

# LAWYERING FOR MARRIAGE EQUALITY

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*Critics of litigation seeking to establish the right of same-sex couples to marry argue that it has produced a backlash undercutting the movement for marriage equality. In this account, movement lawyers emerge as agents of backlash: naively turning to the courts ahead of public opinion, ignoring more productive political alternatives, and ultimately hurting the very cause they purport to advance by securing a court victory that mobilizes opponents to repeal it. This Article challenges the backlash thesis through a close analysis of the California case, which contradicts the portrait of movement lawyers as unsophisticated rights crusaders and casts doubt on the causal claim that court decisions upholding same-sex couples' right to marry have harmed the movement.*

INTRODUCTION.....	1236
I. THEORETICAL FRAMEWORK: THE BACKLASH DEBATE .....	1242
II. CASE STUDY: THE CALIFORNIA MARRIAGE EQUALITY MOVEMENT .....	1247
A. The Lessons of Litigation Past: Before California .....	1248
B. Litigation Avoidance: The Legislative Pursuit of Domestic Partnership .....	1251
1. After Hawaii: The California No-Litigation Strategy.....	1251
2. Legislative Incrementalism and Countermobilization: From Domestic Partner Registry to Proposition 22.....	1256

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3.	Stepping Stones: Planning for Marriage by Winning Domestic Partnership.....	1262
C.	The Best Laid Plans: Litigating Marriage by Necessity .....	1269
1.	Cooler Heads Prevail: Rejecting Litigation (Again) by Consensus .....	1269
2.	Litigating in Defense of Domestic Partnership.....	1271
3.	Game Change: Marriage Equality in San Francisco.....	1274
4.	Winning Despite Themselves: <i>In re Marriage Cases</i> .....	1281
D.	On the Sidelines: Proposition 8, <i>Perry</i> , and the Plan for 2012 .....	1293
III.	ANALYSIS: THE LIMITS OF BACKLASH.....	1304
A.	Control Over Ends and Means.....	1304
1.	Constructing the Agenda: The Path to Marriage.....	1304
2.	Controlling the Tactics: Litigation Triggers and Movement Responses .....	1307
a.	Causes of Litigation.....	1308
(1)	Countermobilization .....	1308
(2)	Contingency .....	1309
(3)	Contestation .....	1309
b.	Mechanisms of Control .....	1310
(1)	Direct Intervention .....	1310
(2)	Remonstrance .....	1311
(3)	Indirect Involvement .....	1311
B.	Multidimensional Advocacy .....	1312
1.	Legislation to Enhance Litigation.....	1312
2.	Litigation to Enhance Legislation.....	1314
3.	Litigation as a Legislative Shield.....	1314
4.	Public Education .....	1315
5.	Beyond (But Not Without) Litigation.....	1317
C.	Backlash Mechanics and the Causation Problem .....	1318
1.	Judicial Exceptionalism?.....	1318
2.	Baselines and Metrics .....	1325
	CONCLUSION: TOWARD A THEORY OF MOVEMENT LAWYERING—IN THE FACE OF BACKLASH.....	1327

## 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.<sup>2</sup> Both groups comprise a minority of the population in the United States and have been subject to systematic

1. ADVOCATE, Dec. 2008 (quoting the cover).

2. See Craig J. Konnoth, Note, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s*, 119 YALE L.J. 316 (2009).

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*,<sup>3</sup> the 1967 U.S. Supreme Court decision that overturned prohibitions on interracial marriage.<sup>4</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,<sup>5</sup> summed up in the wry phrase “gay is *not* the new black.”<sup>6</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 a 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>7</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. The thesis is most closely identified with two scholars, University of Chicago political scientist Gerald Rosenberg and Harvard legal

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3. 388 U.S. 1 (1967).

4. On the power of the antimiscegenation analogy, see Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107 (2002); Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1996); Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379; James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93 (1993).

5. See Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 UTAH L. REV. 781, 792.

6. Irene Monroe, *Gay Is Not the New Black*, HUFFINGTON POST, Dec. 16, 2008, [http://www.huffingtonpost.com/irene-monroe/gay-is-emnotem-the-new-bl\\_b\\_151573.html](http://www.huffingtonpost.com/irene-monroe/gay-is-emnotem-the-new-bl_b_151573.html).

7. Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC’Y REV. 151, 152 (2009); see also Linda J. Lacey & D. Marianne Blair, *Coping With the Aftermath of Victory*, 40 TULSA L. REV. 371 (2005).

historian Michael Klarman, each of whom has developed a backlash analysis of *Brown v. Board of Education*,<sup>8</sup> and applied the backlash framework to evaluate the impact of crucial marriage equality cases.<sup>9</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.

We focus primarily on Rosenberg's work since he has offered the fullest elaboration of backlash in the marriage equality context and has been the most strident in his criticism of marriage litigation and, by extension, the lawyers who have brought it.<sup>10</sup> His rebuke of lawyers is especially noteworthy given their limited role in his scholarly narrative. Because Rosenberg's approach to backlash is positivist in nature—he aims to test the impact of court decisions on social outcomes<sup>11</sup>—the perspectives and motivations of the lawyers involved are not central to the story. Rosenberg refers generically to same-sex marriage “litigation,” and when it is necessary to identify actors, he makes reference to “Progressives,” “proponents,”<sup>12</sup> “litigants,” or “activists.”<sup>13</sup> Yet it is clear from the context of Rosenberg's analysis that LGBT movement lawyers are important targets of his critique: His analysis of marriage for same-sex couples is part of a broader examination of impact litigation campaigns orchestrated by cause-oriented groups like LDF;<sup>14</sup> he refers to a litigation “campaign” and “movement,” which assumes ideologically motivated lawyers as the driving force;<sup>15</sup> and when he needs an example of misguided “proponents,” he points to the movement lawyers.<sup>16</sup> 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, Rosenberg concludes that same-sex marriage

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8. 347 U.S. 483 (1954).

9. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008); Michael Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005).

10. Indeed, Klarman recently qualified his backlash claim, conceding that although *Goodridge* caused a short-term backlash, it “very likely contributed, in the mid-term, to a dramatic acceleration in the move to gay marriage.” Michael Klarman, *Marriage Equality: Are Lawsuits the Best Way?*, HARV. L. BULL., Summer 2009, at 7, 9.

11. Gerald N. Rosenberg, *Positivism, Interpretivism, and the Study of Law*, 21 LAW & SOC. INQUIRY 435 (1996) (book review).

12. See ROSENBERG, *supra* note 9, at 342–43.

13. See *id.* at 343, 347.

14. See *id.* at 91–93.

15. *Id.* at 340.

16. *Id.* at 339 (quoting then-Lambda Legal attorney Evan Wolfson on the significance of *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)).

“proponents,” “succumbing to the ‘lure of litigation,’”<sup>17</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>18</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>19</sup>

A number of scholars have already begun to challenge these premises, drawing upon national data to question the assumptions that lawyers naively turned to courts,<sup>20</sup> lacked a coordinated advocacy strategy,<sup>21</sup> and produced negative outcomes that would not otherwise have occurred.<sup>22</sup> This scholarly engagement has aided in understanding the overall impact of marriage equality advocacy. It has also helped to clarify the key terms of disagreement between critics and supporters of litigation’s role in the movement. What is missing, however, is a context-specific examination of the challenges movement lawyers have faced, the strategic choices they have made, and the outcomes they have achieved. Case study analysis would contribute to our understanding

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17. *Id.* at 419.

18. Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 *DRAKE L. REV.* 795, 813 (2006) [hereinafter Rosenberg, *Courting Disaster*]; see also Gerald N. Rosenberg, *Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage*, 42 *J. MARSHALL L. REV.* 643, 643 (2009) [hereinafter Rosenberg, *Saul Alinsky*].

19. For a cogent analysis of this point, see Dara E. Purvis, *Evaluating Legal Activism: A Response to Rosenberg*, 17 *BUFF. J. GENDER, L. & SOC. POL’Y* 1 (2009).

20. See ELLEN ANN ANDERSEN, *OUT OF THE CLOSET AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* (2004); see also Andrew Koppelman, *The Limits of Strategic Litigation*, 17 *LAW & SEXUALITY* 1 (2008).

21. See Purvis, *supra* note 19, at 49–50; see also Laura Beth Nielsen, *Social Movements, Social Process: A Response to Gerald Rosenberg*, 42 *J. MARSHALL L. REV.* 671 (2009).

22. Keck, *supra* note 7; see also Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 *WM. & MARY BILL RTS. J.* 1493 (2006); Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 *DRAKE L. REV.* 861 (2006).

of important aspects of the lawyering process, such as how lawyers constructed goals, decided among tactical options, and responded to opponents' efforts.

Our aim, therefore, is to analyze the power of the backlash thesis—and particularly its assignment of movement lawyer culpability—through a close study of the marriage equality movement in California.<sup>23</sup> California is a key theater of marriage equality activism: It has the largest population of same-sex couples of any state (nearly eighty-five thousand, constituting 15 percent of U.S. same-sex couples) and is home to some of the country's leading LGBT advocacy organizations.<sup>24</sup> California lawyers play a leadership role in the national movement, and what happens in California is often viewed as a bellwether of national trends. Moreover, the California campaign itself, which spans roughly the last decade, has provided a civics lesson in how law can be made, with legal rules governing same-sex couples created through the judicial, legislative, and initiative processes. And, crucially, after the 2008 passage of Proposition 8—the state constitutional amendment barring marriage for same-sex couples—California has become both a prominent symbol of backlash and a key battleground for future activism. Focusing on movement lawyering in California allows us to assess outcomes by the goals that were set, and modified, by the lawyers themselves. We do this through a close reading of the movement's history, based on the legislative and litigation record, secondary source coverage of the campaign, and the insights of key movement actors.

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 with 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.

First, movement lawyers did not define the legal right to marry as their immediate objective and initiate a litigation campaign to achieve it. Rather, comprehensive domestic partnership was the initial goal. Affirmative litigation was not the vehicle of choice. The backlash presumption that lawyers

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23. By undertaking this study, we do not mean to suggest that marriage is normatively preferable to other types of family forms for same-sex couples. It is of course true that the push toward marriage may have a domesticating impact on the LGBT rights movement more broadly, allocating energy and resources away from other worthy goals, and prioritizing an institution that has been roundly (and justifiably) critiqued for its negative impact on women. Our project does not take sides in this debate, but rather attempts to show how one side—those sympathetic to marriage—pursued its ends.

24. GARY J. GATES, WILLIAMS INST., SAME-SEX SPOUSES AND UNMARRIED PARTNERS IN THE AMERICAN COMMUNITY SURVEY, 2008, app. tbl.2 (2009).

succumbed to the “lure of litigation” obscures the reasons for court intervention in California and omits the crucial role of countermovement organizations, like the Alliance Defense Fund (ADF) and Liberty Counsel, in shaping legal cases. California now has a constitutional barrier to marriage for same-sex couples, but this has occurred *in spite of* the movement lawyers’ leadership—not because of it.

Second, the lawyers did not give litigation tactical priority. To the contrary, since its inception, the California campaign generally sought to *avoid* affirmative litigation in favor of a legislative and public education approach—with litigation used defensively to block challenges to successfully enacted bills. Movement lawyers also intervened to shape the trajectory of litigation they did not initiate in order to mitigate the risk of bad outcomes. The backlash account thus obscures the *deliberate turn away from a singular focus on litigation* as a route to achieve marriage equality toward a much more nuanced and multidimensional advocacy approach. At least in California, the portrait of movement lawyers as naïve rights crusaders who fail to adequately invest in alternative advocacy strategies is inaccurate and demeaning.

Finally, we find that the evidence in support of the backlash account’s causal claim is weak. It is not clear that court decisions, either in Hawaii and Vermont in the 1990s or in California in 2008, led to the passage of two antigay California initiatives—Proposition 22 in 2000 and Proposition 8 in 2008. By focusing solely on court decisions, the backlash thesis fails to account for the influence of nonjudicial factors. Specifically, the legislative push for domestic partnership in California motivated, at least in part, the statutory prohibition on marriage for same-sex couples embodied in Proposition 22. And during their television advertising campaign, Proposition 8 proponents emphasized the specter of same-sex marriage being taught in schools over the fact that the right to marry for same-sex couples derived from a court decision, suggesting that the schools issue resonated more powerfully with voters.

Furthermore, there has been significant progress toward the goals set by movement lawyers. A decade ago, the state provided no rights to same-sex couples. California now has comprehensive domestic partnership—a goal that movement lawyers worked strenuously to achieve. Of course, Proposition 8 constitutionally banned marriage for same-sex couples, making it more difficult to attain. But there are still married same-sex couples in the state: eighteen thousand legally married couples prior to Proposition 8 and more out-of-state couples given legal status under a state law passed in its wake.<sup>25</sup> Moreover, given

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25. See S.B. 54, 2009–2010 Leg., Reg. Sess. (Cal. 2009); Janet Kornblum, *Bans on Gay Marriage Gain Ground*, USA TODAY, Nov. 5, 2008, at A18.

the ease with which the California Constitution may be amended by initiative, it is far from clear that the last word has been spoken.

This analysis leads us not only to challenge the validity of the backlash thesis 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.<sup>26</sup> 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? We may still conclude, after an analysis of the evidence of these integrated strategies, that multidimensional advocacy for marriage equality has backfired or that litigation has played an outsized (and detrimental) role. But we should be able to understand the tradeoffs and pinpoint the miscues across the range of strategic choices—a task that has not yet been undertaken.

Part I explicates the backlash debate. Part II offers a detailed account of the legal and political movement in California to establish the legal right to marry for same-sex couples. Part III then uses the California case to challenge the backlash thesis in particular, and the scholarly focus on litigation more generally.

## I. THEORETICAL FRAMEWORK: THE BACKLASH DEBATE

The backlash thesis in the marriage equality context begins with a series of significant court decisions: the Hawaii Supreme Court’s 1993 decision in *Baehr v. Lewin*,<sup>27</sup> which ruled that the state’s marriage restriction discriminated based on sex and thus needed to be analyzed by the trial court under a strict scrutiny standard; the Vermont Supreme Court’s 1999 decision in *Baker v. State*,<sup>28</sup> which declared that same-sex couples were entitled to the rights and benefits of marriage and which ultimately led to the nation’s first civil union

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26. See Nielsen, *supra* note 21, at 682.

27. 852 P.2d 44 (Haw. 1993).

28. 744 A.2d 864 (Vt. 1999).

regime; and the Massachusetts Supreme Judicial Court's 2003 decision in *Goodridge v. Department of Public Health*,<sup>29</sup> which ruled that the Massachusetts Constitution required recognition of the right to marry for same-sex couples.

Gerald Rosenberg contends that these court decisions caused political countermobilization that resulted in statutory or constitutional limitations on marriage for same-sex couples—and thus that the court decisions did more harm than good. After *Baehr*, Congress passed the Defense of Marriage Act (DOMA), which foreclosed federal recognition of same-sex marriages.<sup>30</sup> Hawaii voters adopted a constitutional amendment that allowed the legislature to prohibit same-sex marriage, and Alaska voters amended their state constitution to explicitly ban marriage for same-sex couples. In addition, thirty states barred same-sex couples from marriage by statute.<sup>31</sup> Additional responses followed the *Baker* decision, with two states adopting constitutional bans and eight others passing statutory restrictions on marriage for same-sex couples (and, in some cases, nonmarital same-sex relationships) between 2000 and 2003.<sup>32</sup> Then, after the *Goodridge* decision—the first actually to produce the right to marry for same-sex couples—another twenty-three states passed constitutional prohibitions by 2006,<sup>33</sup> bringing the total number of bans to forty-five (twenty-seven of which were by constitutional amendment).<sup>34</sup> In addition, the backlash account suggests that voter initiatives aimed at restricting the rights of same-sex couples encouraged social conservatives to vote in large numbers,<sup>35</sup> contributing to the reelection of President George W. Bush and to the election of conservative legislators hostile to LGBT claims.<sup>36</sup> On the basis of this record, Rosenberg concludes that the marriage equality movement “has been a disaster.”<sup>37</sup>

The backlash thesis in the marriage equality context relies on three premises that together operate to paint a picture of movement lawyer culpability for negative outcomes produced by litigation. First, the backlash thesis makes a *motivational* assumption: that LGBT rights lawyers set marriage as the movement goal and then affirmatively pursued litigation to achieve it,

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29. 798 N.E.2d 941 (Mass. 2003).

30. ROSENBERG, *supra* note 9, at 357 tbl.13.1.

31. Keck, *supra* note 7, at 153.

32. *See id.* at 172 tbl.5.

33. *Id.* at 153.

34. *See* ROSENBERG, *supra* note 9, at 362–63.

35. *See id.* at 370; Klarman, *supra* note 9, at 467–69.

36. *See* ROSENBERG, *supra* note 9, at 375, 382. For an analysis showing that such initiatives did not contribute to Bush's victory, see Stephen Ansolabehere & Charles Stewart III, *Truth in Numbers*, BOSTON REV., Feb./Mar. 2005, at 40.

37. Rosenberg, *Courting Disaster*, *supra* note 18, at 824.

along the lines of LDF's legal campaign in *Brown v. Board of Education*.<sup>38</sup> Rosenberg, for instance, ignores the different postures of same-sex marriage suits—whether those suits were brought by movement lawyers, by sympathetic nonmovement lawyers, or by countermovement lawyers. Instead, he asserts that “same-sex marriage proponents adopted *litigation* as a main strategy to win the right to marriage.”<sup>39</sup> This framing also suggests that there is only one measure of success: the establishment and enforcement of the legal right to marry. Secondary victories or indirect effects are viewed as failing to advance the marriage goal.<sup>40</sup> Indeed, it is because Rosenberg views marriage equality as the “self-stated goal” of “litigants and litigators” that he concludes the movement has been a failure.<sup>41</sup>

Next, the backlash account rests on a *tactical* premise: that LGBT rights lawyers have preferred litigation to other tactics and accordingly shifted resources to litigation and neglected political avenues. The tactical premise reinforces lawyer culpability by locating advocacy squarely within the courts, which Rosenberg criticizes, and minimizing or even ignoring political work, whether it is legislative advocacy or community education.<sup>42</sup> Indeed, Rosenberg goes so far as to suggest that movement lawyers are insincere when they contend that they engage in “multi-tiered” advocacy, arguing that although they “give lip service” to the idea of integrating litigation into a broader political effort, their actual allocation of resources toward litigation undermines that claim.<sup>43</sup> As a result, lawyers are blamed for bad litigation outcomes, but given no credit for good outcomes in other advocacy domains.

Blaming lawyers for litigation backlash requires a third—*causal*—assumption: that litigation provokes countermobilization—which would not have occurred but for judicial intervention—and that the harms from such countermobilization outweigh any good outcomes flowing from the litigation. Countermobilization, in this account, is caused by the unique negative public reaction to decisions by courts, which are countermajoritarian institutions with less democratic legitimacy. In this framework, “a legislative strategy would

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38. 347 U.S. 483 (1954).

39. ROSENBERG, *supra* note 9, at 340.

40. See Purvis, *supra* note 19, at 12–13. As Rosenberg suggests, “If the goal is improving the lives of gay men and lesbians, then there is a good deal to celebrate. On the other hand, if the goal of the litigation is marriage equality, then little has been achieved and major obstacles have been created.” ROSENBERG, *supra* note 9, at 368.

41. ROSENBERG, *supra* note 9, at 368.

42. See Rosenberg, *Saul Alinsky*, *supra* note 18, at 656 (“Lambda Legal, Gay & Lesbian Advocates & Defenders (‘GLAAD’) [sic], and the Human Rights Campaign (‘HRC’) . . . are elite-based groups that have approached same-sex marriage through litigation. They have rarely engaged in the kind of public protests around marriage equality that build mass organizations.”).

43. Rosenberg, *Courting Disaster*, *supra* note 18, at 818.

[be] less likely to produce backlash.”<sup>44</sup> Rosenberg views the results of marriage equality litigation through this lens, arguing that “the ‘one step forward, two steps back’ view . . . accurately describes the situation” resulting from litigation.<sup>45</sup> Although Rosenberg acknowledges that there have been significant legislative victories, such as civil unions and domestic partnerships, he views these as either irrelevant (since they are not marriage), outweighed by marriage setbacks, or unrelated to the litigation campaign.<sup>46</sup>

An emerging scholarship, drawing upon national data, has painted a different picture of the nature and impact of the marriage equality movement, challenging the central backlash premises.<sup>47</sup> First, with respect to lawyer motivation, it has emphasized the distinction between litigation initiated by movement and nonmovement lawyers. For instance, in the early 1990s, LGBT movement lawyers did not affirmatively pursue litigation to achieve the right to marry in Hawaii. Instead, they decided to participate in litigation that, while in direct contravention of movement strategy, was nonetheless moving forward.<sup>48</sup> While Rosenberg portrays *Baehr* cocounsel Evan Wolfson—then at Lambda Legal—as a naïve rights crusader who has litigated with “disastrous results,”<sup>49</sup> Wolfson joined the *Baehr* team in order to shape the legal strategy after efforts to dissuade the main lawyer from taking the case had failed.<sup>50</sup> As Dara Purvis demonstrates, in Hawaii and other states, the lawyers made the best of a bad situation.<sup>51</sup>

Second, contrary to the premise that litigation is given tactical priority, scholars have documented how movement lawyers in fact have deployed multiple techniques to advance not just marriage, but a range of relationship recognition regimes. For instance, Thomas Keck has argued that marriage

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44. ROSENBERG, *supra* note 9, at 417.

45. *Id.* at 368; see also Kenneth K. Hsu, *Why the Politics of Marriage Matter: Evaluating Legal and Strategic Approaches on Both Sides of the Debate on Same-Sex Marriage*, 20 BYU J. PUB. L. 275, 279 (2006).

46. At one point, Rosenberg argues that progress for same-sex couples in the policy domain derives not from litigation but from “a changing culture.” ROSENBERG, *supra* note 9, at 415; see also Klarman, *supra* note 9, at 462.

47. This scholarship generally relies on legal mobilization theory that emphasizes how actors involved in movements understand and interpret the events around them, and how these understandings shape the trajectory of movements. See MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 10–11 (1994) [hereinafter MCCANN, RIGHTS AT WORK]; see also Michael W. McCann, *How Does Law Matter for Social Movements?*, in HOW DOES LAW MATTER? 76, 83–84 (Bryant G. Garth & Austin Sarat eds., 1998); Michael McCann, *Causal Versus Constitutive Explanations (or, On the Difficulty of Being So Positive . . .)*, 21 LAW & SOC. INQUIRY 457 (1996).

48. See MARTIN DUPUIS, SAME-SEX MARRIAGE, LEGAL MOBILIZATION, & THE POLITICS OF RIGHTS 49–50 (2002).

49. Rosenberg, *Courting Disaster*, *supra* note 18, at 824.

50. See Purvis, *supra* note 19, at 20.

51. See *id.* at 20–21.

litigation produced the very possibility for legislatively enacted nonmarital relationship recognition. Litigation introduced the concept of civil unions and cast nonmarital regimes as a moderate, compromise position, which advocates actively pursued in state legislatures.<sup>52</sup>

Finally, this new scholarship takes issue with the causal claim that underlies the backlash thesis. Rather than link backlash exclusively to litigation and argue that political tactics would have avoided such backlash, Keck argues that legislative gains produce backlash as well. For example, he explains that citizen referenda have been “repeatedly used to repeal gay rights policies that have been enacted by elected officials” and that “the legislative expansion of partnership rights for same-sex couples has repeatedly sparked countermobilization.”<sup>53</sup> Similarly, Jane Schacter argues that “backlash against courts is best understood within the larger category of political backlash rather than as being *sui generis*.”<sup>54</sup> Advocates themselves see the movement/countermovement struggle play out across institutional domains. For instance, GLAD litigator Mary Bonauto notes that the opposition has historically used direct democracy to counter any and all LGBT advances.<sup>55</sup> Through this lens, backlash is merely a moment of mobilization in an already-existing countermovement poised to respond to any LGBT advances, in whatever branch of government they arise.<sup>56</sup>

Furthermore, scholars contend that the progress made on LGBT rights issues has been substantial and, crucially, that such progress derives in part from litigation. For example, Keck argues that litigation has played an important role in expanding the rights of LGBT people across multiple domains and that it is far from clear that a nonlitigation strategy would have been more successful.<sup>57</sup> Similarly, Purvis argues that if the goal is viewed more broadly as

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52. See Keck, *supra* note 7, at 158–59, 170–71; see also DUPUIS, *supra* note 48, at 164.

53. Keck, *supra* note 7, at 179, 180; see also Donald P. Haider-Markel, Alana Querze & Kara Lindaman, *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304 (2007).

54. See Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1158 (2010).

55. See Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 65 (2005) [hereinafter Bonauto, *Goodridge in Context*]; see also Barbara Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 41 (1997). Moreover, Bonauto points out that countermovement forces have not only responded to LGBT advances, thus leading to backlash, but they also have preemptively deprived LGBT individuals of baseline rights, a phenomenon Bonauto simply refers to as “lash.” See Memorandum From Mary Bonauto, Civil Rights Project Dir., GLAD, to Douglas NeJaime, Assoc. Professor, Loyola Law Sch., Los Angeles, at 1–2 (Mar. 5, 2010) [hereinafter Bonauto Memo].

56. See Schacter, *supra* note 54, at 1213.

57. See Keck, *supra* note 7, at 167–82. Keck shows that between May 1993—the time of the *Baehr* decision—and November 2008, much has changed: While twenty-three states criminalized consensual sodomy in 1993, none do so today; while eleven states had hate crimes laws that included sexual orientation and gender identity, thirty-two do today; and while eight states had sexual orientation

the achievement of “a legal right of gays and lesbians to receive recognition of their intimate relationships in the same way that heterosexual relationships [are] recognized,” then that goal has been “more fully realized.”<sup>58</sup>

The scholarly challenge to the backlash thesis has significantly recast the impact of litigation—and, by extension, the role of lawyers—in the marriage equality movement, undercutting Rosenberg’s assertion that the legal strategy has been “disastrous.” Nonetheless, by attempting to meet the backlash thesis on its own terms, this scholarship has by necessity largely avoided detailed analysis of specific campaigns in favor of a macro-level appraisal of national movement trends and outcomes. While this national data is crucial, it obscures the on-the-ground understandings and pragmatic choices that shape legal strategy and, ultimately, must factor into an accurate accounting of its results. A qualitative examination—incorporating the views of key actors—focused on the genesis, trajectory, and culmination of marriage equality legal campaigns is therefore a helpful supplement to our understanding of what litigation was designed to achieve, the constraints against which it was deployed, and its results. Toward this end, we turn here to examine the movement lawyers’ construction and execution of legal strategy through a detailed case study of the pivotal California campaign.

## II. CASE STUDY: THE CALIFORNIA MARRIAGE EQUALITY MOVEMENT

The California campaign has spanned more than a decade, roughly bookended by two antigay statewide initiatives: the first imposing a statutory bar to the recognition of marriage for same-sex couples and the second incorporating that bar into the California Constitution. This general trajectory is consistent with the core backlash notions of policy regression and the erection of increasingly more formidable barriers to marriage equality. Yet, as we have suggested, how we understand these initiatives in relation to legal strategy depends on the conditions under which litigation occurred and the available alternatives. This Part aims to situate the decade-long arc of California marriage equality activism in the broader legal and political context in order to better assess its impact.

The California campaign is framed by three overarching dynamics. The first is movement lawyers’ resistance to affirmative litigation and the influence

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employment nondiscrimination laws, twenty do today. *Id.* at 174–75 & tbl.6; see also Schacter, *supra* note 54, at 1220.

