IN RE MARRIAGE CASES, SAME-SEX MARRIAGE, AND THE CALIFORNIA SUPREME COURT AS CRITICAL SOCIAL MOVEMENT ALLY

CARLO A. PEDRIOLI*

"[R]etaining 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."[1]

INTRODUCTION

Since the 2003 Massachusetts Supreme Judicial Court opinion in *Goodridge v. Department of Public Health*,[2] which had legalized same-sex marriage in the Bay State, state supreme courts in New York, New Jersey, Maryland, Georgia, and Washington had stopped short of mandating that their governments provide for same-sex marriage.[3] The New Jersey Supreme Court had required that the same rights of marriage be available to same-sex couples but had not required that the package for those rights be labeled as *marriage*.[4]

At least at the state supreme court level, California would be much more like Massachusetts than New York, New Jersey, Maryland, Georgia, and Washington. California had "been on the cutting edge of civil rights issues," including when its Supreme Court had struck down a ban on interracial

* Professor of Law, Southern University, Baton Rouge, LA, U.S.A. J.D., University of the Pacific, Sacramento, CA, U.S.A, 2002; Ph.D., Communication, University of Utah, Salt Lake City, UT, U.S.A., 2005; Member, State Bar of California, U.S.A.

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[1] *In re* Marriage Cases, 183 P.3d 384, 402 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *abrogated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd*, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated*, Hollingsworth v. Perry, 570 U.S. 693 (2013) (deciding that the proponents of the constitutional amendment lacked standing to defend the case on behalf of state officials, who ultimately declined to defend it).

[2] 798 N.E.2d 941 (Mass. 2003).

[3] MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 116 (2013).

[4] JASON PIERCESON, SAME-SEX MARRIAGE IN THE UNITED STATES: THE ROAD TO THE SUPREME COURT 154–55 (2013).

marriage in 1948 in *Perez v. Sharp*,[5] action that the U.S. Supreme Court would not take until 1967.[6] Indeed, over the decades, the California Supreme Court had developed a "reputation as a judicial innovator."[7] On May 15, 2008, with its decision in *In re Marriage Cases*,[8] the seven-member California Supreme Court, then mainly populated by six Republican appointees and described as "moderately conservative" in nature, became the second state supreme court to legalize same-sex marriage, doing so by a four-to-three vote.[9] The Court issued a lengthy opinion of almost sixty pages.[10]

During the summer and fall of 2008, approximately 17,000 same-sex couples took advantage of their newly-granted civil right to marriage.[11] California law allowed for non-resident same-sex couples to marry in California, although, at the time, federal law did not require other states to recognize the marriages.[12]

Despite the numerous same-sex marriages that followed the Court's decision, the issue of same-sex marriage remained controversial in the Golden State. Since 1999, the California Legislature had passed several bills that provided increasingly extensive rights for domestic partners.[13] In the wake of the unauthorized issuance of marriage licenses to same-sex couples in San Francisco in 2004, which the city's Mayor Gavin Newsom[14] had promoted, the Democrat-controlled California Legislature had passed legislation in favor of same-sex marriage in 2005 and 2007.[15] In both 2005 and 2007, all legislative Republicans, as well as some Democrats, had opposed the bills.[16] Republican Governor Arnold Schwarzenegger had vetoed the same-sex marriage legislation in both cases.[17]

Like the state government, the public was divided on same-sex marriage, although increasingly less so as the 2000s progressed. In 2000, the public had voted approximately sixty-one percent to thirty-nine percent in favor of Proposition 22, which had declared, "[O]nly marriage between a man and a woman is valid or recognized in California."[18] In 2007, one poll indicated

[5] 198 P.2d 17 (Cal. 1948).

[6] Dan J. Bulfer, *How California Got It Right: Mining* In re Marriage Cases *for the Seeds of a Viable Federal Challenge to Same-Sex Marriage Bans*, 41 CAL. W. L. REV. 49, 91 (2010); Adam Liptak, *California Supreme Court Overturns Gay Marriage Ban*, N.Y. TIMES (May 16, 2008), http://www.nytimes.com/2008/05/16/us/16marriage.html [https://perma.cc/T3GN-TBKQ]. *See also* Loving v. Virginia, 388 U.S. 1 (1967).

[7] PIERCESON, *supra* note 4, at 189.

[8] 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *abrogated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd*, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated*, Hollingsworth v. Perry, 570 U.S. 693 (2013) (deciding that the proponents of the constitutional amendment lacked standing to defend the case on behalf of state officials, who ultimately declined to defend it).

[9] Liptak, *supra* note 6; Maura Dolan, *Gay Marriage Ban Overturned*, L.A. TIMES (May 17, 2008), http://www.latimes.com/news/la-me-gay-marriage17-2008may17-story.html [https://perma.cc/4Z65-EG4Y].

[10] *In re Marriage Cases*, 183 P.3d at 397–453.

[11] KLARMAN, *supra* note 3, at 120.

[12] Dolan, *supra* note 9.

[13] KLARMAN, *supra* note 3, at 120.

[14] In 2018, Newsom would be elected Governor of California. Tim Arango & Thomas Fuller, *Gavin Newsom Is Elected Governor of California*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/california-midterms-election.html [https://perma.cc/J965-S4GT].

[15] JOSEPH MELLO, THE COURTS, THE BALLOT BOX, AND GAY RIGHTS: HOW OUR GOVERNING INSTITUTIONS SHAPE THE SAME-SEX MARRIAGE DEBATE 78 (2016).

[16] PIERCESON, *supra* note 4, at 187.

[17] *Id.*

[18] KLARMAN, *supra* note 3, at 120.

that the state's public was divided evenly forty-six percent to forty-six percent on same-sex marriage,[19]and another poll of the same year showed forty-three percent support for same-sex marriage.[20]

Such division among the state government and the public was reflected before the Supreme Court as it prepared to issue its May 2008 decision. The Court received forty-five amicus curiae briefs from organizations with very different views on same-sex marriage.[21]

When the Supreme Court eventually issued its decision, the decision received sharply diverging responses. Lynn D. Wardle, a law professor at Brigham Young University, scolded the Court for exceeding its judicial authority.[22] Wardle described the opinion as a "radical departure from precedent" and more politics than law.[23] Kelly Shackelford, counsel for the Liberty Legal Institute, a non-profit law firm that opposed same-sex marriage, agreed, claiming, "This is outrageous judicial activism and should be a wake-up call to the country."[24] Mathew Stayer, who founded Liberty Counsel, which also opposed same-sex marriage, described the opinion as "outrageous" and "nonsense."[25] "No matter how you stretch California's Constitution, you cannot find anywhere in its text, its history or tradition that now, after so many years, it magically protects what most societies condemn," he stated.[26]

Meanwhile, from a very different vantage point, another set of perspectives appeared. San Francisco Mayor Newsom, who, four years before the Court legalized marriage for sexual minorities, had instructed San Francisco officials to issue marriage licenses to same-sex couples, acknowledged that he felt vindicated, stating, "I don't think we would have won—and I mean this sincerely, though I may be wrong—had we not put a human face on this issue."[27] He added, "So, for that I am proud of what we did in 2004."[28] Plaintiff Stuart Gaffney of the case just decided exclaimed, "I can finally say I will be able to marry John, the man that I love."[29] He continued, "Today is the happiest and most romantic day of our lives."[30] Evan Wolfson, who acted as executive director of Freedom to Marry, which supported same-sex marriage, observed, "This decision will give Americans

