

Equality in the Garden State: Litigation and Social Activism in the Struggle for Marriage Equality

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I. INTRODUCTION

The first *New York Times* wedding announcement to feature a gay couple described how Steven Goldstein and Daniel Gross met. The relationship began with a self-deprecating personal ad in the *Washington City Paper*, followed by a date at Dupont Circle's Kramerbooks, a month's worth of long-distance phone calls and, years later, a civil union ceremony in Vermont.¹ Although the *Times*' decision in August 2002 to include same-sex unions sparked controversy, the wedding announcement itself was as quotidian as it was historic.² The piece did not mention the many battles fought over the paper's wedding section: the impassioned four-page letter Goldstein and Gross wrote to the *Times* editorial board,³ or the years of lobbying by the Gay and Lesbian Alliance Against Defamation (GLAAD).⁴ It simply told a story about two people falling in love.

Four and a half years later, Goldstein and Gross celebrated another first. On February 20, 2007, New Jersey's civil union law went into effect, a product of the state supreme court's October 2006 ruling in *Lewis v. Harris* that same-sex couples were entitled to all the rights and privileges of marriage.⁵ Shortly after midnight, the New Jersey couple exchanged vows in the office of their state senator, renewing a marital commitment first cemented in Vermont and becoming one of the first pairs to register under the new partnership law. Once again, the event was a mix of the ordinary and the

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¹ Weddings/Celebrations, *Daniel Gross and Steven Goldstein*, N.Y. TIMES, Sept. 1, 2002, § 9, at 12.

² Lauren Sandler, *Gay Marriages Don't Change the Gray Lady*, NEW REPUBLIC, Sept. 23, 2002, at 14.

³ *CNN Live Today* (CNN television broadcast Sept. 2, 2002).

⁴ Christopher Farah, *Black, White and Pink All Over*, SALON.COM, Dec. 12, 2003, <http://dir.salon.com/story/mwt/feature/2003/12/12/nyt/>.

⁵ See *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006).

extraordinary, with a throng of photographers crowded around the rabbi as he blessed the ceremony. Images from the event appeared on the front page of one of New Jersey's most prominent newspapers the following morning.⁶

The two anecdotes illustrate part of the reason why gay activists have proved so successful in pushing for marriage rights in New Jersey. The stories put faces and names to the fight for equality, and by sharing personal moments on such a public stage, these events have helped to normalize relationships that so many still find abnormal.

It's no accident that Steven Goldstein featured prominently in both moments. After a career as an Emmy-winning producer, a press secretary, and a campaign manager, he knew the importance of good storytelling. Since founding Garden State Equality (GSE), the state's largest gay rights organization, in 2004, Goldstein has used this tactic to push same-sex partnership rights to the forefront of New Jersey's political agenda. At a time when other progressive states have rejected marriage equality, Goldstein and his allies built a movement that took New Jersey from failing to recognize any same-sex partnership rights to the cusp of gay marriage in four years. Goldstein found ways to tell compelling stories about gay couples that resonated with voters and policymakers, even if it meant injecting himself and his partner into the debate.

This grassroots effort was immensely successful, so much so that the *Associated Press* stated GSE "could be a model for the rest of the country."⁷ By normalizing the abnormal and helping New Jersey residents overcome their resistance to same-sex marriage, GSE did as much to pave the way for a partial victory in *Lewis* as did the plaintiffs' attorneys. GSE built a coalition so steadfast that it not only fended off conservative backlash after *Lewis*, but also continued to push for same-sex marriage immediately after the decision. And, indeed, GSE has been a "model" organization. It is precisely the type of group that the architects of the marriage equality movement envisioned when they first mapped out their strategy twenty years ago. It was supposed to happen this way.

This Essay consists of two parts. It begins by reviewing the long-term visions that gay activists developed to fight for marriage equality in the early 1990s, and then examines how the tactics employed by GSE and the *Lewis* attorneys demonstrate the successes and shortcomings of that strategy as it was implemented in New Jersey. The Essay concludes by considering the future of the state's same-sex marriage debate and reiterating the necessity of building social movements that combine impact litigation with traditional grassroots organizing.

⁶ Ruth Padawar & William Lamb, *Gay Couple Marks Milestone, Then Returns to the Campaign*, THE RECORD (Bergen County, N.J.), Feb. 20, 2007, at A01.

⁷ Garden State Equality, About Us, available at <http://www.gardenstateequality.org/about.htm> (last visited Apr. 7, 2008).

II. THE LONG-TERM STRATEGY

To a casual observer, the story of the marriage equality movement seems to have unfolded haphazardly. It began in Hawaii in 1993, where a team of local lawyers convinced the state supreme court to demand a compelling justification for same-sex marriage restrictions.⁸ After the Congress passed federal legislation in “defense of marriage” three years later, the story then hopscotched across the country, with court victories in Vermont and Massachusetts⁹ followed by a string of defeats in state capitals elsewhere.¹⁰ By the time the issue reached the New Jersey Supreme Court in March 2005, the issue of marriage equality had transformed in twenty years from an obscure theoretical debate into one of the most controversial social movements of the generation.

The strategy behind this crusade was far better developed than the cacophony of litigation and legislation suggests. The strategizing began before even the Hawaii case, in the early 1990s when a team of young gay litigators, led by Evan Wolfson at Lambda Legal Education and Defense Fund (Lambda Legal), charted out a long-term plan for promoting marriage equality. Wolfson’s vision remains alive today, and the approach first articulated years ago in Lambda Legal’s offices can be found in New Jersey as Steven Goldstein pushes the state ever-closer to marriage equality.