58. Purvis, *supra* note 19, at 34–35.

of external events and countermovement actors in ultimately drawing lawyers into court to challenge the marriage ban. In California, the legal rights campaign to establish marriage equality through judicial decree began, paradoxically, as an effort by LGBT rights advocates to pursue a legislative strategy. The second related dynamic is LGBT rights advocates' deliberate attempt to coordinate their efforts across the litigation, legislative, and organizing domains. Throughout the campaign, lawyers not only pursued multiple avenues of reform, but did so with an eye toward how advocacy in one arena would impact advocacy in another. Third, the record of policy achievements in support of same-sex relationships was substantial: from no laws recognizing same-sex couples in the late 1990s to comprehensive domestic partnership in 2005 to some legally recognized marriages by 2010. It is true that by the end of the decade, Proposition 8 and the federal challenge to it overshadowed these developments, but this occurred over the objection of movement lawyers—not because of them.

#### A. The Lessons of Litigation Past: Before California

While many trace the modern marriage equality movement to the early 1990s litigation in Hawaii, that was not the first time that same-sex couples sought the right to marry.<sup>59</sup> In the 1970s and early 1980s, lesbians and gay men in numerous states asserted the right to marry the partner of their choice. State courts in Washington, Minnesota, and Kentucky held, with little analysis, that there was no constitutional right to marry for same-sex couples.<sup>60</sup> LGBT legal organizations were not involved in these early attempts at marriage equality, which were brought by private lawyers.<sup>61</sup> Indeed, the leading LGBT litigation organizations were just sprouting up around this time. Lambda Legal, NCLR, and GLAD formed in 1973, 1977, and 1978, respectively. The fourth leading LGBT rights group, the ACLU LGBT Project, formed in 1986. Rather than litigate affirmative rights claims, like the right to marry, lawyers at these organizations undertook more defensive work in their early years, such as

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59. For a comprehensive history, see William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993); see also Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 84 (Austin Sarat & Stuart A. Scheingold eds., 2006).

60. See *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974); see also *Adams v. Howerton*, 673 F.2d 1036, 1041–42 (9th Cir. 1982) (holding that a same-sex “spouse” did not qualify as an immediate relative for federal immigration purposes); *DeSanto v. Barnsley*, No. 81-1746, 1982 WL 1406, at \*\*5–6 (Pa. Super. Ct. 1982) (holding that a same-sex couple could not have a common law marriage for divorce purposes).

61. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 48 (2008).

GLAD's effort to defend gay men arrested in a raid on the Boston Public Library.<sup>62</sup>

As lawyers became leading forces in the LGBT movement, they began to consider the strategic position and normative desirability of marriage as a movement goal. In the late 1980s, Lambda Legal's Executive Director, Tom Stoddard, and Legal Director, Paula Ettelbrick, debated the merits of the marriage question in a series of articles in an LGBT publication. Stoddard argued that the right to marry was essential to lesbian and gay citizenship and that marriage itself could remedy many of the inequities lesbian and gay families faced.<sup>63</sup> Ettelbrick, on the other hand, urged the movement to continue to serve diverse family forms rather than prioritize marriage, which historically had been steeped in gender stereotypes.<sup>64</sup> As this debate underscored, there was no consensus within the LGBT activist community on the goal of marriage.<sup>65</sup>

Moreover, after the movement's loss in *Bowers v. Hardwick*,<sup>66</sup> the 1986 U.S. Supreme Court decision upholding Georgia's antisodomy statute, it was clear that the traditional model of federal court impact litigation was not the route to vindicate LGBT rights. Lawyers could not convincingly argue that the federal Constitution provided protection to lesbians and gay men at the same time that it permitted the criminalization of the conduct that generally defined the group.<sup>67</sup> Accordingly, LGBT rights lawyers turned their attention to state courts and state law claims, eager to make gains they could shield from Supreme Court review.<sup>68</sup> Lawyers experienced some success with this state-based strategy. Indeed, of the

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62. See GLAD, GLAD is Founded in 1978 in Response to a Sting Operation at the Boston Public Library, [http://www.glad.org/30years/case\\_jan.html](http://www.glad.org/30years/case_jan.html) (last visited June 6, 2010).

63. See Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9.

64. See Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 14.

65. See Mary C. Dunlap, *The Lesbian and Gay Marriage Debate, A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY 63, 64 (1991). Compare Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 17 (1991), and William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 353 (1992), with Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535, 1536 (1993). Some advocates sought a compromise position that recognized the importance of access to marriage while also deemphasizing marriage as family policy. See Family Bill of Rights (Evan Wolfson Draft, Sept. 14, 1989), reprinted in Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 560-65 (2009) [hereinafter Polikoff, *Equality and Justice*].

66. 478 U.S. 186 (1986).

67. See, e.g., *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). But see *Romer v. Evans*, 517 U.S. 620 (1996).

68. See Steven A. Boutcher, *Making Lemonade: Turning Adverse Decisions Into Opportunities for Mobilization*, AMICI, Fall 2005, at 8, 12.

eleven states that decriminalized sodomy after *Bowers*, eight did so by judicial decree.<sup>69</sup> State courts demonstrated a willingness to interpret state constitutions to protect lesbians and gay men in a way that the federal Constitution did not, and the results of one state court decision began to bleed into the next.<sup>70</sup>

While movement lawyers were making impressive strides on a variety of fronts in state courts, they continued to resist a full-fledged marriage challenge. In the early 1990s, a group of same-sex couples in Hawaii sought representation from the ACLU and Lambda Legal, but both groups, fearful of unfavorable precedent and political backlash, declined.<sup>71</sup> The couples instead found a private attorney, Dan Foley, to represent them.<sup>72</sup> But once it was clear that the state supreme court was going to weigh in, Lambda Legal joined the effort.<sup>73</sup> To the surprise of many within the LGBT movement, the Hawaii Supreme Court held in *Baehr v. Lewin*<sup>74</sup> that the marriage restriction made a sex-based classification, which merited the most rigorous form of scrutiny under the Hawaii Constitution. On remand, the trial court found that the restriction failed this searching review.<sup>75</sup> The unlikely events in Hawaii catapulted marriage onto the national LGBT rights agenda.

After the Hawaii Supreme Court's decision, political forces reacted. Voters in Hawaii passed a constitutional amendment reserving the issue of same-sex marriage for the legislature, which had already decided that marriage should be limited to different-sex couples.<sup>76</sup> But as part of the compromise to put the constitutional amendment to voters, the legislature adopted a reciprocal beneficiary regime, allowing individuals, including lesbians and gay men, to designate another individual to whom a limited set of rights and responsibilities would run.<sup>77</sup> Hawaii's new legislation represented the first statewide relationship recognition regime for same-sex couples in the United States.<sup>78</sup>

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69. See, e.g., *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (D. Minn. May 15, 2001); see also ANDERSEN, *supra* note 20, at 100–01.

70. Compare *Gryczan v. State*, 942 P.2d 112,121 (Mont. 1997) (finding the state antisodomy law unconstitutional), with *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004) (finding unconstitutional a university's policy giving insurance benefits to different-sex, but not same-sex, couples).

71. See DUPUIS, *supra* note 48, at 49–50.

72. See *id.*

73. See *id.*

74. 852 P.2d 44 (Haw. 1993).

75. See *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). Also around this time, the District of Columbia Court of Appeals rejected a same-sex couple's marriage claim. See *Dean v. District of Columbia*, 653 A.2d at 307 (D.C. Ct. App. 1995).

76. See HAW. CONST. art I, § 23.

77. See HAW. REV. STAT. ANN. § 572C (LexisNexis 2005).

78. See Bettina Boxall, *A New Era Set to Begin in Benefits for Gay Couples*, L.A. TIMES, July 7, 1997, at A3; Susan Essoyan, *Hawaii Approves Benefits Package for Gay Couples*, L.A. TIMES, Apr.

## B. Litigation Avoidance: The Legislative Pursuit of Domestic Partnership

### 1. After Hawaii: The California No-Litigation Strategy

The California campaign, born in the shadow of *Baehr*, deliberately sought to avoid its outcome. What would ultimately become one of the most litigation-focused marriage equality campaigns in recent history—in which courts were involved in nearly every phase of the movement—began as an effort to avoid courts at all costs.

The statutory framework for marriage in California has long been a source of controversy. In 1971, a California code revision deleting gender-specific language in statutory minimum-age laws led to the reformulation of the marriage laws to read that “[a]ny unmarried person of the age of 18 years or upwards, and not otherwise disqualified, is capable of consenting to and consummating marriage.”<sup>79</sup> Although not intended to invite same-sex couples to marry, some same-sex couples in the 1970s took advantage of the revision to seek marriage licenses.<sup>80</sup> To prevent this from occurring, the California legislature, at the request of the County Clerks’ Association,<sup>81</sup> again amended the marriage definition in 1977 to clarify that “[m]arriage is a personal relation arising out of a civil contract between a man and a woman.”<sup>82</sup> This change demonstrated an intent (stated in the legislative findings) to deny the right to marry to same-sex couples.<sup>83</sup>

Several years later, the announcement of *Baehr* and the subsequent political reaction in Hawaii had two major impacts, both of which drove California advocacy into the legislative arena. First, it mobilized opponents of marriage for same-sex couples to attempt to legislate stricter bans in California. Second, it persuaded LGBT rights lawyers to stay out of court for fear of provoking a similar constitutional amendment in California.

The first impact of *Baehr*—conservative countermobilization against same-sex marriage—was quickly evident. In the immediate aftermath of the Hawaii decision, LGBT rights lawyers found themselves acting defensively against

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30, 1997, at A3. The District of Columbia created a domestic partnership registry in 1992. See POLIKOFF, *supra* note 61, at 51.

79. *In re Marriage Cases*, 183 P.3d 384, 408 (Cal. 2008).

80. *Id.* at 409.

81. *Id.*

82. CAL. CIV. CODE § 4100 (West 1977) (repealed and continued without substantive change at CAL. FAM. CODE § 300 (West 2010). Democratic Governor Jerry Brown signed this amendment into law.

83. Telephone Interview With Jennifer Pizer, Dir., Marriage Project, Lambda Legal (Dec. 16, 2009); Geoff Kors, Executive Dir., Equality California, Remarks at the Seminar on Problem Solving in the Public Interest, UCLA School of Law (Sept. 3, 2009) [hereinafter Kors Remarks].

opponents to thwart the passage of a marriage ban. *Baehr* raised the specter that Hawaii would be the first state in the country to legalize marriage for same-sex couples.<sup>84</sup> That possibility, in turn, caused opponents to worry about its potential to undermine state law bans by requiring the recognition of validly performed Hawaii marriages under the U.S. Constitution's Full Faith and Credit Clause as well as state principles of marriage reciprocity.<sup>85</sup> In 1996, Congress passed, and President Bill Clinton signed, the federal DOMA, which both defined marriage (under federal law) as between a man and a woman, and asserted that "[n]o state . . . needs to treat a relationship between persons of the same sex as a marriage, even if the relationship is considered a marriage in another state."<sup>86</sup>

Californian opponents of marriage for same-sex couples began to develop their own state-law "mini-DOMA" to bar the recognition of out-of-state marriages. After the *Baehr* remand,<sup>87</sup> California Assembly Member William "Pete" Knight, a Republican from Palmdale and a fierce same-sex marriage opponent, introduced Assembly Bill (AB) 1982, designed to prevent California from recognizing the out-of-state marriages of same-sex couples.<sup>88</sup> Although AB 1982 passed the assembly, Bay Area Democratic Senator Bill Lockyer killed the legislation by introducing a "poison pill" amendment.<sup>89</sup> While not changing the prohibition on marriage, the amendment would have established a registry for domestic partners, making them eligible for a limited range of benefits, including hospital visitation rights, a preference for domestic partners in conservator appointments, and authorization for state and local employers to include domestic partners under family health plans.<sup>90</sup> Rather than countenance any legal recognition of same-sex unions, Republicans turned against AB 1982, which barely passed the state senate in August 1996 after Lieutenant

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84. See ANDERSEN, *supra* note 20, at 178.

85. See Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257, 261 (2006).

86. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006)).

87. *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

88. Ed Bond, *Irreconcilable Differences on Gay Marriage*, L.A. TIMES, Feb. 20, 1996, at B3. Some also suspected that the bill was introduced to mobilize socially conservative voters in a presidential election year. See Carl Ingram, *Senate Panel OKs Bill Targeting Gay Marriages*, L.A. TIMES, Aug. 13, 1996, at A3.

89. Carl Ingram, *Bill Opposing Gay Marriages Weakened*, L.A. TIMES, July 11, 1996, at A3.

90. See ASSEM. B. 1982, 1995-96 Leg., Reg. Sess. (Cal. 1995) (amended in Senate, July 11, 1996); Ingram, *supra* note 89.

Governor Gray Davis, in his role as president of the senate, made a special appearance to break a 20–20 tie.<sup>91</sup> Knight subsequently withdrew the bill.<sup>92</sup>

While AB 1982 underscored the importance of the legislative arena as a site of struggle over marriage, it also augured the increasing appeal of domestic partnership. The second impact of the Hawaii case was that it prompted LGBT rights lawyers in California to adopt an affirmative legislative campaign in favor of a comprehensive domestic partnership law. Particularly as it became clear that the Hawaii case was moving toward reversal via state initiative, advocates concluded that litigation was too risky in California and therefore shifted their strategy toward the pursuit of “marriage in all but name” through the state legislature.<sup>93</sup>

The tactical decision to deemphasize marriage and avoid courts was devised by a group of leading LGBT rights lawyers in California.<sup>94</sup> Lawyers affiliated with the key LGBT legal organizations—Lambda Legal, NCLR, and the ACLU—combined elite academic credentials with deep experience in the LGBT movement. At Lambda Legal, the main lawyers were Jon Davidson and Jennifer Pizer.<sup>95</sup> Davidson, a Yale Law School graduate, had been a partner at the Los Angeles law firm of Irell & Manella until 1988, when he left to become the head of the ACLU of Southern California (ACLU-SC) Lesbian and Gay Rights Project; he joined Lambda Legal as Supervising Attorney in 1995 and subsequently became its Legal Director.<sup>96</sup> Pizer was a 1987 graduate of the New York University School of Law, where she received a public interest fellowship. She was Legal Director at the National Abortion Rights Action League in Washington, D.C., before becoming a litigation associate in a small plaintiffs’ firm in San Francisco. Pizer began volunteering at Lambda Legal and eventually became a board member. She joined Lambda Legal’s staff in 1996 and became its National Marriage Project Director in 2008.<sup>97</sup> At NCLR, Kate Kendell was appointed Legal Director in 1994 (after several years at the ACLU of Utah) and became Executive Director in 1996. She was joined by Shannon

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91. See Carl Ingram, *Davis Breaks Tie, Backs Domestic Partner Registry*, L.A. TIMES, Aug. 20, 1996, at B8.

92. Carl Ingram, *Senate OKs Benefits for Same-Sex Partners*, L.A. TIMES, May 26, 1999, at A3.

93. See generally William C. Duncan, *Avoidance Strategy: Same-Sex Marriage Litigation and the Federal Courts*, 29 CAMPBELL L. REV. 29, 29 (2006).

94. 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) [hereinafter Pizer Remarks].

95. Lambda Legal attorney Myron Quon, who joined the organization in 1996, also worked on marriage equality issues during this period. Email From Myron Quon, Executive Dir., Asian Pac. Am. Legal Res. Ctr., to Professor Scott L. Cummings, UCLA Sch. of Law (Feb. 13, 2010).

96. Taylor Flynn, a Columbia Law School graduate, succeeded Jon Davidson at the ACLU-SC and stayed on as a staff attorney until 1999.

97. Telephone Interview With Pizer, *supra* note 83.

Minter, who came in 1993 from Cornell Law School as a National Association for Public Interest Law Fellow, founding a project to provide legal services to LGBT youth.<sup>98</sup> In 1995, Matt Coles became the Director of the ACLU's national Lesbian and Gay Rights Project, having moved from the ACLU of Northern California (ACLU-NC), where he had led campaigns to pass a statewide employment antidiscrimination law, as well as domestic partner ordinances in Berkeley and San Francisco.<sup>99</sup> These lawyers worked in a national coalition with their East Coast counterparts, particularly GLAD's Bonauto in Boston, and Lambda Legal's Wolfson in New York.<sup>100</sup>

One lesson that these lawyers took away from the Hawaii litigation was that they had to develop a proactive strategy—or risk continuously being placed in defensive postures by private lawyers who initiated litigation against their judgment. From a movement perspective, Hawaii was a case of the “tail wagging the dog,” unleashing “forces [lawyers] weren't ready to deal with.”<sup>101</sup> Additionally, the lawyers read *Baehr* to mean not that litigation was always a strategic negative, but rather that it should only be used in states where it could be adequately defended.

With the “crushing loss” of *Bowers* in the U.S. Supreme Court still fresh, advocates reached a consensus that the marriage campaign had to proceed state-by-state.<sup>102</sup> After Congress passed DOMA, movement lawyers had invitations to litigate marriage in other states but had declined for strategic reasons.<sup>103</sup> They only wanted to litigate in a state that already had strong LGBT protections, a sympathetic public and judiciary, and a constitution that was difficult to amend.<sup>104</sup> Toward this end, Wolfson and Professor Barbara Cox at California Western School of Law coordinated a formal fifty-state marriage analysis to determine the states in which marriage could be won and preserved against attack.<sup>105</sup> GLAD supervised a similar analysis for the New England states, focusing more on relationship recognition than marriage per se.<sup>106</sup> Lawyer-activists Beth Robinson and Susan Murray took the lead in Vermont, where they had been laying the groundwork for a legal challenge for several years.

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98. Notable Equal Justice Works Alumni, at <http://www.equaljusticeworks.org/communities/alumni/notable> (last visited June 6, 2010).

99. Telephone Interview With Matt Coles, Dir., ACLU LGBT Rights Project (Feb. 17, 2010).

100. See Polikoff, *Equality and Justice*, *supra* note 65, at 535 (“In the mid-1980s, gay rights litigators from around the country began ‘roundtable’ meetings. At these gatherings, the movement’s lawyers shared information on test cases, coordinated legal strategies, and established priorities.”).

101. Pizer Remarks, *supra* note 94.

102. Telephone Interview With Pizer, *supra* note 83.

103. See DUPUIS, *supra* note 48, at 62.

104. Pizer Remarks, *supra* note 94.

105. Telephone Interview With Jon Davidson, Legal Dir., Lambda Legal (Feb. 17, 2010).

106. See Bonauto Memo, *supra* note 55, at 3.

On the basis of their analysis, and with the support of other advocates, GLAD chose to litigate a test case in Vermont.<sup>107</sup>

In sharp contrast, it was clear from the outset that “California would not be the place” where marriage litigation was launched.<sup>108</sup> California had some factors in its favor: For instance, its supreme court had held as a constitutional matter that the state could not discriminate in employment on the basis of sexual orientation;<sup>109</sup> the state’s labor and public accommodations laws prohibited sexual orientation discrimination;<sup>110</sup> its hate crimes law applied to crimes committed because of a person’s sexual orientation;<sup>111</sup> and there was some favorable (although mixed) case law in support of the parental rights of lesbians and gay men.<sup>112</sup>

However, there were two issues that weighed heavily against California litigation. One was the specter of judicial elections. California Supreme Court justices are appointed by the governor but subject to reconfirmation by the electorate at the next general election and every twelve years afterwards.<sup>113</sup> In 1986, California voters rejected Chief Justice Rose Bird and her allies Cruz Reynoso and Joseph Grodin for their opposition to the death penalty.<sup>114</sup> Within the marriage equality movement, there was concern that the justices—all but one of whom were appointed by a Republican governor—would be reluctant to get too far in front of public opinion on the marriage issue for fear of meeting a similar fate.<sup>115</sup>

By far the most important factor militating against litigation, however, was the ease with which California’s Constitution could be amended to erase any gain won through the court. The key question was: “If we were to win in the supreme court, what would we need to do to hold on to it?”<sup>116</sup> In California, the rules for amending the state constitution through popular initiative are relatively easy, requiring a small percentage of voter signatures to qualify for

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107. See *id.*

108. Telephone Interview With Pizer, *supra* note 83; see also Maura Dolan & Lee Romney, *S.F. Wedding Planners Are Pursuing a Legal Strategy*, L.A. TIMES, Feb. 22, 2004, at A1.

109. See *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458 (1979).

110. See CAL. LAB. CODE § 1102.1 (repealed 1999); *Beaty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593 (Ct. App. 1992) (interpreting CAL. CIV. CODE §§ 51, 52 (2010)).

111. See CAL. PENAL CODE § 422.7 (2003) (amended 2004).

112. See, e.g., *In re Marriage of Birdsall*, 243 Cal. Rptr. 287 (Ct. App. 1988) (holding that a gay father was entitled to visitation rights); *In re Brian R.*, 3 Cal. Rptr. 2d 768 (Ct. App. 1991) (holding that a lesbian couple could not be disqualified from adopting a foster child).

113. See CAL. CONST. art. VI, § 16(a)-(d).

114. See Robert Lindsey, *Deukmejian and Cranston Win as 3 Judges Are Ousted*, N.Y. TIMES, Nov. 6, 1986, at A30.

115. *Id.*

116. Pizer Remarks, *supra* note 94.

the ballot and a majority vote to pass.<sup>117</sup> Because of this, lawyers determined at the outset to avoid provoking an amendment. They knew the polling data and calculated that, while marriage would very likely ultimately pass in California, that time was still in the future. This decision angered some LGBT activists, who argued that members of their community were “hurting because of an unjust law” and wanted to pursue the Hawaii path.<sup>118</sup> At the moment that advocates were fighting AB 1982 in the legislature, they were also “fending off those who wanted to litigate in court.”<sup>119</sup> However, as this debate played out against the backdrop of *Baehr*’s initiative-driven reversal, the lawyers were able to persuasively show the risks of litigation, and their position prevailed.

## 2. Legislative Incrementalism and Countermobilization: From Domestic Partner Registry to Proposition 22

The legislative strategy eventually coalesced around the goal of establishing a comprehensive domestic partnership regime, which would confer all the rights and benefits of marriage on same-sex couples without its imprimatur. Yet this “marriage in all but name” strategy was by no means settled in the late 1990s. Rather, its evolution was shaped by the complex interaction of local efforts to expand rights for same-sex couples, increasingly strident opposition to same-sex marriage, and ongoing marriage litigation in states like Hawaii and Vermont.

The movement for a statewide domestic partner law built on prior local and statewide legislative initiatives that had emerged in the 1980s. For many, the push for domestic partnership represented an effort to challenge the dominance of marriage by creating a range of relationship formats, with different rights and benefits attaching to each. Toward this end, domestic partnership was often available to same-sex and different-sex couples.<sup>120</sup> Domestic partnership also responded specifically to the AIDS crisis affecting the gay community.<sup>121</sup> “It was such an enormous problem with people dying . . . They were legal strangers [who] couldn’t visit in the hospital. The other partner’s family would come in and take the kids—take everything.”<sup>122</sup> Berkeley was the first city to

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117. To qualify for the ballot, a petition needs the signatures of electors equal to 8 percent of those who voted in the governor’s race in the last election. CAL. CONST. art. II, § 8.

118. Pizer Remarks, *supra* note 94.

119. *Id.*

120. See POLIKOFF, *supra* note 61, at 49; see also Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1188–95 (1992).

121. Kors Remarks, *supra* note 83.

122. *Id.*

enact a domestic partner registry in 1984, and by 1999, twelve California cities had adopted some type of domestic partner legislation.<sup>123</sup>

The passage of the 1996 San Francisco Equal Benefits Ordinance represented a significant new step in the evolution of domestic partnership. The ordinance, authored by Supervisor Leslie Katz and signed in November 1996 by Mayor Willie Brown, required all businesses with a city contract to provide health benefits to their workers' unmarried partners.<sup>124</sup> The motive force behind the bill was Geoff Kors, a Stanford Law School graduate who had worked at the ACLU in Chicago and was at the time a partner in the San Francisco civil rights firm Wotman, Kors & Clouiter, as well as Katz's chief of staff.<sup>125</sup> Kors conceived of the bill as a way to push the Salvation Army, which had received city contracts to provide meals to AIDS victims despite antigay policies, to adopt a more progressive approach toward the gay community.<sup>126</sup> The ordinance had a broad impact, covering large businesses like United Airlines at the city-owned San Francisco Airport, and thus "changed the landscape of what domestic partner benefits were," showing that they could be used to legislate greater equality for same-sex couples even within the private sector.<sup>127</sup>

These local efforts, in turn, fed into the statewide pursuit of domestic partnership, which was accelerated after the 1998 election of Governor Gray Davis, a Democrat who campaigned in support of gay rights.<sup>128</sup> In 1998, there were still no statewide laws recognizing a same-sex couple as a family.<sup>129</sup> A domestic partner registry bill had been passed by the state legislature in 1994, but was vetoed by Republican Governor Pete Wilson; similar legislation was introduced in 1995 and then again in 1997, but neither bill made it out of the assembly.<sup>130</sup>

The first successful step toward a state domestic partnership law came in 1999, when Los Angeles Democrat Kevin Murray, who had just moved from the assembly to the state senate, reintroduced the domestic partner bill that

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123. Ingram, *supra* note 92.

124. *Mayor Signs Domestic Partner Law for Firms Dealing With S.F.*, L.A. TIMES, Nov. 9, 1996, at A20.

125. Telephone Interview With Shannon Minter, Legal Dir., Nat'l Ctr. for Lesbian Rights (Dec. 17, 2009). The ACLU's Matt Coles also worked on the bill with Kors. Telephone Interview With Coles, *supra* note 99.

126. Kors Remarks, *supra* note 83.

127. *Id.*

128. See Governor Gray Davis, Accomplishments: Opportunity for All Californians: Gay [sic] and Lesbians, <http://www.gray-davis.com/Page.aspx?PageID=27> (last visited June 6, 2010).

129. David Codell, Principal, The Law Office of David Codell, Remarks at the Seminar on Problem Solving in the Public Interest, UCLA School of Law (Sept. 17, 2009) [hereinafter Codell Remarks].

130. Ingram, *supra* note 92.

had been defeated in 1997.<sup>131</sup> Carol Migden, a Democrat from San Francisco, introduced its assembly counterpart, AB 26, which began to move first and thus became the focal point of advocacy. The registry bill was the first piece of legislation sponsored by a newly formed group, the California Alliance for Pride and Equality (CAPE), which was started in 1998 to advance LGBT-friendly legislation.<sup>132</sup>

The debate around AB 26 reflected two different visions of what domestic partnership should be. One viewed domestic partnership as a way to move the legal status of same-sex couples incrementally closer to marriage, eventually setting the stage for marriage equality. The second viewed domestic partnership as a true alternative to marriage: “a kind of ‘family diversity model’ that would create a system of legal protections that made sense for people who were not necessarily a romantic intimate couple.”<sup>133</sup> As AB 26 made its way through the assembly, these two visions vied with one another for primacy, reflecting ambivalence within the LGBT rights community about the ultimate purpose of domestic partner laws. For Lambda Legal’s Davidson and the ACLU’s Coles, the goal was “to have a world in which marriage would be open to everyone, and something that provided a less highly defined but still significant safety net—like domestic partnership—would also be available to everyone.”<sup>134</sup> “Different people had different ideas.”<sup>135</sup> There was “not an agreement that [advocates would] keep adding [to domestic partnership] until you got marriage [as opposed to] adding what made sense until you had another status available to everybody.”<sup>136</sup>

The tension between these competing visions was reflected in negotiations leading up to the bill’s enactment. Davidson and Coles were involved in the initial drafting with the goal of getting “the concept accepted under California law” by “start[ing] small, including things that only people seen as mean spirited [would] deny, like hospital visitation.”<sup>137</sup> They reviewed the Probate Code and sought to modify existing statutes by focusing on “places where people [were] really getting hurt” and thinking about what changes would be “the hardest

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131. See Mark Gladstone, *Davis Likely to Sign Domestic Partners Bill*, L.A. TIMES, Sept. 3, 1999, at A3.

