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# **“THE DIVINE INSTITUTION OF MARRIAGE”: AN OVERVIEW OF LDS INVOLVEMENT IN THE PROPOSITION 8 CAMPAIGN**

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*The Church of Jesus Christ of Latter-day Saints (LDS or Mormon church) was heavily involved in the passage of Proposition 8 in California. Church members participated in a variety of ways including extensive fundraising and a variety of publicity efforts such as door-to-door get-out-the-word campaigns.*

*Statements by the church and its leaders were a central part of the LDS Proposition 8 strategy. The church issued three official statements on Proposition 8, which combined theological and religious content with specific political, sociological, and legal claims. For instance, in their support for Proposition 8, LDS church leaders (most of them not legal professionals) made a series of detailed predictions about the legal consequences of same-sex marriage. These official declarations were supplemented and reinforced by a variety of unofficial statements from church leaders and members.*

*This Article tells the story of LDS involvement with Proposition 8, in particular the legal claims made by the church and its leaders. It assembles the statements made by church leaders and church members during the Proposition 8 campaign, briefly examines the accuracy of some of the most broadly circulated claims, and discusses implications.*

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## INTRODUCTION

LDS<sup>2</sup> church involvement in the Proposition 8 campaign has generated substantial interest, given the pivotal role of church members and their contributions during the close campaign. Church members were instrumental in the passage of Proposition 8, and official and unofficial statements helped drive member participation in the campaign. Despite the intense media focus on aspects of church involvement, existing accounts are often light on specifics. There is no single in depth account in existing legal literature of LDS statements about Proposition 8.<sup>3</sup>

In this article, I set out a detailed descriptive account of LDS involvement in the Proposition 8 campaign. I catalog and describe some important claims made by the LDS church, and provide brief analysis. A full discussion of the accuracy of all church statements is beyond the scope of this article, but I set out some initial thoughts regarding prominent legal claims and their deployment during the campaign, and I briefly sketch some potential paths for future discussion.

I. A SHORT LEGAL HISTORY OF *MARRIAGE CASES* AND PROPOSITION 8

In 2000, California voters approved California's Proposition 22, which amended state law to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."<sup>4</sup> LGBTQ<sup>5</sup> advocates

<sup>2</sup> Throughout this paper, I will use the terms LDS and Mormon interchangeably, to refer to the Church of Jesus Christ of Latter-day Saints or its members.

<sup>3</sup> Numerous law articles mention the basic fact of significant LDS participation in the Proposition 8 campaign. However, none have analyzed the ways in which specific claims from church leaders contributed to overwhelming church member support for the proposition. For instance, there are currently zero articles in the Westlaw database which discuss the specific legal claims made by Elder Bednar, which were an important part of the LDS response to Proposition 8, *see infra* Part IV.A.c (discussing remarks of Elder Bednar), or the widespread use of the Six Consequences document, *see infra* Part IV.C (discussing the Six Consequences document). One article by Fred Gedicks does briefly discuss LDS statements about Proposition 8, in the context of a discussion on religion in the public sphere; however, it does not examine specific claims in any depth. *See* Frederick Mark Gedicks, *Truth and Consequences: Mitt Romney, Proposition 8, and Public Reason*, 61 ALA. L. REV. 337, 366 (2010). In addition, some legal scholars have provided insightful analysis of some of the legal claims that arose during the Proposition 8 campaign generally, or the differences between marriage and antidiscrimination laws. *See* Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 357, 366–90 (2011) (discussing some specific claims made by Proposition 8 advocates); Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169 (2012) (discussing critical differences between marriage and antidiscrimination laws). However, to date no legal scholars have examined the cultural and religious background of LDS support for Proposition 8.

<sup>4</sup> *See California Defense of Marriage Act, Proposition 22*, available at <http://primary2000.sos.ca.gov/VoterGuide/Propositions/22text.htm>. Proposition 8 passed with a 61% vote.

continued to seek legal recognition of marriages, and in February 2004 the city of San Francisco began issuing marriage licenses to same-sex couples.<sup>6</sup> During a one-month period, approximately 4,000 same-sex couples married.<sup>7</sup> In *Lockyer v. City and County of San Francisco*,<sup>8</sup> the California Supreme Court invalidated those marriages but left open the question of the constitutional validity of the California marriage statutes.<sup>9</sup>

The legal issue in the consolidated *Marriage Cases* was “whether our state Constitution prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship that affords all of the significant legal rights and obligations traditionally associated under state law with the institution of marriage, but under which the union of an opposite-sex couple is officially designated a ‘marriage’ whereas the union of a same-sex couple is officially designated a ‘domestic partnership.’”<sup>10</sup>

The consolidated appeal was one of the most heavily briefed cases in the court’s history, with written briefs from more than twenty counties and municipalities and more than 250 religious and civil rights leaders and organizations, and almost four hours of oral argument in court.<sup>11</sup> The

<sup>5</sup> Two quick notes on terminology: First, *LGBTQ*. There is no single designation which perfectly describes members of the lesbian, gay, bisexual, transgender and queer (or questioning) community. Throughout this Article, I will use the term LGBTQ, while recognizing the inherent limits of that term. See Sarah Camille Conrey, Hey, *What About Me?: Why Sexual Education Classes Shouldn’t Keep Ignoring LGBTQ Students*, 23 HASTINGS WOMEN’S L.J. 85 n.1 (“‘LGBTQ’ stands for ‘Lesbian, Gay, Bisexual, Transgender, [and] Queer.’ I use this term because it was the most prevalently used and most inclusive term that I encountered.”); cf. Julie A. Greenberg, *Intersex and Intrasex Debates: Building Alliances to Challenge Sex Discrimination*, 12 CARDOZO J.L. & GENDER 99, 103–04 (discussing debate among intersex groups about inclusion in an LGBTI label). Second, *same-sex marriage*. There are several other terms in use, including gay marriage, marriage equality, and marriage protection. In addition, opponents sometimes use scare quotes, as in *gay “marriage”* as a sort of indication of their view that these relationships should not be considered marriages. In this article, I will use the neutral label *same-sex marriage*; however, other terms appear in some quoted material.

<sup>6</sup> In re *Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008). This took place under the direction of San Francisco mayor Gavin Newsom. *Mayor Defends Same-Sex Marriages*, CNN.COM (Feb. 22, 2004, 10:51 PM), <http://www.cnn.com/2004/LAW/02/22/same.sex/index.html>. This action was immediately challenged in court. The superior court declined to grant an immediate stay, but the California Supreme Court issued a stay in March 2004.

<sup>7</sup> *Marriage Cases*, 183 P.3d at 403.

<sup>8</sup> 95 P.3d 459 (Cal. 2004).

<sup>9</sup> *Id.* at 464; accord *Marriage Cases*, 183 P.3d at 403 (noting that *Lockyer* did not address the constitutionality of the statutes).

<sup>10</sup> *Marriage Cases*, 183 P.3d at 398.

<sup>11</sup> Press Release, American Civil Liberties Union, Same-sex Couples Ask California Supreme Court to Strike down Marriage Ban, (Feb. 6, 2008), available at <http://www.aclu.org/LGBTQ/relationships/34004prs20080206.html>; see also Adam Liptak, *Definition of Marriage is at Heart of California Case*, N.Y. TIMES, Mar. 5, 2008. Attorneys for San Francisco and for individual plaintiffs representing twenty-three same-sex couples argued that the state marriage law violated equal protection rights and antidiscrimination laws, while state attorneys and proponents argued that the law was justified because of cultural tradition. See Bob Egelko, *State Supreme Court*

court's 4-3 ruling on May 15, 2008, found that the statutory scheme establishing different forms of legal recognition for same-sex and opposite-sex unions violated the state constitution by "potentially impinging upon a same-sex couple's constitutional right to marry."<sup>12</sup>

Reactions followed swiftly. Many commentators praised the decision; for instance an editorial in the *New York Times* stated the decision "brought the United States a step closer to fulfilling its ideals of equality and justice."<sup>13</sup> The *Los Angeles Times* hailed the court's recognition that "rights must supersede customs, that just because marriage traditionally has been defined as a union between a man and a woman, it cannot be denied to same-sex couples by 'tradition alone.'"<sup>14</sup> Other politicians and pundits criticized the decision. Maggie Gallagher of the National Organization for Marriage contended that the court ruling put same-sex marriage foes "in the exact position as racists under California law," while Thomas Messner of the Heritage Foundation wrote that the decision would "invite private forms of discrimination" against "those who continue to believe marriage is a relationship between a man and a woman," including denial of government benefits, censorship, and increased liability under nondiscrimination laws.<sup>15</sup>

From the start, it was clear that same-sex marriage opponents would seek to overrule *Marriage Cases* at the ballot box. Even before the court's decision, groups collected signatures to place the issue on the ballot as a proposed constitutional amendment. In April 2008, proponents formally submitted the proposed amendment which stated: "[O]nly marriage between a man and a woman is valid or recognized in California."<sup>16</sup>

*Takes Up Same-Sex Marriage*, S.F. CHRON., Mar. 3, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2008/03/03/MN7KV9PRA.DTL>; Maura Dolan, *Same-Sex Marriage Has Skeptics On Court*, L.A. TIMES, Mar. 5, 2008, available at <http://articles.latimes.com/2008/mar/05/local/me-gaymarriage5>.

<sup>12</sup> *Marriage Cases*, 183 P.3d at 400.

<sup>13</sup> Editorial, *A Victory for Equality and Justice*, N.Y. TIMES, May 17, 2008.

<sup>14</sup> Editorial, *Marriage Rights for All*, L.A. TIMES, May 16, 2008.

<sup>15</sup> Maggie Gallagher, *Prop. 22 Can Save Traditional Marriage in California*, HUMAN EVENTS (May 29, 2008, 3:01 AM), <http://www.humanevents.com/article.php?id=26716>; Thomas M. Messner, *Same-Sex Marriage and the Threat to Religious Liberty*, HERITAGE FOUND. (Oct. 30, 2008), <http://www.heritage.org/research/reports/2008/10/same-sex-marriage-and-the-threat-to-religious-liberty> (responding to both *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), in *California and Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008)).

<sup>16</sup> *Initiative to Ban Gay Marriage on Calif. Ballot*, DENVER POST, June 3, 2008, available at [http://www.denverpost.com/entertainment/ci\\_9459575?source=pkg](http://www.denverpost.com/entertainment/ci_9459575?source=pkg) (noting that the petition was submitted by Bader & Associates, Inc.); see *Who We Are*, BADER & ASSOCIATES, INC., <http://www.baderandassociates.com/home> (last visited Nov. 17, 2011) (describing themselves as a "petition management firm that specializes in qualifying ballot initiatives"); see also *California Proposition 8, the "Eliminates Right of Same-Sex Couples to Marry" Initiative*, BALLOTEDIA, [http://ballotpedia.org/wiki/index.php/California\\_Proposition\\_8\\_\(2008\)#Path\\_to\\_the\\_ballot](http://ballotpedia.org/wiki/index.php/California_Proposition_8_(2008)#Path_to_the_ballot) (last visited

The subsequent campaign was vigorously contested by both sides and included a variety of early constitutional and procedural challenges.<sup>17</sup> Massive fundraising on both sides resulted in almost \$80 million being spent on the issue.<sup>18</sup> Proposition 8 was narrowly approved by California voters, by a margin of 52 percent to 48 percent.<sup>19</sup> A series of later appeals as well as an ongoing federal constitutional case have created further uncertainties about the ultimate effect of Proposition 8.<sup>20</sup>

## II. BASIC BACKGROUND ON LDS ORGANIZATION AND DOCTRINE

With the basic backdrop of Proposition 8 in place, we can examine LDS actions during the campaign. In order to better understand the topic, we will first briefly set out some background information on LDS doctrine, organization, and political history.

### A. Institutional Titles and Organization

LDS church leadership positions and titles can be a bit of a mystery for the uninitiated. The church is led by a Prophet who is viewed as having direct communication with God. The Prophet is generally referred to as “President” – i.e., “President Gordon B. Hinckley.” The Prophet and two

Nov. 17, 2011); see generally Anthony E. Varona, *Taking Initiatives: Reconciling Race, Religion, Media and Democracy in the Quest for Marriage Equality*, 19 COLUM. J. GENDER & L. 805 (2010).

<sup>17</sup> Maura Dolan and Tami Abdollah, *Gay Rights Supporters File 3 Lawsuits Against Prop. 8*, L.A. TIMES, Nov. 6, 2008, available at <http://articles.latimes.com/print/2008/nov/06/local/me-gaylegal6> (noting that same-sex marriage advocates argued that the proposition should be excluded from the ballot as an illegal constitutional revision, rather than an action which could properly be performed by a ballot initiative and also that the California Supreme Court initially declined to hear the challenge); Bob Egelko, *Challenge Tossed, Gay Marriage Ban on Ballot*, S.F. CHRON., July 17, 2008, available at [http://articles.sfgate.com/2008-07-17/bay-area/17174379\\_1\\_same-sex-marriage-equality-california-ballot-measure](http://articles.sfgate.com/2008-07-17/bay-area/17174379_1_same-sex-marriage-equality-california-ballot-measure). In addition, there were questions about the ballot language which was used. The Attorney General described the proposition on the ballot as “changes the California Constitution to eliminate the right of same-sex couples to marry in California.” This description was contested by supporters of the proposition. See Jessica Garrison, *Prop. 8 Rewording Contested*, L.A. TIMES, July 29, 2008, available at <http://articles.latimes.com/2008/jul/29/local/me-gaymarriage29>; see also *Eliminates Right of Same-Sex Couples to Marry. Initiative Constitutional Amendment*, VOTERS INFO. GUIDE, available at <http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop8-title-sum.htm>.

<sup>18</sup> Jessica Garrison, *Gay Marriage at Issue in Maine*, L.A. TIMES, Aug. 15, 2009, available at <http://articles.latimes.com/print/2009/aug/15/local/me-briefs15.S4> (stating that there has been an eighty million dollar battle over Proposition 8).

<sup>19</sup> Tamara Audi, Justin Scheck & Christopher Lawton, *California Votes for Prop 8*, WALL ST. J., Nov. 5, 2008, available at <http://online.wsj.com/article/SB122586056759900673.html>.

<sup>20</sup> See Brent Hunsaker, *Courts Hold Uncertain Future of Proposition 8*, ABC NEWS (Aug. 5, 2010, 6:12 PM), <http://www.abc4.com/content/news/top%20stories/story/Courts-hold-uncertain-future-for-Proposition-8/T34r0qaDXUeT7V-ywZp95g.csp>; Varona, *supra* note 16, at 810–11 (discussing appeals); Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 914–18 (discussing the federal constitutional case).

Apostles who assist him<sup>21</sup> are known as the First Presidency, which is the presiding body in the church.<sup>22</sup>

The Quorum of the Twelve Apostles consists of twelve other senior church leaders and is the governing body directly below the First Presidency.<sup>23</sup> Members of the Twelve are referred to as Apostles, and use the title Elder – i.e., Elder Dallin H. Oaks.<sup>24</sup> (A common comparison – and oversimplified, but helpful for outside observers – is that the church Prophet is the equivalent of the Pope in Catholic hierarchy, while the Apostles are akin to senior Cardinals.) And the next tier of church leadership is the First Quorum of the Seventy, whose members are known as Seventies, and who also use the title Elder.

The Prophet, Apostles, and Seventies are known as General Authorities – they have authority over the general church membership. Every six months, the church holds a General Conference at which the General Authorities deliver sermons to the church as a whole.<sup>25</sup> Conference (as it is commonly called) is widely viewed by church members, and Conference proceedings are also published in the church’s monthly magazine.

Finally, local church leaders (almost all lay clergy – unpaid volunteers) supervise and instruct members on an everyday basis. Local congregations known as wards are each led by a Bishop. Wards are grouped into stakes, under the direction of a Stake President. Local leaders like Bishops and Stake Presidents are empowered to direct the members of their congregations, but not the church as a whole.<sup>26</sup>

### *B. Mormons and Marriage*

The church has a complicated history on marriage. From about 1831 to about 1890, some members of the church entered into polygamous marriages, typically referred to within the community as “plural marriage” or “the principle.”<sup>27</sup> The church in Utah repeatedly clashed with the federal government over the practice, and by 1890 federal pressure had

<sup>21</sup> See generally *ENCYCLOPEDIA OF MORMONISM* (Daniel H. Ludlow ed., 1992) (stating the names of Presidents of the church, all of them being men).

<sup>22</sup> See generally *id.* (mentioning that upon the death of an existing Prophet, the new Prophet is drawn from the senior leadership of the Twelve).

