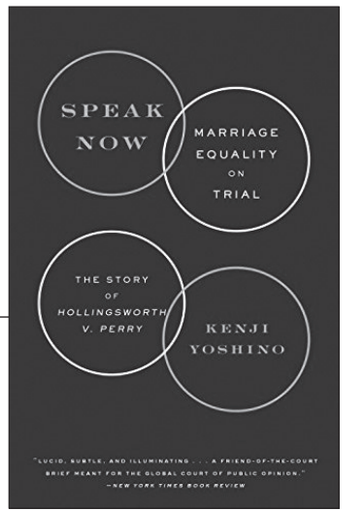
Penguin Random House
ACADEMIC RESOURCES

Instructor's Guide

Speak Now: Marriage Equality on Trial

The Story of *Hollingsworth v. Perry*

by Kenji Yoshino



Broadway | TR | 978-0-385-34882-9 | $16.00
e-Book: 978-0-385-34881-2 | $13.99

about this book

Speak Now recounts the story of *Hollingsworth v. Perry*, the landmark case that legalized same-sex marriage in California. The book is simultaneously an absorbing account of the trial, a memoir about the beginning of Yoshino's marriage and family life, and a love letter to the civil trial. The trial coverage traces the case from its beginnings in the Beverly Hills Hotel, to the U.S. Court of Appeals for the Ninth Circuit, and to the U.S. Supreme Court, giving thorough descriptions of the plaintiffs, proponents, witnesses, judge, and the parties' legal strategies.

about the author

Speak Now is the third book by Kenji Yoshino, who is the Chief Justice Earl Warren Professor of Constitutional Law at New York University School of Law. An award-winning professor who previously taught at Yale Law School, Yoshino studies, writes, and teaches in the fields of constitutional law, anti-discrimination law, and law and literature. With degrees from Harvard, Oxford, and Yale Law School, Yoshino is a leading voice on contemporary legal issues, and contributes to numerous television and radio programs in addition to his academic writing. Yoshino lives in New York with his husband and two children.

note to teachers

Speak Now is suitable for use in:

- Anthropology: kinship and community, political and economic anthropology, religion, social and cultural anthropology
- Cultural Studies: cultural theory, gender, sexuality
- History: legal history, LGBT history, history of the family, political history, religious history, social and cultural history, women's and gender history
- Law: family law, human rights and civil liberties, jurisprudence, legal theory, public law, socio-legal theory, U.S. law, constitutional law
- Politics: political theory, U.S. politics
- Sociology: sociology of law, sociology of gender, sociology of sexuality, theory, social policy, political sociology, cultural sociology, sociology of the family
- Gender Studies: cultural sexuality, gender identity, gender inequality, LGBT history, queer studies, socio-legal studies

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chapter summaries and discussion questions

introduction

The book begins in 2009 with the story of Kenji Yoshino's wedding to his husband Ron Stoneham in Connecticut, which took place as the case that became *Hollingsworth v. Perry* advanced in California. Yoshino paints a picture of moving into early adulthood as a gay male thinking that marriage was unavailable to him. Life events taken for granted by heterosexuals were not open to homosexuals; as a child, Yoshino assumed that because he was gay, he would never have a family of his own. But Yoshino and his new husband were "ideologically progressive but temperamentally conservative"—they wanted a somewhat traditional family with marriage and kids. They wanted the "protections of the institution" (p. 4) of marriage.

The introduction presents a theme developed throughout the text: that often social change is created deliberately and methodically by activists using carefully choreographed court cases to bring about results. *Hollingsworth v. Perry* is presented in the context of the larger struggle for gay civil rights, which is compared to the earlier struggle for interracial marriage, embedded in the civil rights movement. The *Perry* trial was controversial within the LGBT community, where it was seen as rushing the methodical movement toward equality.

Yoshino also introduces another major theme: his love for the law and the "intellectual rigor" (p. 7) of civil trials. He believes the *Perry* trial created a thorough conversation on same-sex marriage because court cases put people under oath and subject them to cross-examination, whereas other venues allow opinions to go unchallenged. For this reason, Yoshino expresses concern that trials are becoming rarer. He argues that civil trials are important tools for clarifying debates in ways that other arenas in which "culture wars" are waged—such a media debates, blogging, and voting—cannot.

Yoshino chose to write this book because he thinks the court record of the *Perry* trial is the most complete record available of why same-sex marriage should be legal. He realizes not many people will read the transcript of the twelve-day trial, or even the 136-page decision.

To gather data for the book, Yoshino interviewed over forty players on both sides of the court case and studied the trial transcripts and court opinions.

questions

1. Why did Yoshino title the book *Speak Now*? Why does he include details about his life in the story?
2. What does Yoshino mean when he says he and his husband were "ideologically progressive but temperamentally conservative" (p. 4)?
3. What does Yoshino mean when he speaks about the "protections of the institution [of marriage]" (p. 4)?
4. Using court cases to bring about social change is a common social movement strategy. Research an example—for example cases to overturn or limit *Roe v. Wade*, to expand rights for women or African Americans, to eliminate restrictions on campaign contributions, to restrict the power of unions, etc. Why do activists who are working for social change worry about change coming "too soon"?
5. What does Boies mean by his statement that "a witness stand is a lonely place to lie" (p. 8)?
6. Yoshino says that civil trials are "going the way of the dodo" (p. 8) because of their expense and delays, but he also thinks they serve a vital role in society. What are the pros and cons of civil trials? Do you agree with Yoshino that they serve an important purpose in our society?
7. What methods did Yoshino use to gather information for the book?

part I: before

chapter 1: the plaintiffs

November 4, 2008, the night Barack Obama was elected president, was also the night that Prop 8 passed in California, banning same-sex marriage. While this was a huge setback, at this point most LGBT groups were against launching a federal lawsuit against Prop 8 and similar laws. Their strategy to legalize same-sex marriage was guided by the lasting success of the civil rights movement. Court cases moved toward civil rights incrementally, so by the time interracial marriage

came before the U.S. Supreme Court, only sixteen states still had anti-miscegenation laws. The abortion rights movement offers a cautionary contrast. When *Roe v. Wade* legalized abortion in the United States, it invalidated laws in a supermajority of states, which many believe created a huge backlash.

Yoshino provides some broader context about the fight to legalize same-sex marriage in the United States. In 1993, the Hawaii Supreme Court held that same-sex marriage bans must be subjected to heightened judicial scrutiny under the state constitution, leading many to believe that same-sex marriage would soon be legalized in Hawaii and then eventually throughout the country. Public backlash led to the federal Defense of Marriage Act (DOMA) in 1996, which defined marriage for all federal purposes as a union of one man and one woman.

In California, the battle over same-sex marriages was fought on several fronts. First came Prop 22. In 2000, Prop 22 (also known as the Knight initiative) added a provision to the California Family Code saying that "only marriage between a man and a woman is valid or recognized in California" (p. 17). This meant that California would not have to perform same-sex marriage or to recognize same-sex marriages formed in other states. In March 2005, various groups mounted a legal challenge to Prop 22 (*In re Marriage Cases*), and Judge Richard Kramer ruled that under the state constitution, same-sex marriages must be allowed. In 2006, the California Court of Appeals overturned the lower court decision. In 2008 the case made it to the California Supreme Court, which ruled that Prop 22 was invalid under the California constitution.

Much of the drive toward same-sex marriage in California occurred outside the courts. In 2003, the California legislature strengthened its 1999 domestic partnership law. Domestic partnerships in the state offered the legal benefits of marriage without being marriages. On February 10, 2004, San Francisco Mayor Gavin Newsom began to issue marriage licenses to same-sex couples, saying he was upholding the state constitution's equal protection clause. About 4,000 couples got licenses. In March 2004 the California Superior Court stopped San Francisco from issuing any more licenses while it reviewed the case. After five months, the court decided that the San Francisco marriage licenses were invalid. In 2005, the California Legislature then passed a bill to legalize same-sex marriage, which Governor Arnold Schwarzenegger vetoed. In 2007, the legislature passed another bill that would have legalized same-sex marriage, and again the governor vetoed it.

