

The View From Below: Public Interest Lawyering, Social Change, and Adjudication



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ABSTRACT

In *Public Interest Lawyering: A Contemporary Perspective*, Professors Alan Chen and Scott Cummings provide a nuanced and thorough account of the relationship between lawyering and social change. In this Review Essay, Professor Douglas NeJaime explores how key insights from Chen and Cummings' textbook could impact the way students approach adjudication, which remains the primary subject of instruction in law school classrooms. Continuing the marriage equality case study with which Chen and Cummings conclude, NeJaime analyzes the U.S. Supreme Court's recent decisions in *Hollingsworth v. Perry* and *United States v. Windsor* through the lens of *Public Interest Lawyering*. He argues that rather than understand the decisions as instances of top-down, court-ordered reform, students would locate the Court's intervention within a bottom-up, dynamic process of legal and social change. As Public Interest Lawyering reveals—and as the Court's approach in *Perry* and *Windsor* confirms—lawyers, litigants, and activists, rather than judges, drive that process.

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INTRODUCTION

In *Public Interest Lawyering: A Contemporary Perspective*, Professors Alan Chen and Scott Cummings translate the complex world of public interest practice into a powerful pedagogical framework.¹ In the process, they furnish a comprehensive and engaging account of the relationship between lawyering and social change. The lawyers who populate the text have developed models of practice that leverage law's possibilities while accounting for its limitations. These lawyers operate across a range of institutional domains and rely on legal and nonlegal tactics. Collectively they work in a number of different professional settings and represent clients and causes in an array of substantive areas across the political spectrum. By showing today's law students, who constitute the future of public interest practice, the sophistication and variety that characterizes the field, Chen and Cummings ensure that it remains a rich and lively area for both practice and research.

Specialized courses on public interest law are the most likely candidates for Chen and Cummings' textbook, but in this Review Essay, I explore the benefits of deploying the textbook's lessons more broadly across the law school curriculum. I attend to how key insights from *Public Interest Lawyering* could impact students' outlook on adjudication, which serves as the main way students understand the production and meaning of law. I focus specifically on the paradigmatic adjudicative moment—a U.S. Supreme Court decision. By extending the marriage equality case study with which Chen and Cummings conclude the textbook, I explore how students can approach the recent Supreme Court decisions in *Hollingsworth v. Perry*² and *United States v. Windsor*³ through the lens offered by *Public Interest Lawyering*. I argue that rather than viewing legal and social change as a top-down process driven by courts and judges, students could see a dynamic, bottom-up process fueled by lawyers, litigants, and activists. Moreover, students could see courts as lively participants in a dialogue about constitutional and social change, responding to, rather than commanding, nonjudicial actors. These lessons can alter the way students approach subjects across the curriculum and ultimately impact their careers as lawyers.

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1. ALAN K. CHEN & SCOTT L. CUMMINGS, *PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE* (2013).
 2. 133 S. Ct. 2652 (2013).
 3. 133 S. Ct. 2675 (2013).

I. PUBLIC INTEREST LAWYERING

Each chapter in *Public Interest Lawyering* addresses a significant component of the field. Chen and Cummings trace the historical trajectory of public interest law.⁴ They dedicate significant attention to the identities of public interest lawyers themselves and the variety of practice settings they inhabit.⁵ The authors show the range of tactics public interest lawyers deploy, examining both legal and nonlegal advocacy in multiple arenas and at all levels of government.⁶ They document the global proliferation of public interest practice.⁷ They attend to lawyers' relationships to their clients and explore the ethical and representational issues that arise in this context.⁸ The authors' rich account of public interest lawyering reveals a complex field of actors—movements, allies, countermovements, the state—each complicated by internal divisions over priorities and tactics.

In the final chapter, Chen and Cummings “put it all together”⁹ by offering case studies of lawyers for two different social change campaigns. The first addresses the LGBT rights movement's marriage equality campaign in California; the second involves the campaign by labor, environmental, and community

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4. See CHEN & CUMMINGS, *supra* note 1, at 41–92. As Chen and Cummings show, “in the early phase of the public interest law movement, liberal public interest litigation was attractive precisely because courts were more receptive to large public law cases and judges were typically more willing to engage in activist decision making to implement social reform.” *Id.* at 518 (citing JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 1–2 (1978)). But “[w]hen those conditions change[d], public interest advocacy change[d] with it.” *Id.* The conservative effort to populate the bench with conservative judges and the Republican attack on legal services together limited the possibilities of court-based change. *See id.* at 112. At the same time, these changes created a more favorable environment for conservative advocacy. *See id.* at 109–10. The conservative legal movement built its own public interest law infrastructure and articulated its own vision of the public interest. *See id.* at 115; *see also, e.g.*, ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); Anthony Paik et al., *Lawyers of the Right: Networks and Organization*, 32 *LAW & SOC. INQUIRY* 883 (2007); Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of “Public Interest Law,”* 52 *UCLA L. REV.* 1223 (2005). Chen and Cummings show that even as conservatives have lodged powerful critiques of litigation as an illegitimate and undemocratic vehicle for social change, they have “enthusiastically embraced public interest lawyering on its own terms.” *See* CHEN & CUMMINGS, *supra* note 1, at 114.
 5. *See* CHEN & CUMMINGS, *supra* note 1, at 125–99. Chen and Cummings explore the expansion of public interest law across practice sites and the political and economic forces that contributed to this development. The conservative attack on and defunding of legal services organizations led to a greater need for private practice attorneys to take on public interest work. *See* DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 298–302 (1988); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 *CALIF. L. REV.* 209 (2003).
 6. *See* CHEN & CUMMINGS, *supra* note 1, at 201–72.
 7. *See id.* at 445–91.
 8. *See id.* at 273–399.
 9. *Id.* at 202.

groups to stop big-box retailers in Los Angeles.¹⁰ These case studies reveal how lawyers fuse “different modes of advocacy into a holistic and multidimensional approach to social change.”¹¹ They bring to life the complicating factors introduced throughout the book in ways that highlight both the possibilities and limitations of public interest lawyering. Ultimately, the case studies leave students with a message of hope, showing that even as the road unpredictably twists and turns, lawyers contribute to social change in crucial ways.

