
UC DAVIS LAW REVIEW

VOL. 48, NO. 2



DECEMBER 2014

LECTURE

Law Review Symposium 2014 — Keynote by Erwin Chemerinsky

*Erwin Chemerinsky**

Justice Antonin Scalia is right. Do you know how rarely I have gotten to say that? (*Laughter*) In his dissent in *United States v. Windsor*, he said: “It’s just a matter of waiting for the other shoe to drop.”¹ He said that it’s just a matter of time before the United States Supreme Court is gonna say about state laws that prohibit same-sex marriage what it said about section 3 of the Defense of Marriage Act.² And I think that is certainly correct.

I remember when the Massachusetts Supreme Judicial Court decided *Goodridge*³ in 2003, soon thereafter saying that I believe that in my lifetime marriage equality will exist everywhere in the United States. In 2004, when I uttered those words, they seemed quite audacious. In 2004, there were waves of initiatives across the country to amend state constitutions to say that marriage had to be between a man and a

* Copyright © 2014 Erwin Chemerinsky. Founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law, with a joint appointment in Political Science.

¹ See *United States v. Windsor*, 133 S. Ct. 2675, 2705 (2013).

² See *id.* at 2710.

³ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

woman.⁴ There is good reason to believe that *Goodridge* gave the 2004 presidential election to George W. Bush. Republicans put an initiative on the Ohio ballot to amend the Ohio Constitution with the clear goal of increasing conservative republican turnout.⁵ There have actually been studies done that estimate that the additional Republican voters were enough to give Ohio to Bush, rather than John Kerry.⁶ Had Kerry won the Ohio election, he would have then been the President of the United States.

And yet even in 2004, I felt it was just a matter of time — though, I thought it would be a fairly long amount of time — before marriage equality came to everywhere in the United States. Yet today, as I stand before you, in February of 2014, I'd say now it's just a short amount of time before marriage equality exists everywhere in this country. Now, obviously, the fight hasn't yet been won. At this moment, there are seventeen states and the District of Columbia, which have marriage equality.⁷ Which, even by the arithmetic I can do, leaves thirty-three states, or a majority, that don't yet have marriage equality.

But, I want to make three points in my remarks today. First, I want to tell you why I believe that marriage equality is inevitable, and inevitable soon. Second, I want to talk about why this has happened. How has it come to be that there has been such a quick transformation in social attitudes and the legal landscape? But third, I want to talk about what this tells us about the role and function of the courts in our democratic society.

Let me start by talking about why I feel so comfortable with saying that marriage equality is inevitable. Some of it, of course, is the shift in popular opinions. We have all seen the opinion polls that show that a

⁴ See *Ballot Measures*, CNN.COM, <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures> (last visited Oct. 8, 2014) (showing that Arkansas, Georgia, Kentucky, Mississippi, Michigan, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah all had 2004 election ballot measures for amending state constitutions to ban same-sex marriage).

⁵ See Walter Shapiro, *Ohio Churches Hope Marriage Ban Prods Voters to Polls*, USA TODAY (Sept. 26, 2004), http://usatoday30.usatoday.com/news/opinion/columnist/shapiro/2004-09-26-hype_x.htm.

⁶ See David E. Campbell & J. Quin Monson, *The Religion Card: Gay Marriage and the 2004 Presidential Election*, 72 PUB. OPINION Q. 399, 415 (2008); Daniel A. Smith, Matthew DeSantis & Jason Kassel, *Same-Sex Marriage Ballot Measures and the 2004 Presidential Election*, 38 ST. & LOC. GOV'T REV. 78, 87 (2006); James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES (Nov. 4, 2004), <http://www.nytimes.com/2004/11/04/politics/campaign/04gay.html>.

⁷ See Ian Simpson, *U.S. Court to Hear Lawsuit Against Virginia Gay Marriage Ban*, REUTERS (Feb. 4, 2014), <http://www.reuters.com/article/2014/02/04/us-usa-gaymarriage-virginia-idUSBREA130MH20140204>.

majority of Americans now believe that gays and lesbians should have marriage equality.⁸ I think that the most important aspect of those opinion polls are those that indicate that among voters under age thirty-five, 70% believe in marriage equality.⁹ That, by itself, would indicate that it is simply a matter of time before marriage equality is favored by an overwhelming majority of the population. In fact, if you look at the opinion polls, they show: the younger the voters, the stronger the support for marriage equality; the older the voters, the less the support for marriage equality.¹⁰

I think there is a more subtle aspect of this as well. And it's the nature of conservatism among younger republicans. I think it tends to be

⁸ See, e.g., *CNN/ORC International Poll — May 29 to 31, 2012*, CNN, <http://i2.cdn.turner.com/cnn/2012/images/06/06/rel5e.pdf> (last visited Oct. 26, 2014) [hereinafter *CNN/ORC Poll*] (demonstrating that 52% of men and 56% of women believe that marriages between gay and lesbian couples should be recognized by the law as valid); David Ingold, *More than Half of Americans Support Allowing Same-Sex Marriage*, BLOOMBERG, <http://www.bloomberg.com/infographics/2013-06-06/bloomberg-national-poll-gay-marriage.html> (last visited Oct. 25, 2014) (“Fifty-two percent [of Americans] say they back giving gay couples the right to marry.”); Q: *Overall, Do You Support or Oppose Allowing Gays and Lesbians to Marry Legally*, WASH. POST (Apr. 17, 2014), http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2014/03/05/National-Politics/Polling/question_13288.xml?uuid=VWqBHKQjEeO4ZTiyVNkgYw (showing that 59% of registered voters support allowing gays and lesbians to marry legally); *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx> (last visited Oct. 25, 2014) (exhibiting a Gallop Poll in which 55% of respondents indicated that they believed that marriages between homosexuals should be valid under the law); see also *Same-Sex Marriage, Gay Rights*, POLLINGREPORT.COM, <http://www.pollingreport.com/civil.htm> (last visited Oct. 2, 2014) (presenting the results of multiple polls that ask about respondents’ support or opposition to gay marriage).

⁹ See Rea Carey, *Americans Want Fairness for Gay Couples*, US NEWS & WORLD REPORT (Oct. 7, 2011, 9:12 AM), <http://www.usnews.com/debate-club/should-gay-marriage-be-legal-nationwide/americans-want-fairness-for-gay-couples> (“Recent polls show that 53 percent of Americans support legalizing marriage for same-sex couples; 70 percent of Americans ages 18-34 support it.”); Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx> (reporting 70% support for gay marriage among the American population aged 18-34); see also, e.g., *CNN/ORC Poll*, *supra* note 8 (demonstrating that 73% of respondents between the ages of 18 and 34 believe that marriages between gay and lesbian couples should be recognized by the law as valid).

¹⁰ See Newport, *supra* note 9 (“Support for legal gay marriage decreases markedly with age, ranging from 70% support among those aged 18 to 34, to 39% support among those 55 and older.”); see, e.g., *CNN/ORC Poll*, *supra* note 8 (indicating that while 65% of respondents under 50 believe that same-sex marriages should be valid, only 41% of respondents 50 and older share the same sentiments); *The Changing Landscape of Same-Sex Marriage*, WASH. POST (Oct. 17, 2014), <http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage/>.

overlooked that they tend to be much more libertarian in their conservatism than the traditional moral or social conservatives. I've often believed that the strength of the Republican Party, should they choose to capitalize it, will be in the libertarian direction, not the social and moral conservative direction. Libertarianism surely would favor allowing for marriage equality.

Nate Silver — if not the best, the most prominent pollster in the United States — has done charts and graphs that show that by the year 2020, just six years from now, in all but six states in the country, the majority of people will favor marriage equality.¹¹ Put in these terms — “all but six states,” “in a few years,” “marriage equality favored by a majority” — it is easy to see why I say marriage equality is inevitable.

