

## **The Honeymoon is Over, Maybe for Good: The Same-Sex Marriage Issue Before the California Supreme Court**

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### INTRODUCTION

In the past several years, the same-sex marriage debate has been a widely publicized and hotly contested issue in American jurisprudence. This important civil rights issue involves the denial of a fundamental right to a class of persons based on their sexual orientation. Currently, there is no national consensus on the recognition of same-sex marriages or domestic partnerships and civil unions.<sup>1</sup> In California, homosexuals can enter into domestic partnerships.<sup>2</sup> However, under federal law, only unions between a man and a woman will be recognized as a marriage.<sup>3</sup> In California, marriage was available to same-sex couples for a one month period in 2004. During this brief period, it seemed as if homosexuals finally attained equal social and legal recognition of their relationships. However, the wedded bliss was short-lived; these marriages led to a flood of litigation all the way up to the California Supreme Court.<sup>4</sup>

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<sup>1</sup> California and Massachusetts are the only two states to currently allow same-sex marriage. Marriage Equality USA, <http://www.marriageequality.org> (last visited Sept. 26, 2008). Six states offer civil unions and domestic partnerships. *Id.* (follow "Get the Facts" hyperlink; then follow "Current Status" hyperlink). Twenty-six states have state constitutional bans on same-sex marriage. *Id.* Marriage Equality USA's "sole purpose and focus is to end discrimination in civil marriage so that same-sex couples can enjoy the same legal and societal status as opposite-sex couples." *Id.* (follow "About Us" hyperlink).

<sup>2</sup> In California, "[d]omestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." CAL. FAM. CODE § 297(a) (West 2004).

<sup>3</sup> The Defense of Marriage Act of 1996 (DOMA) does not allow the federal government to recognize any marriage other than one between a man and a woman. 1 U.S.C. § 7 (2005). DOMA also declares that states are not obligated to recognize a same-sex union formed in another state. 28 U.S.C. § 1738C (2005).

<sup>4</sup> See *In re Marriage Cases*, No. S147999, petition for review granted (Dec. 20, 2006). While publication of this article was pending, the California Supreme Court decided *In re Marriage Cases*. The rendered decision is discussed in the Author's Addendum, *infra* Parts VII–IX, and in the related case digest *infra* at 12 CHAP. L. REV. 237 (2008).

This Note discusses the 2006 California court of appeal decision, *In re Marriage Cases*. The San Francisco trial court found that California Family Code sections 300<sup>5</sup> and 308.5,<sup>6</sup> which define marriage as between a man and a woman, violated equal protection under the California Constitution.<sup>7</sup> The court of appeal reversed.<sup>8</sup> This Note reviews the legal, factual, and procedural background, including that of the group of cases eventually consolidated into a single action—*In re Marriage Cases*—which is now pending before the California Supreme Court.<sup>9</sup> This Note then explores the arguments made by parties on both sides of the litigation via their appellate briefs, as well as amicus briefs. This Note concludes that the California Supreme Court should reverse the court of appeal and affirm the San Francisco trial court finding that the current California marriage laws violate the state constitution.

## I. THE CURRENT STATE OF MARRIAGE LAWS IN CALIFORNIA

### A. The Definition of Marriage

Under the California Family Code, “[o]nly marriage between a man and a woman is valid or recognized in California.”<sup>10</sup> Section 300 explains that “[m]arriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary.”<sup>11</sup> Only unmarried males and unmarried females who are eighteen or older may consent to and consummate a marriage.<sup>12</sup>

Until 1977, California’s marriage statutes considered marriage a “personal relation arising out of a civil contract to which the consent of the parties making the contract is necessary.”<sup>13</sup> In 1977, the California Legislature amended this definition by adding gender-specific terms in order to prohibit same-sex marriage.<sup>14</sup> This definition of marriage has

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<sup>5</sup> “Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, except as provided by Section 425 and Part 4 (commencing with Section 500).” CAL. FAM. CODE § 300(a) (West 2008).

<sup>6</sup> “Only marriage between a man and a woman is valid or recognized in California.” CAL. FAM. CODE § 308.5 (West 2004).

<sup>7</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Ct. App. 2006).

<sup>8</sup> *Id.*

<sup>9</sup> *Supra* note 4.

<sup>10</sup> CAL. FAM. CODE § 308.5 (West 2004).

<sup>11</sup> *Id.* § 300(a).

<sup>12</sup> *Id.* §§ 301, 302(a).

<sup>13</sup> Assemb. B. 43, 2007–08 Leg., Reg. Sess. (Cal. 2006) (describing the status of California’s marriage statutes from 1850 to 1977).

<sup>14</sup> *Id.* (“In 1977, the Legislature amended the state’s marriage law to replace the gender-neutral description of marriage with language specifically limiting marriage to a ‘civil contract between a man and a woman.’ The Legislature’s express purpose for this amendment was to prohibit same-sex couples from marrying.”). See also ASSEMB. COMM. ON THE JUDICIARY, DIGEST FOR ASSEMB. B. 607, 1977–78 Leg., Reg. Sess., at 23–28 (Assemb. 3d Reading, Cal. 1977), *microformed on* Cal. Leg. State Assemb. Analysis, KA223 1977la Micro (Univ. Microfilms, Int’l) (“Under existing law it is not clear whether

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remained unchanged in the thirty years since its adoption.<sup>15</sup>

#### B. Domestic Partnerships

Domestic partnerships offer same-sex couples legal benefits and protections that are similar to a marriage.<sup>16</sup> Under California law, “[d]omestic partners are two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”<sup>17</sup> Domestic partnerships are only available to same-sex partners if: (1) they share a common residence; (2) neither partner is married or in a domestic partnership with another person; (3) they are not blood relatives; and (4) they are both at least eighteen years old and capable of consent.<sup>18</sup> Domestic partnerships are also available to opposite-sex partners if they meet the above requirements and if at least one partner is over the age of sixty-two and one or both partners qualify to collect federal Social Security insurance benefits under Title II and Title XVI of the Social Security Act.<sup>19</sup> Once these requirements are met, partners in California may file a Declaration of Domestic Partnership with the Secretary of State.<sup>20</sup>

Registered domestic partners in California enjoy rights similar to those available to married couples. California’s Family Code states:

Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.<sup>21</sup>

This code section also grants specific rights and responsibilities to partners regarding the receipt of death benefits as a surviving partner, parental rights over children, the rights regarding nondiscrimination afforded opposite-sex couples and the right to be free from discrimination by a public agency.<sup>22</sup> Domestic partners also have the same obligations

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partners of the same sex can get married. This bill clarifies the situation by providing that of the two partners to a marriage, one must be male and the other female.”).

<sup>15</sup> California Civil Code section 4101 was repealed in 1992 and replaced by California Family Code section 301 with no substantive change to the definition of marriage. *See* CAL. CIV. CODE § 4101 (West 1997).

<sup>16</sup> *See, e.g.*, CAL. PROB. CODE § 4716(a) (West 2004) (giving a domestic partner the authority to make medical decisions if their partner lacks the capacity to do so); CAL. INS. CODE § 381.5(a) (West 2005) (giving equal insurance benefits to the domestic partner of an insured); CAL. R&T CODE § 62(p) (West 2008) (providing property tax benefits to transfers between domestic partners); CAL. R&T CODE § 18521(d) (West 2008) (state tax returns of domestic partners are treated similar to that of spouses); CAL. CODE OF CIV. PRO. § 377.60 (West 2008) (right to sue for wrongful death of a domestic partner).

<sup>17</sup> CAL. FAM. CODE § 297(a) (West 2004).

<sup>18</sup> *Id.* § 297(b)(1)–(6).

<sup>19</sup> *Id.* *See also* Title II of the Social Security Act, 42 U.S.C. § 402(a) (2004) (old-age insurance benefits); Title XVI of the Social Security Act, 42 U.S.C. § 1381 (2003) (supplemental security income for the aged, blind, and disabled).

<sup>20</sup> CAL. FAM. CODE § 297(b) (West 2004).

<sup>21</sup> CAL. FAM. CODE § 297.5(a) (West 2008).

