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“Dual Track Advocacy:” Legal Strategies, Political Strategies and Their Intersection in the Marriage Equality Movement

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“Dual Track Advocacy:” Legal Strategies, Political Strategies and Their Intersection in the
Marriage Equality Movement

A thesis offered to the faculty of the College of Arts and Sciences in partial fulfillment of a
Bachelors of Arts with an Honors Endorsement

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May 13, 2014

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I. Introduction

The LGB rights movement is one of the great civil rights movements of our time. Whereas the 1950s and 1960s witnessed the struggle to extend full recognition of African-Americans' citizenship and dignity, the past two decades have witnessed a similar struggle as the nation has moved to accept LGB people¹ and recognize their full citizenship. In the LGB rights movement, perhaps the most visible issue for the last twenty years has been marriage equality. The first cases suing for the right to marriage for LGB people were filed in the 1970s, but the issue of marriage for same-sex couples only emerged into public view in the 1990s. Following numerous losses in the first decades of marriage equality litigation, organizations litigating for marriage equality and private advocates for marriage equality finally began winning cases in courts across the nation.

This thesis draws on interviews with many of the main attorneys involved in the organizations campaigning for marriage equality over the past two decades, many of whom run such organizations. Using the information from those interviews, this thesis analyzes how the organizations campaigning for marriage equality managed to win in court and protect those victories from interference from other branches of government. To do so, this thesis focuses on the intersection of law and politics in marriage equality litigation, the understanding of organizations working toward marriage equality of that intersection, and the strategies of those organizations that stem from an understanding of that intersection. This thesis analyzes both legal and political strategies, as well as investigating the actual workings of the organizations campaigning for marriage equality. In so doing, this thesis also addresses those organizations' conception and reaction to the "backlash hypothesis" that dominates scholarly literature of the marriage equality movement.

¹ See definitions below.

This thesis begins with definitions of key terms to avoid confusion, followed by a discussion of the methods used in this study, followed by a review of the extant literature. Since the law looks backward even as it advances, and since the lawyers interviewed for this study referred to past cases and based their strategy on the cases' outcomes, a short history of marriage equality litigation follows the literature review. After that short history, the results of the interviews are presented. I conclude that the organizations campaigning for marriage equality have internalized the backlash hypothesis, and thus emphasize the political aspect of marriage equality test cases. I also conclude that such organizations have politicized almost every aspect of their work to both win and protect legal victories, turning such traditionally legal aspects of litigation such as plaintiff selection, *amici* briefs and even legal arguments into political tools.

II. Definitions of Key Terms

Many current scholars do not separate the concepts of “legal” and “political,” and instead view them as two parts of the same whole. This is reflected in modern theories of attitudinalism, which argues that legal decisions made by judges are actually political decisions. On the other hand, the theories of historical institutionalism argue that judges make decisions based both on policy preferences and the limits imposed by law and custom.² Some scholars have even argued that “Constitutional arguments are as much the stuff of politics as the pork barrel and the log roll...[B]asic constitutional institutions provide normative and procedural frameworks that allow political debate.”³ This essay will deal with “legal” and “political” aspects of marriage equality cases as separate entities, even though this essay will also discuss how every marriage equality case has both legal and political aspects that must be attended to in order for advocates of marriage equality to succeed.

In all the interviews conducted for this essay, the participants acknowledged that the prevailing wisdom in the organizations involved in marriage equality litigation is that there are, in fact, these two sides of every marriage case. According to most, this was a hard lesson learned after the first marriage cases. In order to analyze political and legal aspects of marriage equality cases, this essay separates them with the understanding that such a separation is merely a device used for analysis, and not a division that is reflected at all times in campaigns for marriage equality. The following definitions are definitions of key terms used in this essay, and will govern the discussion of legal and political aspects of marriage equality cases.

A. **Legal**

² Howard Gillman, Mark A. Graber & Keith E. Whittington, *American Constitutionalism, Volume I: Structures of Government*, (New York: Oxford University Press, 2013), 17.

³ *Ibid.*, xx.

For the purposes of this essay, the term “legal” shall refer to any actions that take place in the judicial branch of government, and not in the elected branches of government or in relation to popular referenda. As such, legal strategies are strategies that pertain only to arguments used in courts of law. The legal aspects of the marriage cases discussed in this essay are the aspects of the cases that occurred in courts of law, and not in legislatures or in the general public. Legal arguments and strategies include arguing for heightened versus rational basis scrutiny of a law or using Due Process arguments instead of Equal Protection arguments. There are aspects of the cases discussed in this case that do not neatly fit into definitions of “political” and “legal” without making definitions of those terms so wide as to rob them of meaning. Such aspects include the timing of bringing a lawsuit and *amici curiae* briefs. The timing of a lawsuit may be influenced by events outside the judicial branch in the public or in legislatures. However, since the action of bringing of a case and its adjudication both occur in courts of law, such decisions will be discussed as legal strategies. Similarly, as I will show, the marshalling of *amici curiae* has overwhelmingly political overtones. Sometimes briefs filed by *amici* do not even make legalistic arguments. However, since the briefs are filed with courts of law and are filed as means to the end of influencing a lawsuit, *amici* briefs shall be discussed in terms of legal strategy as much as possible.

B. Political

As mentioned above, legal actions occur in the judiciary. Political actions are actions that occur in the elected branches of government and the general public, either in the context of a popular referendum or not. Political aspects of the cases discussed in this essay include grassroots organizing of volunteers to run the organizations that bring lawsuits, public advocacy, lobbying in legislatures, and public education. Although actions taken in the elected branches

have legal overtones because they deal with the creation of law and policy, such actions shall be discussed as political strategies, since they occur solely in the elected branches. This essay is not so much focused on the language of the laws enacted by referendum or legislative processes, but on the process that led to that final product of a law. Another difficulty in this definition is the use of *amicus curiae* briefs, a type of legal form, to make political points. As I will show, the organizations litigating for marriage equality do this quite often. *Amici* briefs that are written to rebut popular conceptions of LGB people, or to show that large swaths of society already support marriage equality engage in political arguments. *Amici* briefs that make such arguments do not argue along legal lines, such as advocating for a specific level of judicial scrutiny. Instead, such briefs aim to show or build consensus. Thus, for the purposes of this essay, the term “political” will also refer to attempts to reach consensus and to appeal to non-legal arguments.

C. LGB

In this essay, the acronym LGB is used to represent all people who self-identify as lesbian, gay or bisexual, and are therefore likely to be either involved in or affected by the lawsuits discussed in this essay. Although far more common acronyms are LGBTQ (Lesbian, Gay, Bisexual, Transgender/Transsexual, and Queer/Questioning) or just LGBT, I have decided to use simply LGB. I made this decision with no intention of lessening other identities in importance. Issues facing transgender and transgender persons are of immense importance, and represent a still-developing and fascinating field of law and policy.⁴ However, such issues are beyond the scope of this paper. This paper deals only with marriage, and transsexual/transgender marriage is an issue too much in flux and too recently arrived at by the public conscious to be

⁴ See Anton Marino, “TRANSgressions of Inequality: The Struggle Finding Legal Protections Against Wrongful Employment Termination on the Basis of the Transgender Identity,” *Journal of Gender, Social Policy & the Law* 21, no. 4 (2013): 865-893; Stevie V. Tran & Elizabeth M. Glazer, “Transgenderless,” *Harvard Journal of Law & Gender* 35, (2012): 399-423; and Chinyere Ezie, “Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination - The Need for Strict Scrutiny,” *Columbia Journal of Gender & Law* 20 (2011): 141.

addressed in adequate depth in this study. As such, this essay shall use LGB as its acronym.⁵ This essay shall also use the term “marriage equality” except when interviewees mention marriage equality by other terms. “Marriage equality” is now the preferred term for discussing the goal of the movement, as opposed to “same-sex marriage” or “gay marriage.” The transition from those two phrases to “marriage equality” was a slow process. As I will show, some attorneys campaigning for marriage equality in the 1990s opposed the use of “same-sex” or “gay marriage” as descriptors of their goals. To those attorneys, such terms were too narrow—they saw themselves as fighting for marriage for everyone, regardless of sexual orientation, gender identification, or any other characteristic. However, the terms “same-sex marriage” and “gay marriage” were easier for the public to use, and so were used at first. Now, with the nation more familiar and comfortable with marriage equality, and with the fine-tuning of the political outreach of organizations working toward marriage equality, the term “marriage equality” has gained popularity.

Throughout this essay I refer to the LGB community and the LGB rights movement, more colloquially referred to as the gay rights movement. The LGB community exists more in theory than in reality, and, as Aloni explains in words that apply as much to his as this essay,

This does not mean that a monolithic community of LGB individuals exists in any meaningful way. At times, the multitude of interests within this community converge; at other times, they diverge significantly. Acknowledging this to be the case, I nevertheless refer to a “community” throughout this Article, and I attempt to be clear about those times when interests within the community are most likely to diverge, especially vis-à-vis marriage.⁶

⁵ The use of LGB is not unusual, and Erez Aloni gave a wonderful explanation for its use, which also works in this context:

“I use the term LGB to describe members who self-identify as lesbian, gay, or bisexual. In doing so, I do not intend to erase or obscure other identities. . . . This article does not refer specifically to transgender marriage because this raises questions concerning a state’s definition of male and female. For some transgender individuals, the option to marry already exists, even in states that do not recognize same-sex marriage. This is not to say that transgender people do not have an interest in same-sex marriage, just that the rules for determining the sex of a person are different from state to state and involve different sets of legal rules.” (Erez Aloni, “Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage,” *Duke Journal of Gender Law & Policy* 18: 106n1).

⁶ Ibid.

The same may be said of the LGB rights movement, and even the much more recently arisen marriage equality movement. The LGB rights movement has focused on as many goals as there have been interests within the LGB community. These issues have changed over time, and strategies have also changed. There are also many organizations working toward LGB rights, each with their own mission and strategy. To talk of the LGB rights movement as monolithic may be misleading, and the times when voices within the movement differed with each other shall be duly noted. The movement toward marriage equality also contains many voices, groups and strategies. Just as there is no monolithic LGB community or LGB rights community, there is no monolithic marriage equality movement. In fact, until the late 1990s, the marriage equality movement did not truly exist as a movement. Until that point, most work toward marriage equality was done by organizations that were involved in the LGB rights movement and private attorneys. By 2014 there are many organizations, such as Freedom to Marry, dedicated to marriage equality, so one can properly talk of a “movement” for marriage equality. Of course, that movement works toward a single goal – marriage equality – but it does not move as a single unit on every case, law and situation. The main organizations that have worked toward marriage equality (Lambda Legal, the ACLU’s Gay, Lesbian, Transgender & AIDS Project, Freedom to Marry, Gay & Lesbian Advocates and Defenders, the Human Rights Campaign and the National Center for Lesbian Rights) provide much of the guidance, funding, and litigation for the broader campaign, but other parties, such as private attorneys and individuals are also important actors. I shall be clear when organizations undertook certain strategies and campaigns, as opposed to private individuals. I shall also be clear when organizations working for LGB rights and marriage equality had internal differences of note, and when they did not.

III. Methods

The principle sources for this thesis are structured qualitative interviews of six named attorneys and one unnamed attorney involved with marriage equality litigation, along with secondary sources, such as legal briefs, academic works, law review articles, and court decisions. To best understand the meshing of legal and political strategies, the interviews focused on those topics and their intersection. The interviews stressed both the interpretive “how” and experiential “what” questions.⁷ The author conducted all interviews, and all recordings and transcriptions of the interviews are held on file with the author.

The interviewed attorneys that wished to be named in this study were Susan Murray (one of the lead attorneys in *Baker v. State of Vermont*), Beth Robinson (another lead attorney in *Baker* and now Associate Justice on the Vermont Supreme Court), Mary Bonauto (Civil Rights Project Director at Gay & Lesbian Advocates and Defenders), Evan Wolfson (longtime attorney at Lambda Legal Defense and Education Fund and founder of Freedom to Marry), Kevin Cathcart (Executive Director of Lambda Legal) and James Esseks (Director of the ACLU’s Lesbian, Gay, Bisexual, Transgender & AIDS Project). I also interviewed one attorney who did not want to be named in this thesis. Where that person’s comments appear, this thesis will merely note the date of the interview, offering no other identifying facts.

⁷ James A. Holstein and Jaber F. Gubrium, “Active Interviewing,” in Darin Weinberg, ed., *Qualitative Research Methods*, (New York: Blackwell Publishers, 2002), 124.

IV. Literature Review

A. **Politics and Law in the Marriage Equality Movement**

This thesis addresses the broad question of the interaction and place of law and politics in reform movements. There is agreement among scholars that the two are inextricably linked in the campaign for marriage equality, even though both organizations and private attorneys have focused on litigation. Thomas Keck has argued that law and politics are linked, and that insisting otherwise ignores “the causal significance of the litigation campaigns.”⁸ Stephen Engel found⁹ an empirical basis for the link between public opinion and gay rights litigation. Engels discovered that, no matter what the outcome of a case, public opposition to gay rights increased after court rulings.¹⁰ Scott Cummings and Douglass NeJaimie argued¹¹ that politics and public opinion could not be separated in a study of the marriage equality litigation in California. Thus, they included not only litigation but also the political maneuvering and public advocacy that accompanied it in their sweeping account of the Californian marriage equality litigation campaign.¹² Dale Carpenter has also argued that the lawyers involved in the landmark decision of *Lawrence v. Texas* had to carefully control access to the plaintiffs, and continue to do so today.¹³ Carpenter argued that the lawyers did this to control the political messages surrounding the case, as the plaintiffs themselves were not the most exemplary individuals.¹⁴

Daniel Pinello has also demonstrated¹⁵ the intense political activity that accompanied the

⁸ Thomas Keck, “Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights,” *Law & Society Review* 43, no. 1 (2009): 151-186.

⁹ In “Frame Spillover: Media Framing and Public Opinion of a Multifaceted LGBT Rights Agenda,” *Law & Social Inquiry* 38, no. 2 (Spring 2013): 403-441.

¹⁰ *Ibid.*, 405.

¹¹ In “Lawyering for Marriage Equality,” *UCLA Law Review* 57 (2010): 1235-1331.

¹² *Ibid.*

¹³ Dale Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas: How a Bedroom Arrest Decriminalized Gay Americans*, (New York: W.W. Norton & Co., 2012), 70-74.

¹⁴ *Ibid.*, 91.

¹⁵ In *America’s Struggle for Same-Sex Marriage*, (New York: Cambridge University Press, 2006).

marriage equality litigation in Massachusetts in 2004. Beth Robinson, one of the lead attorneys in *Baker v. State of Vermont*, has also shown¹⁶ the intense lobbying and political maneuvering that accompanied the litigation in *Baker* after the Vermont Supreme Court ordered the legislature to find a solution to the problem of the denial of marriage to same-sex couples. Mary Bonauto, a lead attorney in Gay and Lesbian Advocates and Defenders (GLAD), has also argued¹⁷ that the political progress the LGB rights movement had made in Massachusetts, such as with employment non-discrimination law, made the victory in *Goodridge v. Department of Public Health* possible.

Despite the consensus that law and politics are connected in the marriage equality litigation campaign, there is little research on whether key actors, such as directors of organizations and the lawyers at such organizations, agree that there is a connection between the two. Since there has been no research done on what attorneys involved in this litigation think on this subject, there has been no research on how such thinking affects strategies in the organizations litigating for marriage equality. There is also no research on how those organizations handle activity that blurs the already oft-elusive line between law and politics, such as *amicus* briefs. Finally, there is no research on what the state of the interaction between law and politics is in the campaign for marriage equality now. There is no research on the effect recent swings in public opinion and victories for the cause of marriage equality have had on the strategies of the organizations that have worked toward that goal. This thesis will address and seek to fill each of those gaps in the literature.

B. Backlash

Backlash, one of the visible manifestations of the interaction of law and politics, is more

¹⁶ In “The Road to Inclusion for Same-Sex Couples: Lessons from Vermont,” *Seton Hall Constitutional Journal* 11 (Spring, 2001): 237-257.

¹⁷ In “*Goodridge* in Context,” *Harvard Civil Rights-Civil Liberties Law Review* 40 (2005): 10-21.

often discussed because of its practical implications. Anyone approaching the subjects of issue litigation, reform movements, and the marriage equality litigation campaign specifically must confront the issue of the backlash hypothesis, which features prominently in the literature on such subjects. Vesla M. Weaver, in an article about elite whites' reactions to civil rights advances by black Americans in the 1960s, defines the term in the following manner: "Backlash is the politically and electorally expressed public resentment that arises from perceived racial advance, intervention, or excess."¹⁸ Backlash in the context of the LGB rights movement and the marriage equality litigation may be defined in the exact same manner, substituting the LGB population into the definition instead of racial groups.

Perhaps the two most vocal proponents of the backlash hypothesis are Gerald N. Rosenberg and Michael J. Klarman. Rosenberg's famous book *The Hollow Hope*, when originally published in 1991, focused on the backlash from various types of issue litigation, especially that surrounding the Civil Rights Movement of the 1950s and 1960s. According to Rosenberg, the litigation that led to *Brown v. Board of Education* was practically meaningless. In Rosenberg's analysis, only after the U.S. Congress and executive agencies in the federal government set about enforcing *Brown* in the mid 1960s did the Supreme Court's decision carry any meaning. The second edition of *The Hollow Hope* extended that hypothesis to marriage equality litigation in Hawaii, Vermont, and Massachusetts from 1993 to 2004.¹⁹ According to Rosenberg, the victories for marriage equality in Hawaii (*Baehr v. Lewin*), Vermont (*Baker v. State of Vermont*), and Massachusetts (*Goodridge v. Department of Public Health*) all came at a terrible cost. The victory in Hawaii was immediately erased by popular referendum and

¹⁸ Vesla M. Weaver, "Frontlash: Race and the Development of Punitive Crime Policy," *Studies in American Political Development* 21 (Fall 2007): 237.

¹⁹ *The Hollow Hope: Can Court Bring About Social Change?* 2nd edition, (Chicago: The University of Chicago Press, 2008).

subsequent legislative action. The partial victory in Vermont was achieved only to have the Democrats (most of whom had supported the civil union bill of 2000) lose control of the Vermont House of Representatives in the 2000 elections. Furthermore, by 2006, forty-five states and the federal government had adopted measures to define marriage as the union of one man and one woman.²⁰ This trend only got worse after *Goodridge*, for in 2004, eleven states ratified amendments to their constitutions defining marriage as the union of one man and one woman.²¹ Rosenberg even goes so far as to say that the placement of marriage amendments on the ballot in 2004 may have cost Democrats key elections that year, including the presidential election.²²

Similarly, Klarman has argued²³ that the litigation surrounding *Brown v. Board of Education* did more harm than good. The Supreme Court's ruling against school segregation based on race sparked massive southern resistance and undermined the efforts of white moderates by polarizing the politics of race. Perhaps the most ostentatious example of the resistance *Brown* sparked was the "Southern Manifesto" in which southern Senators and Representatives pledged to overturn the *Brown* decision "by any lawful means."²⁴ In a more recent article,²⁵ Klarman extended his backlash hypothesis to the marriage equality litigation in Massachusetts in 2003. According to Klarman, the "most significant short-term consequences of *Goodridge*, as with *Brown*, may have been the political backlash that it inspired."²⁶

The backlash hypothesis has a neat logic. According to the backlash hypothesizers, advances on marriage equality that came before public support was present for such a move met

²⁰ *Ibid.*, 363-364.

²¹ *Ibid.*, 364.

²² *Ibid.*, 375.

²³ In "Brown, Racial Change and the Civil Rights Movement," *Virginia Law Review* 80 (1994): 7-150.

²⁴ This may be found at *Congressional Record*, 84th Congress, 2nd Session, Vol. 102, part 4 (March 12, 1956): 4459-4460.

²⁵ "Brown and Lawrence (and Goodridge)," *Michigan Law Review* 104 (2005): 431-489.

²⁶ *Ibid.*, 482. However, as will be discussed below, Klarman has recently changed his thinking on the backlash hypothesis as applied to the marriage equality movement.

with electorally expressed resentment and possible reversal. Other scholars who support the backlash hypothesis include political scientist Mark Carl Rom,²⁷ historian John D’Emilio²⁸ and political scientists Karen O’Connor and Alixandra B. Yanus.²⁹ Each bases their analysis of the campaign for marriage equality on the backlash hypothesis and offer techniques to avoid backlash. The four scholars recommend a much more political strategy for the organizations campaigning for marriage equality, instead of a litigation-heavy strategy.

On the other hand, there are many scholars who do not accept the backlash hypothesis’s narrative of litigation inevitably meeting with either immediate meaninglessness or electoral reversal. Ellen Ann Andersen has argued that “there are at least some circumstances in which reformers can be served by turning to courts,” and uses the very cases that Rosenberg cites as evidence that courts can bring about “favorable shifts in the legal and cultural frames surrounding gay rights.”³⁰ Carlos A. Ball, who also examines *Brown* and other cases the backlash hypothesizers focus on, agrees with Andersen, and argues³¹ that backlash is a natural part of controversial litigation, but that the campaign for marriage equality has made real gains despite resistance. Patricia A. Cain agrees, arguing³² that backlash happens in all civil rights movements, but that the real measure of a movement’s strength is the steps forward it takes against the headwind of backlash. Similarly, William N. Eskridge, Jr. argues³³ that, while *Baehr* produced debilitating reversals for LGB people, it did prepare the ground for *Baker* in Vermont.

²⁷ In “Introduction: The Politics of Same-Sex Marriage,” in *The Politics of Same-Sex Marriage*, edited by Craig A. Rimmerman & Clyde Wilcox, (Chicago: The University of Chicago Press, 2007), 1-38.

²⁸ In “Will the Courts Set Us Free? Reflections on the Campaign for Same-Sex Marriage,” in *The Politics of Same-Sex Marriage*, 39-64.

²⁹ In “‘Til Death—or the Supreme Court—Do Us Part: Litigating Gay Marriage,” in *The Politics of Same-Sex Marriage*, 291-312.

³⁰ Ellen Ann Andersen, *Out of the Closets & into the Courts: Legal Opportunity Structures and Gay Rights Litigation*, (Ann Arbor, MI: The University of Michigan Press, 2006), 216.

³¹ In “The Backlash Thesis and Same-Sex Marriage: Learning from *Brown v. Board of Education* and its Aftermath,” *William & Mary Bill of Rights Journal* 14 (2006): 1493-1538.

³² In “Contextualizing *Varnum v. Brien*: A ‘Moment’ in History,” *Journal of Gender, Race & Justice* 13 (2009): 27-58.

³³ In *Equality Practice: Civil Unions and the Future of Gay Rights*, (New York: Routledge, 2002).

More recently, Eskridge has argued³⁴ that most backlash hypothesis scholarship confuses backlash with normal politics, and argues that litigation has significantly advanced the cause of marriage equality. In the same vein, Daniel Pinello has argued,³⁵ based on numerous interviews with main actors in the marriage equality movement, that the *Goodridge* decision accomplished real good for LGB people, and that it inspired elites and grass roots to mobilize across the nation.

Taking an international perspective, Miriam Smith has argued³⁶ that the more successful Canadian marriage equality movement has relied on litigation just as much as the American movement, leading her to suggest that litigation does not always lead to backlash in marriage equality cases. Keck has also argued³⁷ that, empirically, backlash has not been nearly as serious or prevalent as Rosenberg and Klarman make it out to be, especially in the cases of Massachusetts and Vermont. In their sweeping survey of California marriage equality litigation,³⁸ Scott L. Cummings and Douglas NeJaime conclude that the backlash hypothesis overstates its claim. Specifically, evidence from California's extensive marriage equality litigation, which eventually led to *In Re Marriage Cases* and Proposition 8, does not support the claim "that the court decision *caused* the bad outcome."³⁹ Furthermore, Cummings and NeJaime point to evidence from California and Maine's efforts to legislate marriage equality as proof that the backlash hypothesizers forget that legislative action can lead to the same negative political ramifications as litigation.⁴⁰ Perhaps the most impressive argument against a rigid and robust backlash hypothesis is Michael Klarman's more recent work. Since the publication of the

³⁴ In "Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States," *Boston University Law Review* 93 (2013): 275-323.

