

## Keynote Address

# Winning Marriage Equality: Lessons from Court

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I was delighted to be asked to return to Yale to give the keynote address at this Symposium, and particularly to do so at its close. Being in this position gives me the opportunity to sum up, to draw together, and even to borrow liberally from, the other speakers' comments. It avoids the typical keynote problem of having one's remarks thereafter be the target of all the other speakers' critiques. And, of course, most importantly, it lets me have the last word. The only problem is that, given Yale Law School Dean Harold Koh's promise at the Symposium's outset that my talk would resolve all the inquiries he posed about the current struggle for marriage equality, I once again have been made to feel like the youngest child at Passover, but with five challenging questions instead of four to answer.<sup>1</sup>

Thankfully, the speakers before me have been an inspiration. Their ideas have been provocative and their words spectacularly stimulating. The speakers all have made me want to hear more and think further about their comments.

I want to start my remarks with a few initial observations, prompted by the other speakers' presentations. Initially, I think it is important to highlight the transformative nature of the discussions had at this Symposium, and that our nation itself recently has been having, regarding relationships formed by same-sex couples, as contrasted with some of the earlier battles of the lesbian and gay rights movement. As scholars of sexual orientation have discussed, one of the things that makes sexual orientation different from other identity characteristics (such as race, sex or national origin) is that sexual orientation is fundamentally relational in nature.<sup>2</sup> One's sexual orientation is defined by one's attraction to, and intimate, romantic, and sexual relationships with, other people. What

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1. See THE PASSOVER HAGGADAH 21 (Nahum N. Glazer ed. 3rd rev. 3d 1979).

2. See, e.g., Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Configuration of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3, 337 (1995) ("sexual orientation . . . is perceived and defined in direct relation to the sex of a person and that of his or her erotic partners"). See generally Letitia A. Peplau & Susan D. Cochran, *A Relational Perspective on Homosexuality*, in HOMOSEXUALITY/HETEROSEXUALITY: CONCEPTS OF SEXUAL ORIENTATION (David P. McWhirter et al. eds., 1990).

makes lesbians and gay men different from heterosexuals is that, for us, those relationships are formed with others of our same sex.

In seeking equality and fair treatment in the workplace, much of the progress gay people have made—to the point where eighty-eight percent of the public now supports equal employment opportunity regardless of sexual orientation<sup>3</sup>—has been support for equal treatment in spite of sexual orientation. This support is based on an understanding that sexuality is irrelevant to work and, at times, an insistence that gay employees not “flaunt” or make an issue of our sexual orientation<sup>4</sup>—a view that ultimately became codified in the United States military’s Don’t Ask, Don’t Tell policy.<sup>5</sup> Additionally, advances in workplace equality largely have forged only a “negative” right: a right to be free from adverse treatment based on sexual orientation, a right essentially premised on mere tolerance of gay people.<sup>6</sup>

On the other hand, in relationship rights work, we are fighting for equality and fair treatment as people who are, or would like to be, in relationships with others of the same sex. In this struggle, others cannot ignore our sexual orientation or treat us equally in spite of it. This work instead seeks equality across our difference from heterosexuals.<sup>7</sup> Rather than tolerance, it seeks acceptance—indeed, affirmation and even celebration—of us as lesbians, gay men, and bisexuals, and of our love for and dedication to our partners. This has been a huge shift in the fight for LGBT rights. It has been a move from privacy (in the form of “just leave us alone” and stop criminalizing our love) to individual liberty regarding our choice of partners and equal respect for our lives.

I further want to note that fighting for the freedom to marry, as well as seeking rights for those in non-marital, committed relationships, requires questioning what has most privileged heterosexuals as heterosexuals. The fundamentalist right wing over and over again apocalyptically warns that society as we know it will come to an end if same-sex couples are allowed to marry.<sup>8</sup> And sometimes I think they are right. Society as they know it treats

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3. See Sean Cahill, *A Milestone for Gay Marriage*, N.Y. TIMES, June 23, 2003, at A20 (referencing May 2003 Gallup poll results).

