

S168047/S168066/S168078

IN THE SUPREME COURT OF CALIFORNIA

KAREN L. STRAUSS, et al., Petitioners,

v.

MARK D. HORTON, et al., State Registrar of Vital Statistics, etc.,
Respondents; DENNIS HOLLINGSWORTH et al., Intervenors.

ROBIN TYLER et al., Petitioners,

v.

STATE OF CALIFORNIA et al., Respondents;
DENNIS HOLLINGSWORTH et al., Intervenors.

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners,

v.

MARK B. HORTON, et al., State Registrar of Vital Statistics, etc.,
Respondents; DENNIS HOLLINGSWORTH et al., Intervenors.

**APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF
AND PROPOSED BRIEF OF LEGISLATIVE *AMICI CURIAE*
IN SUPPORT OF PETITIONERS STRAUSS, ET AL.**

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**APPLICATION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF
PETITIONERS AND STATEMENT OF INTEREST OF *AMICI
CURIAE***

Pursuant to California Rules of Court, rule 8.520, subdivision (f), Amici Curiae current and former California Legislators hereby respectfully apply for leave to file an amici curiae brief in support of the Petitioners. The proposed amici curiae brief is attached to this Application. The proposed Amici are familiar with the questions presented by this case. They believe that there is a need for further argument, as discussed below.

STATEMENTS OF INTEREST

Proposed Amici are sixty-five members and former members of the California State Legislature, including Senate President Pro Tempore Darrell Steinberg, past Senate President Pro Tempore Don Perata, Speaker of the Assembly Karen Bass, Assembly Speaker Emeritus Fabian Nunez, and Senators Elaine Alquist, Ron Calderon, Gilbert Cedillo, Ellen Corbett, Mark DeSaulnier, Loni Hancock, Christine Kehoe, Sheila Kuehl, Mark Leno, Alan S. Lowenthal, Jenny Oropeza, Alex Padilla, Fran Pavley, Mark Ridley-Thomas, Gloria Romero, Joe Simitian, Patricia Wiggins, and Lois Wolk, and Assemblymembers Tom Ammiano, Jim Beall, Jr., Patty Berg, Marty Block, Bob Blumenfield, Julia Brownley, Anna M. Caballero, Charles Calderon, Wesley Chesbro, Joe Coto, Mike Davis, Kevin de Leon, Mike Eng, Noreen Evans, Mike Feuer, Warren T. Furutani, Felipe Fuentes,

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The issues addressed by this brief and the petition lie at the heart of California’s constitutional structure. Upholding and preserving this structure and the constitutionally-assigned responsibilities and roles of this Court, the Legislature, and the People, is of particular interest to the Legislative Amici given their sworn duty to uphold California’s Constitution and the constitutional rights of their constituents.

In addition, many of the Legislative Amici were part of a majority of California legislators that passed the Religious Freedom and Civil Marriage Protection Act, Assembly Bill 43, in the Legislature’s 2007-2008 regular session. Assembly Bill 43 recognized the importance of the institution of civil marriage in promoting stable relationships and protecting the civil rights of individuals in those relationships, as well as their children or dependents and members of their extended families. By eliminating gender-specific language limiting marriage to a civil contract between a

man and a woman, Assembly Bill 43 intended to extend to same-sex couples the fundamental right of marriage. Simply put, it sought to “end the pernicious practice of marriage discrimination in California.” (Assem. Bill No. 43 (2007-2008 Reg. Sess.) § 3(l); see also Assem. Bill No. 849 (2005-2006 Reg. Sess.) § 3(k).)

California’s Legislators have also taken up issues that are directly relevant to those currently before the Court, including Senate Resolution No. 7, which opposes Proposition 8 because it is an improper revision, not an amendment, of the California Constitution (see Sen. Res. No. 7 (2009-2010 Reg. Sess.), at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sr_7_bill_20081218_amended_sen_v98.pdf [as of Jan. 15, 2009]), and House Resolution No. 5, which would find that “the Assembly opposes Proposition 8 because it is an improper revision, not an amendment, of the California Constitution and was not enacted according to the procedures required by Article XVIII of the California Constitution.” (see Assem. Res. No. 5 (2009-2010 Reg. Sess.), at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/hr_5_bill_20081202_introduced.pdf [as of Jan. 15, 2009].)

