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A Hope That's Not So Hollow: How the Supreme Court's Decisions in Windsor and Perry Alter the Political Environment in Which Marriage Equality Activism Operates

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**A HOPE THAT'S NOT SO HOLLOW: HOW THE
SUPREME COURT'S DECISIONS IN *WINDSOR*
AND *PERRY* ALTER THE POLITICAL
ENVIRONMENT IN WHICH MARRIAGE
EQUALITY ACTIVISM OPERATES**

by

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**PROFESSOR GOLUB
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Abstract

This thesis looks at the state of marriage equality activism in the wake of the Supreme Court's June 26, 2013 decisions in *United States v. Windsor* and *Hollingsworth v. Perry*. Some scholars, such as Gerald Rosenberg, argue that Supreme Court decisions can never affect "significant social change," either directly or indirectly, while others argue that such decisions can be hugely important in directly affecting policy. My focus is on how activist organizations, which have a substantial track record of directly affecting policy, are influenced by changes to the political environment stemming from major Court decisions regarding social issues. After examining how past litigative efforts such as *Baehr v. Lewin* and *Goodridge v. Department of Public Health* have affected the LGBT rights movement, and marriage equality activism specifically, I discuss how organizational strategies have changed minimally, but the political environment in which marriage equality activism is operating has shifted quite a bit, especially in terms of framing and legal precedent. I conclude that Court decisions can indeed have a significant impact on social change by affecting the way in which it is possible for activists on both sides of the issue to shape and deliver their message to the general public, legislators, and courts in future litigative efforts.

Chapter 1: Introduction

On June 26, 2013, the Supreme Court of the United States released two highly anticipated decisions for cases regarding same-sex marriage – *Hollingsworth v. Perry* and *United States v. Windsor*. Protestors and supporters swarmed the front steps of the Supreme Court building in Washington D.C., awaiting the final decisions to be released for cases heard in the 2012 and 2013 term. The outcome of the Court’s decisions would significantly affect, it seemed, the immediate fate of same-sex marriage in the United States; a lot potentially hung in the balance for both supporters and opponents of marriage equality.

Perry was an appeal to overturn a Ninth Circuit Court of Appeals decision striking down Proposition 8 in California, an amendment to the state constitution that restricted marriage to between one man and one woman. Prior to the passage of Proposition 8 in November 2008, same-sex marriage had been legal in California following a California State Supreme Court decision in May 2008 stating that restricting marriage to opposite-sex couples was in violation of the state’s constitution. A Supreme Court decision striking down Proposition 8 as unconstitutional under the United States Constitution would both re-legalize same-sex marriage in California, and rule all other state constitutional amendments restricting marriage to between one man and one woman, amendments which 29 states besides California had at the time.¹ *Perry* reached the Supreme Court after passing through the U.S. District Court of the Northern District

¹ "Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws."

of California and the Ninth Circuit Court of Appeals, both of which found Proposition 8 to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.²

Windsor focused on the federal government's refusal to recognize same-sex marriages and grant them federal benefits under the Defense of Marriage Act, or DOMA. *Windsor*'s path to the Supreme Court had begun when Edith Windsor had sued the government to issue her a refund of the \$363,053 estate tax she had been required to pay on her inheritance from the estate of her deceased wife, Thea Spyer. Had the federal government recognized their marriage, Windsor would have qualified for an unlimited spousal deduction and would not have had to pay a tax.³ The federal government contested the refund, but at the same time the Obama administration announced that they believed DOMA, specifically Section III of the law, was unconstitutional and that the Justice Department would no longer be defending it in court disputes, but would continue enforcing it unless and until the Supreme Court also determined it to be unconstitutional.⁴ However, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives filed a motion to intervene and defend the constitutionality of DOMA and Section III. The case passed through the U.S. District Court for the Southern District of New York and the Second Circuit Court of Appeals, both of which sided with Windsor in finding Section III of DOMA unconstitutional.⁵ The Supreme Court heard oral arguments for *Perry* on March 26, 2013, and for *Windsor* on March 27, 2013.

The Supreme Court's decision in *Perry*, delivered by Chief Justice John Roberts,⁴ seemed on the surface to be rather underwhelming on a national level, but extremely

² Barnes, Robert.

³ Schwartz, John.

⁴ United States Department of Justice.

⁵ *Windsor v. United States*.

positive for marriage equality supporters when it came to the state of California. The Court held that the petitioners, supporters of Proposition 8, did not have standing in the case because they had suffered no legal harm as a function of same-sex marriage being legal.⁶ The case was dismissed on these grounds and found that the Ninth Circuit Court of Appeals should not have reviewed the case either, sending the case back to the District Court, where Judge Vaughn Walker had found Proposition 8 to be unconstitutional under the Due Process and Equal Protection Clauses.⁷ While this did nothing to change national policy regarding same-sex marriage, it did re-legalize same-sex marriage in California in a way that would be much more difficult to overturn in the future.

With regards to *Windsor*, the Supreme Court affected national policy much more directly, although perhaps not as completely as marriage equality proponents would have liked. Justice Anthony Kennedy, who also authored landmark gay rights decisions like *Romer v. Evans* and *Lawrence v. Texas*, wrote the majority opinion, in which the Court struck down Section III of DOMA. The constitutional basis for this ruling was based in Due Process, Equal Protection, and federalism.⁸ While this did not have the effect of legalizing same-sex marriage on a national level, it did require the federal government to recognize and provide benefits to legally married same-sex couples in the same way that it does opposite-sex couples. While not a broadly sweeping victory in the eyes of marriage equality supporters, most view it as an important step on the road to full federal legalization.

⁶ Hollingsworth v. Perry.

⁷ Dolan, Maura.

⁸ Liptak, Adam.

The same-sex marriage decisions have been widely viewed as landmarks for the Supreme Court and for social policy in America. But how important are the decisions in *Windsor* and *Perry*, really, in terms of causing social change in the United States? How do these decisions really affect marriage equality activist strategies and the political environment in which said activism operates? What is the tangible impact of these Court opinions?

With respect to real-world, political significance, these questions help us examine how the Supreme Court marriage equality decisions affect the current state and the future of marriage equality activism. This is important because same-sex marriage is a very controversial topic in our current political climate, and can perhaps be viewed as our era's equivalent to the Civil Rights Movement of the 1950s and 1960s. The tangible effects of the decisions are that the federal government now must recognize and provide benefits to same-sex married couples (due to *Windsor*), and that anti-marriage equality activists will likely find it harder to bring a suit claiming any damage caused to them by legalizing gay marriage (due to the lack of standing found in *Perry*). But how do these decisions affect activist strategies or the political landscape?

With respect to significance as a contribution to the literature surrounding the topic of the Supreme Court affecting social change, this would look at the indirect effects of Supreme Court decisions through activism and activist organizations. It will also examine the idea that indirect effects of Court decisions are just as important as direct effects of Court decisions.

Thus, the question guiding my research is: can the Supreme Court cause social change indirectly by affecting activist strategies and the political environment in which

activists operate, specifically in the case of marriage equality activism in the wake of *United States v. Windsor* and *Hollingsworth v. Perry*?

Can the Supreme Court Affect Social Change?

The question of the efficacy of the Supreme Court at affecting social change has been a central point of debate in the academic literature. Main theories regarding the issue can generally be categorized into one of two camps: on the one hand, that the Court can produce significant social change, on the other, that it nearly never can.

One of the seminal works claiming the latter – that the Court rarely, if ever, produces significant social change – is Gerald Rosenberg’s book *The Hollow Hope*. Rosenberg defines social change as, “policy change with nationwide impact,” which is a very broad definition of the term – what, exactly, constitutes “nationwide impact?”⁹ I find his definition to be loose enough that it is difficult for any litigative efforts to meet the standards that he sets for fulfilling what he defines as “significant social change.” I find a more workable definition of significant social change to be “a change in policy that changes the social status quo for a majority of a particular demographic group.” This demographic group could be Southern Blacks, who Rosenberg focuses on in his study on *Brown* and school desegregation; women, who Rosenberg focuses on in his study on *Roe* and other women’s rights issues; or the LGBT community, who Rosenberg focuses on in his study of early marriage equality litigation, and who I will be focusing on here. While this definition is certainly not perfect, it helps to narrow the scope of “significant social change” in a way that proves more useful for my purposes.

⁹ Rosenberg, Gerald N., 4

Rosenberg argues that the Court can only cause significant social change if it overcomes all of the three constraints laid out in what he refers to as the “Constrained Court View:” 1) The limited nature of constitutional rights, which can be overcome if there is “ample legal precedent for change;” 2) the lack of judicial independence, which can be overcome if the executive and legislative branches substantially support the change; and 3) the judiciary’s lack of powers of implementation, which can be overcome if there are high levels of public support or low levels of public opposition.¹⁰ Once these constraints have been overcome, at least one of four conditions must be met: 1) “Positive incentives are offered to induce compliance;” 2) “costs are imposed to induce compliance;” 3) “court decisions allow for market implementation;” or 4) “Administrators and officials crucial for implementation are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind.”¹¹ However, Rosenberg also claims that if court action manages to overcome all of these obstacles, it is more likely that the social change being seen is the result of public opinion or action on the part of the executive or legislative branches than it is the result of a Court decision.¹² He uses several case studies to illustrate his theory – that the Court is not an effective actor when it comes to creating social change – including a case study on gay rights activism and litigation up through 2004. He does raise the idea in each case study that Supreme Court decisions could indirectly lead to social change through “extra-judicial” influence, such as inspiring others to act on the issue and creating a favorable political

¹⁰ Rosenberg, Gerald N., 35-36

¹¹ Rosenberg, Gerald N., 36

¹² Rosenberg, Gerald N., 35

climate, but systematically argues against this idea in each instance.¹³ However, his methodology is a bit suspect when viewed from a standpoint that focuses more on political reality and subtleties as opposed to his focus on direct, quantifiable causal effects. He uses data and graphs to try and find direct causal links between Court decisions and specific outcomes that he deems important, such as media coverage or policies passed by the legislative branch. Such direct causal links in the way he uses them are rarely seen in the politics of social change, which tends to manifest itself as more of a domino effect, but even when he looks at “extra-judicial” effects of the Court, he refuses to acknowledge potential domino-like effects and the way that Court decisions affect activist group strategies and the political environment. This lack of acknowledgement is significant in this case because he *does* seem to view organizations and activist groups as strong actors when it comes to social change, but tends to claim that this court influence does not have a significant effect on these activists by pointing out that most activist groups and activities were started prior to the corresponding court decision. However, he does not discuss the idea of changed activist strategies or a different political environment in which activism operates, both of which could significantly affect the path of activist work surrounding an issue. Thus, it would follow that if Supreme Court decisions can be shown to affect activist strategies or the political environment in which activism operates, then the Court indirectly affects social change.

