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The Question of Constitutionality: How Separate are the Powers? The Administrative and Social Ramifications of *Lockyer v. City and County of San Francisco*

By Kristin Ecklund*

“The definition [of marriage] is deeply rooted in the public’s understanding of what marriage is.”¹

“No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.”²

I. INTRODUCTION

On December 22, 2004, Superior Court Judge Richard Kramer began sorting out the arguments of what has become one of the most divisive issues in American political and social culture.³ Same-sex marriage has not only developed into one of this generation’s most hotly contested debates, but it has created both heroes and villains out of some well-known, and not-so-well-known, American figures. In fact, the individual most often credited for igniting this social conflagration had gone virtually unnoticed by the media’s radar until the beginning of 2004, when he single-handedly sparked a controversy that was to have the entire nation up in arms. San Francisco Mayor Gavin Newsom became the face of same-sex

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1. Thomas Peele, *Judge Hears Gay Marriage Arguments*, San Ramon Valley Times, Dec. 23, 2004, at A1.

2. *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 512 (Cal. 2004) (quoting *Cooper v. Aaron*, 358 U.S. 1, 18 (1958)).

3. Peele, *supra* note 1, at A1.

marriage when he issued more than 4,000 marriage licenses to homosexual couples in February of 2004.⁴

This note explores the consequences of Newsom's actions, which are addressed by the California Supreme Court in *Lockyer v. City and County of San Francisco*.⁵ This decision considered whether a local executive official charged with the ministerial duty of enforcing a state statute exceeds his authority when, without a court ruling on the constitutionality of the statute, he refuses to enforce the statute because he has determined it to be unconstitutional.⁶ Part II will provide the historical background of the case.⁷ Part III will analyze the majority opinion of Justice George, as well as the concurring opinion of Justice Moreno, and the concurring and dissenting opinions of Justices Kennard and Werdegar.⁸ Part IV will discuss the administrative, social, and judicial impact of the case.⁹ Part V will conclude the discussion of *Lockyer* and the separation of powers doctrine.¹⁰

II. HISTORICAL BACKGROUND

A. Precedential History

The separation of powers doctrine states that the legislative branch enacts statutes, the executive branch enforces statutes, and the judicial branch interprets statutes.¹¹ Article III, section 3 of the California constitution provides that “[t]he powers of State government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this constitution.”¹² While the California constitution emphasizes the distinctions between the three branches

4. *Id.* at A1.

5. *See generally Lockyer*, 95 P.3d 459.

6. *Id.* at 462.

7. *See infra* Part II and accompanying notes.

8. *See infra* Part III and accompanying notes.

9. *See infra* Part IV and accompanying notes.

10. *See infra* Part V and accompanying notes.

11. *Lockyer*, 95 P.3d at 459.

12. *Superior Court v. County of Mendocino*, 913 P.2d 1046, 1051 (Cal. 1996) (quoting CAL. CONST. art. III, § 3).

of government, California common law has demonstrated that these branches are not fully independent of one another.¹³ For example, the legislative and executive branches are permitted to consider constitutional implications when “making discretionary decisions within their authorized sphere of action”¹⁴ Nevertheless, the established rule is that when an executive official has a ministerial duty to adhere to a particular statute, the official has no authority to disobey the mandate based on his own conclusions about the statute’s constitutionality.¹⁵ This section will trace the history of the separation of powers doctrine as it relates to executive officials within their “spheres of action.”

Article III, section 3.5 of the California constitution prohibits administrative agencies from declaring state laws unconstitutional in the absence of an appellate court determination.¹⁶ This statute was

13. *Id.* The court in *County of Mendocino* noted how the decisions and actions of one branch can have a substantial impact on the other two branches. *Id.* For example, the judiciary determines the constitutionality of legislative and executive actions, the legislature enacts laws that provide the rules for judicial and executive proceedings, and the executive appoints judges and exercises veto power over the legislature. *Id.* at 53. The court noted that this system of “checks and balances” is what the separation of powers doctrine is intended to serve. *Id.* at 53.

14. *Lockyer*, 95 P.3d at 463.

15. *Id.* (citing *Kendall v. United States ex rel Stokes*, 37 U.S. 524 (1838)). In *Kendall*, the court found that the petitioner, the postmaster general, had a ministerial duty to credit the respondents, U.S. mail carriers, with the full amount to which they were entitled under their contracts. *Kendall*, 37 U.S. at 524. Because this was a purely ministerial duty, the postmaster general had no discretion at all. *Id.* The Court stated:

It was urged at the bar, that the postmaster general was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.

Id. at 525.

16. *Lockyer*, 95 P.3d at 466. Article III, section 3.5 states that:

proposed by the Legislature, and it became Proposition 5 in the 1978 election.¹⁷ Proposition 5 was placed on the ballot by the Legislature in response to the California Supreme Court's decision in *Southern Pacific Transportation v. Public Utilities Commission*, which held that the Public Utilities Commission had the power to declare a state statute unconstitutional.¹⁸ In his concurring and dissenting opinion in this case, Justice Mosk vehemently argued that neither the commission, nor any other administrative agency for that matter, had the authority to declare a statute unconstitutional.¹⁹

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; (b) To declare a statute unconstitutional; (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

CAL. CONST. art. III, § 3.5.

17. *Lockyer*, 95 P.3d at 474.

18. *Id.* at 476. (citing *S. Pac. Transp. v. Pub. Utils. Comm'n*, 556 P.2d 289 (Cal. 1976)). In *South Pacific Transportation*, the plaintiff sought review of a decision of the defendant, in which the defendant found that a particular statute of the Public Utilities Code was unconstitutional. 556 P.2d 290-91. The statute at issue, Public Utilities Code section 1202.3, stated that:

[I]n any proceeding under section 1202 involving a Publicly used road or highway not on a publicly maintained road system, the commission may apportion costs of improvement to the public entity if the commission finds (a) express dedication and acceptance of the road or (b) a judicial determination of implied dedication. If neither condition is found, the commission shall order the crossing abolished by physical closing.

S. Pac. Transp., 556 P.2d at 291-92.

The defendant concluded that the statute was unconstitutional because it "unconstitutionally delegates the state's police power to private litigants." *Id.* at 292. The California Supreme Court disagreed with the Public Utilities Commission's findings and declared that the statute was not unconstitutional because it merely gave private litigants the opportunity to bring the commission's attention to a particular need or to instigate action by the commission. *Id.* at 292-93.

19. *S. Pac. Transp.*, 556 P.2d at 293 (Mosk, J., concurring and dissenting). Justice Mosk argued that the commission's exercise of judicial power in this case

Justice Mosk also acknowledged an earlier case, *Walker v. Munro*, in which the California Court of Appeals held that an administrative agency that has been granted judicial or quasi-judicial power by the California constitution has the authority to consider the constitutionality of a statute.²⁰ The justice argued, however, that this

was in direct conflict with the separation of powers doctrine expressed in article III, section 3 of the California Constitution. *Id.* at 295. He maintained that there was neither an express authorization of such judicial power nor an inference of such power from constitutional or legislative authorizations. *Id.* Justice Mosk stated:

A commissioner faithfully upholds the Constitution by complying with the mandates of the Legislature, leaving to courts the decision whether those mandates are invalid. The oath of office to obey the Constitution requires obedience to the Constitution not as self-indulgently defined by the commission, but as interpreted by objective judicial tribunals.

Id. (citing *Barr v. Watts*, 70 So. 2d 347, 351 (Fla. 1953)).

The justice concluded that “laws passed by a legislature represent the will of the people,” and thus these statutes are presumed to be constitutional “until clearly proven otherwise.” *Id.* at 296.

