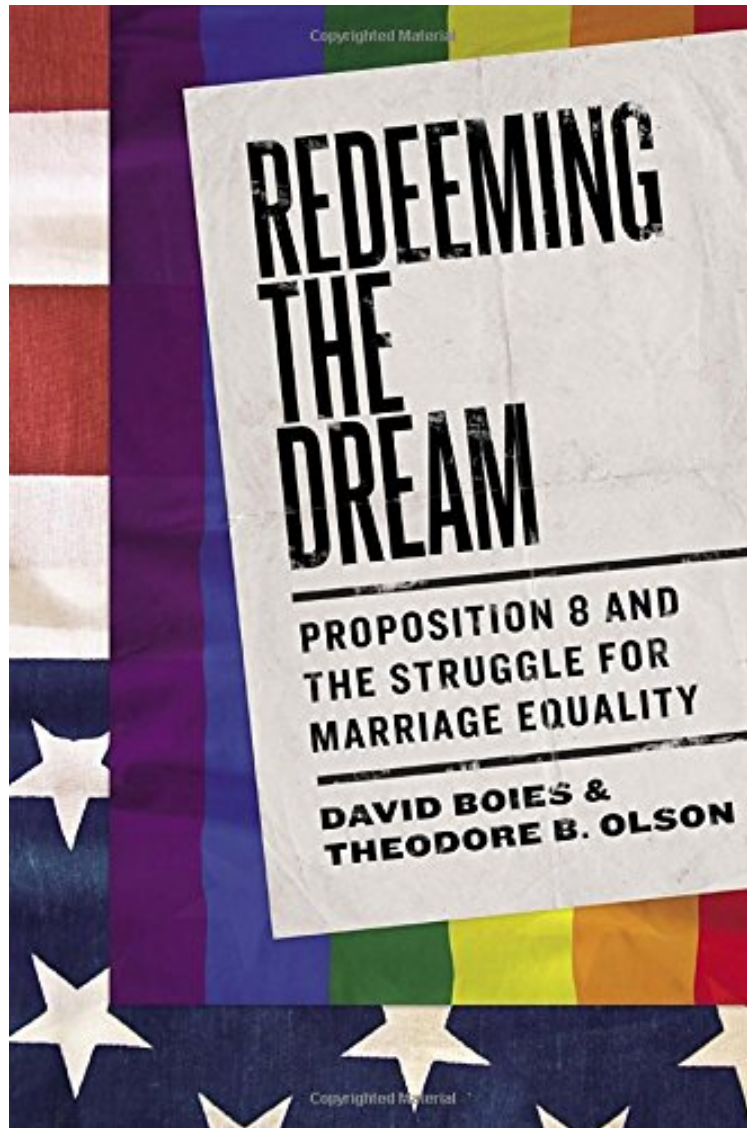


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Redeeming the Dream: Proposition 8 and the Struggle for Marriage Equality

David Boies, Theodore B. Olson

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David Boies, Theodore B. Olson : Redeeming the Dream: Proposition 8 and the Struggle for Marriage Equality before purchasing it in order to gauge whether or not it would be worth my time, and all praised Redeeming the Dream: Proposition 8 and the Struggle for Marriage Equality:

12 of 12 people found the following review helpful. Fantastic book providing behind the scenes details about the fight for marriage equality By Christine Olson David Boise, Ted Olson, the plaintiffs in this case, and all the people who

participated in the years long effort to fight California's Prop 8 should be proud of their hard work and the outstanding result. This book provides so many great insights into how the case came into being, and every step on the journey to the ultimate win...the right for both plaintiff couples to get married, which they were finally able to do in June 2013.0 of 0 people found the following review helpful. Opposites Can AgreeBy Jim FaganOlson and Boies come from opposite ends of the political spectrum as is evidenced by their stands in the Bush Vs. Gore case in the election of 2000. However, they managed to find common ground on the issue of marriage equality. As counsel for the plaintiffs in the case that overturned Proposition 8 in California, they managed to put together logical arguments and articulated them exceedingly well. Olson advances an especially strong conservative case in favor of allowing same sex marriage. With public opinion changing so dramatically on this issue in the last few years, I fully expect to see these two advocating for this cause in the future; perhaps in the Supreme Court again. This book presents a clear picture of what has transpired on the road to marriage equality. I would hope that it can serve as a catalyst for those of differing political perspectives finding common ground in other areas as well. That may be pie in the sky idealism but we can hope.11 of 12 people found the following review helpful. Some day it will seem unbelievable that there was ever any question.By David BlanchardIn mostly layman's terms, Olson and Boies have managed to construct a very readable and moving account of their fight to overturn California's infamous proposition 8. At times as gripping as a Grisham courtroom novel, it is even more moving when considered against the background of the actual people's lives it describes. We owe them a great deal of gratitude for their tireless work in changing the course of history in our time.

NEW YORK TIMES BESTSELLERBreathhtakingly inspiring. Laurence H. Tribe, Professor of Constitutional Law, Harvard Law School When advocates for marriage equality sought to challenge Californias notorious Proposition 8, they were fortunate to have the support of two of the nations preeminent lawyers, David Boies and Theodore B. Olson. Despite the fact that they had argued against one another in the landmark Bush v. Gore case, their commitment to the marriage issue led them to join forces, ultimately defeating the unconstitutional proposition in the Supreme Court after a nearly five-year battle. Redeeming the Dream is the definitive inside account of the key civil rights struggle of our time.

