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Six Cases in Search of a Decision: The Story of *In re Marriage Cases*

Patricia A. Cain* and Jean C. Love**

*“Whatever is a reality today, whatever you touch and believe in and that seems real for you today, is going to be — like the reality of yesterday — an illusion tomorrow.”*¹

On May 15, 2008, the Supreme Court of California handed down its decision in the much awaited litigation officially known as *In re Marriage Cases*.² The case was actually a consolidation of six individual cases, all raising the same issue: Is denial of marriage to same-sex couples valid under the California Constitution? These six cases, as with Pirandello’s six characters in search of an author, took center stage for a time, not in a real theater, but rather in the evolving drama over extending equal marriage rights to gay men and lesbians. And while the case, like Pirandello’s play, does conclude, the story remains unfinished. The Supreme Court’s decision opened the institution of marriage, making it equally accessible to same-sex couples in California. But the reality of that day became an illusion in the tomorrow that produced Proposition 8, the ballot initiative that limited marriage to heterosexual couples. Of course, it is possible that tomorrow’s reality will turn Proposition 8 into an illusion, but that story has yet to be written, even as other states such as Iowa recognize the validity of same-sex marriage.

Background

On January 20, 2004, President George W. Bush in his State of the Union Address said:

A strong America must also value the institution of marriage Activist judges, however, have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people’s voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.

* Professor Cain would like to thank her co-author, Jean Love, the co-editors of this book (who provided incredible feedback during the entire process), and her research assistant, Erik Kaeding, Class of 2010, Santa Clara Law, who went “above and beyond” in uncovering everything that could possibly be relevant to this case. She would also like to thank the many couples who shared their stories about the joy of being legally married in the State of California.

** Jean Love would like to thank her co-author, Pat Cain, for making all of her dreams come true when they were legally married in the State of California on October 4, 2008.

¹ Luigi Pirandello, *Six Characters in Search of an Author* 64 (2004).

² 183 P.3d 384 (Cal. 2008). The case is also popularly known as the California Marriage Cases and we will sometimes refer to the case by this name.

Gavin Newsom, the newly elected mayor of San Francisco, heard that speech and felt a sense of outrage at the discriminatory force of Bush's statement, a clear reference to the 2003 Massachusetts decision that had extended the right of marriage in that state to same-sex couples.³ Newsom called his office and asked his staff to begin researching what he, as mayor, might do to defend the sanctity of marriage for gay men and lesbians.

Newsom had been mayor of San Francisco for exactly 18 days.⁴ The mayoral campaign had not been an easy one. Challenged in the run-off election by Green Party candidate, Matt Gonzalez, Newsom outspent Gonzalez ten to one. His \$4.0 million campaign produced a margin of victory measured by 11,000 votes. Liberal groups in San Francisco had branded Newsom as more conservative or a centrist and tended to support Gonzalez.

Nevertheless, this conservative, centrist, heterosexual, first-term mayor forced same-sex marriage into the courts in California by taking a courageous stand in favor of marriage equality. Within three weeks of President Bush's State of the Union address, Mayor Newsom had authorized the issuance of marriage licenses to lesbian and gay couples. On Thursday, February 12, 2004, Del Martin and Phyllis Lyon, legendary feminists and lesbian activists, became the first couple in California to be legally wed.

Couples flocked to City Hall to take advantage of this momentous happening. Within twenty-four hours of the first weddings, however, on Friday, February 13, two anti-gay organizations, Campaign for California Families and Proposition 22 Legal Defense and Education Fund, together with anti-gay activist Randy Thomasson, filed two separate suits in superior court seeking to enjoin the Mayor's office from issuing any further marriage licenses to gay and lesbian couples. The superior court did not issue an immediate stay, finding that the complainants would not be irreparably harmed in any way by the continued issuance of marriage licenses. Instead, the court ordered the City either to cease issuing licenses or to "show cause" on March 29 why it should not.

On February 14, Valentine's Day, Barbara and Renee Webster-Hawkins lined up with 300 other couples. It was Saturday morning, but City Hall staff members worked overtime to issue licenses and perform ceremonies. The couple in front of them was from Amador County and the couple behind them was from San Diego. Instant bonding occurred as this mass of couples shared the seriousness of the moment. Gone were the hecklers of the first day and, although some news stations remained, most of the people outside City Hall were ordinary people just grateful for the opportunity that Mayor Newsom had provided. Five hours later Barbara and Renee finally made it inside the building, holding the single rose that a stranger had handed them. Within minutes, after swearing they were the two people named on the license application, an officiant led them to a private chamber where two strangers, now new friends, witnessed their vows.

The demand for marriage licenses by same-sex couples was so strong that City Hall had to adopt new procedures to alleviate the problems caused by the long lines that had formed outside the building in the early days. The clerk's office began scheduling appointments for the

³ See *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁴ He was sworn in on January 3, 2004.

future. Couples were frantic to get on the appointment calendar, aware that there were legal challenges to the mayor's decision and that a court ruling might halt the issuance of licenses at any moment.

On February 25, 2004, three taxpayers filed a petition in the California Supreme Court seeking a writ of mandate to compel the county clerk to cease and desist issuing marriage licenses to same-sex couples and requesting an immediate stay. Two days later, Attorney General William Lockyer filed a similar petition requesting the Supreme Court to exercise original jurisdiction in this matter, to order compliance with the marriage laws as written, to invalidate all same-sex marriages performed to date, and to issue an immediate stay. The unusual circumstances and the uncertainty of the legality of the weddings created sufficient reasons for the Supreme Court to intervene. The court consolidated the cases and asked the City to respond by March 5.

By midday on March 11, San Francisco had issued marriage licenses to over 4,000 couples.⁵ Thousands of additional couples had contacted the clerk's office and been assigned appointment dates that stretched forward for months. Jeanne Rizzo and Pali Cooper, together for 15 years, had called the clerk's office repeatedly, reaching a busy signal. Finally, they got through and scheduled an appointment for March 11 at 3:00 p.m. They went to City Hall that day, accompanied by their son, Christopher, and about 50 family members and friends. The two women wore flower necklaces. Garry Schermann and Eric Temple, both dressed in wedding suits, were also in line at 2:45 p.m. that day, waiting to formalize their vows. Garry's mother had flown in from Dallas just that morning to be a witness to the nuptials. Other couples were filling out wedding license applications, saying their vows, and taking their licenses to Assessor-Recorder Mabel Teng for filing. None of these couples was aware that, at 2:33 p.m., the California Supreme Court would issue a stay to discontinue the issuance of same-sex marriage licenses.⁶

When the issuance of the stay was announced, Jeanne and Pali, who had been looking forward to this day for over fifteen years, broke into tears and held onto each other. Devin Baker and Art Adams, also scheduled for a 3:00 p.m. ceremony, were halfway through filling out their form when the clerk told them to stop. Baker says he was heartbroken. Wedding ceremonies that were in progress were completed, but the couples were unable to file their licenses.

Del and Phyllis, Barbara and Renee, and the other 4,035 couples who had been married over the past month, wondered whether their marriages would survive the California Supreme Court's scrutiny. Many couples readily admitted that they expected an adverse ruling by the

⁵ The final count was 4,037 according to the New York Times. Dean E. Murphy, *San Francisco Married 4,037 Same-Sex Pairs From 46 States*, N.Y. Times, Mar. 18, 2004, at A26.

⁶ The clerk's office issued the following notice:

Effective March 11, 2004 - 2:33 p.m. by order of the California Supreme Court. The San Francisco County Clerk has been ordered to discontinue issuance of same-sex marriage licenses. Therefore all previously scheduled same-sex appointments are now cancelled. . . .

We (the authors of this chapter) were scheduled for an early April appointment at City Hall to formalize our union of more than 20 years. We received a copy of this notice by e-mail from the Clerk on March 12, 2004.

high court. Still, their vows during that month were more than mere street theatre. They were real, carrying deep significance. Witnesses at these weddings often broke into tears as they heard officiants say: “By virtue of the authority vested in me by the State of California, I now pronounce you spouses for life.” The thought that the State of California stood behind these unions was enormously empowering.

These wedding experiences transformed families. Six weeks after their February 14 wedding, Barbara and Renee memorialized the event by speaking the exact same vows with a new officiant in the company of 150 family members and friends. Although they had been together for 12 years, this was the first opportunity for their families to acknowledge the importance of their commitment to each other. Barbara’s sister, Wendy Webster Williams, a lawyer,⁷ toasted them at this event, concluding with the following words about legality:

The *legality* of Barbara and Renee’s marriage is fragile, for better or for worse in the hands of the Justices of California Supreme Court. But the *reality* of their marriage is not. In our two families, . . . joined together by Barb & Renee’s long partnership, no court can take this marriage away. It is irrevocable.⁸

On August 12, 2004, the California Supreme Court announced its legal conclusion about the marriages from San Francisco’s “Winter of Love.” In *Lockyer v. City and County of San Francisco*,⁹ the California Supreme Court declared that all of the 4,037 marriages were void, explaining that the mayor did not have the power under the separation of powers doctrine to ignore the clear statutory law of California that restricted marriage to a man and a woman. Even those couples who had expected the outcome were crushed by this pronouncement.

The court in *Lockyer* left open the question of whether or not the statutory restriction of marriage to one man and one woman violated the California Constitution, as Mayor Newsom believed it did. The determination of the constitutionality of such a statute, explained the court, was not an appropriate function for the Mayor or for any other member of the executive branch in California. Such a determination was within the sole province of the judiciary. The story of *In re Marriage Cases* begins here. It is the story of the litigation in six consolidated cases that determined the constitutionality of restricting marriage to one man and one woman.

How Six Cases Came to Court

⁷ Wendy Williams is a law professor at Georgetown. She is also one of the founding members of Equal Rights Advocates, a feminist law firm established in 1973 in San Francisco. In 1971, as a law clerk to Justice Raymond Peters, she was instrumental in focusing the California Supreme Court on the question of sex discrimination in *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971). We called her to discuss the role of *Sail’er Inn* in the California Marriage Cases and, at the end of that discussion, she told us the story of her sister Barb and she put us in touch with Renee and Barb so that we could learn their story first hand.

⁸ E-mail from Wendy Webster Williams, Professor of Law, Georgetown University Law Center, to Patricia Cain, Inez Mabie Distinguished Professor of Law, Santa Clara University School of Law (Aug. 1, 2008) (on file with author).

⁹ *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004).

Five of the six cases in the consolidated appeal to the California Supreme Court arose directly out of San Francisco's "Winter of Love." Two of the cases had been filed against Mayor Newsom on behalf of the two conservative public interest groups who had sought to halt the mayor's issuance of marriage licenses to same-sex couples. These two cases were styled *Thomasson v. Newsom*¹⁰ and *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*. The National Center for Lesbian Rights (NCLR) intervened in these cases on behalf of same-sex couples who had obtained and were seeking marriage licenses. On March 11, when the California Supreme Court granted the stay that halted the issuance of marriage licenses, it also stayed the proceedings in *Thomasson* and *Proposition 22 Legal Defense and Education Fund*.

Three additional cases were filed on March 12. One was filed by the city, *City and County of San Francisco v. State of California*. The second, *Woo v. Lockyer*, was filed by NCLR primarily on behalf of twelve same-sex couples. Private attorney Waukeen McCoy filed a third case, *Clinton v. California*, on behalf of six same-sex couples, and requested that the case be tried as a class action. The last case, *Tyler v. California*, had been filed by private attorney Gloria Allred in Los Angeles on February 24. In June, all of the cases other than *Clinton* were coordinated for trial by Judge Richard Kramer of the Superior Court of California for the County and City of San Francisco. The *Clinton* plaintiffs petitioned for coordination in July and, on September 8, 2004, Judge Kramer ordered the consolidation of all six cases.

