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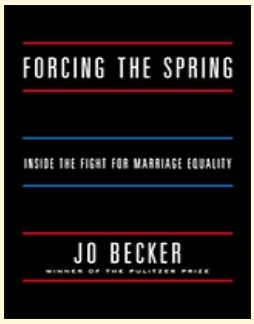
Jo Becker and Dale Carpenter: Two Cases, Two Books

by Claude Summers



Forcing the Spring by Jo Becker.

Among the handful of cases involving homosexuality that the Supreme Court of the United States has considered, the most important in delineating the rights of gay people are *Bowers v. Hardwick* (1986), in which the Supreme Court upheld the constitutionality of sodomy laws and described as "facetious" the claim that homosexuals have a right to privacy; *Romer v. Evans* (1996), in which the Court invalidated Colorado's Amendment 2 on the grounds that it deprived gay people of equal rights under the law and furthered no legitimate state interest; *Lawrence v. Texas* (2003), in which the Supreme Court reversed *Bowers v. Hardwick* and declared that "The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons"; and the two landmark cases decided on June 26, 2013, *Hollingsworth v. Perry* and *Windsor v. U.S.*

Two of these five cases have been the subject of instructively different kinds of books: Dale Carpenter's *Flagrant Conduct. The Story of Lawrence v. Texas: How a Bedroom Arrest Decriminalized Gay Americans* (2012) and Jo Becker's *Forcing the Spring: Inside the Fight for Marriage Equality* (2014), which provides an insider's view of the federal litigation against California's Proposition 8.

Becker's book has attracted a great deal of negative reaction in the gay press--some of it self-serving, like Andrew Sullivan's over-the-top whining in the *Huffington Post* that his contribution to the marriage equality debate is not sufficiently acknowledged, and some of it well-justified. The promotion of Becker's book as a history of the entire marriage equality movement, for example, is both offensive and untrue, and the book itself sometimes reads like a press release for its leading protagonists, political consultant (now Human Rights Campaign president) Chad Griffin and superstar attorneys Theodore Olson and David Boies, who are presented in breathlessly admiring prose.

Notwithstanding these justified critiques, however, *Forcing the Spring* is actually a useful and eminently readable book that deserves a wide readership. Written from a narrow--almost claustrophobic--perspective, it offers a revealing and informative account of the winding history of the case that became known as *Hollingsworth v. Perry*, the challenge in federal court to Proposition 8, the constitutional amendment that banned same-sex marriage in California from November 5, 2008 until June 28, 2013, when marriage equality finally returned to the nation's most populous state.

In response to the gay community's devastating defeat at the polls on November 4, 2008 and then in the California Supreme Court on May 26, 2009, Griffin and his mentors actor-director-activist Rob Reiner and his wife Michelle Reiner, with the support of a number of activists and philanthropists, including Dustin Lance Black, Cleve Jones, David Geffen, and Bruce Cohen, formed the American Foundation for Equal Rights (AFER) in order to mount a federal challenge to Proposition 8 and thereby, it was hoped, achieve marriage equality nationally. Becker's book chronicles the twists and turns of the lawsuit, and in the process both humanizes the participants in the case, including the plaintiffs, attorneys, and sponsors, and tells a riveting story.

The announcement of a federal lawsuit in 2009 was greeted less than enthusiastically by the established gay legal organizations and many legal experts, who judged the move risky and premature. But the quest for a national ruling in favor of equal rights was quickly embraced by most activists. Indeed, the move arose from the frustration and anger felt by the gay grassroots in the wake of the political impotence demonstrated by the Proposition 8 defeat and the slow pace of change

during the disappointing first year of the Obama administration, which allowed gay issues such as the passage of the Employment Non-Discrimination Act and the repeal of Don't Ask, Don't Tell to languish and which used the power of the Justice Department to impede rather than to advance gay rights.

