Case No. S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS et al.,

Petitioners,

v.

MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,

Respondents.

BRIEF *AMICI CURIAE* OF WILLIAM N. ESKRIDGE, JR. AND BRUCE E. CAIN IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. Hyper-Amendability & Death of Revisions 3

II. Constitution-Based Principles for Defining the Amendment-Revision Line 8

A. Correcting for Legislative Biases 8

B. Super-Majorities to Protect Minorities 12

C. Deliberation to Impose Rationality Requirements 19

III. This Court's Precedents Track the Amendment-Revision Line Suggested by the California Constitution 22

A. Governance Amendments: Strong Presumption of Validity 23

B. Public Values Amendments: Presumption of Validity 24

C. Amendments Denying Fundamental Rights to Minorities: Presumption of Invalidity 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Amador Valley Joint Union High School Dist. v. *State Bd. of Equalization*
(1978) 22 Cal.3d 208 24

Brosnahan v. *Brown*
(1982) 32 Cal.3d 236 25

In re Lance W.
(1985) 37 Cal.3d 873 25

Legislature v. *Eu*
(1991) 54 Cal.3d 492 ..... 23, 24

In re Marriage Cases
(2008) 43 Cal.4th 757 ..... 11, 17

McFadden v. *Jordan*
(1948) 32 Cal.2d 330 ..... 1, 24

Mulkey v. *Reitman*
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(1967) 387 U.S. 369 ..... 6, 7, 16, 26

People v. *Frierson*
(1979) 25 Cal.3d 142 ..... 24, 25

Perez v. *Sharp*
(1948) 32 Cal.2d 711 ..... 17, 20, 26

Raven v. *Deukmejian*
(1990) 52 Cal.3d 336 ..... 1, 6, 7, 25, 26

CALIFORNIA CONSTITUTION

Cal. Const., art. I 11

Cal. Const., art. I, § 7(a) 15

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Cal. Const., art. II, § 1 8

Cal. Const., art. XVIII ..... *passim*

Cal. Const., art. XVIII, § 1 ..... 1, 12

Cal. Const., art. XVIII, § 2 1

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Federalist No. 10 (Madison) 15

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Karst, *The Supreme Court, 1976 Term - Foreword: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv. L.Rev. 1 16

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Lambda Legal, *Status of Same-Sex Relationships Nationwide*, <www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html> (as of Jan. 13, 2009) 4

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INTRODUCTION

The California Constitution creates two mechanisms for formal constitutional change: the amendment process, which allows the people to alter the Constitution expeditiously by direct majority vote (Cal. Const., art. XVIII, § 3) and the revision process, which requires both legislative and popular involvement to make more fundamental constitutional changes (Cal. Const., art. XVIII, §§ 1-2). The California Constitution does not tell us what changes to the Constitution are "revisions" that have to go through the more deliberative process of Article XVIII, §§ 1-2. This Court has ruled that substantial rewrites of the Constitution's text are revisions (*McFadden* v. *Jordan* (1948) 32 Cal.2d 330), but in later cases has made clear that less ambitious additions or subtractions are revisions if they fundamentally alter the nature of the organs of governance and rights guaranteed by the California Constitution. (*Raven* v. *Deukmejian* (1990) 52 Cal.3d 336 [ruling that Proposition 115, capping criminal procedure rights to those recognized by the Supreme Court of the United States, was a qualitative constitutional revision that could not be effected through the initiative-constitutional-amendment process].)

Especially under *Raven*'s qualitative approach, much hinges on whether an initiative-based constitutional change is "fundamental." (*Raven*, *supra*, 52 Cal.3d at p. 352.) How does one approach such an issue? It is reasonable to draw the amendment-revision line in a way that preserves the core virtues of the constitutional initiative while also preserving the

core virtues of constitutionalism in a democratic republic. Based upon the analysis that follows, we suggest the following categorical approach:

(1) *Governance.* Issues involving taxation, limits upon government, term limits, general redistricting, and the like involve governance choices where the Legislature is criticized for ignoring popular attitudes about the size, capacity, and shape of the state and its organs. Judicial review should approach these initiative-constitutional-amendments with a *strong presumption of validity.*

(2) *Public Values.* Big normative issues where voters want to cut back excessive regulation are entitled to the same strong presumption of validity. The strong presumption applies when the voters want to add further protections for individual rights (limits on government), but only a *weaker presumption* applies when the voters want to trim back individual rights, such as the procedures followed in criminal cases.

(3) *Fundamental Rights for Minorities.* Where a constitutional initiative takes away a fundamental right from a minority group, judicial review should entertain a *presumption of invalidity.*

The approach we suggest finds legal support in the California Constitution's balance between constitutionalism and democracy in Article XVIII and in this Court's case law. But before making our legal points, we would like to situate Proposition 8 within the broad history of constitutional initiatives in California and other states.