<sup>23</sup> See generally *id.*

<sup>24</sup> *Id.*

<sup>25</sup> See *id.* at 307.

<sup>26</sup> See *id.* at 117. Some smaller congregations, called Branches, are led by Branch Presidents. See generally Matthew Bowman, *THE MORMON PEOPLE: THE MAKING OF AN AMERICAN FAITH* 255–56 (2012) (setting out the structure of LDS leadership).

<sup>27</sup> See Bowman, *supra* note 26, at 80–89, 124–36, 148–52.

become unbearable. Congress passed draconian laws disenfranchising church members and barring them from jury service; it also legally dissolved the church and seized church property, while thousands of church members were jailed in polygamy prosecutions.<sup>28</sup> In 1890, the mainstream LDS church officially renounced the practice of polygamy.<sup>29</sup>

In addition to its polygamous history, the LDS church also has some unusual theological beliefs regarding marriage. In addition to its regular meetinghouses, the church operates a little over 100 *temples* worldwide, and church members may solemnize their weddings (“sealings” in LDS parlance) inside of LDS temples.<sup>30</sup> Members believe this ceremony will allow the marital relationship to endure into the afterlife. Church members therefore view temples as extremely sacred places, and only those church members who pass a special worthiness interview and receive an official “temple recommend” are allowed to enter an LDS temple.<sup>31</sup>

### C. LDS Political Background Generally

In its early days, the LDS church was a highly active political entity. Church founder and initial Prophet Joseph Smith held numerous political offices and eventually ran for President of the United States. His successor Brigham Young was territorial governor in Utah and extensively involved in frontier politics for decades.<sup>32</sup>

However, in recent decades the church has largely avoided the political arena.<sup>33</sup> And in a series of statements and press releases, the church and its leaders have repeatedly espoused a position of official political neutrality

<sup>28</sup> See Nathan B. Oman, *The Story of a Forgotten Battle*, 2002 BYU L. REV. 745 (2002); Nathan B. Oman, *Natural Law and the Rhetoric of Empire: Reynolds v. United States, Polygamy, and Imperialism*, 88 WASH. U. L. REV. 661 (2011); Rodney K. Smith, *Treating Others as our Own: Professor Levinson, Friendship, Religion, and the Public Square*, 38 TULSA L. REV. 731, 737–40 (2003); see also Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 197 n.19 (mentioning history of Mormon persecution).

<sup>29</sup> See Oman, *supra* note 28. Some covert marriages took place until 1904, and a number of relatively small break-away groups practice plural marriage to this day. *Id.*

<sup>30</sup> Temples are also the site of church ordinances performed on behalf of deceased family members.

<sup>31</sup> See ENCYCLOPEDIA OF MORMONISM, *supra* note 21; see also Bowman, *supra* note 26, at 169–70.

<sup>32</sup> See ENCYCLOPEDIA OF MORMONISM, *supra* note 21, at 1098, 1100 (describing the election of Young as governor of the Utah territory and Mormons’ involvement in the political history of the region); see generally RICHARD LYMAN BUSHMAN, *JOSEPH SMITH: ROUGH STONE ROLLING* (2003); LEONARD J. ARRINGTON, *BRIGHAM YOUNG: AMERICAN MOSES* (1985); Bowman, *supra* note 26, at 33–123.

<sup>33</sup> See ENCYCLOPEDIA OF MORMONISM, *supra* note 21, at 1107–09 (stating that the Church has remained neutral on most political matters, taking positions on only a few issues in recent decades); Bowman, *supra* note 26, at 208–28.



on issues of partisan politics.<sup>34</sup> For instance, former President Gordon B. Hinckley said in a television interview that “we do not tell our people how to vote, and we do not tell the government how it should be run.”<sup>35</sup> And an official church press release notes that “the Church does not: endorse, promote or oppose political parties, candidates or platforms; allow its church buildings, membership lists or other resources to be used for partisan political purpose; [or] attempt to direct its members as to which candidate or party they should give their votes to.”<sup>36</sup> However, the church “reserve[s] the right as an institution to address, in a nonpartisan way, issues that it believes have significant community or moral consequences or that directly affect the interests of the Church.”<sup>37</sup>

One area of prominent political involvement was the proposed Equal Rights Amendment. The church officially opposed the ERA, and church members organized in large numbers during the 1970s to oppose the ERA’s passage. Church involvement was pivotal in the ERA’s eventual failure.<sup>38</sup> However, this level of political involvement has been the exception, not the rule. The church has generally maintained a strong norm of non-involvement in political issues for many decades. This makes the church’s high-profile political involvement in the same-sex marriage context particularly unusual.

There is, however, a strong tradition of civic involvement in the LDS community. One of the church’s Articles of Faith – a set of basic and widely-circulated statements of belief – reads, “we believe in being subject to kings, presidents, rulers, and magistrates, in obeying, honoring, and sustaining the law.”<sup>39</sup> In addition, Section 134 of the Doctrine and Covenants (a volume of LDS scripture) contains a detailed discussion of democracy, natural law, and civic involvement.<sup>40</sup>

<sup>34</sup> See *Political Neutrality*, NEWSROOM: MORMON NEWS, THE OFFICIAL NEWSROOM OF THE CHURCH, <http://newsroom.lds.org/official-statement/political-neutrality> (last visited Nov. 28, 2011) (noting that “the Church of Jesus Christ of Latter-day Saints is neutral in matters of party politics”).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* The church also “encourage[s] its members to play a role as responsible citizens in their communities, including becoming informed about issues and voting in elections” and “expect[s] its members to engage in the political process in an informed and civil manner.” *Id.*; see also Gedicks, *supra* note 3, at 337, 341–42 (noting that “the church periodically intervenes in state initiative and ratification campaigns to defend ‘true’ or ‘divine’ principles that it believes ought to be enacted into law”).

<sup>38</sup> See David B. Magleby, *Politics: Contemporary American Politics*, ENCYCLOPEDIA OF MORMONISM, available at <http://eom.byu.edu/index.php/Politics>; MARTHA BRADLEY, *PEDESTALS AND PODIUMS* (2005) (discussing the history of LDS involvement in the ERA campaign); Bowman, *supra* note 26, at 211–12.

<sup>39</sup> 12<sup>th</sup> Article of Faith. See <http://mormon.org/articles-of-faith>.

<sup>40</sup> See generally Rodney K. Smith, *James Madison, John Witherspoon, and Oliver Cowdery: The*

#### D. LDS Doctrine and Ambiguity

Understanding LDS statements is complicated because unlike some other religious traditions, the LDS church largely eschews official statements of doctrine.<sup>41</sup> Outside of its written scriptures, there is strikingly little that is classified as official church doctrine. While there is a paucity of official doctrine, General Authorities do provide frequent guidance through regular Conference talks, which are generally viewed with great deference. Church leaders have also published many books about church theology, although these are also not official doctrine. (Ironically, one of the most popular is a book entitled *Mormon Doctrine*, authored by a now-deceased senior Apostle).<sup>42</sup> And Bishops and Stake Presidents supervise and give instruction to their congregations which many members view as useful guidance.

One example of the complicated nature of LDS doctrine can be seen in a church press release which ironically tries to clarify this very issue. The press release notes that:

Not every statement made by a Church leader, past or present, necessarily constitutes doctrine. A single statement made by a single leader on a single occasion often represents a personal, though well-considered, opinion, but is not meant to be officially binding for the whole Church. With divine inspiration, the First Presidency (the prophet and his two counselors) and the Quorum of the Twelve Apostles (the second-highest governing body of the Church) counsel together to establish doctrine that is consistently proclaimed in official Church publications. This doctrine resides in the four “standard works” of scripture (the Holy Bible, the Book of Mormon, the Doctrine and Covenants and the Pearl of Great Price), official declarations and proclamations, and the Articles of Faith.<sup>43</sup>

*First Amendment and the 134<sup>th</sup> Section of the Doctrine and Covenants*, 2003 BYU L. REV. 891 (2003).

<sup>41</sup> Nathan B. Oman, “*The Living Oracles*”: *Legal Interpretation and Mormon Thought*, 42 DIALOGUE: A JOURNAL OF MORMON THOUGHT 1, 1–2 (Summer 2009) (“Mormonism – despite some important exceptions – has largely eschewed closely reasoned propositional theology.”) (internal citation omitted).

<sup>42</sup> See Peggy Fletcher Stack, *Landmark “Mormon Doctrine” Goes Out of Print*, SALT LAKE TRIBUNE, May 21, 2010; see generally GREGORY A. PRINCE & WM. ROBERT WRIGHT, DAVID O. MCKAY AND THE RISE OF MODERN MORMONISM (2005) (discussing the publication and controversial status of *Mormon Doctrine*).

<sup>43</sup> Press Release, The Church of Jesus Christ of Latter-Day Saints, *Approaching Mormon Doctrine*, (May 4, 2007), available at <http://newsroom.lds.org/article/approaching-mormon-doctrine>.

On its face this seems to clarify the issue: Official church doctrine comes in the form of joint statements by the First Presidency and the Quorum of the Twelve, and other statements are not binding. However, the unsigned press release simply adds another layer of confusion, because it was only issued by the Church public relations department; thus by its own standard it is apparently not doctrine.<sup>44</sup>

Different church members may apply different standards to different statements, and gauging the “official-ness” of any particular statement can be a fraught endeavor. Lived church culture often ignores official boundaries, and statements from General Authorities tend to carry great weight with church members regardless of official limits on their status.<sup>45</sup> As Fred Gedicks notes, “active Mormons display an extraordinary degree of obedience and deference” to statements from church leaders.<sup>46</sup> And in a sort of symbiotic relationship, “contemporary general authority sermons emphasize obedience to ecclesiastical authority and loyalty to the institutional church above virtually every other value.”<sup>47</sup> Doctrine (however defined) typically does not develop through theological discussion; rather, it is based on the will of God as revealed through the Prophet.<sup>48</sup>

In this article, I will try to accurately portray the complicated mix of official and unofficial church statements and their effects, along with any potential ambiguity or disagreements over the applicability any statements. However, my views may not be the only interpretation of these statements or their effects on church members.

<sup>44</sup> See Kaimi Wenger, *The New Useless Statement on Church Doctrine*, TIMES AND SEASONS (May 5, 2007), <http://timesandseasons.org/index.php/2007/05/the-new-useless-statement-on-church-doctrine/>.

<sup>45</sup> The effect of such authority is somewhat analogous to courts that cite to authority which is non-binding but deeply influential.

<sup>46</sup> See Gedicks, *supra* note 3, at 366.

<sup>47</sup> Frederick Mark Gedicks, *The “Embarrassing” Section 134*, 2003 BYU L. REV. 959, 969; see also *id.* at 971 (noting that “part of being a Latter-day Saint is accepting that we have a hierarchical governing structure that requires obedience to the President of the Church, the First Presidency, and the Twelve Apostles as prophets, seers, and revelators of the divine will”).

<sup>48</sup> See generally Val D. Ricks, *Religious Doctrine and the Principles of Revelation*, 1 U. ST. THOMAS L.J. 405, 406–13 (2003) (describing the theological background of LDS views on doctrine and revelation). Such revelations necessarily come through the hierarchical structure of church leadership. *Id.* at 425–30.

### III. PRECURSORS TO LDS INVOLVEMENT IN THE PROPOSITION 8 CAMPAIGN

#### A. *The Proclamation on the Family*

The church's involvement in the same-sex marriage debate predates the Proposition 8 debate in 2008. It has varied in detail somewhat over the years; however, it has followed some consistent themes. One relatively early indication of the church's view on same-sex marriage came in 1995, with the official statement "The Family: A Proclamation to the World."<sup>49</sup> The Proclamation, as it is commonly called,<sup>50</sup> states in part that "we, the First Presidency and the Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, solemnly proclaim that marriage between a man and a woman is ordained of God and that the family is central to the Creator's plan for the eternal destiny of His children."<sup>51</sup> It continues, "The family is ordained of God. Marriage between man and woman is essential to His eternal plan." The Proclamation ends on a dire note: "we warn that the disintegration of the family will bring upon individuals, communities, and nations the calamities foretold by ancient and modern prophets. We call upon responsible citizens and officers of government everywhere to promote those measures designed to maintain and strengthen the family as the fundamental unit of society."<sup>52</sup> The Proclamation was signed by the First Presidency and Quorum of the Twelve.<sup>53</sup> It was read by President Gordon B. Hinckley during Conference proceedings in September 1995. Since 1995 it has been widely discussed and supported by church members, and has been cited extensively by general authorities in Conference.

#### B. *Other LDS Involvement in Same-Sex Marriage Prior to California*

In 1994, the church issued a short internal statement formally opposing same-sex marriage. The 1994 statement, published in the "News" section of the church's monthly magazine without fanfare, stated that "the Church of Jesus Christ of Latter-day Saints oppose[s] any efforts to give legal authorization to marriages between persons of the same gender," because "marriage between a man and a woman is ordained of God to fulfill the

<sup>49</sup> *The Family: A Proclamation to the World*, THE CHURCH OF JESUS CHRIST OF THE LATTER-DAY SAINTS, available at <http://www.lds.org/library/display/0,4945,161-1-11-1,00.html>.

<sup>50</sup> *Id.* It is typically referred to as either the Family Proclamation or merely the Proclamation.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

eternal destiny of His children.” It also included a short call for political action: “We encourage members to appeal to legislators, judges, and other government officials to preserve the purposes and sanctity of marriage between a man and a woman, and to reject all efforts to give legal authorization or other official approval or support to marriages between persons of the same gender.”<sup>54</sup> This statement was a response to the Hawai’i Supreme Court’s ruling in *Baehr v. Miike*.<sup>55</sup>

Following that statement, the church took concrete steps to oppose same-sex marriage in Hawaii, first by seeking to intervene in the court case,<sup>56</sup> and then by making statements, contributing money donations and helping coordinate member efforts.<sup>57</sup> Church president Gordon B. Hinckley told the *L.A. Times* in 1997 that “we’re engaged right now in the same-sex marriage problem in legislation in Hawaii.”<sup>58</sup> An internal church memo from 1997, leaked to news organizations in 2008, discusses a church-wide legal and political strategy to fight same-sex marriage.<sup>59</sup> The memo discusses meetings between Elder Dallin H. Oaks of the Twelve (a former law professor and Utah Supreme Court Justice) and professor Lynn Wardle of BYU Law School over how best to oppose same-sex marriage. Discussing threats posed by same-sex marriage, the memo notes that “it could force other states to accept [same-sex marriage] on the basis of constitutional full faith and credit.” It states that “proposed domestic partnerships need to be watched carefully” as they might become marriage “by another name.” However, it also cites Elder Oaks for the idea that “there may have to be certain legal rights recognized for unmarried people such as hospital

<sup>54</sup> *First Presidency Statement Opposing Same Gender Marriages*, LDS.ORG (Feb. 1, 1994), <http://lds.org/ensign/1994/04/news-of-the-church?lang=eng> (last visited Nov. 28, 2011).

<sup>55</sup> The Hawaii Supreme Court first ruled in 1993 that the same sex marriage ban might be discriminatory. This led to further court hearings in 1995 in which the church unsuccessfully sought to intervene. See *Baehr v. Miike*, 910 P.2d 112, 114–16 (Haw. 1996) (denying motion to intervene).

<sup>56</sup> See Richley H. Crapo, *Chronology Of Mormon / LDS Involvement In Same-Sex Marriage Politics*, MORMONSOCIALSCIENCE.ORG (Jan. 4, 2008), <http://www.mormonsocialscience.org/2008/01/04/richley-crapo-chronology-of-mormon-lds-involvement-in-same-sex-marriage-politics>; see also Richley H. Crapo, *LDS Doctrinal Rhetoric and the Politics of Same-Sex Marriage*, MORMONSOCIALSCIENCE.ORG (Jan. 4, 2008), <http://www.mormonsocialscience.org/2008/01/04/richley-h-crapo-lds-doctrinal-rhetoric-and-the-politics-of-same-sex-marriage>.

<sup>57</sup> See Robert J. Morris, “What Though Our Rights Have Been Assailed?” *Mormons, Politics, Same-Sex Marriage, and Cultural Abuse in the Sandwich Islands (Hawai’i)*, 18 WOMEN’S RTS. L. REP. 129, 137–45.

<sup>58</sup> Larry B. Stammer, *Mormon Leader Takes Stock of Church’s Progress*, L.A. TIMES, Mar. 07, 1997, available at [http://articles.latimes.com/1997-03-07/local/me-35779\\_1\\_worldwide-church](http://articles.latimes.com/1997-03-07/local/me-35779_1_worldwide-church).

