



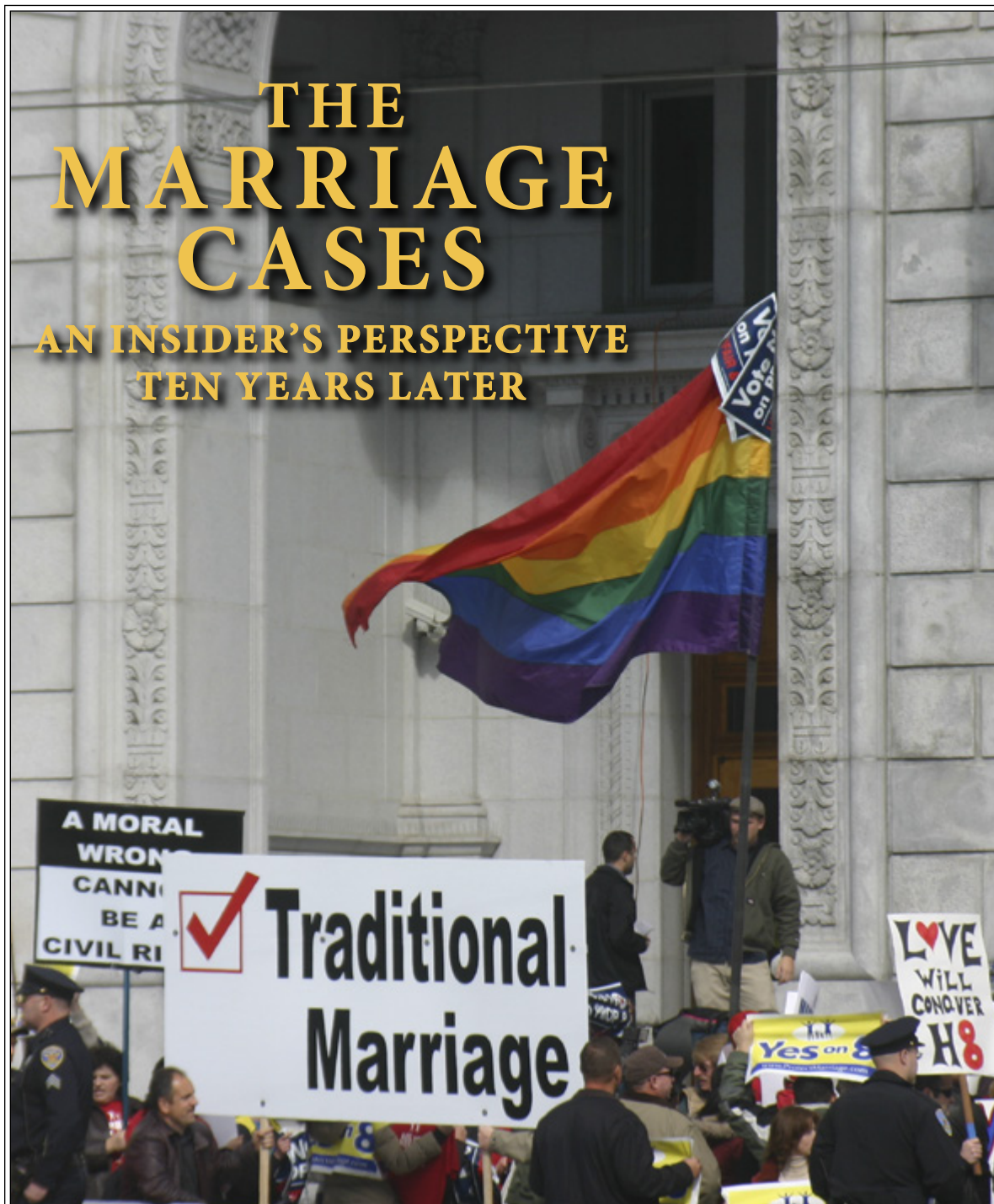
CALIFORNIA SUPREME COURT

Historical Society

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THE MARRIAGE CASES

AN INSIDER'S PERSPECTIVE
TEN YEARS LATER



The Story of *In re Marriage Cases*:

OUR SUPREME COURT'S ROLE IN ESTABLISHING MARRIAGE EQUALITY IN CALIFORNIA

BY JUSTICE THERESE M. STEWART*



Therese M. Stewart, then of the Office of the San Francisco City Attorney, prepares to speak at a press conference after arguing in support of marriage equality before the California Supreme Court on Tuesday, May 25, 2004.

AP PHOTO / JEFF CHIU

AT A FEW minutes before 10:00 a.m. on Thursday, May 15, 2008, attorneys who had worked for San Francisco litigating *In re Marriage Cases*¹ were assembled in my City Hall office. We trolled the California Supreme Court's website as we waited for the decision we'd been promised would be forthcoming, in a notice posted by the Court the day before. Some were optimistic, others apprehensive. I felt butterflies below my ribcage, nearer to my heart than my stomach. Dennis Herrera, my boss and the San Francisco city attorney, flitted in and out along with Matt Dorsey, our press guy, impatient for any news. Across the plaza at the courthouse was Matt's assistant, Lexi Thompson, whom we'd sent to get a hard copy of the opinion in case the Court's website couldn't handle the heavy

traffic we knew it was receiving. After what felt like an eternity, we heard a sound in the distance that seemed like cheering. We wondered whether the anti-marriage equality forces waiting at the courthouse had the numbers to make such a sound carry all the way across the plaza. We were confident the pro-marriage forces did. Still, we wanted a firmer answer than that. We couldn't immediately access the opinion online and the waiting became almost unbearable. Finally, the phone rang, and I answered it. "Lexi, is that you?"

Lexi was crying, and I had trouble understanding her. She was crying because she thought we had won, but she wasn't sure. She had tried to glean the answer from the opinion but it wasn't jumping out at her.

"Take a deep breath," I told her. "O.K., now start reading. From the beginning." I put the phone on speaker. Lexi started to read. She kept reading. And reading. And reading. The answer wasn't forthcoming. (Later I would have occasion to describe the opinion. "Pithy" was not one of the words I used.) While Lexi was reading the hard copy aloud to us on speakerphone, my colleague Amy Margolin succeeded in pulling up the opinion from the Court's website. As she quickly scanned the opinion she began

* Therese M. Stewart is an associate justice on the California Court of Appeal, First Appellate District, Division Two, in San Francisco. Before joining the Court in 2014, she served for 12 years as the chief deputy city attorney for the City and County of San Francisco. In that capacity, she litigated a number of groundbreaking cases on behalf of the city, including *In re Marriage Cases*.

exclaiming. We won. On fundamental rights grounds, on privacy grounds and on equal protection grounds. Not just the rights that go along with marriage. The state could not offer us a lesser name. Our family relationships were entitled to the same dignity as opposite-sex couples' relationships received from the state. We had won the full right to marry. That moment we had been waiting for was a long time in coming.

