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## LITIGATING SAME-SEX MARRIAGE: A DIVORCE ON STRATEGY

by Bryan Lucas

*Love is important! It doesn't matter who people love, as long as they are happy. Everyone should have the right to marry who he or she wants. You may not like two men being married, but for them, it's normal. My two dads should be able to be married and have the same rights as any married couple. How would you feel if you couldn't marry someone just because the government said you weren't allowed to? If I loved someone and wasn't allowed to marry them, I would be really sad. My family has taught me that even if you don't agree with someone, you should still be kind and respectful. The government should too.*<sup>1</sup>

These are the words of the ten-year-old adopted daughter of two men named David and Lee. They live with her older brother, but they are not married, because they reside in Illinois, one of the 41 states where doing so is not recognized, or is explicitly prohibited by law. Lee's father, Mike, wrote, "I want Lee and David to know their union will be honored as a marriage. I want personally to be able to refer to Lee's and David's union as a 'marriage.' I want to call David my 'son-in-law.' I sometimes call him that now, even though I know there is no 'law' that supports that statement. Most of all, I want the law to stop seeing my son as a second class citizen or his love as second class."<sup>2</sup>

These words are taken from an amicus brief filed by Parents, Family, and Friends of Lesbians and Gays to the Supreme Court in *Hollingsworth v. Perry*, one of the primary cases to be addressed herein and a historical centerpiece of the Supreme Court's 2012-2013 term. While of little legal significance, these personal reflections are of not only strategically valuable and surely cathartic for their authors, but important because they strike at a fundamental truth about the same-sex marriage debate; while the ramifications of this matter are discussed, seen, and heard on television, in Congress, and in the courts, those ramifications are *felt* by real same-sex couples and their families as they go about the business of daily life. Ongoing social and

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<sup>1</sup> Brief for Parents, Families, and Friends of Lesbians and Gays as Amicus Curiae, *Hollingsworth v. Perry*, 133 S. Ct. 1521 (2013) (No. 12-144).

<sup>2</sup> *Id.*

empirical trends suggest that these real world ramifications have begun to permanently impact the way many Americans view the issue of same-sex marriage, leading many, particularly in younger generations, to view it as straightforwardly as the ten-year-old daughter of David and Lee. Conscious of these shifting sociopolitical dynamics, advocacy groups have increasingly brought attention to families like David and Lee's, emphasizing the personal nature of marriage, the importance of love and equal treatment before the law, and the inherent similarity of David and Lee's family to every other "normal" American family. While these groups often agree on these tactics, and on the ultimate goal of marriage equality, they have differed on how to litigate the matter of same-sex marriage; this paper will focus on that disagreement.

## **I. INTRODUCTION**

On March 26 and March 27, the Supreme Court heard oral argument in the cases of *Hollingsworth v. Perry* and *United States v. Windsor*, respectively, marking a historic moment both in American legal history and for the gay rights movement, as the first time the nation's highest court directly heard arguments on the issue of same-sex marriage. As these cases worked their way through the courts, they predictably generated a tempest of political controversy between progressives, who view the cases as an important part of an ongoing movement for civil rights, and traditionalists, who view the lawsuits as the latest in a series of attacks on their conception of the institution of marriage. Less predictable, however, was the reaction of some GLBT organizations to the filing of the lawsuit by the plaintiffs in *Perry*. Indeed, organizations such as the Gay and Lesbian Advocates and Defenders, as well as the Lambda Legal Defense Fund, both well-established in the field of GLBT litigation, have feared that *Perry* prematurely demanded too much of the federal court system, thus risking a potentially major setback in a

fight that had to that point executed a deliberate and coordinated strategy.<sup>3</sup> These groups had been implementing strategic litigation that emphasized an incremental approach to achieving the goal of national recognition of same-sex marriage, and found the timing of *Perry* to be inconsistent with that methodology. In contrast with the more aggressive approach of *Perry*, *Windsor* and other cases challenging the Defense of Marriage Act (DOMA) on more limited grounds suit this incremental approach.

While these groups continue to unite in their resolute support for marriage equality, this strategic disagreement raises important questions about the current progress of the movement toward equal rights for same-sex couples and the direction of the effort moving forward. While prognosticating decisions of the nation's highest court is often a fool's venture, and it is impossible to know what conclusions the Court will reach this summer, exploring historical context, relevant jurisprudence, and social trends can provide some clues about what may inform their decision making process and, ultimately, the Court's most likely decision or decisions. By exploring the *Perry* and *Windsor* cases within the context of the development of important gay rights jurisprudence, the gay rights movement in the United States, and recent trends in the same-sex marriage debate, the disagreements regarding litigations strategy are thrown into sharp relief. As previously noted, some gay rights advocates have warned that aggressive litigation may be premature and damage a movement that has made substantial gains in recent years; others believe that aggressive litigation is needed now, because equality seems ripe for the taking, and civil rights are not always to be gained by patience. But how do these arguments compare to past moments of social change when the Court has been asked to resolve questions of deep cultural significance? Cases like *Brown v. Board of Education*<sup>4</sup> and *Roe v. Wade*<sup>5</sup> provide useful

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<sup>3</sup> Andrew Koppelman, *Salvaging Perry*, 125 HARV. L. REV. F. 69 (2012).

<sup>4</sup> *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954).

comparisons, and also further questions. Advocates of an incremental approach to litigation might point to *Brown* as an example of such a strategy, whereas the more aggressive viewpoint could look to *Roe*. Should the Court proceed incrementally, providing same-sex couples with equal treatment in a similar manner as it did African-Americans between the *Brown* decision and its decision in *Loving v. Virginia*, the chance of “culture shock” may be less, but inequality will continue unabated for a substantial period of time. However, if the Court proceeds aggressively, in a manner similar to *Roe*, declaring marriage a constitutional right for same-sex couples, equality will become a present reality, but the traditionalist opposition may be emboldened for a much lengthier cultural battle than would otherwise have been necessary. With the stakes this high, not only as a matter of law and principle, but for their families, friends, and for themselves, marriage equality activists have differed on this matter despite their ultimate ideological unity. This is the complicated sociopolitical nexus though which this paper will explore the topic of same-sex marriage.

## **II. THE WINDSOR CASE: INSIDERS USE AN INCREMENTAL APPROACH**

In 1963, Edie Windsor and Thea Spyer met for the first time in New York City, at a Greenwich Village restaurant called Portofino, a place that they had both heard was one of a few that was part of the safe “underground” network where the heavily stigmatized lesbian community could be open, away from an otherwise dangerous and prejudiced world.<sup>6</sup> Edie has said this was a place you could “let yourself be gay.”<sup>7</sup> Soon, the couple was in love, and Thea asked Edie to marry her, even though there was no place in the United States that gave any legal

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<sup>5</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>6</sup> Complaint at 21, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 1:10CV08435).

<sup>7</sup> Peter Applebome, *Reveling in Her Supreme Court Moment*, NY TIMES (December 10, 2012), <http://www.nytimes.com/2012/12/11/nyregion/edith-windsor-gay-widow-revels-in-supreme-court-fight.html>.

recognition to such a relationship at the time.<sup>8</sup> Fearing a ring might arouse suspicion, Edie wore a brooch instead; their engagement began in 1967.<sup>9</sup>

In 1977, Thea was diagnosed with Progressive Multiple Sclerosis, or MS, a condition that would gradually and irreversibly cause damage to the central nervous system and lead to paralysis.<sup>10</sup> In 1993, when New York began to recognize civil unions, Thea and Edie were among the first couples to have their relationship recognized, but they quickly realized incomparable this union was, in legal terms, to the institution of marriage.<sup>11</sup> In 2007, they traveled to Canada, where they were finally married – after a 40 year engagement. This marriage was recognized as valid in New York State.<sup>12</sup>

When Thea’s health condition worsened, and because many of the medical bills associated with Thea’s care had to be paid out-of-pocket, Edie and Thea made sure to engage in comprehensive financial planning.<sup>13</sup> As a result, the couple knew that Edie would have to make a huge-lump sum payment to the IRS following Thea’s death due to the federal estate tax, a burden most widows or widowers avoid from the marital deduction, a benefit which Edie is not entitled to because the DOMA defines marriage as being “between a man and a woman” for the purposes of federal law.<sup>14</sup> After two years as a married couple, Thea passed away on February 5, 2009.<sup>15</sup>

Under 26 U.S.C. § 2056(a), a property passing from a decedent to their surviving spouse generally is not subjected to the federal estate tax.<sup>16</sup> As the plaintiff’s complaint notes, Congress enacted this statute to ensure that property belonging to a marital unit remains within that marital

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Complaint at 42, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 1:10CV08435) (citing *Martinez v. County of Monroe* 850 N.Y.S.2d 740 (4<sup>th</sup> Dep’t 2008)).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 26 U.S.C. § 2056(a).

unit, thus avoiding undue burdens placed on widows.<sup>17</sup> However, same-sex couples are exclusively denied the benefits of this provision due to the effects of the DOMA. DOMA provides, in pertinent part:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.<sup>18</sup>

Due to the IRS’ application of DOMA, Edie Windsor was denied the benefits of the estate tax marital deduction, in addition to a host of other federal benefits, simply because she was in a same-sex relationship and, as the her lawyers poignantly point out in her complaint in the District Court, had her name instead been “Theo,” no such problem would exist.<sup>19</sup> Mrs. Windsor’s complaint argues that the federal government treats same-sex couples who are legally married differently than married heterosexual couples and, as a result, she was forced to pay \$363,053.00 more in federal estate taxes than a similar situated heterosexual widow would have had to pay and more than \$600,000 in total, because she was not a federally recognized spouse who could inherit their apartment and vacation home tax free.<sup>20</sup> Therefore, she argues, DOMA subjects her to discrimination on the basis of her sexual orientation, subjected her to differential treatment in violation of her right to equal protection under the Fifth Amendment to the Constitution of the United States.<sup>21</sup>

In a fascinating example of shifting social and political opinion on the issue of same-sex marriage, the Obama administration, through Attorney General Eric Holder, issued a statement

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<sup>17</sup> Complaint at 58, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 1:10CV08435) (citing H.R. Rep. No. 97-201, at 159 (1981)).

<sup>18</sup> 1 U.S.C. § 7

<sup>19</sup> Complaint at page 16.

<sup>20</sup> Applebome, *supra* note 7.

