Case No. S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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*Karen L. Strauss, et al.*,

Petitioners,

v.

*Mark B. Horton, as State Registrar of Vital Statistics, etc., et al.*,

Respondents;

*Dennis Hollingsworth, et al.*,

Interveners.



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# APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CONSTITUTIONAL AND CIVIL RIGHTS LAW PROFESSORS IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

### CASES

## CONSTITUTIONAL PROVISIONS, STATUTES & RULES



## LAW REVIEW ARTICLES

**OTHER AUTHORITIES**

## APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to California Rule of Court 8.520(f), amici curiae hereby respectfully apply for permission to file an amicus curiae brief in support of Petitioners in this original writ proceeding. Amici urge this Court to grant the relief sought by Petitioners by declaring that Proposition 8 is null and void in its entirety.

Amici (listed below) are professors of law who teach at California law schools and/or are licensed to practice in the State of California. Amici's teaching, scholarship, and other work have been in the areas of constitutional law, civil rights, or the protection of rights belonging to members of groups against whom discrimination is constitutionally suspect. Collectively, amici's work reflects a deep respect and concern for the principles of equal protection, particularly as they apply to members of groups discriminated against on the basis of a classification warranting high levels of constitutional scrutiny. Amici have played a role in the development of constitutional and civil rights jurisprudence, and have an interest in the continuing cohesive and sound development of those laws. Amici therefore believe that their submission may aid the Court in assessing the petitions now before it.

No party or counsel for any party authored the attached amicus brief in whole or in part. Additionally, no party, counsel for any party, or any

other person or entity made any monetary contribution intended to fund the preparation or submission of the brief, other than the amici curiae or their counsel in this original writ proceeding.

Amici list their titles and affiliations solely for identification purposes:

**Christopher Edley, Jr.**, The Honorable William H. Orrick Jr. Distinguished Chair and Dean, Berkeley Law, University of California at Berkeley;

**Herma Hill Kay**, Barbara Nachtrieb Armstrong Professor of Law and former Dean, Berkeley Law, University of California at Berkeley;

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**Pamela S. Karlan**, Kenneth and Harle Montgomery Professor of Public Interest Law, and Co-Director of Supreme Court Litigation Clinic, Stanford Law School;

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**Mary Dudziak**, Judge Edward J. and Ruey L. Guirado Professor of Law, History and Political Science, University of Southern California Gould School of Law;

**Christine Chambers Goodman**, Professor of Law, Pepperdine University School of Law.

## BRIEF OF AMICUS CURIAE

## SUMMARY OF ARGUMENT

Proposition 8 represents the first time that the California initiative process has been wielded to abolish a fundamental freedom for an unpopular minority group and to alter the Constitution so as to mandate governmental discrimination against that group. In this way, Proposition 8 attempts to breach some of the most elemental textual and structural promises of our state Constitution. It revokes a fundamental right that, in the words of the Constitution, is "inalienable." It dismantles constitutional equality for a single group of Californians – a group that, because of its history of oppression and stigma, is entitled to the highest level of constitutional protection against discrimination. Moreover, it overrides the judiciary's core duty to test laws against the constitutional requirement of equality by "smoking out"[1] impermissible prejudice.

Such sweeping change in fundamental constitutional principles cannot be made by way of simple majority vote. The California Constitution is the written expression of the people's ground rules for how we will govern ourselves, and what the government and its branches can and cannot do. The Constitution itself, which is the ultimate expression of

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[1] (*City of Richmond v. Croson* (1989) 488 U.S. 469, 493 (plur. opn. of O'Connor, J.).)

the people's will, protects against simple majoritarian alteration of these basic ground rules, for although it recognizes an avenue for direct democracy, it also firmly dictates its limits. The Constitution limits the initiative power to ensure that changes this fundamental may be accomplished only through the multi-tiered process of debate, deliberation and decision reflected in a legislative supermajority followed by electoral approval, and never through unchecked majority rule. The requirements of the revision process preserve the people's insistence on the protections of formal discourse as a prerequisite of making momentous changes in our basic form of governance.

As the Court repeatedly has recognized, even relatively simple initiative enactments may substantially alter the underlying principles of the Constitution or our system of government.[2] Proposition 8's impacts are profound. If permitted to stand as an amendment, Proposition 8 would establish that voters may freely use the initiative process to carve out exceptions to the Constitution's equality principle for historically stigmatized minorities, and to do so with regard to valued, important, and personal fundamental rights – in this case, the right to marry the person of

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[2] (See, e.g., *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 351-352; *Amador Valley J. Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 223; *People v. Frierson* (1979) 25 Cal.3d 142, 186-187.)

one's choice, (*In re Marriage Cases* (2008) 43 Cal.4th 757, 813-820)[3] – thus abrogating inalienable rights so basic that "a government may [not] establish or abolish [them] as it sees fit." (*Id.* at p. 818, fn. 41.) Such a conclusion would undermine bedrock constitutional concepts and materially impair – indeed, defeat – the judiciary's unique and central role as the ultimate guardian of constitutional equality. Upholding Proposition 8 would tear the fabric of the equality principle itself, for it would validate the concept that vulnerable minorities have only a conditional and tentative entitlement to equality – an entitlement redeemable only unless and until a bare majority decides otherwise.

Over the last century, this Court has been called upon to evaluate asserted justifications for unequal treatment of certain disfavored minorities and to enforce the fundamental guarantees that protect the equal dignity and equal rights of vulnerable members of society. Repeatedly, the Court has exercised its "most fundamental" judicial role to analyze those concerns, to distinguish compelling need from irrational fear and prejudice, and to "preserve constitutional rights, whether of individual or minority, from obliteration by the majority." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.)

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[3] See Amicus Curiae Brief on Behalf of California Professors of Family Law.

Proposition 8 would render this critical judicial role obsolete. By putting basic equality for an unpopular minority to popular vote, Proposition 8 permitted the decision-making process to become infected with the very fears, prejudices, stereotypes and misinformation that are repugnant to our laws, and that the judiciary is entrusted to prevent from becoming a basis for differential governmental treatment of persons. Upholding Proposition 8 would negate the Court's quintessential role in protecting vulnerable minorities from arbitrary action, thus eliminating any significant governmental check on the ability of a bare majority of voters to strip minorities of the most fundamental human rights based on the very prejudices against which the Constitution is designed to protect us all.

The Constitution makes clear that California voters possess broad authority to amend, but not revise, the Constitution through the initiative process. The distinction between amendment and revision, and the different procedures prescribed for each, are constitutionally-grounded structural checks on direct democracy that warrant vigorous judicial enforcement. As this Court recently noted, the judiciary not only must safeguard the power of direct democracy, but must also enforce its limits:

> Although California decisions consistently and vigorously have safeguarded the right of voters to exercise the authority afforded by the initiative process [citation omitted], our past cases at the same time uniformly establish that initiative measures adopted by the electorate are subject to the same constitutional limitations that apply to statutes adopted by the

> Legislature, and *our courts have not hesitated to invalidate measures enacted through the initiative process when they run afoul of constitutional guarantees provided by either the federal or California Constitution.*

(*In re Marriage Cases, supra,* 43 Cal.4th at p. 851, emphasis added.)

The "amendment" challenged here must be invalidated because it breaches constitutionally prescribed limits. If it is truly the will of the people to overhaul such central tenets of the California Constitution, the measure expressing that will must undergo the more rigorous deliberative process created for constitutional revision. That process incorporates the power of the ballot box while guarding against the danger of "improvident or hasty" revision. (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 347.)

## ARGUMENT

### I. PROPOSITION 8 ATTEMPTS TO ERADICATE A RIGHT THAT THE CONSTITUTION, AS INTERPRETED BY THIS COURT, HAS DEEMED INALIENABLE.

#### A. The California Constitution Guarantees Certain Rights As Inalienable.

Article I, section 1 of the California Constitution declares that certain irrevocable rights belong to every individual:

> *All people* are by nature free and independent and have *inalienable* rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

(Emphasis added.)

Present in substantially the same form since the inception of the state Constitution,[4] this language reflects a choice by our state founders to follow the formulation of a number of sister states that declared certain rights "inalienable," belonging to the people, and existing beyond the undue interference of government. (Joseph Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety* (1997) 25 Hastings Const. L.Q. 1, 2-3.) While similar language in other state constitutions was viewed as "advisory or hortatory," California's language, which includes article I, section 26 ("The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise"), demonstrates that, in this state, inalienable rights are concrete and meaningful, and subject to judicial enforcement. (*Id.* at pp. 20-22.)[5] Thus, "California courts have viewed [article I, section 1] from the outset as a positive protection against interference with enumerated rights." (Grodin,

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[4] "Except for a 1972 amendment substituting the word *people* for the original *men* and adding *privacy* to the list of protected rights, this provision remains as it was first adopted in 1849." (Grodin, Massey & Cunningham, The California State Constitution: A Reference Guide (1993) 38, emphasis in original.)

