

Proposition 3: Constitutional Right to Marriage

Legislative Constitutional Amendment

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I. EXECUTIVE SUMMARY

Proposition 3 is a constitutional amendment that recognizes a fundamental right to marry, regardless of sex or race, in California.¹ Proposed by the California Assembly, California Senate, supported by Governor Newsom, and introduced in the State Legislature as Assembly Constitutional Amendment 5, Proposition 3 removes language added to the California Constitution by Proposition 8 (2008) related to marriage.²

A “YES” vote on this measure means: Language in the California Constitution would be updated to match who can currently marry. There would be no change in who can marry.

A “NO” vote on this measure means: Language in the California Constitution would not be changed. There would be no change in who can marry.³

II. THE LAW

A. 20th Century: Origins of Modern Marriage Equality

1. *Development of Opposite-Sex Marriage Equality in the United States*

As long ago as 1923, the U.S. Supreme Court stated that the liberty guaranteed by the Due Process Clause includes the right to marry.⁴ Nearly a half-century later, a unanimous Supreme Court in *Loving v. Virginia* struck down state laws banning marriage between individuals of different races, holding that these anti-miscegenation statutes violated both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.⁵ The Supreme Court proceeded to expand access to marriage, describing it as “the foundation of the family in our society”,⁶ and struck down state statutes and regulations that burdened marriage rights of those with outstanding child support obligations and of incarcerated individuals.⁷

2. *Beginnings of Marriage Equality in California*

Marriage equality jurisprudence in the State of California began, similarly to that at the federal level, with the protection of interracial couples.⁸ In 1948, the California Supreme Court found that sections of the Civil Code that regulated marriage were unconstitutional because of their

¹ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 5, 2024, at 5, available at <https://vig.cdn.sos.ca.gov/2024/general/pdf/complete-vig.pdf> (last visited Oct. 15, 2024) [“NOVEMBER 2024 VOTER GUIDE”].

² *Id.*

³ *Id.*

⁴ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁵ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁶ *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

⁷ *Id.* at 390–391; *Turner v. Safley*, 482 U.S. 78, 100 (1987).

⁸ *Perez v. Lippold*, 32 Cal. 2d 711 (1948).

vagueness and that they violated the Equal Protection Clause of the U.S. Constitution by “impairing the right of individuals to marry on the basis of race alone[.]”⁹

Conversely, the history of marriage equality for same-sex couples under California law was functionally reset ten years after *Loving* in 1977 with the introduction of Assembly Bill 607.¹⁰ The legislation preempted the recognition of same-sex marriage by adding the phrase “between a man and a woman” to provisions of sections 4100 and 4101 of the Civil Code.¹¹ These provisions of Civil Code former section 4100 were moved to Family Code section 300 when the Family Code was enacted in 1992.¹²

Though excluded from the legal status of marriage, same-sex couples in certain local jurisdictions were able to secure the legal status of a “domestic partnership.”¹³ Domestic partners had some, but not all, of the legal protections and privileges of married persons. Through the end of the twentieth century, eighteen municipalities throughout California conferred the domestic partnership status on same-sex and opposite-sex couples under local laws.¹⁴

B. 1990’s: Same-Sex Relationship Rights and Rejection of Same-Sex Marriage

1. *The Domestication of California*

Just before the new millennium, the California State Legislature passed Assembly Bill 26 (1999), the first of California’s domestic partnership statutes.¹⁵ The bill as enacted added new sections to the Family, Government, and Health Codes primarily providing that “a domestic partnership shall be established between 2 adults of the same sex [...] who have a common residence and meet other specified criteria[.]”¹⁶ According to a signing message from then-Governor Gray Davis, the subsequent amendments enacted through Assembly Bill 25 (2001) resulted in “one of the strongest domestic partner laws in the nation”, but a letter to the editor of *Los Angeles Times* noted that “there [were] still over 1,700 governmental protections offered to married spouses that [weren’t] afforded to domestic partners” under the enacted legislation.¹⁷

2. *Mahalo to The Aloha State*

While state legislatures continued to adopt domestic partnership laws throughout the 1990’s, some state court systems took up constitutional challenges to restrictions on same-sex

⁹ *Id.* at 731–732 (holding that sections 60 and 69 violated the federal equal protection clause “by arbitrarily and unreasonably discriminating against certain racial groups”).

¹⁰ AB 607, 1977 Leg., 1977–1978 Reg. Sess. (Cal. 1977).

¹¹ *Id.*

¹² *Lockyer v. City & Cnty. of S.F.*, 33 Cal. 4th 1055, 1076 n.11 (2004).

¹³ ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ACA 5, at 3 (June 13, 2023).

¹⁴ *Id.*

¹⁵ AB 26, 1999 Leg., 1999–2000 Reg. Sess. (Cal. 1999).

¹⁶ *Id.* at § 2.

¹⁷ CAL. FAM. CODE § 297, Historical and Statutory Notes (West 2020); Samuel T. Holdren, Letter to the Editor, *Davis Signs Bills on Partners, Tuition*, L.A. TIMES, Oct. 17, 2001, <https://www.latimes.com/archives/la-xpm-2001-oct-17-me-58163-story.html> (last visited Oct. 15, 2024).

marriage.¹⁸ Taking the lead on judicial involvement in defining marriage equality, the Hawai'i Supreme Court held in 1993 that a state statute limiting marriage to opposite-sex couples violated the Hawai'i Constitution on equal protection grounds.¹⁹ Upon remand, the trial court applied strict scrutiny, as directed by the Supreme Court, and ruled that the state ban was unconstitutional.²⁰ While the trial court's decision on the merits was stayed pending appeal, the voters of Hawai'i approved a legislatively referred constitutional amendment through the initiative process in 1998.²¹ This amendment permitted the legislature to reserve marriage to different-sex couples, "taking the statute out of the ambit of the equal protection clause of the Hawai'i Constitution" and undoing the state high court's decision.²²

3. *Congress Passes the Defense of Marriage Act (1996)*

Congress was spurred into action by the judicial proceedings in Hawai'i surrounding the state's ban on same-sex marriage.²³ In response to the possibility that a same-sex couple might be married in Hawai'i and then return to the mainland, Congress passed the federal Defense of Marriage Act (DOMA), prohibiting the federal government from treating same-sex couples as spouses for purposes of federal law and authorizing states to refuse to recognize marriages of same-sex couples from other states.²⁴

The enactment of Section 3 of DOMA had a formidable scope; it added a provision to Title 1 of the United States Code, which establishes the rules of construction of the general and permanent laws of the United States.²⁵ Section 3 provided:

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,

¹⁸ CARLOS A. BALL, ET AL., *CASES AND MATERIALS ON SEXUALITY, GENDER IDENTITY, AND THE LAW* 472–76 (7th ed. 2022).

¹⁹ *Baehr v. Lewin*, 74 Haw. 530, 582 (1993).

²⁰ *Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996) ("The sex-based classification in HRS § 572–1, on its face and as applied, is unconstitutional and in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution").

