RECENT CASES

EQUAL PROTECTION — SAME-SEX MARRIAGE — CALIFORNIA SUPREME COURT CLASSIFIES PROPOSITION 8 AS "AMENDMENT" RATHER THAN "REVISION." — *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

In May 2008, a judicial opinion made California the second American state to recognize marriage equality for same-sex couples.[1] Less than six months later, California voters passed Proposition 8, changing the state constitution to strip same-sex couples of this right. Recently, in *Strauss v. Horton*,[2] the California Supreme Court upheld the validity of Proposition 8, holding that the initiative was properly classified under California law as a constitutional "amendment" rather than a constitutional "revision." The supreme court concluded that restricting the term "marriage" to opposite-sex couples did not represent the kind of "fundamental change" necessary to represent a revision, which must be initiated by a legislative supermajority before reaching the voters.[3] The court's standard — that only changes to governmental structure qualify as revisions — was consistent with a narrow reading of California precedent. However, the court missed an opportunity to resolve a problem that had not been addressed by that precedent, and further failed to take into account the judicial role in protecting minority rights. The court should have held that fundamental changes to individual rights for minority groups are per se revisions. In doing so, the court would have required a deliberative process for such constitutional alterations, better serving a conception of courts as the protectors of minority rights.[4] The likely harms the *Strauss* holding will cause for minorities — especially gay individuals — demonstrate the superiority of such a conception of judicial review and the amendment/revision distinction.

In *In re Marriage Cases*,[5] a 4–3 decision, the California Supreme Court held that state laws limiting the designation of the term "marriage" to opposite-sex couples violated both the fundamental right to

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[1] *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

[2] 207 P.3d 48 (Cal. 2009).

[3] *Id.* at 99.

[4] *See Strauss*, 207 P.3d at 133 (Moreno, J., concurring and dissenting). For other theoretical views, see generally JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (describing the judicial role as protecting the rights of minorities to participate in the political process and thus protect their own individual rights); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (arguing that the people are the final authority on constitutional interpretation).

[5] 183 P.3d 384.

marry and the state constitution's equal protection clause.[6] On the latter point, the court reasoned that "retaining the designation of marriage exclusively for opposite-sex couples . . . may well have the effect of perpetuating a more general premise . . . that gay individuals and same-sex couples are in some respects 'second-class citizens.'"[7]

A few weeks after the court's decision, the Secretary of State certified Proposition 8 to appear on the general election ballot.[8] Proposition 8 sought to add a provision to the state constitution reading: "Only marriage between a man and a woman is valid or recognized in California."[9] The California Supreme Court rejected a challenge to including the initiative on the ballot,[10] and on November 4, 2008, California voters approved Proposition 8, 52.3% to 47.7%.[11] Immediately after, same-sex couples seeking to marry, those who had been married before Proposition 8, and numerous California municipal entities filed suit to enjoin the measure's enforcement, on the ground that it was an improperly enacted constitutional revision that required the approval of a legislative supermajority before appearing on the ballot.[12]

The California Supreme Court, in an opinion by Chief Justice George,[13] held that Proposition 8 was not a revision to the state constitution, but merely an amendment. The court began by emphasizing that the case did not involve same-sex marriage per se, but rather was limited to the "scope of the right of the people . . . to change or alter the state Constitution itself through the initiative process."[14] The court defined the effects of Proposition 8 in two ways. First, with regard to the due process aspect of the *Marriage Cases*, the court viewed the initiative as "carving out an exception to the preexisting scope of the privacy and due process clauses,"[15] affecting only equal access to the word "marriage" and not the right to establish an officially recognized family relationship.[16] Second, the court similarly viewed Propo-

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[6] *Marriage Cases*, 183 P.3d at 400–01. On the equal protection point, the court held that classifications based on sexual orientation warranted strict scrutiny review. *Id.* at 401.

[7] *Id.* at 402.

[8] *See Strauss*, 207 P.3d at 68.