[5] Indeed, despite their historical and philosophical roots in natural law theory, "most [states] have assumed that the inalienable rights clauses have some judicially enforceable content." (*Id.* at p. 22.)

Massey & Cunningham, The California State Constitution: A Reference Guide at p. 38.)

The California Supreme Court took up this question shortly after the adoption of the original 1849 Constitution. In *Billings v. Hall* (1857) 7 Cal. 1, the dissenting justice viewed the language of article I, section 1 as a mere "truism," rather than a limitation upon the power of government. (*Id.* at p. 19 (dis. opn. of Terry, J.).) The two justices forming the majority, however, each adamantly interpreted the section as providing important and enforceable protection:

> [The section is] one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.

(*Id.* at p. 6 (Murray, C.J.).)

> [F]or the Constitution to declare a right inalienable, and *at the same time leave the Legislature unlimited power over it*, would be a contradiction in terms, an idle provision, proving that a Constitution was a mere parchment barrier, insufficient to protect the citizen, delusive and visionary, and *the practical result of which would be to destroy, not conserve, the rights it vainly presumed to protect.*[6]

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[6] In essence, Proposition 8 attempts to give the popular majority virtually "unlimited power" to "destroy, not conserve" the inalienable rights of others through an exercise of the initiative power, which is an extension of legislative authority. (See, e.g., *Marine Forests Society v. California Coastal Comm'n* (2005) 36 Cal.4th 1, 35 [electorate acts in legislative capacity when exercising the initiative power].)

(*Billings*, *supra*, 7 Cal. at p. 17 (conc. opn. of Burnett, J.), emphasis added.) (See also *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54 ["In construing the words of a . . . constitutional provision, . . . an interpretation which would render terms surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning"].)

Since that time, the Court has continued to strike down laws that unconstitutionally infringed upon article I, section 1 rights. (See, e.g., *Gibbs v. Tally* (1901) 133 Cal. 373, 377 [statutory restrictions on freedom to contract "clearly contravene[] the provisions of section 1 of article I"]; *Stimson Mill Co. v. Braun* (1902) 136 Cal. 122, 125 [constitutional provision respecting mechanics' liens was subordinate to article I, section 1 declaration that "all men have the inalienable right of 'acquiring, possessing and protecting property'"]; *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 163 [liberty interest under article I, section 1 protects "the right of every citizen to have the personal liberty to develop, whether by education, training, labor, or simply fortuity, to his or her maximum economic, intellectual, and social level"].)

### B. The Right To Marry Is An Inalienable Right.

This Court recently reiterated that the right to marry is "one of the basic, *inalienable* civil rights guaranteed to an individual by the California

Constitution." (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 781, emphasis added.) "[T]he right to marry 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..." (*Id.* at p. 818, emphasis in original.)[7]

In so doing, the Court gave meaning to the inalienability of the fundamental right to marry, as a right that stands beyond the reach of governmental interference:

> In recognizing [that the right to marry is] "a fundamental right of free men [and women]," [citation omitted] the governing California cases establish that **this right embodies fundamental interests of an individual that are protected from abrogation or elimination by the state**...[I]t is apparent under the California Constitution that the right to marry – like the right to establish a home and raise children – has independent *substantive* content, **and cannot properly be understood as simply the right to enter into such a relationship *if (but only if)* the Legislature chooses to establish and retain it**.

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[7] (See also Laurence H. Tribe, *Lawrence v. Texas: The 'Fundamental Right' That Dare Not Speak Its Name* (2004) 117 Harv. L.Rev. 1893, 1922 [intimate relationships "occupy a fundamental place in our lives, in the ways we express ourselves and – especially but not exclusively in the case of lasting relationships – in the ways we learn from one another and reshape the ideas and values with which we entered into those relationships"]; Kenneth L. Karst, *The Freedom of Intimate Association* (1980) 89 Yale L.J. 624, 636 [intimate associations are central to an individual's identity because of their expressive qualities; "An intimate association may influence a person's self-definition not only by what it says to him but also by what it says (or what he thinks it says) to others"].)

(*In re Marriage Cases, supra*, 43 Cal.4th at p. 818, bold emphasis added.)

> [T]he right to marry is **not properly viewed as simply a benefit or privilege that a government may establish or abolish as it sees fit**, but rather that the right constitutes *a basic civil or human right of all people.*

(*Id.* at p. 818, fn. 41, bold emphasis added.)

> [T]he constitutionally based right to marry properly must be understood to encompass the core set of basic *substantive* legal rights and attributes traditionally associated with marriage **that are so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process.**[8]

(*Id.* at p. 781, bold emphasis added.)

> **[T]he fundamental rights embodied within that Constitution for the protection of all persons represent restraints that the people themselves have imposed upon the statutory enactments that may be adopted either by their elected representatives or by the voters through the initiative process.**

(*Id.* at p. 852, bold emphasis added.)

Thus, Proposition 8 purports to take away a right that has been identified as so fundamental that it is "protected from abrogation or

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[8] The reference in this quotation as well as the next to "statutory" enactments reflects the particular context of *In re Marriage Cases*, which examined the constitutionality of two statutes, one of which was enacted by voter initiative. As such, they should not be read as indicating a meaningful distinction regarding constitutional initiatives. More importantly, if the fundamental right to marry is "protected from abrogation or elimination by the state," then by definition it is protected from abrogation by

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elimination by the state." It may well be that violation of this principle, by itself, breaches the boundaries of a constitutional "amendment." The Court need not decide that question, however, for Proposition 8 makes additional serious intrusions into core constitutional structure.

## II. PROPOSITION 8 UNDERMINES THE CONSTITUTIONAL PRINCIPLE OF EQUALITY.

As a constitutional concept, equality is not merely a minimum guarantee of the equal protection clause. Rather, it is an "informing principle" that permeates the Constitution. (Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv. L.Rev. 1, 40, 42.) "The most fundamental interest of all [is] the interest in being treated by the organized society as a respected and participating member." (*Molar v. Gates* (1979) 98 Cal.App.3d 1, 16; quoting Karst, 91 Harv. L.Rev. at p. 33.) The ideals of equality and freedom are "[f]undamental to all forms of democracy" and "key words for defining democracy in both the ancient and modern worlds." (Maureen B. Cavanaugh, *Democracy, Equality, and Taxes* (2003) 54 Ala.

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constitutional voter initiative, which is an exercise of state legislative power.

L.Rev. 415, 443.)[9] "Democracy has its own internal morality, based on the dignity and equality of all human beings . . . Above all, democracy cannot exist without the protection of individual human rights – rights so essential that they must be insulated from the power of the majority." (Aharon Barak, *The Supreme Court 2001 Term Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy* (2002) 116 Harv. L.Rev. 16, 39.)

The equality principle is a pervasive value woven throughout the state Constitution, extending far beyond the equal protection clause of article I, section 7(a). It is first set forth in the opening words of the

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[9] Citing Aristotle, Professor Cavanaugh explains that "freedom and equality are inherent in democracy . . . 'The fundamental idea underlying a democratic form of government is freedom . . . . Freedom means one thing, to rule and be ruled in turn. For this is democratic justice, for there to be an equal share according to number, not according to worth (no citizen being better than any other).'" (*Id.*, 54 Ala. L.Rev. at p. 444, quoting Aristotle, The Politics (T.E. Page et al. eds., H. Rackham trans., G.P. Putnam's Sons 1932) pp. 489-491.)

Abolitionist Charles Sumner has been credited with the first known use in English of the phrase "equality before the law." In an 1849 oral argument before the Massachusetts Supreme Court, Sumner traced the origins of the equality principle through Herodotus, Seneca, Milton, Diderot, and Rousseau, and into the French Revolutionary Constitution of 1791, the first occasion in which equality of rights was made a legal consequence of being "created equal." (John P. Frank & Robert F. Munro, The Original Understanding of 'Equal Protection of the Laws' in One Hundred Years of the Fourteenth Amendment: Implications for the Future (Jules B. Gerard ed., 1973) 49, 61-65.)

Constitution, that "*All people* are by nature free and independent, and have inalienable rights,"[10] and is echoed in numerous provisions of the article I Declaration of Rights and beyond, including:

- *Article I, section 2*: "Every person may freely speak, write and publish his or her sentiments on all subjects . . . ."
- *Article I, section 4*: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs."
- *Article I, section 6*: "Slavery is prohibited. Involuntary servitude is prohibited except to punish crime."
- *Article I, section 7*: "(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. . . ."
- *Article I, section 8*: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."
- *Article I, section 20*: "Noncitizens have the same property rights as citizens."
- *Article I, section 22*: "The right to vote or hold office may not be conditioned by a property qualification."
- *Article I, section 31*: "(a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

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[10] (Cal. Const., art. I, § 1, emphasis added.)

