

McMARRIAGE EQUALITY

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DEAN GORDON SCHABER (1957-1991)

Born in North Dakota, Gordon Schaber (1928–1997) became the nation’s youngest law school dean when in 1957 he took over the reins of the then-unaccredited McGeorge School of Law. Everyone associated with McGeorge knows how Dean Schaber transformed the local law program to become a fully-accredited law school, staffed with nationally recognized scholars, and producing distinguished graduates, including more judges today than any other law school. Fewer people remember that in 1960 Dean Schaber brought Perry Mason himself (aka Raymond Burr) to be McGeorge’s Commencement Speaker—as a substitute for Earl Stanley Gardner, the author of the Perry Mason books.

No one has asserted that Dean Schaber was the godfather of the marriage equality debate—but that is the claim I shall make. Through his influence on longtime McGeorge Professor (later Justice) Anthony Kennedy of Sacramento, Dean Schaber—a lightly closeted gay man—was not only a personal inspiration for equal treatment of sexual and gender minorities but provided Professor Kennedy with the transnational education that bestirred his interest in constitutional rights for sexual minorities. What is more, and perhaps more surprising, Dean Schaber indirectly inspired the marriage debate on both sides. Specifically, McGeorge gave us leading opponents of marriage equality as well as

the key player who delivered it as a matter of constitutional right. I shall start with the opponents, distinguished graduates of McGeorge School of Law.

SEXUALITY, GENDER & MCGEORGE LAW

As set forth in my recent book, demands for marriage equality that had lapsed during the AIDS epidemic came roaring back in the 1990s. The Hawaii Supreme Court in 1993 ruled that denial of marriage licenses to same-sex couples was, literally, “sex discrimination” that the state constitution required to be justified as necessary to serve a compelling public interest.¹ On remand for trial to determine whether the state could justify its discrimination, Judge Kevin Chang scheduled a trial for September 1996. Anticipating that the state would not be successful (indeed it was not), religious and political leaders all over the United States rallied to defend the traditional limitation of civil marriage to one man, one woman.

Most famously, President William Clinton teamed up with super-majorities in both House and Senate to adopt the Defense of Marriage Act of 1996 (DOMA).² DOMA defined marriage as one man, one woman for every federal statute or regulation involving marriage or spouses,³ and denied interstate recognition of same-sex marriages to states choosing not to recognize them.⁴ With Republicans unanimously supporting the bill and most Democrats going along (led by the President), DOMA did not generate a deep congressional debate. But a McGeorge graduate and a McGeorge professor ensured that there would be a serious legislative and later popular debate in California. The student was Andrew Pugno (McGeorge J.D. 1999), and the professor was Anthony Kennedy (Adjunct Faculty, 1965–88, after which he moved to Washington, D.C. as a Justice on the U.S. Supreme Court).

California’s Proposed Junior-DOMA (1996)

Born in February 1973, Andrew (Andy) Pugno does not come across as a political or religious leader. He is a quiet, nice-looking family man, faithful husband to Colleen Pugno and devoted father to their three children, all adults now. A devout Catholic, Pugno is neither a loud, breast-beating evangelical nor a doctrinaire dogmatist. But he lives by a traditional Catholic faith—and that brought him into the public arena.⁵

Under Dean Schaber, hundreds of McGeorge law students worked for the state government in Sacramento. While he was a law student (1996–99), Pugno worked for Assembly Member and (after 1996) then Senator William (Pete) Knight of Palmdale. An Air Force veteran, Colonel Knight was a modest man who

¹ *Baehr v. Lewin*, 852 P.2d 44, 52 (Haw. 1993), discussed in WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, *MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS* 81-94 (2020).

² P.L. 104-199, 110 Stat. 2419 (Sept. 21, 1996).

³ 1 U.S.C. § 7 (amending the Dictionary Act).

⁴ 28 U.S.C. § 1738C (implementing Congress’s authority under the Full Faith & Credit Clause).

⁵ My description of Andy Pugno is based upon reading about him and a lengthy interview with him in the McGeorge cafeteria on October 22, 2015.

considered his family to be his proudest achievement. He and his wives (Helena until her death, and Gail in his second marriage) raised three sons and four step-daughters within the Catholic Church.⁶ For reasons of a shared faith and a common code of loyalty, Andy was perfectly in sync with his boss and was almost his eighth child.

Notwithstanding the large time commitments he was making to Knight, Pugno was an excellent law student. He graduated in May 1999 with “great distinction” and was selected to the Order of the Coif. As a student of constitutional as well as statutory law, Pugno was familiar with civil rights claims, including those being made by lesbians, gay men, and bisexuals. His boss did not share the law student’s interest in constitutional law but was touched by issues of sexuality. In 1995, Knight’s brother, a gay man, died of complications associated with AIDS. In 1996, his son David came out as gay. “It is hard to deal with,” Knight confessed. “But if it’s one of your children, you accept it. . . . It’s his life,” he told the press, with libertarian stoicism.⁷ Although David had a boyfriend and probably wondered whether the state would ever recognize his marriage to another man, his father and his McGeorge intern were sincerely committed to making sure that “gay marriage” would never be legally recognized in California.

On January 4, 1996, Assembly Member Knight unveiled revisions to an earlier bill he had introduced (AB 1982) that would respond to expected Hawaii marriages, the same impulse that was driving the federal DOMA later in the year.⁸ Although tinkered with over the next few months, the bill would have added a new section 308.5 to the Family Code: “A marriage contracted outside this state between individuals of the same gender is not valid in this state.” Section 300 of the Family Code had already been amended in 1977 to entrench the idea that marriage is a “civil contract between a man and a woman,” but section 308 codified the validation rule, whereby courts must recognize out of state marriages as valid in the celebrating jurisdiction. As Pugno explained to Knight, if a gay or lesbian couple were legally married in Hawaii, as appeared likely in 1996, section 308 would require California courts to recognize (give legal effect) to that marriage. Because Hawaii did not limit marriage licenses to in-state residents, it would be easy for California couples to fly to the Aloha State for a vacation, get married, relax on an island honeymoon, and return to California with a marriage certificate the state would recognize. This feature of interstate recognition was a surprise to most lay people. As a general matter, states have great leeway in choosing the rules for recognizing marriages from other states, a fact that made the federal DOMA protection superfluous.

Acting on behalf of his boss, Pugno on February 8 released an explanation for revised AB 1982, as a response to the possibility of Hawaii same-sex marriages. The point of the bill was to entrench the longstanding definition of marriage and ensure a coherent, unified understanding of what the institution meant for Californians. According to the press release, Assembly Member Knight “also

⁶ For Colonel Knight’s biography, see his career description in the National Aviation Hall of Fame, *William (Pete) Knight* (inducted 1988).

⁷ Nancy Hill-Holtzman, *Foe of Gay Marriages Says His Son Is Homosexual*, L.A. TIMES, Sept. 11, 1996 (quotation in text).

⁸ The discussion in text of AB 1982 is taken from ESKRIDGE & RIANO, MARRIAGE EQUALITY, 155–56.

believes that the economic and legal benefits extended to married couples are society's way of regulating and legally binding personal relationships that appear to be capable of creating children. A mother-father couple is the healthiest environment in which a child can grow up, and this environment is fostered with benefits that encourage[] couples to be married before procreating."⁹ The press release recognized that not all married couples had biological children and that many children were conceived and born outside of marriage, but state recognition channeled people's sexual energies into an institution that Knight and his office considered most productive. This was an important statement of the policy reasons that might support a defense of marriage law, but Pugno's McGeorge education had equipped him with research skills that added another, more subtle reason.

Knight's diligent intern had discovered an interesting law-based angle that concerned the sponsor of AB 1982.¹⁰ "One of the author's biggest concerns is that forced government sanctioning of same-sex marriages will lead to a public school curriculum that equates homosexual and traditional marriages as equally acceptable, especially in sex education classes."¹¹ This concern was grounded in the California Education Code. If public schools taught health education, the Education Code required that teachers include discussion of the "legal and financial aspects and responsibilities of marriage and parenthood."¹² Because schools were required to teach something about the "legal aspects" of marriage, Andy concluded that teachers would have to say something about "gay marriage"—and that something was likely to be tolerant or approving. As a result, school children would be "indoctrinated" into the "ideology" of "homosexual rights," dissenting voices from traditionalist faiths would be marginalized or even censored, and parental and pastoral influences on kids' moral education would be disrupted. This association of expanded marriage and public school curricula was a contribution to the marriage debate that would become increasingly important over time, as we shall see below.

The Judiciary Committees of both the Assembly and the Senate held hearings on AB 1982, where legislators debated the constitutionality of the bill in addition to hearing testimony, the committees considered dozens of letters from organizations and citizens and reports from the Legislative Counsel and the Attorney General. The emerging consensus view was that the Full Faith and Credit Clause of Article IV allowed California to announce a strong public policy to preclude recognition of valid (still hypothetical) Hawaii same-sex marriages. Although some gay activists stuck to their view that Article IV required California and other states to recognize valid same-sex marriages from Hawaii, no reputable expert agreed with its view.¹³

Critics argued that the bill was premature (as there were no Hawaii same-sex marriages to be not recognized) and would, if adopted, create confusion. After

⁹ [Andy Pugno], Statement of Assembly Member William J. ("Pete") Knight, A.B. 1982 (Feb. 9, 1996) (quotations in text).

¹⁰ See October 2015 Pugno Interview.

¹¹ [Pugno] Knight Statement, A.B. 1982.

¹² CAL. EDUC. CODE § 51890(a)(1)(D).

¹³ See Report from Bion M. Gregory, Legislative Counsel of California, to Hon. William J. "Pete" Knight, Decision #7063: Marriage (Mar. 28, 1996); Letter from Daniel Lungren, Office of the Attorney General, State of California, to Hon. William J. "Pete" Knight, Re: Support for Your Measure, A.B. 1982 (June 6, 1996).

May 20, 1996, supporters of the Knight Bill had to address the question whether AB 1982 singled out gay people for unconstitutional discrimination based on “animus.” Justice Anthony Kennedy—the former McGeorge professor—authored the Supreme Court’s May 1996 decision in *Romer v. Evans*,¹⁴ which invalidated a state constitutional amendment that excluded LGBT persons from wide swaths of state and local legal protections. As discussed in more detail below, Justice Kennedy was inspired by then-Dean Emeritus Schaber to interrogate discriminations against lesbians, gay men, and bisexuals with a skeptical eye. In his view, honed after decades of practicing and teaching law in Sacramento, one’s sexual orientation should make no difference as to legal rights and duties.

An anecdote will illustrate my point. Decades later, I engaged Tony and Mary Kennedy at a Supreme Court social event. I asked Mary Kennedy if she had attended the retirement celebration for Dean Schaber in 1992; her husband had been the keynote speaker and had praised Dean Schaber as a paragon of the neutral rule of law. When Justice Kennedy joined our conversation, his wife told him I was conjuring up happy memories she had for Dean Schaber, and Justice Kennedy waxed for a few minutes on this outstanding public servant. I asked: Was it widely known that Dean Schaber was gay? Mary Kennedy nodded her head thoughtfully, “Well it was assumed to be the case, but it was not something anyone talked about.” Tony Kennedy scrunched up his face and added, “Yes, it was *irrelevant*.” That was far from a strong pro-gay statement: Not “Gay is Good,” a slogan of the movement for decades, but “Gay is Irrelevant” to one’s enjoyment of rights and responsibilities. The Colorado law Justice Kennedy invalidated in *Romer* went out of its way to deny lesbians, gay men, and bisexuals equal treatment by the state, and for Justice Kennedy this went to the core of the Equal Protection Clause.¹⁵

Although not knowing Kennedy’s priors, Lambda Legal, the ACLU, and the National Center for Lesbian Rights (NCLR) read *Romer* broadly: Why was the Knight bill not a denial of equal protection? Pugno was far from persuaded and asked Professor Lynn Wardle, a family law expert at Brigham Young’s new law school, to educate the committee on the *Romer* question:

The law provides at least three different and distinct legal categories for personal relations and actions: “prohibited relations and conduct,” “permitted relations and behavior,” and “preferred relations and conduct.” The boundary line between the first and second category is “tolerance.” The boundary line between the second category and third category (preferred acts and relations) is the line of “preference.” Historically, homosexual relations have been consistently placed in the prohibited category. Recently, there has been an apparent trend to move homosexual behavior across the “tolerance” barrier, from the “prohibited” category to the “permitted” category. . . . But *tolerating* same-sex

¹⁴ 517 U.S. 620 (1996).

