Case Nos. S168047, S168066, S168078

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

KAREN L. STRAUSS et al., Petitioners,

v.

MARK B. HORTON, Respondents.

ROBIN TYLER et al., Petitioners,

v.

THE STATE OF CALIFORNIA, Respondents.

CITY AND COUNTY OF SAN FRANCISCO, Petitioners,

v.

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

APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICI CURIAE* PROFESSORS OF STATE CONSTITUTIONAL LAW: ROBERT F. WILLIAMS, LAWRENCE FRIEDMAN, VINCENT M. BONVENTRE, DANIEL GORDON, ANN LOUSIN, JAMES G. POPE, AND JEFFREY M. SHAMAN IN SUPPORT OF PETITIONERS

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Pursuant to California Rule of Court 8.520(f), Robert F. Williams, Lawrence Friedman, Vincent M. Bonventre, Daniel Gordon, Ann Lousin, James G. Pope, and Jeffrey M. Shaman (hereafter "Amici") request leave of this Court to file the attached brief of Amici Curiae in support of Petitioners.

THE AMICI CURIAE

Robert F. Williams

Professor Williams is a Distinguished Professor at Rutgers University School of Law (Camden, NJ) where he teaches courses on state constitutional law and serves as Associate Director of the Center for State Constitutional Studies. He served as legislative assistant in the Florida Legislature during the 1967 Constitutional Revision Session, practiced law with Legal Services in Florida and represented clients before the 1978 Florida Constitution Revision Commission. His extensive list of publications on state constitutional law includes: State Constitutional Law: Cases and Materials (Lexis Law Pub., 4th ed. 2006); The New Jersey State Constitution: A Reference Guide (rev. ed. 1997); Drafting State Constitutions, Revisions and Amendments (2006) (with Frank P. Grad); The Brennan Lecture: Interpreting State Constitutions As Unique Legal Documents, 27 Okla. City U. L. Rev. 189 (2002); In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication, 72 Notre Dame L. Rev. 1015 (1997); Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform, 36 Rutgers L. J. 1075 (2005) (with G. Alan Tarr); The State Constitutions of

the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism, 62 Temp. L. Rev. 541 (1989); The State Constitutional Roots of the 'Separate But Equal' Doctrine: Roberts v. City of Boston, 17 Rutgers L. J. 537 (1986) (coauthored); Equality Guarantees in State Constitutional Law, 63 Tex. L. Rev. 1195 (1985).

Lawrence Friedman

Professor Friedman is Associate Professor of Law at New England School of Law in Boston. His publications on state constitutional law include: Unexamined Reliance on Federal Precedent in State Constitutional Interpretation: The Potential Intra-State Effect, 33 Rutgers L.J. 755 (2002), and The Constitutional Value of Dialogue and the New Judicial Federalism, 28 Hasting Const. L.Q. 93 (2000). In addition, he is co-author, with Lynnea Thody, of The Massachusetts State Constitution: A Reference Guide, which is forthcoming from Greenwood Press.

Vincent Martin Bonventre

Professor Bonventre is a Professor of Law at Albany Law School (Albany, NY) where he teaches criminal law, constitutional criminal procedure, judicial process, legal ethics, and state constitutional law. He has also taught as a visiting professor at Syracuse University College of Law and the Maxwell School of Public Affairs (Syracuse, NY). He is the Editor of State Constitutional Commentary and was the founding Editor-in-Chief of the Government, Law & Policy Journal (New York State Bar Association). Prior to his academic career, he served as a law clerk to two judges on the New York Court of Appeals: Hon. Matthew J. Jasen (1983-1985) and Hon. Stewart F. Hancock, Jr. (1987-1990). His publications on state constitutional law, in addition to the annual volumes

of State Constitutional Commentary, include Changing Roles: The Supreme Court and the State High Courts in Safeguarding Rights, 70 Albany Law Review 841 (2007); STREAMS OF TENDENCY" ON THE NEW YORK COURT: IDEOLOGICAL AND JURISPRUDENTIAL PATTERNS IN THE JUDGES' VOTING AND OPINIONS (W.S. Hein, 2003); Court of Appeals Update, 2000 & 2001: Conservative Voting, Narrow Rulings, 65 Albany Law Review 1085 (2002) (with Kelly M. Galligan); Public Law at the New York Court of Appeals: An Update on Developments, 2000, 64 Albany Law Review 1355 (2001) (with Amanda Hiller); Court Bashing and Reality: A Comparative Examination of Criminal Disposition at the New York Court of Appeals and Neighboring High Courts, 36(no.1) The Judges' Journal (American Bar Association) 8 (1997) (with Judi A. DeMarco); State Constitutional Jurisprudence: Decision Making At The New York Court Of Appeals, 13 Touro L. Rev. 3 (1996); New York and the Supremes: State Constitutional Law on the Rebound at the Court of Appeals, 5 (no. 4) State Constitutional Commentaries and Notes 19 (1995); New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals, 67 Temple Law Review 1163 (1994); Court of Appeals - State Constitutional Law Review, 1991, 14 Pace Law Review 353 (1994); State Constitutional Adjudication At The Court Of Appeals, 1990 And 1991: Retrenchment Is The Rule, 56 Alb. L. Rev. 119 (1992); Court Of Appeals – State Constitutional Law Review, 1990, 12 Pace L. Rev. 1 (1992); Beyond The Reemergence – "Inverse Incorporation" And Other Prospects For State Constitutional Law, 53 Alb. L. Rev. 403 (1989); State Constitutionalism in New York: A Non-reactive Tradition, 2 Emerging Issues in State Constitutional Law 31 (1989).