- *Article IV, section 16*: "(a) All laws of a general nature have uniform operation."[11]

In the 1879 Constitutional Convention, the delegates underscored the centrality of the equality principle, defeating a proposal to eliminate article I, section 11 ("all laws of a general nature shall have a uniform operation"):

> [*I*]*t is a fundamental principle in our government that no law shall be passed which affects one person and not the balance of the community. That is the principle, as I understand it, that saves all our personal rights.* That you shall not make a law that shall apply to me and not to the whole community; that you shall not tax my property and not the property of others equally; that the Legislature has no right to pass laws affecting a portion of the community and not the balance. I know that there has been some little difficulty in the Courts to construe that section correctly, but I think *there would be no safeguard to general personal liberty or personal rights in a Constitution that did not have some provision of that kind in it. . . . Our liberty depends upon the proposition that the Legislature shall not pass a law that will operate upon me personally and allow you to escape.*[12]

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[11] See also *Article I, section 24:* "This declaration of rights may not be construed to impair or deny others retained by the people."; *Article IX, section 9*: [The University of California] "(f) . . . . The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs, and no person shall be debarred admission to any department of the university on account of race, religion, ethnic heritage, or sex;" and *Article XIII, section 1*: "(a) All property is taxable and shall be assessed at the same percentage of fair market value . . ."

[12] (E.B. Willis & P.K. Stockton, Debates and Proceedings of the Constitutional Convention of the State of California Convened at the City

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From early on in the state's history, the California Supreme Court interpreted various constitutional provisions as embodying this equality principle. (See, e.g., *People ex rel. Smith v. Judge of Twelfth Dist.* (1861) 17 Cal. 547, 555 [construing article I, section 11 ("All laws of a general nature shall have a uniform operation") and explaining: "[T]o constitute partiality and the invidious discrimination against which the Constitution aims, the denial to another of what is given to one must be made upon substantially the same facts . . . ."]; *City of Pasadena v. Stimson* (1891) 91 Cal. 238, 249-252 [article I, section 2 and article IV, section 25 are sources of the principle that "although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law"]; *People v. Dawson* (1930) 210 Cal. 366, 369-370 [same]; *County of Los Angeles v. S. Cal. Tel. Co.* (1948) 32 Cal.2d 378, 388-389 [test for

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of Sacramento, Saturday, September 28, 1878 (1880) p. 264 (statement of Mr. McFarland), emphasis added.)

determining validity of a statute under California constitutional prohibitions against special legislation – article I, sections 11 and 21, and article IV, section 25, subdivisions 19 and 33 – is "substantially the same" as the test under federal equal protection clause].)[13]

Although the formal equal protection clause now in article I, section 7(a) did not enter the Constitution until 1974, courts historically interpreted other provisions as providing its guarantee of equal treatment.[14] (See, e.g., *Serrano v. Priest* (1976) 18 Cal.3d 728, 776 [former article I, sections 11

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[13] The fact that our state's history has been marked by dark episodes in which Californians have been subject to governmental discrimination highlights rather than detracts from the importance of the equality principle as an enforceable constitutional concept: "Courts ... do not sit or act in a social vacuum... [H]istory makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom." (*City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 466 (conc. & dis. opn. of Marshall, J.).)

[14] With regard to the equal protection clause, the California Constitution Revision Commission ("CCRC") cited article I, sections 11 and 21, and article IV, section 16 as the predecessors of what would become article I, section 7. (Cal. Constitution Revision Comm'n, Article I Declaration of Rights Background Study 2 (1969), pp. 6-7.) It stated that these provisions are "inextricably entwined," (*id.* at p. 8), and address what are "essentially 'equal protection' problems." (*Id.* at p. 6.) The purpose of the new article I, section 7 was to consolidate these provisions, which were previously "separately placed throughout the Constitution," (*id.* at p. 16), and to clarify the phrasing of these provisions, which the CCRC described as "misleading" because "[t]he total effect of the three provisions is to prohibit arbitrary classification of any entity or individual." (*Id.* at p. 17.)

and 21 "commonly known as the equal protection of the laws provisions of our state Constitution," now embodied in article I, section 7]; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 15 & fn.13 [article I, sections 11 and 12 are sources of the California test for equal protection]; *Dep't of Mental Hygiene v. Kirchner* (1965) 62 Cal.2d 586, 588 [article I, sections 11 and 21 "generally thought in California to be substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution"].)

This Court also recognized that the equality principle is incorporated into fundamental rights themselves, separate and apart from guarantees provided by the equal protection clause: "One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families." (*In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 782-783.)[15]

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[15] Indeed, there are many illustrations of the fact that the equality principle permeates the Constitution, and is not cabined in the equal protection clause alone. (See, e.g., *Ex Parte Jentzsch* (1896) 112 Cal. 468, 471 [constitution "guarantees to all equal liberty of religion and conscience"]; *Wollam v. City of Palm Springs* (1963) 59 Cal.2d 276, 294 ["It is fundamental that the basic right of free speech guaranteed by the Constitution belongs equally to everyone"] (dis. opn. of McComb, J.); cf. *Church of the Lukumi v. City of Haileah* (1993) 508 U.S. 520, 542 ["The *Free Exercise Clause* "protect[s]

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Proposition 8 fundamentally alters the California Constitution by reneging on this most basic textual and structural governmental commitment – the underlying principle of equality. Proposition 8 invited electors to create an exception to the equality principle, and to do so through a simple majority vote. If upheld, Proposition 8 would change the very structure of the equality principle itself; for a constitutional "guarantee" of equality, subject to exceptions dictated by the majority, is simply no guarantee at all.

## III. PROPOSITION 8 OVERRIDES CALIFORNIA'S CONSTITUTIONAL STRUCTURE, WHICH ENTRUSTS COURTS WITH ENSURING THAT THE FUNDAMENTAL CIVIL RIGHTS OF HISTORICALLY OPPRESSED MINORITIES ARE PROTECTED AGAINST MAJORITARIAN PREJUDICE.

### A. The Constitution Vests the Judiciary With The Duty and Responsibility to Enforce The Equality Guarantee.

The ultimate enforcement of the cornerstone equality principle has been entrusted to the judiciary, whose role is to test enactments against

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religious observers against unequal treatment"]; *Reynolds v. Sims* (1964) 377 U.S. 533, 560-561 ["fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State"]. See also Melissa Saunders, *Equal Protection, Class Legislation, and Color Blindness* (1997) 96 Mich. L.Rev. 245 [tracing the historic roots of the equality principle, predating the federal equal protection clause].)

constitutional requirements by applying the legal standards that animate the equality guarantee.[16]

The judiciary's central role in preserving basic rights against arbitrary majoritarian rule is firmly embedded in the California Constitution's recognition of the three separate branches of government:

> The separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. (See Cal. Const., arts. IV, V and VI; The Federalist, Nos. 47, 48 (1788).) *Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority* ... Because of its independence and long tenure, the judiciary probably can exert a more enduring and equitable influence in safeguarding fundamental constitutional rights than the other two branches of government, which remain subject to the will of a contemporaneous and fluid majority.

(*Bixby*, *supra*, 4 Cal.3d at p. 141, internal citations omitted, emphasis added.)[17] (See also *United States Steel Corp. v. Public Utilities Com.*

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[16] In the words of Justice Cardozo, "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders." (Benjamin N. Cardozo, The Nature of the Judicial Process (1921) pp. 92-93.)

[17] "'[The separation of powers] doctrine unquestionably places limits upon the actions of each branch with respect to the other branches,'" and the

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(1981) 29 Cal.3d 603, 611-612 ["The constitutional bedrock upon which all equal protection analysis rests is composed of the insistence upon a ... relationship between selected legislative ends and the means chosen to further or achieve them"].)

Invoking Justice Jackson's canonical words, this Court recently acknowledged that our governmental system places certain inalienable rights "beyond the reach of majorities" and entrusts *to the courts* the ultimate authority to interpret and enforce those rights:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles *to be applied by the courts*. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights *may not be submitted to vote; they depend on the outcome of no elections.*

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electorate, through the initiative power, may not exercise its legislative authority "in a manner that would 'defeat' or 'materially impair' a court's exercise of its constitutional power or the fulfillment of its constitutional function.'" (*Marine Forests Society, supra*, 36 Cal.4th at pp. 25, 44 [quoting from *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53, 58-59].) (See also *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1092-1093 ["[T]he determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution"]; *Id.* at p. 704 [referring to courts' role as "'ultimate interpreter of the Constitution'"] (conc. & dis. opn. of Werdegar, J.); *Raven, supra*, 52 Cal.3d at pp. 354-355 ["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 . . . ."].)

(*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 852 [quoting *West Virginia State Bd. of Education v. Barnette* (1943) 319 U.S. 624, 638, emphasis added]; see also *Lucas v. Forty-Fourth Gen. Assem. of State of Colo.* (1964) 377 U.S. 713, 736 [same].)