NEW YORK TIMES BESTSELLER"A carefully crafted, high accessibly play-by-play of the complex four-and-a-half year legal battle over the gay and lesbian right to marry. . . . Their clear explanations about the landmark case and the judicial process in general will leave readers well-prepared to follow the subtleties of the discussion as individual states take on the gay marriage issue."Publishers Weekly (Starred)A triumphant look at the journey of the fight for marriage equality in theProposition 8challenge that went to the Supreme Court."Jonathan Cape-Hart, The American Prospect An excellent, timely account of the legal struggles to attain fundamental rights; certain to appeal to readers of Jo Becker'sForcing the Spring: Inside the Fight for Marriage Equalityand Evan Wolfson'sWhy Marriage Matters: America, Equality and Gay People's Right To Marry.Lynne Maxwell, Library Journal sAbout the AuthorDavid Boies is chairman of the law firm Boies, Schiller Flexner. He lives outside New York City.Theodore B. Olson is a partner at Gibson, Dunn Crutcher in Washington, D.C., where he also lives.Excerpt. Reprinted by permission. All rights reserved.Afew words about the origin of our collaboration and why we have written this book.Our joint enterprise to challenge and overturn Californias Proposition 8 had its origins in the most unlikely of contexts. In the fall of 2000, we found ourselves polar opposites in one of the most dramatic, intense, and hard-fought legal and political contests in our nations history as Democrat Al Gore and Republican George W. Bush, candidates for president, battled over who would receive Floridas electoral college votes and election victory. Although a few presidential elections wind up being landslides, most are spirited and close contests and are not decided until election day. In 2000, though, even election day was not the end of the line: Legal battles and political turmoil would unfold for another five weeks before the outcome was finally decided.The electoral college system allows each state to select electors based upon the size of its congressional delegation. And because most states choose electors on a winner-take-all basis, large popular vote margins in heavily populated states can be offset by considerably smaller margins for the opposing candidate in less populated states. Thus a candidate with less than a majority of the popular vote in a presidential election, or even with fewer popular votes than an opponent, can win a presidential election. Prior to 2000, three persons were elected president while losing the popular vote: John Quincy Adams in 1824, Rutherford Hayes in 1876, and Benjamin Harrison in 1888. It happened again in 2000, but the final result that year became known only after a bitter fight for the electoral votes of Florida, which were ultimately awarded to Texas governor George W. Bush over Vice President Al Gore as a result of a decision of the U.S. Supreme Court on December 12.The electoral college system, a peculiarly American invention, has its supporters and detractors. On the one hand, it encourages campaigning in less populous states; on the other, it can lead candidates largely to ignore the voters in populous states like California, Texas, and New York when one or the other of the candidates has a lock on the vote. But because it is engraved in the Constitution, it is not likely to go away anytime soon.While scores, if not hundreds, of lawyers were involved in the legal skirmishes that took place in federal courts and the courts of Florida, the two of us were the principal opposing Supreme Court advocates who squared off against each other at the Courts oral argument on December 11, 2000,

when the matter came to a climax. The controversy stemmed from the razor-thin closeness of the Florida popular vote. The winner would receive Florida's twenty-five electoral college votes and the election. The lead switched back and forth on the night of election day, with Bush seeming to hold a very slight edge as the initial counting was ending. At one point Gore conceded, and then withdrew his concession. Legal battles began even as dawn approached Florida on the following morning. While Bush clung to and fought to preserve his slight lead, controversies arose immediately as officials struggled over how to deal with the now infamous butterfly ballot, as well as veteran and absentee ballots, and the manner in which punch-card ballots were to be tabulated. Recounts were demanded, started, opposed, stopped, started again, and stopped again. The Florida Supreme Court ultimately rendered three decisions on various aspects of the recount process and the deadlines for counting votes, and the U.S. Supreme Court twice heard arguments and rendered opinions overturning the Florida Supreme Court (the first of which was argued for Bush by Ted but argued for Gore not by David but by another member of the Gore legal team). With the numerous rulings by the courts and Florida election officials, new recount totals, and conflicting tabulations, the possible outcome seemed to change daily. The Bush lead kept shrinking with each new count. The world was transfixed by the avalanche of lawsuits and competing explanations and arguments by the campaign spokespersons and their lawyers. David led the Gore legal team and appeared frequently on television, explaining and defending the Gore position. Ted was performing similar duties for Bush, in court and in the public arena. The day-to-day drama of the recount controversy has been depicted in exhaustive detail including in David's own book *Courting Justice* and in the popular HBO television film *Recount* and will undoubtedly be written about again and again. We will, for now, leave that to others. For the two of us, it all came down to our appearance before the Supreme Court of the United States on December 11. With the election of the forty-third president of the United States hanging in the balance, all of us were exhausted and sleep-deprived after five weeks of nonstop work. Had it gone on another day, it is far from clear that any of us would have remained standing. Outside, on that Monday in December, the Supreme Court was surrounded by satellite trucks, cameras, reporters from all over the world, competing protestors with handmade posters and manufactured signs, tourists, and the simply curious. Inside, the courtroom was packed with leaders of the respective campaigns, members of Congress, journalists, dignitaries and celebrities, lucky members of the public who had managed to score a ticket, law clerks, and lawyers, lawyers everywhere. In the moments before a Supreme Court argument, opposing counsel meet with the Supreme Court clerk, mostly to make sure everyone knows the ground rules and to receive last-minute guidance from the clerk concerning any changes in procedure. That meeting typically takes place in the lawyers lounge, adjacent both to the courtroom and to a small office reserved for the solicitor general. On this day the lounge had been reserved as an overflow room where spectators could hear an audio broadcast of the argument, so the meeting took place in the clerks office. The Courts clerk, William K. Suter (who retired in 2013), formerly the acting judge advocate general of the army, is a tall, distinguished man, with the erect bearing that befits a retired army general. Elegantly dressed in the customary morning suit worn by certain Court officials and representatives of the solicitor generals office, he went over the protocol with us, mindful, as everyone was, that this was an historic occasion, like few others in the Courts history. He explained the days procedures and tried to put us at ease with a few light comments about the Court and his office, which was decorated with an autographed photograph of himself and Private First Class Elvis Presley, who had trained with him at Fort Hood in 1958. It was a noble effort, but nothing was going to put either of us at ease with the presidency at stake and the whole world watching. We then entered the courtroom and took our positions on opposite sides of the podium facing the justices, who entered shortly thereafter. The tense but respectful and professional argument ensued. In his oral arguments, David urged the Court to allow the statewide manual recount of votes ordered by the Florida Supreme Court. He argued that state officials should make every effort to decipher individual ballots so they might count every vote. Ted's position was that the Supreme Court should uphold the properly granted certification of a Bush victory by the Florida secretary of state. He argued that the recount ordered by the state court amounted to a major restructuring of the Florida Election Code with evolving standards varying from county to county that would be different throughout sixty-four different counties. Although the suspense seemed to last forever, especially for those of us who had been in the trenches this included all our colleagues and many reporters the conclusion came just thirty-six hours later. At around 10 P.M. on December 12, the clerks office called the competing lawyers and announced the Courts decision, as copies were handed out to exhausted, confused, frazzled, and windblown reporters standing on the courthouse steps, who began to try to explain the decision to their respective broadcast audiences. The recount was stopped, and the election was finally declared over. Bush was the winner. Vice President Gore delivered a gracious but heavy-hearted concession speech the next evening. The nation, and the world, began the process of moving on. It was out of that historic controversy that our friendship developed and ripened. When Ted was nominated by President Bush in February 2001 to be solicitor general, the governments advocate in the Supreme Court, a partisan confirmation battle ensued. Emotions from the close election were still running high, and Democratic senators, still smarting from the Supreme Court decision, were decidedly cool to the idea of putting Ted in the position of the nations top Supreme Court lawyer. David, however, lent Ted his support, including a personal appeal to Senator Edward M. Kennedy, with whom he had a close relationship. When Ted was finally (narrowly) confirmed by the Senate, David and his wife, Mary, attended his swearing-in at the Justice Department. Later that year

