

AN ORAL HISTORY OF THE MARRIAGE EQUALITY ACT IN NEW YORK†

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Panelists:

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MR. CLARK: Before we get into our give-and-take on the Marriage Equality Law—and we will try to elicit this oral history to supplement the legislative history of that enactment; New York, like many states, does not have a terribly vigorous method of tracking down legislative history¹—I want to give some general background on the evolution of the ban on same-sex marriage in New York, and more generally, also some very skeletal facts about the laws that were passed and the process they went through to be enacted. And then we'll have our give-and-take and try to flesh out that skeletal timeline that I'll give you.

As in all the other states, the ban on same-sex marriage in New York emerged from a fog. Before the late 1960s and early 1970s, no one, really, at a legislative level or judicial level, or even in commentary, was really talking about even the possibility of same-sex marriage. There were some discussions among some in the small “out” gay community before this, but, generally, you didn't find these discussions until the 1970s. As a result, the laws in all the states,² including New York,³ did not explicitly say anything about same-sex marriage. Did not ban it; did not disallow it; did not authorize it; did not mention it. There were lists of bans in the marriage laws of the different states, but none of them included a ban on same-sex marriage explicitly. You have to search long and hard to find references to even the idea of same-sex marriage as a possibility during this early time period among legal sources.

But there are a few. In 1852, the leading American treatise on family law (or at least on marriage and divorce), Bishop's treatise, actually did mention same-sex marriage in passing, but the author thought it was so obviously not allowed that he was not directly talking about it. He was using it as a premise to talk about why impotence among heterosexuals was grounds for nullification of a marriage.⁴ But he did at least tell us, “Marriage

¹ See generally ANDREW STENGEL ET AL., BRENNAN CTR. FOR JUSTICE, STILL BROKEN: NEW YORK STATE LEGISLATIVE REFORM 2008 UPDATE 1–2, 4 (2009), available at http://brennan.3cdn.net/ec21bc2f8e70edb787_j9m6b0k88.pdf (detailing dysfunction in Albany, including the lack of legislative history of bills that are enacted into law).

² See, e.g., Act of Aug. 17, 1977, ch. 339, sec. 1, § 4100, 1977 Cal. Stat. 1295 (adding explicit ban on same-sex marriage to pre-existing marriage law).

³ N.Y. DOM. REL. LAW § 10 (McKinney 2010) (“Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential.”).

⁴ JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND

between two persons of [the same-sex] could have no validity, as none of the ends of matrimony could be accomplished thereby. It has always, therefore, been deemed requisite to the entire validity of every marriage . . . that the parties should be of different sex”⁵ Those ends of matrimony that couldn’t possibly be accomplished were two that he identified: procreation and providing a lawful outlet for sexual gratification.⁶ (Sexual gratification by same-sex couples would not have qualified under the nineteenth-century standards for what would have been a lawful outlet for sexual desires.)

But if you look at Homer Clark’s treatise of 1968⁷—and he is of no relation to me that I know of, by the way—it was a leading family law treatise as well—twentieth century, mid-twentieth century. It went through a couple editions. The 1968 edition said not a word about same-sex marriage,⁸ and this was a very good treatise, a very thorough, comprehensive treatise.

The issue only begins to arise in the late 60s and early 70s. Reverend Troy Perry of California performed the first documented same-sex marriage—not a legal one, not a licensed one, but a ceremonial, religious one.⁹ You have couples beginning to seek marriage licenses in the early 1970s. Probably the most famous example happened in Minnesota, which resulted in litigation: *Baker v. Nelson*.¹⁰

The Minnesota Supreme Court upheld the constitutionality of the ban on same-sex marriage in that state.¹¹ The case went to the Supreme Court, which held that there was no federal question involved in that case.¹² Equal protection? No. Substantive due process? No. But there was still very little going on with same-sex marriage at this early point.

Minnesota, in the *Baker* case, had one of the statutes, like New

DIVORCE § 225 (1852).

⁵ *Id.*

⁶ *Id.* § 226.

⁷ HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* (1968).

⁸ Compare *id.* §§ 2.1–18 (devoting chapter to marriage but omitting any mention of same-sex relationships), with 1 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 2.8 (2d ed. 1987) (devoting section of marriage chapter to same-sex marriages).

⁹ See Terry Wilson, *Altering Tradition: Commitment Ceremonies Help Gay and Lesbian Couples Put a Deeper Meaning Into Their Relationships*, CHI. TRIB., June 9, 1997, at C1.

¹⁰ 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

¹¹ *Id.* at 185–87.

¹² 409 U.S. 810.

York, that did not explicitly address same-sex marriage. The court nevertheless focused on a couple of things in the statute, including the ordinary meaning of the word “marriage,” some incidental references to “husband and wife,” to conclude that the statute did not authorize same-sex marriage, even though it did not explicitly ban it.¹³ New York followed that same interpretation, as did the other states that addressed the question. It is only in 1973 that you get the first states explicitly banning same-sex marriage. Those were Maryland¹⁴ and Texas.¹⁵ New York did not; New York never did explicitly amend its statutes to ban same-sex marriage. Almost every other state did, but the New York legislature never came to agreement on a bill to do that.

When you look at the evolution of the domestic relations statute in New York, you do not find any reference at all, ever, to a ban on same-sex marriage, except in these indirect references to husband and wife. You can look at the 1828 revised statutes, the first real codification of Domestic Relations Law (DRL), and there is nothing about it.¹⁶ The 1896 DRL¹⁷ and the 1909 DRL¹⁸ also say nothing about same-sex marriage. And it’s the 1909 DRL which we still have today, heavily amended, obviously.

But it was in 1971 that a New York court first encountered a same-sex marriage.¹⁹ It happened to be a *Crying Game*²⁰ kind of scenario involving a transgendered person and a heterosexual man who got married in Texas in what sounds like must have been an informal, common-law kind of marriage. It does not sound, from the case reporter,²¹ like it was licensed; Texas allows

¹³ *Baker*, 191 N.W.2d at 185–86. See also 1997 Minn. Laws 1857 (adding explicit language prohibiting same sex marriage by amending MINN. STAT. § 517.03).

¹⁴ Act of May 7, 1973, ch. 213, 1973 Md. Laws 574 (“Only a marriage between a man and a woman is valid in this state.”).

¹⁵ Act of June 15, 1973, ch. 577, 1973 Tex. Gen. Laws 1596 (“A license may not be issued for the marriage of persons of the same sex.”).

¹⁶ 2 N.Y. REV. STAT. pt. 2, ch. 8 tit. 1, art. 1 (1827), amended by Act of Apr. 17, 1896, ch. 272, 1896 N.Y. Laws 215.

¹⁷ Act of Apr. 17, 1896, ch. 272, 1896 N.Y. Laws 215, amended by N.Y. DOM. REL. LAW § 10 (1909).

¹⁸ Act of Feb. 17, 1909, ch. 19, 1909 N.Y. Laws 523 (codified at N.Y. DOM. REL. LAW § 10 (1909); current version at N.Y. DOM. REL. LAW § 10-a (McKinney 2010 & Supp. 2012)).

¹⁹ *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. 1971).

²⁰ *THE CRYING GAME* (Miramax Films 1992).

²¹ *Anonymous*, 325 N.Y.S.2d at 499.

common law marriage,²² so that may be the case. On the wedding night, the husband apparently discovers that he has married somebody who is pre-op and is not willing to continue that arrangement.²³ The husband ends up later in New York seeking an annulment, and the court grants it—again citing procreation as the reason for marriage and the reason for not allowing same-sex couples to marry.²⁴

By 1993, we get an appellate New York decision reiterating the same point, finding that same-sex marriage is not allowed in New York, even though it is not explicitly banned in the statute, and upholding the constitutionality of that result—again citing procreation and adding child rearing as a reason not to allow same-sex couples to marry.²⁵ The Court of Appeals dismissed the appeal of that case.²⁶

It is only when you get into the 1990s and into the new century that you start to see things change, start to see the issue really come onto the national agenda. You also see changes internationally, and you also see changes in the law on gay rights, but not with respect to marriage, *Romer v. Evans*²⁷ and *Lawrence v. Texas*,²⁸ with the Supreme Court finding some constitutional protection for lesbians and gay men. That alters the playing field a bit on the gay marriage question indirectly. You have the Vermont civil union decision in 1999,²⁹ leading to the creation of civil unions there in 2000.³⁰ We have the Netherlands authorizing by statute same-sex marriage in 2001,³¹ Canada by court judgment in 2003,³² and the first state,

²² TEX. FAM. CODE ANN. § 2.401 (Vernon 2006); W. M. Bonesio, Comment, *Marriage and Divorce Under the Texas Family Code*, 8 HOUS. L. REV. 100, 106 (1970).

