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## ***Digest: Strauss v. Horton***

*Errick J. Winek*

Opinion by George, C.J. Concurring Opinions by Kennard, J., and Wedegar, J. Concurring and Dissenting Opinion by Moreno, J.

### Issues

(1) Whether under the California Constitution, Proposition 8 is permissible as a revision of, rather than an amendment to, the California Constitution.

(2) Whether Proposition 8 violates the separation of powers doctrine under the California Constitution.

(3) Whether and to what effect, if not unconstitutional, Proposition 8 would have on same-sex marriages prior to its passage on November 4, 2008.

### Facts

On November 4, 2008, Proposition 8 passed with a majority of persons voting to amend the California Constitution.<sup>1</sup> In doing so, this state initiative added section 7.5—more commonly known as the “California Marriage Protection Act”<sup>2</sup>—to article I of the California Constitution.<sup>3</sup> This newly-added language clarified the constitutional definition of marriage, stating “[o]nly marriage between a man and a woman is valid or recognized in California”<sup>4</sup> and became effective the day after the passage of Proposition 8.<sup>5</sup> If deemed valid, Proposition 8 had the potential to impact an estimated 18,000 same-sex marriages performed prior to its passage in the November 2008 election.<sup>6</sup>

On November 5, 2008, three petitions were filed questioning the validity of Proposition 8.<sup>7</sup> Within the various petitions, the

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<sup>1</sup> *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009).

<sup>2</sup> CAL. CONST. art. 1, § 7.5.

<sup>3</sup> *Strauss*, 207 P.3d at 59.

<sup>4</sup> *Id.* See also CAL. CONST. art. 1, § 7.5

<sup>5</sup> *Strauss*, 207 P.3d at 59.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 68–69. (discussing the three petitions: *Strauss v. Horton* (S168066) (alleging that Proposition 8 was an invalid revision to the state constitution and seeking a writ of mandate ordering state officials not to enforce Proposition 8); *Tyler v. State of*

assertion that Proposition 8's denial of the same-sex couple's right to marry constituted an impermissible revision<sup>8</sup>, rather than an amendment to the California Constitution that could not lawfully be proposed by the initiative process was a common undertone.<sup>9</sup> Moreover, one specific petition argued that Proposition 8 violated the separation of powers doctrine in the California Constitution<sup>10</sup>, and another challenged retroactive application of Proposition 8 on marriages performed prior to its passage in the November 2008 election.<sup>11</sup> Both *Strauss v. Horton* and *Tyler v. State of California* requested the court stay enforcement of Proposition 8 until the court had an opportunity to consider the petitions.<sup>12</sup> Shortly after, official proponents of the recently passed Proposition 8 filed a motion to intervene on all three cases.<sup>13</sup>

On November 19, 2008 the court granted the proponents' motion to intervene and denied the petitions to stay execution of Proposition 8 until a final decision was rendered.<sup>14</sup> In addition, the court issued an order to show cause via expedited briefing schedule calling for all parties to address the issues presented in the three petitions.<sup>15</sup> On March 5, 2009, the court consolidated the rulings on the three petitions into one decision though an order.<sup>16</sup>

#### Analysis

##### 1. Proposition 8's Effect on the Constitutional Right to Marry

After a thorough review of same-sex marital jurisprudence, the court considered the impact Proposition 8 had on the right to marry in the California constitutional context.<sup>17</sup> Opponents to Proposition 8 argued that the new constitutional section could potentially impact either the right to privacy or due process

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California (S168066) (arguing that Proposition 8 was an invalid revision and unconstitutional under the separation of powers doctrine); *City and County of San Francisco v. Horton* (S168078) (contending that Proposition 8 was an invalid revision to California Constitution and, even if constitutional, proposing that Proposition 8 could not retroactively apply to same-sex couples married before its passage)).

<sup>8</sup> See CAL. CONST. art. XVIII, §§ 1–4(2).

<sup>9</sup> *Strauss*, 207 P.3d at 68–69.

<sup>10</sup> *Id.* at 68.