³⁵ In *America's Struggle for Same-Sex Marriage*.

³⁶ In *Political Institutions and Lesbian and Gay Rights in the United States and Canada*, (New York: Routledge, 2008).

³⁷ In "Beyond Backlash: Assessing the Impact of Judicial Decision on LGBT Rights."

³⁸ "Lawyering for Marriage Equality."

³⁹ *Ibid.*, 1323.

⁴⁰ *Ibid.*, 1324 & 1325.

articles mentioned previously, Klarman has argued⁴¹ that backlash only comes when losers in court cases are committed, organized and geographically concentrated. Klarman even concludes that, although the road to success has been fraught with peril for LGB people and their allies, marriage equality litigation has been successful and beneficial.

Part of Klarman's about-face perhaps came from the rapid progress the marriage equality movement made in 2013, which cast serious doubt on the applicability of the backlash hypothesis to the marriage equality litigation campaign. The backlash hypothesis emerged in the 2000s. Klarman's article supporting the backlash hypothesis with an analysis of *Goodridge's* aftermath was published in 2005. *The Politics of Same-Sex Marriage*, to which Rom, D'Emilio, O'Connor and Yanus all contributed pieces of scholarship, is a veritable jeremiad lamenting the reality of the backlash hypothesis. That collection of pro-backlash hypothesis scholarship was published in 2007. The next year, in 2008, Rosenberg published the second edition of *The Hollow Hope*, arguing strongly in favor of the backlash hypothesis in relation to the marriage equality litigation campaign. In that year, the backlash hypothesis, at least superficially, appeared quite valid. By 2008, the movement had only managed to achieve real marriage equality in Massachusetts and had never won a political battle over marriage, such as a referendum. However, in 2009, Vermont, New Hampshire, and the District of Columbia all brought about marriage equality through political channels.⁴² Since then, the marriage equality movement has won many political and legal victories and has seen the percentage of Americans in support of marriage equality rise to over fifty. Given the current climate surrounding marriage equality, the arguments in favor of backlash are less empirically intuitive.

⁴¹ In *From the Closet to the Altar: Courts, Backlash and the Struggle for Same-Sex Marriage*, (New York: Oxford University Press, 2013).

⁴² 15 V.S.A. § 8 (amended 2009); 43 R.S.A. § 457 (amended 2009); and The Associated Press "Washington, D.C., Recognizes Same-Sex Marriages," *The New York Times*, July 7, 2009.

Bonauto has briefly addressed the backlash hypothesis directly,⁴³ arguing that there is no real backlash to marriage equality litigation. Instead, Bonauto argues that the negative political agitation around marriage litigation is more “‘lash’ than ‘backlash’” since many right-wing organizations have mobilized against marriage equality before litigation ran its course, as if the mere suggestion of equality is enough to provoke further lashing by those opposed to marriage equality.⁴⁴ Bonauto’s comments on the backlash hypothesis are the only such comments from an attorney involved in marriage equality litigation in the literature. There has been little to no research on what activists think of the hypothesis. There is no research specifically on whether or not the backlash hypothesis features in organizations’ strategic calculus, and, if so, how. This thesis will seek to begin to fill this gap in the literature.

While there has been no research on the backlash hypothesis’s place in the strategizing of the organizations working toward marriage equality, there has been debate over the role of civil unions. Civil unions may be seen as a strategy by which to mitigate the backlash from marriage litigation, since civil unions avoid using the term “marriage” in reference to same-sex couples. Eskridge has argued⁴⁵ that civil unions are necessary to build the requisite political support for marriage equality. Ronald Shaiko, writing years after Eskridge, agrees with this conclusion.⁴⁶ Other scholars have argued against this “incrementalist” approach. One such scholar is Erez Aloni, who, in a cross-national study of marriage equality movements,⁴⁷ concludes that civil unions are actually a stumbling block on the road to full marriage equality. Marriage equality activists have also been vocally opposed to civil unions. As early as 2001, Beth Robinson

⁴³ In “*Goodridge* in Context.”

⁴⁴ *Ibid.*, 65-66.

⁴⁵ In *Equality Practice*.

⁴⁶ In “Same-Sex Marriage, GLBT Organizations, and the Lack of Spirited Political Engagement,” in *The Politics of Same-Sex Marriage*.

⁴⁷ “Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage.”

argued that “civil unions would not be the end of the line” after the Vermont state legislature enacted the first-in-the-nation civil unions law in 2000.⁴⁸ Bonauto has also made her opposition to civil unions well known in her writings.⁴⁹ However, given the recent massive shifts in public opinion, there has been no work done on the place of civil unions in the current strategy of the organizations working toward marriage equality. This thesis seeks to rectify that.

There is also little research on the role of courtroom defeats in the strategy of organizations advocating marriage equality. This deals with a different type of outcome than the backlash scholarship, since litigation defeats must be dealt with completely differently than political ramifications of judicial decisions. Steven A. Boutcher argued that⁵⁰ losses in court give substantial mobilizing power to social movements. NeJaime also studied⁵¹ the effect of losses in litigation on the LGB rights movement and concluded that such losses actually provide effective talking points and rallying cries for movement organizations. This thesis will fill the gap on what the organizations working toward marriage equality do when defeat comes in the form of an adverse judicial decision, and not just as political fallout from a positive judicial decision.

C. Legal Strategy

There is extensive literature on what the legal advocates for marriage equality should do and what they have done in terms of legal strategy. However, there is no research on the effect political strategies had on legal strategies or vice versa. The *Harvard Law Review* published an entire note in its June 2004 edition on how litigators could attack the federal Defense of Marriage

⁴⁸ Robinson, “The Road to Inclusion for Same-Sex Couples: Lessons from Vermont,” 253.

⁴⁹ Specifically, “*Goodridge* in Context,” 24, and “Ending Marriage Discrimination,” *Suffolk University Law Review* 40, no. 4 (2007): 837.

⁵⁰ In “Making Lemonade: Turning Adverse Decisions into Opportunities for Mobilization,” *AMICI* (American Sociological Association), (Fall 2005).

⁵¹ In “Winning Through Losing,” *Iowa Law Review* 96 (2011): 941-1012.

Act.⁵² The Harvard note advanced both Due Process and Equal Protection – on rational basis grounds no less – challenges to DOMA. Other scholars, such as Courtney A. Powers, have argued⁵³ that the LGB community must be found a suspect class by courts in their equal protection analysis, thus triggering heightened or strict judicial scrutiny of laws affecting LGB people. Kenji Yoshino also argued⁵⁴ during the 1990s in favor of finding the LGB community a suspect class. However, Yoshino has more recently switched to arguing⁵⁵ that Due Process, or at least “liberty-based” arguments, may fare better in the current federal court system, especially in the Supreme Court. Yoshino points out that the Court has shown a recent tendency to reject Equal Protection civil rights arguments, but has accepted Due Process or liberty-based civil rights claims. Evan Wolfson, founder of Freedom to Marry, has argued⁵⁶ that marriage is a right and should be won with arguments about its inherent importance to liberty and freedom. These can be either Due Process arguments or fundamental rights arguments in Equal Protection jurisprudence. Bonauto has also supported fundamental rights arguments based on Due Process in support of marriage equality.⁵⁷ She has also explained why she believes sex discrimination arguments are weak. In her analysis, both men and women are disadvantaged, so no sex-based argument may be made.⁵⁸ Bonauto has also supported Equal Protection arguments, emphasizing that all courts should follow the example set in *Romer*, in which the Supreme Court used rational

⁵² “Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage,” *Harvard Law Review* 117 (June 2004): 2684-2707.

⁵³ In “Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court’s Application of Heightened Scrutiny,” *Duke Journal of Gender Law & Policy* 17 (2010): 385-398.

⁵⁴ In “Suspect Symbols: the Literary Argument for Heightened Scrutiny for Gays,” *Columbia Law Review* 96 (1996): 1753-1843.

⁵⁵ In *Covering: the Hidden Assault on Our Civil Rights* (New York: Random House, 2006).

⁵⁶ In *Why Marriage Matters: America, Equality, and Gay People’s Right to Marry* (New York: Simon & Schuster, 2004).

⁵⁷ *Ibid.*, 844-845.

⁵⁸ *Ibid.*, 833. This is in direct rebuttal to the reasoning of the respective courts in *Baehr v. Lewin* and *Brause v. Bureau of Vital Statistics*.

basis scrutiny, but still struck down an anti-gay referendum in Colorado.⁵⁹

Despite this and other debate over both the proper arguments to use and the reasoning courts and attorneys have used, there is little research on how, if at all, the political and the legal strategies of the organizations litigating marriage equality interact. This thesis will fill that gap by examining how, if at all, the political and legal strategies of such organizations influenced each other.

D. Political Strategy

As mentioned earlier, most scholars have argued that the political and legal sides of the campaign for marriage equality are inextricably linked. They have both explicitly and implicitly argued in that vein by discussing the political maneuvers of the organizations that advocate for marriage equality along with their legal maneuvers. Beth Robinson explained,⁶⁰ just after the enactment of civil unions in Vermont, some of the grass roots organizing, political mobilization and lobbying that accompanied the litigation in *Baker v. State of Vermont*. Bonauto has also explained⁶¹ some of what GLAD did to prepare for *Goodridge* in Massachusetts, as well as what GLAD did afterwards to ensure there was no political derailment of the progress to marriage equality. Among scholars, Pinello has done the most to demonstrate the political strategies and actions of the organizations and individuals working toward marriage equality.⁶² However, his study on the matter, which, like this paper, uses interviews intensively, is now many years out of date. The rapid changes in public opinion over the last decade and changes in the methods of litigation require a revisiting of the material Pinello covered years ago. This thesis will also fill the gap left by the silence of many activists on what exactly they do to politically mobilize the

⁵⁹ Bonauto, "Ending Marriage Discrimination," 849.

⁶⁰ In "The Road to Inclusion for Same-Sex Couples: Lessons from Vermont."

⁶¹ In "*Goodridge* in Context."

⁶² In *America's Struggle for Same-Sex Marriage*.

LGB community and its allies. This thesis will also fill the gap in the literature on how organizations that advocate for marriage equality attempt to reach out to other, non-LGB groups in society so as to win them over.

V. A Short History of Marriage Equality Litigation

A. Overview

Kevin Cathcart, the Executive Director of Lambda Legal, explained in an interview with the author that “every victory stands on the shoulders of a bunch that came before.”⁶³ According to Cathcart, the burst of litigation in 2013 after *U.S. v. Windsor* was in part due to the favorable decision in *Windsor*, but also due to favorable decisions from years before. Looking ahead, Cathcart predicted that every case filed until the Supreme Court rules affirmatively on marriage equality will also talk about *Lawrence v. Texas*, *Romer v. Evans*, and others. Furthermore, the members of the organizations that advocate for marriage equality have learned just as much, if not more, from their defeats than from their victories. Those members of such organizations look back across decades of litigation to craft current and future strategy. As such, past cases feature prominently in attorneys’ thinking. To properly understand the current and even future strategies of organizations advocating for marriage equality, one must first understand the major marriage equality cases of the past. These cases are highly complex, but a short description of each will suffice for current purposes. This list of cases should not be seen as an exhaustive archive of all marriage equality litigation. Such an exhaustive study is beyond the scope of this paper. Only cases that are indicative of broader, important trends, or cases that feature prominently in present-day strategizing will be analyzed. Each of these cases, as will become clear in the comments of the current leaders of the organizations involving in marriage equality litigation, continues to impact the strategies of those organizations.

B. The First Cases (1970-1985)

Individuals and organizations have utilized litigation in their attempt to achieve marriage equality since the 1970s. Some of the first gay rights cases were marriage cases filed in that

⁶³ Kevin Cathcart, Esq., phone interview with author, February 11, 2014

decade. The first marriage cases came soon after the Stonewall Riots in New York City during June 1969, which scholars cite as the start of the modern LGB rights movement.⁶⁴ The new LGB rights movement hoped to model itself after the Civil Rights Movement, and thus also turned to litigation as well as direct action.⁶⁵ However, the first cases brought to court met with almost derisive rejection from the various courts that dealt with them. The first two decades of marriage equality litigation thus ended with no legal progress for the same-sex couples in court and little success in state legislatures. However, the filing of marriage cases did move marriage equality into public debate. Although success was not forthcoming, visibility was.

The first marriage equality case was *Baker v. Nelson*,⁶⁶ which was filed in Minnesota, reaching in the state's supreme court by 1971. The two plaintiffs in the case, "Richard John Baker and James Michael McConnell, both adult male persons, made application to [the] respondent, Gerald R. Nelson, clerk of Hennepin County District Court, for a marriage license" but Nelson declined to issue one on the grounds that the laws of Minnesota did not allow for same-sex marriages.⁶⁷ The Minnesota Supreme Court ruled that, although the laws of Minnesota did not explicitly prohibit same-sex marriages, "a sensible reading" of the applicable statute – i.e. one relying on a 1966 dictionary definition of the word marriage as the union of a man and a woman – disclosed a legislative intent to limit marriages to heterosexual couples.⁶⁸ Furthermore, the unanimous opinion held that the marriage statutes, as they stood and as they were interpreted, did not violate any provision of the United States constitution.⁶⁹ Appealed to the United States Supreme Court due to rules that mandated appeal of all state supreme court decisions that dealt

⁶⁴ Eskridge, *Equality Practice*, 2.

⁶⁵ *Ibid.*, 140.

⁶⁶ 191 N.W.2d 185 (Minn. 1971).

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, 187.

with constitutional objections to laws, *Baker* was dismissed for want of a substantial federal question.⁷⁰ This dismissal was essentially a ruling upon the merits of the case, and it made the decision of the Minnesota court binding precedent.⁷¹

The next major marriage equality case was *Jones v. Hallahan*,⁷² which reached the Kentucky Court of Appeals in 1973. In *Jones v. Hallahan*, two women sued the clerk of the Jefferson County Court after he refused to issue a marriage license to them.⁷³ The Court of Appeals relied on definitions of marriage found in common dictionaries, legal dictionaries, and encyclopedias. Based on these authorities, the court held that the women had no constitutional claim since marriage had always been understood as the union of one man and one woman.⁷⁴ The court also relied on *Baker v. Nelson*, which it treated as binding precedent on the constitutional issues (i.e. violation of the freedom of religion, freedom of association, the right to marry and the Eighth Amendment) raised by the two women.⁷⁵ In this way, the first marriage equality case decided the outcome of the second marriage equality case.

The third marriage equality case in the 1970s was also decided along the same lines as *Baker v. Nelson* and *Jones*. That third case, *Singer v. Hara*,⁷⁶ reached the Washington Court of Appeals for the First District in 1974. Messrs Singer and Bartwick applied for a marriage license from Lloyd Hara, the auditor of Kings County in Washington. When Hara refused to grant one,

⁷⁰ *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027)

⁷¹ See *Hicks v. Miranda*, 422 U.S. 332, 344-345 (“the lower courts are bound by summary decisions by this Court until such time as the Court informs (them) that (they) are not” [internal quotations omitted]). Because of this, several courts have accepted *Baker* as precedent in more recent cases. Such cases include *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir.2006); *Wilson v. Ake*, 354 F.Supp.2d 1298 (M.D.Fla.,2005); and *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006). In other cases, such as *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012), courts did not accept *Baker* as binding precedent.

⁷² 501 S.W. 588 (Ky. 1973).

⁷³ *Ibid.*

⁷⁴ *Ibid.*, 589.

⁷⁵ *Ibid.*, 589 & 590.

⁷⁶ 522 P.2d 1187 (Wash. Ct. App. 1974).

Singer and Bartwick sued.⁷⁷ The Court of Appeals held that the laws of Washington did not allow same-sex marriages and that such a prohibition did not violate the Equal Rights Amendment of the Washington constitution or the federal constitution: “The ERA [Equal Rights Amendment of Washington] provides, in relevant part: Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.”⁷⁸ Like *Jones*, *Singer* relied on the previous marriage cases of the 1970s – *Jones* and *Baker* were cited thrice by the Court of Appeals.⁷⁹ *Singer* was appealed to the Washington Supreme Court, but the appeal was summarily rejected in 1974.⁸⁰

C. Victory and Defeat in the Shadow of *Bowers* (1986-2002)

Due to the failure of the first three marriage equality cases, there was no major litigation for marriage equality until the early 1990s. However, in the late 1980s, the United States Supreme Court handed down a decision in *Bowers v. Hardwick*⁸¹ that dramatically changed LGB rights activists’ strategic outlook and the environment around LGB rights in general. *Bowers* was not a marriage equality case, but it was litigated by some of the biggest players in the LGB rights movement, and it dealt with the issue of sexual intimacy among same-sex couples.⁸² At the heart of *Bowers* was whether a state could criminalize consensual homosexual sex.⁸³ Mr. Hardwick had been charged under a Georgia statute passed in 1819 that criminalized sodomy, with the possible maximum sentence of twenty years in prison.⁸⁴ The Supreme Court rebuffed the arguments of Mr. Hardwick and his counsel that such a law violated the Fourteenth

⁷⁷ Ibid.

⁷⁸ Ibid., 258, 264 & 250.

⁷⁹ Ibid., *Jones*: 254, 255, 262. *Baker v. Nelson*: 254, 262, 264.

⁸⁰ 84 Wash. 2d 1008 (1974).

⁸¹ 478 U.S. 186 (1986).

⁸² Ibid., 187. The forerunner of the NCLR, the Lesbian Rights Project, and the National Gay Rights Advocates were involved in the *Bowers* litigation.

⁸³ Ibid., 188.

⁸⁴ Ibid., 188 & 196.

Amendment of the federal constitution. According to the majority opinion, authored by Justice Byron R. White, “To claim that a right to engage in such conduct [consensual homosexual sodomy] is ‘deeply rooted in this Nation's history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”⁸⁵ Perhaps even more damaging was the concurrence of Chief Justice Warren Burger, who wrote that prohibitions of sodomy have “ancient roots,” doing little to disguise his disdain for homosexuals.⁸⁶ Such pronouncements from the highest court of the land, to say nothing of the actual upholding of Georgia’s statute, did terrible damage to efforts to advance LGB rights. For years, *Bowers* hung like a pall over the entire gay rights movement and influenced all of the strategies employed by its leaders.⁸⁷

Despite the severe defeat the LGB rights movement had suffered in *Bowers*, just a few years after *Bowers* was handed down, another wave of marriage equality litigation began. On December 17, 1990, three same-sex couples in Hawaii filed for marriage licenses, only to be rejected by the state Department of Health.⁸⁸ Those same couples sued in state court to obtain those licenses, and in 1993 the Hawaii Supreme Court rendered a decision on the issue in *Baehr v. Lewin*.⁸⁹ The court held that there was no fundamental right to same-sex marriage, but that the sex-based discrimination found in the Hawaii marriage statutes was subject to strict scrutiny in Equal Protection jurisprudence.⁹⁰ As such, the suit was remanded to the trial level, where the state would have “to overcome the presumption that HRS § 572–1 [Hawaii’s marriage statute wa]s unconstitutional by demonstrating that it further[ed] compelling state interests and [wa]s

⁸⁵ *Ibid.*, 194. Justice White quotes from classic the Due Process cases like *Palko v. Connecticut*, 302 U.S. 319, 325.

⁸⁶ *Ibid.*, 196.

⁸⁷ Mary Bonauto used to always ask, “pre-*Lawrence*, when you’re bringing a federal constitutional claim, how do you deal with *Bowers v. Hardwick*?” That one case stood as an impediment to all LGB rights litigation (Bonauto interview).

⁸⁸ *Baehr v. Lewin*, 852 P.2d 44, 49 (Haw. 1993).

⁸⁹ *Ibid.*, 44.

⁹⁰ *Ibid.*, 57 & 67.

narrowly drawn to avoid unnecessary abridgements of constitutional rights.”⁹¹ This was a stunning victory for advocates of marriage equality, because it was the first time a court at any level had agreed with at least one of their arguments.

While *Baehr* was a victory in the Hawaii Supreme Court, after the ensuing trial an even more favorable ruling augmented that triumph. Judge Gary Chang held that, in light of the higher court’s ruling on the same suit, the marriage statutes of the state of Hawaii violated the state constitution’s Equal Protection Clause.⁹² Judge Chang further ordered that the Department of Health cease withholding marriage licenses from same-sex couples.⁹³ This meant that the three couples that had applied for marriage licenses six years previously could finally get their licenses. However, that was not to be, for the Hawaii Supreme Court’s decision in *Baehr* had touched off a firestorm of anti-LGB sentiment across the nation. By the time of Judge Chang’s order, the political branches of the state and the nation were arrayed against the *Baehr* plaintiffs. In September 1996 the United States Congress passed and President Clinton signed the Defense of Marriage Act (DOMA), which defined marriage as the union of one man and one woman for the purposes of the federal government (i.e. spouses on tax returns and spousal benefits from welfare programs), and also allowed states to disregard same-sex marriages formalized in other jurisdictions.⁹⁴ The debates over the Defense of Marriage Act featured unvarnished homophobia and bigotry in the chambers of Congress and led to a law that imposed a serious impediment on the work of individuals and organizations litigating and agitating for marriage equality.⁹⁵

⁹¹ *Ibid.*, 68.

⁹² *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Cir. Ct. of Haw. Dec. 3, 1996) *22. The case changed names when Miike replaced Lewin as the Director of the Department of Health.

⁹³ *Ibid.*

⁹⁴ 110 Stat. 2419.

⁹⁵ Cf. U.S. Congress, House, *Defense of Marriage Act*, 104th Congress, 2nd session, 1996, Report 104-664.

States throughout the union also adopted “mini-DOMAs,” state-level laws that restricted the definition of marriage to the union of one man and one woman.⁹⁶ This was the start of the first wave of anti-marriage equality state legislation during the 1990s and early 2000s. As the table below illustrates, numerous states adopted mini-DOMAs in the 1990s due to the fervor over *Baehr*. After *Brause*, and especially after *Goodridge*, which will be discussed later, states began ratifying constitutional amendments to prohibit recognition of same-sex unions.

Table 1: Statutory and Constitutional State Responses to Marriage Equality Cases⁹⁷

Year	States’ Prohibitions of Marriage Equality
1995	Statute: Utah
1996	Statute: Alaska, Arizona, Delaware, Georgia, Illinois, Kansas, Michigan, Oklahoma, North Carolina, Pennsylvania, South Carolina, South Dakota and Tennessee
1997	Statute: Arkansas, Florida, Indiana, Maine, Minnesota, Mississippi, Montana, North Dakota and Virginia
1998	Statute: Alabama, Hawaii, Iowa, Kentucky and Washington Amendment: Alaska
1999	Statute: Louisiana and Vermont
2000	Statute: California, Colorado, Idaho and West

⁹⁶ *Morrison v. Sadler*, 821 N.E.2d 15, 19 (Ind. Ct. App., 2005). This decision discusses the Indiana mini-DOMA and those of Indiana’s sister states.

⁹⁷ Rosenberg, *Hollow Hope*, 363; The Human Rights Campaign, “Statewide Marriage Prohibitions,” http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage_prohibitions_3-2014.pdf (accessed April 28, 2014).

	Virginia Amendment: Nebraska
2002	Amendment: Nevada
2004	Amendment: Arkansas, Georgia, Kentucky, Louisiana, Michigan, Missouri, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon and Utah
2005	Amendment: Kansas and Texas
2006	Amendment: Alabama, Idaho, Colorado, South Dakota, South Carolina, Tennessee, Virginia and Wisconsin
2008	Amendment: Arizona, California and Florida
2012	Amendment: North Carolina

As shown in the table above, closer to home for the plaintiffs in *Baehr*, a state constitutional amendment in 1998 authorized the legislature to define marriage as between a man and a woman, which the legislature had already done.⁹⁸ Thus, when the Hawaii Supreme Court once again reviewed the case in 1999, it reversed the decision of Judge Chang.⁹⁹ After nearly a decade of litigation, those Hawaiian couples did not receive the licenses they so desperately wanted. To this day, attorneys in organizations litigating for marriage equality cite *Baehr* as the reason those organizations adopt strategies that are not merely legal in content. As will be discussed below, lawyers associated with such organizations almost uniformly argue in favor of

⁹⁸ Hawaii Constitution, Article I, section 23 (amended 1998).

