S168047, S168066, S168078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS et al., Petitioners,
v.
MARK B. HORTON et al., State Registrar of Vital Statistics, etc.,
Respondents;
DENNIS HOLLINGSWORTH et al., Interveners.

ROBIN TYLER et al., Petitioners,
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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

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Application for Permission to File Amici Curiae Brief and Statement of Interest of Amici Curiae to the Honorable Ronald M. George, Chief Justice, and the Honorable Associate Justices of the Supreme Court of California:

Pursuant to California Rules of Court, Rule 8.200(c), Amici Curiae Pacific Yearly Meeting of the Religious Society of Friends, Santa Monica Monthly Meeting of the Religious Society of Friends, Orange Grove Monthly Meeting of the Religious Society of Friends and Claremont Monthly Meeting of the Religious Society of Friends respectfully request permission to file the accompanying brief in support of Petitioners Strauss, Tyler and the City and County of San Francisco.

The Amici Curiae

Amicus Curiae Pacific Yearly Meeting of the Religious Society of Friends ("Pacific Yearly Meeting") is the organization of Quaker meetings on the West Coast that includes in its membership 38 meetings throughout California and Nevada which continue the original form of Quaker worship referred to as unprogrammed meetings for worship. Pacific Yearly Meeting traces its roots to Quakers who were among the settlers of California in the 1800s. The original colony of Pennsylvania was founded in 1681 by William Penn, one of the leading early Quakers who joined the movement shortly after it began in England in the 1650s. Quakers played a significant role in the early history of the American colonies and had an impact on the development of American law, particularly with respect to the free exercise of religion and elimination of discrimination. William Penn drafted the Frame of Government of Pennsylvania and the

Pennsylvania Charter of Privileges, which were the earliest prototypes for what became the United States Bill of Rights.

The Frame of Government was the first constitution to allow for an amendment process. Penn advised the inhabitants of Pennsylvania that "they were at liberty to amend, alter or add to the existing laws for the public good, as he was not wedded to his own forms but would consent to any changes they might wish to make. . . ." It may well be that Penn's approach to constitutional amendment was an influence on the drafters of the Iowa Constitution and the California Constitution (which copied critical provisions from Iowa, that are the subject of this brief).

By the early 1700s, Quaker meetings and individual Quakers were seeking the abolition of slavery and elimination of race discrimination. Equality for all has remained an important principle of Quaker practice and religious witness in the United States. Throughout the century and a half since the end of the Civil War, Quakers have been active in the civil rights movements for racial and religious minorities and women.

In 1971, the Pacific Yearly Meeting became one of the first religious bodies in the United States to speak out about discrimination based on sexual orientation and called upon all its member meetings to take up the issue. The struggle in society at large to eliminate this form of discrimination has been arduous, but in historical context it is similar to the other long struggles that Quakers have joined to free our country from all forms of discrimination.

Amicus Curiae Santa Monica Monthly Meeting of the Religious Society of Friends is one of the member meetings of Pacific Yearly

Meeting. It has offered same and opposite sex marriages, under the care of its meeting, without discrimination since 1996.

Amicus Curiae Orange Grove Monthly Meeting of the Religious Society of Friends is one of the member meetings of Pacific Yearly Meeting. It is the oldest Quaker meeting in California, having been founded in 1907. It has offered same and opposite sex marriages, under the care of its meeting, without discrimination since 1989.

Amicus Curiae Claremont Monthly Meeting of the Religious Society of Friends is one of the member meetings of Pacific Yearly Meeting. It has offered same and opposite sex marriages, under the care of its meeting, without discrimination since 1990.

Amici Curiae are gravely concerned about Proposition 8 because it would impede them and their member meetings from conducting ceremonies of marriage without discrimination. Proposition 8 would prevent the legal solemnization of certain marriages performed by its meetings, discriminating against a suspect class alone.

Amici Curiae respond to the Court's first question as to whether Proposition 8 is invalid because it constitutes a revision of, rather than an amendment to, the California Constitution. Amici Curiae submit three arguments in the hope of assisting the Court in resolving this issue.

Article II of the California Constitution is entitled "*Voting, Initiative and Referendum, and Recall.*" The right to amend the Constitution by initiative appears in section 8 of article II. Article II, section 1 of the California Constitution provides:

> 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.* (Emphasis added.)

While political power is vested in the people and they have a right to alter or amend their government, the sentence does not end there. This Court has stated that significance should be given to every word of a constitutional provision and that a construction that renders words as surplusage should be avoided. The people's right to alter or amend the government is not absolute, but is limited to circumstances where the *public good may require*.

The public good must take into account the lasting interests of all and protect the interests of minorities. This view was widespread at the time the United States Constitution was drafted and strongly influenced the drafters of the 1846 Iowa Constitution and, in turn, the drafters of the 1849 California Constitution who adopted article II, section 1 from the Iowa Constitution.