Daniel Gordon

Professor Gordon is a professor of law at St. Thomas University School of Law (Miami, Florida). He teaches state constitutional law, civil procedure, and choice of law. He has published extensively on the issues of contemporary state constitutional law and federalism issues, including Brennan's State Constitutional Era Twenty-Five Years Later: The History, The Present, and The State Constitutional Wall, Emerging Issues in State Constitutional Law, 73 Temp. L. Rev. 1031 (2000); Failing the State Constitutional Education Grade: Constitutional Revision Weakening Children and Human Rights, 29 Stetson L. Rev. 271 (1999); Upside Down Intentions: Weakening the State Constitutional Right to Privacy, A Florida Story of Intrigue and a Lack of Historical Integrity, 71 Temp. L. Rev. 579 (1998); The State Constitutionalism of Social Exclusion and Subordination: Stepping Back in Florida, 69 Temp. L. Rev. 1041 (1996); Superconstitutions Saving The Shunned: The State Constitutions Masquerading As Weaklings, 67 Temp. L. Rev. 965 (1994); The Ugly Mirror: Bowers, Plessy And The Reemergence Of The Constitutionalism Of Social Stratification And Historical Reinforcement, 19 J. Contemp. L. 21 (1993).

Ann Lousin

Professor Lousin has been a professor at The John Marshall Law School (Chicago, IL) since 1975. She was a research assistant at The Sixth Illinois Constitutional Convention in 1970, where she assisted in the drafting of nearly every article of the 1970 Illinois Constitution. She was staff of the Constitution Implementation Committee of the Illinois House of Representatives from 1971 to 1973 and Parliamentarian of the House from 1973 to 1975. She is a recognized authority on the Illinois constitution and

has published and lectured widely on that subject, including the following publications: Challenges Facing State Constitutions In The Twenty-First Century, 60 La. L. Rev. 17 (2001); The 1970 Illinois Constitution: Has It Made A Difference?, 8 N. Ill, U. L. Rev. 571 (1988); The 1970 Illinois Constitution: The First Two Decades, 8 N. Ill, U. L. Rev. 845 (1988); Illinois Constitutional Law, (1979).

James G. Pope

Professor Pope has been a professor of law at Rutgers University School of Law (Newark, NJ) since 1986, where he teaches courses in constitutional law and theory. Prior to his teaching career, he clerked for Chief Justice Rose Elizabeth Bird of the California Supreme Court. He has written numerous articles on constitutional law and legal history including An Approach to State Constitutional Interpretation, 24 Rut. L.J. 985-1008 (1993); Republican Moments: The Role Of Direct Popular Power In The American Constitutional Order, 139 U. Penn. L. Rev. 287 (1990); Labor and The Shaping of The Post-New Deal Constitutional Order, 1921-1950, 102 Colum. L. Rev. 1-122 (2002).

Jeffrey M. Shaman

Professor Shaman is Vincent de Paul Professor of Law at DePaul University where he has been a member of the faculty since 1973. Professor Shaman teaches constitutional law, state constitutional law, and a senior research seminar on freedom of speech. He is the author of Constitutional Interpretation: Illusion and Reality (Greenwood Press 2001) and Equality And Liberty In The Golden Age Of State Constitutional Law (Oxford University Press 2008). His articles analyzing the constitutional process have been published in law reviews across the country. The Encyclopedia Of American Law contains a chapter he wrote on the equal

protection clause, and the Oxford Companion To The Supreme Court includes a note he authored on Brown v. Board of Education. Professor Shaman also is a national authority on judicial conduct and ethics, and is co-author of Judicial Conduct And Ethics (Lexus 2007), which received an awarded for excellence from the Association of American Publishers and is now in its fourth edition. He has contributed many articles to Judicature and the Judicial Conduct Reporter, and has lectured extensively on judicial conduct and ethics. In 1994-95 he held the Wicklander Chair for Professional Ethics. Professor Shaman was elected to membership in the American Law Institute in 1983, and is also a member of the U.S. Association of Constitutional Law. He served on the Board of Directors of the DePaul Institute for International Human Rights, and has participated in human rights programs in Algeria, Tunisia, and Zimbabwe. From 1990–1993, Professor Shaman served as President of the Board of Directors of the ACLU of Illinois. As an attorney, Professor Shaman has litigated cases involving due process of law, equal protection of law, freedom of speech, and other constitutional rights. Professor Shaman received a B.A. from the Pennsylvania State University, a J.D. from the University of Southern California, and an LL.M. from Georgetown University, where he held the Keigwin Graduate Fellowship. In 1978, he was awarded a fellowship by the National Endowment for the Humanities to study American legal history at the University of Chicago. Prior to beginning his teaching career, Professor Shaman was an attorney in the Office of the General Counsel for the U.S. Department of Health, Education, and Welfare.

