Reason

October 2008

Analysis of California's Proposition 8: Limits on Marriage

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POLICY BRIEF 76

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Proposition 8: Limit on Marriage

By Adam B. Summers

Executive Summary

Once again gay marriage has emerged as a hot-button issue in California. Back in 2000, voters approved Proposition 22, which declared that the state would only recognize marriage between a man and a woman. But earlier this year, in a surprise decision, the California Supreme Court ruled that marriage was a fundamental civil and human right, and that the state could not deny it to anyone based on sexual orientation. In response, gay marriage opponents revived the Prop. 22 language, this time in the form of a constitutional amendment known as Proposition 8.

ProtectMarriage.com, the leading group pushing the measure, and No on 8, Equality for all, the chief opposition organization, have raised a total of more than $41 million to fight it out through Election Day.

According to public opinion polls, Californians remain deeply divided about gay marriage, although the polls reflect a belief that gay couples should at least be able to form unions and obtain marriage-like benefits, even if the union is called some name other than "marriage." There seems to be some cognitive dissonance over the question of the definition of marriage, for what difference should the name of the relationship or institution make if the rights afforded to those involved are the same?

In its May *In re Marriage Cases* ruling, the state Supreme Court definitively asserted, "[T]he right to marry is not properly viewed as simply a benefit or privilege that a government may establish or abolish as it sees fit, but rather that the right constitutes *a basic civil or human right of all people*." [emphasis in original] The court was correct to recognize marriage as a fundamental right, for the decision to pledge one's love, devotion and fidelity to a significant other is one of the most personal and important decisions an individual can make. What is more, a gay couple's decision to marry does not infringe upon a straight couple's right to do so, or vice versa.

Part of the problem with the issue is that the government has inserted itself into such a personal issue in the first place by conferring certain benefits on married couples, and then establishing the

definitions and rules that determine whether or not one is eligible for such benefits. In the absence of government intervention, all people would be free to define marriage however their religious, moral or philosophical compass might dictate, without affecting the rights of others to do the same. Since the choice to extricate government from marriage is not on the ballot, however, the broader definition of marriage established by the California Supreme Court's decision, which effectively ended the undesirable "separate but (almost) equal" status of straight "marriage" and same-sex "domestic partnerships" in the state, is the next best alternative.

Part 1

Introduction

One of the most contentious issues on the ballot in California this November is Proposition 8, which would amend the state Constitution so that only marriage between a man and a woman would be recognized by the state. Voters previously approved a statute (Proposition 22) containing the same language in 2000 with over 61 percent of the vote, but when the California Supreme Court ruled in May of 2008 that the language violated the fundamental rights of same-sex couples to marry, gay marriage opponents organized to put the constitutional change on the ballot to effectively overturn the Court's decision.

The amount of passion on both sides of the issue can be seen in the significant amount of resources spent on the campaign. For example, as of September 30, anti-gay marriage group ProtectMarriage.com reported taking in $25.4 million in contributions, while the No on 8, Equality for All committee reported receiving $15.8 million in donations.[1] The total amount raised is already larger than the $33 million spent on all 24 gay marriage ban measures that were voted on in other states from 2004-2006.[2] Adding to the drama is the seesawing nature of public opinion polls concerning Proposition 8. Public sentiment seems to be shifting back and forth, and the proposition's prospects are anyone's guess.[3]

The issue is not unique to California, either. Similar constitutional bans will be on the ballot this November in the swing states of Arizona (Proposition 102) and Florida (Amendment 2).

Same-sex couples may seek marriage for both moral and practical reasons. The chief argument is that preventing same-sex couples from marrying violates their civil rights, and denying them this right because of their sexual orientation is fundamentally unfair. Gay marriage opponents counter that marriage has traditionally been between a man and a woman, and that no such right exists, although some support same-sex unions and marriage-like benefits for gays under a different name.

