

Case Nos. S168047, S168066, S168078

JAN - 5 2009

IN THE  
Supreme Court of the State of California

Frederick K. Church Clerk

KAREN L. STRAUSS et al., Petitioners,

Deputy

v.

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

DENNIS HOLLINGSWORTH et al., Interveners.

ROBIN TYLER et al., Petitioners,

v.

THE STATE OF CALIFORNIA et al., Respondents;

DENNIS HOLLINGSWORTH et al., Interveners.

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners,

v.

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

DENNIS HOLLINGSWORTH et al., Interveners.

INTERVENERS' RESPONSE TO PAGES 75-90 OF  
THE ATTORNEY GENERAL'S ANSWER BRIEF

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## INTRODUCTION

The Attorney General rightly concludes that, under this Court’s long-settled and elaborate body of jurisprudence, Proposition 8 indeed constitutes a properly-enacted “amendment.” So too, the Attorney General correctly concludes that, under a proper constitutional analysis, Proposition 8 raises no distinct question with respect to separation of powers.<sup>1</sup> In the concluding 15 pages of his brief, however, the Attorney General invites the Court to sail into entirely uncharted waters. We will not mince words. The Attorney General is inviting this Court to declare a constitutional revolution. His extra-constitutional vision is one of unprecedented judicial hegemony, a sweeping power vested in the least-democratic branch that overrides the precious right of the people to determine how they will be governed. With all respect, the Attorney General has invented an entirely new theory, grounded in ringing principles of natural law and natural rights, but utterly without foundation in this Court’s case law. His is a voice decidedly from the judicial and philosophical past, conveying a hoary message answered fully and decisively by this State’s unswerving commitment to the ultimate sovereignty of we the people, acting through the fundamental right to vote in full and fair elections after vigorous and untrammelled debate. The Attorney General would tear all this asunder. He is profoundly wrong.

This theory of judicial triumphalism is thoroughly rebuked – decade after decade throughout the 20th Century in the wake of Progressive-Era reforms – by this Court’s deeply-held tradition of modesty and humility

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<sup>1</sup> See Attorney General’s Answer Brief in Response to Petition for Extraordinary Relief (hereafter “AG Brf.”), pp. 22-53. Interveners do not waive arguments they may have with other aspects of the Attorney General’s brief.

when the people have spoken at the ballot box through the amendment process. Indeed, the Attorney General stands stonily silent in those last 15 pages about the lavish body of jurisprudence that he elaborately canvasses earlier in his submission. Gone are this Court's teachings about deference to the people in various contexts, including such foundational, highly emotional issues as the death penalty, basic rights of individual freedom against governmental power, and far-reaching structural arrangements such as term limits. Instead, the Attorney General conjures up a parade of imagined horrors, and generously quotes ringing homilies from this Court's 19th Century (and pre-Progressive Era) jurisprudence and from various opinions of the United States Supreme Court (and individual Justices speaking only for themselves and not for the nation's high court). But his macabre parade is entirely fanciful, drawn from other states and from bygone times in California. He invokes 19th Century statements suggesting that "the despotism of a single ruler" is preferable to democratic rule (AG Brf., pp. 85-86), while failing to acknowledge the demonstrated liberality of the people of California, including in the area of gay rights.

The Attorney General also turns a blind eye to the bedrock fact, recognized by this Court in *In re Marriage Cases*, that what is at stake here is emphatically not a bundle of substantive legal rights being stripped away from a class of individuals. Far from it. Proposition 8 leaves fully intact what this Court recognized as virtually all the legal rights and benefits presently enjoyed by opposite-sex couples. The purpose of this narrow, targeted measure is solely to restore to California law, after a brief hiatus, the ancient and nearly ubiquitous definition of marriage. The precise specificity of Proposition 8 – duly enacted by the people – stands in the long tradition of actions by the ultimate sovereign in a democratic polity. It provides no occasion for an unprecedented, sundering departure from this Court's tradition and the structure of California's constitutional order.