4. See, e.g., *Singer v. U.S. Civil Service Com’n*, 530 F.2d 47 (9th Cir. 1976), vacated by 429 U.S. 1034 (1977).

5. 10 U.S.C. § 654.

6. See Vincent J. Samar, *Symposium: “Family” and the Political Landscape for Lesbian, Gay, Bisexual and Transgender (LGBT) People: Gay-Rights As A Particular Instantiation of Human Rights*, 64 ALB. L. REV. 983, 988 (2001) (“the right to nondiscrimination is a negative right imposing a duty . . . not to discriminate” on certain bases).

7. See Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1284-85 (1987) (describing model of “equality as acceptance,” in which “[t]he difference between human beings, whether perceived or real, and whether biological or socially based, should not be permitted to make a difference in the lived out equality of those persons.”).

8. See, e.g. Bill Ervolino, *Gay Weddings’ Best Man: George W. Bush*, THE RECORD (Bergen County, NJ), Feb. 25, 2004, at L11 (quoting statement of conservative leader Gary Bauer, on the

lesbians and gay men as less than full and equal members of our country; marginalizes us, and seeks to render us silent and invisible (if not “converted”<sup>9</sup> or dead); and scapegoats gay people and our families. That society is one that we at last are on the road to leaving behind.

This past year, a new society began. What not long ago had been forecast as decades away became a living reality on May 17, 2004. On that monumental date, same-sex couples became able to marry legally in Massachusetts.<sup>10</sup> It is estimated that five thousand same-sex couples now have done so,<sup>11</sup> which means that ten thousand lesbians, gay men, and bisexuals have been and are legally married to their same-sex spouses right here in the United States.

And yet Massachusetts is still standing. Not even locusts have arrived. In fact, what has been most interesting in terms of the press coverage of this remarkable year is how un-covered the lack of any resulting problems in Massachusetts has been. It has been a total non-story. But that itself should be the story. Men and women have not stopped marrying one another in Massachusetts. There have not been a rash of divorces in the state. In fact, Massachusetts is the state with the lowest divorce rate in the nation.<sup>12</sup>

Indeed, all that has resulted in the wake of allowing these marriages is that thousands of same-sex couples and their children in the state now are more protected against tough times and crises and are enjoying a measure of equality and legal rights and responsibilities that previously was unknown to gay people in this country.

My longtime colleague, Matt Coles of the ACLU, suggested in his remarks at this Symposium that we should forego the language of equality and instead talk about fairness. I think that is sage advice, but, whatever language one invokes, it is critical that we talk about same-sex relationships in terms Americans can understand on an emotional level and not just an intellectual one. For example, on the question of why we cannot settle for civil unions as an acceptable long-term substitute for marriage, it is not enough to speak only about the stigmatization that any supposedly separate-but-equal system of rights necessarily engenders. We need also to invoke the wisdom of the parent with two children fighting over a slice of cake. The parent knows that the best way of achieving equality and fairness is to tell one child that he gets to cut the

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American Family Association web site, that same-sex couples' quest for marriage threatens “[t]he total destruction of . . . society as we know it today.”).

9. See David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297 (1999).

10. See Yvonne Abraham & Rick Klein, *Free to Marry: Historic Day Arrives for Same-Sex Couples in Massachusetts*, BOSTON GLOBE, May 17, 2004, at A1; *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 344, 798 N.E.2d 941, 969-70 (2003).

11. See Judy Peres, *Same-sex Unions Being Left in Limbo; Patchwork Nature of State Laws Likely to Challenge Couples*, CHI. TRIB. Apr. 7, 2005, at C21.