David and Mary offered comfort to Ted when his wife, Barbara, was murdered by terrorists on September 11 when the plane she was on, American Airlines Flight 77, was hijacked and flown into the Pentagon. Later that fall, at a formal dinner in Washington attended by two thousand or so Washingtonians, Ted was the presenter when David received an award for his inspirational accomplishments in overcoming a learning disability. A prolonged standing ovation was accorded the two of us an emotional outpouring of appreciation for the fact that two former adversaries could come together with respect and affection for each other in a city emotionally exhausted and wounded by the close election, the 9/11 attacks, and a frightening and deadly anthrax incident soon afterward. As time went by we began to spend more time together socially. While we differed on many political issues, we found we had much in common, including our respect for and dedication to the law, and our love of fine wine. David and Mary were present in Napa Valley in 2006 when Ted married his wife, Lady. The four of us enjoyed bicycling in Italy, France, Croatia, and Ireland together with friends in the succeeding years. We frequently discussed seeking opportunities to work together on a case one day, although we occasionally found ourselves yet again on opposite sides of the courtroom. Ironically, in one case, Ted, the conservative, wound up representing labor the NFL Players Association while David, the liberal, represented management the NFL and team owners. In another we were on opposing sides in a high-stakes battle between owners of Argentinian bonds. It wasn't until 2009 that our chance finally to team up arose in our former home state of California. Proposition 8 was a watershed event of sorts in California and American history. Just about everything major that happens in California, from the Gold Rush, to the Reagan revolution, to the property tax revolt, reverberates nationally. When it isn't mocking or satirizing California, the rest of the country adopts, adapts, mimics, emulates, or envies what happens there. Unfortunately California, a progressive state in many respects, with a frontier and welcoming attitude, also has a regrettable history of inequality and discrimination. This includes the institutionalized mistreatment of Chinese immigrants who helped build the state; the internment of Japanese Americans (albeit directed by the federal government) in camps in California during World War II; racial discrimination against and ghettoization of African Americans, leading to urban riots during the 1960s and 1970s; and a statewide ballot proposition in the mid-1960s to repeal fair housing laws. The last was ultimately overturned by a 54 Supreme Court decision. But California has also become a remarkably diverse society, rich in multiple subcultures from Asia, distinctive Latino populations, blacks, Armenians, and innumerable other nationalities and ethnicities. California's Supreme Court was the nation's first, in 1948, to strike down laws prohibiting interracial marriage, beating the U.S. Supreme Court to that milestone by nineteen years. In 2008 the California Supreme Court was also one of the first to strike down a state law limiting marriage to the union of a man and a woman. Although we were both born in Illinois, within six months of each other, our parents brought us to California at an early age (David to Southern California, Ted to the Bay Area). We grew up in families that taught us to appreciate the differences between individuals in our society and to believe in principles of equality, to respect the views and backgrounds of others, and to be sensitive to the rights of our fellow citizens. We were both educated in California public schools and California colleges, and so the state's racial, ethnic, and cultural melting pot became part of our DNA. Honoring the differences between individuals and understanding their perspectives, as well as a certain libertarianism, were qualities we took almost for granted as Californians. It thus came as a surprise, even a shock, to both of us, as it did to many others who consider themselves Californians, when, six months after the California Supreme Court issued its decision upholding the right of gays and lesbians to marry, California voters took that right away by a popularly enacted amendment to the state's constitution. The incongruity of this measure, Proposition 8, seemed even more pronounced given that the vote that passed it took place the same day that an African American man, the product of an interracial marriage, was elected president of the United States, with the overwhelming support of California voters. What was going on? We both felt deeply that Proposition 8 was wrong and fundamentally at odds with our vision of America, and with our understanding of California and Californians. As we describe in these pages, we vowed to do everything we could to reverse this immensely unfortunate and strikingly un-Californian, and ultimately un-American, decision. Throughout our effort we kept in mind the Reverend Martin Luther King Jr.'s famous Letter from Birmingham City Jail, in which he responded to pastors and others who had urged him to proceed slowly in the pursuit of equal rights because they feared a backlash. He wrote that for years now I have heard the word Wait! It rings in the ear of every Negro with piercing familiarity. This Wait has almost always meant Never. King made a similar point in his famous I Have a Dream speech when he declared, This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism. . . . Now is the time to make justice a reality for all of God's children. We believed that Reverend King's vision for America included equality for all, and that our efforts could help redeem the dream for those whose lives, loves, and aspirations had been diminished and demeaned by Proposition 8. This book will tell the story of how we joined to fight to overturn Proposition 8 in the courts and to do everything in our power to change public attitudes and address fears regarding our gay and lesbian brothers and sisters that had led to this harmful, depressing, and, in our eyes, tragic development. We feel that it is exceedingly important to share why we believe this endeavor was a critical step in the process of changing not only California but, we hope, America and the world. And to invite our fellow citizens to share our experiences in undertaking this challenge. At the end of this segment of our journey though we certainly do not intend that the story finish there we succeeded in overturning Proposition 8. Thousands of gays and lesbians have married and formed

families in California, and attitudes and public opinion have changed dramatically throughout this nation. Numerous states have subsequently enacted laws allowing gays and lesbians to marry, and many courts have acted where legislatures and citizens have not. The country has evolved swiftly and decisively in the direction of marriage equality and against various forms of discrimination on the basis of sexual orientation. Our effort and the efforts of the scores of people who helped and supported us have contributed, we hope, to the beginning of the end of this last major bastion of institutionalized discrimination in America. We wrote this book to explain our process, our thinking, and our education, and, we hope, to persuade more and more Americans to join us in achieving the ultimate goals that brought us together in this case.

