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## **Journal of Scholarly Perspectives**

### **Title**

Lawyering for Marriage Equality

### **Permalink**

<https://escholarship.org/uc/item/0tz9071t>

### **Journal**

Journal of Scholarly Perspectives, 7(01)

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### **Publication Date**

2011

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# LAWYERING FOR MARRIAGE EQUALITY

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## INTRODUCTION

The movement to achieve marriage equality for same-sex couples has been called “the last great civil rights struggle.”<sup>1</sup> The analogy to the civil rights movement for racial equality in the 1950s and 1960s is deliberately asserted by activists and, in some respects, quite apt. Both groups comprise a minority of the population in the United States and have been subject to systematic discrimination. And, crucially, both have turned to courts to protect rights thwarted by majoritarian political institutions. As one result of civil rights litigation, there is a close legal precedent for marriage equality activists: *Loving v. Virginia*, the 1967 U.S. Supreme Court decision that overturned prohibitions on interracial marriage.<sup>2</sup> But beyond *Loving*, the two movements have shared a deeper history in which lawyers have been important leaders and litigation has loomed large as a strategy for policy reform. Much like the iconic role played by the NAACP Legal Defense and Educational Fund, Inc. (LDF) in the movement for racial equality, lawyers from elite public interest organizations—Lambda Legal, the ACLU Lesbian Gay Bisexual & Transgender (LGBT) Project, the National Center for Lesbian Rights (NCLR), and Gay & Lesbian Advocates & Defenders (GLAD)—have been pivotal in shaping the path toward marriage equality.

Critics of the civil rights analogy are quick to point out the historical, political, and legal differences between the marriage equality and civil rights movements, summed up in the wry phrase “gay is *not* the new black.”<sup>3</sup> Yet the pull of the civil rights framework is strong, not just as a way of legitimizing the marriage equality movement’s use of litigation, but also as a way of judging it. For scholars of law and social change, the emergence of marriage equality as the seminal post-civil rights progressive legal reform movement has provided an opportunity to test the contemporary validity of theories based on the now-dated civil rights paradigm. The result has been a renewed—and vigorous—debate over the promise and perils of social change litigation, with the marriage equality movement at the center.

This debate has revolved around the explanatory power of the “backlash thesis”<sup>4</sup>—the proposition that litigation does more harm than good for social change movements by producing countermobilization that makes reform goals more difficult to achieve.<sup>5</sup> In general, the backlash account emphasizes the institutional role of courts and the political reaction that their decisions produce: Courts establish new rights ahead of public opinion, political opponents mobilize to undercut the new

rights, and the movement suffers. Although the backlash story omits the motivations and decisionmaking processes of the lawyers who bring social change cases—as well as the differences among the lawyers involved across cases—it is presented as an indictment of their efforts. Specifically, Gerald Rosenberg concludes that same-sex marriage “proponents,” “succumbing to the ‘lure of litigation,’”<sup>6</sup> “confused a judicial pronouncement of rights with the attainment of those rights. The battle for same-sex marriage would have been better served if they had never brought litigation, or had lost their cases.”<sup>7</sup>

Yet, to be defensible, such an indictment must be able to prove the empirical validity of a set of underlying assumptions about why litigation is brought in the first instance, what the alternatives to litigation are, and what would have occurred in the absence of litigation. In particular, in order for the backlash thesis to work as a critique of movement lawyer strategy, we should be able to look back at the historical record and find that three premises hold: (1) movement lawyers defined the legal right for same-sex couples to marry as a unitary goal *ex ante* and launched an impact litigation campaign to advance it; (2) litigation was the lawyers’ preferred, if not only, strategy; and (3) the litigation itself was the cause of political backlash resulting in negative movement outcomes, which would have been avoided by staying out of court and pursuing a political strategy.<sup>8</sup>

Our aim, therefore, is to analyze the power of the backlash thesis—and particularly its assignment of movement lawyer culpability—through close study of the marriage equality movement in California. Our general claim is that, while California has indeed experienced a backlash against same-sex marriage culminating in a constitutional ban, the reasons for backlash have less to do with deficient legal strategy and judicial overreaching than the unpredictability of events and the implacability of opposition to marriage for same-sex couples. More specifically, our review of the record of same-sex marriage in California shows that the premises of the backlash thesis do not accurately describe the way that movement lawyers conceived and implemented their advocacy campaign.

Our analysis leads us not only to challenge the validity of backlash in the California case, but also to question more broadly the scholarly emphasis on litigation as the *sine qua non* of social change lawyering. We do not reject litigation as a social change tool—to the contrary, we view it as an essential component of what we call “multidimensional advocacy,” defined as advocacy across different domains (courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education). We draw a key lesson from the California marriage equality campaign: Efforts to isolate court-centered strategies from the broader advocacy context in order to fit litigation into the standard binary framework—is litigation good or bad?—are artificial and antiquated. Though the singular focus on litigation may have been warranted in an earlier era, the relevant question now for appraising social change lawyering

is: How does litigation relate to the range of other strategies that lawyers deploy to advance reform goals?

