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Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution

Anthony Michael Kreis, *Chicago-Kent College of Law*

ARTICLES

STAGES OF CONSTITUTIONAL GRIEF: DEMOCRATIC CONSTITUTIONALISM AND THE MARRIAGE REVOLUTION

*Anthony Michael Kreis**

ABSTRACT

Do courts matter?

Historically, many social movements have turned to the courts to help achieve sweeping social change. Because judicial institutions are supposed to be above the political fray, they are sometimes believed to be immune from ordinary political pressures that otherwise slow down progress. Substantial scholarship casts doubt on this romanticized ideal of courts. This Article posits a new, interactive theory of courts and social movements, under which judicial institutions can legitimize and fuel social movements, but outside actors are necessary to enhance the courts' social reform efficacy. Under this theory, courts matter and can be agents of social change by educating the public and dislodging institutional inertia in the political branches.

This Article addresses these competing visions of judicial capacity for social change in the context of the struggle for marriage equality. Specifically, it considers the extent to which courts were responsible for Americans warming to LGBT rights and coming to new understandings of family, examining evidence marshaled from court rulings, polling data, interviews with federal and state judges, interviews with state elected officials, legislative histories, and media accounts. The Article concludes that courts played a vital role in fueling the marriage equality revolution. They were not, however, unbridled agents of social change because external forces were necessary to maximize the impact of courts' actions.

* Visiting Assistant Professor of Law, Chicago-Kent College of Law. Ph.D., University of Georgia, J.D., Washington and Lee University, B.A., University of North Carolina at Chapel Hill. I am thankful for the various forms of support and insight from Kathy Baker, Ryan Bakker, Felice Batlan, Alex Boni-Saenz, Peg Brinig, Dale Carpenter, Erwin Chemerinsky, Rob Christiansen, Bill Eskridge, J. Amy Dillard, Mary Dudziak, Chai Feldblum, Martha Fineman, Cynthia Godsoe, Linda Greenhouse, Tim Holbrook, Nan Hunter, Nancy Leong, Hillel Levin, Heidi Li Feldman, Stefanie Lindquist, John Maltese, Anthony Madonna, Joe Miller, Brian Murchison, Sheldon Nahmod, Michael Perry, Sally Brown Richardson, Caprice Roberts, Mark Roark, Steve Sanders, Chris Schmidt, Liz Sepper, Reva Siegel, Eric Segall, Joan Shaughnessy, Carolyn Shapiro, Rod Smolla, Christian Turner, Joe Ura, Rich Vining, Sonja West, Teena Wilhelm, Vicky Wilkins, and Robin Fretwell Wilson. I appreciate feedback from the University of Illinois' Harry Krause Emerging Family Law Scholars Workshop and 2016 Loyola University Chicago School of Law Constitutional Law Colloquium. Finally, thanks go to Justice David Baker, Judge Bernard Friedman, Justice Beth Robinson, Chief Justice Marsha Ternus, and Judge Vaughn Walker for generously taking the time to be interviewed and improve the piece.

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Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry.

—Alexander Bickel (1962)¹

The battle for same-sex marriage would have been better served if [same-sex couples] had never brought litigation, or had lost their cases.

—Gerald N. Rosenberg (2006)²

We draw down on a capital of trust, a deposit of trust. We spend that capital of trust, and we have to rebuild that capital.

—Anthony M. Kennedy (2015)³

INTRODUCTION

A substantial proportion of Americans believes courts can save us from ourselves. There is a prominent strain of romanticism in American political discourse, particularly among progressives and legal academics, that judicial institutions are above the fray—that they rise above the lowbrow business of politics to do right by marginalized communities.⁴ One need look no further than anniversaries of *Brown v. Board of Education* to see Americans celebrating the notion that courts *can and should* be champions of ideas whose times have yet to come.

Americans' "attachment," as Gerald Rosenberg once described it,⁵ to the portrayal of judges triumphantly vindicating the rights of the repressed and the downtrodden fails to find wide-scale support in much of the literature studying courts.⁶ Indeed, many scholars criticize perceptions of dominant

¹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 253 (1962).

² Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 *DRAKE L. REV.* 795, 813 (2006).

³ Elliot Spagat, *Justice Anthony Kennedy Compares Gay Marriage Uproar to Anger After Flag Burning Case*, U.S. NEWS (July 15, 2015), <http://www.usnews.com/news/us/articles/2015/07/15/justice-kennedy-acknowledges-gay-marriage-controversy>.

⁴ See, e.g., John Ferejohn & Larry D. Kramer, *Judicial Independence in a Democracy: Institutionalizing Judicial Restraint*, in *NORMS AND THE LAW* 161–62 (John N. Drobak ed., 2006) (discussing the tension between judicial independence and accountability); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 *DUKE L.J.* 1335, 1335 (2001) (distinguishing constitutional interpretation by courts from constitutional interpretation by Congress); Douglas Laycock, *Constitutional Theory Matters*, 50 *TEX. L. REV.* 767, 767–69 (1987) (examining the relevance and implications of different constitutional theories for the judiciary in contrast to the political branches).

⁵ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 9 (2d ed. 2008).

⁶ See Robert A. Kagan, *A Consequential Court: The U.S. Supreme Court in the Twentieth Century*, in *CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE* 199 (Diana Kapiszewski,

judicial power as detached from the historical realities of backlash and resistance to judicial authority.⁷ This raises the question: who is right about the role of courts in social change?

Recent social reform attempts have revived this question.⁸ Beginning in the early 1990s, same-sex marriage advocates systematically used litigation as a tool for social change against stiff popular opposition. The first of these early cases was the 1990 challenge to the District of Columbia's marriage laws,⁹ followed by a challenge to Hawaii's same-sex marriage ban in 1991.¹⁰ Early polling data is sparse, but a 1996 national poll registered only 27% of Americans supported same-sex marriage.¹¹ Deep public opposition notwithstanding, Americans were seemingly in denial. State-level responses to the prospect of same-sex marriage were fairly muted as only Alaska and Hawaii amended their state constitutions to thwart equal marriage before 2000.¹²

When the Supreme Judicial Court of Massachusetts ruled in 2003 for equal marriage rights in *Goodridge v. Department of Public Health*,¹³ it was the first such victory for same-sex couples. At the time, *Gallup* recorded just over 40% support for same-sex marriage nationally.¹⁴ Angry electorates responded by

Gordon Silverstein & Robert A. Kagan eds., 2013) (exploring the "roles played by the U.S. Supreme Court in the twentieth century, asking to what extent and in what ways the Court was a consequential political actor.").

7 See, e.g., ROSENBERG, *supra* note 5, at 95 (describing that courts existed in the desegregation era as an entity that exerted pressure on, and was pressured by, a greater political environment).

8 See, e.g., Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 33 (2016) (examining the distribution of political power between the branches in the U.S. constitutional system); Nicholas O. Stephanopoulos & Mila Versteeg, *The Contours of Constitutional Approval*, 94 WASH. U.L. REV. 113, 115 (2016) (analyzing levels of support for the U.S. Constitution and its application over its constituents); Joy Milligan, *Protecting Disfavored Minorities: Toward Institutional Realism*, 63 UCLA L. REV. 894, 896 (2016) (arguing that the idealistic nature of social reform by the Warren Court in the twentieth century was heavily criticized because "courts were severely constrained in their ability to oversee successful social reforms and protect minorities."); Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017, 2020 (2016) (noting an empirical study on judicial behavior and role of ideological preference in judicial decision-making); Suzanna Sherry, *Introduction: Is the Supreme Court Failing at Its Job, or Are We Failing at Ours?*, 69 VAND. L. REV. 909, 909–10 (2016) (assessing various scholars' views on the proper role of the Supreme Court in the United States constitutional system).

9 *Dean v. District of Columbia*, No. CIV.A. 90-13892, 1992 WL 685364, at *1 (D.C. Super. Ct. June 2, 1992) (affirming the decision that "same-sex marriages are not authorized under the District of Columbia Marriage and Divorce Act."), *aff'd*, 653 A.2d 307 (D.C. Cir. 1995); see also WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 16 & n.* (2002).

10 *Baehr v. Lewin*, 852 P.2d 44, 48 (Haw. 1993) (holding that there is no fundamental right for same-sex couples to marry, but that strict scrutiny must be applied to statutes limiting marriage based on sex), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

11 Justin McCarthy, *Americans' Support for Gay Marriage Remains High, at 61%*, GALLUP (May 19, 2016), www.gallup.com/poll/191645/americans-support-gay-marriage-remains-high.aspx.

12 See *infra* text accompanying notes 50–53.

13 798 N.E.2d 941 (2003).

14 McCarthy, *supra* note 11.

adopting anti-gay marriage bans in twenty-three states between 2004 and 2006.¹⁵ Meanwhile, some Americans began the bargaining process, throwing support behind non-marital same-sex relationship recognition like domestic partnerships and civil unions.¹⁶

A mere ten years later, supermajorities of Americans accepted and supported marriage equality.¹⁷ More stunning, state legislation attacking LGBT rights in Indiana and North Carolina were met with large-scale protestation and national boycotts.¹⁸ Were courts responsible for this dramatic about-face in the American social fabric? *This Article will answer whether and how courts are responsible for the social change leading to Americans' embrace of same-sex marriage.*

The Article will proceed in five parts. To begin, it will construct a theory of courts and social change in Part I. Part II will examine the historical development of litigation asserting a right to same-sex relationship recognition. Turning to empirical data, Part III assesses how the public responded to court rulings expanding protections for same-sex couples. Part IV and Part V then dissect responses from legislators and executive actors, respectively, to gay rights litigation. The Article then closes with a synthesis of all the evidence laid out to conclude that courts were indeed largely responsible for the equal marriage revolution.

I. THE DIALECTICAL COURTS

In 1986, California Supreme Court Chief Justice Rose Bird was up for retention election and under fire for her opposition to the death penalty. Bird defended her unpopular judicial philosophy as an institutional virtue: "Courts are an aristocratic institution in a democracy. That's the dilemma for an institution that has the function of reviewing the will of the people. We're bound to be 'anti-majoritarian.'"¹⁹

¹⁵ David Masci, *An Overview of the Same-Sex Marriage Debate*, PEW RESEARCH CTR. (Apr. 1, 2008), www.pewresearch.org/2008/04/01/an-overview-of-the-samesex-marriage-debate/.

¹⁶ See *infra* Part IV.

¹⁷ Scott Clement & Robert Barnes, *Poll: Gay-Marriage Support at Record High*, WASH. POST (Apr. 23, 2015), https://www.washingtonpost.com/politics/courts_law/poll-gay-marriage-support-at-record-high/2015/04/22/f6548332-e92a-11e4-aae1-d642717d8afa_story.html?utm_term=.71dbf78afe8c.

¹⁸ See Monica Davey, Campbell Robertson & Richard Pérez-Peña, *After Rights Clash, Two States Revise Legislation*, N.Y. TIMES, Apr. 3, 2015, at A12; Richard Fausset & Alan Blinder, *North Carolina Fails to Repeal Measure That Caused Boycotts*, N.Y. TIMES, Dec. 22, 2016, at A22.

Within this Article, the variation in the use of the terms "LGB" and "LGBT" is intentional. Same-sex marriage legislation and litigation implicates the rights of gays, lesbians, and bisexuals, so "LGB" is used to more precisely identify the class of persons whose rights are at issue. The use of "LGBT," which includes transgender persons, is used to capture the wider movement for sexuality-based rights and the broader community within which sexual minorities have organized.

¹⁹ Anthony Lewis, *Chief Justice Bird: Calm at the Center*, N.Y. TIMES (Oct. 23, 1986), <http://www.nytimes.com/1986/10/23/opinion/abroad-at-home-chief-justice-bird-calm-at-the-center.html>.

The Chief Justice's vision of muscular judicial review as a bulwark against political winds aligns with the textbook explanation of courts' purpose. Academics have been divided, proffering various theories and numerous empirical studies about courts and social change—some arguing courts can shape public opinion,²⁰ some finding courts follow dominant societal views,²¹ some suggesting courts act counter to majoritarian impulses,²² and yet others finding courts are limited in their capacity to shape society at all.²³

Gerald Rosenberg's seminal book, *The Hollow Hope*, is the leading piece of scholarship that is skeptical of sweeping judicial influence.²⁴ Rosenberg calls the courts "constrained" and lays out three limitations that inhibit courts' social change efficacy and the conditions necessary to overcome them.

²⁰ See, e.g., PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* 74 (2008) (observing the "unique importance" America grants lawyers and judges in resolving ideological and political disputes); JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 9 (2009) (observing that familiarity with the judicial system correlates with faith in its impartiality); WILLIAM K. MUIR, JR., *PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE* 138 (1967) (enumerating ways in which the law has changed even deep-rooted social attitudes); Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 768 (1989) (analogizing the Court's incomplete influence over public opinion to that of a schoolteacher); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & SOC'Y REV. 151, 181–82 (2009) (noting the many variables affecting the courts' influence on public opinion); William K. Muir, Jr., *The Impact of Supreme Court Decisions on Moral Attitudes*, 23 J. LEGAL EDUC. 89, 91–96 (1970) (analyzing the impact of court decisions on differently situated individuals); Joseph Daniel Ura, *Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions*, 58 AM. J. POL. SCI. 110, 122–23 (2013) (finding that the Supreme Court is uniquely incentivized to push public opinion with its decisions).

²¹ See, e.g., JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 185 (2006) (arguing that the Supreme Court rarely challenges public opinion); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957) (arguing the courts are merely part of unified, national political alliances); Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 304 (2010) (arguing that when the courts act counter to public opinion, the political system acts to bring them back in line); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L. J. 153, 158 (2002) (characterizing scholarly adherence to countermajoritarian theory as an "academic fixation"); Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 L. & INEQ. 1, 92 (2005) (noting that political discourse and majority viewpoints inform court decisions in ways that are often "incongruous with the needs of disadvantaged classes."); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 13–14 (1996) (noting the Supreme Court's retreat on First Amendment issues in the face of anti-Communist public opinion during the McCarthy era).

²² BICKEL, *supra* note 1, at 16.

²³ Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 81 (1994).

²⁴ ROSENBERG, *supra* note 5.

Rosenberg's first constraint is concerned with the limited, enumerated nature of constitutional rights.²⁵ This constraint can be overcome with sufficient legal precedent. Second, courts lack "the necessary independence from the other branches of the government to produce significant social reform."²⁶ If, however, there is substantial support for social reform from elected officials, this constraint can be overcome. Third, courts are constrained in the implementation of decisions if there is significant public opposition, there are no incentives to induce compliance, and/or administrators crucial for implementation are unwilling to act.²⁷

Surely, there is currency in the constrained theory of courts. It cannot be true that courts are unrestrained institutions that have the luxury of throwing caution to the wind. All the while, compelling evidence supports the proposition that courts can act as legitimizing institutions even when judicial intervention fuels discordant responses.

Courts are dialectical. Judicial institutions can legitimize and fuel social movements but must also rely on outside actors to enhance their social reform efficacy. In essence, courts can guide the American polity through stages of constitutional grief and uneasy social turmoil. Six theses underpin the theory.

A. *Precedent*

Risk-averse judges are unlikely to rule for constitutional claims that result in sweeping change. In the mid-1950s, for example, Supreme Court justices were conscious of the controversy ensnaring anti-miscegenation laws. Still reeling over the aftermath of *Brown v. Board of Education*, Justice Frankfurter steered the Court away from taking up interracial marriage, and Justice Clark similarly urged restraint, saying, "[o]ne bombshell at a time is enough."²⁸

Even judges empathetic to a cause will approach it with caution because, as California Supreme Court Chief Justice Rodger Traynor put it, "a judge must plod rather than soar."²⁹ Litigants cannot, therefore, demand drastic changes in the law without sound precedent. Successful social change must be incremental and "requires a lengthy strategy."³⁰ Consequently, it is expected to see that as civil rights doctrine is substantively liberalized and the number of liberal civil rights precedents increase, courts are more likely to rule in favor of the same or similar civil rights claims.

²⁵ *Id.* at 13.

²⁶ *Id.* at 15.

²⁷ *Id.* at 21.

²⁸ WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 193 (1964).

²⁹ ROSENBERG, *supra* note 5, at 12.

³⁰ *Id.* at 31.

B. Support-Structures

Cases do not appear in courts “as if by magic.”³¹ Test cases must be manufactured and willing plaintiffs must come forward to press a claim. Undertaking litigation is demanding. Pursuing a case in court taxes financial resources, necessitates personal time commitments, and requires securing expert assistance. As a result, even the most passionate prospective plaintiffs hoping to use the courts for social reform may lack the assets and training needed to sustain litigation.

