THE "SOCIALLY ENDORSED, LEGALLY FRAMED, NORMATIVE TEMPLATE": WHAT HAS *IN RE MARRIAGE CASES* REALLY DONE FOR SAME-SEX MARRIAGE?

> "As with opposite-sex couples, legal recognition of same-sex couples should tend to strengthen and maintain their relationships by giving them a 'socially endorsed, legally framed, normative template' for their relationships."[1]

1. Grace Blumberg, *California's Adoption of Strong Domestic Partnership Legislation for Same-Sex Couples*, CALIFORNIA POLICY OPTIONS 2006 127, 128 (2006), *available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1011&context=uclaspa.

I. CALIFORNIA: SPEAK NOW OR FOREVER HOLD YOUR PEACE?

The allowance of same-sex marriage remains a contentious subject at the local, state, and federal level.[2] Yet through this controversy, there is no mistaking comedian, actor, and television show host Ellen DeGeneres's excitement over the newly-conferred right to marry her partner, Portia de Rossi.[3] On her daytime talk show website for The Ellen DeGeneres Show, she blogged, "I had a big, big weekend. I got married to Portia de Rossi! . . . The wedding was everything we hoped it would be. . . . Blissfully yours, [t]he just married Mrs. DeGeneres."[4] This celebrity wedding supplied positive press for the recent, though short-lived, allowance of same-sex marriages.[5] Her comments did not mention the legal rights and obligations of the marriage state but rather focused on the joy of being able to legalize their union as a

---

2. *See California Ban on Same-Sex Marriage Struck Down*, CNN.COM, http://www.cnn.com/2008/US/05/15/same.sex.marriage/index.html (last visited Oct. 15, 2008).

3. *The Ellen DeGeneres Show, Just Married*, Aug. 20, 2008, *available at* http://ellen.warnerbros.com/2008/08/just_married.php. This article was written prior to the passage of Proposition 8 on November 4, 2008, that amended the California constitution, which now disallows same-sex marriage. California Marriage Protection Act, CAL. CONST. art. I, § 7.5 (proposed Oct. 1, 2007), *available at* http://ag.ca.gov/cms_pdfs/initiatives/i737_07-0068_Initiative.pdf. The amendment effectively invalidates *In re Marriage Cases*. *Id*. Thus, note that same-sex marriage was allowed in California only between the disposition of *In re Marriage Cases* and the constitutional amendment. *See Gay Couples Rush to Wed in California Before Vote*, N.Y. DAILY NEWS, Oct. 13, 2008, http://www.nydailynews.com/news/us_world/2008/10/13/2008-10-13_gay_couples_rush_to_wed_in_california_be.html. However, the effect of the amendment may not last very long. Recently, the California Supreme Court agreed to hear arguments and review the validity of the amendment. Strauss v. Horton (Cal. 2008) (en banc), *filed*, S168047/S168066/S168078, *available at* http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/S168047_S168066_S168078-11-19-08_ORDER.pdf. The court, as early as March, will address the following questions:

> (1) Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution?
>
> (2) Does Proposition 8 violate the separation of powers doctrine under the California Constitution?
>
> (3) If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?

Id.; Maura Dolan and Jessica Garrison, *Prop. 8 Gay Marriage Ban Goes to Supreme Court*, L.A. TIMES, Nov. 20, 2008, http://www.latimes.com/news/la-me-prop8-supreme-court20-2008nov20,0,3740282.story. The court will not only answer whether Proposition 8 is constitutional, but also whether the 18,000 same-sex marriages that took place between *In re Marriage Cases* and the ban will remain valid. Strauss v. Horton (Cal. 2008); Bob Egelko, *State Supreme Court Rejoins Prop. 8 Battle*, SAN FRANCISCO CHRONICLE, Nov. 20, 2008, at A-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/11/19/BAJC147QAJ.DTL&type=gaylesbian. If the California Supreme Court were to invalidate Proposition 8, *In re Marriage Cases* would again control, and same-sex couples would regain their right to marry. *See Court Will Hear Appeal of Same-Sex Marriage Measure*, CNN, Nov. 20, 2008, http://www.cnn.com/2008/US/11/19/gay.marriage/index.html.

4. *Id*.

5. *Id*.; *Ellen DeGeneres and Portia de Rossi Wed at Their Beverly Hills Home*, USmagazine.com, Aug. 17, 2008, http://www.usmagazine.com/news/ellen-degeneres-and-portia-de-rossi-wed-at-beverly-hills-home (quoting DeGeneres, "It's something that we've wanted to do and we want it to be legal and we are very, very excited.").

marriage.[6] Although celebrity and non-celebrity couples alike were able to marry, that legal marital status may not have conferred much more than a title.[7]

The California Supreme Court's decision in *In re Marriage Cases*, handed down May 18, 2008, made same-sex marriage possible in the state of California.[8] However, with California's comprehensive domestic partnership laws, marriage rights and obligations, and the Defense of Marriage Act, the question becomes whether the California Supreme Court actually did anything worth celebrating or admonishing.

This article hopes to elucidate the potential progress or stagnancy of same-sex marriage proffered by the California Supreme Court. Part II provides an abbreviated history of same-sex marriage throughout the world and particularly in American jurisprudence.[9] Part III examines the holding and reasoning of *In re Marriage Cases* as a backdrop for the ensuing discussion.[10] Part IV investigates the multifarious components contributing to or detracting from same-sex couples' right to marry.[11] Specifically, Part IV looks at the effectiveness of the California Supreme Court's holding, delves into the history and scope of California's domestic partnership law, compares it to traditional marriage in the state, and examines the impact the Defense of Marriage Act has on same-sex couples, regardless of their relationship status.[12] Subsequently, Part IV describes in-depth the benefits, rights, obligations, and privileges that marriage as a legal designation offers, including the tangible, the intangible, and state economic considerations.[13] Part V addresses both the limitations and potential influences *In re Marriage Cases* may have on other states with varying degrees of same-sex relationship recognition, as well as the issue of full faith and credit recognition of same-sex unions across state lines.[14] Part VI addresses the piecemeal advancement of legally recognized same-sex marriages, what needs to happen to achieve both full recognition and what should be done in the interim to guarantee that these couples utilize their rights to the greatest extent possible.[15] Ultimately, this article reveals the following: (i) that the benefits of marriage, both the intangible and tangible, are indispensable; (ii) that while domestic partnerships and their equivalent advance the rights of same-sex couples, they are inadequate to the rights attendant to the marriage bond; and (iii) that although *In re Marriage Cases* sets a positive example for the changes that need to be made to the status of

---

6. *Ellen DeGeneres and Portia de Rossi Wed at Their Beverly Hills Home*, *supra* note 5.

7. *See* discussion *infra* Parts V-VI.

8. *In re* Marriage Cases, 183 P.3d 384, 447 (Cal. 2008). Again, note that this case no longer has the force of law due to the passage of Proposition 8. *See supra* note 3.

9. *See* discussion *infra* Part II.

10. *See* discussion *infra* Part III.

11. *See* discussion *infra* Part IV.

12. *See* discussion *infra* Part IV.

13. *See* discussion *infra* Part IV.

14. *See* discussion *infra* Part V.

15. *See* discussion *infra* Part VI.

same-sex marriage, the full recognition that these relationships deserve will not come until same-sex marriages are treated equal to opposite-sex marriages.[16]

II. HISTORY OF SAME-SEX MARRIAGE

This section presents a brief, chronological history of same-sex marriages internationally, as well as within recent American jurisprudence. It is not intended to be comprehensive but to provide a backdrop for a greater understanding of same-sex marriage and the issues and challenges faced, particularly in American law.

A. World Culture and History

The creation of same-sex marriages is not a recent occurrence.[17] In fact, evidence of these unions can be traced back to early Egypt and Mesopotamia.[18] The evidence of same-sex unions is even stronger in Greek and Roman cultures around fourth century B.C.[19] Pre-Christian Rome may have even provided same-sex relationships with legal and cultural status.[20] However, after the fall of the Roman empire, acceptance of same-sex unions significantly declined, and by 533 A.D. the Justinian Code explicitly outlawed homosexual intimacy.[21]

While the West became more resistant to same-sex relationships after the advent of Christianity, that resistance was actually an anomaly.[22] Cultural permutations of same-sex marriage or a marriage equivalent have existed all over the world for centuries.[23] These versions of same-sex unions persisted in (i) the *berdache* of Native American cultures; (ii) the "boy wives" and "mummy-baby," *mugawe*, and "woman marriage" and "female husband" of African cultures; and (iii) the Indian *hijras*, *berdache* equivalents, the *sou hei*, and the "boy love" between samurai warriors and their *wakashu* (boy) of Asian cultures.[24]

---

16. *See* discussion *infra* Parts III-VII.

17. William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1435 (1993); *see also* Herbert C. Brown, Jr., *History Doesn't Repeat Itself, but It Does Rhyme—Same-Sex Marriage: Is the African-American Community the Oppressor This Time?*, 34 S.U. L. REV. 169, 183-86 (2007).

18. Eskridge, *supra* note 17, at 1437. Such evidence includes legal records, literature, myths, and artifacts of the period. *Id*. Although definitive records are sparse, Eskridge posits that "one might tentatively conclude that most ancient cultures did not prohibit same-sex relationships, nor did many stigmatize them." Id. While Eskridge disclaims that some of the evidence might be debatable, it does suggest that some ancient cultures likely approached same-sex relationships as they did opposite-sex marriages. *Id*.

19. *Id.* at 1441.

20. *Id.* at 1445.

21. *Id*. at 1449. The stigmatization of same-sex intimacy was equated with violations like divorce and adultery. *Id*.

22. *Id*. at 1449, 1469.

23. Eskridge, *supra* note 17, at 1469. Eskridge's sources of these world-wide unions include "traditional historical records, such as contemporary accounts, artifacts, myths, and stories," as well as the fieldwork of anthropologists and ethnographers. *Id*. at 1453.

24. *Id.* at 1454, 1458-68.

Eskridge describes the modern West's cultural resistance towards same-sex relationships as "historically peculiar, expressing hysteria about same-sex intimacy and seeking to suppress same-sex unions with a fervor not frequently observed in other cultures."[25] Express proscription of socially divergent actions began after 1200 A.D. and progressed into the assignment of categories such as "heretics" and "witches" around 1400-1700 A.D.[26] Although the modern West's extreme negative treatment of same-sex marriage took a significant toll, it did not defeat the practice but simply altered the landscape on which the practice persisted.[27]

B. American Jurisprudence

American jurisprudence has its own history of litigating same-sex marriage, all leading to the fundamental questions addressed by *Goodridge* and *In re Marriage Cases.*[28] In *Skinner v. Oklahoma*, the United States Supreme Court confronted the constitutionality of an Oklahoma statute that allowed for sterilization of convicted felons after at least two convictions involving "moral turpitude" to eugenically prevent "socially undesirable offspring."[29] In holding that the statute was unconstitutional on equal protection grounds, the Court reasoned in part, "Marriage and procreation are fundamental to the very existence and survival of the race."[30] The Court's finding anticipates a number of issues arising regarding the rights and privileges of marriage and procreation.[31]

In 1965, the United States Supreme Court held in *Griswold v. Connecticut* that a statute criminalizing the use and distribution of contraceptives was unconstitutional because it infringed on the right to privacy inherent in a marriage.[32] Although the Court did not appear to contemplate same-sex marriage in the holding, the decision did begin to erode the popular anti-homosexual marriage argument that different-sex couples should be the only

---

25. *Id.* at 1469.