[9] CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 128 (2008), *available at* http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposedlaws.pdf#prop8.

[10] This challenge, similar to that of the petitioners in *Strauss*, argued that Proposition 8 was a revision. *See Strauss*, 207 P.3d at 68.

[11] *Id.* Proposition 8 is now codified as CAL. CONST. art. I, § 7.5.

[12] *Strauss*, 207 P.3d at 68–69.

[13] Chief Justice George was joined by Justices Kennard, Baxter, Chin, and Corrigan. Chief Justice George also authored *In re Marriage Cases*.

[14] *Strauss*, 207 P.3d at 60 (emphasis omitted).

[15] *Id.* at 75.

[16] *Id.*

sition 8 as "creating a limited exception to the state equal protection clause" by limiting access to the mere *word* "marriage."[17]

The court next turned to the amendment/revision distinction. Each must be approved by a bare majority of the people; however, while amendments may be generated by the people directly through a ballot initiative, revisions must be initiated and voted on by the legislature (or a constitutional convention) before being submitted for popular approval.[18] Two categories of constitutional changes may qualify as revisions: *quantitative* revisions strike at many different provisions of the state's constitution such that their effects are pervasive, while *qualitative* revisions effect a substantial change in the constitution's governmental plan or structure.[19] Any other change is an amendment.

Chief Justice George determined that Proposition 8 was not a revision on either prong. Quantitatively, the court found it "obvious" that Proposition 8 was not a revision, since it added only fourteen words to the constitution and created an exception to only three clauses: privacy, due process, and equal protection.[20] The qualitative prong was a closer question. Qualitative revisions are difficult to prove, as they must alter the basic governmental plan or framework established by the constitution.[21] Only once had the court found a qualitative revision: in *Raven v. Deukmejian*,[22] the court held that a provision making numerous changes to criminal procedure laws altered the judicial role in construing constitutional rights.[23] The *Strauss* court concluded that Proposition 8 did not "transform or undermine the judicial function."[24] Further, the court refused to hold that a measure that "abrogates a so-called *foundational constitutional principle of law*," such as due process or equal protection, necessarily qualifies as a revision.[25]

The court did express a willingness to classify as a revision a measure of such far-reaching scope that the framers "plausibly intended [it] to be proposed only by a new constitutional convention."[26] Neverthe-

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[17] *Id.* at 78.

[18] *Id.* at 78–80.

[19] *Id.* at 98–99.

[20] *Id.* at 98.

[21] *Id.* A hypothetical qualitative revision invoked by the court is an enactment that vests all judicial power in the legislature. *See* Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1286 (Cal. 1978).

[22] 801 P.2d 1077 (Cal. 1990).

[23] *See Strauss*, 207 P.3d at 93–96.

[24] *Id.* at 99.

[25] *Id.* The court also referenced earlier cases in which changes had been made to fundamental constitutional rights without qualifying as revisions. *Id.* at 99–100 (citing *In re* Lance W., 694 P.2d 744 (Cal. 1985); People v. Frierson, 599 P.2d 587, 613–14 (Cal. 1979)). *Lance W.* held that an initiative changing evidence rules was an amendment. *Frierson* held the same for an initiative declaring that the death penalty was not cruel and unusual punishment.

[26] *Strauss*, 207 P.3d at 101–02 (emphasis omitted).

less, the court determined that Proposition 8 was not so broad. The court concluded that barring access to the word "marriage" was not a major change because the state's domestic partnership laws preserved substantive protections for same-sex couples.[27] The fact that the initiative limited the rights of a minority group was nondeterminative: the court pointed to prior laws altering the rights of minorities that had been held to be amendments.[28] The court did, however, hold that the 18,000 same-sex marriages that had already been performed[29] would remain valid, on retroactivity principles.[30]

