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The Public Sector Case for Marriage Equality

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When my office sued the state of California in 2004 to invalidate state marriage laws that discriminate against gay and lesbian couples, it marked a significant milestone in the long struggle for marriage equality. Our case on behalf of the city and county of San Francisco represented the first government lawsuit in American history to challenge the constitutionality of the same-sex marriage exclusion. Until then, public law offices had only defended the status quo on the issue. None had ever disputed it.

By the time our case reached the California Supreme Court four years later, nearly two dozen cities and coun-

ties statewide had joined with us in what would ultimately prove to be a landmark civil rights case. Fully seven of the state's eight largest cities stood united in support of equal marriage rights; not simply such liberal strongholds as San Francisco and Oakland, but even more moderate population centers like Los Angeles, Sacramento, and San Diego.

Now we are once again before the California Supreme Court on a case involving marriage rights—this time seeking to invalidate Proposition 8, the narrowly approved initiative constitutional amendment that eliminated those rights for same-sex partners.

To be sure, there are important differences between these two successive legal challenges. But none, I think, is more remarkable than this: five years after the first government in history filed suit to challenge marriage discrimination, today not a single government entity in California is advocating that Proposition 8 be upheld. The governor and state attorney general have both said the measure should

be struck down. The state legislature is on the verge of passing resolutions urging Prop 8's invalidation. Local governments representing more than 17.2 million Californians have joined with us in our legal challenge. And there isn't one city or county on record before the state high court in support of Prop 8's retention.

Incredibly, despite obvious political support for the amendment statewide, the legal defense of Prop 8's validity rests solely in the hands of private campaign lawyers and their private sector amici.

What some once regarded as quaint political symbolism by San Francisco in 2004 has improbably emerged as a broad public sector consensus in 2009. It would appear that for many government offices and officials throughout California, five years of legal argument and policy debate have demonstrated that the public sector rationale to oppose marriage discrimination is far more than merely symbolic.

Society has an interest in the institution of marriage, it turns out, and it doesn't take a leap of imagination to recognize that its interest has little to do with the respective genders of the matrimonial partners. There are myriad public benefits to having more marriages rather than fewer, and when baseless discrimination impinges on governments' ability to derive those benefits for the common good, the implications are both substantive and serious.

From the outset of San Francisco's original case five years ago, we asserted what we viewed as a deeply American principle: that discrimination is not merely detrimental to the minority it singles out, but to the majority that would abide it. Without full recognition of marriage for gay and lesbian couples and their families, we argued, San Francisco's local government was impermissibly restricted in its ability to protect the equal rights of its citizens.

Shortly after filing our case, I asked San Francisco's city controller to file a declaration presenting his analysis of the fiscal effect that discriminatory marriage laws have on local government. The findings were anything but symbolic, with direct costs to city taxpayers conservatively estimated at \$20 million annually. Fewer marriages mean both increased public expenditures and foregone revenues for local governments and their taxpayers.

As a public benefits provider, for example, San Francisco picks up the tab for otherwise unsupported individuals in a variety of ways, from general assistance to healthcare services in our public hospital and clinics. Tax delinquency rates are higher without the benefit of two legally committed adults responsible for one another's obligations. Marriage discrimination means reduced revenue from fewer marriage licenses and recording fees.

Like many travel destinations throughout California, San Francisco nets substantial public income from weddings and wedding anniversaries, including revenues from

sales taxes, hotel taxes, airport fees, parking fees, rentals of public buildings and facilities, and payroll taxes for hotel and restaurant workers. When marriage rights are restricted to solely heterosexual couples because of discriminatory laws, taxpayers forgo revenues that would otherwise accrue more broadly.

Proponents of marriage discrimination may argue that the availability of domestic partnerships to same-sex couples theoretically mitigates the public sector's economic losses from the same-sex marriage exclusion. But they offer no evidence that a partnership scheme that is neither as widely recognized nor as socially valued as marriage truly ameliorates the costs imposed by marriage inequality. Indeed, logic suggests that laws that systematically devalue gay and lesbian relationships would do little to encourage voluntary acceptance of marital responsibilities and obligations without the marital rights and benefits that should rightfully go with them.

The San Francisco City Controller's economic analysis was hardly novel.

A study released by the UCLA School of Law's Williams Institute on Sexual Orientation Law and Public Policy immediately following the Supreme Court's marriage ruling last May projected that weddings between gay and lesbian partners would provide a \$370-million boost to California's economy over three years. That estimate assumed that roughly one-half of the state's estimated 92,000

same-sex couples would wed, multiplied by a conservative average of \$8,040 per wedding spent on everything from event planners, restaurants, tent and chair rentals, rings, clothing, florists, caterers, airlines and hotels.

None of this is to argue, of course, that the public sector stake in equal protection of the laws should turn on its cost-benefit analysis to government coffers. But it does demonstrate that the consequences of marriage discrimination aren't limited to those whose rights have been denied, or, more recently, eliminated. In very real terms, the proponents of Proposition 8 didn't simply convince a slim majority of California voters to enshrine antigay discrimination into our state constitution—they committed all of us to subsidize it with our tax dollars.

If the original legal challenges to the discriminatory marriage exclusion held serious public sector implications, suffice it to say that challenges to Prop 8 are the same—only moreso.

While the ostensible intent of Proposition 8 was to eliminate the right of same-sex couples to marry, its application to other potentially disfavored minority groups is significantly more far-reaching. When a bare majority can take away a right assured by our state constitution's liberty and privacy clauses from gay men and lesbians, because some people happen to be uncomfortable with them, then it necessarily follows that other majorities can deprive other disfavored minorities of other constitutional rights.

Indeed, were Proposition 8 upheld as a valid amendment, it is difficult to imagine what foundational principles in California's Constitution couldn't be similarly amended out of existence by simple majority vote. Ultimately, Proposition 8 endangers everyone's rights.

It is clear that the stakes in the Prop. 8 case are no longer limited to marriage equality alone. Hanging in the balance is whether state constitutional protections for pluralism and diversity—qualities that have not only distinguished California throughout its history, but have been key to its emergence as global economic powerhouse—may be henceforth subject to the vicissitudes of campaign politics.

Against this high-stakes backdrop, the public sector consensus to invalidate Proposition 8 is perhaps not surprising. The embattled measure now before the state high court has thrown into stark relief the principle San Francisco asserted in 2004: discrimination is not merely detrimental to the minority it singles out, but ultimately to the majority, too. And that principle isn't limited to same-sex marriage.

Robbed of their capacity to protect the equal rights of their citizens, state and local governments' ability to serve the common good is harmed—both actually and potentially—by injustices that should have no place in 21st Century California.