Accordingly, through their involvement in the legislative process and their active support of relevant bills and resolutions, the Legislative Amici are familiar with the issues addressed by the Petitions, and they

support the position and arguments set forth by the Petitioners. As discussed below, the Legislative Amici urge the Court to preserve the fundamental constitutional structure of government set forth by the framers of California's Constitution, and to preserve the fundamental right to equal protection of the law for all Californians.

The Legislative Amici are familiar with the issues before the Court. Legislative Amici believe that further briefing is necessary to address the matters described above, which are not fully addressed by the parties' briefs. Specifically, Legislative Amici will set forth, and will explain:

1. The significance of the fact that the People entrusted the Legislature with the responsibility to initiate revision of the California Constitution; and

2. How Proposition 8 makes far reaching changes in California's governmental plan and underlying constitutional principles, and thus revises the Constitution without undergoing the constitutionally mandated process for such revisions.

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For the foregoing reasons, *Amici Curiae* current and former
California legislators respectfully request leave to file the attached brief.

Dated: January 15, 2009

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By:  _____
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Table of Contents

| | <u>Page(s)</u> |
|---|----------------|
| I. INTRODUCTION | 1 |
| II. LEGISLATORS' INTEREST | 3 |
| III. THE PEOPLE ENTRUSTED THE LEGISLATURE WITH THE RESPONSIBILITY TO INITIATE REVISION OF THE CONSTITUTION | 7 |
| A. The Constitutions of 1849 And 1879 Prohibited Any Change—Whether By Amendment Or Revision—That Was Not Initiated By The Legislature | 8 |
| B. More Direct Participation By The People In Changing The Constitution Did Not Alter The Legislature's Duty To Propose Any Revisions To The Constitution | 10 |
| 1. The 1879 Constitution Required The Legislature To Initiate Amendments Or Revisions To The Constitution, Despite Widespread Distrust In The Political Process | 10 |
| 2. The 1911 Changes To The Constitution Preserved The Legislature's Responsibility To Propose Revisions In The Face Of Severe Discontent With Government | 11 |
| C. The 1962 Amendment Allowed The People's Direct Vote On A Revision Proposed By The Legislature, But The Revision Still Had To Be Proposed By The Legislature | 14 |
| D. The Legislature's Duty To Initiate The Process Of Constitutional Revision Is Supported By Its Unique Deliberative Role And Capabilities | 15 |
| IV. PROPOSITION 8 MAKES FAR-REACHING CHANGES IN CALIFORNIA'S GOVERNMENTAL PLAN AND UNDERLYING CONSTITUTIONAL PRINCIPLES, AND IS THEREFORE A REVISION | 20 |
| A. This Court Has Defined An "Amendment" As A Change "Within The Lines Of The Original Instrument," And A "Revision" As A Change To The Constitution's "Underlying Principles" | 20 |

| | | |
|-----|--|----|
| B. | Proposition 8 Improperly Restricts The Essential Role Of The Judiciary And The Rights Guaranteed To All People By The Constitution..... | 22 |
| 1. | Proposition 8 Prevents The Judiciary From Exercising Its Responsibility To Interpret The Equal Protection Clause | 23 |
| 2. | Proposition 8 Proponents’ Arguments Misapprehend The Danger In Denying The Court Its Constitutional Role..... | 26 |
| V. | PROPOSITION 8 IMPERMISSIBLY CHANGES THE CONSTITUTIONAL FRAMEWORK WITHOUT UNDERGOING THE CONSTITUTIONALLY MANDATED PROCESS FOR SUCH REVISIONS | 31 |
| VI. | CONCLUSION..... | 32 |

