The Supreme Court of California 2007–2008

Foreword: Judicial Opinions as Public Rhetoric

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By any measure, the California Supreme Court's decision in *In re Marriage Cases* is the most significant in the last year and in recent memory.[1] Chief Justice George's opinion thoroughly and forcefully explains why gay and lesbian individuals have the right to marry under the California Constitution. This conclusion is founded on basic principles of California constitutional law: the right to marry is a fundamental right, and discrimination on the basis of sexual orientation is inherently suspect.

Yet the events that followed the decision quickly overshadowed Chief Justice George's opinion. Opponents of the decision immediately drafted and placed on the ballot an initiative, Proposition 8, that overturned the decision. In an acrimonious campaign, supporters of the initiative argued that the California Supreme Court decision meant that schools would have to teach the virtues of same-sex marriage and that churches would lose their tax exempt status if clergy did not perform such unions. None of these claims were true, but they likely affected some voters.[2]

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1. 183 P.3d 384 (Cal. 2008).

2. In fact, the court, in its opinion, expressly responded to the claim that the decision would require religious institutions to perform same-sex weddings. 183 P.3d at 451–52 ("Finally, affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.").

On November 4, 2008, California voters approved Proposition 8 by a narrow margin, thereby making same-sex marriage illegal in California. Opponents of Proposition 8 then filed a challenge arguing that it was a *revision* of the California Constitution, not an amendment, and thus was not valid because its passage was procedurally inadequate. A constitutional revision must receive approval from two-thirds of both houses of the California legislature and then be ratified by the voters, while an amendment only requires approval by a simple majority of the voters. The California Supreme Court heard the challenge to Proposition 8 on March 5, 2009, and in a 6-1 decision, it upheld the initiative, though it also held that it does not apply retroactively to marriages that occurred between June and November 2008.[3] During these events, attention focused almost solely on the initiative and the challenge to it, to the extent that there has been little focus on Chief Justice George's magnificent opinion. Besides, since Proposition 8 overturned his opinion, its legal significance has been rendered minimal or nonexistent.

Chief Justice George's opinion is striking in how thoroughly and carefully it explains the constitutional basis for marriage equality. Yet its reasoning and rhetoric played virtually no role in the public debate over Proposition 8. If it had been far shorter and much more poorly reasoned and written, the outcome would surely have been the same on election day.

The interesting and unexplored question is whether the opinion could have done anything to sway public opinion or to change Proposition 8's fate. But is this even a fair question to ask? Should judicial opinions seek to persuade the public? To answer that question requires thinking about whom judges actually *intend to* address and whom they *should* address.

In Part I of this Foreword, I discuss the opinion's intended audience and conclude that the court wrote the opinion for those who normally read judicial opinions: judges, lawyers, and scholars. The opinion is long, thorough, and meticulously documented with citations to past cases. In fact, no part of the opinion seems to speak to a non-legally trained audience. Instead, it was written to show that the court's conclusion was firmly grounded in the law and was not simply a policy choice or the reflection of the justices' personal beliefs.

In Part II, I ask whether the opinion could have also addressed another audience: the press and the public. This question requires asking how the opinion might have been written differently if the court had this audience in mind. I discuss two ways in which the court could have addressed this additional audience. First, the court could have much more thoroughly analogized the ban on same-sex marriage to the earlier ban on interracial marriage.[4]

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

4. As discussed below, there is a strong parallel between the California Supreme Court decision invalidating the prohibition of interracial marriage and the ruling in favor of marriage equality for gay and lesbian individuals. In *Perez v. Sharp*, the California Supreme Court struck down California's anti-miscegenation statute. 198 P.2d 17 (Cal. 1948). This was 19 years before

Second, the court could have much more forcefully argued that there is truly no legitimate reason—let alone a compelling one—to keep gay and lesbian individuals from marrying.

I do not assume or assert that writing the opinion in this manner would have changed the outcome as to Proposition 8. There is no way to know. But the opinion could have included arguments and rhetoric that would have supported the campaign against Proposition 8. Undoubtedly, the passage of Proposition 8 reflects numerous factors, including the nature and strength of the campaigns. Supporters of Proposition 8 ran a more effective campaign, albeit one that circulated false claims that the initiative would require teaching of marriage equality for gays and lesbians in schools, while opponents never found a message capable of swaying uncommitted voters.

I want to make clear at the outset that I believe Chief Justice George wrote a superb opinion, and I completely agree with its reasoning and conclusion. But I want to use this Foreword to explore the types of audiences judicial opinions address, whether judges should address a broader audience when they write, and how judges should write opinion to best address those audiences. After all, judicial opinions exist, at least in part, to explain and to persuade—and writing for a restricted audience limits those goals.

I
THE OPINION AND ITS INTENDED AUDIENCE

A. The Opinion

1. Framing the Issue

Chief Justice George began his opinion by making clear that the issue before the court was whether the prohibition on same-sex marriage violated the California Constitution. At the outset of the opinion, the court stated:

> Accordingly, the legal issue we must resolve is not whether it would be constitutionally permissible under the *California* Constitution for the state to limit marriage only to opposite-sex couples while denying same-sex couples any opportunity to enter into an official relationship with all or virtually all of the same substantive attributes, but rather whether our state Constitution prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship that affords all of the significant legal rights and obligations traditionally associated under state law with the institution of marriage, but under which the union of an opposite-sex couple is officially designated a "marriage" whereas the union of a same-sex

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the United States Supreme Court came to the identical conclusion in *Loving v. Virginia*, 388 U.S. 1 (1967).