<sup>21</sup> *Id.*

regarding *Windsor* and another one of the many ongoing cases challenging DOMA, *Pedersen v. Office of Personnel Management*.<sup>22</sup> In the letter, the Attorney General explained that President Obama and his administration had determined that, because sexual orientation is a suspect class, classifications based on that determinant should be subjected to heightened scrutiny when being reviewed under an equal protection analysis.<sup>23</sup> Further, Mr. Holder explained that the administration had determined that DOMA was unconstitutional and that the administration would no longer actively defend it in court, although they would remain parties to the litigation and allow members of Congress interested in its defense to pursue that option.<sup>24</sup> Soon after, the Bipartisan Legal Advisory Group (BLAG), overseen by the Republican-controlled House of Representatives, intervened in the case and signaled that they would be willing to defend DOMA in place of the Department of Justice.<sup>25</sup> Though the executive branch advocating for application of heightened scrutiny to laws discriminating against GLBT people is a tremendous victory for GLBT activists, the District Court took a less ambitious approach by limiting its decision to a rational basis review. First, the court explained that the equal protection requires the government to treat all similarly situated persons alike,<sup>26</sup> therefore prohibiting government from drawing “distinctions between individuals based solely on differences that are irrelevant to a legitimate government interest.”<sup>27</sup> Next, the court explained that there are, of course, exceptions to this rule, and the “paradigm of judicial restraint”<sup>28</sup> is the rational basis review test which suggests that

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<sup>22</sup> Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, DEP’T OF JUSTICE OFFICE OF PUB. AFFAIRS (February 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Press Release, House Leadership To Defend Discriminatory Law After President Called DOMA Unconstitutional, ACLU (April 18, 2011), <http://www.aclu.org/lgbt-rights/house-representatives-seeks-intervene-bereaved-spouse-s-challenge-discriminatory-defense>.

<sup>26</sup> *Windsor*, 833 F. Supp. at 400 (citing *City of Cleburne v. Cleburne Living Ctr.* 473 U.S. 432, 439 (1985)).

<sup>27</sup> *Id.* (citing *Lehr v. Robertson*, 463 U.S. 248, 265 (1983)).

<sup>28</sup> *Id.* (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993)).



“statutory discrimination will be set aside if any state of facts reasonably may be conceived to justify it.”<sup>29</sup>

Intermediated scrutiny, the court explained, is reserved for quasi-suspect classes and requires that a classification be “substantially related to a legitimate state interest.”<sup>30</sup> For the final and most stringent category that the Obama administration recommended be applied, heightened scrutiny, the court said that it would apply to any classification that disadvantages a suspect class or impinges upon the exercise of a fundamental right<sup>31</sup> and courts are required to determine whether or not a law under review is “precisely tailored to serve a compelling government interest.”<sup>32</sup> Intermediate scrutiny has been applied in the past to gender,<sup>33</sup> whereas race has been subject to strict scrutiny.<sup>34</sup> Judge Barbara S. Jones noted that, because heightened scrutiny demands such exacting investigation into the choices of the legislative branch of government, the Supreme Court has been reluctant to establish new suspect classes given deference to Congress and “respect for the separation of powers.”<sup>35</sup> Despite arguments regarding the defining characteristics of a suspect class (history of discrimination, an immutable characteristic upon which the classification is drawn, political powerlessness, and a lack of any relationship between the characteristic in question and the class’s ability to perform or contribute to society), the court decided that there is little precedent to establish that homosexuals are a suspect class.<sup>36</sup>

However, Judge Jones goes on to note a distinction between “laws such as economic or tax legislation that are scrutinized under rational basis review which normally pass constitutional muster, and laws that exhibit a desire to harm a politically unpopular group, which receive a

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<sup>29</sup> *Id.* (citing *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)).

<sup>30</sup> *Id.* at 401 (citing *Mills v. Habluetzel* 456 U.S. 91, 99 (1982)).

<sup>31</sup> *Windsor*, 833 F. Supp. at 400 (citing *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982)).

<sup>32</sup> *Id.* (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

<sup>33</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982).

<sup>34</sup> *Loving v. Virginia* 388 U.S. 1, 11 (1967).

<sup>35</sup> *Windsor*, 833 F. Supp. at 401.

<sup>36</sup> *Id.*

more searching form or rational basis review under the Equal Protection Clause,”<sup>37</sup> a concept that has been referred to as “rational basis with bite.”<sup>38</sup> Regardless, Judge Jones concluded that DOMA’s section 3, the part in question, did not pass rational basis review and failed as a constitutional matter.<sup>39</sup> Congress offered the following justifications at the time it enacted DOMA: (1) defending and nurturing the traditional institution of marriage; (2) promotion heterosexuality; (3) encouraging responsible procreation and childrearing; (4) preserving scarce government resources; and (5) defending traditional notions of morality.<sup>40</sup> The court found no logical relationship between DOMA and the achievement of these goals and, therefore, that the statute was unconstitutional.<sup>41</sup> Mrs. Windsor was awarded the full amount of her taxes plus interest, and the case moved into the appeals process.<sup>42</sup>

To allow for a smooth transition, the Department of Justice filed an appeal on behalf of BLAG and the House Republicans, even though they agreed with the outcome at the trial level. The United States Court of Appeals for the Second Circuit affirmed the district court opinion, but held, as the first circuit court to do so,<sup>43</sup> that homosexuals are a quasi-suspect class and classifications based on sexual orientation should be subject to intermediate scrutiny.<sup>44</sup> The court held that the four factors that determine whether or not a class of people is a quasi-suspect class are met by homosexuals:

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<sup>37</sup> *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 579-80 (2003)).

<sup>38</sup> R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 238 (2002) (explaining that the Supreme Court has established a variety of rational basis standards of review, including the oft-discussed “rational basis with bite” standard of review).

<sup>39</sup> *Windsor*, 833 F. Supp. at 402.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> David S. Kemp, *The End of an Unjust Law: The Second Circuit Strikes Down DOMA and Sets the Stage for Supreme Court Review*, VERDICT (October 22, 2012), <http://verdict.justia.com/2012/10/22/the-end-of-an-unjust-law>.

<sup>44</sup> *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012).

In this case, all four factors justify heightened scrutiny: A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority.<sup>45</sup>

The court elaborated the gays have clearly experienced discrimination in the United States since at least the 1920s and that being homosexual clearly has no impact on one's individual ability to contribute productively to society.<sup>46</sup> The court also explained that, while homosexuality is not always readily identifiable, and may be hidden, it is a trait that invites discrimination when it becomes manifest; that is to say, when it is exposed, it is a distinguishing characteristic by which legal rights are determined and discrimination may be experienced, as with the allocation of marriage licenses or benefits upon the death of one's spouse, as in the case of Mrs. Windsor.<sup>47</sup> As for political power, the court explained that a group need not be entirely powerless to qualify for protection, and while it is clear that gays and lesbians have made strides in politics in recent years, they are still deeply underrepresented in the nation's branches of government.<sup>48</sup> The court noted that, "It is difficult to say whether homosexuals are under-represented in positions of power and authority without knowing their number relative to the heterosexual population."<sup>49</sup> Wisely, they went on to note that, "the seemingly small number of acknowledged homosexuals so situated is attributable either to a hostility that excludes them or to a hostility that keeps their sexual preference private--which, for our purposes, amounts to much the same thing."<sup>50</sup>

The court applied intermediate scrutiny rather concisely to find that DOMA was not substantially related to any legitimate state interest and ended its discussion of the matter with a

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<sup>45</sup> *Id.* at 181.

<sup>46</sup> *Id.* at 182.

<sup>47</sup> *Id.* at 183.

<sup>48</sup> *Id.* at 184 (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

<sup>49</sup> *Windsor*, 699 F.3d at 184.

<sup>50</sup> *Id.*

poignant rebuke of the traditionalist justification for state-sponsored discrimination against same-sex couples:

Our straightforward legal analysis sidesteps the fair point that same-sex marriage is unknown to history and tradition. But law (federal or state) is not concerned with holy matrimony. Government deals with marriage as a civil status – however fundamental – and New York has elected to extend that status to same-sex couples. A state may enforce and dissolve a couple’s marriage, but it cannot sanctify or bless it. For that, the pair must go next door.<sup>51</sup>

In granting certiorari in this case, the Supreme Court asked the parties to brief and argue the following questions 1) whether section 3 of DOMA violates the Fifth Amendment’s guarantee of equal protection; 2) whether the government’s agreement with the Second Circuit’s decision deprived the Court of jurisdiction to hear the case; and 3) whether BLAG has standing to be involved in the case.<sup>52</sup> Given the scope of the arguments in this case, it is easy to understand why advocates of an incremental approach to litigating the same-sex marriage issue have had little fuss over the case, although it may be surprising to note that Mrs. Windsor’s case was initially rejected by some major gay rights groups,<sup>53</sup> although it is of course possible that this was for a variety of reasons, not the least of which is the fact that there are a great many ongoing cases involving DOMA at this very moment, some of which are being litigated by GLAD.<sup>54</sup>

Nonetheless, the case fits neatly into the incremental approach. Even though it has risen quickly to the Supreme Court, the question is not necessarily a broad one – the Court is not being asked to provide a sweeping mandate for same-sex marriage in fifty states, it is merely being asked to strike down DOMA, a statute that was relatively controversial even when it was passed

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<sup>51</sup> *Windsor*, 699 F.3d at 188.

<sup>52</sup> *United States v. Windsor*, 133 S. Ct. 786 (2012).

<sup>53</sup> Applebome, *supra* note 7.

<sup>54</sup> Chris Geidner, *The DOMA Lawsuits: What Is Happening?*, METRO WKLY (June 18, 2012, 4:45 PM), <http://www.metroweekly.com/poliglot/2012/06/domas-federal-definition-of-marriage-what-is-happe.html>.

in 1996 and is opposed by the President who signed it into law.<sup>55</sup> The Court can do this with a narrow holding, perhaps inching the GLBT movement closer toward a broader same-sex marriage victory in five or ten years, but not forcing the hand of a Court that is perhaps not ready for a more aggressive decision. This, at least, would be the position of those advocating for a less aggressive approach than the path followed in the *Perry* case.

Regardless, the courts have thus far held in Edith Windsor's favor, paving the way for a major victory in the movement for marriage equality and giving weight to the argument that Edie's love for Thea has just as much intrinsic value as any other relationship.<sup>56</sup>

### III. THE *PERRY* CASE: OUTSIDERS USE AN AGGRESSIVE APPROACH

In 2004, recently elected Mayor of San Francisco Gavin Newsom began issuing marriage licenses to same-sex couples.<sup>57</sup> After the state Supreme Court issued a stay ordering that the City of San Francisco stop issuing licenses, Judge Richard Kramer of the San Francisco County Superior Court found that California's ban on same-sex marriages was unconstitutional.<sup>58</sup> Soon after, the Supreme Court of California affirmed the Superior Court, finding that strict scrutiny applied to the state's discrimination against homosexuals in the marriage context, because

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<sup>55</sup> Margaret Hartmann, *Bill Clinton Declares He's Against DOMA, Though He's the One Who Signed It*, N.Y. MAGAZINE (March 7, 2013, 10:10 PM), <http://nymag.com/daily/intelligencer/2013/03/bill-clinton-opposes-doma-though-hes-signed-it.html>.