The guarantee against divesting a group of its civil rights by the majority is a bedrock constitutional concept. It is "too clear for argument that constitutional law is not a matter of majority vote. Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority." (*Id.* at p. 737, fn. 30 [quoting *Lisco v. Love* (D.Colo. 1963) 219 F. Supp. 922, 944 (dis. opn. of Doyle, J.)].) Thus, judicial review accomplishes one of the basic purposes of the Constitution – to "protect minorities from the occasional tyranny of majorities. *No plebiscite can legalize an unjust discrimination.*" (*Hall v. St. Helena Parish School Bd.* (E.D. La. 1961) 197 F. Supp. 649, 659, affd., 368 U.S. 515 [quoted in part in *Lucas*, *supra*, 377 U.S. at p. 736, fn. 29, emphasis added]; cf. *Plyler v. Doe* (1982) 457 U.S. 202, 216 ["The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises"].)

Our constitutional form of government has long employed judicial deliberation as a brake or check on unjustified exercises of democratic power over protected rights:

> [T]he limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. *The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.*

(*Hurtado v. California* (1884) 110 U.S. 516, 536, emphasis added.) (See also Laurence H. Tribe, American Constitutional Law (3d ed. 2000) p. 306: "[T]he judiciary plays a vital, and wholly legitimate, role in ensuring that the political branches – subject as they are to the vicissitudes of the moment – do not violate the fundamental liberties of the disfavored, unpopular, or less powerful members of our society. In the words of one scholar, 'the people did not establish primarily a utility-maximizing constitution, but rather a tyranny-minimizing one.'" [quoting Rebecca J. Brown, *Accountability, Liberty, and the Constitution* (1998) 98 Colum. L.Rev. 531, 570].)

With respect to protection of the fundamental rights of vulnerable minorities, the judiciary's role is specific and legally prescribed. The judiciary is tasked with testing laws against the equality guarantee, without deference to the enacting body, by "adopt[ing] 'an attitude of active and critical analysis, [and] subjecting the classifications to strict scrutiny.'" (*In*

*re Marriage Cases*, *supra*, 43 Cal.4th at p. 832, quoting *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 298-299.)

The reason the law requires courts to perform this evaluation with "great care and with considerable skepticism" is because the characteristics of a suspect class "frequently [have] been the basis for biased and improperly stereotypical treatment [] that generally bears no relation to an individual's ability to perform or contribute to society." (*Id.* at p. 844.) Thus, without the bulwark of this quintessentially judicial analysis, a "whole class [may be] relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members." (*Sail'er Inn v. Kirby* (1971) 5 Cal.3d 1, 18.) (See also *Romer v. Evans* (1996) 517 U.S. 620, 635 [voter referendum amending state Constitution to require unequal treatment of gay individuals improperly "deem[ed] a class of persons a stranger to its laws"].)

By applying a searching judicial inquiry, courts are able to "smoke out" "illegitimate notions," and separate them from constitutionally appropriate decision-making. (*City of Richmond v. Croson* (1989) 488 U.S. 469, 493 (plur. opn. of O'Connor, J.).) This method of "approaching certain classifications skeptically, with judgment suspended until the facts are in and the evidence considered... does not allow courts to second-guess reasoned legislative or professional judgments... but it does seek to assure

that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day."[18] (*City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 471-472 (1985) (conc. & dis. opn. of Marshall, J.).) (See also *Romer, supra*, 517 U.S. at pp. 632-633 [court's role is to "insist on knowing the relation between the classification adopted and the object to be attained," for it is the "search for the link between classification and objective [that] gives substance to the Equal Protection Clause"].)

The judicial branch has unique institutional competence to perform this function, because the judiciary is insulated from the compromise and partisanship inherent in the political branches of government:

> Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; "judges represent the Law." ... Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide "individual cases and controversies" on individual records, ... neutrally applying legal principles, and, when necessary, "standing up to what is generally supreme in a democracy:

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[18] Thus, in applying the strict scrutiny test, the court is not substituting its own views that "public policy or the public interest would be served better. . . ." For the question of whether laws violate the equality principle "'is not a matter of social policy but of constitutional interpretation.'" (*In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 849-850, quoting *Lewis v. Harris* (2006) 188 N.J. 415, 474 [908 A.2d 196] (conc. & dis. opn. of Poritz, C.J.).)

> the popular will," Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1180 (1989).
>
> A judiciary capable of performing this function, owing fidelity to no person or party, is a "longstanding Anglo-American tradition," [citation omitted] an essential bulwark of constitutional government, a constant guardian of the rule of law.

(*Republican Party v. White* (2002) 536 U.S. 765, 803-804 (dis. opn. of Ginsburg, J.), citations omitted.)

Proposition 8 constitutes an unprecedented diminishment of this critical judicial function, a responsibility that is at its height when a suspect classification is at issue. This Court exercised this core responsibility in *In Re Marriage Cases* to test legislative actions against the equal protection guarantee by carefully scrutinizing the laws, and determining whether they were supported by compelling need. But Proposition 8 subsequently presented the electorate with the opportunity to "vote" on the entitlement of historically stigmatized Californians to a fundamental human right. In effect, Proposition 8 invited voters to decide that certain protected individuals are no longer entitled to equality, and to make that decision in an environment that was polluted with the kind of "hostility or thoughtlessness" that courts are tasked with preventing through the bulwark of constitutional review.

Thus, Proposition 8 stands for the revolutionary concept that the initiative process may be used to nullify the historical judicial function of

ensuring that members of the most vulnerable groups are protected against the prejudices of the majority.

### B. The California Supreme Court Repeatedly Has Exercised Its Core Judicial Function To Protect Vulnerable Minorities, A Function That Would Be Defeated If Proposition 8 Were Permitted To Stand.

Last year the Court was called upon to exercise its uniquely judicial duty to analyze whether the laws of the State constitutionally could exclude a historically stigmatized minority from the right to marry someone of the same sex. (*In re Marriage Cases, supra,* 43 Cal.4th 757.) The resulting decision is only the most recent in a historic line of cases in which the Court discharged "its gravest and most important responsibility under our constitutional form of government." (*Id.* at pp. 859-860 (conc. opn. of Kennard, J.).)

In each instance, against a backdrop of significant controversy, the California Supreme Court "adopted an attitude of active and critical analysis," and exercised its uniquely judicial responsibility to search for the link between a suspect classification and proffered legal objectives. Through this process, the Court tested suspect legislation against the requirements of the equal protection clause to enforce the constitutional guarantee of equal treatment under the law.

### 1. *Perez v. Sharp* (1948) 32 Cal.2d 711

*Perez* challenged the constitutionality of California's anti-miscegenation statute, which provided that "no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race." (*Perez v. Sharp* (1948) 32 Cal.2d 711, 712.) The Court's role was to determine whether the law was "directed at a social evil and employ[ed] a reasonable means to prevent that evil," or whether the law was "discriminatory and irrational." (*Id.* at p. 713.) Among the justifications put forward and analyzed at length by the Court were concerns that: certain races were more prone than Caucasians to diseases such as tuberculosis (*id.* at p. 718); the amalgamation of races is unnatural (*id.* at p. 720); the progeny of mixed-race marriages are sickly, effeminate, inferior, and likely to be a burden on the community (*id.* at pp. 720, 724); certain races are physically, mentally, or socially inferior (*id.* at pp. 722-724, 727); persons wishing to marry in contravention of racial barriers come from the "dregs of society" (*id.* at p. 724); and the prevention of interracial marriage through the law would diminish racial tension in society and prevent the birth of children who might become social problems. (*Id.* at pp. 724-725; see also pp. 756-760 (dis. opn. of Shenk, J.).)

After addressing and analyzing each of the proffered reasons for the legislation, the majority of the *Perez* Court concluded that the law "impair[ed] the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups." (*Id.* at pp. 731-732.) The Court took the opportunity to identify the "circular reasoning" in popular attitudes that leads to racial prejudice:

> For many years progress was slow in the dissipation of the insecurity that haunts racial minorities, for there are many who believe that their own security depends on its maintenance. *Out of earnest belief, or out of irrational fears, they reason in a circle that such minorities are inferior in health, intelligence, and culture, and that this inferiority proves the need of the barriers of race prejudice.*

(*Id.* at p. 727, emphasis added.) The United States Supreme Court did not declare anti-miscegenation laws unconstitutional until nearly 20 years later in *Loving v. Virginia* (1967) 388 U.S. 1, at which point there were still 16 states that prohibited and punished marriages on the basis of racial classifications. (*Id.* at p. 6.)

### 2. *Fujii v. California* (1952) 38 Cal.2d 718

The California Alien Land Law essentially prohibited all aliens who were "ineligible for citizenship" from owning land, and provided that property purchased in violation of the law would escheat to the State of California. (*Fujii v. California* (1952) 38 Cal.2d 718, 720 & fn.1.) At the time of the decision, by virtue of the then-current federal immigration laws,

the California Alien Land Law could only operate against people of Japanese descent, as well as a few other California residents of other races similarly prohibited from naturalizing. (*Id.* at pp. 729, 734.) Thus, as noted by the Court, although the statutory language classified persons on the basis of eligibility for citizenship, in reality the law classified persons on the basis of race or nationality. (*Id.* at p. 729.) Plaintiff Sei Fujii challenged the law as racially discriminatory against aliens in both purpose and effect. (*Id.* at p. 725.)