BY "LONG TIME," I DON'T MEAN THE FEW, albeit agonizing, minutes we sat there and waited for the opinion that day. And I don't even mean just the four-year period between filing the case and the Supreme Court's decision, when we presented evidence and argued the case in the Superior Court, Court of Appeal and California Supreme Court. I mean the many decades leading up to *In re Marriage Cases*, during which LGBT lawyers and organizations fought for incremental change to gain protection and acceptance for themselves and their intimate relationships. The issues had been far ranging, from child custody battles to gay bars' liquor licenses, police harassment and entrapment to discrimination by landlords and employers, exclusion from federal and state employment and military service to intelligence agencies' denial of security clearances, civil unions and domestic partnerships to equal benefits for employees in same-sex relationships, funding for HIV/AIDS to will contests and disputes over assets of those who died.

There had been many losses and setbacks for the movement, perhaps most significant the U.S. Supreme Court's 1986 decision in *Bowers v. Hardwick*² holding that states could criminalize same-sex intimacy without violating due process. In the wake of that decision, all 12 of the federal circuit courts rejected equal protection claims brought by LGBT people challenging discriminatory treatment. In the post-*Bowers* era, there was no safe harbor in the federal courts and no federal constitutional protection for gay people.

Perhaps in light of this, the right to marry, which many understood was a linchpin to full LGBT equality, had seemed virtually unattainable throughout the 20th century. In 2003, however, two auspicious events changed the legal landscape. In June of that year, the U.S. Supreme Court reversed its prior holding in *Bowers*, and held a Texas law making it a crime for two persons of the same sex to engage in intimate sexual conduct impinged on individuals' exercise of their liberty interests protected by the Due Process Clause and violated the federal Constitution. That case was *Lawrence v. Texas*.³ Five months later, in a case called *Goodridge v. Department of Public Health*,⁴ the Supreme Judicial Court of Massachusetts held that limiting the protections, benefits and obligations of civil marriage to opposite-sex couples lacked a rational basis and violated the Massachusetts Constitution's equal protection provisions.

SOMETIMES, WHAT IS ATTAINABLE IS IN THE EYE OF THE BEHOLDER. In California, at least, the first person to assert unequivocally that our state Constitution guaranteed same-sex couples the right to marry was an outsider, someone not part of the LGBT movement. Someone not chastened by the loss in *Bowers* and the grave harms it had visited on LGBT people in the ensuing decades. Someone who, though not a lawyer, understood basic constitutional principles of liberty and equality and believed those principles meant LGBT couples and families should be treated like all others. That someone was San Francisco's then-mayor, Gavin Newsom.

On February 10, 2004, the city attorney and I met with the mayor and a few members of his staff in his office just around the corner from ours. He had attended Pres. George W. Bush's State of the Union address at which the president had, in the wake of the Massachusetts court's ruling, called for a federal constitutional amendment defining marriage as an opposite-sex union. Angered by this, the mayor told us what he was thinking of doing. He was leaning toward Thursday, February 12. He would marry a lesbian couple widely known and beloved in the LGBT community, Del Martin and Phyllis Lyon. Whether he would marry others as well was up in the air. I understood him to be telling us the train was about to leave the station and he hoped we would be on board. Litigation would follow immediately, and there was little time to prepare.

The next two days were a rush of activity. We pulled together a team of deputy city attorneys to research the many legal issues the mayor's plan raised. Besides the basic argument in defense that the marriage laws' exclusion of same-sex couples violated several constitutional provisions, the more immediate issue was whether the mayor and local county clerk, who was responsible for issuing marriage licenses in San Francisco, could take it upon themselves to deviate from the state marriage statutes on the ground that as written they were unconstitutional. Everyone's gut reaction was they could not, but there was no case directly on point. The clerk, Nancy Alfaro, wanted to change the license application so that instead of referring to the "bride" and "groom," it would be gender neutral. Regulations did not allow local changes to the state form, but that was the least of our worries. We prepared a legend to go with the applications warning that it was unclear whether the government or third parties such as employers would treat the marriages as valid. It would not have been fair to couples who paid for marriage licenses not to warn them of the uncertain road ahead.

On Thursday, February 12, the mayor married Phyllis and Del in an emotional ceremony attended by many leaders in the local LGBT community, including Roberta Achtenberg, Kate Kendall, Joyce Newstadt, and

many others. Then the word went out. Same-sex couples who wished to marry would be allowed to obtain marriage licenses and have their marriages solemnized at San Francisco City Hall.

THE RESPONSE WAS OVERWHELMING. Couples flocked to City Hall applying for licenses and setting up appointments to have their marriages solemnized by deputy county clerks. A line snaked around the first floor of City Hall from the Clerk's Office to the Rotunda. The phones in the Clerk's Office began to ring nonstop. The clerk put out a call for volunteers to be trained and deputized to perform weddings. There was more demand than the city could handle. Members of the press were on hand to take photographs and memorialize the events.

I wasn't prepared for what awaited me when I stepped outside City Hall late that evening. Dozens of people with umbrellas and raincoats to ward off the drizzle lined the Polk Street side of City Hall. Many were sitting in folding chairs with blankets and sleeping bags. There were smiles and talking and laughter. Some were eating and drinking. The mood was festive. When I returned the next morning, they were still there, and the line had grown to encircle the entire city block around City Hall. I entered on the Grove Street side that morning, where the City Hall security staff allow those who work in the building to enter before it opens to the public. I went upstairs to my office on the second floor. I pulled up the shades on my balcony window and looked at all the people on the street below. Some waved. It was hard to hold back tears. The collective yearning of the gay community for equal treatment, for having the government recognize us as the families we are, was in full display that morning. I wondered whether Chief Justice Ronald M. George and the six associate justices, from their chambers across the plaza at the California Supreme Court building, could see the people who so wanted to marry that they had stayed outside in the rain all night in line around City Hall. I hoped they could and would see them.

On Friday, we received notice from Randy Thomasson, the head of an entity called Campaign for California Families (which we came to refer to as the "Campaign for *Some* California Families"), that he had filed a complaint and planned to seek injunctive relief on an ex parte basis the following Monday to stop the city from issuing marriage licenses to same-sex couples. Thomasson was represented by an organization called Liberty Counsel that was affiliated with the late Reverend Jerry Falwell's Liberty University. Later that day, we received notice of a second suit filed by a group called the Proposition 22 Legal Defense and Education Fund, which similarly had filed a writ against the mayor and county clerk and also planned to seek immediate writ relief on an ex parte basis the following week. (Proposition 22 was an initiative measure enacted by California

voters in 2000 stating "Only marriage between a man and a woman is valid or recognized in California.") Prop. 22 was represented by an anti-gay organization called the Alliance Defending Freedom or ADF. Both groups sought immediate injunctive relief to stop the City and County of San Francisco from issuing marriage licenses to same-sex couples.

