

**From Criminal to Citizen:
How The Evolution of Public Opinion
Won Gay Marriage In The Courtroom**

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Prologue

A warm tropical breeze brushed my face as I stood in the Miami Beach Botanical Gardens waiting for the mayor to begin. The crowd murmured with excitement, looking around at each other with anticipation as the sun set behind the palm trees. I glanced over at the couple I had met earlier in the evening. They were dressed in matching tuxedos, holding hands, waiting. The drag queen next to me shifted her weight back and forth, impatient. Then, finally, the speeches were over and the ceremonies could begin. The judge had only lifted the stay on gay marriage in the early hours of the morning, yet hundreds of gay couples lined-up to walk down the makeshift aisle to the hastily constructed altar to be married by the mayor. Dressed in suits, biking clothes, jean shorts, and bathing suits, couple after couple affirmed their love and commitment. Same-sex marriage had come to Florida.

I had witnessed similar jubilation in front of the U.S. Supreme Court building two summers prior when the Court issued its momentous ruling in *United States vs. Windsor*, overturning the Defense of Marriage Act that had prevented the federal government from recognizing same-sex marriage. Beholding the relief and joy on the faces of the people swarming the steps of the Supreme Court building, I knew that I had chosen the right issue to believe in. My parents' generation fought for racial equality, reproductive rights, and political transparency. Mine would fight for same-sex marriage.

While the fight for same-sex marriage has its critics, even within the gay community, its proponents contend that marriage signifies full inclusion into society. The path to same-sex marriage legalization has been fraught with negative jurisprudence, political pushback, and social marginalization. Nonetheless, the people prevailed, and a new avenue to full equality was carved for gay couples.

Introduction

In 1969, when the first drag queen threw a copper at the police in front of the Stonewall Inn in Greenwich Village, marriage was the last civil right on the minds of gay people. As recently as 1986, the U.S. Supreme Court upheld a Georgia sodomy law that criminalized homosexuality. Not until 2003 would the U.S. Supreme Court strike down such laws as unconstitutional, thereby finally removing the ancient link between gay and criminal. The next year, the Massachusetts Supreme Court issued the first judicial ruling that legalized gay marriage. Remarkably, a mere decade later, the U.S. Supreme Court would issue its landmark decision in *United States vs. Windsor*, holding that the government must confer the same federal benefits enjoyed by married heterosexual couples to their homosexual counterparts. The floodgates had opened; the way was paved for future challenges to same-sex marriage bans. Now, in 2015, the U.S. Supreme Court seems ready to affirm a constitutional right to same-sex marriage.

The rapidity of change, in both the public's stance on same-sex marriage and the legal jurisprudence, is extraordinary; gay marriage has been enacted through the ballot box, the media, and the judiciary. Nonetheless, despite outcries of judicial activism from a broad group of critics that includes conservative members of the U.S. Supreme Court, the Court has acted with caution in approaching same-sex marriage. After the virulent backlash of civil rights and sexual freedom cases, the Court does not seek to march ahead of public opinion. It is the attitude of Americans that has most dramatically evolved with the Court responding to these changes—not initiating them. The U.S. Supreme Court has consistently ruled in line with public opinion on same-sex cases, allowing judicial innovation to occur first in the lower federal courts and at the state level.

Chapter 1: Stonewall, AIDS, and Negative Precedent

Before Stonewall and AIDS and direct action, there was the Closet, with a capital “C.” Except for a few small enclaves, notably in New York City and San Francisco, the majority of gays and lesbians lived with the secret stigma of homosexuality. Homosexuality signified criminality, immorality, and disease; it meant social isolation and political persecution. Stonewall Inn in 1969 and the AIDS crisis in the 1980s changed the story of homosexuality in America. These monumental events united and connected the gay community in profoundly new ways, giving rise to a stronger gay consciousness, which would eventually come to fruition in the marriage-equality movement. Nevertheless, while the gay community organized socially and politically in the 1970s and 1980s, inspired by both the civil rights and feminist movements, neither public opinion nor the courts were ready to reject the ancient connection between sodomy and criminality.

The pre-Stonewall narrative of homosexuality in the United States enjoys only brief moments of reduced restriction for gays and lesbians. In the 1920s, during Prohibition, gay men (never lesbians) enjoyed some social acceptance in liberal cities. As Linda Hirshman writes in her book *Victory: The Triumphant Gay Revolution*, “Prohibition had the unexpected consequence of making behaviors like homosexuality, which had always been criminal under the sodomy laws, part of a whole culture of socially accepted criminality.”¹ In New York City, gay masked balls and masquerades, as well as public baths, represented the high-water mark of gay membership in public life. The repeal of Prohibition and subsequent shift of mainstream culture back aboveground ushered gay men back into the closet where they would remain for more than half a century.

The early 1950s marked a particularly perilous time to be gay. A Communist witch-hunt, led by Senator Joe McCarthy, ostensibly targeted Communists in government but was accompanied by parallel “lavender scare,” a purge of gay government employees. The logic of the “lavender scare” held that the discharge of gay government workers was justified because homosexual behavior was immoral, and thereby gays

¹ Linda Hirshman, *Victory: The Triumphant Gay Revolution* (New York: Harper Perennial, 2013), 9.

would be likely to do other immoral acts -- like betray their country due to blackmail.² Accordingly, in 1953, President Eisenhower signed into law Executive Order 10450, barring persons who engaged in “sexual perversion” from federal employment.³ Consequently, the government dismissed thousands of gay workers from their jobs in the 1950s. As a result of the “lavender scare,” the Mattachine Society, a secret homosexual organization formed in 1950 that put members into independently structured guilds to avoid the possibility of naming names, was never able to fulfill its goal of raising gay consciousness due to the great fear of persecution.⁴ Gays now had no group advocating their interests.

Lack of organized gay rights group notwithstanding, in 1958, the United States Supreme Court delivered a marginal victory for gay rights. In *ONE vs. Oleson*⁵ the Court upheld the right of the gay magazine *ONE* to distribute its copies through the U.S. Postal Service. In its decision, the Court rejected the U.S. Postal Service’s claim that it could refuse to deliver the magazine because it was lewd and obscene. This small success, however, must be interpreted narrowly. The Supreme Court upheld freedom of speech and publication under the First Amendment; *ONE vs. Oleson* did not mean that the U.S. Supreme Court put the protection of gay rights on its agenda, and the legality of same-sex marriage was not even a fathomable concept for Court. Nonetheless, some early 1950s gay advocates, such as Donald Webster Cory and E.W. Saunders, refer to marriage as a desirable right, although they recognize its low priority on the gay men’s agenda.⁶ Meanwhile, the question of lesbian marriage was defended and assailed in the pages of the lesbian journal *The Ladder*. Despite a few proponents, it was seen with a deeply critical eye.⁷ Same-sex marriage remained a lingering consideration in the gay community. The nascent movement had broader preoccupations.

In the 1960s, leaders of the gay and lesbian community attempted to mimic the accomplishments of the black civil rights and feminist liberation movements but with

² Hirshman, *Victory*, 46.

³ *Ibid*, 47.

⁴ Harry Hay, “Roots of the Mattachine Society: Birth of a Consciousness.” *The Harvard Gay & Lesbian Review* 2.1 (January 1995): 11.

⁵ *ONE, Incorporated, v. Oleson*, 355 U.S. 371 (1958)

⁶ William Eskridge, *Gay Marriage: For Better or For Worse? What We’ve Learned From the Evidence* (New York: Oxford University Press, 2006), 15.

⁷ *Ibid*, 15.

limited success. In 1960, every state criminalized private, consensual sex between same-sex partners.⁸ The efforts to change public attitudes, known as the “homophile movement” to deemphasize the “sex” in “homosexual,” failed to gain traction and appeared passé after the Stonewall Inn radical gay liberation movement materialized.⁹ The real action began in 1969.

The events at Stonewall Inn on June 28th, 1969, and the rioting in the days after, represent the zenith of gay frustration over their mistreatment by police and disregard for their civil liberties. Although eyewitnesses dispute different details of the events of that night, a general account holds that the police conducted a routine raid of the Mafia-owned Stonewall Inn bar in Greenwich Village, breaking-up the revelries and hauling the transvestites off to jail. For some reason, however, the gay patrons did not disperse as they usually did. They stuck around outside the bar, and soon a crowd gathered. Then, either a transvestite or a lesbian began resisting arrest and was clubbed by a police officer and shoved into the back of a police car. Angrily she called out to bystanders, asking them why they were doing nothing. The crowd started to boo and throw pennies at the police, finally rushing at the paddy wagon with the prisoners as it drove away. With tensions high, the police called for back-up on the radio, but the police radio broke down and they became quickly outnumbered. Meanwhile, protestors had found loose bricks from a nearby construction site and began hurling them at the officers outside the bar. The police had to barricade themselves inside Stonewall Inn as the violence escalated. Even when the riot squad arrived, the gay crowd refused to decamp. The riot lasted for hours into the night and continued for several days. The gays had taken on the police for the first time and had won. The passive protest of the homophile movement and the Mattachine Society had been replaced by active resistance.

The events at Stonewall Inn spawned new, aggressive gay organizations that demanded recognition and rights, raising the public’s awareness of gay issues. For example, in the early 1970s, gay activists waged war on the American Psychiatric Association (APA), to have homosexuality removed from its list of psychiatric disorders.

⁸ Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (New York: Oxford University Press, 2013), 3.

⁹ Jason Pierceson, *Same-Sex Marriage in the United States: The Road to the Supreme Court and Beyond* (Plymouth, United Kingdom: Rowman & Littlefield, 2013), 27.

Protesters interrupted APA meetings and presentations and pressed their case until the APA declassified homosexuality as a pathological disease in 1973.¹⁰ In addition to changing the medical definition of homosexuality, activists concerned themselves with combatting police entrapment and employment discrimination. Most activists did not believe in pursuing an agenda of gay marriage, as they had more pressing interests: protection against employment discrimination, repeal of sodomy laws, promoting the rights of institutionalized gays such as prisoners, recognition of gay student unions at universities, securing tax-exempt status for qualified gay organizations, and protecting the custody rights of lesbian mothers.”¹¹ Neither gay marriage, nor civil partnerships, made the list. Some gay activists vigorously debated the rationality of the institution of marriage for equal partners. In the 1960s, Second Wave feminists had advanced the argument that marriage upheld a social caste system and gendered division of labor that favored men and made women pawns or victims.¹² Many gay activists doubted that heterosexual marriage was an ideal of which to aspire.

Some gay couples did wish to pursue marriage, hoping to build off the 1967 U.S. Supreme Court decision in *Loving v. Virginia*¹³ that declared a Virginia miscegenation law unconstitutional. Writing for a unanimous court, Chief Justice Earl Warren argued, “marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival” and “the Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.”¹⁴ The Chief Justice also emphasized that the right of marriage included the individual choice in whom to marry without infringement by the state. By declaring marriage a fundamental right of individual choice, some homosexual couples saw that they, too, had a right to marriage.

In 1970, Jack Baker and Michael McConnell applied for a marriage license in Minnesota.¹⁵ When the county clerk refused to grant the license, Baker and McConnell sued under state law citing the recent decisions in *Loving* and *Griswold vs. Connecticut*¹⁶ in which the U.S. Supreme Court had found a constitutionally protected right to marital

¹⁰ Hirshman, *Victory*, 137.

¹¹ Klarman, *From the Closet to the Altar*, 23.

¹² Hirshman, *Victory*, 68-73 and Pierceson, *Same-Sex Marriage in the United States*, 41.

¹³ *Loving v. Virginia*, 388 U.S. 1 (1967)

¹⁴ *Loving v. Virginia*, 388 U.S. 1 (1967)

¹⁵ “Case Briefs *Baker v. Nelson*,” 56 *Minnesota Law Review* 959 (1971-1972)

¹⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965)

privacy. The case, *Baker vs. Nelson*,¹⁷ made it all the way to the Minnesota Supreme Court, which ruled that the fundamental right to marriage found in *Loving* did not control because it applied exclusively to racial discrimination. As a 1972 *Minnesota Law Review* article explains, “the court relied on a historical approach to legislative intent, on legislative inaction in revising the statute to specifically permit same-sex marriage, and on weak constitutional arguments which upheld marriage and procreation as fundamental rights.”¹⁸ In other words, as tradition held that marriage was between man and woman, so would marriage remain. Baker and McConnell appealed the decision, but the U.S. Supreme Court refused to grant *certiorari*. Consequently, the powerful negative precedent set by *Baker* in 1971 would deter future same-sex marriage litigation for years to come. Nevertheless, despite the legal setback of *Baker*, the gay rights movement pressed on with direct action protests. For example, in 1971 activists from the Gay Activists Alliance in New York City took over the Marriage License Bureau to throw an engagement party for two same-sex couples in response to a threat from the city clerk to sue religious officials performing same-sex union ceremonies.¹⁹ Thus, disruptive protest, including action on marriage, continued in other venues.

The outbreak of AIDS in the 1980s thrust gay men out of the closet and brought gay issues into the national spotlight. The AIDS crisis devastated the gay community yet wrought formidable institutions, fostered cultural production, and inspired straight people to take up the gay cause. At first, despite the Center for Disease Control’s acknowledgement of a new disease affecting mostly gay men neither the Reagan administration, nor Congress, nor university medical researchers responded. In order to force the government and the public to react, the gay community organized; the Gay Men’s Health Crisis and ACT UP are two of such institutions that raised money, insisted that politicians respond, and brought public awareness to the cause.²⁰

The American public was also introduced to gay people, and the AIDS epidemic, in new ways. Larry Kramer’s play *The Normal Heart* in 1985, Randy Shilts’ book *And The Band Played On* in 1987, and Susan Sontag’s short story “The Way We Live Now”

¹⁷ *Baker v. Nelson* 291 Minn. 310, 191 N.W.2d 185 (1971)

¹⁸ “Case Briefs *Baker v. Nelson*,” 56 *Minnesota Law Review* 960 (1971-1972)

¹⁹ Pierceson, *Same-Sex Marriage in the United States*, 27.

²⁰ Hirshman, *Victory*, 180-188.

in *The New Yorker* in 1987, helped change the way the average person, who may not have known any out gay people, thought about the gay community and the people whose lives were decimated by AIDS. Moreover, AIDS affected gay men indiscriminately. Many high-profile gay men, from actor Rock Hudson to Senator Joseph McCarthy's right-hand man Roy Cohn, were thrust out of the closet.²¹ It also drew prominent straight allies like Hillary Clinton and Elizabeth Taylor to speak about the gay people in their lives and fight for AIDS funding. The increased visibility of gay men, outed by AIDS, made homosexuality seem less mysterious. As Linda Hirshman argues, "Coming out is the central element of the gay revolution...What if every gay person woke up one morning and found he had turned green? No more closet, the exercise concludes, and the gay revolution is accomplished."²² AIDS turned people green.

The amplification of gay issues in American public consciousness, from AIDS and from Stonewall Inn, and the increased visibility of the gay community, made the defeat in *Bowers vs. Hardwick*²³ in 1986 even more demoralizing and surprising. In mid-1980s, sodomy laws remained on the books in many states as a result of the antiquated absorption of Church-based prohibitions on sexual conduct into a secular legal framework. The opportunity for gay legal strategists to test the constitutionality of such sodomy laws in modern America came when the state of Georgia arrested Michael Hardwick for performing consensual oral sex with another man in his hotel suite. Hardwick sued Michael Bowers, the Attorney General of Georgia, arguing that the sodomy law violated his constitutional rights, including the right to privacy enumerated in *Griswold v. Connecticut*.²⁴ Gay advocates won a victory in the Eleventh Circuit Court of Appeals, but the ruling was appealed and the U.S. Supreme Court agreed to hear case.