But, I also believe that it is inevitable because it is likely to happen in the courts. In court after court in the months after *Windsor* there have been decisions striking down laws prohibiting same sex marriage. It's thus only a matter of a short time before the Supreme Court is going to have to face the issue that it ducked in *Hollingsworth v. Perry*, and that's whether laws that prohibit marriage equality for gays and lesbians deny equal protection and violate the fundamental right to marry.¹²

I am confident that the Supreme Court is going to strike down the state laws that prohibit marriage equality for a simple reason: it is impossible for the opponents of marriage equality to articulate a legitimate government interest that is served by keeping gays and lesbians from being able to marry. I think that the opinion the Court will write will come from Anthony Kennedy, just as it did in *United States v. Windsor*.¹³ Much like his opinions in *Romer v. Evans*,¹⁴ *Lawrence v. Texas*,¹⁵ and *United States v. Windsor*,¹⁶ I don't think he is going to adopt heightened scrutiny for sexual orientation discrimination.¹⁷ Like in *Romer* and *Lawrence* and *Windsor*, I don't think he is going to say what level of scrutiny is being used.¹⁸ Instead, like in *Romer*, *Lawrence*, and

¹¹ See Nate Silver, *How Opinion on Same-sex Marriage Is Changing, and What It Means*, FIFTYTHREE (Mar. 26, 2013, 10:10 AM), <http://fivethirtyeight.com/features/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means> (“By 2016 . . . voters in 32 states would be willing to vote in support of same-sex marriage, according to the model. And by 2020, voters in 44 states would do so, assuming that same-sex marriage continues to gain support at roughly its previous rate.”).

¹² See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659-62 (2013).

¹³ See *United States v. Windsor*, 133 S. Ct. 2675, 2675 (2013).

¹⁴ See *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁵ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁶ See *Windsor*, 133 S. Ct. 2675.

¹⁷ See *id.* at 2682-96; *Lawrence*, 539 U.S. at 562-79; *Romer*, 517 U.S. at 623-36.

¹⁸ See *Windsor*, 133 S. Ct. at 2682-96; *Lawrence*, 539 U.S. at 562-79; *Romer*, 517 U.S.

Windsor, he is going to say that no legitimate government interest is served by denying marriage equality to gays and lesbians.¹⁹

Why do I say this, and say it so strongly? Well, look at the arguments that were advanced in *Windsor* by the justices and the litigants.²⁰ Do they even begin to rise to the level of a legitimate government interest? Even knowing how deferential rational basis review traditionally is, do they rise to the level of a legitimate interest?

Does the argument that Justice Alito made in his dissenting opinion that marriage has traditionally been defined as being between a man and a woman count as a legitimate reason to continue to ban same-sex marriage?²¹ But, the problem with this argument is: no longer can it be said in this country that marriage has always been between a man and a woman. In Massachusetts, for more than a decade same-sex couples have been able to marry.²² When the Supreme Court is going to decide this, at least seventeen states — and likely more — will have marriage

at 623-36.

¹⁹ See *Windsor*, 133 S. Ct. at 2693-94; *Lawrence*, 539 U.S. at 578; *Romer*, 517 U.S. at 634-35.

²⁰ See, e.g., *Windsor*, 133 S. Ct. at 2691-93 (“The House concluded that DOMA expresses both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality. The stated purpose of the law was to promote an interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.” (citations omitted) (internal quotation marks omitted)); Brief of Plaintiff-Appellee at 29-30, 35-36, *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (“BLAG . . . asserts six purported justifications for DOMA: (1) maintaining a uniform federal definition of marriage; (2) preserving the public fisc and previous legislative judgments; (3) acting with caution; (4) focus[ing] on opposite-sex couples in subsidizing the begetting and raising of children; (5) encourag[ing] and subsidiz[ing] the raising of children by their own biological mothers and fathers; and (6) encourag[ing] childrearing in a setting with both a mother and a father.” (citations omitted) (internal quotation marks omitted)); Brief for Defendant-Appellant the Bipartisan Legal Advisory Group of the United States House of Representatives at 15-16, *Windsor*, 133 S. Ct. 2675 (2013) (Nos. 12-2335, 12-2435), 2012 WL 3548008 [hereinafter *Windsor* Brief for Defendant] (“DOMA easily passes muster under rational basis review, as it is supported by numerous rational bases. Congress saw that expanding federal marital benefits to same-sex couples would raise significant problems of disuniformity and unfairness in the distribution of such benefits. Moreover, any extension of federal marital benefits likely would increase demands on federal resources, create unpredictable changes in the budgets of federal programs and agencies, and upset the calibration of countless prior statutes dealing with marriages, all of which were structured on the understanding that the institution included only opposite-sex couples. Congress also wanted to preserve its ability to have a federal definition for federal purposes and not have novel state definitions imposed for federal-law purposes.”).

²¹ See *Windsor*, 133 S. Ct. at 2718.

²² See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969-70 (2003) (legalizing same-sex marriage in Massachusetts).

equality. The Court can't say that marriage has always been defined this way. But, there's a larger problem with that, and that's the key precedent from the Supreme Court with regard to marriage: *Loving v. Virginia*.²³

In *Loving v. Virginia*, as everyone knows, the Supreme Court declared unconstitutional the Virginia statute that prohibited interracial marriage.²⁴ From the time Virginia and other states were admitted into the Union, they had laws that prohibited interracial marriage.²⁵ We tend to forget that, in California, there was a law prohibiting interracial marriage until it was declared unconstitutional by the California Supreme Court in the 1940s.²⁶ So, if tradition was the only measure of how marriage was to be defined, then *Loving* was wrongly decided. Surely, that's not what the Court's going to imply. And given that, in *Loving*, the Court rejected tradition as a basis for state marriage laws, how can tradition be the only way of defining marriage when it comes to the rights of gays and lesbians?

The primary argument that was made in the briefs in both *United States v. Windsor* and *Hollingsworth v. Perry* cases was that marriage is primarily about procreation.²⁷ Only opposite-sex couples can procreate

²³ See *Loving v. Virginia*, 388 U.S. 1, 3-4, 12 (1967).

²⁴ *Id.* at 2.

²⁵ See, e.g., *Perez v. Sharp*, 198 P.2d 17, 18 (Cal. 1948) (recounting that the California prohibition of interracial marriages first appeared in 1872); JAMES CURTIS BALLAGH, *WHITE SERVITUDE IN THE COLONY OF VIRGINIA: A STUDY OF THE SYSTEM OF INDENTURED LABOR IN THE AMERICAN COLONIES* 72 n.1 (Herbert B. Adams ed., Kessinger Publ'g 2004) (1895) (providing that Virginia passed a law in 1691 that prohibited interracial marriages); GILBERT THOMAS STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 79 (1911) (describing the law concerning interracial marriage prohibition in Arkansas, South Carolina, and Texas in the 1800s); Carter G. Woodson, *The Beginnings of the Miscegenation of the Whites and Blacks*, 3 J. NEGRO HIST. 335, 345-47 (1918) (describing the prohibition of interracial marriages in Massachusetts, North Carolina, and Pennsylvania in the 1600s and 1700s); Phebe Jacobsen, *Colonial Marriage Records*, THE ARCHIVISTS' BULLDOG (Md. States Archives, Annapolis, Md.), July 18, 1988, available at <http://msa.maryland.gov/msa/refserv/bulldog/bull88/html/bull88.html> (stating that Maryland introduced a law in 1664 prohibited marriage between white women and black men).

²⁶ See *Perez*, 198 P.2d at 18, 29 (holding California Civil Code sections 60 and 69, which banned interracial marriages, to be unconstitutional).

²⁷ See, e.g., Brief of Petitioners at 28, 38-39, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) [hereinafter *Hollingsworth* Brief of Petitioners] (arguing the natural capacity to have children justifies defining marriage as the union of a man and woman); Reply Brief of Petitioners at 1-3, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144) [hereinafter *Hollingsworth* Reply Brief of Petitioners] (arguing that marriage is a gendered institution that is intrinsically linked to procreation); Brief for the United States as Amicus Curiae Supporting Respondents at 32, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144) (noting that the petitioners' central claimed justification for defining marriage as between a man and a woman is "based on an interest in promoting

without artificial assistance, and that therefore this justifies denying the right to marry to same-sex couples.²⁸ I remember when I read the briefs in *Windsor* and in *Perry* that said this, and I didn't get the argument. So, I went back and re-read it and re-read it. I still don't get that argument.