20. *Lockyer*, 95 P.3d at 478 (citing *S. Pac. Transp.*, 556 P.2d 293-94). In *Walker*, the plaintiff liquor dealers had been charged in an administrative proceeding with violating the fair trade provisions of the California Alcoholic Beverage Control Act. *Walker v. Munro*, 2 Cal. Rptr. 737, 739 (Cal. Ct. App. 1960). While the proceeding was pending, the plaintiffs filed for declaratory judgment in superior court to obtain a judgment that the act was unconstitutional and to enjoin the defendant officials from enforcing the act. *Id.* The trial court, relying on the exhaustion of remedies doctrine, ruled in favor of the officials. *Id.* at 741. On appeal, the liquor dealers argued that the exhaustion of remedies doctrine was inapplicable because the officials did not have the authority to decide constitutional questions. *Id.* at 741. The court rejected this notion and found that the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board were “constitutional agencies upon which limited judicial powers have been conferred.” *Id.* The court held that:

The Appeals Board is empowered in appeals from decisions of the department to review the questions “whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.”

Id. at 73 (citing CAL. CONST. art. XX, § 22).

Thus, because the administrative agency had been granted authority by the California Constitution to exercise limited judicial power, the court concluded that the agency in this case had the authority to determine the constitutionality of the statute in question. *Walker*, 2 Cal. Rptr. at 741-42.

decision had been “indirectly criticized and implicitly disapproved” in *State of California v. Superior Court*, which held that the plaintiff seeking a declaration that a particular statute was unconstitutional was not required to pursue its constitutional claim before the administrative agency prior to bringing a court action.²¹

While these two cases that Justice Mosk discussed may seem fundamentally in conflict with one another, given that they resulted in opposite outcomes, their facts make them distinguishable, and therefore the reasoning behind these decisions is consistent.²² Most importantly, the Alcoholic Beverage Control Appeals Board in *Walker*, unlike the Coastal Zone Conservation Commission in *State of California*, had been granted quasi-judicial power by the California constitution.²³ Because of this grant of judicial power, the Alcoholic Beverage Control Appeals Board was authorized to make determinations as to the constitutionality of particular statutes, whereas the Coastal Zone Conservation Commission was denied this authority.²⁴ Thus, the decisions reached in *Walker* and *State of California* were not inconsistent with one another.²⁵

21. *Lockyer*, 95 P.3d at 461 (citing *S. Pac. Transp.*, 556 P.2d at 293). In *State of California v. Superior Court*, the plaintiff sought a declaration in court that the California Coastal Zone Conservation Act was unconstitutional. 524 P.2d 1281, 1289-90 (1974). The plaintiff sought this declaration without first exhausting its administrative remedies by bringing the issue before the Coastal Zone Conservation Commission. However, in this case, the California Supreme Court held that the administrative remedies need not be exhausted since:

an administrative agency is not the appropriate forum in which to challenge the constitutionality of the basic statute under which it operates, there seems little reason to require a litigant to raise the constitutional issue in proceedings before the agency as a condition of raising that issue in the courts.

Id. at 1290.

Thus, because the administrative agency had not been granted authority by the California Constitution to exercise any kind of judicial power, the court concluded that the plaintiff in this case was not required to pursue a constitutional claim before the commission prior to seeking a court action. *Id.* The commission did not have the authority to determine questions of constitutionality. *See id.*

22. *Lockyer*, 95 P.3d at 480.

23. *Id.*

24. *Id.*

25. *Id.*

B. Case History

On February 10, 2004, Gavin Newsom, the newly elected mayor of the city and county of San Francisco, sent a letter to the county clerk requesting that she determine what changes would need to be made to marriage license forms in order to provide marriage licenses without regard to sexual orientation.²⁶ In response to this letter, the county clerk designed a “gender-neutral” application for marriage licenses and a “gender-neutral” marriage license to be used by same-sex couples.²⁷ Two days later, the county clerk, using the altered forms, began issuing marriage licenses to same-sex couples, and by March, approximately 4,000 same-sex marriages were performed under these licenses.²⁸ On February 13, 2004, two separate actions were filed in the San Francisco County Superior Court seeking to halt the issuing of these licenses to same-sex couples; in each case, a request for an immediate stay of the city’s actions were denied.²⁹ On February 27, 2004, the Attorney General filed in the Supreme Court of California for an original writ of mandate, prohibition, certiorari, and/or other relief, and a request for an immediate stay.³⁰

III. ANALYSIS OF OPINION

A. Majority

Justice George delivered the majority opinion.³¹ He began his discussion by noting that the issue in this case could arise in various factual scenarios.³² Justice George explained that, while at first

26. *Id.* at 464.

27. *Id.* at 465. The new form eliminated the terms “bride,” “groom,” “unmarried man,” and “unmarried woman” and replaced them with “first applicant,” “second applicant,” and “unmarried individuals.” *Id.*

28. *Id.*

29. *Id.* at 465-66.

30. *Id.* The petition requested the following: (1) directions to the local officials to comply with the applicable statutes in issuing marriage license, (2) a declaration that the same-sex marriage licenses that had been issued were invalid, and (3) directions to the city to refund any fees collected in connection with such licenses and certificates. *Id.*

31. *Id.* at 462.

32. *Id.* Justice George argued that this issue would arise, for example, if a local

glance this case may seem to present the substantive issue of the rights of homosexuals, in fact, this case addressed a much broader question of the authority of local officials in the execution of state statutes.³³ In order to address such an issue, the Justice posited that the fundamental question of “the role of the rule of law in a society that justly prides itself on being ‘a government of laws, and not of men’” must be determined.³⁴

In determining this question, Justice George acknowledged the separation of powers doctrine as the classic understanding of the local official’s relationship with the other branches of government.³⁵ He noted that the doctrine states that the legislative branch has the authority to enact statutes, the executive branch has the authority to enforce statutes, and the judicial branch has the authority to interpret statutes.³⁶ While executive officials may take into consideration the constitutionality of a particular statute within the scope of their duties, they are not entitled to disregard a statute that imposes a ministerial duty on them, merely because they believe the statute is unconstitutional.³⁷

With regard to the separation of powers doctrine, the court declared that the Legislature determines all aspects relating to marriage in California.³⁸ Specifically, California Family Code sections 300 through 310 set forth the components of a valid

official refused to enforce a statute that restricted the possession of handguns because of his view that it violated the Second Amendment, or if a local official refused to enforce a statute that imposed environmental restrictions on a property owner’s ability to obtain a permit because of his belief that the limitations constituted an uncompensated “taking” of property in violation of the just compensation clause. *Id.* at 462-63.

33. *Id.* at 463.

34. *Id.* at 463 n.1 (quoting Adams, Nonvanguis Papers, No. 7 (1774), reprinted in 4 Works of John Adams (Charles Francis Adams ed. 1851)).

35. *Id.* at 463.

36. *Id.*

37. *Lockyer*, 96 P.3d at 463-64 (stating that when “a duly enacted statute imposes a ministerial duty upon an executive official to follow the dictates of the statute in performing a mandated act, the official generally has no authority to disregard the statutory mandate based on the official’s own determination that the statute is unconstitutional”).

38. *Id.* at 467 (citing *McClure v. Donovan*, 205 P.2d 17, 21 (Cal. 1949) and *Beeler v. Beeler*, 124 Cal. App. 2d 679, 682 (1954)).

marriage.³⁹ As to the validity of marriage, section 300 clearly states that marriages performed in California are to be limited to marriages between a man and a woman.⁴⁰ Moreover, section 308.5 provides that only a marriage between a man and a woman is to be recognized in California.⁴¹ As to who is charged with the execution of the various statutes related to marriage, section 102180 of the Health and Safety Code states that the State Registrar has supervisory power over local registrars in ensuring uniform compliance.⁴²

Thus, in light of the issues brought forth in this case, the court thought it prudent to provide a discussion of the roles of state and local officials with regard to their duties in the issuing of marriage licenses and certificates.⁴³ Based on legislative history, as well as the statutes' emphasis on the importance of procedural uniformity, the court surmised that "marriage is a matter of 'statewide concern' rather than a 'municipal affair.'"⁴⁴ Justice George also noted that the statutes indicate that only the county recorder and county clerk have been granted authority by the state to issue marriage licenses and certificates.⁴⁵ With regard to the authority of a mayor, the statutes reveal that he or she has no power to change or expand the duties of the county clerks or recorders in the granting of marriage licenses.⁴⁶ Thus, if a mayor were to instruct a county clerk or recorder as to the issuing of marriage licenses, the court concluded that this would be in excess of his or her granted authority.⁴⁷

39. *Id.* at 468.