In contrast to the backlash account, LGBT movement lawyers in California prioritized a nonlitigation strategy, and conceptualized litigation as a tactic that succeeds only when it works in conjunction with other techniques—specifically, legislative advocacy and public education. Accordingly, lawyers constructed a legislative record that would further eventual litigation efforts at the same time that they pursued litigation that aided their legislative agenda and public education efforts.

Beginning in the mid-1990s, lawyers affirmatively decided to forego litigation because they were not confident that the California Supreme Court would support a marriage equality claim, and they were even more worried about the ease with which a favorable decision could be reversed through the initiative process. There was recurrent pressure on this “no-litigation” position. California Senator Pete Knight’s initial effort to pass a marriage ban through the legislature (in a bill called AB 1982) motivated some activists to press for litigation, but his early failure strengthened advocates’ arguments to stand down. The passage of Proposition 22, which codified a statutory prohibition against same-sex marriage in the California Family Code, presented another moment when lawyers had to resist community pressure to litigate to reverse the regressive law. Then, after the 1999 Vermont Supreme Court decision in *Baker v. State*,<sup>9</sup> which declared that same-sex couples were entitled to the rights and benefits of marriage (ultimately leading to the nation’s first civil union law), and the filing of a state constitutional challenge to marriage restrictions in Massachusetts (*Goodridge v. Department of Public Health*),<sup>10</sup> movement lawyers had to reiterate their opposition to a California constitutional challenge. This occurred at the 2003 UCLA California Marriage Litigation Roundtable, an invitation-only event of legal scholars and movement lawyers designed to “have a state-wide discussion about whether same-sex marriage litigation, similar to the cases brought in other states such as Vermont and New Jersey, should be brought in California.” The answer, they determined, was a definite no. In particular, the participants concluded that although it might be possible to prevail on the merits in the California Supreme Court, it would be too difficult to defeat a subsequent initiative, which was certain to occur, because public opinion was not yet on the side of marriage for same-sex couples. Finally, the same “no-litigation” message was conveyed both before and after Proposition 8 in a joint statement issued by movement lawyers, entitled “Make Change, Not Lawsuits,” in which they argued that “[t]he fastest way to win the freedom to marry throughout America is by getting marriage through state courts . . . and state legislatures . . . . But one thing couples shouldn’t do is just sue the federal government.”<sup>11</sup>

## I. ANALYSIS: THE LIMITS OF BACKLASH

### A. Multidimensional Advocacy

#### 1. Legislation to Enhance Litigation

Instead of pursuing a high-risk litigation strategy, movement lawyers focused on incremental legislative change. The lead legislative advocate, Equality California's Executive Director, Geoff Kors, is a trained litigator who had transitioned into a policy position. His appreciation for the role of litigation, combined with his political savvy, produced a sophisticated campaign to take domestic partnership in California from a regime of minimal rights to one including substantially all the state-based rights and benefits of marriage. Kors worked closely with movement lawyers—particularly the ACLU's Matt Coles, Lambda Legal's Jenny Pizer and John Davidson, and NCLR's Shannon Minter and Kate Kendell—who were involved in the drafting phase of domestic partnership and marriage legislation and in broader discussions about how best to secure and defend legislative gains.

Movement lawyers pursued a legislative strategy mindful of the prospect of future marriage litigation, carefully creating a record that would aid such litigation when it occurred. There were two facets to this strategy. First, in the context of domestic partnership, lawyers made sure that the legislative record supported the potential legal arguments that the state did not have any legitimate interests in withholding marriage from same-sex couples, and that such a denial was based on animus. In helping to draft the legislative findings for California's comprehensive domestic partnership law (known as AB 205), movement lawyers emphasized the prevalence of discrimination against same-sex couples while affirming the legitimacy and value of same-sex-couple-headed families. They also clearly (and deliberately) demonstrated that domestic partnership remained an institution separate from, and inferior to, marriage. This put movement lawyers in a strong position during the subsequent constitutional challenge to California's marriage law (*In re Marriage Cases*<sup>12</sup>), allowing them to argue that domestic partnership was separate and unequal, but that full-blown marriage for same-sex couples was, in a sense, only a small—albeit crucially important—step for the courts to take.

The second facet to the legislative strategy—advancing a state law marriage bill—was ultimately unsuccessful, but also showed how lawyers viewed the interplay between legislation and litigation. In the wake of the 2004 decision by San Francisco Mayor Gavin Newsom to issue marriage licenses to same-sex couples, it became clear to movement lawyers that it would be valuable to have married same-sex couples in California in order to show that “the sky didn't fall.”<sup>13</sup> This would be helpful in making the constitutional case that there was no harm in same-sex marriage and thus any exclusion based on sexual orientation was irrational. However, when the California Supreme Court nullified the four thousand San Francisco marriages in *Lockyer v. City and County of San Francisco*,<sup>14</sup> that strategy was upended. In response, advocates legislatively advanced a marriage bill in 2005 in order to achieve the right to marry—which was an end in itself—and to produce marriages in the lead-up to the court's resolution of the constitutional merits. The bill was ultimately vetoed and thus the marriages were not achieved through that

means. Nonetheless, the pursuit of the bill was still helpful to the broader advocacy campaign and reinforced the movement lawyers' effort to move forward on multiple tactical fronts. In particular, the fact that the marriage bill had won majority support in the legislature allowed the movement lawyers to argue to the California Supreme Court that marriage was consistent with the state's interests.

