

HOW HAS *PERRY* AFFECTED OTHER MARRIAGE- RIGHTS LITIGATION STRATEGIES?

REFLECTIONS ON A SILVER ANNIVERSARY AND THE GOLDEN RULE

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I.

INTRODUCTION

Anniversaries invite both reflection on the past and speculation about the future. We gathered on October 5, 2012, to share thoughts about the possible future stages and effects of *Hollingsworth v. Perry*.¹ But, this symposium also marks a major reflection moment for me because it is the silver anniversary of my graduation from this law school. More poignantly, when the *N.Y.U. Review of Law and Social Change* (RLSC) last hosted a symposium about the rights of lesbian, gay, bisexual, and transgender people, in 1986,² I was a staff member of this journal. So was the classmate who now, thanks to this movement, is my wife.

Then, as now, our eyes were on the Supreme Court. With all the hope, anxiety, and drama High Court litigation can inspire, we debated whether the Supreme Court could be expected to apply basic constitutional principles in a consistent manner when the rights of gay people are at stake, and what the costs might be if it did not. But then, as that symposium examined, we lived in a country in which half of the states deemed us criminals. The AIDS death toll was horrifying, as was the cruel treatment of many who became ill, or merely were thought to be at risk. At the same time, we were seeing exciting changes. Wisconsin passed the first statewide law prohibiting employment discrimination based on sexual orientation.³ The City of West Hollywood enacted the first local

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1. *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144), *granting cert. to Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *aff’g Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

2. The symposium entitled “Sex, Politics & the Law: Lesbians and Gay Men Take the Offensive” was held on February 22, 1986, and the resulting articles were published later that year in Volume XIV of *RLSC*.

3. Act of Mar. 2, 1982, ch. 112, 1981 Wis. Sess. Laws 901. *See generally Employment Non-*

domestic partnership registry.⁴ Second-parent adoption was conceptualized and accepted, at least within the confidential proceedings of the San Francisco Superior Court.⁵ And here at NYU, down the street from the Stonewall Inn and around the corner from The Duchess,⁶ we had the opportunity to learn from Tom Stoddard, then newly at the helm of Lambda Legal, who had developed one of the first sexual orientation and law courses and for whom a Hays Fellowship is now appropriately named.⁷

We gathered during the period of dramatic lead-up to the Supreme Court arguments in *Bowers v. Hardwick*,⁸ sharing hope and trepidation. Could at least five justices be persuaded to recognize that all of us must be free to make our own choices about love and family, or at least to be physically secure in our homes? Four months later—marking the end of Gay Pride Month and the cheerful optimism of many—Justice White answered for the Court. He emphatically rejected our plea for inclusion in the constitutional contract that defines us as Americans, branding that request, “at best, facetious.”⁹ Chief Justice Burger piled on, concurring that to credit Michael Hardwick’s privacy claim would be “to cast aside millennia of moral teaching.”¹⁰ Lest anyone mistake the depth of his scorn for the proffered equating of same-sex and different-sex relationships, the Chief Justice admonished that the penalty for sodomy under Roman law was death, that the English ecclesiastical courts likewise had imposed criminal sanctions, and that Blackstone considered consensual sodomy “an offense of ‘deeper malignity’ than rape.”¹¹ Wow.

The symposium volume was finalized and published after that decision. In

Discrimination Laws, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws (last updated Jan. 15, 2013) (comparing state employment discrimination laws).

4. Lewis Becker, *Recognition of Domestic Partnerships by Governmental Entities and Private Employers*, 1 NAT’L J. SEXUAL ORIENTATION L. 91, 92 (1995).

5. Emily C. Patt, *Second Parent Adoption: When Crossing the Marital Barrier Is in a Child’s Best Interests*, 3 BERKELEY WOMEN’S L.J. 96, 98 n.13 (1987–1988) (citing *In re Adoption Petition of N.*, No. 18086 (Cal. Super. Ct. Mar. 11, 1986)). See generally Elizabeth Zuckerman, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 731 n.8 (1986) (arguing that states should embrace second-parent adoption for lesbian couples).

6. See generally Lisa Kennedy, *Another Place at the Table: How the Gay and Lesbian Civil Rights Movement Is Changing America*, DENVER POST, Nov. 25, 2007, at A1 (describing the riots at the Stonewall Inn as a “turning point” in the movement); June Thomas, *The Gay Bar: Why the Gay Rights Movement Was Born in One*, SLATE (June 28, 2011), http://www.slate.com/articles/life/the_gay_bar/2011/06/the_gay_bar_4.html (discussing the role that the Stonewall Inn played in the LGBT rights movement).

7. The Arthur Garfield Hays Civil Liberties Program annually awards fellowships to a small group of third-year NYU Law students committed to civil liberties and civil rights work. This author was a Hays Fellow during the 1986–1987 academic year.

8. 478 U.S. 186 (1986) (considering claim that Georgia’s criminal statute prohibiting sodomy violated the due process guarantee of the U.S. Constitution).

9. *Id.* at 194.

10. *Id.* at 197.

