

“NOW YOU GET WHAT YOU WANT, DO YOU WANT MORE?”†

URVASHI VAID††

The impact of *Perry*¹ cannot be abstracted from the movement that gave it birth. But it is precisely the pro-gay marriage movement’s abstraction of marriage, from its roots in social justice, and transformation that has resulted in a dangerous overweighting of the importance of marriage equality. This abstraction both overestimates the value of achieving marriage equality and underestimates the dangers we² are exposing ourselves to in winning it by any means necessary.

The impact of the same-sex marriage movement has been at once positive and destructive. On the one hand, the movement has enlisted a large circle³ of non-gay allies, who can finally champion and support gay and lesbian, bisexual and transgender sexuality. On the other hand, the movement has narrowed its aspirations. Ironically, this acceptance comes with an implicit trade-off: we are supported by straight people, conservative and liberal, precisely because we have conformed our sexual practices into a recognizably heteronormative form of sexual order and intimacy.⁴

The claim to marriage equality succeeds with non-gay allies in part because it removes us from the realm of sexual outlaws and makes queer sexuality more recognizable to straight society. As Judith Stacey noted in an op-ed in *The New York Times* in 2011, “Contrary to conservative fears, the gay struggle for the

† BOB MARLEY, *Want More, on RASTAMAN VIBRATION* (Island Records 1976).

†† Urvashi Vaid is an attorney and organizer whose activism in the LGBT movement spans 30 years. She is Director of the Engaging Tradition Project at Columbia Law School’s Center for Gender and Sexuality Law, and a past executive director of the Arcus Foundation and the National Gay and Lesbian Task Force. Vaid is author of *IRRESISTIBLE REVOLUTION: CONFRONTING RACE, CLASS AND THE ASSUMPTIONS OF LGBT POLITICS* (2012) and *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* (1996).

1. *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. Dec. 7, 2012) (No. 12-144).

2. In this comment, I use the first person plural to refer to lesbian, gay, bisexual and transgender (LGBT) people in the United States and to the U.S. LGBT rights movement.

3. Most mainstream civil rights organizations are now allied with the LGBT movement to achieve nondiscrimination and marriage equality. *See, e.g.*, Peter Wallsten, *NAACP Endorses Same-Sex Marriage*, WASH. POST (May 19, 2012); Press Release, Nat’l Council of La Raza, Rights of LGBT Latinos “On Trial” in the Nation’s Highest Court (Dec. 12, 2012), *available at* http://www.nclr.org/index.php/about_us/news/news_releases/rights_of_lgbt_latinos_on_trial_in_the_nations_highest_court/.

4. *See* Ross Douhat, *More Perfect Unions*, N.Y. TIMES, July 4, 2011, at A19 (arguing that “the less specific and more inclusive an institution becomes, the more likely people are to approach it casually, if they enter it at all”); JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004).

right to marry rebuffs rather than promotes radical feminist and gay family politics. A bid for inclusion, not upheaval, the campaign for marriage has already been nudging gay culture in a more conventional direction.”⁵ Claims that extending the right to marry to gay people will produce more stable families in the gay community are often made in the pro-marriage case. For example, in the plaintiff’s brief to the Ninth Circuit in *Perry*, proponents argued that extension of marriage would produce more “stable family units” and would not impede the state’s interest in “responsible procreation.”⁶

The fight to achieve marriage equality mirrors another breakthrough in LGBT history: the movement’s success in securing an aggressive response to the HIV/AIDS epidemic from mainstream political, religious and cultural leaders. While the epidemic continues, the response achieved can be attributed, at least in part, to the LGBT movement’s compromising of sexual liberty for the more mainstream goal of sexual health.⁷ The same-sex marriage movement has adopted the same strategy:⁸ it has made LGBT people more palatable, and lesbian and gay people more popular, by deemphasizing sexual freedom.

