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I Now Pronounce You Incorporated: A Novel Approach to Same-Sex Marriage

By Joe Eskenazi

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Melding legal principles does not always follow the “You got your chocolate in my peanut butter!” “You got your peanut butter in my chocolate!” path. But humor us, here. In San Francisco, the plaintiffs have made their case in an attempt to overturn Proposition 8, which last year stripped same-sex couples of the right to marry. And, last week in Washington, D.C., the Supreme Court reaffirmed the counter-intuitive legal notion that money is speech and corporations are citizens.

You don’t need to be a legal scholar to predict that this particular Supreme Court won’t look favorably upon any case regarding same-sex marriage. But what if a same-sex couple used the Court’s own logic, declared themselves “corporations” and then decided to merge and “incorporate”? Sure, it sounds ludicrous—but, then, so does declaring a

citizen to be a corporation.

And, according to a handful of legal scholars we reached, it’s not quite as far-fetched an idea as we initially thought it was.

“Well, it would be worth a test case,” said Judge Ken Kawaichi, formerly with the Alameda County Superior Court. “Have two people ‘incorporate’ and ‘merge.’ But what would you call it? A marriage? And what about community property?”

Kawaichi anticipated other scholars’ misgivings about a ploy to fill a legal void regarding same-sex marriage by venturing into the nether-regions of business law. In fact, to a less nebulous degree, this actually isn’t a wholly new concept, notes Todd Brower, a Constitutional law professor at Western State University in Fullerton. In the days before domestic partnerships, he notes, longtime couples used to claim they had been “business partners” when one died and the survivor wanted to claim his or her inheritance. “The courts had a hard time dealing with those cases, and, oftentimes, people were left out in the cold,” says Brower. “I’m not sure what the advantage of a corporate merger would be. In fact, there might be some pretty severe disadvantages.”

Those disadvantages would be most apparent if, at any time, the merger was deemed ill-fitting and the corporations expressed a desire to once again function as autonomous entities. Or, as Neil Sedaka put it, “Breaking Up Is Hard to Do.”

“One of the benefits of marriage and domestic partnership in California is that there’s a whole set of laws and courts set up to deal with domestic relations issues,” notes Brower. “This is a real problem in

other places. If you're a same-sex couple who got a California marriage or a domestic partnership and you end up in Texas, Texas courts don't recognize it. So any couples that have a problem have to go to general courts—and they are not used to hearing cases about what you do when a relationship breaks up."

And, beyond cold, calculating legalisms, scholars told us that fooling around with corporate law when dealing with a loving relationship is just a bit creepy—and a bad fit.

"The law, itself, is directed toward corporate structures. That is not the way people deal with one another—hopefully—in an intimate relationship," said Brower. "When I have a fight with my partner, it's not like having a fight with shareholders or firing the CEO."

What's more, adds professor **Michael Zamperini** of **Golden Gate University**, an "incorporated" couple is still not "married"—and that's what the Prop. 8 trial is really all about. "They would be merged as far as the corporation code would be concerned," he says. "But they would not be merged as far as the family code or marriage rights are concerned."

Well, fair enough. But if same-sex couples "incorporate" in the Caribbean can't they at least get some kind of tax break? Apparently not.

"All lawyers have the experience of having somebody at a cocktail party say 'Why can't I incorporate and then I won't have to pay taxes?' And you always give them the same answer: You will have to pay taxes,'" says Judge Jim Lambden, an associate justice on Division II of the First District Court of Appeals in San Francisco and the chairman of the state Access and Fairness Committee.

Regarding a same-sex "incorporation," the judge noted, "My serious answer is you probably can't do it. My personal answer is, you know, when you go on a trip—and it's a nice trip, part business and part vacation—that never works. It's never fun and it's never good business. It's not a good idea to mix intimate relationships with corporations.

"I don't think that's a particularly good solution to this problem," he continued. "Equal rights would be better."