The idea of indirect social change being influenced by the Supreme Court through on-the-ground activism can be gleaned using the ideas presented by Doug McAdam, Sidney Tarrow and Charles Tilly’s 2001 work *Dynamics of Contention*. The authors

¹³ Rosenberg, Gerald N., 107, 229, 292, 303, 335, 355

focus on the idea that certain political conditions are much more conducive to certain types of activism than others, and that these conditions can be influenced by a variety of factors. This is particularly helpful because they introduce the idea that “general trends” can contribute to a final social environment that is particularly hospitable to certain types of social movements and social change, which helps counteract Rosenberg’s assertion that for Supreme Court decisions to be significant on a social scale, they must create direct and statistically visible change.¹⁴ In reality, Court decisions often build off of one another and Congressional legislation, encouraging or discouraging social trends in a way that can impact the efficacy of certain social movements. Regarding the same-sex marriage issue, it could be said that *Perry* and *Windsor* have perhaps created a more favorable environment for marriage equality activism (perhaps by specifically strengthening a particular “frame”) and a less favorable environment for anti-marriage equality activism. Thus, the Court can affect activist activity, and therefore indirectly cause social change, even if court decisions do not directly lead to strategy changes on an organizational level.

Finally, there are theories specifically dictating that the Courts are a significant actor when it comes to social change. A rather direct opposing view to Rosenberg, and one that is more supportive of my approach, is that of Michael McCann in his book *Rights at Work*. McCann specifically focuses on pay equity between the sexes, but his general look at the effectiveness of litigation in bringing about change in that arena is applicable. While he notes that he began his research on pay equity expecting to end up agreeing with the conventional approach – the approach espoused by Rosenberg – he

¹⁴ McAdam, Doug, Sidney G. Tarrow, and Charles Tilly., 94

explains that the course of his investigation led him to believe that legal norms both significantly affected the fight for pay equity and that activists gained power from litigation, “despite only limited judicial support.”¹⁵ While this positive connection between activism and the Court is useful for my framework, it does not look at how the Court affects activism strategies in any direct manner, and I think any effects of this sort are important to look at. Similar but less specific theories regarding the Court affecting social change, seen in books like Gordon Silverstein’s *Law’s Allure* and Robert Kagan’s *Adversarial Legalism*, argue that the Court is usually efficient at producing social change in a way that political processes are often not, which is why groups seeking rights tend to choose a litigative path. Both the negatives and positives of this push towards litigation in a general or legal sense are discussed, particularly in Kagan’s theory of Janus-faced legalism.¹⁶ However, these theories too do not discuss the way in which the Court influences activism strategies or the political environment specifically in a way that creates a change in how organizations affect or attempt to affect public opinion, policy, or mobilization. They also tend to focus on the Court being able to make change in a direct manner, rather than examining in any depth the idea of the Court affecting change in an indirect manner by affecting the way in which activist organizations operate.

Social Change Through Indirect Action

Instead of attempting to prove that the Supreme Court can cause significant social change in a direct manner, as in, by directly affecting policy or public opinion, I rather seek to discover the ways in which the Court can affect policy, public opinion, and other

¹⁵ McCann, Michael W., 4

¹⁶ Kagan, Robert A., 31

indicators of significant social change by affecting activist group strategies, or through affecting the political environment in a way that makes activism more or less effective than it may have been prior to a Court decision. While I do not discount the idea that the Court can affect change in a direct manner, or even the idea that it cannot affect direct change at all, I will not be focusing on those questions. I will also not be delving into the concept of “judicial activism,” or whether or not the Court *should* be able or willing to make significant social changes, which is another discussion altogether. Indirect effects of the Supreme Court are often discussed as causing chain-of-events that lead to social change, or by causing significant backlash that can actually hamper social change. Instead of looking at a long chain of events potentially sparked by a Court decision, or the negative effects it potentially produced, I will be focusing on how decisions, specifically those decisions handed down in *United States v. Windsor* and *Hollingsworth v. Perry*, affect the strategies of marriage equality organizations in terms of litigation, attempts to create policy, mobilization, and the shaping of public opinion in their favor, as well as looking at how the political environment has shifted in a way that makes their activism more effective. I chose to focus on these cases in particular because of the nature of the decisions that were handed down by the Supreme Court in each case. Since the decisions were not broad and sweeping in the sense that they legalized same-sex marriage on a national level, but did make some fairly significant changes to existing law (in the case of *Windsor*) and set precedent making it more difficult for opponents of same-sex marriage to challenge legalization in courts (*Perry*), they affect the political environment within which activism groups operate.

My hypothesis is that the Supreme Court's decisions in *Windsor* and *Perry* have already affected the strategies of marriage equality organizations, and/or have affected the political environment in a way that organizations can either use to their advantage or that puts them at more of a disadvantage relative to pre-*Windsor* and *Perry*. This contributes to the literature on the topic of the Supreme Court as an actor of social change in a more novel way by examining not only the way in which the decisions in *Perry* and *Windsor* have potentially encouraged one side of the same-sex marriage debate, but also the way in which they have potentially made activism more challenging for the other side. This both avoids the direct cause-and-effect approach favored by Rosenberg, which has significant flaws when it comes to acknowledging many of the nuances of political and social change, but also potentially extends McCann's theory by focusing on another issue in which judicial action may influence the operations of activist groups.

Methodology

To support my claim, I have conducted interviews with members of administrative leadership in LGBT rights activism organizations. In these interviews, I asked a series of questions about how the decisions in *Windsor* and *Perry* have affected organizational strategies, and what, if any, change in the political structure has been perceived by the members of the organization. While I am not looking at direct social change by the Supreme Court as a phenomenon that definitely does or definitely does not exist, I think that the perception of it existing can affect how organizations structure their activist activities within their communities. I also asked respondents if they think that the decisions have affected how their opposition can operate going forward, and how their

ability to operate has been helped or hindered. Respondents have not been identified by name, but I have listed the names of the organizations and provided a brief description of each one. A list of questions that were asked of respondents can be found in the appendix.

By receiving responses from a variety of activist groups, I have been able to gain a good idea of the general current of organizational change, change to the political environment, or lack thereof. I have interviewed members of organizations that operate both on a national and state level, which provided a breadth of information from which I have been able to conduct analysis and draw my conclusions. I have attempted to reach the broadest base possible of organizations by reaching out to prominent national marriage equality groups, the top marriage equality organization in each state that has not legalized same-sex marriage, and the top marriage equality group in states that have legalized marriage equality since the decisions were released in June 2013. I have included feedback from the groups that responded to my request for an interview. I also attempted to reach out to several anti-marriage equality organizations in order to get a sense of how *Windsor* and *Perry* have affected activism on both sides of the issue, but did not receive responses from any of the organizations that I contacted. While this information is by no means all encompassing, it provides enough breadth to spot trends and commonalities or divergences within each sub-category of activist organizations.

I believe that interviews are the best way to approach my inquiry and analysis purely due to the nature of my research. Since I wanted to study how the Supreme Court indirectly creates social change by affecting activism strategies and the political environment, the most direct way to determine if activist groups acknowledge that their strategies are affected by Court decisions, or if they have perceived a change in the

political environment, was to ask them their thoughts on the matter in order to assess the perceived openings and closings in the political structure caused by the decisions. If they believe that their strategies or the political environment have been measurably affected by the decisions in *Windsor* and *Perry*, then my hypothesis will be supported. Merely doing research of past cases would not provide the direct examination of the subject that I think is necessary in this type of inquiry.

Organization

This project will be organized in such a way as to 1) show that the LGBT rights movement has seen changes in the political environment in the past, both negative and positive, due to non-marriage related Supreme Court litigation; 2) show that Rosenberg's analysis of litigation and same-sex marriage is both outdated and much too narrowly focused; and 3) show that the Supreme Court decisions in *Hollingsworth v. Perry* and *United States v. Windsor* have directly caused activist organizations to change their organizational strategies, or have influenced the political environment in a way that activists has made their activism more effective.

Chapter Two will look more in-depth at the social organization theory on which I am basing my argument of changing political environments, examine how LGBT rights litigation in the past has affected the political environment for LGBT activism, and push back on Rosenberg's analysis of same-sex marriage and litigative strategies. Chapter Three will feature brief overviews of the organizations that I have interviewed, including their goals and specific strategies, and discuss whether or not those strategies have changed in the wake of the decisions in *Perry* and *Windsor*. Chapter Four will analyze

more thoroughly the data that I have gathered from the interview in order to identify trends and consensus among organizations regarding changes to the political environment, and how these changes have affected marriage equality activism and will continue to affect it going forward. In the concluding chapter, I will review the evidence and analysis to come to my final conclusion, which is that while organizational strategies have not significantly changed, the political environment in which organizations operate has; and why this is important for understanding the Supreme Court's effect on social change and its role in the American political arena, particularly in the area of same-sex marriage.

Conclusions

In this chapter, I have laid out the background of the Supreme Court decisions in *Hollingsworth v. Perry* and *United States v. Windsor*, hopefully to help to understand the perceived or real influence of these decisions at the time of their release. I have also explained why the question of whether or not the Supreme Court affects social change is important, and whether it can produce indirect social changes that have effects that are just as important as direct social change. I have outlined the various arguments surrounding the question of the efficacy of the Court to affect change, why my approach will add to this literature in a meaningful and productive way, and why my methodology is the best way to achieve my particular goals.

To begin to tackle the question that is laid out before me for my research, I must first look at the historical precedent that exists for believing that Supreme Court decisions have affected the political environment surrounding LGBT activism in general, and

discuss why Rosenberg's analysis of the situation is flawed based on ignorance of the indirect effects of early marriage equality litigation. I hope to convince the reader that these effects are and have been significant, particularly within the politically mainstream gay rights and marriage equality movements.

Chapter 2: Framework

In the introductory chapter, I briefly discussed Gerald Rosenberg's theory that the Supreme Court can never affect social change through its decisions, whether directly or indirectly. For him, this theory extends to the fight for same-sex marriage; he argues that litigation has never helped, and has perhaps hurt, the push for marriage equality. His analysis of the courts and marriage equality only goes up until 2004 (and was published in 2008), long before any of the federal court cases were even filed, but his analysis of the state courts and litigation is as grim as his analysis of federal court involvement in the civil rights movement and the feminist movement. While I am not seeking to challenge Rosenberg's assertion that the courts cannot affect social change directly, I am challenging his assertion that the courts cannot even affect social change indirectly through the influence of public opinion, legislators, activism and other more "effective" vehicles for social change. While I will be getting into the specifics of my argument – that the Supreme Court decisions in *Perry* and *Windsor* have affected the political environment in which activism operates – in later chapters, this chapter will explore more deeply Rosenberg's arguments on why litigation has not been useful to the marriage equality movement and LGBT rights in general, and will push back on his argument through a framework of social organization theory, historical evidence of court decisions affecting the environment in which LGBT activism has operated, and events within the LGBT rights and marriage equality movement that have occurred since his 2004 analysis.

Social Organization Theory

When I say that I will be using the framework of social organization theory, I mean that I will be using Doug McAdam, Sydney Tarrow, and Charles Tilly's theory of contentious politics and how social events can alter the political atmosphere in which contentious politics are occurring, which I touched on very briefly in the previous chapter. McAdam, Tarrow, and Tilly define contentious politics as, "episodic, public, collective interaction among makers of claims and their objects when (a) at least one government is a claimant, an object of claims, or a party to the claims and (b) the claims would, if realized, affect the interest of at least one of the claimants."¹⁷ In this case, the claimants involved are the LGBT community and the governments of the individual states and the United States federally. While the LGBT rights movement was originally a fully transgressive contention, which means that one or more of the parties is a new political actor or is using unprecedented means, it would now be classified as increasingly contained contention, wherein "all parties are established actors employing well-established means of claim making."¹⁸ Certainly, there still remain some elements of the movement that could be classified as transgressive, but overall, this change in classification itself shows how the landscape of LGBT rights activism has changed since it first appeared as a cohesive movement.