²³ *Anonymous*, 325 N.Y.S.2d at 499.

²⁴ *Id.* at 500–01.

²⁵ *In re Cooper*, 592 N.Y.S.2d 797, 797–801 (App. Div. 1993) (holding that the term “surviving spouse” in the Estates, Powers and Trust Law does not apply to same-sex couples).

²⁶ *In re Cooper*, 624 N.E.2d 696 (N.Y. 1993).

²⁷ 517 U.S. 620 (1996).

²⁸ 539 U.S. 558 (2003).

²⁹ *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

³⁰ An Act Relating to Civil Unions, Pub. Act No. 91, § 3 (2000), 2000 Vt. Acts & Resolves 72 (codified as amended at VT. STAT. ANN. tit. 15, §§ 1201–1207 (2001) (repealed in operative part upon authorization of same-sex marriage in 2009)).

³¹ Act Opening the Institute of Marriage, Burgerlijk Wetboek [BW] bk. 1, art. 30(1) (Neth.).

³² See *EGALE Canada, Inc. v. Canada* (2003), 13 B.C.L.R. 4th 1 (Can. B.C.).

Massachusetts, by court decision in 2003.³³ And that's where, when we return to New York, we encounter *Hernandez v. Robles*,³⁴ the Court of Appeals decision of the case in which the same-sex couples sought marriage licenses and were denied in New York. The court, continuing the tradition both in New York and elsewhere, construed the New York statute as not allowing same-sex marriage, despite the absence of any explicit language to that effect in the law, and upheld the constitutionality of the prohibition on same-sex marriage.³⁵

Now, as Mr. Nosanchuk mentioned earlier,³⁶ when you actually look at the equal protection doctrine, I think it is difficult to resist the result, if you are being intellectually honest about it. I will take a second of personal privilege to reiterate just how horrible I think the decision in *Hernandez v. Robles* was, and not just because of the result. The reasoning is awful. It is obviously, manifestly result oriented.³⁷ It is reverse-engineered; it is even written backwards in terms of the order in which the court takes the questions.³⁸ Its language is homophobic.³⁹ It really is

³³ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *see also* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (opining that only marriage, not civil unions, would satisfy *Goodridge*).

³⁴ 855 N.E.2d 1 (N.Y. 2006)

³⁵ *Id.* at 6, 12.

³⁶ The daylong symposium, *LGBT Rights: Toward a More Perfect Union*, featured a panel that addressed family and workplace rights with panelist Matt Nosanchuk, Senior Counselor to the Assistant Attorney General, U.S. Department of Justice, Civil Rights Division. He had observed that the arguments in favor of heightened scrutiny for classifications based on sexual orientation were difficult to resist.

³⁷ The plurality departed from established doctrine by determining the standard of review for sexual orientation-based classifications *situationally* and concluding that the standard of review could not be heightened "where we review legislation governing marriage and family relationships." *Hernandez*, 855 N.E.2d at 11 (misapplying *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)). That situational gerrymandering of the standard of review was doctrinal gibberish, having no foundation in equal protection jurisprudence. It did, however, allow the plurality to evade a genuine analysis of the standard of review appropriate for classifications based on sexual orientation and to avoid any heightened scrutiny in any context in which the legislature might actually be likely to discriminate against homosexuals.

³⁸ The plurality first determined that the exclusion of same-sex couples from civil marriage was supported by a rational basis, and only then considered whether rational basis was the appropriate standard of review. *Id.* at 7–12. The reasoning, moreover, rested on the implicit—and utterly unsupportable premise—that the existence of a rational basis in support of challenged legislation cancels the application of heightened scrutiny. But the very objective of heightened scrutiny is to ensure that a discriminatory law is not upheld without a showing of more than a mere rational basis.

indefensible. And it is not entirely irrelevant because having construed the state constitution that way, it's now the case that we have a number of people in New York, same-sex couples, who now are legally married, but whose legal marriages, unlike heterosexual legal marriages, don't actually command constitutional protection because of *Hernandez v. Robles*. So there remains a gap, constitutionally speaking.

But after the loss in *Hernandez*, there was a strategy shift in the courts to try to gain some recognition of out-of-state marriages, and it found some success in the *Martinez*⁴⁰ decision in 2008 in the Fourth Department. That was used by Governor Paterson to direct the executive branch agencies generally to recognize out-of-state same-sex marriages,⁴¹ a fairly significant crack in the prohibition, given the ease with which you can cross over a border to Massachusetts, or Canada and get married, or Connecticut eventually.⁴² That helped to spur, I think, the legislative action a bit. The potential out-of-state recognition was threatening to supplant New York's local ban in any event, although New York Court of Appeals itself never actually endorsed the *Martinez* decision, it never clearly held that they would recognize the out of state same-sex marriages.

But there was action in the legislature to attempt to reverse *Hernandez* statutorily and allow same-sex couples to marry. Previous bills include one in June 2007, this was Governor Spitzer's bill, passed the assembly 85-61 and was blocked in the senate.⁴³ In May 2009, there was another bill, sponsored, I think, by Assemblymember O'Donnell, who we have with us here today,

³⁹ The plurality insisted upon referring to the trait in question as "sexual preference," *e.g.*, *id.* at 10, even though *sexual orientation* is the legal term of art. See Sexual Orientation Non-Discrimination Act, ch. 2, 2002 N.Y. Laws 46. An opinion so keen on deference to legislature curiously rejected the legislature's more respectful terminology. In a similar vein, of course, was the plurality's description of gays and lesbians as "those who prefer relationships with people of the same sex," *Hernandez*, 855 N.E.2d at 11, as if the matter were equivalent to a favorite ice cream flavor.

⁴⁰ *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740 (App. Div. 2008), *appeal dismissed*, 889 N.E.2d 496 (N.Y. 2008).

⁴¹ Memorandum from David Nocenti, Counsel to the Governor to all State Agency Counsels (May 14, 2008) (on file with the Executive Chamber). See also *Golden v. Paterson*, 877 N.Y.S.2d 822, 837 (Sup. Ct. 2008) (holding that the governor's executive order was valid and consistent with common law, statute, and separation of powers between the legislature and the executive).

⁴² See *Kerrigan v. Comm'n of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008).

⁴³ Assem. 8590, 2007 Leg., 230th Reg. Sess. (N.Y. 2007) (sponsored by Assemblyman O'Donnell and by the Rules Committee in the Senate).

passing again 89-52, and it was blocked in the senate.⁴⁴ December 2009 there was another one; it passed the assembly 88-51 and was rejected by the senate.⁴⁵ This one actually came up for a vote and was rejected 38-24 in a controversy that many of you may recall.⁴⁶ Ultimately, of course, the Marriage Equality Bill was enacted; two bills actually were enacted, one authorizing same-sex marriage, the Marriage Equality Act,⁴⁷ and the other, basically, a religious accommodation act that was enacted at the same time and wrote some protections for religious objectors into the new authorization of same-sex marriage.⁴⁸

In terms of the skeletal timeline we have, on the passage of these bills, June 14, 2011, you have the marriage bill introduced as Assembly 8354, the governor's program bill.⁴⁹ It was quickly reported out of committee and was passed by the assembly the next day, June 15, 80-63.⁵⁰ The Democrats had lost just a few seats in the assembly. June 24, the religious exemption bill emerges from the negotiations, was introduced to the assembly, and was immediately passed 83-51.⁵¹ The marriage bill passed the senate the same day 33-29.⁵² The religious exemptions bill passed the same day, actually the same evening, 36-26.⁵³ Both were signed the same evening by the governor. They became chapters 95 and 96 of the 2011 Laws.

What did the acts do? Well, they did several things. The Marriage Equality Act has several sections. One includes some legislative findings. They are not codified, but they are a guide for interpretation and should not be overlooked by people who are

⁴⁴ Assem. 7732, 2009 Leg., 232d Reg. Sess. (N.Y. 2009) (sponsored by Assemblyman O'Donnell and Senator Duane). The Senate bill died in the Rules Committee.

⁴⁵ Assem. 40,003, 2009 Leg., 232d Reg. Sess. (N.Y. 2009).

⁴⁶ See Jeremy W. Peters, *New York State Senate Votes Down Gay Marriage Bill*, N.Y. TIMES, Dec. 2, 2009 (noting that supporters of the bill believed they were betrayed by senators who pledged support, but who switched their vote on the floor when it was clear the bill would not pass).

⁴⁷ Assem. 8354, 2011 Leg., 234th Reg. Sess. (N.Y. 2011), in Bill Jacket, L. 2011 c. 95.

⁴⁸ Assem. 8520, 2011 Leg., 234th Reg. Sess. (N.Y. 2011), in Bill Jacket, L. 2011 c. 96.

⁴⁹ Assem. 8354.