¹⁵ *Id.* at 631-32.

relationships is quite a different thing from giving them *preferred* status.¹⁶

Professor Wardle also argued that the state constitutional amendment struck down in *Romer* was explicitly targeted against gay people and was a more sweeping deprivation of legal rights.

Overall, reaction to the policy and constitutional arguments broke down entirely by party. The Republican-controlled Assembly was receptive, and Pete Knight and Andy Pugno were certain the GOP Governor Pete Wilson would sign such a measure. The Assembly's Judiciary Committee endorsed AB 1982, and the Legislative Counsel assured the Assembly the bill was constitutional. On January 29, 1996, the bill sailed through the Assembly, 41-31—but it ran into trouble in the Democrat-controlled state Senate. In the Senate Judiciary Committee, Democratic senators proposed amendments to AB 1982 that would have allowed lesbian and gay couples to register as domestic partners, entitled to hospital visitation, preference in conservator appointments, and health insurance benefits if employed by state/local government. A bipartisan majority voted for the amendments over Knight's protests.¹⁷

Governor Wilson threatened to veto the committee's compromise, because expanded domestic partnership for lesbian and gay couples looked too much like marriage. On August 12, Assembly Member Knight announced amendments to the domestic partnership portion of AB 1982—no registry, no health insurance benefits, only assurance of hospital visitation and conservatorship rights. On August 19, the Senate voted 20-20 (all GOP senators voting yes) whether to remove the domestic partnership registry from the Knight bill. In a bold move, Lieutenant Governor Gray Davis broke the tie against the proposal.¹⁸ Without the amendment, Knight abandoned his own bill, and it died on the Assembly calendar. Of course, other states continued to pass mini-DOMAs, and the federal DOMA was enacted the next month.

California's Proposition 22 (2000)

In the November 1996 election, California voted overwhelmingly for the Democrats' Clinton-Gore ticket for President and returned Democratic majorities in both chambers of the Legislature. The voters, however, promoted Pete Knight the California Senate, and Andy Pugno, his loyal intern and a McGeorge law student until 1999, became Senator Knight's chief of staff (1997–2001). Already connected with marriage activists in the Church of Jesus Christ of the Latter-day Saints (through his friendship with Professor Wardle) and in the Catholic Church (his family's own faith community), Pugno in 1998 was invited to attend a conference on the marriage issue sponsored by Catholic University Professor David Orgon Coolidge, who was working with Wardle and the Mormons to launch

¹⁶ Statement of Professor Lynn Wardle Submitted to the California Senate Judiciary Committee Regarding A.B. 1982 (July 3, 1996).

¹⁷ Carl Ingram, *Bill Opposing Gay Marriages Weakened*, L.A. TIMES, July 11, 1996, at A3.

¹⁸ Carl Ingram, *Davis Breaks Tie, Backs Domestic Partner Registry*, L.A. TIMES, Aug. 20, 1996, at B8; Carl Ingram, *Senate OKs Benefits for Same-Sex Partners*, L.A. TIMES, May 26, 1999, at A3.

a popular initiative stopping marriage equality in Hawaii. Coolidge and most of the conferees favored a constitutional amendment barring any state or federal recognition of marriages that were not one man, one woman—but Wardle and Pugno opposed that idea for federalism reasons: as constitutional conservatives, they opposed uniform national rules for big normative issues (like abortion and, now, marriage).

In May 1997, Andy Pugno became Senator Knight’s eyes and ears for a Protection of Marriage Committee. Its agenda was to bypass the increasingly Democrat-controlled California Legislature and to secure a non-recognition law on the books through a ballot initiative. In the same month, Mormon, Catholic, and Evangelical leaders formed the California Defense of Marriage Leadership Group. Pugno and the Protection of Marriage Committee were uncertain about how to proceed. Wardle counseled him that their coalition should aim at an amendment to the state constitution—to head off activism such as that engaged in by the Hawaii Supreme Court. Pugno liked the idea, but a constitutional initiative would be much more expensive to get started: the California Constitution requires signatures from at least 8% of the voters in the last [1994] governor’s race, as opposed to 6% for statutory initiatives.¹⁹ There was also a political reason. Because the Hawaii marriage case was likely to be thwarted by the constitutional initiative the Mormons expected to be placed on the 1998 Hawaii ballot, there was no state recognizing same-sex marriage on the horizon. Pugno, Knight, and their allies felt it would be an uphill battle to sell a constitutional amendment without a more tangible “threat” to marriage.²⁰

Professor Wardle and Gary Lawrence, a brilliant political consultant and Mormon activist, drafted a poll-tested simple text for a proposed ballot initiative: “Only marriage between one man and one woman is valid or recognized in California.”²¹ Some supporters worried that this language might be interpreted to restrict the rights of straight men who wanted to get married a second or third time. It was one thing to exclude lesbian couples from marriage, but quite another even to risk excluding straight men and women who wanted to marry over and over, as many Hollywood stars did. Like Pugno, I find the no-remarriage interpretation of the simple text far-fetched, but in an abundance of caution, Pugno changed the language to say: “Only marriage between a man and a woman is valid or recognized in California.” On March 2, 1998, this new language was filed with the Secretary of State, and the language was approved by the Office of the Attorney General on April 22.²²

The proponents then had five months to collect the needed voter signatures.²³ When more than enough valid signatures were submitted, the

¹⁹ CAL. CONST. art VI, § 16(a)-(d) (to qualify a constitutional initiative, the proponents need to gather signatures amounting to 8% of the voters in the previous governorship election).

²⁰ Lynn D. Wardle to SGM [Same-Gender Marriage] Committee Members: Marlin K. Jensen, Loren C. Dunn, David E. Sorensen, Lance B. Wickman, Richard B. Wirthlin, Arthur S. & Jan Anderson, Von Keetch (March 26, 1998), Prince Archives.

²¹ Memo from Gary Lawrence to California Defense of Marriage Leadership Group (May 12, 1997), Prince Archives.

²² Carl Ingram, *Measure to Ban Gay Marriages OKd for Ballot*, L.A. TIMES, Nov. 18, 1998, at A3.

²³ Memo from Gary Lawrence to California Defense of Marriage Leadership Group (May 12, 1997), Prince Archives.

Attorney General certified the initiative as Proposition 22, offered to the voters in a special election on March 4, 2000. The process of gathering signatures gave Protect Marriage a huge head start, as it had an organizational structure, substantial fundraising, and a voter list with almost 700,000 names months before a lesbian and gay group even had a meeting. Even before filing with the Attorney General, the Protect Marriage Committee received a big boost when the Church of Jesus Christ, headquartered in Salt Lake City but with as many as a million members in California, voted to go all in to support Proposition 22. Pugno added Richard Wirthlin, the famous pollster and Mormon representative, onto its executive committee, which also included Ned Dolejsi, representing the Catholic Conference, and Senator Knight.²⁴ Support from the Church of Jesus Christ mobilized thousands of diligent, educated grassroots canvassers and immediately generated \$3–4 million in contributions to the planned initiative campaign. In June 1999, the Church sent individual letters to 740,000 California Mormons, urging them to contribute money and time to Proposition 22.²⁵

From the beginning, Yes on 22 out-organized and beat the No on Knight campaign in fundraising and grassroots enthusiasm. Pugno’s committee also started with a huge polling advantage. Even the No on Knight pollsters reported considerable anxiety among voters about the family and the well-being of children.

“Voters’ biggest fears about same-sex marriage are values-based and relate to declining moral standards, explaining homosexuality to children, and damaging religious marriage. . . . Ironically, at the same time, participants define marriage in terms of commitment and trust, rather than in terms of gender and they believe same-sex couples are just as committed to one another as heterosexual couples. Furthermore, most believe that all committed couples should have certain basic protections like inheritance rights and hospital visitation rights.”

Jarringly, the focus groups also revealed that many voters felt threatened by lesbian and gay “flaunting,” especially public displays of affection. “The image of two gay people kissing remains remarkably threatening.”²⁶

Through its lawyers, No on Knight scored a symbolic victory in November 1999. The Protection of Marriage Committee had entitled the initiative “Definition of Marriage,” but Attorney General Bill Lockyer had authority to devise a different title for the ballot and for the voter information materials. No on Knight urged Lockyer to adopt a more negative title, “Limit on Marriage,” and the liberal Democrat agreed. Lockyer, who took over the Attorney General’s office from a conservative Republican in January 1999, was, like Pugno, a McGeorge graduate. He had been a student under Dean Schaber and received his law degree in 1986. In May 1999, Attorney General Lockyer was the featured speaker at the McGeorge

²⁴ The account that follows is heavily indebted to Dr. Gregory Prince, *Mormons and Gays* ch. 8 (2018) (inside the LDS Church account of the Prop 22 campaign).

²⁵ Memorandum from Elder Douglas Callister to Stake Presidents in California (May 20, 1999) (quotations in text); see Prince, *Mormons and Gays*, ch. 8; *Mormon Money*, Newsweek, August 9, 1999, p. 6.

²⁶ Memorandum from Celinda Lake & Vicki Shabo, Lake Snell Perry Assocs., to California Same-Sex Marriage Team, “Focus Group Findings: Strategic Recommendations on Same-Sex Marriage” (April 9, 1999).

Commencement where Andy Pugno received his J.D., with great distinction. Pugno was happy to receive his degree but would be disappointed with Lockyer's subsequent decision to rename Proposition 22.

On December 13, the Secretary of State promulgated the informational pamphlet sent to all registered voters, with pro and con arguments supplied by each side. Yes on 22 emphasized the "Don't Redefine Marriage" argument that was dear to Knight and Pugno, while No on 22 charged that the initiative would add nothing to California law, was deeply unfair to lesbian and gay partners and their families, and would have harmful effects on individuals and families. The pamphlet reflected the disparity in endorsements. Los Angeles District Attorney Gil Garcetti and Assembly Speaker Antonio Villaragosa signed the statements for No on 22, while relative unknowns signed the statements for Yes on 22.

Yes on 22 began Spanish-language ads on January 20, 2000, with English ads going up February 7. The theme of the campaign and its ads was: Protect marriage. Don't experiment with this treasured but embattled institution. Most of its ads were rather bland: Let California voters control who is married in our state, and let's all be nostalgic for our wedding days and reminisce about "the way marriage has always been." At least one prominent ad featured a Black schoolteacher who asked parents what they wanted their children exposed to. "I've dedicated my life to their education . . . and teaching them the principles to shape their lives. That's why parents and teachers like me all across California are voting Yes on 22." Would schools be forced to endorse gay marriage if judges forced it upon their state? Andy Pugno thought so. Recall that the Education Code required public schools to include discussions of marriage in their health classes. In 1998, the Legislature amended the Code to bar any kind of anti-gay discrimination in public school instruction.²⁷ Although teachers faulted the argument, Pugno's 1996 conclusion was strengthened by pro-gay legislation enacted over his boss's objections.

The No on Knight ads started February 14, 2000. "Pete Knight, the California politician behind Prop 22, may not like it that his son is gay. But he shouldn't make us vote on his private problem," said one early ad. A spot that started on February 16 featured a fictional Jeff Davis, who explained: "Most people don't support gay marriage, but we do support keeping government out of people's private lives." Some gay groups found this depiction "a shockingly sympathetic image of a homophobe."²⁸ On February 29, No on Knight aired this ad: "Prop 22 won't save a single marriage, but it will hurt gay people. That's what it's intended to do," said the voiceover, as a small image expanded to fill the screen. Depicted were followers of Reverend Fred Phelps at the funeral of gay-bashing victim Matthew Shepard. They were holding signs, "God hates fags," and "Fags burn in Hell." I consider the ad to have been a desperation strategy; Andy Pugno and the Yes on 22 campaign viewed it and the attack-Pete-Knight pieces as hateful.²⁹

²⁷ CAL. EDUC. CODE § 220 (as amended in 1998).

²⁸ On the No on Knight ads, see Toni Broaddus (second in command, under Marshall), *Vote No If You Believe in Marriage: Lessons from the No on Knight/Proposition 22 Campaign*, 15 Berkeley Women's L.J. 1, 5-0 (2000); Aurelio Rojas, *Foes of Prop 22 Disagree on TV Ad*, SF Examiner, Feb. 29, 2000 (describing the Jeff Davis ad and quoting a critic).

²⁹ Evelyn Nieves, *Ballot Initiative That Would Thwart Gay Marriage Is Embroiling California*, N.Y. TIMES, Feb. 24, 2000; Carol Ness, *Tough New Ads Blast Prop 22*, San Francisco Examiner, Mar. 2, 2000.