40. *Id.* (quoting Cal. Fam. Code § 300)). "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." Cal. Fam. Code § 300 (West 2004).

41. *Id.*

42. *Id.* at 470. The Health and Safety Code also provides that "[t]he forms for the application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate shall be prescribed by the State Registrar." *Id.* (quoting Cal. Health & Safety Code § 103125).

43. *Id.* at 471.

44. *Id.*

45. *Id.*

46. *Id.* The court noted that a mayor may have the authority to supervise a county clerk or county recorder in other areas of their employment, however this authority does not extend to the area of granting marriage licenses. *Id.*

47. *Id.*

The court next addressed the question of whether a public official who deems a particular statute to be unconstitutional may refuse to enforce that statute on the basis of this belief.⁴⁸ Justice George began this discussion by establishing that the duties of the county clerk and county recorder are ministerial in the sense that once the statutory requirements for marriage have been established, these officials have no discretion in refraining to issue marriage licenses.⁴⁹ Consequently, when the statutory requirements have not been met, these local officials likewise do not have the discretion to nevertheless issue marriage licenses.⁵⁰ Given these established rules, the court declared that “a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official’s view that it is unconstitutional.”⁵¹

The court elaborated on its decision first by acknowledging article III, section 3.5 of the California constitution, which was cited by petitioner in his argument that the actions of the local officials were improper.⁵² The Justice reasoned that, while section 3.5 was instructive in this case, the court did not have to determine whether the case fell within this article.⁵³ Given that California law had previously established that a local official with ministerial duties does not have the power to refrain from enforcing a statute based on his belief of the statute’s unconstitutionality, the court concluded that the city officials’ actions in this case were ultimately invalid.⁵⁴

The court noted that there existed legal principles prior to the inception of article III, section 3.5 that created a foundation for both the article and the court’s holding in this case. One such principle is

48. *Id.*

49. *Lockyer*, 95 P.3d at 473. The court defined a “ministerial act” as “an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act’s propriety or impropriety, when a given state of facts exists.” *Id.* (quoting *Kavanaugh v. W. Sonoma County High School Dist.*, 62 P.3d 54, 56 (Cal. 2003)).

50. *Lockyer*, 95 P.3d at 473.

51. *Id.*

52. *Id.*

53. *Id.* at 475.

54. *Id.*

that a statute is presumed to be constitutional once it has been enacted.⁵⁵ Thus, a challenging party must clearly show unconstitutionality, and any questions will be resolved in favor of a statute's validity.⁵⁶ Furthermore, the court acknowledged another principle that establishes that a public official's scope of authority is defined by the governing statute from which the authority is derived.⁵⁷

While Justice George maintained that the court need not determine the scope of article III, section 3.5, he reasoned that a review of the historical background that ultimately resulted in the adoption of this article would prove helpful in the analysis.⁵⁸ He noted that the article was placed on the ballot by the Legislature after the California Supreme Court's ruling in *Southern Pacific*.⁵⁹ As previously discussed, the court held in this case that the Public Utilities Commission had the authority to declare a statute unconstitutional.⁶⁰ Justice George also addressed Justice Mosk's concurring and dissenting opinion, in which he strongly disagreed with the majority and argued that no administrative agency could declare a statute unconstitutional because it was the executive branch's duty to merely implement and enforce statutes.⁶¹ The majority noted Justice Mosk's discussion of *Walker*, which established that "an administrative agency that has been granted judicial or quasi-judicial power by the California Constitution...has the authority to consider the constitutionality of a statute in the course of its quasi-judicial proceedings."⁶² The court also acknowledged Justice Mosk's conclusion that, although many powers

55. *Lockyer*, 95 P.3d at 475.

56. *Id.* (citing 7 Witkin, Summary of Cal. Law (9th ed. 1988)).

57. *Id.* at 476. "It is well settled in this state and elsewhere, that when a statute prescribes the particular method in which a public officer, acting under a special authority, shall perform his duties, the mode is the measure of power." *Id.* (quoting *Cowell v. Martin*, 43 Cal. 605, 613-14 (1872)).

58. *Id.*

59. *Id.* (citing *S. Pac. Transp.*, 556 P.2d 289).

60. *Lockyer*, 95 P.3d at 476.

61. *Id.* at 477. Justice Mosk stated that "it is incongruous for the will of the people of the state, reflected by their elected legislators, to be thwarted by a governmental body which exists only to implement that will." *Id.* (quoting *S. Pac. Transp.*, 556 P.2d at 293).

62. *Id.* at 478.

had been granted to the Public Utilities Commission, none of these powers included the right to declare a statute unconstitutional.⁶³

Based on these two seemingly conflicting views, the court in this case concluded that administrative agencies that have been granted judicial or quasi-judicial power by the California constitution have the authority to review the constitutionality of statutes; however, those agencies that have not been granted this authority cannot make such determinations.⁶⁴ Given this historical background, Justice George maintained that, even prior to the existence article III, section 3.5, the law had established that a local official had no power to declare a statute unconstitutional if his or her duties were purely ministerial.⁶⁵

With the adoption of article III, section 3.5, the holding in *Southern Pacific* was overruled, and Justice Mosk's argument that an administrative agency had no power to withhold its enforcement of a statute on the basis of unconstitutionality unless an appellate court had made such a decision, was validated.⁶⁶

While Justice George emphasized that the general rule was that public officials were to comply with statutes, regardless of whether or not they believed them to be constitutional, he noted that there existed an exception to this rule in situations where "a public official's refusal to apply the statute would provide the most practical or reasonable means of enabling the question of the statute's constitutionality to be brought before a court."⁶⁷ While the Justice acknowledged that this might be a viable option in some scenarios, he insisted that this case was not one of these situations, given that there already existed a viable means of ensuring judicial review of the constitutionality of the marriage statutes.⁶⁸ He declared that if the local officials believed that the marriage statutes were unconstitutional, they could have denied a same-sex couple's

63. *Id.*

64. *Id.* at 480.

65. *Id.* The court noted as well that it was unaware of any California case that indicated that a public official was granted judicial or quasi-judicial authority by the California Constitution. *Id.*

66. *Lockyer*. 95 P.3d at 481.

67. *Id.* at 484 (citing Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 994-96 (1994)).

68. *Id.* at 485.

application for marriage and suggested that the couple challenge the decision in court.⁶⁹ This procedure had been used in California to challenge the state's antimiscegenation statute, as well as in other states to challenge opposite-sex marriage statutes.⁷⁰ Given that an option existed that did not require local officials to disregard a state statute, the court concluded that the above exception to the general rule did not apply in this case.⁷¹

The court also acknowledged, and later rejected, an additional exception to the general rule in which "it would be absurd or unreasonable to require a public official to comply with a statute that any reasonable official would conclude is unconstitutional."⁷² Citing the various decisions and opinions that have arisen from out-of-state cases concerning the constitutionality of opposite-sex marriage statutes, the court concluded that this case did not constitute a situation where no reasonable official would believe the California marriage statute was enforceable.⁷³ Thus, the court concluded that "the city officials had no authority to refuse to perform their ministerial duty in conformity with the current California marriage statutes on the basis of their view that the statutory limitation of marriage to a couple comprised of a man and a woman is unconstitutional."⁷⁴

Justice George further rationalized the court's conclusion by

69. *Id.*

70. *Id.* (citing *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999)).

71. *Id.*

72. *Lockyer*, 95 P.3d at 488.

73. *Id.* at 488-89.

74. *Id.* at 490. As support for its conclusion, the court cited *State v. Heard*, an out-of-state case that held:

Executive officers of the State government have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the Constitution. Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as constitutional and legal, until their unconstitutionality or illegality has been judicially established, for, in all well regulated government, obedience to its laws by executive officers is absolutely essential, and of paramount importance.