This Court has previously recognized the inalienable right to marry under article I, section 1. Where an inalienable right is extinguished as to a suspect class alone, the public good does not require such a change in rights. Any attempt to do so would constitute a revision and not an amendment.

Finally, an amendment "is an addition or change along the lines of the original instrument as will affect an improvement or better carry out the purpose for which it was framed." (*Livermore v. Waite* (1894) 102 Cal. 113, 118-19.) Because Proposition 8 eliminates an inalienable right as to a suspect class alone, rather than extending rights or removing limitations on existing rights, it is an invalid revision of the California Constitution.

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

Dated: January 14, 2009

Respectfully submitted,
BRYAN CAVE LLP

Jonathan Solish
Attorneys for Amici Curiae
Pacific Yearly Meeting of the Religious Society of Friends; Santa Monica Monthly Meeting of the Religious Society of Friends; Orange Grove Monthly Meeting of the Religious Society of Friends; Claremont Monthly Meeting of the Religious Society of Friends

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I. Prefatory Statement

Critical provisions of the California Constitution implicated in the questions before the Court were taken nearly verbatim from the Iowa Constitution of 1846. Both Constitutions announce that all people are free and have inalienable rights that include liberty and pursuing and obtaining safety and happiness. Both proclaim that political power is inherent in the people and they have the right to alter or reform the government "when the public good may require."

An analysis of the history of the Iowa and California Constitutions demonstrates that the founders in both states were greatly concerned about protecting their citizens, particularly minorities, from curtailment of their inalienable rights. Early state constitutions, such as Massachusetts' 1780 Constitution, followed Lockean notions, anticipating that laws would be passed by "men of wisdom and virtue," and had, therefore, enabled their legislators to enact "all manner of wholesome and reasonable

. . . laws . . . as they shall judge to be for the good and welfare of this Commonwealth."

Experience taught the drafters of the Iowa Constitution, however, that these lofty expectations had not been met, and that laws had often been passed that unfairly advanced the rights of the powerful, impinging on the liberties of others, with no regard for the public good. The framers of the Iowa Constitution, and the California Constitution, in turn, were not willing to entrust the decision as to which laws served the public good to the makers of the laws alone, but instead imposed a limitation on when laws could be made. Laws could be made only when the "public good may require."

Article I, section 1 of the California Constitution declares that people have inalienable rights, again copying article I, section 1 of the Iowa Constitution nearly verbatim. This brief asserts that these inalienable rights are impervious to incursion by popular vote, whether by alleged constitutional amendment or otherwise, where such rights are extinguished only as to a suspect minority. If this were not so, the majority could redefine "religion" as a belief in any deity not named Allah, or redefine "voting" to mean the casting of a ballot by a white male owning property. Neither change would be required by the public good. Proposition 8 is no different and cannot stand.

Finally, because the California Constitution guaranteed the right to marry to same-sex couples, Proposition 8 does not "follow the lines of the original instrument" and, therefore, constitutes an impermissible revision.

II. The Constitution Can Be Altered Only "When the Public Good May Require"

A. California Voting and Initiative Rights

Article II of the California Constitution is entitled "*Voting, Initiative and Referendum, and Recall.*" A provision of article II—section 8—contains the initiative right. The entirety of article II, including the initiative right, is prefaced by section 1 of article II, which provides: "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.*" (Emphasis added.)

Although the initiative right was not added until 1911, it must be interpreted in the context in which it appears in article II. (*See McFadden v. Jordan* (1948) 32 Cal.2d 330, 334 [The 1911 initiative provision "is to be understood to have been drafted in light of the [1894] *Livermore*

decision."].) Thus, even though section 8 of article II was added after other portions of article II, it is still properly understood in the context of article II into which it was placed.

Because the initiative right is among the rights to alter or reform government set forth in article II, the section entitled "*Voting, Initiative and Referendum, and Recall*," the right is limited by the terms set forth in section 1, the introductory provision of article II. What limit, if any, does the phrase "when the public good may require" place on constitutional initiatives in California?

Announcement of the "right to alter or reform" in article II, section 1 does not end the sentence, though it could have. Instead, the right to alter or reform is followed by a limiting phrase, "when the public good may require." That phrase cannot be disregarded as surplusage—the words must be there for a reason. "Significance should be given, if possible, to every word of [a constitutional provision]. [Citation omitted.] Conversely, a construction that renders a word surplusage should be avoided." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-99.)

Courts should first attempt to give effect to the usual, ordinary import of language to avoid making any language mere surplusage. (*Brewer v. Patel* (1993) 20 Cal.App.4th 1017, 1021.) If language is susceptible of more than one reasonable interpretation, courts will "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340 [citation omitted].)

