The Law of Direct Democracy

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For Shana, Charlie and Edie.
And Nini and Dampah.

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Preface

The idea for this book grew out of my preparation for teaching a seminar on the California Constitution that focused on the California initiative process. I gathered and reviewed material so that I might arrange a series of thirteen weekly readings and put together a syllabus and lesson plan. I quickly learned that there have been frequent conferences and symposia devoted to direct democracy and that there are numerous books and scholarly articles on direct democracy and the initiative process. In 2009, the Association of American Law Schools (AALS) offered two separate programs at their annual meeting that focused on ballot initiatives, one as a "Hot Topic Program" and another as an "AALS Executive Committee Program." In 2010, the AALS annual meeting featured a program on "Direct Democracy and State Constitutionalism: How Voter Initiatives Impact on Judicial and Legislative Decision-Making." I also learned, however, that there is no casebook that sets forth the law of direct democracy either in California or elsewhere in the United States.

As I taught the seminar for three separate semesters, I regularly began class by asking the students whether they had read or heard about a ballot initiative. Inevitably, most of the students would offer up a newspaper article or internet story or conversation they had had at work, at school or with a family member. Even though the course focused on the California initiative process, the students' responses raised issues that were being faced by states all across the country. These state law issues frequently turn into national issues and often end up before the U.S. Supreme Court. Direct democracy has begun to dominate the making of new and controversial laws at the state level. It also makes a compelling and fertile area of academic discourse.

The primary goal in drafting this casebook was to create a casebook that contains all of the material that a student would need to learn the law of direct democracy in the United States. The secondary goal was to provide a series of prompts to challenge the readers and focus their thinking on the big-picture, national issues that are suggested by the individual examples explored in depth in the text. The final goal was to provide citation to the specific constitutional and statutory authority for the rules and processes described in each chapter. Collectively, accomplishment of these three goals offers students and instructors a straightforward presentation of the law of direct democracy and the tools necessary to pursue further inquiry on discrete topics of interest.

I must acknowledge my appreciation to Chapman University and the School of Law for its support of my research efforts and for approving a sabbatical that allowed me to take a small project on California's initiative process and turn it into this book. Thank you.

Editorial Note

In the interest of saving a few trees and the reader's time, the judicial opinions and other materials in this casebook have been edited. In most cases, footnotes and citations within a judicial opinion have been removed, without indication. Where a footnote from a judicial opinion is included in this book, it is given its original number surrounded by asterisks.*31* In some cases, the formatting of the original sources within a judicial opinion has been modified for consistency in citation form. I have removed significant portions of text from most of the judicial opinions, again without indication. [Where I have added text within a judicial opinion by condensing or supplementing a portion of the opinion, it is ordinarily indicated by hard brackets and a reference to — Ed.]

Because this book includes thousands of references to state constitutions and statutes, for the sake of brevity I use the official postal abbreviations for references to individual state constitutions and statutes. For example: the Arizona Constitution is "AZ Const"; Arizona Revised Statues is "AZ R.S. §___"; Illinois Compiled Statutes is "IL C.S."; and the Revised Code of Washington is "WA R.C."

31. Thus, this footnote would reflect footnote 31 from the case in which it appears.

Introduction

In 24 states, the ballot initiative is available at the state government level. More than two-thirds of U.S. citizens live in a city or a state (or both) that permits the people to enact laws through the initiative process. *See* John G. Matsusaka, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY 8 (Univ. of Chicago Press 2004). Although the ballot initiative is not available to propose new federal laws, the ballot initiative is driving the political conversation at a national level. Immigration reform, same-sex marriage, medical marijuana, term limits, tax limitations, state debt and borrowing limitations, abortion, affirmative action and school funding are just a few of the topics of ballot initiatives in the last two decades that have become part of the national debate. Furthermore, the availability and threat of the initiative process also influences the national agenda. *See* Elizabeth Garrett, *Hybrid Democracy*, 73 Geo. Wash. L. Rev. 1096 (2005) ("A complete analysis of any democratic institution thus necessarily involves understanding that it operates in a Hybrid Democracy—neither wholly representative nor wholly direct, but rather a complex combination of both at the local and state levels, which in turn influences national politics.").

This Introduction considers California's experience with same-sex marriage ballot initiatives and the resulting court challenges. The same-sex marriage battle is one that is generally familiar and it illustrates many of the issues and themes that will be examined in greater detail throughout the book:

- the difference between statutory initiatives and constitutional amendment initiatives;
- the ability of elected officials to challenge or repeal ballot initiatives;
- the ability of the people to bypass the legislature;
- the role of the courts in providing a counter-majoritarian check on the will of the voters;
- the importance of fundamental rights expressed in a state constitution;
- the conflicting interpretation of rights expressed in the U.S. Constitution and similar or identical rights expressed in a state constitution;
- determining voter intent and motive when evaluating the meaning of a ballot initiative;
- limits on the ability to amend a state constitution without calling a constitutional convention; and
- the ability and obligation of state officials to defend the constitutionality of a challenged ballot initiative.

As you read about California's experience with one particular ballot initiative, try to identify the practical, legal and political issues that arose and consider whether they are unique to this heated topic.

The Early History of Same-Sex Marriage in California

From the moment it adopted its first constitution in 1849 and was admitted as the 31st state in 1850, the State of California has had a long history in its Constitution and in its statutes of referring to civil marriage as a relationship between a man and a woman. In the early 1970s, same-sex couples applied for marriage licenses from county clerks in several different California counties. These applications were denied. In response to these applications, the Legislature amended the relevant statutory language—at the specific request of the County Clerks' Association of California—to specify that civil marriage must be "between a man and a woman." In 1992, California adopted the Family Code and included language in Family Code section 300 that reiterated this position: "Marriage is a personal relation arising out of a contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary."

Proposition 22: The Statutory Initiative

In 1996, President Bill Clinton signed into law the Defense of Marriage Act (DOMA), a federal law that defines marriage as the legal "union between one man and one woman." 1 U.S.C. §7. DOMA also specified that no State is required "to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State," despite the Full Faith and Credit Clause of the U.S. Constitution. 28 U.S.C. §1738(c). Although this federal legislation was definitely unfriendly to same-sex marriage proponents, it left the door open for California and the other individual states to decide whether they would approve same-sex marriage and whether they would recognize same-sex marriages entered into in a sister state. The voters of California responded by enacting Proposition 22, a ballot initiative statute that was approved by a majority of the voters in a March 2000 primary election and codified at California Family Code section 308.5, which provided: "Only marriage between a man and a woman is valid or recognized in California." Because Proposition 22 was a ballot initiative and did not by its terms specify otherwise, the California Constitution mandated that the Legislature was without power to modify or repeal this provision unless such action was first approved by the voters.