To be clear, students reading *Public Interest Lawyering* will not invariably see law, litigation, and lawyers as positive forces. To the contrary, students may newly question the efficacy of litigation. Chen and Cummings’ treatment of scholarly critiques of litigation raises questions about the legacies of seminal public interest law campaigns.¹² Students will—some for the first time—question whether their chosen profession demobilizes, rather than empowers, subordinated groups.¹³ They will ask whether the turn to courts moderates and quells a movement¹⁴ and whether the language of rights suggests discrete remedies that limit more transformative visions.¹⁵ They will appreciate the problems that arise when lawyers function as elite professionals who dominate, rather than participate in, movement work.¹⁶ Students will wonder whether landmark legal victories stall, rather than aid, social change. They will understand the problems that courts confront in implementing and enforcing their decisions and see that judicial decisions may provoke political backlash that hinders the cause.¹⁷

Yet Chen and Cummings do not allow these powerful critiques of public interest lawyering to go unanswered. Instead, they explore scholarly responses and, more importantly, illustrate the ways in which public interest lawyers them-

10. See *id.* at 497. These case studies draw on Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010) and Scott L. Cummings, *Law in the Labor Movement’s Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927 (2007).

11. CHEN & CUMMINGS, *supra* note 1, at 202.

12. See *id.* at 498–500.

13. See *id.* at 222–23.

14. See *id.* at 499 (citing Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 375 (1982–1983)); see also *id.* at 228.

15. See *id.* at 224–25, 498–99.

16. See *id.* at 222–23, 498. Derrick Bell’s seminal treatment of the NAACP Legal Defense and Educational Fund’s (LDF’s) school desegregation campaign provides the most prominent illustration of this critique. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); see also Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

17. CHEN & CUMMINGS, *supra* note 1, at 226–30.

selves have forged new models of advocacy that integrate these critiques. Having internalized critical perspectives on their work, lawyers have constructed sophisticated practice models that account for some of the potential pitfalls of legal reform.¹⁸ Today's public interest lawyers "adopt a complex, multidimensional approach to addressing social problems—one that combines traditional tools like litigation with other tactics and mobilizes communities to create reform and take a more central role in addressing the problems they face."¹⁹ In fact, public interest lawyers generally "view their roles as multifaceted and integrated, rejecting the idea that [their] strategies can be separated out into discrete lawyer and nonlawyer categories."²⁰

Ultimately, the textbook is a testament to self-reflection by public interest lawyers, and the authors demand that same self-reflection from law students. As they remind their readers, "understanding the challenges that the work confronts and how best to respond is not simply a point of academic concern—it is essential to the movement's success going forward."²¹ In comparison to their outlook upon entering law school, students will likely emerge from Chen and Cummings' textbook with a more nuanced understanding of public interest lawyering and the role of courts in social change. They will view litigation neither as an uncontroversial cure for social ills nor as an unhelpful tactic that should be aban-

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18. See Alan K. Chen, *Rights Lawyer Essentialism and the Next Generation of Rights Critics*, 111 MICH. L. REV. 903, 924–25 (2013). Of course, it is worth questioning critics' historical premise. See *id.* As important historical work has shown, the lawyers who have been targeted by influential critiques, including most centrally lawyers at the NAACP LDF, frequently took a more contextualized and contingent view of litigation and courts than these critiques suggest. See TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 258–59 (2005).
 19. CHEN & CUMMINGS, *supra* note 1, at 500; see also Chen, *supra* note 18, at 924 ("[L]itigation now typically represents only one piece of a larger mosaic of approaches . . ."). Relying on empirical research by Catherine Albiston and Laura Beth Nielsen, Chen and Cummings point toward greater strategic diversity at public interest law organizations even as litigation retains a vital role. See CHEN & CUMMINGS, *supra* note 1, at 146 (citing Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1612 (2006)). On the range of tactics deployed by public interest lawyers, see Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 261, 276 (Austin Sarat & Stuart Scheingold eds., 1998); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2046–49 (2008); Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 472–73 (1999); Michael E. Waterstone et al., *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287, 1292–94 (2012).
 20. CHEN & CUMMINGS, *supra* note 1, at 202.
 21. *Id.* at 534.

done. Instead, they will gain an appreciation for the dynamic and contingent nature of law and social change and the multifaceted and complex field that now defines public interest practice. The self-reflection Chen and Cummings document in public interest lawyers and encourage in today's students will continue to allow public interest law to do what they observe—internalize powerful critiques and yet sustain itself with more sophisticated and politically alert practice models.

II. THE MARRIAGE EQUALITY CASE STUDY

Public Interest Lawyering's case study of the LGBT rights movement's marriage equality campaign in California draws on my work with Cummings.²² It takes students from the initiation of the state's domestic partnership legislation in 1999 to the 2009 filing of *Perry v. Schwarzenegger*,²³ the federal lawsuit challenging Proposition 8, the California constitutional amendment that eliminated same-sex couples' right to marry.²⁴ During that period, the model of multidimensional advocacy that Chen and Cummings identify as the hallmark of contemporary public interest practice is on full display.²⁵ In drawing on a range of tactics, spanning from traditional court-centered techniques to legislative advocacy, public education, and grassroots organizing, LGBT rights lawyers in California made decisions based on the broader political and social context.²⁶ They assessed the desirability of litigation by looking across the entire range of institutional arenas, factoring in both the response to litigation by actors in other venues and the likelihood of success in comparison to other available strategies. And they adjusted their approach as the terrain on which they operated rapidly shifted in unpredictable ways.

Even as LGBT rights advocates initiated marriage litigation in states like Vermont, Massachusetts, and New Jersey, lawyers in California avoided such litigation based on fears of political backlash in the event that they won.²⁷ Given the ease with which voters could amend the California Constitution, lawyers knew it would be difficult to insulate a judicial decision from swift political rever-

22. See Cummings & NeJaime, *supra* note 10.

23. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

24. See CHEN & CUMMINGS, *supra* note 1, at 505–07.

25. See Cummings & NeJaime, *supra* note 10, at 1312–18.

26. See CHEN & CUMMINGS, *supra* note 1, at 518–19, 202.

27. See *id.* at 526–27.

sal.²⁸ Therefore, before seeking the right to marry in court, they hoped to win greater support through political mobilization and public education.²⁹

Instead of litigating for the right to marry, advocates in California focused on legislative change.³⁰ Leading public interest lawyers drafted statutory language for state lawmakers to incrementally build the domestic partnership law.³¹ To pressure lawmakers to adopt the legislative measures, these same lawyers pursued litigation that made tangible the harms experienced by same-sex couples lacking the specific rights at issue.³² For instance, a high-profile lawsuit highlighted the importance of explicitly covering same-sex domestic partners in the wrongful death law.³³ In this way, advocates used litigation to increase the effectiveness of nonlitigation strategies.

