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In Re Marriage Cases: The Fundamental Right to Marry and Equal Protection Under the California Constitution and the Effects of Proposition 8

by RICHARD SALAS*

I. Introduction

On May 15, 2008, the highest state court in the most populous state of the union—California—struck down the limitation on marriage to a union "between a man and a woman"[1] in the landmark decision *In re Marriage Cases.*[2] One month later, county clerks in California began issuing marriage licenses to same-sex couples.[3] However, the legal battle had only

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1. The limitation on marriage to a union between a man and a woman is found twice in the California Family Code. It appears first in subdivision (a) of the California Family Code and provides in pertinent part that "[m]arriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." CAL. FAM. CODE § 300(a) (West 2008), *invalidated in part by In re* Marriage Cases, 43 Cal. 4th 757 (Cal. 2008).

The limitation appears again in § 308.5 of the California Family Code, an initiative statute submitted to and approved by the California voters as Proposition 22 at the March 7, 2000 election that provides in full that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. FAM. CODE § 308.5 (West 2008), *invalidated by In re Marriage Cases*, 43 Cal. 4th 757.

2. *In re Marriage Cases*, 43 Cal. 4th 757.

3. It is reported that approximately 15,000 to 20,000 same-sex marriages took place in California following this decision. Ballotpedia.org, California Proposition 8 (2008), http://ballotpedia.org/wiki/index.php?title=California_Proposition_8_(2008) (last visited Feb. 5, 2009).

just begun, because on November 4, 2008, a slim majority of California voters passed Proposition 8 into law.[4] Proposition 8 states in relevant part that "[o]nly marriage between a man and a woman is valid or recognized in California."[5] The next day, the state of California halted the issuance of marriage licenses to same-sex couples. Petitions were filed almost immediately in the California courts seeking to enjoin and invalidate Proposition 8.[6]

As this Case Comment goes to print, the litigation surrounding the validity of Proposition 8 is still pending. Whether or not same-sex couples will be granted the right to marry is again in the hands of the California Supreme Court. While Proposition 8 may have relegated same-sex couples back to having their official family relationship called something other than marriage, it does not amend or overrule some of the more basic fundamental rights recognized by *In re Marriage Cases*. In ruling that same-sex couples have a constitutional right to marry in California, the court built a foundation of rights that exceed simply the right to the term "marriage." This Case Comment will first provide an in-depth view of the analysis employed by the majority in *In Re Marriage Cases*. Next, because the decision was highly controversial among the seven justices of California's highest court—rendered 4-3—this Case Comment will discuss the opinions of the dissenting justices and, more specifically, what aspects of the majority opinion they believe are erroneous. Finally, although *In Re Marriage Cases* has been overshadowed by the passage of Proposition 8, this Case Comment will discuss the aspects of the decision that have survived it.

II. The Holdings of *In re Marriage Cases*

In re Marriage Cases is a revolutionary legal decision in the struggle for gay rights and sets important precedent apart from bestowing the designation of "marriage" upon the officially recognized family

4. On December 13, 2008, the Secretary of State certified that Proposition 8 passed by 7,001,084 votes (52.3 percent) in favor of the proposition compared to 6,401,482 votes (47.7 percent) opposed to the proposition. Answer Brief in Response to Petition for Extraordinary Relief at 8, Tyler v. State, No. S168047 (Cal. Dec. 19, 2008), *available at* http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168066-answer-brief- petition.pdf.

5. The language of Proposition 8 as it appeared on the November 4, 2008 California statewide election ballot. It is identical to Proposition 22 as it appeared on the March 7, 2000 California statewide primary election ballot.

