Wedlock Deadlock: Equal Protection versus the Will of the Voters

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“Wedlock Deadlock”:* Equal Protection Versus the Will of the Voters

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TABLE OF CONTENTS

I. INTRODUCTION........................................................................................................ 546

II. MARRIAGE IN CALIFORNIA ............................................................................... 548
   A. Background Information .................................................................................. 548
   B. A Mayor Standing Up, the Court Shutting Him Down .................................. 549
   C. Removing Gender from Marriage ................................................................... 552

III. CALIFORNIA INITIATIVES ............................................................................. 553
   A. The Effect of Proposition 22 on California Law ........................................... 553
   B. Two Competing Constitutional Amendments .............................................. 554
      1. The California Constitutional Marriage Amendment ............................. 555
      2. The Voters’ Right to Protect Marriage Initiative ....................................... 556

IV. WHO HAS THE POWER TO DECIDE WHETHER THE RIGHT TO MARRY
    SHOULD BE EXTENDED TO ALL CALIFORNIA CITIZENS? ....................... 558
   A. The People ....................................................................................................... 558
   B. The Legislature ............................................................................................... 560
   C. The Judiciary ................................................................................................... 562
      1. Overruling a Voter-Approved Constitutional Amendment ..................... 564
      2. Deference to Public Opinion .................................................................... 565

V. CONCLUSION ...................................................................................................... 568

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Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. "It is an association that promotes a way of life, not causes; a harmony in living, not in political faiths; a bilateral loyalty, not commercial or social projects." Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution and the decision whether and whom to marry is among life's momentous acts of self-definition.†

I. INTRODUCTION

At 11:06 a.m. on February 12, 2004, Phyllis Lyon, seventy-nine, and Del Martin, eighty-three, exchanged wedding vows, kissed, and then embraced when San Francisco assessor-recorder Mabel Teng pronounced the two "spouse[s] for life." The women had been in a committed relationship for fifty-one years, but had never previously considered the possibility of getting married.3 Unfortunately, their honeymoon was short-lived, as the California Supreme Court ruled exactly six months later that their marriage was illegal and thus invalid.4

In recent years, the question of whether all persons are entitled to the fundamental right to marry,5 regardless of sexual orientation, has emerged as an important issue dividing the American population.6 Few topics of legal policy in this century have generated so much attention or so cleanly divided the nation.7 On one side, advocates of civil rights adamantly argue that equal protection of the laws should be provided to all citizens, rather than only to heterosexual citizens.8 On the other side, religious conservatives are equally convinced that

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3 Id.
4 Lockyer v. City & County of San Francisco, 95 P.3d 459 (Cal. 2004).
5 See, e.g., Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))); Perez v. Lippold, 198 P.2d 17 (Cal. 1948) (holding that the fundamental right to marry includes a person’s right to marry the person of his or her choosing).
6 See generally Maura Dolan & Lee Romney, S.F. Wedding Planners Are Pursuing a Legal Strategy, L.A. TIMES, Feb. 22, 2004, at A1 (outlining the battles fought by civil rights attorneys in recent years); Suzanne Herel, Court Halts Gay Vows: 29-Day Drama: S.F. Unleashed a “Gay-Marriage Tsunami,” S.F. CHRON., Mar. 12, 2004, at A1 (describing the question of whether there is right to marry the person of one’s choosing as “a national debate that [has] been simmering for decades”).
8 See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the
gay men and lesbians have no right to marry and that the current laws limiting marriage to a legal union between one man and one woman must be strengthened to ensure that same-sex couples are never allowed to receive any of the benefits of marriage.  

In 2003, the Supreme Judicial Court of Massachusetts delivered a landmark opinion in Goodridge v. Department of Public Health and held that the Equal Protection Clause of the Massachusetts Constitution decrees that all persons must be allowed to marry, regardless of sexual preference. Several states reacted to the opinion by rushing to pass state constitutional amendments limiting marriage to a union between a man and a woman. As of November 7, 2006, voters in twenty-six states passed constitutional amendments prohibiting same-sex couples from marrying. Voters rejected such an amendment in only one state. On the other hand, only three states other than Massachusetts have granted full marital rights to same-sex couples; to date, none of them will use the term “marriage” to refer to these institutions. California citizens have not voted on a constitutional amendment, making the issue controversial as both sides of the debate fervently attempt to change the law.

This Comment looks at the California political process in an effort to determine which source of political power has the ability to grant or withhold equal protection of the laws.


11. Id. at 950 n.7 (“All people are born free and equal and have certain natural, essential, and unalienable rights . . . . Equality under the law shall not be denied or abridged . . . .” (quoting MASS. CONST. art. I)). Following Goodridge, the plaintiffs filed a motion for an injunction in federal court. Largess v. Supreme Judicial Court, 317 F. Supp. 2d 77 (D. Mass. 2004), aff’d by 373 F.3d 219 (1st Cir. 2004), cert. denied, 543 U.S. 1002 (2004). The court denied relief. Id.

12. See, e.g., OHIO CONST. art. XV, § 11 (“Only a union between one man and one woman may be a marriage valid in this state.”); Id. art. II, § 35 (limiting marriage to one man and one woman and refusing to recognize marriages performed in other states that unite two individuals of the same sex); TEX. CONST. art. I, § 32 (“Marriage in this state shall consist only of the union of one man and one woman. This state . . . may not create or recognize any legal status identical or similar to marriage.”).


14. Id.

15. See Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (holding that the New Jersey Constitution requires same-sex couples be treated the same as heterosexual couples under the law, but leaving it up to the Legislature to decide whether to refer to these unions as “marriages” or by some other name); see also CONN. GEN. STAT. ANN. §§ 46b-38aa to 46b-38pp (West 2005) (providing that same-sex couples in Connecticut may enter into civil unions and shall be considered the equivalent of married spouses in all aspects of the law); VT. STAT. ANN. tit. 15, §§ 1201-1207 (1999) (explaining that same-sex couples are entitled to form civil unions, which are legal relationships that are equivalent to marriage).

16. See generally Buchanan, supra note 13, at A-10 (outlining recent efforts on both sides of the controversy).
marital rights—the people, the Legislature, or the judiciary.\textsuperscript{17} Part II reviews the history of marriage rights in California. Part III looks at the California initiative process, including recent attempts to change marriage law. Part IV reviews the separation of powers in California and looks at the rights and responsibilities of the people and the judicial and legislative branches. This Comment ultimately concludes that, because a court has the ability to weigh constitutional principles against the asserted will of the people, the California Supreme Court is in the best position to decide whether marital rights and benefits should be extended to all citizens.