Think About It

At the time that Proposition 22 was approved, California had 33,871,648 residents, 21,220,772 eligible voters and 14,631,805 registered voters. Proposition 22 was on the ballot in a March 2000 primary election in which 7,883,385 votes were cast. By contrast, 11,142,843 votes were cast in the November 2000 California general election. Proposition 22 was approved when 4,618,673 voters—61.4% of the voters

who voted on that issue — voted "yes." But the number of voters who approved Proposition 22 was only 31.6% of the registered voters, 21.8% of the eligible voters and 13.6% of the population of California.

- ✓ *How is this consistent or inconsistent with democratic principles?*
- ✓ *Is it wise to permit a small minority of registered voters and an even smaller minority of the population to change the law? At an election that is certain to have low turnout?*
- ✓ *Do you care about the views of people who are eligible to vote but choose not to? Do you care about the rights of people who choose not to vote when their rights are put on the ballot? As a society, should we care about these issues?*
- ✓ *What are the possible consequences of preventing the legislature from acting to amend or repeal a statute once enacted? Even if it turns out to be impractical or harmful?*

San Francisco Rejects Proposition 22

In early February 2004, San Francisco Mayor Gavin Newsom ordered the San Francisco County Clerk to revise the forms and documents used to issue marriage licenses so that licenses could be issued that would accommodate same-sex marriages as well as opposite-sex marriages. On February 12, 2004, the City of San Francisco began issuing marriage licenses to same-sex couples. San Francisco City Assessor Mabel Teng officiated over the first same-sex marriage, which occurred that same day in San Francisco City Hall. The very next day, two lawsuits were filed in San Francisco Superior Court seeking to declare the same-sex marriages invalid and seeking to prohibit San Francisco from issuing same-sex marriage licenses. The Superior Court declined to issue an immediate stay, and over the course of the next month San Francisco issued approximately 4,000 same-sex marriage licenses. On March 11, 2004, the Supreme Court of California ordered San Francisco city officials to stop issuing same-sex marriage licenses while it considered various legal challenges relating to the issuance of same-sex marriage licenses and the constitutionality of California's marriage statutes.

On August 12, 2004, the California Supreme Court determined that San Francisco City officials had exceeded their authority in issuing same-sex marriage licenses contrary to California's marriage statutes and ordered them to stop. *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004). The court also determined that all of the 4,000 same-sex marriage licenses that the City officials had issued were invalid and ordered the officials to notify the recipients of the licenses that their marriages were "void from their inception and a legal nullity." The California Supreme Court did not then decide whether the California marriage statues violated the California Constitution but instead waited for the issue to percolate up through the lower courts:

> To avoid any misunderstanding, we emphasize that the substantive question of the constitutional validity of California's statutory provisions limiting marriage to a union between a man and a woman is not before our court in this pro-

> ceeding, and our decision in this case is not intended, and should not be interpreted, to reflect any view on that issue. We hold only that in the absence of a judicial determination that such statutory provisions are unconstitutional, local executive officials lacked authority to issue marriage licenses to, solemnize marriages of, or register certificates of marriage for same-sex couples, and marriages conducted between same-sex couples in violation of the applicable statutes are void and of no legal effect. Should the applicable statutes be judicially determined to be unconstitutional in the future, same-sex couples then would be free to obtain valid marriage licenses and enter into valid marriages.

Id. at 464.

The Legislature and the Governor Respond

In 2005 and again in 2007, the California legislature passed bills approving same-sex marriage. Governor Schwarzenegger vetoed both bills, stating that they were either unnecessary because the California Supreme Court would declare Proposition 22 unconstitutional, or unconstitutional because they conflicted with a valid ballot initiative. The Governor preferred to await the California Supreme Court's ruling on the constitutionality of Proposition 22.

On May 15, 2008, the California Supreme Court issued its opinion holding that the California statutes limiting marriage to a union between a man and a woman violated the California Constitution.

In Re Marriage Cases

Supreme Court of California
183 P.3d 384 (Cal. 2008)

CHIEF JUSTICE GEORGE.

[California] has enacted 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. Past California cases explain that the constitutional validity of a challenged statute or statutes must be evaluated by taking into consideration all of the relevant statutory provisions that bear upon how the state treats the affected persons with regard to the subject at issue.

Accordingly, the legal issue we must resolve is not whether it would be constitutionally permissible under the California Constitution for the state to limit marriage only to opposite-sex couples while denying same-sex couples any opportunity to enter into an official relationship with all or virtually all of the same substantive attributes, but rather whether our state Constitution prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship that affords all of the significant legal rights and

obligations traditionally associated under state law with the institution of marriage, but under which the union of an opposite-sex couple is officially designated a "marriage" whereas the union of a same-sex couple is officially designated a "domestic partnership." The question we must address is whether, under these circumstances, the failure to designate the official relationship of same-sex couples as marriage violates the California Constitution.

Plaintiffs contend that by limiting marriage to opposite-sex couples, California's marriage statutes violate a number of provisions of the California Constitution. In particular, plaintiffs contend that the challenged statutes violate a same-sex couple's fundamental "right to marry" as guaranteed by the privacy, free speech, and due process clauses of the California Constitution, and additionally violate the equal protection clause of the California Constitution.

Plaintiffs base their constitutional challenge in this case solely upon the provisions of the California Constitution and do not advance any claim under the federal Constitution.

Although our state Constitution does not contain any explicit reference to a "right to marry," past California cases establish beyond question that the right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution. [As many California decisions] make clear, the right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice, and, as such, is of fundamental significance both to society and to the individual. In light of the fundamental nature of the substantive rights embodied in the right to marry—and their central importance to an individual's opportunity to live a happy, meaningful, and satisfying life as a full member of society—the California Constitution properly must be interpreted to guarantee this basic civil right to all individuals and couples, without regard to their sexual orientation.

The current statutory assignment of different names for the official family relationships of opposite-sex couples on the one hand, and of same-sex couples on the other, raises constitutional concerns not only in the context of the state constitutional right to marry, but also under the state constitutional equal protection clause. We conclude that sexual orientation should be viewed as a suspect classification for purposes of the California Constitution's equal protection clause and that statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny under this constitutional provision. Plaintiffs additionally contend that the strict scrutiny standard applies here not only because the statutes in question impose differential treatment between individuals on the basis of the suspect classification of sexual orientation, but also because the classification drawn by the statutes impinges upon a same-sex couple's fundamental, constitutionally protected privacy interest, creating unequal and detrimental consequences for same-sex couples and their children. We conclude that in the present context, affording same-sex couples access only to the separate institution of domestic partnership, and denying such couples access to the established institution of marriage, properly must be viewed as impinging upon the right of those couples to have their family relationship accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples.