INTERESTS OF AMICI CURIAE

We are professors of law schools throughout the United States. Our expertise lies in constitutional law, with an emphasis on state constitutional law. In our professional capacities, we have researched, studied and written about public law issues of the kind this Court now faces. We hope that the body of knowledge we have helped to develop on the history, formation, interpretation, and application of state constitutions, including the California Constitution, may be of value to the Court in resolving the questions presented in this appeal. Unique considerations attend the interpretation of state constitutions that litigants often cannot fully explore. We hope to present these important arguments in greater detail.

* * * * *

For the foregoing reasons, the Amici Curiae respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: January 15, 2008

RAOUL D. KENNEDY
Attorneys for Amici Curiae

BRIEF OF AMICI CURIAE

I. SUMMARY OF ARGUMENT

Proposition 8 constitutes an improper revision of the California Constitution based on either a quantitative or a qualitative analysis of its impact.

California's Constitution reflects the animating egalitarian principles and philosophy, as well as the specific equality provisions, passed down through state constitutions from the Revolution through the Westward Movement. Proposition 8 not only conflicts directly with this broad underpinning of the California Constitution (quality), but it also directly impacts a number of specific provisions of the Constitution reaching from the Declaration of Rights, through the Legislative Article, to the Articles on Taxation and Tax Limitation (quantity).

This Court should, despite the deference to the initiative process that it has declared, seriously enforce the constitutional limit the people of California have imposed on themselves in limiting initiatives to amendments and not revisions. This is particularly true in a case like this, where an earlier decision of this Court that protected a disfavored minority has caused a predictable backlash in the form of Proposition 8 which, if upheld, has the potential to unleash a welter of discrimination-based constitutional initiatives.

II. EQUALITY IS A FOUNDATIONAL, ANIMATING ELEMENT OF STATE CONSTITUTIONS, INCLUDING THE CALIFORNIA STATE CONSTITUTION

State constitutions, including the California Constitution, may be contrasted with the Federal Constitution on many different bases. One key distinction is that, unlike the Federal Constitution, with its single

Fourteenth Amendment requirement of equal protection added after the Civil War, state constitutions were built upon equality concerns and are characterized by multiple provisions reflecting a wide variety of general and specific equality mandates. See Jeffrey M. Shaman, Equality and Liberty in the Golden Age of State Constitutional Law 1–5, 28–35, 41–44 (2008). This egalitarian foundation of state constitutions has been transmitted into California's Constitution through the years since 1776 and across the United States from East to West. California's Constitution is a textbook example of an equality-based state constitution. Proposition 8 does much more than change one provision – it flies in the face of the state constitution's egalitarian underpinnings.

The commitment to equality under the state constitutions is embodied in numerous provisions of the constitutions. The interpretation and application of these provisions flow from a baseline understanding of equality as a value of uniquely constitutional dimension.[1] This understanding derives from an examination of the historical context and language of the provisions, as well as the structural and institutional concerns they implicate and the efforts of other courts to interpret their state constitutional analogs. Such an examination reveals a commitment to equality that embraces not only political equality among citizens, but significantly, both the inherent equality of citizens and the value of equality to the larger community.

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[1] See Bernard Bailyn, The Ideological Origins of the American Revolution 319 (1967) ("The details of this new world were not as yet clearly depicted; but faith ran high that a better world than any that had ever been known could be built where authority was distrusted and held in constant security; where the status of men flowed from their achievements and from their personal qualities, not from distinctions ascribed to them at birth; and where the use of power over the lives of men was jealously guarded and severely restricted.").

A. Equality in the Historical Context of State Constitutions

To appreciate fully the provisions of the California Constitution addressing equality, they must be viewed in the earlier context of the Revolutionary state constitution-making processes that took place throughout the newly-independent states following the American Revolution. State constitution-making, after all, was the domestic political language of the Revolution. These early state constitutions form the roots of the California Constitution today.

As the colonies moved towards revolution, equality became a key element of political rhetoric. Colonial leaders adopted the postulate of equality because it provided an effective argument against colonial rule – in 1688, the English Whigs had adopted the concept of social contract and its underlying principle of equality. See Willi Paul Adams, The First American Constitutions 165 (1980); see also Judith A. Baer, Equality Under the Constitution 38-56 (1983) (discussing the philosophical roots of equality in colonial America).

The state constitutions, including California's, still reflect the ideas of Revolutionary thinkers such as John Adams and Thomas Paine. See Bailyn, supra, at 45. Paine published Common Sense, arguably the most influential political pamphlet in American history, in Philadelphia in February 1776. Philip Foner, 1 The Complete Writings of Thomas Paine 4 (1969). Paine urged a "new political language," to represent a "utopian image of an egalitarian republican society." Eric Foner, Tom Paine and Revolutionary America xvi (1976). Paine advocated for establishing simple, republican governments, operated by unicameral legislatures with a wide elective franchise. Id. at 75.

Almost immediately after Common Sense appeared, John Adams published his influential Thoughts on Government, 1 American Political Writing During the Founding Era, 1760-1805 401 (Charles Hyneman & Donald Lutz eds. 1983), as, among other things, a response to Paine. Alfred Owen Aldridge, Thomas Paine's American Ideology 200 (1984). Adams, believing unicameral legislatures presented grave dangers to minority rights, proposed a model for new state governments based on "balanced government," or checks and balances, in which bicameralism and executive power counterbalanced the lower house. 1 American Political Writing, supra, at 403.