By 2003, lawmakers had expanded on the domestic partnership law to provide effectively all the state law rights and responsibilities of marriage.³⁴ But, as Chen and Cummings explain, “advance[s] by movement lawyers and activists [are] met by responses from counter-movements.”³⁵ Social conservative activists challenged the comprehensive domestic partnership law in court, claiming that it contravened Proposition 22, the 2000 voter initiative that produced a statutory ban on recognition of same-sex marriage in California.³⁶ LGBT rights lawyers intervened in the litigation and successfully defended the domestic partnership regime.³⁷

28. *See id.*

29. *See* Cummings & NeJaime, *supra* note 10, at 1270–71. On backlash, see generally MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 1991); Michael J. Klarman, Brown and Lawrence (*and Goodridge*), 104 MICH. L. REV. 431 (2005); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994); Gerald N. Rosenberg, *Saul Alinsky and the Litigation Campaign to Win the Right to Same-Sex Marriage*, 42 J. MARSHALL L. REV. 643 (2009). For critical responses specifically in the marriage equality context, see, for example, Cummings & NeJaime, *supra* note 10; William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275 (2013); Linda Greenhouse & Reva B. Siegel, *Backlash to the Future? From Roe to Perry*, 60 UCLA L. REV. DISC. 240 (2013); Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153 (2009); Jane S. Schacter, *Making Sense of the Marriage Debate*, 91 TEX. L. REV. 1185 (2013) (book review).

30. *See* Cummings & NeJaime, *supra* note 10, at 1263–68.

31. *See id.* at 1266.

32. *See id.* at 1267.

33. *See id.* at 1263–64.

34. 2003 Cal. Legis. Serv. 2586–2595 (West) (codified at CAL. FAM. CODE § 297.5 (West 2010)).

35. CHEN & CUMMINGS, *supra* note 1, at 526.

36. *See id.* at 504.

37. *See id.* For the relevant judicial decision, see *Knight v. Superior Court*, 26 Cal. Rptr. 3d 687 (Ct. App. 2005).

Even as public interest lawyers advanced the cause in California without directly challenging the state's restrictive marriage law, events outside their control prompted them to alter their approach. A powerful ally, San Francisco Mayor Gavin Newsom, took action that "disrupt[ed] the planned strategy of" the organized movement.³⁸ In February 2004, Newsom ordered San Francisco clerks to issue marriage licenses to same-sex couples.³⁹ Movement lawyers warned against Newsom's actions, but once he moved forward they responded.⁴⁰ Even though they had earlier decided not to litigate the marriage issue in California, they changed course when it became clear that litigation initiated by social conservative advocates seeking to enjoin Newsom would implicate the broader question of same-sex couples' right to marry.⁴¹

As marriage litigation moved forward, advocates used legislative advances to drive arguments in court. After convincing California lawmakers to pass a marriage equality bill, which the governor vetoed, the lawyers attempted to leverage that political progress in the legal case. They specifically pointed to key legislative findings to support their doctrinal arguments.⁴² Moreover, they deployed the legislative victories on domestic partnership to undermine the state's legal arguments against marriage recognition.⁴³ In fact, LGBT rights lawyers had included language in the domestic partnership law that later supported their arguments for suspect-class status in litigation.⁴⁴ In other words, advocates anticipated the relationship between legislation and litigation and "planned advocacy efforts to reinforce litigation aims."⁴⁵

After winning the right to marry for same-sex couples at the California Supreme Court in 2008,⁴⁶ lawyers witnessed the political reaction they feared. Mere months after the decision, voters passed Proposition 8, which amended the California Constitution to eliminate same-sex couples' right to marry.⁴⁷ Move-

38. CHEN & CUMMINGS, *supra* note 1, at 527. On this point, see Douglas NeJaime, *Convincing Elites, Controlling Elites*, 54 *STUD. L. POL. & SOC'Y* 175, 176–77 (2011); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 *EMORY L.J.* 663, 665–66 (2012) [hereinafter NeJaime, *The Legal Mobilization Dilemma*].

39. See CHEN & CUMMINGS, *supra* note 1, at 505; see also Cummings & NeJaime, *supra* note 10, at 1276.

40. See CHEN & CUMMINGS, *supra* note 1, at 505; see also Cummings & NeJaime, *supra* note 10, at 1277–80.

41. See CHEN & CUMMINGS, *supra* note 1, at 505; see also Cummings & NeJaime, *supra* note 10, at 1281–84.

42. See Cummings & NeJaime, *supra* note 10, at 1289–91.

43. See *id.* at 1288.

44. See *id.* at 1268–69.

45. CHEN & CUMMINGS, *supra* note 1, at 522.

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

47. CAL. CONST. art. 1, § 7.5.

ment lawyers asked the state supreme court to invalidate the initiative, claiming that Proposition 8 was a constitutional revision, rather than a mere amendment, and therefore required a more stringent process for approval. The court, however, allowed the initiative to stand.⁴⁸

Movement advocates urged constituents not to file a federal challenge to Proposition 8.⁴⁹ Federal litigation, they claimed, is a “temptation we should resist” since “the U.S. Supreme Court typically does not get too far ahead of either public opinion or the law in the majority of states.”⁵⁰ The movement advocates instead encouraged a state-based political strategy to ultimately repeal Proposition 8.⁵¹

Even though movement lawyers firmly believed in the validity of federal claims to marriage, they resisted a lawsuit asserting those claims. For them, federal litigation presented too risky an option in comparison to other available strategies. A significant amount of marriage work had shifted from courts to legislatures, and advocates were experiencing increasing success at the state level. For these lawyers, the opportunities offered by state legislatures around the country suggested that, at that particular moment, working state-by-state made more sense than pursuing a federal lawsuit.⁵² And they feared that the U.S. Supreme Court was unlikely to issue a decision invalidating the marriage laws of the vast majority of states.⁵³

Others clearly disagreed. The filing of *Perry v. Schwarzenegger*⁵⁴—a key moment that concludes the case study—shows how “litigation may be initiated by lawyers outside of—and sometimes in spite of—movement lawyer control.”⁵⁵ The newly formed American Foundation for Equal Rights (AFER) retained two high-profile attorneys, Theodore Olson and David Boies, to pursue a federal challenge to Proposition 8.⁵⁶ Olson, who served as Solicitor General in the Bush

48. See *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); see also CHEN & CUMMINGS, *supra* note 1, at 506.

49. See AM. CIVIL LIBERTIES UNION ET AL., WHY THE BALLOT BOX AND NOT THE COURTS SHOULD BE THE NEXT STEP ON MARRIAGE IN CALIFORNIA 1 (2009) [hereinafter WHY THE BALLOT BOX], available at https://www.aclu.org/pdfs/lgbt/ballot_box_20090527.pdf; see also CHEN & CUMMINGS, *supra* note 1, at 506.