Table of Authorities

| | <u>Page(s)</u> |
|--|----------------|
| Cases | |
| <i>Amador Valley Joint Union High School Dist. v. State Bd. of Equalization</i> (1978) 22 Cal.3d 208..... | 21, 31 |
| <i>Bixby v. Pierno</i> (1971) 4 Cal.3d 130..... | 22 |
| <i>Californians for an Open Primary v. McPherson</i> (2006) 38 Cal.4th 735..... | 16 |
| <i>Castro v. California</i> (1970) 2 Cal.3d 223..... | 23 |
| <i>Cruzan v. Director, Mo. Dep't. of Health</i> (1990) 497 U.S. 261..... | 18 |
| <i>Davis v. Passman</i> (1979) 442 U.S. 228..... | 22 |
| <i>Fujii v. State</i> (1952) 38 Cal.2d 718..... | 22 |
| <i>In re Lance W.</i> (1985) 37 Cal.3d 873..... | 30 |
| <i>In re Marriage Cases</i> (2008) 43 Cal.4th 757..... | passim |
| <i>Legislature v. Eu</i> (1991) 54 Cal.3d 492..... | 17 |
| <i>Livermore v. Waite</i> (1894) 102 Cal.113..... | 20, 21, 31 |
| <i>Lucas v. Forty-Fourth Gen. Assem. of Colo.</i> (1964) 377 U.S. 713..... | 26 |
| <i>McFadden v. Jordan</i> (1948) 32 Cal.2d 330..... | 14, 19 |
| <i>People v. Frierson</i> (1979) 25 Cal.3d 142..... | 27, 28 |
| <i>Perez v. Sharp</i> (1948) 32 Cal.2d 711..... | 23 |
| <i>Raven v. Deukmejian</i> (1990) 52 Cal.3d 336..... | 14, 23, 31 |

| | |
|--|----|
| <i>Roper v. Simmons</i> (2005) 543 U.S. 551 | 28 |
| <i>West Virginia State Board of Education v. Barnette</i> (1943) 319 U.S. 624 | 27 |

Constitutional Provisions

| | |
|---|----|
| Cal. Const. of 1849, art. X, § 1 | 8 |
| Cal. Const. of 1879, art XVIII, § 1 | 8 |
| Cal. Const., art. I | 25 |
| Cal. Const., art. I, § 24 | 24 |
| Cal. Const., art. I, § 7 | 19 |
| Cal. Const., art. XVIII, §§ 2-3 | 15 |

Rules

| | |
|--|---|
| Cal. Rules of Court, rule 8.520(f) | 3 |
|--|---|

Legislative Materials

| | |
|--|----|
| Assem. Bill No. 43 (2007-2008 Reg. Sess.) § 3(l) | 5 |
| Assem. Bill No. 849 (2005-2006 Reg. Sess.) § 3(k) | 5 |
| Assem. Const. Amend. No. 14, Stats. 1961 (1961 Reg. Sess.)..... | 15 |
| Assem. Interim Com., Rep. on Const. Amends. to the Cal. Legislature (Nov. 15, 1960) | 17 |
| Assem. Res. No. 5 (2009-2010 Reg. Sess.) | 6 |
| Citizen’s Legis. Advisory Com., Final Rep. and Recommendations to the Joint Com. on Legislative Organization (Mar. 9, 1961) | 16 |
| Sen. Const. Amend. No. 22, Stats. 1911 (1911 Reg. Sess.) | 13 |
| Sen. Res. No. 7 (2009-2010 Reg. Sess.) | 5 |

Other Authorities

| | |
|---|------------|
| Ernest A. Engelbert & John G. Gunnell, State Constitutional Revision in California: An Analysis Prepared for The Citizen’s Legislative Advisory Commission (Jan. 1961)..... | 14, 15, 16 |
| Hiram W. Johnson, Governor of Cal., Inaugural Address (Jan. 3, 1911)... | 13 |

| | |
|--|--------|
| Manheim & Howard, <i>A Structural Theory of the Initiative Power In California</i> (1998) 31 Loyola L.A. L.Rev. 1165 | 12 |
| Mosk, <i>Raven and Revision</i> (1991) 25 U.C. Davis L.Rev. 1 | 24, 25 |
| Mowry, <i>The California Progressives</i> (1951) | 12 |
| Scheiber, <i>Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution</i> (1989) 17 Hastings Const. L.Q. 35 | 10, 11 |
| Swisher, <i>Motivation and Political Technique in the California Constitutional Convention, 1878-79</i> (1930) | 10 |
| Thomas Jefferson, <i>First Inaugural Address</i> (Mar. 4, 1801)..... | 19 |

I. INTRODUCTION

Proposition 8 breaks a basic promise of California's Constitution—that all Californians must be treated equally under the law—by depriving a small minority of Californians of a fundamental constitutional right, and by preventing the courts from exercising their constitutional responsibility to protect against such an abuse. Proposition 8 is void because it improperly seeks to make far-reaching changes to our system of government and its underlying principles without first having undergone the constitutionally-required scrutiny of legislative debate, deliberation and approval.