⁵⁰ *Id.*

⁵¹ Assem. 8520.

⁵² *N.Y. State S. Transcript*, 234th Reg. Sess. (June 24, 2011) (official result read by the Senate Secretary, who is in fact the Journal Clerk), available at <http://open.nysenate.gov/legislation/transcript/regular-session-06-24-2011>.

⁵³ *Id.*

litigating questions about this statute, declaring marriage to be a fundamental right to which same-sex couples should have equal access.⁵⁴ Now, they can't change the constitution with this piece of legislation, but they have at least gone on record suggesting that *Hernandez* was wrong. The right to be treated equally in all respects under the law is a principle embodied through all parts of the bill and explicitly recognized in the findings. We learn from the findings that the purpose of marriage is not procreation anymore; it is to advance social welfare by promoting stable families, and the extension to same-sex couples for the purpose of that in particular is to achieve basic fairness. Both those are articulated in the bill.

The substantive provisions of the bill: section 3 amends the DRL to validate same-sex marriages and extend all legal incidents of marriage to them on equal terms.⁵⁵ Section 4 amends the DRL to prohibit the denial of a marriage license to a same-sex couple.⁵⁶ Then section 5—dealing with the religious objections—amends the DRL to clarify that no religious officer is required to solemnize any marriage “when acting in his or her [religious] capacity,” and that religious officers can't be sued for refusing to

⁵⁴ The findings state as follows:

Marriage is a fundamental human right. Same-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage. Stable family relationships help build a stronger society. For the welfare of the community and in fairness to all New Yorkers, this act formally recognizes otherwise-valid marriages without regard to whether the parties are of the same or different sex.

It is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law. The omission from this act of changes to other provisions of law shall not be construed as a legislative intent to preserve any legal distinction between same-sex couples and different-sex couples with respect to marriage. The legislature intends that all provisions of law which utilize gender-specific terms in reference to the parties to a marriage, or which in any other way may be inconsistent with this act, be construed in a gender-neutral manner or in any way necessary to effectuate the intent of this act.

Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Laws, 723, 723 (McKinney).

⁵⁵ Assem. 8354 § 3 (“A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.”) (codified at N.Y. DOM. REL. LAW § 10-a (McKinney 2010 & Supp. 2012)).

⁵⁶ *Id.* § 4 (“It shall be necessary for all persons intended to be married in New York state to obtain a marriage license from a town or city clerk in New York state and to deliver said license, within sixty days, to the clergyman or magistrate who is to officiate before the marriage ceremony may be performed.”) (codified at N.Y. DOM. REL. LAW § 13).

solemnize a marriage.⁵⁷ That original marriage equality bill contains some additional religious accommodation language, but it was overwritten by the second bill, so we can move to the second bill and look at the religious accommodation language that ultimately became law.

As the memo accompanying the bill made clear, the goal was to grant equal access to the government-created legal institution of civil marriage, while leaving the religious institution of marriage to its own separate and fully autonomous sphere, clearly trying to separate legal civil marriage from religious marriage.⁵⁸

This religious accommodations bill adds several provisions to the DRL. One, religious entities and their not-for-profit corporations and benevolent orders are exempted from any state and local law that would require them to provide goods, services, or facilities for a wedding. Number two, it confirms that religious organizations and their charitable or educational entities retain the pre-existing exemption that they had from the state human rights act, which allows them—the exemption allows them—to make employment, housing, and admissions decisions based on religion.⁵⁹ Essentially, it's an exception to the ban on public accommodations discrimination. Number three, it confirms that religious corporations retain their full rights, under the religious freedom provision of the state constitution. I am not sure why that needed to be in the bill, because you cannot trump the state constitution with a simple enactment, but it is in there. It gives them assurance, I suppose. Number four, it protects religious officers from being legally penalized or burdened for refusing to solemnize a marriage. The original marriage act said you could not sue them. The combination adds that they cannot be

⁵⁷ *Id.* § 5 (“[P]rovided that no clergyman or minister as defined in section two of the religious corporations law, or Society for Ethical Culture leader shall be required to solemnize any marriage when acting in his or her capacity”) (codified at N.Y. DOM. REL. LAW § 11(1)).

⁵⁸ Sponsor’s Memorandum from Daniel O’Donnell, N.Y. State Assem., in Support of Assem. 8520, 2011 Leg., 234th Reg. Sess. (N.Y. 2011).

Beyond the freedom that clergy will retain over marriage decisions, the bill also ensures that the statutory protections for religious organizations found in the New York Human Rights law remains intact, including, guaranteeing that religious institutions remain free to choose who may use their facilities and halls for marriage ceremonies and celebrations, to whom they rent their housing accommodations, or to whom they provide religious services, consistent with their religious principles. *Id.*

⁵⁹ N.Y. EXEC. LAW § 296(11) (McKinney 2010 & Supp. 2012).

penalized or burdened by law in any other way as well. And, finally, the religious accommodation act adds a non-severability clause to the marriage equality act and says if “any part of the act is to be adjudged as invalid the remainder shall be invalidated.”⁶⁰

As a postscript, we do have some litigation that has emerged after the enactment here. Two cases in particular—or two controversies in particular, I should say. One, an anti-gay group has alleged that passage of the bill violated a number of legislative procedures.⁶¹ That’s thought to be the less weighty of the disputes. A second one, which you may have recently heard of, is a lesbian couple out in Western New York who was denied a marriage license by the town clerk, Rose Marie Belforti, who is refusing to issue marriage licenses because she says issuing same-sex marriage licenses conflicts with her Christian faith, so she has designated a deputy to issue marriage licenses by appointment only.⁶²

That is in a nutshell, with a skeletal look at the background, the process through which the legislature acted, and the bill as it was enacted. Now, from here what we want to do is try to flesh this out and get some additional oral history about the enactment of the statute, how it goes from introduction to enactment, and some of the negotiation that went on, et cetera.

For that purpose, we have our two guests, Assemblymember Daniel J. O’Donnell, elected in 2002 as the first openly gay man in the state assembly. He has repeatedly taken the lead, as I have sort of indicated already, in shepherding marriage equality legislation through the assembly, and that included this year’s Marriage Equality Act. Earlier in his career he was a public defender, and a public interest attorney, focusing on tenant rights and civil rights. Our other guest, Katherine Grainger, assistant counsel to Governor Cuomo for Civil Rights, Labor, Education, and Public Benefits. In this role she was responsible for crafting and implementing this year’s Marriage Equality Act. Before recently joining Governor Cuomo’s office, Ms. Grainger was policy counsel for the Democratic Caucus in the state senate. Earlier in

⁶⁰ Ch. 96, 2011 N.Y. Sess. 725, 725 (McKinney).

⁶¹ *New Yorkers for Constitutional Freedoms v. N.Y. State Senate*, No. 807-2011, at 3 (N.Y. Sup. Ct. Nov. 18, 2011), available at <http://www.scribd.com/doc/74157911/Wig-Gins-Decision-11182011> (“The closed meeting between all Republican Senators and Governor Cuomo, Governor Cuomo actively engaged to persuade Republican Senators to break with their party position and vote for the bill.”).

⁶² Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Roles in Gay Marriages*, N.Y. TIMES, Sept. 27, 2011, at A1.

her career, she was an appellate public defender and a prominent advocate for reproductive rights. So, without further adieu, let's proceed to our discussion of the legislative process.

ASSEM. O'DONNELL: Thank you for that background and there is really not much to add except a lot to add to what the legislative process was. I have now traveled the country with groups wanting to know how this happened and how we got this done, and what I generally say is that we had the perfect storm, and the perfect storm was a few different things. One, we had a governor who was profoundly committed to the issue, which is not to say that Governor Paterson wasn't as committed; he was as committed. But Governor Cuomo had high likeability; he is very popular and committed the resources and the political will to get this done. That was extraordinarily important.

The second thing was the polling. If you look at the polling numbers, the polling has changed dramatically since 2007, when the assembly first passed the bill. In 2007, barely 40 percent of New Yorkers supported marriage equality. Now, those numbers are close to 60 percent. There are districts on Long Island where 75 percent of the voters believe in marriage equality. That is a profoundly dramatic shift, and where did that shift come from?

Well, politicians like to take credit so I would like to tell you it was all me, but I can assure you it was not me. One of the things was a cultural shift. Whether or not you look back to *Brokeback Mountain*,⁶³ where you have the country looking at relationships between two non-stereotypical men who are gay, now the vast majority of television shows that reference gay people and gay lives do so in a very different way than they did even a decade ago.⁶⁴

Remember when *Will & Grace*⁶⁵ came on television? It was earth-shattering that there would be a person who would actually talk about those issues. It was fairly amusing from my perspective because they were sort of sexless gay men, who were not like the gay men I knew. They never had boyfriends. There was no intimacy in their lives, but it managed to be in people's living rooms every day. That is a very important thing and where that comes from is from people who are willing to tell their stories. Every time anyone comes out of the closet, anyone who is

⁶³ BROKEBACK MOUNTAIN (Paramount Pictures 2005).