II. MARRIAGE IN CALIFORNIA

A. Background Information

In 1948, California became the first state in the Union to overturn laws forbidding interracial marriage by finding that each California citizen has a fundamental right to marry the individual of his or her choosing.\textsuperscript{18} Nearly thirty years later, the Legislature rewrote California Family Code section 300 to change the definition of marriage to a union between a man and a woman, fearing that the prior, gender-neutral definition could have allowed same-sex couples to marry.\textsuperscript{19}

In 1996, President Bill Clinton signed the federal Defense of Marriage Act (DOMA). The Act provided that the federal government would recognize only

\textsuperscript{17} The issue is not whether there is a fundamental right to “same-sex marriage.” There is not a question of whether gay men and lesbians should be allowed to form a separate subset of marriage; the issue is whether the fundamental right to marry should be extended to all citizens. \textit{In re Marriage Cases}, 49 Cal. Rptr. 3d 675, 731 (Ct. App. 1st Dist. 2006) (Klime, J., dissenting).

\textsuperscript{18} Perez v. Lippold, 198 P.2d 17 (Cal. 1948).

\textsuperscript{19} \textit{In re Coordination Proceeding, Special Title Rule 1550(c), No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005), rev’d sub. nom. \textit{In re Marriage Cases}, 49 Cal. Rptr. 3d 675 (Ct. App. 1st Dist. 2006) (discussing the legislative history behind California Family Code section 300, which provides the legal definition of marriage within the state).
marriages between a man and a woman and allowed each state to determine whether to legally recognize "a relationship between persons of the same sex that is treated as a marriage" by another state.\textsuperscript{20} Four years later, California voters passed Proposition 22 with sixty-one percent of the vote.\textsuperscript{21} The proposition amended the California Family Code to declare that only marriage between a man and a woman would be recognized or valid in the state.\textsuperscript{22} In the last several years, the Legislature passed a number of laws expanding the rights bestowed upon registered domestic partnerships—legal unions that are similar to marriages.\textsuperscript{23} Today, the rights and responsibilities granted to registered domestic partners are almost as inclusive as those associated with marriage.\textsuperscript{24}

B. A Mayor Standing Up, the Court Shutting Him Down

On February 12, 2004, San Francisco Mayor Gavin Newsom began issuing marriage licenses to same-sex couples, declaring that California's ban on same-sex marriages unfairly discriminated against gay men and lesbians.\textsuperscript{25} The California Supreme Court halted the ceremonies on March 11, 2004, pending a determination of the legality of Mayor Newsom's actions.\textsuperscript{26} From the moment that San Francisco began issuing gender-neutral marriage licenses until the time the court halted the ceremonies, 3,955 same-sex couples flooded the city to legalize their unions.\textsuperscript{27} Six months later, the court invalidated all of these marriages, holding that public officials have a duty to uphold the laws of the state—even those laws with which they disagree.\textsuperscript{28} The court refused to discuss the constitutionality of California Family Code sections 300 and 308.5, stating

\begin{itemize}
\item \textsuperscript{20} 28 U.S.C.A. § 1738C (West Supp. 2006); 1 U.S.C.A. § 7 (West 2005).
\item \textsuperscript{22} See CAL. FAM. CODE § 308.5 (West 2004) (codifying California's Proposition 22).
\item \textsuperscript{23} See id. § 297 (defining a domestic partnership as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring"). Members of a domestic partnership must be of the same gender, unless one or both persons are older than age sixty-two and other eligibility criteria are met. \textit{Id.; see also id.} § 297.5 (explaining the rights, responsibilities, obligations, and protections afforded to registered domestic partners).
\item \textsuperscript{24} See, e.g., \textit{id.} § 297.5(c) (providing that a surviving domestic partner has the same rights by law as a widow or widower); \textit{id.} § 297.5(d) (allowing domestic partners to have the same rights and obligations as spouses with regard to a child by either of the partners). \textit{But see id.} § 297.5(g) (stating specifically that registered domestic partners are prohibited from filing a joint California state tax return).
\item \textsuperscript{25} Gordon, supra note 2, at A1.
\item \textsuperscript{26} Bob Egelko, Surprise Ruling: Newsom Says the City Will Make a Strong Case, S.F. CHRON., Mar. 12, 2004, at A1.
\item \textsuperscript{28} Lockyer v. City & County of San Francisco, 95 P.3d 459, 464 (Cal. 2004). The court also ordered the city to refund, upon request, the eighty-two-dollar license fee and the sixty-two-dollar wedding ceremony fee paid by each couple. \textit{Id.} at 499; \textit{see also} Egelko, supra note 27, at A1 (pointing out that, if each couple actually sought reimbursement, the city would be required to pay nearly $570,000).
\end{itemize}
only that a ministerial official cannot avoid complying with a law on the grounds that “in his opinion the law is unconstitutional.”

The City of San Francisco then filed suit against the State of California, arguing that the state’s law prohibiting gay men and lesbians from enjoying the right to marry violated the Equal Protection Clauses of the California Constitution and the United States Constitution. Reviewing the California Family Code, San Francisco District Court Judge Richard Kramer held that California’s laws limiting marriage to a union between a man and a woman are unconstitutional.

When a statute implicates an individual’s fundamental human rights or singles out a suspect class for different treatment, courts subject the law to strict scrutiny. Judge Kramer found that the strict scrutiny standard is appropriate in the context of limitations on the right to marry; however, he went on to state that the marriage statutes would also be invalid under the more deferential rational basis test.

Specifically, Judge Kramer determined that California’s laws prohibiting two consenting individuals of the same gender from entering into a legal marriage are not rationally related to a legitimate state purpose and therefore unlawfully discriminate against lesbians and gays. The fact that California has granted a number of marriage-like rights to same-sex couples supports the idea that there is no rational basis for denying them the right to marry. In fact, having different laws for married couples and registered domestic partners “smacks of a concept long rejected by the courts: separate but equal.” The state claimed that the traditional definition of marriage is rooted in our nation’s history, an argument that Judge Kramer summarily dismissed. The fact that society has traditionally done something in a certain way is not a rational basis for upholding a law that is otherwise discriminatory.

29. *Lockyer*, 95 P.3d at 494 (quoting State v. State Bd. of Equalizers, 94 So. 681, 684 (Fla. 1922) (emphasis omitted)).
32. *See Cal. Fam. Code* § 300 (West 2004) (defining marriage as a civil contract between a man and a woman); *id.* § 308.5 (“Only marriage between a man and a woman will be valid or recognized in California.”).
34. *Id.* at *2.
35. *See id.* (explaining that under the rational basis test a law is “presumptively valid and must be upheld so long as there exists a rational relationship between the disparity of treatment and some legitimate governmental purpose”). While there is some dispute regarding the proper standard of review in cases that discriminate on the basis of sexual orientation, this Comment discusses only the applicability of the rational basis test.
36. *Id.* at *3.
37. *Id.* at *5 (citing Brown v. Bd. of Educ., 347 U.S. 483, 494 (1952)).
38. *Id.* at *3.
39. *Id.*
alone that the discrimination has been sanctioned by the state for many years
does not supply [constitutional] justification. For example, although both
tradition and history support the notion that interracial marriage should be illegal,
such a law today would clearly be unconstitutional. Judge Kramer concluded
that California could not constitutionally deprive same-sex couples of the right to
marry.