> couple is officially designated a "domestic partnership." The question we must address is whether, under these circumstances, the failure to designate the official relationship of same-sex couples as marriage violates the California Constitution.[5]

This statement of the issue does three important things. First, it makes clear that the court is focusing solely on the California Constitution. Of course, the same arguments for marriage equality—that marriage is a fundamental right and that the ban on same-sex marriage impermissibly discriminates based on sexual orientation—could be made under the U.S. Constitution.[6] However, if the California Supreme Court had relied on the U.S. Constitution, then its decision would have been reviewable in the U.S. Supreme Court, and advocates of marriage equality do not believe that there are five votes for their position in the United States Supreme Court. Subsequent to the court's upholding Proposition 8, Ted Olsen and David Boies filed a lawsuit in federal court challenging the initiative as redefining the U.S. Constitution. There is great disagreement about whether this is a wise strategy. Thus, in California and in other states, advocates carefully pled and presented their arguments solely under the *state* constitutions to foreclose the possibility of U.S. Supreme Court review.[7] So long as the decision rests entirely on state law, the Supreme Court cannot hear the matter.[8]

Second, the court's statement of the issue acknowledges that California's domestic partnership law already provided same-sex partners with virtually all of the legal benefits of marriage. The question was only whether banning "marriage" between same-sex couples violated the California Constitution.

Third, the statement of the issue makes clear at the outset that the court did not write its opinion for the press and the public. The statement is neither easily quoted in newspapers nor readily comprehensible to non-lawyers.

Interestingly, after stating the issue in this way, the court declares:

> It also is important to understand at the outset that our task in this proceeding is not to decide whether we believe, *as a matter of policy*,

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5. *In re Marriage*, 183 P.3d at 398 (emphasis added).

6. The U.S. Supreme Court has recognized a fundamental right to marry under the U.S. Constitution. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (invalidating state law prohibiting marriage if a person's child support obligations were not paid); *Loving*, 388 U.S. 1 (1967) (declaring unconstitutional a ban on interracial marriage). The Court also has invalidated discrimination on the basis of sexual orientation. *See* Romer v. Evans, 517 U.S. 620 (1996) (invalidating an initiative that repealed laws protecting gay and lesbian individuals from discrimination and prohibiting future laws).

7. *See, e.g.*, Standhardt v. Superior Court *in rel*. County of Maricopa, 77 P.3d 451 (Ariz. Ct. App. 2003); Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005); Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Conaway v. Deane, 932 A.2d 571 (Md. 2007); Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Baker v. State, 744 A.2d 864 (Vt. 1999); Andersen v. King County, 138 P.3d 963 (Wash. 2006).

8. *See* Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1874) (Supreme Court may review only federal law issues).

> that the officially recognized relationship of a same-sex couple *should* be designated a marriage rather than a domestic partnership (or some other term), but instead only to determine whether the difference in the official names of the relationships *violates the California Constitution*.[9]

The court did not want readers to infer that the court based its decision only on law and not on policy; it felt the need to state this expressly at the outset.

But does such a statement really persuade anyone? Those who disagree with the court's conclusion likely still see it as a policy choice of several justices. Those who agree do not need the reminder of the basis for the decision. In fact, both sides likely see the statement as disingenuous. Everyone knows—and certainly the readers of the opinion know—that the text of the California Constitution is silent about marriage equality. Therefore, the conclusion of all of the justices, in both the majority and the dissent, is undoubtedly based in part on their policy views.

Judicial opinions are traditionally written to pretend that there is no distinction between discovery and justification; how a judge comes to the conclusion is made to seem the same as how the judge justifies the result. But few judges, if any, believe this. Judicial decisions in areas such as marriage equality undoubtedly are a product of a judge's life experiences, constitutional philosophy, and personal values.[10] Not only do judicial opinions rarely acknowledge this occurrence, but judges find it necessary to go further and declare, as Chief Justice George did, that the justices' policy views had nothing to do with their decision. Chief Justice George stated: "Whatever our views as individuals with regard to this question as a matter of policy, we recognize as judges and as a court our responsibility to limit our consideration of the question to a determination of the constitutional validity of the current legislative provisions."[11]

The court then recited the facts, the procedural posture of the case, and a fairly detailed description of the history of marriage in California. These, of course, are traditional parts of judicial opinions. Yet a much shorter statement would have been enough to make clear to the reader that the court did not put it on its own docket. None of the procedural history seems to relate to the court's constitutional analysis or conclusion. After this, the court explains, again at some length, the history and nature of the protection of domestic partners under California law. The court's rationale for providing such a lengthy explanation is puzzling, as it has little to do with its analysis of the legal issue and it makes the opinion far longer. My guess is that it reflects a desire to write the most

9. *In re Marriage*, 183 P.3d at 398–99 (emphasis in the original).

10. I elaborate on this much more fully in ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987), and more recently in Erwin Chemerinsky, *The Meaning of* Bush v. Gore*: Thoughts on Professor Amar's Analysis*, 61 FLA. L. REV. (forthcoming 2009).

11. *In re Marriage*, 183 P.3d at 399.

thorough opinion possible.

2. The Constitutional Analysis

Then, twenty-two pages into the opinion,[12] the court explains that the right to marry is a fundamental right under the California Constitution and that as a result, strict scrutiny was the appropriate standard of review; that is, the ban on marriage equality was constitutional only if it achieved a compelling government interest. After reviewing the California decisions on marriage, the Court concludes: "As these and many other California decisions make clear, the right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice, and, as such, is of fundamental significance both to society and to the individual."[13] The court then points out that the fundamental right to marry also is recognized under U.S. constitutional law, international declarations of human rights, and in the law review literature.[14]

After this lengthy review, the court states its important conclusion:

> In light of this recognition, sections 1 and 7 of article I of the California Constitution cannot properly be interpreted to withhold from gay individuals the same basic civil right of personal autonomy and liberty (including the right to establish, with the person of one's choice, an officially recognized and sanctioned family) that the California Constitution affords to heterosexual individuals. The privacy and due process provisions of our state Constitution—in declaring that "[a]ll people . . . have [the] inalienable right[ ] [of] privacy" (art. I, § 1) and that no person may be deprived of "liberty" without due process of law (art. I, § 7)—do not purport to reserve to persons of a particular sexual orientation the substantive protection afforded by those provisions. In light of the evolution of our state's understanding concerning the equal dignity and respect to which all persons are entitled without regard to their sexual orientation, it is not appropriate to interpret these provisions in a way that, as a practical matter, excludes gay individuals from the protective reach of such basic civil rights.[15]

Again, the court does not write this important conclusion in language accessible to newspapers or to the general public. It is prose for those already trained to read judicial opinions—judges, lawyers, and academics.