12. See *Our Opinions: Divorce Law Needs No Tweaking*, ATLANTA J. CONST., Mar. 8, 2005, at 8A.

cake in half, but that his sibling will get to choose first which piece to take. Or, as I once explained to my mother when she asked me why gay people need to have not just equal rights, but also the word "marriage," if heterosexuals truly think that equality can exist without access to that word, then let gay people marry and let heterosexuals use some other term. Let heterosexuals try to explain what civil unions are to their children, to emergency workers, to financial institutions, and to the courts. Let heterosexuals feel the exclusion from the cultural symbols and societal respect that, at least in current-day America, surround only marriage. Let heterosexuals in civil unions try to cope with the uncertainty and disrespect for their relationships they will face when they cross state borders or interact with the federal government. In other words, if there are to be two options, then the only way of making sure the division truly is equal and fair is to let gay people have the first choice of which piece of cake to take.<sup>13</sup>

The last initial comment I want to make is that, as several speakers at the Symposium have urged, I strongly agree that we need to fight both for equal access to marriage and for alternatives that respect the ways in which individuals who are not married have structured their lives. These alternatives should not force an all-or-nothing outcome on couples who believe that the history and structure of the institution of marriage conflict with important values they hold. Although marriage has grabbed most of the headlines this year, Lambda Legal, like its sister organizations Gay and Lesbian Advocates and Defenders (GLAD), the National Center for Lesbian Rights (NCLR), and the ACLU's Lesbian and Gay Rights Project, has been busy working on both fronts. In addition to filing lawsuits seeking the freedom to marry, we also have been busy representing unmarried lesbian and gay survivors of those who died on 9/11, defending domestic partnership laws against legal attacks, challenging businesses and government programs that deny unmarried, same-sex couples benefits provided to married, different-sex pairs, and fighting for functional approaches to relationship and parenting rights.<sup>14</sup>

I also believe, however, that, just as the struggle for marriage equality has been critiqued by some within our community,<sup>15</sup> the problems inherent in

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13. Or, to put it in other terms, heterosexuals should do unto gay people as heterosexuals would have others do unto them. Even Justice Scalia, the Supreme Court's most strident conservative voice, has recognized that this restatement of the "golden rule" is the key to the guarantee of equal protection. See *Cruzan v. Director, Missouri Dep't of Pub. Health*, 297 U.S. 261, 287, 300, 110 (1990) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.") (Scalia, J., concurring).

14. Details regarding this work can be found on Lambda Legal's website, available at <http://www.lambdalegal.org/cgi-bin/iowa/issues/record?record=3> (last visited Apr. 18, 2005).

15. See, e.g., Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in *LESBIAN AND GAY MARRIAGE 20* (Suzanne Sherman ed., 1992); Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905 (2001); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1556 (1993). These criticisms of the

creating alternatives to marriage need to be subjected to critical examination as well. We should not fool ourselves by thinking that seeking something other than marriage will be less likely to incur opposition. Many who fight against marriage equality see these alternatives as as much a threat to the institution of marriage as letting gay people access marriage itself.<sup>16</sup> We also need to be concerned about settling for alternatives like civil unions that are simply a lesser shadow of marriage, not a different model of rights and responsibilities, as domestic partnerships originally were conceived to be.<sup>17</sup> While civil unions provide critically important pragmatic protections, they cannot be a stopping point. The LGBT community cannot accept any compromise that requires us permanently to accept second class status and give up the fight for fully equal, fair treatment.

Moreover, as we strive for equality in being able to choose to marry or not, and work for the creation of alternative legal structures such as registered domestic partnerships and reciprocal beneficiary statuses that allocate rights and responsibilities in ways other than marriage, we also need to question the consequences of solutions that privilege couples who legally have formalized their relationship with the government in some form over those who have not.<sup>18</sup> We likewise need to scrutinize the extent to which greater rights and benefits should be provided to those in coupled relationships than to individuals who are not in a committed relationship<sup>19</sup> or who have formed loving families with non-traditional configurations.

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resources that have been devoted to seeking marriage equality themselves have been subjected to rigorous retort. See Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. SOC. CHANGE 567 (1994).