Evan Wolfson joined Lambda Legal in 1989, only six years after writing about marriage equality as a Harvard Law School student.¹¹ He was to become the Thurgood Marshall of the gay rights movement: the big-picture tactician who engineered the early victories of a nascent civil rights struggle.¹² But, when he first arrived at Lambda Legal, same-sex marriage had not yet entered the public consciousness,¹³ and Wolfson needed to develop a ten- or twenty-year plan to shift public opinion on the issue. He gathered a

⁸ See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

⁹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (requiring same-sex marriage under the state equal protection clause); *Baker v. Vermont*, 744 A.2d 864, 878 (Vt. 1999) (requiring, at minimum, civil unions for same-sex couples under the state equal protection clause).

¹⁰ See, e.g., OR. CONST. art. XV, § 5a (amended by November 2004 vote to prohibit same-sex marriage); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *rev. granted*, 149 P.3d 737 (Cal. 2006); *Anderson v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004); see also James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4 (describing how proposed state constitutional amendments banning same-sex marriage increased the turnout of socially conservative voters in November 2004 elections).

¹¹ John Cloud, *Evan Wolfson: Gay Marriage as a Civil Right of Our Times*, TIME, Apr. 26, 2004, at 120.

¹² Tony Mauro, *Trailblazer: Wolfson’s Fight for the Freedom to Marry*, LEGAL TIMES, June 7, 2004, at 1.

¹³ Since the 1970s, lawyers and activists had occasionally and unsuccessfully petitioned the courts for marriage equality but had attracted only intermittent attention. See, e.g., *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

group of attorneys and activists to brainstorm a course of action.¹⁴ Over the next two decades, Wolfson remained at the center of the movement, first as director of the Marriage Project at Lambda Legal and co-counsel in the Hawaii litigation, and later as the founder and president of his own grassroots organization, Freedom to Marry.¹⁵

When Wolfson first publicly described this strategy in a 1994 law review article on the future of same-sex marriage,¹⁶ the movement was at a crossroads. The petitioners had just won before the Hawaiian Supreme Court, and gay activists were unsure what to do next. On one hand, Wolfson needed to address concerns that the marriage movement was proceeding too quickly. Some gay rights organizers were wary of pursuing their objectives through the courts.¹⁷ A controversial new book, Gerald Rosenberg's *The Hollow Hope* only added fuel to the fire, challenging the empirical claim that judges could successfully implement social change from the bench.¹⁸ Some suggested it would be better to wait until the public was more receptive to gay rights.

On the other hand, Wolfson faced critics who argued that the movement was proceeding too slowly. These critics believed that Lambda Legal's efforts were misguided and argued that by seeking to gain access to the fundamentally heterosexual institution of marriage, Lambda Legal was abandoning the "rhetoric of radical transformation" that defined the gay civil rights struggle.¹⁹ These critics wanted to use the gay rights movement as an opportunity to spark a broader sexual revolution.²⁰

Wolfson strived to chart a middle ground between these opposing camps. Writing in the *New York University Review of Law and Social Change*, he noted that a majority of gay and lesbian couples wanted the right to marry their partner and were not interested in more radical transforma-

¹⁴ Telephone Interview with Evan Wolfson, Executive Director, Freedom to Marry, in New York, N.Y. (Oct. 17, 2006) (on file with author).

¹⁵ Press Release, Lambda Legal Educ. & Def. Fund, Evan Wolfson Departs Lambda After Twelve Years On Staff (Mar. 21, 2001) (on file with author), available at <http://www.lambdalegal.org/news/pr/evan-wolfson-departs-lambda.html>. In recent years, Wolfson has been recognized for his foresight and for the success of his tactics. See, e.g., Cloud, *supra* note 11 (naming Wolfson one of the hundred most influential people in the world in 2004); Margaret Cronin Fisk, *Profiles in Power*, NAT'L L.J., June 12, 2002, at col. 1 (naming Wolfson one of the hundred most influential lawyers in the country in 2002).

¹⁶ Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994–1995).

¹⁷ See Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861 (2006).

¹⁸ See *id.* at 570 n.12; GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 9–36 (1st ed. 1991). Rosenberg's book examined the most famous of the Warren Court's decisions, *Brown v. Board of Education*, 347 U.S. 483 (1954), in turn questioning the popular idea that courts were the best guarantors of individual freedoms.

¹⁹ Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1541–42 (1993).

²⁰ *Id.* at 1544–49.

tion.²¹ He believed in aggressively pursuing gay and lesbian rights but was careful to argue for an approach that did not trigger backlash. He did not necessarily reject far-reaching social change, but he believed that any reforms must be couched in innocuous language. “Radical alteration” was possible without using “radical rhetoric.”²²

Wolfson stressed the importance of forming broad-based, multifaceted alliances to push for change.²³ Quoting Martin Luther King, Jr., Wolfson supported reform through a multiplicity of “methodologies”: a movement focused not only on litigation, but also on public education, lobbying, academic research, and grassroots organizing.²⁴

Wolfson believed that the courtroom was only one forum for achieving social change. Equally important were the town hall meeting and the state-house cloakroom. He said that there was no “quick fix” and acknowledged that the movement would require diligence and patience:

Bringing the wrong suit in the wrong way, even for the right objective, could do serious injury not only to our right to marry, but also to the broader range of lesbian and gay rights. The wrong case, wrong judge, or wrong forum could literally set us all back years, if not decades.²⁵

Although he knew it might take a long time to achieve the ultimate goals, Wolfson was optimistic about the certainty of success.²⁶ Gay rights groups more or less adhered to Wolfson’s strategy over the next decade and a half, in no small part because Wolfson played such a central role in executing the tactics.²⁷

As Wolfson had recommended, activists at Lambda Legal and other gay rights organizations first identified a handful of states, almost exclusively socially liberal states in the Northeast and along the Pacific Coast, where they felt they had the best chances of winning marriage equality.²⁸ Lambda Legal lawyers utilized at least two criteria for selecting target states.²⁹ First, they wanted locations with a history of supporting gay rights, either in the legislature, the courts, or both. In particular, they looked for states that did not have a specific law or constitutional amendment forbidding same-sex unions.³⁰ Second, they wanted states where the populations were well-edu-

²¹ Wolfson, *supra* note 16, at 582–87.