The court then refutes the argument that marriage is inherently about procreation. As the court notes, this simply is not true. Heterosexual couples are allowed to marry even if they are incapable of having children or have decided not to procreate. Besides, same-sex couples also will procreate—

12. *See id.* at 419 (discussing the fundamental right to marry).
13. *Id.* at 423.
14. *See id.* at 426 nn.41–42.
15. *Id.* at 429 (omissions in the original).

whether by adoption, surrogacy, or artificial insemination—regardless of whether they are allowed to marry.

Having concluded that the ban on same-sex marriage violates the right to marry under the California Constitution, the court then considers equal protection. The court initially rejects the claim that the ban on marriage equality was gender discrimination. Chief Justice George writes:

> In drawing a distinction between opposite-sex couples and same-sex couples, the challenged marriage statutes do not treat men and women differently. Persons of either gender are treated equally and are permitted to marry only a person of the opposite gender. In light of the equality of treatment between genders, the distinction prescribed by the relevant statutes plainly does not constitute discrimination on the basis of sex as that concept is commonly understood.[16]

Yet, this seems too facile. The sole reason that a man cannot marry a man is because of his sex. All that keeps a woman from marrying a woman is her sex. The core of sex discrimination is always a person being treated differently or denied a benefit because of his or her sex.[17] In this way, though the law treats men and women alike in banning both from marrying those of the same sex, it is still gender discrimination because the law classifies entirely by gender and keeps individuals from receiving a benefit solely on account of their biological sex.

The Court then examines why laws that ban same-sex marriage discriminate based on sexual orientation and why strict scrutiny should be used for sexual orientation discrimination. The court concludes:

> There is no persuasive basis for applying to statutes that classify persons on the basis of the suspect classification of sexual orientation a standard less rigorous than that applied to statutes that classify on the basis of the suspect classifications of gender, race, or religion. Because sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment and that generally bears no relation to an individual's ability to perform or contribute to society, it is appropriate for courts to evaluate with great care and with considerable skepticism any statute that embodies such a classification. The strict scrutiny standard therefore is applicable to statutes that impose differential treatment on the basis of sexual orientation.[18]

This, of course, has significance beyond the issue of marriage equality, and it is unchanged by Proposition 8. Sexual orientation discrimination under the California Constitution now must meet strict scrutiny. To this date, the U.S. Supreme Court has used only rational basis review for sexual orientation

16. *Id.* at 436.

17. *See, e.g.*, 42 U.S.C. § 2000e (2006) (definition of sex discrimination in Title VII of the Civil Rights Act of 1964).

18. *In re Marriage*, 183 P.3d at 444.

discrimination.[19] State courts using strict scrutiny for sexual orientation discrimination may provide precedents that increase the likelihood of the U.S. Supreme Court doing so.

After establishing that strict scrutiny is appropriate because marriage is a fundamental right and because sexual orientation discrimination is suspect, the court then concludes: "the state interest in limiting the designation of marriage exclusively to opposite-sex couples, and in excluding same-sex couples from access to that designation, cannot properly be considered a compelling state interest for equal protection purposes."[20]

3. The Conclusion

The conclusion is then inescapable; laws prohibiting same sex marriage violate the California Constitution:

> In light of all of these circumstances, we conclude that retention of the traditional definition of marriage does not constitute a state interest sufficiently compelling, under the strict scrutiny equal protection standard, to justify withholding that status from same-sex couples. Accordingly, insofar as the provisions of sections 300 and 308.5 draw a distinction between opposite-sex couples and same-sex couples and exclude the latter from access to the designation of marriage, we conclude these statutes are unconstitutional.[21]

This conclusion is the part of the opinion the press is most likely to quote. But even this part is not written for a general audience. The sentences are long. They include references to "strict scrutiny" and to statutory provisions. They are hard to comprehend for those not trained in the law.

B. The Audience?

It is possible to identify many different potential audiences for the California Supreme Court's decision: (1) lower courts; (2) government officials who must follow and implement the rulings; (3) lawyers who will litigate future cases; (4) the parties to that case; (5) professional critics (such as journalists who cover the court and especially law professors); (6) future justices on the court; (7) courts in other states and the U.S. Supreme Court; and (8) the public.[22] Even this is not an exhaustive list of possible audiences.[23]

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19. *See* Romer v. Evans, 517 U.S. 620 (1996) (invalidating initiative repealing laws protecting gay and lesbian individuals from discrimination and precluding the enactment of new such laws).

20. *In re Marriage*, 183 P.3d at 451.

21. *Id.* at 452.

22. I have previously made a similar point about audiences for U.S. Supreme Court decisions. *See* Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2022–23 (2002).

23. For example, there may be an international audience for U.S. Supreme Court decisions. *See, e.g.*, MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN

For whom was the California Supreme Court writing? Assuming that there was conscious attention to the audience, the answer probably would have been all of these groups except perhaps the last. First, some of the opinion would be important for lower courts. For example, the clear declaration that strict scrutiny is to be used for sexual orientation discrimination certainly will matter in future litigation. Also, lower courts inevitably will closely read the California Supreme Court's decision in implementing the right to marriage equality in the host of factual situations sure to arise.

Second, government officials—especially current and future members of the California legislature—are a key audience for the decision. In enacting future laws, the legislature, and for that matter city councils and county boards of supervisors across the state, need to know what they can and cannot do.

Third, lawyers in future cases will carefully study the California Supreme Court's opinion for guidance. A wide variety of issues concerning marriage and sexual orientation might arise in the future. Any lawyers involved, like any judges, would use the California Supreme Court decision as the basis for argument.

Fourth, the parties to the case obviously read the court's decision with enormous interest. They, of course, were most interested in the bottom line result. But the reasoning surely was of interest as well. The supporters of marriage equality must have been heartened by how seriously their arguments were taken and how much they were accepted. The opponents of marriage equality were likely disappointed that a majority of the justices so thoroughly rejected their position.