26. *Id.* at 1471-72.

27. *Id.* at 1474, 1476-83 (giving more specific accounts and a discussion of same-sex unions in Western culture, such as Boston marriages, cross-dressing, and lesbian and gay subcultures); *see also* Brown, *supra* note 17.

28. *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Goutam U. Jois, *Marital Status as Property: Toward a New Jurisprudence for Gay Rights*, 41 HARV. C.R.-C.L. L. REV. 509 (2006).

29. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 536, 538 (1942).

30. *Id.* at 541.

31. *See infra* text accompanying notes 196-97.

32. Griswold v. Connecticut, 381 U.S. 479, 485 (1965). In *Griswold*, the court acknowledged the value and importance of the marriage relationship:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id.

ones allowed to marry due to their natural ability to procreate.[33] *Loving v. Virginia* followed in 1967.[34] The Supreme Court found a Virginia statute criminalizing interracial marriages unconstitutional, based on the Fourteenth Amendment Due Process and Equal Protection Clauses.[35] The decision pronounced that marriage is a fundamental right.[36] *Loving* is again coming to the forefront as same-sex marriage advocates argue that the reasoning behind invalidating anti-miscegenation statutes is similarly applicable to same-sex marriage.[37]

The Supreme Court of Minnesota was one of the first courts to directly address the same-sex marriage issue.[38] The court was confronted with constitutional challenges regarding the denial of a marriage license to a same-sex couple and held that its marriage statute did not violate the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.[39] In addressing the argument made in the context of *Loving*, the court stated, "But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[40] The United States Supreme Court later denied certiorari for want of a substantial federal question, indicating that the discrimination homosexual couples faced with regard to their right to marry was not a significant constitutional issue.[41] The denial also created precedent barring further federal constitutional claims by same-sex couples who were refused marriage licenses.[42] In fact, *Jones v. Hallahan* went so far as to deny any constitutional claim for Kentucky's denial of marriage licenses to same-sex couples.[43] The Court of Appeals of Kentucky found "no constitutional sanction or protection of the right of marriage between persons of the same sex. . . . In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage."[44] In this instance, any recognition of even the minutest right pertaining to same-

33. *See infra* text accompanying notes 197-98.

34. Loving v. Virginia, 388 U.S. 1 (1967).

35. *Id.* at 12.

36. *Id.*

37. *See* Brown, *supra* note 17, at 193; Julie Novkov, *The Miscegenation/Same-Sex Marriage Analogy: What Can We Learn from Legal History?*, 33 LAW & SOC. INQUIRY 345, 383-85 (2008).

38. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *cert. denied*, 409 U.S. 810 (1972).

39. *Id.* at 187.

40. *Id.*

41. Baker v. Nelson, 409 U.S. 810, 810 (1972). The state of New York also heard a same-sex marriage case in 1971, though the action was brought for a declaration of marital status by the husband after discovering that at the time of marriage, his supposed spouse was a male. Anonymous v. Anonymous, 325 N.Y.S.2d 499, 499 (1971). The court held that no marriage ever existed because marriage was only recognized as between one man and one woman. *Id.* at 501.

42. Justin Reinheimer, *What* Lawrence *Should Have Said: Reconstructing an Equality Approach*, 96 CAL. L. REV. 505, 518 (2008).

43. Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973).

44. *Id.* at 590.

sex couples and their quest to be married was denied, as though same-sex coupling was non-existent.[45]

Cases like *Baker* and *Jones* continued to be litigated in other states.[46] However, it was not until 1993 that states were threatened with forced recognition of same-sex marriages.[47] The Supreme Court of Hawaii heard a case similar to the cases heard in other states, addressing the constitutionality of the state's refusal to issue marriage licenses to same-sex couples.[48] The court remanded the case back to the lower courts to determine whether the state could meet the strict scrutiny standard.[49] Because the state's marriage statute did create a classification based on sex, the court held that the state had to overcome the presumption of unconstitutionality of the marriage statute.[50] On remand, the circuit court held that the state had not overcome the burden and found the Hawaii marriage statute unconstitutional.[51] However, before the state supreme court could issue a final ruling, the citizens of Hawaii amended their constitution to deny same-sex couples the right to marry.[52] The amendment headed off the potentially disastrous conflict of laws issue of same-sex marriage recognition in other states not wishing to give credence to the acts of the state issuing the same-sex marriage licenses.[53]

The United States Supreme Court again addressed same-sex coupling in *Romer v. Evans*.[54] Decided in 1996, the Court held a Colorado constitutional amendment that prevented any level of Colorado government from protecting gay or lesbian people unconstitutional as a minority status or protected class.[55] The Court reasoned that "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities."[56] At a minimum, the Court's holding in this case acknowledges some constitutional protection for gays and lesbians, especially after the denial of certiorari in *Baker v. Nelson*.[57]

Later, individual states began to grant similar legal rights to same-sex couples traditionally enjoyed only by married opposite-sex couples.[58] In fact,

---

45. *Id.*

46. *See, e.g.*, DeSanto v. Barnsley, 476 A.2d 952, 952 (Pa. Super. Ct. 1984) (refusing to recognize a common law marriage between persons of the same sex; therefore, the issue of the couple's divorce was moot); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (finding that refusal to issue a marriage license to a same-sex couple was not in violation of the state or federal constitution).

47. Baehr v. Lewin, 852 P.2d 44, 74 (Haw. 1993).

48. *Id.* at 48-49.

49. *Id.* at 48, 68, 76.

50. *Id.* at 67-68.

51. Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *19 (Haw. Cir. Ct. Dec. 3, 1996).

52. Baehr v. Miike, 950 P.2d 1234, 1234 (Haw. 1997); HAW. CONST. art. 1, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

53. Brown, *supra* note 17, at 189.

54. Romer v. Evans, 517 U.S. 620 (1996).

55. *Id.* at 623, 625.

56. *Id.* at 633 (quoting Sweatt v. Painter, 339 U.S. 629, 635 (1950)).

57. *Id.*; Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *cert. denied*, 409 U.S. 810 (1992).

58. *See, e.g.*, Baker v. State, 744 A.2d 864, 911 (Vt. 1999) (finding that the state lacked sufficient justification to continue to deny same-sex couples the benefits afforded to married persons).

the number of states granting extended rights to same-sex couples has slowly increased.[59] But the issue of same-sex couples' rights returned to the federal arena in 2003 with the United States Supreme Court decision in *Lawrence v. Texas*.[60] The Court invalidated a Texas statute criminalizing intimate conduct between persons of the same sex, reasoning that the Framers "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[61] That same year, *Goodridge v. Department of Public Health* was decided, making Massachusetts the first state to allow same-sex marriage.[62] While Massachusetts set the ball rolling, five years would pass before another state, California, would allow issuance of marriage licenses to same-sex couples.[63] Most recently, the Supreme Court of Connecticut handed down *Kerrigan v. Commissioner of Public Health* on October 28, 2008, making Connecticut the third state to issue marriage licenses to same-sex couples.[64] The *Kerrigan* court relied heavily on both *Goodridge* and *In re Marriage Cases* throughout its decision, finding (i) that gays and lesbians are entitled to quasi-suspect classification; (ii) that the state was unable to adequately justify a statutory scheme precluding same-sex marriage; and (iii) such an unjustified statutory ban is violative of the state constitution's equal protection provisions.[65]

The preceding history reveals not only the continued practice of same-sex relationships, which often hold the status of marriage throughout the world, but also the gradual legal allowance and recognition of such a union in American jurisprudence.[66] *In re Marriage Cases*, though no longer in effect, contributes to the overall trend of same-sex marriage recognition and acceptance historically and the emerging trend in American law.[67]

III. *IN RE MARRIAGE CASES*

The Supreme Court of California held on May 15, 2008, that California would become the second state in the United States to allow same-sex marriage.[68] Six consolidated cases came before the court on appeal to address whether the designation of domestic partnership, a statutory scheme affording

59. *See* Human Rights Campaign, *Relationship Recognition in the U.S.*, http://www.hrc.org/documents/Relationship_recognition_map.pdf (last visited Oct. 15, 2008).

60. Lawrence v. Texas, 539 U.S. 558 (2003) (overturning the Court's earlier decision in Bowers v. Hardwick, 478 U.S. 186 (1986) that left a Georgia anti-sodomy statute undisturbed).

61. *Id.* at 578.

62. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

63. *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). Other states were forced to answer whether they would allow same-sex marriage when counties within the state began to issue marriage licenses to same-sex couples. *See, e.g.*, Li v. State, 110 P.3d 91, 97-99 (Or. 2005); Jois, *supra* note 28, at 520-22.

64. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

65. *Id.* at 475-76, 481.

66. *See* discussion *infra* notes 28-63.

67. *See* discussion *infra* notes 28-63.

68. *In re* Marriage Cases, 183 P.3d 384, 452-53 (Cal. 2008).

virtually all the same legal rights as the traditional institution of marriage, and marriage violated the California constitution.[69] Massachusetts was the first state to allow same-sex marriages to take place after deciding on the constitutional question in *Goodridge v. Department of Public Health*.[70]

In re Marriage Cases directly addressed the issue of the constitutionality of same-sex marriage that the California Supreme Court sidestepped in *Lockyer v. City of San Francisco*.[71] *Lockyer*, decided in 2004, only addressed the issue of whether public officials in the city and county of San Francisco lawfully issued marriage licenses to same-sex couples without a judicial pronouncement of the constitutionality of California statutes limiting marriage singularly to a man and woman.[72] However, the court did not consider the constitutional question challenging the validity of the California marriage statutes.[73] The California Supreme Court in *Lockyer* dismissed the proposed issue of same-sex couples' substantive rights and limited its analysis to the scope of authority that a local official, bound to the "ministerial duty of enforcing a statute," may legally exercise.[74] The court found that local officials exceeded their authority in administering marriage licenses, solemnizing marriages, and registering certificates of marriage to same-sex couples in violation of California Family Code sections 300, 301, 308.5, and 355.[75] The court in *In re Marriage Cases* qualified its decision, stressing that it did not decide a public policy issue concerning whether a same-sex relationship should be designated a marriage rather than by any other term, emphasizing that the court's decision reflected only the constitutionality of the semantic difference between domestic partnerships and marriage.[76]

The court analyzed the statutory scheme under a strict scrutiny standard, which requires that the state must have a compelling state interest for the differential treatment of a statutory classification and that differential treatment must be necessary to serve the compelling state interest.[77] In applying the strict scrutiny standard, the court found that the differential treatment of opposite- and same-sex couples contained in the marriage statutes for the purpose of maintaining a traditional definition of marriage was not a compelling enough state interest to justify the disparity under the Equal Protection Clause as it was not necessary to conform to that interest.[78] The court reasoned as follows: (i) the added designation of marriage to same-sex couples is not zero-sum: the protections and benefits of marriage afforded same-sex couples will not