NCLR objected to the inclusion of *Thomasson* and *Proposition 22 Legal Defense and Education Fund* in the consolidated proceedings. While these two cases had neither been dismissed nor received a final ruling, NCLR argued that the supreme court's issuance of a stay on March 11 had effectively granted these petitioners the remedy they had sought. The City and County of San Francisco similarly argued that the petitioners in these two cases lacked standing and that their claims had been mooted by the issuance of the stay. Perhaps out of an abundance of caution, Judge Kramer denied these requests and allowed the two conservative groups to participate in the litigation and to articulate their own justifications for retaining the traditional heterosexual definition of marriage.

The couples in the NCLR case included Del Martin and Phyllis Lyon, the first couple to be married on February 12. Two of the couples scheduled for 3:00 p.m. marriages at City Hall on March 11 were also plaintiffs: Jeanne Rizzo and Pali Cooper and Arthur Adams and Devin Baker. Six additional couples joined these plaintiffs. All of the couples were registered domestic partners. Many of them had children. All of the couples had compelling stories. Of particular interest is the story of Stuart Gaffney and John Lewis, who had been together for seventeen years in 2004 and who had married at City Hall on February 12. Stuart's parents, Estelle Lau, who was Chinese-American, and Mason Gaffney, who was of English-Irish descent, had met at the University of California, Berkeley and married in 1952. That marriage had been forbidden in California until the 1948 opinion in *Perez v. Sharp*,¹¹ which struck down California's anti-miscegenation statute. Stuart describes his childhood as one in which his

¹⁰ This case is sometimes referred to as *Campaign for California Families v. Newsom*.

¹¹ 198 P.2d 17 (Cal. 1948); see discussion of *Perez*, *infra* notes 70–103 and accompanying text.

family's status changed as they moved from state to state, at least until 1967, when the U.S. Supreme Court decided *Loving v. Virginia*.¹²

The *Tyler* case filed in Los Angeles originated from a February 12 incident unrelated to Mayor Newsom's decision to issue marriage licenses. February 12 is National Freedom to Marry Day, a day first proclaimed as such in 1997 by Evan Wolfson, a gay rights attorney who has supported the right to marry throughout his career.¹³ On this day, couples around the country are encouraged to go to the office of their county clerks and demand marriage licenses. Robin Tyler and her partner, Diane Olson, engaged in this annual rite by trekking down to the Beverly Hills clerk's office every February and asking for a license. When the clerk refused Robin and Diane's request, Robin, a regular blogger for the *Huffington Post*, announced that she would file suit. On February 24, her attorney, Gloria Allred, filed a claim on behalf of Tyler and Olson, who were joined in the lawsuit by another couple, Rev. Troy Perry¹⁴ and Phillip Ray deBliiek.

The last case added to the consolidated group, *Clinton v. California*, was filed on behalf of six same-sex couples, all of whom had obtained marriage licenses from the City and County of San Francisco on February 13 and 14, 2004. Interestingly, the complaint alleges that the California marriage statutes violate both the state and federal constitutions. The plaintiffs dropped the claim regarding the Federal Constitution by the time the parties began briefing. As a result, all of the challenges to the constitutionality of the state statute were limited to state constitutional claims.

Legal Threads

Three legal threads weave the background to the story of the California Marriage Cases. The first thread involves the California Constitution. The second thread is the 1948 decision by the California Supreme Court in *Perez v. Sharp*, the case that first recognized a fundamental right to marry the person of one's choice. The third thread involves California's special history in the struggle for gay and lesbian equality.

1. *The California Constitution*

The plaintiffs in the California Marriage Cases alleged that they suffered a denial of their state constitutional rights to liberty, privacy, and equality. The right to liberty can be traced back to 1849, when the framers of the California Constitution decided that Article I would be called the "Declaration of Rights."¹⁵ Article I, Section 1 announced in ringing terms: "All men are by

¹² 388 U.S. 1 (1967).

¹³ Evan Wolfson was an attorney at Lambda Legal Defense and Education Fund from 1989 to 2001. He served as the Director of Lambda's Marriage Project and launched the National Freedom to Marry Coalition, which he currently leads as Executive Director.

¹⁴ Rev. Troy Perry founded the Metropolitan Community Church (MCC) as a gay positive ministry in 1968 in Los Angeles.

¹⁵ For an account of the Constitutional Convention of 1849, see John Ross Browne, *Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October, 1849* (1850). For a description of the deliberations surrounding the adoption of Article I, Section 1, see *id.* at 33–34.

nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.” Although most of the provisions of the Declaration of Rights were based upon New York’s 1846 constitution and Iowa’s constitution of the same year,¹⁶ it is quite possible that Article I, Section 1, was modeled upon the Virginia Bill of Rights,¹⁷ which codified the teachings of natural law.¹⁸ To emphasize that the Declaration of Rights would be interpreted as positive law, the framers further stated in Article I, Section 26: “The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.” Thus, the right to liberty in the California Constitution is neither hortatory nor advisory; rather, it is unquestionably subject to judicial enforcement.¹⁹

The framers of the California Constitution considered it important to ensure that the Declaration of Rights would be judicially enforceable in the California courts because they were keenly aware of the fact that the United States Supreme Court had ruled in *Barron v. Mayor of Baltimore*²⁰ that the federal Bill of Rights applied only to the federal government, and not to the states. Myron Norton, the Chairperson of the Standing Committee on the Constitution, said: “The fact that [these rights in the federal Bill of Rights are guaranteed] in the Constitution of the United States does us no good here; for it has been decided by the Supreme Court of the United States that these provisions only apply in the United States Courts.”²¹

In 1879, the delegates to the second California constitutional convention reaffirmed the text of Article I, section 1.²² By then, the Fourteenth Amendment had been ratified, creating federal constitutional rights that were enforceable against the states. But, in the early 1870s, the United States Supreme Court narrowed the potentially broad scope of the Fourteenth Amendment in the *Slaughter-House Cases*.²³ Consequently, the 1879 delegates were determined that California’s Declaration of Rights would not depend on the United States Constitution for either its meaning or effect. They soundly rejected a proposal to add language providing that the Constitution of the United States is “the great charter of our liberties.”²⁴ During the debate on that proposal, several of the delegates emphasized the fact that the state constitution was in

¹⁶ Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 *Hastings Const. L.Q.* 141, 142–43 (2004) [hereinafter Grodin, *The Early Years*].

¹⁷ Va. Const. Art. I, §1.

¹⁸ A.E. Dick Howard, “*For the Common Benefit: Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*,” 54 *Va. L. Rev.* 816, 823 (1968).

¹⁹ Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 *Hastings Const. L.Q.* 1, 20–22 (1997) (citing cases) [hereinafter Grodin, *Right to Happiness and Safety*].

²⁰ 32 U.S. (7 Pet.) 243 (1833).

²¹ Browne, *supra* note 15, at 294.

²² Grodin, *The Early Years*, *supra* note 16, at 142.

²³ 83 U.S. (16 Wall.) 36 (1872).

²⁴ Grodin, *The Early Years*, *supra* note 16, at 142.

reality the true charter of their liberties.²⁵ The delegates ultimately adopted the unremarkable declaration that the “State of California is an inseparable part of the Union and the United States Constitution is the supreme law of the land.”²⁶

The right to liberty in Article I, Section 1, has been broadly construed by the California Supreme Court to include “a ‘right of privacy’ or ‘liberty’ in matters related to marriage, family, and sex.”²⁷ In 1969, the California Supreme Court interpreted the right to liberty expansively to encompass “the fundamental right of the woman to choose whether to bear children.”²⁸ Later, in 1972, Article I, Section 1 was amended through the initiative process so that it would explicitly apply to women as well as to men, and so that it would explicitly guarantee the right to privacy.²⁹ Article I, Section 1 now states: “All people are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness and privacy.” It is Article I, Section 1, with its explicit references to “liberty” and “privacy,” that is the primary source of the “right to marry” under the California Constitution.

Article I, Section 1 contains no explicit reference to “equality,” which is the third constitutional right that was at issue in the California Marriage Cases. It has been suggested that the 1849 Constitution contained an implicit right to equality in the inclusive language of Article I, Section 1, which stated: “*All men* are by nature free and independent, and have certain inalienable rights” This argument is quite persuasive. At the same time, it must be noted that the record of the 1849 debates shows that the failure to make any explicit reference to equality in Article I, Section 1 was a conscious choice (although the record does not reveal the reasons for that choice). The record shows that, in the early days of the 1849 Convention, a delegate named Mr. Shannon moved the “first section” of the “bill of rights,” starting with the statement: “All men are by nature free and independent, and have certain inalienable rights”³⁰ Mr. Jones, another delegate, immediately moved “to strike out the first section of the bill and insert the first section of the Constitution of Iowa,”³¹ which stated: “All men are, by nature, free and *equal*, and have certain inalienable rights” The Chair ruled that Mr. Jones’ proposed amendment was not in order.³² In response, Mr. Jones moved to strike the entirety of Section 1 as written by Mr. Shannon.³³ Mr. Botts, a third delegate, expressed his approval of Mr.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *People v. Belous*, 458 P.2d 194, 199–200 (Cal. 1969) (citing cases, including *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (striking down California’s anti-miscegenation statute)).

²⁸ *Id.* at 199.

²⁹ Grodin, *Right to Happiness and Safety*, *supra* note 19, at 21.

³⁰ Browne, *supra* note 15, at 33.

³¹ *Id.* at 34.

³² *Id.*

³³ *Id.*

Jones' motion because he considered "the first section superfluous."³⁴ Mr. Sempler, a fourth delegate, rose to respond by saying that he considered Section 1 "an essential principle to be incorporated in a bill of rights."³⁵ After some additional discussion about the order of the amendments, the delegates voted on Mr. Shannon's motion and adopted it by majority vote.³⁶ Thus, Article I, Section 1 of the California Constitution of 1849 expressly guaranteed liberty, but not equality.

During the Constitutional Convention of 1878–79, the issue of equality arose once again. This time, two women pressed the issue. They were not delegates to the Convention, but they lobbied those men who were, asking them to include specific provisions in the Constitution that would guarantee equality to women in the areas of employment and education. They were motivated by the fact that they both had been recent victims of sex discrimination. Clara Shortridge Foltz (a suffragist and a housewife with five children) and Laura DeForce Gordon (a sister-suffragist and newspaper publisher) had been barred from entering the legal profession by a California statute that had provided that only white males could become lawyers.³⁷ Foltz had responded by drafting the Woman Lawyer's Bill in 1877, and she and Gordon had lobbied successfully for the Bill's enactment in that same year.³⁸ In 1878, after reading law, both women had been admitted to the bar—an event that had received national publicity. When the Hastings College of Law opened its doors in 1878 as part of the University of California, both women had applied unsuccessfully for admission. On February 10, 1879, Clara Foltz filed a lawsuit, representing herself and seeking a writ of mandamus ordering her admission to the College of Law.

On February 18, in response to the lobbying by Foltz and Gordon, the Constitutional Convention adopted Article XX, Section 18, which stated: "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." On February 26, the Constitutional Convention adopted Article IX, Section 9, which provided: "No person should be debarred admission to any of the collegiate departments of the university on account of sex." The two sections marked the first express guarantee of equal rights for women in an American constitution.³⁹ In March of 1879, the trial court judge ruled in favor of Clara Foltz, relying on both the Woman Lawyer's Bill and on the recently drafted state constitutional provisions. The Hastings Board of Directors decided to appeal. By the time the appeal was argued to the California Supreme Court, the Constitution of 1879 had been ratified, and the court

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ For the detailed story about the activities of Clara Shortridge Foltz and Laura DeForce Gordon in 1878–79, see Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 *Ind. L.J.* 849, 850-53 (1991) [hereinafter Babcock, *Constitution-Maker*].