On the practical side, according to a January 2004 U.S. General Accounting Office report, there are 1,138 federal benefits that are contingent upon (heterosexual) marital status, or for which marital status is a factor in determining eligibility.[4] At the state level, there are up to several hundred additional benefits. These benefits include Social Security spousal allowances and survivor benefits, the ability of widow(er)s to inherit retirement plans tax-free, numerous other tax breaks, adoption privileges, group insurance rates, community property, medical powers of attorney, etc.

While public opinion has warmed to the idea of equal marriage rights for same-sex couples over the years, it remains deeply divided. Moreover, opinion polls demonstrate that while many people feel that same-sex couples should have many—if not all—of the same rights as opposite-sex couples, there is still a significant degree of trepidation over applying the term "marriage" to these arrangements.

If the legal skirmishes and the public opinion polls are any indication, the battle over Proposition 8 and gay marriage will be a contentious and closely fought contest in November and beyond.

Part 2

Background

A. Gay Marriage in California

While gay marriage has become a particularly hot topic in recent years, it has been fought over in California for decades. In 1977, legislators sought to eliminate any ambiguity over the state's definition of marriage when it inserted the phrase "between a man and a woman" into Section 300 of the California Family Code.[5] The federal government entered the fray in 1996 with the passage of the Defense of Marriage Act, which affirmed that only a marriage between a man and a woman would be recognized for federal purposes, and that individual states have the right not to recognize legal same-sex marriages performed in other states.

California adopted a domestic partnership law (AB 26) in October 1999 that offers same-sex couples the ability to obtain many of the same rights as opposite-sex married couples if they register as domestic partners. The law was significantly expanded in 2003. The rights are still not equal, however, as there are some benefits available to married couples that are not available to domestic partners.[6]

In March of 2000, Proposition 22, the California Defense of Marriage Act, passed with over 61 percent of the vote. The initiative added Section 308.5 to the Family Code, and stated simply, "Only marriage between a man and a woman is valid or recognized in California."

On February 12, 2004, at the direction of Mayor Gavin Newsom, the San Francisco County clerk began issuing marriage licenses to same-sex couples. One month later, on March 11, the California Supreme Court issued an order to stop San Francisco officials from issuing such licenses. The Court later ruled in *Lockyer v. City and County of San Francisco* that the city and county had acted illegally, and that the approximately 4,000 same-sex marriages that had taken place during the month prior to the Supreme Court's order were void and of no legal effect.[7] The city and county then filed a Petition for Writ of Mandate with the Superior Court, seeking a declaration that "all California statutory provisions limiting marriage to unions between a man and a woman violate the California Constitution."[8] Several similar challenges were filed by other affected parties and they were consolidated into the case known as *In re Marriage Cases*.[9]

On May 15, 2008, the California Supreme Court rendered its decision for *In re Marriage Cases*. The Court ruled: "[I]n view of the substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples."[10] The Court's decision came as a surprise since it has a reputation for being conservative and six of the seven judges are Republican appointees.[11]

In response, opponents of gay marriage launched an initiative drive to amend the state Constitution in order to effectively overturn the Court's ruling and return to the one-man-one-woman definition of marriage. Proposition 8 consists of some familiar language: "Only marriage between a man and a woman is valid or recognized in California." It is the same 14 words contained in Proposition 22, only this time the measure would alter the state Constitution, adding the text as Section 7.5 to Article I of the California Constitution. The significant difference is that this time voters are being asked to eliminate a fundamental right, as determined by the California Supreme Court. Changing the state Constitution to eliminate a civil or human right is a rare and significant step to take, which is one reason Proposition 8 has faced more resistance than did Proposition 22.

Both sides again fought in the courts to try to settle the matter before it reached the voters. Gay rights supporters tried and failed to keep Proposition 8 from appearing on the November ballot. Opponents of same-sex marriage lost their own court battle after claiming that changes to the wording of Proposition 8's ballot title and summary made by the attorney general's office might bias voters against the measure. Now the voters will have their say.

B. Gay Marriage in Other States and Nations

In November of 2003, the Massachusetts Supreme Judicial Court became the first state Supreme Court in the nation to rule that same-sex couples have the legal right to marry. In the Court's 4-3 decision, Chief Justice Margaret Marshall wrote, "We declare that barring an individual from the protections, benefits and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts constitution."[12] A subsequent effort to override the decision via a constitutional amendment failed, although in May 2004, when the state began to issue same-sex marriage licenses, then-Governor Mitt Romney directed state agencies not to issue licenses to same-sex couples from states that prohibit gay marriage.