<sup>56</sup> Robert Barnes, *Supreme Court to Hear Same-Sex Marriage Cases*, WASH. POST (December 7, 2012), [http://www.washingtonpost.com/politics/supreme-court-to-hear-same-sex-marriage-cases/2012/12/07/4bf6c366-40ab-11e2-ae43-cf491b837f7b\\_story\\_1.html](http://www.washingtonpost.com/politics/supreme-court-to-hear-same-sex-marriage-cases/2012/12/07/4bf6c366-40ab-11e2-ae43-cf491b837f7b_story_1.html) (quoting Edie Windsor:

When Thea and I met nearly 50 years ago, we never could have dreamed that the story of our life together would be before the Supreme Court as an example of why gay married couples should be treated equally, and not like second-class citizens. While Thea is no longer alive, I know how proud she would have been to see this day. The truth is, I never expected any less from my country.).

<sup>57</sup> *Mayor Defends Same-Sex Marriages*, CNN (February 22, 2004, 10:51 PM), <http://www.cnn.com/2004/LAW/02/22/same.sex/>.

<sup>58</sup> *In re Coordination Proceeding*, Special Title Rule 1550(c), 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005) *aff'd in part, rev'd in part sub nom.* *In re Marriage Cases*, 143 Cal. App. 4th 873, 49 Cal. Rptr. 3d 675 (2006) *review granted and opinion superseded*, 149 P.3d 737 (Cal. 2006) and *rev'd*, 43 Cal. 4th 757 (2008).

marriage was a fundamental right that could not be denied on the basis of sexual orientation, thereby striking down the relevant statutes.<sup>59</sup> Same-sex marriage was legal in California for less than five months when Proposition 8 was passed on November 4, 2008 by a popular vote to amend California's state constitution to expressly forbid it.<sup>60</sup> Soon after, the Supreme Court of California held that the vote was constitutional, but that all the marriages taking place in California before the ban would remain valid.<sup>61</sup> On May 23, 2009, *Perry v. Schwarzenegger* was filed in the United States District Court for the Northern District of California to challenge the constitutionality of Proposition 8 on behalf of two same-sex couples.<sup>62</sup>

In this case, these couples are represented by a most unlikely pair of attorneys – David Boies and Theodore Olson – the latter a “conservative rainmaker” and Boies his ideological opposite – the two having once been on opposite sides of the courtroom in *Bush v. Gore*,<sup>63</sup> which helped to determine the outcome of the 2000 presidential election.<sup>64</sup> In their complaint in the trial court, the attorneys argued first that Proposition 8 substantially impaired plaintiffs' fundamental right to marry.<sup>65</sup> Secondly, they argued that Proposition 8 is not narrowly tailored to further a compelling state interest, as the justifications given by the backers of Proposition 8 (procreation, “responsible procreation,”<sup>66</sup> tradition, recognition of California marriages by other

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<sup>59</sup> *In re Marriage Cases*, 43 Cal. 4th 757 (2008).

<sup>60</sup> CAL. CONST. art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized in California”).

<sup>61</sup> *Strauss v. Horton* 46 Cal.4th 364 (2009).

<sup>62</sup> Complaint at 1, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. CV 09 2292 VRW).

<sup>63</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>64</sup> Jesse McKinley, *Two Ideological Foes Unite to Overturn Proposition 8*, N.Y. TIMES (January 10, 2010), <http://www.nytimes.com/2010/01/11/us/11prop8.html>.

<sup>65</sup> Complaint at 9, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. CV 09 2292 VRW).

<sup>66</sup> Brief for the States of Indiana, Virginia, et al. as Amici Curiae. *Hollingsworth v. Perry*, 133 S. Ct. 1521 (2013) (No. 12-144) (arguing that heterosexual couples need the institution of marriage to protect them from their procreative sexual urges, whereas same-sex couples do not):

When two people become parents by way of artificial insemination, surrogacy or adoption, they have not procreated – at least not with one another. Hence, what is missing is society's interest in encouraging couples to consider and plan for the children that inevitably result from impulsive decisions to act on sexual desires. The sexual activity of same-sex couples implies no consequences similar to that of opposite-sex couples.... Indeed, to the extent same-sex couples

states, administrative convenience) were not legitimate, important, or compelling, and that Proposition 8 was not in any way sufficiently tailored to meet any such interest.<sup>67</sup> Lastly, they argued that Proposition 8 violates the equal protection clause of the Fourteenth Amendment and discriminated against gays and lesbians on the basis of their sexual orientation and their sex.<sup>68</sup>

When Governor Schwarzenegger and his administration declined to defend Proposition 8 against federal constitutional attack, intervening defendants involved with the movement to develop Proposition 8 in the first place stepped in to defend the law, giving the case its *Hollingsworth* name.<sup>69</sup> In his opinion for the Northern District Court of California, Judge Vaughn Walker ruled that Proposition 8 is unconstitutional.<sup>70</sup> Judge Walker engaged in a full trial and had each side present comprehensive cases to establish a meticulous factual record upon which to base his conclusions.<sup>71</sup> In his opinion, Judge Walker first focused on the concept of civil marriage.<sup>72</sup> He emphasized that marriage has evolved over time to include greater respect for the female partner as well as different-race partners, but that the fundamental concept has always been a commitment between two people, and the resulting benefits to broader society and to potential children.<sup>73</sup> Next, the court discussed the opposition's arguments for treating gay

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must take intentional, non-sexual action to become joint parents, such conduct [negates] the need for government involvement. States may assume that couples who by definition can acquire parental rights only through intentional conduct need no further societal...regulation – they are already focused on the consequences of their actions. It is where the parenting may be unintentional, where couples act impulsively while ignoring the consequences, that social ordering is necessary.

<sup>67</sup> Complaint at 9, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. CV 09 2292 VRW).

<sup>68</sup> *Id.*

<sup>69</sup> Michael Gardner, *GOP Leader Reflects On His Tenure: State Senate's Hollingsworth Forced Out of Office by Term Limits*, U-T SAN DIEGO (November 13, 2010, 8:00 PM), <http://www.utsandiego.com/news/2010/nov/13/gop-leader-reflects-on-his-tenure/>.

<sup>70</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012).

<sup>71</sup> *Id.* at 934.

<sup>72</sup> *Id.* at 956.

<sup>73</sup> *Id.* at 934.

couples differently before the law.<sup>74</sup> The Judge found that being gay is not a choice, but it is in fact fundamental to one's identity, and that same-sex couples have happy, satisfying relationships like opposite-sex couples, and form deep emotional bonds and strong commitments to their partners.<sup>75</sup> The Judge also found that children benefit from these relationships, that same-sex marriages have no impact on opposite-sex marriages, and that civil unions do not hold the same benefits as marriage.<sup>76</sup> In a final area of factual findings, Judge Walker found that Proposition 8 was essentially the use of state power to legislate private moral views in a way that perpetuates stigmatization of gay people.<sup>77</sup> Further, the Judge found that "religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians" and are based on false anti-gay stereotypes.<sup>78</sup>

In making his conclusions of law, Judge Walker found that same-sex couples have a right to marry in the same way that opposite-sex couples do and that the traditionalist argument that procreation is the central element of marriage is undermined by the fact that marriage has historically been about "the right to choose a spouse and, with mutual consent, join together and form a household."<sup>79</sup> Judge Walker found that Due Process was violated because the defenders of Proposition 8 did not give a legitimate, much less compelling, public policy justification for depriving gays of the right to marry.<sup>80</sup> Domestic partnerships, he went on to say, do not satisfy this right to marry, as they exemplify the state's true intention – denying same-sex couples the same legal recognition as opposite sex couples.<sup>81</sup> Judge Walker also found that Proposition 8 violated the equal protection clause, both on the basis of sex as a quasi-suspect class and on the

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<sup>74</sup> *Id.*

<sup>75</sup> *Perry*, 704 F. Supp. 2d at 934.

<sup>76</sup> *Id.* at 935.

<sup>77</sup> *Id.* at 938.

<sup>78</sup> *Id.* at 985.

<sup>79</sup> *Id.* at 993.

<sup>80</sup> *Perry*, 704 F. Supp. 2d at 994.

<sup>81</sup> *Id.* at 993.



basis of sexual orientation, which he suggested was most likely a suspect classification, but he felt it unnecessary to decide in certain terms because Proposition 8 lacked even a rational basis.<sup>82</sup> He considered six justifications that had been offered by the defenders of Proposition 8 and found none of them sufficient to sustain the law – it was therefore unconstitutional under his decision, pending the appeals process.<sup>83</sup> For those advocates of an incremental approach to gay rights litigation, this broad and sweeping, heavily fact-laden, and *stare decisis* intensive trial court decision raised the stakes even more, practically daring the relatively liberal Court of Appeals for the Ninth Circuit to challenge the Supreme Court.<sup>84</sup>

In the Ninth Circuit, Judge Reinhardt, writing for a court split 2-1 in favor of the plaintiffs, affirmed the trial court’s decision on much narrower grounds, perhaps himself agreeing that an incremental approach is called for and that the time has not yet come to challenge the Supreme Court to find a fundamental right to marry for same-sex couples.<sup>85</sup> Applying his decision only to California and Proposition 8 itself, he concluded that it is the fact that voters chose to *eliminate* an existing right to marry that is a constitutional violation of Equal Protection.<sup>86</sup> In what has become a memorable line from his opinion, he wrote, “Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples.”<sup>87</sup> Using *Romer v. Evans*, as the precedential basis for the narrow conclusion that a right, once given, cannot be taken away, Judge Reinhardt states

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<sup>82</sup> *Id.* at 997.

<sup>83</sup> *Id.*

<sup>84</sup> Koppelman, *supra* note 3.

<sup>85</sup> *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012).

<sup>86</sup> *Id.* at 1079-80 (explaining that:

Withdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place, regardless of whether the right was withdrawn after a week, a year, or a decade. The action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is.).

<sup>87</sup> *Id.* at 1063.

concisely that, “The Constitution simply does not allow for laws of this sort.”<sup>88</sup> He therefore has given the Supreme Court a moderate course by which to approach the case should they prefer to address the issue of same-sex marriage on a more incremental basis.

