

THE PAST, PRESENT, AND FUTURE ROLE OF *HOLLINGSWORTH V. PERRY*: AN INTRODUCTION

MATEYA BETH KELLEY[†]

As this issue of the *N.Y.U. Review of Law & Social Change* goes to print, the Supreme Court will hear *Hollingsworth v. Perry*¹ in a matter of weeks.² The seesawing legal status of same-sex marriage in California over the last eight years will come to an end, or it will not.³ Either way, the goal of this issue is not to predict any ultimate outcome for the case. You will find here very few guesses on how the Justices may rule, but a feast of suggestions on how they ought to rule. We hope the latter may be of some use in coming months. But more than that, we hope this issue will be a resource in coming decades as a study in the

[†] Mateya Beth Kelley is the 2012–2013 Symposium Editor for the *N.Y.U. Review of Law & Social Change*. She is currently a third-year student at NYU School of Law. She would like to thank her Editors-in-Chief, Kate Berry and Elizabeth Daniel Vasquez, for their courage and professionalism in publishing this issue, the entirety of the journal staff for making it happen, and our authors for their trust and insight. Chief Justice Earl Warren Professor of Constitutional Law Kenji Yoshino, our journal sponsor, is also owed tremendous thanks for his support.

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. This issue went to print in early March 2013. The Court will hear oral argument on March 26, 2013. *See Argument Calendars for the Session Beginning March 18, 2013*, SUP. CT. OF THE U.S., http://www.supremecourt.gov/oral_arguments/argument_calendars/Monthly%20ArgumentCalMar2013.pdf (last updated Feb. 1, 2013).

3. First, I am counting eight years from 2004, when the first lawsuits challenged a California state law defining marriage as between one man and one woman. In 2008, plaintiffs won these consolidated cases under the California Constitution before the California Supreme Court. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008). This decision was superseded by Proposition 8, which led to the filing of *Perry*. *See Perry v. Brown*, 671 F.3d 1052, 1064–68 (9th Cir. 2012) (discussing *Perry*'s immediate history), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

Second, in granting certiorari, the Court agreed to address the petitioners' question but also asked both parties to brief and argue whether petitioners have standing. Order of the Sup. Ct. Certiorari Granted, 568 U.S. ___, (Dec. 7, 2012) (No. 12-144), *available at* http://www.supremecourt.gov/orders/courtorders/120712zr_3f14.pdf; Petition for Writ of Certiorari for Defendant-Appellant, *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. July 30, 2012) (No. 12-144), *available at* http://www.supremecourt.gov/docket/PDFs/12-144_Petition_for_Certiorari.pdf (asking "[w]hether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman").

Third, if the Court holds that petitioners lacked standing to appeal, the definition of marriage across the state will remain in flux because only two California counties would be bound by the reinstated district court opinion. *See Kenji Yoshino, Commentary on Marriage Grants: Different Ways of Splitting the Difference—The Menu of Options in Hollingsworth v. Perry*, SCOTUSBLOG (Dec. 8, 2012, 9:48 AM), <http://www.scotusblog.com/2012/12/commentary-on-marriage-grants-different-ways-of-splitting-the-difference-the-menu-of-options-in-hollingsworth-v-perry/>.

way one case fits into a larger movement.

You have here a time capsule, filled with leading and emerging voices in the LGBTQ movement reflecting on *Perry* before the Court has its final say, before anyone gets the benefit of 20/20 hindsight. Indeed, these comments were first drafted before the Court had even granted certiorari, and have been only minimally edited since then. This timeline is by design. The printed issue is a companion piece to the live symposium of the same name organized by the *Social Change* Board⁴—and a long list of crucial collaborators⁵—at NYU School of Law in October 2012. We intended to foster a useful conversation in the live symposium by convening key players in the case with other brilliant advocates and asking them to reflect on the case and, with certiorari pending, to imagine the best next step. With this issue, we expand and memorialize that discussion. We are confident *Perry* stands already as a landmark case in both constitutional law and social-change history; we are delighted to preserve some of the hopes, uncertainties, and strategies behind it in this volume.