Writing three separate opinions that spanned 128 pages, a three-judge panel
from the First District Court of Appeal reversed the trial court ruling. Reframing
the issue to support their conclusion, the First District held that there is no right
to “same-sex marriage.” The Court then went a step further, holding that
California’s current marriage laws do not discriminate on the basis of sexual
orientation because “the Family Code provisions we are considering make no
reference to the sexual orientation of potential marriage partners. California law
does not literally prohibit gays and lesbians from marrying; however, it requires
those who do to marry someone of the opposite sex.” The court acknowledged
that this requirement “excludes 100 percent of [lesbian and gay couples] from
entering marriage” and that the legislative history shows a specific intent to
exclude these couples, yet it failed to explain how this exclusion is not
discriminatory. As Justice Klime stated in his dissent:

The question at the center of this case is whether the reasons the United
States Supreme Court and the California Supreme Court have deemed
marriage a fundamental constitutional right are as applicable to same-sex
couples as to couples consisting of members of the opposite sex. The
majority’s indifference to those reasons effectively divests the marital
relationship of its most constitutionally significant qualities and permits
marriage to be defined instead by who it excludes. Though not its
purpose, the inescapable effect of the analysis the majority adopts is to

40. See Perez v. Lippold, 198 P.2d 17, 27 (Cal. 1948) (overturning California’s ban on interracial
marriage because it violated the Equal Protection Clause of the California Constitution).
41. See Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (“[T]he fact that the
governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason
for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting
miscegenation from constitutional attack.”).
42. In re Coordination Proceeding, 2005 WL 583129.
43. In re Marriage Cases, 49 Cal. Rptr. 3d 675 (Ct. App. 1st Dist. 2006).
44. The majority ignored the fact that no one asserts a right to “same-sex marriage.” See supra note 17.
45. In re Marriage Cases, 49 Cal. Rptr. 3d at 709.
46. Id. at 709 n.23.
47. Id. at 709-10.
48. See BLACK’S LAW DICTIONARY 479 (7th ed. 1999) (Defining discrimination as “[d]ifferential
treatment; esp. a failure to treat all persons equally when no reasonable distinction can be found between those
favored and those not favored”) (emphasis added).
diminish the humanity of lesbians and gay men whose rights are defeated.\textsuperscript{49}

The California Supreme Court has agreed to review the case,\textsuperscript{50} leaving these questions unresolved. Throughout this long process, most of the parties involved expressed a belief that the court would be required to resolve the issue.\textsuperscript{51}

C. Removing Gender from Marriage

On September 6, 2005, California’s Legislature became the first legislative body in the nation to rewrite the definition of marriage in gender-neutral terms without prompting by the judiciary.\textsuperscript{52} After a bill failed in the Assembly by four votes, Assembly Member Mark Leno amended the bill into Assembly Bill 849 (“AB 849”), which was already pending in the more liberal Senate.\textsuperscript{53} The Senate approved the bill by a vote of twenty-one to fifteen and sent it back to the Assembly where it managed to secure forty-one “ayes”; only thirty-five representatives voted against the bill.\textsuperscript{54} AB 849 would have rewritten the California Family Code to define marriage as a contract based upon the relationship between two persons legally capable of giving consent, thereby removing any gender-based requirements.\textsuperscript{55} Eliminating the phrase “between a man and a woman”\textsuperscript{56} from the definition of marriage would have allowed all couples to marry.\textsuperscript{57}

\begin{footnotesize}
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\item \textsuperscript{49} In re Marriage Cases, 49 Cal. Rptr. 3d at 731 (Klime, J., dissenting).
\item \textsuperscript{50} See California Courts—Appellate Court Case Information, http://appellatecases.courtinfo.ca.gov/ (search by Supreme Court, then search by case number S147999) (last visited Apr. 10, 2007) (on file with the McGeorge Law Review) (showing that the Supreme Court granted petition for review on December 20, 2006).
\item \textsuperscript{51} Romney & Dolan, supra note 21, at A1.
\item \textsuperscript{52} See Bill Ainsworth, Assembly OKs Same-Sex Marriage: First-in-Nation Measure Now Goes to Schwarzenegger, SAN DIEGO UNION-TRIB., Sept. 7, 2005, at A-1 (noting that the Massachusetts Legislature amended the state’s marriage laws only after the Massachusetts Supreme Judicial Court issued a decree that ordered it to do so); see also A.B. 849, 2005-2006 Leg., Reg. Sess. (Cal. 2006) (“Marriage is a personal relation arising out of a civil contract between two persons . . . .”).
\item \textsuperscript{53} Ainsworth, supra note 52, at A1; see also ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 849, at 2 (as introduced Feb. 18, 2005) (explaining that, when the Assembly originally passed the bill, it dealt with fish and game). The Senate deleted the original bill in its entirety and inserted the provisions relating to civil marriage. Id. at 1.
\item \textsuperscript{54} Ainsworth, supra note 52, at A1.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} CAL. FAM. CODE § 300 (West 2004).
\item \textsuperscript{57} See A.B. 849, 2005-2006 Leg., Reg. Sess. (Cal. 2006) (“The Legislature has an interest in encouraging stable relationships regardless of the gender or sexual orientation of the partners. The benefits that accrue to the general community when couples undertake the mutual obligations of marriage accrue regardless of the gender or sexual orientation of the partners . . . . It is the intent of the Legislature in enacting this act to end the pernicious practice of marriage discrimination in California.”).
\end{itemize}
\end{footnotesize}
A month later, Governor Schwarzenegger vetoed the bill, claiming that the legislation was an illegal attempt to overrule Proposition 22.\textsuperscript{58} In a message accompanying the veto, he wrote that "he believed gay couples were ‘entitled to full protection under the law and should not be discriminated against.’"\textsuperscript{59} The Governor maintained that the definition of marriage was best left up to the people or the judiciary, rather than the Legislature.\textsuperscript{60} Following the veto, opponents of equal rights for gays and lesbians vowed to renew their efforts to amend the State Constitution.\textsuperscript{61}

III. CALIFORNIA INITIATIVES

A. The Effect of Proposition 22 on California Law

In 2000, voters passed Proposition 22, which succinctly stated: "Only marriage between a man and a woman is valid or recognized in California."\textsuperscript{62} California Family Code codifies Proposition 22 in the section that discusses marriages performed outside of California.\textsuperscript{63} Taken at face value, the law states that all marriages performed outside of California are given the same legal effect as marriages performed within the state, with the exception that legal marriages between same-sex couples performed outside of the state are invalid.\textsuperscript{64} The law does not say that same-sex couples are unable to marry within California. \textsuperscript{65}

Assembly Member Mark Leno argues that a new law eliminating the gender requirements from the definition of marriage would not overrule Proposition 22, but would change only the 1978 Legislative Act defining marriage as a union between a man and a woman.\textsuperscript{66} Advocates of traditional marriage counter with the contention that the California Family Code applies to all marriages, regardless of where the parties solemnized their vows.\textsuperscript{67} Not surprisingly, courts have reached different opinions as to whether the law would also prevent same-sex couples from legally marrying within the state.\textsuperscript{68}