## ARGUMENT

The Attorney General argues that, despite being a properly enacted amendment to the California Constitution, Proposition 8 is nevertheless invalid because it violates inalienable or natural rights recognized (though not created) under article I, section 1. The precise scope of this theory is unclear. Given the sweep of natural rights notions, the strong implication is that even legislatively proposed revisions cannot abridge fundamental rights. (See AG Brf., pp. 79-82, 84 at fn. 21, 88.) The Attorney General states that his theory applies to both legislatively proposed amendments (*id.* at pp. 84-86) and amendments proposed by initiative (*id.* at pp. 76, 86). But the Attorney General might also be understood to argue that his theory applies only to amendments that remove fundamental rights from suspect classes. (*Id.* at pp. 77, 86.)

However conceived, the argument is not only unprecedented but contradicts the most basic understanding of the role of the judiciary in a constitutional democracy. This Court has never presumed to have the power to strike down – in the name of undefined inalienable or natural rights – constitutional amendments properly enacted by the people. Whatever the nature and scope of such rights as a theoretical matter, two principles are certain: (1) the people have the exclusive right to determine whether, and in what shape and form, such rights are placed into the Constitution for protection by the judiciary, and (2) the judiciary has no authority to second-guess that determination.

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**I. THE ATTORNEY GENERAL’S THEORY FAILS AT EVERY LEVEL BECAUSE THE PEOPLE HAVE THE FINAL WORD ON WHAT THE CALIFORNIA CONSTITUTION SAYS AND THERE IS NO HIGHER LEGAL AUTHORITY WITHIN CALIFORNIA TO WHICH THE JUDICIARY CAN APPEAL.**

**A. The Attorney General’s Theory Is Contrary to Established Precedent and the Foundation of Judicial Legitimacy.**

The Attorney General does not cite a single California case suggesting that the judiciary has authority to strike down properly-enacted amendments to the Constitution for violating article I, section 1 or undefined notions of inalienable rights or natural justice. This Court’s jurisprudence is devoid of anything approaching such a far-reaching principle.

Nor has this Court ever suggested that article I, section 1 of the Constitution, or any portion of the Declaration of Rights, is immune from modification or adjustment by new constitutional amendments. All constitutional provisions “have equal dignity as constituents of the state Constitution.” (*Miller v. Superior Court* (1999) 21 Cal.4th 883, 892.) In the event of alleged tension between constitutional provisions, the established rule is that the specific provision controls over a more general provision.

Illustrative of this principle is *Bowens v. Superior Court* (1991) 1 Cal.4th 36, where this Court faced an “inconsistency between [a] new constitutional provision” enacted by initiative amendment “and this court’s previous interpretation of an indicted defendant’s rights under the state equal protection clause.” (*Id.* at p. 45.) Far from suggesting (as the Attorney General does here) that equal protection, as a component of inalienable liberty and natural rights, cannot be modified by amendment, this Court recited the well-established rule that “[a]s a means of avoiding

conflict, a recent specific provision is deemed to carve out an exception to and thereby limit an older, general provision [of the Constitution].” (*Id.* at p. 45, citations omitted.) The Court held that the amendment “must be seen as ... limiting the scope of the state constitutional right of equal protection” and precluding “a challenge based on the due process clause contained in article I, section 7 of the California Constitution.” (*Ibid.*)

The holding in *Bowens* is just one example of judicial recognition of the bedrock fact that the sovereign “people may adopt constitutional amendments which define the scope of existing state constitutional rights.” (*People v. Valentine* (1986) 42 Cal.3d 170, 181 [addressing effect of initiative amendment diminishing constitutional rights].) “[A] clear, recent, and specific command supersedes any previous inconsistent interpretations of our state charter’s [rights-based] guarantees.” (*Ibid.*) The Attorney General’s assertion that this Court’s interpretation of article I, section 1 enjoys special immunity from limiting amendments is baseless.

Proposition 8 added section 7.5 to the Declaration of Rights. (See Cal. Const., art. I, § 7.5.) Under long-standing precedent, that section must now be construed as limiting the scope of – or carving out an exception to – more general provisions in the Declaration of Rights protecting liberty, privacy, equality, due process, etc. to the limited extent such provisions grant same-sex couples the right to marry. No provision of the Declaration of Rights may be construed to trump the plain meaning of this new and fully operative constitutional provision. If Proposition 8 is a properly-enacted constitutional amendment, and it is, then the right to same-sex marriage no longer exists under the California Constitution.