In defense of the statute's constitutionality, the State asserted that the purpose of the alien land law was to "restrict the use and ownership of land to persons who are loyal and have an interest in the welfare of the state." (*Id.* at p. 732.)[19] The Court examined the proffered purpose against the backdrop of the law's enactment. Voter pamphlets described the law's "primary purpose" as "prohibit[ing] Orientals who cannot become Americans from controlling our rich agricultural lands," and urged that '"Orientals, largely Japanese, are fast securing control of the richest

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[19] This contention echoed arguments successfully made to the United States Supreme Court, which previously had upheld the Washington state alien land law, reasoning that "obviously" one who could not become a citizen "lacks an interest in, and the power to effectually work for the welfare of, the state." (*Terrace v. Thompson* (1923) 263 U.S. 197, 220-221, citation omitted.) *Terrace* also declaimed that "[t]he quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance...." (*Id.* at p. 221.)

irrigated lands in the state,' and that 'control of these rich lands means in time control of the products and control of the markets.'" (*Id.* at p. 735.)[20]

After analyzing the constitutional question presented, a majority of the Court held that "[t]he only disqualification urged against Sei Fujii is that of race, but it may be said of him ... '[that nothing] in this record indicates, and we cannot assume, that he came to America for any purpose different from that which prompted millions of others to seek our shores – a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them.'" (*Id.* at pp. 733-734, citation omitted.)

### 3. *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1

The *Sail'er Inn* petitioners faced potential revocation of their on-sale liquor licenses because they employed women bartenders in violation of a statute prohibiting women from tending bar unless they were licensees, wives of licensees, or sole shareholders of a licensee corporation. (*Sail'er Inn, Inc., supra*, 5 Cal.3d at p. 6.) The Attorney General proffered three arguments to justify the statute's facial discrimination on the basis of gender. First, the State's attorney suggested that "the Legislature may have

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[20] The 1952 *Fujii* decision was issued in the wake of World War II, and the Japanese Internment. (See generally Yamamoto, Chon, Izumi, Kang & Wu, *Race, Rights and Reparation: Law and the Japanese American Internment* (2001).)

concluded that a male bartender or owner must be present in a liquor establishment to preserve order and protect patrons, a function [the Attorney General] contends a woman could not perform." (*Id.* at p. 9.) Second, the State argued that the statute was "designed to protect women since fewer women can be injured by inebriated customers if they are not permitted to work behind a bar." (*Id.*) Finally, the State offered that the law was intended to prevent "improprieties and immoral acts." (*Id.* at p. 10.)

The Court ultimately struck down the exclusionary statute on numerous grounds, including violation of the state and federal equal protection guarantees. In conducting its equal protection analysis, the Court held that women should be treated as a suspect class. (*Id.* at p. 17.) The Court noted that "Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities," then chronicled the historic supporting facts. (*Id.* at pp. 19-20.) The Court concluded that "Women must be permitted to take their chances along with men when they are otherwise qualified and capable of meeting the requirements of their employment.... Such tender and chivalrous concern for the well-being of the female half of the adult population cannot be translated into legal restrictions on employment opportunities for

women. . . . The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage." (*Id.* at pp. 10, 20.)

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In each of the foregoing cases, the Supreme Court exercised its "gravest and most important responsibility" to test legislative enactments against the requirements of the Constitution to enforce the equality principle, and to ensure equal protection of the laws for all.[21] In each case, the Court carried out its responsibility against a societal backdrop in which the majority was hostile to the rights asserted by the protected group. In each instance, it fell upon the Court to carry out its unique judicial function to weigh the arguments, abide by governing legal standards, rather than popular sentiment, and reach an ultimate decision as to whether the enactments undermined the equality guarantee. For, as recently noted by a legal scholar, "[u]npopular decisions are the price of constitutional rights."[22]

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[21] As is true of the *In re Marriage Cases*, each of the three decisions represented an absolute and inviolate judicial determination as to the civil rights of the affected individuals. (See *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 474 [a judicial construction of a statute or constitutional provision is an authoritative statement of what the provision meant before as well as after the decision].)

[22] (Kermit Roosevelt, *California's same-sex marriage case affects all of us*, Christian Science Monitor (Nov. 14, 2008), <http://www.csmonitor.com/2008/1114/p09s01-coop.html> [as of Jan. 13,

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The passage of years has borne out that each decision was legally, morally, and socially just. Indeed, the concept of seeking justice under the law rather than bending to then-prevailing societal mores is an inherent basis for having a Constitution: "[T]he expansive and protective provisions of our constitutions ... were drafted with the knowledge that 'times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.'" (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 854 [quoting *Lawrence v. Texas* (2003) 539 U.S. 558, 579].)

In this context, it is unthinkable that a simple majority of voters could enact "amendments" to our state Constitution through the initiative process that would deny equal treatment and equal dignity under the law to women and non-Whites by providing:

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2009].) Professor Roosevelt notes that "what's troubling for US citizens [about Proposition 8] is the idea that an equality guarantee could not be effectively enforced against the will of a majority. The point of such a guarantee is precisely to protect minorities from discrimination at the hands of a majority... It makes sense to require supermajority support [through the revision process] to overrule a judicial decision that grants rights to a minority. It shows that the judges were so out of step with society that they were probably wrong. But a simple majority does not show that, and the constitution would not afford meaningful protection if it could be overruled at the will of the majority." (*Id.*)

- "No marriage between members of different races shall be valid in the State of California;"
- "People of Japanese descent are prohibited from owning real property in the State of California;" or
- "The Legislature may enact laws barring women from certain occupations."

Yet, Proposition 8 is no different from these, for it similarly purports to deny equal treatment and equal dignity to historically stigmatized Californians. The fact that the United States Constitution, as currently construed, would presumably provide a backstop of protection against each of these hypothesized measures would not lead this Court to conclude that, but for that federal protection, these measures could become the law of this state merely by the endorsement of a majority of the state's electorate. Precisely the same must be said of Proposition 8: the constitutional legitimacy of the profound change it would work in the California Constitution merely by the vote of a popular majority cannot be measured by speculation as to the fate of those changes as a matter of federal constitutional law were they to be challenged in another forum.

### C. The Proposition 8 Election Infected The Decision-Making Process With Stereotypes, Prejudice, and Misinformation.

Through its application of established legal principles, this Court concluded that sexual orientation is a characteristic that bears no relation to a person's ability to contribute to society, and is associated with a stigma of

inferiority and second-class citizenship: "Outside of racial and religious minorities, we can think of no group which has suffered such 'pernicious and sustained hostility' [citation], and such 'immediate and severe opprobrium' [citation] as homosexuals." (*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 841, [quoting *People v. Garcia* (2000) 77 Cal.App.4th at pp. 1276, 1279].) This Court specifically invoked its historic legacy when it held that "just as this court recognized in *Perez* that it was not constitutionally permissible to continue to treat racial or ethnic minorities as inferior..., and in *Sail'er Inn* that it was not constitutionally acceptable to treat women as less capable than and unequal to men..., we now similarly recognize that an individual's homosexual orientation is not a constitutionally legitimate basis for withholding or restricting the individual's legal rights." (*In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 822-823.)

Again, applying established equal protection jurisprudence, the Court employed its most searching level of constitutional review, and required the State to demonstrate that the distinctions drawn by the statutory scheme were necessary to further a constitutionally compelling state interest. The Court concluded that that burden had not been met, and that the statutory scheme thus failed to comply with the constitutional guarantee of equal protection. (*Id.* at pp. 847-857.)

Proposition 8 eliminated this core judicial function of testing laws for compliance with the equal protection guarantee, and instead invited voters to decide whether gay Californians are entitled to a fundamental human right. In that process, the electorate was exposed to (and gay Californians were forced to endure) widespread prejudice, fear-mongering and misinformation. For example, on "World News with Charles Gibson," broadcast nationally on the ABC television network, a voiceover stated "Some evangelicals say this campaign is more important than the presidential race. That if gay marriage is allowed to stand, it would force churches to marry gays, force schools to teach gay marriage, and open the door to pedophilia and bestiality." (Transcript, "World News with Charles Gibson," October 31, 2008; Attachment to Amici Curiae's Brief, Exhibit A.) This narration was followed by Ann Good of the Skyline Westlean [sic] Church, who stated "A person could say, I'm in love with my dog, why should we not be married." (*Id.*)

A New York Times article quoted Charles W. Colson, "an eminent evangelical voice," as claiming that "[t]his vote on whether we stop the gay-marriage juggernaut in California is Armageddon... We lose this, we are going to lose in a lot of other ways, including freedom of religion." The New York Times article goes on to state "In television advertisements, rallies, highway billboards, sermons and phone banks, supporters of

Proposition 8 are warning that if it does not pass, churches that refuse to marry same-sex couples will be sued and lose their tax exempt status. Ministers will be jailed if they preach against homosexuality. Parents will have no right to prevent their children from being taught in school about same-sex marriage."[23] (Laurie Goodstein, *A Line in the Sand for Same-Sex Marriage Foes,* New York Times, (Oct. 27, 2008); this article is viewable at <http://www.nytimes.com/2008/10/27/us/27right.html?_r=2> [as of Jan. 15, 2009].)