The history of California's Constitution reflects its framers' core belief that fundamental changes to the Constitution, and to California's government, should not be based on a majority vote of the electorate alone. Instead, the framers of California's Constitution and architects of California's government—the People themselves—recognized that fundamental changes to the state's Constitution and government should require the participation of both the People's elected representatives in the Legislature, and the People by popular vote or through constitutional convention.

Throughout the nearly 160 years of California's Constitutional history, the Legislature has been assigned the sole responsibility for initiating any fundamental change to the structure of California's Constitution and its government. Even during periods of great popular

discontent with California's government and the Legislature in particular, when the People revisited their constitutional structure, they nevertheless kept with the Legislature the duty and responsibility to commence any fundamental change in the Constitution through the revision process. In 1962, the People again changed the process for revising the Constitution, and again reserved for the Legislature the responsibility to begin any revision to the Constitution. In so doing, the People recognized the unique deliberative role of the Legislature, and the advantages of using the tools of bicameralism, legislative debate, investigation, study and compromise to carefully assess fundamental changes to the Constitution. Accordingly, it is, and has always been, the Legislature's role to initiate fundamental changes to California's Constitution.

Proposition 8 works two such fundamental changes to California's Constitution and our system of government. First, Proposition 8 breaks the Constitution's promise of equal protection to all Californians by depriving a disfavored minority—and only that minority—of a fundamental constitutional right based on a simple majority vote. Second, it strips the Court of its core constitutional responsibility to protect the rights of a protected minority of Californians.

Because Proposition 8 changes underlying principles upon which the California Constitution is based, and because it effects far-reaching changes

in California's basic governmental plan, it is a revision—not an amendment—to the Constitution. Because Proposition 8 sidestepped the Legislature's constitutional role of debating, deliberating on, and commencing this process of revising the Constitution, Proposition 8 is invalid.

II. LEGISLATORS' INTEREST

Pursuant to California Rule of Court 8.520(f) and this Court's November 19, 2008 Order, amici curiae respectfully submit this brief in support of Petitioners in the above-referenced original writ proceeding. Amici are sixty-five members and former members of the California State Legislature, including Senate President Pro Tempore Darrell Steinberg, past Senate President Pro Tempore Don Perata, Speaker of the Assembly Karen Bass, Assembly Speaker Emeritus Fabian Nunez, and Senators Elaine Alquist, Ron Calderon, Gilbert Cedillo, Ellen Corbett, Mark DeSaulnier, Loni Hancock, Christine Kehoe, Sheila Kuehl, Mark Leno, Alan S. Lowenthal, Jenny Oropeza, Alex Padilla, Fran Pavley, Mark Ridley-Thomas, Gloria Romero, Joe Simitian, Patricia Wiggins, and Lois Wolk, and Assemblymembers Tom Ammiano, Jim Beall, Jr., Patty Berg, Marty Block, Bob Blumenfield, Julia Brownley, Anna M. Caballero, Charles Calderon, Wesley Chesbro, Joe Coto, Mike Davis, Kevin de Leon, Mike Eng, Noreen Evans, Mike Feuer, Warren T. Furutani, Felipe Fuentes, Mary

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The issues addressed by this brief and the petition lie at the heart of California’s constitutional structure. Upholding and preserving this structure and the constitutionally-assigned responsibilities and roles of this Court, the Legislature, and the People, is of particular interest to the Legislative Amici given their role in upholding California’s Constitution and the constitutional rights of their constituents, as well as their constitutionally assigned responsibility to protect our charter against imprudent revision.