⁹⁹ *Baehr v. Miike*, 994 P.2d 566 (1999).

public education and public advocacy campaigns based on the unfavorable political fallout from *Baehr*.

While *Baehr* worked its way through the state court system of Hawaii, other marriage equality cases were litigated across the country, with varying degrees of success for the advocates of marriage equality. In 1995, the District of Columbia Court of Appeals held in *Dean v. District of Columbia* that there was no “no statutory violation or denial of due process” in the District’s denial of marriage licenses to same-sex couples.¹⁰⁰ In 1998, Judge Peter A. Michalski of the Alaska Superior Court held in *Brause v. Bureau of Vital Statistics* that marriage was a fundamental right, which meant “the state must therefore have a compelling interest that supports its decision to refuse to recognize the exercise of this fundamental right by those who choose same-sex partners rather than opposite-sex partners.”¹⁰¹ Judge Michalski then arranged for hearings on whether the state could meet such a high burden as providing a compelling interest for such a policy.¹⁰² Before anything more could occur, the people of the state of Alaska ratified a constitutional amendment that defined marriage as the union of one man and one woman.¹⁰³ Just like *Baehr* in Hawaii, *Brause* in Alaska offered a glimmer of hope for the cause of marriage equality that was short-lived and erased by political action in response to the courtroom victory.

There was one major court case in which the LGB rights movement made considerable progress in the 1990s. As the federal Defense of Marriage Act was debated in Congress, the Supreme Court handed down its decision in *Romer v. Evans*.¹⁰⁴ *Romer* stemmed from a referendum in Colorado, which was passed after several local governments in that state passed anti-discrimination ordinances to protect the LGB population. The referendum ratified an

¹⁰⁰ 653 A.2d 307, 309 (D.C. 1995).

¹⁰¹ 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998), *1.

¹⁰² *Ibid.*, *6.

¹⁰³ Alaska Constitution, Article I, section 25 (amended 1999).

¹⁰⁴ 517 U.S. 620 (1996).

amendment (“Amendment 2”) to the Colorado constitution that prohibited such laws.¹⁰⁵ Several LGB individuals and municipalities then filed suit against the state of Colorado, seeking to enjoin enforcement of the new amendment. The Supreme Court, through Justice Anthony Kennedy, was unequivocal in its rejection of the new amendment. The Court concluded:

That Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause [.]¹⁰⁶

This was a major victory for the LGB rights movement, since the Court applied rational basis scrutiny to the Colorado amendment, the mildest possible constitutional test for legislation, and still found it to be in violation of the Fourteenth Amendment. The Court held that, even under rational basis review, a law based on “animus toward the class it affect,” would not survive judicial scrutiny.¹⁰⁷ The decision was immediately recognized as a threat to anti-gay legislation. The import of *Romer* was so quickly grasped that the House Committee on the Judiciary included it in its report of the Defense of Marriage Act to the full House of Representatives. The committee argued that *Romer* did not disallow DOMA.¹⁰⁸ This assertion was put to the test, as will be discussed later, a little more than a decade later.

Marriage equality advocates had little to show for its efforts in the 1990s, the victory in *Romer* notwithstanding. On the other side of the continent from the defeats in Hawaii and Alaska, though, marriage equality advocates were able to secure a victory at the end of the decade. On December 20, 1999 the Vermont Supreme Court handed down its decision in *State of Vermont v. Baker*.¹⁰⁹ Filed on behalf of three sets of same-sex couples that were denied marriage licenses, the court in *Baker* rejected the plaintiff’s claim that they were entitled to

¹⁰⁵ Ibid.

¹⁰⁶ Ibid., 635.

¹⁰⁷ Ibid., 632.

¹⁰⁸ U.S. Congress, House, *Defense of Marriage Act*, 104th Congress, 2nd session, 1996, Report 104-664, 33.

¹⁰⁹ 744 A.2d 864 (Vermont 1999).

marriage licenses under the then-existing statutory scheme governing marriage.¹¹⁰ However, the court did “Conclude that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law.”¹¹¹

The court ordered the state legislature to implement some sort of scheme to extend to same-sex couples the benefits granted to opposite-sex marriage couples. The court did not endorse marriage, civil unions or reciprocal benefits as the preferred remedy, merely indicating that the legislature had to extend the benefits in one way or another.¹¹² In 2000, the Vermont House Judiciary Committee spent six weeks hearing testimony and crafting a law that created a parallel legal structure to marriage.¹¹³ Eventually, after several tense and close votes, the Vermont legislature enacted, and Governor Howard Dean signed, a civil union law that extended the rights and benefits of marriage to same-sex couples, but did not refer to such unions as marriages.¹¹⁴ Despite the fact that marriage did not come from *Baker* and its ancillary legislation, the civil union bill was nonetheless a tremendous victory for marriage equality advocates.

The marriage equality litigation campaign had two lasting victories in the *Bowers* era – *Romer v. Evans*, which forbade states from explicitly denying a particular population enhanced protection under the law, and *Baker v. State of Vermont*, which paved the way for the Vermont legislature to craft civil unions. As will be discussed below, both scholars and attorneys in marriage equality litigation saw civil unions as a necessary stepping-stone to some on the road to full marriage equality. The marriage equality litigation campaign did suffer many stinging

¹¹⁰ Ibid., 869.

¹¹¹ Ibid., 886.

¹¹² Ibid., 887-888.

¹¹³ Robinson, “The Road to Inclusion for Same-Sex Couples: Lessons from Vermont,” 250.

¹¹⁴ Ibid., 252.

defeats in the *Bowers* era. The short-lived victories in Hawaii and Alaska were swiftly reversed by the state legislatures, and states across the nation moved to preemptively ban same-sex marriage recognition before any such marriages could occur. The federal government was not immune to this reaction. DOMA became a major imposition to marriage equality advocates and same-sex couples across the nation for over a decade. Throughout the decade, *Bowers* hung like a cloud over all marriage litigation attempts. However, the civil unions of Vermont and the continuing marriage litigation and debates in legislatures brought the issue further into public view. Civil unions also proved that the benefits of marriage could withstand application to same-sex couples, even if the name of marriage was not similarly applied.

D. The Advent of Marriage Equality: the *Lawrence* and *Goodridge* Era (2003-2007)

After *Baker* and the subsequent passage of Vermont's civil union legislation, there were no major decisions dealing with marriage equality for a couple of years. Then, in 2003, two decisions of great importance, and one decision of lesser import were handed down. These cases brought about true marriage equality, even though that advent was in turn greeted by a massive surge in statutory and constitutional prohibitions on same-sex marriage in the states. Despite the political losses of the mid-2000s, the advocates for marriage equality did manage to achieve a major goal they had striven for – actual marriage equality at the state level.

The first decision of 2003 was not a marriage case at all, but a case revisiting the sodomy laws upheld in *Bowers v. Hardwick*. During the night of September 17, 1998, police raided the apartment of John G. Lawrence in Houston, Texas to find, according to a report filed shortly thereafter, Lawrence having anal sex with a man named Tyron Garner.¹¹⁵ The two were subsequently charged with violating Texas's homosexual conduct law.¹¹⁶ After various appeals,

¹¹⁵ Carpenter, *Flagrant Conduct*, 61, 84.

¹¹⁶ *Ibid.* 80. The statute still exists, and may be found at Texas Penal Code § 21.06(a).

the case reached the United States Supreme Court, and the decision in *Lawrence v. Texas* was handed down on June 26, 2003.¹¹⁷ The Court's six-justice majority, through Justice Anthony Kennedy, was unequivocal: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."¹¹⁸ The Court then struck down Texas's homosexual conduct law.¹¹⁹ Despite this sweeping language, the Court's majority in *Lawrence* was also quite cautious. Justice Kennedy followed his statement on *Bowers* with the following caveats.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.¹²⁰

Gay rights advocates, who had crowded the Court's gallery in anticipation of this decision, openly sobbed as Justice Kennedy read the highlights of his decision aloud.¹²¹ The destruction of sodomy statutes had been a goal of the LGB rights movement for decades, and at last it had come to pass.¹²²

Justice Antonin Scalia wrote a scathing dissent in *Lawrence*, in which he argued that the decision called into question many state laws that had their basis solely in morality, such as prohibitions of same-sex marriage.¹²³ Although the majority decision claimed that the nullification of Texas's homosexual conduct statute did not validate marriage equality, Justice Scalia told Court observers, "do not believe it."¹²⁴ Even the eminent justice could not have

¹¹⁷ *Ibid.*, 253.

¹¹⁸ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Justice Kennedy had joined in 1988, two years after the Court decided *Bowers*, and thus could use such distant language.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, 578. When Justice Kennedy mentioned "formal recognition to any relationship," he was referring to marriage equality.

¹²¹ Carpenter, 259.

¹²² Cf. Aloni, "Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage," 107 and Mary Bonauto "Ending Marriage Discrimination," 815-817.

¹²³ *Lawrence*, 539 U.S. 558, 590 (Scalia, J. dissenting).

¹²⁴ *Ibid.*, 604.

foreseen how prescient his words were, nor how quickly other courts would have to wrestle with the issue of marriage equality in the light of the decision in *Lawrence*. In October 2003, *Lawrence* was cited in the decision of *Standhardt v. Superior Court ex rel. County of Maricopa*, which dealt with two gay men who applied to get a marriage license in Arizona three days after *Lawrence* was handed down.¹²⁵ The Arizona Court of Appeals held that there was no fundamental right to same-sex marriage and that the prohibition of same-sex marriage rationally furthered the legitimate state interest in encouraging procreation and child-rearing in stable homes.¹²⁶ However, what marriage equality advocates lost in Arizona was more than made up in Massachusetts that same year.

Mere weeks after the Arizona Court of Appeals ruled against two gay men seeking marriage licenses, the Supreme Judicial Court of Massachusetts ruled in favor of seven same-sex couples trying to do the same. Although the organization Gay and Lesbian Advocates and Defenders (GLAD) filed the lawsuit that would become *Goodridge v. Department of Public Health*¹²⁷ two years before *Lawrence* was decided, the opening passages of the *Goodridge* decision borrowed heavily from *Lawrence*.¹²⁸ The Supreme Judicial Court, through Chief Justice Margaret H. Marshall, ruled that the exclusion of same-sex couples from the civil institution of marriage was “incompatible with the constitutional principles of respect for individual autonomy and equality under law.”¹²⁹ After ruling same-sex couples must be admitted to the institution of marriage, the court stayed its decision by 180 days “to permit the Legislature to take such action as it may deem appropriate in light of this opinion.”¹³⁰ As with

¹²⁵ 77 P.3d 451, 453 (Ariz. Ct. App. 2003).

¹²⁶ *Ibid.*, 461 & 465.

¹²⁷ 440 Mass. 309 (2003)

¹²⁸ *Ibid.*, 312-313 and Bonauto “*Goodridge* in Context,” 20.

¹²⁹ 440 Mass. 309, 313.

¹³⁰ *Ibid.*, 344.

Baker in Vermont, *Goodridge* was a victory for marriage equality advocates, but immediately involved the legislature.

At first, the Massachusetts legislature tried to create Vermont-style civil unions. In order to comply with the *Goodridge* decision, the Massachusetts Senate submitted a question to the Supreme Judicial Court on the constitutionality of such a scheme.¹³¹ The justices replied that

Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. The holding in *Goodridge*, by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal.¹³²

Stymied, the Massachusetts legislature tried to begin the process of amending the state constitution to overturn *Goodridge*. This and other attempts to stave off issuance of licenses to same-sex couples came to nothing, and those licenses were issued starting on May 17, 2004.¹³³ At long last, after thirty years of litigation and untold years of suffering, the advocates of marriage equality achieved the victory they so desperately desired. Massachusetts served as a beachhead for marriage equality, but it was a precarious one, and the marriage equality activists would have to wait for years for such a victory to come again.

After Massachusetts allowed marriage equality during 2003-2004, Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Utah, and Oregon all ratified amendments via referendum to their respective constitutions banning same-sex unions.¹³⁴ This marked a dramatic escalation from the merely statutory definitions of marriage as the union of one man and one woman that had followed *Baehr* but preceded *Goodridge*. In the face of these laws and amendments, three same-sex couples in Indiana challenged that state's

¹³¹ *Opinions of the Justices to the Senate*, 440 Mass. 1201 (2004).

¹³² *Ibid.*, 1206.

¹³³ Bonauto, "*Goodridge* in Context," 59.

¹³⁴ Joel Roberts, "11 States Ban Gay Marriage," CBS News, November 2, 2004, <http://www.cbsnews.com/news/11-states-ban-same-sex-marriage/> (accessed January 25, 2014).

statutory mini-DOMA, but were eventually stymied by the Indiana Court of Appeals in *Morrison v. Sadler*.¹³⁵ The court held that the DOMA of Indiana did not violate the Equal Protection or Privileges and Immunities clauses of the Indiana constitution, nor did it violate the Due Process guarantees of that constitution.¹³⁶

That same year, as the same-sex couples lost in Indiana, another group of same-sex couples was challenging the prohibition of same-sex marriage in Oregon. The case arose when county officials in Multnomah County (home of Portland, Oregon) issued marriage licenses to same-sex couples. This was part of the “Winter of Love” in 2004 in which numerous local authorities issued marriage licenses to same-sex couples without explicit permission from the states to do so.¹³⁷ In Oregon, Multnomah County, several couples, and organizations all filed suit against the state of Oregon to uphold the validity of those licenses.¹³⁸ The suit that led to *Li v. State of Oregon*¹³⁹ began before the people of Oregon ratified a constitutional amendment banning same-sex marriage in 2004, but was decided by the state supreme Court in 2005. The Supreme Court of Oregon held that all marriages in Oregon were both statutorily and constitutionally limited to unions of opposite-sex couples and refused to entertain the notion that benefits of marriage could be separated from the legal civil institution.¹⁴⁰

Across the continent, advocates for marriage equality ran into resistance in another generally liberal state, New York. A massive, multi-county litigation campaign, waged by many of the largest organizations involved with marriage equality litigation, reached its apogee in 2006

¹³⁵ 821 N.E.2d 15 (Ind. Ct. App. 2005).

¹³⁶ *Ibid.*, 35.

¹³⁷ Pinello, *America's Struggle for Same-Sex Marriage*, 2, 74 & 80; Rosenberg, *Hollow Hope*, 357.

¹³⁸ 110 P.3d 91, 94 (Or. 2005).

¹³⁹ 110 P.3d 91 (Or. 2005).

¹⁴⁰ *Ibid.*, 102.

when the decision in *Hernandez v. Robles* was handed down by the Court of Appeals of New York State.¹⁴¹ The decision opened with one succinct paragraph:

We hold that the New York Constitution does not compel recognition of marriages between members of the same sex. Whether such marriages should be recognized is a question to be addressed by the Legislature.

This was a stinging defeat for the organizations working toward marriage equality. The *Hernandez* litigation had involved multiple organizations and forty-four couples.¹⁴²

Organizations advocating for marriage equality immediately altered their strategies in New York in reaction to the *Hernandez* decision, focusing on the legislature.¹⁴³

Across the Hudson River in New Jersey, the advocates for marriage equality suffered a similar setback that same year. Years earlier, seven same-sex couples tried to get marriage licenses in New Jersey, but were rejected, and sued in what would become *Lewis v. Harris* when the New Jersey Supreme Court handed down its decision in the matter in 2006.¹⁴⁴ The court held that there was no fundamental right to same-sex marriage, but that the withholding of the benefits of marriage from same-sex couples was unacceptable under the New Jersey constitution's guarantee of equal protection to all.¹⁴⁵ As such, the court ordered the state legislature to either emend the marriage statutes of New Jersey to include same-sex couples, or create "a separate statutory structure, like civil unions," within 180 days of the decision.¹⁴⁶ This led the New Jersey legislature to enact a civil union bill, which became law in 2007.¹⁴⁷

¹⁴¹ 855 N.E.2d 1 (N.Y. 2006), the breadth of the campaign may be grasped by examining the *amici curiae* at 1-4.

¹⁴² *Ibid.*, 5.

¹⁴³ Nicholas Confessore & Michael Barbaro, "New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law," *The New York Times*, June 24, 2011, http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?_r=0 (accessed January 25, 2014).

¹⁴⁴ 908 A.2d 196 (N.J. 2006).

¹⁴⁵ *Ibid.*, 200.

¹⁴⁶ *Ibid.*, 221 & 224.

¹⁴⁷ N.J.S.A. 37:1-28.

The marriage equality litigation did not meet with much success in Washington during 2006. In *Andersen v. Kings County*,¹⁴⁸ the Washington Supreme Court dealt with the state's mini-DOMA. Although the plaintiff couples had won a victory at the trial level, the higher court decided that the exclusion of same-sex couples from marriage did not violate any provisions of the state's constitution.¹⁴⁹ As with *Hernandez* in New York, marriage equality advocates in Washington switched strategic focus after *Andersen*, eventually turning toward the initiative process.

Another litigation defeat in a state that would eventually adopt marriage equality was in Maryland in 2007. In *Conaway v. Deane*, the Court of Appeal of Maryland, the state's highest court, ruled that the marriage statutes of the state, under which same-sex couples could not obtain licenses, were constitutional.¹⁵⁰ The court held that same-sex marriage was not a fundamental right, that homosexuals were not a suspect class or quasi-suspect class, and thus the exclusionary marriage statutes were valid under rational basis constitutional review.¹⁵¹ Specifically, the court found that the state's interest in promoting procreation was a valid reason under rational basis review, allowing the statutes to stand.¹⁵²

As the first decade of the new millennium wound down, marriage equality supporters could claim an important victory in Massachusetts with the actual advent of true marriage equality. The broader LGB rights movement also managed to secure a key victory in *Lawrence* with the abolition of anti-sodomy laws. Other opportunities for success in traditionally liberal states, such as Washington, New York and New Jersey, did not end with marriage equality in those states, but the push for marriage equality was building momentum across the continent.

¹⁴⁸ 138 P.3d 963 (Wash. 2006).

¹⁴⁹ *Ibid.*, 968.

¹⁵⁰ 932 A.2d 571 (Md. 2007).

¹⁵¹ *Ibid.*, 635.

¹⁵² *Ibid.*

E. Victory in Connecticut and Iowa, but Reversal in California (2008-2009)

The year 2008 proved to be an epochal moment for marriage equality, and was a year of immensely important litigation. First, the California Supreme Court handed down its decision in *In re Marriage Cases*,¹⁵³ which dealt with the constitutionality of statutorily excluding same-sex couples from the civil institution of marriage. The court found that the right to marry the spouse of one's choice was a fundamental right, and the sex of one's spouse did nothing to abrogate that right.¹⁵⁴ The court also found that sexual orientation was a suspect classification, which warranted strict scrutiny in California jurisprudence.¹⁵⁵ Based on this, the court struck down the existing statutory scheme and ordered marriage extended to same-sex couples across the state.¹⁵⁶ Suddenly, the most populous state in the union allowed same-sex couples to wed with the protections and benefits previously granted solely to opposite-sex couples. In response to this ruling, a massive political campaign resulted in Proposition 8, a voter-approved constitutional amendment, being ratified later on November 4, 2008.¹⁵⁷ Proposition 8 constitutionally defined "marriage" as the union of one man and one woman in California.¹⁵⁸ Just as sudden as the advent of marriage equality was in California, so too was its departure.

On November 5, 2008, three organizations involved in marriage equality litigation – Lambda Legal, the National Center for Lesbian Rights, and the American Civil Liberties Union – filed suit in state court challenging the validity of Proposition 8.¹⁵⁹ The California Supreme Court eventually decided in favor of Proposition 8's constitutionality in *Strauss v. Horton*¹⁶⁰ in

¹⁵³ 183 P.3d 384 (Cal. 2008).

¹⁵⁴ *Ibid.*, 400.

¹⁵⁵ *Ibid.*, 401.

¹⁵⁶ *Ibid.*, 453.

¹⁵⁷ California Constitution, Article I, section 7.5 (amended 2008). For an overview of the Proposition 8 campaign, see Scott L. Cummings & Douglas NeJaime, "Lawyering for Marriage Equality."

¹⁵⁸ California Constitution, Article I, section 7.5 (amended 2008).

¹⁵⁹ Cummings & NeJaime, "Lawyering for Marriage Equality," 1296.

¹⁶⁰ 207 P.3d 48 (Cal. 2009).

2009. The day after *Strauss* was decided and Proposition 8 upheld under state law, two lawyers from outside of the organizations involved in the marriage equality litigation campaign— Ted Olson and David Boies – filed a lawsuit challenging Proposition 8 in federal court. More shall be said of that suit further on in this discussion. Despite the fact that Olson and Boies were nationally known and highly competent constitutional lawyers, there was great unease in organizations that had worked for the cause of marriage equality for years about their case. LGB rights groups claimed not to have known Olson and Boies were filing a lawsuit. On the same day Olson and Boies filed their suit, a group of such organizations issued a statement titled “Why the Ballot Box and Not the Courts Should be the Next Step on Marriage in California.”¹⁶¹ The organizations eventually took on advisory and *amici* roles in the federal lawsuit challenging Proposition 8, although they did attempt to formally intervene when Olson and Boies voiced opposition to the prospect of an actual trial on the merits of Proposition 8.¹⁶² The federal district court rejected their motion to intervene in the case, relegating them permanently to *amici* roles.¹⁶³

While organizations working toward marriage equality and the nation focused on California to see what would come of marriage equality there, litigation continued on the east coast. Although Connecticut had enacted a civil unions law in 2005, Gay & Lesbian Advocates and Defenders filed suit in state court on behalf of eight same-sex couples for full marriage benefits, including the name of marriage.¹⁶⁴ The Connecticut Supreme Court handed down its decision in that suit, *Kerrigan v. Commissioner of Public Health*, in 2008. The court held that the existence of civil unions was not enough for the then-existing statutory scheme to avoid

¹⁶¹ Cummings & NeJaime, “Lawyer for Marriage Equality,” 1300.

¹⁶² *Ibid.*, 1300-1301.

¹⁶³ *Ibid.*

¹⁶⁴ *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 411 (Conn. 2008). Civil Union Law: C.G.S.A. § 46b-38aa (repealed 2009).

inflicting a demonstrable injury on same-sex couples.¹⁶⁵ Furthermore, the Court held that the marriage statutes discriminated based on sexual orientation, which is a quasi-suspect classification eligible for intermediate scrutiny under Connecticut law, and that the state failed to provide a sufficient justification for such discrimination.¹⁶⁶ In 2009, the legislature enacted a gender-neutral marriage statutory scheme that allowed for same-sex couples to be married under Connecticut law.¹⁶⁷ Thus, Connecticut became the third state after Massachusetts and California to adopt marriage equality, although at that time California's constitution still prevented same-sex couples from entering into civilly recognized marriages.

While the legislature of Connecticut enacted a marriage statute that allowed same-sex couples to civilly wed, the Supreme Court of Iowa, to the surprise of many, handed down a decision that mandated marriage equality in that state.¹⁶⁸ Iowa had enacted a mini-DOMA in 1998, but six same-sex couples applied for marriage licenses in the mid-2000s nonetheless. When county officials refused to issue licenses to them, in accordance with the law, those couples sued.¹⁶⁹ That suit was decided in 2009 as *Varnum v. Brien* by Iowa's highest court. The court held that sexual orientation was a suspect classification, triggering intermediate scrutiny under Iowa law.¹⁷⁰ The marriage statute of that time was found to discriminate based on sexual orientation, could not withstand intermediate scrutiny, and thus was struck down.¹⁷¹ The court then remedied the injury inflicted on the plaintiff couples by admitting them and all other same-sex couples into the civil institution of marriage.¹⁷² Despite efforts by conservatives in the

¹⁶⁵ *Ibid.*, 412.

¹⁶⁶ *Ibid.*

¹⁶⁷ C.G.S.A. § 46b-20 (amended 2009).

¹⁶⁸ Cain, "Contextualizing *Varnum v. Brien*: A 'Moment' in History," 46-50.