Forcing the Spring provides insight into the sometimes conflicting legal strategies not only of Olson and Boies, but also of Theresa Stewart, who represented the City of San Francisco in the litigation, and, to a lesser extent, of Charles Cooper, who represented the proponents of Proposition 8. In addition, it illustrates the promotional and organizational genius of Griffin and his associates, and documents their deft maneuvering in the halls of power, especially the attempt to convince the Justice Department to cease defending the constitutionality of the Defense of Marriage Act, to persuade President Obama to complete his evolution on the issue of marriage equality, and to lobby Solicitor General Donald Verrilli to intervene on behalf of the plaintiffs in the Proposition 8 case.

Forcing the Spring also usefully differentiates the contrasting goals of the AFER team and Roberta Kaplan, who represented Edith Windsor in the case that may, somewhat ironically, lead to the fulfillment of the quest originally undertaken by the American Foundation for Equal Rights: marriage equality in every state of the union.

Despite the claims of its publicists, Becker's book is less history than journalism. Becker's decision to "embed" herself with AFER yielded a sense of immediacy that makes her reporting fresh. It also provided access to a number of personal stories, including, for example, the news that Cooper's stepdaughter came out to him in the course of the case, the revelation of how Vice President Biden was prompted to announce his support for marriage equality by his interaction with the children of a gay couple at a fundraiser in their home, and the disclosure that as a young man Judge Vaughn Walker had sought psychological help in an attempt to change his sexual orientation and was thus greatly moved by the testimony of witness Ryan Kendall, who had been forced into reparative therapy as a teenager.

Access to the AFER team also allowed Becker to report that although much has been made of the inspired pairing of Olson and Boies, acclaimed attorneys with decidedly different ideological bearings, who faced each other in *Gore v. Bush*, in which the Supreme Court anointed George W. Bush President of the United States, that pairing was not a part of the original plan for the case.

After Olson agreed to take the Proposition 8 case, he knew he needed a liberal (and preferably gay or lesbian) attorney as co-counsel to allay doubts in the gay community about his commitment to the cause. He initially approached Paul Smith, who argued *Lawrence v. Texas* on behalf of Lambda Legal in 2003. Smith turned down the offer, apparently in deference to the doubts of Lambda Legal colleagues regarding the case. Olson then considered offering the job to Kathleen Sullivan, an openly lesbian Stanford Law School professor, but then learned that she was on President Obama's short list for a possible appointment to the Supreme Court. Olson feared that if he contacted her and she was subsequently appointed (and confirmed) to the Court, she might feel obligated to recuse herself if the case came before her.

Only then did Olson decide to approach Boies, a decision that turned out to be exceedingly wise. For not only are the two attorneys complementary in style and strengths and work well together, but the symbolism of their pairing quickly caught the public's imagination and helped emphasize that the cause of marriage equality transcends partisanship and that both liberal and conservative cases can be made on its behalf.

Despite the obvious advantages of gaining access to key players in the litigation by her embedment with the AFER team, Becker nevertheless would have greatly benefited had she also emulated more closely the approach of Dale Carpenter in *Flagrant Conduct*. Like Becker, Carpenter captures the human drama inherent in impact litigation, but he places that drama in a far broader context. The result is that whereas Becker's book is less history than journalism, Carpenter's book is less journalism than history.

Flagrant Conduct tells the story of *Lawrence v. Texas* through the eyes of the plaintiffs, arresting officers, prosecutors, attorneys, and judges, many of whom agreed to lengthy interviews. Written almost a decade after the case was completed with the Supreme Court invalidating sodomy laws throughout the country, *Flagrant Conduct* has the advantage of perspective. While it lacks the immediacy of *Forcing the Spring,* it offers a far more considered history of its subject.

Carpenter approaches the *Lawrence* case by placing it in a number of essential contexts, including the history and effect of sodomy laws in the United States, as well as the rise of gay rights activism and the police abuse of gay people, especially in Houston, where John Geddes Lawrence and Tyron Garner were arrested in Lawrence's apartment on September 17, 1998 and charged with violating the state's "Homosexual Conduct" law, which made "deviate sexual intercourse with another individual of the same sex" a class C misdemeanor that could have resulted in jail time and a $5,000 fine.