The phrase "when the public good may require" may be susceptible of more than one meaning because the phrase is no longer in common use. A consideration of extrinsic aids is, therefore, appropriate.

B. Early Development in the Meaning of the "Public Good"

It has been suggested that the concept of "public good" in article II, section 1 of the California Constitution comes from the writings of John Locke.[1] Locke believed that lawmakers would exercise sufficient self-restraint to look out for the rights of others in the course of pursuing their own self-interests. By 1776, under Locke's influence, "Americans viewed themselves as capable of suppressing their individual self-interest for the public good . . . ."[2] The Massachusetts Constitution, passed four years later, accordingly anticipated that legislators would be "men of wisdom and virtue," and, therefore, empowered them to enact "all manner of wholesome and reasonable . . . laws . . . as [they] shall judge to be for the good and welfare of the Commonwealth."[3] In such an early, Lockean model, the lawmakers were trusted to judge for themselves when laws would serve the good and welfare of the Commonwealth.

It did not take long for Americans to learn that these idealistic notions did not hold up well in practice. In the few short years under the Articles of Confederation, the framers learned that Americans were "mostly

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[1] *See* Joseph R. Grodin, *et al.*, *The California State Constitution, a Reference Guide*, Greenwood Press (1993) p. 64 ("This provision sets forth the basic Lockean premise as to the justification for government.")

[2] Lane and Oreskes, *The Genius of America: How the Constitution Saved Our Country and Why It Can Do It Again,* Bloomsbury Press (N.Y. 2007) ("Lane and Oreskes"), p. 23.

[3] *Id.* at 41.

self-interested and self-regarding and, in the public arena, usually unable to suppress their self-interests for the greater good."[4] Because of this change in perception, the years between the Articles of Confederation and the Constitution have been called "the most important eleven years in American history."[5] The country at the time was "riven by factions, each intending to impose its interests on others."[6] The "Articles of Confederation became a symbol for what in retrospect seems evident—a government built on reliance on public virtue would fail."[7]

C. Modified Views After Articles of Confederation

Just before the Federal Convention in 1787, James Madison, one of the primary architects of the United States Constitution, collected his thoughts in a memorandum on the *Vices of the Political System of the United States*. Madison concluded that the injustice of laws that had been passed since the revolution called "into question the fundamental principle of republican government, that the majority who rule in such Governments are the safest Guardians both of public Good and of private rights."[8] "'True it is . . . that no other rule exists by which any question that divides a society can be ultimately determined but the will of the majority; but it is

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[4] *Id.* at 23.

[5] *Id.* at 17.

[6] *Id.* at 50.

[7] *Id.* at 43.

[8] J. Thomas Wren, *Inventing Leadership*: *The Challenge of Democracy* (Edward Elgar Publishing 2007), 174.

also true that the majority may trespass on the rights of the minority.'"[9] Madison now knew that the will of the majority "did not automatically produce the common good."[10] Madison, therefore, concluded that the "interest of the majority" could not be the "political standard of right and wrong."[11]

Madison believed that it is "of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure."[12]

Madison sought "to protect the rights of the minority . . . by arguing that their good was necessarily linked to securing the common or public good," proposing that securing the public good and private rights from such danger was "the great object to which our enquiries are directed."[13]

The task of the framers, in Madison's view, was "to secure the public good and private rights against the danger of faction and self interest

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[9] Merrill D. Peterson and Robert C. Vaughan (eds.), *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History*, (Cambridge University Press, 2003), 125 (quoting Madison's *Memorial and Remonstrance)*.

[10] Lane and Oreskes, 52.

[11] *Id.*

[12] *Federalist* Number 51.

[13] Madison, *Federalist* Number 10, 267; Randall Strahan, *James Madison, The Theory and Practice of Republican Government*, Stanford University Press (2003), p. 76.

. . . ."[14] Madison's solution was to "stop or at least slow actions that were supported by merely a majority," by dividing political power among the various branches of government.[15] The public good was *not* simply what a majority of voters might support, but rather a tempering influence on the will of the majority. "In Madison's discussions, the public good emerges *as the opposite of* the temporary and *partial objectives* of men of narrow vision; it *required seeing all the elements of the community* and *considering the lasting interests of all.*"[16] The "central requirement for the perception and pursuit of the public good was impartiality . . . ."[17]

Thus, by 1789, Locke's assumption that the common good would be naturally achieved by private self-restraint and virtue had been tempered by a growing awareness that the public good required built-in restraints upon the power of majorities so that minority rights were protected.

D. Source of Article II, Section 1: The Iowa Constitution

In 1849, the drafters of the California Constitution had before them the two most recently written state constitutions, from Iowa (drafted in 1846) and New York (also drafted in 1846).[18] "Together the Iowa and New York Constitutions lay behind virtually every section of the Californians'

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[14] Lane and Oreskes, 51.

