

# WHERE PERRY FITS IN THE NATIONAL STRATEGY TO WIN THE FREEDOM TO MARRY

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How are we going to win the freedom to marry and end marriage discrimination nationwide? Decades ago, my movement colleagues and I set out to answer that question, and then to make good on the answer.

First in debate, and then in the real work of laying the foundation, breaking the ice, starting to win, and moving the cause forward, we came to understand—and put forward—a national strategy. To shape the strategy that would guide us to victory, we drew on lessons from the history of other social justice movements and other social change chapters in American history. And we drew, as well, on the structure of marriage and how marriage operates in our federal/state system.

What drove the strategy was an understanding of the way America does its civil rights business, the way we achieve transformation of this magnitude in the United States. Civil rights transformation does not come in one single act. Rather, our country, after periods of patchwork, periods of struggle, periods of progress and regression, and uneven periods of gains and disappointments, eventually comes to national resolution through the actions of one of two national actors: either Congress or the Supreme Court.<sup>1</sup>

In mapping out our strategy, the question we weighed was: What do we need to do in order to lay the foundation and create the climate that would enable one of these two national actors—Congress or the Supreme Court (most likely the Supreme Court)—to achieve that national resolution, to finish the job? The resulting strategy—what we at Freedom to Marry, the campaign to win marriage nationwide, now call “the Roadmap to Victory”—was not a secret. It drew from history; it’s on our website: “Roadmap to Victory.”<sup>2</sup>

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1. The third option is a civil war. We decided we would not need to pursue that one.

2. *Roadmap to Victory*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/roadmap-to-victory> (last visited Jan. 17, 2013).

The answer was that, in order to win, we—like every other social change movement on whose shoulders we stand, alongside whom we fight, whose causes we overlap with—were going to have to build two critical masses: (1) a critical mass of public support for the freedom to marry, and (2) a critical mass of states with the freedom to marry. It is when a movement achieves both critical masses that Congress and/or the Supreme Court become emboldened to take the end-stage actions that will bring the country to a national resolution.<sup>3</sup>

We began pursuing this strategy decades ago, rallying support and blazing the path with our eyes on the prize.

In those prior decades, we launched, for example, the Hawaii freedom to marry case. *Baehr v. Lewin* (later *Baehr v. Miike*)<sup>4</sup> was the case that sparked the ongoing global movement and laid the framework for the public discourse and cultural engagement that Adam Umhoefer and Andrea Ritchie talked about, as well as the legal victories won by so many of the lawyers from the leading legal organizations such as the ACLU, Gay & Lesbian Advocates & Defenders (GLAD), Lambda Legal, and the National Center for Lesbian Rights, some of whom you are going to hear from later today.<sup>5</sup>

In the 1990's, as our work on the engine case in Hawaii pushed forward, we opened up a "second front" in the state of Vermont, building on the progress and the conversation Hawaii had spurred. We hoped to cross the finish line first with, if not Hawaii, then Vermont. And we engaged in friendly competition with colleagues from around the globe, such as the Netherlands and Canada, who, spurred by the momentum around Hawaii, began to work to win the freedom to marry in their countries.

Pursuing the "Roadmap to Victory" strategy, we ended the 1990's with our legal victory snatched away by political attack,<sup>6</sup> but having entirely changed the debate and generated the momentum that would carry us to breakthrough and triumph. We moved the American people from the belief that gay people marrying was, as our opponents liked to say then, an oxymoron, to polls showing that two-thirds of the public had come to believe that gay people would win the freedom to marry. As the Hawaii-Vermont chapter concluded and as 2000

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3. Whether *Perry* indeed turns out to be the case in which we achieve that national resolution—victory for the freedom to marry nationwide, our *Loving v. Virginia*—remains to be seen. Rather than speculating, hyping, or handwringing, the best thing we can do is the work that will maximize our chances of winning. Fortunately for us, that turns out to be exactly the work the strategy says we should be doing anyway. See Evan Wolfson, *For Marriage Equality, the Work's Not Just in Court*, N.Y. TIMES (Dec. 10, 2012), [http://www.nytimes.com/2012/12/11/opinion/for-marriage-equality-the-works-not-just-in-court.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/12/11/opinion/for-marriage-equality-the-works-not-just-in-court.html?pagewanted=all&_r=0).

4. *Baehr v. Lewin*, 852 P.2d 44 (1993). See also *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Dec. 3, 1996).

5. Movement lawyers from the ACLU, Lambda Legal, and others participating in the symposium are listed in this journal issue's introduction.

6. A 1998 ballot-measure amended the Hawaii state constitution's equal protection clause so as to prevent the courts from ruling on the denial of the freedom to marry to gay couples, but left it to the legislature to decide whether to lift the exclusion some day.

dawned, we had taught the American people to put the words “gay” and “marriage” in the same sentence.