²¹ See *Hawaii Question 2, Legislative Power to Reserve Marriage to Opposite-Sex Couples Amendment (1998)*, BALLOTPEdia, [https://ballotpedia.org/Hawaii_Question_2,_Legislative_Power_to_Reserve_Marriage_to_Opposite-Sex_Couples_Amendment_\(1998\)](https://ballotpedia.org/Hawaii_Question_2,_Legislative_Power_to_Reserve_Marriage_to_Opposite-Sex_Couples_Amendment_(1998)) (last visited Oct. 15, 2024) (providing basic information about the ballot measure).

²² Robert J. Morris (Kapā'ihiahilina), *Hulihia Ke Au: Implications of Hawai'i Same-Sex Marriage for Policy, Practice, & Culture*, 20 ASIAN P. AM. L.J. 1, 7 (2015) (citing *Baehr v. Miike*, 92 Haw. 634 (1999)).

²³ BALL, *supra* note 18, at 473.

²⁴ Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996), *repealed by* Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022).

²⁵ Off. of the L. Revision Counsel, *Understanding the Code: FAQ and Glossary*, U.S. CODE, <https://uscode.house.gov/faq.xhtml> (last visited Oct. 15, 2024).

and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.²⁶

With DOMA in place, even if a state were to find its constitution allowed for same-sex couples to marry, other states could deny those couples recognition of their marriages; furthermore, even if such a married couple moved to a state that recognized their valid marriage, the spouses could not receive the benefits of marriage granted by the federal government.²⁷ For example, section 3 might prevent the utilization of a federal estate tax exemption for a surviving-spouse.²⁸

C. 2000’s: Propositions, Lawsuits, Vetoes, and Protections

Just as Congress passed DOMA in response to judicial legitimization of same-sex marriage in *Baehr*, “many states passed ‘mini-DOMAs’—laws that banned same-sex marriage on the state level and/or denied recognition of same-sex couples from other states.²⁹ In a period of only fifteen years, California oscillated between constitutional injury and judicial remedy twice.

1. *California Voters Pass Proposition 22 (2000)*

In response to fears that California courts could reverse California statutes – or that same-sex couples married in other states might come to California – California voters approved Proposition 22 in 2000.³⁰ Proposition 22 (2000) (unlike the Proposition 8 (2008)) did not amend the state constitution, but rather was placed on the 2000 Primary Election ballot as an initiated state statute.³¹ The measure added a provision to the Family Code that “only marriage between a man and a woman is valid or recognized in California”, preventing the state from recognizing same-sex marriages valid in other states, such as in Hawai’i, and effectively barring Californians from entering into same-sex marriages in the state.³²

State Senator William J. Knight introduced what was colloquially referred to as “the Knight Initiative” at a time when no other state in the nation “recognize[d] a civil contract or any other relationship between two people of the same sex as a marriage”.³³ Yes on Knight led the campaign

²⁶ 1 U.S.C. § 7 (amended 2022).

²⁷ *E.g.*, *Gill v. Off. of Pers. Mgmt.*, 669 F. Supp. 374 (D. Mass. 2010); *Pederson v. Off. of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012); *Dragovich v. U.S. Dep’t of the Treasury*, 794 F. Supp. 2d 1178 (N.D. Cal. 2011).

²⁸ *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

²⁹ BALL, *supra* note 18, at 473.

³⁰ ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ACA 5, *supra* note 13.

³¹ *Id.*

³² Cal. Fam. Code. § 308.5 (repealed 2015); *California Proposition 22, Definition of Marriage Initiative (March 2000)*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_22_Definition_of_Marriage_Initiative_\(March_2000\)](https://ballotpedia.org/California_Proposition_22_Definition_of_Marriage_Initiative_(March_2000)) (last visited Oct. 15, 2024).

³³ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY, MARCH 7, 2000, at 51, *available at*

in support of Proposition 22 (2000), with the public support of Senator John McCain and the California Republican Party.³⁴ Proponents of the ballot measure stated:

When people ask, “Why is this necessary?” I say that even though California law already says only a man and a woman may marry, it also recognizes marriages from other states. However, judges in some of those states want to define marriage differently than we do. If they succeed, California may have to recognize new kinds of marriages, even though most people believe marriage should be between a man and a woman.³⁵

No on Knight led the campaign in opposition to Proposition 22 (2000), with the public support of Vice President Al Gore, Senators Barbara Boxer and Dianne Feinstein, and Governor Gray Davis.³⁶ The California Democratic Party was not in opposition to the measure.³⁷ Opponents of the ballot measure stated:

PROPOSITION 22 IS UNFAIR. Even when gay or lesbian couples have been together for many years, one companion often has no right to visit a sick or injured companion in the hospital. They often can’t get basic health insurance for dependents. They have no inheritance rights. That’s wrong. And Proposition 22 will make it more difficult to right this wrong—by singling out lesbians and gays for discrimination.³⁸

The measure passed with 4,618,673 yes votes (61.35%) and remained in effect until May 15, 2008.³⁹

2. *Winter of Love and Lockyer (2004)*

In 2004, the City and County of San Francisco ignored Proposition 22 at the direction of then-Mayor Gavin Newsom and began issuing marriage licenses to same-sex couples.⁴⁰ Four-thousand-thirty-seven same-sex couples were married between February 12 and March 12, 2004,

https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2187&context=ca_ballot_props (last visited Oct. 15, 2024) [“MARCH 2000 VOTER GUIDE”] (open access courtesy of UC Law S.F. Scholarship Repository).

³⁴ Evelyn Nieves, *Ballot Initiative That Would Thwart Gay Marriage Is Embroiling California*, N.Y. TIMES, Feb. 25, 2000, <https://www.nytimes.com/2000/02/25/us/ballot-initiative-that-would-thwart-gay-marriage-is-embroiling-california.html> (last visited Oct. 15, 2024).

³⁵ MARCH 2000 VOTER GUIDE, *supra* note 33, at 52.

³⁶ Nieves, *supra* note 35.

³⁷ *California Proposition 22*, BALLOTPEDIA, *supra* note 32.

³⁸ MARCH 2000 VOTER GUIDE, *supra* note 33, at 53.

³⁹ *California Proposition 22*, BALLOTPEDIA, *supra* note 32.

⁴⁰ Greg Lucas, “*Winter of Love*” Begins, Cal. State Libr.: CAL@170 (2020), <https://cal170.library.ca.gov/february-12-2004-winter-of-love-begins-2/> (last visited Oct. 15, 2024).

the California Supreme Court ordered San Francisco to stop issuing marriage licenses to same-sex couples and invalidated the marriages that had already occurred.⁴¹

The California Supreme Court attested in *Lockyer v. City and County of San Francisco* that, “although the present proceeding may be viewed by some as presenting primarily a question of the substantive legal rights of same-sex couples”, the legal issue was narrowly concerned with the authority of a local official declining to enforce state laws he found to be unconstitutional.⁴² The court issued a writ of mandate for San Francisco to comply with the voter-enacted limitations on marriage and to inform the same-sex couples married during the “Winter of Love”, that their marriages would be nullified.⁴³

3. Assemblymember Mark Leno’s Hat Trick Attempt

In response to the *Lockyer* decision, Assemblymember Mark Leno, a Democrat representing then-California Assembly District 13 (comparably, present-day District 17) from 2002–2008, authored three bills to alter the statutes affected by Proposition 22 (2000) through the legislative process.⁴⁴

First, AB 19 (2005) sought to end the denial of marriage licenses to same-sex couples in California.⁴⁵ Because of California Constitutional protections of provisions enacted by the voters through the initiative process,⁴⁶ the bill also attempted to clarify that Family Code Section 308.5 addressed only marriages from other jurisdictions, and therefore the legislature had the authority to enact legislation speaking to the definition of marriage within the state.⁴⁷ AB 19 (2005) failed on the Assembly Floor on third reading.⁴⁸

Second, Assemblymember Leno re-introduced AB 19 (2005) as AB 849 (2005).⁴⁹ AB 849 (2005) passed both houses of the state legislature but was vetoed by then-Governor Arnold Schwarzenegger.⁵⁰

⁴¹ ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ACA 5, *supra* note 13, at 4.