The 2008 California Supreme Court decision allowing same-sex marriage was sweeping because it also said that sexual orientation discrimination cases had to be judged by the stricter standards used to judge racial discrimination cases.

In response to the 2008 ruling, the Protect Marriage coalition started a petition to create an amendment to the state constitution making marriage only between opposite sex couples. The petition became Prop 8 on the ballot in 2008.

There were around 18,000 same-sex marriages in California between June (when *In re Marriage Cases* was decided) and November 2008 (when Prop 8 passed).

After Prop 8 passed, more lawsuits were filed, asking the state to overturn it on procedural grounds—claiming that it was a revision of a law, not an amendment—and also asking to keep the 18,000 marriages that had already taken place legal. The cases were consolidated and named *Strauss v. Horton*. The California Supreme Court determined that Prop 8 was a valid amendment to the state constitution and thus reflected the law of the state. Thus, the only option left to overturn Prop 8 was to challenge it as impermissible under federal law.

Rob Reiner, Michelle Singer Reiner, and Chad Griffin hired Ted Olson, a famous and successful conservative lawyer at the law firm Gibson, Dunn & Crutcher, as lead counsel. Olson was an interesting choice because of his status as a conservative icon—Olson had worked in the Department of Justice under President Ronald Reagan and had served as Solicitor General under President George W. Bush. He agreed to take the case, thinking it was winnable in the U.S. Supreme Court. There are nine justices on the U.S. Supreme Court. At the time Prop 8 was passed, there were four justices generally perceived as conservatives, four generally perceived as liberals, and one "swing vote" justice who frequently provided the deciding vote. The swing voter, Justice Kennedy, had written two decisions that were pro-gay rights, *Romer v. Evans*, which overturned what Yoshino calls a "harsh and far-reaching" (p.25) anti-gay Colorado law in 1996, and *Lawrence v. Texas* in 2003, which struck down state laws making same-sex sodomy illegal, overruling *Bowers v. Hardwick*.

Some people thought the *Lawrence* decision would lead to same-sex marriage being legal, because Justice Kennedy made a point of saying in his decision that moral disapproval of an act

was not enough to make it illegal. Others distinguished between laws that allowed the state to intrude on private activity (like sodomy laws) and laws that ask the state to put a stamp of approval on such activities (like marriage laws).

The Reiner/Griffin team incorporated as the American Foundation for Equal Rights (AFER). This group did public relations and fundraising for the case. AFER then found co-counsel to argue alongside Olson: David Boies, who was as famous as Olson but known for arguing the liberal side of cases. Olson and Boies had squared off against each other in the *Bush v. Gore* case in 2000.

AFER located four plaintiffs: Kristin Perry and Sandra Stier, and Paul Katami and Jeffrey Zarrillo. Stier and Perry had gotten married when San Francisco was issuing marriage licenses, which were later deemed void. Katami and Zarrillo were activists who had made a response video called *Weathering the Storm* in reaction to an anti-same-sex marriage video called *The Approaching Storm*.

The plaintiffs tried to get marriage licenses and were denied. Then their lawyers quietly filed the federal case challenging Prop 8 and waited for the California Supreme Court to deny the state procedural challenge to Prop 8. Although the California Supreme Court upheld Prop 8, it further held that the 18,000 marriages that had taken place legally before its passage were still valid. On May 27, 2009, the day after this happened, AFER publicly announced that it had filed a lawsuit. People were suspicious of Olson's involvement. The nine biggest gay advocacy groups ignored the lawsuit while urging California voters to go back to the ballot box to overturn Prop 8.

Olson, Boies, and AFER were careful to frame the case as a bipartisan case about national equality and civil rights, not as a gay rights case.

questions

1. Outline the significant events across the United States dealing with same-sex marriage that set the stage for the *Perry* case.
2. What is an equal protection clause? How is it related to laws about same-sex marriage?
3. When the California Supreme Court held that marriage licenses issued to same-sex couples in 2004 were invalid, what was the court's reasoning? Does Yoshino think this reasoning is valid?
4. How do state legislatures, state courts, federal laws, and federal courts all fit together?
5. What were the possible advantages and disadvantages to filing a federal challenge to Prop 8? Do you think the plaintiffs made the right decision? Would you have argued for or against filing the lawsuit?
6. Who is Ted Olson? Why was it so significant that he agreed to challenge Prop 8?
7. Who were the plaintiffs in the case? Why were they chosen? Why are they seen as a "lawyer's dream"?
8. Why were major gay-rights groups against filing the *Perry* lawsuit? What was their preferred strategy?

chapter 2: the movement lawyers

Evan Wolfson, often called the godfather of the same-sex marriage movement, whose advocacy for same-sex marriage dates back to the 1980s, founded the organization Freedom to Marry in 2001. The organization fashioned a three-part strategy to make same-sex marriage legal nationwide: 1) fighting state by state for legality; 2) working to increase public support for same-sex marriage; and 3) overturning the Defense of Marriage Act. There were many impediments to these goals. In most states in the 1980s, same-sex sexual contact was illegal. Wisconsin was the only state where it was illegal to discriminate based on sexual orientation. The early gay-rights legal organizations were still concerned with other more basic rights, for example, police harassment of gay people, and whether gay rights organizations had the legal right to incorporate as nonprofit corporations.

Lawsuits from same-sex couples seeking to get married go back to the 1970s. One of these, *Baker v. Nelson,* made it to the Supreme Court in 1972, after the Minnesota Supreme Court ruled against the plaintiffs. The U.S. Supreme Court dismissed their appeal, saying it lacked a substantial federal question.

The 1970s and 1980s saw a growth of "litigation shops" devoted to gay rights litigation. The 1980s also saw the movement take some serious damage, notably with the *Bowers v. Hardwick* case, which upheld state laws that criminalized same-sex sexual conduct. Many other courts took this to mean that discrimination against gays in other areas was legal. Cases denying gays rights to

custody, adoption, and military service were examples of this "ripple effect." For example, in the Sharon Bottoms case in Virginia in 1995, a woman lost custody of her son because she was a lesbian.

In this atmosphere, groups were cautious about the 1990s Hawaii lawsuit for marriage equality. In 1993, the Hawaii Supreme Court decided that same-sex marriage bans discriminated on the basis of sex. Framing the legal question as sex discrimination meant that same-sex marriage bans drew heightened scrutiny from the courts—a searching standard of judicial review—because sex is a legally protected category. In such a case, the state has to argue that "compelling" or "important" state interests make the discrimination necessary. Under this standard, the trial court struck down the ban. In response, Hawaii amended its constitution so that the legislature had the power to define marriage. Congress also passed the Defense of Marriage Act in 1996, which allowed the states not to recognize same-sex marriages performed in other states, and also defined marriage for federal purposes as being between one man and one woman.

While the argument about same-sex marriage often divides people along conservative and liberal lines, this is not always the case. Some conservatives are in favor of same-sex marriage, because marriage is a conservative, stable institution. Some liberals are against it, because they think that same-sex couples should not want to participate in a flawed institution so tied to traditional inequality, or because they do not like the way that marriage trumps all other sorts of relationships legally with regard to the distribution of state benefits.