On March 7, Proposition 22 won, 61.4% to 38.6%. As suggested by Toni Broaddus, one of the No on Knight leaders, the triumph of Proposition 22 was overdetermined. Most Californians started out agreeing with Pugno and Knight. The No on Knight campaign would have been hard-pressed to shift their views—and that was impossible with its clumsy messaging and the disparity in spending. Although the LGBT community raised a surprising amount of money, more than \$6.3 million, it was dwarfed by the \$11 million raised by Yes on 22. Likewise, Yes on 22 had a simple, positive, and powerful message: Protect Marriage. Declining to argue that gay marriages were a good thing for the state, No on Knight’s mantra of “divisive, intrusive, unfair” was complicated, negative, and weak. Not least important, the thousands of Mormon volunteers, donors, and staff members made a huge difference—in contrast to the lethargic support within the LGBT community on the marriage issue (it is estimated that as many as fourteen percent of the gay voters said Yes on 22).³⁰

Notwithstanding the overwhelming electoral victory for Proposition 22, marriage equality, as the movement was increasingly known, was undaunted. California had in 1999 enacted a modest statewide law recognizing domestic partnerships, with limited benefits, for same-sex couples. In 2003, the Legislature passed and the Governor signed AB 205 into law. AB 205 expanded domestic partnerships for registered same-sex couples to include almost all of the legal benefits, duties, rights, and obligations of civil marriage—without the name, of course.³¹

Senator Knight voted no, and the day after AB 205 was signed into law, the Proposition 22 Legal Defense & Education Fund, with Andy Pugno as its counsel, filed suit to invalidate the expanded domestic partnership law as inconsistent with Proposition 22. Attorney General Lockyer defended the expanded domestic partnership law and reconciled it with Proposition 22. Lockyer and other supporters of AB 205 relied on the Proposition 22 ballot materials to show that its sponsors objected to the expansion of marriage, and some had explicitly endorsed alternative institutions such as state and municipal domestic partnership laws. The California Court of Appeals agreed with the Attorney General and ruled that the expanded *domestic partnership* law did not violate California’s ban on same-sex *marriages*.³²

³⁰ Broaddus, *Vote No If You Believe in Marriage*, 15 Berkeley Women’s L.J., pp. 6–7, 10–11.

³¹ CAL. FAM. CODE § 297.5; see Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555 (2004).

³² Knight v. Superior Court, 26 Cal. Rptr. 3d 687, 700 (Ct. App. 2005).

The Texas Sodomy Case (2003)

The Cinderella Moment for marriage equality was 2003. What made 2003 the turning point in the debate was partly California's AB 205, the expanded domestic partnership law, but was mainly a pair of supreme court decisions handed down back east.

A recurring objection to the constitutional case for same-sex marriage was that the U.S. Supreme Court in *Bowers v. Hardwick*³³ held that the Constitution allows states to make consensual, private "homosexual sodomy" (oral or anal sex between consenting adults) a felony. If "homosexuals" can be constitutionally considered criminals because of their characteristic consensual behavior, why can the state not impose lesser burdens on this population, such as exclusion from civil marriage? Justice Scalia had made this point in *Romer v. Evans*, where he praised "tolerant" Coloradans for not putting "homosexuals" in prison (as *Bowers* allowed), and only imposed what he considered minor discriminations against them.³⁴ But he had made that point in an opinion dissenting from Justice Kennedy's opinion for a 6-3 Court. Scalia objected that *Romer* and *Bowers* could not be reconciled.³⁵

Nino Scalia suspected that Anthony Kennedy had already reached that conclusion. Recall that Kennedy had been an adjunct professor at McGeorge from 1965 to 1988, when he moved east to serve on the Supreme Court. An important supporter of Kennedy's elevation, Dean Schaber urged his friend not to sever all ties with McGeorge: You get an extended vacation after July 1, right? Why not teach at McGeorge's famous summer program in Salzburg, Austria? Starting in 1990, that is exactly what the Justice did, every summer. Early on, probably during the summer of 1990 or 1991, Kennedy teamed up with a European scholar to explore the different approaches taken to constitutional privacy by the U.S. Supreme Court in *Bowers* and the European Court of Human Rights in *Dudgeon v. United Kingdom*.³⁶ At another Supreme Court musical event, Justice Kennedy described the course to me.³⁷ He had been familiar with the American decision but had not studied the European one; when he read and contemplated *Dudgeon*, he was embarrassed for his country.

The American judgment had dismissed Michael Hardwick's privacy concerns with being rousted by the police for social activity in his own home as, "at best, facetious" and revealed no interest in the effect of consensual sodomy laws on people's lives.³⁸ Even though the Georgia law applied to any consensual oral intercourse, the American Court obsessed only about "homosexual sodomy."³⁹ The European judgment, in contrast, recognized that "the very existence" of

³³ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

³⁴ *Romer*, 517 U.S. at 644-46 (Scalia, J., dissenting).

³⁵ *Id.* at 640-46.

³⁶ *Dudgeon v. United Kingdom*, Application No. 7525/76 (1981) (holding that law criminalizing consensual anal and oral sex in private places violated the privacy and equality guarantees of the European Convention on Human Rights).

³⁷ The account in text is taken from my conversation with Justice Anthony Kennedy, U.S. Supreme Court, May 2017.

³⁸ *Bowers*, 478 U.S. at 194.

³⁹ *Id.* at 190-92.

Northern Ireland’s criminal penalty for consensual sodomy “continuously and directly affects his private life: either he respects the law and refrains from engaging—even in private with consenting male partners—in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.”⁴⁰ What might justify such totalitarian legislation? The European Court discussed potential public interests in decency, corruption of minors, and even widespread morality but found none of them justified criminalization of purely private activities between consenting adults.⁴¹ The American Court disposed of the issue in one paragraph: invoking the “majority sentiments about the morality of homosexuality,” the state had a rational basis to make such conduct a felony punishable by a minimum of one year and maximum of twenty years in prison.⁴²

By 1994, when Ruth Ginsburg had assumed the seat of Byron White (the author of *Bowers*) and Stephen Breyer succeeded Harry Blackmun (who wrote the lead dissent in *Bowers*), there were five Justices on the U.S. Supreme Court who believed that *Bowers* was not only wrongly decided, but was a stain on the Court. Led by Kennedy, those Justices (Stevens, Souter, Ginsburg, and Breyer) were joined by O’Connor to overturn the antigay initiative in *Romer*, which Scalia denounced as inconsistent with *Bowers*. Seven years later, the Supreme Court evaluated Texas’s “Homosexual Conduct Law,” which made it a crime for consenting adults of the same sex (but not different sex) to engage in private anal or oral sex.⁴³ In *Lawrence v. Texas*,⁴⁴ the Court could easily have applied *Romer*, to hold that if sodomy was a morals crime it should not make a difference whether it is a man and a woman or two women, and hence an equal protection violation. But only Justice O’Connor took that approach,⁴⁵ which would have left *Bowers* (a decision she had joined) alone and all but four consensual sodomy laws still enforceable. Reflecting his Salzburg experience, Justice Kennedy led the majority to overrule *Bowers v. Hardwick* and to hold that gay people, like everyone else, had a privacy right to be left alone to live their lives, so long as they were not harming other people.⁴⁶

Six Justices pointedly rejected the argument made in an *amicus* brief, authored by Professors Gerard Bradley (Notre Dame) and Robby George (Princeton), that had linked the state’s authority to criminalize sodomy and its traditional definition of marriage.⁴⁷ The professors argued that the Supreme Court had always treated conjugal marriage as the only normative framework justifying the regulation of adult relationships. Not only did the Court repeatedly valorize the fundamental right to marriage and family, a point made in *Bowers*, but even the

⁴⁰ *Dudgeon*, ¶ 41.

⁴¹ *Id.* ¶¶ 42–62.

⁴² *Bowers*, 478 U.S. at 196.

⁴³ TEX. CRIM. CODE § 21.06.

⁴⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴⁵ *Id.* at 579–85 (O’Connor, J., concurring in the judgment on equal protection grounds).

⁴⁶ For an excellent account of the background of the Texas sodomy case, see DALE CARPENTER, *FLAGRANT DISREGARD* (2009).

⁴⁷ Brief *Amicus Curiae* Family Research Council, Inc. and Focus on the Family in Support of Respondents, *Lawrence v. Texas* (No. 02-102, filed Feb. 18, 2003), 2003 WL 470066.

contraception and other reproductive rights cases endorsed or accepted the premise that marriage was the baseline for evaluating sexual privacy claims. Consensual sodomy laws were constitutionally permissible, they argued, because they could be understood as reinforcing conjugal marriage. A legislature could reasonably believe that barring non-procreative intercourse (sodomy) would normalize and endorse procreative intercourse, which would strengthen the many state policies that recognized the special status of conjugal marriage. Because “homosexual conduct” was exclusively non-procreative, legislators had the discretion to criminalize only that extreme rejection of the conjugality norm.

When Justice Kennedy read his opinion in open Court on the last day of the Term, June 26, 2003, there were audible gasps when he stated that *Bowers*’s framing of the issue as a “right of homosexuals to engage in sodomy” reflected “the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse,” an unconscious dig at the Bradley and George *amicus*. Closely following the Cato *amicus* brief that I had authored, the opinion recounted the evolution of sodomy laws, from general proscriptions enforced exclusively against non-consensual or public activities (nineteenth century), to laws frequently targeting homosexuals (mid-twentieth century). Once sodomy laws lost their exclusive focus on non-consensual or public conduct, they came under increasing criticism, and Justice Kennedy declared them antithetical to American traditions of free choice regarding matters of personal relationships. Echoing the language in *Dudgeon*, the decision recognized that such statutes “seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.” As a matter of constitutional liberty, consenting adults of all sexual orientations “may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”⁴⁸

Romer, too, was relevant to *Bowers*’ validity, for reasons that had also been developed by the *Dudgeon* judgment. Thus, “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and the private spheres.” Hence, *Romer*’s invalidation of anti-gay discrimination, adopted for its own sake, was relevant to the Court’s re-evaluation of *Bowers*. Justice Kennedy concluded: “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”⁴⁹ No one could remember a case where the Supreme Court had announced that one of its precedents had been wrong *the day it was decided*.

Justice Scalia’s lacerating dissent lambasted his colleagues for striking down a law adopted by the elected legislature, in the face of contrary precedent

⁴⁸ Lawrence, 539 U.S. at 566–67 (2003) (quotations in text); see *id.* at 567–73 (history, much of which was taken verbatim from the Cato *amicus* brief); see Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1641–42 & note 124 (2004).

⁴⁹ *Lawrence*, 539 U.S. at 575–78.

(*Bowers*), and for spelling doom for morals legislation more generally. Indeed, Justice Scalia thundered that the Court was, theoretically, now committed to the far reaches of the “so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”⁵⁰ Such activists are entitled to persuade legislatures to equalize their status and bar discrimination against them, but they are not entitled to revise the Constitution to require the same. In closing, Scalia reminded the media that the “homosexual agenda” prominently included same-sex marriage, which courts in Canada were in the process of recognizing for that nation’s population. A Court sweeping away “discriminatory” sodomy laws was a Court capable of sweeping away “discriminatory” marriage laws. Here’s how:

Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring”; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution”? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.⁵¹

By design, Scalia’s *Lawrence* dissent was a wake-up call for supporters of traditional marriage—and the lawmakers across the street from the Supreme Court took seriously his admonition that homosexual marriage was already the wolf at the door (Canada), and if they waited too long his colleagues on the Court would force it upon the nation.

Three days after *Lawrence*, Dr. William Frist, the Senate Majority Leader, announced his support for a constitutional amendment banning same-sex marriage, and the Republican Party seized upon the issue.⁵² In July 2003, the GOP’s Senate Policy Committee issued a detailed brief on “The Threat to Marriage from the Courts.”⁵³ The report predicted that Massachusetts judges

⁵⁰ *Id.* at 602 (Scalia, J., dissenting).

⁵¹ *Id.* at 604–05.

⁵² Mark O’Keefe, *Religious Right: Frustrated Despite Friends in High Office, Rethinks Strategy*, NEWHOUSE NEWS SERV., July 14, 2003.

⁵³ U.S. Senate, Republican Policy Committee, John Kyl, Chairman, “The Threat to Marriage from the Courts” (July 29, 2003); accord, *What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996? Hearing*

would follow the suggestions in *Lawrence* to impose gay marriage in that Commonwealth, which would stimulate dozens of copycat lawsuits in other states, as well as lawsuits challenging DOMA. Indeed, unless a constitutional amendment were adopted, *Lawrence* spelled constitutional doom for the Defense of Marriage Act, exactly as Justice Scalia had warned.