By the mid-2000s, we had achieved almost a solid majority in the polls. And now with the same strategy, we have built a nationwide majority, literally doubling from twenty-seven percent back in 1996—when we won in Hawaii the world’s first-ever trial examining whether the government has a legitimate and sufficient reason for denying the freedom to marry—to fifty-four percent today, as reported in at least sixteen or more national polls over the past couple years.<sup>7</sup>

Working the Roadmap to Victory, we won the freedom to marry in California in 2008. We first passed the bill through the legislature, only to see it vetoed by the governor. We then went to court and won a victory in the California Supreme Court,<sup>8</sup> only to see that victory painfully, if temporarily, stripped away in a political attack—not a “backlash,” an attack. These ups and downs as world-views contest are features of all major struggles and chapters in American progress, as my fellow panelist Professor Reva Siegel examines in her symposium piece and remarks today.

By following the Roadmap to Victory national strategy, we have gone from zero places in the world, just a little more than a decade ago, to now fourteen countries—on four continent—and six states, plus our nation’s capital, where gay people can share in the freedom to marry.

As part of the strategy, while doing that work and laying that groundwork, we consistently applied ourselves to building—and made public calls to action for—a *campaign* that would integrate all the pieces necessary, as we know from social change experience, to achieve a victory like this.

We knew it was not going to be enough to just have one case (Hawaii or Vermont, California or Iowa) or one state (Vermont or California) or one methodology (litigation, rather than, say, legislation), and so forth and so on. What we needed and called for and built was an affirmative and sustained campaign that reflected what I described repeatedly as the four multi’s: multi-year, multi-state, multi-partner, and multi-methodology.

As we built that campaign and moved forward on the strategy, we began, as described, to lay the building blocks and rack up the wins. And in the midst of this transformative and defining progress, and that campaign, we, inevitably, took some blows. One of those blows was Proposition 8, the 2008 ballot-measure that amended the California constitution so as to strip away the freedom to marry from same-sex couples.

Proposition 8 was, as AFER’s Adam Umhoefer mentioned, a very painful thing for many, many people: real families—including the *Perry* plaintiffs, who are here today—and many others of us all around the country and the world. The passage of Proposition 8 was also, however, a very important wake-up call to the

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7. *Polling Finds Growing Support for the Freedom to Marry*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/resources/entry/marriage-polling> (last updated June 2012).

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

many non-gay people who were either supportive of gay people or the freedom to marry or had not yet thought it through but then felt the extraordinary unfairness of what had just happened. And it was a wake-up call to many gay people who supported the freedom to marry, but had not done enough to help us win it. It was a reminder to all that social change comes only when we do the work.

In the midst of this awakening and the galvanizing power of the stumble in California, *Perry*<sup>9</sup> was filed. *Perry* was an effort by some to accelerate the end stage of the national strategy that I have described.

As we sit here today we do not know the full *Perry* outcome yet and thus, in important ways, this symposium is premature. Depending on whether the Supreme Court takes the case,<sup>10</sup> I hope *Perry* will ultimately turn out to be either a roll-the-dice early fulfillment of our strategy or, perhaps more likely, a significant, if partial, contribution to that strategy. It would clearly be the latter if the Court declines to hear the case and leaves the Ninth Circuit's ruling standing, thereby adding to the critical mass of states by restoring the freedom to marry in California. Only time will tell (just a little time after this symposium is held and this piece is written). It will be then that we may have the final reckoning, the full accounting, of *Perry*'s significance and place in this national strategy and movement.

That said, there are some things we do know about *Perry* already.

One, we know that the *Perry* trial effectively and powerfully reaffirmed what we saw fourteen years before in the historic Hawaii battle and have seen ever since: there is no good reason for excluding loving and committed couples from the freedom to marry.<sup>11</sup> *Perry* dramatically demonstrated, as *Baehr* had fourteen years before and as cases have since, that the opposition is empty and cannot stand in the clear cool light of the courtroom or under actual, serious scrutiny.

Two, we know already that Ted Olson in particular has proven to be an important addition to our cause and our strategy as a symbol and as a messenger, helping open up the enlistments of more conservative voices.<sup>12</sup> Ted has been an eloquent and affective advocate with real power beyond the courtroom as well as

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9. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. 2012) (No. 12-144).

10. On December 6, the Supreme Court granted certiorari in *Perry*, as well as to a challenge to the so-called federal Defense of Marriage Act, *United States v. Windsor*. *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 2012 WL 4009654 (U.S. Dec. 7, 2012) (No. 12-307).

11. Evan Wolfson, *Fourteen Years After Hawaii: New Freedom to Marry Case in California; Same Old, Same Old From Opponents*, THE HUFFINGTON POST (Jan. 21, 2010), [http://www.huffingtonpost.com/evan-wolfson/14-years-after-hawaii-new\\_b\\_431068.html](http://www.huffingtonpost.com/evan-wolfson/14-years-after-hawaii-new_b_431068.html).

