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## Backlash and Marriage Equality

Review by Arthur S. Leonard\*

FROM THE CLOSET TO THE ALTER: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE. By Michael J. Klarman. New York, New York: Oxford University Press. 2013.

Michael Klarman submitted his manuscript for “From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage” to his editor at Oxford University Press on February 27, 2012.<sup>1</sup> As of that date, same-sex couples

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1. Klarman provides the date of his manuscript submission on page 223, in his Acknowledgements section. This is about as good a place as any for this reviewer to raise one terminological disagreement with Klarman. Although he refers to “same-sex marriage” in his title, throughout the book he uses the phrase “gay marriage,” which, while colorfully descriptive, emphasizes the sexual aspect of marriage over the many other aspects of marriage. While it is unlikely that many heterosexuals are going to marry same-sex partners, laws allowing same-sex marriage do not inquire into the sexual orientation of the parties, which is theoretically irrelevant to their administration. An important aspect of this struggle, not addressed by Klarman in his book, is the right of transgender individuals to marry in their preferred gender. As long as access to marriage depends on the sex of the parties, this is problematic, as several state courts have ruled that marriages of transgender individuals were void. *See, e.g., In re Estate of Gardiner*, 42 P.3d 120, 136 (Kan. 2002); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999), *superseded by statute*, TEX. FAM. CODE ANN. § 2.005(a), (b)(8) (West 2013), *as recognized in In re Estate of Araguz III*, No. 13-11-00490-CV, 2014 WL 576085, at \*9 (Tex. App. Feb. 13, 2014) (both holding that a marriage between a man and a transgender woman was void). Once the sex of the parties is irrelevant, the right of transgender individuals to marry the partner of their mutual choice is undeniable, but transgender individuals would not consider these to be gay marriages, because gender identity and sexual orientation are distinct and independent phenomena. In a marriage equality jurisdiction, a transgender woman who considers herself to be a lesbian can marry another woman, and a transgender woman who considers herself to be heterosexual can marry a man, as marriage equality makes both the gender and sexual orientation of the members of a couple irrelevant to their right to marry.

could marry in Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, and the District of Columbia. In the two weeks prior to that date, the legislatures of Washington State, New Jersey, and Maryland had approved same-sex marriage bills, but Governor Christopher Christie had vetoed the New Jersey bill, and the Washington and Maryland bills, which had not yet gone into effect, faced likely initiative votes before same-sex couples could actually marry in those states.<sup>2</sup> Thus, depending how one was counting, same-sex marriage had achieved legal recognition in either six or eight states plus the District of Columbia. By the time Klarman's book was published early in 2013, the Washington State and Maryland laws had survived their initiative votes and gone into effect and Maine voters had approved an affirmative marriage equality initiative, bringing the number of marriage equality states to nine.<sup>3</sup>

During 2013, the year of the book's publication, same-sex marriage laws were passed by legislatures in Rhode Island and Minnesota,<sup>4</sup> Delaware,<sup>5</sup> Hawaii,<sup>6</sup> and Illinois,<sup>7</sup> and litigation had led to same-sex marriage taking effect in New Jersey<sup>8</sup> and New Mexico<sup>9</sup> as well. During December 2013 and January 2014, federal district judges ruled in favor of marriage equality plaintiffs in Utah and Oklahoma,<sup>10</sup>

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2. MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 223 (2013).

3. Erik Eckholm, *In Maine and Maryland, Victories at the Ballot Box for Same-Sex Marriage*, N.Y. TIMES, Nov. 7, 2012, [http://www.nytimes.com/2012/11/07/us/politics/same-sex-marriage-voting-election.html?\\_r=0](http://www.nytimes.com/2012/11/07/us/politics/same-sex-marriage-voting-election.html?_r=0); *Washington Approves Gay Marriage in Referendum 74 Vote*, HUFFINGTON POST (Nov. 7, 2012, 1:12 AM), [http://www.huffingtonpost.com/2012/11/07/washington-referendum-74-gay-marriage\\_n\\_2050539.html](http://www.huffingtonpost.com/2012/11/07/washington-referendum-74-gay-marriage_n_2050539.html).

4. Max Ehrenfreund, *Same-Sex Marriages Begin in Minnesota, Rhode Island*, WASH. POST, Aug. 1, 2013, [http://www.washingtonpost.com/politics/same-sex-marriages-begin-in-minnesota-rhode-island/2013/08/01/1d049fb8-fac0-11e2-9bde-7ddaa186b751\\_story.html](http://www.washingtonpost.com/politics/same-sex-marriages-begin-in-minnesota-rhode-island/2013/08/01/1d049fb8-fac0-11e2-9bde-7ddaa186b751_story.html).

5. *Delaware Gay Marriage Bill Signed into Law*, HUFFINGTON POST (May 7, 2013, 6:04 PM), [http://www.huffingtonpost.com/2013/05/07/delaware-gay-marriage-law\\_n\\_3232771.html](http://www.huffingtonpost.com/2013/05/07/delaware-gay-marriage-law_n_3232771.html).

6. Mileka Lincoln, *Hawaii Becomes 15th State to Legalize Same-Sex Marriage*, HAW. NEWS NOW (Nov. 13, 2013, 3:50 PM), <http://www.hawaiinewsnow.com/story/23960302/breaking-gov-abercrombie-signs>.

7. Monique Garcia, *Quinn Signs Illinois Gay Marriage Bill*, CHI. TRIB., Nov. 20, 2013, [http://articles.chicagotribune.com/2013-11-20/news/chi-illinois-gay-marriage-bill-signing-20131120\\_1\\_civil-unions-gay-marriage-gay-rights](http://articles.chicagotribune.com/2013-11-20/news/chi-illinois-gay-marriage-bill-signing-20131120_1_civil-unions-gay-marriage-gay-rights).

8. *Garden State Equal. v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div.) (granting summary judgment for plaintiffs in suit seeking right to marry for same-sex couples; held state's provision of civil unions did not afford equal protection of the laws, in light of federal recognition of marriages but not civil unions; ordered state to allow same-sex marriages effective October 21, 2013), *stay denied by* 79 A.3d 479 (N.J. Superior Ct. Law Div. 2013), *stay denied by* 79 A.3d 1036 (N.J. 2013).

9. *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013) (same-sex couples have a constitutional right to marry under the New Mexico Constitution).

10. *Bishop v. United States*, 962 F. Supp. 2d (N.D. Okla. 2014); *Kitchen v. Herbert*, 961 F.

and numerous same-sex couples actually married in Utah before the Supreme Court granted a stay of the district court's order pending appeal on January 6, 2014.<sup>11</sup> On June 26, 2013, the last day of its October 2012 Term, the Supreme Court in *United States v. Windsor* declared unconstitutional section 3 of the Defense of Marriage Act (DOMA), under which same-sex marriages could not be recognized by the federal government.<sup>12</sup> That same day, the Court dismissed on jurisdictional grounds an appeal from a district court ruling, which had revived same-sex marriage in California.<sup>13</sup> Thus, the count of marriage equality jurisdictions by the beginning of February 2014, as this Book Review was being submitted, was as high as twenty states plus the District of Columbia, depending how optimistic one was prepared to be about the outcome of the Utah and Oklahoma appeals by defendants in the Tenth Circuit and their ultimate fate in the Supreme Court, perhaps sometime in 2015. At the same time, an appeal was pending in the Ninth Circuit by plaintiffs of an adverse ruling on marriage equality from Nevada,<sup>14</sup> an appeal by the state of Ohio was pending in the Sixth Circuit from a pro-marriage recognition ruling in the context of death certificates for couples married out of state,<sup>15</sup> and marriage equality litigation was pending in numerous other federal and state courts in a wave of lawsuits filed or expanded after the Supreme Court's ruling in *Windsor*.<sup>16</sup> By the time this Book Review appears in print, there are likely to be more trial court rulings on summary judgment motions moving marriage equality to the appellate level in more federal circuits and state court systems.