David Boies
Theodore B. Olson
New York City and Washington, D.C.,
2014

ONE Although the 2008 presidential election produced an historic victory for his candidate, Barack Obama, Rob Reiner was so depressed in the days afterward that he didn't feel like getting out of bed. He was deeply pained by the fact that at the very moment the country had elected the first African American president, a majority of the voters in his state had enacted Proposition 8, which denied marriage rights to gay men and lesbian women. If Californians couldn't get this right, he thought, who could? After brooding for days, Reiner finally roused himself for lunch with his wife, Michele, at a favorite haunt, the Polo Lounge at the Beverly Hills Hotel. An award-winning actor, director, and producer, Reiner was bound to run into friends who had supported his many political causes and would cheer him up. But to ensure that he would be in sympathetic company, he asked Chad Griffin and Kristina Schake to join them. Partners in a public relations firm, Griffin and Schake had worked hard to defeat Proposition 8 in a Vote No campaign that was funded mainly by Hollywood and Silicon Valley. Chad was a political wunderkind who had signed on to the first Clinton presidential campaign instead of going to college and wound up as the youngest member of the White House staff at the age of nineteen. Chad had first met Rob when he was assigned to assist on Reiner's 1995 film *The American President*. White House friends had talked him into returning to school to get a degree. After graduation he went to work for Reiner's charitable foundation, and a deep personal friendship developed. Reiner regarded Griffin as a son. During the lunch, Proposition 8 dominated the conversation. Like mourners at a wake, Griffin, Schake, and the Reiners poured out their shock, grief, and dismay at the outcome of the vote. Only six months earlier, in May 2008, the California Supreme Court, by a vote of 4-3, had determined that denying gay and lesbian Californians the right to marry the person of their choice regardless of their sex would violate the state constitution's guarantee to all its citizens of equal protection under its laws. California had thus become only the second state, after Massachusetts, to legalize marriage between persons of the same sex. That case, titled *In re Marriage Cases*, was the culmination of a long process that had begun in 2000 with the passage of Proposition 22, a statewide ballot measure that restricted marriage to opposite-sex couples. In 2004 San Francisco mayor Gavin Newsom effectively defied that law by unilaterally authorizing the San Francisco county clerk to issue marriage licenses to gay and lesbian couples. Thousands had flocked to City Hall to wed, and pictures of the joyous couples were transmitted all over the world. The celebrations were brought to a halt when the courts ruled that Mayor Newsom had no authority on his own to alter the state's marriage laws, that marriage was a statewide issue, not a matter for local discretion. That ruling was in turn challenged in the litigation that resulted in the May 2008 *In re Marriage Cases* decision pronouncing, as a matter of the California constitution, that marriage between persons of the same sex was a constitutional right. The decision explained that California's domestic partnership law—a law that gave gays and lesbians virtually all the same legal rights as married persons except for the right to call themselves married—was not an adequate substitute for the institution of marriage but bestowed instead a form of second-class citizenship. The opponents of same-sex marriage had anticipated the outcome of the state supreme court decision by gathering signatures for Proposition 8 and taking the steps to put a constitutional amendment to reverse it on the November ballot. Thanks to massive amounts of funds and manpower from, among others, the Catholic, Baptist, and Mormon faiths, Proposition 8 was approved by 52 percent to 48 percent. After the vote, the leaders of the groups that had opposed Proposition 8 were reluctant to bring a federal (as opposed to a state) constitutional challenge to the measure, fearful that a federal court loss, perhaps in the U.S. Supreme Court, would set back for decades the rights of gays and lesbians not only in California but across the country. Instead they initiated proceedings in the California Supreme Court, arguing that Proposition 8, which was labeled an amendment to the California constitution, was itself in violation of that constitution. It was not actually an amendment, they argued, but a revision of the constitution, which required submission to and approval by the California legislature as well as the voters. Hence, they claimed, the November 8 voter approval was insufficient and the proposition was invalid. (The lawsuit made other claims, but the revision argument was the most prominent.) Most legal experts were skeptical that Proposition 8 could be overturned with a California constitutional challenge. Proposition 8 was labeled and marketed as an amendment, and there seemed little prospect that the California Supreme Court would rule otherwise. Thus, at the time of their Polo Lounge lunch, Rob and Michele Reiner and their colleagues were convinced that Proposition 8 would survive a procedural challenge under the California constitution and that the only hope for marriage equality in California was a federal constitutional case. They were also concerned that such a suit was inevitable, given the tens of thousands of gay Californians who yearned to be married. But they were worried that such a case would be brought by a lawyer inexperienced, unprepared, or otherwise ill-equipped for bringing a case that might well go to the Supreme Court of the United States. There were countless lawyers in California who might file such a suit. Unless the plaintiffs

