

Hollingsworth v. Perry

Same-Sex Marriage, the Courts, and Social Reform

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IV

Abstract

The history of same-sex marriage litigation has often been a story of courts making decisions in opposition to public opinion, which as a result has created powerful political backlash. George N. Rosenberg has argued that when courts try to create social reform without significant political and public support, they will create political backlash against the very issue they have ruled in favor of. William N. Eskridge proposes a different theory and concludes that courts have significantly advanced the cause of same-sex marriage by reversing the “burden of inertia,” and moving the issue from a disgust- and identity-based discussion into what he calls “normal politics.” Recent polls show a growing majority of Americans in support of same-sex marriage, and in 2013 the number of states that recognizes same-sex marriage went from nine to seventeen. Additionally, 2013 was the year the Supreme Court struck down parts of the federal Defense of Marriage Act in *United States v. Windsor* and invalidated a ban on same-sex marriage, Proposition 8, in California in *Hollingsworth v. Perry*.

In light of the recent success of same-sex marriage cases in American courts, this thesis suggests a more balanced view on the role of courts than argued by Rosenberg. Furthermore, by following the case that ended up as *Hollingsworth v Perry* in the Supreme Court, this thesis applies Eskridge’s theory in analyzing how the arguments of the opponents of same-sex marriage developed from the initial campaign to pass Proposition 8 and into the various levels of courts and appeals. This thesis argues that courts have invalidated many of the identity-based arguments presented by the same-sex marriage opponents and played a pivotal role in the growing momentum in support of same-sex marriage.

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1 Introduction

The United States is currently in an ongoing debate about same-sex marriage that has the nation spilt down the middle on whether or not one should legalize same-sex marriage. By early 2014, same-sex marriage has been legalized in seventeen states as well as the District of Columbia and eight Native American Tribes.¹ In Utah, Texas, Oklahoma and Virginia, district courts have declared state constitutional amendments banning same-sex marriage unconstitutional. The rulings have been stayed from enforcement and are awaiting appeals. The map is changing rapidly, and in the midterm elections in November 2014, citizens in Ohio, Oregon, Colorado, Florida, Michigan, Arkansas and South Dakota will get the chance to vote for legalization of same-sex marriage in voter enacted referendums. Currently, twenty-nine states have enforceable amendments banning same-sex marriage in their state constitutions, while four states enforce bans through legislation. As of late April 2014, only four state bans to same-sex marriage were not being challenged in a state or federal court.² Things are happening fast and they are happening now.

Recent polls show a growing majority of Americans in support of same-sex marriage, and in 2013 the number of states that recognizes same-sex marriage went from nine to seventeen.³ Additionally, 2013 was the year the U.S. Supreme Court struck down parts of the federal Defense of Marriage Act in *United States v. Windsor*⁴ and invalidated a ban on same-sex marriage, Proposition 8, in California in *Hollingsworth v. Perry*.⁵

The recent success of same-sex marriage litigation in American courts stand in stark contrast to earlier attempts at marriage reform. The history of same-sex marriage litigation has often been a story of courts making decisions in opposition to public opinion, which as a result has created powerful political backlash. George N. Rosenberg has argued that when

¹ The states that have legalized same-sex marriage are: California, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Illinois, Rhode Island, Vermont, Washington, New Jersey, New Mexico: "DEFINING MARRIAGE: STATE DEFENSE OF MARRIAGE LAWS AND SAME-SEX MARRIAGE," *National Conference of State Legislatures*, March 26, 2014, accessed May 4, 2014, <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx#1>

² Denver Nicks, "Federal Suit Filed to Overturn Georgia's Gay Marriage Ban," *Time*, April 22, 2014, accessed May 4, 2014, <http://time.com/71968/georgia-gay-marriage-ban/>

³ Richard Gonzales, "Number Of States Allowing Gay Marriage Expected To Grow," *National Public Radio*, December 25, 2013, accessed April 14, 2014, <http://www.npr.org/2013/12/25/257019750/number-of-states-allowing-gay-marriage-expected-to-grow>

⁴ *United States v. Windsor* 570 U.S. 12 (2013)

⁵ *Hollingsworth v. Perry*, 570 U.S. ____ (2013)

courts try to create social reform without significant political and public support, a powerful backlash against the very issue they have ruled in favor of will follow. William N. Eskridge proposes a different theory and concludes that courts have significantly advanced the cause of same-sex marriage by reversing the “burden of inertia,” and moving the issue from a disgust- and identity-based discussion into what he calls “normal politics.”

1.1 Thesis Statement

The overall goal of this thesis is to analyze how *Hollingsworth v. Perry*, and the California marriage cases leading up to it, evolved through the various levels of courts and appeals. By applying Eskridge’s theory, the thesis aims to explain how the arguments of the opponents of same-sex marriage developed from the initial campaign to pass Proposition 8, and into the courtrooms, and why they have failed.

Furthermore, this thesis places *Hollingsworth v. Perry* within the context of the debate on the role of courts in socially and political controversial issues, and theories on political backlash. The thesis will also discuss *Hollingsworth v. Perry* in light of the growing momentum for same-sex marriage in the United States, and consider whether or not Rosenberg’s theory on political backlash is adequate to describe how the courts have influenced the issue of same-sex marriage.

1.2 Choice of Sources, Theory and Approach

The primary sources studied in this thesis consist of the court documents from *Hollingsworth v. Perry* and the court cases leading up to it. *In re Marriage Cases*⁶ is the decision of the California Supreme Court that ruled the state’s ban on same-sex marriage unconstitutional. *Perry v. Schwarzenegger*⁷ from the Northern District Court of California and *Perry v. Brown*⁸ from the Ninth Circuit are the first cases dealing with same-sex marriage that reached federal courts, and provides crucial insight to the role of courts in the campaign for same-sex marriage. In addition to the opinions of the courts, other primary sources consist of the transcripts from the oral argument hearings, news articles, TV ads and polls.

⁶ *In re Marriage Cases*, 43 Cal 4th 757 (2008)

⁷ *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, United States District Court for the Northern District of California (2010)

⁸ *Perry v. Brown*, 671 F.3d 1052, 9th Cir. (2012)

A central concept in this thesis is whether or not legal cases involving same-sex marriage create political backlash or not. George N. Rosenberg's book *The Hollow Hope*⁹ analyzes the political backlash that has followed same-sex marriage cases and argues that attempts at same-sex marriage litigation has damaged the cause by mobilizing same-sex marriage opponents, and producing litigation that bans same-sex marriage. In the 2013 article "Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States,"¹⁰ William N. Eskridge, professor of law at Yale University, offers a more positive theory on the role of courts and same-sex marriage. In light of the recent success of same-sex marriage cases, Eskridge asserts that Rosenberg overstates the political backlash that has followed court rulings in favor of same-sex marriage and argues that courts have played an important and vital role in the growing acceptance of marriage equality. The theories of Rosenberg and Eskridge will be applied to assess the potential for backlash following the California marriage cases and *Hollingsworth v. Perry*, and to discuss the recent success of same-sex marriage advocates in the United States.

Secondary literature consists of books, academic articles and the webpages of the organizations that sponsored the plaintiffs and respondents of *Hollingsworth v. Perry*. Michael Klarman's examination of key rulings on same-sex marriage and their backlash effect in his book *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*,¹¹ from 2013, is an especially important secondary source as it provides much of the historical background for this thesis.

The key method used in this thesis is a qualitative analysis of the primary and secondary sources. By doing an in-depth study of the primary sources, the thesis discusses Rosenberg and Eskridge's theories to review the impact and effect *Hollingsworth v. Perry* has had on the same-sex marriage issue. Furthermore, the thesis analyzes polls by using quantitative research methods to look for and establish patterns that might indicate or rule out a potential backlash effect resulting from the same-sex marriage cases dealt with in this thesis.

⁹ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd ed.) (University of Chicago Press, 2008)

¹⁰ Eskridge, William N., "Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States," *Boston University Law Review* Vol 93, Issue 2 (2013): 279.

¹¹ Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (Oxford University Press, 2013).

1.3 The Historical Context: The Gay Movement and Same-Sex Marriage in America

In the book, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*, Michael J. Klarman follows the same-sex marriage issue from its early beginnings and into the final years of the 2000s. Today, same-sex marriage has become an issue no one can ignore in the public discourse. However, marriage rights were not on the agenda of the American Gay Rights Movement when it took its first steps in the late 1960s. Same-sex sodomy was criminalized in most states, work-place discrimination was normal and police harassment a real threat. In Ohio, in 1969, a man was acquitted of murder for killing a homosexual. His argument was that the man had made sexual advances toward him.¹² The American Psychiatric Association regarded homosexuality as a mental illness and the Immigration and Naturalization Service barred homosexuals from entering the country because of their “psychopathic personality.” The ACLU (American Civil Liberties Union), although sympathetic to some of the issues raised by gay activists, agreed that homosexuality could be disqualifying when it came to certain types of job positions such as those of police officers, firefighters and teachers.¹³ The cost of being an open homosexual is difficult to exaggerate. The Gay Movement was stigmatized as a group of misfits and pedophiles, and lack of representation and allies resulted in few political victories and breakthroughs.

On Saturday, June 28, 1969, the New York City police raided The Stonewall Inn, a gay bar in Greenwich Village. Police raids such as these were not rare. What was uncommon was the fact that the bars’ patrons showed resistance. The raid turned violent, and four police officers were wounded and thirteen people were arrested. The following night, hundreds of people demonstrated in Greenwich Village, and soon demonstrations spread to cities all over the nation.¹⁴ The Gay Movement had become inspired by the antiwar and black power movements and a younger generation of gay activists demanded a more radical approach and tactics.

The shift from a moderate Gay Movement to one with a more radical and progressive ideology paved the way for radical policies as well. In 1971, Michael McConnell and Jack Baker applied for and received a marriage license in Minnesota. However, the state did not recognize the marriage as valid and the couple filed suit in a state court. The court rejected the

¹² Klarman, *From the Closet to the Altar*, 14.

¹³ Klarman, *From the Closet to the Altar*, 6.

¹⁴ Klarman, *From the Closet to the Altar*, 17.

legal arguments for same-sex marriage, intending to preserve the traditional understanding of marriage.¹⁵ Similar suits and court cases filed in the following years were all rejected on the same basis, namely that the traditional definition of marriage furthered state interests in procreation and child rearing. Constitutional arguments based on due process and the Equal Protection Clause were ignored, as homosexuals were not seen as a suspect class in need of protection under the Fourteenth Amendment.

Even though the case for same-sex marriage could have been considered a lost cause from the beginning, same-sex marriage lawsuits continued to grow in numbers in the early 1970s. However, marriage equality was by no means at the center of the Gay Movement's agenda in the 1970s. It was seen as less important than other issues such as employment discrimination and repeal of sodomy laws, and many believed marriage in itself represented the very society and traditions they wanted to distance themselves from.

In spite of the unsuccessful marriage lawsuits, by 1980, the Gay Movement could look back at a decade with slow, but important progress. Homosexuality was no longer defined as a mental illness, discrimination based on sexual orientation in governmental employment was outlawed and lower courts had started invalidating state sodomy laws. These important victories did not go unnoticed by. In the late 1970s, a coalition of conservative and religious organizations mobilized hundreds of thousands in opposition against the victories of the Gay and Women's Movements. Abortion rights, rising divorce rates and a more impatient Gay Movement gave fuel to a new power factor in American politics often called the Religious Right. Grassroots organizations such as Moral Majority and Focus on the Family spearheaded successful political campaigns to repeal antidiscrimination legislation all over the country. In 1980, the Democratic Party included a gay rights plank in their platform. The same year, however, the Republican Party adopted a plank defending the traditional American family. A majority of Christian evangelicals had supported Carter in the presidential election in 1979, but in 1980 they voted two to one for Reagan.¹⁶

The AIDS crisis of the 1980s gave fuel to even more antagonism against homosexuals in America. Initially viewed as a "gay cancer", the AIDS epidemic led to severe setbacks in housing and employment discrimination. It became normal, and in most instances legal, to discharge workers with AIDS out of fear of spreading the disease, despite evidence that AIDS could not be transmitted through casual contact. Patrick Buchanan, one of Reagan's

¹⁵ Klarman, *From the Closet to the Altar*, 18.

¹⁶ Klarman, *From the Closet to the Altar*, 33.

spokesmen and White House Director of Communications, said that homosexuals had “declared war on nature, and now nature is extracting an awful retribution.”¹⁷ Reagan gave his first speech on AIDS six years into the epidemic, by which time more than twenty thousand people had died. Defenders of sodomy laws used AIDS as an argument to uphold criminalization of homosexuality, and in 1986 the Supreme Court rejected a constitutional challenge against such laws in *Bowers v. Hardwick*.¹⁸ In one of the concurring opinions, Chief Justice Warren E. Burger wrote: "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."¹⁹

Bowers was a devastating setback for the Gay Movement and they were forced to shift the focus from civil rights to AIDS related issues such as increased funding for AIDS research and anti-discrimination protections for AIDS victims. Although the AIDS epidemic could be the reason behind many of the political setbacks for the Gay Movement during the 1980s, the crisis also created sympathy for the homosexual population as the death toll rose. People were forced out of the closet as they were diagnosed with AIDS and the victims were friends, family and co-workers of ordinary Americans. The percentage of Americans who reported knowing someone who is gay doubled between 1985 and 1992, and in 1987, the National March on Washington for Lesbian and Gay Rights drew hundreds of thousand participants.²⁰

By the early nineties, gay rights were still an issue that divided the nation. Buchanan, now a candidate for the Republican nomination for the presidency, used his speech to the Republican National Convention in 1992 to call for a “cultural war for the soul of America:”

The agenda Bill Clinton and Hillary Clinton would impose on America - abortion on demand, a litmus test for the Supreme Court, homosexual rights, discrimination against religious schools, women in combat -that's change, all right. But it is not the kind of change America wants. It is not the kind of change America needs. And it is not the kind of change we can tolerate in a nation that we still call God's country.²¹

On the other side, the Democratic Party ran on a gay friendly platform in the 1992 election. When Bill Clinton was elected president, he appointed gays and lesbians to high-ranking positions within his government and started working to repeal the ban on homosexuals in the

¹⁷ Alex Hern, “Mozilla CEO donated to rightwing candidates, records show,” *The Guardian*, April 2, 2014, accessed May 7, 2014, <http://www.theguardian.com/technology/2014/apr/02/controversial-mozilla-ceo-made-donations-right-wing-candidates-brendan-eich>

¹⁸ *Bowers v. Hardwick*, 487 U.S. 186 (1986)

¹⁹ *Bowers v. Hardwick*, 487 U.S. 186 (1986) (Burger, C.J., concurring)

²⁰ Klarman, *From the Closet to the Altar*, 39.

²¹ “Culture War Speech: Address to the Republican National Convention,” Patrick Joseph Buchanan, accessed February 14, 2014, <http://buchanan.org/blog/1992-republican-national-convention-speech-148>

military. By 1993, eight states had passed laws barring discrimination based on sexual orientation in housing and employment.²² However, a Congress dominated by conservatives succeeded in stopping President Clinton's attempt to allow homosexuals to serve in the military, which led to the compromise commonly called the "Don't Ask, Don't Tell" policy. This meant that the army would not ask soldiers if they were gay, but they would not allow openly gay soldiers to serve. Since the policy was implemented, the army discharged over 13,000 troops for "demonstrating a propensity or intent to engage in homosexual acts."²³ The policy was repealed by Congress and the Obama administration in 2011.

The Gay Movement was still divided in the early nineties on whether they should pursue marriage rights or not. Many found their identity in defining themselves as different and did not wish to be assimilated into mainstream and "conformist" institutions such as marriage. However, the support for making marriage a central focus for the Gay Movement grew as it became more evident that same-sex couples lacked both protection and benefits seen as vital for couples living together. Joint tax filing status, social security survivors' benefits, inheritance and hospital visitation rights are just a few of the benefits connected to marriage. The status of marriage is also important as it was and is seen as the centerpiece of both traditional and modern society's social structure.

Opponents of same-sex marriage main arguments are either social or religious, or both. The Bible's condemnation of homosexual activities and God's design of marriage as a holy institution for a man and a woman have been important for religious opponents of same-sex marriage. In addition, churches and religious organizations have been concerned that their religious freedom would be challenged should same-sex marriage become federal law, as they fear that they would be forced to acknowledge and grant marriage ceremonies to same-sex couples. The social arguments are most often based on questioning the welfare of children in same-sex families and arguing that marriage first and foremost is an institution to promote safe and monogamous procreation.

In 1993, Hawaii became the first American state to recognize same-sex marriage when its supreme court ruled in *Baehr v. Lewin*²⁴ that denying marriage rights to same-sex couples constituted discrimination based on sex. However, the decision did not last very long as the

²² Klarman, *From the Closet to the Altar*, 44.

²³ Bryan Bender, "Continued discharges anger 'don't ask, don't tell' critics," *The Boston Globe*, May 20, 2009, accessed May 3, 2014, http://www.boston.com/news/nation/washington/articles/2009/05/20/continued_discharges_anger_dont_ask_dont_tell_critics/

²⁴ *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993)

Hawaiian legislature enacted a bill defining marriage as a union of one man and one woman a year later. The plaintiffs of *Baehr* did not challenge the amendment in fear of it ending up in the federal Supreme Court where their chances were seen as grim.

In the 1994 congressional elections, Christian conservatives went to the polls in record numbers and about 70 percent voted for the Republican Party. This resulted in a Congress dominated by social conservative republicans with anti-gay rights positions who succeeded in passing the Defense of Marriage Act (DOMA) in 1996. The act made sure that the federal government would not recognize same-sex marriages or give any federal benefits to same-sex couples.

Eyes turned towards Vermont in 1997 when three same-sex couples filed suit after having been denied marriage licenses. In *Baker v. State*,²⁵ the state Supreme Court unanimously invalidated Vermont's exclusion of same-sex couples from marriage. Having witnessed the backlash of *Baehr*, same-sex marriage activists in Vermont took a strategic approach to the issue. Thus, when the state Supreme Court gave the legislature the choice to create a new institution for same-sex couples as long as it provided the same benefits and protections as marriage, they did not protest. In March 2000, the lawmakers of Vermont voted to approve a bill that established civil unions, and a month later it passed the state senate by 19 to 11 votes.²⁶ The issue had created such a controversy that the bill was signed into effect behind closed doors by Democratic governor Howard Dean. Later that year, a law banning same-sex couples from adopting children was passed in Mississippi, and in Nebraska a voter enacted proposition to ban civil unions and domestic partnerships was passed by Nebraskans by 70 percent to 30 percent. In both Mississippi and Nebraska supporters of the amendments attributed their passage to what had happened in Vermont.²⁷

When the U.S. Supreme Court rejected the constitutional challenge against state sodomy laws in 1986, half the states criminalized sexual activities between people of the same sex. By 2003 that number was down to thirteen.²⁸ Even though same-sex marriage and even civil unions were highly controversial in the early 2000s, the general view on homosexuality had grown in a positive direction. In 1998, the police in Houston entered the apartment of John Lawrence based on a report that a robbery was taking place. The report turned out to be false. Instead the police found two men having sex. They were both arrested

²⁵ *Baker v. State*, 744 A.2d 864 (Vt. 1999)

²⁶ Klarman, *From the Closet to the Altar*, 79.

²⁷ Klarman, *From the Closet to the Altar*, 85.

²⁸ Klarman, *From the Closet to the Altar*, 85.

and charged with sodomy. Lawrence appealed all the way up to the federal Supreme Court, and in 2003, the Court invalidated all sodomy laws by a vote of 6 to 3 in *Lawrence v. Texas*.²⁹

Lawrence became the landmark decision the Gay Movement had been waiting for since the 1960s. The Supreme Court ruled that discrimination against gays and lesbians was unconstitutional under the Equal Protection Clause, and so, religious conservatives feared that *Lawrence* would have an effect on same-sex marriage litigation. Their worst fears became reality when Massachusetts became the fifth jurisdiction in the world to recognize same-sex marriage only five months after *Lawrence*.

In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court ruled that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”³⁰ Massachusetts Republican Governor, Mitt Romney, requested the state attorney general and the Court to stop the implementation until people had had the opportunity to vote on an proposed amendment to the state constitution to ban same-sex marriage in the state. The Democratic attorney general refused to meet Romney’s request and same-sex couples in Massachusetts started getting married.³¹ Proponents of same-sex marriage were prepared for the possibilities of political backlash and spent a lot of resources on securing the election of candidates sympathetic to their cause. When the amendment was introduced to the Massachusetts legislators in 2005, same-sex couples had married by the thousands and opinion polls showed a majority of the state’s population in favor of same-sex marriage. In September 2005, the amendment, which also included approval of civil unions, was defeated by an overwhelming majority, 157 to 39 votes.³² The republican minority leader, Brian Patrick Lees, who had co-sponsored the amendment, ended up voting against it: “Gay marriage has begun, and life has not changed for the citizens of the Commonwealth, with the exception of those who can marry.”³³

Even though the case for same-sex marriage in Massachusetts became a success it generated a wave of political backlash all over America. According to polls taken by Pew Research, the support for same-sex marriage fell to 31 percent in 2004, having been as high as 35 percent just two years earlier.³⁴ Polling showed that not a single state would approve same-

²⁹ *Lawrence v. Texas*, 539 U.S 558 (2003)

³⁰ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)

³¹ Klarman, *From the Closet to the Altar*, 91.

³² Klarman, *From the Closet to the Altar*, 96.

³³ Klarman, *From the Closet to the Altar*, 96.

³⁴ Klarman, *From the Closet to the Altar*, 98.

sex marriage by referendum in 2004 and thirteen states passed referenda, dubbed mini-DOMAS, barring same-sex marriage. Religious conservatives started lobbying for a federal constitutional amendment to define marriage as a union between one man and one woman. President Bush endorsed the amendment in 2004 and it became a central issue in that year's presidential election.

Bush was reelected and introduced the amendment to Congress, which voted it down in 2006. In his State of the Union address in 2004, Bush proclaimed that the only alternative left if activist judges persisted in redefining marriage by court order would be a federal marriage amendment act.³⁵ The newly elected mayor of San Francisco, Gavin Newsom, reacted to the president's address by instructing city officials to begin issuing marriage licenses to same-sex couples.³⁶ Without knowing it, Newsom had set in motion a series of events that would take the issue of same-sex marriage all the way up to the federal Supreme Court.

In California, Democrats were able to block the enactment of a mini-DOMA. However, through a voter enacted initiative the California state law was amended in 2000 to the same effect as the mini-DOMA would have had. As same-sex marriage in California was illegal in 2004, Newsom's actions in San Francisco generated several lawsuits that eventually reached the California Supreme Court in 2008. The court ruled in favor of same-sex marriage, concluding that restricting marriage to couples consisting of a man and a woman was unconstitutional under the Equal Protection Clause of the Californian constitution. A new initiative was submitted, Proposition 8, to amend the state constitution to ban marriage between same-sex couples. In November 2008, Proposition 8 was passed by popular vote and same-sex marriage had become illegal again in California.