In the present case, the question before us is whether the state has a constitutionally compelling interest in reserving the designation of marriage only for opposite-sex couples and excluding same-sex couples from access to that designation, and whether this statutory restriction is necessary to serve a compelling state interest. After carefully evaluating the pertinent considerations in the present case, we conclude that the state inter-

est in limiting the designation of marriage exclusively to opposite-sex couples, and in excluding same-sex couples from access to that designation, cannot properly be considered a compelling State interest for equal protection purposes. To begin with, the limitation clearly is not necessary to preserve the rights and benefits of marriage currently enjoyed by opposite-sex couples. Extending access to the designation of marriage to same-sex couples will not deprive any opposite-sex couple or their children of any of the rights and benefits conferred by the marriage statutes, but simply will make the benefit of the marriage designation available to same-sex couples and their children. Accordingly, insofar as the provisions of sections 300 and 308.5 draw a distinction between opposite-sex couples and same-sex couples and exclude the latter from access to the designation of marriage, we conclude these statutes are unconstitutional.

*JUSTICE BAXTER, joined by JUSTICE CHIN, DISSENTED from the portion of the majority opinion holding that the California Constitution gives same-sex couples the right to marry:

I cannot join this exercise in legal jujitsu, by which the Legislature's own weight is used against it to create a constitutional right from whole cloth, defeat the People's will, and invalidate a statute otherwise immune from legislative interference. Though the majority insists otherwise, its pronouncement seriously oversteps the judicial power. The majority purports to apply certain fundamental provisions of the state Constitution, but it runs afoul of another just as fundamental—article III, section 3, the separation of powers clause.

*JUSTICE CORRIGAN also DISSENTED from the portion of the majority opinion holding that Family Code section 308.5 violates the California Constitution:

In my view, Californians should allow our gay and lesbian neighbors to call their unions marriages. But I, and this court, must acknowledge that a majority of Californians hold a different view, and have explicitly said so by their vote. This court can overrule a vote of the people only if the Constitution compels us to do so. Here, the Constitution does not. Therefore, I must dissent.

The voters who passed Proposition 22 not long ago decided to keep the meaning of marriage as it has always been understood in California. The majority improperly infringes on the prerogative of the voters by overriding their decision. It does that which it acknowledges it should not do: it redefines marriage because it believes marriage should be redefined. It justifies its decision by finding a constitutional infirmity where none exists. Plaintiffs are free to take their case to the people, to let them vote on whether they are now ready to accept such a redefinition. Californians have legalized domestic partnership, but decided not to call it "marriage." Four votes on this court should not disturb the balance reached by the democratic process, a balance that is still being tested in the political arena.

Think About It

In general, laws passed by the Legislature are presumed to be constitutional because, among other reasons, courts presume that the individual legislators will honor their oath to obey the constitution. Proposition 22, which formed the basis for California Family Code section 308.5, was a ballot initiative enacted by the people of California rather than the Legislature. The people of California are not required to take an oath to uphold the California Constitution in order to be eligible to vote.

- ✓ *Did the California Supreme Court presume that this statute was constitutional? Did it consider the motives of the voters? Should it have done so?*

- ✓ *Did the California Supreme Court simply assess the California Constitution? Or did it take on the role of establishing policy? What legitimate role, if any, should the judiciary have in influencing policy? On making it?*
- ✓ *Was the dissent correct that this is a matter that should be left to the political arena? Why or why not?*
- ✓ *Why didn't the California Supreme Court consider the validity of the marriage statutes under the U.S. Constitution? Should it have done so?*

Proposition 8: The People Respond to the Courts

In early 2008—while the *In Re Marriage Cases* proceeding was pending before the California Supreme Court but before it issued its May 15 decision—opponents of same-sex marriage began collecting signatures on a petition for a constitutional amendment initiative that ultimately qualified for the November 2008 election as Proposition 8. Proposition 8 would amend the Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." This was the same language as in Proposition 22, but Proposition 8 was an amendment to the California Constitution. On June 2, 2008, the California Secretary of State certified Proposition 8 for the ballot. Press Release for Debra Bowen, *Secretary of State Debra Bowen Certifies Eighth Measure for November 4, 2008, General Election* (June 2, 2008) (*available at* http://www.sos.ca.gov/admin/press-releases/2008/DB08-068.pdf).

On June 4, 2008, the California Supreme Court, by a 4–3 vote, denied a petition for rehearing in *In Re Marriage Cases*. The Court unanimously denied a request to stay the effect of the *In Re Marriage Cases* decision given the pendency of Proposition 8 and ordered that its decision would become final at 5:00 p.m. on June 16, 2008. Mayor Newsom announced that marriages would begin at 5:01 p.m. and that San Francisco's goal was "to marry as many as 5,000 couples by the November election." Jessie McKinley, *Court Won't Delay Same-Sex Marriages*, New York Times (June 5, 2008) (*available at* http://www.nytimes.com/2008/06/05/us/politics/05stay.html?_r=1&ref=us). Approximately 18,000 marriages were performed in California between June 16 and the enactment of Proposition 8.

On November 4, 2008, Proposition 8 was approved by 52.3% of Californians who voted on that issue, by 50.9% of Californians who voted on any issue in that election, by 40.5% of registered California voters and by 30.2% of eligible California voters.

Think About It

Proposition 8, a constitutional amendment ballot initiative, was marginally more difficult to qualify for the ballot than Proposition 22, a statutory ballot initiative. For

an initiative that amends the California Constitution to qualify for the ballot, at least 8% of the electorate (determined by the number of votes cast for governor at the last election) must sign a petition. For a statutory initiative to qualify for the ballot, only 5% of the electorate must sign a petition. But the standard for approval of these two types of ballot initiatives was the same — a simple majority of the voters who voted on that issue in that election. By contrast, the U.S. Constitution can be amended only by (i) a super-majority of the legislature ("two-thirds of both Houses") and ratification by three-fourths of the state legislatures or (ii) a Constitutional Convention (called by two-thirds of the state legislatures) to propose amendments that must be ratified by three-fourths of the state legislatures.

- ✓ *What are the strengths and weaknesses of the processes by which one may amend the California Constitution versus the U.S. Constitution?*
- ✓ *What checks and/or balances exist in California to protect against the majority mistreating a disfavored minority?*

On November 5, 2008, Proposition 8 became effective and amended the California Constitution. That same day, three separate lawsuits were filed. These lawsuits alleged that Proposition 8 was an impermissible change to the California Constitution because it was a "revision" rather than an "amendment." If Proposition 8 was an impermissible "revision" of the California Constitution, it could only be accomplished by calling a Constitutional Convention. See Chapter Nine.

On May 26, 2009, The California Supreme Court upheld Proposition 8.

Strauss v. Horton

Supreme Court of California
207 P.3d 48 (Cal. 2009)

CHIEF JUSTICE GEORGE.

Proposition 8 added a new section — section 7.5 — to article I of the California Constitution, providing: "Only marriage between a man and a woman is valid or recognized in California." The measure took effect on November 5, 2008. In the present case, we address the question whether Proposition 8, under the governing provisions of the California Constitution, constitutes a permissible change to the California Constitution, and — if it does — we are faced with the further question of the effect, if any, of Proposition 8 upon the estimated 18,000 marriages of same-sex couples that were performed before that initiative measure was adopted.