69. *See id.* at 384 n.1, 398.
70. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).
71. Lockyer v. City of San Francisco, 95 P.3d 459, 459-65 (Cal. 2004).
72. *Id.* at 464.
73. *See id.* at 463-64.
74. *Id.* at 464.
75. *Id.* at 464, 467; CAL. FAM. CODE §§ 300, 301, 308.5, 355 (West 2004).
76. *See In re Marriages Cases*, 183 P.3d 384, 421 (Cal. 2008).
77. *Id.* at 401.
78. *Id.*

interfere with or detract from the marriage rights and obligations that currently exist for opposite-sex couples—the "legal framework of the institution of marriage" will not be altered; (ii) the assignment of a different name for the same family relationship exacts a social harm on the homosexual couple and their children because the absence of the preferred and revered label of marriage denigrates the same-sex family relationship to one of lesser dignity than that of opposite-sex couples; (iii) due to the widespread and historical derision of homosexuality, it is likely that a state-implemented legal institution for same-sex couples different from opposite-sex marriage would promote an official disparagement of same-sex couples in committed relationships that are comparable to those of opposite-sex couples; and (iv) continued exclusive reservation of marriage 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."[79] Thus, the court held that any existing California statutes limiting marriage to opposite-sex couples were unconstitutional.[80]

IV. WHAT DOES *IN RE MARRIAGE CASES* MEAN?

During the time that California recognized same-sex marriage, any statutory provisions that were to the contrary were no longer in effect.[81] That included Proposition 22, found in section 308.5 of the California Family Code, a ballot measure voted into existence by voter initiative in March of 2000, limiting marriage in California to that between a man and woman only.[82] The measure passed by sixty-one percent.[83]

Proposition 22's popularity in 2000 and the negative opinion shared by its recent invalidation resulted in a proposal to amend the California constitution.[84] The amendment appeared as "Proposition 8" on the November 4, 2008, ballot.[85] The California Marriage Protection Act located in article 1, section 7.5 of the California constitution is now amended to read: "Only marriage between

79. *Id.* at 401-02.

80. *Id.* at 403. These now unconstitutional provisions include section 300 of the California Family Code stating "[m]arriage is a personal relation arising out of a civil contract between a man and a woman," and section 308.5 stating "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. FAM. CODE §§ 300, 308.5 (West 2004 & Supp. 2008).

81. *In re* Marriage Cases, 183 P.3d at 409.

82. *See id.*

83. Molly Hennessy-Fiske, *Opponents of Gay Marriage See Hope in Ballot Measure*, L.A. TIMES, May 16, 2008, http://articles.latimes.com/2008/may/16/local/me-anti16.

84. Adam Tanner & Alan Elsner ed., *California Gay Marriage Ban Vote to Proceed*, THOMPSON REUTERS, July 16, 2008, http://www.reuters.com/article/domesticNews/idUSN1637877720080716.

85. *Id.*

a man and a woman is valid or recognized in California."[86] The amendment, passed by a simple majority, overturned the recent supreme court case.[87] This, however, does not necessarily automatically void the marriage licenses currently held by same-sex couples as a result of the *In re Marriage Cases* decision.[88]

It is arguable whether the California constitutional amendment applies retroactively to effectively invalidate the licenses already issued.[89] Generally, constitutional and legislative amendments apply prospectively and are presumed not to operate retroactively.[90] The amendment may rebut this presumption if the amendment makes clear a retroactive intent.[91] As it stands, however, the language of the amendment does not expressly indicate such intent, nor does the analysis accompanying the amendment as proposed.[92] California Attorney General Jerry Brown believes that the amendment would act prospectively only and that the same-sex marriages performed after *In re Marriage Cases* would remain valid.[93] However, proponents of the marriage amendment could argue that the inclusion of "recognized" in the language of the proposition indicates a clear intent to apply the amendment retroactively and that it would be illogical to include that word if the intent to continue to recognize and validate the marriage licenses previously issued remained.[94]

Even still, "the gist of retroactivity is whether a law 'gives a different and potentially unfair legal effect to actions *taken in reliance on the preenactment law*.'"[95] If the California Marriage Protection Act is applied retrospectively, the

---

86. California Marriage Protection Act, CAL. CONST. art. I, § 7.5 (proposed Oct. 1, 2007), *available at* http://ag.ca.gov/cms_pdfs/initiatives/i737_07-0068_Initiative.pdf.

87. *See* CAL. CONST. art. II, § 10 (majority of votes needed for initiative to pass); see also California General Election, Election Night Results, http://vote.sos.ca.gov/Returns/props/map190000000008.htm (last visited Nov. 15, 2008).

88. *See* Niles Freeman Equip. v. Joseph, 74 Cal. Rptr. 3d 690, 708 (Ct. App. 2008).

89. Bob Egelko, *Prop. 8 Not Retroactive, Jerry Brown Says*, SAN FRANCISCO CHRONICLE, Aug. 5, 2008, at B-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/04/BA8P1250FN.DTL&tsp=1. Again, the California Supreme Court agreed on November 19, 2008, to review the constitutionality of Proposition 8 and to determine whether Proposition 8 would apply retrospectively if the amendment passes constitutional muster. Strauss v. Horton (Cal. 2008) (en banc), *filed*, S168047/S168066/S168078, *available at* http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/S168047_S168066_S168078-11-19-08_ORDER.pdf; Bob Egelko, *State Supreme Court Rejoins Prop. 8 Battle*, SAN FRANCISCO CHRONICLE, Nov. 20, 2008, at A-1, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/11/19/BAJC147QAJ.DTL& type=gay lesbian.

90. Nelson v. Ada, 878 F.2d 277, 280 (9th Cir. 1989); *In re* Marriage of Bouquet, 546 P.3d 1371, 1372-73 (Cal. 1976).

91. *In re* Marriage of Bouquet, 546 P.3d at 1373.

92. California Marriage Protection Act, *supra* note 86; OFFICIAL VOTER INFORMATION GUIDE 55 (2008), http://www.voterguide.sos.ca.gov/pdf-guide/vig-nov-2008-principal.pdf (explaining that the initiative would amend the Constitution of California to reflect that "notwithstanding the California Supreme Court ruling of May 2008, marriage *would be* limited to individuals of the opposite sex, and individuals of the same sex *would not* have the right to marry in California.") (emphasis added).

93. Egelko, *supra* note 89, at B-1.

94. Egelko, *supra* note 89, at B-1.

95. Niles Freeman Equip. v. Joseph, 74 Cal. Rptr. 3d 690, 708 (Ct. App. 2008) (quoting Cal. Trout, Inc. v. State Water Res. Control Bd., 255 Cal. Rptr. 184, 198 (Ct. App. 1989)).

benefits afforded married persons would no longer be available for the same-sex couples who relied on the validity of their marriage after the supreme court handed down *In re Marriage Cases*.[96] Moreover, any community property acquired or significant decisions made affecting the rights of the parties over the course of the marriage through November 4, 2008, would be invalidated, eroding the ability of the couple to plan their legal rights and obligations around the law.[97] The test of retroactivity of a statute or amendment is whether that application would "materially alter the legal significance of a prior event."[98] This concept of material alteration is related to the rule of retroactivity, that a statute or amendment will not be applied retroactively if it denies a person a vested property right.[99] But the Supreme Court of California has acknowledged the ability of the state to disturb a person's vested property right to protect the "health, safety, morals, and general well being of the people."[100] Thus, all is not lost even if constitutionally protected vested rights are concerned.[101] California Attorney General Brown, applying the test for retrospective effect, disagreed with the potential retroactive effect of the amendment and stated that he "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."[102]

Even though the citizens of California nullified the case by amending the state constitution, it may not matter with respect to the legal rights associated with marriage.[103] The following sections discuss the effect *In re Marriage Cases* may potentially have in conveying or clarifying rights of same-sex couples.[104]

A. California Domestic Partnership Law

The development of domestic partnership law displays a growing social and legal acceptance of same-sex relationships.[105] The history of domestic partnership law in California reflects the advanced legal footing afforded to homosexual couples.[106] The following is a brief history of California domestic partnership law, much of which is taken from *In re Marriage Cases*.

---

96. *See* discussion *infra* Parts IV.A-D.

97. *See Cal. Trout, Inc.*, 255 Cal. Rptr. at 198.

98. *Id.*

99. Deutsch v. Masonic Homes of Cal., 80 Cal. Rptr. 3d 368, 380 (Ct. App. 2008).

100. Addison v. Addison, 399 P.2d 897, 902 (Cal. 1965).

101. *Id.*

102. Egelko, *supra* note 89; *see also* Ryan M. Deam, *Creating the Perfect Case: The Constitutionality of Retroactive Application of the Domestic Partner Rights and Responsibilities Act of 2003*, 35 PEPP. L. REV. 733, 749-66 (2008) (discussing the rules and effects of retrospective application to domestic partnership law).

103. *See* discussion *infra* Part IV.A-D.

104. *See* discussion *infra* Part IV.A-D.

105. *See* discussion *infra* notes 106-243.

106. *See* CAL. FAM. CODE § 297.5 (West 2004 & Supp. 2008).

The California legislature created a domestic partnership registry in 1999 by defining "domestic partners" as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."[107] The requirements to enter into a registered domestic partnership are: (i) the couple share a common residence; (ii) neither individual is currently married to someone else or is a partner in another domestic partnership not yet dissolved; (iii) the couple is not related by consanguinity in a way that would prevent people from marrying in the state; (iv) each partner is at least eighteen years of age; (v) both partners are members of the same sex or at least one partner is over the age of sixty-two (for Social Security purposes); and (vi) both individuals are able to consent to the partnership.[108] However, the rights afforded in 1999 were limited to a few substantive benefits such as domestic partner hospital visitations and health benefits from the state to some of its employees.[109]

In 2001, the California legislature significantly expanded domestic partnership rights to include additional substantive benefits, such as the right to file a wrongful death or intentional infliction of emotional distress suit, the allowance for sick leave to care for one's domestic partner or their child in case of illness, the authorization to have medical power of attorney for an incapacitated partner, and the sanctioning of stepparent adoption of a partner's child.[110]

Again in 2002, the state widened the scope of domestic partnership rights even further by allowing for automatic inheritance rights to a portion of a domestic partner's separate property and by recognizing a domestic partnership as a type of relationship exempted from the proscription against donative transfers in a will written with the assistance of that beneficiary.[111]

After incremental expansion of domestic partnership rights, the California legislature made domestic partnership rights comprehensive by enacting the Domestic Partnership Rights and Responsibilities Act of 2003 (hereafter Domestic Partner Act), codified in section 297.5 of the California Family Code.[112] The current status of this marriage-like relationship encompasses all the state rights inherent in a traditional marriage:

> Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative

107. *Id.* § 297(a).
108. *Id.* § 297(b).
109. *In re* Marriage Cases, 183 P.3d 384, 413 (Cal. 2008).
110. *In re* Marriage Cases, 183 P.3d at 414; Deam, *supra* note 102, at 744.
111. *Id.*; *see also In re* Domestic Partnership of Ellis, 76 Cal. Rptr. 3d 401, 404 (Ct. App. 2008); Deam, supra note 100, at 737-49; Blumberg, *supra* note 1, at 130-31.
112. AB 205, 2003 Leg., 2003-04 Reg. Sess. (Cal. 2003).

> regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed up on spouses.[113]

The Domestic Partner Act effectively transformed California's domestic partnership law from piecemeal and scattered substantive rights to one of the most comprehensive pieces of legislation advocating equal legal recognition of same-sex couples.[114] Once in effect January 1, 2005, homosexual couples in a domestic partnership shared the same legal rights as heterosexual couples in a marriage in California.[115]

Additionally, just nine days before the California Supreme Court handed down its disposition of *In re Marriage Cases*, the Fourth District Court of Appeal decided *In re Domestic Partnership of Ellis*.[116] The issue in that case addressed whether the equitable putative spouse doctrine, then located in section 2251 of the Family Code, applied equally to domestic partners.[117] The putative spouse doctrine provides that "[i]f a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall . . . [d]eclare the party or parties to have the status of putative spouse."[118] Darrin Ellis sought dissolution of his domestic partnership with David James Arriaga on September 8, 2006.[119] Ellis believed their domestic partnership had been registered on August 14, 2003, but, in actuality, the former couple had only signed and notarized the declaration of domestic partnership on that day.[120] Because Ellis and Arriaga did not file their domestic partnership with the Secretary of State, a legal partnership did not exist.[121] The trial court granted Arriaga's motion to dismiss the petition, finding that the putative spouse doctrine was not available to domestic partners who failed to register with the California Secretary of State.[122]

The court of appeals determined that the California legislature intended courts to construe the Domestic Partner Act liberally, in favor of affording domestic partners the same bearing as that given to spouses, excepting those rights or benefits limited solely to married persons.[123] The court held that, given the intent and scope of the Domestic Partner Act, "a person with a reasonable, good faith belief in the validity of his or her registered domestic partnership is similarly entitled to protection as a putative registered domestic

113. CAL. FAM. CODE § 297.5(a) (West 2004 & Supp. 2008).
114. *In re Marriage Cases*, 183 P.3d at 414.
115. CAL. FAM. CODE § 297.5 (West 2004).
116. *See Ellis*, 76 Cal. Rptr. 3d at 401.
117. *Id.* at 402.
118. CAL. FAM. CODE § 2251(a) (West 2004).
119. *Ellis*, 76 Cal. Rptr. 3d at 403.
120. *Id.*
121. CAL. FAM. CODE § 297(b) (West 2004).
122. *Ellis*, 76 Cal. Rptr. 3d at 403.
123. *Id.* at 405.

partner, even if the domestic partnership was not properly registered."[124] The application of an equitable doctrine to ensure the rights entitled to a domestic partnership eliminated any doubt about the comparable legal status domestic partnerships hold to marriage.[125]

The next section examines the rights and obligations of domestic partners as compared to those of married couples. Comparing these two institutions will elucidate the legal impact that the opportunity for a traditional marriage between same-sex couples will have over their existing right to create domestic partnerships.

B. California Domestic Partnership vs. Marriage

Although the state of California briefly put domestic partnerships and marriage on equal legal footing, as evidenced in the *Ellis* case, the two institutions are not the same.[126] The domestic partnership law outlined in the statutes varies from some of the requirements and benefits of traditional marriage.[127] The California Supreme Court made note of these discrepancies in *In re Marriage Cases*, and some of the more pertinent ones are discussed below.[128]

First, domestic partnership registration requires that both partners share a residence at the time of creating the domestic partnership, whereas common residence is not a requirement of marriage.[129]

Second, while the minimum age for marriage and domestic partnership status is eighteen years, only the marriage statutes make an exception for parental or guardian consent for those younger than the statutory age hoping to marry.[130] Because the California constituency adopted Proposition 8 in November, amending the state constitution and overturning *In re Marriage Cases*, both the common residency and strict age requirements, applicable only to domestic partnerships and not marriage, potentially precludes some same-sex couples from the benefits of a recognized, legal union, domestic partnership, or otherwise.[131]

Third, domestic partners wishing to obtain official recognition of that partnership must "file a Declaration of Domestic Partnership with the Secretary of State," who enters the declaration in a state registry.[132] However, those desiring to marry must (i) obtain a marriage license and certificate of registry of marriage from the county clerk; (ii) have an authorized individual "solemnize"

---

124. *Id.* at 406.
125. *Id.*
126. *Id.*
127. *In re* Marriage Cases, 186 P.3d 384, 416 n.24 (Cal. 2008).
128. *See id.*
129. CAL. FAM. CODE §§ 297(b)(1), 300 (West 2004).
130. *Id.* §§ 297(b)(4), 302-03 (West 2004 & Supp. 2008).
131. *See id.*
132. *Id.* § 298.5(a)-(b).

the marriage; and (iii) file the marriage license and certificate of registry to the county recorder in the county that issued the license.[133] The original certificate of registry is then sent to the state registrar, and a copy is retained by the county recorder.[134]

Fourth, much like establishing a domestic partnership as opposed to a marriage, the requirements to dissolve a domestic partnership are not as stringent as those for marriage dissolution.[135] To end a domestic partnership the partners must jointly "file a Notice of Termination of Domestic Partnership with the Secretary of State," and the dissolution may be finalized without court action.[136] Domestic partners may file their dissolution in superior court, but it is not necessary that either partner be a resident of or domiciled in California.[137] On the other hand, summary dissolution of marriage requires a joint filing of a petition in superior court, effective only by the court's judgment.[138] Moreover, a spouse may not get that judgment until one of the spouses has been a resident of California for at least six months and a resident of the county of the filing for three months prior to the filing for the dissolution.[139]

Fifth, a "confidential marriage" is unavailable to domestic partners; this type of union allows an unmarried man and unmarried woman to enter into a marriage without the marriage certificate and the date of the union accessible to the public.[140] The author can only speculate that this type of marriage is a reaction to the number of celebrities in California wishing to keep their marriages private, away from public scrutiny.[141] However, the economic considerations of this discrepancy—especially since Proposition 8 was passed—may be significant.[142]

These discrepancies culminate to reveal certain attitudes about the status of same-sex marriage versus that of traditional marriage. Placing more restrictions on obtaining domestic partnership status and relaxing the requirements for effecting its dissolution, while implementing more exceptions to marriage but demanding a more intricate administrative process for obtaining a marriage or its summary dissolution, imparts greater significance and respect for traditional marriage than domestic partnership. This issue will be addressed in greater depth subsequently.

The California Supreme Court in *In re Marriage Cases* included the unavailability of the putative domestic partner doctrine among the differences between domestic partnership and marriage because of the decision in *Velez v.*

---

133. *Id.* §§ 300, 306; *see also id.* § 359.
134. §§ 306, 359; CAL. HEALTH & SAF. CODE §§ 102285, 102330, 102355 (West 2006 & Supp. 2008).
135. CAL. FAM. CODE §§ 299, 2400 (West 2004).
136. § 299(a)-(c).
137. § 299(d).
138. *See id.* §§ 2250, 2338.
139. *Id.* § 2320.
140. *See id.* § 500.
141. *See* Encinas v. Lowthian Freight Lines, 158 P.2d 575, 579 (Cal. Dist. Ct. App. 1945).
142. *See* discussion *infra* Part II.D.3.

Smith.[143] Lena Velez, a partner in a same-sex relationship, wished to officially dissolve her purported domestic partnership under the putative spouse doctrine.[144] A California appellate court refused to apply the equitable doctrine and denied Velez an official dissolution of her domestic partnership.[145] Nonetheless, another appellate court's holding in *In re Domestic Partnership of Ellis*, decided just before *In re Marriage Cases*, refused to follow *Velez*, finding that the equitable putative spouse doctrine applies equally to domestic partnerships.[146] *Ellis* exemplified the short-lived trend of finding equal value in domestic partnerships and marriage.[147] The California Supreme Court also mentioned two other divergences between the rights of domestic partners and those of spouses.[148] However, the significance of both discrepancies is diminished by the impact of extraneous statutory qualifications.[149]

The examination of the Defense of Marriage Act below serves to magnify a significant limitation on the rights traditionally granted opposite-sex marriages but denied same-sex marriages.

C. Federal Treatment of Same-Sex Marriage: Defense of Marriage Act (DOMA)

A brief look at the Defense of Marriage Act completes the trifecta—domestic partnership law, marriage law, and federal limitations—of analysis surrounding *In re Marriage Cases* and the true extent of the marriage rights momentarily conferred by the decision. Although there are a few disparities between the text and application of the domestic partnership and marriage

143. Velez v. Smith, 48 Cal. Rptr. 3d 642, 656-58 (Ct. App. 2006). *See* Ben Johnson, *Putative Partners: Protecting Couples from the Consequences of Technically Invalid Domestic Partnerships*, 95 CAL. L. REV. 2147 (2007) (providing a deeper discussion of Velez v. Smith and the putative domestic partner doctrine).

144. *Velez*, 48 Cal. Rptr. 3d at 645, 655-56.

145. *Id.* at 656-60.

146. *In re* Domestic Partnership of Ellis, 76 Cal. Rptr. 3d 401, 408 (Ct. App. 2008) ("To the extent *Velez* is inconsistent with our conclusions, we respectfully disagree with its conclusion regarding putative domestic partnerships.").

147. *Id.*

148. *In re* Marriage Cases, 183 P.3d 384, 416 n.24 (Cal. 2008).

149. *Id.* Specifically, the California Supreme Court notes the following:

> Seventh, in order to protect the federal tax-qualified status of the CalPERS (California Public Employees' Retirement System) long-term care insurance program (see Sen. Com. on Appropriations, fiscal summary of Assem. Bill No. 205 (2004-2004 Reg. Sess.) as amended Aug. 21, 2003; 26 U.S.C. § 7702B(f)(2)(C)), the domestic partnership statute provides that "nothing in this section applies to modify eligibility for [such] long-term care plans" (§ 297.5, subd. (g)), which means that although such a plan may provide coverage for a state employee's spouse, it may not provide coverage for an employee's domestic partner; this same disparity, however, would exist even if same-sex couples were permitted to marry under California law, because for federal law purposes the nonemployee partner would not be considered a spouse. (See 1 U.S.C. § 7.)