The strategy embraced by groups fighting for legalization was to go state by state, fighting for same-sex marriages, focusing on states where it was harder to enact a constitutional amendment banning same-sex marriages, and avoiding federal lawsuits. Under this strategy, progress was made. Vermont passed a civil union law in 2000. In 2003, the Supreme Judicial Court of Massachusetts held that, under the state constitution, same-sex couples had a right to marry. Attempts by the legislature to overturn that decision through a constitutional amendment failed. Courts in Iowa and Connecticut followed suit. Legislatures also took up the cause, with Vermont, New Hampshire, and the District of Columbia passing laws authorizing same-sex marriage. The Gay and Lesbian Advocates and Defenders (GLAD) filed a federal lawsuit to strike down the part of DOMA that said the federal government did not have to recognize state-sanctioned gay marriages.

At the same time, other jurisdictions went the other way. Many states started putting same-sex marriage bans into their state constitutions—19 between 2004 and 2006. There was a federal attempt, urged by President George W. Bush, to pass a Federal Marriage Amendment banning same-sex marriage, which did not get enough votes in Congress to go to the states but which received a critical mass of votes. Most gay-rights litigation groups recommended that the *Perry* suit not be filed. When it was filed against their wishes, they expressed chagrin. When the NAACP was fighting Jim Crow laws, it had much more influence and control over the pace of the movement, which suits were filed, and in which order. The gay-rights groups, however, had no power to stop the Boies/Olson suit from going forward. They could only petition to intervene as co-counsel.

questions

1. When did lawsuits for same-sex marriage first get filed in the United States? What was the early reaction to these lawsuits?
2. What was Freedom to Marry's three-prong approach to working for legal same-sex marriage? What were the major roadblocks they faced?
3. How did fallout from the 1986 *Bowers* case influence the LGBT movement's legal strategy?
4. Yoshino outlines a debate on banning same-sex marriage—whether it discriminates on the basis of sex or on sexual orientation. Explain each argument. Which do you find most compelling?
5. Some people who were against same-sex marriage rights pointed out that marriage is seen as higher, in a legal sense, than many other relationships. For example, your spouse can share in your health care benefits, but your sibling can't. What is the state's rationale for ranking marriage above other relationships? Do you agree with this logic?

chapter 3: the proponents

The question of who would defend the *Perry* lawsuit was complicated. Governor Schwarzenegger had changed his view on same-sex marriage and declined to defend Prop 8. Jerry Brown, his attorney general, also declined to defend the law. Brown then became governor, and his attorney

general, Kamala Harris, declined to defend Prop 8. This meant that the group that had fought to get Prop 8 on the ballot ended up defending the case in court.

Andrew Pugno, who had worked for California State Senator Knight on Prop 22, took charge. There were other parties interested in joining the suit: Campaign for California Families (CCF) which opposed any sort of domestic partnership benefits at all for same-sex couples; Liberty Counsel, based at Liberty University; and Alliance Defense Fund (ADF), a legal coalition formed to fight for pro-Christian court decisions. ADF and Liberty Counsel at times tussle over who gets to try important cases.

Pugno usually worked with ADF, but wanted a different lead counsel in this case. He chose Charles Cooper, of Cooper & Kirk. Like Olson and Boies, Cooper was an experienced lawyer who had argued before the Supreme Court. His firm specialized in conservative cases. ADF joined them to supply lay witnesses. Liberty Counsel was not invited to join.

Yoshino discusses ballot initiatives for constitutional amendments and argues that they have been useful to groups that want to pass laws that might not make it through legislature because they lack a secular purpose.

questions

1. Explain the differing positions of the ADF and Liberty Counsel. How do they frame their opposition to same-sex marriage to their members? How do they argue against it in court?
2. Why do some religiously affiliated litigation shops prefer to fight for ballot initiatives for state constitutional amendments as a legal strategy?
3. Name the key players on each side of the lawsuit—the organizations and lawyers lined up on each side.

chapter 4: getting to trial

The *Perry* case was filed on May 22, 2009. The case was assigned to Chief Judge Vaughn R. Walker, who had been accused of making anti-gay rulings in the past. Despite this, it turned out that he was gay, although not openly so at the time of the trial.

Neither side actually wanted a trial. The plaintiffs did not want a trial because they wanted to get to the Supreme Court as quickly as possible. The proponents of Prop 8 (the effective defendants) appeared to be concerned about having the justifications for Prop 8 scrutinized too closely. Judge Walker, however, was adamant about wanting a trial.

Yoshino raises deep questions about how judges make decisions and argues that one reason civil trials are important is that they shine light on two different kinds of facts. Adjudicative facts are facts that are specific to one particular case. Legislative facts are "broader claims about the world" (p. 74). Some believe that only adjudicative facts should be submitted to trial, but Yoshino questions why legislative facts cannot also be subjected to such trials.

Judge Walker clearly believed both kinds of facts could, and in this case should, be subjected to trial. Judge Walker asked for information on 1) the nature of the right to marry; 2) the level of scrutiny that state discrimination on the basis of sexual orientation should receive under the Fourteenth Amendment; and 3) the justification for Prop 8. Prop 8 needed some rationale for existing, since it discriminated against a group of people. Laws that discriminate are judged either under a "rational basis" standard, if they discriminate against groups not specifically protected, or are judged under a stricter "heightened scrutiny" standard, if they discriminate on the basis of a protected category.

LGBT groups filed motions to intervene as co-counsel for the plaintiffs, and so did the City of San Francisco. Parents, Families and Friends of Lesbians and Gays (PFLAG) is one of the movement groups that tried to intervene; they were convinced that trials led to good outcomes for gay rights cases, based on experiences they had in conservative states in cases involving adoption and parenting. They were strongly in favor of going to trial. Liberty Counsel filed to intervene on the side of the proponents. The judge allowed the City of San Francisco to intervene, but not the other groups.

The plaintiffs filed for summary judgment (in which a judge makes a decision on the undisputed facts of the case without holding a trial) which also failed. In this case the judge felt there were too many disputed facts.

Judge Walker wanted to broadcast the trial to five other courtrooms. This was against district court rules, and attempts to change the rules for the trial were blocked by the U.S. Supreme Court.

questions

1. What is heightened scrutiny? When and why is it applied to discrimination cases?
2. What is the difference between legislative and adjudicative facts?
3. Why did both the plaintiffs and proponents initially resist going to trial? Why did Judge Walker decide a trial was necessary?

part II: the trial

chapter 5: curtain up

On January 11, 2010, the trial began and the parties gave their opening statements. Olson stated that the case concerned issues of "marriage and equality," and that Prop 8 created "second-class citizenship" for gays and lesbians (p. 91). Because domestic partnerships only conferred benefits on the economic side of marriages, they could not deliver other benefits of marriage to same-sex couples. He also said that change to the institution of marriage was not the same thing as harm, and that same-sex marriages would not harm opposite-sex marriages.

Cooper argued that, since the majority of California voters in the 2008 election had passed Prop 8, it should stand by the rules of democracy. He also argued that same-sex marriage was only legal in four states, and that tradition and continuity weighed in favor of the proponents. He also said that the primary function of marriage was to promote and regulate procreation and child-rearing, and opposite-sex marriages were the best and only place for this to happen. He also said that Prop 8 was not motivated by animus or ill-will.

The plaintiffs all testified about their lives and the love they felt for their partners and families. The plaintiffs' lawyers' strategy involved invoking both narrative compassion (based on individual stories) and statistical compassion (based on aggregate data).

The proponents did not bring up the sex lives of the plaintiffs, or cross examine them about other personal details, although they had done so during depositions.

Marriage has responsibilities as well as benefits. Under California law, same-sex couples could have domestic partnerships that were marriages in everything but name. The plaintiffs argued that the name—"marriage"—mattered and was a matter of dignity. They testified about microaggressions, which are "brief and commonplace daily indignities imposed on marginalized groups" (p. 98).