11. *Id.* at 197–98.

their final form, its papers reflect not only broken hearts and broken trust, but also defiance, determination, and pragmatism. Mary Dunlap presciently wrote in an introduction to her *Bowers* amicus brief:

In a large if not immeasurable number of legal disputes, the horribly homophobic opinions of Justices White, Powell, and Chief Justice Burger will be invoked to diminish the rights and freedoms of gays, lesbians, and others seeking individual freedom and privacy. We will not avoid these aggressive uses of *Bowers* by staying out of federal courts, by avoiding the Supreme Court, or by settling for the victories that we will and must continue to seek in state courts. . . . Radical, humanistic, and freedom-loving perspectives can and do become majoritarian, as dissenting opinions do, by consistent and tireless articulation, argumentation and struggle, and by refusal to retreat.¹²

Dunlap's passionate commitment to feminist liberation and cross-movement collaboration inspired legions of young lawyers to help envision and build a freer, fairer society. Her approach exemplifies the view of movement lawyering that had animated the symposium's planning. As Debra Rothberg, lead editor of the symposium volume, explained, "lesbians and gay men are a significant and increasingly vocal minority in this country—a minority that will not be silenced by state penal laws, moral condemnation, acts of discrimination, or queerbashing."¹³ To understand how advocates can best advance this movement, the editors planned the symposium to illuminate "the complex ways in which the law interacts with politics, society, and radical visions for change."¹⁴

Reflecting on the twenty-five years of strategic legal work that followed, I think it's fair to say that these themes continue to guide the LGBT freedom and equality movement. Movement advocates have not shunned the federal courts and, despite sometimes devastating losses,¹⁵ breakthrough successes *have* been

12. Mary C. Dunlap, *Brief Amicus Curiae*, *Bowers v. Hardwick: Introduction*, 14 N.Y.U. REV. L. & SOC. CHANGE 949, 951–52 (1986).

13. Debra Rothberg, *Sex, Politics & the Law: Lesbians & Gay Men Take the Offensive: Preface*, 14 N.Y.U. REV. L. & SOC. CHANGE 891, 892 (1986).

14. *Id.* at 894.

15. See, e.g., *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011) (rejecting equal protection challenge to decision by Louisiana Office of Vital Records and Statistics denying "full faith and credit" recognition to out-of-state adoption judgment and refusing new birth certificate for boy adopted by gay male couple); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (rejecting equal protection challenge to state constitutional amendment limiting marriage to different-sex couples and precluding other, more limited recognition of same-sex couples); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (rejecting due process and equal protection challenge to Florida's ban on adoption by "homosexual" persons); *Able v. United States*, 155 F.3d 628 (2d Cir. 1998) (rejecting equal protection challenge to military's ban on service members who engage in homosexual conduct); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (relying on *Bowers v. Hardwick* and rejecting equal protection challenge to federal policy requiring expanded investigations and

won.¹⁶ But Dunlap was all too accurate in her prediction of the frequency and force with which *Bowers* would be wielded against LGBT people—to truncate careers, to strip parents of custody, to justify the military’s exclusionary policy. Seventeen years later, in *Lawrence v. Texas*, briefs cataloguing these harms helped to persuade a majority of the Supreme Court that *Bowers* had been wrongly decided.¹⁷ Justice Kennedy’s eloquence in *Lawrence* was salve to *Bowers*’ insults, but naturally it could not undo the life-altering losses. And while movement advocates never abandoned federal court, *Bowers*’ toll was a constant caution to build an ever-stronger foundation in state law and to think twice before choosing the federal venue.

The resulting emphasis on securing state law protections—and on public education—has yielded steady, transformative progress. Now, at least twenty-one states have protections against sexual orientation discrimination in employment and at least sixteen states and the District of Columbia also explicitly protect against gender identity discrimination.¹⁸ Nearly half the LGBT population of the United States lives in a state that offers at least some formal legal recognition to same-sex couples.¹⁹ In pursuing these advances—in a variety of fora—the LGBT community’s advocates have consistently paired litigation with public education campaigns, while always considering the potential for favorable or adverse political responses.²⁰ I believe Mary Dunlap

mandatory adjudication of lesbian and gay applicants for security clearances).

16. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating thirteen remaining state sodomy laws); *Romer v. Evans*, 517 U.S. 620 (1996) (holding unconstitutional Colorado’s antigay Amendment 2); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding that Title VII’s sex discrimination prohibition protects transgender employees who transition at work and face adverse treatment due to gender non-conformity); *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (holding unconstitutional as a violation of “full faith and credit” guarantee an Oklahoma statute that precluded recognition of other states’ judgments of adoption by same-sex couples, in context of request for new birth certificates for children adopted out-of-state); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) (holding that foreign government’s policy of forcibly attempting to change individual’s sexual orientation is persecution, even if undertaken with intention to help individual, in context of asylum claim); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (holding that failure to protect gay student against peer abuse can constitute sex discrimination or sexual orientation discrimination in violation of equal protection guarantee).

17. See, e.g., Brief of Petitioners at 27–49, *Lawrence*, 539 U.S. 558 (No. 02-102); *Lawrence*, 539 U.S. at 575–76; *id.* at 581–82 (O’Connor, J., concurring).

18. *Employment Non-Discrimination Laws*, *supra* note 3. See also Jennifer C. Pizer, Brad Sears, Christy Mallory & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 755–56 (2012).

