

Constitutional Protection for Marriage

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~~*The professional opinions expressed are those of the author who speaks for himself not any institution with which he is affiliated.~~

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Introduction: I express my great appreciation to the Inland Empire (CA) chapter of the J. Reuben Clark Law Society for inviting me to speak, and to the law offices of Best, Best & Krieger (and our host Franklin C. Adams) for allowing us to meet and originate this “webinar” here, and to Kimberly Gipson, who has overseen the technical arrangements. I especially want to thank my former student, Kurt Rowley, former president of this chapter of the Clark Society, for his exceptional efforts to arrange this. My wife and I grew up in San Bernardino, and we still have family in the area, so we visit once or twice a year. Several years ago, Kurt invited me to speak about same-sex marriage developments, but we were unable to coordinate our schedules. He asked me to let him know when I might be in the area and after several thwarted tries, we are here for a family wedding, and Kurt was able to set this meeting up.

I begin with two points: (1) thank you for all you are doing. You find yourselves on the front lines of a tremendously important and hard-fought contest over the meaning of marriage in public law. It will have enormous impact upon and “wake-effect” implications for the rest of the country and the rest of the world. As goes California, so will go the United States and most of the western world in the next decade on the issue of legalization of SSM. So thank you, TY, TY!

(2) We cannot avoid this issue. We did not seek this controversy, or want it, but advocates of revolutionary, radical redefinition and deconstruction of marriage and the marital family have aggressively taken steps to change public law & policy and have forced the issue

upon us. Under those circumstances, we must “stand up for something.” In the words of Gordon B. Hinckley in the book of that title, *Standing for Something*:

“We go to great lengths to preserve historical buildings and sites in our cities. We need to apply the same fervor to preserving the most ancient and sacred of institutions – the family.

What we *desperately need* today on all fronts . . . are leaders, men and women who are *willing to stand for something*. We need people . . . who are willing to *stand up* for decency, truth, integrity, morality, and law and order . . . even when it is unpopular to do so – perhaps *especially* when it is unpopular to do so.”

The timing of this invitation could not have been more appropriate with the debate over Proposition 8. #This proposed Amendment consists of fourteen simple words: “Only marriage between a man and a woman is valid or recognized in California.” The language is identical to the language of statute enacted by over 60% of the popular vote as Proposition 22 in 2000 (& codified at Family Code § 308.5).

In 2000 California citizens overwhelmingly believed that they needed to give this definition of marriage express statutory protection, even though the understanding that marriage is the union of a man and a woman was well-established in the history, common law, and case precedents in California. But an aggressive litigation campaign was being pursued by gay and lesbian activists in California and the USA, and even though most courts had rejected claims for same-sex marriage, *some judges* already had entered judgments mandating the legalization of same-sex marriage or marriage-equivalent unions, by radically redefining marriage as the union of any two persons, regardless of gender.

Prior to 1995, very few states had laws expressly defining marriage as the union of a man and a woman because that was the historic and common understanding, so codification was not

necessary. The judicial redefinition of marriage (in 1996 by a court in Hawaii, in 1997 by a court in Alaska, then by similar mandates from courts in Vermont, Oregon, Maryland, Connecticut, New Jersey, Massachusetts, and California, to mention just some of the rulings) has caused nearly all states to enact states that expressly define marriage as the union of a man and a woman. Today,[#] at least 45 states have such express written definitions of marriage as a male-female union, and at least one other state (RI) has a very recent decision of the state supreme court (Chambers v. Ormiston, 2007) endorsing male-female union as the established legal understanding of marriage. Thus, in response to the movement to legalize same-sex marriage, about 95% of the states have seen fit to expressly declare in law that marriage is the conjugal union of male and female, and most of this new legislation has occurred within a very short time period, about a decade [95-05].

California usually has been a leader in law reform movements, but it was not a leader in the movement to enact a statute defining marriage as a male-female union. The long-entrenched legislature has been dominated by one political party due to extraordinarily partisan gerrymandering of legislative districts [perhaps the worst politically gerrymandered state legislature in the country today], and the party controlling the legislature was led by politicians who were indebted to and supportive of a very active gay-&-lesbian political lobby. Thus, for several years in a row, legislation to define marriage as the union of a man and a woman was introduced and then bottled up in committees or defeated by the committee leadership and the dominant party. I came to California twice to testify before the legislature about the need for that proposed legislation, and it was like talking to a brick wall.

The only way to get express statutory protection for marriage as the union of a man and a woman in California was by popular initiative petition, and a group of concerned citizens,

working with the legislators who had unsuccessfully tried to get legislation passed (Sen. Pete Knight and others), drafted the fourteen-word Prop. 22 defining marriage as the union of a man and a woman, and they gathered enough signatures on petitions to put it on the ballot, where it was vigorously opposed by the celebrities and money of Hollywood in the South and the money and organization of San Francisco in the North. Fortunately, a coalition of religious organizations, leaders, congregations and faiths worked together in an amazing grass-roots effort to support Prop. 22, and it passed with over 61% of the popular vote.

The movement to compel the legalization of same-sex marriage in the United States (and elsewhere) did not retreat or disappear. Rather, gay activists worked harder to achieve a result legalizing gay marriage that could not be overturned by popular vote, but a constitutional ruling. They achieved that first in an American court of last resort in Massachusetts in November 2003 in *Goodridge v. Dept. of Public Health*. In the past dozen years, at least ten different courts have ruled in favor of mandatory legalization of same-sex marriage and at least two others have mandated equivalent same-sex unions (same-sex marriage lite). Nearly a dozen different constitutional doctrines have been cited by courts considering claims for same-sex marriage;# including due process, equal protection, privacy, right of association, etc.. Remember, it takes only one of them, any one of them, to override all statutes, rules, ordinances and case precedents protecting marriage as the union of a man and a woman.

