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After Eight: Separation of Powers Concerns in the Wake of Proposition 8

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On November 4, 2008, California voters narrowly approved Proposition 8, a ballot initiative that added a new section to the state Constitution which provides that “Only marriage between a man and a woman is valid or recognized in California.”¹ Proposition 8’s proponents intended to reverse the decision by the California Supreme Court in *In re Marriage Cases*, which granted same-sex couples the same right to marry as heterosexual couples under the California Constitution. In *Marriage Cases*, the Court held that the right to marry was a fundamental constitutional right guaranteed by the rights of liberty, privacy, due process, and equal protection. The right to marry, according to the Court, encompasses an individual’s right—regardless of sexual orientation—to enter into “an officially recognized and protected family . . . entitled to the same respect and dignity accorded a union traditionally designated as marriage.”²

Petitioners, including same-sex couples who were unable to marry and those who wanted to preserve legal recognition of their marriage, as well as various municipalities including San Francisco and Los Angeles, sought a stay and immediate review of the validity of Proposition 8 from the California Supreme Court. They argued that Proposition 8 was invalid as an improper “revision” of the constitution that could not be accomplished through the initiative process, which only permits constitutional “amendments.” Under California law, a “revision” is a change to the underlying principles of the state constitution that alters the basic government plan. Revisions require a more deliberative procedural approach and must either originate in the state legislature and then be submitted to the electorate, or in a constitutional convention followed by popular ratification. An “amendment,” by contrast, is a “change within the lines” of the Constitution. Amendments may be proposed and passed by a majority of the electorate by a ballot initiative.

The Court granted the petitions for review, ultimately consolidating the matters for briefing, argument, and decision under *Strauss v. Horton*. In the pending proceeding, the Court limited briefing to three issues: (1) Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution? (2) Does Proposition 8 violate the separation of powers doctrine under the California Constitution? (3) If Proposition 8 is not

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¹ CAL. CONST. art. I, § 7.5.

² *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008) [hereinafter *Marriage Cases*].

unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?³

In their briefs, Petitioners argued, among other things, that Proposition 8 was an invalid constitutional revision because it eliminated an inalienable fundamental right based on a suspect classification, and thus worked a dramatic, substantive change to the state constitution's underlying principles of individual equality. Proposition 8 might well be construed by the Court to change the scope of the fundamental and inalienable rights it interpreted in *Marriage Cases*; if so, the proposition should be struck down as an unconstitutional revision.

Amicus curiae San Francisco La Raza Lawyers Association presented an argument in the alternative: to the extent the rights to liberty, privacy, due process and equal protection have not themselves been changed, then the pre-existing interpretation of those rights in *Marriage Cases* must control—and the attempt to mandate a change in the California Supreme Court's interpretation of pre-existing rights violates separation of powers principles. Thus, even if Proposition 8 is construed as a permissible amendment (as opposed to a revision), it would necessarily violate separation of powers principles because it purports to dictate a specific interpretation of certain other—indisputably unchanged—constitutional provisions.

In the words of its own proponents, Proposition 8 “overturns the flawed legal reasoning of four judges in San Francisco”⁴ The proposition purports to “restore” the definition of marriage, but does not change the bases for the reasoning that the Court employed to prohibit “the difference in the official names” of heterosexual and same-sex relationships in the first instance.⁵

This Issue Brief explains why this attempt to attack the “reasoning” of the California Supreme Court—to change its interpretation of the fundamental rights enumerated in article 1, sections 1 and 7 of the California Constitution—without revising the bases for its reasoning, violates separation of powers principles inherent in the California Constitution and renders Proposition 8 unconstitutional. Section I of this Issue Brief focuses on why separation of powers principles prohibit the electorate from mandating interpretations of the Constitution. Section II continues by describing how Proposition 8 purports to direct the Court's interpretations of pre-existing fundamental rights and thus, violates separation of powers principles.