19. *Marriage & Relationship Recognition Laws: Positive Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/marriage_relationship_laws (last updated Jan. 15, 2013). See also JENNIFER C. PIZER & SHEILA JAMES KUEHL, THE WILLIAMS INST., SAME-SEX COUPLES AND MARRIAGE: MODEL LEGISLATION FOR ALLOWING SAME-SEX COUPLES TO MARRY OR ALL COUPLES TO FORM A CIVIL UNION 3 (2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Pizer-Kuehl-Model-Marriage-Report.pdf>.

20. By “community advocates,” I refer mainly to the three leading national groups engaged in impact litigation, policy advocacy, and public education to end discrimination against lesbian, gay,

would have approved.

Today's *RLSC* editors rightly have observed that we are at a similar moment now. When we gathered in October, the Supreme Court had before it simultaneous petitions for certiorari in an unprecedented half-a-dozen cases concerning the extent to which the U.S. Constitution secures the rights of same-sex couples.²¹ *Hollingsworth v. Perry*, the impetus for this symposium, has had the highest profile.²² Modeled on *Loving v. Virginia*,²³ it presented federal constitutional claims framed broadly in pursuit of a breakthrough decision that would secure the freedom to marry for same-sex couples coast to coast.²⁴ From its first filing in 2009, supporters and detractors alike have been preoccupied with possibilities for its eventual denouement in the Supreme Court. The District Court approved plaintiffs' approach.²⁵ But, the Ninth Circuit narrowed *Perry*'s direct effect just to California and explicitly avoided breaking new legal ground.²⁶ And then, when the Supreme Court granted review, it directed the parties also to brief whether the proponents of Proposition 8 who filed the Ninth Circuit appeal and the petition for certiorari had standing to take these steps.²⁷ The case now offers the Court a range of options for deciding the merits, or

bisexual and transgender (LGBT) people—Lambda Legal, the ACLU LGBT Rights Project, and the National Center for Lesbian Rights—and their sister group in New England, Gay and Lesbian Advocates and Defenders. In this essay I refer to them as the "LGBT Legal Groups." Educational materials related to their cases are available at www.LambdaLegal.org, www.aclu.org, www.nclrights.org, and www.glad.org.

21. In addition to *Perry*, these cases were *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307), *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3006 (U.S. July 3, 2012) (No. 12-15), *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), *petition for cert. filed*, 81 U.S.L.W. 3043 (U.S. July 2, 2012) (No. 12-23), *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-1750, 2012 WL 3113883 (D. Conn. July 31, 2012), *petition for cert. filed*, 81 U.S.L.W. 3087 (U.S. Aug. 21, 2012) (No. 12-231), and *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), *petition for cert. filed*, 81 U.S.L.W. 3048 (U.S. July 3, 2012) (No. 12-16).

22. *Perry* was filed by the American Foundation for Equal Rights (AFER), a nonprofit formed to fund the case and undertake related education. AFER hired Ted Olson and David Boies and their respective law firms, Gibson, Dunn & Crutcher, LLP and Boies, Schiller & Flexner, LLP. This dedication to a single case and payment of commercial law firm fees represents a new approach. The LGBT Legal Groups also frequently co-counsel with the nation's elite law firms but, when they do so, the firms undertake the work as part of their pro bono commitment.

23. 388 U.S. 1 (1967) (holding that anti-miscegenation laws violate interracial couples' rights to equal protection and substantive due process).

24. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F. 3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

25. *Id.* at 991–1003 (holding that the fundamental right to marry is an individual right not limited to those wishing to marry someone of a different sex, that antigay classifications warrant strict equal protection scrutiny, and that the state interests offered in defense of Proposition 8 were insufficient under either strict scrutiny or rational basis equal protection review).

26. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

27. *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

concluding the appeal from the District Court was improperly taken.

Meanwhile, the Court also had petitions for certiorari in four cases in which lower federal courts found unconstitutional a section of the so-called "Defense of Marriage Act" (DOMA).²⁸ Decisions of the First and Second Circuits both applied equal protection reasoning indisputably *not* yet adopted by the Supreme Court in gay rights cases,²⁹ and the U.S. Department of Justice has proposed direct Supreme Court review of a Northern California District Court decision that likewise stepped ahead of current Supreme Court precedent.³⁰ Because the limited, regional reach of these decisions meant federal agencies would be unable to administer federal laws uniformly,³¹ it was widely anticipated that the Court would agree to hear at least one of them. And, indeed, the Court did grant review in *Windsor*.³²

Perry and *Windsor* present distinct legal questions. The first concerns state power used to restrict who may marry and the second considers a federal rule distinguishing between two groups of legally married people for federal law purposes. Because both cases involve marriage and same-sex couples, the reasons offered in defense of both restrictions overlap considerably. But *Perry* offers a particularly interesting window onto this field, especially given some of the similarities and contrasts in strategy between *Perry* and most marriage equality cases brought by the LGBT legal groups. The Symposium panel that I was on was asked how *Perry* has affected litigation strategies in other marriage-rights cases. Upon reflection, I concluded there has been limited effect. But the comparison prompts me to make three observations. First, many elements that built the successful *Perry* case record to this point are the same as those that

28. 1 U.S.C. § 7 (2006). These cases were *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307), *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3006 (U.S. July 3, 2012) (No. 12-15), *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-1750 (VLB), 2012 WL 3113883 (D. Conn. July 31, 2012), *petition for cert. filed*, 81 U.S.L.W. 3087 (U.S. Aug. 21, 2012) (No. 12-231), and *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), *petition for cert. filed*, 81 U.S.L.W. 3048 (U.S. July 3, 2012) (No. 12-16). All four challenge Section 3 of DOMA, which provides that only the marriages of different-sex couples are recognized as marriages for purposes of federal law.