¹⁶⁹ *Varnum v. Brien*, 763 N.W. 2d 862, 872 (Iowa 2009).

¹⁷⁰ *Ibid.*, 896.

¹⁷¹ *Ibid.*, 896, 906.

¹⁷² *Ibid.*, 906.

legislature, the court's order withstood all attempts to overturn it in the elected branches.¹⁷³ By judicial fiat, Iowa unexpectedly became the fourth state to adopt marriage equality.

The advents of marriage equality in Iowa as well as Connecticut, and even the short-lived victory in California, were massive steps forward for the cause of marriage equality. Although California turned out to be a stinging political loss in 2008, the Proposition 8 campaign did display the vicious and ugly homophobia that many Americans could have ignored or tolerated previously. The loss on Proposition 8 also radicalized many LGB people who were either not involved in the campaign for marriage equality or were only weakly involved before 2008. In this way, as will be discussed in the context of the attorneys' experiences, Proposition 8 became a defeat for the advocates of marriage equality that did have some benefits.

F. The Attack on DOMA, Section 3, and the Advent of Marriage Equality in California: (2010-June 2013)

In the two years after Proposition 8 there was a massive shift toward federal litigation in the marriage equality litigation campaign. The focus of the marriage equality litigation also moved to the federal DOMA, which had been passed due to the first victory for marriage equality advocates in *Baehr*. Eventually, one such challenge to DOMA reached the Supreme Court in the form of *U.S. v. Windsor*. The lawsuit of Olson and Boies also progressed in federal district Court, moving on to the Court of Appeals for the Ninth Circuit, and then the Supreme Court. The years from 2010 to 2013 were filled with triumphs for the marriage equality litigation campaign and paved the way for an onslaught of private litigation after June 2013. These years proved to be the turning point for marriage equality, as legal victories easily withstood any political reactions.

¹⁷³ Cain, "Contextualizing *Varnum*," 48.

Organizations such as GLAD and Lambda Legal filed numerous lawsuits challenging the federal DOMA. *Pedersen v. Office of Personnel Management*¹⁷⁴, *Gill v. Office of Personnel Management*¹⁷⁵, *Massachusetts v. U.S. Department of Health and Human Services*,¹⁷⁶ *Windsor v. United States*¹⁷⁷, *Dragovich v. Department of Treasury*¹⁷⁸ and *Golinski v. U.S. Office of Personnel Management*¹⁷⁹ were filed in rapid succession. *Massachusetts* was not filed by an organization or a private individual, but by Attorney-General Martha Coakley of Massachusetts. Coakley, on behalf of the state of Massachusetts, argued that DOMA violated the principles of federalism, since the states have held the power to define marriages within their boundaries since colonial times.¹⁸⁰ The U.S. District Court for Massachusetts agreed, as did the Court of Appeals for the First Circuit.¹⁸¹ However, the suits brought by organizations argued against DOMA, section 3, which prohibited the federal government from recognizing as a marriage any union that was not of one man and one woman, on Equal Protection and Due Process grounds. Due to the fact that there is no Equal Protection Clause that applies to the federal government, the lawsuits only invoked the Due Process Clause of the Fifth Amendment, which many Supreme Court decisions have interpreted as having Equal Protection aspects.¹⁸²

There had been legal challenges to DOMA before this flurry of litigation in 2009. In early 2004, *Smelt v. County of Orange* emerged after a California same-sex couple applied for a

¹⁷⁴ 881 F.Supp.2d 294 (D.Conn., 2012).

¹⁷⁵ 699 F.Supp.2d 374 (D.Mass., 2010).

¹⁷⁶ 698 F.Supp.2d 234 (D.Mass., 2010), then 682 F.3d 1 (1st Cir., 2012).

¹⁷⁷ 833 F.Supp.2d 394 (S.D.N.Y., 2012), then 699 F.3d 169 (2d Cir., 2012), then *U.S. v. Windsor*, No. 12-307 in the Supreme Court.

¹⁷⁸ 872 F.Supp.2d 944 (N.D.Cal., 2012).

¹⁷⁹ 824 F.Supp.2d 968 (N.D.Cal., 2012).

¹⁸⁰ 698 F.Supp.2d 234, 235. For ancient roots of states' ability to regulate marriage see Nancy F. Cott, *Public Vows: a History of Marriage and the Nation*, (Cambridge, MA: Harvard University Press, 2000).

¹⁸¹ *Ibid.*, and 682 F.3d 1, 15-16.

¹⁸² Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

marriage license and were denied one.¹⁸³ The plaintiffs attacked both California state laws and DOMA. In their challenge to DOMA, they argued the law violated “due process, equal protection, and the right to privacy” and constituted sex discrimination.¹⁸⁴ The district court dismissed the case for lack of standing, but did adjudge DOMA to be constitutional.¹⁸⁵ The second challenge in 2004, *Bishop v. United States*, argued DOMA violated both the equal protection principles of the Fifth Amendment and the Due Process Clause of the same.¹⁸⁶ *Bishop* was only decided in U.S. District Court on January 14, 2014, as shall be discussed later.¹⁸⁷ Setbacks and delays plagued another early case, *Torres-Barragan v. Holder*, which challenged DOMA on the grounds that the plaintiffs were an international same-sex couple, and one was prohibited to name the other as an immediate relative.¹⁸⁸ Despite these impediments, the marriage equality litigation campaign forged ahead with its assault on DOMA as the second decade of the twenty-first century began.

Meanwhile, the aforementioned litigation against Proposition 8 continued in the U.S. District Court for the Northern District of California. A massive trial was held before Judge Vaughn Walker from January 11 to January 27, 2010, in which the defenders and challengers of Proposition 8 called dozens of witnesses.¹⁸⁹ Since many of the state officials named in the lawsuit as defendants refused to defend Proposition 8, a group called “Yes On 8” headed by one Dennis Hollingsworth became the intervenor-defendants.¹⁹⁰ On August 4, 2010, Judge Walker handed down a sweeping decision that struck down Proposition 8. Judge Walker held that

¹⁸³ *Smelt v. County of Orange*, 374 F.Supp.2d 861, 864 (C.D. CA, 2005).

¹⁸⁴ *Ibid.*, 872-873.

¹⁸⁵ *Ibid.*, 880.

¹⁸⁶ *Bishop v. United States*, No. 04-848 (N.D. Okla.), Plaintiff’s First Amended Complaint, <http://www.scribd.com/doc/18468361/Bishop-Et-Al-v-Oklahoma-State-of-Et-Al> (accessed April 28, 2013), 8.

¹⁸⁷ 962 F.Supp.2d 1252 (N.D. Okla. 2014).

¹⁸⁸ *Torres-Barragan v. Holder*, CV 09-08564 RGK (C.D. CA), Order re: Defendant’s Motion to Dismiss, <http://www.clearinghouse.net/chDocs/public/IM-CA-0065-0001.pdf> (accessed May 5, 2013), 1.

¹⁸⁹ *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 928 (N.D. Cal. 2010).

¹⁹⁰ *Ibid.*

Proposition 8 did not even have a rational basis for existence, and that it violated the Due Process Clause of the Fourteenth Amendment.¹⁹¹ The proponents of Proposition 8 pressed ahead and appealed to the Ninth Circuit Court of Appeals. The decision from that court will be discussed below with the discussion of the progression of *Windsor* to the Supreme Court.

The assault on DOMA was somewhat complicated on February 23, 2011. On that date, U.S. Attorney General Eric Holder announced that President Obama had ordered the Department of Justice not to defend DOMA in cases in the Second Circuit because both the president and the attorney-general had decided DOMA should be subjected to heightened judicial scrutiny, as opposed to rational basis review.¹⁹² This meant that *Pedersen* and *Windsor*, which the marriage equality advocates had won at the district court level, would not be appealed to higher courts to create binding precedent. In addition to refusing to defend DOMA in the Second Circuit, the Department of Justice submitted briefs in all other DOMA cases arguing in favor of heightened scrutiny for sexual orientation classification and against the constitutionality of DOMA.¹⁹³ Since the Department of Justice no longer defended DOMA in *Pedersen* and *Windsor*, the House of Representatives organization the Bipartisan Legal Advisory Group of the United States House of

¹⁹¹ *Ibid.*, 1003.

¹⁹² U.S. Department of Justice, Office of Public Affairs, “Statement of the Attorney General on Litigation Involving the Defense of Marriage Act,” press release by Eric Holder, 11-222, February 23, 2011, <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> (accessed April 29, 2013). The second circuit is New York, Connecticut and Vermont.

¹⁹³ “Statement of the Attorney General on Litigation Involving the Defense of Marriage Act,” 11-222. However, in a letter to Speaker of the House John Boehner, Attorney-General Holder explained that the federal government would still enforce the provisions of DOMA. Holder also explained that the government would still defend DOMA in circuits that did have binding precedent on what level of judicial scrutiny laws pertaining to sexual orientation should be subject to, which the Second Circuit did not have. In reaching his conclusion that DOMA should be subject to heightened scrutiny, Holder relied on almost completely outdated case law and models of thinking from the 1980’s, ignoring more recent decision on rational basis and heightened scrutiny. Holder also cited a 1992 Richard Posner book in favor of the proposition that sexuality is an immutable characteristic of one’s humanity, instead of more recent social and psychological studies. Holder’s letter to Boehner was filled with contradictions and left many movement activists unsure as to whether his move would help or harm their cause. U.S. Department of Justice, Office of Public Affairs, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, letter by Eric Holder, Jr., 11-223, February 23, 2011, <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (accessed March 12, 2014).

Representatives (BLAG) to defend the law as an intervenor-defendant. With this new party to the litigation, *Windsor* progressed from the Southern District of New York's district court, to the Second Circuit, and then to the Supreme Court. At issue at all stages of the litigation was section 3 of DOMA, which defined the word "marriage" as found in federal statutes as the union of one man and one woman. Section 2 of DOMA, which allows states to ignore same-sex marriages solemnized in other states, was not at issue.

Traveling on a similar track, *Perry* wound its way through the Ninth Circuit Court of Appeals. On February 7, 2012, a three-judge panel of that court issued a decision affirming the decision of Judge Walker.¹⁹⁴ The decision of the judges was rather narrow – in fact, it did not fully address the arguments for the right to marriage that Judge Walker had. Instead, the appeals court found that Proposition 8 violated U.S. Supreme Court case law, specifically *Romer v. Evans*, and that voters could not negatively target a specific group with legislation like the voters of California had done in Proposition 8.¹⁹⁵ Specifically, the Court of Appeals cited the fact that the state of California had granted the right to marry to same-sex couples, but had then rescinded that right.¹⁹⁶ The case was then appealed to the U.S Supreme Court.

The Supreme Court heard the arguments for both *Perry* and *Windsor* on back-to-back days in March 2013 and handed down the decisions for both on June 26. In *Perry*, the Court did not reach the merits of the case. Instead, in a majority opinion written by Chief Justice John Roberts, Jr., the Court ruled that the petitioners ("Yes on 8") did not have standing in the Supreme Court or in the Ninth Circuit Court of Appeals.¹⁹⁷ As such, the decision from Judge Walker of the U.S. District Court stood, allowing the plaintiffs and all other same-sex couples in

¹⁹⁴ *Perry v. Brown*, 671 F.3d 1052 (C.A. 9 2012).

¹⁹⁵ *Ibid.*, 1096. *Romer*, 517 U.S. 620 (1996) held that, even under rational basis review, a law could not be based on "animus" toward a specific group of people.

¹⁹⁶ *Ibid.*, 1063.

¹⁹⁷ *Hollingsworth v. Perry*, No. 12-144 (slip op. 2).

California to marry. In *Windsor*, the Court actually did address the merits of the case in a majority opinion written by Justice Anthony Kennedy. The Court held that “DOMA...violates basic due process and equal protection principles applicable to the Federal Government,” and thus struck it down.¹⁹⁸ This was an epochal day for the cause of marriage equality, for not only had the Supreme Court struck down a discriminatory state law, but also a discriminatory federal law, with much farther-reaching implications. Attorneys disagree on what exactly led to the victory in *Windsor*, but many credit the “dual track” political-legal strategies implemented by the organizations working toward marriage equality after the lessons learned in relation to *Baehr*.

G. The *Windsor* and *Perry* Era: (July 2013-December 2013)

Following the decisions in *Windsor* and *Perry*, there was a veritable explosion of litigation in state and federal courts attacking the validity of bans on marriage equality. There were also many cases filed seeking to enforce provisions of the decisions. In states across the nation, private attorneys, outside of the organizations that had brought most of the litigation before *Windsor*, brought dozens of cases in opposition to state constitutional and statutory prohibitions of same-sex marriage. Most of these cases were in federal court, but other cases were filed in state courts. These cases produced a wave of victories for the cause of marriage equality across the nation, even in traditionally deeply conservative states.

One of the first big victories for the advocates of marriage equality after their twin victories in the summer of 2013 was in New Jersey. In *Garden State Equality v. Dow*, six same-sex couples filed a lawsuit against the state of New Jersey averring that the conferral of civil unions (as mentioned above in the discussion of *Lewis v. Harris*) but not marriage violated their equal protection rights.¹⁹⁹ Judge Jacobson of the New Jersey Superior Court for the Mercer

¹⁹⁸ *U.S. v. Windsor*, No. 12-307 (slip op. 20).

¹⁹⁹ *Garden State Equality v. Dow*, 82 A.3d 336, 339 (N.J. Super. 2013).

Vicinage agreed and ordered that the state to provide marriages, not just civil unions, to same-sex couples.²⁰⁰ Crucial to the court's analysis was the fact that *Windsor* struck down section 3 of DOMA, extending all the federal benefits conferred by marriage to same-sex married couples. Since only marriages, and not civil unions, received those federal benefits, there was a different injury than when the New Jersey Supreme Court decided *Lewis v. Harris*.²⁰¹

Although the New Jersey state government at first appealed the decision directly to the state's supreme court, the government dropped the appeal on October 21, 2013.²⁰² The government's sudden reversal may be attributed to strong signs from the New Jersey Supreme Court that such an appeal would not go well for the state. The strongest such signal was a unanimous decision from the court denying the government's motion to stay the order of Judge Jacobson mandating the state to provide marriage licenses to same-sex couples by October 21. Speaking with one voice, the New Jersey Supreme Court explained, "We can find no public interest in depriving a group of New Jersey residents of their constitutional right to equal protection while the appeals process unfolds."²⁰³ Attorneys for the State of New Jersey probably read that language and realized the court would find against the state. In this way, New Jersey achieved marriage equality mere months after *Windsor* and *Perry* were decided.

After New Jersey, which many thought would swiftly achieve marriage equality through one means or another, two massive shocks came in the form of victories in federal court in Utah and Oklahoma. On December 20, 2013, Judge Robert J. Shelby of the U.S. District Court for Utah handed down a decision in *Kitchen v. Herbert* striking down the statutory and constitutional

²⁰⁰ Ibid., 368.

²⁰¹ Ibid.

²⁰² Kate Zernike & Marc Santora, "As Gays Wed in New Jersey, Christie Ends Court Fight," *The New York Times*, October 21, 2013, http://www.nytimes.com/2013/10/22/nyregion/christie-withdraws-appeal-of-same-sex-marriage-ruling-in-new-jersey.html?_r=0 (accessed February 12, 2014).

²⁰³ *Garden State Equality v. Dow*, 79 A.3d 1036, 1044 (N.J. 2013).

prohibitions of same-sex marriage in Utah.²⁰⁴ At least one of the plaintiff couples had applied for a marriage license before *Windsor* and *Perry* were decided, but in wake of those cases, Judge Shelby held that Utah's denial of marriage licenses to same-sex couples violated both equal protection and due process.²⁰⁵ He subsequently ordered the state to issue marriage licenses to any same-sex couples that requested them. Although the Tenth Circuit Court of Appeals stayed Judge Shelby's order on January 5, 2014, 1,362 same-sex couples were married in Utah in the window of opportunity that order provided.²⁰⁶ The second shock that came in the wake of *Windsor* and *Perry* was the resolution of *Bishop v. United States* in Oklahoma. As mentioned earlier, *Bishop* was filed in 2004 as an attack on section 3 of DOMA. However, in the decade it took to resolve the case, the Supreme Court struck down section 3 of DOMA in *Windsor*, making the original claim moot. Thus, on January 14, 2014, the U.S. District Court for the Northern District of Oklahoma handed down a decision on a different issue: the state of Oklahoma's denial of marriage to same-sex couples. The decision struck down the state's prohibitions on same-sex marriage, but immediately stayed the order to issue marriage licenses to same-sex couples. This immediate stay was due to the stay imposed on the order in *Kitchen* by the Tenth Circuit Court of Appeals, which oversees all federal districts in Oklahoma.²⁰⁷ *Bishop* may be finally resolved when the Tenth Circuit hands down a decision in *Kitchen*.

To this day marriage equality cases are being filed in states across the nation, both by organizations and by private attorneys with no ties to the major organizations involved in marriage equality litigation. Although the political work associated with marriage equality is

²⁰⁴ *Kitchen v. Herbert*, 2013 WL 6697874 (D.Utah 2013).

²⁰⁵ *Ibid.*, *18 & *28.

²⁰⁶ Ralph Becker, "Op-ed: This mayor will never forget the day gay marriage arrived," *Salt Lake Tribune*, February 12, 2014, <http://www.sltrib.com/sltrib/opinion/57535603-82/marriage-couples-utah-gay.html.csp> (accessed February 13, 2014).

²⁰⁷ *Bishop*, 962 F.Supp.2d 1252 (N.D. Okla. 2014).

still mostly done by those major organizations, the marriage equality litigation campaign now involves many attorneys outside those organizations. Cases range from enforcement cases in states wherein marriage equality is already a reality to groundbreaking test cases in states that have not achieved marriage equality. Although this subsection ends the *Windsor* and *Perry* Era in December 2013, in reality that era continues. Such an end-date merely serves to provide an end to this short history of marriage equality litigation. This thesis cannot keep pace with the changes coming every day to the legal landscape on this issue, but this bit of historical context should provide background for the discussions of the lawyers presented in the next section.

VI. Results and Analysis

A. **The Unity of Politics and the Law**

As mentioned previously, there is an understanding in the literature that there are two sides to every test case, especially in a marriage equality test case. The legal side of the case, which occurs in the courtroom and the judicial system, is only half of the process of bringing a test case for marriage. The other half takes place in the political sphere, in the form of political reactions that reverse courtroom victories, or in the resistance of state officials after a victory has been won. All of the people interviewed for this study agreed that there were these two sides to the litigation for marriage equality. To some, to merely refer to the two as “sides” was too compartmentalizing. In fact, everyone agreed that the prevailing wisdom in the organizations that litigation for marriage equality is that one must address both sides (or aspects) in order to win. One attorney involved with such organizations went so far as to say that the organizations have focused far more on the political side of test cases than the legal side. Furthermore, almost universally, the interviewees cited the negative reactions to *Baehr* in the 1990s as the defining moment in the creation of the marriage equality litigation campaign when attorneys realized the political side of test cases could not be ignored. This shows that marriage equality advocates and the organizations they work for are highly aware of the interaction between politics and the law, and that they attempt to manage both sides simultaneously, even when doing things that are at least superficially either wholly political or wholly legal.

Susan Murray, who was one of the lead attorneys in *Baker v. State of Vermont* in the 1990s, said that in *Baehr* it was clear “there hadn’t been a lot of groundwork laid in the community, so that case, even though it had been successful at the trial court level, ended up

getting short circuited by a constitutional amendment.”²⁰⁸ Thus, it was clear that Murray and her co-counsel needed to pursue a “dual track” for every case – being mindful of political issues and legal arguments – and needed to “lay the groundwork” in a variety of ways before filing.²⁰⁹ The Vermont campaign for marriage equality followed the ancient maxim that one must “know thyself.” Thus, the first political groundwork began with talking to gays and lesbians to figure out what issues were important and getting them to talk about them. Murray attributes this first step in Vermont to the passage of an anti-discrimination law in 1991 that protected gays, lesbians, and transgender individuals.²¹⁰ This law allowed the LGB community to come out safely. It was after the passage of this law that Murray and others could talk about why marriage was important to LGB people.²¹¹

Mary Bonauto, the Civil Rights Project Director at Gay & Lesbian Advocates and Defenders (GLAD) and co-counsel to Murray in *Baker*, echoed Murray’s analysis. Bonauto argued, “Hawaii was sprung on us,” because three couples went to a private attorney who plunged into a lawsuit with no preparation.²¹² The third co-counsel in *Baker*, Beth Robinson (now an Associate Justice on the Vermont Supreme Court), also explained that “as early as the early ‘90s, before we did the things we did in Vermont,” many in the organizations involved in marriage equality litigation were keenly aware of the need for “dual track” management of cases.²¹³ After the fallout of the *Baehr* litigation, Bonauto, Murray, and Robinson undertook an

²⁰⁸ Susan Murray, Esq., interview by author, Burlington, VT, November 22, 2013 (hereinafter the “Murray Interview”).

²⁰⁹ Ibid.

²¹⁰ Ibid. The statute is found at 21 V.S.A. § 495.

²¹¹ Ibid.

²¹² Mary Bonauto, Esq., telephone interview with author, December 23, 2013 (hereinafter the “Bonauto Interview.”) In many of the interviews, the movement members referred to *Baehr* not by name, but as “Hawaii.” That one word carries with it, for all those who use it, the almost simultaneous triumph and implosion that happened in relation to the *Baehr* case.

²¹³ Justice Beth Robinson, telephone interview with author, December 30, 2013 (hereinafter the “Robinson Interview”).

extensive public education and advocacy campaign in Vermont before they filed any lawsuit.²¹⁴ According to both Murray and Bonauto, this campaign involved going to multiple community organizations to educate them on the plight of the LGB population due to their exclusion from the institution of marriage. The first to be contacted were the traditional allies of LGB peoples – “the Human Rights Commission, the ACLU and the UU Church, people like that.”²¹⁵ After that, groups like the Rotary Clubs of towns, which Murray described as “less comfortable groups” were informed of the discrimination LGB people faced.²¹⁶ To ensure their message was widely disseminated, Murray, Bonauto and Robinson set up a booth at every county fair in Vermont. At the booth, a seventeen minute video played in which LGB people talked about how they were “actually harmed” by the state’s denial of marriage to them.²¹⁷

To manage all of this, the three attorneys resurrected an organization called the Vermont Coalition for Lesbian and Gay Rights (VCLGR), which had been instrumental in the passage of the 1991 anti-discrimination law mentioned previously.²¹⁸ This organization ran the early political and grassroots aspects of the marriage equality campaign in Vermont. Starting in 1993, the VCLGR hosted annual town hall meetings to discuss issues, including the denial of marriage, for the LGB population in Vermont.²¹⁹ By 1995, hundreds of people at these town hall meetings wanted to fight for marriage equality. Out of this desire, people in the VCLGR formed the separate Vermont Freedom to Marry Taskforce (VFMT), which became its own independent

²¹⁴ Ibid.

²¹⁵ Murray Interview. The UU Church is the Unitarian Universalist Church, long known for its progressive political positions.

²¹⁶ Ibid. and Bonauto Interview.

²¹⁷ Murray interview. This video was called “The Freedom to Marry: a Green Mountain View,” and featured many of the plaintiffs in *Baker*, including Mr. Baker’s partner, Peter Harrigan, as the narrator (Eskridge, *Equality Practice*, 47).

²¹⁸ Ibid.

²¹⁹ Ibid.

entity in 1996.²²⁰ The VFMT then took over the litigation and grassroots organization for the marriage equality campaign in Vermont.