Fifth, the justices knew that professors would parse and carefully analyze their opinion. Chief Justice George's opinion seems especially written for this group in that it shows careful adherence to precedent, well-developed legal arguments, and thorough consideration of opposing arguments.

Sixth, the opinion likely was written with an eye to future cases in the California Supreme Court. The court will deal with other issues concerning marriage and sexual orientation. The court thus detailed principles and reasoning that it will rely on in the future. Also, consciously or not, the opinion seems to seek to persuade a future court not to overrule it.

Seventh, other states' courts are a particularly important audience for this opinion. The court notes that several other state supreme courts had dealt with the issue and resolved it by a single-vote margin.[24] The court also notes that Massachusetts was the only state supreme court to deal with the "comparable issue" of the legality of same-sex marriage in a state that otherwise affords the same legal rights under domestic partnerships. The court also observes that the

DEMOCRACY (2000) (arguing that the Cold War influenced the Court in the school desegregation decisions).

24. *In re Marriage*, 183 P.3d at 397–98 n.3.

matter was simultaneously pending in the Connecticut Supreme Court.[25] It seems likely that the court hoped that its thorough reasoning might help persuade justices in other states to come to a similar conclusion. Perhaps it could even help persuade a U.S. Supreme Court justice if the issue goes before the Court under the U.S. Constitution.

The one audience that the opinion seems to ignore is the general public. The court certainly knew its decision was going to make headlines and receive intense public attention. But little, if any, of the opinion was written for the general public. The following section addresses how this audience might have been addressed and whether it should have been considered.

II
WRITING FOR AN ADDITIONAL AUDIENCE

It is difficult for me to criticize or even imply a criticism of Chief Justice George's opinion. I strongly agree with his conclusion, and his opinion is masterful. He carefully shows why marriage is a fundamental right, why this includes same-sex marriage, and why sexual orientation discrimination is suspect. He thus demonstrates that strict scrutiny is appropriate and that the ban on marriage equality violates strict scrutiny.

Yet, as explained above, the opinion is written entirely for judges, lawyers, and academics. A non-lawyer trying to read some or all of the opinion would likely find it impenetrable. It is then fair to ask two questions: First, *could* the opinion have been written, at least in part, for a more general audience? Second, if so, *should* it have been written in this way?

Without in any way compromising the rest of the opinion, the California Supreme Court could have included explanations and rhetoric more easily accessible to a wider audience. Two ways in which the court could have achieved this end are to have forcefully stated and explained that laws prohibiting same-sex marriage serve no legitimate end and for the court to have much more explicitly analogized the ban on same-sex marriage to laws that prohibited interracial marriage. The Court's careful attempt to show how its ruling is consistent with long-standing precedent, in part, is to establish the basis for its ruling in the eyes of future courts.

A. No Legitimate Purpose

The court could have more clearly stated and explained that laws prohibiting same-sex marriage serve no permissible goal, and more explicitly drawn out the flaws in the arguments supporting those laws. What are the arguments

25. *Id.* ("A similar issue also is currently pending before the Connecticut Supreme Court in *Kerrigan v. Commissioner of Public Health* (No. SC17716, argued May 14, 2007). In *Kerrigan*, the court is expected to determine whether a Connecticut statute that limits marriage to opposite-sex couples is unconstitutional under the Connecticut Constitution . . . .").

advanced for limiting marriage to opposite-sex couples? One argument is that marriage is inherently between opposite-sex couples. This is a definition, not an argument. That marriage has traditionally been between opposite-sex couples tells us nothing about the characteristics of marriage and why those characteristics have to be limited to opposite-sex couples. In fact, if one thinks about all of the core characteristics of marriage—the expression of love and commitment, the benefits and responsibilities—none of those has anything to do with the sexual orientation of the individuals participating. Obviously, the word "marriage" can be defined to be between a man and a woman, or in any other way. But the court could have pointed out that a definition is not a legal argument and there is no acceptable justification for limiting the definition to unions between men and women.

A second argument against same-sex marriage is that marriage's essential purpose is procreation. Therefore, same-sex marriage does not make sense because same-sex couples cannot procreate. As explained above, the California Supreme Court addressed this point.

But the court was not sufficiently explicit in explaining why this argument is wrong on every possible level. Marriage, of course, is not inherently about procreation. Couples are allowed to get marriage licenses even if one or both of them cannot have or does not want any children. Postmenopausal women still can get marriage licenses. Men who have been sterilized or are infertile can get marriage licenses. Society does not impose a requirement of intent to procreate for heterosexual couples, so there is no sense imposing it for same-sex couples.

The even more important flaw in this argument—and one not explored by the Court—is that same-sex couples do procreate, whether it is through artificial insemination or surrogacy or adoption. Same-sex couples have children all the time, and so if the focus is on procreation, there is no reason at all to deny same-sex couples marriage licenses.

A third argument made against same-sex marriage is that it will harm the institution of marriage. The California Supreme Court responded to that argument by quoting the dissent of Chief Judge Judith Kaye of the New York Court of Appeals:

> As Chief Judge Kaye of the New York Court of Appeals succinctly observed in her dissenting opinion . . . : "There are enough marriage licenses to go around for everyone." Further, permitting same-sex couples access to the designation of marriage will not alter the substantive nature of the legal institution of marriage; same-sex couples who choose to enter into the relationship with that designation will be subject to the same duties and obligations to each other, to their children, and to third parties that the law currently imposes upon opposite-sex couples who marry.[26]

26. *Id.* at 451 (citations omitted).

Indeed, the desire of gay and lesbian individuals to marry is tremendously affirming of the institution of marriage. When San Francisco briefly legalized same-sex marriage, hundreds of couples stood for hours in the rain to get marriage licenses. It is hard to imagine a more powerful message in favor of marriage as an institution. The entire battle for marriage equality sends the message that marriage is special and tremendously important.

