

## Proposition 8—End It and Mend It

By David A. Kaiser and David A. Carrillo | February 28, 2023 at 02:06 PM

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California state Sen. Scott Wiener and Assemblymember Evan Low recently introduced Assembly Constitutional Amendment 5 (ACA 5) to repeal Proposition 8, the 2008 ballot initiative that banned same-sex marriage in California by adding Article I, Section 7.5 to the state constitution: “Only marriage between a man and a woman is valid or recognized in California.”

Proposition 8 was a response to the California Supreme Court decision *In re Marriage Cases* (2008) 43 Cal.4th 757, which found a state constitutional right to same-sex marriage. Proposition 8 was ultimately abrogated in 2015 by the U.S. Supreme Court, which held in *Obergefell v. Hodges* (2015) 576 U.S. 644, that the fundamental right to marry under the federal constitution includes same-sex couples. Because of the supremacy clause, the federal constitutional right to same-sex marriage supersedes Proposition 8’s state constitutional restriction.

But Proposition 8 is still a live grenade. The language Proposition 8 installed in Article I, Section 7.5 is still in the California Constitution—ready to spring back to life if federal law changes. That seemingly remote possibility became all too real when the U.S. Supreme Court’s *Dobbs v. Jackson* decision overturned the longstanding judicially-recognized federal right to abortion. In a concurring opinion to *Dobbs*, Justice Clarence Thomas speculated that other judicially recognized federal constitutional rights, including that of same-sex marriage, could also be reconsidered.

Reasonable minds now are justified in wondering whether *Obergefell* is at risk, and Proposition 8 could be reanimated. True, the federal Respect for Marriage Act now requires the federal government to recognize same-sex and interracial marriages, and affirms that states must recognize valid marriage licenses from other states. But that law does not require states to issue marriage licenses to same-sex couples. So if the U.S. Supreme Court abrogates *Obergefell*, as it did *Roe*, then the now-dormant Proposition 8 text in the California constitution will once again ban same-sex marriage in California.

Against this background, ACA 5 currently states:

“The California Constitution declares that defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy are inalienable rights, and that a person may not be deprived of life, liberty, or property without due process of law or equal protection of the laws. This measure would express the intent of the Legislature to amend the Constitution of the State relating to marriage equality.”

The current language of ACA 5 appears to be a placeholder while the bill moves through the legislative process. It surely will be amended, and in that process ACA 5 could achieve two things for marriage equality: remove the language of Proposition 8 from the state constitution, and add new language to the state constitution affirming the right to same-sex marriage.

ACA 5 should do both. Wiener recently suggested that it is sufficient to remove the language of Proposition 8—but that is inadequate. Merely striking the Proposition 8 text only removes the existing ban on same-sex marriage. With that gone, the state of the law arguably reverts to *In re Marriage Cases*, which invalidated a statutory ban on same-sex marriage and instead endorsed a fundamental state right to marriage equality. Even so, the legal authority of *In re Marriage Cases* is only a judicial declaration of a fundamental right, just as *Roe v. Wade* was. The same *Roe–Dobbs* problem presents here too: A right that depends for its existence on a judicial declaration is always at risk from a new judicial interpretation.

Safer, then, to enshrine the right in the state constitution, especially if one is doing an amendment on the subject anyway. If ACA 5 is taking the trouble of removing Proposition 8 from the California constitution it should go the extra yard and add express protection for same-sex marriage.

Of course, doing so risks unforeseen consequences. For example, a too-broadly written right to marriage could open the door to any number of people marrying any other number of people—even non-humans or inanimate objects. Concerns over a too-broadly written constitutional right to marriage could generate political opposition. Even *In re Marriage Cases* and *Obergefell* only extended marriage to two humans (of the same sex) and left in place other traditional legal restrictions on marriage such as degree of family consanguinity.

We drafted some language that avoids these dangers. Instead of removing Article I, Section 7.5, we would revise its content:

“Civil marriage in California cannot be restricted by law on the basis of the sex or gender of the two human beings seeking to marry each other.”

This provides that marriage cannot be denied to two people solely on the basis of their sex or gender, but marriage can continue to be limited by statute for other reasons: for example, only two, only human beings, or no first cousins. This proposal also accounts for nonbinary gender identities. By including sex and gender writ broadly the proposed language is open to non-binary persons, and it is unrestricted by sex or gender, thus allowing for whatever future changes society recognizes on that subject.

Our proposal (and others) surely will be debated, revised and amended. The point is to be forward-thinking and holistic about this opportunity, which may only come this once. Just as the U.S. Supreme Court changed its mind about *Roe*, a future California Supreme Court could change its mind about *In re Marriage Cases*. If you want to make sure you get what you want, put it in writing. If that advice is good enough for contracts, it is good enough for constitutions.

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