The plaintiffs called expert witness Ilan Meyer to testify about microaggressions. These have cumulative effects, daily reminding gay people that society and the law considers them to be unequal and reminding straight people that the law allows and encourages discrimination.

questions

1. What is the function of opening statements in a civil trial? What points did each side cover in the *Perry* trial's opening statements?
2. Although neither side addressed the question in their opening statements, Judge Walker's question about why the state is involved in marriage is thought-provoking. Why do you think the state regulates marriages, when many people see marriage as a religious institution? What are the benefits of this system? What problems does it create?
3. What does it mean to stipulate to a fact in court?
4. Discuss the plaintiffs' decision to use both narrative compassion and statistical compassion in building their case. Which do you think is more powerful? Why?

chapter 6: the right to marry

Although the Constitution does not mention the right to marry, it is accepted as a fundamental right that is protected by the Due Process Clauses found in the Fifth and Fourteenth Amendments to the United States Constitution, which prohibit deprivation of "life, liberty or property, without

due process of law." In general, the government cannot restrict fundamental rights without a compelling justification for doing so. A major point of contention in *Perry* was whether the plaintiffs were seeking access to an established right—the right to marry—or were asking for a new right, the right to same-sex marriage. The difference matters because the Supreme Court rarely recognizes new fundamental rights, and the standard for doing so is high. Plaintiffs pointed to *Loving*, which struck down a ban on interracial marriage, and *Turner*, which struck down a prison regulation forbidding inmates to marry without the warden's permission. Those cases spoke of the right to marry, not the "right to interracial marriage" or the "right to inmate marriage." The proponents countered that prior cases had linked marriage to procreation, which necessarily excludes same-sex couples.

The plaintiffs called marriage historian Nancy Cott to testify as an expert about the history of marriage. She testified that civil marriage (the only kind of marriage at issue in the litigation) has always been a secular institution in the United States, even though many people think of it as a religious institution. She found Prop 8 ads promoting "Biblical" marriage "amusing" because the Bible contains many examples of polygamy. Cott also emphasized the cultural importance of marriage. And she testified that the state's primary purpose in licensing marriage is to create "stable households," with procreation being just one, not the defining, purpose of the institution.

Cott also testified about marriage as a civil right. She explained that slaves were not permitted to marry because they already belonged to someone else. Upon emancipation, slaves rushed to marry because it signified that no one owned them. Even after slavery ended, the law continued to ban interracial marriage as it had since before the founding of the United States. The Supreme Court finally struck down such bans in 1967. Cott explained that such bans resembled bans on same-sex marriage in that they reduced individuals' choice of a marriage partner in such a way that designated some groups as less worthy than others.

Gender roles have also become more fluid within marriages. The old system of "coverture" where husband and wife followed state-mandated roles based on gender has been abolished. Spouses are now equal before the eyes of the law. Yoshino believes that it is the increased gender equality in marriage that has finally made same-sex marriage possible.

The proponent's main expert witness was David Blankenhorn, president of the Institute for American Values. Blankenhorn held a master's degree in comparative labor history but held no degree in relevant areas such as anthropology, psychology, or sociology; nor had he published any peer-reviewed work relevant to the litigation. Accordingly, the plaintiffs questioned his expertise, but the judge allowed his testimony.

Yoshino believes that one advantage of trials is that they allow only experts to give "scientific, technical, or specialized knowledge" (p. 112). By contrast, lay witnesses testify about things they have personally experienced.

Blankenhorn testified that the main functions of marriage are procreation and child rearing. He cited famous experts, most of whom wrote some decades ago—Claude Lévi-Strauss, Bronislaw Malinowski, and Kingsley Davis. He said that marriage has three rules: (1) it is between a man and a woman; (2) it is between two people; and (3) it is a sexual relationship. But on cross examination, he admitted that a high percentage of societies had practiced polygamy. He also sought to argue that polygamy did not violate the "rule of two people," given that one individual married a series of other individuals in a hub-and-spoke manner, rather than all individuals marrying as a group.

The plaintiffs called Helen Zia, a lesbian who had gotten legally married in California in 2008, as a lay witness to speak to her experience of being married. She and her wife had gotten a domestic partnership in California, but she said that it felt more "bureaucratic" and not like a marriage. She also brought an international viewpoint, speaking about how the marriage changed her relationship in the eyes of her Chinese mother. Her testimony underscored how the status of marriage is universal and universally understood.

questions

1. Do you think same-sex marriage is a new right or an expansion of an existing right? Why?
2. In what ways has the institution of marriage changed over the last two centuries? In what ways do you think it may change over the next two centuries?
3. Contrast Cott's views of marriage with those of Blankenhorn.

4. Should Blankenhorn have been permitted to testify as an expert? Why or why not?

chapter 7: a history of discrimination

The Equal Protection Clause of the Fourteenth Amendment is the primary source of the U.S. Constitution's equality principle. Although the Amendment was originally framed to ensure equality for freed slaves, the Amendment does not mention race. Progressive constitutional scholars believe that the framers left the meaning of equality to be determined over time by later generations.

The Supreme Court has held that certain classifications warrant "heightened scrutiny" by the courts: race, national origin, sex, alienage, and non-marital parentage. The idea behind heightened scrutiny is that such classifications are "so seldom relevant to any legitimate government purpose that the courts take a hard look whenever the government uses them to allocate benefits or burdens" (p. 119). By contrast, other classifications are reviewed less rigorously, under "rational-basis review," which means that any legitimate justification explaining the purpose of the law will uphold it.

Perry pushed to include sexual orientation under heightened scrutiny review.

The Supreme Court has analyzed four factors to determine whether certain classifications warrant heightened scrutiny: (1) whether the group has suffered a history of discrimination; (2) whether the group is marked by an obvious, immutable, or distinguishing characteristic; (3) whether the group is politically powerless; and (4) whether the group has the same capacity to contribute to society as others.

Yoshino believes "[a] more fine-grained analysis should take into account, among other factors, a group's socioeconomic status, its health and longevity, and its susceptibility to private and public violence" (p. 121).

In the *Perry* case, the fourth criterion was not a point of contention because the proponents essentially conceded that gay people have an equal capacity to contribute to society. Instead, both sides focused on immutability, the history of discrimination, and political power.

In the argument over the history of discrimination based on sexual orientation, both sides agreed that there was a significant history, but while the plaintiffs argued that this discrimination was ongoing, the proponents argued that it was over.

George Chauncey testified for the plaintiffs as an expert witness, explaining four aspects of discrimination based on sexual orientation: criminalization, discrimination, censorship, and demonization. He discussed sodomy laws and how they were unequally applied based on sexual orientation; discrimination in public accommodations, by the U.S. military, and in employment; censorship in the media; and demonization through campaigns in which gays and lesbians were presented as deviant, depraved, and dangerous. The historical demonization was compared to messages used during the Prop 8 campaign; the images and messages were similar. During cross examination, the proponents emphasized the progress made in these areas: same-sex sexual activity is no longer criminalized, many employers have nondiscrimination polices covering sexual orientation, gay characters appear in the media, and many churches opposed to same-sex marriage underscored that gays deserved respect as human beings.

questions

1. Should some classifications receive more scrutiny by courts than others? Why or why not?
2. Do you agree with the Supreme Court's factors for determining whether certain classifications warrant heightened scrutiny? Why or why not?
3. What other factors, if any, would you consider in determining whether a classification warrants heightened scrutiny?
4. Under the Supreme Court's four factors, what additional classifications might warrant heightened scrutiny?
5. Can you think of any additional ways LGBT people have been discriminated against?

chapter 8: immutability

Immutability refers to whether or not a group can change a particular characteristic. Scholars,

including Yoshino, have argued that courts should consider not just whether someone *can* change but whether they *should have to* change. At least one appellate court has agreed. The Supreme Court has not provided a clear definition of immutability.