More than the costs of protracted litigation, haphazardly filed lawsuits pursued in hostile jurisdictions or prayers for extreme remedies could inflict serious harm on a social movement. As a consequence, the lack of centralized coordination is a serious liability for a social reform movement. Long-term litigation strategies aiming to foster national policy changes are complex and require a tremendous investment of resources and extensive coordination. The impact of litigation should be greater due to strategic, well-organized support structures propping up litigation.³²

C. Political Reinforcement

Even if social reform litigation is successful, courts cannot enforce compliance. Legislators can defund the implementation of judicial decisions, write statutes to undercut rulings, and refer constitutional amendments to strip courts of subject matter jurisdiction or simply overturn decisions. Thus, the more support a judicial decision garners from legislative and executive actors by supportive measures including, but not limited to, advancing legislation and executive orders in line with the courts and blocking constitutional amendments to overturn court rulings, the more efficiently that judicially mandated policy is implemented.

D. Administrative Implementation

Public policy’s success depends on the effectiveness of administrative agencies and bureaucrats charged with day-to-day government operations. Reform-oriented litigation is no different. Successful plaintiffs require cooperation by public administrators. Unless costs are imposed or incentives are offered to induce compliance, litigants and judges rely on public administrators’ willingness to give rulings effect on the ground. Therefore, the admin-

³¹ This term is a derivative of work by Charles Epp. See CHARLES R. EPP, *THE RIGHTS REVOLUTION* 18 (1998).

³² *Id.* at 19.

istrative implementation thesis forecasts that the more support a judicial decision garners from public administrators, the more efficiently that judicially mandated policy is implemented.

E. Rights Consciousness Effect

Moving away from state actors, the Article will examine the impact of courts on the citizenry. If courts are effective agents for social change, judges should have the capacity to rouse citizens to take action and fuel activist mobilization. In this sense, court rulings can provide the impetus for individuals to see a right in a legal claim that they never considered before or cause an individual to rethink his or her prior positions on the issue at hand. For those who are the direct beneficiaries of a ruling, a rights consciousness effect may induce those persons to take action and engage in the political process to demand more rights.

If courts can raise an issue's prominence and inspire individuals to take action, then judicial institutions can be effective vehicles of social change. The rights consciousness thesis expects that litigation will increase issue saliency and will subsequently give rise to a greater awareness of rights necessary to fuel social activism.

F. Legitimization

While a rights consciousness effect should be seen soon after a decision is handed down, the public as a whole may require more time to debate and digest court rulings that have a profound impact on contested policy issues or social norms. If the public holds courts in high regard as protectors of rights and liberties, judges should be able to tap into that institutional standing and confer legitimacy on the policy preferences reflected in their rulings. The legitimization thesis predicts that courts' symbolic position as guardians of the Constitution bolsters courts' institutional legitimacy; thus, public attitudes on policy positions will have a positive relationship with the ideological direction of judicial actors.

II. MARRIAGE AND THE BOUNDED NATURE OF RIGHTS

The judicial process operates in [a] very incremental fashion . . . It is not a revolutionary way of changing things, but it does tend to, I think, support and indicate the inexorable changes that occur in society.

—Judge Vaughn Walker³³

³³ Telephone Interview with Judge Vaughn Walker, N.D. Cal. (Aug. 11, 2016).

Courts are constrained from engaging in social reform by the constitutional text a court is charged with expounding and precedent, the latter applying with greater rigor to inferior courts in the judicial hierarchy. Judges are risk-averse actors who prefer acting incrementally and will resist sweeping rulings for broad constitutional claims even if they are sympathetic to those claims.³⁴ Consequently, litigants cannot rely on judges to do their bidding without sufficient precedent to back the right asserted. A threshold condition that allows for social reform-minded impact litigation's success is ample constitutional precedent to support such action.

The precedent thesis predicts that as civil rights doctrine is liberalized over time, the more rapidly and decisively courts will favor related civil rights claims. Evidence indicating that pro-equal marriage rulings or jurisprudential trends expanding protections for sexual minorities emboldened courts to rule more quickly or more expansively on same-sex couples' civil rights claims supports the hypothesis. In this vein, as the number of pro-equal marriage rulings increase, judges will readily "pile on" and abandon incrementalism.

If judges act cautiously, thus requiring social reform-minded litigants to seek incremental change, litigants must act strategically and sustain a widespread campaign. Any nationwide social reform campaign requires a tremendous amount of financing, planning, and expertise. But, interest groups and impact litigation-focused organizations can blunt these costs and devise long-term litigation blueprints to maximize the likelihood of success.

Support from the broader legal community is also important in this respect. While formal organizations, such as nonprofit legal groups, aid social reform litigation's success, support from the legal community at large is critical because prospective plaintiffs require members of the bar unaffiliated with civil rights groups to press claims. The support structure thesis posits that organizational infrastructure is a necessary condition for litigation-focused social reform and tangential public activism to flourish.

In 2015, the United States Supreme Court ruled in *Obergefell v. Hodges* that the freedom to marry extended to same-sex couples.³⁵ *Obergefell* came in the wake of an onslaught of litigation attacking state same-sex marriage bans that kicked off in 2013. That post-2013 litigation emerged from a longer shift in the trajectory of equal protection jurisprudence favoring LGB rights. Indeed, legal challenges predated *Obergefell* for well over four decades. Dismantling every state law prohibiting marriage between two persons of the same sex was a long time in the coming.

The first same-sex marriage challenge was in 1971 on the heels of the Supreme Court's 1967 ruling in *Loving v. Virginia*, which struck down state

³⁴ See CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS 158 (2009).

³⁵ 135 S. Ct. 2584 (2015).

laws banning interracial marriage.³⁶ The case, *Baker v. Nelson*, arose after a Minneapolis court clerk denied a marriage license to Richard Baker and James McConnell.³⁷ Minnesota law limited marriage rights to “persons of the opposite sex.”³⁸ Baker and McConnell alleged Minnesota’s marriage law ran afoul of the First, Eighth, Ninth, and Fourteenth Amendments.³⁹

A state trial court and the Minnesota Supreme Court rejected the claim. The Minnesota Supreme Court opined, “The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”⁴⁰ The couple appealed to the Supreme Court, which summarily dismissed the couple’s petition for want of a federal question.⁴¹

The Court of Appeals of Kentucky in 1973 rejected a same-sex couple’s claim that the state’s limitation of marriage to opposite-sex couples violated their due process right to marry and offended the prohibition of cruel and unusual punishment in *Jones v. Hallahan*.⁴² The couple additionally argued Kentucky law abridged their religious free exercise and association rights.⁴³ In a procrustean rebuke, the state court ruled, “[T]he relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.”⁴⁴

A 1974 case, *Singer v. Hara*, challenged Washington State’s marriage law, claiming the prohibition of same-sex marriage offended the state and federal constitutions.⁴⁵ The Washington Court of Appeals readily dispensed with the couple’s Eighth, Ninth and Fourteenth Amendment challenges.⁴⁶ The court rejected the state constitutional claims and concluded that “the public interest in affording a favorable environment for the growth of children” outweighed the asserted right.⁴⁷

The 1970s-era lawsuits failed to overcome the bounded rights constraint because they necessitated non-incremental change. For example, anti-sodomy laws were still on the books in an overwhelming majority of states—

³⁶ 388 U.S. 1 (1967).

³⁷ *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

³⁸ *Id.* at 186.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Baker v. Nelson*, 409 U.S. 810 (1972), *overruled by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁴² 501 S.W.2d 588, 589–90 (Ky. 1973), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁴³ *Id.* at 589.

⁴⁴ *Id.* at 590.

⁴⁵ 522 P.2d 1187, 1188–89 (Wash. Ct. App. 1974).

⁴⁶ *Id.* at 1197 (“This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.”).

⁴⁷ *Id.*

including states targeted for marriage litigation.⁴⁸ While the Washington Legislature repealed the state's anti-sodomy law in 1976,⁴⁹ the laws in Kentucky and Minnesota remained on the books until 1992 and 2001, respectively, when state courts invalidated them on state constitutional guarantees.⁵⁰ The first court ruling striking down a law criminalizing same-sex sexual conduct did not come until 1980.⁵¹

The plaintiffs failed to litigate strategically, putting the cart before the horse by tackling marriage rights for persons whose intimate relations were subject to criminal prosecution. Even if the judges in these cases were sympathetic to the plaintiffs, the litigants simply demanded too much. After these losses, a number of litigation-centered organizations formed over the next decade, including Lambda Legal (1973), the National Center for Lesbian Rights (1977), the Gay and Lesbians Advocates and Defenders (1978), and the American Civil Liberties Union's LGBT Project (1985).⁵² The absence of organizations dedicated to LGB rights and long-term litigation strategy handicapped the movement. The bungled marriage litigation in the 1970s was too aggressive and too uncoordinated. A robust support-structure for LGB rights litigation may have avoided these ill-advised actions.

The Supreme Court addressed the criminalization of same-sex relations in 1986. In *Bowers v. Hardwick*, the Court turned away a challenge to a Georgia statute that criminalized sodomy.⁵³ Writing for the Court, Justice White set aside same-sex couples' conduct from conduct protected in previous privacy cases that shielded interests in childrearing and education, intimate family relationships, procreation, marriage, and abortion.⁵⁴ White wrote, "No connection between family, marriage, or procreation on the one hand, and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent."⁵⁵

Bowers was detrimental. However, the *Bowers* Court noted that the case "raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court

⁴⁸ See WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003 201-02 (2008) (describing failed attempts to undo decriminalization of sodomy in two states during the late 1970s).

⁴⁹ 1975 Wash. Sess. Laws 863, 866 (repealing, effective July 1, 1976, laws criminalizing sodomy).

⁵⁰ *Commonwealth v. Wasson*, 842 S.W.2d 487, 500 (Ky. 1992); *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734, at *1 (Minn. Dist. Ct. May 15, 2001).

⁵¹ *Commonwealth v. Bonadio*, 415 A.2d 47, 49-50 (Pa. 1980) (striking down Pennsylvania's criminalization of non-marital, consensual sodomy as an equal protection violation).

⁵² ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 27, 34, 47 (2005).

⁵³ 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵⁴ *Id.* at 190-91.

⁵⁵ *Id.* at 191.

decisions invalidating those laws on state constitutional grounds.”⁵⁶ Indeed, between 1992 and 2002, five state high courts did so.⁵⁷

As state courts struck down sodomy laws on state constitutional grounds, same-sex marriage advocates, led by Evan Wolfson, launched a challenge to Hawaii’s same-sex marriage ban in *Baehr v. Lewin*.⁵⁸ In *Baehr*, the Supreme Court of Hawaii determined that Hawaii’s law limiting marriage between opposite-sex couples constituted sex-based discrimination and, thus, required the state trial court to apply strict scrutiny under the Hawaii Constitution.⁵⁹ The Supreme Court of Hawaii victory was mooted in 1998. Hawaiians amended the Hawaii Constitution to permit the legislature to restrict marriage to heterosexual couples, thus removing the statute from the ambit of the state constitution’s Equal Protection Clause.⁶⁰

Later that year, a state court in Alaska followed the Hawaii courts’ lead in a same-sex marriage challenge and ruled that “[t]he state must . . . have a compelling interest that supports its decision to refuse to recognize the exercise of this fundamental right by those who choose same-sex partners rather than opposite-sex partners.”⁶¹ Alaska voters amended the state constitution to ban same-sex marriage wholesale.⁶²

While litigation percolated in Hawaii courts, the United States Supreme Court recognized for the first time that the Fourteenth Amendment’s protections safeguarded against sexual orientation discrimination. *Romer v. Evans* was the Supreme Court’s first authoritative statement that the entanglement of state action with anti-gay animus is constitutionally impermissible.⁶³ The Court, applying rational basis review, invalidated a state constitutional amendment that repealed and prohibited all local policies that recognized homosexuals as a protected class.⁶⁴ The amendment also prohibited any legislative, executive, or judicial action aimed at expanding protections based on

⁵⁶ *Id.* at 190.

⁵⁷ *Jegley v. Picado*, 80 S.W.3d 332, 353–54 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998); *Wasson*, 842 S.W.2d at 500; *Gryczan v. State*, 942 P.2d 112, 126 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996), *abrogated by* *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008).

⁵⁸ 852 P.2d 44, 48–49 (Haw. 1993), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁵⁹ *Id.* at 67.

⁶⁰ HAW. CONST. art. I, § 23 (1998) (“The legislature shall have the power to reserve marriage to opposite-sex couples.”).

⁶¹ *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998).

⁶² ALASKA CONST. art. I, § 25 (1998) (“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”), *invalidated by* *Hamby v. Parnell*, 56 F. Supp. 3d 1056 (2014).

⁶³ 517 U.S. 620, 632, 635–36 (1996).

⁶⁴ *Id.* at 624, 631–32, 635.

sexual orientation.⁶⁵ The Court determined that “the amendment seems inexplicable by anything but animus toward the class it affects” and concluded that animus did not constitute a rational basis for Colorado’s state action.⁶⁶ Without any animus-free justification for walling off LGB Coloradans from the regular political process, the Court struck down Colorado’s provision under the Equal Protection Clause of the Fourteenth Amendment.⁶⁷

Beth Robinson, Susan Murray, and Mary Bonauto hoped for the victory in Vermont’s courts that narrowly evaded Evan Wolfson a few years before in Hawaii. In December 1999, only three years after Congress enacted the Defense of Marriage Act⁶⁸ in response to the Hawaii litigation, the Vermont Supreme Court prepared to rule on same-sex couples’ rights. The constitutional question in *Baker v. State* was whether the state of Vermont could deny same-sex couples the rights, benefits and responsibilities provided to married heterosexual couples under the Vermont State Constitution’s Common Benefits Clause.⁶⁹

The Vermont Supreme Court unanimously held there was a constitutional infirmity in denying same-sex couples marital rights, but it split on the remedy.⁷⁰ The majority opinion held, “We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the State could do so through a marriage license is obvious. But it is not required to do so”⁷¹ Far from definitively resolving the issue, the court gave what Beth Robinson would describe as “neither an outright loss nor a win.”⁷²

Precedential factors may account for the Vermont Supreme Court’s Solomon exercise. *Baker* was the first court decision to recognize same-sex relationships with finality. However, *Baker* was not the first time the Vermont Supreme Court was a trailblazer in family law rights for same-sex couples.

⁶⁵ *Id.* at 629.

⁶⁶ *Id.* at 632.

⁶⁷ *Id.* at 635.

⁶⁸ Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2012); 28 U.S.C. § 1738C (2012)), *invalidated by* Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015) (“[T]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”), and *United States v. Windsor*, 133 S. Ct. 2675 (2013) (holding Section 3 of the Defense of Marriage Act unconstitutional as violative of the Due Process Clause).

⁶⁹ VT. CONST. ch. I, art. 7; *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

⁷⁰ Compare *Baker*, 744 A.2d at 886, 889 (holding that the plaintiffs were entitled to receive the same benefits and protections as opposite-sex married couples and directing the Vermont legislature to fashion a remedy consistent with its opinion), and *id.* at 889 (Dooley, J., concurring) (concurring with majority’s remedy), with *id.* at 898 (Johnson, J., concurring in part and dissenting in part) (dissenting, only, to the court’s failure to enjoin the state from denying marriage licenses “based solely on the sex of the applicants”).

⁷¹ *Id.* at 887.

⁷² Telephone Interview with Beth Robinson, Former Vt. Freedom to Marry Task Force Dir. & Vt. Supreme Court Justice (Sept. 14, 2012).

Vermont was the first state in the nation to recognize second-parent adoption for same-sex couples in 1993.⁷³ Furthermore, *Bowers* remained good law. Even though *Bowers* was not a formal roadblock for full marriage recognition under the state constitution, it could not have been helpful. *Baker* illustrates the “very caution of the judicial process”⁷⁴ that leads judges to favor incrementalism, consistent with the precedent thesis.

In June 2003, the United States Supreme Court removed whatever obstacle *Bowers* presented to courts considering same-sex marriage litigation. In *Lawrence v. Texas*, the Court struck down anti-sodomy laws as violative of the Fourteenth Amendment’s Due Process Clause, overturning *Bowers*.⁷⁵ The Court found no constitutionally permissible basis to support animus-motivated sodomy prohibitions.⁷⁶ Writing for the Court, Justice Anthony Kennedy concluded, “The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”⁷⁷

Shortly after *Lawrence*, the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Health* became the first court in the United States to rule that right to marry—or not to marry—must apply equally to same-sex couples as it does heterosexual couples under the Massachusetts Constitution.⁷⁸ The court held:

The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.⁷⁹

New York’s struggle over same-sex marriages erupted on February 27, 2004 when New Paltz Mayor Jason West married twenty-five same-sex couples.⁸⁰ Shortly after, the New York Attorney General’s Office issued an

⁷³ *In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271, 1272, 1274 (Vt. 1993).

⁷⁴ Roger J. Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 7 (1977).

⁷⁵ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁷⁶ The Court’s opinion in *Lawrence* infamously did not articulate what level of scrutiny applied to the Texas law. See, e.g., Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1143 (2004) (“Either (1) the Court is by default applying rational-basis scrutiny and is therefore invalidating the law as failing to be rationally related to a legitimate state purpose, or (2) it is abandoning the traditional tiers of scrutiny in its substantive due process analysis and is replacing it with something new, perhaps a general liberty presumption.”).

⁷⁷ *Lawrence*, 539 U.S. at 578.