Like Senator Knight and his former Chief of Staff in Sacramento, the Capitol Hill Republicans believed that public opinion was on their side, but Justice Kennedy better reflected the mood of the country than his party did. GOP pollster Richard Wirthlin reported to supporters of one-man, one-woman marriage that as many as a third of the voters were ambivalent: they did not want to be perceived as anti-gay, but they were concerned with the decline of marriage and the message that same-sex (non-procreative) marriage sent to their children. Based upon message-testing in focus groups, the traditional values movement's most effective argument was this: "*Gays and lesbians have a right to live as they choose, but don't have a right to redefine marriage for our entire society.*"⁵⁴

Four months after Wirthlin delivered this sobering assessment of public opinion, the Massachusetts Supreme Judicial Court ruled in *Goodridge v. Department of Public Health*⁵⁵ that the state constitution required the Commonwealth to hand out marriage licenses to lesbian and gay couples on the same terms as everyone else. The Court deferred enforcement of its mandate until May 17, 2004, so that the Legislature and County Clerks would have a grace period to adjust to the new marriage rule.

FROM THE WINTER OF LOVE TO PROPOSITION 8

McGeorge played no role in *Goodridge*, apart from the fact that the state supreme court cited Justice Kennedy's *Lawrence* opinion, which may have nudged a bare majority of the Court to stick their necks out for complete equality. Traditionalists, in turn, were inspired by Proposition 22 to override *Goodridge* with a constitutional ballot initiative, but they never secured the needed legislative authorization, and gay marriage survived in Massachusetts.⁵⁶ No other state supreme court followed *Goodridge* for the next five years (i.e., between November 2003 and June 2008). And attention immediately shifted back to California, where McGeorge alumni continued to play central roles.

Before the Subcomm. on the Constitution, Civil Rights, and Property Rights, Senate Comm. on the Judiciary, 108th Congress, 17 (Sept. 4, 2003) (former Texas Solicitor General Coleman); Less Faith in Judicial Credit: Are Federal and State Defense of Marriage Initiatives Vulnerable to Judicial Activism?. Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights, Senate Comm. on the Judiciary, 109th Congress (April 13, 2005) (testimony of Professors Bradley and Wardle).

⁵⁴ Richard Wirthlin & Dee Allsop, Wirthlin Worldwide, "Marriage Strategy for Federal Marriage Amendment" (July 2015); Alliance for Marriage, C-SPAN Press Conference at U.S. Capitol, Sept. 17, 2003, available at <https://www.c-span.org/video/?178235-1/federal-marriage-amendment> (viewed Feb. 3, 2018).

⁵⁵ *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

⁵⁶ *ESKRIDGE & RIANO, MARRIAGE EQUALITY*, 227-47.

The Winter of Love (2004)

On February 12, 2004, San Francisco Mayor Gavin Newsom started issuing marriage licenses to lesbian and gay couples—creating a national sensation, as couples drove and flew into the city to express their mutual commitment and make their unions quasi-official.⁵⁷ Kate Kendall, Shannon Minter, and other LGBT leaders were caught off guard when the Mayor’s staff gave them a heads up ahead of time, but they went with the flow and marveled at the enthusiasm and joy the renegade licenses unleashed. Pugno and his allies believed that this was an illegitimate act of civil disobedience—in direct contravention of Proposition 22 and California laws limiting marriage to different-sex unions. Represented by lawyers with the Alliance Defense Fund (ADF, now known as the Alliance Defending Freedom), Andy Pugno’s Proposition 22 Legal Defense and Education Fund (LDEF) immediately filed a lawsuit to stop the Mayor. Pugno and ADF made solid legal arguments that Newsom’s licenses were issued in violation of California statutory law, including language added by Proposition 22, but San Francisco’s Attorney Terry Stewart gamely responded that the Mayor acted correctly because the statutes would be unconstitutional if interpreted to bar his actions. Superior Court Judge James Warren (grandson of Chief Justice Earl Warren) declined on procedural grounds to provide an immediate injunction.⁵⁸

The marriage licenses kept flowing from City Hall until Pugno found an ally in the liberal Democrat (and fellow McGeorge alum) who had prevailed in the AB 205 litigation, Attorney General Lockyer. Obligated as counsel for the state to defend California’s positive law, Lockyer filed a petition to enforce Proposition 22 and earlier marriage statutes with the California Supreme Court, which halted the flow of marriage licenses on March 11. In *Lockyer v. City of San and County of Francisco*,⁵⁹ the California Supreme Court ruled that the Winter of Love marriage licenses were invalid and had no legal effect. Chief Justice Ron George’s opinion for the 6-1 Court relied on the orderly rule of law as binding on executive officials. Consider this: if San Francisco could disregard Proposition 22 and issue marriage licenses based on its interpretation of the Constitution, why couldn’t Fresno disregard AB 2005 and refuse to recognize domestic partnerships, based on its interpretation of Proposition 22?

Lockyer agreed with the Chief Justice: “I am pleased that the court has reaffirmed the important legal principle that non-judicial elected officials do not have the authority to unilaterally declare a state law unconstitutional. If the court had ruled otherwise, local elected officials throughout the state would have license to ignore any state laws they disagree with whether for personal, philosophical, or political reasons.” For example, the Fresno hypothetical. Lockyer continued: “Our form of government provides effective and democratic methods to change the law through legislative action, or by challenging it through judicial review. I respect

⁵⁷ The account in text draws from ESKRIDGE & RIANO, MARRIAGE EQUALITY, 282–96; Scott Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. Rev. 1235, 1374–80 (2010).

⁵⁸ Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco, Civil No. CPF-04-50943 (Super. Ct. S.F. City and County, 2004).

⁵⁹ *Lockyer v. City of San and County of Francisco*, 95 P.3d 459 (Cal. 2004).

the committed, loving relationships of those couples who were married in San Francisco, but these marriages cannot be recognized under California law until such time as the law is changed by the voters or declared unconstitutional by the courts.”⁶⁰

The Winter of Love ended with the Supreme Court’s mandate (no more licenses were issued), but it immediately begat a Spring of Hope, as marriage equality activists seized upon the Court’s and Lockyer’s invitation to follow the legal process as an avenue that might bring them the constitutional recognition they sought. Little did activists know, three of the seven California Supreme Court Justices were inclined to agree with them on the constitutional issue in 2004, and the fourth (Chief Justice George) was open to argument.⁶¹

The Marriage Cases (2005–08)

The day after the California Supreme Court’s final decision in *Lockyer*, San Francisco and several LGBT rights organizations filed lawsuits seeking a judgment that the California Constitution required equal recognition of same-sex unions as marriages, and not just domestic partnerships, and that Proposition 22 itself violated the Constitution.⁶² The constitutionality of Proposition 22 and California’s restriction of marriage to different-sex couples also remained in dispute in the earlier Proposition 22 LDEF lawsuit against San Francisco; Pugno and ADF sought a declaratory judgment that the state marriage limitation was constitutional. Six different constitutional cases were consolidated as *In re Marriage Cases* and assigned to Superior Court Judge Richard Kramer.⁶³

On cross-motions for summary judgment, Judge Kramer ultimately agreed with the challengers and found the same-sex marriage exclusion a violation of the California Constitution’s equal protection guarantees.⁶⁴ In the Court of Appeal, Proposition 22’s defenders took different approaches. Counsel for Attorney General Lockyer denied that the exclusion merited heightened scrutiny but mainly argued that Proposition 22 survived even heightened scrutiny, because its symbolic recognition of traditional marriage was balanced by the equal rights and duties afforded same-sex couples by the domestic partnership law.⁶⁵ Taking a harder line against both marriage equality and expanded domestic partnership, Pugno and ADF argued that there was no basis for strict scrutiny: sexual orientation

⁶⁰ Attorney General’s Press Office, Statement, Aug. 12, 2004, available at <https://perma.cc/3A6J-7M5A> (last visited Aug. 2024).

⁶¹ ESKRIDGE & RIANO, MARRIAGE EQUALITY, 304.

⁶² Cummings & NeJaime, *supra* note 57.

⁶³ On the various lawsuits addressing the constitutional issues and the different theories advanced by challengers, see Cummings & NeJaime, *supra* note 57, at 1281–91.

⁶⁴ *The Marriage Cases*, Case No. 4365 (Super. Ct., S.F. Cnty., March 5, 2005), 2005 WL 583129; Bob Egelko [McGeorge graduate], *Tradition vs. Equality Argued in S.F. Court/Advocates, Foes Lay Out Their Cases Before Judge*, SF Gate, Dec. 23, 2004.

⁶⁵ Appellants’ Opening Brief, *The Marriage Cases*, Case No. A110651 (Cal Ct. App., Dist. 1, filed Sept. 5, 2005), 2005 WL 3263579.

discrimination had never been recognized as a (quasi) suspect classification, and the fundamental right to marriage by definition excluded same-sex couples.⁶⁶

A divided panel of the Court of Appeals reversed Judge Kramer and accepted the constitutional arguments set forth by the McGeorge defenders of Proposition 22.⁶⁷ On appeal to the California Supreme Court, the challengers secured the fourth vote they needed to invalidate the marriage exclusion: Chief Justice Ron George believed that precedent required him to invalidate the exclusion. Specifically, the California Supreme Court had been the first in the twentieth century to overturn a state exclusion for different-race couples, and George could not meaningfully distinguish the two cases: both involved denial of a fundamental constitutional right (marriage) to couples whose commitment and maturity met the requirements of civil marriage, even if not religious marriage.⁶⁸

The Attorney General maintained that the cases were different because same-sex domestic partners enjoyed (almost) all the legal rights and duties that different-sex spouses did. But the Chief Justice engaged in the following thought experiment: “Imagine if marital relationships between a Black man and a Black woman were given the name domestic partnership and the same relationship between a Caucasian man and a Caucasian woman were to be called a marriage, would we find that passed constitutional muster?”⁶⁹ No. Pugno’s Proposition 22 LDEF had argued that the earlier precedent was entirely different, because race-based classifications were inherently suspect, while sexual orientation-based rules were not. The Attorney General had conceded that the state had to show a strong neutral reason to exclude people because of sexual orientation, and George went one step further and wrote for a 4-3 Court that sexual orientation, like race and sex, was a suspect classification under the California Constitution.⁷⁰ Ironically, the Chief Justice went out of his way to say that the exclusion of same-sex couples was not a sex discrimination.

William Lockyer was okay with the Supreme Court’s ruling, as he supported equal rights for sexual and gender minorities. Andy Pugno was very disappointed—but not surprised. He had been in the courtroom for the argument, and like everyone else he could see that conservative Justices Baxter and Ming looked glum that morning, liberal Justice Moreno was chipper, and Chief Justice George looked like the cat that caught the canary. As always, Pugno was prepared to respond to a setback. In 2005, he launched a new organization to support a constitutional Super-DOMA ballot initiative: ProtectMarriage.com could be the vehicle by which he expected the voters to override the Supreme Court by adding language to the California Constitution. Ron Prentice, the head of the California Family Council, was the executive director, and the executive committee for ProtectMarriage.com included representatives from the leading religious groups dedicated to preserving traditional marriage, namely, the Catholics, Latter-day Saints, and Evangelicals.

⁶⁶ Appellant Proposition 22 Legal Defense & Education Fund Opening Brief, *The Marriage Cases*, Case No. A110651 (Cal Ct. App., Dist. 1, filed Oct. 21, 2005), 2005 WL 3955027. 3263579

⁶⁷ *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Ct. App., 1st Dist., 2006).

⁶⁸ *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948); see *ESKRIDGE & RIANO, MARRIAGE EQUALITY*, 306–09.

⁶⁹ *RON GEORGE, CHIEF: THE QUEST FOR JUSTICE IN CALIFORNIA* 632 (2013).

⁷⁰ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

In July 2007, Maggie Gallagher, the main theorist of those skeptical of marriage equality, had created the National Organization for Marriage (NOM) to help coordinate a national campaign supporting the traditional limits to marriage.⁷¹ In December 2007, she secured a commitment from Catholic clerics and donors to fund a signature drive for one of Pugno's proposed constitutional initiatives. Once the Attorney General okayed an initiative, the sponsors would have to submit petitions signed by a staggering 694,354 California voters, 8% of the vote in the 2006 gubernatorial election. Gallagher and her allies raised more than \$1.5 million to launch the successful signature campaign in early 2008, months before oral argument in the *Marriage Cases* on March 4, 2008. Andy Pugno was at the oral argument and agreed that ProtectMarriage.com was acting just in the nick of time, as the California Supreme Court seemed to have decided to invalidate Proposition 22, the junior-DOMA that the voters had added to the Family Code in March 2000.