Ironically, the old natural rights opinions the Attorney General quotes actually contradict his theory. Needless to say, the grandiose philosophy that judges can adjudicate cases based on undefined, natural rights has long since been repudiated and replaced by more modest

conceptions of the judiciary. (See Tribe, *American Constitutional Law* (3d ed.2000) pp. 1336-40, 1343-46, 1352-62.) Yet it is striking that the Attorney General’s theory goes beyond what even California’s early natural rights jurists purported to be doing. When this Court in the mid-19th and very early 20th centuries invoked natural law or inalienable rights, it firmly rooted its authority in the written Constitution. Never has this Court asserted an extra-constitutional power to protect rights or superintend the democratic process to prevent what judges deem to be majoritarian excess. This Court has always described its function as created and limited by the Constitution.

The Attorney General twice quotes from the opinions of Justice Burnett, an early proponent of natural rights jurisprudence. (AG Brf., pp. 80, 89.) But Justice Burnett was careful to ground the Court’s authority to consider natural rights issues in the positive law of the California Constitution rather than in some authority (like natural justice) outside the Constitution. Writing for the Court in *Nougues v. Douglass* (1857) 7 Cal. 65, Justice Burnett explained that the judiciary’s power to interpret law is necessarily dependent on the “legislative power” (i.e., the law-making power) to create the law in the first place:

The legislative power is the creative element in the government, and was exercised partly by the people in the formation of the Constitution. . . . The legislative power makes the laws, and then, after they are so made, the judiciary expounds and the executive executes them.

(*Id.* at p. 70.) Echoing Chief Justice Marshall in *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 178, Justice Burnett based judicial review in the courts’ constitutionally defined role in interpreting the actual text of the Constitution: “The Constitution is itself a law, and must be construed by someone. . . . [¶] The judiciary, from the very nature of its powers and the

means given it by the Constitution, must possess the right to construe the Constitution in the last resort . . . .” (*Nougues v. Douglass, supra*, at p. 70.)

Thus, after crafting the broad inalienable rights language in *Ex parte Newman* (1858) 9 Cal. 502, which the Attorney General quotes at length,<sup>2</sup> Justice Burnett immediately qualified it with the essential caveat that the “sovereign people” are the ones who decide which natural rights become judicially enforceable *constitutional* rights. His analysis, omitted by the Attorney General, is worth quoting at length because it refutes the theory that this Court has – or has ever claimed to have – authority to ignore or strike down a validly-enacted constitutional amendment:

[I]t must be equally clear that the original and primary jurisdiction to determine the question what are these inalienable rights, must exist somewhere; and wherever placed, its exercise must be conclusive, in the contemplation of the theory, upon all.

The power to decide what individual right must be conceded to society, originally existed in the *sovereign people* who made the Constitution. . . . *If they exercised this power, in whole or in part, in the formation of the Constitution, their action, so far, is conclusive.*

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<sup>2</sup> The full paragraph from which the Attorney General quotes on page 80 of his brief reads:

As judged by the system of abstract justice (which is only that code of law which springs from the natural relation and fitness of things) there must be certain inherent and inalienable rights of human nature that no government can rightfully take away. These rights are retained by the individual because their surrender is not required by the good of the whole. The just and legitimate ends of civil government can be practically and efficiently accomplished whilst these rights are retained by the individual. Every person, upon entering into a state of society, only surrenders so much of his individual rights as may be necessary to secure the substantial happiness of the community. Whatever is not necessary to attain this end is reserved to himself.

(*Ex parte Newman, supra*, 9 Cal. 502 at p. 511 (conc. opn. of Burnett, J.); AG Brf., p. 80.)

. . . . The judicial power, from the nature of its functions, cannot determine such a question. Judicial justice is but conformity to the law as already made.

*If these views be correct, the judicial department cannot, in any case, go behind the Constitution, and by any original standard judge the justice or legality of any single one or more of its provisions. The judiciary is but the creature of the Constitution, and cannot judge its creator. It cannot rise above the source of its own existence. If it could do this, it could annul the Constitution, instead of simply declaring what it means. . . .*

. . . .

