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‘TIL PROPOSITION 8 DO US PART:
THE RISE AND FALL OF SAME-SEX MARRIAGE IN
CALIFORNIA

*Addie V. Kies**

I. INTRODUCTION

Imagine falling hopelessly in love with someone, planning to spend the rest of your life with that person, and going down to the courthouse one sunny California morning to get married—and being denied based on your sexual orientation. Now imagine being a religious leader in your community whose life and work are deeply rooted in traditional values, including the holy sacrament of marriage. These two people clearly have divergent beliefs on the issue of same-sex marriage, and each side has tens of thousands of supporters. The struggle to legalize same-sex marriage in the state of California, which began decades ago, continues to be one of the most debated subjects today. In the past year, California legislation has both given and taken away the legal right to marry someone of the opposite sex,¹ and the citizens of the state wait anxiously for a final decision on this controversial topic.

The year 2008 proved to be pivotal in the quest for the legalization of same-sex marriage. In May of that year, the California Supreme Court voted 4-3 to allow members of the same gender to marry legally.² The court reached this decision by finding a section of the California Constitution, which restricted the definition of marriage to apply only to relationships between a man and a woman, unconstitutional.³ However, this ruling was short-lived, as Proposition 8,⁴ a ballot initiative which

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1. *See generally In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); DEBORAH BOWEN, STATEMENT OF VOTE 13 (2008), http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

2. *See In re Marriage Cases*, 183 P.3d at 385.

3. *Id.* at 455.

4. *See BOWEN, supra* note 1, at 13.

received a majority of the popular vote, overturned *In re Marriage Cases*⁵ in November 2008.⁶ With a lawsuit seeking to declare Proposition 8 invalid currently pending in the California Supreme Court,⁷ 2009 will likely be yet another landmark year in the same-sex marriage controversy.

This Note examines the California Supreme Court's decision in *In re Marriage Cases*, which legalized same-sex marriage in the state. Part II traces the history of same-sex marriage legislation in California, including the impact of Proposition 22. Part III summarizes the procedural background of *In re Marriage Cases* and analyzes the court's opinion. Part IV discusses Proposition 8's role in reversing *In re Marriage Cases* and explains the lawsuits pending against it. Part V suggests an alternative compromise to the same-sex marriage debate.

II. THE HISTORY OF SAME-SEX MARRIAGE LAWS IN CALIFORNIA

A. *Perez v. Sharp* Invalidates Anti-Miscegenation Laws in California and Paves the Way for the Supreme Court of the United States to Follow Suit

California has historically been at the forefront of social change with regard to the right of its citizens to marry. The first major California ruling on this subject came from *Perez v. Sharp*.⁸ This case challenged California Civil Code section 69, which provided that "no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race"⁹ and California Civil Code section 60, which stated that "all marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void."¹⁰ The petitioners in *Perez* argued that these statutes were unconstitutional because they infringed on their rights to the free exercise of their religion and to the participation in the sacraments of their religion.¹¹ The Supreme Court of California agreed, declaring that both code sections were too vague to be enforceable and that they violated the right to equal

5. 183 P.3d 384 (Cal. 2008).

6. See BOWEN, *supra* note 1, at 13.

7. California Courts, Proposition 8 Cases, <http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm> (last visited Mar. 15, 2009).

8. 198 P.2d 17 (Cal. 1948).

9. *Id.* at 17-18.

10. *Id.* at 18.

11. *Id.*

protection of the laws under the United States Constitution.¹² California's invalidation of anti-miscegenation laws occurred nearly twenty years before the United States Supreme Court followed suit in *Loving v. Virginia*.¹³ Both *Perez* and *Loving* later proved to be fundamental in establishing equal rights for same-sex couples in recent years.¹⁴

**B. A Statutory Amendment in the 1970s Caused Setbacks for the
Legalization of Same-Sex Marriage and Proposition 22 Reinforces This
Amendment**

Legislation dealing with the legalization of same-sex marriage in California began a struggle that endures today. Until 1977, California Civil Code section 4100 defined marriage as "a personal relation arising out of a civil contract, to which consent of the parties capable of making that contract is necessary."¹⁵ Although this definition was intended to apply only to couples of the opposite sex, the statute did not articulate an unambiguous conclusion, and a change to the code, introduced in 1992, expressly prohibited same-sex marriage.¹⁶ The amended code changed the definition of marriage to "a personal relation arising out of a civil contract *between a man and a woman*, to which the consent of the parties capable of making that contract is necessary."¹⁷ This amendment eliminated all doubt in the interpretation of the statute and effectively barred same-sex couples from marrying.