themselves had the right background, history, and determination, and were spearheaded by experienced, respected constitutional lawyers, that case, they believed, was also destined to fail. The question was obvious, immediate, and urgent: What to do? As the lunch wound down, Michele Reiner looked up from the table to see a familiar face. A talented event coordinator and fund-raiser, Kate Moulene was a professional connector whose work included linking the rich, famous, and powerful to important and worthy causes. A brilliant networker, she knew more prominent and successful people on a first-name basis than most people meet in a lifetime. Like the Reiner lunch group, she had been opposed to Proposition 8 and was dismayed by the outcome of the voting. Kate stopped by the Reiners table and chatted with the group about how best to proceed in opposing the measure. Listening to their concerns, she suggested someone who she thought might offer the best insight on the subject, a Washington lawyer named Ted Olson. He used to be my brother-in-law, explained Kate. He and my sister divorced, but we all stayed friends. Hes brilliant. Hes approachable. And I think hell help you. Chad, Kristina, Michele, and Rob were flabbergasted. A passionate liberal with a long memory, Rob had come to view Ted Olson as the devil during Bush v. Gore. Rob had been a strong supporter of Al Gore, and had actually been in the vice presidents residence the night of the Supreme Court decision. Also, as solicitor general, Ted had been one of the people responsible for policies that, Rob believed, had brought misery to so many Americans during the George W. Bush administration. Given that it was Bush who had backed an amendment to the U.S. Constitution that would have banned same-sex marriage across America, how, Rob wondered, could Ted Olson possibly be helpful in support of marriage equality? Kate had expected Robs response and explained that Ted was open-minded and, in her experience, had manifested an abiding concern for equality and fairness. He was sensitive to the rights of minorities and was outraged whenever he discovered that someone had been bullied. As Kate described Ted as caring and compassionate, she remembered, without mentioning it, that when her mother was being treated for cancer, Ted had written to her every day. Returning to practical considerations, she pointed out that Teds experience might just tip the balance at the Supreme Court, where the justices seemed evenly divided on many controversial issues. Besides, added Kate, if you are going to do this in the federal courts, I dont think theres anyone who has won more historic Supreme Court cases. While Rob, who had been inspired by seeing his parents join the civil rights movement in the 1960s, had no intention of giving up on the marriage equality fight, he wasnt quite ready to consider recruiting someone like Ted Olson as an ally. Olson may have been smart and successful heaven knows, he had prevailed in Bush v. Gore but he was a political enemy. Michele, if anything, was even more stunned by the idea of joining forces with Olson for a challenge to Proposition 8. Are you brain-dead? Kate recalls her saying. As she left the Polo Lounge and drove home, Kate thought she had made her point effectively but was convinced that she had failed to persuade her friends. In fact, they had been so unreceptive that she feared they had forgotten that she was on their side. Then her cell phone rang. It was Rob, and as she would recall it, he said something like, I know you are not really stupid, so tell me again, why would Ted take this case? She repeated her points about Teds core values and added, He can really make a good argument on anything. I recall from time to time asking him to explain some conservative position that I could not comprehend, and even though Im like a Che Guevara liberal, he helped me actually appreciate why conservatives think the way they do on a lot of things. Rob trusted Kate not only as a friend but as an ally and intermediary. His natural creativity kicked in, and he let himself imagine what might happen if Kate were right. In the role of champion of same-sex marriage, Ted would be a wonderful example of casting against type, and sometimes the unexpected worked quite effectively. Okay, said Reiner. We could take a shot. He said he would put Chad in charge of the outreach and send him to Washington to take Teds temperature and evaluate his willingness, sincerity, and level of commitment. After she got home and checked on her five kids, Kate dialed Washington. When Ted came on the line she couldnt resist teasing him about the GOPs loss in the presidential election, but then got down to business. Im going to assume that you think Prop 8 passing was a mistake, she said confidently. Ted told her that she was correct. He believed that discrimination against our citizens based on aspects of their identity race, gender, sexual orientation, who they are as persons was wrong, and the use of a constitutional amendment to make it the law, in any state, seemed beyond the pale. Kate told him about the Polo Lounge discussion and Robs later phone call. Robs fame, which began when he played Michael Meathead Stivic on the groundbreaking 1970s TV show All in the Family and was consolidated when he became a highly regarded director, meant that she didnt have to explain who he was. However, she did make a point of mentioning Reiners political affiliation, and his dedication to the cause. Ted knew Rob not only as a talented creative person, but also as someone who put his heart, energy, and financial resources into the things he believed in. Ted respected that. Rob is serious, Kate concluded, and hes in it for the long haul. It would indeed be a long haul. As Ted confirmed, any legal challenge to the amendment would likely start in a state or federal trial court but had a very good chance of moving all the way to the U.S. Supreme Court. He mentioned that the people who had put Proposition 8 on the ballot were also well aware of this, that he had been approached, very indirectly and informally, about helping on that side. But Ted had never felt comfortable with efforts to stigmatize, isolate, or label gays and lesbians. He leaned toward a free-market, low-tax, less-government, libertarian brand of politics that allowed individual Americans as much freedom as possible. From that perspective he viewed with skepticism restrictions on personal freedoms. I turned them down, said Ted. And you can tell Chad he can call me. Im interested. TWO Theodore B. Olson It is not unusual in Washington offices to find at least one vanity wall decorated with an array of framed

photographs featuring the occupants smiling face with dignitaries, celebrities, officeholders, and diplomats. My office has several photographs of my wife and family members and two signed photographs of the two presidents I have served, Ronald Reagan and George W. Bush. Most visitors to my office give those photographs a passing glance, but almost everyone is intrigued by the framed circle of white goose-feather quills, assembled by my wife, Lady Booth Olson. They come from the U.S. Supreme Court, where by tradition lawyers receive one as a memento each time they appear for an argument. My collection, which now exceeds sixty, comes not just from my tenure as solicitor general in the George W. Bush administration; over thirty represent cases for clients in my practice as a partner of the Gibson, Dunn Crutcher law firm. My early career involved all kinds of litigation matters: product liability and medical malpractice defense, antitrust, securities, entertainment and commercial disputes. But I was particularly drawn to constitutional law, having been privileged to represent the media at the Los Angeles Times, NBC, Los Angeles magazine in battles regarding gag orders, libel suits, and subpoenas to reporters. In representing outdoor advertisers known to most people as billboards I asserted property rights and First Amendment claims against cities, states, and the federal government seeking to remove advertising signs, often without compensation. One of the cases, *Metromedia Inc. v. City of San Diego*, wound up in the Supreme Court in 1981. Although I didn't argue that one in the high court by then I had entered public service it did increase my appetite for complex appellate and constitutional work. In the years since, I've handled constitutional cases on behalf of clients that included international corporations, banks, communications conglomerates, students who challenged racial preferences in law school admissions, the states of Virginia, New York, and Kansas, the U.S. Chamber of Commerce, the American Bar Association, and Presidents Reagan and George W. Bush. I've represented individuals as varied as convicted spy Jonathan Pollard, journalist Timothy Phelps, Hawaiian rancher Freddy Rice, and Los Angeles police officer Stacey Koon. Like most of us, I could never have predicted the course of my life. Born in the Midwest, I was raised in California in a solidly middle-class family. My father was an engineer with United Airlines, and my mother, who grew up on a dairy farm in Wisconsin, became a teacher after her five children were well launched. I never met a lawyer until I was in college and published a cartoon in the student newspaper that so offended a professor that he threatened to sue me. I met with an attorney who helped communicate to the aggrieved academic the meaning of and protection for satire under the First Amendment. But this incident, and four years of extensive experience speaking and debating on my college forensic team, heightened my interest in the law as a career. More inspiration came from Clarence Darrows autobiography, *Attorney for the Damned*, and Louis Nizers *My Life in Court*, both of which make a compelling case for a life in the law. My parents instilled in me a belief in the American dream and the value of hard work. I also became interested in politics and began working for Republican candidates in 1960. I served as president of my law school's Republican group, which was a lonely position at the Berkeley campus of the University of California in 1964 during the Johnson/Goldwater presidential election. After graduating from law school I joined the Los Angeles office of Gibson, Dunn Crutcher. I sought out a partner there, William French Smith, who was widely known in legal, business, and Republican circles, and offered to be his spear carrier, speechwriter, gofer whatever he could use. That turned out to be a fortunate relationship. Smith was among those who convinced Ronald Reagan to run for governor of California, and Reagan became a client of our firm. When he ran for president, we were both active in his campaigns. And when Smith became President Ronald Reagan's first attorney general, the president named me to be assistant attorney general in charge of the Office of Legal Counsel. I was, in essence, the president's and the attorney general's lawyer, the primary lawyer charged with providing legal advice to the president and the executive branch. The position as head of OLC (previously held by William Rehnquist in the Nixon administration and Antonin Scalia in the Ford administration) in the Reagan administration put me in the middle of controversies such as the air traffic controllers strike and executive privilege. When President Reagan left office, I represented him throughout the Iran-Contra investigation. Years later I represented George W. Bush in the *Bush v. Gore* litigation, which culminated in the two Supreme Court decisions that resolved the 2000 election controversies and put Governor Bush in the White House. Although I didn't tell Kate Moulene at the time, and probably did not fully realize it myself, I think that I had made up my mind to accept the opportunity to take on Proposition 8, if it were offered to me, by the time I hung up the phone after speaking with her. I had been shocked by the California voters decision to enact Proposition 8. It seemed wrong, gratuitously hurtful to gays and lesbians, and wholly inconsistent with my views as to what California and America is all about. Had he been aware of my frame of mind, Chad Griffin wouldn't have been so nervous on the day in late November 2008 when he flew to Washington to meet me in my office. Chad has said that he had never before imagined visiting the Gibson Dunn law offices in Washington, D.C., on Connecticut Avenue. He saw our firm as identified with conservative causes. He could hardly have known that most of our practice had nothing to do with politics, and that our lawyers were reasonably evenly divided between Republicans and Democrats and had handled politically controversial cases on all points on the political spectrum. As Chad entered my office he noticed the framed photographs of me with Presidents Reagan and Bush but drew some comfort from the quill pens, the experience they represented, and from the fact that I knew the Supreme Court well. Still, I was the one he blamed, almost personally, for the Supreme Court decisions that made George W. Bush president over Al Gore in 2000. Since he had worked in the Clinton-Gore administration, Chad had been heartbroken by the outcome of *Bush v. Gore*. Also, he blamed