²² *Id.* at 609.

²³ *Id.* at 592–99.

²⁴ MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 24 (1st ed. 1963), *construed in* Wolfson, *supra* note 16, at 608.

²⁵ Wolfson, *supra* note 16, at 611.

²⁶ *Id.* at 615.

²⁷ Cloud, *supra* note 11.

²⁸ Interview with Evan Wolfson, *supra* note 14; *see also* PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* 69–71 (2000) (describing the formation of Lambda Legal’s long-term litigation strategy).

²⁹ Interview with Evan Wolfson, *supra* note 14.

³⁰ Cheryl Wetzstein, *Nine States Vying in Gay ‘Marriage’ Legalization Race*, WASH. TIMES, Sept. 27, 2004, at A06.

cated and affluent, attributes that often correlate with public support for gay rights.³¹

Wolfson and his colleagues waited several years after the initial Hawaii decision before litigating in other states, but by the turn of the century they were pushing more aggressively on several fronts.³² By 2001, Lambda Legal or an affiliated organization was either pursuing or considering action in most of their target states: Massachusetts, Rhode Island, Connecticut, New York, California, Oregon, and Washington State. That year, the group decided to add another state to their list: New Jersey.³³

The Garden State was a natural target.³⁴ Since the late 1960s, New Jersey has been a pioneer on gay rights, being one of the first states to end crackdowns on gay bars,³⁵ to decriminalize sodomy and gay pornography,³⁶ to prohibit workplace discrimination,³⁷ and to grant legal rights to non-biological parents in same-sex families.³⁸ In turn, the state had attracted a growing number of gay couples; and New Jersey residents, who were among the most affluent and best educated in the country, have proved tolerant of the growing gay population.³⁹

Equally important, New Jersey courts were some of the nation's most progressive.⁴⁰ The state's 1947 constitution established a weak, part-time legislature and a strong, independent judiciary; as a result, the courts have

³¹ Jeremy W. Peters, *Hey, Massachusetts, New Jersey Is Passing on the Left*, N.Y. TIMES, Feb. 10, 2008, at WK3; Josh Benson, *Welcome to the Rainbow State*, N.Y. TIMES, Sept. 5, 2004, at 14NJ.

³² See Wetzstein, *supra* note 30.

³³ Interview with Evan Wolfson, *supra* note 14.

³⁴ Benson, *supra* note 31.

³⁵ *One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 18–19 (N.J. 1967); *cf. Murphy's Tavern, Inc. v. Davis*, 175 A.2d 1 (N.J. Super. Ct. App. Div. 1961) (upholding suspension for gay bar in Newark, N.J.); *Paddock Bar, Inc. v. Div. of Alcoholic Beverage Control*, 134 A.2d 779 (N.J. Super. Ct. App. Div. 1957) (upholding suspension of liquor license for gay bar in Asbury Park, N.J.).

³⁶ *City of Newark v. Licht*, 200 A.2d 508 (N.J. Super. Ct. App. Div. 1964) (finding male physique magazines in which all models were clothed not obscene because the photographs were not patently offensive). In *State v. Saunders*, 381 A.2d 333 (N.J. 1977), the state supreme court struck down New Jersey's sodomy statute, six years after the state criminal law revision commission had proposed decriminalizing all sexual practices not involving force, adult corruption of minors, or public offense. See 1 N.J. CRIMINAL LAW REVISION COMM'N, FINAL REPORT 61 (1971) (proposing an amendment to N.J. ADMIN. CODE § 2C:14-2). For a discussion of how the courts dealt with the proposed legislative reforms, see Marc R. Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality in New Jersey: Is Lewis v. Harris a Dead End or Just a Detour?*, 59 RUTGERS L. REV. 291, 302–04 (2007).

³⁷ N.J. ADMIN. CODE § 10:5-5 (1991) (current version 2007) (adding "affectional or sexual orientation" as a protected category under the state's Law Against Discrimination).

³⁸ *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (ruling that after a lesbian couple ended their relationship, the non-biological mother retained visitation rights under the "psychological parent" doctrine); Poirier, *supra* note 36, at 313–18.

³⁹ Benson, *supra* note 31.

⁴⁰ SUSAN P. FINO, THE ROLE OF STATE SUPREME COURTS IN THE NEW JUDICIAL FEDERALISM 71–85, 107 (1987); G. ALAN TARR & MARY CORNELIA ADLIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 268, 273 (1988); Kevin Mulcahy, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn*, 40 SANTA CLARA L. REV. 863 (1999–2000).

often intervened on policy issues on which legislators have failed to act.⁴¹ New Jersey remains one of the few states where voters cannot remove judges from office, allowing courts to rule on controversial social issues without fear of electoral reprisal.⁴² In 2001, the Lambda Legal attorneys hoped that the New Jersey courts would take another strong stance, this time by becoming the first state to legalize same-sex marriage.

