Introduction: A Clash of Rising Powers

A century ago, the Progressive Era's enthusiasm for "experiments in government" led many states to embrace new forms of direct democracy.[1] The experiments included recall of public officials, popular referendum over acts of the legislature, and, most consequentially, the citizen's initiative process.[2] The initiative device allowed citizens to propose laws, place them on the ballot, and enact them at the polls by simple majority vote.[3] For the first time, popular majorities could bypass their representatives and directly dictate policy – an innovation that challenged long-established principles of American constitutional design. But, radical though they were, the reforms did not abolish representative institutions nor create what James Madison would call a "pure democracy."[4] Instead, the initiative, referendum, and recall were grafted into state constitutions alongside the legislature, executive, and courts to create a new, hybrid constitutional system, part representative, part direct.[5] With these

[1] See Elihu Root, "Experiments in Government and the Essentials of the Constitution," in Robert Bacon and James Brown Scott, eds. *Addresses on Government and Citizenship* (Cambridge: Harvard University Press, 1916), 77–97.

[2] The recall allows citizens to circulate a petition to force an election to remove an official from office before the normal expiration of his or her term. The popular referendum allows citizens to challenge laws recently enacted by the government. After the law is enacted, citizens have a limited amount of time to circulate petitions to place it on the ballot. If voters defeat the law, it is void. For further descriptions of direct democracy devices such as referendum and recall, see e.g., David Butler and Austin Ranney, eds., *Referendums: A Comparative Study of Practice and Theory* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978); Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall* (Cambridge: Harvard University Press, 1989), 125–56.

[3] Specific rules for qualifying and adopting initiatives vary from state to state. For a discussion, see Chapter 1.

[4] James Madison, *Federalist* 10 in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, Clinton Rossiter, ed. (New York: Signet Classic, 2003), 76.

[5] For other discussions of this system as a "hybrid," see, e.g., Elizabeth Garrett, "Hybrid Democracy," 73 GEO. WASH. L. REV. 1096 (2005); Shaun Bowler and Amihai Glazer, "Hybrid

experiments in place, it remained to be seen how they would work – how direct democracy and representative institutions would interact in different states, under various circumstances, and over time.

This book analyzes the relationship between two of these powers – the initiative process and the courts – over the past century. This relationship is compelling because the two forces are near opposites. Whereas the initiative process is designed to translate the majority's preferences into law, judicial review is designed in part to counter majorities. Of course, judicial review is not a general power of *veto*; courts can strike down the will of the people only if it is unconstitutional, not if it is merely unwise. But, if they choose, courts can exercise the power expansively, in ways that aggressively counter the majority will.

Moreover, courts are often the only effective institutional check on citizen-initiated laws. The reformers designed the initiative process to bypass the legislature and the executive, but they could not make it bypass the courts. From the earliest days of the Republic, courts have asserted the power to strike down any state law that conflicts with state constitutions or the Constitution of the United States. Because this power extends to laws enacted directly by the people, courts provide a broad institutional limitation on the people's rule.

Although judicial oversight of initiatives guards against the dangers of pure majority rule, it also creates an extreme form of what legal scholar Alexander Bickel called the "counter-majoritarian difficulty."[6] Normally, a court exercising judicial review overturns the decisions of another branch of the government, but, when it strikes down an initiative, it overrides the people themselves. With the stroke of a pen, a few judges can thwart the will of thousands or even millions of voters. To cite one example, in the late 1990s, citizens in Washington State, tiring of high taxes, used the initiative process to impose limits on state taxes and fees. The measure won a decisive victory, with nearly one million citizens voting to enact it. But, shortly after the election, a Washington state judge struck down the initiative on state constitutional grounds.[7] Emerging from the courthouse, the measure's sponsor exclaimed: "One guy with a robe on, but he might as well wear a crown if he is going to act like a king!"[8]

Democracy and Its Consequences," in Shaun Bowler and Amihai Glazer, eds., *Direct Democracy's Impact on American Political Institutions* (New York: Palgrave Macmillan, 2008), 1–19.

[6] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New York: Bobbs-Merrill, 1962), 16.