#### IV. THE DISAGREEMENT

In the middle of the marriage equality movement, there has been a strong and vocal group of advocates who have been critical of David Boies and Ted Olson’s approach in the *Perry* case as a prematurely aggressive attempt to litigate marriage as a fundamental right. The thought process from this particular vantage point is that, while the national climate has improved remarkably fast for the GLBT rights movement, and the marriage equality “moment” in U.S. history seems to be quickly approaching, a major loss in the Supreme Court could be a serious setback and delay that realization, particularly given the relative inexperience of these attorneys in this area of practice.<sup>89</sup> Strident supporters of marriage equality, who have for decades explained that the Constitution provides a logical basis for a fundamental right to marry, do not disagree with these litigators in their legal arguments, and perhaps not with their passion and enthusiasm, but simply with their timing.<sup>90</sup> William Eskridge has advocated for a continued incremental approach to this issue, citing the current conservative majority on the Supreme Court, their mixed record on gay rights, and the Court’s historical tendency to wait for a more

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<sup>88</sup> *Id.* at 1064 (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

<sup>89</sup> Jesse McKinley, *Two Ideological Foes Unite to Overtake Proposition 8*, N.Y. TIMES (January 10, 2010), <http://www.nytimes.com/2010/01/11/us/11prop8.html>.

<sup>90</sup> *Hardball with Chris Matthews* (MSNBC Television Broadcast May 10, 2012), [http://www.msnbc.msn.com/id/47356785/ns/msnbc\\_tv-hardball\\_with\\_chris\\_matthews/t/hardball-chris-matthews-thursday-may/#.T-umj2iIn14](http://www.msnbc.msn.com/id/47356785/ns/msnbc_tv-hardball_with_chris_matthews/t/hardball-chris-matthews-thursday-may/#.T-umj2iIn14) (Evan Wolfson, marriage equality supporter, argues to Ted Olson that a Supreme Court decision in the *Perry* case would be premature and harmful).

definitive national consensus on controversial issues before forcing its way in to the debate's final stages.<sup>91</sup> He notes:

In the mid-1950s, when 30 states still had laws barring people of different races from marrying, the liberal Warren Court refused to overturn this blatant race discrimination. The court did not act until 1967, when only 17 states retained such laws. So long as interracial marriage intensely divided the country, the Warren Court was not prepared to insist upon a norm of equality. Would the current moderates on the Roberts Court be any bolder? It's hard to imagine.<sup>92</sup>

Eskridge goes on to argue that similar circumspection informed Thurgood Marshall when he was prosecuting civil rights claims through the 1940s and '50s – he did not begin his work in *Brown* for school desegregation or toward interracial marriage until the political climate was to his advantage.<sup>93</sup>

In fact, Eskridge's opposition to a broad ruling in the *Perry* case was so strong, despite his long commitment to marriage equality, that he filed an amicus brief with the Ninth Circuit in the *Perry* case advocating for a narrower holding than that of the District Court.<sup>94</sup> When the Ninth Circuit ultimately affirmed the District Court on narrower grounds, limiting its decision to California and giving the Supreme Court a reasonable way to move forward, he applauded the court's decision as both sound jurisprudence and sound politics.<sup>95</sup> He argued that the Supreme Court's inclination to wait for the sociopolitical dynamic to solidify is not only important for litigators to consider when implementing a strategy, but it may be good policy for the Supreme Court, and he used the current climate surrounding the same-sex marriage debate as an example:

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<sup>91</sup> William Eskridge Jr. & Darren Spedale, *Sit Down, Ted Olson and David Boies, Let the States Experiment With Gay Marriage—It's Not Time Yet For a Federal Lawsuit*, SLATE (May 29, 2009, 11:25 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/05/sit\\_down\\_ted\\_olson\\_and\\_david\\_boies.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/05/sit_down_ted_olson_and_david_boies.html).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> William N. Eskridge, Jr., Andrew Koppelman, et al. as Amici Curiae. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10–16696).

<sup>95</sup> William N. Eskridge, Jr., *The Ninth Circuit's Perry Decision and the Constitutional Politics of Marriage Equality*, 64 STAN. L. REV. ONLINE 9 (February 22, 2012), <http://www.stanfordlawreview.org/online/perry-marriage-equality>.

The crusade against marriage equality for gays is still robust in the United States today. Only [nine states] and the District of Columbia now recognize same-sex marriage. More than forty states specifically forbid it, most as a matter of state constitutional law. Americans are evenly divided on the issue, and partisans on both sides have heated feelings. Under these circumstances, the federal judicial branch ought *not* to issue broad rulings that pretend to decide the issue once and for all. This was a lesson of *Roe v. Wade*, a prematurely sweeping decision.<sup>96</sup>

Since that article was written, there has been some substantial change in the polling data, but the primary thrust of his argument remains, and many others have articulated similar views.<sup>97</sup> To be clear, Eskridge has confidence in the inevitability of marriage equality but not in Olson and Boies' timing or approach to achieving it.

Others, however, have been harshly critical of this incremental or “gradualist” approach to litigation strategy, suggesting that it is unfairly shrewd to gays and lesbians to a legal waiting game, wherein they are precluded from utilizing the legal system they have a right to be a part of, simply because particular segments of the legal community want to handle the nation’s highest court with kid gloves. One advocate of this more aggressive approach articulated it this way:

As a basis for judicial inaction, overblown fears of socio-political backlash grow harder to defend with every passing month. Calls for the Court to cut this baby in half--or to ignore it or throw it out the window entirely – are thus out of step with evolving social mores and deeply offensive to anyone who resents the injustice of condemning gays and lesbians to an open-ended legal limbo. This is especially true for those of us who believe that same-sex relationships are as valuable as opposite-sex relationships wherever they happen to be found, and who see little virtue in forcing gays and lesbians from across the United States to accept only a

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<sup>96</sup> *Id.*

<sup>97</sup> David Cole, *Gambling With Gay Marriage*, N.Y. REV. OF BOOKS (February 9, 2012, 11:48 AM), <http://www.nybooks.com/blogs/nyrblog/2012/feb/09/gambling-gay-marriage>

(Had the federal case for gay marriage been postponed, so that by the time it reached the Supreme Court a more significant portion of state governments had recognized the practice without the sky falling, the likelihood of success at the federal level would be much greater. But we are here now, on the precipice. In the long run, I am confident that justice will be done, and our grandchildren will look back on same-sex marriage bans with the same incredulity with which we regard bans on interracial marriage. But there is a real danger that this case may make the long run even longer.”); *See also* Koppelman, *Perry*, *supra*, at 69 (“The Supreme Court is unlikely to impose same-sex marriage on the entire country.”).

few geographic enclaves that recognize their rights while waiting for the rest of the nation to see the light.<sup>98</sup>

While the differences between progressives and traditionalists on the topic of same-sex marriage dominates, this internal disagreement is often overlooked because, in the end, all of these activists will work together and pool their efforts and resources to work toward the common goal of marriage equality. This strategic disagreement, nonetheless, asks important questions about which approach is more rational, how the Supreme Court might proceed, and where the marriage equality movement moves from there.

## V. HISTORICAL CONTEXT: *BROWN V. BOARD OF EDUCATION* AND *ROE V. WADE*

As has become clear, advocates of either position often point to historical context, particularly Supreme Court jurisprudence, and related political and social dynamics, to provide support for their view on how litigators should proceed today. In *Brown v. Board of Education*,<sup>99</sup> the Supreme Court held that racial segregation in public education was unconstitutional, famously putting a beginning to the end of the Jim Crow era set in motion by their decision nearly 60 years earlier in *Plessy v. Ferguson*, relegating African-Americans to a life of “separate but equal.”<sup>100</sup> In the lead up to *Brown*, Thurgood Marshall brought a number of student plaintiffs’ cases in the separate but equal context, but he “argued that it was unnecessary for the Court to hold segregation, *per se*, unconstitutional in order to grant the relief sought because, in each instance, separate but equal facilities had not been provided.”<sup>101</sup> In a pure example of

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<sup>98</sup> Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471 (2012).

<sup>99</sup> *Brown*, 347 U.S. 483 (1954).

<sup>100</sup> The Honorable Constance Baker Motley, *The Historical Setting of Brown and Its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9 (1992).

<sup>101</sup> *Id.*

Marshall implementing the incremental approach, during argument in the *Sipuel v. Board of Regents of the University of Oklahoma*<sup>102</sup> case, he was asked whether he was seeking a ruling on the validity of segregation, per se, and Marshall answered in the negative as a matter of strategy: “Marshall had already discussed this response with his legal staff and mentors. They all agreed that a ‘yes’ answer would be dangerously premature.”<sup>103</sup> It is clear that Marshall and his legal team recognized that an incremental litigation strategy was essential to their overall goal of desegregation the schools and achieving broader civil rights victories, even though it meant that inequality would continue unabated in the daily lives of millions of Americans.

In the decade following the *Brown* decision, the Court decided a number of other significant civil rights cases, and ended government approval of racial segregation in American daily life. However, it took the Court another 13 years to rule that laws banning interracial marriage were unconstitutional in *Loving v. Virginia*,<sup>104</sup> even though more than a dozen states repealed anti-miscegenation laws in the interstice.<sup>105</sup> Perhaps because the Supreme Court was proceeding incrementally in light of growing racial tensions, the justices struck down a Florida prohibition on interracial cohabitation before wading into the issue of interracial marriage.<sup>106</sup>

It took the seemingly innocent marriage of Mildred Loving, a woman of African and Native American descent, and Richard Loving, a white man, to finally bring the issue to the Supreme Court.<sup>107</sup> After the couple married in Washington, D.C., they returned to Virginia and

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<sup>102</sup> *Sipuel v. Bd. of Regents of Univ. of Okl.*, 332 U.S. 631 (1948).

<sup>103</sup> Motley, *supra* note 100.

<sup>104</sup> *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

<sup>105</sup> Brian Palmer, *Won't Somebody Think of the Children*, SLATE (March 27, 2013, 4:34 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2013/03/gay\\_marriage\\_at\\_the\\_supreme\\_court\\_did\\_interracial\\_marriage\\_opponents\\_claim](http://www.slate.com/articles/news_and_politics/explainer/2013/03/gay_marriage_at_the_supreme_court_did_interracial_marriage_opponents_claim).

<sup>106</sup> *McLaughlin v. State of Fla.*, 379 U.S. 184 (1964).