In other words, the status of same-sex marriage is a rapidly moving target, and Professor Klarman took the story on when things were moving so fast that

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Supp. 2d 1181 (D. Utah 2013) (both holding that same-sex couples have a constitutional right to marry under the Fourteenth Amendment).

11. *Herbert v. Kitchen*, 134 S. Ct. 893 (2014) (staying district court's order pending a decision by the Tenth Circuit on whether same-sex couples have a constitutional right to marry).

12. 133 S. Ct. 2675 (2013) (holding that federal statutory definition of marriage limited to different-sex couples violates the Fifth Amendment).

13. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (holding that proponents of state constitutional initiative to ban same-sex marriages lacked Title III standing to appeal from a district court ruling that the initiative was unconstitutional).

14. *Today: Tenth Circuit to Hear Argument in Utah Marriage Case*, LGBT WEEKLY (Apr. 10, 2014), <http://lgbtweekly.com/?p=46760>.

15. *Id.*

16. Of most immediate salience, the U.S. District Court for the Eastern District of Virginia heard oral argument on motions for summary judgment in *Bostic v. Rainey* on February 4, 2014, with the judge telling the parties at the conclusion of argument that she would be ruling "soon." In that case, the recently installed attorney general of Virginia had flipped the state's position, and the solicitor general of the state joined the plaintiffs in arguing that Virginia's ban on same-sex marriage violated the Fourteenth Amendment, leaving two county clerks to defend the ban. Erick Eckholm, *Arguments Heard in Federal Challenge of Virginia's Same-Sex Marriage Ban*, N.Y. TIMES, Feb. 4, 2014, [http://www.nytimes.com/2014/02/05/us/arguments-heard-in-federal-challenge-of-virginias-same-sex-marriage-ban.html?\\_r=0](http://www.nytimes.com/2014/02/05/us/arguments-heard-in-federal-challenge-of-virginias-same-sex-marriage-ban.html?_r=0).

anything published would seem out-of-date before it got from manuscript to hard cover as a matter of the historical record. In this sense, his timing was unfortunate, particularly as his book could not take into account the Supreme Court's decision in *United States v. Windsor*, which accelerated the storm of new marriage litigation and legislation beginning in the summer and fall of 2013. *Windsor* would pose a key test for the central phenomenon he examines in his book: the role of major Supreme Court decisions in advancing or setting back movements for social progress when the Court gets too far in front of public opinion. As this Book Review is written, it may be too soon after *Windsor* to pose more than a tentative conclusion, but it appears that public opinion had moved far enough in support of same-sex marriage by June 2013 that significant political backlash was unlikely, taking into account the various factors that Klarman discusses in his analysis of political backlash to court decisions.<sup>17</sup>

Timing does not render Klarman's book irrelevant or obsolete, however, because his purpose was not primarily to tell the story of the struggle for marriage equality, but rather to use that story to illuminate his interest in the interaction between law, politics, and public opinion as expressed in the phenomenon of "backlash." Klarman was interested in examining the circumstances in which court decisions exacerbate adverse public opinion leading to political reactions that set back the cause that was seemingly advanced by the courtroom victory. The history of the marriage equality struggle provided a wonderful vehicle for such a project when one focused on developments from the 1990s through 2012. In that sense, Professor Klarman's timing is excellent, for he published when the phenomenon of backlash had raised its head several times, but seemed perhaps on the verge of being overcome. The best evidence of this conclusion is that the focus of the movement for same-sex marriage seemed to have shifted, at least in 2012–2013, from being mainly a litigation campaign while it was under study by Klarman to being more of a legislative and electoral campaign in the period immediately following the submission of his manuscript, and that this shift became most pronounced just as Klarman was finishing his book.

Same-sex couples first began litigating for the right to marry in the early 1970s.<sup>18</sup> They had no success then. Every trial and appellate court rejected their claims, and the United States Supreme Court opined in *Baker v. Nelson*, without issuing an opinion, that an appeal from the Minnesota Supreme Court in a same-sex

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17. On January 23, 2014, the organization Freedom to Marry posted on its website an overview of recent polling, showing that a comfortable majority of the national population has supported the right of same-sex couples to marry since at least 2012, and that recent polls had shown majority public support even in some states that at present forbid same-sex marriages. Adam Polaski, *Poll: Majority of Voters in Non-Marriage States Support the Freedom to Marry*, FREEDOM TO MARRY (Jan. 23, 2014, 3:30 PM), <http://www.freedomtomarry.org/blog/entry/poll-majority-of-americans-in-non-marriage-states-support-the-freedom-to-ma>.

18. See KLARMAN, *supra* note 2, at 18–19.

marriage case did not even present a “substantial federal question.”<sup>19</sup> Because these early same-sex marriage cases were unsuccessful, they provoked no significant political backlash, but the lesbian, gay, bisexual, and transgender (LGBT) public interest litigation groups that emerged during the 1970s took a lesson from them and avoided initiating lawsuits seeking marriage rights for same-sex couples for twenty years. In that sense, the litigation groups themselves functioned as a form of backlash against the marriage lawsuits that private litigants had instigated, and they actively discouraged the filing of such lawsuits by private parties.

The AIDS epidemic and the growing phenomenon of same-sex couples having children through donor insemination, adoption, or surrogacy built up renewed interest in the LGBT community in achieving marriage equality during the 1980s. However, the litigation groups, which were focused on attacking sodomy laws and coping with the myriad legal issues spawned by the AIDS epidemic, did not initiate new lawsuits and discouraged private parties from filing them. The Supreme Court’s rejection of a constitutional challenge to Georgia’s felony sodomy law in *Bowers v. Hardwick*<sup>20</sup> reinforced the decision not to sue for marriage rights using federal constitutional theories, since such suits were unlikely to prevail in light of the Supreme Court’s refusal to find constitutional protection for gay sex. Marriage, after all, is historically the central institution in western legal culture in which sex is considered licit, the marriage license being, quite literally, the license to have sex, as many states criminalized any form of sex taking place outside of marriage.

Some couples rejected this cautious counsel from the legal groups, however, and filed lawsuits on their own, using independent counsel. Although some of these new lawsuits crashed and burned,<sup>21</sup> plaintiffs achieved the first sign of a potential victory in Hawaii in 1993, where the state Supreme Court ruled in *Baehr v. Lewin* that the question of same-sex marriage presented a substantial issue of sex discrimination under the state’s Equal Rights Amendment,<sup>22</sup> and remanded the case for trial. Advocates and scholars then suggested to the press that an ultimate victory on the merits in Hawaii would mean that couples from around the country would be able to demand legal recognition of their Hawaiian marriages.<sup>23</sup> In effect, the ultimate “outlier” state court system in terms of geography might be in the position to impose same-sex marriage on the entire country. This helped to spark a strong political backlash—ironically, a backlash to a ruling that did not itself resolve

19. 409 U.S. 810 (1972).

20. 478 U.S. 186 (1985) (holding that the Fourteenth Amendment due process clause did not confer upon homosexuals a constitutional right to engage in sodomy).

21. See, e.g., *Storrs v. Holcomb*, 645 N.Y.S.2d 286 (App. Div. 1996); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

22. 852 P.2d 44 (Haw. 1993).