<sup>59</sup> See Dan Aiello, *Memo links Mass. couple to Prop 22, Mormon strategy*, EDGE BOSTON, Nov. 28, 2008, available at <http://www.edgeboston.com/index.php?ch=news&sc=&sc2=news&sc3=&id=83942>.

visitation” as a concession.<sup>60</sup>

C. *Lynn Wardle Article Opposing Same-Sex Marriage*

Another early indicator of the church’s eventual trajectory was a 1996 article authored by BYU law professor Lynn Wardle and published in the *BYU Law Review*.<sup>61</sup> Because Wardle’s article presages many arguments which would be made during the Proposition 8 campaign, I will discuss it in some detail.

The lengthy article, which reads like a brief, makes a variety of arguments against same-sex marriage. Wardle attacks the “biased and incomplete state of current law review literature” which he blames on an “apparent academic taboo” against criticizing gay rights.<sup>62</sup> He writes that constitutional arguments in favor of same-sex marriage undermine democratic legitimacy by “asking the judiciary to impose a radical redefinition of marriage upon the American people.”<sup>63</sup> He cites to *Bowers v. Hardwick* (his article predates *Lawrence v. Texas*) and asserts that if homosexual acts can be criminalized, then there cannot be a right to state recognition of same-sex relationships.<sup>64</sup>

Wardle also repeatedly makes assertions based on “the nature and meaning of marriage.” For instance, he writes that

The heterosexual dimension of the relationship is at the very core of what makes marriage a unique union and is the reason why marriage is so valuable to individuals and to society. . . . The essence of marriage is the integration of a universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity.<sup>65</sup>

Wardle ties his democratic legitimacy claims to essence-of-marriage assertions:

[T]he historically protected concept of marriage, recognized by scholars worldwide to be the basic unit of society and deeply

<sup>60</sup> *Id.*

<sup>61</sup> Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1 (1996).

<sup>62</sup> *Id.* at 18. Wardle writes that “virtually all the recent scholarship has advocated same-sex marriage; the defense of conventional heterosexual marriage has been almost completely ignored in legal publications.” *Id.* at 4.

<sup>63</sup> *Id.* at 5. Similarly, he dismisses constitutional claims as attempts to “raise . . . progressive social preferences to the level of fundamental constitutional rights.” *Id.* at 27.

<sup>64</sup> *Id.* at 35.

<sup>65</sup> *Id.* at 39.

cherished by the overwhelming majority of men and women who comprise the American polis today, is the union of a man and a woman, not merely any relationship that intertwines self-awareness with various expressions of sexuality.<sup>66</sup>

“Essence of marriage” arguments are also used to distinguish laws based on race:

Race has been found to be unrelated to any legitimate purpose the law could have for distinguishing between couples in marriage regulations. Homosexual behavior, on the other hand, is directly related to one of the fundamental purposes of marriage laws—that is, the regulation of sexual behavior and protection of the basic unit of society—the family.<sup>67</sup>

Finally, Wardle argues that principles of tolerance do not require adoption of same-sex marriage because same-sex marriage is not an expression of tolerance but rather of official endorsement or preference for LGBTQ individuals.<sup>68</sup> Members of society may reasonably reject such endorsement, Wardle writes, if they believe that “some forms of self-gratification, including homosexual behavior, unleash destructive impulses that can wreak havoc on individuals and on society,” or if they “see full-time and part-time homosexuals and their apologists as subverting what remains of the old moral consensus and the institution of marriage and family.”<sup>69</sup> Such belief is not intolerance, but simply avoidance of improper pro-LGBTQ preference or endorsement.

Wardle’s article occupies an important place in the development of LDS thought on same sex marriage. Wardle works at church-operated Brigham Young University. Unlike some nominally religious institutions, BYU is closely supervised by church officials. Students and professors are required to pledge that they will follow church doctrines, such as prohibitions on alcohol.<sup>70</sup> And students and some professors have been

<sup>66</sup> *Id.* at 52; *see also id.* at 33 (“[O]ur nation’s history [and] traditions . . . have long condemned homosexual behavior and have never allowed same-sex marriage.”); *id.* at 57 (“[C]onsistent American legal policy against same-sex marriage . . . reflects the prevailing values of the American people.”). Ironically, Wardle also argues against same-sex marriage by attacking the right of intimate association as a potential slippery slope which could lead to legalized polygamy. *Id.* at 40–48.

<sup>67</sup> *Id.* at 75. Wardle also argues that there is no biological basis for homosexuality, *id.* at 62–74; and criticizes the use of homosexual as a category, arguing that the proper focus is on a person’s actions, not status, *id.* at 83, and writes that “race is an inherent condition, but homosexual behavior is chosen behavior,” *id.* at 82.

<sup>68</sup> *Id.* at 59–62.

<sup>69</sup> *Id.* at 59 n.263.

<sup>70</sup> See BYU Honor Code, available at <https://honorcode.byu.edu/>.

disciplined or even removed for being insufficiently orthodox.<sup>71</sup>

Publication in the *BYU Law Review* is not a sign of church doctrine – the law review publishes many standard legal articles. However, the combination of a BYU professor writing in the *BYU Law Review* on a topic related to official church statements may suggest that Wardle's article reflects (or at least is in agreement with) official church policy (especially when viewed in conjunction with the leaked 1997 memo).<sup>72</sup>

#### D. LDS Involvement in California's Proposition 22

The LDS church took a number of actions regarding California's Proposition 22, which put in place California's original statutory ban on same-sex marriage. For instance, a letter dated May 11, 1999 from the Seventies overseeing California was read to each ward in California in May 1999.<sup>73</sup> This was followed by another letter instructing church members on how to donate to Proposition 22. The letter contained instructions apparently intended to avoid legal problems – for instance, that fundraising should not take place on church property. LDS church members were instrumental in a fundraising campaign which ultimately raised millions of dollars to support Proposition 22.<sup>74</sup>

Church President Gordon B. Hinckley defended the church's actions in an October 1999 Conference talk, stating that

Some portray legalization of so-called same-sex marriage as a civil

<sup>71</sup> Bowman, *supra* note 26, at 242–45; Bryan Waterman & Brian Kagel, *THE LORD'S UNIVERSITY: FREEDOM AND AUTHORITY AT BYU* (1998); David Haglund, *The Case of the Mormon Historian: What Happened when Michael Quinn Challenged the History of the Church he Loved*, SLATE.COM (Nov. 1, 2012), [available at](http://www.slate.com/articles/life/faithbased/2012/11/d_michael_quinn_and_mormon_excommunication_the_complicated_life_of_a_mormon.single.html) [http://www.slate.com/articles/life/faithbased/2012/11/d\\_michael\\_quinn\\_and\\_mormon\\_excommunication\\_the\\_complicated\\_life\\_of\\_a\\_mormon.single.html](http://www.slate.com/articles/life/faithbased/2012/11/d_michael_quinn_and_mormon_excommunication_the_complicated_life_of_a_mormon.single.html).

<sup>72</sup> In addition, many of the claims from Wardle's article were later adopted in official church statements. See *infra* Part IV.A (discussing church statements).

<sup>73</sup> A scanned copy of the letter is available at [http://www.lds-mormon.com/doma\\_copy.shtml](http://www.lds-mormon.com/doma_copy.shtml), a website critical of the church. The letter has not been posted on the church's official website.

<sup>74</sup> See *California Bars Gay Marriage*, ABCNEWS.COM (Mar. 7, 2000), [http://abcnews.go.com/onair/CloserLook/wnt\\_000307\\_CL\\_Prop22\\_feature.html](http://abcnews.go.com/onair/CloserLook/wnt_000307_CL_Prop22_feature.html) (noting that Catholics, Mormons, and Evangelicals raised millions in support of Proposition 22); see also Mary Ellen Robertson, *The Political is Personal*, in 42 *DIALOGUE: A JOURNAL OF MORMON THOUGHT* 123–24 (2009) (“During the months preceding the election, I endured politicking, testimonials, and much inflammatory rhetoric at church and in panicky forwarded emails about the dire consequences if Prop 22 didn't pass: massive school curriculum changes that would make gay sex education mandatory and families headed by same-sex couples seem normal. Such claims played on church members' emotions and fears rather than making any rational sense.”); see generally Robert Salladay, *Mormons now target California: Church asks members to back state ballot initiative*, S.F. EXAMINER, July 4, 1999, at A1 (discussing church efforts in the Proposition 22 campaign). The church also contributed a significant amount to the constitutional amendment campaign in Alaska. See Bob Mims, *Church Funds Initiative to Ban Same-Sex Marriages in Alaska*, SALT LAKE TRIBUNE, Oct. 5, 1998.



right. This is not a matter of civil rights; it is a matter of morality. Others question our constitutional right as a church to raise our voice on an issue that is of critical importance to the future of the family. We believe that defending this sacred institution by working to preserve traditional marriage lies clearly within our religious and constitutional prerogatives. Indeed, we are compelled by our doctrine to speak out. . . .

I commend those of our membership who have voluntarily joined with other like-minded people to defend the sanctity of traditional marriage. As part of a coalition that embraces those of other faiths, you are giving substantially of your means. The money being raised in California has been donated to the coalition by individual members of the Church. You are contributing your time and talents in a cause that in some quarters may not be politically correct but which nevertheless lies at the heart of the Lord's eternal plan for His children, just as those of many other churches are doing. This is a united effort.<sup>75</sup>

A 2006 interview with Elder Dallin H. Oaks of the Twelve and Elder Lance Wickman of the Seventy reiterated some of the same themes.<sup>76</sup> Elder Oaks began by suggesting that the gay rights debate "may be a test of our most basic religious freedoms to teach" church doctrines, pointing to problems in another country where a "church pastor [was] threatened with prison for preaching from the pulpit that homosexual behavior is sinful."<sup>77</sup> Other portions of the interview also engaged political topics briefly, but the majority of the interview focused on interactions with gay and lesbian church members. Elder Oaks and Wickman repeatedly encouraged church members to be kind to gay and lesbian individuals, who suffer from a grievous condition – not unlike a severe mental handicap, said Elder

<sup>75</sup> Gordon B. Hinckley, President, The Church of Jesus Christ of Latter-Day Saints, Address at the Oct. 1999 General Conference, *Why We Do Some of the Things We Do* (Oct. 1999), available at <http://lds.org/general-conference/1999/10/why-we-do-some-of-the-things-we-do?lang=eng>. President Hinckley followed up with conciliatory statements: "[n]evertheless, and I emphasize this, I wish to say that our opposition to attempts to legalize same-sex marriage should never be interpreted as justification for hatred, intolerance, or abuse of those who profess homosexual tendencies, either individually or as a group. As I said from this pulpit one year ago, our hearts reach out to those who refer to themselves as gays and lesbians. We love and honor them as sons and daughters of God. They are welcome in the Church. It is expected, however, that they follow the same God-given rules of conduct that apply to everyone else, whether single or married." *Id.*

<sup>76</sup> See Elders Oaks & Wickman, Official Statement on *Same-Gender Attraction*, LDS NEWSROOM, <http://newsroom.lds.org/official-statement/same-gender-attraction> (last visited Nov. 20, 2011). Note that this is framed as an official church statement to "help clarify the Church's stand on these important, complex and sensitive issues," but may not meet a strict definition of official doctrine. See *supra* note 43 and accompanying text (discussing definitions of official doctrine).

<sup>77</sup> Oaks & Wickman, *supra* note 76. This is probably a reference to the Åke Green case in Sweden. See *infra* Part V.A. (discussing the Green case).

Wickman.<sup>78</sup>

#### IV. LDS ACTIONS AND STATEMENTS RELATING TO PROPOSITION 8

The LDS response to Proposition 8 was multifaceted, building on the church's prior experience with Proposition 22, but greatly expanding on church involvement.<sup>79</sup> The church made three official statements and also coordinated a variety of member acts, while church members also made a number of unofficial statements.

##### A. *Official Statements*

###### a. June 20 Letter to all California Wards

The church's official public reaction began in June 2008. As with Proposition 22, the vehicle was a letter directed to all California wards, and in this case was read over the pulpit on June 29, 2008.<sup>80</sup> This letter, titled "Preserving Traditional Marriage and Strengthening Families," was signed by the First Presidency. It set out several ideas that would become important parts of the church's official discourse on the topic, stating:

In March 2000 California voters overwhelmingly approved a state law providing that "Only marriage between a man and a woman is valid or recognized in California." The California Supreme Court recently reversed this vote of the people. On November 4, 2008, Californians will vote on a proposed amendment to the California state constitution that will now restore the March 2000 definition of marriage approved by the voters.

The Church's teachings and position on this moral issue are unequivocal. Marriage between a man and a woman is ordained of God, and the formation of families is central to the Creator's plan for His children. Children are entitled to be born within this bond of marriage.

A broad-based coalition of churches and other organizations placed

<sup>78</sup> *Id.*

<sup>79</sup> Robertson, *supra* note 74, at 123–24 ("the machinations surrounding the LDS Church's involvement in Proposition 8 made previous efforts to pass Prop 22 look like amateur hour . . . The 2008 campaign was far more polished and tightly organized, though still scripted to appear publicly as a 'grass roots' effort on the part of individual Church members.").

<sup>80</sup> Letter from First Presidency of The Church of Jesus Christ of Latter-Day Saints to Church leaders in California (June 30, 2008), available at <http://newsroom.lds.org/ldsnewsroom/eng/commentary/california-and-same-sex-marriage>.

the proposed amendment on the ballot. The Church will participate with this coalition in seeking its passage. Local Church leaders will provide information about how you may become involved in this important cause.

We ask that you do all you can to support the proposed constitutional amendment by donating of your means and time to assure that marriage in California is legally defined as being between a man and a woman. Our best efforts are required to preserve the sacred institution of marriage.

Concurrent with this letter and under the direction of church leaders, local church leaders began to organize a variety of election events for church members.

b. "Divine Institution of Marriage" statement.

The church issued a formal press release on August 13, 2008, titled "The Divine Institution of Marriage."<sup>81</sup> This set out the most detailed and systematic discussion to date of the church's position on same sex marriage.<sup>82</sup>

The Divine Institution of Marriage press release contained a number of themes, and also made some interesting concessions. It set out a variety of rationales for opposing same-sex marriage. Unsurprisingly, many of these were explicitly religious in nature. For instance, the press release cited to the Biblical account of the Garden of Eden, to make the argument that heterosexual marriage is God-ordained.<sup>83</sup>

It also set out a variety of legal arguments.<sup>84</sup> For instance, the press release predicted that "if same sex marriage becomes a recognized civil right, there would be substantial conflicts with religious freedom."<sup>85</sup> It

<sup>81</sup> Press Release, The Church of Jesus Christ of Latter-Day Saints, The Divine Institution of Marriage (Aug. 13, 2008), <http://www.mormonnewsroom.org/article/the-divine-institution-of-marriage>, (original version without footnotes available at <http://web.archive.org/web/20080822105750/http://newsroom.lds.org/ldsnewsroom/eng/commentary/the-divine-institution-of-marriage>.)

<sup>82</sup> *Id.* Note that because this institutional press release was not signed by the First Presidency or the Quorum of the Twelve, it would be seen, according to some interpretations of church doctrine, as not being an official statement of doctrine. Yet, the high visibility of the press release and its place in a series of public statements suggests that it should be viewed as doctrine under all but the most constrained definitions.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; see also Kaimipono David Wenger, THE CHURCH'S USE OF SECULAR ARGUMENTS, IN SIX VOICES ON PROPOSITION 8: A ROUNDTABLE, 42 DIALOGUE: A JOURNAL OF MORMON THOUGHT 99 (2009).

<sup>85</sup> *Id.*

linked same sex marriage to antidiscrimination law, and suggested that these laws would clash with religion:

Once a state government declares that same-sex unions are a civil right, those governments almost certainly will enforce a wide variety of other policies intended to ensure that there is no discrimination against same-sex couples. This may well place “church and state on a collision course.”