Thus, in the past decade, the people in twenty-seven states have enacted amendments to their state constitutions to provide constitutional protection for marriage as the union of a man and a woman. There are three types of amendments:#

Thus, when the people who sponsored Prop. 22 saw the campaign to override statutes by creative interpretation of state constitutional provisions, including a remarkably political

decision by a California Superior Court ruling that Prop. 22 was unconstitutional and that same-sex couples had a state constitutional right to marry, they wisely decided that the time had come to enact the same kind of constitutional protection for marriage that citizens in more than half of the other states had already adopted. So they drafted and circulated petitions and collected enough signatures to put Prop. 8 on the ballot for this November.

Myths

I think it is important to debunk some of the *myths* and expose some of the *flaws* that you may have heard in the public debate over Prop 8.

1st) the “fringe conservative extremists” argument asserts that amending a constitution to provide constitutional protection for marriage is a radical step that only “fringe conservative extremists” favor. Of course,[#] the fact that voters in twenty-seven other states have enacted constitutional protection for marriage as the union of a man and a woman refutes that claim. The average vote in favor of state marriages amendments in all of the states combined in about 69%, and the state votes have ranged from a low of 57% in favor (OR) to 84% in favor (MS). # A supermajority of voters in a majority of states defies the label “fringe” or “extremists.”

Voters in only one state out of 28 states has failed to pass a proposed state marriage amendment (AZ) and the vote there on an ambiguously drafted SMA was 48.5% to 51.5%. Another marriage amendment is on the ballot in Arizona this November, and is predicted to pass.

2d) you may hear that “only in the wild west” would this be considered. Of course, as the map shows, state marriage amendments have been enacted in all regions of the United States.#

3d),[#] the “inappropriate for constitutional protection” argument asserts that constitutions and basic charters are not meant to protect such things as marriage. However, as a

matter of comparative & international constitutional law, that is clearly false. Explicit constitutional protection for family and marriage are the global norm today.

The Universal Declaration of Human Rights adopted 1946,# the mother of modern human rights, recognizes that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”# Similar statements declaring the foundational importance and specially-protected role of families are found in dozens of other international conventions, compacts, treaties, and instruments, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Hague Convention on the Civil Aspects of International Child Abduction, the Convention on the Rights of the Child, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights.

Likewise, most national constitutions adopted since the UN Declaration of Human Rights (in the past 60+ years) have included some constitutional protection for marriage and/or family.[√ #]

145 nations (/191 sovereign nations in the world) have Constitutional Provisions Protecting and giving special status to “family.” This includes 83 Nations (/191) Have Substantive Constitutional Provisions Protecting “marriage.”

Additionally, # nearly 20% of the national constitutions in the world have explicit protection for marriage as the union of a man and a woman.

Thirty-Seven (37) (of 191) Sovereign Nations Have Constitutional Provisions/Amendments

Protecting Conjugal Marriage

Armenia (art. 32)	Ethiopia (art. 34)	Poland (art. 18)
Azerbaijan (art. 34)	Gambia (Art. 27)	Serbia (art. 62)
Belarus (art. 32)	Honduras (art. 112)	Somalia (art. 2.7)
Brazil (art. 226)	Japan (art. 24)	Suriname (art. 35)
Bulgaria (art. 46)	Latvia (art. 110) – 11/05	Swaziland (art. 27)
Burkina Faso (art. 23)	Lithuania (art. 31)	Tajikistan (art. 33)
Cambodia (art. 45)	Malawi (art. 22)	Turkmenistan (art. 25)
Cameroon UDHR (art. 16)	Moldova (art. 48)	Uganda (art. 31)
China (art. 49)	Montenegro (art. 71)	Ukraine (art. 51)
Columbia (art. 42)	Namibia (art. 14)	Venezuela (art. 77)
Cuba (art. 43)	Nicaragua (art. 72)	Vietnam (art. 64)
Ecuador (art. 33)	Paraguay (arts. 49, 51, 52)	<i>See also Mongolia,</i>
Eritrea (art. 22)	Peru (art. 5)	<i>Romania, Hong Kong</i>

Examples:

Article 45 of the Cambodian Constitution: (4) Marriage shall be conducted according to conditions determined by law based on the principle of mutual consent between *one husband and one wife*.

Article 42 of the Constitution of Columbia: the family “is formed . . . by the free *decision of a man and woman* to contract matrimony”

Article 24 of the Constitution of Japan: “Marriage shall be based only on the mutual consent of *both sexes* and it shall be maintained through mutual cooperation with the equal rights of *husband and wife* as a basis.”

Article 110 of the Constitution of Latvia reads: “The State shall protect and support marriage—*a union between a man and a woman,...*”

Again, express constitutional protection for deeply cherished human rights and relationships that are considered foundational for human happiness and social order is the global norm.

4th)# the “*it’s un-American*” argument notes that the US Constitution has not protection for marriage, and argues that in American constitutional government, constitutional protection for marriage is inappropriate. Constitutional identification and protection of basic rights and institutions is especially needed and especially appropriate when those rights and relationships are deemed threatened by government branches or agencies, or by social, economic or political forces that can be effectively controlled by appropriate government regulation. That was settled conclusively in 1787-1791, when the Constitution of the United States was written and the first amendments (known as the Bill of Rights) were adopted.

5th) *Minorities are threatened by SMAs.* In fact, in states where voting by race has been followed, minorities have voted *for* the state marriage amendments in even higher percentages than white voters have. As the Reverend Walter Fauntroy, who marched and worked with the Rev. Martin Luther King, put it: “I am one of gay rights’ strongest advocates . . . [b]ut . . . it’s a

serious mistake to redefine marriage as anything other than an institution between a man and a woman.”

6th Equality demands legalizing same-sex marriage.

General Colin Powell described the difference between black civil rights claims for equality and gay rights claims for equality. “Skin color is a benign, non-behavioral characteristic; sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument.” As a group of African-American pastors in Georgia declared:

“As our respected fallen leader, Dr. King once said, ‘I have a dream, that my four children will one day live in a country where they will not be judged by the color of their skin but by the content of their character.’ This is a character issue where we cannot tolerate compromise.”

