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Equal Rites and Equal Rights

Melissa Murray†

On May 15, 2008, the California Supreme Court handed down its much-anticipated decision in In re Marriage Cases. In a 4-3 decision authored by Chief Justice Ronald George, the Court struck down California’s existing laws limiting civil marriage to opposite-sex couples. In so doing, California became the second state in the nation to expand marriage to include same-sex couples.

In the days and weeks following the Court’s announcement, there has been considerable discussion of the decision and its ramifications in the state and national press. Most commentators have focused on the Court’s conclusion that a “separate but equal” comprehensive domestic partnership scheme denied same-sex couples the due process and equal protection rights guaranteed by California’s Constitution. Others have examined the Court’s unprecedented decision to recognize gays and lesbians as a suspect class, entitled to the most rigorous constitutional review. All agree that in expanding the scope of marriage and emphasizing the equal protection rights to which gays and lesbians are entitled, the Court’s decision is a monumental

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1. 43 Cal. 4th 757 (2008).
2. Id. at 855-57.
4. See, e.g., Bob Egelko, Making History: California Supreme Court, in 4-3 Decision, Strikes Down Law That Bans Marriage of Same-Sex Couples, S.F. CHRON., May 16, 2008 at A1 (discussing decision); Adam Liptak, A California Court Overturns A Ban on Gay Marriage, N.Y. TIMES, May 16, 2008, at A1 (same); Marriage Rights for All, L.A. TIMES, May 16, 2008 (same); Jesse McKinley, Gay Couples Celebrate; Both Sides See a Fight, N.Y. TIMES, May 16, 2008, at A19 (same).
achievement for the gay rights movement.

Certainly, In re Marriage Cases marks an important step forward in the fight for LGBT civil rights. However, in this remark, I argue that the decision's legacy goes beyond simply expanding marriage rights in California. Although the decision has been lauded as introducing same-sex marriage to California, it also permits the state, in the name of family equality, to eliminate the marriage label in favor of another status that would apply equally to same-sex and opposite-sex couples. In so doing, the decision provides a means of circumventing a pending ballot initiative in California, which would undermine the decision's force by amending the California Constitution to preclude same-sex marriage. Moreover, in making clear the constitutional commitment to family equality, the Court's decision invites us to confront important questions about marriage's role in securing equal rights and the state's role in ensuring equality in intimate life.

A. The Court's Decision

When the California Supreme Court handed down its decision on May 15, 2008, several other United States courts had considered the issue of gay marriage. Many, like New York, determined that the state could lawfully restrict marriage to opposite-sex couples. By contrast, in Vermont and New Jersey, the state supreme courts both concluded that the benefits and burdens of marriage had to be extended to same-sex couples. However, in both jurisdictions, the legislature's implementation of the judicial mandate resulted in the creation of civil unions—a separate status intended to confer marriage's privileges and duties to same-sex couples through a different institution. Only


7. See Baker, 744 A.2d at 867 (finding state ban on same-sex marriage unconstitutional); Lewis, 908 A.2d at 200 (requiring the rights and benefits of marriage be equally available to same-sex couples).

the Massachusetts Supreme Judicial Court's decision resulted in expanding
civil marriage to same-sex couples - and only after the Court, in an advisory
opinion, rejected the prospect of creating civil unions for same-sex couples.9

When the California Supreme Court faced the issue of gay marriage, the
statutory landscape was markedly different from that presented to the other
state courts. Unlike these other jurisdictions, California's family law had since
2005 included a "comprehensive" domestic partnership scheme that provided
same-sex couples with "all of the significant legal rights and obligations
traditionally associated . . . with the institution of marriage."10 Essentially, the
state had given same-sex couples the substance of marriage, but in a form
different from that offered to opposite-sex couples. Accordingly, the question
facing the California Supreme Court was not whether the state was required to
offer same-sex couples the same benefits and privileges as those enjoyed by
married opposite-sex couples. Under the domestic partnership scheme,
California had already done just that. Instead, the question was more narrow
and nuanced: "[W]hether . . . the failure to designate the official relationship of
same-sex couples as marriage violate[d] the California Constitution."11

In answering this question affirmatively, the Court concluded that the
distinction between domestic partnership and marriage violated the due process
and equal protection rights of gays and lesbians. As a due process issue, the
Court determined that "one of the core elements of [the state constitutional
right to marry] is the right of same-sex couples to have their official family
relationship accorded the same dignity, respect, and stature as that accorded to
all other officially recognized family relationships."12 By reserving the "historic
and highly respected"13 marriage label for opposite-sex couples and
denominating same-sex unions with the "new and unfamiliar"14 domestic
partnership label, the state risked denying "the official family relationship of
same-sex couples the equal dignity and respect that is a core element of the
constitutional right to marry."15