Now, the premise seems clearly wrong: that marriage is inherently about procreation. I think Justice Kagan clearly exposed this at the oral argument. You might remember that she inquired as to the attorney who was defending Prop 8, Chuck Cooper: when has a state ever limited the right to marry to those that have the ability or desire to procreate?²⁹ And the hypothetical she gave was: wouldn't we allow a fifty-five year old couple to marry?³⁰ To which you might remember Mr. Cooper said, "well, at least one member of that fifty-five year old couple likely could still procreate," which I think missed the point.³¹ And you might remember that there then ensued a remark on how old Strom Thurmond was when he fathered a child.³²

What this misses most of all is that gay and lesbian couples will procreate, whether or not they can marry. Gay couples will have children through surrogacy and adoption; lesbian couples through artificial insemination and adoption. I thought the single most important question at the oral arguments with regard to *Hollingsworth* and *Windsor* was when Justice Kennedy said: "Aren't there 40,000 children in California who have parents who are same-sex couples? Shouldn't they be able to benefit from having their parents be married?"³³ I knew at that point exactly where Justice Kennedy was going to come out on this issue. And, of course, that's right — that

responsible procreation and child-rearing"); Brief on the Merits for Respondent Edith Schlain Windsor at 24-25, 39-47, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter *Windsor* Brief on the Merits for Respondent] (asserting that the Bipartisan Legal Advisory Group's procreation-based arguments fail because "DOMA is not rationally related to any legitimate federal interest in procreation").

²⁸ See, e.g., *Hollingsworth* Brief of Petitioners, *supra* note 27, at 38-39 (arguing the natural capacity to have children justifies defining marriage as between a man and a woman); *id.* at 13, 20-21 (arguing that the ability for opposite-sex couples to procreate naturally is a "fundamental biological distinction [that] goes to the heart of the State's interest in marriage"); *Windsor* Brief on the Merits for Respondent, *supra* note 27, at 25, 42-45 (arguing that "[f]ederal policy does not favor biological over non-biological . . . children").

²⁹ See Transcript of Oral Argument at 16, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144) [hereinafter *Hollingsworth* Oral Argument Transcript], available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144a.pdf.

³⁰ *Id.* at 24.

³¹ See *id.* at 24 (paraphrasing counsel's response).

³² See *id.* at 25.

³³ See *id.* at 21 (paraphrasing counsel's response).

same-sex couples will continue to procreate whether or not they can marry.

There is also just an incoherence about the argument as was presented by the opponents of same-sex marriage in both *Windsor* and in *Perry*. Remember, the argument goes: marriage is about the right to procreate; only opposite sex couples can procreate without artificial assistance; therefore, this justifies prohibiting same-sex couples from marrying.³⁴ The “therefore” is where it makes no sense. The conclusion just doesn’t follow from the premises.

There’s another argument that was advanced — both in *Windsor* and in *Perry* more generally — and that’s that allowing same-sex marriage is harmful to the institution of marriage.³⁵ And if you go back, especially to the beginning of the litigation about marriage equality, you see that argument made often. And here too it is an argument that is unlikely to persuade anybody. How is allowing a same-sex couple to marry doing harm to the marriage of an opposite-sex couple?

When the New York Court of Appeals, in a 4–2 decision, rejected a right to marriage equality in the state constitution, this was actually a primary argument they relied on.³⁶ And then-Chief Judge Judith Kaye said essentially what I just did: “How does allowing same-sex couples to marry do anything to harm the institution of marriage?”³⁷

³⁴ See *Hollingsworth* Reply Brief of Petitioners, *supra* note 27, at 3-4 (arguing the institution of marriage is about procreation and same-sex couples’ inability to procreate does not fit into the institution); *Windsor* Brief on the Merits for Respondent, *supra* note 27, at 39 (summarizing the Bipartisan Legal Advisory Group’s argument that the inability to procreate justifies denying marriage to same-sex couples).

³⁵ See, e.g., *Hollingsworth* Oral Argument Transcript, *supra* note 29, at 16-19 (arguing that redefining marriage as a genderless institution could ultimately harm the institution of marriage and the interests of society); Transcript of Oral Argument at 77-78, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_jnt1.pdf (stating there are harms when looking at the merit of the issue); *Hollingsworth* Reply Brief of Petitioners, *supra* note 27, at 1-4 (arguing that marriage is a gendered institution that is intrinsically linked to procreation); *Windsor* Brief on the Merits for Respondent, *supra* note 27, at 42 (responding to the Bipartisan Legal Advisory Group’s argument that federal recognition of same-sex marriage would negatively affect the institution of marriage).

³⁶ See *Hernandez v. Robles*, 7 N.Y.3d 338, 356-57, 364-65, 396 (N.Y. 2006).

³⁷ See *id.* at 390-94 (Kaye, C.J., dissenting) (“The relevant question here is whether there exists a rational basis for *excluding* same-sex couples from marriage, and, in fact, whether the State’s interests in recognizing or supporting opposite-sex marriages are rationally *furthered* by the exclusion. . . . But while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the *exclusion* of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone.”).

Well, there is a final argument that might be advanced as to why there is a legitimate government interest. And that's that the state can make a moral judgment that marriage should be between a man and a woman. You'll notice that the primary briefs in neither *Windsor* nor *Perry* made that argument.³⁸ And I think that there is an easy explanation for that: *Lawrence v. Texas* makes that argument untenable.

In *Lawrence v. Texas*, the primary argument advanced by the State of Texas was that it could make a moral judgment that homosexuality is wrong.³⁹ Justice Kennedy's majority opinion expressly rejected that.⁴⁰ Once the Court rejects that argument in *Lawrence v. Texas*, no longer is there a tenable claim that the state can make a moral judgment that it believes that marriage is between a man and a woman and that it's immoral for two men or for two women to marry. If you put all of this together, you can see why I come to the conclusion that it is inevitable that the lower federal courts and ultimately the Supreme Court is going to conclude that the Constitution creates a right to marriage equality for gays and lesbians.

But, if I haven't persuaded you yet, I think I can give you an even simpler reason why I think this is the conclusion that the Court is going to come to. I think that the five Justices who were the majority in *Windsor* are going to face the following question when they confront state laws that prohibit marriage equality: do they want to write the next

³⁸ See *Windsor* Brief for Defendant, *supra* note 20, at 14-15; Brief for the United States on the Merits Question at 38-40, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 683048 ("BLAG makes no effort to defend Section 3 on the basis of [traditional notions of morality], and for good reason. Moral opposition to homosexuality, though it may reflect deeply held personal views, is not a legitimate policy objective that can justify unequal treatment of gay and lesbian people."); Petition for Writ of Certiorari at 38-39, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144) (lacking a moral argument against marriage equality but concluding that "[b]ecause other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group, maintaining the traditional institution of marriage is a legitimate state interest") (internal quotations omitted).

³⁹ See *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) ("Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality.").

⁴⁰ See *id.* at 585 ("Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations — the asserted state interest in this case — other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.").

Plessy v. Ferguson,⁴¹ or do they want to write the next *Brown v. Board of Education*?⁴²

There's no doubt where history is going on this issue. Look at the dozen countries around the world that in the last decade—that now allow marriage equality, even predominantly Catholic countries that allow marriage equality.⁴³ Look at the trend — the accelerating trend in the United States. These five Justices want to be on the right side of history, and there's no doubt where history is going on this issue.

I think of Anthony Kennedy. He undoubtedly regards as one of his most important legacies as a Justice his opinions with regard to the rights of gays and lesbians.⁴⁴ There have only been three Supreme Court cases in all of American history expanding rights for gays and lesbians — the ones I've mentioned: *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor*.⁴⁵ We know who wrote all three of those majority opinions: Anthony Kennedy.⁴⁶

Kennedy, of course, dissented in *Hollingsworth v. Perry*.⁴⁷ He thought that the supporters of the initiative had standing to be able to defend it on appeal.⁴⁸ I believe he came to that conclusion because he wanted the

⁴¹ 163 U.S. 537 (1896).

⁴² 347 U.S. 483 (1954).

⁴³ See generally David Masci et al., *Gay Marriage Around the World*, PEW RES. CTR. (Sept. 2, 2014), <http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/> (listing countries in which same-sex marriage is either legal throughout the whole country, or in certain jurisdictions thereof and noting the Catholic influence in Argentina, Belgium, France, Scotland, and Spain).

⁴⁴ See Tony Mauro, *Gay Rights Likely to be 'Major Part' of Kennedy's Legacy*, N.Y. L.J., July 9, 2013, at 2, 2 (providing the opinions of legal academics regarding how Justice Kennedy's rulings with respect to gay and lesbian rights will affect his legacy).