6. For a list of all the Proposition 8 cases filed with the California Supreme Court, see http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm#casefilings (last visited Mar. 8, 2009).

relationship of same-sex couples in California. Marriage may be one of the ultimate goals of the gay rights movement, but the legal ramifications of this decision reach beyond marriage. The majority opinion contained four major holdings: (1) The California Constitution guarantees to all individuals and couples the fundamental right to marry, regardless of their sexual orientation; (2) sexual orientation is a constitutionally suspect class for purposes of the California equal protection clause, and statutes that draw distinctions based on sexual orientation are subject to strict scrutiny analysis; (3) strict scrutiny must apply because the marriage statutes impinged on same-sex couples' fundamental, constitutionally protected privacy interests, thereby creating unequal and detrimental consequences to them and their children; and (4) the marriage statutes' limitation on marriage as a union between a man and a woman did not serve a compelling state interest and, therefore, violated California's equal protection clause.[7] The court prefaced its decision by explaining what it considered to be a fundamental difference in its analysis of the issue of gay marriage compared to other appellate and state supreme courts that had recently considered the issue.

When a statute is challenged as unconstitutional under the California Constitution, the reviewing court must consider other relevant statutes relating to how the state treats the affected persons in regard to the issues on which the challenge is based.[8] Here, the other relevant statutes include California's comprehensive domestic partnership legislation.[9] Under this statutory scheme, same-sex couples may register as a Domestic Partnership, which is an officially recognized familial and legal relationship granting domestic partners "virtually all of the same substantive legal benefits and privileges, and imposes . . . virtually all of the same legal obligations and duties[] that California law affords to and imposes upon a married couple."[10] In light of these statutes, the court framed the issue less narrowly than whether it is unconstitutional for the state to allow opposite-sex couples to marry and to deny same-sex couples the right to an officially recognized legal relationship or marriage. Instead, the court framed the issue as

7. *In re Marriage Cases*, 43 Cal. 4th at 757.

8. *Id.* at 779 (citing Brown v. Merlo, 8 Cal. 3d 855, 862 (Cal. 1973)).

9. *Id.*

10. *Id.*

> whether our state Constitution prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship that affords all of the significant legal rights and obligations . . . of marriage, but under which the union of an opposite-sex couple is officially designated a "marriage" whereas the union of a same-sex couple is officially designated a "domestic partnership."[11]

The court began by determining the nature and scope of the right to marry.

A. The Fundamental Constitutional "Right to Marry" Under the California Constitution

While the state constitution does not explicitly grant a right to marry, past California cases have established the right to marry as fundamental and "one of the basic, inalienable civil rights guaranteed to an individual by the California Constitution."[12] This inalienable right is embodied as an integral component of an individual's interest in liberty and personal autonomy protected by the due process and privacy clauses of the California Constitution.[13] The status of marriage as a fundamental right was not in controversy, but the court had to determine its scope and content. The Court of Appeal had concluded that the state constitutional right to marry should be interpreted as limited to the right to marry a person of the opposite sex because marriage in California had always been limited to opposite-sex couples.[14] The Court of Appeal rejected the plaintiffs' claim that their fundamental right to marry was denied and concluded that plaintiffs were asking the court to recognize a new constitutional right—namely, the "right to same-sex marriage."[15] The California Supreme Court disagreed with this characterization of the right and invoked *Perez v. Sharp* for support.[16] In *Perez*, a seminal California marriage case, the California Supreme Court struck down the state statutes prohibiting interracial marriage because they infringed upon the fundamental constitutional right

11. *Id.* at 779–80.

12. *Id.* at 781.

13. *Id.* at 810. Unlike the federal Constitution, privacy is explicitly listed as an inalienable right in article 1, section 1 of the California Constitution. CAL. CONST. art. I, § 1.

14. *In re Marriage Cases*, 43 Cal. 4th at 811.

15. *Id.*

16. *Id.* (citing *Perez v. Sharp*, 32 Cal. 2d 711 (Cal. 1948)).

to marry.[17] In declaring these statutes unconstitutional, the court did not characterize the right sought by the plaintiffs as a "right to interracial marriage."[18] Instead, the *Perez* court focused on the substance of the constitutional right to marry as "the freedom to join in marriage *with the person of one's choice*."[19] Furthermore, while anti-miscegenation statutes had existed since the founding of the state, *Perez* made clear that "history alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee."[20] The court concluded that the right at issue was the fundamental right to marry, and it focused on the substance of this right.