<sup>22</sup> *Id.* § 297.5(c), (d), (f), (g).

and responsibilities as married persons with regard to community property, debts to third parties and financial support upon dissolution of the partnership.<sup>23</sup> California domestic partnership law essentially applies any law pertaining to married persons—even those with gender-specific terms referring to a spouse—to same-sex partners, including federal laws targeted at opposite-sex couples.<sup>24</sup> While domestic partnership laws offer recognition and significant state law protections for same-sex couples, they do not grant access to over one thousand federal laws that protect opposite-sex married couples.<sup>25</sup>

## II. BACKGROUND

### A. Facts

Twelve days after being elected, San Francisco Mayor Gavin Newsom attended President Bush's State of the Union speech on January 20, 2004.<sup>26</sup> As the President spoke of outlawing same-sex marriage via a possible constitutional amendment, Newsom decided he wanted to issue marriage licenses to gay and lesbian couples.<sup>27</sup> Newsom's staff researched the issue and determined the language on marriage licenses would need to be made gender neutral.<sup>28</sup> On February 10, 2004, Newsom sent a letter to the County Clerk's office requesting that forms used for the purposes of granting marriage licenses be changed so gender or sexual orientation were not a barrier to obtaining such a license.<sup>29</sup> On February 12th, the City of San Francisco started to provide marriage licenses to same-sex couples.<sup>30</sup> Phyllis Lyon and Del Martin, who founded the first lesbian organization in the United States in 1955,<sup>31</sup> were the first same-sex couple to marry in San Francisco.<sup>32</sup>

Just days after marriage licenses became available, more than 130 couples lined up outside on a cold and rainy Sunday evening to be sure they would be married when city hall opened for business Monday morning.<sup>33</sup> One article capturing the events quoted a local business owner:

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<sup>23</sup> *Id.* § 297.5(k)(1).

<sup>24</sup> *Id.* § 297.5(e), (j).

<sup>25</sup> DAVINA KOTULSKI, WHY YOU SHOULD GIVE A DAMN ABOUT GAY MARRIAGE 15 (2004).

<sup>26</sup> Rachel Gordon, *The Battle Over Same-Sex Marriage: Uncharted Territory*, S.F. CHRON., Feb. 15, 2004, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/02/15/MNGMN51F8Q1.DTL>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Letter from Gavin Newsom, Mayor of San Francisco, to Nancy Alfaro, San Francisco County Clerk (Feb. 10, 2004), available at <http://news.findlaw.com/hdocs/docs/glrts/sfmayor21004ltr.pdf>.

<sup>30</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 686 (Ct. App. 2006).

<sup>31</sup> The name of the organization founded by Phyllis Lyon and Del Martin is "Daughters of Bilitis." About.com, Lesbian Life, <http://lesbianlife.about.com/od/herstory/p/DOB.htm>.

<sup>32</sup> CNN.com, *Mayor Defends Same-Sex Marriages*, Feb. 22, 2004, <http://www.cnn.com/2004/LAW/02/22/same.sex/index.html>.

<sup>33</sup> Simone Sebastian & Tanya Schevitz, *Marriage Mania Grips S.F. as Gays Line up for Licenses: Scores of Couples Camping Out in the Name of Love*, S.F. CHRON., Feb. 16, 2004, at A1,

“There has been a general euphoria” . . . Windows throughout the neighborhood . . . were decorated with signs like “Congratulations Newlyweds!” as two miles away couples from around the world descended on City Hall to get married. “People who had gotten marriage certificates rode through the neighborhood waving their certificates and honking their horns . . .”<sup>34</sup>

More than four thousand marriage licenses were granted to same-sex couples between February 12 and March 11, 2004.<sup>35</sup> In defense of his actions, Newsom said he could not discriminate against people even if it meant the end of his political career.<sup>36</sup>

## B. Procedural History

### 1. Prior to Consolidation

On February 10, 2004, Newsom had issued a press release publicizing the change in marriage license requirements so as to include persons of the same sex.<sup>37</sup> On February 13, 2004, Randy Thomasson and Campaign for California Families filed suit against Mayor Gavin Newsom and San Francisco County Clerk Nancy Alfaro for injunctive and declaratory relief.<sup>38</sup> Although filed the day after San Francisco issued the first gay marriage license, the litigation was originally prepared as a preemptive measure to stop any city action to issue the licenses.<sup>39</sup> Thomasson sued to render the mayor’s directive invalid and asked the court to permanently enjoin the defendants from issuing marriage licenses to same-sex couples.<sup>40</sup> The plaintiffs’ main assertion was that issuing marriage licenses to same-sex couples would violate state law and that Mayor Newsom did not have the authority to circumvent the California marriage codes as they defined marriage.<sup>41</sup> On February 20, Superior Court Judge Ronald Quidachay denied plaintiffs’ request for an immediate stay.<sup>42</sup>

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available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/02/16/MNGD751O1T1.DTL>.

<sup>34</sup> CNN.com, *Gay Mecca Fetes Same-Sex Marriages*, Feb. 19, 2004, <http://www.cnn.com/2004/US/West/02/19/gay.celebrations.reut/index.html>.

<sup>35</sup> Bob Egelko, *Court Halts Gay Vows*, S.F. CHRON., Mar. 12, 2004, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/03/12/MNGHI5JDDU1.DTL>.

<sup>36</sup> *Mayor defends same-sex marriages*, *supra* note 32.

<sup>37</sup> *Id.* at 2.

<sup>38</sup> Verified Amended Complaint for Writ of Mandamus, Declaratory and Injunctive Relief at 1, *Thomasson v. Newsom*, No. CGC 04-428794 (S.F. Super. Ct. Feb. 13, 2004) [hereinafter CCF Complaint], available at <http://www.domawatch.org/cases/california/prop22vsanfrancisco/040214ThomassonAmendedComplaint.pdf>. Thomasson, a California resident, is the founder and director of Campaign for California Families, a non-profit family values organization. Campaign for California Families, <http://www.ccfcalifornia.com> (last visited Sept. 26, 2008). According to the organization’s website, it is a statewide lobbying organization representing those “who believe the sacred institutions of life, marriage and family deserve utmost protection and respect by government and society.” *Id.* (follow “About Us” hyperlink).

<sup>39</sup> CCF Complaint, *supra* note 38, at 1.

<sup>40</sup> *Id.* at 1.

<sup>41</sup> *Id.* at 3.

<sup>42</sup> Harriet Chiang, *Lockyer Pleads to Top Court: State Justices Give S.F. Until Friday to Defend Licenses*, S.F. CHRON., Feb. 28, 2004, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/02/28/MNG1Q5ALU11.DTL>.

A second lawsuit, *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, was also filed on February 13, 2004 challenging the City's actions.<sup>43</sup> Unlike the *Thomasson* lawsuit, this action was in direct response to the issuing of the marriage licenses. The plaintiff, Proposition Legal Defense and Education Fund ("Prop. 22 LDEF"), is an organization seeking to enforce Proposition 22, an initiative passed by California voters in March 2000 and codified as Family Code Section 308.5 ("Only marriage between a man and a woman is valid or recognized in California.")<sup>44</sup> Prop. 22 LDEF's main claim was that issuing marriage licenses to same-sex couples violated California law because the Family Code provisions were valid and should be enforced.<sup>45</sup> The plaintiff sought an immediate stay and declaratory relief.<sup>46</sup> On February 17th, Superior Court Judge James Warren denied the request.<sup>47</sup> *Thomasson* and *Prop. 22 LDEF* were consolidated and scheduled for a hearing on March 29, 2004.<sup>48</sup> At that hearing, San Francisco officials were required to show why issuing marriage licenses to same-sex couples was legal.<sup>49</sup>

When the trial court refused to grant a stay in either case, California Attorney General Bill Lockyer filed an original writ petition in the California Supreme Court on February 27, 2004, claiming the actions taken by Mayor Newsom and other city officials were unlawful.<sup>50</sup> On March 11, 2004, the California Supreme Court ordered San Francisco city officials to show cause why a writ of mandate should not issue, which would require city officials to follow and enforce the existing California marriage statutes in the absence of a judicial determination that the statutory provisions were unconstitutional.<sup>51</sup> The court also directed the officials to enforce the existing marriage statutes and banned any further issuance of unauthorized marriage licenses.<sup>52</sup> The court stayed the pending hearings in *Thomasson* and *Prop. 22 LDEF*, but the stay did not "preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes."<sup>53</sup>

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<sup>43</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 685 (Ct. App. 2006).