\textsuperscript{59} Id.
\textsuperscript{60} Bill Ainsworth, Governor Will Reject Gay Marriage Legislation, SAN DIEGO UNION-TRIB., Sept. 8, 2005, at A-1; cf. infra text accompanying note 127.
\textsuperscript{61} Ainsworth, Governor Will Reject Gay Marriage Legislation, supra note 60.
\textsuperscript{62} CAL. FAM. CODE § 308.5 (West 2004).
\textsuperscript{63} See id. § 308 ("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.").
\textsuperscript{64} Id. §§ 308-308.5.
\textsuperscript{65} Ainsworth, Governor Will Reject Gay Marriage Legislation, supra note 60. But see CAL. FAM. CODE § 308 ("[T]he Legislature is thwarting the will of the voters.... Proposition 22 applies to all marriages.").
\textsuperscript{66} Ainsworth, Governor Will Reject Gay Marriage Legislation, supra note 60.
\textsuperscript{67} Id.
\textsuperscript{68} Compare Armijo v. Miles, 26 Cal. Rptr. 3d 623, 637 (Ct. App. 2d Dist. 2005) (determining that the intent in passing Proposition 22 was to prevent California from recognizing marriages between same-sex
While both arguments have merit, Proposition 22 as codified in the Family Code references only marriages that were performed somewhere other than California; the title of the section is “Foreign Marriages; validity.” Moreover, the voters enacted Proposition 22 following the passage of DOMA, which allows each state to refuse to recognize the validity of marriages performed in other states when the marriage participants happen to be of the same gender. At the time, supporters of Proposition 22 explained the measure as “a pre-emptive strike in the event [that] other states legalize gay marriage.” In fact, the Protection of Marriage Committee, the official sponsor of Proposition 22, explained the initiative by saying that “the primary focus of the measure is to bar California from recognizing homosexual marriages performed in other states.”

The placement of the statute, the overall wording, and the intent of those who originally supported the measure all strongly support Assembly Member Leno’s argument that Proposition 22 has no impact on the question of whether the right to marry in California should be extended to lesbians and gay men. If this is the case, the Legislature should be able to amend section 300 of the Family Code to provide a gender-neutral definition of marriage.

B. Two Competing Constitutional Amendments

Fearing the courts may expand marriage to include all couples, two competing groups continue to attempt to pass state constitutional amendments specifically defining marriage as an exclusive institution between one man and one woman. These groups identify themselves as ProtectMarriage.com and VoteYesMarriage.com. To succeed in amending the Constitution, each group must obtain the signatures of nearly 600,000 California citizens. While the Legislature may amend the Constitution only by a two-thirds majority, an
amendment approved by the people requires only a simple majority. If passed, these amendments would take effect the following day. Should voters pass both amendments simultaneously, only the initiative that receives the higher percentage of the vote will become effective.

1. The California Constitutional Marriage Amendment

ProtectMarriage.com endorses the California Constitutional Marriage Amendment (CMA). The language of this proposed initiative is very concise, stating: “A marriage between a man and a woman is the only legal union that shall be valid or recognized in this state.” Proponents of the amendment believe that it is necessary to ensure that politicians and judges do not “[chip] away at [Proposition] 22 and [ignore] the will of the voters.”

Referring to marriage as the “only legal union” recognized by the State of California has the effect of nullifying domestic partnership laws and preventing the Legislature from legalizing same-sex civil unions. Additionally, supporters of the CMA indicate that it would prevent the Legislature from requiring private employers to give the same legal rights to same-sex couples that it gives to opposite-sex couples. In this manner, the CMA seeks to ensure not only that same-sex couples are unable to marry, but also that they are unable to qualify for any of the benefits of marriage.

77. Id. § 4; cf. Richard B. Collins, New Directions in Direct Democracy: How Democratic Are Initiatives?, 72 U. COLO. L. REV. 983 (2001) (suggesting that it is too easy for the voters to amend their state constitutions through the initiative process and advocating a system that would make the process more difficult).

78. CAL. CONST. art. XVIII, § 4.

79. Id.


82. Id.

83. Id. (“By recognizing marriage between a man and a woman as the only legal union in California, this amendment would prevent any law from recognizing, or giving rights on the basis of, other personal relationships that attempt to imitate marriage, such as homosexual domestic partnerships or civil unions.”) (emphasis added) (internal quotation marks omitted).

84. Id. (“Since no [civil union or domestic partnership] would be legally recognized, it logically follows that there would also be no basis [for private employers] to confer rights, benefits, or obligations on [same-sex couples].”.

85. Those who oppose the equality of same-sex couples also oppose the idea of domestic partnerships because such unions grant many of the rights traditionally reserved for married couples to registered domestic partners. See Knight v. Super. Ct., 26 Cal. Rptr. 3d 687, 689 (Ct. App. 3d Dist. 2005) (arguing that California’s domestic partnership laws are the Legislature’s illegal attempt to amend Proposition 22), petition for review denied, S133961, 2005 Cal. LEXIS 7127 (Cal. June 29, 2005) (on file with the McGeorge Law Review).
2. The Voters’ Right to Protect Marriage Initiative

Alternatively, VoteYesMarriage.com supports a Constitutional Amendment entitled “The California Marriage Amendment: The Voters’ Right to Protect Marriage Initiative” (“Voters’ Rights Initiative”), which would unambiguously ban all same-sex unions within the state. The proposed amendment is much more expansive than the CMA, to the extent that opponents have criticized it as “mean-spirited” and “ahead of the pack in its viciousness.” The proposed amendment seeks to add the following text to the State Constitution:

Only marriage between one man and one woman is valid or recognized in California, whether contracted in this state or elsewhere. Neither the Legislature nor any court, government institution, government agency, initiative statute, local government, or government official shall abolish the civil institution of marriage between one man and one woman, or require private entities to offer or provide rights, incidents, or benefits of marriage to unmarried individuals, or bestow statutory rights, incidents, or employee benefits of marriage on unmarried individuals. Any public act, record, or judicial proceeding, from within this state or another jurisdiction, that violates this section is void and unenforceable.

The second sentence of the amendment would revoke a number of the current rights granted to registered domestic partners and deprive same-sex couples of rights that they currently enjoy under domestic partnership statutes. For example, state and local governments would not be permitted to extend healthcare benefits to same-sex couples, but private organizations would be allowed to choose individually whether to extend these benefits. Specifically, while domestic partners would still be allowed to register with the state, they would not be entitled to any of the rights traditionally awarded to spouses.

The final clause of the Voters’ Rights Initiative poses an additional dilemma. The text says that any judicial ruling that attempts to circumvent the law after it
passes would be "void and unenforceable." The question here is whether voters have the right or power to define the jurisdiction of the courts in this manner. The plain meaning of this provision is that California will not recognize any ruling from any other state or any federal jurisdiction that recognizes or gives validity to a relationship that happens to be between two men or two women. This provision raises some questions that the text of the amendment does not answer.