A useful tool provided by McAdam, Tarrow, and Tilly in regards to understanding how Supreme Court decisions can affect social change through indirect channels is the following question: "How, and how much, does [an event] affect: (a) opportunity bearing on potential actors, (b) mobilizing structures that promote

¹⁷ McAdam, Doug, Sidney G. Tarrow, and Charles Tilly, 5

¹⁸ McAdam, Doug, Sidney G. Tarrow, and Charles Tilly, 7

communication, coordination, and commitment within and among potential actors, (c) framing processes that produce shared definitions of what is happening?”¹⁹ For my purposes, the event in question would be the Supreme Court decisions in *United States v. Windsor* and *Hollingsworth v. Perry* and how they affect the political environment for LGBT activism in the realm of marriage equality as defined by (a), (b), and (c), but also in regards to any other important factors that appeared in my interviews with respondents from various LGBT activist organizations. These effects to the political environment can be either hindering or helpful, as both would affect the way in which activism is conducted and received.

Indirect Effects of Litigation on the Broader LGBT Rights Movement

While Rosenberg focuses his analysis of litigation and LGBT rights solely on marriage equality, the push for marriage equality is not the first time that LGBT activists have seen effects on the political environment in which they are operating from court decisions. While effects, both direct and indirect, have come from more obvious cases like *Bowers v. Hardwick*, *Romer v. Evans*, and *Lawrence v. Texas*, all of which I will discuss, they have also come from less obvious cases like *Griswold v. Connecticut*. *Griswold*'s new finding to a constitutional right to privacy caused the American Civil Liberties Union to reconsider its stance on governmental legal restrictions on homosexuality itself. Previously, the ACLU had refused to get involved in burgeoning LGBT activism, and its support, however limited, was an enormous boon for the

¹⁹ McAdam, Doug, Sidney G. Tarrow, and Charles Tilly, 17-18

movement,²⁰ and has provided the LGBT community with an ally that has been incredibly important over the years. This could be an example of what McAdam, Tarrow, and Tilly refer to as “production of shared definitions” with regard to framing, which is the process by which movements define and present themselves and their aims.²¹ The Court’s decision in *Griswold* changed the way in which the ACLU viewed LGBT rights in a way that, to them, justified their newfound involvement with the movement.

While *Bowers* was definitely a blow to the LGBT community in an extremely direct way, with its ruling that a fundamental right for consenting adults to engage in same-sex sodomy was not protected under the Constitution.²² The 1986 ruling also had indirect effects, both negative and positive, on the LGBT rights movement at the time. Negatively, it made some aspects of activism more difficult for the movement, as many lower court judges used the decision in order to justify various discriminatory practices. On the other hand, *Bowers* made LGBT rights much more visible across the country; resulted in an outpouring of financial support to groups like Lambda Legal, allowing them to expand; and inspired the ACLU to form the Lesbian and Gay Rights Project, which was the first national civil rights movement to endorse marriage equality.²³ *Bowers*’ legal precedent was unarguably a hindrance to the movement, but the backlash from supporters of LGBT rights provided a small silver lining to an otherwise very unfortunate ruling. This isn’t to say that *Bowers* would not have been much more helpful to the LGBT movement had it been decided differently, but simply that the loss in the court was not, in retrospect, a total loss for the movement.

²⁰ Klarman, Michael., 6

²¹ McAdam, Doug, Sidney G. Tarrow, and Charles Tilly, 16-18

²² *Bowers v. Hardwick*.

²³ Klarman, Michael., 38

Romer and *Lawrence* were both victories for the LGBT movement, and both cases also affected the political environment in which activism was being conducted in addition to their more overt positives. *Romer* – which in 1996 struck down a Colorado state constitutional amendment preventing any anti-discrimination ordinances from applying to LGBT individuals within the state under the argument that simple animus was the main motivation for the amendment’s passage²⁴ – deterred similar referenda from being attempted in the future, marked a rejection of moral disapproval as a legitimate reason for discrimination against LGBT individuals, and was the first example of the Supreme Court defending LGBT rights.²⁵ Deterring the opposition from attempting similar referenda in the future meant that LGBT activist groups did not have to spend their time fighting such ballot measures, which could have taken up a significant chunk of their energy and resources had such referenda caught on across the country. The Supreme Court showing emerging support for LGBT rights (from Justice Kennedy’s first of now three opinions expressing such support) under the argument that moral disapproval did not justify discrimination was a turning point for the LGBT movement legally and culturally; since the Court does not like to get too far ahead of public opinion, this decision was an indicator that the overall trend was towards more recognition of LGBT rights. This broader significance means that the ruling, which may seem to mainly have affected Colorado, had a much wider affect on the political environment across the country.

Finally, in 2003, *Lawrence* overturned the ruling in *Bowers*, holding that a Texas anti-sodomy law targeting consensual same-sex relations violated the Fourteenth

²⁴ *Romer v. Evans*.

²⁵ Klarman, Michael., 70

Amendment.²⁶ This opinion also focused on the idea of moral disapproval not being a sufficient state interest for such a discriminatory law, and that a law like this would only be passed with animus as the intent, following the precedent set by *Romer*. The main change to the political environment affected by *Lawrence* was an even greater focus on recognition of same-sex relationships and eventual marriage equality;²⁷ this new focus on marriage equality was heightened due to the *Goodridge* litigation in Massachusetts during the same year. This heightened awareness signaled the shift to a focus on marriage equality as an actually attainable goal – perhaps not any time in the near future, or even perhaps in the next twenty years, but certainly within the lifetimes of the activists working on the issue at the time. At the same time, it heavily mobilized the opposition, with religious conservatives calling for a federal constitutional amendment banning same-sex marriage, which President George W. Bush supported.²⁸ Fortunately, this amendment never gained any real traction in Congress, but it definitely marked the shift in the public consciousness towards focusing on LGBT relationship recognition and the eventuality of marriage equality.

While Rosenberg does not discuss any of the above-mentioned cases in his analysis of litigation and marriage equality, these form a solid basis for the claim that litigation has been extremely important in shaping the political environment of LGBT activism, even if the litigation’s direct effects were not what Rosenberg would qualify as “significant social change.”

²⁶ *Lawrence v. Texas*.

²⁷ Klarman, Michael., 87

²⁸ Klarman, Michael., 88

Baehr, Baker, and Goodridge: Rosenberg's Analysis of Early Marriage Equality

Litigation

Rosenberg focuses heavily on the Hawaii same-sex marriage cases: *Baehr v. Lewin* in 1993, which ruled that the state's refusal to recognize same-sex marriage without a compelling reason violated the state's equal protection guarantee; and *Baehr v. Miike* in 1996, which ordered the Department of Health to begin issuing marriage licenses to same-sex couples.²⁹ Rosenberg focuses mainly on the backlash that these cases inspired from the opposition to marriage equality, which was very successful due to a very low level of public support for same-sex marriage at the time – 68% of Americans opposed gay marriage in 1993.³⁰ Rosenberg is not wrong about the backlash, or the fact that these cases were probably ill-conceived and much too far ahead of public opinion to be successful – in the wake of the two *Baehr* cases, states started passing anti-marriage equality state amendments and statutes, which had not really existed prior to the Hawaii cases. They also inspired the federal legislature to pass the Defense of Marriage Act, or DOMA, in 1996, which marked the first time that the federal government had gotten involved in the definition of marriage, a category traditionally left to the states.³¹ Hawaii voters eventually passed a state constitutional amendment in 1998 that gave the state legislature the power to define marriage however they chose for the state, which at that time was defined as between a man and a woman only.³²

While Rosenberg is right that these cases caused a lot of issues for the LGBT rights movement, and created barriers to marriage equality that had not previously existed, he

²⁹ Rosenberg, Gerald N., 343

³⁰ Klarman, Michael., 59

³¹ Klarman, Michael., 61

³² Rosenberg, Gerald N., 343

misstates that these cases were part of the strategy for LGBT rights activist organizations at the time, as most political strategists involved with the movement thought that these cases would galvanize the opposition, that litigative strategies should be saved for the future, and that marriage was not a realistic short-term goal.³³ He also glosses over the various benefits that these cases *did* provide for the LGBT community and for the trajectory of marriage equality in the United States. The same ballot measure that Hawaii voters passed creating the amendment allowing the state legislature to define marriage (which, incidentally, was a very generous wording compared to other state amendments barring same-sex marriage) also granted sixty out of the 160 state benefits associated with marriage to registered same-sex couples, including property rights, hospital visitation and health care decisions, and inheritance without a will.³⁴ Rosenberg deems this a failure through the lens of marriage equality as the end goal. But considering that marriage equality was not yet a strategic aim of LGBT organizations at the time, these benefits were an amazing step forward for the LGBT community in Hawaii. The cases also put marriage equality into the public consciousness and put it more on the radar of LGBT activists in general.³⁵ While public support was still extremely low, it made marriage equality an option for future activism in a way that it had not been before, and got people to start talking about it.

Now that marriage equality was at least on the table, other state-level litigation started popping up, with the most notable being *Baker v. Vermont* in 1999 and *Goodridge v. Department of Public Health* (Massachusetts) in 2003. Rosenberg dismisses *Baker's*

³³ Klarman, Michael., 52, 55

³⁴ Rosenberg, Gerald N., 344

³⁵ Klarman, Michael., 75

effectiveness because it only produced civil unions in Vermont as opposed to marriage equality.³⁶ This is another example of the issues that arise with Rosenberg's broad definition of significant social change and a fairly static end-point. Civil unions like the ones created in Vermont were unprecedented; they gave same-sex couples that entered them all of the state marriage benefits, simply without the title.³⁷ This was seen as an enormous victory in the LGBT community, even if Rosenberg does not see it as such. Vermont later became the first state to legalize marriage equality through legislative means in 2009.³⁸

Rosenberg's analysis of *Goodridge* is one where time has not done him any favors in terms of strengthening his argument. His argument against its effectiveness was weak at best even in the political climate of 2008 – he acknowledges that the state constitutional amendment banning same-sex marriage in Massachusetts was unlikely to come to fruition, and falls back on the fact that same-sex couples married on a state level still did not enjoy federal benefits.³⁹ The federal benefits aspect is an argument entirely separate from the success of the goals of the *Goodridge* litigation, which were achieved, and has also since been rendered a moot point following *Windsor*. *Goodridge* seems to be a clear example where it would be easy to say, even under Rosenberg's strict system of constraints and conditions, that litigation produced significant social change on a direct level, while also having indirect effects. The most significant indirect effect of *Goodridge* and legalized same-sex marriage, even on the level of one state, was that it started dismantling the opposition's argument that same-sex marriage would lead to societal

³⁶ Rosenberg, Gerald N., 347

³⁷ Klarman, Michael., 78

³⁸ Richardson, Valerie.