The court reasoned that *Perez* and other subsequent decisions concerning the right to marry have all recognized that marriage is linked with establishing a home and raising children, and that civil marriage is the means available to create this officially recognized family.[21] The court cited cases that promote marriage as being "the center of personal affections that ennoble and enrich human life"[22] and as being "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."[23] While society as a whole has an interest in the institution of marriage, past California cases have recognized that the right to marry rests with the individual and the couple.[24]

The court concluded that the right to marry is a basic, constitutionally protected civil right, and that past California cases have established this right as comprising a core set of substantive legal rights and characteristics, traditionally associated with marriage, that are so intertwined with an individual's liberty and personal autonomy that these rights cannot be eliminated by the legislature or through a voter-approved statutory

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17. *Perez*, 32 Cal. 2d at 711.

18. *In re Marriage Cases*, 43 Cal. 4th at 811.

19. *Perez*, 32 Cal. 2d at 715, 717 (emphasis added). Justice Corrigan disagreed with majority's reliance on *Perez*. *In re Marriage Cases*, 43 Cal. 4th at 880 ("The majority places great reliance on the *Perez* court's statement that "the right to marry is the right to join in marriage with the person of one's choice." (quoting *Perez*, 32 Cal. 2d at 715)). "However, *Perez* and the many other cases establishing the fundamental right to marry were all based on the common understanding of marriage as the union of a man and a woman . . . Because those cases involved the traditional definition of marriage, they do not support the majority's analysis." *In re* Marriage Cases, 43 Cal. 4th at 880 (Corrigan, J., concurring and dissenting).

20. *Id.* at 781 (majority opinion) (citing *Perez*, 32 Cal. 2d at 711).

21. *Id.* at 813.

22. *Id.* (quoting DeBurgh v. DeBurgh, 39 Cal. 2d 858, 863–64 (Cal. 1952)).

23. *Id.* (quoting Eldon v. Sheldon, 46 Cal. 3d 267, 274–75 (Cal. 1988)).

24. *Id.* at 816.

initiative.[25] This core substantive content includes the right of an individual, along with the person they have chosen to share their life with, to establish a legally recognized relationship that is "entitled to the same respect and dignity accorded a union traditionally designated as marriage."[26] In light of these determinations about the fundamental right to marry and its importance for the opportunity to live a happy and meaningful life, the California Supreme Court concluded that these rights cannot depend on a person's sexual orientation.[27] The California Constitution guarantees this right to all citizens, whether gay or straight. Similar to when the court recognized it was no longer constitutionally legitimate to treat racial minorities as inferior or women as less capable than men, it now recognizes that sexual orientation is not a legitimate reason to withhold or restrict an individual's legal rights.[28]

Arguing for California, the attorney general asserted that as long as the state grants a couple all of the same substantive legal rights traditionally associated with marriage, it does not violate the constitutional right to marry by designating a same-sex couple's officially recognized relationship by a term other than "marriage."[29] In response, the court held that part of the fundamental constitutional right to establish an officially recognized family relationship embodies the right to have that relationship "accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships."[30] Using a different term to designate the official family relationship of same-sex couples, while reserving the term marriage for opposite-sex couples, will at the very least pose "a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry."[31] Based on this risk, the court held that although the current domestic partnership statutes grant same-sex couples all or most of the substantive legal rights and responsibilities inherent in the fundamental constitutional right to marry, "[T]he current California statutes nonetheless must be viewed as potentially impinging upon a same-sex couple's [fundamental] constitutional right to marry under the California

25. *Id.* at 781.
26. *Id.*
27. *Id.* at 820.
28. *Id.* at 823.
29. *Id.* at 830.
30. *Id.*
31. *Id.* at 831.