The U.S. Supreme Court case of *Bowers vs. Hardwick* examined the Georgia sodomy law that, as written, did not exclusively target homosexual sodomy, but maintained a blanket prohibition on sodomy. It defined sodomy as, "any sexual act involving the sex organs of one person and the mouth or anus of another."²⁵ Instead of ruling on whether the sodomy law violated a fundamental right of couples to privacy, the

²¹ Hirshman, *Victory*, 189.

²² *Ibid*, 188-89.

²³ *Bowers v. Hardwick*, 478 U.S. 186 (1986)

²⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965)

²⁵ Lisa Keen, "Notorious Law Meets Unceremonious End," *Washington Blade*, December 4, 1998.

majority in *Bowers* re-framed the question of the general sodomy law and instead ruled on “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.” Justice Byron White, in his majority opinion, reframed the case with this new question, setting *Hardwick* up to fail. Americans may have supported a right to privacy, but few would have agreed that homosexuals had a right to sodomy.

In re-framing the question, the majority opinion refused to draw a distinction between sexual orientation and sexual conduct. By linking the two—criminalizing the sexual act that defined homosexuality--the Court criminalized homosexuals for their status of being homosexual. As Linda Hirshman quipped in her book, “it’s hard to take the sex out of homosexual.”²⁶ Consequently, Justice White rejected *Hardwick*’s reasoning that “he was a practicing homosexual, that the Georgia sodomy law, as administered by the defendants, placed him in imminent danger of arrest.” While this may have reflected a contemporary understanding of homosexuality, a relevant parallel scenario would be the creation of laws that criminalized African Americans for their status of being black. By criminalizing the sexual behavior of homosexual, the Court upheld the criminalization of homosexuality and denied gays and lesbians their personhood. Justice White stated, “No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.” Furthermore, although sodomy laws were rarely enforced, the criminalization of homosexual behavior created an aura of criminality that justified other forms of discrimination against gays and lesbians.

In his scathing dissent, Justice Harry Blackmun seemed to lament that *Hardwick* brought his lawsuit under the right to privacy instead of on equal protection grounds. It appeared clear to Justice Blackmun that the sole enforcement of homosexual sodomy would violate even a rational basis test, under which the court leaves the most deference to the state in determining the constitutionality of a law. Blackmun argued, “under the circumstances of this case, a claim under the equal protection clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class.” Even if the Court refused to view homosexuals as a suspect class like African Americans, thereby triggering stricter review of the law, the rational basis test,

²⁶ Hirshman, *Victory*, 39.

giving the state the most latitude to legislate, would have deemed the law a violation of Hardwick's Fourteenth amendment right to equal protection.

Justice John Stevens also dissented, finding fault with the discriminatory enforcement of the law. He argued that all citizens had the same interest in liberty, or the same right to be left alone. He questioned whether the state maintained a legitimate interest in its selective application of the law, "a policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group." As Stevens argued, the majority upheld the law based on the legislature's authority to enact laws based on traditional views of morality. In a narrow 5-to-4 vote, the U.S. Supreme Court upheld that state's ability to criminalize homosexuality. Being gay would remain synonymous with criminal.

In the midst of the groundbreaking activism of the AIDS crisis, the defeat in *Bowers* staggered the gay community and shook its faith in the judiciary as an avenue for protection. Public opinion polling, however, indicated that the Supreme Court ruled in line with the thinking of most Americans. A 1986 Gallup poll revealed that only 44% of Americans polled believed that "gay or lesbian relationships between consenting adults" should be legal.²⁷ In 1987, a Gallup poll found that more than 50% of Americans believed that homosexuality to be an unacceptable alternative lifestyle.²⁸ The verdict in *Bowers* should have been less surprising to activists. Nonetheless, the *Bowers* served as an important lesson to gay activists that they had to change public opinion of homosexuality and gay people before the U.S. Supreme Court would act on their behalf.

Most of the 20th century is marked by the continued persecution and marginalization of the gay community. Despite the strengthening of the gay community and increased awareness of gay issues in the 1970s and 1980s, employment discrimination on the basis of sexual preference and police raids on gay establishments remained constitutionally permissible and sodomy illegal. In the 1980s, most gay people remained closeted, and therefore reducing the likelihood that gay issues would find support among by non-gay people. For example, less than ten years after his swing vote

²⁷ Gallup Poll, 1986. <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx>

²⁸ Lydia Saad, "Americans Evenly Divided on Morality of Homosexuality," Gallup, June 18, 2008.

upheld the constitutionality of the Georgia sodomy law in *Bowers*, Justice Powell reported that at the time of the case he believed he had never met a gay person, unaware that one of his law clerks was gay.²⁹

Despite the early efforts of activists, public opinion did not favor gay rights and, accordingly, neither did the U.S. Supreme Court. Even if the events of Stonewall Inn and the AIDS crisis did move some people toward supporting gay rights, according to a 2011 study by the National Opinion Research Center at the University of Chicago, support for gay marriage hovered at a miniscule 11% approval in 1988.³⁰ Significant gains for gay civil rights had been achieved before the 1990s, but the gay civil rights revolution in public opinion and the courts had yet to bare fruit.

²⁹ Klarman, *From the Closet to the Altar*, 37.

³⁰ William Harms, "Americans Move Dramatically Toward Acceptance of Homosexuality, Survey Finds," *University of Chicago News*, September 28, 2011.

Chapter 2: The 1990s: Hawaii, Colorado, and the Defense of Marriage

Despite the frustrating defeat in *Bowers*, the 1990s saw renewed interest and hope among some gay advocates about using the courts to pursue gay civil rights, including same-sex marriage. The decade brought assorted legal challenges to anti-gay laws, innovative arguments in favor of gay rights, and new legal and political setbacks to gay advocates. Yet, the increasing visibility of gay people and the introduction of gay themes into mainstream cultural production encouraged public opinion to resist blanket discrimination of gay people, followed by the U.S. Supreme Court crafting a preliminary legal framework of civil rights for gay Americans.

In 1990, Nina Baehr was angry that she could not name her lesbian partner as her beneficiary on her insurance policy. Against the advice of national gay activists who anticipated failure in the courts, as no state had ruled in favor of marriage, Baehr decided to sue her home state of Hawaii for a marriage license. The two leading gay rights groups, Lambda Legal and the ACLU, both refused to take the case.³¹ Only attorney and gay activist Evan Wolfson, who Linda Hirshman nicknamed “the marriage godfather,” agreed to represent Baehr alongside local heterosexual attorney Dan Foley.³²

Wolfson chose to ignore the public opinion polling suggesting more than two-thirds of Hawaiians opposed gay marriage.³³ He saw marriage as the central social and legal institution of society; fighting marriage discrimination challenged the core of gay exclusion.³⁴ Winning marriage in Hawaii in the 1990s was a long shot, but Wolfson was determined to persuade the courts that the Hawaii constitution, with its explicit prohibition of sex-based classifications, required allowing gay marriage.

Hawaii provided a solid test case for gay marriage. If any state would accept a judicial verdict in favor of gay marriage in the 1990s, Hawaii was a likely possibility. It had repealed its sodomy law in 1973, enacted a ban on employment discrimination based on sexual orientation in 1991, and registered the lowest percentage of people of any state who believed that homosexual relations are always wrong.³⁵ (It would later become the

³¹ Marc Solomon, *Winning Marriage: The Inside Story of How Same-Sex Couples Took On the Politicians and Pundits--And Won* (N.p.: University Press of New England, 2014), 91.

³² Hirshman, *Victory*, 233.

³³ Klarman, *From the Closet to the Altar*, 56.

³⁴ Hirshman, *Victory*, 230-231.

³⁵ Klarman, *From the Closet to the Altar*, 56.

first state to enact a domestic partnership law in 1997.) Still, a favorable ruling by the courts was universally thought to be unlikely.

In 1993, the Hawaii Supreme Court handed down a landmark ruling. It ruled that the state could not deny gay couples the right to marry. Wolfson and Baehr had won. Hawaii became the first state to legalize same-sex marriage. The decision declared homosexuals a suspect class based on sex. Consequently, under the Hawaii constitution that requires sex classifications be reviewed under “heightened” or “intermediate” scrutiny, a stricter review than the rational basis test used in *Bowers*, the court ruled that there was no compelling state interest for denying same-sex couples the right to marry. The Hawaii Supreme Court not only permitted same-sex marriage but created precedent for considering homosexuals a suspect class, requiring stricter scrutiny of state interest.

The Hawaii Supreme Court drew upon federal precedent from *Loving vs. Virginia*,³⁶ the federal anti-miscegenation case from the 1960s. Citing trial judges’ judgment on invoking divine law in their rulings upholding miscegenation laws, Judge Steven Levinson, writing for the Hawaii plurality: “We do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.”³⁷ Judge Levinson argued that certain conceptions of “divine law” could not serve as the basis for a state interest. Judge Levinson also suggested that, like notions of race in the 1960s, perceptions of homosexuality were similarly progressing.

Same-sex marriage proponents were at first overjoyed that Hawaii had become the first state to permit gay marriage, but it quickly became clear that the Hawaii Supreme Court had issued a ruling ahead of its time. The resultant backlash took several forms within Hawaii and around the country. In 1998, a voter referendum amended the Hawaii state constitution to authorize the legislature to limit marriage to unions of one man and one woman. The legislature immediately approved a measure banning same-sex marriage. As legal scholars like Michael Klarman have argued, drawing on the black civil rights and abortion case examples, when the Court intervenes to defend a minority position or even to resolve an issue that divides the country down the middle, its

³⁶ *Loving v. Virginia*, 388 U.S. 1 (1967)

³⁷ *Baehr vs. Lewin* 74 Haw. 645, 852 P.2d 44 (1993)

decisions can generate potent political backlash.³⁸ Hawaii presents a clear example of such backlash. Within 10 years of the Hawaii ruling more than 35 states, including Hawaii, had passed laws explicitly forbidding same-sex marriage.³⁹ The fiercest backlash, however, came from Congress.

In 1996, in response to the *Baehr* decision, Congress passed the Defense of Marriage Act (DOMA), co-sponsored by Republican presidential hopeful, Senator Bob Dole. DOMA ensured no state would be required to recognize same-sex marriage from another state, undermining traditional “full faith and credit” between states. It also gave a federal definition of marriage and prevented same-sex couples from receiving federal marriage benefits. Religious conservatives had recently emerged as a powerful voting bloc, sweeping Republicans into Congress during the 1994 midterm elections.⁴⁰ Appealing to religious voters, the main opponents to same-sex marriage, DOMA easily passed through both Houses of Congress; only 67 Representatives and 17 Senators voted against it.⁴¹ President Bill Clinton who, just a few years earlier, had actively courted the gay vote during the 1992 presidential election, signed the bill into law in the midst of his re-election campaign. Gay marriage had become a wedge issue in the 1996 elections. Meanwhile, liberal Democrats who opposed DOMA did so on grounds of federalism without presenting any defense of gay marriage. They argued instead that the states had always defined marriage and therefore traditional marriage did not require federal protection.⁴² DOMA presented a huge new barrier to gay advocates hoping to continue to secure the right of gays to marry. The openly homophobic testimony of the Representatives and Senators served as a nasty reminder that most of the country remained opposed to marriage.

The backlash resulting from the Hawaii case was vigorous and contained lasting consequences; however, when the Hawaii Supreme Court handed down its landmark ruling in 1993, neither Hawaiians nor Americans had moved far enough on gay issues to support gay marriage. Two-thirds of Hawaiians opposed same-sex marriage.⁴³ The

³⁸ Klarman, *From the Closet to the Altar*, x.

³⁹ *Ibid*, xi.

⁴⁰ *Ibid*, 60.

⁴¹ Hirshman, *Victory*, 235.

⁴² Klarman, *From the Closet to the Altar*, 61.

⁴³ *Ibid*, 56.

Hawaii Supreme Court ruled on gay marriage before public opinion had moved on that specific issue. Furthermore, while innovative legal rulings often come out of state or lower federal courts, the Hawaii case study likely proved to higher courts, including the U.S. Supreme Court, the value of waiting for public support on gay issues, including marriage, to evolve to the point where it could avoid significant political backlash. Nonetheless, Hawaii had begun a national conversation about same-sex marriage that had previously been limited to certain gay circles. The country now had a new issue to consider as pop culture began to introduce gay themes, stories, and celebrities to mainstream America.

Despite the Hawaii political and legislative backlash, cultural production of gay themes flourished during the 1990s, prominent public figures came out of the closet, and legal victories on non-marriage gay issues became possible. For example, the same year as the Hawaii Supreme Court decision, the movie *Philadelphia*, starring Tom Hanks, was released. Hanks won an Academy Award for his role as a corporate lawyer with AIDS, a gay man who seemed straight. It became the twelfth-highest-grossing film of 1993.⁴⁴ In that same year, Tony Kushner's Broadway play about AIDS, religion, and America, *Angels in America: A Gay Fantasia on National Themes*, opened to critical and popular acclaim, winning the Tony award for best play. In 1996, the same year that DOMA became law, *Rent*, a rock-musical about AIDS whose playwright, Jonathan Larson, died of the disease on opening night, premiered on Broadway. It later won the Tony award for best musical and earned a posthumous Pulitzer Prize for Larson.⁴⁵ In 1997, television star and comedian Ellen DeGeneres came out of the closet as a lesbian, first through her title character on her ABC Network television show *Ellen*, and then on the cover of *Time* magazine.⁴⁶ In 1998, *Will & Grace*, a television show featuring gay characters and story-lines, premiered on NBC. The show ran for eight seasons, from 1998 until 2006, and won 16 Emmy awards. As evidence of the show's cultural influence, in 2012 Vice President

⁴⁴ Hirshman, *Victory*, 211.

⁴⁵ Laurie Winer, "'Rent' Goes Up--to Broadway; Pulitzer Prize-Winning Musical Celebrates Life, Even Under Specter of Death," *The Los Angeles Times*, April 30, 1996.

⁴⁶ "Ellen DeGeneres Says She's Gay," *The Record*, April 7, 1997, B6.

Joe Biden cited the show as a prominent contributing factor in educating the American public on gay issues.⁴⁷

Gay themes in popular culture, along with openly gay public figures like Ellen DeGeneres and singer Melissa Etheridge, began to normalize gay people for the average American and garner support for their claims for increased civil rights. For closeted gays and lesbians, the increased visibility of other homosexuals in popular culture likely helped inspire them to come out of the closet. As more gay people told their friends, family, neighbors, and co-workers of their homosexuality became less threatening to heterosexuals.

As homosexuality became demystified in the mid-1990s and more people publically identified as gay, certain liberal municipalities passed local laws preventing different types of discrimination on the basis of sexual orientation. In Colorado, the municipalities of Boulder, Denver, and Aspen passed ordinances prohibiting discrimination in jobs, housing, and public accommodation.⁴⁸ The governor of Colorado also passed an executive order banning discrimination for state employees.⁴⁹ These legislative actions in Colorado prompted the right-wing group “Colorado for Family Values” to mobilize support for a statewide voter referendum. As a result, in 1992, Amendment 2 was adopted to the Colorado Constitution. Amendment 2 precluded all legislative, executive, and judicial action at any level of state or local government designed to protect the status of persons based on their homosexual, lesbian, or bisexual orientation, conduct, practices or relationships.⁵⁰ Amendment 2 prohibited *any* anti-discrimination laws based on sexual orientation in the state of Colorado and prevented the future passage of such a law. It read:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be

⁴⁷ David Eldridge, “Biden ‘comfortable’ with gay marriage, cites ‘Will & Grace,’” *The Washington Times*, May 6, 2012.