In addition to San Francisco's attempt to legalize gay marriage, other local governments in Oregon, New Mexico and New York issued marriage certificates to same-sex couples in 2004.

Same-sex marriage is still considered more the exception than the rule in the United States, though. California and Massachusetts are the only states that allow gay marriage. Forty-one states have laws prohibiting gay marriage. Twenty-seven states, including 24 of the 41 with statutes, have constitutional bans. Besides California, New York and Rhode Island recognize same-sex marriages from other states.[13] Nine states and the District of Columbia offer some form of civil

union or domestic partnership. Of these, Connecticut, New Hampshire, New Jersey and Vermont offer civil unions that grant the same benefits as those available to people in traditional marriages; California, Maine, Oregon, Washington and the District of Columbia offer limited benefits through domestic partnerships; and Hawaii offers "reciprocal beneficiary relationships," another form of domestic partnership.[14]

Just as the American states are divided over the gay marriage issue, so are nations around the globe. As with the United States, some nations allow same-sex marriage unconditionally, others do not permit it but are willing to recognize same-sex marriages performed in other countries, some offer civil unions/domestic partnerships as an alternative to same-sex marriage, and some recognize civil unions only in certain regions. The nations in Table 1 recognize same-sex marriages and civil unions in varying degrees.

Table 1: Same-Sex Marriages and Civil Unions in Other Nations

Institution Recognized	Nations
Same-Sex Marriage	Belgium Canada Netherlands Norway (effective January 1, 2009) South Africa Spain
Same-Sex Marriages from Other Nations	Aruba Israel Netherlands Antilles
Civil Unions / Domestic Partnerships	Andorra Belgium Czech Republic Denmark Finland France Germany Hungary (effective January 1, 2009) Iceland Luxembourg Netherlands New Zealand Slovenia Sweden Switzerland United Kingdom Uruguay
Civil Unions / Domestic Partnerships (Some Regions Only)	Argentina Australia Brazil Canada

	Mexico

Part 3

Civil Rights

Chief among the considerations in considering the gay marriage issue is determining whether any individual has a fundamental right to marry another person and form a family. If such a fundamental right does exist, then the state has no right to deny this right to certain groups of people, regardless of their sexual orientation or other factors. As *In re Marriage Cases* affirms, the right of marriage is, indeed, a fundamental one: "[T]he right to marry is not properly viewed as simply a benefit or privilege that a government may establish or abolish as it sees fit, but rather that the right constitutes *a basic civil or human right of all people*."[15] [emphasis in original]

The California Supreme Court explains how important this right is to the individual liberty of all Californians:

> *[U]nder this state's Constitution, the constitutionally based right to marry properly 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. These core substantive rights include, most fundamentally, the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage. As past cases establish, the substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own—and, if the couple chooses, to raise children within that family—constitutes a vitally important attribute of the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for the benefit of both the individual and society.*[16] *[emphasis in original]*

Finally, equal protection under the law should be afforded to same-sex couples because allowing homosexuals to marry in no way precludes heterosexuals from marrying or devalues the covenant or social contract—depending on one's religious views—of that institution. In the words of the state Supreme Court, "[T]he exclusion of same-sex couples from the designation of marriage clearly is not *necessary* in order to afford full protection to all of the rights and benefits that

currently are enjoyed by married opposite-sex couples."[17] [emphasis in original] Opposite-sex couples are still free to marry and ascribe whatever religious or other significance to that relationship they wish, and to associate with others who hold similar views. They are still free to hold the opinion that same-sex marriages are something less than "traditional" marriage—in their own eyes or the eyes of their deity—but that does not mean they have the right to prevent others with secular or different religious beliefs about the institution of marriage from entering into that same relationship.

Part 4

The Definition of Marriage: What's in a Name?