The "Flagrant Conduct" of Carpenter's title refers not to the activities of the plaintiffs but, in the first instance, to "the behavior of the police themselves," as well as to "the use of precious prosecutorial time and money to pursue two men for sex in a private home rather than to pursue truly public and genuinely harmful acts. The flagrant conduct was the cowardice of elected state court judges who refused even to listen to the men's legal claims, shifted responsibility to other courts, and likely capitulated to political pressure. The flagrant conduct was the passage of a law selectively burdening one small group of people on the pretext of preserving a moral heritage applicable to all. And the flagrant conduct was the refusal of those stalwart legislators, year after year, session after legislative session, decade after decade, to repeal that law, even when it became obvious that it served no public purpose other than to justify discrimination and to dignify animus in every realm against a tiny minority."

Lawrence and Garner were almost certainly not guilty of the charge against them. However, in an act that justifies their status as heroes, rather than pleading "not guilty," they agreed to plead "no contest" so that the case could serve as a vehicle to challenge the unjust law itself.

Unlike the attractive couples handpicked to serve as plaintiffs in AFER's Proposition 8 case, who were frequently promoted by AFER's sawy media operation as the faces of the struggle for marriage equality, Lawrence and Garner were far from ideal plaintiffs. Neither were gay activists; both had criminal records; and they lacked many of the middle-class virtues that could have made them poster boys for a public relations campaign. Consequently, the Lambda Legal team that brought their case to the Supreme Court worked diligently to keep them not in but out of the spotlight.

[In the video below, Carpenter discusses his book and the plaintiffs in *Lawrence v. Texas*.]

Crucially, however, Lawrence and Garner were willing to be outed in homophobic Houston and to accept a police report that they knew was false. As Carpenter notes, they had "little to lose." Moreover, they were willing to avoid the press and leave the talking to their attorneys, who saw in their arrest an opportunity that could potentially lead to the reversal of the heartbreaking loss at the Supreme Court in 1986 in *Bowers v. Hardwick*, a case that also originated in a bedroom arrest.

As with the decision to challenge Proposition 8 in federal court, the decision to challenge Texas's sodomy law was also not greeted enthusiastically by many legal scholars, who feared that the Supreme Court might not be ready to reverse a relatively recent ruling.

Still, *Bowers v. Hardwick* was a 5-4 case from a bitterly divided Court that could have easily gone in the opposite direction. Indeed, Justice Lewis Powell had initially indicated that he would vote to declare sodomy laws unconstitutional, but changed his mind at the last minute and thereby changed the outcome of the case. Since the 1986 ruling, it had been widely condemned as one of the Court's worst decisions in history and Powell himself had ruefully admitted that he had erred in switching his vote.

Moreover, in 1996 the Court had handed down a landmark decision in *Romer v. Evans* that promised the possibility of a new perspective on the Court. Written by Justice Anthony Kennedy, who was appointed by President Reagan in 1988 to succeed Justice Powell, the decision invalidated a state constitutional amendment that prohibited municipalities and state agencies from granting lesbians and gay men "protected status" and denied them the right to bring any "claim of discrimination." In the first unambiguous victory at the Supreme Court for gay rights, the Court concluded that Amendment 2 "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."

Hence, if the *Lawrence* case were to reach the Court, lawyers for Texas would be obliged to demonstrate a legitimate state interest in upholding a statute that was seldom enforced, but that was widely used to stigmatize as criminals gay men and lesbians but not heterosexuals who committed the same proscribed sex acts. In addition, the state might also have to explain why it continued a ban on homosexual sodomy even as it had legalized bestiality.

Lambda Legal took the case through the labyrinthine Texas justice system, which predictably demonstrated little concern for justice, to the United States Supreme Court. Paul Smith, a well-respected appellate attorney with little experience in gay rights litigation, but who was gay, without "being *too* gay," was chosen to argue the case.

During the oral arguments at the Supreme Court, Smith emphasized that the Texas statute violated both the due process and equal protection guarantees of the U.S. Constitution. In contrast, Harris County district attorney Charles Rosenthal was unable either to articulate a single rationale for the law or to answer pointed questions from the Justices. He rested his entire case on the contention that the state could criminalize behavior simply because it was inherently immoral, an argument bought only by Justices Antonin Scalia, Clarence Thomas, and William Rehnquist.