⁷⁸ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁷⁹ *Id.* at 948.

⁸⁰ Robert Sullivan, *Mayor With a Mission*, N.Y. TIMES MAG. (Mar. 28, 2004), www.ny-times.com/2004/03/28/magazine/mayor-with-a-mission.html?mcubz=0.

“informal opinion” stating same-sex couples should not be issued marriage licenses because the legislature did not intend for it.⁸¹ That prompted a series of lawsuits challenging the constitutionality of New York’s statute under the New York Constitution. In 2006, the New York Court of Appeals settled the dispute in *Hernandez v. Robles*.⁸² The Court ruled that limiting marriage rights to heterosexual couples did not violate the New York State Constitution’s equal protection provision.⁸³

In 2004, just before the Supreme Judicial Court of Massachusetts’ ruling legalizing same-sex marriage took effect, Washington attorneys filed suit seeking a similar decision from the Washington Supreme Court.⁸⁴ In 2006, the Washington Supreme Court rejected the plaintiffs’ claim in *Andersen v. King County*.⁸⁵ The Washington Supreme Court, while noting same-sex marriage was a “subject of intense debate throughout the nation” and that “times [we]re changing” with regard to public perspective on same-sex marriage, found that sexual orientation was not a suspect classification and “a person ha[d] no fundamental right to a same-sex marriage.”⁸⁶

Like New York and Washington, litigants in Maryland met judicial defeat. In September 2007, the Maryland Court of Appeals ruled that sexual orientation discrimination was not inherently suspect and the denial of marriage rights to same-sex couples did not implicate a fundamental right.⁸⁷ Applying traditional rational basis, the court rubber-stamped the reservation of marriage for heterosexual couples.⁸⁸

In 2005, same-sex couples achieved a short-lived victory in federal court. In response to a constitutional amendment to the Nebraska Constitution banning same-sex marriage, advocates for equal marriage rights initiated a lawsuit. Taking an incremental approach, the plaintiffs in *Citizens for Equal Protection, Inc. v. Bruning* did not challenge the validity of Nebraska’s statutory definition of marriage, which limited licenses to opposite-sex couples.⁸⁹ The plaintiffs’ challenge focused on political process theory. The state constitutional amendment, in their view, was unlawful because it imposed a burden

⁸¹ N.Y. Att’y Gen., Informal Opinion Letter No. 2004-1 on Same-sex Marriages Under the New York State Domestic Relations Law at 16 (Mar. 3, 2004).

⁸² 855 N.E.2d 1 (N.Y. 2006), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

⁸³ *Id.* at 12.

⁸⁴ Complaint to Redress the Denial of the Basic Civil Right to Marry, *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004).

⁸⁵ *Andersen v. King Cty.*, 138 P.3d 963 (Wash. 2006) (en banc) (plurality opinion), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

⁸⁶ *Id.* at 990.

⁸⁷ *Conway v. Deane*, 932 A.2d 571, 616 (Md. 2007), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

⁸⁸ *Id.* at 616, 634-35.

⁸⁹ *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 985 (D. Neb. 2005), *rev’d*, 455 F.3d 859 (8th Cir. 2006), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

on same-sex marriage advocates that was not imposed on advocates for other marriage policies.⁹⁰ The district court struck the amendment, leaving the statutory ban undisturbed.⁹¹ The Eighth Circuit reversed that ruling in 2006. The circuit precedent, though not a bar for district court judges sympathetic to same-sex plaintiffs, was a handicap.⁹²

The Ninth Circuit became the next appellate court to rule on this issue in the 2012 case *Perry v. Brown*.⁹³ The *Perry* litigation grew out of a well-funded organization, the American Foundation for Equal Rights (“AFER”), that was created to support a federal court challenge to Proposition 8.⁹⁴ Led by Chad Griffin, AFER secured high-profile attorneys David Boies and Ted Olson to take up the federal case. In 2010, the District Court for the Northern District of California considered the challenge to California’s Proposition 8, an initiative and referendum proposal that successfully banned same-sex marriage in the state constitution and overturned a 2008 ruling by the California Supreme Court extending marriage rights to same-sex couples on state constitutional grounds. Federal District Court Judge Vaughn Walker ruled that Proposition 8 violated same-sex couples’ fundamental right to marry and contravened the equal protection guarantees of the Fourteenth Amendment.⁹⁵

Governor Arnold Schwarzenegger and Attorney General Jerry Brown declined to appeal the ruling.⁹⁶ The main interest group that worked to ratify Proposition 8 stood in the state’s place on appeal.⁹⁷ The Ninth Circuit issued a much narrower ruling that California’s Proposition 8 could not take away, by popular referendum, a right already enjoyed by a minority group.⁹⁸ In sidestepping the lower court’s sweeping opinion, the appellate panel advanced a more gradual theory to seal the advent of same-sex marriage in California, but narrowed its precedential impact to discourage Supreme Court review.

California and the plaintiffs vigorously opposed the petition for certiorari to review the Ninth Circuit’s decision. In opposing the petition for certiorari, the City of San Francisco highlighted the need for additional litigation to sift

⁹⁰ *Id.* at 1003.

⁹¹ *Id.* at 1009.

⁹² *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁹³ 671 F.3d 1052, 1063 (9th Cir. 2012).

⁹⁴ See DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* 59 (2016) (“Proposition 8 gave rise to the first federal challenge to a state same-sex marriage law . . . [the challenge was backed by] a newly minted gay rights organization, American Foundation for Equal Rights . . .”).

⁹⁵ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010) (finding that California’s same-sex marriage prohibition violated the Equal Protection Clause of Fourteenth Amendment), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012).

⁹⁶ COLE, *supra* note 94, at 61.

⁹⁷ *Id.*

⁹⁸ *Brown*, 671 F.3d at 1096.

through the “significant constitutional questions” implicated by same-sex marriage laws to “percolate[] in the courts such that the ‘perspective of time’ helps to shed more light on the weighty issues they present.”⁹⁹ The City of San Francisco stressed in its brief in opposition to certiorari that the Supreme Court should not choke off debate, seeing how “this case raises issues that are currently the subject of intense legislative and popular debate.”¹⁰⁰ These positions reflect a gradualist approach to reform litigation.

The Supreme Court nevertheless granted certiorari in *Perry v. Hollingsworth* and preserved the victory without reaching the merits. The Court ruled that the citizen groups lacked standing to appeal the trial court decision.¹⁰¹ With the appellate ruling vacated and the trial court order intact, California resumed issuing same-sex marriage licenses in June 2013.¹⁰² The precedent thesis envisions incremental decision-making of this kind—*Perry* brought the nation’s most populous state into the equal marriage fold and avoided undoing a majority of state marriage laws in one fell swoop.

The same day *Perry* was decided, the Court ruled in a related marriage case, *Windsor v. United States*.¹⁰³ In *Windsor*, the Supreme Court struck down the Defense of Marriage Act (“DOMA”),¹⁰⁴ which was enacted by Congress to hedge against the potential effects of a judicial mandate requiring Hawaii to issue marriage licenses to same-sex couples in 1996.¹⁰⁵ DOMA amended the federal Dictionary Act to define “marriage” and “spouse” to exclude same-sex couples in over 1,000 statutes and regulations.¹⁰⁶ When it was enacted, DOMA had no real practical effect. No jurisdictions recognized same-sex marriage in 1996.¹⁰⁷ Once Massachusetts issued same-sex

⁹⁹ City and County of San Francisco’s Brief in Opposition at 23, *Hollingsworth v. Perry*, 133 S. Ct. 2652, No. 12-144 (2013).

¹⁰⁰ *Id.* at 24.

¹⁰¹ *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) (“We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.”).

¹⁰² Maria L. La Ganga, *California Holds First Gay Wedding Since 2008, in San Francisco*, L.A. TIMES (June 28, 2013), <http://articles.latimes.com/2013/jun/28/local/la-me-ln-california-holds-1st-gay-marriage-since-2008-in-san-francisco-20130628>.

¹⁰³ 133 S. Ct. 2675, 2682 (2013).

¹⁰⁴ Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2012)) (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

¹⁰⁵ Richard Socarides, *Why Bill Clinton Signed the Defense of Marriage Act*, THE NEW YORKER (Mar. 8, 2013), <https://www.newyorker.com/news/news-desk/why-bill-clinton-signed-the-defense-of-marriage-act>.

¹⁰⁶ *Windsor*, 133 S. Ct. at 2683.

¹⁰⁷ Socarides, *supra* note 105 (“Some in the White House pointed out that DOMA, once enacted, would have no immediate practical effect on anyone—there were no state-sanctioned same-sex marriages then for the federal government to ignore.”).

marriage licenses in 2004, DOMA barred lawfully married same-sex couples from a wide array of federal benefits with respect to Social Security, housing, taxation, copyright, and veterans' affairs.¹⁰⁸

The Court in *Windsor* held that DOMA violated the equal protection guarantees incorporated in the Fifth Amendment. Writing for the majority, Justice Kennedy held upon "careful consideration" that DOMA had the purpose and effect of imposing inequality on married same-sex couples, rendering DOMA constitutionally deficient.¹⁰⁹ Justice Kennedy couched *Windsor*'s holding in a substantive due process, equal protection, and federalism hybrid but never articulated what scrutiny the Court applied.

Despite the muddled rationale for striking down the federal anti-recognition law, the decision's emphasis on same-sex couples' dignity and their children signaled a sea change that the Court was poised to defend same-sex couples' families. If the precedent thesis is right, *Windsor* should induce more lawsuits challenging marriage laws and elicit strong responses from courts to more aggressively rule in favor of same-sex couples.

Given the Supreme Court's implicit rejection of the reasoning relied upon by state courts rejecting same-sex marriage claims and the Court's emphasis on married same-sex couples' dignity to strike down the Defense of Marriage Act, it is not surprising a flood of new litigation cropped up in *Windsor*'s wake. In the last six months of 2013, twenty-one new state and federal court filings were initiated and another twenty-eight were filed in 2014, all of which squarely attacked the constitutionality of banning same-sex marriage. By year's end, two state courts of last resort struck blows to state marriage laws.

An interesting trend emerged after *Windsor*. [L]egal interest groups supported most of the litigation prior to June 2013. Private attorneys backed four of the seventeen lawsuits filed before *Windsor* challenging same-sex marriage bans. Legal interest groups shouldered more lawsuits post-*Windsor* than they did during the entire twenty-three-year span between the start of litigation in Hawaii and when *Windsor* was decided. However, private attorneys' share of the lawsuits was greater. After June 2013, private attorneys filed twenty-four lawsuits while thirty-three lawsuits were headed by litigation-oriented organizations. These numbers underscore the importance of support structures for sustaining the same-sex marriage litigation campaign in the long-term.¹¹⁰

After the U.S. Supreme Court ruled in *Windsor*, married same-sex couples could avail themselves of federal benefits. Civil unions, like New Jersey

¹⁰⁸ *Windsor*, 133 S. Ct. at 2694.

¹⁰⁹ *See id.* at 2693 ("The avowed purpose and practical effect of [DOMA] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.").

¹¹⁰ Anthony Michael Kreis, *The Capital of Trust: Judicial Power, Social Reform, and the Case of Same-Sex Marriage* 46–47 (Aug. 8, 2016) (unpublished Ph.D. dissertation, University of Georgia) (on file with the *University of Pennsylvania Journal of Constitutional Law*) (citations omitted).

offered to same-sex couples, were not recognized for federal purposes.¹¹¹ Taking advantage of these new facts, litigants in New Jersey challenged state law for not complying with *Lewis v. Harris*, which required the state treat same-sex couples “equally” to opposite-sex couples.¹¹²

In *Garden State Equality v. Dow*, a state trial court ruled that New Jersey’s civil union law no longer comported with the New Jersey State Constitution’s equal protection guarantees because the state’s civil union law deprived committed same-sex couples the same benefits and privileges afforded to married same-sex couples by the federal government.¹¹³ New Jersey Governor Chris Christie’s Administration applied for a stay of the lower court’s ruling to the New Jersey Supreme Court and was denied.¹¹⁴ With the New Jersey Supreme Court signaling a no-win scenario for the Christie Administration, the trial court decision was not appealed and same-sex couples began obtaining marriage licenses in October 2013.¹¹⁵ In New Jersey, the *Windsor* decision had direct and immediate consequences.

In New Mexico, the State Supreme Court struck down the state’s marriage law on state constitutional grounds. Writing for a unanimous court, Justice Edward Chavez noted New Mexico ran afoul of state constitutional guarantees by irrationally denying couples both state and federal benefits.¹¹⁶

The day following the New Mexico decision, Judge Robert Shelby of the United States District Court of Utah struck down neighboring Utah’s Amendment 3, which banned same-sex marriage, in *Kitchen v. Herbert*.¹¹⁷ Shelby was the first federal judge to invalidate a state’s marriage law for excluding same-sex couples post-*Windsor*.¹¹⁸ In *Kitchen*, Judge Shelby held that the plaintiffs raised a substantial question of federal law over which court had jurisdiction.¹¹⁹ Shelby ruled that Amendment 3 denied same-sex couples’ fundamental right to marry under the Fourteenth Amendment’s Due Process

¹¹¹ See, e.g., Peter J. Reilly, *IRS Recognizes All Marriages But Not Civil Unions*, FORBES (Aug. 29, 2013, 4:32 PM) (reporting that, after the *Windsor* decision, the IRS would recognize same-sex marriages for federal tax purposes if the wedding was legal within the jurisdiction in which it was preformed, but would not do so for civil unions or registered domestic partnerships).

¹¹² *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006).

¹¹³ See *Garden State Equal. v. Dow*, 82 A.3d 336, 368–69 (N.J. Super. Ct. Law. Div. 2013).

¹¹⁴ *Garden State Equal. v. Dow*, 79 A.3d 1036, 1038–39 (N.J. 2013).

¹¹⁵ Kate Zernike & Marc Santora, *As Gays Marry in New Jersey, Christie Yields*, N.Y. TIMES, Oct. 22, 2013, at A1.

¹¹⁶ *Griego v. Oliver*, 316 P.3d 865, 888 (N.M. 2013).

¹¹⁷ *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1216 (D. Utah 2013), *aff’d*, 755 F.3d 1193 (10th Cir. 2014).

¹¹⁸ See Erik Eckholm, *Federal Judge Rules That Same-Sex Marriage Is Legal in Utah*, N.Y. TIMES, Dec. 21, 2013, at A11; Dennis Romboy, *A Year Later, A Look at the Utah Decision on Same-Sex Marriage that ‘Shocked the Nation,’* DESERET NEWS UTAH, (Dec. 19, 2014, 11:20 PM), <https://www.deseretnews.com/article/865618112/A-year-later-a-look-at-the-Utah-decision-on-same-sex-marriage-that-shocked-the-nation.html>.

¹¹⁹ *Kitchen*, 961 F. Supp. 2d at 1195.

Clause and violated the Amendment's Equal Protection Clause because Utah's purported interests in promoting responsible procreation and child-rearing did not rationally relate to Amendment 3.¹²⁰

The *Kitchen* decision marked the beginning of a sharp uptick in federal court rulings holding same-sex marriage bans constitutionally infirm. Following Judge Shelby, district court judges in rapid succession voided anti-gay marriage laws, with appeals made to the 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th circuits. The rate of court rulings indicates that judges are responsive to their colleagues' actions and feel freer to rule for social reform litigation when acting in concert with other judges. After Judge Shelby struck down Utah's constitutional amendment banning equal marriage federal judges felt little need to exercise restraint and ruled against marriage bans with regularity, as the precedent thesis expects.¹²¹

Courts were not unanimous in striking down state marriage laws after June 2013. In all the post-*Windsor* litigation, only three courts ruled in favor of laws excluding same-sex couples from marriage. Prior to *Windsor*, federal courts in Hawaii and Nevada upheld laws restricting marriage to opposite-sex couples in 2012.¹²² In August 2014, a Tennessee court refused in *Borman v. Pyles-Borman* to grant a divorce to a same-sex couple married in Iowa.¹²³ In turning the couple away, Judge Simmons upheld the state's same-sex marriage ban against a constitutional attack. Simmons was the first judge to uphold a state marriage law, breaking a near fourteen-month winning streak for same-sex marriage proponents. Two federal judges upheld bans in Louisiana and Puerto Rico.¹²⁴

While litigation stacked up in state and federal trial courts, federal appellate courts began weighing in. In June 2014, the Tenth Circuit affirmed lower court rulings finding for same-sex couples in Utah and Oklahoma.¹²⁵ The Fourth Circuit followed in July 2014, ruling against Virginia's constitutional exclusion of same-sex couples from marriage.¹²⁶ In September

¹²⁰ *Id.* at 1215–16.

¹²¹ Kreis, *supra* note 110, at 49.

¹²² See *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1003, 1021 (D. Nev. 2012) (ruling that *Baker v. Nelson* barred the plaintiffs' claim and that the state had a legitimate interest in the prohibition of same-sex marriage); see also *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1088 (D. Haw. 2012) (holding that *Baker v. Nelson* barred the plaintiff's claim and declaring that a prohibition of same-sex marriage does not violate the Equal Protection Clause).