[15] *Id.* at 53.

[16] Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism, the Madisonian Framework and Its Legacy*, (University of Chicago Press 1994), 42 (emphasis added).

[17] *Id.* at 43.

[18] Christian G. Fritz, *More than 'Shreds and Patches,' California's First Bill of Rights* (1989-90) 17 Hastings Const. L.Q. 13, 18.

document."[19] Half of the provisions in the California constitution came from Iowa and half came from New York.[20] The Iowa Constitution was relied upon by delegates at the California Constitutional Convention of 1849 because "it was one of the latest and shortest."[21] The Bill of Rights in the California Constitution "drew heavily upon Iowa's Constitution."[22]

Article I, section 2, of the Iowa Constitution is virtually identical to article II, section 1 of the California Constitution, providing that: "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it."[23] Historians analyzing the issue have concluded that the Iowa Constitution "proved to be the source of" article II, section 1 of the California Constitution.[24]

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[19] David Alan Johnson, *Founding the Far West, California, Oregon and Nevada,* University of California Press (1992), p. 102.

[20] 17 Hastings Const. L.Q. at 19.

[21] G. Alan Tarr, *Understanding State Constitutions*, Princeton University Press (1998), 98 (quoting 17 Hastings Const. L.Q. at 18).

[22] 17 Hastings Const. L.Q. at 19.

[23] The New York Constitution of 1846 makes no mention of the public good. *See* Franklin B. Hough, *Constitution of the State of New York, Adopted in 1846 with a Comparative Arrangement of the Constitutional Provisions of Others States, Classified by their Subjects*, Weed, Parsons & Company (Albany, N.Y., 1867).

[24] Lawrence M. Newman, Note, *Rediscovering the California Declaration of Rights* (1974) 26 Hastings L.J. 481 n. 54, 490, 495, 501, 507; *see also* 17 Hastings Const L.Q. at 24-25; Bruce Kempkes, *The Natural Rights Clause of the Iowa Constitution*: *When the Law Sits Too Tight*, 42 Drake L. Rev. 593, n. 174 (1993).

E. Public Policy Concerns at the Time of the Iowa Constitution of 1846

It is not surprising that the federal constitution was closely followed in Iowa[25] (and also used as a partial model in California).[26] The delegates to the Iowa constitutional conventions,[27] however, had the advantage of "seventy years' experience" in observing the consequences of effective state constitutional limits in the eastern states.[28] They had observed the failure of the expectations of early state constitutions, such as the Massachusetts Constitution, that "men of wisdom and virtue," would of their own good will enact "all manner of wholesome and reasonable . . . laws . . . as [they] shall judge to be for the good and welfare of the Commonwealth."[29] Early legislators had instead abused their powers to pass acts that favored wealthy individuals.[30] Iowans, like Madison, were distrustful and unwilling to assume that good and just laws would necessarily be enacted.[31]

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[25] 42 Drake L.Rev. at 597.

[26] 17 Hastings Const. L.Q. at 16, 21.

[27] There were conventions in 1844, 1846 and 1857. The 1846 convention created the constitution used in drafting California's Constitution. The 1857 convention was largely focused on amending restrictive provisions on the use of banks and corporations.

[28] Bruce Kempkes, *Rediscovering the Iowa Constitution: the Role of the Courts Under the Silver Bullet*, 37 Drake L.Rev. 33, 41.

[29] *Id.* at 41.

[30] *Id.* at 41-42.

[31] *Id.*

The Iowa Constitution was framed to impose restrictions on the power of lawmakers because "history and constant experience teach us" of the tendency toward "an undue exercise of power inconsistent with individual rights."[32] To further this purpose, the Iowa Constitution granted courts the power "without question," to invalidate statutes "unjustly interfering with the rights of minorities."[33]

The various influences upon the drafters of the Iowa Constitution are explored in great depth in a law review article by Bruce Kempkes.[34] Kempkes cites the influence on the Iowa territory of Quaker author, James Fennimore Cooper, asserting that Iowans are called Hawkeyes after Cooper's character of that name. Kempkes, quoting Cooper, suggests that Iowans had come to the frontier because they had found the "law sitting too tight" upon them (the title of his article about the Iowa Constitution).[35] Kempkes suggests that the Iowans of the time were "jealous of too much government . . . who desired above all things to maintain the political liberty of the individual, and his freedom in his home affairs."[36] Kempkes reports that the substance of John Stuart Mill's views "could be heard in Iowa City" throughout the period of drafting of the Iowa Constitution,[37]

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[32] *Id.* at 42-43 (citing from an historical speech to Iowa legislature).

[33] *Id.* at 43-44.