Constitution."[32] The court left open the question of whether or not the term "marriage" itself is a core element of the right to marry, and whether the state could constitutionally assign a term other than marriage to the official family relationship of all couples.[33]

B. The Equal Protection Clause of the California Constitution and Suspect Classification

The court reasoned that the distinction drawn by the statutes between same-sex couples and opposite-sex couples "raises constitutional concerns not only under the state constitutional right to marry, but also under the state constitutional equal protection clause."[34] The court began its equal protection analysis by determining which standard of review should be applied to the challenged statutes. Under the California state equal protection clause, the "rational basis" standard of review is ordinarily applicable when determining whether different treatment imposed by a statutory provision or scheme violates the clause.[35] However, when the different treatment imposed by the challenged statute or scheme relies upon a so-called "suspect classification" or when it infringes upon a fundamental right, the "more exacting and rigorous standard of review—'strict scrutiny'—is applied" to determine the constitutionality of the challenged statute or statutes.[36]

The parties challenging the constitutional validity of the statutory scheme contended that the statutes must be subject to the strict scrutiny standard because they (1) discriminate on the basis of gender, a suspect classification; (2) discriminate on the basis of sexual orientation; and (3) impinge upon a fundamental right.[37] The court rejected the argument that the challenged statutory scheme discriminates on the basis of gender.[38] However, the court did find that that the statutory scheme "must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation."[39] The court rejected the defendants argument that the marriage statutes do not directly classify or discriminate based on sexual

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32. *Id.* at 783.
33. *Id.* at 782.
34. *Id.* at 783.
35. *Id.*
36. *Id.*
37. *Id.* at 833.
38. *Id.*
39. *Id.* at 839.

orientation, but, at most, have a disparate impact on homosexuals because the marriage statutes are not facially discriminatory and do not prohibit a gay person from marrying a person of the opposite sex.[40]

Whether sexual orientation should be considered a "suspect classification" under the California equal protection clause, triggering the strict scrutiny standard of review for statutes drawing distinctions on this basis, was a matter of first impression in California.[41] To be considered a constitutionally suspect class for purposes of *applying* the California equal protection clause, there are three general requirements: (1) the class is based on an immutable trait, (2) the immutable trait bears no relation to a person's ability to perform or contribute to society, and (3) the immutable trait is associated with a "stigma of inferiority and second class citizenship" manifested by the group's history of legal and social disabilities.[42] The California Supreme Court and the California Court of Appeal determined that sexual orientation easily met the latter two requirements.[43] However, the Court of Appeal considered the issue of whether or not sexual orientation is an immutable trait to be a factual question without a sufficient record from the trial court to resolve on appeal.[44] Therefore, the appellate court applied rational basis review and upheld the challenged statutes.[45]

On further appeal, the California Supreme Court held that the appellate court erred in rejecting sexual orientation as a suspect classification because of the factual question of the immutability of sexual orientation.[46] As the court explained, "[I]mmutability is not invariably required in order for a characteristic to be considered a suspect classification for equal protection purposes."[47] Religion and citizenship are both characteristics that are not immutable, but both have been determined to be constitutionally suspect classes triggering the strict scrutiny standard.[48] The court held that the most important characteristics in finding

40. *Id.*

41. *Id.* at 840.

42. *Id.* at 841 (citing Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 18–19 (Cal. 1971)).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 841–42 (citing Owens v. City of Signal Hill, 154 Cal. App. 3d 123, 128 (Cal. 1984) (holding religion to be a suspect classification); Raffaelli v. Comm. of Bar Exam'rs, 7 Cal. 3d 288, 292 (Cal. 1972) (treating alienage as a suspect classification)).

a group of persons to be a suspect class is whether the affected persons have "been subject to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual's ability to perform or contribute to society."[49] The court held that sexual orientation should be viewed as a suspect classification and that strict scrutiny will apply for statutes that impose differential treatment on this basis.[50] The attorney general argued for an intermediate scrutiny standard of review but, unlike the federal Constitution, California does not apply an intermediate scrutiny standard for classifications based on any suspect or quasi-suspect class.[51] There is no valid reason for applying a more rigorous standard to classifications based on gender, race, or religion than applying it to sexual orientation.[52]