The 1977 amendment, which was continued without substantive change in the California Family Code in 1994, remained the legal authority on same-sex marriage in California for more than two decades.¹⁸ The citizens of California then reignited the controversy over same-sex marriage rights by passing Proposition 22 on March 7, 2000.¹⁹ This initiative borrowed

12. *Id.* at 29.

13. 388 U.S. 1, 12 (1967) (holding that "marriage is one of the 'basic civil rights of man'" and that under the Constitution, "the freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the State").

14. Karen M. Loewy, *The Unconstitutionality of Excluding Same-Sex Couples from Marriage*, 38 NEW ENG. L. REV. 555, 558 (2004).

15. See CAL. FAM. CODE § 300 (West 1994) (providing historical note with the language of former section 4100).

16. CAL. CIV. CODE § 4100 (West 1992).

17. CAL. FAM. CODE § 300 (West 1992) (emphasis added).

18. See *id.*

19. Cal. Secretary of State, State Ballot Measures, <http://primary2000.sos.ca.gov/returns/prop/00.htm> (last visited Mar. 15, 2009).

language from the 1977 amendment and affirmed that marriage is only defined as a union between a man and a woman.²⁰

However, the California Family Code also contained a provision which stated that “a marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state.”²¹ This section gave rise to controversy over whether California would recognize a same-sex marriage conducted legally in another jurisdiction. In other words, some Californians were fearful that this provision could act as a loophole to circumvent Family Code section 300.²² A new section to the provision, which clarifies that “only marriage between a man and a woman is valid or recognized in California” quickly assuaged these fears.²³ Even if another jurisdiction legally performed same-sex marriage, it would not be recognized in California.

C. Further Legislation in California Fails to Legalize Same-Sex Marriage

During the 2005–2006 session of the California State Legislature, members introduced Assembly Bill 19, which proposed the legalization of same-sex marriage.²⁴ The bill failed on the Assembly floor, but regained life as part of Assembly Bill 849.²⁵ The State Senate and Assembly approved Assembly Bill 849, and it became the first same-sex marriage bill approved by a state legislature.²⁶ This success was short-lived, as Governor Arnold Schwarzenegger vetoed the bill shortly thereafter.²⁷ Schwarzenegger felt that passing the bill would unfairly overturn Proposition 22, which was passed by a majority of voters.²⁸ Passing Assembly Bill 849 would remove power from the hands of California’s citizens and place it in those of the government. Schwarzenegger argued that the same-sex marriage decision must be left to the courts or to another

20. Cal. Secretary of State, Text of Proposition 22, <http://primary2000.sos.ca.gov/VoterGuide/Propositions/22text.htm> (last visited Mar. 15, 2009).

21. CAL. FAM. CODE § 308 (West 1994).

22. Dana S. Kruckenberg et al., Rebuttal to Argument Against Proposition 22, <http://primary2000.sos.ca.gov/VoterGuide/Propositions/22norbt.htm> (last visited Mar. 15, 2009).

23. CAL. FAM. CODE § 308.5 (West 2000).

24. Bill List, AB19, http://leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_19&sess=0506&house=B&author=leno26 (last visited Mar. 15, 2009).

25. *Id.*

26. Nancy Vogel, *Legislature OKs Gay Marriage*, L.A. TIMES, Sept. 7, 2005, at A1.

27. AB 849, Assembly Bill History, http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0801-0850/ab_849_20060223_history.html (last visited Mar. 15, 2009).