Two same-sex couples filed a lawsuit claiming that Proposition 8 violated the Due Process and Equal Protection Clause of the Fourteenth Amendment to the federal Constitution. The case reached the Northern District Court of California and *Perry v. Schwarzenegger* became the first case on same-sex marriage to be heard by a federal court. After the district court ruled in favor of same-sex marriage, the proponents of Proposition 8 appealed the decision and in *Perry v. Brown* they met their second defeat. In a two against one vote, the Ninth Circuit Court upheld the decision of the district court. After the Ninth

³⁵ "Bush calls for ban on same-sex marriages," *CNN*, February 25, 2004, accessed April 22, 2014, <http://edition.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage/>

³⁶ "Mayor defends same-sex marriages," *CNN*, February 23, 2004, accessed April 22, 2014, <http://edition.cnn.com/2004/LAW/02/22/same.sex/>

Circuit declared Proposition 8 unconstitutional the initiative's proponents appealed to the U.S. Supreme Court. 2013 became the year when the U.S. Supreme Court heard arguments and ruled on the issue of same-sex marriage for the first time. *Hollingsworth v. Perry* was the case that originated in California. In *Perry*, the majority of the Court held that the petitioners did not have the standing to appeal. As a result, the judgment of the Ninth Circuit was vacated and the ruling of the Northern District Court of California was upheld. The outcome of *Hollingsworth v. Perry* meant that same-sex couples could get married in California again, but the Supreme Court left the question of same-sex marriage bans' constitutionality open.

1.4 The Historical Context: The Courts and Marriage Litigation

The role and definition of marriage is central to the debate about same-sex marriage. To understand the battle over same-sex marriage one must understand the position and history of the institution in question, and the role the courts have played in that history. The institution of marriage is conceived by many as the cornerstone of a society, a place of family, safety, rights and obligations. Marriage as an idea and institution predates recorded history but it has played an important part in most known cultures and religions.

Today, marriage in the United States is first and foremost a civil matter. States and federal government channel benefits, rights and responsibilities through marital status. Marriage affects immigration, citizenship, tax policy, property and inheritance rules and social benefit programs. Civil authorities may permit religious leaders to solemnize marriages, but not to determine who may enter or leave a civil marriage. Religious leaders may determine independently whether to recognize a civil marriage or divorce, but the recognition or lack of such has no effect on the relationship under state and federal law. This was not always the case.

The religious British colonials firmly believed in the sanctity of monogamous marriage and it became an important part of colonial life and society. In the colonial period, marriage was regulated through common law and religious practices which varied widely among the different colonies. There was, however, a shared view of some of the more important aspects of the institution. Marriage was first and foremost a union between a man and a woman, a contract, both legal and spiritual. The common law turned the married couple

into one person, legally. This legal doctrine, most often referred to as coverture, defined marriage in America up until the middle of the 19th century.

Under coverture, the husband was the legal head of the household. The woman's legal and economic identity was in the hands of her husband's once married. With the rise of feminism in the early 19th century, coverture came under a lot of fire as being oppressive towards women, but when legislators in America started to enact "married women's property acts" it was not because women had asked for it. The laws were designed to separate the wives' property from the husbands, so when he was in debt the entire values of the family would not be at stake.³⁷

As with women's property legislation, state legislators started looking at provisions for divorce. It was still very strict and there had to be behavior involved that clearly broke the contract of marriage. The most common reasons were adultery, sexual incapacity and an extended period of desertion.³⁸

Regulation of marriage had evolved from a religious practice, barely regulated by common law, to a question of politics and rights in the 19th century. The United States Supreme Court has at least fourteen times ruled that marriage is a fundamental right. The first time it did so was in 1888, when the Court ruled in *Maynard v. Hill* that marriage is "the most important relation in life" and "the foundation of the family and society, without which there would be neither civilization nor progress."³⁹ The legislatures move to dictate women's property rights and laws on divorces, and the Supreme Court's ruling in *Maynard v. Hill*, made marriage a political question in the hands of the government. Marriage had become a political and ideological matter.

As women gained more independence and possibilities outside of the home at the beginning of the 20th century, the institution of marriage changed as well. The political and moral implications of marriage became less crucial as women gained the vote and a voice in society, but the economic aspects of marriage became even more important. Even though the doctrine of coverture was defeated both culturally and in law, a new model where the husband was seen as the "provider" and the wife a "dependent" took its place.

The industrial revolution and the urbanization of America moved jobs and factories into the cities, where men worked to provide their wives and families. New Deal policies to

³⁷ Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Harvard University Press, 2000), 53.

³⁸ Cott, *Public Vows*, 48.

³⁹ *Maynard v. Hill*, 125 U.S. 190 (1888), accessed March 1, 2014, <http://supreme.justia.com/cases/federal/us/125/190/case.html>

combat the economic depression of the 1930s were aimed directly at men's providership, which cemented women's economic dependency in marriages even more so. The Social Security programs of the New Deal era rewarded men for taking on family responsibilities and it became a widely accepted truth that working women strengthened the unemployment crisis by not letting men take their jobs.⁴⁰

Racial restrictions on an individual's choice of marriage partner were a natural part of many of the state laws in the post-slavery era. In 1912, the African American boxer Jack Johnson married Lucille Cameron, a white prostitute, which made the national news. A year after the couple married, fourteen states introduced bills that instituted or strengthened their bans on interracial marriage. The first severe blow against racial restrictions on marriage came in 1948, when California became the first state to strike down its ban on interracial marriage after a white woman and a black man where refused a marriage license. The state's Supreme Court ruled that the marriage ban violated the Fourteenth Amendment's guarantee of equal protection of the laws. Soon, about half of the other states with bans on racial intermarriage revoked them and some twenty years later the federal Supreme Court banned all laws prohibiting interracial marriage in *Loving v. Virginia*.⁴¹

The idea of the nuclear family thrived in the decades after World War II, but the idealistic model of marriage did not go unchallenged. In most states one had to prove that the partner had failed to meet the terms of marriage to get a divorce. However, the states varied in how strictly they practiced their divorce laws, which again created troubles for the federal government. California became the first state to reform its divorce law in 1969. In what is called the "no-fault" principle, couples no longer needed to prove that any provision of marriage had been broken. By the mid-1970s, over half of the states had adopted "no-fault" divorce, and in 1985 all of the states offered couples the opportunity to end their marriages without having to give legal arguments. As a result of the changes in divorce laws, the annual divorce rate for married women increased from 15 to 20 divorces per 1000 from 1970 to 1975.⁴²

Even though the modernization of society has taken away many of the central aspects of marriage, it still plays an important role in our culture. Women's legal and economic dependence on men was an important reason for women to get married, and even stay married

⁴⁰ Cott, *Public Vows*, 172.

⁴¹ *Loving v. Virginia*, 388 U.S. 1 (1967)

⁴² U.S Census Bureau, (2011, May), "Number, Timing and Duration of Marriages and Divorces: 2009," retrieved March 6, 2014, from <http://www.census.gov/prod/2011pubs/p70-125.pdf>, 7.

under gruesome conditions. Now, women are freer to live the lives they choose. The sexual liberation of the 1970s has made it possible to explore one's sexuality outside the norms and expectations of marriage. Still, marriage is a cornerstone of both American and other cultures that has gone through the same changes. In her book *Marriage, a History*, Stephanie Coontz explores how the changing society has affected the institution of marriage. Coontz acknowledges that we can never reinstate the social and political position marriage has had in our society, but also warns us not to downplay the importance of love and commitment connected to the institution:

It (marriage) remains the highest expression of commitment in our culture and comes packaged with exacting expectations about responsibility, fidelity, and intimacy. Married couples may no longer have a clear set of rules about which partner should do what in their marriage. But they do have a clear set of rules about what each partner should *not* do. And society has a clear set of rules for how everyone else should and should not relate to each partner. These commonly held expectations and codes of conduct foster the predictability and security that make daily living easier.⁴³

The Decennial Census of 2000 showed that 54.4 percent of the population over the age of 15 was married, and that 18.5 percent were either widowed, divorced or separated.⁴⁴ A 2009 survey by The Survey of Income and Program Participation (SIPP) showed that Americans get married later than before and that there are fewer who choose to get married at all. Another find was that divorce rates have gone down or at least stabilized after an all-time high in the 80s. The data indicates that marriages last longer in the 21st century than they did in the 1990s.⁴⁵ So, even though marriage rates are going down there have not been any drastic changes in the past decades. Marriage is still an important factor in people's lives. Married people in Western Europe and North America are generally happier, healthier and better protected against economic setbacks than other people.

If one can learn one thing about marriage by looking at its history in America it is that it is both a conservative and radical institution. Marriage is conservative in the sense that its role in society has been important throughout human history and radical because marriage always has reflected the modernization of society. Coverture was once seen as the central component of both marriage and family and interracial marriage was deemed by many as dangerous for both the upbringing of children and the society as a whole barely fifty years

⁴³ Stephanie Coontz, *Marriage, A History: How Love Conquered Marriage* (Penguin Books, 2005), 309.

⁴⁴ U.S. Census Bureau, (2003, October), "Decennial Census Data on Marriage and Divorce: Marital Status: 2000," retrieved March 6, 2014, from <http://www.census.gov/prod/2003pubs/c2kbr-30.pdf>, 1.

⁴⁵ U.S. Census Bureau, (2011, May), "Number, Timing and Duration of Marriages and Divorces: 2009," retrieved March 6, 2014, from <http://www.census.gov/prod/2011pubs/p70-125.pdf>, 5.

ago. For the younger generation today that is almost impossible to imagine. Opponents of same-sex marriage recognize this, but argue that allowing same-sex couples to marry not only do change aspects of the institutions of marriage but the very foundations of it, which they argue is the union between one man and one woman.

Marriage is still considered a cornerstone of society and a fundamental right that offers benefits and security to families and couples. Thus, same-sex marriage is in many ways the ultimate test on a culture's willingness to acknowledge homosexuals and their relationships' place in a civilization.

Of the seventeen states that have legalized same-sex marriage only three of them, (Maine, Maryland and Washington) have done so by popular vote. Eight states have legalized it through state legislatures and six through court decisions. Moreover, in most of the states where the legislative body has granted marriage rights to same-sex couples, court rulings are what have led up to the vote in the state legislatures. Proponents of same-sex marriage have gotten a lot of criticism for taking their battle into the courtrooms and not letting it be decided by the public. Strong voices within the gay community have also advocated a different approach since many of the court cases have generated political backlash against their cause.

Many controversial issues in American history such as slavery, segregation, abortion, and now same-sex marriage, have been settled within the courtrooms of the nation. *Plessy v. Ferguson*⁴⁶, *Brown v. Board of Education*⁴⁷ and *Roe v. Wade*⁴⁸ are all cases with historic resonance. These are cases where the nation has been deeply and ideologically split. Some see it as undemocratic that questions pertaining to values, religion and civil rights are left in the hands of judges and not the public.

Robert P. George, professor at Princeton University and founder of the American Principles Project, argues that the culture war never will end if judges invalidate the choice of voters. George uses *Roe v. Wade* as an example of what happens when a morally charged issue is removed from the public. In a comment for the Wall Street Journal he wrote: "Abortion, which the Court purposed to settle in 1973, remains the most unsettled issue in American politics - and the most unsettling. Another *Roe* would deepen the culture war and prolong it indefinitely."⁴⁹ George argues that judges who rule in favor of gay rights do so, not

⁴⁶ *Plessy v. Ferguson*, 163 U.S. 537 (1896)

⁴⁷ *Brown v. Board of Education*, 347 U.S. 483 (1954)

⁴⁸ *Roe v. Wade*, 410 U.S. 113 (1973)

⁴⁹ Robert P. George, "Gay Marriage, Democracy, and the Courts," *The Wall Street Journal*, August 23, 2009, accessed February 22, 2014, <http://online.wsj.com/article/SB10001424052970204619004574322084279548434.html>

out of their reading of the Constitution, state or federal, but out of their political convictions in what is often called “judicial activism.” The proponents of Proposition 8, and other Defense of Marriage Acts, believes that the issue of same-sex marriage and abortion is two of the most divisive political issues in contemporary America, and as such, argue that they should be settled by democratic means and not on acts of “raw judicial power.”

The debate about same-sex marriage is not only about letting same-sex couples marry, but also on whether or not it is in the judicial branch’s power to grant them that right. As marriage is a civil matter dictated by law, it is not strange that same-sex marriage has become a court battle. Throughout American history, reforming divorce rights and uplifting bans on interracial marriage are just two examples of issues pertaining to marriage that have been settled by the courts. However, questions of what is most effective for the proponents of same-sex marriage, and what role the courts should play in a modern democracy, still remain.

1.5 Chapter Outline

The first chapter of this thesis has introduced the topic and thesis statement. It has also explained the choice of theory, sources and method. Additionally, the chapter has placed the topic within a historical and social context. It has discussed how the idea of same-sex marriage evolved within the Gay Movement, and the political backlash that followed the early attempts at same-sex marriage litigation. The chapter has also outlined the cultural and historical development of the institution of marriage in American history, and the historical role of courts in marriage issues.

Chapter two presents the opposing backlash theories of Rosenberg and Eskridge. The chapter provides the theoretical framework necessary to examine and discuss the effect the California marriage cases and *Hollingsworth v. Perry* have had on same-sex marriage in the United States.

The third and fourth chapter focuses on the primary sources. Chapter three follows the case that became *Hollingsworth v. Perry* in the U.S. Supreme Court from its beginning in the state of California. It analyzes how it evolved through the various levels of courts and appeals and discusses the argumentation given from the proponents of Proposition 8 and how they changed from the initial campaign to pass the amendment, to the ones presented in the courts. The written opinions of the different judges, both the majority and dissenting, in *Perry v. Schwarzenegger* and *Perry v. Brown*, are dealt with in detail. In addition, testimonies, briefs

and articles are discussed to explain the recent growth in support for same-sex marriage in America, and especially California.

Chapter four analyzes the majority and dissenting opinions of the U.S. Supreme Court, as well as the oral arguments given in *Hollingsworth v. Perry*. By looking at the different arguments and opinions the chapter analyzes how the case evolved from the lower levels of courts to a national level. The chapter also discusses some of the alternative outcomes *Hollingsworth v. Perry* could have had, and how the final outcome has affected the same-sex marriage debate.

The fifth and final chapter will sum up the arguments, give a conclusion and highlight the most important findings of this thesis. Finally, the conclusion point at areas for further research and gives a brief analysis of the future for same-sex marriage in the United States.

2 Backlash or Progress: The Role of Courts and Same-Sex Marriage Litigation

This chapter presents the theoretical framework the discussion of the primary sources in the following chapters is based on. First, the chapter introduces the theory of backlash theorist Gerald N. Rosenberg, who believes that the courts involvement in the fight for same-sex is threatening the case for marriage equality. Second, the chapter gives an alternative view on the role of courts by discussing William N. Eskridge's critique of Rosenberg's thesis.

2.1 Gerald N. Rosenberg: How Same-Sex Marriage Litigation Creates Political Backlash

According to Gerald N. Rosenberg the history of same-sex marriage litigation in America is a history of political backlash. Rosenberg's book *The Hollow Hope: Can Courts Bring about Social Change?*, analyzes the courts' role in producing political and social change from the middle of the 20th century up until today. In the book, Rosenberg criticizes the idea that the Supreme Court plays a fundamental role in reshaping the modern American society in a liberal direction. Rosenberg's book was published in 1991, to widespread praise but also a lot of criticism. In 2003, the book received the Wadsworth Publishing Award from the Law and Courts Section of the American Political Science Association, an award only given to books and articles, at least ten years old, that have made lasting impressions in the field of law and courts.⁵⁰ In the second edition, which was published in 2008, Rosenberg included same-sex marriage litigation to his theory.

In his analysis, Rosenberg states that there are essentially two different views on the role of the Supreme Court in American society, a "Dynamic Court view" and a "Constrained Court view." The Dynamic Court view sees courts as fulfilling the important task of protecting minorities and defending liberty against the other branches of government. It sees

⁵⁰ Wayne D. Moore, "The Hollow Hope: Can Courts Bring about Social Change? (2nd ed.)," review of *The Hollow Hope: Can Courts Bring about Social Change?*, by Gerald N. Rosenberg, *Law and Politics Book Review*, November, 2008, accessed March 2, 2014, <http://www.lawcourts.org/LPBR/reviews/rosenberg1108.htm>

courts as powerful and potent proponents of change. A Constrained Court view sees the courts as both ineffective and powerless, as they lack both budgetary and physical powers. Thus, their ability to produce significant political and social reform is limited. Rosenberg finds that both a Dynamic and a Constrained view of the Supreme Court oversimplify the Court's potential for creating social reform.⁵¹ He argues that court decisions are neither necessary nor sufficient for producing social reform since courts lack independence and do not have the sufficient tools for implementation. However, Rosenberg also suggests a set of constraints and conditions under which the Supreme Court can produce significant social reform, when overcome:

- I. Courts may effectively produce significant social reform when other actors offer positive incentives to induce compliance.
- II. Courts may effectively produce significant social reform when other actors impose costs to induce compliance.
- III. Courts may effectively produce significant social reform when judicial decisions can be implemented by the market.
- IV. Courts may effectively produce significant social reform by providing leverage, or a shield, cover or excuse, for persons crucial to implementation who are *willing to act*.⁵²

With the first condition, Rosenberg claims that courts can only produce social reform with litigation when there is political support from at least one of the other branches of government. If Congress or the executive branch has signaled support in favor of the issue, or are positive to similar cases, it would reassure the court that the reform has strong support.⁵³

To overcome the second constraint, there must be high costs for those refusing to implement the court decision. Courts acting alone do not have the possibility of providing benefits or costs against non-compliers. Thus, as Condition I already has stated, the policy would need political support from the other branches of government, which again could follow up with both economical and physical power if needed.⁵⁴

Condition III allows courts to produce social reform if the decision can be implemented through the market. If existing institutions do not have to change, but groups or

⁵¹ Rosenberg, *The Hollow Hope*, 4.

⁵² Rosenberg, *The Hollow Hope*, 33.

⁵³ Rosenberg, *The Hollow Hope*, 31.

⁵⁴ Rosenberg, *The Hollow Hope*, 33.

persons are able to create their own institutions to implement court decisions, the courts' inability to reform existing institutions will not affect the outcome of the ruling.⁵⁵

The final condition suggests that social reform can occur if courts allow elected officials to implement the required reforms, but also protest against them at the same time if they feel strongly against it. Using court orders can produce a shield or cover for authorities that fear political backlash. A court order leaves officials with no choice but implementing the change, but it also gives a perfect excuse as to why the change must happen. Condition IV can, however, only be fulfilled if Conditions I and II have been met as there must exist a real threat for not following the court order.⁵⁶

While the conditions imply that courts can produce social reform, they also suggest that this can only occur if social change already has been made outside the courts. The constraints are overcome only when significant political, social and economic change already has happened. Without already existing reform and the presence of at least one of the conditions, Rosenberg contends that courts cannot produce social or political reform.

Baehr, *Baker* and *Goodridge* are often used as examples of successful same-sex marriage litigation. However, Rosenberg attempts to show that they did more harm than good. In 1993, the Hawaii Supreme Court ruled Hawaii's refusal to recognize same-sex marriages unconstitutional under the state constitution's guarantee of equal protection of the law. Three years later, in 1996, the Court upheld their decision, and ruled that Hawaii had failed to follow up *Baehr* and ordered the Department of Health to issue marriage licenses to same-sex couples. The victory proved short-lived, as same-sex marriage opponents mobilized behind an amendment to the Hawaiian Constitution that reserved the issue for legislative determination. The amendment was ratified in 1998, when 69.2 percent voted for the amendment and 28.6 percent against.⁵⁷ Thus, the amendment affirmed a 1994 law passed by the legislature that defined marriage as a union between one man and one woman. Even though the state also passed a bill that gave same-sex couples 60 out of the 160 rights available through marriage, the Court's decision in *Baehr* ended up banning, instead of legalizing same-sex marriage in Hawaii. Following Rosenberg, the litigators could not overcome the constraints that limit the ability of courts to produce significant social reform.⁵⁸

⁵⁵ Rosenberg, *The Hollow Hope*, 33.

⁵⁶ Rosenberg, *The Hollow Hope*, 35.

⁵⁷ Rosenberg, *The Hollow Hope*, 343.

⁵⁸ Rosenberg, *The Hollow Hope*, 344.

In 1999, the Vermont Supreme Court took a more modest approach to the issue and ruled that the legislature had to correct the violation that was the state constitution's denial of the benefits of civil marriage to gay and lesbian couples in *Baker v. State*. The Court suggested a partnership law, and in 2000 the Vermont legislature passed a bill granting same-sex couples the opportunity of forming civil unions. Although civil unions gave many of the rights and benefits of marriage to same-sex couples, it also created a separate legal status for homosexual couples, and the status was not recognized by the federal government following the Defense of Marriage Act. That being said, the same-sex marriage litigation campaign in Vermont was much more successful than it was in Hawaii. Rosenberg claims this is the case because some of the constraints limiting the judicial power were weaker in Vermont. Vermonters were split down the middle over the Supreme Court decision; a 2000 survey showed that 52 percent opposed it.⁵⁹ Moreover, the Court did not operate alone and demanded support from the legislative body and was thus able to overcome Constrain I.

Neither *Baehr* nor *Baker* resulted in same-sex marriages, but in 2003 the Supreme Judicial Court in Massachusetts gave its historic ruling, recognizing same-sex marriage in *Goodridge v. Department of Public Health*. The Court also said that the Massachusetts Constitution required equal treatment, not only in rights, but also in terminology, effectively ruling out civil unions as an alternative to marriage.⁶⁰ There was higher public support for same-sex marriage in Massachusetts than it was in Vermont and Hawaii, and several attempts at passing an amendment to the state constitution, banning same-sex marriage, were successfully blocked. The Court's lack of power of implementation was not a problem, since a functioning bureaucracy had to make few changes in issuing marriage licenses to gay and lesbian couples. Under such conditions, Rosenberg's constraints could be overcome and significant change took place.

One of the effects of *Baehr*, *Baker* and *Goodridge* was mobilization of supporters and opponents of same-sex marriage. New organizations were formed to promote same-sex marriage and old gay rights organizations such as The Human Rights Campaign (HRC) were energized by the issue. In an examination of contributions to HRC, Rosenberg found an increase in HRC's income in 2004 which may have been a result of the *Goodridge* decision the year before. However, HRC's result in 2004 was neither unprecedented nor the largest yearly increase in HRC's budgets the years before.⁶¹ On the other side, contributions to

⁵⁹ Rosenberg, *The Hollow Hope*, 346.

⁶⁰ Rosenberg, *The Hollow Hope*, 347.

⁶¹ Rosenberg, *The Hollow Hope*, 361.

conservative organizations working against same-sex marriage exploded. Focus on the Family increased its contributions by over 17 million dollars in 2004.⁶² Religious and conservative organizations, such as Focus on the Family, were instrumental in the drafting and campaigning of the mini-DOMAS that followed *Goodridge*. The political mobilization against same-sex marriage was so successful that all the constitutional amendments banning same-sex marriage that were on the ballot in 2004 were adopted by large margins. Out of the eleven states with amendments on the ballot, Oregon and Michigan were the only states where the support for the amendments was below 60 percent.⁶³

Four years after *Goodridge*, ten states provided either same-sex marriage (Massachusetts) or a form of domestic partnership with more or less the same rights and benefits as marriage. In Vermont, New Jersey and Massachusetts, the recognition of same-sex unions came as a direct result of litigation. At the same time, however, forty-five states banned same-sex marriage by law, twenty-seven out of them by state constitutions. Following Rosenberg, by 2006, little achievement had been made and major obstacles had been created by the pursuit of marriage equality through the courts.