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[23] In fact, the "misleading claims about the current state of the law or about what Proposition 8 will do" prompted a group of 59 California-based constitutional law professors to draft a joint statement debunking the unsupported assertions about the supposed legal effect of Proposition 8. (This letter is viewable at <http://www.noonprop8.com/downloads/MarriageStatement.Final.pdf> [as of Jan. 13, 2009].)

Similarly, Morris Thurston, a BYU law professor and active member of the Mormon Church, authored a "Commentary on the Document 'Six Consequences' The Coalition (of churches and other organizations in support of Proposition 8) Has Identified If Proposition 8 Fails." Mr. Thurston wrote that "[m]ost of the arguments contained in 'Six Consequences' are either untrue or misleading. The following commentary addresses those arguments and explains how they are based on misinterpretations of law and fact. My intent is to be of service in helping our Church avoid charges of using falsehoods to gain a political victory. Relying on deceptive arguments is not only contrary to gospel principles, but ultimately works against the very mission of the Church." (This letter is viewable at <http://www.noonprop8.com/downloads/Thurston-Memo.pdf> [as of Jan. 13, 2009].)

National radio broadcasting figure Michael Savage, whose syndicated program reaches an estimated 8.25 million listeners per week, referred to "children's minds . . . being raped by the homosexual mafia," and compared the gay rights movement to the Nazi regime, gay marriage to bestiality, and gay parenting to child abuse.[24] (Summaries of "The Savage Nation" broadcasts for June 16, 2008, and October 1 and 29, 2008; these program excerpts are viewable at <http://mediamatters.org/items/printable/200810310015>; <http://mediamatters.org/items/printable/200810030006> and <http://mediamatters.org/items/printable/200806180005> [as of Jan. 15, 2009].)

The Economist quoted a speaker at a pro-Proposition 8 rally in Los Angeles who informed the crowd that "gay marriage and tolerant school lessons are little more than 'a recruiting process for homosexual behavior.'"

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[24] "The danger of direct democracy to minority groups is evidenced by the need, twenty-five years into the modern gay rights movement, for scholars and advocates to respond to ludicrous charges of child molestation and bizarre sexual practices . . . offered by these measures' proponents. On an issue as important as the right to be free from discrimination, the debate should be principled and based upon rational discussion of theories, data, and facts propounded by reliable sources....All that is lacking is a sack of stones for throwing." (William E. Adams, Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy* (1994) 55 Ohio St. L.J. 583, 627-628, citation omitted.)

(The Economist (U.S. Edition), "Showdown Proposition 8," November 1, 2008; this article is viewable at <http://www.economist.com/world/unitedstates/displayStory.cfm?story_id=12522924> [as of Jan. 15, 2009].)

Flyers distributed to California's Chinese community stated "If 'sexual orientation' can be included as a civil liberty, then 'male pedophilia', 'incest', and 'polygamy' will certainly also seek to be considered civil liberties in the future." "Research indicates," the flyer declaimed, "that the probability that children will grow up to become homosexuals is 4-10 times greater in homosexual households than in normal households." It stated that "legalization of same-sex marriage will lead to more adolescents experimenting with homosexuality and the opposition to same-sex marriage is bound to be treated as 'words of hatred', subject to prosecution." (Flyer entitled "Save Marriage · Rescue Our Children, Please Vote Yes on Proposition 8," English Translation, and certification of English translation, Attachment to Amici Curiae's Brief, Exhibit B.)[25]

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[25] It is no response to say that the media also carried statements and opinions against the passage of Proposition 8. The fact that the "public debate" was widely informed by prejudiced and misleading claims speaks directly to the stigma, "pernicious and sustained hostility" and "severe opprobrium" that a court is tasked with addressing through its judicial function in assessing whether equal protection has been violated. The

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The prominence of such manifestly misleading sentiments in the debate underscores the importance of the judiciary's constitutionally prescribed role of testing laws against the requirement of equal protection; indeed, the very purpose of Proposition 8 was to bypass that scrutiny by eliminating the equality requirement for a particular group. Proposition 8 goes beyond the mere denial of a fundamental right to a protected group. It is a fundamental change to the principles and structure of the California Constitution, in which the Court's role as guardian of equality is foundational.

If upheld, Proposition 8 could not be understood by this Court to stand as a singular exception to an otherwise seamless web of protections for historically stigmatized minorities. Bound as it would be to understand Proposition 8 against the backdrop of equality principles informing this Court's jurisprudence, the Court instead would have to view Proposition 8 as precedent for depriving *all* historically stigmatized minorities, by simple amendment to the state's constitution, of *any* of the basic rights provided to

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untrue claims made in the Proposition 8 battle are no less offensive or troubling than if an election were held in the wake of *Perez* to "preserve traditional marriage" by preventing interracial marriages, and if supporters of the initiative waged a campaign that claimed the offspring of interracial marriages would be sickly and inferior, and that non-Caucasians were scientifically proven to be more susceptible to certain diseases.

the rest of society. It would thus create a rule of constitutional law that would short-circuit the role of equal protection and its enforcement by the courts, and remove the structural check on bias and stereotypes. This radical concept shatters the boundaries of constitutional checks and balances, and cannot be viewed as a mere "amendment" to the Constitution.

### D. The Absence of A Deliberative Process Is Peculiarly Harmful To Oppressed Minorities.

"The will of the people" takes on particular significance in the context of Proposition 8. For, as illustrated above, when wielded to remove basic human rights from an unpopular minority, majoritarian will violates the constitutional structures that the people themselves created to guard against such use of direct democracy. Such an exercise of voter power finds no support in the history of the 1911 adoption of the California initiative power. The initiative process was created as a means to break through the dominance of the Southern Pacific Railroad, which at the time, occupied every "nook and cranny" of California government. (Karl M. Manheim and Edward P. Howard, *Symposium on the California Initiative Process: A Structural Theory of the Initiative Power in California* (1998) 31 Loy. L.A. L.Rev. 1165, 1185-1188.)

The revision process offers the filter of representation, and an important opportunity for mediating majority sentiment with judgments of reasonability and fairness through debate and compromise. These aspects

are missing from unfiltered direct democracy. As noted by Professor Derrick Bell, the deliberative process plays a particularly critical role with respect to protecting minority rights:

> [Antagonism toward minorities], if not curable, should at least be contained by a judicial preference for the representative mode of government, where its worst tendencies toward prejudice will be chastened in legislative debate and public scrutiny and diluted by political compromise.

(Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality* (1979) 54 Wash. L.Rev. 1, 29; see also Akhil R. Amar, *Choosing Representatives by Lottery Voting* (1984) 93 Yale L.J. 1283, 1304 ["Because of the structure of legislatures, minorities command more respect from majorities in a legislature than in the polity at large. Perhaps we cannot force white voters to listen to blacks in their neighborhoods, but black legislators can interact with and influence their white colleagues"]; Julian Eule, *Judicial Review of Direct Democracy* (1990) 99 Yale L.J. 1503, 1555 ["Group representation ensures that diverse views are continually expressed, increasing 'the likelihood that political outcomes will incorporate some understanding of the perspectives of all those affected'"].)

Without the benefit of deliberation, minority rights are placed at greater risk, which in turn, highlights the importance of the constitutional limits enforced through judicial review:

> Where, however, the filtering system has been removed, courts must play a larger role – not because direct democracy is unconstitutional, nor because it frequently produces legislation that we may find substantively displeasing or short sighted, but because the judiciary stands *alone* in guarding against the evils incident to transient, impassioned majorities that the Constitution seeks to dissipate. Only when we understand the contextual setting in which we ordinarily visualize judicial review can we formulate a picture of it when it is removed from its traditional context.

(Julian Eule, *Judicial Review of Direct Democracy* (1990) 99 Yale L.J. 1503, 1525.)

## IV. PROPOSITION 8'S FUNDAMENTAL ALTERATION OF THE PREEXISTING CONSTITUTIONAL FRAMEWORK IS A REVISION, NOT AN AMENDMENT.

The constitutional requirement of revision is not a mere technicality, nor is it "anti-democratic." It expresses the people's own insistence, embodied in the most fundamental expression of popular will – the state's Constitution – upon a thoughtful and thorough decision-making process when considering changes to the constitutional structure:

> [T]he preclusion of constitutional revision by initiatives offers a powerful weapon to the courts to strike down initiative measures that are too ambitious in proposing constitutional change. The use of this weapon is hardly anti-democratic... The adoption or revision of a constitution is widely perceived and appreciated as a very solemn expression of popular will. A commitment to the supremacy of the will of the people, however, leaves room for the imposition of procedural obstacles to insure that the people carefully distinguish their will from their whim.