28. Maura Dolan & Michael Finnegan, *Citing Prop. 22, Gov. Rejects Gay Marriage Bill*, L.A. TIMES, Sept. 8, 2005, at A1.

public vote based on a statewide initiative.²⁹ This process was repeated in 2007, resulting in Schwarzenegger's veto of Assembly Bill 43, which also proposed the legalization of same-sex marriage.³⁰

III. *IN RE MARRIAGE CASES* LEGALIZES SAME-SEX MARRIAGE IN CALIFORNIA

A. Procedural History of *In re Marriage Cases*

The path to the California Supreme Court's landmark decision in *In re Marriage Cases* began in 2004, when the Mayor of the City and County of San Francisco requested that the county clerk change the forms and documents used to apply for marriage licenses to accommodate licensing for same-sex couples.³¹ The clerk complied, and San Francisco began issuing marriage licenses to same-sex couples on February 12, 2004.³² Two actions seeking an immediate stay to prohibit the issuance of these marriage licenses were filed the next day in the San Francisco Superior Court.³³ The court refused to issue a stay in these actions and clerks continued to issue marriage licenses to same-sex couples.³⁴

The California Attorney General subsequently filed two petitions seeking a writ of mandate from the California Supreme Court.³⁵ These petitions argued that the City of San Francisco's actions "were unlawful and warranted... immediate intervention" from the court.³⁶ On March 11, 2004, the court directed San Francisco city officials to "enforce the existing marriage statutes and to refrain from issuing marriage licenses not authorized by such provisions."³⁷ The Supreme Court of California stayed the proceedings in *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*³⁸ and *Campaign for California Families*

29. John Ritter, *California Governor to Veto Same-Sex Marriage Bill*, USA TODAY, Sept. 7, 2005.

30. Matthew S. Bajko, *Schwarzenegger Vows to Veto Marriage Bill*, BAY AREA REPORTER (Cal.), Feb. 15, 2007.

31. *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008).

32. *Id.*

33. See Brief for Plaintiff, *Proposition 22 Legal Def. and Educ. Fund v. City and County of S.F.*, No. CPF-04-503943 (Super. Ct. S.F. City & County 2004); Brief for Plaintiff, *Campaign for Cal. Families v. Newsom*, No. CGC-04-428794, (Super. Ct. S.F. City & County 2004).

34. *In re Marriage Cases*, 183 P.3d at 402.

35. *Id.*

36. *Id.*

37. *Id.*

38. No. CPF-04-503943 (Super. Ct. S.F. City & County 2004).

v. *Newsom*,³⁹ although it mentioned that the City of San Francisco was free to bring an action challenging the constitutionality of the state's existing marriage laws.⁴⁰ Several months later, the California Supreme Court ruled the Mayor of San Francisco exceeded the scope of his authority by requesting that the county clerk begin issuing marriage licenses to same-sex couples, since there had been no judicial determination that the statutory provisions limiting marriage to the union of a man and a woman were unconstitutional.⁴¹ It also declared the approximately four thousand same-sex marriages that had taken place prior to March 11, 2004 void from their inception and of no legal effect.⁴²

Meanwhile, the City and County of San Francisco filed a petition seeking a declaration that the state's statutory provisions limiting marriage to unions between a man and a woman are unconstitutional under the California Constitution.⁴³ Same-sex couples and organizations representing various other same-sex couples then filed several similar actions.⁴⁴ The court combined these actions with the *Proposition 22 Legal Defense Fund* and *Campaign* actions, resulting in a single proceeding.⁴⁵ This consolidated proceeding, entitled *In re Marriage Cases*, became an amalgamation of six actions challenging the constitutionality of California's marriage statutes.⁴⁶

On April 13, 2005, the San Francisco Superior Court held that the California marriage statutes were unconstitutional, violating the equal protection clause of the California Constitution.⁴⁷ It stated that "the statutes limiting marriage in California to opposite-sex couples properly must be evaluated under the strict scrutiny equal protection standard, because those statutory enactments rest upon a suspect classification (sex) and impinge upon a fundamental constitutional right (the right to marry)."⁴⁸ However, a Court of Appeal of California reversed the lower court's decision in October 2006.⁴⁹ It disagreed significantly with the superior court's analysis of the equal protection issue and held that the superior court had erred in finding the marriage statutes unconstitutional.⁵⁰ As a result, the California

39. No. CGC-04-428794, (Super. Ct. S.F. City & County 2004).

40. *In re Marriage Cases*, 183 P.3d at 402.

41. *Lockyer v. City & County of S.F.*, 95 P.3d 459, 472 (Cal. 2004).