50. WHY THE BALLOT BOX, *supra* note 49, at 1.

51. See *id.*

52. See LINDA HIRSHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION 311 (2012) (quoting Evan Wolfson: “The choice is do we keep winning which is what we’re doing or do we trigger a premature, problematic, difficult, burdensome, and potentially troublesome result.”).

53. WHY THE BALLOT BOX, *supra* note 49, at 1.

54. 701 F. Supp. 2d 921 (N.D. Cal. 2010).

55. CHEN & CUMMINGS, *supra* note 1, at 527; see also NeJaime, *The Legal Mobilization Dilemma*, *supra* note 38, at 666; William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1637–39 (1997).

56. See CHEN & CUMMINGS, *supra* note 1, at 506.

administration, and Boies, who squared off against Olson in *Bush v. Gore*,⁵⁷ are partners at large national law firms. While the *Perry* suit moved forward against the advice of movement lawyers, those lawyers responded by shaping the litigation through amicus briefing and behind-the-scenes support.⁵⁸

III. CONTINUING THE CASE STUDY—MARRIAGE EQUALITY AT THE SUPREME COURT

The marriage equality case study in *Public Interest Lawyering* lacks a conventional subject in the law school curriculum—a decision by the U.S. Supreme Court. Chen and Cummings tell us that at the time the textbook went to print, the Supreme Court was considering the Proposition 8 proponents' petition for certiorari, after the trial and appellate courts both had ruled Proposition 8 unconstitutional.⁵⁹ In the remainder of this Review Essay, I pick up where the case study leaves off, showing how Chen and Cummings' approach may reshape the way in which law students understand a Supreme Court decision.

On June 26, 2013, the Court handed down its decision in *Perry*, holding that the Proposition 8 proponents, who had become the parties defending the law, lacked standing to appeal the district court's judgment.⁶⁰ When the suit was filed in 2009, California officials refused to defend Proposition 8, prompting the initiative proponents to intervene in the law's defense. After the district court ruled Proposition 8 unconstitutional,⁶¹ California officials declined to appeal, leading the Ninth Circuit Court of Appeals to consider whether the initiative proponents had standing to appeal the adverse ruling.⁶² While the Ninth Circuit determined that they did—and went on to invalidate Proposition 8⁶³—the Supreme Court disagreed. Given the initiative proponents' lack of standing, the Court vacated the Ninth Circuit's decision, thus restoring the district court's 2010 ruling striking down Proposition 8 and effectively returning marriage equality to California. On the same day that the Court issued its ruling in *Perry*, it struck down Section 3 of the federal Defense of Marriage Act (DOMA) in

57. 531 U.S. 98 (2000).

58. See CHEN & CUMMINGS, *supra* note 1, at 506–07.

59. See *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *affg sub nom. Perry*, 704 F. Supp. 2d 921.

60. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

61. See *Perry*, 704 F. Supp. 2d 921.

62. The Ninth Circuit resolved the standing issue after asking the California Supreme Court to weigh in regarding the position of initiative proponents in the state initiative process. See *Perry*, 671 F.3d at 1070. For the California Supreme Court decision, see *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011).

63. See *Perry*, 671 F.3d at 1075, 1096.

United States v. Windsor.⁶⁴ With that decision, the federal government began to recognize same-sex couples' valid state-law marriages.

One or both of these cases will be taught in courses on constitutional law, federal courts, family law, and more specialized topics on gender and sexuality. Yet if students merely read and analyze the Court's decisions, they may miss significant parts of the story. They may emerge with a fairly top-down view of constitutional and social change, one in which the Court is the main driver. Given that the outcomes generally favored marriage equality, some students may glorify the Court while others may criticize it as undemocratic. Yet neither view would be fully justified, as both would locate the justices as the lead characters—ordering change from above.

In *Public Interest Lawyering*, Chen and Cummings focus on lawyers, activists, and clients, rather than judges, and they locate the claims-making process, rather than the act of adjudication, as central.⁶⁵ Viewing *Perry* and *Windsor* through this lens, students would emerge with a more nuanced, bottom-up, de-centered, and ultimately accurate understanding of the role of law and courts in social change.⁶⁶ They would appreciate the important ways in which law shapes political and social life before a U.S. Supreme Court decision—or any judicial decision for that matter—on an important and contested issue. And they would understand that in *Perry* and *Windsor* the Court itself responded to positions and frames staked out by lawyers and viewed its role as part of an ongoing legal, political, and cultural struggle led by activists, not judges.

64. 133 S. Ct. 2675 (2013).

65. This pedagogical treatment parallels an important scholarly intervention. As Cummings argues:

Research on social change has often drawn a distinction between the role of *law* and the role of *lawyers*. Within the literature on court impact, the threshold question is whether a specified legal change, on its own terms, translates into some type of change in social practice. How the legal change occurred in the first instance and who caused it are bracketed off. This facilitates empirical analysis by isolating the independent variable (legal change), but does so by sacrificing important details that may be relevant to understanding aspects of the story.

Scott L. Cummings, *Empirical Studies of Law and Social Change: What Is the Field? What Are the Questions?*, 2013 WIS. L. REV. 171, 187. Instead, because of the complex system of opportunities and constraints under which lawyers operate, it is impossible to judge the impact of law in isolation. Outcomes must be measured against available alternatives, and we must view the motivations for legal action, the events that prompted such action, and the forces driving such action as important to understanding and assessing courts' impacts. As Cummings argues, "to the extent . . . judgments about court impact are, at least in part, about the wisdom of ex ante lawyer decisions to bring cases to court, it is important to include the context of lawyer decision making within the framework of empirical evaluation." *Id.* at 188.

66. I do not mean to suggest that many professors do not already include such a bottom-up perspective in their instruction. Nor do I mean to imply that other casebooks do not attend to the construction of law as a bottom-up process. Rather, I simply show how this bottom-up approach—and the pivotal role that lawyers play—is central to Chen and Cummings' textbook.