(Gerald F. Uelman, *Handling Hot Potatoes: Judicial Review of California Initiatives After Senate v. Jones* (2001) 41 Santa Clara L.Rev. 999, 1013.) (See also *McFadden*, *supra*, 32 Cal.2d at p. 347 ["The differentiation required [between 'amend' and 'revise'] is not merely between two words; more accurately it is between two procedures and between their respective fields of application. . . . The people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision"].)[26]

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[26] It is worth noting that article II, section 1("All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.") should not be read as a preference for extreme populism, but rather as expressing the traditional American view that government derives its power from the people.

Delegates to the 1879 Constitutional Convention confirmed this when they rejected a more radically populist alternative proposed by Mr. Barbour in favor of the current language. (E.B. Willis & P.K. Stockton, Debates and Proceedings of the Constitutional Convention of the State of California Convened at the City of Sacramento, Saturday, September 28, 1878, at p. 233.) In so doing, they noted: "This second section is a mere declaration of principles of the American system of government..." (*Id.* at 233, Statement of Mr. McFarland); "As I understand it, section two is simply a declaration of certain original inherent powers of the people." (*Id.* at 234, Statement of Mr. Wilson); "That section, like section one, simply contains

*Footnote continues on following page*

Although the power of the California initiative is undeniably formidable,[27] it was expressly limited by the people themselves in the California Constitution, and cannot be used to bring about "revisional effect" that is "substantially beyond the system of checks and balances which heretofore has characterized our governmental plan." (*McFadden*, *supra*, 32 Cal.2d at pp. 343, 345-346, 348 [also noting certain provisions "would limit materially the functions of the courts of this state and would effect a substantial change in balance of governmental power"]; see also *Raven*, *supra*, 52 Cal.3d at pp. 351-352 [provision vesting California

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political sentiments that are contained in the Declaration of Independence, and which are not disputed . . ." (*Id.*, Statement of Mr. Van Dyke.)

[27] (See, e.g., *Amador Valley*, *supra*, 22 Cal.3d at p. 229 [finding Proposition 13's tax reform was an amendment, and not a revision to California's Constitution]; *People v. Frierson* (1979) 25 Cal.3d 142, 186-187 [plurality opinion in context of individual criminal case arguing a "technical defect" four years after passage of the initiative that reinstated the death penalty, finding that the initiative was an amendment, and not a revision, and noting the "broad powers of judicial review" retained by the court to "safeguard against arbitrary or disproportionate treatment"].)

Unlike the initiative in *Frierson*, Proposition 8 does not simply limit an important right (in this instance, the right to marry the person of one's choice) for everyone. What makes this initiative wholly unprecedented is that it is *targeted at divesting fundamental rights from members of a single group – a group this Court has recognized as deserving of the highest level of constitutional and judicial protection.* Thus, Proposition 8 is akin to a voter initiative that seeks to reinstate the death penalty, but only with respect to one vulnerable group, e.g., African-Americans, or lesbians and gay men.

court's judicial interpretive power regarding fundamental criminal rights in the federal courts is a revision rather than an amendment, because "[i]n essence and practical effect," the shift of power is "devastating"].)

In finding that the provision at issue in *Raven* effected a revision, rather than an amendment of the Constitution, the Court paid particular heed to the measure's fundamental altering of *historic and unique judicial function*:

> Proposition 115 . . . substantially alters the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections. It directly contradicts the well-established jurisprudential principle that, "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. . . ." (*Nogues v. Douglass* (1858) 7 Cal. 65, 69-70; see also *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 176) [interpreting and applying the Constitution is "the very essence of judicial power"]; *Marin Water, etc. Co. v. Railroad Com.* (1916) 171 Cal. 706, 711-712.) In short, in the words of *Amador, supra*, this "relatively simple enactment [accomplishes] . . . . such far reaching changes in the nature of our basic governmental plan as to amount to a revision . . ." (22 Cal.3d at 223; see also *Livermore v. Waite* (1894) 102 Cal. 113, 118-119 [revisions involve changes in the "underlying principles" on which the Constitution rests].)

(*Raven, supra*, 52 Cal.3d at pp. 354-355.) Proposition 8 likewise alters a unique and historically sanctified judicial function by eviscerating the Court's role as the forum of last resort in adjudicating constitutional equal

protection rights, and in making sure that the equal protection guarantee applies to all, and not just to some.

## V. THE ATTORNEY GENERAL RAISES AN INDEPENDENT AND ALTERNATIVE ROUTE TO THE SAME RESULT: THAT PROPOSITION 8 MUST BE INVALIDATED.

For the reasons set forth by amici, Proposition 8 so fundamentally alters the basic governmental structure that it is a revision, and not an amendment to the Constitution. In addition, amici curiae agree that the Court could also determine that Proposition 8 must be invalidated as an attempted amendment to the Constitution for the reasons set forth in the Attorney General's Brief at pp. 75-90.

## CONCLUSION

Proposition 8 challenges something so deeply ingrained in the California Constitution as to be unquestionable: that a simple majority cannot eliminate basic human rights from the most vulnerable among us.

Under our Constitution, the judicial process is "the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." (*Hurtado, supra*, 110 U.S. at p. 536.)

Proposition 8 strikes at the very heart of this most essential and indispensable judicial function, a function repeatedly invoked by this Court for the protective purpose for which it was intended. If allowed to stand, it would permit "the power of numbers," while "wielding the force of government," to transcend constitutional limits and dispossess susceptible minorities of their fundamental civil rights. It would create a dangerous and powerful precedent for the future abrogation of the rights of other vulnerable members of society.

As such, Proposition 8 is nothing short of a radical revision of our basic governmental plan. If permitted to stand as an amendment, it would enshrine the concept that a bare majority of electors is empowered to declare that the very groups this Court has determined to require heightened protection under the equality guarantees of the California Constitution are, in fact, unequal. It would give the majority the authority to divest these groups of basic human rights, and would also validate the creation of an end-run around the judiciary's role as the ultimate enforcer of constitutional equality. It would allow voters to reinstate the very discrimination from which such historically disadvantaged groups have been freed.

Respectfully Submitted,

Dated: January 15, 2009

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## CERTIFICATE OF COMPLIANCE

Pursuant to the California Rules of Court, I hereby certify that the Amicus Curiae Brief of Constitutional and Civil Rights Law Professors in Support of Petition for Extraordinary Relief has a proportionally spaced, 13-point, Times New Roman typeface, and that as calculated by the word-processing software used to prepare the Brief, it contains 11,838 words.

Dated: January 15, 2009

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ABC News Transcript

**SHOW:** WORLD NEWS WITH CHARLES GIBSON 6:49 PM EST

October 31, 2008 Friday

**LENGTH:** 475 words

**HEADLINE:** 50 STATES IN 50 DAYS;
WEDDING FIGHT

**ANCHORS:** CHARLES GIBSON

**REPORTERS:** DAN HARRIS (SAN DIEGO, CA USA)

**BODY:**

CHARLES GIBSON (ABC NEWS)

(Off-camera) A tough and very expensive campaign battle is coming down to the wire in California. Not the presidential race. Rather, it is an all-out battle over gay marriage. California voters will decide whether to approve proposition eight, which would overturn the recent state Supreme Court ruling that legalized same sex marriage.

GRAPHICS: 50 STATES IN 50 DAYS

CHARLES GIBSON (ABC NEWS)

(Voiceover) Here's Dan Harris with our series, "50 States in 50 Days."

DAN HARRIS (ABC NEWS)

(Voiceover) In a room on the top floor of an Evangelical church San Diego, dozens of Christians are engaged in 40 days of round the clock praying and fasting. Asking god to stop gay marriage in California.

LOU ENGEL (THE CALL)

We believe it's a defining moment in American history. As California goes, so goes the whole nation.

DAN HARRIS (ABC NEWS)

(Voiceover) At a Unitarian church cross town...

DAN HARRIS (ABC NEWS)

(Off-camera) So this is where you got married, right here in this room?

BONNIE RUSSELL (SAME-SEX MARRIAGE PARTNER)

Yes.

JAN GARBOWSKY (SAME-SEX MARRIAGE PARTNER)

Right here.

DAN HARRIS (ABC NEWS)

(Voiceover) Jan Garbowsky and Bonnie Russell show us where they walked down the aisle just a few weeks ago.

BONNIE RUSSELL (SAME-SEX MARRIAGE PARTNER)

We thought this would never happen in our lifetime. At our age.

DAN HARRIS (ABC NEWS)

(Voiceover) These are the two sides in the fight over proposition eight, which has become one of the most expensive campaigns in the country. Second only to the presidential race. The campaign pits millions of dollars from religious groups like Focus on the Family, the Knights of Columbus and members of the Mormon Church, against Hollywood celebrity donors like Brad Pitt, Steven Spielberg and Ellen Degeneres.

ELLEN DEGENERES (TALK SHOW HOST)

Please, please vote no on prop eight.

DAN HARRIS (ABC NEWS)

(Voiceover) Some evangelicals say this campaign is more important than the presidential race. That if gay marriage is allowed to stand, it would force churches to marry gays, force schools to teach gay marriage, and open the door to pedophilia and bestiality.