The legalization of same-sex marriage in Massachusetts and the proposed Federal Marriage Amendment Act made same-sex marriage a campaign issue in the 2004 presidential election between George W. Bush and John Kerry. Both Rosenberg and Klarman go quite far in suggesting that the issue was decisive in the reelection of Bush. A CNN exit poll showed that 22 percent of voters choose “moral values” as the most important issue over issues such as taxes, Iraq, terrorism and the economy. Of the 22 percent, over 70 percent voted for George W. Bush.⁶⁴

The election of 2004 became a thriller, and on Election Day it became clear that the candidate that won in Ohio would also win the election. Bush won the state by a margin of 51 percent to 49 percent, and both Rosenberg and Klarman argue that same-sex marriage played a pivotal role in Bush’s victory in Ohio. Interestingly, Kerry got more votes in Ohio in 2004 than Bush did when he won the state four years earlier. While 64 percent of the registered voters cast a vote in 2000, almost 70 percent did so in 2004. A massive Democratic turnout was surpassed by an even stronger turnout by Republican voters. Rosenberg and Klarman claims that the Republican turnout was the result of the constitutional amendment banning same-sex marriage in Ohio. Self-described conservatives made up 34 percent of Ohio’s

⁶² Rosenberg, *The Hollow Hope*, 361.

⁶³ Rosenberg, *The Hollow Hope*, 364.

⁶⁴ Rosenberg, *The Hollow Hope*, 370.

voters, and 87 percent of them voted for Bush, an increase of 5 percentage points over his 2000 vote.⁶⁵ Thus, if the *Goodridge* case had not been brought, John Kerry might have carried Ohio and won the 2004 election.

Klarman argues that the issue was strategically used by the GOP to energize its base and create problems for the Democrats. Same-sex marriage has been politically problematic for the Democrats because gay rights supporters have voted heavily Democratic, but so have African Americans and Catholics, which are groups where the support of same-sex marriage is low. The issue has therefore been seen as strategically important for republicans, as it has both mobilized its own voters while at the same time divided the Democrats. One of Klarman's central points is that the push for same-sex marriage, which half of the populace opposes, makes it harder for Democrats and gay rights advocates to seek political compromises and winning on other less controversial gay rights issues. Had the focus instead been on civil unions and securing key rights, the table might have been turned, as the Democrats could have maintained a united front, while the Republican Party would have been divided on for example civil unions.⁶⁶

The public opinion towards same-sex marriage was no more positive after the decisions in Hawaii, Vermont and Massachusetts than it was before. Both Gallup and Pew Research Center polls show that the support for same-sex marriage grew from around 27 percent in favor in 1996, to 35 percent in favor in 1999. Between 2000 and 2006, there were only marginal changes in the respondents' answers.⁶⁷ Thus, Rosenberg argues that it is difficult to claim that same-sex marriage litigation had any profound effect on the public support for it, as most of the change in the polls happened before *Baker* and *Goodridge*.

Even though there was an increase in support for civil unions following *Goodridge*, from 41 percent in 2002 to 54 percent in 2004,⁶⁸ Rosenberg claims that it had little to do with the court cases and more to do with an overall cultural change. Public opinion has become increasingly more accepting of homosexuals the last decades and Rosenberg claims that this development has not been because of, but in spite of same-sex marriage litigation. Employment benefits, nondiscrimination policies and support of civil unions gained support

⁶⁵ Rosenberg, *The Hollow Hope*, 381.

⁶⁶ Klarman, *From the Closet to the Altar*, 184.

⁶⁷ Rosenberg, *The Hollow Hope*, 402.

⁶⁸ Rosenberg, *The Hollow Hope*, 406.

of a majority of the population before the Massachusetts Supreme Court ruled in favor of same-sex marriage in 2003.⁶⁹

Klarman recognizes that dramatic social change does not happen unless someone takes a stand. Courts have been pivotal in putting the same-sex marriage issue on the table - not the media or even the Gay Movement. Thus, Klarman concludes that same-sex marriage litigation probably has advanced the cause of same-sex marriage more than it has damaged it. However, it has cost progress on some of the other objectives of the Gay Movement.

The backlash against same-sex marriage litigation, according to Klarman, has endangered not only the issue at stake but also the progress of the Gay Movement on other issues, and the opportunity for gay rights supporters to win elections. When gays and lesbians were asked in the early nineties what the most important issues were for them, they answered equal rights in the workplace and protection against hate crimes - same-sex marriage was barely on their radar. Klarman argues that pushing same-sex marriage through the courts made it difficult to make political compromises to win on those issues because it created a climate where any gay rights issue automatically were put under the spotlight. For instance, once the issue had gained attention following the Hawaii Supreme Court's decision in *Baehr*, the Gay Movement had little choice other than to focus on the backlash. This again took resources from fighting AIDS and securing antidiscrimination legislation.

Klarman argues that the focus of the Gay Movement on securing marriage in certain liberal states diverted resources away from the gay rights struggle in more conservative states, where gays and lesbians lacked even basic legal protection against violence and discrimination in employment and housing.⁷⁰ Even though the push for same-sex marriage has created victory in many states, the most severe backlash has happened in other parts of the nation. In most polls in the 2000s, a majority of Americans said they supported civil unions, even in some of the more conservative states. However, most of the mini-DOMAS included a ban on civil unions as well as same-sex marriage. Thus, same-sex couples have gained marriage rights on the west coast and in the north-east states at the cost of same-sex couples in a lot of other states that now stand with virtually no rights and no benefits.

Following Rosenberg and Klarman, the question of how the right of same-sex marriage is obtained should be as important as when or if it happens. Opposition against same-sex marriage is still strong in many states and will be so for decades. Controversial

⁶⁹ Rosenberg, *The Hollow Hope*, 415.

⁷⁰ Klarman, *From the Closet to the Altar*, 179.

court cases will only give fuel to that opposition. Furthermore, Rosenberg concludes that given the federal DOMA and that forty-five states banned same-sex marriage following the early attempts of same-sex marriage litigation, proponents of same-sex marriage would have been better off not pursuing marriage rights through litigation in the first place.

Both Rosenberg and Klarman suggest that a legislative approach would have been less likely to produce backlash and that by asking for civil unions instead of same-sex marriage, more could have been achieved. According to Rosenberg, the judiciary is “institutionally structured to be susceptible to backlash.”⁷¹ Whereas judicial decisions can be unexpected and shocking, legislative action requires political support by a majority of a legislature whose members sit on behalf of voters with opinions they would be foolish to ignore.

Rosenberg admits that it is difficult to make definitive claims about the role of courts in the coming of same-sex marriage, and a lot has happened since the second edition of his book was published in 2008. However, he claims that this does not prevent an assessment of what has been achieved through litigation or what can be lost by continuing to pursue same-sex marriage through the courts. Thus, he concludes that without public and political support, the constraints of the court system cannot be overcome and same-sex marriage litigation will inherently produce powerful political backlash.⁷² According to Rosenberg, courts cannot create social reform, only sponsor it, and they stand at risk of harming the case for same-sex marriage, when the constraints of the American court system are not overcome.

2.2 William N. Eskridge: How Constitutional Litigation Has Advanced the Case for Same-Sex Marriage

In the article “Backlash Politics: How Constitutional Litigation has Advanced Marriage Equality in the United States,” Eskridge criticizes Rosenberg’s thesis and the claim that courts cannot create societal change. Eskridge proposes another backlash theory and concludes that constitutional litigation has significantly advanced the cause of same-sex marriage.

According to Eskridge, the debate about same-sex marriage has involved three different kinds of politics that can be distinguished based on the motivating factors of the participants, the intensity they invest in the issue and the types of arguments that are

⁷¹ Rosenberg, *The Hollow Hope*, 426.

⁷² Rosenberg, *The Hollow Hope*, 418.

dominant. The first kind of politics involves discussing what the best policy is and what the best way to implement that policy is. Such “normal politics” focus on the consequences of different legal rules for different groups in society. To define an issue as belonging to normal politics, it has to have these features:

1. Participants seem motivated by tangible consequences of various policy options.
2. Participants reveal medium-to-low emotional intensity.
3. Participants have relatively greater focus on facts and falsifiable predictions.⁷³

A second kind of political engagement is “identity politics.” The constitutive issue in this debate involves the expression of different personal or community identities, such as traditional family values versus families we choose. Thus, the important question becomes whether or not same-sex marriage devalues existing opposite-sex marriages or if same-sex marriage only evolves the institution of civil marriage. Arguments that are the focus of identity involve these features:

1. Participants seem motivated by intangible or symbolic consequences of various policy options.
2. Participants reveal relatively higher emotional intensity.
3. Participants are relatively less focused on facts and falsifiable predictions.⁷⁴

Stakes are higher when issues turn to identity politics. When constitutional issues are seen as personal, Eskridge argues that voters tend to generate a “spill-over effect,” meaning that the debate turns beyond the particular issue in question. For example in the case of same-sex marriage the issue has also affected debates about adoption and other gay rights legislation.

The stakes are highest when political debate turns to “politics of disgust.” Such politics are triggered by fundamental issues that are deeply tied to people’s feelings of disgust and contagion. For many Americans, opposition to same-sex marriage is fueled by a personal revulsion and disgust for homosexuality and homosexual acts and not merely by policy or identity based reasons. According to Eskridge, politics of disgust is a form of identity politics that is particularly intense, and potentially even violent.⁷⁵

⁷³ Eskridge, “Backlash Politics,” 292.

⁷⁴ Eskridge, “Backlash Politics,” 294.

⁷⁵ Eskridge, “Backlash Politics,” 293.

Identity politics often deal with symbolic policies, where the debate is more about the moral message the government is sending out rather than what the actual issue is about. Same-sex marriage is for instance seen by many as a way of saying that “homosexuality is ok,” given the status of the institution of marriage has, and not a civil matter granting gays and lesbians the same rights and benefits as committed opposite-sex couples. Backlash politics, as Eskridge uses the term, happens when people see an issue as challenging their groups’ identity. Politics of backlash thrive when government or courts take a position that is an affront to the identities of a minority, or a majority, of the population. If the group of citizens in question finds the minority the authorities are granting rights disgusting and impure, the backlash effect gets even more intense.

Following Eskridge, the politics of backlash is a politic where people invest their identities, and often their feelings of disgust, into particular preferences. When citizens believe that they are disrespected by the state and that their identities are threatened when homosexuals are treated the same, politics of disgust take over. Identity is an important motivator on both sides of the same-sex marriage issue. Same-sex couples and their allies are excited about equality advance, while conservatives that have their identities invested in the traditional definition of marriage are equally energized into opposition. According to Eskridge, a move from a politic of disgust to normal politics can only happen when most citizens feel sympathy for the minority, even though they feel that “change” should come slowly.⁷⁶

Eskridge argues that the early politics of same-sex marriage was dominated by a disgust-based backlash, as homosexuals were considered strange and disgusting by most Americans. The uproar against *Baehr* reflected the intense views people had on same-sex marriage. Before it could have any conceivable effect on family and marriage law in other states, a political backlash against same-sex marriage took place all over the nation. Eskridge claims that the DOMA is a perfect example of a disgust-based backlash. It was purely symbolic, as it had little connection to federal policy; there were no same-sex marriages it could regulate. Furthermore, the debates surrounding the DOMA were dominated by the politics of disgust, with legislators expressing hatred or disapproval of homosexuals.

Rosenberg maintains that the backlash effect of *Baehr* reflected a popular outrage against “judicial activism.” However, Eskridge argues that a similar outcry against same-sex

⁷⁶ Eskridge, “Backlash Politics,” 295.

marriage would have happened even if the Hawaii Legislature and not Supreme Court had come to the conclusion that same-sex marriage should be legal in the Aloha State.⁷⁷

When the Supreme Court in Vermont ruled in favor of same-sex marriage, but held the door open for civil unions in *Baker*, they took the issue from disgust and identity politics to normal politics in way legislatures could not. Vermonters who were motivated by disgust were of course also alarmed by the idea of civil unions, but Vermonters motivated by identity politics were not nearly as alarmed by civil unions as they would have been by same-sex marriage. Thus, Eskridge's theory show how the Supreme Court in Vermont succeeded in creating a wedge between politics of disgust and identity politics in a way that secured same-sex couples in Vermont most of the rights and benefits that previously had only been available to opposite-sex couples.

The backlash following *Goodridge* was powerful. The first wave of mini-DOMAS and the proposed Federal Marriage Amendment Act came in response to the Massachusetts' Supreme Judicial Court's decision in 2004. However, Eskridge suggests that it was less powerful than Rosenberg and Klarman holds it to have been. This is how Eskridge comments Rosenberg and Klarman's claim that Bush's victory in Ohio in the presidential election in 2004 was part of a political backlash against *Goodridge*:

Professor Rosenberg ominously claims that presidential candidate John Kerry "might well" have lost Ohio, and with it the presidency, in his 2004 challenge to President George W. Bush because an anti-gay marriage initiative on the Ohio ballot brought out so many unexpected Bush voters. Even by its own terms, to say that a result "might well" have hinged on a turnout variable is no argument that there was a significant backlash. There were, literally hundreds of reasons Kerry "might well" have lost Ohio.⁷⁸

Following Eskridge, there was political backlash after *Goodridge*, but the case also showed a marked decline in the politics of disgust. The Federal Marriage Amendment Act failed and so did all the attempts to overturn *Goodridge*.

Eskridge argues that the last few years have seen a final move of same-sex marriage into the realm of normal politics. Unlike the presidential campaign and debates between Kerry and Bush in 2004, the issue of same-sex marriage was virtually absent from the campaign in 2012. Obama remained quietly in support of same-sex marriage, while Mitt Romney, now the Republican nominee, remained quietly against it. It was not discussed in the four presidential debates, nor the vice-presidential debate. In the same year, voters in Maine, Maryland and

⁷⁷ Eskridge, "Backlash Politics," 296.

⁷⁸ Eskridge, "Backlash Politics," 303.

Washington endorsed same-sex marriage, while Minnesota rejected a ban on same-sex marriage. However, as Klarman points out, Eskridge too confesses that there are significant differences between the states when it comes to the issue. Sixty percent of North Carolina voters endorsed a constitutional ban on same-sex marriage in May 2012.⁷⁹ Large numbers of Americans in the South, much of the Midwest and the Rocky Mountain states continue to view the issue as fundamental to their identities. Even though same-sex marriage might be inevitable across America in the long run, the move from politics of disgust to normal politics concerning same-sex marriage has not happened as fast in the conservative states as in the Northeast and the West Coast.

Rosenberg and Klarman say that the Gay Movement's focus on same-sex marriage eclipsed other important gay rights issues such as decriminalization, antidiscrimination and hate crime laws. Eskridge, however, argues that the case for same-sex marriage has accelerated the progress of gay rights across the board. Religious and political groups do not want to appear anti-gay, so the public opposition against many of the other issues of gay rights advocates have been abandoned as the focus has been on opposing same-sex marriage. In 1993, twenty-two states criminalized sodomy, eleven states had hate crime laws that included sexual orientation, and eight states had employment discrimination laws. Fifteen years later, in 2008, no states criminalized sodomy, thirty-two states had hate crime laws, and twenty states had employment discrimination laws.

One of Eskridge's central points is that there will be negative reactions against any advance in minority rights regardless of which institution makes the change. A person that is disgusted by homosexuals or whose religious identity is tied to the traditional definition of marriage will be just as outraged by same-sex marriage whether it is sanctioned by a legislature or a court. Eskridge argues that there is no hard evidence suggesting that the level of political backlash always is higher simply because a court and not a legislature recognizes same-sex marriage. The level of backlash has much more to do with the timing of the debate and the public opinion.

An analysis by David Fontana and Donald Braman shows that the decision maker, court versus legislature, had some, but no determinative effect on people's reactions to decisions on controversial issues. They found that a court decision supporting same-sex marriage would not change how people felt about the issue, but would instead mobilize both

⁷⁹ Eskridge, "Backlash Politics," 308.

supporters and opponents of same-sex marriage.⁸⁰ Thus, how intensely the backlash will be following a court decision in favor of same-sex marriage depends on how the issue divides the public, and not the fact that it came through litigation. The backlash to *Baehr* and *Goodridge* were severe and they mobilized thousands who felt intensely that same-sex marriage was a threat against society. However, as the following chapter will show, the reactions that followed the California marriage cases were more balanced, and might even have had a more mobilizing effect on the proponents of same-sex marriage.

Outside the courtrooms same-sex couples have borne the “burden of inertia,” meaning that they have had to prove and justify why they should have marriage rights. Legislators and voters can vote down same-sex marriage on any grounds they wish, be it motivated by disgust, identity, or other concerns. In court, the burden of inertia is equally shared, and both opponents and proponents of same-sex marriage have to justify their positions with arguments that could pass a judicial review. Through reversing, or balancing, the burden of inertia, the courts have created conditions making it impossible to play on anti-gay prejudices and stereotypes.⁸¹ Thus, courts have forced the issue of same-sex marriage from politics of disgust to normal politics.

Eskridge’s claim is that backlash theorists such as Klarman and Rosenberg have not recognized the effects judicial decisions has had on the advancement of same-sex marriage. He argues that Rosenberg understates the courts’ capacity to serve as a catalyst for social change. *Baehr*, *Baker* and *Goodridge* transformed politics, with effects going beyond backlash. Without *Baehr*, there would be no *Baker*, and without *Baker*, there would be no *Goodridge*, and without *Goodridge*, there would be no *Windsor* or *Perry*. Same-sex marriage proponents used the constitutional litigation as a focal point for grass-roots mobilization. Following Eskridge, the courts have been instrumental in elevating the issue of same sex-marriage to the public arena. No matter how important or well-argued the case is, legislators and politicians tend to ignore controversial issues that could provoke groups of voters. The courts, however, cannot ignore legal and constitutional claims without a reason that is established in law principles.

⁸⁰ Eskridge, “Backlash Politics,” 299.

⁸¹ Eskridge, “Backlash Politics,” 313.

3 The California Marriage Cases

This chapter will follow the case that became *Hollingsworth v. Perry* in the United States Supreme Court, from its beginning in the Supreme Court of California through the Northern District Court of California and the Ninth Circuit Court of Appeals. According to Eskridge, the courts have been instrumental in bringing the issue of same-sex marriage from politics of disgust to normal politics by reversing the burden of inertia. Building on Eskridge's theory, this chapter analyzes how the arguments of the proponents of Proposition 8 evolved from the initial campaign and into the various levels of courts and appeals. Furthermore, Rosenberg's backlash theory is applied to explain the political backlash that followed the first same-sex marriages in California. However, as the initial backlash was followed by a successful counterbacklash, the chapter proposes a more balanced theory on the role of courts in same-sex marriage cases than the one argued by Rosenberg.

3.1 The Campaign for Proposition 8 and the Move from Politics of Disgust

In March 2000, an initiative to restrict marriages to only those of opposite-sex couples was passed by popular vote in California.⁸² The initiative, Proposition 22, made same-sex marriage illegal in California by state law. Four years later, the City and County of San Francisco disregarded state law and started giving out marriage licenses to same-sex couples. Following several lawsuits against San Francisco for breaking state law, the issue of same-sex marriage reached the Supreme Court of California in 2008. In May the same year, the Court ruled in favor of same-sex marriage in the decision *in re Marriage Cases*. With four against three votes, the Court concluded that restricting marriage to couples consisting of a man and a woman was unconstitutional under the Equal Protection Clause of the California

⁸² Evelyn Nieves, "THE 2000 CAMPAIGN: CALIFORNIA; Those Opposed to 2 Initiatives Had Little Chance From Start," *New York Times*, March 9, 2000, accessed February 18, 2014, <http://www.nytimes.com/2000/03/09/us/2000-campaign-california-those-opposed-2-initiatives-had-little-chance-start.html>

Constitution.⁸³ Thus, as of May 2008, same-sex couples had the opportunity to marry in California.

However, a new initiative was submitted. Proposition 8 was a measure to amend the state constitution to include these fourteen words: “Only marriage between a man and a woman is valid or recognized in California.”⁸⁴ The campaigns for and against the amendment gained massive attention, as both the state and national media watched with interest. On November 4, 2008, Proposition 8 was passed and the state constitution amended. 52.30 percent voted in favor of the amendment and 47.70 percent against it.⁸⁵

The organization behind the voter initiative and the sponsors of the campaign to pass Proposition 8, Protect Marriage, had three official ballot arguments against same-sex marriage:

1. **Proposition 8 protects our children from being taught in public schools that same-sex marriage is the same as traditional marriage:** If Proposition 8 is not passed, teachers could be required to teach young children there is no difference between gay marriage and traditional marriage. Same-sex marriage is an issue for parents to discuss with their children according to their own values and beliefs.
2. **Proposition 8 protects marriage as an essential institution of society.** While death, divorce, or other circumstances may prevent the ideal, the best situation for a child is to be raised by a married mother and father.
3. **Proposition 8 restores the definition of marriage.** While gays have the right to their private lives, they do not have the right to redefine marriage for everyone else. Proposition 8 restores the traditional definition of marriage as between a man and a woman.⁸⁶

The arguments can be summed up in three core premises. The ideal child-rearing environment requires one male and one female parent, same-sex couples’ marriages redefine opposite-sex couples’ marriages and denial of marriage to same-sex couples will stop public schools from telling children about same-sex marriage and homosexuality.

Opponents of Proposition 8 were organized in several organizations, but their central argument for opposing the amendment was that the freedom to marry is fundamental to

⁸³ “Gay marriage ban overturned,” *LA Times*, May 17, 2008, accessed March 2, 2014, <http://www.latimes.com/news/la-me-gay-marriage17-2008may17,0,7229587.story#axzz30AnmN1QM>

⁸⁴ “Text of Proposed Law,” California Secretary of State, accessed December 15, 2013, <http://vig.cdn.sos.ca.gov/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8>

⁸⁵ “Proposition 8 - Eliminates Right of Same-Sex Couples to Marry,” California Secretary of State, accessed December 15, 2013, <http://www.sos.ca.gov/elections/sov/2008-general/maps/returns/props/prop-8.htm>

⁸⁶ “Ballot Arguments in Favor of Prop 8,” *ProtectMarriage.com*, accessed November 13, 2013, <http://protectmarriage.com/ballot-arguments-in-favor-of-prop-8-2008>

Californian citizens, and that the state constitution should guarantee the same freedom and rights to everyone. They also focused on the fact that the proposition would *take away* a right that already had been granted same-sex couples by the Supreme Court of California.

The arguments provided by the proponents of Proposition 8 fit well with Eskridge's proposed features for identity-based politics. First of all, there is a high emotional intensity in the arguments. In the listed arguments, one sees a real fear of negative consequences, should same-sex marriage be legalized in California. Moreover, the participants are motivated by the symbolic consequences of redefining the traditional definition of marriage, as they fight for an institution they see as fundamental to society and their identities. Finally, the participants are less focused on facts and falsifiable predictions. The final point will be discussed in the following section, as each of the proponents' arguments are addressed accordingly.