[I]t follows that there can be for this Court no higher law than the Constitution . . . . The Constitution may have been unwisely framed. . . . But these are questions for the statesman, not for the jurist. *Courts are bound by the law as it is.*

(*Ex parte Newman, supra*, 9 Cal. at pp. 511-512 (conc. opn. of Burnett, J.), italics added.)<sup>3</sup> Justice Burnett's views are directly contrary to the Attorney General's theory.

The Attorney General's reliance on Justice Terry is likewise misplaced. (See AG Brf., p. 80.) Although later acquiescing in the Court's Constitution-based natural rights jurisprudence (hence his recitation of natural law notions in *Ex parte Newman*), in *Billings v. Hall* (1857) 7 Cal. 1, Justice Terry dissented from the whole natural rights analysis in language that today is considered both prescient and undoubtedly correct:

The doctrine, that judges have power to annul a law, because, in their opinion, its provisions are in violation of natural justice, is one of dangerous consequences, tending to

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<sup>3</sup> Justice Burnett's concurring opinion in *Billings v. Hall* (1857) 7 Cal. 1, likewise grounds inalienable rights jurisprudence in the text of the Constitution. (*Id.* at pp. 16-17.) The language the Attorney General quotes from that opinion on page 89 of his brief is relevant only to restraining the Legislature from enacting ordinary legislation abridging alienable rights already protected by the Constitution, not to cabining the people's right to amend the Constitution.

destroy that distribution of powers made by the Constitution, by concentrating in the hands of the judiciary, functions which are, by the Constitution, conferred on different departments . . . .

The question whether a particular law is in violation of natural justice, may be one of difficult solution. Its determination is governed by no fixed rules, and often depends on considerations of policy and public advantage, which are more properly the subjects of legislative than judicial exposition.

(*Id.* at p. 19 (dis. opn. of Terry, J.)) The other cases the Attorney General cites in support of his inalienable rights and social contract theories are likewise unhelpful. However broadly they may describe inalienable rights, none supposes that courts have authority to declare portions of the Constitution itself unconstitutional.

Justice Iredell's classic rejoinder in *Calder v. Bull* (1798) 3 U.S. (Dall.) 386, to claims of judicial supremacy based on natural law cautions against the path the Attorney General advocates:

[S]ome speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so. . . .

If . . . the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

(*Id.* at pp. 398-99 (Iredell, J., dissenting in part), italics omitted.)<sup>4</sup>

In short, as the Court of Appeal cogently summarized when rejecting essentially the same argument the Attorney General advances here, “there is no inalienable right or natural law which might arguably be above the California Constitution.” (*Olson v. Cory* (1982) 134 Cal.App.3d 85, 101, citing *Nougues v. Douglass, supra*, 7 Cal. at pp. 69-70.) Judicial review is justified and consistent with republican principles only if it upholds the will of the people as expressed in constitutions. (See Hamilton, *The Federalist* No. 78 (Rossiter ed.2003) p. 466 [“[Judicial review] only supposes that the power of the people is superior to both [the judicial and legislative power], and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.”]); see also Interveners’ Opposition Brief (filed 12/19/2008 in *Strauss v. Horton*), pp. 32-35 [reviewing basic functions of judiciary within our constitutional system].) By seeking to turn judicial review against the will of the people as expressed in a duly-enacted constitutional amendment, the Attorney General’s theory invites an unprecedented departure from foundational principles of judicial legitimacy.

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<sup>4</sup> Judge Learned Hand captured the fundamental tension such a theory would create with basic notions of democracy:

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.

(Hand, *The Bill of Rights* (1958) pp. 73-74.)

**B. The Attorney General’s Unprecedented Theory Has Far-Reaching Implications.**

This Court in *In Re Marriage Cases* (2008) 43 Cal.4th 757 (hereafter *Marriage Cases*), reaffirmed its limited constitutional role in matters of rights, stating “at the outset that our task in this proceeding is not to decide whether we believe, *as a matter of policy*” that same-sex couples should be able to marry but whether denying them marriage “*violates the California Constitution.*” (*Id.* at p. 780, italics in original.) “[W]e recognize as judges and as a court our responsibility to limit our consideration of the question to a determination of the constitutional validity of the current legislative provisions.” (*Ibid.*)