Shortly after getting word of these two cases, the mayor announced that City Hall would be open through the Valentine's Day weekend for weddings. Every day of weddings counted. There was national and even international news coverage of the weddings at City Hall. Couples solemnly reciting marital vows before family members, including children. There was joy but also contemplation. Many who had come to engage in a political act found themselves grappling with a mix of emotions about what it meant to marry the person they most loved and to have that marriage recognized and honored by the government. Hearing and speaking the familiar words of the traditional wedding ceremony in reference to themselves and their loved ones evoked feelings far deeper than the political. There was a sense of finally being accepted and recognized, of belonging, of being a full citizen. It was a solemn moment for many, and the press photographs captured the quiet reflection and the sense of awe.

The depiction of gay and lesbian couples in this setting was a far cry from the usual media portrayals of gay people, drawn largely from the most colorful (and least clothed) participants in gay pride parades. That coverage had been used to demonize gay people, to portray a one-dimensional view that made us seem different from everyone else. Watching the weddings taking place on every balcony and niche and beneath the Rotunda of the grand Beaux-Arts building that is San Francisco's City Hall, I suddenly realized that time was of the essence. The more weddings that took place, the stronger would be the sense on the community's part that lesbian and gay relationships matter, just as much as heterosexual relationships do. And the longer the media coverage of this emerging sense could continue, the greater the impact the mayor's acts of civil disobedience would have. Lesbian and gay couples, with and without children, would be seen as the family relationships so many of them are.

WHEN THE TWO LAWSUITS WERE FILED, we bought a small amount of time by contending Thomasson's notice was untimely and had not provided the minimum time required for a hearing that Monday. In the meantime, the Prop. 22 case was set for an ex parte hearing on Tuesday, over which San Francisco Superior Court Judge James Warren would preside. Warren was the grandson of the late Chief Justice Earl Warren and was known as a highly intelligent and thoughtful judge.



The San Francisco City Hall was almost surrounded by people wanting to get married on Valentine's Day 2004.

KURT ROGERS / SAN FRANCISCO CHRONICLE / POLARIS

It was fitting to have such an historic case begin before Warren.

Our strongest argument for staving off immediate relief that did not require Warren to make a constitutional ruling was that the petitioners could not show they would suffer any irreparable harm if the court did not grant immediate relief. I remember Robert Tyler, the ADF lawyer who appeared for Prop. 22, arguing that if men could marry other men and women could marry other women, then a person could marry their dog or a tree. Offensive as this argument seemed, drawing the not-so-veiled analogy between homosexuality and bestiality, I recall trying to make light of it, telling Judge Warren that, as a “dog person” I had deep affection for my dogs, but the idea that allowing same-sex couples to marry would produce a wave of requests for licenses to marry dogs and trees seemed far-fetched. In the end, our main argument — that petitioners had failed to show that allowing same-sex couples to continue to marry for a brief period would cause them or anyone else irreparable harm — carried the day. Instead of issuing the equivalent of a temporary restraining order, Judge Warren issued an order to show cause requiring San Francisco to return three weeks later to argue why he should not issue preliminary injunctive relief. A day or two later, Thomasson presented his ex parte motion to Judge Ronald Quidachay, who followed Judge Warren’s reasoning and set the show cause hearing in that case for the same date and time as the Prop. 22 case.

As the weddings continued into the middle of February, political pressure from various quarters, including the Governor’s Office, was brought to bear on the attorney general, who at the time was former legislator

Bill Lockyer. Gov. Arnold Schwarzenegger issued press releases stating that there was chaos and anarchy at City Hall, and that if the attorney general did not step in and put a stop to the weddings violence might ensue. There was no such risk, but eventually, on February 27, 2004, the attorney general filed an original proceeding in the California Supreme Court requesting a writ of mandate and immediate injunctive relief to stop the weddings. The day before that filing, ADF, this time representing an individual California taxpayer named Lewis, had similarly filed a petition for writ of mandate in the state’s highest court. We wrote to the Court asking that it not take action before allowing us to file an opposition. The court ordered us to respond to both petitions by March 5.

ON THE AFTERNOON OF MARCH 11, 2004, six days after we filed our opposition papers in both cases, the Supreme Court issued orders requiring us to “show cause . . . why a writ of mandate should not issue, directing respondents to apply and abide by the [provisions of the Family Code barring same-sex couples from marrying] in the absence of a judicial determination that these statutory provisions are unconstitutional.” There was also a directive, and it was unequivocal. Pending the Court’s determination of the two original writ proceedings (known as *Lockyer v. City and County of San Francisco*⁵ and *Lewis v. Alfaro*⁶), city officials were to enforce and apply the Family Code provisions as written, without regard to their “personal view of the constitutionality of such provisions,” and “to refrain from issuing marriage licenses or certificates not authorized by such provisions.” The Court also made clear that in these proceedings it would decide only whether city

officials were “exceeding or acting outside the scope of their authority” and would not decide whether the Family Code provisions barring same-sex couples from marrying violated our state Constitution. Perhaps most significant, the Court said its order did “not preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes.”

On reading the order, one of my young colleagues, distraught that the Court had put a stop to the weddings, burst into tears. I had a different reaction. The weddings had begun on February 12, and it was now March 11. We had kept the weddings going, with the attendant favorable national and international media coverage about same-sex families and marriage equality, for a full month. When the weddings began, neither I nor the city attorney had been confident we could avoid a stay or injunction against city officials for even a *week*, and our efforts had supported the mayor in achieving forward momentum that already was longer lasting than we had dared to hope. Even better was the sentence in the Court’s order that we viewed as an invitation to continue our effort to overturn the marriage laws by starting anew in the Superior Court.

IT WASN’T NECESSARILY A BAD THING that the Court had declined to decide the constitutionality of the marriage statutes at this juncture. The tenor of the Court’s order suggested to me, at least, that it wasn’t particularly pleased with the mayor or the city. The George Court was known for being somewhat cautious and incremental in its approach to the evolution of the law. I thought it likely the Court viewed the mayor’s actions as a threat to the rule of law and an encroachment on its own authority to say what the state Constitution means, and these beliefs were borne out when we argued the *Lockyer* case in May of that year and in the Court’s opinion, issued in August. Another concern about having the Court address the constitutional merits immediately was that the Legislature had recently enacted our state’s first comprehensive domestic partner law, known as AB 205, and that law had not even taken effect yet. I feared the Court would view that law as providing an adequate substitute for marriage to California’s LGBT citizens. Having the merits of the constitutionality of the marriage statutes wait for another day, when the Court would not be so focused on the mayor and his civil disobedience and the domestic partner law would not be so recent, seemed to me a good thing. More time and lower court proceedings in which these issues could percolate was, on balance, a positive development.