[19] *Id.*
[20] Dolan, *supra* note 9.
[21] *In re* Marriage Cases, 183 P.3d 384, 407 n.10 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *abrogated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd*, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated*, Hollingsworth v. Perry, 570 U.S. 693 (2013) (deciding that the proponents of the constitutional amendment lacked standing to defend the case on behalf of state officials, who ultimately declined to defend it).
[22] Lynn D. Wardle, *Restructuring Democracy or Lawlessness? Critical Reflections on* In re Marriage Cases, 14 NEXUS: CHAPMAN'S J.L. & POL'Y 91, 91–96 (2009).
[23] *Id.* at 93, 95.
[24] Robert Barnes & Ashley Surdin, *California Supreme Court Strikes Ban on Same-Sex Marriage*, WASH. POST. (May 16, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/05/15/AR2008051500589.html?sid=ST2008051502357 [https://perma.cc/38EJ-SLCD].
[25] Dolan, *supra* note 9.
[26] *Id.*
[27] Barnes & Surdin, *supra* note 24.
[28] *Id.*
[29] Dolan, *supra* note 9.
[30] *Id.*

the lived experience that ending exclusion from marriage helps families and harms no one."[31]

While acknowledging the role of activists who led the modern movement for same-sex marriage, this Article draws upon social movement theory in the field of communication to examine how the California Supreme Court played a leading role from within the establishment in furthering the social movement for same-sex marriage in the United States. The Article studies the various opinions in *In re Marriage Cases* to see how the members of the Court, divided four to three, constructed or refrained from constructing marriage as a right that ought to be available to sexual minorities. The Article progresses by providing a brief note on social movement theory in communication and examining the various opinions in *In re Marriage Cases*, including the opinion for the Court, one concurring opinion, and two concurring and dissenting opinions. The discussion should facilitate an enhanced understanding of state supreme court rhetoric of same-sex marriage and additionally provide some refinement of social movement theory, including with regard to how a faction within a fractured establishment can further a social movement.

I. A BRIEF NOTE ON SOCIAL MOVEMENT THEORY IN COMMUNICATION

In the field of communication, consideration of social movements became particularly intense during and shortly after the mid-1960s.[32] Between 1965 and 1980, communication scholars published over 200 studies of various aspects of social movements.[33] Such study is understandable given the great amount of social angst and the ensuing unrest that the 1960s produced. Since 1980, communication scholars have continued to examine social movements, although, in many cases, with a broader understanding of what can constitute rhetorical texts and events.[34] Of course, other fields such as political science and sociology have devoted great attention to social movements as well,[35] but the focus here will be on social movement theory in communication.

Social movements are "group action undertaken by social actors, including individuals, groups and organizations, for the purpose of affecting social and political change."[36] From the perspective of traditional social movement theory in communication, social movements have unfolded in a particular manner. Initially, individuals, who are generally relatively large in number,[37] are concerned with some aspect of society and seek change.[38]

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[31] Liptak, *supra* note 6.

[32] *See* Stephen E. Lucas, *Coming to Terms with Movement Studies*, 31 CENT. STATES SPEECH J. 255, 255 (1980).

[33] *Id.*

[34] Christina R. Foust, *"Social Movement Rhetoric": A Critical Genealogy, Post-1980*, *in* WHAT DEMOCRACY LOOKS LIKE: THE RHETORIC OF SOCIAL MOVEMENTS AND COUNTERPUBLICS 46, 53 (Christina R. Foust, Amy Pason & Kate Zittlow Rogness eds., 2017).

[35] Christina R. Foust & Kate Drazner Hoyt, *Social Movement 2.0: Integrating and Assessing Scholarship on Social Media and Movement*, 18 REV. COMMC'N 37, 38 (2018).

[36] Halim Rane & Sumra Salem, *Social Media, Social Movements and the Diffusion of Ideas in the Arab Uprisings*, 18 J. INT'L COMMC'N 97, 98 (2012).

[37] Lucas, *supra* note 32, at 255.

[38] Leland M. Griffin, *The Rhetoric of Historical Movements*, 38 Q.J. SPEECH 184, 184 (1952).

Different types of media are important in furthering the message of a social movement,[39] and leadership provides the face of the movement that the public recognizes.[40] The social movement agitates against the establishment, generally making the movement's presence known, and the establishment responds to movement activity, often in an attempt to control the social movement.[41] Social movements can constitute both phenomena and meaning.[42]

One important aspect of traditional social movement theory has been that social movements are not institutionalized.[43] From this perspective, a social movement is not part of the establishment,[44] and the social movement often tries to form its identity in such a manner as to separate itself from the establishment.[45] Indeed, the line between the social movement and the establishment is clear. Established institutions that change themselves do not constitute social movements, and, when a social movement becomes part of the status quo, the social movement is no longer a social movement.[46]

[39] Karma R. Chávez, *Counter-Public Enclaves and Understanding the Function of Rhetoric in Social Movement Coalition-Building*, 59 COMMC'N Q. 1, 6 (2011). Social movements can use media to convey logical and emotional discourses, verbal and nonverbal discourses, and some combination of these types of discourse. *See* KEVIN MICHAEL DELUCA, IMAGE POLITICS: THE NEW RHETORIC OF ENVIRONMENTAL ACTIVISM 14–22 (1999). *See also* Franklyn S. Haiman, *Nonverbal Communication and the First Amendment: The Rhetoric of the Streets Revisited*, 68 Q.J. SPEECH 371, 371 (1982) (discussing developments in nonverbal modes of protest). Although media concentration can be a challenge for a social movement that is trying to promote its message, more recent technologies can help a movement get around media concentration. *See* DELUCA, *supra*, at 88. *See also* Elise Danielle Thorburn, *Social Media, Subjectivity, and Surveillance: Moving on from Occupy, the Rise of Live Streaming Video*, 11 COMMC'N & CRITICAL/CULTURAL STUD. 52, 52 (2014) (discussing the use of live streaming in the 2012 Quebec student strike).

[40] CHARLES J. STEWART, CRAIG ALLEN SMITH & ROBERT E. DENTON, JR., PERSUASION AND SOCIAL MOVEMENTS 111–12 (4th ed. 2001). Study of social movements has focused on public rhetorical actions such as the "oratorical, material, visual, or performative and embodied." Chávez, *supra* note 39, at 2. However, some more recent research has examined non-public rhetorical actions that take place behind the scenes of social movements. *See, e.g.*, Roberta Chevrette & Aaron Hess, *"The FEMEN Body Can Do Everything": Generating the Agentic Bodies of Social Movement through Internal and External Rhetorics*, 86 COMMC'N MONOGRAPHS 416, 419–20 (2019).

[41] JOHN W. BOWERS, DONOVAN J. OCHS & RICHARD J. JENSEN, THE RHETORIC OF AGITATION AND CONTROL 4, 8 (2d ed. 1993); Erika Biddle, *Re-Animating Joseph Beuys' "Social Sculpture": Artistic Interventions and the Occupy Movement*, 11 COMMC'N & CRITICAL/CULTURAL STUD. 25, 29–30 (2014). Although traditional thinking has been that physical presence is important in social movements, more recent thinking has considered that physical absence may be important in some social movements. *See* Biddle, *supra*, at 29–30 (considering the Occupy movement of fall 2011). In some cases, physical absence may not be intentional. If unintentional, physical absence does not necessarily preclude participation, as individuals can participate remotely. A. FREYA THIMSEN, THE DEMOCRATIC ETHOS: AUTHENTICITY AND INSTRUMENTALISM IN US MOVEMENT RHETORIC AFTER OCCUPY 24, 43 (2022) (noting the availability of newer technologies and the possibility of donating financially).

[42] Lucas, *supra* note 32, at 258. For an argument that social movements constitute meaning as opposed to phenomena, see Michael Calvin McGee, *"Social Movement": Phenomenon or Meaning?*, 31 CENT. STATES SPEECH J. 233, 233 (1980). McGee argued that, for the rhetorical study of movements to become its own domain, such study should be hermeneutic as opposed to simply behavioral in nature. *Id.* at 241–42.