<sup>107</sup> Dionne Walker, *Pioneer of Interracial Marriage Looks Back*, USA TODAY (June 10, 2007, 1:37 PM), [http://usatoday30.usatoday.com/news/nation/2007-06-10-loving\\_N.htm](http://usatoday30.usatoday.com/news/nation/2007-06-10-loving_N.htm).

were arrested, because interracial marriage was illegal in their home state.<sup>108</sup> The trial judge explained that:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>109</sup>

Their attorney argued passionately before the Supreme Court, however, that the Lovings should be entitled to all the same rights and benefits that same-race couples are entitled to, and that finding anti-miscegenation laws unconstitutional would afford them these protections.<sup>110</sup> The Court wrote that, “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”<sup>111</sup> Elaborating on the fundamental importance of the institution of marriage in the scheme of liberty, Chief Justice Warren stated, “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. . . marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>112</sup> This language has been thrust into the spotlight once again as same-sex marriage litigators look to *Loving* as the primary jurisprudence that establishes not only that marriage is a fundamental right, necessary to a citizen’s pursuit of happiness, but withholding it on the basis of discrimination is unacceptable. The question is whether or not the Court will extend its reasoning in *Loving* and its equal protection jurisprudence to include protection for same-sex couples. The case is also useful in highlighting another example of incremental judicial action and the surrounding legislative and societal environment that influenced the decision making process of the Court.

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<sup>108</sup> *Id.*

<sup>109</sup> *Loving*, 388 U.S. at 3.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

At the time of the *Loving* decision, seventeen states still enforced laws against interracial marriage. By 1972, five years after the Courts decision, 37% of Americans still supported anti-miscegenation laws.<sup>113</sup> While the decision made them unenforceable, many of these remaining states kept the laws “on the books” for decades. Alabama didn’t remove its law until a 2000 popular amendment, 33 years after the *Loving* decision, and 40% of the electorate voted to keep the voided law,<sup>114</sup> perhaps suggesting that, in some places, some progressive judicial actions are always aggressive.

While Thurgood Marshall’s approach to civil rights litigation was ultimately successful, and the Lovings won their right to marry, supporters of a more aggressive litigation strategy would say that this process was too lengthy and may have forced African-Americans and interracial couples in many states to suffer the many burdens caused by discrimination for longer than necessary. These issues were deeply complex, of course, but particularly in the years between *Brown* and *Loving*, aggressive activists would have preferred a less wait and see approach.

As an example of a more direct strategy, activists often point to the Supreme Court’s decision in *Roe v. Wade*. First, it is important to acknowledge that the subject of abortion rights may not be viewed by all as a substantive or moral corollary to civil rights or same-sex marriage, but it is as another example of a subject rooted in a rich social and judicial history that informs modern litigation strategy. In 1973, the Court established a nationwide right to abortion through its landmark decision in *Roe*.<sup>115</sup> At the time of this decision, abortion was fully illegal under all

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<sup>113</sup> Michael J. Rosenfeld, *Support for Laws Against Racial Inter-marriage in the U.S.*, STANFORD U. [http://www.stanford.edu/~mrosenfe/Attitudes\\_Interracial.pdf](http://www.stanford.edu/~mrosenfe/Attitudes_Interracial.pdf).

<sup>114</sup> Suzy Hansen, *Mixing It Up: Alabama just legalized black-white marriage. An expert talks about why it took so long and the American obsession with racial purity*, SALON (March 8, 2001, 3:14 PM), <http://www.salon.com/2001/03/08/sollors/>.

<sup>115</sup> *Roe v. Wade*, 410 U.S. 113 (1973).



circumstances in 30 states, legal under limited circumstances in 16, and only legal on demand in four states<sup>116</sup> Between 1967 and the *Roe* decision, the country had seen some liberalization of abortion laws at the state level, as about one third of states liberalized or repealed their criminal abortion laws, starting with Colorado in 1967.<sup>117</sup> As a result of this state liberalization and the decision in *Roe*, the country dramatically shifted away from near universal criminalization of abortion with limited exceptions in a few states to nationwide recognition of a right to abortion, all in a six year period.<sup>118</sup> While this is certainly an example of aggressive litigation that prevailed, it is as yet unclear whether or not the social dynamics at work at the time of the Court's decision in *Roe* are equivalent to those at work in the same-sex marriage context; would today's Court make such an aggressive ruling given the current sociopolitical dynamic? Further, advocates of the incremental approach, though they would surely hope to see same-sex couples afforded equal rights as soon as possible, are wary of the potential setbacks to the GLBT community that might be caused by an overly ambitious decision by the Court. Incrementalists argue that one need not look any further than the deep political division that has been observed in the years after the Supreme Court's decision in *Roe v. Wade*.

Many news outlets, political commentators, and scholars have noted that one of the lasting legacies of *Roe v. Wade* is its divisive impact on the American political landscape.<sup>119</sup> Even Supreme Court Justice Ruth Bader Ginsburg, herself a well-known liberal judge and fierce advocate of women's rights, has said that the Court's decision, while legally correct, was potentially damaging in its timing, and that a more incremental development through the states

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<sup>116</sup> David Masci, *A History of Key Abortion Rulings of the U.S. Supreme Court*, PEW RES. CTR. (January 16, 2013), <http://www.pewforum.org/Abortion/A-History-of-Key-Abortion-Rulings-of-the-US-Supreme-Court.aspx>.

<sup>117</sup> *History of Abortion*, NAT'L ABORTION FED'N, [http://www.prochoice.org/about\\_abortion/history\\_abortion.html](http://www.prochoice.org/about_abortion/history_abortion.html).

<sup>118</sup> *Id.*

<sup>119</sup> David Crary, *40 Years After Roe v. Wade, Deep Divide is Legacy*, AP (January 19, 2013, 3:50 PM), <http://bigstory.ap.org/article/roe-v-wade-after-40-years-deep-divide-legacy>.

may have helped to avoid the political divisions that have become so entrenched in American politics, at least on this particular issue.<sup>120</sup> She proposed that the Court could have limited their decision to the particular state statute in question, left the political process to further development in the states, and moved on to the broader question of a woman's right to privacy nationwide at a later time.<sup>121</sup> Speaking at a Columbia Law School symposium, she said:

It's not that the judgment was wrong, but it moved too far too fast...the court made a decision that made every abortion law in the country invalid, even the most liberal. We'll never know whether I'm right or wrong...things might have turned out differently if the court had been more restrained.<sup>122</sup>

While it is unclear whether the lasting partisanship surrounding the abortion issue results from an inherent moral divisiveness or from the aggressiveness of the Court's decision in *Roe v. Wade*, there can be no doubt based on statistics alone that the decision has caused political embitterment and alienation.

The polling data consistently shows that the *Roe v. Wade* decision, and the subject of abortion in general, continues to be extremely controversial and complicated within the American landscape. A Pew Research Center poll finds 63 percent of U.S. adults are opposed to overturning *Roe*, compared to 60 percent in 1992, a fairly static number over the course of twenty years, and a substantial majority of Americans still consider abortion to be "morally wrong."<sup>123</sup> A recent Gallup poll taking a measure of opinion on abortion shows that 52 percent of Americans think that the procedure should be legal under certain circumstances, 25 percent want it to be legal in all cases, and 20 percent think it should be illegal in all cases, which is a very

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<sup>120</sup> David Crary, *Ginsburg questions 1973 abortion ruling's timing*, AP (February 20, 2012), [http://boston.com/news/education/higher/articles/2012/02/10/ginsburg\\_questions\\_1973\\_abortion\\_rulings\\_timing/](http://boston.com/news/education/higher/articles/2012/02/10/ginsburg_questions_1973_abortion_rulings_timing/).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Roe v. Wade at 40: Most Oppose Overturning Abortion Decision*, PEW RES. CTR. (January 16, 2013), <http://www.pewforum.org/Abortion/roe-v-wade-at-40.aspx#differences>.

close breakdown to Gallup's polling data in the 1970s.<sup>124</sup> Beyond polling, the abortion issue has continued to be a controversial issue in the federal court system. Beginning with the Supreme Court's decision in *Webster v. Reproductive Health Services*,<sup>125</sup> a more conservative Court has increasingly accepted greater state restrictions on access to abortions and a woman's right to choose. Later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>126</sup> the Court lowered the standard necessary to determine if a woman's right to choose an abortion had been infringed upon to an assessment of whether or not an undue burden had been placed upon her by the state, further broadening the Court's jurisprudence on abortion and, therefore, the ongoing debate in every state over what is and is not legal in terms of regulating abortions. Today, the abortion debate rages on over issues such as "partial-birth" or dilation and extraction abortions, pre-abortion ultrasounds, and laws that restrict abortions to before 20 weeks or earlier on the basis of the fetus potentially feeling pain, among countless other causes of controversy.<sup>127</sup> In many respects, the development of abortion law is still ongoing in the states and, as a result, a fierce debate is raging on between pro-life and pro-choice advocates, whether they be women's rights activists, members of religious groups or otherwise. Advocates of an aggressive litigation strategy in the same-sex marriage cases point out that the *Roe v. Wade* decision was far more of a "bolt out of the blue" than a decision granting marriage rights to same-sex couples would be, mainly because they believe that the marriage equality movement has "ripened" more than the abortion issue had at the time of the *Roe* decision, and because all signs point to public acceptance of same-sex marriage progressing exponentially, in the same way public acceptance

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<sup>124</sup> *Abortion*, GALLUP POLL, <http://www.gallup.com/poll/1576/abortion.aspx>.

<sup>125</sup> *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

<sup>126</sup> *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, (1992).

<sup>127</sup> Masci, *supra* note 116.

for interracial marriage has.<sup>128</sup> Additionally, they note that abortion is substantively an inherently different issue; those that are deeply opposed to abortion view it as murder, but, as one such advocate state it, “for the gay marriage opponent in, say, Mississippi, how will their lives change if the openly gay couple living down the street can now obtain a marriage license?”<sup>129</sup>

In contrast, current data suggests that same-sex marriage is gaining increasing support in American society and will continue to do so exponentially in coming years, as the level of support among younger demographic groups is overwhelming.