[34] 42 Drake L. Rev. at 593.

[35] 42 Drake L.Rev. at 616.

[36] *Id.* at 620, fn. 151.

[37] *Id.* at 620.

specifically citing Mill's view that power can be exerted against an individual only to prevent harm to others.[38]

One Iowa delegate argued, "I do not believe in that pure Democracy, or rather the Iron will of the majority [who] enact their laws at the ballot box. If that were our form of Government it would be unnecessary for us to be here to-day making a Constitution. We came here *simply to protect the rights of the weaker, the minority if you please.*"[39]

Another delegate stated: "I understand democracy to be the principle which does justice to all, *protects all,* and allows the largest liberty consistent with the public safety. It is that which puts no shackles or trammels upon the man in his individual or associated capacity, *that is not absolutely necessary for the public good.*"[40]

Early state constitutions had simply allowed the passage of "all manner of wholesome and reasonable" laws as the legislature "shall judge to be for the good and welfare of the Commonwealth."[41] The Iowans of 1846, who wrote the provision now set forth as article II, section 1 of the California Constitution, saw that these vague directives had led to unfair and despotic laws.[42] The limitation the Iowans placed on power, that laws could be passed "*when the public good may require,*" eliminated the broad discretion of the Massachusetts Constitution, where propriety was to be

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[38] *Id.* at 617.

[39] *Id.* at 629, fn. 204 (emphasis added).

[40] *Id.* at 619, fn. 143 (emphasis added).

[41] 37 Drake L.Rev. at 41.

[42] *Id.*

determined by the lawmaker, and suggested that there might be occasions where the public good did *not* require a new law. Thus, the Iowa Constitution did not entrust lawmakers to pass such laws as *they* shall judge to be for the good of the Commonwealth, but instead *limited* the right of lawmakers to passing laws when the public good may require.

F. Views from the California Constitutional Convention of 1849

The framers of the Iowa Constitution meant to place no "shackles or trammels upon the man in his individual or associated capacity, *that is not absolutely necessary for the public good.*" These sentiments were echoed by the comments of delegates to the California Constitutional Convention and ultimately embraced by the adoption of key provisions from the Iowa Constitution.

In the words of one California delegate: "[G]overnment was instituted for the protection of the minority . . . the majority of any community is the party to be governed; the restrictions of law are interposed between them and the weaker party; they are to be restrained from infringing on the rights of the minority."[43]

"[F]undamental principles of government" were placed in the Constitution "for the protection of minorities and the well-being of the mass—majorities can protect themselves."[44] Another delegate commented: "I wish the rights of the minority in California to be protected I

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[43] Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution, in September and October, 1849* (1850), 22.

[44] *Id.* at 51-52.

contend for the right of the people—whenever it shall be necessary to exercise that right—to amend the Constitution; but for the minority as well as the majority."[45]

G. Impact of the Phrase "Whenever the Public Good May Require"

In light of the context of its drafting, the phrase "when the public good may require" should not be viewed as meaningless surplusage, but instead as a significant limitation on the power of lawmakers to impinge on minority rights. Limitations were not to be placed on minorities unless absolutely necessary for the public good.

No California or Iowa court appears to have interpreted the limiting phrase "when the public good may require" in the context of altering or reforming the government, but this Court has defined the phrase "public good" in other contexts. In determining whether a particular regulation was a reasonable exercise of the police power for the public good, this Court defined it to mean "legislation enacted to promote the public health, safety, morals and general welfare," adding that "[i]f there is a proper legislative purpose, a law enacted to carry out that purpose, if not arbitrary nor discriminatory, must be upheld by the courts." (*State Board of Dry Cleaners v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, 440.)

In grappling with the phrase "public policy," California courts have looked to the definition of the public good. "Public policy means the public good. Anything which intends to undermine that sense of security for individual rights, whether for personal liberty or private property, which any citizen ought to feel, is against public policy." (*Noble v. City of Palo*

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[45] *Id.* at 360.

Alto (1928) 89 Cal.App. 47, 51; *accord, Safeway Stores, Inc. v. Retail Clerks Int'l* (1953) 41 Cal.2d 567, 575.)

H. The "Public Good" Limitation Applies to Constitutional Initiatives

Where a *statute* so impinges on the inalienable right of a suspect class, there is no doubt that it may be struck down as unconstitutional, as the Court struck down the predecessor to Proposition 8 in the *Marriage Cases.* This Court found the core set of substantive legal rights associated with marriage were "so integral to an individual's liberty and personal autonomy *that they may not be eliminated or abrogated by* the Legislature or the *electorate through the statutory initiative process.*" (*In re Marriage Cases* (2008) 43 Cal.4th 757, 781 [emphasis added].)

