
THE *PERRY* LITIGATION AND THE CHANGING POLITICAL LANDSCAPE FOR MARRIAGE EQUALITY

PAUL M. SMITH[†]

How has the *Perry*¹ marriage case affected other marriage equality litigation? A conventional legal analysis would suggest the answer is “not very much.” By the time Judge Walker ruled for the plaintiffs in *Perry* in 2010, the most significant victories for marriage equality at the state level (Massachusetts in 2003,² Connecticut in 2008,³ California in 2008,⁴ and Iowa in 2009⁵) had already occurred. So had the major losses at the state level (Washington in 2006,⁶ New York in 2006,⁷ and Maryland in 2007⁸), as well as the in-between decisions leading to the creation of civil unions (Vermont in 1999⁹ and New Jersey in 2006¹⁰). In many ways, these cases, along with the Supreme Court’s 2003 decision in *Lawrence v. Texas*—which invalidated all sodomy laws¹¹—provided the foundation for *Perry*. Justice Scalia’s dissent in *Lawrence* laid out the argument for a federal constitutional right to marry.¹² It was based on (1) the *Lawrence* majority’s recognition of the role that long-term partnerships of same-sex couples play in the lives of gay and lesbian people, and (2) the majority’s rejection of morality as a justification for discrimination against gay people.¹³ The argument was further developed in the various state constitutional cases just mentioned. The evidence so adroitly presented by the plaintiffs in the *Perry* trial involved many of the same experts that gay rights groups had been presenting for years in those state marriage cases.

That said, it would be myopic to deny that *Perry* has had an effect on the

[†] Paul M. Smith is a partner in the Washington office of Jenner & Block LLP, where he chairs the firm’s Appellate and Supreme Court practice. In 2003, he argued the landmark *Lawrence v. Texas* gay rights case as co-counsel with Lambda Legal. He later served on the Board of Directors of Lambda Legal for seven years and co-chaired their Board of Directors for two years. He is currently co-counsel in two constitutional challenges to the Defense of Marriage Act.

1. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

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

3. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

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

5. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

6. *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006) (en banc).

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

8. *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

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

10. *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

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

12. *Id.* at 604–05.

13. *Id.*

effort to achieve greater marriage equality since 2009. *Perry*'s effect has not stemmed directly from the admirable legal rulings already achieved. Rather, *Perry*'s greatest impact thus far has been on public discourse concerning marriage equality. The existence of the *Perry* litigation, pursued by establishment law firm lawyers, including leading conservative Republican lawyer Theodore Olson, has pushed into the mainstream the notion that same-sex couples deserve to be treated with equal respect under the law, including under marriage laws.¹⁴ This, in turn, will have an effect on the courts, which do not operate in a political and cultural vacuum when deciding how aggressively to push the country toward greater fulfillment of the Constitution's promise of equality under the law for all persons.¹⁵ Indeed, this changed discourse may already have influenced the courts in myriad decisions invalidating section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 (2006).¹⁶

How did *Perry* do so much to change the political and cultural acceptance of marriage equality? First, the case involved the largest state, California, and a challenge to a very closely watched initiative, Proposition 8—which had taken away marriage rights that the California Supreme Court had already granted to same-sex couples.¹⁷ Second, the case itself was well-designed to achieve a huge public relations impact: the brilliant decision to team up Olson with David Boies, his opposing counsel in *Bush v. Gore*,¹⁸ made the first serious effort to litigate a federal right to marry a cultural phenomenon that was irresistible to the mainstream press.¹⁹ Third, an aggressive public relations effort multiplied the

14. See *infra* notes 24–27; Ana Marie Cox, *How Gay Equality Became the New Normal of US Politics in 2012*, GUARDIAN (Nov. 7, 2012), www.guardian.co.uk/commentisfree/2012/nov/07/gay-equality-new-normal-us-politics-2012.

15. See *infra* notes 33 and 35.

16. See, e.g., *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012); *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-1750, 2012 WL 3113883 (D. Conn. July 31, 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012).

17. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (holding that privacy and due process provisions of California Constitution guarantee right to marriage for all individuals regardless of sexual orientation).

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

19. See, e.g., Jo Becker, *A Conservative's Road to Same-Sex Marriage Advocacy*, N.Y. TIMES (Aug. 18, 2009), http://www.nytimes.com/2009/08/19/us/19olson.html?pagewanted=all&_r=0; John Avlon, *Will Boies and Olson Win the Gay Marriage Argument?*, THE DAILY BEAST (June 13, 2010), <http://www.thedailybeast.com/articles/2010/06/14/gay-marriage-david-boies-and-ted-olson-team-up-on-prop-8-closing-arguments.html> (“The two legal legends famously squared off in *Bush v. Gore*, but their personal friendship and shared principle on this issue have led them to push for marriage equality in the courts via *Perry v. Schwarzenegger*.”). Adding Boies and his firm to the team erased any potential concerns that Olson, a highly visible supporter of politicians who have opposed LGBT equality, was anything less than completely sincere in his desire to achieve full equality for same-sex couples regarding marriage. Becker, *supra* (“Theodore B. Olson’s office is a testament to his iconic status in the conservative legal movement. A framed photograph of Ronald Reagan, the first of two Republican presidents Mr. Olson served, is warmly inscribed with

impact of the case.²⁰ That effort included a fight to make the *Perry* trial open for viewing to more than a few spectators—a fight that went all the way to the U.S. Supreme Court²¹—and the authoring and presentation of a stage play reenacting the trial, complete with star actors.²² Never before had a civil rights lawsuit been conceived in Hollywood, “cast” by Hollywood, and then turned immediately into an actual artistic presentation on stage.²³ The case is truly unique. One assumes the blockbuster film only awaits the actual outcome on appeal.

So where is the evidence that this unique case has changed the political and cultural environment in which those of us litigating for LGBT equality now work? Certainly the level of public support for marriage equality has been increasing dramatically during the pendency of the case. In 2008, only 39% of Americans supported marriage equality, with 51% opposing it. By 2012, Americans supported marriage equality 48%–44%.²⁴ Several other polls now show an outright majority of Americans supporting marriage equality, with the number increasing steadily.²⁵ And we have now seen the Democratic Party make

‘heartfelt thanks.’ Fifty-five white quills commemorate each of his appearances before the Supreme Court, where he most famously argued the 2000 election case that put George W. Bush in the White House. On the bookshelf sits a Defense Department medal honoring his legal defense of Mr. Bush’s counterterrorism policies after Sept. 11. . . . In the gay community, though, conspiracy theories initially abounded that Mr. Olson had taken the case to sabotage it. . . . Still, to allay suspicions on the left, he suggested bringing on his adversary in *Bush v. Gore*, David Boies, whom he had since befriended.”).

20. A “case study” posted on the website of the Griffin Schein public relations firm tells the story:

To support the case, Griffin|Schein has run a media war-room throughout all stages of the case with an eye toward ending the politically-charged and divisive rhetoric about marriage – and the public has responded. Polls have shifted significantly in favor of marriage equality since the *Perry* case was launched, thanks in part to thousands of news articles featuring the case, including the covers of *Time* and *Newsweek*, and a sustained PR campaign that featured the unveiling of “8,” a one night reading of the District Court hearing on Broadway and in Los Angeles featuring some of Hollywood’s brightest stars, including Morgan Freeman, Brad Pitt, and George Clooney.

GRIFFIN SCHEIN, <http://griffinschein.com/case-studies/american-foundation-for-equal-rights> (last visited March 3, 2013).

21. *Hollingsworth v. Perry*, 558 U.S. 183 (2010) (per curiam) (granting stay of video broadcast of trial).