The Supreme Court of the United States established its right to review state laws for federal constitutional violations more than a century ago, indicating that any attempt by a state to pass a law or constitutional amendment limiting the Supreme Court's power of review would be futile. Only Congress may limit the Supreme Court's jurisdiction. Arguably, states are constitutionally precluded from passing legislation to preclude same-sex couples from marrying. Although the Supreme Court has not yet spoken on the issue, the developing jurisprudence suggests that an amendment forbidding gay men and lesbians from marrying would be constitutionally vulnerable. By this proposition, any attempt by the California people to amend the State Constitution would be fruitless, "since the Supremacy Clause of the United States Constitution would make those state constitutional provisions null and void, whether or not they remained on the books." If the provision in the Voters' Rights Initiative limiting the judiciary's ability to review the law is not unconstitutional on its face, the fact that the provision exists will not save the law from attack. In 1912, Colorado voters similarly tried to limit the power of the state and federal courts by passing a constitutional amendment providing that only the Colorado Supreme Court could hold a state law unconstitutional. Additionally, the amendment provided that, if the Colorado Supreme Court invalidated a law as unconstitutional, the people could

92. See id. (mandating that any judicial proceeding violating the section, from any jurisdiction, is void and unenforceable). But see U.S. CONST. art. VI, cl. 2 ("This Constitution... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

93. The author attempted to contact VoteYesMarriage.com for clarification. Telephone calls to the telephone number listed on the website resulted only in referrals back to the web site; inquiries sent via e-mail went unanswered.

94. See generally Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (holding that the Supreme Court of the United States has the authority to review state court decisions for constitutional violations to ensure consistency throughout the United States).

95. U.S. CONST. art. III, § 2, cl. 2 ("The supreme Court shall have appellate Jurisdiction... with such Exceptions, and under such Regulations as the Congress shall make.").


97. Id. at 953-54 ("Referenda that are designed to alter the political structure to make it more difficult for a particular identifiable minority to secure benefits or avoid burdens may well offend constitutional guarantees.").

98. Id. at 952.

vote again to review the court's decision. The State Supreme Court found itself "stretch[ing] the federal Constitution to put down the populist rebellion against its authority." The California Supreme Court might well find itself in a similar position. If the provision of the Voters' Rights Initiative that limits the ability of the California courts to overrule the amendment is valid, gay men and lesbians will be forced to take the fight for equality to the federal courts. Either way, the passage of the Voters' Rights Initiative would not automatically end the battle.

**IV. Who Has the Power to Decide Whether the Right to Marry Should Be Extended to All California Citizens?**

If a constitutional amendment would not end the debate over marriage, then who gets to make the ultimate decision? In an effort to avoid the tyranny of government, the Founding Fathers based the federal government on a separation of powers theory—the idea that by dividing power among three branches, "all forms of tyranny that might occur if one entity controlled all governmental power" could be avoided. When California ratified its State Constitution many years later, the drafters included a similar system of checks and balances. The executive, judicial, and legislative branches all have specific functions to ensure that their powers remain separate. Additionally, the California Constitution reserves a number of rights for the people and explains the process by which the people may amend the document or pass initiatives to amend state laws.  

**A. The People**

"All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." The people of California have the right to amend the State Constitution through the initiative process. When the people
pass an initiative, the Legislature may amend or repeal the law only if the voters approve the change via another statute.109

While the California Constitution provides broad powers to its citizenry, the voters are not free to do whatever they want: "The voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."110 One commentator has suggested that the initiative process should be amended to make it more difficult to amend state constitutions than to simply pass statutes.111

When the voters of a state pass an initiative, the courts are intended to be the sole body with authority to review it.112 However, once the voters pass a constitutional amendment, "[s]tate courts have no state-law basis to address constitutional issues other than their authority to interpret the initiative,"113 thereby depriving the courts of their power of review. One commentator suggests that each state adopt a procedure that allows the voters to amend the state constitution by initiative, except for the bill of rights and the section outlining the initiative process.114 This procedure would preserve the power of the people to amend state constitutions, but would allow state courts to retain the right to review decisions affecting fundamental rights, thus "keeping more issues within the state[s'] legal system[s]."115 In this manner, states may effectively balance the will of the people against the dangers involved with allowing bare majorities to grant or revoke fundamental civil rights.116

Additionally, any constitutional amendment restricting marriage may not be valid. Historically, when a state passes two or more laws concerning the same subject, the "later and more specific provision" will preempt an "earlier and more general statute."117 This same principle applies to constitutional amendments. Thus, when the people approve a specific constitutional amendment, the new law will automatically trump any conflicting prior amendment.118 However, at least one scholar has suggested that this historical practice is not the most desirable

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109. Id. art. II, § 10(c).
111. Collins, supra note 77, at 1001.
112. Id. at 999.
113. Id. at 1000.
114. See id. at 1000-01 (explaining that Mississippi currently utilizes this procedure for amending its Constitution).
115. Id.
116. Id. at 1002-03.
117. See generally R. Stephen Painter, Jr., Reserving the Right: Does a Constitutional Marriage Amendment Necessarily Trump an Earlier and More General Equal Protection or Privacy Provision?, 36 Seton Hall L. Rev. 125, 127 (2005) (comparing the historical approach, that a newer law automatically Trumps any pre-existing, conflicting statutes, with a more recent balancing test undertaken by some courts).
118. See generally id. at 126-28 (explaining that, generally, courts have automatically assumed that state constitutional amendments limiting marriage to a man and a woman preempt the constitutions' earlier, general privacy or equal protection provisions).
approach when reviewing constitutional amendments. Another approach to determine a law's legitimacy is to "weigh the constitutional interests at stake in any given case and interpret the earlier and more general constitutional principle of equality or privacy as ultimately governing over the [fundamental right] question."

In 1964, the Supreme Court of the United States departed from the historical view that a later constitutional amendment would automatically preempt a prior, more general provision in a case regarding the impact of the Commerce Clause on state regulations of the importation of liquor in the aftermath of the Twenty-First Amendment. The Court found that "both [provisions] are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." In subsequent cases, the Court determined that section 2 of the Twenty-First Amendment could not protect state liquor laws from challenges on equal protection and First Amendment grounds. Under the balancing test used in these cases, a more recent voter-passed amendment may not automatically preempt the earlier, general constitutional promises of equality and privacy; any law attempting to revoke these guarantees would be void and unenforceable. Therefore, it is important for the courts to weigh a newer amendment against the older provision to see which should control. Under this approach, a constitutional amendment passed by the voters may not automatically end the dispute over marriage; it could merely put the issue before the courts for the ultimate determination.

B. The Legislature

The California Constitution grants legislative power to the Senate and the Assembly, however, "the people reserve to themselves the power of initiative and referendum." The California Constitution expressly forbids the Legislature from overruling the will of the people by passing statutes that conflict with voter-
passed initiatives. Governor Schwarzenegger cited this constitutional provision in his refusal to sign AB 849, declaring that the Legislature’s effort illegally attempted to overrule Proposition 22. Additionally, an administrative agency has no ability to decide that a voter-passed initiative is unconstitutional or refuse to enforce it absent a ruling by an appellate court.