Even if the matter of equal rights is settled, there is still the issue of whether the equal unions of same-sex and opposite-sex couples should be called by different names. There seems to be widespread confusion—and cognitive dissonance—about the very word "marriage."

Polls consistently show that even in areas where voters are wary of overturning laws to permit same-sex marriage, significant percentages of people favor bestowing the same, or substantially similar, rights on gay couples as on married straight couples, so long as the relationships are called some other name, like "civil unions" or "domestic partnerships." A couple of polls taken in 2004, when there was a big push to amend the U.S. Constitution to prohibit the recognition of same-sex marriages, illustrates this point well. A USA Today/CNN/Gallup poll found that 61 percent of Americans opposed gay marriage, yet the same survey revealed that 54 percent of respondents favored civil unions for gay and lesbian couples.[18] Similarly, a Washington Post-ABC News poll found that 59 percent of people opposed same-sex marriage, yet 51 percent supported civil unions.[19] More recently, a June 2008 SurveyUSA poll, conducted about one month after the California Supreme Court's decision that same-sex marriage was legal and one week before the ruling was to go into effect, found that while a plurality of Californians (by a 44 percent to 38 percent margin) said they would support amending the state Constitution to limit the definition of marriage to that between one man and one woman, 39 percent of respondents said they supported gay marriage, and an additional 31 percent supported civil unions.[20] Even President George Bush, who pushed for the failed federal constitutional ban on same-sex marriages, has suggested that gay couples should be able to enjoy many, if not all, of the benefits of marriage through civil unions or domestic partnerships if individual states sanction such "legal arrangements other than marriage."[21]

The fight over the word "marriage" stems from those in the religious community who claim that the "traditional" one-man-one-woman institution of marriage is sacred, and that their teachings do not allow it to be applied to same-sex unions. But why should the religious community have a monopoly on deciding the definition of the word? Furthermore, the argument falls apart when one considers the marriages of opposite-sex couples who do not subscribe to these religious beliefs. If "marriage" is to be restricted to use as a religious institution, then straight nonreligious couples should not be allowed to "marry" either, yet those of faith do not seem to have a problem with

these straight nonreligious marriages. Must we refer to any union not undertaken in a house of worship or performed by a religious leader as a “civil union?”

Regardless of one’s religious beliefs, there seems to be growing sentiment that same-sex unions should be afforded the same benefits as opposite-sex unions. If the rights are the same, what difference does semantics make?

Part 5

Other Objections to Gay Marriage and Arguments for Prop. 8

In addition to whether or not marriage is a fundamental right and what the definition of marriage should be, proponents of Proposition 8 have offered some other arguments for the passage of the measure:

A. Activist Judges Are Thwarting the Will of the People

Supporters of Proposition 8 often point to the popularity of Proposition 22, which passed with over 61 percent of the vote in 2000, and indignantly argue that "four judges overturned the will of 4.6 million people." The role of the California Supreme Court is to interpret and apply the California Constitution. If it finds that a law violates fundamental rights that the Constitution is intended to protect, it has every right—a duty, even—to overturn that law. Court decisions are certainly not always popular, but their role is to serve as a check against the tyranny of the majority. Just because the majority of a population has greater numbers than a minority does not necessarily make it right, as we have seen throughout periods of our nation's history where, for example, slavery was tolerated, women were prohibited from voting, and interracial marriage was banned. To be sure, there are times when the court oversteps its authority and usurps the legislature's power to make laws, but this is not one of those cases.

B. "Protecting" Children from Teachings About Same-Sex Marriage in Public Schools

One of the arguments made in favor of Proposition 8 is that its failure might mean that teachers could be required to teach children "as young as kindergarteners" that "gay marriage is okay," and that "there is *no difference* between gay marriage and traditional marriage."[22] Proponents cite California Education Code Section 51890, which states: "Pupils will receive instruction to aid them in making decisions in matters of personal, family, and community health, to include the following subjects: […] (D) Family health and child development, including the legal and financial aspects and responsibilities of marriage and parenthood."[23] The claim about gay marriage instruction to

kindergarteners apparently refers to the fact that this section of the Education Code applies to "comprehensive health education programs" for the state's K-12 public schools. This author's personal experience in the California public schools is that there was virtually no instruction at all regarding marriage, and what little there was consisted of a brief overview during a high school health class. It seems highly unlikely that such a charged issue as gay marriage would be discussed, much less advocated in some way, to young children in the public schools, especially since parents have the ability to exert their influence on instruction in local school districts. If it were to be discussed with older children, it is difficult to see how mentioning a constitutionally-recognized right would somehow harm students, who regularly discuss numerous other controversial issues of the day in classrooms.