III. THE NEW JERSEY STRATEGY

A. *The Litigation*

Lawrence Lustberg's involvement in gay rights litigation began with a call from David Buckel in early 2001. Lustberg, a senior partner at the Newark firm then known as Gibbons, Del Deo, Dolan, Griffinger and Vecchione, was involved in high-profile pro bono work and often fielded calls from public interest groups asking for legal assistance. Buckel introduced himself and started the conversation with a simple question: "Do you want to be involved in the greatest civil rights movement of our time?"⁴³

Skeptical, Lustberg waited for explanation.⁴⁴ Buckel, who had become director of the Marriage Project at Lambda Legal after Evan Wolfson left, said that he planned to file a marriage equality suit in New Jersey and was hoping to partner with a local firm.⁴⁵ Buckel explained that he needed help navigating the state's court system and wanted to know if Gibbons, Del Deo would join as pro bono counsel. Lustberg, a heterosexual with no previous ties to the gay community, had been involved in numerous other civil rights projects, and so jumped at the opportunity. They agreed to divide up the work: Buckel would find plaintiffs, organize political support, and argue the case in court, while Lustberg and a young associate at his firm would craft the legal arguments and write the majority of the briefs. Both Buckel and Lustberg would remain in contact with Steven Goldstein, who would soon found Garden State Equality and who proved to be an important ally in the development of a coherent public message.⁴⁶

Once Lustberg was on board, the team began the lengthy process of laying the groundwork for litigation, beginning with the identification of possible plaintiffs. Much like Goldstein, Buckel believed the best shot at

⁴¹ See, e.g., *S. Burlington County NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713 (N.J. 1975); *Abbot v. Burke*, 477 A.2d 1278 (N.J. Super. Ct. App. Div. 1984); see also BARBARA G. SALMORE & STEPHEN A. SALMORE, *NEW JERSEY POLITICS AND GOVERNMENT: SUBURBAN POLITICS COMES OF AGE* 192 (2d ed. 1998).

⁴² See AM. JUDICATURE SOC'Y, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* (2d. ed. 1993).

⁴³ Telephone Interview with Lawrence Lustberg, Senior Partner & Chair of Criminal Def. Dep't, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, in Newark, N.J. (Oct. 19, 2006).

⁴⁴ *Id.*

⁴⁵ Lambda Legal Educ. & Def. Fund, David S. Buckel, <http://www.lambdalegal.org/about-us/staff/David-S-Buckel.html> (last visited Mar. 16, 2008).

⁴⁶ Interview with Lawrence Lustberg, *supra* note 43.

victory was to frame the case as a story of regular families suffering needless discrimination; he needed individuals who were both compelling and conventional.⁴⁷ As Lustberg explained, Buckel wanted “conservative, white-picket-fence kind of plaintiffs,” the kind of people that average New Jerseyans could relate to.⁴⁸ Buckel and Lustberg ultimately chose a diverse group of seven couples, including a pair of Episcopal ministers who lived together in Union City and served as the lead plaintiffs.⁴⁹ These people would become the public face of the campaign for gay marriage.

With the plaintiffs selected, Buckel and Lustberg prepared for the first round of litigation—filing a complaint for injunctive and declaratory relief in a New Jersey Superior Court.⁵⁰ The attorneys knew they would lose at the trial level. With no state case law to support the issuance of marriage licenses to same-sex couples, the trial court would have virtually no legal basis to find in favor of the plaintiffs. The filing, which eventually occurred on June 27, 2002, was nonetheless important for two reasons: as a necessary first step for later appeals and as a political tool for laying out the case as the litigation team wanted the public to understand it. In the complaint, the team carefully included at least one paragraph about each pair of plaintiffs, language which often appeared verbatim in Lambda Legal’s press releases.⁵¹

After the complaint was dismissed by the trial court in late 2003, Lustberg and Buckel began the appeals process.⁵² Their legal claims were twofold. First, they argued that New Jersey’s ban on same-sex marriage violated homosexuals’ fundamental right to marry. Lustberg acknowledged later that this would be the more difficult argument to win.⁵³ The New Jersey constitution protects substantive, “inalienable” liberty rights, but state courts have avoided interpreting this phrase broadly.⁵⁴ New Jersey courts generally have followed the lead of the U.S. Supreme Court, requiring an asserted fundamental liberty interest to be clearly identified and deeply rooted in the “traditions, history, and conscience” of the state.⁵⁵

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Complaint at 2–3, *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Law Div. Nov. 5, 2003) No. L-00-4233-02, available at <http://www.lambdalegal.org/our-work/in-court/complaints/lewis-v-harris-complaint.html>.

⁵⁰ *Id.* at 11.

⁵¹ *Id.* at 2–8; Kate Coscarelli, *Same-Sex Couples Sue for Right to Marry in N.J.*, STAR-LEDGER (Newark, N.J.), June 27, 2002, at 17; see, e.g., Press Release, Lambda Legal Educ. & Def. Fund, Sweeping Gay Marriage Lawsuit in New Jersey Aims for U.S. History (June 25, 2002), available at <http://www.lambdalegal.org/news/pr/gay-marriage-new-jersey-2.html>.

⁵² *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Law Div. 2003); Press Release, Lambda Legal Educ. & Def. Fund, Lower-Court Loss in Lawsuit Seeking Marriage for Same-Sex Couples in New Jersey ‘Propels Us Forward’ To Higher Courts Where Case Will Be Decided, Lambda Legal Says (Nov. 5, 2003), available at <http://www.lambdalegal.org/news/pr/lower-court-loss-in-lawsuit.html>.

⁵³ Interview with Lawrence Lustberg, *supra* note 43.

⁵⁴ N.J. CONST. art. I, para. 1.

⁵⁵ *State v. Parker*, 592 A.2d 228, 238–39 (N.J. 1991), cert. denied, 503 U.S. 939 (1992); accord *King v. S. Jersey Nat’l Bank*, 220 A.2d 1, 9–10 (1974).

The second legal claim was more favorable for the plaintiffs. Lustberg and Buckel argued that the existing marriage law violated the state equal protection clause by impermissibly distinguishing between opposite-sex and same-sex couples. The state's equal protection jurisprudence adopts a flexible test for determining constitutional violations, one that considers three factors: the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction.⁵⁶ This standard departs significantly from federal Equal Protection Clause analysis, giving New Jersey judges greater leeway to extend legal protection to new classes of citizens. To win, Lustberg and Buckel only had to prove that (1) marriage is an important state right, (2) that the existing statutory scheme prevented gay couples from accessing that right, and (3) that there was no public need for such a restriction.⁵⁷ There was no clear standard for evaluating these claims, and so the more sympathetic the attorneys could make their clients appear, the greater the likelihood of victory.