Wasting no time, we took the Supreme Court up on its invitation that very afternoon by filing a new lawsuit on behalf of San Francisco challenging the marriage statutes under the California Constitution’s equal

protection, liberty and privacy clauses. The next day, our friends at the National Center for Lesbian Rights (NCLR), Lambda Legal Defense and Education Fund and the ACLU of Northern California filed a companion lawsuit on behalf of lesbian and gay couples who wished to marry. The Judicial Council consolidated those and other cases (including the Prop. 22 and Thomasson cases), which collectively came to be known as “*In re Marriage Cases*,” before Judge Richard Kramer in San Francisco Superior Court. It would be another four years before these cases, and the issue of whether the state Constitution guaranteed its LGBT citizens full equality in regard to their family relationships, reached the California Supreme Court.

There was a flurry of activity at the City Attorney’s Office in response to *In re Marriage Cases*. Many lawyers offered to work on any project we needed help on. And there were many. Lawyers at my former law firm worked on the case pro bono. We interviewed lesbians, gay men and their families about how denial of the right to marry had affected them, and prepared declarations for those who had compelling stories to tell. My favorites included Beilin Zia, a 70-year-old Chinese immigrant who told us about how important marriage is in Chinese culture, how all of her children save one had married, and that one, her daughter Helen, had a partner, Lia, whom she viewed as a daughter but did not know how to introduce to her friends. Another favorite was 16-year-old Michael Allen Quenneville, whose moms were lesbians. In his words, “Domestic partnership [is] not the same as marriage. It’s less than marriage and everyone knows it.”

I tasked interns in our office with preparing binders on each of the California Supreme Court justices that would include general information about them and their families, their rulings on matters directly affecting LGBT people, and their opinions on other issues within the umbrella of constitutional privacy, liberty and equal protection jurisprudence. They prepared a pressboard wall hanging for me with a photo of the trial court judge and each of the Supreme Court justices, including descriptions of them and how they had voted in recent LGBT cases. That pressboard would hang on my wall for the next four years as we contemplated how our arguments might be received by our ultimate audience.

IN AUGUST 2004, THE CALIFORNIA SUPREME COURT issued its ruling in the *Lockyer* and *Lewis* cases. Its ruling that the mayor and other city officials lacked the power to decline to enforce the state marriage laws based on their own view that the law as written was unconstitutional was not unexpected. It had been clear from the argument in May of that year, if not earlier, that this was where the Court was headed. Though not a surprise, it was nonetheless a disappointment that the Court invalidated all of the approximately 4,000 marriages of



LEFT: *The first legally married same-sex couple in San Francisco are married by City Assessor/Recorder Mabel Teng in her office at City Hall. Phyllis Lyon and Del Martin, who had by then been together for 51 years, say their vows.*

LIZ MANGELSDORF / SAN FRANCISCO CHRONICLE / POLARIS



RIGHT: *Holding twin daughters Sophia and Elizabeth, Eric Etherington (LEFT) exchanges marriage vows with Doug Okun in front of Marriage Commissioner Richard Ow.*

PAUL CHINN / SAN FRANCISCO CHRONICLE / POLARIS

same-sex couples that had been solemnized by the city in 2004. The Court ordered the city to void the licenses and to refund all fees paid by the couples. There were dissents on that point by Justices Joyce L. Kennard and Kathryn M. Werdegard, which softened the blow. The language of Justice Kennard's opinion was promising.⁷ But I wondered whether the majority understood the effect this part of its ruling would have on the couples, whom it had not allowed to intervene in the case to make the argument as to why the Court should leave those marriages intact. I tried to view that part of the ruling from the Court's perspective. Even apart from the fact that it had been quite annoyed at the mayor and the city for taking the law into their own hands and, as Justice Marvin R. Baxter put it at oral argument, "creating this mess," the Court was concerned about the uncertainty and potential litigation that could arise if employers, insurers, government agencies or others declined to recognize the marriages.⁸

IN THE SPIRIT OF THE MAXIM THAT THE BEST DEFENSE IS A GOOD OFFENSE, we quickly put the loss in *Lockyer* behind us and focused on our constitutional challenge to the marriage laws. In my mind's eye, I had envisioned a trial on the factual issues at the core of the case. The Prop. 22 and Thomasson opponents made all manner of assertions about gay people, our relationships, our parenting and the dire effects allowing us to marry would have on society. They truly believed that being lesbian or gay was a "choice," that making that "choice" represented a form of mental illness, that our relationships were all about promiscuity and sex and bore no resemblance to family, and that we were out to convert straight people and especially children, into our deviant "lifestyle." Beyond that, we posed a threat to their

religious freedom because acceptance of homosexual relationships as a good thing was inconsistent with their religious beliefs. If the state condoned those relationships by recognizing them as marriages, it would be rejecting their firmly held religious beliefs that we were an abomination in the eyes of God. Through a trial on these issues, we could demonstrate the fallacy of these arguments, through a combination of lay witness testimony, expert testimony and skillful cross-examination of the purported experts and scholars our opponents would call. Many of these same individuals, who were far out of the mainstream of social science scholarship, had offered declarations and testimony in other cases. We knew what they were going to say, and we could meet their pseudo-science with experts of our own, whose scholarship would be far superior and difficult to challenge.

Our colleagues at NCLR, Lambda and the ACLU, who represented the gay and lesbian couples in the lead companion case, were not convinced a trial was the right course. This was a point of tension between us, but one that did not last long. Judge Kramer made it plain he had no interest in a trial. He wanted to decide the case on briefs, allowed all parties to submit whatever evidence they wished to present in declaration form, and set a schedule for argument.

Alongside NCLR and others, we argued the cases before Judge Kramer in December 2004. He asked questions of both sides but kept his cards close to the vest. His ruling came four months later in a thoughtful decision addressing only the sex discrimination claim. He held that by allowing men — but not women — to marry women, and allowing women — but not men — to marry men, the state was treating women and men differently based on their gender, and the marriage

statutes were therefore subject to strict scrutiny under our high Court's equal protection precedents in the gender discrimination arena. There was no compelling justification for that differential treatment. The decision was celebrated in the LGBT community, but with full awareness that it represented only the first leg of a three-part journey through the trial and appellate courts that would be required to secure marriage equality for same-sex couples in California.

IT WOULD TAKE ANOTHER YEAR AND A HALF for us to complete the second leg of the journey, and we would end it in a place far from where we wanted to be.