⁴² *Lockyer v. City & Cnty. of S.F.*, 33 Cal. 4th 1055, 1086 (2004).

⁴³ *Id.* at 1120.

⁴⁴ ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ACA 5, *supra* note 13, at 4; *See also* 2020 Cal. Citizens Redistricting Commission, *Maps: Final Certified Assembly Districts*, WE DRAW THE LINES CA, <https://wedrawthelines.ca.gov/transition/maps-final-draft-assembly-districts/> (last visited Oct. 15, 2024) (displaying interactive maps comparing Assembly Districts across redistricting cycles).

⁴⁵ AB 19, 2005 Leg., 2005–2006 Reg. Sess. (Cal. 2005) (as amended on May 12, 2005, but not enacted).

⁴⁶ CAL. CONST. art. II, §10(c).

⁴⁷ AB 19, 2005 Leg., 2005–2006 Reg. Sess. (Cal. 2005) (as amended on May 12, 2005, but not enacted), at § 8.

⁴⁸ Complete Bill History of AB 19, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=200520060AB19 (last visited Oct. 15, 2024).

⁴⁹ AB 849, 2005 Leg., 2005–2006 Reg. Sess. (Cal. 2005) (as enrolled on Sept. 7, 2005, but not enacted).

⁵⁰ Complete Bill History of AB 849, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=200520060AB849 (last visited Oct. 15, 2024); Nancy Vogel and Jordan Rau, *Gov. Vetoes Same-Sex Marriage Bill*, L.A. TIMES, Sept. 30, 2005, <https://www.latimes.com/la-me-timelinegaymarriage-2005sep30-story.html> (last visited Oct. 15, 2024).

Third, Assemblymember Leno made one final attempt to amend the Family Code and limit the scope of Proposition 22 (2000) with the introduction of AB 43 (2005).⁵¹ The bill passed both houses, but was again vetoed by Gov. Schwarzenegger, this time the Governor stating that it was up to the Supreme Court to decide if the state's ban on same-sex marriage was constitutional.⁵²

Though unable to legislatively remedy the ban on same-sex marriage, California lawmakers led the way in extending relationship recognition to same-sex couples through nonmarital statuses by creating and repeatedly expanding domestic partnership laws until they included practically all the state-law rights and obligations of marriage.⁵³

4. *In re Marriage Cases* (2008)

With the expansion of nonmarital relationship recognition in the Family Code, the rights and obligations between marriage and domestic partnership became so similar that courts were tasked with considering whether domestic partnerships became a constitutional injury, rather than remedy.⁵⁴ The California Supreme Court weighed the availability of marriage to opposite-sex couples and the statutory relegation to domestic partnerships of same-sex couples in the consolidated *In re Marriage Cases*.⁵⁵ In the resulting landmark 2008 marriage equality decision the Court held:

[B]y drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and by reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership ... [the state denies] same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.⁵⁶

Ruling that gays and lesbians constituted a suspect class, the California Supreme Court applied strict scrutiny to the state's statutory marriage ban enacted by Proposition 22 (2000), and found a violation of same-sex couples' fundamental right to marry.⁵⁷ It further concluded that the right to marry encompassed substantive legal rights "so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated [...] *through the statutory initiative process*".⁵⁸ Importantly, both holdings in *Marriage Cases* were based on the Due Process

⁵¹ AB 43, 2005 Leg., 2007–2008 Reg. Sess. (Cal. 2007) (as enrolled on Sept. 27, 2007, but not enacted).

⁵² ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ACA 5, *supra* note 13, at 4.

⁵³ BALL, *supra* note 18, at 487 (citing CAL. FAM. CODE. §§ 297, 297.5 (2005)).

⁵⁴ BALL, *supra* note 18, at 488.

⁵⁵ *In re Marriage Cases*, 43 Cal. 4th 757, 780 (2008).

⁵⁶ *Id.* at 830–31.

⁵⁷ *Id.*

⁵⁸ *Id.* at 781 (emphasis added).

and Equal Protection clauses of the California Constitution, not the analogous clauses of the U.S. Constitution.⁵⁹

The same supporters of Proposition 22 in the litigation before the court in *Lockyer*⁶⁰, contended in *Marriage Cases* that the California Constitution itself “mandates” defining marriage as Proposition 22 does in Section 308.5 of the Family Code; however, the government defendants in the case did not advance an argument that the California Constitution “defined[d] or limite[d] the marriage relationship to a union of a man and a woman”.⁶¹ In its reasoning, the Supreme Court addressed the separation-of-power doctrine concern that the court’s ruling on Proposition 22’s provisions would be a judicial revision redefining marriage in California so “that public policy or the public interest would be better served.”⁶²

The California Supreme Court determined that the “long-standing nature” of the limitation on same-sex marriage enacted in Proposition 22 could not “*exempt[]* the statutory provisions embodying that definition *from the constraints imposed by the California Constitution*” and therefore the court would not violate separation-of-powers doctrine in determining the unconstitutionality of the statutory ban.⁶³

Approximately 18,000 same-sex couples married in California after the effective date of the *In re Marriage Cases* decision and before the passage of Proposition 8.⁶⁴

5. California Voters Pass Proposition 8 (2008)⁶⁵

Because the California Supreme Court had based its decision in *Marriage Cases* on the due process and equal protection clauses of the state constitution, and that the provisions of Proposition 22 were statutory in nature and not an embodiment of a constitutional definition of marriage⁶⁶, opponents of same-sex marriage sought to amend the constitution to make it clear that it permitted prohibitions on same-sex marriage.⁶⁷ Unlike the simple majority required for the legislature to pass statutory amendments to legislatively enacted provisions, Assemblymember

⁵⁹ BALL, *supra* note 18, at 486.

⁶⁰ For the California Supreme Court’s discussion of mootness of parties’ claims in contemporaneous litigation against the City and County of San Francisco related to its disregard of Proposition 22’s ban on same-sex marriage, see *Marriage Cases*, 43 Cal. 4th 789–92.

⁶¹ *Marriage Cases*, 43 Cal. 4th at 848.

⁶² *Id.* at 758–59.

⁶³ *Id.* at 849 (emphasis original).

⁶⁴ ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ACA 5, *supra* note 13, at 4.

