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Until the People Spoke: The California Supreme Court's Response to Same-Sex "Marriage" in *In Re Marriages*

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In this paper, I present a traditional legal analysis and a rhetorical analysis of the Supreme Court of California's recent ruling, In re Marriages. *In this case, a State of California statute defined "marriage" as a legally sanctioned relationship only for opposite-sex couples. This statutory definition was successfully challenged as unconstitutional.*

The legal analysis discusses the precedents and other justifications for the Court's ruling. The rhetorical analysis identifies central terms of meaning and value, examines the reasoning held out as valid, presents the relationships that spring up as a result of this opinion, and, finally, describes the new legal culture thereby created.

Introduction

In 2000, the voters of California enacted Proposition 22, a referendum that provided that California would recognize only out-of-state marriages "between a man and a woman."[1] Proposition 22 was then codified as part of the California Family Code, defining marriage in California as a union only between people of the opposite sex. The City and County of San Francisco petitioned the Superior Court for a declaration that this law does not apply to marriages solemnized in California and that a law limiting marriage to a union between a man and a woman violates the California Constitution.[2] Similar actions were filed by a number of same-sex couples, arguing that they were either not permitted to marry or that their out-of-state marriages were not recognized under California law. Statewide organizations representing thousands of same-sex couples joined in these actions,[3] resulting in a consolidated proceeding, *In re Marriages.*[4] This case eventually was accepted on appeal by the Supreme Court of California, and it is their opinion striking down this law as unconstitutional that is analyzed in this article. Specifically, I began with a traditional legal analysis of *In re Marriages* and conclude with a rhetorical analysis using a method drawn from the writings of Professor James Boyd White, examining the key words and phrases in the opinion and identifying the new relationships that emerge as a result.

Related Research

While the topic of same-sex marriage has been researched and discussed by many,[5] because the *In re Marriages* opinion is so recent, few commentators have addressed this specific appellate opinion. In fact, only one law review article to date specifically addresses this opinion, Jessica Blome's note, "The Religious Freedom and Civil Marriage Protection Act: How Governor Schwarzenegger Failed His Constituents."[6] An examination of this opinion from a rhetorical perspective can reveal the importance of the role language plays in the shaping of our culture's legal reality.

The connection between language and law presents a field of study ominously large and unamenable to easy organization. Richard Posner notes these difficulties in his work, *Law and Literature*:

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[1] Cal. Fam. Code §308.5 (2000) (codifying the original referendum limiting California's recognition of marriage to only those "between a man and a woman" and commonly referred to as the California Defense of Marriage Act).
[2] *In re Marriage Cases*, 43 Cal. 4th 757, 786, 183 P.3d 384, 76 Cal. Rptr. 3d 683, 2008 Cal. LEXIS 5247 (2008).
[3] See *Woo v. Lockyer (*Super. Ct. S.F. City & County, No. CPF-04-504038)(Woo); *Tyler v. County of Los Angeles* (Super. Ct. L.A. County, No. BS-088506)(Tyler); and, *Clinton v. State of California.* (Super. Ct. S.F. City & County, No. CGC-04-429548)(*Clinton*).
[4] 43 Cal. 4th 757, 183 P.3d 384, 76 Cal. Rptr. 3d 683, 2008 Cal. LEXIS 5247 (2008).
[5] See, for e.g., Kevin J. Worthen, Who Decides and What Difference Does it Make?: Defining Marriage in "Our Democratic, Federal Republic," 18 *BYU J. Pub. L.* 273, 273 (2003)("Literally hundreds of law review articles have been written on the topic.").
[6] 10 *J. Gender Race & Just.* 481 (2007).

> The study of law and literature seeks to use legal insights to enhance the understanding of literature, not just literary insights to enhance under-standing of law. The field envisages a general confrontation or comparison, for purposes of mutual illumination, of two vast bodies of texts, and of the techniques for analyzing each body. The result is a rich but confusing array of potential links between law and literature.[7]

For some, the study of the connection between law and language means an examination of the process of argumentation. For example, this connection led philosophers Chaim Perelman and Stephen Toulmin to create new models or systems of argument. Moving away from a system of argument based on first premises accepted as true, Perelman advances a system that is audience centered: "The aim of argumentation is not to deduce consequences from given premises; it is rather to elicit or increase the adherence of the members of an audience to theses that are presented for their consent."[8] Argumentation, to Perelman, is the crucial vehicle for a "thorough investigation of proof in law, of its variations and evolution, [and] can, more than any other study, acquaint us with the relations existing between thought and action."[9]

Like Perelman, Toulmin's investigations of the connection between language and law led him to focus on the area of argumentation. "Logic," according to Toulmin, "is generalized jurisprudence. Arguments can be compared with lawsuits, and the claims we make and argue for in extra-legal contexts with claims made in the courts, while the case we present in making good each kind of claim can be compared with each other."[10]

Other researchers examining the connection between language and the law focus on fictional texts with a legal theme. An illustrative sample includes Earl F. Briden's "Idiots First, Then Juries: Legal Metaphors in Mark Twain's *Pudd'nhead Wilson*,"[11] Alice N. Benston's "Portia, the Law, and the Tripartite Structure of *The Merchant of Venice*,"[12] Martha S. Robinson's "The Law of the State in Kafka's *The Trial*,"[13] Allen Boyer's "Crime, Cannibalism and Joseph Conrad: The Influence of *Regina v. Dudley and Stephens* on *Lord Jim*,"[14] and G.H. Treitel's "*Jane Austen* and the Law."[15] Other scholars examine the connection between language and law by focusing on legal texts. For example, Robert A. Ferguson examines the U.S. Constitution itself in "We Do Ordain and Establish': The Constitution as Literary Text,"[16] and Richard H. Weisberg examines the use of artistic language by Justice Cardozo in his opinions, in "Law, Literature and Cardozo's Judicial Poetics."[17]

Critical Methodology: James Boyd White

James Boyd White is one contemporary scholar who has devoted considerable effort to the examination of the relationship between rhetoric and law. White presents his method of literary and cultural criticism in his book, *When Words Lose Their Meaning,*[18] and uses his method of criticism to examine texts that range from Homer's Iliad[19] to the U.S. Constitution.[20] One underlying tenant of White's method is that language creates culture:

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[7] *Law and Literature: A Misunderstood Relation* ix (1988).
[8] *The Realm of Rhetoric* 9 (W. Kluback trans. 1982).
[9] *The Idea of Justice and the Problem of Argumentation* 108 (1963).
[10] *The Uses of Argument* 7 (1958).
[11] 20 *Tex. Studies in Literature & Language* 169 (1978).
[12] 30 *Shakespeare Quarterly* 367 (1979).
[13] 6 *ALSA Forum* 127 (1982).
[14] 20 Loy. *L.A.L. Rev.* 9 (1986).
[15] 100 *Law Q. Rev.* 549 (1984).
[16] 29 *Wm. & Mary L. Rev.* 3 (1987).
[17] 1 *Cardozo L. Rev.* 283 (1979).
[18] James Boyd White, *White When Words Lose Their Meaning,* (1984).
[19] *Id.* at 24-58.
[20] *Id.* at 240-47.