## VI. SAME SEX-MARRIAGE AND SOCIETAL TRENDS

In recent years, there has been a dramatic shift in public approval for same-sex marriage. A CBS News poll<sup>130</sup> shows 53 percent in favor of same-sex marriage, while only 39% oppose its legalization; a Pew Research Center<sup>131</sup> shows 49% in favor, 44% opposed; and a ABC News/Washington Post<sup>132</sup> poll shows 58% in favor, 36% opposed. The CBS News poll finds that peoples between the ages of 18-29 support same-sex marriage overwhelmingly, by a margin of 73 percent to 21 percent.<sup>133</sup> In that age group, even a plurality of Republicans support marriage equality.<sup>134</sup> Between the ages of 30 and 44, support still meets a substantial margin of 59 percent to 37 percent, and between the ages of 45 and 64, there is a tie at 46 percent in favor and 46

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<sup>128</sup> Adam Liptak, *Shadow of Roe v. Wade Hangs Over Ruling on Gay Marriage*, N.Y. TIMES (March 23, 2013), <http://www.nytimes.com/2013/03/24/us/roes-shadow-as-supreme-court-hears-same-sex-marriage-cases.html>.

<sup>129</sup> *Id.*

<sup>130</sup> *Poll: 53% of Americans support same-sex marriage*, CBS NEWS (March 26, 2013, 7:00 AM), [http://www.cbsnews.com/8301-250\\_162-57576249/poll-53-of-americans-support-same-sex-marriage/](http://www.cbsnews.com/8301-250_162-57576249/poll-53-of-americans-support-same-sex-marriage/).

<sup>131</sup> Andrew Kohut, *Yes, More Americans Favor Legalizing Gay Marriage, But How Many Do?*, PEW RES. CTR. (March 29, 2013), <http://www.pewresearch.org/2013/03/29/yes-more-americans-favor-legalizing-gay-marriage-but-just-how-many-do/>.

<sup>132</sup> *March 2013 Post-ABC poll - Same-sex marriage*, WASH. POST (March 26, 2013), [http://www.washingtonpost.com/politics/polling/march-2013-postabc-poll-samesex-marriage/2013/03/26/aeb55690-8ff5-11e2-9173-7f87cda73b49\\_page.html](http://www.washingtonpost.com/politics/polling/march-2013-postabc-poll-samesex-marriage/2013/03/26/aeb55690-8ff5-11e2-9173-7f87cda73b49_page.html).

<sup>133</sup> *Poll, supra* note 130.

<sup>134</sup> *Id.*

percent opposed.<sup>135</sup> Only those about 65 are statistically opposed as an age group, and they oppose by a margin of 52 to 35 percent.<sup>136</sup> In the CBS poll, 33 percent of respondents indicated that they once held an opposing viewpoint, an example of how rapidly viewpoints have changed.<sup>137</sup> These statistics suggest a major cultural shift in the last five years in particular, as the Pew Research Center found as recently as 2008 that 49 percent of Americans were opposed to same-sex marriage and 38 percent were in favor of its legalization.<sup>138</sup> This broad public support has translated into a series of victories in states around country in recent years.

Eight of the nine states that legally recognize same-sex marriage did so in the last five years; the only state to do so before that was Massachusetts in 2004. A landmark achievement in the marriage equality movement was when same-sex marriage was legalized in Maine, Maryland, and Washington – the first time that voters had approved of such a measure instead of courts. Washington D.C. has also legalized same-sex marriage. Eight states and Washington D.C. grant the equivalent of state-level spousal rights to same-sex couples, most of which were enacted since New Jersey legalized civil unions in 2007, although California’s domestic partnerships had been in effect since 1999.<sup>139</sup> For the first time in U.S. history, a sitting President has endorsed same-sex marriage, as President Obama passionately stated in his second inaugural address that, “Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law...for if we are truly created equal, then surely the love we commit to one another must be equal, as well.”<sup>140</sup> The President himself had previously been opposed to

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Kohut, *supra* note 131.

<sup>139</sup> *Marriage Equality & Other Relationship Recognition Laws*, HUM. RTS. CAMPAIGN, [http://www.hrc.org/files/assets/resources/Relationship\\_Recognition\\_Laws\\_Map.pdf](http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map.pdf).

<sup>140</sup> Richard Socarides, *America’s Most Important Gay-Rights Speech?*, NEW YORKER (January 21, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/01/americas-most-important-gay-rights-speech.html>

same-sex marriage, but he has openly discussed how his opinion has evolved in much the same way that many other American's opinions have.<sup>141</sup> Similarly, President Clinton<sup>142</sup> and former Secretary of State Hillary Clinton<sup>143</sup>, who remain incredibly high profile figures in American politics and daily life, and who both previously opposed same-sex marriage, have come out in strong support of its legalization. America has even elected its first lesbian Senator, Tammy Baldwin of Wisconsin.<sup>144</sup>

The various amicus curiae that filed with the Supreme Court and lower courts in the *Perry* and *Windsor* cases are also as testament to the groundswell of societal support for same-sex marriage. A litany of high profile Republicans, including Meg Whitman, John Huntsman, Christine Todd Whitman, and dozens more, argued in favor of marriage equality, bucking their party's official position.<sup>145</sup> Senator Rob Portman of Ohio, once considered a leading contender to be Mitt Romney's running mate in the 2012 president elections, became the first sitting Republican senator to endorse same-sex marriage.<sup>146</sup> He announced that he had come to realize that, after finding out his own son was gay, he wanted him to be able to have the same enjoyment and quality of life that he had: "We conservatives believe in personal liberty and minimal government interference in people's lives. We also consider the family unit to be the

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(A lot has been written about how quickly public opinion has shifted in favor of gay-rights. President Obama's second Inaugural was evidence of that, but more strikingly it was evidence of a newfound willingness to lead the country more dramatically into the future on gay equality.).

<sup>141</sup> Devin Dwyer, *President Obama Cites 'Winds of Change' in Same-Sex Marriage Shift*, ABC NEWS (March 10, 2012), <http://abcnews.go.com/Politics/president-obama-cites-winds-change-sex-marriage-shift/story?id=16315420#.UYDYd8p4934>.

<sup>142</sup> Peter Baker, *Now in Defense of Gay Marriage, Bill Clinton*, N.Y. TIMES (March 25, 2013), <http://www.nytimes.com/2013/03/26/us/politics/bill-clintons-decision-and-regret-on-defense-of-marriage-act.html>.

<sup>143</sup> Jillian Rayfield, *Hillary Clinton announces support for gay marriage*, SALON (March 18, 2013), [http://www.salon.com/2013/03/18/hillary\\_clinton\\_announces\\_support\\_for\\_gay\\_marriage\\_2/](http://www.salon.com/2013/03/18/hillary_clinton_announces_support_for_gay_marriage_2/).

<sup>144</sup> Amanda Terkel, *Tammy Baldwin Sworn In To Senate, Becomes First Openly Gay Senator*, HUFFINGTON POST (January 3, 2013, 4:28 PM), [http://www.huffingtonpost.com/2013/01/03/tammy-baldwin-senate\\_n\\_2404459.html/](http://www.huffingtonpost.com/2013/01/03/tammy-baldwin-senate_n_2404459.html/).

<sup>145</sup> Sheryl Gay Stolberg, *Republicans Sign Brief in Support of Gay Marriage*, N.Y. TIMES (February 25, 2013), <http://www.nytimes.com/2013/02/26/us/politics/prominent-republicans-sign-brief-in-support-of-gay-marriage.html>.

<sup>146</sup> Aaron Blake, *Rob Portman Announces Support for Gay Marriage*, WASH. POST (March 15, 2013, 8:02 AM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/15/prominent-republican-senator-announces-support-for-gay-marriage/>.

fundamental building block of society. We should encourage people to make long-term commitments to each other and build families, so as to foster strong, stable communities and promote personal responsibility.”<sup>147</sup> Senator Portman experienced substantial praise from supporters of marriage equality, and a great deal of criticism from traditionalists.<sup>148</sup> His evolution on the issue highlighted the fact that same-sex marriage, particularly as it continues to grow in support across demographic boundaries, has become a divisive issue within the Republican Party itself.<sup>149</sup> Interestingly and importantly, polls are increasingly indicating that an enormous factor that is changing people’s beliefs on the subject of marriage is actually having personal relationships with gays and lesbians.<sup>150</sup> Further amicus curiae show diverse and growing support for same-sex marriage, including a brief by dozens of prominent Fortune 500 companies,<sup>151</sup> a brief by professional football players and major professional sports franchises,<sup>152</sup> as well as major medical organizations and child advocacy groups such as the American Psychological Association, the American Medical Association, the American Academy of Pediatrics, the American Psychiatric Association, and the Adoption and Child Welfare Advocates.<sup>153</sup> These organizations have presented important arguments to the Court, stating that the sociological, medical, and psychological communities have overwhelmingly concluded that “homosexuality is a normal expression of human sexuality, is generally not chosen, and is highly resistant to change,” that “gay men and lesbian women form stable, committed relationships that are

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Greg Sargent, *Among Republicans, a generational divide on gay marriage*, WASH. POST (March 26, 2013, 12:52 PM), <http://www.washingtonpost.com/blogs/plum-line/wp/2013/03/26/among-republicans-a-generational-divide-on-gay-marriage/>.

<sup>150</sup> *Growing Support for Gay Marriage: Changed Minds and Changing Demographics*, PEW RES. CTR. (March 20, 2013), <http://www.people-press.org/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics/>.

<sup>151</sup> Brief for American Companies as Amici Curiae, *Hollingsworth v. Perry*, 133 S. Ct. 1521 (2013) (No. 12-144).

<sup>152</sup> Brief for Chris Kluwe and Brendon Ayanbadejo as Amici Curia, *Hollingsworth v. Perry*, 133 S. Ct. 1521 (2013) (No. 12-144).

<sup>153</sup> Brief for the American Psychological Association, the American Medical Association, et al. as Amici Curiae, *Hollingsworth v. Perry*, 133 S. Ct. 1521 (2013) (No. 12-144).

equivalent to heterosexual relationships in essential respects,” that, “the institution of marriage offers social, psychological, and health benefits that are denied to same-sex couples,” that, “the factors that affect the adjustment of children are not dependent on parental gender or sexual orientation,” and that there is no “scientific basis for concluding that gay and lesbian parents are any less fit or capable than heterosexual parents, or that their children are any less psychologically healthy.”<sup>154</sup> The parties that support same-sex marriage from the perspective of social science are of particular importance, as they undermine many traditionalist arguments against marriage equality, and they are a very large part of the overall trend that the Court will be unable to ignore in evaluating its options in the *Windsor* and *Perry* cases.