Id. The court also mentions a property tax exemption worth $1,000 for an "unmarried spouse of a deceased veteran" whose property value is at least $10,000, but few tax payers use this exemption because there is a more advantageous exemption for the same property, as provided by section 205.5(f) of the Revenue and Taxation Code, which is available to both types of unions under section 297.5(a) of the Family Code. *Id.*

statutes, the legal rights and benefits available to California heterosexual and homosexual couples remain relatively equal.[150] In fact, *In re Marriage Cases* did nothing to grant benefits of marriage to same-sex couples on a federal level.[151] Since the passage of the federal same-sex marriage provision, DOMA, effective since September 21, 1996, the definition of marriage explicitly precludes the designation of same-sex couples as spouses for the purpose of interpreting and applying any federal law.[152] The following examines the extent of DOMA's reach.[153]

When compared to the discrepancies between California domestic partnership law and traditional marriage, DOMA takes the prize. Barry R. Bedrick, in his chapter "The Defense of Marriage Act: Federal Law in which Benefits, Rights and Privileges are Contingent on Martial Status," identifies categories of federal law in which rights, benefits, or privileges of that law are defined by, somehow limited to, or affected by one's marital status.[154] The categories include the following: (i) Social Security and related programs, such as housing and food stamps; (ii) veteran's benefits; (iii) taxation; (iv) federal civilian military service benefits; (v) employment benefits and related laws; (vi) immigration, naturalization, and aliens; (vii) Indians; (viii) trade, commerce, and intellectual property; (ix) financial disclosure and conflict of interest; (x) crimes and family violence; (xi) loans, guarantees, and payments in agriculture; (xii) federal natural resources and related laws; and (xiii) miscellaneous laws.[155] These categories indicate how vast the scope of DOMA really is and, because it is disconnected from state-conferred rights, how potentially devastating for same-sex couples.

While Bedrick provides examples from each of the categories listed, this section will only examine a few of those examples. For instance, taxation has a significant impact on estate planning, especially with regard to estate and gift tax laws.[156] Bedrick mentions four occasions that would be affected by marital status:

---

150. *See* discussion *supra* Part IV.B.

151. *See* 1 U.S.C. § 7 (2006).

152. *Id.* The section reads:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Id.

153. *See* discussion *infra* Part IV.C (exploring the added consequence of DOMA's reach and the potential magnitude of rights that could be conferred to same-sex couples married in California if it were repealed or found unconstitutional).

154. BARRY R. BEDRICK, *The Defense of Marriage Act: Federal Laws in Which Benefits, Rights and Privileges are Contingent on Marital Status*, *in* DEFENSE OF MARRIAGE: DOES IT NEED DEFENDING? 29, 29 (James Perkins ed., 2004).

155. *Id.* at 32-46.

156. *See id.* at 36.

> [1] For estate tax purposes, property transferred to one spouse as the result of the death of another is deductible for purposes of determining the value of the decedent's estate. [2] Gifts from one spouse to another are deductible for purposes of the gift tax. [3] Gifts from one spouse to a third party are deemed to be from both spouses equally. [4] The law permits transfers of property from one spouse to another (or to a former spouse if the transfer is incident to a divorce) without any recognition of gain or loss for tax purposes.[157]

These tax advantages, which allow the relatively unencumbered movement of large amounts of property by married persons, are unavailable to those who are not recognized as spouses.[158]

Employment benefits also significantly affect a couple's estate planning. Under DOMA, employment rights defined or affected by marriage effectively prevented the extension of these advantages to same-sex couples. Bedrick again lays out situations in which being married bestows significant benefits not accessible to unmarried couples.[159] The federal laws affecting employment benefits often address the following: (i) the privileges received from an employer-sponsored health benefit program to which the employees are the beneficiaries, (ii) the continuation of those health benefits after, for example, an employee's death or divorce, and (iii) the option to take unpaid leave to care for a very sick spouse.[160] Also, the recognition as a spouse under these federal laws protects the interests of one spouse when the other becomes eligible for a benefit.[161] This is true for the Employee Retirement Income Security Act (ERISA), which prohibits the eligible employee spouse from denying the other spouse benefits of their retirement plan by changing beneficiaries or waiving certain benefits without first obtaining the written consent of the non-employee spouse.[162] ERISA contains a provision that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title," giving it a wide reach.[163]

Ironically, many people are attracted to the United States because of the liberties available to those within its borders. However, the liberty to marry one of the same sex is not universally available, and even if a same-sex couple is able to marry, the benefits attendant with that status are denied by the federal government, including an advantageous immigration status.[164] Bedrick provides examples on how one's marriage status affects noncitizens, including

---

157. *Id.*
158. *Id.*
159. *Id.* at 38.
160. *Id.*
161. *Id.*
162. *Id.*
163. 29 U.S.C. 1144(a) (2000); *see also* Rovira v. AT&T, 817 F. Supp. 1062, 1072 (S.D.N.Y. 1993) (holding in part that the company's pension plan, covered by ERISA, providing for death benefits upon employee-spouse's death but required the eligible beneficiaries be actual spouses as defined by state law was not per se unreasonable or discriminatory under ERISA).
164. *See* Adams v. Howerton, 673 F.2d 1036, 1039-40 (9th Cir. 1982).

(i) the special status given to noncitizens based on their employment and that status is then proffered to their spouses; (ii) the favored status extended to an asylee's spouse; or (iii) the loss of permanent residence or other status for the misuse of one's marital status.[165] *Matthews v. Gonzales* illustrates the effect of DOMA on the immigration status of same-sex couples.[166] Matthews, a citizen of the United Kingdom, was in the United States on a J-1 exchange visitor visa, suitable for a non-resident who only wishes to be in the U.S. temporarily.[167] Matthews overstayed her visa by more than ten years and was served with notice to appear before the Immigration and Naturalization Service for removal proceedings.[168] She sought cancellation of removal based on section 240A(b) of the Immigration and Nationality Act (INA), arguing that her "'same-sex meretricious relationship'" with her partner, a U.S. citizen, qualified her for the cancellation because her "'removal would result in exceptional and extremely unusual hardship'" on her partner.[169] The Ninth Circuit Court of Appeals found that Matthews had no standing because she was not party to a legal union, and "[a]lthough the INA contains a partial definition of 'spouse,'. . . the Defense of Marriage Act ('DOMA') . . . introduced a complete and exclusive definition that controls the interpretation of 'any Act of Congress.'"[170] "Importantly here, DOMA defines 'spouse,' in part, as one party to a 'legal union.'"[171] This case, as well as the other examples within some of the categories listed by Bedrick, are illustrative of the reach of DOMA and its resounding impact on federal rights and benefits affected by marital status.

D. "What's in a Name?"[172]

The above comparison between California domestic partnership law and marriage reveals no real corporeal legal inequalities.[173] Virtually all of the benefits afforded married persons are available to domestic partners under California domestic partnership law.[174] Moreover, the benefits bestowed upon

---

165. BEDRICK, *supra* note 154, at 38-39.

166. Matthews v. Gonzales, 171 F. App'x 120, 121-22 (9th Cir. 2006).

167. 8 U.S.C. § 1101(a)(15)(J) (2006).

168. *Matthews*, 171 F. App'x at 121.

169. 8 U.S.C. § 1229b(b)(1)(D) (2006). 240A(b)(1) of the INA states:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien . . . (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. 1229b(b)(1)(D); *see also Matthews*, 171 F. App'x at 121 (quoting from 8 U.S.C. § 1229b).

170. *Matthews*, 171 F. App'x at 122; *see also* 1 U.S.C. § 7 (2000).

171. *Matthews*, 171 F. App'x at 122.

172. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2, line 43.

173. *But see* Misha Isaak, *"What's in a Name?": Civil Unions and the Constitutional Significance of Marriage*, 10 U. PA. J. CONST. L. 607, 621-25 (2008), for the proposition and discussion of a constitutional argument advocating the tangible nature of the status of marriage.

174. *See* CAL. FAM. CODE § 297.5 (West 2004 & Supp. 2008).

married persons under federal programs are specifically precluded from same-sex couples, regardless of whether the marriage is a valid legal union in any state.[175] Thus, the issues are whether the California Supreme Court's decision in *In re Marriage Cases* has really done anything for same-sex couples wishing to marry and whether the passage of Proposition 8 will really make a difference.

The following section takes a look at the many facets of marriage and the arguments for and against same-sex marriage. There are both tangible benefits and intangible benefits that accompany marriage. It will be helpful to identify the tangible benefits so they can be contrasted with the intangible benefits.

1. The Tangible

Because marriage is a creation of the state, the legal rights associated with that status are numerous and indispensable.[176] Richard D. Mohr provides a good summary of some of the material benefits inherent upon the marriage state.[177] The benefits attendant to marriage include the following: (i) advantageous income taxation, such as deductions, credits, improved rates, and exemptions; (ii) greater public assistance; (iii) "the equitable control, division, acquisition, and disposition of community property"; (iv) upon death, the right of intestate succession for those without wills, and for those with estates subject to probate, the allowance of gift transfers to spouses that are almost entirely untaxed; (v) the exemption of "property from attachments resulting from one partner's debts"; (vi) the right to seek wrongful death of one's spouse; (vii) the right to collect survivor's benefits; (viii) the right to unemployment benefits if one spouse must move to follow her partner to a new job and must subsequently quit her job; (ix) as mentioned above, the option to acquire residency status for a noncitizen partner; and (x) the right to hospital visitation and to attend a spouse's funeral.[178] This is not an exclusive list; however, it illustrates the material import of a legal union.[179]

---

175. *See* discussion *supra* Part IV.C.

176. Baehr v. Lewin, 852 P.2d 44, 58 (Haw. 1993).

177. RICHARD D. MOHR, THE LONG ARC OF JUSTICE 63-64 (2005).

178. *Id.* at 63-65.

179. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955-56 (Mass. 2003) (allowing same-sex marriages and providing a list of benefits only available to married persons). The following lists some of the advantages of marriage the court identified that are not listed above: (i) joint Massachusetts income tax filing; (ii) tenancy by the entirety; (iii) extension of the benefit of the homestead protection to one's spouse and children; (iv) the rights of elective share and of dower; (v) entitlement to wages owed to a deceased employee; (vi) eligibility to continue certain businesses of a deceased spouse; (vii) the right to share the medical policy of one's spouse; (viii) temporary and permanent alimony rights; (ix) the right to separate support on separation of the parties that does not result in divorce; and (x) the right to bring a claim for loss of consortium or receive damages resulting from tort actions. *Id.*

2. The Intangible

The material benefits above are a significant aspect of the marriage state, but, as some including the California Supreme Court, argue, they are directly connected to the intangible or represent only one part of the entire union of marriage.[180] First, the California Supreme Court acknowledged that a right to marry automatically entails a "core set of basic substantive legal rights" fundamental to individual liberty and personal autonomy.[181] Further, the supreme court found that these foundational substantive rights, at minimum, encompass the opportunity to create an official, legally recognized family with the protections, benefits, and obligations associated with establishing such a unit and that this opportunity be afforded the same respect and dignity as that of a "union traditionally designated as marriage."[182] Opponents of same-sex marriage urge that their right to marry need not be designated as marriage so long as their constitutional rights, in substance, are protected and that by electing to call the same-sex relationship by another term, the couple's constitutional rights have not been violated.[183] The court reinforces the significance and basic right to establish a family under the broader right to marry, and a fundamental tenet of officially recognizing that family is conferring dignity and respect equal to that bestowed on other officially recognized familial relationships.[184] To require different nomenclature for marriages between heterosexuals and homosexuals would seriously jeopardize the equal dignity and respect entitled to families as demanded by the California constitution.[185]

Second, and related to the court's emphasis on dignity and respect, the supreme court specifically addresses the intangible social effect of semantically differentiating between same-sex coupling and opposite-sex marriage.[186] In

---

180. *In re* Marriage Cases, 183 P.3d 384, 418 (Cal. 2008) (defending the dual significance of the statutory rights bestowed on both married couples and domestic partners). The court disagreed with the notion that those rights are simply material or tangible benefits:

> [C]haracterization inaccurately minimizes the scope and nature of the benefits and responsibilities afforded by California's domestic partnership law. . . . The broad reach of this legislation extends to the extremely wide network of statutory provisions, common law rules, and administrative practices that give substance to the legal institution of civil marriage, including, among many others, various rules and policies concerning parental rights and responsibilities affecting the raising of children, mutual duties of respect, fidelity and support, the fiduciary relationship between partners, the privileged nature of confidential communications between partners, and a partners authority to make health care decisions when his or her partner is unable to act for himself or herself. These legal rights and responsibilities embody more than merely the "material" or "tangible" financial benefits that are extended by government to married couples.