Murray and Robinson alone easily managed both the legal and political sides of the case in Vermont, with help from Bonauto. The two Vermont attorneys, with assistance from Bonauto, could manage the political outreach to community groups and legislators and the filing of legal papers. According to all three, the small size of Vermont allowed the three of them to manage the whole campaign. However, all three were clear that such centralized control would be nearly impossible to replicate in larger, more populous states.²²¹ Robinson went so far as to say that “peoples’ skill sets have become much more specialized,” so such a model would not work, even in Vermont, if an organization wanted to engage in litigation in a “state of the art way” today.²²² Although there were committees, a board, and dozens of volunteers for the VFMT, Murray and Robinson ran the show.²²³

In litigation campaigns outside Vermont, lawyers echoed many of the sentiments Murray, Robinson, and Bonauto voiced. Bonauto did mention that, in many of the cases she worked in outside of *Baker* (i.e. *Kerrigan* and *Goodridge*), she oversaw public education campaigns similar to that conducted in Vermont. Evan Wolfson, the founder of Freedom to Marry, is widely credited with envisioning and proselytizing for the “dual track” management of political and legal aspects of marriage cases, and he claimed to have argued for such strategy for twenty years.²²⁴ This means he started at the same time the *Baehr* litigation worked its way through the Hawaii courts.

²²⁰ Ibid.

²²¹ Murray, Bonauto and Robinson interviews.

²²² Robinson interview.

²²³ Ibid.

²²⁴ Evan Wolfson, telephone interview with author, January 15, 2014 (hereinafter the “Wolfson Interview”). Robinson, in her interview, praised Wolfson for his recognition of the need for political and legal management of cases.

Kevin Cathcart, the Executive Director of Lambda Legal Defense and Education Fund, indicated that, in a significant amount of the litigation Lambda has been involved in (i.e. *Varnum v. Brien*, *Lewis v. Harris*, *Garden State Equality v. Dow*, and *In re Marriage Cases*), there have been “robust” educational campaigns to accompany the lawsuits.²²⁵ Of course, such could not be the case with all the cases Lambda has taken to court – cases like *Baehr* and *Lawrence* had little public education associated with them – but it was the general rule. According to Cathcart, not only was “the Hawaii Case” the “textbook learning opportunity” for the organizations involved in marriage equality litigation on the necessity of public education and political management accompanying litigation, but also *Varnum* in Iowa.²²⁶ In 2009, the Iowa Supreme Court handed down a unanimous decision affirming marriage equality on constitutional grounds in *Varnum*. However, in retention elections the next year, three justices were removed from the bench, due to a campaign that focused on their votes in *Varnum*.²²⁷ This was the first time an Iowan justice had ever lost a retention election.²²⁸ Cathcart described this as a “warning shot from the right wing to try to intimidate judges” across the country.²²⁹

As the leader one of the organizations involved in advocacy for marriage equality, with the lessons from *Baehr* and *Varnum* fully internalized, Wolfson indicated that different people usually manage the political and legal aspects of marriage equality cases.²³⁰ As opposed to the *Baker* litigation, wherein Murray and Robinson could manage the whole case, both legally and politically, more recent litigation has public education staff manage the public education campaign.²³¹ Freedom to Marry does the public education and advocacy associated with test

²²⁵ Kevin Cathcart, Esq., telephone interview with author, February 11, 2014 (hereinafter the “Cathcart Interview”).

²²⁶ Ibid.

²²⁷ Ibid., and Grant Schulte, “Iowans Dismiss Three Justices,” *Des Moines Register*, November 3, 2010.

²²⁸ Ibid.

²²⁹ Cathcart interview.

²³⁰ Wolfson interview.

²³¹ Ibid.

cases for marriage equality, but does no litigating, leaving that to organizations like GLAD, the ACLU and Lambda.²³² Bonauto indicated that, until *Goodridge* in 2004, she managed both the political and the legal sides of litigation campaigns. However, after *Goodridge*, GLAD hired a public affairs director due to the increased interest of the nation and the LGB community on marriage cases.²³³ The public affairs director was technologically savvy, and was tasked with getting the stories of plaintiffs out to the world.²³⁴ In fact, one attorney involved in marriage equality litigation remarked that the focus in the organizations involved in marriage equality litigation has shifted so far from the legal side of cases that more resources are poured into public advocacy than ever before.²³⁵

Cathcart agreed with Wolfson, indicating that “different people do different things” but that the whole process is coordinated.²³⁶ For Lambda Legal, the best way to accomplish public education and advocacy is through “earned media” instead of the more grassroots methods that Murray and Robinson utilized in Vermont.²³⁷ Earned media is coverage from the mainstream media, in the form of newspapers covering the plaintiffs’ struggles or TV stations running stories on the case and the individuals involved. This publicity is essentially free, and it allows Lambda to “play” in expensive media markets. As Cathcart explained, “we don’t have the kind of budgets to do advertising campaigns the way Diet Coke can do advertising campaigns,” especially in the media markets of New York, New Jersey, Philadelphia and other expensive markets in which Lambda operates.²³⁸ To get earned media and to further public education, Lambda conducts town hall meetings, brings plaintiffs to meet editorial boards and reporters,

²³² Ibid.

²³³ Bonauto interview.

²³⁴ Ibid.

²³⁵ Interview with an attorney associated with the marriage equality movement, December 30, 2013.

²³⁶ Ibid.

²³⁷ Cathcart interview.

²³⁸ Cathcart interview.

sets up interviews for TV stations, features plaintiffs in Lambda's newspaper, brings plaintiffs to meet state politicians and power players, and utilizes social media.²³⁹ For a lot of groundwork, Lambda relies on and has worked with what Cathcart called the "Equality organizations" – the LGBT rights organizations in each state.²⁴⁰

James Esseks, Director of the ACLU's Lesbian, Gay, Bisexual, Transgender & AIDS Project, went so far as to say that merely phrasing the political and the legal aspects of test cases separately implied they were compartmentalized, which he insisted they were not in the organizations responsible for marriage equality litigation.²⁴¹ According to him, the prevailing wisdom is that there are such various aspects of test cases.²⁴² In agreement with Cathcart, Esseks explained that the ACLU has different staffers doing different jobs, all related to the same case. There are staff attorneys that work on litigation, staff attorneys that work on lobbying, policy strategists that work on ballot initiatives and lobbying, and public communication strategists. Esseks explained that all of these people were coordinated in individual states or on individual cases to "move the ball forward" collectively.²⁴³

Although different people do different tasks in the organizations' holistic strategy, the need to attend to both politics and the law is taken as a given principle in the organizations working toward marriage equality. The lessons of *Baehr* and *Varnum* were hard learned and fully internalized. Organizations have never since attempted to bring a test case for marriage without first conducting an extensive political campaign to prepare the public and the legislature for the eventual litigation and the potential success of the movement in court. Since the law and politics are so closely bound together in the thinking of these organizations, the next section

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ James Esseks, Esq., telephone interview with author, February 24, 2014 (hereinafter the "Esseks interview").

²⁴² Ibid.

²⁴³ Ibid.

analyzes the possible tensions between the political messages of these organizations and the legal arguments they made in court.

B. Potential Tensions Between Politics and the Law

While the attorneys in organizations involved in marriage equality litigation are aware that politics and the law intersect in their work, they claimed they did not give much thought to how the political and legal sides influenced each other. This is unsurprising, since few such attorneys could be expected to explicitly state that their legal arguments were made for political purposes, or that their legal arguments were guided by political considerations. One cannot expect the attorneys in this study to explicitly criticize the activities of their allies as being too overtly political or legal since everyone in the campaign for marriage equality does have a common goal, despite some differences in strategy. According to most of the attorneys, the two sides made the same arguments, though oftentimes with different emphases, and were never in tension with each other.

Murray was clear that the legal and political sides of the campaign for marriage equality made the same arguments to judges and the public at large, respectively.²⁴⁴ At no time during the lead-up to the decision in *Baker* did the two sides “step on each other’s toes.”²⁴⁵ However, the two sides had to use different styles of argument. The public political side of the campaign told stories of the discrimination and injuries LGB people faced, while the legal side argued those injuries were contrary to law or the constitution.²⁴⁶ According to Murray, “there are some very subtle legal arguments you are making in any case, and that is not possible in public advocacy. You need to say something that anyone can understand, so you have to be very broad-

²⁴⁴ Murray interview.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

brush about it.”²⁴⁷ As an example, Murray explained that Robinson hated the term “gay marriage,” because she thought she was just fighting for the right to marry for everyone.

Murray, on the other hand, thought that “gay marriage” made sense to a lot more people than something like “marriage equality,” and thus was comfortable with the former phrase.²⁴⁸

Bonauto offered a similar example when she explained that the organizations working toward marriage equality realized the best way to talk about marriage with the public was not to focus on the benefits one receives from the institution of marriage, but the fundamental right of everyone to marry.²⁴⁹ Esseks likewise saw no influence or tension between the two sides, except with regard to the nomenclature of what marriage equality advocates were striving for.²⁵⁰

According to Esseks, the advocates now seek and argue for “marriage equality” in legal paperwork, not “gay marriage.”²⁵¹

Wolfson agreed with Murray that the two sides of the campaign for marriage equality never influence each other. In Wolfson’s work, the public education campaigns have always been filled with concepts of liberty and equality, which are precisely the type of arguments that marriage equality advocates make in the courtroom.²⁵² There was never any influence that the political side had on legal arguments that Wolfson saw, because, to him, the advances in the political sphere simply “have strengthened and helped elevate a different emphasis” in the extant legal arguments.²⁵³ Furthermore, “how people understand who gay people are...creates more space for legal arguments,” but did not create new legal arguments.²⁵⁴ Cathcart agreed with Wolfson, Murray and Esseks that the two sides did not influence each other. Cathcart does not

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Bonauto interview.

²⁵⁰ Esseks interview.

²⁵¹ Ibid.

²⁵² Wolfson interview.

²⁵³ Ibid.

²⁵⁴ Ibid.

believe that the two sides could influence each other because the constitutional arguments – the right of all Americans to marry the person they love – are so clear-cut.²⁵⁵

Robinson was a dissenting voice among the attorneys involved in this study with regard to any tensions that existed between the legal and political sides of the campaign for marriage equality. Robinson explained that a tension did arise between the two sides when Vermont enacted its civil unions law but other states either refused to recognize such unions or did not have a set policy on doing so.²⁵⁶ “As an advocate who was thinking about legal strategy,” Robinson had “to be very careful to leave the door open to the argument that a civil union is and should be recognized in those [other] states” as the equivalent of a marriage.²⁵⁷ However, in the political activity post-*Baker*, activists had to “talk about the ways in which civil unions fall short...[to] persuade...fellow Vermonters that we need to keep moving toward marriage after they did this heavy lift that became civil unions.”²⁵⁸ Robinson did not want the political activists to simply say that civil unions were not recognized elsewhere because that would jeopardize the legal arguments she wanted to make in favor of civil unions being recognized.²⁵⁹ Despite this, the argument that resonated with, and received the most attention from, the public was that civil unions were not recognized in other states as marriages.²⁶⁰

With Robinson as the exception, the attorneys in this study unsurprisingly could not come up with an example of a time when the political message and the legal arguments of the organizations campaigning for marriage equality overtly influenced each other. Further analysis will show that the two sides do influence each other in the work of such organizations, but most

²⁵⁵ Cathcart interview.

²⁵⁶ Robinson interview.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

of the attorneys did not explicitly discuss tensions between the legal and political aspects of cases in a broad and abstract sense. According to most of the attorneys, the clarity of the arguments the advocates of marriage equality must make – the right to marriage is fundamental to all Americans, and no American should be treated differently than similarly situated Americans – eased possible tensions between the two types of argument the organizations advocating for marriage equality must make.

C. The Involvement and Issues of National Organizations

Marriage equality advocates face the issue of having only a handful of central organizations, but fifty states in which to conduct marriage equality campaigns. The involvement of national organizations in state marriage equality campaigns is a case-by-case determination. According to Bonauto, the pushes for marriage equality in Vermont, Massachusetts, and Connecticut were all locally controlled.²⁶¹ In each of those state campaigns, GLAD assisted state groups, but to different degrees. In Massachusetts, where GLAD is headquartered, Bonauto and GLAD ran the entire operation, and only after the victory in *Goodridge*, when “the entire right wing of the nation was doing its damndest to pull th[e] victory out of the ground,” did national organizations like the Human Rights Campaign step in to provide additional funding and support.²⁶² Robinson, who only worked on *Baker*, explained that the strategies associated with that litigation were entirely specific to Vermont, and that she, Bonauto, and Murray ran the whole operation.²⁶³ Through Bonauto, GLAD was associated with the *Baker* litigation and Vermont’s public education campaigns, but GLAD mostly focused on the litigation aspects of the Vermont campaign.²⁶⁴ Additionally, Lambda, the NCLR, and the

²⁶¹ Bonauto interview.

²⁶² Ibid.

²⁶³ Robinson interview.

²⁶⁴ Ibid.

ACLU all filed *amicus* briefs in *Baker*, but such national or regional organizations did not run the campaign in Vermont.²⁶⁵ In fact, Robinson argued that having “national groups come into Vermont would be counter-productive” because of the fierce independence of Vermonters.²⁶⁶

Esseks agreed that all state campaigns, such as they existed, were state-specific, even if a national organization such as the ACLU was involved. As an example, he cited the litigation in New Mexico, which resulted in the ACLU and NCLR winning a complete victory in *Griego v. Oliver* on December 19, 2013.²⁶⁷ Years before the paperwork for *Griego* was filed, the ACLU and its allies conducted a massive political campaign in New Mexico. The national ACLU, along with ALCU New Mexico, the NCLR, Equality New Mexico, and Freedom to Marry all coordinated to spread the word on same-sex couples’ devotion to each other and the injuries they suffered because of the denial of marriage to them by the state of New Mexico.²⁶⁸ The organizations put several staffers on the ground in New Mexico to accomplish this and to build a coalition of business owners, Hispanics, and conservatives in support of marriage equality before the issue went to court.²⁶⁹ To spread the word, the staffers put on town hall meetings, set up speakers’ bureaus, and worked to get newspapers to write on the couples in the lawsuit.²⁷⁰ This is precisely the type of activity Cathcart described in Lambda’s public education and advocacy campaigns.

As for what Cathcart had to say on the state-specificity of political campaigns accompanying litigation, he prefaced his comments by noting that, until the past year, only a handful of organizations, which coordinated closely among themselves, actually brought

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ 316 P.3d 865 (N.M. 2013).

²⁶⁸ Esseks interview.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

marriage cases to court.²⁷¹ This has changed with the *Windsor* decision and the flood of private litigation that followed. When the organizations brought litigation and executed a political campaign to accompany it, they had to coordinate with the local and state LGB rights organizations. This created some conflict. According to Cathcart, “there were times when people in states would say, ‘we don’t want someone to bring a marriage case because we think we could move a civil rights bill [through the state legislature]. Once marriage gets out there, it gets harder...’”²⁷² Some did not want national organizations to come in and “upend the cart” on a long-term legislative project in a particular state.²⁷³ On top of that, people within the states sometimes did not agree, and oftentimes states would have multiple LGB organizations.²⁷⁴ While Cathcart acknowledged this conflict and the need to form some sort of consensus with state organizations, he did explain, “If we had to have consensus to move forward on litigation, there wouldn’t be much litigation in this world, because consensus on anything is hard to come by.”²⁷⁵ Wolfson agreed with Esseks and Cathcart, explaining that, while there may be state-specific plans and strategies, it is all part of the national plan to get marriage equality for all.²⁷⁶

Another issue the larger national organizations have to deal with is donors. The organizations advocating for marriage equality get their funds from private donations, and each attorney involved in this study had to deal with donors’ desires. According to Murray, Bonauto, Robinson, and Esseks, donors to the organizations have not come to the organizations with demands.²⁷⁷ Unsurprisingly, those four attorneys reported never having issues with donors who refused to give money after a strategic decision was made, or who wanted a particular strategy as

²⁷¹ Cathcart interview.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Wolfson interview.

²⁷⁷ Murray, Bonauto, Robinson and Esseks interviews.

a condition of their donation.²⁷⁸ Bonauto did mention that such issues could arise and be a problem if one were in charge of a small organization that depended on one or a few big donors.²⁷⁹ However, since GLAD is a large organization with many donors, she has never faced that problem in her work.²⁸⁰

Cathcart and Wolfson offered a slightly more complex picture of donor relations. Wolfson explained that “different funders have different agendas and different approaches...funders are all over the map.” However, Wolfson has worked hard with donors to bring them around to one strategy. Wolfson credits the national organizations with succeeding in persuading donors “to buy into a vision and a strategy and a campaign.”²⁸¹ As such, Wolfson has never had major issues with donors. Cathcart intimated that he and Lambda have not had problems with individual donors, but have experienced issues with foundations that wish to donate.²⁸² Despite this, as Bonauto pointed out, donor issues only really become a big issue when there are few donors. Cathcart’s Lambda Legal has plentiful and generous donors, which allows Cathcart to say, “thanks but no thanks,” to foundations that demand certain things of Lambda that its leadership do not think are prudent for the campaign for marriage equality.²⁸³

Another issue the organizations working toward marriage equality struggle with is handling litigation that comes from outside the organizations that have historically brought most of the litigation. This litigation can have the effect that *Baehr* did in Hawaii—the plaintiffs may win, but if the political groundwork is not laid, it all may be for naught. However, simply because litigation originates outside the organizations and is managed primarily by people who

²⁷⁸ Ibid.

²⁷⁹ Bonauto interview.

²⁸⁰ Ibid.

²⁸¹ Wolfson interview.

²⁸² Cathcart interview.

²⁸³ Ibid.

are not employed by such organizations does not mean that it will fail. As one attorney involved with marriage equality litigation pointed out, *Baker*, the first case in which marriage equality advocates won a permanent victory, technically came from outside the organizations dedicated to marriage equality because none of the major organizations started it, although GLAD did assist considerably through Bonauto.²⁸⁴ With regard to non-organization litigation, both Murray and Bonauto said, “You can’t stop someone from filing a lawsuit,” but explained that private litigation outside of the organizations that have had a lot of experience with marriage equality litigation can be managed to maximize its effectiveness.²⁸⁵ Bonauto explained that the organizations do “engage with them [private attorneys] about the issues...engage them about the strength of their arguments [and] make them think more contextually.”²⁸⁶

Wolfson agreed with this, saying that the organizations work quite closely with each other to bring effective cases, but that they do not have a “monopoly on who has access to the courts.” In the cases in which private attorneys bring litigation, the organizations, “try to persuade them to bring more strategic cases...and not necessarily go to court just because you have a very legitimate and real grievance, but to understand that litigation is a tool, that it needs to be used carefully.”²⁸⁷ Esseks offered similar sentiments, stating that, in the case of litigation that is not filed by attorneys from the organizations, “you do what you can to engage with the lawyers,” that are working on the case to explain to them the intricacies of a marriage test case.²⁸⁸ One can also “file a friend of the court brief...and hope for the best.”²⁸⁹

²⁸⁴ Interview with an attorney associated with the marriage equality movement.

²⁸⁵ Murray and Bonauto interviews.

²⁸⁶ Bonauto interview.

²⁸⁷ Wolfson interview.

²⁸⁸ Esseks interview.

²⁸⁹ Ibid.

Cathcart argued that big national law firms should be involved in marriage equality litigation because they are “unexpected messengers” for marriage equality, due to their conservative history. Cathcart believes the “unexpected messenger” story is good and plays well in the media.²⁹⁰ That being said, when litigation comes from outside the organizations that have experience with marriage equality litigation, it can scare Cathcart if the attorneys have too much naiveté about the outcome or forget about the latent prejudice toward LGB people that still lingers in society.²⁹¹ Naïve lawyers often put together plaintiff groups that are not diverse enough for Cathcart’s liking and may expose the litigation to problems in the political sphere, especially if, as often happens in private litigation, the public education aspect of the litigation is neglected.²⁹² Robinson agreed that it is a challenge to manage numerous lawsuits that come from outside the organizations dedicated to marriage equality. She cited the unfortunate political backlash to the 1998 case of *Brause v. Bureau of Vital Statistics* as an example of what could happen if litigation was not part of a broader strategy.²⁹³ For Robinson, the national organizations need to rein in over-zealous litigators, and also not pressure unwilling states – such as the unnamed examples Cathcart cited previously – into dealing with a marriage lawsuit.²⁹⁴ Luckily for her, “everyone coalesced” with regard to *Baker*—national organizations were supportive of the move to file, but they never pressured her or her co-counsel to do so.²⁹⁵

The national marriage equality organizations are cognizant of the fact that sometimes their interference in a state will upset the LGB rights movement in that particular state. However, they are not afraid to move ahead in a particular state if there is no consensus among

²⁹⁰ Cathcart interview.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Robinson interview. *Brause*, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998), was immediately followed by a new amendment to the Alaska constitution banning marriage equality.

²⁹⁴ Robinson interview.

²⁹⁵ Ibid.

all the state organizations within it. The national organizations also have had no major troubles with donors withdrawing funding due to strategic decisions made by the organizations. The organizations also appear to have a plan for what to do when litigation comes from outside the few organizations that have extensive experience with that type of litigation. In such a situation, the organizations engage with the private attorneys and seek to get involved in an advisory and *amicus* role. This is the best the organizations can hope for, since they cannot block others from filing lawsuits.

D. *Windsor* as the Result of a Political-Legal Strategy

Every attorney that commented on *Windsor* mentioned that the victory in that case argued that such a victory was due to the political-legal “dual track” strategy that the national organizations adopted due to their realization of the intersection of politics and the law in their work. Murray was unequivocal—she stated *Windsor* was “absolutely,” a victory of the combined political-legal strategy of the organizations involved in marriage equality litigation.²⁹⁶ Bonauto agreed, explaining that *Windsor* went from being a federalism case to a discrimination case.²⁹⁷ The challenge to DOMA changed in 2009 from a challenge to the federal government defining marriage (a task historically reserved to the states) to a challenge to the federal government’s definition of marriage.²⁹⁸ In a case Bonauto brought with GLAD that was similar and contemporaneous to *Windsor*, she won on the U.S. District Court level in front of an elderly Nixon appointee, who ruled for GLAD because the federal government was “treating one group of married people differently.”²⁹⁹ Bonauto credits this victory and others in the fight to strike down DOMA to the fact that the organizations involved in that litigation got stories of married

²⁹⁶ Murray interview.

²⁹⁷ Bonauto interview.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

couples unable to enjoy the federal benefits of marriage out into the media before the litigation started.³⁰⁰

Wolfson was just as emphatic as Murray, claiming that the *Windsor* victory was “absolutely” due to the “dual track” advocacy he has supported in marriage equality litigation since the early 1990s.³⁰¹ Esseks agreed with Wolfson and Murray, but was slightly less emphatic about it. “The win in *Windsor* couldn’t have happened without all of the progress on the freedom to marry that preceded it,” in the courts, legislatures, at the ballot box, and the movement of public opinion on the issue.³⁰² Esseks also saw *Windsor* driving the marriage issue in the lower federal courts today.³⁰³ Similarly, Cathcart argued that the victory in *Windsor* was not necessarily due only to the political-legal strategy, but to the cases that came before.³⁰⁴ “*Windsor* is partly a result of the cases that came before, and I don’t just mean the cases that won, or the arguments based on the *Lawrence* case.”³⁰⁵ Cathcart viewed the burst of litigation in federal courts after *Windsor* as “standing on the shoulders of the *Windsor* case, but it didn’t start with the *Windsor* case...[but with] all the things that came before.”³⁰⁶ To Cathcart, such legal victories were made possible by a line of cases, both won and lost, stretching back through *Lawrence*, *Romer*, *Bowers*, and beyond.

Cathcart took the broadest historical view of any attorney involved in this study, but the consensus of all was that *Windsor* happened because the organizations involved in marriage equality litigation adopted a strategy that addressed both the legal and political aspects of marriage equality. According to the attorneys, the strategy of addressing both the political

³⁰⁰ Ibid.

³⁰¹ Wolfson interview.

³⁰² Esseks interview.

³⁰³ Ibid.

³⁰⁴ Cathcart interview.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

sphere and the legal arguments in relation to a piece of marriage equality litigation has already born fruit in the victory that was the decision in *U.S. v. Windsor*. The next section will move on to analyze the organizations' strategies and actions surrounding the selection of plaintiffs for marriage test cases. This area of the litigation campaign for marriage equality is one where the line between that which is legal and that which is political becomes blurry when it exists at all. This also demonstrates the influence the political aspects of the marriage cases have on their legal aspects. As the attorneys explained, plaintiffs were political agents that also happened to fill a legal role in lawsuits. This casts some doubt on the attorney's previous assertion that there is no influence of one side on the other.