Winning the government’s attention regarding AIDS came at a price: instead of focusing on the underlying causes of the disease, the LGBT movement had to temper its message. The movement did little to address the ways that racism, poverty and gender bias were central to the epidemic.⁹ As a result, the

5. Judith Stacey, *Unequal Opportunity*, N.Y. TIMES (July 3, 2011), <http://www.nytimes.com/roomfordebate/2011/07/03/marriage-the-next-chapter/marriage-in-the-us-unequal-opportunity>. See also Paula L. Ettelbrick, *Legal Marriage Is Not The Answer*, HARV. GAY & LESBIAN REV., Fall 1997, at 34, available at <http://www.greview.com/article.php?articleid=1477> (arguing that marriage entrenches existing sexual and family norms that the LGBT movement should seek to expand).

6. Brief for Appellees at 50, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10–16696). “More than 37,000 children in California are currently being raised by same-sex couples. Allowing these couples to marry would plainly serve the purpose of ‘increasing the likelihood that children will be born to and raised in stable family units.’” *Id.* at 52 (citing *In re Marriage Cases*, 183 P.3d 384, 433 (Cal. 2008)).

7. At first, both liberal and conservative political leaders viewed HIV/AIDS as a gay disease and ignored, avoided, and resisted responding to the HIV/AIDS epidemic. See, e.g., Allen White, *Reagan’s AIDS Legacy / Silence Equals Death*, S.F. CHRON. (June 8, 2004), <http://www.sfgate.com/opinion/openforum/article/Reagan-s-AIDS-Legacy-Silence-equals-death-2751030.php> (stating that President Reagan waited six years after the first diagnosis of HIV to address the HIV/AIDS epidemic, despite calls from scientists and politicians to invest resources in preventing the transmission of the disease). But the scope of the disease spread, and the persistent combination of direct action activism, insider lobbying, and a conscious strategy of “de-gayng AIDS” to get government and public health sectors to respond ultimately resulted in increases in support from non-gay allies in health and media. JOHN-MANUEL ANDRIOTE, VICTORY DEFERRED: HOW AIDS CHANGED GAY LIFE IN AMERICA (1999) (chronicling political strategies of LGBT movement to achieve political action on AIDS); Celia Kitzinger & Elizabeth Peel, *The De-Gaying and Re-Gaying of AIDS: Contested Homophobias in Lesbian and Gay Awareness Training*, 16 DISCOURSE & SOC’Y 173, 177 (2005), available at <http://das.sagepub.com/content/16/2/173.full.pdf+html>.

8. See *supra* note 5.

9. See, e.g., BRETT C. STOCKDILL, *ACTIVISM AGAINST AIDS: AT THE INTERSECTIONS OF SEXUALITY, RACE, GENDER, AND CLASS* (2003), which applies an intersectional framework to

movement secured increases in research and treatment funds, but it failed to reform or restructure the health care system; a whole new HIV-specific infrastructure was created, which reinforced previous racial and gender hierarchies.¹⁰ Twenty years later, the cost of a narrow focus on HIV infection has resulted in inadequate funding and support for holistic sexual health, particularly for gay men,¹¹ and continuing inattention to the epidemic's spread in communities of color.¹²

Perhaps all moments of advancement against deeply held stereotypes and traditions have such mixed effects; securing change from a culture invested in certain ways of thinking about things as entrenched in tradition as gender, family, sexual desire and morality is difficult. But one would think a movement emerging from sexual difference and gender and sexuality-based prejudice would make a more overt effort to address and reinvent the underlying norms, arguments and traditional ways of thinking used to uphold the status quo. Instead, in both the marriage and HIV examples, the movement chose to argue for admission to, rather than a reinvention of, existing traditions and norms.

analyze the politics, policy choices and priorities of different sectors of the AIDS movement to expose ways that some responses ignored race and gender implications; CINDY PATTON, *INVENTING AIDS* (1990), which turns a critical eye to the ways an increasingly scientific response to AIDS professionalized the movement and limited engagement with race, gender and economic aspects of the epidemic; SHALINI BHARAT, *RACISM, RACIAL DISCRIMINATION AND HIV/AIDS* (Feb. 2002), available at www.ohchr.org/Documents/Issues/Racism/IWG/Session3/RacismAIDS.doc.