Ultimately, viewing *Perry* and *Windsor* through the lens of *Public Interest Lawyering* reveals the creation of legal meaning and social change as part of a bottom-up, rather than top-down process. That we see this while studying two landmark Supreme Court decisions—one that effectively brings same-sex marriage to the most populous state in the country and the other that requires the federal government to recognize such marriages—only underscores the importance of viewing Supreme Court cases from below. With this perspective, we see how cases are often shaped by decisionmaking processes and social movement conflict in which lawyers, rather than Supreme Court justices, play central roles.

A. Understanding *Perry*

As Chen and Cummings show, lawyers at social movement organizations, lawyers in private practice, and lawyers in government at federal, state, and local levels all participate in public interest work. In the marriage equality context, their work intersected in ways that produced important realignments that altered the posture of the *Perry* litigation and gave rise to significant nonmerits issues. Ultimately, the Court disposed of the case by concluding that the initiative proponents lacked standing to appeal. Chief Justice Robert's majority opinion effectively returned the right to marry to same-sex couples in California—without saying anything about the constitutional issues implicated by Proposition 8.

In answering the complaint in *Perry* in 2009, California's then-Attorney General Jerry Brown did something unusual: He agreed that Proposition 8 violated the federal Constitution and therefore refused to defend the law.⁶⁷ Then-Governor Arnold Schwarzenegger also offered no defense.⁶⁸ Brown's successor, Kamala Harris, maintained the State's position when Brown became Governor at the beginning of 2011.⁶⁹ These decisions left the Proposition 8 proponents and their lawyers—conservative cause lawyers—to defend the law throughout the entire course of the litigation. Their lack of standing to appeal the district court's adverse judgment ultimately doomed their defense without any substantive decision by the Court.⁷⁰ The odd configuration of lawyers in the *Perry* litiga-

67. See Answer of Attorney General Edmund G. Brown Jr., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-cv-2292), 2009 WL 1748382.

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

69. See Michael Doyle, *California AG Kamala Harris Reaping Prop. 8 PR Bonanza*, SACRAMENTO BEE, Mar. 28, 2013, <http://blogs.sacbee.com/capitolalert/latest/2013/03/kamala-harris-reaping-prop-8-pr-bonanza.html>.

70. Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527, 530–32 (labeling this the “one-state (procedural) solution”).

tion demonstrates the importance of public interest lawyering occurring in a variety of locations, including in government offices. Along with the lawyers from the city attorney's office in San Francisco, who had been litigating for marriage equality since defending their mayor's actions back in 2004, lawyers from the state attorney general's office made the case for marriage equality. In the context of a hotly contested legal, political, and cultural issue, the state's lawyers worked to invalidate, rather than uphold, state law.

Of course, the decision by the state's lawyers was controversial. Chen and Cummings raise many of the representational and ethical issues government lawyers face,⁷¹ and in the context of *Perry*, students can explore how they would approach their obligations to defend and enforce laws when they find those laws unjust or determine that they are unconstitutional. In *Perry*, as Justice Kennedy complained in dissent, state officials essentially vetoed the constitutional law-making that had occurred through the initiative process.⁷² In effectively allowing the state officials to have their way, had the Court inappropriately vested "the right to make law" with the government, rather than the people?⁷³ Had the state's lawyers shirked their responsibilities, or had they staked out a vital role in constitutional and social change? However students answer these questions, they will see that lawyer decisionmaking in government offices shaped the contest over same-sex couples' right to marry and dramatically influenced the result of the litigation.

Yet it would be naïve to view the result in *Perry* as merely a decision determined by standing doctrine. Instead, we must understand the Court's resolution against the backdrop of some of the justices' reluctance to reach the merits. From the beginning of the litigation, the Olson-Boies team had, against the advice of the country's leading LGBT rights lawyers, sought a Supreme Court decision holding that a state cannot exclude same-sex couples from marriage.⁷⁴ Although they—and other lawyers involved in the litigation—put forward more limited constitutional claims that would have affected only California or a handful of other, relatively progressive states, Olson and Boies consistently argued that Proposition 8 deprived same-sex couples' of their fundamental right to marry and that sexual orientation-based classifications should be subjected to heightened

71. See CHEN & CUMMINGS, *supra* note 1, at 152–69.

72. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2671 (2013) (Kennedy, J., dissenting). This would raise questions relating to popular constitutionalism. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

73. *Perry*, 133 S. Ct. at 2675 (Kennedy, J., dissenting).

74. See generally Transcript of Proceedings, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (09-cv-2292).

scrutiny for equal protection purposes. A victory based on either theory likely would have yielded a “fifty-state solution,”⁷⁵ leading the Court to strike down, in one fell swoop, the restrictive marriage laws of thirty-eight states.⁷⁶

Some of the justices were clearly reluctant to produce such a sweeping result. Concerned with their own institutional legitimacy and the backlash a broad decision could produce, justices both supportive of and hostile to constitutional claims to marriage equality may have wanted to sidestep the ongoing political and cultural battle. This desire to avoid a substantive ruling may help explain the odd combination of justices in the majority. Chief Justice Roberts, whose dissent in *Windsor* makes clear that he believes states can prohibit same-sex marriage,⁷⁷ wrote for the Court. Justice Scalia, who also would allow states to ban same-sex marriage,⁷⁸ joined Chief Justice Roberts’ majority opinion in *Perry*. Yet the other three justices in the majority—Justices Ginsburg, Breyer, and Kagan—are generally believed to be sympathetic to the claim that state marriage bans are unconstitutional.

Even some of the dissenting justices may have hoped that the Court could avoid the issue for a few more years. Justice Kennedy, who would have reached the merits, seemed to wish that the Court had never confronted the case in the first place. At oral argument, he suggested that the Court should not have accepted *Perry* and floated the possibility of dismissing the petition as improvidently granted.⁷⁹ Regardless of whether the justices had formulated their opinions on the constitutionality of state laws restricting marriage for same-sex couples, they hesitated to rule on that question in 2013, when many states were actively debating the issue and were quickly moving into the marriage equality column. Indeed, Rhode Island, Delaware, and Minnesota all passed marriage equality laws in the time between the March oral argument and the June decision.

Even as Justice Kennedy may have hoped to avoid the question of same-sex couples’ constitutional right to marry, his substantive commitment to preserving the integrity of the California initiative process prevailed. Denying certiorari or dismissing the petition would have preserved the Ninth Circuit’s ruling in favor of standing for the initiative proponents. But once confronted with the case, Justice Kennedy refused to sign on to a ruling on standing simply to avoid the substantive question. In fact, in his dissent, he alluded to the relationship between

75. Yoshino, *supra* note 70, at 537.

76. See *Marriage Center*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/marriage-center> (last visited July 31, 2013).