LGBT rights lawyers also litigated with a keen eye to how it might advance their legislative agenda. Toward this end, the lawyers engaged in strategic litigation relating to nonmarital relationship recognition, asserting relatively modest legal claims that produced compelling human interest stories that could be mobilized to move the legislative process. The strategy was to present a "wrenching story, with powerful evidence, in which the legal step was relatively small."<sup>15</sup> One example was the case of Keith Bradkowski, whose registered domestic partner was a flight attendant on the first American Airlines flight to crash into the World Trade Center on September 11. Lambda Legal's Pizer represented Bradkowski in his difficult effort to receive money from victim compensation funds. Bradkowski's powerful testimony in front of the California legislature was credited with helping ensure the passage of AB 2216 in 2002, which provided domestic partners with inheritance rights.<sup>16</sup> This case and others like it increased the salience of the issue of LGBT family recognition by replacing abstract legal concepts with powerful stories of real human suffering. These stories, in turn, served the movement's legislative agenda as advocates relied on them in seeking additional rights from the legislature.

## 2. Litigation to Enhance Legislation

Movement lawyers also used litigation to protect legislative gains. Most significantly, when countermovement forces sued to invalidate comprehensive domestic partnership based on Proposition 22, movement lawyers successfully protected their legislative achievement through litigation. Defending a legislatively enacted, nonmarital relationship-recognition law produced less publicity and presented less risk than affirmative marriage litigation since the lawyers were not asking the courts to affirmatively declare relationship rights, but rather to defer to the results of representative democracy.

## 3. Litigation as a Legislative Shield

Litigation and legislative advocacy were also used to advance the movement's public education aims, which were geared toward ensuring sufficient public support to withstand a voter initiative to ban marriage for same-sex couples. Key to this project was the effort by movement lawyers to protect the validity of the four thousand San Francisco marriages after the Newsom decision in 2004. NCLR's Kendell, for instance, sought to harness the powerful images of same-sex couples rushing to get

## 4. Public Education



married: “I was confident at the time that people seeing couples night after night joyous with their families, kids, and parents in tow standing in the rain just to get a marriage license was going to be transformative.”<sup>17</sup>

#### 5. Beyond (But Not Without) Litigation

Overall, the LGBT rights lawyers’ approach in California—generally avoiding affirmative litigation, cultivating litigation’s indirect effects, and understanding litigation in relation to other institutional domains—shows that the backlash account’s stereotyped vision of the naïve rights-crusading public interest lawyer is inaccurate. LGBT rights lawyers in California appreciated the relationship between litigation and non-litigation strategies and made decisions based on how to maximize overall success. They understood that court-centered disputes constitute one of the many ways in which ongoing social conflicts play out. Accordingly, they did not look to courts as saviors, but rather saw them as just one of the many players in the marriage equality movement. Similarly, they viewed litigation as just one tactic in their repertoire, seizing upon the dynamic relationship among courts, other governmental branches, elites, and the public.

There are two important implications of these findings. First, the California marriage equality case suggests that the single-minded scholarly focus on litigation as *the* social reform vehicle is outmoded. Contemporary legal advocacy in the marriage context does not fit the top-down, litigation-centric framework developed to address the civil rights movement of the mid-twentieth century. This finding should make us rethink the appropriateness of the conventional emphasis on litigation in other advocacy contexts and investigate the degree to which the multidimensional model of advocacy deployed in the marriage equality movement applies across different substantive domains. To the extent that lawyering in other fields embraces multidimensionality, it should reinforce the rejection of theories that focus exclusively on litigation in favor of a more nuanced scholarly approach.

However—and this is the second point—it is important to emphasize that moving beyond the focus on litigation is not to diminish its importance as a movement strategy. It is true that LGBT rights lawyers in the California case sought to avoid marriage litigation and resorted to it only by necessity. But that is not to suggest that litigation is “bad” and legislative advocacy and other strategies are necessarily “good.” To so conclude would simply reproduce the critique of litigation. Rather, the lesson to draw from the California case is that litigation is an essential, albeit partial, tactic in social change struggle. It may well be of limited efficacy by itself, but when strategically deployed in tandem with organizing, political advocacy, and public education campaigns, it is an important tool. When LGBT rights lawyers believed that they could use litigation to advance the cause—for instance, by defending AB 205 or filing what would become *In re Marriage Cases* in response to the California Supreme Court’s invitation for a constitutional challenge—they did so with skill and

success. And, as the affirmative litigation in Vermont and Massachusetts highlights, it was not simply that movement lawyers disdained litigation, but instead that they held a well-researched view that *in the California context* it would produce negative movement results if used prematurely.