The prospect of same-sex marriage has already spawned legal collisions with the rights of free speech and of action based on religious beliefs. For example, advocates and government officials in certain states already are challenging the long-held right of religious adoption agencies to follow their religious beliefs and only place children in homes with both a mother and a father. As a result, Catholic Charities in Boston has stopped offering adoption services.<sup>86</sup>

The press release also stated that “advocates of same-sex marriage are suggesting that tax exemptions and benefits be withdrawn from any religious organization that does not embrace same-sex unions.” And it made a variety of claims about “mandatory changes in school curricula” which would be caused by same-sex marriage: “When the state says that same-sex unions are equivalent to heterosexual marriages, the curriculum of public schools will have to support this claim.”<sup>87</sup>

The press release also made social science claims. In particular, it stated that marriage is ultimately about procreation and child-rearing. It then stated that heterosexual couples provide “the optimal environment for children” because of “the differing strengths that a father and a mother, by virtue of their gender, bring to the task.”<sup>88</sup>

Finally, it made a variety of political arguments. These build on the earlier June letter’s explicit appeal to populism. For instance, it states that “those who would impose same-sex marriage on American society . . . have taken their case to the state courts, asking judges to remake the institution of marriage . . . [A] broad majority of courts – six out of eight state supreme courts – have upheld traditional marriage laws. Only two, Massachusetts and now California, have gone in the other direction, and then, only by the slimmest of margins – 4 to 3 in both cases.”<sup>89</sup> The

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* This statement was descriptively accurate at the time it was made; it predated court decisions such as *Varnum v. Brien* and *Kerrigan v. Commissioner* where unanimous courts ruled in favor of same-sex marriage rights. See generally William N. Eskridge, *Foreword: The Marriage Cases – Reversing the Burden of Inertia in a Populist Constitutional Democracy*, 97 CAL. L. REV. 1785 (2009) (discussing cases).

language of imposition and democratic legitimacy was used to cast same-sex marriage as an elitist, anti-democratic imposition. And the press release echoed arguments seen earlier about tolerance, stating that allowing same-sex marriage is not tolerance, but is “official endorsement.”<sup>90</sup>

It contained one interesting concession, stating that, “The Church does not object to rights (already established in California) regarding hospitalization and medical care, fair housing and employment rights, or probate rights, so long as these do not infringe on the integrity of the family or the constitutional rights of churches and their adherents to administer and practice their religion free from government interference.”<sup>91</sup> It also contained a call for civility, stating that the church position “neither constitutes nor condones any hostility towards homosexual men and women,” and directing members to “approach this issue with respect for others, understanding, love, and civility.”<sup>92</sup>

### c. October 8 Broadcast

The third official statement was a satellite broadcast sent to church meetinghouses in California in October 2008.<sup>93</sup> It was instructional in nature, and it included directions from Elders M. Russell Ballard and Quentin L. Cook of the Twelve, as well as Elder Whitney Clayton of the Seventy, the church leader specifically in charge of California. It also included some videotaped statements from Elder David A. Bednar of the Twelve.<sup>94</sup>

The October 8 broadcast reiterated a number of themes already introduced by the church. Elder Ballard discussed the importance of

<sup>90</sup> For an in depth discussion of the secular themes discussed in the press release, see Wenger, *supra* note 84.

<sup>91</sup> *Id.*; see *infra* Part IV.B. for more discussion of this portion of the press release.

<sup>92</sup> *Id.*

<sup>93</sup> See Press Release, The Church of Jesus Christ of Latter-Day Saints Newsroom, Church Readies Members on Proposition 8 (Oct. 8, 2008), available at <http://www.newsroom.lds.org/ldsnewsroom/eng/news-releases-stories/church-readies-members-on-proposition-8> (making available a video of the broadcast); *LDS Church Proposition 8 Broadcast Transcript*, 8 Oct 2008, WIKILEAKS (Oct. 15, 2008), [http://wikileaks.ch/wiki/LDS\\_church\\_Proposition\\_8\\_broadcast\\_transcript\\_8\\_Oct\\_2008](http://wikileaks.ch/wiki/LDS_church_Proposition_8_broadcast_transcript_8_Oct_2008) (publishing an unofficial transcript); *Prop8Recording/Full*, KOLOBCAFE (Oct. 13, 2008), <http://kolobcafe.com/wiki/index.php?title=Prop8Recording/Full&oldid=108> (publishing an unofficial transcript) [hereinafter October Transcript]. No official transcript has been released.

<sup>94</sup> See October Transcript, *supra* note 93 (transcribing Elder Bednar’s answers). Note that, like the Divine Institution press release, this broadcast may not qualify as church doctrine under some strict definitions. See *supra* note 82 (discussing officialness of these statements). However, the participation of multiple apostles in a broadcast for all California members indicates a very high degree of officialness for these statements as well. In addition, Elder Ballard began the presentation by stating that he and his colleagues were participating in the broadcast at the direction of the First Presidency. See October Transcript, *supra* note 93.

heterosexual marriage in LDS theology, and he encouraged younger church members to support Proposition 8 through blogging and YouTube. Elder Clayton also discussed political strategy in some detail. "The time between now and Election Day will be a sprint instead of a marathon . . . Now is the time for us to shine in this magnificent cause," said Elder Clayton, who then provided a variety of detailed political strategies to support Proposition 8.<sup>95</sup>

The broadcast also reiterated themes of legal oppression and political usurpation. Elder Ballard cited Proposition 22 and that "the California Supreme Court ruled against the vote of the people." He also cited President Hinckley's statement that Proposition 8 was not a matter of civil rights, but of morality.

Elder Cook continued with a detailed attack on same-sex marriage which echoed much of the previous Divine Institution statement. Cook, an attorney who previously practiced corporate law, stated in the broadcast that "the court's decision will inevitably lead to conflicts with religious liberties, freedom of association, and free speech rights . . . The freedom of families to raise children in an atmosphere that values and supports the unique importance of marriage between a man and a woman will be lost. Society will become more and more hostile to traditional beliefs about marriage and family. People inside of institutions with beliefs that oppose same sex marriage will increasingly be labeled as intolerant and subjected to legal penalties or social ostracism."<sup>96</sup> He further elaborated on three specific points. First, same-sex marriage would alter education law: "unless Proposition 8 passes, children in public schools likely will be taught about same-sex marriages, and that such unions should be respected as the equal of traditional marriages." Second, it would affect adoption law: "the state tried to force Catholic charities in Boston to disregard its religious beliefs and place children with homosexual couples. . . . California's religious adoption agencies will likely face the same choice."

<sup>95</sup> Elder Clayton urged members to divide tasks into a "voter identification phase which consists of canvassing to identify voter preferences," an "advocacy and persuasion phase in which we seek to educate and persuade those voters who are undecided," and a "get out the vote phase, in which voters are encouraged to actually go to their polling place and vote." He encouraged church members to put up yard signs and to participate in phone banks set up for the campaign. He asked that "at least thirty people in each ward and branch in California . . . donate at least four hours per week between now and the election" – or more than four hours, if possible. He detailed "six ways to spend your time on Prop 8" including dedicating Saturdays to phone bank work and neighborhood canvassing, and committing to a One Hundred Hour program the weekend before the election. He encouraged church members to use church-prepared media tools, and work with a designated ward member in charge of coordinating Proposition 8 efforts. See October Transcript, *supra* note 93.

<sup>96</sup> *Id.*

And third, the church's tax status would be threatened, because "pressure will mount to revoke the tax exempt status of religious organizations and other charities that refuse to recognize same-sex marriages or open their facilities for the performance of such marriages. The argument will be that the government shouldn't subsidize discriminatory beliefs with tax exemptions."<sup>97</sup>

Elder Bednar's comments were the most sweeping. Bednar, a non-lawyer, framed his recorded remarks in the style of an interview with young adult church members. One interlocutor asked the question "I'm not married, and I don't have any kids, so, what effect does this have personally for me?" Elder Bednar replied by painting a picture of future oppression:

Well, people say, "All we want is our opportunity, it has no effect on you." But there are people who push on the edges of what is legally allowable, and they use the courts to try to make additional progress to their particular point of view. Therefore, if you have a church, and it does not recognize same-gender marriage, then that is discriminatory, and you should not be allowed to do that.

It is not just wild and crazy to suggest that there could be sanctions against the teaching of our doctrine, because we focus on marriage between a man and a woman, and would not place on equal standing marriage between a man and a man, or a woman and a woman.<sup>98</sup>

Elder Bednar also stated that religious speech would be threatened if Proposition 8 were not passed: "If your religious doctrine is such that you believe marriage between a man and a woman is the only definition of marriage, then that smacks up against free speech, because if marriage is defined in a more broad way, between members of the same gender, then you can't talk about that." He warned that religious oppression was evident from the experience of "other countries in which same-gender marriage has been adopted legally."<sup>99</sup>

Interestingly, Elder Bednar used domestic partner protections as a launching pad to argue that same-sex marriage was unnecessary: "in California, same-gender couples have a variety of protected rights, so they don't lose anything if this particular proposition goes down. . . . they would lose nothing."<sup>100</sup> And Elder Bednar repeated that Proposition 8 was not

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

intolerant. In contrast, he warned, legalization of same-sex marriage would itself lead to “a decreasingly tolerant environment for our own beliefs.”<sup>101</sup>

The broadcast also included a montage of short video clips featuring young-adult church members, also echoing prior statements. For instance, one woman said that “religious freedoms are at stake here. I think that people’s ability to believe in marriage as a divine institution of God, and to preach that, and to follow their conscience, and incorporate that into their everyday lives, that is very much a risk.” Another repeated the point that “Same-sex domestic partnerships already have all the civil and legal rights and benefits of marriage.” And another focused on political arguments:

The fact that there were four judges that went, and made this decision after sixty-one percent of the population of California said, actually, we define marriage as between a man and a woman, and then to go and to flip it, I have a hard time with that. When I vote for something, I expect that that law is going to remain on the books until the people say, you know, never mind. And so, for me, to be able to stand up and say, I don’t agree with what four judges did, and I’m going to put my foot down about that, that makes me feel American.<sup>102</sup>

As I have written elsewhere, the church’s three official statements make three kinds of secular argument: legal, sociological, and political.<sup>103</sup> This mirrors and builds on the church’s prior experience in the political arena in areas ranging from the ERA to Proposition 22.

### *B. Changes Regarding Domestic Partners*

Interestingly, during the Proposition 8 campaign the church softened its prior stance on domestic partnerships. Early in the campaign, it seemed likely that the church would not support domestic partnership rights.

For one thing, the church’s political partners at Protect Marriage had repeatedly stated their opposition to domestic partnership rights.<sup>104</sup> Given

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See Wenger, *supra* note 84 (discussing legal, sociological, and political arguments). Church leaders continued to make religious and spiritual claims as well. See, e.g., Russell M. Nelson, *Celestial Marriage*, Conference Talk, October 2008, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Oct. 2008), <http://lds.org/conference/talk/display/0,5232,49-1-947-28,00.html>. (stating that “[a] couple in love can choose a marriage of the highest quality or a lesser type [non-temple marriage] that will not endure. Or they can choose neither and brazenly steal what they want as ‘marital shoplifters.’”).

<sup>104</sup> See *FAQs*, PROTECTMARRIAGE.COM, (May 8, 2006), <http://web.archive.org/web/20060508183535/www.protectmarriage.com/index.aspx?protect=FAQ> (answering the following questions: “6. Would the *ProtectMarriage* Amendment allow ‘homosexual



those very clear statements from the church's Protect Marriage partners, it might seem likely that the church would oppose domestic partner rights. In addition, the 2006 interview with Elders Oaks and Wickman had included negative statements about domestic partner rights:

PUBLIC AFFAIRS: Would you extend the same argument against same-gender marriage to civil unions or some kind of benefits short of marriage?

ELDER WICKMAN: One way to think of marriage is as a bundle of rights associated with what it means for two people to be married. What the First Presidency has done is express its support of marriage and for that bundle of rights belonging to a man and a woman. The First Presidency hasn't expressed itself concerning any specific right. It really doesn't matter what you call it. If you have some legally sanctioned relationship with the bundle of legal rights traditionally belonging to marriage and governing authority has slapped a label on it, whether it is civil union or domestic partnership or whatever label it's given, it is nonetheless tantamount to marriage. That is something to which our doctrine simply requires us to speak out and say, "That is not right. That's not appropriate."<sup>105</sup>

Given both the attitude of the church's political allies and the church's own prior hints, one could have expected that the church would have come out in opposition to domestic partner rights. Instead, precisely the opposite occurred. The Divine Institution of Marriage press release stated directly that: "The Church does not object to rights (already established in California) regarding hospitalization and medical care, fair housing and employment rights, or probate rights, so long as these do not infringe on the integrity of the family or the constitutional rights of churches and their adherents to administer and practice their religion free from government

marriage by a different name"? *Answer*. No. By recognizing marriage between a man and a woman as the only legal union in California, this amendment would prevent any law from recognizing, or giving rights on the basis of, other personal relationships that attempt to imitate marriage, such as homosexual 'domestic partnerships' or 'civil unions.' 7. Would the *ProtectMarriage* Amendment allow the Legislature to give, or require private employers to give, the legal rights and benefits of married spouses to other relationships, such as 'domestic partnerships'? *Answer*. No. Since marriage would be the only legal union that may be recognized under the *ProtectMarriage* Amendment, no other adult relationships that attempt to imitate marriage could be legally recognized. Since no other type of intimate union would be legally recognized, it logically follows that there would also be no basis upon which to confer rights, benefits, or obligations on such un-recognized relationships.").

<sup>105</sup> See Oaks & Wickman, *supra* note 76. This approach is consistent with statements from Lynn Wardle's article. See Wardle, *supra* note 61, at n.1 (stating that "most of the objections to same-sex marriage presented herein would apply equally against proposals for any other special, preferred, marriage-like legal status conferred upon same-sex couples through procedures similar to those required for heterosexual marriage, such as broad, same-sex domestic partnership schemes").

interference.”<sup>106</sup>

This statement of very clear support for domestic partner rights was quite a surprise and generated discussion in media outlets as well as in LDS blogs.<sup>107</sup>

The church’s about-face on domestic partnership became a vital part of its “love the gays, hate the gayness” message. Church leaders repeatedly built this new view into arguments favoring Proposition 8, stating that “same-gender couples would lose nothing” if Proposition 8 was passed because domestic partnership would remain an option.<sup>108</sup>

### C. Local Statements

In addition to the institutional statements, many local church leaders made statements about Proposition 8. These took place at the individual ward and stake level. Thus, they are of less clear status. At the very least, they are not statements of official church doctrine. However, many church members see such statements as highly persuasive on the local level, as local leaders have religious stewardship over their flocks.<sup>109</sup> And many church members (including local leaders) sent e-mails relating to Proposition 8. While there is no central repository of these, many of them were retained by individual church members.<sup>110</sup> These included various political and legal commentary which were regularly sent to some church members.<sup>111</sup>

One widely circulated memo alleged “six consequences that the coalition has identified if Proposition 8 fails.”<sup>112</sup> This framing created a legal narrative in which same-sex marriage led to a variety of specific legal

<sup>106</sup> *The Divine Institution of Marriage*, *supra* note 81. California law provides that registered domestic partners have the same legal rights as married persons. See CAL. FAM. CODE § 297.5 (West 2007) (“Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provision or sources of law, as are granted to and imposed upon spouses.”).

<sup>107</sup> See, e.g., Kaimipono David Wenger, *A Change in Domestic Partnerships?*, BY COMMON CONSENT BLOG (Aug. 13, 2008), <http://bycommonconsent.com/2008/08/13/what-about-domestic-partnerships/>.

<sup>108</sup> See October Transcript, *supra* note 93.

<sup>109</sup> See generally Brigham Daniels, *Revitalizing Zion: Nineteenth-Century Mormonism and Today’s Urban Sprawl*, 28 J. LAND RESOURCES & ENVTL L. 257 (2008) (discussing concept of stewardship and role of bishops).

<sup>110</sup> For privacy purposes, people in this section will be designated by pseudonyms.

<sup>111</sup> Interview with Anonymous Member #1 (e-mail on file with author).