42. *Id.* at 495; *In re Marriage Cases*, 183 P.3d at 403.

43. *In re Marriage Cases*, 183 P.3d at 402-03.

44. *Id.*

45. *Id.* at 403.

46. *Id.*

47. *Id.* at 404.

48. *Id.*

49. *Id.*

50. *Id.*

Supreme Court granted review of the constitutional issues in *In re Marriage Cases*.⁵¹

B. Analysis of *In re Marriage Cases*

In re Marriage Cases finally confronted the issue that the *Lockyer v. City and County of San Francisco*⁵² court had refused to address in 2004: whether the California marriage statutes are valid under the state's Constitution.⁵³ However, the court first emphasized one significant difference between cases in other states regarding same-sex marriage laws and the case at hand.⁵⁴ California, unlike the majority of states, previously enacted domestic partnership legislation allowing same-sex couples to enjoy practically all of the same legal benefits, privileges, obligations, and duties as married couples.⁵⁵ In addition, California precedent states that all relevant statutory provisions that relate to how the state treats the affected individuals must be evaluated when determining the constitutionality of a particular statute.⁵⁶ As a result, the issue in *In re Marriage Cases* was actually whether the California Constitution

prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship that affords all of the significant legal rights and obligations traditionally associated under state law with the institution of marriage, but under which the union of an opposite-sex couple is officially designated a "marriage" whereas the union of a same-sex couple is officially designated a "domestic partnership."⁵⁷

In other words, determining whether the terminology used to describe a same-sex union is constitutional is more important than whether an actual same-sex marriage is constitutional because the legal equivalent of same-sex marriages already exists in California.⁵⁸ In contrast, other states have simply ruled on the constitutionality of limiting marriage to opposite-sex couples while denying same-sex couples the right to take part in a legal relationship that affords them the same benefits.⁵⁹

51. *Id.* at 405.

52. 95 P.3d 459 (Cal. 2004).

53. *In re Marriage Cases*, 183 P.3d at 397.

54. *Id.* at 397–98.

55. *Id.* at 398.

56. *Id.*; see *Brown v. Merlo*, 506 P.2d 212, 214 (Cal. 1973).

57. *In re Marriage Cases*, 183 P.3d at 398.

58. *Id.*

59. *Id.* at 397; see *Standhardt v. Superior Court*, 77 P.3d 451, 453 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15, 18 (Ind. Ct. App. 2005); *Conaway v. Deane*, 932 A.2d 571, 581 (Md. 2007); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196,

A second preliminary point that the court discussed in *In re Marriage Cases* relates to the rationale behind its decision. The court was clear to assert that the proceeding is not a policy matter, but instead focuses solely on the constitutional issue.⁶⁰ It recognized that those who support same-sex marriage do so because it is unfair to deny these couples the right to marry and it is possible that doing so is harmful to the fiscal interests of the state and its economic institutions.⁶¹ It also recognized that those who oppose same-sex marriage feel that it is necessary to “preserve the long-standing and traditional definition of marriage as a union between a man and a woman.”⁶² Despite the court’s belief on whether same-sex couples should be permitted to enter into marriage, it did not have the authority to rule on such a policy matter in this case.⁶³

The California Supreme Court next considered the three constitutional issues presented and made a final ruling on each.⁶⁴ First, the court turned its attention to the nature and scope of the “right to marry.”⁶⁵ According to the court’s 1948 decision in *Perez v. Sharp*,⁶⁶ which held that anti-miscegenation laws were unconstitutional, the right to marry is a fundamental right in the California Constitution.⁶⁷ The court also cited *Perez* for breaking with statutory history, which had prohibited interracial marriage since California’s founding, in order to make this constitutional determination.⁶⁸ The court concluded that in California, the right to marry must be “understood to encompass the core set of basic *substantive* legal rights and attributes traditionally associated with marriage that are so integral to an individual’s liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process.”⁶⁹ Because the constitution secured the right to marriage as a fundamental right, every individual has an opportunity to establish an officially recognized and protected family that encompasses the same rights as traditional married couples.⁷⁰

200 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006); *Baker v. State*, 744 A.2d 864, 807 (Vt. 1999); *Andersen v. King County*, 138 P.3d 963, 968 (Wash. 2006).