³ Notably, the pending cases do not consider the substantive effect of Proposition 8, such as the equal protection issues posed by laws banning same-sex marriage. *See, e.g.,* Varnum v. Brien, No. 07-1499, 2009 WL 874044, at *30 (Iowa Apr. 3, 2009) (striking statutory ban against same-sex marriage on equal protection grounds). At oral argument on March 5, 2009, the Court appeared to be more concerned with the threshold issue of whether the California electorate has the power to effect a change like the one encapsulated in Proposition 8 by initiative. It is our hope and expectation that, if the threshold issues are answered in the affirmative, the courts would then be faced with other issues, such as whether the change effected violates equal protection guarantees.

⁴ Voter Information Guide, Gen. Elec. 2008 Rebuttal to Arguments Against Prop. 8 (Nov. 4, 2008) [hereinafter Rebuttal to Arguments Against Prop. 8].

⁵ *Marriage Cases*, 183 P.3d at 399.

I. Separation of powers principles prohibit the electorate from mandating interpretations of the Constitution

In *Marriage Cases*, the California Supreme Court “conclude[d] that the right to marry, as embodied in article I, sections 1 and 7 of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples” to marry.⁶ In addressing a statute using the same language as Proposition 8, the Court consistently made clear that its conclusion was based not on a definition of marriage, but rather on the interpretation of fundamental rights enumerated in article I, sections 1 and 7.⁷

Proposition 8 does not amend the fundamental rights the court interpreted in *Marriage Cases*. It instead attempts to tell the court *how to interpret* those rights. In the words of its own proponents, Proposition 8 “overturns the flawed legal reasoning of four judges in San Francisco”⁸ The proposition purports to “restore” the definition of marriage,⁹ but does not change the *bases* for the reasoning that the Court employed to prohibit “the difference in the official names” of heterosexual and same-sex relationships in the first instance.¹⁰

This attempt to attack the “reasoning” of the California Supreme Court—to change its interpretation of article I, sections 1 and 7—without revising the bases for its reasoning violates separation of powers principles inherent in the California Constitution and renders Proposition 8 unconstitutional.

The electorate’s power of initiative is neither unfettered nor is it immune from constitutional scrutiny, including a separation of powers analysis. As the California Supreme Court has established:

“[T]he California Constitution permits a particular governmental function . . . to be exercised by a particular branch . . . does not establish that the separation of powers clause places no limits on the exercise of that function by that branch”¹¹

There is no question that when the electorate exercises the initiative, it acts in a law-making role. The California Supreme Court has previously recognized limitations on this power. The initiative power can be exercised only to accomplish acts that are legislative in character,¹² and cannot be used, for example, to compel the legislature to propose an amendment to the Federal Constitution.¹³

⁶ *Id.* at 433.

⁷ *Id.* at 425-27, 429.

⁸ Rebuttal to Arguments Against Prop. 8, *supra* note 4, at 57.

⁹ *Id.*; Voter Information Guide, Gen. Elec. 2008 Argument in Favor of Prop. 8, at 56 (Nov. 4, 2008) [hereinafter Arguments in Favor of Prop. 8].

¹⁰ *Marriage Cases*, 183 P.3d at 399.

¹¹ *Marine Forests Soc’y v. California Coastal Comm’n*, 113 P.3d 1062, 1086 (Cal. 2005).

¹² *Am. Fed’n of Labor v. Eu*, 686 P.2d 609, 613-615 (Cal. 1984).

¹³ *Id.* at 623.

The initiative power itself is also subject to state and federal constitutional limitations.¹⁴ For example, in *Mulkey v. Reitman*,¹⁵ the Court struck down an initiative amendment regarding housing discrimination for violating the federal Equal Protection Clause. And both the state and the U.S. Supreme Court have recognized limits on the electorate's ability to take away fundamental rights. In *Lucas v. Forty-Fourth Gen. Assembly of Colorado*, for example, the U.S. Supreme Court held that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be,"¹⁶ and in *West Virginia State Bd. of Educ. v. Barnette*, the high court held that "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no election."¹⁷

