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CALIFORNIA INITIATIVE REVIEW

Proposition 8: Eliminates Right of Same-Sex Couples To Marry. Initiative Constitutional Amendment.

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I. Executive Summary

Proposition 8, titled “Eliminates Right of Same-Sex Couples to Marry,” is an initiative constitutional amendment that would amend the California Constitution to read “only marriage between a man and a woman is valid or recognized in California.” Secretary of State, *Official Voter Guide: Proposition 8*, <http://www.voterguide.sos.ca.gov/title-sum/pdf/prop8-title-summary.pdf> (accessed Sept. 15, 2008). In March 2000, voters passed an initiative statute, Proposition 22, which added Section 308.5 to the California Family Code that also read “only marriage between a man and a woman is valid or recognized in California.” Secretary of State, *Official Voter Guide, Proposition 22*, <http://primary2000.sos.ca.gov/VoterGuide/Propositions/22text.htm> (accessed Sept. 15, 2008).

On May 15, 2008, in the *In re Marriage Cases*, the California Supreme Court, by a 4-3 margin, held that Proposition 22 violated the equal protection clause of the state constitution. *In re Marriage Cases*, 43 Cal. 4th 757 (2008) [hereinafter “*Marriage Cases*”]. In deciding the *Marriage Cases*, the Court relied on that fact that the California Constitution did not expressly prevent same-sex marriage. *Id.* Proposition 8 would potentially overturn the Court’s decision because it would entrench the initiative language into the constitution, thus altering the foundation upon which the Court made its decision. J. Clark Kelso, *State Supreme Court Reinforces Basic Freedoms*, http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/September2008&MONTH=9&YEAR=2008 (accessed Oct. 14, 2008).

This proposition is very controversial, politically charged, and has gained widespread national attention. The presidential candidates have even weighed in on the issue, with Republican candidate John McCain in favor and Democratic candidate Barack Obama opposed. Machael Falcone, *McCain and Obama Differ on Same-Sex Marriage Initiative*, <http://www.nytimes.com/2008/07/03/us/politics/03gay.html?ex=1372910400&en=90c772fc4c50d1db&ei=5124&partner=permalink&exprod=permalink> (accessed Sept. 15, 2008). On October 10, 2008, only 24 days before Election Day, Connecticut became the third state in the nation to legalize same-sex marriage. Edward Mason, *Local Marriage Pioneers Cheer: Connecticut Same-Sex Weddings Ok*, http://news.bostonherald.com/news/national/northeast/view/2008_10_11_Local_marriage_pioneers_cheer:_Connecticut_same_sex_weddings_OK/srv=home&position=also (Oct. 11, 2008) (accessed Oct. 14, 2008). The Connecticut Supreme Court stated that “segregation of heterosexual and homosexual couples into separate institutions” is a cognizable harm and held that prohibiting same-sex marriage violates their state Constitution. *Kerrigan v. Commr. of Public Health*, <http://www.jud.state.ct.us/external/supapp/aro.htm#supreme> (accessed Oct. 14, 2008). The Connecticut Supreme Court’s decision has only increased the national scrutiny of Proposition 8.

The issue of same-sex marriage is not only a national topic of controversy, but it is also debated globally. *See Where You Can Marry: Global Summary of Registered Partnership, Domestic Partnership, and Marriage Laws*, <http://www.iglhrc.org/site/iglhrc/content.php?type=1&id=91> (accessed Oct. 14, 2008). Around the world there is a great deal of variation in same-sex relationship recognition. *Id.* At one end of the spectrum are the six nations where same-sex marriage is legal: the Netherlands, Belgium, Spain, Canada, South Africa. and Norway

(beginning January 1, 2009). *Id.* Additionally, there are four countries that recognize foreign same-sex marriages, though do not perform such marriages themselves, including Aruba (Dutch only), Israel, France, and Netherlands Antilles (Dutch only). *Id.* Similarly, in the United States, the state of New York also recognizes foreign same-sex marriages. *Id.* In the middle of the spectrum are the approximately thirty nations that recognize either domestic partnerships or civil unions for same-sex couples. *Id.* At the opposite end of the spectrum, there are a number of countries where same-sex relationships are illegal, including approximately nine countries where punishment for such relationships may include the death penalty. *Id.* As recently as October 10, 2008 (the same day the Connecticut Supreme Court found in favor of same-sex marriage), the Portuguese Parliament rejected a proposal to overturn their ban on same-sex marriage. Axel Bugge, *Portuguese parliament rejects gay marriage bill*, <http://www.thestar.com/News/World/article/515361> (accessed Oct. 14, 2008).

Proposition 8 has faced many challenges since its inception. When the California Supreme Court declared that Proposition 22 was unconstitutional, it ordered that the decision take effect on June 16, 2008. Or. Denying Defs' Pet. for Rehearing and Mot. for Stay, http://www.nclrights.org/site/DocServer/2008.06.04.Court.Order_re_denial_of_rehearing_and_stay.pdf?docID=3181 (accessed Oct. 4, 2008). In an attempt to prevent same-sex marriages from being performed prior to the November election, Proponents of Proposition 8 filed a motion to stay the Court's order until after the election. *Id.* The Court denied this motion. *Id.*

In an attempt to prevent Proposition 8 from appearing on the November ballot, opponents of the initiative filed a pre-election challenge with the court. Maura Dolan, *Bid to Ban Gay Marriage Will Stay On Ballot, California Supreme Court Rules*, <http://www.latimes.com/news/local/politics/cal/la-me-gaymarriage17-2008jul17,0,4823383.story> (accessed Sept. 15, 2008). This pre-election challenge was summarily denied. *Id.* Finally, several drafting challenges to Proposition 8 were considered and largely denied. Bob Egelko, *Judge Refuses to Order Change in Prop. 8 Title*, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/08/BAE512702F.DTL&type=politics> (accessed Sept. 15, 2008). If Proposition 8 passes, it will surely face more challenges.

Since the Court's ruling, over 11,000 same-sex couples have married in California. Jesse McKinley, *Gay Couples Rush to the Altar in California Ahead of November Vote*, http://www.nytimes.com/2008/10/08/us/08gay.html?_r=1&em&oref=slogin (accessed Oct. 14, 2008). The status of such marriages, if Proposition 8 passes, remains unclear. Peter DeVecchio, *Calif.'s Prop. 8: It's Not Over Till It's Over*, http://www.advocate.com/exclusive_detail_ektid57945.asp (accessed Sept. 15, 2008). Many legal scholars believe the amendment would not retroactively invalidate these marriages. Sue Rochman, *Marriage: The Bliss & The Battle*, *The Advocate* (July 1, 2008) (available at 2008 WLNR 13030797). In effect, the amendment could result in a sub-set of legally married same-sex couples, while the rest would not be entitled to marriage. *Id.* However, it is difficult to predict the legal ramifications of this unique situation because no state has passed a constitutional amendment banning same-sex marriage after validly issuing marriage licenses to same-sex couples. *Id.*