³⁹ Rosenberg, Gerald N., 350

decay and cause opposite-sex marriages to suffer, and allowed the public its first look at stable same-sex couples and families.

Finally, Rosenberg looks at some of the indirect effects that he acknowledges litigation may be able to have, including an effect on public opinion. He notes the significant increase in public support for LGBT rights over the past few decades, but emphasizes that, “Importantly, these changes are not primarily the result of litigation. Rather, they are the result of a changing culture.”⁴⁰ This observation is certainly true to an extent, but it ignores the fact that the process of changing public opinion is cyclical, and that events build on each other and do not occur in a vacuum. As I pointed out above, *Goodridge* influenced public opinion in favor of same-sex marriage on some level by making the idea of a married same-sex couple more normalized and removing the bite of arguments that legalized marriage equality would lead to some sort of societal collapse. Opposition to marriage equality within a state, unlike opposition to abortion and *Roe v. Wade*, seems to significantly decrease once marriage equality has been implemented, and sometimes the most efficient way to implement it is through a litigative pathway. This was certainly the case in Iowa, which was one of the more surprising states to legalize same-sex marriage early on in 2009. The state Supreme Court ruled in favor of marriage equality, and despite unfavorable public opinion towards same-sex marriage in the state, the democratically controlled state legislature refused to start the process to overturn the ruling. With no options to re-restrict marriage to heterosexual couples only, the opposition eventually just stopped pushing back despite public opinion initially being in

⁴⁰ Rosenberg, Gerald N., 415

their favor.⁴¹ Thus, litigation, legislation, and cultural shifts all play important roles, with each influencing the others.

Conclusions

This chapter has shown that even if one accepts Rosenberg's argument that litigation can never really affect significant social change, there have been many key indirect effects of litigation on the political environment in which LGBT activism has operated, making a case for litigation affecting social change through more indirect channels. Would Rosenberg's analysis of same-sex marriage and litigation be different were he to release an updated edition of his argument today? It is impossible to know for sure, but I could see him potentially arguing that *Windsor* and *Perry* were not examples of court decisions creating significant social change; *Perry* on the argument that it only directly affected California, and *Windsor* on the argument that it did not, in fact, legalize same-sex marriage on a national level. However, could he argue that these cases have not had a significant indirect effect, namely by changing the political environment in which LGBT activism is currently operating? I will explore this issue in depth in the following chapters by looking at the ways in which respondents that I interviewed from several LGBT rights organizations say that the decisions have changed the landscape in which they are fighting for equality.

⁴¹ Klarman, Michael., 127

Chapter Three: Organizational Profiles and Changes in Strategy

While it seems that there is a precedent for Supreme Court decisions indirectly affecting LGBT activism – perhaps first with the effect that *Griswold v. Connecticut* and the finding of a right to privacy had in encouraging the ACLU to begin assisting with litigation in the gay rights movement – it is important to determine if the most recent Supreme Court decisions in *United States and Windsor* and *Hollingsworth v. Perry* have had an effect on current activism efforts. I decided that the most effective way to determine this was to interview leadership members of LGBT rights groups and see what their perspectives were in terms of how their strategies have, or have not, changed in the wake of the decisions, and if they have perceived any change, positive or negative, in the political environment in which they conduct their activism.

My goal for the interviews that I conducted was to gather a breadth of information from a variety of different organizations that perform activism campaigns for marriage equality and other LGBT issues. These organizations fell into four main categories: national organizations and state-based organizations. Among the state organizations, there were those from states that have not yet legalized marriage equality and those from states who have seen marriage equality legalized since the Supreme Court handed down their decisions in *Perry* and *Windsor* on June 26, 2013. I wanted to look at both national and state organizations to see if responses and reactions to the decisions varied based on organization scale, scope, or focus. Among the state organizations, I chose states that have not yet legalized marriage equality to see how their strategies may have changed going forward or how they view the political environment as having changed as they continue to push for marriage equality and other LGBT rights. I spoke to states that have

legalized marriage equality since the decisions came down to determine if the decisions had any direct effect, in their mind, on marriage equality becoming legal in their states, and how exactly the decisions were able to assist them in pushing forward in the legalization process. I chose not to interview organizations in states that had legalized marriage equality before the decisions – while those organizations are still working hard on LGBT issues that have yet to be solved in their own state and across the country, my focus was on marriage equality and how that particular area of activism was shaped by the Court’s decisions. In an attempt to gather data from both sides of the marriage equality debate, I did try to get in contact with several anti-marriage equality organizations, including Family Research Council, the Thomas Moore Law Center, Concerned Women for America, and the National Organization for Marriage. However, I was unable to get in contact with anyone at these organizations to schedule an interview.

This chapter will provide a look into each of the ten organizations from which I was able to interview a representative. On the national side of things, I interviewed respondents from Equality Federation, American Foundation for Equal Rights (AFER), Marriage Equality USA, and the National Equality Action Team (NEAT), a subsidiary organization of Marriage Equality USA. On the state side of things, I interviewed respondents from Equality Texas, Equality Ohio, Equality North Carolina, Equality Alabama, Equality Illinois, and Equality Hawaii. I will briefly describe the background and goals of each organization before moving on to discussing whether these organizations’ strategies seem to have changed since the decisions, and if so, how. The information that I gathered from the interviews regarding changes in the political environment will be analyzed in more depth in the following chapter. I will start with the

national organizations before moving onto the state organizations, which will further be organized between states which had not yet legalized marriage equality at the time of our interview, and states that had seen legalized marriage equality in the time between the June 26 decisions and our discussion. I will then look at some of the strategies that organizations have said that they are using in the continuing push for marriage equality.

National Organizations

Equality Federation

Equality Federation is a national organization that functions quite differently from most national LGBT organizations – while they do focus somewhat on marriage equality and other LGBT issues on a national level, they put most of their energy into helping state organizations with their local campaigns, as they believe that change starts through grassroots activism in local communities.⁴² Many state-level organizations are also member organizations of the federation; all of the state organizations that I spoke with count themselves as members. Equality Federation lends assistance to state organizations through providing them with resources, including counsel regarding specific state issues, helping to train leadership and instruct state leaders on how to run a successful organization, and developing policy programs for states at all different levels of the fight for LGBT equality.⁴³ In the words of my respondent from the organization, “We back momentum in the state for winning the freedom to marry, and our role is to strengthen those state-based organizations that are making the push to win marriage.”⁴⁴ They

⁴² "Equality Federation."

⁴³ "Equality Federation."

⁴⁴ Equality Federation Respondent.

contribute to national efforts, such as advocating before Congress or the President, but their focus is on changing the hearts and minds of local communities and legislators.

American Foundation for Equal Rights (AFER)

The American Foundation for Equal Rights, or AFER, was founded in 2009 as the sole sponsor for the litigation in the various *Perry* cases. The organization's goal is "full federal marriage equality for all Americans," and they are currently pursuing a federal court case in Virginia challenging that state's Marriage Amendment,⁴⁵ which bars same-sex marriage (and which was struck down as unconstitutional by a federal judge in February 2014).⁴⁶ AFER focuses solely on litigative tactics as an organization in the fight to win marriage equality.

Marriage Equality USA

Marriage Equality USA supports the national movement for marriage equality through a variety of methods, including assisting state organizations with their campaigns for marriage equality, media campaigns to tell people about the personal stories of those affected by marriage discrimination, community gatherings and rallies to raise awareness, and educational outreach to educate the public about the realities and benefits of marriage equality.⁴⁷ My respondent from the organization noted that organizational activities surrounding the decisions had included organizing outside of the federal courthouse and the Ninth Circuit Court of Appeals in San Francisco during the trials and decisions in

⁴⁵ "American Foundation for Equal Rights."

⁴⁶ Wolf, Richard.

⁴⁷ "Marriage Equality USA."

Perry v. Schwarzenegger and *Perry v. Brown*, and in Washington D.C. before the decisions were released in *Hollingsworth v. Perry* and *Windsor*. This served the purpose both of being at the scene of the action when the decisions were released and being able to provide a public face of the issue to the media.⁴⁸ Getting as many personal stories into the public eye as possible to encourage greater understanding and change hearts and minds is one of the organization's main focuses. This led them to contribute an amicus brief to the Supreme Court for the *Perry* case, which placed minimum emphasis on legal argumentation and centered mainly on the stories of couples that had experienced "both the joy of marriage, as well couples who had experienced the pain of having it denied."⁴⁹ My respondent also noted that some of the language used by Justice Kennedy in the *Windsor* decision strongly echoed the language and sentiment that Marriage Equality USA had put into their brief.

National Equality Action Team (NEAT)

The National Equality Action Team, or NEAT, is a subsidiary of Marriage Equality USA focused on assisting local organizations with their campaigns for marriage equality by providing volunteers and other resources. In their own words, "NEAT supports and works with state leaders of active marriage equality campaigns by recruiting, training, and supporting volunteers from across the country."⁵⁰ This means using recruited volunteers to engage in voter contact – mainly in the form of phone banking, as most volunteers are located outside of the states in which the campaigns are

⁴⁸ Marriage Equality USA Respondent.

⁴⁹ Marriage Equality USA Respondent.

⁵⁰ "National Equality Action Team - NEAT."

taking place – in order to provide assistance to individual state campaigns.⁵¹ While Marriage Equality USA is looking more at activism and changes on the national level, NEAT is more focused on winning states and building a critical mass of states that have legalized marriage equality.

State Organizations

Equality Texas

Equality Texas, like all of the other state organizations that I interviewed, is a member organization of Equality Federation. The organization consists of two components: Equality Texas Foundation, which conducts polling and educates the citizens of Texas regarding policies and their effects on the LGBT community; and Equality Texas, which lobbies the Texas legislature to pass bills that help prevent discrimination against LGBT identified people and repeal discriminatory laws.⁵² My respondent from the organization said that while they are definitely working on marriage in Texas, most of their focus is currently on other issues affecting LGBT Texans, including extending Texas's affirmative defense law – a legal defense for teenaged couples accused of indecent activities with a minor while in a consensual relationship – to apply to same-sex couples as well as opposite-sex couples.⁵³

⁵¹ NEAT Respondent.

⁵² "Equality Texas."

⁵³ Equality Texas Respondent.

Equality Ohio

Equality Ohio was founded in response to the state constitutional amendment banning same-sex marriage and civil unions in 2005. The organization focuses on “changing hearts and minds” of Ohioans on the issue of marriage equality, and does a lot of organizing around legislative measures in the Ohio legislature.⁵⁴ As stated by my respondent from the organization, “Currently [our main goal regarding marriage equality] is to educate Ohioans on the importance of respecting the dignity of all marriages.”⁵⁵

Equality North Carolina

Equality North Carolina is made up of three different sub-branches: Equality NC, the parent organization focused on lobbying in the legislature; Equality NC Action fund, a PAC that works to fund the campaigns of candidates favorable to LGBT rights; and Equality NC Foundation, which focuses on education regarding LGBT issues in the state of North Carolina.⁵⁶ My respondent works with both Equality NC and Equality NC Foundation. Their work has become more challenging in recent years due to a political shift in the North Carolina legislature that made the governing body overwhelmingly conservative.⁵⁷

Equality Alabama

Equality Alabama works to promote equality for LGBT individuals “where they work, where they live, where they learn, and where they play” – this means focusing on

⁵⁴ "Equality Ohio."