7th) Gender Equality requires legalizing same-sex marriage. Perhaps the most succinct response to this was made by Justice Ruth Bader Ginsburg who wrote in a famous decision: “Physical differences between men and women. . . are enduring: ‘The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’” *United States v. Virginia*, 116 S.Ct. 2264, 2276 (1996)

Why the US has no Constitutional Protection for Marriage

There are three reasons why the U.S. Constitution does not contain specific protection for marriage: time, structure and difficulty.

First, Constitutions address the critical issues of the time at which the document was drafted. For example, in 1787-1791 forced quartering of troops in private homes was a huge

issue and the Third amendment to the US Constitution addresses that issue; denial of jury trial was a huge issue, and it is addressed in the Sixth and Seventh Amendments. However, in 1787, forced same-sex marriage was not a threat; conjugal marriage was universally accepted as the only form of marriage, and marital families were the only legitimate form of families in America.

In recent decades, however, family definition and structure have become very controversial issues, and as a result, many of the national Constitutions drafted and adopted in recent decades have included provisions expressly protecting the institutions of family and marriage.

Second, an essential structural principle of the U.S. Constitution is federalism, under which the regulation of matters of marriage and family relations is primarily allocated to the states, and beyond the authority of the national government. The Founders feared the concentration of power, and for reasons of dispersal of governmental power, only limited powers were given to the federal government by the U.S. Constitution. The power to regulate (and protect) marriage and family were for most purposes left under the power of the states.

(Votes in the Senate and House in 2004 and 2006 on the proposed Federal Marriage Amendment— which received a majority of votes in both the House and the Senate 2006 but which fell far short of the two-thirds majority required for proposing a constitutional amendment -- showed that this principle is taken very seriously by many conservatives, including John McCain, who voted against the proposed amendment on federalism grounds and said they would vote *for* a marriage amendment if a court mandated the legalization of same-sex marriage.)

Third, the U.S. Constitution can be amended to address contemporary issues, but the amendment process is deliberately very difficult, and has become culturally even more difficult

over the years. Only sixteen amendments have been adopted in the 217 years since the original Constitution and the Bill of Rights were adopted.

These three reasons explain why the US Constitution has no national marriage amendment or family provision.

But these do not explain why States like California have no constitutional amendments protecting marriage. The reasons are three: 1) history (it was not previously an issue, not an issue when the state constitution was drafted); 2) political inertia (too much work and too much political cost to make the effort); and 3) intimidation (those who try to protect the institution of marriage and prevent same-sex marriage suffer abuse, harassment and mud-slinging attacks that discourage them from making the effort).

But constitutional protection for the institution of conjugal marriage is necessary today!!

The state constitutional doctrines that have been interpreted to mandate same-sex marriage or marriage-equivalent same-sex civil unions have close if not exact counterparts in the constitutions of the remaining 23 states that do not have protection for marriage, and also in federal constitutional jurisprudence. Thus, the same arguments that persuaded state court judges in some states to interpret their state constitutions to mandate the legalization of same-sex marriage can be expected eventually to persuade judges in other states to interpret their state constitutions, and eventually to entice some judges interpret the US constitution as mandating the legalization of same-sex marriage.

Déjà vu:

Ironically, the arguments against constitutional protection for marriage are *déjà vu* - an eerie repeat of the very arguments that were asserted by opponents of the Bill of Rights in 1787-91 and rejected by the Founders of America. 1) Then, opponents of the Bill of Rights argued

that there were ample other protections for basic rights; today opponents of constitutional protection argue that an amendment is not necessary. (I read recently that the Governor of Arizona opposes the state marriage amendment as unnecessary; they were asserting that in California up until the May 15 decision of the California Supreme Court.) Fortunately, the Founders rejected that argument, as we must reject it today.

2) In 1787, opponents of the Bill of Rights argued that it would endanger individual liberties to adopt the proposed amendments (*inclusion unios est expression alterius*). Today, opponents of same-sex marriage argue that it will reduce individual liberties of gays and lesbians. Now, as in 1787, the argument ignores the danger of *not* protecting threatened rights and relations. To create new same-sex marriage liberties comes at the expense of reducing and weakening the institution of conjugal marriage and the liberties of all other Americans to continue to enjoy the blessings of that institution undiluted and untransformed by the inclusion of same-sex unions.

3) Some opponents of the marriage amendments argue that it will distort the shape of government to adopt marriage amendments, as did opponents of the Bill of Rights. That argument was put to rest in 1791 when the Bill of Rights was adopted. Then, as now, the basic purpose of the government is to protect cherished institutions like jury trial, privacy of homes, and [today] conjugal marriage; it is no distortion to expressly obligate government to do what it was set up to do.

4) A popular argument against the marriage amendment now is that it diverts attention from more important matters of government. That, of course, was one of the most popular arguments asserted in 1789 against Madison's effort to get Congress to consider and propose the Bill of Rights. Fortunately then, as now, the point is clear, that if these basic institutions and

relations are not preserved and protected, government will have a lot more, and a lot more expensive work to do to clean up the mess that results when families are unstable, undervalued, and in shambles. And what more important business is there? (Pork barrel politics? Gerrymandering?)

5) In 1787 as today, one argument was that enactment of such amendments was futile. Even Madison wondered if the amendments would be meaningless “parchment barriers” easily ignored by those in power. Today, it is argued that SSM is the wave of the future, it cannot be stopped. Both arguments are valid only if we have lost the rule of law; if we have become a mere government of men, not of laws.

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So here we are now, in a replay of 2000. However, the context is quite different in three significant ways.# The need to be diligent, active, and involved in supporting Prop 8 is even greater than it was in 2000.

First, the SSM movement is more popular and stronger today, and , the prevailing sentiment is for “change” and it is led by a very charismatic and eloquent candidate for the U.S. Presidency who has openly expressed his opposition to Prop. 8, and who is expected to draw record numbers of new California voters to the polls this November, most of whom will vote against Prop. 8. A recent newspaper article reported that as of the beginning of July, opponents of Prop 8 had reported raising \$4 million, while supporters had raised only \$3.6 million (10% less).