In the decision handed down on June 26, 2003, Justice Anthony Kennedy, joined by Justices Stephen Breyer, Ruth Bader Ginsburg, David Souter, and John Paul Stevens, ringingly endorsed due process and the right to privacy. Gay men and lesbians, the majority held, are "entitled to respect for their private lives . . . The state cannot demean their existence or control their destiny by making their private sexual conduct a crime."

Moreover, the Court recognized the stigmatizing effect of sodomy laws and of *Bowers v. Hardwick*. Of the latter, Justice Kennedy wrote, "Its continuance as a precedent demeans the lives of homosexual persons." He declared emphatically: "*Bowers* was not correct when it was decided, and it is not correct today. *Bowers v. Hardwick* should be and now is overruled."

Justice Sandra Day O'Connor concurred in declaring the Texas statute unconstitutional on equal protection grounds ("The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct--and only that conduct--subject to criminal sanction") but did not join the majority that reversed *Bowers v. Hardwick*.

The Court's ruling in *Lawrence v. Texas* is the most significant legal victory in the history of the gay rights movement. It changed the legal landscape in which gay men and lesbians live in the United States. By acknowledging the legitimacy of gay and lesbian relationships, the Supreme Court gave the glbtq movement a new credibility in debates about issues as diverse as adoption, parental rights, employment and licensing rights, service in the military, partner benefits, and marriage.

As Carpenter observes, "Before *Lawrence*, when it was possible for a state to criminalize the sexual lives of gay people, it was much easier to deny them a host of the other rights and privileges taken for granted by most Americans. Before *Lawrence*, it was logical to say the government could disfavor them in jobs where they might be regarded as role models, like police officers and teachers. It was possible to believe that they, like any class of criminals, should be watched around children, even their own, or should be altogether prohibited from adopting and raising kids. . . . And if their sexual conduct could be made a crime, it was no stretch to declare that their relationships need not be formally recognized by the law, including in marriage."

[Carpenter discusses more details of *Lawrence v. Texas* in a conversation with Elizabeth Marquardt in the video below.]

The gay-rights lawyers who argued *Lawrence v. Texas* scrupulously avoided the question of marriage and in his decision, Justice Kennedy conspicuously reserved the issue for another day. Tellingly, however, the majority decision's implication for marriage was scathingly referenced in Scalia's bitter and intemperate dissent.

Although one would scarcely know it from Becker's book, the quest for marriage equality was well underway when the *Lawrence* decision was handed down in June 2003 and was soon to receive impetus from its first permanent victory, the Massachusetts Supreme Court's pathbreaking *Goodridge* decision in November 2003 that brought same-sex marriage to the Bay State in May 2004.

The Massachusetts litigation itself followed other statewide attempts to achieve marriage equality, most notably in Hawaii and Alaska (which in turn prompted the federal Defense of Marriage Act, which was signed into law by President Bill Clinton in 1996), and Vermont;

and it led to President George W. Bush's endorsement of a federal marriage amendment to prohibit same-sex marriage and the placement of a number of state Defense of Marriage Acts on the ballot in the 2004 election in a cynical (and successful) attempt to rally religious conservatives to the polls.

Becker's failure to place the Proposition 8 litigation in the broader context of the struggle for marriage equality, and to recognize the immense contributions of such individuals as Evan Wolfson, Mary Bonauto, Jon Davidson, Shannon Minter, and Theresa Wright, and of organizations such as GLAD, Lambda Legal, the National Center for Lesbian Rights, Freedom to Marry, and the ACLU to the cause, makes her book seem parochial and insufficiently informed.

Becker also fails to provide sufficient context to understand many other aspects of the litigation. For example, frustration at the passage of Proposition 8 led not only to the founding of AFER to seek marriage equality nationwide, but it also led to a remarkable increase in grassroots activism generally, furthered by the explosion of a gay blogosphere that amplified the voices of gay people generally.

The rise of groups such as GetEqual, the increased activism against Don't Ask, Don't Tell, the impatience with the unresponsiveness of the Obama administration, and the surprising success of the National Equality March of October 11, 2009 are all important events that are ignored in *Forcing the Spring*, but that helped shape the atmospherics in which the Proposition 8 case was conducted.