⁴⁸ McClain, Linda. “From *Romer v. Evans* to *United States v. Windsor*: Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act.” *Duke Journal of Gender Law & Policy* 20 (2013): 359.

⁴⁹ *Ibid.*

⁵⁰ *Romer v. Evans*, 517 U.S. 620 (1996)

the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.⁵¹

The amendment reversed decades of progress by gay civil rights activists who had fought for protection against dismissal by employers and denial of public housing or accommodations. Fearing the broad implications and sweeping consequences, several plaintiffs filed suit, arguing that Amendment 2 violated the state and federal constitutions.

Initially, as an emergency measure to stop the inclusion of the amendment into the Colorado Constitution, a judge of the Colorado District Court approved an injunction of the amendment. Then, during the 9-day bench trial, Colorado defended Amendment 2 on the grounds that it prevented homosexuals from receiving special rights and instead put them in the same position as all other persons. Respondents alleged that Amendment 2 would subject them to immediate and substantial discrimination on the basis of their sexual orientation.

The Colorado District Court agreed. Their ruling, which declared Amendment 2 unconstitutional and approved a permanent injunction, stated that strict scrutiny should be applied because the law burdened the fundamental rights of an independently identifiable group. The decision also named a fundamental right to be protected from the state's endorsement of private biases.⁵² The Colorado State Attorney General appealed the ruling, but the Colorado Supreme Court upheld the district court's permanent injunction, choosing to examine the amendment using strict scrutiny. It did so not because the amendment targeted a minority group but because it infringed on the fundamental right of gays and lesbians to participate in the political process. Thus, the Colorado Supreme Court accepted the reasoning presented by the respondents that Amendment 2 violated the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.⁵³

The U.S. Supreme Court granted *certiorari* and upheld the Colorado Supreme Court's decision in *Romer vs. Evans*⁵⁴ in 1996. Writing for the 6-to-3 majority, Justice Kennedy invalidated Amendment 2 without using strict scrutiny; instead, he

⁵¹ Amendment 2 to the Colorado Constitution, Article 2 Section 2. Adopted November 3, 1992.

⁵² Susan Mezey, *Queers in Court* (Lanham, MD: Rowman & Littlefield Publishers, 2007), 60.

⁵³ "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

⁵⁴ *Romer v. Evans*, 517 U.S. 620 (1996)

demonstrated how, even under the rational basis test, with strong deference to the legislature, the state's argument that Amendment 2 simply denied special rights was unsound. Justice Kennedy affirmed the Colorado Supreme Court's judgment that "the amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and forbids reinstatement of these laws and policies." He showed how the amendment would nullify protections in both the private and public sphere and how similar statutes protecting other groups would remain while only those affecting homosexuals would be removed. He concluded that the statutes passed to protect homosexuals from discrimination were not conferring special rights: "We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them." Amendment 2 did not even the playing field, as its defendants argued, but imposed a special disability on homosexuals alone. Moreover, the defendants argued that Amendment 2 was necessary to protect heterosexuals because the gay community had undue political power and influence.

The last argument failed to hold-up in court, as the very passage of Amendment 2 revealed the gay community's lack of power, as it was unable to resist legislation and voter referendums like Amendment 2 that preyed on negative and malicious stereotypes about homosexuality. As one legal scholar commented at the time, the very political powerlessness of homosexuals was proven by the enactment of Amendment 2.⁵⁵ The defendants' argument that Amendment 2 merely granted special rights to homosexuals was undone.

Justice Kennedy also used the rational basis test to show how Amendment 2 violated the Fourteenth Amendment's Equal Protection Clause by infringing upon the rights of a class of people without a legitimate state interest. He held that Amendment 2 was "at once too narrow and too broad." He argued, "It identifies persons by a single trait and then denies them protection across the board." Although Kennedy argued that Amendment 2 identified persons based on their homosexuality and then discriminated against them, he did not state that homosexuals constituted a suspect class of people. He

⁵⁵ Zamansky, Stephen, "Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law," 35 B.C.L. Rev. 221 (1993): 254

applied only minimal scrutiny as he examined Amendment 2. Accordingly, under the rational basis test, he wrote: “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.” Justice Kennedy held that there was no legitimate government interest in denying a group protection. He argued “laws of this kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.” Animus, Kennedy concluded, cannot constitute a legitimate government interest. Therefore, under minimal scrutiny, he held Amendment 2 unconstitutional because it was passed due to a clear desire to harm a minority group and had no legislative purpose other than to make homosexuals unequal. The animus argument, that a state cannot use moral disapproval as a legitimate state argument, had been hinted at by Judge Levinson in the Hawaii decision. Animus as an irrational and illegitimate state interest has been applied in race and segregation cases, including *Loving vs. Virginia*⁵⁶ and *Brown vs. Board of Education*,⁵⁷ but its use by the Supreme court in a gay rights case set a crucial precedent for its later application in gay marriage cases.

In his oft-quoted dissent, Justice Scalia immediately recognized the problem with *Romer*--it never mentioned *Bowers*. Scalia wrote, “In holding that homosexuality cannot be singled out for unfavorable treatment the Court contradicts a decision unchallenged here, pronounced only ten years ago, and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.” Justice Scalia recalled how in *Bowers* the Court upheld the criminalization of homosexuality. Therefore, he concluded, “If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.”⁵⁸ Justice Scalia queried, how could the majority reconcile *Bowers* with *Romer*? *Bowers* held that traditional understanding of morality was a legitimate state interest, while *Romer* suggested just the opposite. The respondents argued that Amendment 2 applied to individuals who do not engage in homosexual acts, but discriminated against them solely on the basis of their

⁵⁶ *Loving v. Virginia*, 388 U.S. 1 (1967)

⁵⁷ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

⁵⁸ *Romer v. Evans*, 517 U.S. 620 (1996)

homosexual orientation. However, *Bowers* did not distinguish between conduct and orientation. The ruling in *Bowers* criminalized the very fact of being homosexual. As Justice Scalia argued, “If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.” Justice Scalia appropriately questioned the distinction the majority attempted to make between conduct and orientation, although he misread the protection against discrimination as a granting of special favor to homosexuals. Justice Scalia showed how Justice Kennedy’s animus argument in *Romer* could not fit with the *Bowers* precedent. The animus that the majority disapproved of in *Romer* was the same animus that was upheld in *Bowers*: moral disapproval of homosexual conduct. Consequently, while Justice Kennedy did not mention *Bowers*, the most relevant precedent, in his majority opinion, he had already begun creating a framework for its dismantlement.

The passage of Amendment 2 and DOMA suggest that discrimination against homosexuals persisted in the 1990s, despite the legal gains made in *Romer* and the increased visibility of gays and lesbians in pop culture. Public opinion polling in the early 1990s revealed that Americans wrestled with the idea of homosexuality. Polling showed that Americans believed homosexual acts should be legal, but only about one-third of Americans believed that gay people should be allowed to marry or adopt children.⁵⁹ In 1996, a Gallup poll showed that only 27% of Americans believed same-sex marriage should be recognized by the same laws as valid as traditional marriage.⁶⁰ Yet in 1992, 74% Americans also believed that homosexuals should have equal employment opportunities.⁶¹ The U.S. Supreme Court’s ruling in *Romer* affirmed this attitude by ruling that the government could not legislate blanket discriminate against homosexuals. Therefore, the U.S. Supreme Court continued to rule in line with shifting public opinion. Public sentiment did not yet support same-sex marriage, but it did support protection from broad discrimination in areas such as employment and housing.

The decade closed with a victory for gay marriage advocates. In 1999, the Vermont Supreme Court ruled under the equal protection clause of the Fourteenth

⁵⁹ Zamansky, “Colorado’s Amendment 2,” 35 B.C.L. Rev. 221 (1993): 246.

⁶⁰ 1996 Gallup poll. <http://www.gallup.com/poll/117328/marriage.aspx>

⁶¹ Saad, “Gay Rights Attitudes A Mixed Bag,” Gallup News Service, May 20, 2005.

Amendment that the traditional definition of marriage discriminated against same-sex couples. Vermont's highest court informed the legislature that it could either amend the existing marriage law to include gay couples or create civil unions to provide the same benefits of marriage.⁶²

Vermont chose to become the first state to enact a civil union law providing gays with the same legal protections and benefits as married couples. Unlike the Hawaii Supreme Court, which had ruled that the state constitution required same-sex marriage, the Vermont Supreme Court presented a compromise option in civil unions. Moreover, perhaps with a nod to the Hawaii political backlash, the Vermont Supreme Court, as scholar Jason Pierceson writes, "retained the prerogative to revisit the remedy if the legislature did not act according to the court's mandate...the justices did not allow the political process to be played out without the court's oversight."⁶³

Like Hawaii, Vermont was a liberal state, but, unlike Hawaii, there was no well-funded campaign by religious organizations, and gay marriage advocates had their own grassroots organization, "Freedom to Marry Vermont." It told the compelling stories of same-sex couples and drummed up support for civil unions.⁶⁴ An emotional appeal on the floor of the House by an openly gay legislator swayed some undecided lawmakers to pass the civil union law, which garnered Democrat, Republican, and Progressive party support.

Although early polling suggested that Vermonters opposed the law 52% to 43%, by the time the governor who had supported the legislation was reelected the following year, an exit poll found that a majority of voters had come to support the law.⁶⁵ Over that time, grassroots organizers had drummed up support for the law by emphasizing how little things had changed for heterosexual couples and how civil unions positively affected the lives of gay couples. This pattern of initial opposition, followed by organized grassroots pro-marriage campaigns, and then general acceptance by the public, would be repeated with gay marriage in Massachusetts a few years later.

⁶² Pierceson, *Same-Sex Marriage in the United States*, 104.

⁶³ *Ibid*, 105.

⁶⁴ *Ibid*, 107.

⁶⁵ *Ibid*.

The 1990s signify a time of both progress and setback for gay rights advocates. After a huge loss in Hawaii and the resulting political backlash, gay advocates won in Vermont and garnered their first favorable U.S. Supreme Court precedent with *Romer*. Suggesting changing perceptions on homosexuality, *The New York Times* declared the Vermont ruling a “breakthrough for fairness.”⁶⁶ Its Editorial Board went on to endorse marriage over civil unions: “It is hard to see how any such domestic partnership system could deliver the exact privileges accorded to heterosexual couples.”⁶⁷ Although *The New York Times* may have been ahead of public opinion on same-sex marriage, even among liberals, its public announcement of support for marriage gave credence to the gay marriage movement. Therefore, the new millennia began with inherent contradictions: sodomy remained criminalized and gay marriage had been defeated, but laws protecting gays and lesbians from discrimination had been upheld and civil unions were approved in one state.

⁶⁶ Editorial Board, “Vermont’s Momentous Ruling,” *The New York Times*, December 22, 1999.

⁶⁷ *Ibid.*

Chapter 3: *Lawrence* Changes Everything and The First Domino Falls In Massachusetts

The 21st century began with the continued criminalization of homosexuality and no states permitting same-sex marriage. Yet, in the late 1990s and early 2000s, public opinion on homosexuality had begun to evolve, providing the setting for two historic court decisions in 2003. The first, *Lawrence vs. Texas*,⁶⁸ was issued by the U.S. Supreme Court, and the second, *Goodridge vs. Department of Public Health*,⁶⁹ by the Massachusetts Supreme Court. These rulings galvanized the same-sex marriage revolution and changed the reality of being gay in America. With the repeal of *Bowers* in the *Lawrence* decision, and the first judicial mandate for same-sex marriage from *Goodridge*, seemingly impenetrable barriers were thwarted. While the U.S. Supreme Court finally caught up to changing national public opinion in *Lawrence*, the Massachusetts Supreme Court ruled ahead of the state's public opinion, but the work of gay activists minimized the backlash. The contemporary same-sex marriage movement was born.

Before the Defense of Marriage Act in 1996, gay marriage did not have a place in national dialogue. Public opinion polls asked about the morality of homosexuality or if a heterosexual person knew a homosexual person; gay marriage was so far outside the realm of possibility that few polls bothered collect data about it. Even though 68% of Americans opposed same-sex marriage in 1996, ideas about homosexuality had begun to shift whereas data from the 1970s and 1980s indicated steady opposition to homosexuality.⁷⁰ In 1991, 72% of Americans still believed homosexual behavior to be “always wrong.” By 2004, that number had dropped to 56%. In 1985, a *Los Angeles Times* survey found that 64% of persons polled said that they would be “very upset” to learn their child was gay. By 2004, that number had been cut in half to 33%.⁷¹

⁶⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003)

⁶⁹ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)

⁷⁰ Unfortunately, data from before the 1990s is lacking. In 2013, the Pew Research Center asked questions like “Do you have close friends or family who are gay and lesbian?” and “Do you know any gay or lesbian people raising children?” As the Pew Research Center did not think to ask these types of questions twenty years earlier, it is impossible to measure a change over time. The existing data suggests that the latter half of the 1990s was a time of transformation in the general attitudes of the American public toward homosexuality.

⁷¹ “In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as ‘Inevitable,’” Pew Research Center, June 6, 2013.

A 2013 Pew Research study of gay and lesbian Americans allows for the inference that the 1990s marked a significant shift in the American public's ideas of homosexuality and attitudes toward gay people. In 1993, only 61% of Americans reported personally knowing a gay person.⁷² By 2013, approximately 90% now knew a gay person.⁷³ Additionally, this 2013 Pew Research Center analysis showed that knowing someone who is gay or lesbian is linked with greater acceptance of homosexuality.⁷⁴ Moreover, 70% of gays and lesbians believe that they too believe knowing a gay person helps foster acceptance among heterosexuals.⁷⁵ Similarly, knowing a gay person made it more difficult to hate him or her, deny him or her protection, and condone unequal treatment.

The role of prominent gay and lesbian public figures played an important role in the public's growing acceptance of homosexuality. The 2013 Pew Research Center poll revealed that comedienne and TV host Ellen DeGeneres, who came out of the closet in 1997, tops the list of people who did the most to advance gay rights, far surpassing any other publically gay figure.⁷⁶ About half of gays and lesbians (49%) believe that sympathetic gay characters on television and in movies have had a positive affect on societal acceptance of homosexuality.⁷⁷ Television and Hollywood movies began featuring these types of gay characters in the mid-1990s. It is thereby possible to infer a change in public opinion during the 1990s, despite the limited data, based on the gay community's own perceptions of significant factors.

Whatever progress gay activists made with anti-discrimination laws or civil unions, as long as *Bowers* remained on the books federal law would sanction the criminalization of homosexuality. But by 2003 only thirteen states still criminalized sodomy, and only four of them specifically targeted homosexual sex.⁷⁸ Opinion polling showed that while half of all Americans still thought homosexual sex morally

⁷² "In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as 'Inevitable,'" Pew Research Center, June 6, 2013.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Klarman, *From the Closet to the Altar*, 85.

objectionable, few supported its criminal prosecution.⁷⁹ Accordingly, although only less than two decades after *Bowers*, a minute amount of time for the U.S. Supreme Court to reverse itself, when John Lawrence was arrested in his residence for having consensual, homosexual sex in the state of Texas, gay advocates jumped at the opportunity to have the U.S. Supreme Court revisit its decision in *Bowers*.

In the *Lawrence vs. Texas*⁸⁰ opinion, written by Justice Kennedy, the majority re-examined *Bowers* under the Due Process Clause of the Fourteenth Amendment instead of hearing the challenge as an equal protection violation. They did so because the Texas sodomy law, unlike the more general sodomy law in *Bowers*, targeted homosexual conduct exclusively. In his opinion, Justice Kennedy adopted Justice Stevens' dissent in *Bowers* and adapted the history of fundamental rights, privacy, and homosexuality outlined by Justice White in the *Bowers* majority opinion to fit the new ruling in *Lawrence*. It overruled *Bowers*, which had been law for only seventeen years.