E. Plaintiff Selection

The next step in the litigation campaign after laying the political groundwork for the case is selecting plaintiffs. There are two problems inherent in this activity: actually getting the plaintiffs, and getting the plaintiffs that will be the best for the cause. Since the organizations involved in marriage equality litigation are acutely aware of the interaction between law and politics, the selection of plaintiffs in many ways bridges the gap or blurs the line between that which is political and that which is legal. The plaintiffs serve a legal purpose – without them, there is no lawsuit – but they also serve as “ambassadors” for the whole LGB community.³⁰⁷ The plaintiffs in these test cases are the faces of the LGB population for many people outside of the community. As such, they must do outreach and education, which are political activities.

This double use of plaintiffs once again shows the attorneys' awareness of the interaction or inseparability of law and politics and also demonstrates concrete strategies the organizations involved in marriage equality litigation employ. Furthermore, the process of plaintiff selection is primarily a political one. The legal role plaintiffs must play is easy, but the political roles the

³⁰⁷ Bonauto interview.

plaintiffs must play are time-consuming, delicate, and highly important. The attorneys in these organizations are keenly aware of the double role the plaintiffs in test cases must play. As such, immense amounts of energy are invested in selecting plaintiffs, and the attorneys always look for individuals that meet certain exacting criteria.

All of this energy is expended to ensure that the ultimate goal of the marriage equality litigation campaign is not upset in the political, or even the legal, sphere because unsavory clients become the face of the litigation. Even in legal documents filed with courts, the plaintiffs send political messages about the integration of LGB people in society and their similarities with other Americans, which are political arguments aimed at drawing the court into a presented consensus with the rest of society. This is a common issue in civil rights movements. For example, Rosa Parks was chosen as the symbol of the Montgomery Bus Boycott because of her wholesomeness, whereas Claudette Colvin, who was refused a seat on a Montgomery city bus nine months before Parks, was passed over because she was an unwed teenage mother.³⁰⁸ Leaders of the African-American community in Montgomery thought that Colvin's situation "would make her an extremely vulnerable standard-bearer" for the Civil Rights Movement.³⁰⁹ Leaders of the organizations involved in marriage equality litigation vet their plaintiffs in the same manner.

The first problem in finding plaintiffs, that of simply getting members of the LGB community to serve as plaintiffs in a test case, was largely solved for Murray through the statewide town meetings that the VCLGR held before *Baker* was filed. The plaintiffs for the Vermont litigation were drawn from the VFMT Speakers' Bureau. This Bureau was set up in VFMT to train people to speak to the public about the issues that face the LGB population. They

³⁰⁸ Taylor Branch, *Parting the Waters: America in the King Years 1954-63*, (New York: Simon & Schuster, 1998), 123.

³⁰⁹ *Ibid.*

were natural spokespeople for the LGB population, so they were natural selections for the plaintiffs for the eventual lawsuit for marriage equality in Vermont.³¹⁰ Robinson elaborated on that, explaining that the call for plaintiffs for the impending litigation was transmitted orally.³¹¹

For Bonauto in the lead-up to *Goodridge*, the problem of finding plaintiffs was even more swiftly dealt with because people had been coming to her seeking to file a lawsuit for marriage equality for years before she felt she had laid the correct groundwork for a suit to go forward.³¹² Bonauto also asked allies (attorneys and laypeople) across Massachusetts to get plaintiffs from every corner of Massachusetts.³¹³ Wolfson encountered the same situation Bonauto did, indicating, “Sometimes the plaintiffs come to you because something horrible happened.”³¹⁴ Wolfson explained that organizations also look for compelling stories, like couples that could not visit each other in the hospital, or who have been together for decades.³¹⁵ Cathcart explained that the methods by which Lambda Legal have recruited plaintiffs for test cases has varied from state to state. In the states wherein Lambda does not care immensely about giving opponents to marriage equality forewarning, Lambda uses the state “Equality Organizations” because they are usually the largest LGB groups in the state, as well as Lambda’s mailing and membership lists.³¹⁶ Lambda follows a slightly stealthier plan of action when they do not want to give opponents any forewarning at all. In those cases, the method of obtaining plaintiffs will be by word of mouth and through allies throughout the state in question.³¹⁷

³¹⁰ Murray interview.

³¹¹ Robinson interview.

³¹² Bonauto interview.

³¹³ Ibid. She succeeded in getting plaintiffs from five of the fourteen counties in Massachusetts.

³¹⁴ Wolfson interview.

³¹⁵ Ibid.

³¹⁶ Cathcart interview.

³¹⁷ Ibid.

The second problem of finding “good” plaintiffs is much harder than simply finding any plaintiffs for a test case. As Cathcart explained, “plaintiffs...have to be better than good.”³¹⁸ Speaking with some remove, Wolfson explained all impact litigation organizations look for “powerful stories and compelling messengers” for their test cases.³¹⁹ The plaintiffs are the messengers in marriage equality cases. There is an immense amount of media focus on the named plaintiffs in the cases, and the plaintiffs themselves are ambassadors for the entire LGB population. As such, the plaintiffs need to have certain characteristics that not all LGB people possess. Murray said she looked for people with specific stories to tell, especially parents and men. All plaintiffs had to be firmly dedicated to the cause of marriage equality, too.³²⁰ According to Murray, she wanted parents because the “big bugaboo of opponents [was:] gay people can’t get married because they can’t have kids.”³²¹ To counter this argument, Murray ensured that two out of the three plaintiff couples in *Baker* were parents raising children.³²² Murray also wanted male couples for her test case in Vermont because, in her words, “there was – there is – a very big stigma against gay men...lesbians are invisible and gay men get tortured.”³²³ To counter that stigma, Murray brought Stan Baker and his partner Peter Harrigan on board. Baker became the lead plaintiff for the test case.³²⁴

Much like Murray, Bonauto looked for plaintiffs that met specific criteria. The plaintiff couples that Bonauto took on in her cases in Massachusetts, Connecticut and elsewhere needed the following: to have been affected by marriage discrimination; a genuine desire to get married; the ability to stand up to scrutiny; no skeletons in the closet; emotional stamina; and, the ability

³¹⁸ Ibid.

³¹⁹ Wolfson interview.

³²⁰ Murray interview.

³²¹ Ibid.

³²² Ibid.

³²³ Ibid.

³²⁴ Ibid.

to be honest about personal issues.³²⁵ Not many people met those standards. Furthermore, Bonauto sought to situate the plaintiff couples in the community. The selection of plaintiffs was deliberate in the pursuit of this end. All plaintiff couples were selected to, in some way or another, break down the perceived barriers between the LGB community and everyone else.³²⁶ Bonauto wanted people outside the LGB community to associate and sympathize with the plaintiffs in her cases.

Cathcart, speaking for Lambda Legal, echoed the broad statement of Wolfson, and reiterated many of the characteristics Bonauto claimed to look for in plaintiff couples. Cathcart looked for clients that could “speak to as wide a range of people in the LGBT community and outside the LGBT community.”³²⁷ To accomplish this goal, he and Lambda looked for the following characteristics: compelling stories, such as long, loving relationships; couples raising children (similar to Murray); “people who have faced concrete problems” like the inability to visit a loved one in the hospital; racial diversity; the ability to make others see themselves or their community as involved in the litigation; and geographical diversity.³²⁸ Cathcart explained that geographic diversity means different things “in states the size of California, and states the size of Rhode Island...even New Jersey versus Iowa” but that such diversity is “critically important.”³²⁹ As examples to prove the importance of geographic diversity, Cathcart cited Illinois and New York State. Both such states have massive metropolises that dominate the politics of their states (Chicago in Illinois and New York City in New York), and often breed resentment either “up-state” or “down-state” in New York and Illinois, respectively.³³⁰ Thus, to

³²⁵ Bonauto interview.

³²⁶ Ibid.

³²⁷ Cathcart interview.

³²⁸ Ibid.

³²⁹ Ibid.

³³⁰ Ibid.

avoid the appearance that a group of big-city LGB people was imposing its views on the rest of the state, Lambda worked to get plaintiffs from across both states when it brought litigation in Illinois and New York.³³¹ Finally, when selecting clients, Lambda made sure that there was no history of domestic violence, nor were there criminal records, or any other sorts of “white noise” associated with any of the plaintiffs.³³² These sorts of things, according to Cathcart, would keep people from focusing on the discrimination that the plaintiff couples were fighting against.³³³

Esseks and the ACLU do many of the same things that Cathcart at Lambda and Bonauto at GLAD do. Esseks had some clients just walk through the door, just like Bonauto and Cathcart. Edith Windsor of *U.S. v. Windsor* fame was one such client.³³⁴ However, the ACLU also interviewed potential clients, looking for plaintiffs that would do the best job of demonstrating the harm inflicted by denying marriage to same-sex couples.³³⁵ The ACLU also looked for qualities that would make the plaintiffs relatable, such as long relationships and couples that had sacrificed for each other.³³⁶ All of these qualities kept people focused on the discrimination at issue in the litigation.

Every attorney interviewed for this study agreed that the plaintiffs in marriage litigation had to be “better than good” because they had to serve a political role as “ambassadors” for their cause. To avoid clients who may be viewed as unsavory by those either inside or outside of the LGB community, attorneys in the organizations bringing marriage equality lawsuits impose high standards on those who wish to bring marriage equality litigation. As mentioned earlier, not many people meet the criteria set by the organizations for plaintiffs in marriage test cases. Not

³³¹ Ibid. For example, in New York, Lambda worked with 44 plaintiff couples, located in New York City, Albany and Ithaca.

³³² Ibid.

³³³ Ibid.

³³⁴ Esseks interview.

³³⁵ Ibid.

³³⁶ Ibid.

many people have what it takes to be a plaintiff in such a high stakes case. As Cathcart put it, choosing nearly perfect plaintiffs allows for the focus of the lawsuit to be on the discrimination they have faced, and not on distracting “white noise” such as domestic issues.³³⁷

The careful selection of plaintiffs in marriage equality cases has not gone unnoticed. Some people outside of the organizations involved in the marriage equality litigation campaign have asked whether such selection to produce such an atypical plaintiff pool makes for good test cases, since the plaintiffs are not representative of most people. One such person was Judge Downing of the Washington State Superior Court.³³⁸ In *Andersen v. King County*, which eventually reached the Washington State Supreme Court, Judge Downing observed

Certainly these plaintiffs have been *carefully handpicked* to serve as *suitable standard bearers* for the cause of same-sex marriage. Their lives reflect hard work, professional achievement, religious faith and a willingness to stand up for their beliefs. They are law-abiding, taxpaying model citizens.³³⁹

Despite their exemplarity, Judge Downing worried “if it clouds the Court's view to decide a test case with a view to parties who may rise above the median in so many respects.”³⁴⁰ Judge Downing decided the answer to his own question was no.

While recognizing the imperfection of human nature, it is still beneficial to contemplate what we all should be rather than what we, too often, are. The delineation of rights is best done with a view to human potentialities rather than in fear of our shortcomings. The characteristics embodied by these plaintiffs are ones that our society and the institution of marriage need more of, not less. Let the plaintiffs stand as inspirations for all those citizens, homosexual and heterosexual, who may follow their path.³⁴¹

As the decision of Judge Downing shows, marriage equality advocates accomplished their political goal with its plaintiff selection in *Andersen*. The judge was highly aware that the lawyers had “carefully handpicked...suitable standard bearers” for the cause of marriage equality in Washington state and found that such an atypical group of individuals was actually quite

³³⁷ Cathcart interview.

³³⁸ *Andersen v. King County*, 2004 WL 1738447 (Wash. Super. 2004).

³³⁹ *Ibid.*, *12, emphasis added.

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

suitable for a marriage equality test case. There was no “white noise” in *Andersen*, just plaintiffs that Cathcart would describe as “better than good.” While it is beyond the scope of this study to determine if or how much the lives of the plaintiffs swayed Judge Downing, it is clear that the judge thought highly of the plaintiffs before him, enough to comment extensively on them. This demonstrates the political nature of the role of plaintiffs in a marriage test case. Any same-sex couple could be plaintiffs to marriage litigation, but only atypical couples would lead a judge to wax so poetically in a decision.

In the final analysis, the selection of plaintiffs, while undertaken to fill a legal position in a lawsuit, is inherently a political process. The selection of plaintiffs is done to appeal to as broad an array of people as possible. This is not fine-tuned legal argument; this is argument by example and is political in nature since it attempts to build popular consensus around marriage equality. The following section will expand the analysis of the marriage equality litigation campaign into another subject that blurs the line between legal and political: the marshalling of *amici curiae*.

F. Marshalling *Amici Curiae*

The lawyers in the organizations involved marriage equality litigation do have an understanding that marriage equality cases have legal and political aspects that must be addressed if the movement is to make advances. Perhaps in acknowledgement of the political nature of marriage cases, organizations have taken special care of one of the most political aspects of arguing a lawsuit, the *amicus curiae* briefs. Just as in the political action of selecting good plaintiffs, organizations invest tremendous energy into acquiring *amici curiae* that will sway courts with political statements as well as legal arguments. Every attorney in this study indicated that the *amicus* briefs are of great import in the cases, not only for what they say, but

also for who writes them. Sometimes the biggest political statement an *amicus* organization can make is placing its name on a brief, signaling to the court that the organization supports marriage equality. As with carefully selected plaintiffs, *amici curiae* are in a legal position in a lawsuit, but their activity in marriage equality cases is almost wholly political.

Although numerous *amici* weighed in during the *Baehr* litigation, the first major *amicus* campaign marriage equality advocates undertook was in Vermont during the *Baker* litigation. Murray explained that the *amicus* briefs in *Baker* served multiple purposes. *Amicus* briefs needed to bring arguments that could not be given much room in the principal briefs of the case. The overall strategy was to let the principal briefs focus on the legal arguments, while the *amicus* briefs were for arguments that the *Baker* counsel though might sway the court or a single justice, but were not worthy of full mention in the principal brief.³⁴² Arguments about applying higher standards of review to classifications based on sexual orientation were left to the *amicus* briefs of major national organizations in the LGB rights movement, and not the principle brief.³⁴³

Robinson expanded upon this point, explaining that Lambda Legal argued that prohibiting marriage equality constituted sexual orientation discrimination in their *amicus* brief.³⁴⁴ The National Organization for Women and the National Center for Lesbian Rights then argued in their briefs that prohibiting marriage equality constituted sex discrimination.³⁴⁵ Wolfson agreed with Murray and Robinson, stating that the *amicus* briefs were for “arguments that you don’t have space to make, or that someone else has a stronger voice or greater expertise to make that will round out the core set of arguments.”³⁴⁶ The key to a successful *amici* campaign, according to Wolfson, was finding who will “resonate with the court, even if the

³⁴² Murray interview.

³⁴³ Ibid.

³⁴⁴ Robinson interview.

³⁴⁵ Ibid.

³⁴⁶ Wolfson interview.

content of what they're saying isn't very different," from what the lawyers or other *amici* argue.³⁴⁷ An *amicus* that resonates with the court might be a powerful business group or other organization that has considerable sway outside of the courtroom that the court would be aware of. In some ways, the messenger to the court is more important than the message itself.

The *amicus* briefs also needed to bring various voices to the court that the marriage equality advocates wanted the court to hear. Thus, the *Baker* attorneys focused on getting a brief from clergy in Vermont to rebut the argument that marriage equality "goes against God's law."³⁴⁸ Murray and her co-counsel also arranged for a brief from psychologists to address "the kid issue" and rebut the argument "that kids are going to be screwed up if they get raised by gay people."³⁴⁹ In this way, the attorneys in *Baker* addressed concerns that were political, not legal, in that they did not deal with standards of judicial scrutiny or legal rules.

When conducting her own *amici* campaigns, Bonauto focused on getting "genuine experts...with no ax to grind" to address the court.³⁵⁰ For example, in *Goodridge*, Bonauto managed to have the two best-known family law attorneys in Massachusetts compose a brief debunking the argument that same-sex couples should not be allowed to marry because they could not procreate.³⁵¹ Not only were the attorneys well known and widely acknowledged as the foremost experts in Massachusetts's family law, but also "not in any way could anyone accuse them of being great gay rights supporters."³⁵² Bonauto also looked for the unusual voices that the court might be surprised to hear in support of marriage equality. The best example of this was in the *Windsor* litigation when Bonauto and others arranged to have 286 of the Fortune 500

³⁴⁷ Ibid.

³⁴⁸ Murray interview.

³⁴⁹ Ibid.

³⁵⁰ Bonauto interview.

³⁵¹ Ibid.

³⁵² Ibid.

companies sign on to a brief explaining how DOMA was bad for business.³⁵³ The businesses added a new voice, one the court was not expecting, and also served as a symbol of how much public perception had changed to be in favor of marriage equality. Once again, the messengers to the court were just as important as the message they bore.

Bonauto's prominence and skill at conducting *amici* campaigns is such that, when asked how to make a good *amici* campaign, Esseks replied, "you talk to Mary Bonauto."³⁵⁴ Esseks went on to elaborate on what he and the ACLU sought in *amicus* briefs for marriage cases. Esseks looks for "religious voices, business voices, conservative voices, [and] unexpected messengers."³⁵⁵ Esseks particularly likes utilizing unexpected messengers because they ensure that the briefs will actually be read in cases where there are numerous lengthy briefs.³⁵⁶

Similarly, Cathcart explained that he and Lambda look for "as broad a coalition of voices as possible," in the *amicus* briefs.³⁵⁷ Thus, he looks for political leaders, religious leaders, civil rights organizations and organizations with good name recognition.³⁵⁸ Just as important as the actual argument of the brief and the organization signing off on it is the law firm that assists in the composition of the brief. Cathcart noted that there has been a massive shift in recent years, with more and more major national law firms assisting in the composition of *amicus* briefs for marriage cases.³⁵⁹ This is especially interesting to Cathcart because it used to be that one could not be gay and work for a major law firm because they were so conservative.³⁶⁰ To Cathcart, the fact that major firms actively assist with *amicus* briefs in marriage cases, even though they make little money on them and might jeopardize client relations, is a sign of changes in society that

³⁵³ Ibid.

³⁵⁴ Esseks interview.

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ Cathcart interview.

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ Ibid.

have already occurred that favor the adoption of marriage equality.³⁶¹ This is especially helpful, because the major firms are “a world the judges know,” and they will realize that the legal establishment is on the side of marriage equality when at one point it was quite conservative on that issue.³⁶² Thus, to Cathcart, even “the messenger for the messenger” is important in *amicus* briefs.³⁶³

All the attorneys interviewed for this study recognize the importance of good *amici curiae*, and thus seeks out *amici* that will sway courts. The manner by which good *amici* sway courts is not merely through legal arguments. The presence of major national law firms on the briefs signals to courts that the national legal establishment is in favor of marriage equality. Briefs from clergy, psychologists, and family law specialists also put the lie to common stereotypes and arguments against marriage equality. Business and conservative voices in briefs will also alert judges to the fact that marriage equality is not a fringe or partisan issue, but a mainstream one that affects many segments of the population. These arguments, in contrast to the legal arguments offered by *amici* like the ACLU and NCLR, are inherently political arguments. In selecting and courting *amici*, the attorneys in the organizations pursuing marriage equality litigation demonstrate their understanding of the intersection of the law and politics. The next section will analyze how far that understanding goes toward an acceptance of the scholarly literature’s backlash hypothesis.

G. Backlash

As mentioned previously in the literature review, a great controversy in the scholarly literature on the marriage equality litigation campaign is over the presence of “backlash.” This backlash hypothesis presupposes an intersection of the law and politics, which the attorneys in

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Ibid.

this study accept as well. However, those attorneys are not completely willing to take the next analytical step and refer to the political resistance it faces due to legal victories as “backlash.” When the attorneys interviewed in this study brought their test cases to court, they were all aware of the possibility of resistance, but not all of them actually referred to that resistance as backlash. In fact, a couple argued that the term “backlash” is not even the correct term to use in the context of marriage equality litigation. Nonetheless, the attorneys were aware of the potential for adverse reactions after a favorable court decision came down. This shows the attorneys in the organizations responsible for much marriage equality litigation have internalized key provisions of the backlash hypothesis, even if attorneys do not use the word “backlash.” While a couple of attorneys refused to refer to the resistance they met after favorable judicial decisions as “backlash,” they did mention that they were aware of negative political ramifications after such a decision. This affected the political decisions to fill the legal positions of plaintiffs and *amici curiae* in marriage equality litigation.

Murray defined backlash nationally and locally. According to her experience in *Baker*, the local backlash in Vermont was felt in 2000 was “entirely political, in that some legislators who had voted for civil unions...were voted out.”³⁶⁴ The Democrats, who had almost uniformly supported the civil unions law, lost control of the House of Representatives and almost lost the Senate. Murray thought that the backlash was completely unnecessary, because the decision in *Baker*, in her view, unnecessarily forced the legislature to enact a law to remedy the denial of marriage benefits to same-sex couples. She would have preferred that the *Baker* court simply imposed marriage on the state. In fact, she and Robinson had premised their entire strategy on the legislature never getting involved.³⁶⁵ Interestingly, Murray expressed the opinion that a more

³⁶⁴ Murray interview.

³⁶⁵ Ibid.

radical decision simply imposing marriage equality on the state by judicial fiat would have caused less severe backlash than the more cautious decision in *Baker* that forced the legislature to act. Another unexpected feature of local backlash to Murray was that the debate over marriage equality allowed people to express homophobia in ways that they had not felt free to do so before. Murray cited people going on the radio and putting lawn signs out in opposition to marriage equality and civil unions as examples of this emergence of homophobia.³⁶⁶ Nationally, Murray defined backlash as “one hell of a lot of statutes and constitutional amendments,” in over thirty states banning marriage equality.³⁶⁷

Robinson defined backlash as the idea that a win in court is subject to a potentially adverse public reaction. She argued that the fact that one must account for this adverse public reaction “up front” to avoid negative repercussions of a legal victory later makes marriage equality litigation different from other types of litigation.³⁶⁸ Esseks agreed with Robinson, defining backlash as “political fallout, political consequences to advances in litigation,” but also had nothing good to say about the backlash-hypothesizer critiques of the marriage equality litigation campaign.³⁶⁹ To him, such critiques assumed too much compartmentalization of law and politics by the organizations involved in marriage equality litigation and tunnel vision on the part of the litigators that is simply not true in the litigation campaign. Cathcart reverted to the shorthand of marriage equality advocates to explain what backlash meant to him, referring simply to “Hawaii and Iowa.”³⁷⁰ He also explained that the right-wing legal groups, such as the Thomas Moore Center, were sources of backlash. Although he expressed hope for the future,

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Robinson interview.

³⁶⁹ Esseks interview.

³⁷⁰ Cathcart interview.

and explained that, as of 2014, backlash has become substantially “watered down,” Cathcart did not at any time suggest that backlash would end within the foreseeable future.³⁷¹

Bonauto and Wolfson, on the other hand, do not believe that the term “backlash” is correct when applied to the events surrounding the marriage equality litigation campaign, but they do acknowledge the resistance the marriage equality advocates have faced in response to their victories in court. Bonauto has repeatedly explained why she is opposed to the term “backlash,” as applied to the resistance she has faced after winning victories in court, usually quoting the Reverend Dr. Martin Luther King Jr., who said that the Civil Rights Movement did not experience backlash, but did experience “lashing.”³⁷² According to Bonauto, the LGB population has experienced similar lashing. There was no real backlash *against* marriage equality, just a “continued lash” beginning before the advocates of marriage equality won any concrete victories.³⁷³ One of the things Bonauto reminds others is that, before *Goodridge* was even filed, there were thirty-six states with statutory prohibitions of same-sex marriage and four that had amendments. “Before there was marriage anywhere in the nation, there were still plenty of legislative leaders” who preemptively opposed marriage equality and who “used the initiative process as a tool against gay people.” According to Bonauto, LGB people have “had plenty of lash.”³⁷⁴ Bonauto also disagrees with some political scientists – such as Gerald Rosenberg and Michael Klarman, mentioned in the literature review section of this thesis – who argue that the Democratic Party lost the 2004 elections, particularly in Ohio due to the marriage issues being on

³⁷¹ Ibid.