77. See *United States v. Windsor*, 133 S. Ct. 2675, 2696–97 (2013) (Roberts, C.J., dissenting).

78. *Id.* at 2709 (Scalia, J., dissenting).

79. See Transcript of Oral Argument at 48, 63, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

the majority's holding and the institutional role of the Court as it approaches hotly contested issues: "Of course, the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject."⁸⁰ The justices, in other words, are right to proceed with care when dealing with same-sex marriage. "But," Justice Kennedy continued, "it is shortsighted to misconstrue principles of justiciability to avoid that subject."⁸¹ Confronted with the case, he would have reached the merits (in some form), but his earlier reservations suggested that he would have happily allowed the issue to continue to work its way through the lower federal courts and state political institutions. Justice Kennedy's reasoning opens a window into the relationship between courts and social change—a relationship that played out doctrinally in *Perry* as a contest over prudential limits on the federal courts' authority to hear cases. In this sense, students may understand the result in *Perry* not simply as reflective of the justices' disagreement about standing doctrine but also as an attempt to find a doctrinal escape hatch.

Ultimately, *Perry* produced an important victory for the LGBT rights movement. California, the most populous state in the country, became the latest to allow same-sex couples to marry. Yet *Perry* did not yield the landmark victory that some lawyers and activists envisioned. It did not deliver the right to marry to lesbians and gay men across the country. Instead, it allowed the marriage equality movement to continue. In this sense, the Court's decision kept social movement advocates, rather than judges, in the leading role. It gave those advocates fuel, but it did not settle the debate.

Against this backdrop, students can explore whether the *Perry* lawyers, and Olson and Boies in particular, had been too optimistic. Had they asked the justices to do too much too soon? Had the LGBT movement lawyers been right to discourage a federal lawsuit until more states had moved into the marriage equality column? These questions may allow students to contemplate potential differences across the many practice settings that Chen and Cummings examine. *Public Interest Lawyering* explores the nonprofit sector, including offices dependent on government funding, government service, including lawyers working for and against the state, and private practice, including lawyers at small and large firms.⁸² The textbook materials allow students not simply to appreciate the range of settings in which public interest lawyering occurs but to analyze the important differences across such settings. The conflict over the filing of *Perry* and

80. *Perry*, 133 S. Ct. at 2674 (Kennedy, J., dissenting).

81. *Id.*

82. See CHEN & CUMMINGS, *supra* note 1, at 125–99.

its reception at the Court may suggest that the private-firm lawyers representing the plaintiffs may not have integrated critiques of litigation into their approach to the same extent as lawyers at public interest organizations. Indeed, when asked why he brought the suit when others in the movement urged caution, Olson explained that the lawsuit was necessary because same-sex couples should not be told to “live with [discrimination] for a few more years.”⁸³ Under this view, the Court offered a short-term solution. Perhaps the private firm lawyers in *Perry* had been seduced by the “myth of rights.”⁸⁴ The Court, in the end, seemed unprepared to intervene in a far-reaching way on the question of marriage equality at the state level.

Of course, we cannot generalize from this one example, but the internalization of critiques across practice settings could be a fruitful issue for both classroom discussion and future empirical research. Such discussion would also open up broader normative questions about the proper role of courts in the social change process. Students could contemplate whether courts should dramatically push social change or instead merely facilitate incremental advances. Students could question whether, given that courts are charged with resolving legal claims brought by injured parties, such institutional considerations should inform adjudication at all.

At the same time, students may ask whether the lawyers at LGBT public interest organizations had been too cautious. Had they internalized litigation critiques too drastically? Undoubtedly, even apart from the result, *Perry* had a dramatic impact on the marriage equality cause. Even as Olson and Boies seemed to take an overly optimistic view of the role of courts in social change, they leveraged the litigation in a sophisticated way. Consistent with the images of public interest lawyers that Chen and Cummings depict, the *Perry* team translated their lawsuit into an effective media and public education campaign.⁸⁵ Well before *Perry* arrived at the Supreme Court, the lawyers exploited its influence outside the courts. In fact, they began to do so well before any judicial decision in the case: Olson and Boies garnered extensive media coverage when they announced the lawsuit with a televised press conference and subsequently appeared on high-profile news programs and in leading periodicals.⁸⁶ Even after their argument at the Supreme Court, CNN ran a documentary about the legal

83. *Marriage Warriors: Showdown at the Supreme Court*, CNN (Mar. 30, 2013, 7:30 PM), <http://transcripts.cnn.com/TRANSCRIPTS/1303/30/se.01.html>.

84. See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 5-7 (2d ed. 2004).

85. See CHEN & CUMMINGS, *supra* note 1, at 267-71.

86. See NeJaime, *The Legal Mobilization Dilemma*, *supra* note 38, at 718.

team, allowing Olson and Boies to make their case in the court of public opinion.⁸⁷ Olson's participation in particular facilitated conservative support for the cause.⁸⁸ Prominent Republicans signed an amicus curiae brief submitted to the Supreme Court in support of the *Perry* plaintiffs.⁸⁹ Ultimately, the indirect effects of the lawsuit may have been just as significant as the adjudicated result, and Olson and Boies seemed keenly aware of this extrajudicial impact. The *Perry* suit, which ended with a decidedly unsexy ruling on standing, propelled the marriage equality cause forward, both in and out of court.

B. Comparing *Windsor*

Perry, of course, was not alone at the Supreme Court. The Court considered the case along with *Windsor*, one of several challenges to DOMA driven by lawyers at LGBT public interest organizations. Even as LGBT movement lawyers warned against *Perry*—and throughout the litigation urged doctrinal paths that would have limited its impact⁹⁰—they did not abandon litigation. Instead, they actively pursued federal lawsuits challenging DOMA. Placing *Perry* and *Windsor* side by side, students can explore the differences across lawsuits aimed at achieving social change and assess the lawyer decisionmaking that produces such lawsuits. Ultimately, *Windsor*, in many ways, demonstrates that public interest lawyering is a dynamic and evolving process. Lawyers viewed DOMA litigation as merely a step—albeit a significant one—along the way to full marriage equality. In pursuing the litigation, they relied on important developments at the state and federal levels, and throughout the litigation they adjusted their strategy to account for the changing political and cultural context. In *Windsor*'s wake, they continue to press for marriage equality, both in and out of court.