10. A "holistic" response to AIDS addresses the underlying economic and racial disparities of the disease, rather than merely addressing behavioral change. See RUSSELL ROBINSON, ET AL. & AISHA C. MOODIE-MILLS, *HIV/AIDS INEQUALITY: STRUCTURAL BARRIERS TO PREVENTION, TREATMENT, AND CARE IN COMMUNITIES OF COLOR: WHY WE NEED A HOLISTIC APPROACH TO ELIMINATE RACIAL DISPARITIES IN HIV/AIDS* (2012), available at http://www.americanprogress.org/wp-content/uploads/issues/2012/07/pdf/hiv_community_of_color.pdf. For an analysis of how the response to HIV/AIDS in black communities was limited by gender and sexual hierarchies in the community, see CATHY COHEN, *THE BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS* (1999).

11. The problematic nature of the focus on a crisis-cure frame in HIV/AIDS and its resultant impact on ignoring the sexual lives and needs of gay men, bisexuals and men who have sex with men was brilliantly argued and organized for by the late Eric Rofes. See ERIC ROFES, *THE GAY MEN'S HEALTH MOVEMENT IN THE UNITED STATES: RECONCEPTUALIZING & REINVIGORATING OUR WORK WITH GAY MEN'S COMMUNITIES, NATIONAL GAY MEN'S SUMMIT* (2005), available at http://www.ericrofes.com/speaking/Gay_Mens_Health_Movement.pdf (articulating six principles for re-focusing from a narrow HIV framework to a broader commitment to gay men's health); ERIC ROFES, *DRY BONES BREATHE: GAY MEN CREATING POST-AIDS IDENTITIES AND CULTURES* (1998) (arguing that AIDS has become a chronic reality and that the movement must adapt its approach to be able to continue to influence gay men's behavior and health needs); ERIC ROFES, *REVIVING THE TRIBE: REGENERATING GAY MEN'S SEXUALITY AND CULTURE IN THE ONGOING EPIDEMIC* (1996) (arguing that AIDS has left gay men emotionally scarred, and articulating a focus on sexual freedom as a means to rebuild gay men's mental health); ERIC ROFES, *THRIVING: GAY MEN'S HEALTH IN THE 21ST CENTURY* (2007), available at <http://www.ericrofes.com/pdf/THRIVING>.

12. "Black gay men account for nearly 1 in 4 new HIV infections. And the problem is getting worse, with new infections among Black gay men rapidly rising." BLACK AIDS INSTITUTE, *BACK OF THE LINE: THE STATE OF AIDS AMONG BLACK GAY MEN IN AMERICA* (2012), available at <http://www.blackaids.org/docs/back.pdf>; ROBINSON, ET AL. & MOODIE-MILLS, *supra* note 10.

The same-sex marriage movement's growth from the early 1990's has been the result of brilliant stewardship, good and careful legal planning, and a clear focus on a limited objective—the achievement of marriage equality at the state level wherever possible.¹³ But when seen from the perspective of how winning *Perry* (or marriage equality in general) will impact the life chances of all parts of the LGBT community, the drive for marriage equality has been distracting and detrimental.¹⁴

First, the movement for marriage equality narrowed the focus, resources, and policy aspirations of the mainstream LGBT rights movement into a single issue and led to the constriction of a previously larger family recognition agenda.¹⁵ Since marriage took center stage, the quest to secure additional rights, arguably more important than earning the right to marry, has stalled. Twenty-one states have some form of legislation banning discrimination in employment due to sexual orientation (some include gender identity as well); thirteen of these laws were passed in the 1980's and 1990's, before the marriage movement took off.¹⁶ Since marriage equality has gained prominence, only eight new states have enacted nondiscrimination laws and the Federal Employment Nondiscrimination Act has not moved forward.¹⁷ By comparison, 41 states have enacted new forms of anti-gay laws about LGBT relationships—enacted by statute, constitutional amendment or ballot referenda.¹⁸ These laws will require decades of action to overturn.

Over the past two decades, the resources being spent on marriage equality dwarf the time and energy spent on other issues at the state level. For example, since 2007, a funder-partnership focused on advancing nondiscrimination laws at the state level, called the State Equality Fund, spent \$7 million dollars.¹⁹ By contrast, the four same-sex partnership initiatives on the ballot in 2008 (in

13. This leadership role has been performed by Evan Wolfson of Freedom to Marry, the late Tom Stoddard of LLDEF, Mary Bonauto and the staff at GLAD, and the work of LLDEF, NCLR, ACLU LGBT Rights Project and the Williams Institute.

14. Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309, 321 (2005) (“Biopolitics concerns the distribution of life chances across the population A biopolitical analysis, therefore requires moving away from only understanding marriage as an institution . . . and beginning to think of it as a technology, or mechanism, for channeling resources and populations.”).

15. NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008) (articulating the ways the LGBT movement could engage a broader family protection agenda); Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?, OUT/LOOK*, Autumn 1989, at 8–12 (arguing marriage is too narrow a focus for the movement).

16. NATIONAL GAY AND LESBIAN TASK FORCE, *STATE NONDISCRIMINATION LAWS IN THE U.S.* (2012), available at http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12.pdf.

17. *Id.*

18. *Marriage and Relationship Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/marriage_relationship_laws (last visited Nov. 19, 2012).

19. *Announcement and 2012 Cycle 1 Open Invitation for Letters of Inquiry*, GILL FOUNDATION, <http://www.gillfoundation.org/grants/outside-colorado/state-equality-fund> (last visited Nov. 19, 2012).

Arkansas, Arizona, California and Florida) required the LGBT movement and its allies to raise more than \$51.1 million dollars to oppose in that one year alone.²⁰

Second, winning the right to same-sex marriage will not automatically confer full human rights on LGBT communities. Sexual prejudice against lesbians, gay men, bisexuals and transgender people will not disappear if and when marriage is won.²¹ That requires a defeat of the anti-gay right, as well as a re-ordering of ideas of maleness and femaleness that we are still far from achieving, despite decades of feminist conversation.²²

Third, the right to marry can be achieved legally while LGBT people continue to be undermined culturally. Marriage for same-sex couples is opposed by many, if not most, fundamentalist religions,²³ by the theocratic social movements affiliated with these religious traditions, and by deep-pocketed industrialists who use and manipulate religious movement fervor to maintain their economic dominance.²⁴ Together, these interests have formed a significant

20. Peter Quist, *The Money Behind the 2008 Same Sex Partnership Ballot Measures*, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS (Nov. 18, 2009), <http://www.followthemoney.org/press/PrintReportView.phtml?r=406>.

21. Gregory M. Herek, *Beyond "Homophobia": Thinking About Sexual Prejudice and Stigma in the Twenty-First Century*, 1 SEXUAL RES. AND SOC. POL'Y 6, 14 (2004) ("I offer some preliminary thoughts about three general arenas in which hostility based on sexual orientation should be studied. First, such hostility exists in the form of shared knowledge that is embodied in cultural ideologies that define sexuality, demarcate social groupings based on it, and assign value to those groups and their members. Second, these ideologies are expressed through society's structure, institutions, and power relations. Third, individuals internalize these ideologies and through their attitudes and actions, express, reinforce, and challenge them.").

22. Feminist writers from Simone de Beauvoir to Judith Butler have argued that fundamental rethinking of gender beyond biological maleness and femaleness is needed. See, e.g., SIMONE DE BEAUVOIR, *THE SECOND SEX* 267 (H.M. Parshley trans., Vintage Books 1989) (1949) ("One is not born, but rather becomes, a woman."); Judith Butler, *Sex and Gender in Simone de Beauvoir's Second Sex*, 72 YALE FRENCH STUD. 35, 35 (1986), available at <http://www.jstor.org/stable/pdfplus/2930225.pdf?acceptTC=true> ("If being a woman is one cultural interpretation of being female, and if that interpretation is in no way necessitated by being female, then it appears that the female body is the arbitrary locus of the gender 'woman,' and there is no reason to preclude the possibility of that body becoming the locus of other constructions of gender.").

23. "And opposition to abortion and homosexuality remain the primary rallying call for American evangelicals." Brian Beary, *Religious Fundamentalism: Does It Lead To Intolerance and Violence?*, 3 CQ GLOBAL RESEARCHER 27, 36 (2009), available at http://www.sagepub.com/ritzerintro/study/materials/cqresearcher/77708_16.1cq.pdf. "Throughout much of Africa, Asia and the Middle East large majorities feel that faith in God is a necessary foundation for morality and good values, and similar majorities believe society should reject homosexuality." THE PEW GLOBAL ATTITUDES PROJECT, *WORLD PUBLICS WELCOME GLOBAL TRADE – BUT NOT IMMIGRATION: 47-NATION PEW GLOBAL ATTITUDES SURVEY 33–39* (2007), available at <http://www.pewglobal.org/files/2007/10/Pew-Global-Attitudes-Report-October-4-2007-NOT-EMBARGOED.pdf>.