Id.

181. *Id.* at 399.

182. *Id.*

183. *Id.* at 400.

184. *Id.* at 400.

185. *Id.*

186. *Id.* at 402.

reaching its decision, the court determined that designating "separate but equal" statuses for the two familial relationships may impermissibly effect a social mindset that same-sex couples are "'second-class citizens'" that may tolerably and understandably be treated disparately.[187]

Third, Richard Mohr identifies an inherent value in one's place in the world, beyond that of the property rights created with one's labor, which is not to be abrogated by the state.[188] He posits:

> While the state, with adequate justification, can take away the value an individual has instilled in other things and even temporarily control his means of instilling these values, it cannot prevent the individual from valuing himself and possessing himself and yet still suppose that—at least in some areas such as those protected by substantive rights—he is not merely a tool of and for the state but has his own projects and values that take precedence. If there are any substantive liberties, one has a right to instill value in oneself and possess oneself.[189]

Though Mohr does not speak to marriage specifically, his argument as it relates to privacy and the body is equally applicable to the intangible benefits and rights of marriage.[190] Thus, the substantive liberties provided to a person by virtue of the person's right to obtain them based on self-valuation and possession, including the right of marriage and the right to establish a family, are inherent, whether or not acknowledged by the state.[191] However, official governmental adoption of the right of same-sex couples to marry would lend credence to the state's goal of equally conferring dignity and respect to all family relationships.[192]

Fourth, lending the term marriage to a relationship socially and legally legitimizes the union.[193] Legally, the desire to encourage family relationships and to protect family members during life crises by assigning all the legal rights, benefits, and obligations to the familial construct supplies an intangible basis for recognizing a marriage.[194] Although the California legislature expressed this policy in regards to the expansion of domestic partnership law, the purpose of the legislation was to impart the same legitimacy and rights of married couples to domestic partnerships, thus acknowledging the legitimizing

---

187. *Id.*

188. RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND THE LAW 119-120 (1988).

189. *Id.* at 120.

190. *Id.*

191. *Id.*

192. *See In re Marriage Cases*, 183 P.3d at 400.

193. *See* Justin Reinheimer, *What Lawrence Should Have Said: Reconstructing an Equality Approach*, 96 CAL. L. REV. 505, 542 (2008) (stating that "marriage legitimizes relationships through state recognition that provides a vast array of automatic legal and economic benefits, privileges, and obligations . . . . Because states confer legal entitlements and social goods to recognized marriages, the denial of the right to marry deprives those individuals and couples excluded from the institution of marriage from myriad entitlements.").

194. 2003 Cal. Legis. Serv. Ch. 421, § 1(b) (West).

value of a marriage.[195] However, because the recognition of a domestic partnership is not equal with marriage, the titular value of marriage is higher and remains quintessential.[196]

Aside from the stigma of fornication, opponents of same-sex marriage argue that marriage is a social institution utilized for procreative purposes.[197] These opponents argue that opposite-sex couples are theoretically capable of procreating and "do not rely on 'inherently more cumbersome' noncoital means of reproduction, and they are more likely than same-sex couples to have children, or more children."[198] Thus, because same-sex couples cannot use the traditional methods of reproduction as easily as opposite-sex couples, or at all, same sex couples should not be afforded the same weight or legitimacy as marriage.[199] However, courts, which help assign legitimacy to the resolution of social issues surrounding their decisions, have found the procreation argument untenable.[200] To follow that argument to its logical conclusion, heterosexual couples unable to reproduce (who often turn to adoption) could not marry or obtain the same value marriage holds for reproducing opposite-sex couples.[201]

Fifth, privacy in marriage is sometimes respected more and given greater protection than other relationships.[202] Generally, physical intimacy is protected on privacy grounds for both married and unmarried couples, heterosexual or homosexual.[203] However, marriage provides more comprehensive privacy protection not offered any other relationship—specifically, the spousal privilege.[204] The intimacy inherent in the marriage relationship demands trust and results in the exchange of information that requires the immunity of

---

195. *See In re Marriage Cases*, 183 P.3d at 414; *see* CAL. FAM. CODE § 297.5 (West 2004 & Supp. 2008).

196. *See* discussion *supra* Part IV.B.

197. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 951 (Mass. 2003); *see also In re Marriage Cases*, 183 P.3d at 430.

198. *Goodridge*, 798 N.E.2d at 951.

199. *See id.*

200. Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 963 (2008).

201. *See In re Marriage Cases*, 183 P.3d at 430; Goodridge, 798 N.E.2d at 962 (finding that by adopting the procreation argument, the state would "confer[] an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.").

202. *Compare* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that the prohibition of the sale of contraceptives to unmarried couples violated the Equal Protection Clause, thereby expanding the right to privacy beyond the marriage relation to protect unmarried couples) *with Griswold v. Connecticut*, 381 U.S. 479 (1965) (focusing on the privacy essential to the marriage bond).

203. *Eisenstadt*, 405 U.S. at 453; *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (finding a Texas statute that criminalized homosexual sodomy violative of the substantive due process component of the Fourteenth Amendment). Justice Kennedy wrote: "[Homosexuals'] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'" *Id.* (quoting Planned Parenthood Se. Penn. v. Casey, 505 U.S. 833, 847 (1992)).

204. *See* George L. Blum, Annotation, *"Communications" Within Testimonial Privilege of Confidential Communications Between Husband and Wife as Including Knowledge Derived from Observation by One Spouse of Acts of Other Spouse*, 23 A.L.R. 6th §§ 1, 2 (2007).

spouses from compelled testimony of spousal communication.[205] "This pairing of trust and transparency within marriage constitutes the moral ground for legal immunity . . . and explains why this immunity is not extended to (mere) friends."[206] Spousal privilege assigns a value to marriage intangibles like privacy and intimacy not normally afforded to unmarried couples and certainly precluded a class of people not allowed to marry in forty-eight states.[207]

3. A Different Kind of Tangible—State Economic Considerations

Unlike the material benefits a married couple receives from legal recognition of their union, the state issuing the marriage license also stands to gain something tangible—money.[208] As one of the three states able to issue marriage licenses to same-sex couples, California had a monopoly on those issuances in the western half of the U.S. Until recently, the strength of this position was increased because of the more liberal distribution of marriage licenses in California before the passage of Proposition 8.[209] This advantage was due to a 1913 Massachusetts statute that remained in effect until its repeal this year.[210] In order to receive a valid marriage license, the provision required either Massachusetts state residency or that the non-resident couple's state of residence recognized same-sex marriages.[211] However, in an emergency act effective July 31, 2008, the Massachusetts legislature repealed the 1913 provision, effectively removing the residency requirement and allowing non-resident same-sex couples to marry in the state even if their home state continues to refuse recognition of the legal union.[212] In fact, the *Boston Globe* commented on the anticipated fiscal benefits Massachusetts can expect to receive: "A recent study the Patrick administration commissioned estimated that 32,200 couples would come to Massachusetts to marry in the next three years, creating 330 jobs and adding $111 million to the economy."[213] This study and the acknowledged financial benefits associated with expanding the pool of marriage-eligible couples further reinforces the notion that potentially hefty

---

205. MOHR, *supra* note 188, at 64.

206. *Id.* Mohr goes on to assert that this privilege is waivable when one's relationship with a child is involved, such as alleged child abuse. *Id.* Spousal immunity and its exceptions also relate to the discussion above regarding legitimacy and the procreation argument. *Id.* Mohr concludes that "[t]his exception is another example showing that marital rights are not grounded in marriage's being thought of an incubator for procreation." *Id.*

207. *See id.*

208. *See* Karen Breslau, *After the Vows: What's Next in the Fight Over Same-Sex Marriage*, NEWSWEEK, June 17, 2008, http://www.newsweek.com/id/141935/page/1.

209. *See* CAL. FAM. CODE § 352 (West 2004).

210. MASS. GEN. LAWS ANN. ch. 207, § 11 (West 2007) (derived from Mass. Gen. Laws, ch. 360, § 2 (1913)) (repealed 2008).

211. *Id.*

212. 2008 Mass. Legis. Serv. 216 (West).

213. Michael Levenson, *Same Sex Couples Applaud Repeal: Mass. Opens Door for Out-of-State Gays to Marry*, THE BOSTON GLOBE, Aug. 1, 2008, *available at* http://www.boston.com/news/local/articles/2008/08/01/same_sex_couples_applaud_repeal/.

state revenue sources can serve as a strong incentive to abandon outmoded state policies.[214]

Although California can no longer monetarily gain from allowing same-sex marriages, including the advantage of exclusively allowing non-resident couples to marry, it had an opportunity to make a handsome profit from the unions that took place there.[215] In 2006, the average wedding costs approached $28,000 in the United States, excluding the engagement ring and honeymoon.[216] This money is typically spent on the attire, ceremony, favors and gifts, flowers, jewelry, music, photography and video, the reception, stationary, transportation, and even wedding insurance.[217] Couples coming from outside the state to marry also contribute to the profits. In fact, those planning destination weddings do not spend much less on average than the average non-destination wedding, which is close to $26,000.[218]

In 2004, the *Boston Globe* commented on the potential boom in the wedding industry in anticipation of the *Goodridge* decision allowing same-sex marriage in Massachusetts.[219] The article revealed that although some vendors would not be willing to work with homosexual couples, "most [would] recognize gay marriage as a potential gold mine."[220] Even if the couple chooses to forego a lavish wedding with all the amenities offered by the private sector, the state and local governments stand to profit from the official union.[221] Yoho County Court Clerk, Freddie Oakley, expressed in July, in anticipation of being able to issue marriage licenses in California, "[f]or us weddings are a profit center—the county's going to make more money. We charge $75 for the license and $40 to perform the service."[222] Thus, the method employed by same-sex couples to obtain their marriage bond worked for the state's potential gain.[223]

Newsweek reported that a UCLA study conducted in June 2008 revealed a significant potential fiscal gain for the state and local governments.[224] The study estimated that in the three years following the California Supreme Court decision, the number of same-sex marriages performed will increase spending

---

214. *Id.*

215. Breslau, *supra* note 208.

216. SixWise.com, *The Average Cost of a Wedding Now Equals a New Sedan—Here's a Breakdown of Costs*, SIXWISE.COM, June 27, 2007, http://www.sixwise.com/newsletters/07/06/27/The_Average_Cost_of_a_Wedding_Now_Equals_a_New_Sedan_--_Heres_a_Breakdown_of_Costs.htm (last visited Oct. 15, 2008).