³⁸ For a detailed account of the passage of the Woman Lawyer's Bill in 1877 and of Clara Foltz's subsequent lawsuit seeking admission to the new law school at Hastings in 1879, see Barbara Allen Babcock, *Clara Shortridge Foltz, "First Woman,"* 30 *Ariz. L. Rev.* 673, 689–95 (1988).

³⁹ Babcock, *Constitution-Maker*, *supra* note 37, at 851.

affirmed the writ of mandamus ordering that Clara Foltz be admitted to the Hastings College of Law.⁴⁰

The second case to be litigated under the 1879 equality provisions was *In re Mary Maguire*.⁴¹ In 1881, Mary Maguire relied on Article XX, Section 18 to challenge a San Francisco ordinance that provided: “Every person who . . . employs any female to wait . . . on any person in any dance-cellar, bar-room, or in any place where malt, vinous, or spirituous liquors are sold, and every female who in such place shall wait . . . on any person, is guilty of a misdemeanor.”⁴² Mary McGuire had been arrested for violating the ordinance, and she petitioned for a writ of habeas corpus.⁴³ The respondent argued that the ordinance did not violate Article XX, Section 18 because Mary McGuire had not been disqualified from waiting on persons in a bar-room where liquors are sold “on account of her sex,” but rather on account of the fact that such employment of a woman is “hurtful to sound public morality.”⁴⁴ Justice Thornton, writing for the majority, took the position that while the state could enforce morality, the constitution prevented the state from doing so by prohibiting women from engaging in lawful employment.⁴⁵ He buttressed his opinion by focusing on the command of Article I, Section 22 that “[t]he provisions of this Constitution are mandatory and prohibitory, unless by expressed words they are declared to be otherwise.” He observed that there was no exception in the Constitution that would authorize discrimination on the basis of sex for the purpose of promoting public morality.⁴⁶ The California Supreme Court ordered that Mary McGuire’s petition for a writ of habeas corpus be granted. Mary McGuire, along with Clara Foltz, had proven the power of an express (albeit narrow) guarantee of equality.

Despite the lack of an express, general equal protection clause in the California Constitution of 1879, the California Supreme Court announced in 1900 that an implicit principle of equal protection existed in the 1879 Constitution.⁴⁷ Article I, Section 21 of the 1879 Constitution provided: “No citizen or class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens.” And Article I, Section 11, stated: “All laws of a general nature shall have a uniform operation.” According to the court, these two provisions, taken together, supported an implicit guarantee of equal protection in the California Constitution.⁴⁸

⁴⁰ Foltz v. Hoge, 54 Cal. 28 (1879).

⁴¹ 57 Cal. 604 (1881).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 606–07.

⁴⁵ *Id.* at 609.

⁴⁶ *Id.*

⁴⁷ Britton v. Bd. of Election Comm’rs, 61 P. 1115, 1117 (Cal. 1900) (challenging provision of a primary election law).

⁴⁸ *Id.*

The court considered both the explicit and the implicit guarantees of equality in the California Constitution in *Sail'er Inn, Inc. v. Kirby*,⁴⁹ a 1971 case that was central to the court's discussion of equality in the California Marriage Cases. The plaintiffs in *Sail'er Inn* held on-sale liquor licenses and sought a writ of mandate to prevent the Department of Alcoholic Beverage Control from revoking their licenses because they employed women bartenders. Section 25656 of the Business and Professions Code prevented women from being hired as bartenders except when they were licensees, wives of licensees, or shareholders of a corporation holding a license.⁵⁰ The plaintiffs contended that Section 25656 violated Article XX, Section 18. Additionally, they claimed that it violated Article I, Sections 11 and 21, of the California Constitution, and that it violated the federal Equal Protection Clause.

Turning first to the plaintiffs' claim under Article XX, Section 18, the California Supreme Court ruled that Section 25656 was unconstitutional based upon *In re McGuire*.⁵¹ In particular, the court said that "mere prejudice, however ancient, common or socially acceptable," is not a justification for discrimination against job applicants.⁵² It concluded by observing: "It is clear that bartending is a lawful vocation, that women are as capable of mixing drinks as men, and that section 25656 nonetheless disqualifies the vast majority of women from entering the bartending occupation."⁵³

Although the court could have stopped with its holding in favor of the plaintiffs under Article XX, Section 18, it went on to consider the plaintiffs' claims that they had been denied equal protection under both the federal and state constitutions. The plaintiffs alleged that they had been denied equal protection because Section 25656 prohibited women from tending bar unless they or their husbands held a liquor license, but did not impose a comparable limitation on men. The California Supreme Court took the position that the federal and state tests for a denial of equal protection were "substantially the same,"⁵⁴ and therefore it considered the federal and state constitutional provisions simultaneously. The court then turned to the first issue, which was determining the proper standard of review. The court said that it would apply the two-level test employed by the United States Supreme Court in reviewing legislative classifications under the Equal Protection Clause.⁵⁵ It described that two-level test as one in which low-level scrutiny was

⁴⁹ 485 P.2d 529 (Cal. 1971). *Sail'er* was almost dismissed on the ground that it did not present a sufficiently important issue to merit review. If an astute recent Boalt Hall graduate, Wendy Williams, then clerking for Justice Peters, had not noticed the case and understood its import, the history of the California constitution might have been different. For more information about Wendy Williams, see *supra* note 7.

⁵⁰ 485 P.2d at 531.

⁵¹ 57 Cal. 604 (1881).

⁵² *Sail'er Inn*, 485 P.2d at 533.

⁵³ *Id.*

⁵⁴ *Id.* at 538 n.13.

⁵⁵ *Id.* at 538.

applied in the area of economic regulation, and strict scrutiny was applied “in cases involving ‘suspect classifications’ or in cases touching on ‘fundamental interests.’”⁵⁶

Moving to the second issue, the court held that Section 25656 contained a facial sex-based classification and that classifications based upon sex should be treated as suspect.⁵⁷ The court acknowledged that the United States Supreme Court had not designated sex-based classifications as suspect,⁵⁸ but it also observed that other courts “have begun to treat sex classifications as at least marginally suspect.”⁵⁹ It then analyzed those classifications that the United States Supreme Court had already designated as suspect classifications, such as classifications based on race or national origin. Four criteria emerged, including whether the classification (1) was based upon an immutable trait; (2) bore no relation to ability and therefore relegated a whole class of people to an inferior legal status without regard to the capabilities of the individual members of the class; (3) reflected a history of discrimination that created a stigma of inferiority; and (4) burdened groups who were politically powerless.⁶⁰ Applying these four criteria, the court found that sex was a suspect classification because (1) gender is an immutable trait; (2) women are capable of being bar tenders; (3) women as a class have suffered from a history of discrimination; and (4) women are politically powerless because, although they obtained the right to vote in 1920, they remain “underrepresented in federal and state legislative bodies and in political party leadership.”⁶¹ *Sail’er Inn* was the first case in the nation to hold that sex is a suspect classification.

Turning to the application of strict scrutiny, the court placed the burden on the state to establish that it had a *compelling* interest which justified the law and that the means were *necessary* to further its purpose.⁶² The state asserted that its compelling interest was in “preventing improprieties” in connection with the sale of alcoholic beverages, and it argued that “women in bars, unrestrained by husbands or the risk of losing a liquor license, will commit improper acts.”⁶³ The court was not persuaded. It found that the state had failed to prove a compelling interest because there was no reason to believe that women bartenders would have any less incentive than male bartenders to obey the gender-neutral statutes governing the sale of alcoholic beverages.⁶⁴ The court also observed that nondiscriminatory statutes constituted a

⁵⁶ *Id.* at 539.

⁵⁷ *Id.*

⁵⁸ *See, e.g.,* *Goesaert v. Cleary*, 335 U.S. 464 (1948) (applying low level-scrutiny to a sex-based classification). The court in *Sail’er Inn* was able to distinguish *Goesaert*.

⁵⁹ 485 P.2d at 539–40. The court cited *United States ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968).

⁶⁰ 485 P.2d at 540–41. The fourth criterion was only mentioned in a footnote. *Id.* at 540 n.17.

⁶¹ *Id.* at 540–41 & 540 n.17.

⁶² *Id.* at 539.

⁶³ *Id.* at 542.

⁶⁴ *Id.*

preferable means to the end.⁶⁵ Therefore, the court held that Section 25656 violated both the state and federal constitutions.⁶⁶

In 1974, California added Article I, Section 7(a) to create an explicit state constitutional guarantee of equality akin to the federal guarantee of equal protection: “A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.” A new Article I, Section 24 emphasized the independence of the state constitution from the Federal Constitution: “Rights guaranteed by the Constitution are not dependent on those guaranteed by the United States Constitution.” In 1976, based on these two new additions to the state constitution, the California Supreme Court clarified the relationship between the state constitution and the Federal Constitution: “[O]ur state equal protection provisions, while ‘substantially the equivalent of’ the guarantees contained in the Fourteenth Amendment to the United States Constitution, are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable.”⁶⁷ Consequently, it is now clear that sex continues to be a suspect classification under the California Constitution, even though the United States Supreme Court ruled in 1976⁶⁸ that sex is only a quasi-suspect classification.⁶⁹

2. *Perez v. Sharp*

In the California Marriage Cases, the court relied heavily on *Perez v. Sharp*,⁷⁰ a pathbreaking case in which the California Supreme Court struck down California’s anti-miscegenation statute under the Federal Constitution by a vote of 4-3. Even though *Perez* had been decided under the Federal Constitution, the court in the California Marriage Cases treated *Perez* as if it were also a state constitutional law precedent.

In 1947, Sylvester Davis (a black man) and Andrea Perez (a Mexican-American mestiza with olive-colored skin regarded by law to be white) mutually agreed that they wanted to get married.⁷¹ But when they went to the office of the Los Angeles County Clerk, the clerk denied them a license⁷² because of California’s anti-miscegenation statute, which stated: “All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal

⁶⁵ *Id.*

⁶⁶ *Id.* at 543.

⁶⁷ *Serrano v. Priest*, 557 P.2d 929, 950 (Cal. 1976).

⁶⁸ *Craig v. Boren*, 429 U.S. 190 (1976).

⁶⁹ *Molar v. Gates*, 159 Cal. Rptr. 239 (Cal. Ct. App. 1979) (applying strict scrutiny to a sex-based classification under California’s equal protection clause and applying intermediate-level scrutiny under the federal Equal Protection Clause).

⁷⁰ 198 P.2d 17 (Cal. 1948).

⁷¹ Dara Orenstein, *Void for Vagueness: Mexicans and the Collapse of Miscegenation Laws in California*, 7 *Pac. Hist. Rev.* 367-69, 372, 403 (2005).

⁷² *Id.* at 368.

and void.”⁷³ No marriage license could be issued to such interracial couples.⁷⁴ California’s anti-miscegenation statute dated back to the first session of the legislature in 1850.⁷⁵ Originally, interracial marriage had been a crime in California (as it was in many other states), but in 1872, the California legislature had amended its anti-miscegenation statute by removing the criminal penalty and by declaring that interracial marriages are void. California’s prohibition on interracial marriage had one loophole: Sylvester and Andrea could have driven to Mexico to get married, and then returned to California as a legally married couple.⁷⁶ But, as devout Catholics, they wanted to get married in Saint Patrick’s Church in Los Angeles.⁷⁷

Sylvester and Andrea knew Daniel Marshall, a white civil rights lawyer who also worshipped at Saint Patrick’s Church in Los Angeles, and he agreed to take their case.⁷⁸ As he contemplated his litigation options, he realized that an equal protection challenge under the Constitution of the United States would be met with the “equal application defense.”⁷⁹ He also realized that a substantive due process challenge would be met with the fear of resurrecting *Lochner*.⁸⁰ Therefore, he chose to emphasize the argument that California’s anti-miscegenation statute violated the “free exercise of religion” clauses of both the state and federal constitutions.⁸¹ On August 8, 1947, Marshall filed his complaint with the California Supreme Court, requesting a writ of mandate that would direct the county clerk to issue a marriage license to Sylvester and Andrea.⁸² The court agreed to exercise original jurisdiction and heard oral arguments on October 6, 1947.⁸³ Marshall’s argument focused almost exclusively on the free exercise challenge.⁸⁴

⁷³ Cal. Civ. Code § 60 (West 1941), *invalidated by* *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

⁷⁴ Cal. Civ. Code § 69 (West 1941), *invalidated by* *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

⁷⁵ The history of the amendments to the statute is detailed in *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

⁷⁶ *Pearson v. Pearson*, 51 Cal. 120, 125 (1875).