Within these important constitutional limitations, the electorate has the power to change the substance of a right itself. But it cannot tell the court *how* to interpret the Constitution or apply pre-existing constitutional rights. Under firmly established state and federal precedent, "the judiciary, from the very nature of its powers and means given it by the Constitution, must possess the right to construe the Constitution in the last resort"¹⁸

The California Supreme Court's own precedents illustrate the distinction between permissible law-making that leaves room for judicial interpretation and impermissible constitutional directives in the initiative process. In *People v. Frierson*, the Court upheld an initiative amendment to the Constitution that changed the *substance* of the right to be free from cruel and unusual punishment exactly because it still preserved the Court's own ability to protect, interpret, and apply fundamental rights.¹⁹ The proposition at issue there expressly provided that laws allowing potential imposition of the "death penalty . . . shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments"²⁰

That initiative, which allowed potential imposition of the death penalty, was permissible, in part, because it did not impede the California Supreme Court's ultimate role in interpreting and applying constitutional protections in any individual case. As the Court recognized: "we retain broad powers of judicial review . . . to [among other things] safeguard against arbitrary or disproportionate treatment," violating other fundamental rights.²¹ Unlike Proposition 8, which purports to direct the court to interpret the Constitution as blanketly prohibiting all same-sex marriage, the proposition in *Frierson* left room for the court to determine whether the death penalty was appropriate in any particular case, or whether imposition of that penalty would violate a fundamental right.

¹⁴ *Legislature of the State of California v. Deukmejian*, 669 P.2d 17, 26 (Cal. 1983).

¹⁵ 413 P.2d 825 (Cal. 1966).

¹⁶ 377 U.S. 713, 736 (1964).

¹⁷ 319 U.S. 624, 638 (1943).

¹⁸ *Raven v. Deukmejian*, 801 P.2d 1077, 1089 (Cal. 1990) (quoting *Nogues v. Douglass* 7 Cal. 65, 69-70 (1858)); see also CAL. CONST. art. VI, § 1; *Connerly v. Schwarzenegger*, 53 Cal. Rptr.3d 203, 209 (Cal. Ct. App. 2007) ("The California Supreme Court . . . is the final authority on the interpretation of the state Constitution." (internal quotes and citation omitted)).

¹⁹ 599 P.2d 587, 613 (1979).

²⁰ *Id.* at 605.

²¹ *Id.* at 614.

In contrast is *Raven v. Deukmejian*.²² There, the California Supreme Court invalidated an initiative amendment that did not directly change fundamental rights, but would have “vest[ed] all judicial *interpretive* power, as to fundamental criminal defense rights” in the California Constitution in a body *other than* the California Supreme Court.²³ That attempt to control the judicial interpretation of fundamental rights was simply impermissible, and was rightly struck down as an improper revision.

Principles enumerated in *City of Boerne v. Flores*²⁴ further demonstrate why Proposition 8 violates this proscription. There, the U.S. Supreme Court recognized that legislative enactments purporting to circumvent pre-existing judicial interpretations must be understood in the context of the Court’s role as the final interpreter of the federal Constitution.

Seven years prior to *Boerne*, the high court interpreted the scope and understanding of certain freedom-of-religion guarantees under the First Amendment in *Employment Div. v. Smith*.²⁵ As in this case, the “law-making” act subsequently attempted to “restore” the traditional, pre-*Smith* view of the scope of those rights under the First Amendment.²⁶ That legislative act did not, however, change the substance of the rights previously interpreted by the Court. The U.S. Supreme Court found that this attempt to change the reasoning expressed in *Smith* without changing the *basis* for that reasoning was an unconstitutional violation of separation of powers principles:

Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.²⁷ When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.²⁸

Our structure of government prevents law-makers from compelling a certain interpretation of constitutional rights by the judiciary. Under separation of powers principles, it is impermissible to “deprive[] the state judiciary of its foundational power to decide cases by

²² 801 P.2d 1077, 1089 (Cal. 1990).

²³ *Id.* at 1086 (italics original).

²⁴ 521 U.S. 507 (1997).

²⁵ *Id.* at 512-13 (discussing *Employment Div. v. Smith*, 494 U.S.872 (1990)).

²⁶ *Id.* at 515.