This would not even be a consideration if the vast majority of the schools in California—and, indeed, the nation at large—were not run by government. If education was private, there would not be any single set of standards applied to an entire district—or state—and parents would be free to choose the schools that best meet their children's needs and fit their belief systems. Even in the current environment, however, private schools and homeschooling remain as options for parents who are unsatisfied with the content of instruction offered by the public schools.

Finally, the concern for children exposed to the very idea of gay marriage, or parenting by two same-sex partners, seems rather misplaced in light of the state of traditional marriage, which is all-too-often plagued by divorce, abuse or otherwise less-than-optimal conditions for raising children. Some have argued that same-sex partners should not be permitted to raise children because their family structure is somehow damaging to children, but, as the state Supreme Court has noted, "This state's current policies and conduct regarding homosexuality recognize … that gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children."[24]

Even if one was to assume, for the sake of argument, that a same-sex household is a suboptimal environment for raising children, that does not necessarily give government the authority to prohibit such arrangements. For example, one could argue that children raised in upper-middle-class households tend to be the most successful because poor families may not be able to provide for their children's needs and very wealthy families may spoil them and never force them to develop a strong work ethic. Does this mean that the government should prohibit very poor or very rich couples from having children? Just as the government cannot legislate happiness or wealth, it cannot legislate ideal family arrangements—and it should not try.

C. Religious Freedom

It may be argued that recognizing same-sex marriage violates one's religious freedom. But, as noted previously, heterosexual couples are still free to apply whatever religious meaning they choose to their own marriages. Houses of worship and religious organizations are still free to teach whatever doctrines they believe regarding marriage. Same-sex marriage is no more forced upon heterosexuals than traditional marriage is forced upon homosexuals. Priests, ministers, rabbis, and other religious leaders will not be forced to perform same-sex marriage ceremonies in contravention of their beliefs. Moreover, where is the consideration of the religious freedom of those who hold different beliefs? Just as religious leaders who believe in the value of traditional marriage are free to wed heterosexual couples, religious leaders who support same-sex marriage should have the freedom to wed gay couples.

Part 6

Fiscal Effects

While the main arguments for or against Proposition 8 center around moral and/or emotional positions regarding civil rights, the definition of marriage, attitudes regarding sexual orientation and behavior, etc., it is at least worth pointing out its fiscal effects. According to the Legislative Analyst's Office (LAO), Proposition 8 would result in a small loss of state and local revenue, primarily from sales taxes. This is due to an expected increase in spending on same-sex weddings that would not take place if the initiative were to pass. The LAO estimates that this revenue loss will total several tens of millions of dollars over the next few years, but that the measure "would likely have little fiscal impact on state and local governments" in the long run.[25] If the proposition fails, and if same-sex marriage is anything like opposite-sex marriage, it is reasonable to assume that the marriage counseling, divorce law and legal document services industries will see increased business as well.

Part 7

An Alternative: Getting the State Out of Marriage Altogether

While the California Supreme Court's *In re Marriage Cases* decision offers gay individuals the same freedoms as straight individuals to formalize their commitments to a significant other, it should also serve as a reminder that the government has encroached on the most personal aspects of our lives.

By conferring special benefits on married couples, and then defining a legal union as between a man and a woman in the 1996 Defense of Marriage Act, the federal government has politicized a private issue. State and local governments have likewise encroached upon marriage by offering benefits to straight couples and imposing licensing requirements to show proof of eligibility for the goodies.

