, order, and responsibility; but proponents of same-sex marriage want to advance these values, too, and thus we cannot conclude that these important values require the burden on personal dignity imposed by Proposition 8.

Proposition 8 impairs human dignity, and the evidence does not show that same-sex marriage threatens the state's interest in protecting the welfare and stability of families. Proposition 8's supporters aim to advance responsibility, traditional order, and stability as essential to safety and welfare, but same-sex marriage is an effort to conform to these values. As prohibiting same sex marriage has not been shown necessary to serve the compelling interests of the state, we AFFIRM the judgment of the lower court.