16. Conservative legal and political organizations consistently have attacked not only progress toward marriage equality, but also laws providing benefits to domestic partners. See, e.g., S.D. Meyers v. City & County of San Francisco, 253 F.3d 461 (9th Cir. 2003); Knight v. Super. Ct., 2005 Cal. App. LEXIS 521 (Apr. 4, 2005); Tyma v. Montgomery County, 369 Md. 497, 801 A.2d 198 (2002); Slatery v. City of New York, 266 A.D.2d 24, 697 N.Y.S.2d 603 (1999); Heinsma v. City of Vancouver, 144 Wn. 2d 556, 29 P.3d 709 (2001). These groups repeatedly refer to civil unions and domestic partnerships as "gay marriage by another name," see, for example, Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1 (quoting Robert Knight, director of the Culture and Family Institute). They warn that "sanctioning civil unions or domestic partnerships would create a 'slippery slope' that would undermine the institution of marriage just as much as same-sex marriage would." Lynn Waldsmith, *Gay Marriage Draws Backlash; but Backers Note Growing Tolerance among the Young*, DETROIT NEWS, Sept. 7, 2003, at 15A (quoting moral theologian for the Archdiocese of Detroit).

17. See Barbara A. Cox, "The Little Project." *From Alternative Families to Domestic Partnerships to Same-Sex Marriage*, 15 WISC. WOMEN'S L.J. 77 (Spring 2000).

18. See Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 U.C.L.A. L. REV. 1555 (2004).

19. Even before the topic became the centerpiece of an episode *Sex and the City*, I long wondered about the fairness of our society rewarding those who already have been fortunate to find someone to love, be loved by, and share their life with, by giving them parties, presents, and hundreds of legal rights and benefits denied to those who remain single. See *Sex and the City: A Woman's Right to Shoes* (HBO cable television broadcast, Aug. 17, 2003).

That is enough for my “initial” observations. I was given a job to do. At the beginning of this Symposium, five questions were asked: (1) What is at stake in the marriage debate? (2) What does it mean politically? (3) What can be learned from international developments? (4) What are the relationships between sexual orientation and both sex and race with regard to this struggle? (5) At what level of government should these issues be fought out and decided. What we heard from the Symposium’s speakers is that there is no one answer to any of these questions. Here, however, is my shot at a bird’s eye summary: (1) A tremendous amount at stake in the current debate over marriage equality; (2) elements of the debate have multifaceted, and often contradictory, political meanings; (3) a great deal can be learned from progress toward marriage equality that has been achieved in other countries; (4) the relationships between sexual orientation and sex and race with regard to marriage are complex; and (5) arguments can be made supporting different levels of government as each the most effective or appropriate for addressing these issues.

Seriously, though, because of the enormity of these questions, I am not even going to attempt, in the limited time I have available, to speak directly to each of these points. Instead, I will rely on the old adage that you should write (or talk) about what you know, which, for me, is litigation. I therefore want to focus the rest of my remarks on why I believe we have done so well in the courts; what we can learn from those achievements to secure more judicial victories and accomplish the non-judicial work that remains; and whether focusing on the judiciary is an appropriate and effective way to proceed.

While we have made incredibly important advances in obtaining protections for same-sex relationships in the state legislatures and in public opinion,<sup>20</sup> there is no question in my mind that we have been most successful in court. The decisions in Alaska, Hawaii, Massachusetts, New York, Vermont, and Washington have provided movingly eloquent and sweeping affirmations of equality, liberty, fairness and, yes, love.<sup>21</sup> For example, the decision in *Goodridge* not only granted full marriage equality, but it did so based on the understanding that, without the right to choose to marry, “one is excluded from the full range of human experience and denied full protection of the laws for one’s avowed commitment to an intimate and lasting human relationship,”<sup>22</sup> and that “[t]he marriage ban works a deep and scarring

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20. See, e.g., Cal. Fam. Code § 297.5; N.J.S.A. 26:8A-1 *et seq.*; *Gays and the Election: Don't Give Up the Fight for Realistic Goals*, THE RECORD (Bergen County, N.J.), Nov. 10, 2004, at L10 (discussing CNN Election Day exit polls showing that sixty-two percent of voters nationwide support same-sex couples having access to marriage, civil unions or domestic partner benefits).

21. See *Brause v. Bureau of Vital Statistics*, 21 P.3d 357 (Alaska 2001); *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 444 (1993); *Goodridge*, *supra* note 11; *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999); *Hernandez v. Robles*, 2005 N.Y. Misc. LEXIS 248 (N.Y. Sup. Ct., N.Y. County, Feb. 4, 2005); *Anderson v. King County* (Wash. Super. Ct. Aug. 4, 2004), available at [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/308.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/308.pdf).