⁴⁵ See Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 269 (2014) (tracing the legal status of homosexuality from *Bowers*, to *Romer*, to *Lawrence*, and then to *Windsor*); see also Chris Bower, *Juggling Rights and Utility: A Legal and Philosophical Framework for Analyzing Same-Sex Marriage in the Wake of United States v. Windsor*, 102 CALIF. L. REV. 971, 976-78 (2014) (discussing how Justice Kennedy's approach to Fifth Amendment jurisprudence in *Romer*, *Lawrence*, and *Windsor* affected the rights of homosexuals); D. Edward Hayes & Sarah C. Boone, *The Same Love: Marriage Equality in Bankruptcy Post-DOMA and the Evolving Rights of Registered Domestic Partners*, 33 CAL. BANKR. J. 49, 64 (2014) (discussing how *Windsor* expanded the economic rights of gay and lesbian couples); Darren Lenard Hutchinson, "Not Without Political Power": *Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 1012 (2014) (discussing the Court's holdings in *Romer*, *Lawrence*, and *Windsor*).

⁴⁶ See *Windsor v. United States*, 133 S. Ct. 2675, 2682 (2008); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *Romer v. Evans*, 517 U.S. 620, 623 (1996).

⁴⁷ See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) (Kennedy, J., dissenting).

⁴⁸ See *id.* ("In my submission, the Article III requirement for a justiciable case or

Supreme Court to reach the merits of *Hollingsworth v. Perry*. He wanted the Court to declare Prop 8 unconstitutional, and in doing so, grant a right of marriage equality throughout the country.

Anthony Kennedy, for many years, taught constitutional law not very far from here at McGeorge Law School. I think, as a former Constitutional Law professor, he is very aware of what it's going to mean when his opinions are taught in the future. Does he want to write the opinion that's going to reject the right to marriage equality that future generations of law professors and law students will look at the way we look at *Plessy v. Ferguson*? Or does he want to write the opinion that is going to be celebrated for advancing the rights of equality for gays and lesbians? So, that's why I feel so confident in my prediction that marriage equality is inevitable.

This brings me to the second part of my talk. How did this happen and happen so quickly? As recently as 2008, Barack Obama said that he didn't favor marriage equality.⁴⁹ Of course, he has since changed his position.⁵⁰ As recently as 2008, a majority of California voters passed an initiative, Proposition 8, to amend the state's constitution to say that marriage had to be between a man and a woman.⁵¹ No one — not even the most ardent opponents of marriage equality — believe that Prop 8 would have a chance of passing today.

So, how could it be that social change occurred, and this rapidly? In fact, I can't think of, with regard to any other major issue, having social change happen this fast. A number of things have come together, and I think it's worth spending time as legal scholars, as social commentators reflecting on this. One part of the explanation was the brilliant litigation strategy that was employed. The lawyers who were litigating for marriage equality decided at the beginning to focus on state courts and state constitutions.

That's not how we are instructed in law school. Everyone gets a course in United States constitutional law; relatively few people take courses in state constitutional law. My guess is that a relatively few number of law schools offer courses in state constitutional law. The

controversy does not prevent proponents from having their day in court.”).

⁴⁹ See Catherine Elsworth, *Barack Obama: Marriage Is Between a Man and a Woman*, TELEGRAPH (Nov. 3, 2008), <http://www.telegraph.co.uk/news/worldnews/barackobama/3375059/Barack-Obama-marriage-is-between-a-man-and-a-woman.html>.

⁵⁰ See Josh Earnest, *President Obama Supports Same-Sex Marriage*, THE WHITE HOUSE BLOG (May 10, 2012, 7:31 PM), <http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage>.

⁵¹ See DEBRA BOWEN, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 13 (2008) (stating that Proposition 8, which eliminated the right of same-sex couples to marry, was passed by 52.3% of the popular vote).

natural inclination, I believe, of civil rights lawyers is to want to go to federal court because we all have in mind that it was the federal courts that brought about desegregation in a way that state courts just weren't going to do. And yet, the lawyers from Lambda Legal Defense thought that they needed to go to state court and use state constitutions first, and that's what they did.

One of the first cases was *Baehr v. Lewin*, where the lawyers tried to litigate under the Hawaii Constitution.⁵² They got a ruling from the Hawaii Supreme Court that laws that prohibit marriage equality are a form of sex discrimination.⁵³ The only reason I can't marry another man is because of my sex. Isn't that clearly sex discrimination? Under the Hawaii Constitution, strict scrutiny is used for sex discrimination and the Hawaii Supreme Court remanded the matter back to the trial court to see if strict scrutiny was met.⁵⁴ Hawaii voters then passed an initiative that made the case moot, but it was a blueprint for litigation in terms of using state constitutions and state courts.

The Massachusetts Supreme Judicial Court's decision in 2003 in *Goodridge* was truly a landmark: the first state supreme court to recognize a right of marriage equality.⁵⁵ And in a number of states, advocates for marriage equality brought lawsuits based on state constitutions.⁵⁶ There were failures. As I mentioned, the New York

⁵² See *Baehr v. Lewin*, 852 P.2d 44, 50 (Haw. 1993).

⁵³ *Id.* at 64-67.

⁵⁴ *Id.* (“[W]e hold that sex is a ‘suspect category’ for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution and that HRS § 572-1 is subject to the ‘strict scrutiny’ test. It therefore follows, and we so hold, that (1) HRS § 572-1 is presumed to be unconstitutional (2) unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute’s sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples’ constitutional rights.” (citations omitted)).

⁵⁵ See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (“We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”); M.K.B. Darmer & Tiffany Chang, *Moving Beyond the “Immutability Debate” in the Fight for Equality After Proposition 8*, 12 SCHOLAR 1, 25 (2009) (“In *Goodridge v. Department of Public Health*, the Supreme Court of Massachusetts became the first state high court to find marriage bans unconstitutional.”).

⁵⁶ See, e.g., *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 411 (Conn. 2008) (“The plaintiffs, eight same sex couples, commenced this action, claiming that the state statutory prohibition against same sex marriage violates their rights to substantive due process and equal protection under the state constitution.”); *Varnum v. Brien*, 763 N.W.2d 862, 872-73 (Iowa 2009) (“[Plaintiffs] claimed the statutory same-sex marriage ban violates certain liberty and equality rights under the Iowa Constitution.”); *Goodridge*, 798 N.E.2d at 950 (“[P]laintiffs filed suit . . . seeking a judgment that the

Court of Appeals, in a 4–2 decision, rejected the idea of a right to marriage equality.⁵⁷ But, there were successes. The Iowa Supreme Court unanimously found a right to marriage equality under the State Constitution.⁵⁸ The California Supreme Court, in May 2008, did so.⁵⁹

I think this was a brilliant strategy for at least a couple of reasons. One is it was a way of keeping the matter out of the federal courts and away from the Supreme Court for a longer period of time until one could be more sure of the chance of victory in the federal courts and the Supreme Court. Obviously, a loss in the Supreme Court early on would have been devastating — devastating with regard to building support nationally for marriage equality. Even a loss in a federal court of appeals would have been much more harmful than a loss in an individual state.

It really wasn't until Ted Olson and David Boies brought their challenge to Proposition 8 in federal court in San Francisco that things changed.⁶⁰ And as you may know, the architects of the challenge to laws prohibiting marriage equality — those who brought the case in state

exclusion of the Plaintiff couples and other qualified same-sex couples from access to marriage licenses . . . violates . . . the Massachusetts Constitution.” (citation omitted) (internal quotation marks omitted)); *Lewis v. Harris*, 188 N.J. 415, 423 (2006) (“Plaintiffs . . . claim that New Jersey’s laws, which restrict civil marriage to the union of a man and a woman, violate the liberty and equal protection guarantees of the New Jersey Constitution.”); *Griego v. Oliver*, 316 P.3d 865, 870 (N.M. 2013) (“[Plaintiffs] allege that they have a constitutional right under the Due Process and Equal Protection provisions of New Mexico’s Bill of Rights to enter into civil marriages and to enjoy the concomitant legal rights, protections, and responsibilities of marriage.”).

⁵⁷ See *Hernandez v. Robles*, 7 N.Y.3d 338, 356 (N.Y. 2006) (holding that the New York Constitution does not compel recognition of same-sex marriages).

⁵⁸ *Varnum*, 763 N.W.2d at 904 (holding that Iowa’s “equal protection clause requires more than has been offered to justify the continued existence of the same-sex marriage ban under the statute”).

⁵⁹ *In re Marriage Cases*, 43 Cal. 4th 757, 814-15 (2008) (“[T]he right to marry represents the right of an individual to establish a legally recognized family with the person of one’s choice . . .”).