Particularly relevant is the passionate yearning for a change of direction in the gay and lesbian movement that was expressed at the National Equality March and that also influenced the decision to challenge Proposition 8 in federal court. Veteran activists Cleve Jones and David Mixner, who issued the call for the National Equality March, expressed disappointment with the gay and lesbian political establishment, which was widely seen as having been co-opted by the Democratic Party, which itself was seen as more interested in raising money from its glbtq constituency than in actually enacting laws that would advance equal rights.

Jones, for example, told the *New York Times*, "The endless pursuit of fractions of equality, state by state, county by county, locality by locality, is not enough. Until we get federal action, everyone of those local victories--as important as they are--every one is incomplete and impermanent."

At the march itself, Mixner perfectly captured its spirit with the following words, "When people tell me to be patient, when people tell me, oh lord, not now. All I can think about is how many more tears must be shed so some politicians in a back room can figure out when it's convenient to join us and to fight for our freedom."

By failing to provide this broader context, Becker not only appears unaware of the deep yearning on the part of the grassroots for the change in direction that AFER sought in filing the federal lawsuit against the advice of the gay legal establishment, but she also fails to note the irony inherent in the fact that the bold litigation advanced (at least initially) by a handful of gay and straight millionaires actually more closely reflected the mood of ordinary gay and lesbian citizens than the larger, but more timid organizations supposedly representing them.

Becker also sometimes fails to provide sufficient information about some of the participants in the lawsuit. For example, Becker presents Charles Cooper as a man torn against himself, implying that perhaps his heart was not in the enterprise. She eventually explains his discomfort as related to the fact that his stepdaughter had come out to him during the course of the case and that he and his wife actually grew to admire Kris Perry and Sandy Stier, two of the plaintiffs.

That may well be true, and it is certainly possible that Cooper's attitude toward gay people evolved significantly during the course of the Prop 8 case.

However, it is at least relevant to note that Cooper has a long and ignoble history as an opponent of gay rights, one that significantly qualifies the mostly sympathetic portrait of him that emerges in *Forcing the Spring*. In 1986, for example, when he was an assistant attorney general during the Reagan administration, Cooper authored a pernicious policy memo arguing that people with AIDS were not covered by laws prohibiting employment discrimination against the disabled. In 1995, he filed a brief with the Supreme Court on behalf of several states, including Alabama, defending Colorado's notorious Amendment 2. In addition, in the 1990s he also defended Hawaii's denial of marriage rights to gay and lesbian couples before the state Supreme Court in *Baehr v. Anderson*, one of the very first marriage equality cases.

Moreover, Becker's book is marred not only by its omissions, but also by some factual errors. Westboro Baptist Church, for example, is not located in Florida but in Kansas. The U.S. Conference of Catholic Bishops did not file an amicus brief urging that Proposition 8 be struck down; its brief argued that it should be upheld.

Notwithstanding some errors, however, *Forcing the Spring* provides a thorough and absorbing account of the case from its conception in the minds of Griffin and the Reiners through its disposition at the Supreme Court.

That journey includes the historic trial presided over by Judge Walker that demonstrated the intellectual bankruptcy of the opposition to same-sex marriage, as epitomized by the inability of star witness David Blankenhorn to articulate how same-sex marriage would "deinstitutionalize" marriage itself. Despite having asserted over and over again in various speeches and publications that allowing gay men and lesbians to marry would damage the institution of marriage, under oath a tongue-tied Blankenhorn could not specify what this damage might be. Nor could he cite any harm that the institution of marriage had suffered in those jurisdictions where same-sex couples had been allowed to marry for more than a decade.

The journey to the Supreme Court also encompasses the appeal of Judge Walker's decision at the U.S. Court of Appeals for the Ninth Circuit, with its nine-month delay to allow the California Supreme Court to clarify a question of standing, and its 2-1 decision declaring Proposition 8 unconstitutional on narrow grounds.