As of October 4, 2008, the most recent poll regarding Proposition 8 reported that 47% of all likely voters would vote in favor of the constitutional amendment, 42% would vote against it,

and 11% were undecided. *CBS 5 Poll: Young Voters Lead Prop 8 Support Shift*, <http://cbs5.com/local/proposition.8.poll.2.834082.html> (accessed Oct. 14, 2008). The poll had a sample size of “670 likely voters” and a 3.6% margin of error. *Id.* Those conducting the poll have stated that the race is still too close to call because various polls conducted since May have showed different results. *Id.* The following is a list of all the polls that have been conducted regarding Proposition 8 as of October 14, 2008:

| ORGANIZATION | SAMPLE SIZE | UNDECIDED | YES | NO | DATE |
|-------------------------------|--------------------|------------------|------------|-----------|-------------|
| Survey USA | 670 | 10% | 47% | 42% | 10/6/08 |
| Survey USA | 661 | 8% | 44% | 49% | 9/25/08 |
| Public Policy Institute of CA | 1,157 | 4% | 41% | 55% | 9/24/08 |
| The Field Poll | 830 | 7% | 38% | 55% | 9/16/08 |
| Public Policy Institute of CA | 1,047 | 6% | 40% | 54% | 8/27/08 |
| The Field Poll | 672 | 7% | 42% | 51% | 7/17/08 |
| The Field Poll | 1,052 | 7% | 42% | 51% | 5/28/08 |
| LA Times/KTLA | 834 | 11% | 54% | 35% | 5/23/08 |

II. The Law

A. History of Same-Sex Marriage in California

Throughout California’s history, the word “marriage” has been understood to describe a relationship between a man and a woman. *Marriage Cases*, 43 Cal. 4th at 792-93. In 1996, the Federal Defense of Marriage Act (hereinafter “DOMA”) was enacted allowing states to choose whether or not to recognize out-of-state same-sex marriages. 1 U.S.C. § 7 (1996); 28 U.S.C. § 1738C (1996). In the March 2000 primary election, California voters passed Proposition 22, a California Defense of Marriage Act, by a 61.4% to 38.6% margin. Secretary of State, *Statewide Returns: 2000 State Ballot Measures*, <http://primary2000.sos.ca.gov/returns/prop/00.htm> (accessed Sept. 15, 2008). Proposition 22, titled “Limitation on Marriages” was an initiative statute that added Section 308.5 to the California Family Code, which read “only marriage between a man and a woman is valid or recognized in California.” Official Voter Guide: Prop. 22. Proponents of Proposition 22 sought to both prohibit future in-state marriages between same-sex couples, and prevent recognition of out-of-state same-sex marriages as permitted under DOMA. *Id.*

Although Proposition 22 precluded same-sex couples from getting married in California, the State Legislature enacted domestic partnership legislation. *Marriage Cases*, 43 Cal. 4th at 801-03. This legislation allowed “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring” to register as domestic partners. *Id.* When first enacted in 1999, the rights and responsibilities associated with domestic partnerships were very limited. *Id.* However, in 2003 the Legislature passed the Domestic Partner Rights and Responsibilities Act, and in effect, made domestic partnership virtually equal to marriage. *Id.*

In 2004, San Francisco Mayor Gavin Newsom began issuing marriage licenses to same-sex partners, resulting in substantial media attention, and bringing the issue of same-sex marriage to the forefront of American politics. Carolyn Lochhead, *The Battle Over Same-Sex Marriage:*

Uncharted Territory, <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/02/15/MNGMN51F8Q1.DTL> (Feb. 15, 2004) (last accessed Sept. 15, 2008). Ultimately, the California Supreme Court annulled the estimated 4,000 San Francisco marriages in *Lockyer v. City and County of San Francisco*, without considering the underlying issue of whether denying same-sex couples the right to marry violates the California Constitution. *Lockyer v. S.F.*, 95 P.3d 459 (Cal. 2004). In *Lockyer*, the Court only addressed the narrow issue of whether an executive official can act in violation of a law they believe to be unconstitutional. *Id.* The *Lockyer* court held that under the doctrine of Separation of Powers, determining the constitutionality of statutes is reserved only for the judiciary, not elected officials. *Id.* If an executive official believes a statute is unconstitutional, he or she must bring it before the court. *Id.*

Also in 2004, Assemblyman Mark Leno (D-San Francisco) introduced AB 1967, titled the “Marriage License Non-Discrimination Act” that, if passed, would have prevented the State of California from discriminating against same-sex couples when issuing marriage licenses. *Same-Sex Marriage in California - Overview and Issues*, <http://igs.berkeley.edu/library/htGayMarriage.html> (accessed Oct. 14, 2008). AB 1967 was held in the Assembly Appropriations Committee, with plans to reintroduce a similar bill in the future. *Id.* In 2005, Assemblyman Leno introduced AB 849, titled the “Religious Freedom and Civil Marriage Protection Act” that, if passed, would have allowed same-sex marriage in California. *Id.* AB 849 was passed by the Legislature, but ultimately vetoed by Governor Arnold Schwarzenegger. *Id.* In 2007, Assemblyman Leno introduced AB 43, again titled “Religious Freedom and Civil Marriage Protection Act” and, if passed, would have allowed same-sex marriage in California. *Id.* As with AB 849, AB 43 was passed by the California Legislature, but vetoed by the Governor. *Id.*

In 2005, Assemblyman Ray Haynes (R-Western Riverside and Northern San Diego Counties) introduced ACA 3, which, if passed, would not only have added Section 7.5 to Article I of the California Constitution, providing that “only marriage between a man and a woman is valid or recognized in California,” but it would have also eliminated domestic partnership benefits for same-sex couples. ACA 3 Assembly Constitutional Amendment – Bill Analysis, http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/aca_3_cfa_20050509_101653_asm_comm.html (accessed Oct. 2, 2008). Also in 2005, Assemblyman Bill Morrow (R-Northern San Diego and Southern Orange Counties) introduced SCA 1, which was identical to ACA 3. *Id.* Proponents of ACA 3 and SCA 1 argued that such measures were necessary to prevent same-sex marriage advocates from incrementally increasing domestic partnership rights and circumventing Proposition 22. *Id.* Opponents of the measures argued that the Constitution should not be used to deny individual rights, and that every Californian deserves equal access to marriage, regardless of their sexual orientation. *Id.* Ultimately both measures failed committee votes. *Id.*

In 2008, the *Marriage Cases* led the California Supreme Court to consider the substantive issue it had not considered in *Lockyer*: the constitutionality of denying same-sex couples the right to marry. *Marriage Cases*, 43 Cal. 4th 757. In a 4-3 decision, the Court applied strict scrutiny, and held that marriage is a fundamental right that cannot be denied to same-sex couples – a group who the Court determined was a suspect class under the California Constitution. *Id.* at 853-58. In a 121 page decision, the Court reasoned that under the California Equal Protection Clause, limiting marriage to opposite-sex couples discriminates on the basis of sexual orientation

and that such a limitation on marriage neither serves a compelling state interest, nor is it necessary to serve such an interest. *Id.*

The Court also stated that one of the “core elements” of the constitutional right to marriage was the right to have a couple’s relationship “accorded dignity and respect equal to that accorded other officially recognized families.” *Id.* Therefore, the Court reasoned, drawing a distinction between opposite sex couples and same-sex couples based on their differing sexual orientation “poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.” *Id.* This decision overturned the statute enacted by Proposition 22. *Id.* The Court’s ruling officially went into effect on June 17, 2008, after which date same-sex couples could legally obtain marriage licenses. Wyatt Buchanan, *Same-sex Marriages Can Start June 17*, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/05/28/BA5I10UTJS.DTL> (accessed Sept. 15, 2008).