Echoing the changing public perceptions of gays and lesbians in America, *Lawrence* reflected the growing intellectual and judicial separation of homosexuals from the act of homosexual sex. The court recognized homosexuality beyond sexual conduct, such that gays and lesbians entered into relationships and raised families together. Justice Kennedy wrote, "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." Nevertheless, Justice Kennedy held that these relationships may or may not be "entitled to formal recognition in the law," thus implying that he did not seek to extend his ruling beyond sodomy. Justice Kennedy did write, however, that conduct is "but one element in a personal bond that is more enduring," which recognized that, despite dubious legal status, homosexual relationships could not be criminalized.

Another substantial change from *Bowers* to *Lawrence*, again reflecting the evolution in the understanding of homosexuality, involved the question of morality as a legitimate state interest. Justice Kennedy defined the question as "whether the majority may use the power of the state to enforce these views on the whole society through

⁷⁹ Klarman, *From the Closet to the Altar*, 85.

⁸⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003)

operation of the criminal law.” Justice Kennedy relied on *Romer v. Evans* and a 1992 abortion case, *Planned Parenthood of Southeastern PA v. Casey*,⁸¹ to hold that morality could not be considered a legitimate state interest—that is, what is necessary to justify the passage of a law. Justice Kennedy quotes from *Casey* when he ruled that the Constitution protects the liberty of all people “to define one’s own concept of existence.”

The most progressive component of Kennedy’s decision in *Lawrence* was the Court’s recognition of a stigma of inequality for gays and lesbians. Justice Kennedy reasoned that if homosexual conduct was criminalized, even if it went unenforced, that a stigma remained—and that stigma allowed for other forms of discrimination based on sexual orientation. Moreover, he continued, “the stigma this statute imposes is not trivial” and “its continuance as precedent demeans the lives of homosexual persons.” Finally, Kennedy concluded the statute impeded upon the dignity of homosexual persons. This conception of equal dignity later encouraged gay activists to press for full marriage equality over the parallel institution of civil unions.

In contrast to Justice Kennedy’s reliance on the Due Process Clause, Justice O’Connor’s concurring opinion in *Lawrence* relied on the Equal Protection Clause. She concurred in overturning the Texas sodomy statute, but not in overruling *Bowers*. She began with a discussion of scrutiny—an issue Justice Kennedy’s opinion completely and, arguably, purposely ignored. When referencing *Romer*, Justice O’Connor wrote, “When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.” She referenced Justice Scalia’s *Lawrence* dissent to suggest that in *Romer* and in *Lawrence* the Court has used an unprecedented and more searching form of rational basis review, a “rational basis plus.” Nevertheless, she proceeded under rational basis review to attempt to distinguish *Bowers* from *Lawrence*: “*Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished.” She concurred with the majority that moral disapproval, like animus, was not a legitimate state interest; however, she ignored that the *Bowers* Court upheld the Georgia sodomy law based on the state interest in promoting traditional views on morality and not just on

⁸¹ *Planned Parenthood of Southeastern Pa v. Casey*, 505 U.S. 833 (1992)

whether homosexuality was a fundamental right. Her argument of distinction was further confounded when she wrote: “Because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior.” She ignored that despite the broad language of the Georgia statute in *Bowers*, it was also indiscriminately enforced only for homosexuals. Justice O’Connor also admitted that Texas’ law, which linked homosexual conduct with homosexuality, was “directed toward gay persons as a class.” Therefore, Justice O’Connor identified homosexuals as a class, the very thing Justice Kennedy avoided. Thus, the inconsistencies in her argument help show why the Court did not adopt her Equal Protection reasoning to overrule the Texas statute and uphold *Bowers*. Nevertheless, Justice O’Connor, revealing her more conservative tendencies, overtly stated the difference between sodomy and the leap to same-sex marriage—perhaps reminding her colleagues that public opinion did not yet accept gay marriage. She argued that unlike moral disapproval of homosexual conduct, preserving the traditional institution of marriage would be a legitimate state interest, “Other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.” Justice O’Connor therefore attempted to limit her concurring opinion in a way that sought to protect traditional marriage.

Unsurprisingly, given his vote in *Bowers* and dissent in *Romer*, Justice Scalia issued a biting dissent of the majority opinion in *Lawrence*. For him, the sodomy law in *Bowers* was rightfully sustained under minimal scrutiny. He concluded that under the same standard of rational basis review used in *Bowers*, the sodomy law in *Lawrence* must be similarly upheld. He argued that the *Lawrence* majority applied an “unheard-of form of rational basis review that will have far-reaching implications beyond this case.” Additionally, he maintained that the only fundamental right in question was the fundamental right to engage in homosexual sodomy. Because the *Lawrence* court agreed that such a right did not exist, Justice Scalia argued that the law must be upheld under the most minimal scrutiny. Justice Scalia then continued that traditional morality should be considered a legitimate interest for legislatures under the rational basis test: “The impossibility of distinguishing homosexuality from other traditional “morals” offenses is precisely why *Bowers* rejected the rational-basis challenge. ‘The law,’ he said, ‘is

constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.” Justice Scalia then listed numerous criminal laws that had been upheld under the rational basis test, such as criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity, which could now be called into question under *Lawrence*. Presumably these laws would be upheld under rational basis and, accordingly, Justice Scalia’s dissent suggested the Court was using a new, unnamed heightened rational basis.⁸²

As he did in his *Romer* dissent, Justice Scalia again wrote of the incompatibility of *Lawrence* with all the existing laws that regulate homosexual relationships. He mocked Justice O’Connor’s statement that unlike homosexual sodomy, same-sex marriage would have a legitimate state interest in preserving the traditional institution of marriage. In his characteristically snarky prose, he wrote, “But ‘preserving the traditional institution of marriage’ is just a kinder way of describing the State’s *moral disapproval* of same-sex couples.” As in *Romer*, he again discerned the writing on the wall for laws prohibiting same-sex marriage: “Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.” Moreover, he queried, if moral disapprobation could no longer be considered a legitimate state interest, “what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising the liberty protected by the Constitution?” Justice Scalia’s dissent recognized the clear inconsistencies in the court’s position on homosexuality. While no court had yet to rule in favor of same-sex marriage and the majority attempted to pre-emptively distinguish sodomy from marriage, Justice Scalia’s dissent provided a logical roadmap for future challenges.

Despite the public’s growing acceptance of gays and lesbians, the *Lawrence* decision produced a backlash against same-sex marriage, with its critics accepting Justice

⁸² Justice Scalia’s slippery-slope logic has been disputed by Rutgers Law Professor Carlos Ball, who argues that the difference between incestuous and polygamous relationships is the ability for parties to enter and remain in those committed relationships. Ball, Carlos A. “Why Liberty Judicial Review Is As Legitimate As Equality Review: The Case of Gay Rights Jurisprudence.” *Journal of Constitutional Law* 14, no. 1 (2011-2012): 1-76.

Scalia's logical point that *Lawrence* provided openings for a successful legal challenge to traditional marriage. For most of the country, even if homosexuality was no longer criminal, gay marriage remained offensive and taboo.

On November 18, 2003, five months after *Lawrence*, the Massachusetts Supreme Court handed down the first judicial ruling requiring same-sex marriage under a state constitution in *Goodridge vs. Department of Public Health*.⁸³ Gay marriage advocates had argued the Massachusetts case differently than in Hawaii and Vermont. Gay and Lesbian Advocates and Defenders (GLAD) lawyers shifted their strategy from discussing the benefits of marriage to its cultural status, its place in American culture.⁸⁴ GLAD lawyers argued that gays had been subject to historic discrimination, that marriage was a fundamental right, and sexual partnership is a private decision like birth control.⁸⁵ In the 4-3 decision, Chief Justice Margaret Marshall's opinion took GLAD's arguments and expanded upon them. She used rational basis review and cited *Lawrence* as obvious relevant precedent, noting especially that that it was not the state's job to mandate moral code. She also harkened back to the miscegenation case of *Loving* to ground her decision in the liberal constitutional tradition. Finally she discussed marriage as an institution of civic life, similar to housing or employment, in which Massachusetts had already prohibited discrimination in 1989. Massachusetts became the fifth jurisdiction in the world, after Ontario, British Columbia, Belgium, and the Netherlands, to enact same-sex marriage.⁸⁶

Goodridge gave Massachusetts officials six months to prepare for marriage, leaving six months for the opponents of same-sex marriage to attempt to defeat the decision through legislative action. Learning from the political backlash of the Hawaii Supreme Court decision and now maintaining a much greater infrastructure of political organization and legal advocacy groups, same-sex marriage advocates mobilized in Massachusetts to ensure that marriage licenses would be issued to gay couples on May

⁸³ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)

⁸⁴ Pierceson, *Same-Sex Marriage in the United States*, 110.

⁸⁵ Hirshman, *Victory*, 291.

⁸⁶ Klarman, *From the Closet to the Altar*, 90.

17, 2004. As same-sex marriage advocate Marc Solomon explained, there were only two ways that the decision could be stopped: a lawsuit that would overturn the decision or a federal challenge.⁸⁷ There were two political ways to reverse the decision: amend either the Massachusetts or federal constitution.⁸⁸ A legal challenge seemed unlikely given that the decision had come from the highest state court, so advocacy groups focused on preventing a constitutional amendment passing through the Massachusetts state legislature or through the citizen-initiative process. Advocates knew that they could not afford to fail again as they had failed in Hawaii. The backlash had to be minimized, or gay marriage would become unwinnable anywhere.

The main opposition to the ruling came from the religious right, most specifically, the Catholic Church. As Solomon recounts, the Vatican declared, “there are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God’s plan for marriage and family.”⁸⁹ Although not a tremendously powerful group within the state, religious conservatives still made impressive opponents. A conservative media campaign running anti-gay ads targeted working class communities of Irish, Italian, and Portuguese Catholic; as Solomon recalls, “A voice-over compared the silence of religious conservatives in the face of the ‘threat’ to marriage to the complicity of those who didn’t stand up to the Nazis.”⁹⁰ In this initial flurry of events, the main pro-same-sex marriage group, MassEquality, was bolstered only by the Massachusetts Supreme Court’s clarification that it’s ruling required marriage--not civil unions. To the dismay of gay advocates, many liberal-leaning politicians, including Senator John Kerry of Massachusetts, the 2004 Democratic presidential candidate, announced their preference for civil unions over marriage and for a constitutional convention that would overturn the marriage ruling.

As pro-same-sex marriage advocates counter-organized, preparing to defeat efforts to pass a state constitutional amendment, they focused on convincing individual state lawmakers, as well as the general public, that gay couples deserved the right to marry. Their campaign focused on individual couples who related their stories on TV and

⁸⁷ Solomon, *Winning Marriage*, 12.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, 13.

⁹⁰ *Ibid.*, 18.

radio ads, announcing their desire for marriage and the legitimacy that marriage gave their relationships. These advertisements humanized gays and lesbians to both citizens and their elected officials by showing gay couples as regular people who merely wanted the same rights as their heterosexual counterparts.

At the constitutional convention, legislators divided into three blocs: the first and largest favored civil unions; the second favored marriage; the third, a compromise measure, supporting a ban on gay marriage while mandating the creation of civil unions.⁹¹ The third measure, although opposed by both religious conservatives and advocates for same-sex marriage, passed. This measure needed to pass a second convention, however, to become law.

In between the first and second constitutional convention came state elections, offering the public the chance to retain or reject politicians who had supported same-sex marriage at the convention. MassEquality raised \$700,000 to support candidates favorable to marriage in the primaries; its efforts proved successful when all seven pro-gay marriage candidates who faced challenges emerged victorious.⁹² In the general election, all fifty incumbent legislators who had supported gay marriage at the convention and faced challengers kept their seats, while four open seats went to pro-marriage lawmakers.⁹³ Eighteen months later, at the second constitutional convention, the compromise measure was rejected by a vote of 157 to 39.⁹⁴ Even the Republican leader of the Senate and an original co-author of the amendment, Brian Lees, voted against banning same-sex marriage: “I’ve received over 7,000 letters, emails, and phone calls from people. The majority of people asked me to vote against this proposal.”⁹⁵ He acknowledged, “Gay marriage has begun and life has not changed for the citizens of the commonwealth with the exception of those who can marry who could not before.”⁹⁶ Bay Staters had shifted so far in favor of marriage that even Republicans felt support for same-sex marriage had become politically prudent.

⁹¹ Klarman, *From the Closet to the Altar*, 93.

⁹² *Ibid*, 95.

⁹³ *Ibid*, 96.

⁹⁴ *Ibid*.

⁹⁵ Solomon, *Winning Marriage*, 91.

⁹⁶ *Ibid*.

Despite the success for same-sex marriage in the constitutional conventions, same-sex marriage still faced a second challenge from the citizen-initiative. Gay-marriage advocates turned to the job of getting a majority of state lawmakers to vote ‘no’ on the citizen amendment. Three-and-a-half years after the *Goodridge* decision, the Massachusetts Senate and House of Representatives voted down the citizen-initiative. Gay marriage defeated political backlash.

Public opinion in Massachusetts shifted decisively in the years after *Goodridge*. Six months before *Goodridge* a *Boston Globe* opinion poll showed support for gay marriage hovered at just 50%.⁹⁷ Right after *Goodridge*, polls showed that 48% supported marriage, a small drop.⁹⁸ A week after the first constitutional convention, a *Globe* poll revealed that just 35% of people supported the legalization of gay marriage.⁹⁹ In March 2005, a year and a half after the decision, the *Boston Globe* reported that 56% of Bay Staters supported same-sex marriage.¹⁰⁰ The people of Massachusetts had rapidly reversed their opinions. *Goodridge* proved that once gay marriages began, people readily lost interest in opposing them, with some earlier opponents now supporting them. In 2010, Republican Scott Brown, during his campaign for U.S. Senator, stated that gay marriage was settled law--the people had moved on.¹⁰¹

Despite their acceptance in Massachusetts, *Lawrence* and *Goodridge* provoked a national backlash and helped make same-sex marriage a salient issue for the 2004 presidential election. Thirteen states had passed constitutional amendments banning same-sex marriage.¹⁰² Congressional Republicans denounced the decision along with religious conservatives, and President Bush endorsed a constitutional amendment limiting marriage to a man and a woman. The president attacked gay marriage in his State of the Union address: “Activist judges...have begun redefining marriage by court order, without regard for the will of the people and their elected representatives...Our nation must defend the sanctity of marriage.”¹⁰³ While Republican politicians united their party’s base in opposition to same-sex marriage, and Democrats rallied around the compromise

⁹⁷ Pierceson, *Same-Sex Marriage in the United States*, 111.

⁹⁸ Solomon, *Winning Marriage*, 38

⁹⁹ *Ibid.*

¹⁰⁰ Klarman, *From the Closet to the Altar*, 97.

¹⁰¹ *Ibid.*

¹⁰² Pierceson, *Same-Sex Marriage in the United States*, 108.

¹⁰³ Solomon, *Winning Marriage*, 18.

measure of permitting gays and lesbians to enter into civil unions, others eagerly jumped at the opportunity to further advance same-sex marriage. In San Francisco, Mayor Gavin Newsom began issuing marriage licenses to gay couples beginning in February 2004. Within ten days, three thousand gay couples had married in the city.¹⁰⁴ Although clear that the state would not recognize the licenses, the Newsom's actions inspired other county officials around the country, including in New York, New Mexico, and Oregon to issue marriage licenses to gay couples in their jurisdictions. The same-sex marriage revolution was underway.