⁵⁵ Equality Ohio Respondent.

⁵⁶ "Equality NC."

⁵⁷ Equality NC Respondent.

workplace discrimination, public accommodation discrimination, school anti-bullying initiatives, and promoting equality in the social sphere.⁵⁸ Equality Alabama lobbies the Alabama legislature in order to promote equality issues, and has recently been building a business coalition by focusing on the ways in which increased equality for the LGBT community in the state would benefit Alabama and all of its citizens economically.⁵⁹

Equality Illinois

Illinois is one of the several states that have seen legalized marriage equality since the Supreme Court handed down their decisions in *Windsor* and *Perry* in June 2013. This certainly doesn't mean that Equality Illinois's work is done – as the oldest equality organization in Illinois, founded in 1991, the organization is involved with a variety of other issues that affect LGBT individuals in the state besides marriage.⁶⁰ However, up until the Illinois legislature passed the Religious Freedom and Marriage Fairness Act in November, Equality Illinois was heavily involved in ensuring that the bill passed through lobbying legislators and educating the voters of Illinois that marriage equality mattered.

Equality Hawaii

Equality Hawaii, the final organization I interviewed, focuses mainly on legislative lobbying and educating the citizens of Hawaii about LGBT equality issues through methods like media campaigns and one-on-one discussions.⁶¹ As one of the states to pass marriage equality following the June decisions, the organization has also

⁵⁸ Equality Alabama Respondent.

⁵⁹ Equality Alabama Respondent.

⁶⁰ "Equality Illinois."

⁶¹ "Equality Hawaii."

been able to focus more of their energy on key equality measures in recent months: currently, they are working on a comprehensive safe-school bill that gives a comprehensive plan for preventing bullying in schools, especially based on gender identity and sexual orientation.⁶² However, before marriage passed in the state, they were involved with the legislation and lobbying every step of the way.

Strategies

National Organizations

Overall, the sense that I took away from the interviews is that broader strategies have not changed significantly in the wake of *Windsor* and *Perry*, although tactics for carrying out these strategies may have shifted. My respondent from Equality Federation said that while the decisions have not affected Equality Federation’s larger strategies of working with state organizations on their local campaigns, for marriage equality as well as other LGBT issues, he noted that he had seen an uptick in state court cases across the country. “At this point, there’s a case in nearly every state. Prior to the decisions, we were not working with our state groups around how to be involved with a court case. Post-decisions, that is absolutely the reality we’re in; state-based organizations... are dealing with these court cases... but because they are not legal groups, they come to us for guidance and expertise on how they can better support the legal efforts that are in play.”⁶³ This would be an example of tactics shifting – the focus has become more litigation-centered – without the overall strategy of supporting state-based organizations changing.

⁶² Equality Hawaii Respondent.

⁶³ Equality Federation Respondent.

My AFER respondent said that since the organization's focus is on litigation, the strategies of the organization have not changed, although they would likely be focusing on different issues if the Supreme Court had decided the *Perry* case on its merits in a way that extended marriage equality to the country as a whole. My respondent from AFER did speak to the way that their case has, in his eyes, affected marriage equality litigation, however: "When we went to trial, it was the first time that this issue was put on trial [in federal court], and so now there's precedent out there... since our case was filed, now you have sixteen or seventeen other cases in other states that have been filed in federal court."⁶⁴ This would indicate a shift in general strategies across the movement for winning marriage equality, even if AFER as an organization has largely stayed with the same strategies.

NEAT's respondent said that she thought that the decisions in *Windsor* and *Perry* had not directly affected NEAT's organizational strategies – similar to what was said by Equality Federation. "The strategy before and the strategy after is, we want to win way more states, if we win more states, then the Supreme Court will feel safer doing what they eventually, legally and constitutionally, will do."⁶⁵ She does believe that the Supreme Court will ultimately decide the national solution regarding marriage equality, as many states will be recalcitrant to the bitter end. She says that given this stubbornness from certain states, winning a critical mass of states before that final decision will help prevent significant backlash from opponents: "In *Roe v. Wade* in 1973, and *Brown v. Board of Education* in 1954, the Supreme Court was seen as being ahead of the country, or taking too much of an activist position on a social issues, and so some argue that what

⁶⁴ AFER Respondent.

⁶⁵ NEAT Respondent.

that does is that it stops conversation, it stops the consensus building process.”⁶⁶

Avoiding extreme backlash at this stage in the marriage equality movement is crucial, since backlash against marriage rights would likely lead to significant backlash against, and difficulty attaining, other extremely significant rights for the LGBT community, including many transgender rights and non-discrimination rights. The backlash caused across the country by the 1993 and 1996 decisions in *Baehr*, discussed in the previous chapter, shows the challenging consequences that a premature decision on marriage equality could bring about. NEAT’s focus on building a strong critical mass on a state-by-state basis reflects this caution regarding pushing the Supreme Court to make a decision that would potentially not fit well with public opinion.

In general, it seems that national organizational strategies stayed largely the same in the wake of the decisions, something that held true with state organizations as well. There are some notable points, however: the strategy of “changing hearts and minds,” and the difference in political opportunities between states that have since legalized marriage equality and states that have yet to do so.

Changing Hearts and Minds

“Changing hearts and minds” was the phrase that kept appearing repeatedly in interviews when respondents described what their current strategies are for promoting marriage equality. This strategy focuses on sharing personal stories of members of the LGBT community who are affected by the issue of same-sex marriage; stories might entail a discussion of how much being able to marry has improved the life of the family

⁶⁶ NEAT Respondent.

of an LGBT couple, or how the inability to marry is harming an LGBT couple by making hospital visitation or end-of-life arrangements more difficult. These stories are aimed at both the general public, in order to further facilitate the cultural shift that the country has seen over the past decade, as well as the legislators who may be presented with legislation that affects the LGBT community. While personal stories are usually the basis of the changing hearts and minds strategy, each organization had a slightly different take on the tactic.

My respondent at Equality Federation says that the organization continues to be very focused on furthering the cultural shift that the country has seen on same-sex marriage by continuing to change hearts and minds, which my respondent did say has been helped by the decisions: “What the court decision did was create an additional level of consciousness in the public around this issue, and it gave LGBT people a platform to talk about their families as the case was working its way through.” Thus, while the organizational strategies of Equality Federation remain the same as they were prior to the decisions in *Perry* and *Windsor*, the specifics of these strategies have shifted into new arenas and the decisions have made it easier for the organization to get their message across to the average voter, something that I will explore more in-depth next chapter.

Changing prevalent public opinion is especially important in Texas, where demographic shifts have led to increased support for marriage equality overall, but where older and whiter demographics tend to remain opposed.⁶⁷ One way in which they are attempting to change hearts and minds is by appealing to the Texas sense of individualism and a mistrust of government being too involved in people’s personal lives,

⁶⁷ Equality Texas Respondent.

which is an excellent argument when it comes to letting two adults in love get married.⁶⁸ By making marriage equality into an issue that traditional Texan values are consistent with, the organization hopes to convince people in the older demographics to reconsider their positions on the issue and reach majority support for marriage equality in the state.

Equality North Carolina has been using the tactic to complement litigative efforts in the state. The ACLU filed a lawsuit regarding the state's same-sex marriage ban in federal court, which "uses much of the same language that Kennedy's opinion did in the *Windsor* case."⁶⁹ While Equality NC is not actively partnered in the lawsuit, they are working in conjunction with the ACLU of North Carolina in providing the "much needed cultural campaign on the ground," changing hearts and minds with personal stories of LGBT individuals, couples, and families.⁷⁰ The cultural campaign is important even if marriage equality ends up being decided by the courts, either for the state or nationally, before it is decided by North Carolina's elected officials or voters in order to minimize the challenges involved with actually enforcing legalized marriage equality and preventing negative backlash.⁷¹

Differences in Political Opportunities

The main variances that were reported to me in how strategies have or have not changed were mainly divided along political opportunity lines: high political opportunity (support for LGBT rights and marriage equality by public officials, favorable public opinion regarding same-sex marriage) and low political opportunity (public officials tend

⁶⁸ Equality Texas Respondent.

⁶⁹ Equality NC Respondent.

⁷⁰ Equality NC Respondent.

⁷¹ Equality NC Respondent.

to oppose marriage equality, low public support of same-sex marriage, difficult-to-overturn constitutional bans in place). States in which marriage equality was seen as more widely acceptable even before the Supreme Court decisions were able to adjust existing strategies to push for marriage equality in the wake of *Perry* and *Windsor* (high political opportunity), while states with less progressive political environments often chose to focus the momentum towards more fundamental issues faced by the LGBT community (low political opportunity).

Low Political Opportunity

In general, organizations with low political opportunity in regards to legalizing marriage equality seemed to have changed their strategies very little, if at all. My Equality Texas respondent said that since the Texas legislature will not be meeting in 2014 (it only meets in odd-numbered years), Equality Texas is still in the midst of determining how their strategies will change when it comes to pressuring the legislature to legalize marriage equality during its next session. The main challenge to marriage equality in Texas is the state's constitutional amendment banning same-sex marriage, which was passed in 2005 and would require a very involved legislative process to overturn.⁷² This amendment has since been declared unconstitutional by a federal court judge, but it is being allowed to stand pending the appeals process.⁷³ I will be further discussing the potential implications of this judicial action in the next chapter.

Alabama has a ways to go in order to enact any sort of legislation or pass any ballot measure legalizing same-sex marriage due to the general political environment in

⁷² Equality Texas Respondent.

⁷³ Fernandez, Manny.

the state. However, my respondent says that some of the language used in the *Windsor* decision has been very useful when working on other equality initiatives: “There is a bill before our legislature now that relates to education... and when sex education is taught in schools, the curriculum still includes that homosexuality is a crime and a disease. Obviously we know that’s not fact, and we refer back to the *Windsor* case, specifically, to make the argument that they are depriving these students of fair and equal protection, and that this aspect of the curriculum should be removed completely.”⁷⁴ To maximize support, the organization also has tried to move away from specifying equality measures as being LGBT rights issues, and has attempted to frame them more as general equality issues, the remedying of which can benefit the state a whole – a tactic which my respondent says has been helped by the language used in the *Windsor* opinion.⁷⁵ This would be a clear example of McAdam, Tarrow, and Tilly’s concept of changing the “framing processes that produce shared definitions of what is happening.”⁷⁶

The fight for marriage equality is difficult in North Carolina due to Amendment 1, which passed in 2012, as well as the fact that there are no state-wide anti-discrimination laws for the workplace regarding sexual orientation – every state that has legalized marriage equality has first had a comprehensive anti-discrimination law on the books.⁷⁷ The decisions in *Windsor* and *Perry* have shifted the dialogue back to marriage in the state, whereas Equality NC had previously been putting most of their energy into fighting workplace discrimination. My respondent says that the organization has been using this

⁷⁴ Equality Alabama Respondent.

⁷⁵ Equality Alabama Respondent.