29. *Windsor*, 699 F.3d at 181–85 (finding that DOMA imposes a sexual orientation classification and holding, for the first time by a federal appellate court, that such classifications warrant heightened equal protection scrutiny); *Massachusetts*, 682 F.3d at 1, 11 (holding that rational basis review should be applied but that a more searching form of that analysis is warranted due to the federalism concerns presented by DOMA's imposition of federal discrimination in an area of traditional state authority).

30. *Golinski*, 824 F. Supp. 2d at 968 (concluding that heightened scrutiny should be applied to DOMA's sexual orientation classification).

31. According to the General Accounting Office, one's marital status is relevant in 1,138 provisions of federal law, not including the countless federal implementing regulations and bodies of non-regulatory guidance. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004), *available at* <http://www.gao.gov/new.items/d04353r.pdf>.

32. 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307).

yielded good results in prior cases and remain instrumental. Second, key differences in how *Perry* initially was launched reflect the different measures of optimism and skepticism between the *Perry* team and the LGBT Legal Groups about whether the U.S. Supreme Court is likely to vindicate lesbian and gay couples' marriage claims broadly in the near term. Third, other points of difference highlight the critical roles of messengers and allies in this advocacy.

II.

CONSISTENT LITIGATION THEMES ACROSS DECADES

Same-sex couples have been seeking the freedom to marry through litigation since the 1970s, in the first days of the modern gay rights movement post-Stonewall.³³ The judges who considered those early cases hardly took the claims seriously, often simply citing dictionary descriptions of who is approved, rather than legal reasons for who is denied.³⁴ As the movement advanced, we marked progress in the 1980s when strong dissenting voices emerged.³⁵ And then, in 1993, the Hawaii Supreme Court opened a new, promising chapter by putting the burden of justification on the State for the first time and ordering a trial of whether there indeed are constitutionally adequate reasons for denying same-sex couples an equal opportunity to marry.³⁶ That order grabbed the attention of the nation. *

The trial that followed tested the lone reason the State had not abandoned for keeping marriage as a different-sex-only institution—that doing so purportedly benefits children.³⁷ At trial, however, the social science experts called to defend the exclusion of gay couples acknowledged, under cross-examination, that marriage discrimination cannot be expected to help children.³⁸ The trial court made detailed factual findings and concluded that the State had no grounds for maintaining the exclusion.³⁹

Fast-forward sixteen years and those watching the *Perry* trial witnessed a similar acknowledgement of society's true interests. David Blankenhorn was called as the sole expert to defend Proposition 8 based on the ostensible needs of children for parents of different sexes.⁴⁰ He instead admitted that he could not identify any concrete ways that excluding same-sex couples from marriage

33. See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

34. *Baker*, 191 N.W.2d at 186 n.1; *Singer*, 522 P.2d at 1191.

35. *Dean v. District of Columbia*, 653 A.2d 307, 309–61 (D.C. 1995) (Ferren, J., concurring in part and dissenting in part).

36. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

37. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996).

38. See *id.* at *4, *5, *7–8, *10.

39. *Id.* at *16–17, *18.

40. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 945–50 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F. 3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

assists different-sex couples, their children, or society, and that denying same-sex couples marriage harms them and their children.⁴¹

The parallels between *Baehr* and *Perry* continue. As in *Baehr*, the *Perry* trial court made detailed factual findings and concluded there were no constitutionally adequate grounds for the discriminatory abridgement of the freedom to marry.⁴² And again, the factual findings did not shape the outcome on appeal.⁴³ But both times, the trial court took the legal claims seriously, interrogated the anti-gay family policy, and exposed the emptiness of the defense case. And both times, that dramatic process had significant public education value and positive social change effect.

Of course, *Baehr* and *Perry* represent different stages in public awareness. During the years in between the two cases, public discussion, legislation, and ballot fights continued coast-to-coast.⁴⁴ Same-sex couples continued to challenge denial of their freedom to marry through litigation.⁴⁵ The LGBT Legal Groups managed many such cases as part of a coordinated strategy. Knowing the Hawaii plaintiffs were not aberrant in their desire to marry, and that courts elsewhere probably also would give fair consideration to same-sex couples' claims, the LGBT Legal Groups undertook exhaustive research to determine where additional marriage litigation might productively be launched. Considerations included (1) whether state jurisprudence protects individual and minority rights more robustly than federal jurisprudence, (2) the extent to which state family law protects same-sex couples and their families, (3) whether state judges are elected or appointed and face retention votes, and (4) how easy or difficult it is to amend the state's constitution. The 1999 *Baker v. State* case in Vermont and then *Goodridge v. Department of Public Health* in Massachusetts four years later, both brought by GLAD, were the first to emerge from that collaborative research and planning process,⁴⁶ followed by *Lewis v. Harris*, litigated in New Jersey by Lambda Legal.⁴⁷

Varnum v. Brien, decided by the Iowa Supreme Court in the spring of 2009,

41. *Id.* at 950.