<sup>112</sup> See Guy Murray, *Six Consequences the Coalition Has Identified If Proposition 8 Fails*, PROTECTING MARRIAGE (Sept. 14, 2008), <http://protectingmarriage.wordpress.com/2008/09/14/six-consequences-the-coalition-has-identified-if-proposition-8-fails/>. A similar document was circulated relating to the same-sex marriage amendment in Arizona. E-mail in possession of the author.

consequences. The memo alleged, among other things, that “children in public schools will *have to be taught* that same-sex marriage is just as good as traditional marriage” (emphasis in original) and that “churches may be sued over their tax exempt status if they refuse to allow same-sex marriage ceremonies in their religious buildings open to the public.”<sup>113</sup> It also predicted challenges to religious adoption agencies and colleges, because “Catholic Charities in Boston already closed its doors in Massachusetts because courts legalized same-sex marriage there.” Most alarming, the Six Consequences memo claimed that “ministers who preach against same-sex marriages may be sued for hate speech and risk government fines.”<sup>114</sup> And the memo spoke of “lawsuits . . . already lost (e.g., photographers cannot now refuse to photograph gay marriages, doctors cannot now refuse to perform artificial insemination of gays even given other willing doctors).”<sup>115</sup> These claims were widely circulated, often being sent more than once to members.<sup>116</sup> Many church members received the Six Consequences memo from local leaders. In addition, many of the claims of the Six Consequences memo were published on websites popular among church members.<sup>117</sup>

Given its widespread circulation, the Six Consequences document likely influenced many church members’ opinions. In addition, it became the site of an interesting debate over church membership and loyalty. Church member Morris Thurston, an attorney who opposed Proposition 8, wrote a detailed analysis of problems with the legal claims made in the Six

<sup>113</sup> *Id.* The document continues, “[t]he California Education Code already requires that health education classes instruct children about marriage. (§51890). Therefore, unless Proposition 8 passes, children will be taught that marriage is between any two adults regardless of gender. There will be serious clashes between the secular school system and the right of parents to teach their children their own values and beliefs.” *Id.*

<sup>114</sup> *Id.* It continued that “[i]t already happened in Canada, a country that legalized gay marriage. A recent California court held that municipal employees may not say: ‘traditional marriage,’ or ‘family values’ because, after the same-sex marriage case, it is ‘hate speech.’” *Id.*

<sup>115</sup> *Id.* The memo also writes that same-sex marriage will be expensive: “Even if courts eventually find in favor of a defender of traditional marriage (highly improbable given today’s activist judges), think of the money – your money – that will be spent on such legal battles.” *Id.* The overwrought cynicism about courts is incongruent with Wardle’s and the Divine Institution press release’s assertions that courts are generally not ruling in favor of same-sex marriage. Wardle, *supra* note 61, at 47–49; *The Divine Institution of Marriage*, *supra* note 81. In addition, the claims that same-sex marriage will be expensive seem incongruous in the context of a campaign which raised \$20 million.

<sup>116</sup> Morris Thurston, *Rebuttal to ‘Six Consequences if Proposition 8 Fails’*, MORMONS FOR MARRIAGE BLOG (Sept. 18, 2008), <http://www.mormonsformarriage.com/wp-content/uploads/2008/10/mat-responses-to-six-consequences-if-prop-8-fails-rev-1-1.pdf> (noting that the Six Consequences document was circulating among members, especially in California).

<sup>117</sup> See, e.g., *Six Consequences If Proposition 8 Fails*, PROPOSITION 8 SAVING MARRIAGE (Aug. 24, 2008), <http://prop8savingmarriage.blogspot.com/2008/08/six-consequences-if-proposition-8-fails.html>; *Six Consequences*, CALIFORNIA VOTED YES! ON PROPOSITION 8 (Sept. 2, 2008), <http://yesproposition8.blogspot.com/2008/09/i-received-this-from-friend.html>.

Consequences memo.<sup>118</sup> However, Thurston's memo was itself subject to heated criticism from other LDS and LDS-affiliated attorneys. LDS attorney Blake Ostler challenged Thurston's credentials and analysis.<sup>119</sup> Similarly, political advocate William Duncan challenged Thurston's claims and his identification as LDS.<sup>120</sup> Both seemed intent on discrediting a prominent Mormon voice opposing Proposition 8.<sup>121</sup>

Church member e-mails collected similar claims, often summarizing views and in some cases conflating legal issues. One church member warned his ward members by e-mail that "a Methodist church has already been stripped of their tax-exempt status for not extending use of their marriage pavilion for gay marriages," and that unless Proposition 8 was passed, "even teaching chastity in the home could possibly be considered illegal."<sup>122</sup>

Church members forwarded articles and e-mail blasts from conservative political organizations. These included, for instance, an e-mail from United Families International stating that "when same-sex marriage becomes law . . . pastors and churches are forced to perform same-sex marriages against their better wishes. Opposition to homosexuality is squelched."<sup>123</sup> They also included an article from Canadian political activist Dawn Stefanowicz arguing that gay couples neglect and abuse their children.<sup>124</sup>

Official Proposition 8 coordinators were designated in many California wards, and often sent dozens of e-mails to ward members, using ward e-mail lists. These e-mails often made very specific legal claims about the consequences of Proposition 8.<sup>125</sup> In one ward, for instance, the bishop circulated a detailed statement dealing with legal consequences of Proposition 8.<sup>126</sup> These sorts of statements carried a perception of authority

<sup>118</sup> Thurston, *supra* note 116 (As a matter of full disclosure: I provided some feedback on Thurston's memo while it was in draft form).

<sup>119</sup> Blake Ostler, *Prop 8 Comment (That is Now a Prop 8 Post)*, NEW COOL THANG (Oct. 20, 2008, 4:59 PM), <http://www.newcoolthang.com/index.php/2008/10/prop-8-comment-they-would-not-print/569/>.

<sup>120</sup> See William Duncan, *Religious Freedom Concerns are Real with Same-Sex Marriage*, MERIDIAN MAGAZINE, September 25, 2008, archive copy available at <http://web.archive.org/web/20100131152817/http://ldsmag.com/familyleadernetwork/080925freedom.html>; see also Morris A. Thurston, *Religious Organizations Should not Rely on False or Misleading Legal Arguments in Their Zeal to Support California Proposition 8*, MORMONS FOR MARRIAGE (Oct. 10, 2008, 7:25 AM), <http://mormonsformarriage.com/?p=45> (responding to Duncan's claims).

<sup>121</sup> *Id.* Thurston himself wrote that he did not want the erroneous views of the Six Consequences memo to be attributed to the church, as the memo was not an official church statement. *Id.*

<sup>122</sup> Anonymous Member #2 (e-mail on file with author).

<sup>123</sup> Anonymous member #3. E-mail on file with author.

<sup>124</sup> Anonymous member #4. E-mail on file with author.

<sup>125</sup> Anonymous member #5. E-mail on file with author.

<sup>126</sup> Anonymous member #6. E-mail on file with author.

for many church members.

Church member e-mails and website discussions ran the gamut in tone. Many followed the lead of church leaders in calling for respect for opposing views.<sup>127</sup> Others did not. One church member e-mail called gay rights advocates “morons” who were “trying to force their perverted lifestyles on the rest of us.”<sup>128</sup> And in a particularly stark example, an article in the conservative *Meridian Magazine* claimed that same-sex marriage supporters were violating election laws, screaming obscenities (at calm, collected church members), and, incredibly, “swerv[ing] their cars toward the children on the curb.”<sup>129</sup>

#### *D. High-profile Statements*

One important subset of individual statements is the individual statements from church members in high-profile positions. For instance, prominent science fiction author Orson Scott Card, a popular celebrity among church members, used his online column to launch highly charged attacks on same-sex marriage. In an early column, Card encouraged church members to use secular argument to support Proposition 8.<sup>130</sup> This took various forms in his own column. One column was dedicated to the social benefits of straight monogamy.<sup>131</sup> Another column argued that sexual orientation was not immutable, and that it should be viewed as a “reproductive dysfunction” to be treated and minimized, rather than a personal trait to be respected.<sup>132</sup>

In the most high-profile column, Card wrote that California and Massachusetts court decisions “mark[] the end of democracy in America” and that the supporters of same-sex marriage were “diktats” whose

<sup>127</sup> While I have generally used pseudonyms in this section, I am happy to note that my own ward’s bishop and Proposition 8 coordinator both repeatedly urged respect.

<sup>128</sup> See Anonymous member #7, E-mail on file with author. This was similar to some statements made by church members during the Proposition 22 campaign. See Robertson, *supra* note 74 at 125–26 (“Some individuals used the campaign as license to vent their uncharitable feelings about gay people. In 2000, a man in my ward commented during a Church meeting that AIDS was the means by which ‘those faggots were getting what they deserve.’ His views were challenged by other members of his quorum, thankfully. But this man was heavily involved in fund-raising and house meetings to promote Prop 22, and such incidents make it harder to believe that Church members’ political activities are not motivated by visceral anti-gay sentiment.”).

<sup>129</sup> Paul Bishop, *In the Face of Hatred*, MERIDIAN MAGAZINE (Apr. 27, 2009), <http://www.ldsmag.com/component/zine/article/4070>.

<sup>130</sup> Orson Scott Card, *Why and How to Defend Marriage*, DESERET NEWS (July 3, 2008, 12:01 AM), <http://www.mormontimes.com/article/10230/Why-and-how-to-defend-marriage>.

<sup>131</sup> Orson Scott Card, *Communities Succeed with Monogamy*, DESERET NEWS (Oct 2, 2008, 12:08 AM), <http://www.mormontimes.com/article/10605/Communities-succeed-with-monogamy>.

<sup>132</sup> Orson Scott Card, *Science on Gays Falls Short*, DESERET NEWS (Aug. 7, 2008, 12:07 AM), <http://www.mormontimes.com/article/10235/Science-on-gays-falls-short>.

methods were “undemocratic, unconstitutional and intolerant.”<sup>133</sup> He predicted that RICO laws would be used to silence opponents of same-sex marriage. And in a chilling passage, Card wrote that “these dictator-judges do not seem to understand that their authority extends only as far as people choose to obey them.” He then predicts (or encourages) a violent response from angry straight people everywhere: “Marriage has only one definition, and any government that attempts to change it is my mortal enemy. I will act to destroy that government and bring it down, so it can be replaced with a government that will respect and support marriage.”<sup>134</sup>

In a later, somewhat more conciliatory column, Card wrote that people had “misunderstood” the church’s view, “that we think of them as our enemies [who] pose a direct personal threat to us.” This was untrue, Card insisted. However, overzealous gay-rights advocates “would forbid us to publicly teach and express our belief that marriage is only meaningful between heterosexual couples,” and would “suppress religious freedom, freedom of speech and press, and the right of parents to control their children’s moral education.” “Those who promote gay marriage have already shown a disposition to insist on uniformity of thought on the topic,” wrote Card, “and will certainly attempt to use the power of the state to suppress any attempt to publicly express a preference for heterosexuality, even (or especially) when such a preference has a religious basis.”<sup>135</sup>

Similar warnings to a broader audience came from LDS law professor Richard Peterson, who played a prominent role in the election. In a series of high-profile campaign commercials, Peterson lent a credentialed voice to claims that unless Proposition 8 passed, young schoolchildren would be forced to learn about same-sex marriage, churches would lose tax exemptions, and people would be sued for personal belief.<sup>136</sup> Peterson’s

<sup>133</sup> Orson Scott Card, *State Job is Not to Redefine Marriage*, DESERET NEWS (July 24, 2008, 12:01 AM), <http://www.mormontimes.com/article/10233/State-job-is-not-to-redefine-marriage.html>.

<sup>134</sup> *Id.* Card frames this statement as a prediction or question, but in the context of the column, it looks like an exhortation. These kinds of suggestions of violence are a serious threat to the rule of law. See generally Kaimipono David Wenger, *Reparations Within the Rule of Law*, 29 T. JEFFERSON L. REV. 231 (2007) (discussing the concept of rule of law).

<sup>135</sup> Orson Scott Card, *Disagree But Don’t Be Unkind*, DESERET NEWS (Oct. 23, 2008, 12:06 AM), <http://www.deseretnews.com/article/print/705382360/Disagree-but-don-t-be-unkind.html> (discussing earlier statements by Card); see also Orson Scott Card, *The Hypocrites of Homosexuality*, SUNSTONE MAGAZINE, Feb. 2009, available at <http://www.nauvoo.com/library/card-hypocrites.html> (stating that “gay activism as a movement is no longer looking for civil rights, which by and large homosexuals already have. Rather they are seeking to enforce acceptance of their sexual liaisons as having equal validity with heterosexual marriages, to the point of having legal rights as spouses, the right to adopt children, and the right to insist that their behavior be taught to children in public schools as a completely acceptable ‘alternative lifestyle.’”).

<sup>136</sup> See *Yes on Proposition 8 California*, YOUTUBE, [www.youtube.com/watch?v=fNaHpHl3t8g](http://www.youtube.com/watch?v=fNaHpHl3t8g) (last visited Nov. 27, 2011) (portraying one of Peterson’s Prop 8 commercials); see also Ashley

controversial ads were incredibly important in the Proposition 8 campaign, as the ads' broad assertions and Peterson's position as a law professor were instrumental in swaying moderate voters.<sup>137</sup>

### *E. Donations, Events, and Other Support*

Church members were repeatedly urged to donate money to support Proposition 8. Local wards distributed donation forms and used e-mails, phone calls, church talks, and individual discussion to encourage members to donate. Wards also set up a framework for donations (being careful to avoid doing so on church property). Church members made efforts to comply with election laws. One ward e-mail stated that "we cannot collect money on church property" but that "we can collect money at a church function that is not at the [church] building," and encouraged members to bring their contributions to a ward function held at the beach.<sup>138</sup> There were specific regional target amounts ("our ward has been asked to raise this amount").<sup>139</sup> And sometimes requests for money were particularly strong-armed. The Wall Street Journal reported that a Seventy held a conference call with wealthy church members to urge them to donate at least \$25,000 each, and also noted that some church members reported being told that "their souls would be in jeopardy" if they did not donate money.<sup>140</sup> Other e-mails sent by some local leaders included forwarded requests for donations to national political organizations: "Right now, whatever you are doing, we need you to stop and make whatever gift you can to preserve the institution of marriage. Unless we raise \$3 million in

Harrell, *Prop 8 Ad Wars: The Counterattack*, SAN FRANCISCO NEWS, Sep. 29, 2008, available at [http://blogs.sfweekly.com/thesnitch/2008/09/prop\\_8\\_ad\\_wars\\_the\\_counteratta.php](http://blogs.sfweekly.com/thesnitch/2008/09/prop_8_ad_wars_the_counteratta.php) (describing Peterson's ads.); William Araiza, "For Identification Purposes Only," PRAWFSBLAWG, Nov. 2, 2008, available at <http://prawfsblawg.blogs.com/prawfsblawg/2008/11/for-identificat.html> (discussing later disclaimer in the ads stating that Peterson's institutional identification was "for identification purposes only"); *Pepperdine Prez Lashes Out at Anti-Gay Prop 8 Propaganda*, QUEERTY, Nov. 24, 2011, available at <http://www.queerty.com/pepperdine-prez-lashes-out-at-anti-gay-prop-8-propaganda-20081016/> (discussing statement of official neutrality made by Pepperdine University's president). Pepperdine is not an LDS-affiliated university; it is affiliated with the Church of Christ. See *About Pepperdine*, available at <http://www.pepperdine.edu/about/pepperdine/christiantradition/>.

<sup>137</sup> See Michael Foust, "Historic Campaign Scored Prop 8's Win in California," BAPTIST PRESS, Nov. 6, 2008, available at <http://www.sbc Baptist Press.org/bpnews.asp?id=29277> (asking "how did supporters of Proposition 8 manage, in a mere seven weeks, to turn a 17-point polling deficit into a five-point Election Day victory? The answer? A number of factors, led by three main ones: a solid consistent message about the impact of gay marriage on public schools, better-than-expected fundraising and historical cooperation among various religious groups to back the measure and get out the vote.").

<sup>138</sup> E-mail on file with author.

<sup>139</sup> E-mail on file with author.

<sup>140</sup> Mark Schoofs, *Mormons Boost Antigay Marriage Effort*, WALL. ST. J., Sept. 20, 2008, available at <http://online.wsj.com/article/SB122186063716658279.html>.

the next week, we're going to lose."<sup>141</sup> An oft-repeated message was that "this may be the most important election we have ever seen."<sup>142</sup>

In response to the calls from their leaders, LDS church members turned out in the tens of thousands to contribute millions of dollars to the Proposition 8 campaign. Tracking the exact amount of LDS donations is difficult, but there is broad agreement that church members contributed at least half of the \$40 million spent by the Yes on 8 campaign.<sup>143</sup> Some estimates are even higher.<sup>144</sup> These contributions largely came from thousands of relatively small individual contributions – perhaps as many as 60,000 individual church members – rather than from a few very high-dollar contributions.<sup>145</sup> There were multiple accounts of individual church members giving substantial portions of their life savings to the Proposition 8 campaign.<sup>146</sup> The church also contributed a relatively small amount directly, most in the form of employee time.<sup>147</sup>

Church members also donated time and labor to extensive, church-organized election support. In California wards, specific church members were assigned to coordinate Proposition 8 efforts. Specific events varied from ward to ward, but typically included events, rallies, door-to-door canvassing, and other support.<sup>148</sup> Wards divided neighborhoods and assigned members to go door-to-door to get out the vote. Members also participated in well-organized call banks, operating in shifts to call thousands of Californians. The church provided a pre-set script and talking points for these efforts.<sup>149</sup>

<sup>141</sup> E-mail on file with author.