¹⁰⁴ Klarman, *From the Closet to the Altar*, 99.

Chapter 4: Building A Critical Mass

With the Massachusetts decision, same-sex marriage acquired momentum. Advocates tabled their fear of another Hawaii catastrophe and began a more aggressive push for same-sex marriage through the courts and state legislatures. Advocacy groups pursued a state-by-state policy of building what Evan Wolfson, now the Lambda Legal Defense Fund Marriage Project Director, called “a critical mass.” Borrowing from the civil rights movement of the 1950s and 60s, the plan was to win marriage in individual states, enough of them to force either Congress or the U.S. Supreme Court to act. If advocacy groups could win marriage in enough states, states without marriage would come to be viewed as outliers. As legal scholars Barry Friedman and Erin F. Delancey explain, “the judiciary provides its vital service to the central government in suppressing undesired conduct by the constituent states.”¹⁰⁵ That is, the U.S. Supreme Court tends to suppress the laws of states with policies that differ from the rest of the country. If gay marriage advocates could build a critical mass of states with gay marriage, the court would be more likely to rule in favor of gay marriage.

Advocacy groups began to pursue same-sex marriage in the courts and in state legislatures around the country, from New Jersey to Iowa. The most significant and emblematic conflicts emerged in the country’s two largest states and, not coincidentally the states with the largest gay populations, New York and California.

In New York, gay marriage advocacy groups in March 2004 began filing lawsuits on behalf of same-sex couples for marriage licenses. Eleven months after, in February 2005, Judge Doris Ling-Cohan of the state trial court, or the court of original instance, declared same-sex marriage a fundamental right and the denial of same-sex marriage to be a violation of equal protection. “Same-sex couples,” she wrote, “are entitled to the same fundamental right to follow their hearts and publicly commit to a lifetime partnership with the person of their choosing.”¹⁰⁶ Judge Ling-Cohan then went on to list the inimitability of the institution of marriage, which included intangible benefits like securing the bond between parents and children. She rejected the claim that civil unions could be considered a proper substitute to marriage. Judge Ling-Cohan concluded that

¹⁰⁵ Barry Friedman and Erin F. Delancey, “Becoming Supreme: The Federal Foundation for Judicial Supremacy,” *Columbia Law Review* 111 (2011): 1140.

¹⁰⁶ *Hernandez vs. Robles*, 7 Misc 3d 459 (Sup Ct, New York County 2005), 24.

“the protections of the New York Constitution extend beyond those found in the Federal Constitution, which sets the floor, but not the ceiling, for the rights of the individual.” She gave the city Marriage License Bureau thirty days to begin issuing marriage licenses to gay couples.

Her decision immediately provoked outcries of judicial activism from religious groups, conservatives, and other opponents to same-sex marriage. The state appealed the decision all the way to the state’s highest court, the Court of Appeals. In *Hernandez vs. Robles*¹⁰⁷ that court reversed the trial court’s decision, citing deference to the legislature, which had never repealed an 19th century domestic law defining marriage as between a man and a woman. The 4-to-2 plurality decision, with one justice recusing himself, distinguished same-sex marriage from miscegenation cases that Judge Ling-Cohan had cited as relevant precedent. Unlike miscegenation cases, which had come out of a long history of racial discrimination, “the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind.” The decision thus dismissed any arguments in favor of viewing gays and lesbians as a suspect class. Consequently, using the rational basis test, the plurality found several reasons why the state had an interest in the definition of marriage. For example, the court argued, “the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships.” The decision went on to argue, “the Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.” It continued that the goal of procreation was a legitimate state interest in preserving marriage between a man and a woman. In a final assault on the trial court’s opinion, the plurality rebuked Judge Ling-Cohan for judicial activism.

The *Hernandez* dissent, written by Chief Justice Judith Kaye (a Barnard College graduate) disputed the entire reasoning of the plurality opinion. She argued that homosexuals constituted a suspect class and the law accordingly deserved stricter scrutiny. The chief justice also found the miscegenation cases to be a proper parallel and reminded her colleagues, “tens of thousands of children are currently being raised by same-sex couples in New York.” She argued that “depriving these children of the benefits

¹⁰⁷ *Hernandez v. Robles* 855 N.E.2d 1 (N.Y. 2006)

and protections available to the children of opposite-sex couples is antithetical to their welfare.” Denying marriage to gay couples hurt New York families, not the other way around. New York law already held that homosexuality was not cause for denying the adoption of children. The dissent concluded with an ominous rebuke of the plurality, “I am confident that future generations will look back on today’s decision as an unfortunate misstep.”

Gay marriage advocates thus turned to the legislature to pass a pro-marriage bill. In 2007 and 2009 the New York State Assembly passed a same-sex marriage bill only to have it defeated by the New York State Senate each time. The 2009 fight particularly disheartened gay advocates as the Democratic Governor David Paterson supported marriage equality and Democrats controlled the Senate. The Senate vote was lost by Democratic defectors who voted with a united Republican party against marriage. Democratic Brooklyn Senator, Kevin S. Parker, called the act of the defectors, several of whom had changed their position on marriage at the last minute when it became clear that the measure would be defeated, “political cowards.”¹⁰⁸

Politicians in Albany may have misread New York’s voters. *The New York Times* reported that support for gay marriage had grown consistently and, right before the Senate vote, a poll from the Marist Institute for Public Opinion in Poughkeepsie showed that 51 % of registered voters supported same-sex marriage while only 42% opposed it.¹⁰⁹ Moreover, the most populous areas of the state, New York City and Westchester County, overwhelmingly favored gay marriage.¹¹⁰ Gay advocates would have to wait for the election of a new legislature in 2011. Meanwhile, they maintained a steady grass-roots media campaign to bolster support among the public for marriage.

In 2010, using the same political strategy honed in Massachusetts, gay rights groups under an umbrella organization called Fight Back New York targeted legislators, both Democrats and Republicans, who had voted against marriage in 2009. For the 2010 midterm elections, Fight Back New York spent approximately \$800,000 on key Senate

¹⁰⁸ Jeremy Peters, “New York State Senate Votes Down Gay Marriage Bill,” *The New York Times*, December 2, 2009.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

racism.¹¹¹ In the end, Fight Back replaced three anti-marriage Senate incumbents, two Democrats and one Republican, with senators who had promised to vote in favor of gay marriage.¹¹² The elections also gave the Empire State a new governor, Andrew Cuomo, son of famed liberal former Democratic New York governor, Mario Cuomo.

Unlike his predecessor, Governor Andrew Cuomo took up the fight for same-sex marriage unmarred by political scandal and on the tails of a sweeping electoral victory. He intended to use the resultant political clout to push a marriage equality bill through the legislature that had just gained a Republican majority. Even during his election campaign Cuomo had prioritized same-sex marriage, reflecting New York's inclination to favor marriage equality. At one donor event hosted by The Empire State Pride Agenda (ESPA) he stated, "I don't want to be the governor who lobbies for marriage equality. I don't want to be the governor who fights for marriage equality. I want to be the governor who signs the law that makes equality a reality in the state of New York."¹¹³

Governor Cuomo partnered with gay advocacy groups and Log Cabin Republicans, including Wall Street billionaire Paul Singer and New York City Mayor Michael Bloomberg, to coordinate a push for a same-sex marriage bill in the 2011 legislative session. Having witnessed first-hand as attorney general the loss in 2009, Cuomo understood the challenges ahead. Included in the new political strategy was a Madison Avenue PR firm to direct a \$3 million pro-marriage media blitz build on the support of the 58% of New Yorkers who already approved of marriage equality.¹¹⁴ With Cuomo's influence, gay advocates' grass roots constituent pressure, and prominent Republican money, the Marriage Equality bill passed the Republican Senate by a vote of 33-29, with four Republican votes and only a single Democrat defector. On June 24, 2011, New York became the largest state to legalize same-sex marriage through legislative act rather than the courts.

Why did gay marriage fail in the courts in New York courts in 2006 but win through the legislature in 2011? A national public opinion poll in 2005 revealed 40% of

¹¹¹ Solomon, *Winning Marriage*, 163.

¹¹² *Ibid.*

¹¹³ *Ibid.*, 171.

¹¹⁴ *Ibid.*, 181.

Americans trusted their judiciary to “deal with the issue of gay marriage.”¹¹⁵ A modest increase of 5% of Americans, 45% in total, believed that the issue should be left to the state legislature.¹¹⁶ It would seem that the American public did care about the question of judicial legitimacy and gay marriage. The *Hernandez* majority may have chosen to “defer to the legislature” on gay marriage, but the American public did not demand it. Additionally, while nationally public opinion moved slowly in favor of gay marriage from 39% in 2006 to 48% in 2011,¹¹⁷ New York State was less affected by such transformation. With its large gay population and liberal politics, the Empire State had historically been more progressive on gay issues than the rest of the country. And, unlike in most other states, the failure of the legalization of gay marriage through the courts and the legislature in 2007 and 2009, and its later success in 2011, must be attributed to factors other than public opinion.

Legal scholar Jason Pierceson argues that the failure of same-sex marriage in *Hernandez* originated in the make-up of the court rather than opposition from the people. He writes, “The shift on the Court of Appeals from a liberal, activist court toward a more deferential stance reflects one of the goals of New York’s three-term Republican governor, George Pataki...Pataki used his appointments to counter the court’s activism for liberal causes.”¹¹⁸ Of the judicial appointees remaining on the Court from liberal Governor Mario Cuomo, one recused himself and the other voted with the plurality, likely looking for a reappointment by Pataki.¹¹⁹ With such a court, gay marriage advocates could not succeed.

The failure of same-sex marriage bills in the state senate in 2007 and 2009 may be chalked up to poor Democratic Party leadership and unity, which was compounded by a weak governor short of political capital. In contrast, the victory in 2011 may be attributed to a strong push from Governor Andrew Cuomo, a well-funded vast grassroots media campaign by gay advocates to increase existing strong support for marriage equality, and the support of prominent Republican donors who promised to support incumbents who might face political opposition if they voted ‘yes’ on marriage. These features of the New

¹¹⁵ ABC News/Washington Post Poll, conducted June 2-5, 2005. <http://www.pollingreport.com/civil2.htm>

¹¹⁶ *Ibid.*

¹¹⁷ Gallup Public Opinion polls 2006 and 2011. <http://www.gallup.com/poll/117328/marriage.aspx>

¹¹⁸ Pierceson, *Same-Sex Marriage in the United States*, 166.

¹¹⁹ *Ibid.*

York judiciary and state politics show New York to be unique as a case-study; the legalization of same-sex marriage in New York followed the trend of public opinion but other external forces were at play as well.

Meanwhile, on the opposite coast, in California, events unfolded similarly to New York at first, but soon it became clear that the escalating battle for same-sex marriage in California would play out in the courts and among voters rather than the legislature. The first punch was thrown by Mayor Gavin Newsom of San Francisco who, inspired by the *Goodridge* decision and enraged by President George W. Bush's proposed federal amendment to ban gay marriage, decided that the California constitution, like that of Massachusetts, required same-sex marriage. In February 2004, Newsom, a straight, Catholic mainstream politician who had not once mentioned gay marriage during his campaign, directed the city clerk to begin issuing marriage licenses to gay couples in defiance of a 2000 voter-initiative statute prohibiting same-sex marriage. Immediately, lawsuits were filed and twenty-nine days later, a California state court halted the marriage proceedings.¹²⁰ That August, the California Supreme Court affirmed the decision of the lower court, ruling that the Mayor had overstepped his authority, and nullified the more than four thousand marriages from the so-called "Winter of Love."¹²¹ Newsom's actions, however, inspired a same-sex marriage bill in the Democratic-controlled state legislature that was vetoed by Governor Arnold Schwarzenegger in 2005 and again in 2007. The legislature, without the support of the governor, was powerless to overturn the voter initiative.

With no hope of legislative success, gay advocates turned to the courts to challenge the constitutionality of the voter initiative law. In *Marriage Cases*,¹²² an opinion written by Judge Richard Kramer of the San Francisco County Superior Court, declared the law unconstitutional, as it violated the equal protection clause of the California constitution. Judge Kramer ruled that while he believed *Marriage Cases* should be decided using strict scrutiny, as gays and lesbians constituted a suspect group,

¹²⁰ Tad Friend, "Going Places; Letter from California," *The New Yorker*, October 4, 2004.

¹²¹ *Ibid.*

¹²² *Marriage Cases*, slip opinion, San Francisco County Superior Court, March 14, 2005.

the statute violated the equal protection clause even under the rational basis test. Drawing on *Lawrence*,¹²³ Judge Kramer argued that the tradition of heterosexual marriage was insufficient grounds to ban gay marriage. Judge Kramer also held that the existence of “marriage-like rights without marriage” actually worked against the state’s argument that it had a legitimate interest in denying gay couples marriage. He referenced *Brown vs. The Board of Education of Topeka Kansas*¹²⁴ to suggest that like school segregation, the denial of marriage created an intangible feeling of inferiority affecting people’s perception of their place within their communities. The voter initiative statute, he concluded, was unconstitutional.

In March 2005 in *Re Marriage Cases*,¹²⁵ the California Supreme Court not only affirmed Judge Kramer’s decision but added that gay couples had a constitutional right to marry in California. The majority opinion referenced the changes in the state’s “understanding and legal treatment of gay individuals and gay couples,” which now “recognize[d] that gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children.” The majority continued that “gay individuals are entitled to the same legal rights and the same respect and dignity afforded all other individuals.” By emphasizing the change in the public’s general perception of gay people, the California Supreme Court intimated the success and progress of the gay marriage movement. Not only were gays and lesbians entitled to equal rights but “equal dignity.” Anything but marriage fell short.

In its 2008 decision, the California Supreme Court followed the direction of public opinion. Eight years prior, the voter initiative passed by a margin of 61% to 39%.¹²⁶ By 2007, however, the steady progress of the gay marriage movement showed that California remained evenly divided on gay marriage: 46% favored and 46% opposed.¹²⁷ The California Supreme Court responded to a progressing upward trend for support of same-sex marriage.

¹²³ *Lawrence v. Texas*, 539 U.S. 558 (2003)

¹²⁴ *Brown v. Board of Education of Topeka Kansas*, 347 U.S. 483 (1954)

¹²⁵ *Re Marriage Cases*, 43 Cal.4th 757 (2008)

¹²⁶ Klarman, *From the Closet to the Altar*, 120.

¹²⁷ *Ibid.*

Unlike in Massachusetts and New York, opponents of same-sex marriage in California were organized, funded, and pro-active. And in 2008 marriage had not yet reached majority support among Californians. Even before the California Supreme Court handed down its decision, opponents of gay marriage had collected enough petition signatures to put a constitutional amendment banning gay marriage on the ballot.¹²⁸ Their petition became Proposition 8, which defined marriage as between one man and one woman.

Under the umbrella group “Protect Marriage,” the Mormon Church, the California Catholic Conference, evangelical churches, the National Organization for Marriage (NOM) and other conservative groups initiated a mass media campaign to support Proposition 8.¹²⁹ The conservative media campaign, known as “Yes on 8,” generated contributions totaling more than \$40 million with significant amounts of money coming from out-of-state donors.¹³⁰ The Knights of Columbus, a Catholic fraternal organization, donated approximately \$1 million dollars.¹³¹ Donations from the Mormon Church totaled about 40% of the total contributions—about \$16 million.¹³² “Protect Marriage” hired veteran PR firm Schubert Flint, which had played a large role in defeating tobacco taxes for children’s health and tort reform a few years earlier.¹³³ The firm’s three-pronged plan targeted religious freedom, individual freedom of expression, and the education of children in public schools.¹³⁴ One advertisement, airing in both Spanish and English, featured a young girl coming home from school and telling her mother ‘I learned how a prince married a prince, and I can marry a princess.’ The support for same-sex marriage dropped a point every other day for two weeks following the ad.¹³⁵ Parents of young children moved to support Proposition 8 despite the gay advocates’ response ad of the Superintendent of Public Education reminding voters that gay marriage had nothing to do with public schools.¹³⁶

¹²⁸ Klarman, *From the Closet to the Altar*, 121.