This Court’s description of its role as interpreter (not maker) of the law contrasts sharply with the judicial function envisioned by the Attorney General. The Attorney General’s theory would fundamentally alter the role of the California judiciary. For the first time, it would require this Court to exercise independent judgment concerning the substantive validity of constitutional amendments. The judiciary would decide whether amendments advance sufficiently weighty policy goals to justify limiting inalienable rights, guided only by its own understanding of extra-constitutional notions of natural rights, social contract theory, principles of abstract justice, and public necessity. It would place a vital portion of the Constitution – one with broad social implications as this case dramatically illustrates – beyond the amendment power and thus effectively beyond the control of the sovereign people that created the Constitution in the first place. It would, in brief, constitute the California judiciary as the supreme overseer of the people’s use of their constitution-making power – a result patently contrary to popular sovereignty. The creation of such a judicial oligarchy would constitute a profound revision of the California Constitution.

The Attorney General attempts to limit his theory to “amendments that diminish or abrogate the right to liberty” (AG Brf., p. 77, fn. 17), but the limitation is both arbitrary and illusory. It is arbitrary because other rights, such as “defending life” and “acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy” are equally “inalienable” under article I, section 1. If anything, property rights, whose protection lies at the very core of traditional natural rights theory, are the most prominently and carefully protected. There is no logical reason why these rights should be excluded from the Attorney General’s theory. The limitation is also illusory because the word “liberty” is broad enough to encompass virtually any right the judiciary might seek to assert as the basis for rejecting an amendment. Property rights are certainly covered. (See *Ex parte Newman, supra*, 9 Cal. at p. 510 [characterizing property rights as a species of liberty].)<sup>5</sup>

The Attorney General also purports to limit his sweeping theory by including a strict scrutiny test that would allow an amendment to survive if

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<sup>5</sup> The Court in *Ex parte Drexel* (1905) 147 Cal. 763, adopted this sweeping description of the inalienable right to liberty protected under article I, section 1:

The word ‘liberty’ as used in the constitution of the United States and the several states, has frequently been construed, and means more than mere freedom from restraint. It means not merely the right to go where one chooses, but to do such acts as he may judge best for his interest, not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give him the highest enjoyment. The liberty mentioned is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary, and essential, to his carrying out to a successful conclusion the purpose above mentioned.

(*Id.* at p. 764, citations and quotation marks omitted.)

the judiciary, in its sole discretion, determines that the people have a compelling reason for it. The theory is deeply flawed. For one thing, strict scrutiny has never been used to test the validity of one part of a constitution against another. For another, the Attorney General's test is, at bottom, no test at all. If the judiciary declares a right fundamental under the Constitution (such as the right of same-sex couples to marry) and strikes down a law as violating that right (such as Family Code § 300), it necessarily does so because the law fails strict scrutiny. (See *Marriage Cases, supra*, 43 Cal.4th at pp. 844-47, 855-56.) But if the same test determines whether an amendment limiting that fundamental right is valid under the state Constitution, then the outcome will always be to strike down the new amendment since it has already been judicially determined that it fails strict scrutiny. The Attorney General perfectly illustrates the illusory nature of his test when he summarily concludes that Proposition 8 is invalid precisely because this Court held in the *Marriage Cases* that limiting marriage to opposite-sex couples does not further a compelling interest. (AG Brf., p. 90.)

The practical result of the Attorney General's theory is that the people can never amend the Constitution to overrule judicial interpretations of inalienable rights. Tellingly, the Attorney General admits that notions of inalienable rights are not fixed and thus may change dramatically over time. (AG Brf., pp. 82-84.) Thus, under his theory, even outmoded understandings of inalienable rights could be insulated from constitutional correction.

Take some of the old natural rights cases the Attorney General relies on. In *Ex parte Newman*, this Court struck down a Sunday closing law as "in conflict with the first section of article first of the Constitution, because, without necessity, it infringes upon the liberty of the citizen, by restraining his right to acquire property." (*Ex parte Newman, supra*, 9 Cal. at p. 510.)