The backlash thesis presumes that there is a clear causal relationship between court decisions and political outcomes. Within this model, the court decision is the “but for” cause of countermobilization: It is court action against public sentiment that ignites opposition, which succeeds in enacting regressive policy. The argument thus rests on a notion of “judicial exceptionalism”—that the unique countermajoritarian nature of court decisions produces backlash where other forms of lawmaking, such as legislation, would not.

Yet, in California, the evidence in support of this causal relationship is thin. It is instructive to look at the two anti-same-sex marriage statewide initiatives: Proposition 22, which banned marriage for same-sex couples by statute in 2000, and Proposition 8, which banned it by constitutional amendment in 2008. In the case of Proposition 22, the causal relationship is fuzzy. From the backlash perspective, the strongest argument would be that the *Baehr v. Lewin* decision in Hawaii<sup>18</sup>—which ruled that the state’s marriage restrictions discriminated based on sex and thus warranted strict scrutiny analysis—caused political reverberations in California, where opponents worried that Hawaii marriages would have to be recognized. This motivated Senator Knight to advance AB 1982 in 1996, which was defeated, and then to resurrect the statutory ban in Proposition 22, which was approved for the statewide ballot in 1998. The Vermont Supreme Court decision in December 1999 added fuel to the fire and helped mobilize marriage equality opponents to pass Proposition 22 by a convincing margin in March 2000.

However, it is not clear that this was the actual causal chain. By the time Proposition 22 qualified for the ballot, Hawaii had passed its constitutional amendment permitting the legislature to prohibit marriage by same-sex couples (which it had already decided to do), thus withdrawing the threat of forced recognition of out-of-state marriages. Vermont’s *Baker v. State*<sup>19</sup> decision may have provided additional impetus, but by the time California voters went to the polls in 2000, it was clear that Vermont was heading toward civil unions, not marriage, for same-sex couples. Moreover, part of the motivation for Proposition 22 appeared to be the legislative efforts to establish domestic partnership, particularly the 1999 passage of California’s domestic partner registry, which opponents viewed as a step toward marriage. Indeed, once comprehensive domestic partnership was passed in 2003, opponents attempted to negate it by arguing that it contravened Proposition 22.

In the Proposition 8 context, the causal chain is even more attenuated. There are two separate court linkages. The first runs from *Goodridge v. Department of*

## B. Backlash Mechanics and the Causation Problem

### 1. Judicial Exceptionalism?

*Public Health*<sup>20</sup> to the *Marriage Cases*; the second from the *Marriage Cases* to Proposition 8. There is reason to be dubious of both. With respect to the first, the argument would be that *Goodridge* provoked Mayor Newsom's issuance of marriage licenses to same-sex couples in San Francisco,<sup>21</sup> and that this decision, in turn, provoked the Alliance Defense Fund (ADF), a Christian Right legal organization, to initiate litigation that ultimately ended up squarely presenting the constitutional challenge against California's statutory marriage ban. Yet, if the causal chain is supposed to run from the court decision to public opposition, one must strain to fit the *Goodridge* link into that framework. In fact, the Newsom decision, rather than represent public opposition, was just the opposite: an expression of elite political support for *Goodridge* and an attempt to extend its reach. Tracing a line from Newsom's action to the California Supreme Court decision also fails to neatly follow the backlash story, since the court decision is the result of countermobilization (ADF filed the injunction action that led to the *Marriage Cases* decision), not its cause.

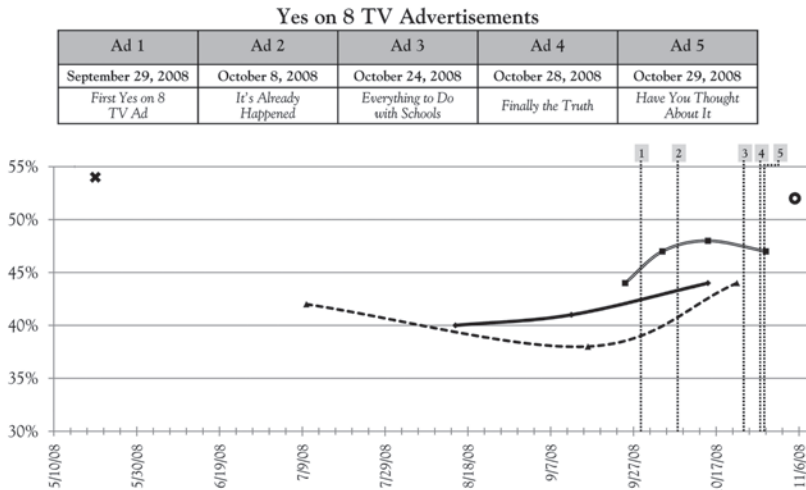
Even if we take the California Supreme Court decision on its own terms, it is not at all clear that it caused Proposition 8 in any meaningful sense. It is the case that Christian Right advocates seized on the supreme court oral arguments to mobilize constituents and raise funds to place Proposition 8 on the ballot.<sup>22</sup> However, the picture is complicated. These same countermovement advocates were organizing the Proposition 8 effort before marriage equality litigation had commenced.<sup>23</sup>

Furthermore, if it were true that there was something unique about court decisions that caused backlash, we would expect public support for Proposition 8 to increase precisely because it was the California Supreme Court that affirmed the legality of marriage for same-sex couples. However, the public opinion data on Proposition 8, at best, only support a more limited claim: that the countermajoritarian nature of the judiciary was one factor among many that influenced public opposition.<sup>24</sup> And there is reason to suspect that the judicial origin of the marriage equality law was less important than other factors, namely the specter that schools would be compelled to teach about homosexuality and same-sex relationships.