Buckel and Lustberg sought to bolster their primary legal claims with a carefully orchestrated lineup of amici briefs.⁵⁸ The American Psychological Association, for example, discussed how the children of same-sex couples would benefit if their parents were allowed to marry.⁵⁹ More than 150 clergymen joined together to argue that gay unions would not undermine traditional religious understandings of marriage.⁶⁰ History professors filed another brief noting that gay couples have existed for generations.⁶¹ These documents, along with many others, helped to fill any gaps in the plaintiffs' arguments and to suggest a broad-based support for marriage equality throughout the state.

Lambda Legal filed its appeals brief in fall 2004, and Buckel argued the case on December 7, 2004. As expected, they again lost in court.⁶² The three-judge panel was split, however, with Judge Donald Collester dissenting from the opinion and arguing in favor of marriage equality.⁶³ Although

⁵⁶ *Sojourner A. v. N.J. Dep't Soc. Servs.*, 828 A.2d 306, 314 (N.J. 2003); *George Harms Constr. Co. v. N.J. Tpk. Auth.*, 644 A.2d 76, 87 (N.J. 1994); *Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp.*, 364 A.2d 1016, 1036 (N.J. 1976), *cert. denied*, 430 U.S. 977 (1977).

⁵⁷ *Sojourner A.*, 828 A.2d at 314.

⁵⁸ Interview with Lawrence Lustberg, *supra* note 43; see also SCOTT A. COMPARATO, *Amici Curiae and Strategic Behavior in State Supreme Courts* 87–100 (2003).

⁵⁹ Brief for American Psychological Ass'n, et al. as Amici Curiae Supporting Appellants, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. App. Div. 2005) (No. A-2244-03T5), available at <http://www.lambdalegal.org/our-work/in-court/briefs/lewis-v-harris-brief-13.html>.

⁶⁰ Brief for Clergy Members in Support of Marriage as Amici Curiae Supporting Appellants, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. App. Div. 2005) (No. A-2244-03T5), available at <http://www.lambdalegal.org/our-work/in-court/briefs/lewis-v-harris-brief-4.html>.

⁶¹ Brief for Professors of the History of Marriage, Families and the Law as Amici Curiae Supporting Appellants, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. App. Div. 2005) (No. A-2244-03T5), available at <http://data.lambdalegal.org/pdf/551.pdf>.

⁶² Press Release, Lambda Legal Educ. & Def. Fund, New Jersey Appeals Court Rules 2-1 Against Marriage Equality for Same-Sex Couples, Moving Lambda Legal's Case to State Supreme Court for Final Ruling (June 14, 2005), <http://www.lambdalegal.org/news/pr/new-jersey-appeals-court.html>.

⁶³ *Lewis*, 875 A.2d at 278 (Collester, J., dissenting).

the dissent had little legal significance, it did show that at least one member of the New Jersey judiciary supported gay marriage.⁶⁴ Regardless, the next and final step was an appeal to New Jersey State Supreme Court, a move that Lustberg and Buckel had long anticipated.⁶⁵ The attorneys once again readied themselves for battle.

B. *The Politics*

Although the legal arguments did not change over the five years of litigation, the political context surrounding them continued to evolve. Buckel and Lustberg filed their complaint a full year before the U.S. Supreme Court decriminalized sodomy in *Lawrence v. Texas* and more than sixteen months before the Massachusetts Supreme Judicial Council permitted same-sex marriage in *Goodridge v. Department of Public Health*.⁶⁶ Although neither case directly impacted the *Lewis* litigation, the historic decisions raised the salience of same-sex marriage rights for New Jersey residents and policymakers.⁶⁷ So too did a variety of other events, including Canada's recognition of same-sex marriages in 2003, the introduction of the Federal Marriage Amendment in 2004, and New Jersey Governor James McGreevey's resignation after admitting an adulterous gay relationship in 2005.⁶⁸ The two most important political developments, however, took place within the state's borders. The first was legislative; the second was transformative.

In January 2004, the New Jersey state legislature passed the Domestic Partnership Act (DPA).⁶⁹ The law, which made New Jersey the fifth state in the country to provide some legal status to cohabitating gay couples, was part of an effort to defuse the *Lewis* litigation by offering some rights to same-sex families.⁷⁰ Among other obligations, the DPA required health insurers to extend coverage to domestic partners, required hospitals to admit partners as "immediate family" during health emergencies, and allowed the partners of former state employees to collect retirement benefits upon their deaths.⁷¹ However, it left out many other rights of marriage, including the right for an individual automatically to assume parental rights for any chil-

⁶⁴ Associated Press, *N.J. Court Says No on Gay Marriage*, BOSTON GLOBE, June 15, 2005.

⁶⁵ Interview with Lawrence Lustberg, *supra* note 43.

⁶⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁶⁷ Cf. Adam Nagourney, 'Moral Values' Carried Bush, Rove Says, N.Y. TIMES, Nov. 10, 2004, at A20.

⁶⁸ Cf. Leslie Brody, *Public Reaction Heartens Rights Proponents; Leaders Say Governor May Have Helped Their Cause*, THE RECORD (Bergen County, N.J.), Aug. 19, 2004, at A01.

⁶⁹ N.J. STAT. ANN. § 26:8A (West 2008).

⁷⁰ See Laura Mansnerus, *New Jersey to Recognize Gay Couples*, N.Y. TIMES, Jan. 9, 2004, at B1; Ruth Padawer, *Rights for Same-Sex Couples Become Law; Governor Praises Step for 'Fairness, Respect.'* THE RECORD (Bergen County, N.J.), Jan. 13, 2004, at A01.