²⁷ *Id.* at 535-36 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

²⁸ *Id.* at 536.

independently interpreting provisions of the state constitution”²⁹ Accordingly, ballot initiatives cannot direct interpretation and application of pre-existing constitutional provisions that have already been interpreted by prior case law.

II. Proposition 8 violates separation of powers principles because it purports to tell the judiciary the meaning of pre-existing fundamental rights in the California Constitution

In *Marriage Cases*, the California Supreme Court interpreted article I, sections 1 and 7 of the California Constitution to find that the rights to liberty, privacy, due process, and equal protection specifically enumerated in the state Constitution encompass a right for same-sex couples to marry. Proposition 8 does not change sections 1 or 7, or any of the pre-existing fundamental rights interpreted in *Marriage Cases*.

Rather, Proposition 8 attacks the California Supreme Court’s *interpretation* of those fundamental rights. In the words of its proponents, Proposition 8 seeks to “overturn[] the flawed legal *reasoning* of four judges in San Francisco”³⁰ and “[i]t overturns the outrageous decision of four activist Supreme Court judges who ignored the will of the people.”³¹ Because the California Supreme Court properly acts as the final arbiter in interpreting and applying the fundamental rights enumerated in sections 1 and 7, Proposition 8’s attempt to change the court’s “reasoning” is invalid.

A. In *Marriage Cases*, the California Supreme Court interpreted article I, sections 1 and 7 to encompass a right for same-sex couples to marry

This Court’s decision in *Marriage Cases* established that the California Constitution’s liberty and privacy clauses guarantee same-sex couples the same substantive rights to marry as heterosexual couples.³² Interpreting and applying article I, sections 1 and 7 of the California Constitution, the court held that “the right to marry is a basic, *constitutionally protected civil right* – a fundamental right of free men and women . . . protected from abrogation or elimination by the state.”³³

Marriage Cases interpreted the California Constitution as grounding the right of marriage on fundamental, inalienable constitutional rights applicable to heterosexual and homosexual individuals alike:

[S]ections 1 and 7 of article I of the California Constitution *cannot properly be interpreted* to withhold from gay individuals the same basic civil right of personal autonomy and liberty (including the right to establish, with the person of one’s choice, an officially recognized and sanctioned family) that the California Constitution

²⁹ Legislature of the State of California v. Eu, 816 P.2d 1309, 1318 (Cal. 1991)..

³⁰ Rebuttal to Arguments Against Prop. 8, *supra* note 4, at 57 (italics and emphasis added).

³¹ Arguments in Favor of Prop. 8, *supra* note 9, at 56 (italics original).

³² *In re Marriage Cases*, 183 P.3d 384, 419-434 .

³³ *Id.* at 426 (internal citations and quotation marks omitted; italics original).

affords heterosexual individuals. The privacy and due process provisions of our state Constitution—in declaring that “[a]ll people . . . have [the] inalienable right[] [of] privacy” (art. I, § 1) and that no person may be deprived of “liberty” without due process of law (art. I, § 7) – do not purport to reserve to persons of a particular sexual orientation the substantive protection afforded by those provisions.³⁴

It also held that “[i]n light of the fundamental nature of the substantive rights embodied in the right to marry . . . the *California Constitution properly must be interpreted* to guarantee this basic civil right to all individuals and couples, without regard to their sexual orientation.”³⁵ And that that right “is an integral component of an individual’s interest in *personal autonomy* protected by the privacy provision of article I, section 1 and of the liberty interest protected by the due process clause of article I, section 7.”³⁶

B. Proposition 8 is invalid because it seeks to change the “reasoning” of the judiciary without changing the fundamental rights on which that reasoning was based

Proposition 8 purports to “overturn[] the flawed legal *reasoning* of four judges in San Francisco,” *i.e.*, the California Supreme Court’s prior interpretation that the rights enumerated in sections 1 and 7 of the state Constitution encompass the right of same-sex couples to marry.³⁷ Proposition 8, however, does not change the *bases* for that reasoning (*i.e.*, the fundamental rights of liberty and privacy), and therefore is an unconstitutional infringement of this Court’s role as the ultimate authority interpreting and applying constitutional rights.