I. HYPER-AMENDABILITY & DEATH OF REVISIONS

The placement of Proposition 8 on the 2008 ballot exemplifies a broad trend in this state and nationwide: initiative-based constitutional amendments are increasing exponentially, while constitutional revisions and conventions have entirely disappeared. Both trends are cause for concern, and the biggest victims are minority groups subject to widespread prejudice and stereotyping.

State constitutions are by design more malleable than the U.S. Constitution; this is not only a distinctive feature of state constitutions but may be a virtue, because they provide a means to codify America's evolving public values. Like California, many states have separate procedures for simple *amendment* of their constitutions, for significant *revision*, and for complete *replacement* with a new constitution. Existing state constitutions have been amended over 5000 times, and many states have revised or replaced their constitutions more than once. In recent years, however, the patterns of amendment, revision, and replacement have diverged significantly. State constitutional amendment activity continues at a high and now accelerated level; there were 689 amendments in the period 1994-2001 alone. We call this *hyper-amendability*.[1] A large chunk of those initiative-based state constitutional amendments have been aimed at sexual and gender minorities – not only the anti-marriage initiatives that

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[1] See Cain et al., *Constitutional Change: Is It Too Easy To Amend Our State Constitution?* in Constitutional Reform in California: Making State Government More Effective and Responsive (Cain & Noll, edits., 1995).

have been adopted in California and 29 other states,[2] but also initiatives depriving sexual and gender minorities rights to adopt children and to the protections of anti-discrimination laws.[3]

In contrast, the pace of state constitutional revision or replacement has slowed to a dead stop. There were 144 constitutional conventions and 94 new state constitutions in the nineteenth century, but only 84 conventions and 23 new constitutions in the twentieth, and none since 1984.[4] Even in the 14 states that provide for automatic consideration of whether to call a constitutional convention, voters have become less interested in taking up the opportunities for fundamental reform offered to them: only 4 of these 25 referenda have been successful and none in over a quarter century.[5] Two thirds of the states now operate with constitutions that are over 100 years old.[6]

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[2] At present, 30 states have state constitutional bars to marriage for same-sex couples, all of them adopted by popular initiatives. For a current list, see *Status of Same-Sex Relationships Nationwide*, Lambda Legal <www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html> (as of Jan. 13, 2009).

[3] See Gamble, *Putting Civil Rights to a Popular Vote* (1997) 41 Am. J. Pol. Sci. 245, documenting the rising tide of anti-gay initiatives, 1959-1993. For important normative context of anti-gay initiatives, see Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents* (1994) 29 Harv. C.R.-C.L.L.Rev. 283.

[4] Tarr, *Introduction*, State Constitutions for the Twenty-First Century: The Agenda of State Constitutional Reform (Tarr & Williams edits., 2006) vol. 1, pp. 1-3.

[5] Benjamin, *Constitutional Amendment and Revision*, in State Constitutions for the Twenty-First Century, *supra*, vol. 1, p. 196.

[6] Tarr, *Introduction*, *supra*, p. 1.

This emerging pattern of *hyper-amendability* combined with the *death of revisions* (and new constitutions) has occurred because the revision or replacement paths in California and most other states are more cumbersome and subject to legislative control, while the amendment process has become much easier due to the professionalization of the initiative qualification process and immunity from legislative veto.[7] In California, both the constitutional convention and revision processes have to be initiated by the Legislature. Constitutional conventions require time to select members and to organize themselves. Moreover, when all is said and done, there is no guarantee that a group will get what it wants since the agenda of a convention cannot be limited. A revision commission is easier to form, but its members are selected by elected officials and its recommendations have to go first to the Legislature and then to the voters for approval. By comparison, drafting a measure and getting it qualified as an initiative-constitutional-amendment is an easier process that is less subject to derailment.

Much of the expansion in initiative-constitutional-amendment activity is an extension of political contests in the legislature or the court system. Increasingly, organized groups that have lost in the legislative process or in court are trying to reverse their defeats through constitutional initiatives. Even groups that are prevailing in the Legislature are now trying to lock-in their perhaps temporary advantage through constitutionalizing it by means of ballot initiatives. Most of this activity is

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[7] See Lee, *The Initiative Boom: An Excess of Democracy*, in Governing California (Lubenow & Cain edits., 1997) pp. 113-33.

of no serious concern to this Court and other thoughtful observers. The California Constitution is a hodge-podge that includes matters as diverse as basic rights and detailed policies. There is no constitutional purity to defend. But sometimes groups over-reach, and in the haste to secure an advantage on a particular policy, they write a measure that fundamentally revises the constitution. Given the virtual blockage of the revision process, the pressure to push the limits of revision through amendment has been on the rise and will likely continue to increase. And it will increase until its limits are made clear.