22. *Goodridge*, 440 Mass. at 326 (internal quotation marks and citation omitted).

hardship on a very real segment of the community.”<sup>23</sup> The court not only got the outcome right; it profoundly understood the full measure of what was at stake.

Maybe the five questions that Dean Harold Koh initially posed at this Symposium have me thinking in fives, but in analyzing our success, five principal reasons stand out to explain why we have been more successful in court than in the legislatures or in current public discourse.

First, lawsuits force longer and deeper thinking about these issues. Unlike asking someone their view in a public opinion poll, judges do much more than give snap, unreflective responses to hard questions. Courts are supposed to come to their decisions after full engagement and diligent consideration of the issues and the arguments. Jurists read hundreds of pages of briefs from both the parties and amici, while also reviewing a wealth of case law. Additionally, judges listen to hours of argument in which opposing positions are fully responded to through real intellectual discourse, rather than mere exchange of sound bites. Finally, they think carefully about the precise questions posed and how the answers will affect not only the case before them, but also those to come.

Second, judges’ decisions on constitutional issues of this magnitude are supposed to be guided by fundamental values of the nation rather than political outcomes or concerns. The question posed in court is not, “Do you personally approve of same-sex couples being able to marry?” but, instead, “What do our deepest values of equal protection and personal liberty really mean and require when it comes to this issue?” or, “What is it that the noblest and most important principles underlying our Constitution tell us the right answer—as opposed to the popular or easy one—should be?” Unlike those in the legislative and executive branches, judges are supposed to answer these questions free from concern about electoral politics.<sup>24</sup> It is for this reason that the current battle over judicial independence is being waged so fiercely, and is so perilous for those who care about the Constitution and about the future of this country.<sup>25</sup>

Third, legal cases present the question of marriage equality not as an abstraction, but as something affecting real people whose lives and families

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23. *Id.* at 341.

24. Gay rights frequently have not fared well in the political arena because of complicating factors that differentiate that struggle from other civil rights battles. For example, some heterosexuals and some closeted lesbians and gay men historically have been unwilling to speak up for gay people based on concerns that doing so might identify or brand them as themselves being homosexual. See Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 U.C.L.A. L. REV. 915, 973 (June 1999). Fearing the wrath of the well-financed religious right, those running for office also frequently overestimate the political cost of supporting gay rights, even though recent elections (such as the latest in Massachusetts) have shown that, at least in certain states, quite the reverse may be true. See Frank Phillips, *Bid Seen Weakening to Ban Gay Marriage Amendment; Foes May Get Majority*, BOSTON GLOBE, Jan. 18, 2005, at A1.

25. Lambda Legal has commenced a new project, entitled “Courting Justice,” to address this threat. See [http://ga4.org/lambdalegal/notice-description.tcl?newsletter\\_id=3102808](http://ga4.org/lambdalegal/notice-description.tcl?newsletter_id=3102808).

will be affected by the answers judges supply. In deciding that the New York Constitution requires that same-sex couples be allowed to marry, Judge Doris Ling-Cohan understood the anxieties and expense that Mary Jo Kennedy and Jo-Ann Shain experienced in having to undergo a second parent adoption of their daughter who, had they been married, automatically would have been legally recognized as the child of them both.<sup>26</sup> Similarly, the judge heard a recounting of the frightening real-world problems Nevin Cohen encountered trying to obtain information and to be involved in making critical decisions when the person he wanted to marry, Daniel Hernandez, was ill and in the hospital.<sup>27</sup> It was in considering the individuals before her, namely “health care professionals, a computer specialist, a textile stylist, a waiter, city planners, and a director of an emergency food assistance program,”<sup>28</sup> as well as their children and other family members<sup>29</sup> that Judge Ling-Cohan was able fully to recognize how “the decision of whether and whom to marry is life-transforming.” Likewise, it was the real life stories presented to her that helped her see that no legitimate reason exists to deny those individuals access to marriage’s unique “extensive legal structure that honors and protects a couple’s relationship, helps support the family and its children through an unparalleled array of rights and responsibilities, and privileges a married couple as a single financial and legal unit.”<sup>30</sup>

