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On Amending and Revising the Constitution: The Issues behind the Challenge to Proposition 8

Joseph R. Grodin
University of California, Hastings College of the Law

Abstract

The principal question before the California Supreme Court is whether the state constitution can be modified through an initiative measure when that modification would take away from an identifiable group rights that the state Supreme Court has deemed to be "fundamental." A subsidiary issue, which would arise only if Proposition 8 is upheld, is whether that measure operates to invalidate marriages conducted before its passage.

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Joseph R. Grodin*
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Within months of its controversial decision in the *Marriage Cases*, upholding a right to same-sex marriage under the California Constitution, the state Supreme Court is back in the fray, this time confronting a challenge to the equally controversial Proposition 8—the initiative measure aimed at overturning the court's decision by defining marriage to be between a man and a woman. The court may hear arguments in the challenge as early as March, in which case a decision can be expected by early summer.

The principal question before the court is whether the state constitution can be modified through an initiative measure when that modification would take away from an identifiable group rights that the state Supreme Court has deemed to be "fundamental." A subsidiary issue, which would arise only if Proposition 8 is upheld, is whether that measure operates to invalidate marriages conducted before its passage.

The original California Constitution of 1849 provided two methods of modifying the constitution: through "amendment," proposed by a majority in both houses of the legislature and adopted by the voters, or through "revision," adopted at a constitutional convention. The 1879 constitution continued the same arrangement, except that it required a legislative proposal to be approved by two-thirds, rather than a simple majority, of both houses (art. 18, sec. 1). Although there were no early cases that tested the issue, the Supreme Court, through dicta in an 1894 decision, opined that the legislature had no power under this arrangement to propose revisions, as distinguished from amendments.

So matters stood until 1911, when the Progressives brought the initiative to California and defined it to mean "the power of the electors to propose statutes *and amendments to the Constitution* and to adopt or reject them" (art. 2, sec. 8). The ef-

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*Joseph R. Grodin is a Distinguished Emeritus Professor at UC Hastings College of the Law, and a former Associate Justice of the California Supreme Court. He has written and taught on issues involving the state constitutions in general and the California Constitution in particular.

fect was to bypass the requirement for legislative proposal, thus making California one of the few states in which the initiative can be used directly to amend the state constitution.

The constitution was again modified in 1970 to give the legislature power to propose, by two-thirds vote in both houses, not only an "amendment" but also a "revision" to the constitution. As a result, the constitution can be amended through a measure placed on the ballot through either legislative proposal or through petition, but revision requires either legislative action or a constitutional convention.

The terms "amendment" and "revision" are not defined in the constitution, and prior case law is frustratingly opaque. In a 1949 case the court held, with little analysis, that an initiative measure that would have had the effect of repealing or substantially altering at least 15 of the then 25 articles of the constitution, constituted a "revision," and could not be adopted through the initiative process.[1]

More recently, the court has held that the nature of the changes as well as their number are relevant to the distinction. In *Raven v. Deukmejian (1990) 52 Cal.3d 336,* the court characterized an initiative measure that would have required California courts, in applying state constitutional provisions in criminal proceedings, to adhere to interpretations of similar provisions in the federal Constitution as calling for a fundamental change in the role of the judiciary and the rights of criminal defendants, and declared it was thus a revision inappropriate to the initiative process.

On the other side of the ledger are two cases in which the court, without much discussion, rejected efforts to characterize initiative measures as impermissible attempts at revisions aimed at overturning California Supreme Court decisions that had interpreted the state constitution to give broader rights than those recognized under the federal Constitution: *In re Lance W (1985) 37 Cal3d 873,* which upheld a provision that limited the state exclusionary remedy for search and seizure violations to the boundaries fixed by the federal Constitution; and *People v. Frierson (1979) 25 Cal.3d 142,* which rejected the California Supreme Court's earlier holding that the death penalty was invalid under the California Constitution.

The court in *Raven* distinguished these cases on the ground that the provisions at issue in *Raven* involved a "broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution." The challengers to Proposition 8 would distinguish them further by observing that, unlike the situation with same-sex marriage, neither involved an attempt to withdraw "fundamental rights" from a "suspect class," i.e., a class that has historically been the object of discrimination or prejudice so as to require a court to apply "strict scrutiny" in analyzing equal protection challenges to legislation that affects it. Protection of suspect classes against deprivation of fundamental rights by the majority goes to the heart of the judicial function and to the function of a bill of rights, they argue, so that the very structure of the state constitution requires that

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an attempt to withdraw such protection be characterized as a "revision" and not a mere amendment.

The attorney general has weighed in with a brief that presents a challengingly different perspective. Normally, it is considered to be the attorney general's job to defend legislation against constitutional attack, and in the first part of the brief he does so, arguing that the challengers' fundamental rights/suspect class argument is incoherent and difficult of application, and so accepts that Proposition 8 constitutes an amendment rather than a revision. But in a sudden shift, the last part of the brief insists that it is also the attorney general's job to defend the *entire* state constitution, and argues that Proposition 8 is invalid anyway, because it purports to take away rights that the constitution declares to be "inalienable."

This is an interesting argument. In the *Marriage Cases* the court held the ban on same-sex marriage to implicate a fundamental right to marry, protected by article 1, section 1 of the state constitution, which reads in relevant part: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty . . . and pursuing and obtaining safety, happiness and privacy."

The concept of inalienable rights existing by nature is of course the product of Enlightenment philosophy, and so is difficult to square with the modern, essentially positivist, view of the nature of law and the judicial function.

Nevertheless, the language is there, and article 1, section 26 of the constitution instructs: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Chief Justice Murray, in an early case referring to the right of property, also encompassed within article 1, section 1, admonished that the language should be taken seriously: "It was not lightly incorporated into the Constitution of the State as one of those political dogmas designed to tickle the popular ear, but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen."[2] It would seem that if the term "inalienable" can be given a meaningful positivist interpretation consistent with modern jurisprudential thought, it ought to be.

The attorney general relies on the "inalienability" as a guide to the intent of the framers, and he argues that they could not have intended individual rights protected under the first section of the constitution to be subject to withdrawal by the majority on the basis of simple popular vote. Perhaps the attorney general's view of his constitutional obligations prevented him from making the potentially more persuasive argument that the "inalienability" language (combined with the reference to "all people") lends textual foundation to the challengers' structural argument that a provision that would deprive a group of persons of a right deemed to be fundamental must be regarded as a revision, and not merely an amendment.

Beyond the pending case, it may be time for Californians to rethink more generally the manner in which the state constitution, and especially those provisions relating to individual and minority rights, should be subject to change. For that matter, it is long past time for Californians to rethink the uses (and abuses) of the initiative process, but that may be wishful thinking.

Notes

[1] McFadden v. Jordan, (1949) 32 Cal. 2d 330.

[2] See Grodin, "The California Supreme Court and State Constitutional Rights—The Early Years," 31 *Hastings Constitutional Law Quarterly* 141 (2004).

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