President Bush and political wizard Karl Rove for recent antigay marriage ballot referendum campaigns that had tapped into the fear and prejudices of certain values voters to increase turnout. In 2004 these referenda were passed in each of the eleven states where they were proposed. The intense interest in the same-sex marriage issue might have increased turnout for Bush in key states, and that may have given him the margin that ensured a second term. In Chad's mind, none of it would have happened but for my victory in the court struggle over the 2000 election. In fact, the responsibility for the Supreme Court's decisions in 2000 rested with the justices alone. My advocacy for the Bush-Cheney team had been to present the most compelling arguments to support my client. David did the same for Vice President Gore. The justices made the decisions. Likewise, Chad couldn't have known that although I was responsible for supporting the administration's position in the Court, when the White House had sought my opinion on a constitutional amendment to define marriage as exclusively heterosexual, I responded that I thought it was a bad idea. As I recall, I said, I wouldn't vote for it and I am quite sure it would never get the votes required to pass. As Chad asked me about matters of law and fact surrounding marriage equality, he realized that I was more conversant with the issues than he had anticipated, and sympathetic. He began to relax and later explained that it was then that he began to consider that I might be the right person to make a federal case against Proposition 8. The irony of a former intimate of the Clinton White House teaming up with someone who had been an outspoken Clinton critic piqued his interest. More important, he sensed that if I threw my weight behind the cause, I might influence at least some fellow conservatives or moderates. At minimum, my presence in the case would spark media interest, which would be an important part of persuading the public that the cause was just. For my part, I found Chad to be both intensely bright and far more direct and candid than most of the people you meet in political circles. Although more than thirty years and a lifetime of experience separated us, I was impressed by his passion, intensity, sincerity, and strength of purpose. He also seemed realistic. He knew that a challenge to Proposition 8 would almost certainly end up at the U.S. Supreme Court. The risk that a loss there would set back the cause of equality nationwide had inhibited other lawyers who had considered the issue. The reward, however, would be profound. A victory, even if confined to California, would restore what the voters had taken away. A more sweeping decision, upending all the laws in the country that discriminated against same-sex couples, would make tens of millions of people, and their loving relationships, equal in the eyes of the law. The implications of marriage equality were both broad and deep. A foundational relationship in personal, social, cultural, and legal terms, marriage determines an individual's status with regard to Social Security, property rights, inheritance claims, health insurance coverage, and parental rights. These are only a few of the areas where spouses enjoy special rights, privileges, and responsibilities. On the federal level alone, more than a thousand statutes and regulations touch on marriage as a defining legal and social bond. Any change in the definition of who might or might not be legally wed would help overturn long-standing prejudices about sexual orientation, gender, and relationships. For decades the courts had been moving gradually toward a point where a decision favoring marriage equality seemed possible. One crucial landmark had been the famous *Loving v. Virginia* decision of 1967, which held that no couple could be denied the right to marry on the basis of the race of their chosen spouse. After *Loving*, which underscored the fundamental importance of marriage in many aspects of our culture, came the 1996 case of *Romer v. Evans*, which found that Colorado had no rational basis for acting to limit legal protections accorded to lesbians and gays. Finally, in 2003 the Court held in *Lawrence v. Texas* that antisodomy laws used to criminalize same-sex relationships were unconstitutional. Taken together, these precedents provided powerful support for the next step: full marriage equality. The Supreme Court record and related constitutional principles were present in my mind as I talked with Chad, but in this first encounter, much of our conversation was personal. Chad's life story would fill a book by itself. Chad spoke powerfully about the emotional and psychological burdens of growing up gay in the American South of the 1980s, an experience that heightened his understanding of the toll that anxiety over one's sexual identity can take on young people, inspired his passion for justice, and provided him the energy and drive to pursue the goal of equality for gays and lesbians everywhere. He was raised in Arkadelphia, Arkansas (population 10,000), during the time when Bill Clinton was governor of that state. Arkadelphia was steeped in the traditions of the Southern Baptist Convention and small-town America. Education was the family business: His mother taught elementary school, and his father was a district superintendent. The golden rule was the most important lesson they taught me, he told me. It was that and the idea that if you saw something wrong you were supposed to do something about it. Don't just sit there. Get involved. As Chad explained it, Arkansas was the kind of place where, even as late as the 1990s (he graduated from high school in 1991), it was possible to believe you didn't know a single gay person. He understood this because he didn't even acknowledge his own identity as a gay man until he was well into his twenties. No one talked about these issues where I grew up, he recalled. I really did think that I had never known a gay person. I didn't even know that I was a gay person. He then raised a fact that I had only vaguely understood: the high suicide rate among teenagers struggling with their sexual identity. Reliable studies have shown that gay and lesbian teens are more than twice as likely as their heterosexual peers to say that they have attempted suicide. They are also subject to higher rates of bullying. Historically the rejection and hostility that lesbian and gay kids feel flow from deep sources of fear and prejudice that were codified as moral imperatives in religion and law. Just as the Constitution justified racism by condoning slavery and counting blacks as just three-fifths of whites, thousands of laws effectively supported, even endorsed, the