<sup>44</sup> First Amended Verified Petition for Writ of Mandate and Immediate Stay, and Complaint for Injunctive and Declaratory Relief at 2, *Proposition 22 Legal Def. and Educ. Fund v. City and County of S.F.*, No. CPF 04-503943 (S.F. Super. Ct. Feb. 13, 2004), [hereinafter *Prop. 22 LDEF Petition*], available at [http://www.domawatch.org/cases/california/prop22vsanfrancisco/P22vSF\\_FirstAmndVrfdPet.pdf](http://www.domawatch.org/cases/california/prop22vsanfrancisco/P22vSF_FirstAmndVrfdPet.pdf).

<sup>45</sup> City and County of San Francisco's Cross-Complaint for Declaratory Relief (To Determine Validity of State Statutes) at 4, *Proposition 22 Legal Def. and Educ. Fund v. The City and County of S.F.*, No. CPF 04-503943 (S.F. Super. Ct. Feb. 13, 2004), available at <http://www.domawatch.org/cases/california/prop22vsanfrancisco/Prop22City%27sCrossComplaint.pdf>.

<sup>46</sup> *Prop. 22 LDEF Petition*, *supra* note 44, at 5.

<sup>47</sup> Chiang, *supra* note 42.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 1072 (Cal. 2004).

<sup>51</sup> *Id.* at 1073.

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

<sup>53</sup> *Id.* at 1074.

Three suits were then filed in superior court challenging the state's marriage statutes, which defined marriage as between a man and a woman.<sup>54</sup> The first complaint was filed by the City of San Francisco, seeking declaratory relief and a petition for writ of mandate.<sup>55</sup> This suit specifically challenged California Family Code sections 300 and 308.5.<sup>56</sup> Two other lawsuits seeking writs of mandate were filed by groups of same-sex couples in Los Angeles and San Francisco Superior Courts, claiming they were prevented from marrying in California or that their out-of-state marriages were not recognized as valid under California law.<sup>57</sup>

The second action, *Tyler v. County of Los Angeles* was filed on February 23, 2004.<sup>58</sup> The *Tyler* petitioners were two same-sex couples; one couple who wanted to marry, and another couple who wanted state recognition of their Canadian marriage.<sup>59</sup> Both couples had been denied a license by the County of Los Angeles because of the current marriage law.<sup>60</sup> The *Tyler* couples claimed that their fundamental right to marry was violated by California's marriage laws.<sup>61</sup> Equality California, a gay rights organization, was granted leave to intervene.<sup>62</sup>

The third action, *Woo v. Lockyer*, was filed in San Francisco Superior Court on March 12, 2004.<sup>63</sup> The advocacy groups Our Family Coalition and Equality California joined the same-sex couple plaintiffs and made claims similar to those in *Tyler* and *City and County of San Francisco* ("CCSF").<sup>64</sup> The Superior Court consolidated *Woo* and *CCSF* on April 1, 2004.<sup>65</sup>

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<sup>54</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 687 (Ct. App. 2006).

<sup>55</sup> *City and County of San Francisco v. State*, No. CGC-04 429539 (S.F. Super. Ct. 2004), available at [http://www.domawatch.org/cases/california/prop22vsanfrancisco/Final\\_Decision\\_04132005.pdf](http://www.domawatch.org/cases/california/prop22vsanfrancisco/Final_Decision_04132005.pdf).

<sup>56</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d at 687.

<sup>57</sup> *Id.*

<sup>58</sup> *Tyler v. County of Los Angeles*, No. BS-088506 (L.A. Super. Ct. 2004), available at <http://www.domawatch.org> (follow "Index of Cases" hyperlink).

<sup>59</sup> *Petition for Writ of Mandate or Prohibition at 2, Tyler v. County of Los Angeles*, No. BS-088506 (L.A. Super. Ct. Feb. 23, 2004), available at <http://www.domawatch.org/cases/california/tylervlosangeles/040223PetitionForWritOfMandate.pdf>.

<sup>60</sup> *Id.* at 4.

<sup>61</sup> *Id.* at 5.

<sup>62</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d at 687 n.3. Equality California is an organization that "works to achieve equality and secure legal protections for LGBT people." About EQCA, - Equality California, <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4025493> (last visited Sept. 26, 2008).

<sup>63</sup> *Third Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, Woo v. Lockyer*, No. CGC-04-504038 (S.F. Super. Ct. Aug. 31, 2004), available at [http://www.domawatch.org/cases/california/sanfranciscovstate/Woo\\_3rd\\_AmndPet.pdf](http://www.domawatch.org/cases/california/sanfranciscovstate/Woo_3rd_AmndPet.pdf).

<sup>64</sup> "Our Family Coalition promotes the rights and well-being of Bay Area lesbian, gay, bisexual, and transgender families with children and prospective parents through education, advocacy, social networking, and grassroots community organizing." Our Family Coalition: Home, <http://www.ourfamily.org> (last visited Sept. 26, 2008).

<sup>65</sup> *City and County of San Francisco v. State*, 27 Cal. Rptr. 3d 722, 726 (Ct. App. 2005).

On August 12, 2004, the California Supreme Court issued a writ of mandate in *Lockyer* requiring San Francisco city officials to enforce the existing state marriage statutes defining marriage as between a man and a woman.<sup>66</sup> Finding that California Family Code provisions had been violated, the court directed officials

to take all necessary remedial steps to undo the continuing effects of the officials' past unauthorized actions, including making appropriate corrections to all relevant official records and notifying all affected same-sex couples that the same-sex marriages authorized by the officials are void and of no legal effect.<sup>67</sup>

In limiting its decision to the validity of the approximately four thousand same-sex marriages performed in San Francisco, the court did not issue an opinion regarding the constitutionality of California's marriage statutes:

To avoid any misunderstanding, we emphasize that the substantive question of the constitutional validity of California's statutory provisions limiting marriage to a union between a man and a woman is not before our court in this proceeding, and our decision in this case is not intended, and should not be interpreted, to reflect any view on that issue. We hold only that in the absence of a judicial determination that such statutory provisions are unconstitutional, local executive officials lacked authority to issue marriage licenses to, solemnize marriages of, or register certificates of marriage for same-sex couples, and marriages conducted between same-sex couples in violation of the applicable statutes are void and of no legal effect. Should the applicable statutes be judicially determined to be unconstitutional in the future, same-sex couples then would be free to obtain valid marriage licenses and enter into valid marriages.<sup>68</sup>

## 2. Consolidation and Trial

Before the California Supreme Court reached its final decision in *Lockyer*, the cases discussed above were coordinated and assigned to San Francisco Superior Court Judge Richard A. Kramer.<sup>69</sup> The Judicial Council coordinated *CCSF*, *Tyler*, and *Woo* with the two proceedings stayed as a result of the *Lockyer* case (*Thomasson* and *Prop. 22 LDEF*) on June 14, 2004.<sup>70</sup> This single proceeding, entitled *Marriage Cases*, was coordinated to address the constitutional challenges to California's marriage statutes.<sup>71</sup> In addition to these cases, a sixth case, *Clinton v. State of California*, was added to the coordinated proceeding on September 8, 2004.<sup>72</sup> *Clinton* had been filed on March 12, 2004 in San Francisco Superior Court by six same-sex couples seeking to have their marriage licenses upheld.<sup>73</sup>

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<sup>66</sup> *Lockyer*, 95 P.3d 459, 464 (Cal. 2004).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365, S.F. Super. Ct. (2004).

<sup>70</sup> *Id.* at 1 n.1.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Complaint for Declaratory Relief by Same-Sex Married Couples Challenging the Constitutionality of the Family Code at 2, *Clinton v. State*, No. CGC-04-429548 (S.F. Super. Ct. 2004), available at <http://www.domawatch.org/cases/california/clintonvstate/Complaint.pdf>.