Three questions guided both the live symposium, corresponding to three panels at the live event, and the written volume, corresponding to the three sections contained within. Section one considers how *Perry* affects the work of LGBTQ advocates working on issues other than marriage equality, or on marriage equality in ways other than litigation. Section two considers how *Perry* has affected other marriage-equality litigation strategies. Section three considers how, ideally, the Court should decide *Perry*.

4. The live event—“Making Constitutional Change: The Past, Present and Future Role of *Perry v. Brown*”—was held at the law school on October 4th and 5th, 2012. On the 4th, Will Pomerantz of Epic Theater Ensemble staged a reading of the American Foundation for Equal Rights and Broadway Impact’s 8, a play by Dustin Lance Black. On the 5th, Rachel Maddow interviewed *Perry* litigators David Boies and Theodore B. Olson and then twelve panelists joined in three panels. We are exceedingly grateful to Ms. Maddow, Mr. Boies, and Mr. Olson, and to our panelists—Matt Coles, Erwin Chemerinsky, David Cruz, Jon W. Davidson, William Eskridge, Jr., Roberta A. Kaplan, Melissa Murray, Jennifer C. Pizer, Andrea J. Ritchie, Reva Siegel, Paul M. Smith, Therese Stewart, Evan Wolfson, and Kenji Yoshino—for their contributions. Our symposium was the best-attended in NYU School of Law’s history. Note that no video of the panels is available, but a full recording of Ms. Maddow’s interview of the litigators is available on her blog. Will Femia, *Rachel Maddow Interviews Olson and Boies on Marriage Equality*, THE MADDOW BLOG (Oct. 5 2012, 9:43 PM), http://maddowblog.msnbc.com/_news/2012/10/05/14250630-rachel-maddow-interviews-olson-and-boies-on-marriage-equality?lite.

5. Our symposium was, appropriately, a labor of love that couldn’t have happened without serious collaboration. Special thanks are due to Will Pomerantz and Ron Russell of Epic Theater Ensemble for bringing us such a moving rendition of 8. These thanks of course extend as well to their cast of volunteer recruits (in order of appearance): Elizabeth Rich, Lanna Joffrey, Ryan Weldon, Luke Doyle, Gian-Murray Gianino, Stephen Bel Davies, Todd Alan Johnson, Michael Kirby, Rhett Henkel, Kevin Hogan, Joyce Farmer-Clary, Brendan McMahon, Sloan Grenz, and Seth Duerr. NYU OUTLaw also played key roles in the live events—members Carson Baucher, Sara Maeder, and Geoffrey Wertime, in particular; administrative staff at NYU Law—James Britt, David Mora and Paul O’Grady especially; and members of the 2012–2013 *Social Change* Board, including my predecessor as Symposium Editor, Dan Svirsky.

I.

CONCEPTUAL STRUCTURE: AN HOURGLASS OF COLLATERAL EFFECT

In theory, the symposium questions channel the scope of inquiry around *Perry* into an hourglass-shaped map of collateral effect, with *Perry* now at mid-point. Our inquiries begin in question one at the top of the hourglass—the widest end of the funnel-shape—then narrow in question two, then burrow into the middle of the hourglass in question three, leading to the *Perry* decision itself. As the issue goes to print, we are all paused here; but in imagining an ideal decision, we are looking with our authors down through the hourglass to see the field broaden again around the many things new precedent might touch.

Thus, the first question is the broadest, surveying *Perry*'s place in a much bigger picture: a decades-long effort by LGBTQ-rights advocates and supporters for liberty and equality; that is, for the right to be who they are with acknowledged dignity. It raises a wide-range of attendant questions: What do community advocates seek today other than marriage equality? Does the current focus on marriage equality complement or advance those goals? Does it impose costs? Both? Neither? Who decides which goals go forward? What role does impact litigation play in the effort? How can impact litigators negotiate their role in answering these questions responsibly?

The second question narrows the inquiry by closing in specifically on litigation strategy. Situated in light of related cases now advancing at the federal level,⁶ the collateral-effect questions raised are similar to those from our first question: What arguments do these other cases make? Does *Perry* complement, advance, duplicate, or detract from other efforts? How can we assess those questions in light of the huge variety of goals discussed in Section I? What lessons can impact litigators and advocates for any kind of issue take from this history?