A fourth argument advanced by opponents of marriage equality is that children of opposite-sex parents have better psychological health than those of same-sex parents, and thus the government is justified in denying marriage licenses for same-sex couples. President George W. Bush made exactly that argument. He said that the social science data shows that children do better if they have parents of opposite gender.[27] There is almost no social science data to support the President's conclusions. Most of the studies cited found only that children with single parents often have more problems than children with two parents. But that has nothing to do with sexual orientation. It does reflect that being a parent is enormously difficult and that it is even more difficult to be a single parent. But that does not at all relate to the issue of whether same-sex couples should be able to get marriage licenses. There are a few studies that have looked at children of same-sex parents, and they show that those children have no greater problems by any measure than children of opposite-sex parents.[28]

Most of all, the problem with this argument is that it truly misses the point. The question is not whether same-sex couples should have children. The issue, thankfully, is not whether or not society should sterilize gay and lesbian individuals. The reality is that many same-sex couples will have children. Given that same-sex couples will have children, the only relevant question is, from a social perspective, whether those children are better off when the parents are married or unmarried. I know of no data that answers that question. I know of no studies that compare children with same-sex parents who are married to children of same-sex parents who are unmarried. Same-sex marriage is still so new, not only in the United States but around the world, that time is needed to conduct those studies. However, everything we understand about marriage and how it contributes to the stability of relationships suggests that children with same-sex parents are better off if those parents are married than unmarried because marriage is more likely to perpetuate stable relationships.

This seems a key omission from the California Supreme Court's decision: that allowing same-sex marriage is inherently pro-family. Society values marriage, in part, because it provides stability to family relationships. Allowing same-sex marriage would provide that benefit to children of same-sex couples.

27. *See* Benedict Carey, *Experts Dispute Bush on Gay-Adoption Issue*, N.Y. TIMES, Jan. 29, 2005, at A16.

28. *Id.*

My point is that the court could have gone further and explained that the ban on marriage equality for gay and lesbian individuals serves no legitimate purpose. The court could have much more thoroughly exposed the flaws in the arguments against allowing same-sex marriage. Instead, it refutes only the historic condemnation of homosexual activity and bias against gay and lesbian individuals. I am not suggesting that the court should have omitted its analysis finding that the ban on same-sex marriage failed strict scrutiny. Rather, I am arguing that it could have gone further, and in language far more accessible to the general public, it could have explained why the prohibition serves no legitimate purpose. I recognize that it is uncertain whether this would have affected the fate of Proposition 8. The general public still might not have read the decision. The media in reporting the decision might not have reported the analysis described above. Even if it did, this might have changed few minds. But it might have been communicated through the media and it might have helped persuade some people on the issue. There is no way to know whether a legal brief or an oral argument made a difference in persuading a judge. But the need for them to be effective and persuasive is not challenged. Likewise, my point is that the opinion could have done more to persuade the general public, even though it can never be known what effect that might have had or what difference it would have made.

B. The Analogy to Race

From a rhetorical perspective, the California Supreme Court could have more fully and forcefully used the analogy to laws prohibiting interracial marriage. The court did not ignore this point altogether; rather, early in its opinion it stated:

> Although, as an historical matter, civil marriage and the rights associated with it traditionally have been afforded only to opposite-sex couples, this court's landmark decision 60 years ago in *Perez v. Sharp*[29] . . . —which found that California's statutory provisions prohibiting interracial marriages were inconsistent with the fundamental constitutional right to marry, notwithstanding the circumstance that statutory prohibitions on interracial marriage had existed since the founding of the state—makes clear that history alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee. The decision in *Perez*, although rendered by a deeply divided court, is a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized.[30]

29. 198 P.2d 17 (Cal. 1948).

30. *In re Marriage*, 183 P.3d at 399 (citation omitted).

But the analogy between laws prohibiting same-sex marriage and laws prohibiting interracial marriage is stronger and more persuasive than the court acknowledged. There is a striking parallel between the arguments advanced to justify antimiscegenation laws and the arguments used to justify the ban on same-sex marriage.

In defending laws prohibiting interracial marriage in the landmark cases *Loving v. Virginia* and *McLaughlin v. Florida*, states argued to the U.S. Supreme Court that history strongly supported such statutes. Such laws had existed throughout American history, and there was no indication that the Fourteenth Amendment, or any part of the Constitution, was meant to change that.

In arguing that the framers' intent in drafting the Fourteenth Amendment confirmed the constitutionality of antimiscegenation laws, the states discussed the intent of the legislature in enacting the Civil Rights Act of 1866 and Freedman's Bureau Bill.[31] The states emphasized that: (a) the legislature clearly intended that these acts not abrogate state antimiscegenation laws;[32] and (b) Congress enacted the Fourteenth Amendment to ensure the constitutionality of these acts but not to invalidate antimiscegenation laws, which these predicate acts left standing.[33] The states therefore concluded that the framers of the Fourteenth Amendment must have intended to exclude state antimiscegenation laws from the terms of the provision.[34] They further noted that the legislatures that ratified the Fourteenth Amendment also intended the amendment not to abrogate antimiscegenation laws because a majority of ratifying states maintained and enforced their antimiscegenation laws as late as 1951.[35]

Further, the states argued that their preferred interpretation was consistent with a long line of judicial decisions considering the constitutionality of antimiscegenation laws.[36] The states also argued that it would be inappropriate for the court to inquire into the wisdom of the policies underlying the antimiscegenation laws because of the scientific nature of the justifications.[37] They argued that the legislature, not the courts, should ultimately determine whether the policy was appropriate.[38]

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31. Brief of Appellee at 14, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395); *accord* Brief of Appellee at 11, McLaughlin v. Florida, 379 U.S. 184 (1964) (No. 11).

32. Brief of Appellee at 23, *Loving*, 388 U.S. 1 (No. 395); *accord* Brief of Appellee at 25–26, *McLaughlin*, 379 U.S. 184 (No. 11).