Id. at 490 (quoting *State v. Heard*, 18 So. 746, 749-52 (La. 1895)).

citing the practical consequences of the city's argument.⁷⁵ He posited that most executive officials lack the necessary legal training to make viable constitutional determinations.⁷⁶ Furthermore, he maintained that a local official has no authority to submit others to his personal views by refusing to implement his ministerial duties.⁷⁷ Even if the official did have such authority, the individuals affected by his actions would be denied procedural safeguards, including an opportunity to be heard.⁷⁸ Justice George also emphasized that, were each official in the state authorized to determine whether or not to carry out a ministerial duty, there would be no uniformity as to enforcement of state statutes, which would cause confusion among the public.⁷⁹ This confusion would continue because, according to the city's proposed rule, a court could not order compliance with a statute until it had ruled on the constitutionality of that statute.⁸⁰

The court next addressed the city's argument that the federal supremacy clause granted a local official authority to refuse to enforce a state statute.⁸¹ The city cited *Ex Parte Young* and *LSO, Ltd. v. Stroh* as the basis for its position.⁸² The court distinguished these cases from the present set of facts on the ground that these cases stood for the proposition that an official acting in compliance with a statute is not precluded from injunction or monetary judgment if a court later determines the statute to be unconstitutional.⁸³ Justice George in fact determined that the Supreme Court had contradicted

75. *Id.*

76. *Lockyer*, 95 P.3d at 490.

77. *Id.*

78. *Id.* at 491.

79. *Id.* Justice George commented:

If each official were empowered to decide whether or not to carry out each ministerial act based upon the official's own personal judgment of the constitutionality of an underlying statute, the enforcement of statutes would become haphazard, leading to confusion and chaos and thwarting the uniform statewide treatment that state statutes generally are intended to provide.

Id.

80. *Id.* at 492.

81. *Id.*

82. *Id.* (citing *Ex Parte Young*, 209 U.S. 123 (1908); *LSO, Ltd. v. Stroh*, 205 F.3d 1146 (9th Cir. 2000)).

83. *Id.*

the city's contention in its declaration that the "proper role of federal executive officials with regard to constitutional determinations is instructive."⁸⁴ In *Smith v. Indiana*, the Supreme Court stated that "there are many authorities to the effect that a ministerial officer, charged by law with the duty of enforcing a certain statute, cannot refuse to perform his plain duty thereunder upon the ground that in his opinion it is repugnant to the Constitution."⁸⁵ Thus, the court concluded that its holding did not conflict with any federal requirement.⁸⁶

Lastly, the court addressed the scope of relief that was to be ordered.⁸⁷ The court determined that it was appropriate to order the officials not only to comply with the statutes in the future but also to correct their past actions by notifying all of the affected individuals of the invalidity of their marriages.⁸⁸ Thus, all same-sex marriages authorized by the city officials were to be considered "void and of no legal effect from their inception."⁸⁹ The court noted that, because the validity of same-sex marriage was a question of law, individuals who were not formal parties to this case were in no different a position than if this question had been presented in a case involving another same-sex couple.⁹⁰ The justice maintained that all interested parties had had notice and opportunity to be heard.⁹¹ Though the city urged the court to postpone its ruling until the validity of same-sex marriages had been determined, Justice George rejected this request on the ground that it would be imprudent to keep these marriages "in

84. *Id.* at 492-93.

85. *Id.* at 493. (quoting *Smith v. Indiana*, 191 U.S. 138, 148 (1903) (emphasis added). The Supreme Court held that the power of a local official to question the constitutionality of a statute is a state question rather than a federal question, which, the justice contended, refuted the city's argument that an executive officer could refuse to comply with a statute whenever he believed it violated the federal Constitution. *Id.* at 493-94.

86. *Id.* at 494.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 495.

91. *Id.* The court stated that, while interested individuals may not have had the opportunity to intervene in the present proceeding, its orders denying intervention were without prejudice as to amicus curiae participation. *Id.*

limbo” until such a determination was made.⁹² Thus, the court instructed the county clerk and county recorder to take the following corrective actions:

(1) identify all same-sex couples to whom the officials issued marriage licenses, solemnized marriage ceremonies, or registered marriage certificates, (2) notify these couples that this court has determined that same-sex marriages that have been performed in California are void from their inception and a legal nullity, and that these officials have been directed to correct their records to reflect the invalidity of these marriage licenses and marriages, (3) provide these couples an opportunity to demonstrate that their marriages are not same-sex marriages and thus that the official records of their marriage licenses and marriages should not be revised, (4) offer to refund, upon request, all marriage-related fees paid by or on behalf of same-sex couples, and (5) make appropriate corrections to all relevant records.⁹³

The court concluded with its holding that “an executive official who is charged with the ministerial duty of enforcing a statute generally has an obligation to execute that duty in the absence of a judicial determination that the statute is unconstitutional, regardless of the official’s personal view of the constitutionality of the statute.”⁹⁴

1. Justice Moreno’s Concurrence

Justice Moreno authored a concurring opinion.⁹⁵ He noted that, while the majority opinion primarily discussed the limitations on local executive officials in disobeying statutes that have not yet been judicially determined to be unconstitutional, what had not been

92. *Id.*

93. *Id.* at 495-96.

94. *Id.*

95. *Id.* at 499 (Moreno, J., concurring). Justice Moreno was joined in his concurrence by Justices Baxter, Chin, and Brown.

addressed was what courts should do when faced with local executive disobedience.⁹⁶ Though courts in many cases invariably decide the constitutional question underlying a local official's refusal to obey a particular statute, the court in this case refused to determine the constitutional validity of Family Code Section 300.⁹⁷ Rather, the majority held that a writ of mandate against the local officials was appropriate because they had exceeded their ministerial duties.⁹⁸ Justice Moreno agreed with the majority that, under these circumstances, the issuance of a writ of mandate prior to the adjudication of the underlying constitutional question was appropriate, however, he acknowledged that the court had discretion to refrain from issuing the writ until the issue of constitutionality had been determined.⁹⁹ Thus, the justice's separate opinion was designed to address how courts should exercise their discretion when faced with a similar case.¹⁰⁰

Justice Moreno first observed that most California courts, when faced with a local official who refuses to observe a particular statute, have determined the constitutional issue before deciding whether a writ of mandate should be issued.¹⁰¹ This is based on the fact that local officials will sometimes preliminarily determine that a statute is

96. *Id.*

97. *Id.* at 500.

98. *Id.* Justice Moreno outlined the requirements for obtaining a writ of mandate as: "(1) [a] clear, present and usually ministerial duty on the part of the respondent . . . ; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty" *Id.* (quoting Santa Clara County Counsel Attys. Assn. v. Woodside, 7 Cal. 4th 525, 539-40 (1994)). The Justice also noted that "the lack of any plain, speedy and adequate remedy in the usual course of law . . ." is also required. *Id.* (quoting Flora Crane Serv., Inc. v. Ross, 61 Cal. 2d 199, 203 (1964)).

99. *Id.* Justice Moreno stated: "when a court is asked to grant a writ of mandate to enforce a statute over which hangs a substantial cloud of unconstitutionality, the above-stated principles dictate that a court at least has the discretion to refuse to issue the writ until the underlying constitutional question has been decided." *Id.*

100. *Id.*

101. *Id.* (citing County of Riverside v. Superior Court, 30 Cal. 4th 278 (2003); Star-Kist Foods, Inc. v. County of Los Angeles, 42 Cal. 3d 1 (1986); Zee Toys, Inc. v. County of Los Angeles, 85 Cal. App. 3d, 763 (1978); Paso Robles Hosp. Dist. v. Negley, 29 Cal. 2d 203 (1946); Denman v. Broderick, 111 Cal. 96 (1896); City of Oakland v. Digre, 205 Cal. App. 3d 99 (1988); Bayside Timber Co. v. Bd. of Supervisors, 20 Cal. App. 3d 1 (1971)).

unconstitutional so as to bring the constitutional challenge to the courts.¹⁰² This practice is known as the exercise of an “executive function.”¹⁰³

The justice concluded that there are at least three situations in which a local official’s refusal to comply with a statute would be reasonable; and therefore, courts asked to grant a writ of mandate should first resolve the underlying constitutional issue.¹⁰⁴ The first of these situations involves cases where the statute in question violates a “clearly established . . . constitutional right.”¹⁰⁵ In this scenario, the refusal to comply with an unconstitutional statute would not violate the separation of powers because “refusing to enforce clearly unconstitutional statutes saves the resources of both the executive and the judiciary.”¹⁰⁶ The second situation of reasonable executive disobedience that Justice Moreno addressed would be situations in which there is a substantial question as to the statute’s constitutionality, and the statute is related to the locality’s self-governance.¹⁰⁷ In this scenario, the local official is directly affected by the statute in question and therefore has standing to challenge it.¹⁰⁸ The third situation is one in which there is a question as to the statute’s constitutionality, and irreparable harm may result to individuals whom the local executive has some obligation to protect.¹⁰⁹ In this scenario, while a court would have the discretion to

102. *Id.* at 501.