Perhaps recognizing the line between law-making and impermissible directives to this Court on matters of constitutional interpretation, the proponents of Proposition 8 attempt to cast it as merely “restor[ing] the definition” of marriage.³⁸ But *Marriage Cases* was never about the definition of marriage. Rather, it was about the interpretation of fundamental rights, and whether article I, sections 1 and 7 encompass a right of marriage for same-sex couples:

It is also important to understand at the outset that our task in this proceeding is not to decide whether we believe, *as a matter of policy*, that the officially recognized relationship of a same-sex couple *should* be designated a marriage rather than a domestic partnership (or some other term), but instead only to determine

³⁴ *Id.* at 429 (brackets and ellipses original; italics added).

³⁵ *Id.* at 427 (italics added; original italics deleted).

³⁶ *Id.* at 426 (italics original).

³⁷ Rebuttal to Arguments Against Prop. 8, *supra* note 4, at 57 (emphasis added; italics original).

³⁸ Arguments in Favor of Prop. 8, *supra* note 9, at 56; Rebuttal to Argument Against Prop. 8, *supra* note 4, at 57. *See also* *City of Boerne v. Flores*, 521 U.S. 507, 515 (finding unconstitutional similar attempt to “restore” prior law without changing fundamental rights interpreted in prior case law).

whether the difference in the official names of the relationships violates the California Constitution.³⁹

Proposition 8 is not a “carve out” to the fundamental rights of liberty, privacy, due process, and equal protection. Proponents told voters that these fundamental rights were *not* themselves being amended. The pamphlet told voters that the proposition was intended to eliminate only the right of same-sex couples to marry without “tak[ing] away any other rights or benefits of gay couples.”⁴⁰ Past California jurisprudence has established that a constitutional amendment “should not be construed to effect the implied repeal of another constitutional provision In order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the Court may say that it was intended as a substitute for the first.”⁴¹

The “carve-out” arguments advanced by proponents of Proposition 8 highlight the point that the distinction between permissible law-making and impermissible constitutional-interpretive directives is not a mere technicality—particularly in this circumstance. Putting aside the significant question of whether the “inalienable rights” in article I, section 1 could ever be abrogated by amendment or initiative, there is little doubt that Californians may have felt differently about enacting a carve-out to the fundamental rights of liberty, privacy, due process, and equal protection. Certainly, the proponents of Proposition 8 would not have been able to campaign on a platform that “other rights” of same-sex couples would remain unaffected.

III. Conclusion

In *Marriage Cases*, the California Supreme Court interpreted the fundamental rights of liberty, privacy, due process, and equal protection to make invalid attempts to limit the right of marriage to heterosexual couples. Proposition 8 does not revise or amend the fundamental rights at issue in *Marriage Cases*, but instead compels a certain interpretation of them, requiring the Court to find that its construction of the California Constitution was wrong and that: “[o]nly marriage between a man and a woman is valid or recognized” under the Constitution.⁴²

Separation of powers principles mandate that “[t]he judiciary. . . must possess the right to construe the Constitution in the last resort. . . .”⁴³ As such, Proposition 8’s directive to interpret the state Constitution as precluding the right of same-sex couples to marry is invalid and unconstitutional. This attempt to control judicial interpretive power should also underscore why those who care about separation of powers and the integrity of the three branches of government should be profoundly troubled by Proposition 8, regardless of their position on same-sex marriage.

³⁹ *Marriage Cases*, 183 P.3d at 398-99 (italics original).

⁴⁰ Rebuttal to Arguments Against Prop. 8, *supra* note 4, at 57.

⁴¹ *ITT World Commc’ns v. City of San Francisco*, 693 P.2d 811, 816-17 (Cal. 1985) (internal quotation marks and citations omitted).

⁴² CAL. CONST. art. I, § 7.5.

⁴³ *Raven v. Deukmejian*, 801 P.2d 1077, 1089 (Cal. 1990) (internal citation omitted).