[7] On November 2, 1999, Washington voters adopted Initiative 695, a measure to reduce vehicle license fees and require voter approval for future tax and fee increases. The vote on the measure was 992,715 Yes to 775,054 No, a 58-to-42 percent margin. On March 14, 2000, on cross motions for summary judgment, Washington Superior Court Judge Robert Alsdorf issued a written decision striking down the initiative in its entirety. On appeal, the Washington Supreme Court affirmed, holding that the initiative conflicted with several state constitutional provisions. See *Amalgamated Transit Union Local 587 v. State of Washington*, 142 Wash.2d 183 (2000).

[8] The initiative's sponsor, Tim Eyman, is quoted in David Postman, "I-695 Ruling Fuels Debate over Role of Courts," *The Seattle Times*, April 11, 2000, B-1.

And, indeed, conflicts of this type raise the question: Who is sovereign in this system – the people or the judges?

American judges have long subscribed to John Marshall's maxim that "it is emphatically the province and duty of the judicial department to say what the law is."[9] In practice, this means that if a court and the people disagree about a constitutional issue, the court's view must prevail. But, Progressive Era reformers, frustrated by opposition from the courts, sought to reverse this hierarchy by giving the people, not courts, the last word on contested state constitutional questions. Notably, Theodore Roosevelt promoted a plan for "recall" of judicial decisions, which would have allowed citizens of a state to approve or reject a court's ruling that a law violated the state's constitution. Roosevelt's plan failed, but in some states a different form of direct democracy, the initiative constitutional amendment (ICA), achieved similar ends. Armed with the ICA, citizens could override an unpopular judicial interpretation of a state constitution by directly amending the constitution. This form of direct democracy would not constrain judicial interpretation of the *federal* Constitution, but it gave the people in several states a counterweight to the judicial power.

The conflict between direct democracy and courts has become more intense as the two powers have gained strength. Twenty-four states now allow citizens to enact laws directly, and the use of the initiative process in the United States has grown several-fold since the 1970s. In several states, especially in the West, citizens have increasingly sought to use the initiative process to dictate outcomes in the most important areas of state responsibility, including taxing and spending, education, environmental regulation, election law, and criminal justice policy. At the same time, the judicial power has greatly expanded as courts have used judicial review to enforce a growing sphere of minority and individual rights, especially in the areas of equal protection, due process, privacy, free speech, and criminal procedure and punishment. By redefining many political controversies in rights terms, courts have shifted much policy making from majoritarian political processes to the judicial arena.

A recent controversy in California shows how a constitutional system that combines a strong form of direct democracy and an expansive judicial power can produce dramatic conflict.

IN RE MARRIAGE CASES

When California voters went to the polls on March 7, 2000, they faced a long list of decisions. The ballot included primary elections for U.S. president and various federal, state, and local legislative offices as well as 20 statewide ballot propositions, some placed on the ballot by the legislature, others by citizens through initiative petition. In all, the twenty propositions, including text, summaries, and arguments, filled 164 pages in the state ballot pamphlet. The shortest measure, Proposition 22, was a citizen initiative. Just 14 words

[9] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

long, it sought to add Section 308.5 to the state Family Code to read, "Only marriage between a man and a woman is valid or recognized in California."[10]

Proposition 22 was sponsored by Republican state legislator (and former Air Force test pilot) Pete Knight. Knight believed that the emerging movement for same-sex marriage threatened the marriage institution. He wanted to resist this movement in California, but was unable to convince his legislative colleagues to ban the recognition of same-sex marriages. Although polls showed that a majority of California voters wanted to preserve marriage as a union between a man and a woman, the legislature killed several of Knight's bills designed to set these limits.[11] Knight thus turned to the initiative process.

Beginning in 1997, Knight and a coalition of religious groups pursued an effort to place the nation's first citizen-initiated defense of marriage law on the California ballot.[12] At the outset, the proponents had to reach agreement on the measure's language. Based on research indicating that the proposal had the best chance of success if drafted in concise, easy-to-understand language, the proponents settled on the simple one-sentence text. Next, the proponents had to make the crucial decision whether to qualify the measure as an initiative statute or a state constitutional amendment. In California, as in many other initiative states, the signature requirements for initiative constitutional amendments are higher than for initiative statutes. To reach the ballot, California statutory initiatives must receive signatures equaling five percent of the vote for governor in the last election, whereas initiative constitutional amendments need eight percent – both within a 150-day window.[13] At the time, this meant that a constitutional amendment would need more than 693,000 valid signatures, compared with slightly more than 433,000 valid signatures for an initiative statute – a difference of nearly 260,000 signatures.[14] Many considered the higher figure to be prohibitive, and the proponents decided to draft the measure as an initiative statute rather than a constitutional amendment. Using a combination of for-profit petition gathering firms, direct mail, and a large volunteer effort, the proponents were able to gather the necessary signatures. Proposition 22 qualified for the March 2000 ballot.[15]

[10] California Secretary of State, *California Voter Information Guide, Primary Election, March 7, 2000*, 132, http://traynor.uchastings.edu/ballot_pdf/2000.pdf.