C. The Fundamental Privacy Right Under the California Constitution

The strict scrutiny standard of review is also applied for purposes of the California equal protection clause when a fundamental right is infringed. Here, the court held that strict scrutiny should also apply because the distinction drawn by the statutes "impinges upon a same-sex couple's fundamental, constitutionally protected privacy interest, creating unequal and detrimental consequences for same-sex couples and their children."[53] As noted above, one of the core elements of the state constitutional fundamental right to marry is the right of the individual and couple to have their officially recognized family relationship accorded respect and dignity equal to that accorded other officially recognized family relationships. Designating the use of a different name to a same-sex couples poses, at the very least, a risk that the different name itself will deny them their constitutionally protected right to such equal dignity and respect. The court concluded the challenged statutes must be viewed as having this constitutionally impermissible effect.[54]

First, because the term "marriage" itself has a long and celebrated history and a widespread understanding that signifies an approved and favored institution by the community, this clearly grants considerable and

49. *Id.* at 843.
50. *Id.* at 843–44.
51. *Id.* at 843.
52. *Id.* at 844.
53. *Id.*
54. *Id.*

undeniable symbolic importance to the term.[55] Providing opposite-sex couples the exclusive designation of marriage while affording same-sex couples a different and novel designation, will impose significantly unequal treatment on same-sex couples.[56] Second, because of the widespread historical disparagement of, and discrimination against, homosexuals there is a significant risk that retaining a distinction in the name marriage—the most fundamental of relationships—will cause domestic partnerships "to be viewed as of a lesser stature than marriage and, in effect, as a mark of second class citizenship."[57] Third, because the public is very familiar with the term "marriage," while "domestic partnership" is a rather novel and unfamiliar term, the use of both terms is likely to "pose significant difficulties and complications for same-sex couples, and perhaps more poignantly for their children" that would be avoided if same-sex couples were granted access to the designation of marriage.[58] The court held that the statutes must be viewed as impinging upon the fundamental privacy rights of same-sex couples and, therefore, subject to strict scrutiny.

D. Applying the Strict Scrutiny Standard

Under the strict scrutiny standard of review for purposes of California's equal protection clause, the state carries a heavy burden of justification.[59] To demonstrate the constitutional validity of a challenged statute, the state must show "(1) that the state interest intended to be served by the differential treatment not only is a constitutionally legitimate interest, but is a *compelling* state interest, and (2) that the differential treatment not only is reasonably related to but is *necessary* to serve that compelling state interest."[60] The court framed the question as "whether the state has a constitutionally *compelling* interest in reserving the designation of marriage only for opposite-sex couples and excluding same-sex couples from access to that designation, and whether the statutory restriction is *necessary* to serve a compelling state interest."[61]

The attorney general first argued that any change to the traditional definition of marriage should be left solely to the legislative process and

55. *Id.* at 845.

56. *Id.*

57. *Id.* at 846.

58. *Id.*

59. *Id.* at 847.

60. *Id.* at 784 (emphasis added).

61. *Id.* at 848 (emphasis added).

that, therefore, the separation-of-powers doctrine precludes a court from modifying this traditional definition.[62] The court dismissed the separation-of-powers argument, stating that the question before it was not a matter of social policy, but of constitutional interpretation.[63] The attorney general then argued that the compelling state interest in retaining the traditional definition of marriage—as a union between a man and a woman—rests upon the historic and well-established nature of this limitation, which still applies in the majority of jurisdictions in the United States and the world.[64] While the limitation of marriage to a union between a man and a woman may be the predominant view, the court reminds us of the dramatic metamorphosis that social views and policies have undergone with respect to women and minorities in only the last fifty years.[65] Even the most accepted of social practices and traditions can hide prejudice and inequities that are rarely appreciated by those who are not subject to their reach.[66]