We fully briefed the cases in the First District Court of Appeal by May 2006. The case was assigned to a panel of Presiding Justice William McGuinness, Justice J. Anthony Kline, and Justice Joanne Parrilli, and we presented oral argument in July 2006. It was an all-day affair, with three sets of opponents (the state, Prop. 22 and Thomasson) arguing against each of four sets of plaintiffs. Perhaps not surprising to those who know him as an engaged and active participant in oral argument, Justice Kline dominated the questioning. There were robust discussions of U.S. Supreme Court liberty and privacy cases, along with California Supreme Court cases on the same subject. By the end of the day, all of the advocates were exhausted. I was optimistic that Kline was on our side, but McGuinness and Parrilli were harder to read. *The Recorder* published a cartoon the following day depicting Justice Kline on the bench speaking with arms outstretched, one hand in front of McGuinness's mouth and the other in front of Parrilli's.

I was in the middle of a mediation across the Bay in Oakland, when the intermediate court's ruling came down in October 2006. My office called and arranged for a copy to be delivered to me by messenger. During breaks in the mediation, I scoured the opinion. We had lost, with Justice McGuinness writing a lengthy majority opinion and Justice Parrilli concurring.⁹ The majority described the right at issue not as marriage, but as "same-sex" marriage and held that right was not protected by either due process or the constitutional right to privacy, laws treating gay men and lesbians differently from heterosexual persons did not trigger strict scrutiny analysis, and the state's interest in "preserving the traditional definition of marriage" provided a rational basis for upholding the law. The majority seemed to say that because no California court had previously held strict scrutiny applied to laws treating lesbians and gay men less favorably than heterosexual persons and because Judge Kramer had declined to allow a trial on the issue, the Court of Appeal's hands were tied.¹⁰ The majority concluded it was not the courts' prerogative to "redefine" marriage. This was frustrating for many reasons, one of which was that Prop. 22 arguably prevented

the Legislature from acting and, although the Legislature had nonetheless adopted a marriage bill, the governor had vetoed it, saying the courts should decide the issue.¹¹ Needless to say, as an advocate and as a lesbian, I was deeply disappointed.

JUSTICE KLINE'S POWERFUL DISSENT WAS THE SILVER LINING. Its thrust was that the California Constitution's express right to privacy guaranteed the same autonomy to make personal decisions about one's life that had been recognized in U.S. Supreme Court and California Supreme Court cases.¹² The decision whether and whom to marry, which the Supreme Court had recognized in *Loving v. Virginia*¹³ and our Supreme Court had recognized even earlier in *Perez v. Sharp*,¹⁴ was one that lesbians and gay men, like the mixed-race couples in those cases, had a constitutional right to make. Justice Kline recognized that in order to address whether same-sex couples had a fundamental liberty and privacy interest in marriage, one had to understand the attributes of marriage that had led to its recognition as a constitutionally protected right. In his opinion, "[t]he marital relationship is within the zone of autonomy protected by the right of privacy not just because of the profound nature of the attachment and commitment that marriage represents, the material benefits it provides, and the social ordering it furthers, but also because the decision to marry represents one of the most self-defining decisions an individual can make."¹⁵ And, in his view, "there is nothing about same-sex couples that makes them less able to partake of the attributes of marriage that are constitutionally significant."¹⁶

In mid-November, the city, the NCLR plaintiffs and others filed their petitions for review. Even the State of California agreed review should be granted. The only party opposing review was Prop. 22. As expected, the Court granted review the following month. The third leg of our judicial journey was finally underway. I had not been entirely satisfied with our brief in the Court of Appeal and so decided to scrap it and start fresh. There were so many lenses through which we wanted the Court to see the issues. We started from a broad perspective, writing pieces on every topic we thought should be considered for inclusion in the brief: the California Supreme Court's proud history of independently construing our state constitutional guarantees; the evolution of civil marriage laws in California and the role the Court had played in that evolution; the efforts to attain marriage equality through political branches of the state government and their failure to get the job done; the history of discrimination against lesbians and gay men; the state constitutional right to privacy and its guarantee of the right to marry; the gender stereotypes at play in the exclusion of same-sex couples from marriage; the irrationality of providing almost all of the

state law rights and obligations of marriage to same-sex couples while denying them the title and stature of marriage; and the parallels between the separate domestic partner regime for same-sex couples and laws providing separate but unequal facilities to racial minorities prior to *Brown v. Board of Education*.¹⁷

OUR OPPONENTS, ESPECIALLY THE STATE, HAD AS THEIR RALLYING THEME “TRADITION,” reminiscent of the song from *Fiddler on the Roof*. They labelled marriage of opposite-sex couples “traditional marriage,” as if there was one enduring set of features that marriage had always represented. They labelled marriage of same-sex couples “same-sex marriage,” to suggest and emphasize that it was some entirely different idea that bore little, if any, resemblance to “traditional marriage.” We “the gays” were, in the view of Prop. 22 and Thomasson, out to destroy marriage as it had “always” been understood. And even if that wasn’t our intent, it would be the effect. As lesbians and gay men flocked to marriage, opposite-sex couples would cease to value it. They would run the other way. At best, they argued, the effect on the institution they called “traditional marriage” of allowing same-sex couples to marry was unknown and unknowable, and the state had the right to preserve the status quo until some unidentified future point when it would all become clearer. (How it would become clearer while the status quo was being maintained was not explained.)

We had a counter-narrative, of course, and it was rooted in what we viewed as a more accurate understanding of history. Marriage had evolved constantly since our country became a nation and California became a state. That evolution reflected, most significantly, a trend away from a model in which men had virtually all of the power in the relationship toward one that recognized women as equal partners. Thus, coverture had been rejected at California’s founding in favor of a community property model, both spouses now had the right to manage and use community property, both had equal rights and obligations to support and care for children, and divorce did not require either party to prove the other was at fault. Women now assumed the same obligations as men upon marrying, including those of supporting their spouses and children. Our opponents’ view of marriage as necessitating two individuals of the opposite gender was based on anachronistic notions of gender roles that had long since been removed from the law governing marriage.

This line of argument forced our opponents into reliance on the one difference between opposite-sex and same-sex couples that was undeniable: the former can readily reproduce and have children who are the genetic offspring of both, whereas the latter require some form of intervention to bring children into the

world. Our opponents’ reliance on this difference was rife with problems and contradictions. First, they had to argue, in essence, that children who are genetically related to both parents are the primary goal of marriage, which had never been the case. Opposite-sex couples adopt children, raise step-children, and use assisted reproduction just as same-sex couples do, and none had been ejected from marriage for failing to have the “right kind” of offspring, or for having none at all. Our opponents also argued opposite-sex couples can “accidentally procreate,” and that marriage exists to “channel” their procreation into stable family units. Because same-sex couples do not have children by “accident,” the argument goes, they have no need for such “channeling.” As NYU Law Prof. Kenji Yoshino wrote in an op-ed around this time, first anti-gay advocates argued gay people were not good enough for marriage and now they were arguing we were too good for it.