Allowing the Legislature to pass a law defining marriage is one of the more attractive methods of settling the dispute over marriage because the Legislature is one of “the key features of our ‘democratic, federal republican system.’” A state statute “could not be criticized as anti-democratic because it would be enacted by the duly elected representatives of the people.” Additionally, a legislative enactment is often more well-thought-out than a voter-passed initiative, and the Legislature has the ability to include certain compromises into a statute prior to its passage. A state legislative enactment would also lack the “alienation potential” inherent in a court decision and therefore would be “one of the prime contenders for the best form for resolving the . . . issue.”

“It is well settled in California that ‘the legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated . . . .’” To date, the only California appellate court to address the issue in this context of allowing same-sex couples to marry reached the same conclusion. However, when the Legislature exercised this power, Governor Schwarzenegger vetoed the measure, stating that the Legislature exceeded its authority under the California Constitution.

Lest there be any speculation that the Legislature is powerless to address the issue, because Governor Schwarzenegger vetoed its one attempt to do so . . . one should not oversimplify what the Governor’s veto message

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127. See id. art. II, § 10(c) (stating that the Legislature may overrule a voter-approved initiative by statute only if the initiative contains a provision allowing amendment or repeal without voter approval).
128. See supra text accompanying notes 57-59.
129. Vogel & Rau, supra note 58. For a discussion of whether the bill would have actually overruled Proposition 22 see Part III.A.
130. CAL. CONST. art. III, § 3.5(a).
131. Worthen, supra note 7, at 302.
132. Id.
133. See generally Strasser, supra note 96, at 951-54 (discussing how legislation defining marriage might be able to avoid some of the constitutional deficiencies that could be offended by a voter-passed constitutional amendment).
134. Worthen, supra note 7, at 302.
136. In re Marriage Cases, 49 Cal. Rptr. 675, 685 (Ct. App. 1st Dist. 2006) (“The six cases before us ultimately distill to the question of who gets to define marriage in our democratic society. We believe that this power rests in the people and their elected representatives, and courts may not appropriate themselves the power to change the definition of such a basic social institution.”) (emphasis added).
137. See supra notes 53-59 and accompanying text.
actually said. In exercising his veto power, the Governor expressed doubts about the Legislature’s ability to amend Fam. Code, section 308.5 without submitting the matter to voters . . . . 138

Thus, California appears to be caught in a game of “not it!”—with everyone reassigning elsewhere the power to make the decision. The result is a stalemate, with everyone except Governor Schwarzenegger deferring to the Legislature; Governor Schwarzenegger chose instead to block it. However, it is important to note that the California Supreme Court has yet to weigh in on the issue. 139

C. The Judiciary

Most commentators believe that ultimately the California Supreme Court will decide whether each person in California has an equal right to marry the partner of his or her choosing. 140 The function of the judicial branch is to interpret the laws and review them for possible constitutional violations. 141 In carrying out this function, courts have generally given a great deal of deference to the popular vote, 142 however, nothing in the Constitution requires the courts to bow to the will of the people. “One’s right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.” 143 Additionally, “[a] citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that [they] be.” 144 Allowing the California Supreme Court to review the constitutionality of the state’s marriage laws appears to be the best way to ensure that the majority of the voters cannot infringe upon the rights of the minority.

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138. In re Marriage Cases, 49 Cal. Rptr. 3d at 726 n.35. The opinion failed to address the fact that A.B. 849 made no mention of Family Code section 308.5. Id.

139. See supra text accompanying note 50. The California Supreme Court has, however, implicitly stated that domestic partnerships are not the same as marriage, thus negating the state’s arguments that the institutions are equal. See Knight v. Schwarzenegger, 128 Cal. App. 4th 14 (2005) (holding domestic partnership laws do not overrule section 308.5 because a domestic partnership is not marriage), petition for review denied, 2005 CAL. LEXIS 7127 (Cal. June 29, 2005); see also CAL. CT. R. 29.3(b)(2) (2006) (“When the Court of Appeal receives an order dismissing review, the decision of that court is final . . . .”).

140. Romney & Dolan, supra note 21.

141. See generally CAL. CONST. art. III, § 3.5(a) (stating that no administrative agency may “declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such a statute is unconstitutional”).

142. See, e.g., Citizens for Equal Prot. v. Bruning (Bruning II), 455 F.3d 859, 867 (8th Cir. 2006) (“Rational-basis review is highly deferential to the legislature or, in this case, to the electorate . . . .”); Andersen v. King County, 138 P.3d 963, 983 (Wash. 2006) (5-4 decision) (plurality opinion) (“[T]he public consensus, as evidenced by legislation adopted after robust debate, must be given great deference.”).


144. Id. (quoting Lucas v. Forty-Fourth Gen. Assemb. of Colo., 377 U.S. 713, 736 (1964)).
One problem that arises out of allowing the judicial branch to make the final decision regarding the right to marry is that unlike legislators, the citizens of California do not directly elect the members of the judiciary. There is some concern that tensions would arise if the members of a state court took it upon themselves to declare that all people must be allowed to marry because a judge is not required to answer to any constituents. A number of citizens might take exception to a judicial decree that conflicts with their ideas about marriage. Some people fear that allowing state courts to review marriage “can too easily lead to judicial resolution of the issue contrary to the will of the people and the legislature.” The argument continues that “[a]t least some state court judges appear to be too eager to . . . resolve the issue for themselves, without a careful consideration of their proper role in the system.”

The problem with these statements, however, is that the role of the judiciary is not to uphold the will of the people at the expense of constitutional principles. These arguments ignore the fact that the judiciary serves a supervisory function, ensuring that the state is not able to pass laws that violate the principles outlined in the State Constitution. The judiciary is not a rubber-stamp designed to validate the opinion of the majority of the voters, although that seems to be what some people advocate.

If faced with the issue of whether same-sex couples have the right to marry, the California Supreme Court would be bound by state and federal constitutional principles and precedent from the Supreme Court of the United States. It is very difficult to predict how the California Supreme Court would decide the issue. One fairly recent case, if followed, suggests the judiciary might decide that California may not single out gay men and lesbians for disparate treatment.