60. *In re Marriage Cases*, 193 P.3d at 398–99.

61. *Id.* at 399.

62. *Id.*

63. *Id.*

64. *Id.* at 399–402.

65. *Id.* at 399.

66. 198 P.2d 17 (Cal. 1948).

67. *In re Marriage Cases*, 193 P.3d at 399.

68. *Id.*; see *Perez*, 198 P.2d at 29, 38.

69. *In re Marriage Cases*, 183 P.3d at 399.

70. *Id.*

Second, the court considered the domestic partnership legislation already in effect.⁷¹ The Attorney General of California argued that the existing legislation, which provides all of the substantive aspects of marriage to heterosexual and homosexual couples, precludes the necessity of labeling the relationship as a "marriage."⁷² He asserted, "so long as the state affords a couple all of the constitutionally protected *substantive* incidents of marriage, the state does not violate the couple's constitutional right to marry simply by assigning their official relationship a *name* other than marriage."⁷³ The court, however, disagreed with the Attorney General's view and held that the current legislation does violate same-sex couples' constitutional right to marry, despite the fact that they are afforded the same substantive elements of marriage as opposite-sex couples.⁷⁴

The California Supreme Court then recognized that because same-sex couples are not permitted to adopt the legal name of "marriage," it is possible that California's marriage statutes are unconstitutional under the state constitutional equal protection clause.⁷⁵ This determination lay within the standard of review used in deciding whether differential treatment of individuals violates the equal protection clause.⁷⁶ Generally, the rational basis standard of review is proper in making this judgment.⁷⁷ However, a strict scrutiny standard must be applied when "the distinction drawn by a statute rests upon a so-called 'suspect classification' or impinges upon a fundamental right."⁷⁸ The court found that the strict scrutiny standard is applicable in *In re Marriage Cases* because the statutes in question classify and discriminate on the basis of sexual orientation.⁷⁹ In addition, the right of entering into a legal marriage is fundamental and to deny this right results in discrimination.⁸⁰

[I]n order to demonstrate the constitutional validity of a challenged statutory classification, the state must establish 1) that the state interest intended to be served by the differential treatment not only is a constitutionally legitimate interest, but is a *compelling* state interest, and 2) that the differential treatment

71. *Id.* at 400.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 401.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

not only is reasonably related to but is *necessary* to serve that compelling state interest.⁸¹

The court discussed several reasons for concluding that retaining California's marriage statutes cannot be considered compelling or necessary to the interest of the state.⁸² First, allowing same-sex couples legally to marry does not deprive opposite-sex couples of any rights, nor does it change the legal framework of the institution of marriage.⁸³ Second, denying same-sex couples the ability to use the word "marriage" causes harm to their families by casting doubt on whether there exists a legitimate marital relationship.⁸⁴ Third, refusing same-sex couples the official designation of marriage is likely to cause their relationships to be perceived as "lesser" than those of their opposite-sex counterparts.⁸⁵ Fourth, only allowing same-sex couples to use a separate term for their relationship implies that they are second-class citizens who may be treated differently under the law than heterosexual persons.⁸⁶ Because of these factors, the California Supreme Court held that the state marriage statutes are not based upon a compelling or necessary state interest and are unconstitutional.⁸⁷

IV. PROPOSITION 8

A. The Passage of Proposition 8 Overturns *In re Marriage Cases*

Just months after the California Supreme Court's landmark decision in *In re Marriage Cases*, a new ballot initiative threatened to strip the right of marriage from same-sex couples once again. This initiative, called Proposition 8, sought to restrict the definition of marriage in the California Constitution to read that "[o]nly marriage between a man and a woman is valid or recognized in California."⁸⁸ Proposition 8, if passed, would effectively overrule the court's decision in *In re Marriage Cases*.

The initiative required nearly 700,000 petition signatures in order to qualify for the ballot in California.⁸⁹ The number of signatures greatly

81. *Id.*

82. *Id.* at 401–02.

83. *Id.* at 401.

84. *Id.*

85. *Id.* at 401–02.

86. *Id.* at 402.