In addition, many of the Legislative Amici were part of a majority of California legislators that passed the Religious Freedom and Civil Marriage Protection Act, Assembly Bill 43, in the Legislature’s 2007-2008 regular session. Assembly Bill 43 recognized the importance of the institution of civil marriage in promoting stable relationships and protecting the civil rights of individuals in those relationships, as well as their children or

dependents and members of their extended families. By eliminating gender-specific language limiting marriage to a civil contract between a man and a woman, Assembly Bill 43 intended to extend to same-sex couples the fundamental right of marriage. Simply put, it sought to “end the pernicious practice of marriage discrimination in California.” (Assem. Bill No. 43 3(l) (2007-2008 Reg. Sess.) § 3(l); see also Assem. Bill No. 849 (2005-2006 Reg. Sess.) § 3(k).)

California’s Legislators have also taken up issues that are directly relevant to those currently before the Court.

First, on December 18, 2008, the California Senate passed Senate Resolution No. 7, which opposes Proposition 8 because it is an improper revision, not an amendment, of the California Constitution. (See Sen. Res. No. 7 (2009-2010 Reg. Sess.), at <http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sr_7_bill_20081218_amended_sen_v98.pdf> [as of Jan. 15, 2009].) In passing Senate Resolution No. 7, the Senate made official findings regarding Proposition 8 and matters that are currently at issue before the Court in this case. The Senate resolved, in part, as follows:

WHEREAS, Proposition 8 purports to amend the California Constitution to eliminate a fundamental right only for a particular minority group on the basis of a suspect classification, while permitting the majority to retain that fundamental right; and

WHEREAS, Proposition 8 would severely undermine the foundational principle of equal protection by establishing that any disfavored minority can be targeted to have its

fundamental rights stripped away by a simple majority vote;
and

WHEREAS, Proposition 8 would substantially alter our basic governmental plan by eliminating equal protection as a structural check on the exercise of majority power and by permitting majorities to force groups defined by suspect classifications to fight to protect their fundamental rights under the California Constitution at every election; and

WHEREAS, Proposition 8 would violate the separation of powers doctrine by stripping courts of their core, constitutionally mandated function and traditional authority to enforce equal protection to prevent government discrimination against minority groups and the selective denial of fundamental rights on suspect bases; and

WHEREAS Proposition 8 would also violate the separation of power doctrine by intruding on the vital role of the Legislature in vetting revisions to the California Constitution and by sidestepping the constitutionally required rigors of the legislative process; now, therefore, be it

Resolved by the Senate of the State of California, That the Senate opposes Proposition 8 because it is an improper revision, not an amendment, of the California Constitution and was not enacted according to the procedures required by Article XVIII of the California Constitution. . . .

(Ibid.)

Second, a parallel Resolution with essentially identical findings is pending in the Assembly. House Resolution No. 5 would also find, on the same grounds that the Senate found, that Proposition 8 “is an improper revision, not an amendment, of the California Constitution and was not enacted according to the procedures required by Article XVIII of the California Constitution” (Assem. Res. No. 5 (2009-2010 Reg. Sess.),

at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/hr_5_bill_20081202_introduced.pdf> [as of Jan. 15, 2009].)

Accordingly, through their involvement in the legislative process and their active support of relevant bills and resolutions, the Legislative Amici are familiar with the issues addressed by the Petitions, and they support the position and arguments set forth by the Petitioners. As discussed below, the Legislative Amici urge the Court to preserve the fundamental constitutional structure of government set forth by the framers of California's Constitution by preserving the right to equal protection of the law and the judiciary's role of protecting that right for all Californians.

III. THE PEOPLE ENTRUSTED THE LEGISLATURE WITH THE RESPONSIBILITY TO INITIATE REVISION OF THE CONSTITUTION

Since the beginning of California's statehood, California's Constitution has specified that the duty to initiate revisions to the Constitution is entrusted to the Legislature. Over the course of nearly 160 years and three relevant changes to the Constitution—in 1879, 1911, and 1962—the People of California have entrusted the Legislature with this responsibility. The People's decision to entrust the power to initiate constitutional revisions with the Legislature reflects the People's determination that decisions of such magnitude must involve *both* the sovereign voice of the People—whether expressed through a popular vote or a constitutional convention—and the Legislature's ability to deliberate,

debate, and hold hearings regarding the inevitable tradeoffs involved in a revision between different constitutional values and concerns.

By sidestepping the crucial test of legislative debate, deliberation, and analysis, the proponents of Proposition 8 tried to undercut the will of the People as articulated over many years in California's Constitution.