⁷⁷ Orenstein, *supra* note 71, at 386.

⁷⁸ *Id.* at 388–89.

⁷⁹ Under the equal application defense, the fact that different races are equally burdened is cited for the principle that there is no discrimination on the basis of race. As to marriage, if blacks cannot marry whites, they are treated equally with whites who cannot marry blacks. *See Pace v. Alabama*, 106 U.S. 583 (1883).

⁸⁰ *Lochner v. New York*, 198 U.S. 45 (1905) (holding that the due process clause protects individual liberty of contract so strongly that legislatures cannot enact protective legislation that interferes with such liberty). By 1938, *Lochner*’s protection of liberty had been significantly cabined by the Supreme Court, thereby enabling much of President Roosevelt’s New Deal legislation to survive constitutional attack.

⁸¹ Orenstein, *supra* note 71, at 390. For a discussion of Marshall’s strategy, see Robin A. Lenhardt, *Forgotten Lessons on Race, Law, and Marriage: The Story of Perez v. Sharp*, in *Race Law Stories* 354-56 (Rachel Moran & Devon Carbado eds. 2008).

⁸² Orenstein, *supra* note 71, at 394.

⁸³ *Id.*

⁸⁴ For a discussion of the briefs and the oral arguments, see Lenhardt, *supra* note 81, at 356–59.

As Charles Stanley, the lawyer for the County, delivered his response to the free exercise argument, Justice Traynor suddenly interrupted him by asking the first question of the day: “What about the equal protection of the law?”⁸⁵ Justice Traynor pressed on: “What legitimate social purpose is served by this statute?” Stanley answered: “[T]here is evidence that crossing of widely divergent races will have detrimental biological results.” Justice Traynor expressed his dissatisfaction with Stanley’s answer: “What you have to establish is not the validity of a law preventing mixed marriages of races generally, but a law prohibiting the mixing of Caucasians with any of the specified colored races.” Stanley struggled as he attempted to answer Justice Traynor’s question: “I do not like to say it or to tie myself in with ‘Mein Kampf’—but it has been shown that the white race is superior physically and mentally to the black race, and the intermarriage of these races results in a lessening of physical vitality and mentality in their offspring.” With a hint of incredulity in his voice, Justice Traynor inquired: “Are there medical men in this country who say such a thing?”

The California Supreme Court handed down its decision in *Perez v. Sharp* on October 1, 1948.⁸⁶ Justice Traynor (joined by Justices Gibson and Carter) wrote an opinion holding that California’s anti-miscegenation statute was unconstitutional because it denied the plaintiffs the fundamental right to marry and because it violated the equal protection of the laws.⁸⁷ Justice Edmonds cast the fourth vote to strike down California’s anti-miscegenation statute, concurring in the result. He found that the right to marry is “grounded in the fundamental principles of Christianity,” and therefore it is protected by the federal constitutional guarantee of religious freedom.⁸⁸ Justice Shenk (joined by Justices Schauer and Spence) dissented on the grounds that the state has the power to regulate marriage and that an anti-miscegenation statute must be upheld pursuant to the equal application defense.⁸⁹

The organization of Justice Traynor’s opinion was brilliant. He knew that the respondent was relying on the “equal application defense.”⁹⁰ However, instead of opening with a discussion of the equal protection clause and the “equal application defense,” he began with a discussion of the free exercise clause. He acknowledged that the regulation of marriage is a “proper function of the state,” and therefore the state may adopt reasonable regulations with an incidental impact on religious practices.⁹¹ However, he said, if a marriage statute contains a “discriminatory and irrational” classification, then the statute unconstitutionally restricts “not only religious liberty,

⁸⁵ Transcript of Oral Argument, *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (No. L.A. 20305). All of our quotations from the oral argument in this paragraph are taken from the transcript of the oral argument.

⁸⁶ 198 P.2d 17 (Cal. 1948).

⁸⁷ *Id.* at 17–29. Justice Traynor also found that the statute was too vague. *Id.*

⁸⁸ *Id.* at 34 (Edmonds, J., concurring).

⁸⁹ *Id.* at 35–47 (Shenk, J., dissenting).

⁹⁰ *Pace v. Alabama*, 106 U.S. 583, 585 (1883).

⁹¹ *Perez*, 198 P.2d at 18.

but the right to marry as well.”⁹² His reasoning made the transition from the free exercise of religion to the fundamental right to marry.

Justice Traynor moved so swiftly to a discussion of the fundamental right to marry because he was about to define the right to marry in a way that would permit him to escape from the jaws of the “equal application defense.” He first established that the United States Supreme Court had recognized a fundamental right to marry during the *Lochner* era in *Meyer v. Nebraska*.⁹³ He then emphasized that marriage is “something more than a civil contract subject to regulation by the state; it is a fundamental right of free men.”⁹⁴ Consequently, he said that any infringement of the fundamental right to marry must be based upon more than prejudice.⁹⁵ Finally, he uttered the most famous words in his opinion: “Since the right to marry is the right to join in marriage with the person of one’s choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry.”⁹⁶

Now Justice Traynor tackled the equal protection issue. He understood that the state’s equal application defense was premised on the assumption that California’s anti-miscegenation statute imposed an equal burden on both blacks and whites because each race was prevented from marrying the other. However, he rejected the state’s assumption: “The decisive question . . . is not whether different races are equally treated” because “[t]he right to marry is the right of individuals, not of racial groups.”⁹⁷ His definition of the fundamental right to marry had rendered the equal application defense irrelevant.⁹⁸ Justice Traynor also understood that the United States Supreme Court still honored the “separate, but equal” doctrine.⁹⁹ However, he said: “A holding that . . . segregation [into separate facilities] does not impair the right of an individual to ride on trains . . . is clearly inapplicable to the right of an individual to marry.”¹⁰⁰ Ultimately, Justice Traynor applied strict scrutiny to what he called a race-based classification, and he ruled that California’s anti-miscegenation statute violated the federal Equal Protection Clause because it served no compelling state interest.¹⁰¹

⁹² *Id.*

⁹³ 262 U.S. 390 (1923).

⁹⁴ *Perez*, 198 P.2d at 18–19.

⁹⁵ *Id.* at 19.

⁹⁶ *Id.*

⁹⁷ *Id.* at 20.

⁹⁸ *Id.* at 25.

⁹⁹ *Id.* at 20–21.

¹⁰⁰ *Id.* at 21.

¹⁰¹ *Id.* at 27.

The newspapers in California and around the nation carried stories about the *Perez* case.¹⁰² No one seemed to know exactly what to say about the unprecedented decision, which may explain why it was not the topic of editorials, nor did it trigger any type of a nationwide backlash. California officials declined to seek *certiorari*, and Andrea and Sylvester married the following February in Saint Patrick's Church in Los Angeles.¹⁰³

3. *California and Gay Rights.*

California, and in particular San Francisco, has had a unique and supportive history with respect to gay rights. The Mattachine Society, the first long-term gay rights organization in the country, was established by Henry Hay in Los Angeles in 1950. Several years later, in 1955, Del Martin and Phyllis Lyon founded the first lesbian organization, the Daughters of Bilitis, in San Francisco. A third important gay rights organization, the Society for Individual Rights, was also founded in San Francisco in the early 1960s.¹⁰⁴

In the 1960s, gay rights litigation was virtually nonexistent.¹⁰⁵ Nonetheless, California courts handed down two landmark decisions. In 1967, at a time when most lesbian moms going through divorce avoided custody challenges at very high costs,¹⁰⁶ a lesbian mom in California challenged the trial court's denial of custody and won a ruling that lesbianism per se could not bar a mother from custody.¹⁰⁷ Two years later, the California Supreme Court bucked another national trend by ruling that homosexuality per se was not a sufficient basis for removing a male teacher from the classroom.¹⁰⁸

Because society often used sodomy statutes to harass lesbian and gay men by classifying them as potential criminals, lesbian and gay rights litigators in the 1970s began to challenge the constitutionality of these statutes. Although litigators were sometimes successful at the trial level, courts tended to reverse these cases on appeal.¹⁰⁹ The legislature finally stepped in and resolved the issue for the entire state by repealing the criminal statute in 1975, thereby joining a

¹⁰² Lenhardt, *supra* note 81, at 364.

¹⁰³ Orenstein, *supra* note 71, at 404.

¹⁰⁴ See generally Patricia A. Cain, *Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement* 53–55 (2000) [hereinafter Cain, *Rainbow Rights*].

¹⁰⁵ See Rhonda R. Rivera, *Book Review: Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970*, 132 U. Penn. L. Rev. 391, 406–09 (1984) (discussing the shift in types and numbers of gay rights cases from the 1960s to the 1970s).

¹⁰⁶ For example, lesbian moms typically were willing to relinquish all claims to property and spousal support in exchange for a husband's agreement not to contest custody.

¹⁰⁷ *Nadler v. Superior Court*, 63 Cal. Rptr. 352 (Cal. Ct. App. 1967).

¹⁰⁸ *Morrison v. State Bd. of Educ.*, 461 P.2d 375 (Cal. 1969).

¹⁰⁹ See, e.g., *People v. Baldwin*, 112 Cal. Rptr. 290 (Cal. Ct. App. 1974) (reversing dismissal of sodomy charge). A.L. Wirin, Fred Okrand et al., longtime ACLU lawyers, filed an amicus brief.

minority of approximately ten states that had previously decriminalized both opposite-sex and same-sex consensual sodomy.¹¹⁰

In 1977, Harvey Milk won a seat on the San Francisco Board of Supervisors, becoming the first “out” gay man to be elected to public office in California, and perhaps in the United States.¹¹¹ While in office, he helped pass a San Francisco ordinance banning discrimination against gay people. A handful of other cities across the country had adopted similar, often narrower, ordinances. Mostly small college towns, rather than large urban centers, enacted these ordinances in the early 1970s.¹¹²

As gay rights claims became more visible in cities across the country, the backlash began. Aided by the efforts of Anita Bryant, local ordinances protecting gay people that had been passed in the mid-1970s were repealed in Dade County, Florida; St. Paul, Minnesota; Wichita, Kansas; and Eugene, Oregon.¹¹³ In large part, these battles were waged as campaigns to save school children from homosexual teachers. Nowhere was that message more clear than in the battle over Proposition 6, the Briggs Initiative, on the ballot in the November 1978 elections in California.

The Briggs Initiative, crafted by State Senator John V. Briggs, who had mounted an unsuccessful campaign for Governor of California, claimed to be a necessary means to prevent gay and lesbian teachers, and their allies, from teaching the state’s youth that homosexuality was an acceptable lifestyle. Briggs had been unable to shepherd a statute to this effect through the legislature, and so he brought the issue directly to the people through the initiative process.¹¹⁴ Although the initiative appeared to be unstoppable six months before the election, voters ultimately defeated the initiative 58.4% to 41.6%. As it turned out, the “No on 6” campaign was vastly better organized than the “Yes on 6” group. Then-Governor Ronald Reagan sided with the “No on 6” campaign.