⁶⁴ E.g., *Modern Family* (ABC 2011) (featuring a gay couple who adopted a baby as one of three main plotlines).

⁶⁵ *Will & Grace* (NBC 1998).

known says “yeah, I’m gay too” it shakes the foundation of what people perceive us to be. There was a cultural shift that went on that allowed for this change in polling, which was extraordinarily important in my opinion.

The last element of the perfect storm was that the gays worked together, which had never happened before. I will not say that they checked their egos at the door; but they at least acknowledged they had them and that sometimes they get in the way. That was a major improvement from previous years, when you could not do a thing without some other group saying “I did this.” It was just torture. I can tell you that in 2007, some days I literally wanted to just—whatever hair I have—pull it out because you could not get these different divergent groups to work in synch. This year, the gay community came together and worked in sync to make this push possible.

We had some additional important advantages. We had Shelly Silver, the Speaker in the assembly. Among other things, Shelly Silver is an Orthodox Jew, and to have someone with that type of religious background and faith willing to take this lead was very important. They all can say I am God-less and you are godless, but you’re going to have a hard time saying Shelly Silver is godless. Politicians are competitive animals. He does not like to go backwards.

In 2007, Speaker Silver gave me this bill, and in 2007 when I got the bill there were twenty-five committed assembly “yes” votes in April, and in June we put it on the floor, we got eight-five votes. Deborah Glick⁶⁶ and I managed to convince sixty people to go from a maybe or a “no” to a “yes” in sixty days. That, folks, is unheard of in the state capitol. Things do not move that fast. I was very proud, but the truth is, I was unaware at the time what the import was to the Speaker because once he had been out and public that this is the position that the assembly was going to take, he did not want to go backwards.

Two years later in 2009 we had to vote for it twice. I will let other people talk about that if they would like; I am not going to go into that. But we voted for it twice and it got eight-nine votes the second time we voted. This is the way that went: walking down the hall, Speaker Silver, says “Dan, we’ll do your bill tomorrow?” and I said, “Okay, Shelly.” That is the way it was. Now why was that? Because I had a color-coded chart of the “yesses,” “nos,” and maybes for this vote every single week. I

⁶⁶ Hon. Deborah J. Glick represents the 66th district in the state assembly.

would drive to Albany and on Sunday nights or Mondays, the first thing I would do is give the Speaker, give to Judy, his chief of staff, and give the person who runs the floor the week's color-coded chart so they would know that I knew where the vote was. I knew where the vote was on every single day, which was also important because people don't show up every day.

On any given day in a 150-member assembly, there are 129 people there, or 134 people. Where are those other twenty people? Where are those other fifteen people? If they are "no" votes, I do not care where they are. If they are "yes" votes, I want to know where they are. That process had gone on. There were a number of people who retired and there were a number of seats that we lost in the last election cycle, so this year, our vote count was not eighty-nine people. I had seventy-seven "yes" votes this year, and you need seventy-six. That means no room, no margin for error. The Speaker and I, and Deborah, and eventually Matt⁶⁷ and Harry,⁶⁸ started communication about where that vote count was, and what I did in 2007 was I sent out regular, weekly communications to my colleagues, and in all those communications, I ended with the same thing. "John and I thank you for taking the time to consider taking this vote." I knew exactly what I was doing; I was making this vote personal. It is personal to me; it is personal to my life; it is personal.

In 2011, I had to go back and do that again. I did not have to do that in 2009 because we had eighty-nine votes. That is a fourteen-vote margin. People can go on vacation. But when you only have a two-vote margin, you have to make sure that you solidify your "yes" votes and that you shake loose some maybes or "nos" and in this year, in the end, we got three new votes all who had been "no" votes before, all who responded to some of the interactions with Deborah and me and Harry and Matt. That is what allowed the perfect storm to come together. The religious exemption stuff happened in the end and I had known for about a month that if the senate took a vote we had the votes to pass it.

One of the things I will be critical of the second floor,⁶⁹ the governor's staff, is that there are different cultures in the different legislative bodies. Just go watch them for an hour and

⁶⁷ Hon. Matthew Titone represents the 61st district in the state assembly.

⁶⁸ Hon. Harry B. Bronson represents the 131st district in the state assembly.

⁶⁹ The governor's office and many staff members are located on the second floor of the Capitol building in Albany. Hence, the term "the second floor" is commonly used to refer to the governor or the governor's staff.

you will understand. The assembly, we like to talk a lot, we like to feel like we are part of things, we like to put our names on bills, there is a process. The process is a means of engagement. One needs to engage assemblymembers if you want things to move because they like to feel like they are important and they matter. Even when they do not, they like to feel that way, so even if it is just a ruse, they have to feel like they are part of this decision making process. In the senate, they could write a bill on a piece of toilet paper at midnight and pass it at 12:05 A.M. It is an entirely different culture—the culture is different. So, the process of engaging your colleagues, asking them to be sponsors and all that stuff had to be part of this year's, 2011's, process because without it I wouldn't solidify the votes and I wouldn't get the additional votes.

That led to tension with the second floor because starting on, I don't know, January 7 or January 12, I was in regular communication with the governor's staff saying: "Where's the bill? Where's the bill? I need the bill! I need to begin the process of engaging my colleagues to remind them that this vote is out there, and get them ready." And I was told, "It's coming, it's coming." It was coming in February. It was coming in March. It was coming in April. It was just coming for too long. Finally, I decided to introduce my own bill.⁷⁰

MS. GRAINGER: It was very popular.

ASSEM. O'DONNELL: Everywhere but the second floor it was popular. On the second floor, it was not popular.⁷¹ I did not do it because the Speaker wanted me to do it. I did it because I knew I needed a month or two to have this communication process undertaken, and I had felt that I adequately conveyed to the representatives on the second floor, other than Ms. Grainger, that I would eventually have to do this if they didn't send me a bill.

Let us just say they didn't take too kindly to it. But something very interesting happened. All these different groups that had been working for the whole year finally felt that they had something to do. See, because this is part of the problem. You cannot really talk about a bill unless you have one, right? So, you

⁷⁰ Assem. 7600, 2011 Leg., 234th Reg. Sess. (N.Y. 2011).

⁷¹ See Michael Barbaro, *Behind N.Y. Gay Marriage, an Unlikely Mix of Forces*, N.Y. TIMES, June 25, 2011, at A1 ("When Assemblyman Daniel J. O'Donnell, an openly gay Democrat from Manhattan, introduced a same-sex marriage bill in May without first alerting the governor's office, he was upbraided by Mr. Cohen. 'What do you think you're doing?' the governor's aide barked over the phone.").

have to have a physical written product to say this is what it is. I just used the identical language we had used before and I was hoping that that would nudge the governor to send us his bill, which he did. I managed to collect sixty-nine sponsors for this bill. Now, you only need seventy-six votes, so if you have sixty-nine people who are willing to put their name on the bill before it comes to the floor, you pretty much guarantee its passage. The truth is knowing that the Speaker wanted me to pass this bill, I need to add one other detail, which is if we had been in a situation where someone was absolutely unavailable or something—somebody's kid fell down—and we were short a vote, the person who would get us that vote would be Shelly.

I put the bill in and we got sixty-nine sponsors which pretty much sent the message that we were ready to move; and please remember the haters, you know, the Maggie Gallaghers of the world.⁷² You know, I went on that news hour and she kept calling me by another name. You would think someone named Gallagher could get O'Donnell. I don't understand. But anyway the haters were out there saying the assembly doesn't have the votes, the assembly does not have the votes, the assembly doesn't have the votes. There is no way to counteract that messaging if you're not doing something, and so the minute we were able, I was able to go out and say well I have sixty-nine sponsors, and that messaging on their part totally shut down because not even they could say realistically "they don't have the votes" when we only needed seven more to pass the bill. That in my opinion is how this year was different than the previous year, previous years, and the governor played a huge role in that. Here, Katherine will have to speak to this.

The governor negotiated the religious exemption, the additional bill. I knew it was real. My partner John, my husband, came to all five votes in the assembly and both votes in the senate. So he was there the whole time. I knew that it was moving when I was presented by the second floor with, "this is the religious exemption language that we want in the new bill." Did I love it? No. Did I think that it codified existing law? I did. But I knew politically what needed to happen in the senate was that if you were to get people to change their votes, you had to

⁷² Maggie Gallagher is the president of the Institute for Marriage and Public Policy, and a vocal opponent of same-sex marriage. See INST. FOR MARRIAGE AND PUBLIC POLICY, <http://www.marriagedebate.com> (last visited Jan. 20, 2012).

give them a reason, something to hang their hat on. This was a mechanism to do that with them. Usually I am very, very sharing so if I have a bill that affects our community I usually automatically go to my fellow colleagues Deborah, Matt, and Harry and say do you want to go on this bill with me. In this particular case I did not do that. Only I was, the Speaker and I, were shown what the language was. I approved the language. If it was a mistake I am taking the fall. I am not adding, you know, Deborah and Harry's name to something if that ends up becoming a problem. But I do not think it will become a problem.