Both Paine in Common Sense and Adams in Thoughts on Government revealed the sense of liberation and exhilaration felt by constitution-makers and citizens at the beginning of the founding decade. Both the more radical Paine – arguing that Americans had the opportunity to "begin the world over again," Philip Foner, The Life and Major Writings of Thomas Paine 45 (1974) – and the more conservative Adams – proclaiming "an opportunity of making an election of government," 1 American Political Writing, supra, at 408 – were united in their rejection of British hierarchical society, with its arbitrary, sometimes hereditary, social distinctions and privileges. See Gordon S. Wood, The Radicalism of the American Revolution 239-40 (1992). The Revolutionaries' view of equality, for the most part, was not one of "social leveling." Gordon S. Wood, The Creation of the American Republic, 1776-1787 70 (1969). Rather, they supported equality of opportunity, accepting and accommodating social differences. Id. at 72. They also rejected a government based on the arbitrary prerogative of one or more persons. Gordon S. Wood, Foreword: State Constitution-Making In The American Revolution, 24 Rutgers L.J.

911, 915-16 (1993). Underlying both Paine's and Adams' proposals was a belief in, and a commitment to equality – a very complex notion, but central to the new political language of the Revolution.

This shared commitment to equality deeply influenced the formation of Revolutionary constitutions such as the Massachusetts Constitution. Both radicals and conservatives rejected the proposed Constitution of 1778 for its failure to include a bill of rights, and, in particular, provisions guaranteeing the equality of citizens. See The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780 22 (Oscar Handlin & Mary Flug Handlin eds. 1966). Theophilus Parsons, a future delegate to the 1779 constitutional convention, voiced the view of many in the Essex Result, in which he argued that

> All men are born equally free. The rights they possess at their births are equal, and of the same kind. Some of these rights are alienable, and may be parted with for an equivalent. Others are unalienable and inherent, and of that importance, that no equivalent can be received in exchange . . . .
>
> The alienation of some rights, in themselves alienable, may be also void, if the bargain is of that nature, that no equivalent can be received . . . . Each individual also surrenders the power of controuling his natural alienable right, ONLY WHEN THE GOOD OF THE WHOLE REQUIRES IT. The supreme power therefore can do nothing but what is for the good of the whole; and when it goes beyond this line, it is a power usurped.

Id. at 330-31 (emphasis in original). The complex distinction between alienable and unalienable rights is discussed in Ronald M. Peters, Jr., The Massachusetts Constitution of 1780: A Social Compact 75-87, 181 (1978). The radical Berkshire Constitutionalists, in the Instructions of the Town of Pittsfield to its delegate to the 1779 Constitutional Convention, insisted:

> In the Bill of Rights, you will endeavor that all those unalienable and important rights which are essential to

> true liberty, and form the basis of government in a free State, shall be inserted: particularly . . . that, as all men are equal by nature, so, when they enter into a state of civil government, they are entitled precisely to the same rights and privileges, or to an equal degree of political happiness . . . .

Id. at 410-11.

In 1814, the Supreme Judicial Court of Massachusetts rendered one of the leading equality decisions in the country in Holden v. James, 11 Mass. 396 (1814). The court held:

> It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that any one should be subjected to losses, damages, suits or actions, from which all others under like circumstances, are exempted. [11 Mass. at 405.]

Ultimately, John Adams and the other framers included in the Constitution of 1780 numerous provisions expressing a commitment to equality.

Indeed, the very system of checks and balances that Adams designed for Massachusetts was driven by the need to protect the equal rights and liberties of individuals. See John Adams, Defence of the Constitutions of Government of the United States of America 1 (1787). State constitution-makers, like Adams, addressed these concerns not only in the design of government structures, with a special emphasis on equal participation in government, but also in the specific equality provisions in state constitutions.

The equality provisions of the early state constitutions may appear to be somewhat archaic when compared with the more modern language of contemporary constitutions. When they are read in light of the egalitarian revolution of the founding era, however, they elucidate the animating underpinnings of the Revolution itself. Viewed in this wider

historical context, the commitment to equality expressed in the state constitutions, including California's, has a forceful logic and consistency. This commitment establishes not just the right of all individuals to equal participation in the political process, but also its logical corollary, the revolutionary notion of inherent equality: that all individuals possess the same unalienable rights and, as to the exercise of those rights and the pursuit of their personal interests, none shall be favored above others.

B. State Constitutional Equality Provisions

A few early state constitutions contained language similar to the classic language of equality in the Declaration of Independence. Section 1 of the Virginia Bill of Rights, written by George Mason and adopted a month before the Declaration of Independence, provided:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. [Va. Const. art. I, § 1.]

A.E. Dick Howard, a leading expert on the Virginia Constitution, noted that "it is to the teachings of natural law, rather than to the dictates of the British constitution, that we owe" this provision. A.E. Dick Howard, "For the Common Benefit": Constitutional History in Virginia As a Casebook for the Modern Constitution-Maker, 54 Va. L. Rev. 816, 823 (1968). Although only Pennsylvania (Pa. Const. art. I, § 1 (1776)) and Massachusetts (Mass. Const. pt. I, art. I (1780)) initially included broad provisions such as Virginia's, many states (including California) now have similarly worded provisions. Notions of equality, however, permeated the first state constitutions with respect to governmental structure, even if not with respect to individual rights. See generally Peters, The Massachusetts

Constitution of 1780: A Social Compact at 190 (discussing these two facets of political equality).