For equal protection purposes, the Court held that classifications based on
"sexual orientation, like gender, race, or religion,"16 were constitutionally

9. Goodridge, 798 N.E.2d 941; Opinions of the Justices to the Senate, 802 N.E.2d at 566-
72.
11. Id. at 780. Indeed, as the Court made clear from the outset, its task was not to determine
"whether we believe, as a matter of policy, that the officially recognized relationship of a same-
sex couple should be designated a marriage rather than a domestic partnership," but instead
"whether the difference in the official names of the relationships violates the California
Constitution." Id. (emphasis in original).
12. Id. at 830.
13. Id. at 831.
14. Id.
15. Id.
16. Id. at 844.
suspect and subject to strict scrutiny. Applying this rigorous standard, the Court analogized California's domestic partnership scheme to the "separate but equal" educational arrangements found unconstitutional by the United States Supreme Court in *Sweatt v. Painter* and *United States v. Virginia.* The distinction in nomenclature, the Court observed, presented the "significant risk" that domestic partnership would be "viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship." Because this risk was not offset by the state's interest in retaining the traditional definition of marriage — an interest the Court deemed insufficiently compelling — the Court struck down the offending distinction as unconstitutional.

Upon concluding that California's marriage laws violated the state Constitution, the Court turned to the question of the appropriate remedy. Ultimately, it determined that expanding the scope of civil marriage to include same-sex couples would comport with the Constitution's equality mandate and "would be most consistent with the likely intent of the Legislature, had that body recognized that unequal treatment was constitutionally impermissible." Indeed, the expansion of civil marriage to include same-sex couples had been approved by the state Legislature twice before in 2005 and 2007. In both cases, the laws were vetoed by the governor.

The emphasis on marriage as the appropriate remedy suggests its place as the primary marker of legitimate adult relationships. As the Court discussed,
if the Legislature had recognized that domestic partnerships were unconstitutional, its likely response would have been to expand marriage – as opposed to expanding domestic partnership – to all couples seeking state recognition of their relationships. Choosing marriage as the appropriate constitutional remedy reflects the cultural importance of marriage as a means of recognizing adult intimate relationships. But while equal access to marriage has been seen as the endgame for those seeking legal recognition of their relationships, the Court’s decision also suggests that it does not have to be.

B. An Alternative Path?

The Court’s opinion emphasizes that the state Constitution insists on family equality in substance and form. However, in mandating family equality for same-sex couples, the Constitution does not necessarily require that the vehicle for that equality be marriage. Neither does the Court’s decision. Although the Court acknowledges that “extending the designation of marriage to same-sex couples, rather than denying it to all couples,” is most consistent with California’s “legislative policy and preference,” this result is not a constitutional mandate and the Court does not make it one.

Instead, even as the Court expands civil marriage to include gays and lesbians, the decision gestures (perhaps unwittingly) towards an alternative path. Because the decision does not endorse any particular status for state recognition of adult intimate relationships, and requires only that the status selected be equally available to same-sex and opposite-sex couples alike, it permits the state to use a status other than marriage for recognizing adult intimate relationships. Accordingly, under the Court’s logic, expanding marriage to include same-sex couples is not the only option. The state could abandon the marriage label altogether and use some other status – for example, domestic partnership or civil union – as the vehicle for conferring the burdens and benefits of family and intimate association. All that is required, as a constitutional matter, is that the label be the same for all couples.

In gesturing towards this alternative mean of achieving equality, In re Marriage Cases goes farther than any other decision on the controversial and vexed question of gay marriage. Beyond simply extending the right to marry to a broader constituency, the Court’s insistence on equality for all couples leaves the door open for the state to abandon the marriage label in favor of another civil status.

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27. Id. at 856.
28. Of course, some would argue that the decision does not do enough to destabilize the notion of a single vehicle for state recognition of adult relationships. Some scholars have challenged marriage’s primacy and have argued for greater diversity in the legal recognition of adult relationships. I discuss some of these arguments briefly in Section C.
29. This, however, prompts the question of whether, upon recognizing a fundamental right
Looking beyond marriage appears even more pressing in light of the developments that have taken place since the Court announced its decision. Predictably, the decision has been accompanied by a flurry of preparations for the coming flood of same-sex marriages, and equally fervent efforts to reverse course and stop the recognition of same-sex marriages. Those who object to the decision and the expansion of civil marriage have coalesced around a particularly Californian response: the ballot initiative. When Californians go to the polls in November, they will have the option of voting to amend the state constitution to limit state recognition of marriage to opposite-sex unions.