87. *Id.*

88. California Voter Information Guide, <http://www.voterguide.sos.ca.gov/text-proposed-laws/text-of-proposed-laws.pdf>.

89. Press Release, Debra Bowen, Cal. Sec'y of State, Secretary of State Debra Bowen Certifies Eighth

surpassed this threshold and the initiative became a part of the ballot on June 2, 2008.⁹⁰ The campaigns both for and against Proposition 8 raised tens of millions of dollars in preparation for the November 4, 2008 election, becoming the highest-funded campaigns in the country for this election, except for the presidential campaign.⁹¹ The initiative faced a challenge from opponents long before Election Day in the form of a petition for its removal from the ballot.⁹² This petition argued that Proposition 8 was a constitutional revision and could only be introduced to voters through the legislature or a constitutional convention.⁹³ Although the court denied the petition, this issue would be revived after the November election.⁹⁴

Despite opposition from numerous political figures, celebrities, and citizens of California, Proposition 8 passed with approximately fifty-two percent of the electoral vote.⁹⁵ Because an amendment to the California Constitution only requires approval by a simple majority of voters, cities throughout California had to cease the issuance of marriage licenses to same-sex couples after the November 4, 2008 election.⁹⁶ An exit poll conducted by CNN broke down the supporters of Proposition 8 by demographics.⁹⁷ The following groups voted to approve Proposition 8: eighty-four percent of weekly churchgoers; eighty-two percent of Republicans; eighty-one percent of white evangelicals; seventy percent of African Americans; sixty-eight percent of voters married with children; sixty-five percent of all Protestants; sixty-five percent of white Protestants; sixty-four percent of voters with children in the household; sixty-four percent of Catholics; sixty-one percent of voters over the age of sixty-five; sixty percent of married people; fifty-nine percent of suburban dwellers; fifty-eight percent of non-college graduates; fifty-six percent of union households; fifty-three percent of Latinos; and fifty-one percent of white men.⁹⁸

Measure for November 4, 2008, General Election (June 2, 2008).

90. *Id.*

91. *California Same-Sex Marriage Initiative Campaigns Shatter Spending Records*, U.S. NEWS, Oct. 29, 2008.

92. Maura Dolan, *Gay Rights Groups Lose a Round*, L.A. TIMES, July 17, 2008, at B3.

93. *Id.*

94. *Id.*

95. BOWEN, *supra* note 1, at 13.

96. CAL. CONST. art. XVIII, § 2.

97. CNN, Local Exit Polls: California Proposition 8, <http://edition.cnn.com/ELECTION/2008/results/polls/#val=CAI01p1> (last visited Mar. 15, 2009).

98. *Exit Poll Data: Prop. 8*, SACRAMENTO BEE, Nov. 5, 2008, available at http://media.sacbee.com/smedia/2008/11/05/18/prop8.source.prod_affiliate.4.pdf.

B. Lawsuits are Filed Following the Passage of Proposition 8

After Proposition 8 passed in California, once again denying same-sex couples the right to legally marry, opponents filed various lawsuits seeking to overturn it.⁹⁹ On November 19, 2008, the California Supreme Court accepted three lawsuits challenging Proposition 8 and agreed to hear them together.¹⁰⁰ The court rejected three additional lawsuits, but it accepted amicus briefs submitted by the petitioners.¹⁰¹ The court will consider three main issues in deciding whether to uphold or overrule Proposition 8.¹⁰²

First, the court must consider whether Proposition 8 constitutes a revision of or an amendment to the California Constitution. California case law defines a revision as a “substantial alteration of the entire Constitution, rather than to a less extensive change in one or more of its provisions.”¹⁰³ In order to revise the California Constitution, the revision must be approved by a majority of voters as well as by two-thirds approval of each of the houses of the California State Legislature.¹⁰⁴ In contrast, an amendment can be adopted solely by a majority of voters.¹⁰⁵ The significance of this difference lies within the method used to pass Proposition 8. Because the initiative goes to a popular vote without legislative approval, it is only valid if it is deemed to be an amendment.¹⁰⁶ If the court determines that Proposition 8 is actually a revision, the citizens of California will have failed to pass the initiative with legislative approval.¹⁰⁷ Because there is virtually no case law on the differences between a revision and an amendment, the California Supreme Court’s decision on this subject will be highly significant to California law.¹⁰⁸

The second question the court must consider is whether Proposition 8 violates the California Constitution’s separation of powers doctrine.¹⁰⁹ The petitioners in the lawsuits opposing Proposition 8 maintain that the

99. See Press Release, Judicial Council of Cal., California Supreme Court Takes Action on Proposition 8 (Nov. 19, 2008), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR66-08.pdf>.

