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Supreme Court Rejects Challenges to Prop. 8, But Finds Existing Marriages of Same-Sex Couples Valid

San Francisco — The California Supreme Court, by a 6-1 vote, today rejected a constitutional challenge to Proposition 8, an initiative measure adopted by the voters at the November 4, 2008 election that added a section to the California Constitution providing “Only marriage between a man and a woman is valid or recognized in California.” The court’s opinion resolves the petitions in *Strauss v. Horton*, S168047, *Tyler v. State of California*, S168066, and *City and County of San Francisco v. Horton*, S168078. The opinion is available online at www.courtinfo.ca.gov/courts/supreme/.

The court further unanimously held that the scope of Proposition 8 is narrow, limited solely to restricting the use of the term “marriage” to opposite-sex couples, while not otherwise affecting the fundamental constitutional rights of same-sex couples described in its earlier opinion in *In re Marriage Cases* (2008) 43 Cal.4th 757.

The court also unanimously held that the new constitutional provision applies only prospectively, and does not affect the continued validity of the estimated 18,000 marriages of same-sex couples that occurred prior to November 5, 2008, when the new constitutional provision took effect. The challenges to Proposition 8 before the court were filed by numerous same-sex couples and public entities and were based solely on the provisions of the California Constitution and did not raise any federal constitutional claim.

The majority opinion was authored by Chief Justice Ronald M. George, and was joined by Justices Joyce L. Kennard, Marvin R. Baxter, Ming W. Chin, and Carol A. Corrigan. In addition to signing the majority opinion, Justice Kennard filed a separate concurring opinion.

Justice Kathryn Mickle Werdegar filed a concurring opinion, agreeing with the

result reached by the majority opinion but disagreeing in part with its analysis. Justice Carlos R. Moreno filed a concurring and dissenting opinion, agreeing with the majority's conclusion that Proposition 8 applies only prospectively but concluding that Proposition 8 is invalid because it is not a lawful amendment of the California Constitution.

MAJORITY OPINION

The 136-page majority opinion notes at the outset that the court's role is not to determine whether Proposition 8 "is wise or sound as a matter of policy or whether we, as individuals believe it *should* be a part of the California Constitution," but rather "is limited to interpreting and applying the principles and rules embodied in the California Constitution, setting aside our own personal beliefs and values."

The opinion further emphasizes that the principal legal issue in this case is entirely distinct from the issue that was presented in the court's decision last year in *In re Marriage Cases* (2008) 43 Cal.4th 757. There, the court was called upon to determine "the validity (or invalidity) of a *statutory* provision limiting marriage to a union between a man and a woman *under state constitutional provisions that do not expressly permit or prescribe such a limitation.*" In the present case, by contrast, the principal issue "concerns the scope of *the right of the people, under the provisions of the California Constitution, to change or alter the state Constitution itself* through the initiative process so as to incorporate such a limitation as an explicit section of the state Constitution."

Amendment or Revision

Under the California Constitution the initiative process may be used to propose and adopt constitutional *amendments* but may not be used to *revise* the state Constitution. Petitioners primarily contend that Proposition 8 is a constitutional revision rather than a constitutional amendment and therefore could not lawfully be adopted through the initiative process.

In addressing the question whether Proposition 8 constitutes a constitutional amendment or, instead, a constitutional revision, the majority observes that "we by no means write on a clean slate." The opinion explains that the amendment/revision dichotomy dates back to the original 1849 California Constitution, long before the adoption of the initiative process in 1911; the origin and history of the distinction "indicates that the category of *constitutional revision* referred to the kind of wholesale or fundamental alteration of the constitutional structure that appropriately could be undertaken only by a constitutional convention, in contrast to the category of *constitutional amendments* which included any and all of the more discrete changes to the Constitution that thereafter might be proposed."

Furthermore, the opinion points out that over the past three decades numerous California Supreme Court decisions have established that in determining whether a constitutional change constitutes a revision rather than an amendment, a court must assess "(1) the meaning and scope of the constitutional change at issue, and (2) the effect — both quantitative and qualitative — that the

constitutional change will have on *the basic governmental plan or framework* embodied in the preexisting provisions of the California Constitution.”

Analyzing the scope of Proposition 8, the majority opinion explains that, contrary to petitioners’ assertions, the initiative measure does not “entirely repeal” or “abrogate” the aspect of a same-sex couple’s state constitutional right of privacy and due process discussed in the majority opinion in the *Marriage Cases* — namely, the constitutional right to “choose one’s life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage” — nor does it “fundamentally alter” the substance of state constitutional equal protection principles recognized in that opinion.