In a sense, this trilogy of cases illustrates the variety of limitations that our constitutional system imposes upon each branch of government — the executive, the legislative, and the judicial.

In addressing the issues now presented in the third chapter of this narrative, it is important at the outset to emphasize a number of significant points. First, as explained in the *Marriage Cases*, our task in the present proceeding is not to determine whether the provision at issue is wise or sound as a matter of policy or whether we, as individuals, believe it should be a part of the California Constitution. Regardless of our views as individuals on this question of policy, we recognize as judges and as a court our responsibility to confine our consideration to a determination of the constitutional validity and

legal effect of the measure in question. It bears emphasis in this regard that our role is limited to interpreting and applying the principles and rules embodied in the California Constitution, setting aside our own personal beliefs and values.

Second, it also is necessary to understand that the legal issues before us in this case are entirely distinct from those that were presented in either *Lockyer* or the *Marriage Cases*. Unlike the issues that were before us in those cases, the issues facing us here do not concern a public official's authority (or lack of authority) to refuse to comply with his or her ministerial duty to enforce a statute on the basis of the official's personal view that the statute is unconstitutional, or 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. Instead, the principal issue before us 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.

In considering this question, it is essential to keep in mind that the provisions of the California Constitution governing the procedures by which that Constitution may be amended are very different from the more familiar provisions of the United States Constitution relating to the means by which the federal Constitution may be amended. The federal Constitution provides that an amendment to that Constitution may be proposed either by two-thirds of both houses of Congress or by a convention called on the application of two-thirds of the state legislatures, and requires, in either instance, that any proposed amendment be ratified by the legislatures of (or by conventions held in) three-fourths of the states. U.S. Const. art. V. In contrast, the California Constitution provides that an amendment to that Constitution may be proposed either by two-thirds of the membership of each house of the Legislature (CA Const. art. XVIII, § 1) or by an initiative petition signed by voters numbering at least 8 percent of the total votes cast for all candidates for Governor in the last gubernatorial election (*id.* art. II, § 8(b); *id.*, art. XVIII, § 3), and further specifies that, once an amendment is proposed by either means, the amendment becomes part of the state Constitution if it is approved by a simple majority of the voters who cast votes on the measure at a statewide election. *Id.*, art. XVIII, § 4.

As is evident from the foregoing description, the process for amending our state Constitution is considerably less arduous and restrictive than the amendment process embodied in the federal Constitution, a difference dramatically demonstrated by the circumstance that only 27 amendments to the United States Constitution have been adopted since the federal Constitution was ratified in 1788, whereas more than 500 amendments to the California Constitution have been adopted since ratification of California's current Constitution in 1879.

At the same time, as numerous decisions of this court have explained, although the initiative process may be used to propose and adopt amendments to the California Constitution, under its governing provisions that process may not be used to revise the state Constitution. Petitioners' principal argument rests on the claim that Proposition 8 should be viewed as a constitutional revision rather than as a constitutional amendment, and that this change in the state Constitution therefore could not lawfully be adopted through the initiative process.

As we shall see, our state's original 1849 California Constitution provided that the Legislature could propose constitutional amendments, but that a constitutional revision could be proposed only by means of a constitutional convention, the method used in 1849 to draft the initial constitution in anticipation of California's statehood the following year.

Thus, as originally adopted, the constitutional amendment/revision dichotomy in California — which mirrored the framework set forth in many other state constitutions of the same vintage — 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 amendment, which included any and all of the more discrete changes to the Constitution that thereafter might be proposed.

Contrary to petitioners' assertion, Proposition 8 does not entirely repeal or abrogate the aspect of a same-sex couple's state constitutional right of privacy and due process that was analyzed in the majority opinion in the *Marriage Cases* — that is, the constitutional right of same-sex couples 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 Proposition 8 fundamentally alter the meaning and substance of state constitutional equal protection principles as articulated in that opinion. Instead, the measure carves out a narrow and limited exception to these state constitutional rights, reserving the official designation of the term "marriage" for the union of opposite-sex couples as a matter of state constitutional law, but leaving undisturbed all of the other extremely significant substantive aspects of a same-sex couple's state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection of the laws.

Taking into consideration the actual limited effect of Proposition 8 upon the preexisting state constitutional right of privacy and due process and upon the guarantee of equal protection of the laws, and after comparing this initiative measure to the many other constitutional changes that have been reviewed and evaluated in numerous prior decisions of this court, we conclude Proposition 8 constitutes a constitutional amendment rather than a constitutional revision. As a quantitative matter, petitioners concede that Proposition 8 — which adds but a single, simple section to the Constitution — does not constitute a revision. As a qualitative matter, the act of limiting access to the designation of marriage to opposite-sex couples does not have a substantial or, indeed, even a minimal effect on the governmental plan or framework of California that existed prior to the amendment. Contrary to petitioners' claim in this regard, the measure does not transform or undermine the judicial function; this court will continue to exercise its 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. Furthermore, the judiciary's authority in applying the state Constitution always has been limited by the content of the provisions set forth in our Constitution, and that limitation remains unchanged.

Finally, we consider whether Proposition 8 affects the validity of the marriages of same-sex couples that were performed prior to the adoption of Proposition 8. Applying well-established legal principles pertinent to the question whether a constitutional provision should be interpreted to apply prospectively or retroactively, we conclude that the new section cannot properly be interpreted to apply retroactively. Accordingly, the marriages of same-sex couples performed prior to the effective date of Proposition 8 remain valid and must continue to be recognized in this state.

*JUSTICE MORENO concurred in the decision to affirm the validity of the 18,000 marriages performed before Proposition 8 was enacted, but DISSENTED from the conclusion that Proposition 8 was a permissible "amendment" to the California Constitution:

In *In re Marriage Cases*, we held that denying same-sex couples the right to marry denies them equal protection of the law. Proposition 8 partially abrogated that decision by

amending the California Constitution to deny same-sex couples fully equal treatment by adding the words: "Only marriage between a man and a woman is valid or recognized in California."

The question before us is not whether the language inserted into the California Constitution by Proposition 8 discriminates against same-sex couples and denies them equal protection of the law; we already decided in the *Marriage Cases* that it does. The question before us today is whether such a change to one of the core values upon which our state Constitution is founded can be accomplished by amending the Constitution through an initiative measure placed upon the ballot by the signatures of 8 percent of the number of persons who voted in the last gubernatorial election and passed by a simple majority of the voters. Or is this limitation on the scope of the equal protection clause to deny the full protection of the law to a minority group based upon a suspect classification such a fundamental change that it can only be accomplished by revising the California Constitution, either through a constitutional convention or by a measure passed by a two-thirds vote of both houses of the Legislature and approved by the voters?

For reasons elaborated below, I conclude 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." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281 (Cal. 1978)). The 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. It weakens the status of our state Constitution as a bulwark of fundamental rights for minorities protected from the will of the majority. I therefore dissent.