[11] During the 1995–1996 session, Knight introduced AB 1982, which would have amended the California Family Code to prevent recognition of out-of-state, same-sex marriages. The bill won approval in the state assembly, but was defeated in the state senate. Knight later introduced similar bills, but none were passed out of the house of origin.

[12] In 1998, voters in Hawaii and Alaska approved defense-of-marriage amendments that had been approved by the legislatures of those states. The California measure was the first to be put on the ballot by citizen petition. For further discussion, see Chapter 7.

[13] See CAL. CONST. art. II, sec. 8(b); *California Elections Code* sec. 336. Other states have different signature requirements.

[14] These figures were based on the vote for all candidates for governor in the 1994 general election, which totaled 8,665,375. Because some signatures are invalid for one reason or another, proponents have to submit a larger number than the thresholds to qualify a measure for the ballot.

[15] Andrew Pugno, (attorney, Proposition 22 Legal Defense and Education Fund), interview with the author, August 22, 2008.

Weeks before the election, the California secretary of state mailed a ballot pamphlet to all voters in the state. The pamphlet contained the text of the measures, summaries prepared by the attorney general and legislative analyst, and arguments by proponents and opponents of each measure. In their ballot argument, proponents warned voters that "judges in some . . . states want to define marriage differently than we do. If they succeed, California may have to recognize new kinds of marriages, even though most people believe marriage should be between a man and a woman."[16] In response, the opponents did not try to persuade voters to embrace same-sex marriage, but urged them to view the measure as an unnecessary and mean-spirited effort to "pick on specific groups of people and single them out for discrimination."[17]

In the March 2000 election, California voters approved Proposition 22 by a 61 to 39 percent margin. The statewide vote was 4,618,673 to 2,909,370, with majorities in all regions of the state, except the San Francisco Bay Area, supporting its adoption.[18] But, this vote of the people did not settle the issue. Proposition 22's opponents vowed to resist the outcome by various means. Their options were limited, however, by the unique nature of California's constitutional design. Most importantly, the California Constitution prohibits the legislature from amending or repealing statutes enacted through the initiative process, unless the initiative itself so allows. As a result, the legislature was powerless to repeal Proposition 22 or to enact a statute recognizing same-sex marriage in the state. Any repeal of Proposition 22 would require a new vote of the people.[19]

Although Proposition 22's opponents could not repeal the measure in the legislature, they could challenge it in the courts. At the time, gay rights groups were reluctant to challenge state marriage laws on federal constitutional grounds.[20]

[16] Gary Beckner, Thomas Fong, and Jeanne Murray, "Argument in Favor of Proposition 22" in California Secretary of State, *California Voter Information Guide, Primary Election, March 7, 2000*, 52.

[17] Antonio R. Villaraigosa, the Right Reverend William E. Swing, and Krys Wulff, "Argument Against Proposition 22," in ibid., 53.

[18] California Secretary of State, *Statement of Vote, March 7, 2000 Primary Election*.

[19] CAL. CONST. art. II, sec. 10(c) states that "[t]he Legislature . . . may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." Many other initiative states place some restrictions on future legislative amendment to or repeal of voter-approved initiatives, but no other state has an absolute prohibition. In 2005, the California legislature approved AB 849 (Leno), a bill that would have allowed same-sex couples to marry in the state. Governor Schwarzenegger vetoed the bill on the grounds that the legislature could not override Proposition 22. The California Supreme Court confirmed this view in *In re Marriage Cases*, 43 Cal.4th 757 (2008).