Yoshino writes that, broadly speaking, people who are in favor of same-sex marriage think sexual orientation is immutable and marriage is mutable, while those opposed believe the opposite.

The plaintiffs called Ryan Kendall as a lay witness. Kendall was a gay man born to conservative Christian parents. He was rejected by his parents after they learned he was gay and was sent to conversion therapy in an attempt to change his sexual orientation. Those experiences made him suicidal and depressed. After years of therapy, Kendall remained gay.

The plaintiffs' expert witness on immutability was Gregory Herek, a psychology professor at UC Davis. He said sexual orientation was defined based on a person's "attraction, self-identification, and behavior" (p. 137). He testified that most people are consistent across those three dimensions but admitted that about eight to nine percent of the population experience inconsistencies. For example, some men may have sex with other men and yet not identify as gay. Herek testified that most gay and lesbian people report experiencing little to no choice in their sexual orientation. Additionally, the consensus of the psychological community is that efforts to change a person's sexual orientation are ineffective and perhaps harmful.

questions

1. Give some examples of immutable traits.
2. Why do you think supporters of same-sex marriage generally tend to believe sexual orientation is immutable, while opponents generally do not?
3. Do you think a person can change his or her sexual orientation? Why or why not?

chapter 9: political powerlessness

The U.S. Supreme Court has defined political powerlessness as "the condition of having 'no ability to get the attention of lawmakers'" (p. 143). That definition created a major irony for the parties: the plaintiffs had to downplay their progress in the court of public opinion to argue that they were politically powerless, and the proponents had to reverse their usual rhetoric that the majority of citizens are against gay rights and instead say that gays and lesbians have political power.

The proponents called Kenneth Miller, a government professor at Claremont McKenna College, as an expert witness. His PhD was from UC Berkeley, and his law degree was from Harvard. Miller identified numerous people and organizations that support gay rights, including media outlets, labor organizations, corporations, and political groups.

Although Miller was an impressively credentialed witness, Yoshino observes several weaknesses in his testimony. He concentrated more on California and could not speak as extensively about nationwide trends. More problematically, he had borrowed a great deal from another scholar's expert report in his own expert report for the trial. His testimony downplaying the power of churches working against same-sex marriage also contradicted an article he had published, and he had also previously published articles stating that ballot initiatives could be harmful to minority rights.

The plaintiffs called Gary Segura, a political scientist at Stanford, to explain how even with the support of a growing number of individuals and organizations, gays and lesbians still lack political power. Segura explained that conservative churches have massive political power and that they use ballot initiatives to transform their religious beliefs into law. There have been about 200 ballot initiatives in the United States concerning gay rights since the 1970s; gays have lost about 70% of these, most of which have dealt with same-sex marriage. Segura also connected political powerlessness with prejudice and hate crimes.

Yoshino believes the Court's definition of powerlessness as "no ability to get the attention of lawmakers" is incoherent because it takes significant political power to get the attention of any branch of government, including the courts. Thus, only groups with political power have the chance to be labeled powerless by the courts. Additionally, despite the Court's definition, it has granted heightened scrutiny to women and racial minorities, even though they have demonstrated the ability to get lawmakers' attention. Moreover, the Court has sometimes linked political powerlessness to prejudice and at other times assessed powerlessness by comparing the group in

question with other groups that are protected by heighted scrutiny. Accordingly, Yoshino believes the Court will have to define political powerlessness more clearly.

questions

1. Name some groups that have "no ability to get the attention of lawmakers."
2. How do you think political powerlessness should be defined? Under your definition, name some groups that would qualify as politically powerless.

chapter 10: the ideal family

There were several ways the plaintiffs could win. If they could show Prop 8 infringed on their fundamental right to marry or if they demonstrated that heightened scrutiny should apply, they would win. Otherwise, they would lose unless they could prove that no conceivable justification could support Prop 8.

Yoshino sorts the proponents' numerous proposed justifications into five categories: 1) the right of children to be brought up in an ideal environment; 2) the need to preserve the institution of marriage, including its link to "responsible procreation" (p. 156) and its traditions, emphasizing the need to not change things too quickly; 3) the free exercise of religion; 4) parents' rights over their children's education; and 5) anything else the court could produce (as the court under the most deferential standard would have to exhaust all conceivable rationales, even if the litigant had not raised them). Some of those justifications were doomed from the start. Appeals to tradition by themselves are not enough to justify laws; otherwise, tradition would still justify bans on interracial marriage. Objections based on religious freedom and children's education are misplaced. People who claim a right to discriminate based on religious beliefs are affected by laws against discrimination, not by the right of same-sex couples to marry. And nothing prohibits parents from teaching their children what they want to teach them about same-sex marriage, regardless of whether it is legal.

Accordingly, the proponents limited their arguments in the courtroom to three justifications: "optimal child rearing, the prevention of the deinstitutionalization of marriage, and the suppression of irresponsible procreation" (p. 158).

The plaintiffs called expert witness Michael Lamb, head of the Department of Social and Developmental Psychology at the University of Cambridge, who has written over five hundred articles. Lamb testified that children are equally likely to be well adjusted irrespective of whether they are raised by gay or straight parents. Rather, children are most affected by "their relationships with their parents; the relationship between their parents; and the financial and social resources available to them" (p. 161). Importantly, Lamb's own views had shifted since the 1970s, when he believed that having a father was necessary for child development. He conceded that subsequent research had shown that belief to be wrong.

The plaintiffs also introduced some material used in the Prop 8 campaign about parenting and same-sex marriage. For example, a pamphlet called "21 Reasons Why Gender Matters" made the spurious claim that gay parents are more likely to raise gay children and were more likely to sexually abuse their children.

The proponents relied on expert David Blankenhorn to testify about child rearing. He testified that children do better with parents who are generically tied to them because of kin altruism—the idea that people treat relations better than strangers. Ultimately, though, he could not cite studies that said that children raised from birth by a same-sex couple had worse outcomes than children raised by an opposite-sex couple. Indeed, he acknowledged that on some measures adoptive children do better than genetic children because their parents have to undergo screening.

Yoshino ends the chapter with details about the birth of his two children. Both were born, 14 months apart, to a surrogate mother in Topeka, Kansas, where the infamously anti-gay Westboro Baptist Church is located. Yoshino muses on how issues raised during the trial—genetic ties between parent and child, adoption, gendered parenting, and the love of a parent for a child—play out in his family.

questions

1. Should tradition be sufficient to justify a law? Why or why not?
2. Which justifications, if any, do you find most convincing to support a ban on same-sex marriage? Why?

3. Do you think the existence of same-sex marriage impinges the religious liberty of people who oppose it? Why or why not?

chapter 11: a threat to marriage

Yoshino says that the conservative argument that same-sex marriage harms marriage overall is akin to a trademark lawsuit—one group's use of a term causes "tarnishment" of the concept. "A 'tarnishment' claim arises when a competitor uses [a] mark in a way that diminishes its cachet" (p. 174). In other words, conservatives believe that calling same-sex unions "marriages" denigrates opposite-sex marriages.

Some supporters of same-sex marriage argue that it will strengthen the institution. For instance, they maintain that same-sex marriage provides a model of equality between spouses, as opposed to opposite-sex marriages which have been traditionally marked by gender-based inequality. And there is always the chance that same-sex marriage won't change the institution of marriage at all.

Lee Badgett, economist at the University of Massachusetts, testified for the plaintiffs about the social and economic consequences of same-sex marriage. She testified that jurisdictions such as Spain and Massachusetts had experienced no adverse effects from the legalization of same-sex marriage. Although proponents' counsel attempted to demonstrate the negative effects of same-sex marriage in the Netherlands, Badgett explained that his statistics only established that marriage rates had declined in the Netherlands, not that same-sex marriage had caused that decline.