¹²⁹ *Ibid.*

¹³⁰ Shin, Michael. “Show Me the Money! The Geography of Contributions to California’s Proposition 8.” *The California Journal of Politics and Policy* 1, (2009): 4.

¹³¹ *Ibid.*, 6.

¹³² *Ibid.*

¹³³ Hirshman, *Victory*, 303.

¹³⁴ *Ibid.*, 304

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*, 306.

Although pro-marriage groups raised approximately the same amount of money, the force of the media campaign run by Schubert Flint, coupled with a last Sunday sermon effort by churches, pushed the vote on Proposition 8 to “yes.” In the same monumental election that produced the first African American President of the United States, Proposition 8 passed by a margin of 52.2% to 47.8%.¹³⁷ National Election Pool (NEP) estimates suggested that 70% of black voters, who came out in large numbers to support Barack Obama, supported Proposition 8 along with 53% of Latino voters.¹³⁸ Additionally, while Obama announced his opposition to Proposition 8, he was criticized for not being vocal enough and continuing to oppose gay marriage.¹³⁹ While minority opposition to same-sex marriage has been attributed to greater religiosity among these voters, not their race or politics, the large turnout of these voters likely helped secure the affirmative vote.¹⁴⁰

If public opinion was evenly divided on same-sex marriage before the California Supreme Court ruling, the “Yes on 8” campaign proved effective enough to sway Californians the other way. Before the voter initiative, when the Court handed down its decision, the public seemed receptive to gay marriage, but Proposition 8 proved that the opposition’s response could be swift, harsh, and ugly.

The lesson from the New York and California case studies is simple: each state is different. There are distinctive political forces at play. Timing matters. Citizenries are not identical. Strategies cannot be uniform across all states. New York and California proved that building the critical mass required flexibility, creativity, and resourcefulness. When Proposition 8 passed in 2008, no state except Massachusetts had legalized gay marriage. Three years later when the New York legislature passed its marriage equality bill, six states and the District of Columbia had legalized same-sex marriage. Marriage equality in New York in 2011 marked a turning point in the same-sex marriage movement. After 2011, national politics and public opinion, as viewed through the lens of Barack Obama’s

¹³⁷ Klarman, *From the Closet to the Altar*, 122.

¹³⁸ Marisa Abrajano, “Are Blacks and Latinos Responsible for the Passage of Proposition 8? Analyzing Voter Attitudes on California’s Proposal to Ban Same-Sex Marriage in 2008.” *Political Research Quarterly* 63, no. 4 (December 2010): 922.

¹³⁹ Klarman, *From the Closet to the Altar*, 123.

¹⁴⁰ Pierceson, *Same-Sex Marriage in the United States*, 193.

advancing position on gay marriage between the 2008 and 2012 elections, trended toward the acceptance of same-sex marriage.

In 2008, Democratic Presidential candidate Barack Obama opposed same-sex marriage. His move to endorse gay marriage before the 2012 election presents a useful barometer in gauging the strength of changing public opinion on marriage equality.¹⁴¹ Therefore, between 2008 and 2012 as Obama went from opposing to supporting marriage equality, gay marriage went from being taboo to politically advantageous.

Although Senator Barack Obama opposed the passage of Proposition 8 in California, he maintained a strong opposition to same-sex marriage during the 2008 election, maintaining 2004 Democratic Presidential Candidate John Kerry's position favoring civil unions as a sufficient alternative to marriage. Expectedly, in 2008, public opinion polling revealed that 39% of Americans favored same-sex marriage while 51% opposed.¹⁴² Even among Democrats, only half favored gay marriage in 2008.¹⁴³

Although Senator Obama opposed gay marriage throughout the 2008 campaign, he did favor the repeal of the Defense of Marriage Act (DOMA) leading some gay advocates, including Marc Solomon, to believe that Obama would be amenable to same-sex marriage in the future. Solomon writes, "Supporting the freedom to marry wasn't yet considered in the 'acceptable' range...it would be our job to advance the cause nationally to the point where a sympathetic president believed that support for the freedom to marry was politically viable."¹⁴⁴ Consequently, gay donors rallied to the 2008 Obama campaign, and the Democratic Party during the 2010 midterm elections, opening up their homes for fundraisers and introducing him to their families. As for many Americans, meeting and interacting with gay couples and their children may have begun to influence Obama's feelings on gay marriage.

¹⁴¹ It is unlikely that an incumbent Presidential candidate, like Barack Obama in 2012, would shift his position on a controversial issue if it were not supported by national public opinion--especially given that he had been elected in 2008 by a large turnout of African American voters who tended to oppose gay marriage.

¹⁴² "Changing Attitudes on Gay Marriage," Pew Research Center, September 24, 2014.

¹⁴³ *Ibid.*

¹⁴⁴ Solomon, *Winning Marriage*, 267.

In 2010, Obama announced that his views on same-sex marriage were “evolving.” To a room of liberal bloggers, Obama announced:

I think that it is an issue that I wrestle with and think about because I have a whole host of friends who are in gay partnerships. I have staff members who are in committed, monogamous relationships, who are raising children, who are wonderful parents. And I care about them deeply. And so while I’m not prepared to reverse myself here, sitting in the Roosevelt Room at 3:30 in the afternoon, I think it’s fair to say that it’s something that I think a lot about.¹⁴⁵

In the two years since the 2008 election, the percentage of Americans who favored same-sex marriage had modestly increased from 39% to 42%, continuing the steady upward trend in favor of marriage equality begun in 2004.¹⁴⁶ Trends within the Democratic Party revealed that more Democrats supported same-sex marriage than in 2008—about 53% in 2010.¹⁴⁷ Finally, polling revealed that younger generations supported same-sex marriage in far greater numbers than their parents and grandparents, implying that younger voters would favor candidates who also supported gay marriage. Younger voters also tended to feel particularly inspired by gay marriage as a political issue.¹⁴⁸ As his views on gay rights and same-sex marriage evolved alongside the rest of Americans, the President announced his support for the repeal of the military’s “Don’t Ask Don’t Tell” policy, a 1994 law banning openly gay men and women from serving in the military, in his 2010 State of the Union address. Congress repealed the law that December.

In February 2011, Attorney General Eric Holder announced that the Obama administration would no longer defend DOMA, as the President believed it unconstitutional, leaving Congress to defend DOMA in *Windsor vs. United States*,¹⁴⁹ to be discussed in the next chapter. That summer, New York passed its marriage equality bill—the largest state to legalize gay marriage through the political process. The tide had turned. For the first time in history, a greater number of Americans favored gay marriage rather than opposed it.¹⁵⁰ The millennial generation, those born after 1981, grew their

¹⁴⁵ Becky Bowers, “President Barack Obama’s Shifting Stance On Gay Marriage,” *Poltifact.com*, May 11, 2012.

¹⁴⁶ “Changing Attitudes on Gay Marriage,” Pew Research Center, September 24, 2014.

¹⁴⁷ *Ibid.*

¹⁴⁸ Solomon, *Winning Marriage*, 294.

¹⁴⁹ *United States v. Windsor*, 570 U.S. ____ (2013) (Docket No. 12-307)

¹⁵⁰ “Changing Attitudes on Gay Marriage,” Pew Research Center, September 24, 2014.

support from 53% in 2010 to 61%.¹⁵¹ Even within the Republican Party, 27% of Republicans reported favoring gay marriage.¹⁵² Accounting for almost all major variables, 2011 marked a period of unprecedented growth in support of gay marriage.

Seizing the momentum of 2011, gay advocates decided to give the president a major public push—putting marriage equality into the 2012 Democratic Party platform. Advocates organized the “Democrats: Say I Do!” campaign, which quickly drew the support of Democratic House Leader Nancy Pelosi.¹⁵³ The “Say I Do!” campaign targeted key Democratic politicians to influence as many important party leaders to the side of marriage equality. By 2012 Senator John Kerry was ready to publically support marriage equality in the Democratic Party platform.¹⁵⁴ Moreover, a large majority of registered Democrats favored same-sex marriage, about 62%.¹⁵⁵ With the heat turned up from within the Democratic Party, the White House began to feel pressure to respond.

The first word from the White House came from a slip by Vice President Joe Biden on *Meet the Press*. Without explicitly endorsing marriage, the Vice President spoke of a gay family he had met at a recent fundraiser in Los Angeles and the impact the family had on him. Although the White House scrambled, the proverbial cat was out of the bag. A few days later, at a White House press conference, the President of the United States announced, “same-sex couples should be able to get married.”¹⁵⁶ When President Obama won re-election that November, he won on a platform of marriage equality.

By the end of 2012, ten states and the District of Columbia had legalized same-sex marriage either through the legislature or by judicial mandate. National public opinion on same-sex marriage had dramatically increased; two election cycles earlier only 31% of Americans supported gay marriage while in 2012 almost half the country favored marriage.¹⁵⁷ Despite this progress, the vast majority of Americans still lived in states where same-sex marriage remained illegal. California had Proposition 8, and many other states had similar constitutional amendments banning gay marriage. DOMA remained law, and Democrats had lost control of the House of Representatives in the

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ Solomon, *Winning Marriage*, 297.

¹⁵⁴ *Ibid.*, 298.

¹⁵⁵ “Changing Attitudes on Gay Marriage,” Pew Research Center, September 24, 2014.

¹⁵⁶ Solomon, *Winning Marriage*, 307.

¹⁵⁷ “Changing Attitudes on Gay Marriage,” Pew Research Center, September 24, 2014.

2010-midterm elections. The re-election of Barack Obama on a platform of marriage equality was a huge victory, but after 2012 the final battle for marriage shifted once again from the political to judicial arena.

Chapter 5: Skim Milk Marriage

In 2013, two U.S. Supreme Court cases fundamentally transformed the same-sex marriage movement. In California, gay couples filed lawsuits challenging the constitutionality of Proposition 8 under the U.S. Constitution while in New York Edie Windsor filed a federal lawsuit to recoup estate tax money she had paid after the death of her wife who was not recognized as such under DOMA. These two cases became *Hollingsworth vs. Perry*¹⁵⁸ and *Windsor vs. U.S.*¹⁵⁹ The former challenged the constitutionality of state constitutional amendments banning same-sex marriage while the latter confronted the constitutionality of Section 3 of DOMA. If the U.S. Supreme Court ruled against gay marriage in either case, it would take years for the same-sex marriage movement to recover. Negative precedent could persist for decades. Everything was at stake.

With Proposition 8 overturning the California Supreme Court's favorable ruling on same-sex marriage, the only recourse left to activists was federal court. Although some activists worried that a legal challenge to Proposition 8 would prematurely call upon the U.S. Supreme Court to rule on the constitutionality of all state amendments banning same-sex marriage, others believed that the potential gain outweighed the risk. To better the odds, the Proposition 8 lawsuit united two powerhouse attorneys, liberal David Boies and conservative Ted Olson. These two lawyers had previously argued the 2000-election controversy case *Bush vs. Gore*¹⁶⁰ in front of the U.S. Supreme Court as opposing counsel. Boies, a liberal private litigator, represented Al Gore while Olson, on the opposite end of the political spectrum, represented George W. Bush and later served as his solicitor general. The flashy legal team of Olson and Boies brought the case an aura of bipartisanship, star-power, and legitimacy. Everyone knew Olson and Boies played to win.

¹⁵⁸ *Perry v. Hollingsworth*, 570 U.S. ____ (2013)

¹⁵⁹ *United States vs. Windsor*, 570 U.S. __ (2013)

¹⁶⁰ *Bush v. Gore*, 531 U.S. 98 (2000)

In May 2009, Olson and Boies filed a federal lawsuit on behalf of two gay couples that had been denied marriage licenses due to Proposition 8. The plaintiffs argued that Proposition 8 violated the Equal Protection and Due Process clauses of the Fourteenth Amendment of the U.S. Constitution. For the first time since Hawaii in 1993, there would be a full bench trial with presentation of evidence and expert witness testimony on the purported state interest for Proposition 8. The state of California, however, declined to defend Proposition 8, as Republican Governor Schwarzenegger did not wish to take a position. Democratic Attorney General Jerry Brown separately stated that he believed the law to be unconstitutional. Instead, Judge Vaughn Walker of the U.S. District Court of Northern California permitted the proponents of the citizen initiative to defend the law.

The 2010 bench trial of *Perry vs. Schwarzenegger*¹⁶¹ soon became a national media spectacle as the nation watched premiere trial attorneys from both sides of the aisle argue that Proposition 8 was unconstitutional. Boies and Olsen began by claiming that gays and lesbians constituted a suspect class, requiring heightened scrutiny under the Equal Protection Clause. They also maintained that Proposition 8 was both too narrow and too broad—it first singled out gays and lesbians and then imposed upon them unequal treatment. They argued that Proposition 8 violated the Due Process Clause, because it prevented the plaintiffs from marrying, a fundamental right. Finally, they contended that California’s provision of a domestic partnership, which gave same-sex couples the same “rights and responsibilities of marriage without actually providing marriage,” discriminated without legitimate justification against a suspect class.

The defendants of the law—that is, the group behind the citizen initiative—argued that Proposition 8 maintained California’s definition of marriage as excluding same-sex couples, affirmed the will of California citizens to exclude same sex couples from marriage, promoted stability in relationships between a man and a woman because they naturally (and sometimes unintentionally) produced children, and promoted ‘statistically optimal’ child-rearing households; that is, households in which children are raised by a man and a woman married to each other. They moved away from a morality argument,

¹⁶¹ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (Cal. 2010)

cautious of moral disapproval as an illegitimate state interest, and instead attempted to prove a secular interest.

In the district court ruling, Judge Vaughn Walker affirmed Boies and Olson's arguments, finding Proposition 8 unconstitutional. He held that the amendment "both burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation." He began by identifying a fundamental right to marry. He then argued that because marriage was a fundamental right, an attempt to restrict marriage must be examined under strict scrutiny. He stated, "gays and lesbians are the type of minority strict scrutiny was designed to protect." However, he continued that even under rational basis review, Proposition 8 had no narrowly tailored, compelling state interest. While Judge Walker recognized and agreed with the argument made by the Olson and Boies in favor of strict scrutiny, he chose to overrule Proposition 8 using rational basis review.

Judge Walker next ruled on the issue of domestic partnerships. He held that under equal protection rationale, domestic partnerships, as a parallel institution to marriage, existed only to distinguish same-sex from opposite-sex couples without offering the same social meaning as marriage. Judge Walker concluded that California did not meet its due process obligation to allow plaintiffs to marry by offering them a substitute, inferior institution.

Judge Walker continued to show the purported state interests of Proposition 8 were illegitimate. He referenced the myriad witnesses presented by Olson and Boies who disproved the defendants' claims the state's interest in protecting the children of gay couples. Contrarily, defendants presented only one witness to testify in favor of the government's legitimate interest in limiting marriage. Judge Walker held that this sole witness "provided no credible evidence to support any of the claimed adverse effects proponents [of Proposition 8] promised to demonstrate." Meanwhile, Olson and Boies' expert sociologists and psychologists proved the falsity of the defendants' claims of the harmful effects of homosexual couples raising children. The state's legitimate interest in protecting the wellbeing of children was not accepted.

