

**NAMES AND DESIGNATIONS IN LAW: TOWARDS A NOMINALIST APPROACH
TO CONSTITUTIONAL JURISPRUDENCE**¹

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I.

In a constitutional democracy, the people have the last word – or a Constitutional Court. And such a Court has to, *inter alia*, ensure that the people retain the power to give their word. Now, the people’s vote often is difficult to predict and, on occasion, even contradictory. A Constitutional Court, in contrast, has to maintain the continuity of the Constitution, adjust it to the changing times but also ensure that the political conditions do not compromise its substance. The well-understood balance between continuity and change, therefore, belongs to the noblest tasks of constitutional jurisprudence. The California Supreme Court, however, has shown quite a remarkable turn in this respect: In May 2009 it confirmed in *Strauss v. Horton*², by a majority of 6:1, an amendment to the California Constitution, which now reads: “Only marriage between a man and a woman is valid or recognized in California”³, whereas it declared a year before in *In re Marriage Cases*, a statutory family law provision⁴ with exactly the same formulation, unconstitutional because retention of the traditional definition of marriage did not constitute a state interest sufficiently compelling, under the strict scrutiny equal protection standard, to justify withholding that status from same-sex couples.⁵

In both instances the reviewed provisions have come about by direct-democratic legislative initiatives. The fact that constitutional amendments can be adopted by initiative is a specialty of California law and is regarded as a particularly democratic feature of the California Constitution.⁶ In the current

¹ Thanks to Chad Crowe for a help with the language and to Eric Engle for the editorial fine-tuning.

² KAREN L. STRAUSS, et al., Petitioners, v. MARK B. HORTON, et al. The decision is of May 26, 2009 and is published under: <http://www.courtinfo.ca.gov/opinions/documents/S168047.PDF>. Page numbers in this article refer to the pages there.

³ Cal. Const., Art. I, § 7.5.

⁴ California Family Code, § 308.5.

⁵ *In re Marriage Cases*, 43 Cal. 4th 757 (May 2008).

⁶ Cal. Const., Art. II, § 8, subd. (b); Art. XVIII, §§ 3 and 4. Seventeen more states, though, permit constitutional amendments to be proposed through the initiative process. These states are: Arizona (Ariz. Const., art. 4, pt. 1, § 1(2)), Arkansas (Ark. Const., art. 5, § 1), Colorado (Colo. Const., art. V, § 1(1)), Florida (Fla. Const., art. XI, § 3), Illinois (Ill. Const., art. XIV, § 3), Massachusetts (Mass. Const., amend. art. XLVIII, pt. II, § 2), Michigan (Mich. Const., art. (2010) J. JURIS 121

case, however, the people decided with 52% of the votes cast for the proposed amendment (the so-called *Proposition 8*) and thus against same-sex marriage. But while petitioners insisted with *In re Marriage* that homosexual couples, in addition to their right to register as domestic partners⁷, also have the right to a civil marriage, the Court now holds that the new amendment means only a change in language, not in case – and is therefore only a case of different names.

This interpretation seems to allow for a legal concept which might be called Constitutional Nominalism. Thus, after a brief overview of the Court's reasoning (II), I shall try to assess the decision in light of some reflections on nominalist philosophy (III).

II.

The California Supreme Court's current ruling, and seemingly contradictory stance to the decision the year before, was generally surprising. Crucially, the new amendment immediately took effect the day after the election. Thus, says the Court in *Strauss v. Horton*, the Constitution is now a different one than in May 2008 when it decided *In re Marriage*. Accordingly, the opinion goes, while *In re Marriage* was concerned with a statutory provision limiting marriage to a union between a man and a woman under state constitutional provisions that did not expressly permit or prescribe such a limitation, the principal issue in *Strauss* concerned the scope of the right of the people, under the provisions of the California Constitution, to change or alter the state Constitution itself through the initiative process so as to incorporate such a limitation as an explicit section of it.⁸

XII, § 2), Mississippi (Miss. Const., art. 15, § 273), Missouri (Mo. Const., art. III, § 49), Montana (Mont. Const., art. XIV, § 9), Nebraska (Neb. Const., art. III, §§ 1, 2), Nevada (Nev. Const., art. 19, § 2), North Dakota (N.D. Const., art. III, §§ 1, 9), Ohio (Ohio Const., art. II, §§ 1, 1a), Oklahoma (Okla. Const., art. 5, §§ 1, 2), Oregon (Or. Const., art. IV, §§ 1, 2), and South Dakota (S.D. Const., art. XXIII, § 1).