42. *Id.* at 1003.

43. The *Baehr* trial court decision was superseded by referendum. *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *5 (Dec. 9, 1999). *Perry* was decided on narrow grounds largely as a matter of law based on *Romer*, 517 U.S. 620, 620 (1996), without relying on the district court's factual findings. See *Perry v. Brown*, 671 F.3d 1052, 1075–95 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

44. For lists of affirmative protections including marriage for same-sex couples, see *Marriage & Relationship Recognition Laws: Positive Laws*, *supra* note 19. For current state restrictions on marriage and other relationship protections for same-sex couples, see *Marriage & Relationship Recognition Laws: Negative Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/marriage_relationship_laws (last updated Jan. 15, 2013).

45. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 397–98 & n.3 (2008); Mark Strasser, *A Little Older, a Little Wiser, and Still Committed*, 61 RUTGERS L. REV. 507, 526–27 & nn.75–83 (2009).

46. 744 A.2d 864 (Vt. 1999); 798 N.E.2d 941 (Mass. 2003).

47. 908 A.2d 196 (N.J. 2006).

shows the point to which the case planning had evolved by 2006 when that case began.⁴⁸ Lambda Legal framed the case to answer directly the baseless assertions that marriage discrimination benefits children. This was done by spotlighting children with same-sex parents who have been thriving developmentally but have been burdened by the discrimination against their parents. Doctors Michael Lamb, Anne Peplau and Greg Herek, and Professors George Chauncy, Nancy Cott and Lee Badgett, among others, provided expert testimony respectively on the needs of children, the dynamics of adult relationships, the nature of sexual orientation, the history of antigay discrimination and of marriage, and the economic consequences of marriage discrimination. Each expert had provided similar testimony in past cases addressing civil rights protections, adoption or foster care bans, or marriage.⁴⁹ Many unfamiliar with Iowa civil rights history found the unanimous victory astounding. But those who knew Iowa state civil rights history, the fiercely independent Iowa judiciary, and the former Iowa Solicitor General who joined Lambda Legal to co-counsel the case pro bono, were joyous but not surprised. And as a side benefit, the case built on prior litigation and produced templates for expert witness preparation in a marriage case long before Judge Walker requested a trial in *Perry*.⁵⁰

III.

OF OPTIMISM AND SKEPTICISM

AFER conceived of *Perry* as a federal court challenge presenting broad federal constitutional claims taking aim not just at Proposition 8, but at all the state marriage restrictions nationwide. It sought a fast resolution in the Supreme Court by requesting urgent injunctive relief, the denial of which entails a right of immediate appeal. Put together, these elements made for a daring, high-risk endeavor.

True, the federal due process and equal protection claims were framed much like the claims in most marriage cases brought pursuant to state constitutions.

48. 763 N.W.2d 862 (Iowa 2009).

49. Numerous preeminent researchers and scholars have lent their expertise over the years, often repeatedly, to assist courts grappling with issues of sexual orientation or gender identity discrimination and working to apply appropriately the legal tests that have evolved in other civil rights contexts. By listing just these individuals—each of whom also testified at the *Perry* trial—I do not intend to convey lack of respect or appreciation for the contributions of the many others who have played critical roles in impact cases over the years.

50. To the starting templates, the campaigns for and against Proposition 8 and the preexisting legal landscape of California of course provided copious new material that added to the drama of the trial. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), also offered a starting template for demonstrating at trial the infirmity of an antigay initiative by interrogating its enactment campaign in the context of the long history of antigay discrimination and the other factors relevant to whether heightened equal protection scrutiny should apply. See also *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 434–40 (S.D. Ohio 1994) (presenting expert testimony at trial and successfully showing that heightened scrutiny should apply to an antigay local ballot measure and that the measure could not survive such review).

But a state win or loss applies just within that state. In contrast, if it is confirmed in federal court that the fundamental right to marry is an individual right under federal law and is not limited by sexual orientation, that ruling would have national implications. The federal due process clause ultimately must mean the same thing in Kentucky as California, and in Mississippi as Massachusetts. The same is true for a federal equal protection ruling that states lack adequate grounds to treat same-sex couples and different-sex couples unequally regarding marriage. Both claims are, to most of us working in the LGBT rights legal field, obviously sound. The question always has been when to ask the Supreme Court its view.

For the injunction hearing about a month after the case's launch—with AFER's blessing—the LGBT Legal Groups filed an amicus brief in the District Court that framed the equal protection claim more narrowly than AFER had done, in a manner that applied just to California and did not employ heightened scrutiny.⁵¹ Notwithstanding plaintiffs' desire to argue the case as a matter of law⁵² and, win or lose, to advance quickly to the Ninth Circuit, Judge Walker deferred ruling on the injunction motion and urged the parties instead to present evidence at trial on a series of questions about marriage, same-sex couples, and the factors bearing on whether antigay laws should be presumed unconstitutional.⁵³ Suddenly, the case was on a longer timetable than the plaintiffs had initially anticipated and the court had a range of issues and theories to consider. The San Francisco City Attorney's Office was allowed to co-counsel the case.⁵⁴ The LGBT Legal Groups were not permitted to intervene,⁵⁵ and so assisted in other ways. For example, they provided to plaintiffs' counsel expert witness material from cases including *Varnum*, *Romer*, *Equality Foundation*, and *In re Adoption of X.X.G.*,⁵⁶ and filed multiple *amicus* briefs further developing the more narrowly framed equal protection analysis.⁵⁷

51. Brief of Amici Curiae, ACLU, Lambda Legal Defense and Education Fund, Inc. & National Center for Lesbian Rights at 6–17, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292 VRW).