Second, the opposition by gay activists and sympathizers in 2000 to Prop. 22 was intense at times, but the intensity is significantly greater today. Today, there is hostility and punitive

reaction against not just the arguments that favor Prop. 8, but for the mere expression of views that support Prop. 8! Never before have I seen such biased, blatantly one-sided newspaper coverage by so many California newspapers on an issue of such importance. There are always some newspapers that lean one way, and some that tilt the other way, but never before have so many leaned the same way. Getting an op-ed supporting Prop. 8 published, or finding a news story that doesn't spin the situation to favor the gay-lesbian agenda, is almost impossible. For example, an August 27, 2008 report on the recent "National Lesbian and Gay Journalists Association (NLGJA) (pronounced "neglige") attended by "hundreds of journalists – and [with] ringing endorsements – from virtually every major publication and broadcaster in the news media."¹ "In a full-page ad in the convention program, NBC Universal declared it is 'proud to support NLGJA,' under the bold headline: 'YOUR VICTORIES ARE OUR VICTORIES.'"² The convention was supported by \$15,000 contributions apiece from CBS, CNN, ESPN, and Hearst, and \$10,000 each from NBC, Fox Business, Fox News, and the Washington Post, and \$5,000 from ABC News, and Bloomberg, and by many other media outlets who bought advertisements including Cox, ABC News, and the owner of *USA Today*. The use of harsh attack-language to condemn persons who express views opposed to same-sex marriage is widespread (e.g., N. Dak. L. Rev.) even though fundamentally inconsistent with the very notion of "free speech" and a "free press."

Third, the gay movement has increased in credibility, and influence. In the intervening six years, the Supreme Court decided *Lawrence v. Texas*, giving a huge boost in legitimacy to the gay rights movement; the Massachusetts Supreme Court decided *Goodridge* interpreting the state constitution to mandate same-sex marriage and got away with it; the legislature passed once

¹ Brian Fitzpatrick, NBC to "Gay" Journalists: 'Your Victories Are Our Victories,' the Culture and Media Institute (Aug. 27, 2008), available at <http://www.cultureandmediainstitute.org/articles/2008/20080827094844.aspx> (seen 080829).

² *Id.*

a proposed amendment there to ban same-sex marriage but permit same-sex civil unions, but the old anti-populist 1780 state constitution requires such proposed amendments to be approved by two separate legislatures, and early this year the Massachusetts legislature on the second vote rejected the proposed amendment and refused to send it to the people (again, one political party controls the entire legislature and it was afraid of having the issue on the November ballot because it might draw to the polls voters who would vote for conservative rather than Democratic candidates, as it did in the 2004 elections).

Fourth, the California Supreme Court in May of this year decided *In re Marriage Cases* and interpreted the California Constitution to mandate same-sex marriage. While that opinion is unimpressive and unpersuasive as a matter of constitution analysis, it still adds to the credibility of legalizing same-sex marriage that the California Supreme Court legalized gay marriage.

Fifth, supporters of same-sex marriage have engaged in widespread misuse and abuse of government authority to oppose Prop. 8. Exhibit “A” of this abuse of public power is the rewording of the description of the amendment by Attorney General Jerry Brown. It had read previously: “*Limit on Marriage. Constitutional Amendment. Amends the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California. . . .*” Brown rewrote the description to read: “*Eliminates Right of Same-Sex Couples to Marry Initiative. Constitutional Amendment. Changes the California Constitution to eliminate the right of same-sex couples to marry in California. Provides that only marriage between a man and a woman is valid or recognized in California.*”³ That is the language voters will see when they enter the voters booth in November, not the 14 words of the amendment itself. Independents can be

³ Maggie Gallagher, *Jerry Brown Tries to Sink California Marriage Amendment*, Human Events, (Aug. 19, 2008), available at <http://www.humanevents.com/article.php?id=28083> (seen 080901); Mark A. Jansson, v. Debra Bowen, Case No. 34-2008-00017351 (Dept. 29, Superior Court of California, County of Sacramento), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1597_ruling_on_proposition_8.pdf#xml=http://search.doj.ca.gov:8004/AGSearch/isysquery/41a318d3-de02-4651-97f7-22110bb567fc/1/hilite/ (seen 080901).

expected to recoil a little at the prospect of “eliminating” a right, especially to remove a right held by “same-sex couples” and an elimination of a “right . . . marry.” I speculate that Brown’s changed Title and summary will effect at least 5% of the votes cast, and could make the difference in a close election.⁴ Not surprisingly, the courts rubber-stamped Brown’s revision.

As Attorney General, Brown put forward a very weak argument in defense of the California marriage law in the case before the Supreme Court, refusing to make arguments that had persuaded courts in other states like New York, Washington, and Maryland.⁵ On the motion for stay which was supported by Attorneys General from nearly one-quarter of the states (at least eleven other states), Brown opposed the motion, “asserted that a stay was unnecessary,” and “urg[ed] the justices not to grant the stay.”⁶ The court obliged. [[Likewise, in a petition for extraordinary writ filed by opponents of Proposition 8 to block the amendment from appearing on the ballot,⁷ Brown took a dive, refusing to defend the initiative process authorized by the California state constitution.]] In what can only be described as an extremely political, anticipatory advisory opinion, Brown has rendered an official Attorney General position (in a brief filed in court) stating that even if Prop. 8 passes, same-sex marriage will be valid (despite the present-tense language of Prop 8 that says only male-female marriages “are valid”).