It has been an interesting year for me. One of the things about my partner, first of all, we have been together thirty-one years, which is a very long time. If you knew him you'd understand why I would want to be with him for thirty-one years. People do not have a clue why he would want to be with me for thirty-one years. But one of the things is, when I arrived in Albany it became clear to me that many of my colleagues, some of whom would say, "I do not know any gay people," they did not understand, they just didn't understand.

One of my colleagues asked me what the last thing I do before I go to bed is and I said, "I call John."

He said, "Well, you are married." I said, "Well, if I am married, then why can't I get the piece of paper?" He was like, yeah, that makes sense.

I intentionally brought John around a lot and made this a very personal battle, which was very important in making the positive outcome. There were half a dozen maybes and he had the list and he went around to them, making it clear to them that if you are voting "no" you are voting against me and him, and all those six maybes became "yes" votes, which is how we got from the seventy-nine to eighty-five in 2007. I thought that when that bill passed in 2007 that I would never have a greater political moment, but I was wrong because when I went on the floor of the senate and the lieutenant governor said, do we have a message from the assembly and they said yes we have a bill from Mr. O'Donnell and they put Mr. O'Donnell's bill on the floor, let me tell you, that was quite the moment.

John and I were standing in the back and a number of my colleagues were surrounding us and you know the assembly, when the polling number was not there and when the culture was not there, the assembly stood up and did the right thing. I am extraordinarily proud of my colleagues for doing that and very grateful to the Speaker for giving me the chance to do that and to

give a shout out to him. He knew when he was going to give me the bill; he knew what I was going to do. He knew. He said to me, if you get the votes, you get the votes, and I knew that meant if I got the votes that his vote would be included. So I am very grateful to him and I am very happy that we have got this done.

When the religious exemption bill came on the floor the last night of session the Republicans asked no questions. I said, "Really! Okay," like I said, they're very *hamish*, people like to talk. "Really, no questions?"⁷³ But I did speak on the bill and what I did say was that I was hoping that this would finally come to an end because it was becoming much more difficult for me to interact with my colleagues because I only viewed them through the perspective of this vote. So, before this vote was taken, for example, I never would put my name on the bill of somebody who voted "no." If you're a "no" vote, then you don't have my political support for what you think is right even if it's what I think is right. I'm not going to do that. You know, having battled this for the last five years it would be good if, politically and personally, I could move away from viewing my colleagues from the perspective of this particular vote. I am hoping that thanks to Governor Cuomo and the brilliant Katherine Grainger we are done with this issue and can move on to other others things.

MS. GRAINGER: I cannot start talking about the process without acknowledging Assemblymember O'Donnell who supported marriage equality far before it was fashionable in Albany. Without his leadership, perseverance, guidance, we would not be here. We would not be having this conversation and we would not have this incredible victory in New York so thank you.

I had worked for Governor Cuomo for two days when he gave his first State of the State Address. In it he reaffirmed his commitment to making marriage a reality for all couples in New York, during the 2011 legislative session.⁷⁴ Specifically he said: "We believe in justice for all then let's pass marriage equality this year for all."⁷⁵ This was part of the governor's commitment to returning New York back to a progressive capital and as the governor said, to seize the moment of opportunity that is before us now. I was a little, I do not know, injured, after my two years

⁷³ See STENGEL ET AL, *supra* note 1, at 19 (citing statistics for a lack of debate as a contributing factor to legislative dysfunction).

⁷⁴ Andrew M. Cuomo, Governor of N.Y., State of the State Address (Jan. 5, 2011) (transcript available at <http://www.governor.ny.gov/print/126>).

⁷⁵ *Id.*

working in the New York senate where we had unsuccessfully tried to pass a marriage equality bill in 2009.

It was a Governor Paterson program bill taken up in an extraordinary session. The bill failed. It really failed— by six votes.⁷⁶ It failed by more votes than most people anticipated and I think a lot of people thought it was a tremendous setback for the movement. Certainly a tremendous setback for all the work Assemblymember O'Donnell had done. So it was refreshing to hear somebody like Governor Cuomo, take on this effort and make it part of his agenda when he was just starting out as governor.

When the governor made this statement, there were only six states that had actually passed a marriage equality bill, Massachusetts being one of them. The majority of states had some sort of ban on the books, whether it was constitutional or statutory, saying that marriage was only between a man and a woman. In New York, we had a situation where, in the senate, we had lost the Democratic majority and the Republicans now had control of that house. In 2009, when the bill was brought to the floor by the then Democratic majority, not one Republican voted for it. We also had, we had a situation where we needed six votes from the senate, and Assemblymember O'Donnell has already talked about the votes needed in the assembly, to get the bill passed. This was the landscape, as the governor was speaking about passing a marriage equality bill during the 2011 legislative session.

Internally, even though it did not seem like anything was happening on the second floor, we were working on bill language, on structure and strategy, but I think that the real shift publically occurred in March when the governor had a meeting with key stakeholders, Assemblymember O'Donnell, New York City Council Speaker Christine Quinn,⁷⁷ Senator Duane,⁷⁸ the bill sponsor in the senate, as well as the prominent lesbian, gay, bisexual and transgender (LGBT) leaders on this issue.

The governor had a formal meeting in the Red Room. At that meeting he appointed his number two, Steve Cohen, who was the secretary to the governor at the time, to take the lead. I think that was an important symbol to people on the outside as well as

⁷⁶ *See supra* note 46 and accompanying text.

⁷⁷ Hon. Christine C. Quinn is the Speaker of the New York City council.

⁷⁸ Hon. Tom Duane represents the 29th district in the state senate. He was the sponsor of the 2009 same-sex marriage bill, which failed in his chamber. *See supra* note 46.

the legislature that the governor was real about getting this done. He was putting his number two guy on it, he put a team together, and he spoke very frankly. The governor talked about his commitment to making marriage a reality and emphasized the importance of coordination among the groups and everyone speaking with one voice, something that the LGBT community and most progressive communities struggle with, right? Everybody's motivated by their boards and donors and who is going to be on the front page of the *New York Times* and it works against us. The governor made it quite clear that this needed to be done in a unified fashion and as a result of that a group was formed that was called New Yorker's United For Marriage. This group became an umbrella for all the major LGBT groups working on this issue in New York, and resulted in us being able to achieve something amazing.

I agree one hundred percent that there was a perfect storm. We had a very popular governor who was pushing this. We already had the momentum that Assemblymember O'Donnell created in the assembly. Now the LGBT advocates were coming together in a coordinated fashion in a very strategic, monied, advocacy push, which I believe lead to shifts not only in public opinion, but as a result of the public getting behind this legislation, it also lead the elected officials who were on the fence to move as well.

I am going to speak from the perspective of the second floor and then also the senate because I think that the chapter amendment, the religious exemption, was driven by what was going on in that house. As I have said, we needed six votes in the senate to pass the bill. There were thirty Republicans in the senate and of those we thought that we could get three, we also thought we could get three of the Democrats who had voted "no" in 2009. Senator Diaz was not going to be one of our "yes" votes.⁷⁹ So we weren't focusing on him. But there were other Senators, Huntley,⁸⁰ Addabbo,⁸¹ and Carl Kruger⁸² who had voted against

⁷⁹ Hon. Rubén Díaz, a Pentecostal minister, represents the 32d district in the state senate. A vocal opponent of same-sex marriage, he voted against the same-sex marriage bills in 2009 and 2011. See Michael M. Grybaum, *Senator and Granddaughter on Two Sides, but One Stage, in Debate on Gay Marriage*, N.Y. TIMES, May 15, 2011, at A13.

⁸⁰ Hon. Shirley L. Huntley represents the 10th district in the state senate. She voted against the same-sex marriage bill in 2009 and voted for both bills in 2011.

⁸¹ Hon. Joseph P. Addabbo represents the 15th district in the state senate.

the bill in 2009, that had since shown some indication that they could be persuaded otherwise.