103. *Id.* Justice Moreno emphasized that the exercise of executive function is not to upset the separation of powers but rather it is to “raise constitutional issues for the courts to ultimately decide.” *Id.*

104. *Id.*

105. *Id.* An example of such a situation would be when a local official decides not to spend resources to adhere to an obviously unconstitutional statute. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* Justice Moreno gave several examples of this second category of executive disobedience, such as officials challenging statutes to determine the validity of a bond, an exemption to a local tax that violates the commerce clause, the payment of a government salary for employment that was unconstitutionally created, or a statute that affects city or county employee compensation. *Id.* In these cases, the local officials’ refusal to comply with the statutes in question merely preserves the status quo, which has a very minimal effect on the judiciary’s authority. *Id.*

109. *Id.* at 501-02. Examples of individuals whom the local executive has an obligation to protect are: residents of the city, employees, patients in a public

issue the writ without first deciding the underlying constitutional issue, enforcing a potentially unconstitutional statute could “work irreparable harm, [and] would not ‘promot[e] the ends of justice.’”¹¹⁰

Justice Moreno argued that this case did not fall into any of the above three categories.¹¹¹ First, it was not clear whether Family Code section 300 was unconstitutional.¹¹² Second, the statute in question did not interfere with the city’s self-governance because the local officials in this case had a ministerial duty to adhere to the state marriage law.¹¹³ Lastly, this case did not fit into the third category because the only harm caused by the enforcement of the statute was the delay in homosexual couples being married while the constitutional issue was being determined.¹¹⁴ Consequently, the justice concluded that “the city advances no plausible reason why it had to disobey the statute in question” and agreed with the majority that a writ of mandate should be issued against the local officials.¹¹⁵

hospital, students of a public school, and patrons of a public library. *Id.* at 1124.

110. *Id.* at 502 (quoting *McDaniel v. City of San Francisco*, 259 Cal. App. 2d 356, 360-61 (1968)).

111. *Id.*

112. *Id.* Justice Moreno argued that the constitutionality of Family Code section 300 had not been established by the language of the constitutional provisions or state or federal precedent. *Id.*

113. Justice Moreno maintained that, unlike the examples cited above where the constitutionality of a statute is likely to go unchallenged unless the official challenges it, Family Code section 300 affects the rights of individuals, and therefore, those affected individuals are in the best position to challenge the statute. *Id.*

114. *Id.* The justice stated that this delay was likely to result regardless of whether or not the writ of mandate was granted because the statute prohibited local officials from granting marriage licenses to same-sex couples. *Id.* These officials did have the authority to issue licenses of “indeterminate legal status,” thus “[t]he exercise of the court’s mandate power to preclude local officials from continuing this course of action, and voiding the licenses already issued, brings no irreparable harm to the individuals who have received or might receive such licenses.” *Id.*

115. *Id.* Justice Moreno conceded that it might have been appropriate to delay the issuance of a writ until the constitutional question had been determined if the mayor had issued a single “test case” homosexual marriage license. *Id.* However, because the local executive issued over 4,000 marriage licenses, Justice Moreno concluded that “the city went well beyond making a preliminary determination of the statute’s unconstitutionality or performing an act that would bring the constitutional issue to the courts.” *Id.* By issuing so many marriage licenses, the local officials not only acted against their ministerial duties, but they violated the doctrine of separation of powers by deciding the constitutionality of

C. Concurring and Dissenting Opinions

1. Justice Kennard's Opinion

Justice Kennard concurred with the majority opinion insofar as the court concluded that the local officials exceeded their authority by issuing same-sex marriage licenses.¹¹⁶ However, she did not agree that the 4,000 marriages that had been performed under these licenses should be declared void.¹¹⁷ She argued instead that a determination on these licenses should not be made until the constitutional question had been resolved.¹¹⁸

Like Justice Moreno, Justice Kennard believed that there are a few situations in which a local official may refuse to enforce a statute based on constitutionality.¹¹⁹ These situations include:

- (1) when the statute's unconstitutionality is obvious beyond dispute in light of unambiguous constitutional language or controlling judicial decisions;
- (2) when refraining from enforcement is necessary to preserve the status quo and to prevent irreparable harm pending judicial determination of a legitimate and substantial constitutional question about the statute's validity;
- (3) when enforcing the statute could put the public official at risk for substantial personal liability; or
- (4) when refraining from enforcement is the only practical means to obtain a judicial determination of the constitutional question.¹²⁰

As to the first scenario, Justice Kennard maintained that California's marriage laws are not clearly unconstitutional.¹²¹ On the

the statute without the authority to do so. *Id.*

116. *Id.* at 503 (Kennard, J., concurring and dissenting).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* Justice Kennard argued that neither the federal nor state Constitution prohibits same-sex marriage or the limiting of marriage to opposite-sex couples. *Id.*

contrary, the justice discussed *Baker v. Nelson*, a United States Supreme Court case holding that a state law restricting marriage to opposite-sex couples was not unconstitutional.¹²² She concluded that:

[b]ecause neither the federal nor the California Constitution contains any provision directly and expressly guaranteeing a right to marry another person of the same sex, and because no court has ever decided that either Constitution confers that right, this is not a situation in which a public official refused to enforce a law that was obviously and indisputably unconstitutional.¹²³

As to the second scenario, Justice Kennard argued that this was not a situation where refraining from enforcing a statute would preserve the status quo in order to prevent irreparable harm.¹²⁴ Rather, the local officials were in fact *altering* the status quo by issuing the marriage licenses against Family Code section 300.¹²⁵ The justice concluded that this issuing of marriage licenses was not a temporary action taken to prevent irreparable harm but rather was intended to be a “permanent change in traditional marriage eligibility requirements, based on [the officials’] own views about

122. *Id.* (citing *Baker v. Nelson*, 409 U.S. 810 (1972)). In this case, the Minnesota Supreme Court held that a state law restricting marriage to opposite-sex couples was not unconstitutional. *Id.* at 503 (citing *Baker v. Nelson*, 291 Minn. 310 (1971)). The court then dismissed the appeal ““for want of substantial federal question.”” *Lockyer*, 95 P.3d at 504 (citing *Baker*, 409 U.S. at 810). Justice Kennard argued that a dismissal on the grounds of lack of a federal question reaffirmed the lower court’s decision and prevented “lower courts and public officials from coming to the conclusion that a state law barring marriage between persons of the same sex violates the equal protection or due process guarantees of the United States Constitution.” *Id.* at 504. Thus, the justice maintained that until the Supreme Court rules otherwise, *Baker* is controlling as to the question of whether a state may define marriage as between a man and a woman. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 504-05. Justice Kennard cited Family Code section 300 and Family Code section 308.5 as support for the notion that California’s status quo had been opposite-sex marriage. *Id.* at 505. She also noted that California courts have only recognized opposite-sex marriages. *Id.* (citing *Mott v. Mott*, 82 Cal. 413 (1890)).

constitutional questions.”¹²⁶ These actions, the justice argued, were beyond the city officials’ authority.¹²⁷

As to the third scenario, Justice Kennard believed that “[t]his was not a situation in which public officials had reason to fear they might be held personally liable in damages for enforcing a constitutionally invalid state law.”¹²⁸ The justice noted that a public official may not be held personally liable in a civil rights action for enforcing a state law that is later deemed to be unconstitutional “unless the ‘contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.’”¹²⁹ Consequently, because the Supreme Court in *Baker* held that a state law prohibiting same-sex marriage is not unconstitutional, Justice Kennard argued that no reasonable public official would conclude that refraining from issuing marriage licenses to homosexual couples would be unconstitutional.¹³⁰ Therefore, no personal liability could be imposed on the local officials who upheld the California statute.¹³¹ Justice Kennard also maintained that there was no basis for the local officials to fear personal liability for not issuing same-sex marriage licenses.¹³²

Finally, as to the fourth scenario, Justice Kennard held that the mayor’s refusal to enforce the statute in question was not the only way to obtain a judicial determination as to the underlying question of constitutionality.¹³³ Citing the cases that were used to challenge California’s prohibition against interracial marriage in the 1940s, the justice maintained that the prohibition against same-sex marriage

126. *Id.* at 505.