> The language, after all, is the repository of the kinds of meaning and relation that make a culture what it is . . . . In a sense we literally are the language that we speak, for the particular culture that makes us a "we"—that defines and connects us, that differentiates us from others—is enacted and embedded in our language.[21]

This intimate link between language and culture justifies White's method of defining a culture by examining its texts.

A critique based on a methodology drawn from White's work would focus on two main areas of interest. The first would be an examination of the key words or phrases presented in a text. The second would be an identification of the relationships that are created as a result of the existence of the text. In this paper, I identify and discuss the key words "individuals," "equality" and "marriage" and then conclude with a discussion of the newly formed legal relationships created as a result of the existence of this California Supreme Court opinion. However, before a discussion of the rhetorical dimension of this opinion is presented, it is important to begin with a traditional legal analysis to reveal the Court's legal reasoning and justification for its decision.

I. *In Re Marriages:* Legal Analysis

A. Factual and Procedural Scenario

In this case, California's marriage statutes were challenged on the grounds that same-sex couples were discriminated against because the statute allowed same-sex couples only to commit to each other in "domestic partnerships," not "marriages."

1. Legislative Response

In 2000, the voters of California enacted Proposition 22, a referendum which provided that California would recognize only out-of-state marriages "between a man and a woman."[22] Proposition 22 was then codified in Section 308.5 of the California Family Code, and along with similar provisions in Sections 300 through 302, defined marriage in California as a union only between people of the opposite sex.

Five years later, the California Legislature adopted the Religious Freedom and Civil Marriage Protection Act (RFCMPA), which overturned Sections 300 through 302 of the California Family Code by defining marriage as a relationship between two *people*.[23] However, Section 308.5 was not affected. Also, in the 2005 case, *In re Coordination*, a California Superior Court determined that California's marriage statutes were not "rationally related" to a "legitimate government purpose" and declared that portion of the statutes which defined marriage as only between a man and a woman per se unconstitutional.[24]

Even in the face of legislative and judicial approval for the RFCMPA, on Thursday, September 29, 2005, California Governor Arnold Schwarzenegger vetoed the RFCMPA.[25] Governor Schwarzenegger's explanation for exercising his veto

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[21] *Id.* at 20.
[22] Cal. Fam. Code §308.5 (2000) (codifying the original referendum limiting California's recognition of marriage to only those "between a man and a woman" and commonly referred to as the California Defense of Marriage Act).
[23] Religious Freedom and Civil Marriage Protection Act, Assemb. B. 849, 2005-2006 Sess. (Cal. 2005) as amended June 28, 2005.
[24] No. 4356, 2005 WL 583129, at 4-5 (Cal. Super. Mar. 14, 2005).
[25] Lynda Gledhill, "Schwarzenegger Vetoes Gay Marriage Bill as Promised," *San Francisco Chron.*, Sept. 29, 2005; Arnold Schwarzenegger, Letter to the Members of the California State Assembly, Sept. 29, 2005 (vetoing Assemb. B. 849), http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab 0801-0850/ab 849 vt 20050929.html. In his message to the California Legislature, Governor Schwarzenegger expressed his belief that the legislature cannot overturn an initiative adopted by the electorate. Id. He went on to explain that vetoing the RFCMPA did not affect his support for domestic partnership law.

power in this case was his belief that the people or the courts of California should be the only authorities to change the existing definition of marriage because the people had enacted Proposition 22 with their referendum power.[26]

2. Legal Response

On February 10, 2004, the Mayor of San Francisco sent a letter to the County Clerk, directing him to determine the changes needed to the forms and documents used by them for the issuance of marriage licenses so they could be amended without regard to gender or sexual orientation.[27] On February 12, 2004, the County Clerk revised the pertinent forms and they began issuing marriage licenses to same-sex couples. The very next day, two separate actions were filed in San Francisco Superior Court seeking an immediate stay as well as a writ relief, prohibiting the issuance of marriage licenses to same-sex couples: *Proposition 22 Legal Defense and Education Fund v. City* and *County of Francisco* and *Campaign for California Families v. Newsom*. (Who is Newsom—City Manager?) However, the Superior Court declined to grant an immediate stay in these two actions.[28] In addition, the California Attorney General and a number of taxpayers filed two separate petitions to the California Supreme Court, seeking the issuance of an original writ of mandate, arguing that the City's actions were unlawful and that the issue warranted the attention of the Supreme Court of California. *Lockyer v. City and County of San Francisco* and *Lewis v. Alfaro.*[29]

On March 11, 2004, the California Supreme Court issued an order to show cause in these original writ proceedings and directed City officials to enforce the existing marriage statutes and to refrain from issuing marriage licenses not authorized by such provisions. While this order stayed the proceedings in the *Proposition 22 Legal Defense Fund* and *Campaign* actions, it did not preclude the filing of a separate action challenging the constitutionality of California's current marriage statutes.[30]

The City and County of San Francisco ("City") filed a writ petition and complaint for declaratory relief in Superior Court, seeking a declaration that Section 308.5 of the Family Code (an initiative statute proposed by Proposition 22 and enacted by the voters) does not apply to marriages solemnized in California and that, in any event, all California statutory provisions limiting marriage unions to that between a man and a woman violate the California Constitution.[31] Two similar actions were filed by a number of same-sex couples, stating they were either not permitted to marry or that their out-of-state marriages were not recognized under California law. Statewide organizations representing thousands of same-sex couples joined in these actions. *Woo v. Lockyer (*Super. Ct. S.F. City & County, No. CPF-04-504038)(Woo); *Tyler v. County of Los Angeles* (Super. Ct. L.A. County, No. BS-088506)(Tyler).[32]

These five cases, *CCSF, Woo, Tyler, Proposition 22 Legal Defense Fund* and *Campaign*, were then consolidated into a single proceeding, *In re Marriage* (hereinafter, *"Marriage Cases"),* with a sixth action added later, *Clinton v. State of California.* (Super. Ct. S.F. City & County, No. CGC-04-429548)(*Clinton*).[33]