The third question narrows our focus to *Perry*'s immediate, undecided disposition in the Supreme Court—and, by putting the potential collateral effects of new precedent in play, turns our imaginations back to *Perry*'s broader effect on the movement and the country. Who might new precedent from the *Perry* case reach, beyond same-sex couples who want to marry in California? What might happen, and, more importantly for this issue, what *should* happen? Why? I count at least eleven different normative suggestions within these pages, with as many differing jurisprudential or policy arguments for ruling one way or another. The final choice is for the Court, of course. But we intend, by presenting such a wide range of ideas, to emphasize that it is also, at some level, the lawyers'.

6. For summary of the ten federal cases that petitioned for certiorari in the October 2012 Term, see Amy Howe, *Court to Consider Same-Sex Marriage Cases: In Plain English*, SCOTUSBLOG (Nov. 29, 2013, 8:39 PM), <http://www.scotusblog.com/2012/11/court-to-consider-same-sex-marriage-cases-in-plain-english/>.

Again, this progression of inquiry is all in theory, all in the abstract. Just as in the real world of rights advocacy, nothing works in practice exactly as it does in theory. In the final result, if the comments herein form some sort of picture, it is more like dots all over the what-does-*Perry*-mean map than a neatly conceived hourglass. That is, authors in each section speak to their own question, but they also may speak to the others. Consequently, if you are interested in any one of the questions, we encourage you to peruse the responses to them all.⁷

II.

BACKGROUND TO THIS ISSUE

Before we set you on your way, a few final background points round out this introduction: basic facts, a note on our editorial choices, and a point of personal reflection.

A. The Case at Issue: A Basic History of Hollingsworth v. Perry

The plaintiffs in *Perry* challenge California's Proposition 8 ("Prop 8") as a violation of the Fourteenth Amendment to the U.S. Constitution.⁸ Prop 8 amended the California constitution by popular referendum in 2008 as follows: "Only marriage between a man and a woman is valid or recognized in California."⁹ The amendment responded to a California Supreme Court case of the same year that invalidated an identically worded state law under the state constitution.¹⁰ *Perry* went to trial in January 2010, before federal District Judge Vaughn Walker of the Northern District of California.¹¹ Judge Walker held for the plaintiffs, striking down Prop 8 as both a violation of plaintiffs' fundamental

7. As an additional bonus, if you read through all of the comments, you will find a number of interesting sub-conversations. A constellation of them challenges the desirability of marriage at all, for example. Arguments for the benefits of domestic partnerships appear across the sections. A doctrinal debate about the virtues of a narrow versus broad holding recurs most often. An interest in *Perry*'s place on a global scale also emerges, and much more. While recognizing that you will most likely digest this issue in discrete bits, pulled from digital search engines and the internet, we hope you will also—if not now, someday—enjoy grappling with the whole.

8. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (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).

9. *Id.* See also Secretary of State for the State of California, *Official Voter Information Guide for California General Election Tuesday*, at 128 (text of Prop 8), 54–57 (summary and arguments for and against) (2008), available at <http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf>.

10. On May 15, 2008, in *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008), the California Supreme Court invalidated a California law identical to Prop 8 (passed also by referendum, in 2000, and known as Proposition 22) under the Fourteenth Amendment. See *Perry v. Brown*, 671 F.3d 1052, 1065–67 (9th Cir. 2012) for a concise summary of Proposition 22 and *In re Marriage Cases*' holdings under both the Due Process and Equal Protection clauses.

11. *E.g.*, Maura Dolan, *Novel Testimony Likely at Prop. 8 Trial*, L.A. TIMES, Jan. 11, 2010, at 4, available at 2010 WLNR 545874.

right to marry and as a form of irrational discrimination.¹² Judge Walker also found that the evidence supported application of heightened scrutiny on account of both sex and sexual orientation.¹³ The Ninth Circuit affirmed on narrower grounds, relying heavily on *Romer v. Evans* and holding that California could not take away a right once granted without a rational basis for doing so.¹⁴ The Supreme Court granted certiorari in December 2012.¹⁵ On the same day, it also accepted *United States v. Windsor*,¹⁶ one of eight challenges to the Federal Defense of Marriage Act simultaneously pending before it.¹⁷