<sup>11</sup> *Id.* at 69.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 74.

aspects of the California Constitution.<sup>18</sup> Proponents, however, claimed that Proposition 8 merely sought to limit the definition of marriage solely to same-sex couples, not to impede the rights of same-sex couples to have a legally recognized family.<sup>19</sup> The court reasoned that Proposition 8 crafted a limited exception to the privacy and due process clause of the California Constitution.<sup>20</sup> By its terms, the court articulated, Proposition 8 referred only to the literal word “marriage” and did not impact the rights of same-sex couples to establish an organized family relationship.<sup>21</sup>

## 2. Revision

Having determined that Proposition 8 carved out the right of same-sex couples to access the designation of “marriage,” the court turned to the petitioner’s first point of contention that the constitutional change caused by Proposition 8 was not an amendment, but rather an invalid constitutional revision.<sup>22</sup> Section 3 of the California Constitution allows for amendments to be made either through proposal in the Legislature or through the initiative process.<sup>23</sup> However, the court stated a revision to the California Constitution could only be proposed through a constitutional convention or by a two-thirds vote of the entire State Legislature.<sup>24</sup>

While both constitutional amendments and revisions require a majority of voters approval, a revision—which substantially alters the entire Constitution, the basic framework of the governmental structure or the powers held by one or more governmental branches<sup>25</sup>—requires prior approval of two-thirds of each house of the California State Legislature.<sup>26</sup> The court explained that the distinction between an amendment and a

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<sup>18</sup> *Id.* at 75.

<sup>19</sup> *Id.* at 76–77.

<sup>20</sup> *Id.* at 75.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 78.

<sup>23</sup> See CAL. CONST. art. XVIII, §§ 1–3. See also CAL. CONST. art. II, § 8 defining “initiative” as:

The power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them . . . may be proposed by presenting the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

*Id.*

<sup>24</sup> *Strauss*, 207 P.3d at 79–80.

<sup>25</sup> *Id.* at 99.

<sup>26</sup> *Id.* at 80.

revision could be determined by considering both the quantitative and qualitative effects of the measure on California's constitutional scheme.<sup>27</sup> In the court's view, the addition of a 14-word section did not quantify enough to rise to the level of a revision.<sup>28</sup> Additionally, Proposition 8 did not constitute a "fundamental change in the *basic governmental plan or framework*" as to constitute a substantive revision to the California Constitution.<sup>29</sup> Rather, the court opined that the limited effect of Proposition 8 only to use of the term "marriage" indicated that Proposition 8 was an amendment.<sup>30</sup>

### 3. Separation of Powers Doctrine

Petitioners also argued that Proposition 8 violated the separation of powers doctrine.<sup>31</sup> Though petitioners claimed that Proposition 8 was a carefully crafted method of re-litigating the *Marriage Cases*, the court stated that Proposition 8 did not reconsider the decision.<sup>32</sup> Rather, the state initiative amended the California Constitution and created a new substantive rule.<sup>33</sup> Being that the passage of the proposition created a new constitutional amendment, it became the judiciary's duty to ensure its application.<sup>34</sup> In announcing that it was within the right of the electorate to propose and adopt an amendment to the California Constitution, the court declared that neither the people, nor the legislature, infringed upon the powers of the judiciary.<sup>35</sup>

### 4. Attorney General's Claim that Proposition 8 Abrogated Inalienable Rights

Along with the contentions raised by petitioners, the Attorney General articulated that Proposition 8 was a constitutional violation because it abrogated same sex couple's inalienable rights protected by the California Constitution.<sup>36</sup> In dismissing this claim, the court said that the limited effect of Proposition 8 in creating an exception to the right to use the label

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<sup>27</sup> *Id.* at 80–114. *See also* CAL. CONST. art. II, § 8, art. XVIII, §§ 2, 3.

<sup>28</sup> *Id.* at 98.

<sup>29</sup> *Id.* at 99.

<sup>30</sup> *Id.* at 114.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 114–15.

<sup>33</sup> *Id.* at 115.

<sup>34</sup> *Id.* at 116.

<sup>35</sup> *Id.* *See also* CAL. CONST. art. II, § 8(a) (stating "[t]he initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them") (emphasis added).

<sup>36</sup> *Strauss*, 207 P.3d at 116.