⁶⁵ For the California Initiative Review’s contemporaneous analysis of Proposition 8, see generally Joshua Irving Kob & Rebekah Leah Grodsky, *Proposition 8: Eliminates Right of Same-Sex Couples To Marry. Initiative Constitutional Amendment.*, CAL. INIT. REV., (Fall 2008), available at <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1085&context=california-initiative-review> (last visited Oct. 15, 2024)

⁶⁶ Part II(C)(4), *supra*.

⁶⁷ ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ACA 5, *supra* note 13, at 5.

Leno and colleagues would have to pass legislation through both houses with a 2/3 vote, and then recommend such a measure to the electorate for passage in order to repeal or amend a constitutional amendment banning same-sex marriage.⁶⁸

Proposition 8 (2008) would change the California Constitution to eliminate the right of same-sex couples to marry and provide that only marriage between a man and a woman is valid or recognized in California.⁶⁹ Specifically, Proposition 8 (2008) would add Section 7.5 to Article I of the California Constitution, which states, “Only marriage between a man and a woman is valid or recognized in California.”⁷⁰

a. Prop 8 Proponents’ Public Policy Argument

Protect Marriage, also known as Yes on 8, led the campaign in support of Proposition 8, with the public support of Senator John McCain, then a presidential candidate, and several political and religious organizations.⁷¹ Notably, the signers of the argument in favor of Proposition 8 in the Secretary of State’s Official Voter Information Guide included California Family Council then-President Ron Prentice.⁷²

Proponents of the ballot measure argued that Proposition 8 contained the “the same 14 words that were previously approved in 2000” by California voters when passing Proposition 22 (2000).⁷³ They also framed the measure as restoration of the voters’ will that “four activist judges in San Francisco wrongly overturned”.⁷⁴ Further, it was argued that Proposition would not remove any rights, as it would not remove sections of the Family Code that granted marriage-like rights to domestic partners.⁷⁵

b. Prop 8 Opponents’ Public Policy Argument

Public opponents of Proposition 8 included Former President Barack Obama, then a U.S. Senator and presidential candidate, the California Democratic Party, and other civil rights and

⁶⁸ CAL. CONST. art. XVIII, § 1.

⁶⁹ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2008, at 9, available at https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2265&context=ca_ballot_props (last visited Oct. 15, 2024) [“NOVEMBER 2008 VOTER GUIDE”] (open access courtesy of UC Law S.F. Scholarship Repository).

⁷⁰ Cal. Proposition 8 (2008).

⁷¹ *California Proposition 8, Same-Sex Marriage Ban Initiative (2008)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_8_Same-Sex_Marriage_Ban_Initiative_\(2008\)](https://ballotpedia.org/California_Proposition_8_Same-Sex_Marriage_Ban_Initiative_(2008)) (last visited Oct. 15, 2024).

⁷² Compare NOVEMBER 2008 VOTER GUIDE, *supra* note 69, at 56 (argument in favor signed by then-current president of California Family Council, with NOVEMBER 2024 VOTER GUIDE, *supra* note 1, at 5 (argument in opposition signed by current president of California Family Council).

⁷³ NOVEMBER 2008 VOTER GUIDE, *supra* note 69, at 56.

⁷⁴ *Id.*

⁷⁵ *Id.* (proponents citing CAL. FAM. CODE § 297.5).

education organizations, including Equality California (EQCA).⁷⁶ Additionally, Associate Professor of Law Rachael Salcido of McGeorge School of Law signed on to the rebuttal to argument in favor of Proposition 8 in the Secretary of State’s Official Voter Information Guide.⁷⁷

Opponents of the measure framed the proposition as a violation of equal protection, in line with what the California Supreme Court held when considering Proposition 22 in *Marriage Cases*.⁷⁸ They argued that Proposition 8 would “mandate[] one set of rules for [same-sex] couples and another set for everyone else”, adding that California laws should treat everyone equally.⁷⁹ Opponents also added that, although legislation attempted to address the issue of hospital visitation for domestic partners in 2001⁸⁰, the confusion of rights and procedures for domestic partners in healthcare settings was inadequate compared to the “certainty and the security” of marriage.⁸¹

The measure passed with 7,001,084 yes votes (52.24%) to 6,401,482 no votes (47.76%) and remained in effect until June 28, 2013.⁸² The constitutional amendment enacted by the initiative, though now unenforceable, remains in the California Constitution today.⁸³

6. *Strauss v. Horton (2009)*

The day after the November 2008 election, three lawsuits challenging Proposition 8 were filed directly in the California Supreme Court.⁸⁴ The court ordered three issues to be briefed and argued: 1) if Proposition 8 was a revision rather than an amendment, 2) if the measure violated separation-of-powers doctrine, and 3) what the effect the measure would have on existing same-sex marriages in the state.⁸⁵ After hearing oral arguments, the Supreme Court, upheld Proposition 8 in a 6-1 decision, but held, unanimously, that the same-sex marriages performed in California before the passage of Proposition 8 remained valid.⁸⁶ The court reasoned that Proposition 8

⁷⁶ Compare Proposition 8, BALLOTPEDIA, *supra* note 71 (listing EQCA as opponent), with California Proposition 3, Right to Marry and Repeal Proposition 8 Amendment (2024), BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_3,_Right_to_Marry_and_Repeal_Proposition_8_Amendment_\(2024\)](https://ballotpedia.org/California_Proposition_3,_Right_to_Marry_and_Repeal_Proposition_8_Amendment_(2024)) (last visited Oct. 15, 2024) (listing EQCA as supporter).

⁷⁷ NOVEMBER 2008 VOTER GUIDE, *supra* note 69, at 56.

For further discussion on the significant impact of University of Pacific – McGeorge School of Law faculty, staff, and alumni on the development of same-sex marriage law in the State of California *see generally* William Eskridge, Jr., Prof. of Pub. L., Yale L. Sch., Centennial Speaker Series: McGeorge and Marriage Equality “McMarriage Equality” (Sept. 18, 2024), (on file with the *California Initiative Review*).

⁷⁸ *Marriage Cases*, 43 Cal. 4th at 830–31.

⁷⁹ NOVEMBER 2008 VOTER GUIDE, *supra* note 69, at 57.

⁸⁰ AB 25, 2001 Leg., 2001–2002 Reg. Sess. (Cal. 2001).

⁸¹ NOVEMBER 2008 VOTER GUIDE, *supra* note 69, at 57.

⁸² *California Proposition 8*, BALLOTPEDIA, *supra* note 71.

⁸³ ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ACA 5, *supra* note 13, at 1.

⁸⁴ Jud. Council of Cal., *Proposition 8 Cases - Background*, CAL. CTS., <https://www.courts.ca.gov/6465.htm> (last visited Oct. 15, 2024).

⁸⁵ News Release from Lynn Holton, Pub. Info. Officer, Jud. Council of Cal. (No. 66, Nov. 19, 2008) *available at* <https://www.courts.ca.gov/documents/NR66-08.PDF> (last visited Oct. 15, 2024).