B. Existing Law

Article I, Section 7 of the California Constitution, also known as the California Equal Protection Clause, currently reads:

SEC. 7. (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws...

(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

Cal Const. art. I, § 7. As interpreted by the California Supreme Court, this section of the California Constitution gives rise to the fundamental right of marriage and prohibits discrimination based on sexual orientation. *Marriage Cases*, 43 Cal. 4th 757.

C. Proposed Change to the Law

Proposition 8 would amend Article I, Section 7 of the California Constitution by adding Section 7.5. *Official Voter Guide*, Proposition 8. This section would read “only marriage between a man and a woman is valid or recognized in California.” *Id.* If this section is added to the California Constitution, it would overturn the Court’s decision in the *Marriage Cases*, and prevent same-sex couples from entering into legally recognized marriages under California law. *Id.*

D. Likely Effects of the Proposed Change

If Proposition 8 passes, the important question will be whether or not the amendment retroactively invalidates the approximately 11,000 same-sex marriages performed in California during the six months between the *Marriage Cases* and the election. According to proponents of Proposition 8, “only marriage between a man and a woman will be valid or recognized in

California, *regardless of when or where performed.*” *Proposition 8 Eliminates Right of Same-Sex Couples to Marry*, <http://www.smartvoter.org/2008/11/04/ca/state/prop/8/> (accessed Oct. 14, 2008). (emphasis added). Joan Hollinger, a legal scholar at the University of California, Berkeley, School of Law, stated, “constitutional scholars agree that the amendment cannot be effective retroactively, so anyone married before November would be protected.” Rochman, *The Advocate*. Additionally, the Attorney General of California, Jerry Brown, is on record stating “I would think the court, in looking at the underlying equities, would most probably conclude that upholding the marriages performed in that interval (before the election) would be a just result.” Bob Egelko, *Prop. 8 Not Retroactive, Jerry Brown Says*, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/05/BA8P1250FN.DTL> (accessed Sept. 15, 2008). Because this is uncharted territory, it is impossible to know how the Court will decide. As Professor Lawrence C. Levine, of the University of the Pacific, McGeorge School of Law has stated “[a]nyone who tells you what will happen doesn’t really know what they are talking about.” Rochman, *The Advocate*.

With respect to the proposition’s potential fiscal effects, Proposition 8 may, in the next several years, cause California to lose several tens of millions of dollars in potential revenue associated with same-sex marriages. *Official Voter Guide*, Proposition 8. Losses would include decreased revenue from state and local government sales taxes. *Id.* However, it is estimated that there would be little long-term fiscal impact. *Id.*

III. Drafting Issues

Prior to the decision in the *Marriage Cases*, proponents of Proposition 8 had already begun gathering signatures to qualify the initiative for the November ballot. *Jansson v. Bowen*, http://ag.ca.gov/cms_attachments/press/pdfs/n1597_ruling_on_proposition_8.pdf (accessed Oct. 14, 2008). At that time, the circulating title and summary read:

LIMIT ON MARRIAGE. CONSTITUTIONAL AMENDMENT.

Amends the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California.
Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local government: The measure would have no fiscal effect on state or local governments. This is because there would be no change to the manner in which marriages are currently recognized by the state.

Id.

Proposition 8 was certified for the November ballot on June 2, 2008, after the *Marriage Cases* decision. *Id.* In response to the change in law, the Attorney General revised the ballot title and summary from the original circulating petition. *Id.* The Attorney General explained that “the change was necessary because of the dramatic turn of events that have taken place since the petitions were circulated: namely that the California Supreme Court legalized same-sex marriage and thousands of gay couples have since wed.” Egelko, *Judge Refuses To Order Change In Prop. 8 Title*. The revised ballot title and summary reads:

ELIMINATES RIGHT OF SAME-SEX COUPLES TO MARRY. INITIATIVE CONSTITUTIONAL AMENDMENT.

Changes the California Constitution to eliminate the right of same-sex couples to marry. Provides that only marriage between a man and a woman is valid or recognized in California. Fiscal Impact: Over next few years, potential revenue loss, mainly sales taxes, totaling in the several tens of millions of dollars, to state and local governments. In the long run, likely little fiscal impact on state and local governments.

Id.

Proponents of Proposition 8 filed a petition with the Sacramento Superior Court asking the court to compel the Attorney General to change the ballot title, summary, and label, on the grounds that the revised version was false, misleading, argumentative, and likely to create prejudice. *Id.* Proponents argued the new language is too negative and focuses too narrowly on the measure's effect on same-sex couples. *Id.* Judge Timothy M. Frawley denied this petition, reasoning that in light of the California Supreme Court's decision in the *Marriage Cases*, the primary purpose and effect of the initiative would be to eliminate the right of same-sex couples to marry. *Id.*

Proponents also challenged language from the ballot pamphlet in the Argument Against Proposition 8 section. *Id.* This challenge focused on whether stating that domestic partnership and marriage are not the same could be considered false and misleading. *Id.* In light of the *Marriage Cases*, which stated domestic partnerships were not equal to marriage, Judge Frawley rejected this challenge. *Id.*

Opponents of Proposition 8 filed a petition with the same Sacramento Superior Court, asking the court to compel the Attorney General to change the official Argument In Favor of Proposition 8 in the ballot booklet. *Id.* Opponents claimed that this language overstated the impact Proposition 8 would have on school children. *Id.* The language in question read:

In health education classes, state law requires teachers to instruct children as young as kindergarteners about marriage. If the gay marriage ruling is not overturned, TEACHERS WILL BE REQUIRED to teach young children that there is *no difference* between gay marriage and traditional marriage.

Id. Judge Frawley held that "WILL BE REQUIRED" should be changed to "COULD BE REQUIRED," reasoning that public schools would not be forced to provide such instruction and that parents would have the option to withdraw their children from those specific portions of instruction. *Id.*

IV. Constitutional Issues

If Proposition 8 passes, opponents of the amendment will likely challenge it under state law. The state law challenges would probably include (1) the initiative constitutes a

constitutional revision, and not a constitutional amendment; and (2) the circulated petitions were inaccurate and misleading. If these challenges fail, Proposition 8 would remain in the California Constitution – unless violative of federal law. U.S. Const. amend. XI. Therefore, if opponents lose at the state level, they would likely seek redress in federal court. The federal claims could include (1) Proposition 8 takes away an existing right from an unpopular group on the basis of animus towards that group; (2) Proposition 8 denies same-sex couples the fundamental right to marriage; and (3) Proposition 8 violates the Equal Protection Clause of the United States Constitution.