Think About It

Proposition 22 and Proposition 8 were practically identical. Yet Proposition 22 was invalid because it was a statute initiative that conflicted with the California Constitution. Proposition 8 was valid because it was a ballot initiative that amended the California Constitution, but did not "revise" it.

- ✓ *Is there a hierarchy of rights in the California Constitution? Should some constitutional rights be more fundamental than others?*
- ✓ *Why should some changes to the California Constitution require a constitutional convention?*
- ✓ *Are there any constitutional rights that cannot be eliminated from the California Constitution? From the U.S. Constitution?*
- ✓ *Are there certain constitutional rights that are so important that their elimination constitutes a "revision" rather than an amendment?*

✓ *If you knew that the majority passed a provision because of its bias against a minority and the provision was intended to discriminate against the minority, would it matter to you? Should it matter legally? If yes, what level of proof should be required to establish the bad motive? If not, why not?*

Same-Sex Marriage Supporters Make It a Federal Case

On May 22, 2009, just four days before the California Supreme Court upheld Proposition 8 against a challenge under the California Constitution in *Strauss v. Horton*, same-sex marriage supporters filed an action in federal court alleging that Proposition 8 violates the Fourteenth Amendment to the U.S Constitution. The case was assigned to U.S. District Court Judge Vaughn Walker. Judge Walker denied plaintiffs' motion for preliminary injunction. He later denied Proposition 8 supporters' motion for summary judgment. Judge Walker presided over a bench trial from January 11–27, 2010, and later issued a decision holding that Proposition 8 violated both the Due Process and the Equal Protection clauses of the Fourteenth Amendment.

Perry v. Schwarzenegger

U.S. District Court for the Northern District of California
704 F.Supp.2d 921 (N.D.Cal. 2010)

DISTRICT JUDGE VAUGHN WALKER.

Trial Proceedings And Summary Of Testimony

The parties' positions on the constitutionality of Proposition 8 raised significant disputed factual questions, and for the reasons the court explained in denying proponents' motion for summary judgment, the court set the matter for trial. The parties were given a full opportunity to present evidence in support of their positions. They engaged in significant discovery, including third-party discovery, to build an evidentiary record. Both before and after trial, both in this court and in the court of appeals, the parties and third parties disputed the appropriate boundaries of discovery in an action challenging a voter-enacted initiative.

Plaintiffs presented eight lay witnesses, including the four plaintiffs, and nine expert witnesses. Proponents' evidentiary presentation was dwarfed by that of plaintiffs. Proponents presented two expert witnesses and conducted lengthy and thorough cross-examinations of plaintiffs' expert witnesses but failed to build a credible factual record to support their claim that Proposition 8 served a legitimate government interest.

Although the evidence covered a range of issues, the direct and cross-examinations focused on the following broad questions:

WHETHER ANY EVIDENCE SUPPORTS CALIFORNIA'S REFUSAL TO RECOGNIZE MARRIAGE BETWEEN TWO PEOPLE BECAUSE OF THEIR SEX;

WHETHER ANY EVIDENCE SHOWS CALIFORNIA HAS AN INTEREST IN DIFFERENTIATING BETWEEN SAME-SEX AND OPPOSITE-SEX UNIONS; and

WHETHER THE EVIDENCE SHOWS PROPOSITION 8 ENACTED A PRIVATE MORAL VIEW WITHOUT ADVANCING A LEGITIMATE GOVERNMENT INTEREST.

The trial evidence provides no basis for establishing that California has an interest in refusing to recognize marriage between two people because of their sex [and the] the testimony shows that California has no interest in differentiating between same-sex and opposite-sex unions.

For the reasons stated in the sections that follow, the evidence presented at trial fatally undermines the premises underlying proponents' proffered rationales for Proposition 8. An initiative measure adopted by the voters deserves great respect. The considered views and opinions of even the most highly qualified scholars and experts seldom outweigh the determinations of the voters. When challenged, however, the voters' determinations must find at least some support in evidence. This is especially so when those determinations enact into law classifications of persons. Conjecture, speculation and fears are not enough. Still less will the moral disapprobation of a group or class of citizens suffice, no matter how large the majority that shares that view. The evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in such disapproval. As such, Proposition 8 is beyond the constitutional reach of the voters or their representatives.

CONCLUSION

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional.

REMEDIES

Plaintiffs have demonstrated by overwhelming evidence that Proposition 8 violates their due process and equal protection rights and that they will continue to suffer these constitutional violations until state officials cease enforcement of Proposition 8. California is able to issue marriage licenses to same-sex couples, as it has already issued 18,000 marriage licenses to same-sex couples and has not suffered any demonstrated harm as a result; moreover, California officials have chosen not to defend Proposition 8 in these proceedings.

Because Proposition 8 is unconstitutional under both the Due Process and Equal Protection Clauses, the court orders entry of judgment permanently enjoining its enforcement; prohibiting the official defendants from applying or enforcing Proposition 8 and directing the official defendants that all persons under their control or supervision shall not apply or enforce Proposition 8. The clerk is DIRECTED to enter judgment without

bond in favor of plaintiffs and plaintiff-intervenors and against defendants and defendant-intervenors pursuant to FRCP 58.

Think About It

The District Court held a trial and received evidence from both opponents and proponents of Proposition 8. Among such evidence was the following: (i) 84 percent of those who attend church weekly voted "yes" on Proposition 8, 54 percent of those who attend church occasionally voted "no" on Proposition 8 and 83 percent of those who never attend church voted "no" on Proposition 8 and (ii) numerous claims made by the supporters of Proposition 8 in their campaign literature and advertising were unsupported by facts and/or false.

- ✓ *Was it necessary to have a trial and consider evidence? Why?*
- ✓ *Does it matter whether all or nearly all self-identified "religious" people support a ballot initiative and all or nearly all "non-religious" people oppose it?*
- ✓ *Is it relevant to deciding whether a ballot initiative is valid that the voters who voted "yes" did so based on a demonstrably faulty understanding of the initiative? Demonstrably false factual premises?*

An Issue of Standing: Who Will Defend Prop 8?

Proposition 8 proponents promptly appealed the decision to the Ninth Circuit and requested that Judge Walker stay the enforcement of this decision to ensure that Proposition 8 remained in effect during the pendency of their appeal. On August 12, 2010, Judge Walker denied the motion to stay. Four days later, however, the Ninth Circuit granted appellants' motion to stay the District Court's order and ordered expedited briefing in the appeal.

On January 4, 2011, the Ninth Circuit issued a decision concluding that it lacked jurisdiction to hear the appeal of Judge Walker's decision finding that Proposition 8 violated the U.S. Constitution unless the "official proponents" of Proposition 8 had standing. Pursuant to California state law, the official proponents are the individuals who "submit the text of a proposed initiative or referendum to the Attorney General with a request that he or she prepare a circulating title and summary of the chief purpose and points of the proposed measure." CA Elec. Code § 342. Ordinarily, the California Attorney General would defend the constitutionality of a validly enacted law such as Proposition 8. But the Attorney General and the Governor had both declined to do so. Whether the official proponents of an initiative measure had standing to appeal the judgment declaring Proposition 8 unconstitutional was an issue of California state law for which there was no controlling precedent. Thus, the Ninth Circuit certified the question and asked the Supreme Court of California to exercise its discretion to accept and decide the certified question.

