THE CALIFORNIA *Journal of*
Politics & Policy

Volume 1, Issue 1 2009

Should Proposition 8 Be Held to Be Retroactive?

Jesse H. Choper
University of California, Berkeley Law School

Abstract

The legal challenges to Proposition 8 all involve matters of state law on which the California Supreme Court alone is the final authority. But even if the court agrees with interveners and upholds the validity of Proposition 8, there is a separate question of its effect on the 18,000 couples who have already been married. On this issue, the California Supreme Court must first determine if the voters intended the proposition to apply retroactively. This essay urges that it should not be construed as being retroactive and, in doing so, explores two possible challenges under the U.S. Constitution if the court were to interpret Proposition 8 so as to invalidate the 18,000 marriages.

KEYWORDS: Proposition 8, same-sex marriage, gay rights

Acknowledgements: Thanks to Justin Lee, Class of '09, for excellent assistance in preparing this essay.

THE CALIFORNIA
Journal of
Politics
& Policy

Should Proposition 8 Be Held to Be Retroactive?

Jesse H. Choper*
University of California, Berkeley Law School

Introduction

In June 2008, the California Supreme Court held that family code laws defining marriage as only between "a man and a woman" violated the California Constitution.[1] In the five-month period ending November 5, when the voters approved Proposition 8—adding the words, "Only marriage between a man and a woman is valid or recognized in California,"[2] to the constitution—an estimated 18,000 same-sex couples married.[3]

The very day that Proposition 8 went into effect, several petitions for extraordinary relief[4] sought to invalidate the proposition on the ground that it should have been passed as a constitutional "revision" rather than a constitutional "amendment" under the rules of the California Constitution.[5] Revisions must first be approved by two-thirds of each house of the state legislature, whereas amendments may be placed on the ballot by voter petition alone—as was Proposition 8.[6] Thus if Proposition 8 is found to be a revision it will be held unconstitutional for failing to have been first approved by legislative vote.

Of the six initial filings, three were consolidated under *Strauss v. Horton*[7] and three were stayed pending its resolution.[8] There are three parties in *Strauss*: petitioners (private parties seeking to invalidate Proposition 8), respondent (the state represented by the attorney general of California), and interveners (the "Yes on 8" campaign).

Both petitioners and the attorney general agree that Proposition 8 should not have been passed as an amendment, but for different reasons. In the *Marriage Cases*, the California Supreme Court overturned the ban against same-sex marriages because (1) sexual orientation is a suspect classification under the state Equal Protection Clause thus requiring special justification, and (2) same-sex marriage is a protected aspect of the fundamental right to privacy explicitly guaranteed under Article 1, Section 1 of the California Constitution.[9] Petitioners now argue that because equal

---

*Jesse Choper is Earl Warren Professor of Public Law, University of California, Berkeley Law School.

protection violations are inherently countermajoritarian, the courts have a special duty to protect suspect groups against discrimination. Any change to this scheme would be structural in that it would shift power from the courts to the legislative branch, and so Proposition 8 should have been passed as a revision. In contrast, the attorney general submits that this equal-protection argument produces an unworkable standard, but nonetheless that Proposition 8 may not be enacted by amendment because it revokes a fundamental right.[10] The attorney general further argues that fundamental rights stemming from Article I, Section 1 of the California Constitution cannot be abrogated by a simple majority vote, as in the amendment process, without a compelling interest.[11]

The interveners contend that Proposition 8 is not structural (and therefore not a revision) because it simply changes a single aspect of substantive law—it does not, for example, systematically remove the power of the courts to protect gays and lesbians from all claims under the Equal Protection Clause.[12] In response to the attorney general's arguments concerning rights in Article I, Section 1, the interveners simply respond that there is no precedential authority supporting it.[13]

These challenges all involve matters of state law on which the California Supreme Court alone is the final authority. But even if the court agrees with interveners and upholds the validity of Proposition 8, there is a separate question of its effect on the 18,000 couples who have already been married. On this issue, the California Supreme Court must first determine if the voters intended the proposition to apply retroactively. This essay urges that it should not be construed as being retroactive and, in doing so, explores two possible challenges under the U.S. Constitution if the court were to interpret Proposition 8 so as to invalidate the 18,000 marriages.