⁸⁶ ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ACA 5, *supra* note 13, at 4.

narrowly restricted the use of the term marriage to opposite-sex couple, while not otherwise affecting “the fundamental constitutional rights of same-sex couples” described in *Marriage Cases*.⁸⁷

D. 2010’s–2022, Part 1: The Law of the Golden State

1. *Brown & Hollingsworth & Perry & Schwarzenegger*⁸⁸

The California Supreme Court in *Strauss v. Horton* heard the challenges to Proposition 8 based solely on the provisions of the California Constitution.⁸⁹ Before the state court issued its decision, marriage equality advocates sued to challenge the measure’s constitutionality in the federal courts, on grounds that it violated the Due Process Clause and Equal Protection Clause of the United States Constitution.⁹⁰ Similarly to the Obama Administration’s decision regarding DOMA, discussed below, neither then-Governor Schwarzenegger nor then-Attorney General Jerry Brown would defend Proposition 8 before the federal court.⁹¹ The official proponents of Proposition 8 intervened on behalf of the defendants, and the City and County of San Francisco intervened on behalf of the plaintiffs.⁹²

After a thirteen-day trial on the constitutionality of Proposition 8, the federal district court concluded that Proposition 8 was unconstitutional, violating both the federal due process and the equal protection clauses.⁹³ The district court used heightened scrutiny in its determination, but found that the amendment did not even survive rational basis review.⁹⁴

On appeal, the Court of Appeals for the Ninth Circuit affirmed the decision of the district court finding Proposition 8 to be unconstitutional under rational basis review.⁹⁵ The Ninth Circuit’s reasoning focused on the fact that voters had eliminated the right of same-sex couples’ to marry

⁸⁷ News Release from Lynn Holton, Pub. Info. Officer, Jud. Council of Cal. (No. 29, May 26, 2009) available at <https://www.courts.ca.gov/documents/NR29-09.PDF> (last visited Oct. 15, 2024) (summarizing *Strauss v. Horton*, 46 Cal. 4th 364 (2009)).

⁸⁸ This article limits discussion of the Ninth Circuit’s ruling on the constitutionality of Proposition 8 (2008) to the merits, as that is most relevant to the informed voter in the opinion of the co-authors. A significant question of civil procedure arose out of the named defendants’ decision not to appeal the district court’s ruling in favor of the petitioner, even though the intervenors filed a notice to appeal. *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011) [*Perry II*]. For a thorough and concise explanation of the jurisdictional issues related to the Ninth Circuit hearing the Proponents’ appeal under Article III of the U.S. Constitution, and the California Supreme Court’s findings on the matter, see generally Letter from Kamala D. Harris, Att’y Gen., Cal. Off. of the Att’y Gen., to Edmund G. Brown Jr., Governor of Cal. (June 3, 2013) available at https://oag.ca.gov/system/files/attachments/press_releases/AG%20Advice%20Letter%20to%20Gov%20Brown%20Re%20Prop%208%20%281%29.pdf (last visited Oct. 15, 2024).

⁸⁹ *Id.*

⁹⁰ SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF ACA 5, at 3 (July 7, 2023).

⁹¹ BALL, *supra* note 18, at 491.

⁹² Letter from Kamala D. Harris to Edmund G. Brown Jr., *supra* note 88, at 2.

⁹³ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) [*Perry I*].

⁹⁴ *Id.*

⁹⁵ *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) [*Perry IV*].

found in *Marriage Cases*, but maintained the rights and responsibilities of marriage within the domestic partnership scheme.⁹⁶ The court asserted that the initiative was failed rational basis review because its only purpose was to “officially reclassify [same-sex couples’] relationships and family as inferior to those of opposite-sex couples.”⁹⁷

The United States Supreme Court granted certiorari, but did not ultimately address the merits of same-sex marriage, instead dismissing, five votes to four, an effort to appeal the Ninth Circuit ruling on the ground that petitioner lacked standing.⁹⁸ The Supreme Court accordingly vacated the ruling of the Ninth Circuit, leaving the district court decision “the decisive ruling in the case.”⁹⁹ Thus, after 2013, while the language added by Proposition 8 was still in Article 1, Section 7.5 of the California Constitution, it was no longer enforceable.¹⁰⁰

2. *Legalization of Same-Sex Marriage in California*

On June 28, 2013, California began allowing same-sex couples to marry and began recognizing marriages between same sex couples from other states.¹⁰¹ In the upper chamber, after having completed his service in the California State Assembly, then-State Senator Mark Leno introduced SB 1306 with the goal to “clarify that all laws relating to marriage and the rights and responsibilities of spouses apply equally to opposite-sex and same-sex spouses.”¹⁰²

E. 2010’s–2022, Part 2: The Law of the Land

1. *The End of DOMA in Windsor (2013)*

In 2011, President Barack Obama directed the Justice Department to stop defending DOMA in court.¹⁰³ Attorney General Eric Holder announced the decision in a letter to Speaker of the House John Boehner in light of the conclusion that sexual orientation-based classifications merit heightened scrutiny, and therefore “a crucial provision of the Defense of Marriage Act ‘is unconstitutional’.”¹⁰⁴ The Second Circuit Court of Appeals, agreeing with the determination of the Justice Department, held that intermediate scrutiny should apply to classifications based on sexual orientation, and thus found Section 3 of DOMA unconstitutional.¹⁰⁵

⁹⁶ BALL, *supra* note 18, at 492.

⁹⁷ *Perry IV*, 671 F. 3d at 1064.

⁹⁸ *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

⁹⁹ BALL, *supra* note 18, at 492.

¹⁰⁰ SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF ACA 5, *supra* note 90.

¹⁰¹ ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF ACA 5, *supra* note 13, at 6.

¹⁰² SB 1306, 2014 Leg., 2013–2014 Reg. Sess. (Cal. 2014), at § 1.

¹⁰³ Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 23, 2011, <https://www.nytimes.com/2011/02/24/us/24marriage.html> (last accessed Oct. 15, 2024).

¹⁰⁴ *Id.*

¹⁰⁵ *Windsor v. United States*, 699 F.3d 169, 185–188 (2d Cir. 2012).

The U.S. Supreme Court granted certiorari and considered whether the discriminatory exclusion of spouses in same-sex marriages from the federal rights and responsibilities that come from federal recognition of their marriages was justified by a legitimate purpose.¹⁰⁶ On the same day that the Supreme Court issued its opinion in *Hollingsworth*, it also issued its opinion in *United States v. Windsor*.¹⁰⁷ In a majority opinion delivered by Justice Kennedy, the court invoked the Equal Protection Clause to ultimately strike down Section 3 of DOMA nationwide.¹⁰⁸

Similarly to the effects of *Hollingsworth* on the language of Proposition 8 (2008) in California, *Windsor* did not remove Section 3 of DOMA from Title 1, but the federal law protected same-sex marriages from denial of federal recognition.