A. California Constitution

1. Proposition 8 As a Revision of the Constitution

Proposition 8 will most likely face claims that the initiative is a constitutional revision, rather than a constitutional amendment. To qualify an initiative constitutional amendment for the ballot in California, proponents only have to obtain signatures equal to at least 8% of the total votes cast during the last gubernatorial election. Secretary of State, *Initiative Guide*, http://www.sos.ca.gov/elections/initiative_guide.htm (accessed Oct. 14, 2008). In contrast, a constitutional revision carries more stringent procedures, requiring either a constitutional convention and popular ratification, or legislative submission of the measure to the electorate. *Id.*

An initiative is deemed a revision, as opposed to a constitutional amendment, when it would significantly alter the most basic structural principles of the constitutional system. *See Raven v. Deukmejian*, 52 Cal. 3d 336 (1990). The more significant the change to the constitution, the more deliberation and debate should be put into adopting that change. *Id.* In considering this issue, courts will evaluate the quantitative and qualitative effects of the initiative on the constitutional scheme. *Id.* The quantitative analysis focuses on the amount of structural changes to the constitution, while the qualitative analysis focuses on the essence and practical effect of the changes. *Id.* If either one or both is substantial, the court may determine the initiative is a constitutional revision. *Id.*

For example, in *Raven*, the California Supreme Court considered whether Proposition 115, known as the Crime Victims Justice Reform Act was a constitutional amendment or a revision. *Id.* The Court first considered the quantitative effects, finding that it affected only one constitutional article, and was no more extensive than previous amendments had been. *Id.* However, when the Court considered the qualitative effects, it found substantial changes, which it held to constitute a revision. *Id.* The Court stated, “in practical effect, the new provision vests a critical portion of state judicial power in the United States Supreme Court, certainly a fundamental change in our preexisting governmental plan.” *Id.*

Similar to *Raven*, Proposition 8 would have little quantitative effect because it only adds fourteen words to one article of the constitution. The litigation would focus on whether those fourteen words effectuate a substantial qualitative change, thus constituting a revision.

One claim proponents of Proposition 8 could make in arguing that it would not effectuate a substantial qualitative change would be that defining marriage as only between a man and a

woman has been the tradition since the founding of the State. In response to that argument, opponents could argue that eliminating the fundamental right to marry for same-sex couples, based on their sexual orientation (a classification the California Supreme Court held to be suspect and deserving of a heightened level of scrutiny), would effectuate a substantial qualitative change.

One claim opponents could make regarding whether Proposition 8 effectuates a substantial qualitative change, could come under the doctrine of separation of powers. Opponents could argue that the practical qualitative effect of the initiative would be to vest “a critical portion of state power” in the people, rather than the judiciary, where it has traditionally belonged. *See Perez v. Sharp*, 32 Cal. 2d 711 (1948) (overturning a California law banning interracial marriage because it was based on discrimination); *and Sail’er Inn v. Kirby*, 5 Cal. 3d 1 (1971) (overturning a California law prohibiting women from working as bartenders because its effect was to prevent women from having equal opportunity). Opponents could reason that if this initiative is passed and considered an amendment, then it would take away the power of the Court to decide what constitutes equal treatment of minority groups. If that were the case, then in the future any group who is the majority could take away equal treatment from any group who is in the minority, with only a majority vote, and the California Supreme Court would be powerless to stop them. Opponents could argue that this shift in power from the judiciary to the people would mean that California would no longer have an effective equal protection clause and could no longer effectively protect minority groups from the will of the majority – thus, effecting a substantial qualitative change.

In response to this argument, proponents could assert that Proposition 8 does not have the qualitative effect of shifting the balance of power away from the judiciary. Proponents could argue that the California Constitution explicitly grants the people the power to amend the Constitution by initiative, and that Proposition 8 is merely a valid exercise of such power – thus, not a prohibited shift of power, and not a substantial qualitative change. The novelty of the issue of same-sex marriage makes the result of such claims difficult to predict.

2. Circulating Petitions For Proposition 8 As False and Misleading

In addition to the challenge that Proposition 8 is a constitutional revision, opponents of the initiative might bring a claim charging that the description of the initiative on the circulated petitions was inaccurate and misleading. Unless opponents can show that the inaccuracies were intentional, it seems unlikely the Court would hold in opponent’s favor because historically California courts have been reluctant to overturn election results on the basis of a procedural defect from the petition-circulation stage. *See e.g. Lockyer*, 95 P.3d at 459.

B. Federal Constitution

1. Role of the Federal Constitution and the Fourteenth Amendment

The United States Constitution is the “supreme law of the land.” U.S. Const. art. VI, cl. 2. Under the Fourteenth Amendment, “no state shall deprive any person of life liberty or property without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws.” U.S. Const. amend. XIV. The Fourteenth Amendment specifically limits state power and serves as a protection of individual liberty interests. *Id.*

In contrast to the California Constitution, the Federal Constitution is designed to be more difficult to amend. While California voters can amend the constitution through initiative by a simple majority vote, there is no analogous federal initiative process. Amending the Federal Constitution requires either a two-thirds vote by both houses and ratification by three-fourths of the states, or a constitutional convention. U.S. Const. art. V. In United States history, the latter procedure for amendment has never been used.

2. Federal Defense of Marriage Act

DOMA, passed by Congress in 1996 and signed into law by President Bill Clinton, defines marriage as “a legal union between one man and one woman as husband and wife.” 1 U.S.C. § 7; and 28 U.S.C. § 1738C. Under DOMA, the United States Federal Government may not recognize any same-sex relationship as marriage. *Id.* DOMA also mandates that individual states do not have to recognize same-sex relationships as marriage, even if that same-sex relationship was considered a valid marriage in another state. *Id.*

If Proposition 8 passes and opponents decide to challenge its constitutionality within the federal court system, opponents will have to decide which strategic approach would have the best results. Their potential claims could include (1) challenging Proposition 8 narrowly by claiming that it is an initiative encouraging the violation of rights; (2) challenging Proposition 8 broadly by claiming that it is unconstitutional to deny same-sex couples the right to marriage; or (3) bringing both claims.

If opponents challenge the initiative narrowly, they could potentially do so without arguing the constitutionality of DOMA. On the other hand, if opponents challenge the initiative broadly, they would have to argue that DOMA is unconstitutional because, in essence, Proposition 8 accomplishes the same thing on the state level that DOMA accomplishes on the federal level. The constitutionality of DOMA could be challenged under the Full Faith and Credit Clause, the Equal Protection Clause, or it could be argued that DOMA denies a fundamental right to same-sex couples. In response, proponents of Proposition 8 could argue that DOMA is consistent with history and tradition and was a valid exercise of Congress’ Commerce Power and is therefore constitutional. The United States Supreme Court has not yet considered the constitutionality of DOMA. See Michael C. Dorf, *The California Same-Sex Marriage Ruling: What it Says, What it Means, and Why It's Right*, <http://writ.lp.findlaw.com/dorf/20080519.html> (accessed Oct. 14, 2008).

3. Proposition 8 As An Initiative Encouraging Violation of Rights

The United States Supreme Court will sometimes find that a state ballot initiative which takes away rights from a class of people violates the Fourteenth Amendment. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 536-39 (3d ed., Aspen 2006). For this to occur, opponents of Proposition 8 would have to show (1) the fundamental right of marriage in California includes same-sex marriage; (2) Proposition 8 would take away that right

and prevent same-sex couples from gaining that right again in the future; and (3) the initiative is motivated by an intent to promote discrimination. *Id.* In making this narrow argument, opponents could theoretically overturn Proposition 8 without arguing that the federal fundamental right of marriage includes same-sex couples.