David Blankenhorn testified in favor of the proponents and spoke in conceptual terms about the deinstitutionalization of marriage. He testified that marriage had experienced "deinstitutionalization"—or had become weaker and less respected as a social structure—over decades. While he freely admitted that heterosexuals had done this damage, he also opined that same-sex marriage would accelerate the trend, resulting in negative consequences for children and society at large. He did not, however, support this opinion with data.

Deinstitutionalization was not the proponents' main argument. Rather, they leaned heavily on the related argument that bans on same-sex marriage could be justified by the "responsible procreation" argument. Under the "responsible procreation" argument, marriage is necessary to channel straight couples, who can procreate accidentally, into stable unions with legal and societal support that will encourage those couples to raise their children within the bonds of marriage. Because gay couples cannot accidentally procreate, they need no such support. The argument is counterintuitive yet clever. By casting straight couples as irresponsible procreators, the argument justifies discrimination against gay people through a negative stereotype of straight people.

questions

1. Which do you think is more likely: that same-sex marriage will have a positive effect on the institution of marriage, a negative effect, or no effect at all? Why? What evidence exists to support your position?
2. People in favor of same-sex marriage often say that it will benefit the institution by providing a model for equality between spouses. Do you think equality between spouses is desirable? Why or why not?
3. How might the deinstitutionalization of marriage affect society? Could there be both positive and negative effects? If so, what might they be?

chapter 12: the bare desire to harm

One of the plaintiffs' arguments for overturning Prop 8 was that there was no "rational basis" for the law. The Supreme Court has held that "animus" toward a group is not a valid justification for passing a law. For example, in *Department of Agriculture v. Moreno (1973)*, the Court stated that legislation passed on the basis of a "bare . . . desire to harm a politically unpopular group" (p. 189) is not constitutionally permissible. In *Romer v. Evans* (1996), the Supreme Court invalidated a Colorado constitutional amendment that prohibited local governments from granting protections to gays and lesbians, because it determined that the rationale for the amendment was animus, or the "bare desire to harm" sexual minorities.

Arguing that a law is based on animus can be delicate, because it suggests that the proponents of the law are bigoted or hateful. The proponents of Proposition 8 maintained that there were rational bases—for example, tradition or child wellbeing—that could have motivated voters beyond the "desire to harm" same-sex couples. The Prop 8 proponents and their allies sought to distance themselves from more extreme groups, such as the Westboro Baptist Church, which frequently rely on hateful rhetoric in denouncing homosexuality. One witness for the proponents, David Blankenhorn, said of homophobia: "I regret it and deplore it, and wish it would go away" (p. 191).

Meanwhile, the plaintiffs sought to prove that anti-gay animus was the driving force behind Prop 8. One of their strategies for proving animus was to call Bill Tam as a "hostile witness"; that is, a witness who opposes the party that calls him to the stand. Tam was one of the five official proponents of Prop 8, and his public statements against homosexuality were often more incendiary than the more cautious advocacy by the other proponents. The plaintiffs used Tam's statements linking homosexuality with prostitution, incest, pedophilia, and other sorts of "moral decay" to show that the proponents of Prop 8 were motivated by anti-gay animus.

questions

1. What is "animus"? Why might a court be reluctant to declare that a law was passed on the basis of animus?
2. What is a "hostile witness?" Why would a party ever call a hostile witness?
3. Why did the plaintiffs call Bill Tam as a "hostile witness?"
4. What reasons did the proponents put forth in favor of Prop 8 to show that their motivation was not animus toward gays and lesbians? What do you make of these arguments?

chapter 13: the phantom witnesses

To the surprise of many, the Prop 8 proponents called only two witnesses. The plaintiffs, on the other hand, called seventeen. One reason the proponents had so few witnesses is that four decided not to participate before the trial began. The proponents stated that these witnesses were withdrawn because Judge Walker had allowed the trial proceedings to be digitally recorded, and they feared they would face harassment if their testimony became public. By contrast, the plaintiffs believed these four expert witnesses withdrew because they had performed poorly in pre-trial depositions. Yoshino interviewed all four withdrawn witnesses to get to the bottom of this dispute.

Paul Nathanson, a PhD in religious studies and a gay man, was against same-sex marriage because he believed in gender-differentiated parenting and also because he thought that men would become further sidelined in society if lesbians could get married. Yoshino believes that Nathanson withdrew because of weaknesses in his expert report and because his objections to same-sex marriage had little to do with his field of expertise.

Katherine Young held a chair in religious studies at McGill University. Her expert report relied heavily on anthropological arguments in favor of opposite-sex marriage. But in deposition, counsel for plaintiffs was able to establish that Young had no real expertise in the field of anthropology. Young's report also contained weaknesses. Young claimed that "the interdependence of maleness and femaleness" was a "universal" (p. 208) aspect of marriage. Yet Young herself could point to many cultures around the world that allowed same-sex marriage.

Another withdrawn witness, Daniel Robinson, was a professor emeritus of psychology and psychiatry at Georgetown. He had done prior research on the heritability of genetic traits, and he was called by the proponents to present evidence that sexual orientation is not passed on genetically—and thus is not immutable. Yoshino observed that not even the plaintiffs argued that sexual orientation was a matter of pure genetics and questioned whether Robinson's testimony would have been relevant to any disputed issue.

The final withdrawn witness, Loren Marks, was a tenured professor at Louisiana State University's School of Social Work, and he specialized in faith, family, and African American families. Marks wrote an expert report that claimed that "the biological, marriage-based (intact) family is associated with better child outcomes than non-marital, divorced, or step-families" (p. 212). At deposition, plaintiff's counsel was able to get Marks to admit that studies showed that adoptive parents led to child outcomes that were just as good as biological parents, and Marks said he would be willing to remove the word "biological" from his report. Marks did not have specific

expertise in gender-differentiated parenting. Thus, the only difference he was prepared to speak to regarding parenting and child outcomes was that intact families with married parents were better for children than divorced or non-marital families. This argument would seem to cut for allowing parents in same-sex relationships to marry.

After assessing all the evidence, Yoshino concludes that while some witnesses may have been intimidated, none could have advanced the proponents' case. He observes that perhaps Judge Walker's decision to allow recording of the proceedings actually did a favor to the proponents, by providing their weaker witnesses with a credible excuse for bowing out.

questions

1. Why did the plaintiffs call so many more witnesses than the proponents? Would the proponents have helped their cause by calling more witnesses?
2. What were the strengths and weaknesses of the four witnesses for the proponents who withdrew before the trial? Do you think their absence changed the outcome of the trial?

chapter 14: the trial court

The parties presented their closing statements, summarizing the arguments and evidence they had presented at trial. About two months later, on August 4, 2010, Judge Walker issued a 136-page opinion holding that Prop 8 violates both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.

Before discussing the merits of the parties' arguments, the opinion addressed the credibility of the witnesses. Judge Walker found the plaintiffs' witnesses to be qualified. But he found fault with the proponents' witnesses, stating that Blankenhorn's testimony should be given virtually no consideration, because it consisted primarily of Blankenhorn's own opinion, not his expertise in any relevant field. Judge Walker also questioned Miller's familiarity with "gay and lesbian politics" (p. 229) and noted that a 2001 article Miller published conflicted with his testimony.

The opinion next laid out 80 findings of fact, based on the evidence presented at trial, and then proceeded to the court's legal conclusions. Judge Walker observed that the parties did not dispute that marriage is a fundamental right in the United States. He reasoned that the plaintiffs did not seek the creation of a new right but simply to exercise the right of marriage that is available to all Americans. Judge Walker determined that the proponents had presented no rational basis for limiting marriage to opposite-sex couples. He found that such a limitation discriminated on the basis of both sex and sexual orientation. He concluded that Prop 8 was "premised on the belief that same-sex couples are simply not as good as opposite-sex couples" and that "this belief is not a proper basis on which to legislate" (p. 233).