23. See Bettina Boxall, *Hawaii Justices Open Door to Legalizing Gay Marriages: Law: State High Court Calls Ban Unconstitutional and Orders a Trial. Ruling Stirs Debate Across U.S.*, L.A. TIMES, Mar. 26, 1995, [http://articles.latimes.com/1995-03-26/news/mn-47332\\_1\\_gay-marriage](http://articles.latimes.com/1995-03-26/news/mn-47332_1_gay-marriage).

the issue on the merits and that was ultimately countered by a state constitutional amendment.<sup>24</sup> Within a few years of the Hawaii Supreme Court's original ruling, the federal government had enacted DOMA,<sup>25</sup> and many states had adopted statutes and/or constitutional amendments defining marriage as exclusively a different-sex union—in some cases ruling out any alternative legal structure for same-sex couples, such as civil unions or domestic partnerships.<sup>26</sup>

Public opinion surveys, which began asking about same-sex marriage as the issue became politically salient after the initial Hawaii Supreme Court ruling, showed scant public support for the idea.<sup>27</sup> Republican members of Congress, anticipating the national elections in 1996, seized upon the issue as a means of mobilizing conservative electoral turnout and proposed DOMA, a measure intended both to relieve states of any obligation under the Constitution's Full Faith and Credit Clause to recognize same-sex marriages contracted in other states, and proposed adding a provision to the Federal Dictionary Act that would establish for the first time a universal federal law definition of marriage as being a union between one man and one woman.<sup>28</sup> The newly-enacted DOMA was at first merely a political statement with no practical application because same-sex couples could not marry anywhere in the world, so no states were being confronted with demands to recognize same-sex marriages from other jurisdictions and nobody was then seeking recognition of same-sex marriages from the federal government. President Bill Clinton, running for his second term, neutralized the marriage equality issue for that election by endorsing the legislation, which passed shortly before the election by huge bipartisan majorities and was promptly signed into law.<sup>29</sup>

DOMA is a prime example of political backlash to a court decision, and a rather amazing one, since the court decision in question did not even grant same-sex couples the right to marry. In that sense, it might be described as an “anticipatory backlash” to what some pundits suggested might be coming down the road as the Hawaii case advanced to trial. Although the Hawaii trial judge ruled late in 1996 that the state had failed to meet its burden of proving a compelling interest to justify excluding same-sex couples from the right to marry,<sup>30</sup> that decision never went

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24. After the amendment was enacted, the Supreme Court of Hawaii declared the case moot and dismissed the appeal. *See* Baehr v. Miike, 994 P.2d 566 (Haw. 1999).

25. Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996) (section 3 *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013)).

26. KLARMAN, *supra* note 2, at 58–59.

27. *See* Marriage, GALLUP, INC., <http://www.gallup.com/poll/117328/marriage.aspx> (Apr. 2, 2014).

28. KLARMAN, *supra* note 2, at 60.

29. *See* Peter Baker, *Now in Defense of Gay Marriage, Bill Clinton*, N.Y. TIMES, Mar. 25, 2013, <http://www.nytimes.com/2013/03/26/us/politics/bill-clintons-decision-and-regret-on-defense-of-marriage-act.html>.

30. Baehr v. Miike, No. 91-1394-05, 1996 WL 694235, at \*21–22 (Haw. Cir. Ct. Dec. 3, 1996) (finding Hawaii's prohibition against same-sex marriages violates the State Constitu-

into effect. The Hawaii Supreme Court sat on the state's appeal for several years while the legislature put a marriage amendment on the ballot whose enactment rendered the lawsuit moot.<sup>31</sup> DOMA and the Hawaii Marriage Amendment were not the only signs of backlash in 1996. Alaska also adopted a marriage amendment in response to a state trial court decision.<sup>32</sup> In subsequent years, as noted above, state statutes and constitutional amendments barring same-sex marriage were adopted in many states. The political backlash to the partial court victory in Hawaii seemingly confirmed the LGBT rights movement's avoidance of the legislative process in its struggle to achieve marriage equality during the 1990s, as no American jurisdiction appeared amenable to legislating in favor of same-sex marriage during that decade. Perhaps more importantly, there were other, more pressing issues to concern the LGBT movement at that time, including the continuing struggle to decriminalize gay sex, to enact protection against discrimination at the federal and state levels, and to meet the challenges posed by the AIDS epidemic.

However, earlier in 1996 the United States Supreme Court ruled for the first time that discrimination because of sexual orientation presented a legitimate federal question when it struck down a Colorado state constitutional amendment in *Romer v. Evans* as a facial violation of the Fourteenth Amendment's Equal Protection Clause.<sup>33</sup> Colorado Amendment 2, adopted in 1992, prohibited the state from protecting gay people from discrimination.<sup>34</sup> The Supreme Court found that such a sweeping exclusion from the protection of the state was a clear violation of the Fourteenth Amendment. A measure enacted expressly for the purpose of making a particular class of people unequal to everybody else in the eyes of the state could not stand under the Equal Protection Clause, according to Justice Kennedy's opinion for the six-three Court, unless it could be shown to advance some legitimate non-discriminatory state interest, and the Court found none in this instance.<sup>35</sup> The *Romer* decision implicitly meant that *Baker v. Nelson* should no longer be regarded as the operative constitutional statement on the issue of equal protection claims by gay litigants challenging discriminatory statutes. Additionally, as Justice Scalia angrily observed in dissent, the *Romer* decision as much as overruled *Bowers v. Hardwick* without even mentioning it.<sup>36</sup> Just as the Hawaii Supreme Court's 1996 decision raised hopes that progress toward marriage equality might be made in state courts raising state constitutional claims that were not controlled by such adverse United States Supreme Court precedents as *Baker* and *Bowers*, the Su-

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tion's equal protection clause).

31. Michael D. Sant' Ambrogio & Sylvia A. Law, *Baehr v. Lewin and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705, 717–18 (2011).

32. KLARMAN, *supra* note 2, at 67.

33. 517 U.S. 620, 635–36 (1996).

34. *Id.* at 623–24.

35. *Id.* at 635.

36. *Id.* at 636 (Scalia, J., dissenting).



preme Court's decision in *Romer* suggested that the Court might someday be open to marriage equality claims. Certainly, the experience in Hawaii suggested to gay litigation groups that it was possible to use state constitutional arguments to achieve marriage equality in state courts, provided one could avoid political backlash leading to an overruling state constitutional amendment.

These developments emboldened LGBT rights litigators, who had previously eschewed same-sex marriage litigation, and they decided to follow a selective, state-by-state strategy of filing marriage equality lawsuits after spending time educating the public. They also carefully studied the political and legal climate in each state before selecting the state court systems that were deemed most likely to be receptive, focusing their litigation strategy on states where political backlash to a successful court decision might be diffused by the passage of time before a constitutional amendment could be placed on the ballot.<sup>37</sup> The LGBT litigation groups had learned a valuable lesson from Hawaii: don't put all your eggs in the litigation basket; if the political opposition can capitalize on adverse public opinion by quickly placing an overruling constitutional amendment on the ballot before same-sex couples can start marrying, there is no way to demonstrate that such marriages did not adversely affect the state. This consideration, together with an existing body of progressive state constitutional law and a moderately friendly political and judicial climate (as reflected in the repeal of sodomy laws, the enactment of laws banning sexual orientation discrimination, and progressive rulings on gay parental rights in the courts), led the litigation groups to target, in order: Vermont, Massachusetts, New Jersey, and Iowa.<sup>38</sup> By focusing their arguments solely on state constitutional doctrine, they insulated their lawsuits from United States Supreme Court review. At the same time, gay rights groups in California decided to avoid litigating and to pursue a gradual legislative strategy, because the California initiative process makes it relatively easy for a determined group to put an initiative statute or constitutional amendment on the ballot.

The Vermont Supreme Court's ruling in *Baker v. State* was the first fruit of the new litigation strategy, finding the exclusion of same-sex couples from the rights and benefits of marriage violated the state constitution, but leaving the remedy to the legislature.<sup>39</sup> The Vermont legislature then adopted the nation's first Civil Union Act in 2000 after a furious debate that consumed the entire state.<sup>40</sup> Town meetings across the state involved much of the electorate in the argument.<sup>41</sup> Although the law fell short of full marriage rights, its passage triggered a political backlash in

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37. KLARMAN, *supra* note 2, at 85.