12. *Young Conservatives for the Freedom to Marry*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/young-conservatives-for-the-freedom-to-marry> (last visited Jan. 17, 2013).

in it.

Three, we know that should the Supreme Court not take *Perry*—restoring the freedom to marry for Californian couples and restoring California as one of our engines for the freedom to marry nationally—the case will have been a significant addition to the already surging momentum in favor of the freedom to marry, momentum that we built throughout the 1990's and the 2000's, and that has accelerated triumphantly in the past few years.

And four, we also know already that *Perry* has been both important and at times over-hyped. For a good historical account and a good understanding of how we have been winning, it is important to acknowledge—as this symposium builds to later today—that while this symposium is framed around *Perry*, what *Perry* reflects and builds on and contributes to is a far broader multi-year, multi-state, multi partner, and multi-methodology campaign. That campaign—not any one case or one splash—is the roadmap to the victory that shimmers within our reach, if we keep on doing the reaching.

Three more points:

One, the work we do and the successes we create cannot only be measured by their legal elements, but must also be measured in terms of their cultural and political effects. To my mind, the freedom to marry movement's engagement of and with the public, *Perry* being part of it, has been an extraordinary weapon for reducing and addressing homophobia more generally. Our engagement—the conversations, the personal stories, the battles, the messaging, the diverse voices rising in support—has also improved people's understanding of who gay people are and our claim to basic values, including love, commitment, justice, connectedness, family, dedication, and self-sacrifice.

Marriage is this extraordinarily powerful vocabulary that doesn't fix everything, but that has been an engine to help move everything forward. As Andrea Ritchie rightly reminds us, even when we have won the freedom to marry, even as we are winning the freedom to marry, we care about a lot more than "just" marriage, important as marriage undoubtedly is in its own right and as an engine. No one should have to choose between love and safety, between love and employment. We want it all.

Two, as Reva Siegel reminds us, and I agree with this point very deeply, our strategy, which includes *Perry*, has always been to think about not just the law, but also the culture and the engagement, and the interplay amongst them. Like Reva, I reject the notion of backlash as a kind of intimidation. I think we should be strategic, but it is not about fearing backlash. In my book, *Why Marriage Matters*, I quote Martin Luther King, who said on this point:

People talk about the white backlash . . . . Now, my answer to this question is that there is really no white backlash, because that gives the impression that the nation had decided it was going to solve this problem and then there was a step back because of developments in the civil rights movement. Now, the fact is that

America has been backlashing on the civil rights question for centuries now . . . . [T]he backlash is merely the surfacing of prejudices, of hostilities, of hatreds and fears that already existed and they are just now starting to open.<sup>13</sup>

I agree with Dr. King that what we are really talking about is a struggle of competing worldviews and understandings, in which we move the freedom to marry forward while the opponents of equality and inclusion are fighting to maintain discrimination or exclusion. We are trying to end the exclusion of loving and committed same-sex couples from marriage, the unfair and oppressive denial of the freedom to marry. As I used to say in the early years of our campaign, “their backlash began before we even lashed.”

Three, the final point I would make is that whether or not the Supreme Court takes *Perry* (and we will find that out presumably within a matter of weeks), and whether or not the Court takes one or more of the challenges to the so-called Defense of Marriage Act (and we will find that out presumably within the next few weeks), what is clear is that the Roadmap to Victory strategy calling for simultaneous work on three tracks—(1) a sustained, affirmative, and continued engagement in growing the majority, (2) winning more states, and (3) ending federal discrimination—remains the key to winning.<sup>14</sup> More than any one case or any one state or any one partner or any one methodology, the strategy that has brought us to this moment of transformation and triumph is the strategy that will bring it home.<sup>15</sup> Together we must make the same strong case for the freedom to marry in the court of public opinion that our advocates, whoever and whenever, will make and have been making in the courts of law.

Winning more states and winning over more hearts and minds—national, federal, and state tracks together—must be the focus of our continued energy, investments, and action. No one case, state, battle, victory, or defeat changes the need for the sustained *engagement* that is, and always has been, the prelude to marriage.

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13. Martin Luther King, Jr., Seventh Annual Gandhi Memorial Lecture (Nov. 6, 1966).

14. See Wolfson, *supra* note 3.

15. For exceptional in-depth, independent reporting on how the overall freedom to marry campaign has propelled the movement toward victory, beyond any one case, see Molly Ball, *The Marriage Plot: Inside This Year's Epic Campaign for Gay Equality*, THE ATLANTIC MAG. (Dec. 11, 2012), [http://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot/265865/?single\\_page=true](http://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot/265865/?single_page=true).