52. Reporter's Transcript of Proceedings at 20, 21, 24, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (No. 09-CV-2292), available at <http://www.afer.org/wp-content/uploads/2009/12/2009-07-02-AFER-Hearing-Transcript.pdf>.

53. Order, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (No. 09-CV-2292) (deferring ruling on preliminary injunction motion and listing factual issues for trial), available at http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/perry_ca_20090630_order-granting-motion-to-intervene.pdf. See also Reporter's Transcript of Proceedings, *supra* note 52, at 9–12, 19.

54. Transcript of Proceedings at 25–33, 53–56, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (No. 09-CV-2292), available at <http://www.afer.org/wp-content/uploads/2009/12/2009-08-19-AFER-Hearing-Transcript-Mtn-to-Intervene-and-Case-Mgmt.pdf>.

55. *Id.* at 9–17, 50–51.

56. Fla. Dep't of Children & Families v. *In re Matter of Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (invalidating Florida's ban on adoption by lesbian or gay adults).

57. The LGBT Legal Groups' post-trial amicus brief and amicus brief to the Ninth Circuit are available at http://www.lambdalegal.org/sites/default/files/legaldocs/downloads/perry_ca_20100

Over the next six months, plaintiffs' counsel did a stellar job drawing from the materials provided from the prior cases and building upon them. Given the much-publicized tensions between AFER and the LGBT Legal Groups when the case began, it is worth reflecting on how the case evolved during the three-and-a-half-years that followed. The Supreme Court has granted review in a case with broad rulings from the District Court, a narrow framing by the Court of Appeal, and a thorough factual record. The completeness of this package is due to the pragmatism, flexibility, and skill of plaintiffs' counsel, as well as to the assistance of those who have been litigating in the area for years, including those in the San Francisco City Attorney's office—who co-counseled the trial—and those at the LGBT Legal Groups—who helped from a distance.⁵⁸

IV.

OF MESSENGERS AND ALLIES

In the marriage cases brought by the LGBT Legal Groups, some consistent litigation choices address a central challenge that the LGBT movement faces—an opposition based on myths and stereotypes that persist due to the continued invisibility of many LGBT people, who hide in part due to persistent hostility driven by ignorance. Certain political and religious groups deliberately feed this vicious cycle. But, because those groups' assertions are false, we succeed as we prompt those who have seen gay people as “other” and “less than” to look again and to recognize that the capacity and yearning for love, commitment, and family are not functions of sexual orientation. When mainstream institutions and respected non-LGBT leaders confirm that they, too, see through the falsehoods and reject discrimination, it can be even more persuasive.

To prompt a broader range of nongay people to reconsider their assumptions about why same-sex couples should or should not be permitted to marry, assembling a pool of plaintiffs who demonstrate the racial, socio-economic, religious and geographic diversity of the affected population and who can be effective messengers to diverse audiences often is an effective strategy. Additionally, it can be helpful to emphasize that many same-sex couples are raising children and caring for other family members and that those children and family members also pay a price when the law discriminates. *Amici curiae* from across communities, professions, and perspectives can then reinforce these points and show that past precedents concerning marriage and civil rights should apply similarly here. Leading law firms, scholars, retired judges and other

203_amicusaclu-lambda-legal-et-al.pdf and http://www.lambdalegal.org/sites/default/files/legal_docs/downloads/perry_ca_20101025_amicu-aclu-nc-et-al.pdf.

58. The most relevant prior years for *Perry* were 2004 to 2008, when the San Francisco City Attorney's office and LGBT Legal Groups litigated *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), and *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), which together solidified the foundation of California family law and constitutional law protecting lesbian and gay couples and led to 18,000 legally married same-sex couples showing through their stable, daily lives the fictions underlying the defense case in *Perry*.

respected legal voices are invited to weigh in as co-counsel, counsel for *amici*, or *amici* themselves. Their presence reinforces that thoughtful people invested in the integrity of our legal system now call out the historical habit of stigmatizing and excluding LGBT people as unwarranted and harmful.

Other key case planning questions routinely include whether to rely primarily on legal arguments,⁵⁹ and whether to supplement the plaintiffs' testimony with experts and, if so, on what points. If evidence is to be introduced, should it be done through affidavits, deposition testimony, or a trial? As case records from Hawaii to Iowa demonstrate, the answers vary depending on (1) what needs to be established given state law and defense arguments, and (2) where credibility issues are likely to arise and make a difference. Counsel must decide whether cross-examination will be helpful enough to warrant the time and resources of a trial. Of course, these strategy decisions may not rest exclusively with counsel. For example, where Judge Walker wanted a trial in *Perry*, Judge Kramer did not permit one in *In re Marriage Cases*.⁶⁰

Litigation planning involves not just proving each element of the claims, but selection of messengers to build credibility and to encourage decision-makers to relinquish fears or biases they may not even realize they have. In AFER's approach, the key messengers were not the plaintiffs, the experts, or the advocacy group, though they all played roles. Instead, they were Ted Olson and, secondarily, David Boies. Their partnership has been so effective—as a public education strategy at least—because it was so unexpected. Also, this teaming of former adversaries with opposing political views seems to obviate a need some in media seem to perceive for a kind of “balance” that frequently leads to inclusion of an antigay spokesperson whenever counsel for same-sex couples will be heard. Without that hostile opponent, a much more engaging and persuasive interview is possible.