At the Supreme Court Olson forcefully described the effects of Proposition 8 as "stigmatizing a class of Californians based upon their status and labeling their most cherished relationships as second-rate, different, unequal and not O.K." and sought a broad ruling that would reach beyond the particular circumstances of the Golden State.

The high Court ultimately issued a decision that was simultaneously a major victory for marriage equality and a disappointing failure to declare a fundamental right to marry the person one loves.

Becker's book fittingly concludes with the long-delayed California weddings of the plaintiffs on June 28, 2013. Just before 5:00 p.m. that day, Kris Perry and Sandy Stier were married before a hastily assembled crowd at San Francisco City Hall by California Attorney General Kamala Harris. The other plaintiffs, Paul Katami and Jeffrey Zarrillo, were married in Los Angeles an hour later by Mayor Antonio Villaraigosa.

Despite its triumph in returning marriage equality to California, however, the Proposition 8 case did not yield the ruling that AFER sought, one that would establish marriage equality throughout the nation. Rather than reach the merits of the case, the Supreme Court, in a decision written by Chief Justice Roberts, who was joined by an unlikely coalition of Justices Scalia, Ginsburg, Breyer, and Kagan, ruled that the proponents of Proposition 8 lacked standing to appeal Judge Walker's decision.

Thus, Judge Walker's historic and deeply humane opinion declaring Proposition 8 unconstitutional became the governing decision in the case. Since that decision is from a District Court rather than an appellate court, however, it applies only to California and has limited precedential value.

Although the litigation over Proposition 8 did not yield the broad ruling AFER sought, Chief Justice Roberts' decision did validate a point that marriage equality activists have argued repeatedly: allowing gay and lesbian couples to marry harms no one. Even the most ardent opponents of same-sex marriage were unable to demonstrate that they sustained any injury when gay and lesbian couples were allowed to marry.

Moreover, in addition to returning marriage equality to California, the epic battle against Proposition 8 served the important purpose of educating the public about marriage equality generally. The exhaustive trial conducted by Judge Walker demonstrated clearly both the harm caused by the proposition and also the animus that motivated it.

Although the Supreme Court prevented the live broadcast of Judge Walker's trial, and the Ninth Circuit later refused to release videos of the trial, it became vividly familiar to a large audience when AFER board member Dustin Lance Black wrote the play *8*, which portrayed the actual events and testimony of the trial. As Black remarked to the Associated Press on the eve of the play's reading on Broadway, the trial "was the first time I've ever seen our case argued by the most capable lawyers in the world, in a court of law where the other side had to raise their right hand and swear to tell the truth . . . . It killed me to think that this would only live inside the courtroom for the dozens to see and not the country to see . . . . We immediately started to figure out, 'How do we get this truth out there?'"

Star-studded casts presented the play not only on Broadway but also in Los Angeles and to a worldwide audience on YouTube. In addition, AFER and Broadway Impact released and licensed the play for readings nationwide on college campuses and in community theaters free of charge.

As a result of Griffin's mastery of promotion and marketing, and his ability to marshal the support of Hollywood celebrities, the Proposition 8 litigation received far more media attention than any previous gay rights case. It also received considerably more attention than the case

challenging the Defense of Marriage Act (DOMA) brought by Roberta Kaplan on behalf of Edith Windsor that was decided on the same day as *Hollingsworth v. Perry.*

Edith Windsor sued to overturn DOMA when she was required to pay more than $350,000 in federal estate taxes after her spouse, Thea Spyer, died in 2009. The couple had lived together for 44 years. They were married in 2007 in Canada. Although New York state, where they resided, recognized their marriage, DOMA prevented the federal government from doing so. Had their marriage been recognized, Spyer's estate would have passed to Windsor with no tax due. An attractive and vivacious widow, Edie Windsor quickly became the personification of both the material injury inflicted by DOMA and the less tangible but nevertheless real insult such legislation imposes on gay people generally.

On the surface, the Proposition 8 case seemed by far the more ambitious of the two cases. Its plaintiffs were asking for a broad ruling establishing the right to marry, whereas the Windsor case sought only that same-sex married couples be treated equally by the federal government. Chief Justice Roberts even suggested that the Obama administration could have settled the case without appealing it to the Supreme Court. A ruling from the Supreme Court based on grounds of federalism might resolve Edith Windsor's tax claim but do nothing to extend marriage equality itself.