132. CAPE replaced Life Lobby, which had served as a statewide umbrella for the many organizations doing work around LGBT advocacy and HIV/AIDS in the 1990s. Telephone Interview With Pizer, *supra* note 83.

133. Telephone Interview With Davidson, *supra* note 105.

134. Telephone Interview With Coles, *supra* note 99.

135. *Id.*

136. Telephone Interview With Davidson, *supra* note 105.

137. *Id.*

to argue for or argue against.”<sup>138</sup> Because they “were working at the time on AIDS, [they] were hyper-attuned to intestate succession issues and guardianship. Those are hard things to argue against.”<sup>139</sup> In contrast, they held back on community property because “it was a tougher sell—more marriage-like,” and they “weren’t sure the gay community was ready for it.”<sup>140</sup>

AB 26 supporters initially attempted to craft the bill as one that would apply to both same- and different-sex couples for whom marriage was either unavailable or did not meet their immediate needs, preventing it from being ignored “as a gay people’s thing.”<sup>141</sup> But this effort to widen the status to include all different-sex couples drew a strong reaction from Governor Davis, who did not want to be seen as weakening marriage by creating a competing scheme that everyone could access. To allay Davis’s concerns, Migden modified her bill to only cover different-sex senior couples, contending that there was no procreation argument in favor of their marriages and that, in some cases, requiring senior couples to marry would deprive them of important social security and pension benefits from prior marriages.<sup>142</sup> The specific addition of seniors provided a new political constituency to support the bill and “gave politicians cover” by linking the bill to an uncontroversial population.<sup>143</sup> The change persuaded Governor Davis to sign AB 26 on October 2, 1999, thereby establishing a registry that allowed domestic partners to have hospital visitation rights and provided health benefits for partners of government employees covered by the state retirement system.<sup>144</sup> While it provided relatively meager benefits, the registry bill was so controversial that legislators were forced to add a provision declaring that “[r]egistration as a domestic partner under this division shall not be evidence of, or establish, any rights existing under law other than those expressly provided to domestic partners” in the bill.<sup>145</sup>

Although significant—AB 26 was the first time a state had enacted a domestic partnership bill in the absence of a judicial opinion requiring same-sex partner recognition—the bill was incremental and some advocates were skeptical of its impact. NCLR’s Minter, though “supportive, thought it

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138. Telephone Interview With Coles, *supra* note 99.

139. *Id.*

140. *Id.*

141. *Id.*

142. Telephone Interview With Davidson, *supra* note 105; see also Ingram, *supra* note 92.

143. Interview With Matt Coles, Dir., ACLU LGBT Project, at UCLA Sch. of Law (Feb. 19, 2010).

144. Assem. B. 26, 1999–2000 Cal. Legis. Serv. 3372–3378 (West); see also Amy Pyle, *State Begins Accepting Gays’ Domestic Partner Sign-Ups*, L.A. TIMES, Jan. 4, 2000, at A1.

145. Assem. B. 26 § 299.5, 1999–2000 Cal. Legis. Serv. 3375 (West).

didn't get us anything. We got hospital visitation and that was it. 'Is that all?' I asked."<sup>146</sup>

Opponents of marriage for same-sex couples took a much different view. To them, the pursuit of domestic partner legislation signaled a troubling advance toward marriage. Even before AB 26 was introduced, the "Protection of Marriage Committee," formed after the demise of AB 1982 by Pete Knight (who was elected state senator in 1996), succeeded in qualifying Proposition 22 for the March 7, 2000 ballot.<sup>147</sup> The passage of AB 26 gave Proposition 22 proponents a new sense of urgency. Proposition 22 sought to accomplish through initiative what Knight failed to do through legislation: amend the Family Code to prohibit California from recognizing any marriage other than between a man and a woman.<sup>148</sup> By the time Proposition 22 was introduced, Hawaii voters had decided to amend their constitution to authorize the legislature to prohibit same-sex marriage, and thus no state had legally married same-sex couples for California to recognize.<sup>149</sup> Nonetheless, the Yes on 22 campaign, supported by Christian Right groups like the Campaign for California Families, pressed on with Proposition 22, arguing that the ongoing efforts to establish marriage for same-sex couples in states like Vermont required immediate action.<sup>150</sup>

The Proposition 22 campaign was expensive and divisive. The Yes on 22 side raised over \$8 million, much of it coming early in the campaign, from the Catholic and Mormon Churches, along with thousands of individual donors, many from out of state.<sup>151</sup> The No on 22 campaign had a slower fundraising start, with only \$2 million by January 2000 (compared to nearly \$5 million on the Yes side);<sup>152</sup> as a result, the No on 22 campaign did not air television advertisements until mid-February.<sup>153</sup> While the Yes on 22 forces sought to display the proposition as threatening "traditional" marriage and targeted specific ethnic groups, particularly Latinos, the No side initially aired ads suggesting that the proposition would increase discrimination against gays and lesbians<sup>154</sup>—sticking with its mantra of "It's divisive. It's intrusive. It's

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146. Telephone Interview With Minter, *supra* note 125.

147. See Carl Ingram, *Measure to Ban Gay Marriages OK'd for Ballot*, L.A. TIMES, Nov. 18, 1998, at A3; Jenifer Warren, *Marriage Initiative Authors Challenge Its Renaming*, L.A. TIMES, Dec. 7, 1999, at A3.

148. Ingram, *supra* note 147.

149. *Id.*

150. *Id.*

151. See Jenifer Warren, *TV Ad for Anti-Gay Marriage Initiative Targets Latino Voters*, L.A. TIMES, Jan. 21, 2000, at A3.

152. E.J. Graff, *Wedding March*, AM. PROSPECT, Nov. 30, 2002, available at [http://www.prospect.org/cs/articles?article=wedding\\_march](http://www.prospect.org/cs/articles?article=wedding_march).

153. Jenifer Warren, *Marriage Measure's Foes Launch TV Ads*, L.A. TIMES, Feb. 17, 2000, at A3.

154. *Id.*

unfair.”<sup>155</sup> Proposition 22 opponents also argued that precluding marriage for same-sex couples would have negative impacts on adults and children in same-sex-couple-headed families; these individuals would be deprived of legal rights and forced to endure legal uncertainty.<sup>156</sup> The No campaign attempted to counteract the organized Christian Right movement’s support of Proposition 22 by coordinating a multi-faith religious coalition opposed to the initiative.<sup>157</sup> And No forces portrayed Proposition 22 as Senator Knight’s personal vendetta against his gay son.<sup>158</sup> Yet the No campaign faltered in its messaging and failed to do significant targeted outreach to communities of color.<sup>159</sup> With money streaming in during the month before the election (the No on 22 campaign received over half of its total funds during this time), the No forces stepped up their attacks, airing a provocative ad showing “a single image: anti-gay protesters holding signs that read ‘God Hates Fags’ and ‘Faggots Burn in Hell.’”<sup>160</sup> But it was too late. Proposition 22 passed by an overwhelming 61 percent to 39 percent margin.<sup>161</sup>

The success of Proposition 22 prompted immediate disagreement about next steps. For some, it was a repudiation of the incrementalist strategy formulated by LGBT rights lawyers. The *Los Angeles Times* ran a story quoting West Hollywood City Councilman Steve Martin, who rejected the counsel of gays “in self-appointed leadership positions” arguing that “we choose our battles carefully and steer away from the issue of marriage because it’s too divisive”; instead, he stated that “[w]e’re going to lay siege and storm the castle.”<sup>162</sup> By outlawing marriage, Proposition 22 had the effect of increasing the importance of marriage as a movement goal. Yet, at least in the short term, Proposition 22 reinforced the movement lawyers’ decision to downplay marriage and avoid affirmative litigation in favor of a legislative strategy to expand domestic partnership.<sup>163</sup> The lawyers chose not to challenge the constitutionality of

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155. Toni Broaddus, *Vote No If You Believe in Marriage: Lessons From the No on Knight/No on Proposition 22 Campaign*, 15 BERKELEY WOMEN’S L.J. 1, 5 (2000).

156. See MICHAEL S. WALD, THE STANFORD INST. FOR RESEARCH ON WOMEN & GENDER & THE STANFORD CTR. ON ADOLESCENCE, *SAME-SEX COUPLES: MARRIAGE, FAMILIES, AND CHILDREN: AN ANALYSIS OF PROPOSITION 22, THE KNIGHT INITIATIVE* 19 (1999).

157. See Margaret Ramirez, *Coalition Rallying Against Initiative to Ban Gay Marriages*, L.A. TIMES, Jan. 22, 2000, at B2.

158. See Jenifer Warren, *Initiative Foes Turn to Author’s Son*, L.A. TIMES, Feb. 24, 2000, at A3.

159. See Broaddus, *supra* note 155, at 10.

160. *Id.* at 7.

161. Jenifer Warren, *Gays Differ Sharply Over Their Next Steps*, L.A. TIMES, Mar. 9, 2000, at A3.

162. *Id.*

163. See Jenifer Warren, *Gays Gaining Acceptance in State, Poll Finds*, L.A. TIMES, June 14, 2000, at A3.

Proposition 22 at the time.<sup>164</sup> This decision was partly based on a calculation of how likely it was that such a lawsuit would succeed in court. It was also informed by the lawyers' analysis of precisely what Proposition 22 had done. Although it was true that Proposition 22 had barred the recognition of out-of-state marriages by same-sex couples, at that point no states outside of California had created such a marital status—and thus the bar, while anathema to the movement lawyers' goals, was (for the moment) an empty letter. In addition, from the movement lawyers' perspective, there was ambiguity about whether Proposition 22 prohibited the state of California from itself deciding to create the legal right to marry for same-sex couples.<sup>165</sup> Movement lawyers pointed to ballot materials circulated with Proposition 22 stating that it would "not take away anyone's rights to inheritance or hospital visitation" and, instead, was only designed to close "legal loopholes" that "could force California to recognize 'same-sex marriages' in other states."<sup>166</sup> It was on this interpretation of Proposition 22—proscribing California's power to recognize out-of-state marriages, but not affecting its power to enact its own relationship recognition laws—that advocates decided to proceed with their legislative strategy.<sup>167</sup>

### 3. Stepping Stones: Planning for Marriage by Winning Domestic Partnership

One lesson of the Proposition 22 campaign was the need for a stronger political organization to advance legislation and run campaigns. In addition to coordinating among legal, policy, and grassroots groups, CAPE was a major fundraiser for the No on 22 campaign. However, Proposition 22 tested the fledgling coalition, which was criticized for lacking strong central leadership and the ability to effectively coordinate statewide efforts.<sup>168</sup> For LGBT activists, there was a sense that the No on 22 campaign had "lost both the battle and the war, by not moving the education forward . . ."<sup>169</sup> After the initiative passed, CAPE's leader stepped down and was replaced by Geoff Kors as Interim Director; Kors formally became the Executive Director the next year as the organization, which would change its name to Equality California, became

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164. Telephone Interview With Coles, *supra* note 99.

165. Codell Remarks, *supra* note 129.

166. OFFICE OF THE SEC'Y OF STATE OF CAL., VOTER INFORMATION GUIDE FOR MARCH 7, 2000 ELECTION 52–53 (2000) (from Argument in Favor of Proposition 22 and Rebuttal to Argument Against Proposition 22).

167. Codell Remarks, *supra* note 129.

168. See DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE 96 (2006).

169. *Id.* (quoting Equality California's Molly McKay, Associate Executive Director of Equality California).

the public education and legislative advocacy arm of the marriage equality movement. Its long-term focus was on “doing the positive educational work about [the] lives and relationships [of same-sex couples] that’s eventually going to make [marriage] winnable in California.”<sup>170</sup> In the near term, the organization’s goal was to become a major force within state politics. Equality California did this by spearheading the drive for comprehensive domestic partnership benefits—not simply as a goal in its own right but as a stepping stone for moving incrementally closer to marriage. AB 26, the domestic partner registry that took effect in January 2000, was the vehicle for this strategy—turning “into a train that very rapidly moved in California.”<sup>171</sup>

Yet not everyone was on the train at the outset. The decision to use domestic partnership as a stepping stone to marriage was in tension with the position, held by Davidson and Coles, that domestic partnership should be available as an independent status in its own right, separate and apart from marriage. Coles, in particular, believed that most people in the LGBT community “wanted some rights and ways to structure their relationships legally but didn’t really care how that happened.”<sup>172</sup> Those who “wanted marriage and didn’t want anything else,” however, were a motivated group that consistently advocated for marriage as the definitive legal status.<sup>173</sup> In the wake of Proposition 22, the model of using domestic partnership as a means of winning marriage increasingly gained sway.<sup>174</sup> Although many advocates did not abandon domestic partnership as an independent status and, indeed, were still committed to a diversity of legal relationship forms, the focus on domestic partnership as an end in itself receded in the fight for marriage equality.

Beginning in 2000, advocates sponsored a series of bills that would culminate in the achievement of nearly equal rights and benefits. After adding the right to secure senior housing in 2000, advocates succeeded in passing AB 25 in 2001, which among other things included the right of domestic partners to adopt a partner’s child using the stepparent adoption process, to make medical decisions for a partner, and to use sick leave to care for a partner or a partner’s child.<sup>175</sup> In addition, AB 25 authorized the right to sue for the wrongful death of a partner.<sup>176</sup> This last right was codified after the high-profile legal case of Sharon Smith (brought by NCLR’s Minter), whose partner was mauled to death

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170. *Id.*

171. Kors Remarks, *supra* note 83.

172. Telephone Interview With Coles, *supra* note 99.

173. *Id.*

174. *Id.*

175. Jenifer Warren, *Bill Expanding Domestic Partners’ Rights Signed*, L.A. TIMES, Oct. 15, 2001, at B6.

176. See Julie Tamaki, *Domestic Partner Bill Clears Assembly*, L.A. TIMES, June 7, 2001, at B1.

by their neighbors' dogs in the hallway of their apartment building. The case generated outrage that Smith had no clear rights under California's wrongful death statute.<sup>177</sup>

At the time the legislation was passed, Governor Davis indicated that he would veto giving domestic partners the right of inheritance, prompting supporters to drop that provision from the bill.<sup>178</sup> However, less than one month after AB 25 was signed into law, the September 11 attacks occurred. One of the victims, a flight attendant on the first American Airlines flight to crash into the World Trade Center, was the registered domestic partner of a California resident, Keith Bradkowski. 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>179</sup>

By 2003, the timing appeared auspicious for comprehensive domestic partnership legislation. In 1999, the Vermont Supreme Court held in *Baker v. State*<sup>180</sup> that under the Vermont Constitution, same-sex couples were entitled to all of the rights and benefits of marriage, even if the state was not required to open up the actual institution of marriage to these couples.<sup>181</sup> In response to the court's decision, Vermont had successfully instituted a civil union regime,<sup>182</sup> giving legislators some confidence that California could safely follow suit. A civil union bill (drafted with the assistance of Lambda Legal's Davidson and Pizer) was introduced by Assembly Member Paul Koretz, a Democrat from West Hollywood, in 2001, but failed to gain sufficient support to move forward.<sup>183</sup>

The concept of a comprehensive relationship recognition bill, however, was far from dead. Instead, the framework and findings underlying the civil union legislation were revised and repackaged into domestic partnership. The

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177. In Sharon Smith's civil suit, the superior court in San Francisco ruled that a same-sex partner had standing to sue for wrongful death. Shannon Minter, *Expanding Wrongful Death Status and Other Death Benefits to Same-Sex Partners*, HUM. RTS., July 1, 2003, available at <http://www.abanet.org/irr/hr/summer03/expanding.html>; see also *Solomon v. District of Columbia*, 21 Fam. L. Rep. (BNA) 1316 (D.C. Super. Ct. 1995) (allowing a deceased woman's same-sex partner to prove that she was next of kin in a wrongful death action).

178. Kors Remarks, *supra* note 83.

179. 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-attending-signing.html](http://www.lambdalegal.org/news/pr/ca_20020910_gay-partner-of-911-victim-lambda-lawyer-attending-signing.html).

180. 744 A.2d 864 (Vt. 1999).

181. *Id.*

182. See VT. STAT. ANN. tit. 15, § 23 (1999).

183. See Miguel Bustillo, *Bill Would Allow Civil Unions for Gays, Lesbians*, L.A. TIMES, Mar. 2, 2001, at A3.

reformulated bill needed a legislative champion, which turned out to be prominent Los Angeles progressive Jackie Goldberg, who arrived in the assembly in 2001 after a long tenure on Los Angeles's city council. As a member of the assembly's LGBT caucus, she was approached in 2001 by Governor Davis, who asked that the caucus not run any LGBT-focused bills the next year when Davis was up for reelection.<sup>184</sup> Goldberg agreed but extracted a deal: After Davis was reelected, she wanted "the whole ball of wax"—comprehensive domestic partnership.<sup>185</sup> Davis agreed, and Goldberg was assigned to be the principal author. She then asked Lambda Legal's Davidson and Pizer, whom she knew through other legislative efforts, to assist in drafting the legislation, which would come to be known as AB 205.<sup>186</sup> Although Goldberg had the assistance of legislative counsel, she determined that "this was too delicate and needed the hands of people for whom this was a passion and not just a job."<sup>187</sup> Movement lawyers provided assistance,<sup>188</sup> Goldberg worked to line up votes, and Equality California's Kors coordinated outside pressure on legislators.

In negotiating the bill, LGBT advocates gained important leverage from the pending recall election against Davis, which made him reluctant to risk alienating a core constituency.<sup>189</sup> Although Goldberg believed there was never a risk that Davis "wasn't going to sign" the final legislation since "he never went back on his word,"<sup>190</sup> Kors thought that "had it not been for the recall of Davis, the bill wouldn't have been signed."<sup>191</sup> Despite Goldberg's efforts to "get votes,"<sup>192</sup> the bill stalled in the assembly, where supporters were one vote short.<sup>193</sup> LGBT advocates were focusing resources on persuading liberal Assembly Member Hannah-Beth Jackson from Santa Barbara, who was seeking to run for state senate in a more conservative district. After multiple protests, Jackson met with some of the bill's supporters and claimed that she would not vote for the bill because Governor Davis had told her he would veto it. This was news to LGBT advocates, who understood they had a deal. After a story ran in the *Santa Barbara News-Press* reporting on the governor's purported

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184. Telephone Interview With Jackie Goldberg, Faculty Adviser, UCLA TEACH/Compton Program, Former California Assembly Member (Jan. 15, 2010).

185. *Id.*

186. *Id.*

187. *Id.*

188. For instance, Pizer drafted a legal opinion for Goldberg stating that the proposed bill would not contravene Proposition 22. Memorandum From Jennifer C. Pizer, Senior Staff Attorney, Lambda Legal Defense & Educ. Fund, to the Honorable Jackie Goldberg (Jan. 24, 2003) (on file with author).

189. See Carl Ingram, *Recall Seen as Wild Card for New Bills*, L.A. TIMES, Aug. 18, 2003, at B1.

190. Telephone Interview With Goldberg, *supra* note 184.

191. Kors Remarks, *supra* note 83.

192. Telephone Interview With Goldberg, *supra* note 184.

193. Kors Remarks, *supra* note 83.

opposition,<sup>194</sup> LGBT rights groups pressured Davis to demonstrate his commitment to domestic partnership by convincing Jackson to support the bill, which he was able to do.<sup>195</sup>

In terms of the bill's provisions, there were a number of strategic decisions and compromises. Davidson and Pizer, drawing on the Koretz civil union bill as a model, convinced Goldberg early on to draft the bill as a blanket provision of all the rights of spouses, rather than to enumerate rights individually.<sup>196</sup> Davidson was afraid that amending individual statutes "would leave certain things out because we would miss some issues and [fail to capture issues] every time a new statute was passed. Also, we wanted [domestic partnership to apply] pervasively throughout the law, [not just to statutes, but also] to the common law, rules, regulations, and guidelines."<sup>197</sup> The issue, then, became what would be excluded from this general grant of rights.

A key struggle was over the rights to community property and spousal support, which Davis considered "too marriage-y"<sup>198</sup> and therefore wanted out of the final bill.<sup>199</sup> The lawyers believed that including these rights was essential to creating financial parity within the domestic partnership regime: Because domestic partners would be responsible for each other's debts, they should also be entitled to each other's assets in the event the relationship did not work out.<sup>200</sup> In the absence of such parity, there was a "risk that the financially weaker party could end up with the responsibility for the debts of the wealthier one without the right to claim community property or spousal support."<sup>201</sup>

The opportunity for a compromise on this issue came after the Williams Project, a national research institute on sexual orientation law and policy that had been recently established at the UCLA School of Law, released an important report. At the legislature's request, Williams Project researchers provided an analysis of the financial consequences of comprehensive domestic partnership. Their overall conclusion—that the law would positively impact the state budget

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194. Rhonda Parks Manville, *Concerned Gay Parents Lobby Assemblywoman*, SANTA BARBARA NEWS-PRESS, May 31, 2003.

195. See Nancy Vogel, *Bill Giving Gay Partners More Legal Rights Sent to Governor*, L.A. TIMES, Sept. 4, 2003, at B6.

196. Telephone Interview With Goldberg, *supra* note 184.

197. Telephone Interview With Davidson, *supra* note 105.

198. Telephone Interview With Jennifer Pizer, Dir., Marriage Project, Lambda Legal (Mar. 16, 2010).

199. Kors Remarks, *supra* note 83.

200. Telephone Interview With Jennifer Pizer, Dir., Marriage Project, Lambda Legal (Mar. 17, 2010).

201. *Id.*

by up to \$10.6 million per year<sup>202</sup>—was tempered by the fact that one reason for this gain was that AB 205 would effectively increase taxes on some same-sex couples who would no longer be able to separately claim deductions for dependent children.<sup>203</sup> That the increase would be more than counterbalanced by a reduction in tax revenues based on the ability of same-sex couples to use the “married filing jointly” status presented Davis with the worst of both political worlds<sup>204</sup>—he would lose needed state tax revenue while still “being hoisted on the petard of raising taxes.”<sup>205</sup> The parties therefore agreed to a compromise: Goldberg would drop the joint tax filing provision from the bill in exchange for Davis’s support for community property and spousal support.

While the tax issue offered important leverage in negotiating for community property and spousal support, advocates also used stories from their own litigation to show how the lack of such rights imposed real harms on financially vulnerable partners.<sup>206</sup> On a related issue—whether a child born to a registered domestic partnership should be presumed the child of both partners—advocates were helped by the case of Lydia Ramos, whose partner died in a car accident and whose youngest daughter was taken by relatives of the deceased partner. Lambda Legal represented Ramos, who ultimately received custody, and her testimony in support of AB 205 was credited with helping advance the bill’s provision applying the presumption of parentage to domestic partners.<sup>207</sup>

With all of these details worked out by late September 2003, Governor Davis signed AB 205,<sup>208</sup> which stated in sweeping language that domestic partners

shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules,

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202. See M.V. LEE BADGETT & R. BRADLEY SEARS, EQUAL RIGHTS, FISCAL RESPONSIBILITY: THE IMPACT OF AB 205 ON CALIFORNIA’S BUDGET (2003); see also *Appropriations Comm. Testimony on AB 205*, R. Bradley Sears, *Williams Project Dir.* 2003-2004 Leg., Reg. Sess. (Cal. 2003) (including a smaller estimate).

203. See BADGETT & SEARS, *supra* note 202, at 11.

204. See *id.* at 13.

205. Telephone Interview With Goldberg, *supra* note 184. The overall gain in state revenues was based on reductions in public benefits spending.

206. Telephone Interview With Pizer, *supra* note 200.

207. See Press Release, Lambda Legal, California Assembly Bill 205 Lead Witness Lydia Ramos and Lambda Legal Defense & Education Fund Statements on Passage of Critical Domestic Partner Legislation, June 4, 2003, <http://www.lambdalegal.org/news/pr/california-bill-205-family-protection.html>.

208. Gregg Jones & Nancy Vogel, *Domestic Partners Law Expands Gay Rights*, L.A. TIMES, Sept. 20, 2003, at A1.

government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.<sup>209</sup>

The start date of the law was deferred until January 1, 2005, in order to allow time for those already registered as domestic partners, but who did not want the full panoply of rights and responsibilities created by AB 205, to delist themselves from the registry.<sup>210</sup> Although the bill left out some rights, such as the ability to file joint tax returns,<sup>211</sup> it was hailed as a major advance for LGBT rights, second only to Vermont's civil union statute.<sup>212</sup> Given that same-sex couples had no state rights only four years earlier—and “the very notion that you would treat gay couples as a family was extremely controversial” to some<sup>213</sup>—AB 205 was a significant advance.<sup>214</sup>

Although the domestic partnership bills were important on their own terms, the lawyers who drafted them did so with an eye toward eventual marriage litigation. “We were able to create through the legislative process a body of findings and policy on same-sex couples [showing] how they are equal in every way . . . [in order to] set up suspect class arguments.”<sup>215</sup> These findings were designed to support constitutionally based marriage arguments by showing that the state's interest in denying marriage was invalid. For instance, AB 205 noted both the significance of discrimination and the reality of same-sex-couple-headed families:

The Legislature hereby finds and declares that despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together, participate in their communities together, and many raise children and care for other dependent family members together.<sup>216</sup>

209. 2003 Cal. Legis. Serv. 2586–2595, 2588 (West) (codified at CAL. FAM. CODE § 297.5 (West 2010)); see also Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555 (2004).

210. See Jones & Vogel, *supra* note 208.

211. This was later amended in SB 1827, which required domestic partners to use the same tax filing status as married couples beginning in 2007.

212. Jones & Vogel, *supra* note 208. But see Carol A. Docan & Richard F. Sperling, *California's Domestic Partnership Law: Incremental Progress or Dramatic Social Change?*, 14 WM. MARY J. WOMEN & L. 153 (2007); Enrique A. Monagas, *California's Assembly Bill 205, The Domestic Partner Rights and Responsibilities Act of 2003: Is Domestic Partner Legislation Compromising the Campaign for Marriage Equality?*, 17 HASTINGS WOMEN'S L.J. 39 (2006).

213. Codell Remarks, *supra* note 129.

214. *Id.*

215. Kors Remarks, *supra* note 83.

216. 2003 Cal. Legis. Serv. 2586–2595, 2588 (West).

Thus, while they were advancing a separate legislative system to govern same-sex relationships, advocates were also laying the groundwork to argue for their ultimate inadequacy: If same-sex couples were equal to their heterosexual counterparts in terms of their ability to care for one another, inherit property, and raise families, then to deny them marriage “had to be animus.”<sup>217</sup>

### C. The Best Laid Plans: Litigating Marriage by Necessity

#### 1. Cooler Heads Prevail: Rejecting Litigation (Again) by Consensus

Whether or not to pursue marriage litigation was the agenda of a January 2003 meeting of lawyers and academics at the UCLA School of Law convened by the Williams Project. The project was headed by Brad Sears, a 1995 Harvard Law School graduate who had received an Echoing Green fellowship to start the HIV Legal Checkup Project in Los Angeles and then joined the staff of the HIV/AIDS Legal Services Alliance of Los Angeles before becoming the Williams Project’s founding executive director. At the time, Sears was joined by the Williams Project’s faculty chair, Professor Bill Rubenstein, who was the author of a leading casebook on sexual orientation law and widely considered one of the country’s foremost authorities on LGBT legal issues.