24. Researchers of right wing social movements in the US have traced the link between growth of the right wing institutions and targeted funding by reactionary industrialists. For example, for the role played by beer manufacturer Joseph Coors in the founding of the Heritage Foundation, see RUSS BELLANT, *THE COORS CONNECTION: HOW COORS FAMILY PHILANTHROPY UNDERMINES DEMOCRATIC PLURALISM* (1991). See also *It's No Accident That Coors Is the Right Beer in America*, CORPORATE ACCOUNTABILITY PROJECT, <http://www.corporations.org/coors/article>

and well-financed reactionary movement in the U.S. with a long-term goal of securing a theocratic country—a movement that seeks nothing less than the subordination of women and the “repairing” of gay men and women.²⁵

Opponents of same-sex marriage continue to argue in court cases that “traditional” norms and forms of marriage are essential to the social good.²⁶ The courts have thus far rejected such claims, holding that preserving tradition on its own cannot override the demand of equal protection. As David Cole notes in his 2009 review of four marriage books, “In its gay marriage decision, the Connecticut Supreme Court explained that courts must look behind tradition to ‘determine whether the reasons underlying the tradition are sufficient.’ Tradition itself is not a justification for discrimination.”²⁷ *Perry* and courts’ rejection of the notion of tradition as a legitimate basis to deny same-sex marriage ironically accompanies an appeal to tradition made by proponents of same-sex marriage. The LGBT marriage movement echoes traditional arguments in seeking marriage, arguing for the value of monogamy, for the idea that marriage promotes stability and social integration, and for the position that its extension to same-sex couples would not change the institution in meaningful ways.

Fourth, in their narrow focus on winning marriage, proponents of same-sex marriage seem willing to sacrifice large segments of the LGBT communities (single parents, uncoupled people, those not interested in marriage) in order to secure the support of right-wing allies. A key strategy of the marriage movement has been to win over conservative politicians to support marriage equality whose interests do not align with nor support those in the LGBT community who are poor, immigrant, transgender or women. This strategy has involved a focused

.html (last visited Jan. 17, 2013). Additional research on the right-leaning institutions and their funding by various industrialists and corporate entities can be accessed at the People For the American Way website, www.rightwingwatch.org, and at the website of the think-tank Political Research Associates, www.publiceye.org. See also SARA DIAMOND, *ROADS TO DOMINION: RIGHT-WING MOVEMENTS AND POLITICAL POWER IN THE U.S.* (1995) (tracing the history of the rise of right wing ideology, showing its links to mainstream ideas, and identifying the business and political interests that support right wing movements).

25. See JEAN HARDISTY, *MOBILIZING RESENTMENT: CONSERVATIVE RESURGENCE FROM THE JOHN BIRCH SOCIETY TO THE PROMISE KEEPERS* 97–126 (2000); ROBERT O. SELF, *ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S* 6 (2012) (“[W]hat unfolds here is an argument about how American disputes over gender, sex and family were interwoven with a much grander transformation of the national polity itself – the institutions, laws, values, political cultures, and notions of government that constitute civic life – and how Americans conceived of the nation and the possibility of improving society.”); URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 307–46 (1995).

26. Petition for Writ of Certiorari, *Perry v. Hollingsworth*, 81 U.S.L.W. 3075 (U.S. July 30, 2012) (No. 12-144).

27. David Cole, *The Same Sex Future*, *THE NEW YORK REV. OF BOOKS* (July 2, 2009), <http://www.nybooks.com/articles/archives/2009/jul/02/the-same-sex-future> (reviewing WILLIAM N. ESKRIDGE JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE’VE LEARNED FROM THE EVIDENCE* (2007); EVAN GERSTMANN, *SAME-SEX MARRIAGE AND THE CONSTITUTION* (2008); ROBIN WEST, *MARRIAGE, SEXUALITY, AND GENDER* (2007); *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* (Douglas Laycock, Anthony R. Picarello Jr. & Robin Fretwell Wilson eds., 2008)).

effort to fund research on what messages will move independents and conservatives,²⁸ to win allies within the Republican Party,²⁹ to recruit the support of conservative donors,³⁰ and to target moderates for election and conservatives for defeat.³¹ The desire to win more “mainstream” support has resulted in an uncritical and cynical embrace of conservative family values rhetoric, and an endorsement of the right’s claims about the centrality of nuclear, two-parent families.