¹²³ No. 2014CV36, 2014 WL 4251133, at *7 (Tenn. Cir. Ct. Aug. 5, 2014) (stating that under the Full Faith and Credit Clause, Tennessee is not required to recognize a marriage even though Iowa did so).

¹²⁴ See *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 913 (E.D. La. 2014) (holding that Louisiana has a legitimate interest in prohibiting same-sex marriage); *Conde-Vidal v. Garcia-Padilla*, 54 F. Supp. 3d 157, 167–68 (D.P.R. 2014) (declaring that the right to allow same-sex marriage depends on people through its legislature, rather than the courts, since courts were required to rely upon precedent to maintain prohibition of same-sex marriage).

¹²⁵ See *Kitchen v. Herbert*, 755 F.3d 1193, 1229–30 (10th Cir. 2014) (holding that same-sex couples have the same fundamental rights under the Fourteenth Amendment to marry as opposite-sex couples).

¹²⁶ See *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014) (finding that Virginia's prohibition of same-

2014, the Seventh Circuit ruled against Indiana and Wisconsin's laws banning same-sex marriage with remarkable speed—nine days after oral arguments.¹²⁷ The five losing states petitioned the Supreme Court for certiorari.¹²⁸

On October 6, 2014, the Supreme Court denied the five certiorari petitions.¹²⁹ Circuit precedent now foreclosed any plausible defense of marriage laws in Colorado, Kansas, North Carolina, South Carolina, West Virginia, and Wyoming.¹³⁰ Overnight, the number of same-sex marriage states jumped from nineteen to thirty.¹³¹ The following day, the Ninth Circuit voided Nevada's anti-marriage equality law and affirmed a ruling striking Idaho's marriage amendment.¹³² In total, five additional states were placed into the equal marriage column, totaling thirty-five states and the District of Columbia.¹³³ In short order, courts and legislatures brought near national uniformity to the patchwork of marriage laws that existed prior to June 2013.

A month later, the Court of Appeals for the Sixth Circuit created a circuit split, upholding marriage laws limiting rights to opposite-sex couples in Kentucky, Michigan, Ohio, and Tennessee.¹³⁴ The majority opinion by Judge Jeffrey Sutton rejected the plaintiffs' overtures that the federal courts were an appropriate venue for resolving the public debate on marriage equality. Ultimately, the court determined that same-sex marriage was not a proper question for federal judicial resolution and should evolve through political

sex marriage violates the Fourteenth Amendment because it does not further state interests in creating "optimal" families).

¹²⁷ *Baskin v. Bogan*, 766 F.3d 648, 659 (7th Cir. 2014).

¹²⁸ Petition for a Writ of Certiorari, *Herbert v. Kitchen*, 135 S. Ct. 216 (2014) (No. 14-124), 2014 WL 3867707; Petition for a Writ of Certiorari, *Smith v. Bishop*, 135 S. Ct. 271 (2014) (No. 14-136), 2014 WL 2867714; Petition for Writ of Certiorari, *Rainey v. Bostic*, 135 S. Ct. 286 (2014) (No. 14-153), 2014 WL 3919599; Petition for a Writ of Certiorari, *McQuigg v. Bostic*, 135 S. Ct. 314 (2014) (No. 14-251), 2014 WL 4351585; Petition for Writ of Certiorari, *Bogan v. Baskin*, 135 S. Ct. 316 (2014) (No. 14-277), 2014 WL 4418688; Petition for a Writ of Certiorari, *Walker v. Wolf*, 135 S. Ct. 216 (2014) (No. 14-278), 2014 WL 4418689.

¹²⁹ *Herbert v. Kitchen*, 135 S. Ct. 265 (2014) (denying petition for writ of certiorari); *Smith v. Bishop*, 135 S. Ct. 271 (2014) (same); *Rainey v. Bostic*, 135 S. Ct. 286 (2014) (same); *McQuigg v. Bostic*, 135 S. Ct. 314 (2014) (same); *Bogan v. Baskin*, 135 S. Ct. 316 (2014) (same); *Walker v. Wolf*, 135 S. Ct. 316 (2014) (same); see also Amy Howe, *Today's Orders: Same-Sex Marriage Petitions Denied*, SCOTUSBLOG (Oct. 6, 2014, 10:41 AM), <http://www.scotusblog.com/2014/10/todays-orders-same-sex-marriage-petitions-denied/>.

¹³⁰ Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES, Oct. 7, 2014, at A1.

¹³¹ *Id.*

¹³² Lyle Denniston, *Two More Bans Fall (Updated)*, SCOTUSBLOG (Oct. 7, 2014, 10:58 PM), <http://www.scotusblog.com/2014/10/two-more-bans-fall/#more-218736>.

¹³³ Cf. Liptak, *supra* note 130 ("Other appeals courts are likely to rule soon on yet other marriage bans, including the United States Court of Appeals for the Ninth Circuit in San Francisco, which has jurisdiction over nine states, five of which still have same-sex marriage bans. If that court rules in favor of same-sex marriage, as expected, it will be allowed in 35 states.").

¹³⁴ *DeBoer v. Snyder*, 772 F.3d 388, 396 (6th Cir. 2014), *overruled by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

processes.¹³⁵ The Sixth Circuit decided the Supreme Court's 1971 determination that a same-sex couple's marriage claim in *Baker v. Nelson* lacked a justiciable federal question controlled their analysis.¹³⁶

With a circuit split, the Supreme Court would have to take the case or reverse the opinion summarily. The Court granted certiorari in January 2015 and designated James Obergefell as the lead petitioner.¹³⁷ The appeal, now named *Obergefell v. Hodges*, was placed on the calendar for oral arguments in April 2015. On June 26, 2015, the Court ruled 5-4 that the fundamental right to marry extended to same-sex couples.¹³⁸

Echoing the sentiments of the parties who opposed certiorari in *Perry* and the dissenting opinion in the Sixth Circuit, Justice Kennedy emphasized the near-uniformity with which courts exercised their power to dismantle a majority of state marriage laws to same-sex couples' benefit.¹³⁹ In clear terms, the majority opinion tied the Court's comfort to rule decisively for same-sex couples with the numerous lower court rulings finding for same-sex couples, supporting the precedent hypothesis' expectation that courts will more readily rule for civil rights plaintiffs the more significant pro-civil rights decisions courts render. The Court explained:

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other . . . the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions.¹⁴⁰

The earliest same-sex marriage litigation failed to advance much, if any, measurable progress for same-sex couples or the movement for LGB rights more broadly. As a basic matter, the litigation failed to achieve a victory in

¹³⁵ *Id.* at 420–21.

¹³⁶ *Id.* at 400.

¹³⁷ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (reviewing the Sixth Circuit's reversal of sixteen consolidated cases that held unconstitutional state laws in Michigan, Kentucky, Ohio, and Tennessee that denied same-sex couples the right to marry).

¹³⁸ *Id.* at 2607–08.

¹³⁹ Compare *id.* at 2597 (“With the exception of the opinion here under review and one other, the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution.” (citation omitted)), with *DeBoer*, 772 F.3d at 428–30 (Daughtrey, J., dissenting) (summarizing the recent Circuit opinions ruling in favor of same-sex marriage), and *supra* notes 96–100 (discussing the views of those opposed to the petition for certiorari in *Perry*).

¹⁴⁰ *Id.* at 2597 (internal citations omitted).

each case. Even still, the litigation did not prompt any legislative movement to afford same-sex couples any relationship recognition—marriage or otherwise. States during the decade began to harden laws to ensure domestic relations law excluded same-sex couples. Maryland, Virginia, Florida, California, and Wyoming became the first states to expressly prohibit same-sex marriage between 1973 and 1977.

The 1970s-era litigation failed because it emerged from nothing and then asked too much of judges. There was no sustained attempt to build favorable precedent safeguarding the most basic legal rights of LGB persons before jumping to relationship recognition, nor was there any robust organizational infrastructure to prop up a protracted litigation campaign. This evidence is consistent with the Constrained Court Theory and the hypotheses concerning the value of precedent and the necessity of support-structures.¹⁴¹

The decisions in *Windsor* and *Obergefell* benefited from the precedential rulings in *Romer* and *Lawrence* that overturned laws that discriminated against the LGB community. And with respect to *Lawrence*, the Court federally constitutionalized the right of LGB persons to be free of criminalization following a series of rulings by state courts finding parallel protections in their respective state constitutions. Additionally, *Obergefell* came off the heels of over a decade's worth of judicial decisions on the state and federal level eating away at state marriage laws, as well as legislative enactments of same-sex marriage rights. However, the importance of the *Windsor* decision in same-sex marriage advocates' success in *Obergefell* is hard to overstate.

In the most immediate sense, *Windsor* reshaped the landscape and allowed the New Jersey state courts to easily circumvent the 2006 state supreme court precedent mandating equal benefits, but not equal marriage rights, to same-sex couples. *Windsor* allowed New Jersey courts to reverse-engineer the *Lewis* decision by reasoning the federal government's non-recognition of civil unions rendered New Jersey's exclusion of same-sex couples from marriage constitutionally deficient under the New Jersey Constitution.

Courts more eagerly side with social reform plaintiffs as other rulings backing that outcome accumulate. The effectiveness of the signal *Windsor* sent to judges and lawyers to lay the groundwork to reign in discriminating marriage law states is evidenced by the sharp uptick in litigation filed in *Windsor*'s aftermath. Not only did the number of new filings rise, but also private attorneys accounted for nearly double the proportion of those filing litigation post-*Windsor* than before June 2013.¹⁴² The increased share of litigation taken up by private attorneys suggests that the Supreme Court's precedent communicated to some that a tipping point had been reached

¹⁴¹ See *supra* notes 24–27 and accompanying text; see also *supra* Subparts I.A.–B.

¹⁴² See Kreis, *supra* note 110, at 48.

where litigation would yield substantial attorneys' fees. And, indeed, attorneys' fees in excess of \$13.5 million were assessed against states that defended anti-same-sex marriage laws.¹⁴³

The larger share of private attorney involvement may also have come about because the fears that haphazard litigation might lead to negative precedent, thus requiring meticulous coordination on impact litigation, evaporated with the Defense of Marriage Act's demise. Whatever the cause, the onslaught of new filings—and sometimes numerous filings in the same state—allowed courts to attack the legitimacy of state same-sex marriage prohibitions with rapid fire. That momentum, both in terms of the sheer number of courts striking down state marriage laws, the rate at which courts were dispensing with litigation, and the near uniformity of rulings against states, solidified *Obergefell's* foundation.

The presence of robust support structures to sustain an extended litigation campaign is crucial if courts are to be used as instrumentalities for social change. As the Constrained Court Theory articulates, judges are more likely to rule in favor of litigants if they seek out incremental remedies or have sufficient precedent to validate their claims.¹⁴⁴ In the case of same-sex marriage, early cases failed to succeed because they did not look to make gradual change, nor were they part of any calculated widespread court-centered movement. These 1970s-era lawsuits, if successful, would have invalidated every state's marriage laws in one fell swoop and years before many states would decriminalize same-sex relations. Later lawsuits smartly focused on state constitutions before raising federal constitutional questions—a more time-consuming and pricey tactic.

The costs of pursuing a strategic incremental litigation plan necessitate financial and logistical support to effectively execute it. Later lawsuits benefited from well-funded efforts and exceptional attorneys, notably in the Proposition 8 case. Even more importantly for the same-sex marriage movement, the barrage of lawsuits and court rulings striking down same-sex marriage bans in the post-*Windsor* era was the kind of unrelenting social reform litigation drive that created an ideal environment for the United States Supreme Court to act in *Obergefell*, as Justice Kennedy highlighted. Same-sex marriage litigation was more successful because plaintiffs took advantage of the shifting trajectory in LGB-rights jurisprudence and adopted a gradual approach. Moreover, the movement and the litigation to support it were more effective because it had the necessary support structures to buttress prolonged fights in the courts.

¹⁴³ See Zoe Tillman, *Same-Sex Union Foes to Pay Up*, NAT'L L.J., Jan. 25, 2016, at 1 (noting that since 2013, federal courts have ordered twenty-five states to pay the legal fees of their opponents who successfully argued against those states' same-sex marriage bans).

¹⁴⁴ See *supra* notes 24–27 and accompanying text.

III. COURTS AND THE PUBLIC-AT-LARGE

One substantial claim made by judicial interventionists is that courts have a legitimization effect on public opinion.¹⁴⁵ Assuming courts are willing to breach the countervailing weight of public opposition in the first place, pro-interventionists posit courts can bring the public into their fold and tamp down opposition. What evidence exists to demonstrate that this effect holds true for same-sex marriage or gay rights more generally?

In this Part, I examine the evidence against two competing conceptualizations of court: the Constrained Court Theory and legitimization theory. The Constrained Court Theory does not leave room for the courts to lead the public on social reform issues, whereas legitimization theory says that courts have the capacity to bring the public in line with the court's positions over time. Legitimization theory reasons that because courts hold a particular gravitas in society, judges can confer legitimacy on an issue or movement that helps to advance social acceptance of an idea or movement.

If the constrained court theory is right, then there should be no substantial gains in public acceptance of same-sex marriage or same-sex relationship recognition after successful litigation campaigns. If legitimization theory is accurate, observers should see significant gains in the public's mood favoring equal relationship rights after judicial intervention. Whatever gains LGB Americans made in garnering public support after victories in the courts, however, must be dissected. If legitimization theory holds water, alternative explanations for the public's warming toward same-sex relationships unrelated to judicial intervention should be discarded. In addition, this Part will assess the thesis that judicial rulings gave rise to rights consciousness. The rights-consciousness thesis predicts that courts can breathe life into an issue by bringing it to the fore of the public's consciousness, allowing members of the public to understand the nature of what is at stake.

Any attempt to parse the effect of litigation or court rulings on public opinion is a task fraught with methodological challenges. First, it is difficult to isolate the effects of litigation and judicial intervention from other developments in society more broadly. Second, the ordering of questions in a poll can influence polling outcomes. Polls that measure public support for civil unions in addition to marriage for same-sex couples may produce results that vary from polling that questions respondents squarely on marriage recognition. A third challenge is the limited polling data from the 1990s and early

¹⁴⁵ See, e.g., James W. Stoutenborough et al., *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POL. RES. Q. 419, 430 (2006) (exploring the circumstances under which court decisions influence public opinion, and concluding that "Supreme Court decisions can have a significant impact on public opinion in the area of gay civil rights").

2000s.¹⁴⁶ Regarding state-level data, not all states are equal with respect to the body of data's robustness. For example, there are virtually no data capturing Vermonters' moods prior to the decision in *Baker v. State* in 1999. Other states, like California, have more reliably consistent polling data.

This Part will begin examining Vermonters' response to the state high court's ruling that same-sex couples are constitutionally protected. From there, this Part delves into state-level and national public responses.

A. *States and the Backlash Thesis*

The Vermont Supreme Court was the first to rule with finality that same-sex couples were entitled to equal rights under the state constitution.¹⁴⁷ The Vermont Legislature's enactment of civil unions followed.¹⁴⁸ Extensive polling data was not taken measuring Vermonters' support for civil unions or marriage for LGB people, limiting our understanding of *Baker's* reception. One poll from late 2000 registered a majority of Vermonters (54%) in opposition to the new civil union law.¹⁴⁹

On the surface, the Vermont Supreme Court's decision was not received warmly in the state. Indeed, the ruling in *Baker* was heavily criticized and fomented an already bubbling anti-establishment movement. As the movement percolated, black-and-white signs cropped up throughout Vermont with a demand to "Take Back Vermont."¹⁵⁰ The *New York Times* reported on the host of issues that stoked the fires, in addition to same-sex couples' winning relationship recognition rights:

Stop and inquire at houses displaying the signs in this poor farming and logging region of central Vermont, and the translation becomes clear: We are furious at our legislators for passing a law this spring letting gay couples be joined in marriagelike civil unions. We are mad about property tax reform, and all the permits we need to log or build on our land, and all the other laws our politicians pass against our will. We want to vote them out in November.¹⁵¹

¹⁴⁶ Exemplifying the relatively scant data in the 1990s and early 2000s, Gallup polled Americans on same-sex marriage only three times between 1996 and 2004. After 2004, Gallup polled respondents about same-sex marriage every year, and sometimes placed a poll in the field more than once within a year. *Marriage*, GALLUP, <http://news.gallup.com/poll/117328/marriage.aspx> (last visited Mar. 28, 2018).

¹⁴⁷ *Baker v. State*, 744 A.2d 864 (Vt. 1999).

¹⁴⁸ 1999 Vt. Adv. Leg. Sev. 91 (LexisNexis) (codified as amended at VT. STAT. ANN. tit. 15, §§ 1201–1207 (LEXIS through 2017 Sess.)).

¹⁴⁹ Ross Sneyd, *Vermont Legislators Face Backlash After Approving Same-Sex Civil Unions*, SANTA CRUZ SENT., Sept. 7, 2000, at C-4.

