

Prop



LEGAL BATTLE CONTINUES

By Cynthia Kincaid

In November 2008, Californians went to the polls and voted on one of the most contentious propositions in the state's history. By a wide margin, voters passed Proposition 8, which addressed the legality of gay marriage by changing California's state constitution to define marriage as a union between a man and a woman. Passage of the proposition eliminated same-sex couples' right to legally marry.

Two Order of the Coif Pacific McGeorge classmates found themselves at the heart of the legal wrangling: **Andy Pugno**, '99, an attorney in private practice and **Kimberley Graham**, '99, deputy attorney general with California's Department of Justice.

Historical Underpinnings

The legislative debate over same-sex marriage has raged since 1995, when Hawaii first tried to redefine marriage. Pugno, who was fresh out of law school and working for then-Assemblyman Pete Knight, took up the cause on Knight's behalf of keeping the definition of marriage between a man

and a woman with AB 1982. The unsuccessful bill prohibited California from recognizing gay marriage from other states.

Since then, Pugno has advocated against gay marriage, serving as the chief attorney in defending Proposition 22, the successful 2000 voter initiative that defined marriage between a man and a woman.

"Proposition 22 said that even if another state changes the definition of marriage, we are going to keep it the same here in California," says Pugno, attorney at law for the Law Offices of Andrew Pugno in Folsom.

San Francisco Mayor Gavin Newsom declared Proposition 22 unconstitutional in 2004 and began issuing marriage licenses, which led to a trilogy of cases on the same-sex marriage issue. “These cases brought a direct legal challenge to Proposition 22,” says Pugno, who by then had opened his own law practice in trusts and estate planning. The California Supreme Court struck down Proposition 22 in May 2008.

“A month later, Proposition 8 qualified for the ballot and that began the campaign essentially to reverse what the court had done in May,” says Pugno.

Taking the Initiative

The ongoing battle over same-sex marriage wouldn't be possible were it not for California initiative process, a system that some say has become onerous.

“California is virtually unique among American states in that we have such an open and easy process to amend the state Constitution—for better or for worse,” says **Lawrence Levine**, a Pacific McGeorge professor. “We've got much greater direct citizen participation in the development of our Constitution than most other states, so whenever there's a controversial decision that has a social impact, you can imagine how it could lead to an effort to amend the Constitution.”

The proposition battle itself was groundbreaking. An estimated \$80 million was spent fighting for and against the issue, making it one of the nation's most expensive proposition fights. “Proposition 8 was the first time that the voters were actually undoing a court ruling that legalized gay marriage,” says Pugno. “It was the first time that you had a court that struck down the marriage laws and opened up licensing for same-sex couples, and then the voters were asked to reverse that.”

A Continuing Debate

There's no question that Andy Pugno has played a significant role in Proposition 8's success. Pugno began working for Knight in 1995, the year he began law school as an evening division student. “Later, when I had obtained my license to practice law, I was involved in a variety of cases defending the marriage laws against legal challenges,” he says.

Pugno credits McGeorge with teaching him how to think strategically about the law, which, he says, has allowed him to argue Proposition 8's merits dispassionately. “I learned how to think as a lawyer, including evaluating issues from all perspectives in a dispassionate way, which improves one's ability to be an advocate,” he says. “I trace a lot of my success to avoiding getting sucked into an emotional fight and sticking to the policy debate that's really at stake.”

Both houses of the state Legislature and the state's attorney general, Jerry Brown, have condemned Proposition

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8. Still, only another voter initiative can overturn the ruling, and efforts are already under way.

“I think in either 2010 or 2012, the voters of California will have the opportunity to vote on this initiative again,” says Levine. “And the battle will go on.”

Levine is concerned, not only about the constant ongoing fight, but the continuing costs, as well. “The Proposition 8 battle is estimated to have cost about \$80 million in terms of the efforts on both sides, at a time when our state is virtually bankrupt,” he says. “Eighty million could have been spent on education or health care. Instead \$80 million was spent on this bloodbath over whether or not to undo a decision of the state Supreme Court.”

And the legal fight is, indeed, continuing. Ted Olson and David Boies have filed suit in federal court challenging the proposition. This case, Pugno says, will open up a new volume in the debate. “This case has so much behind it, I think it's on its way to the U.S. Supreme Court,” he says.

Despite all of this, Levine believes an initiative within the next few years will ultimately undo Proposition 8. “They're going to lose eventually, so what have you accomplished?” he asks.

But Pugno disagrees, believing that the U.S. will follow Europeans, who protect traditional marriage, but recognize and provide rights and benefits to alternative relationships. In fact, he feels California has already started down this path.

“In California, the domestic partners law has been expanded to the point that same-sex couples can access nearly all the rights and benefits that married couples can access, which diminishes the strengths of the argument that there is a need for changing the definition of marriage to protect people's legal status,” he says.

But Levine still believes that California's initiative process will have the final say. “Conventional wisdom says that within five years these results will be undone through another initiative,” he says. “This isn't the end; this is just the beginning of an emotionally exhausting and financially expensive process through initiative.”