If the ballot initiative successfully amends the state Constitution, it will effectively override the Court’s conclusion that excluding same-sex couples from civil marriage violates the California Constitution. However, the to marry, the state could abolish marriage as a legal status. Some scholars have argued that unlike “negative rights that protect citizens from excessive intrusion by the state in protected activities, such as the right of free speech, religion, or family privacy . . . the right to enter civil marriage is an affirmative right, defined solely by the government’s creation of the licensing system and of the status with its attendant legal attributes.” Elizabeth S. Scott, A World Without Marriage, 41 FAM. L.Q. 537, 545 (2007); see also Cass R. Sunstein, The Right to Marry, 26 CARDOZO L. REV. 2081, 2096 (2005) (analogizing the right to marry to the right to vote and arguing that “the ‘right to marry’ entails . . . an individual right of access to the official institution of marriage so long as the state provides that institution”). Under this view, the state is under no obligation to offer marriage licensing (and thus, could abolish marriage licensing altogether). However, if it is offered, it must be available equally.

In its decision, the Court reasoned that the right to marry goes beyond the procedural question of licensing and instead has “independent substantive content.” In re Marriage Cases, 43 Cal. 4th at 819. Consequently, under the Court’s analysis, the substantive content of this right “embodies fundamental interests of an individual that are protected from abrogation or elimination by the state.” Id. The Court’s distinction between the substantive content of marriage and the state’s role in licensing marriage might be seen as an attempt to avoid the difficult issues raised in the wake of the U.S. Supreme Court’s desegregation order in Brown v. Board of Education, 347 U.S. 483 (1954). Following Brown, many Southern municipalities responded to the Court’s order to integrate places of public accommodation by refusing to make such places available at all. Ultimately, the U.S. Supreme Court held that such a response did not violate the federal Equal Protection Clause. See Palmer v. Thompson, 403 U.S. 217 (1971) (holding that city’s decision to close a public swimming pool, rather than integrating it, did not violate the federal Equal Protection Clause).

30. Carolyn Marshall, California Sets June Date for Same-Sex Marriage Licenses, N.Y. TIMES, May 29, 2008, at A17 (describing the preparations, including the revision of licensing forms, for the advent of same-sex marriages).
31. Jesse McKinley, California Ruling on Same-Sex Marriage Fuels a Battle, Rather Than Ending It, N.Y. TIMES, May 18, 2008, at A18 (describing efforts to curb the decision’s force); Jesse McKinley, “I Do”? Oh, No. Not Here You Don’t, N.Y. TIMES, June 13, 2008, at A18 (discussing Kern County’s decision to stop performing marriages altogether, rather than perform same-sex unions); Jesse McKinley, States Seek Delay in California Marriage Ruling, N.Y. TIMES, May 31, 2008, at A10 (describing calls by the attorneys general of ten states to stay the Court’s decision).
32. The proposed amendment reads as follows: “Amends the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California.” Protect Marriage, Read the Initiative, http://www.protectmarriage.com/read.php (last visited July 19, 2008).
33. This leaves aside the question of whether the ballot initiative – or any future ballot
proposed amendment does not necessarily override the Constitution’s equality mandate. If the ballot initiative forecloses same-sex marriage, and thereby requires differential treatment of same-sex and opposite-sex couples with regard to access to marriage, the Court could conclude that in order to comply with the Constitution’s equality mandate, the state must find another rubric – other than marriage – through which to recognize adult intimate relationships. This would mean that, in the name of equality, the state could offer the substantive content of marriage, but must do so under another label that would apply to same-sex and opposite-sex couples alike. In noting that what is constitutionally required is conferring the benefits of marriage (the substance) to all couples in the same manner (the form), the Court’s decision provides a path around the ballot initiative’s aim towards the realization of the Constitution’s equality mandate.

CONCLUSION: THE PROBLEM OF EQUAL RITES AND EQUAL RIGHTS

Regardless of whether the ballot initiative is successful or not, the Court’s decision also prompts broader questions about equality, marriage, and the state’s role in ensuring equal rights. As I discussed earlier, the Court’s decision, and its choice to remedy the constitutional violation by mandating equal access to marriage, makes clear the cultural power and significance of marriage in our society. But the Court’s emphasis on the Constitution’s equality mandate begs the question: Should our efforts to secure equal rights for all necessarily be tethered to marriage?