The political debate surrounding Proposition 8 did, however, also signal a move away from politics of disgust. In the ballot arguments, the same-sex marriage opponents even included a passage where they proclaimed that the amendment was not an attack on the "gay lifestyle:"

Prop 8 doesn't take away any rights or benefits of gay or lesbian domestic partnerships. Under California law, "domestic partners shall have the same rights, protections, and benefits" as married spouses. (Family Code § 297.5.) There are no exceptions. Prop 8 does not take away any rights, and does not interfere with gays living the lifestyle they choose.⁸⁷

Even though Protect Marriage insists that sexuality is a lifestyle choice, a notion often used to argue that homosexuals can choose to become heterosexual, the argumentation is not based on disgust or revulsion. Arguments that branded homosexuals as immoral and obscene were not part of the debate, at least not the official one.

⁸⁷ "Ballot Arguments."

3.2 *Perry v. Schwarzenegger*

The California Supreme Court upheld Proposition 8 against several lawsuits that claimed that the proposition violated the rules for amending the California Constitution. It did, however, also leave the same-sex marriages already performed undisturbed by the new amendment, in *Strauss v. Horton*.⁸⁸ During the time same-sex marriage was legal in California, approximately 18,000 marriage licenses were issued to same-sex couples.⁸⁹

Two same-sex couples, Kristin Perry and Sandra Stier, and Paul Katami and Jeffrey Zarrillo, backed by Americans for Equal Rights, filed a lawsuit claiming that Proposition 8 violated the Due Process and Equal Protection Clause of the Fourteenth Amendment to the Constitution, this time the United States Constitution.⁹⁰ The case reached the district court of the Northern District of California, and *Perry v. Schwarzenegger* became the first case on same-sex marriage to be heard by a federal court. The defendant, the state of California, answered the complaint, but Governor Arnold Schwarzenegger and the Attorney General, now Governor, Edmund G. Brown, both refused to defend Proposition 8 in court, and Protect Marriage intervened as defendants on behalf of the state of California. The plaintiffs alleged that Proposition 8 deprived them of due process and equal protection of the laws under the Fourteenth Amendment. Their central arguments presented in court were as following:

1. It prevents each plaintiff from marrying the person of his or her choice.
2. The choice of marriage partner is sheltered by the Fourteenth Amendment from the state's unwarranted usurpation of that choice.
3. California's provision of domestic partnership – a status giving same-sex couples the rights and responsibilities of marriage without providing marriage – does not afford plaintiffs an adequate substitute for marriage and, by disabling plaintiffs from marrying the person of their choice, invidiously discriminates, without justification, against plaintiffs and others who seek to marry a person of the same sex.⁹¹

⁸⁸ *Strauss v. Horton*, 46 Cal 4th 364 (2009)

⁸⁹ Karen Gullo, "California Supreme Court Upholds Gay Marriage Ban," *Bloomberg*, May 26, 2009, accessed February 3, 2014, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aXjgJBirm_0g&refer=us

⁹⁰ "The Plaintiffs," American Foundation for Equal Rights, accessed January 3, 2014, <http://www.afer.org/about/plaintiffs/>

⁹¹ *Perry v. Schwarzenegger*, 704, 5.

Proposition 8 was ruled unconstitutional by Judge Vaughn Walker of the Northern District Court of California, with the argument that Proposition 8 violated the Due Process and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In the testimonies that preceded the district court's ruling, the defendants and plaintiffs could almost have been discussing two separate issues entirely. While the plaintiffs focused on the legality of the amendment, the proponents of the amendment build their arguments around what they saw as negative consequences of allowing same-sex couples marriage rights. In addition to the plaintiffs' own testimonies, a group of nine expert witnesses was called by the plaintiffs. Proponents called not a single official proponent of Proposition 8 to explain the arguments presented to the voters. After having withdrawn several expert witnesses, the defendants called only two, sociologist David Blankenhorn and Kenneth P. Miller, professor of government at Claremont McKenna College. Both Blankenhorn and Miller had a hard time in court when they were asked to legitimate the arguments used in the Proposition 8 campaign.

3.2.1 Children

A central argument in the campaign to pass Proposition 8 was the desire to protect children from information about homosexuals and same-sex marriage. Protect Marriage warned that the recognition of same-sex marriage would force public schools to include teaching about same-sex marriage. Several of the televised commercials sponsored by Protect Marriage, suggested that same-sex marriage would be taught in public schools without parental control.

One of the commercials depicted a girl coming home from school and telling her mother that she learned "how a prince married a prince, and I can marry a princess." The commercial called "It's already happened,"⁹² warned that schools would be forced to teach same-sex marriage without parental consent. It did so by referring to Massachusetts where schools talked about same-sex marriage following the *Goodridge* decision. In another commercial, "Robb and Robin Wirthlin's Story,"⁹³ a Massachusetts couple talked about how their son was taught that people of the same sex can marry. The father angrily states that "It was just shocking that our son, you know, would start talking about men marrying other

⁹² "It's already happened," VoteYesonProp8, *YouTube* video, 0:30, October 7, 2008, accessed February 21, 2014, <https://www.youtube.com/watch?v=0PgjcgqFYP4>

⁹³ "Robb and Robin Wirthlin's Story," VoteYesonProp8, *YouTube* video, 4:32. October 20, 2008, accessed February 21, 2014, <https://www.youtube.com/watch?v=WLHWBWSaW-4>

men.” The televised commercial even implied that same-sex marriage would be promoted in math, science and spelling.

As Eskridge proposes, identity based arguments are inherently less focused on facts and more on emotion. In a brief written to the Ninth Circuit in support of the plaintiffs and the district court’s ruling, the California Teachers Association debunked the concerns of the same-sex marriage opponents. They claimed that California law did not, and would not require public schools to impose private values regarding same-sex marriage on children if Proposition 8 was overturned: “Even in those districts where comprehensive sexual health is part of the curriculum, a parent or guardian can choose to remove his or her child from participation in the program or any portion of the program found to be objectionable.”⁹⁴ Furthermore, the brief stated that public school teachers are prohibited from giving instruction, and school districts are prohibited from sponsoring any activity, which adversely reflects upon persons because of their race, religion, disability, gender, sexual orientation, handicap, national origin, or ancestry.⁹⁵ In other words, nothing about the recognition of same-sex marriage would change the existing curriculum of California’s public schools.

The Proposition 8 campaign played on people’s fear that exposing children to homosexuality and same-sex marriage would draw children into homosexual behavior. The school-argument is a good example of the “spill-over-effect” that Eskridge argues goes along with identity politics. Suddenly the issue was no longer about marriage, but education and children’s sexuality.

In court, the defendants could not provide evidence showing that information about homosexuality or same-sex marriage would pose a danger to children. Furthermore, the court argued that the prospect of Californian children learning about the laws and legal rights of the state’s population did not provide an independent reason for stripping members of a disfavored group of a right they had been given, even if the proponents’ claim had been true.

Acknowledging that Proposition 8 had to be justified on a secular and factual basis, the proponents quickly abandoned this argument in the district court and focused on the traditional meaning of marriage and the role of procreation. Once presented in court, the argument that same-sex marriage would require public schools to teach children about

⁹⁴ “Brief for the California Teachers Association as Amicus Curiae in Support of Plaintiff-Appellees,” *Perry v. Brown*, 671 F.3d 1052, 9th Cir. (no. 10-16696), 2012, 7.

<http://cdn.ca9.uscourts.gov/datastore/general/2010/10/27/amicus35.pdf>

⁹⁵ “Brief for the California Teacher Association,” 8.

homosexuality was rendered useless. The court forced a move from identity politics to normal politics.

3.2.2 Procreation

The claim that marriage is an institution to promote stability for heterosexual couples with children has become fundamental for same-sex marriage opponents. The argument is that two people of the same sex cannot procreate; they should not be allowed to marry. The TV ad, “The Story of Prop 8,”⁹⁶ featured a montage of wedding pictures and heterosexual couples playing with their children while a voiceover narrated: “Marriage involves a complex web of social, legal and spiritual commitments that bind men and women for one overriding societal purpose: to create a loving environment for the raising up of children. Protecting the interests of children is the reason the state has for regulating marriage to begin with.” In another commercial called “Daddy, Where do babies Come From?,”⁹⁷ a daughter of two gay male parents asks where babies come from after talking to a friend that have told her only a mommy and a daddy can have a baby. The fathers are clearly uncomfortable and suggest that their daughter should spend less time at her friend’s house. A narrator ends the commercial with declaring: “Let’s not confuse our kids. Protect marriage by protecting the real meaning of marriage: Only between a man and a woman.”

In an article written for the *California Law Review* in 2010, Ruth Butterfield Isaacsen explores why the procreation-argument has become so important for same-sex marriage opponents. She argues that children raised in traditional households are allowed to learn “the gendered structure of the home and greater society, and begin to practice their gender-specific roles and responsibilities within the home.”⁹⁸ Thus, expanding the right of marriage to same-sex couples would not be seen as societal progress, but rather societal degeneration, because it robs children from their primary arena to learn the “appropriate” gender roles. A brief by Campaign for California Families, written for the California Supreme Court prior to *Marriage Cases*, sums up many of the arguments related to procreation and marriage: “same-sex couples’ inability to naturally procreate precludes their need of the stability of civil marriage, that children thrive best with opposite-sex parents, and that children of same-sex couples face

⁹⁶ “The Story of Prop 8,” VoteYesonProp8, *YouTube* video, 2:13, November 2, 2008, accessed February 21, 2014, http://www.youtube.com/watch?v=yBrFHC1aoWI&index=3&list=UUwcBxc4o00aXIRLS0Zi_pzg

⁹⁷ “Where do babies come from?” VoteYesonProp8, *YouTube* video, 1:06, October 25, 2008, accessed February 21, 2014, <https://www.youtube.com/watch?v=75J3TN9Zzck>

⁹⁸ Ruth Butterfield Isaacsen, “Teachable Moments: The Use of Child-Centered Arguments in the Same-Sex Marriage Debate,” *California Law Review* Vol. 98, No. 1 (2010): 135.

a higher risk of social/emotional problems, promiscuity, suicide, and homosexual behavior.”⁹⁹ The arguments presented in this brief, as well as the televised ads sponsored by Protect Marriage, are examples of identity politics. They reveal intense emotions and a fear of losing something profound and important, and they make assertions that are not backed by facts.

During the *Perry v. Schwarzenegger* testimony, David Blankenhorn presented two arguments as to why procreation should be considered a legitimate reason for upholding Proposition 8. First, he stated that marriage is a “socially approved sexual relationship between man and a woman,”¹⁰⁰ the purpose being to create an institution for bearing and raising children biologically related to both spouses. However, Blankenhorn has also stated that marriage is fundamentally a private adult commitment that focuses on the “tender feelings that spouses have for one another.”¹⁰¹ Blankenhorn presented a dual view on the definition of marriage without really concluding in favor of one or the other.

Blankenhorn’s second argument was that children raised by their married, biological parents do better than children raised in other environments. However, the studies Blankenhorn presented only compared various family structures – they did not emphasize biology. Thus, the evidence provided by Blankenhorn did not support a conclusion that the biological link between a parent and his or her child had any significant variable for the child’s upbringing. Then, the defendants provided studies showing that married parents provide the ideal child-rearing environment. However, the studies compared only married opposite-sex parents to single or step parents and not with families headed by same-sex couples. Psychologist Michael Lamb testified on behalf of the plaintiffs and argued that such studies only strengthened the argument for same-sex marriage, as it would provide families headed by same-sex couples with the same security and benefits as married opposite-sex couples.¹⁰² Lamb’s logic is quite simple: marriage benefits children, so we must offer it to same-sex couples because they have children now, too. The Supreme Court of California concluded in a similar fashion in *Marriage Cases*, where the majority of the court ruled that state support for same-sex marriage would “confirm that a stable two-parent family relationship, supported by the State’s official recognition and protection, is equally as

⁹⁹ Isaacsen, “Teachable Moments,” 145.

¹⁰⁰ *Perry v. Schwarzenegger*, 704, 13.

¹⁰¹ *Perry v. Schwarzenegger*, 704, 13.

¹⁰² *Perry v. Schwarzenegger*, 704, 17.

important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples.”¹⁰³

During their closing arguments, the proponents of Proposition 8 focused on responsible procreation as a reason for regulating marriage. In essence, their argument can be summarized to be that the state has an interest in encouraging sexual activity between heterosexual couples because it can lead to pregnancy and children. Furthermore, the state has an interest in children being raised in stable households within stable marriages. Because sexual activity between same-sex couples does not lead to children, the state has no interest in encouraging their sexual activity to occur within a stable marriage. Thus, according to the defendants, the state’s only interest is in opposite-sex sexual activity. However, when the proponents of Proposition 8 were asked to provide evidence for the claim that same-sex marriage impairs the interest a state have in marriage as procreative, they first replied that it was “not the legally relevant question.” Pressed for an answer, the counsel only replied: “Your honor, my answer is: I don’t know. I don’t know.”¹⁰⁴ Unimpressed by the proponents’ lack of evidence, Judge Walker wrote the following in the courts opinion: “The evidence did not show any historical purpose for excluding same-sex couples from marriage, as states have never required spouses to have an ability or willingness to procreate in order to marry. Rather, the exclusion exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed.”¹⁰⁵ The link between marriage and procreation is arguably rooted in both culture and history. However, raising children was never the fundamental purpose of marriage. According to Isaacsen, the campaign for Proposition 8’s attempt to narrow marriage to its procreative function “flies in the face of both the historical and contemporary understandings of marriage.”¹⁰⁶

The rhetorical transformation of the child-based arguments in the district court should be seen as a turning point for same-sex marriage proponents. Same-sex marriage opponents could not prove that same-sex marriage would harm children – an especially difficult exercise in a state where thousands of children already are living happily and well with same-sex parents.

¹⁰³ *In re Marriage Cases*, 43, 78.

¹⁰⁴ *Perry v. Schwarzenegger*, 704, 9.

¹⁰⁵ *Perry v. Schwarzenegger*, 704, 113.

¹⁰⁶ Isaacsen, “Teachable Moments,” 152.

3.2.3 Tradition

A central point of the opposition against same-sex marriage is the importance of preserving tradition. Defenders of the traditional definition of marriage as a union between one man and one woman contend that tradition is a legitimate justification for upholding bans on same-sex marriage. Tradition has been a prominent argument in most of the states that have passed a mini-DOMA, which is true for the campaign for Proposition 8 in California as well.

Same-sex marriage opponents argue that traditions, like the institution of marriage, reflect time-tested wisdom and cultural identity, and that redefining marriage may result in unintended consequences that might be irreversible. Professor of law at the University of Virginia, Kim Forde-Mazrui suggests that while tradition is not a sufficient justification by itself, the benefits of preserving tradition, such as reinforcing a social identity, can be treated as a legitimate interest by a court.¹⁰⁷ He argues that when a law has lasted for generations, it should be assumed that the law has served important interests: “The majority of adults have chosen to enter marriages throughout history which suggests that it offers benefits that on balance have proven useful.”¹⁰⁸

Marriage has traditionally been limited to opposite-sex couples, but that tradition does not indicate what purposes or beliefs which makes it impossible to include same-sex couples in that institution. To pass a judicial review, the argument in question must rationally serve the intent of the law. Following Forde-Mazrui, one could assume that preserving tradition and opposite-sex marriage in particular, could be a legitimate interest. The question is whether the reasons for reserving marriage *exclusively* to opposite-sex couples are rationally related to preserving opposite-sex marriage.¹⁰⁹ A popular argument against same-sex marriage is that heterosexual couples would decline to marry if same-sex marriage was allowed, because marriage would then be deemed as less privileged. If this was true and same-sex marriage actually would result in fewer opposite-sex marriages, it could be seen as a legitimate reason to ban same-sex couples from getting married.

The fear that same-sex marriage would redefine the traditional definition of marriage was a central part of the testimonies in *Perry v. Schwarzenegger*. In court, Blankenhorn argued that recognizing same-sex marriage would lead to a deinstitutionalization of marriage. He described deinstitutionalization as a process “through which previously stable patterns and

¹⁰⁷ Kim Forde-Mazrui, “Tradition as Justification: The Case of Opposite-Sex Marriage,” *The University of Chicago Law Review*, Vol. 78, No. 1 (2011): 290.

¹⁰⁸ Forde-Mazrui, “Tradition as Justification,” 312.

¹⁰⁹ Forde-Mazrui, “Tradition as Justification,” 314.

rules forming an institution slowly erode or change.”¹¹⁰ In addition to same-sex marriage, Blankenhorn saw out-of-wedlock childbearing, rising divorce rates and increased use of assistive reproductive technologies as symptoms of the deinstitutionalization of marriage in America. He was, however, not clear on whether same-sex marriage is a cause for the other symptoms or a symptom in itself. Furthermore, Blankenhorn could not give evidence that supported the conclusion that same-sex marriage would lead to any – or several – of the other symptoms he gave. During cross-examination, Blankenhorn was presented with a study concluding that same-sex marriage had no adverse effect on marriage, divorce or abortion rates. Even though Blankenhorn dismissed the study, saying that the authors “think that the conclusion is so self-evident that anybody who has an opposing point of view is not a rational person,”¹¹¹ he agreed that it would be beneficial for children raised by same-sex couples if their parents were permitted to marry. Judge Walker found Blankenhorn’s opinions unreliable on the basis that they were mere thought experiments and not supported by evidence or methodology.¹¹²

Even though Blankenhorn testified that marriage would benefit same-sex couples and their children, reduce discrimination against gays and lesbians and be “a victory for the worthy ideas of tolerance and inclusion,”¹¹³ he concluded that the state of California should not recognize same-sex marriage. Blankenhorn identified three rules of marriage which he testified had been consistent across cultures and times: the rule of opposites, the rule of two and the rule of sex. Same-sex marriage would break those rules and thus weaken marriage as an institution.

Historian Nancy Cott testified on behalf of the plaintiffs about the public institution of marriage and the state’s interest in recognizing and regulating marriages. She emphasized the economic partnership of marriages and the need for one another to support each other in terms of material needs. Cott also recognized that the state’s primary purpose for regulating marriages is to create stable households. Following Cott, the question becomes whether or not same-sex marriages would have a negative effect on the households and the institution of marriage. She concluded her testimony by stating that it would not, and that same-sex marriage would provide “another resource for stability and social order.”¹¹⁴

¹¹⁰ *Perry v. Schwarzenegger*, 704, 45.

¹¹¹ *Perry v. Schwarzenegger*, 704, 47.

¹¹² *Perry v. Schwarzenegger*, 704, 48.

¹¹³ *Perry v. Schwarzenegger*, 704, 14.

¹¹⁴ *Perry v. Schwarzenegger*, 704, 15.

The question at hand is whether it is legitimate for a state to assume that a law's status as a tradition warrants the conclusion that the law ought to be continued. Even though there might follow benefits from preserving tradition, Forde-Mazrui concludes that the fear of unintended consequences is too speculative and insubstantial to justify banning same-sex marriage.¹¹⁵

Following Forde-Mazrui, tradition is an especially attractive justification to those defending laws that burden groups toward whom there has been a cultural shift from societal disapproval to a substantial degree of public tolerance. Throughout American history, tradition has been used to justify slavery, segregation and sex discrimination. Forde-Mazrui argues that the more tradition is relied on as a justification for a law, the more likely it is that feelings of disgust are covertly at work.¹¹⁶ When disgust-based justifications for banning same-sex marriage are seen as unacceptable, tradition easily emerges as a perceived legitimate justification.

In Judge Walker's opinion, the claim that same-sex marriage would weaken the institution of marriage could have passed a rational basis review, but the plaintiffs presented evidence rebutting any claim of potential negative consequences of same-sex marriage on the society as a whole. As with the other two arguments it became clear that the defendants struggled to back up their arguments with objective facts that could hold in court. Walker writes: "The tradition of restricting marriage to opposite-sex couples does not further any state interest. Rather, the evidence shows that Proposition 8 harms the state's interest in equality, because it mandates that men and women be treated differently based only on antiquated and discredited notions of gender."¹¹⁷

The tradition-argument is what Eskridge calls identity politics. It is strongly connected with religious and cultural identities and the fear that same-sex marriage would devalue existing opposite-sex marriages. Even though tradition as a justification for banning same-sex marriage arguably is rooted in identity, once presented in court it could be defined as normal politics. In normal politics, there could be legitimate benefits that would follow from preserving tradition that could be used to justify Proposition 8, but only if those benefits outweigh the benefits of reform and only if the justifications are based on empirical facts. The Northern District Court for California ruled that they did not.

¹¹⁵ Forde-Mazrui, "Tradition as Justification," 333.

¹¹⁶ Forde-Mazrui, "Tradition as Justification," 326.

¹¹⁷ *Perry v. Schwarzenegger*, 704, 124.

3.2.4 Same-Sex Marriage and the Constitution

The Fourteenth Amendment to the U.S. Constitution was adopted in 1868 and gave citizenship to the African-American population by stating that all people born or naturalized in America are citizens of the United States. The amendment also insured that neither state nor local governments could deprive persons of life, liberty or property without “due process of the law.” The Equal Protection Clause of the Fourteenth Amendment gives all citizens equal protection of the law and was famously used in *Brown v. Board of Education* for overturning a longstanding reading of the Constitution that opened for a “separate, but equal” doctrine, allowing racial segregation in public transportation, education and other areas.

When the California Supreme Court ruled in favor of same-sex marriage in *Marriage Cases*, the Court agreed that marriage is a fundamental right that is protected by both the state and federal Constitution. The disagreement was on whether or not there is a fundamental right for same-sex couples to be included in that institution. The minority of the court considered that same-sex couples in domestic partnerships had the same rights and benefits given to married opposite-sex couples. However, the majority argued that, regardless of what rights domestic partnerships and civil unions include, the exclusion of same-sex couples from the institution of marriage is unconstitutional per definition. Chief Justice Robert M. George wrote in the majority opinion:

Retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation of same-sex couples may well have the effect of perpetuating more general premise - now emphatically rejected by this state - that gay individuals and same-sex couples are in some respects “second-class citizens” who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples. Under these circumstances, we cannot find that retention of the traditional definition of marriage constitutes a compelling state interest. Accordingly, we conclude that to the extent the current California statutory provision limit marriage to opposite-sex couples, these statutes are unconstitutional.¹¹⁸

The United States Supreme Court has several times found it inadequate to create separate institutions for certain groups and minorities, most famously in *Brown*. Also in 1996, in *United States v. Virginia*,¹¹⁹ the court ruled it unconstitutional for Virginia to found a separate military program for women rather than admitting them to the Virginia Military Institute.

¹¹⁸ *In re Marriage Cases*, 43, 11.

¹¹⁹ *United States v. Virginia*, 518 U.S. 515 (1996)

Even though authorities grant the same benefits through a separate institution, the symbolic difference that remains could be just as important as the benefits connected to them.