⁶⁰ See *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2009) (challenging Proposition 8 on the grounds that it violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment); see also Jennifer C. Pizer, *How Has Perry Affected Other Marriage Rights Litigation Strategies*, 37 N.Y.U. REV. L. & SOC. CHANGE 165, 173-78 (2013) (explaining that the litigation strategy in *Perry* was “a daring, high-risk endeavor” and stating that the overall progress of the marriage equality movement after *Perry* is remarkable). See generally ALLIANCE FOR JUSTICE, LOVE AND THE LAW: FEDERAL CASES CHALLENGING STATE BANS ON SAME-SEX MARRIAGE (2014), available at <http://www.afj.org/wp-content/uploads/2014/07/Federal-Marriage-Equality-Report-UPDATES-09.17.14.pdf> (“The Supreme Court opened a door with its rulings in *Perry* and *Windsor*, and nearly every subsequent federal challenge has resulted in judges — both Democratic and Republican appointees — striking down state bans on same-sex marriage.”).

court — were quite critical of Ted Olson and David Boies for doing this. They felt that they had a strategy plan in terms of how to go state-to-state to build support to bring about change. And they were upset that some outsiders who hadn't been involved in the movement came and litigated in federal court.

I remember, when the lawsuit was filed by Ted Olson and David Boies in federal court, getting asked by reporters, "Is this a good thing or a bad thing?" I said, "Well, let's wait and see what the Supreme Court does; that depending on what the Supreme Court does, we will see if this was a brilliant strategy or not." But it was inevitable that somebody was going to file a lawsuit in federal court under the United States Constitution. So long as it was just in state court under state law, the matter couldn't be removed to federal court — couldn't go to the Supreme Court. But, those who were bringing these lawsuits couldn't stop others from suing in federal court. And if anyone was going to do it, it was great that it was accomplished by prestigious lawyers like Ted Olson and David Boies. And also, having people who are identified as prominent Democrats and prominent Republicans together litigating was important symbolically.

But I think there is another way in which this litigation strategy was brilliant and that's that it let states be the laboratories for experimentation. That people could see Massachusetts allow same-sex couples to marry, and they could see that there was no harm to the institution of marriage from doing so.⁶¹ They could see other states —

⁶¹ See, e.g., Eric Alan Isaacson, *Goodridge Lights a Nation's Way to Civic Equality*, Bos. B.J., Nov. 2013, at 15, available at <http://bostonbarjournal.com/2013/11/15/goodridge-lights-a-nations-way-to-civic-equality/> ("Yet the tide turned, thanks to *Goodridge* and Massachusetts — whose civic society obviously did not collapse, and whose people enjoyed a remarkably low divorce rate. Family values remained alive and well in the Commonwealth. Her churches were open and tax exempt, whether or not they offered religious nuptials to same-sex couples. Their clergy remained free, as always, to decide whose marriages they would officiate, and on what terms. And many Massachusetts churches have joyfully thrown open their doors for same-sex couples desiring religious rites."); Matt Viser & Michael Levenson, *Mass. Helped Propel Marriage Equality Change*, BOS. GLOBE (June 28, 2013), <http://www.bostonglobe.com/news/nation/2013/06/26/roots-supreme-court-decision-overturning-doma-are-massachusetts/G31gFFEZbXLvgl0IWnFojO/story.html> ("The *Goodridge* case helped change public attitudes toward same-sex marriage by unleashing a wave of same-sex weddings, where countless aunts, uncles, coworkers, and friends witnessed gay couples pledge to love and support one another."). But see Patrick J. Egan & Nathaniel Persily, *Court Decisions and Trends in Support for Same-Sex Marriage*, POLLING REP. (Aug. 17, 2009), <http://www.pollingreport.com/penp0908.htm> ("Almost immediately [after *Lawrence*], support for same-sex marriage dropped. . . . The downward trajectory continued through [*Goodridge*] in 2003 and 2004, and until the 2004 election, when same-sex marriage continued to be a salient political issue. . . . It took somewhere between four

Iowa and briefly California — allow marriage equality and see that it didn't cause any problems with regard to the administration of state laws.⁶² And in this way, it could send a message to the rest of the country, and it could help build support.

At the same time, I think there was a brilliant legislative strategy. Supporters of rights for gays and lesbians worked in legislatures to get laws protecting domestic partners adopted.⁶³ Many states, including California, adopted laws extending almost all of the rights of marriage to domestic partners and specifically to same-sex couples.⁶⁴ In California, the law that was adopted really did extend almost all of the benefits, other than those related to the tax system, and the California law then become a model elsewhere.⁶⁵

and five years for Americans' support for the idea of legalizing same-sex marriage . . . to rise above pre-*Lawrence* levels.”).

⁶² See *In re Marriage Cases*, 43 Cal. 4th at 814-15; *Varnum*, 763 N.W.2d at 904. For a variety of Iowan officials' opinions on *Varnum*'s effect in the state, see Randy Evans, *Five Years After Ruling, Iowans Reflect on Gay Marriage Changes*, DES MOINES REG. (Mar. 31, 2014), <http://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2014/03/30/5-years-after-ruling-iowans-reflect-on-gay-marriage-changes/7097561/> (“The sky has not fallen in Iowa. Houses of worship remain protected to make their own decision on same-gender ceremonies. For same-gender families, however, the sky has opened up, creating real opportunities.”). But see Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1190-95 (stating that, in California, *In re Marriage Cases* prompted significant backlash from same-sex marriage opponents and led to the enactment of Proposition 8).

⁶³ See, e.g., S. 1306, 2013–2014 Leg., Reg. Sess. (Cal. 2014) (extending the rights of marriage to same-sex couples and recognizing the validity of same-sex marriages contracted outside of California); S. 54, 2009–2010 Leg., Reg. Sess. (Cal. 2009) (providing that same-sex couples that were married after November 5, 2008 would enjoy the same rights, protections, and benefits of marriage as opposite-sex couples); S. 10, 98th Gen. Assemb., Reg. Sess. (Ill. 2014) (providing that all Illinois marriage laws “shall apply equally to marriages of same-sex and different-sex couples”); S. 394, 2013 Gen. Ct., 163rd Sess. (N.H. 2013) (amending New Hampshire law to recognize marriages of same-sex couples, whether contracted in-state or out-of-state, as valid and legitimate); A. 8354, 2011 Leg., 234th Sess. (N.Y. 2011) (declaring all New York marriages to be valid “regardless of whether the parties to the marriage are of the same or different sex”).

⁶⁴ See A. 205, 2003 Leg., Reg. Sess. (Cal. 2003) (extending rights of marriage to domestic partners). Registered domestic partnerships in California are substantially similar to registered domestic partnerships in the District of Columbia and civil unions in New Jersey. See D.C. CODE § 32-702 (2014); N.J. STAT. ANN. § 37:1-28 (West 2009).

⁶⁵ See A. 205, 2003 Leg., Reg. Sess. (Cal. 2003). The District of Columbia and New Jersey were among the first states to implement domestic partnerships laws that were similar to California's scheme. See, e.g., D.C. CODE § 16-308 (2012) (providing equal parental rights to same-sex couples); A. 3743, 210th Leg., 2d Ann. Sess. (N.J. 2003) (extending rights of married couples to persons in domestic partnerships); see also Denise M. Beauregard, *California's DP Law a Model for Country to Follow*, PRIDESOURCE (Jan. 27,

One of the interesting things that occurred while all of this was happening was that conservatives who had previously opposed domestic partner laws came to seize on domestic partner laws as the alternative to marriage.⁶⁶ Their argument was: we don't need to provide marriage rights to gays and lesbians because we are giving them rights as domestic partners.⁶⁷ But once they made that move, I believe they gave up the game. Because once we've given the right of marriage — other than the title — through domestic partnership, once all of the benefits of marriage are being conveyed through domestic partnership laws, then the question is then why not allow marriage too? And, of course, the only possible answer to that is a moral or religious argument against same-sex marriages, which isn't going to work as a constitutional basis.

It's interesting that when the Ninth Circuit, in its opinion in February 2012, declared Prop 8 unconstitutional as violating equal protection, it said that since California is already extending virtually all of the rights of marriage but the title to gay and lesbian couples, what's the legitimate government interest in denying the right to marry as well?⁶⁸

2005), <http://www.pridesource.com/article.html?article=11278> (describing the California Domestic Partnership law as a “perfect prototype” and arguing that it “should be the example for the nation to follow”); Lee Romney, *New California Law Boosts Domestic Partners' Rights, Responsibilities*, SEATTLE TIMES (Jan. 2, 2005, 12:00 AM), http://seattletimes.com/html/nationworld/2002138193_gays02.html (“[D]omestic partnership in California [is] equivalent to marriage in almost all but name.”).