One way to evaluate the influence of the court decision on public opinion is to look at how it was used by the Yes on 8 campaign in its messaging. Although the Yes on 8 campaign used multiple venues to get its message out, including online videos and "viral" emails, we focus on television advertising, on which the campaign invested heavily during the two months leading up to the vote. Figure 1 tracks the three major public opinion polls leading up to Proposition 8 and indicates the first air date for the five major Yes on 8 television advertisements.

FIGURE 1: PERCENT IN SUPPORT OF CALIFORNIA PROPOSITION 8

-- Field Poll    — Survey USA    — Public Policy Institute of California    \* LA Times    ● Prop. 8 Vote



As Figure 1 shows, there was only one poll in the immediate wake of the May 15, 2008 *Marriage Cases* decision, by the *Los Angeles Times*; it did not ask specifically about Proposition 8 (which had not yet been named), but rather asked if the respondent would vote in favor of a proposed amendment that would “reverse the court’s decision and state that marriage is only between a man and a woman,” to which 54 percent answered yes.<sup>25</sup> By July, three separate polls—the Field Poll, Survey USA, and the Public Policy Institute of California poll—started tracking support for Proposition 8. In the first of these, the July Field Poll, support for Proposition 8 was at a relatively low 42 percent, suggesting that the impact of the court decision on public opposition to marriage equality softened as the immediacy of the decision faded. Support for Proposition 8 began to increase in September and generally continued to trend up as the election drew near.<sup>26</sup>

This period of increased support for Proposition 8 corresponded to the Yes on 8 television advertising campaign, leading commentators to suggest that the ads had an important impact on public opinion.<sup>27</sup> The Yes on 8 proponents mobilized several arguments to make their public case. At the outset of the television campaign, the supreme court decision played a clear—though partial—role. The first ad, which began airing on September 29, 2008, depicted a grinning Gavin Newsom uttering the phrase, “It’s gonna happen, whether you like it or not!,” and explicitly emphasized the anticourt theme (“Four judges ignored four million voters and imposed same-sex marriage on California.”).<sup>28</sup> This ad, however, did not simply rest on the “activist court” theme, but also raised two other arguments: that marriage equality would undermine the free exercise of religion (“churches could lose

their tax exemption”) and affect public school programming (“gay marriage taught in public schools”).<sup>29</sup> It is not possible to say which argument had the most public impact, but the Yes on 8 campaign’s choice of which ads to air next is suggestive of the arguments it believed had the most traction. The next three ads (It’s Already Happened, October 8; Everything to Do With Schools, October 24; and Finally the Truth, October 28) did not mention the court decision and instead focused exclusively on the impact of Proposition 8 on school programming, all suggesting that its defeat would mean that “gay marriage” would be taught in schools and that parents would have no legal right to remove their children from such instruction.<sup>30</sup> The final ad of the campaign, “Have You Thought About It?,” began airing on October 29, and returned to the trio of arguments (religious freedom, the activist court, and schools) that were raised in the first ad a month earlier. Whereas polling put support for Proposition 8 at between 38 and 44 percent when the Yes on 8 ads began to air, by the time of the election on November 5, 2008, Proposition 8 passed with 52 percent of the vote.

What does this tell us? Consistent with the backlash account, Yes on 8 proponents mobilized the court decision in their ad campaign, suggesting that it struck a public chord. However, the strong backlash claim—that the court decision *caused* the bad outcome—is unsupported. The activist court theme was never presented in the television ads as a stand-alone reason to vote for Proposition 8. And during the crucial month before the vote, the three successive ads aired by the Yes on 8 campaign focused exclusively on schools, suggesting they were having the most impact—a conclusion supported by exit polling showing that parents with school-age children voted for Proposition 8 in disproportionately high numbers.<sup>31</sup> Of course, we do not know whether in a close vote those motivated by anger toward the “activist court” tipped the scales. However, the focus of the ads in the final stage of the campaign suggests that Proposition 8 proponents did not believe that the “activist court” message was their strongest closing argument.