In examining the proffered compelling state interest, the court first determined that excluding same-sex couples from the designation of marriage is clearly not necessary to protect the rights and benefits currently enjoyed by married opposite-sex couples.[67] Granting same-sex couples the designation of marriage will neither deprive opposite-sex couples of any rights, nor alter the basic legal framework of marriage, because all couples will be subject to the same rights and obligations imposed on married opposite-sex couples.[68] Second, by exclusively reserving the term marriage for opposite-sex couple and allowing same-sex couples only this new and unfamiliar designation of domestic partnership, this will cause appreciable harm to same-sex couples and their children. The court reasons this is because this distinction is "likely to cast doubt on whether the official family relationship of same-sex couples enjoys dignity equal to that of opposite-sex couples."[69] Third, because of the historically widespread oppression and disparagement of homosexual individuals, excluding same-sex couples from the designation of marriage will likely be viewed as an official governmental position that their relationships and families are of a

62. *Id.*
63. *Id.* at 850.
64. *Id.* at 853.
65. *Id.*
66. *Id.* at 854.
67. *Id.* at 784.
68. *Id.*
69. *Id.*

"lesser stature" than the relationships and families of opposite-sex couples.[70] Finally, excluding same-sex couples from marriage while reserving it exclusively for opposite-sex couples "may well have the effect of perpetuating a more general premise—now emphatically rejected by this state—that gay individuals and same-sex couples are in some respects 'second-class citizens' who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples."[71]

In light of these determinations, the California Supreme Court held that retaining the traditional definition of marriage is not a compelling state interest.[72] Without this justification the court held that "insofar as the provisions of section 300 and 308.5 [of the California Family Code] draw a distinction between opposite-sex couples and same-sex couples and exclude the latter from access to the designation of marriage, we conclude these statutes are unconstitutional."[73] The court determined that the proper remedy was to extend marriage to same-sex couples.[74] To effectuate this ruling the court ordered that the language of section 300 that limits marriage to a union "between a man and a woman" be stricken from the statute.[75] In regards to section 308.5, the court ruled that because the statute's sole purpose is to limit marriage to a man and a woman, it must be stricken in its entirety.[76]

III. The Dissenting Opinions

Three of the justices on the California Supreme Court dissented from the majority. Justice Corrigan wrote a dissenting opinion, and Justice Baxter wrote a dissenting opinion that Justice Chin joined. Justice Corrigan began her dissent by stating that she personally believes that same-sex couples should be able to marry; however, she recognizes that the majority of Californians feel differently, and that the state constitution does not compel the result the majority has reached.[77] Corrigan wrote that as a matter of equal protection, the California Constitution does require that

70. *Id.*

71. *Id.* at 785.

72. *Id.*

73. *Id.* at 855–56.

74. *Id.* at 856.

75. *Id.* at 857.

76. *Id.*

77. *Id.* at 757, 878 (Corrigan, J., dissenting).

domestic partners have virtually all same rights and obligations afforded to and imposed on traditional spouses.[78] However, the question in this case is only whether domestic partners have a constitutional right to the name "marriage."[79] According to Corrigan, the majority does not give full and fair consideration to the Domestic Partnership Act ("DPA"), and instead of recognizing the equality it confers on same-sex couples, "[T]he majority denigrates domestic partnership as 'only a novel alternative designation . . . constituting significantly unequal treatment,' and a mark of second-class citizenship."[80] Domestic partnerships and marriages have the same legal standing in California. The DPA fulfills the constitutional requirement of equal protection, but this does not make the traditional definition of marriage unconstitutional.[81]

Corrigan disagrees with the majority's reliance on the race cases and with its characterization of the holding in *Perez v. Sharp* regarding the right to marry.[82] The civil rights cases were based on enacted amendments to the United States Constitution. And *Perez*, along with the other cases that establish the fundamental right to marry, implicitly assume that marriage is limited to opposite-sex couples.[83] This case is different from other civil rights cases because the definition of those rights, like the right to vote or the right to education, was not altered by extending the right to minorities and women; here, however, the plaintiffs seek to fundamentally change the definition of marriage into something new.[84] Corrigan writes that equal protection should not apply to the designation of marriage because the legitimate purpose of the statutes is to retain the traditional definition of marriage.[85] She reasons that "plaintiffs are not similarly situated with spouses. While their unions are of the equal legal dignity, they are different because they join partners of the same gender."[86] Finally, Corrigan believes the majority overstepped its judicial boundaries in this case and should have left this debate to the voters and to the political process.[87]

78. *Id.*
79. *Id.*
80. *Id.* at 879.
81. *Id.* at 880.
82. *Id.*
83. *Id.*
84. *Id.* at 881.
85. *Id.*
86. *Id.* at 881–82.
87. *Id.* at 882–84.