The trial court hearing for the six coordinated actions took place on December 22–23, 2004.<sup>74</sup> “Spectators, including most of the 12 plaintiff couples and a number of their supporters, lined up in the courthouse corridors more than an hour before the hearing and filled the courtroom during the daylong proceedings.”<sup>75</sup> One such spectator was Stuart Gaffney, an original plaintiff from the *Lockyer* action, who married his partner of seventeen years in San Francisco on the first day marriage licenses were issued.<sup>76</sup> After the hearings, Gaffney commented: “Our very lives were before the court. . . . People who don’t know us are telling us whether we can get married or not. . . . We’re trying to get that happiest day of our lives back.”<sup>77</sup> On April 13, 2005, the trial court ruled that the California Family Code provisions defining marriage as between a man and a woman violated equal protection under the state constitution.<sup>78</sup>

While the United States Constitution uses intermediate scrutiny for gender classifications,<sup>79</sup> the California Constitution views gender as a suspect classification requiring the higher standard of strict scrutiny.<sup>80</sup> The intermediate scrutiny standard requires that state action serve “important governmental objectives, and must be substantially related to achievement of those objectives.”<sup>81</sup> But strict scrutiny generally requires the government to prove a “compelling interest” in creating a suspect classification.<sup>82</sup>

In 1971, the California Supreme Court set forth the principle that the strict scrutiny standard of review applies where suspect classifications such as sex are used.<sup>83</sup> The court held that sex qualifies as a suspect classification because it is an immutable trait, such as race, for which a class of persons is treated differently without regard to capabilities.<sup>84</sup> In applying the strict scrutiny standard of review for gender classifications, the trial court in *Marriage Cases* first determined that “Family Code provisions limiting marriage in California to opposite-sex unions are subject to strict judicial scrutiny because they rest on a suspect classification (gender). . . .”<sup>85</sup> The two separate classifications created by the marriage statutes are same-sex and opposite-sex. These criteria are

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<sup>74</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 688 (Ct. App. 2006).

<sup>75</sup> Bob Egelko, *Tradition vs. Equality Argued in S.F. Court: Advocates, Foes Lay Out their Cases Before Judge*, S.F. CHRON., Dec. 23, 2004, at A-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/12/23/MNGM3AGB3B1.DTL>.

<sup>76</sup> Rona Marech, *Those who filed suit*, S.F. CHRON, Dec. 21, 2004, at A12, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/12/21/MNGN8AEV0J1.DTL>.

<sup>77</sup> Egelko, *supra* note 75.

<sup>78</sup> *In re Marriage Cases*, 49 Cal. Rptr 3d at 688.

<sup>79</sup> See *Craig v. Boren*, 429 U.S. 190, 197–99 (1976).

<sup>80</sup> *Catholic Charities of Sacramento v. Superior Court*, 32 Cal. 4th 527, 564 (2004) (citing *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 539–42 (Cal. 1971)).

<sup>81</sup> *Craig*, 429 U.S. at 197.

<sup>82</sup> *Id.* at 220.

<sup>83</sup> *Sail’er Inn*, 485 P.2d at 539.

<sup>84</sup> *Id.* at 540.

<sup>85</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 688 (Ct. App. 2006).

used to discriminate against individuals because their partner's gender becomes the sole basis for determining eligibility for marriage under the law. Therefore, "for the purpose of an equal protection analysis, the legislative scheme creates a gender-based classification."<sup>86</sup> The trial court went on to say: "It is well established that a gender-based classification is a 'suspect' classification and thus subject to the strict scrutiny of analysis under the equal protection clause of the California Constitution."<sup>87</sup>

The court also applied strict scrutiny because the marriage statutes infringed upon a fundamental right.<sup>88</sup> The trial court noted that California courts had previously determined the right to marry as a fundamental constitutional right.<sup>89</sup> And the Supreme Court of California held in 1948 that "the essence of the right to marry is freedom to join in marriage with the person of one's choice."<sup>90</sup> Under the California marriage statutes, homosexual persons are denied the fundamental right to marry a partner of one's choosing.

Not only did the trial court rule that the California marriage statutes failed to meet strict scrutiny,<sup>91</sup> it also held that the marriage statutes failed to meet even the rational basis test because the statutes did not further a legitimate state interest.<sup>92</sup> The state argued that because marriage had traditionally been between a man and a woman, the state had a legitimate interest in reserving marriage for opposite-sex unions.<sup>93</sup> Rejecting this argument, the court noted, "The state's protracted denial of equal protection cannot be justified simply because such constitutional violation has become traditional."<sup>94</sup> The court concluded that "California's traditional limit of marriage to a union between a man and a woman is not a sufficient rational basis to justify Family Code sections 300 and 308.5. Simply put, same-sex marriage cannot be prohibited solely because California has always done so before."<sup>95</sup> The State of California, the Campaign for California Families,<sup>96</sup> and the Prop. 22 LDEF all filed separate appeals, which were consolidated on December 1, 2005 by the California court of appeals into one action now known as *In re Marriage Cases*.<sup>97</sup>

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<sup>86</sup> *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365, S.F. Super. Ct. (2004), at 17.

<sup>87</sup> *Id.* at 19 (citing *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 564 (2004)).

<sup>88</sup> See *Sail'er Inn*, 485 P.2d 529 at 539.

<sup>89</sup> See *Marriage Cases*, at 19 (quoting *In re Carrafa*, 143 Cal. Rptr. 848, 850 (Ct. App. 1978)).

<sup>90</sup> *Perez v. Sharp*, 198 P.2d 17, 21 (Cal. 1948).

<sup>91</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 688 (Ct. App. 2006).

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

<sup>93</sup> See Final decision, *Marriage Cases*, at 6.

<sup>94</sup> *Id.* at 7.

<sup>95</sup> *Id.* at 8.

<sup>96</sup> On appeal, the *Thomasson* case was captioned *Campaign for California Families v. Newson*. See *In re Marriage Cases*, 49 Cal. Rptr. 3d at 727.

<sup>97</sup> California Courts - Appellate Court Case Information, 1st Appellate District, Docket (Register of Actions), City and County of San Francisco v. State of California et al., <http://appellatecases.com>.

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### 3. On Appeal

The legal issue decided by a three judge panel of the California court of appeal was: “Did the trial court err when it concluded Family Code statutes defining civil marriage as the union between a man and a woman are unconstitutional?”<sup>98</sup> The appeal was argued on July 10, 2006,<sup>99</sup> and the court of appeal reversed.<sup>100</sup>

Presiding Justice William McGuiness delivered the majority opinion, joined by Justice Joanne Parrilli.<sup>101</sup> Justice McGuiness decided that it was not the role of the appellate court to decide which party advanced the most compelling idea of what marriage is, but to determine whether the statutory definition of marriage in California is unconstitutional because homosexual persons are not afforded the option of marrying the partner of their choosing.<sup>102</sup> The majority opinion made seven main points: (1) opponents of same-sex marriage lack standing to pursue claims for declaratory relief;<sup>103</sup> (2) the fundamental due process right to marry did not encompass a right to same-sex marriage;<sup>104</sup> (3) the California Family Code provisions restricting marriage to opposite sex couples did not impermissibly discriminate on basis of gender;<sup>105</sup> (4) the disparate impact of such provisions on gays and lesbians did not trigger strict scrutiny equal protection analysis;<sup>106</sup> (5) the California state constitutional right of privacy does not encompass a right to same-sex marriage;<sup>107</sup> (6) federal and state guarantees of free expression do not encompass the right of gays and lesbians to express commitments in civil same-sex marriages;<sup>108</sup> and (7) under the rational basis test, restrictive Family Code provisions furthered a legitimate state interest and thus did not violate equal protection rights of gays and lesbians.<sup>109</sup>

Applying the rational basis test, the appellate court concluded that the statutes were constitutional because they did not deprive homosexuals of a vested right to same-sex marriage, nor did they discriminate against

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courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc\_id=62337&doc\_no=A110449 (last visited Sept. 27, 2008).

<sup>98</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d at 684. The court specifically references California Family Code sections 300, 301, 302, and 308.5. *Id.*

<sup>99</sup> Minutes, California Court of Appeal, First Appellate District (July 10, 2006), available at <http://www.courtinfo.ca.gov/courts/minutes/documents/AJUL0306.PDF> (last visited Sept. 27, 2008).

<sup>100</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d at 726–27.

<sup>101</sup> Bob Egelko, *The Battle Over Same-Sex Marriage, Same-Sex Marriage Ban Upheld in Ruling*, S.F. CHRON., Oct. 6, 2006, at A-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/10/05/BAG4KLJAF24.DTL>.

<sup>102</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d at 685.

<sup>103</sup> *Id.* at 691.

<sup>104</sup> *Id.* at 699.

<sup>105</sup> *Id.* at 706.

<sup>106</sup> *Id.* at 709.

<sup>107</sup> *Id.* at 714.

<sup>108</sup> *Id.* at 717.