For example, in *Romer v. Evans*, voters in Colorado passed an initiative constitutional amendment that eliminated laws protecting gay men and lesbians from discrimination. *Romer v. Evans*, 517 U.S. 620 (1996). The United States Supreme Court found the initiative unconstitutional because it took away rights from a particular group, and was motivated by animus toward that group. *Id.*

Similarly, opponents of Proposition 8 could argue that (1) same-sex couples in California currently have a right to marriage; (2) Proposition 8 amends the California Constitution to take that right away; and (3) the motivation behind Proposition 8 is to discriminate against same-sex couples by excluding them from the institution of marriage for no legitimate reason. Proponents could respond that Proposition 8 is not motivated by an intent to discriminate, but rather, an effort to promote opposite-sex marriage, which Proponents consider the ideal environment for procreation and child rearing. Additionally, proponents could point to the fact that same-sex couples in California enjoy virtually all the substantive marriage rights a state can offer under the Domestic Partnership Act to bolster their argument that the intent of the initiative is not to promote discrimination.

If Proposition 8 passes, it is evident that it would eliminate the right of same-sex couples to get married. The arguments would focus on whether or not the intent behind the proposition was to discriminate against gay men and lesbians. Although it is difficult to predict the outcome of such a challenge, the current make-up of the United States Supreme Court makes it more likely that the Court would not find a discriminatory intent behind Proposition 8.

4. Marriage As a Fundamental Right

A fundamental right is a right that is “deeply rooted in this Nation’s history and tradition” and implicit in the concept of ordered liberty. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). Some examples of fundamental rights include the right to vote, the right to procreate, the right to travel, the right to keep the family together, and the right to marriage. Chemerinsky, *Constitutional Law: Principles and Policies* at 792. Both fundamental rights and non-fundamental rights are protected under the United States Constitution. However, because of their importance, fundamental rights receive a significantly higher level of scrutiny (titled “strict scrutiny”) from courts. *Id.* at 794-98. In order to pass strict scrutiny, a law must be necessary to serve a compelling state interest. *Id.* Because this is a difficult standard to meet, when a law infringes on a fundamental right and strict scrutiny is applied, it is rare the court will uphold the law at issue. *Id.* The alternative to strict scrutiny, for non-fundamental rights, is rational basis. *Id.* Under rational basis, the state must only show that the law or state action at issue is rationally related to a legitimate state interest. *Id.*

The seminal case recognizing marriage as a fundamental right is *Loving v. Virginia*, which overturned bans on interracial marriage and declared:

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.

Loving v. Virginia, 388 U.S. 1 (1967). Since *Loving*, the Court has consistently reaffirmed that marriage is a fundamental right. For example, in *Zablocki* the Court overturned a law requiring child support payments to be up to date before a marriage license would be issued. *Zablocki v. Redhail*, 434 U.S. 374 (1978). In *Turner*, the Court even extended the fundamental right of marriage to include inmates. *Turner v. Safley*, 482 U.S. 78 (1987). However, no federal court has recognized that the fundamental right to marriage extends to same-sex couples.

Proponents of Proposition 8 could argue that marriage between a man and a woman is a fundamental right, but it does not extend to same-sex couples. They could reason that there is no history recognizing same-sex marriage as “deeply rooted in our nation’s traditions” since all Supreme Court precedent for marriage as a fundamental right involves marriage between a man and a woman. *Moore*, 431 U.S. at 503. Additionally, proponents would likely point out that DOMA already expressly defines marriage as “a legal union between one man and one woman as husband and wife.” 1 U.S.C. § 7. On the other hand, opponents of Proposition 8 could argue the fundamental right of marriage has evolved substantially over time. Opponents could potentially show this evolution by citing examples such as a woman’s former status as the property of her husband and the former prohibition of interracial marriage.

It seems unlikely that the Supreme Court will extend the fundamental right to marry to include same-sex couples given the fact that no federal court has done so before. However, it is difficult to predict the outcome of such a challenge because courts are often responsive to evolving social mores and could conceivably extend the fundamental right of marriage to same-sex couples.

5. Same-Sex Marriage Under the Federal Equal Protection Clause

If Proposition 8 passes, opponents of the initiative could claim that the amendment violates the Federal Equal Protection Clause of the United States Constitution’s Fourteenth Amendment. Equal protection analysis is triggered by a state action distinguishing between similarly situated classes of people. Chemerinsky, *Constitutional Law: Principles and Policies*, at 668–77. In analyzing whether such a distinction is unconstitutional, courts first determine whether the state action is discriminatory. *Id.* If found to be discriminatory, courts will next identify the class of people being discriminated against. *Id.* If that class of people is a suspect class, courts will generally apply strict scrutiny. *Id.* If the class is not a suspect class, courts will most often apply rational basis. *Id.* There are some cases in which an intermediate level of scrutiny has been applied without recognizing a suspect classification, including at least one case regarding discrimination based on sexual orientation. *See Witt v. Dept. of A.F.*, 527 F.3d 806, 809 (9th Cir. 2008). Under this intermediate level of scrutiny, the court considers whether the state action is substantially related to an important governmental purpose. Chemerinsky, *Constitutional Law: Principles and Policies*, at 671.

The United States Supreme Court has not definitively stated which standard of review applies in cases involving discrimination based on sexual orientation. *Id.* at 782, 787–89. In the absence of such guidance, most federal courts have applied rational basis review. *Id.* Many constitutional law scholars argue that in *Lawrence v. Texas* the Court applied intermediate scrutiny in overturning a Texas statute criminalizing consensual homosexual sex. *Id.* Because *Lawrence* did not explicitly state the standard of review being applied, it left the topic open for debate. *Id.* Proponents of Proposition 8 would likely argue *Lawrence* applied only rational basis review, while opponents would argue that *Lawrence* implicated a heightened standard. Supreme Court precedent sheds little light on the question of which standard of review is applicable, however, regardless of which standard of review is deemed applicable by the Court, the substantive arguments put forth by both sides will be substantially similar.

In the event an equal protection claim is brought, opponents could argue that the constitutional amendment draws an arbitrary line between same-sex and opposite-sex couples, motivated by animus towards lesbians and gay men. Opponents might argue that, in their view, there is no rational or legitimate purpose to be served by restricting marriage to only opposite-sex couples. On the other hand, proponents could contend that under the Federal Constitution there is no history or tradition indicating that restricting marriage to only opposite-sex couples would violate the Equal Protection Clause.

There is no federal precedent finding a state constitutional amendment banning same-sex marriage unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. However, there is also no federal precedent holding that such a constitutional amendment is constitutional under the Federal Equal Protection Clause. With no precedent either way, it is impossible to predict with certainty the outcome of such a challenge.