oppression of gay men and lesbian women. Although certain individuals across the country resisted this discrimination, inferiority and differentness were deeply ingrained in the law. Fortunately, when equality is enforced, it has demonstrably beneficial effects. Teens who say they live in less hostile communities and supportive families do better in every measure of well-being, from mental health to resistance to drug use. This suggests that while life can be challenging for young lesbian and gay people, we make it better every time we move, as individuals and as a society, to break down prejudice and increase equality. Before we ended our meeting, I made certain that Chad understood the demands of a Proposition 8 challenge. First, the process would be a marathon, not a sprint, and it could take five years or more. Actually, it would be more like those obstacle endurance races that more and more Americans are joining these days. Second, while Gibson Dunn would donate substantial time and resources to the fight, the actual cost would likely run into the millions of dollars, and the Griffin/Reiner group would have to prepare to meet the financial burden. It was very important that any effort like this involve broad support personal and financial buy-ins not just a lawyers venture. Finally, the project would require some responsible, levelheaded people gay and lesbian couples who were being denied their rights under Prop 8 and could withstand all the pressures they would face as plaintiffs. These individuals would be the public faces of the case, subject to press scrutiny and intense questioning at trial. They would have to be capable of grace under enormous pressure, and they would have to be committed to staying together throughout it all. We need real, legitimate human beings who really want to be married, I stressed. Chad later told me that he returned to Los Angeles believing I was the right lawyer to lead the effort against Prop 8. He expected resistance from others in the equal-rights community, but he thought that once they met me they would change their minds. A meeting at the Reiners house would be a starting point. If I could win over the passionate, committed, demanding, irascible Rob and Michele, others would fall into place. When I went home that day after my meeting with Chad I talked it over with my wife, Lady, who greeted the prospect of this civil rights challenge with real enthusiasm. She too had been raised in a family that could not tolerate prejudice. But as a lawyer and self-described legal geek, Lady recognized immediately the difficulties the case presented. Chief among them was the matter of asking the courts to overturn a legally valid if constitutionally flawed plebiscite. In the American system we tend to favor direct democracy whenever possible. This means that the voice of the people, expressed in a referendum, usually prevails. But like me, Lady believed that marriage equality was a truly just cause, and this case could be the opportunity of a lifetime to bring justice to millions of people. In her mind, bringing a case against Proposition 8 would give meaning and value to our careers in a way that made meaningful contributions to many, many lives. The Reiners are very down-to-earth people. They are neither young nor glamorous, and they don't come with an entourage. You can't be around them without becoming imbued with their passion, energy, and enthusiasm. Rob and Michele expressed no discernible skepticism about me when we met at the doorstep of their Brentwood, California, home; indeed, I was welcomed with literally open arms. Chad was present, as was Kate Moulene, and also two Academy Award winners, producer Bruce Cohen and writer Dustin Lance Black. Bruce, a big player in the gay and lesbian rights movement, had married his longtime partner, Gabriel Catone, during the brief period in 2008 when same-sex marriages were legal in California. An extremely effective fund-raiser for liberal causes and candidates, he had also founded one of the first organizations in Los Angeles a group called Out There to support gay men and lesbian women in the film industry. Lance was widely regarded as one of the most influential young men in Hollywood. He won an Academy Award for his screenplay for the movie Milk, which tells the story of San Francisco's first openly gay member of the board of supervisors Harvey Milk, who was murdered by a fellow supervisor. Energetic, outgoing, and somewhat larger than life, Rob blurted out that he still found it a bit mind-boggling that Ted Olson is at my house! He delivered this line with his iconic and infectious big, warm smile. When the conversation turned serious he explained that he didn't have a direct stake in marriage equality. We don't have a gay child, so about all you can say is we're in the gay-adjacent community, as he put it. However, Rob said, he was very serious about politics and social policy, especially when it came to civil rights. In this particular case he was also motivated by his love for Chad, and his belief that this was something we could realistically hope to accomplish. He was unwilling to accept that the fight for equality had ended on election night 2008 with the other side holding the prize. When the conversation turned to me, I acknowledged that if I filed the initial lawsuit to overturn Proposition 8, many in the gay and lesbian community were not going to believe I was doing it for the right reason. There was, after all, nothing new in the idea of asking the federal courts to settle the marriage equality question. LGBT lawyers had been arguing the pros and cons of this approach for more than a decade and had formed an informal consensus that it was just too risky. If someone with my conservative background and reputation now brought such a case, it might well be perceived as an underhanded maneuver or trick. Those who didn't know me might think I was hoping to lose, effectively facilitating a judicial decision upholding a ban on same-sex marriage and setting back the cause for generations to come. The notion that I might be acting as some sort of legal double agent was both paranoid and slanderous. I don't take cases to lose but we would have to deal with that kind of reaction. As I explained to the group, When Californians enacted Proposition 8, I was saddened. It struck me as mean-spirited and gratuitously cruel. To this day I do not understand, and recoil against, antipathy or hostility toward gay, lesbian, or transgender individuals. I am convinced that with few exceptions we have very little or no control over our sexual orientation. It is a characteristic that is an inherent part of who we are when we are born and as we develop sexually. From what I