⁴ The L.A. Times has noted that Brown’s decided pro-same-sex marriage revision of the ballot title and summary “has raised suspicion in some circles that Brown, a possible candidate for governor in 2010, was influenced by politics. ‘He is delivering something . . . that is very important to the gay community, and that is a title and summary that is more likely to lead you to vote ‘No,’ ” said political analyst Tony Quinn.” Jessica Garrison, *Opponents of Gay Marriage Say They’ll Sue Over Change in Wording of Proposition 8*, L.A. Times, July 29, 2008, available at http://www.latimes.com/news/local/politics/cal/la-me-gaymarriage29-2008jul29.0.7313757_story (seen 080901 in Top6). Likewise, the Sacramento Bee reports: “Attorney General Jerry Brown has intimated that he, too, will jump into the race [for California Governor in 2010]. He reported raising more than \$200,000 in June in his reelection account. He recently renamed the account from “Jerry Brown for Attorney General” to “Jerry Brown 2010. “I don’t do too much these days except sue people,” he said in a March speech at the state Democratic convention. “But someday maybe I’ll get around to doing more than that, and hopefully you’ll help.”

Kevin Hamamura & Shane Goldmacher, *San Francisco Mayor Opens Bid for 2010 Governor’s Race*, Sacramento Bee, July 1, 2008, available at <http://www.sacbee.com/749/story/1054485.html> (seen 080901, Top6).

⁵ Gallagher, *supra* note ____.

⁶ Jesse McKinley, *States Seek Delay in California Marriage Ruling*, N.Y. Times, May 31, 2008, available at http://www.nytimes.com/2008/05/31/us/31gay.html?_r=1&partner=rssnyt&oref=slogin (seen 080901); Chris Rizo, *Ten AGs ask California court to stay gay marriage*, Legal Newsline, May 30, 2008, available at <http://www.legalnewsline.com/news/213060-ten-ags-ask-california-court-to-stay-gay-marriage-ruling> (seen 080901); Missouri Government, *Mo. AG requests Calif. stay same-sex marriage ruling*, June 3, 2008, available at <http://www.topix.com/forum/state/mo-gov/TCHMDHNR55QNBEA43> (seen 080901).

⁷ *Bennet v. Bowen*, S164520, filed June 20, 2008, denied July 16, 2008, California Supreme Court Media Advisory No. 27, July 16, 2008, at <http://www.courtinfo.ca.gov/presscenter/newsreleases/MA27-08.PDF> (seen 080901).

⁸Attorney General Brown has been consistently partisan and biased and used his government office to promote same-sex marriage, and to deny equal protection of the law to those who support Prop 8 and who oppose same-sex marriage.⁹

Sixth, it should come as no surprise that a poll of expected voters taken by the Public Policy Institute of California (Aug. 12-19, 2008) found:

Proposition 8, which would amend the state constitution to eliminate same-sex marriage, is favored by 40 percent and opposed by 54 percent of the state's likely voters. Democratic (66%) and independent likely voters (59%) are against it, and Republican likely voters are in favor (60%). . . .

Opposition to Proposition 8 this year is not an indication of a dramatic shift in voters' opinions. Asked whether they favor letting gay and lesbian couples marry, likely voters are evenly split (47% in favor, 47% opposed) and have been since August 2005. . . .

"It's early in the campaign season, and in the end, the vote on this measure, like the other two, could be hard to predict," says Mark Baldassare, PPIC president and CEO. "Overall views on gay marriage have not budged in a year. . . ."

Press Release, *Ban on Gay Marriage Trails – Voters Split on Teen Abortion Constraints, Redistricting*, (PPIC, Aug. 27, 2008), available at <http://www.ppic.org/main/pressrelease.asp?p=873> (seen 080829). Surprisingly, men expressed much more support for the amendment than women (45% compared to 35%). *Id.* at 11.

⁸ Bob Egelko, AG Brown: Despite Vote, Same-Sex Marriages Since May 15 Will Stay Legal, S.F. Chronicle, Aug. 4, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/04/BA8P1250FN.DTL&tsp=1> (seen 080901) (IMapp Top6).

⁹ Maggie Gallagher, *Jerry Brown Tries to Sink California Marriage Amendment*, Human Events, (Aug. 19, 2008), available at <http://www.humanevents.com/article.php?id=28083> (seen 080901).

By comparison, considering Prop 4 which would amend the state Constitution to require parental notification at least 48 hours before an abortion is performed on a minor, the poll found that 47 percent of those polled supported the proposed amendment and 44 percent opposed it. Californians & their government at 11 (PPIC Statewide Survey, Mark Baldassare, et al, Aug. 27, 2008), at available at http://www.ppic.org/content/pubs/survey/S_808MBS.pdf (seen 080829). That suggests that shallow understanding of what the amendment is about, fostered by the A.G.'s biased description, may play a significant role in the outcome.

Polls taken in the past three months have varied wildly, from an LA Times Poll in May showing support for Prop 8 ahead 54-35% in May, to a Field Poll taken a day later showing opponents of Prop 8 leading 51-42%, to a Survey USA News Poll in mid-June showing supporters of Prop 8 ahead 44-38%, to the August PPI poll showing opponents ahead.¹⁰

Why the *In re Marriage Cases* Decision Should be Overturned by Prop 8:

As an aside, regarding the quality of the *In re Marriage Cases* opinion, even the liberal Washington Post newspaper,[#] which strongly supports same-sex marriage,¹¹ criticized the opinion, calling it a "flawed court decision," not because they disliked the policy result of the decision, but because the court intruded into the political processes to address the issue, and because it did so very ineptly. The Post criticized the California Court for "engag[ing] in an unnecessary bout of judicial micromanagement by redefining marriage through a novel reading of the state constitution."¹²

¹⁰ Gallagher, *supra* note ____.

¹¹ Editorial, *Meddling in Marriage*, Washington Post, May 20, 2008, at A-12, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/19/AR2008051902640.html> (last seen 21 May 2008): "BESTOWING THE full rights and obligations of marriage on all loving, committed relationships -- whether heterosexual or homosexual -- is a matter of social and political justice. There should be no room in this country for the kind of discrimination that would relegate same-sex couples to second-class status."