While the Marriage Cases were being coordinated in Superior Court, the California Supreme Court, on August 12, 2004, issued its opinion in *Lockyer,* holding that City officials had exceeded their authority in issuing marriage licenses to same-

[26] *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 697 (citing Governor's Letter).
[27] 43 Cal. 4th at 785.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 785-86.
[31] *Id.* at 786.
[32] *Id.*
[33] *Id.*

sex couples in the absence of a judicial determination that the statutory provisions limiting marriage to a man and a woman were unconstitutional, and held that the 4,000 same-sex marriages performed in San Francisco prior to March 11, 2004 were void.[34] The Supreme Court ordered City officials to notify the couples that their marriages were void *ab initio*, but made it clear that the substantive question of the constitutionality of the statutory provisions was not before the *Lockyer* Court.[35]

On April 13, 2005, after a hearing on the coordinated Marriage Cases, the Superior Court held that the statutory provisions limiting marriage to man-woman marriages were a violation of the equal protection clause. This analysis was based on a strict scrutiny standard because it rested on a suspect classification (sex) and impinged upon a fundamental constitutional right (the right to marry). However, the court noted, the distinction would not even meet a rational basis standard because it did not further any legitimate state interest.[36] Judgment was entered in favor of the plaintiffs in each of the coordinated cases.[37]

B. California Court of Appeals

On appeal, in a 2-1 decision, the Court of Appeals reversed, stating that the constitutional right to marry encompasses only the right to marry a person of the opposite sex (finding no historical or precedential support for an expanded reading of this right); denied that the statutes discriminated on the basis of sex because members of either sex were allowed to marry other members of the opposite sex; found that the statute did provide for differential treatment on the basis of sexual orientation, but found that sexual orientation is not a suspect classification for purposes of the state equal protection clause; and, under a rational basis test, the Court of Appeals said the "state has a legitimate interest in preserving the traditional definition of marriage and that the statute's classifications are rationally related to that interest."[38]

In her concurring opinion, Justice Joanne C. Parrilli stated she "hoped" the two forms of union would be treated equally. In his dissenting opinion, Justice J. Anthony Kline disagreed with the conclusion that same-sex couples were seeking recognition of a novel constitutional right; explained why sexual orientation should be considered a suspect classification; and concluded that restricting marriage to opposite-sex couples "'has no rational basis, let alone a compelling justification.'"[39]

C. Supreme Court of California

Even though the Supreme Court of California argued that the current statutory provisions regarding domestic partnerships afforded same-sex couples virtually all of the legal benefits and responsibilities afforded by California law to married opposite-sex couples,[40] the Supreme Court of California found the marriage statutes unconstitutional under two basic grounds—privacy and equal protection.

1. Constitutional Right of Privacy or Personal Autonomy

First, the Court argued that the marriage statutes violated the state constitutional right to marry as a matter of privacy or personal autonomy:

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[34] *Id.* at 787.
[35] *Id.*
[36] *Id.* at 787-88.
[37] *Id.* at 788.
[38] *Id.*
[39] *Id.* at 789.
[40] *Id.* at 807.

> We need not decide in this case whether the name "marriage" is *invariably* a core element of the state constitutional right to marry . . . . Under the current statutes, the state has not revised the name of the official family relationship for *all* couples, but rather has drawn a distinction between the name for the official family relationship of opposite-sex couples (marriage) and that for same-sex couples (domestic partnership). One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of "marriage" exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.[41]

Specifically, the Court found the right to marry is a "fundamental constitutional right": "Although our state Constitution does not contain any explicit reference to a "right to marry," past California cases establish beyond question that the right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution."[42] And, importantly, the Court makes it clear that this is a right protected by California's explicit state constitutional privacy clause:

> With California's adoption in 1972 of a constitutional amendment explicitly adding "privacy" to the "inalienable rights" of all Californians protected by article 1, section 1 of the California Constitution—an amendment whose history demonstrates that it was intended, among other purposes, to encompass the federal constitutional right of privacy . . . [citations omitted]—the state constitutional right to marry, while presumably still embodied as a component of the liberty protected by the state due process clause, now also clearly falls within the reach of the constitutional protection afforded to an individual's interest in personal autonomy by California's explicit state constitutional privacy clause.[43]

Put another way, the Court found that the right to marry is a matter of personal autonomy:

> Because our cases make clear that the right to marry is an integral component of an individual's interest in *personal autonomy* protected by the privacy provision of article I, section 1, and of the *liberty* interest protected by the due process clause of article 1, section 7, it is apparent under the California Constitution that the right to marry—like the right to establish a home and raise children—has independent *substantive* content, and cannot properly be understood as simply the right to enter into such a relationship *if (but only if)* the Legislature chooses to establish and retain it.[44]

2. California Equal Protection Clause Analysis

A second legal basis relied upon by the California Supreme Court was the equal protection clause of the California Constitution. That is, the Court said the marriage statutes offend the equal protection clause because they treat people differently not on the basis of sex or gender, but on the basis of sexual orientation.[45] Specifically, the Court found differential treatment in that a same-sex couple's family relationship was not accorded the same respect and dignity enjoyed by an opposite-sex couple.[46]

Having argued that the marriage statutes treated a group of persons differently, the next step, as in any equal protection analysis, was to determine the appropriate standard of review. In order to assess the appropriate standard of review, the Court first needed to determine whether or not a fundamental constitutional right was at issue: "The question of whether the marriage statutes violate the fundamental right to marry may be determinative of the appropriate standard of

[41] *Id.* at 782-83 (italics in original).
[42] *Id.* at 809.
[43] *Id.* at 810.
[44] *Id.* at 818-19.
[45] *Id.* at 783.
[46] *Id.* at 783-84.

review in evaluating plaintiffs' equal protection challenge, we first address whether the challenged statutes independently infringe a fundamental constitutional right guaranteed by the California Constitution."[47]

The Court then devoted significant efforts to support the conclusion that marriage—while not specifically mentioned in the California Constitution—is a fundamental constitutional right important to society at large and to the individual as well.[48] Specifically, the court argued that civil marriage serves society because society has an overriding interest in the welfare of children and marriage facilitates a strong family setting where children can be raised by two loving parents; the role of the family in educating children serves society's interests by perpetuating the social and political culture; and, the legal obligation of support in a marriage relieves society of obligation of caring for individuals who may become incapacitated or otherwise unable to support themselves.[49] In fact, it is these significant interests, the Court stated, that justifies the Legislature's broad authority in protecting, regulating and encouraging ("creating incentives") the marital relationship.[50]