V. Policy Considerations

A. Proponents' Arguments in Favor of Proposition 8

Proponents of Proposition 8 assert that the constitutional amendment contains the same fourteen words defining marriage that were approved by over 61% of California voters in 2000. Yes on 8: Protect Marriage, *About Prop. 8*, <http://www.protectmarriage.com/about> (accessed Oct. 5, 2008). Proponents argue that the California Supreme Court should not have overturned Proposition 22 because Proposition 22 represented the will of the people and overturning it redefined marriage without asking the people themselves to accept the new definition. *Id.* Proponents also assert that the Court's decision has undermined the value of marriage for opposite-sex couples by making marriage "nothing more than a contractual relationship." Yes on 8: Protect Marriage, *Questions & Answers About Proposition 8*, <http://www.protectmarriage.com/files/faq.pdf> (accessed Oct. 5, 2008). Because in California marriage has historically been defined as between a man and a woman, proponents of Proposition 8 are concerned that if the definition of marriage is expanded to include same-sex couples, in the future the definition of marriage might be expanded further. *Id.*

In support of the initiative, proponents of Proposition 8 advocate that the ideal environment for raising children is in a family relationship with both their biological mother and father. *Id.* Although proponents of Proposition 8 recognize that divorce and death can disrupt what they consider the ideal environment for childrearing, they maintain that the constitutional amendment eliminating same-sex marriage is necessary to promote opposite-sex marriage. *Id.* In proponents' view, this would protect both the institution of marriage and California's children. *Id.*

Proponents also assert that if Proposition 8 does not pass and same-sex marriage remains legal in California, school children may be taught that same-sex marriage is the same as opposite-sex marriage. Focus on the Family, *Is Marriage in Jeopardy? Part 2*, <http://www.family.org/socialissues/A000000647.cfm> (accessed Oct. 5, 2008). Proponents worry that if children are taught this, they will be confused about both gender roles and opposite-sex marriage. *Id.*

A significant number of proponents of Proposition 8 believe that marriage should be solely between a man and a woman as recognized in Judeo-Christian religious values. *See* Yes on 8: Protect Marriage, *Endorsements: Churches & Ministries*, <http://www.protectmarriage.com/endorsements/churches-endorsing> (accessed Oct. 5, 2008). For example, many argue that the book of Genesis describes the institution of marriage as solely being between a man and a woman through the story of Adam and Eve. Steven Waldman, *A Common Missed Conception: Why Religious People are Against Gay Marriage*, <http://www.slate.com/id/2091413/> (accessed Oct. 5, 2008). Supporters of this view often advocate that the main function of marriage is procreation. *Id.* Under this line of reasoning, it would be illogical to allow same-sex couples to get married because homosexual sex serves no procreative function. *Id.*

For example, one avid supporter of Proposition 8, the group Focus on the Family, promotes itself as an evangelical organization whose mission is to "cooperate with the Holy Spirit in sharing the Gospel of Jesus Christ with as many people as possible by nurturing and defending the God-ordained institution of the family and promoting biblical truths worldwide." *About Focus on the Family*, http://www.focusonthefamily.com/about_us.aspx (accessed Oct. 5, 2008). Focus on the Family believes that same-sex marriage is wrong because "men and women are uniquely designed to complement each other physically, emotionally and spiritually." *Focus on the Family's Position Statement on Same-Sex 'Marriage' and Civil Unions*, <http://www.citizenlink.org/FOSI/marriage/A000000985.cfm> (accessed Oct. 5, 2008). Proponents of Proposition 8, who base their support for the initiative on religious beliefs, also commonly assert that the constitutional amendment is necessary to prevent churches from being forced to perform or recognize same-sex marriages. *Id.*

Many opponents of Proposition 8 analogize former laws banning interracial marriage (later deemed unconstitutional) to current laws banning same-sex marriage. However, in the opinion of Proposition 8's proponents, the issue of same-sex marriage differs from the issue of interracial marriage, because of their belief that homosexuality is a choice, while race or ethnicity is not. iProtect Marriage, *The Issue: Marrying a Same-Sex Lover is Not a Civil Right*, <http://iprotectmarriage.com/the-issue/> (last accessed Oct. 5, 2008). To support this opinion,

proponents argue that “countless gays and lesbians have left the homosexual lifestyle,” while a person cannot decide to change their race or ethnicity. *Id.*

Proponents of Proposition 8 believe that this proposition will not harm same-sex couples because it will not take away any rights that are available to them under California’s domestic partnership laws. Yes on 8: Protect Marriage, *Questions & Answers About Proposition 8*. “Marriage” is a bundle of rights granted to couples jointly by the state government and the federal government. Karen M. Doering, *1,500 Reasons Why We Need Marriage Equality*, <http://www.nclrights.org/site/DocServer/1500reasons-0304.pdf?docID=901> (Feb. 2, 2004) (accessed Oct. 14, 2008). This bundle constitutes approximately 1,500 rights total, with about 500 rights from the state government and about 1,000 from the federal government. *Id.* Under California’s domestic partnership laws, same-sex couples are granted virtually all 500 state rights associated with marriage, therefore, proponents assert that same-sex couples would not lose any substantive rights if Proposition 8 passes. Yes on 8: Protect Marriage, *Questions & Answers About Proposition 8*.

Proponents of the initiative also assert that Proposition 8 does not discriminate against lesbians and gay men and that it is “not an attack on the gay lifestyle.” *Id.* Proponents argue that lesbians and gay men have a right to their private lives, but not to “change the definition of marriage for everyone else.” Yes on 8: Protect Marriage, *Why Proposition 8*, <http://www.protectmarriage.com/about/why> (accessed Oct. 5, 2008). Under this line of reasoning, proponents assert that gay men and lesbians would not be denied the fundamental right to marriage because if they want to get married, they can – they are simply limited to marrying someone of the opposite sex. *Id.*

In sum, proponents of Proposition 8 urge voters to vote YES on the initiative because they want to restrict the definition of marriage to a union between one man and one woman. Proponents of Proposition 8 base many of their arguments on religious doctrine and they garner support from numerous conservative religious organizations. Proponents distinguish laws banning interracial marriage from laws banning same-sex marriage by stating that sexual orientation is a choice, while race is not. Proponents also believe that this constitutional amendment will protect children by promoting opposite-sex marriage, while it avoids harm to same-sex couples, since the option to enter into a domestic partnership would still be available. Proponents argue that Proposition 8 will not discriminate against gay men and lesbians because it would take away virtually no substantive rights from same-sex couples.