[43] Lucas, *supra* note 32, at 255–56; STEWART, SMITH & DENTON, *supra* note 40, at 5–6; Amy Pason, Christina R. Foust & Kate Zittlow Rogness, *Introduction: Rhetoric and the Study of Social Change*, *in* WHAT DEMOCRACY LOOKS LIKE: THE RHETORIC OF SOCIAL MOVEMENTS AND COUNTERPUBLICS 1, 2 (Christina R. Foust, Amy Pason & Kate Zittlow Rogness eds., 2017).

[44] STEWART, SMITH & DENTON, *supra* note 40, at 5.

[45] Jennifer Ann Peeples, *Downwind: Articulation and Appropriation of Social Movement Discourse*, 76 S. COMMC'N J. 248, 251 (2011).

[46] STEWART, SMITH & DENTON, *supra* note 40, at 5–6.

A classic example of a social movement is the civil rights movement of the 1950s and 1960s.[47] At that time, many African Americans responded to racially discriminatory laws and practices, such as those related to public accommodations and voting.[48] The civil rights movement found support in and inspiration from the Black church.[49] Martin Luther King, Jr., himself a pastor, was a principal face of the movement.[50] Leaders like King spoke out publicly, while they and their followers drew attention to their cause in the streets and elsewhere.[51] These developments received much-needed media coverage, particularly on television.[52] Meanwhile, Southern politicians tried, both rhetorically and physically, to resist the movement.[53]

Other examples of social movements include the movements for women's rights,[54] against the Vietnam War,[55] for Latino/a rights,[56] for indigenous rights,[57] for Palestinian rights,[58] against neoliberalism,[59] and to address the climate crisis.[60] Some social movements have developed specific names. The Me Too, Occupy, and Black Lives Matter movements, which respectively have demanded change regarding sexual harassment and assault of women,[61] socioeconomic inequality,[62] and police violence against Black people,[63] are three examples of such movements. Movements are not necessarily mutually exclusive of each other.[64]

The traditional perspective on social movements described above assumes a homogenous establishment that responds monolithically to the agitation of a movement. However, the establishment is not always

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[47] *See* Franklyn S. Haiman, *The Rhetoric of the Streets: Some Legal and Ethical Considerations*, 53 Q.J. SPEECH 99, 99–100 (1967).

[48] *Id.* at 99–100, 112; Jack Nelson, *The Civil Rights Movement: A Press Perspective*, 28 HUM. RTS. 3, 4 (2001).

[49] Dennis C. Dickerson, *African American Religious Intellectuals and the Theological Foundations of the Civil Rights Movement, 1930–55*, 74 CHURCH HIST. 217, 217–20 (2005).

[50] *Id.* at 217.

[51] *Id*; Haiman, *supra* note 47, at 99–100, 112.

[52] Nelson, *supra* note 48, at 4.

[53] Dan T. Carter, *Legacy of Rage: George Wallace and the Transformation of American Politics*, 62 J.S. HIST. 3, 6–7 (1996); Nelson, *supra* note 48, at 4.

[54] *See* Chávez, *supra* note 39, at 2. *See also* Kerith Woodyard & Kathryn Cady, *All The Working Woman's Friends: Protective Labor Legislation and the Early ERA Controversy*, 42 WOMEN & LANGUAGE 23, 23–25 (2019); Tiffany Lewis, *Mapping Social Movements and Leveraging the U.S. West: The Rhetoric of the Woman Suffrage Map*, 42 WOMEN'S STUD. IN COMMC'N 490 (2019).

[55] *See* Haiman, *supra* note 47, at 99.

[56] *See* Fernando Pedro Delgado, *Chicano Movement Rhetoric: An Ideographic Interpretation*, 43 COMMC'N Q. 446, 446 (1995); Stacey K. Sowards, *Dolores Huerta, the United Farm Workers, and People Power: Rhetorical Participation in Latina/o/x Suffrage and Social Movements*, 106 Q.J. SPEECH 285, 285–86 (2020).

[57] *See* Sibo Chen, *How to Discredit a Social Movement: Negative Framing of "Idle No More" in Canadian Print Media*, 13 ENV'T COMMC'N 144, 144–45 (2019).

[58] *See* Jennifer Hitchcock, *Framing Palestinian Rights: A Rhetorical Frame Analysis of Vernacular Boycott, Divestment, Sanctions (BDS) Movement Discourse*, 53 RHETORIC SOC. Q. 87, 87 (2023).

[59] *See* Shiv Ganesh & Cynthia Stohl, *Qualifying Engagement: A Study of Information and Communication Technology and the Global Social Justice Movement in Aotearoa New Zealand*, 77 COMMC'N MONOGRAPHS 51, 51–52 (2010).

[60] *See* Nicholas S. Paliewicz, *Making Sense of the People's Climate March: Towards an Aesthetic Approach to the Rhetoric of Social Protest*, 83 W.J. COMMC'N 94, 94–95 (2019).

[61] *See* Emma Frances Bloomfield, *Rhetorical Constellations and the Inventional/Intersectional Possibilities of #MeToo*, 43 J. COMMC'N INQUIRY 394, 400–01 (2019).

[62] *See* Biddle, *supra* note 41, at 26–27.

[63] *See* Chloe Banks, *Disciplining Black Activism: Post-Racial Rhetoric, Public Memory and Decorum in News Media Framing of the Black Lives Matter Movement*, 32 CONTINUUM: J. MEDIA & CULTURAL STUD. 709, 710 (2018).

[64] *See* Hitchcock, *supra* note 58, at 93–94.

homogenous and actually may be fractured in responding to agitation.[65] Indeed, engagement may take place within the establishment.[66] After the movement's initial agitation, engagement can occur between or among the factions within the power structure.[67] For instance, if a faction within the court system is receptive to a movement's message, the court system can be a point of entry into the system for agitators.[68] Presumably, if an internal faction is large or influential enough, the original agitators can do more than have their message heard, and significant social change is possible.

When, via a faction within the establishment, a social movement gains significant access to a limited part, but not all parts, of the establishment, the line between the social movement and the establishment becomes blurred. While the social movement may still exist outside the establishment, and factions of the establishment may attempt to control the social movement in response to the movement's agitation, a portion of the establishment nonetheless labors on behalf of the social movement. That pro-social movement faction of the establishment is neither the social movement itself nor the establishment that attempts to control the social movement. Thus, the pro-social movement faction of the establishment functions in a liminal rhetorical space that is theoretically provocative and suggestive of a need for some revision of traditional social movement theory in communication. This complicating dynamic of a strong pro-social movement faction of the establishment developed in *In re Marriage Cases*, and the consequences were profound.

II. OPINIONS OF THE CASE

On February 12, 2004, at the instruction of Mayor Newsom, the City and County of San Francisco started granting civil marriage licenses to individuals in same-sex relationships.[69] Weddings took place at San Francisco City Hall, across the street from the Supreme Court.[70] Various entities, including the Proposition 22 Legal Defense and Education Fund and the Campaign for California Families, took legal action, requesting that the state court system prevent San Francisco from issuing the marriage licenses.[71] Eventually, six proceedings, brought by parties that aimed to prevent or promote same-sex marriage, were pending in the California courts.[72] In three such proceedings, same-sex couples were agitating against the statewide status quo, the San Francisco government notwithstanding, that

[65] Carlo A. Pedrioli, *A Fractured Establishment's Responses to Social Movement Agitation: The U.S. Supreme Court and the Negotiation of an Outsider Point of Entry in* Walker v. City of Birmingham, 44 FREE SPEECH Y.B. 107, 108 (2010).