22. See, e.g., David Ng, *George Clooney Joins L.A. Cast of Prop. 8 Play*, L.A. TIMES (Dec. 14, 2011), <http://latimesblogs.latimes.com/culturemonster/2011/12/george-clooney-joins-cast-of-prop-8-play-reading-in-la.html>; James C. Taylor, *From a California Courtroom to Broadway: A Reading of ‘8’*, L.A. TIMES (Sept. 20, 2011), <http://latimesblogs.latimes.com/culturemonster/2011/09/from-a-california-courtroom-to-broadway-a-reading-of-8-.html>.

23. The idea of filing a lawsuit to challenge Proposition 8 and to hire Ted Olson to do it originated with Hollywood producer and actor Rob Reiner. See Becker, *supra* note 19.

24. *Two-Thirds of Democrats Now Support Gay Marriage*, PEW RESEARCH CENTER (July 31, 2012), <http://www.pewforum.org/Politics-and-Elections/Two-Thirds-of-Democrats-Now-Support-Gay-Marriage.aspx>.

25. See Ruy Teixeira, *Public Opinion Snapshot: Are We Past the Tipping Point on Support for Marriage Equality?*, CENTER FOR AMERICAN PROGRESS (Sept. 24, 2012),

support for full marriage equality one of its bedrock positions.²⁶ Indeed, the President himself announced this position on national television, becoming the first American President to endorse same-sex marriage.²⁷

To be sure, these impressive changes were not the result of *Perry* alone. They were the product of a long and sustained effort, pursued by many organizations and individuals in the courts, in the legislatures, in the media, and in the streets. Public support for marriage equality is in reality the culmination of a decades-long campaign for greater respect and recognition of gays and lesbians traceable back to the Stonewall Rebellion and before.²⁸ But *Perry* added an important new element to the vast stream that makes up a successful civil rights movement, including lawsuits, lobbying, demonstrations, and one-on-one persuasion.

I say that not because I think that the Democratic Party would be less accepting of LGBT equality in 2012 absent *Perry*; rather, the decision has further pushed the anti-marriage position, currently espoused by the Republican Party,²⁹ to the margins of mainstream thought. Even as the Republican Party in 2012 not only opposed any sort of marriage rights for same-sex couples in its platform, but even called for a federal constitutional amendment to turn back the progress toward marriage equality that has already been achieved,³⁰ there is a

<http://www.americanprogress.org/issues/public-opinion/news/2012/09/24/38933/public-opinion-snapshot-are-we-past-the-tipping-point-on-support-for-marriage-equality/> (citing CBS NEWS/N.Y. TIMES POLL (2012); AP/NATIONAL CONSTITUTION CENTER POLL (2012)).

26. The Democratic Party endorsed same-sex marriage in its 2012 platform. *2012 Democratic National Platform*, DEMOCRATS, <http://www.democrats.org/democratic-national-platform> (last accessed Jan. 12, 2013) (“We support marriage equality and support the movement to secure equal treatment under law for same-sex couples.”). Moreover, polls show that a large majority of Democratic members of Congress support same-sex marriage. See Trudy Ring, *Congressional Support for Marriage Equality Lags Public's*, ADVOCATE.COM (Aug. 3, 2012), <http://www.advocate.com/politics/marriage-equality/2012/08/03/congressional-support-marriage-equality-lags-public> (citing Human Rights Campaign database) (“Other findings include that 72% of Democrats in Congress support marriage equality, with 9% opposed and 19% whose positions are unclear or unknown.”).

27. See *Obama's Historic Pro-Gay Marriage Stance*, ABC NEWS (May 9, 2012), <http://abcnews.go.com/Nightline/video/obamas-historic-pro-gay-marriage-stance-16316563>.

28. See *Introduction: Stonewall Uprising*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/introduction/stonewall-intro/> (last visited Jan. 13, 2013) (“In the early morning hours of June 28, 1969, police raided the Stonewall Inn, a popular gay bar in the Greenwich Village section of New York City. Such raids were not unusual in the late 1960s, an era when homosexual sex was illegal in every state but Illinois. That night, however, the street erupted into violent protests and demonstrations that lasted for the next six days. The Stonewall riots, as they came to be known, marked a major turning point in the modern gay civil rights movement in the United States and around the world.”); *Timeline: Milestones in the American Gay Rights Movement*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/timeline/stonewall/> (last visited Jan. 13, 2013).