A. The Constitutions of 1849 And 1879 Prohibited Any Change—Whether By Amendment Or Revision—That Was Not Initiated By The Legislature

From its beginning, the California Constitution has provided for the powers of constitutional revision and amendment. Both article X of the Constitution of 1849 and article XVIII of the Constitution of 1879 specified that the Legislature had the sole power to initiate amendments and revisions to the Constitution. (Cal. Const. of 1849, art. X, § 1; Cal. Const. of 1879, art XVIII, § 1.)¹ Under both of these Constitutions, the Legislature began

¹ The Constitution of 1849 set out the following framework for amendment and revision:

Sec. 1. Any amendment . . . may be proposed in the Senate or Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendments, shall be . . . referred to the Legislature then next to be chosen And if, in the Legislature next chosen . . . shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment . . . to the people

Sec. 2. And if, at any time two-thirds of the Senate and Assembly shall think it necessary to revise and change this

[Footnote continued on next page]

the process of amendment or revision by a two-thirds vote in favor of the change, followed by ratification by a majority of voters (in the case of an amendment) or by a constitutional convention (in the case of a revision). (*Ibid.*) But no change to the Constitution, whether by amendment or revision, could be made by popular vote alone.

[Footnote continued from previous page]

entire Constitution, they shall recommend to the electors, at the next election for members of the Legislature, to vote for or against the convention; and if it shall appear that a majority of the electors voting at such election have voted in favor of calling a convention, the Legislature shall, at its next session, provide by law for calling a convention

(Cal. Const of 1849, art. X, §§ 1-2.)

The Constitution of 1879 provided:

Sec. 1. Any amendment . . . may be proposed in the senate or assembly, and if two-thirds of all the members elected to each of the two houses shall vote in favor thereof, such proposed amendment . . . shall be entered in their journals . . . and it shall be the duty of the legislature to submit such proposed amendment . . . to the people

Sec. 2. Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to revise this constitution, they shall recommend to the electors to vote at the next general election for or against a convention for that purpose, and if a majority of the electors voting at such election on the proposition for a convention shall vote in favor thereof, the legislature shall, at its next session, provide by law for calling the same.

(Cal. Const. of 1879, art. XVIII, §§ 1-2.)

B. More Direct Participation By The People In Changing The Constitution Did Not Alter The Legislature's Duty To Propose Any Revisions To The Constitution

In both 1879 and 1911, the People reacted to the serious political, social, and economic discontent in California, in part by changing the Constitution to provide for a more direct popular voice in the process of amending or revising the Constitution.² Nevertheless, the People maintained in the Legislature the sole constitutional responsibility of initiating any revision to the Constitution.

1. The 1879 Constitution Required The Legislature To Initiate Amendments Or Revisions To The Constitution, Despite Widespread Distrust In The Political Process

In the 1870s, Californians suffered extensive unemployment and homelessness, aggravated by a spread of business failures, mortgage foreclosures, and bank closings. (Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution* (1989) 17 Hastings Const. L.Q. 35, 36-37 (hereafter Scheiber); see generally Swisher, *Motivation and Political Technique in the California Constitutional Convention, 1878-79* (1930) pp. 8-16.) The widespread suffering and

² Specifically, the Constitution of 1879 required each amendment proposed by the Legislature to be proposed separately to the People, and in 1911, the People provided for constitutional amendments through the initiative process.

social dislocation that resulted from these social and economic problems led to “a sense that something had gone terribly wrong with political process, rather than a concern solely with economic distress and its causes.” (Scheiber, *supra*, 17 Hastings Const. L.Q. at p. 37.) Further, the state legislature of the time was unabashedly corrupted by the influence of the Central Pacific Railroad, the giant land and cattle companies, and other corporate interests, and the state judiciary was seen as incapable of rendering impartial judgments. (See *id.* at p. 38.) Notwithstanding this severe political discontent, the 1879 Constitution provided that the Constitution could neither be amended nor revised without the Legislature initiating the process of amendment or revision.