Fourth, judicial decision-making proceeds progressively based on the established building blocks of precedent. Notwithstanding the rhetoric of the far right, gay rights victories do not spring forth, fully formed, from Zeus’ brow. Rather, outcomes are influenced by the lessons learned from earlier cases. The trial court decision in *Hernandez v. Robles*,<sup>31</sup> Lambda Legal’s marriage case in New York, illustrated this principle well, by building not just on *Lawrence*,<sup>32</sup> *Romer*,<sup>33</sup> and *Goodridge*,<sup>34</sup> but also on *Levin*,<sup>35</sup> *Matter of Jacob*,<sup>36</sup> *Braschi*,<sup>37</sup> *Onofre*,<sup>38</sup> *Langan*,<sup>39</sup> and even *Under 21*,<sup>40</sup> a case Lambda litigated more than 20 years ago.

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26. *Hernandez v. Robles*, 2005 N.Y. Misc. LEXIS 248, at \*9-\*10 (N.Y. Sup. Ct., N.Y. County, Feb. 4, 2005).

27. *Id.* at \*16.

28. *Id.* at \*8.

29. *Id.* at \*2-\*3, \*10-\*12, \*50-\*51, \*67.

30. *Ibid.* at \*83.

31. 2005 N.Y. Misc. LEXIS 248 (N.Y. Sup. Ct., N.Y. County, Feb. 4, 2005).

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

33. *Romer v. Evans*, 517 U.S. 620 (1996).

34. *Goodridge v. Dep’t of Pub. Health*, *supra* note 11.

35. *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001).

36. *Matter of Jacob*, 660 N.E.2d 397 (N.Y. 1995).

37. *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989).

38. *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980).

39. *Langan v. St. Vincent’s Hosp.*, 765 N.Y.S.2d 411 (Sup. Ct. Nassau County 2003).

40. *Under 21 v. City of New York*, 108 A.D.2d 250, 488 N.Y.S.2d 669 (1985), *modified* 482 N.E.2d 1 (N.Y. 1985).

Finally, in court, advocates are able to bring the focus exclusively upon the civil institution of marriage, rather than the religious one. When people are asked in polls, "Should same-sex couples be able to marry?" it can be unclear if their answers reflect their views about legal marriage, religious marriage, or some scrambled notion of the two. Indeed, that confusion has been fed by many political and religious leaders who are opposed to marriage equality. For example, President Bush's public comments about the court cases seeking marriage equality again and again have included language concerning the "sacred institution" of marriage or the "sanctity" of marriage.<sup>41</sup> But the "sacred institution" of marriage is not the legal institution entered by signing a marriage license. The legal institution dictates things like one's ability to get higher social security benefits upon the death of a partner, and one's entitlement to, or requirement to pay, support if the relationship ends. Moreover, sacraments are things afforded by religious leaders, not governments. Likewise, the state does not "sanctify" anything because "sanctity" is a religious concept. Clearly, there has been a concerted attempt to confuse legal "rights" with religious "rites." The constitutional separation of church and state, however, avoids that confusion within the courts.

We cannot let our successes in front of the judiciary blind us to litigation's relationship to other, more political processes. As Professors Reva Siegel and Robert Post elucidated in their exchange at this symposium, judicial decision-making often is an interactive process involving courts, legislatures, and the public, though not usually recognized as such. Indeed, the political reaction we have seen this past year to LGBT people's civil rights advances in the courts is not without precedent.<sup>42</sup> For those of you who are older, you may remember back to 1964, when California passed Proposition 14, an attempt to undo fair housing protections by giving homeowners a state constitutional right to rent or sell their property to whomever they chose. That initiative was the result of organized political opposition to racial equality gains that had been won largely in the courts. Measures like Proposition 14 passed in a number of jurisdictions across the country. Ultimately, the federal courts struck down such measures in cases like *Reitman v. Mulkey*<sup>43</sup> and *Hunter v. Erickson*<sup>44</sup> on federal