Justice Werdegar concurred. Rejecting the majority's holding that only measures affecting governmental structure are revisions, she called for a rule that any initiative substantially altering the "foundational principles of social organization in free societies" can be a revision.[31] As such, "amendment[s] of sufficient scope to a foundational principle of *individual* liberty . . . such as equal protection" could qualify as revisions.[32] However, she concluded that Proposition 8 did not change a foundational constitutional principle, since limiting access to the word "marriage" was mere "[d]isagreement over a single, newly recognized, contested application of a general principle."[33]

Although Justice Moreno concurred in upholding the validity of the existing marriages, he dissented from the court's conclusion that Proposition 8 was procedurally valid. Justice Moreno would have classified it as a revision, as it "requir[ed] discrimination against a minority group on the basis of a suspect classification" and struck "at the core of the promise of equality that underlies our California Constitution."[34] Focusing on the "inherently countermajoritarian" nature of equal protection,[35] he concluded that the majority's rule "weakens the status of our state Constitution as a bulwark of fundamental rights for minorities."[36] Justice Moreno concluded that none of the majority's cited precedents held "that a modification of the California Constitution constitutes a revision *only* if it alters the structure of government."[37]

The *Strauss* majority, in holding that constitutional changes only qualify as qualitative revisions when they affect the state's basic governmental plan, missed an opportunity to improve on existing pre-

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[27] *See id.* at 102–03.
[28] *Id.* at 103. These included women's suffrage and reinstatement of the death penalty. *Id.*
[29] *Id.* at 59.
[30] *Id.* at 119–22.
[31] *Id.* at 124 (Werdegar, J., concurring).
[32] *Id.* at 127 (emphasis added).
[33] *Id.* at 128.
[34] *Id.* at 129 (Moreno, J., concurring and dissenting).
[35] *Id.* at 130.
[36] *Id.* at 129.
[37] *Id.* at 138 (emphasis added).

cedent. The standard enunciated by Justice Werdegar — that substantial alterations to the foundational principles of social organization may constitute revisions — recognizes the role of judicial review in protecting minority rights. Nevertheless, Justice Werdegar was incorrect in asserting that altering the definition of "marriage" was a change too narrow in scope to qualify as a revision. The court should have adopted Justice Werdegar's amendment/revision standard and held that Proposition 8 qualified as a revision because of its broad impact on equal protection. The significance of the marriage right and the dangers of allowing fundamental rights to be altered through the nondeliberative amendment process further support this conclusion.

The *Strauss* court followed a constrained reading of precedent that fails to address the problems caused by subjecting minority rights to the amendment process. The majority's position is plausibly consistent with precedent establishing that fundamental changes in government structure are revisions.[38] However, as Justice Werdegar pointed out, "the court ha[d] never held that a constitutional initiative was an amendment . . . *because* it affected only individual rights rather than governmental organization."[39] Justice Werdegar noted that the California framers intended to protect individual liberties as "jealously . . . [as] the forms of governmental organization."[40] This would indicate that changes affecting fundamental individual rights ought to qualify as revisions when they are highly intrusive on those rights.

Justice Werdegar's standard is superior to that of the majority because it implicitly recognizes the problems caused by subjecting minority rights to the relatively simple amendment process, and the unique role of judges in protecting these rights. However, Justice Werdegar misapplied her own standard by classifying Proposition 8 as an amendment. Under her standard, a major change in equal protection should be classified as a revision. The marriage right goes to the core of equality for homosexuals,[41] affecting their very perceptions of individuality and personhood. *In re Marriage Cases* stands for the principle that the word "marriage" has deep dignitary importance: "reserv-

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[38] *See, e.g.*, Legislature v. Eu, 816 P.2d 1309 (Cal. 1991) (classifying term limit measures as amendments because they do not alter government structure sufficiently to be revisions); *In re* Lance W., 694 P.2d 744 (Cal. 1985) (evidence rules); Brosnahan v. Brown, 651 P.2d 274 (Cal. 1982) (criminal procedure changes).