Senator Addabbo was an interesting example because he was really focused on the vote count in his district. He said in 2009 that if my constituents want this bill, then I will vote for it. In 2009 he came out and said the support was not there, I'm not going to vote "yes." In 2011 he said the same thing; he put out a newsletter, I guess one of these constituent newsletters that the members mail out, and it asked for his constituents to write in and let him know where they stood on marriage. As a result of that he got over 2,000, I think it was something closer to 4,000, letters in support of marriage. That was coupled with the postcard campaign that the advocates were doing in his community. These grassroots advocates produced a significant number of postcards also in support of marriage. In the end, I believe, over 8,000 people had weighed in the district. It is a small district in Queens—and 80 percent of them were in support of marriage.

ASSEM. O'DONNELL: Can I just interrupt just to remind people for those who do not know that many of these senators, Senator Addabbo particularly, these assemblymembers all voted "yes." Catherine Nolan⁸³ had been a longtime advocate; she voted, she was a sponsor of the bill in 2007, so how is it that her constituency which overlaps his that permitted her to take the "yes" vote would be so hard on him if he voted "yes," and obviously it turned out to not be the case.

MS. GRAINGER: I think that is an important point and I think there are a lot of senators that were hiding behind this "we-can't-vote-for-it" reelection argument. We would often point to what had happened in the assembly where their counterparts had been voting "yes" for years and were just fine. Senator Addabbo did come out and change his vote on the bill. In mid-June, there was a press conference where the three Democratic senators who voted "no" for the bill in 2009 changed their vote.⁸⁴ We went from

He voted against the same-sex marriage bill in 2009 and voted for both bills in 2011.

⁸² Until December 2011, Carl Kruger represented the 27th district in the state senate, when he resigned his seat and pleaded guilty to federal corruption charges. See William K. Rashbaum, *After Resigning, Tearful Senator Pleads Guilty to Accepting Bribes*, N.Y. TIMES, Dec. 20, 2011, at A30.

⁸³ Hon. Catherine Nolan represents the 37th district in the state assembly.

⁸⁴ See Nicholas Confessore & Michael Barbaro, *Once Against Marriage, 4 Senators Say They Will Back It*, N.Y. TIMES, June 12, 2011, at A13 (noting that Senators Joseph P. Addabbo, Jr., Shirely L. Huntley, and Carl Kruger joined

the press conference that was held in the governor's Red Room on the second floor into his conference room, with the advocates. Were you [Assemblymember O'Donnell] there?

ASSEM. O'DONNELL: Oh, yes.

MS. GRAINGER: In the governor's conference room, we were talking strategy, what was next, three votes to go, two weeks until the end of session, when the governor's secretary came in and passed him a note. The governor got up and went into his office and then he came back in and he said, "I have a surprise for you." We were sitting there, none of us had slept in weeks, and the governor brought in Senator Alesi, into the room and who said "I've decided that I'm going to vote 'yes' for gay marriage."⁸⁵

We knew he was close, but that is how we all found out. Senator Alesi gave a private and personal speech talking about why his vote had changed. We could actually see, and I do not know if you [Assemblymember O'Donnell] felt this way about the other members, but their bodies changed when they voted "yes" or they changed their vote. They talked differently. They could look us in the eye. They changed, it was like a weight had been lifted and that is what it seemed like when Senator Alesi told us that he was a "yes" vote.

Two days later, Senator McDonald, also a Republican, said he was going to be a "yes."⁸⁶ So, we were down to one and we had over a week to go. The assembly already passed the Marriage Equality Act and we were ready to go. And then everything stopped.

I think it was like ten days until the end of session and nothing was happening because no one wanted to be the deciding vote in the senate. We were stuck at thirty-one. We had had several conversations with senators; we knew who was on the fence. The governor was talking to people every hour. These senators, they were coming in and out of his office. We never knew when there was going to be one of these surprise announcements when the

Governor Cuomo at a press conference to make the announcement, and that Senator Alesi, a Republican, announced his intention separately the same day).

⁸⁵ See *id.* Hon. James S. Alesi represents the 55th district in the state senate. Senator Alesi initially accepted *Albany Government Law Review's* invitation to speak at the oral history transcribed herein, however, a conflict in his schedule arose. See Thomas Kaplan, *A Campaign Windfall for 4 Republicans Who Voted for Same-Sex Marriage*, N.Y. TIMES, Oct. 12, 2011, at A23.

⁸⁶ Jimmy Vielkind, *GOP Senator from Saratoga Becomes 31st Vote for Same-Sex Marriage Bill*, TIMES UNION (Albany), June 15, 2011.

door would open and somebody else would come in. We were stuck. One of the things that came out at that time was that the majority of the senators that were still on the fence were talking to the governor about needing to deliver a more robust religious exemption.

Where this is coming from, this is a national effort—marriage equality is a national effort—everything that we did on this bill we knew was going to be examined and looked at, and picked up, and copied in other states. On the other side of this, it was the same thing. There was an extreme national push to put a religious exemption into the bill. The senators, not all of them, but many of them, were getting tons of pressure from the outside movements, from religious groups, to carry this exemption.⁸⁷ I think the whole process was daunting, it was a hard process, but the religious exemption was just torture. One of the things we are so proud of in New York is that we have a very robust Civil Rights Law.⁸⁸ We have a Human Rights Law.⁸⁹ We have a very strong state constitution⁹⁰ and we were trying to add to that by passing the Marriage Equality bill. We were trying to build on New York's civil rights protections, not undo them.

It was this very delicate dance of realizing we had one vote to go and it was very much a reality that we could get this done this year, but also recognizing that any misstep, and we could actually undo the good that people had been fighting for in New York for years, the Sexual Orientation Non-Discrimination Act⁹¹ and other protections for gays and lesbians in the state. In all honesty, some of the things that were coming to us would not only have undone the rights for gay and lesbian folks, but for all protected groups.

We had proposals that were presented to us that would have allowed a clerk at a sales store to refuse to sell a wedding dress to a lesbian or whoever wanted to buy one because they were morally opposed to that person getting married. We had suggestions that were brought to us that would have made it so that a religious group that received state money, which is allowed if the entity uses that money for a secular purpose, could

⁸⁷ See Nicholas Confessore & Danny Hakim, *Once Republicans Urge Cuomo to Alter Same-Sex Marriage Bill*, N.Y. TIMES, June 16, 2011, at A28.

⁸⁸ See N.Y. CIV. RIGHTS LAW §§ 2–84 (McKinney 2010).

⁸⁹ See N.Y. EXEC. LAW §§ 290–301 (McKinney 2010).

⁹⁰ See N.Y. CONST. art. 1, §§ 1–18 (Bill of Rights).

⁹¹ Ch. 2, 2002 N.Y. Laws 46 (codified in scattered sections of N.Y. EXEC. LAW, CIV. RIGHTS LAW, and EDUC. LAW).

discriminate. We would be creating this situation where we would be allowing folks that received state funds, organizations that received state funds to discriminate. We received proposals that we thought could undo protections that already existed in the state for gays and lesbians, such as their right to adopt, regardless of marriage.

We were in work groups and discussions and proposals were being given to us all the time. At the end, we had over forty drafts of the chapter amendment that you, Professor Clark, cited before we settled the final version. What we were trying to do was give enough that it would be meaningful to the folks whose votes we needed, without undoing existing rights. Some of it reads as clumsy because we were restating what already exists in the state constitution, in the state Human Rights law. Clearly we did not need to put that language in, right? Those provisions were in the law and arguably we did not need to recodify them in the bill, but it was a strategy to make the religious exemption robust enough to make folks comfortable and vote “yes.”

You mentioned the reverse severability clause.⁹² This reverse severability clause was proposed, I think it was the last day, and I do not even know who gave it, it does not matter in the end where it came from, what matters is what it would do. A severability clause as it is normally drafted or put in a bill would say that if one provision of the bill is struck down the rest of the bill stands.⁹³ What this was doing was saying that if any provision of the bill, in this circumstance it would be if the religious exemption was struck down, then the whole bill goes down. Here we are doing this dance where we were trying to make sure that this religious exemption is constitutional, is not going to undo any existing rights, and it is going to get us where

⁹² See ch. 96, 2011 N.Y. Sess. Laws 725, 725 (McKinney) (“This act is to be construed as a whole, and all parts of it are to be read and construed together. If any part of this act shall be adjudged by any court of competent jurisdiction to be invalid, the remainder of this act shall be invalidated. Nothing herein shall be construed to affect the parties’ right to appeal the matter.”).

⁹³ A severability clause typically reads: If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein. See, e.g., ch. 168, 2010 N.Y. Sess. Laws 830, 845 (McKinney).

we need to go, but then also recognizing that once we put this reverse severability clause in if anybody decided to challenge the religious exemption and the courts said it was unconstitutional or not needed, then the whole Marriage Equality Act would fail.

I have cried at work twice in my life, that day, I had to go into my office and have some alone time. But, in hindsight the religious exemption was legally sound and we did not damage the entire provision by putting it in. But it was a difficult decision to make. I remember walking over to Assemblymember O'Donnell's office with the bill language in my hand kind of going through the Legislative Office Building and hoping that you would still speak to me after you read it.