⁷¹ N.J. STAT. ANN. § 26:8A-6, -13 (West 2008).

dren born to their partner, the right of intestate succession, the right of joint property ownership, and the right of spousal privilege.⁷²

The passage of the DPA presented a challenge for the *Lewis* legal team. From a legal perspective, the DPA eliminated some of the harms to the plaintiffs that the complaint alleged. From a political perspective, the Lambda Legal staff worried that New Jerseyans would think that the new law resolved the problems facing gay couples in the state. The *Lewis* team had two options for incorporating the DPA into their legal strategy: embrace the new law as indicative of the state's support for gay rights or reject the law as insufficient.

Buckel and Lustberg ultimately adopted the latter strategy, arguing that the DPA failed to grant gay couples the protections they deserved.⁷³ They enlisted the help of the New Jersey Bar Association, which authored an amicus brief stating that most family lawyers found the Domestic Partnership Statute both confusing and insufficient for protecting the rights of same-sex couples.⁷⁴ They then asked Goldstein to author a second, more polemic brief, one that attacked the DPA for providing gay couples with only "10 of the 1,138 substantive rights accorded to married couples."⁷⁵ Buckel and Lustberg hoped that this combination of arguments would convince the state supreme court that only full marriage equality would provide adequate protections to gay couples. In the short-term, they hoped that these tactics would help avoid this unexpected stumbling block.

The other major event that occurred while *Lewis* was pending on appeal was the founding of Garden State Equality (GSE). The event was transformative, not simply because GSE fundamentally shifted the state's political dynamics, but also because its leaders demonstrated the ability to weave together numerous gay-friendly organizations into a powerful force that could push a coherent, consistent message. Before GSE, Lambda Legal had provided educational information about the *Lewis* litigation, but not nearly with the scope the new organization would offer.

The primary force behind this transformation was the charismatic Steven Goldstein, who had spent a career in media and politics.⁷⁶ Goldstein and his partner, Daniel Gross, left their Brooklyn Heights apartment for New Jersey after the passage of the Domestic Partnership Act. Eager to live in a

⁷² See Jim Edwards, *Case Tests the Marital Privilege's Application to Same-Sex Couples, Sheriff Seeks to Depose Lesbian in Workplace-Bias Suit*, N.J. L.J., Feb. 23, 2004, at 5; Mansnerus, *supra* note 70; Padawer, *supra* note 70.

⁷³ See MichaelAnn Knotts, *N.J. Domestic Partner Act: Much Praise for the Law That Falls Short of Others*, N.J. LAW., Feb. 23, 2004, at 1; Interview with Lawrence Lustberg, *supra* note 43.

⁷⁴ Brief for New Jersey Bar Ass'n, as Amici Curiae Supporting Appellants, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. 58,398), available at <http://www.lambdalegal.org/our-work/in-court/briefs/lewis-v-harris-brief-1.html>.

⁷⁵ Brief for Garden State Equality Education Fund, Inc. et al. as Amici Curiae Supporting Appellants, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. 58,398), available at <http://www.lambdalegal.org/our-work/in-court/briefs/lewis-v-harris.html>.

⁷⁶ Jeff Mulvihill, *An Organizer Builds Momentum for Gay Rights*, STAR-LEDGER (Newark, N.J.), July 10, 2006, at 2; Weddings/Celebrations, *supra* note 1.

state where they received legal protections, Goldstein and Gross traded their city apartment, like so many couples before them, for a home in Jersey suburbia.⁷⁷ Their decision to relocate changed the course of the state's gay rights movement.

At the time of their move, New Jersey lacked a full-time, statewide gay rights organization, and Goldstein's friends involved in the movement encouraged him to establish one. Operating out of a basement office in the Montclair Unitarian Church, Goldstein raised money, courted regional media, and organized grassroots support. The group soon opened a statehouse office in Trenton and hired full-time staff to lobby legislators. Within two years, GSE boasted 14,000 members and counted over 30,000 references in state and national newspapers.⁷⁸ The *New Jersey Lawyer* praised the organization for raising "an unprecedented war chest and active membership."⁷⁹ With its newfound influence, GSE began to push the state towards marriage equality.

Goldstein developed a variety of tactics to advance the group's agenda. He began by coordinating with the smaller gay rights groups that existed in the state.⁸⁰ Goldstein created an e-mail list and a basic website to keep supporters aware of new developments and upcoming events. He also sought to organize his membership politically, creating caucuses for African-Americans, Hispanics, labor, and clergymen, and encouraging GSE members to volunteer at legislative campaign offices throughout the state during elections.⁸¹ Meanwhile, he engaged with local media, and quickly became known for bombarding politicians and journalists with daily press releases.⁸² In one highly publicized incident, Goldstein was protesting against Ocean County's passage of anti-gay legislation, when he dropped to his knee in front of a full bank of television cameras to plead for equal treatment.⁸³ He proved adept at orchestrating media campaigns, and never lacked a pithy quote for reporters working under deadline.

⁷⁷ Kerry Eleveld, *Next Stop, New Jersey: Garden State Poised to Become Mecca For Gay Couples*, N.Y. BLADE, July 24, 2006; Janon Fisher, *Gays Sign Up for New Jersey Domestic Partner Status*, N.Y. TIMES, July 11, 2004, at 33; Weddings/Celebrations, *supra* note 1.

⁷⁸ Garden State Equality, *supra* note 7.

⁷⁹ Kris W. Scibiorski, *When Gay Rights and Politics Marry; The Man with the Game Plan*, N.J. LAW., July 17, 2006, at 1.

⁸⁰ Eleveld, *supra* note 77.