Justice Marvin R. Baxter wrote one of the dissenting opinions of the California Supreme Court and disagreed on the account that marriage is an institution open for all individuals: “The marriage statutes are facially neutral on that subject. They allow all persons, whether homosexual or heterosexual, to enter into the relationship called marriage, and they do not, by their terms, prohibit any two persons from marrying each other *on the ground that* one or both of the partners is gay.”¹²⁰ In other words, the marriage statutes do not discriminate homosexuals, because no one is stopping homosexuals from marrying someone of the opposite sex.

However, Chief Justice George pointed out that by limiting marriage to opposite-sex couples, the marriage statutes impose a different treatment on homosexual individuals because of their sexual orientation. Whether or not a group is entitled to be protected by the Equal Protection Clause depends on whether the group is considered a “suspect classification.” Most rulings about same-sex marriage have come to the conclusion that statutes that treat persons differently because of sexuality are not to be considered unconstitutional, unlike statutes that treat people differently because of an individual’s race, sex, religion or national origin. Reasons for this have traditionally been based on the view that a person’s sexuality is not immutable. Gender and race are considered immutable traits and therefore qualify protection by the Equal Protection Clause. But as Chief Justice George and the majority opinion notes, a person’s religion can also change, but religion is still considered a classification that is subject to protection by the Equal Protection Clause. So in the majority opinion, it is irrelevant whether or not one believes an individual’s sexuality is something a person chooses or not. One can still be considered to be in need of protection from majoritarianism.

The then Attorney General of California, Bill Lockyer, argued before the California Supreme Court that a new standard should be included when considering a group for protection by the Fourteenth Amendment. He proposed to take into consideration whether or not the group is able to wield political power in defense of its interest, something he believed the gay community in California had proved they do. Justice Baxter supported the view of the Attorney General and argued that gays and lesbians lack the unpopularity and political

¹²⁰ *In re Marriage Cases*, 43 Cal 4th 757 (2008) (Baxter, M.R, dissenting), 20.

vulnerability a suspect classification needs to be taken in under the Equal Protection Clause. Baxter claims that homosexuals in California are far from politically powerless. On the contrary, the Gay Movement in the Golden State is more popular and powerful than in most other states. The majority of the Court did not agree:

Our decisions make clear that the most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification are whether the class of persons who exhibit a certain characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual's ability to perform or contribute to society.¹²¹

Following Chief Justice George and the majority of the Court, this view disregards that both women and ethnic groups still are treated as suspect classifications. Not because of their position today, but because these groups, as well as homosexuals, share a history of persecution and discrimination and are more "suspect" to abuse of a majority.

In the district court, the defendants' testimony focused on the arguments given in the campaign to pass Proposition 8 and not the plaintiff's challenge of the amendment as unconstitutional. However, Kenneth P. Miller, a professor of government at Claremont McKenna College, was called to give arguments as to why homosexuals are not a suspect class in need of protection of the Due Process Clause. Miller argued that a group's political power includes money, access to lawmakers, the size and cohesion of a group, the ability to attract allies and form coalitions, and the ability to persuade.¹²² He pointed to failed attempts in California to fire teachers that publically supported homosexuality and an attempt at creating an HIV register as examples of the political success of gays and lesbians in California. He also showed to support of gay and lesbian rights from religious, political and corporate groupings, but could not explain how his data could be consistent with the fact that 84 percent of those who attend church weekly voted yes on Proposition 8.¹²³ Finally, Miller's testimony was further undermined when the court was presented with a work by Miller that stated that "gays and lesbians, like other minorities, are vulnerable and powerless in the initiative process,"¹²⁴ such as Proposition 8.

¹²¹ *In re Marriage Cases*, 43, 99.

¹²² *Perry v. Schwarzenegger*, 704, 50.

¹²³ *Perry v. Schwarzenegger*, 704, 52.

¹²⁴ *Perry v. Schwarzenegger*, 704, 53.

In his conclusion Judge Walker ruled that the plaintiffs rightfully sought a fundamental right to marry under the Due Process Clause:

1. Proposition 8 requires California to treat same-sex couples differently from opposite-sex couples.
2. Proposition 8 reserves the most socially valued form of relationship (marriage) for opposite-sex couples.
3. Proposition 8 increases costs and decreases wealth for same-sex couples because of increased tax burdens, decreased availability of health insurance and higher transaction costs to secure rights and obligations typically associated with marriage. Domestic partnerships reduce but do not eliminate these costs.¹²⁵

Having established that, Walker discussed whether or not the state of California fulfills its due process obligation to same-sex couples with domestic partnerships. Even though domestic partnerships offer same-sex couples almost all of the rights and responsibilities as marriage does, there still is a symbolic disparity between the two institutions. Judge Walker concluded that the hearing reflected that marriage is a culturally superior status and that California did not meet its due process obligation when the substitute offered to the plaintiffs was inferior both culturally and economically.

Judge Walker gave little credit to the proponents of Proposition 8 in the conclusion to his opinion: “Many of the purported interests identified by proponents are nothing more than a fear or unarticulated dislike of same-sex couples.”¹²⁶ Thus, Proposition 8 was rendered unconstitutional under the Equal Protection Clause of the United States Constitution by the Northern District Court of California.

3.3 *Perry v. Brown*

The proponents of Proposition 8 quickly appealed the decision of the district court, and in *Perry v. Brown*, they met their second defeat in a federal court. In a two against one vote, the Ninth Circuit upheld the decision of the district court. Even though the Ninth Circuit ruled Proposition 8 unconstitutional, it did so, on a much narrower ground than the district court, applying it only to the state of California.

¹²⁵ *Perry v. Schwarzenegger*, 704, 91.

¹²⁶ *Perry v. Schwarzenegger*, 704, 132.

The Ninth Circuit saw the case as unique in two senses. First, California had already extended the right of marriage to same-sex couples at the time of the amendment. Second, Proposition 8's only effect was to take away the designation of "marriage." The limited effect of the proposition allowed the Ninth Circuit to address the amendment's constitutionality on narrow grounds.

Judge Walker and the district court held Proposition 8 unconstitutional for two reasons. It deprived same-sex couples of the right to marry, guaranteed by the Due Process Clause, and it excluded same-sex couples from state-sponsored marriage while allowing opposite-sex couples access to it, in violation of the Equal Protection Clause. This was a very broad ruling. In the circuit court, a much narrower ground formed the basis for the ruling. Since same-sex marriage already was legal in California at the time the Constitution was amended to ban same-sex marriage, Proposition 8 took away already existing rights from a singled out group. The Equal Protection Clause of the Constitution protects minority groups from being deprived of existing rights without legitimate reasons.

The majority opinion of the Ninth Circuit, written by Judge Stephen Roy Reinhardt, stressed the fact that Proposition 8 did not take away any of the rights of homosexuals in California except the designation of marriage. However, he did not emphasize the limited effect of Proposition 8 in order to minimize its harm, but rather to highlight the importance of the designation of marriage. Reinhardt wrote: "It is the designation of 'marriage' itself that expresses validation, by the state and the community, and that serves as a symbol, like a wedding ceremony or a wedding ring, of something profoundly important."¹²⁷ To emphasize his point he used a quote by the proponents made during the hearings in the district court. Here the proponents admitted that "the word marriage has a unique meaning and there is significant symbolic disparity between domestic partnership and marriage."¹²⁸

The majority of the Circuit Court did not consider whether same-sex couples have a fundamental right to marry or whether states that ban same-sex marriage are wrong in doing so. The question the Ninth Circuit addressed was whether or not the people of a state may strip away a right, constitutional or not, from a group that had previously enjoyed that right on the same terms as the rest of the state population.

The Fourteenth Amendment demands that a change in the law must be justified on a legitimate purpose. Neither the district court, nor the Ninth Circuit found the proponents

¹²⁷ *Perry v. Brown*, 671, 38.

¹²⁸ *Perry v. Brown*, 671, 37.

proposed reasons for banning same-sex marriage legitimate enough to pass a rational basis review. To illustrate, Reinhardt compared the case with two other, *Evans v. Romer*¹²⁹ and *U.S. Dep't of Agric. v. Moreno*.¹³⁰

Romer is a Supreme Court decision that came following a voter initiated amendment to the Colorado Constitution in 1992. The initiative would prohibit the state from providing any protection against discrimination based on sexual orientation. In 1973, in *Moreno*, the Supreme Court held an amendment to the Food Stamp Act unconstitutional. The amendment tried to exclude households of “unrelated individuals”, such as hippies, from the benefits of the Food Stamp Act. According to Reinhardt, the Supreme Court did not rule as it did because Congress was obligated to provide food stamps to “hippies” or Colorado to enact antidiscrimination laws under the Fourteenth Amendment. It did so because the amendments targeted and excluded a group of people from a right they previously had enjoyed without any rational reason.¹³¹ This is the same reason the district and circuit court used for striking down Proposition 8.

In his dissenting opinion, Judge N.R. Smith finds Reinhardt’s comparison of *Perry v. Brown* with *Romer* irrelevant. Smith’s point was that the voter initiative in *Romer* was much more far reaching, in that it wanted to change a targeted group’s legal status entirely. In addition, Smith also claimed that the fact that the right was withdrawn should not affect the analysis of Proposition 8 as constitutional or not. In *Romer*, Smith argues, the Supreme Court of Colorado did not base their decision on the fact that rights were withdrawn. It was only mentioned in examples where specific legal protections were removed following the targeting of gays and lesbians as a single group.¹³²

When it comes to Reinhardt’s focus on the fact that a right was withdrawn, the proponents see it as irrelevant to the case, because *In re Marriage Cases* was a short-lived decision. Same-sex couples only had the right to marry during 143 days before Proposition 8 was enacted. Judge Reinhardt dismissed this argument by stating that withdrawing a right from a disfavored group is different than declining to give that right in the first place, regardless of whether the right was withdrawn after years or weeks. In other words, the law cannot regard a law’s constitutionality on the basis of how long it has lasted.

¹²⁹ *Romer v. Evans*, 517 U.S. 620 (1996)

¹³⁰ *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973)

¹³¹ *Perry v. Brown*, 671, 51.

¹³² *Perry v. Brown*, 671 F.3d 1052, 9th Cir. (2012) (Smith, N.R, dissenting), 20.

Even though Judge Smith disagreed with the majority ruling, he too argued that Proposition 8 must have a legitimate governmental interest to pass a rational basis review. The difference is that Smith was not as dismissive to the rationality of the proponents' argumentation as the majority of the Ninth Circuit was. In his dissenting opinion, Smith discussed two of the proponents main arguments: the question of responsible procreation and optimal parenting environments, and whether or not withdrawing same-sex couples' access to the designation of marriage relates to those factors. In an interesting move, Smith highlights the fact that the proponents accused the plaintiffs of failing to present a single study comparing the outcomes for children of married biological parents with children with same-sex parents.¹³³ Judge Walker made the same point in the district court. Only then it was used in the opposite way. Walker accused the proponents of presenting arguments saying that biological parents produce the best child rearing environments without showing to any study comparing them to same-sex parents.¹³⁴ It should be noted that research comparing heterosexual couples' parenting with homosexual couples' does indeed exist. In a brief in support of the plaintiffs, the American Psychological Association (APA) stated that:

The scientific research that has directly compared outcomes for children with gay and lesbian parents with outcomes for children with heterosexual parents has been consistent in showing that lesbian and gay parents are as fit and capable as heterosexual parents, and their children are as psychologically healthy and well-adjusted as children reared by heterosexual parents. Empirical research over the past two decades has failed to find any meaningful differences in the parenting ability of lesbian and gay parents compared to heterosexual parents.¹³⁵

Even if the brief by APA had been taken into account, Smith argues that since the question of optimal parenting is debatable, it should be considered a conceivably legitimate governmental interest.¹³⁶ He concludes that it is enough that the people of California adopted Proposition 8 under the perceived rationale that married opposite-sex couples are the best parents.

In a brief in support of the proponents of Proposition 8, the National Organization for Marriage wrote that the state's definition of marriage helps shape the cultural understanding of what marriage is and what purposes it serves: "Legally redefining marriage as the union of any two persons, particularly through the blunt instrument of constitutional mandate, will

¹³³ *Perry v. Brown*, 671, (Smith, N.R, dissenting), 29.

¹³⁴ *Perry v. Schwarzenegger*, 704, 45.

¹³⁵ "Brief of the American Psychological Association, The California Psychological Association, The American Psychiatric Association, And The American Association For Marriage And Family Therapy as Amici Curiae in Support of Plaintiff-Appellees," *Perry v. Brown*, 671 F.3d 1052, 9th Cir. (no. 10-16696), 2012, 20, <http://cdn.ca9.uscourts.gov/datastore/general/2010/10/27/amicus29.pdf>

¹³⁶ *Perry v. Brown*, 671, (Smith, N.R, dissenting), 29.

weaken or sever the connection in the public square between marriage and procreation, elevating adult desires for love and commitment over the needs of children as the defining public purpose of marriage in law.”¹³⁷ Following Judge Smith, procreation and the traditional definition of marriage are of some legitimate governmental interest. However, if Proposition 8 is relevant to procreation, one must believe that opposite-sex couples will be less likely to have and raise children in married families if same-sex couples also can marry. No evidence was presented to support such a claim. Still, as with the argument of optimal parenting, Smith argues that if the people of California believed that withdrawing the designation of marriage from same-sex couples would further the legitimate interest of promoting responsible procreation, this would in itself be enough to pass a rational basis review.

Perry v. Brown is another example of how a court managed to render identity-based argument insufficient when trying to legitimize a ban on same-sex marriage. Judge Reinhardt argued that the proponents’ arguments fail to address why the right for same-sex couples to marry should be withdrawn from them. The majority concludes that Proposition 8 could not have been enacted to promote what the proponents said it would. Proposition 8 does nothing to control the education of schoolchildren, protect optimal childrearing by biological parents or encourage responsible procreation. Proposition 8 simply takes away the designation of marriage, while leaving in place all other rights and responsibilities of same-sex couples.

Perry v. Brown exemplifies the journey the issue of same-sex marriage has taken from politics of disgust, to identity politics, to finally being treated as an issue belonging to normal politics. Forty years after a state court in Minnesota rejected the legal arguments for same-sex marriage on the ground that it intended to preserve the traditional understanding of marriage, Reinhardt and the Ninth Circuit proclaimed that tradition and procreation alone could not be sufficient a reason to ban same-sex marriage.

Of the three judges present at the Ninth Circuit hearing, only one, Smith, dissented. In the majority opinion, Judge Reinhardt concluded with the following statement: “By using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause.”¹³⁸ In a narrow ruling, the Ninth Circuit ruled Proposition 8 unconstitutional on the

¹³⁷ “Brief of the National Organization for Marriage, National Organization for Marriage Rhode Island, And Family Leader as Amici Curiae in Support of the Intervening Defendants-Appellants,” *Perry v. Brown*, 671 F.3d 1052, 9th Cir. (no. 10-16696), 2012, 5, <http://cdn.ca9.uscourts.gov/datastore/general/2010/10/26/amicus20.pdf>

¹³⁸ *Perry v. Brown*, 671, 79.

basis of lacking rational arguments for removing the right of marriage to same-sex couples based on governmental interests.

The proponents of Proposition 8 requested a rehearing *en banc* (full court). This was, however, denied and the case was appealed to the U.S Supreme Court, where it was granted a *writ of certiorari* in December 2012. The Supreme Court started hearing arguments on the case, now called *Hollingsworth v. Perry*, in March 2013, and gave its decision in June 2013.

3.4 From Backlash to Counterbacklash

The backlash that followed the Supreme Court of California's recognition of same-sex marriage in California gives evidence to Rosenberg's view that courts inherently create political backlash when they rule in favor of a controversial issue without the necessary political and public support. The success of Proposition 8 indicates that the traditional definition of marriage still was in accord with a majority of the Californian population and that the California Supreme Court was premature in its decision. However, the story did not end there. History will show that the California marriage cases was not a story about political backlash, but the story of when the tide turned in favor of same-sex marriage in America. To ignore or undermine the courts role in that would be both naïve and factually wrong.

Marriage Cases and the following campaign to pass Proposition 8 mobilized proponents and opponents in staggering numbers. According to Rosenberg, the mobilizing effect on same-sex marriage opponents was higher than on the proponents following *Baehr*, *Baker* and *Goodridge*. The picture in California is, however, more balanced.

The battle over same-sex marriage in California in 2008 became that year's highest-funded campaign on any state ballot and surpassed every campaign in the country in spending, except the presidential election campaigns of Obama and McCain. It was also the largest amount of money ever raised over an electoral fight in California.¹³⁹ The campaign to pass the amendment raised about \$39 million and the one against \$44 million.¹⁴⁰ Both proponents and opponents of Proposition 8 made significant use of online tactics. Over 800 videos were posted on YouTube, most consisting of original content and most taking a

¹³⁹ "Tracking the money: Final Numbers," *LA Times*, February 3, 2009, accessed April 15, 2014, <http://www.latimes.com/local/la-moneymap,0,1777132.htmlstory#axzz2zAeaoTsX>

¹⁴⁰ "Proposition 8: Who gave in the gay marriage battle?," *LA Times*, accessed April 24, 2014, <http://projects.latimes.com/prop8/>

position against the proposition.¹⁴¹ While the same-sex proponents were ultimately defeated and the amendment passed, they outspent the opponents in money, ran a successful campaign in social media and gained support from several leading news outlets. The proposed amendment fueled a campaign that gained statewide, national and even international attention. Yet, once the proposition had passed, the real surprise happened.

Eleven days after the ballot measure passed, tens of thousands of people gathered in cities across the nation in support of same-sex marriage.¹⁴² It was one of the nation's largest gay rights demonstrations. The Gay Movement was energized, not only in California, but in the nation as a whole. A campaign called *NOH8* was created by photographer Adam Bouska and his partner Jeff Parshley. The name of the campaign is a play on a common nickname for the proposition, "Proposition H8" (pronounced "Proposition hate"). *NOH8* featured people with duct tape over their mouths and "NOH8" painted on one cheek. Four years after its inception, the campaign had published over 30,000 photos taken at 120 open photo shoots in 43 states.¹⁴³ The campaign started with portraits of Californians, but soon rose to include politicians, military personnel and celebrities.

Dustin Lance Black, screenwriter of the Oscar-winning movie *Milk*, wrote a play called *8* that reenacted the trial and testimonies of *Perry v. Schwarzenegger*. The play premiered on September 19, 2011, at the Eugene O'Neill Theatre in New York City, starring amongst others, Morgan Freeman and John Lithgow.¹⁴⁴ On March 3, 2012, *8* was staged in Los Angeles, starring an ensemble of Brad Pitt, George Clooney, Jane Lynch, Martin Sheen and Kevin Bacon.¹⁴⁵ The play was written in response to the successful efforts by the proponents of Proposition 8 to prevent broadcast of the trial and the release of trial video recordings as they feared witness intimidation. The play made sure that the public got the opportunity to see the testimonies after all. *8* and the *NOH8* campaign are but two examples of the counterbacklash against Proposition 8. Same-sex marriage had become an issue on

¹⁴¹ Kjerstin Thorson et al., "YouTube and Proposition 8: A case study in video activism," *Information, Communication & Society* Vol. 13, No. 1 (2010): 339.

¹⁴² Jesse McKinley, "Across U.S., Big Rallies for Same-Sex Marriage," *New York Times*, November 15, 2008, accessed March 10, 2014, <http://www.nytimes.com/2008/11/16/us/16protest.html>

¹⁴³ "About," *NOH8 Campaign*, accessed January 17, 2014, <http://www.noh8campaign.com/article/about>

¹⁴⁴ David Rooney, "Dustin Lance Black Debuts Prop. 8 Play in New York," *The Hollywood Reporter*, February 20, 2011, accessed February 2, 2014, <http://www.hollywoodreporter.com/news/dustin-lance-black-debuts-prop-237834>

¹⁴⁵ "George Clooney, Brad Pitt lead all-star Prop. 8 play reading," *LA Times*, March 4, 2012, accessed February 2, 2014, <http://latimesblogs.latimes.com/culturemonster/2012/03/george-clooney-brad-pitt-enact-prop-8-stage-drama.html#sthash.QQFmXBLY.dpuf>

everybody's lips and two years after the amendment passed, a CNN poll showed a majority of Americans in support of same-sex marriage for the first time.¹⁴⁶

The Public Policy Institute of California (PPIC) started polling on same-sex marriage in 2000. In the first poll, 39 percent of Californians were in favor of same-sex marriage and 55 percent opposed. In October 2008, one month before the passage of Proposition 8, 44 percent were positive to marriage reform. Support for same-sex marriage in California moved above 50 percent in 2010,¹⁴⁷ and the margin of support continued to grow as the *Perry* case moved through the courts of appeal. One should be careful to attribute the growing acceptance of same-sex marriage to court decisions alone, but two conclusions can be made. First of all, the California marriage cases did not have a negative effect on the public's view on same-sex marriage as both Californian and national polls continue to show a growing support for same-sex marriage. Furthermore, without the marriage cases, the issue would not have been getting as much attention, and thus, it is hardly controversial to state that the cases had a positive impact on the growing awareness and acceptance of same-sex marriage in the California population.

The fact that the mobilization of proponents and opponents of same-sex marriage was balanced after *Marriage Cases* and that the public opinion grew in favor of same-sex marriage in light of the same-sex marriage controversies in California suggests that Rosenberg's theory on courts and political backlash is limited, at best. That is, unless the courts in fact successfully overcame the constraints proposed by Rosenberg.

Rosenberg's central point is that courts only can create social reform when significant political actors offer support. The fact that the state of California and then governor Arnold Schwarzenegger refused to support Proposition 8 in court suggests that at least one of the constraints was overcome. In addition, even though then presidential nominee Barack Obama said that his view on marriage was that it was for one man and one woman, he was strongly against Proposition 8 based on the fact that it took away a right already given. Thus, at first glance, one could claim that since the district and circuit court had backing from both the state and federal level, the prospect of political backlash was diminished, paving the way for social reform. However, the picture is more nuanced than that.

¹⁴⁶ Andrew Gelmand, Jeffrey Lax and Justin Phillips, "Over Time, a Gay Marriage Groundswell," *New York Times*, August 21, 2010, accessed January 29, 2014.

http://www.nytimes.com/2010/08/22/weekinreview/22gay.html?_r=0

¹⁴⁷ Sonja Petek, "CALIFORNIANS' ATTITUDES TOWARD SAME-SEX MARRIAGE," *Public Policy Institute of California*, December, 2013, accessed March 10, 2013, http://www.ppic.org/main/publication_show.asp?i=1012

In his period as Governor of California, Arnold Schwarzenegger vetoed two legislative bills that would recognize same-sex marriage in California.¹⁴⁸ However, following *Marriage Cases*, he said that he respected and would uphold the Supreme Court's position, and that he would oppose any attempts to change the state constitution to ban same-sex marriage.¹⁴⁹ Schwarzenegger's position on same-sex marriage changed *because* of the courts role on the issue. Furthermore, Obama's view on same-sex marriage evolved the same year. In 2004, he stated that marriage is between a man and a woman, but in response to Proposition 8, he said that he opposed the "divisive and discriminatory efforts to amend the California Constitution."¹⁵⁰ The California Supreme Court's decision and the following backlash changed the views of two central political figures, which made it easier in the following court cases. Thus, even though Rosenberg's central constraint was overcome, it was because of, and not in spite of, the role of the courts.