¹² *Id.*

As a law professor who has followed and analyzed same-sex marriage and family law issues very closely, I agree with that criticism. The California Supreme Court made five types of very serious mistakes in *In re Marriage Cases* - structural, substantive, analytical, political and pandering.[#]

Structurally, the court had no business making the "decision" it made; it is not a judicial decision. It was judicial over-reaching, judicial legislation. To paraphrase a famous statement of Professor Clark about a dubious Supreme Court decision,¹³ the California Supreme Court had so much respect for the will of the people of California than to believe that it could be expressed by a mere 61.4% of the voters. The opinion is a classic example judicial arrogance, the belief in judicial sovereignty.

Substantively, the court diminished, and weakened the marital family, most basic institution in society. The radical redefinition of marriage is not without consequences. The court's interpretation of the constitution was more than "novel" as the Post described it; it was spun from wool of creative imagination rather than textual, historical, precedential, or disciplined by principle.

Analytically, the grossly excessive 122-page majority opinion might have been published as a third rate law review article, but it disgrace to judicial opinion writing. Two of my articles were cited but simply ignored; my former colleague Bruce Hafen was cited also but his work was twisted and distorted out of context so badly he was indignant about the dishonesty. The court's decision rests entirely upon a pile of assumptions (such as the equal contributions to

¹³ Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L.J. 267, 292 (1946) (discussing two chancellors who overturned New Jersey's statutory adoption of the Totten Trust in *Fidelity Union Trust Co. v. Field*, 311 U. S. 169 (1940) *rev'g Field v. Fidelity Union Trust Co.*, 108 F. (2d) 521 (C. C. A. 3d, 1939)).

society of conjugal marriages and of same-sex unions, and the total the absence of harm to society, families and children from radically redefining marriage). The court simply declared, decreed and assumed without any evidence or effort to show a factual, actual, credible basis for the assumptions and conclusions except their pure political will. They closed their eyes to contrary evidence and simply refused to acknowledge, much less engage, the arguments and evidence that contradicted their radical assumptions. The imperially decreed and pontificated, but never engaged, reasoned or analyzed the facts.

Fourth, the decision was a bald political act and judicial politics threatens the integrity and independence of the judicial branch. In method and substance, it showed a lack of judicial temperament, care, and prudence and opted instead for the impatient road of immediatel political influence. For example, just days after the decision, the Secretary of State certified that Prop. 8 had enough signatures and would be on the November ballot. A motion was filed to stay the judgment until the people of California could vote on the constitutional question in November. The California Supreme Court quickly denied the motion in an unprecedented political act of hubris, and proceeded to try to create a "fait accompli." By contrast, remember how the Supreme Court of Hawaii stayed the appeal of the lower court ruling for same-sex marriage as soon as the legislature passed a proposed amendment that would be on the ballot, even though it meant that the case was on hold for approximately 18 months to await the vote of the people. That was an example of judicial statesmanship. Likewise, even the Massachusetts Supreme Court stayed the effect of its judgment for six months, to let the state and the government prepare for and respond to the ruling. When the New Jersey Supreme Court mandated SSCUs in 2006, it also stayed the effect of its judgment for 6 months to let the state prepare. If the California Supreme Court had followed those precedents, and stayed the judgment a mere six months, the people of California

would have had the opportunity to confirm or reject that radical decision by voting in November on Prop. 8. By contrast to both of those courts, the California Supreme Court, has given a textbook example of political manipulation by a judicial branch –in both method and effect. By insuring that there will be thousands of same-sex marriages before November, they guarantee complications from the amendment that otherwise would not exist. By unleashing the exportation of same-sex marriages, they guarantee litigation in many (perhaps all) other states challenging laws banning same-sex marriage recognition in those states, and also guaranteeing litigation challenges to the federal DOMA (as well as many other federal laws) as well.

Fifth, the court's decision capitulated to the capture of marriage by a popular social ideological movement. The effort to legalize same-sex marriage is following the same strategy as the racial eugencists followed when the attempted to ban inter-racial marriage in American states. Their strategy (successfully for a time) was to capture the institution of marriage, to redefine marriage in order to promote their racist ideology, and to advance their social revolution. Courageously, sixty years ago the California Supreme Court stood up against the political effort to capture marriage to promote the social agenda of racism and overturned the antimiscegenation laws the eugenicists had passed. Sadly, today the California Supreme Court has not only capitulated to the political movement to redefine marriage to promote another radical social agenda, but this time it is leading the way, using its judicial power to mandate acceptance of the radical redefinition of marriage sought by the gay and lesbian political movement to capture the institution of marriage to promote their political ideology. This time, the court is on the same side of the "capture marriage" effort as the eugenic racists were 60 years ago.

What's the Harm of Legalizing Same-Sex Marriage:

The question I have been asked more than any other is: “what’s the harm? How does legalizing SSM harm me, my marriage, my family, my state/nation?”

There is no quick “sound-bite” answer to that. But three observations are in order.

First, the question subtly shifts the burden of proof from those proposing a radical alteration of a basic social institution to show their reform will not cause harm, and puts the burden on those defending the established global norm.

Second, it assumes that there is immediate, visible harm, like a bone sticking through skin or spurting out a severed artery, when the harm is not fully immediate but unfolds over time, taking a full generation before the full consequences can be documented. It is like the dangers of smoking – the damage is not obvious at first, and by the time people realize that smoking is harmful to them, irreversible damage has often been done (they may have cancer, emphysema, heart attacks, or strokes).

The harms of legalizing SSM are like the harmful effects of divorce upon children – such harms were generally denied in the 1960s and 1970s during campaign for no-fault divorce laws; but within a decade social scientists were documenting the harm to children and a generation after the no-fault divorce revolution, there a large body of irrefutable evidence of the seriously harmful effects (fortunately for 2/3 of children only temporary (lasting a few years), but in some cases lifelong harms) of divorce (~~nearly always painful and usually severely difficult effects~~) in the lives of children of divorce.

Third, it diverts attention from transformative effect on marriage of inclusion of gay-lesbian lifestyles. I will return to that.