Judge Walker ordered the state of California to begin issuing marriage licenses to same-sex couples. However, his order did not take immediate effect, because the judge gave the Ninth Circuit a chance to stay the ruling pending appeal. The Ninth Circuit did in fact stay the ruling, keeping Prop 8 in place for the time being.

questions

1. What was Judge Walker's ruling on the case? On what grounds did he overturn Prop 8?
2. What is the difference between a finding of fact and a conclusion of law? Why is it significant that Judge Walker's opinion contained 80 findings of fact?
3. Why did California not begin issuing marriage licenses as soon as Judge Walker's decision was announced?

chapter 15: the court of appeals

After losing in the district court, the proponents appealed to the Ninth Circuit. The appeal raised the additional issue of whether the proponents had standing to appeal the case. The plaintiffs had brought suit against the California officials charged with enforcing Prop 8, but when those officials declined to defend the law in court, the proponents of the law stepped in to defend it. Once plaintiffs prevailed in the trial court, the Ninth Circuit had to decide whether the proponents had a legal right to bring an appeal.

To aid its determination of the standing issue, the Ninth Circuit asked the California Supreme Court whether the proponents could defend Prop 8 under California state law. The California Supreme Court unanimously held that they could.

While the California Supreme Court was deliberating, however, the proponents tried a different tactic. Judge Walker retired shortly after issuing his Prop 8 decision and publicly acknowledged for the first time that he was gay and in a long-term relationship with another man. The proponents asked Judge Walker's replacement, Judge James Ware, to throw out the case because of Judge Walker's perceived bias. Judge Ware swiftly rejected the request.

With the California Supreme Court having determined that the proponents could defend Prop 8 under California law, the Ninth Circuit panel decided, as a matter of federal law, that the proponents had the right to bring the appeal. A majority of the panel then went on to agree with Judge Walker's holding that there was no rational basis for Prop 8: "Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples. The Constitution simply does not allow for laws of this sort" (p. 241). In particular, the majority opinion stated that the fact that California had taken away a right that gays and lesbians previously enjoyed made it even more suspect that the motivations were driven by animus.

But the appellate court's reasoning was narrower than Judge Walker's opinion. For example, it did not hold that the fundamental right of marriage extended to same-sex couples, nor did it address Judge Walker's conclusion that Prop 8 was a form of sex discrimination. One judge dissented from the holding that Prop 8 was unconstitutional, but the court unanimously affirmed Judge Ware's decision that Judge Walker's decision was valid.

The proponents asked the Ninth Circuit to review the decision *en banc*, that is, by a larger panel of judges. Meanwhile, advocates of marriage equality faced victories and setbacks around the country. Maryland legislatively passed same-sex marriage, and President Obama announced support for marriage equality. Even David Blankenhorn, one of the two witnesses for the proponents at trial, publicly announced his support of same-sex marriage. On the other hand, New Jersey Governor Chris Christie vetoed marriage equality legislation, and North Carolina voters ratified a constitutional amendment defining marriage as between one man and one woman.

The Ninth Circuit declined to hear the case *en banc*, and the proponents appealed to the United States Supreme Court.

questions

1. What standard(s) do federal appellate courts use to review trial court opinions? In what way are findings of fact reviewed differently from conclusions of law?
2. Why did the proponents argue that legislative facts should be reviewed *de novo* rather than for clear error?
3. What was the ruling of the Ninth Circuit?
4. What do you make of the proponents' attempt to vacate Judge Walker's ruling on grounds that his own long-term same-sex relationship made him biased? On what grounds should a judge with a possible interest in the outcome of a case be disqualified from hearing the lawsuit?
5. How, if at all, did the ongoing public debate—including advances and setbacks for marriage equality—affect the legal debates over the constitutionality of same-sex marriage bans?

chapter 16: the supreme court

The U.S. Supreme Court granted *certiorari*, that is, it decided to take the proponents' appeal of the Ninth Circuit decision. The proponents used their opportunity in front of the Supreme Court to attack the district court's legislative findings of fact, that is, findings of facts about "the world" and not the particular parties to the lawsuit. The proponents argued that the Supreme Court should not give any deference to Judge Walker's findings of legislative facts but should consider afresh their evidence in favor of valid rationales for limiting marriage to opposite-sex couples. In contrast, the plaintiffs relied on the extensive factual development and findings in the trial record.

Nearly 100 amicus ("friend of the court") briefs were filed by parties not involved with the litigation, but who had an interest in the outcome. Yoshino observes that while many of the briefs made assertions regarding the supposed benefits of opposite-sex marriage, these claims were not subjected to the rigorous adversarial adjudicative process that tested the evidence presented at trial.

At oral argument, the Court asked questions about whether the proponents had standing to bring an appeal, as well as the constitutionality of Proposition 8. Ultimately, the Court held that the district court's decision did not affect the proponents in the "personal and individual way" (p. 263) that gave them legal standing to appeal the case. Since the proponents did not have the legal capacity to appeal and the State of California was unwilling to appeal, Judge Walker's opinion would remain undisturbed. Thus, Proposition 8 was overturned in California, but the Supreme Court did not make any substantive rulings on whether Proposition 8 was unconstitutional.

questions

1. Why did Olson and Boies have mixed feelings about the Supreme Court's review of the case?
2. What were the Supreme Court's options for deciding the *Perry* appeal? How did the Court ultimately decide?
3. What effect did the Supreme Court's decision have on gay couples seeking to be married in California and the rest of the country?

chapter 17: civil ceremonies

In the final chapter, Yoshino praises the fact-finding aspect of the *Perry* trial. The adversarial process subjects claims and arguments to rigorous testing, and the formality of the courtroom disfavors weak evidence and testimony. Yoshino contrasts the trial with other forums for the creation of law. For example, legislative hearings and debates are often heavily influenced by lobbyists and large donors, and they may not provide the same opportunities for opponents to challenge dubious assertions. Public debates can be even more fraught with inaccuracies, since freedom of speech allows all persons to express their beliefs, irrespective of truth or falsity.

Yoshino concedes that some people—represented by such judicial stalwarts as Supreme Court Justices Thomas and Alito—believe that the *Perry* trial improperly sought to answer questions best left to "philosophers, historians, social scientists, and theologians" (p. 276). He further admits that his critics may accuse him of praising the *Perry* trial simply because it resulted in his favored outcome. But Yoshino is firm in his conviction that the proponents did not lose because of judicial bias, or because they did not have sufficient resources or legal counsel to represent their views. They lost, Yoshino believes, because under the microscope of the civil trial, "the opponents finally had nowhere to turn, and their arguments were revealed for what they are: wholly unpersuasive." Yoshino states that he would like to see other "thorny" issues go to trial, including abortion, gun control, and climate change. "For me, the *Perry* trial explored not one, but two civil ceremonies—the ceremony of marriage and the ceremony of the trial. I have come to see that my convictions about the importance of the civil trial are just as consequential as my convictions about marriage. And so I say again—for the next great legal controversy that turns on legislative facts: *Let there be a trial*" (p. 280).

questions

1. Why does Yoshino so strongly favor the trial process for questions about controversial policy issues? Do you agree that the judicial process should have a primary role in questions over abortion, gun control, climate change, and other matters of intense public debate? What are the strengths and weaknesses of settling these matters in the court system?
2. Yoshino writes: "[T]rials separate fact from belief. At least in the United States today, the trial requires an innately secular form of argumentation. As such, it operates as a sieve that filters out religious motivations for law." Are religious beliefs a valid justification for policy choices? Does the civil trial unfairly "stack the deck" against religious believers in matters of controversial social issues?
3. How do you think the Prop 8 proponents would respond to Yoshino's observations about the importance of fact-finding in the *Perry* litigation? What do you think?

legal concepts

state and federal court systems

Judicial power in the United States is shared between the federal and state courts. Federal courts have limited jurisdiction under the Constitution and federal statutes to decide certain types of lawsuits. Federal courts have power to decide cases arising under the U.S. Constitution or federal statutes (known as "federal question" jurisdiction). Federal courts may also decide certain cases where the parties are from different states (known as "diversity" jurisdiction).