Judge Walker, challenging Justice O'Connor's concurring opinion in *Lawrence*, held that tradition alone did not constitute rational basis. The tradition of needing a

mother and a father for child-rearing was an artifact of a time when traditional gender roles dictated marriage. In the past, men and women fulfilled distinctive roles, but men and women were no longer treated differently under the law or social custom based on antiquated notions of gender. Furthermore, because gay adoption was legal in California, and same-sex couples united in domestic partnership tended to raise families, the interest of promoting opposite-sex parenting over same-sex parenting was duly denied.

Lastly, Judge Walker discussed how the Proposition 8 movement mobilized support for the voter initiative through a negative advertising campaign depicting gays and lesbians in an extremely negative manner. The court found this campaign related to the animus rejected by Justice Kennedy in *Romer*.

After the long trial, Judge Walker ruled in favor of the plaintiffs, “Proposition 8 violates due process and equal protection rights.” He stated that California was able to issue marriage licenses to same-sex couples as “it had already issued 18,000 marriage licenses to same-sex couples and has not suffered any demonstrated harm as a result.” He enjoined the public officials named as defendants from enforcing the law.

Armed with a great victory, Boies and Olson, gay advocates, and gay couples braced themselves for the appeal. The public officials of the state of California, however, decided not to pursue an appeal. Consequently, the proponents of Proposition 8 went to the California Supreme Court to see if they had the authority to assert the state’s interest and appeal the law. The California Supreme Court ruled that the proponents of Proposition 8 could bring the appeal. In accordance with the California Supreme Court’s decision, the Ninth Circuit Court of Appeals concluded that the petitioners had standing and agreed to hear the appeal.

In *Perry vs. Brown*,¹⁶² as the lawsuit was now called after Attorney General Jerry Brown won the gubernatorial election, the Ninth Circuit Court of Appeals upheld Judge Walker’s ruling but on narrower grounds. The Ninth Circuit agreed with the district court that Proposition 8 deprived same-sex couples of the fundamental right to marry guaranteed by the Due Process Clause. The Court did, however, change the equal protection argument from the inequality of the parallel institution of domestic partnership to the revocation of the existing right to marry: “We therefore need not and do not

¹⁶² *Perry v. Brown*, 52 Cal. 4th 1116, 265 P.3d 1002, 134 Cal. Rptr. 3d 499

consider whether same-sex couples have a fundamental right to marry, or whether states that fail to afford the right to marry to gays and lesbians must do so.” This allowed the Ninth Circuit to rely heavily on *Romer* and decide the case more narrowly without ruling on a fundamental right of same-sex marriage or the constitutionality of domestic partnerships.

The Ninth Circuit opinion relied heavily on the precedent set by *Romer*, suggesting a pre-emptive attempt to appeal to the author of *Romer* and the U.S. Supreme Court’s main swing vote, Justice Anthony Kennedy. The Ninth Circuit’s argument for Proposition 8 paralleled *Romer*’s regarding Amendment 2 in Colorado, which similarly took away a right that already existed: “Proposition 8’s only effect was to take away that important and legally significant designation [of marriage], while leaving in place all of its incidents.” The Ninth Circuit demonstrated how Proposition 8 did not dismantle any of the substantial rights of gay and lesbians, such as their ability to raise children together, become foster parents, or file state taxes jointly. Instead, Proposition 8 removed only the designation of marriage. Marriage as opposed to domestic partnership carried with it certain social benefits, among them positive, intangible benefits of the distinction of marriage as compared to a domestic partnership. Poetically, Justice Reinhardt, the author of the opinion, emphasized the positive social esteem reserved for marriage, “A rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of ‘registered domestic partnership’ does not.”

The Ninth Circuit’s decision referred to the equal dignity of gay and lesbian relationships, arguing that to reclassify gay relationships and families as inferior to those of heterosexuals had no purpose but that same animus rejected in *Romer*. Justice Reinhardt relied on *Romer* to again show that Proposition 8, like Amendment 2, was simultaneously too narrow and too broad—it identified a class of citizens and then denied them certain societal status without legitimate state interest. He wrote: “tradition alone is not justification for taking away a right that already had been granted, even though that grant was in derogation of tradition.” Unlike Judge Walker who argued that tradition alone was not a state interest, Judge Reinhardt narrowed this idea to a specific circumstance. This decision by the Ninth Circuit initiated a final appeal to the U.S.

Supreme Court by the citizen-defendants. In December 2012, the Supreme Court agreed to hear their appeal.

Meanwhile, in New York, in November 2010 Edie Windsor filed suit against the U.S. federal government for \$363, 053 in federal tax money she had paid after the death of her wife, Thea Spayer in 2009. Edie and Thea had been a couple for almost fifty years before Thea's death, and for more than thirty years Edie had taken care of Thea, who suffered from multiple sclerosis.¹⁶³ In 2007, the couple made the trip to Canada to make their life-long partnership a marriage. Edie argued that the Defense of Marriage Act, preventing the federal government from recognizing her marriage recognized by the state of New York since 2011, violated her equal protection rights under the Fourteenth Amendment and her right to due process under the Fifth Amendment. More broadly, she wanted the federal government to recognize gay marriages performed in the nine states where same-sex marriage was legal.

In addition to a sympathetic plaintiff in 83-year-old Edie Windsor, the case benefitted from signing-on attorney Roberta "Robbie" Kaplan, a partner at top corporate law firm Paul, Weiss, Rifkind, Wharton & Garrison. Like Ted Olson and David Boies in California, Kaplan added star power, vast legal experience, and financial resources. Kaplan was also familiar with different legal approaches to same-sex marriage from her experience losing *Hernandez vs. Robles* in front of the New York Supreme Court.

For the first challenge, in front of U.S. District Court Judge Barbara Jones, Kaplan argued that "the clearly unequal treatment of Edie and Thea's marriage both demeans their remarkable commitment to one another and has great practical significance for Edie, the sole beneficiary of Thea's estate."¹⁶⁴ She thus suggested that the denial of marriage deprived gay couples of a certain dignity. She continued that the federal government had habitually deferred to the states on the question of marriage protections, responsibilities, and benefits, but since the passage of DOMA had improperly deviated

¹⁶³ Solomon, *Winning Marriage*, 318.

¹⁶⁴ Complaint filed by Roberta Kaplan to the United States District Court, Southern District of New York in *Windsor vs. U.S.*, slip opinion, United States District Court, Southern District of New York, Case No. 1:10-cv-08435-BSJ-JCF, June 6, 2012. <https://www.aclu.org/files/assets/2010-11-9-WindsorvUS-Complaint.pdf>

from that tradition of federalism. She recounted that DOMA presented four reasons for a legitimate state interest during the time of its passage: (1) defending and nurturing the institution of traditional heterosexual marriage, (2) advancing traditional notions of morality, (3) protecting state sovereignty and democratic self-governance, and (4) preserving scarce government resources. Kaplan argued that all four of the of the state's interests were "irrational." Furthermore, she argued that DOMA violated Edie's right to equal protection: "if 'Thea' were instead 'Theo' her estate would have passed to the benefit of Edie tax-free. Solely because Edie and Theo were both women, Thea's estate was denied the marital deduction."¹⁶⁵ She asked Judge Jones to review DOMA under intermediate or strict scrutiny as, she argued, gays and lesbians constituted a suspect class. Judge Jones refused to address the question of whether homosexuals should be deemed as suspect class but used the rational basis test to rule in favor of Edie Windsor.¹⁶⁶ Section 3 of the Defense of Marriage Act was unconstitutional; gay couples legally married would now become eligible for federal benefits and protections.

The Bipartisan Legal Advocacy Group (BLAG), the group appointed by the U.S. House of Representatives to defend DOMA after the Obama Administration announced that it would not, appealed the decision to the Second Circuit Court of Appeals. The Second Circuit upheld the ruling by Judge Jones but decided the case under intermediate scrutiny, arguing that homosexuals constituted a quasi-suspect class.¹⁶⁷ Chief Judge Dennis Jacobs, writing for the Second Circuit, held, "We conclude that homosexuality is a sufficiently discernible characteristic to define a discrete minority class." He suggested that DOMA might be able to withstand the rational basis test but such line of reasoning was unnecessary since the law triggered intermediate scrutiny, an in-between level of scrutiny usually reserved for sex-based, or gender, discrimination. Under intermediate scrutiny, the Second Circuit could not find a legitimate state interest in denying same-sex couples federal recognition of their marriages. BLAG appealed the decision, and the U.S.

¹⁶⁵ Complaint filed by Roberta Kaplan to the United States District Court, Southern District of New York in *Windsor vs. U.S.*, slip opinion, United States District Court, Southern District of New York, Case No. 1:10-cv-08435-BSJ-JCF, June 6, 2012. <https://www.aclu.org/files/assets/2010-11-9-WindsorvUS-Complaint.pdf>

¹⁶⁶ *Windsor vs. U.S.*, slip opinion, United States District Court, Southern District of New York, Case No. 1:10-cv-08435-BSJ-JCF, June 6, 2012.

¹⁶⁷ *Windsor vs. U.S.*, United States District Court of Appeals, Second Circuit. October 18, 2012.

Supreme Court granted *certiorari*. The Supreme Court would now have the final say on DOMA.

By 2013, when the U.S. Supreme Court heard oral arguments for *Windsor vs. U.S.*, the national public had undergone a radical shift in its perception of homosexuality, gays and lesbians, and same-sex marriage. In 1996, when the Defense of Marriage Act was signed into law, a mere 27% of Americans believed that same-sex marriage should be legal while 68% did not.¹⁶⁸ Even among gays and lesbians, marriage seemed impossible. In 1996, openly gay Congressman Barney Frank called gay marriage “politically, the toughest issue.”¹⁶⁹ A poll by *Newsweek* in 1994 asked gays and lesbians what issues were most important to them: 91% thought equal rights in the workplace were very important; 77% named health care and social security benefits; 42% identified legally sanctioned gay marriage.¹⁷⁰ Twenty years later, 93% of gay and lesbian adults favored marriage, with 58% believing that marriage should be the top priority even if it shifted focus from other issues.¹⁷¹ Most significantly, by 2013, the attitude of the general American public had shifted in favor of gay marriage. By the time the Supreme Court heard oral arguments in *Windsor*, public opinion favoring same-sex marriage hovered somewhere between 50% and 53%.¹⁷²

During oral arguments, Attorney Kaplan attempted to focus her argument on the failure of DOMA to relate to a legitimate state interest even under rational basis review. Chief Justice John Roberts and Justice Scalia quickly interrupted to ask whether there would be a legitimate interest in maintaining a uniform federal definition of marriage. Kaplan replied with a federalism argument: states had always been trusted to define marriage independently of Congress. She also reasoned that DOMA was unconstitutional for the very reason that it singled out gay marriage as a reason to federally define marriage:

There has been Federal litigation for hundreds of years with respect to the residency of where people live or don't live, or whether they are divorced or not divorced throughout the Federal system. And the Federal Government has always

¹⁶⁸ Frank Newport, “For First Time, Majority of Americans Favor Legal Gay Marriage,” Gallup, May 20, 2011.

¹⁶⁹ Klarman, *From the Closet to the Altar*, 167.

¹⁷⁰ *Ibid.*

¹⁷¹ “A Survey of LGBT Americans,” Pew Research Center, June 12, 2013.

¹⁷² Pierceson, *Same-Sex Marriage in the United States*, 239.

handled that and has never before -- and we believe this is why it's unconstitutional -- separated out a class of married gay couples solely because they were gay.¹⁷³

Uniformity in a federal definition of marriage could not be a state interest, as her opponents from BLAG had attempted to argue.

Kaplan proceeded with her line of reasoning to suggest that the only reason for DOMA's enactment was moral disapproval, an illegitimate state interest: "There is little doubt that the answer to the question of why Congress singled out gay people's marriages for disrespect through DOMA. The answer can't be uniformity as we've discussed." She continued, "The only conclusion that can be drawn is what was in the House Report, which is moral disapproval of gay people, which the Congress thought was permissible in 1996 because it relied on the Court's *Bowers* decision, which this Court has said was wrong."¹⁷⁴ The Chief Justice interrupted to ask whether it was possible that 84 of the Senators who had voted for DOMA had based their vote on moral disapproval. Kaplan responded that she believed there had been a "sea change" in the understanding of gay people and their relationships since 1996. Thus, Kaplan asked the Court to recognize that public opinion on homosexuality, gay people, and gay marriage had fundamentally changed since 1996. The grassroots media campaigns, the coming out of the closet, and the increased visibility of gays and lesbians had dramatically transformed the public's perception of gay people and their civil rights. Both Kaplan and the Chief Justice knew that such openly homophobic testimony as had been heard on the floor of the House of Representatives in 1996 would never again be tolerated. Times had changed. People had changed their minds on gay people and on gay marriage.

In the questioning of Paul Clement, counsel for BLAG, during oral arguments, Justice Ruth Bader-Ginsburg coined a phrase that would come to symbolize the unequal treatment of married gay couples under DOMA. Justice Ginsburg proffered that DOMA created two types of marriages: "the full marriage, and then this sort of skim-milk marriage."¹⁷⁵ Justice Bader-Ginsburg proved prescient.

¹⁷³ Transcript of oral arguments in *Windsor vs. U.S.* 570 U.S. __ (2013)
http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_jnt1.pdf

¹⁷⁴ Transcript of oral arguments in *Windsor vs. U.S.* 570 U.S. __ (2013)
http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_jnt1.pdf

¹⁷⁵ *Ibid.*

On June 26, 2013 Justice Kennedy, the U.S. Supreme Court’s main swing vote and a man who had documented his evolution on gay issues in *Romer* and *Lawrence*, read his 5-to-4 majority opinion; the Court found Section 3 of the Defense of Marriage Act unconstitutional.¹⁷⁶ In the opinion, Justice Kennedy focused on the equal dignity of homosexual relationships, accepting the argument set forth by Kaplan. He discussed the inequality of same-sex marriages under federal law calling them “second-class marriages,” a clear harkening to his colleague Justice Bader-Ginsburg’s “skim-milk marriage.” Justice Kennedy continued with this reasoning to argue, “By creating two contradictory marriage regimes within the same state, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law. The dual structure of marriage created by DOMA was untenable.

Justice Kennedy stated that New York had given gay and lesbian couples equal dignity when they legalized same-sex marriage, and DOMA had removed that dignity. According to Justice Kennedy, marriage “conferred upon [homosexuals] a dignity and status of immense import” which “enhanced the recognition, dignity, and protection of the class in their own community.” That the federal government, through DOMA, could use this state-defined class to do the opposite—that is, create indignity by taking away the recognition of marriage—was a deprivation of liberty protected by the Fifth Amendment. This reasoning paralleled Justice Kennedy’s reasoning in *Romer*: the law was unconstitutional in that it defined a class of people and then took away their rights.

In addition to denying gay couples equal dignity, Justice Kennedy argued that DOMA imposed a sense of otherness on gay couples and families. He held that “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.” The stigma of DOMA, Justice Kennedy continued, harmed not only for gay couples but their children:

The differentiation demeans the couple, whose moral and sexual choices the Constitution protects and whose relationship the state has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

¹⁷⁶ *United States vs. Windsor*, 570 U.S. __ (2013)

In short, the federal government's refusal to recognize the legitimacy of gay relationships by acknowledging their marriages suggested to the children of homosexual couples that their parents' relationship was worth less. Here, Justice Kennedy held that the federal government's policy under DOMA could have a negative affect on "tens of thousands" of children.