⁷ California Family Code, §§ 297 ff.: "Domestic Partner Registration".

⁸ I leave aside a second strand of the decision which concerns the question whether Proposition 8 is a constitutional *revision* rather than an amendment. A *revision* to the California Constitution may be proposed either by two thirds of each house of the Legislature or by a constitutional convention; Cal. Const., Art. XVIII, §§ 1 and 2. For our purpose it suffices that, according to the court, "the *amendment* process *never* has been reserved only for minor or unimportant changes to the state Constitution"; *Strauss v. Horton*, *ibid.* 93 (original italics). In this respect the court points out that the right of women to vote in California, the initiative, referendum, and recall powers themselves, an explicit right of privacy, and even the reinstatement of the death penalty, all came about by constitutional amendment; *ibid.*, 93 f.

Given the great importance of direct democracy in the California Constitution the Court felt hesitant to intervene. Justice Kennard, who also signed the majority opinion in *In re Marriage*, explains in her concurring opinion, how she sees the court's function in this respect: "My view on this issue has not changed. Interpreting and enforcing the state Constitution is a judicial responsibility, and the judiciary's duty to exercise this authority is particularly important and grave when constitutionally guaranteed rights and freedoms are at stake. What has changed, however, is the state Constitution that this Court interpreted and enforced in the *Marriage Cases*. [...] Although the people through the initiative power *may not change* this Court's interpretation of language in the state Constitution, they *may change* the constitutional language itself, and thereby enlarge or reduce the personal rights that the state Constitution as so amended will thereafter guarantee and protect. [...] Although this Court's decision in the *Marriage Cases* [...] remains the final word on the meaning of the state Constitution *as it then read*, the people have now used their initiative power to refashion the wording of the California Constitution and by this means have altered its substance, and thus its meaning, as of the effective date of the initiative measure".⁹ In such a case it is the Court's duty to reconcile the new provision with the other constitutional norms.

What again was at stake was the constitutional right to marry, as embodied in the *privacy* and *due process clauses* of the California Constitution (art. I, §§ 1, 7), and the state's *equal protection guarantee* (art. I, § 7). And here, the Court already observed in *In re Marriage* that "in recent decades, there has been a fundamental and dramatic transformation in this state's understanding and legal treatment of gay individuals and gay couples" resulting in a general recognition "that gay individuals are entitled to the same legal rights and the same respect and dignity afforded all other individuals and are protected from discrimination on the basis of their sexual orientation".¹⁰ Thus, the Court concluded, "that the right to marry, as embodied in article I, sections 1 and 7 of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage".¹¹

⁹ *Strauss v. Horton*, Kennard, J., concurring, S. 2 f. (original italics).

¹⁰ *In re Marriage*, *ibid.* 821-822

¹¹ *Ibid.*, 829

In *Strauss v. Horton*, the Court contends, this has not changed. It is merely the constitutional language which would be different now. And in light of *In re Marriage*, the majority opinion emphasizes, “[p]roposition 8 reasonably must be interpreted in a limited fashion as eliminating only the right of same-sex couples to equal access to the *designation* of marriage, and as not otherwise affecting the constitutional right of those couples to establish an officially recognized family relationship”.¹² The term “marriage” is reserved for heterosexual couples and the corresponding determination in the constitutional text via constitutional amendment is reserved for the people.

III.