Despite these early beginnings, much of the modern judicial doctrine of equality under state constitutions has its textual basis in provisions such as section 1 of the Virginia Bill of Rights. Even though many of these provisions seem only to declare political truths, they have been interpreted to limit state actions.

Several of the early constitutions contained another type of general equality provision intended to prohibit grants similar to royal privileges. Section IV of the 1776 Virginia Bill of Rights, for example, provided that "no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services." Va. Const. art. 1, § 4 (1776). For a similar provision, see Mass. Const. pt. 1, art. VI (1780) and section 7(b) of Article I of the California Constitution.

The wave of constitutional revision in the 1820s did not focus on the generally applicable equality provisions contained in the first state constitutions. See generally Merrill D. Peterson, Democracy, Liberty and Property: The State Constitutional Conventions of the 1820's (1966) (discussing the Massachusetts, New York, and Virginia conventions). Instead, equality issues centered around extending the right to vote to blacks and nonfreeholders and apportioning legislative representation. Id. at 59, 214, 377. Nonetheless, reformers commonly invoked those early equality provisions, as well as natural law arguments, to support their proposals for political equality. Howard, supra at 862.

Later in the century, many states amended their constitutions to curb the granting of "special" or "exclusive" privileges, after a series of

abuses by the relatively unfettered state legislatures responding to powerful economic interests. See James Willard Hurst, The Growth of American Law: The Law Makers 241-42 (1950). These provisions were modeled after provisions adopted earlier in other states, such as section IV of the Virginia Bill of Rights. For example, article I, section 20 of the 1859 Oregon Constitution, which was patterned after Indiana's 1851 constitution, provides: "No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Or. Const. art. I, § 20 (1859). These provisions commonly are found in state bills of rights – not in the legislative articles. They reflect the Jacksonian opposition to favoritism and special treatment for the powerful. Historian Rush Welter observed:

> Hence the whole thrust of Jacksonian thought was in the first instance negative, an effort to eliminate institutions and practices that an earlier generation had more or less taken for granted.
>
> The "aristocracy" that Jacksonians complained of consisted of selective access to power, prosperity, or influence. At bottom it was a political rather than a social or economic concept: in Jacksonian eyes, an "aristocrat" was someone who was empowered by law to affect the economic and social welfare of his contemporaries, or who enjoyed legal privileges that he could turn to his own account in an otherwise competitive economy. [Rush Welter, The Mind of America: 1820-1860, at 77-78 (1975) (footnote omitted).]

Although these provisions may overlap somewhat with federal equal protection doctrine, closer scrutiny reveals significant differences. As Justice Hans Linde of the Oregon Supreme Court has noted, Oregon's article I, section 20 and the federal equal protection clause "were placed in different constitutions at different times by different men to enact different historic concerns into constitutional policy." Hans Linde, Without

"Due Process": Unconstitutional Law in Oregon, 49 Or. L. Rev. 125, 141 (1970). Justice Betty Roberts of the same court has noted further:

> Article I, section 20, of the Oregon Constitution has been said to be the "antithesis" of the equal protection clause of the fourteenth amendment . . . . While the fourteenth amendment forbids curtailment of rights belonging to a particular group or individual, article I, section 20, prevents the enlargement of rights . . . . There is an historical basis for this distinction. The Reconstruction Congress, which adopted the fourteenth amendment in 1868, was concerned with discrimination against disfavored groups or individuals, specifically, former slaves . . . . When article I, section 20, was adopted as a part of the Oregon Constitution nine years earlier, in 1859, the concern of its drafters was favoritism and the granting of special privileges for a select few. [Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 42 (1982) (citations omitted).]

A provision like Oregon's, then, does not seek equal protection of the laws at all. Instead, it prohibits legislative discrimination in favor of a minority or powerful group. This, once again, represents the historical origins of California's Article I, § 7(b).

Closely related to, but different from, the provisions prohibiting grants of special or exclusive privileges are prohibitions on "special" and "local" laws. See James Q. Dealey, Growth of American State Constitutions 224-26 (1915); Hurst, supra at 241-42. These provisions, found in the legislative articles of state constitutions, contain either general or detailed limitations on the objects of legislation – special laws are those that apply to specified or a limited number of persons; local laws are those that apply to specified or a limited number of localities. Though intended in part to curb legislative abuses, these proscriptions on special and local laws reflect a concern for equal treatment under the law and improper legislative classifications.

In the 1960s a number of state constitutions were amended to include provisions prohibiting discrimination in the exercise of civil rights. Pennsylvania, for example, added a provision in 1967 which directs that "[n]either the Commonwealth nor any political subdivisions thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." Pa. Const. art. I, § 26 (1967). Similar provisions in other states typically limit the proscription to discrimination on the basis of race, color, or national origin.

Prohibiting this type of discrimination has become increasingly important as state governments have expanded from regulation into the provision of services. See generally Frank P. Grad, The State Constitution: Its Function and Form in Our Time, 54 Va. L. Rev. 928, 929-39 (1968) (describing the shifting functions of state governments); cf. Hurst, supra at 241 ("Until the 1930's the prevailing political notion was in terms of the bad men and restriction."). When state governments merely regulated conduct, prohibiting them from denying persons' civil rights was an effective limit – they did not have the leverage of attaching "unconstitutional conditions" to the provision of services; therefore, it was not as easy to favor one right over another. Thus, these provisions prohibiting discrimination against persons in the exercise of their civil rights are needed to keep states from picking and choosing among citizens' rights they seek to advance or repress.