This Court, and this Court alone, has the power to make those limits clear and thereby to slow down or redirect the process we have described. Indeed, this Court exercised that power in 1991 when its decision in *Raven* invalidated Proposition 115's effort to close off rights recognition for criminal defendants. If this Court had treated the constitutional initiative in *Raven* as an initiative-constitutional-amendment, this state would surely have seen more, and probably more ambitious, initiative-constitutional-amendments circumscribing the ability of the state judiciary to interpret the individual rights provisions of the California Constitution. Instead, after *Raven*, such issues have generally been left to the normal processes of judicial elaboration.

Likewise, 42 years ago, this Court invalidated Proposition 14, a constitutional initiative that overrode state rules regulating race discrimination in property transactions. *See Mulkey* v. *Reitman* (1966) 64 Cal.2d 529, affd. *sub nom Reitman* v. *Mulkey* (1967) 387 U.S. 369 (holding

that Proposition 14 violated the Equal Protection Clause of the U.S. Constitution). If this Court (and the Supreme Court of the United States) had treated Proposition 14 as a normal amendment deregulating property law, this state would surely have seen more constitutional initiatives removing state protections from racial minorities. Instead, after *Mulkey*, such issues have been left to the normal processes of legislative enactments, agency implementation, and judicial interpretation.

Proposition 8, at issue in this case, is an even more troubling example of *hyper-amendability* than Proposition 115 or, perhaps, even Proposition 14. In contrast to Proposition 115, which applied to all citizens who might in the future be charged with a crime, Proposition 8 takes away a fundamental constitutional right from just a minority. In contrast to Proposition 14, where the discrimination was found in the motivations of proponents, discrimination is on the face of Proposition 8. If this Court allows Proposition 8 to be treated as an initiative-constitutional-amendment, we can expect further amendments of this sort, and *hyper-amendability* will receive precisely the kind of validation that this Court refused to provide for Proposition 115 in *Raven* (52 Cal.3d 336) and refused to provide for Proposition 14 in *Mulkey* (64 Cal.2d 529).

The foregoing discussion, of course, does not tell us what limit the Court should announce. Our suggested limit is drawn from the structure of Article XVIII and the purposes of the California Constitution, to which we now turn.

II. CONSTITUTION-BASED PRINCIPLES FOR DEFINING THE AMENDMENT-REVISION LINE

The California Constitution creates the distinction between amendments and revisions – and we therefore ought to look to the California Constitution to figure out how that line might be drawn. The Constitution does not define the terms, nor do their ordinary meanings seem so sharply different as to be helpful. But the structures of Article XVIII and of the Constitution generally help us figure out how initiative-constitutional-amendments might be differentiated from legislative-constitutional-revisions as a *constitutional* (legal) matter. In the process, we shall develop the three-part qualitative approach announced in the Introduction. We start, of course, with a presumption of validity for initiative-constitutional-amendments that are the result of a popular petition and a majority vote: "Government is instituted for [the people's] protection, security, and benefit, and they have the right to alter or reform it when the public good may require." (Cal. Const., art. II, § 1.)

A. Correcting for Legislative Biases

The first structural feature of Article XVIII's distinction between amendments and revisions is that the former allow the voters to circumvent the California Legislature, while the latter must be proposed by the Legislature. (To be sure, a constitutional amendment can be proposed by the Legislature, but our point is that it need not be. Also, the *hyper-amendability* phenomenon may be marginalizing the legislative-amendment option; it is easier to pay organizations to collect signatures than to persuade two-thirds of the Legislature to place a matter on the ballot.) As a

matter of both logic and history, the primary reason for allowing initiative-constitutional-amendments by direct majority vote of the people is that the Legislature is not always responsive to strong public needs and preferences. This was a rational and correct understanding, of course. There are three scenarios that inspired the 1911 addition of the constitutional initiative process to the California Constitution.

First is the problem of *self-dealing*. The Legislature can be expected to be biased in favor of its members' positions of power and authority. Political insiders tend toward policies that preserve their positions, power, and authority in ways that do not serve the interests of the public. In setting electoral districts and terms of office, regulating the conduct and financing of campaigns, responding to criticism, and asserting their own jurisdiction, legislators are prone to act in their own self-interest even when such action is not in the overall public interest or favored by the voters.[8] This problem is of constitutional dimensions, because under the California Constitution the Legislature is an agent of the public and is supposed to act only in the public interest.[9]

Second is the problem of *over-regulation*. In the post-New Deal era, legislators tend to favor more taxes, bigger government, and more

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[8] See Smith, *Direct Democracy and Election and Ethics Laws*, in Democracy in the States (Cain et al. edits., 2008).