⁷⁶ McAdam, Doug, Sidney G. Tarrow, and Charles Tilly, 16

⁷⁷ Equality NC Respondent.

momentum around marriage to further the cause of other pro-equality issues in addition to marriage itself.⁷⁸

Finally, my respondent from Equality Ohio says that the organization's strategies have changed in the sense that litigation seems to be becoming more of a viable strategy when it comes to winning marriage equality than it was in the past, and is potentially becoming more viable than legislation within certain political environments. "It has allowed people to find cracks in the legal structure, using some of these arguments that came out of the cases."⁷⁹ In other words, the decisions have only had very minimal effect on strategies in the state; there is currently an equal split in Ohio in terms of public opinion regarding marriage equality, and both sides saw a bump of a few percentage points following the release of the decisions in June.⁸⁰ Currently, he says, Equality Ohio is in the midst of trying to determine which avenue – litigative, legislative, or at the ballot box – is going to be the most successful going forward, and thus which avenue to put the most resources behind.⁸¹ The fact that Ohio even has a potential way forward right now for same-sex marriage to succeed in the state means that it has higher political opportunity than many of the other states in this category, but it still does not enjoy enough support from public officials or the general population to be categorized as having high political opportunity. States like Ohio could be said to be on more of a middle ground.

⁷⁸ Equality NC Respondent.

⁷⁹ Equality Ohio Respondent.

⁸⁰ Equality Ohio Respondent.

⁸¹ Equality Ohio Respondent.

High Political Opportunity

Organizations in states with higher political opportunity didn't necessarily see their strategies change very much either, but they did see an opening in the political structure following the decisions in which their existing strategies could be used to obtain a successful outcome. My respondent from Illinois says that he thinks the decisions in *Windsor* and *Perry*, *Windsor* in particular, were incredibly helpful in the final push to legalize marriage equality in Illinois. “[Before the decisions], it was somewhat esoteric [to discuss legalizing marriage equality in the state when marriages would not be recognized federally]. There were more than 1,100 federal benefits and policies that affected married couples, and that were denied to same-sex couples, even if they were involved in a civil union in places like Illinois. And suddenly, with the Supreme Court decisions, this is not an esoteric discussion; same-sex couples could, in fact, take advantage of these benefits and policies if they wanted to get married.”⁸² The timing of the decisions in assisting with this push was crucial as well – the Illinois legislature had decided not to vote on the bill before session ended on May 31, 2013, and the movement did not want to lose the momentum that they had built up during the spring. The decisions allowed them to use new ammunition when it came to talking to legislators and voters as they waited for the bill to be brought to a vote in the fall – a strategy that ultimately paid off.⁸³

The respondent from Equality Hawaii says that the decisions in *Windsor* and *Perry* played a key role in marriage equality being passed this past autumn, the fall of 2013. There had been a discussion of a marriage equality bill in the 2013 legislative

⁸² Equality Illinois Respondent.

⁸³ Equality Illinois Respondent.

session, but due to in-fighting in the state House of Representatives, the bill was tabled – some representatives who were on the fence said that they needed the courts to come down with a decision in order to prevent a “patchwork of fifty versions of marriage.”⁸⁴ Once the decisions were released, however, Governor Neil Abercrombie called for the marriage issue to be resolved by the end of the year in order to allow Hawaii same-sex couples who wished to marry, but who would not receive federal benefits under the state’s civil union law, to have access to those benefits as soon as possible.⁸⁵ Data collected by Hawaii United for Marriage also shows a six-point decrease in opposition to same-sex marriage, from 37% to 31% opposed, between January 2013 and August 2013; that large of a shift during the timeframe of when the rulings were released could point to public opinion being favorably affected by the content of the decisions.⁸⁶ A main strategy that they used in order to convince legislators and the public to rethink their position on the issue was using personal stories; for instance, they focused on the story of a couple where one man was dying of prostate cancer, who might not live until 2014, and who was not healthy enough to take a trip to the mainland in order to get married in a state where marriage equality was recognized. They also gathered pro-equality quotes from state legislators who might not have been the most obvious supporters of marriage equality in order to show that a very wide variety of people can be in favor of same-sex marriage. All of this contributed to their success, and likely contributed to the 6% decline that the organization saw in public opposition between January 2013 and August 2013.⁸⁷

⁸⁴ Equality Hawaii Respondent.

⁸⁵ Equality Hawaii Respondent.

⁸⁶ "Poll Finds Majority Support for Marriage Equality in Hawaii."

⁸⁷ Equality Hawaii Respondent.

Conclusions

From this brief overview of the organizations interviewed, it is evident that there was a wide range of reactions to the decisions in *Windsor* and *Perry*, and that different organizations were affected in a variety of ways depending on the type of organization and, for state organizations, the political environment of the state in which the organization is located. While it seems that many groups have not overtly seen their strategies change in the wake of the decisions, some states (Hawaii, Illinois) saw the political environment clearly shift in their favor which allowed them to make a final push for legalization, and others with more restricted political opportunities (Alabama, Texas) saw more subtle shifts in their tactical approach to more fundamental LGBT issues that still leave a long road ahead to marriage equality, barring a sweeping Supreme Court case in the near future. Of course, the decisions are still recent enough that the organizations themselves may not entirely know if and how their strategies might change, or even how they may have subtly changed already. The next chapter will delve deeper into the trends and patterns that came through in the interviews, and will help to paint a clearer picture of how the Supreme Court decisions of June 2013 have affected the political environment in which political organization around marriage equality operates on a state and national level.

Chapter 4: Analysis of Changes to the Political Environment

In the last chapter I looked briefly at the organizations that I interviewed, and gave an overview of how they have, or have not, changed their activism strategies since the decisions in *United States v. Windsor* and *Hollingsworth v. Perry* in June 2013. The lack of strategy changes, however, does not mean that the Supreme Court decisions in these cases have not had an effect on marriage equality activism in the months following the decisions – the other element at play is changes to the political environment in which such activism operates in a way that makes it easier or more difficult for the organizations’ messages to come across to politicians and the general public (again, McAdam, Tarrow, and Tilly’s theory of “framing” within social movements), affects the way in which they interact with the opposition, and affects the channels available to them for achieving their goals.

In this chapter, I will be looking more in-depth at the changes in the political environment that were reported to me by the respondents that I interviewed at the various organizations in terms of both framing opportunities presented by the language used in the Supreme Court decisions (particularly *Windsor*) and new legal precedent that will aid future litigation and potentially hinder the opposition. I will start by discussing the more general changes in the political environment that the organizations have seen; these general observations will be divided into national and state categories to show comparisons and contrasts between the two levels of organization. I will then look at some broader patterns and common threads that I noted between the interviews on both a state and a national level, including how the opposition to marriage equality has changed its tactics and been affected by the decisions, and how the legal precedent set by *Windsor*

and *Perry* has shaped the political environment. Finally, I will look at the organizations' responses regarding the overall importance of litigation in the marriage equality movement, their main strategies going forward, and some downsides for the general LGBT equality movement that may result from legalized marriage equality.

General Changes

National Organizations

National LGBT rights organizations, due to their scope and access to some of the top political decision makers, significantly influence the political environment that they are, in turn, affected by. For Marriage Equality USA, this effect came in the form of an amicus curiae brief that they submitted to the Supreme Court in *Hollingsworth v. Perry*. This brief, instead of using extensive legal language and arguments, focused instead on personal stories of those who had “experienced the joy of marriage, and what it meant to them, as well as couples who had experienced the pain of having it denied.”⁸⁸ While it cannot be said for certain that Justice Kennedy was directly referencing this brief with his opinion in *Windsor*, much of the language that he uses is reminiscent of the language used in the amicus brief.⁸⁹ Arguments presented in the amicus brief include “the freedom to marry gives same-sex couples... a profound sense of dignity, respect, and belonging,” “marriage allows same-sex couples to communicate that they are a family,” and “even legally marriage same-sex couples are vulnerable as long as the United States Constitution does not protect their freedom to marry in every state.”⁹⁰ While Justice

⁸⁸ Marriage Equality USA Respondent.

⁸⁹ Marriage Equality USA Respondent.

⁹⁰ "Perry: Amicus Brief of Marriage Equality USA."

Kennedy did not use this exact phrasing in his opinion, statements such as “when the State used its historic and essential authority to define the marital relation in this way, its role and power in making the decision enhanced the recognition, dignity, and protection of the class in their own community,” “[DOMA] makes it even more difficult for the children [of same-sex couples] to understand the integrity and closeness of their own family and its concord with other families in their community and their daily lives,” and “DOMA undermines... state-sanctioned same-sex marriages; for it tells those couples... that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage,” echo strongly the sentiments and language used in the amicus brief.⁹¹

This language is another great example of McAdam, Tarrow, and Tilly’s “framing” concept, and could be an example of “production of shared definitions” by making the societal perception of same-sex couples more closely match the LGBT community’s perception of them. It allows the marriage equality movement to push their agenda forward in a way that focuses on human dignity and family values, both concepts that tend to resonate with the American public. My respondent from the organization indicates that this production of shared definitions is one of the reasons why the opinion is so helpful. Using the language of dignity and family cohesiveness in addition to the financial benefits of marriage helps to underscore the humanity of the issue.

The American Foundation for Equal Rights, or AFER, was more directly involved in bringing about changes in the political environment, as they were the sole sponsors of

⁹¹ United States v. Windsor.

the *Perry* litigation from the district court level all the way up to the Supreme Court.⁹² When they filed the suit in the Northern California federal district court, they were the first to file a suit involving marriage equality at the federal level, giving it the potential to be heard by the nation's highest court, which it eventually was.⁹³ Had they not brought the suit, only *Windsor* would have reached the Supreme Court, if it had been filed at all – *Perry* gave the LGBT rights movement more confidence that litigation could be a winning strategy for marriage equality.

Beyond the ways in which these national organizations affected the way the decisions came down, they have noticed changes to the political environment that the decisions have wrought. One of the main ones is an entirely new category of same-sex couple that can now feel safe in their decision to marry – couples where one partner is not a U.S. citizen or permanent resident. Prior to the *Windsor* decision, such couples were discouraged from getting married, even in states where marriage equality existed, because the federal government would not recognize the marriage and could still choose to deport the non-citizen partner; marriage might even have hurt the couple's cause during deportation hearings or other procedures.⁹⁴ This new safety in marriage for “bi-national” couples means that such couples in states where marriage equality is still not legal may be more inclined to help with the cause than they were before, since now they may feel that they have more at stake. Increased marriage rights may have also made gay couples feel more comfortable about being more open about their relationships with their

⁹² "American Foundation for Equal Rights."

⁹³ AFER Respondent.

⁹⁴ Marriage Equality USA Respondent.

friends, coworkers, and family members in a way that influenced how those people felt about LGBT rights and marriage equality in particular.