2. The 1911 Changes To The Constitution Preserved The Legislature’s Responsibility To Propose Revisions In The Face Of Severe Discontent With Government

Similar forces led to a change in the California Constitution in 1911, after years of governance by a Legislature that was popularly believed to be unresponsive to the People and beholden to corporate interests. (See Grodin et al., *The California State Constitution: A Reference Guide* (1993) p. 16 (hereafter Grodin).) In the face of growing frustration, the People amended the Constitution to “reserve” their powers of initiative and referendum. (*Ibid.*) At the time, the Central Pacific-Southern Pacific Railroad was the largest landowner in the state, and with a near monopoly

on the state's transportation facilities, it wielded enormous economic power. (*Ibid.*) It translated this power into control over the various organs of state and local government, influencing politicians in both parties and controlling much of the state judiciary. (Mowry, *The California Progressives* (1951) pp. 12-16 (hereafter Mowry).)

As a result, "in the thirty years following adoption of the 1879 constitution, not a single bill opposed by the Southern Pacific Railroad was enacted in Sacramento." (Manheim & Howard, *A Structural Theory of the Initiative Power In California* (1998) 31 *Loyola L.A. L.Rev.* 1165, 1184, citation omitted.) Resentment of the railroad's political dominance sparked a demand for reform that ultimately coalesced around the Progressive movement. (See Grodin, *supra*, at p. 17.) In 1910, Hiram Johnson, the Progressive Republican gubernatorial candidate, won the election and sought to enact an agenda centered on dismantling the political power of the special interests. (See Mowry, *supra*, at pp. 133-135.)

The initiative, one of many measures introduced as part of the Progressive agenda, provided a means by which the People could take the act of legislating into their own hands. (See Grodin, *supra*, at p. 17.) Introduced as part of Senate Constitutional Amendment 22 on February 20, 1911, it reaffirmed that "[t]he legislative power of this state shall be vested in a senate and assembly" but reserved to the People "the power to propose

laws and amendments to the constitution . . . independent of the legislature . . .” (Sen. Const. Amend. No. 22, Stats. 1911 (1911 Reg. Sess.) ch. 22, p. 1655.) The effect of the Amendment was to “give to the electorate the power of action when desired,” and to “place in the hands of the people the means by which they may protect themselves” from a government beholden to corporate interests. (Hiram W. Johnson, Governor of Cal., Inaugural Address (Jan. 3, 1911) p. 5.)

But the 1911 Amendment is also notable for the changes it *did not* make in the Constitution. Although the 1911 Amendment originated at the peak of the Progressive movement and popular frustration with government in California, and although the People reserved the right of proposing both laws and amendments to the Constitution, the People did not alter the preexisting distinction between constitutional amendment and revision. Similarly, the People did not alter the Legislature’s exclusive role in initiating revisions to the Constitution by calling a constitutional convention.

This decision to reserve the power of amendment to themselves, but still require that the Legislature initiate any revision to the Constitution, underscores the importance of preserving the integrity of the architecture of the Constitution, and the fundamental structural protections it provides all Californians. (See, e.g., *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349-

350 (hereafter *Raven*); *McFadden v. Jordan* (1948) 32 Cal.2d 330, 347 (hereafter *McFadden*.)

C. The 1962 Amendment Allowed The People's Direct Vote On A Revision Proposed By The Legislature, But The Revision Still Had To Be Proposed By The Legislature

The Legislature's role in revising the Constitution was thoroughly examined in the early 1960s. The Legislature believed that the "study of the peoples [*sic*] basic charter should be conducted under the direction of citizens[.]" (Ernest A. Engelbert & John G. Gunnell, *State Constitutional Revision in California: An Analysis Prepared for The Citizen's Legislative Advisory Commission* (Jan. 1961) p. 100 (hereafter *Englebert*)), and therefore authorized the Citizens' Legislative Advisory Commission, a group of private citizens, to analyze the Legislature's role in the constitutional revision process. The Citizens' Commission held public hearings and published reports, in part based on scholarly analysis of constitutional history, to analyze how the Legislature could best advance constitutional reform after commentators had observed "a growing conviction among various groups in California that a constitution adopted over three quarters of a century ago warrant[ed] basic review." (*Id.* at p. 28.) The Legislature had also determined that the Constitution was "in need of a fundamental review." (*Id.* at p. 1, citation omitted.)

As a result of the work of the Citizens' Commission, Assembly Constitutional Amendment 14 (Assem. Const. Amend. No. 14, Stats. 1961