Proposition 8 (2008)

Led by Andy Pugno, Ron Prentice, and its executive committee, ProtectMarriage.com would manage the constitutional initiative campaign. The first step had been to draft the proposed constitutional text. Earlier proposals would have revoked the state domestic partnership law as well as barred same-sex marriages, but many religious supporters of traditional marriage were reluctant to take away domestic partnership, and political consultants told Pugno that a simple marriage initiative would be much more likely to succeed. Submitted to the Attorney General in October 2007 and approved for signatures in February 2008, "Proposition 8" (the number assigned by the Secretary of State) copied Proposition 22 to add the following language to the state constitution: "Only marriage between a man and a woman is valid or recognized in California."⁷²

In May 2008, right before the California Supreme Court's decision, ProtectMarriage.com retained Schubert Flint Public Affairs to manage the campaign. A Sacramento firm created in 2003, Schubert Flint had successfully represented corporations seeking to defeat voter initiatives to impose new regulatory burdens, such as higher tobacco taxes and required health insurance for employees. Andy Pugno knew Jeff Flint from working together in the California Legislature and explained that this would be the biggest and most famous initiative campaign of the 2008 cycle, and participation would be profitable for the company. Although they had never been involved in a "values" campaign, Flint's partner Frank Schubert (a devout Catholic) agreed with the message: "Restore marriage."⁷³

Schubert Flint would have overall responsibility for the entire campaign—developing a strategy and message, raising money, creating radio and television ads, and coordinating grassroots field organizers and volunteers. Based on the

⁷¹ Political Research Associates, *Profiles on the Right: National Organization for Marriage (NOM)* (Nov. 11, 2013) (NOM's budget and other organizational details). For an in-depth discussion of Gallagher and her philosophy, see ESKRIDGE & RIANO, MARRIAGE EQUALITY, 248–81.

⁷² On the earlier proposed constitutional initiatives, see *Voters Won't See Domestic-Partnership Rollback Initiatives on November Ballot*, Capitol Weekly, May 25, 2006; Joe Dignan, *California Girds for Marriage Fight*, Gay City, Dec. 1–7, 2005.

⁷³ William Eskridge Jr. Telephone Interview with Frank Schubert, July 14, 2017; Erik Eckholm, *One Man Guides the Fight Against Gay Marriage*, N.Y. TIMES, Oct. 9, 2012.

firm's earlier experience in ballot campaigns, Schubert Flint understood that the California Supreme Court and the media had framed the issue in terms of the rights of committed lesbian and gay couples and the benefits marriage afforded them and their children. Once clerks started issuing marriage licenses at 5 p.m. on June 16, 2008, marriage equality would profit from a great deal of free and positive media attention. Thinking within this framework, voters would not be willing to change the constitution. Thus, the "Yes on 8" campaign needed to reframe the issue in a manner that would alarm voters about the costs of marriage equality for them.

Some of the Evangelical supporters of one man, one woman marriage wanted to argue that rights for sexual and gender minorities should be rolled back because LGBT people were predatory and diseased—but Pugno and Schubert were unwilling to do so, because they considered such a message to be inconsistent with Catholic morality and because it was a stale argument that would alienate more voters than motivate them. In the first half of 2008, Schubert Flint did surveys and focus groups to figure out exactly what messages would appeal to undecided voters and would impel No on 8 voters to reconsider their opposition. Based upon his experience in the Proposition 22 campaign, Andy Pugno already knew the answer to that question: parents worried about their children's exposure to pro-gay messaging in schools would be the primary target audience for Proposition 8's messaging. Schubert discovered that focus groups had no idea that marriage equality might alter the curricular agenda in the state's public schools. Pugno's research into the state education code persuaded him that teachers would, indeed, have to teach children of all ages that "gay marriage" was the same as "traditional marriage," which Andy saw as the Achilles' heel of the *Marriage Cases*.⁷⁴

A third decision made by ProtectMarriage.com was probably the most consequential. Pugno and his colleagues believed that their coalition of white Catholics and Evangelicals needed to be expanded considerably. Thus, they recruited Bishop George McKinney, the Director of the Coalition of African-American Pastors, and Rosie Avila, the Governing Board Member of the Santa Ana Unified School District, to join Ron Prentice as signatories for the state-sponsored ballot materials for Yes on 8. Many pastors agreed with Reverend McKinney, that the needs of minority communities were better met by reaffirming the universal understanding of marriage than by expanding that understanding in ways that would be "confusing" to the next generation.⁷⁵

Given their experience with Proposition 22, Pugno and his colleagues believed that active involvement of the Church of Jesus Christ of the Latter-day Saints was important. Catholic bishops made a direct pitch to the President of the Church.⁷⁶ The President dispatched a delegation headed by Elder Whitney Clayton, the Presidency of the Seventy, to gather facts and write a report on what the Church should do. Elder Clayton was another McGeorge alumnus; he received his law degree from Dean Schaber in May 1978 and practiced business law for twenty years in Newport Beach, California. A great-great grandson of Brigham Young

⁷⁴ William Eskridge Jr. Interview with Andy Pugno, Sacramento, CA, Oct. 22, 2015.

⁷⁵ George McKinney, *Christian Marriage: An Act of Faith, Hope, and Commitment* (1977); George McKinney, *The New Slave Masters* (2005); "Politically Speaking," NBC 7 (San Diego), Oct. 10, 2008 (debate featuring Reverend McKinney), available at <https://perma.cc/H45M-MC2Z> (last visited April 15, 2018).

⁷⁶ *Archbishop Niederauer Explains Catholic Involvement in Prop. 8*, CATHOLIC NEWS AGENCY, Dec. 4, 2008.

and Walter Clayton (who composed “Come, Come, Ye Saints”), original settlers who traveled an arduous 1300 miles from Illinois to settle Utah in 1846–47, Elder Clayton embodied the Latter-day values of a strong productive marriage (seven children) and utter fidelity to God, Church, and Family. And he embodied the McGeorge virtues associated with the rule of law, hard work, and organizational discipline.

Clayton’s delegation met with Pugno and his executive committee, as well as religious leaders, to figure out how deep the support was for Prop 8, and whether other religious groups would carry some of the load, and not leave it all to the Mormons, as had occurred in 2000. Elder Clayton and his colleagues were favorably impressed. Based upon their report, the First Presidency on June 20, 2008 formally committed the Church of Jesus Christ to support Proposition 8. (It was very unusual for the Church to make such an important commitment of resources in such a short period of time.) Elder Clayton was designated the Church’s liaison with the Pugno, Schubert Flint, and the other Yes-on-8 managers.⁷⁷ As had been the case in 2000, the traditional marriage coalition was in place well before the popular vote on the constitutional DOMA. Unlike 2000, the marriage equality side was also well-organized well before the vote.

As explained in my marriage equality book, Equality for All’s No-on-8 campaign was the most ambitious, well-organized ballot campaign ever accomplished for the rights of sexual and gender minorities—but the Yes-on-8 campaign was more effective.⁷⁸ Although Frank Schubert was the maestro who was probably most responsible for winning an uphill battle, our McGeorge alumni played key roles in the success of Proposition 8. To begin with, Pugno, Schubert, and Clayton worked harmoniously to articulate a clear and consistent message that most Californians found persuasive: gay people form families that society should tolerate but not promote; conjugal marriage remains the normative line that identifies families that the state, society, and religion should endorse, subsidize, and celebrate with the most vigor. This was a message that excited millions of voters and motivated hundreds of thousands of people to donate their money, their time, and their enthusiasm. The No-on-8 leadership believed that gay people form families that society should embrace, for the same reasons it celebrates traditional marriage—but they were afraid to rest their campaign on that belief, because most Californians were not there yet and they did not know how to change their minds in the summer and fall of 2008. Hence, their messaging was more cautious, less consistent, and ultimately unpersuasive.

Drafted by Pugno and Schubert, the official ballot materials explicitly laid out what the Yes-on-8 executive committee considered the normative balance struck by Yes on 8:

Proposition 8 is about preserving marriage; *it’s not an attack on the gay lifestyle*. Proposition 8 doesn’t take away any rights or benefits of gay or lesbian domestic partnerships. Under California law, “domestic partners shall have the same rights, protections,

⁷⁷ Prince, *Mormons and Gays*, ch. 15.

⁷⁸ For a comprehensive account of the organization and strategy of each side, see ESKRIDGE & RIANO, MARRIAGE EQUALITY, 368–79.

and benefits” as married spouses. (Family Code § 297.5.) There are NO exceptions. Proposition 8 WILL NOT change this.

This statement of the Yes-on-8 philosophy was controversial among religious traditionalists but reflected the stick-to-the-center strategy followed pretty consistently and sometimes quite creatively by the official Yes-on-8 campaign.

“Proposition 8, ‘In Plain English,’” a video-cartoon posted on the ProtectMarriage.com website in mid-October, captured the prevailing moral as well as messaging philosophy of its executive committee and its political consultants.⁷⁹ Cartoon figures Jan and Tom had two children, a dog, and a minivan. They were a traditional white middle-class cartoon couple (“Tom mows his lawn on Saturday. Jan likes to cook”)—but this was modern California, and so they lived next door to Dan and Michael, depicted as a hand-holding, offbeat-looking white cartoon couple, who were nice neighbors. “When Jan and Tom were on vacation, Dan and Michael watched their dog. When Dan was sick, Jan brought him soup.” After they learned about Proposition 8, Jan and Tom became what consultants refer to as “conflicted voters”: “On the one hand, they believed in and wanted to teach their children traditional values. On the other hand, they felt that Dan and Michael should be treated fairly and equally, regardless of their lifestyle choice.” The video effectively set up an emotional dilemma for the tolerant but responsible parents, who then engaged in some carefully guided research. Cartoon Tom discovered that the California domestic partnership law already gave Cartoon Dan and Michael *all* of the rights and benefits of marriage. So if the gay neighbors *already* had all the rights they need, what was all the contentious debate all about? This was a rhetorical question, as the video cartoon never answered that question from Dan and Michael’s point of view.

In turn, Cartoon Jan talked to her sister, Cartoon Nancy, who lived in Massachusetts, where same-sex marriage had been legal since 2004. In 2006, two sets of (real) parents objected to their children being read *King and King*, a kids’ book that romanticized same-sex marriage. Judges and school administrators allegedly rebuffed the parents’ efforts to withdraw their kids from this particular instruction. Wow! “Tom was now starting to understand. Changing the definition of marriage was a big deal and could have some very serious consequences. . . . If Proposition 8 were to fail, would their church be required to perform same-sex marriages? What would their children be taught at school?” Yikes! Tom and Jan decided to cast cartoon votes for Proposition 8—but they “are still good friends with Dan and Michael. In fact, they’re having a barbeque together right now.” (This caption was under a drawing of four cartoon adults, two cartoon children, and a cartoon dog all smiling congenially around a cartoon grill. “Eat up!”) Emotional conflict resolved: “Tom and Jan have come to an important conclusion: they can respect Dan and Michael’s lifestyle choice without affirming and embracing their lifestyle.”

⁷⁹ *Proposition 8, “In Plain English”* (Oct. 12, 2008, posted on ProtectMarriage.com), available at <https://www.youtube.com/watch?v=vI-GjWY-WIA> (viewed April 29, 2018); see WILLIAM ESKRIDGE JR. & NAN HUNTER, *SEXUALITY GENDER AND THE LAW* app. 6 (4th ed. 2017) (reprinting the cartoon frames and text of the video). All of the quotations in text are from the video.

So the debate within the Yes-on-8 coalition was over what values to emphasize and how to depict lesbian and gay couples. If they wanted to persuade conflicted voters to support Prop 8, Schubert and Pugno's approach was the way to go. In contrast, the No-on-8 coalition was divided over a rights approach versus a values approach, with its consultants and some of the lawyers on the executive committee favoring the former. Thus, the No-on-8 argument against Prop 8 opened with the same claims that had prevailed with the California Supreme Court:

OUR CALIFORNIA CONSTITUTION—the law of our land—
SHOULD GUARANTEE THE SAME FREEDOMS AND
RIGHTS TO EVERYONE—NO ONE group SHOULD be
singled out to BE TREATED DIFFERENTLY.

In fact, our nation was founded on the principle that all people
should be treated equally. EQUAL PROTECTION UNDER THE
LAW IS THE FOUNDATION OF AMERICAN SOCIETY.

That's what this election is about—equality, freedom, and fairness, for all.