The 2003 meeting, called the California Marriage Litigation Roundtable, was an invitation-only event designed to bring together legal scholars and movement lawyers to evaluate the possibility of litigation based on the best research available.<sup>218</sup> The meeting was prompted by the interest of some lawyers and activists—moved by the ongoing Massachusetts case—in pursuing marriage litigation in California. The formal goal was 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.”<sup>219</sup> The meeting was attended by all of the major LGBT rights lawyers—including Coles, Davidson, Kendell, Kors, Minter, Pizer, and ACLU lawyers Jordan Budd (Legal Director of the ACLU in San Diego), Maggie Crosby (Staff Attorney at the ACLU-NC), and Martha Matthews (Staff Attorney at the ACLU-SC)—and leading legal academics whose work touched on LGBT themes.<sup>220</sup>

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217. Kors Remarks, *supra* note 83.

218. Telephone Interview With Brad Sears, Executive Dir., Williams Inst. (Jan. 7, 2010).

219. Invitation Letter, California Marriage Litigation Roundtable (on file with author).

220. The academics were Devon Carbado (UCLA), Erwin Chemerinsky (USC), Barbara Cox (California Western), David Cruz (USC), Isabelle Gunning (Southwestern), Chris Littleton (UCLA), Bill Rubenstein (UCLA), Michael Wald (Stanford), and Tobias Wolff (UC Davis). Also in attendance were other lawyers affiliated with the movement—David Codell and Laura Brill from Irell & Manella, Jay Kohorn of the California Appellate Project, Molly McKay from Gordon & Rees, M.E. Stephens

The sessions included in-depth discussions of potential legal theories and venues, the likelihood of success and the risks of losing, and alternative political strategies.<sup>221</sup> In preparation for the meeting, advocates wrote briefing papers on aspects of the contemplated litigation, which included analyses of California doctrine related to LGBT rights and marriage law, an evaluation of California Supreme Court justices, and an overview of marriage litigation nationwide.<sup>222</sup> Included in these conference materials was also an extensive analysis of the possibility of a ballot initiative banning marriage by constitutional amendment if litigation were successful. That memo concluded with the following admonition:

[A]ny decision to file a marriage case in California . . . needs to include [consideration of] whether political, donor and public support for allowing same-sex couples to marry has increased sufficiently that such an initiative could be defeated at the polls, and whether now is the right time to undertake this potential battle . . . . *Failure to consider these matters could make affirmative marriage litigation not only futile, but it could set back future attempts to obtain both judicial and legislative reform to the marriage laws.*<sup>223</sup>

As a result of the roundtable discussion, the participants decided that the timing was not yet right for marriage litigation in California.<sup>224</sup> In particular, they 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,<sup>225</sup> which was certain to occur, because public opinion was not yet on the side of marriage for same-sex couples. As one participant noted: “Sure we can litigate it and make beautiful arguments [but that would] draw all the crazies out of the woodwork at the next election and that’s not helpful.”<sup>226</sup> The conclusion to avoid litigation was thus carefully considered and systematic,

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from Stock Stephens, Los Angeles litigator Carol Sobel, and Clyde Wadsworth from Heller, Ehrman, White & McAuliffe—as well as activists such as Toni Broaddus from Californians for Civil Marriage. The Williams Project, *Marriage Litigation on Behalf of Same-Sex Couples in California: A Roundtable Discussion*, Participants Guide P3–P16 (Jan. 10, 2003) [hereinafter *Marriage Litigation Roundtable*].

221. Agenda, *Marriage Litigation Roundtable*, *supra* note 220.

222. *Marriage Litigation Roundtable*, *supra* note 220, at 61–189.

223. Memorandum on Amendment of the California Constitution From Jon W. Davidson, Legal Counsel, Lambda Legal, to California Marriage Litigation Roundtable, Dec. 16, 2002 (on file with author) (emphasis added).

224. Telephone Interview With Pizer, *supra* note 83.

225. This was based in part on polling data indicating that while support for same-sex marriage had gone up nearly 15 percent since 1996, it was still nearly 5 percentage points lower than opposition.

226. Telephone Interview With Martha Matthews, Supervising Attorney, Children’s Law Ctr. of Los Angeles (Feb. 12, 2010).

guided by the lawyers' core strategic principle, which was to "maximize success and minimize loss . . . . Success breeds success, and a loss holds us back."<sup>227</sup>

## 2. Litigating in Defense of Domestic Partnership

The strategy coming out of the AB 205 battle was to defend domestic partnership against anticipated legal attack and allow the public to gradually get used to the reality of domestic partnership as the law took effect beginning in 2005.<sup>228</sup> Marriage litigation was deliberately deferred, with advocates eyeing 2006 as the earliest possible date for a frontal legal challenge to marriage.<sup>229</sup> As Lambda Legal's Pizer put it: "Smart people had thought about it. We had a plan."<sup>230</sup>

Initially, the strategy unfolded according to plan. The day after the passage of AB 205, Senator Knight, under the auspices of the Proposition 22 Legal Defense and Education Fund (which he founded),<sup>231</sup> sued the state in Sacramento Superior Court to enjoin the law as a violation of Proposition 22.<sup>232</sup> Arizona-based Alliance Defense Fund (ADF) and affiliated attorney Andrew Pugno, Knight's former chief of staff,<sup>233</sup> served as counsel. ADF, which was founded in 1994 by evangelical leaders,<sup>234</sup> engaged in litigation devoted to "guarding the sanctity of human life," "protecting marriage and the family," and "defending religious freedom."<sup>235</sup>

ADF's central argument was that AB 205, by "extend[ing] the rights and duties of marriage to persons registered as domestic partners," contravened Proposition 22's language limiting marriage to a man and woman.<sup>236</sup> Specifically, they claimed that AB 205 constituted a legislative amendment to the marriage initiative, which, under the California Constitution, was invalid without the

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227. Telephone Interview With Pizer, *supra* note 83; see also Evan Wolfson, *Marriage Equality and Some Lessons for the Scary Work of Winning*, 14 LAW & SEXUALITY 135, 141 (2005).

228. Pizer Remarks, *supra* note 94.

229. *Id.*

230. *Id.*; see also Erika Hayasaki, *Activists Look for Ways to Establish Gay Marriage in California*, L.A. TIMES, Nov. 23, 2003, at B3.

231. See Lee Romney, *Foes of Gay Marriage Can't Join Case*, L.A. TIMES, Apr. 9, 2004, at B6.

232. Nancy Vogel, *Foes of Partner Law File Suit*, L.A. TIMES, Sept. 23, 2003, at B1.

233. See Jenifer Warren, *State Sen. Knight Laments Gay Son's Commentary*, L.A. TIMES, Oct. 15, 1999, at A3.

234. See AllianceDefenseFund, History, <http://www.alliancedefensefund.org/about/History/Default.aspx> (last visited June 6, 2010).

235. AllianceDefenseFund, Issues, <http://www.alliancedefensefund.org/issues/Default.aspx> (last visited June 6, 2010); see also Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J. L. & GENDER 303, 322–23 (2009).

236. Verified Complaint for Declaratory and Injunctive Relief at ¶ 26, *Knight v. Davis*, No. 03AS05284 (Cal. Super. Ct. Sept. 8, 2004), 2003 WL 25776689.

separate approval of the voters.<sup>237</sup> A similar lawsuit against AB 205 was filed in Los Angeles by the Campaign for California Families (CCF),<sup>238</sup> a self-described “pro-family” organization founded by social conservative activist and Proposition 22 organizer Randy Thomasson.<sup>239</sup> Opponents also introduced a referendum to reverse the law, but the referendum was quickly dropped, as polling suggested that it would fail. The legal cases were consolidated in the Sacramento court, which granted permission to Equality California and a group of registered domestic partners (represented by LGBT rights lawyers) to intervene in the case,<sup>240</sup> *Knight v. Superior Court*.<sup>241</sup>

David Codell, a private attorney who had been a partner at Irell & Manella before starting his own firm in 2003, was lead counsel in the case, joined by Lambda Legal’s Davidson and Pizer, NCLR’s Minter, and several attorneys from the ACLU, including Peter Eliasberg in Los Angeles, Christine Sun in San Francisco, and Budd in San Diego. Codell was a highly accomplished lawyer—a Harvard Law School graduate who had clerked for Justice Ginsburg on the Supreme Court—and had been heavily involved in LGBT rights litigation on a pro bono basis while at Irell.<sup>242</sup>

In arguing in support of AB 205, lawyers were faced with a strategic choice. The court of appeal in Sacramento, where the case would be decided, was considered to be a conservative court not likely to be moved by arguments about the merits of domestic partnership as a distinct legal status.<sup>243</sup> For Codell, “the key was to convince [the court] that ours was the more conservative position” under California initiative law.<sup>244</sup> It was also important for lawyers to make it very clear that domestic partnership was *not* marriage. Because ADF argued that AB 205 was intended to establish rights tantamount to marriage, distinguishing domestic partnership was crucial to undercutting ADF’s core claim. Yet advocates had another reason for asking the court to rule that domestic partnership was not marriage: “Because then, when marriage litigation was before

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237. *Id.* ¶ 31.

238. See *Knight v. Schwarzenegger*, Nos. 03AS05284, 03AS07035, 2004 WL 2011407, at \*1 (Cal. Super. Ct. Sept. 8, 2004).

239. See Motion by Campaign for California Families to Intervene as Respondent With Supporting Memorandum of Points and Authorities and Declaration of Randy Thomasson in Support at 15, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (No. S168047); Campaign for Children and Families, About, <http://savecalifornia.com/about.html> (last visited June 6, 2010).

240. Codell Remarks, *supra* note 129.

241. 26 Cal. Rptr. 3d 687 (Ct. App. 2005).

242. See Law Office of David C. Codell, <http://www.codell.com/codell.html> (last visited June 6, 2010).

243. Codell Remarks, *supra* note 129.

244. *Id.*

the courts, there would no longer be a question that gay couples were being denied equal protection of the laws.”<sup>245</sup>

The lawyers therefore decided to lead with what could be viewed as a conservative argument rooted in the initiative process—“that to protect the people’s initiative power, you have to construe the measure to mean what the voters would have understood it to mean”<sup>246</sup>—and then to follow that up with an argument about the difference between domestic partnership and marriage. The lawyers stressed that their lead argument was consistent with the interpretation set forth in the Proposition 22 ballot materials, which emphasized that the initiative did not take away rights (such as domestic partnership), but rather precluded the recognition of same-sex marriages. The trial court agreed, dismissing the case on summary judgment on the grounds that “the domestic partners act does not amend the defense of marriage initiative and, therefore, its enactment without subsequent voter approval does not violate California’s Constitution.”<sup>247</sup>

In December 2004, ADF filed a petition for writ of mandate with the appellate court to block enforcement of AB 205, which was to go into effect on January 1, 2005. The appellate court denied the request for a stay, but issued another writ asking the movement lawyers to show why the trial court should not be reversed.<sup>248</sup> The lawyers filed the brief and were prepared for the worst.<sup>249</sup> However, to their relief, the court of appeal issued a ruling that agreed with their position, holding that “the initiative was intended only to limit the status of marriage to heterosexual couples and to prevent the recognition in California of homosexual marriages that have been, or may in the future be, legitimized by laws of other jurisdictions.”<sup>250</sup> The appellate court adopted the conservative argument proffered by Codell and his cocounsel, holding that if Proposition 22 was intended to repeal or limit the legislature’s power to enact laws regulating domestic partnership, “the electorate was not given the opportunity to vote on that undisclosed objective, and courts are precluded from interpreting Proposition 22 in a manner that was not presented to the voters.”<sup>251</sup> Having so held, the appellate court declined to review Proposition 22’s constitutional merits.<sup>252</sup> The decision was upheld against a collateral challenge in 2006.<sup>253</sup>

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245. *Id.*

246. *Id.*

247. Knight v. Superior Court, 26 Cal. Rptr. 3d 687, 689 (Ct. App. 2005).

248. *Id.*

249. Codell Remarks, *supra* note 129.

250. Knight, 26 Cal. Rptr. 3d at 690.

251. *Id.*

252. *Id.*

253. Knight v. Schwarzenegger, No. C048596, 2006 WL 650659 (Cal. Ct. App. Mar. 16, 2006).

The success in the AB 205 case was important on two levels. First, it was a key victory on its own terms, as it cemented the legal validity of the domestic partnership regime that advocates had worked so hard to build. Second, it paved the way for a future push toward establishing marriage as a legal right in California. As lawyers had planned, the *Knight* decision created a judicial record that domestic partnership was deliberately established as a legal status “inferior to marriage.”<sup>254</sup> This would serve to strengthen the lawyers’ position that the California marriage laws violated equal protection—an argument that was already in play at the California Supreme Court by the time *Knight* was resolved.

### 3. Game Change: Marriage Equality in San Francisco

The drive toward marriage—which would appear imminent when the AB 205 case ended in 2006—was still considered a distant goal when the case began three years earlier. The initial catalyst came from Massachusetts, where GLAD had also been laying the groundwork for a marriage challenge since the late 1990s.<sup>255</sup> Like Vermont, the Massachusetts Constitution was relatively difficult to amend, and the state had increasingly recognized the rights of lesbians and gay men.<sup>256</sup> On November 18, 2003, just a few months after the U.S. Supreme Court struck down Texas’s antisodomy law in *Lawrence v. Texas*,<sup>257</sup> the Massachusetts Supreme Judicial Court held in *Goodridge v. Department of Public Health*<sup>258</sup> that same-sex couples had the right to marry under the Massachusetts Constitution. While the legislature and other officials immediately attempted to frame the decision as requiring only Vermont-style civil unions, the court clarified in a separate opinion on February 3, 2004, that only full marriage equality would satisfy constitutional mandates.<sup>259</sup> Same-sex couples began to marry on May 17, 2004, and the legislature defeated repeated attempts to send a constitutional amendment prohibiting same-sex marriage to the voters.<sup>260</sup>

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254. Codell Remarks, *supra* note 129.

255. Bonauto declined a marriage case during her first week at GLAD in March 1990 and did not file the *Goodridge* challenge until April 2001. See Bonauto Memo, *supra* note 55, at 3.

256. The legislature had enacted an antidiscrimination law, and the courts had announced significant parental rights at the same time that they expanded the rights of unmarried different-sex couples. See Bonauto, *Goodridge in Context*, *supra* note 55, at 10–16.

257. 539 U.S. 558 (2003).

258. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

259. See *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

260. See Andrea Estes & Scott Helman, *Legislature Again Blocks Bid to Ban Gay Marriage*, BOSTON GLOBE, Nov. 10, 2006, at A1.

The Massachusetts decision energized both those supporting the right of same-sex couples to marry and those opposed. In his State of the Union address delivered on January 20, 2004, President George W. Bush vowed to “protect” the institution of marriage from “activist judges.”<sup>261</sup> A movement was launched to create a Federal Marriage Amendment, which would change the U.S. Constitution to prohibit states from allowing same-sex couples to marry.<sup>262</sup> And more states adopted their own constitutional amendments restricting marriage to different-sex couples.<sup>263</sup>

On the other side, officials in more progressive areas of the country welcomed the *Goodridge* decision. In California, after the decision was announced, Democratic State Assembly Member Mark Leno from San Francisco called Kors of Equality California (with whom Leno had worked in passing AB 205) and developed a plan to introduce a marriage equality bill.<sup>264</sup> While Leno “wasn’t convinced we needed to fight a war over a word,” *Goodridge* changed his mind “irrevocably” by asserting that the “only remedy is marriage and marriage alone . . . [*Goodridge*] struck a chord in me and I said, ‘I want to do a marriage bill.’”<sup>265</sup>

Movement lawyers, however, were not so convinced. Their concerns centered both on timing—the bill would come up during a presidential election year—and the risk of failure. With respect to the latter, the lawyers were worried that if the state legislature rejected the bill, it would create a negative public record at a time when they were trying to carefully build forward momentum.<sup>266</sup> Several “weeks of conference calls” ensued among Leno, Kors, Lambda Legal’s Davidson and Pizer, and NCLR’s Kendell and Minter.<sup>267</sup> A compromise was struck in which it was agreed that the bill would be passed out of the Assembly Judiciary Committee as a first step, but that Leno would ask the Appropriations Committee to hold the bill there to prevent it from reaching the full assembly before the presidential election in 2004.<sup>268</sup> As Leno recalls:

I knew it was a presidential election year and likely we didn’t have the votes. But I knew we’d be making history, just to get out of the first committee. I proactively stated that I, not the [Assembly] Speaker [Fabian

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261. PINELLO, *supra* note 168, at 75.

262. See S.J. Res. 26, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/query/z?c108:S.J.RES.26>.

263. See Bonauto, *Goodridge in Context*, *supra* note 55, at 64.

264. Telephone Interview With Mark Leno, Cal. Senator (Feb. 9, 2010).

265. *Id.*

266. Telephone Interview With Jennifer Pizer, Dir., Marriage Project, Lambda Legal (Feb. 13, 2010).

267. Telephone Interview With Leno, *supra* note 264.

268. *Id.*

Nunez], would be the heavy and hold the bill in Appropriations with the promise that we would be back in December 2004 after the election with a newly introduced bill for 2005 with the intent of getting it to the governor's desk.<sup>269</sup>

Drafting the bill was simple, since it only required "chang[ing] a few words in the Family Code."<sup>270</sup> Although Leno and Kors knew the bill "didn't have the necessary floor votes," their idea was "to build momentum, educate the public, and push moderate Democrats."<sup>271</sup> They planned to introduce the bill around Valentine's Day in 2004.<sup>272</sup>

This plan was disrupted, however, by San Francisco Mayor Gavin Newsom, who had attended President Bush's speech as a guest of San Francisco Congresswoman Nancy Pelosi and was particularly dismayed by Bush's position on marriage.<sup>273</sup> Although Newsom had only been in office for twelve days, his "disbelief" at Bush's divisive rhetoric strengthened his resolve "to do something."<sup>274</sup> After reviewing the *Goodridge* decision in tandem with the California Constitution's equality guarantee, Newsom concluded that a proper interpretation of the state constitution would allow same-sex couples to marry. Newsom approached his chief of staff, Steve Kawa, and said, "We're going to do this. Figure out how."<sup>275</sup> In early February 2004, he decided to order the San Francisco County Clerk to begin issuing marriage licenses to same-sex couples.<sup>276</sup> Although the later press accounts suggested that it was "political suicide,"<sup>277</sup> Newsom's decision was motivated in part by a calculation of the political benefits.<sup>278</sup> After barely defeating a progressive challenger in the mayoral contest, Newsom's decision would serve to shore up his progressive base in San Francisco.<sup>279</sup> In the long term, Newsom was betting that "by the time [he] is ready to be a United States senator, in a decade, [this] will . . . have been Rosa Parks on the bus that the people of California are willing to accept."<sup>280</sup>

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269. *Id.*

270. *Id.*

271. Kors Remarks, *supra* note 83.

272. Telephone Interview With Leno, *supra* note 264.

273. See PINELLO, *supra* note 168, at 74–76.

274. *Id.* at 75.

275. *Id.*

276. See *id.* at 76–77.

277. Rone Tempest, *S.F.'s Hero of the Moment*, L.A. TIMES, Feb. 16, 2004, at B1.

278. See Lee Romney, *World Beats a Path to S.F. Mayor Newsom's Door*, L.A. TIMES, Mar. 13, 2004, at A1.

279. See PINELLO, *supra* note 168, at 77–79 (quoting an anonymous member of San Francisco's Board of Supervisors and NCLR's Kate Kendell).

280. *Id.* at 78 (quoting an anonymous member of San Francisco's Board of Supervisors).

Although LGBT rights leaders subsequently lauded Newsom's decision as "chang[ing] the nature of the debate,"<sup>281</sup> they were not included in the deliberations leading up to it and initially expressed serious concerns about the national and local implications. While some were publicly calling Newsom a hero, others were privately asking, "How the hell could he do this? . . . How much consultation was there with the gay community?"<sup>282</sup>

On Friday, February 6, 2004, Kawa called NCLR director Kendell to inform her that the mayor was planning to start issuing marriage licenses to same-sex couples on the following Monday.<sup>283</sup> Kendell worried about the consequences. She was "shocked" and "started expressing reservations about the idea . . . So I said, 'Steve, we've really got to check this out in Massachusetts. In addition, we've got the whole Federal Marriage Amendment situation. You really need to think about this a little bit more.'"<sup>284</sup> Kendell also warned that issuing marriage licenses "could trigger support for a [state] constitutional amendment."<sup>285</sup>

Kendell's first call was to Minter,<sup>286</sup> who (along with staff attorney Courtney Joslin) deliberated and "initially tried to talk [Newsom] out of it."<sup>287</sup> However, when Kendell talked again to Kawa, he made it clear that the call "was an act of notification, not consultation."<sup>288</sup> During the weekend, Kendell consulted with GLAD and the Human Rights Campaign, the main national LGBT political group.<sup>289</sup> Her discussions with GLAD attorneys in Massachusetts—where the legislature was dealing with a variety of proposals in the wake of the court's order that civil unions were insufficient<sup>290</sup>—made Kendell think that perhaps it was a good idea from a national political perspective: "The Massachusetts people . . . liked the idea of a Western front opening up, so that there would be more of a national conversation, instead of 'Massachusetts is an outlier and not part of the natural politics of the country.'"<sup>291</sup> GLAD lawyers made clear that they did not think Newsom's decision in San Francisco would harm their result in *Goodridge*.<sup>292</sup> Kendell and her staff had

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281. *Id.* at 79 (quoting Molly McKay, Associate Executive Director of Equality California).

282. Telephone Interview With Davidson, *supra* note 105.

283. Kate Kendell, *The Right to Marry and the San Francisco Experience*, 44 FAM. CT. REV. 33, 37 (2006).

284. PINELLO, *supra* note 168, at 76.

285. Telephone Interview With Kate Kendell, Executive Dir., Nat'l Ctr. for Lesbian Rights (Feb. 22, 2010).

286. *Id.*

287. Telephone Interview With Minter, *supra* note 125.

288. PINELLO, *supra* note 168, at 77.

289. Telephone Interview With Kendell, *supra* note 285.

290. See *In re Opinion of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

291. PINELLO, *supra* note 168, at 77.

292. See Bonauto Memo, *supra* note 55, at 3.

further discussions during the weekend that led Kendell to “be completely convinced that we should do this.”<sup>293</sup> The NCLR team concluded: “Why should we try to talk [Newsom] out of it? Who are we to do that? We agree with him on the substance.”<sup>294</sup> Kendell switched from reticence to “a ‘game on’ sensibility. If this is what’s up, let’s go for it.”<sup>295</sup> With Newsom’s decision, “[t]here was this sense of possibility. This could be a game-changing moment.”<sup>296</sup> Although Minter was “nervous about where it would end up,” he concluded that it “was the right thing to do.”<sup>297</sup>

Other LGBT rights groups were not contacted directly by Newsom, and when they found out about his plans, some were not as positive as NCLR. On Monday, February 9, Kendell called the ACLU’s Coles,<sup>298</sup> who agreed with Newsom “on the substance, but disagreed with the strategic decision.”<sup>299</sup> For NCLR lawyers, however, by the time they met with the mayor’s senior staff that same day, the political calculus was clear: Since “the mayor was definitely going to [issue licenses],”<sup>300</sup> NCLR could not be in the position of opposing what would be a watershed decision in the struggle for marriage equality. Kendell concluded that, “What this demands is that people be engaged and take some risks on their own initiative in order to move issues forward in a difficult political environment.”<sup>301</sup> In collaboration with other LGBT rights advocates, NCLR’s best hope was to shape the debate once it unfolded and to harness the opportunity to advance public education and prepare for the legal challenge that would surely come.

In the heat of the moment, NCLR did not foresee “an affirmative marriage case,” but rather was busy “prepping the mayor with talking points about the history of marriage litigation” to get him ready for the media attention his decision would create.<sup>302</sup> Kendell also focused on the public education piece. She had met Del Martin, 83, and Phyllis Lyon, 79—a lesbian couple who had been together for over fifty years—when she first moved to San Francisco in the mid-1990s. Del and Phyllis were considered “pioneers” of the movement, and Kendell believed that they “had to be” the first couple to be

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293. PINELLO, *supra* note 168, at 77.

294. Telephone Interview With Minter, *supra* note 125.

295. Telephone Interview With Kendell, *supra* note 285.

296. *Id.*

297. Telephone Interview With Minter, *supra* note 125.

298. Telephone Interview With Kendell, *supra* note 285.

299. Telephone Interview With Coles, *supra* note 99.

300. PINELLO, *supra* note 168, at 77 (quoting NCLR’s Kate Kendell).

301. *Id.* at 94.

302. Telephone Interview With Kendell, *supra* note 285.

married in San Francisco.<sup>303</sup> Kendell called Del and Phyllis, and they agreed—a decision that involved becoming spokespeople for the national cause in what would quickly become a media frenzy. Kendell then worked with the mayor’s office to orchestrate Del and Phyllis’s ceremony on the steps of City Hall and sought to avoid an immediate legal challenge, “so that we could at least get them married.”<sup>304</sup>

Kendell and other movement lawyers knew that marriage opponents would seek to enjoin the issuance of licenses—an issue that would fall to the San Francisco Office of the City Attorney to defend. The city attorney’s legal team was led by Chief Deputy Therese Stewart, who joined the office in 2002 to oversee litigation, after doing pro bono work on its behalf. Stewart had a strong background in LGBT rights, although she did not come to the office to pursue that work.<sup>305</sup> Prior to joining the city attorney’s office, she had been a partner at Howard, Rice, Nemerovsky, Canady, Falk & Rabin, where she had been chair of the San Francisco Bar’s LGBT Committee and active on LGBT pro bono issues.<sup>306</sup> Stewart and her staff met with Newsom on Monday, February 9—after the mayor’s staff had already spoken with NCLR—when “the train was already well on its way” with respect to Newsom’s marriage license plans.<sup>307</sup> Stewart presumed that the mayor’s prior deliberations and conversations with NCLR had sorted out “the political implications,” and thus focused her discussion on the legal “pros and cons, what was likely to happen, and the uncertainties.”<sup>308</sup> After the meeting, Stewart “pulled the smartest people” she could find to figure out how to “stave off an immediate injunction . . . . It was completely insane.”<sup>309</sup>

On February 10, after his meeting with the city attorneys, Newsom sent a letter to the San Francisco County Clerk asking that she “determine what changes should be made to the forms and documents used to apply for and issue marriage licenses in order to provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation.”<sup>310</sup> The letter suggested that Newsom was acting to uphold the California Constitution, which he claimed prohibited discrimination against lesbians and gay men with respect to

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303. *Id.*

304. *Id.*

305. Telephone Interview With Therese Stewart, Chief Deputy, San Francisco City Attorney (Feb. 1, 2010).

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Lockyer v. City of San Francisco*, 95 P.3d 459, 465 n.4 (Cal. 2004).

marriage.<sup>311</sup> The clerk designed a gender-neutral marriage application and on February 12 Newsom announced that he would order the clerk to begin giving marriage licenses to same-sex couples.<sup>312</sup> Senator Leno introduced his marriage bill that same day, but it received little notice.<sup>313</sup>

Newsom's announcement was met with both shock and jubilation. Democratic leaders warned of its repercussions in an election year in which Democrats wanted to unseat President Bush and make gains in Congress.<sup>314</sup> Yet its most immediate effect was to unleash a flood of same-sex marriages (over four thousand in the end) that began with the much-publicized union of Del and Phyllis, who instantly became icons.<sup>315</sup>

"It was a magical and heady time"<sup>316</sup>—one that LGBT rights advocates tried to use to send a powerful public education message: "[T]here were all these lesbian and gay couples in long-term, committed relationships, with their children, with their parents, with family there celebrating, and who'd been together at least as long as most nongay couples. And the sky didn't fall."<sup>317</sup> Some lawyers were more skeptical about how the images of same-sex couples marrying would be received. Coles, for instance, believed that "most Americans didn't react to the pictures of couples marrying in San Francisco by saying, 'This is great.'"<sup>318</sup>

Nonetheless, in the wake of Newsom's decision, movement leaders sought to use the "winter of love"<sup>319</sup> to make the case that allowing same-sex couples to marry caused no harm to the institution of marriage and therefore denying them the right to do so was sheer discrimination. It was an argument that would be crucial to convincing the public to support marriage for same-sex couples against a voter initiative to impose a constitutional ban that leaders feared would come.<sup>320</sup> It was also potentially relevant to a constitutional analysis of marriage equality, which the Newsom decision had placed on an inexorable path toward a state supreme court ruling.