The Court also stated that the institution of marriage is important not only to society, but to the individual and the couple itself, providing that marriage is "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."[51] Specifically, the Court provided, the legal commitment to a long term emotional and economic relationship allows an individual to rely upon a loving relationship in a way that may be crucial to an individual's development as a person and achieve his or her full potential; provides an opportunity to become part of a partner's family, with "a wider and often critical network of economic and emotional security"; and, gives one the opportunity to publicly and officially express one's love for and long-term commitment to another as an important element of self-expression that can give meaning to one's life.[52] Finally, the Court stated that the ability to have and raise children with a partner is a "most valuable component of one's liberty and personal autonomy."[53] Moreover, according to the Court, this substantive right goes beyond the "negative" right to be free from overreaching governmental intrusion, and includes the "positive" right to have the state take affirmative action to acknowledge and support the family unit.[54]

The Court concluded this section by reemphasizing the importance of the constitutional interests at stake: "In light of the fundamental nature of the substantive rights embodied in the right to marry—and their central importance to an individual's opportunity to live a happy, meaningful, and satisfying life as a full member of society—the California Constitution properly must be interpreted to guarantee this basic civil right to *all* individuals and couples, without regard to their sexual orientation."[55] This leads, then, to the Court's applying the highest level of scrutiny, "strict scrutiny."

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[47] *Id.* at 809.
[48] *Id.* at 813-14, *citing Perez v. Sharp*, 32 Cal.2d 711 (1948)("Marriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men."); *Elden v. Sheldon*, 46 Cal.3d 267 (1988)(cohabitants should not be treated similarly to married persons for purposes of bringing a negligent infliction of emotional distress claim because "'[m]arriage is accorded [a special] degree of dignity in recognition "[t]he joining of the man and woman in marriage is at once *the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime*"); *Williams v. Garcetti, 5* Cal.4th 561 (1993)("we . . . recognize[ ] that '[t]he concept of personal liberties and fundamental human rights entitled to protection against overbroad intrusion or regulation by government . . . extends to . . . such basic civil liberties and rights not listed in the Constitution [as] the right "to marry, establish a home and bring up children . . . and the right to privacy and to be let alone by the government in "the private realm of family life.'"); *Warfield v. Peninsula Golf & Country Club*, 10 Cal.4th 594 (1995)(family, marriage, child-rearing, and family relationships are a subset of the right of intimate association. The constitutional right to marry is a subset of the right of intimate association—a subset possessing its own substantive content and affording a distinct set of constitutional protections and guarantees).
[49] *Id.* at 815-16.
[50] *Id.* at 816.
[51] *Id.*, *quoting Marvin v. Marvin*, 18 Cal.3d 660, 684 (1976); *accord, Maynard v. Hill*, 125 U.S. 190, 205 (1888).
[52] *Id.*
[53] *Id.*
[54] *Id.* at 819-20.
[55] *Id.* at 820.

The Court noted that the question of the appropriate standard for review in this case was a matter of first impression in California. But, after noting that the "great majority" of other states have decided not to apply strict scrutiny, the Court concluded that the marriage statutes treat persons differently because of their sexual orientation and should, therefore, be subjected to strict scrutiny under the California Constitution.[56]

The Supreme Court disagreed with the Court of Appeal's conclusion and analysis in this area. The Court of Appeals stated: "For a classification to be considered 'suspect' for equal protection purposes, generally three requirements must be met. The defining characteristic must be based upon an 'immutable trait'; bear [ ] no relation to [a person's] ability to perform or contribute to society; and be associated with a 'stigma of inferiority and second class citizenship,' manifested by the group's history of legal and social disabilities.[57] The Supreme Court agreed with the Court of Appeals that homosexuality does not bear any relation to a person's ability to contribute to society and it is associated with "stigma of inferiority." However, the Supreme Court disagreed with the conclusion that it is appropriate to reject sexual orientation as a suspect classification because there is a question as to whether this characteristic is "immutable."[58] Specifically, the Court noted that gender is considered immutable for equal protection purposes, but stated that immutability is not invariably required for a characteristic to be considered a "suspect classification." For example, the Court provided, religion and alienage are characteristics that trigger suspect classification and are not immutable.[59] However, the Court seemed to find sexual orientation to be so fundamental to a person's make-up that it becomes tantamount to being immutable, when it concluded, "[s]exual orientation and sexual identity . . . are so fundamental to one's identity that a person should not be required to abandon them."[60]

Because the standard of review was held to be "strict scrutiny," in order to save the marriage statutes, the state would have to show that its interest in maintaining these distinctions is a *constitutionally compelling* one that justifies the disparate treatment prescribed by the statutes in question. Moreover, the state would have to show that the distinctions drawn by the statute are necessary to further a *compelling* state interest.[61] If, on the other hand, the Court had concluded that this disparate treatment of same-sex couples versus opposite-sex couples with regard to being "married" did not affect a protected class of persons or did not impact a fundamental constitutional right, the state would only have had to show that there is a "rational basis"—a much easier standard of proof to meet.[62]

In defending the state's proffered interest in retaining the definition of marriage as a union only between a man and a woman, the Attorney General and the Governor argued that this limitation was the accepted "historic nature" of marriage and that the "overwhelming majority of jurisdictions in the United States and around the world" limit marriage to opposite-sex couples.[63] The Court's response to this argument was that history alone is an inadequate judge of what is right, particularly when less powerful classes of people are involved:

> [I]f we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and

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[56] *Id.* at 841.
[57] *Id.*, *quoting Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 18-19 (1971).*
[58] *Id.*
[59] *Id.* at 842.
[60] *Id.*
[61] *Id.* at 848.
[62] In fact, the application of the mere rationality test almost always results in a court upholding a given law, while the application of the "strict scrutiny" standard nearly always results in a given law being found unconstitutional.
[63] *Id.* at 853.

> inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions.[64]

In fact, the Court continued, "[i]t is instructive to recall that the traditional, well-established legal rules . . . of our not-so-distant past (1) barred interracial marriage, (2) upheld the routine exclusion of women from many occupations and official duties, and (3) considered the relegation of racial minorities to separately and assertively equivalent public facilities and institutions as constitutionally equal treatment."[65] The Constitution itself was drafted with the idea in mind that we should not be tyrannized by the often myopic vision of the present: "As the United States Supreme Court observed in . . . *Lawrence v. Texas*, 539 U.S. 558, 579 (2003), the expansive and protective provisions of our constitutions . . . were drafted with the knowledge that 'times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.'"[66]

Accordingly, the Court concluded that the state interest in limiting the designation of marriage exclusively to opposite-sex couples, thereby excluding same-sex couples from access to that designation, could not "properly be considered a compelling state interest for equal protection purposes."[67] Limiting the ability to marry to only opposite-sex couples, the Court explained, was "not necessary to preserve the rights and benefits of marriage currently enjoyed by opposite-sex couples," and allowing same-sex couples to marry would not deprive opposite-sex couples of any of the rights and benefits they currently enjoy under the statutes.[68] Moreover, allowing same-sex couples to marry would "not alter the substantive nature of the legal institution of marriage"—same-sex couples would "be subject to the same duties and obligations to each other, to their children, and to third parties that the law currently imposes upon opposite-sex couples who marry."[69] Finally, giving same-sex couples the right to be "married' would "not impinge upon the religious freedom of any religious organization . . .no religion w[ould] be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant w[ould] be required to solemnize a marriage in contravention of his or her religious beliefs.[70]

On the other hand, excluding same-sex couples from becoming "married" would result in "a real and appreciable harm upon same-sex couples and their children."[71] First, by reserving the term "marriage" which "describes a family relationship unreservedly sanctioned by the community" for only opposite-sex couples, while providing same-sex couples with "only a novel, alternative institution," it is likely to be "viewed as an official statement that the family relationship of same-sex couples is not of comparable status or equal dignity to the family relationship of opposite-sex couples."[72] Second, because of the "historical disparagement of gay persons," the use of a distinctive term for same-sex unions is likely to result in a "parallel institution" that is "considered a mark of second-class citizenship."[73] Finally, a judicial decision that upholds differential treatment of opposite-sex and same-sex couples "would be understood as *validating*" the "general proposition" that society can—"under the law"—treat gay individuals and couples differently than—"and less favorably"—heterosexual individuals and couples.[74]

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[64] *Id.* at 853-54.
[65] *Id.* at 854.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 854-55.
[71] *Id.* at 855.
[72] *Id.*
[73] *Id.*
[74] *Id.*

Having concluded that the marriage statutes presented an unwarranted disparate treatment of same-sex couples by not allowing them to be "married," the Court was then faced with deciding on an appropriate remedy. Specifically, the question became, "whether the constitutional violation should be eliminated . . . by extending to the previously existing class the . . . benefit that the statute affords to the included class, or . . . by withholding the benefit equally from both the previously included class and the excluded class."[75] This determination is typically guided by "the likely intent of the Legislature, had that body recognized that unequal treatment was constitutionally permissible."[76] In this case, given the obvious importance that all parties place on the designation "marriage," the Court concluded that extending the designation of marriage to same-sex couples was "probably more consistent with the legislative intent" than not allowing anyone to "marry."[77] Accordingly, the Court awarded the plaintiffs a writ of mandate directing "state officials to take all actions necessary" to ensure that county clerks and other local officials allow both opposite-sex and same-sex couples to marry.[78]

II. Rhetorical Analysis

A. Phrases of Central Meaning and Value

An understanding of the legal reality created by the Court in the *In re Marriages* opinion requires first an examination of the central terms of meaning and value presented in this opinion. White believes that a critical examination of the central terms of meaning and value in discourse does not focus on the definitions or translations of equivalence but looks instead for "an understanding of the possibilities they represent for making and changing the world."[79] This shift from a focus on understanding a given term's formal and precise meaning to a focus on its meaning as it interacts with the culture at large is a recognition that terms such as "honor," "freedom," "family" or "property" lose meaning when translated into other words or considered without benefit of context. White says, "Their meaning resides not in their reducibility to other terms but in their irreducibility; it resides in the particular ways each can be combined with other words in a wide variety of contexts."[80]

This examination by White of the individual building blocks in a text, the words themselves, is not a novel concept. For example, I.A. Richards and Richard Weaver devoted considerable attention to individual words in their scholarship. Richards focused on the potential for misunderstanding in his examination of words. Richards warned his readers that words only have meaning in context; to think otherwise is to fall prey to the mistaken belief that words have inherent meaning: "Words, as every one knows, 'mean' nothing by themselves, although the belief that they once did . . . was once equally universal."[81] Weaver also examined words themselves, but he focused not on their potential for misunderstanding, but on their ability to create expectations by their very existence: "But a single term is an incipient proposition, awaiting only the necessary coupling with another term; and it cannot be denied that single names set up expectancies of propositional embodiment."[82] So, like Richards, Weaver believed that words have the potential for meaning, a potential that is realized once these words are placed in a context.

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[75] *Id.* at 856.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 856-57.
[79] White, *supra* note 18, at 11.
[80] *Id.*
[81] I.A. Richards, *The Meaning of Meaning*, in *The Rhetorical Tradition: Readings from Classical Times to the Present* 1274 (eds. Patricia Bizzell and Bruce Herzberg 1990).
[82] Weaver, *The Ethics of Rhetoric,* 211 (Davis, Ca.: Hermagoras Press)(1985).

Moreover, Weaver believed that some terms carry such a persuasive impact because of their importance to a given culture at a given time, that they can be referred to as "ultimate terms." Specifically, Weaver presented three ultimate terms—"god," "devil" and "charismatic." God terms are terms of ultimate good and, as one might expect, inhabit the top of the hierarchy of words: "By 'god term' we mean that expression about which all other expressions are ranked as subordinate and serving dominations and powers. Its force imparts to the others their lesser degree of force, and fixes the scale by which degrees of comparison are understood."[83] On the other end of the spectrum are "terms of repulsion," which Weaver denotes as "devil terms."[84] Reminiscent of Burke's notion that language both creates guilt and can be used to cleanse it,[85] Weaver views devil terms as a necessary mechanism for societal catharsis, a way to purge ourselves of negative feelings: "There seems indeed to be some obscure psychic law which compels every nation to have in its national imagination an enemy. Perhaps this is but a version of the tribal need for a scapegoat, for something which will personify 'the adversary.' If a nation did not have an enemy, an enemy would be invented to take care of those expressions of scorn and hatred to which peoples must give vent."[86] However, much like the U.S. Supreme Court's definition of obscenity (Justice White famously said that he may not be able to define obscenity specifically, but "I know it when I see it"[87]), Weaver states devil terms elude specific definition, but are readily recognized by all: "A singular truth about these terms is that . . . they defy any real analysis. That is to say, one cannot explain how they generate their peculiar force of repudiation. One only recognizes them as publicly-agreed-upon devil terms."[88] Finally, Weaver identifies a third class of ultimate terms, "charismatic terms." As their name suggests, these are terms imbued with a power, but a power not readily defined by a simple connection to a term's referent:

> But in charismatic terms we are confronted with a different creation: these terms seem to have broken loose somehow and to operate independently of referential connections. . . . Their meaning seems inexplicable unless we accept the hypothesis that their content proceeds out of a popular will that they *shall* mean something. In effect, they are rhetorical by common consent, or by 'charisma.'"[89]

Given Weaver's belief in the power of language ("We have shown that rhetorical force must be conceived as a power transmitted through the links of a chain that extends upward toward some ultimate source."[90]), it is appropriate that Weaver concludes his discussion of ultimate terms by noting the need for an ethical use of that power:

> An ethics of rhetoric requires that ultimate terms be ultimate in some rational sense. . . . Perhaps the best that any of us can do is to hold a dialectic with himself to see what the wider circumferences of his terms of persuasion are. This process will not only improve the consistency of one's thinking but it will also, if the foregoing analysis is sound, prevent his becoming a creature of evil public forces and a victim of his own thoughtless rhetoric.[91]

Weaver's sense of ethical responsibility for a person's choices of words adds an important dimension to White's discussion of central terms of meaning and value. In fact, an ethical assessment of authors themselves can be conducted through an identification and analysis of the terms they choose as ultimate terms. Just as Weaver asserts that a person's choice of

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[83] *Id.* at 212.
[84] *Id.* at 222.
[85] See Sonja Foss, Karen Foss and Robert Trapp, *Contemporary Perspectives on Rhetoric*, 3rd ed. 210 (2002)("Guilt is a permanent part of the human condition in that it is intrinsic in the negative and the hierarchy produced by language. Some methods of catharsis, purgation, purification, or cleansing are needed to rid individuals of this guilt so that they can achieve redemption. Just as a language system creates guilt, it is the means through which that guilt is purged.")
[86] *Id.*
[87] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).
[88] Weaver, *supra* note 82, at 223.
[89] *Id.* at 227 (emphasis in original).
[90] *Id.* at 211.
[91] *Id.* at 232.

argument form reflects the character of that person,[92] so too must the choice of ultimate terms reflect the inner workings of a given rhetor. Concomitantly, these ultimate terms also can be used to develop a snapshot of the culture within which these rhetors operate. The accuracy or clarity of this snapshot rests on the following assumptions: First, rhetors will use ultimate terms they think will most efficaciously move an audience towards assent to their theses. Second, rhetors will use ultimate terms available to them as members of a particular culture at a given moment in time. Weaver, for example, writing as he was in 1950's America, identified communism as a devil term: "Now 'Communist' is beyond any rival the devil term, and as such it is employed even by the American president when he feels the need of a strong rhetorical point."[93]

An examination, then, of the choice of key words presented by appellate judges in their opinions can be used to develop a snapshot of our culture through the lens of an appellate opinion. Specifically, the key words used by the *In re Marriages* Court can be analyzed to develop a snapshot of the legal culture that is created when the Court chooses to use particular words of central meaning and value.

1. "Individuals"

Throughout the text of this opinion, the court repeatedly refers to the people impacted by this law by the gender-neutral term "individuals." One possible explanation is that the authoring Justice wished to de-emphasize the importance of gender in the analysis of this statutory language. The analysis focused, then, on the impropriety of treating various *citizens*—regardless of their sexuality—of the State of California in disparate ways. This neutered reference sidesteps the very crux of the issue for those people in favor of the marriage statutes at issue—that same-sex couples should not be allowed to enter into a state sanctioned "marriage."

However, the use of the term individual by the Court also is ironic in this context. Ultimately, the Court is responding to what it perceives as an unfair treatment of people who have chosen to commit themselves through a state sanctioned and socially-recognized ritual that results in the two persons committing to each other as a "married couple," but cannot do so because of their sexual orientation. However, this repeated use of the term individuals just reinforces a sense of isolation and separation for gay couples. As far as the State of California is concerned, at least as viewed through the lens of the statutory provisions defining marriage as a privilege only for opposite-sex couples, same-sex couples do not have the right to marry, to join as one—they will never be allowed to be anything but "individuals."

2. "Equality"

This case revolves around the constitutional efficacy of the marriage amendments. Accordingly, this opinion focused exclusively on the Court's role in examining the marriage statutes for their constitutionality. One of the crucial legal theories examined was whether or not the marriage statutes offended the Fourteenth Amendment's "equal protection" clause. Accordingly, the notion of equality is defined here within the framework and context of the Fourteenth Amendment's equal protection clause, which provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[94] Equal protection analysis centers around laws or policies that in some way

[92] Weaver states, "that no man escapes being branded by the premise that he regards as most efficacious in an argument. The general importance of this is that major premises, in addition to their logical function as part of a deductive argument, are expressive of values, and a characteristic major premise characterizes the user." *Id.* at 55-6.
[93] *Id.* at 223.
[94] U.S. Const. amend. XIV.

seek to treat classes of persons differently: "Our equal protection jurisprudence has typically been concerned with governmental classifications that "affect some groups of citizens differently than others.'"[95]

The marriage statutes, it was argued, treat same-sex persons differently (thus denying them the "equal protection of the laws") because it denies them the opportunity to be "married," offering them, instead, the ability to be officially recognized as a couple only in a "civil union" ceremony.

The notion of equality is, of course, a key concept in American ideology. The court's use of equality here shows that the notion of equality—in and of itself—is not the end point of analysis. In the area of equal protection analysis, not all rights are protected equally. That is, laws and policies that treat people differently are tested by different levels of scrutiny depending upon the reason for the disparate treatment. The two basic levels of scrutiny for a potential distinction in a law are "rational basis" or "strict scrutiny":

> There are two different standards traditionally applied by California courts in evaluating challenges made to legislation under the equal protection clause. As we recently explained . . . "'"[t]he first is the basic and conventional standard for reviewing economic and social welfare legislation in which there is a 'discrimination' or differential treatment between classes or individuals. . . . [which] invests legislation involving such differentiated treatment with a presumption of constitutionality and "requir[es] merely that the distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose." . . . [T]he burden of demonstrating the invalidity of a classification under this standard rests squarely upon *the party who assails it*.'"
>
> "[T]he second equal protection standard is '"a more stringent test [that] is applied . . . in cases involving "suspect classifications" or touching on "fundamental interests." Here the courts adopt "an attitude of active and critical analysis, subjecting the classification to strict scrutiny. . . . Under the strict standard applied in such cases, *the state* bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purposes."[96]

In this case, because sexual orientation is not a suspect classification that would justify the imposition of a strict scrutiny analysis, the Court—if it wanted to overrule this law—was left with finding that it impinged upon a fundamental interest.