<sup>142</sup> E-mail on file with author.

<sup>143</sup> See Shoofs, *supra* note 116 (explaining campaign contributions are not tracked by religion). However, contributions of over \$100 are made public, and a group of Proposition 8 opponents combed over donation lists to identify Mormon contributors. In addition, Proposition 8 supporters released some numbers.

<sup>144</sup> One pundit wrote that church members had contributed up to 77% of the donations for Yes on 8. See Andrew Sullivan, *The Mormon Money Behind Proposition 8*, THE ATLANTIC (Oct. 23, 2008, 12:14 PM), <http://www.theatlantic.com/daily-dish/archive/2008/10/the-mormon-money-behind-proposition-8/209748/>.

<sup>145</sup> Peggy Fletcher Stack, *LDS Wards Feeling the Toll of Conflict*, SALT LAKE TRIBUNE, Oct. 26, 2008, available at [http://www.sltrib.com/ci\\_10819792](http://www.sltrib.com/ci_10819792).

<sup>146</sup> Matthai Kuruvila, *Mormons Face Flak for Backing Prop. 8*, S.F. CHRON., Oct. 27, 2008, at B1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/10/27/BAP113OIRD.DTL>.

<sup>147</sup> See *Mormon church reports spending \$180,000 on Proposition 8*, L.A. TIMES, Jan. 30, 2009, available at <http://latimesblogs.latimes.com/lanow/2009/01/top-officials-w.html>.

<sup>148</sup> Joanna Brooks, *When Mormons Mobilize: Anti-Gay Marriage Prop. 8 Effort 'Outed'?*, RELIGION DISPATCHES, Jan. 31, 2010, available at [http://www.religiondispatches.org/archive/sexandgender/2236/when\\_mormons\\_mobilize%3A\\_anti-gay\\_marriage\\_prop\\_8\\_effort\\_%E2%80%98outed%E2%80%99; see also Anonymous Member #8, e-mail on file with author](http://www.religiondispatches.org/archive/sexandgender/2236/when_mormons_mobilize%3A_anti-gay_marriage_prop_8_effort_%E2%80%98outed%E2%80%99; see also Anonymous Member #8, e-mail on file with author).

<sup>149</sup> Jesse McKinley & Kirk Johnson, *Mormons Tipped the Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 15, 2008, at A1, available at



LDS church services were sometimes dominated by messages about Proposition 8. By longtime tradition, the first Sunday of each month is a testimony meeting, a time open to sharing of individual stories and testimony by members who feel inspired to speak.<sup>150</sup> During the Proposition 8 campaign, testimony meetings in many wards were dominated by discussion of Proposition 8.<sup>151</sup> As I wrote online, “Three of the testimonies from today were lengthy discussions of Prop 8 (topics covered included the need to help the amendment pass; the awful consequences for years to come if it doesn’t pass; the joy of Prop 8 volunteer work; the idea that depression about doing Prop 8 work is sent from Satan to try to block the work; and satisfaction that we Mormons are pulling the laborer’s oar and doing a lot more door-knocking than the Evangelicals).”<sup>152</sup>

Wards and stakes also conducted services designed to increase support for Proposition 8. In one stake, the stake presidency conducted a series of talks on the prophetic authority of President Monson and the importance of obedience, including hymns and children’s songs emphasizing the need to obey church leaders. During the service, the Proposition 8 letter was read to the congregation again.<sup>153</sup>

In addition, church members heeded Elder Ballard’s call to add pro-Proposition 8 statements to their blogs. Dozens of personal and group blogs carried such messages. For instance, some bloggers at the popular Times and Seasons blog ran a church-created widget which displayed a variety of rotating messages in question and answer form.<sup>154</sup> Some wards and stakes set up local websites to distribute material. These often mirrored the church’s Protect Marriage website; some of them included additional links or discussion.<sup>155</sup> The overall effort was very successful; as Gedicks notes, “the resources mobilized by the LDS Church in support of

[http://www.nytimes.com/2008/11/15/us/politics/15marriage.html?\\_r=1&hp=&oref=slogin&pagewanted=print](http://www.nytimes.com/2008/11/15/us/politics/15marriage.html?_r=1&hp=&oref=slogin&pagewanted=print).

<sup>150</sup> See *ENCYCLOPEDIA OF MORMONISM*, *supra* note 21.

<sup>151</sup> Kaimipono David Wenger, *Prop-8-imonies*, BY COMMON CONSENT, Sept. 7, 2008, *available at* <http://bycommonconsent.com/2008/09/07/prop-8-imonies/>.

<sup>152</sup> *Id.*

<sup>153</sup> E-mail on file with author.

<sup>154</sup> See Frank McIntyre, *Prop 8*, TIMES AND SEASONS (Oct. 17, 2008), <http://timesandseasons.org/index.php/2008/10/prop-8/> (posting a blog widget with a variety of messages in Q&A form, for example: “Myth: Allowing same-sex marriage will not affect me or my children. Fact: This issue has already sparked legal collisions with your rights of free speech and freedom of religion.”).

<sup>155</sup> See, e.g., PROTECT MARRIAGE POWAY, <http://replay.waybackmachine.org/20081031233431/http://protectmarriagepoway.com/> (last visited Nov. 28, 2011).

Proposition 8 are generally acknowledged to have been the decisive factor in its passage.”<sup>156</sup>

The level and effectiveness of church member involvement was no surprise. The church is extremely well-organized and its practice of dividing wards along geographic lines makes it extremely effective at organizing local efforts. And given Mormon cultural norms and the “extraordinary degree of obedience and deference” typically given to church leaders, Gedicks notes that “it was entirely predictable that the First Presidency’s urging of church members ‘to do all that you can’ to support Proposition 8 would trigger an avalanche of financial donations and volunteer work.”<sup>157</sup>

#### *F. Reactions to Church Involvement*

Outside reactions sometimes fanned the flames, reinforcing attitudes among church members. For instance, some political ads focused on the church’s involvement in the campaign. In one high-visibility campaign commercial, two LDS missionaries enter a lesbian couple’s house and tear apart the couple’s marriage license. The advertisement concludes with the message, “Say no to a church taking over your government.”<sup>158</sup> The ad drew praise from the *Los Angeles Times* editorial board, but vehement protests from church members and some supporters. LDS writer Paul Bishop wrote that the commercial should be viewed as a hate crime.<sup>159</sup> Pundit Jonah Goldberg called it “religious slander” targeting “the most vulnerable of the culturally conservative religious denominations.”<sup>160</sup> Other critics focused on aspects of prior church history, such as the church’s problematic history of polygamy or its struggles with racial equality.<sup>161</sup>

Both sides threatened and engaged in boycotts. Proposition 8 supporters mailed letters to businesses that had contributed to Equality California threatening to publicly identify them as enemies of marriage unless they

<sup>156</sup> Gedicks, *supra* note 3, at 365.

<sup>157</sup> *Id.* at 366.

<sup>158</sup> “Home Invasion”: Vote NO on Prop 8, COURAGE CAMPAIGN (Oct. 31, 2008), [http://www.youtube.com/watch?v=q28UwAyzUkE&feature=player\\_embedded](http://www.youtube.com/watch?v=q28UwAyzUkE&feature=player_embedded); see also Jonah Goldberg, *An Ugly Attack on Mormons*, L.A. TIMES (Dec. 2, 2008), available at <http://www.latimes.com/news/opinion/commentary/la-oe-goldberg2-2008dec02,0,6411205.column>.

<sup>159</sup> Paul Bishop, *The Face of Hatred*, MERIDIAN MAGAZINE (April 27, 2009), available at <http://www.ldsmag.com/article/4070?Itemid=>.

<sup>160</sup> Goldberg, *supra* note 158.

<sup>161</sup> For instance, one critic wrote that “the tactics and rhetoric which the Church uses today to attack gays and lesbians are the very tactics and rhetoric which the Church’s enemies used to attack it regarding polygamy.” Morris, *supra* note 57, at 130.

contributed to Proposition 8.<sup>162</sup> Boycotts were more widely used by Proposition 8 opponents and were especially intense after the election. A writer at *DailyKos* wrote that “we should direct our anger over Prop 8 against those organizations that fought us the hardest. Let’s start with the Mormon Church and Mormons. . . . Vote with your wallets! Every dollar less that you give to a tithed Mormon is a dollar less that can be tithed and spent on anti-gay activity.”<sup>163</sup> Protesters urged boycott of businesses owned by or employing church members. In particular, they proposed a boycott of Marriott hotels (despite the company’s attempts to distance itself from the church’s actions).<sup>164</sup>

One writer at *DailyKos* posted a vaguely threatening appeal for volunteers to dig up dirt about individual church members who had donated to Proposition 8.<sup>165</sup> Some individual church members lost jobs because of their support for Proposition 8.<sup>166</sup> These responses led to a feeling of vulnerability in church members.<sup>167</sup>

After the election, protests intensified. Thousands marched outside of LDS temples in many cities. Some reactions included clearly illegal behavior. For instance, Proposition 8 signs were sometimes stolen or defaced during the campaign.<sup>168</sup> Some post-election protests were

<sup>162</sup> See Robert Cruickshank, *Yes on 8 Campaign Blackmails No on 8 Donors*, CALITICS (Oct. 23, 2008, 5:55 PM), <http://www.calitics.com/showDiary.do?diaryId=7267>.

<sup>163</sup> See Buster CT1K, *Boycott Mormon businesses and Anyone else who Supported Prop 8*, DAILYKOS (Nov. 7, 2008, 3:01 PM), <http://www.dailykos.com/story/2008/11/07/657069/-Boycott-Mormon-businesses-and-Anyone-else-who-Supported-Prop-8>; see also Admin, *Proposition 8 Blacklist/Boycott List* (Nov. 16, 2008), <http://www.stopthemormons.com/2008/11/16/proposition-8-blacklistboycott-list/>.

<sup>164</sup> See Buster CT1K, *I cancelled my Marriott reservation today over Prop 8 – Boycott Marriott!*, DAILYKOS (Nov. 13, 2008, 11:55 AM), <http://www.dailykos.com/story/2008/11/13/144620/41> (urging a protest of Marriott hotels); see also Zach Behrens, *Marriott Hotel CEO Responds to Prop 8 Allegations*, Laist (Nov. 12, 2008), [http://laist.com/2008/11/12/marriott\\_hotel\\_owner\\_responds\\_to\\_pr.php](http://laist.com/2008/11/12/marriott_hotel_owner_responds_to_pr.php) (discussing Marriott’s response); see also Kilian Melloy, *Marriott Hotels Does Post-Prop. 8 Damage Control*, EDGE (Nov. 13, 2008), <http://www.edgeboston.com/index.php?ch=news&sc=&sc2=news&sc3=&id=83336> (discussing Marriott’s response).

<sup>165</sup> See Dante Atkins, *How YOU can defeat Prop 8 and preserve marriage equality*, DAILYKOS (Oct. 20, 2008, 12:00 PM), <http://www.dailykos.com/story/2008/10/20/01429/971/630/636014>.

<sup>166</sup> See Michelle Beaver, *Proposition 8 -- “...Mormons say they’ve been unfairly targeted”*, MONTEREY.BACKPAGE.COM (Oct. 29, 2011), <http://monterey.backpage.com/LegalServices/proposition-8-mormons-say-theyve-been-unfairly-targeted/7195953>.

<sup>167</sup> See Alison Stateman, *What Happens If You’re on Gay Rights’ ‘Enemies List’*, TIME, Nov. 15, 2008, available at <http://www.time.com/time/nation/article/0,8599,1859323,00.html>; see also Jesse McKinley, *Marriage Ban Donors Feel Exposed by List*, N.Y. TIMES, Jan. 18, 2009, available at [http://www.nytimes.com/2009/01/19/us/19prop8.html?\\_r=1](http://www.nytimes.com/2009/01/19/us/19prop8.html?_r=1).

<sup>168</sup> See *Tolerance?*, MESSENGER AND ADVOCATE (Oct. 9, 2008), <http://messengerandadvocate.wordpress.com/2008/10/09/tolerance/>; see also *Tolerance III*, MESSENGER AND ADVOCATE (Oct. 26, 2008), <http://messengerandadvocate.wordpress.com/2008/10/26/tolerance-iii/>.

accompanied by vandalism of church property, burning of church scriptures, and threats or reports of violence against Proposition 8 supporters.<sup>169</sup>

Some critics also questioned the church's compliance with campaign reporting laws or attacked the church's position as a tax-exempt organization. Advocacy groups urged the state of California to investigate whether the LDS Church violated campaign finance laws.<sup>170</sup> Some critics argued that the church's tax exemption should be revoked, but those claims were generally dismissed as legal non-starters.<sup>171</sup>

For church members, the protests and boycotts tended to reinforce the narrative of gay-fomented oppression which had circulated during the campaign. That is, during the campaign church members were repeatedly told that gay-rights advocates wished to impose on church members' liberty. The boycotts, with their intermittent destructive acts, fit perfectly into this narrative. One church member wrote to me personally (responding to my earlier statement that Proposition 8 would not have a legal effect on the church): "So, Proposition 8 either way won't affect the Church, eh? Just watch this protest at the LA Temple."<sup>172</sup> And yes, Orson Scott Card weighed in, writing that reactions to Proposition 8 demonstrated that Mormons were the real victims of oppression all along.<sup>173</sup>

## V. BRIEF ANALYSIS OF CHURCH CLAIMS REGARDING PROPOSITION 8

This section will briefly discuss the accuracy of some of the more widely circulated claims in the LDS community regarding legal effects of same-sex marriage or of Proposition 8.<sup>174</sup>

<sup>169</sup> See, e.g., Cornell Barnard, *Prop 8 Fight turns violent in Modesto*, ABC (Oct. 14, 2008, 6:48 AM), <http://www.news10.net/news/local/story.aspx?storyid=49101>.

<sup>170</sup> See Jessica Ravitz, *Probe into LDS Church's Prop 8 donations going forward*, SALT LAKE TRIBUNE, Nov. 25, 2008, [http://www.sltrib.com/ci\\_11064769](http://www.sltrib.com/ci_11064769).

<sup>171</sup> See Matthai Kuruvila, *Tax-Exempt Benefit Disputed in Prop. 8 Campaign*, S.F. CHRONICLE, Nov. 28, 2008, [http://articles.sfgate.com/2008-11-28/bay-area/17127704\\_1\\_tax-exempt-church-and-state-tax-code](http://articles.sfgate.com/2008-11-28/bay-area/17127704_1_tax-exempt-church-and-state-tax-code); Brian Galle, *The LDS Church, Proposition 8, and the Federal Law of Charities*, 103 NW. U. L. REV. COLLOQUY 370 (2009) (noting that challenges to the church's tax-exempt status are unlikely to succeed under existing law).

<sup>172</sup> Anonymous member #9, e-mail on file with author.

<sup>173</sup> See Orson Scott Card, *Heroes and Victims in Prop. 8 Struggle*, MORMON TIMES, Nov. 13, 2008, <http://www.mormontimes.com/article/11158/Heroes-and-victims-in-Prop-8-struggle> ("They claim to be our victims. And yet they are the ones who tried to force us to accept their radical change through judicial edict.").

<sup>174</sup> A full treatment of the claims is beyond the scope of this article. Some of these claims have been addressed in more depth elsewhere. See, e.g., Murray, *supra* note 3 (discussing claims relating to education).

### *A. Criminal-law Restrictions on Speech*

One widely circulated claim was that absent Proposition 8, church members might face criminal sanction for speaking against same-sex marriage. This claim was made at both the institutional and individual level. Notably, Elder Bednar said that failure to pass Proposition 8 would limit free speech, stating both that “there could be sanctions against the teaching of our doctrine,” and that gay rights advocates would argue that churches “should not be allowed to do that” (that is, oppose same sex marriage). The claim was also widely circulated at the individual and ward level such as through the Six Consequences memo’s predictions that absent Proposition 8, “ministers who preach against same-sex marriages may be sued for hate speech and risk government fines.”

This claim appears to be loosely based on the Åke Green case in Sweden. In that 2005 case, a Swedish minister was originally convicted of criminal hate speech for a sermon in which he made a number of highly negative statements about LGBTQ people.<sup>175</sup> However, this decision was overturned on appeal later that year, as the Swedish Supreme court found that Green’s comments were protected under EU law.<sup>176</sup>

Within the United States, there is no law or evidence to support predictions of criminal restrictions on church speech. As noted above, the Green case in Sweden resulted in charges being dismissed on appeal. The likelihood of prosecution in the U.S. is even less likely, due to the more robust First Amendment protections for speech and for religion.<sup>177</sup> In addition, the limited available record does not bear out predictions of criminal-law speech restrictions. Most obviously, Massachusetts has allowed same sex marriage for eight years. During this time, there have been no “sanctions against the teaching of LDS church doctrine,” nor any ministers prosecuted for hate speech because of sermons opposing same-sex marriage.