The Court in *Ex parte Quarg* (1906) 149 Cal. 79, 80, struck down a law against scalping theater tickets for violating rights “inherent in every natural person” and protected under article I, section 1. Freely trading stamps and coupons was found to be an inalienable right under article I, section 1 in *Ex parte Drexel, supra*, 147 Cal. 763. And in *Ex parte Whitwell* (1893) 98 Cal. 73, 78-83, the Court held that one has a fundamental right to operate an asylum for the mildly insane within four hundred yards of homes and schools. Under the Attorney General’s theory, these plainly outdated conceptions of inalienable rights – and many others – would have been presumptively immune from modification by constitutional amendment.

**C. Even Understood Narrowly, the Attorney General’s Theory Must Fail.**

The Attorney General’s theory fails even if construed in its narrowest terms – as a rule limiting initiative amendments that modify the fundamental constitutional rights of a suspect class. First and foremost, the acknowledged importance of protecting the rights of minorities does not by itself grant the judiciary extra-constitutional powers. The judiciary is entirely a creature of the Constitution, not an independent, free-standing guardian of minority rights or natural law. However the sovereign people may choose to alter their Constitution, that document becomes the supreme law the judiciary must interpret and enforce, whatever its current views, subject only to federal constitutional constraints.

Moreover, the theory cannot rely on a distinction between initiative amendments and legislative amendments. Those are merely two different procedural vehicles for *proposing* constitutional amendments to the people for consideration. Once enacted by the people, amendments proposed through either vehicle become valid provisions of the Constitution. Nothing in California law suggests that a constitutional amendment

proposed through the initiative process has less stature than one proposed by the Legislature. As noted above, the Attorney General does not purport to draw such a distinction. To be sure, legislative amendments are more difficult to propose, but under either procedure it is the people by simple majority vote who ultimately adopt or reject the measure. The relative ease with which initiatives qualify for the ballot owes to the sovereign people's decision to reserve for themselves a broad initiative power. (See Cal. Const., art. II, § 8, subd. (a); *Id.*, art. IV, § 1.) It does not suggest second-class status for initiative amendments. As the Attorney General's own analysis implies, whatever rule applies to constitutional amendments proposed through the initiative process must also apply to those proposed by the Legislature.

More deeply, Proposition 8 does not present the disturbing case suggested by the Attorney General and petitioners in their revision/amendment arguments. This is emphatically not the case of the majority in any manner tyrannizing a vulnerable minority. Any such description of Proposition 8 would be wildly inaccurate and grossly unfair. Indeed, the Attorney General notes this Court's conclusion that Proposition 22, which enacted identical language, was not inspired by "an invidious intent or purpose." (AG Brf., p. 27, fn. 9; see also *Marriage Cases*, *supra*, 43 Cal.4th at p. 856, fn. 73.) There is no reason to think passage of Proposition 8 was any different.

On the contrary, with surgical precision Proposition 8 restores the basic definition of marriage in California to its historic roots. The people thereby brought California law into conformity with the national consensus on marriage as evidenced by overwhelming majorities in Congress<sup>6</sup> and the

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<sup>6</sup> In 1996, Congress passed – and President Clinton signed into law – the federal Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738, which defines marriage for federal purposes as the traditional male-female union.

laws of 47 other states,<sup>7</sup> and with the consensus of the vast majority of foreign jurisdictions.<sup>8</sup> However, Proposition 8 leaves intact California’s “comprehensive domestic partnership legislation under which a same-sex couple may enter into a legal relationship that affords the couple virtually all of the same substantive legal benefits and privileges, and imposes upon the couple virtually all of the same legal obligations and duties, that California law affords to and imposes upon a married couple.” (*Marriage Cases, supra*, 43 Cal.4th at p. 779; see also Fam. Code, §§ 297 et seq. [Domestic Partnership Act].) Tellingly, the people of California rejected out of hand contemporaneous efforts to revoke domestic partnerships. (See California Secretary of State Press Release, January 31, 2008, “Ninth Marriage Initiative Enters Circulation,” at <http://www.sos.ca.gov/admin/press-releases/2008/DB08-018.pdf> [proposed initiative defining marriage and eliminating domestic partnership rights; never appeared on the ballot for lack of signatures].)