[66] *Id.* at 115.

[67] *Id.*

[68] *Id.* at 116.

[69] *In re* Marriage Cases, 183 P.3d 384, 402 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *abrogated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd*, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated*, Hollingsworth v. Perry, 570 U.S. 693 (2013) (deciding that the proponents of the constitutional amendment lacked standing to defend the case on behalf of state officials, who ultimately declined to defend it).

[70] Dolan, *supra* note 9.

[71] *In re Marriage Cases*, 183 P.3d at 402.

[72] *Id.* at 402–03.

prevented same-sex marriage.[73] Eventually, all six cases were consolidated into one proceeding at the superior court, or trial court, level.[74]

Separately, in two legal actions, California Attorney General Bill Locker and various taxpayers had asked the California Supreme Court to issue an original writ of mandate that instructed San Francisco officials to abide by the then-existing marriage laws in California, which limited marriage to different-sex couples.[75] On March 11, 2004, while the other legal actions were pending, the Supreme Court instructed San Francisco city officials to refrain from issuing any further marriage licenses to same-sex couples.[76] On August 12, 2004, the Court determined that San Francisco officials "had exceeded their authority" because they had acted "in the absence of a judicial determination that the statutory provisions limiting marriage to the union of a man and a woman [were] unconstitutional."[77] The Court decided that approximately 4,000 same-sex marriage licenses issued between February 12 and March 11, 2004, "were void and of no legal effect."[78] However, the Court noted that it was not issuing an opinion on the constitutionality of California's marriage laws.[79]

Meanwhile, the proceedings in the lower court continued, addressing the constitutionality of the marriage laws. The trial court decided that the state marriage laws violated the California Constitution, but the appellate court came to the opposite conclusion.[80]

In response to the agitation of the Plaintiffs,[81] the California Supreme Court, an important part of the state government, fractured four votes to three in the 2008 *In re Marriage Cases* matter. Chief Justice Ronald George authored the majority opinion for the Court, which Justices Joyce Kennard, Kathryn Werdegar, and Carlos Moreno, the only Democrat on the Court at that time, joined.[82] Justice Kennard also wrote a concurring opinion.[83] Justice Marvin Baxter wrote a concurring and dissenting opinion, which ultimately was more of a dissent than a concurrence; Justice Ming Chin joined Justice Baxter's opinion.[84] Like Justice Baxter, Justice Carol Corrigan penned a concurring and dissenting opinion that ultimately was more of a dissent than a concurrence.[85] Eventually, in the struggle over the word *marriage*, the dispute among the members of the Court was regarding the appropriate body of state government, the Court or the Legislature, to address the issue of same-sex marriage.

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[73] *Id.*
[74] *Id.* at 403.
[75] *Id.* at 402–03.
[76] *Id.* at 402.
[77] *Id.* at 403.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 403–04.
[81] Because four of the six parties that initiated litigation opposed the existing California laws on marriage, "[f]or convenience and ease of reference," George indicated that the Court would refer to the challengers of the status quo as Plaintiffs. *Id.* at 401 n.6.
[82] *Id.* at 397, 453; Maura Dolan, *Same-Sex Case Weighed on Chief Justice: Ronald George Sees Echoes of Past Civil Rights Struggles in the Landmark Gay Marriage Ruling He Shepherded*, L.A. TIMES (May 18, 2008), http://articles.latimes.com/2008/may/18/local/me-gay18 [https://perma.cc/ 5ED4-TZL9].
[83] *In re Marriage Cases*, 183 P.3d at 453.
[84] *Id.* at 456, 468.
[85] *Id.* at 468.

A point of entry into the status quo developed, and the Supreme Court's majority, itself not the social movement, eventually played a role in furthering the social movement for same-sex marriage, as Mayor Gavin Newsom and local officials in San Francisco had done several years earlier. Using the judicial review power, by which judges can review acts of other branches of government,[86] the majority acted as an agent of change on behalf of the social movement. While institutionalized in part, the social movement for same-sex marriage had not become fully institutionalized because, in addition to the dissenting members of the Court, Republicans in the Legislature did not approve of same-sex marriage, and the public was split on the issue. Also, backlash came quickly in the form of a ballot proposition to change the California Constitution. Thus, the matter was not one in which an institution chose to reform itself, nor was it one in which a social movement had become the norm. Instead, the movement for same-sex marriage had gained a key ally in the Court's majority, and the struggle would continue because of the forceful negative responses from other components of the establishment, especially outspoken portions of the public.

A. CHIEF JUSTICE RONALD GEORGE'S MAJORITY OPINION

Chief Justice George wrote the majority opinion for the California Supreme Court, which, at almost sixty pages in length, was anything but concise.[87] He extensively combed through existing California law to conclude that same-sex couples had a right to marriage.

George framed the issue as somewhat different from that which other state supreme courts had faced. Unlike other jurisdictions, California provided for domestic partnerships, which included almost all marital rights, so, for the most part, the argument was over the application of the word *marriage*, not about the legal recognition of same-sex relationships.[88] California's domestic partnerships were similar to the civil unions of several states.[89] At this point, the Supreme Court would address the substantive issue it had not addressed in 2004. In an effort to establish the credibility of the Court, George insisted that the Court's opinion reflected constitutional law, not the public policy preferences of the justices.[90]

Initially, George addressed a procedural matter. Following the Court's decision in 2004 to instruct San Francisco officials to stop issuing marriage licenses to same-sex couples, the Proposition 22 Legal Defense and Education Fund and the Campaign for California Families, which had sought such relief, no longer had "a direct legal interest that [would] be injured or adversely affected."[91] Of course, philosophical interests remained, but the

[86] WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 1 (2000).
[87] *In re Marriage Cases*, 183 P.3d at 397–453.
[88] *Id.* at 397–98.
[89] *Id.* at 398 n.2.
[90] *Id.* at 398–99.
[91] *Id.* at 405–06.

cases of the Fund and the Campaign were moot and should have been dismissed.[92]

Turning to the substance of the case, George began by reviewing the California statutes in question. He conceded that, from the time California had become a state in the middle of the nineteenth century, civil marriage, as reflected in the 1849 California Constitution and contemporary legislation, had been heterosexual in nature.[93] He also noted that, from the beginning, California had distinguished civil marriage from religious marriage.[94] Despite changes in the marriage laws since the nineteenth century, the heterosexual nature of marriage had remained.[95]

In the 1970s, after the passage of the Twenty-Sixth Amendment to the U.S. Constitution, which lowered the voting age from twenty-one to eighteen,[96] the California Legislature had lowered most minimum ages in the state.[97] With regard to revising the language of the marriage laws and making the legal marriage age the same for men and women, the Legislature had omitted references to the specific sexes of the parties, but the legislative history did not suggest that the Legislature had wanted marriage to encompass same-sex couples.[98] During the same decade, various same-sex couples had sought marriage, and, upon request by the County Clerks' Association of California, the Legislature had revised the language so that it once again strictly referred to male and female.[99]

As of 2008, the current definition of civil marriage, housed in Family Code Section 300, was "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 [was] necessary."[100] Meanwhile, Family Code Section 308.5, the codified version of Proposition 22, which voters had passed in March 2000, read, "Only marriage between a man and a woman is valid or recognized in California."[101] Whether Section 308.5 applied only to marriages from other states or to both marriages from other states and those solemnized in California was a disputed matter.[102] That Section 308.5 was a statute based on a ballot proposition was important; the Legislature could not change such a statute without public approval.[103] As such, if Section 308.5 applied to both non-California marriages and California marriages, any legislative authorization of same-sex marriage would need voter approval.[104]