[39] *Strauss*, 207 P.3d at 125 (Werdegar, J., concurring). The case most supporting the majority's contention that changes to individual minority rights qualify as amendments is *People v. Frierson*, 599 P.2d 587 (Cal. 1979). In that case, a measure declaring that the death penalty was not cruel and unusual punishment was held to be an amendment. However, because this holding was based on judicial review and governmental structure arguments, *see id.* at 613–14, it has little bearing on an individual rights standard.

[40] *Strauss*, 207 P.3d at 126 (Werdegar, J., concurring).

[41] *See generally* Frederick Mark Gedicks, *Atmospheric Harms in Constitutional Law*, 69 MD. L. REV. 149 (2009) (discussing the special harms that denial of marriage causes same-sex couples).

ing the historic designation of 'marriage' exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples . . . equal dignity and respect."[42] As homosexuality must be expressed to be discernible, denying homosexuals the right to marry denies them the opportunity to have their relationships — and, by extension, their individuality — recognized as equally valid and meaningful by society.[43] Marriage can thus become a proxy for dignity.[44] It is this denial of dignity that strikes at the very heart of liberty.[45]

Justice Werdegar's standard asserts that "the scope of the change" is what matters.[46] She claimed that the "newly recognized"[47] nature of the same-sex marriage right made an alteration to it less significant. This ought not to matter, however, because she cites no legal standard whereby newly recognized rights are less valuable than longstanding ones. Similarly unconvincing is Justice Werdegar's (and the majority's) claim that access to a word involves pure "nomenclature."[48] As *In re Marriage Cases* recognized, with regard to marriage, the word may be the most important part. Justice Werdegar and the majority erred greatly by pulling back from this more honest assessment of the word's significance. Had they not done so, they might have recognized the momentous nature of the change in equal protection that they were allowing to pass as an amendment. Denial of access to the word "marriage" affects the dignity of same-sex couples in a way that renders them fundamentally unequal in society. Any measure that classifies a minority group as less dignified is necessarily of sufficient scope to qualify as a revision under Justice Werdegar's standard by violating the foundational principle of equality.

When properly applied, however, Justice Werdegar's standard protects against the broader effects on equal protection that occur when changes like Proposition 8 are classified as amendments. By contrast, the majority's rule makes it extremely difficult for courts to police restrictions on suspect classes. *In re Marriage Cases* was significant not only because the court found a fundamental right to same-sex mar-

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[42] *In re* Marriage Cases, 183 P.3d 384, 400 (Cal. 2008).

[43] *See* Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 FORDHAM L. REV. 1699, 1782–84 (1998).

[44] *Cf.* Lewis v. Harris, 875 A.2d 259, 290 (N.J. Super. Ct. App. Div. 2005) (Collester, J., dissenting) ("What Sarah Lael and her partner lack and seek [through marriage] may be summed up in the word dignity.").

[45] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

[46] *Strauss*, 207 P.3d at 127 (Werdegar, J., concurring).

[47] *Id.* at 128.

[48] *Id.*; *id.* at 61–62 (majority opinion).

riage, but also because the court determined that homosexuals are a suspect class, and that classifications drawn on the basis of sexual orientation are subject to strict scrutiny review.[49] The *Strauss* court, in failing to read existing precedent broadly to craft a rule that the fundamental rights of minorities may not be stripped by amendments, damaged the court's ability to protect minority rights from majority oppression, thus rendering those rights unstable.[50]

If a bare majority of the electorate can overturn a judicial decision based on heightened scrutiny, then the very rationale for such scrutiny is undercut. Classifying a minority group as "suspect" merely adds two steps to the process of discrimination and oppression. If the populace does not want to discriminate against a disfavored group, its representatives will not pass a discriminatory law in the first place. If the citizenry does want to discriminate, however, a court's designation of a group as a suspect class simply mandates a ballot initiative rather than a legislative enactment. Indeed, the incentives are quite perverse: from an efficiency standpoint, it is preferable for the citizenry at large to bypass the deliberative representative body and simply pass a slew of discriminatory constitutional amendments in order to avoid judicial review, as such amendments are shielded from heightened scrutiny.[51]

Had the *Strauss* court adopted Justice Werdegar's standard and used it to classify Proposition 8 as a revision, this incentive would be minimized. Before reaching the populace, discriminatory laws would have to survive strict scrutiny or take the form of revisions requiring a legislative supermajority.[52] This added protection would sustain the framers' intention for the constitution to be a bulwark for minority rights. If a core function of the state constitution is to protect disfavored minorities from majority tyranny, subjecting minority rights to a nondeliberative bare majority vote — as the amendment process permits — is certainly a strange way of accomplishing it.