38. *Id.* at 67.

39. 744 A.2d 864, 867 (Vt. 1999) (holding that same-sex couples are entitled to rights and benefits of marriage under state constitution's equal benefits clause).

40. Thomas H. Little, *Bill Lippert and Civil Unions: A Policy Entrepreneur in the Right Place at the Right Time*, 2011 MICH. ST. L. REV. 237, 239–42 (2011).

41. *Id.* at 241.

the next state election cycle: some legislators who voted for the measure were not re-elected and one house of the legislature fell to the Republicans, while Democrats barely held their majority in the other.<sup>42</sup> However, the new, more conservative legislature made no serious attempt to repeal the Civil Union Act.

The litigation groups were not dissuaded by the political backlash in Vermont, and went ahead to file their next state constitutional lawsuit in Massachusetts, where they achieved victory on the heels of the United States Supreme Court's 2003 ruling in *Lawrence v. Texas*, the culmination of the decades-long struggle against sodomy laws.<sup>43</sup> Just months after *Lawrence*, the Massachusetts Supreme Judicial Court became the first American appellate court<sup>44</sup> to hold that same-sex couples had a constitutional right to marry, in *Goodridge v. Department of Public Health*,<sup>45</sup> with an opinion that cited *Lawrence* even though the federal constitutional ruling technically was not involved in the case.<sup>46</sup> There was an immediate political backlash, and legislative leaders asked the court for an advisory opinion about whether a civil union law similar to Vermont's would cure the constitutional problem.<sup>47</sup> After the court replied with a resounding "no,"<sup>48</sup> the legislators approved a state constitutional amendment. However, in Massachusetts it takes separate passage of an identically worded amendment with a legislative election intervening to put such a proposal on the ballot.<sup>49</sup> As marriages began taking place pursuant to the court's order in May 2004, public opinion in the state began to turn decisively in support of same-sex marriage, and when the amendment came up for consideration the second time, it fell short.<sup>50</sup> Thus, Massachusetts became the first state in which same-sex marriages could take place, although by that time same-sex marriages could also take place in Belgium, the Netherlands, and some Canadian provinces.<sup>51</sup>

From there litigation multiplied, stimulated mainly by political events of early 2004 playing out on a national stage as the people of Massachusetts anticipated the effective date of the court's order. President George W. Bush responded

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42. *Id.* at 249.

43. 539 U.S. 558 (2003) (holding Texas Homosexual Conduct Law violated Fourteenth Amendment Due Process Clause by an unjustified restriction on liberty of same-sex couples).

44. But not the first appellate court in the world, as some Canadian appeals courts had already ruled for same-sex marriage by then. *See Halpern v. Canada*, 65 O.R. 3d 161 (Can. Ont. C.A. 2003).

45. 798 N.E.2d 941, 961 (Mass. 2003) (holding denial of marriage to same-sex couples violates state constitutional guarantees of due process and equal protection).

46. Since the case was decided under state constitutional law, the citation to *Lawrence*, a federal constitutional case, was largely symbolic. *See id.* at 948–49.

47. *See* Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

48. *Id.* at 572 (holding that civil unions would not satisfy the state constitution's requirement of equal marriage rights for same-sex couples).

49. KLARMAN, *supra* note 2, at 89–90.

50. *Id.* at 97.

51. *Id.* at 90.

to these developments by calling in his State of the Union message for the nation to protect the “sanctity of marriage” against “activist judges,” a reference to the recent *Goodridge* decision.<sup>52</sup> His call inspired San Francisco mayor Gavin Newsom to examine the Massachusetts decision, decide it was persuasive, and order the San Francisco County clerk to issue marriage licenses in February 2004, before the Massachusetts ruling had even gone into effect.<sup>53</sup> Thousands of same-sex couples flocked to San Francisco for marriage licenses,<sup>54</sup> and local mayors and county clerks in Oregon, New Mexico, and New York engaged in parallel “civil disobedience.”<sup>55</sup> All of these efforts sputtered out in the short run,<sup>56</sup> but the Massachusetts developments led to new lawsuits in many states initiated by same-sex couples or local political groups. Results of the lawsuits were mixed, and many of them were unsuccessful in the short run,<sup>57</sup> although in several states adverse decisions in the courts inspired renewed political efforts.

For example, unsuccessful litigation in New York, where the highest court rejected a marriage equality claim in 2006, led to intensified legislative efforts as well as successful attempts to achieve judicial marriage recognition for couples who went out of state to marry.<sup>58</sup> Political advocates were undeterred by a 2009 setback in the New York State Senate, and came back with assertive leadership from a newly-elected governor to achieve passage of a marriage equality law in 2011.<sup>59</sup>

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52. President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 20, 2004).

53. See Rachel Gordon, *The Battle Over Same-Sex Marriage / Uncharted Territory / Bush's Stance Led Newsom to Take Action*, S.F. CHRON. (Feb. 15, 2004, 4:00 AM), <http://www.sfgate.com/news/article/THE-BATTLE-OVER-SAME-SEX-MARRIAGE-Uncharted-2823315.php#page-1>.

54. *Mayor Defends Same-Sex Marriages*, CNN (Feb. 22, 2004, 10:51 PM), <http://www.cnn.com/2004/LAW/02/22/same.sex/>.

55. See Dean E. Murphy, *Some Democrats Blame One of Their Own*, N.Y. TIMES, Nov. 5, 2004, <http://www.nytimes.com/2004/11/05/politics/campaign/05newsom.html>.

56. For instance, the California Supreme Court ruled that the marriages performed in San Francisco in 2004 were invalid, suggesting that if same-sex couples sought to marry, they should initiate a lawsuit seeking vindication of that right. *Lockyer v. San Francisco*, 95 P.3d 459 (Cal. 2004).

57. Notable defeats, but always by sharply divided votes in state-high courts, came in New York, Maryland, and Washington State. In each of those states, gay rights political organizations regrouped, shifted their strategies to the legislature, and eventually achieved enactment of marriage equality laws. See *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 885 N.E.2d 1 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006).

58. Although New York's Court of Appeals never ruled directly on the point, intermediate appellate courts around the state unanimously ordered marriage recognition in a series of cases beginning early in 2008. This proved crucial to the victory over section 3 of DOMA in *Windsor*, as the plaintiff's marriage took place in Canada and her spouse died at a time when New York appellate precedent would recognize her marriage, even though the state had not yet enacted its Marriage Equality Act. 133 S. Ct. 2675 (2013).

59. Curiously, Klarman mentions the 2011 legislative success only in passing, despite

The California story is particularly interesting in the context of political backlash, as gay rights movement leaders in that state first sought to avoid political backlash by taking a legislative route. They achieved passage of a domestic partnership law providing for registration and a limited set of rights at a time when such a measure was relatively novel. However, even this modest effort stimulated backlash as initiative proponents, heavily funded by conservative religious groups, put a measure on the 2000 ballot intended to block the legislature from being able to approve same-sex marriage by inserting into the state's statute books a publicly enacted, exclusionary definition of marriage. That effort, labeled Proposition 22, passed overwhelmingly, but as the legislature voted repeatedly to expand the number of rights and protections covered by the Domestic Partnership Act, the courts rejected the argument that this expanded act violated the marriage initiative statute.<sup>60</sup> Supporters of same-sex marriage got the legislature to approve a marriage equality statute, arguing that Proposition 22 could be construed only to bar recognition of same-sex marriages from other jurisdictions,<sup>61</sup> but Governor Arnold Schwarzenegger vetoed the bill.<sup>62</sup> By that time, the California Supreme Court had invalidated the marriages performed in San Francisco in 2004, and lawsuits had been filed around the state contending that Proposition 22 violated the California Constitution by depriving same-sex couples of a fundamental right to marry without sufficient justification. The governor's veto of the marriage bill was premised on the argument that the legislature could not pass such a measure to repeal or replace a popularly enacted initiative statute, and that the question of same-sex marriage was pending in the courts.