[20] An exception was *Citizens for Equal Protection, Inc. v. Bruning*, the federal constitutional challenge to Nebraska's defense-of-marriage amendment, I-416 of 2000. In this case, advocates of same-sex marriage sought to invalidate I-416, but notably did not seek a federal constitutional right to marry, nor any remedies related to marriage, civil unions, or domestic partnerships. Instead, they made the more limited argument that I-416 violated the equal protection clause of the Fourteenth Amendment by preventing petitioners from lobbying their elected representatives for legal protection for same-sex relationships. A federal district judge embraced this theory,

From their perspective, the worst outcome would be to raise these claims prematurely and receive an adverse ruling by the U.S. Supreme Court. However, these groups were prepared to attack marriage statutes in state courts on state constitutional grounds. This strategy would limit the number of states where challenges were possible. Wherever marriage limitations were embedded in a state constitution – as "Defense of Marriage Amendments" soon were in many states – they were largely insulated against state constitutional challenge.[21] Indeed, had the proponents of Proposition 22 qualified the measure as a state constitutional amendment, they would have effectively protected it from the charge that it violated state constitutional rights. But, Proposition 22 was a statute, and thus vulnerable to this form of attack.

The opponents of Proposition 22 did not immediately challenge the measure in court. Instead, they offered resistance by other means. In early 2004, San Francisco Mayor Gavin Newsom defied the marriage restriction by ordering San Francisco officials to issue marriage licenses to same-sex couples. Approximately 4,000 same-sex couples participated in marriage ceremonies in the city before the California Supreme Court stepped in and declared these marriages void. At the time, the court expressly noted that it was reserving judgment on the substantive question of Proposition 22's constitutional validity.[22] Soon, same-sex couples filed challenges in state trial courts, and these and related cases were joined in a coordinated action titled *In re Marriage Cases*.[23]

The plaintiffs in these actions asserted that the limitation of marriage to "a man and a woman" violated their rights under the state constitution. In particular, they argued that the restriction violated their fundamental right to marry as protected by the California Constitution's privacy, free speech, and due process clauses, as well as the state constitution's equal protection guarantee.[24] After skirmishes in the lower courts, the California Supreme Court granted review.

but the Eighth Circuit reversed. See *Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859 (8th Cir. 2006), reversing 290 F.Supp.2d 1004 (D. Neb. 2003).

[21] The only basis for a *state* constitutional challenge to a state constitutional amendment is that the amendment violates the state's rules for constitutional amendment – for example, it contains multiple subjects or constitutes a "revision" rather than an amendment. Of course, state constitutional amendments may also be vulnerable to a range of *federal* constitutional challenges.

[22] *Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1073–4 (2004).

[23] *In re Marriage Cases*, JJCP No. 4365, consolidating *Woo v. Lockyer* (Super. Ct. S.F. City & County, No. CPF-04–504038); *Tyler v. County of Los Angeles* (Super. Ct. L.A. County, No. BS-088506); *City and County of San Francisco v. State of California* (Super. Ct. S.F. City & County, No. CGC-04–429539); as well as litigation seeking enforcement of Proposition 22, *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (Super. Ct. S.F. City & County, No. CPF-04–503943); *Campaign for California Families v. Newsom*, Super. Ct. S.F. City & County, No. CGC-04–428794). An additional action filed by same-sex couples was also later added to the coordination proceeding. *Clinton v. State of California* (Super. Ct. S.F. City & County, No. CGC-04–429548).

[24] See *In re Marriage Cases*, 143 Cal. App. 4th 873 (Cal. App. 1st Dist., 2006); CAL. CONST. art. I, sections 1, 2, 7.

Both sides understood that the stakes were high. After the Massachusetts Supreme Judicial Court had declared in 2003 that same-sex couples had a right to marry that was protected by that state's constitution, no other state had followed its lead.[25] Indeed, courts in New York (2006), Washington (2006), New Jersey (2006), and Maryland (2007) had ruled the other way, and similar challenges were still pending in Connecticut and Iowa.[26] The outcome of the litigation in California, the nation's most populous state, would either strengthen the consensus against same-sex marriage or, conversely, revive the movement for widespread recognition of this right. The parties and a multitude of *amici curiae* briefed the issues at length, the lawyers engaged in an extended oral argument, and the court took the case under submission.

The Court's Decision: A Declaration of Rights

On May 15, 2008, a divided court issued its decision in *In re Marriage Cases*.[27] By a 4-to-3 vote, the court struck down Proposition 22 and other state marriage laws on state constitutional grounds. The decision, authored by Chief Justice Ronald George, framed the case in the language of rights and cast a broad vision of the state constitutional rights of gay persons and same-sex couples.