Was Proposition 8 Intended to Apply Retroactively?

Legislative retroactivity is generally disfavored. For example, though there are very few provisions in the original U.S. Constitution (i.e., before the Bill of Rights) dealing with individual liberty, three of them address legislative retroactivity: the *ex post facto* prohibition, the bar against bills of attainder, and the ban on impairing the obligation of contracts.[14] The U.S. Supreme Court has invoked James Madison's explanation in Federalist 44 that these prohibited measures "are contrary to the first principles of the social compact, and to every principle of sound legislation."[15]

Similarly in California, "statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent."[16] In the case of initiatives, the California Supreme Court will try to ascertain the voters' intent first by looking at the text of the proposition and then examining extrinsic evidence such as the voter guides to resolve ambiguities.[17]

DOI: 10.2202/1944-4370.1017

The text of Proposition 8 simply states that only an opposite-sex marriage "is valid or recognized." Given the presumption against retroactivity, there is a strong argument that Proposition 8 should not be construed to apply retroactively because nothing expressly says that it does.[18]

If the court were to use "other indicia of voters' intent" in resolving the issue, including the Voter Information Guide,[19] interveners point out that historically, there has been a "long-standing understanding that marriage under California law refers to a union between a man and a woman."[20] In the 1970s, several same-sex couples applied for a marriage license after the legislature removed explicit reference to the words "male" and "female."[21] Though they were denied licenses, the legislature clarified the law by adding a clause limiting marriage to be between "a man and a woman."[22] As other jurisdictions began to recognize same-sex marriage, another clause intended to prevent same-sex marriages from being recognized in California was added as a statute by Proposition 22 in 2000.[23] Therefore, interveners conclude, it is hard to imagine that voters actually intended to legalize any same-sex marriages, including those performed during the five months.

Moreover, interveners contend that the Voter Information Guide indicates an intent that the proposition apply retroactively, e.g., by stating that the ban on same-sex marriages will apply "regardless of when or where performed."[24] But over seven million people voted for Proposition 8.[25] Ascertaining their collective "intent" is an extraordinarily difficult task. It is unlikely that undoing the 18,000 legal marriages was something that many voters contemplated at all, given that nothing in the text of the proposition raised it as an issue. And one offhand, fairly inexplicit remark buried in a 140-page-long voter guide appears to be especially unreliable. For example, in *Evangelatos v. Superior Court*, the California Supreme Court, interpreting Proposition 51 in 1986, determined that the issue of retroactivity simply wasn't addressed in the text of that proposition, and it seemed to want something quite explicit in the voter materials to confirm that voters intended for it to apply retroactively.[26] It would seem that interveners have a steeply uphill road to convince the court that it should abrogate one of the most important civil rights of so many couples based on the voter guide.

In addition, two separate challenges to Proposition 8 under the U.S. Constitution, which may be eventually taken to the U.S. Supreme Court if Proposition 8 is held to be retroactive, will affect the way the California Supreme Court interprets the retroactivity of Proposition 8. "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable."[27]

The basis of the rule is the assumption that the legislature always intends to pass a constitutional statute.[28] Similarly, when interpreting initiatives, the court will "assume that the voters intended the measure to be valid and construe it to avoid serious doubts as to its constitutionality if that can be done without doing violence to the reasonable meaning of the language."[29] As the text of the proposition simply states what "is valid or recognized in California," it is quite plausible to interpret this text to apply to prospective same-sex marriages without doing "violence to the reasonable meaning of the language." And the California Supreme Court may well do so in order to avoid the following credible federal challenges to the statute.[30]

If Retroactive, Is Proposition 8 Valid under the U.S. Constitution?

The Contracts Clause

The Contracts Clause states that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[31] To determine whether Proposition 8 is prohibited by this clause, the U.S. Supreme Court would determine (a) whether marriage is a contract under the meaning of the clause, (b) whether Proposition 8 is a sufficient impairment of that contract, and (c) if it is, whether there the impairment is justified.