In 2008, the California Supreme Court ruled in favor of marriage equality, finding that same-sex couples were pursuing a fundamental right, and that their sexual orientation was a "suspect classification" for purposes of state equal protection analysis.<sup>63</sup> The governor and attorney general had not defended the exclusionary marriage law on the merits, leaving that task to proponents of the initiative, and the state government promptly complied with the opinion. However, the proponents of Proposition 22, anticipating the ruling, came back with a new initiative, for which they had collected signatures even before the decision, seeking to enact

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New York's significance as the largest state to have achieved marriage equality through legislation. Perhaps his focus on political backlash to judicial decisions has led him to downplay the legislative achievements in the marriage equality struggle. But part of the reaction to litigation defeats, as he notes, is for gay rights supporters to increase their efforts through political organization and donations to political causes.

60. KLARMAN, *supra* note 2, at 84–85.

61. *Id.*

62. *Id.* at 120.

63. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (denial of right to marry to same sex couples violates state constitutional due process and equal protection requirements), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 7.5, *as recognized in* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

Proposition 22 in the form of a constitutional amendment. Thus posed to the public as Proposition 8,<sup>64</sup> the measure passed in November 2008 by a comfortable margin after thousands of same-sex couples had married in California.<sup>65</sup> Passage of Proposition 8 shocked some because public opinion polls had suggested that support for same-sex marriage in California was increasing.<sup>66</sup> Some blamed a surge of voting by socially conservative African American voters lured to the polls by the first African American presidential candidate, Barack Obama, who although formally opposing Proposition 8, also stated his opposition to same-sex marriage in statements that were used by Proposition 8 proponents in advertising to minority communities.<sup>67</sup> Gay rights groups filed suit in the California Supreme Court, challenging the bona fides of Proposition 8, but were turned down, although the court held that same-sex marriages already performed remained valid, and that the Domestic Partnership Law would be construed to provide equal rights to same-sex couples, because Proposition 8 had not overruled the court's equal protection holding.<sup>68</sup>

Gay rights groups immediately issued a joint press statement discouraging anybody from filing a federal challenge to Proposition 8, but a private group, the American Foundation for Equal Rights (AFER), had already formed for that purpose, filing suit in federal court in the same week that the California Supreme Court's decision was announced. That case, *Perry v. Schwarzenegger*, was decided by the district court in 2010, holding that Proposition 8 violated the Fourteenth Amendment Due Process and Equal Protection Clauses.<sup>69</sup> The opinion closely followed the state constitutional holdings of the California Supreme Court's 2008 decision in treating the right of same-sex couples to marry as a fundamental right and exclusion from that right as an instance of unconstitutional discrimination on the basis of sexual orientation.<sup>70</sup> The governor and attorney general again refused to defend the Proposition on the merits, so proponents intervened to provide a defense. After the district court ruled, proponents sought to appeal and have the court's order stayed pending the outcome, although their standing to appeal in light of the Constitution's Article III "case or controversy" requirement was questioned. The Ninth Circuit referred the question of standing to the California Supreme Court while placing the district court's order on hold, so same-sex marriages did not then resume.<sup>71</sup> The California Supreme Court opined that proponents of initiatives had standing

64. KLARMAN, *supra* note 2, at 121.

65. *Id.* at 122.

66. *Id.*

67. *Id.* at 123.

68. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (Proposition 8 was not a "revision" and its enactment did not violate California constitutional rules for amending the constitution).

69. 704 F. Supp. 2d 921 (N.D. Cal. 2010) (Proposition 8 violated Fourteenth Amendment right of same-sex couples to marry).

70. *Id.*

71. *Perry v. Brown*, 639 F.3d 1153 (9th Cir. 2011) (denying plaintiff's request to vacate stay, certifying question of initiative proponents' standing to the California Supreme Court).

to defend their handiwork as a matter of state law.<sup>72</sup> The Ninth Circuit relied upon the state supreme court's ruling and addressed the merits, finding Proposition 8 unconstitutional on a different theory derived from the United States Supreme Court's *Romer* decision: that California voters did not have a rational basis for withdrawing the right to marry from same-sex couples after it had been granted to them under the state constitution by the California Supreme Court.<sup>73</sup> The proponents won a grant of certiorari from the United States Supreme Court, which ruled on the same date as the *Windsor* decision that proponents in *Perry* lacked Article III standing, thus vacating the Ninth Circuit's decision and leaving the district court's ruling as, in effect, an unappealed ruling to which state officials were willing to comply.<sup>74</sup> Within days, same-sex couples resumed marrying in California.

By the time the Supreme Court ruled in the Proposition 8 case, marriage equality had spread considerably beyond the six to eight states where it was established when Professor Klarman submitted his manuscript, and public opinion had moved along with it. Gay rights groups in California anticipated a possible loss in the Supreme Court and had discussed going back to the electorate for a new constitutional amendment to displace Proposition 8, reasonably confident that they could be successful with a more effective campaign in light of the increased public support shown by opinion polls. They had held back from attempting to put such a measure on the ballot for 2012, in light of the victory in the Ninth Circuit. However, the response to the Supreme Court's ruling by the state government, complying with the district court order, made further efforts in this direction unnecessary.

One important development that seems to have pushed the marriage equality struggle forward was the Obama administration's decision not to defend section 3 of DOMA in lawsuits pending in the Second and First Circuits. This was followed in 2012 by Vice President Joseph Biden and President Barack Obama stating their respective support for the right of same-sex couples to marry as a matter of public policy. Although the President did not assert that same-sex couples had a constitutional right to marry, his support for the right to marry as a political matter, stated just days after North Carolina voters had approved a constitutional amendment banning same-sex marriage, gave new impetus to those arguing for the passage of marriage equality laws. In addition, his support probably contributed to the ballot box victories for marriage equality in November 2012 in Maine, Maryland, Washington State, and Minnesota (where an anti-same-sex marriage amendment was

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72. *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011) (informing Ninth Circuit that initiative proponents have standing to defend their proposals in litigation).

73. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (holding that initiative proponents have Article III standing to appeal the district court opinion, and that Proposition 8 violates the Fourteenth Amendment).

74. *Hollingsworth*, 133 S. Ct. at 2652 (initiative proponents do not have standing to appeal district court decision holding their proposition unconstitutional; Ninth Circuit ruling vacated and appeal dismissed).

defeated)<sup>75</sup> as the President was winning re-election by a comfortable popular and Electoral College margin. This provides a dramatic example of backlash turned on its head. Gay rights was once such a toxic issue in presidential politics that when Democratic presidential candidate Walter Mondale was the first major party presidential nominee to address a gay rights political fundraising dinner (at the Waldorf Astoria in New York at which this reviewer was present during the 1984 presidential campaign), he took care to avoid saying anything while being recorded by television and radio that might be used against him in political advertising, eschewing such words as “gay,” “lesbian,” or even “homosexual.” Just showing up was considered daring.

In 1992, President Clinton openly reached out for gay support and campaigned on an overt gay-rights platform, but that did not include an endorsement for same-sex marriage, and he suffered immediate backlash when he attempted to keep his promise to end the military ban on service by gay people. Ultimately, President Clinton signed into law two of the most expressly anti-gay measures in federal legislative history: the “don’t ask, don’t tell” military policy and DOMA. Until President Obama stated his endorsement for same-sex marriage in 2012, no major party nominee had campaigned for the presidency with this position in his platform, and Obama’s re-election surely helped to persuade many wavering politicians that it was possible to be openly supportive on this issue without incurring political annihilation.