Rosenberg also argues that when courts tackle controversial issues, the chance for political backlash grows, because it is seen as undemocratic. Whether or not a court should be able to rule mini-DOMAS unconstitutional became a central issue in the campaign of the proponents of Proposition 8. Former Speaker of the House, Newt Gingrich, said in a televised commercial, financed by Protect Marriage, that four judges overturned the will of the people when they declared the law denying same-sex couples marriage rights unconstitutional.¹⁵¹ According to Gingrich, it was pivotal to the future of America to keep the courts in check, because it is not up to the courts to define values or create new rights. That is up to the American people to do. The proponents of Proposition 8 used the concept of "imperial judges" as one of their main arguments to pass the amendment:

Californians have never voted for same-sex marriage. If gay activists want to legalize gay marriage, they should put it on the ballot. Instead, they have gone behind the backs of voters and convinced four activist judges in San Francisco to redefine marriage for the rest of society. That is the wrong approach.¹⁵²

¹⁴⁸ Jill Tucker, "Schwarzenegger vetoes same-sex marriage bill again," *SFGate*, October 12, 2007, accessed April 10, 2014, <http://www.sfgate.com/bayarea/article/Schwarzenegger-vetoes-same-sex-marriage-bill-again-2497886.php>

¹⁴⁹ "Preserving California's Constitution," *New York Times*, September 28, 2008, accessed April 10, 2014.

¹⁵⁰ John Wildermuth, "Obama opposes proposed ban on gay marriage," *SFGate*, July 2, 2008, accessed April 4, 2014. <http://www.sfgate.com/news/article/Obama-opposes-proposed-ban-on-gay-marriage-3278328.php>

¹⁵¹ Newt Gingrich, "Stop imperial judges," Video, *Yes on Proposition 8*, accessed May, 2011.

<http://www.whatisprop8.com/stop-imperial-judges.html>

¹⁵² "Ballot Arguments."

Rosenberg's theory and the focus on "imperial judges" by the proponents would suggest that the California Supreme Court's ruling was instrumental in the passage of Proposition 8. However, an analysis of the exit poll data from California shows that religion, age and ideology was the determinative factors for why people voted in favor of the amendment.¹⁵³ Moreover, an inquiry by David Binder Research asked voters specifically if they believed that "Proposition 8 would serve to rein in the activist judges on the CA Supreme Court." Only 29 percent answered yes. On the other hand 58 percent said that Proposition 8 would preserve traditional marriage and 37 percent stated that the amendment would stop the teaching of same-sex marriage to children in elementary school.¹⁵⁴ It was the issue that was important, not the role of the Court.

Following Rosenberg, those who rely on the courts, without significant public and political support, will fail to achieve meaningful social change, and may set their issue back. The California marriage cases stands in stark contrast to this theory. While the initial response to the Supreme Court of California's ruling in favor of same-sex marriage was a powerful political backlash, the counterbacklash that followed and the surge in political and public support of same-sex marriage suggest a much more nuanced view of the role of courts in creating social reform.

The courts ruled that excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest. Proponents of Proposition 8 offered both cultural and religious reasons for why same-sex couples should be denied the opportunity to get married. However, identity based arguments are much easier to maintain outside the courtrooms, where there is little demand for the checking of facts. It is much easier to get away with an argumentation based on possible negative consequences of same-sex marriage when one can take advantage of already existing biases and stereotypical portrayals of the homosexual population in America. The problem for the opponents of same-sex marriage is that the law is blind to those biases.

The Proposition 8 campaign and the following court cases reflect the changing dynamics of backlash politics described by Eskridge. Public appeals to politics of disgust by same-sex marriage opponents were renounced and identity politics became the main focus of the opposition. Both the televised commercials and the arguments presented in court depicted

¹⁵³ "Ballot Measures California Proposition 8: Ban on Gay Marriage," CNN, accessed March 3, 2014, <http://edition.cnn.com/ELECTION/2008/results/polls/#val=CAI01p1>

¹⁵⁴ "Proposition 8 Post-Election California Voter Survey," David Binder Research, accessed, March 3 2014, (San Francisco, 2008), 43, <http://files.meetup.com/1333125/DBR%20PROP%208%20POST-ELECTION%20SUMMARY%20REPORT%20012109%20V2.pdf>

same-sex couples as a danger to families, education and religious freedom. These identity based arguments secured the passage of Proposition 8, but once the burden of inertia was reversed in court, the opponents of same-sex marriage were forced to move from politics of identity to normal politics. As the burden of inertia had been reversed, the normal politics arguments against same-sex marriage were stretched thin when they were met by the courts' demand for rational connections between arguments and consequences.

The California marriage cases did not only show how normal politics has started to overtake backlash politics, they are also part of the reason as to why it is happening. Moving from identity to normal politics is important for same-sex marriage proponents because it makes political backlash less likely and opens up for a powerful counterbacklash. This has not gone the same-sex marriage opponents by, and might have been the reason for why they fought so hard to stop the district court testimonies from being broadcasted. Their official objection was that the broadcast would create witness intimidation.¹⁵⁵ However, as the proponents only called two witnesses, both of which were public personas, it is difficult to accept that it was demanded based on a concern for witnesses. The truth is that the proponents probably new perfectly well that they would have a hard time in the district court, and thus, the fewer who witnessed the hearings the better.

David Blankenhorn's testimony in the Northern District Court of California serves as a good example of the social change the courts have made. His testimony was challenged by the plaintiffs, who claimed that his arguments was based on personal belief rather than facts. The court agreed and wrote that his testimony "should be given essentially no weight."¹⁵⁶ When asked about his study on the effects of same-sex marriage, Blankenhorn answered that he based his conclusions on "reading articles and having conversations with people, and trying to be an informed person about it."¹⁵⁷ Judge Walker reached the conclusion that the testimony of Blankenhorn provided no basis for establishing evidence that California has an interest in refusing to recognize same-sex marriage.

In June 2012, Blankenhorn announced that his position on same-sex marriage had changed in a New York Times opinion column:

I had hoped that the gay marriage debate would be mostly about marriage's relationship to parenthood. But it hasn't been. Or perhaps it's fairer to say that I and others have made that argument, and that we have largely failed to persuade. In the mind of today's public, gay

¹⁵⁵ Klarman, *From the Closet to the Altar*, 198.

¹⁵⁶ *Perry v. Schwarzenegger*, 704, 39.

¹⁵⁷ *Perry v. Schwarzenegger*, 704, 39.

marriage is almost entirely about accepting lesbians and gay men as equal citizens. And to my deep regret, much of the opposition to gay marriage seems to stem, at least in part, from an underlying anti-gay animus. To me, a Southerner by birth whose formative moral experience was the civil rights movement, this fact is profoundly disturbing.¹⁵⁸

Blankenhorn's position on same-sex marriage reflects the societal change of America's view on the issue, and the courts role in that development. Failing to convince the court that tradition and procreation alone are reasons for banning same-sex marriage, one is left with disgust and identity based arguments that no longer satisfy the courts or the majority of the American people. As that transformation takes place and the risk of political backlash diminishes, the doors are opened for a social reform of the institution of marriage to include same-sex couples.

¹⁵⁸ David Blankenhorn, "How My View on Gay Marriage Changed," *New York Times*, June 22, 2012, accessed November 18, 2013, http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?_r=1&

4 Same-Sex Marriage and the U.S. Supreme Court

After the United States Court of Appeals for the Ninth Circuit declared Proposition 8 unconstitutional, the initiative's proponents appealed to the federal Supreme Court. After the Court decided to hear the case, Americans braced themselves for a potential landmark decision on same-sex marriage. Gay rights activists hoped that the Supreme Court would rule in favor of same-sex marriage and rule all bans on same-sex marriage unconstitutional.

On June 26, 2013, the Supreme Court rendered its decision in the case now called *Hollingsworth v. Perry*. In a 5-4 decision, they ruled that the backers of Proposition 8 lacked appellant standing, both in the Supreme Court and at the appeal court. Thus, the case was returned to the Ninth Circuit with instructions to vacate their ruling in *Perry v. Brown*. This left the original district court decision in *Perry v. Schwarzenegger* the final ruling in the case and Proposition 8 was overturned.

After addressing the issue of standing, this chapter considers the Supreme Court majority's and minority's written opinions and the oral argument hearing in light of Eskridge's theory on same-sex marriage politics. Although the federal Supreme Court did not rule on the arguments given in the lower courts, they were still addressed during the oral argument given in March 2013. By looking at the arguments given during the hearing and the justices' response to them, this chapter will analyze the arguments' transition from the district and circuit court to the national level. Additionally, the chapter analyzes the outcome of the case and the potential for political backlash by applying Rosenberg's theory on the constraints of the Supreme Court. Finally, the chapter considers some of the other outcomes the case could have had, and the effect *Hollingsworth v. Perry* has had on the latest evolution of same-sex marriage in the United States.

4.1 The Issue of Standing

When the state of California refused to defend Proposition 8 in the federal courts, the proponents of the amendment asked to intervene as defendants. The legality of this intervention was affirmed by the California Supreme Court, who ruled that the official proponents of an amendment could be authorized under California law to appear and present the state's interest in a federal court. However, when the United States Supreme Court gave their ruling in *Hollingsworth v. Perry*, they concluded that the proponents lacked standing to appeal.

The judicial power of the federal courts is limited to decide in actual cases or controversies, as Article III of the federal constitution demands that a party invoking the jurisdiction of a federal court must have suffered a concrete or particularized injury. In other words, to have standing, one has to have a “direct stake” in the outcome of one's appeal, which the majority of the Supreme Court did not find that the sponsors of Proposition 8 had. Once the Northern District Court of California issued its order, the plaintiffs of *Perry v. Schwarzenegger* no longer had any injury to address, and the state officials chose not to appeal. The proponents of Proposition 8 that had intervened in the district court, however, sought to appeal the court's decision. Following the decision of the majority of the United States Supreme Court, once Proposition 8 was approved, it became a constitutional amendment that the petitioners had no role in enforcing. Thus, no matter how committed the petitioners might have been in upholding Proposition 8, it was not enough to create a case or controversy under Article III.

Chief Justice Roberts wrote the majority opinion of the Supreme Court and was joined by Justices Scalia, Ginsburg, Breyer and Kagan. In the majority opinion he wrote:

The Court does not question California's sovereign right to maintain an initiative process, or the right of initiative proponents to defend their initiatives in California courts. But standing in federal court is a question of federal law, not state law. No matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override this Court's settled law to the contrary. Article III's requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in the federal system of separated powers. States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.¹⁵⁹

¹⁵⁹ *Hollingsworth v. Perry*, 570, 16.

Even though the sponsors of Proposition 8 lost in the district court, they lacked standing to appeal to the Ninth Circuit Court and the federal Supreme Court because the injury in question was done to the state of California and not the organization, Protect Marriage. Disagreeing with or disliking a law was not enough. One must be a party that has suffered an injury.

The minority opinion was written by Justice Kennedy and joined by Justices Thomas, Alito and Sotomayor. They held that the State of California sustained a concrete injury when a United States district court nullified a portion of its State Constitution. Furthermore, they argued that the federal Supreme Court cannot determine if the proponents have the authority to present the state's interest in a federal court. That would be up to the state in question to determine, which California did with its supreme court's decision. The proponents' authority was a consequence of the California Constitution and the California Elections Code. The Supreme Court of California held that California law gives the right for official proponents of an initiative to represent the State's interests in defending their proposition when state officials choose not to do so.

Justice Kennedy and the dissenters argued that the purpose of voter initiatives is at stake when the only party that can defend an enacted initiative can also decline to defend it: "In short, the Court today unsettles its longtime understanding of the basis for jurisdiction in representative-party litigation, leaving the law unclear and the District Court's judgment, and its accompanying statewide injunction, effectively immune from appellate review."¹⁶⁰ Following the Court's minority, the Supreme Court's ruling in *Hollingsworth v. Perry* stand at risk to eliminate the possibility of testing voter initiatives in court without the approval of state authorities. The initiative system's purpose is to allow people to influence policies and laws, where politicians have failed in the eyes of the initiatives' proponents. Neglecting to give the proponents standing in the Proposition 8 controversy, results in a situation where the Governor and Attorney General of California in praxis gave a *de facto* veto in favor of same-sex marriage when they refused to defend the amendment in court.

The Supreme Court heard oral arguments for the case on March 26, 2013. Appellate attorney Charles J. Cooper gave arguments on behalf of the petitioners. Cooper also led the legal team of the proponents in *Perry v. Brown*. He argued that the proponents of Proposition 8 had standing to defend the measure as representatives of the people and state of California.

¹⁶⁰ *Hollingsworth v. Perry*, 570 U.S. ____ (2013) (Kennedy, J., dissenting), 12.

When asked what injury the proponents had suffered that would leave them with a standing under Article III, Cooper answered: “The question before the Court, I would submit, is not the injury to the individual proponents; it’s the injury to the State. The - - legislators in the Karcher case had no individual particularized injury, and yet this Court recognized they were proper representatives of the State’s interests, the State’s injury.”¹⁶¹ The Karcher case that Cooper refers to was a case in which the Supreme Court held that two state legislators from New Jersey, the Speaker of the General Assembly and President of the Senate, could intervene in a suit against the state to defend the constitutionality of a New Jersey law, after the New Jersey Attorney General declined to do so. However, as Chief Justice Roberts writes in the majority opinion of the Supreme Court, those officials lost their standing when they lost their positions as Speaker and President prior to their appeal to the Supreme Court.¹⁶² The proponents of Proposition 8 had suffered no other injury than the fact that they lost their case in the lower courts. Moreover, they were not elected by the people, and they were not appointed by the State of California to represent them.

Theodore B. Olson, Republican and conservative star, famed for his success in representing George W. Bush in *Bush v. Gore*,¹⁶³ as well as being an outspoken supporter of same-sex marriage, represented the respondents in *Hollingsworth v. Perry*. Olson argued that since the State of California did not appoint the proponents to represent California, they could not have standing under Article III. Solicitor General Donald B. Verrilli made arguments to the Supreme Court on behalf of the Obama administration in support of the respondents. Even though he was quick to affirm that the federal government did not take a position on the standing issue, when pressed for an answer, he stated: “We do not think that with respect to standing, that at this point with the initiative process over, that Petitioners really have what is more in the nature of a generalized grievance and because they’re not an agent of the State of California or have any other official tie to the State that would – would result in any official control of their litigation, that the better conclusion is that there’s not Article III standing here.”¹⁶⁴ Both Olson and Verrilli pointed to the petitioners’ lack of injury and that a mere dislike of a law is not enough to have standing under Article III. However, their views might also have been strategic, as they took part in giving the Supreme Court a way out of the case without having to rule on the constitutionality of same-sex marriage.

¹⁶¹ *Hollingsworth v. Perry*, “Oral Argument,” The Oyez Project, *Hollingsworth v. Perry*, 570 U.S.____ (2013), 7. Available at: http://www.oyez.org/cases/2010-2019/2012/2012_12_144

¹⁶² *Hollingsworth v. Perry*, 570, 11-12.

¹⁶³ *Bush v. Gore*, 531 U.S. 98 (2000)

¹⁶⁴ *Hollingsworth v. Perry*, “Oral Argument,” 50.

The unusual line-up of the conservative Justices Thomas and Alito, and the more liberal Sotomayor, and Kennedy, who usually gives the swing-vote, would have had disagreements on the constitutionality of Proposition 8. However, when it comes to the question of standing, they agreed that the sensitivity of the issue was no excuse for reaching a bad decision on the petitioners' standing. Cooper and the dissenters' argument was that when elected officials decline to defend a statute that results from a legal democratic initiative process, there must be room for citizens of the state to appeal on behalf of the state.¹⁶⁵ The fear of the minority of the Court was that *Hollingsworth v. Perry* might have more consequences for the practice of voter initiatives than for the issue of same-sex marriage. The fact is that when the State of California refused to appeal the initiative, they effectively vetoed it and the whole initiative process was basically invalidated. Should states decline defending voter initiatives in court in the future, *Hollingsworth v. Perry* will have made precedence in the way the legality of voter initiatives is handled that might endanger the entire concept of this practice altogether.

4.2 *Hollingsworth v. Perry* and the Oral Arguments

The Supreme Court decided to grant certiorari to review the Ninth Circuit ruling in *Perry v. Brown* to determine not only the standing issue, but also whether the Equal Protection Clause of the U.S Constitution forbids removing marriage rights from gays and lesbians, once this has been granted. Surprisingly, this question was hardly discussed during the oral argument. Instead, the hearing focused mainly on the issue of standing. However, the petitioners' and respondents' merits were also addressed and questioned by the Supreme Court's Justices. In addition, several dozen briefs were filed in support for both sides. Topics such as the designation of marriage and procreation's role in marriage were discussed by the Supreme Court in the historic hearing that took place on March 26, 2013.

Tradition as a justification for banning same-sex marriage resurfaced from the lower courts in both the oral arguments and in many of the briefs that were written in support of the petitioners in *Hollingsworth v. Perry*. Since the case pertained to California, a state that provides its homosexual population with the same rights as heterosexuals, Chief Justice Roberts challenged Olson and the respondents on the fact that their claim was really just about the label and designation of marriage. Furthermore, by granting that label to gays and

¹⁶⁵ *Hollingsworth v. Perry*, "Oral Argument," 6.

lesbians, the traditional definition of marriage would be changed: “If you tell a child that somebody has to be their friend, I suppose you can force the child to say, this is my friend, but it changes the definition of what it means to be a friend. And that’s [sic] it seems to me what the – what supporters of Proposition 8 are saying here. You’re – all you’re interested in is the label and you insist on changing the definition of the label.”¹⁶⁶ To answer this, Olson argued that there are some labels that are very important in America: “It is like you were to say you can vote, you can travel, but you may not be a citizen.”¹⁶⁷ Tradition is an identity-based argument, which both Roberts and Olson show with this exchange of arguments. As Chief Justice Roberts pointed out, in California, same-sex couples could enjoy all of the same benefits granted by the state as opposite-sex couples did. Thus, the question turned to whether or not the right to call one’s union a “marriage” is protected by the Constitution and the Equal Protection Clause. Olson’s main focus was that the Supreme Court has time and again affirmed marriage as a fundamental individual right, a right that is denied gay and lesbian couples. Homosexuals have also been treated as a suspect class by the Supreme Court in previous rulings. Thus, Olson concluded that the Court should rule the ban on same-sex marriages unconstitutional under the Equal Protection Clause of the federal constitution.

Roberts implied that to preserve tradition and the label of marriage could be considered a legitimate justification for banning same-sex marriage. Evan Gerstmann, author of *Same-Sex Marriage and the Constitution*, acknowledges that some people might feel that their opposite-sex marriages will be less valued if same-sex marriage is recognized. However, the same can be said about many of the civil rights. Gerstmann argues that the whole idea of separating education between white and black people was based on the fear that if one mixed the races, the education would in some way become of a lesser standard.¹⁶⁸

In the struggle for gay rights, comparisons with the Civil Rights Movement are not unusual, and the entire history of Proposition 8 and *Hollingsworth v. Perry* is filled with references to *Loving v. Virginia*. It is easy to see why, as both cases deal with marriage rights and a suspect class. A central argument in *Loving* was the question of how well biracial children would do in society; the same goes for children of same-sex couples in the current debate.

This comparison is dangerous for opponents of same-sex marriage, since *Loving* is held up as one of the Supreme Court’s most historic and important rulings that exemplify the

¹⁶⁶ *Hollingsworth v. Perry*, “Oral Argument,” 45.

¹⁶⁷ *Hollingsworth v. Perry*, “Oral Argument,” 45.

¹⁶⁸ Gerstmann, Evan, *Same-Sex Marriage and the Constitution* (Cambridge University Press, 2008), 158.

American notion of equality and equal protection for all Americans. Thus, the petitioners represented by Cooper, used most of their time at the end of the hearing to discredit this analogy. Cooper argued that while *Loving* rightfully ruled that the color of the skin of the spouses is irrelevant to any legitimate purpose of marriage, the differences between opposite-sex couples and same-sex couples is not irrelevant in discussing the legitimate purpose of marriage. Marriage, according to Cooper, is the institution that society always has used to regulate heterosexual and procreative relationships, and therefore *Loving* cannot be used in favor of ruling any bans on same-sex marriage unconstitutional.¹⁶⁹

Yet, it is difficult to argue that tradition as an argument could stand a rational basis review in the Supreme Court. When the Court struck down the all-male admission policy of the Virginia Military Institute in *United States v. Virginia*, they gave no weight to the institution's argument that training male soldiers was a longstanding tradition of theirs. Instead, the Supreme Court viewed tradition negatively, as it reflected old stereotypes about gender. The Court's majority ruled that the function of the Equal Protection Clause is to extend protection to people that traditionally have been excluded from the rights and benefits in question.¹⁷⁰ Thus, the existing precedence would point to that the tradition-argument would fail a review by the Supreme Court.

The fact that tradition no longer is treated as a valid legal argument does not mean that it always has been so. *Baker v. Nelson* is the case where the Minnesota Supreme Court, in 1972, ruled that a state law banning same-sex marriage did not violate the U.S. Constitution. The appeal to the U.S. Supreme Court was dismissed because the Court did not see it as a federal question. In the *Baker* opinion the state Supreme Court used tradition as an argument for upholding the state law that forbid same-sex couples to marry in Minnesota. In the *Perry* oral argument, Justice Scalia required an answer as to when it became unconstitutional to exclude homosexual couples from the designation of marriage, arguing that courts do not create law but decides what the law is. In light of Scalia's argument an important question becomes when tradition stopped being a justifiable reason for banning same-sex marriage.

In an article written for the *Journal of Church and State*, David W. Machacek and Adrienne Fulco explores the Supreme Court's move from using moral and religious arguments in the opinions to a strictly legal language. In *Bowers*, the case that upheld Georgia's anti-sodomy law in 1986, Justice Blackmun described homosexuality as "a crime

¹⁶⁹ *Hollingsworth v. Perry*, "Oral Argument," 67.

¹⁷⁰ Forde-Mazrui, "Tradition as Justification," 298.

not fit to be named among Christians.”¹⁷¹ *Bowers* perfectly illustrates what Eskridge mean with a politic of disgust as well as how religion and tradition was normal justifications for upholding a contested law. Seventeen years later, Justice Kennedy delivered the Court’s opinion in *Lawrence v. Texas* that struck down the last anti-sodomy laws in America: “Our obligation is to define the liberty of all, not to mandate our own moral code.”¹⁷² Justice Scalia wrote a furious dissent in which he proclaimed that *Lawrence* “effectively decrees the end of all moral legislation.”¹⁷³

It is beyond the scope of this thesis to discuss and conclude how or why tradition, moral and religion no longer have the same hold on public discourse and opinion as it had. Furthermore, it is difficult to say how much of a role the courts have played in this development. Machacek and Fulco does, however, state that as courts delivers reasons for their decisions, they also educate lawmakers and the public about what will and will not be acceptable in similar cases in the future.¹⁷⁴ They argue that with *Lawrence*, the Supreme Court shifted the debate over gay rights into a new legal terrain and that once moral objection, tradition and religion have been rejected as legitimate bases of law-making, bans on same-sex marriage stand on much narrower grounds.¹⁷⁵ The respect for the rights of homosexuals has been growing for decades, and Machacek and Fulco believes this trend has received a significant boost by the courts recent handling of arguments based on tradition.¹⁷⁶

Cooper’s principal argument was the same as in the Ninth Circuit, namely that the State’s principal interest in marriage is regulating procreation and to make it less likely that either party will engage in “irresponsible procreative conduct outside of marriage.”¹⁷⁷

The concern is that redefining marriage as a genderless institution will sever its biding connection to its historic traditional procreative purposes, and it will refocus, refocus the purpose of marriage and the definition of marriage away from the raising of children and to the emotional needs and desires of adults, of adult couples.¹⁷⁸

Justice Kagan confronted Cooper on whether it would be constitutional to ban people over the age of 55 from getting married on the grounds that it is unlikely that they could bring children

¹⁷¹ *Bowers v. Hardwick*, 487 U.S. 186 (1986), 200.