One interesting facet of this analysis is that it is clear that the question of equal protection is not a simple dichotomy—the question isn't simply, "Is this law constitutional or not?" Despite the seemingly clear dichotomy presented by the language in the 14th Amendment to the Constitution—"[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws"—equal protection analysis has a multi-tiered approach that allows for different levels of constitutional protection based upon the type of issue being addressed or the status of a given class of persons affected by a law. For example, the constitutionality of a statute that treats racial minorities differently than others is regarded with extreme suspicion by a court and is subject to "strict scrutiny," while a statute that treats people of various ages differently is only held to a "rational basis" analysis. So, the Court has analyzed racial classifications under a strict scrutiny standard in cases involving race-conscious university admissions policies,[97] race-based preferences in government contracts,[98] and race-based districting intended to improve minority representation.[99] But, other classifications are not subjected to this exacting level of scrutiny. Proponents of a policy that distinguished between classes of people based only on age, for example, needed to show only that there was

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[95] *Engquist v. Oregon Dep't of Agriculture*, 128 S. Ct. 2146; 170 L. Ed. 2d 975 (2008), *quoting, McGowan* v. *Maryland,* 366 U.S. 420, 425, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961).
[96] *Id.* at 832, *quoting Hernandez v. City of Hanford*, 41 Cal. 4th 279, 298-99 (2007)(italics in original).
[97] *See, for e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003).
[98] *See, for e.g.*, *Adarand Constructors Inc. v. Pena,* 515 U.S. 200 (1995).
[99] *See, for e.g.*, *Shaw* v. *Reno*, 509 U.S. 630, 650 (1993).

some "rational basis" for treating a class of persons differently. In *Massachusetts Board of Retirement* v. *Murgia*, the Court held that it was constitutionally "permissible for the Commonwealth of Massachusetts to declare that members of its state police force who have been proved medically fit for service are nonetheless legislatively unfit to be policemen and must be terminated—involuntarily "retired"—because they have reached the age of 50."[100] In fact, under federal law, there is a *three*-tiered equal protection analysis, with classifications based on illegitimacy or sex reviewed under an "intermediate scrutiny" standard.[101]

A system where absolute constitutional rights—"no state shall . . ."—are interpreted literally would use an "either/or" form of analysis to judge the constitutionality of a given statute. A statute would be deemed unconstitutional, then, if it treated *any* subset of citizens differently than the rest. The problem with this type of constitutional interpretation is the potential for serious ramifications in the real world. For example, currently many important government benefits are given only to certain classes of people—Social Security benefits to retirees or the disabled, government assistance with food and housing for people living at or under the poverty level, and so on. To expand these programs to include all citizens would be to invite economic ruin. So, a more sophisticated system other than this either/or analysis is required. The question becomes, then, where to draw the line. The answer is, of course, that the Court draws the line as it is presented with different cases over time and that the line has moved over time. For example, "separate but equal" schools for blacks and whites were legally acceptable until it was finally held to be unconstitutional in the 1954 decision, *Brown v. Board of Education.*

This notion that not all rights are protected equally is also bolstered by the Court's consistent use of the phrase "fundamental" constitutional right. Again, there appears to be a hierarchy of constitutional rights, with the more prominent rights being labeled "fundamental." The Court consistently and frequently defined the right of marriage as a *fundamental* right, with at least sixty-four uses of the word "fundamental" used in the discussions regarding marriage.[102] The court's intention here is to stress the importance of the right to marry for all citizens. However, apparently without intending to do so, by defining certain constitutional rights as *fundamental,* the Court creates a new category of constitutional rights—a set of lesser constitutional rights not defined as fundamental.

3. "Marriage"

Finally, and most importantly, is the term "marriage." It is at this point that the Court reveals that it recognizes the power of language, and, more specifically, the power of a single term to affect the culture at large in a significant way. This case ultimately turned upon the single premise that it would be unfair to same-sex couples to give them essentially the same legal rights and obligations of being married, but to force them to call this sanctioned relationship by another name ("civil union"). One of the things the Court did at length was to list a number of specific rights and obligations that same-sex couples enjoy in California.[103] In fact, after providing a lengthy list of the statutory provisions enacted over the years regarding the rights and obligations attendant to a same-sex union, including, *inter alia*, hospital visitation rights, state health benefits to partners, the right to sue for wrongful death, and to make medical decisions on behalf of an incapacitated partner,

[100] 427 U.S. 307 (1976).
[101] *See, for e.g., Clark v. Jeter,* 486 U.S. 456, 461 (1988).
[102] Identified in a key word search using LexisNexis, using "fundamental" as the Boolean term. Sometimes this use of the word "fundamental" by the Court was in those passages where the Court synthesized the arguments presented by the various parties or the Court of Appeals. However, this only reveals that all of the parties routinely linked the right to marry with the phrase "fundamental."
[103] *In re Marriages*, 43 Cal. 4th at 807.

the Court concluded that "the current statutory provisions generally afford same-sex couples virtually all of the benefits and responsibilities afforded by California law to married opposite-sex couples."[104] However, despite the almost even playing field between the rights and responsibilities of opposite-sex married couples and same-sex couples joined in a civil union, the Court focused on the importance of the phrase or label itself—this case was more about the lack of equal dignity and respect shown to same-sex couples by not allowing their committed relationship to be called a "marriage" than it was about the actual rights and obligations.

B. Relationships

Now, in line with White's method of cultural criticism, the question remains, "What is the legal culture created, constituted or reconstituted as a result of this Supreme Court of California opinion?" One way to answer this question is by identifying the newly formed relationships created by this text.

White identifies one relationship created by a text as that one created between the textual community (the readers of a given text)[105] and "the larger culture that supplies the materials with which it is formed."[106] One question provided by White as an example of this type of analysis is pertinent to the topic of law: "And, to turn to our own country, what can it mean to establish a public world on the premise that 'All men are created equal'?"[107] This is an example of how a text, in this case, the Declaration of Independence, and the relations it engenders, affects an entire society.

The heart of this case is the relationship between the state and its citizens as viewed through the lens of the marriage amendments' language that allows only opposite-sex persons to marry. By declaring that only opposite-sex persons can receive the state sanctioned bestowal of "married," the language of the statutes, whether intentionally or not, creates a set of second-class citizens—those who are not fit to have their committed relationship called the historically recognized and accepted moniker "married." Instead, as the Court points out, they must be satisfied with the new and unfamiliar relationship represented by the phrase "civil union." In the legal culture, at least as defined by the Supreme Court of California, one of the more important facets of this relationship is the measure of legitimacy for all couples. Unlike society in general sometimes, the California Supreme Court views same-sex couples and their families as legitimate members of our society.