The court began by acknowledging that the California Constitution does not include an explicit "right to marry," but observed that past cases had located this right elsewhere in the text, including Article I's due process and privacy clauses.[28] Then, crucially, the court held that this fundamental right is an individual freedom "to join in marriage with the person of one's choice" and that "the California Constitution properly must be interpreted to guarantee this basic civil right to all individuals and couples, without regard to their sexual orientation."[29] The court denied that it was creating a new right of same-sex marriage; instead, it was declaring that the right to marry could not be denied to same-sex couples. Proposition 22 and the state's other marriage

[25] The Massachusetts case was *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003). See also *Opinions of the Justices to the Senate*, 440 Mass. 1201 (2004).

[26] *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), upholding New York's marriage laws; *Andersen v. King County*, 158 Wn.2d 1 (2006), upholding Washington marriage laws; *Lewis v. Harris*, 188 N.J. 415 (2006), declaring a right to same-sex civil unions with benefits of marriage, but not requiring those unions be labeled "marriages"; and *Conaway v. Deane*, 401 Md. 219 (2007), upholding Maryland marriage laws. In October 2008, five months after the California Supreme Court's decision in *In re Marriage Cases*, the Connecticut Supreme Court issued its decision in *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008) striking down Connecticut's marriage laws and establishing the state constitutional right of same-sex couples to marry. In April 2009, the Iowa Supreme Court issued a similar ruling in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

[27] *In re Marriage Cases*, 43 Cal.4th 757 (2008).

[28] Ibid., 809–10.

[29] Ibid., 811, 820, citing *Perez v. Sharp*, 32 Cal.2d 711, 715, 717 (1948), a case invalidating California's anti-miscegenation law on state constitutional grounds.

laws denied same-sex couples this fundamental right, and thus violated the state constitution.

This holding would have been sufficient to resolve the case, but, the court further held that the marriage restriction violated the state constitution's equal protection clause. For the first time, the court announced that, under this clause, all classifications based on sexual orientation are constitutionally suspect and subject to strict judicial scrutiny. This move was groundbreaking because American courts, including the U.S. Supreme Court, had previously declined to declare sexual orientation a suspect classification. But, the California Supreme Court asserted that there was no persuasive reason for applying a more lenient standard to classifications based on sexual orientation than to those based on gender, race, or religion. According to the court, the California marriage restriction discriminated against persons based on their sexual orientation and could not survive this strict level of judicial scrutiny.[30]

The court thus used an expansive interpretation of two state constitutional rights – the implied right to marry and the equal protection guarantee – to strike down Proposition 22.[31]

The Court vs. the Voters

In an important passage in his opinion, Chief Justice George rejected the view that the court should give greater deference to the marriage restriction because it had been directly enacted by the voters. "[T]he circumstance that the limitation of marriage to a union between a man and a woman . . . was enacted as an initiative measure by a vote of the electorate . . . neither exempts the statutory provision from constitutional scrutiny nor justifies a more deferential standard of review," the Chief Justice wrote. "[I]nitiative measures adopted by the electorate are subject to the same constitutional limitations that apply to statutes adopted by the Legislature, and our courts have not hesitated to invalidate measures enacted through the initiative process when they run afoul of constitutional guarantees provided by either the federal or California Constitution."[32]

Associate Justice Joyce Kennard, in a concurring opinion, even more pointedly asserted the court's authority to override the will of the people. "The architects of our federal and state Constitutions understood that widespread and deeply rooted prejudices may lead majoritarian institutions to deny fundamental freedoms to unpopular minority groups," she wrote. "[T]he most effective remedy for this form of oppression is an independent judiciary charged with the solemn responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and equal protection."[33]

[30] Ibid., 840, 854.
[31] Ibid., 855–7.
[32] Ibid., 851.
[33] Ibid., 859–60, Kennard, J., concurring.