Of note, in both 2005 and 2007, the Legislature, viewing Family Code Section 308.5 as only applying to non-California marriages, passed legislation that would have authorized the issuance of same-sex marriage licenses in California.[105] Governor Schwarzenegger refused to sign either

[92] *Id.*
[93] *Id.* at 407.
[94] *Id.* at 407 n.11.
[95] *Id.* at 407–08.
[96] U.S. CONST. amend. XXVI, § 1.
[97] *In re Marriage Cases*, 183 P.3d at 408.
[98] *Id.*
[99] *Id.* at 409.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 409–10.
[103] *Id.* at 410.
[104] *Id.*
[105] *Id.* at 410 n.17.

bill, noting in the case of the 2005 bill that he believed the bill needed voter approval at the ballot box, and noting in both cases that he believed the court system would resolve the issue.[106]

Moving to examine the problem, George read Family Code Section 308.5 broadly. First, he observed that the language of Section 308.5 appeared to refer to both marriages performed in California and those performed outside the state.[107] Because of the appearance of the words *valid* and *recognized*, he reasoned that the average voter likely understood Proposition 22 to apply to both types of marriages.[108] Nothing in the background of Proposition 22, including the ballot materials, indicated to the contrary.[109] George specifically recognized that Proposition 22 was one of the mini-Defense of Marriage Acts (mini-DOMAs), styled after the 1996 federal statute that Congress had called the Defense of Marriage Act (DOMA),[110] that states had passed during the 1990s and 2000s following the Hawaii Supreme Court's decision in *Baehr v. Lewin*,[111] announced in 1993.[112] In the immediate aftermath of *Baehr*, to be able to deny marriage licenses to same-sex couples, Hawaii would need to satisfy strict scrutiny, the highest level of judicial review.[113]

Second, George pointed out that reading Section 308.5 narrowly would open the door to a situation that would create problems under the U.S. Constitution's Privileges and Immunities Clause and Full Faith and Credit Clause.[114] The U.S. Constitution's Privileges and Immunities Clause, located in Article IV, stated, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States."[115] This Clause limited a state's ability to discriminate against individuals from out of state regarding "fundamental rights or important economic activities."[116] The U.S. Constitution's Full Faith and Credit Clause, also located in Article IV, provided, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[117] In not recognizing out-of-state marriages, but recognizing California marriages, California would be discriminating against out-of-staters with regard to the

[106] *Id.*
[107] *Id.* at 410.
[108] *Id.* at 411.
[109] *Id.* at 411–412.
[110] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013) (striking down Section 3, which contained the heterosexual-only federal definition of marriage), Obergefell v. Hodges, 576 U.S. 644 (2015) (superseding Section 2, which allowed sibling states not to recognize same-sex marriages from other states). For background on DOMA, see WILLIAM N. ESKRIDGE, JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS 120–25, 134–39 (2020).
[111] 852 P.2d 44 (Haw. 1993) (plurality opinion), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23, *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).
[112] *In re Marriage Cases*, 183 P.3d at 412 n.20. *See also* ESKRIDGE & RIANO, *supra* note 110, at 143–44, 273.
[113] ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 170 n.8 (2002); ESKRIDGE & RIANO, *supra* note 110, at 89.
[114] *In re Marriage Cases*, 183 P.3d at 412–13.
[115] U.S. CONST. art. IV, § 2, cl. 1.
[116] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 530 (7th ed. 2023).
[117] U.S. CONST. art. IV, § 1.

fundamental right of marriage, as well as not recognizing out-of-state records in the form of marriage licenses.[118]

George turned to a review of domestic partnership legislation, which began in California in 1999.[119] Domestic partners were "two adults who ha[d] chosen to share one another's lives in an intimate and committed relationship of mutual caring."[120] Such domestic partners were of the same sex, or, if the domestic partners were of different sexes, at least one partner had to be over sixty-two years old.[121] As of 1999, limited rights such as health benefits for the partners of some state employees and hospital visitation privileges were available.[122]

Over the years, the Legislature added additional benefits for domestic partners. In 2001, the Legislature added the ability to bring a lawsuit for wrongful death, to use sick leave to take care of a domestic partner or the partner's child, to make healthcare decisions for a partner who was incapacitated, and to enjoy other benefits.[123] In 2002, the Legislature added further benefits such as an automatic inheritance of part of the deceased partner's individual property.[124]

In 2003, the Legislature passed a major piece of legislation entitled the California Domestic Partner Rights and Responsibilities Act.[125] This Act was comprehensive legislation that reflected the view that "many lesbian, gay, and bisexual Californians ha[d] formed lasting, committed, and caring relationships with persons of the same sex."[126] The Legislature called for a liberal construing of the Act, and the Act specifically indicated that, legally, domestic partners would "*have the same rights, protections, and benefits*," as well as "*the same responsibilities, obligations, and duties*," as spouses.[127] While the 2003 statute did not allow for joint income filing by domestic partners, a 2006 statute eliminated this inconsistency in state law.[128]

Although George recognized that California law provided same-sex couples with "virtually all of the benefits and responsibilities" that different-sex couples had,[129] a few inconsistencies remained.[130] For example, while parties to a marriage did not need to have a common residence at the time of the marriage, parties to a domestic partnership did.[131] Also, while a party to a marriage could be under eighteen with parental consent or court order, a party to a domestic partnership could not be.[132] More importantly, the California Legislature could not do anything about federal law, a higher source of law, so federal benefits like Social Security and Medicare were

[118] *In re Marriage Cases*, 183 P.3d at 412–13
[119] *Id.* at 413.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.* at 414.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.* (emphasis in original).
[128] *Id.* at 415.
[129] *Id.* at 417–18.
[130] *Id.* at 416 n.24.
[131] *Id.*
[132] *Id.*

under the federal standard that viewed marriage as exclusively heterosexual.[133]

With this overview of the history of state domestic partnerships on the table, George moved to examine the various legal concepts and provisions that were implicated. He began with a reflection on a fundamental right to marry for which privacy, free speech, and due process provisions in Article 1, Sections 1, 2, and 7 of the California Constitution provided.[134] Although the California Constitution did not provide explicitly for a right to marry, case law that interpreted the Constitution did.[135] Marriage rights were associated with the right to privacy, added to the Constitution in 1972; the state privacy provision included the privacy rights that the U.S. Supreme Court had developed since its 1965 decision in *Griswold v. Connecticut*,[136] which had addressed privacy and contraception.[137]

Both "the scope and content" of this right to marriage were at issue.[138] George saw the case as one about a right to marriage rather than one about a right to same-sex marriage.[139] For instance, he looked to the California Supreme Court's 1948 decision in *Perez v. Sharp*,[140] which had examined the right to marriage rather than a right to interracial marriage.[141] George saw the Plaintiffs in the current case as not trying to create a new right under the California Constitution, but rather trying to gain access to an existing right.[142]

Looking at various examples of case law, George concluded that marriage involved "the right of an individual to establish a legally recognized family with the person of one's choice."[143] Such an institution was important to society because society had an interest in the wellbeing, education, and socialization of children.[144] Marriage was "the 'basic unit' or 'building block' of society."[145] At an individual level, marriage afforded, for instance, "an important element of self-expression that c[ould] give special meaning to one's life," as well as other benefits.[146]

George pointed out that marriage was more than a statutory right; marriage was a state constitutional right.[147] State case law explained that, under the California Constitution, marriage was "an integral component" of one's autonomy and liberty, which both the Privacy Clause in Article I, Section 1 and the Due Process Clause of Article I, Section 7 protected.[148] In elevating marriage as a higher-order right, the California Constitution tracked the U.S. Constitution and the U.N. Universal Declaration of Human

