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Can California's same-sex marriages be saved?

A constitutional ban would also likely doom the unions already on the books.

By Kenji Yoshino

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We have all heard of May-December marriages, but in California these days, it's the status of a June-November marriage that is at issue.

Since June 16, same-sex couples have been marrying at a rapid clip, pursuant to last month's landmark ruling by the state Supreme Court. In November, however, Californians will vote on a proposed state constitutional amendment that would define marriage as being strictly between a man and a woman. If it passes, there obviously would be no more same-sex marriages in the future. But what would happen to the marriages that gays and lesbians already entered into between June and November?

This would be a novel issue, so no one knows for sure. But I believe the amendment would void the marriages. For the same-sex marriages to survive, freedom-to-marry advocates would have to win at least one of two arguments in the courts. Both arguments would rest on the unfairness of applying the reinstated ban retroactively, but both would probably fail.

The first argument would be that the constitutional amendment was not intended to apply retroactively to same-sex marriages. But it is hard to see how this case would be made. The proposed amendment does not say that "only a man and woman may get married in California," which might reasonably be construed to apply just to future marriages. It says that "only marriage between a man and a woman is valid or recognized in California." The language leaves room for *other* states to recognize the June-November marriages as valid, but it leaves no discernible discretion for any governmental body in California to continue extending marriage rights to the June-November crowd.

The second argument that might protect the existing same-sex marriages is that the retroactive application of the amendment would violate the federal Constitution. This is a more credible argument -- as every first-year law student knows, if a state constitution conflicts with the U.S. Constitution, the latter will trump the former as "the supreme law of the land." Moreover, Article I of the U.S. Constitution contains a provision that seems directly on point: "No state shall ... pass any ... ex post facto law." As "ex post facto" means "after the fact," this provision appears to prohibit states from legislating retroactively.

However, since the 1798 Supreme Court case of Calder vs. Bull, the ex post facto clause has generally been deemed to apply only to criminal laws. Thus, a state legislature cannot increase the punishment for a crime after it has been committed, but it remains free to impose retroactive civil disabilities. In the Calder case, for instance, the ex post facto clause did not bar the Connecticut Legislature from reopening an ostensibly final probate proceeding. In the centuries since then, the Supreme Court has on occasion stretched the definition of what constitutes an "essentially criminal" penalty, thereby extending the protections offered by the clause. But it is highly unlikely that any court would treat the annulment of same-sex marriages as a criminal punishment in civil dress.

One could still argue that other provisions of the U.S. Constitution prohibit California from applying the proposed amendment retroactively. The most likely candidates are the prohibition on state action that impairs the obligation of contracts (which falls under Article I), or the 14th Amendment's due-process clause, which has been understood to guarantee fundamental fairness under the law. But these arguments are also long shots. There is direct Supreme Court precedent holding that marriages do not fall under the protection of the contracts clause. Similarly, the argument that retroactive application of civil laws violates the due-process clause has been a repeat loser in the courts.

Despite the settled law in this area, many people -- including lawyers -- still seem to believe that the June-November marriages will be safe simply because it would be so unfair to annul them.

I agree that voiding these marriages would be unfair. I can't help but think of lesbian activists Del Martin, 87, and Phyllis Lyon, 83, who have been in a relationship for 55 years. Martin and Lyon got married on Feb. 12, 2004, in the brief window of time during which Mayor Gavin Newsom ordered the city of San Francisco to issue marriage licenses to same-sex couples. That marriage was annulled pursuant to a court ruling on Aug. 12 of that year. This year, after the state Supreme Court decided in May that gay marriage *was,* after all, allowable, Martin and Lyon tied the knot again. It shocks the conscience to think that this couple -- one of whom is apparently not in good health -- could have their marriage annulled by the state again this fall.

But just because something is unfair does not mean it is unconstitutional. There is nothing in the language of the November ballot proposition or in the federal Constitution that would prevent the proposed constitutional amendment (assuming it is passed) from withdrawing state recognition of the thousands of same-sex marriages by California couples that are projected to take place before the general election. Californians cannot rely on the courts to rectify this potential injustice. They must take matters into their own hands in the voting booth in November.

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