¹¹⁰ See generally William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* app. A-1 at 328-331 (1999).

¹¹¹ An out lesbian, Kathy Kozachenko, was elected to the Ann Arbor City Council in 1974 and Elaine Noble, who came out as a lesbian in 1974, served several terms in the Massachusetts legislature. Allan Spear had been elected to the Minnesota senate in 1972, but he did not come out as a gay man until 1974.

¹¹² The first such ordinance was adopted in 1972 in East Lansing, Michigan, which is home to Michigan State. See Cain, *Rainbow Rights*, *supra* note 104, at 204. In 1975, a similar ordinance was adopted in Austin, Texas, which in those years was both a college town and the state capital, but whose population was only around 250,000. Today, however, the trend is for larger urban cities to adopt such ordinances. San Francisco was one of the first large cities to do so. For a table that reflects the modern trend, see Nan D. Hunter, *Lawyering for Social Justice*, 72 N.Y.U. L. Rev. 1009 (1997).

¹¹³ See Nan D. Hunter, *Identity, Speech, and Equality*, 79 Va. L. Rev. 1695 (1993).

¹¹⁴ Under this process, once sufficient signatures have been collected, a measure can go on the ballot to be passed as a statutory measure or as an amendment to the constitution, depending on the number of signatures collected. The Briggs Initiative (Proposition 6) was proposed as a statutory measure.

After 1978, the California courts continued to rule against discrimination. Even before Wisconsin's much heralded first-in-the-nation gay civil rights law took effect in 1982,¹¹⁵ the California courts, applying state and federal constitutional provisions, as well as the Unruh Civil Rights Act, recognized claims of discrimination raised by gay public employees, employees of privately-owned public utilities, prospective tenants, and clients of all public accommodations.¹¹⁶

In the 1980s, attention shifted from concerns about discrimination to recognition of same-sex relationships. Activists fought to get the City of Berkeley and the City of San Francisco to enact domestic partner ordinances. The term "domestic partnership" sought to define a legal relationship for same-sex partners other than marriage, from which they were barred, and to extend workplace benefits to domestic partners of city employees that were substantially equal to the benefits that were provided to employee spouses. Harry Britt got such a provision through the San Francisco Board of Supervisors in 1982, but then-Mayor Dianne Feinstein vetoed it. The negative reaction in the gay community was so strong that Feinstein was subjected to a recall vote shortly thereafter. Feinstein, generally a supporter of the gay community, survived the recall. The firestorm, however, had brought national attention to the argument that same-sex partners should be recognized as domestic partners and entitled to workplace benefits similar to married couples.

The City of Berkeley became the first governmental entity in the country to recognize "domestic partnership" status between two persons of the same sex and to provide some of the benefits available to the spouses of city employees (initially dental and certain leave benefits, but eventually medical insurance benefits as well). The City of West Hollywood was next, and it extended its domestic partner ordinance to allow same-sex couples to register, whether or not they were city employees and whether or not they sought any benefits from employers by registering. The desire to have legal recognition of their relationships was so strong that many couples felt there was a gain even though all they could do was register. Other California cities followed Berkeley and West Hollywood. By 1999, at least twelve cities and four counties in California had extended benefits to registered domestic partners. And 1999 marked the year that the California legislature first enacted a statute that granted statewide recognition to same-sex couples who registered with the state as domestic partners. While the benefits of registration were limited in the early years, the number of rights available to registered domestic partners under California law has continued to increase so that, by 2005, registered domestic partners enjoyed most of the same benefits and responsibilities as spouses.¹¹⁷

California courts also have been at the forefront regarding recognition of parent-child relationships in gay and lesbian families. The state's trial courts permitted the first second-parent adoptions, although the California Supreme Court did not affirm the practice until

¹¹⁵ See generally Wis. Stat. Ann. § 111.31 and § 111.36 (employment) and § 66.1011 (housing) (West 2009) (enacted in 1981, effective 1982).

¹¹⁶ See, e.g., *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979) (discrimination against "out" gay persons infringes state statute guaranteeing right to engage in political activity). See also *Hubert v. Williams*, 184 Cal. Rptr. 161 (Cal. Ct. App. 1982) (Unruh Civil Rights Act prevents landlords from refusing to rent to a person on the basis of that person's sexual orientation).

¹¹⁷ A.B. 205, codified at Cal. Fam. Code §§ 297-299.3 (West 2009).

2004.¹¹⁸ And, in a trilogy of cases decided in 2005, the California Supreme Court strengthened gay and lesbian families by recognizing parent-child rights and obligations, even in the absence of second-parent adoptions.¹¹⁹

Thus, with respect to gay and lesbian rights generally, and even with respect to relationship recognition outside of marriage, California's history indicates a supportive environment for gay rights litigation. This history makes sense, given that California is a state in which more-same sex couples reside than in any other state in the union. California's gains for the gay community have included political representation, protection against discrimination, and ultimately, protection for relationships. But this last area, relationship protection, has been the most difficult to address. And California has been no different from other states in its resistance to the concept of marriage equality, which many gay rights advocates view as the ultimate protection for same-sex couples.

The history of same-sex marriage in California began in the 1970s. In 1971, California had eliminated its gender-based distinction for capacity to consent to marriage.¹²⁰ As a result, the new statute, in gender-neutral terms, set the age of consent at eighteen for any "unmarried person." Inspired by the post-Stonewall energy of a new gay rights movement, same-sex couples in California began applying for marriage licenses, claiming that the statute permitted any two unmarried *persons* to enter into a marriage.¹²¹ County clerks had always understood the statute to apply only to opposite sex couples, so they declined these requests. Ultimately the county clerks asked the legislature to amend the statute to provide explicit language restricting marriage to a man and a woman. In 1977, the legislature revised the statutory language to provide that "[m]arriage is a personal relation arising out of a civil contract between a man and a woman"¹²² The push for the issuance of marriage licenses to same-sex couples subsided.

In the 1980s, the marriage equality issue arose again. First the ACLU, and then the Bar Association of San Francisco, went on record as endorsing the right of same-sex couples to marry.¹²³ In the early 1990s, same-sex couples in D.C., Chicago, Los Angeles, and other cities applied for licenses. Some sued after their applications had been denied. These cases, brought in state courts, claimed violations of state constitutions.

The first successful marriage case at the state level was *Baehr v. Lewin*.¹²⁴ In 1993, the Hawaii Supreme Court held that restricting marital partners on the basis of gender constituted

¹¹⁸ See *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003), *cert. denied*, 540 U.S. 1220 (2004).

¹¹⁹ *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005).

¹²⁰ Before this amendment, the age of consent for males was 21, whereas for females it was 18.

¹²¹ Couples in other states applied for marriage licenses as well. Several couples litigated the issue when they were denied licenses. See, e.g., *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

¹²² This language tracks the language in the Uniform Marriage and Divorce Act § 201 (1973).

¹²³ The ACLU statement of support came in 1986, and the San Francisco Bar statement followed in 1989.

¹²⁴ 852 P.2d 44 (Haw. 1993).

sex discrimination, which, under the Hawaii Equal Rights Amendment, triggered strict scrutiny. The high court remanded the case to the trial court to consider whether the government could show a compelling justification for the marriage restriction.

Well before the trial court ruled on remand that the statute was unconstitutional, forces around the country that opposed same-sex marriage began to mobilize. Arguing that activist judges in Hawaii were about to force same-sex marriage on the entire country, these advocates for heterosexual marriage lobbied their state legislatures to adopt bills prohibiting their states from recognizing out-of-state same-sex marriages. Utah was the first state to react to the threat from Hawaii, passing a Defense of Marriage Act (DOMA) in 1995. In 1996, the federal government and fifteen additional states joined Utah in enacting DOMAs. The federal DOMA not only prohibited recognition of same-sex marriages at the federal level, but it also declared that no state should be required under the Full Faith and Credit Clause to recognize a same-sex marriage from another state.

In an ironic twist of fate, Congress passed the federal DOMA on the same day (September 10, 1996) that the trial in the Hawaii marriage case began. The Hawaii trial court ruled in favor of the same-sex couples on December 3, 1996. The court stayed the decision, pending appeal to the Hawaii Supreme Court. While the case was pending, the people of Hawaii, in November 1998, amended the state constitution to provide that the legislature had the power to define marriage, thereby validating the existing marriage statute, which limited marriage to one man and one woman. Ultimately, the Hawaii Supreme Court dismissed the case in 1999. No same-sex couples were ever able to marry in Hawaii and yet the litigation produced a backlash that resulted in the passage of thirty state DOMAs by 1999.¹²⁵

California joined this backlash in 2000. Some California legislators had pushed for a state defense of marriage act that would prohibit state recognition of same-sex marriages from other states, but the bill never passed. State Senator Pete Knight, who had sponsored the bill at least twice in the legislature, then turned to the people. Proposition 22, also known as the Knight Initiative, appeared on the ballot at California's 2000 presidential primary. It passed by an affirmative vote of 61% of the electorate.

The language of Proposition 22 was simple: "Only marriage between a man and a woman is valid or recognized in California." This proposition was a statutory initiative, not a constitutional amendment. Passing the measure would do nothing more than add a new section to the Family Code. Because Section 300 of the Family Code, which had been amended in 1977, already provided that marriage was a union between a man and a woman, some argued that Proposition 22 was unnecessary. The proponents replied:

When people ask, "Why is this necessary?" I say that even though California law already says only a man and a woman may marry, it also recognizes marriages from other states. However, judges in some of those states want to define marriage differently than

¹²⁵ Also during this period, Alaska added a constitutional provision restricting marriage to a man and a woman. The amendment was in direct response to a lower court decision in Alaska. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (holding that the right to choose one's life partner was a fundamental right subject to strict scrutiny under the Alaska constitution).

we do. If they succeed, California may have to recognize new kinds of marriages, even though most people believe marriage should be between a man and a woman.¹²⁶

Thus, although Proposition 22's language was broad enough to declare any same-sex marriage performed in California void, the articulated intent of the proponents was to protect California from having to recognize the marriages of same-sex couples that were valid in other states.

By the time California voters went to the polls on March 7, 2000, everyone should have known that Hawaii was no longer a threat. But a new state caused concern: Vermont. On December 20, 1999, the Vermont Supreme Court had ruled that excluding same-sex couples from the rights and benefits of marriage violated the "equal benefits" provision of the Vermont Constitution. The court did not automatically extend the rights and benefits of marriage to same-sex couples, however. Instead, it asked the legislature to consider what appropriate remedy would resolve the inequality. Ultimately, the legislature enacted a civil union bill, extending the rights, benefits, and liabilities of marriage to same-sex couples who entered into a civil union.

After the success in Vermont, several additional marriage equality cases entered the courts in other states. Between 2001 and 2003, advocates filed cases in Massachusetts (2001), New Jersey (2002), Indiana (2002), and Arizona (2003). The Massachusetts and New Jersey cases were brought by public interest litigators at the national level (GLAD and Lambda) who had carefully chosen states where the political will to support the extension of marriage seemed possible and where it was not easy for the general populace to overturn supreme court cases by constitutional initiatives. The Indiana and Arizona cases, by contrast, were brought by local ACLU lawyers, without much enthusiastic support at the national level.