¹⁵⁰ *Id.*

¹⁵¹ Carey Goldberg, *Vermont Residents Split Over Civil Unions Law*, N.Y. TIMES (Sept. 3, 2000), <http://www.nytimes.com/2000/09/03/us/vermont-residents-split-over-civil-unions-law.html>.

It bears noting that though a number of issues fed into the movement, the consensus seems to follow the assessment of one Take Back Vermont supporter who told the *New York Times*, “Civil unions are like the straw that broke the camel’s back.”¹⁵² The movement began as a response to two land use regulations, which severely restricted developers’ rights in the state and limited the clear-cutting of wooded areas.¹⁵³ In 1997, the movement found an additional cause in fighting a law that created a statewide funding formula for education.¹⁵⁴ That law, Act 60,¹⁵⁵ was bitterly resisted. In response, Vermonters filed eleven lawsuits, privatized a local school, and refused to send property taxes to state officials.¹⁵⁶ The Take Back Vermont movement was described as a “simmering complaint over many issues,”¹⁵⁷ that the civil unions law emboldened. However, the movement continued to rove for new targets throughout the 2000 election campaign, as one media account reported:

Civil unions opened the vent, but now the backlash has found other targets. “Take Back Vermont” has come to mean take it back from the state Supreme Court, which ordered equity for gay couples, and from the legislators who refused to hold a referendum; from the environmentalists, big business and those 40,000 New Yorkers and Bostonians who have second homes in Vermont.¹⁵⁸

Republican Richard Westman, who was first elected to the Vermont House in 1983, saw the leaders of the Take Back Vermont movement as riding a longer wave of anti-liberal establishment that crested in 2000:

I think if you look at the election cycle, the two years before civil unions, the education funding bill had passed. The Republicans had been on the downward slide for quite a long time. After they passed Act 60 [concerning education funding], the Republicans came back and picked up seats. The very next election cycle after civil unions, the Republicans picked up ten seats. There was some combination of those two issues, which helped produce a Republican majority in the legislature. There was some feeling amongst some people on a host of issues that the place was getting out of control too fast.¹⁵⁹

Despite numerous grievances, the most aggressive opposition targeted the civil unions law. Towns reported heightened tension, including anti-gay graffiti vandalism. Hostility in one town caused the local newspaper to print an editorial signed by 168 locals lamenting that “a climate of fear [was] being

¹⁵² *Id.*

¹⁵³ JOHN J. DUFFY, SAMUEL B. HAND & RALPH H. ORTH, *THE VERMONT ENCYCLOPEDIA* 284 (2003).

¹⁵⁴ *Id.*

¹⁵⁵ Equal Educational Opportunity Act of 1997, 1997 Vt. Legis. Serv. 60 (West) (codified as amended at VT. STAT. ANN. tit. 16, § 1 (West, Westlaw through First Sess. 2017–2018 Vt. Gen. Assemb.).

¹⁵⁶ Jack Hoffman, *Civil Unions Seen as Target of ‘Take Back Vermont’*, RUTLEDGE HERALD, Sept. 24, 2000.

¹⁵⁷ Ellen Goodman, *‘Take Back Vermont,’ the Signs Say, But Take It Back to What?*, LEWISTON MORNING TRIB., Nov. 5, 2000, at 3F.

¹⁵⁸ Hanna Rosin, *Same-Sex Union Divides Vermont Town*, BANGOR DAILY NEWS, Oct. 12, 2000, at B6.

¹⁵⁹ Telephone Interview with Richard Westman, Vt. State Representative (May 21, 2016).

created by people whose alarmist tactics discourage rational debate.”¹⁶⁰ The groups called for an end to “the divisiveness, hostility and mistrust we see overtaking our towns since the passage of the civil unions law.”¹⁶¹ These towns were not alone. As then-Governor Howard Dean recalled, Vermont was ensnared in “the least civil public debate in the state in over a century.”¹⁶² Vermont was a tinderbox—so much so that officials feared that violence might be imminent and took precautionary measures. Dean wore a bulletproof vest during the campaign season.¹⁶³ The Speaker of the House had an armed state trooper standing guard behind a curtain during the civil union debate.¹⁶⁴

Dean said civil unions were one of a number of issues feeding into conservative discontents but that:

Civil unions galvanized the right wing. The [Take Back Vermont] movement was discombobulated until that point. [Civil unions] scared a lot of people. When some group is lower in the pecking order [and] is all of a sudden equal, that was a really an earthquake. It was the straw that broke the camel’s back, but it was the biggest straw of them all.¹⁶⁵

Republican Tom Little echoed a similar theme offered in Dean’s assessment:

I’d frame it this way. It was clear to me then and now that it was all about civil unions, however the folks who were exercised by that included people who found common ground over property rights issues and gun control issues. But if you looked at a Venn diagram there were also people opposed to legislation who were not part of those other circles. I think it was a distinct motivation for some people.¹⁶⁶

The Take Back Vermont movement metastasized during the run-up to the 2000 elections. Take Back Vermonters successfully primaried half of the ten Republican legislators who voted in favor of civil unions, including one thirty-year incumbent.¹⁶⁷ Republicans took control of the Vermont House of Representatives for the first time in sixteen years.¹⁶⁸ The battle for control of the House districts, a sign of the movement’s intensity, may overstate its overall potency. The Vermont GOP exhibited signs of life throughout the

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Liz Halloran, *How Vermont’s ‘Civil’ War Fueled the Gay Marriage Movement*, NPR (Mar. 23, 2013), <http://www.npr.org/2013/03/27/174651233/how-vermonts-civil-war-fueled-the-gay-marriage-movement>.

¹⁶³ See Tim Jones, *Howard Dean: Tapping into a Party’s Anger*, CHI. TRIB. (Feb. 18, 2004), <http://www.chicagotribune.com/sns-2004election-deanprofile-story.html> (reporting that Dean “sometimes traveled around the state in a bulletproof vest” after signing the civil unions bill).

¹⁶⁴ Telephone Interview with Michael J. Obuchowski, Vt. Speaker of the House of Representatives (May 11, 2016).

¹⁶⁵ Telephone Interview with Howard Dean, Vt. Governor (May 13, 2016).

¹⁶⁶ Telephone Interview with Tom Little, Vt. State Representative (May 11, 2016).

¹⁶⁷ Gwen Florio, *Backlash in Vermont*, PHILA. INQUIRER, Oct. 25, 2000, at C3.

¹⁶⁸ MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 82–83 (2013).

1990s. Republicans controlled the Vermont Senate in 1995 and 1996 by an 18-12 margin.¹⁶⁹

Democrat Howard Dean barely broke 50% of the vote in his gubernatorial reelection bid.¹⁷⁰ However, Dean also faced opposition from Anthony Pollina, a Progressive Party candidate. Pollina supported full marriage rights for same-sex couples and garnered over 9% of the vote. Ruth Dwyer, who hoped to ride a wave of anti-liberal elitism into power, had a lackluster showing at slightly below 38%. Dwyer took a smaller share of the vote in 2000 than she did two years earlier. In addition to reelecting Dean, Vermonters narrowly returned the lieutenant governor, a same-sex marriage supporter, for another term.

The Take Back Vermont movement scared a number of key advocates for equal marriage and resonated within Vermont political circles for some years to come. There is evidence that the initial reactions to *Baker* in Vermont polarized the public, but little basis to conclude there was a groundswell of backlash to the civil union law. In fact, much of the anti-civil union pushback in Vermont was bootstrapped onto other festering complaints rural Vermonters held against liberals. The record offers little support for the proposition *Baker* independently spurred a widespread disquiet in the electorate.

Turning west, parallels between Vermont and California are noticeable. At least one longstanding polling firm, Field, has measured Californians' temperature on same-sex marriage as far back as 1977 and with regularity since the 1990s. In addition to Field, the Public Policy Institute of California ("PPIC") has consistently polled Californians' support for equal marriage rights. In 1977, "[A] poll of Californians showed a cold reception for gay rights, only 28 percent of Californians supported extending marriage rights to same-sex couples."¹⁷¹ In the course of nearly a quarter century, the data exposes an uptick in support for equal marriage legalization, but no significant softening in opposition.

Polling data showing opposition to same-sex marriage in the high 50 to low 60 percentage range bore out in a 2000 California initiative to ban same-sex marriage. In 2000, California voters endorsed Proposition 22, also known as the Knight Initiative, to enshrine into state family law that "only marriage between a man and a woman is valid or recognized in California." Proposition 22 won majority support in all but six of the state's fifty-eight counties, with all six counties clustered in the San Francisco Bay Area. In all, Proposition 22 took 61 percent of the vote, with 38 percent of voters

¹⁶⁹ Jennifer Bernier, *Coordinator's Corner*, 20 LEGIS. RES. LIBR. NEWSLINE 4, 5 (1996).

¹⁷⁰ OFFICE OF THE VT. SEC'Y OF ST., GENERAL ELECTION RESULTS GOVERNOR 1789-2012, <https://www.sec.state.vt.us/media/308153/stofflgov.pdf>.

¹⁷¹ Kreis, *supra* note 110, at 66; see also Rachel Gordon, *Acceptance of Gay Marriage Growing in State/Field Poll: Half of Voters Still Against It—But Even More Oppose Constitutional Ban*, SF GATE (Feb. 26, 2004, 4:00 AM), <https://www.sfgate.com/news/article/Acceptance-of-gay-marriage-growing-in-state-2790477.php>.

opposed. The defeat for equal marriage rights was resounding but mapped onto the previous near-25 years of polling data.

Majority support in California for equal marriage was not registered until May 2008 when the California State Supreme Court legalized same-sex marriage. Before the state Supreme Court struck down California's statutory same-sex marriage ban, public opinion was generally stable. In the early 2000s, both the Field Poll and Public Policy Institute of California polling indicates support for equal marriage in the state hovered in the mid-to-low 40 percent range.¹⁷²

California voters narrowly voted to overturn the California Supreme Court and ban same-sex marriage in November 2008.¹⁷³ Importantly, voters' willingness to oppose gay and lesbian rights was softer in 2008 than 2000. Fifty-two percent of voters opted to ban same-sex marriage, a near 10 percent drop from 2000.¹⁷⁴ PPIC polls indicate support for same-sex marriage cracked the 50% mark in March 2010 when the trial challenging Proposition 8 was underway. The Californian electorate was stable between February 2006 and March 2010, during the heat of litigation.¹⁷⁵

Polling data in Massachusetts, Connecticut, and Iowa is thin compared to California, particularly with respect to polling prior to each of those states' courts ruling in favor of same-sex couples. In Massachusetts, polls from April and November 2003, before the *Goodridge* decision, indicated opposition to same-sex marriage rested in the 40 percent range. The polls registered opposition at 44 and 43 percent, respectively. Resistance to full marriage recognition spiked by 10 point in the wake of the Supreme Judicial Court's ruling. That February 2004 poll reported support for *Goodridge*'s outcome sunk to 35 percent from the earlier polls that recorded a near majority of Massachusetts residents supporting same-sex couples' right to marry.

The high court may have enabled this backlash when it gave the Massachusetts General Court 180 days to enact legislation before *Goodridge* took effect. The delay may have allowed for the stoking of opposition and building of tension as the dissolution of the stay drew nearer. Nearly a year after *Goodridge* took effect and same-sex couples married in the Bay State, the public warmed to the constitutionalization of same-sex marriage, with polling indicating slightly higher support for equal marriage in March 2005 than existed before the court ruled.¹⁷⁶

In Connecticut, three polls examined the level of support for gay marriage rights prior to the state supreme court ruling in *Kerrigan* in 2008. Continuity

¹⁷² *Id.*; see also *In re Marriage Cases*, 183 P.3d 384, 401, 451 (Cal. 2008); Evelyn Nieves, *Ballot Initiative That Would Thwart Gay Marriage is Embroiling California*, N.Y. TIMES (Feb. 25, 2000), www.nytimes.com/2000/02/25/us/ballot-initiative-that-would-thwart-gay-marriage-is-embroiling-california.html.

¹⁷³ Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

¹⁷⁴ *Id.*

¹⁷⁵ Kreis, *supra* note 110, at 65–67.

¹⁷⁶ *Id.* at 67–68 (internal citation omitted).

was a hallmark across the polls taken in 2003, 2004, and 2005. Support for marriage lied in the low-to-mid forties and opposition in the low fifties.¹⁷⁷ The April 2005 poll showed the greatest amount of opposition and a small decline in public acceptance of same-sex marriage. Complicating analysis here, however, is the fact that no polling took place between April 2005 and December 2008. Thus, while there was a ten-point gap trending toward a pro-gay marriage position after *Kerrigan*, there is no hard evidence to conclude the court caused it. However, it is reasonable to infer from the numbers that, at a minimum, the court's decision did not prompt a backlash.¹⁷⁸

Like California, Iowa presents a more complicated landscape for analysis. Three polls were taken in Iowa on same-sex marriage before Varnum, the first in September 2003. In the first poll in the field, respondents overwhelmingly objected to marriage for non-heterosexuals by a margin of 65 to 23. However, the next Iowa poll was not until 2008, placing that five-year span in a black box. By 2008, there was a small rise in the public's approval of same-sex marriage. That small gain of supporters was matched with a nearly equally small sag in opposition, polling in 2008 showed 62 percent of Iowans rejected same-sex marriage.

Whatever stability public opposition in Iowa held prior to 2009 was disturbed radically around the time the Iowa Supreme Court struck down the state's exclusion of same-sex couples from marriage. Between polls taken four months prior to the Iowa Supreme Court's ruling in April 2009 and 5 months after the decision, opposition decreased by 19 points. The precipitous softening of opposition to same-sex marriage supports the legitimization hypothesis. The September 2009 poll marked the first time that equal marriage supporters and opponents were statistically tied. No poll found majority support of Varnum until 2014, but support steadily rose throughout the span between 2009 and 2014.¹⁷⁹

B. National Temperature

In the ten-year span between March 1996 and May 2006, Gallup's polling on same-sex marriage indicated a 12% increase in support for same-sex marriage. Most of that early change occurred by February 1999 prior to *Baker*, *Lawrence*, and *Goodridge*, but after the Hawaii litigation, DOMA's enactment, and *Romer v. Evans*.¹⁸⁰ In March 2004, Gallup's Frank Newport observed that between 1999 and 2004 "little changed from responses to surveys."¹⁸¹ In their review of same-sex marriage opinion trends, Brewer and

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 69.

¹⁷⁹ *Id.* at 69–70.

¹⁸⁰ JEFF JONES & LYDIA SAAD, GALLUP POLL SOCIAL SERIES: VALUES AND BELIEFS (2016), http://www.gallup.com/file/poll/191657/Same_Sex_Marriage_Importance_%20Issue_to_Vote_160519.pdf.

¹⁸¹ Frank Newport, *Opposition to Legalized Same-Sex Marriage Steady*, GALLUP (Mar. 11, 2004), <http://www.gallup.com/poll/10960/opposition-legalized-samesex-marriage-steady.aspx>.

Wilcox describe the period between 1988 and 2004 as one of “striking stability” where there was “no durable trend in public support” for same-sex marriage.¹⁸² In 2006, Persily, Egan, and Wallsten echoed Newport, Brewer, and Wilcox, determining that “support for the legalization of same-sex marriage has risen only slightly since 1996.”¹⁸³ Rosenberg’s treatment of polling data in 2008 fell in line with these earlier conclusions that “public opinion data don’t support the claim that litigation on behalf of same-sex marriage substantially increased support for it.”¹⁸⁴

Nationally, support for same-sex marriage was more muted between 2004 and 2009 than in states moving toward same-sex marriage rights, but it was not stagnant. Examining Gallup’s data on the question, opposition to same-sex marriage did not fall below 50% until May 2011, just weeks before New York’s Governor Andrew Cuomo signed the Marriage Equality Act.¹⁸⁵ Support for equal marriage never dipped below the 50% mark after May 2012.¹⁸⁶ Increased support over the long term for same-sex marriage meets the expectations of legitimization theory. However, the lag in time between the first pro-LGB marriage rights rulings and rising levels of support makes the connection between the two slightly attenuated.

The relative stability in public opinion between the 1990s and early 2000s did not last. In the time between December 2003 after *Goodridge* was decided and May 2013 before the Supreme Court ruled in *Windsor*, public support for same-sex marriage rose from 31% to 53%.¹⁸⁷ That trend—indicative of a legitimizing effect—continued after *Windsor*. In May 2015, Gallup recorded public support for same-sex marriage at 60%. The most significant period of change in the Gallup data was between March 2005 and May 2011.¹⁸⁸ In 2005, support for same-sex marriage bottomed at 28%. Majority support for equal marriage was registered in the May 2011 Gallup poll.¹⁸⁹ This time period was litigation intensive. Adding onto wins in Vermont and Massachusetts,¹⁹⁰ LGB advocates scored victories for relationship recognition in California, Connecticut, Iowa, and New Jersey prior to any state legislatively adopted equal marriage rights for gay couples.¹⁹¹ Unsuccessful litigation

¹⁸² Paul R. Brewer & Clyde Wilcox, *Same-Sex Marriage and Civil Unions*, 69 PUB. OP. Q. 599, 602 (2005).