Controversy has surrounded key players in the *Perry* litigation since its inception and continues to dog some of them. For many in the marriage equality movement, the plaintiffs' challenge seemed premature, and the wisdom of filing suit was hotly contested.¹⁸ Many institutional LGBTQ legal advocates perceived a loss to be too big a risk to their long-term state-by-state legal and political strategy.¹⁹ But still others, in and out of the movement, believed nothing could be better for the country than to see both David Boies and Theodore Olson—formerly best known for their roles on opposite sides of the controversy in *Bush v. Gore*²⁰—united as co-lead-litigators for the plaintiffs.²¹ Interest in these

12. *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 991 (holding that “Proposition 8 both unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation.”).

13. *Id.* at 996–97 (finding that a “claim based on sexual orientation is equivalent to a claim of discrimination based on sex” and that “[t]he trial record shows that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation”).

14. *Perry v. Brown*, 671 F.3d at 1063–64 (“Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite sex couples. The Constitution simply does not allow for ‘laws of this sort.’” (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996))).

15. Order of the Sup. Ct. Certiorari Granted, 568 U.S. ___, (Dec. 7, 2012) (No. 12-144), available at http://www.supremecourt.gov/orders/courtorders/120712zr_3f14.pdf.

16. *Id.*, granting cert. to *United States v. Windsor*, 699 F.3d 169 (2d Cir. 2012) (affirming that Section 3 of the Defense of Marriage Act is unconstitutional).

17. See Howe, *supra* note 6.

18. E.g., Chuleenan Svetvilas, *Challenging Prop 8: The Hidden Story*, CALIFORNIA LAWYER (Jan. 2010), <http://www.callawyer.com/clstory.cfm?pubdt=201001&eid=906575&evd=1>.

19. Memorandum from the ACLU, GLAD, Lambda Legal, NCLR, Equality Federation, Freedom to Marry, glad, Human Rights Campaign & National Gay & Lesbian Task Force, *Why the Ballot Box and Not the Courts Should Be the Next Step on Marriage in California* 3 (May 2009), available at http://www.aclu.org/pdfs/lgbt/ballot_box_20090527.pdf (“The bottom line. A marriage case based on the federal constitution may well not win the right to marry back in California. A loss would likely set back the fight for marriage nationwide and hurt LGBT parents, employees, and students all over America.”); Memorandum from the ACLU, GLAD, Lambda Legal, NCLR, Equality Federation, Freedom to Marry, glad, Human Rights Campaign & National Gay & Lesbian Task Force, *Make Change, Not Lawsuits* 1 (May 2009), available at https://www.aclu.org/pdfs/lgbt/make_change_20090527.pdf (“Bottom Line: . . . don’t go suing right away. Most lawsuits will likely set us all back. There are other ways to fight that are more likely to win.”).

20. 531 U.S. 98 (2000).

21. Cf. Joel Klein, *David Boies and Theodore Olson*, TIME (Apr. 29, 2010),

personalities persists today, of course, but the controversy surrounding actors on the plaintiffs' side has mainly settled.²²

The opposite is true for the defendants, whose standing, in the literal Article III sense, has only grown more problematic as the case progresses. The plaintiffs named a number of state officials in the complaint, almost all of whom refused to defend Prop 8. The only state official who did not refuse to defend it—California's Attorney General—simply conceded that Prop 8 is unconstitutional.²³ The district court permitted the original proponents of Prop 8 to intervene and defend.²⁴ The Ninth Circuit found defendants had standing after asking the California Supreme Court whether they were authorized to represent California under state law. The Supreme Court, however, has reopened the question by asking both parties to brief whether the defendant-appellants have standing.²⁵

Finally, even the trial judge's involvement has been challenged. Eight months after delivering his opinion in *Perry*, Judge Walker publicly "disclosed that he was gay and that he had for the past ten years been in a relationship with another man."²⁶ The defendants' motion to vacate the judgment based on this fact was denied at both district and circuit levels.²⁷