2. *Obergefell v. Hodges* (2015)

In the wake of *Windsor*, litigation over marriage equality spread to more and more states, with challengers asserting both a fundamental right to marriage and federal equal protection under the U.S. Constitution.¹⁰⁹ While many appellate courts ruled in favor of same-sex couples, eventually the Court of Appeals for the Sixth Circuit rules against same-sex couples in a consolidation case.¹¹⁰ The Supreme Court granted certiorari to hear an appeal in what we now know as *Obergefell v. Hodges*.¹¹¹

Five votes to four, the Supreme Court in *Obergefell* found that the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment provided LGBTQ individuals a fundamental right to marry, and that no state law banning same-sex marriage is Constitutional.¹¹² The court further held that no state may refuse to recognize a lawful same-sex marriage performed in another State on the grounds that it is a same-sex marriage, effectively making marriage equality the law of the land.¹¹³

F. 2020's: *Dobbs* and Its Aftermath

In the recent Supreme Court opinion in *Dobbs v. Jackson Women's Health Organization*, the Court held that the U.S. Constitution does not confer a right to an abortion because the U.S. Constitution does not mention abortion.¹¹⁴ Like the protections for same-sex and interracial marriage, the federal protection for abortion was only found in caselaw, so the ruling took away the federal protection for abortion, giving power to each state's government to decide whether they want to protect or prohibit abortion in their state.¹¹⁵ In a concurrence, Associate U.S. Supreme

¹⁰⁶ *United States v. Windsor*, 570 U.S. 744 (2013).

¹⁰⁷ BALL, *supra* note 18, at 490.

¹⁰⁸ *Windsor*, 570 U.S. at 775.

¹⁰⁹ BALL, *supra* note 18, at 491.

¹¹⁰ *DeBoer v. Snyder*, 772 F. 3d 388 (6th Cir. 2014).

¹¹¹ 576 U.S. 644 (2015).

¹¹² *Id.* at 675.

¹¹³ *Id.* at 681.

¹¹⁴ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

¹¹⁵ *Id.*

Court Justice Clarence Thomas suggested that the Supreme Court’s holding in *Dobbs* required reconsideration of other cases that relied on federal substantive due process.¹¹⁶ Two of the foundational cases for marriage equality discussed above, *Loving* and *Obergefell*, are supported by substantive due process.¹¹⁷

1. *Respect for Marriage Act (2022)*

The Respect for Marriage Act (RMA) formally replaced provisions of DOMA found unconstitutional in *Windsor* and amended the definitions in Title 1 of the U.S. Code to state an individual shall be considered married if that individual’s marriage is between two individuals and is valid in the State where the marriage was entered into; furthermore, the bill requires states to give full faith and credit to marriages validly entered into in another jurisdiction.¹¹⁸ Congress passed the Respect for Marriage Act (RMA) in the wake of the *Dobbs* decision for similar reasons as stated behind the need for Proposition 3. To overcome thresholds of support needed for RMA to be heard in the Senate, Democratic and Republican senators reached agreement on an amendment to the bill that explicitly exempts religious institutions from the obligation to recognize same-sex unions.¹¹⁹

2. “Mirror” Ballot Measures

Concerns about the loss of federal protections for marriage equality included in substantive due process have been felt elsewhere. Like California, twenty-nine states have constitutional amendments banning same-sex marriages, each having been unenforceable under federal law since 2015’s *Obergefell* decision.¹²⁰ Three very similar legislatively referred constitutional amendments, including California’s, are on their states’ respective ballots this General Election.¹²¹ So far, Nevada is the only state that has explicitly repealed or amended an enacted prohibition on same-sex marriage.¹²²

¹¹⁶ *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) (“For that reason, in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous,’ we have a duty to ‘correct the error’ established in those precedents” (internal citations omitted)).

¹¹⁷ See *Substantive Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/substantive_due_process (last visited Oct. 15, 2024) (listing out the fundamental rights included in substantive due process jurisprudence).

¹¹⁸ Respect for Marriage Act §§ 3–5.

¹¹⁹ Respect for Marriage Act § 6; Annie Karni, *Same-Sex Marriage Rights Bill Clears a Crucial Senate Hurdle*, N.Y. TIMES (updated Dec. 5, 2022), <https://www.nytimes.com/2022/11/16/us/politics/same-sex-marriage-bill-senate.html> (last visited Oct. 15, 2024).

¹²⁰ *California Proposition 3*, BALLOTEDIA, *supra* note 76.

¹²¹ *California Proposition 3*, BALLOTEDIA, *supra* note 76.

¹²² Nev. Question 2 (2020).

a. Nevada: Marriage Regardless of Gender Amendment (2020)

Nevada Question 2, the Marriage Regardless of Gender Amendment, was on the ballot in Nevada as a legislatively referred constitutional amendment on November 3, 2020.¹²³ It was approved by the voters with 821,050 (62.43%) yes votes to 494,186 (37.57%) no votes.¹²⁴ The Unique to Nevada’s measure is a specific provision reiterating exceptions for religious organizations and foreclosing a private cause of action “against a religious organization or member of the clergy” for refusal to solemnize a marriage.¹²⁵

b. Hawai’i: Remove Legislature Authority to Limit Marriage to Opposite-Sex Couples Amendment (2024)

The Hawaii Remove Legislature Authority to Limit Marriage to Opposite-Sex Couples Amendment is on the ballot in Hawai’i as a legislatively referred constitutional amendment on November 5, 2024.¹²⁶ This amendment would repeal the legislative authority to withhold marriage from same-sex couples granted by Question 2 (1998) but would not add any further provisions to the Hawai’i Constitution.¹²⁷

c. Colorado: Remove Constitutional Same-Sex Marriage Ban Amendment (2024)

Colorado Amendment J, the Remove Constitutional Same-Sex Marriage Ban Amendment, is on the ballot in Colorado as a legislatively referred constitutional amendment on November 5, 2024.¹²⁸ The amendment would repeal article II, section 31 of the Colorado Constitution defining marriage as “only a union of one man and one woman shall be valid or recognized as a marriage in this state”, but would not add any additional provisions.¹²⁹

¹²³ *Nevada Question 2, Marriage Regardless of Gender Amendment (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Nevada_Question_2_Marriage_Regardless_of_Gender_Amendment_\(2020\)](https://ballotpedia.org/Nevada_Question_2_Marriage_Regardless_of_Gender_Amendment_(2020)) (last visited Oct. 15, 2024).

¹²⁴ Nev. Question 2 (2020).

¹²⁵ *Id.*

¹²⁶ *Hawaii Remove Legislature Authority to Limit Marriage to Opposite-Sex Couples Amendment (2024)*, BALLOTPEDIA, [https://ballotpedia.org/Hawaii_Remove_Legislature_Authority_to_Limit_Marriage_to_Opposite-Sex_Couples_Amendment_\(2024\)](https://ballotpedia.org/Hawaii_Remove_Legislature_Authority_to_Limit_Marriage_to_Opposite-Sex_Couples_Amendment_(2024)) (last visited Oct. 15, 2024).

¹²⁷ *Id.*

¹²⁸ *Colorado Amendment J, Remove Constitutional Same-Sex Marriage Ban Amendment (2024)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado_Amendment_J_Remove_Constitutional_Same-Sex_Marriage_Ban_Amendment_\(2024\)](https://ballotpedia.org/Colorado_Amendment_J_Remove_Constitutional_Same-Sex_Marriage_Ban_Amendment_(2024)) (last visited Oct. 15, 2024).

¹²⁹ Colo. Amendment J (2024).

III. PROPOSED LAW

Proposition 3 would amend the California Constitution to repeal Section 7.5 of Article 1 stating:

Only marriage between a man and a woman is valid or recognized in California.