The Obama administration’s position responded to the spread of litigation challenging section 3 of DOMA. When President Obama was elected in 2009, the Justice Department was about to file a brief in support of a motion to dismiss in a DOMA challenge pending in a California federal court. Although Obama’s campaign position was that DOMA should be repealed, the Justice Department filed a brief in support of the motion to dismiss asserting that the justifications cited in the legislative history were sufficient to save DOMA from a finding of unconstitutionality under traditional rationality review. This filing proved offensive to the LGBT community, bringing forth protests from community leaders, and causing the Justice Department to reconsider the arguments it could make, especially in the light of new litigation brought in the federal court in Boston on behalf of married same-sex couples who were being denied federal benefits due to DOMA.<sup>76</sup>

Until same-sex couples started marrying in Canada and Massachusetts, nobody had actual standing to challenge DOMA,<sup>77</sup> but once married same-sex couples

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75. The defeat of the Minnesota Marriage Amendment encouraged activists to seek passage of a marriage equality bill in that state, which was quickly accomplished when the legislators elected at the same time that the amendment failed took office in 2013.

76. Linda Deutsch & Lisa Leff, *Obama Admin Moves to Dismiss Defense of Marriage Act Challenge*, HUFFINGTON POST (June 12, 2009, 5:12 AM), [http://www.huffingtonpost.com/2009/06/12/obama-defends-antigay-def\\_n\\_214764.html](http://www.huffingtonpost.com/2009/06/12/obama-defends-antigay-def_n_214764.html).

77. See, e.g., *Smelt v. Cnty. of Orange*, 447 F.3d 673 (9th Cir. 2006) (holding that

began to suffer the denial of federal benefits and status for their marriages, new litigation became inevitable. Gay & Lesbian Advocates & Defenders (GLAD) put together a case involving multiple plaintiffs in Massachusetts, which was filed toward the end of the Bush administration. The Justice Department at first mounted a spirited defense of DOMA, arguing that at the time of its enactment, Congress could have rationally sought to preserve the federal status quo (under which only different-sex marriages were recognized) and maintain a uniform meaning of marriage under federal law, but the trial court rejected this argument in a 2010 ruling.<sup>78</sup> Massachusetts's attorney general also filed suit challenging DOMA on federalism grounds in a case that was considered simultaneously with the private litigation.<sup>79</sup> The Justice Department appealed the anti-DOMA decisions in these two cases to the First Circuit, at first filing a brief repeating the arguments it had made to the district court in light of the First Circuit's existing precedent under which the rational basis approach would apply.<sup>80</sup> However, when GLAD filed a new case in Connecticut at about the same time that the ACLU filed the *Windsor* case in New York,<sup>81</sup> the Obama administration's need to respond in the Second Circuit, which had not yet ruled on the level of judicial scrutiny given to anti-gay statutes, led to reconsideration and repositioning by the administration.

The Justice Department concluded that heightened scrutiny would apply to statutes that discriminate because of sexual orientation, and that section 3 of DOMA would not survive heightened scrutiny because the arguments that had been made in the Massachusetts case (and rejected by the district court in 2010) were too weak for that purpose. The President's ultimate position was that the government would continue as defendant and would continue to enforce section 3 of DOMA, but would not defend it on the merits and would do what had to be done to allow Congress to intervene to defend its handiwork.<sup>82</sup> The Senate, in Democratic hands,

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unmarried same-sex couples lack standing to challenge either operative provision of DOMA).

78. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 393 (D. Mass. 2010) (rejecting the Obama administration's argument that DOMA was intended to "preserve the status quo," finding that the "status quo" at the time of DOMA's enactment was that the federal government routinely recognized marriages contracted under state law), *aff'd sub nom. Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012).

79. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 252–53 (D. Mass. 2010) (holding that DOMA violated the Tenth Amendment by intruding on the state's prerogative to define marriage), *aff'd*, 682 F.3d 1 (1st Cir. 2012).

80. The First Circuit had adopted the rational basis approach for reviewing claims of sexual orientation discrimination in *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008), which rejected a constitutional challenge to the military's ban on service by openly gay individuals using rational basis review.

81. *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012).

82. Press Release, Eric Holder, Att'y Gen., U.S. Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.



took no action in response, but the House Republican leadership decided to do so through the Bipartisan Legal Advisory Group (BLAG), a committee consisting of the Speaker, the Majority and Minority Leaders, and the Majority and Minority Whips that functioned on an ad hoc basis to formulate legal policy for the House. BLAG voted three-two to hire former Solicitor General Paul Clement to present a defense. Despite vigorous advocacy by Mr. Clement, both the First and Second Circuits found section 3 unconstitutional during 2012, with the First Circuit adhering to its precedent applying the rational basis test (and finding no rational basis for the federal government to distinguish between lawful same-sex and different-sex marriages) and the Second Circuit embracing heightened scrutiny and striking down the measure under that standard, finding that DOMA failed to substantially advance an important state interest.<sup>83</sup>

With numerous certiorari petitions on file from the two cases (and the Connecticut case, which had not yet been argued in the Second Circuit, as well as cases from other parts of the country), the Supreme Court decided to grant the Justice Department's certiorari petition in *Windsor*, and then asked the parties to brief whether the government had standing to appeal the district court's ruling in favor of Edith Windsor in light of the government's agreement with that court that the statute was unconstitutional. Concluding that no party to the litigation was likely to raise standing as an issue, the Court appointed its own amicus, Professor Vicki Jackson, a faculty colleague of Professor Klarman at Harvard, to argue against jurisdiction, but she failed to persuade a majority of the Court.<sup>84</sup>

The ensuing five-four decision carefully limited itself to the question of whether the federal government could, consistent with the Fifth Amendment, deny same-sex marriages contracted under state law the same recognition that it accorded different-sex marriages. The Court's opinion never discussed whether same-sex couples had a right to marry pursuant to the Fourteenth Amendment. Instead, the Court focused on whether Congress had sufficient justification to adopt a sweeping federal ban on recognizing same-sex marriages that states had allowed to take place. Applying the Fifth Amendment's Due Process Clause, with its judicially recognized Equal Protection component, the Court found section 3 to have enacted discrimination into the United States Code, denying to married same-sex couples the "equal dignity" to which they were entitled under the Fifth Amendment.

Justice Kennedy's opinion discussed the traditional role of the states in defining marriage, but disclaimed basing the ruling on federalism (as the First Circuit had done, in part, in its DOMA section 3 ruling). Instead, Justice Kennedy focused

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83. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

84. *United States v. Windsor*, 133 S. Ct. 786 (2012) (granting certiorari and directing parties to address the standing issue); *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (rejecting the argument by court-appointed amicus that the Court lacked jurisdiction over the appeal).

on indicia in the titling of the statute and its legislative history, concluding that it was enacted based on animus against same-sex couples who married under state law. His opinion never discussed the arguments that had been made by the Justice Department in defending DOMA in prior litigation, or the arguments advanced by Mr. Clement on behalf of BLAG in seeking to justify the law on this appeal. In his formulation of the holding, Justice Kennedy emphasized that the “equal dignity” to which same-sex couples were entitled was contingent on the states having conferred upon them the status of married couples, and that the decision extended only to lawful marriages sanctioned by the states.<sup>85</sup> Chief Justice Roberts picked up on this in his dissent, arguing that the majority opinion was based on federalism, implying it had no significance for pending Fourteenth Amendment suits against states denying marriage equality.<sup>86</sup> Justice Scalia, however, found that the majority’s reasoning provided a strong foundation for same-sex marriage plaintiffs to assert a Fourteenth Amendment right to marry. Indeed, in a separate dissent, Scalia reproduced a portion of Kennedy’s opinion, crossing out and substituting words and phrases in order to demonstrate how the opinion could be repurposed for such use.<sup>87</sup>