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41. See Pam Belluck, *Hundreds of Same-Sex Couples Wed in Massachusetts*, N.Y. Times, May 18, 2004, at A1; Pam Belluck, *Massachusetts Gives New Push to Gay Marriage*, N.Y. Times, Feb. 5, 2004, at A1; Pam Belluck, *Same-Sex Marriage: The Overview; Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. TIMES, Nov. 19, 2003, at A1; David D. Kirkpatrick, *Conservatives Mount Stem Cell and Immigration Challenges*, N.Y. TIMES, Aug. 26, 2004, at A25; Robert Pear, *President Plans Anti-Gang Initiative and Program to Train Lawyers in Death Penalty Cases*, N.Y. TIMES, Feb. 3, 2005, at A23; Katharine Q. Seelye, *Conservatives Mobilize Against Ruling on Gay Marriage*, N.Y. TIMES, Nov. 20, 2003, at A29; Pam Robin Toner & Robert Pear, *State of the Union; Domestic Agenda; Ban on Gay Marriage Leads List of Proposals*, N.Y. TIMES, Jan. 21, 2004, at A17; *The 2000 Campaign; 2<sup>nd</sup> Presidential Debate Between Gov. Bush and Vice President Gore*, N.Y. TIMES, Oct. 12, 2000, at A22.

42. For information on what happened in the last election and its significance, see <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1552>.

43. 387 U.S. 369 (1967).

constitutional grounds. These judicial victories so removed such responses from civil rights opponents' arsenal that, today, we look back in surprise at the notion that laws banning race discrimination in housing were highly controversial only 40 years ago.

For those who are not quite as old, we saw a similar development with regard to the progress made in the adoption of laws barring sexual orientation discrimination in employment, housing, public accommodations, and public services. Challenging these advances, our opponents attempted to move the issue to the ballot box, culminating in the passage of Amendment 2 in Colorado in 1992, and attempts to do the same in numerous other locales.<sup>45</sup> Yet again, the federal courts had to be resorted to in order to prevent a civil rights roll-back. Lambda and the ACLU argued before the U.S. Supreme Court that such state constitutional amendments violate the federal Constitution. Our victory in *Romer v. Evans*<sup>46</sup> successfully removed reliance on anti-gay sentiment expressed at the ballot box as a means of halting the forward momentum of this aspect of civil rights progress. As a result, 17 states and the District of Columbia prohibit discrimination based on sexual orientation, with Illinois having joined the list this year, and with Maine and Washington on the verge of joining next.<sup>47</sup>

There thus is nothing wrong with resorting to the courts as the ultimate protector of civil rights. This does not mean, however, that we should rush into federal court to challenge state constitutional amendments denying gay people marriage equality or immediately try to secure a ruling that relies on a federal constitutional right to marry the person of one's choice. We need to look back at the reasons we have been successful thus far in court and learn from those victories. Applying the five lessons outlined previously, we should consider the following:

First, we need more courts and the country as a whole to think longer and harder about these issues. We need to effect deeper intellectual engagement about why lesbians and gay men deserve the choice to marry our partners, just as heterosexuals can. We need to work more vigorously to respond to the concerns of those who do not yet support marriage equality. Most critically, we need to defeat the far rights' efforts to end a full and fair consideration of the issues and to rush the country to judgment by attacking judges who conscientiously are doing their jobs and by amending constitutions as a way of forever locking into place our current inequities.

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44. 393 U.S. 385 (1969).

45. See John F. Niblock, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 U.C.L.A. L. REV. 153, 155-56 & 156 n.10 (1993).

46. 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

47. See <http://www.lambdalegal.org/cgi-bin/iowa/news/maps.html?record=4>. After the Symposium was held, Maine indeed became the 18th state to enact such a law. Mark Peters, *Baldacci Signs Controversial Gay Rights Bill*, Portland Press Herald (Maine), Apr. 1, 2005, at A1.

Second, we need to help the public appreciate that what is at stake is not only the outcome of this particular issue, but ultimately the meaning of our nation's fundamental values and the nature of the country in which we want to live. We need to counter the pundits who speak as if only the religious right is concerned about values. We must encourage Americans to understand that those fighting for marriage equality are among the individuals most concerned about the moral values of commitment, love, family, children, community, dignity, and respect. What could be more of a traditional "family value" than to seek to marry the person you love and thereby protect your family?