Instead, it carves out a limited exception to these constitutional rights by reserving the official designation of the term “marriage” for the union of opposite-sex couples, but leaves undisturbed all of the other aspects of a same-sex couple’s constitutional right to establish an officially recognized and protected family relationship and to the equal protection of the laws.

The opinion emphasizes that it is not minimizing the significance that the official designation of “marriage” holds for both the proponents and opponents of Proposition 8, and explains that an accurate assessment of the actual effect of Proposition 8 on the constitutional rights of same-sex couples is necessary to evaluate the constitutional challenges that are advanced in this case.

The majority opinion then analyzes the quantitative and qualitative effect of Proposition 8 on the preexisting provisions of the state Constitution. Petitioners concede that the measure does not amount to a quantitative revision, but maintain that it constitutes a qualitative revision. Addressing this contention, the opinion explains that the distinction between an amendment and a revision does not depend upon the relative importance of the measure in question, pointing out that “(1) the right of women to vote in California, (2) the initiative, referendum, and recall powers, (3) the reinstatement of the death penalty, (4) an explicit right of privacy, (5) a substantial modification of the statewide real property tax system, and (6) legislative term limits — to list only a very few examples — all became part of the California Constitution by *constitutional amendment, not by constitutional revision.*”

Instead, the governing decisions establish that whether a change amounts to a qualitative revision depends upon the nature and scope of the proposed alteration. Reiterating the standard that has been applied in all of the numerous California cases decided in recent decades, the opinion states that to constitute a qualitative revision “a constitutional measure must make a far reaching change *in the fundamental governmental structure or the foundational power of its branches* as set forth in the Constitution.”

Applying this standard to Proposition 8, the opinion concludes that a measure limiting access to the designation of marriage to opposite-sex couples does not meet this test. Although petitioners claim that the proposition transforms the judicial function, the opinion explains that the measure does not

interfere with the courts' ability or traditional responsibility to faithfully enforce *all* of the provisions of the California Constitution, which now include the new section added through the voters' approval of Proposition 8.

Petitioners also contend that Proposition 8 should be considered a constitutional revision because it conflicts with a fundamental constitutional principle that protects a minority group from having its constitutional rights diminished in any respect by majority vote. The majority opinion explains there is no authority to support the claim that in California a majority of voters may not adopt through the initiative process a measure that diminishes a state constitutional right, even if that right has been interpreted and applied in a judicial decision. The opinion cites many amendments to the California Constitution, adopted through the initiative process by majority vote in response to court decisions, that have had just such an effect.

Although a number of other state constitutions contain provisions that preclude using the initiative power to amend specified provisions of those constitutions, the majority opinion emphasizes that the California Constitution contains no comparable limitation. Because there is no express restriction on the initiative power, and consistent with past California holdings, the majority opinion concludes that the California Constitution does not restrict the people's right to use the initiative to modify preexisting constitutional rights through the approval of Proposition 8.

Separation of Powers

The majority opinion next addresses petitioners' claim that Proposition 8 violates the state constitutional separation of powers doctrine. The majority opinion rejects this contention, pointing out that, contrary to petitioners' assertion, Proposition 8 does not "readjudicate" the issue that was resolved by this court in the *Marriage Cases*. Proposition 8 does not purport to revisit the question of the state of the law at the time of the *Marriage Cases*, but instead establishes a new substantive constitutional rule that took effect upon the voters' approval of the initiative measure.

Further, because the state Constitution explicitly recognizes the right of the people to amend the Constitution through the initiative process, the people, in exercising that authority, have not usurped a power allocated by the Constitution exclusively to the judiciary or another branch of government.

Inalienable Rights

The majority opinion next addresses and rejects the Attorney General's claim that because article I, section 1 of the California Constitution characterizes certain rights including the right of privacy as "inalienable," Proposition 8 is invalid because it abrogates such rights without a compelling interest.

The opinion explains that not only does Proposition 8 not "abrogate" the aspect of the right of privacy discussed in the majority opinion in the *Marriage Cases*, but that the identification of a

right as “inalienable” has never been understood to mean that such right is exempt from any limitation or to preclude the adoption of a constitutional amendment that restricts the scope of such a right. The opinion emphasizes that there is no authority to support the Attorney General’s theory.

Validity of Existing Marriages of Same-Sex Couples

Finally, the majority opinion addresses the question of the effect of Proposition 8 on the marriages of same-sex couples performed prior to the adoption of Proposition 8. Applying the well-established legal principles that govern whether a constitutional provision should be interpreted to apply prospectively or retroactively, the opinion concludes that Proposition 8 cannot be interpreted to apply retroactively and that the marriages of same-sex couples performed before the effective date of Proposition 8 remain valid and must continue to be recognized in California. This holding of the majority opinion was concurred in by all of the justices.