This newfound sense of identity with the marriage equality movement also extends to LGBT individuals who were not entirely enthused with the push for marriage equality when federal benefits were not a part of the picture, and same-sex marriage seemed like even more of a second-class version of marriage. With the federal benefits, says the Marriage Equality USA respondent, some of these individuals are more inclined to actively support and take part in the movement, which is a boon.⁹⁵ This sentiment of an expanding circle of supporters was echoed by respondents from the National Equality Action Team (NEAT) and Equality Federation; extending even beyond previously disillusioned members of the LGBT community, the Supreme Court decisions, and *Windsor* in particular, have “created an additional level of consciousness on the issue,”⁹⁶ given organizations specific language that they can use to frame the issue of marriage equality, and “given a lot more credibility to the cause with the stamp of approval from the federal government.”⁹⁷

My respondent from NEAT noted that there are also fewer and fewer institutional barriers to marriage equality: “Organizations like the military and the National Guard are starting to support marriage.”⁹⁸ This shift may be partially due to the decisions, but partly due to the changing societal view of same-sex marriage as well; it is likely that the Supreme Court was somewhat influenced by a shift in the public opinion so great that the

⁹⁵ Marriage Equality USA Respondent.

⁹⁶ Equality Federation Respondent.

⁹⁷ NEAT Respondent.

⁹⁸ NEAT Respondent.

United States military, an institution that is traditionally viewed as downright homophobic, has started to change its views.

Finally, in a telling bit of polling data, my respondent from Marriage Equality USA notes that while marriage equality has enjoyed majority support in nationwide polls in the recent past, the number of people polled who view marriage equality as “inevitable” is much higher than the number of those who support it; this means that there is a large number of people who oppose marriage equality but view it, ultimately, as inevitable. As my respondent notes, “that sense of inevitability may cause them to redirect their energy elsewhere.”⁹⁹

State Organizations

The national organizations certainly were not the only ones to notice shifts in the political environment – all of the state organizations I spoke with mentioned changes as well. Some of them were very direct; the legislative decisions legalizing marriage equality in Illinois and Hawaii during the fall of 2013 were both from bills that had been tabled in the spring prior to the release of the decisions, and the decisions were the impetus to bring those bills for a vote in the fall.¹⁰⁰ In Hawaii, the governor even called for a special legislative session in order to have the marriage issue resolved “by the end of the year.”¹⁰¹ The decisions also gave Equality Illinois and Equality Hawaii a new arsenal of arguments to use with legislators and the general public heading into the legislative vote: the respondent from Equality Illinois said that arguments for state

⁹⁹ Marriage Equality USA Respondent.

¹⁰⁰ Equality Hawaii Respondent.

¹⁰¹ Equality Hawaii Respondent.

marriage seemed “less esoteric” when there were federal benefits that could not be received by couples in civil unions, and that neighboring, married same-sex couples could have different benefits if one couple had chosen to get married out-of-state;¹⁰² the respondent from Equality Hawaii voiced similar experiences regarding the power of federal benefits being available, with an additional argument that it would create a new level of socio-economic inequality if the only couples in Hawaii who would be eligible for federal benefits were the ones who could afford to travel to the mainland to be married in a state that performed same-sex marriages.¹⁰³

Organizations in states that still have yet to legalize marriage equality articulated less dramatic effects on the political environment, but noted that there were effects nonetheless. One of the main points from states in which marriage equality might be a bit more distant was that the arguments from the Supreme Court decision in *Windsor* and the district court decision in *Perry* were being applied to help argue for other LGBT issues. In North Carolina, where the political climate has “never been more conservative,”¹⁰⁴ discussion of marriage has nevertheless been on the forefront of the conversation regarding LGBT rights, especially since North Carolina’s state constitutional amendment banning same-sex marriage, Amendment 1, passed in 2012 as a ballot measure. My respondent from Equality North Carolina says, “We’ve used marriage to get people involved with other LGBT issues, like workplace discrimination, bullying, and healthcare. Since *Windsor*, marriage has been on the forefront of everyone’s mind, and therefore the pro-equality movement has had to use that momentum to further other pro-

¹⁰² Equality Illinois Respondent.

¹⁰³ Equality Hawaii Respondent.

¹⁰⁴ Equality NC Respondent.

equality issues.”¹⁰⁵ As no states that have won marriage equality have done so without first having a workplace anti-discrimination law of some kind, this work is extremely crucial.¹⁰⁶ My respondent from Equality Alabama similarly noted that the equal protection argument from *Windsor* was being used to further other key LGBT issues, particularly in an attempt to remove from the state sexual education curriculum that homosexuality is a crime and a disease.¹⁰⁷

Broad Trends

Effect on Opposition

General Effects

Nearly all of the organizations I spoke with noted that there had been some effect on the opposition to marriage equality as a result of the decisions in *Windsor* and *Perry* that had altered the political environment in some way. The respondent from Equality Hawaii says that some of the arguments previously used in favor of civil unions versus marriage are now much more tenuous with the new federal benefits: “When you look at [the rulings] in simplistic terms, what they did was they took away that last silver bullet for the people who were saying, ‘Well, why do we have to call it marriage? Why can’t we give you civil unions, domestic partnerships; we’ll give you rights, but reserve marriage for only opposite-sex couples. And when those rulings came down, and the federal government started to say, we’re now giving federal benefits to same-sex couples, but only if they’re married, it really exposed the whole two-tier concept [of having civil

¹⁰⁵ Equality NC Respondent.

¹⁰⁶ Equality NC Respondent.

¹⁰⁷ Equality Alabama Respondent.

unions as opposed to marriage for same-sex couples].”¹⁰⁸ Taking away this argument from the opposition makes it much more difficult for an anti-marriage argument to be made without arguing against all rights for same-sex couples traditionally associated with marriage.

Other states have seen a variety of changes from the opposition. My respondent from Equality Texas says that the opposition there has moved from “ridicule to fight,” and has also started engaging in more trans-bashing, which is an unfortunate but perhaps unsurprising turn of events.¹⁰⁹ Equality North Carolina’s respondent said that they had seen a new tactic of claiming that Amendment 1, which banned same-sex marriage in the state, was in fact a mandate against all rights for LGBT individuals, including workplace anti-discrimination laws.¹¹⁰ Respondents from both Equality Hawaii and AFER mentioned that the opposition’s new strategy appeared to be to stall or delay as long as possible when it comes to implementing marriage equality.¹¹¹ This may signal desperation on the part of the opposition, which ties in with what was discussed earlier regarding the high number of people polled who view same-sex marriage as inevitable. While the opposition knows that marriage equality is going to happen eventually, they can try to put it off as long as possible in the meantime.

Religious Exemptions

Religious exemptions were one category of recent oppositional tactics noted by several of the groups that I interviewed. Respondents from both Marriage Equality USA

¹⁰⁸ Equality Hawaii Respondent.

¹⁰⁹ Equality Texas Respondent.

¹¹⁰ Equality NC Respondent.

¹¹¹ Equality Hawaii Respondent.

and Equality Federation noted that they had seen an increase in religious exemptions being written into bills expanding LGBT rights or as bills on their own.¹¹² My respondent from Equality Texas says that they have been using clergy members who support marriage equality in legislative hearings in order to counteract some of these new pushes for religious exemptions.¹¹³ This phenomenon of increasing fervor for religious exemptions to be written into LGBT equality bills can even be seen in the title of the marriage equality bill passed by the Illinois legislature: the Religious Freedom and Marriage Fairness Act, which legalizes same-sex marriage while ensuring that no religious congregation that objects to performing same-sex marriages can be forced to.¹¹⁴ This is a very benign and understandable form of a religious freedom exemption, as my Marriage Equality USA respondent said, “No church should be forced to perform a wedding that they don’t want to, and everyone agrees on that... and I wouldn’t want to get married in a church that doesn’t want to marry me.”¹¹⁵ However, there are certainly more insidious forms of religious exemptions being attempted in state legislatures across the country, with an especially notable one being Arizona’s Senate Bill 1062, which would have allowed people greater protection when asserting their religious beliefs as a reason to not provide service to LGBT individuals. While both chambers of the Arizona legislature passed the bill, Governor Jan Brewer ultimately vetoed it on February 26, 2013.¹¹⁶ Religious exemptions as a political strategy have been on the rise recently, with some organizations also seeking religious exemptions from certain provisions of the

¹¹² Marriage Equality USA Respondent.

¹¹³ Equality Texas Respondent.

¹¹⁴ *Religious Freedom and Marriage Fairness Act.*

¹¹⁵ Marriage Equality USA Respondent.

¹¹⁶ Christie, Bob.

Affordable Care Act, such as the provision of birth control through employer-provided health insurance. The fact that this tactic is being used across multiple political arenas suggests that it may be becoming a more viable strategy for, generally, more conservative causes. The tension between bills like Arizona's and the legitimate religious freedoms regarding churches refusing to perform marriages is one that will need to be resolved in the coming months and years. As the marriage equality respondent said, "How are changes going to be implemented fairly so that we get the rights that we deserve, but so that freedom of speech and freedom of religion are given the respect that they deserve?"¹¹⁷

Evidentiary Support

An effect on the opposition that was not caused by the decisions but rather noticed during the legal proceedings in the cases is the struggle that counsel for the opposition to marriage equality has in producing evidence that is compelling as a reason for why marriage equality should not be legal. As my respondent from NEAT said, "the 'traditional marriage' side of things, those who do not support same-sex marriage, their arguments are usually based on tradition and prejudice. And courts don't generally find that very persuasive."¹¹⁸ The respondent from AFER also shared the organization's experience with the opposition in the courtroom: "At the district court level, when we made our arguments before Judge Vaughn Walker, there was so much evidence in support of our side. In fact, the other side had only two witnesses that they presented. And one of their star witnesses actually ended up saying that the day that marriage

¹¹⁷ Marriage Equality USA Respondent.

¹¹⁸ NEAT Respondent.

equality is allowed in this country is the day that we will be more American.”¹¹⁹ He also says that this requirement of evidence is what hampers the opposition’s ability to do well in the court versus when they are trying to convince voters, for example: “With a ballot measure, you can put up a commercial and pretty much say anything. You can use hyperbole; you can say whatever you want. But when you’re in a court of law, and you’re under oath, you have to say nothing that is untruthful.”¹²⁰ An extension of this argument can be seen in the fact that the Supreme Court remanded *Perry* back to the district court decision based on the lack of standing of the proponents of Proposition 8; since they had not been actually harmed, and there was no evidence of legal harm, they did not have the standing to bring the case. This precedent will likely prove to be a huge boon to the marriage equality movement and the LGBT rights movement in general, since it suggests that those who cannot prove that they are legally harmed by the expansion of marriage rights (or again, LGBT rights overall) are not able to bring litigation challenging such rights in court.

New Legal Precedent

Another change to the political environment noted by multiple organizations is the fact that there is now new legal precedent in federal court regarding marriage equality, which provides new ammunition for litigative tactics on the pro-equality side. As the respondent from Equality Ohio said, “it has allowed people to find cracks in the legal structure.”¹²¹ A slew of cases were filed in federal courts across the country during

¹¹⁹ AFER Respondent.

¹²⁰ AFER Respondent.