This Court’s landmark decision in *People v. Frierson* (1979) 25 Cal.3d 142 (hereafter *Frierson*) again provides important guidance. When the Court in *People v. Anderson* (1972) 6 Cal.3d 628 (hereafter *Anderson*) declared the death penalty unconstitutional, it did so on the ground that

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The vote was overwhelmingly in favor, passing by 85-14 in the Senate and 342-67 in the House of Representatives. (U.S. Senate Roll Call Votes 104th Congress - 2nd Session, *A Bill To Define And Protect The Institution Of Marriage*, available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=104&session=2&vote=00280](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00280); U.S. House of Representatives Role Call Votes 104<sup>th</sup> Congress, Final Vote Results For Roll Call 316 (*Defense of Marriage Act*), available at <http://clerk.house.gov/evs/1996/roll316.xml>.)

<sup>7</sup> Only Massachusetts and Connecticut currently grant marriage licenses to same-sex couples.

<sup>8</sup> It appears that same-sex couples can marry in only seven foreign jurisdictions: the Netherlands, Belgium, Spain, Canada, South Africa, Norway and Nepal.

capital punishment violates human dignity. (*Id.* at pp. 650-51 [“The dignity of man, the individual and the society as a whole, is today demeaned by our continued practice of capital punishment” and thus is “cruel within the meaning of article I, section 6, of the California Constitution.”]); see also *id.* at p. 656 [concluding that capital punishment “is incompatible with the dignity of man”].) The *Anderson* Court poignantly noted “that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.” (*Id.* at p. 649.) Hence, when this Court in *Frierson* confronted a challenge to an initiative amendment that reversed *Anderson* and restored the death penalty, directly at issue was an amendment that would eviscerate the most fundamental dignity interest.

Yet despite the personal views of the justices – including Justice Mosk’s open disgust with the people’s decision (*Frierson, supra*, 25 Cal.3d at p. 189 (conc. opn. of Mosk, J.)) – the *Frierson* Court adhered to its constitutional role by yielding to the will of the people and upholding the amendment against a revision-based challenge. (*Id.* at p. 187.) The fact that a profound dignity interest was at issue was no impediment to the ruling. Nor was it an issue that, in the words of *Anderson*, “[t]he cruel or unusual punishment clause of the California Constitution, like other provisions of the Declaration of Rights, operates to restrain legislative and executive action and to protect fundamental individual and minority rights against encroachment by the majority.” (*Anderson, supra*, 6 Cal.3d at p. 640, italics added.) Indeed, capital punishment remains constitutional in California despite the view – widely held by scholars and jurists – that it is disproportionately imposed on the poor and racial minorities. (See, e.g., Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer* (1994) 103 YALE L.J. 1835, 1836; Baldus & Woodworth, *Race Discrimination and the Death Penalty: An Empirical*

*and Legal Overview* in America's Experiment with Capital Punishment (Acker et al. edits., 2003) p. 501.)

If the unparalleled dignity interests at stake in *Frierson* did not justify departure from established judicial norms and constitutional principles, then neither does the present case.

**II. UNWARRANTED FEARS ABOUT MAJORITARIAN TYRANNY ARE NO BASIS FOR DECIDING THIS CASE; OUR TRUST MUST REMAIN IN THE PEOPLE.**

Like most contentious social or legal issues, it is easy to cast the same-sex marriage issue as a stark conflict between fundamental rights and majoritarian oppression.<sup>9</sup> That is certainly how petitioners and the Attorney General (in his final 15 pages) seek to portray things. But ultimately, this entire matter – from Proposition 22, to the Domestic Partnership Act, to the *Marriage Cases*, to Proposition 8, and much else in between – is best viewed as an important democratic conversation, both among the people and between the people and their servants in government, about the proper definition of marriage. At issue is the complex question of how to reconcile the people's deep, historic, nationwide attachment to the traditional definition of marriage with claims by same-sex couples for legal rights and equal status.

This Court assured the people in the *Marriage Cases* that its role in this debate was solely to address constitutional rights, not to dictate public policy based on personal preferences. (*Marriage Cases, supra*, 43 Cal.4th at p. 780.) But as a valid constitutional amendment, Proposition 8 has now moved the democratic conversation to its highest level. The sovereign people will no doubt continue to debate the issue in terms of inalienable rights, justice, tradition, and social welfare. However, the judiciary no

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<sup>9</sup> For example, the Attorney General's theory relies on *Ex parte Quarg, supra*, 149 Cal. 79 (AG Brf., pp. 80-81), which found a fundamental right to scalp theater tickets.

longer has a role in determining the definition of marriage. For the judiciary – bound by oath to uphold the Constitution as it is and not as judges personally hope it to be – that issue is now settled as a matter of constitutional law.