Those who advocate legalizing same-sex marriage argue that “the sky did not fall in The Netherlands or Canada or Massachusetts when they legalized same–sex marriage” a few years ago. There are three flaws with this argument. First, it is an attempt to switch the burden of proof about harm to those who defend marriage rather than those who are proposing a radical change. Second, it diverts attention; the enduring harms of same-sex marriage become evident over decades, not overnight. It will take as long to clearly document the detrimental consequences of legalizing same-sex marriage, just as it took to document clearly the harm of unilateral, no-fault divorce on demand which many American states adopted 30-35 years ago. Third, Already we can identify some harms.

Perhaps the best quick answer to the “what’s the harm from legalizing SSM” is – that it will harm you and your family and your community the same way that legalizing polygamous marriages with 13-year-old girls or legalizing marriage between fathers-and-daughters would harm you and your family and your community.

Legalizing SSM changes a critical social institution, and changes the common understanding of what that social institution is, and changes the script for marriage and for how we expect to live our lives when we marry, it changes the social understanding of the responsibilities we undertake by entering the institution of marriage.

It changes the meaning of marriage by the transformative power of inclusion; it weakens and lowers expectations of marriage by accepting/including gay-lesbian lifestyles as marriage; it undermines the principle that children deserve to have both mother and father.

It is useful to begin by distinguishing the public interest in marriage (public welfare, taxes, law and order, education, socialization, etc.) from the private interests in marriage (romance, fulfillment, etc.). Marriage is not merely a private matter. Because of its profound

public importance it is also *public institution*, a *public status*, regulated by the law because the public has a huge interest in protecting this social institution.

When marriages fail or fail to form, society must pick up the pieces and the public incurs huge fiscal & social costs such as for increased mental health treatment, increased medical services, increased juvenile delinquency, impaired education, and reduced labor productivity.

A recent study by a Business School professor published by the Institute for American Values and the Institute for Marriage and Public Policy calculates that the public costs – costs to American taxpayers -- of family marital break-up and of non-marital child-bearing (CBOW), total at least \$112 billion each year for the USA, more than a \$ one trillion every decade. (For comparison, that is more per year than we spent on the war in Iraq during the first 2 years, and the cost per decade is about 2/3 as much as the total amount the US has spent in the entire six-and-one-half years on the war in Iraq.) \$70 billion in federal budget costs go to dealing with the consequences of marital break-down and avoidance every year, and family fragmentation costs state and local governments \$42 billion every year. In Utah the state and local costs attributed to family fragmentation amount to 10.7% of the total tax burden, or \$276 million per year. In California the state and local costs attributed to family fragmentation amount to 11.5% of the total state and local tax burden, or \$4.829 billion in taxes per year.

So there is a huge public interest in protecting and strengthening the institution of marriage. There is a huge fiscal danger to legalizing same-sex marriage if it weakens the institution of marriage.

How marriage is defined sends signals to and reflects common understandings about the expectations of the relationship. Keeping those signals clear is critical to protect the vulnerable,

including children, adults who invest a large part of their lives in families, and persons who depend on the care given by families.

Legalizing same-sex marriage will drain marriage of the social meaning it now has. Marriage links not only men with women, but parents with children. Legalizing same-sex marriage obscures that linkage, and weakens the message connecting marriage with spousal and parental responsibility.

Marriage is more than a mere “word” or “piece of paper.” It is not a matter of simple legal positivism – a marriage means whatever the lawmakers choose. While the law regulates marriage, conjugal marriage is the oldest social institution in the world; it is a ubiquitous, natural, pre-legal, pre-state institution found in some form in all societies. Calling the union of two men or two women a marriage does not make it one; such word games do not transform the nature of the relationship. It is like the story attributed to Abraham Lincoln: he is said to have once asked how many legs a calf would have if you counted a tail as a leg. To the response "five legs," Lincoln said, "No; calling a tail a leg doesn't make it a leg." Likewise, calling the union of two men or two women a marriage doesn't make it a marriage.

After and throughout thousands of years of recorded human history, men and women are different, and the union of a man and woman still creates a different kind of union that the union of 2 men or 2 women. Marriage involves the complementary, conjugal union of a man and a woman.

Men and women are different in a universe of complementary ways and aspects. The gender integrative union of a man and a woman is different than the gender apartheid union of two men or two women. The union of man and woman in marriage creates a unique and

uniquely valuable union much greater than the sum of the parts. Conjugal marriage contributes more to society than other forms of intimate adult relationship.

Marriage establishes the moral core of the family and the moral baseline and standards for society in many ways. “Marriage is a society's cultural infrastructure” In marriage and family, the individual acquires his core kinship identity. Without a solid family identity, many persons struggle and some turn to gangs, and extremist movements as a substitute for family identity. In conjugal marriage and the marital family most persons learn the most poignant lessons about how to live in meaningful relationships. Marriage is not only the most critical bridge and bonding connection in society, it is the instrument of the most important moral transformation of individuals. Marriage connects us as individuals from strangers into kin, from men and women into husbands and wives, from persons of separate generations into families.

One of the best summaries of such evidence comes in a book published recently by David Blankenhorn, entitled *The Future of Marriage*. Using a poll of data reporting interviews with 50,000 adults in 35 nations, Blankenhorn created four categories of countries according to their laws regarding same-sex unions and analyzed attitudes towards marriage. He reports:

The correlations are strong. Support for marriage is by far the weakest in countries with same-sex marriage. The countries with marriage-like civil unions show significantly more support for marriage. The two countries with only regional recognition of gay marriage (Australia and the United States) do better still on these support-for-marriage measurements, and those without either gay marriage or marriage-like civil unions do best of all.¹⁴

¹⁴ Blankenhorn, *Defining Marriage Down*, *supra* at *2. (Analyzing data from the International Social Science Programme).