<sup>109</sup> *Id.*

homosexuals under the suspect class of gender.<sup>110</sup> The court ruled that requiring a person to choose another of the opposite sex in order to legally marry was rationally related to California's interest in maintaining the heterosexual nature of marriage as it had always historically been defined.<sup>111</sup> The court also reasoned that same-sex couples were afforded similar rights as heterosexual married couples under the state's domestic partnership laws.<sup>112</sup>

Reflecting on the legislative intent of amending the gender-neutral marriage provisions in 1977, the court observed that Assembly Bill No. 607 was passed to amend the marriage statute "to prohibit persons of the same sex from entering lawful marriage."<sup>113</sup> The appellate court stated that it is the role of the legislature, and not the judiciary, to change a statute or to grant homosexuals a right not offered by the existing law.<sup>114</sup> According to Judge McGuiness, changes to the marriage laws would have to come from the people of California through the legislative process because it is not the role of judges to redefine social institutions.<sup>115</sup>

### C. Current Status

After the court of appeal issued its opinion, six petitions for review were filed by November 14, 2006.<sup>116</sup> On December 20, 2006, the California Supreme Court granted certiorari in *In re Marriage Cases*.<sup>117</sup> The case was argued before the court on March 4, 2008, with a ruling due by June 4, 2008.<sup>118</sup> In addition to briefs filed by the parties, there are a total of thirty nine amicus briefs filed in support of either side of the action,<sup>119</sup> including those filed by cities, bar associations, religious organizations, law professors, and gay rights organizations.<sup>120</sup>

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<sup>110</sup> *Id.* at 686.

<sup>111</sup> *Id.* at 720.

<sup>112</sup> *Id.* at 695.

<sup>113</sup> *Id.* at 692 (citing S. COMM. ON THE JUDICIARY, ANALYSIS OF ASSEMB. B. NO. 607, 1977-78 Leg., Reg. Sess., at 1 (Cal. 1977) (as amended May 23, 1977)). For a history of the amendments, see *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 468 n.11 (Cal. 2004).

<sup>114</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d at 685.

<sup>115</sup> *Id.*

<sup>116</sup> Media Advisory Release No. 41, Judicial Council of California, California Supreme Court Accepts Same-Sex Marriage Cases for Review (Dec. 20, 2006), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/MA41-06.PDF> (last visited Sept. 27, 2008).

<sup>117</sup> Bob Egelko, *Marriage Law Goes to High Court: State Supreme Court Sets Aside Appellate Ruling on Same-Sex Issue, Agrees to Hear Arguments*, S.F. CHRON., 21 Dec. 2006, at B-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/12/21/BAGEKN357O24.DTL>.

<sup>118</sup> See Julia Cheever, *Divided California Supreme Court Hears Same Sex Marriage Case*, S.F. SENTINEL.COM, Mar. 4, 2008, <http://www.sanfranciscosentinel.com/?p=10775> (last visited Sept. 27, 2008).

<sup>119</sup> See DOMAwatch.org – California, *Proposition 22 Legal Defense & Education Fund v. City and County of San Francisco, consolidated with Thomasson v. Newsom*, <http://www.domawatch.org/stateissues/california/prop22vsanfrancisco.html> (collecting amicus briefs from the Court of Appeal action *In re Marriage Cases*).

<sup>120</sup> See *id.*

### III. THE LEGAL ISSUE BEFORE THE CALIFORNIA SUPREME COURT

The California Supreme Court will be deciding the issue:

Does California's statutory ban on marriage between two persons of the same sex violate the California Constitution by denying equal protection of the laws on the basis of sexual orientation or sex, by infringing on the fundamental right to marry, or by denying the right to privacy and freedom of expression?<sup>121</sup>

### IV. THE BEST ARGUMENTS OF THE PARTIES

#### A. The Best Legal Arguments for the Unconstitutionality of the Ban on Same-Sex Marriage

The four petitioners' briefs make numerous arguments aimed at demonstrating the unconstitutionality of the existing law. But the City of San Francisco's opening brief presents the argument that will most likely persuade the California Supreme Court to reverse the court of appeal's ruling and is the most inclusive brief in terms of issues covered.<sup>122</sup> The City of San Francisco's brief begins with a history of discrimination against homosexuals as well as a general history of marriage.<sup>123</sup> It then proceeds with a discussion of constitutional and social discrimination.<sup>124</sup> The brief and its supplemental parts provide the strongest legal argument for the parties in favor of same-sex marriages, particularly with a discussion of the inferior status of domestic partnerships compared to heterosexual marriages.

The San Francisco brief makes three arguments why California's Family Codes are unconstitutional. First, excluding homosexuals from the institution of marriage is not rationally related to a legitimate governmental interest.<sup>125</sup> According to San Francisco, "[t]he marriage exclusion is irrational, and for that reason the Court need not reach the remaining questions in the case: whether the marriage laws should be subject to strict equal protection scrutiny . . . ."<sup>126</sup> The brief urges that the marriage exclusion will fail the rational basis test if it is "inconsistent with existing State policy towards lesbians and gay men."<sup>127</sup> The rational basis test requires a two step analysis. "There must be some rationality in the nature of the class singled out *and* a rational relationship between the legislative

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<sup>121</sup> News Release No. S.C. 51/06, Judicial Council of California, Summary of Cases Accepted During the Week of December 18, 2006 (Dec. 22, 2006), *available at* <http://www.courtinfo.ca.gov/courts/supreme/summaries/WS121806.PDF>.

<sup>122</sup> See Petitioner City and County of San Francisco's Opening Brief on the Merits, In re Marriage Cases, No. S147999 (Cal. 2007) [hereinafter San Francisco Brief].

<sup>123</sup> *Id.* at 6–26.

<sup>124</sup> *Id.* at 32.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 33.

<sup>127</sup> *Id.*

goal and the class singled out for unfavorable treatment.”<sup>128</sup> The California court of appeal found the test satisfied because the state had an interest in retaining the historical nature of marriage as a heterosexual institution.

However, this line of reasoning is erroneous and was previously overruled when used to support anti-miscegenation laws. The United States Supreme Court determined that the purpose of such laws was to promote white supremacy despite the state’s rationalization that “blacks and whites were treated equally because both were barred from interracial marriage.”<sup>129</sup> The prominent scholar, William Eskridge, argues that “[m]ost of the restrictions, such as the bar to different-race marriage, are legally constructed practices reflecting divisive social prejudice rather than sound policy. *Loving* [v. *Virginia*] is at odds with the philosophy that historical pedigree alone justifies a dividing practice restricting who may enjoy state benefits.”<sup>130</sup> Just as the United States Supreme Court found in *Loving*, the California Supreme Court should recognize that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>131</sup>

As described in his book, *Sex and Reason*,<sup>132</sup> Richard A. Posner believes that the vital personal right of marriage enunciated in *Loving* does not apply to homosexuals in a literal context, because the *Loving* Court only addressed heterosexual marriage.<sup>133</sup> Posner notes that “if the freedom to marry” principle of *Loving* is applied to homosexuals and “taken seriously, the deprivation to the homosexual couple denied the right to marry would carry a heavy weight.”<sup>134</sup> Posner appears to argue that unless the right to marry is downplayed, homosexuals could claim they are being denied a significant right. But while the Supreme Court may have only considered heterosexual marriage in *Loving*, the main principle underlying the freedom to marry can still be examined and applied in the context of same-sex marriage.

Even if the California Supreme Court finds a rational basis for discriminating against homosexuals with respect to marriage, the Family Code provisions would still be subject to strict scrutiny because they single out homosexuals as a suspect class.<sup>135</sup> To establish a suspect class, a party

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<sup>128</sup> *Id.* at 32 (citing *Young v. Haines*, 718 P.2d 909, 918 (Cal. 1986)) (internal quotations omitted) (emphasis added).

<sup>129</sup> DAVID MOATS, *CIVIL WARS: A BATTLE FOR GAY MARRIAGE* 132 (Harcourt 2004).

<sup>130</sup> WILLIAM N. ESKRIDGE, JR., *FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT: THE CASE FOR SAME-SEX MARRIAGE* 160 (Free Press 1996).

<sup>131</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>132</sup> RICHARD A. POSNER, *Homosexuality: The Policy Questions*, in *SEX AND REASON* 291, 312–13 (Harvard Univ. Press 1992), reprinted in ANDREW SULLIVAN, *SAME-SEX MARRIAGE PRO AND CON: A READER* 186 (Vintage Books 2004).

<sup>133</sup> *Id.* at 188. (reprinting RICHARD A. POSNER, *HOMOSEXUALITY: THE POLICY QUESTIONS*, (Harvard Univ. Press 1992).