What, then, of the Attorney General’s appeal to dark, conjectural fears that the people of California might someday use their initiative amendment power in tyrannical ways? (AG Brf., pp. 76-77.) The answer is simple: the democratic experiment rests entirely on trust in the people. The people of California richly deserve such trust. By any measure, they are tolerant, moderate, and deeply committed to protecting minority rights. California’s generous statutory protections for the civil rights of gays and lesbians amply attest to their concern for minorities.<sup>10</sup> There is not the slightest evidence that the people might actually use their initiative amendment power to accomplish tyrannical ends, and the ultimate bulwark of the United States Constitution will ensure that never happens. Baseless fears of majoritarian abuse are not a valid reason for adopting the Attorney General’s unprecedented theory.

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<sup>10</sup> See, e.g., Cal. Civ. Code § 51 [Unruh Civil Rights Act – access to business establishments]; Cal. Gov. Code § 12920 & 12921 [employment and housing]; Cal. Gov. Code § 12940 [unlawful employment practices]; Cal. Gov. Code § 12944 [discrimination by licensing boards]; Cal. Gov. Code § 12955 [discrimination in housing and land use practices]; Cal. Ins. Code § 10140 [insurance discrimination]; Cal. Health & Saf. Code § 1365.5 [health care discrimination]; Cal. Lab. Code § 4600.6 [contracts in health care industry]; Cal. Health & Saf. Code § 1586.7 [discrimination in adult day care centers]; Cal. Wel. & Inst. Code § 16013 [discrimination against persons caring for foster children]; Cal. Wel. & Inst. Code § 16001.9 [discrimination against children in foster care]; Cal. Gov. Code § 11135 [discrimination in government programs]; Cal. Pub. Contract Code § 6108 [discrimination by government contractors]; Cal. Code Civ. Proc. § 231.5 [barring peremptory challenges based on sexual orientation]; Cal. Ed. Code §§ 200 & 220 [equal educational rights]; Cal. Penal Code § 422.55 [hate crimes]; Cal. Fam. Code §§ 297 & 297.5 [domestic partnership rights equal to marriage rights].

## CONCLUSION

With painstaking analysis, the Attorney General's brief demolishes petitioners' argument that Proposition 8 is an improper revision or that it violates the separation of powers. By contrast, the Attorney General's newly-minted inalienable rights theory, if adopted, would shake the very foundations of California's constitutional order. It should be rejected.

Dated: January 5, 2009

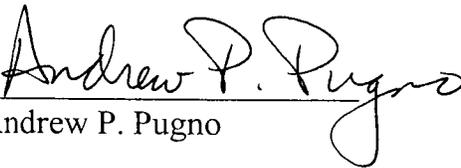
Respectfully submitted,

KENNETH W. STARR

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**RULE 8.204(C)(1) CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel for Interveners hereby certifies that this Interveners' Response to Pages 75-90 of the Attorney General's Answer Brief is proportionately spaced, has a typeface of 13 points or more, and contains 5,079 words, including footnotes but excluding the Table of Contents, Table of Authorities and Certificate of Compliance, as calculated by using the word count feature in Microsoft Word.

  
Andrew P. Pugno

*Attorney for Interveners*

**PROOF OF SERVICE**

I, Andrew P. Pugno, 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 101 Parkshore Drive, Suite 100, Folsom, CA 95630.

On January 5, 2009, I served the following document(s):

1. **INTERVENERS' RESPONSE TO PAGES 75-90 OF THE ATTORNEY GENERAL'S ANSWER BRIEF**

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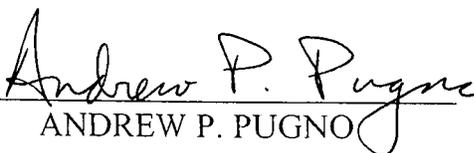
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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on January 5, 2009, at Folsom, California.

  
\_\_\_\_\_  
ANDREW P. PUGNO

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