The court has shown some flexibility in determining whether a legal instrument is a contract for the purposes of the Contracts Clause. For example, a state's grant of a corporate charter has been held to be a contract that may only be repealed or otherwise altered by an express reservation giving the state power to do so.[32] Marriage is often referred to as a private civil contract, but in 1819, the court stated that while "marriage is a contract . . . every society has an inherent right to regulate" it, and that "it cannot be considered as within the spirit of [the Contracts Clause.]"[33] This statement need not, however, be as big an obstacle as it appears. It was a dictum rather than authoritative reasoning and later courts have read it for the much narrower proposition that states have the right to retroactively regulate the terms of divorce.[34] The Court has also observed that marriage has "elements" of contract, but is "so interwoven with the very fabric of society" that its creation and dissolution is strictly regulated by law, adding that marriage is "often termed . . . as a civil contract" but "it is something more than a mere contract."[35] When subsequently faced with the specific question of whether marriage is a contract for purposes of the Contracts Clause, however, the court has avoided responding, assuming that marriage was a contract but then deciding that the regulation in question was not an impairment.[36]

DOI: 10.2202/1944-4370.1017

Moreover, the U.S. Supreme Court has made clear that "the existence and nature of the contract" claimed to be impaired is a question "primarily of state law,"[37] and California statutes and case law disclose that marriage has a substantial relationship to the law of contracts. The family code defines marriage as a "personal relation arising out of a civil contract,"[38] though it then adds that "[c]onsent alone does not constitute marriage" as it might if it were a "pure" contract. The California Supreme Court allows a spouse to sue for community property rights on an implied contract theory of marriage, as long as consideration is not based only on sexual relations.[39] In considering the effect of the state's move to no-fault divorces, the court analogized divorce to the dissolution of a business partnership.[40] That the state imports contract law into its marriage law advances a credible argument that marriage is the type of private agreement the U.S. Supreme Court should protect against retroactive impairment.

If marriage does qualify as a contract for purposes of the Contracts Clause, Proposition 8 is an unconstitutional impairment if it "renders [contractual rights] invalid, or releases or extinguishes them" or is found to "derogate from substantial contractual rights."[41] It is hard to imagine any impairment more complete than annulment of the 18,000 marriages.

Still, the state may justify impairments if it can show that it had a "significant and legitimate public purpose behind the regulation."[42] Several factors are used to determine whether this criterion is met.[43] One involves the nature of the deprivation caused by the regulation. The court is more likely to uphold temporary regulations or those made for emergency purposes, conditions certainly not present here.[44] The court is also more likely to uphold contractual modifications that are minor.[45] Proposition 8, however, is a complete and permanent destruction of the right to marry. Though California has civil unions that afford many benefits of marriage,[46] the force of Proposition 8 is powerfully evidenced by the intensity generated by both sides of the same-sex marriage controversy.

The court also considers whether the law operates in an area already regulated. While family law in general and marriage specifically are areas ordinarily within the states' domain, the Contracts Clause cases that deal with state regulation of marriage mainly concern the terms of divorce and property division.[47] Proposition 8 operates to nullify marriages altogether, which makes it qualitatively different from typical marriage regulations that usually (but not always) respond to issues of the health, welfare, or maturity of the parties or problems of their offspring.

Retroactive legislation is more readily sustained if the behavior regulated serves the general public welfare as opposed to benefiting special interests.[48] While it may be argued that Proposition 8 applies a general rule of opposite-sex marriage to everyone, the reality is that it disadvantages only homosexuals, a small segment of

the population, much like the small number of companies targeted by the pension-fund regulation in *Allied Structural Steel v. Spannaus*.[49]

As for the element of a "significant" government interest, it is difficult to identify exactly the state purpose served by the same-sex marriage bar. As discussed more fully below,[50] whatever societal benefits that accrue to opposite-sex marriages may well also accrue to same-sex marriages, and there is no empirical evidence that same-sex marriage causes any tangible, direct injury to anyone. Any legitimizing effect of same-sex marriage is wholly psychological damage, not tangible.

One factor that appears to raise greater obstacles for the opponents of Proposition 8 concerns the legitimate expectations of the contracting parties who "are unlikely to expect that state law will remain entirely static. Thus, a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement."[51] It may be difficult for the Proposition 8 challengers to demonstrate they reasonably relied on continued legality of same-sex marriage. Even as the *In re Marriage* challenge was in front of the California courts, the Yes on 8 campaign worked to get Proposition 8 on the ballot, thus threatening the permanency of a ruling in favor of same-sex marriages. Still, this single factor should not be held to outweigh the larger number of others that generally point in the opposite direction.