Lower courts did not take long to pick up on Scalia’s observations. Federal district judges in Utah<sup>88</sup> and Oklahoma<sup>89</sup> have cited his remarks in support of their conclusions that those states violated the Fourteenth Amendment by denying access to marriage to same-sex couples. In addition to arming marriage equality plaintiffs with an analytical roadmap for their Fourteenth Amendment arguments, *Windsor* equipped them with a new equality argument because of its rapid and enthusiastic embrace by the Obama administration. The President instructed the Justice Department to coordinate the administration’s response to *Windsor*, and within days federal departments began to announce their new policies recognizing married same-sex couples for various rights and benefits. By the end of the summer of 2013, it was clear that with a few exceptions due to specific statutory or regulatory language that needed adjusting, married same-sex couples would be able to access a broad sweep of federal rights and benefits, regardless of their place of domicile.<sup>90</sup> Their marriages were recognized for purposes of federal taxes, federal

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85. *Windsor*, 133 S. Ct. at 2695–96.

86. *Id.* at 2696–97 (Roberts, C.J., dissenting).

87. *Id.* at 2709–10 (Scalia, J., dissenting).

88. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) (holding that denial of marriage to same-sex couples violates the Fourteenth Amendment by depriving them of the fundamental right to marry).

89. *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (holding that denial of marriage to same-sex couples violates the Fourteenth Amendment by discriminating on the basis of sexual orientation).

90. Within days of the *Windsor* decision, the administration had announced that it would recognize the same-sex marriages of federal employees for purposes of federal employee benefits programs, and this was quickly followed by announcements by the Defense Department and the Internal Revenue Service.

employee benefits, military spousal benefits (including National Guard units operated by the states in jurisdictions whose laws banned recognition of same-sex marriages), labor and employee benefits regulation, campaign funding regulations, Social Security, and a host of others.<sup>91</sup> Going forward, plaintiffs could argue that their state's refusal to allow them to marry was denying them important federal rights and benefits, rendering civil unions and domestic partnerships demonstrably unequal since the administration construed *Windsor* not to apply to civil unions and domestic partnerships.

This argument immediately bore fruit in New Jersey, where a lawsuit challenging the state's Civil Union Act as failing to provide equal protection moved rapidly to a summary judgment for the plaintiffs.<sup>92</sup> When the trial judge refused to stay her ruling,<sup>93</sup> the state petitioned the New Jersey Supreme Court for a stay. That court unanimously denied the stay and issued an opinion explaining why a subsequent appeal to the United States Supreme Court was almost certainly doomed to failure.<sup>94</sup> Governor Christopher Christie, who had vetoed a marriage equality bill two years earlier, dropped the appeal of this ruling, and same-sex marriage arrived in the Garden State.

The *Windsor* decision also lit a fire under activists in New Mexico, where a legislative deadlock had prevented either anti-same-sex marriage or pro-same-sex marriage measures from advancing in the legislature. As of the summer of 2013, New Mexico was the only state that did not afford same-sex marriage, but also did not have either a constitutional provision or statute expressly banning it. The attorney general of the state had opined that despite its gender neutral language, the marriage statute, construed by reference to legislative intent, did not authorize same-sex marriages, but that the state's established principles of marriage recognition would support recognizing same-sex marriages contracted elsewhere. Some county clerks were eager after *Windsor* to issue marriage licenses (as one intrepid clerk had done briefly in 2004), and some trial judges were willing to issue orders for them to do so. As the summer advanced, the number of counties issuing marriage licenses gradually increased, and the organization of county clerks joined the parties in pending marriage equality cases to ask the state supreme court to take up

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91. The main exceptions to the "place of celebration" rule for determining federal recognition were for Family and Medical Leave Act benefits and for Social Security surviving spouse benefits.

92. *Garden State Equal. v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013) (holding that denial of marriage to same-sex couples violates equal protection requirements of the New Jersey Constitution).

93. *Garden State Equal. v. Dow*, 79 A.3d 479 (N.J. Super. Ct. Law Div. 2013) (denying a motion to stay the September 27, 2013, ruling ordering New Jersey to allow same-sex couples to marry).

94. *Garden State Equal. v. Dow*, 79 A.3d 1036 (N.J. 2013) (holding that the state was not entitled to a stay of the trial court's order requiring the state to allow same-sex couples to marry).

the matter directly in order to resolve the “chaos.” That court, in a unanimous ruling channeling much of the reasoning of *Windsor*, held that same-sex couples had a right to marry under the state’s constitution.<sup>95</sup>

*Windsor* also affected legislative efforts. An Illinois marriage equality bill was stalled in the legislature as it adjourned in the spring of 2013, amidst hopes that the issue might be addressed in the fall after the elections when the lame duck session would convene to respond to any vetoes issued by the governor. By the time the legislature reconvened, enough additional legislators had been persuaded that pending marriage equality lawsuits in state court would come out in favor of same-sex marriage that the necessary votes to enact the bill were there. Because it was passed during the “veto session” without a specified supermajority, the bill could not go into effect until June 1, 2014.<sup>96</sup> However, some couples facing terminal illnesses were able to persuade a federal district judge that they should be allowed to marry sooner, and shortly thereafter the state was operating under a decision requiring it to process marriage licenses for all couples with qualifying medical conditions.<sup>97</sup>

In Hawaii, where previous marriage equality proposals had also languished in the legislature, Governor Neil Abercrombie, a proponent of same-sex marriage, reacted to *Windsor* by suggesting that the pending appeal of an adverse marriage equality ruling to the Ninth Circuit was likely to result in a reversal. The governor introduced his own marriage equality bill as the legislature reconvened, and it passed both houses by huge margins after massive legislative hearings at which thousands of Hawaiians testified pro and con. Although there was still strong opposition being voiced, it was clear to legislators that the tide had turned, a majority of the public now supported marriage equality, and legislators were not likely to face significant retribution from voters if they passed it.<sup>98</sup>

The overwhelming positive media response to the *Windsor* decision helped to persuade the LGBT advocacy organizations that it was now time to move with an aggressive litigation strategy in the courts, and marriage equality lawsuits were quickly filed in many states. The lawsuits in states with constitutional bans were filed in federal court, although some state court lawsuits were also filed. Rather than organize politically to attempt to repeal the constitutional bans, the groups calculated that the mounting public support and the receptivity signaled by the Supreme Court justified litigation. Pending federal court cases challenging state bans

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95. *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013).

96. Monique Garcia, *Quinn Signs Illinois Gay Marriage Bill*, CHI. TRIB., Nov. 20, 2013, [http://articles.chicagotribune.com/2013-11-20/news/chi-illinois-gay-marriage-bill-signing-20131120\\_1\\_civil-unions-gay-marriage-gay-rights](http://articles.chicagotribune.com/2013-11-20/news/chi-illinois-gay-marriage-bill-signing-20131120_1_civil-unions-gay-marriage-gay-rights).

97. *Lee v. Orr*, No. 13-CV-8719, 2013 WL 6490577, at \*3 (N.D. Ill. Dec. 10, 2013) (holding same-sex couples facing terminal illness were entitled to marry in advance of the effective date of the state’s marriage equality statute).