[9] See also Ely, Democracy and Distrust: A Theory of Judicial Review (1980), arguing from the premises of constitutionalism generally (and the U.S. Constitution in particular) that there needs to be an outside monitor to offset the tendency of political "insiders" to insulate themselves at the expense of the public interest.

regulations than voters do.[10] Legislators usually view their job as solving public problems, typically through a pro-active government program. Voters, too, want their representatives to solve problems, but tend to be more cost-conscious, because it is voters and not legislators (by and large) who bear the burdens and pay the costs of regulation. The constitutional initiative is a mechanism for the voters to place limits on or to channel legislative innovations in the direction the public prefers. Unlike the self-dealing problem, which has a constitutional dimension, the over-regulation problem is one of policy balance.

Third is the problem of *special interests*. During the Progressive era, when the initiative was added to the California Constitution, a primary justification was to short-circuit the influence of "special interests," namely, interest groups who seek rents from government or try to head off needed regulation.[11] Although an important justification for the initiative-constitutional-amendment and other mechanisms of direct democracy, the circumvent-special-interests justification is the most tricky, because the key term depends on a political judgment. In the Proposition 8 campaign, proponents saw gay people as a "special interest" seeking to impose costs on parents and their children, while opponents of Proposition 8 saw its

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[10] While the statement in text seems to be true of the post-New Deal era, in the early twentieth century voters tended to favor more regulation in many areas. For a historical and empirical analysis along these lines, see Matsusaka, For the Many or the Few: The Initiative, Public Policy, and American Democracy (2004).

[11] For a thoughtful analysis of direct democracy and "special interests," see Gerber, The Populist Paradox: Interest Group Influence and the Promise of Direct Democracy (1999).

sponsors as "special interests" mobilizing anti-gay stereotypes and prejudice in an effort to reassert a "special exception" to the constitutional right to marry. The California Constitution weighs in on this debate in the following way. Its Declaration of Rights (Cal. Const., art. I) tells us that groups seeking to protect dignitary, equality, speech, and other important constitutional rights are acting in the public interest in the most serious way.[12]

As a matter of constitutional structure, Article XVIII, read together with the whole Constitution, provides a mechanism for the voters to amend the Constitution when the Legislature is not likely to pursue the public interest. Many scholars are critical of the voters' ability to do a better job or even to figure out what is in their own interest, but for purposes of understanding the California Constitution, we place those objections to one side. Under the Constitution itself, initiatives, rather than revisions, are especially appropriate for matters of governance, such as the allocation of public resources and tax burdens; the rules governing lobbying, electoral districts, campaign finance, ethics in government; and limits on the authority of government, including limits grounded in personal rights as

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[12] Such claims must be objectively plausible, for almost any issue can be expressed in terms of individual rights as well as policy. For example, contrast the equality claims of the plaintiffs in *In re Marriage Cases* (2008), 43 Cal.4th 757, which were not only plausible claims that had been accepted by other courts and were persuasive to a majority of the neutral arbiters of this Court, with the liberty claims made by the proponents of Proposition 8, such as the speculative (in our view, flatly incorrect) assertion made in some ads that marriage recognition for same-sex couples would require churches to give up their religious principles.

well as allocational decisions. As for initiative-based constitutional amendments addressing any of these matters, the Constitution suggests a *strong presumption of validity*. The strong presumption can be overcome by a showing that the amendment has made a too broad and fundamental change in the constitutional authority and duties of an organ of government.

The foregoing analysis does not, however, tell us how more intangible matters of great public debate ought to be handled. Issues of interest to the voters such as the death penalty for certain crimes, the legal status of marijuana and other drugs, affirmative action, and aid in dying (or death with dignity) are increasingly matters for constitutional initiatives all over the country, including California, of course. Our analysis of these kinds of issues starts with the *presumption of validity* suggested by the general purposes of Article XVIII but requires a more detailed constitutional interrogation of both Article XVIII and the Constitution. Are there situations where public-values initiative-constitutional-amendments lose that presumption of validity and ought to be pressed as revisions?

B. Super-Majorities to Protect Minorities

A second distinction between Article XVIII initiative-constitutional-amendments and legislative-constitutional-revisions is that the latter are not only necessarily screened by the Legislature, but also require two-thirds votes in both chambers of the Legislature before they can be presented to the voters for approval.[13] Revisions therefore *must* pass through a triple

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[13] The analysis above does not apply to legislative-constitutional-amendments (Cal. Const., art. XVIII, § 1), which also require a two-thirds vote in the Legislature to secure a place on the ballot.

screen: (1) legislators must approve them; (2) indeed, two chambers must approve; and (3) legislative approval must be by a two-thirds vote. This is a demanding process, and it is clear from the foregoing analysis that the process is not suited for constitutional changes that involve ordinary governance issues or deregulation. From the perspective of democratic constitutionalism, the best justification for such a demanding process is to protect fundamental constitutional rights, especially those of minorities who are vulnerable in an up-or-down majority vote of all adult citizens. Specifically, the super-majority requirements for a revision are responsive to America's and California's long *equality* tradition, where *all* citizens are assured access to the fundamental rights guaranteed by the state.