Is same-sex civil union only a matter of name and designation? As I said, one could take this for some kind of Constitutional Nominalism. Nominalism suffers from a bad reputation and has (perhaps wrongly) been attributed to the English philosopher William of Ockham who turned from the Aristotelian categories to experience and semantics.¹³ Three centuries later, Thomas Hobbes opposed the empirical aspect of law to the natural law tradition and noted law’s ability to be modified arbitrarily. For him, language is not just a tool for mapping the world, it also changes the world. Language alone, as Hobbes already knew, is capable of constituting human reality, particularly political reality. But as such, language remains artificial. And it is this, which makes things replaceable by names and designations and linkable in new ways, freeing them from their merely natural causal relations and making them objects of the will of the itself artificial person.¹⁴

Nominalism, in Hobbes as well as in Ockham, started with the rejection of universals. In a more modern sense, it implies the rejection of abstract objects, objects that are neither spatial nor temporal, and which, though not already in

¹² *Strauss v. Horton*, *ibid.*, 37 (italics added); see also *ibid.*, 7 f., 11, 36 ff., 42 f., 92 f.

¹³ See e.g. Ph. Boehner, The Realistic Conceptualism of William Ockham, in: *Traditio* 4 (1946), 307 ff. In his article “William of Ockham” for the *Stanford Encyclopedia of Philosophy* (Edward N. Zalta, ed.) Paul Vincent Spade notes: “[Ockham’s] originality and influence should not be exaggerated. For all his deserved reputation, his logical views are sometimes completely derivative and occasionally very idiosyncratic”; -- citations omitted. For new literature on Ockham see especially C. Panaccio, *Les mots, les concepts et les choses. Le sémantisme de Guillaume d’Occam et le nominalisme d’aujourd’hui*, 1991.

¹⁴ Th. Hobbes, *Leviathan*, esp. chs. 4 and 5. See also Hobbes, *Elements of Philosophy. De corpore*, Part I, chs. 2-6, in: The English Works of Thomas Hobbes (Molesworth ed.), vol. I, 1839; and *Elements of Law*, Part I, chs. 1-5, *ibid.* vol. IV, 1840. See also C. Leijenhorst, Sense and Nonsense About Sense: Hobbes and the Aristotelians on Sense Perception and Imagination, in: P. Springboorg (ed.), *The Cambridge Companion to Hobbes’s Leviathan*, 2007, 82 ff.

Aristotle, but at least since Kant's Table of Categories¹⁵, are supposed to belong to the conditions of possibility of our knowledge and experience. As John Stuart Mill once famously summarized, early nominalism put it this way: "there is nothing general except names".¹⁶ In our time, the notion that philosophy should abstain from classical ontology owes much to the writings of Nelson Goodman¹⁷ who, along with Wilfrid Sellars¹⁸, John Searle¹⁹, and others, paved the road to what today is called Constructivism in science. Conversely, much of this constructivism, as Ian Hacking has observed, is motivated by an often unstated nominalist view.²⁰ Both sides, however, are dubious about the idea that reality has an intrinsic structure that science accurately describes. These doubts are raised by the notorious, persistent, seemingly insoluble perplexities to which the notion of "intrinsic" gives rise. The most familiar of these is the question: How can we ever hope to compare reality as it is in itself, naked and undescribed, with our descriptions of it? Many philosophers rebuked the notions of "intrinsic" and "in itself", as a result of the failure to answer that question. Instead, they look on the language we use to describe, and foremost *name*, the world and the problems we have with it. And again, it was Hobbes who already spoke against "those insignificant words, *abstract substance, separated essence, and the like*", and against "that confusion of words derived from the Latin verb *est*".²¹

But most importantly, the nominalist dissolution of classical metaphysics and, with it, the rejection of the possibility of a priori knowledge, makes language appear in historical perspective. Indeed, when the world no longer can be judged by the "nature of things", but instead belongs to man's eponymous sovereignty, then any language, along with its history of denotation, grammar, and syntax can be understood as a variation of a logic of historical experience.²²

¹⁵ In his *Critique of Pure Reason*, Kant arrives at his list of categories by first enumerating the forms of possible judgment (B95/A70-B109/A93).

¹⁶ J. S. Mill, *System of Logic*, Book I, ch. 5, § 3 (citing Hobbes), in: *Collected Works* (J. M. Robson, ed.), vol. VII, 1963 ff.

¹⁷ N. Goodman, *The Structure of Appearance*, 1951/3rd ed., 1977; see also his *Ways of Worldmaking*, 1978.