127. *Id.*

128. *Id.*

129. *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

130. *Id.* at 505.

131. *Id.*

132. *Id.* Justice Kennard cited Government Code section 820.6, which “provides immunity for public employees acting in good faith, without malice, under a statute that proves to be unconstitutional.” *Id.* Consequently, because same-sex marriage has never been granted in California, the state courts have never suggested that statutes that prohibit same-sex marriage are unconstitutional, and the California constitution does not grant an express right to same sex marriage, Justice Kennard maintained that Government Code section 820.6 would provide immunity to any official for enforcing the opposite-sex marriage statute. *Id.* at 505-06.

133. *Id.* at 506.

could be challenged by a lawsuit brought by a homosexual couple who had been denied a marriage license.¹³⁴

Justice Kennard concluded her discussion of the general rule prohibiting executive non-enforcement based on constitutional grounds by noting the confusion and lack of conformity that would result if all of the local officials in California's fifty-eight counties could independently decide which rules would and would not be enforced based on their reading of the Constitution.¹³⁵ She stated that:

To ensure uniformity and consistency in the statewide application and enforcement of duly enacted and presumptively valid statutes, the authority of public officials to decline enforcement of state laws, in the absence of a judicial determination of invalidity, based on the officials' own constitutional determinations, is and must be carefully and narrowly limited.¹³⁶

Thus, Justice Kennard agreed with the majority that the San Francisco officials exceeded their authority by issuing marriage licenses to homosexual couples.¹³⁷

Because the justice agreed that the local officials had exceeded their authority, she concurred with the majority that the proper judgment would be to require the officials to comply with the marriage statutes, to notify the couples who had received the licenses that they were invalid, to offer refunds for the license fees that were collected, and to make corrections to the records.¹³⁸ Nonetheless, she did not agree that the marriages should be declared as void and a legal nullity.¹³⁹ Justice Kennard advocated that until the

134. *Id.* (citing *Perez*, 32 Cal. 2d at 711).

135. *Lockyer*, P.3d at 506.

136. *Id.*

137. *Id.*

138. *Id.* at 507.

139. *Id.* Justice Kennard argued that the determination of whether these 4,000 marriages were void should be detained until the constitutionality of the statute is resolved. *Id.* She maintained that:

[i]f the restriction is constitutional, then a marriage between persons of the same sex would be a legal impossibility, and no marriage would ever have existed. But if the restriction violates

constitutional issue of the marriage statutes has been resolved, it is premature to declare these marriages invalid.¹⁴⁰

2. Justice Werdegar's Opinion

Like Justice Kennard, Justice Werdegar agreed with the majority that the San Francisco officials violated the California marriage statutes by issuing marriage licenses to homosexual couples.¹⁴¹ The justice also agreed that the officials should be ordered to comply with the statutes until and unless they are determined to be unconstitutional.¹⁴² However, this was as far as the justice's opinion concurred with the majority.

Justice Werdegar argued that the majority was incorrect in declaring the 4,000 marriages performed as void.¹⁴³ Just as Justice Kennard had argued, Justice Werdegar maintained that if the California statutes were later determined to be unconstitutional, the couples who had already received their marriage licenses would be entitled to recognition of their marriage.¹⁴⁴ The justice also felt that declaring these marriages void was unfair to the affected couples who had not been joined as parties in the litigation or been given notice or

a fundamental constitutional right, the situation could be quite different. A court might then be required to determine the validity of same-sex marriages that had been performed *before* the laws prohibiting those marriages had been invalidated on constitutional grounds.

Id.

Thus, if the California marriage statute were later judicially determined to be unconstitutional, the marriages that were issued unlawfully by the city officials could be recognized retroactively as valid. *Id.*

140. *Id.* at 507-08. Justice Kennard maintained that “[s]hould the pending lawsuits ultimately be resolved by a determination that the opposite-sex marriage restriction is constitutionally invalid . . . it would then be the appropriate time to address the validity of previously solemnized same-sex marriages.” *Id.* at 508.

141. *Id.* (Werdegar, J., concurring and dissenting).

142. *Id.*

143. *Id.*

144. *Id.* The justice noted that interracial marriages that had previously been void under anti-miscegeny statutes were later validated after the Supreme Court declared those statutes to be unconstitutional. *Id.* (citing *Dick v. Reaves*, 434 P.2d 295, 298 (Okla. 1967)). Justice Werdegar advocated that the majority's declaration of the marriages as void was a premature decision that did not represent a fair judicial process. *Lockyer*, 95 P.3d at 508.

opportunity to appear.¹⁴⁵

The justice further disagreed with the majority as to its comments on the separation of powers and the relationship between the judicial and executive branches.¹⁴⁶ Justice Werdegar stated that the majority's characterization of the city officials' actions as "a threat to the rule of law" was an exaggeration of the events that took place in this case.¹⁴⁷ Additionally, the justice maintained that the majority's declaration of power over the executive branch was not justified.¹⁴⁸ She argued that a rule requiring a local executive official to seek the court's permission before refraining from compliance with an unconstitutional statute, defied the separation of powers doctrine.¹⁴⁹

145. *Id.* at 509. On March 12, 2004, the California Supreme Court denied all petitions to intervene. *Id.* Thus, Justice Werdegar argued that "[t]o declare marriages void after denying requests by the purported spouses to appear in court as parties and be heard on the matter is hard to justify, to say the least." *Id.* The justice further noted that none of the affected couples had been given notice, which due process requires, and eleven homosexual couples who affirmatively sought to intervene, were denied the opportunity to appear. *Id.* As the justice advocated, all members of a class action have the right to notice and the opportunity to appear, and therefore, the affected couples in this case should not have been denied this same right. *Id.* Justice Werdegar stated:

[w]hat the majority has done, in effect, is to give petitioners the benefit of an action against a defendant class of same-sex couples free of the burden of procedural due process. If the majority truly desired to hear the views of the same-sex couples whose rights it is adjudicating, it would not proceed in absentia.

Id.

146. *Id.* at 510.