The state, represented by the attorney general,¹⁸ along with the Prop. 22 and Thomasson parties, was defending California’s marriage statutes. However, it sought to distance itself from the two organizations and some of their anti-gay rhetoric. In its briefs, the attorney general strenuously avoided arguments that lesbians and gay men would destroy marriage, that they or their families were unequal to others and that the law expressed a preference for families with “biological” children over any other kind of family. But avoiding these arguments left the state on a tightrope between our side and that of the anti-gay organizations. The state had basically three arguments, two of which presupposed the constitutional standard that would govern would be the lenient rational basis test rather than any higher level of scrutiny. Its first argument was that there was a state interest in preserving the tradition of opposite-sex marriage. The problem with this was that if “preserving tradition” provided a basis for preserving the status quo, it would be hard to find any law that would not survive constitutional scrutiny. A justification, even a questionable one, must be more than “we’re used to things this way.” The state’s second argument was that it had an interest in leaving the issue to the political branches to resolve. This argument suffered from the same flaw as the first one; it would render constitutional review, at least in rational basis cases, meaningless. The state was asking the Court to say it was not its job to decide the constitutionality of the law. The state’s third argument was in essence that domestic partnership was equal to marriage, that the two now had most or all of the same legal rights and benefits, and the difference in name and stature was constitutionally insignificant. The last argument was the one, it seemed to me, that had the best possibility of gaining traction.

After crafting many parts of a potential brief addressing these issues, we set about editing them, but even with

major cutting we were unable at first pass to reduce the draft below 200 pages. More had to be done. I enlisted a brilliant colleague, Paul Zarefsky, who had not been involved in the case to that point, to read the brief and suggest how it might be revised and pared down to a manageable size. Paul did much to improve and shorten the draft, but it was still too long. I could not bear even to look at it anymore and asked one of the chief drafters, Vince Chhabria, to take on the task of making the hardest decisions to reduce the brief to a size we could reasonably expect the Court would allow us to file. In the end, our brief focused most heavily on the equal protection-sexual orientation argument, and paid very little attention to the autonomy-privacy argument that was so central to Justice Kline's dissent in the Court of Appeal. However, we were confident that our colleagues at NCLR, Lambda and the ACLU would cover all the bases in their brief, and Justice Kline had done us the favor of making the privacy argument as well as it could possibly be made. There would also be more opportunities for briefing, both in reply to the state's and the Prop. 22/Thomasson respondents' briefs, in response to the 44 amicus briefs filed on both sides of the case and, as it turned out, in supplemental briefing the Court directed the parties to file addressing a series of questions raised by the Court.

BY THE END OF 2007, WITH ALL BRIEFS FILED, IT WAS TIME TO PREPARE FOR ORAL ARGUMENT. We held two in-house moot court sessions, one with myself and Shannon Minter, who would argue for the NCLR plaintiffs, and a set of moot judges drawn from our office and his, and another moot in which I argued to a panel of lawyers we selected from the community, including my former partner Jerry Falk and Stanford Law Prof. Pam Karlan. Finally, my last moot would be in front of an audience at Golden Gate Law School, where Prof. Myron Moscowitz organized moot sessions for cases to be argued in appellate courts around the state. The worst thing about moot is that you trip and fall in front of your colleagues, and in the case of the Golden Gate session, in front of an auditorium full of law students. The best thing is that questions come at you in ways you do not expect, providing you the opportunity to prepare for them before the real argument takes place. I recall that Myron asked a question that really stumped me. It went something like this: "What authority do you have supporting the proposition that the name 'marriage' has constitutional significance?" That question would stay with me for the next few weeks as I prepared for argument.

Eventually I realized that I had the answer to that question all along. I just had not anticipated the question coming at me in that form. Myron's point was the one I'd been worried about from the outset of the case. Why isn't the domestic partner law good enough? So

what if it has a separate name; why does that matter if it provides all of the rights and obligations that marriage provides to opposite-sex couples? Of course, I knew the answer to the question phrased that way. The name "domestic partnership" is new. It does not carry the prestige and universal understanding that comes with "marriage." The different title brings a different stature, a lesser stature in the case of domestic partnership. It is a parallel institution, yet one that is by dint of its separateness, necessarily unequal. But what authority could I cite for that proposition, I wondered. As I read back over all of the research we had done and the cases we had cited, it came to me. Segregation cases, and in particular, two pertaining to higher education, held the answer. I crafted a response to Myron's question using *Sweatt v. Painter*¹⁹ and *United States v. Virginia*.²⁰

As I practiced for oral argument, I tried out different parts of the argument on my partner, Carole Scagnetti. She persuaded me that I should not save this point for response to a question but rather should lead with it. And that is what I did.

ON MARCH 4, 2008, WE ARRIVED EARLY at the courthouse at 350 McAllister Street. On the fourth floor, the line of people eager to attend the argument stretched from the metal detector all the way to the end of the hallway. With my argument binder, the city attorney, and my colleagues Vince Chhabria and Danny Chou by my side, we bypassed the line, informed the security staff we were counsel, and were permitted into the courtroom. As other counsel arrived and those in attendance filed in, the room became noisy and I closed my eyes and focused on breathing to keep myself calm and keep my nervous energy in check. Eventually, the court clerk, Frederick Ohlrich, gave the argument day speech I had heard him give twice before, instructing counsel on Supreme Court etiquette and reminding us not to use justices' names if we were at all uncertain of them. I knew I would be the first to argue and I used the button that controls the podium to lower it to the height at which I could see my notes if needed and be sufficiently close to the microphone to be heard.

The gavel sounded three times. "The honorable chief justice and associate justices of the Supreme Court of California. Hear ye, hear ye, hear ye. The Honorable Supreme Court sitting en banc is now in session. Please be seated." The case was called, we stated our appearances and the argument began. After a brief preface about what I intended to address, I began.

"Words matter. Names matter. We know that from cases like *Sweatt v. Painter* and *United States v. Virginia*. In those cases, the Supreme Court held that the injustice of excluding blacks and women from institutions of higher learning that were highly regarded and rich in traditions and prestige could not be remedied



Therese M. Stewart, representing the San Francisco City Attorney's office, gestures during her argument in support of marriage equality before the California Supreme Court in San Francisco, Tuesday, March 4, 2008.

AP PHOTO / PAUL SAKUMA, POOL

by creating new and separate schools that lacked all of those qualities.”

Chief Justice George interrupted with the first question and I forgot about the camera, the audience, my opponents and my colleagues. It was a conversation between the justices and me, and in that moment, nothing else mattered. The justices were, of course, well prepared, and their questions went right to the heart of the matter. I answered them as directly as I could, and my 30-minute argument flew by.