Justice Baxter wrote a more scathing dissent. Initially, Baxter contends the majority has relied too heavily on the California Legislature's passage of progressive civil rights protections for gays and lesbians in finding a constitutional right to same-sex marriage.[88] Baxter believes the majority has allowed the legislature to indirectly amend the state constitution and repeal an initiative statute even though the legislature does not directly possess this power.[89] He also believes the majority violated separation-of-powers doctrine by infringing on the people's right, directly or through their legislators, to decide fundamental issues of public policy for themselves.[90] He agrees with Court of Appeal that the majority erred in characterizing the right too broadly as the "right to marry" instead as the "right to same-sex marriage."[91] Because Baxter finds no such constitutional right, he reasons that the challenged marriage statutes should not be subject to strict scrutiny and, therefore, are valid as long as they are reasonable.[92] He concludes that the statutes are reasonable and rejects the plaintiffs' due process claim.[93]

Baxter also rejects the plaintiffs' equal protection claim at the threshold, agreeing with Justice Corrigan that same-sex and opposite-sex couples are not similarly situated with respect to the designation of "marriage."[94] He contends, as do the defendants, that the marriage statutes have at most a disparate impact on gay persons because the statutes do not prohibit gay persons from marrying someone of the opposite sex.[95] Even if plaintiffs' claims passed the threshold, sexual orientation should not be a suspect classification because neither the U.S. Supreme Court nor any other out-of-state court (except for one) has ever granted sexual orientation this status, and California should not contravene this predominant view.[96] In addition, sexual orientation should not be a suspect classification because only politically powerless minority groups should be granted such a protected status, and gays and lesbians now wield considerable political power.[97] Baxter and Corrigan both found that retaining the traditional

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88. *Id.* at 757, 861 (Baxter, J., dissenting).
89. *Id.*
90. *Id.* at 864–65.
91. *Id.* at 870.
92. *Id.* at 872.
93. *Id.*
94. *Id.* at 872–73.
95. *Id.* at 874.
96. *Id.* at 875.
97. *Id.* at 876–77.

definition of marriage is a legitimate interest because they and California voters believe that this definition should be retained without any further justifications.

Baxter, unlike Corrigan, dissents from the majority opinion on every major point. Baxter does not even concede that same-sex couples have a right to a legally recognized family relationship, even if it is not termed marriage. His transparent dissent is indicative of his lack of respect for gays and lesbians as a class of people and for their very real social and political struggles.

IV. The Effects of Proposition 8 and Conclusion

It is important to note what the effects of Proposition 8 are on *In re Marriage Cases* and what aspects of the decision have survived. As discussed, Proposition 8 states exactly what the invalidated family code section 308.5 and Proposition 22 stated: "Only marriage between a man and a woman is valid or recognized in California."[98] Proposition 8, like Proposition 22, was passed by a simple majority of voters during a statewide election through the initiative process.[99] Proposition 8, however, was an amendment to the California Constitution. Proposition 22 was only a statutory voter initiative and, therefore, the reason it was clearly subject to judicial review for constitutional challenges. The state constitutional amendment passed as Proposition 8, which is meant to override the holding of this case and return California back to the position of exclusively reserving the designation "marriage" for opposite-sex couples and "domestic partnership" for same-sex couples. According to the California Supreme Court, this differential treatment imposed by the classifications may pose the risk of denying same-sex couples the equal dignity and respect that opposite-sex couples are given through access to the term marriage.[100] In essence, if we call marriage something different than the traditional term, it may mean we view if differently, resulting in potential inequity toward same-sex couples and the infringements of their rights.