And to add Section 7.5 to Article 1 stating:

- (a) The right to marry is a fundamental right.
- (b) This section is in furtherance of both of the following:
 - (1) The inalienable rights to enjoy life and liberty and to pursue and obtain safety, happiness, and privacy guaranteed by Section 1.
 - (2) The rights to due process and equal protection guaranteed by Section 7.¹³⁰

Stated differently, Proposition 3 would repeal the ban on same-sex marriage added into the California Constitution by Proposition 8 (2008) and found unconstitutional in *Perry v. Schwarzenegger* (2010) by the U.S. District Court for the Northern District of California. Proposition 3 would also add an enumerated right to marriage and dictate the right's basis in privacy rights and the due process and equal protection clauses of the California Constitutions.

IV. DRAFTING ISSUES

The legislative history of ACA 5 (2023) shows that the authors first introduced it as a “spot bill” pursuant to the Standing Rules of the Assembly, allowing for its introduction while still drafting statutory language.¹³¹ The original language of the spot bill stated that “[i]t is the intent of the Legislature to amend the Constitution of the State relating to marriage equality.”¹³² The amendment history of ACA 5 (2023), as indexed by the California Legislative Information System, shows only one amendment.¹³³ Prior to the hearing in the Assembly Judiciary Committee, the bill was amended by the author to the current text of Proposition 3.¹³⁴

¹³⁰ Cal. Proposition 3 (2024).

¹³¹ See HR 2, 2022 Leg., 2021–2022 Reg. Sess. (Cal. 2022) (procedure for “Spot Bills” at R. 51.5.A).

¹³² Compare Versions of ACA 5, https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=202320240ACA5&cversion=20230ACA599INT (last visited Oct. 15, 2024) (“07/20/23 – Chaptered” compared to “02/14/23 – Introduced”).

¹³³ Complete Bill History of ACA 5, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=202320240ACA5 (last visited Oct. 15, 2024).

¹³⁴ *Id.*

Like concerns from abortion access proponents about the drafting of Proposition 1 (2022), proponents of marriage equality express concern that the provisions of Proposition 3 are too broad.¹³⁵

V. CONSTITUTIONAL ISSUES

In *Strauss v. Horton*, challengers of Proposition 8 (2008) asserted that the measure was impermissibly enacted.¹³⁶ Ballot initiatives are required to go through different processes for enactment depending on if they are amendments or revisions.¹³⁷ Opponents of Proposition 3 would certainly argue that the initiative was not an amendment but a revision, thus requiring a higher threshold for passage; however, such a claim is not at issue here. Proposition 3 went through the appropriate process for passage as a revision, earning 2/3 vote in each house of the legislature and awaiting passage by the voters. Therefore, it is not a revision in the guise of an amendment, but rather a revision on its face.

According to the United States Constitution, federal law is supreme to any state law.¹³⁸ This means if a state law is in conflict with a valid federal law, then the federal law is the governing law.¹³⁹ California can enumerate a fundamental right to marriage in its own constitution because such a right would not be inconsistent with the federal fundamental right to marriage recognized in *Obergefell*.¹⁴⁰ Furthermore, the RMA enacted provisions with an eye towards a patchwork of different protections for same-sex marriage, so it would not be in conflict with existing statute to have an enumerated right to marriage in the California Constitution, even in the event that *Obergefell* and even *Loving* are overruled. Therefore, there is unlikely to be a Supremacy Clause issue with Proposition 3.

Though Proposition 3 itself is not implicated, in modern jurisprudence, same-sex marriage is often at issue in claims arising under the First Amendment's Free Exercise Clause, especially when individuals who provide wedding-related services are penalized for withholding such services from same-sex couples based on philosophical and religious beliefs.¹⁴¹ Individuals are

¹³⁵ Cf. Alek Kocher et al., *Proposition 1: Constitution Right To Reproductive Freedom*, CAL. INIT. REV., (Fall 2022), at 6, available at <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1105&context=california-initiative-review> (last visited Oct. 15, 2024) (explaining pro-choice voters' concerns about the drafting choices made by the authors of Senate Constitutional Amendment 10 when establishing a broad constitutional right to reproductive freedom).

¹³⁶ *Strauss*, 46 Cal. 4th at 364.

¹³⁷ CAL. CONST. art. XVIII.

¹³⁸ U.S. CONST. art. VI, cl 2.

¹³⁹ E.g., *Gibbons v. Ogden*, 22 U.S. 1 (1824) (“But the framers of our constitution [...] declar[ed] the supremacy not only of itself, but of the laws made in pursuance of it.”).

¹⁴⁰ *Obergefell*, 576 U.S. at 681.

¹⁴¹ See *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018) (Cake shop and its owner sought review of the Colorado Civil Rights Commission's decision and issuance of cease and desist order, in a proceeding arising from shop's refusal to sell a wedding cake to a same-sex couple, requiring shop and owner not to violate Colorado Anti-Discrimination Act (CADA) by discriminating against potential customers because of their sexual orientation); *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269 (2019) (Designers of custom wedding invitations brought action against city for declaratory and injunctive relief, alleging that ordinance, precluding discrimination on basis of sexual orientation, violated designers' right to free speech and their free exercise right under Free Exercise of Religion Act (FERA)); cf. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023)

able to file complaints in court when their rights are being infringed upon, and an enumerated right to marriage in the California Constitution may increase potential right/counter-right litigation.¹⁴² Though likely that such litigation is more likely to occur, it is unlikely that a case can be brought against the statute itself. A constitutional challenge would have to assert that the enumeration of marriage as a right is a violation of plaintiff's own rights, but the text of Proposition 3 includes the right to marriage in Sections 1 and 7 of the California Constitution. Therefore, it is unlikely that an individual might prevail on a challenge against the amendment.

VI. PUBLIC POLICY ISSUES

A. Proponents' Public Policy Argument

“Proposition 3 protects Californians’ freedom to marry, regardless of their race or gender. Proposition 3 removes discriminatory language from the California Constitution stating marriage is only between a man and a woman. Proposition 3 reinforces California’s commitment to civil rights and protects personal freedom. Vote YES! YesonProp3CA.com”¹⁴³

The argument in favor of Proposition 3 in the Secretary of State’s Official Voter Information Guide is signed by Assemblymember Evan Low, Executive Director of Equality California (EQCA), Tony Hoang, and CEO of Planned Parenthood Affiliates of California Jodi Hicks. Proponents argue that Proposition 3 would update the California Constitution to reflect the current application of federal law related to marriage and “[the voters’] values as Californians.”¹⁴⁴

Though not explicitly stated, proponents point to the suggestion that marriage may not continue to be a recognized fundamental right within the U.S. Constitution in a concurring opinion in *Dobbs*.¹⁴⁵ This same insinuation that federal protections will make state laws prohibiting same-sex marriage enforceable is parallel to supporting arguments of Proposition 1 (addressing reproductive freedom) this past election cycle.¹⁴⁶ Allusion to this potential loss of federal

(The sole member-owner of limited liability company (LLC) that provided website and graphic design services and which sought to enter the wedding website business, together with the company, brought pre-enforcement action against members of the Colorado Civil Rights Commission (CCRC) and the Colorado Attorney General, seeking to enjoin the defendants from forcing the plaintiffs, through enforcement of the Colorado Anti-Discrimination Act (CADA), to convey on wedding websites messages inconsistent with the member-owner's belief that same-sex marriage is “false”).