On November 17, 2011, the California Supreme Court answered the certified question by confirming that, under California law, the official proponents had standing to defend the validity of Proposition 8 when state officials declined to do so.

Perry v. Brown

Supreme Court of California
265 P.3d 1002 (Cal. 2011)

CHIEF JUSTICE CANTIL-SAKAUYE.

As posed by the Ninth Circuit, the question to be decided is "[w]hether under article II, section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so."

In addressing this issue, we emphasize at the outset that although in this case the question posed by the Ninth Circuit happens to arise in litigation challenging the validity, under the United States Constitution, of the initiative measure (Proposition 8) that added a section to the California Constitution providing that "[o]nly marriage between a man and a woman is valid or recognized in California," the state law issue that has been submitted to this court is totally unrelated to the substantive question of the constitutional validity of Proposition 8. Instead, the question before us involves a fundamental procedural issue that may arise with respect to any initiative measure, without regard to its subject matter. The same procedural issue regarding an official initiative proponent's standing to appear as a party in a judicial proceeding to defend the validity of a voter-approved initiative or to appeal a judgment invalidating it when the public officials who ordinarily provide such a defense or file such an appeal decline to do so, could arise with regard to an initiative measure that, for example, (1) limited campaign contributions that may be collected by elected legislative or executive officials, or (2) imposed term limits for legislative and executive offices, or (3) prohibited government officials from accepting employment after leaving office with companies or individuals that have benefited from the officials' discretionary governmental decisions while in office. The resolution of this procedural question does not turn on the substance of the particular initiative measure at issue, but rather on the purpose and integrity of the initiative process itself.

As we discuss more fully below, in the past official proponents of initiative measures in California have uniformly been permitted to participate as parties — either as interveners or as real parties in interest — in numerous lawsuits in California courts challenging the validity of the initiative measure the proponents sponsored. Such participation has routinely been permitted (1) without any inquiry into or showing that the proponents' own property, liberty, or other personal legally protected interests would be specially affected by invalidation of the measure, and (2) whether or not the government officials who ordinarily defend a challenged enactment were also defending the measure in the proceeding. This court, however, has not previously had occasion fully to explain the basis upon which an official initiative proponent's ability to participate as a party in such litigation rests.

As we shall explain, because the initiative process is specifically intended to enable the people to amend the state Constitution or to enact statutes when current government officials have declined to adopt (and often have publicly opposed) the measure in question, the voters who have successfully adopted an initiative measure may reasonably harbor a legitimate concern that the public officials who ordinarily defend a challenged state law in court may not, in the case of an initiative measure, always undertake such a defense with vigor or with the objectives and interests of those voters paramount in mind. As a consequence, California courts have routinely permitted the official proponents of an initiative to intervene or appear as real parties in interest to defend a challenged voter-approved initiative measure in order "to guard the people's right to exercise initiative power" or, in other words, to enable such proponents to assert the people's, and hence the state's, interest in defending the validity of the initiative measure. Allowing official proponents to assert the state's interest in the validity of the initiative measure in such litigation (along with any public officials who may also be defending the measure) (1) assures voters who supported the measure and enacted it into law that any residual hostility or indifference of current public officials to the substance of the initiative measure will not prevent a full and robust defense of the measure to be mounted in court on the people's behalf, and (2) ensures a court faced with the responsibility of reviewing and resolving a legal challenge to an initiative measure that it is aware of and addresses the full range of legal arguments that reasonably may be proffered in the measure's defense. In this manner, the official proponents' general ability to appear and defend the state's interest in the validity of the initiative measure and to appeal a lower court judgment invalidating the measure serves to enhance both the fairness of the judicial process and the appearance of fairness of that process.

We have cautioned that in most instances it may well be an abuse of discretion for a court to fail to permit the official proponents of an initiative to intervene in a judicial proceeding to protect the people's right to exercise their initiative power even when one or more government defendants are defending the initiative's validity in the proceeding. Thus, in an instance — like that identified in the question submitted by the Ninth Circuit — in which the public officials have totally declined to defend the initiative's validity at all, we conclude that, in light of the nature and purpose of the initiative process embodied in article II, section 8 of the California Constitution (hereafter article II, section 8) and the unique role of initiative proponents in the constitutional initiative process as recognized by numerous provisions of the Elections Code, it would clearly constitute an abuse of discretion for a court to deny the official proponents of an initiative the opportunity to participate as formal parties in the proceeding, either as interveners or as real parties in interest, in order to assert the people's and hence the state's interest in the validity of the measure and to appeal a judgment invalidating the measure. In other words, because it is essential to the integrity of the initiative process embodied in article II, section 8 that there be someone to assert the state's interest in an initiative's validity on behalf of the people when the public officials who normally assert that interest decline to do so, and because the official proponents of an initiative (in light of their unique relationship to the initiative measure under art. II, § 8 and the relevant provisions of the Elections Code) are the most obvious and logical persons to assert the state's interest in the initiative's validity on behalf of the voters who enacted the measure, we conclude that California law authorizes the official proponents, under such circumstances, to appear in the proceeding to assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure.

Neither the Governor, the Attorney General, nor any other executive or legislative official has the authority to veto or invalidate an initiative measure that has been approved by the voters. It would exalt form over substance to interpret California law in a manner that would permit these public officials to indirectly achieve such a result by denying the official initiative proponents the authority to step in to assert the state's interest in the validity of the measure or to appeal a lower court judgment invalidating the measure when those public officials decline to assert that interest or to appeal an adverse judgment.

Accordingly, we respond to the question posed by the Ninth Circuit in the affirmative. In a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.

Think About It

The Governor and the Attorney General of California both declined to defend the constitutionality of Proposition 8. Instead, the official proponents of Proposition 8 defended it during the federal court litigation.

- ✓ *Is it ever appropriate for an elected official to refuse to defend the constitutionality of a law?*
- ✓ *Should the Court give any weight to the fact that the Governor and the Attorney General both think that Proposition 8 is unconstitutional?*
- ✓ *Are the official proponents of a ballot initiative the only other group with standing? What if they do a poor job of litigating the matter? Should the court step in and help them? Who else might be authorized (or deputized) to take over?*

On to the U.S. Supreme Court

After the California Supreme Court's decision, the Ninth Circuit took up the appeal of District Court Judge Walker's decision. On February 7, 2012, the Ninth Circuit affirmed the finding that Proposition 8 was unconstitutional.

Perry v. Brown

U.S. Court of Appeals for the Ninth Circuit
671 F.3d 1052 (9th Cir. 2012)

CIRCUIT JUDGE REINHARDT.