147. *Id.* Justice Werdegar noted that when the California Supreme Court issued an interim order on March 11, 2004 for the officials to stop issuing the same-sex marriage licenses, they fully complied. *Id.* After this order was issued, no other California county or municipality granted a same-sex marriage license. *Id.*

148. *Id.* Justice Werdegar claimed that it was misguided of the majority to assert that the executive must follow statutory laws unless and until the court tells it otherwise. *Id.* The justice argued that "[t]o recognize that an executive officer has the practical freedom to act based on an interpretation of the Constitution that may ultimately prove to be wrong does not mean the rule of law has collapsed." *Id.* at 511. The justice maintained that as long as the judicial branch can hear legal challenges to executive actions, enjoin such actions if deemed necessary, and remain the final word in constitutional interpretation, there is no threat to the rule of law. *Id.*

149. *Id.* The justice asserted that the executive branch is "active," while the judicial branch is "reactive." *Id.* Thus, the executive branch, according to Justice

Moreover, the justice disagreed with the majority's characterization of "executive officers exercising 'ministerial' functions as statutory automatons" who have no discretion in questioning the constitutionality of a particular statute.¹⁵⁰ Justice Werdegar concluded her opinion by asserting that, given the San Francisco officials' compliance with the court's interim order in ceasing to issue same-sex marriage licenses, the majority's speculation as to the limits of the executive branch's authority was "unnecessary and regrettable."¹⁵¹ She stated:

[w]e, as a court, should not claim more power than we need to do our job effectively. In particular, strong claims of judicial power over the executive branch are best left unmade and, if they must be made, are best reserved for cases presenting a real threat to the separation of powers – a threat that provides manifest necessity for the claim, a genuine test of the claim's validity, and a suitable incentive for caution in its articulation. None of these conditions, all of which are necessary to ensure sound decisions in hard cases, is present here.¹⁵²

IV. IMPACT

The ramifications of the California Supreme Court's decision in *Lockyer v. City and County of San Francisco* have played a major role in many of America's most recent political and social

Werdegar, should not have to "await the courts' pleasure." *Id.*

150. *Id.* Justice Werdegar pointed out that local officials were merely performing their ministerial functions when they enforced state segregation laws after *Brown v. Board of Education* had been passed. *Id.* (citing *Brown v. Board of Education*, 347 U.S. 483 (1954)). The justice argued that the courts once believed that executive officials' oaths to obey the Constitution "had sufficient gravity in such cases to permit them to obey the higher law, even *before* the courts had spoken state by state." *Lockyer*, 95 P.3d at 511. Justice Werdegar maintained that the majority in this case had rejected this understanding of the executive branch and instead had claimed that executive officials are to obey the mandates passed by the legislature until the courts make a decision as to their constitutionality. *Id.*

151. *Id.* at 512.

152. *Id.*

controversies.¹⁵³ While the court in *Lockyer* strongly emphasized that its decision was not to be a ruling on the substantive issue of same-sex marriage,¹⁵⁴ what erupted from this case, and the events leading up to this litigation, was nothing short of a social magnification of homosexual rights in America.¹⁵⁵ At the time the court's decision was released, the justices were well aware that the constitutional issue of California's marriage statutes was making its way up the judicial ladder.¹⁵⁶ It would not be much longer until the judicial branch would be faced with the question that this court had so adamantly declared was meant for its evaluation, not that of the executive officials who had made their own constitutional rulings.¹⁵⁷ The only question left after this case is what role, if any, the executive branch plays in constitutional decision-making.

A. Administrative Impact

The most definitive administrative impact of *Lockyer v. City and County of San Francisco* is the power it has provided to the judiciary. The final conclusion in this case is that the ultimate determination of constitutionality is made by the courts.¹⁵⁸ While this holding may

153. See Tom Musbach, *Bush Backs FMA, Outrages Gay Citizens* (Jan. 6, 2005), at <http://www.gay.com/news/article.html?2004/02/24/5> (describing how San Francisco's gay weddings prompted President Bush to support the Federal Marriage Act, an act that defines marriage as a union between a man and a woman).

154. *Lockyer*, 95 P.3d at 463. Justice George stated that:

although the present proceeding may be viewed by some as presenting primarily a question of the substantive legal rights of same-sex couples, in actuality the legal issue before us implicates the interest of all individuals in ensuring that public officials execute their official duties in a manner that respects the limits of the authority granted to them as officeholders.

Id.

155. Peele, *supra* note 1, at A25 (detailing how many advocates for same-sex marriage have compared this movement to the civil rights movement of the 1960s).

156. *Lockyer*, 95 P.3d at 507. Justice Kennard stated: "Recognizing the difficulty and seriousness of the constitutional question, which is now presented in pending superior court actions, this court has declined to address it in this case."

Id.

157. See Peele, *supra* note 1, at A1.

158. *Lockyer*, 95 P.3d at 485. Justice George quoted Justice Mosk as stating that a local executive official "'faithfully upholds the Constitution by complying

seem to some as merely a reaffirmation of the separation of powers doctrine, others might consider it to be a stripping of the executive branch of any kind of constitutional authority it may have once had.¹⁵⁹ As Justice Werdegar argued in her concurring and dissenting opinion:

[I] see no justification for asserting a broad claim of power over the executive branch. Make no mistake, the majority does assert such a claim by holding that executive officers must follow statutory rather than constitutional law until a court gives them permission in advance to do otherwise. For the judiciary to assert such power over the executive branch is fundamentally misguided.¹⁶⁰

The holding in this case causes one to question whether the executive branch is left with any kind of constitutional discretion. While Justices Moreno and Kennard enumerated a few specific situations in which public officials would be permitted to disobey a statute based on constitutional grounds,¹⁶¹ these scenarios involve fact patterns in which constitutionality is hardly even an issue or the concerns of constitutionality are superseded by a greater concern.¹⁶²

with the mandates of the Legislature, leaving to courts the decision whether those mandates are invalid.” *Id.* (quoting *S. Pac. Transp.*, 18 Cal. 3d at 319).

159. *See Lockyer*, 95 P.3d at 510-13.

160. *Id.* at 510.

161. *See id.* at 501-03 (stating that executive disobedience of a statute would be permissible in cases in which the statute violates a clearly established constitutional right; cases in which there is a substantial question as to the statute’s constitutionality and the statute governs matters integral to a locality’s limited power of self-governance; and cases in which the question of a statute’s constitutionality is substantial and irreparable harm may result to individuals to which the local government has some protective obligation). *See also id.* at 503 (stating that executive disobedience of a statute would be permissible when the statute’s unconstitutionality is obvious in light of unambiguous constitutional language or controlling judicial decisions; when refraining from enforcement is necessary to preserve status quo and to prevent irreparable harm; when enforcing the statute could put the public official at risk for substantial personal liability; and when refraining from enforcement is the only practical means to obtain a judicial determination of the constitutional question).

162. *See id.* at 501-03.

Thus, the only authority the executive seems to retain in regard to constitutionality is essentially superficial and somewhat skewed. It is interesting to consider whether this case would have been so one-sided if the San Francisco officials' duties were not ministerial and the executive were allowed a certain amount of discretion in its decision-making.

While all of the justices agreed in this case that the San Francisco officials had overstepped their bounds, the question still remains as to how much leeway a local executive official retains after the holding in this case. How can a mayor or governor carry out his or her duties to uphold the Constitution if they must first seek the judiciary's permission to act? Though the *Lockyer* court drew a line in the sand as to where the executive branch's power stops, it failed to elaborate as to the boundaries within which the executive branch has free reign to make its decisions. Consequently, the question of constitutionality remains, and the separation of powers remains in flux.

B. Social Impact

The social impact of *Lockyer*, and the events leading up to litigation, is pervasive and far-reaching. Though the case did not address the substantive issue of same-sex marriage, many outside the courtroom felt that this holding would play a substantial role in the future of homosexual political issues. One of those individuals concerned with the outcome of the case was President George W. Bush, who used a radio address in July 2003 to urge support for the proposed Federal Marriage Amendment, an amendment that would define marriage as a union between a man and a woman.¹⁶³ The

163. Kathy Kiely, *Gay Issues on Ballot Add Twist to Election*, USA Today, Jul. 11, 2004, available at http://www.usatoday.com/news/politicselections/nation/president/2004-07-11-cover-gay-marriage-election_x.htm. The proposed amendment, which was introduced in the U.S. House of Representatives on May 21, 2003, stated:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

Federal Marriage Amendment, H.R.J. Res. 56, 108th Cong. (1st Sess. 2003).

President, concerned with the same-sex weddings that had been performed in San Francisco, felt that the only way to protect the institution of marriage from “activist judges” would be to enshrine it in “the only law a court cannot overturn.”¹⁶⁴ It seems almost ironic that the executive branch, which was essentially stripped of most of its constitutional authority in *Lockyer*, would set out to assure that the judiciary could not overrule its actions in this context – even if those actions were to prevent the issuance of same-sex marriage licenses.