The long tradition is rooted in this question: What is the state for? In *Leviathan* (1651), Thomas Hobbes argued that government is justified, and earns our consent, by allowing us to escape the "state of nature." The civil state exists so that citizens can pursue their lives without fear that other citizens, or outside invaders, will interfere with their lives and their ability to operate in the world. To protect citizens thus, the civil state needs legislatures to enact laws serving the public interest, police to enforce those laws, and courts to adjudicate controversies without resort to private feuds. These protections, moreover, need to be made available to *everyone*. The state's failure to preserve and protect, and to make these protections broadly available so that people can live their lives secure from fear, is for Hobbes the failure of the state to do its job. If the state protects only some, or provides protection ineptly, this is a justification—and according to

Hobbes the *only* justification—for civil disobedience and self-defense.[14] John Locke, the political philosopher who was probably most influential among America's founding generation, expanded upon Hobbes' analysis in *A Second Treatise of Government* (1689). Locke argued that the civil state not only saved people from the "inconveniences" (risks to life and limb) of the state of nature, but also provided citizens with the ability to add to their liberties and possessions, and enrich their lives beyond what they could possibly enjoy in the state of nature. Like Hobbes, Locke maintained that arbitrary governmental treatment denying some citizens their fundamental "lives, liberties, and estates" was justification for dissolving the social contract.[15]

Lockean theory was one justification for the American Revolution: the colonists believed that they were treated arbitrarily by a distant government. The equality principle of Hobbes and Locke was a central feature of early American state and federal constitutional law. As James Madison put it shortly before the Philadelphia Convention that drafted the U.S. Constitution, "equality . . . ought to be the basis of every law," and the law should not subject some persons to "peculiar burdens" or grant others "peculiar exemptions."[16] During the ratifying debates, Madison justified the bicamerialism and presentment requirements for lawmaking on this

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[14] Hobbes, The Leviathan, Review and Conclusion (1651); also Hobbes, The Elements of Law Natural and Politic (1650) ¶ 20.5.

[15] Locke, A Second Treatise of Government (1689) ¶ 222.

[16] Madison, Memorial and Remonstrance Against Religious Assessments (1785).

basis, and Hamilton deployed a similar argument for judicial review.[17] From the earliest days of the American republic, state as well as federal judges invalidated discriminatory measures they deemed to be "class legislation," singling out one group for special advantages or disabilities without regard to the public interest.[18]

Thus, when California became a state, it was well-established in American constitutional law that the state was not authorized to adopt class legislation as defined above. The positive precept is that the civil state must be neutral as to various groups in society, at least as to fundamental matters such as the enjoyment of life, guarantees of property and contract rights, and marriage (as both this Court and the Supreme Court of the United States have repeatedly held). The Equal Protection Clause (1868) of the U.S. Constitution codifies this precept, but the California Constitution makes it even more central in its Declaration of Rights. The Declaration not only says that "[a] person may not be . . . denied equal protection of the laws" (Cal. Const., art. I, § 7(a)), but also says this: "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." (Cal. Const., art. I, § 7(b).) For California's Constitution, as for the U.S. Constitution, equal treatment is the

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[17] Federalist No. 10 (Madison) (arguing for bicameralism and presentment in order to reduce the problem of "factions); Federalist No. 78 (Hamilton) (arguing for an independent judiciary to assure that "partial and unjust laws" would receive a narrow construction or be invalidated through judicial review).

[18] See Saunders, *Equal Protection, Class Legislation, and Color-Blindness* (1997) 96 Mich. L.Rev. 245.

fundamental baseline, the most important individual right, and one of the most important structural features of the Constitution.[19]

As *Reitman* illustrates, racial minorities have been vulnerable to initiative-constitutional-amendments that take away fundamental rights (in *Reitman*, to enter into property transactions on a nondiscriminatory basis). As a minority, people of color need to attract mainstream allies to protect their rights in an up-or-down majority vote – but as a minority long subject to prejudice and stereotyping it was hard in the 1960s for this group to attract allies: many prejudiced voters favored any measure that harmed or excluded people of color and most moderate voters harbored racial stereotypes that made them reluctant to vote for equal treatment. In part because this Court and the Supreme Court of the United States have insisted that citizens of color not be subject to class legislation and special exclusions, Americans are gradually coming to accept the principle that race ought not be a basis for exclusion in public law.