### *B. Tax Claims*

A number of statements were made about the church’s tax exemption.

<sup>175</sup> See Keith B. Richburg & Alan Cooperman, *Swede's Sermon on Gays: Bigotry or Free Speech?*, WASH. POST, Jan. 29, 2005, at A01 (discussing Green case).

<sup>176</sup> *Åke Green Cleared over Gay Sermon*, THE LOCAL, Nov. 29, 2005, available at <http://www.thelocal.se/2590/20051129/>.

<sup>177</sup> In addition to First Amendment protections, federal and state RFRAs protect religious acts and statements in many jurisdictions. See generally Christopher C. Lund, *Religious Liberty after Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010); Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 80 (2000).

These included both official statements from Elder Cook and from the Divine Institution press release and unofficial statements such as the Six Consequences memo.

The church interacts with the tax code in a number of places. The most important of these is the church's federal 501(c)(3) exemption, which exempts the church from federal income tax and allows contributions to be deducted.<sup>178</sup> A change to the church's 501(c)(3) exemption would have a major impact on the institution. Some church members and Proposition 8 advocates cited to the *Bob Jones* federal tax case to support this claim. For instance, William Duncan wrote in a widely circulated e-mail "The Bob Jones case and many other laws teach us that the law does not tolerate those it considers to be bigots. Proposition 8 would overrule the California Supreme Court's holding about marriage and allow those who believe in marriage to continue that belief without the official stigma of being considered bigots."<sup>179</sup>

However, the *Bob Jones* case does not stand for the proposition that "law

<sup>178</sup> One widely circulated e-mail drew on a state-law case to make misleading implications about federal law. An article published on one pro-Proposition 8 website (the site was not LDS, but this claim was widely forwarded by LDS church members) stated: "CLAIM: Current California law exempts churches and other religious organizations from having to perform marriages for same-sex couples or conduct other services against their religious beliefs. FACT 1: New Jersey's Ocean Grove Camp, lost its tax-exempt status after refusing to allow a same-sex couple to marry on its grounds." See Christian Examiner, *Proposition 8: Separating Fiction From Fact*, available at [http://www.christianexaminer.com/Articles/Articles%20Dec08/Art\\_Dec08\\_10.html](http://www.christianexaminer.com/Articles/Articles%20Dec08/Art_Dec08_10.html); see also anonymous e-mail #10 (on file with author).

This claim was in part based on a real case involving state tax law. However, it does not support the claims made by Proposition 8 proponents. The Ocean Grove case involved a Methodist institution in New Jersey, which received a property tax break for a beachfront pavilion, under a New Jersey state statute allowing tax breaks for some property that was fully open to the public. In 2007, the church refused to let lesbian couples hold their civil union ceremonies at the pavilion. As a result, the state ruled that the property no longer met the statutory requirement that it be open to all members of the public, and thus did not qualify for the particular tax break. The church ended up paying about \$20,000 in property taxes as a result. Its general charitable status was not affected. The Ocean Grove case does not indicate that California churches would lose their federal 501(c)(3) exemption unless Proposition 8 passed. Ocean Grove did not involve federal law at all; it involved state agency application of a specific, tailored tax break for certain types of property. It related only to the particular statute in question. And the state's same-sex marriage policy did not affect the outcome – in fact, New Jersey isn't a same-sex marriage state at all. The use of Ocean Grove to suggest that California churches could lose their tax exemption unless Proposition 8 passed was highly misleading. See generally Editorial, *No on Proposition 8*, L.A. TIMES, Nov. 2, 2008, available at <http://www.latimes.com/news/opinion/la-ed-prop8-2-2008nov02,0,5926932.story> (discussing the background of the Ocean Grove case); Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y 206, 210 (2010) (same); NeJaime, *supra* note 3, at 1202.

<sup>179</sup> William C. Duncan, *Religious Freedom Concerns are Real with Same-Sex Marriage*, MERIDIAN MAGAZINE, Sept. 25, 2008, available at <http://web.archive.org/web/20100131152817/http://ldsmag.com/familyleadernetwork/080925freedom.html>. Duncan's claim echoes a high-profile assertion by Catholic scholar Mary Ann Glendon that the bigotry label would lead to anti-religious discrimination. See Mary Ann Glendon, *For Better or For Worse?*, WALL ST. J., Feb. 25, 2004, at A14.

does not tolerate those it considers to be bigots” (and Proposition 8 certainly does not protect from any “official stigma”). Instead, the much narrower holding is that some educational 501(c)(3) organizations might lose their tax-exempt status if they act against public policy.<sup>180</sup> It is highly unlikely that *Bob Jones* would result in the LDS church losing its 501(c)(3) status over its views on same-sex marriage. The *Bob Jones* case involved a school, not a church, and this rule has never been used on a religious exemption.<sup>181</sup> Even if the court were to extend the *Bob Jones* standard to cover churches, it is not clear that the LDS church’s stance on same-sex marriage would trigger scrutiny. After all, the church’s male-only priesthood has never triggered tax consequences. And of course any such application would be subject to religious freedom challenges which do not exist for other charitable entities.<sup>182</sup> It seems conceptually possible that, if courts and administrative agencies chose to make significant changes to existing law, *Bob Jones* could be used to attack the church’s 501(c)(3) exemption, but this would require major changes to existing law.<sup>183</sup> It is telling that the church has opposed same-sex marriage in Massachusetts for eight years now without any discernible 501(c)(3) effects. It seems safe to agree with the five dozen California law professors who signed a letter stating that “No church’s tax-exempt status will be affected by its decisions about whether to solemnize marriages between same-sex couples.”<sup>184</sup>

It is true that some LGBTQ rights advocates have argued that the church should lose its tax exemption.<sup>185</sup> These arguments have been based on the church’s level of political involvement; so, ironically, the church’s involvement in Proposition 8 bolsters these arguments. However, the church’s level of political involvement almost certainly does not rise to the

<sup>180</sup> An organization “must serve a public purpose and not be contrary to established public policy” and “must . . . be in harmony with the public interest . . . [a]nd the institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.” *Bob Jones Univ. v. United States*, 461 U.S. 574, 586, 592 (1983). This applies to organizations whose policies are “contrary to established public policy” or are very “at odds with the common community conscience.” *Id.*; see Duncan, *supra* note 179 (citing *Bob Jones* as an example).

<sup>181</sup> See *Jones*, 461 U.S. at 574.

<sup>182</sup> See *supra* note 177 (discussing RFRA protections).

<sup>183</sup> As a side note, this is not to say that there should be no debate over the legitimacy of 501(c)(3) exemptions. The tax exemption is of rather recent provenance, and without much legislative history. It is not a constitutional right; and one can certainly argue that it ought to be changed. See generally Brian Galle, *The Role of Charity in a Federal System*, 53 WM. & MARY L. REV. 777 (2012); Brian Galle, *Keep Charity Charitable*, 88 TEX. L. REV. 1213 (2010) (discussing theoretical basis for charitable rules in tax).

<sup>184</sup> Michael Gardner, *Law Professors Enter Prop. 8 Fray on Church’s Tax-Exempt Status*, SIGN ON SAN DIEGO (Oct. 30, 2008), [http://www.signonsandiego.com/uniontrib/20081030/news\\_1n30exempt.html](http://www.signonsandiego.com/uniontrib/20081030/news_1n30exempt.html).

<sup>185</sup> See Kuruvila, *supra* note 143.

level of a tax violation under existing law.<sup>186</sup>

### C. Claims Relating to Forced Marriage

Some claims were made by members that absent Proposition 8, the church would be required to solemnize same-sex weddings.<sup>187</sup> These claims relating to forced marriage do not appear to have a sound legal basis. Nothing in the *Marriage Cases* decision requires the church to perform same-sex marriages in temples or the like. In fact, the court opinion itself says exactly the opposite: “No religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs. (Cal. Const., art. I, § 4).”<sup>188</sup>

This is unsurprising, since as a general matter religious organizations are not required to solemnize the marriages of every legally marriageable couple. For instance, the law does not require Mormon officiants to marry Catholics to other Catholics inside Mormon temples, even though the couple may be legally marriageable. (Indeed, even Mormons must pass a special worthiness interview to be eligible to marry in an LDS temple.)<sup>189</sup> Forced-marriage claims draw on fear, not fact.<sup>190</sup>

While the misunderstandings here were unfortunate, the fear is understandable given prior persecution of Mormons over marriage norms.<sup>191</sup> Unlike other groups, Mormons *do* have a history of being

<sup>186</sup> A 501(c)(3) organization cannot support particular candidates, nor can it devote a “substantial part of its activities” to “attempting to influence legislation” – that is, to lobbying. The test here is “determined on the basis of all the pertinent facts and circumstances in each case” and “considers a variety of factors, including the time devoted (by both compensated and volunteer workers) and the expenditures devoted by the organization to the activity.” I.R.C. § 501(c)(3) (2006). The amount spent by the church is almost certainly below limits under existing case law. See Galle, *supra* note 171.

<sup>187</sup> See, e.g., Elizabeth Gettelman, *Mormon Church GOTV for Prop 8: “Do All You Can”*, MOTHER JONES, Oct. 22, 2008, available at <http://www.motherjones.com/mojom/2008/10/mormon-church-gotv-prop-8-do-all-you-can> (citing church member supporting Proposition 8 since otherwise there would be “gay marriage in my church”); see also Anonymous Member e-mail #11.

<sup>188</sup> In re *Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008).

This is framed as a descriptive statement, rather than an imperative statement. However, this finding was a central component of the court’s ultimate holding. That is, it was in part because no church would be forced to perform same-sex marriages, that the court’s analysis followed. Thus, it was a central part of the court’s holding. Similarly, while the church did not itself raise the issue of polygamy, both church critics and allies sometimes discussed it. *Marriage Cases* itself explicitly stated that it would not apply to polygamous marriages. *Id.* at 434.

<sup>189</sup> See generally text accompanying *supra* notes 30-31 (discussing LDS temples).

<sup>190</sup> See Kaimipono D. Wenger, *Lies About Prop 8, Part I*, CONCURRING OPINIONS (Oct. 30, 2008), [http://www.concurringopinions.com/archives/2008/10/proposition\\_8\\_a.html](http://www.concurringopinions.com/archives/2008/10/proposition_8_a.html).

<sup>191</sup> See *supra* Part II.B (discussing federal prosecutions based on Mormon polygamy); see also Kaimi Wenger, *Gays and the Church: Whose Ox is Being Gored*, TIMES AND SEASONS BLOG, Oct. 14, 2009, available at <http://timesandseasons.org/index.php/2009/10/gays-and-the-church-whose-ox-is->



violently forced to comply with federal marriage policy, and that history plays a significant role in community consciousness. For instance, Nate Oman wrote that he had a “visceral, tribal reaction” when he first read the legal history of church persecution over polygamy; “I felt betrayed by America and the Constitution.”<sup>192</sup> Similar fear and depth of emotion over perceptions of forced marriage may have motivated at least some of the LDS participation in the Proposition 8 campaign. (And some statements by same-sex marriage proponents, such as Gavin Newsom’s “like it or not” speech, probably contributed to this fear.)<sup>193</sup>

#### *D. Antidiscrimination Law Misunderstandings*

Many of the dire predictions made about same-sex marriage actually related to effects of antidiscrimination law, not marriage law.<sup>194</sup> This confusion led to widespread misunderstanding among church members. For instance, in the high-profile *North Coast Women’s Care Medical Group v. Superior Court* case (often called the *Benitez* case), the court ruled that a doctor was legally prohibited from refusing to treat a lesbian patient.<sup>195</sup> But this was an antidiscrimination case, not a marriage case.

California antidiscrimination law prohibits businesses from discriminating on the basis of sexual orientation.<sup>196</sup> (Similar protections exist in over twenty jurisdictions.)<sup>197</sup> This protection was passed into law by the California legislature in 2006; it was not created by the *Marriage Cases* decision which did not take place until 2008.<sup>198</sup>

Proposition 8 proponents repeatedly cited to antidiscrimination cases as “consequences” that would occur if Proposition 8 did not pass. For instance, the Six Consequences memo and the Duncan article both pointed to the *Benitez* case. But this connection was deceptive; *Benitez* was based

being-gored/ (discussing how church members see themselves as victims in LGBT interactions).

<sup>192</sup> Oman, *supra* note 28, at 745.

<sup>193</sup> See Murray, *supra* note 3, at 369–72 (discussing Newsom’s speech and its use in the campaign).

<sup>194</sup> For an especially insightful discussion of the distinctions between antidiscrimination and marriage laws and their effects, see NeJaime, *supra* note 3.

<sup>195</sup> 44 Cal. 4th 1145 (2008).

<sup>196</sup> The California Unruh Antidiscrimination Act provides that persons of any sexual orientation “are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever,” and that “No business establishment of any kind whatsoever shall discriminate against” individuals based on their orientation. CAL. CIV. CODE § 51(b) (2011); CAL. CIV. CODE § 51.5(a) (2011).

<sup>197</sup> See NeJaime, *supra* note 3, at 1190.

<sup>198</sup> See Stats. 2005, ch. 420, § 2, CAL. CIV. CODE § 51(b) (effective Jan. 1, 2006) (amending Unruh Civil Rights Act to prohibit discrimination based on sexual orientation and marital status).

on antidiscrimination law, not on marriage law,<sup>199</sup> and Proposition 8 did not affect antidiscrimination laws.<sup>200</sup>

It was highly misleading to characterize antidiscrimination cases as related to *Marriage Cases*, or to claim that businesses in California would be unable to discriminate against gays and lesbians unless Proposition 8 was passed.<sup>201</sup> In fact, businesses in California were *already* prohibited from anti-gay discrimination, and neither *Marriage Cases* nor Proposition 8 changed this. As Doug NeJaime notes succinctly, “the conflicts raised by scholars generally do not hinge on marriage recognition.”<sup>202</sup> It is very unfortunate that church leaders and members sometimes claimed or implied that antidiscrimination law application was a “consequence” of *Marriage Cases*, as if compliance with existing antidiscrimination law was some future harm which could be avoided through passing Proposition 8.

This is not to suggest that no criticism can be made of antidiscrimination cases or statutes, including on religious accommodation grounds. However, such discussion should make clear the difference between distinct laws, with any changes “occur[ing] explicitly in the domain of antidiscrimination law.”<sup>203</sup> Instead, proponents used high-profile conversations about marriage to level veiled attacks on antidiscrimination laws.

#### *E. Adoption and Education claims*

Claims of forced adoption were misleading for the same reason. Adoption agencies are *already* bound under antidiscrimination laws. For instance, church leaders and members repeatedly claimed that same-sex marriage had caused Catholic Charities to be expelled from Massachusetts, and that the same would happen in California absent Proposition 8. However, the Catholic Charities example is inapposite, and the *Goodridge* case did not affect Catholic Charities. Instead, as the *Los Angeles Times* notes, “the service arm of the Roman Catholic Church closed its adoption program in Massachusetts not because of the state’s gay marriage law but

<sup>199</sup> The same applies to the widely discussed New Mexico photographer case. That was also an antidiscrimination case, not a marriage case; and in fact, New Mexico does not recognize same-sex marriage. See NeJaime, *supra* note 3, at 1201, 1223 (discussing the New Mexico case).

<sup>200</sup> Ironically, church leaders sometimes cited to the fact that Proposition 8 would not affect antidiscrimination laws as a reason to vote for the Proposition. See Statements of Elder Bednar in October Transcript, *supra* note 93.

<sup>201</sup> Ironically, Proposition 8 proponents often raised the idea of religious discrimination in making these arguments. NeJaime, *supra* note 3, at 1181.

<sup>202</sup> *Id.* at 1203.