33. Brief of Appellee at 27, *Loving*, 388 U.S. 1 (No. 395); *accord* Brief of Appellee at 30, 36–37, *McLaughlin*, 379 U.S. 184 (No. 11).

34. Brief of Appellee at 27, *Loving*, 388 U.S. 1 (No. 395); *accord* Brief of Appellee at 37, *McLaughlin*, 379 U.S. 184 (No. 11).

35. Brief of Appellee at 28, *Loving*, 388 U.S. 1 (No. 395); *accord* Brief of Appellee at 37–38, *McLaughlin*, 379 U.S. 184 (No. 11).

36. Brief of Appellee at 31–32, *Loving*, 388 U.S. 1 (No. 395); *accord* Brief of Appellee at 38–39, *McLaughlin*, 379 U.S. 184 (No. 11).

37. Brief of Appellee State of Virginia at 38–42, *Loving*, 388 U.S. 1 (No. 395).

38. Brief of Appellee State of Virginia at 38–41.

Finally, the states articulated some of the scientific justifications underlying these laws. They argued from eugenics that when two races breed, the inferior qualities might be emphasized in the progeny.[39] They also invoked sociology, arguing that race crossings disturb "social inheritance."[40] An argument from sociology that the *McLaughlin* states raised was that interracial marriages cause interracial conflicts and the legislature may properly act to reduce community tension.[41] Additionally, the *Loving* states invoked statistics, arguing that odds do not favor intermarriages, stating that almost two to four times as many intermarriages end in divorce, separation, or annulment as do intramarriages.[42] They invoked this statistic to suggest that it would protect the welfare of children to prevent intermarriages.[43] Further, in arguing for child welfare, the *McLaughlin* appellees argued that it is "well known" that "both the white and negro race tend to shun the off-spring of interracial marriages."[44] Thus, they reasoned that the antimiscegenation laws protect children and their psychological need to identify with others.[45]

In addition to the states' arguments in *Loving* and *McLaughlin*, many state courts prior to *Loving* had upheld antimiscegenation laws. In so doing, state court decisions emphasized states' rights, reasoning, for example, that preservation of racial integrity is the unquestioned and legitimate policy of the state.[46] They also emphasized the primary right of the states to regulate, control, and protect the institution of marriage.[47] Courts further noted in several of the earlier cases that antimiscegenation laws existed in more than half the states, indicating that the majority of people considered the policies underlying these laws to be proper governmental objectives.[48]

Moreover, these decisions invoked pseudo-scientific eugenic concerns. In *Scott v. Georgia*, the Supreme Court of Georgia proclaimed that "[t]he amalgamation of the races is not only unnatural, but is always productive of deplorable results . . . . [T]he offspring of these unnatural connections are generally sickly and effeminate, and . . . they are inferior in physical development and strength[] to the full blood of either race."[49] In *Naim v. Naim*, the Supreme Court of Appeals of Virginia concluded that it could not find any requirement that the state shall not legislate to "prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy

39. *Id.* at 42–43.
40. *Id.* at 44–45.
41. Brief of Appellee at 41, *McLaughlin*, 379 U.S. 184 (No. 11).
42. Brief of Appellee at 49, *Loving*, 388 U.S. 1 (No. 395).
43. *Id.* at 47–48.
44. Brief of Appellee State of Florida at 41, *McLaughlin*, 379 U.S. 184 (No. 11).
45. *Id.*
46. *See, e.g.*, Naim v. Naim, 87 S.E.2d 749, 752 (Va. 1955).
47. *Id.* at 751–53; *see also, e.g.*, State v. Gibson, 36 Ind. 389, 402–03 (1871); Kirby v. Kirby, 206 P. 405, 406 (Ariz. 1922).
48. *See, e.g.*, *Naim*, 87 S.E.2d at 755.
49. Scott v. Georgia, 39 Ga. 321, 321 (1869).

the quality of its citizenship."[50] Finally, in *State v. Jackson*, the Missouri Supreme Court justified its holding by noting, "if the issue of a black man and a white woman and a white man and a black woman intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites . . . ."[51]

The arguments in the marriage equality cases could not be more similar. Some advocates in the California Supreme Court argued that the traditional view of marriage is appropriate because marriage is the foundation of society, and therefore its definition should not be subject to change.[52] They contended, based on this history, that changing the definition of marriage to eliminate the requirement of opposite sex partnership is constitutionally invalid.[53] Further, several advocates of traditional marriage argued that if marriage were to be redefined, the legislature, not the courts, should effect that redefinition.[54] They argued that at its core, marriage is not about rights, but about public policy.[55] Therefore, they contended that courts are ill-suited to make these moral determinations; they are more properly delegated to the legislature.[56]

It might be argued that the analogy to the prohibition on interracial marriage is flawed because same-sex couples had almost all of the benefits of marriage through domestic partnerships, while interracial couples did not. Opponents of marriage equality thus could argue that because no legal rights are denied to same-sex couples, it should be left to the majority to choose the definition of marriage it prefers. It is here, though, that the analogy to the ban on interracial marriage is most powerful and apt. Imagine that a state were to say that marriage was limited to couples of the same race, but that interracial couples could have the benefits of marriage through domestic partnerships. Surely, this form of "separate but equal" would violate equal protection. It is inconceivable that the Court in *Loving*, let alone today, would have allowed it. There is no reason why it is any more acceptable with regard to sexual orientation.

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50. *Naim*, 87 S.E.2d at 756.

51. State v. Jackson, 80 Mo. 175, 179 (1883).

52. Answer Brief of Respondent Campaign for California Families at 8–9, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999); *see also* Brief for the California Ethnic Religious Organizations for Marriage as Amici Curiae Supporting Respondents at 5–7, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999).

53. Answer Brief of Respondent Campaign for California Families at 8.

54. Brief of the Church of Jesus Christ of Latter Day Saints et al. as Amici Curiae Supporting Respondent State of California at 24–28, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999); *see also* Answer Brief of Respondent State of California at 48, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999); Brief of Respondent 22 Legal Defense and Education Fund at 14–15, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999).