ASSEM. O'DONNELL: By that point, Katherine, I was speaking to you one way or the other.

MS. GRAINGER: We all know how it ends. We were able to agree on this chapter amendment. Senator Saland⁹⁴ called the governor the morning of the June 24 vote and said that he was a "yes" vote. I knew he was a "yes" vote because I saw his wife walk out with a video camera. She had taped this whole process. She was very much in favor of the bill. That was part of where the pressure and push came from in his household. And, we got it done.

ASSEM. O'DONNELL: If I could just add a couple things, one is that Katherine was instrumental in making it happen for one thing. Secondly the reverse severability stuff, it is still not clear to me whether or not that applies just to the religious bill or whether it applies to the other bill. So, that, to me, leaves a question that will need to be determined.

In the end why did I go along with it and put my name on it—sometimes people do not want their names put in a bill and the rules committee does it—but you know so I did not want to take a pass on that. In the end I never intended, nor do I seek, to force a religious person to marry me—that was never my idea. Right? When I give these talks around the country, I always say at the end of the wedding they say by the power invested in my by the state of New York, it is about a piece of paper that is issued by a government and not a religious thing.

It is sort of an anecdote, Judy Rapfogel who is the Speaker's chief of staff, came up to me and said to me, "When you do this I know some very understanding rabbis." I said, "Judy, listen I have been fighting for secular marriage for five years and I am

⁹⁴ Hon. Stephen M. Saland represents the 41st district in the state senate.

not going that way. I am not getting married by a judge, and not in a church.⁹⁵

In the end even thought it was difficult to swallow. It capsulated what I had thought we had always intended, which was that no religious person is forced to perform one of these weddings. If you do not want to marry someone you do not have to, which as we pointed out today. If you want to get married by, say, Judge Robert Smith of the Court of Appeals, if you wanted that you should have your head examined,⁹⁶ but if you wanted that you cannot force him to marry you today whether you are a straight couple, a gay couple; there is no right to force someone to perform your wedding. That was never my intention and it is because that is what I believe the religious exemption has drafted was meant to say that we were able to get where we are.

MR. CLARK: You know in a couple of years Governor Cuomo will get a chance to make an appointment to that seat in the Court of Appeals, Justice Smith's seat.

ASSEM. O'DONNELL: Not a day too soon.

MR. CLARK: It might be a very appropriate time for an openly gay or lesbian judge for the first time on the Court of Appeals to replace Judge Smith.

ASSEM. O'DONNELL: A lot of my buddies work was instrumental in getting Rosalyn Richter appointed in the Appellate Division at the time.⁹⁷ She was the first openly gay or lesbian person to serve on an appellate court in America. I mean just think about this. There is a lot of work to be done not just on marriage, but I helped a lot with Governor Paterson on that as well just so you know. But I will not tell those stories when I am being videotaped, but boy those are stories.

MR. CLARK: Listening to you both, and thinking about how you swayed the undecided or actually convinced them to change from their "no" vote from prior years, among other things it sounds like the lobbying is extremely personal. Family members, your family

⁹⁵ On January 29, 2012, Assemblymember O'Donnell was married to his longtime partner by Judith Kaye, former Chief Judge of the New York Court of Appeals, at an event space in Manhattan. Elissa Gootman, Vows, *John Banta and Daniel O'Donnell*, N.Y. TIMES, Feb. 3, 2012, at ST15.

⁹⁶ Judge Smith wrote the majority opinion in *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

⁹⁷ Press Release, Office of Governor David A. Paterson, Governor Paterson Announces Appellate Division Appointments and Court of Claims Nominations (Mar. 5, 2009), available at http://www.governor.ny.gov/archive/paterson/press/press_0305096.html.

members, their family members, the rabbi, is that one of the main lessons that we try to take this to other states?

ASSEM. O'DONNELL: It absolutely is the only lesson because the truth is I got more votes in the assembly—to some assemblymembers, you know, I am like the exotic fruit from Manhattan, right? They are like, what is that—so, they do not really understand. Yet they do understand when people of their generation have gay kids. So, it was more effective often to find the constituent in their district who wants their daughter or son to get married than it is for them to talk to me. They think: what do they know about my life? One of the things, the Gill Foundation⁹⁸ had done extensive, research about this subject and the truth is that we know what the most effective messaging is and how to do that. We have just chosen to ignore it. Like, for example celebrities. I am not against celebrities really. I have some in my family; sometimes that is good, sometimes that is bad.

But the truth is that having Ellen DeGeneres on television saying I want gay marriage in California is not really relevant to the average voter and the average citizen because they think, they live this life that is not much like mine. They live their life that way not just because they are gay but because they are wealthy, so it is the ordinary stories of your next-door neighbors, which are often much more compelling from a legislative point of view. What Katherine said before about Senator Addabbo is also very true. In 2009, I had three Republicans who were previous “no”s who I almost got to vote “yes.” What stopped them was in the ten days before the vote they received five times as many communications from “no” voters than from “yes” voters. Even though those sampling numbers are small, one hundred “nos” and only twenty “yeses,” when that is presented to an elected official that is the surest way to get them to be afraid.

The two things I can say is, one, your best shot is to approach officials who have yet to take a public position. After they have voted on an issue, it is much harder to get them to change. The second thing is absolutely the personal stuff and one of the reasons why I knew the bill was passing was because I was told Senator Saland's wife⁹⁹ was on her way with her video camera. I heard from a lot of people that she was a fierce advocate and that

⁹⁸ See *About Gill*, GILL FOUNDATION, <http://www.gillfoundation.org/about> (last visited Feb. 22, 2012).

⁹⁹ Linda Saland is married to Hon. Stephen M. Saland.

she wanted to be here when history was made. Once I knew that she was in the senate chamber that told me what was coming next.

MR. CLARK: It seemed from the outside, watching the failure in the senate of the earlier bill, that there had been a good deal of that personal lobbying by at least one member's rabbi going into that vote.

ASSEM. O'DONNELL: Is this a yes-or-no question because I could analyze a yes-or-no question?

MR. CLARK: Well, it seems it did not have much effect; it was worse than expected, that vote on that bill.

ASSEM. O'DONNELL: Communication strategies need to be thought through. When I did this in 2007 with these weekly communications, I was in regular consultation with Evan Wolfson and he was the one from Freedom to Marry¹⁰⁰ who got me the letter from Mildred Loving, from Loving Virginia, saying this is the same issue. We learned, at the time I had a staffer who had worked in the California Assembly, we learned of a woman who was an assemblymember who voted "no," then she voted "yes," then she ran for the state senate and won in a very conservative district despite that vote.¹⁰¹ We wrote a letter for her and said would you send this letter? The strategy was every week to appeal to people, to my colleagues on a different level, whether it was political, whether it was legal, whether was it moral, and then change them week to week, always ending with the same thing. That kind of comprehensive, thought through, regular attention communication strategy did not occur in the senate in 2009; kill them with kindness is not a strategy.

We saw what the results were in that failed vote. In that lovely March meeting that Ms. Grainger pointed out one of the things I mentioned was what damage that vote did to the vote in my house. I had to put toothpaste back in the tube because that had sort of destabilized some of my "yes" votes and I will not go into it why. In the end, the answer is no, that kind of comprehensive communication strategy was not undertaken in

¹⁰⁰ Evan Wolfson is the Founder and President of Freedom to Marry, an organization dedicated to campaigning for same-sex marriage rights nationwide. See About Freedom to Marry, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/about-us> (last visited Jan. 20, 2012).

¹⁰¹ In 2005, Hon. Gloria Negrete-McLeod represented the 61st district in the California Assembly. See Nancy Vogel, *Legislature OKs Gay Marriage*, L.A. TIMES, Sept. 7, 2005, at A1. She now represents the 32d district in the California Senate.

2009.

MS. GRAINGER: I would just add that in terms of this being a personal issue, it all was. I mean the governor approached this from a very personal perspective. He wanted to do this because it was a civil rights issue, but also because he had many friends that were gays and lesbians that he respected very much who wanted to get married and he was in a position to help that occur. There were many closed-door conversations on this where it was, I know your rabbi is saying this, but this is something you need to do for the greater good. As an elected official, this is something you are being called upon to do.

I do think the negotiations, the whole process was very personal, including the religious piece. That is part of why we took it as seriously as we did is that even though, I think, neither of us, and probably none of you, would have thought that a religious exemption was even needed in the bill based on the statutory and constitutional protections that the state already had, and as Assemblymember O'Donnell pointed out, this was civil marriage. It had nothing to do with religion.