<sup>203</sup> *Id.* at 1180; see generally *id.* at 1175–83.

because of a gay anti-discrimination law passed many years earlier.”<sup>204</sup> The *Times* continues that

The Proposition 8 campaign, funded in large part by Mormons who were urged to do so by their church, does not mention that the Mormon church’s adoption arm in Massachusetts is still operating, even though it does not place children in gay and lesbian households. How can this be? It’s a matter of public accountability, not infringement on religion. Catholic Charities acted as a state contractor, receiving state and federal money to find homes for special-needs children who were wards of the state, and it faced the loss of public funding if it did not comply with the anti-discrimination law. In contrast, LDS Family Services runs a private adoption service without public funding. Its work and its ability to follow its religious teachings have not been altered.<sup>205</sup>

A variety of claims were also made by church members and leaders regarding education, including the claim that unless Proposition 8 was passed, schools would be required to teach children about same-sex marriage. These claims were made by leaders such as Elder Cook, and were also circulated in popular sources such as the Six Consequences memo. Leaders cited the Massachusetts case of *Parker v. Hurley*, which was characterized as a case where a parent was arrested for disagreeing with same-sex marriage. However, that arrest was for trespassing on school property.<sup>206</sup> California law professors stated outright that “Proposition 8 would have no effect on teaching or the protection of parental rights already provided by state law.”<sup>207</sup>

<sup>204</sup> *No on Proposition 8: Debunking the Myths Used to Promote the Ban on Same-Sex Marriage*, LOS ANGELES TIMES, Nov. 2, 2008, <http://www.latimes.com/news/printedition/opinion/la-ed-prop8-2-2008nov02,0,7071124.story>; see also Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions: Gay Issue Stirred Move By Agency*, BOSTON GLOBE, Mar. 11, 2006, [http://www.boston.com/news/local/articles/2006/03/11/catholic\\_charities\\_stuns\\_state\\_ends\\_adoptions/](http://www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/); Patricia Wen *Seven Quit Charity Over Policy of Bishops: Deplore Effort to Exclude Same-Sex Adoptions*, BOSTON GLOBE, Mar. 2, 2006, [http://www.boston.com/news/local/articles/2006/03/02/seven\\_quit\\_charity\\_over\\_policy\\_of\\_bishops/](http://www.boston.com/news/local/articles/2006/03/02/seven_quit_charity_over_policy_of_bishops/).

<sup>205</sup> *No on Proposition 8*, LOS ANGELES TIMES, Nov. 2, 2008, <http://www.latimes.com/news/printedition/opinion/la-ed-prop8-2-2008nov02,0,7071124.story>.

<sup>206</sup> See *Parker v. Hurley*, 514 F.3d 87, 93 (1st Cir. 2008).

<sup>207</sup> See Gardner, *supra* note 184. For an excellent analysis of claims made about education, see Murray, *supra* note 3. For an insightful discussion of *Parker* and the stakes in education, see Douglas NeJaime, *Inclusion, Accommodation and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J. L. & GENDER 303 (2009); see also Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81, 94 (2011) (discussing claims of required education); Kim H. Pearson, *Mimetic Reproduction of Sexuality in Child*

### F. Recap and Analysis

During the campaign, church leaders and members made a variety of specific legal claims about Proposition 8. However, many of these claims were misleading. Statements about religious restriction, business law, education, and adoption often gave false impressions about Proposition 8's effects, and frequently conflated same-sex marriage and antidiscrimination laws.<sup>208</sup>

### CONCLUSION: THE FUTURE

At the same-sex marriage symposium, Professor Marc DeGirolami asked panelists on the religion panel whether their religious traditions might change its position on same-sex marriage. The LDS church has a robust tradition of change, based on its doctrine that the living prophet can communicate with God and thus direct the church as needed. Indeed, the church has significantly changed policy and doctrine in the past on a number of occasions, including changes on polygamy and the treatment of Black church members.<sup>209</sup> The theological framework absolutely exists within the LDS church for significant doctrinal changes. And there is a more tenuous tradition of change from the bottom up, through cultural pressure.<sup>210</sup>

However, social forces suggest that there will be little change in the church's position. The Proposition 8 campaign was a defining moment for the LDS community, and support for legal heterosexual-only marriage is now strongly tied to LDS community views.<sup>211</sup> It appears that, to draw on Judith Butler, support for Proposition 8 has become a defining marker of

*Custody Decisions*, 22 YALE J. L. & FEMINISM 53 (2010) (discussing claims that LGBTQ individuals are inferior parents).

<sup>208</sup> See Wenger, *supra* note 190; NeJaime, *supra* note 3, at 1181.

<sup>209</sup> See generally Bowman, *supra* note 26, at 148–61, 214–15 (discussing changes on polygamy and race).

<sup>210</sup> See Barbara Bradley Hagerty, *Mormonism: A Scrutinized, Yet Evolving Faith*, NPR, Nov. 28, 2012, available at <http://www.npr.org/2012/11/28/166022894/mormonism-a-scrutinized-yet-evolving-faith> (citing professor Joanna Brooks).

<sup>211</sup> This is a rather new development. As LDS law professor Val Ricks notes, “the LDS Church’s position on the role of the state in marriage” has historically been “unclear,” and recent church statements are not consistent with prior practice. For instance, church founder Joseph Smith solemnized marriages without state authority, and his successor Brigham Young (and several subsequent prophets) solemnized plural marriages in active contravention of contrary federal laws. Val D. Ricks, *Contract Law and Christian Conscience*, 2003 B.Y.U. L. REV. 993, 995 n.8; see generally EDWIN B. FIRMAGE & RICHARD C. MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 1830-1900* (1988).

performed Mormon identity.<sup>212</sup> The LDS community has adopted this, and now public statements defending “the family” (that is, the heterosexual framework) against perceived attacks by LGBTQ advocates have become a central aspect of LDS identity performance. These conversations sometimes present the passage of Proposition 8 as a modern-day miracle and proof of God’s blessing, while contrary court rulings are viewed as a test of faith for the righteous. Some of these statements veer into the clearly excessive; in one recent law review article, Lynn Wardle compared fellow opponents of same-sex marriage to Jews courageously battling Nazi genocide.<sup>213</sup>

For those church members who support same sex marriage, it is frustrating to see the immense energy and cohesiveness of the LDS community used to attack the rights of LGBTQ couples.<sup>214</sup> Laura Compton, an LDS opponent of Proposition 8, told a reporter that “the Proposition 8 rhetoric is very divisive and it is hurting congregations.”<sup>215</sup> As some church members have spoken out against the church’s actions, there has been an increase in boundary policing. Members of the advocacy group Mormons for Marriage (which supports same-sex marriage rights) have been branded apostates; some church members have compared opponents of Proposition 8 to minions of Satan.<sup>216</sup> Prominent LDS academic Joanna Brooks has repeatedly been criticized by other church members for her support of same-sex marriage; in one recent *Newsweek/Daily Beast* article, BYU professor Ralph Hancock is quoted

<sup>212</sup> See generally Judith Butler, *GENDER TROUBLE* (1980) (setting out theory of identity performance); Mario Barnes, “*But Some of [Them] are Brave*”: *Identity Performance, the Military, and the Dangers of an Integration Success Story*, 14 DUKE J. GENDER L. & POL’Y 693 (2007).

<sup>213</sup> Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1365–76 (2007). The article made a number of inflammatory claims, for instance about promiscuity in the LGBTQ community. See *id.* This type of rhetoric is reminiscent of Alice Ristoph and Melissa Murray’s observation that “families that resist, rebel, or simply fail to conform may be perceived as threats to the political order.” Alice Ristoph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1259 (2010).

<sup>214</sup> Recognizing the energy in the community, some church members have urged greater involvement of the LDS community in areas of social justice such as immigration. See Rebecca Van Uitert, *Undocumented Immigrants in the United States: A Discussion of Catholic Social Thought and “Mormon Social Thought” Principles*, 46 J. CATH. LEGAL STUD. 277 (2007).

<sup>215</sup> Jennifer Dobner, *Latter-Day Saints Counseled to Strive for Unity*, ASSOCIATED PRESS, Oct. 5, 2008, [http://www.affirmation.org/pdf/2008\\_10\\_05\\_ap.doc](http://www.affirmation.org/pdf/2008_10_05_ap.doc). Robertson notes that, “[i]n some Church media outlets and conservative Mormon-themed blogs, opposing same-sex marriage and protecting traditional marriage were painted as the epic battle of our lifetimes. Writers and speakers intimated that those who didn’t fall into step with the Church’s marching order had an insufficient grasp of the gospel. They just don’t understand; otherwise they’d be on the correct side of the issue. After all, the prophet has spoken. Sowing such seeds results in divisions and contention among Church members.” Robertson, *supra* note 74, at 123, 125.

<sup>216</sup> Peggy Fletcher Stack, *LDS Wards Feeling Toll of Conflict*, THE SALT LAKE TRIBUNE, Oct. 26, 2008, [http://www.sltrib.com/ci\\_10819792](http://www.sltrib.com/ci_10819792).

saying that Brooks “must choose between being a gay-rights proponent and being a Mormon.”<sup>217</sup>

Church leadership seems to be implicitly encouraging this kind of boundary policing. An early statement suggesting that members were free to disagree with the church about Proposition 8 has not been repeated.<sup>218</sup> Instead, Elder Whitney Clayton told the *Deseret News* that church members who publicly opposed Proposition 8 could potentially be subject to church discipline, noting that “those judgments are left up to local bishops and stake presidents and the particular circumstances involved.”<sup>219</sup> There have been reports of local sanctions, including local leaders withholding temple privileges from members who did not support Proposition 8.<sup>220</sup> And the church has a history of authoritarian responses to dissent, including the use of special committees to monitor church member statements.<sup>221</sup> Elder M. Russell Ballard of the Twelve said in a recent Conference talk that “in the Lord’s Church there is no such thing as a ‘loyal opposition.’ One is either for the kingdom of God and stands in defense of God’s prophets and apostles, or one stands opposed.”<sup>222</sup>

However, church members who support LGBTQ rights can point to some positive developments as well. The Proposition 8 campaign shifted attitudes towards domestic partner rights. Gay rights advocates were able to use the church’s own statements – that it was not opposed to domestic partner rights – to support the ultimately successful drive to pass new antidiscrimination laws in Salt Lake City.<sup>223</sup> The church has made a few

<sup>217</sup> See Jamie Reno, *Ask Mormon Girl Author Joanna Brooks on LDS Church, Mitt Romney, Faith*, THE DAILY BEAST, Mar. 4, 2012, available at <http://www.thedailybeast.com/articles/2012/03/04/ask-mormon-girl-author-joanna-brooks-on-lds-church-mitt-romney-faith.html>.

<sup>218</sup> In an October 26 article, the Salt Lake Tribune quoted Elder Clayton as saying, “Latter-day Saints are free to disagree with their church on the issue without facing any sanction . . . We love them and bear them no ill will.” See Peggy Fletcher Stack, *Prop 8: California gay marriage fight divides LDS faithful*, SALT LAKE TRIB., Oct. 26, 2008, [http://www.sltrib.com/ci\\_10797630](http://www.sltrib.com/ci_10797630).

<sup>219</sup> Carrie A. Moore, *LDS Official Lauds Work for California’s Prop. 8*, DESERET NEWS, Nov. 6, 2008, <http://www.deseretnews.com/article/705260852/LDS-official-lauds-work-for-Californias-Prop-8.html>.

<sup>220</sup> Stack, *supra* note 164.

<sup>221</sup> See Lavina Fielding Anderson, *The LDS intellectual community and church leadership: A contemporary chronology*, 26 DIALOGUE: A JOURNAL OF MORMON THOUGHT 7, 9–64 (providing an extremely thorough chronology of church responses to member criticism). This article led to Anderson’s own excommunication. See “Six Intellectuals Disciplined for Apostasy,” SUNSTONE, Nov. 1993, at 65–73.

<sup>222</sup> M. Russell Ballard, *Beware of False Prophets and False Teachers*, CONFERENCE TALK, Oct. 1999, available at <https://www.lds.org/general-conference/1999/10/beware-of-false-prophets-and-false-teachers?lang=eng>.

<sup>223</sup> See Varona, *supra* note 16, at 854–55; see also See Jennifer Dobner, *Salt Lake City Oks Gay Rights Laws with Mormon Backing*, HUFFINGTON POST, Nov. 11, 2009, [http://www.huffingtonpost.com/2009/11/11/salt-lake-city-oks-gay-ri\\_n\\_353399.html](http://www.huffingtonpost.com/2009/11/11/salt-lake-city-oks-gay-ri_n_353399.html).

doctrinal changes as well, recently changing its official handbook to state that gay thoughts or feelings are not a sin.<sup>224</sup> Additionally, the church leaders' calls for civility and repeated affirmations of love for LGBTQ individuals are a welcome change from prior rhetoric which was often deeply offensive.<sup>225</sup> Ultimately, the current position of "heterosexism with civility" seems likely to be the official stance of the community for the foreseeable future. And if church members absorb the messages of civility, the life experiences of LGBTQ church members will certainly improve.<sup>226</sup> As gay LDS blogger Ty Mansfield told the Salt Lake Tribune, "We're going to be hearing more and more statements like [Elder Uchtdorf's], calling church members to a greater expression of compassion and kindness. Doctrine will remain the same, but we'll see a pretty radical shift in the culture of the church in how we relate both to the issue of same-sex attraction and to those who experience homosexual feelings. We've made some significant strides over the last few years, and I think this is only the beginning."<sup>227</sup> In this vein, the church launched a new website in late 2012 to publicize its official position of (qualified) love and support for gay church members.<sup>228</sup> But marriage – a word which "carries a uniquely intense, resonant, and emotional force in our language and culture"<sup>229</sup> – remains off limits.

Proposition 8 was a defining moment for both the LDS and LGBTQ communities. The story is not finished; it seems quite possible, for instance, that LDS statements may ultimately become legally significant as

<sup>224</sup> Joanna Brooks, *Homosexual Thoughts and Feelings Not a Sin, Says New LDS Handbook*, RELIGION DISPATCHES, Nov. 11, 2010, available at [http://www.religiondispatches.org/dispatches/joannabrooks/3720/homosexual\\_thoughts\\_and\\_feelings\\_not\\_a\\_sin\\_says\\_new\\_lds\\_handbook](http://www.religiondispatches.org/dispatches/joannabrooks/3720/homosexual_thoughts_and_feelings_not_a_sin_says_new_lds_handbook).

<sup>225</sup> See Kairi Wenger, *Evolving LDS Views on Homosexuality*, TIMES AND SEASONS BLOG, Sept. 13, 2011, available at <http://timesandseasons.org/index.php/2011/09/evolving-lds-views-on-homosexuality/> (documenting changes in LDS statements about LGBTQ individuals); see also Rebecca Rosen Lum, *Mormon Church Changes Stance on Homosexuality*, OAKLAND TRIB., Aug. 20, 2007, [http://www.insidebayarea.com/ci\\_6668882](http://www.insidebayarea.com/ci_6668882).

<sup>226</sup> One ward recently placed an openly gay man in a mid-level leadership position. See Peggy Fletcher Stack, *Gay Mormon Named to Key Local LDS Leadership Position in San Francisco*, SALT LAKE TRIB., Sept. 7, 2011, <http://www.sltrib.com/sltrib/news/52486958-78/mayne-gay-lds-ward.html.csp>.

<sup>227</sup> Peggy Fletcher Stack, *High-ranking LDS leader weighs in on same-sex attraction*, SALT LAKE TRIBUNE, Oct. 29, 2010, <http://www.sltrib.com/sltrib/news/50537493-78/uchtdorf-church-lds-sex.html.csp?page=1>.

<sup>228</sup> See McKay Coppins, *Mormon Church: Sexuality is not a Choice*, BUZZFEED, Dec. 6, 2012, <http://www.buzzfeed.com/mckaycoppins/mormon-church-sexuality-is-not-a-choice> (discussing the new MormonsAndGays website).

<sup>229</sup> Bryan H. Wildenthal, *To Say "I Do": Shahar v. Bowers, Same-Sex Marriage, and Public Employee Free Speech Rights*, 15 GA. ST. U. L. REV. 381, 433–34 (1998). It is also the most visible public expression of the relational component which is crucial to LGBTQ identity. NeJaime, *supra* note 3, at 1196.

evidence of unconstitutional animus, or may otherwise play a role in the unfolding landscape of rights.<sup>230</sup> Meanwhile, the church has kept a somewhat low profile since 2008, declining to play a major role in other same-sex marriage elections. Perhaps this was due to other factors; but it may also be a sign of shifting attitudes among church members. Same-sex marriage advocates sometimes ask, “Why [is] our marriage anyone else’s business, anyway?”<sup>231</sup> At some point, the LDS community may come to agree.

<sup>230</sup> Susannah Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

<sup>231</sup> Bryan H. Wildenthal, *A Personal Perspective on Marriage, Time, Space, Uncertainty, and the Law*, 2011 MICH. ST. L. REV. 229, 230 (2011).