217. *Id.*

218. A-WeddingDay.com, Wedding Trends 2006, Feb. 21, 2007, http://www.a-weddingday.com/wedding trends.html (last visited Oct. 15, 2008).

219. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 941 (Mass. 2003); Emily Shartin, *Profits Eyed on Gay Weddings: Industry Sees Boom as Marriage Becomes Legal*, THE BOSTON GLOBE, Mar. 11, 2004, http://www.boston.com/news/local/massachusetts/articles/2004/03/11/profits_eyed_on_gay_weddings/.

220. Shartin, *supra* note 219.

221. Breslau, *supra* note 208.

222. Stephen Magagnini, *Yolo County Prepares to Conduct First Same-sex Marriages*, SACRAMENTO BEE, June 16, 2008, *available at* 2008 WLNR 11366050.

223. *Id.*

224. Breslau, *supra* note 208.

in the state by nearly $684 million.[225] Although Governor Schwarzenegger has admitted that he personally identifies with the traditional, limiting definition of marriage, he acknowledged the financial benefit and the positive impact same-sex marriage would have on the state: "I hope California's economy is booming because everyone is going to come here and get married . . . I think all of this is great."[226] *In re Marriage Cases* effectively broadened the customer base for the marriage industry, albeit briefly, which likely resulted in significantly increased business profits in the state, as well as increasing county revenue from the issuance of marriage licenses.[227] In fact, California acknowledged its potential gain over the coming few years from continuing to allow same-sex marriages with reference to the Proposition 8 initiative ballot.[228] The analysis reinforced the above contentions, stating that an increase in spending on weddings for same-sex couples would result.[229] The legislative analyst further evaluated the fiscal effects of Proposition 8's passage, warning that adopting the constitutional amendment could result in the loss of "several tens of millions of dollars."[230]

It is not unheard of to change a state policy with the direct or ancillary intent of bringing in more business and greater revenue to the state.[231] A state's allowance of same-sex marriage may be analogized to the trend to expand or even abolish the rule against perpetuities (RAP).[232] RAP states that "'[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.'"[233] RAP has gradually become liberalized, with states employing a variety of manipulations to meet competing demands and ease the burdens of the restrictive rule.[234] Estate planners posit that a longer rule period or the elimination of the rule altogether would provide a more favorable and saleable investment prospect.[235]

Lynn Foster argues that, besides the benefit escaping of the generation-skipping transfer (GST) tax by eliminating RAP, one of the most compelling reasons to eradicate RAP is the "competition among states to offer the most favorable legal climate for trust investments."[236] Joel C. Dobris reasons in part that the public and state are encouraged by the rich, with good public images,

---

225. *Id.*
226. *Id.*
227. *Id.*
228. OFFICIAL VOTER INFORMATION GUIDE, *supra* note 92.
229. *Id.*
230. *Id.*
231. *See* Lynn Foster, *Fifty-one Flowers: Current Perpetuities Law in the States*, 22 PROB. & PROP. 30 (2008); Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the Rap Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601, 605 (2000).
232. *See* Foster, *supra* note 231, at 32.
233. *Id.* at 30 (quoting Harvard law professor John Chipman Gray).
234. *See id.* at 30-31 (giving a list and explanation of these various manipulations, including the wait-and-see approach and cy pres).
235. *Id.* at 31.
236. *Id.*

and the positive images they impart.[237] To attract the rich and others interested in trust investments or estate diversification, states attempt to offer the most attractive location for those investments.[238] "Thus, freedom from the Rule Against Perpetuities is being merchandized along with other trust 'products.'"[239]

Very few states continue to follow the traditional rule against perpetuities, and Idaho, New Jersey, Pennsylvania, Rhode Island, South Dakota, and Wisconsin have completely abolished the rule.[240] The remaining states employ some lesser form of RAP.[241] Much like those six states that abolished the rule, California, Massachusetts, and likely Connecticut recognize, among other intangible interests, the monetary value of being on the cusp of same-sex marriage law.[242] Thus, economic considerations may induce a state to alter its policies, however rooted in tradition.[243]

V. A COMPARISON—WHAT *IN RE MARRIAGE CASES* COULD (NOT) DO

So far, the article has addressed what the California decision has done—or not done—for California. This section looks at the potential impact *In re Marriage Cases* may have on other states that do not allow same-sex marriage.[244]

A. States with Comprehensive Domestic Partnership Law or Civil Unions

States with comprehensive domestic partnership law or civil unions stand in approximately the same position as California before its decision in *In re*

---

237. Dobris, *supra* note 231, at 617.

238. *Id.*

239. *See id.* at 605.

240. Foster, *supra* note 231, at 34-37.

241. *Id.*

242. *See* League of Women Voters of California Education Fund, Proposition 8: Eliminates Right of Same-Sex Couples to Marry—California State Government, http://www.smartvoter.org/2008/11/04/ca/state/prop/8/ (last visited Oct. 15, 2008). *But see* Michael P. Mayko, *Same Sex Couples Get Ready to Wed*, CONNECTICUT POST, Nov. 13, 2008, http://www.connpost.com/breakingnews/ci_10965295?source=rv (quoting William Gerrish, spokesman for the Connecticut Department of Health, anticipating an "initial surge in the number of same-sex marriages for the next few months . . . [b]ut after this initial surge, we expect the number of civil unions will decline as the number of same-sex marriages increases, thus resulting in a zero net gain of revenue.").

243. *See* Foster, *supra* note 231, at 32. Although Proposition 8 invalidated *In re Marriage Cases*, eliminating the monetary benefits of allowing same-sex marriage, the assertions above still hold true. *See* California Marriage Protection Act, *supra* note 86. The state of California recognized the economic returns, both in the public media, as well as on the Nov. 4, 2008, ballot. *Id*.; Breslau, *supra* note 208. Instead, it was the California constituency that was unswayed by the potential fiscal gains. *See* CAL. CONST. art. II, § 8 (defining and explaining voter initiative); see also California General Election, supra note 87.

244. *See* discussion *supra* Part V.A.-C. This section is not intended to be a cumulative comparison of same-sex relationships recognized throughout the country but is simply intended to be a wider-based assessment relying on a few examples.

Marriage Cases.[245] Statewide law granting same-sex couples virtually all the material benefits bestowed marriage does not affect the legal status of these couples in any significant way. Instead, these states, much like pre-*In re Marriage Cases* California, lack the intangible rights and privileges afforded traditional marriage.[246] Additionally, the parallel state of affairs of these states to California before the recent supreme court decision provides a considerable basis for argued change in either direction, pro- or anti- same-sex marriage.

On the one hand, the intangible benefits lacking in official but non-marital same-sex relationships supplies proponents a strong foundation for changing the tide of opinion in favor of granting same-sex marriage. The arguments might go as follows: (i) California, Massachusetts, and now Connecticut courts have found an equal protection violation due to the withholding of intangible and invaluable benefits of marriage; and (ii) comprehensive domestic partnership and civil union laws already grant the legal rights and obligations of marriage to same-sex couples, so what is a different legal designation of marriage going to hurt?[247] It changes nothing legally, especially with the backdrop of DOMA.[248]

On the other hand, opponents could just as easily argue the opposite, that California voters overturned *In re Marriage Cases* by passing Proposition 8 by popular vote.[249] Because the amendment passed, Massachusetts and Connecticut are the only states granting marriage licenses to same-sex couples, which demonstrates that a solid majority of the states' and federal public policy are against it.[250] Oregon serves as a prime example.[251] Multnomah County began issuing marriage licenses, and while the determination of the county's authority to do so was on appeal, Oregon voters passed a constitutional amendment specifically limiting marriage to one man and one woman.[252] The Supreme Court of Oregon found that the issued marriage licenses were void *ab initio* because counties lacked the authority to decide a statewide issue on a local level.[253] Moreover, Oregon later passed a comprehensive domestic partnership law, obviously indicating an intent to continue separating official same- and opposite-sex relationships.[254]

---

245. *See* notes *supra* 246-58.

246. Human Rights Campaign, *Relationship Recognition in the U.S.*, July 22, 2008, http://www.hrc.org/documents/Relationship_recognition_map.pdf. These states include Vermont (civil unions, 2000), Connecticut (civil unions, 2005), New Hampshire (civil unions, 2008), New Jersey (civil unions, 2007), and Oregon (domestic partnerships, 2008). *Id*.

247. *In re* Marriage Cases, 183 P.3d 384, 451-52 (Cal. 2008); Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 954-56 (Mass. 2003); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 473-75 (Conn. 2008).

248. *See* discussion *infra* Part IV.C.

249. *See* discussion *supra* notes 84-87.

250. *See* 1 U.S.C. § 7 (2006).

251. Li v. State, 110 P.3d 91, 98 (Or. 2005).

252. *Id.* at 97.

253. *Id.* at 101-02.

254. OR. REV. STAT. ANN. § 107.005 (West 2007).

B. States Lacking Same-Sex Relationship Recognition

Not all states provide for their gay and lesbian constituents.[255] In fact, a majority do not.[256] The absence of same-sex relationship recognition provisions includes the lack of statutory domestic partnership registries or the non-issuance of civil unions and the adoption of the Defense of Marriage Act (DOMA).[257]

New York is an exception.[258] While it does not have domestic partnerships or civil unions, it does recognize and provide the same benefits of marriage to those with a marriage bond obtained in another state.[259] In *Martinez v. County of Monroe*, the New York Supreme Court Appellate Division found that non-resident same-sex marriages neither violate any of the two state exceptions nor contravene the state's public policy.[260] The court also explicitly acknowledged the state's rejection of DOMA.[261] New York's unique approach to same-sex relationships provides a prime example of the significant impact that the California decision may have on other states without domestic partnership law or civil unions.[262] For example, those who married in California may then move to New York and receive all the rights and benefits of a foreign jurisdiction.[263] Although same-sex couples may not acquire an officially recognized relationship in New York, they now have a wider array of options for domicile and civil redress.[264]

---

255. *See* Justin Reinheimer, *What Lawrence Should Have Said: Reconstructing an Equality Approach*, 96 CAL. L. REV. 505, 516-17 n.42-45.