Just as Olson and Boies were obliged to argue that the proponents of Proposition 8 lacked standing to appeal Judge Walker's decision, they did so without their hearts in it, hoping that the Court would instead issue a broad ruling on the merits of their case, so Roberta Kaplan was obligated to place the interests of her actual client first. While she was hoping that the Court would issue a ruling based more on equal protection than on the grounds of states' rights, she indicated in oral argument that she would also be happy with a narrow ruling, a "small get" compared to the "big get" sought by Olson and Boies.

The 5-4 decision in the *Windsor* case, written by Justice Kennedy and joined by Justices Breyer, Ginsburg, Kagan, and Sotomayor, includes elements of federalism and does not in itself establish a fundamental right to marry. But the opinion, full of Justice Kennedy's characteristic concern for individual dignity, is solidly based in equal protection analysis and provides the rationale to make the case for a fundamental right to marry in subsequent suits.

The decision declared that DOMA was enacted simply to injure same-sex couples. "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate class, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."

The principal effect of DOMA, the majority held, is "to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality . . . ." The law "undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples and all the world, 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."

Moreover, Justice Kennedy added, DOMA also "humiliates tens of thousands of children now being raised by same-sex couples.[It] makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."

Echoing the opinion he wrote in *Romer v. Evans*, Justice Kennedy concluded, "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment."

As Becker points out, the decision in *Windsor* actually echoes arguments that had been made forcefully in the Proposition 8 case. Unquestionably, the two cases jointly influenced members of the Court. Roberta Kaplan herself later observed that "had the Prop 8 case not been there, maybe [the Supreme Court majority] would not have ruled so expansively in the *Windsor* case, because clearly they were trying to send a signal on the larger question."

In addition, it is relevant to note that Justice Kennedy, the author of the great trinity of Supreme Court decisions protecting the rights of gay people–*Romer*, *Lawrence*, and *Windsor*–voted with the minority that wanted to reach the merits of the Proposition 8 case. It is certainly conceivable that had he prevailed on that point, the decision in the Proposition 8 case might have yielded the "big get" that Olson and Boies and AFER sought.

Following the historic decision in *Windsor,* the Obama administration acted swiftly to insure that legally married same-sex couples are treated equally by the federal government. The decision also influenced the legislatures of additional states to enact marriage equality laws, and state courts in New Jersey and New Mexico cited it as they ruled in favor of marriage equality.

Most significantly, however, the *Windsor* decision has been the basis of federal District Court rulings in states as unlikely as Utah, Kentucky, and Oklahoma invalidating state DOMA amendments and statutes. It is likely that the decision AFER sought from the Supreme Court will be forthcoming sooner rather than later, and it may well come in a case argued by Olson and Boies, who are now co-counsel in a suit challenging Virginia's ban on same-sex marriage.

Anyone interested in the gay rights struggle will find the books by Dale Carpenter and Jo Becker rewarding. Both are compellingly written and accessible. While illuminating the frequently arcane corners of the American justice system, they also make clear the human stakes at issue in the quest for equal rights under the law.

[In the video below Becker discusses her book on the PBS Newshour.]

[In the following video, Becker discusses both her book and the criticisms of it in the gay press at an appearance at Washington, D.C.'s Politics and Prose Bookstore.]

Jo Becker is a Pulitzer Prize-winning investigative reporter for the *New York Times.* She has taught investigative journalism as a visiting professor at Princeton University.

Forcing the Spring: Inside the Fight for Marriage Equality. New York: The Penguin Press, 2014. Learn more about the book and buy it at the Penguin website.

Dale Carpenter is the Earl R. Larson Professor of Civil Rights and Civil Liberties Law at the University of Minnesota Law School. He lives in Minneapolis.

Flagrant Conduct: The Story of *Lawrence v. Texas.* New York: W. W. Norton, 2012. Learn more about the book and buy it at the W.W. Norton Flagrant-Conduct website.

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