



# Legal Landscape

## A Dangerous Proposition

How easy should it be to take away fundamental rights secure for the majority from a historically discriminated against minority? That's the question raised by the lawsuit filed November 5 by Lambda Legal, the National Center for Lesbian Rights, and the ACLU to overturn Prop 8, the initiative designed to eliminate gay people's ability to marry in the Golden State.

The constitution makes it quite difficult for the legislative or executive branches to deprive a vulnerable minority, and them alone, of a core constitutional right. Such efforts are treated as suspect and, to be valid, must pass strict scrutiny by the courts. Discriminatory treatment of this sort is not permissible unless it is demonstrated that eliminating a minority's exercise of a basic right is necessary to further a compelling government interest. In other words, a high hurdle exists to taking such dangerous action and it is the responsibility of the courts to guard against it.

What about when a minority's core constitutional rights are sought to be eliminated by changing the constitution itself? We contend this should be equally difficult and that the California Constitution supports that essential safeguard.

California's Constitution can be changed in two ways. The voters are allowed to amend the constitution by gathering sufficient signatures to place an initiative on the ballot that then needs only a simple majority to pass. But certain kinds of changes to the state constitution are considered a revision that must first pass two-thirds of each house of the legislature before being placed on the ballot.

Past cases explain that a measure that would substantially alter the underlying principles of the state constitution or that would make far-reaching changes in the nature of the state's basic governmental plan are revisions that must go through the more deliberative process of super-majority legislative approval before being submitted to the voters. Because Prop 8 did not follow that procedure, we contend that it is invalid.

In the Marriage Cases, the California Supreme Court held that discrimination against lesbians and gay men is as suspect as discrimination based on race, national origin, religion or sex. The Court also held that the right to marry is fundamental and cannot be deprived based on the sexual orientation of those who would marry. In trying to change this, Prop 8 would inscribe discriminatory treatment into the state's constitution, punching a hole in the foundational constitutional principle that fundamental rights belong equally to everyone. Prop 8 would also undo the essential role that courts play protecting minorities against an overreaching majority.

If the right to marry can be taken away from gay people so easily, then nothing would keep a majority of voters from taking away any fundamental right — not just from gay people but from racial, ethnic and religious minorities or women as well. That's why groups such as the California NAACP, the Mexican American Legal Defense and Education Fund, the California Council of Churches and the California Women's Law Center filed their own lawsuits challenging Prop 8. On January 15, 43 *amicus* briefs in support of invalidating Prop 8 were submitted to the California Supreme Court, overwhelming the other side's far smaller number.

A constitution is supposed to be a safeguard against the "tyranny of the majority," and courts have a primary responsibility to ensure that that safeguard remains strong. California's Supreme Court should fulfill that responsibility and hold that the discrimination inherent in Prop 8 cannot be so easily made part of California's charter.

JON W. DAVIDSON  
LEGAL DIRECTOR