⁸¹ Interview with Steven Goldstein, Founder, Garden State Equality, in Teaneck, N.J. (Oct. 17, 2006) (on file with author).

⁸² Ruth Padawer, *A Champion for His Cause; Seasoned Crusader Leads N.J. Gay-Marriage Fight*, THE RECORD (Bergen County, N.J.), June 26, 2006, at A01.

⁸³ *Id.* In the final months before the state supreme court issued its decision in *Lewis*, Goldstein began to incorporate his reputation for toughness into GSE's political campaign. For a while, the organization started using the expression, "You bet we're intense. It's the fight of our lives," as its unofficial motto and website tagline. See Garden State Equality, N.J. Supreme Court Tells Legislature to Give Gay Couples All Rights but Does Not Specify Marriage; Garden State Equality Announced that Three Legislators Will Rapidly Introduce a Bill for 100% Marriage Equality, http://eqfed.org/gse/notice-description.tcl?newsletter_id=3751803 (last visited Mar. 16, 2008).

Throughout this process, Goldstein was in regular contact with both the *Lewis* legal team and with his old friend, Evan Wolfson.⁸⁴ Goldstein had been an early supporter of Wolfson's long-term plan for winning marriage equality and he adapted many of the former Lambda Legal lawyer's strategies for his own use in New Jersey. GSE's combination of public education, lobbying, and media exposure had its roots in Wolfson's 1994 article in the *New York University Review of Law and Social Change*. This strategy helped transform marriage equality from a minor issue in New Jersey politics into one of the state's most-discussed matters.

In the months leading up to the state supreme court's decision, GSE organized over fifty events promoting marriage equality.⁸⁵ Even Goldstein's opposition, John Tomicki, the president of the New Jersey Coalition to Preserve and Protect Marriage, described him as "a Johnny one-note with a megaphone. But I have to say, he's been very effective . . . and it's clear he has no plans on stopping."⁸⁶

All of this work paid off: by June 2006, a Rutgers poll showed that fifty percent of New Jerseyans supported gay marriage, one of the highest percentages in the country, and a full sixty-five percent of those surveyed supported civil unions.⁸⁷ These developments no doubt had an impact on the *Lewis* case as it worked its way through the courts. As Goldstein himself acknowledged, the "justices [of the New Jersey Supreme Court] would have to be blind to not see the change that's going on in this state."⁸⁸

C. *The State Supreme Court and Beyond*

On February 15, 2006, David Buckel argued the same two-pronged argument to the state supreme court that the team had made to the appeals court: the state ban violated plaintiff's fundamental right to marriage and it failed to provide equal protection of the law.⁸⁹

One of the more interesting developments occurred on the other side of the case, where Assistant Attorney General Patrick DeAlmeida was responsible for defending the state's marriage ban. A highly-regarded appellate lawyer, DeAlmeida was known for his excellent advocacy skills.⁹⁰ Yet, in this case, DeAlmeida's reply brief limited the state's defense to a handful of half-hearted arguments about the importance of preserving traditional no-

⁸⁴ Interview with Steven Goldstein, *supra* note 81.

⁸⁵ Garden State Equality, Garden State Equality's Awesome Autumn: An Historic Campaign Whirlwind of More than Fifty Events in Three Months (on file with author).

⁸⁶ *Id.*

⁸⁷ Press Release, Eagleton Institute of Politics, New Jerseyans Now Support Gay Civil Unions by 2-1 (June 23, 2006), http://eagletonpoll.rutgers.edu/polls/release_06-23-06.pdf.

⁸⁸ Interview with Steven Goldstein, *supra* note 81.

⁸⁹ See generally Brief of Appellants, *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006) (No. 58,398), available at <http://www.lambdalegal.org/our-work/in-court/briefs/lewis-v-harris-brief-15.html>.

⁹⁰ Robert Seidenstein, *Myriad Questions in Gay Marriage Case*, N.J. LAW., Feb. 20, 2006, at 3.

tions of marriage and maintaining similar laws with other states. The absence of more common arguments against same-sex marriage—such as the need to protect the rights of children—was notable. Numerous court observers, including the Lambda Legal attorneys, suspected that the state was intentionally “punting on the case.”⁹¹ It appeared that even those responsible for upholding the state’s gendered marriage laws had come to question their validity.

Ultimately, Lambda’s legal arguments proved more persuasive to the New Jersey justices than did the state’s perfunctory replies. On October 25, 2006, the New Jersey Supreme Court issued its decision in *Lewis v. Harris*.⁹² The court held that denying same-sex couples the financial and social benefits given to their heterosexual counterparts bore “no substantial relationship to a legitimate government purpose.”⁹³ On the merits, the court rejected the petitioners’ argument that gay couples had a fundamental right to marry, but did find that the marriage restriction violated the state’s equal protection guarantee.⁹⁴ As a result, same-sex couples were entitled to all the rights and privileges enjoyed by opposite-sex couples under civil marriage laws, although the court left the name to be given to these unions as a matter for “the democratic process.”⁹⁵ Five years after the lawyers at Lambda Legal first put New Jersey on its list of target states, they achieved a near-complete victory in the state’s highest court.

The movement did not end with the court’s decision. Goldstein had arranged for hundreds of GSE members to wait by the State House for the decision; after it was released, many stood in confusion as they tried to figure out what exactly the ruling meant.⁹⁶ Goldstein, never one to back down, called the outcome disappointing and immediately began lobbying state legislators to enact full marriage equality by statute.⁹⁷ The ruling gave the state 180 days to decide what the unions should be called, and Goldstein hoped he could persuade legislators to term them “marriages.”⁹⁸ But few elected officials wanted to extend themselves any further than the court’s decision required. Momentum for marriage equality legislation quickly fizzled⁹⁹ and,

⁹¹ Interview with Lawrence Lustberg, *supra* note 43.