A Dissenting View

Three of the court's seven justices dissented. In the lead dissent, Justice Marvin Baxter rejected the view that the marriage controversy was a question of constitutional rights to be determined by courts. Instead, he argued, it was a question of social policy best resolved by the people, acting either directly or through their elected representatives. "Nothing in our Constitution, express or implicit, compels the majority's startling conclusion that the age-old understanding of marriage – an understanding recently confirmed by an initiative law – is no longer valid," Baxter wrote. The people could legitimately choose, if they wished, to change that definition. And, indeed, it was quite possible that "left to its own devices," a democratic consensus would form to give legal recognition to same-sex marriage. "But a bare majority of this court, not satisfied with the pace of democratic change, now abruptly forestalls that process and substitutes, by judicial fiat, its own social policy views for those expressed by the People themselves."[34] The court had improperly "invent[ed] a new constitutional right," Baxter argued, and had found that "our Constitution suddenly demands no less than a permanent redefinition of marriage, regardless of the popular will."[35]

Popular Constitutionalism and the Last Word

Near the end of *In re Marriage Cases*, Chief Justice George quoted from the U.S. Supreme Court's famous decision in *West Virginia State Board of Education v. Barnette* (1943).[36] In that case, the Supreme Court invoked the First Amendment to strike down a West Virginia statute requiring public school students to salute the American flag. Writing for the Court, Justice Robert Jackson argued that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[37]

In this passage, Justice Jackson was enunciating the principle of "higher constitutionalism" – the idea that constitutional rights rise above normal democratic politics and that courts, not the people, are the final interpreters and guardians of these rights.

In *Marriage Cases*, Chief Justice George sought to portray the state constitutional marriage rights of same-sex couples in the same higher constitutional

[34] Ibid., 861, Baxter, J., dissenting.
[35] Ibid., 863–4.
[36] *In re Marriage Cases*, 43 Cal.4th at 852, citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).
[37] Ibid.

terms – *beyond the reach of majorities*. But, the analogy was flawed. Federal constitutional rights are elevated above normal democratic politics only because the supermajority requirements for federal constitutional amendments are so exacting. But, the constitutional dynamics are quite different in the states, especially in states that allow for direct initiative constitutional amendment. If the people can amend their constitution by petition and simple majority vote, constitutional rights are up for grabs. Courts may seek to define the scope of these rights, but, their decisions are always subject to popular override. Unlike the federal constitutional rights Justice Jackson described in *Barnette*, state constitutional rights *may* be submitted to a vote and *do* depend on the outcome of elections.

Opponents of same-sex marriage understood this dynamic. As *In re Marriage Cases* was pending in the California Supreme Court, they gathered signatures for a new initiative with the exact same fourteen words as Proposition 22 – but, this time, they were able to qualify the measure as a state constitutional amendment. The new initiative, Proposition 8, would amend the California Constitution to include the same 14 words as in Proposition 22: "Only marriage between a man and a woman is valid or recognized in California." The measure appeared on the November 4, 2008, ballot and gave the people the opportunity to override the state Supreme Court on this controversial question.

The pre-election fight over Proposition 8 was intense. One early skirmish involved the wording of the ballot title – a factor that can greatly influence voter attitudes toward a ballot measure. In 2000, Proposition 22 had been titled: "Limit on Marriages: Initiative Statute." But, in 2008, Attorney General Jerry Brown revised the title for Proposition 8 to read: "Eliminates Right of Same-Sex Couples to Marry."[38] Polls indicated that this reframing of the issue as an elimination of a right undermined support for the measure.[39]

The Yes-on-8 side fought back by emphasizing that the California Supreme Court had thwarted the will of the voters when it overturned Proposition 22, and that the new measure restored the people's preferred definition of marriage. In the official ballot pamphlet, the sponsors of Proposition 8 argued that

> Proposition 8 is simple and straightforward. It contains the same 14 words that were previously approved in 2000 by over 61% of California voters: "Only marriage between a man and a woman is valid or recognized in California."

[38] Proponents of Proposition 8 unsuccessfully challenged this change to the ballot title. Aurelio Rojas, "Ruling on Ballot Title is Setback for Proposition 8 Backers," *The Sacramento Bee*, August 9, 2008, 3A.

[39] Mark DiCamillo and Mervin Field, "55% of Voters Oppose Proposition 8, the Initiative to Ban Same-Sex Marriages in California," The Field Poll, Release #2287, September 18, 2008. Surveying respondents between September 5 and September 14, 2008, the poll found that opposition to Proposition 8 increased when respondents were read the new ballot summary that Proposition 8 "eliminates right." According to DiCamillo and Field, "These findings indicate that similar to past initiative campaigns the wording of a ballot summary can have a pronounced impact on how voters make judgments about a proposition."