¹⁷² *Lawrence v. Texas*, 539, 10.

¹⁷³ *Lawrence*, 539 U.S 558 (2003) (Scalia, dissenting), 15.

¹⁷⁴ Adrienne Fulco and David W. Machacek, “The Courts and Public Discourse: The Case of Gay Marriage,” *Journal of Church and State* 46 (2004): 767.

¹⁷⁵ Fulco and Machacek, «The Courts and Public Discourse,» 776.

¹⁷⁶ Fulco and Machacek, «The Courts and Public Discourse,» 774.

¹⁷⁷ *Hollingsworth v. Perry*, “Oral Argument,” 26.

¹⁷⁸ *Hollingsworth v. Perry*, “Oral Argument,” 23.

into the world, while Justice Ginsburg referred to *Turner v. Safley*,¹⁷⁹ where the court ruled that prisoners that are not going to be released still have the right to marry.¹⁸⁰ To answer these questions, Cooper addressed what must be seen as the essence of the petitioners' argument: that the society has an interest in seeing heterosexual couples getting married because that institution will make it more likely those children will be raised by the mother and father who brought them into the world.¹⁸¹ Since same-sex couples do not have the ability to produce offspring on their own, this definition of marriage would not include them. Such an argument resonates well with the conservative population of America. However, as proven in the Ninth Circuit, it is difficult to argue that way in a courtroom.

Both Cooper and Justice Scalia discussed the fact that allowing same-sex marriage would result in legalizing adoption by same-sex couples. They both argued that permitting same-sex couples to adopt could have unforeseen consequences for the children involved and society as a whole. However, since the case in question originates from California, they were both reminded that some 37,000 children live with same-sex parents in the state that already allows same-sex couples adoption rights. However, Justice Scalia justified his argument by reminding the court that the respondents argued for a nationwide rule.¹⁸²

One should be careful to assume which way the Court would have gone if the case had not been dismissed based on standing. However, it would have been difficult for the Supreme Court to recognize procreation as a legitimate reason for upholding Proposition 8. First of all, the United States Supreme Court has already debunked allegations that marriage first and foremost is for child rearing. In *Loving*, the Court described marriage as a fundamental freedom and a vital personal right, with no reference to procreation.¹⁸³ Also, in the case Justice Ginsburg referenced, *Turner v. Safley*, the Court ruled that marriage is a right of such a value that it cannot be denied to prison inmates, people who are not able to procreate and raise children. Furthermore, many states permit first-cousin marriages if at least one partner is sterile or is at an age where procreation is unlikely. Thus, there are states that have as a condition for marriage that the couple *cannot* procreate.¹⁸⁴

Even though the Court ended up not addressing the procreation-argument in their final decision, it is clear from the oral argument and the precedence from other cases that

¹⁷⁹ *Turner v. Safley*, 482 U.S. 78 (1987)

¹⁸⁰ *Hollingsworth v. Perry*, "Oral Argument," 26-27.

¹⁸¹ *Hollingsworth v. Perry*, "Oral Argument," 27.

¹⁸² *Hollingsworth v. Perry*, "Oral Argument," 20.

¹⁸³ Isaacsen, "Teachable Moments," 154.

¹⁸⁴ Forde-Mazrui, "Tradition as Justification," 340.

procreation would not have been deemed a justifiable reason for denying same-sex couples to marry by the Supreme Court. If they had done that, they would have overturned existing precedence in a manner that would have far reaching consequences, way beyond the issue of same-sex marriage.

4.3 The Roads Not Taken

Hollingsworth v. Perry was a perfect opportunity for the Supreme Court to make a sweeping landmark decision on same-sex marriage. However, the Court ended up dismissing the case entirely on procedural grounds. Prior to the court's ruling, there was a lot of debate and speculation on how the Court would rule. It was the first time the Supreme Court could rule on the constitutionality of same-sex marriage and there was a possibility that it would end in a decision affecting the entire nation. Yet, there was little enthusiasm for a broad ruling at the oral argument, even among the liberal Justices. At any rate, the Supreme Court ended up ruling that the proponents of Proposition 8 lacked standing to appeal. As a consequence of the decision, same-sex marriages in California could resume. If the State of California had decided to appeal the case themselves, or if the Supreme Court had granted the petitioners standing, the case would have turned out differently. Several different outcomes were on the table when Supreme Court decided to hear arguments on the case, and all of them would have affected the case of same-sex marriage in different ways.

If the Court had decided to uphold Proposition 8, same-sex marriage would be outlawed in California, and states would remain free to allow or ban same-sex marriages. The Supreme Court could also have struck down Proposition 8 in a narrow ruling, by supporting the district and circuit court in that California was not entitled to withdraw the right of same-sex marriage once it had been established by the California Supreme Court in *Marriage Cases*. That would have allowed same-sex marriage in California but left mini-DOMAs in other states intact.

A third option that was argued by the Obama administration, both in their brief and by Solicitor General Verrilli in the oral argument, was for the Supreme Court to rule that California was not free to provide the benefits of marriage through civil unions but at the same time withhold the designation of "marriage." This rationale would have ruled the bans on same-sex marriage in the states with civil unions unconstitutional. The states that would

have been affected by that rationale were California, Oregon, Nevada, Colorado, Illinois, New Jersey and Hawaii.

Verrilli argued that the states that grant civil unions or other benefits of marriage cannot do so while at the same time withholding the designation of marriage to same-sex couples. Justice Ginsburg, however, pointed to the fact that states that have made considerable effort with regard to gay rights then would be forced to go all the way, while states that have done nothing at all can do as they will. Justice Breyer agreed and posed the question if such a ruling would close rather than open doors.¹⁸⁵ States might become less willing to grant same-sex couples benefits and even repeal its civil union laws in fear of being forced to recognize same-sex marriage. Even the conservative Chief Justice Roberts argued that Verrilli and the federal government was willing to wait in the rest of the country but not in the states that actually have made the most progress on gay rights in the first place.

The ruling the same-sex marriage movement had hoped for, but did not get, was a landmark decision concluding that all bans on same-sex marriage violate the Constitution. Had the Supreme Court reached this decision, all state laws and constitutional amendments prohibiting same-sex marriage would have fallen. Still, there were few who anticipated a landmark decision in either direction. Justice Ginsburg, who often has been seen to interpret the Constitution in a flexible way, addressed an audience at the University of Chicago Law School in May 2013, where she criticized the landmark decision *Roe v. Wade*. *Roe* was the case that legalized abortion in all fifty states and also one of the examples Rosenberg has used to argue that the Supreme Court cannot create social reform, because of the intense political backlash that followed that decision. The ruling fueled the anti-abortion movement and the issue remains one of the most controversial political questions in American politics even today. In her address, Justice Ginsburg said: “My criticism of *Roe* is that it seemed to have stopped the momentum on the side of change.”¹⁸⁶ The liberal justices of the Supreme Court might have feared that a broad ruling in support of same-sex marriage would provoke a backlash similar to the one that followed *Roe*.

Following Rosenberg’s theory on the constraints of the judicial branch in creating social reform, one can argue that the outcome of *Hollingsworth v. Perry* is a result of the Court’s fear of not fulfilling Rosenberg’s professed conditions. If the Supreme Court felt that

¹⁸⁵ *Hollingsworth v. Perry*, “Oral Argument,” 52.

¹⁸⁶ Meredith Heagney, “Justice Ruth Bader Ginsburg Offers Critique of *Roe v. Wade* During Law School Visit,” *The University of Chicago The Law School*, May 25, 2013, accessed February 15, 2014. <http://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit>

they would make a ruling that was ahead of the political and public opinion, rejecting the case based on standing might have been seen an easy way out. However, at the time the Supreme Court gave its decision, same-sex marriage had the support of both a majority of the population and from significant political actors. The first time a national poll showed a majority of the American population in support of same-sex marriage was in 2010, three years before *Hollingsworth v. Perry*, and the support has continued to grow in the following years. In May 2012, President Obama came out in support of same-sex marriage in an interview with CNN.¹⁸⁷ The same year, in September, the Democratic Party incorporated support for same-sex marriage in their platform.¹⁸⁸ Although the federal government's argument in *Hollingsworth v. Perry* might have been flawed in the eyes of both the Supreme Court and the same-sex marriage proponents, it was a testament to the recent progress of same-sex marriage when the executive branch argued in favor of, and not against the issue in the U.S. Supreme Court.

Thus, the Supreme Court's decision to not rule in favor of same-sex marriage could not have been based on the lack of significant political and public support. However, following the oral argument, it should come as no surprise that the Supreme Court reached a narrow ruling based on a procedural question rather than a constitutional one. The Justices seemed skeptical to the case throughout the entire hearing, where the question of equal protection under the law was barely raised. The arguments and opinions from the lower courts were either ignored or given little time. Thus, the question one is left with is why the Court decided to hear the case in the first place. If it was the majority's opinion that the petitioners lacked standing, they could have just declined the appeal in the first place. A question even the Justices took time to ponder during the hearing as Justice Kennedy outright said that he wondered if the case was properly granted. Justice Scalia put it this way: "It's too late for that, too late for that now, isn't it? I mean, we granted cert. I mean, that's essentially asking, you know, why did we grant cert. We should let it percolate for another – you know, we – we have crossed that river, I think."¹⁸⁹ The Supreme Court ended with a decision that did not cross any river, barely tipping their toes into it, but certainly with the knowledge that they eventually will have to swim across or abandon the river at some point.

¹⁸⁷ John Earnest, "President Obama Supports Same-Sex Marriage," *The White House*, May 10, 2012, accessed February 24, 2014, <http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage>

¹⁸⁸ "Democratic Party Platform Includes Abortion, Same-Sex 'Marriage,'" *National Catholic Register*, September 5, 2012, accessed February 24, 2014, <http://www.ncregister.com/daily-news/democratic-party-platform-includes-abortion-same-sex-marriage-while-excludi#ixzz30Gc9uwTF>

¹⁸⁹ *Hollingsworth v. Perry*, "Oral Argument," 64.

4.4 *Hollingsworth v. Perry*: Backlash or Progress?

The governor of California ordered state officials to resume issuing marriage licenses to same-sex couples almost immediately after the opinion of the Court went public. The outcome of *Hollingsworth v. Perry* was celebrated as a victory by the Gay Movement, and the case for same-sex marriage gained momentum in the months that followed. There has been an increase in the efforts for marriage equality, both through political and through legal means all over America. In 2013, the number of states recognizing same-sex marriage went from nine to seventeen.¹⁹⁰

The number of states that recognize same-sex marriage will rise in the years to come, as the public's acceptance of same-sex marriage continues to grow. A Gallup poll released on July 26, 2013, showed that over 52 percent of the American population now supports a law legalizing same-sex marriage in all 50 states.¹⁹¹ Among Democrats, the number is as high as 70 percent, whereas the support by Republicans is at 30 percent. Surprisingly, same-sex marriage also has support from a large portion of the religious community. Sixty percent of Catholics and 51 percent of those who say they attend church nearly weekly support gay marriage, according to Gallup's poll.

Whether or not the newfound enthusiasm of the Gay Movement and the recent progress of same-sex marriage can be traced back to *Hollingsworth v. Perry* is not a question one can give a definitive answer to. Nevertheless, if one looks at the reactions to the case, there is some evidence that suggests that *Hollingsworth v. Perry* has had an effect. Pew Research Center's polling data on same-sex marriage saw an increase in support for same-sex marriage that went from 50 percent in 2013, to 54 percent in 2014.¹⁹² Thus, the case did definitely not have a negative effect on the issue. Moreover, support for same-sex marriage skyrocketed in California following *Hollingsworth v. Perry*. The Public Policy Institute of California's statewide surveys found that the support for same-sex marriage went from about 50 percent in early 2013, to 61 percent in September the same year.¹⁹³

As follows, it is an uncontroversial statement to say that *Hollingsworth v. Perry* did not create political backlash. However, one might also conclude that the Court diminished the potential for backlash, because they made a narrow ruling. Had the Supreme Court delivered a

¹⁹⁰ "Number Of States Allowing Gay Marriage Expected To Grow"

¹⁹¹ Lydia Saad, "In U.S., 52% Back Law to Legalize Gay Marriage in 50 States", in Gallup, July 29, 2013, accessed January 31, 2014, <http://www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx>

¹⁹² "Gay Marriage," *Pew Research Center*, accessed, March 13 2014, <http://www.pewresearch.org/data-trend/domestic-issues/attitudes-on-gay-marriage/>

¹⁹³ "Californians' Attitudes toward Same-Sex Marriage."

landmark decision in favor of same-sex marriage, the picture might have looked different. In light of Rosenberg's thesis on the courts and political backlash, one could say that *Hollingsworth v. Perry* both affirms and rejects his theory. It affirms his theory because the Court made a narrow ruling that did not create any significant social reform, perhaps because the Court felt that it did not have the necessary support and tools for implementing such a reform. However, *Hollingsworth v. Perry* also show that Rosenberg's theory is not universal. The outcome of the case was legalization of same-sex marriage in California, a victory that would have been impossible without the involvement of the courts.

Another important point that should be made concerning *Hollingsworth v. Perry* is how the arguments of the same-sex marriage opponents were met in the Supreme Court. The oral argument of *Hollingsworth v. Perry* is a testimony to Eskridge's claim that the reversal of the burden of inertia serves the interests of the proponents of same-sex marriage. Although the hearing affirmed the conservative Justices rejection of same-sex marriage, they had a hard time supporting tradition and procreation as legitimate reasons for banning same-sex marriage. Those arguments were also ridiculed by Justices Ginsburg and Kagan, who pointed to previous decisions that rendered procreation irrelevant to sustain the institution of marriage. We will, however, not know for certain which way the Court will go when they finally will have to come down on one side of the issue. Still, should the Court refuse to recognize same-sex marriage as a constitutional right, it is highly unlikely that it will be on the grounds of the identity-based arguments that have been so important for the same-sex marriage opponents.

There were long lines into the courtroom the day the opinion of the Supreme Court in *Hollingsworth v. Perry* was made public. Outside, several thousand people waited for the answer. The Supreme Court did not decide whether or not there is a constitutional right to same-sex marriage. Neither did they solve the constitutional challenge to Proposition 8. An unusual coalition between Chief Justice Roberts and Justice Scalia and the more liberal Justices Ginsburg, Breyer and Kagan ruled that the petitioners of *Hollingsworth v. Perry* lacked a legal right to defend their initiative in a federal court. Nevertheless, *Hollingsworth v. Perry* did have a real impact on one state. The decision left Proposition 8 dead, and same-sex couples could again get married in the state of California. On June 28, 2013, only two days after the Supreme Court ruling, Kristin Perry and Sandra Stier, two of the plaintiffs in the

case, got married, with California Attorney General Kamala Harris officiating the ceremony.¹⁹⁴

¹⁹⁴ Michal Martinez. "California begins same-sex marriage ceremonies." *CNN*, June 30, 2013, accessed March 29, 2014. <http://edition.cnn.com/2013/06/28/us/california-same-sex-marriage-ceremony/>

5 Conclusion

5.1 The Future of Same-Sex Marriage in America

Unlike the courts of many other countries, American courts have the power to invalidate political acts of democratically elected officials. This has from time to time led to debates about the role of courts in a society that favors majority rule. When unelected judges declare executive or legislative actions unconstitutional, it is often seen as a form of judicial activism where judges decide cases on the basis of their own views in opposition to the public's preference. According to Rosenberg, powerful political backlash will follow when courts choose to ignore the majority's view in controversial issues.

During the oral argument Justice Alito raised his concern with ending a contemporary political debate with a Supreme Court ruling:

You want us to step in and render a decision based on an assessment of the effects of this institution which is newer than cell phones or the Internet? I mean we – we are not – we do not have the ability to see the future. On a question like that, of such fundamental importance, why should it not be left for the people, either acting through initiatives and referendums or through their elected public officials?¹⁹⁵

This concern was shared by the petitioners, and Cooper ended his rebuttal argument with a plea to the Court to recognize that the Supreme Court would put a democratic debate to rest if they made a permanent ruling, and that the case first and foremost is a political question that should be decided by the people.

There is, however, a danger to unchecked majoritarianism. The courts play an important role in protecting minorities who cannot protect themselves through a political process. For a minority that has been as condemned as gays and lesbians have been throughout American history, the courts were virtually the only forums where they could seek reform. Same-sex marriage advocates have had to struggle to match the resources, both human and economic, of the opponents of same-sex marriage. If the courts had not heard their plea, how long would it have taken before a state legislature had passed legislation in favor of same-sex marriage? How long before the Democratic Party had adopted a pro-stance on the

¹⁹⁵ *Hollingsworth v. Perry*, “Oral Argument,” 56.

issue? And how long before a President had endorsed the idea? As the public opinion has been so opposed to the idea, it is almost inconceivable to think that elected officials would have put themselves in the forefront for same-sex marriage as the courts have. Had it not been for the courts' involvement, the issue would probably have remained dead for another decade or so. What the Hawaiian Supreme Court started in *Baehr* and the federal Supreme Court has followed up in *Windsor* and *Perry* is nothing less than the social reform Rosenberg argues courts cannot create.

Hollingsworth v. Perry and the California marriage cases did not end the same-sex marriage debate in the United States, but they have signaled a shift where the same-sex marriage proponents have gained momentum. The recent victories in same-sex marriage litigation have come at a cost, as court decisions in favor of marriage equality have been met with, at times overwhelming, political backlash. However, time will show that the benefits of taking the issue into the courtrooms have outnumbered the costs, as the public and political support for same-sex marriage continues to grow. Courts cannot settle controversial issues once and for all, but they can either lead or follow. In the case of same-sex marriage, they have taken a leading role.

Since the Supreme Court left the question of same-sex marriage's constitutionality open, the issue will return to the lower courts for them to decide. *Hollingsworth v. Perry*'s twin case, *United States v. Windsor*, ruled that the federal government must recognize same-sex marriages. *Windsor* struck down Section 3 of the federal Defense of Marriage Act, which is the part that excluded married same-sex couples from federal programs and benefits. In late 2013, and early 2014, district courts in Utah and Oklahoma invoked the language of *Windsor* to strike down the states' ban on same-sex marriage.¹⁹⁶ As the federal government now is free to give the benefits of marriage to both same-sex couples and opposite-sex couples, the district courts ruled that the states cannot single out a group of people and deny them those federal benefits.¹⁹⁷ Both cases have been stayed and are underway in the courts of appeals.

Taken together, *Windsor* and *Perry* have advanced the cause of same-sex marriage in America. Even though the Supreme Court was not ready to find a constitutional right to same-sex marriage, it is clear that the language of the *Windsor* decision and the result of *Perry* only will accelerate the progress toward same-sex marriage recognition in all fifty states. When the

¹⁹⁶ Heide Brandes, "U.S. judge rules Oklahoma gay marriage ban unconstitutional," *Chicago Tribune*, January 14, 2014, accessed April 1, 2014, http://articles.chicagotribune.com/2014-01-14/news/sns-rt-us-usa-gaymarriage-oklahoma-20140114_1_gay-marriage-marriage-act-u-s-constitution

¹⁹⁷ Tom Watkins, "In Utah, judge's ruling ignites same-sex marriage frenzy," *CNN*, December 21, 2013, accessed April 1, 2014, <http://edition.cnn.com/2013/12/20/justice/utah-same-sex-marriage-ruling/>

time comes when the issue of same-sex marriage yet again reaches the Supreme Court, all signs suggest it will be in a country where more states and more people have embraced the idea of same-sex marriage.

The percentage of the population living in a state that recognizes same-sex marriage went from 14 percent to 38 percent in 2013.¹⁹⁸ According to the U.S. Census Bureau, the number of same-sex couple households has grown in the U.S. by 80 percent between 2000 and 2010.¹⁹⁹ A poll taken in 2013 also showed that 73 percent of Americans sees legal recognition of same-sex marriage as inevitable.²⁰⁰ There are good reasons to believe that the two thirds of Americans are correct in their assumptions.

Since 2010, a majority of Americans have been positive towards the prospect of same-sex marriage, and there are few reasons to believe that this will change any time soon. On the contrary, that number will rise for a couple of reasons. The most important factor is that young people support it. By 2009, a majority of people between the ages of eighteen and twenty-nine supported same-sex marriage in thirty-eight states, including conservative ones, such as Kansas, Idaho, and Wyoming.²⁰¹ Young people are more likely to know someone who is gay and have grown up in a society that is friendlier to homosexuals than their parents have.

In 1993, 61 percent of Americans reported that they knew someone who was gay. By 2013, that number was at 87 percent.²⁰² In a 2013 survey, only 13 percent of those who reported having close friends or family members who are gay agreed with the statement that permitting same-sex marriage would undermine the morals of the country.²⁰³ Even among young Republicans, a majority is now in support.²⁰⁴ This demographical change makes same-sex marriage in America inevitable, as the opposition against same-sex marriage will quite literally die out.

Furthermore, before 2009, the annual rate of increase in support of same-sex marriage was about 1.5 percentage points, but since then it has been closer to 4 percentage points. That rate of change suggests a basic cultural shift rather than just demographic replacement.

¹⁹⁸ Freedom to Marry, "States," accessed March 28, 2014, <http://www.freedomtomarry.org/states/>

¹⁹⁹ U.S. Census Bureau, (2011, September), Same-Sex Couple Households," retrieved April 2, 2014, from <http://www.census.gov/prod/2011pubs/acsbr10-03.pdf>

²⁰⁰ "In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as 'Inevitable'," *Pew Research Center*, June 2, 2013, accessed April 12, 2014, <http://www.people-press.org/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable/>

²⁰¹ Klarman, *From the Closet to the Altar*, 199.

²⁰² "In Gay Marriage Debate."

²⁰³ Klarman, *From the Closet to the Altar*, 198.

²⁰⁴ Jocelyn Kiley, "61% of young Republicans favor same-sex marriage," *Pew Research Center*, March 10, 2014, accessed April 18, 2014, <http://www.pewresearch.org/fact-tank/2014/03/10/61-of-young-republicans-favor-same-sex-marriage/>

Indeed, the percentage of senior citizens that supports same-sex marriage has increased by 15 percentage points between 2008 and 2013.²⁰⁵

Rosenberg concedes that the United States today is more accepting of LGBT persons and supportive of same-sex marriage than it was at the turn of the millennium, though he claims that these changes are not primarily the result of litigation, but rather the result of a changing culture. The fact that 87 percent of Americans say they know someone who is gay affects their view on same-sex marriage, and so could the growth in portrayals of gay characters in television and movies for that matter. Thus, Rosenberg is correct in that the societal change cannot be attributed to the courts alone. It is, however, difficult to argue that the courts have been unimportant when it comes to the battle over same-sex marriage. If anything, the courts have put an issue on the agenda that otherwise would have remained in the shadows for yet many years.