<sup>134</sup> SULLIVAN, *supra* note 132, at 188 (internal quotations omitted).

<sup>135</sup> San Francisco Brief, *supra* note 122, at 60.

must show: “(1) the group has suffered a history of discrimination and stigmatization; and (2) the discrimination is based on characteristics that have no bearing on the group’s ability to perform in society.”<sup>136</sup> The California Legislature has enacted laws prohibiting discrimination against homosexuals in education, employment, housing, parenting and other areas.<sup>137</sup> These laws offer protection for homosexuals in public and private spheres, showing the state’s recognition of “the existence and the pervasiveness of sexual orientation discrimination, and the ability of lesbians and gay men to contribute to society in all aspects of economic, public and private life.”<sup>138</sup>

Strict scrutiny analysis should be applied because the marriage statutes discriminate against homosexuals on the basis of sex. The marriage statutes are not sex-neutral because classification as either male or female is required to determine who is eligible for marriage under the law, and the right to marry is determined based on the sex of the would-be spouse that an individual chooses.<sup>139</sup> The court of appeal did not apply a strict scrutiny test for discrimination on the basis of sex because it held that men and women were treated equally under the law.<sup>140</sup> In other words, both men and women could marry persons of the opposite sex. The petitioners argue that rights belong to individuals, and that the court of appeal’s holding implies that discrimination against one class is allowed so long as a parallel class suffers the exact same discrimination.<sup>141</sup> The fact that homosexuals are discriminated against on an equal basis still means they suffer discrimination solely based on the sex of their partner.

The San Francisco brief reminds us that a law grounded in history or custom can be invalidated by the judiciary on constitutional grounds.<sup>142</sup> It specifically discusses the mixed-race marriage laws, which were struck down for violating the liberty interests and equal rights of those they affected, despite being rooted in tradition.<sup>143</sup> The fact that homosexuals have not previously been afforded the right to marry is not a valid reason for concluding that they have no reasonable expectation of a privacy right to marry the person of their choice. The court need not uphold the Family Codes simply because they follow the custom and tradition of excluding homosexuals from marriage.

The next issue addressed is privacy rights. The California Constitution protects the privacy rights of its citizen.<sup>144</sup> The California

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<sup>136</sup> *Id.* (citing *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 540 (Cal. 1971)).

<sup>137</sup> San Francisco Brief, *supra* note 122, at 63–64.

<sup>138</sup> *Id.* at 64.

<sup>139</sup> *Id.* at 73.

<sup>140</sup> *Id.* at 74.

<sup>141</sup> *Id.* at 74–75.

<sup>142</sup> *Id.* at 41–42.

<sup>143</sup> *Id.* at 43.

<sup>144</sup> *Id.* at 82 (citing CAL. CONST. art. 1, § 1 (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty . . . and pursuing and

Family Code infringes upon a homosexual's right to "autonomy privacy" derived from California case law and described as "the interest in making intimate personal decisions or conducting personal activities without observation, intrusion or interference."<sup>145</sup> In *Ortiz v. Los Angeles Police Relief Ass'n*, the California court of appeal held that California's constitutional right to privacy includes the right to marry.<sup>146</sup> After becoming engaged to an incarcerated felon, the *Ortiz* plaintiff was fired by her employer, an association that provided compensation to police officers.<sup>147</sup> Although the court found in favor of the employer after balancing certain safety reasons against the plaintiff's personal interest, the court emphasized the plaintiff's right of privacy to marry, and especially the right to marry the person of her choice.<sup>148</sup> Here, the state denies homosexuals the right to marry a person of their choice and invades their right to autonomous privacy by excluding them from civil marriage. This is only lawful if the state can show a compelling government interest in excluding homosexuals from this institution.<sup>149</sup> San Francisco argues that because the state failed to even meet the rational basis test, the marriage laws do not advance a compelling state interest.<sup>150</sup>

#### B. Best Arguments for the Constitutionality of the Statutory Ban

Strong arguments in support of the California Family Code, and against same-sex marriage, are set forth in a brief by the Campaign for California Families and in an amicus curiae brief by the public interest organization, Judicial Watch. The amicus brief focuses on the role of the courts in deciding the constitutionality of the statutes, while the Campaign for California Families brief addresses the merits of the claim.

##### 1. The Traditional Definition of Marriage

The Campaign for California Families brief presents the strongest argument for upholding the California Family Code.<sup>151</sup> Its argument is deeply rooted in the traditional definition of marriage,<sup>152</sup> pointing to the fact that the United States Supreme Court upheld marriage as the union between a man and a woman.<sup>153</sup> Arguing that the definition of marriage is

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obtaining safety, happiness, and privacy.")).

<sup>145</sup> *Id.* at 82 (citing *Hill v. Nat'l Collegiate Ath. Ass'n*, 865 P.2d 633, 654 (Cal. 1994)) (internal quotations omitted).

<sup>146</sup> *Id.* at 83 (citing *Ortiz v. Police Relief Ass'n*, 120 Cal. Rptr. 2d 671, 681 (Ct. App. 2002)).

<sup>147</sup> *Ortiz*, 120 Cal. Rptr. at 673–74.

<sup>148</sup> *Id.* at 678–79.

<sup>149</sup> San Francisco Brief, *supra* note 122, at 86–87 (citing *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 818 (Cal. 1997)).

<sup>150</sup> *Id.* at 87.

<sup>151</sup> Answer Brief Campaign for California Families on the Merits at 13, *In re Marriage Cases*, No. S147999 (Cal. June 7, 2007) [hereinafter CCF Brief] (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

<sup>152</sup> *Id.* at 8.

<sup>153</sup> *Id.* at 11–13.

older than the state statutes at issue here, the respondents assert that “[m]arriage is not merely a creation of statute, but is an institution that is older than the Constitution, state statutes and court decisions.”<sup>154</sup> This point demonstrates that the government does not create rights, but instead creates social institutions to regulate people seeking to express, obtain, and protect their rights.

The brief also cites the 1877 case of *Meister v. Moore*, which held that marriage statutes “regulate the mode of entering into the contract, but they do not confer the right.”<sup>155</sup> The idea is that the government cannot change the institution of marriage to include homosexuals, because the coming together of a man and woman in marriage existed before the creation of the social institution.

The Campaign for California Families argues that the institution of marriage is the foundation of society.<sup>156</sup> Emphasizing the procreative nature of the marital relationship, its brief states, “marriage statutes reflect that reality and provide governmental approval and support for the institution upon which society depends for its future.”<sup>157</sup> Respondents argue that same-sex couples are seeking to break down the structure and purpose of traditional marriage while also asking to become a part of the institution.<sup>158</sup> But even heterosexuals who join in traditional marriage do not always procreate and, therefore, under the respondent’s argument, do not contribute to the foundation and future of society. Following this reasoning, it seems that all infertile heterosexual couples as well as all those who do not intend to bear children should also be denied access to marriage.

The Campaign for California Families’ argument fails to acknowledge that a marriage may occur for reasons other than procreation. William Eskridge notes that opponents of same-sex marriage often claim that fostering family values requires reserving marriage for those who want to (naturally) procreate and raise a family.<sup>159</sup> But Eskridge counters this argument: “Families need not be heterosexual, and they need not procreate. The state has always allowed couples to marry even though they do not desire children or are physically incapable of procreation. Marriage in an urbanized society serves companionate, economic, and interpersonal goals that are independent of procreation.”<sup>160</sup>

Opponents of same-sex marriage attack the analogy between banning homosexuals from marriage and anti-miscegenation laws, by claiming that marriage was designed to bring men and women together, while race was

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<sup>154</sup> *Id.* at 13 (citing *Griswold*, 381 U.S. at 486).

<sup>155</sup> *Id.* at 12 (citing *Meister v. Moore*, 96 U.S. 76, 78–79 (1877)).

<sup>156</sup> *Id.* at 8.

<sup>157</sup> *Id.* at 12.

<sup>158</sup> *Id.* at 6–7.

<sup>159</sup> ESKRIDGE, *supra* note 130, at 12.

<sup>160</sup> *Id.*

added to the institution.<sup>161</sup> Some argue that *Loving* struck down anti-miscegenation laws because the institution of marriage was corrupted by laws promoting racism.<sup>162</sup> Supporters of this claim cite marriage scholar David Blankenhorn to argue that the institution of marriage should not be manipulated for individual wants, nor should concepts “that are alien and even hostile to the institution’s core forms, meanings and reasons for being” be grafted onto the institution of marriage.<sup>163</sup> It is undisputed that the institution of marriage has never applied to homosexual unions, and doing so would graft the recognition of a new type of partnership onto marriage. But unlike the past, where discrimination was grafted onto marriage, conferring marital rights to same sex couples would serve as recognition that rights have been denied to homosexuals.