A recent vivid illustration of this uncritical embrace of right wing values comes from the August 2012 Republican National Convention. Two gay organizations took out a full-page ad in the local Tampa newspaper promoting their support for marriage and its compatibility with Republican values. The ad began with a quote from a long-time anti-gay family values advocate:

“The Institution of marriage is the foundation of civil society. Its success as an institution will determine our success as a nation.”
Tony Perkins, Family Research Council, GOP Platform

The advertisement continued:

We agree. That’s why Log Cabin Republicans and Young Conservatives for the Freedom to Marry believe that government should stop denying marriage licenses to committed gay and lesbian families. As conservatives, we believe that the

28. The most publicly available research of this kind is found on the website of Third Way, which defines itself as follows: “Third Way is a think tank that answers America’s challenges with modern ideas aimed at the center. We advocate for private-sector economic growth, a tough and smart centrist security strategy, a clean energy revolution, and progress on divisive social issues, all through moderate-led U.S. politics.” *About Us*, THIRD WAY, http://www.thirdway.org/about_us (last visited Nov. 19, 2012). See also MOVEMENT ADVANCEMENT PROJECT, GLAAD & FREEDOM TO MARRY, AN ALLY’S GUIDE TO TALKING ABOUT MARRIAGE FOR SAME-SEX COUPLES (2012), available at http://freemarry.3cdn.net/ce7d90fdbef3ea7667_ztm6bv4w.pdf (outlining ways that allies can support marriage equality).

29. Matt Sledge, *How New York Legalized Gay Marriage*, HUFFINGTON POST (June 25, 2011, 3:03 PM), http://www.huffingtonpost.com/2011/06/25/new-york-gay-marriage_n_884527.html.

30. Frank Bruni, *The GOP’s Gay Trajectory*, N.Y. TIMES (June 9, 2012), <http://www.nytimes.com/2012/06/10/opinion/sunday/the-gops-gay-trajectory.html>; Joe, *New York: Wealthy GOP Donors are Backing New York Marriage Equality Campaign*, JOE MY GOD (May 11, 2011), <http://joemygod.blogspot.com/2011/05/new-york-wealthy-gop-donors-are-backing.html>; Lauren Rodgers, *New York Senate Republicans Rewarded for Marriage Equality Votes*, BALLOTPEdia (Oct. 15, 2011), http://ballotpedia.org/wiki/index.php/New_York_Senate_Republicans_rewarded_for_marriage_equality_votes; Igor Volsky, *New York Republicans Who Voted for Marriage Equality See Sharp Increase in Fund Raising*, THINK PROGRESS (Jan. 18, 2012), <http://thinkprogress.org/lgbt/2012/01/18/405880/new-york-republicans-who-voted-for-marriage-equality-see-sharp-increase-in-fund-raising/>.

31. Chuck Colbert, *The Race to Save Marriage Equality*, BOS. SPIRIT (May 12, 2009), <http://www.bostonspiritmagazine.com/home/2009/5/12/the-race-to-save-marriage-equality.html>.

freedom to marry is directly in line with the core ideals and principles of the Republican Party.

Family values means valuing ALL families.³²

Does the LGBT movement believe that “marriage is the foundation of civil society?” Where did that debate take place? For whom is this small band of conservatives, a minority within a minority, speaking? Do “we” the LGBT movement really “agree” with Tony Perkins, one of the most vitriolic antagonists against human rights for LGBT people?³³ Is the conception of family promoted by the Family Research Council identical to that of LGBT families? Is the freedom to marry that we seek “directly in line with the core ideas and principles of the Republican party”?