¹⁴² For more on the right/counter-right legal theory in gay marriage jurisprudence, *see generally* LIBBY S. ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM ch. 2, 89-98 (2018).

¹⁴³ NOVEMBER 2024 VOTER GUIDE, *supra* note 1, at 5.

¹⁴⁴ *Id.* at 22.

¹⁴⁵ *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring) (“For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous,’ we have a duty to ‘correct the error’ established in those precedents” (internal citations omitted)).

¹⁴⁶ *See* Kocher et al., *supra* note 135.

protections for marriage rights “[has] made it clear California must be proactive in protecting the freedom to marry[.]”¹⁴⁷

The rebuttal to the argument against Proposition 3 in the Secretary of State’s Official Voter Information Guide is signed by Senator Scott Wiener, Human Rights Campaign Senior Regional Organizing Lead Mia Kirby, and TransLatin@ Coalition Vice President Maria Roman.¹⁴⁸ Proponents counter that Proposition 3 does not alter California laws related to consent to marriage and prohibition against polygamy, a concern raised by opponents of the initiative.¹⁴⁹ Proponents also attest that freedom of religion concerns are misplaced as the initiative “would not change the existing rights of clergy and religious denominations to refuse to perform a marriage.”¹⁵⁰

B. Opponents’ Public Policy Argument

“Proposition 3 removes all rules for marriage, opening the door to child marriages, incest, and polygamy. It changes California’s constitution even though same-sex marriage is already legal. By making moms and dads optional, it puts children at risk. This careless measure harms families and society. Vote No on Proposition 3.”¹⁵¹

The argument against Proposition 3 in the Secretary of State’s Official Voter Information Guide is signed by California Family Council President Jonathan Keller and The American Council for Evangelicals President Tanner DiBella. Opponents argue that the broad language of Proposition 3 changes the definition of marriage in unanticipated ways and that “[a] ‘fundamental right’ to marry [...] would remove protections against child marriages, incest, and polygamy.”¹⁵²

Opponents reiterate that access to same-sex marriage has been protected at the federal level by Supreme Court precedent since 2015 and that amending the California Constitution through Proposition 3 in anticipation of a reversal is unnecessarily “fixing a problem that doesn’t exist and is instead causing HARM.”¹⁵³ The opponents of the measure assert that “by changing the definition of marriage, [Proposition 3] suggests that children don’t need both a mom and a dad.” Opponents allege that children without both a mother and a father have worse emotional, behavioral, academic, and financial outcomes, and that removing the unenforceable marriage provision would increase risks.¹⁵⁴

The rebuttal to argument in favor of Proposition 3 in the Secretary of State’s Official Voter Information Guide is signed again by Presidents Keller and DiBella, with DiBella signing here as

¹⁴⁷ NOVEMBER 2024 VOTER GUIDE, *supra* note 1, at 23.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 22.

¹⁵¹ NOVEMBER 2024 VOTER GUIDE, *supra* note 1, at 5.

¹⁵² *Id.* at 23.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

“Rev. Tanner DiBella, Founder // The American Council for Evangelicals”.¹⁵⁵ Opponents counter that Proposition 3 is not necessary to prevent discrimination because same-sex marriage is federally protected and the Supreme Court is not trying to change that, a concern raised by opponents of the initiative.¹⁵⁶ Opponents also attest that Californians can care about civil rights and fairness and protect equal rights, but the language of Proposition 3 “puts what adults want ahead of what children need.”¹⁵⁷

VII. CAMPAIGN FINANCE

Freedom to Marry, which is reported to be led by EQCA, the national Human Rights Campaign, and TransLatin@ Coalition, led the campaign to promote the passage of ACA 5 (2023).¹⁵⁸ Yes on Proposition 3, Sponsored by EQCA and Kevin De Leon Believing in a Better California Ballot Measure Committee - Yes on Propositions 3, 32, and 33 (“BBCA”) are the committees registered in support of Proposition 3. EQCA reports \$2,246,806.83 in total contributions between January 1, 2024, and September 21, 2024.¹⁵⁹ BBCA reports \$550,000.00 in total contributions between January 1, 2024, and September 21, 2024, though the committee’s expenditures are not distinguished between support for Proposition 3 and other ballot measures.¹⁶⁰ It is reported the top contribution of \$1M was made to EQCA by the Federated Indians of Graton Rancheria, based in Rohnert Park, CA.¹⁶¹

Meanwhile, opponents of Proposition 3 have spent \$0 against it.¹⁶²

VIII. FISCAL CONSIDERATION

Proposition 3 would not change who is allowed to marry in California. This means there would be no change in revenues or costs to state and local governments.¹⁶³

¹⁵⁵ *Id.* at 22.

¹⁵⁶ *Id.*

¹⁵⁷ NOVEMBER 2024 VOTER GUIDE, *supra* note 1, at 22.

¹⁵⁸ BAR Ed. Bd., *Editorial: EQCA must ‘be bold’ on ballot measure*, BAY AREA REPORTER (May 22, 2024), <https://www.ebar.com/story.php?ch=opinion&id=333341> (last visited Oct. 15, 2024).

¹⁵⁹ *Campaign Finance: Yes on Proposition 3, Sponsored by Equality California*, CAL. SEC’Y OF STATE: CAL-ACCESS, <https://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1340742&session=2023&type=monetary&view=general> (last visited Oct. 15, 2024).

¹⁶⁰ *Campaign Finance: De Leon Believing in a Better California Ballot Measure Committee – Yes on Propositions 3, 32, and 33*, CAL. SEC’Y OF STATE: CAL-ACCESS, <https://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1297793&session=2023&view=general> (last visited Oct. 15, 2024).

¹⁶¹ *Campaign Finance: Yes on Proposition 3, Sponsored by Equality California*, CAL. SEC’Y OF STATE: CAL-ACCESS, <https://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1340742&session=2023&type=monetary&view=late1> (last visited Oct. 15, 2024).

¹⁶² *Campaign Finance: Proposition 003 – ACA 5*, CAL. SEC’Y OF STATE: CAL-ACCESS, <https://cal-access.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1470591&session=2023> (last visited Oct. 15, 2024).

¹⁶³ *Proposition 3 Analysis*, CAL. SEC’Y OF STATE, <https://voterguide.sos.ca.gov/propositions/3/analysis.htm> (last visited Oct. 15, 2024).

IX. CONCLUSION

Proposition 3 aims to ensure that the position of California as a state that provides extra protection to marriage equality is clear regardless of whether federal protections or definitions backslide. Although this measure would not functionally change who can marry, this measure would align the text of the California Constitution with the current law. Proposition 3 will do so by repealing an unenforceable section of the state constitution and adding a section recognizing marriage as a fundamental right.

A **YES** vote for Proposition 3 would repeal an unenforceable limitation on marriage enacted by the voters in Proposition 8 (2008) and recognize marriage as an enumerated fundamental right in the California Constitution. There would be no change in who can marry.

A **NO** vote for Proposition 3 would leave in place the unenforceable limitation on marriage enacted by the voters in Proposition 8 (2008). Marriage would remain an implied fundamental right under the federal and California Constitution. There would be no change in who can marry.