Finally, this opinion also reveals the often complex relationships between the various components of our system of governance, a complex dance between the California Legislature, the Executive Branch, the Judiciary and the citizens of California themselves. Citizens typically ask legislators to present laws, and after the legislature passes a proposed bill, it can then be challenged by some citizen in the court system to ensure that this new legislation passes constitutional muster, that is, that it doesn't impinge upon some constitutional right like freedom of speech, equal protection of the laws or due process. In California, the citizens often play a more direct role in the creation of law through their system of ballot initiatives. At this stage, the Supreme Court of California invalidated a statute that was adopted as a result of the 2002 ballot initiative, Proposition 22. However, a special procedure is available in California that allows a ballot initiative to become part of the

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[104] *Id.*
[105] White refers to this relationship as the "textual community." *See* White, *supra* note 18, at 14. White explains further: "[O]ne element in the relationship between a reader and writer is a kind of negotiation in which the reader constantly asks himself what this text is asking him to assent to and to become and whether or not he wishes to acquiesce. The reader's engagement with the text is thus by its nature tentative: while responding to the text he is always asking how he is responding, who he is becoming, and checking that against the other things he is." *Id.* at 16-7.
[106] *Id.* at 278.
[107] *Id.* at 14.

California Constitution, thus making it immune from further state constitutional challenge.[108] A constitutional amendment requires the proponents to gather the signatures of at least eight percent of the number of registered voters who cast a ballot in the last gubernatorial election (as opposed to five percent for an ordinary ballot initiative like Proposition 22).[109] This feat was accomplished, and Proposition 8 was successfully passed by the voters in California on November 5, 2008, by a margin of 52.2% in favor, to 47.8% opposed.[110] Specifically, Proposition 8 reads as follows:

> This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8, of the California Constitution.
>
> This initiative measure expressly amends the California Constitution by adding a section thereto; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.
>
> SECTION 1. Title
>
> This measure shall be known and may be cited as the "California Marriage Protection Act."
>
> SECTION 2. Section 7.5 is added to Article I of the California Constitution, to read:
>
> *Section 7.5. Only marriage between a man and a woman is valid or recognized in California.*[111]

Accordingly, the California Supreme Court's holding in this case became essentially moot as a result of this amendment to the State of California Constitution. However, there are likely to be future challenges that may well result in the Court revisiting the issues presented in this opinion by the California Supreme Court.

Conclusion

In this paper I examined the text of the State of California Supreme Court opinion *In re Marriages,* using a methodology guided by the writing of James Boyd White. More specifically, the central terms of meaning and value presented in this opinion were identified, as well as the relationships created as a result of the existence of this opinion. The purpose of this examination was to uncover the way in which this opinion altered our legal reality. While what is created by the text—a legal reality—is ephemeral, it is nonetheless real and important; it is a part of the social structure within which each of us operates. White explains:

> In addition, while the legal text speaks directly to its reader, as other texts do, the textual community it establishes with the individual reader is also a way of making another community, a community among its readers. In this sense, law is structurally ulterior in character, for it is always meant to affect what you say and do in relation to others. Indeed, it is literally and deliberately constitutive: it creates roles and relations, places, and occasions on which one may speak; it gives to the parties a set of things that they may say, and prohibits them from saying other things; it makes a real social world.[112]

The first term of central meaning and value identified in this opinion was the term "individuals." By focusing on *individuals*, the Court focused on the impropriety of treating various *citizens*—regardless of their sexuality—of the State of California in disparate ways. This neutered reference sidestepped the very crux of the issue for those people in favor of the marriage statutes at issue—that same-sex couples should not be allowed to enter into a state sanctioned "marriage."

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[108] See, Dorf, Michael, "The California Same-Sex Marriage Ruling: What it Says, What it Means, and Why it's Right," Findlaw for Legal Professionals, accessed November 17, 2008 at http://writ.lp.findlaw.com/dorf/20080519.html.
[109] *Id.*
[110] "Tuesday, November 4, 2008 Election Night Result," California Secretary of State website, accessed November 17, 2008, at http://vote.sos.ca.gov/Returns/props/59.htm
[111] "Tuesday, November 4, 2008 Official Voter Information Guide," California Secretary of State website, accessed November 17, 2008, at http://www.voterguide.sos.ca.gov/title-sum/prop8-title-sum.htm.
[112] White, *supra* note 18, at 12.

The second term identified was "equality." One of the crucial legal theories examined was whether or not the marriage statutes offended the Fourteenth Amendment's "equal protection" clause. Accordingly, the notion of equality was defined here within the framework and context of the Fourteenth Amendment's equal protection clause. The marriage statutes, the Court concluded, treated same-sex persons differently (thus denying them the "equal protection of the laws") because it denied them the opportunity to be "married," offering them, instead, the ability to be officially recognized as a couple only in a "civil union" ceremony. The notion of equality is, of course, a key concept in American ideology. The court's use of equality in this opinion showed, first, that the notion of equality—in and of itself—is not the end point of analysis, and, second, that the Court views one of its roles in this area as protecting equality for all of its citizens—even those who otherwise do not have the resources to protect themselves. This notion that not all rights are protected equally was also bolstered by the Court's consistent use of the phrase "fundamental" constitutional right. Again, there appears to be a hierarchy of constitutional rights, with the more prominent rights being labeled "fundamental."

The final central term of meaning and value was the term "marriage" itself. This case ultimately turned upon the single premise that it would be unfair to same-sex couples to give them essentially the same legal rights and obligations of being married, but to force them to call this sanctioned relationship by another name ("civil union"). And, despite the almost even playing field between the legal rights and responsibilities of opposite-sex married couples and same-sex couples joined in a civil union, the Court focused on the importance of the phrase or label itself—this case was more about the lack of equal dignity and respect shown to same-sex couples by not allowing their committed relationship to be called a "marriage" than it was about the actual rights and obligations.

The most important relationship created as a result of this California Supreme Court opinion is the newly formed relationship where the committed relationship between two loving persons—irrespective of sexual orientation—is recognized as a valid relationship, deserving of state sanctioned dignity and respect, that is, a "marriage." Unfortunately, this newly formed relationship existed for only a brief moment before being eradicated by the will of the people of California on election day, November 5, 2008. For now, there are those gay couples who got married before November 5, 2008, and still (for now, at least) enjoy the same dignity and respect the law should afford to all.