Third, we need to make these moral values concrete by showing what is at stake for the real people who are the family members, friends, co-employees, and neighbors of all Americans. We must open our hearts and share how it feels when a mortuary treats us as a stranger after the love of our life has died, when a hospital denies us access to our loved one's bed in his or her last conscious moment, when our country tells us we must move to another land if we want to remain with our non-citizen partner, and when our children are taken away from us because we never went through the expensive and intrusive process of adopting them, if that was even possible where we live. We need to reveal how our partners and our children are denied health insurance, social security benefits, and tax breaks that families headed by married couples take for granted. We need to bring home to America the unfair costs, indignities, and heartbreak of gay people's exclusion from marriage.

Fourth, we need to build upon successes and distinguish losses. We need to look back at how the disheartening loss in *Bowers v. Hardwick*<sup>48</sup> did not stop the gay rights movement. Instead, *Bowers* launched renewed legislative efforts to repeal state sodomy laws and a series of state constitutional challenges to those that remained, ultimately paving the way for the victory in *Lawrence v. Texas*.<sup>49</sup> In the same way, we need to forge building blocks in the legislatures and the courts that will make the transition from no rights to marriage a less frightening leap. If we have setbacks, they should be used to convince others of the unfairness of our vulnerability and second class status and the need for change. When we have advances, they should be used to demonstrate to America the positive outcomes, rather than harms, that result from supporting all our nation's families.

Fifth, and finally, we must make clearer that the central issue is the civil institution of marriage, under which the government provides rights and imposes responsibilities. We need to rebut the deliberate confusion that comes when purely religious symbols and meanings are overlaid on the nation's consideration of who will be allowed to obtain a civil marriage license and reap the attached benefits. As with past civil rights struggles, religious leaders are

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48. 478 U.S. 186 (1986).

49. See *Lawrence v. Texas*, 539 U.S. 558, 570-71 (collecting cases).

critically important to securing these advances by challenging the notion that some religious views should prevail over others and by speaking the language of social justice, rather than just scripture.<sup>50</sup>

The nation has experienced a tremendous jumpstart on winning marriage equality this year. The work done has been intense. There are currently active marriage cases in eight states,<sup>51</sup> coupled with seemingly unending activity in legislatures, the media, organizing, public education, and important discussions like this Symposium. But it has just been a start.

Pulling together the many strands of the last day and a half has been quite a challenge, yet it is nothing compared to the challenge the LGBT movement now is engaged in across the land. But, like my close ally Kate Kendell of the National Center for Lesbian Rights, I believe we will get there. Looking back at history gives me faith that our nation's promises of equality and liberty ultimately will not be denied to a whole group of Americans. Hearing the voices of the couples who are seeking the freedom to marry and the insights their children have shared,<sup>52</sup> and seeing what those dedicated to justice, like the incredible student organizers of this Symposium, can achieve, gives me great hope. I just look forward to the day when the main problem about a same-sex couple getting married will be trying to figure out what wedding present to bring. May we get there soon.

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50. See LAMBDA LEGAL, PEOPLE OF FAITH SPEAK OUT (2003), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1211>.

51. See Lee Romney & Maura Dolan, *Judge Rules State Can't Bar Gay Marriage*, L.A. Times, Mar. 15, 2005, at A1.

52. Sixteen year-old Aliyah Shain exclaimed in response to her two mothers' victory in Lambda Legal's New York marriage case, "I'm feel very excited. They deserve it. . . . They taught me that a relationship is based on love." Helen Peterson, *Gay Marriage OK; City Gets Chance to File Appeal*, N.Y. Daily News, Feb. 5, 2005, at 5. When asked her reaction to President Bush's comments opposing marriages of same-sex couples, she added, "I would invite the president to spend a day in my home because I think that would greatly change his mind." Sabrina Tavernise, *New York Judge Opens a Window to Gay Marriage*, N.Y. Times, Feb. 5, 2005, at A1. If only all of America could be invited in.