Presenting a federalism argument, Justice Kennedy claimed that DOMA was an anomaly in its interference in an area of law traditionally left to the states. DOMA interfered with state law simply to deny benefits to married couples. He argued, "This is strong evidence of a law having the purpose and effect of disapproval of that class." Thus, Justice Kennedy harkened back to his opinions in *Romer* and *Lawrence* where he had argued that moral disapproval could not justify a law. Referring to the House of Representatives' Congressional Record, Justice Kennedy identified the purpose for the law was to express "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially JudeoChristian) morality." With Justice Kennedy as the deciding vote, he and the four liberal justices, Breyer, Bader-Ginsburg, Sotomayor, Kagan, found Section 3 of the Defense of Marriage Act in violation of the Due Process Clause of the Fifth Amendment.

In a dissenting opinion, Chief Justice Roberts emphasized the federalism argument made in the majority opinion. The Chief Justice, seemingly unnecessarily, reminded Justice Kennedy and the rest of the majority that they had overruled DOMA on the grounds of federalism, not a fundamental right to gay marriage. He attempted to use his dissent to limit the decision and prevent a broader ruling in favor of gay marriage in the future. His dissent was weakened, however, by the fact that none of the other conservative justices, notably the ardent federalist Justice Clarence Thomas, joined him in the dissent. This suggested that the other conservative justices did not believe that the federalism argument was the main crux of the majority opinion.

Justice Scalia's dissent conflicted with that of Chief Justice Roberts, arguing that the federalism discussion in the majority opinion functioned simply to mislead the public into thinking it would not affect the states' prerogative to define marriage in the future. As he did in his *Romer* and *Lawrence* dissents, Justice Scalia identified *Windsor* as a slippery slope for future judicial decisions favoring homosexuals: "It takes real cheek for

today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to Congress's hateful moral judgment against it." Justice Scalia was most frustrated by the majority's refusal to recognize a legitimate state interest in defending traditional marriage. He cited his own dissent in *Lawrence*, "the Constitution does not forbid the government to enforce traditional moral and sexual norms." He also argued that the federal government had a legitimate state interest in creating a uniform framework of laws. Under the majority's ruling, gay marriage created uncertainty in federal policy. Finally, Justice Scalia accused his colleagues of judicial activism--legislating from the bench, "It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it."

Justice Scalia's allegation of judicial activism was a familiar charge, loaded with connotation. It suggested that Justices Kennedy, Breyer, Bader-Ginsburg, Sotomayor and Kagan had overstepped their judicial authority to impose unwanted policy on the American people. It suggested that the majority of Americans still wanted DOMA on the books. But as the complete lack of political backlash to the *Windsor* opinion revealed, the majority of Americans had changed their minds on DOMA. Zealous resistance to gay marriage in national politics had faded by 2013. No mainstream politician seriously considered proposing a federal constitutional amendment to ban gay marriage, as President George W. Bush had in 2004. Roberta Kaplan, Edie Windsor, and gay advocates had won the courtroom and the hearts and minds of a majority of Americans.

The same day it handed down its decision in *Windsor*, the U.S. Supreme Court also delivered Ted Olson and David Boies a victory in *Hollingsworth vs. Perry*.¹⁷⁷ While the Court had the opportunity to rule on the constitutionality of Proposition 8, which would have far-reaching affects on all the state constitutional amendments defining marriage, the Court instead ruled on a technical issue—whether the defendants of Proposition 8 had standing to bring the appeal before the Court. In short, the Court ruled that they did not [have standing]. Additionally, the Court ruled that the Ninth Circuit Court of Appeals never had the jurisdiction to hear the appeal from the district court. The

¹⁷⁷ *Perry v. Hollingsworth*, 570 U.S. ___ (2013)

Supreme Court vacated the decision from the Ninth Circuit, leaving Judge Walker's district court ruling the final ruling on the matter. Proposition 8 was unconstitutional. California once again had legal same-sex marriage.

In June 2013, when the U.S. Supreme Court handed down both landmark decisions, public opinion favoring gay marriage hovered just above 50%.¹⁷⁸ In neither *Windsor* nor *Hollingsworth* did the U.S. Supreme Court rule ahead of public opinion. Just a few weeks before the decisions were read, a Pew Research Center poll revealed that 72% of Americans believed that the legalization of same-sex marriage was inevitable.¹⁷⁹ While only 31% of Republicans favored the legalization of same-sex marriage, 59% of Democrats and 58% of Independents favored same-sex marriage.¹⁸⁰ These numbers suggest that a majority of Americans were ready to reject a law prohibiting the recognition of gay marriages already performed, but were not yet ready for gay marriage to become legal in every state. Both Supreme Court decisions followed these findings.

Windsor and *Hollingsworth* opened the floodgates to new legal challenges to same-sex marriage. They also inspired states to stop challenging gay marriage in the courts and to pass marriage equality laws. For example, in New Jersey, Governor Chris Christie declined to pursue an appeal on his state's gay marriage case, and in Illinois, Governor Pat Quinn signed into law legislation legalizing same-sex marriage.

Windsor left many legal questions unresolved. Issues such as gay divorce and the ability of states to deny reciprocity to gay couples were left for the lower state and federal courts to sort out. The language of *Windsor* has proffered most judges to rule in favor of gay marriage, but all of these challenges await a final word from the U.S. Supreme Court. Similarly, *Hollingsworth* inspired new lawsuits to challenge the constitutionality of state amendments prohibiting gay marriage. By early 2015, thirty-six states and the District of Columbia were performing same-sex marriage, and on January 16, 2015, the U.S. Supreme Court announced that it would rule on the question of a constitutionally protected right to same-sex marriage. Evan Wolfson had his critical mass. A "sea change," indeed.

¹⁷⁸ "Changing Attitudes on Gay Marriage," Pew Research Center, September 24, 2014.

¹⁷⁹ "In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as 'Inevitable,'" Pew Research Center, June 6, 2013.

¹⁸⁰ *Ibid.*

Concluding Thoughts And A Look Ahead

The U.S. Supreme Court has moved remarkably quickly on the question of gay rights. In 1986, *Bowers* upheld the constitutionality of sodomy laws. A mere seventeen years later the Court reversed itself in *Lawrence*. As a point of comparison, the Supreme Court took fifty-eight years to reverse itself on the issue of racial segregation. The rapidity of change in court doctrine has led to cries of judicial activism from critical politicians, private citizens, and even conservative members of the Supreme Court. Nonetheless, the Court has not legislated from the bench as critics decry. Instead, the U.S. Supreme Court has responded to dramatic changes in the American public's perception of homosexuality, gay couples, and marriage. Perhaps wary of the political backlash associated with its rulings on controversial civil rights and reproduction cases, the U.S. Supreme Court has consistently ruled in line with national public opinion on gay marriage, allowing the lower federal courts and state courts to issue the landmark decisions.

In January 2015, the U.S. Supreme Court agreed to rule on whether state constitutional amendments banning same-sex marriage, like Proposition 8 in California, were constitutional. The Court will hear oral arguments in April with a decision expected in June. Only fourteen states continue to constitutionally prohibit gay marriage; they have become the outliers. With national public opinion in favor of gay marriage now approaching 60%,¹⁸¹ a clear majority, the U.S. Supreme Court is likely to rule accordingly and declare a constitutional right to same-sex marriage.

National trends indicate that gay marriage is becoming increasingly accepted, if not favored. As Gallup reported in 2014:

“When Gallup first asked Americans this question about same-sex marriage in 1996, 68% were opposed to recognizing marriage between two men or two women, with slightly more than a quarter supporting it (27%). Since then, support has steadily grown, reaching 42% by 2004 when Massachusetts became the first state to legalize it.”¹⁸²

National opinion polls now show the favorable trend has jumped even more dramatically since *Windsor*. The American public supports gay marriage, and these trends are unlikely to change should the Supreme Court rule in favor of gay marriage. To the contrary, a

¹⁸¹ Justin McCarthy, “Same-Sex Marriage Support Reaches New High at 55%,” Gallup, May 21, 2014.

¹⁸² *Ibid.*

marriage equality ruling from the Supreme Court would most likely accelerate the acceptance of gay marriage.

Young voters now overwhelmingly support gay marriage. 78% of people between the ages of 18 and 29 support the legalization of gay marriage.¹⁸³ In fact, only the majority of voters over age 50 oppose gay marriage, while almost half of voters (48%) between the ages of 50 and 64 do favor it.¹⁸⁴ Even in conservative states, the majority of young people favor same-sex marriage.¹⁸⁵ Michael Klarman suggests that young people are more likely to know someone who is openly gay and thereby believe that homosexuality is an immutable characteristic like race, unlike previous generations.¹⁸⁶ The significance of young voters supporting gay marriage is that the trends in favor of gay marriage will only increase with time.

As homosexuality continues to become de-stigmatized, more people will make their sexuality public. As Klarman writes, “as more gays and lesbians have come out of the closet, the social environment has become more hospitable. In turn, as the social environment has become more hospitable, more gays and lesbians have felt free to come out of the closet.”¹⁸⁷ This self-reinforcing cycle increases the visibility of gay people and thereby helps amass more allies to the side of marriage equality. In the mid-1980s, amidst the AIDS crisis, more than half of Americans reported that they did not know anyone who was gay.¹⁸⁸ By 2000, 75% of Americans stated that they knew someone who was openly gay.¹⁸⁹ That number now hovers at about 87%.¹⁹⁰ Knowing a gay person is a significant factor in determining a person’s position on gay issues. About two-thirds (68%) of people who know gays and lesbians favor marriage equality, compared with just 32% of people who do not know anyone who is gay.¹⁹¹

As support for gay marriage has increased, religious opposition has also weakened. Although the Catholic, Mormon, Orthodox Jewish, and Southern Baptist

¹⁸³ Justin McCarthy, “Same-Sex Marriage Support Reaches New High at 55%,” Gallup, May 21, 2014.

¹⁸⁴ *Ibid.*

¹⁸⁵ Klarman, *From the Closet to the Altar*, 199.

¹⁸⁶ *Ibid.*, 200.

¹⁸⁷ *Ibid.*, 197.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ “In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as ‘Inevitable,’” Pew Research Center, June 6, 2013.

¹⁹¹ *Ibid.*

Church remain firmly against, the Presbyterian Church (U.S.A), Conservative and Reform Jewish movements, the Society of Friends, the Unitarian Universalist Church, United Church of Christ, and the Evangelical Lutheran Church now sanction same-sex marriage.¹⁹² Furthermore, while Catholic Pope Francis has reiterated his opposition to gay marriage, he has signaled a slight warming to gay issues, including gay clergymen in the Church.¹⁹³ As the Catholic Church has led much of the opposition to gay marriage, any rhetoric less bellicose should be seen as a victory for gay people. Moreover, even among religious conservatives who oppose gay marriage, many believe marriage equality to be inevitable. In May of 2013, 61% of American Catholics favored same-sex marriage but 71% thought it inevitable.¹⁹⁴ These numbers suggest that opposition among some Catholics has weakened along with the population at large, although it remains strong among Mormons and evangelical Protestants.

With public opinion polls suggesting minimal backlash if the Supreme Court rules in favor of gay marriage, the role of the Court's main swing voter, Justice Kennedy should not be overshadowed or deemphasized. CNN Supreme Court commentator and author Jeffrey Toobin has argued that Justice Kennedy is heavily influenced by international opinion and international courts, which have moved toward the acceptance of same-sex marriage in recent years.¹⁹⁵ His *Lawrence* opinion confirms this inclination: "The right petitioners seek in this case has been accepted as an integral part of human freedom in many countries."¹⁹⁶ Toobin also argues that Justice Kennedy's view has been that the Court is obligated to consider the evolving standards of society.¹⁹⁷ This suggests that Justice Kennedy would respond favorably to a gay marriage challenge now that marriage is supported among Americans and has become increasingly common in the Western world.

¹⁹² Davd Masci, "Where Christian Churches, Other Religions Stand On Gay Marriage," Pew Research Center, March 18, 2015.

¹⁹³ Michelle Richinick, "Pope Francis suggests gay marriage threatens traditional families," *MSNBC.com*, January 16, 2015.

¹⁹⁴ "In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as 'Inevitable,'" Pew Research Center, June 6, 2013.

¹⁹⁵ Jeffrey Toobin, *The Nine* (New York: Anchor Books, 2007), 212.

¹⁹⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003)

¹⁹⁷ Jeffrey Toobin, "Swing Shift: How Anthony Kennedy's passion for foreign law could change the Supreme Court," *The New Yorker*, September 12, 2005.

In looking closely at the decisions from *Romer to Windsor*, Justice Kennedy has clearly evolved in his understanding of homosexuality and the rights of gays and lesbians alongside the American people. In *Romer*, he began with refusing animus and moral disapproval as legitimate state interests and moved to identifying the right of gays and lesbians to have equal dignity in their relationships in *Windsor*. As the equal dignity argument is the most promising for gay rights litigation, and such jurisprudence was articulated by Justice Kennedy himself, it seems likely that he would rule in favor of equal dignity—that is, in favor of same-sex marriage. Justice Kennedy has authored all three landmark gay rights opinions, and he gave a vigorous dissent on the standing issue in *Perry v. Hollingsworth*, indicating that he was ready to rule on gay marriage. Finally, with Justice Kennedy lies the one vote needed to bring gay marriage to all the states. It seems quite unlikely that Justice Kennedy would reverse his gay rights legacy at its apex and switch his developed position on gay issues.

The greatest barrier to a broad judicial ruling in favor of same-sex marriage is the erstwhile failure of the U.S. Supreme Court to identify homosexuals as a suspect or quasi-suspect group, which would provide for intermediate or strict scrutiny. While lower courts, such as the California district court in *Perry* and the Second Circuit Court of Appeals in *Windsor*, have explained why gay rights cases require a stricter scrutiny, the U.S. Supreme Court has remained intentionally vague about its use of rational basis review in gay rights cases. Beginning in *Romer*, Justice Scalia dissented on the level of scrutiny used by Justice Kennedy in his majority opinions. Justice Scalia ardently believes that a strict rational basis review would not have led the majority to their rulings in *Romer*, *Lawrence*, and *Windsor*. However, even if the U.S. Supreme Court has applied a “rational basis plus” type review, as Justice O’Connor hinted at in her *Lawrence* concurring opinion, the obliqueness of the Court to declare such a level of scrutiny perpetuated a lack of uniformity in the lower courts. If the Court identifies a new “rational basis plus” level of scrutiny it would be to examine laws more carefully when they appear to be based on dislike of, or a desire to harm, a particular group. If the Court decided officially to create a rational basis plus level of review, then it seems likely that a same-sex marriage challenge would succeed. Given the arguments made by lower courts in various gay rights challenges, it seems logical to evaluate gay rights cases on a level of

scrutiny that is more than just rational basis review. The success of popular statewide referenda movements against gay rights along with a clear history of discrimination, prove that gays and lesbians still need judicial protection. There may have been a “sea change in understanding,” as was argued by Roberta Kaplan, but the country has not seen a sea change in their power, political or otherwise. The true question remains, however, can gay marriage challenge be upheld under rational basis review? Even if unstated, the level of scrutiny used in gay rights cases does appear to be rational basis plus, and if that level of scrutiny were applied to a gay marriage challenge, it should succeed.

Although the same-sex marriage case to be decided in June has its challenges, it is unlikely that the Supreme Court would have agreed to hear the case if it did not intend to rule in favor of gay marriage. From Stonewall Inn and the AIDS crisis, which first brought homosexuals out of the closet, to the mainstream cultural production of the 1990s that introduced Americans to gay people through pop culture, American attitudes toward gay people have changed tremendously over a short amount of time. With public opinion supportive of marriage equality, and little reason to expect potent political backlash, the U.S. Supreme Court will likely find a constitutional right to same-sex marriage this summer.

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