¹⁸³ Nathaniel Persily, Patrick Egan & Kevin Wallsten, *Gay Marriage, Public Opinion and the Courts*, 13–14 (Apr. 29, 2006) (unpublished Legal Scholarship Repository, University of Pennsylvania Law School), http://scholarship.law.upenn.edu/faculty_scholarship/91.

¹⁸⁴ Rosenberg, *supra* note 5, at 404.

¹⁸⁵ JONES & SAAD, *supra* note 180; *see also* 2011 N.Y. Sess. Laws ch. 95 (A. 8354) (McKinney).

¹⁸⁶ McCarthy, *supra* note 11.

¹⁸⁷ JONES & SAAD, *supra* note 180.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *See infra* Part IV.

¹⁹¹ *See In re Marriage Cases*, 183 P.3d 384, 398 (Cal. 2008) (applying the California Constitution to extend marriage rights to same-sex couples); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407,

concluded in the courts of last resort in Maryland, New York, Oregon, and Washington.¹⁹² In 2009, the first legislative enactments of equal marriage took place in Vermont and New Hampshire.¹⁹³ Maine also passed same-sex marriage legislation that was rejected by voters prior to it taking effect.¹⁹⁴

The two polls Gallup initiated with the shortest time gap between them were conducted in this period. Gallup's poll in May 2005 saw a ten-point increase in public support for recognition of same-sex marriage from March 2005. Opposition dropped twelve points in the May survey. The March poll registered the lowest amount of support for equal marriage since February 1999.¹⁹⁵ In the interim that the two polls were in the field, Superior Court Judge Richard Kramer struck down California's same-sex marriage ban on March 14, 2005.¹⁹⁶ None of Gallup's polls conducted in 2006 or after recorded support for same-sex marriage recognition below 39%.¹⁹⁷ That single data point fails to find corroboration in polls in California where there was little movement in the same time period.

While aggregate polling data lends some support to the legitimization hypothesis, it is necessary to look at structural shifts undergirding the aggregate changes in public opinion to better parse out what effect court rulings may have had on public attitudes on marriage rights for gay couples.

These data from Gallup recording whether Americans were satisfied or dissatisfied with the acceptance of gays and lesbians is telling. Prior to 2004, satisfaction levels remained fairly stable between 35 and 40%.¹⁹⁸ Dissatisfaction with LGB acceptance began to shift in 2004. The number of

411 (Conn. 2008) (applying the Connecticut Constitution to extend marriage rights to same-sex couples); *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009) (applying the Iowa Constitution to extend marriage rights to same-sex couples); *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006) (applying the New Jersey Constitution to require the state provide marriage rights or parallel rights to same-sex couples).

¹⁹² *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (rejecting same-sex marriage claims under the Maryland Constitution); *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006) (rejecting same-sex marriage claims under the New York Constitution); *Andersen v. King Cty.*, 138 P.3d 963 (Wash. 2006) (rejecting same-sex marriage claims under the Washington Constitution).

¹⁹³ Act Relative to Civil Marriage and Civil Unions, 2009 N.H. Laws ch. 59 (West); Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, 2009 Vt. Legis. Serv. 3 (West); see also Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES (June 3, 2009), <http://www.nytimes.com/2009/06/04/us/04marriage.html>; *infra* Part IV (discussing Vermont's same-sex marriage legislation).

¹⁹⁴ Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, 2009 Me. Legis. Serv. Ch. 82 (West); see also Abby Goodnough, *A Setback in Maine for Gay Marriage, But Medical Marijuana Law Expands*, N.Y. TIMES (Nov. 4, 2009), <https://www.nytimes.com/2009/11/05/us/politics/05maine.html>.

¹⁹⁵ JONES & SAAD, *supra* note 180.

¹⁹⁶ *In re Marriage Cases*, No. 4365, 2005 WL 583129 (Super. Ct., S.F. Cty. March 14, 2005).

¹⁹⁷ JONES & SAAD, *supra* note 180.

¹⁹⁸ Justin McCarthy, *Satisfaction with Acceptance of Gays in U.S. at New High*, GALLUP (Jan. 18, 2016), www.gallup.com/poll/188657/satisfaction-acceptance-gays-new-high.aspx.

Americans dissatisfied and wishing for less acceptance of sexual minorities peaked between 2004 and 2006, at the same time the largest rise in those dissatisfied and wanting more acceptance occurred.¹⁹⁹ Indeed, the percentage of Americans voicing displeasure with the lack of progress on gay rights peaked in 2007, at 22%, which later dwindled to 10% by 2016.²⁰⁰

The data indicate that events between 2004 and 2008 caused disruption in Americans' mood on LGB issues. Between 2004 and 2008, no states took legislative action to advance same-sex marriage, though four offered civil unions or substantially similar state recognition.²⁰¹ Statewide nondiscrimination legislation covering private entities also progressed during this time in five states.

If court rulings can arouse the passions of individuals to demand more acceptance and legal protections, then there should be a corresponding rise in the number of Americans calling for greater acceptance of gays and lesbians after major judicial victories. The polling trend between 2004 and 2012 mirrors what the rights consciousness thesis predicts. Prior to 2004, there was little movement in the number of Americans clamoring for greater social approval of sexual minorities. Each year, the percentage of respondents in this category fell within a three-point margin.²⁰² After 2004, in the wake of *Lawrence* and *Goodridge* and in the midst of marriage controversies in states across the nation, there is a discernable upward trend in the percentage of Americans wanting greater acceptance of gays and lesbians.

Equally interesting, this set of polling offers insight into the legitimization hypothesis' validity. If courts are legitimizing actors, then a decrease in Americans expressing a preference for less tolerance of gays and lesbians despite a rise in legal protections for gays and lesbians, including rulings favoring same-sex marriage, should be evident. If courts are incapable of moving the public in their direction as the Constrained Court Theory indicates, then little movement or a rise in the number of Americans expressing dissatisfaction with the growing social embrace of LGB rights will be detected. Between 2003 and 2006, there was a small increase in the number of respondents expressing a preference for less social acceptance of gays and lesbians.²⁰³ After peaking in 2006 where it was two points shy of being the plurality position, the number of Americans holding a negative viewpoint of gay and lesbian tolerance dropped precipitously. By 2015, 14% of Americans rejected the improved standing of gays and lesbians—halved from the 30% of Americans with that view in 2006.²⁰⁴

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *See infra* Part IV.B.

²⁰² McCarthy, *supra* note 198.

²⁰³ *Id.*

²⁰⁴ *Id.*

A few demographic factors warrant exploration. First, the rise in the public's aggregate warming toward LGB rights could be due to generational replacement. Polling reveals distinct generational gaps in support for same-sex marriage. Younger Americans are more likely to support equal marriage. If younger Americans are more socially liberal, as their share of the electorate rises, one would expect to see the overall trend favor equal marriage rights. If favorable changes in the public's overall support for equal marriage rights are generational, claims that judicial legitimization is responsible for the shift are undermined.

Millennials born after 1981, for example, on average supported same-sex marriage double the rate of Americans born between 1928 and 1945.²⁰⁵ Baby Boomers, born between 1946 and 1964, were more supportive of same-sex marriage than the generation before, but less supportive than Americans born 1965 and later.²⁰⁶ Interestingly, however, support for same-sex couples rose among all these groups between 2001 and 2013. Support among all of these generational groups bottomed out between 2003 and 2004, but in the following years, each age group's increased level of support was steep. Support for LGB couples among the Silent Generation (persons born between 1928 and 1945) nearly doubled between 2003 and 2013, while support among Millennials jumped nineteen points.²⁰⁷

Another consideration worth exploring is whether Americans were exposed to more LGB people between 2004 and 2009. One of the strongest arguments from scholars and pundits alike that judicial intervention in gay rights was unnecessary for the marriage movement's success is that the number of openly LGB persons has risen over time, and the public's exposure to LGB persons softened opposition to marriage rights. Polling shows that Americans who had openly LGB friends and relatives were more likely to support same-sex marriage.²⁰⁸

The causal link here, however, is unclear. On one hand, greater exposure to sexual minorities may well enhance the likelihood of one's support for sexual minority rights. On the other hand, it could also be true that persons with more liberal attitudes on sexuality may signal a receptiveness that induces LGB people to be open with those already socially liberal persons. One poll looking at the percentage of Americans who personally knew an

²⁰⁵ *Growing Support Across Generations for Same-Sex Marriage: Changed Minds and Changing Demographics*, PEW RES. CTR. (Mar. 20, 2013), www.people-press.org/2015/06/08/support-for-same-sex-marriage-at-record-high-but-key-segments-remain-opposed/6-8-2015-11-27-10-am/.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Lymari Morales, *Knowing Someone Gay/Lesbian Affects Views of Gay Issues*, GALLUP (May 29, 2009), www.gallup.com/poll/118931/known-someone-gay-lesbian-affects-views-gay-issues.aspx.

LGB person in 2003, 2004, 2008, and 2009 did not show a significant shift in the number of Americans who had personal ties to openly LGB people.

Comparing polling data between 1992 and 2010 shows a sharp uptick in the number of Americans who knew someone gay or lesbian—56% of Americans in 1992 did not know someone gay or lesbian.²⁰⁹ By 2010, an overwhelming number of Americans personally knew a person who identified as gay or lesbian and six in ten Americans had close family members or friends who were openly gay.²¹⁰

When asked why they supported same-sex marriage rights in 2012 and 2013, polling responses suggest that personal relationships with LGB friends and family members impacted many Americans' views. In a 2013 Pew poll, 14% of respondents said they had once opposed equal marriage but changed their mind.²¹¹ These respondents were then allowed to provide open-ended responses as to what caused them to change. A 32% plurality mentioned openly LGB friends, family members, and acquaintances as having some influence on their decision-making process.²¹² However, a significant number of the proffered factors included changing world events and an increasing awareness of same-sex marriage.

A 2012 Gallup poll also asked supporters of same-sex marriage the reason for their support. The number of respondents that pointed to friends and family members failed to crack double digits at 9%.²¹³ The top two justifications Gallup recorded for interviewees' same-sex marriage support referenced equal rights and personal happiness.²¹⁴ As a follow up question, respondents who stated they changed their minds on same-sex marriage were asked for open-ended rationales for their shift in opinion. Mirroring the 2013 Pew results, generic responses of becoming more aware and tolerant were the top two reasons offered. Contrary to the Pew findings, only 3% of those polled mentioned close LGB friends, relatives, and acquaintances as impacting their change of heart.²¹⁵ Thus, by the public's own account, personal connections alone were not overwhelmingly responsible for attitude shifts in favor of equal marriage.

²⁰⁹ Brian Montopoli, *Poll: With Higher Visibility, Less Disapproval for Gays*, CBS NEWS (June 9, 2010, 7:02 AM), www.cbsnews.com/news/poll-with-higher-visibility-less-disapproval-for-gays/.

²¹⁰ *Id.*

²¹¹ *Growing Support for Gay Marriage: Changed Minds and Changing Demographics*, PEW RES. CTR. (Mar. 20, 2013), www.people-press.org/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics/.

²¹² *Id.*

²¹³ Frank Newport, *Religion Big Factor for Americans Against Same-Sex Marriage*, GALLUP (Dec. 5, 2012), www.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx.

²¹⁴ *Id.*

²¹⁵ *Gay and Lesbian Rights*, Gallup (Nov. 26-29, 2012), <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx>.

C. Mood Shifts: Courts or the Secularization of America?

The 2012 Gallup survey which asked respondents to offer explanations for their opposition to same-sex marriage were generally religious in nature. A 47% plurality of marriage equality opponents cited religion generally or the Bible as an explanation for their opposition.²¹⁶ These numbers reflect the dominant narrative in state legislation and referenda concerning equal marriage opposition. Could the rise in support for same-sex couples' freedom to marry be part of a broader secularizing America?

Polling data showing Americans' attendance at religious services and those who say religion plays an important role in their life reveal relative stability in the public's religious conduct. Americans who indicate they attended religious services within the last week has hovered around the 40% mark between 1992 and 2014.²¹⁷ When asked how important religion was in their lives, a majority of Americans ranked religion as being "very important" in their lives over this period.²¹⁸ There is a slight, but noticeable downward trend between 2004 and 2008, with those describing religion as "very important" sliding from 61% to 54%.²¹⁹

D. Conclusion

Measuring the cause-and-effect relationship between judicial decisions expanding same-sex marriage rights and relationship recognition rights more generally is a difficult task. Nevertheless, the convergence of evidence offers credence to claims that the courts had a role in legitimizing same-sex marriage with the public. While state-level data collection was less robust than nationwide surveying, state court litigation appears to have disrupted stable levels of opposition and support in their wake, with the public mood trending toward the courts' decisions.

National polling also reveals that litigation-related disruption of public opinion between 2004 and 2008 gave rise to long-term acceptance of gay rights. As marriages began in Massachusetts and state court litigation picked up steam, the number of Americans satisfied with gay rights nosedived. In fact, the highest recorded percentage of Americans who were dissatisfied with the state of acceptance for gay and lesbians peaked in 2007. In 2008, the smallest amount of separation between Americans satisfied and unsatisfied (both those who wanted more and less acceptance of sexual minorities) was recorded. By

²¹⁶ Newport, *supra* note 213.

²¹⁷ Frank Newport, *In U.S., Four in 10 Report Attending Church in Last Week*, GALLUP (Dec. 24, 2013), www.gallup.com/poll/166613/four-report-attending-church-last-week.aspx.

²¹⁸ *Id.*

²¹⁹ *Id.*

2016, Americans who were satisfied with acceptance of gays and lesbians or wanted greater acceptance outnumbered detractors 70% to 13%, a shift from the 51% to 30% margin in 2004.²²⁰ This evidence is consistent with the rights consciousness hypothesis' expectations that rulings favoring same-sex marriage and rights for sexual minorities feeds a civil rights awareness that translates into more demands for expanded rights and acceptance.

If the Constrained Court Theory is correct, there should be no noticeable shift in public opinion after judicial victories. Conversely, if legitimization theory accurately captures the impact of litigation, we should discern significant shifts in the public's reception favoring civil rights for LGB persons in the wake of successful litigation. Given the paucity of data prior to 2000, caution is warranted against overstating the weight of the evidence. Mindful of that and the general limitations on drawing conclusions from polling data, the Constrained Court Theory does not square with polling on either the state or national level. The polling between 1996 and 2004 shows little movement in the public's mood favoring same-sex marriage, but there were significant shifts in the direction of equal marriage advocates between 2005 and 2011 during which marriages continued in Massachusetts, more courts extended to same-sex couples the freedom to marry, and two states successfully enacted and implemented marriage equality legislation.

IV. THE STATUTORY EVOLUTION OF FAMILY LAW

Beginning in the late 1990s, state legislators debated extending relationship recognition rights to same-sex couples. Some legislatures acted in response to a court mandate to extend rights; some legislatures acted after freedom to marry litigation failed; and other legislatures acted without any threat of judicial intervention. In this section, I chronologically examine legislative action in states that recognized same-sex marriage before 2013 to test the political reinforcement thesis and the rights consciousness hypothesis. The evidentiary record of same-sex marriage in the legislative process is reconstructed in this section through a variety of sources including floor debate transcripts, interviews with elected officials, recordings of legislative testimony, and contemporary media accounts.

We should expect to see, consistent with the principles outlined in the Constrained Court Theory, that the stronger the support from legislators, including blocking constitutional amendments to overturn a decision or enacting substantive legislation in support of a decision, the more effective a court's ruling. Testing the rights consciousness hypothesis, we should expect to see that judicial rulings in favor of LGB rights and same-sex relationship recognition motivated elected officials to take action. Another important

²²⁰ McCarthy, *supra* note 198.

pattern we should see—if the rights consciousness theory is valid—is that successful litigation made the issue of LGB civil rights more salient, prompting legislators to consider the merits of enacting pro-LGB legislation.

In this section, I will examine the legislative activity that resulted in the status quo changing years before the Supreme Court struck down DOMA in *Windsor v. United States*. The primary goal in this section is to understand legislators' motivations and their varied responses to litigation and court decisions in their own states and across the country.