145. See CAL. CONST. art VI (discussing the process of appointing members of the judicial branch).
146. Worthen, supra note 7, at 302.
147. Romney, supra note 74, at A1 (quoting Randy Thomasson as saying, “Judges and politicians have no right to flush marriage down the drain”).
148. Worthen, supra note 7, at 306.
149. Id. at 302. But see infra Part IV.C.2.
150. See generally CAL. CONST. art. III, § 3.5(a) (stating that no administrative agency may “declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such a statute is unconstitutional”).
151. See, e.g., Worthen, supra note 7, at 306 (arguing that allowing the courts to determine the constitutionality of the current marriage laws runs the “risk of tyranny of the judiciary”); ProtectMarriage.com, Why It’s Needed, http://www.protectmarriage.com/index.aspx?protect=why (last visited Dec. 3, 2006) (on file with the McGeorge Law Review) (claiming that a number of recent court decisions have been inconsistent with Proposition 22 and have ignored the will of the people).
153. See infra Part VI.C.1.
1. Overruling a Voter-Approved Constitutional Amendment

In *Romer v. Evans*, the Supreme Court held for the first time that a state may not discriminate against a class of people based on their sexual orientation. In 1992, the people of Colorado passed a state constitutional amendment ("Amendment 2") that repealed all city and county ordinances that "prohibit[ed] discrimination on the basis of homosexual, lesbian or bisexual orientation, conduct, practices, or relationships." After a lengthy legal battle, the Colorado Supreme Court enjoined enforcement of the amendment and the Supreme Court of the United States granted certiorari.

In effect, the law permitted citizens of Colorado to discriminate against one group of people as defined by the amendment. Previously, the ordinances in question prohibited discrimination against a number of specific groups. Amendment 2 served only to enjoin enforcement of these laws with respect to gay men, lesbians, and bisexuals. Additionally, Amendment 2 made it acceptable for government employers and state colleges to discriminate in this manner.

The result of Amendment 2 was to single out gay men, bisexuals, and lesbians as a class, preventing them from taking advantage of the laws of Colorado because of their homosexual status. The majority opinion of the United States Supreme Court stated that the purpose of equal protection is to require the government "to remain available to all who seek its assistance." The Court believed that Amendment 2's broad language could give rise to an interpretation that no government body could support any legal claim that may arise if the victim happened to be homosexual. This reading of the law served to deprive homosexuals of rights that the rest of the population enjoyed. These types of laws are "born of animosity toward the class of persons affected." The Court recognized that, "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest."
2. Deference to Public Opinion

Even following Romer, the future of gay civil rights remains unclear. To avoid the application of Romer, those who oppose equal rights to marriage claim that laws limiting marriage to a man and a woman are not merely born of animus towards gay men and lesbians.\(^{167}\) Undoubtedly, supporters of statutes forbidding interracial marriage in the sixties made the same assertion, which was not sufficient to hide the true motivation behind those laws.\(^{168}\) However, “[b]ecause of the lack of guidance given by the Romer court in its opinion, it is difficult to predict precisely what [effect] the Romer decision will have on the analysis of legislation that impacts specific groups.”\(^{169}\) Romer did not set forth clear guidelines for deciding these types of issues; as a result, most of the lower courts faced with similar issues have avoided following the holding by reading Romer very narrowly or distinguishing the case before them from Romer.\(^{170}\) At least one commentator has claimed that Romer stands only for the narrow proposition that a state cannot completely exclude homosexuals from the political process and leave them no recourse other than amending the state constitution.\(^{171}\)

Less than a year after Romer, the Sixth Circuit Court of Appeals upheld the validity of a city charter amendment virtually identical to Amendment 2.\(^{172}\) Article XII of the Cincinnati Charter Amendment (“Article XII”) stated that a person may not be considered a member of a protected class or a minority based on his or her sexual orientation.\(^{173}\) It further stated that homosexuals were not entitled to any preferential treatment and that any conflicting regulation “shall be null and void and of no force or effect.”\(^{174}\) The district court originally considered Article XII in 1995 and found that “homosexuals did not constitute either a ‘suspect class’ or a ‘quasi-suspect class’ because the conduct which defined them as homosexuals was constitutionally proscribable.”\(^{175}\)

\(^{167}\) Strasser, supra note 96, at 957.

\(^{168}\) See id. (“[T]hose supporting anti-miscegenation laws at issue in Loving might have claimed that they did not want marriage to be sullied by allowing individuals of different races to marry or . . . they did not want the meaning of marriage to be undermined by such unions. Just as such an explanation would not have sufficed . . . with respect to interracial marriages, it should not suffice now.”); see also Loving v. Virginia, 388 U.S. 1, 11 (1967) (“[T]he racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”).


\(^{170}\) See infra text accompanying notes 172-200.

\(^{171}\) Bodi, supra note 169, at 696.

\(^{172}\) Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997).

\(^{173}\) Id. at 291.

\(^{174}\) Id.

\(^{175}\) Id. at 293 (quoting Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 266-67 & n.2 (6th Cir. 1995)).
The Supreme Court of the United States disagreed with the Sixth Circuit, vacating the judgment and remanding the case for reconsideration in light of Romer. On remand, the Sixth Circuit applied the "rational relationship" test used in Romer to determine that Article XII, a municipal ordinance virtually identical to Amendment 2, was valid. The Sixth Circuit believed that "the two cases involved substantially different enactments of entirely distinct scope and impact, which conceptually and analytically distinguished the constitutional posture of the two measures."

Although the laws were virtually identical, one commentator suggests that the Cincinnati Charter Amendment was not unconstitutional because it prevented gay men and lesbians from obtaining anti-discrimination support only at the city level, without depriving them of protection statewide, as Amendment 2 did. Whereas Amendment 2 left the affected class with no choice but to amend the State Constitution, the Cincinnati Charter Amendment permitted homosexuals to seek relief from the county or state governments. This argument leaves something to be desired, as it allows each city to decide whether it wishes to allow discrimination against certain groups of people, but not others.

The plaintiffs appealed the decision to the Supreme Court of the United States for a second time. The Court declined to review the case; however, Justice Stevens emphasized that the Court in no way intended to imply agreement with the lower court's decision.

In Andersen v. King County, the plaintiffs disputed Washington's 1998 DOMA under the Privileges and Immunities Clause of the Washington Constitution, the Due Process Clause of the Washington Constitution, and the Equal Rights Amendment. The Washington Supreme Court found each of these arguments unpersuasive. First, the court explained that the purpose of the Privileges and Immunities Clause is to prevent undue "favoritism," not prohibit "hostile discrimination" and that the "concern about favoritism arises where a privilege or immunity is granted to a minority class." Thus, the court was not persuaded that DOMA violated the Privileges and Immunities Clause because

177. Equal. Found. of Greater Cincinnati, Inc., 128 F.3d at 301.
178. Id. at 295.
179. Bodi, supra note 169, at 678.
180. Id. at 698.
181. See Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 525 U.S. 943, 943 (1998) ("As I have pointed out on more than one occasion, the denial of a petition for a writ of certiorari is not a ruling on the merits. . . . The Court's action today should not be interpreted either as an independent construction of the charter or as an expression of its views about the underlying issues . . . .").
182. 138 P.3d 963 (Wash. 2006) (5-4 decision) (plurality opinion).
183. Id. at 968.
184. Id. at 972.
DOMA is a law that favors the majority; it does not grant special treatment to a minority class.\(^{185}\)

Second, the court rejected the plaintiffs’ argument that Washington’s marriage laws violated the State’s Equal Rights Amendment. The Equal Rights Amendment to the Washington Constitution provides that “[e]quality of rights and responsibilities under the law shall not be denied or abridged on account of sex.”\(^{186}\) The court denied this claim as well, finding that the law “treats both sexes the same; neither a man nor a woman may marry a person of the same sex.”\(^{187}\)