³⁷² Bonauto, “*Goodridge in Context*,” 65n365; Bonauto interview.

³⁷³ Bonauto interview.

³⁷⁴ Ibid.

the ballot and in the public mind due to *Goodridge*.³⁷⁵ Bonauto agrees with Thomas Keck and others that the backlash hypothesis is far overblown, especially with regard to Ohio in 2004.³⁷⁶

Wolfson similarly cites the Rev. Dr. King in his writings and interviews. Wolfson's 2004 book *Why Marriage Matters* cites the same speech that Bonauto cites when she explains that the LGB population has not suffered from backlash, but has suffered from lashing. King spoke of the supposed "white backlash" to the African-American civil rights movement's successes.³⁷⁷ However, King argued that there was no backlash,

Because that gives the impression that the nation had decided it was going to solve this problem and then there was a step back because of developments in the civil rights movement. Now, the fact is that America has been backlashing on the civil rights question for centuries now...the backlash is merely the surfacing of prejudices...that already existed and they are just now starting to open.³⁷⁸

Wolfson believes that the campaign for marriage equality has suffered from the same surfacing of extant prejudices, instead of the nation agreeing to grant marriage equality and then collectively reversing that decision. Instead, Wolfson views the resistance to marriage equality litigation victories as simply a manifestation of a "struggle over two competing visions of America's meaning, principles of equality under the law, and so on."³⁷⁹ This is similar to Murray's description of what she referred to as backlash in Vermont after *Baker*. After the decision of *Baker* was handed down and the legislature began seriously debating provisions to carrying out its mandate, latent homophobia bubbled up across the state.

Whether or not the attorneys involved in marriage equality litigation referred to the resistance they faced due to court victories as "backlash" or bought into the backlash hypothesis, every attorney understood that resistance existed. Every attorney involved in this study

³⁷⁵ Ibid.

³⁷⁶ Ibid.

³⁷⁷ Martin Luther King, Jr., "Seventh Annual Gandhi Memorial Lecture," Howard University, Washington, D.C., November 6, 1966 quoted in Evan Wolfson, *Why Marriage Matters: America, Equality and Gay People's Right to Marry*, (New York: Simon & Schuster, 2004), 19.

³⁷⁸ Ibid.

³⁷⁹ Wolfson interview.

explained that resistance to legal victories was in his or her mind as every case was litigated. Murray explained that backlash was in her mind when *Baker* was pending, and that she and VFMT did everything they could to prevent debilitating backlash by continuing the educational process.³⁸⁰ However, she did stress that since she, Robinson, and Bonauto were all lawyers they had faith in the judiciary's power to "protect minorities from the tyranny of the majority."³⁸¹ Murray did point out that other members of the LGB community were much more frightened of backlash or political repercussions. One such community member Murray named was Bill Lippert, an openly gay Democratic member of the Vermont House of Representative from Hinesburg, Vermont. Lippert was worried not only that he might lose his seat, but also that the Democratic Party might lose spectacularly because of its association with the marriage equality struggle.³⁸² Lippert was also worried for his own personal safety; Murray reported that he received death threats due to his association with the civil unions law and his open homosexuality.³⁸³ Despite this, Murray insisted that the lawyers were not, and could not have been, paralyzed by their fear of negative repercussions or resistance.

Robinson, Murray's co-counselor and a fellow Vermonter, explained that one must always expect some sort of adverse reaction to victory in marriage equality cases, but that the intensity of such a reaction was a local question.³⁸⁴ According to Robinson, marriage equality cases "are not in a place yet where they can escape public notice."³⁸⁵ The question for Robinson is whether or not the public attention will bring debilitating negative repercussions, the way it was in Vermont in 2000 when the Democrats lost the Vermont House of Representatives.³⁸⁶ In

³⁸⁰ Murray interview.

³⁸¹ Ibid.

³⁸² Ibid. Although the Democrats lost control of the Vermont House of Representatives, Lippert still holds his seat.

³⁸³ Ibid.

³⁸⁴ Robinson interview.

³⁸⁵ Ibid.

³⁸⁶ Ibid.

2009, when Robinson shepherded the Vermont marriage equality legislation through the state legislature, the bill passed, same-sex couples got truly married, and no real adverse reaction occurred. Robinson attributes this to the fact that in 2009 the opponents of marriage equality were weak in influence, disorganized, and few in number.³⁸⁷ This nicely echoes Klarman's assertion that backlash only comes when losers in court cases are "committed, organized and geographically concentrated."³⁸⁸

Bonauto unequivocally stated she expected resistance in all of the marriage equality cases she worked on. In fact, Bonauto even put the DOMA litigation she was pursuing on hold for the 2008 election cycle so that the Democratic Party would not be put into a tough place and potentially lose votes because of the divisive issue of marriage.³⁸⁹ While Bonauto may disagree with some scholars (e.g. Rosenberg) that negative feelings toward marriage equality among voters in swing states cost the Democrats the 2004 elections, she acted as if she did agree with such scholarship. This shows the internalization of the backlash hypothesis, even if attorneys do not refer to the negative repercussions of legal victories as "backlash" the way Klarman and Rosenberg do. Bonauto also put her DOMA litigation on hold until many years after Massachusetts allowed same-sex couples to wed in 2004. Although section 3 of DOMA harmed same-sex couples in Massachusetts "because the federal government was telling these married people that they were not married," Bonauto waited five years to file a lawsuit "for really good reasons...we wanted the harm to build up."³⁹⁰ That way, all the legal and factual arguments would be in the marriage equality advocates' favor.

³⁸⁷ Ibid.

³⁸⁸ Klarman, *From the Closet to the Altar*, x.

³⁸⁹ Bonauto interview.

³⁹⁰ Ibid.

Cathcart also stated that one has to be prepared in every marriage case for resistance to any advances the litigation campaign may make in court.³⁹¹ The history of the struggle for marriage equality has been one of intense struggle to win in court and hold on to that victory in the political sphere beyond the courtroom. According to Cathcart, though, that has changed in the past few years. “Over the twenty-some-year period in which this work has been done...there have been enormous changes. Just look at the polling data from the early ‘90s to last year.”³⁹² Now Cathcart and Lambda Legal actually struggle with the question, “what do you do with cases that no one is defending?”³⁹³ As an example, Cathcart cited the state of Nevada’s withdrawal from a marriage equality case in which it had defended the Nevada constitutional amendment that banned marriage equality. The state had been forced to withdraw its defense because the Court of Appeals for the Ninth Circuit, the precedents of which bind Nevada courts, decided that classifications based on sexual orientation must be subject to heightened judicial scrutiny in *Smithkline Beecham Corporation v. Abbot Laboratories*.³⁹⁴ Cathcart explained that this recent switch in public support and the states’ withdrawal from defense of statutes and constitutional amendments is a problem, but “we’ve spent the last decades not even being able to dream of having that problem.”³⁹⁵

Esseks agreed with Cathcart and Bonauto that backlash must be expected in every marriage equality case, but he argued that the dip in public support that usually follows marriage

³⁹¹ Cathcart interview.

³⁹² Ibid. In the early 1990’s, over 75% of respondents to the NORC General Social Survey indicated that they thought same-sex couples having sexual relations was “always wrong,” (Andersen, *Out of the Closets and Into the Courts*, 116, fig. 4). In 2010-2011 national polls showed a majority of Americans in favor of marriage equality for the first time (Klarman, *From the Closet to the Altar*, 218).

³⁹³ Cathcart interview.

³⁹⁴ Cathcart interview; 740 F.3d 471 (C.A.9, 2014). The *Smithkline Beecham Corp.* case involved a *Batson* challenge to the removal of a gay juror from a jury pool about to hear a case involving AIDS medication manufacturers.

³⁹⁵ Cathcart interview.

equality victories in court “tends to turn around” once one takes a longer view of time.³⁹⁶

Wolfson also agreed that resistance must be expected, and that the work of blunting the ferocity of that resistance “is not done simply by filing a brief or getting a ruling.”³⁹⁷ However, he did allude to the fact that this understanding was not shared by all lawyers and plaintiffs involved in marriage equality litigation, perhaps referring to the private attorneys and individual plaintiffs outside of the national marriage equality organizations who still file cases in favor of marriage equality.³⁹⁸

As Cathcart mentioned, there has been a massive shift in public opinion that has resulted in decreased vigor for defense of statutes and constitutional amendments banning marriage equality. However, every attorney involved in this study explained that the United States as a whole has not reached the end of resistance to the victories of marriage equality advocates in court. Every attorney explained that marriage equality cases must still be filed with the expectation of resistance outside the courtroom, even if marriage equality advocates secure a victory in court.

H. Backlash Due to Prematurity: Was Marriage Foisted on the LGB Rights Movement?

The following section analyzes a different resistance issue: whether the resistance marriage equality advocates suffered was due to the fact that the marriage issue was imposed on the broader LGB rights movement. If such imposition actually occurred, it may explain the debilitating early resistance the litigation campaign faced because the LGB rights organizations had been unable to do the requisite preparatory political groundwork.

³⁹⁶ Esseks interview. Cf. Engel, “Frame Spillover,” 405.

³⁹⁷ Wolfson interview.

³⁹⁸ Ibid.

According to some scholars, the marriage issue arrived rather suddenly in the LGB rights movement and was not welcomed by all.³⁹⁹ The same scholars argue that the broader movement changed because of the rise of the marriage equality litigation campaign within the broader LGB rights movement. D’Emilio notes the suddenness of marriage’s arrival on the national stage with the decision in *Baehr*, a decision the United States at large was wholly unprepared for.⁴⁰⁰ D’Emilio also points out that the organizations in the LGB rights movement themselves was not wholly supportive of marriage. Two LGB rights advocates, Paula Ettelbrick and Tom Stoddard, toured the nation in the 1980s and 1990s for Lambda Legal, publically debating the merits of marriage as a goal for the LGB rights movement, with Ettelbrick arguing against it and Stoddard arguing for it.⁴⁰¹ This was a real debate in the LGB rights movement, since many members of the movement organizations agreed with Ettelbrick and believed they should create their own types of relationships. Other issues, such as AIDS research, bullying of LGB children, and employment discrimination were seen by many as more pressing issues for LGB people than marriage. According to D’Emilio, many factors, such as the New Right’s emphasis on family values and the aging of the Stonewall Generation, according to D’Emilio, led to marriage becoming the prominent issue of the LGB rights movement.⁴⁰²

Pinello’s study of the marriage equality campaign of the early 2000s quotes Evan Wolfson to explain how the LGB rights movement changed due to the advent of marriage as an issue after *Baehr*. According to Wolfson, the entire organizational structure of the LGB rights movement changed to lay the groundwork for marriage equality litigation.⁴⁰³ The “Equality Federation of statewide groups” was formed to bring all LGB rights groups into the same

³⁹⁹ D’Emilio, “Will the Courts Set Us Free?”40-41; Pinello, *America’s Struggle for Same-Sex Marriage*, 27-28.

⁴⁰⁰ D’Emilio, 58.

⁴⁰¹ *Ibid.*, 41.

⁴⁰² *Ibid.*, 50.

⁴⁰³ Pinello, *America’s Struggle for Same-Sex Marriage*, 27.

strategy and to keep them all informed.⁴⁰⁴ The movement organizations also shifted toward seeing things in terms of “the cause” and not “one case, or one battle or one issue.”⁴⁰⁵ According to Wolfson, this thinking and organization was completely new for the LGB rights movement and happened because of the *Baehr* litigation and the lessons learned from its aftermath.⁴⁰⁶

Unsurprisingly, all the attorneys interviewed in this study indicated that the marriage issue was ripe for litigation when it arose in the 1990s, and that it was neither imposed upon, nor did it substantively change the strategies of, the broader LGB rights movement. In Vermont, according to Murray and Robinson, the next legal step for LGB Vermonters was marriage by the mid 1990s. Murray listed three crucial steps that led to marriage being ready for litigation and acceptance in Vermont. First, in 1989, Vermont’s legislature enacted a hate crimes statute that listed sexual orientation and gender identity as protected characteristics, along with more traditional protected categories such as race.⁴⁰⁷ Second, in 1992, a new anti-discrimination law went into effect that protected LGB people. Third, in 1993, the Vermont Supreme Court ruled that same-sex couples could adopt each other’s children.⁴⁰⁸ This is similar to the incrementalist approach that Eskridge advocated for in the early 2000s.⁴⁰⁹ Regardless of the empirical validity of Eskridge’s theory now, at the time Murray was preparing for a test case for marriage in Vermont in the 1990s, the legal climate was ready, so that marriage was in no way foisted on the LGB rights movement. In fact, Murray argued, “We went after it.”⁴¹⁰ Robinson agreed that the time was right for Vermont’s test case. However, she did explain that she, Murray, and Bonauto

⁴⁰⁴ *Ibid.*, 28.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*

⁴⁰⁷ 13 V.S.A. § 1455

⁴⁰⁸ *Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d 1271 (Vt. 1993). Murray interview. Two years later, the legislature made it possible for same-sex couples to adopt each other’s children by statute (15A V.S.A. § 1-102).

⁴⁰⁹ Eskridge, *Equality Practice*.

⁴¹⁰ Murray interview.

were acutely aware that they could not “jump in too soon,” but that they could not be too late, either.⁴¹¹

Bonauto agreed that the time was right for the test case in Vermont, especially because of the strong protections that the Common Benefits Clause of the Vermont state constitution gave to minorities.⁴¹² The Common Benefits Clause arguments carried the day in *Baker v. State of Vermont*.⁴¹³ She also mentioned that people had come to GLAD from the beginning of her time there.⁴¹⁴ Bonauto even directly rebutted the assertion in “the academic literature” that the organizations that brought marriage equality litigation made an issue of marriage when most people did not want it. She argued that they “weren’t the ones taking the phone calls” and that many LGB people were angry with her for not being even more aggressive on marriage at an earlier time.⁴¹⁵

Wolfson echoed Bonauto, arguing that some activists perceived the marriage issue was foisted on the broader LGB rights movement because they were not focused on marriage when it resurfaced as a major issue in the 1990s. According to Wolfson, most of the activist elite in the LGB rights movement moved away from marriage after the universal failure of the first wave of marriage cases.⁴¹⁶ However, he was quick to point out that a mere two years after the Stonewall Riots of 1969, which are now thought of as the beginning of the modern LGB rights movement, marriage equality was before the United States Supreme Court.⁴¹⁷ To Wolfson, marriage was not a new issue at all, but one that is as old as the modern LGB rights movement itself.

⁴¹¹ Robinson interview.

⁴¹² Bonauto interview.

⁴¹³ *Baker*, 744 A.2d 864, 886.

⁴¹⁴ Bonauto interview. She began working at GLAD in 1990 (<https://www.glad.org/about/staff/mary-bonauto> [accessed February 23, 2014]).

⁴¹⁵ Ibid.

⁴¹⁶ Wolfson interview.

⁴¹⁷ Ibid. He was referring to *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), cert. denied 409 U.S. 810 (1972).

Cathcart agreed with all the other attorneys, but also pointed out that the era in which marriage reemerged as a major issue was a massively different one from the current one due to the difference in the AIDS epidemic in the 1980s and 1990s versus today.⁴¹⁸ Twenty-five years ago, AIDS killed thousands of LGB people and weakened the LGB rights movement tremendously.⁴¹⁹ In that climate, people were dying, and their relationships were unrecognized by the state. The AIDS epidemic also drove people to fight for marriage because marriage offered a reprieve from the grisly battles the LGB community fought for AIDS research and other life-or-death matters. According to Cathcart, marriage was attractive to LGB people of that time because it meant they could fight for “something that was happy, not sad,” and that fighting for marriage equality was seen as something “that wasn’t fighting against something bad, it was fighting for something they’d been denied.”⁴²⁰ Cathcart also scoffed at the idea that the marriage issue was imposed on the LGB rights movement, wondering how anything could actually be “imposed” on the broader movement.⁴²¹ Thus, as marriage equality activists lay the groundwork for a test case in Vermont in the 1990s, and even in Massachusetts later in that decade, the marriage equality activists were ready for the fight that would come.

Esseks was even more adamant that the marriage issue was not foisted upon the broader LGB rights movement. He pointed out that the ACLU brought the first marriage equality case in 1970.⁴²² Like Wolfson, Esseks referred to *Baker v. Nelson*, which even reached the United States Supreme Court. For Esseks, the reemergence of the marriage issue in the 1990s was the result of two forces – one within the LGB rights movement, and one without. Internally, the LGB rights movement at that time had many people who were enthusiastic about marriage and

⁴¹⁸ Cathcart interview.

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² Esseks interview.

wanted it. Of course, there were those who did not want marriage to be a goal for the LGB rights movement, or perhaps wanted it to be a secondary goal.⁴²³ The pro-marriage voices represented by Stoddard eventually became the most noticeable in the LGB rights movement. External to the LGB rights movement, its opponents flew to the issue of marriage equality because they thought that it would be an issue they could win on.⁴²⁴ Politically speaking, they were quite right about this. Esseks went so far as to say:

If we had all collectively stopped, and filed no more briefs, and made no more legal arguments and filed any other marriage litigation, the public discussion would have been focused on marriage anyways, not because it was driven by LGBT rights advocates, but because that's where our opponents wanted the conversation to go.⁴²⁵

To Esseks, any “imposition” of marriage on the broader LGB rights movement may have partially been due to a strategic choice made by conservative groups, but the LGB movement was ready to move on to marriage when it became an issue in the 1990s.⁴²⁶

Given their positions in, and proximity to, the organizations responsible for much marriage equality litigation, it is completely unsurprising that not a single attorney in this study expressed the belief that the marriage issue was foisted upon an unwilling LGB rights movement, or that the machinations of external groups and individuals brought marriage to the fore without the LGB movement doing anything. According to the attorneys, the LGB movement organizations were ready to fight for marriage when marriage became a national issue in the 1990s. They believe that in some places, such as Vermont, the legal and political groundwork had actually been laid before marriage became an issue. In their view, contrary to some scholarly critiques, activists in the broader LGB rights movement did not rush headlong

⁴²³ Ibid.

⁴²⁴ Ibid.

⁴²⁵ Ibid.

⁴²⁶ Cf. Cummings & NeJaime, “Lawyering for Marriage Equality,” 1261, (“By outlawing marriage [equality], Proposition 22 [passed in California in 2000] had the effect of increasing the importance of marriage as a movement goal.”)

into marriage. A better observation would be that advocates for marriage equality did not grasp the intersection of the law and politics in their work to a sufficient extent before losing politically after several early cases.

I. The End of Backlash?

The issue of marriage equality now inhabits a different world than when it was seriously litigated in the 1990s. “Don’t Ask, Don’t Tell” has been repealed;⁴²⁷ a majority of Americans support marriage equality;⁴²⁸ President Obama and Vice President Biden have repeatedly publically voiced support for marriage equality;⁴²⁹ marriage equality advocates have won numerous cases in court; and, several referenda have enacted marriage equality. Looking at these facts, one may be led to believe that the United States has reached the end of backlash. Not a single attorney interviewed in this study believed that such a historical moment has come to pass.

Murray explained that it may seem like the end of backlash has come, but once one travels outside of the Northeast and the few other states that allow marriage equality by law, the resistance to marriage equality is still a reality.⁴³⁰ After all, *Windsor* only struck down section 3 of DOMA, not section 2, which allows states to not recognize same-sex couples’ marriages if they were performed in another state. Murray also employed an analogy that other attorneys used as well—that of the campaign to strike down anti-miscegenation laws in the mid-twentieth century. According to Murray, the California Supreme Court struck down anti-miscegenation laws first, but it took nineteen years for the United States Supreme Court to follow suit in *Loving*

⁴²⁷ 124 Stat. 3515, 3516 and 3517

⁴²⁸ Klarman, *From the Closet to the Altar*, 218

⁴²⁹ Jeff Mason, “Same-Sex Couples Should be Able to Marry: Obama,” *Chicago Tribune*, May 9, 2012; Christi Parsons, “Biden ‘Comfortable’ with Equal Rights for Gays Who Wed,” *Los Angeles Times*, May 8, 2012.

⁴³⁰ Murray interview.

v. Virginia.⁴³¹ Murray predicts that, since the Massachusetts Supreme Judicial Court mandated marriage in 2004, by or before the year 2023 the United States Supreme Court will hand down a decision affirmatively in favor of marriage equality.⁴³²

Robinson echoed Murray, arguing a state-by-state analysis is crucial, because she believes one cannot treat the nation as a homogenous whole on this issue.⁴³³ Wolfson argued, “we have come to a turning point, and victory is within reach and will happen, provided we stick with the work, but it won’t just waft in by itself or on a wave of inevitability.”⁴³⁴ That work includes the public outreach and education programs that accompany the litigation for marriage equality.

While Murray, Robinson, and Wolfson did not in any way indicate that backlash or resistance to marriage equality victories was finished, they were much more hopeful than Bonauto, Cathcart, and Esseks. Bonauto argued, “if it were possible still to criminalize a relationship between same-sex couples, some states would do it, but it’s not possible because of *Lawrence v. Texas*.”⁴³⁵ She also pointed out that many states that do not have marriage equality either by legislation or judicial fiat have constitutional amendments banning marriage equality. “Changing the fundamental charter of your government to forbid any recognition of any relationship that approximates a marriage” is the ultimate insult for Bonauto, and a sign that such states will not go along willingly with court decisions mandating marriage equality.⁴³⁶ Esseks insists that the nation is “not even close” to the end of backlash, but he argues on different

⁴³¹ *Ibid. Perez v. Sharp*, 198 P.2d 17 (CA 1948), struck California’s law, while *Loving*, 388 U.S. 1 (1967), struck down all such laws.

⁴³² Murray interview.

⁴³³ Robinson interview.

⁴³⁴ Wolfson interview. Cf. Martin Luther King Jr., “Letter from Birmingham Jail.” “human progress never rolls in on wheels of inevitability.”

⁴³⁵ Bonauto interview.

⁴³⁶ *Ibid.*

grounds.⁴³⁷ To Esseks, the fight is now no longer over constitutional amendments banning marriage equality, but rather over “religious freedom restoration acts” that permit private discrimination against same-sex couples if such discrimination conforms to an individual’s religious belief.⁴³⁸

Cathcart agreed with Bonauto and Esseks, indicating that the legislature of the state of Indiana was debating the passage of a constitutional amendment banning recognition of same-sex couples’ marriages.⁴³⁹ To Cathcart, when a legislature is still debating such an amendment, one cannot talk of the end of backlash.⁴⁴⁰ However, Cathcart does believe, like Murray does, that the United States Supreme Court will issue a decision affirmatively calling for marriage equality in all states. The only difference between the two lawyers is that Cathcart believes such a decision will come soon—“in the next couple of years.”⁴⁴¹ Even if such a decision comes to pass, Cathcart believes that the resistance to it would be widespread. As an analogy, Cathcart pointed out that *Varnum* decided and settled the issue of marriage equality in Iowa, and has withstood the test of time despite backlash via the judicial retention elections, but that Lambda still has to bring cases to enforce its mandate.⁴⁴² In 2013, Lambda brought two cases to the Iowa Supreme Court on behalf of two lesbian couples. One couple wanted both of their names on the death certificate of a child as parents thereof, the other couples wanted both of their names on a

⁴³⁷ Esseks interview.

⁴³⁸ Ibid. For example, a New Mexican photographer refused to photograph a lesbian couple’s wedding in 2007, causing the couple to sue on the theory that the photographer illegally discriminated based on sexual orientation. The photographer countered that to be forced to photograph a wedding her religion condemns would violate her right to free speech. The New Mexico Human Rights Commission and Supreme Court agreed with the wedded couple, and the U.S. Supreme Court refused to grant cert (David G. Savage, “Supreme Court won’t hear appeal of New Mexico gay bias case,” *Los Angeles Times*, April 7, 2014). Arizona’s vetoed Religious Freedom Restoration Act would have allowed the photographer to refuse service to the lesbian couple.

⁴³⁹ Cathcart interview.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid.