55. Brief of the Church of Jesus Christ of Latter Day Saints at 25, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999).

56. *Id.* at 25–26.

Opponents of marriage equality argued that defining marriage as between a man and a woman would foster responsible procreation and promote the optimal environment for rearing a child.[57] They argued that population replenishment relies on encouraging heterosexual relationships.[58] They further argued that the state encourages responsible procreation by encouraging heterosexual couples, the couples that can procreate, to maintain a stable, long-term partnership.[59] For the same reasons, they reasoned that encouraging heterosexual marriages but not homosexual marriages promotes the optimal environment for child rearing.[60] They pointed to various studies showing that children raised in homes with a mother and a father are healthier, including, for instance, studies indicating that children raised in heterosexual homes do better in school than those raised in homes with same-sex parents.[61]

Thus, in both debates, these advocates argued that a court is not the appropriate institution to decide the issues; rather, the issues should be left for legislatures to resolve.[62] Further, both made many policy arguments about why their preferred definition of marriage was legitimate and proper. They alleged that many of these arguments, in both cases, are rooted in science,[63] but in both cases the validity or conclusiveness of the scientific evidence is debatable.[64] Also, advocates in both debates argued that these types of marriages harm society and especially children.[65]

Finally, it is important to note that in both controversies, courts and advocates touched upon religious arguments.[66] In *Loving v. Virginia*, the

57. Brief of Respondent Campaign for California Families at 56–58, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999); *accord* Brief for the California Ethnic Religious Organizations for Marriage as Amici Curiae Supporting Respondents at 9, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999).

58. Brief of Respondent Campaign for California Families at 56–58, *In re* Marriage Cases, 183 P.3d 384 (No. S 147999).

59. *Id.* at 61 (quoting Morrison v. Sadler, 821 N.E. 2d. 15, 25 (Ind. Ct. App. 2005)).

60. *Id.* at 66–67 (citing Hernandez v. Robles, 7 N.Y. 3d. 338, 359–60 (2006)).

61. *Id.* at 69–71.

62. *See* Brief of Appellee at 38–41, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395); Brief of the Church of Jesus Christ of Latter Day Saints et al. as Amici Curiae Supporting Respondent State of California at 24–28, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999); *see also* Brief of Respondent State of California at 48, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999); Brief of Respondent 22 Legal Defense and Education Fund at 14–15, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999).

63. *See* Brief of Appellee at 43–45, 48–51, *Loving*, 388 U.S. 1 (No. 395); Brief of Respondent Campaign for California Families at 69–71, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999).

64. *See, e.g.*, Carey, *supra* note 27, at A16.

65. *See* Brief of Appellee State at 47–48, *Loving*, 388 U.S. 1 (No. 395); Brief of Appellee State at 41, McLaughlin v. Florida, 379 U.S. 184 (1964) (No. 11); Brief of Respondent Campaign for California Families at 56–58, 66–67, 69–71, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999).

66. *See, e.g.*, FRANCIS J. GILLIGAN, S.T.L., THE MORALITY OF THE COLOR LINE 90 (1928); Brief of John J. Russell, Bishop of Richmond, et al. as Amici Curiae Supporting Petitioner at 6, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395); Brief for the California Ethnic Religious

Supreme Court quoted the Virginia trial judge's reasoning in his opinion in which the defendants pleaded guilty to violation of Virginia's antimiscegenation law. The trial judge wrote:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[67]

Further, the U.S. Supreme Court itself articulated the moral underpinnings of many states' bans on interracial marriage in *Scott v. Sandford*. There, the Court noted that "intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage."[68]

Various religious leaders also invoked religion to argue against interracial marriage. For example, Reverend Francis Gilligan, a religious figure who has written widely on the morality of interracial marriages in the United States, strongly discouraged the practice. In 1929, he wrote that "a marriage between a Negro and a white person in the United States, at the present time, would place a considerable handicap on the moral life of the contracting parties."[69] He therefore concluded that interracial marriages in the United States would most always be morally wrong, even though at the time, the Catholic Church officially recognized the validity of interracial marriages.[70]

However, other religious figures advocated fiercely against antimiscegenation laws. In *Loving v. Virginia*, several Catholic religious leaders submitted an amicus brief in favor of invalidating Virginia's antimiscegenation law.[71] They argued that it prohibited the free exercise of religion guaranteed by the U.S. Constitution and was therefore invalid.[72] They further argued that the antimiscegenation statute was unconstitutional because it denied the right to beget children.[73]

There is a striking similarity between those arguments and the religious arguments made with regard to same-sex marriage. Multiple organizations

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Organizations for Marriage as Amici Curiae Supporting Respondents at 10, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999); Brief for the Church of Jesus Christ of Latter Day Saints et al. as Amici Curiae Supporting Respondent State of California at 19, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999); Brief of the Unitarian Universalist Association of Congregations et al. as Amici Curiae Supporting Petitioners at 43, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999).

67. *Loving*, 388 U.S. at 3.

68. Scott v. Sandford, 60 U.S. 393, 409 (1856).

69. GILLIGAN, *supra* note 66, at 90.

70. *Id.* at 90, 93.

71. Brief of John J. Russell, Bishop of Richmond, et al., as Amici Curiae Supporting Petitioner, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).

72. *Id.* at 6.

73. *Id.* at 20.

submitted amicus briefs in favor of maintaining the traditional definition of marriage. A group of several religious organizations, including the Church of Jesus Christ of Latter-day Saints, the California Catholic Conference, the National Association of Evangelicals, and the Union of Orthodox Jewish Congregations of America, together submitted a brief on behalf of the state. Also, a group called the California Ethnic Religious Organizations for Marriage submitted an amicus brief on behalf of the state. Most of these amicis' arguments—claims about the definition of marriage and the importance of marriage in child-rearing—have been reviewed above.