In sum, while Proposition 8's challengers may not easily persuade the court that same-sex marriage is a contract for purposes of the Contracts Clause, if they do, it is quite clear that Proposition 8 is an impairment. Though marriage plainly falls within the ambit of traditional state police power, the view that there is a "significant and legitimate public purpose" at stake may well be found wanting: there is no evidence of tangible harm from same-sex marriage, yet nullifying marriages results in the permanent revocation of "one of the 'basic civil rights of man.'"[52]

The Due Process Clause

The Due Process Clause of the Fourteenth Amendment, which has been held to prohibit interference with past and future contracts[53] as well as retroactive legislation in general, may be used against the retroactivity of Proposition 8. The U.S. Supreme Court will not strike down all laws with retroactive effect, but "[i]t does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively."[54] In general, "[r]etroactivity is disfavored in the law," because retroactive statutes "can deprive citizens of legitimate expectations and upset settled transactions."[55] Such laws must have "a legitimate legislative purpose furthered by rational means." The retroactivity may not constitute what is sometimes described as an "arbitrary action" that causes sufficient "surprise" to warrant invalidation.[56]

DOI: 10.2202/1944-4370.1017

The Supreme Court has only infrequently ruled against the constitutionality of either federal or state laws because of their retroactive effect, especially in respect to economic legislation since the *Lochner* era.[57] Still, as Justice Kennedy noted within the past decade in joining four other members of the court to invalidate a statute with retroactive effect,[58] even for economic regulations, the court's "decisions treat due process challenges based on the retroactive character of the statutes in question as serious and meritorious, thus confirming the vitality of our legal tradition's disfavor of retroactive economic legislation."[59]

Indeed, there is good reason to believe that the due process challenge to Proposition 8 might fare better than most other types of claims. As will be discussed shortly, the right to marry is a fundamental civil liberty of the type classically distinguished from purely economic legislation.[60] No Supreme Court ruling has examined a state law retroactively revoking civil liberties. "Especially because the Court's decisions reflect its 'recognition that retroactive lawmaking is a particular concern for the courts because of the legislative "tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals,'"'[61] the court may be considerably more willing to weigh the benefits and burdens of withdrawing the right to same-sex marriage.

In addition to the narrower issue of retroactivity, Proposition 8 may be challenged as entirely invalid under the Due Process Clause. In "reaffirming the fundamental character of the right to marry" in *Zablocki v. Redhail*, the U.S. Supreme Court held that it would uphold a statute impairing the right to marry only when "it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[62] *Zablocki* overturned a statute preventing marriage unless the applicant could show compliance with certain child support obligations.[63] The court distinguished an earlier case, *Califano v. Jobst*, which upheld a law reducing certain social security benefits upon marriage, because of inadequate "directness and substantiality of the interference with the freedom to marry."[64] The statute in *Jobst* did not make marriage "practically impossible" as it did in *Zablocki*.[65]

To uphold the statute, the government must show that Proposition 8 is "closely tailored to effectuate" "sufficiently important state interests." But whatever societal benefits accrue from opposite-sex marriages may also result from same-sex marriages, so their prohibition may actually harm the general public welfare. Moreover, there is no empirical evidence that same-sex marriage causes any tangible, direct injury to anyone.[66] This lack of data or other forms of proof tends to refute a major argument for banning gay marriage: that it undermines the institution of marriage. Without hard evidence that banning gay marriage actually discourages opposite-sex marriage, the ban seems premature. Another argument is that same-sex marriage may help to legitimize homosexual conduct considered immoral by

some. But that damage is wholly psychological, not tangible, and might well be given little weight at most.

Proposition 8 severs—permanently and completely—"one of the 'basic civil rights of man'"[67] for many couples. While the *Zablocki* statute made it "practically impossible" for some to wed, Proposition 8 makes it *actually impossible* for a large class of people to marry. A serious argument can be made that the total and permanent revocation of a historically fundamental right for a minority class of people in order to serve a distinctly insubstantial state interest may cause the Supreme Court to hold that Proposition 8 violates the Fourteenth Amendment of the U.S. Constitution. Consequently, the California Supreme Court should avoid these potential constitutional difficulties by interpreting Proposition 8 not to be retroactive.