⁶⁶ In California's official 2008 ballot materials, proponents of Proposition 8 asserted: “Proposition 8 is about preserving marriage; it's not an attack on the gay lifestyle. Proposition 8 doesn't take away any rights or benefits of gay or lesbian domestic partnerships. Under California law, ‘domestic partners shall have the same rights, protections, and benefits’ as married spouses.” DEBRA BOWEN, CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 128 (2008) [hereinafter VOTER INFORMATION GUIDE] (emphasis omitted), available at <http://voterguide.sos.ca.gov/past/2008/general/pdf-guide/vig-nov-2008-principal.pdf>; see also Michael W. Chapman, *Romney Against Gay ‘Marriage’ But OK With ‘Domestic Partnerships,’ Gay Adoption, Gays in Military*, CYBERCAST NEWS SERV. (Jan. 9, 2012, 6:43 PM), <http://cnsnews.com/news/article/romney-against-gay-marriage-ok-domestic-partnerships-gay-adoption-gays-military> (“Romney has maintained that he opposes same-sex ‘marriage’ because as a social institution he believes that status is reserved only for one man and one woman. As for domestic partner benefits, Romney supports granting the legal privileges that heterosexual spouses enjoy, such as health insurance coverage, hospital visitation rights, joint ownership of property, survivorship rights, child custody, etcetera.”).

⁶⁷ See VOTER INFORMATION GUIDE, *supra* note 66, at 56.

⁶⁸ See *Perry v. Brown*, 671 F.3d 1052, 1088 (9th Cir. 2012) (observing that California already recognizes full parental rights for same-sex couples).

There are still so many laws in society that discriminate against gays and lesbians.⁶⁹ There is no federal statute that prohibits employment discrimination against gays and lesbians.⁷⁰ I think that groups that litigate and advocate on behalf of gays and lesbians had to figure out where they should put their emphasis. This isn't unlike the choices that the civil rights movement and the NAACP focused on in the 1940s.⁷¹ Whenever I teach the equal protection part of constitutional law, I always ask my students: if they were the lawyers in Baltimore in the late 1940s at the NAACP, in planning which of the Jim Crow laws that segregated so much of the country to challenge, where would they focus on? Would they focus on the laws that required the parks and the beaches, the schools, the restaurants, the cemeteries — where would they focus first? The advocates with regard to equality based on sexual orientation made the brilliant choice by focusing on marriage. By doing so, they could adopt the conservative rhetoric of being “pro-family.”

To be candid, there was an image of gays as promiscuous from the bathhouses of the 1980s.⁷² This was obviously an image before the AIDS

⁶⁹ Deirdre M. Bowen, *All that Heaven Will Allow: A Statistical Analysis of the Coexistence of Same-Sex Marriage and Gay Matrimonial Bans*, 91 DENV. U. L. REV. 277, 285 & nn.38-39 (2014) (presenting a list of thirty-three states which have “mini-DOMAs” in constitutional or statutory form restricting the definition of marriage to one man and one woman); see, e.g., WYO. STAT. ANN. § 20-1-101 (2014) (“Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential.”); H. 2453, 2014 Leg., Reg. Sess. (Kan. 2014) (proposed legislation allowing businesses to refuse to serve customers based on same-sex relationships).

⁷⁰ Title VII of the Civil Rights Act of 1964 prohibits discrimination only on the basis of race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2 (2012). See Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 278-79, 81-86 (2014) (explaining that there is a “need for LGBT-specific employment legislation” because Title VII does not prevent LGBT-related employment discrimination). See generally *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014) (discussing the federal government’s historical discriminatory treatment of LGBT persons in employment and other contexts).

⁷¹ See DAVISON M. DOUGLAS, *READING, WRITING, & RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS* 20-21 (1995) (tracing NAACP litigation in the 1940’s to effectuate education reform); MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 82-104 (2004) (narrating the NAACP’s abandonment of an equalization strategy and decision to attack segregation directly during the 1940’s); see also, e.g., *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 193-94, 199 (1944) (invalidating a labor union’s unequal treatment of African American craftsmen); *Morris v. Williams*, 149 F.2d 703, 704, 709 (8th Cir. 1945) (holding that the Little Rock school system violated the Fourteenth Amendment when it provided unequal salaries to African American teachers solely on the basis of their race).

⁷² Robert A. Beaty, Jr., *The Great Bathhouse Bugaboo: A Practitioner’s Inquiry into the Criminal and Public Health Policy of Gay Bathhouses*, 12 MICH. ST. U. J. MED. & L.

epidemic, but it is one that many people had.⁷³ By focusing on marriage, it changes that image. Now, it's simply gay and lesbian couples who wanted to be part of an institution that's long been traditionally protected — long been integral to society. I think, in this regard, the rhetoric was important as well when there was this shift to using the phrase "marriage equality." The advocates of this right, instead of speaking so much about "same-sex marriage," which then puts the focus on "same-sex," phrased this instead as being about "marriage equality." And equality is such a powerful norm in our society.

The supporters of marriage equality could then present this as a matter of tolerance: that to support marriage equality is to be tolerant and to be inclusive. To oppose it is to seem quite intolerant. I believe that's what Justice Kennedy was saying when he wrote in *Windsor* of how the Defense of Marriage Act was based on a desire to disadvantage gays and lesbians.⁷⁴ Ultimately, the message of those that support marriage equality could be: we realize that you may oppose marriage for gays and lesbians, you may oppose same-sex marriage; then don't marry someone of the same sex. But, that's not a reason to deny marriage equality to others.

In addition to the importance of the litigation strategy and the legislative strategy and the rhetorical strategy, we should not underestimate the role of the media. Many believe that the tide turned for the civil rights movement in the early 1960s because of the media.⁷⁵

341, 352-53 (2008) ("Since the mid-1980s, early in the AIDS epidemic, 'gay bathhouses and sex clubs have been the targets of community and public health ire as the cause of the spread of the disease among men who have sex with men.'" (citation omitted)); Jennifer Cook, *Shaken from Her Pedestal: A Decade of New York City's Sex Industry Under Siege*, 9 N.Y. CITY L. REV. 121, 126-28 (2005) (explaining that, in the 1980s, homosexual bathhouses were characterized as "establishments where high-risk sexual activity occurred" (internal quotation marks omitted)).

⁷³ See Beatey, *supra* note 72, at 352; Cook, *supra* note 72, at 126-28.

⁷⁴ See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.").

⁷⁵ See, e.g., CHRISTINE ACHAM, *REVOLUTION TELEVISED: PRIME TIME AND THE STRUGGLE FOR BLACK POWER* 27-28 (2004) (explaining that media coverage during the Civil Rights Movement helped bring about social change); ANIKO BODROGHKOZY, *EQUAL TIME: TELEVISION AND THE CIVIL RIGHTS MOVEMENT* 41 (2012) ("TV newsmen suggested that their medium made the civil rights movement possible and . . . television news was an agent of change in the struggle for integration and racial justice."); Jack Nelson, *The Civil Rights Movement: A Press Perspective*, HUM. RTS., Fall 2001, at 3, 4 ("It was only after the news media began to cover Martin Luther King's protests extensively, and the broader public began to respond, that real reform began to take place."); David Treadwell, *Journalists Discuss Coverage of Movement: Media Role in Civil Rights Era Reviewed*, L.A.

When people on the nightly news could see Bull Connor turning the fire hoses on the civil rights protestors, and especially on children, many think that's the moment when public attitude shifted with regard to segregation.⁷⁶

I think that the media played an important role here as well. One of the defining moments occurred when then-Mayor of San Francisco, Gavin Newsom, briefly allowed same-sex couples to marry there.⁷⁷ And

TIMES (Apr. 5, 1987), http://articles.latimes.com/1987-04-05/news/mn-380_1_civil-rights-movement ("The civil rights movement would have been like a bird without wings if it hadn't been for the news media." (quoting Rep. John Lewis)); William G. Thomas III, *Television News and the Civil Rights Struggle: The Views in Virginia and Mississippi*, S. SPACES (Nov. 3, 2004), <http://southernspaces.org/2004/television-news-and-civil-rights-struggle-views-virginia-and-mississippi> ("Historians, commentators, and participants have suggested connections between the media, especially television news, and the course of the civil rights movement.").