Ted Olson also has been effective because, as a leading conservative, he has credibility with conservative audiences. He speaks about why marriage is, in many ways, a conservative institution. He reminds people that ending government interference with individual freedom historically has been a conservative value. When he calls out publicly the inconsistency between his party's libertarian traditions and its current opposition to gay people's freedom to marry, it seems to ring true for some groups of people who have been resistant

59. For example, in a state that imposes the same rights and obligations on parents regardless of parental sexual orientation, plaintiffs can say that the state should not be heard to contend that it excludes same-sex couples from marriage to discourage them from being parents because state policy is that children need parental role models of different genders. In other words, if existing state law establishes certain policies, then the court may recognize those policies as a matter of law without needing additional evidence. See *In re Marriage Cases*, 183 P.3d at 429. Given the well-developed law in California, the LGBT Legal Groups took that approach in the state marriage litigation. See Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1285–86 (2010).

60. 183 P.3d at 403–04; Cummings & NeJaime, *supra* note 59, at 1285.

to change in this area of law.

Perhaps because Olson is AFER's main messenger, *Perry* has two plaintiff couples rather than a larger group. There is gender balance but not a priority on showing racial, religious and other diversity.⁶¹ Plaintiffs' case emphasized the emotional meaning of marriage and the related harms of being relegated to second-class status by being offered only domestic partnership. They relied especially on Dr. Ilan Meyer's testimony about the health consequences of minority stress due to social stigma. Given the comprehensive nature of California's partnership system, it may have made sense to focus less on practical problems caused by a lack of legal protections and more on the mental health consequences of stigma. This approach probably would seem incomplete in other states that refuse same-sex couples any legal status and leave them grossly vulnerable, but it compellingly demonstrated the inequality and harm of California's two-tier family recognition system.

But, regardless of how far the law has developed in any particular state, the movement needs an ever-broader array of messengers engaging audiences with the questions that always lie at the heart of this equal protection problem: How would *you* feel if you were told that your love and commitment are unworthy of the dignity and celebration afforded all others? Would *you* want to be relegated to only domestic partnership or civil union rather than the status and language of marriage that is familiar to young and old alike? Yes, it boils down to the Golden Rule. And more people are hearing this "do unto others" message every day. Because the issue still makes some people uncomfortable, new, reassuring messengers are invaluable. As a public education matter, who more persuasive for those who feel threatened by this proposal for change than a grandfatherly stalwart of the Republican Party?

As a litigation matter, however, a shrewd choice of messengers does not necessarily answer the central question *Perry* poses: Is it reasonable to think a majority of this Supreme Court is prepared now to strike down the marriage restrictions of four-fifths of the states? Considering that only sixteen states still had anti-miscegenation laws when *Loving v. Virginia* negated them federally,⁶² and that only thirteen state sodomy laws remained when *Lawrence* revisited *Bowers*,⁶³ it seems implausible that *Perry* will be *Loving* for same-sex couples. And yet, because of the flexible engagement of so many inside and outside the *Perry* litigation, the options for a favorable outcome are varied, the extremity of the stakes reduced, and the odds of success continue, with time, to increase. We are long past doubt about the eventual answer to the constitutional question. By

61. At trial, plaintiffs did include the lay witness testimony of Helen Zia. As in the state litigation, she explained the importance of the familiar language and meaning of marriage, especially to her mother and her mother's Chinese-speaking friends. See *In re Marriage Cases*, 49 Cal Rptr. 3d 675, 734 n.23 (Cal. Ct. App. 2006) (Kline, J., concurring in part and dissenting in part).

62. 388 U.S. 1, 6 (1967).

63. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

this journal's next LGBT rights symposium, today's impassioned foes of gay and lesbian nuptials likely will appear as overwrought and anachronistic as the *Bowers* majority appears now.

V.

CONCLUSION

Why revisit so much history for a symposium dedicated to debating *Perry*'s potential future in the Supreme Court and its long-term significance? It is because we cannot assess the likely prospects for any case without its historical context. We also cannot draw sensible conclusions from *Perry* about impact lawyering for LGBT people without acknowledging the case's similarities to other cases, including some in which federal district courts took evidence and concluded that heightened scrutiny should apply to antigay discrimination as it does to other classifications, only to have the appellate courts refuse that conclusion.⁶⁴

But even as we put *Perry* in its historical perspective, the overall progress of this multi-dimensional movement is remarkable. Four years ago, California voters passed Proposition 8. This November, voters in all four states with ballot measures on marriage voted against discrimination. In Maine, Maryland and Washington, the measures ratified marriage equality after the state legislatures already had done so.⁶⁵ In Minnesota, voters rejected a proposed state