As many scholars have observed, marriage long has been crucially constitutive of social and political citizenship. The ability to marry – and measure that seeks to amend the Constitution to prohibit same-sex marriage – would alter the constitutional commitment to equality so profoundly that it would constitute a constitutional revision requiring approval by two-thirds of the Legislature before being submitted to the voters. See Bob Egelko, Gay Marriage Backers Want Ban Issue Off Ballot, S.F. CHRON., June 21, 2008, at B3. It is worth noting that opponents of the initiative have made this claim, arguing that because it would withhold equal marriage rights, the proposed amendment requires legislative approval before it can be placed on the ballot. Id. 34. Undoubtedly, such a step would provoke intense criticism and calls of judicial activism and countermajoritarianism. I do not claim that such action on the part of the Court is likely, but rather, that the decision’s emphasis on the constitutional commitment to family equality would permit such a response, however unlikely. 35. See discussion supra Part A; Katherine M. Franke, Longing for Loving, 76 FORDHAM L. REV. 2685, 2689 (2008) (discussing the “normative centrality and, indeed, priority of the institution of marriage” in our society). 36. See, e.g., Candice Lewis Breedenner, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP (1998) (discussing marriage’s role in constituting women’s citizenship); Nancy F. Cott, Public Vows: A HISTORY OF MARRIAGE AND THE NATION (2000) (describing marriage’s role in defining and delimiting citizenship); Nancy F. Cott, Marriage and Women’s Citizenship in the United States, 1830-1934, 103 AM. HIST. REV. 1440 (1998) (analyzing the ideological underpinnings of the relationship between marriage and citizenship); Angela P. Harris, Loving Before and After the Law, 76 FORDHAM L. REV. 2821, 2821 (2008) (arguing that marriage should be viewed as “a practice of national citizenship”).
obtain state recognition of that marriage—has been closely linked to citizenship, to being included in the polity.\textsuperscript{37} Because of this political provenance, marriage has figured prominently in the struggle for civil rights, and the inability to enter lawful marriage has highlighted the political and social marginalization of disenfranchised groups.\textsuperscript{38}

But marriage has not been a wholly positive force in achieving equality and exercising citizenship rights. Although marriage has served as a means of civic inclusion, it also has served as a means of social control and discipline.\textsuperscript{39} Further, as many others have noted, marriage often has been a vehicle for the disenfranchisement and subordination of women.\textsuperscript{40} For centuries, the law of marital coverture produced—indeed, \textit{required}—the legal subordination of wives to their husbands.\textsuperscript{41} Despite the abrogation of coverture and the renegotiation of women’s citizenship status within the modern polity, feminist legal theorists argue that marriage continues to produce inequalities, reifying gendered caregiving roles and stymieing efforts to achieve economic equality.\textsuperscript{42}

Similarly, although many in the LGBT community have pushed for marriage

\begin{itemize}
\item \textsuperscript{37} Brenda Cossman, \textit{Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging} 7 (2007) (claiming that heterosexuality, and indirectly marriage, has been a boundary that historically has separated those considered citizens within the polity and those considered beyond the borders of political and civil inclusion); Katherine M. Franke, \textit{Becoming A Citizen: Reconstruction Era Regulation of African American Marriages}, 11 \textit{Yale J.L. & Human.} 251, 277 (1999) ("Formerly enslaved people and abolitionists generally deemed the right to marry one of the most important ramifications of emancipation.").
\item \textsuperscript{38} The denial of marriage rights to African Americans during the antebellum period profoundly underscored their civil and political marginalization. Franke, \textit{supra} note 37 at 252 ("Antebellum social rules and laws considered enslaved people morally and legally unfit to marry."); Peter Wallenstein, \textit{Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s}, 70 \textit{Chi.-Kent L. Rev.} 371, 379 (1994) (noting that in the \textit{Dred Scott} decision, "Chief Justice Roger B. Taney had stressed state laws banning marriage between blacks and whites to support the conclusion that blacks were not citizens"). Similarly, Leti Volpp has demonstrated the ways in which restrictions on Asian-American marriages made clear this group's marginalized status within the polity. Leti Volpp, \textit{Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage}, 53 \textit{UCLA L. Rev.} 405 (2005).
\item \textsuperscript{39} See Franke, \textit{supra} note 37, at 295 (discussing the postbellum use of marriage as a “civilizing” agent for newly freed African-American men and women); Angela Onwuachi-Willig, \textit{The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control}, 93 \textit{Calif. L. Rev.} 1647, 1694 (2005) (arguing that the contemporary emphasis on marriage promotion is an attempt to force African-American families to conform to Anglo-American family norms and practices).
\item \textsuperscript{40} See, e.g., Paula Ettelbrick, \textit{Since When Is Marriage a Path To Liberation?}, in \textit{LESBIANS, GAY MEN, AND THE LAW} 401, 402 (William B. Rubenstein ed., 1993) (describing marriage as an institution "[s]teeped in a patriarchal system that looks to ownership, property, and dominance of men over women as its basis"); Herma Hill Kay, \textit{“Making Marriage and Divorce Safe for Women” Revisited}, 32 \textit{Hofstra L. Rev.} 71, 90 (2003) (asserting that the law of marriage "is at bottom a codification of a society’s attitudes about women").
\item \textsuperscript{42} See, e.g., Laura A. Rosenbury, \textit{Friends with Benefits?}, 106 \textit{Mich. L. Rev.} 189, 219 (2007) ("[T]he practice of marriage, as shaped by the state, plays a vital role in maintaining gender inequality.").
\end{itemize}
equality, others assert that expanding marriage to gays and lesbians will further entrench the institution's inherent heteronormativity and gender hierarchy, while exacerbating the unequal treatment of those who choose to live outside of marriage. 43