The drama of the case also extends beyond these controversies. It is the first challenge under the U.S. Constitution to a state's denial of same-sex marriage. The legal and policy issues are inherently dramatic, followed closely by lawyers and laymen alike. It has been to the Supreme Court once before already, when, on the eve of trial, the Court granted the defendants' motion to stay public broadcast of the trial.²⁸ The trial itself went on for twelve days, involved nineteen witnesses, and resulted in eighty sweeping findings-of-fact (including definitions of marriage and sexual orientation and determinations of the impact

http://www.time.com/time/specials/packages/article/0,28804,1984685_1984745_1985481,00.html (naming these "lions of America's legal establishment" to TIME's 2010 hundred most influential people list for "reminding us that the ideas binding us together in our constitutional democracy are far more important than those separating us"); Theodore B. Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK, Jan. 8, 2010, Cover Story, available at 2010 WLNR 575118.

22. Cf. Joe Garofoli, *Jitters as Prop. 8 Goes to High Court*, S.F. CHRONICLE, Dec. 9, 2012, at A1, available at <http://www.sfgate.com/politics/joegarofoli/article/Jitters-as-Prop-8-goes-to-high-court-4102887.php> ("That tension [between the lead litigators and institutional LGBTQ legal advocacy groups] has certainly dissipated some because we're in a different place than we were three years ago," said Jon Davidson, legal director at Lambda Legal, a national gay rights group.').

23. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *granting cert. to Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

24. *Id.*

25. Order of the Sup. Ct. Certiorari Granted, 568 U.S. ___, (Dec. 7, 2012) (No. 12-144), available at http://www.supremecourt.gov/orders/courtorders/120712zr_3f14.pdf.

26. *Perry v. Brown*, 671 F.3d 1052, 1095 (9th Cir. 2012), *granting cert. to Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

27. *Id.*

28. *Hollingsworth v. Perry*, 558 U.S. 183 (2010) (per curiam).

of same-sex marriage on children, on different-sex marriages, and on state and local economies).²⁹ Moreover, the trial has literally been turned into a dramatic production. In collaboration with the American Foundation for Equal Rights and Broadway Impact, Oscar-winning screenwriter Dustin Lance Black wrote a ninety-minute play—composed largely of the verbatim trial transcript—that has been produced by local theater groups in dozens of cities across the U.S. already, and staged with mega-star celebrities in Los Angeles and New York.³⁰ The whole story is already a broad cultural phenomenon.

B. The Journal Issue: A Note on Word Choice and Editorial Philosophy

Part and parcel with the diversity of opinion appearing in these pages is a diversity of word choice. Specifically, you will see our authors describe the community most affected by this discussion as, variously, “gay people,” “lesbians and gays,” and with differing acronym-combinations of the words gay, lesbian, bisexual, transgender, and queer: LGB, LGBT, and LGBTQ. These differences are political and ideological choices reflecting long-standing debates within the community about its boundaries.³¹ Similarly, what it is that we are discussing is described in various ways, including “same-sex marriage,” “marriage equality,” “the equality movement,” “LGBTQ rights,” and “the gay rights movement.” This too reflects differing goals and rhetorical strategies to reach them. For some the goal-in-sight, and topic, remains as wide as “the movement.” For others, now is the time to keep the conversation on marriage. The level of generality described (“same-sex marriage” versus “the gay rights movement”) is thus part of the debate. We cannot speak to how much weight any of our authors would put in her choices of terms, but, for these reasons, we have intentionally not standardized usage of these words across the comments.

That said, you will also note that the diversity of opinion we have invited and preserved is “one-sided” in a particular way: none of our authors challenges the idea that an individual should be free to marry someone of the same sex. We have solicited comments on only one side of this issue for many reasons. First, we thought it would make for a better symposium event and issue. In considering our topic, we decided others were already effectively conducting the “marriage: right or wrong?” debate.³² We believed our discussion would delve

29. *Perry v. Brown*, 671 F.3d at 1069.

30. See generally American Foundation for Equal Rights and Broadway Impact’s website dedicated to 8 for background information on the work’s genesis, or to view streams of the celebrity performance in L.A. or maps indicating where the play has been staged so far. American Foundation for Equal Rights & Broadway Impact, “8” THE PLAY, www.8theplay.com (last visited Feb. 17, 2013). We are grateful, again, to both organizations for enabling us to host a reading of the work as part of our symposium.