⁴⁴² Ibid.

birth certificate as parents.⁴⁴³ Despite *Varnum*, state agencies refused to do so, although the Iowa Supreme Court eventually ordered them to comply with *Varnum*'s mandate.⁴⁴⁴ Thus, Cathcart foresees massive resistance, especially in the South, to a Supreme Court decision mandating marriage equality.

With still just a bare majority of Americans in support of marriage equality and continued resistance to judicial rulings in favor of marriage equality, the attorneys involved in marriage equality litigation interviewed for this study do not believe the end of backlash has come. These attorneys do not even believe that the apex of backlash has passed, merely that backlash of the future will be different, such as “religious freedom restoration acts.”

J. The Effect of Losses in Litigation and the Legislature

Although most of the literature on the marriage equality litigation campaign has focused on the political resistance or backlash that follows victories in court, there is little research on the effects of litigation losses or of national organizations' opinion of litigation losses.⁴⁴⁵ This flipside of the backlash hypothesis – which assumes marriage equality advocates win in court – remains unexplored. By and large, the attorneys involved in this study argued that litigation defeats actually aided the push for marriage equality, despite the temporary setback. This demonstrates a dramatic departure from the internalization of the backlash hypothesis mentioned previously. The attorneys mostly insisted that in the event of legal defeats the political side of the organizations' work was not harmed, and may have even been helped by that defeat. Murray was the exception to this general rule. Murray believes that litigation defeats are irretrievably bad. “It seems obvious to” Murray that defeats in court would be setbacks for the cause of

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ For a review of the literature on backlash, see section IV, subsection B.

marriage equality.⁴⁴⁶ One attorney involved with marriage equality litigation expressed the belief that *Baker* was not a victory because it did not bring about full marriage equality.

However, the attorney did note that *Baker* wound up being beneficial in the end because it did not derail the progression to marriage in Vermont.⁴⁴⁷

Cathcart explained that, although the line of causality is not perfectly clear, the litigation losses in New York⁴⁴⁸ and Washington⁴⁴⁹ states helped. “The public education value...of lawsuits that lost” was vast because it opened up space for further public discussion.⁴⁵⁰ This would have been harder without “the blaze of publicity surrounding the lawsuits, sometimes even including the loss.”⁴⁵¹ Additionally, litigation losses get “earned media” for the marriage equality campaign, which is how Cathcart sees national and regional organizations getting their message out most effectively.⁴⁵² Wolfson also cited the *Hernandez* loss in New York State as a loss for the marriage equality litigation campaign that wound up actually helping the cause of marriage equality in the long run because of the publicity it received, leading to the legislature passing a marriage equality law.⁴⁵³ Wolfson also saw the massive loss in *Bowers* as another such eventually beneficial loss for the LGB rights movement as a whole and the marriage equality litigation campaign within it. According to Wolfson, *Bowers* “renewed commitment in fighting for the freedom to marry.”⁴⁵⁴

⁴⁴⁶ Murray interview.

⁴⁴⁷ Interview with an attorney associated with the marriage equality movement.

⁴⁴⁸ *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

⁴⁴⁹ *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

⁴⁵⁰ Cathcart interview.

⁴⁵¹ *Ibid.*

⁴⁵² *Ibid.*

⁴⁵³ Wolfson interview.

⁴⁵⁴ *Ibid.* Wolfson has maintained litigation losses are not the end of the line for many years. In reference to his loss in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), Wolfson said “though we may have lost the supreme court case 5-4, the gay community is winning the cause” (Chris Bull, “Fanning the Flames,” *The Advocate*, May 22, 2001, 49).

Esseks agreed with Wolfson and Cathcart, but went even further, arguing that “every single one” of marriage equality advocates’ defeats advance the cause of marriage equality in the long run.⁴⁵⁵ According to Esseks, “we’re trying to get the country’s attention [and] talk to them about why these people want to get married, [so] each of the pieces of litigation has started a conversation.”⁴⁵⁶ These cases, even the losses, allowed the cause of marriage equality to move forward. For example, in the slew of marriage cases filed in New York, Oregon, Washington, Maryland, Connecticut, and California in 2004, the advocates of marriage equality lost all but the California and Connecticut cases.⁴⁵⁷ However, all of those losses helped achieve the political victories in New York, Maryland and Washington.⁴⁵⁸

Many of the attorneys involved in this study also largely held the belief that even legislative defeats can help advance the cause of marriage equality. On the other hand, Cathcart was adamant that political defeats simply forced people to work harder.⁴⁵⁹ To Cathcart, “some of the [defeats suffered in] lawsuits led to the possibility for legislative action,” but the same could not be said for defeats suffered in states’ legislatures. Esseks gave a mild example of a legislative defeat that ended up assisting the cause of marriage equality in the long run: the New York State Assembly’s failure to pass a marriage equality bill in 2009.⁴⁶⁰ While Esseks believes that the marriage equality could have come about in the legislature without that loss, it did allow for the creation of a “plan of action” for several organizations’ successful push for marriage equality in 2011.⁴⁶¹

⁴⁵⁵ Esseks interview.

⁴⁵⁶ Ibid.

⁴⁵⁷ *Hernandez*, 855 N.E.2d 1; *Li*, 110 P.3d 91; *Andersen*, 138 P.3d 963; *Conaway*, 932 A.2d 571; *Kerrigan*, 957 A.2d 407; *In Re Marriage Cases*, 183 P.3d 384; Esseks interview.

⁴⁵⁸ Ibid.

⁴⁵⁹ Cathcart interview.

⁴⁶⁰ Esseks interview.

⁴⁶¹ Ibid.

In contrast to Cathcart and Esseks, Wolfson and Bonauto both cited the losses in California in 2008 and Maine in 2009 as examples of political losses that galvanized the organizations and individuals and brought about progress despite the initial setback they created. To Bonauto, “Prop 8, ironically, turned out to be extremely helpful.”⁴⁶² The Proposition 8 campaign, “put on display for the nation the kinds of attacks we’ve been experiencing...it was an eye opener for many” in that it revealed homophobia in all of its ugliness.⁴⁶³ Furthermore, “there’s nothing like having something taken away to be a motivator, and so people in California were...politicized by this.”⁴⁶⁴ Then, before Maine voters went to the ballot in 2009, organizations dedicated to marriage equality raised a lot of money from small online donations from people who “didn’t want another Prop 8 to happen.”⁴⁶⁵ When Mainers took away the right marry from same-sex couples later in 2009, people were once against radicalized and energized, which helped the cause of marriage equality in the long run, even though the Proposition 8 campaign and the Maine defeat caused so much damage.⁴⁶⁶ Wolfson saw the loss on Proposition 8 as

Shocking the conscience of a lot of non-gay people and awakening a lot of people out of their complacency and sense that we were just going to drift to victory, and spurred the invention of Freedom to Marriage into the robust campaign that we have been since 2010 to win the freedom to marry, having been more of an internal movement strategy center.⁴⁶⁷

Wolfson also explained that, after the loss in the first Maine battle, activists spent months knocking on doors and reframing political arguments.⁴⁶⁸ That effort and retooling, in Wolfson’s mind, won the second Maine referendum in 2011.

⁴⁶² Bonauto interview.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid.

⁴⁶⁷ Wolfson interview.

⁴⁶⁸ Wolfson interview.

According to some of the lawyers interviewed in this study, losses in court can actually advance the cause of marriage equality in the long run by bringing media attention to the issue of marriage discrimination and energizing LGB people and their allies to work harder. Although the lawyers disagreed over whether political losses can have the same effect, some argued that the losses in referenda in Maine and California served both as ugly examples of homophobia to non-LGB Americans and as reasons for LGB people to engage in activism.

K. The Viability of Civil Unions

One method by which the advocates of marriage equality have sought to deflect backlash in the past has been with the acceptance of civil unions instead of full civil marriage. Civil unions used to be seen as an intermediate step between no marriage and full civil marriage when the acquisition of full civil marriage for same-sex couples was seen as politically infeasible. Civil unions did not exist as a legal concept until the Vermont legislature enacted its civil unions law in 2000, but some⁴⁶⁹ saw them as a compromise whereby LGB people received all the benefits of marriage except the name. Today, there is much less impetus to fight for civil unions, and the organizations involved in marriage equality litigation are less willing to compromise by accepting them. As Cathcart explained, there is no “juice” for civil unions anymore—no one lobbies for them because “what people are seeing is other states getting marriage...that’s what people want.”⁴⁷⁰ Cathcart did acknowledge that civil unions, “while a compromise, were at least a compromise that moved things forward,” and brought marriage equality activists closer to their ultimate goal of marriage equality.⁴⁷¹

Robinson agreed with Cathcart and stated that civil unions were a huge step forward in Vermont in 2000, but that they would have been a massive step backward in Massachusetts in

⁴⁶⁹ Such as William N. Eskridge, Jr. in *Equality Practice*.

⁴⁷⁰ Cathcart interview.

⁴⁷¹ *Ibid.*

2004.⁴⁷² Robinson never liked civil unions, seeing them as “less than fully equal” because one of the benefits of being married “is the status of being married.”⁴⁷³ The desirability of civil unions to Robinson depended on the long-term strategy of the organizations litigation marriage equality, which was marriage, meaning civil unions were a bittersweet compromise.⁴⁷⁴ Murray agreed with Robinson and Cathcart, but argued that *Windsor*, not *Goodridge* really turned the tide against civil unions in favor of marriage.⁴⁷⁵ Esseks offered a similar analysis, arguing they “were never a necessary compromise,” but that they were progress.⁴⁷⁶ Bonauto offered two observations about civil unions. First, Vermont’s civil union law was “bittersweet” because it was “not everything [advocates for marriage equality] wanted, but it was incredible to get it.”⁴⁷⁷ Second, even though civil unions offered LGB people unprecedented legal protections, “it was not the same thing” as marriage, but was “a separate system for gay people, and it rankled.”⁴⁷⁸ Due to all of these sentiments, key members of the organizations involved in litigation and lobbying for marriage equality at this moment in time no longer look to civil unions as a stepping-stone to marriage. Instead, key attorneys are now of the belief that marriage is attainable without such stepping-stones.

L. Legal Strategy

Once the advocates of marriage equality reach the courtroom, they can focus on legal arguments and worry to a lesser degree about the political aspects of the marriage equality campaign. While the attorneys in the this study were in agreement on the intersection of the law and politics, the reality of resistance to legal victories, and the need to address both the political

⁴⁷² Robinson interview

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

⁴⁷⁵ Murray interview.

⁴⁷⁶ Esseks interview.

⁴⁷⁷ Bonauto interview.

⁴⁷⁸ Ibid.

and the legal spheres with regard to marriage equality cases, they were rather divided on legal strategy. The attorneys interviewed for this study were divided on the issues of whether an attorney from an organization dedicated to marriage equality goes to court for the client or the cause, and whether it is better to use Due Process or Equal Protection arguments. For all the ink spilled over the legal strategies of advocates for marriage equality, there is no real consensus.

On the issue of whether attorneys from organizations dedicated to marriage equality go to court for the plaintiffs in marriage cases or the broader cause, Esseks explained that an attorney from an organization dedicated to the advancement of marriage equality always tries to ensure the interests of the individuals and the cause line up, but that the attorney always represents the interests of the individual clients above all else.⁴⁷⁹ Bonauto agreed, stating that clients always come first if there is conflict between their desires and the desires of the broader cause because “as an attorney [one has] an absolute obligation to the clients.”⁴⁸⁰ However, Bonauto did qualify that statement by noting that the attorneys do, “explain to . . . potential plaintiffs that they are effectively ambassadors, that this case is beyond them.”⁴⁸¹ Even when this is explained, sometimes the clients do not want to do what the attorneys from marriage equality organizations want them to do. For Bonauto, this was especially present in employment lawsuits, not marriage litigation. Oftentimes, Bonauto’s clients in employment discrimination lawsuits simply wanted to get a settlement and move on with their lives, whereas GLAD wanted to create binding precedent by taking the cases to higher appellate courts.⁴⁸² Even though she also wanted to create binding precedent, Bonauto had to obey her clients’ wishes.

⁴⁷⁹ Esseks interview.

⁴⁸⁰ Bonauto interview.

⁴⁸¹ Ibid.

⁴⁸² Ibid.

Murray agreed with Bonauto that an attorney always represents his or her clients above all else. Like Bonauto, Murray explained that plaintiffs in marriage equality cases “understand that they represent other people, and the discrimination they’ve suffered is emblematic of the discrimination others have suffered.”⁴⁸³ Robinson also agreed, citing an example from the broader LGB rights movement of when the clients’ wishes and the movement’s goals were not aligned. According to Robinson, in marriage cases, “the tensions you might have are significantly diminished because the plaintiffs who participate in a test case are people whose goal is to do something that is good for the movement, and they are not looking” to be unhelpful for the movement.⁴⁸⁴ However, in family law cases wherein a LGB or transgender client simply wants visitation rights with their child and not a legal statement from a higher court, the tension between clients’ goals and the broader cause’s goals is most pronounced.⁴⁸⁵ Cathcart also agreed, stating, “you have to go to court for the plaintiffs, but if you pick your plaintiffs properly, and you frame your case properly, I don’t think there has to be a difference between the goals of the plaintiffs and the goals of the movement.”⁴⁸⁶ Despite the statements of attorneys that the desires of the organizations dedicated to marriage equality and their clients can be harmonized, it appears that, on balance, the tradeoff between representing clients and representing a cause is so fraught that movement attorneys, like Cathcart Murray and Bonauto, must avoid that tradeoff. To Cathcart, the alignment of the two sets of goals is made easier by the fact that marriage equality cases are about “clear-cut constitutional issues” such as the fundamental right to marry and the state’s equal treatment of individuals.⁴⁸⁷

Despite this broad consensus among the aforementioned attorneys, Wolfson argued,

⁴⁸³ Murray interview.

⁴⁸⁴ Robinson interview.

⁴⁸⁵ Ibid.

⁴⁸⁶ Cathcart interview.

⁴⁸⁷ Ibid.

The priority is always to be thinking about the broader impact...you have to be very transparent about that when you take the case, and need to have an understanding on the part of the plaintiffs that they too will prioritize the broader concerns of the movement and the law change we're all seeking rather than win at any cost on their own.⁴⁸⁸

Although Wolfson did emphasize the fact that the plaintiffs would be aware of the prioritization of the organization's goals, he did break from the rest of the attorneys involved in this study by so strongly emphasizing the cause over the clients.

On another fundamental question of legal strategy in marriage equality litigation – whether to employ Due Process of Equal Protection arguments – the attorneys in this study were also divided or were unsure. The choice of legal arguments can have profound impact on the relationship between the legal and political arguments the advocates of marriage equality make. For example, Bonauto believes the best way to talk to people about marriage is to focus on the dignity of marriage and the right to marriage, not on economic benefits. In terms of constitutional doctrine, emphasizing the dignity of marriage fits better within Due Process reasoning, whereas focusing on the economic benefits of marriage makes more sense as an Equal Protection argument. Although the attorneys in this study insisted the legal and political arguments do not substantively influence each other, they did indicate that the two types of arguments argue the same thing: denial of marriage to same-sex couples is unfair. Selection of a certain argument in court determines whether that actually happens.

Murray argued that, at least in Vermont, the Equal Protection arguments were the better arguments.⁴⁸⁹ In the Vermont state constitution, Equal Protection arguments are usually based on the Common Benefits Clause, which serves the same purpose as the Equal Protection Clause

⁴⁸⁸ Wolfson interview.

⁴⁸⁹ Murray interview.

of the Fourteenth Amendment of the federal constitution.⁴⁹⁰ Murray based her belief on her understanding of the Vermont state constitution—that it was written with the goal of “not [having] any people who were privileged over others.”⁴⁹¹ This convinced Murray before *Baker* was even argued that the Common Benefits arguments would fare better than Due Process arguments.

In contrast, Bonauto, who served as Murray’s co-counsel in *Baker*, prefers Due Process arguments in marriage equality cases. While Bonauto does think that both types of arguments need to be included in every marriage equality brief, “there is something simple and elegant” about Due Process arguments.⁴⁹² To Bonauto, the argument that “we are all Americans, and if there are certain fundamental rights guaranteed to all Americans, what is the excuse for saying this one group of Americans can’t participate [?]” is a more common sense approach that many can grasp than Equal Protection arguments.⁴⁹³ As an added bonus, using the fundamental rights language of Due Process arguments allows for the marriage equality advocates to talk about marriage itself, and not just the technical benefits and protections that stem from it.⁴⁹⁴ Bonauto has also gone on record against the argument that the denial of marriage to same-sex couples constitutes sex discrimination. To Bonauto, “there is no discrimination because men and women are equally disadvantaged,” since a couple of men that wish to be married face the same discrimination as a couple of women.⁴⁹⁵

Robinson argued that all types of arguments – statutory, Due Process and Equal Protection – need to be included in legal briefs because “my view of what the strongest argument

⁴⁹⁰ Vermont Constitution, Chapter 1, article 7. Many Vermont Supreme Court decisions have interpreted the clause to be even more protective than the federal Equal Protection Clause. Cf. *State of Vermont v. Jewett*, 146 Vt. 221 (1985); *State of Vermont v. Badger*, 141 Vt. 430 (1982); and *Bennington v. State of Vermont*, 161 Vt. 472 (1994).

⁴⁹¹ Murray interview.

⁴⁹² Bonauto interview.

⁴⁹³ Ibid.

⁴⁹⁴ Ibid.

⁴⁹⁵ Bonauto, “Ending Marriage Discrimination,” 833.

was and somebody else’s view of what the strongest arguments was weren’t necessarily the same,” and she could not predict with certainty which arguments would carry the day with the court as a whole.⁴⁹⁶ To illustrate the fact that different arguments appealed to different people, necessitating the inclusion of all valid arguments, Robinson cited the two moot courts the *Baker* counsel held before orally arguing *Baker* before the Vermont Supreme Court. The first moot court session consisted of a panel of gay, feminist, and other progressive thinkers and progressive lawyers. The consensus of that group was that attorneys in *Baker* “should lead with the sex discrimination argument.”⁴⁹⁷ However, the next moot court session consisted of a panel of straight men, mostly unengaged from the LGB rights movement. The consensus from that group was “you need to drop the sex discrimination argument – it is your worst argument – and you need to lead with the fundamental right to marry.”⁴⁹⁸ “The lesson is that...this is an issue that is not only legally subject to a range of analyses, but it strikes people fundamentally in different ways,” and advocates need to be cognizant of this fact.⁴⁹⁹

Wolfson agreed with Robinson with regard to not having to choose between the two types of arguments. Wolfson also argued that marriage equality advocates have won cases due to both types of arguments, so one is not especially better than the other.⁵⁰⁰ Esseks was also split, but on a personal preference level. Esseks personally “is a big fan of the fundamental right to marry” because everyone agrees that such a right exists; the fight is merely over whether same-sex couples are covered by it.⁵⁰¹ However, he is also aware that “we have won [with] the Equal Protection argument much more than we have won [with] the fundamental right

⁴⁹⁶ Robinson interview.

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid.

⁵⁰⁰ Wolfson interview.

⁵⁰¹ Esseks interview.

argument.”⁵⁰² Cathcart was even more non-committal, stating that “we’ll know the answer to that question [whether Due Process or Equal Protection arguments are stronger] when we have a win at the Supreme Court, and at the moment,” one cannot prejudice any type of argument for fear of losing an effective tool.⁵⁰³

Each of the lawyers interviewed on the topic of legal strategy gave a different answer over whether Equal Protection or Due Process arguments are stronger. While this has not seemed to create dissention and disunity within and among the organizations litigating marriage equality, it is impressive that after decades of litigation and many successes, attorneys are still unsure as to which argument is best. The attorneys were also mostly in agreement that one must, as an attorney, represent the wishes of one’s client, but also stressed the organization’s goal of marriage equality had to be achieved through those clients. Many of the attorneys solved this riddle by selecting clients with the same goals as the organization, while Wolfson argued the cause’s goals were paramount in any test case. The consensus legal strategy of the attorneys therefore appears to be to select clients with identical goals as the organization representing them, and to employ every valid argument against anti-marriage equality law and constitutional amendments.

⁵⁰² Ibid.

⁵⁰³ Cathcart interview.

VII. Conclusion

As was apparent throughout the interviews in this study, the environment surrounding the issue of marriage equality has changed dramatically over the past decade and even in the past year. *Windsor* and the shift in public opinion in the United States to a majority of Americans supporting marriage equality have completely changed the circumstances the advocates for marriage equality face in the courtroom and out. The coming years may bring even more dramatic changes, such as a decision from the United States Supreme Court mandating marriage equality in all states.

This thesis found that the attorneys in major marriage equality organizations do not necessarily accept the entire backlash hypothesis, but do understand that the law and politics are inextricably linked with regard to marriage equality litigation campaigns. Organizations litigating marriage equality cases understand that resistance to favorable court decisions is not only common but also able to be mitigated by robust public education and political advocacy. This demonstrates the internalization of the backlash hypothesis, even if some attorneys prefer to not use the term “backlash.” However, the internalization of the backlash hypothesis is not complete by attorneys in the marriage equality litigation campaign. In the event of a legal loss, the interviewed attorneys argued that national and regional organizations could spin the straw of legal defeat into political gold. The litigation losses in Washington, New York, Maryland, and Oregon spurred many people to fight harder for the right to marry in the legislature, and also awakened non-LGB people to issues LGB people face with regard to marriage discrimination. The losses in Maine and California in the political sphere had a similar educational and radicalizing effect. Further research is warranted to explore this interesting twist the marriage equality organizations put on the traditional backlash hypothesis. With this nuance in the

organizations' internalization of the backlash hypothesis, the organizations still accept the main provision of that hypothesis: negative repercussions will most likely occur after legal victories.

The desire to mitigate negative repercussions to victories for marriage equality in court drives strategy of marriage equality advocacy organizations when it comes to selecting clients, marshalling *amici curiae*, and managing political campaigns that accompany litigation. Clients are selected to appeal to as broad a spectrum of American society as possible, and to refute common prejudices about same-sex couples, such as the belief that they cannot raise children. *Amici* are also selected to rebut those arguments and to signal to the courts that vast swaths of society accept marriage equality. These two processes involve legal institutions, but the arguments that the *amici* and plaintiffs make, both explicitly and implicitly, are political. The *amicus curiae* brief of hundreds of businesses in *Windsor* did little to advance any legal arguments, but it sent a strong political message to the Supreme Court about how a vast swath of corporate America felt about marriage equality.

The marriage equality organizations' political campaigns now emphasize "earned media" – newspaper, radio and television reports – as well as town hall meetings and more grassroots interaction. Civil unions, the backlash-mitigating compromise of the 2000s, are now no longer a valid option, and the attorneys in the organizations are unwilling to accept them. The wide swings in public opinion toward favoring marriage equality have also led the organizations to struggle not only with resistance to legal victories, but also how to get those legal victories in the first place now that many people will not defend anti-marriage equality laws and constitutional amendments.

These leading marriage equality advocacy attorneys acknowledge that the law and politics interact and intersect, but do not believe that the two influence each other. The legal and

political arguments follow similar, if parallel tracks, with legal arguments emphasizing legal doctrines and political arguments emphasizing the dignity of marriage and the unfairness of marriage discrimination. Despite the imagery of railroad tracks, as the statements about plaintiff selection and *amicus curiae* briefs show, political considerations drive decisions in legal aspects of lawsuits. Attorneys deeply involved in marriage equality litigation also have no real consensus on whether Due Process or Equal Protection arguments are more effective. The consensus instead appears to be to include all available valid arguments in briefs and oral arguments. This is both a legal and political decision, since the two types of arguments have shown different levels of success when translated into political arguments. Bonauto explained Due Process arguments are more “common sense,”⁵⁰⁴ but Esseks argued that the marriage equality advocates have had more success in court with Equal Protection arguments. It makes good political sense to include all arguments so that as many people as possible may be swayed on an issue that, as Robinson explained, strikes different people in different ways. Further research could also illuminate the political nature of lawsuit timing, to which Bonauto alluded to when talking about the anti-DOMA litigation campaign. Even in decisions on entirely legal matters, political considerations factor in. The politicization of the movement for marriage equality, even though it is focused on litigation, is the main strategy of the major organizations involved in that movement.

⁵⁰⁴ Bonauto interview.

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