This denial of equal dignity and respect violates several fundamental constitutional rights of the California State Constitution.[101] It unconstitutionally impinges on the fundamental right to marry, which is

98. *See supra* note 5.

99. *See supra* notes 1, 3.

100. *In re Marriage Cases*, 43 Cal. 4th at 757, 831.

101. *Id.* at 783–84.

part of the fundamental rights of due process and privacy.[102] Furthermore, the classifications imposed by the amendment violate the state equal protection clause because the court found that retaining the traditional definition of marriage did not serve a compelling state interest.[103] However, this does not fully abrogate a same-sex couple's fundamental right to marry under the California Constitution. The right to marry is comprised of numerous substantive rights, including a fundamental state constitutional right to enter into a legally recognized relationship imposing virtually all the same rights and obligations on same-sex and opposite-sex couples.[104] The DPA already grants this legally recognized relationship to same-sex couples, but it is only legislation.[105] The California Supreme Court, however, has ensured that the large number of rights granted to same-sex couples under the DPA is now interpreted to be constitutionally protected as rights encompassed by the fundamental right to marry under the state constitution, a right not limited by one's sexual orientation.[106]

Of overwhelming importance is something that Proposition 8 does not change: sexual orientation is now a suspect classification under the California's equal protection clause triggering strict scrutiny review of any statute that is classified on this basis.[107] California is a progressive state, and anti-discrimination statutes protecting gays and lesbians have already been in effect, but the court has now granted them suspect class status to ensure their equal treatment under the law. Regardless of Proposition 8, *In re Marriages* sets revolutionary social and legal policy for the future in California and possibly the nation in its legal treatment of same-sex couples.

In effect, the California Supreme Court has done everything within its powers to unequivocally state that it recognizes the historical oppression and social condemnation of gays and lesbians, and that discrimination against these groups is no longer promoted, acceptable, or tolerated by California. Nevertheless, Proposition 8, which amended the state constitution, achieves these results. Proposition 8, just like *In re*

102. *Id.* at 783, 809–10.

103. *Id.* at 784.

104. *Id.* at 829.

105. In 2003, the legislature enacted comprehensive domestic partnership legislation expanding the already existing domestic partnership laws in California. *See* Domestic Partners Rights and Responsibilities Act of 2003, Stats., ch. 421, § 3 (codified as amended at CAL. FAM. CODE § 297 (2008)).

106. *In re Marriage Cases*, 43 Cal. 4th at 782.

107. *Id.* at 784.

Marriages, was not going to have the final word on this matter. As discussed, the litigation seeking to invalidate this measure is currently pending in the California Supreme Court. Can this amendment, the fundamental rights of privacy and marriage, and the equal protection clause of the California Constitution stand together? This is one of the questions posed by the litigation surrounding the validity of Proposition 8.[108] As the attorney general frames the issue, Proposition 8 should be invalidated even if it was validly passed as a constitutional amendment because it abrogates fundamental rights, without a compelling interest, protected by Article I of the California Constitution.[109] One of the lingering issues originally ordered for briefing is what happens to the thousands of same-sex marriages that were validly performed in California before the passage of this proposition if the court resolves the litigation in favor of upholding Proposition 8.[110] The other two questions originally ordered for briefing were (1) whether Proposition 8 is invalid because it constitutes a revision of, rather than an amendment to, the California Constitution, and (2) whether it violates the separation-of- powers doctrine of the California Constitution.[111] These questions, along with whether or not same-sex couples will again be allowed to "marry" in California, should be permanently and finally resolved this time. Oral arguments were heard by the court on March 5, 2009.[112]

108. This was not one of the original questions ordered for briefing by the court, but was proffered as an argument by the attorney general in this response brief to the petitions filed to invalidate Proposition 8. Answer Brief in Response to Petition for Extraordinary Relief at 75–78, Tyler v. State, No. S168047 (Cal. Dec. 19, 2008), *available a* http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168066-answer-brief petition.pdf.

109. *Id.*

110. *Id.* at 8–9.

111. *Id.*

112. California Court Website (Proposition 8 Cases), http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm (last visited Feb. 24, 2009).

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