For these reasons, some feminist legal theorists and queer theorists have insisted that marriage is not the solution to the problem of ensuring equal rights — it is the problem. In order to achieve the promise of more egalitarian partnerships and true equality for all families, they argue, we must be willing to contemplate a world in which marriage is not the only model for legally cognizable adult intimate relationships, nor the sole vehicle for state recognition of such relationships. 44

Amidst all of this debate, the decision in In re Marriage Cases is important and path-breaking. Although it will be understood as the case that

43. See, e.g., MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 82 (1999) ("Marriage sanctifies some couples at the expense of others. It is selective legitimacy."); Nancy D. Polikoff, We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage", 79 VA. L. REV. 1535, 1546 (1993) (arguing that extending marriage to same-sex couples would mean that "[m]arriage would be touted as the solution to these couples' problems; the limitations of marriage, and of a social system valuing one form of human relationship above all others, would be downplayed"); Michael Warner, Beyond Gay Marriage, in LEFT LEGALISM/LEFT CRITIQUE 259, 267 (Wendy Brown & Janet Halley eds., 2002) (asserting that same-sex marriage merely reinforces marriage as "the zone of privacy outside of which sex is unprotected"); Katherine M. Franke, The Domesticated Liberty of Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1414 (2004) (arguing that the push for same-sex marriage rights has "created a path dependency that privileges privatized and domesticated rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality"); Franke, supra note 35, at 2689 (explaining that "the legitimacy and respectability that law confers on marital couples reinforces the illegitimacy and deviance of those whose sexual, intimate, and affective commitments, if not merely contacts, lie in nonmarital contexts"); Lawrence Everett Forbes, A Brother As Significant as Any Other, N.Y. TIMES, July 13, 2008, at 6 (lamenting the "spreading legality" of same-sex marriage on the ground that it will further marginalize other forms of intimacy and commitment).

44. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 228-30 (1995) (advocating the abolition of civil marriage in favor of state recognition of the mother-child caregiving dyad); NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 7-9 (2008) (arguing that family equality requires shifting focus away from marriage and marriage equality towards valuing a diversity of familial arrangements); Rosenbury, supra note 42, at 233 (arguing for a the recognition of a multiplicity of personal relationships, including friendship); Franke, supra note 35, at 2703-05 (suggesting that because it exists in the absence of state regulation, friendship may be a useful alternative to marriage as the archetype of intimate association).

Indeed, some scholars challenge not only marriage, but an entire system of state recognition predicated on conforming to traditional notions of coupled intimacy. See generally Laura A. Rosenbury and Jennifer Rothman, Beyond Intimacy (unpublished draft on file with author); Elizabeth F. Emens, Monogamy's Law: Compulsory Monogamy and Polyamorous Existence, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004). It is worth noting that while In re Marriage Cases offers the possibility of legal regulation of adult intimate relationships through a rubric other than marriage, the decision does not go so far as to contemplate state recognition of a variety of intimate arrangements or arrangements that depart from the normative understanding of marriage.
created gay marriage in California, its legacy is likely to be considerably more broad – and ultimately, more compelling – than this significant development. In making clear the constitutional obligation to ensure equality for all families, the Court’s decision forces us to confront the important question of how to square marriage with the promise of equal rights and the law’s role in structuring family life. In its innovative approach to the question of equal rights, the Court not only broadens the available options, it also deepens a conversation about marriage and equality that goes beyond same-sex marriage.