Several states adopted constitutional provisions banning various forms of sex discrimination at the end of the nineteenth century. Generally speaking, however, the "state ERA" is a phenomenon of the 1970s – the most recent manifestation of equality concerns in state constitutions.

Although many states have interpreted these generally applicable bill of rights provisions to guarantee equality under the law, other provisions, not usually found in bills of rights, expressly require equality in specific and limited instances. When applicable, these provisions offer state courts sound textual bases for invalidating state actions. And at the same time they warrant extending equality guarantees beyond those of federal equal protection doctrine, these provisions allow courts to avoid some of the problems of basing decisions on generally applicable equality provisions. Thus, the New Jersey court used the state's thorough and efficient education provision as a more "specific and limited" basis for its equality decision. Robinson v. Cahill, 303 A.2d 273, 283–84 (N.J. 1973).

In addition, most states have uniformity in taxation provisions that provide specific grounds for enforcing equality. See generally Michael Bernard, Constitutions, Taxation and Land Policy (1979) (abstracting tax provisions from the federal and all state constitutions); Wade J. Newhouse, Constitutional Equality and Uniformity in State Taxation (2d ed. 1984) (analysis of state tax uniformity and equality provisions, organized into nine prototypical clauses). It is important to note, though, that while these provisions may be limited in focus, they can be far reaching in effect. The primary effect of tax uniformity provisions is to mandate equality in property taxation. See Notes, Inequality in Property Tax Assessments; New Cures for an Old Ill, 75 Harv. L. Rev. 1374, 1377-80 (1962).

III. PROPOSITION 8 MODIFIES OR AFFECTS MANY PROVISIONS THROUGHOUT THE CALIFORNIA CONSTITUTION

The California Constitution reflects this animating and organizing principle of equality, both in a deep historical sense, dating to

1849, and in a broad textual sense, with equality provisions appearing throughout the Constitution. When California adopted its first constitution, in 1849, it modeled many of its provisions on earlier state constitutions, beginning with those adopted during the Revolution. See David Alan Johnson, Founding The Far West: California, Oregon, and Nevada, 1840-1890, 102 (1992). See also Christian G. Fritz, The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution – Making in the Nineteenth Century West, 25 Rutgers L.J. 945, 978-79 (1994). It therefore adopted the equality-based features and philosophy of those earlier state constitutions.

California's state constitutional record on equality, to be sure, has not been unblemished. For example, the 1879 anti-Chinese state constitutional provisions, Harry N. Scheiber, Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution, 17 Hast. Const. L.Q. 35, 42-44, 49, 68–69 (1989) and the 1960s' Proposition 14, struck down in Reitman v. Mulkey, 387 U.S. 369 (1967), were far from high points of egalitarian consciousness. Still, California's record of concerns over equality, both in state constitutional provisions as well as their judicial interpretation by this Court, is among the strongest in the nation.

Article I, § 1 of the California Constitution, with its origins in the 1776 Revolutionary state constitutions, as noted earlier, is a stirring declaration of equality and liberty. These clauses are often the basis for equality rulings in other states. This would also be possible in California. Cf. City of Santa Barbara v. Adamson, 27 Cal. 3d 123 (1980). The specific addition of "privacy" protection in 1972, through Article I, § 1, reinforces the power of this provision; Proposition 8 eliminates any potential relevance of that section for the marriage rights of same-sex couples.

Article I, § 7, prior to the introduction of a specific equal protection clause in 1974, served as the primary equality guarantee. Joseph R. Grodin, Calvin R. Massey & Richard B. Cunningham, The California State Constitution: A Reference Guide 47 (1993) (hereinafter Grodin). Classifications affecting citizens' privileges and immunities were subject to judicial review. See, e.g., Dep't of Mental Hygiene v. Kirchner, 62 Cal. 2d 586 (1965). Proposition 8 eliminates the possibility of such litigation and judicial review concerning the marriage rights of same-sex couples.

With the advent of § 7(a), the equal protection clause, as part of the 1974 package of amendments, fueled by, among other things, modern concerns about the potential for discrimination, the people of California once again went on record as embracing the equality principle. Of course, 1974 also brought Article I, § 24, California's declaration of state constitutional independence, defended so forcefully by this Court in Raven v. Deukmejian, 52 Cal. 3d 336 (1990). Proposition 8 renders both Article I, § 7(a) and Article I, § 24 inapplicable only to the marriage rights of same-sex couples.

Article I, § 8 expresses the equality principle with respect to business and employment. Together with Article IX, § 9(f), this provision has its origins in the heroic efforts of Clara Foltz, who pressed claims of gender equality upon the 1879 California Constitutional Convention and benefited Californians ever since. See Barbara Allen Babcock, Clara Shortridge Foltz: Constitution-Maker, 66 Ind. L.J. 849, 851-53 (1991). Article I, § 8 was updated in 1976, in the equality-oriented 1970s amendments. Grodin, supra, at 14.

Article I, § 20, granting equal property rights to noncitizens, dates from 1849, but was subjected to exclusion of Asians in 1879, only to

be amended to its current egalitarian text in 1974, in the package of equality-based amendments that year. Grodin, supra, at 57. The provision is a hospitable alternative to the usual "hard on the outside and soft on the inside" approach to citizenship and the rights of noncitizens. See Linda Bosniak, The Citizen and the Alien: Dilemmas of Contemporary Membership 4 (2006).