The rule should be no different for a constitutional initiative provision. This Court has the power "to preserve constitutional rights, whether of individual or minority, from obliteration by the majority." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.) The Court certainly has the power to strike down a constitutional amendment passed by initiative, as it did in *Mulkey v. Reitman* (1966) 64 Cal.2d 529, *aff'd sub nom Reitman v. Mulkey*, 387 U.S. 369 (1967), albeit on federal equal protection grounds. Striking a state constitutional amendment on the ground that it impinges upon the inalienable rights of a suspect class may be a matter of first impression for the Court. Issues like the one before the Court are rare, because they are so inconsistent with our traditions. (*See Romer v. Evans* 517 U.S. 620 (1996) [observing as to state constitutional amendment by initiative that withdrew rights from homosexuals alone—that it is "not within our constitutional tradition to enact laws of this sort," which

explained "why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare"].)

In the absence of some compelling state interest—a showing that the public good requires it—the voters may *not* alter an inalienable constitutional right as to a suspect class alone and any attempt to do so would constitute an improper amendment.

In the *Marriage Cases*, this Court concluded that "the interest in retaining the traditional and well-established definition of marriage—cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest." (43 Cal.4th at 784 [emphasis in original].) This Court essentially recognized that treating same-sex couples differently from opposite-sex couples was *inconsistent* with the values underpinning the concept of the public good. (*Id.*) The right to marry and form an officially recognized family "constitutes a vitally important attribute of the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for the benefit of both the individual and society." (*Id.* at 781-82.) In reaching this conclusion, this Court determined that including same-sex couples within the designation of marriage would not deprive opposite-sex couples of the rights and benefits of marriage, but would instead extend those same rights and benefits to same-sex couples. (*Id.* at 784.) By contrast, differential treatment would perpetuate the premise that same-sex couples are second class citizens in relationships entitled to less dignity. (*Id.*)

Because this Court has already analyzed the very words now before it, the substantive issue has already been resolved. Here, the public good

does not *require* the impairment of an inalienable constitutional right as to a suspect class alone. Instead, the public good calls for the protection of minority rights of a suspect class when they are the only ones deprived of an inalienable right. (*See Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213 [holding in the context of conditional public benefits, that privacy rights may not be impinged upon unless "the value accruing to the public from the imposition of the condition manifestly outweighs any resulting impairment of the constitutional right"].)

III. Inalienable Rights May Not Be Altered as to a Suspect Class Alone in the Absence of a Compelling State Interest

Article I, section 1 of the California Constitution provides:

> All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety, happiness and privacy.

Article I, section 1 of the Iowa Constitution is virtually the same.[46]

It has been suggested under Iowa's "inalienable rights clause" that "neither the General Assembly by legislation *nor the people by constitutional amendment* could affect those rights,"[47] so that "certain fundamental rights" simply "could not be altered by constitutional

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[46] "All men are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."

[47] 42 Drake L.Rev. at 598, fn. 14 (emphasis in original).

amendment; rights that are 'inalienable' cannot be divested from one generation by a preceding one."[48]

Inalienable rights include "the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity, or develop their faculties, so as to give them their highest enjoyment." (*Hooper v. People of State of California*, 155 U.S. 648, 663 (1895).)

Not long after the adoption of the California Constitution, this Court observed that article I, section 1 "*is necessary to the existence of civil liberty* and free institutions. It was not lightly incorporated into the Constitution of this State as one of those political dogmas designed to tickle the popular ear and conveying no substantial meaning or idea; but as *one of those fundamental principles of enlightened government*, without a rigorous observance of which there could be neither liberty nor safety to the citizen." (*Billings v. Hall* (1857) 7 Cal. 1, 6, emphasis added.)

Article I, section 1 sets forth those rights designated as inalienable: "enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." There have been cases where rights from the Declaration of Rights section of the Constitution have been eliminated by constitutional amendment initiative. These cases have not allowed an initiative to extinguish an article I, section 1 right as to a suspect class alone. (*See People v. Frierson* (1979) 25 Cal.3d 142, 187; *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 240.)

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[48] *Id.*

Within the past year, this Court held that the "constitutional right to marry" was "*one of the basic inalienable civil rights guaranteed* to an individual by the California Constitution." (*In re Marriage Cases,* 43 Cal.4th at 781 [emphasis added].) Indeed, the first sentence of the *Marriage Cases* opinion cited to the inalienable rights secured by article I, section 1 of the California Constitution and found a statute that says the same thing as Proposition 8 to be "incompatible with" such rights. (*Id.* at 714.)

In the *Marriage Cases*, this Court held that inalienable rights could not be denied due to sexual orientation: "The privacy and due process provisions of our state Constitution—in declaring that "[a]ll people . . . have [the] inalienable right[] [of] privacy" (art. I, § 1) and that no person may be deprived of "liberty" without due process of law (art. I, § 7) — do not purport to reserve to persons of a particular sexual orientation the substantive protection afforded by those provisions." (43 Cal.4th at 823.)