The chief was engaged and asked the lion's share of the questions, or so it seemed to me that day. That said, all six of the associate justices asked challenging questions. At some point in the argument I became confident we had the chief on our side. He spoke eloquently in asking a question about the institution of marriage and how it had evolved over the decades since our Constitution was first adopted. I don't remember all of what went into my strong conviction that we had his vote, but I do remember feeling certain that we did by the time I sat down. Justice Ming Chin asked a number of questions about domestic partnership and why I contended it wasn't equal to marriage, and Justices Baxter and Carol A. Corrigan also asked difficult questions focused on why this issue wasn't one for the Legislature rather than the Court. Justice Kennard paraphrased our arguments and asked me to confirm this was what we were arguing. I had hoped to get her vote ever since she dissented from

the nullification of the licenses in the *Lockyer* case. Justices Werdegar and Carlos R. Moreno held their cards close to the vest. Nonetheless, when I sat down I was certain we had won the case. It had always seemed to me that our success or failure would depend on the chief justice. He was cautious, but a strong leader. If he was with us, I felt certain at least three justices would join him. I hoped we might get more, but it didn't matter. To win, we needed four, and that was good enough.

I whispered in my colleague Vince's ear when I sat down. “We are going to win.” He looked back at me with a little skepticism, not sure why I was so sure. Perhaps it was as much what I felt in my interactions with the justices that day as it was the questions they'd asked. Whatever it was, I felt certain.

Shannon Minter did an outstanding job arguing for our side, responding to a series of challenging questions, such as whether the authors of the state Constitution contemplated same-sex couples marrying, whether by adopting the domestic partner law the Legislature had conceded that same-sex couples were entitled to equal treatment, and whether if that were the case, the Legislature should be concerned that by enacting progressive laws it would enshrine them into our Constitution. Justice Baxter asked how the voters could have acted irrationally in adopting Prop. 22 given that at the time they adopted it no state or country permitted same-sex couples to marry. Shannon deftly responded by observing



Supporters and opponents of marriage equality gathered in the plaza outside San Francisco City Hall and the California Supreme Court as the Court heard arguments on marriage equality, March 4, 2008.

PHOTO: DEX CRAIG / CALIFORNIA JUDICIAL COUNCIL

that the same could be said of the interracial marriage law at the time it was adopted; even by the time the California Supreme Court struck that law down, few, if any, states permitted interracial marriage.

The Prop. 22 and Thomasson lawyers faced an equally challenging series of questions, and seemed not to appreciate their audience. They had backed themselves into a corner by arguing that the ideal family is one with “biological” children, apparently unaware that Justice Moreno had an adopted child and that none of the justices were receptive to the argument that the marriage laws are solely focused on procreation.

Perhaps predictably, Deputy Attorney General Chris Krueger, who argued for the state, made a yeoman’s effort but struggled mightily to stay on the tightrope the state’s arguments had placed him on. He made a valiant effort to defend the law in the only way he could without demeaning lesbians, gay men and their families. I felt sorry for him. But not nearly sorry enough to want him to prevail.

WE RETURN NOW TO MAY 15, 2008. By about 10:10 a.m. after what had seemed like an eternity, we finally had the California Supreme Court’s opinion and were reading it. By the end of the introduction, at page 12 of the slip opinion, we understood finally that we had indeed won the case. The Chief Justice wrote:

One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple’s right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of “marriage” exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex

couples such equal dignity and respect. We therefore conclude that although the provisions of the current domestic partnership legislation afford same-sex couples most of the substantive elements embodied in the constitutional right to marry, the current California statutes nonetheless must be viewed as potentially impinging upon a same-sex couple’s constitutional right to marry under the California Constitution.

Furthermore, the circumstance that the current California statutes assign a different name for the official family relationship of same-sex couples as contrasted with the name for the official family relationship of opposite-sex couples raises constitutional concerns not only under the state constitutional right to marry, but also under the state constitutional equal protection clause. . . .

As we shall explain, . . . we conclude that strict scrutiny . . . is applicable here because (1) the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents — like gender, race, and religion — a constitutionally suspect basis upon which to impose differential treatment, and (2) the differential treatment at issue impinges upon a same-sex couple’s fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple.²¹

As I attempted to quickly get my brain around the decision and its implications, Amy Margolin kept piping up enthusiastically to read snippets aloud. I sent her and everyone else out of my office. I can’t read or think with interruptions or background noise, and we had a conference call with NCLR and the press scheduled for later that morning.

THE MAJORITY OPINION WAS 121 PAGES; THERE WERE NO HEADNOTES. I skimmed over the Court's discussion of the procedural history of the cases, whether Prop. 22 and Thomasson had standing (it held they did not), and the domestic partner law to get to the meat of the decision. The Court held that the right to marry is a fundamental right protected by the state Constitution, that the right we were seeking was the same constitutionally protected right to marry that opposite-sex couples enjoy and not some other or different right called "same-sex marriage."

The opinion rejected our opponents' argument that excluding same-sex couples from marriage was necessary to protect marriage and opposite-sex couples. We would not deprive them of any rights and, by choosing to marry, would subject ourselves to all of the same obligations currently imposed on opposite-sex couples. It recognized the very real harm the separate regime imposed on gay people.

[R]etaining the traditional definition of marriage and affording same-sex couples only a separate and differently named family relationship will, as a realistic matter, impose appreciable harm on same-sex couples and their children, because denying such couples access to the familiar and highly favored designation of marriage is likely to cast doubt on whether the official family relationship of same-sex couples enjoys dignity equal to that of opposite-sex couples. . . . Finally, retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples may well have the effect of perpetuating a more general premise — now emphatically rejected by this state — that gay individuals and same-sex couples are in some respects "second-class citizens" who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples.²²

Its description of the scope of the right to marry was especially moving.

[O]ur decisions . . . recognize that the legal right and opportunity to enter into such an officially recognized relationship also is of overriding importance to the individual and to the affected couple. . . . The ability of an individual to join in a committed, long-term, officially recognized family relationship with the person of his or her choice is often of crucial significance to the individual's happiness and well-being. The legal commitment to long-term mutual emotional and economic support that is an integral part of an officially recognized marriage relationship provides an indi-

vidual with the ability to invest in and rely upon a loving relationship with another adult in a way that may be crucial to the individual's development as a person and achievement of his or her full potential.