In 2003, supporters of extending marriage to same-sex couples experienced their first pure victory. Chief Justice Margaret H. Marshall of the Supreme Judicial Court of Massachusetts, who wrote the majority opinion in *Goodridge v. Department of Public Health*,¹²⁷ announced: "[O]ur decision marks a change in the history of our marriage law." Depriving same-sex couples from "access to the protections, benefits and obligations of civil marriage" is "incompatible with the constitutional principles of respect for individual autonomy and equality under law" and "violates the Massachusetts Constitution."¹²⁸ In a subsequent advisory opinion to the state legislature, the court took the position that the only appropriate remedy would be the extension of the institution of marriage (rather than civil unions) to same-sex couples.¹²⁹

The Massachusetts decision set off another national backlash. While a handful of mayors joined Gavin Newsom in early 2004 by supporting the issuance of marriage licenses to same-sex

¹²⁶ This quote is excerpted from the document prepared by the State to inform the voters about Proposition 22. The petitioners in the California Marriage Cases argued that the legislative history of Proposition 22 demonstrated a limited purpose to void only out of state same-sex marriages. The Supreme Court, however, rejected this narrow construction, thereby forcing a consideration of the constitutionality of the measure.

¹²⁷ 798 N.E.2d 941 (Mass. 2003).

¹²⁸ *Id.* at 949, 953 .

¹²⁹ Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

couples in their jurisdictions, actions at the state level were much more negative. Before the Massachusetts decision, only three states had enacted constitutional amendments banning same-sex marriages.¹³⁰ During 2004, thirteen additional states adopted such amendments.¹³¹

The backlash did not come as a surprise to the national public interest lawyers fighting for marriage equality. They knew the battle was likely to be a long one—the inevitable process of taking two steps forward and one step backward, a process experienced by all civil rights movements. They sought to keep fighting while minimizing the setbacks. It did not make much sense to bring cases in states where a strong majority of the population opposed marriages for same-sex couples, especially if the people had the power to amend the constitution directly through the initiative process. The ease with which many states could amend their constitutions through the initiative power led public interest litigators to look for test case states in which constitutional amendments had to be approved by the state legislature before being voted on by the people. The other considerations for an ideal test case state were the existence of a state legislature, as well as a judiciary, that had a positive record of support for gay rights issues, and the presence of a population that tended to support more progressive causes. While California seemed an attractive choice for future marriage litigation for many of these latter reasons, the state’s initiative process was a negative counterbalance.

California is one of sixteen states in which the general population can exercise direct democracy and amend the state constitution without any consultation with the legislature. California has become known as a state where the general population amends the constitution on a regular basis, probably because the process is relatively easy. The first step, gathering signatures in support of the initiative, requires the signatures of only 8% of the voters in the most recent gubernatorial election. Only the State of Colorado has a lower signature requirement.¹³² At the next stage, when the initiative is placed on the ballot for a vote, only a simple majority of those voting on the matter need to approve the initiative in order to add it to the constitution.¹³³

Because of this initiative process and the passage of Proposition 22 by 61% of the voters in the state, California had not been high on anyone’s list as the best state for testing the marriage laws in the courts. Mayor Newsom’s actions, however, changed the landscape. Now California emerged into the mix, but not because national gay rights lawyers identified it as a good test case

¹³⁰ Alaska (1998), Nebraska (2000), and Nevada (2002). The Hawaii constitutional amendment in 1998 did not ban same-sex marriage, but rather authorized the legislature to define marriage, thereby validating the statute that limited marriage to one man and one woman.

¹³¹ By 2006, this number had grown to 26 states (27 states if you include Hawaii). And, by the end of 2006, marriage litigation had ended in negative decisions in Arizona, Indiana, New York, Washington, and Oregon. A positive decision in the New Jersey case resulted in the legislature passing broad civil union protections for same-sex couples rather than extending marriage.

¹³² California, Florida and Oregon all require 8% of those voting in the last gubernatorial election. Only Colorado has a lower threshold, requiring 5% of those who voted for Secretary of State in the last election. South Dakota requires 4% of the general population, but that works out to a higher number of signatures than the 5% or 8% requirements.

¹³³ Florida, by contrast, requires a 60% majority vote to pass a constitutional amendment. Some states that require a mere majority calculate the vote on the basis of all persons voting in the election rather than limiting the calculation to the persons voting on the amendment.

state. Instead, Mayor Newsom, the City and County of San Francisco, and those individual couples who had filed suit that February because they were simply tired of waiting for judicial recognition of their rights made the decision to litigate.¹³⁴

The Decisions

1. *The Trial Court's Opinion*¹³⁵

Judge Kramer, the trial court judge, acknowledged that he was deciding six consolidated cases, but he chose to focus on “the common issue” in all of the cases: “[W]hether Family Code section 300, which provides that a marriage in California is a union between a man and a woman, and Family Code section 308.5, which provides that only a marriage between a man and a woman is valid or recognized in California, violate California’s Constitution.” Judge Kramer also acknowledged that the parties in favor of same-sex marriage had challenged the Family Code sections under the liberty, privacy, and equal protection provisions of the state constitution, but he announced that he would resolve the cases solely under the equal protection clause. The parties had chosen not to challenge the Family Code sections under the Federal Constitution because they did not want the case to go to the United States Supreme Court. Instead, the parties wanted the California courts to interpret the state constitution independently of the Federal Constitution. Applying the law developed in *Sail’er Inn* and *Perez*, the standard for reviewing the statute would be either strict scrutiny or deferential low-level scrutiny. The parties in favor of same-sex marriage asserted that the statutes should be subjected to strict scrutiny under the equal protection clause because (1) they contained a suspect, facial, sex-based classification insofar as they restricted marriage to a man and a woman; and (2) they also burdened the fundamental right to marry. The parties against same-sex marriage responded by saying that the Family Code sections should be subjected to low-level scrutiny because (1) they did not actually discriminate on the basis of sex, since they were statutes of equal application; and (2) no fundamental right to marry a person of the same sex existed. The Attorney General made the additional argument that California’s entire statutory scheme did not violate the state’s equal protection clause because the legislature had created two “separate, but equal” family institutions: marriage and registered domestic partnerships.

The trial court judge regarded Sections 300 and 308.5 as creating a facial, sex-based classification that would ordinarily trigger strict scrutiny under *Sail’er Inn*. He then turned to a consideration of the equal application defense. Relying on Justice Traynor’s analysis in *Perez*, he held that the equal application defense was not applicable in this case because the right to marry is the right of individuals, not of groups. If a lesbian wants to marry the person of her choice, she will marry a woman. And if a gay man wants to marry the person of his choice, he will marry a man. Viewed from an individual rights’ perspective, the equal burden on the class of men and the class of women was simply irrelevant. The trial court judge noted that *Perez* had been cited by the United States Supreme Court in *Loving v. Virginia* (a challenge to Virginia’s

¹³⁴ Of course, NCLR, a national LGBT organization, was also a key player in this litigation. But the NCLR lawyers did not initiate the litigation process. Rather, they responded, quickly and impressively to be sure, to the events that unfolded as a result of Mayor Newsom’s decision to begin issuing licenses to same-sex couples.

¹³⁵ *In re Coordination Proceeding*, Special Title [Rule 1550(c)], Marriage Cases, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005).

criminal anti-miscegenation statute under the Equal Protection Clause). In *Loving*, the Court also had refused to recognize the equal application defense. And, prior to *Loving*, the United States Supreme Court had overruled *Pace v. Alabama*¹³⁶ in *McLaughlin v. Florida*.¹³⁷

The Attorney General sought to distinguish *Perez* and *Loving* by saying that the statutes at issue had not been race-neutral because they had prohibited interracial marriages selectively. Thus, the real purpose of the statutes had been to maintain White Supremacy. The trial court judge rejected the Attorney General's argument. He noted that, through dictum in *Loving*, the United States Supreme Court had indicated that it would have struck down even a general prohibition on all interracial marriages, since there is no compelling state interest in protecting racial integrity.

The Attorney General then sought to distinguish both *Perez* and *Loving* on the ground that, when California and Virginia banned interracial marriages, neither state had provided a "separate, but equal alternative" (such as interracial civil unions). By contrast, the Attorney General argued, when California banned same-sex marriages, it had created a "separate, but equal alternative" in the form of registered domestic partnerships. Therefore, the Attorney General asserted, California's family law statutes should be characterized as nondiscriminatory or else they should be subjected to low-level scrutiny. Judge Kramer rejected the Attorney General's argument, citing *Brown v. Board of Education*.¹³⁸ In *Brown*, the United States Supreme Court had held that the provision of "separate, but equal" educational opportunities to racial minorities "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."¹³⁹ The Court in *Brown* had applied strict scrutiny to strike down the perceived race-based classification. Judge Kramer thought that the same logic was applicable to the California Marriage Cases. Because registered domestic partnerships generate "a feeling of inferiority," he announced that he would apply strict scrutiny to this perceived sex-based classification. Nevertheless, just to be safe, he indicated that he would also apply low-level scrutiny.

After determining that the Family Code sections created a sex-based classification, the trial court judge turned to the issue of whether the statutes denied a fundamental right to marry. The opponents of same-sex marriage argued that the fundamental right to marry, which *Perez* and *Loving* had recognized was the "right to marry a person of the opposite sex." They asserted that "a fundamental right to same-sex marriage" had never been recognized in California. Furthermore, they suggested that, if the right to same-sex marriage were deemed to be a fundamental right, such a ruling would open the door to a brother marrying a sister and to an adult marrying a child. Judge Kramer criticized this mode of analysis and rejected it in favor of Justice Traynor's mode of analysis in *Perez*. He said that the point of the exercise is to

¹³⁶ 106 U.S. 583 (1883) (upholding a statute that imposed a greater penalty for the crimes of adultery and fornication when those crimes were committed by a "white person" and a "negro" because "[t]he punishment of each offending person, whether white or black, is the same").

¹³⁷ 379 U.S. 184 (1964) (striking down a statute that prohibited opposite sex cohabitation between a "white" and a "negro" because the statute actually contained a race-based classification that had to be subjected to strict scrutiny).

¹³⁸ 347 U.S. 483 (1954).

¹³⁹ *Id.* at 494.

determine whether a fundamental right exists and then to determine to what extent, if at all, the government can limit that right. Citing to *Perez*, Judge Kramer found a “fundamental right to marry a person of one’s choice.” Then, in dictum, he said that a state may preclude incestuous marriages, and a state may also establish a minimum age for effective consent, thereby eliminating the “parade of horrible social ills” envisioned by the opponents of same-sex marriage.

Having found both a suspect, sex-based classification and a fundamental right to marry a person of one’s choice, the trial court judge turned his attention to the state’s primary justification. Applying low-level scrutiny, he considered whether the Family Code sections served a legitimate governmental objective because they honored the “traditional” definition of marriage. He ruled that, “[e]ven under the rational basis standard, a statute lacking a reasonable connection to a legitimate state interest cannot acquire such a connection simply by surviving unchallenged over time.” The plaintiffs in the *Proposition 22* and the *Thomasson* cases then suggested that procreation was a legitimate state interest. Judge Kramer rejected their argument based on the fact that one does not have to be married to procreate, nor does one have to procreate to be married. Finally, Judge Kramer then applied strict scrutiny and, not surprisingly, he found that the classification served no compelling state interest, since he had already found that it served no legitimate governmental objective.

2. The Court of Appeal’s Opinion¹⁴⁰

The Court of Appeal, by a vote of 2-1, in an opinion by Justice McGuiness (joined by Justice Parrilli) reversed the trial court’s equal protection ruling and held that the fundamental right to marry does not encompass the right to same-sex marriage. Justice Kline, by contrast, would have upheld the trial court judge on the grounds that the fundamental right to marry is available to all, and that sexual orientation is a suspect classification (an issue which the trial court judge had avoided, and which the California Supreme Court had not yet addressed).

Justice McGuiness first focused on whether there is a fundamental right to marry a person of the same sex. He thought that the lawyers for the supporters of same-sex marriage really were asking the court to redefine marriage. He took the position that the judiciary, unlike the legislature, simply does not have the authority to extend marriage to same-sex couples.