Notes

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

[2] California General Election, Tuesday, November 4, 2008, Voter Information Guide at 128.

[3] Jessica Garrison and Maura Dolan, "Jerry Brown Asks California Supreme Court to Void Gay-Marriage Ban," *Los Angeles Times*, December 20, 2008, <http://www.latimes.com/news/local/crime/la-me-gay-marriage20-2008dec20,0,6948014.story>.

[4] The petitions were all filed directly with the California Supreme Court under its original jurisdiction "in proceedings for extraordinary relief in the nature of mandamus," which the court will exercise for matters of "great public importance." Cal. Const. art. VI, § 10; Raven v. Deukmejian 52 Cal. 3d 336, 340 (1990).

[5] Strauss v. Horton, S168047, Amended Petition for Writ of Mandate at 14 (Nov. 5, 2008).

[6] Cal. Const. art. XVIII, § 1. Specifically, petitions for amendment need a number of signatures totaling at least eight percent of the number of votes in the previous gubernatorial election. *Id.* at art. II, § 8.

[7] Petition for Writ of Mandate, San Francisco v. Horton, S168078 (Cal. Nov. 5, 2008); Immediate Stay Request, Tyler v. California, S168066 (Cal. Nov. 5, 2008); Amended Petition for Writ of Mandate, Strauss v. Horton, S168047 (Cal. Nov. 5, 2008).

[8] Petition for Writ of Mandate, Asian Pacific Am. Legal Ctr. v. Horton, S168281 (Cal. Nov. 14, 2008); Petition for Writ of Mandate, Equal Rights Advocates and Cal. Women's Law Ctr. v. Horton, S168302 (Cal. Nov. 17, 2008); Petition for Writ of Mandate or Prohibition, Cal. Council of Churches v. Horton, S158332 (Cal. Nov 17, 2008).

[9] *In re* Marriage Cases, 183 P.3d 384, 400, 443-44 (Cal. 2008).

[10] Answer Brief in Response to Petition for Extraordinary Relief at 78, Strauss v. Horton, S168047 (Cal. Dec. 19, 2008).

[11] The government brief does not address the issue of whether fundamental rights can be altered by revision.

[12] Interveners' Opposition Brief at 23, Strauss v. Horton, S168047 (Cal. Dec. 19, 2008).

[13] Interveners' Answer to Amicus Curiae Briefs and Supplemental Response to Pages 75–90 of the attorney general's answer brief at 2–16, Strauss v. Horton, S168047 (Cal. Jan. 21, 2009).

DOI: 10.2202/1944-4370.1017

[14] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994); *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1208 (1988). The Takings Clause is another protection against retroactive legislation. *Landgraf*, 511 U.S. at 266. The Takings Clause has some kinship with retroactive analysis under the Due Process Clause. Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).

[15] Landgraf, 511 U.S. at 268 n.20.

[16] AETNA v. Industrial Accident Comm'n, 182 P.2d 159, 161 (Cal. Sup. Ct. 1947).

[17] AETNA, 182 P.2d at 161; Knight v. Superior Court 128 Cal. App. 4th 14, 23 (2005).

[18] This is the position of the government. Strauss v. Horton, S168047, Government Answer Brief at 63 (Dec. 19, 2008); *see also* Evangelatos v. Superior Court, 44 Cal.3d 1188, 1209 (1988) (requiring an explicit statement of retroactive intent in voter materials because retroactivity was not addressed in the text of a proposition). The position of interveners is that the proposition plainly states that same-sex marriages are not "valid" or "recognized," and it does so without reference to when or where those marriages were formed. Strauss v. Horton, S168047, Interveners Opposition Brief at 37 (Dec. 19, 2008).

[19] Knight v. Superior Court, 128 Cal. App. 4th, 14, 23 (2005).

[20] *In re* Marriage Cases, 183 P.3d 384, 408 (Cal. 2008).

[21] *In re* Marriage Cases, 183 P.3d at 408–09. This change was made for other reasons. *Id.*

[22] California Family Code § 300; *In re Marriage Cases*, 183 P.3d at 409.

[23] California Family Code § 425.