¹⁸ See esp. W. Sellars, *Empiricism and the Philosophy of Mind*, in his *Science, Perception and Reality*, 1963. See also J. Seibt, *Properties as Processes, A Synoptic Study of Wilfrid Sellars' Nominalism*, 1990.

¹⁹ J. Searle, *Speech Acts*, 1969; see also Searle, *The Construction of Social Reality*, 1995.

²⁰ I. Hacking, *The Social Construction of What?*, 1999, 80-84. And see esp. *ibid.*, 83 f., Footnote 14, where Hacking's own use of the concept of "nominalism", interestingly, comes close to Kant's transcendental idealism.

²¹ *De corpore*, *ibid*, ch. 3, No. 4 (original italics).

²² See also H.-G. Gadamer, *Wahrheit und Methode*, *Gesammelte Werke* Bd. 1, 1990, 439 f.; engl. trans. *Truth and Method*, 2nd rev. edition, 1989, part III, ch. 2 (c).

In one form or another, this idea runs through the thoughts of authors as diverse as Nietzsche or Wittgenstein, Habermas or Derrida, as well as from W. v. O. Quine and Donald Davidson to Richard Rorty.²³ The often pejorative use of the word nominalism, along with its accusation of arbitrariness – usually, that linguistic arbitrariness causes arbitrariness in things – is therefore neither warranted in terms of language nor in terms of substance. Rather, it is necessary, as the Rolling Stones would have it, to “shine a light” on *understanding*²⁴, which in our context is the understanding of language. And what is true for philosophical hermeneutics applies to legal hermeneutics as well.

Jeremy Bentham was perhaps the first who took this route. He developed a radically empiricist theory of the meaning of words, which supported his utilitarianism and legal positivism.²⁵ Later, H.L.A. Hart, following Bentham’s path, used the new developments in the philosophy of language to ‘elucidate’ the concept of law. He did so in studying the work of Ludwig Wittgenstein, and also the Oxford ‘ordinary language’ philosophers such as J. L. Austin. Hart suggested a basic “rule of recognition” that allows for the identification of law and which, as such, is a matter of (linguistic) convention.²⁶ Hence, this rule is not made valid by another legal rule; it is a “social rule”. Hart claimed that such a social rule is a regular pattern of conduct accompanied by a “distinctive normative attitude”, which “consists in the standing disposition of individuals to take such patterns of conduct both as guides to their own future conduct and as standards of criticism”.²⁷ Basically, though, Hart described the rule of recognition circularly: From the social acceptance of the rule and its manifesting in legal practice he inferred the rule to exist, and then used its existence to identify the law.

Subsequently, other legal philosophers have dismissed the view that linguistic conventions can explain the rule of law. Ronald Dworkin, as one of the leading authors, has opposed Hart’s theory on the basis that his whole approach to

²³ I don’t, of course, want to insinuate that all of the mentioned authors are “nominalists”. All of them, however, think that truth is a property of sentences which again are dependent upon the vocabularies they consist of. Most pointedly this was elaborated by Richard Rorty, *Contingency, Irony, and Solidarity*, 1989, esp. ch. 1. And, for the last time now, already by Hobbes: “[F]or truth consists in speech, and not in the things spoken of”; *De corpore*, *ibid.*, ch. 3, No. 7.

²⁴ Besides H.-G. Gadamer, *supra*, see G. H. von Wright, *Explanation and Understanding*, 1971.

²⁵ See J. Bentham, *Of Laws in General* (H.L.A Hart ed.) 1970; see also G.J. Postema, *Bentham and the Common Law Tradition*, 1986.

²⁶ “[...] the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact”; H.L.A. Hart, *The Concept of Law*, 1961, 107 (2nd ed. 1994).