Further, entry into a formal, officially recognized family relationship provides an individual with the opportunity to become a part of one's partner's family, providing a wider and often critical network of economic and emotional security. . . . The opportunity of a couple to establish an officially recognized family of their own . . . also permits the couple to join the broader family social structure that is a significant feature of community life. Moreover, the opportunity to publicly and officially express one's love for and long-term commitment to another person by establishing a family together with that person also is an important element of self-expression that can give special meaning to one's life. Finally, of course, the ability to have children and raise them with a loved one who can share the joys and challenges of that endeavor is without doubt a most valuable component of one's liberty and personal autonomy. Although persons can have children and raise them outside of marriage, the institution of civil marriage affords official governmental sanction and sanctuary to the family unit, granting a parent the ability to afford his or her children the substantial benefits that flow from a stable two-parent family environment, a ready and public means of establishing to others the legal basis of one's parental relationship to one's children . . . and the additional security that comes from the knowledge that his or her parental relationship with a child will be afforded protection by the government against the adverse actions or claims of others.²³

By the time of the conference call, when I had read as much of the opinion as I could, it was difficult to stanch the flow of emotions within me that resulted from the realization of just how well the Court understood not only our arguments, yet our experiences as people who had been treated as outsiders for most of our lives. But, as had been the case from the beginning of this odyssey, there was no time for feelings. We had a press conference to cover and celebrations to attend.

THE FOLLOWING DAYS AND WEEKS WERE FILLED with reading and responding to new pleadings and briefs submitted by our opponents and their supporters, in a last-ditch effort to get the Court to stay its decision, and advising city officials about the meaning of the decision and when the decision would become final and about their plan to re-open City Hall to weddings of same-sex couples.

At some point, I received a call from Howard Mintz, a reporter from the *San Jose Mercury News*, who had heard that I planned to marry my partner of 16 years. He asked me how it felt to be getting married after working on the *Marriage Cases* for the last four years. I did not expect it to happen, but his question pulled out the cork that had kept in the bottle emotions that had been fermenting for as long as I had been working on the case, and probably longer. In that brief moment, the emotions flowed, unchecked. I tried to say something cogent to Howard but couldn't hold back tears. I think he was stunned, and I certainly was. After the call, I tried to put the cork back in, which was prudent because, as it turned out, we were far from done.

THANKS TO CHIEF JUSTICE GEORGE AND THE CALIFORNIA SUPREME COURT, Carole and I were legally married at City Hall in August 2008. One could view the victory in *In re Marriage Cases* as short lived since about five months after the Court issued it the voters enacted Proposition 8, which amended our state Constitution to explicitly deny marriage to same-sex couples. But I don't view it that way at all. Key tenets of the Court's decision survived Proposition 8, including that in all contexts but marriage in California strict scrutiny applies to classifications that distinguish LGBT people from others. More than that, the decision served as a foundation upon which subsequent legal victories were won, including state supreme court decisions in Connecticut,²⁴ Iowa,²⁵ and other states, the federal court decisions that restored marriage equality in California,²⁶ and the United States Supreme Court's 2015 decision in *Obergefell v. Hodges*,²⁷ holding that same-sex couples have the same federal constitutional right to marry that opposite-sex couples enjoy. *In re Marriage Cases* was a landmark decision that, in the end, was not diminished by Proposition 8. It was Proposition 8, and not *In re Marriage Cases*, that ended up being a blip on the radar screen of the movement for LGBT equality. That movement continues, and I have no doubt that *In re Marriage Cases*, like *Perez v. Sharp* before it, will continue to provide meaning to the courts in their role of interpreting and enforcing our state constitutional guarantees. ★

ENDNOTES

1. The California Supreme Court's 2008 decision in the case may be found at 43 Cal.4th 757.
2. *Bowers v. Hardwick* (1986) 478 U.S. 186.
3. *Lawrence v. Texas* (2003) 539 U.S. 558.
4. *Goodridge v. Department of Public Health* (Mass. 2003) 798 N.E.2d 941.
5. *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055.

6. *Lewis v. Alfaro* was addressed in the same opinion as *Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055.

7. *Lockyer*, *supra*, 33 Cal.4th at p. 1132 [Kennard, J., concurring and dissenting] ["For many, marriage is the most significant and most highly treasured experience in a lifetime. Individuals in loving same-sex relationships have waited years, sometimes several decades, for a chance to wed, yearning to obtain the public validation that only marriage can give."].

8. *Id.* at p. 1117 ["[W]e believe it would not be prudent or wise to leave the validity of these marriages in limbo for what might be a substantial period of time given the potential confusion (for third parties, such as employers, insurers, or other governmental entities, as well as for the affected couples) that such an uncertain status inevitably would entail."].

9. *In re Marriage Cases* (2006) 49 Cal.Rptr.3d 675, 740, as modified on denial of reh'g (Nov. 6, 2006), review granted and opinion superseded (Cal. 2006) 53 Cal.Rptr.3d 317, and rev'd (2008) 43 Cal.4th 757.

10. See, e.g., *id.* at p. 712 ["California courts have not decided whether sexual orientation is a suspect classification under our state Constitution's equal protection clause"]; *id.* at p. 713 ["The trial court did not conduct an evidentiary hearing, and no clear factual record was developed addressing the three suspect classification factors"]; *id.* at p. 714 ["Lacking guidance from our Supreme Court or decisions from our sister Courts of Appeal, and lacking even a finding from the trial court on the issue, we decline to forge new ground in this case by declaring sexual orientation to be a suspect classification for purposes of equal protection analysis."].

11. See *id.* at pp. 685, 693, 696–697, 700–701, 705.

12. See *id.* 49 Cal.Rptr.3d at pp. 731–764 [Kline, J., dissenting].

13. *Loving v. Virginia* (1967) 388 U.S. 1.

14. *Perez v. Sharp* (1948) 32 Cal.2d 711.

15. *Id.* at p. 736.

16. *Id.* at p. 740.

17. *Brown v. Board of Education* (1954) 347 U.S. 483.

18. Bill Lockyer was the attorney general when the cases were initiated. By the time the California Supreme Court heard the cases in 2008, Jerry Brown held that office.

19. *Sweatt v. Painter* (1950) 339 U.S. 629.

20. *United States v. Virginia* (1996) 518 U.S. 515.

21. *In re Marriage Cases* (2008) 43 Cal.4th 757, 782–784.

22. *Id.* at pp. 784–785.

23. *Id.* at pp. 816–817, footnotes omitted.

24. See *Kerrigan v. Commissioner of Public Health* (Conn. 2009) 957 A.2d 407, 417, 419, 424, 433, 438, 453, 461, 472–475, 481–482.

25. *Varnum v. Brien* (Iowa 2009) 763 N.W.2d 862, 882, 885, 887, 890, 893–894, 906 & fn. 17.

26. *Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F. Supp. 921, 928, 956, 959, 976–977, 993–994, 1000; *Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052, 1065–1067, 1077, 1079–1080, 1087–1091 & fn. 12.

27. *Obergefell v. Hodges* (2015) 135 S.Ct. 2584; see *id.* at p. 2610.