“By any means necessary” sounds bold, but it is in reality only a recipe for conformity and submission to those in power. The marriage movement’s promotion of support and funding from right-wing financiers like Paul Singer, the brothers David and Charles Koch, and Ken Mehlman represent a debasement of the LGBT movement’s core values and an abandonment of large segments of LGBT communities. Values like standing up for all LGBT people, including those who are immigrant, in unions, women, in need of reproductive health services, or low-income, for example, single or making non-traditional families, are sidelined in the rush to gain the support of right wing funders who oppose the rights of these parts of our communities. The conservative and mainstream movement is selling out women, lesbians, low-income people, people of color and many other populations in its embrace of the very leaders of the Tea Party and its hostile agenda.³⁴

Fifth, winning marriage gives many the illusion of winning the war for LGBT rights, when in fact it does not secure equality or justice for all parts of LGBT communities. Following victories in Massachusetts and New York, the LGBT movement in those states significantly demobilized. In Massachusetts, it

32. News Release, Log Cabin Republicans, Young Conservatives and Log Cabin Republicans Call for Freedom to Marry in Full-Page Ad in Tampa (Aug. 28, 2012), available at <http://www.logcabin.org/site/apps/nlnet/content2.aspx?c=nsKSL7PMLpF&b=6420733&ct=12058823>.

33. For Tony Perkins’ anti-gay work, see, for example, *Tony Perkins*, GLAAD, <http://www.glaad.org/cap/tony-perkins> (last visited Jan. 17, 2013). The Southern Poverty Law Center has listed Family Research Council as an anti-gay hate group. *Family Research Council*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/get-informed/intelligence-files/groups/family-research-council> (last visited Jan. 17, 2013).

34. TONY CARRK, *THE KOCH BROTHERS: WHAT YOU NEED TO KNOW ABOUT THE FINANCIERS OF THE RADICAL RIGHT* (2011), available at http://www.americanprogressaction.org/wp-content/uploads/issues/2011/04/pdf/koch_brothers.pdf; Will Kohler, *Former RNC Chair Ken Mehlman Helped Gay Marriage in NY But He Still Donates Heavily to Anti-GAY GOP*, BACK2STONEWALL (Feb. 14, 2012), <http://www.back2stonewall.com/2012/02/rnc-chair-ken-mehlman.html>.

took 8 more years from the marriage win to secure nondiscrimination for transgender persons.³⁵ In New York, after marriage equality was achieved, the statewide LGBT organization fell into disarray and fired its executive director over a disagreement about what was to come next.³⁶ Major legislative, educational and cultural gains are yet to be realized in New York as well as the 49 other states (and around the globe).³⁷ In addition, people of color, transgender people, low-income LGBT people and lesbians and gay men affected by the narrowing of reproductive freedom remain under-served by the mainstream LGBT legal and political movement.³⁸

Sixth, securing the right to gay marriage does not change the institution of marriage, its relationship to capitalism, and its privileged status as a state-sanctioned form of family, or its gender role-infused history. Gay marriage as we have argued for it and performed it so far is functionally equivalent to straight marriage. Recreating it in gay drag does not address its dysfunctions of power. Nor does it address more fundamental questions like whether marriage is the best way to distribute benefits to families;³⁹ whether the nuclear family form is maladaptive to the needs of raising children and building community in the 21st century; whether this form of family even has the supports it needs despite the heated rhetoric around its importance. While the mainstream LGBT rights organizations and advocates were working on marriage, few resources were committed to securing a right to universal health care and other benefits included in a robust social safety net. These issues are LGBT issues, and securing them would remove some of the urgency for a right to marry for same-sex couples, since, for example, one would not be dependent upon one's spouse's

35. The court decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) was issued in November of 2003. The Massachusetts transgender equal rights law, An Act Relative To Gender Identity, banning discrimination in employment, housing credit, education and hate crimes was passed in November 2011 and took effect in July of 2012. See Adam Sege, *New Law Backs Transgender Residents*, BOSTON GLOBE, July 2, 2012, http://www.boston.com/news/local/massachusetts/articles/2012/07/02/transgender_rights_law_take_s_effect/.