In nations without gay marriage, people are twice to say married people are happier than in nations with gay marriage, and nearly twice as likely to say that people with children ought to marry.¹⁵

IF you want to see what happens to societies that devalue marriage, there is perhaps not better, more tragic example than what happened in Russia following the Bolshevik Revolution of 1917. The new government enacted radical marriage and family law reforms, 1917-1927, based on the Marxist-Leninist ideology of the need to eliminate the repressive institution of bourgeois marriage and marital family life. The enacted laws promoting non-marital living, abolishing church marriages, making it possible to get divorced by merely sending a postcard to the registry agency, leading to “seasonal” marriages, as workers moved with the seasons, legalization of homosexuality, legalization of abortion, etc.. The consequences of those radical reforms (exacerbated by the civil war and the social-and-military-policy-induced-famine) were utterly disastrous: instability, dislocation, separation, breakdown of millions of families and of society, starvation of millions, the emergence of a huge class of street orphans, the growth of crime, the abandonment of literally hundreds of thousands of children (the state rather than biological parents had the child care responsibility in the new workers paradise). Across Russia children and women suffered and starved, until Stalin, seeing the growing threat of Germany abruptly reversed the policies, reinstated the old marriage and family laws, and rushed to strengthen and prepare the society for the horrific war with Germany that came much too soon and only increased the suffering.

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Same-sex relationships differ in profound ways in all of these critical aspects. The difference is the danger. The inclusion of same-sex relationships with different values in the social understanding of marriage will transform the social understanding of that basic unit of society.

The morality and behavioral expectations of gays and lesbians differ markedly from married men and women. For example, promiscuity, infidelity, multiple sexual partners, and dangerous sexual practices are the behavioral norms among gay couples (and also, to a lesser extent, lesbian couples), rather than monogamy and sexual self-control which are the norms fostered by and nurtured in heterosexual marriages.

For example, a study by Dutch AIDS researchers, published in 2003 in the journal AIDS, reported on the number of partners among Amsterdam's homosexual population.¹⁶ They found:

- 86% of new HIV/AIDS infections in gay men were in men who had steady partners.

- Gay men with steady partners engage in more risky sexual behaviors than gays without steady partners.

- Gay men with steady partners had 8 other sex partners ("casual partners") per year, on average.

- The average duration of committed relationships among gay steady partners was 1.5 years.¹⁷

American researchers Bell and Weinberg reported that 43 percent of white male homosexuals had sex with 500 or more partners, with 28 percent having one thousand or more sex partners.¹⁸ A more recent study of 2,583 older sexually active gay men reported that "the

¹⁶Maria Xiridou, Ronald Geskus, et al., *The contribution of steady and casual partnerships to incidence of HIV infection among homosexual men in Amsterdam*, 17 (7) AIDS 1029 (2 May 2003), available at <http://www.aidsonline.com/pt/re/aids/pdfhandler.00002030-200305020-00012.pdf?jsessionid=FrMF7bsJNjx6Znq8QlqzTFXPQSShnmnLTy4TG4pmbXlySXPtTnyz9!1057067369!-949856144!8091!-1> (seen February 20, 2007). The purpose of the study was to assess whether provision of certain AIDS drugs had resulted in an increase of unsafe sexual practices in the gay community in The Netherlands.

¹⁷*Id.*

¹⁸Martin S. Bell & Alan P. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 308-09 (1978).

modal range for number of sexual partners ever . . . was 101-500,” while 10.2 percent to 15.7 percent had between 501 and 1,000 partners, and another 10.2 percent to 15.7 percent reported having had more than one thousand sexual partners in their lifetime.¹⁹ Kirk and Madsen reported in their that “the cheating ratio of ‘married’ gay males, given enough time, approaches 100%. . . . Many gay lovers, bowing to the inevitable, agree to an ‘open relationship,’ for which there are as many sets of ground rules as there are couples”²⁰

A study published in 2006, of same-sex registered partnerships in Norway and Sweden, noted that significant problems with stability of the relationship, and significantly higher rates of breakup. The divorce-risk levels were about 50% higher for registered gay men partnerships than for comparable heterosexual couples, and controlling for variables, the risk of divorce was twice as high for lesbian couples as it was for gay men couples. ²¹ Another study of Swedish registered partnerships found that gay male couples were fifty percent more likely to divorce than married heterosexual couples, while lesbian couples were over 150 percent more likely to divorce than heterosexual couples.²² Controlling for variables, gay couples were 35 percent and lesbian couples 200 percent more likely to divorce than heterosexual couples.²³

Elie Wiesel, whose family were killed in Nazi death camps he survived, begins *Night* with a tribute to one who spoke up to warn his community, even though he was neglected and marginalized for doing so. In his Nobel acceptance speech Wiesel said: ““I swore never to be silent We must take sides.”

¹⁹ Paul Van de Ven, et al., *A Comparative Demographic and Sexual Profile of Older Homosexually Active Men*, 34 *Journal of Sex Research* 354 (1997), cited in Dailey, *supra* note __, at __.

²⁰ Marshall Kirk & Hunter Madsen, *After the Ball* 330 (1989). Likewise, Andrew Sullivan contrasts male-female marriages with same sex relationships and explains, “there is more likely to be a greater understanding of the need for extramarital outlets between two men than between a man and a woman.” Andrew Sullivan, *Virtually Normal* 202 (1996), cited in IVC Statistics, *supra* note __, at __.

²¹ Gunnar Andersson, Turid Noack, Ane Sierstad & Harald Weedon-Fekjaer, *The Demographics of Same-Sex Marriages in Norway and Sweden*, 43 *Demography* 79, 89-90 (2006), available at <http://muse.jhu.edu/journals/demography/v043/43.1andersson.html#tab02>.

²² Maggie Gallagher & Joshua K. Baker, *Same-Sex Unions and Divorce Risk: Data from Sweden*, iMAPP Policy Brief, May 3, 2004 copy in author’s possession.

²³*Id.*

He also said: “There is so much to be done, there is so much that can be done. One person – a Raoul Wallenberg, an Albert Schweitzer, a Martin Luther King, Jr. – one person of integrity can make a difference, a difference of life and death.”

-President Gordon B, Hinckley wrote:

- “We cannot effect a turnaround in a day or a month or a year. But with enough effort, *we can begin a turnaround within a generation, and accomplish wonders within two generations* – a period of time that is not very long in the history of humanity.

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Cover of “What’s the Harm”