A. Hawaii

Hawaii's same-sex marriage litigation was the first in the United States that appeared poised for success. The Supreme Court of Hawaii's instruction to the trial court that same-sex couples' marriage exclusion claim triggered strict scrutiny signaled that the advent of same-sex marriage recognition in Hawaii was a *fait accompli*.²²¹ Upon remand, the trial court ruled against the state in December 1996.²²² However, Judge Kevin Chang stayed his ruling despite believing the state's likelihood to prevail on the merits in the Supreme Court of Hawaii "was 'not particularly tremendous.'"²²³

In 1997, the Hawaii State Legislature moved to curb the state courts' jurisdiction over same-sex couples' state constitutional rights as it pertained to relationship recognition by proposing an amendment to the state constitution. That amendment, successfully ratified by the voters in 1998, removed the question of same-sex marriage from judicial review, but it did not foreclose the legislature from enacting equal marriage rights for same-sex couples or affording same-sex couples with other forms of relationship recognition.²²⁴

The same year legislators submitted that constitutional amendment to voters, they created a state reciprocal beneficiary registry.²²⁵ Hawaii's reciprocal beneficiary partnerships afforded couples otherwise prohibited from marrying to make medical decisions, bring wrongful death actions, receive worker's compensation survival benefits, assume inheritance rights, own property by tenancy by the entirety, take emergency medical leave for their partner, earn state pension benefits, and obtain insurance covering a partner.²²⁶ The law did not provide for joint adoption rights, mandated private healthcare insurance, joint tax filings, judicial dissolution of the partnership, spousal support if the couple separated, or spousal privilege in legal proceedings.

²²¹ Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

²²² Baehr v. Miike, No. CIV. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

²²³ Sandra Oshiro, *Hawaiian Judge Puts Same-Sex Marriage Ruling on Hold*, NATION, Dec. 6, 1996, at A12.

²²⁴ HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

²²⁵ Marriage—Legal Prohibition—Reciprocal Beneficiaries, 1997 Haw. Sess. Laws 383.

²²⁶ *Id.* at 826, 838-841.

Unlike marriage or marriage-like relationship recognition by the state, Hawaii's law created a relationship status that was easy to enter and almost as easy to exit. As William Eskridge argued, Hawaii's registry law "present[ed] [same-sex couples] with a bundle of *rights and benefits* [but] den[ied] them the *duties and obligations* associated with state-recognized marriage. That is, the state promised to honor reciprocal beneficiaries' rights to make decisions for one another and receive benefits but did not impose obligations on the couples."²²⁷

Hawaii did not successfully pass a bill in the legislature to expand relationship recognition for same-sex couples until 2010.²²⁸ The legislature sent Republican Governor Linda Lingle a bill creating civil unions—a relationship recognition that served as a functional equivalent to marriage in all but name.²²⁹ Lingle vetoed the civil union bill on July 6, 2010, and Lambda Legal and the ACLU filed a lawsuit on July 29, 2010.²³⁰ The groups argued that the Hawaii Constitution required civil unions for same-sex couples even though the legislature retained the constitutional prerogative to limit marriage to opposite-sex couples.²³¹

After pro-LGBT Neil Abercrombie was elected to serve as Hawaii's governor, civil union legislation had the promise of becoming law. In January 2011, the Hawaii Senate voted 19-6²³² and the House of Representatives 31-19 to enact civil unions.²³³ Abercrombie signed the law, which became effective the following January.²³⁴ After the Supreme Court's ruling in *Windsor*, Hawaii took the final step and enacted a marriage equality statute in November 2013.²³⁵

Hawaii's same-sex marriage litigation was a mixed success. On one hand it raised the profile of same-sex marriage and was successful on the merits in the judicial process. Conversely, the litigation fell short because unsupportive legislators submitted a constitutional amendment for popular approval to

²²⁷ ESKRIDGE, *supra* note 9, at 185.

²²⁸ H.B. 444, 25th Leg., Reg. Sess. (Haw. 2009).

²²⁹ *Lawmakers in Hawaii Vote to Back Civil Unions*, N.Y. TIMES (May 1, 2010), www.nytimes.com/2010/05/02/us/02hawaii.html?mcubz=0.

²³⁰ Complaint for Declaratory & Injunctive Relief; Summons, *Young v. Lingle*, No. 1CC101001621 (Haw. Cir. Ct. July 29, 2010), https://www.lamdalegal.org/sites/default/files/legal-docs/downloads/young-v-lingle_hi_20100729_complaint-for-declaratory-and-injunctive-relief-summons.pdf.

²³¹ *Id.* at 30, 35.

²³² B.J. Reyes, *Hawaii Senate Passes Civil Unions Bill*, HONOLULU STAR ADVERTISER (Jan. 28, 2011), www.staradvertiser.com/2011/01/28/breaking-news/hawaii-senate-passes-civil-unions-bill/.

²³³ B.J. Reyes, *Representatives Pass Civil-Unions Measure*, HONOLULU STAR ADVERTISER (Feb. 12, 2011), <http://www.staradvertiser.com/2011/02/12/hawaii-news/representatives-pass-civil-unions-measure/>.

²³⁴ B.J. Reyes, *'Today is an Amazing Day'*, HONOLULU STAR ADVERTISER (Feb. 24, 2011), <http://www.staradvertiser.com/2011/02/24/hawaii-news/today-is-an-amazing-day/>.

²³⁵ Hawaii Marriage Equality Act of 2013, S.B. 1, 27th Leg., 2nd Special Sess. (Haw. 2013).

foreclose it. The failure of same-sex marriage litigation in Hawaii is attributable to opposition in the Hawaii State Legislature, as the political reinforcement thesis predicts. However, Hawaii's enactment of a state-sanctioned relationship status for same-sex couples illustrates a major step for same-sex couples' rights, consistent with what we would expect to see if the rights consciousness thesis is correct. The events in Hawaii spurred action in other states, including Vermont. The chain of events that unfurled there between 1999 and 2000 culminated in the greatest single advancement of equal treatment for same-sex couples.

B. Vermont

Inspired by the prospect of civil marriage for gay couples in Hawaii, lawyers Beth Robinson and Susan Murray helped found the Vermont Freedom to Marry Task Force in 1995.²³⁶ The Task Force's mission was to train Vermonters to speak to their communities about same-sex marriage and participate in local events such as county fairs.²³⁷ The Task Force's work was grassroots in nature until three same-sex couples approached Robinson and Murray and asked to challenge Vermont's marriage law.²³⁸ Robinson and Murray, joined by co-counsel Mary Bonauto of the Gay and Lesbian Advocates and Defenders, filed suit in 1997.²³⁹

In December 1999, the Vermont Supreme Court ruled in *Baker v. State* that state legislators must provide all of the rights and responsibilities of marriage to same-sex couples but could do so under another name. The court punted the fight over equal marriage to the state legislature.²⁴⁰ In a short three-day window, the Task Force hastily drew up a legislative strategy.²⁴¹

Prior legislation concerning same-sex relationship recognition did not fare well. Bills to enact domestic partnerships with limited visitation rights failed in 1992 and 1993 in the House Judiciary Committee.²⁴² Another bill creating domestic partnerships equivalent to marriage failed in the 1993–

²³⁶ Mary L. Bonauto, *The Freedom to Marry for Same-Sex Couples in the United States of America*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 185 (Robert Wintemute & Mads Andenæs eds., 2001).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 177 n.1, 185.

²⁴⁰ *Baker v. State*, 744 A.2d 864, 888–89 (Vt. 1999) (holding Vermont Constitution required all benefits and privileges of marriage be extended to same-sex couples, but suspending the effect of its decision to allow the legislature to enact legislation consistent with the court's decision); see also Bonauto, *supra* note 236 at 189–90.

²⁴¹ Telephone Interview with Beth Robinson, *supra* note 72.

²⁴² H.R. 248, 1993–1994 Sess. (Vt. 1993); H.R. 887, 1991–1992 Sess. (Vt. 1992).

1994 legislative session.²⁴³ No bill to recognize same-sex relationships was filed in the 1999–2000 session of the legislature before *Baker*.

Task Force members understood from the get-go that equal marriage legislation was unlikely. Lacking an appetite to expand marriage, legislators created a parallel institution called a “civil union”—a term coined in the Vermont Judiciary Committee.²⁴⁴ The outcome disappointed same-sex couples’ advocates, but it did not surprise them.²⁴⁵

Setbacks notwithstanding, there were important developments for same-sex marriage advocates. Bill Lippert, an openly gay six-year veteran of the Vermont House of Representatives, was Vice Chairman of the House Judiciary Committee in 2000. After the civil union fight, Lippert resolved to press on for marriage equality and continue his service in the House. “I decided to stay in the legislature until we had full marriage equality,” Lippert said.²⁴⁶ For other legislative leaders, the *Baker* decision marked the first time they were provoked to seriously contemplate the merits of marriage equality. Shap Smith, who became the Vermont House Speaker in 2008, said, “I started to really think about [marriage equality] when Vermont was discussing the *Baker* decision.”²⁴⁷ A main sponsor of the 2009 marriage equality bill, Senator Claire Ayer, said that she first started thinking about marriage rights “when the decision in Vermont came down on the civil unions case.”²⁴⁸

Similarly, House member David Zuckerman, a primary sponsor of both the 2000 and 2009 marriage equality bills, recalled:

I was in the legislature when the Vermont Supreme Court made the *Baker* decision. . . . Prior to that, I don’t believe marriage equality was on my radar screen. But that [the announcement of *Baker*] was the first time when I can put my finger on it and say I would work on marriage equality.²⁴⁹

Representative David Deen was also an early marriage supporter. Deen reflected, “I never really thought of marriage as being a civil right until the Supreme Court decision. I just had never thought of it. . . . And then the [Vermont] Supreme Court decision came down and I saw it very differently.”²⁵⁰ Other Vermont leaders said *Baker* marked the beginning of their same-sex marriage advocacy. Vermont House Speaker Michael Obuchowski said that “[i]t was the court decision in *Baker*” where he started thinking about same-sex couples’ rights. “The fact that the *Baker* decision said that human beings’ rights

²⁴³ H.R. 471, 1993–1994 Sess. (Vt. 1993).

²⁴⁴ Telephone Interview with Bill Lippert, Former Vt. House Judiciary Comm. Vice Chairman (June 21, 2012).

²⁴⁵ Telephone Interview with Beth Robinson, *supra* note 72.

²⁴⁶ Telephone Interview with Bill Lippert, *supra* note 244.

²⁴⁷ Telephone Interview with Shap Smith, Vt. Speaker of the House (June 21, 2012).

²⁴⁸ Telephone Interview with Claire Ayer, Vt. State Sen. (May 28, 2012).

²⁴⁹ Telephone Interview with David Zuckerman, Vt. Sen. (June 25, 2012).

²⁵⁰ Telephone Interview with David Deen, Vt. Rep. (May 4, 2016).

were being violated was a great motivator for me. I tried to put myself in the plaintiffs' situation and decided I wouldn't want my rights violated."²⁵¹

The House Judiciary Committee Chair, Republican Tom Little, also pointed to *Baker* as a watershed moment. Little played a pivotal role in both 2000 and 2009. Little authored the civil union law and later chaired the Legislature's Commission examining marriage rights for same-sex couples in the lead up to the 2009 legislative session. Little explained how *Baker* influenced him:

I never sought elected office with gay marriage or gay rights as one of my reasons for running. . . . It was pretty much the litigation that brought it to my mind. . . . I read the Supreme Court decision and I agreed with it. The only defense the Attorney General put up was procreation, which turned out to be a pretty lame reason to hang the whole thing on.²⁵²

Like Little, Governor Howard Dean credited the Vermont Supreme Court for raising awareness about the inadequacies of family law. Dean said that issues concerning same-sex couples were not "on his radar." Dean did not publicly support marriage equality until 2009, but he said that his gradual favoring of same-sex marriage dated back to 1999. Dean recalled:

Viscerally, I was uncomfortable with [same-sex marriage in 1999]. I grew up in a time [when] homophobia was okay. I often say that if you were gay when I was in high school you'd get your ass kicked. But, I was always very much for the underdog and for civil rights. I knew out gay people and I wasn't a flaming homophobe. But, the idea of two men marrying? I was like, "What?" I was uncomfortable with it. I think there were a lot of people like me who started out like me. I never opposed it. The court decision prompted me to think about it because the legislature was told they needed to do something about it. After I sat down and people explained to me the 1700 rights you didn't get, it was pretty obvious to me that it wasn't about sex—it was about equal rights.²⁵³

Despite failing to attain what they set out to achieve in 1997, the Task Force's leadership and same-sex couples secured a modest victory in *Baker*. Ultimately, the Vermont Supreme Court decision resulted in a "separate-but-equal" relationship recognition status for same-sex couples. The invention of civil unions in Vermont is complicated to assess in terms of success. On one hand, civil unions were subordinate institutions to marriage, but on the other, they offered same-sex couples direly needed tangible benefits and responsibilities of marriage. Because the Vermont Supreme Court allotted the political branches some discretion to craft a remedy, the effectiveness of *Baker* was acutely reliant on the support of the governor and legislators, as the political reinforcement thesis predicts.

The fact that *Baker* did not extend marriage eligibility to the LGB community in the short term made it less effective than if the Vermont Legislature

²⁵¹ Telephone Interview with Michael J. Obuchowski, *supra* note 164.

²⁵² Telephone Interview with Tom Little, *supra* note 166.

²⁵³ Telephone Interview with Howard Dean, *supra* note 165.

had approved a marriage bill. Whatever its symbolic shortcomings, they should not detract from the unmistakable milestone of the Vermont civil unions legislation, which accorded marriage in all but name to same-sex couples. Importantly, nothing suggests that Vermont legislators were eager to expand any official status to same-sex couples prior to *Baker*. Michael Obuchowski, who held the Speaker post from 1995 to 2001, said that the momentum to act and protect gay couples “all generated from the court decision.”²⁵⁴ All three domestic partnership bills introduced in the 1990s failed to gain traction. No bills were filed to address domestic relations and sexual minorities during the 1999–2000 session before *Baker*. Tom Little corroborated this point:

I think but for the *Baker* decision you would’ve never had civil unions in Vermont. I think people may have introduced domestic partnership legislation or marriage legislation. After the Massachusetts decision, and if Vermont still didn’t have litigation pending, there would have [been] a greater effort but I think it would’ve faced an uphill battle.²⁵⁵

In this sense, the post-*Baker* landscape in Vermont is a paradox. While *Baker*’s success was proportional to legislators’ political will to craft legislation and block constitutional amendments to overturn it, there are no facts in the record indicating the legislature was imminently poised to act on its own volition.

The inadequacies of “separate-but-equal” institutions aside, the *Baker* decision helped put in place a few key stepping stones for the Task Force from which they could build a legislative leadership team and buttress a pro-marriage coalition. When the Task Force pushed for equal marriage legislation in 2009, these incomplete victories post-*Baker* proved indispensable.

C. Massachusetts

While Massachusetts’ *Goodridge* decision was pioneering,²⁵⁶ the political branches grappled with LGB rights long before it was handed down. Sixteen years after its initial introduction, the legislature enacted legislation in 1989 prohibiting sexual orientation discrimination in employment, housing, and public accommodations.²⁵⁷ That progress notwithstanding, Massachusetts continued to discriminate against LGB persons from becoming foster parents.²⁵⁸ That

²⁵⁴ Telephone Interview with Michael J. Obuchowski, *supra* note 164.

²⁵⁵ Telephone Interview with Tom Little, *supra* note 166.

²⁵⁶ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the Massachusetts Constitution requires the right to marry to apply equally to same-sex and opposite-sex couples); see also *supra* notes 13, 78–79 and accompanying text.

²⁵⁷ Act of Nov. 15, 1989, 1989 Mass. Acts 796, 797–800, 802 (1989).

²⁵⁸ Renee Loth, *State’s Gay Foster Care Policy Politically Based, Memos Show*, BOS. GLOBE, Aug. 19, 1988, at 22.

policy was challenged in court and ended in early 1990.²⁵⁹ A subsequent effort to reinstate the policy through a budget provision was vetoed.²⁶⁰

In 1993, Republican Governor William Weld said he was not in favor of same-sex marriage, though he later credited *Goodridge* for helping him come to support marriage equality.²⁶¹ Weld's Administration did, however, usher in considerable gains for same-sex couples. In 1992, Weld extended some benefits to state employees' same-sex partners.²⁶² In 1996, despite fellow Republicans' fierce opposition to same-sex unions, Weld pledged to recognize out-of-state same-sex marriages.²⁶³

In 1998, the General Court (Massachusetts's legislature) advanced legislation that would allow Boston to establish domestic partnerships with limited benefits open to same-sex and opposite-sex couples.²⁶⁴ Republican Governor Paul Cellucci opposed a domestic partnership law that included opposite-sex couples, believing it undermined marriage, and vetoed it.²⁶⁵

In 1999, Democratic State Representative John Rogers filed a bill to block the Commonwealth from recognizing out-of-state same-sex marriages.²⁶⁶ The 1999 bill never gained traction, but Rogers filed another in 2001 to ban local domestic partnerships and Massachusetts from recognizing same-sex marriages and out-of-state civil unions.²⁶⁷ That same year, seven same-sex couples filed suit in state court challenging the constitutionality of the Commonwealth's domestic relations laws to the extent the laws excluded same-sex couples from marriage rights.²⁶⁸

In July 2001, Massachusetts Citizens for Marriage successfully petitioned to amend the state constitution, banning same-sex marriage.²⁶⁹ The Massachusetts Constitution's amendment procedure allows citizens to submit proposals that meet a requisite number of petition signatures for the General Court's consideration in joint session.²⁷⁰ If an offered amendment receives

²⁵⁹ Kay Longcope, *Foster-Care Ban on Gays is Reversed*, BOS. GLOBE, Apr. 5, 1990, at 1.