B. Opponents’ Arguments in Opposition to Proposition 8

Opponents of Proposition 8 argue that both the California Constitution and the Federal Constitution promise everyone the same basic rights and freedoms and forbid singling out one group of people for unfair treatment. No on Prop. 8: Equality For All, *Why Vote No on Prop 8?*, <http://noonprop8.com/about?id=0010> (accessed Oct. 5, 2008). Opponents assert that prohibiting same-sex marriage would single out gay and lesbian people based on their sexual orientation and exclude them from enjoyment of the fundamental right to marriage. *Id.* Opponents point out that Proposition 8 would create two separate sets of rules: one for same-sex couples (domestic partnership) and another for everyone else (marriage). *Id.* In opponents’ view, domestic

partnership cannot serve as a substitute for marriage, regardless of the fact that same-sex couples would have virtually all the same substantive rights. *Id.* Opponents make this argument based on their belief that the title “marriage” matters. *Id.*

Attorney, Therese Stewart, argued for the Petitioners in the *Marriage Cases* that “words matter, names matter” and opponents of Proposition 8 have adopted a similar theme. *Marriage Equality: Panel Discussion on Proposition 8*, http://fora.tv/2008/09/02/Marriage_Equality_Panel_Discussion_on_Proposition_8 (Sept. 2, 2008) (accessed Oct. 14, 2008). To Proposition 8’s opponents, words carry great significance. *Id.* They argue that an important part of marriage is the universal understanding of what the word “marriage” means. *Id.* Opponents explain that when a couple says that they are married, it is universally understood that the two spouses are committed to each other for life and their relationship is afforded a certain level of respect by society. *Id.* Opponents assert that, because there is no universal understanding of what the term “domestic partnership” means, if Proposition 8 passes, same-sex couples would not be “treated with the same automatic recognition and respect as legally married spouses.” *Id.* They argue that this could have the effect of relegating same-sex relationships to a second-class status. *Id.*

Opponents of Proposition 8 argue that the names and words used to describe same-sex relationships have an emotional impact on the children of same-sex couples. *Id.* For example, during a recent panel discussion regarding marriage equality, hosted by The Commonwealth Club of California (a national forum for public affairs), Stewart told the story of a sixteen-year-old son of lesbian mothers who explained to her why he wanted his mothers to get married. *Id.* According to Stewart, this boy’s reasoning was that even though his moms did all the same things that other parents did, he felt like other people did not see his parents as equals because they could not get married. *Id.* Stewart quoted this boy as stating that when his moms were able to get married, it showed the world that “they were in it for real.” *Id.*

Opponents of Proposition 8 recognize that, in California, marriage has historically been defined as between a man and a woman, but they argue that history alone is not enough to justify preserving what they argue is an unconstitutional and discriminatory practice. *Id.* To illustrate this point, opponents of Proposition 8 often cite the fact that interracial couples were historically prohibited from marrying, but modernly, such couples enjoy an equal right to marriage. *Id.* Opponents explain that as modern attitudes about interracial relationships changed, so did the Court’s analysis regarding whether prohibiting interracial marriage was constitutional. *Id.*

Proponents of the initiative often claim that sexual orientation is a choice. However, the American Psychological Association (hereinafter “APA”), whose mission is to “advance the creation, communication and application of psychological knowledge to benefit society and improve people’s lives,” argues against that view. *About APA*, <http://www.apa.org/about> (accessed Oct. 14, 2008). The APA instead argues that that “[t]here is no consensus among scientists about the exact reasons that an individual develops a heterosexual, bisexual, gay, or lesbian orientation.” *Answers to Your Questions for a Better Understanding of Sexual Orientation & Homosexuality*, <http://www.apa.org/topics/sorientation.html> (accessed Oct. 14, 2008). The APA further states that “[m]any think that nature and nurture both play complex roles” and “most people experience little or no sense of choice about their sexual orientation.” *Id.* Additionally, the APA states that the “prejudice and discrimination that people who identify

as lesbian, gay, or bisexual regularly experience have been shown to have negative psychological effects.” *Id.*

The 2000 United States Census showed that 33% of female same-sex households and 22% of male same-sex households reported that they were raising at least one child under the age of 18. *Id.* These percentages account for more than 70,000 children. *Id.* While proponents of Proposition 8 claim that children are better off being raised by opposite-sex parents, the APA instead asserts that:

[S]ocial science has shown that the concerns often raised about children of lesbian and gay parents—concerns that are generally grounded in prejudice against and stereotypes about gay people—are unfounded. Overall, the research indicates that the children of lesbian and gay parents do not differ markedly from the children of heterosexual parents in their development, adjustment, or overall well-being.

Id. Although the APA has not weighed in on Proposition 8, the APA Policy Statement regarding Sexual Orientation and Marriage states that the APA “believes that it is unfair and discriminatory to deny same-sex couples legal access to civil marriage and to all its attendant benefits, rights, and privileges.” *APA Policy Statement: Sexual Orientation and Marriage*, <http://www.apa.org/pi/lgbq/policy/marriage.html> (July 2004) (last accessed Oct. 14, 2008).

Many proponents of Proposition 8 base their marriage beliefs on religious teachings. Stewart, on the other hand, argues that California has never allowed religion to define what the word “marriage” means for the State. *Marriage Equality: Panel Discussion on Proposition 8*. She points out that even today churches are not forced to marry people of different religions or marry divorced people, and she further argues that the right for churches to refuse to perform same-sex marriages would be no different. *Id.* In the *Marriage Cases*, the California Supreme Court similarly stated that:

[A]ccording same-sex couples the opportunity to obtain the designation of marriage will not impose upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.

Marriage Cases, 43 Cal. 4th at 854-55.

Proponents of Proposition 8 claim that this constitutional amendment is necessary to prevent school-children from learning about same-sex marriage. In response to that assertion, opponents argue that under the California Department of Education guidelines, schools will not have to teach children about same-sex marriage. No on Prop. 8: Equality For All, *Facts v. Fiction*, <http://noonprop8.com/about?id=0012> (accessed Oct. 14, 2008). Under these guidelines, schools are required to provide students basic information about the responsibilities associated

with marriage before they graduate from high school. *Id.* Usually students learn this information in high school health class. *Id.* Opponents point out however, that unlike other states, “California law clearly gives parents and guardians broad authority to remove their children from any health instruction if it conflicts with their religious beliefs or moral convictions.” *Id.*

In sum, opponents of Proposition 8 state that defeating the initiative is important because “marriage equality speaks to the very core of who we are as human beings.” *Id.* Opponents of the initiative urge voters to vote NO on Proposition 8 to ensure that all Californians continue to enjoy the rights, benefits and responsibilities associated with marriage. Opponents believe that by voting NO on Proposition 8 voters can protect the ideals of “equality, freedom and fairness for all” and ensure that all Californians enjoy equality under the law.

C. Proposition 8 and the Presidential Election

The ballot initiative process is sometimes used to drive a particular group of voters to the polls. For example, Karl Rove, President George W. Bush’s former principal advisor, said “to the degree it energizes people who might otherwise not vote,” a ballot measure banning gay marriage “tends to help us.” Daniel A. Smith, Matthew Desantis & Jason Kassel, *Same-Sex Marriage Ballot Measures and the 2004 Presidential Election*, <http://www.clas.ufl.edu/users/dasmith/SLGR2006.pdf> (accessed Sept. 15, 2008). In 2004, there were eleven state ballots containing initiatives to ban same-sex marriage. *Id.* There was also consideration on the federal level of amending the United States Constitution to ban same-sex marriage. *Id.* Because same-sex marriage is a deep political issue and the Republican candidates generally oppose it, some political analysts believe these initiatives helped President Bush win the swing state of Ohio in 2004. *Id.* Republican turnout in Ohio for the 2004 election was 5 points higher than the 2000 election, and President Bush won by a slim margin of 136,000 votes. Jake Tapper, *Was Same-Sex Marriage Partly to Blame for Kerry’s Loss*, <http://abcnews.go.com/WNT/story?id=230634&page=1> (accessed Sept. 15, 2008).