¹²¹ Equality Ohio Respondent.

the proceedings for *Windsor* and *Perry*, and many more have been filed since the decisions were released. The Equality Federation respondent says that the organization has needed to provide support much more frequently to state groups dealing with a lawsuit for the first time.¹²² Equality North Carolina's respondent, among others, noted the usage of language from *Windsor* in a federal case filed in the state by the ACLU, specifically the new precedent regarding equal protection.¹²³ And while some may write *Perry* off as having minimal impact, since the ruling only reinstated marriage equality within California, the fact that the decision was remanded to Judge Vaughn Walker's opinion in the district court creates a good deal of useful precedent within the federal court system, as Judge Walker's written opinion verges on scathing when it comes to Proposition 8's proponents and their arguments against marriage equality.¹²⁴

A major way in which the precedent set by the Supreme Court decisions has affected the political environment is the recent trend of federal judges striking down state-level constitutional bans against same-sex marriage as unconstitutional. Since the decisions in *Windsor* and *Perry* were handed down in June, four states have had their constitutional bans on same-sex marriage struck down as unconstitutional by federal judges: Utah, Oklahoma, Virginia, and Texas.¹²⁵ Additionally, a federal judge ruled that Kentucky's ban on recognizing same-sex marriages performed in other states is also unconstitutional.¹²⁶ While none of these rulings have been officially enforced, as they are all being appealed to higher courts, many of the judges handing down the rulings have

¹²² Equality Federation Respondent.

¹²³ Equality NC Respondent.

¹²⁴ *Perry v. Schwarzenegger*.

¹²⁵ *Fernandez, Manny*.

¹²⁶ *Cheves, John*.

based their language off of the opinion in *Windsor*,¹²⁷ and may also feel more emboldened to make decisions like these following the precedent set by the Supreme Court. While I was unable, time-wise, to discuss the ruling in Texas with my respondent from Equality Texas, the constitutional ban being overturned would be a groundbreaking change for the equality movement in Texas, as my respondent cited the ban as one of the major challenges to implementing marriage equality in the state.¹²⁸ The use of the language from *Windsor* had already appeared in several lawsuits in the state, including a lawsuit against the city of Houston suing for city employee benefits for same-sex couples, which the city had implemented before the law was stayed by a judge.¹²⁹ It will be interesting, going forward, to see how these decisions play out when they reach the appeals circuit, and the outcome will likely depend on the political leanings of the appeals circuit in which each state is located; however, it is possible that one or more of these cases will reach the Supreme Court in upcoming years.

Value of Litigation in the Fight for Marriage Equality

One of the final questions that I asked the organizations that I spoke with was whether they thought that litigation or legislation was a better tactic on the road to marriage equality. Most of them were very positive about the role of the courts in the pro-equality movement, while noting that it is key to use both litigation and legislation in conjunction with each other going forward. My AFER respondent pointed to the use of the courts as a way to combat the tyranny of the majority in the form of ballot measures,

¹²⁷ Fernandez, Manny.

¹²⁸ Equality Texas Respondent.

¹²⁹ Equality Texas Respondent.

which is indeed how the courts were used in the *Perry* case against Proposition 8.¹³⁰ The respondent from Equality Texas emphasized that the courts are crucial, especially in this political environment, but that legislative initiatives are very important for wider, sweeping changes.¹³¹ Similarly, the respondents from both Equality Ohio and Equality Alabama said that while litigation is definitely a good tool, it is more useful in some judicial districts than others, depending on how those districts traditionally lean politically.¹³²

Many respondents from the organizations that I spoke with, especially the national ones, believe that the final decision on marriage equality nationally will be handed down by the Supreme Court at some point in the future, but that we need to reach a critical mass of states with legalized marriage equality before they will feel comfortable that such a ruling is in line with public opinion.¹³³ The respondent from NEAT says that she thinks the Supreme Court would like to avoid backlash from a decision on marriage equality that is at all comparable to the backlash experienced after *Roe v. Wade*, which galvanized the anti-choice contingent of the country in a way that was very unexpected, and from which there are still repercussions today in the abortion debate.¹³⁴ The respondent from AFER disagreed that there would be backlash on the same scale even following a sweeping decision regarding marriage equality: “I think with *Roe v. Wade*, you have folks that are on one side or the other, who are absolutists, where it’s an issue of life or death. Whereas on our issue, when people get to know their gay friends, neighbors,

¹³⁰ AFER Respondent.

¹³¹ Equality Texas Respondent.

¹³² Equality Ohio Respondent.

¹³³ Equality NC Respondent.

¹³⁴ NEAT Respondent.

and family members, there's been a lot of evolution going on with people's mentalities about gay marriage."¹³⁵ This trend of evolving views on the issue could mitigate any truly serious backlash, and given the favorable view of marriage equality among the younger generations,¹³⁶ would likely mean a sweeping decision would not lead to a sustained campaign against the ruling in the same style of the anti-choice coalition. The respondent from Marriage Equality USA compared a sweeping Supreme Court decision in favor of marriage equality to *Loving v. Virginia*, instead, saying that at the time that *Loving* came down, two-thirds of the states had already legalized interracial marriage;¹³⁷ this further supports the idea that the Supreme Court will likely issue a more assertive decision legalizing same-sex marriage on a national level when more states have legalized it on their own.

Conclusions

Overall, while strategies may not have changed very significantly for the majority of the organizations that I interviewed, it seems that the political environment in which marriage equality activism operates has been affected by the rulings in *Windsor* and *Perry* on a variety of different levels. Effects on the opposition will alter how the two sides to the issue interact and combat each other (topics of contestation may change, litigation may become something that the opposition avoids, etc.), and it seems that most of the oppositional effects have been in the favor of the pro-equality movement, while making the opposition's fight more challenging. While I was unfortunately unable to get

¹³⁵ AFER Respondent.

¹³⁶ *Pew Research Center*.

¹³⁷ Marriage Equality USA Respondent.

in contact with any “traditional marriage” organizations in order to discuss the rulings with them, the fact that so many of the organizations that I spoke with seem to believe that they have gained more of an upper hand as a result of the rulings is telling. The polling data mentioned to me by the Marriage Equality USA respondent regarding the high percentage of people who believe that marriage equality is inevitable also points to the conclusion that the anti-marriage equality movement is fighting a losing battle that has gotten more difficult in the past nine months. This losing battle goes hand-in-hand with the finding that legal precedent set by *Windsor*, in particular, has made it more common for federal judges to strike down state-level constitutional bans, and has made litigation a more popular strategy among the pro-equality movement. Since it has been discussed that anti-equality groups have a hard time making their case in court, this strategy could become increasingly appealing. It seems that while the decisions in *Perry* and *Windsor* may have been part of the growing tide of support for marriage equality, they have also produced favorable results that may make the final stages of legalized same-sex marriage on a national scale progress more quickly than they would have otherwise.

Chapter 5: Conclusions

Based on the information that I gathered from my interviews and analyzed in previous chapters, it seems evident that my hypothesis, which was that the decisions in *Windsor* and *Perry* would both cause activist groups to change their strategies as well as change the political environment in which such groups were operating, was partially correct; while specific activism strategies have not changed for the groups that I spoke with, the political environment in which marriage equality activism is operating has definitely been altered by the Supreme Court's decisions in *Hollingsworth v. Perry* and *United States v. Windsor*. Beyond simply the interviews that I conducted for this project, there is also ample evidence that court decisions have affected LGBT rights activism in the past, lending credence to the idea that such an effect may have happened with the most recent cases as well.

Despite Rosenberg's claims that the Supreme Court can never affect social change, it seems that Supreme Court decisions can significantly affect social change; changes to the political environment can open or close doors for activism on both sides of an issue, which can really affect how a message is able to be conveyed to the public, as well as the type of message being conveyed. While strategies among marriage equality activists may not have changed from building a strong state coalition and changing the hearts and minds of legislators and the general public, the messages that they have been able to use in order to convince people of their cause have been strengthened due to new court precedent on equal protection and the availability of federal benefits. Conversely, opponents to marriage equality have seen that their arguments against same-sex marriage, while effective among the general public, tend not to hold up very well as evidence in a

court of law; they have also lost the argument that civil unions are a valid equivalent to marriage with the new regulations regarding federal benefits, and have been losing the argument that same-sex marriage will cause civilization to collapse since 2003 and the ruling in *Goodridge*. These changes have, as mentioned in chapter four, led even those opposed to marriage equality to believe that it is inevitable.

I would also be inclined to believe that if Supreme Court decisions have affected the political environment this much for LGBT and marriage equality activism, decisions on other issues have also affected the political environment in which other activism operates; it would be very interesting to conduct similar studies regarding the Civil Rights Movement and the feminist movement, both of which Rosenberg focuses on in *The Hollow Hope*. Certainly, we already know that *Roe v. Wade*, a case Rosenberg discusses, changed the political environment in a negative way for pro-choice advocates by inspiring enough backlash to bring about a robust anti-choice movement that has persisted to this day, and does not seem to be going away anytime soon.

So, what does this mean for the future of marriage equality activism, and for LGBT rights activism in general? It will likely be difficult to say until future cases make it to the Supreme Court; since strategies do not seem to be something that is altered by court decisions, at least not ones of the nature of *Perry* and *Windsor*, any changes to the political environment would be highly dependent on the nature and outcome of future cases decided by the Supreme Court. It is also possible that activism strategies will change going forward in response to the shifts in the political environment, and the organizations themselves have yet to determine how, exactly, strategies will evolve in the coming months and years. It is my inclination that the next time a marriage equality case

reaches the Supreme Court, the Court will finally make a sweeping decision that results in marriage equality on a national level. In this case, depending on how public opinion is leaning at that time, activists may want to continue working on changing hearts and minds; not just to prevent backlash against the decision and continue to build public support in favor of marriage equality, but also to continue to build support for other very important initiatives for LGBT rights. Marriage equality is very important to many members of the LGBT community, but achieving it does not mean that LGBT rights have forever been secured in every important area. There will still be work to be done on anti-discrimination measures for the workplace and public accommodations, preventing bias and hate crimes, transgender rights, school bullying, and a whole host of other issues that continue to affect the LGBT community. Maintaining momentum on LGBT activism among the general public once the high-visibility, popular movement for marriage equality has achieved its goal will definitely be a challenge that the activism community will need to take on.

Appendix: Interview Questions

The following questions are the general framework for the interviews that I conducted, although there was slight variation in the specific questions asked of each individual respondent due to follow-up questions, questions that were answered without being specifically asked, and other variables.

1. What are the main goals of your organization in terms of marriage equality in your state/the nation as a whole?
2. What were some of your main organizational strategies prior to the Supreme Court decisions in *United States v. Windsor* and *Hollingsworth v. Perry*?
3. Did your organization anticipate that these cases would be decided the way that they were? What would have been the ideal outcome for these cases for your organization?
4. Have the decisions in these cases affected your organization's strategies moving forward? How so? If not, why not?
5. Do you think that these decisions have hindered your organization's abilities to achieve your goals in any way? If so, how so?
6. Do you have any other information regarding this topic that you think is pertinent to my project that you would be willing to share, or anything else that you would like me to know?
7. What were major challenges to activism before the cases were decided? Have any of those challenges been mitigated or aggravated by the cases?
8. Have the organizational strategies of marriage equality opponents changed since the cases were decided? How are you planning to combat these new strategies?

9. Does (and how) your state-level organization interface/coordinate with national organization(s)... etc? (And vice-versa for participants who are part of a national organization).
10. How useful do you think litigation and court involvement are to the marriage equality movement overall?
11. Who else would you recommend that I speak to regarding this subject?

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