Even if the court decision was related to the passage of Proposition 8, the backlash thesis only stands up as a critique of courts if it can prove the counterfactual: that the same events would not have transpired if Governor Schwarzenegger had signed the legislature’s marriage bill and there had been no court decision. This counterfactual, of course, cannot be proved. But there is reason to suspect that a marriage bill, passed by the legislature and signed by the governor, would have produced a similar backlash effect. It is clear that if marriage passed through the legislature, opponents would have sought to reverse it via the initiative process and were already attempting to place the issue on the 2006 ballot.<sup>32</sup> As California Senator Mark Leno was preparing to introduce the marriage bill in 2005, an ADF attorney predicted that if either the courts or the legislature established the legal right for same-sex couples to marry, the voters would reverse it. Likewise, Randy Thomasson of the Campaign for California Families stated that passage of a mar-

riage equality bill by the legislature “will ignite the majority of California” to vote for a constitutional amendment to “override the politicians.”<sup>33</sup> Thus, opponents were mobilized to place a constitutional ban on the ballot irrespective of the form in which marriage equality was passed. And one could imagine that had the bill been enacted against the backdrop of Proposition 22, there would have been a similarly harsh media campaign: “the unaccountable bureaucrats in Sacramento, captured by pro-gay special interests, have thwarted the will of the people . . . .”

Then, the question becomes: Would voters have been less likely to overturn a marriage bill enacted by the legislature? While this question is impossible to answer with certainty, there is at least circumstantial evidence suggesting that a marriage bill would have fared no better than the court’s decision in front of the voters. This evidence emerges from recent events in Maine, where the legislature—in the absence of any court decision—passed a marriage equality bill, which the governor signed. However, voters reversed the decision in November 2009.<sup>34</sup> The campaign to overturn the law relied on the same playbook developed during California’s Proposition 8 campaign.<sup>35</sup> The same advertisements linking marriage equality to gay-inclusive school curricula distracted voters from the core of the issue and stoked the fears of parents.<sup>36</sup> And instead of pointing to a “handful of judges,” the campaign for voter repeal argued that a “handful of politicians cannot be the only ones to decide what the definition of marriage should mean for the entire state of Maine.”<sup>37</sup> In the end, voters in both California and Maine narrowly overturned the legalization of marriage for same-sex couples, and the different institutional postures of the initial legalization did not determine the ultimate outcomes.

How do we measure the success of litigation campaigns? Rosenberg assesses the effectiveness of LGBT rights advocacy by focusing on the ultimate end goal: marriage.<sup>38</sup> Thomas Keck, in his analysis of LGBT rights, focuses on the starting point—the absence of legal status for same-sex unions—and compares this to the rising number of state-based relationship recognition laws, including both marital and nonmarital regimes.<sup>39</sup> If we measure success in relation to the goal of establishing a right for same-sex couples to marry, the gulf between aspirations and reality may seem large. But if instead we base success on how far from the starting point the movement has come, the progress appears quite impressive.

The same issue of baseline affects our analysis of California. Judging by the metric of full marriage equality, the movement in California has come up short and, in a real sense, must now surmount a difficult new hurdle in repealing Proposition 8. However, measuring success relative to the starting point of nonrecognition paints a different picture. Whereas same-sex couples had no statewide legal rights in early 1999, by the end of 2009, they had won comprehensive domestic partnership and, in addition, full legal recognition for in-state and out-of-state marriages performed

## 2. Baselines and Metrics

prior to Proposition 8 and full recognition (without the label “marriage”) for out-of-state marriages entered after Proposition 8 (per SB 54). California thus went from having no legally recognized same-sex unions in 1999 to having over forty-eight thousand registered domestic partners by 2008,<sup>40</sup> eighteen thousand same-sex couples legally married inside California prior to Proposition 8, an unknown (but possibly significant) number of pre-Proposition 8 legally recognized out-of-state marriages, and an unknown, but growing, number of same-sex couples married out-of-state after Proposition 8, who are entitled to full legal status in California, albeit without the marriage label.

While the ultimate appraisal of the movement’s “success” or “failure” may depend on one’s vantage point, our own view is that this record demonstrates substantial progress measured relative to the starting point of no rights. It is also relevant to note that through the eyes of those most keenly attuned to the marriage equality movement in California—the lawyers themselves—the picture is far from the grim portrait depicted by backlash proponents. To the contrary, the lawyers view their accomplishments in both creating domestic partnership and creating limited marital recognition as major advances. Even after the passage of Proposition 8, movement lawyers generally remain positive about what they have accomplished—and optimistic about what lies ahead. Minter, the lead lawyer for the LGBT rights groups in the *Marriage Cases*, put it this way: “[L]ook at where we are. Things have moved forward more quickly and dramatically than anyone would have dreamed. We are so much further along now than where we were in 2004.”<sup>41</sup>

**CONCLUSION:  
MOVEMENT  
LAWYERING—  
IN THE FACE OF  
BACKLASH**

**I**n the urge to understand and appraise the complex forces that have driven the marriage equality movement, it is easy to overlook the elemental heroism that has defined the work of lawyers and activists who—in the face of implacable opposition and virulent hostility—have moved marriage from the margins to the mainstream in California. Working for relatively little pay and recognition, they asserted the right to be treated equally and fought for its realization. That they have not fully succeeded in achieving it speaks more to the power and perseverance of their opponents than to their own sophistication and tenacity. What we are to make of their efforts is a question that will continue to be vigorously debated. In California, though marriage equality has not yet been achieved, the legal landscape for same-sex couples has been transformed over the past decade, from a regime of no rights to one of equality in all but name, with a significant number of intact marriages of same-sex couples. Although the future is still uncertain, an analysis that obscures these gains offers an incomplete picture of the marriage equality movement that diminishes advocates’ efforts and presents a false accounting of what has been won and lost—so far.