Blankenhorn writes, “today’s proponents of same-sex marriage in the United States are seeking to restructure marriage and use it for a special purpose. That purpose is to gain social recognition of the dignity of homosexual love.”<sup>164</sup> But if heterosexuals can enter a marriage to gain social recognition of the dignity of their love, why should homosexuals be denied the same opportunity? The Campaign for California Families’ brief argues that the purpose of marriage is not to help change public attitudes, but to perpetuate society.<sup>165</sup> However, marriage is a widely recognized social institution where cultural attitudes play out in the public sphere. The current nature of the marital institution prevents homosexuals from participating in this part of society. Just as the anti-miscegenation laws were struck down as discriminating against mixed-race couples in the 1960s, allowing same-sex unions to be part of the marriage institution will strike down the similar discrimination faced by same-sex couples today.

According to the respondents, laws defining marriage as a union between a man and a woman do not actually discriminate on the basis of sexual orientation. They argue that “regardless of sexual orientation, any person can marry any person of the opposite sex,” meaning marriage *is* available to homosexuals—as long as they marry a person of the opposite sex.<sup>166</sup> After all, individuals seeking to marry are not questioned by the

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<sup>161</sup> CCF Brief, *supra* note 151, at 16–17.

<sup>162</sup> *Id.* at 17 (citing *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967)).

<sup>163</sup> *Id.* (citing DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 175–76 (Encounter Books 2007)). “David Blankenhorn is founder and president of the Institute for American Values, a private, nonpartisan organization devoted to contributing intellectually to the renewal of marriage and family life and the sources of competence, character, and citizenship in the United States.” Institute for American Values, About David Blackenhorn, [http://www.americanvalues.org/html/about\\_david\\_blankenhorn.html](http://www.americanvalues.org/html/about_david_blankenhorn.html) (last visited Sept. 27, 2008).

<sup>164</sup> CCF Brief, *supra* note 151, at 18 (citing BLANKENHORN, *supra* note 163, at 177–78).

<sup>165</sup> *Id.* at 18.

<sup>166</sup> *Id.* at 34. A similar argument was struck down by the United States Supreme Court in *Loving v. Virginia*. See 388 U.S. 1, 8–9 (1967) (rejecting the state’s argument “that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from . . . the very heavy burden of justification”).

state about their sexual orientation.<sup>167</sup> Therefore, equal protection of the law is not violated because the law was not enacted with the intent to discriminate against individual homosexuals, even if they are part of a suspect class.<sup>168</sup> The respondents argue that homosexuals still have the right to marry any person of the opposite sex—the same right that is afforded to all members of their own sex.

Claiming that homosexuals do not receive disfavored treatment under the marriage laws makes no sense, considering Mayor Gavin Newsom had to take controversial action to provide equal treatment to homosexual couples who wished access to marriage. Heterosexuals are favored by the law within the definition set out in the marriage provisions. Their sexual orientation is more convenient because the law finds the expression of that orientation valid. While the state does not make an outright inquiry into a person's sexual orientation before granting a marriage license, the state does take indirect action by only allowing one group's sexual orientation to be valid under the law. Although homosexuals can get married, heterosexuals are afforded the full right to choose their partner as their spouse while homosexuals are not.

## 2. Judicial Restraint

If the California Supreme Court decides to uphold the decision of the court of appeal, the amicus curiae brief by Judicial Watch offers a straightforward line of reasoning regarding judicial restraint.<sup>169</sup> Judicial Watch, Inc. is a public interest organization founded in 1994, and funded by private foundations—mainly conservative groups.<sup>170</sup> Judicial Watch follows litigation and often files amicus curiae briefs.<sup>171</sup> Instead of focusing on the individual rights of homosexuals, the Judicial Watch brief focuses on the balance of governmental powers and the judiciary's ability to demonstrate restraint, emphasizing the reasons to avoid “judicial activism” by focusing on the role of the judiciary in reviewing constitutional issues. The brief stressed the need for judicial restraint when the court hears constitutional issues so as to not override action taken by the legislature that duly enacted a statute.<sup>172</sup>

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<sup>167</sup> CCF brief, *supra* note 151, at 34.

<sup>168</sup> *Id.* at 35.

<sup>169</sup> Brief of *Amicus Curiae* Judicial Watch, Inc. in Support of the State of California and Governor Arnold Schwarzenegger, No. S147999 (Cal. June 20, 2007) [hereinafter *Judicial Watch Brief*].

<sup>170</sup> See About Us, Judicial Watch, <http://www.judicialwatch.org/about.shtml> (last visited Sept. 27, 2008).

<sup>171</sup> According to the organization's website, Judicial Watch is a “conservative, non-partisan educational foundation, promotes transparency, accountability and integrity in government, politics and the law.” *Id.* The website provides information regarding current areas of law in which Judicial Watch has either filed a lawsuit or amicus curiae brief. Examples include suits against international, federal and local governments. See generally *id.*

<sup>172</sup> *Judicial Watch Brief*, *supra* note 169, at 9.

The Judicial Watch brief argues that the California Supreme Court must make two presumptions “out of respect for a coordinate branch of government.”<sup>173</sup> First, the court should begin with the premise that the California Legislature wrote and enacted laws within constitutional limits.<sup>174</sup> “[W]hen the Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind. . . the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision.”<sup>175</sup> Second, according to the court:

All presumptions and intendments are in favor of the constitutionality of a statute enacted by the legislature; all doubts are to be resolved in favor and not against the validity of a statute; that before an act of a coordinate branch of the government can be declared invalid by the judiciary for the reason that it is in conflict with the Constitution, such conflict must be clear, positive, and unquestionable . . . .<sup>176</sup>

The Judicial Watch brief argues that judicial restraint is most important when issues arise under substantive due process and equal protection.<sup>177</sup> Once a court deems an individual’s rights and interests constitutionally protected, it is difficult to change such status through the legislative process.<sup>178</sup> The United States Supreme Court noted that once this status is conferred, “a right is effectively removed from the hands of the people and placed into the guardianship of unelected judges.”<sup>179</sup> Courts should be reluctant to change what represents the will of the people as enacted through the legislature.

The Judicial Watch brief supports the California court of appeal’s decision. In relation to substantive due process and equal protection, the brief argues that the appellate court correctly identified the right being asserted by the plaintiffs as a specific right to same-sex marriage.<sup>180</sup> The Judicial Watch brief also argues that the appellate court was correct in ruling that the asserted “right” has not existed before in American history, and creating a right to same-sex marriage is, therefore, a novel idea.<sup>181</sup> The brief concludes that the California court of appeal was correct in holding that such novelty “precludes its recognition as a constitutionally protected fundamental right.”<sup>182</sup>

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<sup>173</sup> *Id.* at 10.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 10–11 (citing *Pac. Legal Found. v. Brown*, 624 P.2d 1215, 1221 (Cal. 1981)).

<sup>176</sup> *Id.* at 11–12 (citing *Jersey Maid Milk Prods. Co. v. Brock*, 91 P.2d 577, 586–87 (Cal. 1939)).

<sup>177</sup> *Id.* at 15–16.

<sup>178</sup> *Id.* at 17.

<sup>179</sup> *Id.* at 16 (quoting *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1250 (11th Cir. 2004)).

<sup>180</sup> *Id.* at 24.

<sup>181</sup> *Id.* at 22–23.

<sup>182</sup> *Id.* at 26 (citing *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 704 (2006)).

## V. HOW THE CALIFORNIA SUPREME COURT SHOULD RULE

The California Supreme Court should reverse the ruling of the appellate court by reinstating the trial court's ruling that the California Family Code provisions are unconstitutional. In reaching this decision, the California Supreme Court should give great weight to the briefs filed by the City and County of San Francisco because they give an in-depth review of the totality of the issues presented by *In re Marriage Cases*. Unlike the respondent's briefs, San Francisco's arguments are not based solely on historical or traditional notions of the institution of marriage. The petitioners focus on the liberty interests denied to individuals and on the social discrimination perpetuated by denying homosexuals equal marriage rights. If the California Supreme Court rules similar to the trial court, and finds that the Family Code provisions are unconstitutional, it will help end discrimination against homosexuals by removing their unions from a second class status. Allowing same-sex couples the right to marry ensures these individuals full recognition, protection, and equality under the law—at least at the state level. The California Supreme Court should reinstate the trial court ruling, which found that the California Family Code provisions defining marriage as only the union between a man and a woman violates the California Constitution.