Article I, § 21, concerning separate property of married persons, dates from 1849 and implemented the equal treatment of married women. Proposition 8 renders this guarantee irrelevant for same-sex couples who wish to marry.

Article IV, § 16, dating from 1849, bans "special and local" laws passed by the Legislature, and requires laws to have "uniform operation." Prior to 1974, this clause and the earlier Article I, § 7, served as California's equality guarantees. Grodin, supra, at 101; People v. Soto, 171 Cal. App. 3d 1158 (1985). Proposition 8 eliminates any possible reliance on these provisions in the context of marriage rights of same-sex couples.

Article IX, § 5 mandates the establishment of "common schools." The Common School movement was one of the most broad-based, egalitarian programs in the history of our country. Molly O'Brien & Amanda Woodrum, The Constitutional Common School, 51 Clev. St. L. Rev. 581 (2004). This Court interpreted this provision, in light of Article I, § 7's equal protection clause, to require equal funding for public schools, a landmark decision in American law. Serrano v. Priest, 18 Cal. 3d 728 (1976), cert. denied 432 U.S. 907 (1977).

Article XIII, § 1 is California's uniformity in taxation provision, reflecting the concerns about equal taxation that have been included in most state constitutions. A number of other provisions on

taxation, however, are linked to married persons, or spouses. See Cal. Const. art. XIII, §§ 3(o)(3); (p)(1); (q)(3); 4(a). See also Cal. Const. art. XIIIA, § 2(a), (g)(1)–(5), . Proposition 8 renders all of these provisions inapplicable to the marriage rights of same-sex couples.

This brief survey of the equality-based provisions of the California Constitution makes it clear that Proposition 8 cuts a direct swath across a number of its equality provisions, as well as striking an even broader blow against the egalitarian philosophy reflected throughout the California Constitution.

IV. THIS COURT IS RESPONSIBLE FOR ENFORCING THE CONSTRAINT CALIFORNIANS IMPOSED ON THEMSELVES IN LIMITING THE INITIATIVE TO CONSTITUTIONAL "AMENDMENTS"

One of the most important distinctions between federal and state constitutional law is the important role that state courts play as a crucial safeguard to enforce the limits on the processes of state constitutional change. G. Alan Tarr observed that "[W]hereas the United States Supreme Court has dismissed procedural challenges to the federal amendment process as "political questions," state courts have proved quite willing to address a wide range of issues associated with state constitutional change." G. Alan Tarr, Understanding State Constitutions 26, 27 (1998). This is quite clear in California, where this Court, despite its expressed deference to the initiative process, has taken its responsibility to interpret the state constitution seriously, so as to include enforcement of the procedural restrictions on state constitutional change. See, e.g. Californians for an Open Primary v. McPherson, 38 Cal. 4th 735 (2006); Senate of the State of Cal. v. Jones, 21 Cal. 4th 1142 (1999).

Here, the very real, constitutional constraint on the peoples' power of initiative is a textual provision of the Constitution itself, adopted by Californians to limit themselves to "amendments." The limit appears repeatedly. See Cal. Const. art. II, § 8(a) & (b); art. XVIII, § 3.

This amendment/revision dichotomy, has its origins in the 1849 Constitution, through the 1879 Constitution, to its adoption for the initiative in 1911. It was most recently reaffirmed by the people of California in 1962 when they ratified the legislatively-proposed amendment to Article XVIII, § 1, authorizing the Legislature to propose revisions, as well as amendments, to the voters for their approval but retaining the limitation on the initiative only for amendments.

Despite the expression of popular sovereignty in Art. II, § 1 ("All political power is inherent in the people . . . . and they have the right to alter or reform it when the public good may require."), this power of the people must be constrained by the procedures and limits on that power contained elsewhere in the Constitution. The constitutional amendment/revision dichotomy is one such, judicially enforceable limit. The binding nature of such limits on governmental change was not always seen to be applicable to "the people," see Christian G. Fritz, American Sovereigns: The People and America's Constitutional Tradition Before The Civil War 3-8 (2008), but that debate has now been resolved to limit state constitutional change to procedures specified in the constitution.

It is especially important for state constitutional law that procedural limits on the processes of change are considered binding and enforceable by the courts because, in contrast to the federal Constitution, state constitutions have come to be utilized as tools or instruments of what would otherwise be viewed as ordinary lawmaking. G. Alan Tarr noted:

"State constitutions . . . deal directly with matters of public policy, sometimes in considerable detail . . . . Policy provisions in state constitutions may also take the form of policy directives." Tarr, supra, at 20-21. See also id. at 132-33. To the extent, therefore, that the processes of state constitutional change include what may be the product of the ordinary give-and-take of public policy debate, the initiative process (which does not provide for deliberation or give-and-take), should be scrutinized with particular care by this Court. See Legislature v. Eu, 54 Cal. 3d 492, 506 (1991) ("the revision provision is based on the principle that 'comprehensive changes' to the Constitution require more formality, discussion and deliberation than is available through the initiative process."); Thomas Gais & Gerald Benjamin, Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform, 68 Temp. L. Rev. 1291 (1995).