31. Cf., e.g., Jim Kepner, Address, *Why Can’t We All Get Together, and What Do We Have in Common?*, Apr. 28, 1997, in GREAT SPEECHES ON GAY RIGHTS 85–112 (James Daley ed., 2010) (surveying historical plurality of the movement’s goals and internal contestation of them among diverse community members).

32. See e.g., JOHN CORVINO & MAGGIE GALLAGHER, *DEBATING SAME-SEX MARRIAGE* (2012);

deeper into the “collateral” issues that interest us more, as described above, if our contributors were not sidetracked by that oft-asked question. Second, and relatedly, we on the journal Board were minimally interested in the “right or wrong” debate because we have already picked a side. We are in consensus that there is no rational reason to deny anyone this right (or interest, or opportunity, whatever one calls it). Thus, justice calls for more attention to one side than the other—as does our journal’s general philosophy. Since the journal’s founding, we have focused on producing “scholarship with the power to promote change—not only change in unjust and repressive laws, but also change in how we think about law as a tool for advancing social justice.”³³ Page-to-Practice scholarship aspires to have a “practical, useful influence on the ground,” particularly for communities whose interests are underrepresented in the legal system and for lawyers who are trying to change that.³⁴ We have adhered to this in both our choice of questions and of authors.

C. The Normative Issue: A Personal Word on Perry’s “Collateral Effects”

Finally—while I have some page space and editorial prerogative—a personal word on the “same-sex marriage: right or wrong?” question we have otherwise avoided. There are many ways in which I disagree with the supporters of Prop 8. I will leave you with just one.

In urging the passage of Prop 8, its supporters launched an attack not merely on the meaning of love between two people in a marriage, but on the broader definition and essence of family. As the plaintiffs’ lawyers so ably showed, the defendants’ arguments, both before the 2008 election and to the district court, rely on a belief that it is best for children to be raised by 1) a male and a female, 2) who are married, and 3) who are the children’s biological parents.³⁵ Defendants argue these three criteria are so important, in fact, that same-sex couples must be denied the right to marry just to prevent anyone from possibly thinking that *other* family formations are acceptable ways to raise children.³⁶

I disagree. I disagree with the supporters of Prop 8 on these points in part because they failed to show *any* credible evidence undergirding their beliefs, and the plaintiffs showed much to the contrary. But I also disagree because I, like all of you, know something about family from personal experience. My mother was adopted and became, not long after she had me, a single parent. In reviewing the

SAME-SEX MARRIAGE: PRO AND CON (Andrew Sullivan ed., 2004).

33. Liz Kukura & Katy Mastman, *From Page to Practice: An Introduction*, 34 N.Y.U. REV. L. & SOC. CHANGE 424, 428 (2010).

34. *Id.* See also *About*, N.Y.U. REVIEW OF LAW & SOCIAL CHANGE, <http://socialchangenyu.com/about/> (last visited Mar. 7, 2013) (captioning our mission as follows: “Legal Scholarship to Promote Social Equality and Empower Marginalized Communities”).

35. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930–31 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *granting cert. to Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

36. *Cf. id.* at 930–38.

defendants' arguments at trial, I was struck by the long reach of their claims. If the existence of same-sex marriages damages the meaning of "family," does my existence or my mother's inflict the same damage? Have we, and the thousands of other families like and unlike ours, been busy deinstitutionalizing the Prop 8 supporters' families all our lives? The underlying suggestion in the defendants' arguments is inexorably that the state has a legitimate interest in stigmatizing our families too. I disagree.

I suspect that some of you have picked up on this undercurrent of implication in the same-sex marriage debate already. Certainly many of our authors have, and, as we learned from Ted Olson during the live event, so did lawyers on his team.³⁷ A constitutional case, of course, is never just between two parties. It expounds a collective principle that touches us all.

37. See Interview with David Boies & Theodore B. Olson, *Perry* Litigators, at NYU School of Law (Oct. 5, 2012), available at http://maddowblog.msnbc.com/_news/2012/10/05/14250630-rachel-maddow-interviews-olson-and-boies-on-marriage-equality?lite.