[24] California General Election, Tuesday, November 4, 2008, Voter Information Guide at 57.

[25] Statement of the Vote, November 4, 2008, General Election, California Secretary of State Debra Bowen, available at <http://www.sos.ca.gov/elections/sov/2008_general/contents.htm>.

[26] Evangelatos v. Superior Court, 44 Cal.3d 1188, 1209 (1988).

[27] People v. Romero, 13 Cal. 4th 497, 509 (1996) (internal citations omitted).

[28] *Id.*

[29] People v. Hernandez, 30 Cal. 4th 835, 868 (2003) (internal citations omitted).

[30] *Hernandez*, for example, avoided a potential 8th Amendment challenge in interpreting a penal statute. *Hernandez*, 30 Cal. 4th 868.

[31] U.S. Const. art. I, § 10, cl. 1.

[32] Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 600–01 (1819).

[33] Dartmouth College, 17 U.S. at 600–01.

[34] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 429 n.8 (1934).

[35] Andrews v. Andrews, 188 U.S. 14, 30 (1903).

[36] Moffitt v. Kelly, 218 U.S. 400, 404–05 (1910).

[37] Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938).

[38] California Family Code § 300.

[39] Marvin v. Marvin, 18 Cal. 3d 660 (1976).

[40] *In re* Marriage of Cary, 34 Cal. App. 3d 345 (1973).

[41] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 431 (1934).

[42] Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400, 411–12 (1983).

[43] *See* Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978); Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400 (1983).

[44] *See Allied Structural*, 438 U.S. at 242 (distinguishing an earlier case because it was a review of an emergency regulation).

[45] *See id.*

[46] *In re* Marriage Cases, 183 P.3d 384, 416–17 n.24 (2008).

[47] *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 429 n.8 (1934).

[48] Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400, 412 (1983).

[49] *Allied Structural* invalidated a Minnesota law retroactively modifying a pension program, which also required immediate payouts for employers that had closed their Minnesota offices. *Allied Structural*, 438 U.S. at 247–48.

[50] *See infra* Section III.B.

[51] U.S. Trust v. New Jersey, 431 U.S. 1, 19 n.17 (1977).

[52] Loving v. Virgina, 388 U.S. 1, 12 (1967) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[53] For a period it essentially superseded the Contracts Clause, though now both clauses have independent vitality. Erwin Chemerinsky, *Constitutional Law Principles and Policies* 634 (3rd ed. 2006).

[54] Usery v. Turner Elkhorn Mining, 428 U.S. 1, 16 (1976).

[55] General Motors v. Romein, 503 U.S. 181, 191 (1991).

[56] Welch v. Henry, 305 U.S. 134, 150 (1938).

[57] *Compare, e.g.*, Untermyer v. Anderson, 276 U.S. 440, 445 (1928) (citing Blodgett v. Holden 275 U.S. 142, 147 (1927) (plurality)); Nichols v. Coolidge, 274 U.S. 531, 542–43 (1927), *with* United States v. Hemme, 476 U.S. 558, 567–68 (1986).

[58] The four justices declined to address the due process claim because they concluded that the statute violated the Takings Clause.

[59] Eastern Enterprises v. Apfel, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring).

[60] United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938). This is not to say that same-sex marriage is necessarily a constitutionally guaranteed right. The point here is that even without so holding, the retroactive denial of a right closely related to those recognized as "fundamental" under the Due Process Clause should require greater justification from the government than, say, tax legislation.

[61] Eastern Enterprises, 524 U.S. at 548 (Kennedy, J., concurring) (citing *Landgraf v. USI Film Products,* 511 U.S. 244, 266 (1994)).

[62] Zablocki v. Redhail, 434 U.S. 374, 386, 388 (1978).

[63] *Id.* at 389 (1978).

[64] Califano v. Jobst, 434 U.S. 47 (1977); Zablocki v. Redhail, 434 U.S. 374, 387 n.12 (1978).

[65] Zablocki, 434 U.S. at 387 n.12.

[66] *See generally* Jesse H. Choper & John C. Yoo, "Can the Government Prohibit Gay Marriage?", 50 *S. Tex. L. Rev*. 32–35 (2008).

[67] Loving v. Virgina, 388 U.S. 1, 12 (1967) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

DOI: 10.2202/1944-4370.1017