Reitman was decided in an era before the *hyper-amendability* that we describe above. Hyper-amendability was entering its heyday just as gay rights rose to the upper level of the public agenda, so that sexual and gender minorities have joined racial minorities as particularly vulnerable groups in popular initiatives. As a minority, gay people need to attract mainstream allies to protect their rights in an up-or-down majority vote – but as a minority long subject to prejudice and stereotyping it remains hard for this

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[19] See Karst, *The Supreme Court, 1976 Term – Foreword: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv. L.Rev. 1, 40-42.

group to attract allies: many prejudiced voters favor any measure that harms or excludes lesbians, gay men, bisexuals, or transgendered persons, and even moderate voters are reluctant because of the anti-gay stereotypes (e.g., "predatory homosexuals" who "recruit" vulnerable children and destroy traditional families) that the state long built into its public education and state policy.[20]

As this Court recognized in *In re Marriage Cases* (2008) 43 Cal.4th 757, sexual orientation is a suspect classification for the same reasons race and sex are, and marriage is a fundamental right for lesbian and gay couples just as it is for interracial couples whose rights were protected in *Perez* v. *Sharp* (1948) 32 Cal.2d 711. The whole point of a Constitution according to social contract theory, the founders of our nation, and the terms of our state constitution is to entrench guarantees that *all* citizens can count on. A natural reading of Article XVIII, in light of these constitutional commitments, is that higher hurdles must be surmounted before the voters can essentially add to the Constitution class legislation that takes away a fundamental constitutional right from a minority that has traditionally been the object of prejudice and stereotyping. If such class legislation is really

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[20] On California's long history of demonizing "homosexuals" as predatory against children and as anti-family, see Eskridge, Dishonorable Passions: Sodomy Law in America, 1861-2003 (2008) pp. 46-108. On the uphill battle the gay and lesbian minority faces in popular votes, see Haider-Markel et al., *Win, Lose, or Draw: A Re-Examination of Direct Democracy and Minority Rights* (2007) 60 Pol. Res. Q. 304-14, documenting that 71% of anti-gay ballot initiatives prevailed in the period 1972-2005.

needed to protect the overall public interest, then it ought to go through the screening process entailed in legislative-constitutional-revisions.

Our analysis is also open to the Attorney General's position in response to this Petition. The Attorney General says that Proposition 8 deprives a minority group of an "inalienable right," and that cannot be accomplished through an initiative-constitutional-amendment. The Attorney General remains open to the possibility that a legislative-constitutional-revision might alter "inalienable rights," and our foregoing analysis provides some support for that possibility. In turn, however, our analysis considers the possibility that "inalienable rights" can only be compromised by the third option under Article XVIII: convening a Constitutional Convention and ultimately replacing the current Constitution with a new one. As we have argued above, hyper-amendability has made that process, like the revision process, irrelevant, but a ruling from this Court that the initiative-constitutional-amendment process cannot be the basis for Proposition 8 might be the stimulus for a broader constitutional conversation.

Indeed, this ramification of the Attorney General's position is far from unprecedented. Like the California Constitution, the first part of the German Constitution is a declaration of individual rights, including dignitary and equality rights. Reasoning from the structure of that constitution, the German Supreme Court has formulated a doctrine called "unconstitutional constitutional amendments," which holds that "even a constitutional amendment would be unconstitutional were it to conflict with

the core values or spirit of the Basic Law as a whole."[21] In the language of Article XVIII, one might say that the German Constitution has opted for replacement as the only mechanism for overrides of fundamental constitutional rights.

C. Deliberation to Impose Rationality Requirements

There is a third feature of Article XVIII that is relevant to drawing the amendment-revision line. A simple initiative-constitutional-amendment requires only a majority vote of the people, while a revision requires votes in both chambers of the Legislature as well as a majority vote of the people. (A legislative-constitutional-amendment proceeds through the Legislature as well, but the amendment process does not require this and usually does not proceed in this way.) What is further distinctive about the legislative-constitutional-revision process is that it is characteristically *deliberative* in a deeper way than the initiative-constitutional-amendment process is. The amendment process involves public debate, but differs from the revision process in terms of reasons, transparency, and accountability. In the popular debate, conducted largely in the media, appeals are often emotional, and policy justifications are typically unsupported by facts or solid information. For example, the proponents of Proposition 8 centrally maintained that state recognition of same-sex marriage would *require* schools to teach (vulnerable) children that "gay marriage" is just as good as "traditional marriage." That claim has no basis, and its acceptance by some

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[21] Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany (1997) p. 48 (explaining the doctrine of "unconstitutional constitutional amendments"); *id.* at p. 542 n.90.

voters probably made the difference between the gay minority's having the same marriage rights as the straight majority and having no marriage rights at all.