## VII. THE COURT’S GLBT JURISPRUDENCE AND CURRENT OPTIONS

In 1972, relatively soon after the *Loving* decision, the Minnesota Supreme Court rejected a same-sex couple’s claim that the federal Constitution entitled them to marry.<sup>155</sup> The Supreme Court dismissed an appeal of this case, *Baker v. Nelson*, “for want of a substantial federal question.”<sup>156</sup> In a 1986 case reviewing a Georgia law classifying homosexual sexual activity as illegal “sodomy,” *Bowers v. Hardwick*, the Supreme Court held that there was no constitutionally protected right to engage in homosexual sex.<sup>157</sup> Though these decisions were not friendly to the gay rights movement, the Court’s jurisprudence has evolved along with society and, in recent years, a number of decisions have been released that may have a very real impact on decision-making in the marriage context.

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<sup>154</sup> *Id.*

<sup>155</sup> *Baker v. Nelson*, 409 U.S. 810 (1972).

<sup>156</sup> *Id.*

<sup>157</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).



Regulation of same-sex sexual activity is well-established in American history, and the Court's decision in *Lawrence v. Texas* finding that the Fourteenth Amendment afforded people with a right to privacy and liberty that extended to homosexual intercourse was a landmark in the movement for gay rights, especially as a direct rejection of the Court's previous ruling in *Bowers*.<sup>158</sup> At the time of *Lawrence*, in 2003, nine states continued to ban sodomy regardless of the sex of those engaging in the conduct, and four states prohibited only same-sex couples from engaging in anal and oral sex.<sup>159</sup> Four decades earlier, every state in the nation had laws banning sodomy, so the Court did not necessarily act aggressively in this case, but the justice's decision aligned with concurrent social and political change in American society.<sup>160</sup> Justice Kennedy, writing for the Court, explained that defendants, who had been convicted of sodomy in Texas, were entitled to engage in private, consensual sexual conduct as adults under the Constitution's protection of liberty and privacy, founded in the Fourteenth Amendment's due process clause.<sup>161</sup> He referred to Chief Justice Burger's concurring opinion in *Bowers*, in which he said that, "condemnation of [homosexual practices] is firmly rooted in Judeo-Christian moral and ethical standards," to argue that "the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," thus establishing that moral disapproval of homosexual conduct cannot provide a basis for government action,<sup>162</sup> and, as Justice Scalia famously pointed out in a vehemently argued dissent, the Court's reasoning in *Lawrence* has important implications for same-sex marriage as a constitutional matter.<sup>163</sup> If moral disapproval cannot serve as a basis for denying same-sex couples privacy in their intimate

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<sup>158</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>159</sup> *Supreme Court Strikes Down Texas Law Banning Sodomy*, AP (June 26, 2003), <http://www.nytimes.com/2003/06/26/politics/26WIRE-SODO.html>.

<sup>160</sup> *Id.*

<sup>161</sup> *Lawrence*, 539 U.S. at 578.

<sup>162</sup> *Id.*

<sup>163</sup> *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

relations, Scalia reasons, how can it serve as a basis to deny them a right to marry in some future case?<sup>164</sup> While he acknowledges that Kennedy wrote for the majority that the decision does not, “involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,” Scalia argues that his is a “bald, unreasoned disclaimer” that defies the broader logic of the opinion, and that an earlier passage hints that *Lawrence* is indeed laying the groundwork for same-sex marriage.<sup>165</sup> Earlier in the dissent, Kennedy writes that the Constitution protects “personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education,” and he goes on to explain that “persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>166</sup> In language that has been thoroughly referenced as the *Perry* and *Windsor* cases worked their way through the courts, Scalia argues that the *Lawrence* decision “dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions...If moral disapprobation of homosexual conduct is ‘no legitimate state interest’ for purposes of proscribing that conduct...what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution?’”<sup>167</sup> After discussing the dangers of the Court’s decision in terms of its direct breadth and potential for future applicability, Scalia even argues that procreation, one of the major justifications that opponents of same-sex marriage use in place of moral disapproval of homosexuality to justify state denial of marriage rights to same-sex couples, cannot logically serve as such a justification “since the sterile and the elderly are allowed to marry.”<sup>168</sup> He concludes that, “this case ‘does not involve’ the issue of homosexual marriage only if one

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 574.

<sup>167</sup> *Id.* at 604.

<sup>168</sup> *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).

entertains the belief that principle and logic have nothing to do with the decisions of this Court.”<sup>169</sup> As Scalia has submitted, *Lawrence* is an essential case in the Court’s gay rights jurisprudence and will surely influence the future of same-sex marriage.

Another major Supreme Court case dealing with gay rights matters was *Romer v. Evans*, in which the Court invalidated a Colorado constitutional amendment that prohibited any protections for homosexuals as a group under law because it was not rationally related to any legitimate state interest.<sup>170</sup> Justice Kennedy, again writing for the Court, begins in powerful fashion with a quote from Justice Harlan’s dissent in *Plessy v. Ferguson*, saying that the Constitution “neither knows nor tolerates classes among citizens.”<sup>171</sup> Getting to the merits of the Coloradoan constitutional amendment, Kennedy explained that, “We must conclude 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.”<sup>172</sup> While the Court did not apply a standard of heightened scrutiny in this case, and the law was dismissed under a rational basis review, this decision does not preclude the possibility a heightened standard will be applied in the future. Because Justice Kennedy has been at the helm of two opinions that have marked major achievements in the gay rights movement, and because he is often viewed as the “swing vote” on a court that is otherwise viewed as having four solidly conservative and four solidly liberal justices, even though he is ideologically conservative in many respects, Kennedy is viewed as essential to the future of same-sex marriage in federal litigation, at least as long as he remains on the Supreme Court.

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<sup>169</sup> *Id.*

<sup>170</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>171</sup> *Id.* at 623 (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting)).

<sup>172</sup> *Id.* at 635.

Justice Kennedy's arguments in *Romer* and *Lawrence* were historic not only because they were the first times that the Supreme Court held in favor of gay rights, but also because they did so forcefully, empathetically, and articulately.<sup>173</sup> Despite this, the implications of these decisions for same-sex marriage, and Justice Kennedy's readiness to move forward on declaring a fundamental right to marriage for same-sex couples at this particular moment in time are unclear.<sup>174</sup> By couching his decisions in broad terms such as "liberty," "autonomy," "dignity," and "self-determination," and narrowing the decisions as much as possible, Kennedy has brought gays and lesbians within the protection of the law and granted them humanity and justice in the eyes of the Supreme Court, while leaving broader questions about marriage and applicable standards of scrutiny open for future cases and, perhaps, a more appropriate "moment" in American history to address these questions.<sup>175</sup> Whether or not the *Windsor* and *Perry* cases have presented Justice Kennedy and the remaining justices with that moment is perhaps the most repeated question surrounding the Supreme Court's current term. On a personal level, it is well-known that Kennedy is a libertarian "California establishment" Republican and that he knows and is friends with many gay people, but it is difficult to say that this will influence his decision, and it is more likely that his decision making will be influenced by his understanding of the law and his sense of the current readiness of society for same-sex marriage across the nation.<sup>176</sup> Kennedy is acutely aware of the potentially negative impact of a premature and aggressive decision on same-sex marriage, but he is also aware of evolving social trends and the current political climate surrounding the issue.<sup>177</sup> In *Lawrence*, Kennedy artfully phrased his view on the

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<sup>173</sup> Lawrence C. Levine, *Justice Kennedy's "Gay Agenda": Romer, Lawrence, and the Struggle for Marriage Equality*, 44 MCGEORGE L. REV. 1 (2013).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> David. G. Savage, *Gay Marriage Fight May Hinge on Supreme Court's Anthony Kennedy*, L.A. TIMES (February 8, 2012), <http://articles.latimes.com/2012/feb/08/nation/la-na-marriage-kennedy-20120209>.

<sup>177</sup> Levine, *supra* note 173.

evolution of constitutional interpretation, in dicta that may become highly predictive of his future participation in decisions related to same-sex marriage, or of a future Court's decision to do what he and his peers could not:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truth and that later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its own principles in their own search for greater freedom.<sup>178</sup>

As pundits continue to focus on Kennedy, many forget that Chief Justice John Roberts is the leader of the Court, nearly 20 years his junior, potentially intellectually flexible, and therefore concerned about his and the Court's legacy on controversial civil rights issues. Further, he is likely understanding of the fact that any decision involving gay rights today may face him again five, ten, fifteen, twenty, or even thirty years in the future, and not a predictable vote in any direction, as he proved in *National Federation of Independent Business v. Sebelius*.<sup>179</sup> In that decision, many legal analysts speculated that Roberts felt a great deal of pressure in his role as Chief Justice to preserve the legacy of the Court as a judicial institution free from the lowly and unpopular game of partisan politics currently entangling the other branches of government; they argued that he feared a decision dismantling the Affordable Healthcare Act, President Obama's signature legislative achievement, would be seen by many as conservative judicial activism.<sup>180</sup> This emphasis on legacy, and on the responsibilities of being Chief Justice, will also weight on

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<sup>178</sup> *Lawrence*, 539 U.S. at 579.

<sup>179</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). (Chief Justice Roberts sided with those justices typically perceived to be on the liberal wing of the Court to uphold the majority of the Affordable Healthcare Act, President Obama's signature healthcare law. The law was passed in an atmosphere of deep partisan division and the conservative Chief Justice's vote was seen as a surprising but possibly calculated and pragmatic decision, designed to preserve the credibility of the Court as a nonpartisan judicial institution, above the fray of Washington politics.).

<sup>180</sup> Richard Socarides, *How Would John Roberts Rule On Gay-Marriage Cases?*, *NEW YORKER* (July 9, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/07/john-roberts-supreme-court-gay-marriage-cases.html>.

his decision making in the context of same-sex marriage.<sup>181</sup> As a relatively young man at fifty-eight, it is not inconceivable that he could be serving on the Supreme Court for another two to three decades, which is an extremely long time in the court of public opinion. A decision against same-sex marriage now would almost certainly be faced with reversal during his tenure, as the *Bowers* finding that laws against sodomy were constitutional was reversed after only 17 years, and the current rate of increase in polls for same-sex marriage is rapid. At an increase of about 1.5 percent a year, according to some estimates, that could mean public support for same-sex marriage at about 70 percent when he is in his mid-seventies.<sup>182</sup> Of course, public opinion is not the only factor that the Chief Justice Roberts will consider in making determinations about same-sex marriage, but his focus on legacy, his relative youth, and the pervasive and rapid shifts in opinion on gay rights occurring in American society are certain to influence his thought process as he questions whether or not he wants to lead the Supreme Court against the overwhelming course of social progress. Further, there is evidence that Roberts is open to the cause of gay rights, as he performed pro bono legal work for the gay activist groups behind the *Romer* case in 1996, to the extent that he was “instrumental in reviewing filings and preparing oral arguments.”<sup>183</sup> While attorneys may not necessarily agree with every client for whom they work, this information is just another piece of information that may be helpful in evaluating the Chief Justice’s sense of the gay rights movement.