In reaching these conclusions, the court provided a narrow interpretation of Romer, stating that it “rest[ed] on the principle that equal protection is denied where the law’s purpose is discrimination and it has no legitimate government purpose.”\(^{188}\) The court further held that Romer did not apply in the marriage context because it involved a law “motivated solely by animus and . . . lacked any legitimate governmental purpose.”\(^{189}\) It distinguished Romer by stating that “even if animus in part motivates legislative decision making, unconstitutionality does not follow if the law is otherwise rationally related to legitimate state interests.”\(^{190}\) Thus, the court declined to follow Romer and held that Washington’s marriage laws are rationally related to the legitimate government purpose of promoting procreation.\(^{191}\) The plurality failed to explain how forbidding certain people from marrying encouraged others to do so or, in fact, had any effect whatsoever on how any citizens choose to procreate.\(^{192}\)

In Citizens for Equal Protection v. Bruning, the Eighth Circuit Court of Appeals took the procreation argument one step further, stating that laws restricting marriage to opposite-sex couples are legitimately “based on a ‘responsible procreation’ theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot.”\(^{193}\) In

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185. *Id.* at 972-73.
186. WASH. CONST. art. XXXI, § 1.
187. *Andersen*, 138 P.3d at 969; cf. *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967) (“[M]iscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race.”).
188. *Andersen*, 138 P.3d at 976.
189. *Id.* at 981.
190. *Id.* at 981-82.
191. *Id.* at 982-83.
192. *See id.* at 1012-13 (Fairhurst, J., dissenting) (“The plurality and concurrence condone blatant discrimination against Washington’s gay and lesbian citizens in the name of encouraging procreation, marriage for individuals in relationships that result in children, and the raising of children in homes headed by opposite-sex parents, while ignoring the fact that denying same-sex couples the right to marry has no prospect of furthering any of those interests.”); *accord* *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003) (“The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children.”).
193. *Bruning II*, 455 F.3d 859, 867 (8th Cir. 2006).
Bruning, the plaintiffs argued that section 29 was added to the Nebraska Constitution to prohibit same-sex couples from receiving any state recognition and "deprive[d] gays and lesbians of 'equal footing in the political arena' because state and local government officials now lack the power to address issues of importance to this minority."[194] The plaintiffs directly attacked section 29 using the reasoning in Romer; they did not "assert a right to marriage or same-sex unions."[195] The Eighth Circuit noted that "Romer contained broad language condemning the Colorado enactment for making it 'more difficult for one group of citizens than for all others to seek aid from the government,'"[196] but did not discuss the plaintiffs' argument that section 29 affected them similarly. Instead, the court said only that "there is no fundamental right to be free of the political barrier a validly enacted constitutional amendment erects."[197] The court then went on to find a rational basis for section 29 without explaining what that rational basis is.[198]

These cases illustrate that the assertion that the institution of marriage is under attack by radical judges is unfounded.[199] Quite to the contrary, the opinions show that the courts will go a long way to uphold the perceived will of the people.[200]

V. CONCLUSION

All sides can agree that the question of who should be allowed to marry is currently a heated issue.[201] The California Legislature attempted to pass a law providing for gender-neutral marriage, but Governor Schwarzenegger vetoed its effort.[202] As one group sues the state for equal rights, others hurry to pass a constitutional amendment to solidify California's existing marriage laws and ensure that lesbians and gay men are never allowed to enjoy the same right to marriage that the state grants to heterosexuals. As each of these competing

194. Id. at 865.
195. Id.
196. Id. at 866 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).
197. Id. at 868.
198. Id. ("If the many state laws limiting the persons who may marry are rationally related to a legitimate government interest, so is the reinforcing effect of [section] 29.") (emphasis added). The court noted that the Legislature has an interest in encouraging heterosexual marriage, but failed to explain either why only heterosexual couples should marry prior to raising children, or how forbidding same-sex couples from marrying will encourage opposite-sex couples to do so. Id.
199. See ProtectMarriage.com, Why Its Needed, supra note 151 ("[J]udges have chipped away at Proposition 22 and ignored the will of the voters.").
200. See Bruning II, 455 F.3d at 867 ("The Equal Protection Clause 'is not a license for courts to judge the wisdom, fairness, or logic of the [voters'] choices.'" (quoting F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993))) (alteration in original).
201. Worthen, supra note 7, at 273.
202. See supra text accompanying notes 53-59.
groups fights to win the right to define marriage, it is generally recognized that the Supreme Court of California will eventually have to intervene.\textsuperscript{203}

Laws denying the right to marry the person of one’s choosing prohibit same-sex couples from enjoying the California Constitution’s guarantee of equal protection.\textsuperscript{204} To avoid a judicial determination that the current statutes are unconstitutional, two conservative groups rush to pass a constitutional amendment that will define marriage once and for all as a union between one man and one woman. Additionally, these amendments, if passed, will revoke domestic partnership rights for registered couples, thereby ensuring that homosexuals are treated as second-class citizens.\textsuperscript{205}

Under the California Constitution, the Supreme Court of California retains the right to determine the constitutionality of state laws.\textsuperscript{206} If a party brings a suit challenging an amendment to the State Constitution, the court retains the ability to review the issue, regardless of any contrary provision written into the law itself.\textsuperscript{207} It has been suggested that a court may utilize “an interpretive approach permitting a later and more specific amendment to be considered in light of constitutional principles articulated in earlier and more general provisions.”\textsuperscript{208} Under this approach, a state constitutional amendment might not automatically take precedence over the general equal protection provisions found elsewhere in the Constitution. A person could challenge the law and the courts could utilize a balancing test to determine whether the law should be allowed to preempt the basic guarantee of equal protection.\textsuperscript{209}

Ultimately, the California Supreme Court will probably have to decide whether the fundamental right to marry includes the right of each person to marry the partner of his or her choosing, even if that partner happens to be of the same gender.\textsuperscript{210} Because the judicial branch will almost certainly have the final say, regardless of intervening constitutional amendments or statutes, any attempt by the citizens to amend the California State Constitution prior to a judicial determination of the issue will most likely be moot.

\begin{footnotes}
\item[203.] Romney & Dolan, supra note 21.
\item[204.] See generally Perez v. Lippold, 198 P.2d 17 (Cal. 1948) (declaring that California citizens have a fundamental right to marry and that California law prohibiting interracial marriage violated equal protection laws).
\item[205.] See supra text accompanying notes 83-85, 89-93.
\item[206.] See generally CAL. CONST. art. III, § 3.5(a) (stating that no administrative agency may “declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such a statute is unconstitutional”).
\item[207.] See supra notes 94-98 and accompanying text.
\item[208.] Painter, supra note 117, at 157.
\item[209.] Id.
\item[210.] Romney & Dolan, supra note 21 and text accompanying note 51.
\end{footnotes}