The focus on equal rights was the main theme of the campaign,⁸⁰ but it was more persuasive to California judges than to California voters. Based on empirical research, progressive advocacy organizations had a different view about the kinds of arguments that might persuade undecided voters, many of whom believed that lesbian and gay couples wanted to get married just for the benefits or the symbolic recognition. The better message would have been that endorsed by these groups: "Marriage isn't about 'rights.' It's about love, commitment, and responsibility. It's about the things we give, not the things we get. . . . Straight and gay couples want to marry for the same reasons," namely lifetime commitment, interpersonal responsibility, mutual caregiving.⁸¹

The ballot materials carried the core messages of the different sides, but voters were much more likely to be influenced or persuaded by personal contact or media memes. On this front, Elder Clayton's army of Mormon neighborhood volunteers was Yes-on-8's ace in the hole. Starting in August, thousands of Mormon volunteers walked their neighborhoods and buttonholed neighbors to vote for Prop 8. Frank Schubert told me that as many as 250,000 volunteers—the large majority Latter-day Saints—worked for Yes on 8 at some point during the campaign, and 100,000 worked the polls for Yes on 8 the day of the election.⁸²

⁸⁰ California General Election, *Official Voter Information Guide, Tuesday November 4, 2008*, Prop 8: Argument Against Proposition 8 (emphasis and capitalization in original). These materials are reproduced in Eskridge, Hunter & Joslin, *Sexuality Gender and the Law* Appendix 6. For a statement of the No-on-8 consultants' strategy, see Dewey Square, Consultants, *Equality for All . . . A Road Map to Victory* (June 2008), reprinted in David Fleischer, *The Prop 8 Report: What Defeat in California Can Teach Us about Winning Future Ballot Measures on Same-Sex Marriage* Appendix Q (2010).

⁸¹ GLAAD and MAP, *Talking About Marriage and Relationship Recognition for Gay Couples* (Jan. 2008) (quotations in text).

⁸² Memorandum from Gary Lawrence, State LDS Grassroots Director, to All Area Directors etc. (Aug. 7, 2008); Eskridge Telephone Interview with Schubert.

Just as important was the Mormon fundraising juggernaut. In July, the Salt Lake City leadership issued directives to each of the seventeen stakes and the hundreds of wards in California, with assessments for money to be raised. Always inclined to remain in the background, the Church leadership insisted that all donations be made directly to ProtectMarriage.com. A key idea was for stake and ward leaders to ask their wealthiest members to give \$25,000 apiece, and in July and August a stream of \$25,000 contributions showed up in the Yes-on-8 reports. Checks poured in from middle-class donors as well. “Some Mormons who declined to donate said their local church leaders had made highly charged appeals, such as saying their souls would be in jeopardy if they didn’t give. Church spokesmen said any such incident didn’t reflect Mormon Church policy.”⁸³ On September 30, the official tally had \$25.4 million in contributions to Yes on 8, compared with \$15.8 million to No on 8. This financial advantage allowed Yes on 8 to buy more commercial advertising time in more media markets in early October—and hence to define the issues in the minds of voters.⁸⁴

Mormon consultants Glen Greener and Gary Lawrence were responsible for generating the most talked-about document of the campaign, *Six Consequences If Proposition 8 Fails*,⁸⁵ which was promulgated as a blog on August 24, 2008, and distributed to voters as part of the Latter-day outreach by neighbors and volunteers. If the state constitution were not amended to restore traditional marriage, the statement warned that (1) children in public schools would have to be taught that same-sex marriage is just as good as traditional marriage, (2) churches would lose their tax-exempt status if they refused to perform same-sex marriages, (3) religious adoption agencies would have to give up their policy of placing children in homes with one mother and one father, (4) religious schools would have to open their married student housing to same-sex couples, (5) ministers preaching against same-sex marriage could be charged with hate speech, and (6) everyone would have to pay for the many lawsuits engendered by same-sex marriage advocates. This document was an intellectual blueprint for Frank Schubert’s planned ad campaign to demonstrate that seemingly wonderful lesbian and gay weddings had surprising costs for most Californians. Mormon lawyer Morris Thurston promulgated a detailed response to *Six Consequences*, arguing that claims (1), (2), and (4) were wrong and misrepresented the law, that claim (5) was so out of whack with established First Amendment doctrine as to be an irresponsible assertion, and that claims (3) and (6) were speculative or overstated.⁸⁶ On the law, Thurston was probably wrong about point (1), for the reasons Pugno had articulated since 1996—reasons that were confirmed when the Legislature amended the Education Code in 2007 to specifically prohibit anti-gay bias in public school instruction.⁸⁷

⁸³ Mark Schoofs, *Mormons Boost Antigay Marriage Effort*, WALL ST. J., Sept. 20, 2008 (quotations in text).

⁸⁴ Schoofs, *Mormons Boost Antigay Marriage Effort*.

⁸⁵ *Six Consequences If Proposition 8 Fails*, PROP 8 BLOG (Aug. 24, 2008), <https://perma.cc/B2KW-U5X2> (viewed June 1, 2016).

⁸⁶ Morris Thurston, *A Commentary on the Document “Six Consequences . . . if Proposition 8 Fails”* (2008), available at <https://perma.cc/V6SA-KEB7> (viewed April 22, 2018).

⁸⁷ CAL. EDUC. CODE §§ 51890(a)(1)(D) & 51933(b)(7) (duty to teach marriage); *ibid.*, § 51500 (barring instruction reflecting a “discriminatory bias”). See Lynn Wardle, *The Impacts on Education of Legalizing Same-Sex Marriage and Lessons from Abortion Jurisprudence*, 2011 BYU EDUC. & L.J. 593 (expanding the Latter-day argument in text beyond California, to other school systems).

The Yes-on-8 campaign stepped up its intensity after October 6, when early voting commenced in California. Two days later, Elder Clayton and a few colleagues shared their inspirational words with Mormon congregations all over California, through a satellite broadcast officially called *The Divine Institution of Marriage Broadcast*. Elder Clayton asked that each congregation call upon thirty members to donate four hours a week to the campaign (including walking and calling on Saturdays), urged all young Latter-day Saints to blog and text message their support to all their friends, and announced a new website (www.preservemarriage.com) with materials that the faithful could distribute to get out the truth about Proposition 8.

The Church's representatives explained what they considered the long-term consequences of marriage for lesbian and gay couples. It would undermine religious freedom because of the "tyranny of tolerance," whereby gay people asked religious Californians to tolerate their unions, but over time toleration would morph into sanction or approval and disagreement with sanctioned marriages would be "discriminatory." This dynamic would play out the same way in schools: even though the *Marriage Cases* did not explicitly direct schools to indoctrinate children, the effect of marriage equality, in the context of the state Education Code, would be to require teachers to treat "gay marriage" the same as "traditional marriage," contrary to traditional faith.⁸⁸ Reports from local congregations suggest that they took this broadcast seriously, and increasing numbers of Mormon families felt strong pressure from their lay leaders to give money, donate time, and spread the word among their friends that Proposition 8 was the Gettysburg for people of faith.

In the six weeks leading up to the vote, California's airwaves were saturated with Prop 8 ads.⁸⁹ On both sides, they were developed by professional advertising people, but Andy Pugno came up with the best ad ideas of the Yes-on-8 campaign. Pugno showed Schubert a tape of Mayor Gavin Newsom's reaction to the marriage ruling, and he also educated the publicists about recent statutes requiring instruction on marriage for school districts teaching sex education and prohibiting sexual orientation discrimination in all instruction. After running preliminary versions through focus groups, where participants found their message mighty persuasive, Schubert and his associates put these threads together in two very powerful opening ads.⁹⁰

On September 29, Yes on 8 began running its "Newsom" ad. The ad began with Mayor Newsom gloating over the triumph of marriage for LGBT people: "This door's wide open now! It's gonna happen, *whether you like it or not*," he gleefully hollered. The ad warned that the decision imposed upon California by "four unelected judges" was not about tolerance. As explained to the voters by a law professor, the consequences would be dire: "People sued over their personal beliefs!" "Churches lose their tax exemptions!" "Gay marriage taught in public schools." After this brief tutorial, the ad reran Newsom's smug gloating: "*Whether*

⁸⁸ Elder L. Whitney Clayton et al., Satellite Broadcast, "The Divine Institution of Marriage Broadcast" (Oct. 8, 2008); accord, Wardle, *Impact on Education of Legalizing Same-Sex Marriage*.

⁸⁹ The texts for all of the advertisements discussed in text are presented in David Fleischer, *The Prop 8 Report: What Proposition 8 Can Teach Us About Winning Future Initiatives* Appendix "E" (LGBT Mentoring Project, Jan. 2009).

⁹⁰ Eskridge Telephone Interview with Schubert.

you like it or not.” This ad caught the attention of many conflicted voters. In its internal polls, No on 8 saw opposition to Prop 8 plummet after this ad; some of the drop occurred because No on 8 did not have enough money to air immediate responses.

Yes on 8 began to run its “Two Princes” ads in early October. In that ad, a young Latina with double ponytails proudly announces to her alarmed mom, “I want to marry a Princess!” The aspiring bride explains that she and her classmates just learned (from reading *King and King*) that a prince can marry another prince—and so she wants to marry a princess. Mom looks concerned, confused, defeated. Many parents identified with the alarmed parent. Yes on 8 used its fundraising advantage to dominate the airwaves, alternating among “Newsom,” “Two Princes,” and a third ad, also featuring parental concerns about their kids’ education. Daily tracking polls for No on 8 found that opposition to Proposition 8 by women with children in their homes fell from 52% to 38%, with a corresponding rise in support for Proposition 8.⁹¹ Its tracking polls showed Yes on 8 with 50% or more of the voters every day until the two weeks before the election.

On October 22, No on 8 finally made a big media purchase with its direct response to the indoctrinating schoolchildren argument, “O’Connell.” Facing the camera, California Superintendent of Education Jack O’Connell explained that the state did not require any particular curriculum as regards the definition of marriage and that the *Marriage Cases* had nothing to do with schools. Pollsters found that this ad did not respond to the underlying emotional appeal of “Two Princes.” Conflicted voters who had children were concerned about the moral education of their kids. Before the campaign, most parents would not have thought about how teachers and schools would deal with something like marriage equality. Once Andy Pugno and his team hammered marriage equality with its potential effect on public education, their child-protective emotions engaged them in an inner dialogue that nudged some conflicted voters toward Yes on 8 and prevented others from tipping toward No on 8. Pugno’s message proved to be decisive in a manner he did not imagine.

On October 10, a Creative Arts Charter School first-grade class surprised their teacher, Erin Carder, by showing up at her San Francisco City Hall wedding to her female partner, Kerri McCoy. (Mayor Newsom presided over the wedding.) As the brides walked down the steps outside City Hall, the children tossed rose petals and blew bubbles at the brides. The outing was organized by the parents, and eighteen kids participated, after receiving permission from their parents (two parents opted out of the trip). The event was filmed and publicized in the local news media. This happy event had very unhappy consequences for No on 8.

Within two days, Schubert Flint ran a new ad, “Field Trip,” in ten major media markets (including four in Spanish). The ad started with Ms. Carder’s first-grade class celebrating their teacher marrying another woman: “A public school took first-graders to a lesbian wedding, calling it a ‘teachable moment.’” Responding to Superintendent O’Connell’s insistence that California schools would not have to teach anything about gay marriage, the ad showed that first-graders were being taught to *cheer* a lesbian couple after they got legally married. “Children *will* be taught gay marriage unless we vote ‘yes’ on Proposition 8.” The

⁹¹ Fleischer, *Prop 8 Report*, Appendix “D” (visuals on the Lake Research daily tracking polls).

ad was very effective, and no one noticed when some of the parents objected to Yes on 8's use of their children's happy faces to punish their beloved teacher. Both sides flooded the airwaves for the remainder of the campaign, but none dislodged "Field Trip" as the focal point of water-cooler and parent-teacher conversations.

California voters adopted Proposition 8 by a decisive margin, 52.3%-47.7%.⁹² Why did Proposition 8 prevail with the voters in a relatively gay-friendly state like California? The most popular theories have been that No on 8 ran a poor campaign and that Yes on 8 ran a nasty one. There is something to be said for both arguments: No on 8 offered less persuasive messaging and failed to counter the education ads inspired by Andy Pugno's research, while many supporters of Yes on 8 made homophobic slurs, and even the official campaign (Pugno and Clayton) seemed to say that "the gays" could be tolerated, but only as second-class citizens.⁹³ On the whole, I rather agree with Frank Schubert, that his side won because there were more supporters of traditional marriage who were eager, enthusiastic, and morally hungry to "take back" marriage than there were supporters of marriage equality who evinced enthusiasm for protecting their new rights and status.⁹⁴ Most Californians were like Cartoon Tom and Jan, happy to have lesbian and gay neighbors but solicitous of public messages that "their" families were the same as Tom and Jan's. Marriage is special, for religious, social, and governance reasons: the state endorses, subsidizes, and encourages marriage as the best way to channel people's sexual activities and family formation. LGBT couples had domestic partnerships, with all the legal rights, benefits, and duties of marriage, and most Californians thought that was sufficient.