The story of the national marriage equality movement is still being written, which means that an overall appraisal cannot yet be fully completed. What we do know is that the echoes of California activism continue to reverberate in legislatures and courts around the country, as advocates continue to pursue a state-by-state strategy (while closely watching *Perry v. Schwarzenegger*,<sup>42</sup> the federal constitutional challenge to Proposition 8 that advocates discouraged). These multiple and contested efforts underscore the central lessons from our analysis of the California case. Advocacy around marriage equality is multidimensional, contextual, and unpredictable. Litigation plays an important, but not decisive, strategic role: It is part of an overall arsenal that includes legislative advocacy and public education, and it is always undertaken in the context of a careful analysis of the likely political consequences and how they might be addressed. Opposition is constant and sophisticated, so that there is never a clear “win,” only moves that are certain to be countered. In this sense, the model of lawyering in the marriage equality context is not one of avoiding backlash, but managing its inevitable onset by influencing its form and intensity.





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1. ADVOCATE, Dec. 2008 (cover story).
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9. 744 A.2d 864 (Vt. 1999).
10. 798 N.E.2d 941 (Mass. 2003).
11. ACLU ET AL., MAKE CHANGE, NOT LAWSUITS, [http://data.lambdalegal.org/publications/downloads/fs\\_make-change-not-lawsuits.pdf](http://data.lambdalegal.org/publications/downloads/fs_make-change-not-lawsuits.pdf) (last visited May 4, 2010).
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13. DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE 80 (2006) (quoting Molly McKay, Associate Executive Director of Equality California).
14. No. S122923, 2004 WL 473257 (Cal. Mar. 11, 2004).
15. Jennifer Pizer, Dir., Marriage Project, Lambda Legal, Remarks at the Seminar on Problem Solving in the Public Interest, UCLA School of Law (Oct. 8, 2009).
16. See Press Release, Lambda Legal, Gay Partner of 9/11 Victim and Lambda Legal Lawyer to Attend Signing of Bill Providing Inheritance Rights to Domestic Partners, Sept. 10, 2002, [http://www.lambdalegal.org/news/pr/ca\\_20020910\\_gay-partner-of-911-victim-lambda-lawyer-attend-signing.html](http://www.lambdalegal.org/news/pr/ca_20020910_gay-partner-of-911-victim-lambda-lawyer-attend-signing.html).
17. Telephone Interview with Kate Kendell, Executive Dir., Nat'l Ctr. For Lesbian Rights (Feb. 22, 2010).
18. 852 P.2d 44 (Haw. 1993).
19. 744 A.2d 864 (Vt. 1999).

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21. See Klarman, *supra* note 5, at 481.
22. Jesse McKinley, *California Ruling on Same-Sex Marriage Fuels a Battle, Rather Than Ending It*, N.Y. TIMES, May 18, 2008, at A18.
23. See *id.*
24. For an example of how Yes on 8 used the counter-majoritarian nature of the judiciary, see *Arguments: Prop 8*, in CALIFORNIA GENERAL ELECTION OFFICIAL VOTER INFORMATION GUIDE 56 (2008), available at <http://www.voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt8.htm>.
25. *May 2008—Los Angeles Times/KTLA California Same-Sex Marriage Poll*, L.A. TIMES, May 23, 2008, at A1. A Field Poll taken shortly thereafter showed support for same-sex marriage at 51 percent. See MARK DiCAMILLO & MERVIN FIELD, FIELD RESEARCH CORP., #2268: GROWING TRENDS IN SUPPORT OF ALLOWING SAME-SEX MARRIAGE IN CALIFORNIA 1 (May 28, 2008).
26. In the Field Poll, support for Proposition 8 decreased from mid-July to mid-September (from 42 percent to 38 percent), but then increased by 6 points by the end of October. See *The Field Poll*, Mark DiCamillo & Mervin Field, *Prop. 8 (Same-Sex Marriage Ban) Dividing 49% No—44% Yes, With Many Voters in Conflict* (Oct. 31, 2008); *The Field Poll*, Mark DiCamillo & Mervin Field, *55% of Voters Oppose Proposition 8, the Initiative to Ban Same-Sex Marriage in California* (Sept. 18, 2008); *The Field Poll*, Mark DiCamillo & Mervin Field, *By a 51% to 42% Margin Voters Appear Ready to Vote No on Proposition 8, the Initiative to Ban Same-Sex Marriage in California* (Sept. 18, 2008). In the Public Policy Institute of California (PPIC) polls, support for Proposition 8 increased from 40 percent in mid-August, to 41 percent in mid-September, to 44 percent in mid-October. See PUB. POL'Y INST. OF CAL., PPIC STATEWIDE SURVEY: CALIFORNIA 3, at 6 (Aug. 2008); John Wildermuth, *Poll: Same-Sex Marriage Ban Not Wooing Voters*, S.F. CHRON., Sept. 25, 2008, at B2 (reporting on PPIC poll conducted Sept. 9–16 showing 41 percent support for and 55 percent opposition to Proposition 8); PUB. POL'Y INST. OF CAL., PPIC STATEWIDE SURVEY: CALIFORNIA 3, at 5 (Oct. 2008) (showing, in poll conducted Oct. 12–19, support for Proposition 8 at 44 percent and opposition at 52 percent). The Survey USA poll figures showed support for Proposition 8 increasing from late September to early October (from 44 percent to 47 percent), increasing slightly by mid-October (to 48 percent), and then dipping by one percentage point—within the margin of error—by late October. See Survey USA, *Results of SurveyUSA Election Poll #14761* (Nov. 1, 2010) (showing, in poll conducted Oct. 29–31, support for Proposition 8 at 47 percent and opposition at 50 percent); Survey USA, *Results of SurveyUSA Election Poll #14613* (Oct. 17, 2008) (showing, in poll conducted Oct. 15–16, support for Proposition 8 at 48 percent and opposition at 45 percent); Survey USA, *Results of SurveyUSA Election Poll #14503* (Oct. 6, 2008) (showing, in poll conducted Sept. 23–24, support for Proposition 8 at 44 percent and opposition at 49 percent).
27. See Mark DiCamillo, *Why Prop. 8 Confounded Pre-election Pollsters*, S.F. CHRON., Nov. 10, 2008, at B5.
28. ProtectMarriage.com, *First Yes on 8 TV Ad*, <http://www.protectmarriage.com/video/view/2> (last visited May 4, 2010).
29. *Id.*
30. ProtectMarriage.com, *It's Already Happened*, <http://www.protectmarriage.com/video/view/5> (last visited May 4, 2010) (“Teaching children about gay marriage will happen here unless we pass Proposition 8.”); ProtectMarriage.com, *Everything to Do With Schools*, <http://protectmarriage.com/video/view/7> (last visited May 4, 2010) (“Gay marriage will be taught in our schools unless we vote