[133] *Id.* at 417.
[134] *Id.* at 419.
[135] *Id.*
[136] 381 U.S. 479 (1965).
[137] *In re Marriage Cases*, 183 P.3d at 419–20.
[138] *Id.* at 420.
[139] *Id.*
[140] 198 P.2d 17 (Cal. 1948).
[141] *In re Marriage Cases*, 183 P.3d at 420–21.
[142] *Id.* at 421.
[143] *Id.* at 423.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 425.
[147] *Id.* at 426.
[148] *Id.*

Rights.[149] In addition to being a negative right, which meant that the government generally had a responsibility to avoid interfering with marriage, marriage was also a positive right, which meant that the government had certain affirmative obligations to couples.[150] For instance, the government had an affirmative obligation to recognize "the couple's relationship as a family."[151]

A tradition of heterosexual marriage in the state was insufficient to abridge a constitutional right.[152] For instance, in the *Perez v. Sharp* case, which had involved restrictions on interracial marriage, the California Supreme Court had rejected the prior thinking of the Court's 1854 *People v. Hall*[153] case, which had referenced the alleged inferiority of non-White individuals.[154] In the decades that led up to the 2000s, California had revised its "understanding and legal treatment of gay individuals and gay couples."[155] For instance, provisions of the state code prohibited discrimination based on sexual orientation in services by businesses, employment, housing, and other areas.[156] The Privacy and Due Process Clauses in the California Constitution would not allow discrimination against sexual minorities.[157]

George responded to several arguments from the opponents of same-sex marriage. He maintained that lack of an ability to procreate was not reason to deny sexual minorities access to marriage. Although marriage and procreation had been linked, marriage had not been limited to individuals who were able to procreate.[158] Even if unable to reproduce naturally, individuals in a marriage could have children through adoption or assisted reproduction.[159] George also dismissed claims that the right to marriage should be limited to individuals who may procreate accidentally and that legal recognition of same-sex marriages would somehow convey a message that biological parenthood was unimportant.[160]

Accordingly, George concluded that the right to marry, grounded in both Sections 1 and 7 of Article I of the California Constitution, applied to same-sex couples as well as to different-sex couples.[161] Although the Domestic Partner Act gave same-sex couples virtually all the rights that different-sex couples had in marriage, the term *marriage* was needed to ensure "equal dignity and respect" for same-sex couples.[162] In a footnote, he added that the constitutional right to marriage did not apply "to polygamous or incestuous relationships" due to "their potentially detrimental effect on a sound family environment."[163]

[149] *Id.* at 426 n.41.
[150] *Id.* at 426.
[151] *Id.* at 426–27.
[152] *Id.* at 427.
[153] 4 Cal. 399 (1854).
[154] *In re Marriage Cases*, 183 P.3d at 428 n.45.
[155] *Id.* at 428.
[156] *Id.* at 428 n.46.
[157] *Id.* at 429.
[158] *Id.* at 431.
[159] *Id.*
[160] *Id.* at 431–32.
[161] *Id.* at 433–34.
[162] *Id.* at 434–35.
[163] *Id.* at 434 n.52.

Having looked at the state constitutional right to marry under the Privacy and Due Process Clauses in Article I, George moved to the Equal Protection Clause in Section 7 of the same Article.[164] He examined various protected categories under the Equal Protection Clause, beginning with sex and gender.[165] George did not accept the Plaintiffs' claim that, because a woman who desired to marry another woman would be able to do so if she happened to be a man, and, because a man who desired to marry another man would be able to do so if he happened to be a woman, the statutes constituted discrimination based on sex or gender.[166] He maintained that someone of either sex could marry someone of the other sex.[167] Of course, this would be strange if someone were gay or lesbian, but George would address sexual orientation later. He noted that most of the courts that had considered restrictions on same-sex marriage as a form of sex discrimination, including the Vermont Supreme Court in *Baker v. Vermont*[168] and the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*,[169] had rejected such a claim.[170] The Hawaii Supreme Court in *Baehr v. Lewin*[171] was the one state court that had accepted the contention.[172] Accordingly, George concluded the marriage statutes did not discriminate based on sex or gender.

Nonetheless, discrimination could still occur based on another category, and, as such, George examined sexual orientation.[173] Because the marriage statutes restricted marriage to different-sex couples, he saw the statutes "as directly classifying and prescribing distinct treatment on the basis of sexual orientation."[174]

Given this discrimination based on sexual orientation, the Court had to determine how carefully it would examine the state's discrimination, a novel issue in California at that time.[175] If the Court considered sexual orientation as a "suspect classification," then the Court would look at the discrimination much more carefully than if the Court did not.[176] Also, under such circumstances, the burden of proof would be on the government, not on the challenger.[177]

George began with the legal definition used by the appellate court below, which was that a suspect classification involved a trait that could not be changed, did not relate to one's ability to make a contribution to society, and was associated with some mark of social inferiority.[178] While George wrote that past case law in the state clearly satisfied the latter two elements of the test regarding sexual orientation, case law had not answered the first element

[164] *Id.* at 435.
[165] *Id.* at 436.
[166] *Id.* at 436–37.
[167] *Id.* at 436.
[168] 744 A.2d 864 (Vt. 1999).
[169] 798 N.E.2d 941 (Mass. 2003).
[170] *In re Marriage Cases*, 183 P.3d at 438–39 n.57.
[171] 852 P.2d 44 (Haw. 1993) (plurality opinion), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23, *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).
[172] *In re Marriage Cases*, 183 P.3d at 438–39 n.57.
[173] *Id.* at 440.
[174] *Id.*
[175] *Id.* at 441–42.
[176] *Id.* at 441.
[177] *Id.* at 435–36.
[178] *Id.* at 442.

so clearly.[179] However, George rejected immutability as a requirement for establishing a suspect class because religion constituted a suspect class, even though one's religious beliefs could change.[180] Because sex, religion, and race were all suspect classifications, he also rejected the Attorney General's claim that current political powerlessness should be another element in establishing a suspect class.[181] As such, George resolved that sexual orientation would be a suspect classification in California, and this new suspect classification would receive the same level of judicial scrutiny as sex, religion, and race.[182] This decision reflected the first time that a state supreme court had viewed sexual orientation as a suspect classification.[183]

The author of the majority opinion offered another reason why more careful judicial review should apply in cases of sexual orientation; the statutes in question restricted fundamental interests of dignity and respect of sexual minorities, already discussed earlier in his opinion.[184] While the word *marriage* had "symbolic importance," the separate institution of domestic partnership might conjure up images of separate public educational systems, including those in higher education, for Whites and Blacks during the era of state-sanctioned segregation.[185] Also, in "numerous everyday social, employment, and governmental settings," an individual in a domestic partnership who accurately responded to an inquiry about marital status would be revealing his or her sexual orientation, which someone might prefer not to do.[186]

To justify the discrimination against sexual minorities with regard to marriage, the Defendants had to proffer a compelling interest for such discrimination and show how the discrimination was necessary to advance that interest.[187] George examined various state interests that the different Defendants had advanced.[188]

He rejected the argument of the Proposition 22 Legal Defense Fund and the Campaign that, because both the 1849 and 1879 California Constitutions used sex-specific language regarding marriage and separate property rights, the common law definition of marriage, heterosexual in nature, had become part of the current California Constitution.[189] George cited case law from 1867 that had noted that the laws in effect when California adopted its 1849 Constitution, its first, continued in effect until the Legislature changed them.[190] Subject to voter approval if the applicable law were a ballot proposition, the California Constitution did not prohibit the Legislature from changing the law.[191]

George also rejected the argument of the Attorney General and the Governor that, because of the tradition of heterosexual marriage, marriage

[179] *Id.*
[180] *Id.* at 442–43.
[181] *Id.* at 443.
[182] *Id.* at 443–44.
[183] PIERCESON, *supra* note 4, at 190.
[184] *In re Marriage Cases*, 183 P.3d at 446.
[185] *Id.* at 445.
[186] *Id.* at 446.
[187] *Id.* at 447.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*

should remain heterosexual unless the Legislature made a change.[192] He resisted tradition as an excuse for avoiding constitutional questions, noting that the Court had an important role to play in answering such questions.[193] The matter of the roles of the Legislature and the Court in addressing tradition was a key point of contention between the majority and the dissenting justices.