Are emotional appeals and nonfactual claims unknown in the legislative process? Of course not. The difference is that such claims are subject to the deliberation requirement of Article XVIII. Any legislator making such a claim is immediately subject to dispute by other legislators. Unlike voters, who can cast their vote anonymously and for any reason (including prejudice), legislators must cast their votes publicly and are accountable to defend their votes based upon public reason. If a legislator's public reason is clearly a makeweight or invokes phony stereotypes, then she or he will be subject to media and other criticism, maybe even ridicule. This process does not mean that sexual and gender minorities always win in the Legislature (or that they should). What it does mean is that there is greater assurance that legislative deliberation will render a judgment that is more accountable to reason and facts than the judgment of anonymous voters in an amendment contest.

Consider this thought experiment. Assume that the Supreme Court of the United States in 1949 vacated this Court's opinion in *Perez* v. *Sharp* (1948) 32 Cal.2d 711, because the (pre-*Brown* v. *Board of Ed.*) Court felt that such an interpretation of the U.S. Constitution would inflame half the nation. On remand, assume that this Court reasserted its holding under the California Constitution's several equality guarantees. And in 1950, the voters added this to the California Constitution through an initiative-

constitutional-amendment: "To prevent a dilution of the white race, no nonwhite person can marry a white person in this state, nor shall such a marriage be recognized." Is this an amendment that can be added by majority vote, and a vote that was surely fueled by racial prejudice and stereotypes? Or is it properly characterized as a legislative-constitutional-revision that has to go through the Legislature first? Or is this a change that cannot be made to the existing Constitution and thus would require replacement of the existing Constitution?

To be sure, this hypothetical is set in a period well before the hyper-amendability phenomenon we describe, but the point of our thought experiment is that if Proposition 8 is a permissible initiative-constitutional-amendment, so would this hypothetical post-*Perez* initiative have been. Would it not be a fundamental change to the Constitution to deny a small minority this fundamental right? To add such explicit racism? If no other argument we have made gains any traction with this Court, we urge you to consider the deliberative advantages of Article XVIII's revision procedure. Even if the population of the state were overwhelmingly against interracial marriage in 1950, as was probably the case, the Legislature would have been reluctant to advance such a measure to the voters, because all the arguments against interracial marriage – the *Perez* plurality opinion carefully laid them all out, with the dissenting opinion filling in details – were not justified by fact-based neutral principles and were really driven by prejudice and stereotypes.

Perhaps even more important, if the Legislature had sent the measure on to the voters as a proposed legislative-constitutional-revision, it would almost certainly have "revised" the language set forth above, to render it less inflammatory. Specifically, the Legislature would likely have deleted the prefatory clause ("To prevent a dilution of the white race") and might have proposed something like the following: "No nonwhite person can marry a white person in this state, nor shall such a marriage be recognized." Or, to remove the white supremacy gloss that might be placed on this language, the Legislature might have revised the revision in this way: "No person can marry another person of a different race in this state, nor shall such a marriage be recognized." However lamentable such a legislative-constitutional-revision would have been, this language would have been the least worst version of it.

III. THIS COURT'S PRECEDENTS TRACK THE AMENDMENT-REVISION LINE SUGGESTED BY THE CALIFORNIA CONSTITUTION

Recall the presumptions for drawing the amendment-revision line derived from Article XVIII and the structure of the California Constitution:

(1) *Strong Presumption of Validity for Amendments Relating to Governance.*

(2) *Presumption of Validity for Public Values Amendments, Especially Those Limiting Government.*

(3) *Presumption of Invalidity for Amendments Denying Fundamental Rights to Minorities.*

These lines, derived from the California Constitution itself, are a helpful way of organizing this Court's precedents evaluating the legitimacy of initiative-constitutional-amendments.

A. Governance Amendments: Strong Presumption of Validity

Most of the initiative-constitutional-amendments adopted in California are measures that relate to governance issues. Perhaps a large majority of these initiative-constitutional-amendments are either not challenged or not seriously challenged, because of the strong presumption of validity. Such a presumption is very hard to rebut, and some serious petitioners have come away from this Court empty-handed, consistent with our structural argument.