64. See, e.g., *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 434–40 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261, 267–68 (6th Cir. 1995); *Jantz v. Muci*, 759 F. Supp. 1543, 1546–51 (D. Kan. 1991), *rev'd*, 976 F.2d 623, 629–30 (10th Cir. 1992); *BenShalom v. Marsh*, 703 F. Supp. 1372, 1378–80 (E.D. Wis. 1989), *rev'd*, 881 F.2d 454, 464 (7th Cir. 1989); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1368–70 (N.D. Cal. 1987), *rev'd*, 895 F.2d 563, 573–74 (9th Cir. 1990). Likewise, when prognosticating about the continuing influence of Judge Walker's decision in *Perry*, we should consider the multiple rulings from trial courts in other famously gay-friendly cities that eloquently affirmed same-sex couples' freedom to marry, only to have appellate courts shy away. See, e.g., *Hernandez v. Robles*, 794 N.Y.S.2d 579, 609–10 (Sup. Ct. 2005), *rev'd*, 805 N.Y.S.2d 354, 358–63 (App. Div. 2005), *aff'd*, 855 N.E.2d 1, 7–12 (N.Y. 2006); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *5–11 (Wash. Super. Ct. Aug. 4, 2004), *rev'd*, 138 P.3d 963, 968–69 (Wash. 2006); *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145, at *8–9 (Md. Cir. Ct. Jan. 20, 2006), *rev'd*, 932 A.2d 571, 635 (Md. 2007).

65. Maine voters approved an initiative that ratified the substance of a marriage law passed in 2009 as Public Law Chapter 82 of the 124th Maine Legislature, which had been rejected by state voters that year. For 2012 and 2009 ballot information, see *Maine Same-Sex Marriage Question, Question 1 (2012)*, BALLOTPEDIA, [http://www.ballotpedia.com/wiki/index.php/Maine_Same-Sex_Marriage_Question_Question_1_\(2012\)](http://www.ballotpedia.com/wiki/index.php/Maine_Same-Sex_Marriage_Question_Question_1_(2012)) (last modified Jan. 8, 2013); *Maine Same-Sex Marriage People's Veto, Question 1 (2009)*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/Maine_SameSex_Marriage_People's_Veto_Question_1_\(2009\)](http://ballotpedia.org/wiki/index.php/Maine_SameSex_Marriage_People's_Veto_Question_1_(2009)) (last modified Oct. 24, 2012). The Maryland marriage bill was House Bill 438, which became Chapter 2, 2012 Laws of Maryland. Washington State's marriage bill was Substitute Senate Bill 6239, which became Chapter 3, Laws of 2012. For information concerning the Maryland and Washington ballot measures, see *Maryland Same-Sex Civil Marriage Referendum, Question 6 (2012)*, BALLOTPEDIA, [http://www.ballotpedia.com/wiki/index.php/Maryland_SameSex_Marriage_Referendum_Question_6_\(2012\)](http://www.ballotpedia.com/wiki/index.php/Maryland_SameSex_Marriage_Referendum_Question_6_(2012)) (last modified Jan. 2, 2013); *Washington Same-Sex Marriage Veto Referendum*,

constitutional amendment to restrict marriage to different-sex couples,⁶⁶ setting the stage for marriage equality legislation in 2013.⁶⁷ Record numbers of openly LGBT candidates won at all levels of government.⁶⁸ And an unbroken chain of federal court decisions—most written by Republican appointees—has held DOMA unconstitutional. Taking all this into account, is it still too early to ask the Supreme Court to address antigay marriage restrictions definitively? Despite the accelerating pace of change, none of us really knows. What we do know is that, concerning issues of sexuality and gender roles, people can be fiercely irrational. So despite the mountain of precedent, there remain a great many judges, legislators, and voters to whom the case still must be made. Same-sex couples will continue to do their part—sharing their stories of love and simple desire to celebrate the binding together of their lives and families. A more diverse group of messengers will produce a more receptive audience. And we social change lawyers must remain creative, flexible, and determined in our role as responsible catalysts in order to chart the best paths toward justice for our clients and community.

Referendum 74 (2012), BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/Washington_Same-Sex_Marriage_Veto_Referendum,_Referendum_74_\(2012\)](http://ballotpedia.org/wiki/index.php/Washington_Same-Sex_Marriage_Veto_Referendum,_Referendum_74_(2012)) (last modified Jan. 9, 2013).

66. Doug Belden, *Minnesota Defeats Marriage Amendment*, TWINCITIES.COM (Nov. 7, 2012), http://www.twincities.com/elections/ci_21945639/minnesota-first-state-defeat-gay-marriage-amendment. See also *Minnesota Same-Sex Marriage Amendment, Amendment 1 (2012)*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/Minnesota_SameSex_Marriage_Amendment,_Amendment_1_\(2012\)](http://ballotpedia.org/wiki/index.php/Minnesota_SameSex_Marriage_Amendment,_Amendment_1_(2012)) (last modified Dec. 16, 2012).

67. See Ann Kaner-Roth, *New Year, New Legislature*, PROJECT 515, <http://project515.org/new-year-new-legislature/> (last visited Jan. 28, 2013).

68. See, e.g., Denis Dison, *Victory Fund Celebrates Huge Night for Gay Candidates*, GAY POLITICS (Nov. 7, 2012), <http://www.gaypolitics.com/2012/11/07/victory-fund-celebrates-huge-night-for-gay-candidates/>.