sense, and from what I have learned, there is nothing we can do to change that part of ourselves, and attempts to do so are both ineffective and often quite harmful. As someone put it to me, Did you choose to be heterosexual? The answer was, and is, No. Just as I would not envision myself in an intimate same-sex relationship, I would certainly not expect a gay man or woman to find fulfillment in an opposite-sex relationship. The Prop 8 case also appealed to me, I explained, because diversity however overused a term is one of America's most attractive characteristics. As a people, we have many more qualities in common than those that divide us. By and large we share the same aspirations, needs, fears, and hopes. We were taught from an early age that we are all Americans, linked by the fundamental promise expressed most vividly and unforgettably in the Declaration of Independence that all men are created equal. However different we may look or behave on the surface, we are equally entitled to our nation's promise of freedom and happiness. Sexual orientation, I told the group, seems to me very much in the same category as race, nationality, or gender. We not only accept and respect such differences in this country, but that acceptance is something that distinguishes us. President Reagan was fond of saying that one can go to Japan but not become Japanese, or go to Norway and not become Norwegian. But people can come to America from anywhere and everywhere and become truly American. It has been said that America is an idea, a promise, a dream. Although our country has at times been tragically deficient in living up to those aspirations, they have always been our collective national commitment. I had not been able to conceive of a reason why our gay brothers and sisters, neighbors, friends, and coworkers were not equally entitled to enjoy the relationships and institutions recognized by our laws or created by our governments, and equally entitled as well to the pursuit of happiness. We would all agree, even if the Supreme Court had not repeatedly told us as much, that marriage is a fundamental right and a basic cultural value in our society. It is a building block of our neighborhoods and our economy, an expression of liberty, and a right of privacy and association. Gays and lesbians crave the right to be married, in the same way and for the same reasons as other citizens do. Why should we expect them to be different from the rest of us? And what right do we have to say that the woman next door who is attracted to another woman cannot marry the person she loves? Who are we to say that their love is inferior, unacceptable, and, worst of all, against the law? That seemed to me wrong, without rational purpose, harmful, exclusionary, demeaning, and un-American. To my thinking, I explained, the fact that heterosexual sex could result in children did not refute any of this. Marriage is not now and never has been restricted to achieving that outcome. We know and accept that some married people are unable or unwilling to have children, or are uninterested in doing so. Yet their marriages are just as important to them in their sexual relationship, their spirituality, and their need for love, affection, and security. Children are of course an important consideration for those who wish to be married, but marriage is a great deal more than that. And children are being brought into this world and quite happily raised by gays and lesbians. I had once been asked very indirectly and not officially whether I would be willing to defend a Colorado enactment that overturned laws that protected gays and lesbians from discrimination. I did not like what that measure was doing to Coloradans and so I declined. After Proposition 8 was passed, I received a call I do not even remember from whom inquiring about my interest in possibly helping with the legal defense of the measure. I said I would not want to be on that side of the case, fighting to deprive citizens of California of the right to marry the people they loved. When first approached about taking on the challenge to Proposition 8, therefore, I had already decided that I did not like the law and the fence it put around gay people. I did not think that the right to marriage should or could constitutionally be withheld from homosexuals. And I could only begin to imagine the hurt, pain, anguish, isolation, and alienation that is created when that relationship is denied to two loving individuals. It struck me then, and strikes me now, as wrong, morally and legally, and contrary to the spirit that I was taught growing up in California. That I was a conservative was, I explained that day, not the slightest bit inconsistent with my undertaking to overturn Proposition 8. Marriage is a coming together of two loving individuals to create a family, to seek stability, to work together, to share hopes and dreams, to build an economic unit, to provide mutual support, to help form a community. What could be more conservative than that? Over the course of my career I had come to have enormous respect for our Constitution and our commitment to the rule of law. A lawyer has a responsibility to step forward when those rights are withheld from our citizens. I thought that I could contribute to vindicating the rights of those whose equality was diminished and whose place in our society was demeaned by Proposition 8. I was not willing to look those individuals in the eye and tell them to search elsewhere for help. So, I told my listeners, I would take the case if I was sure that we could do it right and if I thought we could win. I went on to describe the main concerns we would have to resolve. A federal lawsuit, I explained, is never a small undertaking, and in my experience a lot of people do not understand what a big deal it actually is. They believe in a cause. They want to get involved, but they don't understand what will be required of them. More specifically, I noted that not only would it be a long and expensive process, as I had warned Chad, but it would be hard going every step of the way, with many potential setbacks. It would also be emotionally draining, as we could all expect to be attacked and criticized, even by our friends. (For some of us, of course, especially by our friends.) Although I didn't reveal it at the time, I had already experienced some blowback around the issue. In confidential conversations with trusted friends on the right I had received a few harsh reactions to the mere possibility that I would choose to challenge Proposition 8. Some felt that the will of the people, expressed in the election, was inviolate. Others objected to marriage equality on moral or religious grounds. Some were particularly

disturbed that I would lend my skill and stature to an effort to add a new right to the Constitution. Most disappointing to me was that so many people failed to see how marriage equality was a truly conservative ideal, based on bedrock values such as liberty, freedom, and equality. On a moral level, marriage was about forming a binding, committed, and stable relationship. In this light, lesbians and gays should be hailed for wanting to enter into the institution. As a legal matter, it seemed obvious that no citizen should be forced to accept second-class status because of immutable characteristics such as race, color, or sexual orientation. And when it came to social policy, there was no legitimate basis that I could perceive to support discrimination against gays and lesbians who sought to marry and have children, or to make them some sort of outcasts. All these points were discussed at the Reiners home, as lunch was followed by coffee and then more coffee. Trust was established, commitments formed, and it became clear that a team was taking shape. The conversation then shifted to strategy. The timing of the lawsuit would depend in part on the outcome of the Proposition 8 challenges that were already before the California Supreme Court. Eventually consolidated into a single case titled *Strauss v. Horton*, this action would take about six months to resolve. Since few informed observers believed the court would overturn Prop 8 on state constitutional grounds, a federal challenge could be mounted as soon as the state court made its decision. During the period in which the state court case was being decided, I could start work with a small team to begin researching and drafting a complaint. All of this would be done quietly under the radar, as the cliché goes that we could enhance the likelihood that we would be the first to file and get ahead of anyone else who might have the same idea about bringing a federal suit. Our desire to file as soon as possible wasn't merely a matter of competitiveness or pride, although both were certainly factors. More important was the concern that other lawsuits would only confuse matters without contributing any meaningful benefits. It was all too easy to imagine the process breaking down as competing attorneys and activists argued over particular decisions and brought long-standing disputes and rivalries into the process. It would be far more effective, I believed, to move nimbly and efficiently and without the excess baggage of partisanship, or multiple chefs in the kitchen. The full scope of the task we would face would depend on the way various courts might respond to the case. One judge might be willing to act on the basis of briefs, motions, and pleadings from lawyers; another might want to conduct a full-blown trial to resolve a host of issues related to the status of gay and lesbian Americans. In the decades-long history of struggle over equal rights for gay men and lesbians, no court had ever received testimony and considered evidence to address on a comprehensive, thorough basis the fundamental questions about the nature of homosexuality, society's attempts to regulate relationships, the impact of official discrimination against same-sex couples, and the welfare of children in families headed by same-sex couples. A judge who chose this route would, in effect, put prejudice on trial. Besides the legal initiative, our side would also need to undertake substantial public relations and fund-raising efforts. Money would be needed for the expense of the litigation, which would require thousands of lawyer hours, perhaps expert witnesses, and various support services. Public relations would be important to deal with the press and potential criticism from the lesbian and gay rights establishment, and to communicate our message regarding marriage and discrimination to the wider public. Fortunately Rob, Chad, and Michele had significant experience putting together the kind of organization required for this job. In the 1990s they had conducted a successful campaign for a referendum called Proposition 10, which raised taxes on tobacco to fund a host of services for children aged five and younger. Prop 10 translated Rob's abiding interest in child development into action on behalf of kids and established him as an effective public advocate. By 2008, First 5 California, as the agency that Prop 10 created was called, had funded almost \$1 billion in child health, nutrition, and education programs serving more than three million kids.