²⁷ *Ibid.*, 255

legal philosophy is undermined or “stung” by his approach to words – that Hart wrongly thought that lawyers all follow certain linguistic criteria for judging legal propositions.²⁸ Dworkin’s so called “semantic sting” argument has set an agenda for much recent debate in the philosophy of law.²⁹ It implies that there must be more to the concept of legal validity than can be explained by a set of shared criteria embodied in a basic rule of recognition. This touches on the question about the relation between fact and value in law, and between law and morality. This question, according to Dworkin, can only be answered by what he famously called “Law as Integrity”, a method of interpretation which owes much to John Rawls’ “Justice as Fairness” and takes the moral underpinnings of law into account.³⁰ And, what has been most controversially discussed since: Dworkin claims that there is always a right answer to virtually every legal dispute – literally a Herculean task, especially for a court.³¹

We cannot determine the merits of this argument here in detail or whether such a Herculean judge, “[w]hen he intervenes in the process of government to declare some statute or other act of government unconstitutional, he does this in service of his most conscientious judgement about what democracy really is and what the Constitution, parent and guardian of democracy, really means”.³² What we can determine, however, is that whatever such a judge is doing, he does it with words. This even more so as no constitutional text can be separated from the language of the society it governs. And to ensure that both stay in line over time is the foremost task of constitutional jurisprudence. This does not mean that interpretative reason necessarily resigns itself to historical tradition. Instead, we should view the circularity of the hermeneutic deployment of meaning as an opportunity to appropriately work through the changing meanings in society.³³ Or, as Martin Heidegger put it: “What is decisive is not to get out of the circle but to come into it the right way”.³⁴ Constitutional jurisprudence, therefore, primarily is concerned with words, i.e. with names and designations. They define the things at stake.

Now, a particular sexual preference is certainly not something the state has to judge. Nevertheless, a democratic legislature must be able to decide what it considers a marriage. Whether this needs to be done in the constitution, one

²⁸ R. Dworkin, *Law’s Empire*, 1986, 31 ff., 45 f.

²⁹ See, for instance, the essays in J. Coleman (ed.), *Hart’s Postscript*, 2001.

³⁰ R. Dworkin, *Law’s Empire*, 1986, chs. 6 and 7.

³¹ R. Dworkin, *Law’s Empire*, *ibid.*, 239; see also his *A Matter of Principle*, 1985, esp. ch. 5.

³² R. Dworkin, *Law’s Empire*, *ibid.*, 399.

³³ See e.g. D. C. Hoy, *The Critical Circle: Literature, History, and Philosophical Hermeneutics*, 1978.

³⁴ M. Heidegger, *Being and Time* (Macquarrie/Robinson trans.), 1962, 195 (§ 32).

can surely find questionable, and equally, that amending the constitution in California is so easy.³⁵ However, the California Supreme Court explicitly interpreted the new amendment in such a restricted way that it would not infringe the constitutionally protected right to choose one's life partner regardless of sexual orientation. It thereby, like the US-Supreme Court³⁶, unequivocally rejected the natural law tradition.³⁷ Rightly, the Court confronts the so called "inalienable" or natural personal rights with the same "inalienable" rights of the Californian people to amend the Constitution.³⁸ That in fact leads nowhere. And all the more so, as one certainly could ask whether a natural law argument would weaken rather than strengthen the case for same-sex marriage.

Against this background, the nominalism of the California Supreme Court is not so flawed. And it used an original hermeneutic standard when it related the new amendment to the other constitutional norms: "[W]hen constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted. [...] As a means of avoiding conflict, a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision".³⁹ Applied to the conflict of the present constitutional amendment with the fundamental interest of same-sex couples in having their family relationship accorded the same respect and dignity enjoyed by opposite-sex couples, the Court concluded: "[T]he measure carves out a narrow and limited exception to these state constitutional rights, reserving the official *designation* of the term "marriage" for the union of opposite-sex couples as a matter of state constitutional law, but leaving undisturbed all of the other extremely significant substantive aspects of a same-sex couple's state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection of the laws".⁴⁰

Thus, this decision certainly cannot be accused of arbitrariness. Rather it can be seen as a well-balanced interpretive approach to the constitutional text, which takes into account both the customary language of the protected constitutional rights and the current, albeit traditional civic use of the term marriage. The result may disappoint some. It should not be underestimated, however, that the Court did not elevate itself to something like a language creator, but followed judicial restraint by merely setting the new amendment bindingly under the

³⁵ But this, as *Strauss v. Horton* makes clear, is not for the Court to determine; *ibid.*, 12 f.