How about the Latter-day Saints commandeered by Elder Clayton and his colleagues? Prop 8 would not have won without the Mormons. Members of the Church of Jesus Christ provided most of the money, as many as 90% of the dedicated volunteers, some of the best ideas, and many of the leaders for Proposition 8. Estimates vary widely, but my best guess is that Mormon donors contributed around \$22 million of the \$39 million spent to pass Proposition 8. Without all that money, Yes on 8 would not have been able to saturate the media with the "Newsom" and "Two Princes" ads that arguably turned the election decisively in favor of Proposition 8, nor would the supporters have been able to afford last-minute ad buys to counter the energized No-on-8 campaign. Without almost 100,000 Mormon foot soldiers, Yes on 8 would not have had the grassroots depth that turned out voters on election day.

MARRIAGE EQUALITY IN CALIFORNIA

Andy Pugno, Frank Schubert, and Whitney Clayton ran a damned effective campaign and won a ballot initiative that could easily have gone the other way. An unexpected consequence was the emotional impact Yes-on-8's aggressive

⁹² Patrick Egan & Kenneth Sherrill, *California's Proposition 8: What Happened, and What Does the Future Hold?* (NLGTF Policy Inst. 2009); Public Policy Institute of California, "Post-Election Survey: Proposition 8 Results Expose Deep Rifts Over Same-Sex Marriage" (Dec. 3, 2008).

⁹³ Fleischer, *Prop 8 Report*, pp. 14–15; William Eskridge Jr. Interview with Doreena Wang and Jenny Pizer, July 2015; accord, Wang, *Parallel Journeys Through Discrimination*.

⁹⁴ William Eskridge Jr. Interview with Frank Schubert, Washington D.C., June 17, 2017.

campaign had on LGBT people, their families, and their friends. In California, tens of thousands of lesbians, gay men, bisexuals, and transgender persons were raising children in committed relationships. If you were such a parent, or children who loved those parents, how would you feel about the “Two Princes” ad? If you were a parent whose child adored their grade school teacher, who happened to be a lesbian, how would you feel about the “Field Trip” ad? Hundreds of thousands of parents and children took the attacks personally, and Proposition 8’s triumph at the polls was Pyrrhic. Neither Andy Pugno nor Whitney Clayton nor Bill Lockyer nor other McGeorge alumni had the final word. Ultimately, it would be McGeorge Professor Tony Kennedy.

The 8 Trial (2010)

In the wake of their decisive loss, San Francisco and the organizations supporting No on 8 returned to court—partly to head off a federal constitutional lawsuit they feared would be premature. Their argument was that the California Constitution could be *amended* through initiatives but not fundamentally *revised*. Was Proposition 8 such a fundamental change in the Constitution as to constitute an unconstitutional revision? The petition, filed directly with the California Supreme Court as *Strauss v. Horton*,⁹⁵ was directed against relevant state officials. Assuming that state officials would not vigorously defend Proposition 8, Andy Pugno secured the services of former Solicitor General Kenneth Starr (then Dean of the Pepperdine Caruso Law School) to be co-counsel for Dennis Hollingsworth and the other Proposition 8 sponsors, whom the Supreme Court allowed to intervene as defendants. Writing for a 6-1 majority, Chief Justice George agreed with Starr and Pugno, that Proposition 8 was an important amendment but did not fundamentally revise the constitutional structure.

The day after *Strauss* was handed down, May 27, 2009, the constitutional dream team of Ted Olson, Solicitor General under President Bush, and David Boies, the lawyer for almost-President Gore in 2000, filed a federal lawsuit challenging Prop 8 as inconsistent with the Equal Protection Clause of the U.S. Constitution. The plaintiffs in *Perry v. Schwarzenegger* were two committed lesbian and gay couples. The defendants were California’s Governor, Attorney General, and local officials—none of whom would raise a finger to defend Prop 8.

Knowing that, Pugno asked Starr to represent the sponsors once more, but Starr begged off. Upon the recommendation of Princeton Professor Robby George, the nation’s leading natural law philosopher, Pugno turned to Chuck Cooper, a prominent Washington DC attorney who had succeeded Ted Olson as head of the Office of Legal Counsel during the Reagan Administration.⁹⁶ Although an excellent attorney, Cooper’s small law firm (Cooper & Kirk) would prove to be unable to mount a defense nearly as effective as Schubert & Flint had been able to

⁹⁵ 207 P.3d 48 (Cal. 2009).

⁹⁶ ESKRIDGE & RIANO, MARRIAGE EQUALITY 404.

do in the Prop 8 campaign. What Olson and Boies expected to be the “trial of the century” was, in my view, a disappointment.⁹⁷

On occasion, a great trial has been epochal. Examples include the Scopes “Monkey” Trial in 1925 and the Peter Zenger “Free Press” Trial in 1735. The “8 Trial” could have been an exciting duel between the claims of equality and dignity for lesbian and gay couples, versus the dignity and liberty of parents, citizens, and institutions adhering to traditional marriage as a matter of religious faith. But that was not the case, in large part because one side of the debate never really got its act together. At trial, Ted Olson presented the two couples, whose testimony offered compelling stories of productive lives, deep love, and commitment to family. San Francisco had intervened as a plaintiff in the case, and its counsel, Terry Stewart, was important in recruiting experts who gave compelling accounts of how marriage as an institution has constantly evolved, lesbian and gay couples have revealed interest in committed relationships and their children would benefit from civil marriage, and the unfair discrimination suffered by sexual and gender minorities.

By January 2010, when the 8 Trial commenced, public opinion in California and elsewhere had decisively turned in favor of marriage equality, and the burden was on the defense to justify the exclusion; this flipped the burden in the Prop 8 campaign, where Pugno and Schubert reframed the debate around preserving traditional marriage. Counsel for the Proposition 8 defenders poked holes in some of the expert testimony but were never able to mount a strong positive case for how a neutral rule of law could exclude committed adult couples, many raising children, from civil marriage.

Judge Vernon Walker, whose appointment had been blocked for a year by LGBT allies, was a libertarian, discreetly gay Republican who wanted evidence of the benefits and costs of marriage equality.⁹⁸ The testimony of the two plaintiff couples was enough to demonstrate that a separate-but-roughly-equal domestic partnership regime was not nearly the same as marriage equality, and he demanded evidence from the defendants that equality would impose costs on the state and society. Cooper and Pugno were not able to recruit historians as good as Nancy Cott (Yale) or empiricists as good as Letitia Peplau (UCLA), and four of their expert witnesses dropped out on the eve of trial. Pugno believed, with justification, that they were deterred by the possibility of a televised proceeding and the likelihood of internet publicity.⁹⁹

The supporters of Proposition 8 were inspired mainly by political and natural law philosophy: from their perspective, marriage was definitionally one man, one woman, a notion that unified the state, religion, and society around a central norm that had proven robust for centuries—and certainly a policy the state and its voters were allowed to implement consistent with the U.S. Constitution. I do not believe witnesses for such a philosophy would have moved Judge Walker, but the defense passed up an opportunity to create a great debate by calling upon

⁹⁷ Compare KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL—THE STORY OF *HOLLINGSWORTH V. PERRY* 7 (2015) (“trial of the century”), with ESKRIDGE & RIANO, MARRIAGE EQUALITY 396–429 (not quite the trial of the century because of the mismatch between plaintiffs’ case and the weak defense). See also DAVID BOIES & THEODORE OLSON, REDEEMING THE DREAM: THE CASE FOR MARRIAGE EQUALITY (2014).

⁹⁸ ESKRIDGE & RIANO, MARRIAGE EQUALITY 403–04.

⁹⁹ YOSHINO, SPEAK NOW, 204–09.

an amazing array of academics who agreed with them—super-star critics of marriage equality ranging from law professors Mary Ann Glendon (Harvard Law) and Lynn Wardle (BYU Law), philosophers Robby George (Princeton) and John Finnis (Oxford), and political theorists such as James Q. Wilson (Harvard).

Instead of such an all-star line-up, the defense got trapped in the empirical debate over their heartfelt belief that marriage equality would, as a social fact, undermine the institution of marriage over time. I call this the “Jenga argument” against expanding marriage. In Jenga, the players start with a tower of wood blocks, and each player tries to remove a block without toppling the tower.



As any Jenga player knows, the tower’s stability is threatened most when one of the bottom blocks is removed; if two of the three are removed, the tower either falls immediately or does so in a few turns. Pugno and the Prop 8 defenders believed that traditional marriage had already lost one of its three foundational blocks, when California and other states adopted no-fault divorce: marriage is no longer “till death do us part,” is instead “until we get tired of one another.” If a second foundational block, the different-sex requirement tied to procreation, were removed, the institution would lose most of its meaning and the tower would collapse.

I think this is an ingenious argument—but it lacks empirical verification. In 2004, Judge Bork and other defenders of traditional marriage had supported the Federal Marriage Amendment by claiming that “homosexual marriage” in Scandinavia had “caused” marriage rates to collapse. Darren Spedale and I wrote an entire book refuting that factual claim: No Scandinavian country had recognized marriage equality in 2004, and their creation of alternative “registered partnership” regimes had been followed by a stabilization of marriage rates after decades of steep decline and by a decline in divorce rates.¹⁰⁰ That was not proof that marriage equality would “cause” marriage to rebound, but it surely was strong evidence against the Bork claims and the Jenga argument at least in the short term. The same pattern recurred in the United States. After Massachusetts started issuing marriage

¹⁰⁰ WILLIAM N. ESKRIDGE JR. & DARREN SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE’VE LEARNED FROM THE EVIDENCE* (2006).

licenses in 2004 and Connecticut and Iowa started in 2008, the marriage rates in those states increased and then continued at a stable level—in contrast to the dramatic marriage-rate decline in each state before 2004 and 2008.¹⁰¹

Maggie Gallagher, the most sophisticated critic of marriage equality, would have responded that the Jenga argument may take many years to manifest itself. A fair point, but the defenders of Proposition 8 allowed themselves to be boxed into a conversation where empirical evidence was required. Their only expert witness along these lines was David Blankenhorn, a public intellectual without deep empirical training or academic credentials comparable to the plaintiffs' experts. He was a thoughtful witness—but his causal account was undermined, refuted, ridiculed, and left for dead on cross-examination by David Boies.¹⁰²

Judge Walker's judgment was a foregone conclusion. Pugno and Cooper took some comfort in the fact that the judge's reasoning was very broad, interpreting the fundamental due process to marry to go beyond procreative unions and equal protection to require strict scrutiny sexual orientation discrimination.¹⁰³ They were confident, with good reason, that the U.S. Supreme Court would not go that far in 2010, for the Walker opinion would have been what advocates called a fifty-state solution: it would have required marriage equality everywhere. Terry Stewart and my *amicus* brief persuaded the Ninth Circuit to affirm based on a one-state solution, that is, reasons distinctive to California.¹⁰⁴ The activists and attorneys who won the trial were mad as hell that their victory on appeal was so narrow.

Hollingsworth v. Perry (2013)

United States v. Windsor (2013)

By 2012, when the Ninth Circuit affirmed the 8 Trial's judgment, a majority of the public favored marriage equality, and the opposition was falling in both numbers and intensity. Represented by the Law Office of Andrew Pugno, the ADF, and Cooper & Kirk, the intervening sponsors of Proposition 8 sought review of the constitutional judgment with the Supreme Court. The Court has discretion as to which cases it will hear and grants very few petitions for review, but Chuck Cooper was sure their case would be included. He might have been surprised that Justice Kennedy, the McGeorge professor, voted with the four liberal Justices *not* to take the case.¹⁰⁵ Conversations with the Justices persuade me that Kennedy and the others felt the issue needed to percolate in the lower courts. There was no other district or circuit court opinion on the federal constitutional issues until those in *Perry*, and the Court's normal process usually requires a split in the courts of appeals before addressing big constitutional issues such as this one. Four

¹⁰¹ ESKRIDGE & RIANO, MARRIAGE EQUALITY, APP. 3.

¹⁰² ESKRIDGE & RIANO, MARRIAGE EQUALITY, 420–24.

¹⁰³ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

¹⁰⁴ *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012); William N. Eskridge Jr., *The Ninth Circuit's Decision and the Politics of Marriage Equality*, 64 STAN. L. REV. ONLINE 93 (2012).