That a social reform is inevitable does not mean that opponents will cease fighting it, as the backlash following *Roe v. Wade* is a good example of. Although the ultimate outcome of the same-sex marriage debate in America no longer seems to be in much doubt, the battle is far from over. Many of the Southern states will probably resist for at least another decade or so. Putting pressure on the issue in the conservative states might strengthen the opposition and create animosity against other gay rights issues such as hate crime legislation and antidiscrimination legislation. Thus, an important question for the same-sex marriage advocates is whether or not one should pause and let America mature to the idea of same-sex marriage before the issue is brought before the Supreme Court again. By the time the Supreme Court gave its ruling in *Loving v. Virginia*, a majority of states had already struck down their laws banning interracial marriage.²⁰⁶ The Supreme Court might not be willing to rule bans on same-sex marriage unconstitutional before half of the states already do so. Thus, should a case reach the Supreme Court in advance of that situation, the Court might be unwilling to make a landmark decision in favor of same-sex marriage. Such a decision could stall the rapid progress towards changing the state marriage laws that we have seen the last years. A decision could be overturned at a later time of course, but the Supreme Court is not known for reversing its rulings quickly. The ruling to uphold state sodomy laws in 1986, *Bowers v. Hardwick*, was not overruled for almost twenty years until *Lawrence v. Texas* in 2003.

²⁰⁵ Klarman, *From the Closet to the Altar*, 187.

²⁰⁶ Isaacsen, "Teachable Moments," 157.

Klarman favors a more natural progression and points to how same-sex marriage has been introduced in other countries. A gradual progression from decriminalization, antidiscrimination legislation and civil unions to same-sex marriage minimizes the risk of backlash because it enables the public and politicians to grow comfortable with the social reform over time. There could be good reasons for taking a cautious approach to a matter as controversial as same-sex marriage. However, waiting is not a neutral act, but has real consequences for people. Also, with the rapid progress seen in the last years it would be very difficult to argue that one should pause the litigation campaign once the momentum has shifted.

5.2 Recommendations for Further Research

This thesis has been limited to analyzing the evolution of a few court cases and their outcomes. For further research, it would be interesting to compare the results of this thesis with the cases from Utah and Ohio that are currently under their way in the court of appeals. By looking at the courts' opinions and the hearing transcripts one might find evidence that supports the claim that identity-based arguments are becoming useless as legitimate reasons for banning same-sex marriage.

Another recommendation would be to look more closely on the conservative states, as the potential for backlash is much higher there. In February 2014, a federal judge in Texas ruled against the state's ban on same-sex marriage saying: "Texas' current marriage laws deny homosexual couples the right to marry, and in doing so, demean their dignity for no legitimate reason."²⁰⁷ That decision has also been stayed pending appeal to the Fifth Circuit Court. By examining the political reactions against the ruling and following local polls on same-sex marriage in Texas, it would be interesting to do a comparative study between California and Texas. This way one could discuss whether the findings of this thesis are limited to a liberal state such as California or if the move to normal politics have reached the southern states as well.

Finally, when the U.S. Supreme Court gives its landmark ruling on same-sex marriage, one will be able to do a final comprehensive study on same-sex marriage litigation. Even though a decision could be years away, the Supreme Court must be aware that the current

²⁰⁷ Laurel Brubaker Calkins, "Texas Gay-Marriage Ban Held Illegal as Judge Delays Order," *Bloomberg*, February 27, 2014, accessed May 8, 2014, <http://www.bloomberg.com/news/2014-02-26/texas-same-sex-marriage-ban-unconstitutional-federal-judge-says.html>

situation is unsustainable in the long run. The question of what happens to a same-sex couple's marriage status when they move from a state that have legalized same-sex marriage to a state that bans it must be solved on a federal level. Even if the recent district courts' rulings are reversed by the appellate courts, it is only a matter of time before a lower court ruling that strikes down a mini-DOMA is upheld. The continued pressure from the lower courts suggests that the Supreme Court will be confronted with the issue again sooner rather than later. When they are, one should look closely in the opinions of the Court's majority and minority for how they handle the different arguments and if they take any steps to minimize the risk of political backlash.

5.3 Concluding Remarks

The purpose of this thesis has been to examine the California marriage cases and *Hollingsworth v. Perry* in light of Rosenberg and Eskridge's theories on political backlash and same-sex marriage. In conclusion, the role of courts should neither be exaggerated nor undermined regarding the cultural change that is America's view on same-sex marriage. Court decisions in favor of same-sex marriage have not created the amount of political damage Rosenberg suggests they have, nor has it brought a sweeping nation-wide societal change in favor of same-sex marriage. The courts reflect the modernization of the American society, but they have also functioned as triggers. Court cases on same-sex marriage made the issue more desirable because it was seen as more available. *Goodridge* did not only create backlash, it served as an inspiration for the battles that came after, and the *Perry* cases have energized an entire movement.

The most important role the courts have played in the fight for same-sex marriage has been the handling of the opponents' arguments. The findings of this thesis suggest that normal politics is prevailing over moral and identity-based arguments to the degree that same-sex marriage seems all but inevitable in all fifty states within the next decade.

One of the problems of the arguments of the opponents is that they go a long way in defining what marriage is. They have argued that marriage is a traditional and historic union between one man and one woman, that marriage is for procreation and that same-sex marriage will damage children. However, what they have failed to recognize is that marriage never has been a static institution. Changes to women's property rights, the elimination of coverture and the legalization of interracial marriage demonstrate that marriage is, in fact, an institution that

evolves and changes as the society does.²⁰⁸ Those changes have often come through the courts, as marriage has been, and is, treated as a civil matter regulated through laws. If the opponents cannot produce arguments that give judges a rational basis for upholding bans on same-sex marriage, they are doomed to fail in the courtrooms.

The truth is that the principal, though unspoken, reason for the opposition against same-sex marriage is that the Bible condemns it. Religion is by far the most cited factor, mentioned by 52 percent of opponents in a Pew Research Center poll, as to why homosexuals should not be allowed to marry. No more than one in ten cited any other reason than their moral objection against homosexuality.²⁰⁹ Thus, opponents of same-sex marriage are confronted with a difficult situation. Religion-based arguments will not be seen as legitimate in a courtroom where the principle of separation of Church and State is fundamental. Yet, as this thesis has shown, the more same-sex marriage opponents lean on identity-based arguments the more incredible their claims are exposed as being.

This development would not have taken place outside the courtrooms, and it suggests that Rosenberg is wrong in presuming that courts inherently create political backlash when faced with controversial issues. If anything, the California marriage cases and *Hollingsworth v. Perry* display that the Constrained Court view of Rosenberg, and other backlash theorists, is outdated and that Eskridge is right when he claims that courts have served as a catalyst for the coming of same-sex marriage in America. In *The Hollow Hope*, Rosenberg acknowledges that some may regard the combined results of the same-sex marriage litigation campaign as “two steps forward, one step back.” Rosenberg, however, summarizes the result as “one step, forward, two back.”²¹⁰ When the history of same-sex marriage in America is written, the story of how a voter initiative in California ended up in the United States Supreme Court will be regarded as the time when normal politics finally overtook the politics of backlash and disgust, and the case for same-sex marriage not only took *one* step forward, but a giant leap.

²⁰⁸ Isaacsen, “Teachable Moments,” 153.

²⁰⁹ “In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as ‘Inevitable’.”

²¹⁰ Rosenberg, *The Hollow Hope*, 368.

Bibliography

Court Cases, Amicus Briefs and Transcripts:

“Brief for the California Teachers Association as Amicus Curiae in Support of Plaintiff-Appellees,” *Perry v. Brown*, 671 F.3d 1052, 9th Cir. (no. 10-16696), 2012.

<http://cdn.ca9.uscourts.gov/datastore/general/2010/10/27/amicus35.pdf>

“Brief of the American Psychological Association, The California Psychological Association, The American Psychiatric Association, And The American Association For Marriage And Family Therapy as Amici Curiae in Support of Plaintiff-Appellees,” *Perry v. Brown*, 671 F.3d 1052, 9th Cir. (no. 10-16696), 2012.

<http://cdn.ca9.uscourts.gov/datastore/general/2010/10/27/amicus29.pdf>

“Brief of the National Organization for Marriage, National Organization for Marriage Rhode Island, And Family Leader as Amici Curiae in Support of the Intervening Defendants-Appellants,” *Perry v. Brown*, 671 F.3d 1052, 9th Cir. (no. 10-16696), 2012.

<http://cdn.ca9.uscourts.gov/datastore/general/2010/10/26/amicus20.pdf>

Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993)

Baker v. Nelson 409 U.S. 810 (1972)

Baker v. State, 744 A.2d 864 (Vt. 1999)

Bowers v. Hardwick, 487 U.S. 186 (1986)

Bowers v. Hardwick, 487 U.S. 186 (1986) (Burger, C.J, concurring)

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

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

Department of Agriculture v. Moreno, 413 U.S. 528 (1973)

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

Hollingsworth v. Perry, “Oral Argument.” The Oyez Project. Available at:
http://www.oyez.org/cases/2010-2019/2012/2012_12_144

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

Hollingsworth v. Perry, 570 U.S. ____ (2013) (Kennedy, J., dissenting)

In re Marriage Cases, 43 Cal 4th 757 (2008)

In re Marriage Cases, 43 Cal 4th 757 (2008) (Baxter, M.R., dissenting)

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

Lawrence v. Texas, 539 U.S. 558 (2003) (Scalia, dissenting)

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

Maynard v. Hill, No. 125, 190 U.S. (1888) Accessed March 1, 2014.

<http://supreme.justia.com/cases/federal/us/125/190/case.html>

Perry v. Brown, 671 F.3d 1052, 9th Cir. (2012)

Perry v. Brown, 671 F.3d 1052, 9th Cir. (2012) (Smith, N.R., dissenting)

Perry v. Schwarzenegger, 704 F.Supp.2d 921, United States District Court for the Northern
District of California (2010)

Plessy v. Ferguson, 163 U.S. 537 (1896)

Roe v. Wade, 410 U.S. 113 (1973)

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

Strauss v. Horton, 46 Cal 4th 364 (2009)

Turner v. Safley, 482 U.S. 78 (1987)

United States v. Virginia, 518 U.S. 515 (1996)

United States v. Windsor 570 U.S. 12 (2013)

Books and Articles:

Coontz, Stephanie. *Marriage, A History: How Love Conquered Marriage*. Penguin Books, 2005.

Cott, Nancy. *Public Vows: A History of Marriage and the Nation*. Harvard University Press, 2000.

Eskridge, William N. "Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States." *Boston University Law Review*, Vol 93, Issue 2 (2013)

Forde-Mazrui, Kim. "Tradition as Justification: The Case of Opposite-Sex Marriage." *The University of Chicago Law Review*, Vol. 78, No. 1 (2011): 281-343.

Fulco, Adrienne, and David W. Machacek. "The Courts and Public Discourse: The Case of Gay Marriage." *Journal of Church and State* 46 (2004): 767-786.

Gerstmann, Evan. *Same-Sex Marriage and the Constitution*. Cambridge University Press, 2008.

Isaacson, Ruth Butterfield. "Teachable Moments: The Use of Child-Centered Arguments in the Same-Sex Marriage Debate." *California Law Review* Vol. 98, No. 1 (2010): 121-157.

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

Rosenberg, Gerald N. *The Hollow Hope: Can Courts Bring about Social Change?*. The University of Chicago Press, 2008.

Thorson, Kjerstin, Brian Ekdale, Porismita Borah, Namkoong Kang and Shah Chirag. "YouTube and Proposition 8: A case study in video activism." *Information, Communication & Society* Vol. 13, No. 1 (2010): 325-349.

News Articles, Websites and Polls:

American Foundation for Equal Rights. "The Plaintiffs." Accessed January 3, 2014.

<http://www.afer.org/about/plaintiffs/>

Bender, Bryan. "Continued discharges anger 'don't ask, don't tell' critics." *The Boston Globe*, May 20 2009. Accessed May 3, 2014.

http://www.boston.com/news/nation/washington/articles/2009/05/20/continued_discharges_anger_dont_ask_dont_tell_critics/

Blankenhorn, David. "How My View on Gay Marriage Changed." *New York Times*, June 22, 2012. Accessed November, 2013. http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?_r=1&

Brandes, Heide. "U.S. judge rules Oklahoma gay marriage ban unconstitutional." *Chicago Tribune*, January 14, 2014. Accessed April 1, 2014.

http://articles.chicagotribune.com/2014-01-14/news/sns-rt-us-usa-gaymarriage-oklahoma-20140114_1_gay-marriage-marriage-act-u-s-constitution

Buchanan, Patrick J. "Culture War Speech: Address to the Republican National Convention." *Buchanan.org*, August 17, 1992. Accessed February 14, 2014.

<http://buchanan.org/blog/1992-republican-national-convention-speech-148>

"Bush calls for ban on same-sex marriages." CNN, February 25, 2004. Accessed April 22, 2014. <http://edition.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage/>

California Secretary of State. "Proposition 8 - Eliminates Right of Same-Sex Couples to Marry." Accessed December 15, 2013. <http://www.sos.ca.gov/elections/sov/2008-general/maps/returns/props/prop-8.htm>

California Secretary of State. "Text of Proposed Law." Accessed December 15, 2013.

<http://vig.cdn.sos.ca.gov/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8>

Calkins, Laurel Brubaker, "Texas Gay-Marriage Ban Held Illegal as Judge Delays Order." *Bloomberg*, February 27, 2014. Accessed May 8, 2014,

<http://www.bloomberg.com/news/2014-02-26/texas-same-sex-marriage-ban-unconstitutional-federal-judge-says.html>

CNN. "Ballot Measures California Proposition 8: Ban on Gay Marriage." Accessed March 3, 2014. <http://edition.cnn.com/ELECTION/2008/results/polls/#val=CAI01p1>

David Binder Research. "Proposition 8 Post-Election California Voter Survey." Accessed March 3, 2014. San Francisco, 2008.
<http://files.meetup.com/1333125/DBR%20PROP%208%20POST-ELECTION%20SUMMARY%20REPORT%20012109%20V2.pdf>

"DEFINING MARRIAGE: STATE DEFENSE OF MARRIAGE LAWS AND SAME-SEX MARRIAGE." National Conference of State Legislatures. March 26, 2014. Accessed May 4, 2014. <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx#1>

"Democratic Party Platform Includes Abortion, Same-Sex 'Marriage.'" National Catholic Register. September 5, 2012. Accessed February 24, 2014.
<http://www.ncregister.com/daily-news/democratic-party-platform-includes-abortion-same-sex-marriage-while-excludi#ixzz30Gc9uwTF>

Freedom to Marry. "States." Accessed March 28, 2014.
<http://www.freedomtomarry.org/states/>

Earnest, John. "President Obama Supports Same-Sex Marriage." The White House. May 10, 2012. Accessed February 24, 2014. <http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage>

"Gay marriage ban overturned." LA Times, May 17, 2008. Accessed March 2, 2014.
<http://www.latimes.com/news/la-me-gay-marriage17-2008may17,0,7229587.story#axzz30AnmN1QM>

"Gay Marriage." Pew Research Center. Accessed, March 2014.
<http://www.pewresearch.org/data-trend/domestic-issues/attitudes-on-gay-marriage/>

Gelman, Andrew, Lax, Jeffrey and Phillips, Justin. "Over Time, a Gay Marriage Groundswell." *New York Times*, August 21, 2010. Accessed January 29, 2014.
http://www.nytimes.com/2010/08/22/weekinreview/22gay.html?_r=0

“George Clooney, Brad Pitt lead all-star Prop. 8 play reading.” *LA Times*, March 4, 2012. Accessed March, 2014. <http://latimesblogs.latimes.com/culturemonster/2012/03/george-clooney-brad-pitt-enact-prop-8-stage-drama.html#sthash.QQFmXBLY.dpuf>

George Robert P., “Gay Marriage, Democracy, and the Courts“, *The Wall Street Journal*. Accessed February 22, 2014. <http://online.wsj.com/article/SB10001424052970204619004574322084279548434.html>

Gonzales, Richard. “Number Of States Allowing Gay Marriage Expected To Grow.” *National Public Radio*. December 25, 2013. Accessed April 14, 2014. <http://www.npr.org/2013/12/25/257019750/number-of-states-allowing-gay-marriage-expected-to-grow>

Gullo, Karen. “California Supreme Court Upholds Gay Marriage Ban.” *Bloomberg*, May 26, 2009. Accessed February 3, 2014. http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aXjgJBirm_0g&refer=us

Heagney, Meredith. “Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit.” *The University of Chicago The Law School*. May 25, 2013. Accessed February 15, 2014. <http://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit>

Hern, Alex. “Mozilla CEO donated to rightwing candidates, records show.” *The Guardian*, April 2, 2014. Accessed May 7, 2014. <http://www.theguardian.com/technology/2014/apr/02/controversial-mozilla-ceo-made-donations-right-wing-candidates-brendan-eich>

“In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as ‘Inevitable’.” *Pew Research Center*, June 2, 2013. Accessed April 12, 2014. <http://www.people-press.org/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable/>

Kiley, Jocelyn. “61% of young Republicans favor same-sex marriage.” *Pew Research Center*, March 10, 2014. Accessed April 18, 2014. <http://www.pewresearch.org/fact-tank/2014/03/10/61-of-young-republicans-favor-same-sex-marriage/>

- Lydia Saad. "In U.S., 52% Back Law to Legalize Gay Marriage in 50 States." Gallup. July 29, 2013. Accessed January 31, 2014. <http://www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx>
- Martinez, Michal. "California begins same-sex marriage ceremonies." *CNN*. June 30, 2013. Accessed March 29, 2014. <http://edition.cnn.com/2013/06/28/us/california-same-sex-marriage-ceremony/>
- "Mayor defends same-sex marriages." CNN, February 23, 2004. Accessed April 22, 2014. <http://edition.cnn.com/2004/LAW/02/22/same.sex/>
- McKinley, Jesse. "Across U.S., Big Rallies for Same-Sex Marriage." *New York Times*, November 15, 2008. Accessed March 10, 2014. <http://www.nytimes.com/2008/11/16/us/16protest.html>
- Moore, Wayne D., "The Hollow Hope: Can Courts Bring about Social Change? (2nd ed.)." Review of *The Hollow Hope: Can Courts Bring about Social Change?*, by Gerald N. Rosenberg. *Law and Politics Book Review*. November, 2008. Accessed March 2, 2014. <http://www.lawcourts.org/LPBR/reviews/rosenberg1108.htm>
- Nicks, Denver. "Federal Suit Filed to Overturn Georgia's Gay Marriage Ban." *Time*, April 22, 2014. Accessed May 4, 2014. <http://time.com/71968/georgia-gay-marriage-ban/>
- Nieves, Evelyn. "THE 2000 CAMPAIGN: CALIFORNIA; Those Opposed to 2 Initiatives Had Little Chance From Start." *New York Times*, March 9, 2000. Accessed February 18, 2014. <http://www.nytimes.com/2000/03/09/us/2000-campaign-california-those-opposed-2-initiatives-had-little-chance-start.html>
- NOH8 Campaign. "About." Accessed January 17, 2014. <http://www.noh8campaign.com/article/about>
- Petek, Sonja. "CALIFORNIANS' ATTITUDES TOWARD SAME-SEX MARRIAGE." *Public Policy Institute of California*, December, 2013. Accessed March 10, 2014. http://www.ppic.org/main/publication_show.asp?i=1012
- ProtectMarriage.com. "Ballot Arguments in Favor of Prop 8." Accessed November 13, 2013. <http://protectmarriage.com/ballot-arguments-in-favor-of-prop-8-2008>

- “Preserving California’s Constitution.” *New York Times*, September 28, 2008. Accessed April 10, 2014.
- “Proposition 8: Who gave in the gay marriage battle?.” *LA Times*. Accessed April 24, 2014. <http://projects.latimes.com/prop8/>
- Rooney, David. “Dustin Lance Black Debuts Prop. 8 Play in New York.” *The Hollywood Reporter*, February 20, 2011. Accessed February 2, 2014. <http://www.hollywoodreporter.com/news/dustin-lance-black-debuts-prop-237834>
- “Tracking the money: Final Numbers.” *LA Times*, February 3, 2009. Accessed April 15, 2014. <http://www.latimes.com/local/la-moneymap,0,1777132.htmlstory#axzz2zAeaoTsX>
- Tucker, Jill. “Schwarzenegger vetoes same-sex marriage bill again.” *SFGate*, October 12, 2007. Accessed April 10, 2014. <http://www.sfgate.com/bayarea/article/Schwarzenegger-vetoes-same-sex-marriage-bill-again-2497886.php>
- U.S. Census Bureau. (2003, October). “Decennial Census Data on Marriage and Divorce: Marital Status: 2000.” Retrieved March 6, 2014, from <http://www.census.gov/prod/2003pubs/c2kbr-30.pdf>
- U.S. Census Bureau. (2011, May). “Number, Timing and Duration of Marriages and Divorces: 2009.” Retrieved March 6, 2014, from <http://www.census.gov/prod/2011pubs/p70-125.pdf>
- U.S. Census Bureau. (2011, September). “Same-Sex Couple Households.” Retrieved April 2, 2014, from <http://www.census.gov/prod/2011pubs/acsbr10-03.pdf>
- Watkins, Tom. “In Utah, judge's ruling ignites same-sex marriage frenzy.” *CNN*, December 21, 2013. Accessed April 1, 2014. <http://edition.cnn.com/2013/12/20/justice/utah-same-sex-marriage-ruling/>
- Wildermuth, John. “Obama opposes proposed ban on gay marriage.” *SFGate*, July 2, 2008. Accessed April 4, 2014. <http://www.sfgate.com/news/article/Obama-opposes-proposed-ban-on-gay-marriage-3278328.php>

Videos:

Gingrich, Newt. "Stop imperial judges." Video. *Yes on Proposition 8*. Accessed May, 2011.
<http://www.whatisprop8.com/stop-imperial-judges.html>

VoteYesonProp8. "It's already happened." *YouTube* video, 0:30. October 7, 2008. Accessed February 21, 2014. <https://www.youtube.com/watch?v=0PgcgqFYP4>

VoteYesonProp8. "Robb and Robin Wirthlin's Story." *YouTube* video, 4:32. October 20, 2008. Accessed February 21, 2014. <https://www.youtube.com/watch?v=WLHWBWSaW-4>

VoteYesonProp8. "The Story of Prop 8." *YouTube* video, 2:13. November 2, 2008. Accessed February 21, 2014.
http://www.youtube.com/watch?v=yBrFHC1aoWI&index=3&list=UUwcBxc4o00aXIRLS0Zi_pzg

VoteYesonProp8. "Where do babies come from?." *YouTube* video, 1:06. October 25, 2008. Accessed February 21, 2014. <https://www.youtube.com/watch?v=75J3TN9Zzck>