



Law School Memorandum

From Lynn Wardle

To: Elder Loren C. Dunn

Date: July 31, 1997

Room: 518 JRCB

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**RE: California Voter Proposal Regarding Same-sex Marriage**

I am informed that a proposal rejecting same-sex marriage has been drafted for submission to voters in California. It provides that same-sex marriage is not valid or recognized in that state. If a sufficient number of signatures is obtained, this proposal will be placed on the ballot, and if passed by the voters, it will become law. I am informed that the proposal will not amend the California constitution, but if passed, will become a type of law which cannot be repealed by the legislature alone without referral to the people for another ballot vote. (I have not personally researched that.)

If a voter-approved law cannot be repealed by mere legislation, but requires popular vote to repeal, that provides an extra degree of protection for the law against shifting political winds in the legislature. I suspect that a creative legislature must find some way to partially circumvent or undermine such a law without explicitly repealing it, but protection from legislative repeal nonetheless could provide more security for the legal policy than ordinary legislation. However, it might arguably be possible for a court to interpret the state or federal constitution as invalidating the voter proposal if it passes. I do not think there are good constitutional arguments for invalidating the law, but opponents would certainly challenge it.

If the proposal were to amend the state constitution, then it could not be judicially nullified under the state constitution. However, the U.S. Supreme Court decision in *Romer v. Evans* indicates some judicial hostility against anti-homosexual policies that are written into state constitutions. From that perspective, it may be advantageous to not amend the state constitution.

I will be back in Utah on August 7th. My secretary Florence Beal (378-2079) or my son David (221-1130) will know where to reach me in the interim. Also, Professor Eric Anderson, (graduate of our law school and former law clerk at the U.S. Supreme court) who teaches at the University of Iowa College of Law, consulted about the California proposal.

Faithfully your brother,  
LDW

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