As this Court stated in an 1857 decision, "for 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." (*Billings v. Hall* (1857) 7 Cal. 1, 17 (concurring opinion, J. Burnett).) There is no reason that a direct initiative vote of the people should carry any greater force, especially where an inalienable right had been extinguished as to a suspect class alone.

If *all people* had an inalienable right regardless of sexual orientation in May of 2008, that right cannot properly be extinguished as to the members of a suspect class alone, by a mere amendment by popular vote.

IV. The Inalienable Rights of Suspect Minorities Should Be Considered as "Withdrawn from the Possibility of Amendment"

In *Livermore v. Waite* (1894) 102 Cal. 113, a constitutional amendment was passed that conditionally moved the capital of the state from Sacramento to San Jose. The portion of the California Constitution that had initially established the capital in Sacramento then expressly provided that it could be amended by constitutional amendment. The *Livermore* court accordingly notes that the "section of the constitution in which this provision is contained is *not thereby withdrawn from the possibility of amendment.*" (*Id.* at 120 [emphasis added].)

This Court also recently suggested that certain rights have been placed beyond the reach of majorities and depend on the outcome of no elections:

> 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.*

(*In re Marriage Cases*, 43 Cal.4th at 852 (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), emphasis added; *see also Lucas v. Forty-Fourth Gen. Assembly of Colorado*, 377 U.S. 713, 736-37 (1964) ["A citizen's constitutional rights can hardly be

infringed simply because a majority of the people choose that it be."]; *Hall v. St. Helena Parish School Bd.*, 197 F.Supp. 649, 659 (E.D.La. 1961), *aff'd*, 368 U.S. 515 ["No plebiscite can legalize an unjust discrimination."].)

This statement, along with the reasoning of the *Livermore* Court, suggest that there may be sections of the Constitution that are withdrawn from the possibility of amendment and that cannot depend on the outcome of elections. Inalienable rights should be viewed in this manner, especially when extinguished as to a suspect class alone, in the absence of a compelling state interest. Otherwise, inalienable rights could be eroded serially by redefining those who hold them so that the inalienable rights of suspect groups could be freely alienated at the will of the majority. The majority at its whim, in the manner of someone painting a mustache on the Mona Lisa, could besmirch the Constitution and its principles by adding phrases like "except for Mormons" to inalienable rights. Democracy "must be something more than two wolves and a sheep voting on what to have for dinner."[49]

V. Proposition 8 Is Not a Proper Amendment

The most useful analysis of the meaning of an amendment appears in the 1894 *Livermore* decision, where the Court set aside a constitutional change enacted through the process now known as the primary "revision" process—approval by two-thirds of the members of each legislative house and ratification by a majority of the electorate. At the time, constitutional change could be effected only through a "revision" by constitutional

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[49] James Bovard, *Lost Rights, The Destruction of American Liberty* (St. Martin's Press: New York, 1994), p. 333.

convention and an "amendment" by the combined legislative-electoral process. (*Livermore*, 102 Cal. at 117).[50] Discussing the latter "amendment" process—the procedural equivalent of the current, combined legislative-electoral "revision" process—the Court stated that "the significance of the term 'amendment' implies such *an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.*" (*Id.* at 118-19 [emphasis added].)

The phrase "within the lines of the original instrument" suggests that an amendment may not be inconsistent with what is already in the Constitution. (*See McFadden v. Jordan* (1948) 32 Cal.2d 330, 349-51 [setting aside an initiative because it did not "within the lines of the original instrument constitute an improvement or better carry out the purposes for which [the Constitution] was framed"] [internal quotes omitted].)

The phrases "effect an improvement" and "better carry out the purpose for which it was framed" suggest that existing rights may be expanded but a curtailment of existing rights would not be covered.

The *Livermore* Court viewed proper amendments in the context of removing limitations or expanding application of existing rights, as society changed: "Experience may disclose defects in some of [the Constitution's] details, or in the practical application of some of the principles or limitations which it contains." (*Id.* at 119.) "The . . . changes of society or time," the Court stated, "may demand the *removal of some of these limitations*, or an *extended application* of [the Constitution's] principles" by

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[50] Amendment by initiative was adopted in 1911. Revision by the combined legislative-electoral process would not be available until 1962.

means of the combined legislative-electoral process. (*Id.* [emphasis added].)

The *Livermore* Court's limitation of the term "amendment" suggests that an amendment may properly *expand* or *improve* rights already established in the "original instrument." Amendments expanding suffrage rights to the previously disenfranchised would meet this definition. When an amendment seeks, however, to *curtail* the inalienable constitutional rights of a suspect class alone, it does not "better carry out" the purpose for which the Constitution was framed and the definition of "amendment" is no longer met.