⁷⁶ See, e.g., ACHAM, *supra* note 75, at 28 (quoting Attorney General Robert F. Kennedy) ("[W]hat Bull Connor did down there — the dogs and the hoses and the pictures with the Negroes — is what created a feeling in the United States that more was needed to be done."); Nelson, *supra* note 75, at 4 ("[C]overage on the evening television news was essential to moving public opinion. Riveting images of Birmingham Police Commissioner Bull Connor's officers using dogs and fire hoses to attack defenseless blacks . . . sparked such national outrage that Congress passed the 1964 Public Accommodations Act."); David Benjamin Oppenheimer, *Essay, Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 667-68 (1995) (explaining that the media's coverage of the use of fire hoses and canine units on the Birmingham marchers led to a fundamental shift in national opinion); Maurice J. Hobson, Op-Ed., *But for Bull Connor and Birmingham, We Would Not Have Dr. Martin Luther King Jr.'s 'Letter from Birmingham Jail'*, AL.COM (Apr. 13, 2013), http://www.al.com/opinion/index.ssf/2013/04/but_for_bull_connor_and_birmin.html (stating that the international news coverage of Bull Connor's actions pressured the Kennedy administration to assuage discrimination); James L. Baggett, *Eugene "Bull" Connor*, ENCYCLOPEDIA ALA. (Mar. 9, 2007), <http://www.encyclopediaofalabama.org/face/Article.jsp?id=h-1091> ("Images of [police officers and firemen using dogs and high-pressure water hoses against demonstrators] appeared on television and in newspapers throughout the country and helped to shift public opinion in favor of national civil-rights legislation.").

⁷⁷ See, e.g., LEIGH MOSCOWITZ, *THE BATTLE OVER MARRIAGE: GAY RIGHTS ACTIVISM THROUGH THE MEDIA* 1-3, 38-39 (2013) (explaining that Newsom's actions "catapulted the issue of gay marriage to the center stage of mainstream cultural debate"); Melissa Murray, *Marriage Rights and Parental Rights: Parents, The State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 363-64 (2009) ("Newsom's unorthodox move escalated the debate and drew national attention to the [marriage equality] issue."); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 706 (2012) (stating that Newsom's actions ultimately led to the recognition of same-sex couples' fundamental right to marry under the California constitution); Schacter, *supra* note 62, at 1172 (stating that the ruling granting same-sex couples the right to marry can be traced back to mayor Gavin Newsom granting same-sex marriage); Rachel Gordon, *The Battle over Same-Sex Marriage/Uncharted Territory/Bush's Stance Led Newsom to Take Action*, SFGATE (Feb. 15, 2004), <http://www.sfgate.com/news/article/THE-BATTLE-OVER-SAME-SEX-MARRIAGE-Uncharted->

the media — all the media — showed pictures of same-sex couples standing in the rain, holding hands, waiting to get married.⁷⁸ What was a more pro-family image — an image more pro-marriage — than that one?

Of course, programs like *Will & Grace*,⁷⁹ movies like *The Kids Are All Right*⁸⁰ also played a key role because it broke down the sense there's "us" and "them." It made everybody part of the "us," and the media doing that also then helped pave the way for what I believe is the inevitability of marriage equality in the United States.

If you'll accept this characterization, then that leads me to my third part of my remarks: what does this tell us about the role of the courts, about the judiciary, and the democratic society? I think here, as always, it requires that we have a fairly nuanced explanation. In part, I think what I've just discussed shows us that the courts really were an essential part of bringing about marriage equality.

You might be familiar with a book by the name of *The Hollow Hope* by Professor Gerald Rosenberg at the University of Chicago.⁸¹ *The Hollow Hope* got a good deal of attention. In it, Professor Rosenberg argues that courts can't make a difference in society.⁸² He says the positive things that the courts have brought about would have happened anyway and that the courts can't really be the impetus for social change.⁸³ There are a group of constitutional scholars that, in part, rely on Professor Rosenberg's work to argue against judicial review.⁸⁴ Often it's been conservatives who argue against judicial

2823315.php (reporting on Newsom's decision to direct the San Francisco county clerk to permit same-sex partners to marry, and the nationwide political factors considered in that decision).

⁷⁸ See, e.g., *Gay Couples Flock to S.F. for Marriage Licenses*, FOXNEWS (Feb. 17, 2004), <http://www.foxnews.com/story/2004/02/17/gay-couples-flock-to-sf-for-marriage-licenses/> (reporting on the many marriages performed in San Francisco, despite the rainy weather); Steven Winn, 'Gay Marriage 2004' — *Culture Clash, Romance and Classic S.F. Theater*, SFGate (Mar. 2, 2004, 4:00 AM), <http://www.sfgate.com/entertainment/article/Gay-Marriage-2004-culture-clash-romance-and-2815564.php> (noting television interviews of same-sex partners in San Francisco standing in the rain waiting to obtain marriage certificates).

⁷⁹ See *Will & Grace* (NBC television broadcast Sept. 1998–May 2006).

⁸⁰ See *THE KIDS ARE ALL RIGHT* (Focus Features 2010).

⁸¹ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

⁸² *Id.* at 338.

⁸³ *Id.* at 341-42.

⁸⁴ Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 676; see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1831-32 (2005) (arguing that Rosenberg's

review; it's interesting that the scholars that are referred to here are "progressives." And they've come to embrace a movement that they call "popular constitutionalism."⁸⁵

I think that the clearest expression of this comes from a book by Harvard Professor Mark Tushnet titled *Taking the Constitution Away from the Courts*.⁸⁶ In it, he argued that we should eliminate judicial review.⁸⁷ Part of his argument was the Gerald Rosenberg one: that courts really don't make much a difference anyway.⁸⁸ James MacGregor Burns, in a book just a few years ago, argued for the elimination of judicial review.⁸⁹ Former Stanford Dean Larry Kramer wrote a prominent book in this vein of popular constitutionalism.⁹⁰ He argues against judicial supremacy, though I am not quite sure what he means by that.⁹¹

I think that what I've discussed today — what this Symposium is focusing on — is so important in showing that courts can make a difference and that courts are essential in bringing about certain social change. I don't believe that we would be at the place we are now — with seventeen states and the District of Columbia allowing marriage equality — if the Massachusetts Supreme Judicial Court in *Goodridge* had not found such a right.⁹² I think that the country needed to see that it's possible to have marriage equality without any other harm to social institutions. I think it was only after some of the state courts had found such a right that you could begin to see a legislature — like New York in 2011 — creating the right.⁹³ And then there could be initiatives —

Hollow Hope "raises important issues about the broader effects of court decisions"); David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's The Hollow Hope: Can Courts Bring About Social Change?*, 12 J.L. & POL'Y 63, 65-67 (1996) (discussing the critical reception of *Hollow Hope*).

⁸⁵ Chemerinsky, *supra* note 84, at 675-77.

⁸⁶ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

⁸⁷ *Id.* at 154-55.

⁸⁸ *See id.* at 135-36; *see also* ROSENBERG, *supra* note 81, at 341-43.

⁸⁹ JAMES MACGREGOR BURNS, *PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT* 255-59 (2009).

⁹⁰ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

⁹¹ *Id.* at 249-53.

⁹² *See generally* *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that same-sex couples have the right to marry).

⁹³ N.Y. DOM. REL. LAW § 10-a (McKinney 2011). *See generally* Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES (June 24, 2011), <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html> (noting that New York legalized same-sex marriage after five other states had enacted laws that permitted same-sex marriage).

like in Maryland, Maine, and Washington in 2012 — creating such a right.⁹⁴

It requires that we recognize that it's not that the courts can do it alone, but it is that the courts are essential to bringing about change, and that courts do bring about change in decisions like the ones we are talking about today. I believe that the legislative, the rhetorical, the media strategy were all essential. What this tells me is that so much of the literature and constitutional theory that says the courts can't succeed and the courts are unnecessary is misguided; we need a much more complicated and nuanced account of the role of the court together with other institutions in bringing about social change.

I don't know if the marriage equality movement can be a blueprint for other social changes. So many things have come together in just the right way to make it as successful as it's been in this short of a period of time. But certainly if I were to design another social movement for equality, I'd look very carefully at how the marriage equality movement has succeeded.