State courts have "general jurisdiction," which means that they have jurisdiction over all matters that are not specifically reserved by the U.S. Constitution or federal statutes for the federal courts. Family law matters, such as marriage, divorce, child custody, etc., have typically been matters of state law.

The Supremacy Clause of Article VI of the U.S. Constitution provides that federal law is the "supreme law of the land," meaning that where state and federal law conflict, federal law will prevail.

constitutions and statutes

There are many sources of law in the United States, including constitutions, treaties, statutes, regulations, and case law.

A constitution is the governing document of a country or state. Constitutions usually do not govern day-to-day matters, but instead provide a structure of government and recognize basic rights of citizens. Constitutions are usually relatively difficult to amend.

Statutes are laws enacted under the authority of a constitution. Statutes are generally enacted by legislatures, although some states, including California, may also enact statutes by referendum (i.e., by the voters of the state).

Courts have authority to interpret constitutions and statutes. If a court decides that a law conflicts with a higher source of law, the court may declare the lower law to be invalid. For example, if a state statute conflicts with a state constitution, the statute will be invalidated (or "stuck down"). A court may also strike down parts of a state statute or state constitution that are not permitted by the U.S. Constitution.

california statutes restricting marriage to opposite-sex couples

In 1977, the California marriage statute was amended to clarify that a marriage could be entered into only by a man and a woman. In 2000, the state enacted a statute that went even further, which provided: "Only marriage between a man and a woman is valid or recognized in California."

proposition 8

After the California Supreme Court held that the California constitution did not permit statutes limiting marriage to opposite couples in *In re Marriage Cases*, opponents of same-sex marriage organized an effort to amend the California constitution. In November 2008, 52% of California voters approved adding the following language to the state constitution: "Only marriage between a man and a woman is valid or recognized in California." In *Strauss v. Horton*, the California Supreme Court upheld the validity of Proposition 8, holding that the constitutional amendment "carve[

d] out a narrow and limited exception to these state constitutional rights, reserving the official designation of the term 'marriage' for the union of opposite-sex couples as a matter of state constitutional law."

After Proposition 8 and *Strauss v. Horton*, the California constitution clearly limited marriage to a man and a woman. Thus, the only options left for marriage equality advocates in the state were to amend the state constitution again or seek to invalidate the language of Proposition 8 as a matter of federal law. The plaintiffs in *Hollingsworth v. Perry* opted for the second route, which you will read about in *Speak Now*.

defendants vs. "proponents"

When someone wants to challenge the constitutionality of a law in court, the usual method is to sue a governmental official responsible for enforcing the law. Governor Arnold Schwarzenegger and Attorney General Jerry Brown decided not to defend Proposition 8 from constitutional attack.

Ordinarily, when a party chooses not to defend a lawsuit, the plaintiff wins "by default." But Judge Walker allowed the proponents of the Prop 8 ballot initiative to intervene, that is, to defend the action even though the plaintiffs did not name them as defendants. The U.S. Supreme Court later ruled that the proponents did not have standing to appeal the case to the Ninth Circuit.

summary of selected cases

In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court of the United States held that state bans on interracial marriage violate both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.

Baker v. Nelson, 409 U.S. 810 (1972), was the first same-sex marriage case to reach the Supreme Court of the United States. After the Supreme Court of Minnesota held that Minnesota law did not authorize marriage between persons of the same sex and that the federal constitution did not preclude Minnesota's decision to exclude same-sex couples from marriage, the plaintiffs appealed to the Supreme Court of the United States, which dismissed the appeal for "want of a substantial federal question."

Bowers v. Hardwick, 478 U.S. 186 (1986), held that the federal constitution permits the states to criminalize intimate conduct between same-sex couples. In the years after *Bowers*, lower courts held that, if the constitution permits *criminalization* of same-sex conduct, then it certainly permits other forms of discrimination, such as discrimination in adoption or military service.

In *Baehr v. Miike*, 852 P.2d 44 (Haw. 1993), the Supreme Court of Hawaii held that the state's ban on same-sex marriage required heightened judicial scrutiny under the state's Equal Protection Clause because it constituted discrimination based on sex. On remand, the trial court ruled that the state failed to meet its burden to justify its ban on same-sex marriage but it delayed implementation of its decision, which otherwise would have required the state to license same-sex marriages, pending appeal. To preempt a final court decision guaranteeing same-sex marriage, Hawaii enacted a constitutional amendment permitting the legislature to define marriage as it pleased, which effectively ratified the state's ban on same-sex marriage. The Hawaii litigation provoked a national panic, which led Congress to pass the so-called Defense of Marriage Act ("DOMA"). DOMA did two things: (1) it restricted the definition of marriage for federal purposes to opposite-sex couples; and (2) it permitted states to decline recognition of same-sex marriages performed in other states.

In *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999), the Supreme Court of Vermont unanimously held that the state's prohibition of same-sex marriage violated the Vermont Constitution. The court, however, did not require legalization of same-sex marriage. Instead, it gave the legislature the opportunity to either permit same-sex marriage or to enact an alternative system to ensure same-sex couples received the same benefits as married couples. Shortly thereafter, the Vermont legislature enacted civil unions but did not permit same-sex marriage.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court of the United States overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and held that states may not criminalize private, consensual, intimate conduct between same-sex couples.

In *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), the Supreme Judicial Court of Massachusetts became the first state court of last resort to hold that the state's constitution gave same-sex couples the right to marry. Although the case was a landmark victory for advocates of same-sex marriage, it provoked a backlash that led to numerous states enacting constitutional amendments to ban same-sex marriage.

In *In re Marriage Cases*, 183 P.3d. 49 (Cal. 2008), the California Supreme Court held that the statutes limiting marriage to opposite couples violated the equal protection clause of the state constitution. The court struck down the discriminatory parts of the statutes, opening the door for same-sex couples to legally marry in California. The court did not address the question of whether the California marriage statutes violated the U.S. Constitution.

Windsor v. United States, 133 S. Ct. 2675 (2013), held that DOMA violates the federal constitution's guarantee of equal protection of the laws as applied to same-sex couples who are legally married under state law. The Supreme Court of the United States explained: "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." Immediately

following the decision, lower courts relied on *Windsor* to strike down state bans on same-sex marriage in numerous states around the country.

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court of the United States held that state bans on same-sex marriage violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, impinging on same-sex couples' fundamental right to marry. The decision effectively legalized same-sex marriage nationwide, requiring states both to license same-sex marriages and to recognize same-sex marriages performed in other states.

about this guide's writers

CHASE COOPER received his law degree from the University of Virginia School of Law. He is an associate litigation attorney at Jones Day in Dallas. Any views expressed in this publication are solely those of the authors and do not necessarily represent the views of Jones Day or its clients.

KENT PIACENTI received his law degree from the University of Virginia, where he graduated Order of the Coif and served as Editor-in-Chief of the *Virginia Law Review*. Kent is a trial and appellate litigation associate in the Dallas office of Vinson & Elkins LLP. Any views expressed in this publication are solely those of the authors and do not necessarily represent the views of Vinson & Elkins LLP or its clients.

KATHERINE WALKER earned a PhD in sociology from the University of Massachusetts, Amherst, and currently teaches at Virginia Commonwealth University's University College. Her research interests are in cultural sociology, identity, and collective memory.

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