³⁶ See L. Tribe, *American Constitutional Law*, 3rd ed., 2000, 1335-1362.

³⁷ *Strauss v. Horton*, *ibid.*, 11 f., 122 ff., 126,

³⁸ *Strauss v. Horton*, *ibid.*, 124 ff.

³⁹ *Bowens v. Superior Court*, 1 Cal. 4th 36, 45 (1991).

⁴⁰ *Strauss v. Horton*, *ibid.*, 7 (original emphasis); see also 35 ff.

other constitutional guarantees. In a Constitutional Democracy, creators of language, and legal language in particular, are the people who, if they find it necessary, also can use their power to amend the constitution in this respect. If one likes, it is only the “forceless force of the better argument” (Habermas) that counts here. But, so far as we can see, there is no guarantee for accuracy, or truth, external to language.

And since Thomas Kuhn has called attention to the contingent and contextual nature of our knowledge,⁴¹ the overestimated belief in strict methodological criteria has lost its magical power too. The question, then, how we think and talk about things and what we make out of them in terms of them being “wrongly” or “rightly” perceived comes down to a matter of *fit*. This was basically the same in Kant.⁴² Of course, we believe a proposition is true only if it fits our standards and criteria but, conversely, we hold our standards and criteria as true if they fit what we believe is right. It may suffice, then, if our reasoning leads to something like a “reflective equilibrium”, which John Rawls once suggested.⁴³ The California Supreme Court in *Strauss v. Horton* reached such equilibrium within its authority.

One problem, though, remains. What happens to the estimated 18,000 same-sex marriages that were performed in California before the new amendment took effect? It is an old Common Law tradition that laws under *due process*-protection do not apply retroactively unless the legislature explicitly intends so. We don’t need to go into detail here. It is enough to note that the California Supreme Court couldn’t find such intention and thus concluded that *Proposition 8* should be interpreted to only apply prospectively and not to invalidate retroactively the marriages of same-sex couples performed prior to its effective date.⁴⁴ This, however, causes the implausible situation that there are now married same-sex couples within a state legal framework that reserves the term marriage exclusively for heterosexuals. So perhaps the California Supreme Court already should have deferred to the direct-democratic electorate in *In re Marriage*. It not only would have avoided the current problems, but also have kept the Constitution out of the maelstrom of everyday politics. The campaigns for a renewed constitutional amendment have already begun.⁴⁵

⁴¹ Th. Kuhn, *The Structure of Scientific Revolutions*, 1962/1969.

⁴² See H. Putnam, *Reason, Truth, and History*, 1981, 60 ff., see also *ibid.*, 123 (citing Nelson Goodman) and 133 f. (with reference to some sort of Aristotelian Eudaemonia).

⁴³ J. Rawls, *A Theory of Justice*, 1971, 20 f, 48-51, and 120 f., following Nelson Goodman, *Fact, Fiction, Forecast*, 1955, 65-68, concerning the methods of deductive and inductive inference.

⁴⁴ *Strauss v. Horton*, *ibid.*, 128 ff.

⁴⁵ *San Francisco Chronicle*: “Prop. 8 Stands; More Ballot Battles Ahead”, of May 27, 2009, A 1.

California's Governor Arnold Schwarzenegger called the outcome of the initiative "unfortunate". Meanwhile, the California Supreme Court had spoken, and thus gave the last word back to the people. The democratic contest of opinions is the heart of a vibrant liberal society. And in this contest, as the Court expressly pointed out, the homosexual community can continue to seek a majority.⁴⁶ With only 52 to 48% of the votes for the new amendment they are very close.

⁴⁶ *Strauss v. Horton*, *ibid.*, 135: "Having determined that none of the constitutional challenges to the adoption of Proposition 8 have merit, we observe that if there is to be a change to the state constitutional rule embodied in that measure, it must "find its expression at the ballot box"; citing *In re Marriage Cases*, 43 Cal.4th 757, 884 (conc. & dis. opn. Corrigan, J.).