36. Kate Taylor, *Gay Rights Group Fires Chief, Central in Marriage Fight*, N.Y. TIMES, Mar. 6, 2012, <http://www.nytimes.com/2012/03/07/nyregion/new-yorks-marriage-battle-won-gay-rights-group-fires-its-director.html> (“With a large part of its political agenda accomplished, its challenge is to figure out what its future purpose is in the battle for equality,” said Dick Dadey, the Pride Agenda’s first executive director, who is now the executive director of Citizens Union.”).

37. Twenty-nine states have no laws banning discrimination in employment; 10 states in the country do not have any local jurisdictions within them that have nondiscrimination ordinances; 18 states have no laws protecting LGBT students from harassment and bullying; same-sex parents face barriers to joint adoption in 5 states, and the law is unclear in 27 other states; 7 states restrict second-parent adoptions by same-sex couples, and availability is uncertain in 30 other states; 29 states do not cover sexual orientation and gender identity in their housing discrimination laws. *Equality Maps*, MOVEMENT ADVANCEMENT PROJECT, <http://www.lgbtmap.org/equality-maps> (last visited Jan. 17, 2013).

38. URVASHI VAID, *IRRESISTIBLE REVOLUTION: CONFRONTING RACE, CLASS AND THE ASSUMPTIONS OF LGBT POLITICS* (2012) (detailing the exclusion of issues of importance to these populations in the community through analysis of data and organizational priorities).

39. POLIKOFF, *supra* note 15.

employment-related health insurance in order to have health security.

In part, *Perry* promises more than it delivers because it continues our civil rights movement's acceptance of the leadership of lawyers and courts to set and define the parameters of our vision. This is understandable. Winning legal reform has become a virtual stand-in for equality. But this understanding abstracts law from its roots in today's economic and political power structures. Law is not separate from these structures. It is built and operated to perpetuate them. As such, law can often be a tool that benefits powerful and wealthy interests: it is no coincidence that the *Perry* litigation arose outside of the LGBT legal movement's structure, by the intervention of wealthy gay and straight individuals who created the lawsuit; secured the bipartisan, made-for-TV, expensive legal team; and financed it with millions of dollars. Even if the case's masterminds were right in their beliefs and the end results justify their means, the process by which this case emerged illustrates the way that those with the power to set an agenda can determine what issues or approaches organizations prioritize.⁴⁰

Lawsuits and court decisions have a unique ability to focus a societal conversation and dominate public discourse. But courts and lawyers are more limited than we like to think.⁴¹ Their power is structural: court decisions create a framework within which social and political order is lived. Lawyers are like architects drafting plans and submitting renovations to an always pre-existing structure determined by legislative and judicial precedent. The plan may be inventive or even visionary in its proposed use of space, form, narrative and materials—but it is bounded by the limitations of the space it seeks to transform.

Despite the post-civil rights mythology we have built around law and legal action, litigation and court decisions are as much forms of limitation, as of transcendence or change. Law is the ultimate tool of conformity and containment. Its application defines and maintains “things as they are,” it upholds tradition defined as the status quo, it seeks to preserve and not disturb the social and political order.⁴²

If the Supreme Court upholds *Perry*, thousands of LGBT people in California will be able to marry, and another step towards full legal equality will be achieved. But, inequality and anti-LGBT prejudice will still need to be addressed. Family rejection and religious persecution will not end. LGBT people of color will still experience racial disparities. Bias, violence and harassment of transgender persons will not have ended. In short, while *Perry* may signal to

40. For a fuller discussion of the question of how agendas are set in the LGBT movement, and the disproportionate influence of major donors on what gets prioritized by national organizations, see VAID, *supra* note 38, at 71–102.

41. MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 209 (2010) (“We should not think that legal change can effect social change all on its own. That did not happen with race, and it will not happen here.”).

42. Martin Krygier, *Law as Tradition*, 5 L. & PHIL. 237 (1986); Martin Krygier, *The Traditionality of Statutes*, 1 RATIO JURIS 20 (1988).

many that same-sex equality has been achieved, the work of the LGBT liberation movement will be far from finished.

The LGBT movement was and remains a capacious one. It harbors goals ranging from achieving nondiscrimination in all facets of life to ending violence based on sexual, gender or racial difference, to securing housing and shelter for poor and homeless LGBT people. Marriage was initially but one objective within a larger set of very broad and deep movement goals. It needs to be so once again.