Prior to November 4, 2008, the California Constitution guaranteed the right to marry to opposite-sex couples and same-sex couples alike. On that day, the People of Califor-

nia adopted Proposition 8, which amended the state constitution to eliminate the right of same-sex couples to marry. We consider whether that amendment violates the Fourteenth Amendment to the United States Constitution. We conclude that it does.

Although the Constitution permits communities to enact most laws they believe to be desirable, it requires that there be at least a legitimate reason for the passage of a law that treats different classes of people differently. There was no such reason that Proposition 8 could have been enacted. Because under California statutory law, same-sex couples had all the rights of opposite-sex couples, regardless of their marital status, all parties agree that Proposition 8 had one effect only. It stripped same-sex couples of the ability they previously possessed to obtain from the State, or any other authorized party, an important right — the right to obtain and use the designation of 'marriage' to describe their relationships. Nothing more, nothing less. Proposition 8 therefore could not have been enacted to advance California's interests in childrearing or responsible procreation, for it had no effect on the rights of same-sex couples to raise children or on the procreative practices of other couples. Nor did Proposition 8 have any effect on religious freedom or on parents' rights to control their children's education; it could not have been enacted to safeguard these liberties.

All that Proposition 8 accomplished was to take away from same-sex couples the right to be granted marriage licenses and thus legally to use the designation of 'marriage,' which symbolizes state legitimization and societal recognition of their committed relationships. Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples. The Constitution simply does not allow for "laws of this sort." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

Before considering the constitutional question of the validity of Proposition 8's *elimination* of the rights of same-sex couples to marry, we first decide that the official sponsors of Proposition 8 are entitled to appeal the decision below, which declared the measure unconstitutional and enjoined its enforcement. The California Constitution and Elections Code endow the official sponsors of an initiative measure with the authority to represent the State's interest in establishing the validity of a measure enacted by the voters, when the State's elected leaders refuse to do so. *See Perry v. Brown*, 265 P.3d 1002 (2011). It is for the State of California to decide who may assert its interests in litigation, and we respect its decision by holding that Proposition 8's proponents have standing to bring this appeal on behalf of the State. We therefore conclude that, through the proponents of ballot measures, the People of California must be allowed to defend in federal courts, including on appeal, the validity of their use of the initiative power. Here, however, their defense fails on the merits. The People may not employ the initiative power to single out a disfavored group for unequal treatment and strip them, without a legitimate justification, of a right as important as the right to marry. Accordingly, we affirm the judgment of the district court.

On June 5, 2012, the Ninth Circuit denied a petition for rehearing en banc. Although the Ninth Circuit affirmed Judge Walker's decision, the stay it had issued remained in place, blocking resumption of same-sex marriages in California pending appeal to the United States Supreme Court. As expected, the proponents of Proposition 8 then sought review in the United State Supreme Court on the question "Whether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman." On December 7, 2012, the Supreme Court granted the petition for a writ of certiorari and also ordered that "[i]n addition to

the question presented by the petition, the parties are directed to brief and argue the following question: Whether petitioners have standing under Article III, § 2 of the Constitution in this case."

Hollingsworth v. Perry

Supreme Court of the United States
133 S.Ct. 2652, ___ U.S. ___ (2013)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

I

The public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry. That question has also given rise to litigation. In this case, petitioners, who oppose same-sex marriage, ask us to decide whether the Equal Protection Clause "prohibits the State of California from defining marriage as the union of a man and a woman." Respondents, same-sex couples who wish to marry, view the issue in somewhat different terms: For them, it is whether California — having previously recognized the right of same-sex couples to marry — may reverse that decision through a referendum.

Federal courts have authority under the Constitution to answer such questions only if necessary to do so in the course of deciding an actual "case" or "controversy." As used in the Constitution, those words do not include every sort of dispute, but only those historically viewed as capable of resolution through the judicial process. This is an essential limit on our power: It ensures that we act *as judges,* and do not engage in policymaking properly left to elected representatives.

For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have "standing," which requires, among other things, that it have suffered a concrete and particularized injury. Because we find that petitioners do not have standing, we have no authority to decide this case on the merits, and neither did the Ninth Circuit.

Respondents, two same-sex couples who wish to marry, filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. The complaint named as defendants California's Governor, attorney general, and various other state and local officials responsible for enforcing California's marriage laws. Those officials refused to defend the law, although they have continued to enforce it throughout this litigation. The District Court allowed petitioners — the official proponents of the initiative — to intervene to defend it. After a 12-day bench trial, the District Court declared Proposition 8 unconstitutional, permanently enjoining the California officials named as defendants from enforcing the law, and "directing the official defendants that all persons under their control or supervision" shall not enforce it.

Those officials elected not to appeal the District Court order.

II

The doctrine of standing serves to prevent the judicial process from being used to usurp the powers of the political branches. In light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we

must put aside the natural urge to proceed directly to the merits of an important dispute and to "settle" it for the sake of convenience and efficiency.

Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an "actual controversy" persist throughout all stages of litigation. That means that standing must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance. We therefore must decide whether petitioners had standing to appeal the District Court's order.

Respondents initiated this case in the District Court against the California officials responsible for enforcing Proposition 8. The parties do not contest that respondents had Article III standing to do so. Each couple expressed a desire to marry and obtain "official sanction" from the State, which was unavailable to them given the declaration in Proposition 8 that "marriage" in California is solely between a man and a woman.

After the District Court declared Proposition 8 unconstitutional and enjoined the state officials named as defendants from enforcing it, however, the inquiry under Article III changed. Respondents no longer had any injury to redress — they had won — and the state officials chose not to appeal.

The only individuals who sought to appeal that order were petitioners, who had intervened in the District Court. But the District Court had not ordered them to do or refrain from doing anything. To have standing, a litigant must seek relief for an injury that affects him in a personal and individual way. He must possess a direct stake in the outcome of the case. Here, however, petitioners had no "direct stake" in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.

Petitioners argue that the California Constitution and its election laws give them a "'unique,' 'special,' and 'distinct' role in the initiative process — one 'involving both authority and responsibilities that differ from other supporters of the measure.'" Reply Brief 5 (quoting 265 P.3d at 1006, 1017–18, 1030). True enough — but only when it comes to the process of enacting the law. Upon submitting the proposed initiative to the attorney general, petitioners became the official "proponents" of Proposition 8. CA Elec. Code § 342. As such, they were responsible for collecting the signatures required to qualify the measure for the ballot. *Id.* §§ 9607–9609. After those signatures were collected, the proponents alone had the right to file the measure with election officials to put it on the ballot. *Id.* § 9032. Petitioners also possessed control over the arguments in favor of the initiative that would appear in California's ballot pamphlets. *Id.* §§ 9064, 9065, 9067, 9069.

But once Proposition 8 was approved by the voters, the measure became a duly enacted constitutional amendment or statute. Petitioners have no role — special or otherwise — in the enforcement of Proposition 8. They therefore have no "personal stake" in defending its enforcement that is distinguishable from the general interest of every citizen of California.