That Family Code Section 308.5 had been approved through the initiative process did not exempt it from judicial review.[194] The Constitution itself contained "the ultimate expression of the people's will," and, in interpreting the Constitution, California courts had invalidated various ballot propositions in the past.[195]

Returning to the Attorney General and Governor's tradition argument, George conceded that, as of May 2008, merely six jurisdictions around the world recognized marriage for same-sex couples.[196] Nonetheless, he observed that a later generation could view the laws and social practices of a prior generation as oppressive.[197] He cited examples of restrictions on interracial marriage, the exclusion of women from various fields and positions, and racial segregation in public places.[198] Accordingly, having rejected the various state interests advanced as compelling, he concluded no compelling state interest existed; the statutes in question were unconstitutional.[199]

George added a few items, likely to calm the nerves of individuals uncomfortable with or afraid of same-sex marriage. For instance, if marriage were available to sexual minorities, different-sex couples would retain all of their rights to marriage.[200] Marriage would remain the same, except that sexual minorities would have access to the institution.[201] No religious group would have to change its practices in light of the Supreme Court's opinion,[202] which likely referred to the fear that California would somehow require religious groups opposed to same-sex marriage to perform same-sex marriages in religious contexts.

Finally, George addressed a remedy. Based on case law, he noted that the Court would find the remedy that the Legislature likely would have employed if it had understood that the discrimination in question was unconstitutional.[203] Since it was unlikely that the Legislature would have removed the availability of marriage in general, the more likely approach would have been to extend marriage to same-sex couples.[204] As such, George, speaking for the majority of the Court, determined that the heterosexual-only language in Family Code Section 300 would be stricken

[192] *Id.* at 447–48.
[193] *Id.* at 448.
[194] *Id.* at 449.
[195] *Id.* at 450.
[196] *Id.* at 450 n.70.
[197] *Id.* at 451.
[198] *Id.*
[199] *Id.* at 451–52.
[200] *Id.* at 451.
[201] *Id.*
[202] *Id.* at 451–52.
[203] *Id.* at 452–53.
[204] *Id.* at 453.

so that Section 300 would be understood to be exclusive of a particular sexual orientation.[205] Likewise, Family Code Section 308.5 could not stand.[206]

In an interview shortly after the announcement of the decision, George noted that a trip to the South with his parents during the era of segregation had informed his understanding of how society could oppress a minority group.[207] That experience had "left 'quite an indelible impression on [him].'"[208] Nonetheless, he admitted that his thinking on marriage had been "more of an evolution than an epiphany"; reading and speaking extensively with staff attorneys had helped to inform his understanding.[209] Because of the highly charged nature of *In re Marriage Cases*, George, as Chief Justice, had wanted to author the majority opinion himself.[210]

B. JUSTICE JOYCE KENNARD'S CONCURRENCE

Justice Kennard concurred, joined by Justices Werdegar and Moreno.[211] Kennard filed her concurrence to address issues related to the California Supreme Court's 2004 decision in *Lockyer v. City and County of San Francisco*[212] and the role of the Supreme Court in addressing the issue of marriage for same-sex couples.[213]

Regarding *Lockyer*, Kennard emphasized that the case had determined that the local officials in San Francisco did not have the authority to assess the constitutionality of the state marriage laws; the court system had such authority.[214] As of May 2008, the Supreme Court had made an assessment that marriage licenses should be issued to interested same-sex couples.[215] Moreover, she expressed regret that, instead of waiting for a judicial determination on the merits of access to marriage by same-sex couples, the Court in *Lockyer* had nullified the approximately 4,000 marriages performed in San Francisco in 2004, a decision to which the concurring justice had objected at the time.[216]

Kennard also emphasized the important role that courts like the Supreme Court played in the protection of minority rights. When majoritarian prejudices led institutions to deny fundamental rights to minority groups, the court system had the power to address such denial of rights.[217] In the current case, the Supreme Court had performed such a role.[218]

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[205] *Id.*
[206] *Id.*
[207] Dolan, *supra* note 82.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *In re Marriage Cases*, 183 P.3d at 453 (Kennard, J., concurring).
[212] 95 P.3d 459 (Cal. 2004).
[213] *In re Marriage Cases*, 183 P.3d at 453 (Kennard, J., concurring).
[214] *Id.* at 454.
[215] *Id.*
[216] *Id.*
[217] *Id.* at 455.
[218] *Id.*

C. JUSTICE MARVIN BAXTER'S CONCURRENCE AND DISSENT

As the Court fractured in response to agitation, Justice Baxter issued an opinion that both concurred with and dissented from the majority opinion.[219] Justice Chin concurred with Justice Baxter's opinion.[220] While agreeing with the majority on its rejection of the claim of sex-based discrimination, Justice Baxter ultimately maintained that the Court's decision violated the doctrine of separation of powers.[221]

Baxter conceded that the Legislature could change the traditional understanding of marriage.[222] Indeed, in the years leading up to the current case, advocates of same-sex marriage had "gain[ed] attention and considerable public support."[223] Eventually, the democratic process might have led to the availability of same-sex marriage, but the majority of the Court intervened.[224]

The Court had, according to Baxter, overstepped its authority by interfering with "the People's general right, directly or through their chosen legislators, to decide fundamental issues of public policy for themselves."[225] He noted that, in 2000, the public had approved Proposition 22 with over sixty percent of the vote.[226]

Baxter denied the existence of a fundamental right to same-sex marriage, focusing on the lack of a tradition of marriage for same-sex couples.[227] He observed that, as of May 2008, only one state, Massachusetts, had legalized marriage for same-sex couples, and that decision had been controversial.[228] Meanwhile, dozens of states had passed laws or changed their constitutions to keep marriage as a heterosexual institution.[229] With the Domestic Partner Rights and Responsibilities Act of 2003, the California Legislature had assumed marriage was a heterosexual-only institution.[230] He opposed what he called the majority's "cataclysmic transformation" of marriage.[231]

Additionally, Baxter took issue with the majority's use of statutory law to construct a constitutional right.[232] He expressed concern that the Court could transform "a pattern of legislation" such as the state's civil rights statutes regarding sexual orientation into constitutional law.[233] Only the public could amend the Constitution.[234]

The justice saw the Court as creating a new right regarding same-sex marriage, rather than extending marriage to same-sex couples.[235] Nothing in

[219] *Id.* at 456 (Baxter, J., concurring in part and dissenting in part).
[220] *Id.* at 468.
[221] *Id.* at 456–57.
[222] *Id.* at 457.
[223] *Id.*
[224] *Id.*
[225] *Id.* at 458–59.
[226] *Id.* at 459.
[227] *Id.* at 459–60.
[228] *Id.* at 460.
[229] *Id.*
[230] *Id.*
[231] *Id.* at 459.
[232] *Id.* at 461.
[233] *Id.*
[234] *Id.*
[235] *Id.* at 462.

federal or California case law supported this conclusion.[236] For instance, the California Supreme Court's *Perez v. Sharp* case, which had struck down racially-based restrictions on marriage, involved only heterosexual marriage.[237]