Justice McGuiness acknowledged that, at first glance, the interracial marriage cases might appear to provide compelling support for holding that same-sex couples enjoy the same fundamental right to marry as interracial couples. However, on second glance, he concluded that the central holdings of *Perez* and *Loving* are that laws prohibiting interracial marriage constitute invidious racial discrimination in violation of the principle of equality.

With regard to the equal protection clause, Justice McGuiness ruled that the Family Code sections did not discriminate on the basis of sex because they were subject to the equal application defense. He concluded that *Loving* had only rejected the equal application defense in the context of interracial marriage because the true purpose of Virginia’s anti-miscegenation law was to maintain White Supremacy. By contrast, in the California Marriage Cases, Justice McGuiness found no evidence that California’s opposite-sex definition of marriage discriminated

¹⁴⁰ In re Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006).

against males or females, nor did he find any evidence that the definition had been enacted in order to maintain discriminatory assumptions about gender roles.

Turning to Justice Kline's claim that the opposite-sex definition of marriage contained a suspect, sexual orientation-based classification, Justice McGuinness agreed that the marriage statutes implicitly classified on the basis of sexual orientation. As a practical matter, the Family Code sections rendered marriage unavailable to same-sex couples, and therefore circumstantial evidence of disparate treatment on the basis of sexual orientation existed. But Justice McGuinness was unwilling to find that the classification was suspect because no proof of the immutability of sexual orientation was available, since the trial court judge had not conducted an evidentiary hearing on the issue. Once the court of appeal had concluded that sexual orientation was a non-suspect classification, it upheld the Family Code sections at issue on the ground that the opposite-sex definition of marriage was rationally related to the state's legitimate interest in preserving the institution of marriage.

3. The Oral Argument

On the morning of March 4, 2008, the small formal courtroom in the Earl Warren Building that houses the California Supreme Court when it is in session was packed. Because so many spectators wanted to see at least some portion of the argument, the clerk allowed rotating groups to sit in the courtroom for one hour each. The lawyers sat in a semi-circle just in front of the wooden dais, with the onlookers to either side and behind them. Just behind the bench at which the Justices would sit when they entered hung a large, imposing painting of a California landscape by artist Walter Dixon, stretching the length of the entire wall and rising up to the domed ceiling. The painting in the scene provided a sense of calm for the high emotions and nerves rippling through the audience.

Eight different lawyers would participate in the oral arguments, which would last more than three hours.¹⁴¹ Opening the argument for Petitioners and representing the City and County of San Francisco was Therese Stewart, Chief Deputy City Attorney. Following her would be Shannon Minter, Legal Director of the National Center for Lesbian Rights, representing the twelve San Francisco couples. Michael Maroko, a partner in the Allred firm, representing the petitioners from Los Angeles (Robin Tyler and others) would argue third, and Waukeen McCoy would argue last on behalf of the remaining San Francisco petitioners. Chris Krueger represented the Attorney General's Office, followed by Kenneth Mennemeier of Sacramento, representing Governor Schwarzenegger. It is unusual for the Governor to be separately represented in a legal proceeding and several of the Justices, most notably Justice Kennard, questioned Mr. Mennemeier about why that was the case. Apparently the Attorney General's brief, although arguing that rational basis was the current appropriate level of review for sexual orientation, also argued in the alternative, that if a heightened level of scrutiny were applied, then intermediate scrutiny, rather than strict scrutiny, would be appropriate. The Governor, by contrast, wanted to maintain that only rational basis review was appropriate.

The two private organizations arguing in support of respondents were the Proposition 22 Legal Defense Fund and Campaign for California Families, represented by Glen Lavy of the Alliance Defense Fund and Mathew D. Staver of Liberty Counsel, respectively. Their arguments

¹⁴¹ In addition, a record number of briefs was filed, including over 40 different amicus curiae briefs.

differed most notably from those advanced by the government respondents insofar as they sought to justify the marriage restriction based on a governmental interest in procreation.

Chief Justice George, who would author the majority opinion that would reverse the court of appeal, asked the opening question of Ms. Stewart: “Is it your position that the use of the terminology ‘marriage’ itself is part and parcel of the right to marry and that that name could not be changed by the legislature or by constitutional amendment . . . even if it were applied to all persons?” She replied: “Your Honor, it is our position that the state could not change the name marriage for a number of reasons, one of which is that it would be somewhat akin to Prince Edwards County deciding to shut down public schools just to avoid having to admit black people to them.”

During the time for rebuttal, Justice Kennard, who would join Chief Justice George’s majority opinion, followed up with a related question: “Ms. Stewart, if the California legislature were to enact the law providing that mixed race couples could not marry but they could register as domestic partners, do you perceive a violation of the state constitution?” Ms. Stewart responded: “I think the court would strike it down in a heartbeat, Your Honor.” During the time for rebuttal, Justice Werdegar, who would also join Chief Justice George’s majority opinion, asked Ms. Stewart whether the type of statute described by Justice Kennard would violate *Perez*. Ms. Stewart responded by saying: “Say we call it transracial unions instead of marriage. And I just don’t think the case would have come out differently. I think the court would have recognized that marriage is a meaningful institution.”

When Mr. Minter approached the podium on rebuttal, he said: “Your honors . . . , with apologies to Shakespeare, same sex couples come here today to praise marriage, not to bury it. Petitioners deeply value the tradition of marriage and wish to participate in it with all the joy and responsibility that that brings.” Chief Justice George said: “I thought when you invoked Shakespeare you were going to invoke the line: “‘What’s in a name?’” After a ripple of laughter was heard throughout the courtroom, Mr. Minter responded: “Also would have been very appropriate.” Then Justice Moreno, who would join Chief Justice George’s majority opinion, said: “Also, with apologies to Shakespeare, I thought that you were going to say ‘a rose by any other name would smell just as sweet.’” Mr. Minter replied: “Names are very important, your Honor.” Thus, both at the outset and at the conclusion of the three-hour oral argument, it had become clear that the major issues in the case were the ones that the trial court judge had identified: “What’s in a name?” Was there a fundamental right of all persons in the state of California to marry the person of one’s choice under *Perez*? Or was the registered domestic partnership system a “separate, but equal alternative” to the institution of marriage? If not, should the definition of opposite-sex marriage be subjected to deferential, low-level scrutiny based on the recognition of the “equal application defense?” Or, by contrast, should the definition of opposite-sex marriage be subjected to strict scrutiny on the ground that it contains either a sex-based classification or a sexual orientation-based classification that could be characterized as a suspect classification under *Sail’er Inn*?

4. *The Supreme Court’s Opinion*¹⁴²

¹⁴² In re Marriage Cases, 183 P.3d 384 (Cal. 2008).

The California Supreme Court, by a vote of 4-3, reversed the court of appeal's ruling. Chief Justice George (joined by Justices Kennard, Werdegar, and Moreno) wrote the majority opinion. Justice Kennard wrote a concurring opinion. Justice Baxter (joined by Justice Chin) wrote one of the dissenting opinions, and Justice Corrigan wrote a separate dissenting opinion.

The dissenters, of course, agreed with the court of appeal. Justice Baxter took the position that no fundamental right to same-sex marriage existed under the California Constitution, nor did same-sex couples enjoy a constitutional right to the name "marriage." He also took the position that no sex-based classification appeared in the statutes at issue because, under the equal application defense, the statutes did not discriminate on the basis of gender. Next, he observed that the statutes contained no facial sexual orientation-based classification. He also refused to find circumstantial evidence of disparate treatment on the basis of sexual orientation because he could not find any evidence that the statutes at issue were adopted for a discriminatory purpose. On the contrary, he said that the legislation was simply intended to maintain an age-old understanding of the meaning of marriage. Even if circumstantial evidence of a classification on the basis of sexual orientation were present, he continued, the classification would not be subject to strict scrutiny because the record contained insufficient proof that the classification was suspect. Justice Baxter acknowledged a history of discrimination against lesbians and gay men in California, but he found that the gay and lesbian community does not currently lack political power, as evidenced by the recent enactment of the domestic partnership statutes. Because Justice Baxter characterized sexual orientation as a non-suspect classification, he applied deferential low-level scrutiny and found that the statutes at issue served a legitimate governmental objective by preserving the traditional definition of marriage. He closed his opinion with the following observation: "If such a profound change in this ancient social institution is to occur, the People and their representatives, who represent the public conscience, should have the right, and the responsibility, to control the pace of that change through the democratic process." Justice Corrigan dissented separately to emphasize the degree to which she agreed with Justice Baxter's closing observation.

Like Justice Traynor in *Perez*, Chief Justice George opened his opinion for the majority of the court with a discussion of the state constitutional "right to marry a person of one's choice," and then he considered whether the statutes at issue violated the equal protection clause. From the outset, however, he also had to distinguish the core issue in *Perez* from the core issue in the California Marriage Cases. In *Perez*, the anti-miscegenation statute had simply voided interracial marriages between a man and a woman. Therefore, in *Perez*, the central issue was whether the ban on interracial marriages violated the constitutional right to marry. In the California Marriage Cases, by contrast, the legislature had not only excluded same-sex couples from the institution of marriage, but it also had enacted comprehensive domestic partnership legislation. That legislation afforded to same-sex couples virtually all of the same substantive legal benefits as California law affords to married couples. Therefore, the central issue in the California Marriage Cases was whether, under these circumstances, the failure to designate the official relationship of same-sex couples as marriage violated the California Constitution.

Chief Justice George began to tackle that question by dealing with the issue of whether the lawyers for the same-sex couples were asking the court to recognize a narrow constitutional right to same-sex marriage or a broad constitutional right to marry the person of one's choice. He found that *Perez* had not recognized a narrow constitutional right to interracial marriage. Rather, *Perez* had focused on what George called the substance of the constitutional right at

issue—that is, the importance to an individual of the freedom to join in marriage with a person of one’s choice. Therefore, George considered his task to be examining the nature and the substance of the interests protected by the constitutional right to marry. He noted that both *Perez* and subsequent California decisions on the topic of family law had recognized repeatedly the linkage between marriage, establishing a home, and raising children. He observed that both the individual and society benefit from the institution of marriage.

Chief Justice George then considered the dual aspect of the constitutional right to marry. On the one hand, it is a “negative” right that insulates the couple’s relationship from interference by the state. On the other hand, it is a “positive” right that requires the state to take at least some affirmative action to acknowledge and support the family unit. He held that, while the constitutional right to marry does not require the state to provide specific tax or other governmental benefits, it does require the state “to grant official public recognition to the couple’s relationship as a family,” “to protect the core elements of the family relationship from at least some types of improper interference by others,” and to provide “assurance to each member of the relationship that the government will enforce the mutual obligations between the partners (and their children) that are an aspect of the commitments upon which the relationship rests.” Chief Justice George understood what a bold definition of marriage he had just written. He could not cite to United States Supreme Court decisions to back up his definition of marriage. Rather, he had to cite to a number of law review articles supporting the view that the constitutional right to marry encompasses a positive right to have the state publicly and officially recognize a couple’s family relationship.¹⁴³

Chief Justice George next determined who has access to the fundamental right to marry. He concluded that the California Constitution must properly be interpreted to guarantee this basic civil right to all individuals and couples, without regard to sexual orientation. Chief Justice George had just announced the path-breaking holding that same-sex couples enjoy an “equal liberty” interest in the fundamental right to marry under the California Constitution.