As an initial matter, the DOMA lawsuits demonstrate that while public interest lawyers have moved outside the courts and have at times avoided litigation, they have not abandoned courts.⁹¹ As Chen and Cummings show, the critiques of public interest law prompted a scholarly turn, mainly on the left, away from litigation and courts as productive components of activism aimed at social

87. *Marriage Warriors: Showdown at the Supreme Court*, *supra* note 83.

88. See NeJaime, *The Legal Mobilization Dilemma*, *supra* note 38, at 716–18.

89. See Brief of Amici Curiae Kenneth B. Mehlman et al. Supporting Respondents, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 769312.

90. See NeJaime, *The Legal Mobilization Dilemma*, *supra* note 38, at 734 (explaining that lawyers from LGBT public interest organizations pressed a “California-specific factual and doctrinal reframing [of *Perry*] . . . to provide the best opportunity for a denial of certiorari by the Supreme Court, a favorable decision by the Court if it [took] the case, and the least destructive aftermath if the Court decide[d] against the plaintiffs”).

91. Cummings & NeJaime, *supra* note 10, at 1317–18.

change.⁹² But while scholarly critiques of public interest law offer crucial insights, they should not be viewed as disabling.⁹³ Chen and Cummings bring to light the continued and vital contributions that litigation and courts make to social change, even if those contributions are partial and contingent. Many public interest lawyers, including LGBT movement advocates, have charted a course that accounts for critiques of public interest law by forging a more agile and sophisticated practice. They continue to successfully deploy litigation even as they approach the choice to litigate with caution and understand litigation in relation to a range of other tactics.

As Chen and Cummings show, the choice to litigate—just as the choice to undertake any tactic—depends on a dynamic legal, political, and cultural context.⁹⁴ In 2009, the same year that Olson and Boies filed *Perry*, lawyers at Gay & Lesbian Advocates & Defenders (GLAD) filed *Gill v. Office of Personnel Management*, a federal lawsuit challenging Section 3 of DOMA.⁹⁵ The movement lawyers struck when the political context for such litigation appeared more favorable.⁹⁶ The newly elected Obama Administration expressed greater support for LGBT rights than its predecessor, and the President advocated DOMA's repeal.⁹⁷ Moreover, litigation challenging DOMA seized on state-level progress.⁹⁸ With more states opening marriage to same-sex couples, DOMA appeared increasingly inconsistent with states' power to regulate marriage in a way that provided equality to same-sex couples. And with more married same-sex couples, the harms inflicted by DOMA became more widespread.

92. See CHEN & CUMMINGS, *supra* note 1, at 115; see also Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 885–88 (2013).

93. See Rhode, *supra* note 19, at 2028 (explaining how public interest lawyers, who are “acutely aware of the limits of litigation in securing social change, . . . have become more selective in their use of lawsuits, and have focused more attention on multiple strategies including policy and public education”).

94. See CHEN & CUMMINGS, *supra* note 1, at 511 (“No social change campaign writes on a blank slate. As public interest lawyers approach a campaign, they must take inventory of the social, political, legal, and cultural context in which it is planned and conducted. In so doing, they evaluate the existing political opportunity structure in order to identify the best route to move power to achieve their political goals.”).

95. See First Amended and Supplemental Complaint for Declaratory, Injunctive, or Other Relief and for Review of Agency Action, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (09-CV-10309). The district court's decision was affirmed by the First Circuit in *Massachusetts v. United States Department of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012). See also NeJaime, *The Legal Mobilization Dilemma*, *supra* note 38, at 685.

96. See Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649, 691–92 (2012).

97. See *id.* at 691–92.

98. See NeJaime, *The Legal Mobilization Dilemma*, *supra* note 38, at 685.

After a favorable district court decision in *Gill*, ACLU lawyers, along with lawyers in private practice providing pro bono representation, filed *Windsor*.⁹⁹ DOMA challenges proliferated around the country.¹⁰⁰ Students may wonder why lawyers from the leading LGBT public interest organizations favored one type of federal litigation—challenges to DOMA—and not the other—challenges to state marriage bans. As opposed to the heavy lift sought by the plaintiffs’ counsel in *Perry*, the DOMA suits asked only that the federal government recognize marriages of same-sex couples from states that already recognize such marriages. In other words, they presented more limited claims with less sweeping impact. A favorable result would directly affect only a handful of states and would not force any state to issue marriage licenses to same-sex couples. While hugely significant, a victory for LGBT rights lawyers would nonetheless constitute a limited, incremental step toward full marriage equality. As the movement advocates explained in their joint statement discouraging federal litigation challenging state marriage bans like Proposition 8, the “thoughtfully constructed” DOMA litigation “is more modest than a case [like *Perry*] claiming there is a federal constitutional right to marry.”¹⁰¹

As Chen and Cummings show, government lawyers contribute to public interest law campaigns in significant ways,¹⁰² and attorneys general in particular can move the government’s agenda in new directions.¹⁰³ As LGBT rights advocates had hoped, the political context for challenging DOMA proved especially favorable. The lawyers used the litigation to pressure officials in the Obama Administration, including Attorney General Eric Holder, to follow through on their commitment to LGBT equality. Unlike in the First Circuit, where *Gill* moved forward, the Second Circuit, where *Windsor* was filed, lacked precedent on the level of scrutiny for sexual orientation-based classifications. Accordingly, the Department of Justice (DOJ) had to address the question.¹⁰⁴ After weeks of deliberations inside the Obama Administration, the DOJ determined that it would not defend Section 3 of DOMA.¹⁰⁵ In articulating the Administration’s view that Section 3 is unconstitutional, Attorney General Holder laid out the le-

99. See Complaint, *Windsor v. United States*, 797 F. Supp. 2d 320 (S.D.N.Y. 2011) (No. 10-CV-08435).

100. See, e.g., Second Amended Complaint at 1-2, *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d 967 (N.D. Cal. 2011) (No. 10-CV-0257); Complaint for Declaratory and Injunctive Relief, *Pedersen v. Office of Pers. Mgmt.*, No. 10-CV-1750-VLB (D. Conn. Nov. 9, 2010).