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311. *Id.*; see also Lee Romney, *In S.F., a Test Case for Gays*, L.A. TIMES, Feb. 11, 2004, at B1.

312. *Lockyer*, 95 P.3d at 465.

313. Kors Remarks, *supra* note 83.

314. Tempest, *supra* note 277.

315. Kendell, *supra* note 283, at 38.

316. *Id.*

317. PINELLO, *supra* note 168, at 79–80 (quoting Molly McKay, Associate Executive Director of Equality California).

318. Telephone Interview With Coles, *supra* note 99.

319. PINELLO, *supra* note 168, at 80.

320. See *id.* at 97 (quoting Molly McKay, Associate Executive Director of Equality California).

#### 4. Winning Despite Themselves: *In re Marriage Cases*

For the lawyers who had labored to carefully control the timing and nature of any marriage challenge, the Newsom decision immediately transformed the political landscape. Overnight, the question for the lawyers became: “What part of our strategy can we salvage?”<sup>321</sup> The answer emerged out of a thicket of legal wrangling over the San Francisco marriages. On February 13, 2004, two legal challenges were filed, one by the Proposition 22 Legal Defense and Education Fund,<sup>322</sup> and the other by CCF.<sup>323</sup> ADF represented the Proposition 22 Legal Defense and Education Fund.<sup>324</sup> CCF was represented by Florida-based Liberty Counsel,<sup>325</sup> a Christian Right legal organization tied to Jerry Falwell’s Liberty University that was founded in 1989 to protect “religious freedom” and advance “traditional family values.”<sup>326</sup> San Francisco Chief Deputy City Attorney Stewart led the team of government lawyers defending the legality of the marriages. Neither the ADF nor the Liberty Counsel suit directly raised the constitutionality of California’s existing marriage scheme.<sup>327</sup> Instead, the challenges focused on the question of local government authority to issue marriage licenses,<sup>328</sup> and sought a writ of mandate (and immediate stay) directing the San Francisco County Clerk to cease issuing marriage licenses to same-sex couples.<sup>329</sup>

Yet the premise of the writ actions—that the underlying marriage laws were valid—only begged the constitutional question, which quickly erupted to the surface and produced an intense period of in-court squabbling. After the marriages began, the lawyers—led by City Attorney Stewart—were in court every day for about a week with the immediate goal of “staving off a [temporary restraining order] or immediate writ and gaining more time to brief and argue

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321. Pizer Remarks, *supra* note 94.

322. Proposition 22 Legal Def. & Educ. Fund v. City of San Francisco, No. 503943, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005).

323. Thomasson v. Newsom, No. 428794, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005).

324. See Proposition 22 Legal Def. & Educ. Fund, 2005 WL 583129.

325. See Thomasson, 2005 WL 583129.

326. HANS J. HACKER, THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION 65 n.22 (2005); see Liberty Counsel, About Us, <http://www.lc.org/index.cfm?pid=14096> (last visited June 6, 2010).

327. See Verified Amended Complaint for Writ of Mandamus, Declaratory and Injunctive Relief, Thomasson v. Newsom, No. CGC-04-428794 (Cal. Super. Ct. Mar. 14, 2005); First Amended Verified Petition for Writ of Mandate and Immediate Stay, and Complaint for Injunctive and Declaratory Relief, Proposition 22 Legal Def. & Educ. Fund v. City of San Francisco, No. CPF-04-503943 (Cal. Super. Ct. Mar. 14, 2005).

328. See Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. C.R. & C.L. 1 (2007); see also Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005).

329. *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008).

the merits.”<sup>330</sup> NCLR, Lambda Legal, and the ACLU intervened in the ADF suit on behalf of same-sex couples and argued that the requested relief could not be granted without holding the existing laws constitutional.<sup>331</sup> In response, ADF moved to file an amended brief requesting a declaration of the constitutionality of the marriage statutes.<sup>332</sup> The trial court rejected the motion on the ground that the existing complaint sufficiently raised the constitutional question.<sup>333</sup> On February 17, the trial court in the ADF suit denied the motion for an immediate stay due to a lack of irreparable harm,<sup>334</sup> and instead issued an alternative writ ordering the city to stop giving marriage licenses or show cause for not doing so.<sup>335</sup>

Two days later, San Francisco, represented by Stewart,<sup>336</sup> responded by filing a cross-complaint seeking to declare the marriage laws unconstitutional.<sup>337</sup> Stewart “filed the cross-complaint in declaratory relief . . . because we thought it would be important to our defense of the Mayor’s action at that point . . . and if we were going to litigate the constitutionality of the marriage [laws] as a defense it made sense to seek affirmative relief to the same effect.”<sup>338</sup> Then, on February 23, high-profile Los Angeles employment law attorney Gloria Allred brought suit in *Tyler v. County of Los Angeles*<sup>339</sup> on behalf of two Los Angeles same-sex couples denied marriage licenses, challenging the denial on

330. Email From Therese Stewart, Chief Deputy, San Francisco City Attorney, to Scott L. Cummings, Professor, UCLA Sch. of Law (Mar. 15, 2010 5:09 PM PST).

331. See Appellant Proposition 22 Legal Defense and Education Fund’s Opening Brief at 2 n.1, Proposition 22 Legal Def. & Educ. Fund v. City of San Francisco, No. A110651 (Cal. Ct. App. Dec. 20, 2006) [hereinafter Appellant Proposition 22 Opening Brief]; Intervenor’s Cross-Complaint for Declaratory and Injunctive Relief at 9, Thomasson v. Newsom, No. CGC-04-428794 (Cal. Super. Ct. Mar. 10, 2004); Lee Romney & Patrick Dillon, *S.F. Judge Won’t Halt Marriages*, L.A. TIMES, Feb. 18, 2004, at A1.

332. Appellant Proposition 22 Opening Brief, *supra* note 331, at 2 n.1.

333. See *id.*

334. See Romney & Dillon, *supra* note 331. The Thomasson court similarly denied CCF’s motion for an immediate stay. *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 465–66 (Cal. 2004).

335. See *Lockyer*, 95 P.3d at 466 n.6.

336. Stewart, the Chief Deputy City Attorney, was joined by Deputy City Attorneys Julia Friedlander, Kathleen Morris, and Sherri Sokeland Kaiser, as well as pro bono attorneys from Howard, Rice, Nemerovsky, Canady, Falk & Rabin. Danny Choi, Chief of Appellate Litigation, and Deputy City Attorney Vince Chhabria joined the team on appeal.

337. City and County of San Francisco’s Cross-Complaint for Declaratory Relief at 5, Proposition 22 Legal Def. & Educ. Fund v. City and County of San Francisco, No. 503943 (Cal. Super. Ct. Mar. 14, 2005).

338. Email From Therese Stewart, Chief Deputy, San Francisco City Attorney, to Professor Scott L. Cummings, UCLA Sch. of Law (Feb. 16, 2010). On March 10, NCLR, Lambda Legal, and the ACLU also filed a cross-complaint on behalf of the intervenor same-sex couples. Intervenor’s Cross-Complaint for Declaratory and Injunctive Relief, Thomasson v. Newsom, No. CGC-04-428794 (Cal. Super. Ct. Mar. 10, 2004).

339. Case No. BS088506 (Cal. Super. Ct. filed Feb. 23, 2004).

the ground that the marriage statutes violated the state constitution.<sup>340</sup> Equality California, represented by Codell, NCLR, Lambda Legal, and the ACLU, immediately moved to intervene in that case.<sup>341</sup>

Having asserted its legal authority, the City of San Francisco continued to issue marriage licenses. On February 27, under pressure from Republican Governor Arnold Schwarzenegger, California Attorney General Bill Lockyer filed his own petition for a writ of mandate and immediate stay to halt the marriages.<sup>342</sup> In so doing, he requested that the court resolve the city's constitutional challenge as a threshold issue.<sup>343</sup> The attorney general's suit, *Lockyer v. City and County of San Francisco*, was joined by a taxpayers' suit, filed two days earlier, also seeking to compel the county clerk to stop issuing marriage licenses to same-sex couples.<sup>344</sup>

On March 11, 2004, the California Supreme Court handed down an order splitting the litigation onto two tracks: one limited to the question of local government authority and the other focused on the constitutionality of existing marriage laws. With respect to the local government authority issue, the court eventually ordered San Francisco officials to stop issuing marriage licenses and adhere to existing state law pending a final resolution on the legal merits.<sup>345</sup> In order to avoid potentially conflicting rulings, the court stayed the ADF and CCF suits. The court also made clear that it invited a constitutional challenge to the marriage laws, noting that the stay did "not preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes."<sup>346</sup>

With the constitutionality of the marriage statutes now clearly in play, the immediate question—for both the government and LGBT rights lawyers—was "do we file?"<sup>347</sup> For City Attorney Stewart, the decision was an easy one. When the California Supreme Court's March 11 order came down, Stewart believed that her office was well-positioned to argue the constitutional question, given its resources and expertise. Although she was certain that there would be a backlash to a positive court decision, she believed that "the cat was already out of the bag" with respect to the constitutional issue, and if it was

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340. See Petition for Writ of Mandate or Prohibition at 5, *Tyler v. County of Los Angeles*, No. BS088506 (Cal. Super. Ct. Feb. 23, 2004) (complaint paragraph 17 in the first cause of action).

341. See Robin Tyler et al. v. County of Los Angeles, Case Summary, No. BS088506.

342. See *Lockyer*, 95 P.3d at 466.

343. *Id.*

344. See *Lewis v. Alfaro*, No. S122865, 2004 WL 473258, at \*1 (Cal. Mar. 11, 2004).

345. *Lockyer*, 95 P.3d at 467.

346. *Id.*

347. Telephone Interview With Stewart, *supra* note 305.

going to be litigated “it should be done as well as it could.”<sup>348</sup> The city attorneys therefore moved quickly—and thus did not coordinate strategy with the movement lawyers—filing their constitutional challenge to California’s marriage laws on the same day the supreme court issued its order.<sup>349</sup>

Movement lawyers also acted decisively to challenge the marriage laws’ constitutionality. As Pizer recalled, “There was no question that we would accept [the court’s invitation] and file that case.”<sup>350</sup> Like the city attorneys, the movement lawyers recognized the risks of litigating the constitutional question, but believed that if they did not strike at that moment, someone else would, with potentially damaging effects. “This is a state with a great many lawyers and LGBT people who wanted marriage. [The court’s invitation] would receive a response, if not by us then by others.”<sup>351</sup> Indeed, Allred had already filed the *Tyler* suit at this point. In addition, the public pressure in favor of pursuing litigation was also a factor: “There was too much public engagement and community expectation . . . . We couldn’t have really decided to drop the issue of marriage equality at that point because that would have meant abandoning all those married couples” who had already taken advantage of Newsom’s decision.<sup>352</sup> On the merits, the lawyers interpreted the court’s invitation as a positive signal that gave them “reason to hope for a good decision.”<sup>353</sup> And there was a sense that the political landscape had changed in ways that might allow them to fend off a subsequent voter initiative: “There were changes in public opinion according to our polling. There was a better-organized political structure in the state. We’d done public education and had more support from mainstream forces in the state . . . . It seemed more possible that we could both win and preserve the win.”<sup>354</sup>

Moreover, lawyers at NCLR had already contemplated filing an affirmative constitutional challenge in 2005 or 2006.<sup>355</sup> Although “left to [their] own devices, [NCLR lawyers] wouldn’t have filed a lawsuit in March [2004],” it “would have happened” soon thereafter: “Our community would have demanded it.”<sup>356</sup> While premature, a constitutional challenge was therefore not viewed by

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348. *Id.*

349. See Complaint for Declaratory Relief, *City of San Francisco v. California*, No. CGC-04-429537 (Cal. Super. Ct. Mar. 11, 2004).

350. Telephone Interview With Pizer, *supra* note 266.

351. *Id.*

352. *Id.*

353. *Id.*

354. Telephone Interview With Davidson, *supra* note 105. Not everyone shared this view, particularly the ACLU’s Matt Coles. Interview With Coles, *supra* note 143.

355. Telephone Interview With Kendell, *supra* note 285.

356. *Id.*

NCLR as the risk it once was, particularly after the “winter of love” produced images of same-sex couples getting married that lawyers believed “[were] going to accelerate public acceptance” and therefore strengthen their ability to fight back against a constitutional amendment.<sup>357</sup> Accordingly, when the court’s order came down, LGBT rights lawyers were “up all night preparing the lawsuit. We didn’t want to let one more day go by.”<sup>358</sup> On March 12, the day after the San Francisco City Attorney’s suit was filed, NCLR, Lambda Legal, and the ACLU, along with Codell and pro bono lawyers from Heller Ehrman, brought a similar constitutional challenge, *Woo v. Lockyer*,<sup>359</sup> on behalf of Equality California and twelve same-sex couples.<sup>360</sup>

All of the pending cases were transferred to San Francisco Superior Court Judge Richard Kramer, who ultimately consolidated them into a single proceeding, entitled *In re Marriage Cases*.<sup>361</sup> NCLR’s Minter was lead counsel in *Woo*; City Attorney Stewart was lead counsel in the city’s constitutional challenge. The decision to have Minter serve as lead counsel in *Woo* was an “organic” one: “Things were transpiring in San Francisco, which was our home base. We were present on the scene with Newsom, so it just made sense.”<sup>362</sup> There were efforts by the city attorneys and movement lawyers to coordinate legal strategy. At the beginning, Stewart participated in regular conference calls with the *Woo* lawyers, but as the case progressed dealt primarily with Minter, with whom she was “joined at the hip.”<sup>363</sup> There was an early disagreement over whether to ask for a trial, with Stewart of the view that a factual hearing would expose the irrationality of the ban on marriage for same-sex couples, but the issue was mooted when the court decided to bypass trial.<sup>364</sup> Despite the court’s ruling, the city attorneys still sought to make an evidentiary record by filing several expert witness declarations on issues such as the history of discrimination against lesbians and gay men, the history of marriage, the immutability of sexual orientation, and the economic harm to same-sex couples denied the right to marry. The city attorneys also filed

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357. *Id.*

358. *Id.*

359. Case No. CPF-04-504038 (Cal. Super. Ct. filed Mar. 12, 2004).

360. Dena Narbaitz and Clyde Wadsworth, from Steefel, Levitt & Weiss in San Francisco, were also on the briefs for plaintiffs. Christine Sun, Peter Eliasberg, and Clare Pastore were counsel from the ACLU-SC, while Tamara Lange, Alex Cleghorn, and Alan Schlosser were counsel from the ACLU-NC. In addition to Gloria Allred’s Tyler suit, another private lawsuit was filed later. See Complaint for Declaratory Relief by Same-Sex Married Couples Challenging the Constitutionality of the Family Code, *Clinton v. California*, No. CGC-04-429548 (Cal. Super. Ct. Aug. 13, 2004).

361. 183 P.3d 384 (Cal. 2008).

362. Telephone Interview With Minter, *supra* note 125.

363. Telephone Interview With Stewart, *supra* note 305.

364. *Id.*

declarations from married same-sex couples and their teenage children, explaining why the status of marriage was so important to them.<sup>365</sup>

As the case progressed, the movement lawyers and city attorneys talked constantly in order to make sure they “weren’t operating at cross-purposes.”<sup>366</sup> And while the working relationship was productive, Stewart had the impression that the movement lawyers “would have liked it if we would have been off in the corner in a narrow role.”<sup>367</sup> There was no technical division of issues, and each team worked on its own briefs independently. In the lead-up to oral arguments, there were strategy discussions about who should emphasize which issues and how best to answer anticipated questions from the court. However, in the end, both teams prepared to argue all aspects of the case since it was crucial that each team “be ready for anything.”<sup>368</sup>

The city attorneys focused their arguments on their concern that “the Court would believe the difference [between marriage and domestic partnership] was in name only and therefore was not constitutionally significant.”<sup>369</sup>

According to Stewart:

[W]e feared the Court would feel that because the [domestic partnership] bill was so comprehensive it meant the Court should not interject itself because gays were being taken care of in the political process and did not need protection from the Court. We focused our arguments on the importance of marriage, its meaning, the evolution of the institution over time without its destruction. We also hit heavily on the history of discrimination against lesbians and gay men, because most people, including the jurists, are not familiar with that history. . . . We argued strongly that the Court could strike the law down as irrational because the findings of the [domestic partnership] bill and its provisions were impossible to square with excluding gays and lesbians from marriage. . . . We hoped the Court would apply strict scrutiny but it was known as an incrementalist, cautious court, and no other high court in any state or the U.S. system had ever applied strict scrutiny to gay people. But even if it did not apply strict scrutiny, the arguments about those factors would make it want to decide in our favor and possibly give it the fortitude to do so.<sup>370</sup>

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365. Email From Therese Stewart, Chief Deputy, San Francisco City Attorney, to Scott L. Cummings, Professor, UCLA Sch. of Law (Mar. 15, 2010 5:52 PM PST) (on file with author).

366. Telephone Interview With Stewart, *supra* note 305.

367. *Id.*

368. *Id.*

369. Email From Stewart, *supra* note 330.

370. *Id.*

The movement lawyers in *Woo* made two strategic decisions to advance their case. First, they decided to lead with their statutory interpretation argument and frame the constitutional challenge as an alternative ground, thus giving the court a way to avoid the constitutional issue and still rule in their favor. The choice to lead with the statutory argument—despite its relative weakness—reflected the lawyers’ ongoing reluctance to seek constitutional review. The statutory argument focused on Family Code § 308.5, enacted by Proposition 22, which stated that “[o]nly marriage between a man and a woman is valid or recognized in California.”<sup>371</sup> The movement lawyers argued that § 308.5 was only designed to preclude the recognition of marriages entered into *outside of California*, but did not purport to limit marriages entered into *inside of California*.<sup>372</sup> Therefore, the lawyers argued, “California got to make the choice” of whether to enact its own law authorizing the marriage of same-sex couples without running afoul of § 308.5.<sup>373</sup> The lawyers thus urged the court to avoid the constitutional question and instead allow the state to enact marriage legislatively.

Then, in setting up the constitutional arguments, the lawyers made their second key strategic decision: to frame arguments in a way so that marriage for same-sex couples would be viewed as a “small step” for the court to take. This subtle argument relied on both the prospect of a favorable outcome in the simultaneously pending *Knight v. Superior Court*<sup>374</sup> litigation over AB 205 and a careful marshalling of the legislative findings incorporated in that bill and the other domestic partnership legislation. The simultaneous *Knight* litigation required a delicate balancing act. On the one hand, the lawyers wanted to establish in *Knight* that domestic partnership was legally distinct from—and inferior to—full marriage in order to set up their constitutional challenge in the *Marriage Cases*. On the other hand, they wanted to directly argue in the *Marriage Cases* that the rights and benefits accorded under domestic partnership were so close to marriage that it really just “boiled down to the word marriage.”<sup>375</sup> The key was therefore maintaining these two positions—that domestic partnership was practically so close to marriage, while legally still so far—without appearing inconsistent. The lawyers hoped that the *Knight* lawsuit would be resolved first, since it would allow them to establish the legal inferiority of domestic

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371. CAL. FAM. CODE § 308.5 (2004).

372. See *In re Marriage Cases*, 183 P.3d 384, 409–10 (Cal. 2008).

373. Codell Remarks, *supra* note 129; see also Third Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief at ¶ 39(a), *Woo v. Lockyer*, Case No. CGC-04-504038 (Cal. Super. Ct. Sept. 1, 2004).

374. 26 Cal. Rptr. 3d 687 (Ct. App. 2005).

375. Codell Remarks, *supra* note 129.

partnership under more favorable conditions, which included a legal presumption in favor of AB 205 and the alliance of the state attorney general.<sup>376</sup>

The lawyers in *Woo* also wanted to set up sexual orientation as a suspect classification, thus triggering strict scrutiny of the marriage ban. To do this, they relied on the legislative and litigation record that they had so carefully crafted. For evidence of discrimination, advocates pointed in part to the legislative findings in AB 205 and other domestic partner statutes. To demonstrate the irrelevance of sexual orientation to social participation, advocates pointed out that “California ha[d] enacted over fifty laws banning discrimination based on sexual orientation, in schools, government, employment, child custody matters, adoption matters.”<sup>377</sup> In addition, the legal groups had successfully litigated suits establishing that California parenting statutes had to be applied equally to same-sex parents; these cases “took off the table rationales related to procreation and parenting used to uphold other marriage bans.”<sup>378</sup> As a result, when the “question came to the court, they weren’t making some huge step” in holding California’s ban on same-sex marriage unconstitutional.<sup>379</sup>

What the lawyers did not have by the time the case reached the supreme court were married same-sex couples whose experiences could be used as evidence. Movement leaders had hoped that as Californians had time to become accustomed to the four thousand same-sex couples issued marriage licenses in San Francisco—and to see that such marriages did not affect different-sex marriages—they could point to this experience to show the irrationality of California’s law. However, on August 12, 2004, those four thousand marriages were nullified by the California Supreme Court in the *Lockyer* case, which held that San Francisco city officials had in fact exceeded their power in issuing marriage licenses.<sup>380</sup> Although the city attorneys had argued that the court should leave the existing marriages intact pending resolution of the constitutional question, the court’s decision to rule separately on the issue of local government authority led it to nullify the marriages solely on that ground.<sup>381</sup> Leaders from Equality California attempted to turn the *Lockyer* decision into

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376. *Id.*

377. *Id.*

378. Telephone Interview With Minter, *supra* note 125. NCLR won a trio of cases in 2005 holding that “children born to same-sex couples must be treated equally to other children and thus have a legally protected relationship to both partners.” Press Release, NCLR, National Center for Lesbian Rights Applauds California Supreme Court Decisions in Groundbreaking Parenting Cases (Aug. 22, 2005), available at [http://www.nclrights.org/site/PageServer?pagename=press\\_pr\\_parenting\\_082205](http://www.nclrights.org/site/PageServer?pagename=press_pr_parenting_082205).

379. Codell Remarks, *supra* note 129.

380. *Lockyer v. City of San Francisco*, 95 P.3d 459, 499 (Cal. 2004).

381. *Id.* The court’s decision mooted the initial lawsuits by ADF and CCF, which were denied the right to formally intervene in the *Marriage Cases*, but were nonetheless kept in the case as appellants challenging the dismissal of their cases. *In re Marriage Cases*, 183 P.3d 384, 404–08 (Cal. 2008).

an opportunity for public education: “We had talking points ready and had statewide meetings with our different community partners. So the moment the court ruled, we put into place a plan we’d set up.”<sup>382</sup> Media coverage was widespread, and LGBT advocates used it “to put a human face on the issue. We let people know, ‘This is our pain . . . These are our families at stake.’”<sup>383</sup>

The *Lockyer* decision also influenced efforts to revive a marriage bill in the state legislature—refocusing attention on how the legislative process might interact with the pending litigation. After the initial Leno marriage bill passed the Judiciary Committee in April 2004,<sup>384</sup> it was allowed to die in the Appropriations Committee as planned.<sup>385</sup> As Leno prepared to reintroduce the marriage bill at the beginning of 2005,<sup>386</sup> the *Marriage Cases* litigation gave it new urgency but also posed new risks. In the wake of *Lockyer*, the justification for a marriage bill was strengthened, as it offered the last hope to create a record of same-sex marriages before the inevitable supreme court decision and ensuing ballot initiative.

Yet the pendency of the *Marriage Cases* also made the lawyers cautious about ensuring that the marriage bill reinforced the legal arguments that lawyers were making in court. Particularly because there was skepticism that Governor Schwarzenegger would ultimately sign the bill, known as AB 849, lawyers wanted the debate within the legislature to help the litigation.<sup>387</sup> The lawyers wanted any legislative findings in support of a marriage bill to make clear that Family Code § 308.5, enacted by Proposition 22, only banned the recognition of out-of-state same-sex marriages, and did not preclude California from affirmatively deciding to permit same-sex couples to marry on its own terms.<sup>388</sup> This was important because it would create a legislative record in support of the statutory argument in court that California could institute marriage without contravening Proposition 22 (thus rendering it unnecessary for the supreme court to reach the constitutional question).<sup>389</sup> In addition, persuading reluctant assembly members that the marriage bill was legally consistent with Proposition 22 was necessary to garner their support.<sup>390</sup> Lambda Legal’s

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382. PINELLO, *supra* note 168, at 89 (quoting Molly McKay, Associate Executive Director of Equality California).

383. *Id.* at 90.

384. See Robert Salladay, *Legislators Support Same-Sex Marriage*, L.A. TIMES, Apr. 21, 2004, at A1.

385. See Robert Salladay, *Gay Marriage Bill Expected to Die in Assembly*, L.A. TIMES, May 18, 2004, at B6.

386. See William Wan & Lee Romney, *Marriage Debate in a New Arena*, L.A. TIMES, Aug. 14, 2004, at B1.

387. Telephone Interview With Davidson, *supra* note 105.

388. Telephone Interview With Pizer, *supra* note 266.

389. *Id.*

390. *Id.*

Davidson led the effort to provide legal analysis to Leno and other assembly members on the interpretation of Proposition 22.<sup>391</sup>

Meanwhile, Leno worked to win votes in the assembly, positioning marriage as a civil rights issue and creating a coalition of groups that included the NAACP, the Mexican American Legal Defense and Educational Fund, the ACLU, Asian Law Caucus, Legal Momentum, and the Anti-Defamation League to lobby for the bill's passage.<sup>392</sup> After failing in the assembly on a floor vote in June, the Senate Democratic Caucus—under the leadership of Sheila Kuehl from Santa Monica—revised the marriage bill in a process known as “gut and amend” and presented it to the full senate, which passed the bill in a historic August vote. The senate's approval created new momentum for the marriage bill, which in September was re-sent to the full assembly. In the assembly, it passed over unified Republican opposition by one vote in a dramatic final scene in which Democrat Simon Salinas, from a heavily Latino district in the Central Valley, “hesitated for several seconds as the tally hung at 40 ‘ayes’—one short of passage” before finally voting yes.<sup>393</sup> Although Governor Schwarzenegger had earlier stated that he did not care if same-sex couples married<sup>394</sup>—and advocates believed they had given the governor “legal and constitutional cover” to pass the bill<sup>395</sup>—Schwarzenegger ultimately vetoed AB 849, citing the primacy of Proposition 22.<sup>396</sup> In an ironic twist on the typical conservative argument against “judicial activism,” the governor issued a statement that he believed “the matter should be determined not by legislative action—which would be unconstitutional—but by court decision or another vote of the people of our state.”<sup>397</sup> The following year, Leno reintroduced the marriage bill, which again passed the senate and assembly,<sup>398</sup> only to be vetoed in October 2007 on the same grounds.<sup>399</sup>

Yet by this time, supporters of marriage for same-sex couples believed that they had accomplished an important goal. With the California Supreme Court

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391. *Id.*

392. Telephone Interview With Leno, *supra* note 264.

393. Nancy Vogel, *Legislature OKs Gay Marriage*, L.A. TIMES, Sept. 7, 2005, at A1. The bill had passed the senate a week earlier. See Jordan Rau & Nancy Vogel, *State Senate Votes to Let Gays Marry*, L.A. TIMES, Sept. 2, 2005, at A1.

394. See Peter Nicholas, *Schwarzenegger's Opinion on Same-Sex Marriage: "I Don't Care"*, L.A. TIMES, June 25, 2004, at B5.