## AUTHOR'S ADDENDUM

*Editor's Note: After this article was written, the California Supreme Court issued its landmark ruling on same-sex marriage. This addendum addresses that opinion and discusses whether the California Supreme Court utilized the arguments analyzed in Part IV.*

## VI. THE CALIFORNIA SUPREME COURT'S RULING: *IN RE MARRIAGE CASES*

On May 15, 2008, the California Supreme Court issued a ruling for *In re Marriage Cases*.<sup>183</sup> The 4-3 decision overturned the court of appeal ruling that the California Constitution was not violated by defining marriage as between a man and a woman. In its landmark ruling, the majority held:

We therefore conclude that in view of the substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.<sup>184</sup>

The court narrowed the issue to whether the California Constitution prohibited the creation of separate unions for same-sex and opposite-sex couples when both are "officially recognized family relationships that

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<sup>183</sup> 183 P.3d 384 (Cal. 2008).

<sup>184</sup> *Id.* at 400.

afford[] all of the significant legal rights and obligations traditionally associated under state law with the institution of marriage.”<sup>185</sup> In this context, the court found that “failing to designate the official relationship of same-sex couples as marriages violates the California Constitution.”<sup>186</sup>

In the majority opinion, Chief Justice Ron George concluded that:

[T]he purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California’s current marriage statutes—the interest in retaining the traditional and well-established definition of marriage—cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest.<sup>187</sup>

In applying strict scrutiny, the court refused to classify same-sex couples as second-class citizens. The court recognized that “retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples” effectively treats same-sex relationships differently under the law.<sup>188</sup> Furthermore, allowing same-sex couples to marry does “not deprive opposite-sex couples of any rights and will not alter the legal framework of marriage.”<sup>189</sup>

## VII. THE BEST ARGUMENTS OF THE PARTIES SET FORTH IN THEIR BRIEFS

Part IV of this article set forth the best arguments contained in the parties’ briefs. Part IV analyzed the City and County of San Francisco’s brief as the best argument in favor of striking down the ban on same-sex marriage. Part IV also analyzed two opponent’s briefs—one by the Campaign for California Families and an amicus curie brief by Judicial Watch—which argued that the ban on same-sex marriage was valid under the California Constitution.

### A. The Best Legal Arguments for the Unconstitutionality of the Ban on Same-Sex Marriage

The San Francisco brief set forth compelling arguments surrounding privacy rights. In analyzing this brief, this article pointed to the use of *Ortiz v. Los Angeles Police Relief Association*. The *Ortiz* court held that the California constitutional right to privacy includes the right to marry.<sup>190</sup> The *In re Marriage Cases* majority relied on *Ortiz* to hold that “the state constitutional right to marry . . . now also clearly falls within the reach of the constitutional protection afforded to an individual’s interest in personal autonomy by California’s explicit state constitutional privacy clause.”<sup>191</sup>

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<sup>185</sup> *Id.* at 398.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 401.

<sup>188</sup> *Id.* at 402.

<sup>189</sup> *Id.* at 401.

<sup>190</sup> *Ortiz v. Los Angeles Police Relief Ass’n*, 120 Cal. Rptr. 2d 670 (Ct. App. 2002).

<sup>191</sup> *In re Marriage Cases*, 183 P.3d at 420.

The San Francisco brief also argued that, despite being grounded in history and tradition, a law can still be invalidated. As an example, the San Francisco brief discussed bans on mixed-race marriage, which violate individual liberty interests.<sup>192</sup> This article subsequently argued that the “fact that homosexuals have not previously been afforded the right to marry is not a valid reason for concluding that they have no reasonable expectation of a privacy right to marry the person of their choice.”<sup>193</sup> The California Supreme Court agreed: “Tradition alone, however, generally has not been viewed as a sufficient justification for perpetuating, without examination, the restriction or denial of a fundamental *constitutional* right.”<sup>194</sup>

## B. Best Arguments For the Constitutionality of the Statutory Ban

### 1. The Traditional Definition of Marriage

The Campaign for California Families’ brief (CCF brief) presented arguments that focus on the traditional definition and understanding of marriage as the union of a man and a woman. The CCF brief contended that “because only a man and a woman can produce children biologically with one another, the constitutional right to marry necessarily is limited to opposite-sex couples.”<sup>195</sup> The California Supreme Court called this argument “fundamentally flawed.”<sup>196</sup> The court emphasized that the constitutional right to marry was independent from the ability to procreate:

A person who is physically incapable of bearing children still has the potential to become a parent and raise a child through adoption or through means of assisted reproduction, and the constitutional right to marry ensures the individual the opportunity to raise children in an officially recognized family with the person with whom the individual has chosen to share his or her life.<sup>197</sup>

The court noted that the constitutional right to marry has never been reserved only to those who are physically capable of having children.<sup>198</sup> Indeed, the court acknowledged that the legal recognition and protection of marriage is just as important to children raised by same-sex couples as it is for children raised by heterosexual couples.<sup>199</sup>

### 2. Judicial Restraint

The amicus curie brief by Judicial Watch, Inc. (“Judicial Watch brief”) focused on the role that judges play in statutory interpretation while

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<sup>192</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>193</sup> See *supra* Part IV.

<sup>194</sup> *In re Marriage Cases*, 183 P.3d at 427 (citing *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) and *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971)) (emphasis added).

<sup>195</sup> *Id.* at 430 (discussing the CCF brief’s arguments).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 431.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 433.

arguing that judges need to recognize the balance of power in a democratic system.<sup>200</sup> While it does not directly cite the Judicial Watch brief, Justice Corrigan's dissent notes the particular need for restraint in constitutional interpretation, and states that the judiciary should be extremely cautious when interpreting statutes embattled in an ongoing debate when the voters have not yet settled the issue.<sup>201</sup> While she stated her belief that same-sex couples should be allowed to call their unions marriage, her dissent was based on the premise that "[t]he process of reform and familiarization should go forward in the legislative sphere and in society at large."<sup>202</sup>

#### VIII. THE NEXT STEP

Campaign for California Families filed a stay, requesting that same-sex marriages not be allowed until California voters decide whether to amend the state constitution to ban same-sex marriage in the November 2008 election. The California Supreme Court denied the stay and declared the ruling in *In re Marriage Cases* final at 5 p.m. on June 16, 2008.<sup>203</sup> That same day, counties began issuing marriage licenses to same-sex couples.<sup>204</sup> However, an initiative to constitutionally ban same-sex marriage has qualified to appear on the ballot in November 2008.<sup>205</sup> If passed, the constitutional amendment will overrule the court's decision and define marriage as between a man and a woman in California. A state constitutional ban would mean that any same-sex marriages previously performed in California would no longer be valid or recognized under state law.

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<sup>200</sup> See Judicial Watch Brief, *supra* note 169.

<sup>201</sup> *In re Marriage Cases*, 183 P.3d at 471 (Corrigan, J., dissenting).

<sup>202</sup> *Id.* at 470.

<sup>203</sup> See News Release No. 31, Judicial Council of California, California Supreme Court Denies Rehearing and Stay in Marriage Cases (June 4, 2008), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR31-08.PDF> (last visited Sept. 27, 2008).

<sup>204</sup> Wyatt Buchanan et al., *Wave of Weddings for Bay Area Same-Sex Couples*, S.F. CHRON., June 17, 2008, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/06/17/MND911A5DK.DTL&hw=Wave+of+weddings+for+Bay+Area+same+sex+couples&sn=004&sc=646>.

<sup>205</sup> If passed, Proposition 8 will change the California Constitution "to eliminate the right of same-sex couples to marry in California." See SEC. OF STATE, CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 54 (Aug. 11, 2008) (providing the "official title and summary" for Proposition 8 as prepared by the Attorney General), available at <http://www.voterguide.sos.ca.gov/title-sum/pdf/prop8-title-summary.pdf>. For the full text of Proposition 8, see *id.* at 128, available at <http://www.voterguide.sos.ca.gov/text-proposed-laws/text-of-proposed-laws.pdf#prop8>.