Even though oral arguments have historically proven to be ineffective measures of ultimate conclusions, the oral argument in the *Perry* and *Windsor* cases allowed the justices to give some hints as to issues of concern and their possible intentions. In relation to DOMA,

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Richard A. Serrano, *Roberts Donated Help to Gay Rights Case*, L.A. TIMES (August 4, 2005), <http://articles.latimes.com/2005/aug/04/nation/na-roberts4>.

Justice Kagan took issue with Congress' stated intention of expressing moral disapproval for homosexuality through the law, perhaps implicating *Lawrence* and suggesting that this was an inappropriate basis for a government action.<sup>184</sup> Justice Ginsburg said that DOMA created an environment where opposite-sex couples who were married were entitled to all benefits under federal law and therefore had "full marriages," whereas same-sex couples who were married were not and therefore had "skim milk marriages."<sup>185</sup> While the liberal justices focused on equal protection matters, Justice Kennedy focused on issues related to federalism, saying that there was potentially a federal "conflict with what has always been the essence of state police power, which is to regulate marriage, divorce, custody."<sup>186</sup> Though consensus might not be reached on every issue, DOMA seemed to be at a very real risk of being overturned, at least based on the questions posed by the justices, but this is perhaps the least predictable and reliable measure.<sup>187</sup> According to reports by the news media, at least, the justices seemed far more poised to strike down DOMA than they did to issue a broad opinion in the *Perry* case.<sup>188</sup>

At oral argument in the *Perry* case, Justice Kennedy was decidedly reserved and noted that Olson and Boies were asking the Court to go into "uncharted waters" by declaring that same-sex couples had a fundamental right to marry.<sup>189</sup> He noted that uncharted waters might be considered a positive or a negative metaphor, but suggested that the Court might have made a mistake in even granting the case, hinting at issues with standing related to the intervening

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<sup>184</sup> Liz Goodwin, *Lawmakers' 'moral disapproval' of gay people in 1996 could doom DOMA law in Supreme Court*, YAHOO! NEWS (March 27, 2013), <http://news.yahoo.com/blogs/ticket/lawmakers-moral-disapproval-gay-people-1996-could-doom-224933451--politics.html>.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Margaret Talbot, *Justice Kennedy's DOMA Problem*, NEW YORKER (March 27, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/03/justice-kennedys-doma-problem.html>.

<sup>188</sup> Emily Bazelon, *Ditching DOMA*, SLATE (March 27, 2013), [http://slate.com/articles/news\\_and\\_politics/supreme\\_court\\_dispatches/2013/03/supreme\\_court\\_oral\\_argument\\_on\\_doma\\_the\\_defense\\_of\\_marriage\\_act\\_can\\_t\\_be.html](http://slate.com/articles/news_and_politics/supreme_court_dispatches/2013/03/supreme_court_oral_argument_on_doma_the_defense_of_marriage_act_can_t_be.html).

<sup>189</sup> Oral Argument, *Hollingsworth*, 133 S. Ct. 1521 (2013), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_audio\\_detail.aspx?argument=12-144](http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=12-144).

defendants in the case.<sup>190</sup> Some analysts have noted that dismissing the case for lack of standing may be a way for the Court to get out of having to make a prematurely broad decision, or an uneven and awkward decision, while still making certain that same-sex couples in California are ultimately given the right to marry, and leaving the door open to a future case when the incremental approach has taken hold in more states.<sup>191</sup> How much can truly be taken out of oral arguments is hard to know, and the media is largely speculative, but the line of questioning utilized by the justices is informative nonetheless.

Given these considerations, legal analysts have speculated that the Court will likely proceed in the *Perry* case with one of five options.<sup>192</sup> They speculate that the Court could 1) uphold Proposition 8, thus allowing states to limit civil marriage to opposite-sex couples; 2) the Court could hold that the Fourteenth Amendment's equal protection guarantees prohibit states from denying same-sex couples marriage licenses – the widest possible option; 3) the Court could find that, once states have offered same-sex couples all or most of the “incidents of marriage” that are offered to similarly situated opposite-sex couples, there is no purpose for denying same-sex couples the status of “marriage” other than to stigmatize them on the basis of their sexual orientation, thus affecting only the eight states that already extend to same-sex couples civil unions, but not marriage; 4) the Court could follow the court of appeals and hold that a state cannot remove a right to marry once it has given that right and virtually all of the

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<sup>190</sup> *Id.*

<sup>191</sup> Adam Liptak, *Who Wanted to Take the Case on Gay Marriage? Ask Scalia*, N.Y. TIMES (March 29, 2013), <http://www.nytimes.com/2013/03/30/us/supreme-courts-glimpse-at-thinking-on-same-sex-marriage.html>.

<sup>192</sup> Marty Lederman, *The Court's five options in the California marriage case*, SCOTUSBLOG (March 1st, 2013, 11:11 AM), <http://www.scotusblog.com/2013/03/the-courts-five-options-in-the-california-marriage-case>.



incidents of marriage already given to similarly situated opposite-sex couples; or 5) the Court could simply dismiss the appeal on standing grounds without addressing the merits.<sup>193</sup>

### **VIII. Analysis**

As the Supreme Court has established time and time again, civil marriage is one of life's most important processes, and it is the choice of two individuals to formally commit their love to one another, to form a family, and to build a shared life, that makes the institution important to broader society from a secular and practical perspective. While it would be valuable to other gay rights causes for the Court to apply an intermediate or heightened scrutiny standard to government classifications based on sexual orientation, it seems unnecessary for the Court to apply these standards for the purpose of finding state prohibitions of same-sex marriage unconstitutional, as there can be no rational basis for such laws. As Judge Walker's thorough district court opinion found in the *Perry* case, the reasons presented by governments for these bans, from preserving the institution of marriage, to tradition, morality, condemnation of homosexuality, "protecting" children, and various other religious reasons are simply not legitimate state reasons for discriminating against homosexuals. The extensive trial record established by Judge Walker provides direct evidence that homosexuality is simply not a choice, that homosexuals form loving bonds in the same way that heterosexuals do, and the overwhelming judgment of the sociological and medical community is that children from same-sex homes do just as well as children from traditional families. As for tradition and religious views, it is important to note that these are concepts to be respected, and those that revere them should not be roundly denounced as bigots or intolerant simply because they do not support same-sex marriage, but their belief systems do not justify discrimination under the Constitution.

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<sup>193</sup> *Id.*

Similarly, the Constitution assures religious groups that they will never have to recognize marriages of which they do not approve, and this is just as proper as the government treating all citizens equally under the law. Having said that, my opinion on same-sex marriage, equal protection, and the Constitution will not convince the Supreme Court, and the question of which strategy for doing that is better – the incremental or the aggressive – is more another issue entirely.

As a theoretical matter, the incremental approach appears to have a more historically-based, logical approach, whereas the aggressive standpoint tends to be more emotional. Incrementalists like Eskridge look to the historical tendency of the Supreme Court to proceed incrementally, and the dangers of proceeding aggressively, to suggest that the movement benefits by proceeding cautiously. Those that advocate the aggressive approach often argue that same-sex couples deserve marriage equality now and, therefore, a reserved strategy is inappropriate. Legally, aggressive activists are in the right, but incrementalists have a stronger, more logic-based theoretical approach in this regard. Despite the fact that the incrementalist method appears to approach same-sex marriage litigation from more solid footing than the aggressive approach, the incrementalist position does successfully apply its own reasoning. Incrementalists argue that the Supreme Court's past incremental tendencies, the risks of aggressive decisions like *Roe*, and the danger of a negative decision necessitate caution, but these arguments don't survive application to the dynamics of the same-sex marriage issue in 2013, although they might have mere months ago.

While it is impossible to know what the Court will do in June, it seems likely that DOMA may be at an end, as the Court can proceed incrementally with the *Windsor* case. With *Perry*, the Court seems unlikely to proceed aggressively, but this does not mean aggressive activists have

failed. As long as the Court does not deal a setback to the marriage equality movement, the argument that *Perry* was too aggressive does not hold water, and, while the oral arguments seemed to suggest the Court is not prepared to release a sweeping decision on same-sex marriage this term, the current balance of the Court, and ongoing social trends make it highly unlikely that the Court will do anything but delay deciding the issue until some future case, or issue a limited holding. When the Supreme Court proceeded incrementally in the civil rights era, the country was far more divided, as the polling data discussed earlier suggests. While the number of states with same-sex marriage is close, though not equal, to the number of states with liberal abortion laws at the time of the *Roe* decision, the analogy simply does not hold up because the issue is fundamentally different. For pro-life activists, abortion will always be murder, whereas same-sex marriage hardly affects the lives of those not involved in it, and the polling data reflects a seemingly unstoppable trend of growing support, while abortion has remained divisive for decades. While a sweeping decision like *Roe* may be improbable at this time, a similar cultural backlash would be highly unlikely and, if it did result, it would be short-lived. Thus, while the incremental approach tends to follow a more rational thought process, it fails in this instance largely because an aggressive ruling would not be damaging in the way that past aggressive rulings were, because social trends mean the Court is uniquely situated to rule differently than the Court has in similar situations, and because the current court is highly unlikely to rule against the gay rights movement, even though it is not likely to rule particularly aggressively in favor of the gay rights movement.

## **IX. CONCLUSION**

At stake in the *Windsor* and *Perry* cases is the quality of life for millions of real people, just trying to live and love like every other American they know. For those who have dedicated

their lives to the gay rights movement, the issue of same-sex marriage is deeply felt. The controversy between those that advocate for an aggressive litigation strategy and those that advocate for an incremental one, it surely must be noted, is not one between opponents, but one between unquestionable allies, so passionate about this keystone concern that its future must be pursued with vigorous internal debate such that mistakes can be corrected and a path forward can be forged regardless of what may happen in the states, in the court system, and beyond. This paper is designed as a roadmap to explore this internal debate, so that a path forward can be forged when the Supreme Court releases its decisions in June of 2013, because the gay rights movement will unite and continue to rally forward towards a day when the promise of equality and justice for all is truly realized.

For her part, Edie Windsor isn't worried: "We did our homework, and we got here, and it's joyous to be here," she said on the steps of the Supreme Court in March.<sup>194</sup> "I think we'll win if there's justice. But if it doesn't happen this time, it will happen next time or the next. But it will happen."<sup>195</sup>

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<sup>194</sup> Applebome, *supra* note 7.

<sup>195</sup> *Id.*