The *Strauss* majority rule also overlooked a second major way in which classifying Proposition 8 as an amendment undercuts equal protection in general. By holding that the rights of minority groups in California may be taken away by a bare majority of the electorate, without prior deliberation or legislative consent, the court incentivized minority groups not to seek vindication of these rights in the first

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[49] *In re* Marriage Cases, 183 P.3d 384, 441–42 (Cal. 2008). Other suspect classifications under California law include race, sex, religion, and national origin. *Id.* at 441.

[50] *Cf. Strauss*, 207 P.3d at 130 (Moreno, J., dissenting).

[51] Interest groups may prefer bare majority constitutional amendments to typical legislation for other reasons as well, including the permanency of these changes and the ability to avoid having to compromise with state legislators. *See* Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1525–26, 1530 (2009).

[52] CAL. CONST. art. XVIII, § 1.

place. Scholars have discussed the phenomenon that court decisions recognizing rights for minorities may produce sociopolitical "backlashes," thus counseling judges to take caution in carrying out their countermajoritarian role.[53] Under the *Strauss* majority's rule, knowing that petitioning a court for recognition of their civil rights may be fruitless if half the electorate plus one will simply be able to strip those rights away in the next election, minorities will be incentivized not to seek such rights in the judicial system unless they have the funding and emotional resilience to wage a likely fruitless state electoral battle.[54] Had the *Strauss* court recognized that the constitution was intended to protect governmental structure *and* individual rights, minorities would know they had the protection of a legislative supermajority stopgap before the rights they won legislatively or judicially could be repealed as part of a backlash. By asserting that those rights can be taken away through the relatively simple amendment process, the court has in effect encouraged minorities, especially disfavored ones, not to seek vindication of their fundamental rights in the first place.

Because initiatives broadly threatening equal protection ought to qualify as revisions, and because Proposition 8 broadly harmed equal protection, the initiative should have been classified as a revision. Revisions inject a deliberative stage into lawmaking, a wise endeavor with regard to laws greatly affecting foundational principles like equal protection. By permitting a nondeliberative majority to strip disfavored minorities of a right going to their very status as free and equal citizens, the court essentially announced that the dignity and equality of any group only exist insofar as half of the population plus one sees fit to grant them, enshrining a principle of survival-of-the-fittest majority rule into the state constitution. The amendment/revision standard established by the *Strauss* court threatens to be the exception that swallows the underlying principle of constitutional protection of minority rights. In the words of Justice Kennedy, in a case whose stakes were not entirely unlike those in *Strauss*, "It ought not to remain binding precedent."[55] The reasoning of the *Strauss* court cannot withstand close scrutiny, and will not last long in the annals of the law.

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[53] *See generally, e.g.*, Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431 (2005); A. Jean Thomas, *The Hard Edge of* Kulturkampf*: Cultural Violence, Political Backlashes and Judicial Resistance to* Lawrence *and* Brown, 23 QUINNIPIAC L. REV. 707 (2004). *But see* Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151 (2009).

[54] The cost of the Proposition 8 battle was approximately $83 million. *Donors Poured 83M into Prop 8 Campaigns*, ASSOCIATED PRESS, Feb. 3, 2009, http://www.365gay.com/news/donors-poured-83m-into-prop-8-campaigns.

[55] Lawrence v. Texas, 539 U.S. 558, 578 (2003) (referring to Bowers v. Hardwick, 478 U.S. 186 (1986)).