



## **Freedom Forum**

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### **Court To Hear Oral Arguments Regarding Proposition 8 on March 5<sup>th</sup>—What is At Stake?**

Former U.S. Solicitor General and Pepperdine University Law School Dean Kenneth Star will argue in defense of Proposition 8 at the California Supreme court on March 5, 2009. At issue are legal challenges to the California constitutional amendment passed November 4, 2008, which defines marriage as between one man and one woman.

The most important issue before the court is whether Proposition 8 was an “amendment” to the state constitution or a “revision.” If deemed a revision, Proposition 8 would have required a higher hurdles to passage, including approval of the state legislature. A constitutional revision is a law that affects a fundamental change in the structure of the constitution. Proposition 8’s confirmation of traditional marriage does not meet the definition of a revision. Fortunately, most legal experts agree that Proposition 8 is a constitutional “amendment” and was therefore properly enacted by a majority of Californians in the initiative process. Even Attorney General Jerry Brown agrees in his court documents that Prop. 8 is an amendment, not a revision.

Another issue is the fate of the same-sex “marriages” that occurred between June and November of 2008. This was the brief period during which when same-sex “marriage” was “legalized” by the California Supreme Court. While we disagree with the result, the consensus of most legal scholars is that the Court will likely allow these marriages to stand.

The most stunning issue advanced by the anti-family crowd is whether the new judicially created “fundamental” right to same-sex “marriage” is a “liberty interest” superior to the people’s right to amend the state constitution to define marriage as only between a man and a woman. This novel legal theory is advanced and argued, with no legal support, by Jerry Brown and other same-sex marriage advocates. Kenneth Star does a wonderful job of refuting this dangerous argument in his legal brief to the court. As we discussed in last month’s Freedom Forum, if this argument prevails, it will result in judicial tyranny and may signal the end of our democratic republic as we know it. Under this approach, Judges, not “we the people” would have the final say on important public policy issues. Black robed oligarchs would create new legal “rights” which would actively subvert morality and our republican form of government.

The court’s written opinion will be issued in the next several months. We are cautiously optimistic that Proposition 8 will stand. However, if they are unsuccessful at the California Supreme Court, opponents of Proposition 8 are already preparing their own constitutional amendments for 2010 or 2012 to unwind Prop 8.

We strongly believe that it is very important that you understand California’s marriage battle in the larger context. As we have explained in past Freedom Forum’s it is not only the definition of marriage that is at stake here, but religious freedom and free speech. The homosexual legal agenda poses a direct and real threat to our precious First Amendment rights. That agenda, if not stopped, will lead to the loss of existing legal protections for pastors and religious organizations. If we loose the current fight, we strongly believe that we could very quickly see challenges to non-profit status of churches, forced hiring of homosexuals by religious organizations and legal persecution of pastors for “hate speech”. Freedom loving Californians will need to remain vigilant during these very challenging times.

### **Essay: “We the people,” Who?**

Move over former British empire. A new tyranny seeks to oppress our citizens today. Here comes the Judge!

Since the dawn of time the powerful have often abused their authority to oppress the weak. Kings, Czars, party chairmen and other despots have all taken their place in the shameful halls of history by abusing their authority over those they should have served rather than oppressed.

Today in America we face a new threat to freedom. What is the threat? It is “enlightened” judges who are unsatisfied with leaving lawmaking authority with the

legislature or the people, where it belongs. This threat is most pernicious when the judiciary creates novel “constitutional rights.” Usurping the legislative process, the courts have through creative, though intellectually dishonest, lawyering created new “rights.” This brazen power grab violates the sacred concept of the “separation of powers;” the concept that governmental authority should be decentralized in a democratic republic. Fundamentally it means that judges should judge, legislatures should legislate, and the executive should execute.

The most famous example of judicial tyranny in the past 40 years is *Roe v. Wade*. Whatever your personal opinion about abortion, no fair minded person who reads the decision can argue that the Supreme Court did not fabricate a completely new constitutional “right.” I would call it a judicially sanctioned “license to kill.” Without amending the constitution, the black robed judges did just that--they amended the constitution. The problem is that in doing so, the judges removed a controversial moral issue from “we the people” which is the appropriate locus of authority in our democratic republic. The consequence has been millions of deaths and a deep societal rift.

The most recent example of the threat of judicial tyranny is embodied in the ferocious fight over how we define marriage. Defying 5000 years of history, the expressed will of Californians, and common sense, the California Supreme Court created a new “constitutional” right to same-sex marriage in May 2008. In November 2008, “we the people” of California fought back and amended our constitution to define marriage as only between a man and a woman. Now, amazingly, Attorney General Jerry Brown, who is sworn to uphold the constitution, is actively advocating that the California Supreme court trash the constitution and nullify the will of the people. He wants the Court to interpret the constitution in a manner which would declare Prop 8, a constitutional provision, “unconstitutional.” Incredible!

Unfortunately, our judges today are increasingly acting like the “Court of Star Chamber,” a 15th-century to 17th-century English court consisting of judges who were appointed by the Crown and sat in closed session on cases involving state security. Modern American judges, like the Court of Star Chamber, are becoming increasingly known, not for dispensing justice under the law, but for their secret, harsh, or arbitrary rulings.

If Jerry Brown and the radical judicial activists get their way, it may effectively signal the end of democracy in America as we know it. *We the people* would become obsolete, since the more “enlightened” judges could always overrule our will (even our constitutional amendments) if the will of the people conflicts with their elitist view of morality and law. These acts of judicial “terrorism” are inimical to our founders’ concepts of separation of powers and of ordered liberty and *must* not stand.

## **Spring Dinner for Friends of the WCLP.**

This spring, we will be inviting friends of the Western Center for Law & Policy to join us in celebrating the victories we have enjoyed in the ongoing fight for faith, family and freedom. Details will follow soon.