Another ramification of this case was revealed in the 2004 election, where bans on homosexual marriage passed in all of the eleven states that had placed the measure on their ballots.¹⁶⁵ And while many argue that these initiatives did not necessarily launch President Bush to a victory,¹⁶⁶ others felt that the notoriety of Mayor Gavin Newsom and the same-sex marriage ceremonies, flashed across the nightly news, encouraged conservative voters to rush to the polls.¹⁶⁷ Consequently, even though the California Supreme Court justices emphasized that the *Lockyer* case had nothing to do with the underlying issue of same-sex marriage, the social upheaval

164. *Id.*

165. Charisse Jones, *Issues: 11 States Nix Gay Marriage; Calif. OKs Stem-Cell Work*, USA Today, Nov. 5, 2004, available at <http://www.usatoday.com/news/politicselections/vote2004/initiative.htm>. The eleven states that banned same-sex marriage included the following: Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. *Id.*

166. *Id.* USA Today reported that because 2004 was a particularly contentious election year, “turnout would likely have been high with or without the proposed amendments.” *Id.*

167. Kiely, *supra* note 162. Before the election, USA Today predicted: The conventional wisdom says that making an issue of gay marriage will help President Bush’s re-election. All the ballot initiatives will be up for a vote on the same day as the presidential election . . . Democrats . . . fought to keep the same-sex union question off the Nov. 2 ballot, a sign of their concern about its impact.

Id. See also Lisa Leff, *Split Won’t Likely Tarnish S.F. Mayor’s Image*, SAN RAMON VALLEY TIMES, Jan. 9, 2005, at A36. It was reported that “[a]fter Republicans held onto the White House and gained power in Congress in November, some prominent Democrats blamed the same-sex marriage issue in general and Newsom in particular for giving social conservatives a reason to vote.” *Id.*

that the case created could be felt by many, both in and outside of the courtroom.

At a more local level, the court's decision had a profound effect on the homosexual individuals who had been formerly granted marriage licenses in February.¹⁶⁸ Beyond these particular individuals, many more homosexual Americans felt that the state law and the case holding, placed them in a "separate and inferior legal status."¹⁶⁹ The right to marry seemed to be such a fundamental right that many could not believe that they did not have the opportunity to enjoy it as every other – heterosexual - American. These same-sex couples argued that the legislature had made a conscious decision to discriminate against gay individuals when it passed the state code that defined marriage as between a man and a woman.¹⁷⁰ Thus, though the decision in *Lockyer* was not meant to take a stance on the gay rights issue, many who felt the negative impact by the case perceived the decision as a clear indication of the judiciary's leanings on the question of constitutionality.

C. Judicial Impact

Given that the California Supreme Court chose not to resolve the underlying constitutional question of same-sex marriage in *Lockyer*, this issue finally reached the San Francisco Superior Court on December 22, 2004 – ten months after Mayor Newsom had begun issuing the controversial marriage licenses.¹⁷¹ Judge Richard Kramer began hearing arguments from a group of thirty different lawyers who represented a group of consolidated cases that pitted the city officials and twelve homosexual couples against the state of California and socially conservative groups.¹⁷² While the plaintiffs argued that the current marriage statutes placed homosexual couples in a separate and inferior class, the defendants argued that the purpose of the statute was procreation, and therefore, the statute should remain as written.¹⁷³

168. Peele, *supra* note 1, at A1.

169. *Id.*

170. *Id.* at A25.

171. *Id.* at A1.

172. *Id.*

173. *Id.* Deputy Attorney General Louis Mauro, in defending the current

Judge Kramer concluded that he had three options in this debate – he could find that: (1) the statute is constitutional as it stands, giving a victory to the state and the family campaign; (2) the statute is unconstitutional as it stands, giving a victory to the city and the homosexual couples; or (3) more hearings need to be conducted.¹⁷⁴ Noting that appeals were inevitable after his ruling, Judge Kramer emphasized that he wanted to create a “clean case record for appellate courts” because he realized that he was “only the first stop.”¹⁷⁵

Finally, on March 14, 2005, Judge Kramer ruled that the same-sex marriage ban violated equal protection guaranteed by the state constitution.¹⁷⁶ Judge Kramer found unconvincing the argument made by same-sex marriage opponents that marriage is meant to further procreation, given that there are many married heterosexual couples that choose not to have children, as well as many children that are born out of wedlock.¹⁷⁷ He also rejected the argument that the state’s domestic partnership law adequately protected the rights of homosexual couples.¹⁷⁸ Judge Kramer stated: “The idea that marriagelike rights without marriage is adequate smacks of a concept long rejected by the courts - separate but equal.”¹⁷⁹ While Mayor Newsom and homosexual partners were elated by the decision, San Francisco executive officials will not likely be able to issue same-sex marriage licenses until all of the court appeals are finalized – a process that could take more than one year to resolve.¹⁸⁰

statute, urged Judge Kramer “to uphold existing law and allow the Legislature, not the judiciary, to make ‘complex social policy.’” *Id.*

174. Thomas Peele, *Same-Sex Marriage Debate Focuses on Children*, SAN RAMON VALLEY TIMES, Dec. 24, 2004, at A4.

175. *Id.* Judge Kramer has until mid-April of 2005 to reach a ruling. *Id.*

176. Matt Krupnick, *Gay Couples Get One Step Nearer Altar*, SAN RAMON VALLEY TIMES, Mar. 15, 2005, at A1. The judge concluded that: “The state’s protracted denial of equal protection cannot be justified simply because such constitutional violation has become traditional. Simply put, same-sex marriage cannot be prohibited solely because California has always done so before.” *Id.*

177. *Id.* at A25.

178. *Id.*

179. *Id.*

180. *Id.* Mayor Newsom stated at a press conference that “[t]his is an important day, but it is far from complete. I look forward to the day when we look back and say ‘Why was this such a big deal?’” *Id.*

The situation that has arisen in these debates is illustrative of the impact that *Lockyer* has had on the judicial arena. As the California Supreme Court had encouraged, homosexual couples, the undeniably affected parties, are taking their cases to the judiciary to have this constitutional issue resolved once and for all. Though the proverbial ball is rolling, it will be quite some time before a final resolution is reached. Until then, San Francisco officials must refrain from issuing any more gender-neutral marriage licenses, and homosexual individuals must hold their breath for a final ruling.

V. CONCLUSION

The California Supreme Court's decision in *Lockyer* came at a time when America was concerned with much more than the separation of powers. While the justices did their best to emphasize that this type of case could appear in any type of situation, not just one surrounding gay marriage, many perceived this decision as a defining moment in the nation's stance on same-sex marriage. Unfortunately, what was missed in all of the media sensationalism and political double-talk, was the fact that this decision affected how local executive officials could conduct their duties.

While the majority and the other concurring and dissenting opinions raised extremely valid issues and arguments for their stances on the separation of powers, ultimately the majority's more structured view of the doctrine prevailed. The court determined that a local official who has been granted merely ministerial duties has neither the authority nor discretion to determine the constitutionality of a statute.¹⁸¹ And while certain exceptions may exist where an official would have the discretion to make particular decisions, given the definition of state marriage statutes, as well as the fact that other options are available to the officials if they perceive the statutes to be unconstitutional, this was not such a situation.¹⁸²

181. *Lockyer*, 95 P.3d at 471. The court held that "a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional." *Id.* at 473.

182. *Id.* at 485. The majority stated that "the city officials had no authority to refuse to perform their ministerial duty in conformity with the current California

Given that the majority refused to address the underlying question of constitutionality involved in this case, however, the parties are once again seeking to gain some answers as to what kind of marriage is legally and constitutionally recognized in the state of California. It would not be surprising to find these justices once again faced with the question that they refrained from answering in its first appearance. The justices' decisions and arguments laid out in *Lockyer* could very well affect how the question addressing the constitutionality of the marriage statutes are handled in future cases.

marriage statutes on the basis of their view that the statutory limitation of marriage to a couple comprised of a man and a woman is unconstitutional." *Id.* at 488.