The terms "amendment" and "revision" are open-textured and must be interpreted by this Court. This Court has indicated that an initiative constitutes an improper revision if it changes the "basic governmental plan," Brosnahan v. Brown, 32 Cal. 3d 236, 260 (1982); Amador Valley Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 223 (1978), or "involves a change in the basic plan of California government, *i.e.*, a change in its fundamental structure or the foundational powers of its branches." Legislature v. Eu, 54 Cal. 3d at 509. The recurring commitment to equality is part of California's basic governmental plan.

Proposition 8, at issue herein, is a policy-oriented provision. It not only directly undermines a number of the California Constitutional equality provisions, and more broadly contradicts the egalitarian philosophy of the Constitution, it operates to modify any statutes providing

benefits to married couples not covered by the Domestic Partnership Law or any such statutes that may in the future be removed from that law's coverage by the Legislature. State constitutional change can be utilized to modify statutes as well as constitutional provisions. Consulting Eng'rs and Land Surveyors of Cal., Inc. v. Prof'l Eng'rs in Cal. Gov't, 42 Cal. 4th 578, 586 (2007); Reitman, 387 U.S. 369. Further, Proposition 8 absolutely bars any future statute that would grant marriage rights to same-sex couples.

Though Proposition 8 is a policy-oriented state constitutional provision, it was not the ordinary product of the give-and-take of policymaking. In purporting to overrule this Court's decision in In re Marriage Cases, 43 Cal. 4th 757 (2008) it takes aim at a decision, admittedly controversial, that protected an unpopular minority. Such decisions often provoke popular backlashes. See, e.g., Brown v. Bd. of Educ., 384 U.S. 483 (1954). In this climate there is a real danger that initiated "amendments" enacted by impassioned and temporary majorities, without the moderating influence of deliberation in the legislature or a constitutional convention, will nullify this Court's enforcement of basic constitutional guarantees on behalf of disapproved minorities. An initiative, passed by a small majority (of those voting) in a climate where prejudice against a minority might well have been the deciding factor, is a direct affront to the California Constitution's fundamental and pervasive principles of equality. These factors, and the unique circumstances of this matter, must be balanced against this Court's expressed deference to the initiative process.

In the case of the amendment/revision dichotomy, this Court enforced the important limits on the initiative in Raven v. Deukmejian, 52 Cal. 3d 336 (1990). There, this Court applied the quantitative and

qualitative tests for improper revision, concluding that the initiative was an improper qualitative revision. See also Adams v. Gunter, 238 So. 2d 824 (Fla. 1970) (striking down, on qualitative grounds, as a revision an initiative purporting to "amend" the Florida Constitution to provide for a unicameral legislature).

Petitioners and Amici have demonstrated the qualitative reach of Proposition 8, contradicting the egalitarian underpinnings of the California Constitution itself, as well as purporting to deny a specific, fundamental right to a defined class of California citizens. In itself, that qualitative impact is sufficient to establish that Proposition 8 is a revision. In addition, Amici have demonstrated the broad application of Proposition 8, modifying and undermining many of the equality provisions contained in the California Constitution. Proposition 8 accordingly represents a quantitative revision of the Constitution as well.

V. CONCLUSION

Proposition 8 tears a hole in the California Constitution. This breach goes deep, all the way back to the 1849 California Constitution and its early equality provisions, as summarized above. The breach is also wide, stretching across the text of the current Constitution, from the Declaration of Rights, through the Legislative Article and into the Taxation Article, as well as to the statutes that lay beyond the Constitution's four corners. Quantitatively and qualitatively, Proposition 8 can only be considered a revision of the California Constitution.

If Proposition 8 is upheld, it will provide license for groups of Californians to lash out at groups of their fellow citizens through the initiative process (as long as those groups are not protected by the minimum standards of federal constitutional doctrine) in battles to see which group can enshrine its discriminatory policies in the California Constitution. This is an ugly prospect, and it is not proper constitutional law.

This Court is the leading, most highly-regarded and most followed state supreme court in the United States. Jake Dear & Edward W. Jessen, "Followed Rates" and Leading State Cases, 1940-2005, 41 U.C. Davis L. Rev. 683 (2007). The eyes of the country, and the world, are on this Court, interpreting the California Constitution in the broad American state constitutional context (imperfect as it is) of egalitarian concerns over the generations, as well as the similar California constitutional tradition (also imperfect) of opportunity for all. Proposition 8 takes the state back to 1879 and to the 1960s' Proposition 14, making the Constitution, the state's fundamental law, a vehicle for discrimination. Proposition 8 should not be allowed to so infect the California Constitution, at least not through an

initiative, a mode of lawmaking which lacks all the benefits of deliberation and compromise, as well as the procedural safeguards of either legislative or constitutional convention proposals.

After all, it is a Constitution that the people have purported to amend; such a prospect should be undertaken only with the greatest care.

DATED: January 15, 2009

By: _____
RAOUL D. KENNEDY
Attorneys for Amici Curiae

RULE 8.204(C)(1) CERTIFICATE

The undersigned counsel hereby certifies, pursuant to Rule 8.204(c)(1) of the California Rules of Court, that this APPLICATION TO FILE AMICUS BRIEF AND BRIEF OF AMICI CURIAE uses a proportionately spaced Times New Roman 13-point typeface, and that the text of the brief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, totals 7,623 words, according to the word count provided by the word processing software used to prepare the brief.

DATED: January 15, 2009

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