256. *Id.*

257. Human Rights Campaign, *Statewide Marriage Prohibitions*, http://www.hrc.org/documents/marriage_prohibitions.pdf (last visited May 30, 2008). The states that adopt the broader consequences of restricting marriage to only heterosexuals and the lack of recognition of legal relationships include: Alabama, Arkansas, Georgia, Kentucky, Idaho, Louisiana, Michigan, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin. *Id*. Just recently, Arizona, California, and Florida adopted constitutional amendments prohibiting same-sex marriage. ARIZ. CONST. art. XXX, § 1; CAL. CONST. art. I, § 7.5; Florida Marriage Protection Amendment 1 (2008), http://election.dos.state.fl.us./initiatives/fulltext/pdf/41550-1.pdf.

258. *See* Reinheimer, *supra* note 255.

259. The state does, however, afford domestic partners some explicit rights, such as visitation rights of an ill or elderly domestic partner, and the right to control the disposition of a domestic partner's remains. N.Y. PUB. HEALTH §§ 2805-q, 4201 (Consol. 2007 & Supp. 2008); Martinez v. County of Monroe, 850 N.Y.S.2d 740, 743 (App. Div. 2008).

260. *Martinez*, 850 N.Y.S.2d at 742-43. Those exceptions include the following: (i) marriages prohibited by the positive law of New York, and (ii) incestuous or polygamous unions, which also fall under the first exception. *Id.* at 742.

261. *Id.* at 743.

262. *See id.* at 742-43.

263. *Id.*

264. *Id.*

C. Interstate Recognition

Marriage has traditionally been left to the states individually to define while still respecting the laws and judgments of other states.[265] However, DOMA eliminated this full faith and credit requirement with regard to same-sex marriage.[266] The provision provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[267]

In addition to preventing recognition of the status of "spouse" for same-sex marriages, DOMA gives states the option of also rejecting that status.[268] This option includes the allowance to reject both the marriage and any "right or claim arising from such relationship."[269] Thus, a same-sex couple moving from California to Texas would be rejected as spouses, and Texas would not have to afford any right or accept any claim related thereto.[270] Further, other states need not recognize one state's domestic partnership or civil union registry.[271]

Before DOMA, states were obligated to respect a judgment rendered by a sister state under the Full Faith and Credit Clause of the United States Constitution.[272] The clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[273] "It was held that the obligation was unequivocal if the judgment relied on was a valid judgment."[274] Although DOMA superseded this obligation, states still have the discretion to recognize both the same-sex relationship and its resulting rights or foreign judgments. In this instance, *In re*

---

265. *See* U.S. CONST. art. IV, § 1; Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 381 (2005).

266. 28 U.S.C. § 1738C (2000).

267. *Id.*

268. *See* 1 U.S.C. § 7; 28 U.S.C. § 1738C.

269. 28 U.S.C. § 1738C.

270. *See* TEX. CONST. art. 1, § 32; TEX. FAM. CODE ANN. § 2.001 (Vernon 2006).

271. *See* Grace Blumberg, *California's Adoption of Strong Domestic Partnership Legislation for Same-Sex Couples*, CALIFORNIA POLICY OPTIONS 2006 127, 130 (2006), *available at* http://www.spa.ucla.Edu/calpolicy/files06/blumbergrevrevII.pdf.

272. Wardle, *supra* note 265, at 380.

273. U.S. CONST. art. IV, § 1.

274. Wardle, *supra* note 265, at 380 (quoting Restatement (Second) of Judgments § 81 cmt. b (1982)) (internal quotations omitted).

Marriage Cases provided an example of a state not lending any force to the federal option.[275]

Although some states have chosen not to follow DOMA, that choice lends no greater force than those states who chose to adopt the Act.[276] However, the constitutionality of DOMA is still a contentious issue.[277] In fact, the State Regulation of Marriage is Inappropriate Act was introduced to the U.S. House of Representatives on May 21, 2008, and seeks to "eliminate any Federal policy on the definition of marriage."[278] If DOMA was to be found unconstitutional by the courts or repealed by Congress, then the effect of the short-lived California decision, Massachusetts's licensing, and Connecticut's recent allowance of same-sex marriage would be resounding.[279] Those states relying on the discretion of DOMA to prohibit same-sex marriage would no longer have federal backing.[280] The Full Faith and Credit Clause would require interstate recognition of those marriages performed in California, Massachusetts, and Connecticut.[281]

The next section looks at what should be done to fully account for same-sex couples' rights, both with and without the right to marry.

VI. TWO STEPS FORWARD, ONE STEP BACK

Putting *In re Marriage Cases* in an overall same-sex marriage legal context reveals that there is much left to be resolved.[282] Like the anti-miscegenation efforts of the 1960's, progress for same-sex marriage recognition is piecemeal.[283] Although states have traditionally controlled the rights and obligations of marriage, the federal government now carries a strong influence via DOMA.[284] For example, states begin to confer rights to same-sex couples and then rescind those rights independently or in connection to DOMA, but they are later able to reinstate or institute new policies providing just the amount of recognition with which that state is most comfortable.[285] Same-sex couples in states that offer the comprehensive right to marry are still limited on the federal level.[286] In effect, this results in a two steps forward, one step back

---

275. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); *see also* Martinez v. County of Monroe, 850 N.Y.S.2d 740 (App. Div. 2008).

276. *See* Human Rights Campaign, Relationship Recognition in the U.S., http://www.hrc.org/documents/Relationship_recognition_Laws_map.pdf (last visited Oct. 15, 2008).

277. *See, e.g.*, Wardle, *supra* note 265.

278. State Regulation of Marriage is Inappropriate Act, H.R. 6115, 110th Cong. (2d Sess. 2007).

279. *See* U.S. CONST. art. IV, § 1.

280. *See* Wardle, *supra* note 265, at 374.

281. U.S. CONST. art. IV, § 1.

282. *See* discussion *supra* Parts IV.A-D, V.A-C.

283. *See* Brown, *supra* note 17, at 193.

284. *Id.* at 193 (citing Zablocki v. Redhail, 434 U.S. 374 (1978)); 28 U.S.C. § 1738C (2000); 1 U.S.C. § 7.

285. *See, e.g.*, Li v. State, 110 P.3d 91 (Or. 2005); Baker v. State, 744 A.2d 864 (Vt. 1999).

286. 1 U.S.C. § 7.

effect on the rights of gay and lesbian couples.[287] There remains uncertainty for same-sex couples as to their rights as a couple, even if those rights are gradually increased by domestic partnerships or civil unions.[288]

For a number of moral and legal reasons, same-sex couples wishing to make a long-term commitments should not be denied the rights afforded heterosexual couples.[289] On a purely tangible basis, these rights are essential to and inherent in a marriage-like relationship.[290] However, the determination that the intangible rights of same-sex couples should not be denied could control the assignment of the couples' tangible rights.[291] Although the United States Supreme Court has attributed the right to marry as fundamental, this association between marriage and a citizen's fundamental rights has not yet been applied to same-sex couples.[292] While states like California, Massachusetts, and Connecticut have granted this right to gay and lesbian couples, or offer an alternative like domestic partnerships, the full extent of the rights inherent in the marriage bond will remain elusive until Congress repeals DOMA or the Supreme Court declares it unconstitutional.[293]

In re Marriage Cases and *Kerrigan* recognized intangible interests not previously sanctioned; however, the tangible rights for which one can proactively plan have not changed significantly through the recognition of same-sex marriage.[294] This is due to California's comprehensive domestic partnership laws, which provide essentially the same legal rights to domestic partners as if they were married, and the federal non-recognition provisions of DOMA.[295] Until positive and consistent changes can be made, estate planners in all states must monitor the extent of same-sex relationship recognition across jurisdictions.[296] Also, the estate planning community must communicate its ability to plan successfully for same-sex partners' lives together, even if their legal status remains unfairly subordinate to heterosexual marriage.[297]

---

287. *See id.*

288. *See* discussion *supra* Part IV.A.

289. *See* Baker v. State, 744 A.2d 864 (Vt. 1999).

290. Blumberg, *supra* note 1, at 128-29.

291. *See* Baker v. Nelson, 409 U.S. 810, 810 (1972) (denying certiorari for lack of a "substantial federal question.").

292. Loving v. Virginia, 388 U.S. 1, 13 (1967).

293. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); *see also* Wardle, *supra* note 265, at 390.

294. *See* discussion *supra* Part IV.B.

295. 28 U.S.C. § 1738C (2000); 1 U.S.C. § 7; CAL. FAM. CODE § 297.5 (West 2004 & Supp. 2008).

296. *See* Foster, *supra* note 231, at 33. Foster's assertion that "estate planners should be sure to carefully check each state's statutes and not hesitate to consult or retain counsel in those states when planning across state lines," though discussing the current state of perpetuities law throughout the country, is equally applicable to the situation here. *Id.* The writing of this article serves as a prime example of the preceding assertion. This article was updated frequently before publication to reflect, for example, the repeal of the Massachusetts residency requirement, the adoption of Proposition 8 in November 2008, and the recent Connecticut Supreme Court decision, Kerrigan, allowing same-sex couples to marry, all of which indicates how quickly the law can change and the need to stay abreast of those changes.

297. JOAN M. BURDA, ESTATE PLANNING FOR SAME-SEX COUPLES 4, 7 (A.B.A. 2004).

VII. CONCLUSION

The rights of same-sex couples are ever expanding, but the ability to marry reaches the apex of legal recognition of gay and lesbian rights.[298] Although comprehensive domestic partnership law encompasses most of the tangible rights attendant to marriage, the intangibles speak just as loudly and resoundingly to the heart of equal treatment of same-sex couples.[299] It is the inherent dignity of the person and the right to be afforded an equal dignity to heterosexual couples that appears to be at the front of the same-sex marriage debate.[300] California's brief authorization of same-sex marriage extended not only those material rights that differ slightly from domestic partnerships, but also the intangible benefits wedged deep in the marriage bond that are not available to domestic partners, however comprehensive their rights.[301] Although DOMA precludes federal recognition of same-sex partners as spouses, many of the rights and benefits bestowed upon spouses are those of the material sort that can be accommodated through smart and thorough estate planning.[302]

In re Marriage Cases also implicitly recognized the economic interest a state holds in expanding traditional rights before precluding the non-traditional.[303] Moreover, *In re Marriage Cases* helps set the stage for the furtherance of same-sex marriage, even though overturned by Proposition 8.[304] More and more states are adopting domestic partnership or civil union legislation.[305] The closer the rights of domestic partnerships or civil unions become to the rights afforded the traditional marriage bond, the author can only hope it will bring greater recognition and allowance of same-sex marriage.

by Meghan McCalla[*]

298. *See* discussion *supra* Part IV.A-B.
299. *In re* Marriage Cases, 183 P.3d 384, 400 (Cal. 2008).
300. *Id.*
301. *Id.* at 399-400.
302. 1 U.S.C. § 7 (1996); *see also* Burda, *supra* note 297, at 9.
303. *See* discussion *supra* Part IV.D.3.
304. *See* discussion *supra* Part V.A.
305. *See* Human Rights Campaign, *supra* note 59.

* The author, with sincere gratitude, acknowledges the help and encouragement of Governor Preston E. Smith Regents Professor of Law, Professor Gerry W. Beyer, Texas Tech University School of Law, who served as an exemplar and mentor.