Although he maintained, "In no way do I equate same-sex unions with incestuous and polygamous relationships as a matter of social policy or social acceptance," Baxter nonetheless suggested that, if the Court could provide for same-sex marriage, the Court, at some point "ten, fifteen, or twenty years" in the future, could provide for incestuous or polygamous marriages, which, the dissenting justice noted, "society abhor[red]."[238] The Court should not have opened a door to "less deserving[] claims of a right to marry."[239] Such discussions should have remained in "the arena of legislative resolution."[240]

Given the lack of a substantive due process right to marriage, Baxter maintained that the state only needed a reasonable basis for its discrimination.[241] He addressed the reasonableness of the laws in his discussion of equal protection.[242]

Turning to equal protection, Baxter examined the legislation.[243] Given the public preference for traditional heterosexual-only marriage, he did not see same-sex couples and different-sex couples as similarly situated.[244] Likewise, he did not find discrimination based on sexual orientation because, although having a different impact on sexual minorities, the state statutes were neutral regarding sexual orientation.[245] He found no evidence that the Legislature promulgated Family Code Section 300 or that the public voted for what became Family Code Section 308.5 to adversely impact sexual minorities; rather, as he saw it, the Legislature and the public wanted to preserve a traditional understanding of marriage.[246]

According to Baxter, sexual orientation should not be a suspect class. The U.S. Supreme Court had never determined that sexual orientation was a suspect class.[247] Moreover, lack of political power was a key ingredient in the making of a suspect class, but, given the "political emergence" of the sexual minority community in California, that community no longer lacked power.[248] Baxter refused to ignore what he called the "current reality" of California politics.[249]

Given the lack of a suspect class, the statutes only had to be reasonable.[250] The Legislature's reserving the term *marriage* for different-sex couples reflected the voting public's preference as stated in Proposition

[236] *Id.*
[237] *Id.* at 462–63.
[238] *Id.* at 463.
[239] *Id.* at 463–64.
[240] *Id.*
[241] *Id.* at 464.
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] *Id.* at 465.
[246] *Id.*
[247] *Id.*
[248] *Id.* at 466–67.
[249] *Id.* at 467.
[250] *Id.*

22.[251] Since the federal definition of marriage was heterosexual-only, retaining marriage for heterosexual individuals could help with the administration of federal-state programs.[252] Finally, the public preference reflected a longstanding understanding of marriage.[253] Any change should come from the people's representatives in the Legislature.[254] As such, the statutes in question were reasonable and should stand.

D. JUSTICE CAROL CORRIGAN'S CONCURRENCE AND DISSENT

Like Justice Baxter, Justice Corrigan offered a concurring and dissenting opinion that contributed to fracturing on the Court.[255] While expressing her belief that "Californians should allow our gay and lesbian neighbors to call their unions marriages," Corrigan believed that the state Constitution did not allow the Court to overrule the public on the issue of same-sex marriage.[256] As Baxter did, Corrigan agreed with the majority on several issues, but that agreement only went so far.[257] Corrigan framed the issue as whether domestic partners had a right, under the Constitution, to the term *marriage*.[258]

Corrigan emphasized the significant rights that the California Domestic Partner Rights and Responsibilities Act of 2003 had established, to which, in her view, the Court had "fail[ed] to give full and fair consideration."[259] Like Baxter, Corrigan believed that the Plaintiffs were attempting to alter the definition of marriage.[260]

For equal protection purposes, the justice resisted the Court's race analogy. She maintained that the quest for African American rights had continued for a century or so after the post-Civil War amendments to the U.S. Constitution.[261] In contrast, Corrigan claimed that sexual minorities had achieved "equal legal rights" in under a decade.[262]

Corrigan was unconvinced about the issue of terminology. Indeed, for equal protection purposes, while she believed that same-sex couples were in the same position as different-sex couples regarding rights and responsibilities associated with families, she did not believe same-sex couples were in the same position as different-sex couples regarding the term *marriage*.[263] Accepting retaining the traditional concept of marriage as a "legitimate purpose" of the marriage statutes, Corrigan believed that the Plaintiffs were not similarly situated with heterosexual couples for that purpose.[264]

As Baxter did, Corrigan indicated that the legislative process, not litigation, should have been the path that the Plaintiffs followed to obtain

[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.* at 467–68.
[255] *Id.* at 468 (Corrigan, J., concurring in part and dissenting in part).
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.* at 469.
[261] *Id.*
[262] *Id.*
[263] *Id.* at 470.
[264] *Id.*

their goal, particularly "in the midst of a major social change."[265] Judicial restraint, "a covenant between judges and the people from whom their power derives," should have prevented the Court from "judicial overreaching."[266] Perhaps alluding to the backlash inside and outside of Hawaii after the Hawaii Supreme Court's 1993 decision in *Baehr v. Lewin*, Corrigan warned that "when ideas are imposed, opposition hardens and progress may be hampered."[267]

CONCLUSION

Drawing upon social movement theory in the field of communication, this Article has studied the rhetorics of the California Supreme Court in *In re Marriage Cases.* The Article has shown how the state government in general and the Court in particular fractured in responding to the movement activity, supported by local government in San Francisco, that called for same-sex marriage. In terms of the fracturing on the Court, in the majority opinion, Chief Justice George combed through state law to conclude that same-sex couples had a right to marriage, and, in a concurring opinion, Justice Kennard emphasized the role of the judiciary in vindicating individual rights. In their opinions, which focused more on dissent than concurrence, Justices Baxter and Corrigan expressed their belief that the public, not the Supreme Court, should change the law on marriage, either directly through a ballot proposition or indirectly through the Legislature.

Additionally, this Article has illustrated how the Court's majority, although itself not the social movement, played a leading role from within the establishment in furthering the movement for same-sex marriage. By virtue of the judicial review power, the majority functioned as an agent of change for the social movement. Although partially institutionalized, the social movement for same-sex marriage had not become fully institutionalized because the Legislature was divided, mainly on party lines, on the subject of same-sex marriage. Also, public opinion on the matter was roughly split, and a ballot proposition to change the Constitution regarding marriage was looming.

In so viewing *In re Marriage Cases*, this Article has problematized traditional social movement theory in several ways. Embracing less traditional research on social movements in communication, the Article has provided an example of how outsiders can locate a point of entry into the system when the establishment, itself not monolithic, fractures in responding to agitation. Moreover, the Article has taken the further step of showing what can result when outsiders have a point of entry. Indeed, a social movement can make allies sufficiently important in number or influence who may facilitate change within the system. The Court's majority, via judicial review, functioned as an ally inside the establishment that could provide the movement with significant access to the establishment. The U.S. public, as well as supreme courts in other states, had the opportunity to consider further the possibility of civil marriage as an institution that might include sexual

[265] *Id.* at 471.
[266] *Id.*
[267] *Id.*

minorities.[268] Neither the social movement itself nor a reactionary part of the establishment, the Court's majority operated in a liminal rhetorical space. As such, in some situations, the previously-clear line between a social movement and the establishment can become blurrier.

Gerald Rosenberg warned that short-term backlash can follow progressive action by courts.[269] That is essentially what happened in California—even while the Supreme Court was still deciding *In re Marriage Cases*.[270] Opponents of same-sex marriage had been collecting signatures for a ballot proposition that would alter the California Constitution to limit marriage to different-sex couples, and the Court's decision further motivated opponents of same-sex marriage to move forward with promoting what became known on the November 2008 ballot as Proposition 8.[271]

[268] CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 185, 192 (2010).
[269] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 417 (2d ed. 2008).
[270] MELLO, *supra* note 15, at 79; ESKRIDGE & RIANO, *supra* note 110, at 369.
[271] KLARMAN, *supra* note 3, at 121.