And petitioners are plainly not agents of the State — "formal" or otherwise. As an initial matter, petitioners' newfound claim of agency is inconsistent with their representations to the District Court. When the proponents sought to intervene in this case, they did not purport to be agents of California. They argued instead that "no other party in this case w[ould] adequately represent *their interests as official proponents*." Motion to Intervene in No. 09-2292 (ND Cal.), p. 6 (emphasis added). It was their "unique legal status" as official proponents — not an agency relationship with the people of California —

that petitioners claimed "endow[ed] them with a significantly protectable interest" in ensuring that the District Court not "undo[] all that they ha[d] done in obtaining … enactment" of Proposition 8. *Id.,* at 10, 11.

More to the point, the most basic features of an agency relationship are missing here. Agency requires more than mere authorization to assert a particular interest. "An essential element of agency is the principal's right to control the agent's actions." 1 Restatement (Third) of Agency § 1.01, Comment *f* (2005). Yet petitioners answer to no one; they decide for themselves, with no review, what arguments to make and how to make them. Unlike California's attorney general, they are not elected at regular intervals—or elected at all. No provision provides for their removal. As one *amicus* explains, "the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it." Brief for Walter Dellinger 23.

Unlike California's elected officials, they have taken no oath of office. As the California Supreme Court explained, petitioners are bound simply by "the same ethical constraints that apply to all other parties in a legal proceeding." They are free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities.

Neither the California Supreme Court nor the Ninth Circuit ever described the proponents as agents of the State, and they plainly do not qualify as such.

IV

We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.

Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction.

It is so ordered.

*Justice KENNEDY, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE SOTOMAYOR join, DISSENTING.

The Court's opinion is correct to state, and the Supreme Court of California was careful to acknowledge, that a proponent's standing to defend an initiative in federal court is a question of federal law. Proper resolution of the justiciability question requires, in this case, a threshold determination of state law. The state-law question is how California defines and elaborates the status and authority of an initiative's proponents who seek to intervene in court to defend the initiative after its adoption by the electorate. Those state-law issues have been addressed in a meticulous and unanimous opinion by the Supreme Court of California.

Under California law, a proponent has the authority to appear in court and assert the State's interest in defending an enacted initiative when the public officials charged with that duty refuse to do so. The State deems such an appearance essential to the integrity of its initiative process. Yet the Court today concludes that this state-defined status and this state-conferred right fall short of meeting federal requirements because the proponents cannot point to a formal delegation of authority that tracks the requirements of the Restatement of Agency. But the State Supreme Court's definition of proponents' pow-

ers is binding on this Court. And that definition is fully sufficient to establish the standing and adversity that are requisites for justiciability under Article III of the United States Constitution.

In my view Article III does not require California, when deciding who may appear in court to defend an initiative on its behalf, to comply with the Restatement of Agency or with this Court's view of how a State should make its laws or structure its government. The Court's reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials — the same officials who would not defend the initiative, an injury the Court now leaves unremedied. The Court's decision also has implications for the 26 other States that use an initiative or popular referendum system and which, like California, may choose to have initiative proponents stand in for the State when public officials decline to defend an initiative in litigation. See M. Waters, Initiative and Referendum Almanac 12 (2003). In my submission, the Article III requirement for a justiciable case or controversy does not prevent proponents from having their day in court.

These are the premises for this respectful dissent.

Think About It

Chief Justice Roberts writes that the requirement of standing "ensures that we act ***as judges*** *and do not engage in policymaking properly left to elected representatives."*

- ✓ *Who engages in policymaking in the initiative process? Is there a difference in a law enacted by the legislature and a law enacted as the result of a successful ballot initiative campaign?*
- ✓ *In the words of the California Supreme Court, "the initiative process is specifically intended to enable the people to amend the state Constitution or to enact statutes when current government officials have declined to adopt (and often have publicly opposed) the measure in question." Following the Court's opinion in* Perry v. Hollingsworth*, what recourse do the people have when the legislative and executive branch oppose a policy position favored by the people?*
- ✓ *Chief Justice Roberts offers the following in support of his conclusion that petitioners lack standing: Proponents "are free to pursue a purely ideological commitment to the law's constitutionality without the need to take cognizance of resource constraints, changes in public opinion, or potential ramifications for other state priorities." Is that a bad thing?*

The Same-Sex Marriage Battle — California and Beyond

On June 28, 2013, the Ninth Circuit issued a one-sentence order lifting the stay it had issued in the Proposition 8 case. California Governor Jerry Brown notified county clerks

and recorders to issue same-sex marriage licenses immediately. Plaintiffs Kris Perry and Sandy Stier were married that same day in a San Francisco ceremony performed by California Attorney General Kamala Harris. Plaintiffs Paul Katami and Jeff Zarrillo also were married that day in a Los Angeles ceremony performed by Los Angeles Mayor Antonio Villaraigosa.

The Supreme Court's decision in *Perry v. Hollingsworth* did not resolve the matter of same-sex marriage at a national level. Instead, it left the matter to be resolved on a state-by-state basis. At the time of the Supreme Court's decision, California joined 12 other states that allow same-sex marriage: Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington, plus the District of Columbia.

Maine enacted legislation permitting same-sex marriage in 2009, but same-sex marriage opponents circulated a referendum petition to place the issue on the ballot. The people of Maine approved the referendum (53%–47%), thus voiding the law permitting same-sex marriage at the November election. In 2012, same-sex marriage proponents gathered sufficient signatures to place the issue *back* on the ballot in the form of "Maine Question 1," an initiated state statute that would legalize same-sex marriage. The people of Maine approved the ballot initiative by a vote of 53%–47%. In 2013, voters in Maryland and Washington approved legislation allowing same-sex marriage in referendum elections.

By contrast, most states have amended their state constitutions in the last 15 years to prohibit same-sex marriage. Some states amended their constitution as a result of successful ballot initiative campaigns — for example, Arizona, Arkansas, Florida, Montana, Nebraska, Nevada, Ohio and Oregon. Other states amended their constitutions through legislative action that was then approved by the people in a ballot referendum — for example, Colorado, Idaho, Michigan, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota and Utah.

The goal of this Introduction chapter is to familiarize you with the direct democracy issues that you will read about in more depth and in different contexts in the chapters that follow. Although this Introduction considers one ballot initiative topic from one particular state, many of the issues that arose in California's same-sex marriage initiatives arise each time a citizen considers whether to circulate an initiative petition (or a referendum petition or a recall petition). Proponents and opponents of any ballot initiative must decide whether the issue is part of a coordinated statewide or national campaign, what is the right campaign message to ensure the success of their respective positions and what is the right legal strategy. As you read on, consider which issues occur with nearly every ballot measure and which issues are unique to a specific ballot measure. Attempt to answer the questions in the "Think About It" boxes and see whether your views change, or are reinforced, as you proceed.