Having defined the right to marry as a fundamental right, Chief Justice George then applied strict scrutiny to the two sections of the Family Code that excluded same-sex couples from the institution of marriage. He considered the argument that tradition was a compelling state interest, but found that courts generally have not viewed tradition alone as a sufficient justification for denying a fundamental constitutional right. Next, he refused to find that procreation was a compelling state interest because the constitutional right to marry never has belonged exclusively to individuals who are capable of having children. Finally, he considered whether the promotion of “responsible procreation” was a potential compelling state interest. He acknowledged that a few recent same-sex marriage cases from other jurisdictions had recognized “responsible procreation” as a legitimate governmental objective under low-level scrutiny. Those cases had held that, because parenthood is always intended by same-sex couples, while it may be unintended by opposite-sex couples, it is only opposite-sex couples who need the institution of marriage. George refused to follow these precedents because he was applying strict scrutiny. Furthermore, none of California’s past cases suggested that the constitutional right to marry belongs only to individuals who are at risk of producing children accidentally. Of course, even if George had recognized that “responsible procreation” was a valid state interest,

¹⁴³ E.g., Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 Minn. L. Rev. 1184 (2004).

the question would have remained why same-sex couples had to be excluded from marriage to ensure that opposite-sex couples would enjoy its benefits. Having considered all three of the compelling state interests asserted by the parties to the litigation, George concluded that the fundamental right to marry guarantees same-sex couples the same constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship.

Chief Justice George then moved to what he considered to be the core issue in the case. The Attorney General had argued that all of the substantive incidents of marriage have been given to same-sex couples through the Domestic Partner Act. Therefore, the Attorney General had claimed that the word "marriage" was all that the state had denied to registered domestic partners. For this reason, the Attorney General had taken the position that the fundamental right to marry can no more be the basis for same-sex couples to compel the state to denominate their committed relationships as marriages than it could be the basis for anyone to prevent the state legislature from changing the name of the marital institution itself to "civil unions." Chief Justice George left open the hypothetical question of whether the state constitutional right to marry necessarily would afford all couples the constitutional right to require the state to designate their official family relationships as marriages. For example, he refused to decide whether the state could assign a name other than marriage to all couples in order to clarify the fact that the civil institution of marriage is distinct from the religious institution of marriage. Instead, he zoomed in on the actual issue before the court. That issue was whether there was a violation of the constitutional right to marry when the state had granted the traditional designation of marriage to opposite-sex couples and had assigned a different designation—domestic partnership—to same-sex couples. In short, the question was whether separate family institutions could adequately satisfy the California Constitution's guarantee of "equal liberty." George answered that question in the following words: "[O]ne of the core elements of this fundamental right [to marry] is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships." Therefore, he said, the current statutes posed a serious risk of denying to same-sex couples the equal dignity and respect that is at the core of the constitutional right to marry. Echoing Ms. Stewart's argument on behalf of the City, he concluded that the court's holding in *Perez* would have been the same even if an alternative institution, such as a "transracial union," had been available to interracial couples.

Chief Justice George then shifted to a new topic by observing that the state's assignment of different names for the official family relationships of opposite-sex and same-sex couples raised constitutional questions under the equal protection clause. The lawyers for the same-sex couples contended that strict scrutiny applied because the Family Code provisions at issue contained sex-based and sexual orientation-based classifications, both of which should be characterized as suspect. They also contended that their clients were entitled to strict scrutiny under the fundamental interest strand of equal protection because the right to marry is a fundamental constitutional right under the California Constitution. The Attorney General argued that, if the state extends to a couple all of the substantive incidents of marriage, the state does not violate a couple's constitutional right to marry simply by giving their official relationship a name other than marriage.

Chief Justice George first ruled that the facial sex-based classification at issue was not discriminatory because it was subject to the equal application defense. He distinguished *Perez*

and *Loving* on the ground that they had involved racial classifications where there was proof of a legislative purpose to maintain White Supremacy. Then he turned his attention to the question of whether the case revealed circumstantial evidence of disparate treatment on the basis of sexual orientation. He said: “In our view, the statutory provisions restricting marriage to a man and a woman cannot be understood as having merely a disparate impact on gay persons, but instead may be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation.”

The next question was whether sexual orientation is a suspect classification. Chief Justice George was quick to acknowledge both the history of discrimination against lesbians and gays in California and the reality that sexual orientation has no relationship to one’s ability to perform or contribute to society. He took the position that immutability is not invariably required for a characteristic to be considered a suspect classification, citing to religion and alienage as examples of mutable, suspect classifications. Moreover, he said: “Because a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require the person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.” When the Attorney General argued that lesbians and gay men are not politically powerless, Chief Justice George observed that a group’s current political powerlessness is not a necessary prerequisite for treatment as a suspect class. If it were, then it would be impossible to justify those decisions that continue to treat sex, race, and religion as suspect classifications. Rather, as the court said in *Sail’er Inn*, the issue is whether “outdated social stereotypes result in invidious laws or practices.” And, in answer to that question, the court held that statutes that treat people differently on the basis of sexual orientation should be viewed as constitutionally suspect under California’s equal protection clause. Chief Justice George’s holding was unprecedented both in California and across the nation. The California Supreme Court became the first state high court to rule that sexual orientation is a suspect classification.

Chief Justice George was now ready to move to the final argument of the lawyers for the same-sex couples that the Family Code sections deserved strict scrutiny under the equal protection clause because the statutes interfered with the fundamental right to marry. He found that, by affording same-sex couples access only to the separate institution of domestic partnership, the statutes at issue impinged upon the right of same-sex couples to have their family relationships accorded equal respect and dignity. This holding reaffirmed *Brown v. Board of Education* in the context of same-sex marriage. Just as there was a stigmatic harm that occurred in *Brown*, so too there was stigmatic harm in the California Marriage Cases. Consequently, Chief Justice George held that, “in contrast to earlier times, our state now recognizes that an individual’s sexual orientation—like a person’s race or gender—does not constitute a legitimate basis upon which to deny or withhold legal rights.”

The Aftermath and the Impact

The court released the lengthy decision in the case (over 150 pages) on May 15, 2008. Many across the nation were glued to computer screens, having been alerted that the decision would be available on the court’s web page at 10 a.m. Others gathered at the Supreme Court building, where copies of the opinion were made available at \$10.00 a copy. Kate Kendell, Executive Director of the National Center for Lesbian Rights, says someone handed her a copy of the decision and the press release and she felt that at that moment her entire life had come into focus. This was the apex. Her team had won.

People who did not have the benefit of the press release read the decision quickly, looking for the first clear indication of the court's holding. At page 6, Chief Justice George, in a sentence far too long and convoluted for speed-reading, finally pronounced:

[W]e conclude that, under this state's Constitution, the constitutionally based right to marry properly must be understood to encompass the core set of basic *substantive* legal rights and attributes traditionally associated with marriage that are so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process. These core substantive rights include, most fundamentally, the opportunity of an individual to establish — with the person with whom the individual has chosen to share his or her life — an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.

The crowd at the Supreme Court building cheered. Plaintiff Jeanne Rizzo, who had been next in line to get married in 2004 when the Supreme Court issued its stay, called her partner on her cell phone and announced that it looked like they would be getting married after all.

The decision took effect 30 days after it was handed down. The first possible moment that anyone could be married was at 5:01 p.m. on June 16. At precisely 5:07 p.m., Del Martin and Phyllis Lyon were pronounced legally married by San Francisco Mayor Gavin Newsom. They wore the same blue and purple outfits that they had worn for their 2004 ceremony. This time they were surrounded by hundreds of friends and well-wishers.

At 4:30 that afternoon, in Beverly Hills, Robin Tyler and Diane Olson once again approached the clerk in Beverly Hills to request a marriage license at 5 p.m. For the first time in eight years, with a little thoughtful advance planning from the clerk, they got the answer they wanted. License in hand, they moved outside the courthouse for their religious Jewish wedding ceremony performed by Rabbi Denise Eger.

On June 17, lines formed at clerk's offices around the state. Couples who had planned ahead already had appointments to get their licenses in places of heavy demand like San Francisco. Jo Wilson and Carol Bennett came from Austin and were on the clerk's schedule for June 17. Their granddaughter made a special trip to California so she could be a witness. Because they were being wed in San Francisco, they wore flowers in their hair. A bag lady on the street outside City Hall lent them some scissors to cut away the extra length of the garlands. When Jo tried to compensate her for her help, the lady said that the extra flowers were all she wanted.

Karen Stogdill and Kris Hill had been so excited when they read the Supreme Court opinion that, unaware of the 30 day rule, they had rushed to City Hall to request a license within ten minutes of the decision's publication. They were first told they could come back on June 16, but that turned out to be wrong, and so they were married on June 17. John Lewis and Stuart Gaffney, two of the plaintiffs in the case, also married on June 17. Jeanne Rizzo and Pali Cooper were married by Mayor Newsom on September 5.

On November 4, 2008, the people of California flocked to the polls to elect Barack Obama as the first African-American president. They also faced Proposition 8, a ballot initiative to amend the California Constitution to provide that only a marriage between a man and a woman would be valid or recognized in the state. Obama won easily. So did the ballot initiative, 52% to 48%. On November 5, same-sex couples applying for marriage licenses at San Francisco City Hall were stunned by the following message:

ATTENTION SAME SEX COUPLES

Under the California Constitution an amendment becomes effective the day after the election at which the voters adopt the amendment. Based on this provision and on the Secretary of State's report of the semi-official results of the November 4 election relating to Proposition 8, the County Clerk has ceased issuing licenses for or performing civil marriage ceremonies for same-sex couples.

On May 26, 2009, the California Supreme Court upheld the validity of Proposition 8.¹⁴⁴ The court also ruled that the 18,000 marriages celebrated by same-sex couples in California between June 16 and November 5 were valid. At about the same time that the court issued its Proposition 8 decision, two high profile lawyers, Ted Olson and David Boies, announced that they had filed suit in federal court challenging Proposition 8 under the Federal Constitution.¹⁴⁵ The final ending to the story of same-sex marriage in California is not yet known.

But the impact of this bold decision by the California Supreme Court, defining marriage as a fundamental right for everyone and declaring sexual orientation a suspect classification to be accorded the same strict scrutiny as race-based and sex-based classifications, outlives the battering at the ballot box. Sexual orientation remains a suspect classification for future constitutional cases in California. Advocates continue the political process, planning a new ballot initiative to reverse Proposition 8.¹⁴⁶

And the impact of this decision has been felt beyond California. In October, before the November elections, the Connecticut Supreme Court followed California's lead, extending marriage rights to same-sex couples and holding that sexual orientation classifications should be accorded heightened scrutiny under the Connecticut constitution.¹⁴⁷ The Supreme Court of Iowa, construing a state constitution with language regarding inalienable rights that is very similar to the language of California's constitution, ruled in favor of marriage equality on April 3, 2009.¹⁴⁸ Shortly thereafter, the Vermont legislature became the first state legislature to extend marriage

¹⁴⁴ *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009)

¹⁴⁵ The case is *Perry v. Schwarzenegger* and the trial began on January 11, 2010. Details about the case can be found at www.equalrightsfoundation.org.

¹⁴⁶ For updates on the effort to repeal Proposition 8, see Equality California, at www.eqca.org.

¹⁴⁷ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (holding that classifications based on sexual orientation are subject to intermediate level scrutiny under the Connecticut constitution and striking down the Connecticut marriage statutes limiting marriage to persons of the opposite sex).

¹⁴⁸ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

rights to same-sex couples.¹⁴⁹ And, finally, echoing the words of Wendy Williams as she toasted her sister's marriage during the "Winter of Love," for those of us who reveled in the wonder of being able to marry the person of our choice before November 4, no one, not even the people of the State of California, can take these marriages away from us. They are real.

¹⁴⁹ The New Hampshire legislature has also extended marriage to same-sex couples, with the law becoming effective January 2010. A similar bill passed the Maine legislature, but was repealed by a "People's Veto" initiative on November 3, 2009. The legislature is free to re-enact the same provision in the future. Similar marriage bills have been introduced in other states.