JUSTICE KENNARD’S CONCURRING OPINION

In her separate concurring opinion, Justice Kennard explains that “[a]lthough the people through the initiative power *may not change* the court’s interpretation of language in the state Constitution, they *may change* the constitutional language itself, and thereby enlarge or reduce the personal rights that the state Constitution as so amended will thereafter guarantee and protect.

“The difference between interpretation and alteration is the difference between the judicial and legislative powers. Interpretation of existing statutory and constitutional provisions is a fundamental power of the judicial branch, while alteration of existing statutory and constitutional provisions — by addition, deletion, or modification — is a fundamental legislative power that the people may exercise through the initiative process.

“Although this court’s decision in the *Marriage Cases* remains the final word on the meaning of the state Constitution *as it then read*, the people have now used their initiative power to refashion the wording of the California Constitution and by this means have altered its substance, and thus its meaning, as of the effective date of the initiative measure.”

JUSTICE WERDEGAR’S CONCURRING OPINION

In her concurring opinion, Justice Werdegar states that although she agrees with the majority opinion that Proposition 8 “is a valid amendment to the California Constitution rather than a procedurally defective revision,” she rejects “much of the majority’s analysis.”

Disagreeing with the majority that prior California decisions define a constitutional revision as limited to a constitutional change that is “focused on governmental structure and organization,” the concurring opinion declares that “[t]he drafters of our Constitution never imagined, nor would they have approved, a rule that gives the foundational principles of social organization in free societies,

such as equal protection, less protection from hasty, unconsidered change than principles of governmental organization.”

Justice Werdegar explains that “just as an amendment of sufficient scope to a single principle as important as judicial power can be a revision . . . so too, in my view, can be an amendment of sufficient scope to a foundational principle of individual liberty in our free society, such as equal protection.”

The critical question, as she would pose it, “is whether Proposition 8 accomplishes a change of sufficient scope in a foundational principle of individual liberty as to amount to a constitutional revision.”

Justice Werdegar concludes that although Proposition 8 impinges upon the right of same-sex couples to have their family relationship accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples, the measure “has not brought about such a broad change in the principle of equal protection as to amount to a constitutional revision.” She emphasizes that “all three branches of state government continue to have the duty, within their respective spheres of operation, today as before the passage of Proposition 8, to eliminate the remaining important differences between marriage and domestic partnership, both in substance and perception.”

JUSTICE MORENO’S CONCURRING AND DISSENTING OPINION

In his concurring and dissenting opinion, Justice Moreno concludes that Proposition 8 is not a lawful amendment to the California Constitution because it alters the equal protection clause to deny same-sex couples equal treatment, explaining that “requiring discrimination against a minority group on the basis of a suspect classification strikes at the core of the promise of equality that underlies our California Constitution and thus ‘represents such a drastic and far-reaching change in the nature and operation of our governmental structure that it must be considered a “revision” of the state Constitution rather than a mere “amendment” thereof.’ ” Justice Moreno points out that the equal protection clause is “inherently countermajoritarian” and observes that “there is no ‘underlying’ principle more basic to our Constitution than that the equal protection clause protects the fundamental rights of minorities from the will of the majority.”

In Justice Moreno’s view, “[d]enying the designation of marriage to same-sex couples cannot fairly be described as a ‘narrow’ or ‘limited’ exception to the requirement of equal protection,” but adds that “even a narrow and limited exception to the promise of full equality strikes at the core of, and thus fundamentally alters, the guarantee of equal treatment Promising equal treatment to some is fundamentally different from promising equal treatment for all. Promising treatment that is almost equal is fundamentally different from ensuring truly equal treatment. Granting a disfavored minority only some of the rights enjoyed by the majority is fundamentally different from recognizing, as a constitutional imperative, that they must be granted all of those rights.”

Justice Moreno declares that “Proposition 8 represents an unprecedented instance of a majority of voters altering the meaning of the equal protection clause by modifying the California Constitution to require deprivation of a fundamental right on the basis of a suspect classification.” He states that “[t]he rule the majority crafts today not only allows same-sex couples to be stripped of the right to marry that this court recognized in the *Marriage Cases*, it places at risk the state constitutional rights of all disfavored minorities” and “weakens the status of our state Constitution as a bulwark of fundamental rights for minorities protected from the will of the majority.”

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