For example, in *Legislature* v. *Eu* (1991) 54 Cal.3d 492, this Court evaluated Proposition 140, which made many important changes in the legislative branch, including term limits for legislators. Proposition 140 was, as a functional matter, a fundamental change in the state's governance structure, but this Court upheld those changes as a proper Article XVIII amendment. The Court set the petitioners' burden very high, but the primary reason offered by the Court for not insisting upon the legislative-constitutional-revision process was this one: "to hold that reform measures such as Proposition 140, which are directed at reforming the Legislature itself, can be initiated only with the Legislature's own consent and approval, could eliminate the only practical means the people possess to achieve reform of that branch." (*Id.* at p. 511.) Under such a standard, Proposition 140 passed Article XVIII review, as it should have; the very substantial

changes in the legislative branch were, ultimately, justified by the self-dealing problem that helped inspire Article XVIII.[22] Much the same analysis applies to the even more far-reaching changes effected by the tax-limiting Proposition 13 in 1978 and upheld by this Court in *Amador Valley Joint Union High School Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208.

Note that the strong presumption of validity *can* be rebutted, as it was in *McFadden* v. *Jordan* (1948) 32 Cal.2d 330. Although the initiative-constitutional-amendment in *McFadden* related to governance issues, the amendment revised so much of the California Constitution that this Court had no choice but to invalidate it on the grounds that such rewriting could only be accomplished through revisions or a new constitutional convention.

B. Public Values Amendments: Presumption of Validity

The public retains an interest in pressing public values issues in situations where the Legislature has been slow to act. The easiest cases are those where an initiative-constitutional-amendment provides additional limits on governmental power by creating new individual rights, for example. In these cases, the strong presumption of validity is fully mobilized, and such cases have not proven troublesome for this Court.

The more often litigated initiative-constitutional-amendments are those confirming or expanding governmental authority in the face of individual rights claims. A leading case is *People* v. *Frierson* (1979) 25

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[22] This Court struck down deprivation of legislator pension benefits as a violation of the Contracts Clause of the U.S. Constitution (*Eu*, *supra*, 54 Cal.3d at pp. 538-44).

Cal.3d 142, which evaluated a 1972 initiative-constitutional-amendment that overrode this Court's judgment that the death penalty violated the California Constitution. Justice Richardson's plurality opinion did not provide a detailed set of reasons for accepting this change as an amendment (*id.* at pp. 186-88), but our theory does provide such a justification: even though the initiative-constitutional-amendment was expanding state power and erasing a previous constitutional right, it was still entitled to a presumption of validity, and there was nothing to trump that presumption, for the amendment deprived no minority of a fundamental right. The death penalty is equally applicable to everyone, and is expected to deter all of us from heinous conduct. (See also *Brosnahan* v. *Brown* (1982) 32 Cal.3d 236.)

Contrast *Raven* v. *Deukmejian* (1990) 52 Cal.3d 336, which involved Proposition 115, where the voters amended the Constitution to provide that certain enumerated rights of criminal defendants would be construed consistently with the United States Constitution and that criminal and juvenile defendants would not be afforded greater rights than that afforded by the federal Constitution. The proponents of Proposition 115 had strong arguments for sustaining this amendment under *Frierson*, as well as *In re Lance W.* (1985) 37 Cal.3d 873 (upholding an initiative-constitutional-amendment limiting the exclusionary rule and other matters of evidence), but this Court ruled that this portion of Proposition 115 was a revision and was therefore invalid. As the Constitution requires, the Court started with a presumption of validity, but found that presumption rebutted

by the twin facts that Proposition 115's realignment of rights effected "far reaching, fundamental changes in our governmental plan," as well as "a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution." (*Raven, supra*, 52 Cal.3d at p. 355.)

C. Amendments Denying Fundamental Rights to Minorities: Presumption of Invalidity

Proposition 8 is a far cry from the initiatives considered in this Court's previous decisions, including *Raven,* where the revocation of important constitutional rights applied to all citizens of California and was not targeted at a minority. The greater includes the lesser: if Proposition 115, applying evenly to all citizens, was a "fundamental change in our governmental plan," then surely Proposition 8 is as well, for it targets a minority group and carves out a special exclusion for that group in a constitutional right that this Court and other courts have recognized as "fundamental."

The closest analogues to Proposition 8 are *Mulkey* and our thought experiment involving a hypothetical initiative-constitutional-amendment overriding *Perez*. Under the principles underlying the California Constitution generally and Article XVIII in particular, Proposition 14, our hypothetical proposition, and Proposition 8 all meet the same fate: they are invalid unless legislative super-majorities send those proposals to a popular vote as legislative-constitutional-revisions.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petitioners' Briefs, this Court should grant the petition for writ of mandate and order Respondents to refrain from enforcing or effectuating Proposition 8.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT
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PROOF OF SERVICE

I, Jessica Long, declare as follows:

I am employed with the law firm of Brune and Richard LLP, whose address is 235 Montgomery Street, San Francisco, CA 94104. I am over the age of eighteen years and not a party to this action.

On January 15, 2009, I served the following document(s), by method indicated below on the parties in this action, listed on the attached service list:

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