By politicizing a private matter—deciding to whom one may pledge one's love, support and fidelity—opponents of same-sex marriage have created a world of winners and losers where once there were only voluntary promises. Gay marriage opponents are thus wrong to insist that they have the right to decide how marriage should be defined (i.e., whether it should be sanctioned only if it is between a man and a woman, or even whether marriage should be a religious institution or a secular social commitment) not only for themselves but *for everyone else* as well.

Similarly, same-sex couples should not be able to force their notion of marriage on others, either. Religious leaders or others who would perform marriage ceremonies have every right to *refuse* to marry couples for moral, philosophical or any other reasons.

Private business owners should be able to decide for themselves whether it is in their interest to offer group health benefits, family leave benefits, special mortgage loan rates, etc., to gay couples as well as straight. Furthermore, businesses should not be compelled by law to offer any particular benefits to any employee—gay or straight. Fears that this might lead to widespread discrimination are unfounded in a free-market system, which inherently provides incentives for businesses to thrive by serving customers, regardless of their race, gender, or sexual orientation. This is not to say that there would be no discrimination in a free-market system without work benefits mandates, but employees and customers would be free to vote with their feet and dollars to reward businesses

that operate in accordance with their values, and to punish and protest those that do not.

The evidence suggests that governments are actually lagging private business in acknowledging the value of same-sex marriage. A May 2008 *Los Angeles Times* article reports: "It appears that many companies that offer marriage-related incentives to customers, such as rental car companies that allow spouses to drive at no extra charge, already extend those benefits to domestic partners."[26]

Customers are not the only ones benefiting from this broader view of marriage, either; employees are benefiting as well. According to the Human Rights Campaign's 2009 Corporate Equality Index, businesses are rapidly accepting and extending benefits to same-sex partners. Said Human Rights Campaign Foundation President Joe Solmonese, "[T]he rates at which corporate America has expanded policies, practices and benefits to include LGBT employees have been faster than perhaps many thought possible."[27] A record 260 companies (of the 584 total that were rated), representing over 9.3 million full-time employees, received a 100 percent score.[28] Among the companies earning a perfect score were American Express, Apple, Best Buy, Chevron, Eastman Kodak, Ernst & Young, Ford, Hewlett-Packard, IBM, Nike, Shell Oil, Southern California Edison, Starbucks, Target, Walt Disney Co., Wells Fargo, and Xerox.[29] More businesses receiving a 100 percent rating were headquartered in California and New York than any other states.[30] As Marvin Odum, president of Shell Oil, explained to the Human Rights Campaign, "A 100-percent rating helps us to better attract, recruit and retain diverse talent."[31] The Index also revealed that 92 percent of the businesses rated offer domestic partnership health coverage benefits to their employees.[32]

In the public sector, however, the issue has been much more contentious. By turning to courts and legislation, both opponents and supporters of gay marriage are merely perpetuating the politicization of what should be a private, personal issue. Both sides should instead argue that the government should get out of the marriage business entirely.

Part 8

Conclusion

There are few things, if any, more personal than deciding whom to pledge one's love, devotion, and fidelity to in a committed relationship, or deciding to start a family. The California Supreme Court was correct to identify these as fundamental individual rights that no act of government, or even a majority of the population, can infringe upon.

Much too much has been made of the very definition of the word "marriage." Marriage is an institution and arrangement that free people may enter into for religious or secular reasons. There is no reason certain portions of the religious community should have a monopoly over the definition of the word and define it not only for themselves, but for everyone else as well. In cases where same-sex civil unions offer all the same rights and responsibilities as "traditional" marriage for heterosexual couples, it is silly to call these relationships by different names, and only perpetuates the notion that they are "separate but equal." Moreover, gay marriage does not diminish the value of the bond enjoyed by straight married couples, or prevent them from ascribing whatever religious beliefs they wish to see in their own union.

Marriage, whether entered into by those who consider it a sacred religious covenant or those who see it as a secular social bond and contract, is a profoundly personal decision between those in love. The sanctity of marriage must be defined by the individual—or couple—not an interest group. Ideally, it would not be defined by the state, either, but that option is not yet available to Californians.

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