“marriage” did not impact same-sex couple’s inalienable rights.<sup>37</sup> Moreover, the court declared that inalienable rights were not completely immune from restriction and could be affected by a constitutional amendment aimed at limiting that right.<sup>38</sup>

#### 5. Retroactive Impact of Proposition 8 on Pre-Existing Marriages

After concluding that Proposition 8 could not be invalidated on any of the petitioner’s or Attorney General’s theories, the court considered what effect, if any, Proposition 8 would have on same-sex marriages performed before the passage of Proposition 8 in November 2008.<sup>39</sup> The opponents of Proposition 8 argued that it could only be read as being prospective in nature, while proponents of Proposition 8 claimed that the language was written so to impact all same-sex marriages performed in California, both before or after Proposition 8’s effective date.<sup>40</sup>

In weighing these arguments, the court noted that the language of Proposition 8 did not explicitly contain a retroactive provision on its face.<sup>41</sup> Rather, the language, written in present tense, did not definitively evidence a design to apply retroactively.<sup>42</sup> Even when confronted by the claim from the proponents that extrinsic evidence showed that Proposition 8 was to be applied to all marriages before and after Proposition 8’s passage, the court stated that the official title and general summary of Proposition 8 for the election did not “clearly and unambiguously” indicate an intent for the initiative to be applied in this manner.<sup>43</sup> In the absence of such language and intent, the court concluded that Proposition 8 could not retroactively invalidate the same-sex marriages performed before its passage.<sup>44</sup>

#### Holding

The court held that Proposition 8 was an amendment to the California Constitution, did not violate the separation of powers doctrine, was not invalid as an abrogation of the inalienable rights doctrine, and did not apply retroactively to same-sex

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 116–19.

<sup>39</sup> *Id.* at 119.

<sup>40</sup> *Id.* at 119–20.

<sup>41</sup> *Id.* at 120.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 120–21.

<sup>44</sup> *Id.* at 122.

marriages before its effective date.<sup>45</sup>

#### Concurrence (Kennard, J.)

The focus of Justice Kennard's concurrence centered on the view that interpreting the laws of the California Constitution—which becomes particularly crucial when individual rights are involved—was within the power of the judiciary.<sup>46</sup> However, the power to alter the California Constitution was not within the role of the judicial branch, but rather a power invested in the people of California.<sup>47</sup> Acknowledging that Proposition 8 changed the California Constitution, Kennard recognized that the court was now duty-bound to discharge the obligations arising with the new amendment.<sup>48</sup>

#### Concurrence (Werdegar, J.)

While tending to agree with the majority that Proposition 8 was a constitutional amendment as opposed to an invalid revision, Justice Werdegar took issue with the definition of “revision” used.<sup>49</sup> Rather than the approach used by the majority, Werdegar opined that the analysis should focus on whether the scope of Proposition 8 sufficiently changed an individual liberty to a degree that would comprise to a constitutional revision.<sup>50</sup>

#### Dissent

Justice Moreno agreed with petitioners that Proposition 8 discriminated against a suspect class to a level that epitomized a substantial and dramatic change in the governmental structure that it had to be deemed a constitutional revision.<sup>51</sup> Moreover, Moreno disagreed with the majority's belief that limiting only the designation of “marriage” to opposite-sex couples carved out a “narrow” or “limited” exception to the requirement of equal protection.<sup>52</sup> Ultimately the dissent concluded that the change brought by Proposition 8 could have only resulted from a constitutional revision.<sup>53</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 123.

<sup>47</sup> *Id.* at 123.

<sup>48</sup> *Id.* at 123–24.

<sup>49</sup> *Id.* at 124.

<sup>50</sup> *Id.* at 127–28.

<sup>51</sup> *Id.* at 129.

<sup>52</sup> *Id.* at 130.

<sup>53</sup> *Id.* at 138.

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**Legal Significance**

This decision affirmed Proposition 8 as a valid constitutional amendment to the California Constitution restricting the designation of “marriage” only to opposite-sex couples. However, the decision held that Proposition 8 did not invalidate the marriages of same-sex couples performed prior to the passage of Proposition 8 in November 2008 due to the absence of a retroactive provision or clear legislative intent that Proposition 8 should have a retroactive force.