100. *Id.*

101. See Press Release, Judicial Council of Cal., Supreme Court Issues Orders in Proposition 8 Cases (Nov. 20, 2008), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR67-08.pdf>.

102. *Id.*

103. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1285 (Cal. 1978).

104. CAL. CONST. art. XVIII, § 2.

105. CAL. CONST. art. XVIII, § 3.

106. Jesse McKinley, *With Same-Sex Marriage, A Court Takes on the People’s Voice*, N.Y. TIMES, Nov. 21, 2008, at A18.

107. *Id.*

108. *Id.*

109. *Id.*

California Legislature cannot overturn the protection of minority groups because that a function of the judicial branch.¹¹⁰ If the court determines that this is the case, it will hold Proposition 8, which the judiciary has not overruled, invalid.¹¹¹

The third issue that the California Supreme Court must address is whether Proposition 8 retroactively invalidates same-sex marriages performed prior to the passage of the initiative. Approximately sixteen thousand same-sex marriages occurred between the holding in *In re Marriage Cases* on May 15, 2008 and the passage of Proposition 8 on November 4, 2008.¹¹² Because Proposition 8 does not explicitly express whether or not the same-sex marriages performed legally are invalid, this is a particularly significant decision left to the California Supreme Court.¹¹³ Supporters of the initiative argue that the initiative intended to deny recognition to same-sex marriages, since it does state that California only recognizes heterosexual marriages.¹¹⁴

California's Attorney General responded to the combined lawsuits on December 19, 2008.¹¹⁵ In response to the arguments set forth by the petitioners, he asserted: 1) neither the revision/amendment analysis nor the separation of powers analysis should be used to overturn Proposition 8, 2) Proposition 8 should not overturn the sixteen thousand same-sex marriages performed legally in California, and 3) Proposition 8 should be "stricken as inconsistent with the guarantees of individual liberty safeguarded by article 1, section 1 of the Constitution."¹¹⁶ The California Supreme Court is expected to hear the lawsuits in opposition to Proposition 8 in 2009.

V. RECOMMENDATIONS AND SOLUTIONS

A. Eliminating the Term "Marriage" Is One Solution to the Same-Sex Marriage Debate

While equal rights with regard to sexual orientation and marriage is undoubtedly a controversial topic, one solution that has yet to be discussed by the California Supreme Court may provide an answer which would

110. Tony Quinn, *Recalling the Supreme Court—If it Comes to That*, CAPITOL WEEKLY, Dec. 4, 2008.

111. *Id.*

112. Bob Egelko, *If Prop. 8 Passes, What About Those Who Wed?*, S.F. CHRONICLE, Nov. 1, 2008.

113. *Id.*

114. *Id.*

115. Brief of Respondent, *Strauss v. Horton*, No. S168047 (Cal. Dec. 19, 2008).

116. *Id.* at 90.

appease a larger group of people. Despite acknowledging that same-sex couples should be able to enjoy the same benefits as opposite-sex couples, the court in *In re Marriage Cases* did not hold that equal rights in marriage are constitutional mandates.¹¹⁷ Rather than granting same-sex couples the right to a traditional marriage, an alternative solution may be to create a different designation for all couples.¹¹⁸

Creating a new label for intimate relationships between adults, such as “domestic partnership” or “civil union,” would eliminate any inequality between the options available for homosexual and heterosexual couples.¹¹⁹ Although this suggestion may still be objectionable for proponents of maintaining the traditional definition of marriage, those less focused on the term will likely accept it. Because Proposition 8 only overruled same-sex marriage, “the court could conclude that in order to comply with the Constitution’s equality mandate, the state must find another rubric—other than marriage—through which to recognize adult intimate relationships.”¹²⁰ The elimination of the “marriage” distinction would satisfy the Constitution’s equal protection requirement while providing equal marriage rights for everyone.¹²¹

B. The Privatization of Marriage and the Subsequent Use of the Corporations Model of Marriage is Another Method of Solving the Controversy over Same-Sex Marriage