But the personal pleas and personal stories that people came in of really being torn. I mean we can be flip about it but people were quite torn about some of the religious concerns. It was personal on so many levels and that is what made the bill obviously very important but also very challenging.

MR. CLARK: A critical component, which you both mentioned I think, was the gay advocacy groups banding together and reducing some of the competitiveness between them. How can that be replicated, and more specifically, would that have happened without that horrible senate failure? Is that at work here?

MS. GRAINGER: I think we got Barack Obama because of George Bush, right? Something had to happen to swing the pendulum the other way. I would say the failed senate vote could have been that, but I think there was much more than that going on. You learn from your mistakes, but you also had Governor Cuomo and it is known as the "Cuomo Machine." They come in and they are very strategic and targeted and this was part of it. You do not step out of line in "Cuomoland." He made it very clear that if we're going to get this done, we're going to get it done and the way he wants to do it. I know [Assemblymember O'Donnell is] going to comment on it.

ASSEM. O'DONNELL: Oh, yes.

MS. GRAINGER: This is how it needs to happen. I think that

was part of it. But also at that point nobody cared about the ego as much as trying to get this done. Everyone knew we could not have this bill fail twice. That would have been a death knell and we would not have been able to recover from that. I think there was a lot at stake and people were willing to do whatever it took. Coming together as one voice was part of that.

ASSEM. O'DONNELL: What I will add to that is I have attended more events where more people and entities have taken credit for this bill passage. I usually bring my boyfriend so he can put his hand on my thigh to keep me in my chair. But if you cannot handle that then you really cannot do this job. Whatever the expression is, success has a million mothers and failure is an orphan, right? The success is the success and lots of people want to take credit and that is fine and that is good. So in that sense it can be replicated, yes. I think 2009 did a horrible job to us and the people in the movement knew it and they chose to band together.

When I put my bill in and the governor was unhappy, let me be really clear, that unhappiness was made very clear to me. There was no head on my pillow or anything but I did check when I got home, let us just say that. At the gay pride parade, he said to my partner, my fiancé, "Does he ever smile?" That's what he said about me.

And John looks at me saying, "You're laughing and smiling all the time." Well not when I'm on the second floor in Albany. I ain't smiling. So I take a great deal of credit for accomplishing this but I'm only part of the accomplishment.

It is so multi-faceted and takes so many different people with different skills and things happening at the same time that it is both foolish and unproductive to be vested in "who did" or "who said," it just doesn't get us anywhere. I hope the success teaches those organizations that are out there trying to accomplish this, to be able to find a way to do that. But I will continue to go to lots of dinners next year where lots of different entities will put out video and their executive director will get up there and say "I passed marriage equality." "Rock on sister," as my sister would say.

MS. GRAINGER: The only thing to add to that is the progressive movement generally can learn a lesson from that unified voice. The conservative groups have been using it for years and very well. Even now I will get lobbied on a bill, a progressive piece of legislation, and I will have ten different meetings from ten

different groups, all on the same bill. So I hope that it is something we can really utilize in the state in order to push a more progressive agenda and get it done.

MR. CLARK: Another critical factor, it seems, was the commitment of the governor—I mean *obviously*; I should not say *seems*—was the commitment of the governor. And Ms. Grainger you said, well, we believe this is the right thing to do, so let's get it done this session. I am a little more cynical than that, and I'm thinking about the advocates in Maryland who have tried to move their governor, and they have succeeded in moving their governor a bit from civil unions and quiet support to more active support. But could you elaborate a bit on the motives of the governor. There are lots of things that you think are the right thing to do.

MS. GRAINGER: This was personal for the governor. Obviously he is a political animal and he makes decisions based on many reasons but he put together an agenda and he said, if anyone read the *New York Times* article that kind of relived this process,¹⁰² this was something that he was personally committed to doing and was going to push it because it needed to happen. Because of that too he made it very clear that if this bill was not going to pass then he was not going to move it. He was not going to play with people's civil rights and put something on the floor that was going to go down. Sure, there are all kinds of reasons why elected officials make decisions but at the end of the day this was something that the governor believed in.

ASSEM. O'DONNELL: Governor O'Malley is now firmly in favor of marriage.¹⁰³ From a political point of view I think you will have a difficult time running for president in a Democratic primary in 2016 or 2020 if you don't take this position. Obviously for this governor, the thing he likes best in life, other than Sandra Lee and his cars,¹⁰⁴ is winning. When you win, when someone just failed, that makes the winning even sweeter and more important. He wanted to win and he put all his resources behind it and we're only here because he did.

MR. CLARK: The *New York Times* story, it may be the same

¹⁰² Barbaro, *supra* note 71. See also Thomas Kaplan, *After Pushing Gay Marriage, Cuomo Is Thanked With Money*, N.Y. TIMES, Dec. 1, 2011, at A29 (noting fundraising events in New York and Los Angeles tied to same-sex marriage).

¹⁰³ Associated Press, *Maryland: Governor Vows to Push Same-Sex Marriage*, N.Y. TIMES, July 23, 2011, at A11.

¹⁰⁴ Sandra Lee is Governor Cuomo's companion. See Michael Barbaro, *Indulging an Obsession with Motors and Muscles*, N.Y. TIMES, Oct. 28, 2010, at A22.

story that you two are talking about, included this: “[B]ehind the scenes [the story of how same sex marriage became legal in New York] was really about the Republican party reckoning with a profoundly changing power dynamic, where Wall Street donors and gay-rights advocates demonstrated more might and muscle than a Roman Catholic hierarchy and an ineffective opposition.”¹⁰⁵ How much credit do you give to that part of it in swaying the votes? How important is that to the people in Maryland who don’t have a Wall Street with lot of hedge funds?

ASSEM. O’DONNELL: Well, back to my previous point about personal stories, most of those donors are people who have gay children. They have very conservative economic policies and right wing agendas possibly, but they also love their children. So they had to figure out a way to rectify those two conflicting things. Republicans take credit for the sun going up, like Rudolf Giuliani, sun goes up, I did that, sun goes down, look I did that too. They do that. They do that by their very nature and you really cannot expect them not to do that. It is a tad frustrating to me, tonight there is a million dollar fundraiser for the three Republicans who voted “yes” and all the people there never gave me a dollar. I am kind of curious why that is. So it is frustrating because when you move the ball down the field and you get it to the five yard line and then the person who carries it the last five yards goes, “Oh, look, look what I did.”

This is a bipartisan issue, trying to make it one party versus the other, you are never going to succeed. You have to find where the gays are and there are some in everyone’s family. So you have to find them and find who their parents and uncles and cousins know because that is really the way it will happen. If it turns out that those people are filthy rich, we should shake the tree for some money too.

But, in the end, having listened to Senator Grisanti and Senator Saland¹⁰⁶ on the floor,¹⁰⁷ I do not think that money had

¹⁰⁵ Barbaro, *supra* note 71.

¹⁰⁶ Hon. Mark Gristati represents the 60th district in the state senate. Senators Gristani and Saland, who are members of the Republican conference, voted to pass same-sex marriage. Senator Saland voted against the same-sex marriage bill in 2009 and voted for both bills in 2011. Senator Gristanti was elected to his seat in 2010.

¹⁰⁷ *N.Y. State S. Transcript*, 234th Reg. Sess. (June 24, 2011), available at <http://open.nysenate.gov/legislation/transcript/regular-session-06-24-2011>.

[Grisanti:] “I struggled with the word ‘marriage’ as between a man and a woman. That’s how I am raised. But I also struggled with the rights

anything to do with it. I think that they both used legal analysis to say there is no rational reason why this distinction exists. I believe, having listened to them, they searched their consciences and were not making a political calculation. Now we are all politicians, we play a political game, so the role of money and the role of knowing that if you are attacked you will be protected financially is important. But in the end, I don't think that's what got the four Republican votes that we had to get to get where we are.

MS. GRAINGER: I agree with that.

ASSEM. O'DONNELL: That's why we get along so well.

that are lacking for same-sex couples, and I've stated this numerous times. I cannot deny that right or an opportunity for someone, nor stand in the way of allowing them to obtain the rights that I have."

....

[Saland:] "Coming from a rather traditional background and being married for some 46 years and being raised by parents who preached to me the importance of tolerance, respect and acceptance of others—and of course, as I'm sure all of our parents taught us, always to do the right thing—my quandary was all of the folks who wrote me the thousands and thousands of letters and emails and thousands of telephone calls. They all asked me to do the right thing.

And I'm not quite sure I can do the right thing by both the proponents and the opponents. And needless to say, my decision on this bill is going to disappoint a significant number of people.

But I can say that my intellectual and emotional journey has ended here today. And I have to define doing the right thing as treating all persons with equality. And that equality includes within the definition of marriage. And I fear that to do otherwise would fly in the face of my upbringing." *Id.*