29. Ring, *supra* note 26 (only one Republican member of Congress supports marriage equality).

30. See Michael Cooper, *Party Platforms Are Poles Apart in Their View of the Nation*, N.Y. TIMES, Sept. 4, 2012, at A7.

tangible movement toward support for equality within the ranks of conservative thought leaders and politicians. We saw this in New York State last year when four Republican State Senators crossed the aisle to support the enactment of the law granting full marriage rights to same-sex couples.³¹ And we have seen it in the support for marriage equality voiced by such conservative leaders as Dick Cheney and David Koch.³² One begins to have a sense that the Republican establishment will soon understand that there is nothing radical or “left wing” about a group of people who simply want to tie the knot and use the word “married” to describe a legal and emotional relationship. The *Perry* litigation and the involvement of Ted Olson deserve a lot of the credit for this incipient change.

But why does any of this matter? The requested subject of this comment, after all, was the effects of *Perry* on other litigation promoting marriage equality, not just on politics and culture. My answer is that courts do not decide these kinds of cases in a vacuum. Courts, and the Supreme Court in particular, have to be aware of the limits of their abilities to impose new values and arrangements that would not have been adopted in the other branches.³³ Getting out too far ahead of the popular will in cases of this sort is likely to produce a clamor of protests about lawless activism and active resistance to the Court’s mandate. For an institution that depends on its public perception for its legitimacy, that is never a welcome prospect.

Justice Ruth Bader Ginsburg, to take one example, has commented that the Supreme Court went too far, too fast in 1973 with the *Roe v. Wade*³⁴ decision legalizing abortion nationwide.³⁵ The *Perry* case, like *Roe*, is now presenting the

31. See, e.g., Thomas Kaplan, *A Campaign Windfall for 4 Republicans Who Voted for Same-Sex Marriage*, N.Y. TIMES, Oct. 13, 2011, at A23.

32. See David Karl Schoenbrodt Myers, *Republicans Support Same-Sex Marriage, Too*, BALT. SUN (Nov. 1, 2012), http://articles.baltimoresun.com/2012-11-01/news/bs-ed-gop-marriage-letter-20121101_1_marriage-equality-republicans-civil-marriage-protection-act; Kenneth P. Vogel, *David Koch Breaks from GOP on Gay Marriage, Taxes, Defense Cuts*, POLITICO (Aug. 30, 2012), <http://www.politico.com/news/stories/0812/80483.html>.

33. A strong proponent of the view that the Supreme Court often generates detrimental backlashes when it gets too far ahead of popular sentiment is Professor Michael Klarman. See Michael Klarman, *Courts, Social Change, and Political Backlash*, Hart Lecture at Georgetown Law Center (Mar. 31, 2011), in GEORGETOWN LAW: THE SCHOLARLY COMMONS (2011), available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1001&context=hartlecture>. His new book, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*, applies this insight to the struggle for marriage equality, noting the strong negative reaction to the first successful marriage equality cases in many other states. MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2012).

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

35. See, e.g., Linda Greenhouse, *Judge Ginsburg Still Voices Strong Doubts on Rationale Behind Roe v. Wade Ruling*, N.Y. TIMES, June 16, 1993, at A1 (“Judge Ginsburg has argued that by issuing a broad ruling that swept most state abortion laws off the books, the Court created an inherently vulnerable precedent that led to a backlash and short-circuited a liberal trend then under

Court with the opportunity to take another large step that some Justices may be worried about taking. However, distinct from *Roe*, *Perry* has helped lay the groundwork that may convince the Court to do just that, by changing the political discourse and helping the American people understand the compelling case that can be made for marriage equality.