¹⁰⁵ ESKRIDGE & RIANO, MARRIAGE EQUALITY, 531.

conservative Justices, however, voted to take review: Chief Justice Roberts and Justices Scalia, Thomas, and Alito. To grant review, only four are required.

The Court included an Article III issue to precede the Fourteenth Amendment issue that was the parties' virtually exclusive focus: Did the intervening defendants—the sponsors of the constitutional initiative—have a concrete and distinct personal interest sufficient to give them “standing” to appeal Judge Walker’s judgment. (The Governor, Attorney General, and county officials who were the named defendants had declined to participate actively in the trial defense and did not file an appeal.) When the Court heard argument in *Hollingsworth v. Perry* on March 26, 2013, the focus was Article III and not the Fourteenth Amendment.

The Justices who had been stars of their federal courts classes at the Harvard Law School (John Roberts, Nino Scalia, Ruth Bader Ginsburg, Steve Breyer, and Elena Kagan) were full of questions about whether the Proposition 8 Proponents had the distinctive “personal stake” that the Court required for a party to have standing. The California Supreme Court had told the Ninth Circuit that

“[i]n a post-election challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the states interest in the initiatives validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.”¹⁰⁶

That the Proposition 8 Proponents could adjudicate the issues in state court did not mean that they could do so in federal court, however. The Harvard Justices were skeptical that the state law authorization for the private parties “to assert the state’s interest” was sufficient to meet the stringent “case or controversy” requirement as the Court had interpreted it.

Armed with arguments made in an excellent *amicus* brief filed by former Acting Solicitor General Walter Dellinger and primarily authored by Irv Gornstein of the Georgetown University Law Center,¹⁰⁷ the Harvard Justices seemed unpersuaded that the Proposition 8 sponsors had a distinctive interest: everyone in California had an interest in the fate of 8, and the interest of the sponsors was not unique as a matter of legal right.¹⁰⁸ Government officials have a legally cognizable personal stake in defending state law, and private parties legally deputized and vested with fiduciary responsibilities to the public interest can defend state law for similar reasons. But the sponsors had not been deputized by state law to represent all the people of California, nor did they take an oath or assume fiduciary responsibilities to the public.

Although also a Harvard Law alum, Justice Kennedy, the McGeorge professor, was a Californian, alert to the special status of initiatives and their proponents under the California Constitution. For him, the proponents did not

¹⁰⁶ *Perry v. Brown*, 265 P.3d 1002, 1007 (Cal. 2011) (quotation in text).

¹⁰⁷ Brief *Amicus Curiae* of Walter Dellinger in Support of Respondents on the Issue of Standing, *Hollingsworth* (filed Feb. 28, 2013), 2013 WL 768643.

¹⁰⁸ ESKRIDGE & RIANO, MARRIAGE EQUALITY, 535–37.

share the same general interest in Proposition 8 as everyone else in California; they did have a personal stake in the initiative they had sponsored that was not shared by the general population. And they had a distinctive state constitutional interest as well. The point of the initiative process is to impose popular measures that elected representatives are not willing to adopt; to allow the representatives to thwart the will of the people by refusing to defend the initiatives, as the California officials had done, would be an anti-democratic deployment of Article III, and Tony Kennedy wanted no part of that process. He was joined in his skepticism by the three Yale Law School graduates—Justices Thomas, Alito, and Sotomayor, none of whom shared the Harvard enthusiasm for creating new and more intricate doctrine limiting Article III standing. For them, Article III was satisfied because the sponsors provided a strongly adversarial controversy for the Court and better represented the state on this distinctive issue than the state’s own attorney general would have done.

In an anti-climax, the Court dismissed the appeal on Article III grounds in *Hollingsworth v. Perry*.¹⁰⁹ The Chief Justice’s opinion for the 5-4 Court closely followed the reasoning of the Gornstein-Dellinger brief. Once the California Constitution had been amended, the proponents had no more of a “personal stake” in defending its enforcement than any other citizen of California. That was fatal. “Article III standing is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests.”¹¹⁰ The majority opinion distinguished *between* 8 Proponents, who at most were authorized to argue the state’s interests when public officials would not, *in contrast to* public officials themselves, as well as private persons officially deputized to act as official agents of the state with fiduciary responsibilities to the public.¹¹¹ Justice Kennedy, the McGeorge Justice, wrote an excellent (and, to me, persuasive) dissent, joined by the three Yale Justices. (*Hollingsworth* is the only case where all three of those Yale law graduates voted together in a dissenting opinion.)

Although dissenting on the procedural issue in the Proposition 8 Case, Justice Kennedy wrote the opinion for a 5-4 Court in the case heard the next day, March 27, 2013. In *United States v. Windsor*,¹¹² Justice Kennedy continued with the analysis he had initiated in the Texas homosexual conduct case and, specifically, the lessons he had derived at the McGeorge Salzburg program in the early 1990s. As in *Dudgeon*, Kennedy’s opinion started with an ode to how important state marriage law was to “the daily lives and customs of its people,” such as Edie Windsor (the respondent) and Thea Spyer (her late wife, whose death generated a claim for the marriage exclusion with the IRS).¹¹³ Without ruling that Congress was always required to follow state family law, Kennedy suggested that such an unprecedentedly sweeping disavowal of state law harmed actual families in ways the Court had never seen before. And its targeting a minority group was “strong evidence” that DOMA’s purpose was “to impose a disadvantage, a

¹⁰⁹ *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (holding that the Proposition 8 proponents had no standing to appeal Judge Walker’s judgment).

¹¹⁰ *Id.* at 707.

¹¹¹ See *id.* at 712–13 (distinguishing situations where proponents might be legally deputized agents of the state).

¹¹² *United States v. Windsor* 570 U.S. 744 (2013).

¹¹³ *Id.* at 770–71.

separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”¹¹⁴ Justice Kennedy’s punch line resonated with the dignity-focused analysis the European Court of Human Rights applied in *Dudgeon*:

“The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”¹¹⁵

Justice Scalia’s outraged, over-the-top dissenting opinion (joined by Justice Thomas) assailed the majority on all points of law but ended with a sour prediction: there were now five Justices prepared to strike down all the remaining state laws and constitutional provisions patterned on DOMA. As evidence, he edited several passages from Justice Kennedy’s majority opinion, as they might be re-purposed for the next case, where the same majority would impose marriage equality on all fifty states. One example, with cross-outs being Scalia’s deletions and italics representing his additions:¹¹⁶

“~~DOMA’s~~ *This state law’s* principal effect is to identify a subset of ~~state-sanctioned—marriages~~ *constitutionally protected sexual relationships*, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA~~ *this state law* contrives to deprive some couples ~~married under the laws of their State~~ *enjoying constitutionally protected sexual relationships*, but not other couples, of both rights and responsibilities.”

“By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition.”¹¹⁷

On LGBT rights, Scalia was the Court’s Cassandra—his prophecy of what he considered future disaster was ignored by the majority but came to pass precisely as predicted. In *Windsor*, Scalia’s was a self-fulfilling prophecy. After *Hollingsworth*, marriage equality immediately came to California, as Judge Walker’s judgment was the only one left standing after the appeals were rendered

¹¹⁴ *Id.* at 770–71.

¹¹⁵ *Id.* at 703.

¹¹⁶ *Id.* at 799 (Scalia, J., dissenting) (emphasis in the original)

¹¹⁷ *Id.* at 800.

nonjusticiable. Between June 26, 2013 (*Windsor*) and June 26, 2015, district courts handed down marriage decisions affecting the exclusionary laws in 28 states—and all but one district court (Louisiana) required marriage equality to conform to equality guarantees following *Windsor*, per the Scalia interpretation of the majority opinion.¹¹⁸

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Most of the district court decisions were appealed to federal circuit courts, four of which handed down opinions the year after *Windsor*. The Seventh Circuit affirmed the invalidity of marriage exclusions in Indiana and Wisconsin,¹¹⁹ the Tenth Circuit did so for Utah and Oklahoma,¹²⁰ and the Fourth Circuit followed suit for Virginia's several exclusions.¹²¹ All five states sought Supreme Court review during the summer of 2014. When the Court returned for the October 2014 Term, it faced thousands of petitions, most of which the Justices denied. Everyone on both sides of the debate expected the Court to take one or even all of the five state petitions. Imagine the surprise when on October 6, 2014, the Court denied review in all five.

As they had done in *Hollingsworth*, Justice Kennedy and the four liberal Justices were waiting for a split in the circuits, and so for me the surprise was that Chief Justice Roberts joined them in denying review. Before October 6, nineteen states were issuing marriage licenses without regard to the sex of the partners. After October 6, the number swiftly upgraded to 30—the five states under final judgments invalidating their discrimination, plus six other states in the circuits where district courts and circuit court panels were bound by the earlier decisions: South Carolina, North Carolina, and Virginia in the Fourth Circuit; Colorado, Kansas, and Wyoming in the Tenth Circuit. The day after the dramatic denial, the Ninth Circuit ruled that the marriage exclusions in Idaho and Nevada were unconstitutional—and when the Supreme Court denied review in those cases, five more states joined the marriage equality column: Alaska, Arizona, and Montana in addition to Idaho and Nevada.¹²² Within weeks, marriage equality went from nineteen states to 35.

When the Sixth Circuit finally created a circuit split in December 2014,¹²³ the Court took review—but the result was foreordained. Scalia's Cassandric prophecy came to pass in *Obergefell v. Hodges*,¹²⁴ where Justice Kennedy once again wrote for a 5-4 Court, this time invalidating the same-sex marriage exclusions in the four states of the Sixth Circuit (Kentucky, Michigan, Ohio, Tennessee), but implicitly in the remaining hold-out states of the South and Plains.

¹¹⁸ ESKRIDGE & RIANO, MARRIAGE EQUALITY, 561.

¹¹⁹ *Baskin v. Bogan*, 766 F.3d 348 (7th Cir. 2014).

¹²⁰ *Herbert v. Kitchen*, 755 F.3d 1193 (10th Cir. 2014) (Utah); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) (Oklahoma).

¹²¹ *Bostic v. Schaefer*, 760 F.3d 353 (4th Cir. 2014).

¹²² *Latta v. Otto*, 771 F.3d 456 (9th Cir. 2014); ESKRIDGE & RIANO, MARRIAGE EQUALITY, 577–78.

¹²³ *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

¹²⁴ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

Marriage equality is a landmark legacy of the Roberts Court, though with the Chief Justice in dissent.

I don't know exactly when Justice Kennedy was prepared to vote for nationwide marriage equality, but in my view he was okay with full equality as early as 2013, as evidenced by his *Windsor* opinion, as analyzed by Justice Scalia. But I think the seeds were planted well before 2013, and for that I return to McGeorge.

On November 20, 1992, McGeorge celebrated Dean Schaber's retirement and his sixty-fifth birthday in a lavish banquet filled with tributes to the Dean.¹²⁵ His longtime friend Tony Kennedy delivered the keynote address—without notes, as he emphasized to me when I asked him and his wife about that night. Other speakers, such as former Attorney General Ed Meese, had praised Dean Schaber for his public service and for encouraging thousands of McGeorge law students (students such as Andy Pugno) to work with the state government. Kennedy joined that chorus and emphasized how Schaber had led the Sacramento bar toward inclusion of women and people of color. Back in the day, Schaber had been a Contracts teacher, and Kennedy exploited that connection: “Each of us ha[s] a compact with our fellow citizens, and for Gordon, he has a covenant with all of humanity.”

Justice Kennedy certainly saw himself as following the example of Dean Schaber, and the humanity he embraced in 1992 not only included gay people like the Dean, but also included committed lesbian and gay couples. The hosts for the Dean Schaber celebration were celebrated actor Raymond Burr and his longtime (1960–93) partner Robert Benevides.¹²⁶ Burr was an old friend of Dean Schaber and benefactor to the law school. He and Benevides were a discreet but uncloseted couple by 1992, and when Burr died the next year his partner inherited his considerable estate, just as a spouse would. I cannot help but think that this McGeorge event helped normalize committed same-sex couples for Tony and Mary Kennedy and thereby paved the way for marriage equality, delivered to the nation by one vote, that of a conservative Republican who was a product of Reagan-era Sacramento and Schaber-era McGeorge.

¹²⁵ A video of the celebration can be found at <https://perma.cc/G5YS-8NNF> (viewed Aug. 30, 2024).

¹²⁶ MICHAEL SETH STARR, *HIDING IN PLAIN SIGHT: THE SECRET LIFE OF RAYMOND BURR* (2009).

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