ANN GOOD (SKYLINE WESTLEAN CHURCH)

A person could say, I'm in love with my dog, why should we not be married.

DAN HARRIS (ABC NEWS)

(Voiceover) All lies and scare tactics, say people like Jan and Bonnie.

JAN GARBOWSKY (SAME-SEX MARRIAGE PARTNER)

Well we live in a democracy, not a theocracy, and I'm just amazed that anybody's faith would say, take away somebody else's rights.

DAN HARRIS (ABC NEWS)

(Voiceover) Polls show this race is very tight. Both sides say if they lose, they will be devastated, but will get up the next morning and start the fight all over again. Dan Harris, ABC News, San Diego.

CHARLES GIBSON (ABC NEWS)

(Voiceover) And up next, future voters with a current election year hit. And they are our "Persons of the Week."

COMMERCIAL BREAK

50 STATES IN 50 DAYS; WEDDING FIGHT ABC News Transcript October 31, 2008 Friday

**LOAD-DATE:** November 3, 2008

# 為何應當支持 8 號提案？

1. 8 號提案清楚註明婚姻的歷史原義: 婚姻 = 一男一女的結合

2. 同性婚姻並非公民權利

公民權 (Civil Right) 是給予不同種族的人有同等待遇。種族乃與生俱來，不能改變的，但科學證實同性戀乃是一種可以改變的「性偏好」。如果「性偏好」也可列入民權，那「變童」、「亂倫」和「多人婚姻」也必行將申請列為民權。並且加州已有同性伴侶結合權，得到合理法律保護。

3.同性的結合與傳統婚姻完全不同，所以不應享同樣地位

| 傳統婚姻 | 同性婚姻 |
|---|---|
| 一男一女 | 兩男或兩女 |
| 自然交合 | 不自然交合 |
| 可生兒育女 | 不可傳宗接代 |
| 孩子可從父母學習兩性的不同 | 孩子失去父或母 |

4. 同性婚姻會奪去大眾的權利並扭曲下一代對婚姻的正常觀念

1) 2000 年加州 61%選民投票決定婚姻是一男一女，現在 4 位法官強奪選民的決定權，強逼加州居民及後代子孫接受同性婚姻。
2) 同性婚姻的合法將導致更多青少年嘗試同性戀，反對同性婚姻的言論勢必被視為「仇恨言語」而受檢控。
3) 兒童需要父母作兩性的模範，同性婚姻剝奪了他們的權益。
4) 宗教團體也可能因發表不同意同性婚姻言論而被起訴。
5) 美國麻省同性婚姻合法後已開始在幼兒園就育導孩童男人與男人結婚是正常的，剝奪了反對同性婚姻父母的道德教育權。

5. 同性婚姻合法後的北歐國家展現社會道德墮落，婚姻家庭失常

1) 荷蘭 2001 年同性婚姻合法，如今亂倫合法，2006 年人獸交合法 (2008 年 3 月重新禁止)，12 歲兒童性交合法，性病氾濫。
2) 瑞典在 1994 年接納同性婚姻，現在兄弟姊妹已可通婚，傳統婚姻不受尊重，同居與分手有若等閒，56%嬰兒為未婚母親所生。
3) 1989 年丹麥同性結合合法，2004 年其教育部出版(後被禁)的初中生性教育 CD，內容竟含同性交合，三人交合與「人獸交合」的鏡頭。06 年更出現合法人獸交妓院。

研究指出，成長於同性家庭的兒童，日後變成同性戀的機率比一般家庭[illegible]人若要[illegible]將一男一女婚姻列入加州憲法，可避免歐洲所發[illegible]

挽救婚姻，拯救兒孫

請務必前往投票：請投

**8 號提案 yes**

# 挽救婚姻。拯救兒孫

2008年11月4日

加州大選

## 請投8號提案YES

- 8號提案保存原有的一男一女婚姻制度
- 8號提案保衛61%人民原意：婚姻乃一男一女制度
- 8號提案保護孩子不受公校襲同性戀教育的洗腦
- 8號提案保證兒童的成長，有父母同作榜樣與教導。
- 8號提案防衛社會道德墮落

挽救一男一女婚姻

最後機會！

## Why should you support Proposition 8?

**1. Proposition 8 clearly specifies the historical and original meaning of marriage: marriage = a union between one man and one woman**

**2. Same-sex marriage does not fall under the heading of Civil Rights**

Civil rights provide equal status and equal treatment for those belonging to different ethnic groups. Ethnicity is an inherent trait that cannot be changed, but science has confirmed that homosexuality is a "sexual orientation" that can be changed. If "sexual orientation" can be included as a civil liberty, then "male pedophilia", "incest", and "polygamy" will certainly also seek to be considered civil liberties in the future. What's more, homosexual couples already have the right to civil unions in California, gaining reasonable legal protection.

**3. Same-sex marriage and traditional marriage are completely different, so they should not enjoy the same status**

| Traditional Marriage | Same-sex Marriage |
|---|---|
| Between one man and one woman | Between two men or two women |
| Natural coitus | Unnatural coitus |
| Can reproduce children | Family name is not passed on |
| Children can learn gender differences from their mother and father | Children are deprived of either a father or a mother |

**4. Same-sex marriage can divest the people of their rights by distorting one generation's notion of what is normal**

1) In 2000, 61% of California voters decided that marriage meant the union between one man and one woman; now 4 judges have taken away voters' rights to decide issues, forcing California's residents and its future generations to accept same-sex marriage.
2) The legalization of same-sex marriage will lead to more adolescents experimenting with homosexuality and the opposition to same-sex marriage is bound to be treated as "words of hatred", subject to prosecution.
3) Children need a father and a mother to set examples for both genders; same-sex marriage deprives them of this right.
4) Religious organizations could also be sued because they openly oppose same-sex marriage.
5) After same-sex marriage was legalized in Massachusetts, kindergartens began teaching children that marriage between two men was normal, depriving parents opposed to same-sex marriage of the right to give their own children a moral education.

**5. After same-sex marriage was legalized in Scandinavia, social morals began to lapse and marriage and family became abnormal**

1) In 2001 same-sex marriage was legalized in the Netherlands. Now incest has been legalized. In 2006 bestiality was legalized (in March 2008 it was again prohibited). Sexual relations with children of twelve years of age have been legalized. Sexually-transmitted diseases are running rampant.
2) In 1994, Sweden accepted homosexual marriage; now intermarriage among siblings is possible and traditional marriage has lost its respectability. Living together and breaking up are considered trivial. 56% of all infants are born to unwed mothers.
3) In 1989, civil unions for homosexual couples were legalized in Denmark; in 2004, sexual education CDs released (was banned later) by the Ministry of Education for middle school students actually even included the scenes of homosexual coitus, three-person coitus, and "bestiality." In 2006, even legalized incest brothels came into being.

Research indicates that the probability that children will grow up to become homosexuals is 4-10 times greater in homosexual households than in normal households. If the California Constitution defines marriage between one man and one woman, it may prevent potential social disaster across Europe and allow all children to develop a healthy intelligence.

**Save marriage, rescue our children**
**Please make sure you go vote: please vote**
***YES on PROPOSITION 8***

## SAVE MARRIAGE • RESCUE OUR CHILDREN

**November 4, 2008**

*California General Election*

**Please vote *YES* on *PROPOSITION 8***

- Proposition 8 preserves marriage as the union between one man and one woman
- Proposition 8 safeguards the wishes of 61% of the population: marriage defined only as between one man and one woman
- Proposition 8 protects our children from being brainwashed with homosexuality education in the public schools
- Proposition 8 guarantees our children's development with both a father and a mother to teach them and to set an example for them.
- Proposition 8 defends society against moral degeneration

***Protect marriage between one***
***Man and one woman***
***It's our last chance!***

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SINGAPORE
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TOKYO
TORONTO
VANCOUVER
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City of New York, State of New York, County of New York

I, Angela Hsu, hereby certify that the following is, to the best of my knowledge and belief, a true and accurate translation of document **CH-Yes-8-leaflet-10-12-08** from Traditional Chinese into English.

Angela Hsu

Sworn to before me this
09th day of January 2009

Signature, Notary Public

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I further declare that on the date hereof I served a copy of:

**APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CONSTITUTIONAL AND CIVIL RIGHTS LAW PROFESSORS IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF**

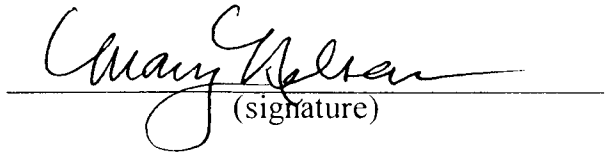
on the following by placing a true copy thereof enclosed in a sealed envelope with delivery fees provided for, addressed as follows for collection by UPS at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482, in accordance with Morrison & Foerster's ordinary business practice:

**SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at San Francisco, California, this 15th day of January, 2009.

Mary Nelson
(typed)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