Proposition 8 does not remove limitations on existing rights nor does it extend rights to persons not previously accorded them. It, therefore, does not fall "within the lines of the original instrument" as recently construed by this Court in *In re Marriage Cases*:

> We therefore conclude that in view of the substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted *to guarantee this basic civil right to all Californians*, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.

(*In re Marriage Cases*, 43 Cal.4th at 782 [emphasis added].)

Before Proposition 8 was passed, the "lines of the original instrument" established and guaranteed a right that was both inalienable and fundamental. The "lines of the original instrument" were drawn by this Court's opinion in the *Marriage Cases*. The ink charting those lines was not yet dry when Proposition 8 was drafted—not to blot dry and clarify those lines, but to blot them out of existence and erase what had already

been written. Proposition 8 did not extend the lines that had already been drawn before it and, therefore, was not a proper amendment. The constitutional "guarantee" recognized by this Court in the *Marriage Cases* should be protected by more than a "mere parchment barrier."

Justice Stanley Mosk has suggested that because the standards for constitutional revision have changed substantially over the years so that a constitutional convention is no longer required, "the definitional standard may require modification."[51] Mosk proposes that, under the present constitutional scheme, "'revision' might perhaps be deemed to denote a change that is little, if at all, more extensive than that accomplished by 'amendment.'"[52] Mosk accordingly suggests the following approach: "[i]f an 'amendment' is a modification 'within the lines of the original instrument,' a 'revision' is any change beyond those lines.'"[53] Justice Mosk's suggestion is sensible. The extinguishment of a fundamental, inalienable right as to a suspect class alone is a change beyond the lines of the original instrument and should be viewed as a revision.

VI. Conclusion

California voters hold the right to change the Constitution by initiative measure. Their right to alter or reform the government, however, is limited to circumstances "when the public good may require." Because article II, section 1 does not end after proclaiming the people's right to "alter or reform" government, the following phrase, "when the public good may require," cannot be disregarded as surplusage—the words must be

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[51] Stanley Mosk, *Raven and Revision* (1991-1992) 25 U.C. Davis L.Rev. 1 .

[52] *Id.*

[53] *Id.*

there for a reason. This Court has stated that significance should be given to every word of a constitutional provision.

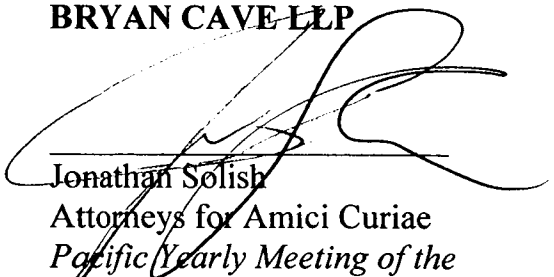
The "public good," in Madison's view, "*required seeing all the elements of the community* and considering the lasting interests of all" and prevented "an undue exercise of power inconsistent with individual rights." The Iowans, whose words were adopted by the framers of the California Constitution, were concerned about laws "unjustly interfering with the rights of minorities" and sought to place "no shackles or trammels upon the man in his individual or associated capacity *that is not absolutely necessary for the public good.*" The framers of the California Constitution were also greatly concerned with protecting the rights of minorities.

Where an inalienable right is extinguished for a suspect class alone, as it is under Proposition 8, and there is no compelling state interest in doing so, the public good does not require the alteration, and no constitutional amendment may be made. Further, such rights should be considered "withdrawn from the possibility of amendment" and should "depend upon the outcome of no elections." Finally, an initiative which extinguishes inalienable rights as to a suspect class alone simply does not fall within the "lines of the original instrument" and, thus, cannot be considered a proper constitutional amendment.

WHEREFORE, it is respectfully submitted that Proposition 8 must be struck down as an improper attempt to amend the California Constitution.

Dated: January 14, 2009

Respectfully submitted,
BRYAN CAVE LLP



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CERTIFICATE OF WORD COURT PURSUANT TO RULE 8.360(b)(1)

Pursuant to California Rule of Court 8.360(b)(1); counsel for Amici Curiae hereby certifies that the number of words contained in this Amicus Curiae Brief, including footnotes but excluding the Table of contact, Table of Authorities, and this Certificate, is 6,320 words as calculated using the word count feature of the computer program used to prepare the brief.

By: _____
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CERTIFICATE OF SERVICE

I, Dora Barnett, declare: I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 120 Broadway, Suite 300, Santa Monica, CA 90401.

On January 14, 2009, I served the following document(s):

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

***AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS**

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

Executed on January 14, 2009, at Santa Monica, California

Dora Barnett

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