395. Telephone Interview With Leno, *supra* note 264.

396. See Michael Finnegan & Maura Dolan, *Citing Prop. 22, Gov. Rejects Gay Marriage Bill*, L.A. TIMES, Sept. 8, 2005, at A1.

397. *Id.*

398. See Nancy Vogel, *Same-Sex Unions OK'd by Assembly*, L.A. TIMES, June 6, 2007, at B3.

399. See Veto Message, A.B. 43 (Oct. 12, 2007), available at [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0001-0050/ab\\_43\\_vt\\_20071012.html](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_43_vt_20071012.html).

reviewing the parties' briefs in the *Marriage Cases*, lawyers were able to point to the legislative findings in the marriage bills in support of their arguments.<sup>400</sup> In fact, lawyers for the *Woo* plaintiffs specifically argued that AB 849 supported the narrow construction of Family Code § 308.5 as only prohibiting "California from recognizing marriages from other jurisdictions, not as a limitation on who may marry in California," while also providing evidence that "excluding same-sex couples from marriage discriminates based on sex."<sup>401</sup>

These arguments made their way up to the California Supreme Court by an arduous path. The trial court's March 2005 ruling that the marriage ban violated the state Equal Protection Clause was reversed the following year by the appellate court, which refused to hold that the marriage restriction relied on a suspect classification and instead found that the state had met its burden by showing a legitimate interest in upholding the "traditional" definition of marriage.<sup>402</sup> By this time, however, the *Knight* lawsuit over AB 205 had become final. The *Marriage Cases* were thus set to go up to the supreme court against what movement lawyers believed to be a favorable legal backdrop in which it was "clearly established and understood by every judge . . . that [the domestic partnership regime was] simply unequal."<sup>403</sup>

Petitioning the California Supreme Court, however, was not a foregone conclusion. After the disappointing appellate court ruling, lawyers at NCLR, Lambda Legal, and the ACLU had serious discussions about whether to seek supreme court review.<sup>404</sup> Some of the lawyers thought "of course we take review" because if the court was not favorable, it would simply deny the petition for review.<sup>405</sup> Others, however, were more cautious about their chances of success on the legal merits and worried that even if they could win, the political consequences would be devastating.<sup>406</sup> By the fall of 2006, "when petitions were due in California, we had lost in Nebraska, lost in New York, lost in Oregon, . . . lost in Washington . . . and the only win any of us had on marriage was Massachusetts. And so, at that point, we're like, 'Huh, hey guys, this is not a manifestly successful program.'"<sup>407</sup> Ultimately, however, the

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400. Telephone Interview With Leno, *supra* note 264.

401. Respondents' Opening Brief on the Merits at 46 n.35, 82, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), available at [http://www.nclrights.org/site/DocServer/Rymer\\_Reply\\_Brief\\_Merits081707.pdf?docID=1860](http://www.nclrights.org/site/DocServer/Rymer_Reply_Brief_Merits081707.pdf?docID=1860).

402. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 706–14, 718–24 (Ct. App. 2006).

403. Codell Remarks, *supra* note 129.

404. Telephone Interview With James Esseks, Co-Dir., LGBT Rights Project, ACLU (Feb. 23, 2010).

405. *Id.*

406. *Id.*

407. *Id.*

lawyers decided to move forward, motivated by the fact that other parties were filing for review. “The case was going up, so why would we go from being parties to sitting on the sidelines?”<sup>408</sup>

In preparation for the supreme court argument, Minter and his colleagues took steps to shore up their position. For one, Minter and Stewart organized a massive amicus brief campaign in support of marriage for same-sex couples.<sup>409</sup> Support came from diverse quarters—African American pastors, public interest groups, bar associations, civil rights groups, and law professors.<sup>410</sup> In one example, API Equality-LA, a marriage equality group formed in 2005, helped organize an amicus brief of over sixty Asian American organizations,<sup>411</sup> using it as an opportunity to build bridges between LGBT and Asian American groups around a shared commitment to civil rights, while also generating positive publicity about marriage equality within Asian immigrant communities.<sup>412</sup> The city attorneys obtained some important briefs, including one from Berkeley law professor Jesse Choper, arguing that the court should not defer to the political branches,<sup>413</sup> as well as others from California cities and counties, state legislators, bar associations, and international law professors. The overall goal of the amicus campaign was to normalize same-sex marriage for the court by showing the broad range of supporters, though some of the lawyers viewed the length of the amicus list in the case as too unwieldy.<sup>414</sup>

In addition, the lawyers fine-tuned their arguments to resonate more powerfully with the emotional and social meaning of marriage. After the lawyers had submitted their briefs to the appellate court, their client, Equality California, conducted public opinion research that found that people generally did not think of marriage as a bundle of legal rights and benefits, but viewed marriage in more profound and personal terms. When Minter reviewed the data, it was “one of those light bulb moments. While I was looking at that research about the most effective public messages, I thought we should be using these themes in our legal briefs.”<sup>415</sup> As a result, the lawyers changed their briefing dramatically between the appellate and supreme court arguments to emphasize “the

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408. *Id.*

409. See Lee Romney, *Taking Sides on Same-Sex Marriage*, L.A. TIMES, Jan. 11, 2006, at B4.

410. See *id.*

411. See Robert S. Chang & Karin Wang, *Democratizing the Courts: How an Amicus Brief Helped Organize the Asian American Community to Support Marriage Equality*, 14 UCLA ASIAN PAC. AM. L.J. 22 (2009).

412. Karin Wang, Vice President of Programs, Asian Pac. Am. Legal Ctr., Remarks at the Seminar on Problem Solving in the Public Interest, UCLA School of Law (Oct. 21, 2009).

413. Amicus Curiae Brief by Professor Jesse H. Choper in Support of Petitioners, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S14799).

414. See Pizer Remarks, *supra* note 94.

415. Telephone Interview With Minter, *supra* note 125.

personal and social significance of marriage, which the court picked up on profoundly in its decision.”<sup>416</sup>

The supreme court decision, announced on May 15, 2008, was an epic moment in the national marriage equality movement. Although the court dismissed the statutory argument regarding the scope of § 308.5, it accepted the plaintiffs’ constitutional position in sweeping terms. Specifically, the court held that California law limiting marriage to a man and a woman violated state due process and equal protection guarantees since the right to marry is fundamental, sexual orientation constitutes a suspect classification, and no compelling state interest supports the restriction.<sup>417</sup> In the end, it seemed that the lawyers’ strategy of framing the decision as a “small step” and emphasizing the personal dimension of marriage had paid off. In striking down the ban, the court emphasized that while same-sex couples already had “virtually all of the legal benefits, privileges, responsibilities, and duties” of married couples,<sup>418</sup> marriage was not just a legal construct, but also had “substantive content”: “[O]ur cases make clear that the right to marry is an integral component of an individual’s interest in personal autonomy . . . and of their liberty interest.”<sup>419</sup> In one fell swoop, what was seen as a pipe dream only five years earlier, had become a legal reality in California. Despite themselves, lawyers for marriage equality had succeeded in establishing it as a constitutional right.

#### D. On the Sidelines: Proposition 8, *Perry*, and the Plan for 2012

As movement lawyers had predicted, opponents were quickly moving to invalidate the supreme court decision through an initiative to amend the California Constitution to read that “only marriage between a man and a woman is valid or recognized in California.”<sup>420</sup> Marriage equality opponents ProtectMarriage.com and VoteYesMarriage.com had been attempting to qualify such an initiative for statewide ballot as early as 2005.<sup>421</sup> After the *Marriage Cases* supreme court oral arguments on March 4, 2008, when Chief Justice Ronald George made comments widely interpreted as signaling the court’s

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416. *Id.*

417. See *In re Marriage Cases*, 183 P.3d 384, 400–01 (Cal. 2008).

418. *Id.* at 413.

419. *Id.* at 425–26.

420. *Official Title and Summary: Prop. 8*, in CALIFORNIA GENERAL ELECTION OFFICIAL VOTER INFORMATION GUIDE 54 (2008), available at <http://www.voterguide.sos.ca.gov/past/2008/general/title-sum/prop8-title-sum.htm>.

421. See PINELLO, *supra* note 168, at 99. The early versions of the initiative would have eliminated domestic partnership rights as well as the right to marry. Email From Therese M. Stewart, Chief Deputy, San Francisco City Attorney, to Scott L. Cummings, Professor, UCLA Sch. of Law (Mar. 15, 2010 6:19 PM PST).

intent to invalidate the marriage ban,<sup>422</sup> out-of-state money began flowing into California in support of an initiative drive.<sup>423</sup> Less than a month after the *Marriage Cases* were decided, the anti-same-sex-marriage initiative, known as Proposition 8, had qualified for the November 2008 statewide ballot.<sup>424</sup> Marriage equality opponents, led by ProtectMarriage.com with ADF acting as legal advisor, believed that even though they had lost the legal battle, they could still win the political war.<sup>425</sup>

The Proposition 8 campaign was notable for both its expense and vitriol, although there were echoes of the earlier Proposition 22 campaign. Fundraising on both sides broke records for a social policy initiative, with large sums coming from out of state, and money flowing in from over twenty foreign countries. In the final tally, fundraising was roughly even, with each side raising more than \$40 million.<sup>426</sup>

There was early legal wrangling over the proper title of the initiative for the state ballot, with Yes on 8 objecting to the title, which Attorney General Jerry Brown had changed to read: "Eliminates (the) Right of Same-Sex Couples to Marry."<sup>427</sup> ADF sued to modify the title, but the challenge was rejected by a Sacramento Superior Court judge, who held that the title accurately summarized the measure.<sup>428</sup> The judge also ruled that the Yes on 8 campaign had to change its ballot materials, which erroneously stated that the *Marriage Cases* decision would "require" schools to teach about same-sex marriage.<sup>429</sup>

Movement lawyers also began jostling over the impending vote. During the summer, the lawyers filed suit attempting to block Proposition 8, but the supreme court rejected it.<sup>430</sup> They then "retooled and revamped [the lawsuit] and expanded it and had papers ready to file the next day after the vote."<sup>431</sup> In

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422. See Adam Liptak, *Definition of Marriage Is at Heart of California Case*, N.Y. TIMES, Mar. 5, 2008, at A14.

423. See Lisa Leff, *Gay Marriage Amendment Headed to California Ballot*, ASSOCIATED PRESS, Apr. 24, 2008.

424. See Jack Leonard, *Voters Will Decide on Gay Marriage*, L.A. TIMES, June 3, 2008, at B1.

425. See Glen Lavy, *A State Marriage Amendment Is Needed*, SAN DIEGO UNION-TRIB., May 16, 2008, available at [http://legacy.signonsandiego.com/uniontrib/20080516/news\\_lz1e16lavy.html](http://legacy.signonsandiego.com/uniontrib/20080516/news_lz1e16lavy.html).

426. Jessica Garrison, Cara Mia DiMassa & Richard C. Paddock, *Nation Watches as State Weighs Ban*, L.A. TIMES, Nov. 5, 2008, at A1; California Secretary of State, Campaign Finance: ProtectMarriage.com—Yes on 8, A Project of California Renewal, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1302592&session=2007> (last visited June 6, 2010).

427. See Bob Egelko, *Judge Refuses to Order Change in Prop. 8 Title*, S.F. CHRON., Aug. 9, 2008, at B1.

428. See *id.*; see also Bob Egelko, *Prop. 8 Backers Drop Challenge on Wording*, S.F. CHRON., Aug. 12, 2008, at B3.

429. See Egelko, *supra* note 427.

430. Telephone Interview With Esseks, *supra* note 404.

431. *Id.*

addition, the lawyers moved to undercut what they anticipated would be powerful pressure to file a federal constitutional challenge should Proposition 8 pass. In June 2008, they issued a joint statement, 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>432</sup> While the statement was explicitly directed to those in other states who wanted to press for marriage equality through the federal courts, the subtext was clear: If Proposition 8 passed in California, a federal lawsuit was not the vehicle to challenge it.

As the superior court ruling over the issue of schools on the ballot materials portended, the Proposition 8 battle turned on messaging, with the Yes on 8 campaign making a strategic decision not to emphasize the value of preserving the “traditional” definition of marriage (as they had with Proposition 22).<sup>433</sup> Instead, marriage equality opponents aired ads painting Proposition 8 as a measure to protect children from being taught about same-sex marriage in schools.<sup>434</sup> The No on 8 campaign was slow to respond to this argument, which badly damaged its efforts.<sup>435</sup>

On November 4, 2008, California voters narrowly passed Proposition 8, by a 52–48 percent margin.<sup>436</sup> The measure’s passage revealed deep divisions and provoked recriminations. A National Election Pool (NEP) exit poll showed 70 percent African American support for Proposition 8, which led some to place blame on African American voters.<sup>437</sup> Post-election analysis, however, revealed that African American support was overstated and that the NEP poll was an outlier.<sup>438</sup> Instead, voter preferences correlated more with religiosity than with race.<sup>439</sup> Nonetheless, the No on 8 Campaign faced criticism for its lack of outreach to African American and Latino voters.<sup>440</sup> Support for

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432. 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 June 6, 2010).

433. See Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 359 (2009); see also Queerty.com, Masterminds Behind “Yes on 8” Reveal How They Did It, Feb. 24, 2009, <http://www.queerty.com/masterminds-behind-yes-on-8-reveal-how-they-did-it-20090224>.

434. See Jessica Garrison, *A Prop. 8 Fight Over Schools*, L.A. TIMES, Oct. 19, 2008, at B1.

435. See discussion *infra* Part III.C.1.

436. See Kevin Fagan & John King, *National Protests Condemn Prop. 8*, S.F. CHRON., Nov. 16, 2008, at A1.

437. See Cara Mia DiMassa & Jessica Garrison, *Why Gays, Blacks Are Divided on Prop. 8*, L.A. TIMES, Nov. 8, 2008, at A1.

438. See PATRICK J. EGAN & KENNETH SHERRILL, CALIFORNIA’S PROPOSITION 8: WHAT HAPPENED, AND WHAT DOES THE FUTURE HOLD? 9 (2009).

439. See *id.* at 11.

440. See Jessica Garrison, *Angrier Response to Prop. 8 Arises*, L.A. TIMES, Nov. 13, 2008, at A1.

Proposition 8 drew heavily from the ranks of the Christian Right, including evangelical Protestants and the Catholic and Mormon Churches, although the measure also revealed rifts within religious communities.<sup>441</sup> The Progressive Jewish Alliance and other Jewish groups joined Episcopal dioceses in opposition to Proposition 8, as did human and civil rights groups, unions, and progressive companies.<sup>442</sup>

The passage of Proposition 8 unleashed a wave of protests both within California and around the country, many of which were facilitated by activists on social networking sites like Facebook.<sup>443</sup> Join the Impact, a group created immediately after the passage of Proposition 8, established a website used to coordinate a National Day of Protest on November 15 that saw hundreds of thousands of protesters turn out across the country.<sup>444</sup>

While these protests vividly highlighted the breadth of national outrage over Proposition 8, they could not provide a direct challenge to the law—a task that fell to movement lawyers. The day after voters approved the measure, Lambda Legal, NCLR, and the ACLU challenged Proposition 8 in the state supreme court—in a case called *Strauss v. Horton*<sup>445</sup>—arguing that the initiative “revised,” rather than “amended,” the state constitution by abrogating equal protection for same-sex couples.<sup>446</sup> As a constitutional revision, they argued, the initiative required approval by two-thirds of the legislature before submission to the voters.<sup>447</sup> The supreme court rejected that argument, ruling

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441. See Jessica Garrison, *Black Clergy Both Attack, Defend Prop. 8*, L.A. TIMES, Oct. 22, 2008, at B4; Duke Helfand, *Clergy Vocalize Stance on Prop. 8*, L.A. TIMES, Oct. 26, 2008, at B4.

442. See Michelle Quinn, *Anti-Prop. 8 Campaign Gets a Boost from Apple*, L.A. TIMES, Oct. 25, 2008, at C1.

443. See Tony Barboza et al., *Protests a Key Test for Prop. 8 Foes*, L.A. TIMES, Nov. 15, 2008, at B1; Ari B. Bloomekatz et al., *Throngs Protest Across the State*, L.A. TIMES, Nov. 9, 2008, at B1.

444. LGBT activists also organized boycotts of businesses linked to Yes on 8 donors, while conservative lawyer James Bopp, Jr. (along with ADF) filed a federal lawsuit on behalf of ProtectMarriage.com to preclude the public release of the names of Yes on 8 donors, despite a state election law mandating their release. See Jesse McKinley, *Marriage Ban Donors Feel Exposed by List*, N.Y. TIMES, Jan. 19, 2009, at A12. While the court denied the plaintiffs’ request for a preliminary injunction, it more recently granted the plaintiffs’ request for class certification. See *ProtectMarriage.com v. Bowen*, 262 F.R.D. 504 (E.D. Cal. 2009).

445. 207 P.3d 48 (Cal. 2009).

446. Maura Dolan & Tami Abdollah, *Gay Rights Supporters File 3 Lawsuits Against Prop. 8*, L.A. TIMES, Nov. 6, 2008, at A23. For Lambda Legal, the lawyers were Jon Davidson, Jennifer Pizer, and Tara Borelli; for NCLR, Shannon Minter, Christopher Stoll, Melanie Rowen, Catherine Sakimura, Illona Turner, and Shin-Ming Wong; and James Esseks for the ACLU national office, Alan Schlosser and Elizabeth Gill for the ACLU-NC, Mark Rosenbaum, Clare Pastore, and Lori Rifkin for the ACLU-SC, and David Blair-Loy for the ACLU Foundation of San Diego and Imperial Counties. In addition, David Codell and pro bono lawyers from Orrick, Herrington & Sutcliffe were on the legal team.

447. *Strauss v. Horton*, 207 P.3d 48, 60 (Cal. 2009). This case was joined by two others, *Tyler v. State of California*, filed by Gloria Allred, and *City and County of San Francisco v. Horton*, brought

that Proposition 8 merely amended the state constitution to change the definition of marriage and did not “substantially alter” the basic constitutional framework.<sup>448</sup> The court, however, left intact the roughly eighteen thousand marriages that had occurred between the *Marriage Cases* decision and the passage of Proposition 8.<sup>449</sup>

The *Strauss* ruling left open the question of whether out-of-state marriages—performed both before and after the passage of Proposition 8—were valid.<sup>450</sup> To resolve this point, Equality California’s Kors led a coalition of advocates, including lawyers from NCLR and Lambda Legal, in an effort to pass clarifying legislation. Senator Leno sponsored the bill, Senate Bill (SB) 54, which stated that “a marriage between two persons of the same sex contracted outside this state . . . is valid in this state if the marriage was contracted prior to November 5, 2008,”<sup>451</sup> the date Proposition 8 passed. In addition, the bill provided that marriages of same-sex couples entered after that date would be accorded the same rights and responsibilities “as are granted to and imposed upon spouses with the sole exception of the designation of ‘marriage.’”<sup>452</sup> Movement lawyers traveled to Sacramento to meet with lawmakers and persuade them that such a law would not contravene Proposition 8.<sup>453</sup> Governor Schwarzenegger—convinced that SB 54 posed little political risk since it merely clarified the status of out-of-state unions left unaddressed by Proposition 8—signed SB 54 into law on October 11, 2009. SB 54 was crucial to the ongoing movement because it meant that California was “not simply in the position of being pushed back to a [domestic partnership] regime, but [was] in the unique position of having legally married [same-sex] couples, and a state law requiring full recognition of any marriages entered anywhere prior to Prop. 8 and nearly full recognition of out of state marriages entered *after* Prop. 8.”<sup>454</sup> SB 54 therefore offered some solace in the face of *Strauss*, moving marriage forward, albeit by much less than advocates would have liked. Nonetheless, the bill—combined with the decision in *Strauss* to validate the eighteen thousand pre-Proposition 8 marriages—created a growing beachhead that could be expanded.

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by the San Francisco City Attorney’s office. All three were consolidated for decision by the California Supreme Court.

448. *Strauss*, 207 P.3d at 63–64.

449. *Id.* at 122.

450. *Id.* at 122 n.48.

451. CAL. FAM. CODE § 308b (2010).

452. *Id.* § 308c.

453. Telephone Interview With Kendell, *supra* note 285.

454. Email From Shannon Minter, Legal Dir., National Center for Lesbian Rights, to Professor Scott L. Cummings, UCLA Sch. of Law (Feb. 18, 2010).

*Strauss* itself also strengthened the educational and organizing dimensions of the marriage equality movement, both in relation to Equality California's efforts and outside of them. In the lead-up to the *Strauss* decision, there was a coordinated effort to use the publicity generated by the case as a vehicle for public education.<sup>455</sup> The case also further mobilized new technology-savvy, bottom-up grassroots efforts led by younger activists.<sup>456</sup> The group Freedom Action Inclusion Rights (FAIR) emerged after Proposition 8 to facilitate activism via social networking sites, and was instrumental in organizing the Los Angeles protests on the November 15 National Day of Protest.<sup>457</sup> As the *Strauss* decision drew nearer, FAIR organized discussions on Facebook about the case, orchestrated a march to the Los Angeles City Hall to watch a live feed of the oral argument, and organized a mass demonstration, called Day of Decision, to respond to the anticipated unfavorable decision.<sup>458</sup>

In the lead up to the *Strauss* ruling, which most assumed would affirm Proposition 8, there was pressure on the LGBT rights groups to file a federal lawsuit. As they had become accustomed to doing across the country to protect their strategy, movement lawyers fielded many calls from constituents who wanted to file suit and "spent a lot of time talking people down from that particular ledge."<sup>459</sup> Yet the lawyers also explicitly discussed the possibility of bringing their own federal lawsuit. As Pizer quipped, "It's not as if we don't know where the federal courthouse is."<sup>460</sup> At issue was whether to constitutionally challenge the unique nature of Proposition 8, which eliminated the right of same-sex couples to marry despite the fact that the California Supreme Court had clearly established it and the California legislature had conferred all the same rights and responsibilities through domestic partnership. Movement lawyers could not agree, however, that even a narrowly tailored challenge was wise in light of the risk of a more sweepingly negative U.S. Supreme Court ruling on the constitutionality of marriage bans.<sup>461</sup> "By the time we're in spring of 2009, this group of advocates had been over that ground and decided this wasn't something [they] were putting together because of a combination of being

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455. In a memorable moment outside the courthouse before the supreme court hearing, a gay state legislator predicted: "If this supreme court does not overturn Prop. 8 entirely, there will be a million of us on the streets nationally fighting for our right. We are not going away and we will not be invisible!" *Activists Out as California Court Weighs Gay Marriage* (National Public Radio broadcast Mar. 6, 2009).

456. On the use of technology and the LGBT movement, see Philip C. Aka, *Technology Use and the Gay Movement for Equality in America*, 35 CAP. U. L. REV. 665 (2007).

457. Suzy Jack, Co-Chair, Freedom Action Inclusion Rights, Remarks to Problem Solving in the Public Interest Seminar (Nov. 5, 2009).

458. *Id.*

459. Telephone Interview With Esseks, *supra* note 404.

460. Telephone Interview With Jenny Pizer, Dir., Marriage Project, Lambda Legal (Mar. 3, 2010).

461. Interview With Coles, *supra* note 143.

concerned about prospects in federal court and thinking that a political solution was the better way in California.”<sup>462</sup>

Yet no sooner was the supreme court decision upholding Proposition 8 issued, than another lawsuit was announced—not by movement lawyers, but by legal elites, and ideological opposites: Ted Olson, who represented George W. Bush in the 2000 recount and then served as his solicitor general,<sup>463</sup> and David Boies, a prominent trial lawyer who represented Al Gore in the 2000 recount. On May 27, 2009 (the day after the *Strauss* court ruling), Olson and Boies announced that they had filed a federal lawsuit on behalf of two California same-sex couples, arguing that Proposition 8 violated the federal equal protection and due process guarantees.<sup>464</sup> The case was orchestrated by Los Angeles political strategist Chad Griffin, who had worked on Bill Clinton’s 1992 presidential campaign and then ran a foundation for filmmaker and liberal political activist Rob Reiner.<sup>465</sup> A mutual friend put Olson in touch with Griffin, who selected the plaintiffs and set up the American Foundation for Equal Rights (AFER) to fund the litigation.<sup>466</sup> Olson’s firm, Gibson Dunn & Crutcher, agreed to take the case on a “hybrid” fee arrangement in which it would donate the first \$100,000 worth of services and then collect “flat fees for the various stages,” ultimately amounting to millions of dollars.<sup>467</sup> Olson then brought in Boies.<sup>468</sup>

In May 2009, Olson and his colleagues discussed the merits of a possible suit with Lambda Legal’s Davidson and Pizer and ACLU-SC Director Ramona Ripston and Legal Director Mark Rosenbaum.<sup>469</sup> After the conclusion of these discussions, which were confidential, Olson decided to proceed with the suit, *Perry v. Schwarzenegger*,<sup>470</sup> which was filed four days prior to the announcement of the *Strauss* decision.<sup>471</sup> Leaders of LGBT legal groups claimed they did not learn of the filing until it was officially announced.<sup>472</sup> On the day after *Strauss*—and without knowledge of the imminent announcement of *Perry*—LGBT rights

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462. Telephone Interview With Esseks, *supra* note 404.

463. See Jo Becker, *The Road to Championing Same-Sex Marriage*, N.Y. TIMES, Aug. 19, 2009, at A1.

464. See Complaint for Declaratory, Injunctive, or Other Relief at 1–2, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. May 22, 2009) [hereinafter *Perry* Complaint], available at [http://www.domawatch.org/cases/9thcircuit/Perry\\_v\\_Schwarzenegger/District%20Court/PvS\\_DN\\_1\\_2\\_Complaint\\_052209.pdf](http://www.domawatch.org/cases/9thcircuit/Perry_v_Schwarzenegger/District%20Court/PvS_DN_1_2_Complaint_052209.pdf).

465. See Margaret Talbot, *A Risky Proposal*, NEW YORKER, Jan. 18, 2010, at 40, 42–43.

466. See *id.* at 44.

467. Chuleenan Svetvilas, *Challenging Prop 8: The Hidden Story*, CAL. LAW. MAG., available at <http://www.callawyer.com/story.cfm?eid=906575&evid=1>.

468. *Id.*

469. See *id.*

470. *Perry* Complaint, *supra* note 464.

471. Svetvilas, *supra* note 467.

472. *Id.*

lawyers reissued an updated version of their earlier joint statement, this time called “Why the Ballot Box and Not the Courts Should be the Next Step on Marriage in California,” arguing that “we need to go back to the voters.”<sup>473</sup>

Immediately after *Perry* was announced, LGBT advocates had to decide how to respond to the well-funded federal suit. Lawyers from NCLR, Lambda Legal, and the ACLU, along with Equality California’s Kors and lawyers from the Office of the San Francisco City Attorney involved in the *Marriage Cases*, collaborated with the *Perry* attorneys in charting strategy.<sup>474</sup> Although the movement lawyers disagreed with the decision to file the lawsuit, they nonetheless wanted a voice in the litigation. When they considered the possibilities of direct intervention or filing a parallel suit, they asked themselves: “Would our participation make a difference?”<sup>475</sup> Based on their assessment of the risks of the lawsuit, coupled with their respect for the litigation skills of Olson and Boies, they determined that the answer was no.<sup>476</sup> Instead, they decided to play an amicus role and, after conversations with lawyers from the Olson-Boies team, filed an amicus brief in June laying out their version of the case.<sup>477</sup>

The movement lawyers’ decision not to intervene changed, however, when a dispute erupted over whether the *Perry* lawyers should seek a hearing to take evidence on issues of discrimination and inequality. Olson and Boies were opposed to an evidentiary hearing, preferring to tee up the legal issue for review.<sup>478</sup> On June 30, 2009, District Court Judge Vaughn Walker issued a tentative ruling that indicated his intention to develop a factual record through trial in order to determine a number of issues, including the appropriate level of judicial scrutiny.<sup>479</sup> The ACLU’s James Esseks looked at that ruling and said, “Oh my God, he totally gets it, he’s totally into it. This is a guy who might rule our way because he’s asking the right questions.”<sup>480</sup> At the July 2 hearing on the matter, Olson resisted the need for a full-blown evidentiary hearing, arguing that “there are many things that can be resolved by agreement, by cross-motions, perhaps, for summary judgment, or perhaps some

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473. See ACLU ET AL., WHY THE BALLOT BOX AND NOT THE COURTS SHOULD BE THE NEXT STEP ON MARRIAGE IN CALIFORNIA (2009), available at [https://www.aclu.org/pdfs/lgbt/ballot\\_box\\_20090527.pdf](https://www.aclu.org/pdfs/lgbt/ballot_box_20090527.pdf).