I realize I'm talking about all of this as if the fight has been won, as if it's in the past tense. I very much agree with the banner, "Not Equal Yet." And yet, as I speak to you, we've come so far, so fast, with regard to marriage equality. There's still many other areas of equality with regard to sexual orientation to work on. My conclusion is my thesis: that we really are on the verge of the time when gays and lesbians will be able to get all of the legal benefits of marriage, have all of the joys of marriage, experience all the disappointments of marriage that heterosexual couples have always had.

QUESTIONS AND ANSWERS

Q: I was wondering, what do you think, like, the longer effects of adopting the conservative family rhetoric will do for other alternative family models and other, like, equality movements?

EC: I want to go back to a case that those of you who have had constitutional law might remember: *Michael H. v. Gerald D.*⁹⁵ from 1989. If you remember what was involved here was a woman — who the court described as "an international model" — was married, but she

⁹⁴ Chelsea J. Carter & Allison Brennan, *Maryland, Maine, Washington Approve Same-Sex Marriage; 2 States Legalize Pot*, CNN (Nov. 7, 2012), <http://www.cnn.com/2012/11/01/politics/ballot-initiatives>; see MD. CODE ANN., FAM. LAW § 2-201 (2013); ME. REV. STAT. tit. 19-A, § 650-A (2012); WASH. REV. CODE ANN. § 26.04.010 (2012).

⁹⁵ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

had an affair.⁹⁶ She conceived a child as a result of the affair.⁹⁷ She lived with the biological father and the child for about a year and a half.⁹⁸ And then, she left the biological father and returned to her husband and took the child with her.⁹⁹ The biological father sued for visitation.¹⁰⁰

California had a law that said that if a married woman had a child under these circumstances, there's an irrebuttable presumption that her husband was the father of the child.¹⁰¹ As a result, the California courts denied the biological father of any visitation, of any parental rights.¹⁰² And the Supreme Court — five to four — upheld the California law and its application.¹⁰³ Justice Scalia wrote the opinion for the Court and he says: “We define rights by looking at the tradition at the most specific level of abstraction — there is no tradition of protecting the rights of an unmarried father where the child is conceived by adultery.”¹⁰⁴

Now, I remember as I was reading that opinion, and as I teach that opinion every year, always focusing on the fact that the Court had a very simplistic role of a family: one father, one mother, with kids.¹⁰⁵ I think of it, and this is going to reflect my age, as the Ozzie and Harriet of the legal *Leave it to Beaver*¹⁰⁶ family, like the Cleavers. I see so many blank expressions. They were the TV shows in the 1950s and 60s. They were the classic mother and father and kids type family.

That's not the world we live in any longer. We now have multiple people who are involved in the raising of children; we could go through all the reasons why. And the law has to recognize this, and to recognize the rights of many different people with regard to the interests of the child. I think one of the great things about the marriage equality movement is that it causes us to recognize the traditional mother-father-children family isn't the way that many people live in our society anymore. So, my hope is that this will help to fuel rights for others.

⁹⁶ *Id.* at 113.

⁹⁷ *Id.* at 113-14.

⁹⁸ *Id.* at 114.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *See id.* at 118-20.

¹⁰² *Id.* at 119.

¹⁰³ *Id.* at 110-11.

¹⁰⁴ *See id.* at 126-27 & n.6.

¹⁰⁵ *See id.* at 124.

¹⁰⁶ *Leave It to Beaver* (NBC television broadcast Oct. 1957–June 1963).

Q: If you have other cultures, and I'm not trying to put this on the LDS community ((unintelligible)). Why can't you then have, eventually, spouse A, B, and C?

EC: I think courts are going to have confront that, and one of the things I was thinking of is the prior question. I think that there will be challenges to laws that prohibit polygamy, arguing that if marriage isn't going to be defined solely on the basis of tradition, then why can't you have that? And I think that that's a question that's going to need to be answered: does the government have a sufficient interest in prohibiting polygamous relationships?

Now, I could begin to develop such an argument; I don't know if it will be persuasive. Polygamy has traditionally worked to the tremendous disadvantage of women. There has been a way in which polygamous relationships have been very subordinating of women, and so it's quite different than whether we will allow same-sex couples to marry. But yes, I think that once we say that we're going to recognize non-traditional marriage within the constitutional rubric of marriage, we have to answer the question of, well, which ones? But, that's the right question to be asking.

I don't have an opinion on this subject; I don't know enough. But, I think that we are going to have to face that question. I don't think, though, that we have to face that question to decide that gay and lesbian couples should be able to marry. I can't yet see what's the legitimate interest that's being served by keeping a gay couple or a lesbian couple from being able to marry. And I think that's the way a majority of this Court is going to look at it.

Q: How much of the litigation strategy that you credited as being so wise and astute was really thought out in advance or evolved in a particularly, like equal, equality, not same-sex marriage and in state court . . . ?

EC: To a very large extent, it was thought out in advance. So, I remember talking to Jon Davidson and Jenny Pizer at Lambda Legal Defense, and Lambda brought many of these suits, including the one in California, and they were adamant that they wanted to be in state court under state constitutions. If there is a federal issue had been raised, the defendant could remove the case from state court to federal court and then go up to the Supreme Court. And if there is a constitutional issue raised in state court, even if it's not removed, the Supreme Court can

review that constitutional issue unless there is an independent, adequate state ground.

The advocates wanted this to be in state court; they wanted to build support. And according to the media, they were very upset when David Boies and Ted Olson went to federal court because they thought it was too soon to go there.

I also know that they made the conscious choice to create and use the phrase “marriage equality.” And I think it was, for the reasons I said, a wise, even a brilliant, rhetorical strategy. Now a lot of things are out of anyone’s control. I don’t think that they believed that the Iowa Supreme Court was going to come down unanimously in favor of marriage equality when it did.¹⁰⁷ But I thought that was such an important message — a state right in the center of the country. And we shouldn’t forget that three justices on the Iowa Supreme Court were then voted out of office because of that decision, even though it was a unanimous ruling.¹⁰⁸

So, there’s things you can’t plan. But, I think this was a brilliantly conceived litigation, legislative, rhetorical strategy.

Q: How much were they balancing, at the time, the political climate with the possible election of a black president?

EC: I don’t think they could have imagined. Remember, this is a strategy that begins with at least *Baehr v. Lewin*.¹⁰⁹ And remember it is *Baehr v. Lewin* that leads to the Defense of Marriage Act.¹¹⁰ And the vote in favor of the Defense of Marriage Act wasn’t close in Congress.¹¹¹

So, at the time all of this is going on, no one had ever heard of Barack Obama. I mean, he was a legislator in the Illinois Legislature; he wasn’t even a United States Senator yet.¹¹² So I think it takes careful planning, and also a fair amount of good fortune.

¹⁰⁷ See *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (holding that same-sex couples were similarly situated as opposite-sex couples with respect to the subject and purposes of the state’s marriage laws).

¹⁰⁸ A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), <http://www.nytimes.com/2010/11/04/us/politics/04judges.html>.

¹⁰⁹ 852 P.2d 44 (Haw. 1993).

¹¹⁰ See Defense of Marriage Act, 28 U.S.C. § 1738C (1996); H.R. REP. NO. 104-664, at 2-11 (1996).

¹¹¹ The bill passed the House by a vote of 342–67 on July 12, 1996. 142 CONG. REC. H7505–06 (daily ed. July 12, 1996). It passed the Senate by a vote of 85–14 on September 10, 1996. 142 CONG. REC. S10,129 (daily ed. Sept. 10, 1996).

¹¹² Barack Obama was not an Illinois State Senator until November 5, 1996. See *Election Results for 1996 General Election, Illinois Senate, District 13*, CHI. DEMOCRACY

PROJECT, http://chicagodemocracy.org/ElectionResults.jsp?election=crdd_general,gis_entity_crdd_1996_General_Election,il_sen_13 (last visited Aug. 24, 2014). Obama was elected to the U.S. Senate in 2004. See *About Barack Obama*, BARACKOBAMA.COM, <http://www.barackobama.com/about/barack-obama> (last visited Aug. 24, 2014).

In *United States v. Windsor*, Kennedy wrote for a five-justice majority (including Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan). His opinion struck down the federal Defense of Marriage Act (DOMA).⁵ The *Windsor* opinion caps a trilogy of historic Kennedy opinions affirming gay equality. It sounds the same theme with which he began the process in the 1996 case of *Romer v. Evans*: no government has the authority under the Constitution to single gay people out as less worthy than others. As refined in *Lawrence v. Texas*, that principle means that, when a law makes gays unequal, the Court need not consider whether sexual orientation is like race or gender, a trait requiring special solicitude from courts.