Another proposed solution to the same-sex marriage debate is the privatization of marriage.¹²² This can be achieved by completely removing the government from all aspects of the marital relationship. Instead of mandating government regulation of marriage, religious groups would be allowed to choose which relationships to recognize—whether it be only heterosexual marriages or both opposite-sex and same-sex marriages.¹²³ The privatization of marriage is comparable to the privatization of religion, often referred to as “separation of church and state,”¹²⁴ a measure adopted by the founders of the United States to avoid disagreement over official

117. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008); see Melissa Murray, *Equal Rites and Equal Rights*, 96 CAL. L. REV. 1395, 1399 (2008).

118. Murray, *supra* note 117, at 1399.

119. *Id.*

120. *Id.* at 1401.

121. *Id.*

122. David Boaz, *Privatize Marriage: A Simple Solution to the Gay Marriage Debate*, SLATE MAGAZINE, Apr. 25, 1997, <http://www.slate.com/toolbar.aspx?action=print&id=2440>.

123. *Id.*

124. *Id.*

religion in the new country. A similar separation of marriage and state likely would be successful in putting all marriages on equal footing and would allow American citizens more freedom of choice.¹²⁵

One variation on the concept of privatizing marriage is to treat marriage like any other type of contract.¹²⁶ While the enforcement of the marriage contract would be the responsibility of the government, the parties to the contract would be free to define its terms.¹²⁷ If this marriage by contract proposition were to be adopted, couples could contract as to who would work outside the home, care for children, perform household chores, and pay bills.¹²⁸ The contract could also include provisions for the division of property, as well as spousal and child support payments, in case of divorce.¹²⁹ Although basic forms could be available for those who want to abide by a standard marriage contract, couples would also have the option of customizing their contract as much as they wish.¹³⁰ Without government interference in the creation of such a contractual relationship, same-sex marriages would be treated as equal to heterosexual marriages.¹³¹

This idea of defining the marital relationship in the form of a contract is sometimes referred to as the "corporations model of marriage."¹³² A corporation is defined as "a group or succession of persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it."¹³³ If this definition is applied to marriage, it is clear that it "lends itself easily to a union of two persons, but without any explicit sex differentiation."¹³⁴

Many of the characteristics of corporations, when applied to marriage contracts, would provide a viable alternative to traditional marriage which would create an equal playing field for same-sex couples. A corporation is created when it files its articles of incorporation, thereby listing a basic description of the corporation, with the state.¹³⁵ Similarly, a marriage under

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Jeremiah A. Ho, *What's Love Got to Do with It? The Corporations Model of Marriage in the Same-Sex Marriage Debate*, 28 WHITTIER L. REV. 1239, 1269 (2007).

133. BLACK'S LAW DICTIONARY 365 (8th ed. 2004).

134. Ho, *supra* note 132, at 1270.

135. *Id.* at 1272.

the corporations model of marriage would be created when the couple registers basic identification information with the government.¹³⁶ From there, the government would not interfere with either the operations of the corporation or the marriage unless it is necessary to uphold the provisions in the contractual agreement. Methods of dissolution would be equally comparable.¹³⁷ A corporation can voluntarily dissolve by filing with the secretary of state, while a no-fault divorce could occur by a similar filing with the government.¹³⁸ Such an arrangement, where marriage contracts are analogous to corporate agreements, would likely solve the same-sex marriage debate, as it would allow same-sex marriages to be treated the same as opposite-sex marriages.

VI. CONCLUSION

The road to the legalization of same-sex marriage has been fraught with delays, speed bumps, and u-turns. While proponents of same-sex marriage celebrated their victory in *In re Marriage Cases*, opponents quickly and effectively sought to invalidate these unions through the ballot initiative Proposition 8. Only time will tell what the future holds for this struggle, as the California Supreme Court prepares to hear arguments from both sides. The determination of legality may not provide the ultimate answer to the debate and as suggested by some commentators, other solutions such as eliminating the designation of marriage altogether or privatizing marriage, perhaps under the corporations model of marriage, could be effective. This type of radical departure from tradition could be the most effective way to provide all citizens with equal rights and end the same-sex marriage debate.

136. *Id.* at 1271–72.

137. *Id.* at 1274.

138. *Id.*