474. See Svetvilas, *supra* note 467.

475. Telephone Interview With Pizer, *supra* note 460.

476. *Id.*

477. See Brief of Amici Curiae American Civil Liberties Union, Lambda Legal Defense and Education Fund, Inc., and National Center for Lesbian Rights at 1, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. June 25, 2009) [hereinafter June 25 Amicus Brief]; see also Telephone Interview With Pizer, *supra* note 460.

478. Interview With Coles, *supra* note 143.

479. Order at 6, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. June 30, 2009).

480. Telephone Interview With Esseks, *supra* note 404.

narrowing process.”<sup>481</sup> Concerned that Olson’s resistance portended a weak effort at trial, the ACLU, Lambda Legal, and NCLR moved to intervene on July 8 in order to assist in the development of the factual record on the ground that they had deep familiarity with the factual issues related to marriage for same-sex couples.<sup>482</sup> Their intervention motion was also a way to put pressure on Olson and Boies to take the call for evidence seriously.<sup>483</sup>

The Perry lawyers resisted the intervention, not wanting to have “five captains of the ship.”<sup>484</sup> A letter from AFER President Griffin to leading LGBT rights lawyers became public and revealed the basis for the opposition.<sup>485</sup> Griffin took issue with the movement lawyers’ public rejection of the AFER strategy, asserting that “[i]n public and private, you have made it unmistakably clear that you strongly disagree with our legal strategy.”<sup>486</sup> Griffin wondered whether their intervention served as a way to derail the case. “Having gone to such great lengths to dissuade us from filing suit and to tar this case in the press, it seems likely that your misgivings about our strategy will be reflected—either subtly or overtly—in your actions in court.”<sup>487</sup> The district court denied the LGBT rights groups’ motion,<sup>488</sup> relegating them to an amicus capacity. However, their motion did succeed in helping to steer the case toward a trial, in which the San Francisco City Attorney’s Office played an important role. The city attorneys moved to intervene after receiving “a lot of calls from government actors and community activists” and discussing the possibility with the Olson team, which indicated it would not mount serious opposition.<sup>489</sup> The goal of the city attorneys was “to do as much as [they] could to assist in the overall effort and make sure that the best case that could be put on was.”<sup>490</sup> The district court permitted the city of San Francisco to intervene as a government entity that would be charged with enforcing any legal change.<sup>491</sup> On the other side, when

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481. Reporter’s Transcript of Proceedings at 21, *Perry v. Schwarzenegger*, No. 09-CV-2292 (July 2, 2009).

482. See Notice of Motion and Motion to Intervene as Party Plaintiffs; Memorandum of Points and Authorities at 1, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. July 8, 2009).

483. See Interview With Coles, *supra* note 143.

484. Svetvilas, *supra* note 467.

485. See Letter From Chad H. Griffin, Bd. President, Am. Found. for Equal Rights, to Kate Kendell, Executive Dir., Nat’l Ctr. for Lesbian Rights, Jennifer Pizer, Marriage Project Dir., Lambda Legal & Mark Rosenbaum, Legal Dir., ACLU of S. Cal., (July 8, 2009), available at <http://www.dailyjournal.com/Fileserver/djicxtext/MediaKit/CalLaw/48417553.pdf>.

486. *Id.* at 1.

487. *Id.* at 2.

488. See Bob Egelko, *Judge Sets January Trial for Prop. 8 Lawsuit*, S.F. CHRON., Aug. 20, 2009, at D3.

489. Telephone Interview With Stewart, *supra* note 305.

490. *Id.*

491. See Egelko, *supra* note 488.

Attorney General Brown refused to defend Proposition 8,<sup>492</sup> ADF was permitted to intervene in support of the law.<sup>493</sup>

Movement lawyers have responded to their exclusion from the trial in two ways. One has been to re-engage the plaintiffs' lawyers after the ugly falling out over the motion to intervene. Toward that end, movement lawyers have provided background information and expert witnesses in support of the *Perry* plaintiffs and have publicly stated that "[w]e are interested in doing whatever we can to make sure their case is as successful as possible."<sup>494</sup> In their amicus capacity, movement lawyers have sought to emphasize "the singular nature of the case presented by Proposition 8, and the California-focused analysis that accordingly is warranted."<sup>495</sup> In an effort to avoid a ruling on whether sexual orientation classifications merit strict scrutiny under the federal Equal Protection Clause, the lawyers have asserted that Proposition 8 "is unconstitutional regardless of the level of scrutiny applicable to it," based on the fact that it "amended the state's constitution after same-sex couples' right to marry had been conclusively held to be a component of that constitution's guarantee of equality," "while leaving the substantive, legal rights and obligations of same-sex, state-registered couples . . . intact."<sup>496</sup> By asking the court to rule in favor of the plaintiffs on narrow, state-specific grounds, the lawyers have sought to frame the issues in a way that has the greatest chance of being upheld by the U.S. Supreme Court on review.

The trial got off to a dramatic start when the U.S. Supreme Court issued a last second order banning video coverage (ostensibly to protect marriage equality opponents from being harassed).<sup>497</sup> The trial court then proceeded to take extensive evidence on issues including the history of marriage, the effect of same-sex marriage on children, the history of discrimination against lesbians and gay men, and the political power of lesbians and gay men.<sup>498</sup> Many of the

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492. See Maura Dolan, *Gov. Won't Defend Proposition 8*, L.A. TIMES, June 18, 2009, at A4.

493. See Order at 3, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. June 30, 2009).

494. Svetvilas, *supra* note 467 (quoting James Esseks, Co-Director of the ACLU LGBT Project).

495. June 25 Amicus Brief, *supra* note 477, at 1.

496. Brief for American Civil Liberties Union, et al. as Amici Curiae Supporting Petitioner at 1, *Perry v. Schwarzenegger*, No. 09-CV-2292 (Feb. 3, 2010). This brief was filed by Schlosser and Gill at ACLU-NC, as well as Davidson, Pizer, and Borelli at Lambda Legal, and Minter, Stoll, and Turner at NCLR.

497. See David G. Savage & Carol J. Williams, *Supreme Court Bars Video of Prop. 8 Trial*, L.A. TIMES, Jan. 12, 2010, at A9.

498. See, e.g., Transcript of Proceedings at 1523–736, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. Jan. 20, 2010) (testimony of Gary Segura); Transcript of Trial-Day 05 at 13–213, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. Jan. 15, 2010) (testimony of Michael Lamb); Transcript of Trial-Day 2, *Perry v. Schwarzenegger*, No. 09-CV-2292 (N.D. Cal. Jan. 12, 2010) (testimony of Nancy Cott and George Chauncey).

witnesses who testified in support of marriage for same-sex couples had also been brought in by the city attorneys as experts in the *Marriage Cases*.<sup>499</sup>

As the *Perry* suit unfolds, LGBT advocacy groups have set their sights on another statewide ballot initiative, this time to repeal Proposition 8. While some LGBT groups pushed for a 2010 initiative,<sup>500</sup> the most influential groups, including Lambda Legal and Equality California, have set forth a strategy—called “Winning Back Marriage Equality”—aimed at the 2012 ballot.<sup>501</sup> The key to 2012, according to Equality California, is maximizing the turnout of younger voters:

Age is one of the top predictors of someone’s position on marriage equality—the younger one is, the more likely they are to support the right of same-sex couples to marry . . . [Because a presidential election mobilizes young voters], all things being equal, based solely on the age and demographic of likely turnout at the polls, we are 1–2 percentage points better off in a presidential general election year . . . .<sup>502</sup>

For movement lawyers, the decade of advocacy around the issue of marriage equality in California ended in irony: excluded from the “trial of the century” they had so vigorously fought to oppose, and forced to focus on the political work of reversing Proposition 8, which they had so clearly seen and attempted to avert. It was not a decade without movement miscues, but the overarching story was one of movement lawyers struggling to protect their incrementalist agenda from being derailed by activists and other lawyers who wanted to move faster, on the one hand, and marriage equality opponents, on the other. In the end, that strategy was only a partial success. The movement’s comprehensive domestic partnership victory was overshadowed by Proposition 8. *Perry*, too, asserted a fundamental challenge to the movement, risking a negative decision by the U.S. Supreme Court despite providing some positive publicity. LGBT rights lawyers have moved on in the face of *Perry*, filing other cases designed to advance the state-by-state strategy,<sup>503</sup> and additional federal challenges viewed

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499. Telephone Interview With Stewart, *supra* note 305.

500. The group Love, Honor, Cherish spearheaded the push for a 2010 ballot initiative, but failed to gather the required signatures. See Maura Dolan, *Prop 8 Repeal Not on Ballot*, L.A. TIMES, Apr. 13, 2010, at AA5.

501. See Press Release, Lambda Legal, Lambda Legal Calls for More Education and Time to Restore Marriage Equality in California (Nov. 30, 2009), [http://www.lambdalegal.org/news/pr/xca\\_20091130\\_lambda-calls-for-more.html](http://www.lambdalegal.org/news/pr/xca_20091130_lambda-calls-for-more.html).

502. EQUAL CAL., WINNING BACK MARRIAGE EQUALITY IN CALIFORNIA: ANALYSIS AND PLAN 7–8 (2009).

503. See, e.g., Lambda Legal, Sweeping gay Marriage Lawsuit in New Jersey Aims for U.S. History, [http://www.lambdalegal.org/news/pr/ny\\_20020626\\_sweeping-gay-marriage-suit-nj-aims-for-history.html](http://www.lambdalegal.org/news/pr/ny_20020626_sweeping-gay-marriage-suit-nj-aims-for-history.html) (describing suit challenging New Jersey’s civil union regime as a constitutionally inadequate substitute for marriage).

as potentially complementing movement arguments in *Perry*. An important case currently pending in the Ninth Circuit is *Collins v. Brewer*, which seeks to enjoin Arizona's attempt to strip health benefits from the domestic partners of state employees<sup>504</sup>—and which movement lawyers believe will provide another vehicle for the court to evaluate federal equal protection and due process claims in relation to same-sex couples. Yet in the end, while their work continues in other crucial venues, movement lawyers have been largely relegated to the sidelines in *Perry*, watching the seemingly inexorable march of marriage equality toward the Supreme Court—hoping for the best, but planning for the worst.

### III. ANALYSIS: THE LIMITS OF BACKLASH

At one level, California appears to present a textbook case of backlash: The seminal state case establishing the constitutional right of same-sex couples to marry provoked Proposition 8, which took that right away and, by amending the state constitution, made it more difficult to achieve in the future. Yet, as we have suggested, for the backlash story to work as a way of critiquing the legal strategy, it must be the case that other good options outside of litigation existed to advance marriage for same-sex couples, and lawyers chose not to pursue them, opting for litigation instead—thereby causing the movement to suffer. A close analysis of the California case, however, reveals that the crucial premises underlying the backlash account—that lawyers controlled the litigation agenda, ignored or deemphasized nonlitigation alternatives, and won a legal decision that caused the marriage ban to be passed—are not supported. Accordingly, it is not possible, on the basis of the litigation record alone, to blame movement lawyers for the bad outcome of Proposition 8.

#### A. Control Over Ends and Means

##### 1. Constructing the Agenda: The Path to Marriage

Gerald Rosenberg asserts that marriage equality is the “self-stated” goal of movement lawyers and thus judges their efforts accordingly. He is, of course,

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504. See Amended Complaint for Injunctive and Declaratory Relief, *Collins v. Brewer*, No. CV09-2402-PHX-JWS (filed Jan. 7, 2010); Press Release, Lambda Legal, Lambda Legal Files Federal Lawsuit Seeking to Block Elimination of Domestic Partner Benefits for Gay and Lesbian State Employees, [http://www.lambdalegal.org/news/pr/xaz\\_20091117\\_lambda-files-suit-block.html](http://www.lambdalegal.org/news/pr/xaz_20091117_lambda-files-suit-block.html) (Nov. 17, 2009). Lambda Legal has also been involved in a case by a federal court employee seeking to enforce an order, issued in connection with the Ninth Circuit's employee dispute resolution process, that DOMA does not bar the provision of federal health benefits to the employee's same-sex spouse. See Complaint, *Golinski v. OPM*, C 10 0257 (filed Jan. 20, 2010).

correct to state that by the time movement lawyers settled upon a state-by-state approach after *Baehr v. Lewin*,<sup>505</sup> many in the movement contemplated the right to marry as the best outcome. However, this was not a consensus view, and even those who supported marriage did so for diverse reasons. Throughout the 1990s and into the 2000s, there was intense debate within the LGBT community about whether embracing marriage meant assimilating to heterosexual norms,<sup>506</sup> with some prominent marriage critics arguing that the LGBT community should stand for diverse family arrangements.<sup>507</sup> For instance, in the early phase of this discussion, Lambda Legal's Pizer personally rejected marriage but recognized its importance to the movement; she later came to believe that marriage was important and that her previous views were inadequately informed.<sup>508</sup>

In California, the marriage debate played out in the contest over the meaning of domestic partnership and its relationship to marriage. Although advocates generally viewed marriage as a long-term movement goal and worked assiduously toward its achievement,<sup>509</sup> there was genuine disagreement about whether marriage should be the exclusive objective, supplanting other legal statuses such as domestic partnership. This disagreement was evident in the initial push to pass a statewide domestic partnership registry (AB 26) in 1999. Although some marriage advocates had already begun to view domestic partnership as a "stepping stone" toward marriage, others saw domestic partnership as an end in itself—a distinct system of legal protections that would make sense for those for whom marriage was undesirable or inapplicable. Lambda Legal's Davidson and the ACLU's Coles, in particular, objected to appropriating domestic partnership as a means to the end of marriage, opting instead to view domestic partnership as a way of promoting multiple family forms.<sup>510</sup> AB 26, therefore, was deliberately crafted to apply to different-sex couples in need of alternative ways of arranging their domestic affairs with respect to issues like hospital visitation. Although Governor Davis's concern about undermining marriage for different-sex couples ultimately led to the bill's

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505. 852 P.2d 44 (Haw. 1993).

506. See Elizabeth B. Cooper, *Who Needs Marriage?: Equality and the Role of the State*, 8 J.L. & FAM. STUD. 325 (2006); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006); Polikoff, *Equality and Justice*, *supra* note 65.

507. See generally MICHAEL WARNER, *THE TROUBLE WITH NORMAL* (1999). For race- and class-based critiques of the centrality of marriage, see Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309, 325 & n.70 (2005).

508. See Pizer Remarks, *supra* note 94.

509. Indeed, Lambda Legal had established its Marriage Project in 1992.

510. Telephone Interview With Coles, *supra* note 99; Telephone Interview With Davidson, *supra* note 105.

modification to apply only to different-sex senior couples, the effort to cast the bill in broad family diversity terms reflected not simply political calculation, but also a genuine difference of opinion about appropriate scope. The incrementalist strategy that followed emphasized short-term steps to build new rights into the nonmarital relationship recognition regime. These steps mattered, not simply as a means to an end, but as meaningful ends in their own right.

Over time, calls for marriage became more univocal, but this occurred in part as a result of complex interactions both inside and outside the LGBT rights movement. Within movement circles, an important development was marriage proponents' success in pushing their agenda in the face of broader ambivalence about alternative family structures. In Coles's view, while the "leadership was divided" about whether to pursue marriage to the exclusion of other statuses, "there was a deeply motivated minority who wanted marriage, and so their view became the more important view."<sup>511</sup>

In California, the key moment came with the passage of comprehensive domestic partnership, which was hailed as a policy watershed for same-sex couples, conferring "the same rights, protections, and benefits" as heterosexual spouses. Marriage proponents deliberately drafted the bill with an eye toward marriage, incorporating legislative findings on discrimination against same-sex couples that were designed to "set up suspect class arguments."<sup>512</sup> Yet for those who were uneasy with giving priority to marriage, the merger of domestic partnership and marriage was less a strategic innovation than a cause for concern. From this point of view, domestic partnership "was hijacked by marriage folks."<sup>513</sup>

Outside the movement, the ferocity of opponents' efforts to deny marriage rights to lesbians and gay men had the effect of heightening its importance as the ultimate symbol of LGBT equality. The spectacle of *Baehr*'s initiative-driven reversal, combined with Senator Knight's successful effort to ban recognition of same-sex couples' marriages in California through Proposition 22, reinforced movement support for marriage as a goal worth fighting for. Because same-sex marriage opponents were actively staking out marriage as the right to be denied, the LGBT rights movement responded by turning more of its attention to marriage. In addition, as *Baehr* highlighted, marriage was becoming the focal point of legal and political struggle whether movement lawyers wanted it to or not. Accordingly, advocates embraced marriage, in part, as a way of

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511. Telephone Interview With Coles, *supra* note 99.

512. Kors Remarks, *supra* note 83.

513. Telephone Interview With Coles, *supra* note 143.

seizing control of the issue, shaping the terms of the debate, and maximizing opportunities for success.

External funding considerations also influenced the primacy of marriage. As marriage equality emerged as a powerful national issue, philanthropic foundations began directing increasing resources for marriage-related advocacy,<sup>514</sup> which allowed LGBT rights organizations to devote more attention to the issue. At NCLR, for example, funding for marriage litigation “increased hugely” after *Goodridge v. Department of Public Health*<sup>515</sup> in Massachusetts, coming from donors that included the Gill Foundation in Denver, the Haas Foundation in San Francisco, the Arcus Foundation in New York, and the Ford Foundation.<sup>516</sup>

Even as marriage gained currency as a movement goal, issues of form, timing, and its relationship to other legal statuses remained fluid. Movement lawyers did not exclusively fix on achieving marriage as a constitutional right (as opposed to a statutory one), or view outcomes short of marriage, like civil unions or domestic partnership rights, as policy failures.<sup>517</sup> The focus on securing the right of same-sex couples to marry thus evolved from within the movement in a complex and organic way.

## 2. Controlling the Tactics: Litigation Triggers and Movement Responses

The backlash account of marriage equality presupposes the familiar test-case strategy in which movement lawyers select the appropriate case to raise precisely the issue they want to resolve through the courts. This framework collapses different types of lawsuits (affirmative and defensive) by different actors (movement lawyers, nonmovement lawyers, and countermovement lawyers), and ignores the circumstances under which they arise (with or without movement support).<sup>518</sup>

The California experience was contrary to the test-case paradigm. Movement lawyers did not drive litigation efforts around marriage equality (they actively sought to avoid them), but once litigation was commenced, they became involved out of necessity in order to shape the results. Aside from the state law challenge to Proposition 8, movement lawyers did not initiate the crucial California same-sex relationship cases: They intervened to defend AB 205

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514. Telephone Interview With Kendell, *supra* note 285.

515. 798 N.E.2d 941 (Mass. 2003).

516. Telephone Interview With Kendell, *supra* note 285.

517. See Purvis, *supra* note 19, at 34.

518. See *id.* at 6.

against the lawsuit filed by ADF, filed *Woo v. Lockyer*<sup>519</sup> after the San Francisco City Attorney and Gloria Allred had already filed similar suits, and attempted but were denied intervention in *Perry v. Schwarzenegger*.<sup>520</sup> In each instance, the litigation was launched as the result of actions outside of the movement lawyers' immediate control. We identify three specific litigation triggers: (1) countermobilization (suits initiated by opponents), (2) contingency (unpredictable events), and (3) contestation (suits initiated by nonmovement lawyers). Movement lawyers responded to these triggers in three ways: (1) direct intervention, (2) remonstrations, and (3) indirect involvement.

a. Causes of Litigation

(1) Countermobilization

Contemporary social struggles often feature opposing movements reacting to one another.<sup>521</sup> The California marriage equality movement, opposed by a well-organized and well-funded Christian Right countermovement, is an illustrative case. As evidenced by the Proposition 22 campaign, Christian Right activists were organizing around the issue of same-sex marriage in advance of litigation and before LGBT rights lawyers themselves had coalesced around the pursuit of marriage.<sup>522</sup> In part, Christian Right activists were responding to the litigation in Hawaii and Vermont, which they believed might force California to eventually recognize out-of-state marriages of same-sex couples. At the same time, they were reacting to domestic partnership reform in the California legislature.

This countermovement was responsible for initiating key legal battles over same-sex unions. ADF sued to enjoin the implementation of the comprehensive domestic partnership bill, AB 205, on the ground that it violated Proposition 22's marriage ban. It then sued to stop Newsom's decision to issue marriage licenses to same-sex couples in the case that provoked *In re Marriage Cases*.<sup>523</sup> The one affirmative case movement lawyers filed, *Strauss v. Horton*,<sup>524</sup> was in direct response to the opposition's successful passage of Proposition 8.

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519. Case No. CPF-04-504038 (Cal. Super. Ct. filed Mar. 12, 2004).

520. Case No. 09-CV-2292 (N.D. Cal. filed June 30, 2009).

521. See David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628, 1632–33 (1996).

522. See Ingram, *supra* note 147.

523. 183 P.3d 384 (Cal. 2008).

524. 207 P.3d 48 (Cal. 2009).

### (2) Contingency

In the *Marriage Cases*, ADF acted only after San Francisco Mayor Newsom unilaterally decided to issue marriage licenses. ADF thus seized upon an opportunity that, from the vantage point of movement lawyers, was unpredictable and unwanted. Movement lawyers therefore found themselves litigating marriage equality at a time they did not choose and in a procedural posture they did not desire—although once Newsom made the decision, the lawyers expressed support and sought to use it strategically to promote public education around the legitimacy of marriage for same-sex couples. While lawyers had, up to that point, succeeded in controlling the affirmative litigation agenda, Newsom's unforeseen decision undercut that control and set off a chain of events that led to three California Supreme Court decisions: the first enjoining Newsom's issuance of marriage licenses, the second declaring a right to marry for same-sex couples, and the third upholding Proposition 8. While the movement lawyers successfully litigated the issue of marriage equality at the California Supreme Court, their earlier strategic decision regarding timing in California proved correct: The judicial victory was quickly taken away by constitutional amendment.

### (3) Contestation

Just as movement lawyers could not prevent Newsom from issuing marriage licenses, they ultimately could not control private lawyers willing to represent constituents eager to litigate. Preventing private lawyers from filing suits inconsistent with movement lawyer goals has been a long-standing issue across different litigation campaigns.<sup>525</sup> Historically, the concern has been about nonmovement lawyers, lacking the sophistication and big-picture perspective, taking cases for a fee that could result in negative precedent undermining the impact litigation campaign. In the marriage equality context, the initial impetus for asserting movement lawyer control over the national campaign came from the failure to prevent a nonmovement attorney from litigating the Hawaii case.

In California, there were two significant instances of private attorney intervention that influenced the course of advocacy. The first occurred in the immediate aftermath of the Newsom decision, when employment law attorney Allred filed the *Tyler v. County of Los Angeles*<sup>526</sup> suit challenging the

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525. See, e.g., MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973 (1995); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION (1987).

526. Case No. BS088506 (Cal. Super. Ct. filed Feb. 23, 2004).

constitutionality of the marriage laws.<sup>527</sup> That suit was a factor influencing the movement lawyers' subsequent decision to file *Woo*, which they viewed as necessary, in part, to prevent the constitutional issues from being shaped by Allred (and the private lawyers in another case, *Clinton v. State of California*,<sup>528</sup> filed in August 2004). The Allred suit to some degree tracked the historical model of nonmovement challenges to movement lawyer control. Although Allred had cultivated a high-profile television personality (particularly after her representation of the family of Nicole Brown Simpson during the O.J. Simpson case), as a small-firm attorney, she lacked the political expertise of the movement lawyers and the professional resources of the elite corporate bar.

However, the second instance of private attorney intervention—the *Perry* case—was much different. There, control over litigation strategy was wrested not by smaller-scale private attorneys, as in *Baehr* and *Tyler*, but by legal titans (and large-firm attorneys) Olson and Boies, acting at the behest of an activist client with the resources to pay for the best counsel money could buy and the hubris to disregard the collective judgment of the movement lawyers.

#### b. Mechanisms of Control

##### (1) Direct Intervention

Although movement lawyers did not generally initiate lawsuits in the California campaign, they nonetheless attempted to shape the outcomes through various assertions of control. The most direct was intervention in pending cases to shape the legal theories and decisions. ADF's suit to strike down AB 205, formally against the state of California, drew in movement lawyers as intervenors representing the interests of same-sex couples who benefited from the law. In that case, movement lawyers used litigation defensively to protect their hard-won legal status. Similarly, movement lawyers intervened in ADF's initial suit to stop the San Francisco marriage licenses and in the *Tyler* suit filed by Allred. After the California Supreme Court's order inviting a constitutional challenge to the marriage laws (and the city attorneys' affirmative lawsuit), the movement lawyers filed *Woo* to preserve their ability to participate in the resolution of the constitutional question in the consolidated cases.<sup>529</sup> In key cases in which the movement lawyers intervened, their arguments on the

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527. See Gloria Allred, Same Gender Marriage (Mar. 3, 2008), <http://www.gloriaallred.com/CM/Media/Same-Gender-Marriage.asp>.

528. Case No. CGC-04-429548 (Cal. Super. Ct. filed Aug. 13, 2004).

529. See Lee Romney, *Two Christian Advocacy Groups Put Faith in Courts*, L.A. TIMES, Mar. 5, 2004, at A1.

merits were largely successful: that AB 205 did not violate Proposition 22 and that the California marriage laws were unconstitutional.<sup>530</sup> Efforts to intervene in *Perry* were denied.

### (2) Remonstrations

In the face of potential legal or political challenges, movement lawyers attempted to exert control by using the credibility developed through years of experience to dissuade dissonant action. This approach proved less successful. Prior to *Perry*, movement lawyers issued a joint statement in opposition to a federal challenge to Proposition 8 and, once it was clear that a federal case was being contemplated, met with Olson and his colleagues to advise them not to file—advice that went unheeded. Lawyers took this same approach in response to Newsom’s earlier decision to issue marriage licenses, attempting to dissuade him from what they perceived as a high-risk strategy. This ultimately did not work: While Kendell gave her advice to Newsom’s chief of staff, it became clear that she was simply receiving notice of the mayor’s decision.

### (3) Indirect Involvement

When remonstrations failed, movement lawyers tried to put the best face on difficult situations by positive media messaging, sharing resources, and filing amicus briefs in pending cases. After the Newsom decision, they publicly supported the issuance of marriage licenses and intervened to defend their legality. Kendell and the NCLR staff, in particular, became the most enthusiastic supporters of Newsom and attempted to turn his decision to their strategic advantage; seizing on the moment’s public education potential, Kendell and her colleagues tried to shape media coverage by highlighting the marriage of Del and Phyllis, and then using the fact that four thousand same-sex couples had been married without event to argue that there was no threat to marriage as an institution. In *Perry*, movement lawyers issued strong statements in support of the litigants and the merits (“We think they’ve got it right about the law”<sup>531</sup>), while providing backup resources and support. Simultaneously, movement lawyers have sought to provide an alternative, California-specific basis for

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530. Movement lawyers also successfully used intervention to argue against deciding on the merits a federal challenge to DOMA. See *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 864 (C.D. Cal. 2005), *aff’d in part and vacated in part*, 447 F.3d 673 (9th Cir. 2006). On appeal, NCLR and Lambda Legal, representing Equality California, moved to intervene, and successfully argued that the plaintiffs lacked standing and that the court should abstain. See *id.* at 686.