In the upcoming 2008 election, some Republican and Democratic strategists have recognized a similar strategy being employed again to attract voters who would likely favor Republican candidate, Senator John McCain. Tim Rutten, *To Defeat Obama, Conservatives Take the Initiative*, <http://www.latimes.com/news/opinion/commentary/la-oe-rutten26-2008jul26,1,4263471.column> (accessed Sept. 15, 2008). In addition to choosing a strong social conservative as his vice presidential running mate, Alaska Governor Sarah Palin, ballot initiatives on hot-button issues may help McCain in a number of key states. *Id.* For example, Colorado voters will decide whether life’s legal beginning is at the moment of conception, and whether to end affirmative action in college admissions and government hiring. *Id.* South Dakota will consider banning abortion, except in cases of rape and incest, while California voters face an initiative on parental notification for abortions. *Id.* Missouri will vote on whether to make English its official language, and similarly, Oregon will vote on restrictions for bilingual education. *Id.* Initiatives seeking to ban same-sex marriage will appear on the ballot not only in California, but also in Florida and Arizona. *Id.* Recently, on October 10, 2008, the Connecticut Supreme Court legalized same-sex marriage, and while a constitutional ban on same-sex marriage is not on that state’s ballot, voters could approve a constitutional convention, where the

Connecticut Supreme Court decision could then be overturned. Michael Levenson and Andrew Ryan, *Connecticut Supreme Court Legalizes Same-sex Marriage*, http://www.boston.com/news/local/breaking_news/2008/10/connecticut_sup.html?p1=Well_MostPop_Emailed3 (accessed Oct. 14, 2008).

In California, both presidential candidates expressed opinions on Proposition 8. Senator McCain supports the amendment, stating, “I support the efforts of the people of California to recognize marriage as a unique institution between a man and a woman, just as we did in my home state of Arizona. I do not believe judges should be making these decisions.” Justin Ewers, *McCain Supports Effort to Ban Gay Marriage*, <http://www.usnews.com/articles/news/campaign-2008/2008/06/27/mccain-supports-efforts-to-ban-gay-marriage.html> (accessed Sept. 15, 2008). Democratic candidate, Senator Barack Obama, expressed opposition to Proposition 8 stating that he supports “fully equal rights and benefits to same-sex couples under both state and federal law. And that is why I oppose the divisive and discriminatory efforts to amend the California Constitution, and similar efforts to amend the U.S. constitution or those of other states.” Aurelio Rojas, *Obama Rejects Proposed California Gay Marriage Ban*, <http://www.sacbee.com/111/story/1051404.html> (accessed Sept. 15, 2008). Although some supporters of Senator McCain have expressed their belief that having Proposition 8 on the ballot would help him in the traditionally Democratic state of California, current polling shows no such effect. Rutten, *To Defeat Obama, Conservatives Take the Initiative*. Polling in California shows Senator Obama winning on average 53.4% of the vote, compared to Senator McCain’s 39.6%. *See 2008 California Presidential General Election: McCain vs. Obama*, <http://www.pollster.com/polls/ca/08-ca-pres-ge-mvo.php> (accessed Oct. 14, 2008).

VI. Financial Support For Proposition 8

California law permits unlimited donations to support or oppose ballot measures. Proposition 8 has garnered significant financial support. As of October 7, 2008, over 30,785 donations had been received, totaling over \$50 million dollars, including approximately \$14 million dollars from outside the state of California. Michael Gardner, *\$50 million contributed on same-sex marriage issue*, <http://www.signonsandiego.com/news/politics/20081007-9999-1n7prop8.html> (accessed Oct. 14, 2008). Of the \$50 million dollars, proponents of Proposition 8 have raised \$26.8 million and opponents have raised \$21.4 million. *Id.* Proponents report that over 40% of their donations from Mormon individuals and are small to moderate in size. *Id.*

As of October 20, 2008, some of the notable contributions to the YES on Proposition 8 campaign include:

| | |
|------------------------------------|-------------|
| National Organization for Marriage | \$1,441,134 |
| Knights of Columbus | \$1,277,000 |
| American Family Association | \$1,000,000 |
| John Templeton, Jr. (PA) | \$900,000 |
| Fieldstead & Co. (Irvine, CA) | \$900,000 |
| Focus on the Family | \$470,563 |
| Elsa Prince (Holland, MI) | \$450,000 |

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|--|-----------|
| Concerned Women For America | \$409,000 |
| Robert Hurtt Jr. (Garden Grove, CA) | \$250,000 |
| Terry Caster (San Diego, CA) | \$172,500 |
| Pacific Shores Masonry (Corona, CA) | \$125,000 |
| Manchester Financial Group (San Diego, CA) | \$125,000 |
| Evangelical Christian Credit Union | \$100,000 |
| Stephen Samuelian (Laguna Beach, CA) | \$100,000 |
| William Bolthouse (Avila Beach, CA) | \$100,000 |

As of October 20, 2008, some of the notable contributions to the NO on Proposition 8 campaign include:

| | |
|--|-------------|
| California Teachers' Association | \$1,250,265 |
| Robert W. Wilson (Brooklyn, NY) | \$1,200,000 |
| David Bohnett (Beverly Hills, CA) | \$1,100,000 |
| Jon Stryker (Kalamazoo, MI) | \$1,055,000 |
| Bruce Bastian (Orem, UT) | \$1,015,000 |
| David Maltz (Cleveland, OH) | \$1,000,000 |
| Human Rights Campaign | \$409,097 |
| Pacific Gas & Electric Company | \$250,000 |
| Robert Haas (Levi Strauss & Co., CEO) | \$100,500 |
| Steven Spielberg & Kate Capshaw | \$100,000 |
| Democratic State Central Committee of CA | \$100,000 |
| Michael Huffington (Marina Del Rey, CA) | \$100,000 |
| Brad Pitt | \$100,000 |
| Ellen DeGeneres | \$100,000 |

Campaign Finance Activity Propositions & Ballot Measures, <http://cal-access.sos.ca.gov/Campaign/Measures/> (last accessed Oct. 14, 2008).

VIII. Conclusion

Currently, same-sex marriage is legal in California, Massachusetts and Connecticut. If approved by California voters on November 4, Proposition 8 would amend the California Constitution to read, “only marriage between a man and a woman is valid or recognized in California.” The proposition would overturn the California Supreme Court’s ruling in the *Marriage Cases*, which granted same-sex couples the right to marry. It is unclear whether Proposition 8 would take effect retroactively and invalidate the same-sex marriages that took place between the *Marriages Cases* and the election. Furthermore, if the proposition passes, legal challenges will likely occur. At the state level, such challenges will probably focus on the *Marriage Cases*, claiming that the initiative is a constitutional revision, and that the circulating petitions were false and misleading. At the federal level, opponents could claim that the initiative has a discriminatory intent, that the constitutional amendment takes away a fundamental right from same-sex couples or that it violates the Federal Equal Protection Clause. Regardless of the outcome of this election, same-sex marriage will continue to be debated throughout the nation.