⁹² Tina Kelley, *Plaintiffs See Move From ‘Second-Class’ Status*, N.Y. TIMES, Oct. 26, 2006, at B9.

⁹³ *Lewis v. Harris*, 908 A.2d 196, 220 (N.J. 2006).

⁹⁴ *Id.* at 222.

⁹⁵ *Id.* at 200. As Lustberg and Buckel hoped, the court found that the Domestic Partnership Act did not adequately provide gays and lesbians with their constitutionally guaranteed rights, and that the legislature needed to create a new statutory framework.

⁹⁶ See, e.g., Jonathan Tamari, *High Court Ruling A Victory for Gay-Marriage Advocates*, ASBURY PARK PRESS, Oct. 26, 2006, at 1A.

⁹⁷ Paul Brubaker, *Gay Marriage Is Right, Says Left; Liberal Groups Roll Out Online Ads Championing Same-Sex Matrimony*, HERALD NEWS (Passaic County, N.J.), Dec. 5, 2006, at B01; David W. Chen, *A Civil Union Bill Advances Amid Criticism by All Involved*, N.Y. TIMES, Dec. 8, 2006, at B4.

⁹⁸ Cf. David M. Wagner, *Gay Marriage Lite; New Jersey’s High Court Doesn’t Quite Go All the Way*, WKLY. STANDARD, Nov. 6, 2006.

⁹⁹ Tom Baldwin, *Alliance Proposes Civil Unions for Gays*, ASBURY PARK PRESS, Nov. 28, 2006, at 3A.

by mid-December, the legislature settled on the term “civil unions.” The bill passed both the State Assembly and State Senate easily, and Governor Corzine signed it into law on December 21, 2006.¹⁰⁰

Goldstein still refused to give up. Over the next year, he spent much of his time criticizing the inadequacies of the new civil union statute.¹⁰¹ The strategy was reminiscent of the amicus brief he wrote for *Lewis* attacking the DPA: downplay the adequacy of existing legislation and push for broader protections. The tactic, at least as it applied to civil unions, was also rather novel: traditionally, gay rights groups have celebrated, rather than denigrated, civil unions. But Goldstein rejected the idea, hoping to highlight the injustices of the new law as a way of re-building political will.¹⁰²

Garden State Equality publicized stories from same-sex couples who registered for civil unions but were not treated as married couples, including a high-profile incident where the United Parcel Service refused to grant the same benefits to civil union partners as it did for married partners.¹⁰³ Less than three months after the civil union law went into effect, Goldstein reported that over a hundred couples—one-eighth of all the couples who had registered at that point—were denied marital rights by employers or insurers.¹⁰⁴ At least initially, the strategy seems to be working. By early November 2007, the Director of the Civil Rights Division of the State Attorney General announced that the law was a “failure” and that civil unions were “not working as effectively as if the word ‘marriage’ were used.”¹⁰⁵

As support crumbles for the civil union law, it is unclear exactly when, and how, the state will seek to eliminate the separate statutory framework for same-sex couples and allow all New Jerseyans to marry. Goldstein and GSE show no signs of letting up.

IV. CONCLUSION

As Evan Wolfson sat in the conference room of Lambda Legal’s New York offices in the early 1990s, strategizing with other lawyers about how to achieve marriage equality victories over the next two decades, few could have predicted the success of his plan. Similarly, as Steven Goldstein

¹⁰⁰ John McAlpin, *Corzine Enacts Civil Unions; Gay Couples Applaud Rights Victory as Historic*, THE RECORD (Bergen County, N.J.), Dec. 21, 2006, at A01.

¹⁰¹ Robert Schwaneberg & Brian Donohue, *A Celebration and a Vow*, STAR-LEDGER (Newark, N.J.), Feb. 20, 2007, at 9.

¹⁰² The New Jersey Supreme Court left open the possibility that civil unions would prove unable to provide the full rights of marriage guaranteed to same-sex couples. *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006).

¹⁰³ Kareem Fahim, *In Civil Unions, New Challenges Over Benefits*, N.Y. TIMES, Aug. 1, 2007, at B1; Kareem Fahim, *Corzine Enters Dispute With United Parcel Service Over Who Is a Legal Spouse*, N.Y. TIMES, July 21, 2007, at B2.

¹⁰⁴ Ruth Padawer, *Many in Civil Unions Claim Denial of Benefits; 103 of 852 N.J. Couples Complain About Employers, Insurers*, THE RECORD (Bergen County, N.J.), May 22, 2007, at A05.

¹⁰⁵ Robert Schwaneberg, *Civil Unions Fall Short of Marriage, State Discovers*, STAR-LEDGER (Newark, N.J.), Nov. 2, 2007, at 1.

packed up his Brooklyn Heights apartment in early 2004 for a new home across the Hudson, few could have known how radically he would transform New Jersey's cultural landscape. The combined vision, energy, and determination of these two gay men have demonstrated the impact that committed attorneys can have on social movements. In part, they have succeeded in changing peoples' lives by advancing novel legal arguments. But their victories have had as much to do, as Goldstein explained, with their ability to "stop being a lawyer" and "start being an activist."¹⁰⁶

The outcome in *Lewis v. Harris* and the tremendous expansion in rights that New Jersey's gay and lesbian couples have experienced thanks to Lambda Legal and Garden State Equality have demonstrated that successful litigation requires more than good brief-writing. Rather, by engaging with others' human sensibilities, by attempting to affect people through education and emotion, and by developing connections between those who demand access to legal rights and those who already possess them, Goldstein and his colleagues have revealed the strategies necessary to achieve lasting social change. If others can replicate their model successfully, then the struggle for marriage rights will continue until equality is achieved for all.

¹⁰⁶ Interview with Steven Goldstein, *supra* note 81.