101. WHY THE BALLOT BOX, *supra* note 49, at 3.

102. See CHEN & CUMMINGS, *supra* note 1, at 152-54.

103. See *id.* at 156.

104. See NeJaime, *supra* note 92, at 692-93.

105. Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1.

gal argument that sexual orientation–based classifications merit heightened scrutiny for equal protection purposes.¹⁰⁶ With DOMA, suddenly lawyers who had been defending a law that discriminated against same-sex couples were making the case against the law. As a product of shifting state positions, government lawyers, including Attorney General Holder, became lawyers for the marriage equality cause.¹⁰⁷

As we saw in *Perry*, the lack of executive branch defense raised significant questions of justiciability. Unlike the attorney general and governor in California, however, the Obama administration made clear it would continue to enforce the law until a definitive judicial ruling and would facilitate congressional intervention to defend it.¹⁰⁸ Nonetheless, with the executive branch agreeing with the plaintiff and the district and appellate court decisions in her favor, the Court could have avoided the merits in *Windsor* just as it did in *Perry*. In fact, two of the justices in the *Perry* majority—Chief Justice Roberts and Justice Scalia—would have found the nonmerits questions dispositive in both cases.¹⁰⁹ They could not see a defensible reason to reach out and decide the merits in one case but not the other.

Yet the *Windsor* majority found a justiciable controversy and moved on to the substantive issues. While the nonmerits questions in *Perry* and *Windsor* differed in important ways, the resolution in each case may also relate to the scope of the merits questions presented and the pressing need for a substantive determination on DOMA. In *Windsor*, as opposed to *Perry*, leaving the substantive question unsettled would have produced significant uncertainty and left same-sex couples across the country in a state of limbo. As Justice Kennedy explained, “[C]ourts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA’s sweep involving over 1,000 federal statutes and a myriad of federal regulations.”¹¹⁰ If the Court did not step in at this point, “the costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved.”¹¹¹ And, of course, the Court could decide the substantive question in *Windsor* without significantly altering the situation at the

106. See Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker of the U.S. House of Representatives (Feb. 23, 2011) [hereinafter Holder Letter], available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

107. See NeJaime, *supra* note 92, at 696–97; see also CHEN & CUMMINGS, *supra* note 1, at 152.

108. See Holder Letter, *supra* note 106.

109. *United States v. Windsor*, 133 S. Ct. 2675, 2696–2720 (2013).

110. *Windsor*, 133 S. Ct. at 2688.

111. *Id.*

state level—without, in other words, forcing unwilling states to issue marriage licenses to same-sex couples.

Ultimately, while both *Perry* and *Windsor* posed fundamental questions regarding sexual orientation equality specifically in the context of marriage, the Court addressed the merits of those questions in *Windsor* while avoiding them in *Perry*. This type of split decision may relate more to the Court's position in the broader political context than to the substantive question of sexual orientation equality. Of course, it remains critical that students master the doctrinal concepts emerging from the cases, but it is also important that students understand that outcomes and inconsistencies may have more to do with institutional factors than with doctrinal considerations. As the LGBT movement lawyers explained in 2009 when they discouraged federal litigation targeting state marriage prohibitions, “[A]rguments in the briefs are not the only thing that influences the Court’s decisions. The climate of receptivity . . . on these issues matter[s] as well.”¹¹²

The *Windsor* decision itself, striking down Section 3 of DOMA, reflects the impact of LGBT rights advocates, who have successfully brought same-sex couples within the constitutional parameters of equality. Indeed, Justice Kennedy linked New York’s recognition of marriage for same-sex couples to the state’s “evolving understanding of the meaning of equality.”¹¹³ That evolution directly sprung from the work of LGBT rights lawyers. Lawyers at Lambda Legal had unsuccessfully litigated marriage equality in the New York state courts,¹¹⁴ but that defeat did not silence them.¹¹⁵ Instead, it propelled them forward as they turned to actors in other branches of government, ultimately achieving marriage equality legislatively. By the time Edie Windsor’s claim arrived at the Supreme Court, social movement advocates and their constituents had dramatically reshaped the understanding of equality, as both a constitutional and political matter, for same-sex couples.

Yet even as Justice Kennedy’s majority opinion invokes powerful language of liberty, equality, and dignity, it orders only a limited form of change. While laying the foundation for a future decision invalidating state marriage bans, it leaves that question for another day. Indeed, Justice Kennedy skirted the level-of-scrutiny question that had been central to the DOJ’s shift in positions and had guided the Second Circuit Court of Appeals’ analysis.¹¹⁶ A holding that sexual

112. AM. CIVIL LIBERTIES UNION ET AL., MAKE CHANGE, NOT LAWSUITS 4 (2009), available at http://www.aclu.org/pdfs/lgbt/make_change_20090527.pdf.

113. *Windsor*, 133 S. Ct. at 2693.

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

115. See Douglas Nejaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 999–1001 (2011).

116. See *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).

orientation-based classifications deserve heightened scrutiny for equal protection purposes would have immediately rendered a host of discriminatory laws, including state marriage bans, suspect. While Justice Kennedy announced significant constitutional principles that will certainly aid LGBT rights advocates as they challenge state marriage restrictions—both in and out of court—he avoided directly intervening in that issue. His approach, as public interest lawyers had hoped when they filed federal lawsuits challenging DOMA, significantly moved forward the marriage equality cause. But it did not decisively settle the question. In this sense, *Windsor*, like *Perry*, is a point along the way to marriage equality—it fuels, rather than ends, social movement activity and public interest lawyering. The decision leaves lawyers, not judges, to continue to press the issue.

CONCLUSION

If students study the Supreme Court decisions in *Perry* and *Windsor* after exposure to *Public Interest Lawyering*, they will do so with a sense of context and contingency that could impact their more general understanding of the relationship among litigation, courts, and social change. Students will neither see the Court as same-sex couples' savior nor fault the Court for intervening in an undemocratic and illegitimate manner. Instead, students will appreciate that the decisions emerged only after years of public interest advocacy on behalf of same-sex couples' right to marry. They will see that the Court's treatment grew out of lawyers' highly contested and carefully calculated decisions about tactics and timing. They will know the years of mobilization and advocacy—both in and out of court—that laid the groundwork for the Court's opinions. In the end, they would realize that *Perry* and *Windsor* are not the work of judges but of lawyers.

Of course, the cases left significant issues undecided. Questions over the constitutionality of state marriage bans loom. And opponents of marriage equality have vowed to fight on at the state level. Public interest lawyers on both sides will continue to mobilize, strategize, and advocate. They will continue to collectively write the story of law and social change. Indeed, as Chen and Cummings declare: "The hallmark of public interest lawyering . . . is a recognition that the fight never ends, success is never complete, but that the struggle must nonetheless constantly be joined—and rejoined."¹¹⁷

117. CHEN & CUMMINGS, *supra* note 1, at 534.