531. Svetvilas, *supra* note 467 (quoting James Esseks, Co-Director of the ACLU LGBT Project).

resolving the case—both through amicus briefs and media statements—in order to increase the chances for a favorable U.S. Supreme Court decision.<sup>532</sup> They also filed additional lawsuits—in particular, *Collins v. Brewer*, the federal challenge to Arizona’s elimination of health benefits for state employees’ domestic partners—designed to provide alternative cases for the Ninth Circuit to shape constitutional law on same-sex relationship recognition.

## B. Multidimensional Advocacy

In contrast to the backlash account’s presumption that litigation receives tactical priority by movement lawyers, the California case reveals lawyers who are deliberately engaging in *multidimensional advocacy* across legal and political domains. Specifically, LGBT movement lawyers prioritized a nonlitigation strategy over litigation, 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.

### 1. Legislation to Enhance Litigation

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. Senator Knight’s initial effort to pass a marriage ban through the legislature motivated some activists to press for litigation, but *Baehr*’s reversal strengthened advocates’ arguments to stand down. The passage of Proposition 22 presented another moment when lawyers had to resist community pressure to litigate to reverse the regressive law. Then, after the Vermont case was decided and the Massachusetts litigation was launched, movement lawyers had to reiterate their opposition to a constitutional challenge at the 2003 UCLA California Marriage

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532. Another example of public advocacy occurred in the latest iteration of the *Smelt* DOMA challenge, in which movement groups used the Obama administration’s surprisingly strenuous initial support of the law to shame the administration, ultimately compelling it to change its legal position, to include married same-sex couples in the 2010 Census, and to provide a limited set of domestic partner benefits to federal employees. First Amended Complaint for Declaratory and Injunctive Relief, *Smelt v. United States*, No. SACV04-1042 (C.D. Cal. Sept. 24, 2009), available at [http://www.domawatch.org/cases/9thcircuit/smelt/orangecounty/20040924\\_complaint.pdf](http://www.domawatch.org/cases/9thcircuit/smelt/orangecounty/20040924_complaint.pdf); see Jake Sherman, *White House Looks to Include Same-Sex Unions in Census Count*, WALL ST. J., June 19, 2009, at A4.

Litigation Roundtable. Finally, the same message was conveyed both before and after Proposition 8 in the movement lawyers' joint statement against a federal lawsuit.<sup>533</sup>

Instead of pursuing a high-risk litigation strategy, movement lawyers focused on incremental legislative change. The lead legislative advocate, Equality California's 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 Coles, Pizer, Davidson, Minter, and 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 according same-sex couples all the rights and benefits of marriage, the comprehensive domestic partnership law emphasized the prevalence of discrimination against same-sex couples while affirming the legitimacy and value of same-sex-couple-headed families. The law 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 *Marriage Cases*, 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 of the legislative strategy—advancing a marriage bill—was ultimately unsuccessful, but also showed how lawyers viewed the interplay between legislation and litigation. In the wake of the Newsom decision, 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>534</sup> This would be helpful in making the constitutional case that there was no

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533. See ACLU ET AL., *supra* note 432; ACLU ET AL., *supra* note 473.

534. PINELLO, *supra* note 168, at 80 (quoting Molly McKay, Associate Executive Director of Equality California).

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>535</sup> that strategy was upended. In response, advocates revived Senator Leno's 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.

## 2. Litigation to Enhance Legislation

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>536</sup> The stories of Sharon Smith and Keith Bradkowski, told in high-profile cases, resonated with the legislature's consideration of wrongful death claims and inheritance rights, respectively. And Lydia Ramos's case highlighted the importance of creating a presumption of parentage to protect the rights of nonbiological parents in same-sex-couple-headed families. These cases 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.

## 3. Litigation as a Legislative Shield

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

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535. No. S122923, 2004 WL 473257 (Cal. Mar. 11, 2004).

536. Pizer Remarks, *supra* note 94.

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.

#### 4. Public Education

Litigation and legislative advocacy were also used to advance the movement's public education aims, which were geared toward garnering sufficient public support to withstand a voter initiative to ban marriage for same-sex couples. For movement lawyers, the litigation was "part of a bigger strategy of changing the narrative of gay people that existed before *Baehr*, [which portrayed] gay people as individuals, usually a man, on the search for sex, not in a relationship, and lonely . . . . What was transformative across gay rights was relationship litigation that started and made an incredible difference in making people think of lesbians and gay men as people with families."<sup>537</sup>

One aspect of this project was the effort by advocates to promote 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 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>538</sup>

The lawyers also attempted to structure the ultimate marriage litigation with an eye toward its public education potential. Although the *Woo* case was by necessity put together in haste, the lawyers attempted to select plaintiffs who would be more broadly reflective of the state's gay population than the stereotyped version of the white, urban gay man: "[W]e were trying to find plaintiffs who would be good spokespeople and representative of different parts of the state."<sup>539</sup> But the educative value of cases was not always fully realized. For instance, in *Woo*, the plaintiffs did not reflect broad socioeconomic diversity. Furthermore, because California already had a domestic partnership regime, the movement lawyers could not argue that the LGBT community suffered complete legal exclusion, which might have been more easily packaged into public relations sound bites.<sup>540</sup>

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537. Telephone Interview With Davidson, *supra* note 105.

538. Telephone Interview With Kendell, *supra* note 285.

539. Telephone Interview With Davidson, *supra* note 105.

540. *Id.*

The focus on public education also had organizational impacts. Lambda Legal, for instance, set up a Department of Education and Public Affairs to promote its message.<sup>541</sup> Equality California emerged as the key public education organization, attempting to bridge the education, legislative, and litigation facets of the campaign with programs like Let California Ring, which focused on door-to-door canvassing, media relations, and engaging youth.<sup>542</sup> In addition, more grassroots groups like FAIR attempted to use litigation—such as the *Strauss v. Horton*<sup>543</sup> case—as a vehicle to mobilize young people to protest the deprivation of marriage rights.

Finally, UCLA's Williams Institute emerged during the course of the California marriage equality movement as an important player in the public education field.<sup>544</sup> Although not an advocacy organization, the Williams Institute uses data analysis and research to support LGBT rights efforts, providing policy analysis relevant to legislation and authoring amicus briefs bearing on marriage equality litigation. For instance, during the debate over AB 205, its analysis of the financial consequences of comprehensive domestic partnership—showing that it would effectively raise taxes on some same-sex couples while reducing tax revenue overall<sup>545</sup>—was a key factor in forcing Governor Davis to compromise by agreeing to community property and spousal support in exchange for dropping the provision allowing domestic partners to jointly file their taxes as married couples. Although the analysis ultimately proved helpful in moving the legislative process forward, it came with a tradeoff since the findings on tax increases were not necessarily what advocates and legislators wanted to hear. This may have ruffled the feathers of movement allies at the time, but it also reinforced the Williams Institute's independence, which has been crucial to its credibility in providing subsequent policy research. For instance, during the *Marriage Cases* litigation, Williams Institute researchers Lee Badgett and Gary Gates filed an amicus brief showing that California same-sex couples were raising more than seventy thousand children<sup>546</sup>—a fact that Chief Justice George cited in his opinion.<sup>547</sup> The Williams Institute also compiled the data for the estimate that eighteen thousand same-sex couples were married in the wake of the

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541. *Id.*

542. See Let California Ring, About Let California Ring, [http://www.letcaliforniaringsite.org/site/c.ljtj6MQluE/b.3348071/k.C79A/About\\_Us.htm](http://www.letcaliforniaringsite.org/site/c.ljtj6MQluE/b.3348071/k.C79A/About_Us.htm) (last visited June 6, 2010).

543. 207 P.3d 48 (Cal. 2009).

544. The Williams Project changed its name to the Williams Institute in 2006.

545. See BADGETT & SEARS, *supra* note 202.

546. See Application for Leave to File Amicus Curiae Brief and Brief of Amici Curiae M.V. Lee Badgett and Gary J. Gates in Support of the Parties Challenging the Marriage Exclusion, *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2007) (No. S147999).

547. See *In re Marriage Cases*, 183 P.3d 384, 433 n.50 (Cal. 2008).

*Marriage Cases*, and has continued to conduct influential studies on LGBT demographics, the extent of discrimination, and the economic impact of pro-LGBT laws.<sup>548</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 nonlitigation 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.<sup>549</sup> 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 scholarly focus on litigation as the social reform vehicle-of-choice for movement lawyers is outmoded. Contemporary legal advocacy in the marriage context does not fit the top-down, litigation-centric framework developed to address the civil rights campaign of the mid-twentieth century.<sup>550</sup> 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.<sup>551</sup> To the extent that lawyering in other fields embraces

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548. See Bob Egelko, *Same-Sex Marriage Issue Back to State Top Court*, S.F. CHRON., Nov. 6, 2008, at A19 (noting Williams Institute researchers' estimate of eighteen thousand married same-sex couples in California).

549. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); see also GENE BURNS, *THE MORAL VETO* 12 (2005).

550. For a critique of the historical accuracy of this view, see Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 258–59 (2005).

551. Cf. MCCANN, *RIGHTS AT WORK*, *supra* note 47; Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 473 (1999).

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 generally sought to avoid marriage litigation and ultimately 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 *Woo* 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.

### C. Backlash Mechanics and the Causation Problem

#### 1. Judicial Exceptionalism?

In his broad critique of social reform litigation, Rosenberg relies on both the courts’ lack of enforcement power and the backlash thesis to support his claim that courts offer only a “hollow hope.” For instance, with *Brown v. Board of Education*,<sup>552</sup> he points to the lack of actual school desegregation due to powerful Southern opposition and ineffective judicial implementation.<sup>553</sup> Marriage for same-sex couples, however, does not present judicial enforcement problems since after the right to marry is achieved, “nothing else needs to be done.”<sup>554</sup> Local registrars do not enjoy discretion and therefore must issue marriage licenses to same-sex couples so desiring. For instance, even when clerks

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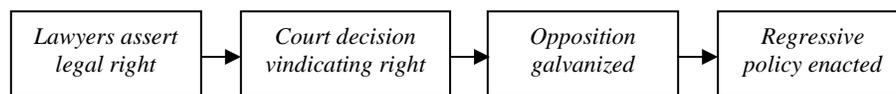
552. 347 U.S. 483 (1954).

553. See Rosenberg, *Courting Disaster*, *supra* note 18, at 809–10. Klarman seeks to tie implementation to backlash. He argues that decisions like *Brown* and *Goodridge* “not only mandate changes in the abstract, but they inspire activists to take concrete steps to implement them, thus further inciting political backlash.” Klarman, *supra* note 9, at 480.

554. ROSENBERG, *supra* note 9, at 351; see also Keck, *supra* note 7, at 157.

in California's Kern and Merced Counties protested the *Marriage Cases* decision by refusing to *preside over* any marriage ceremonies, they continued to *issue* gender-neutral marriage licenses to both same-sex and different-sex couples.<sup>555</sup>

It is precisely because enforcement is not an issue in the marriage equality context that the debate about court-centered strategies has focused on backlash. 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* decision in Hawaii caused political reverberations in California, where opponents worried that Hawaii marriages would have to be recognized in California. 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>556</sup> decision may have provided additional impetus, but by the time California voters

555. See Amanda Fehd, 2 Officials Say “I Don’t” to Same-Sex Marriages, SAN DIEGO UNION-TRIB., June 7, 2008 available at [http://recall.uniontrib.com/uniontrib/20080607/news\\_1n7samesex.html](http://recall.uniontrib.com/uniontrib/20080607/news_1n7samesex.html).

556. 744 A.2d 864 (Vt. 1999).

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 Public Health*<sup>557</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>558</sup> and that this decision, in turn, provoked the ADF 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 representing 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 in the *Marriage Cases* 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>559</sup> However, the picture is complicated. These same countermovement advocates were organizing the Proposition 8 effort before marriage equality litigation had commenced.<sup>560</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

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557. 798 N.E.2d 941 (Mass. 2003).

558. See Klarman, *supra* note 9, at 481.

559. Jesse McKinley, *California Ruling on Same-Sex Marriage Fuels a Battle, Rather Than Ending It*, N.Y. TIMES, May 18, 2008, at A18.

560. See *id.*

countermajoritarian nature of the judiciary was one factor among many that influenced public opposition.<sup>561</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.

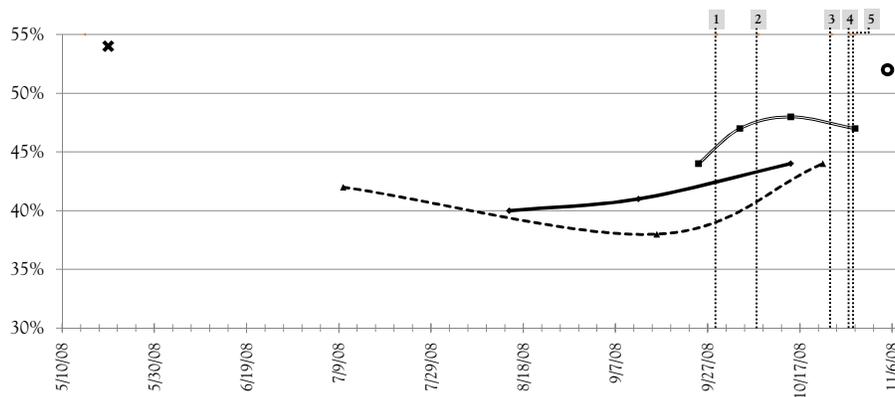
One way to evaluate the influence of the *Marriage Cases* decision on public opinion is to look at how it was used by the Yes on 8 campaign in its messaging. Although the Yes on 8 campaign used multiple venues to get its message out, including online videos and “viral” emails, we focus on television advertising, on which the campaign invested heavily during the two months before the Proposition 8 vote.<sup>562</sup> 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

Yes on 8 TV Advertisements

Ad 1	Ad 2	Ad 3	Ad 4	Ad 5
September 29, 2008	October 8, 2008	October 24, 2008	October 28, 2008	October 29, 2008
<i>First Yes on 8 TV Ad</i>	<i>It's Already Happened</i>	<i>Everything to Do with Schools</i>	<i>Finally the Truth</i>	<i>Have You Thought About It</i>



561. For an example of how Yes on 8 used the countermajoritarian 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>.

562. For an insightful analysis of the Yes on 8 advertising campaign, see Murray, *supra* note 433.

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>563</sup> As the election drew near, 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 upward as the election drew near.<sup>564</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>565</sup> The Yes on 8 proponents

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563. 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 TREND IN SUPPORT OF ALLOWING SAME-SEX MARRIAGE IN CALIFORNIA 1 (2008).

564. 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 six points by the end of October. See Mark DiCamillo & Mervin Field, *Prop. 8 (Same-Sex Marriage Ban) Dividing 49% No—44% Yes, With Many Voters in Conflict*, FIELD POLL, Oct. 31, 2008; Mark DiCamillo & Mervin Field, *55% of Voters Oppose Proposition 8, the Initiative to Ban Same-Sex Marriage in California*, FIELD POLL, Sept. 18, 2008; Mark DiCamillo & Mervin Field, *By a 51% to 42% Margin Voters Appear Ready to Vote No on Proposition 8, the “Limit on Marriage” Constitutional Amendment*, FIELD POLL, July 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: CALIFORNIANS AND THEIR GOVERNMENT 3 (2008) (showing, in a poll conducted Aug. 12–19, support for Proposition 8 at 40 percent and opposition at 54 percent); John Wildermuth, *Poll: Same-Sex Marriage Ban Not Wooing Voters*, S.F. CHRON., Sept. 25, 2008, at B2 (reporting on a 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: CALIFORNIANS AND THEIR GOVERNMENT 5 (2008) (showing, in a 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 *Results of SurveyUSA Election Poll #14761*, SURVEYUSA, Nov. 1, 2010 (showing, in a poll conducted Oct. 29–31, support for Proposition 8 at 47 percent and opposition at 50 percent); *Results of SurveyUSA Election Poll #14613*, SURVEYUSA, Oct. 17, 2008 (showing, in a poll conducted Oct. 15–16, support for Proposition 8 at 48 percent and opposition at 45 percent); *Results of SurveyUSA Election Poll #14503*, SURVEYUSA, Oct. 6, 2008 (showing, in a poll conducted Sept. 23–24, support for Proposition 8 at 44 percent and opposition at 49 percent).

565. See Mark DiCamillo, *Why Prop. 8 Confounded Pre-election Pollsters*, S.F. CHRON., Nov. 10, 2008, at B5.

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>566</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>567</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>568</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,

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566. ProtectMarriage.com, First Yes on 8 TV Ad, <http://www.protectmarriage.com/video/view/2> (last visited June 6, 2010).

567. *Id.*

568. ProtectMarriage.com, It’s Already Happened, <http://www.protectmarriage.com/video/view/5> (last visited June 6, 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 June 6, 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 June 6, 2010) (“Children will be taught about gay marriage unless we vote Yes on Proposition 8.”).

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>569</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 advertisements 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<sup>570</sup>: 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>571</sup> As Senator 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.<sup>572</sup> Likewise, Randy Thomasson of the Campaign for California Families stated that passage of a marriage equality bill by the legislature “will ignite the majority of California” to vote for a constitutional amendment to “override the politicians.”<sup>573</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

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569. See THE THOMAS & DOROTHY LEAVEY CENTER FOR THE STUDY OF LOS ANGELES, LC SLA 2008 EXIT POLLS OF THE PRESIDENTIAL PRIMARY AND NATIONAL ELECTIONS IN THE CITY OF LOS ANGELES; RESULTS OF THE LC SLA 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).

570. See Meyer & Staggenborg, *supra* note 521, at 1636.

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

572. See Wan & Romney, *supra* note 386.

573. Vogel, *supra* note 571.

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>574</sup> The campaign to overturn the law relied on the same playbook developed during California's Proposition 8 campaign.<sup>575</sup> The same advertisements linking marriage equality to gay-inclusive school curricula stoked parents' fears.<sup>576</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>577</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.<sup>578</sup>

## 2. Baselines and Metrics

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>579</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>580</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

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

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

576. 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 June 6, 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.").

577. 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 June 6, 2010).

578. There are other important examples of Christian Right groups using the initiative process to reverse legislative gains for lesbians and gay men, including Colorado's Amendment 2 (ultimately struck down by the U.S. Supreme Court), which barred the state and municipalities from enacting antidiscrimination laws based on sexual orientation. See *Romer v. Evans*, 517 U.S. 620 (1996).

579. See ROSENBERG, *supra* note 9, at 353.

580. See Keck, *supra* note 7, at 171.

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 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>581</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>582</sup> Other lawyers expressed similar views,<sup>583</sup> and there is a sense that, given the shifting demographics—with younger people more supportive of marriage for same-sex couples—it is only a matter of time

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

582. Telephone Interview With Minter, *supra* note 125.

583. See Telephone Interview With Kendall, *supra* note 285; Pizer Remarks, *supra* note 94.

before marriage is achieved.<sup>584</sup> It may be possible to discount such optimistic appraisals because they come from participants with a vested interest in telling a positive story of their involvement. But they are nonetheless sincerely held and suggest that those closest to the fight believe that much has been won—and the struggle is by no means over.

Even if one credits this progress, a distinct criticism of the movement still remains: that the focus on achieving marriage as a legal right—waged by relatively well-off, mostly white, elite-educated lawyers in relatively well-resourced organizations—may have had the effect of de-radicalizing the movement and narrowing the field of possible alternatives within the broader arena of LGBT activism.<sup>585</sup> This is a legitimate concern—outside the domain of backlash—that we cannot address systematically here; however, we do offer two observations. First, there is evidence that the push for marriage created some political space for alternatives like domestic partnership, which were made to appear more moderate by comparison.<sup>586</sup> This may not be precisely what critics of marriage have in mind, but it suggests that there might be some broader benefits of the marriage equality movement. Second, the critique of rights-based strategies must always be evaluated in light of the question: As opposed to what?<sup>587</sup> In the LGBT rights context, it is worth asking what alternatives were politically possible and how the marriage equality movement interacted with, and potentially negated, those options.

#### CONCLUSION: TOWARD A THEORY OF MOVEMENT LAWYERING—IN THE FACE OF BACKLASH

In 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

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584. Kors Remarks, *supra* note 83.

585. See, e.g., Sandra R. Levitsky, *To Lead With Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 145, 146 (Austin Sarat & Stuart A. Scheingold eds., 2006).

586. See, e.g., Keck, *supra* note 7, at 158–59.

587. See *id.* at 175.

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 married 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*).<sup>588</sup> The Vermont and New Hampshire legislatures, as well as the Washington, D.C. Council, recently approved marriage for same-sex couples,<sup>589</sup> while Iowa and Connecticut saw state supreme court decisions awarding same-sex couples full access to marriage<sup>590</sup>—bringing the total number of states with marriage equality to five plus the District of Columbia. New York began recognizing same-sex couples' marriages from other jurisdictions, and Maryland is poised to do the same.<sup>591</sup> Meanwhile, some states with marriage bans have enacted relationship recognition regimes.<sup>592</sup> There have also been recent losses: In addition to the Maine marriage repeal, the New York and New Jersey legislatures voted down marriage equality bills. The New Jersey action prompted movement lawyers to return to the New Jersey Supreme Court to vindicate the right to equal treatment announced in an earlier decision.<sup>593</sup> In the wake of Proposition 8 and the voter repeal in Maine, there has been renewed criticism of the

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588. In 2009, GLAD filed a challenge to DOMA in Massachusetts federal district court. See Complaint for Declaratory, Injunctive, or Other Relief and for Review of Agency Action, *Gill v. Office of Pers. Mgt.*, Case No. 09-CV-10309 (Mass. Dist. Ct. Mar. 3, 2009).

589. See S.B. 115, 2009 Leg., 2009–2010 Sess. (Vt. 2009); H.B. 73, 2009 Leg., 161st Sess. (N.H. 2009); Ian Urbina, *Nation's Capital Joins 5 States in Legalizing Same-Sex Marriage*, N.Y. TIMES, Mar. 4, 2010, at A19.

590. *Kerrigan v. Comm'n of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

591. See Aaron C. Davis & John Wagner, *Maryland to Recognize Gay Marriages From Other Places*, WASH. POST, Feb. 25, 2010, at A1; Danny Hakim, *Gay Spouses Due Benefits in the State, Court Finds*, N.Y. TIMES, Nov. 20, 2009, at A29.

592. The Nevada, Oregon, and Washington legislatures passed domestic partnership laws that provide all of the state-based rights and benefits of marriage. See S.B. 283, 2009 Leg., 75th Sess. (Nev. 2009); S.B. 5688, 2009 Leg., Reg. Sess. (Wash. 2009); H.B. 2007, 74th Leg. Assem., Reg. Sess. (Ore. 2007). Wisconsin passed a limited domestic partnership law, and Colorado enacted a designated beneficiaries regime. See WIS. STAT. § 765 (2009); COLO. REV. STAT. § 15-22-101 (2010).

593. See Press Release, Lambda Legal, *Lambda Legal Returns to New Jersey Supreme Court Seeking Marriage Equality* (Mar. 18, 2010), [http://lambdalegal.org/news/pr/nj\\_20100318\\_lambda-returns-nj.html](http://lambdalegal.org/news/pr/nj_20100318_lambda-returns-nj.html).

state-by-state approach,<sup>594</sup> with some leaders arguing that direct action is necessary and others favoring a federal strategy focusing on the repeal of DOMA.<sup>595</sup>

These multiple and contested efforts underscore the central lessons from our analysis of the California case. Movement 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.

These insights point toward a theoretical framework for understanding and evaluating movement lawyering that moves beyond the litigation-centric model of the backlash thesis and other prominent post-civil rights accounts of law and social change,<sup>596</sup> and builds upon the work of post-structuralist and legal mobilization theorists who have drawn attention to the complex relationships between legal advocacy and multiple levers of political power.<sup>597</sup>

Our contribution to this ongoing theoretical development is to position movement lawyers as sophisticated political agents within a complex field characterized by: (1) multiple *actors*, including allies and opponents, as well as political decisionmakers and the general public, whom lawyers seek to persuade to support their goals;<sup>598</sup> (2) a range of *tactical choices* to advance policy ends in which litigation is an important option, but not preordained, and one that is complemented by legislative advocacy, public education, and grassroots organizing; and (3) multiple and overlapping *institutional domains* within which

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594. See Abby Goodnough, *Gay Rights Rebuke May Result in a Change in Tactics*, N.Y. TIMES, Nov. 5, 2009, at A25.

595. See Jeremy W. Peters, *Debate on Gay March Exposes Division in Rights Movement*, N.Y. TIMES, Oct. 10, 2009, at A14.

596. For the classic historical accounts, see JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974).

597. See MCCANN, *RIGHTS AT WORK*, *supra* note 47; Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and to, Social Movements: An Introduction*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS*, *supra* note 585, at 1; Lucie E. White, *To Learn and Teach: Lessons From Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699.

598. See Dieter Rucht, *Movement Allies, Adversaries, and Third Parties*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 197 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2007).

policy ends may be advanced, including courts, legislatures, administrative agencies, the ballot initiative system, extralegal channels (public pressure, boycotts), and private bargaining processes, all of which operate at different scales—local, state, federal, and international—that present distinct opportunities and challenges for advocates seeking reform. It is beyond the scope of our study here to provide a comprehensive analysis of how movement lawyers navigate within this field. Yet this framework does suggest a set of empirical questions that we lay out as a guide for future research.

*Actors.* Who are the movement lawyers? What is their background, motivation, organizational affiliation, access to power, and strategic philosophy? How representative are they of the constituency they seek to help? What mechanisms exist to hold them accountable? Who are their likely allies in terms of cocounsel for cases, community activists, political elites (politicians, government lawyers, and judges), and private sector elites (business supporters, foundations, and influential private citizens)? Who are their opponents, how well are they organized, financed, and connected to power? What strategies and tactics are opponents likely to pursue? How important is public support to the cause, where does public opinion currently stand, and what are the key levers of public influence? Are nonmovement lawyers likely to become involved in related cases that could affect the movement and, if so, how can they be influenced not to intervene?

*Tactical Choices.* What is the range of tactics available to movement lawyers? Which tactics are likely to be the most and least powerful in the circumstances? What are the counterstrategies likely to be employed by opponents and what are the expected results? With respect to litigation, what is the likely outcome, in terms of the judicial decision, countermobilization, and public reaction? Is litigation initiated by movement lawyers, nonmovement allies, or opponents? What opportunities exist to influence the course of litigation that is not affirmatively launched by movement lawyers? How is litigation used to enhance bargaining power or extract concessions in other domains? Are there legislative or nonlegal political alternatives? How might lawyers use multiple tactics in mutually reinforcing ways? What is the distribution of effort and resources across tactical choices?

*Institutional Domains.* What lawmaking and extralegal arenas exist for advancing policy goals? Which are likely to be most effective for achieving the desired outcome? Which venues (for example, courts versus legislatures) have the most sympathetic decisionmakers and which are most vulnerable to opponents' countermobilization efforts? Which jurisdictions present the greatest opportunities for gains (for example, federal versus state government)? Which

jurisdictions present the greatest risk of loss and how can those losses be minimized or avoided? Can pressure from one jurisdiction be mobilized to influence another?

Ultimately, the answers to these questions will provide the building blocks for a more nuanced appraisal of the challenges movement lawyers face, the choices they make, and the results they accomplish. In the end, the lawyers will be judged by how—and how much—they are able to bend the existing vectors of power to benefit those who lack it. Such judgment should not sugarcoat the truth, but neither should it diminish what has been achieved by presenting only a partial version.