Another group of organizations, including Jews Offering New Alternatives to Homosexuality, submitted a brief on behalf of one respondent in defense of traditional marriage. This group argued that homosexual individuals should not be treated as a class carrying immutable characteristics, because that had not been proven.[74] It argued that to classify them this way, and to apply strict scrutiny, would stigmatize those individuals who have changed their sexual orientation.[75]

Further, the group African-American Pastors in California advocated maintaining a traditional definition of marriage, arguing in part that accepting the analogy to racial discrimination would jeopardize this group's freedom to preach and bear witness to the Gospel.[76] They argued that characterizing traditional marriage as invidious discrimination leads inevitably down the slippery slope to undermining a traditional "prudish" version of morality.[77] This could then become a tool to "reform" other institutions, including churches, that teach traditional marriage.[78]

Finally, one group of religious organizations submitted a brief on behalf of petitioners, advocating a redefinition of marriage. This group included the Unitarian Universalist Association of Congregations, the General Synod of the United Church of Christ, the Union for Reform Judaism, Soka Gakkai International-USA, the Universal Fellowship of Metropolitan Community Churches, the California Council of Churches, and the California Faith for Equality. They argued in part that limiting marriage to couples consisting of a man and woman advances some religious views while inhibiting others.[79] Because of this effect, they also argued that the marriage laws at issue raise

74. Brief of the Jews Offering New Alternatives to Homosexuality et al. as Amici Curiae Supporting Respondents at 2–3, 14, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999).

75. *Id.* at 14–16.

76. Brief of the African-American Pastors in California as Amici Curiae Supporting Respondents at 20, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999).

77. *Id.* at 21–22.

78. *Id.* at 21.

79. Brief of the Unitarian Universalist Association of Congregations et al. as Amici Curiae Supporting Petitioners at 43, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S 147999).

serious issues under the California Constitution's Religion Clauses.[80]

The California Supreme Court could have focused much more explicitly on the precedent of invalidating laws prohibiting interracial marriage. Both antimiscegenation laws and laws prohibiting interracial marriage have long been part of American history. In each instance, marriage was defined to exclude the prohibited unions. In neither instance does the California Constitution's text and history provide guidance.

The analogy to the decisions invalidating antimiscegenation laws provides a powerful rhetorical appeal that the California Supreme Court did not fully use. The decisions striking down the prohibition of interracial marriage show that the answer to the constitutionality of denying gay and lesbian individuals the right to marry cannot be found in the text, history, traditions, or definitions. The decisions invalidating antimiscegenation laws were very controversial at that time, but now are universally regarded as correct and essential. Most of all, the analogy shows that laws prohibiting same-sex marriage and those prohibiting interracial marriage are based on prejudices, not actual justifications. Put another way, the analogy provides a powerful rhetorical appeal, one that might have been particularly persuasive to African American and Latino voters.

C. Should the Court Have Appealed to the Public?

Thus far, I have suggested that the California Supreme Court's decision was not written for the public as an audience, but that it could have done more to speak to this audience. Should it have done so? In answering this question, it is crucial to remember that this is not an either/or situation; it is not a matter of writing for the public or writing for judges, lawyers, and scholars. The opinion could have included everything for the latter audience and still had clear explanations and persuasive rhetoric for the general public. Nor is there reason to believe that writing the opinion to be more accessible and persuasive to the public would lessen its persuasiveness to lawyers and judges. All of the legal arguments, with appropriate citations, would be there. But the opinion could have been written in a manner would have made it easier for reporters to communicate it to the public and for the public to be persuaded by the legal basis for its conclusion.

There are many reasons that the public is an appropriate, and indeed a necessary, audience. First, in California, voters have the power to overturn Supreme Court decisions, whether by amendment or revision (which first requires legislative action). The justices on the California Supreme Court obviously knew that an initiative to overturn their decision was likely. They could have spoken to this audience, which may well have the final say on the issue. Using a judicial opinion to persuade voters is completely appropriate

80. *Id.* at 14.

because it only involves no more than more clearly and meticulously explaining the rationale for the decision in terms that the voters can understand. The decision was no more likely to be received as activist because it was clearer and more persuasive; its perceived activism was based on the result and its impact.

Second, the justices on the California Supreme Court are, in a sense, elected officials. Under the California Constitution, justices face retention elections at regular intervals. By tradition, if not by ethical rules, justices speak about cases through their opinions. This was the chance to speak to their constituents. Obviously, all judges, including federal judges with life tenure, speak to the public through their judicial opinions. But the need to speak to the public is heightened for judges who face election or retention election. Judicial opinions take on greater significance in cases like the marriage equality decision, which received tremendous attention and likely will play a role in subsequent elections.

Finally, the court had the chance to influence the public's understanding of the California Constitution on an issue of immense public importance. Courts can be moral leaders on issues and can help shape the public's views. Decisions in cases like this provide unique opportunities to educate the public about the law, the role of the courts, and the place of the Constitution. Not speaking to the public squanders this opportunity.

Obviously, writing the opinion to be more accessible and persuasive to the public would not mean that more non-lawyers would read the opinion. No matter how it was written, the opinion would be read by few other than judges, lawyers, law students, and journalists. But in communicating the court's rationale to the public, the media would have faced a very different task if the opinion had been written with an eye towards explaining and communicating to the public why the court found a state constitutional right to marriage equality.

CONCLUSION

I deeply believe that gay and lesbian individuals should have the same right to express love and commitment through marriage that heterosexual individuals always have had. Gay and lesbian individuals should have the same chance to experience the joys, and yes, the disappointments, of marriage that heterosexual individuals always have had. I know that there are those who vehemently disagree and strongly oppose same-sex marriage. My response is that these people should not marry someone of the same sex, but that is not a reason to deny the right to others.

Notwithstanding Proposition 8, I still believe that in my lifetime, marriage equality for gay and lesbian individuals will exist in the United States. The California Supreme Court's decision is a great step in this direction and would have been even more so without Proposition 8. Chief Justice George's opinion for the court is thorough and persuasive in explaining why prohibiting same-sex marriage violates the California Constitution.

I thus write as someone who agrees with the court's conclusion and reasoning. Yet, I also write as someone who wishes that the court had done more to appeal to the court that for now has the last word in California: the court of public opinion.