98. Lincoln, *supra* note 6.

on second-parent adoptions in Michigan<sup>99</sup> and North Carolina<sup>100</sup> were expanded to become marriage equality cases, and new lawsuits were filed in Arkansas,<sup>101</sup> South Carolina,<sup>102</sup> Pennsylvania,<sup>103</sup> Virginia,<sup>104</sup> West Virginia,<sup>105</sup> Kentucky,<sup>106</sup> Tennessee,<sup>107</sup> Louisiana,<sup>108</sup> Texas,<sup>109</sup> Colorado,<sup>110</sup> Arizona,<sup>111</sup> Oregon,<sup>112</sup> Idaho,<sup>113</sup> and Wisconsin,<sup>114</sup>

99. *DeBoer v. Snyder*, No. 12-CV-10285, 2013 WL 3466719 (E.D. Mich. July 1, 2013) (denying motion to dismiss amended complaint challenging the validity of Michigan's constitutional prohibition against same-sex marriage).

100. First Amended Complaint, *Fisher-Borne v. Smith*, No. 1:12-CV-589 (M.D.N.C. July 19, 2013), 2013 WL 4051175.

101. Complaint, *Jernigan v. Crane*, No. 4:13-CV-410 (E.D. Ark. July 15, 2013); Complaint, *Wright v. State*, No. 60-CV-13-2662 (Ark. Cir. Ct. July 1, 2013).

102. Complaint, *Bradacs v. Haley*, No. 3:13-CV-02351-JFA (D.S.C. Aug. 28, 2013), 2013 WL 4603857.

103. Complaint, *Palladino v. Corbett*, No. 2:13-CV-05641 (E.D. Pa. Sept. 26, 2013) (seeking recognition in Pennsylvania of same-sex marriages contracted in other states); Complaint, *Whitewood v. Corbett*, No. 1:13-CV-1861 (M.D. Pa. July 9, 2013), 2013 WL 3456582 (same).

104. *Bostic v. Rainey*, No. 2:13-CV-395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014) (holding that Virginia's constitutional and statutory bars on same-sex marriage violate the due process and equal protection rights guaranteed by the Fourteenth Amendment); *Harris v. McDonnell*, No. 5:13-CV-00077, 2013 WL 6835145 (W.D. Va. Dec. 23, 2013) (partially denying a motion to dismiss challenge brought to enjoin enforcement of the state's ban on same-sex marriage), *stayed sub nom.*, *Harris v. Rainey*, No. 5:13-CV-00077, 2014 WL 1292803 (W.D. Va. Mar. 31, 2014) ("Based on plaintiffs' intervention in the pending appeal in *Bostic* and concerns over prudential standing, the court will stay this matter until the Fourth Circuit rules.").

105. *McGee v. Cole*, No. 3:13-CV-24068, 2014 WL 321122 (S.D. W. Va. Jan. 29, 2014) (denying a motion to dismiss action challenging the constitutionality of West Virginia's same-sex marriage ban).

106. *Bourke v. Beshear*, No. 3:13-CV-750-h, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (holding that Kentucky's nonrecognition of same-sex marriages entered into in other states fails rational basis review); Complaint, *Ky. Equal. Fed'n v. Beshear* (Ky. Cir. Ct. Sept. 10, 2013).

107. *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 WL 117069 (M.D. Tenn. Mar. 20, 2014) (granting a preliminary injunction to bar state defendants from enforcing state anti-recognition laws).

108. *Robicheaux v. Caldwell*, No. 13-CV-5090, 2013 WL 6198279 (E.D. La. Nov. 27, 2013) (dismissing for failure to demonstrate an adequate connection between the defendant state actor and the allegedly unconstitutional act); Complaint, *Robicheaux v. Caldwell*, No. 14-CV-00097 (E.D. La. Feb. 7, 2014) (new complaint).

109. *De Leon v. Perry*, No. 5:13-CV-00982, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (holding that the state's failure to recognize out-of-state same-sex marriages fails rational basis review).

110. Complaint, *Brinkman v. Long*, No. 2013-CV-032572 (Colo. Dist. Ct. Oct. 31, 2013).

111. Complaint, *Connolly v. Brewer*, No. 2:14-CV-00024 (D. Ariz. Jan. 6, 2014), 2014 WL 46565.

112. Complaint, *Geiger v. Kitzhaber*, No. 6:13-CV-01834 (D. Or. Oct. 15, 2013); Complaint, *Rummell v. Kitzhaber*, No. 6:13-CV-02256 (D. Or. Dec. 19, 2013).

113. Complaint, *Latta v. Otter*, No. 1:13-CV-00482 (D. Idaho Nov. 8, 2013).

114. Complaint, *Wolf v. Walker*, No. 3:14-CV-00064 (W.D. Wis. Feb. 3, 2014), 2014 WL

with others to come.

With a general consensus that legislation for marriage equality in the remaining states was unlikely (or in those with constitutional amendments, impossible), the litigation route looked like the best bet to increase the number of marriage equality jurisdictions. Advocates recognize the likelihood, however, that no federal district court victory will be final until the Supreme Court has ultimately spoken, unless that Court takes the very timid approach of denying certiorari petitions from pro-marriage equality decisions by the courts of appeals. The District of Utah's cryptic denial of a stay, on the grounds that that the state was unlikely to win on appeal, suggested that the Utah decision would most likely be affirmed by the Tenth Circuit, but the Supreme Court reversed, granting the stay pending a final decision by the Tenth Circuit.<sup>115</sup> In addition, the Ninth Circuit's Proposition 8 ruling, although vacated by the Supreme Court on jurisdictional grounds,<sup>116</sup> together with a January 2014 ruling that lawyers could not use peremptory strikes to eliminate gay jurors,<sup>117</sup> seem to signal the likelihood that the Ninth Circuit will reverse a ruling against same-sex marriage by the District of Nevada in a pending appeal.<sup>118</sup> Thus, the race to the Supreme Court seemed to be well advanced by early 2014.

Some of these developments happened faster than Professor Klarman had predicted, although he confidently asserts that marriage equality proponents have survived and bounced back from the significant political backlash inspired by *Baehr v. Lewin*<sup>119</sup> and *Goodridge v. Department of Public Health*<sup>120</sup> (the Hawaii and Massachusetts marriage rulings by state high courts). *Goodridge* led to a slew of state constitutional amendments banning same-sex marriage and may have contributed to the re-election of President George W. Bush, who appointed likely marriage equality opponents Chief Justice John Roberts and Associate Justice Samuel Alito to the Supreme Court.<sup>121</sup> The Iowa Supreme Court's 2009 marriage equality ruling<sup>122</sup> led to the loss of retention elections by several pro-equality justices as a result

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115. *Kitchen v. Herbert*, No. 2:13-CV-217, 2013 WL 6834634, at \*2 (D. Utah Dec. 23, 2013), *rev'd*, 134 S. Ct. 893 (2014).

116. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

117. *Smithkline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014) (finding that because sexual orientation discrimination claims merit heightened scrutiny, peremptory challenges may not be used for the purposes of preventing gay people from sitting as jurors).

118. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012), *appeal docketed*, No. 12-17668 (9th Cir. Dec. 4, 2012).

119. 852 P.2d 44 (Haw. 1993).

120. 798 N.E.2d 941 (Mass. 2003).

121. Klarman reported that Republican-sponsored state constitutional amendments banning same-sex marriage were proposed in twenty-five states after the *Goodridge* decision was announced and were passed in all but one. KLARMAN, *supra* note 2, at 185–86.

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

of a campaign financed and executed by out-of-state forces.<sup>123</sup> These may be the last major instances of backlash on the issue of marriage equality. The *Windsor* ruling did not seem to provoke any falling off of public support for marriage equality, and the national conversation seems to have moved on, with most assuming, as does Klarman, that same-sex marriage nationwide is the likely outcome.<sup>124</sup>

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123. KLARMAN, *supra* note 2, at 151–54.

124. As noted above, a poll of voters in states that did not allow same-sex marriage as of the fall of 2013 found that a majority of those states, viewed collectively, supported same-sex marriage, and that most of them believed that same-sex marriage would become available in their state in the future. Polaski, *supra* note 17.