Yes on Proposition 8.”); ProtectionMarriage.com, Finally the Truth, <http://www.protectmarriage.com/video/view/8> (last visited May 4, 2010) (“Children will be taught about gay marriage unless we vote Yes on Proposition 8.”).

31. See THE THOMAS AND DOROTHY LEAVEY CENTER FOR THE STUDY OF LOS ANGELES, LCSLA 2008 EXIT POLLS OF THE PRESIDENTIAL PRIMARY AND NATIONAL ELECTIONS IN THE CITY OF LOS ANGELES; RESULTS OF THE LCSLA NATIONAL ELECTION EXIT POLL: ALL CITY, VALLEY, AND NON VALLEY (2008), available at <http://www.lmu.edu/AssetFactory.aspx?did=32036> (finding that according to exit polls, only 55 percent of Los Angeles voters with school-age children voted against Proposition 8, compared to 70 percent of other Los Angeles voters).

32. See Nancy Vogel, *'06 Ballot is a Goal for Foes of Gay Marriage*, L.A. TIMES, Apr. 27, 2005, at B3.

33. *Id.*

34. See Kevin Miller & Judy Harrison, *Gay Marriage Repealed in Maine*, BANGOR DAILY NEWS, Nov. 4, 2009, at A1.

35. See Bob Drogin, *In Maine, It's Like Prop. 8 All Over Again*, L.A. TIMES, Oct. 20, 2009, at A1.

36. See StandforMarriageMaine.com, About the People's Veto and Question 1, [http://standformarriagemaine.com/?page\\_id=256](http://standformarriagemaine.com/?page_id=256) (last visited May 4, 2010) (“Without Question 1, teachers will be required to teach young children that there is no difference between homosexual marriage and traditional marriage and parents will lose control over what their kids learn in school about marriage and sexual orientation.”).

37. See StandforMarriageMaine.com, Myths and Facts About the People's Veto of Homosexual Marriage Legislation (LD 1020), [http://standformarriage.com/?page\\_id=271](http://standformarriage.com/?page_id=271) (last visited May 4, 2010).

38. See ROSENBERG, *supra* note 5, at 353.

39. See Keck, *supra* note 4, at 171.

40. See GARY J. GATES, M.V. LEE BADGET, & DEBORAH HO, WILLIAMS INST., MARRIAGE, REGISTRATION AND DISSOLUTION BY SAME-SEX COUPLES IN THE U.S. 5 (2008).

41. Telephone Interview with Shannon Minter, Legal Dir., Nat'l Ctr. For Lesbian Rights (Dec. 17, 2009).

42. See Complaint for Declaratory, Injunctive, or Other Relief, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. May 22, 2009), available at [http://www.domawatch.org/cases/9thcircuit/Perry\\_v\\_Schwarzenegger/District%20Court/PvS\\_DN\\_1\\_2\\_Complaint052209.pdf](http://www.domawatch.org/cases/9thcircuit/Perry_v_Schwarzenegger/District%20Court/PvS_DN_1_2_Complaint052209.pdf).