²⁶⁰ Act of Aug. 1, 1990, 1990 Mass. Acts 271, 550–51 (1990).

²⁶¹ Chris Bull, *A Maverick on Gay Marriage*, ADVOCATE, Mar. 2, 2004, at 17.

²⁶² *Mass. Governor to Recognize Same-Sex Partners*, UPI (Aug. 5, 1992), <http://www.upi.com/Archives/1992/08/05/Mass-governor-to-recognize-same-sex-partners/6337712987200/>.

²⁶³ Opinion, *Gov. Weld: Legalize Gay Marriage*, HARVARD CRIMSON (Dec. 16, 1996), <http://www.the-crimson.com/article/1996/12/16/gov-weld-legalize-gay-marriage-pbgbovernor/>.

²⁶⁴ Tatsha Robertson, *Edict Expected on Partner Benefits*, BOS. GLOBE, Aug. 4, 1998, at B1.

²⁶⁵ *Id.*

²⁶⁶ H.B. 472, 181st Reg. Sess. (Mass. 1999).

²⁶⁷ H.B. 3375, 182nd Reg. Sess. (Mass. 2001).

²⁶⁸ COLE, *supra* note 94, at 46–47.

²⁶⁹ Press Release, Mass. Citizens for Marriage, Marriage Amendment Unveiled Tomorrow (July 30, 2001), <http://web.archive.org/web/20020225044034/http://marriagematters.org/pressreleases/release1.html>.

²⁷⁰ MASS. CONST., Arts. of Amend., art. XLVIII, pt. IV § 2.

25% of the General Court members' approval—fifty votes in all—in to successive sessions the proposal is submitted as a ballot question and is ratified by an affirmative majority vote.²⁷¹

Under the state constitution, the joint session is led by the president of the Massachusetts Senate.²⁷² Senate President Tom Birmingham convened a session on June 19, 2002, and immediately adjourned it for a month.²⁷³ Birmingham opposed Massachusetts's Citizens for Marriage campaign and amending the constitution to restrict the marriage recognition to opposite-sex couples.²⁷⁴ Upon legislators' return on July 17, Birmingham again moved for an immediate adjournment. The adjournment motion carried 137-53—a sufficient number of votes to move the amendment on the merits.²⁷⁵ Unsuccessful, proponents of the amendment turned back to the legislative process, offering a final pre-*Goodridge* anti-gay amendment push in April 2003. The effort failed to get any language out of committee.²⁷⁶

The General Court before *Goodridge* was in a holding pattern as elected officials showed little desire to recognize same-sex partners. This was due to socially conservative leadership in the House of Representatives, unlike in the Senate where civil unions were under discussion.²⁷⁷ LGB rights activists held out little hope of seeing favorable legislation enacted, as openly gay Massachusetts State Representative Liz Malia reflected:

Our discussions were mostly around domestic partnership benefits. And that had been the battle for the last few terms. . . .

I think it's probably pretty fair to say that, with some intensive discussions with leadership, where we thought we would be able to move would be toward domestic partners, but with DOMA language. . . .

I think that we had really hit a stalemate before the *Goodridge* decision arrived.²⁷⁸

One member of the Massachusetts House Judiciary Committee in 2004, Representative David Paul Linsky, echoed Malia's grim outlook. Linsky

²⁷¹ *Id.* at § 4.

²⁷² *Id.* at § 2.

²⁷³ MA. H. JOURNAL, 182ND SESS. (June 19, 2002), <https://malegislature.gov/Journal/House/182/06-01-2002>.

²⁷⁴ See Daniel R. Pinello, What a Difference a Court Decision Makes: Same-Sex Marriage and *Goodridge* (Sept. 1–4, 2005), <http://www.danpinello.com/APSA2005.htm> (arguing that the impact of Massachusetts' high court rulings on marriage equality reflects the judicial process's "significant" influence on social reform).

²⁷⁵ *Same-Sex Marriage Referendum Dies*, CHI. TRIB. (July 18, 2002), articles.chicagotribune.com/2002-07-18/news/0207180252_1_consecutive-legislative-sessions-same-sex-amendment.

²⁷⁶ Raphael Lewis, *Panel Delays Vote on Gay Marriage*, BOS. GLOBE, May 1, 2003, at B6.

²⁷⁷ Raphael Lewis, *Mass. Senate Eyes Civil Unions: Move Comes as SJC Mulls Gay Marriage*, BOS. GLOBE (Sept. 7, 2003), http://archive.boston.com/news/local/articles/2003/09/07/mass_senate_eyes_civil_unions/.

²⁷⁸ Pinello, *supra* note 274.

estimated that some form of domestic partner legislation might have had support in the chamber, but that it was doomed because of opposition from House leadership.²⁷⁹ As for civil unions or marriage, Linsky said that but for *Goodridge*, Massachusetts would have had to wait. Without the Supreme Judicial Court's intervention, Linsky offered, "[A marriage bill] would never have gotten out of committee. Whether or not a formal vote was taken, the bill would not come out. At most, it would have been put into a 'legislative study,' which is a graveyard."²⁸⁰

When the Massachusetts high court handed down the *Goodridge* decision, the court stayed the ruling for 180 days.²⁸¹ A month after the Supreme Judicial Court's decision, the Massachusetts Senate submitted proposed legislation for the court's advisory review.²⁸² The language referred to the court created Vermont-styled civil unions.²⁸³ The following February, the court opined that the Senate's proposal, creating a subordinate civil union right for same-sex couples and preserving marriage for opposite-sex couples, was constitutionality infirm, even if the distinction was in name only.²⁸⁴ The court reasoned that creating a separate name for state recognition of same-sex couples' relationships relegated LGB persons to "second-class status."²⁸⁵

Anti-marriage equality advocates amassed support for abrogating *Goodridge*. Of note, Archbishop Patrick O'Malley, leader of the Catholic Church in Boston, called for a constitutional convention to ban same-sex marriage.²⁸⁶ Then Governor Mitt Romney echoed O'Malley and backed a state constitutional amendment.²⁸⁷ Proponents of equal marriage rights mobilized as well, forming a new pro-LGBT interest group: MassEquality.²⁸⁸

The legislature met again in February to consider two legislatively proposed amendments to ban same-sex marriage, requiring 100 votes in the affirmative over two successive legislative sessions.²⁸⁹ Ultimately, legislators

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ David J. Garrow, *A Revolutionary Year: Judicial Assertiveness and Gay Rights*, in *A YEAR AT THE SUPREME COURT* 69 (Neal Devins & Davison M. Douglas eds., 2004) (arguing that the *Lawrence* decision was the culmination of a line of Supreme Court cases dating from the 1960s).

²⁸² Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

²⁸³ *Id.*

²⁸⁴ *Id.* at 572.

²⁸⁵ *Id.* at 570.

²⁸⁶ Elizabeth Mehren, *Same-Sex Marriage Divides Mass.*, L.A. TIMES (Feb. 17, 2004), articles.latimes.com/2004/feb/17/nation/na-divide17.

²⁸⁷ *Id.*

²⁸⁸ See Donald P. Haider-Markel & Jami Taylor, *Two Steps Forward, One Step Back: The Slow Forward Dance of LGBT Rights in America*, in *AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS* 54 (Carlos A. Ball ed., 2016) (detailing issues, controversies, and struggles that remain despite marriage equality victories).

²⁸⁹ MASS. CONST. art. XLVIII § 4.

defeated a proposed amendment, which was silent on civil unions but would have defined marriage as the union of a man and a woman, 94-103.²⁹⁰ In March, the General Court gave its blessing by a margin of 105-92 to an amendment that would foreclose same-sex marriage but establish civil unions.²⁹¹ In addition, the amendment included a provision disallowing the federal government from recognizing civil unions as a marriage for federal benefits.²⁹² The amendment now required majority approval by legislators in 2005, before it could be placed on the November 2006 ballot for ratification.²⁹³

In the interim period, the Romney Administration prepared for implementation of *Goodridge*. One area of controversy arose over the 1913 law that disallowed out-of-state persons to marry in Massachusetts if it was not legal for them to marry in their home state.²⁹⁴ In a forceful statement arguing for the strict application of the out-of-state validity requirement, Romney said, "Massachusetts should not become the Las Vegas of same-sex marriage. . . . We do not intend to export our marriage confusion to the entire nation."²⁹⁵

As controversy brewed over non-residents' marriage applications, the Administration prepared to update the ministerial functions for licensing clerks. Governor Romney's legal counsel issued a memorandum instructing Justices of the Peace to resign if they were unwilling to perform same-sex marriages.²⁹⁶ The Administration rolled out new licensing forms, eliminating gendered language.²⁹⁷ Marriages began on May 17, 2004.²⁹⁸

In September 2005, legislators were called to vote on the proposed constitutional amendment to ban same-sex marriage and create civil unions.²⁹⁹ The

²⁹⁰ *How Legislators Voted on Travis Gay Marriage Amendment*, BOS. GLOBE (Feb. 12, 2004), archive.boston.com/news/local/massachusetts/articles/2004/02/12/how_legislators_voted_on_travis_gay_marriage_amendment/.

²⁹¹ Pam Belluck, *Setback is Dealt to Gay Marriage*, N.Y. TIMES (Mar. 30, 2004), www.nytimes.com/2004/03/30/us/setback-is-dealt-to-gay-marriage.html.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Pam Belluck, *Romney Won't Let Gay Outsiders Wed in Massachusetts*, N.Y. TIMES (Apr. 25, 2004), <http://www.nytimes.com/2004/04/25/us/romney-won-t-let-gay-outsiders-wed-in-massachusetts.html>.

²⁹⁵ *Id.*

²⁹⁶ John McElhenny & Michael Levenson, *Marriage Restriction Debated: Under Romney Plan, Couples Face Checks*, BOS. GLOBE (Apr. 26, 2004), https://web.archive.org/web/20050318183813/http://www.boston.com/news/local/massachusetts/articles/2004/04/26/marriage_restriction_debated?pg=full.

²⁹⁷ Christine MacDonald & Bill Dedman, *About 2,500 Gay Couples Sought Licenses in 1st Week Cambridge Led in Gay Marriage Applications*, BOS. GLOBE, June 17, 2004, http://archive.boston.com/news/local/massachusetts/articles/2004/06/17/about_2500_gay_couples_sought_licenses_in_1st_week?pg=full.

²⁹⁸ Kailani Koenig, *Ten Years Ago, Massachusetts Introduced Us to Gay Marriage*, MSNBC (May 16, 2015, 6:02 PM), <http://www.msnbc.com/msnbc/ten-years-ago-massachusetts-introduced-us-gay-marriage>.

²⁹⁹ Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES (Sept. 15, 2005), <http://www.nytimes.com/2005/09/15/us/massachusetts-rejects-bill-to-eliminate-gay-marriage.html>.

measure failed 157-39.³⁰⁰ Rank-and-file legislators backed away from the proposal, as did one co-sponsor of the amendment, Republican State Senator Brian Lees, who explained his decision, "Gay marriage has begun, and life has not changed for the citizens of the commonwealth, with the exception of those who can now marry. . . . This amendment which was an appropriate measure or compromise a year ago, is no longer, I feel, a compromise today."³⁰¹

Same-sex marriage opponents now returned to a voter-initiated amendment process that would require only fifty votes rather than a majority of legislators to submit the anti-gay marriage amendment to the voters.³⁰² The anti-*Goodridge* forces collected 170,000 signatures, triggering another constitutional convention in 2006.³⁰³

The joint session of the legislature adjourned twice without voting on the merits of the marriage prohibition by large margins. In July, legislators voted 100-91 to delay until November.³⁰⁴ In November, they voted to delay again by a vote of 109-87.³⁰⁵ Anti-gay marriage forces, frustrated by legislators' lack of appetite to vote on the merits, filed litigation to force a vote on the proposed amendment.³⁰⁶ Eventually, they were successful and secured sixty-two votes in favor of the ban in January 2007.³⁰⁷ A second constitutional convention would be necessary with the newly elected legislature.

In the interim, supporters of amending the state constitution suffered a leadership vacuum. A new Senate president took control of the chamber and joined House Speaker Salvatore DiMasi in opposition of disturbing *Goodridge*.³⁰⁸ Governor Deval Patrick, a same-sex marriage supporter, was elected in November 2006 to succeed Romney.³⁰⁹ Patrick joined the House and Senate leaders to work at peeling away pro-amendment votes.³¹⁰

³⁰⁰ *Id.*

³⁰¹ Stephen Smith, *Same-Sex Marriage Win in Boston*, CBS News (Sept. 14, 2005, 3:21PM), <https://www.cbsnews.com/news/same-sex-marriage-win-in-boston/>.

³⁰² Pam Belluck, *Gain for Same-Sex Marriage in Massachusetts*, N.Y. TIMES (Nov. 10, 2006), <http://www.nytimes.com/2006/11/10/us/politics/10marriage.html>.

³⁰³ *Id.*

³⁰⁴ Kate Zezima, *Vote on Same-Sex Marriage is Delayed in Massachusetts*, N.Y. TIMES (July 13, 2006), <http://www.nytimes.com/2006/07/13/us/13gay.html>.

³⁰⁵ Steve LeBlanc, *Gay Marriage Vote Put off in Mass.*, WASH. POST (Nov. 10, 2006, 3:52 AM), www.washingtonpost.com/wp-dyn/content/article/2006/11/10/AR2006111000113.html.

³⁰⁶ Pam Belluck, *Same-Sex Marriage Setback in Massachusetts*, N.Y. TIMES (Jan. 3, 2007), <http://www.nytimes.com/2007/01/03/us/03gay.html>.

³⁰⁷ *Id.*

³⁰⁸ Frank Phillips & Andrea Estes, *Right of Gays to Marry Set for Years to Come*, BOS. GLOBE (June 15, 2007), http://archive.boston.com/news/local/massachusetts/articles/2007/06/15/right_of_gays_to_marry_set_for_years_to_come/?page=full.

³⁰⁹ *Id.*

³¹⁰ *Id.*

When the convention reconvened for mere seconds in June 2007, gay marriage opponents garnered only forty-five votes.³¹¹ The amendment's backers lost seven supporters through resignations and turnover once the new legislature convened, but also failed to hold onto prior supporters.³¹² A total of nine legislators, including seven Democrats and two Republicans, switched their votes.³¹³ One Democratic lawmaker, Senator Michael Morrissey, who switched his vote, explained his very private decision was about protecting minority rights. Senator Morrissey explained, "In the end it came down to the fact that we have to do what we think is the right thing and what we feel comfortable with. Protecting the rights of the minority is one of the things we have to do."³¹⁴ Other lawmakers that flipped offered their concerns about taking away rights and greater exposure to LGB persons. "I couldn't take away the happiness those people have been able to enjoy," Representative Paul Kujawski explained.³¹⁵ Senator Gale Candaras, who voted for the amendment when she was a state representative, published an exhaustive explanation for her flip, writing:

[Same-sex couples] deserve and are entitled to the same legal protections enjoyed by all others citizens of our state. This is the law of the Commonwealth, articulated by our Supreme Judicial Court in *Goodrich v. The Department of Public Health*, decided in November, 2003. Despite dire predictions, there has been no adverse societal impact from this decision and most people now express little concern about same gender marriage.³¹⁶

The Massachusetts General Court struck one more blow to anti-*Goodridge* groups by dismantling the last remaining impediment in Massachusetts law, which had barred out-of-state gay couples from marrying.³¹⁷ The Massachusetts Senate repealed the 1913 statute mandating residency requirements for marriage license applicants by a unanimous voice vote.³¹⁸ The Massachusetts House followed, voting to repeal by a large margin of 118-35.³¹⁹ Democratic Governor Patrick signed the repeal legislation in July 2008.³²⁰

Though Massachusetts was the first jurisdiction to offer same-sex couples access to marriage in 2004, political leaders debated same-sex relationship

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ Pam Belluck, *Massachusetts Gay Marriage to Remain Legal*, N.Y. TIMES (June 15, 2007), <http://www.nytimes.com/2007/06/15/us/15gay.html>.

³¹⁶ Peter Lyons, *Sen. G. Candaras Statement from Constitutional Conv.*, MASSLIVE (June 14, 2007, 10:28 PM), http://blog.masslive.com/io/2007/06/sen_g_candaras_statement_from.html.

³¹⁷ Act of July 31, 2008, 2008 Mass. Acts 216.

³¹⁸ Pam Belluck & Katie Zezima, *A 1913 Law Dies to Better Serve Gay Marriages*, N.Y. TIMES (July 16, 2008), <http://www.nytimes.com/2008/07/16/us/16gay.html>.

³¹⁹ Act of July 31, 2008, 2008 Mass. Acts 216; *see also* Pam Belluck, *Same-Sex Marriage Barrier Nears End in Massachusetts*, N.Y. TIMES (July 30, 2008), <http://www.nytimes.com/2008/07/30/us/30marriageweb.html>.

³²⁰ *Id.*

recognition throughout the 1990s. The *Goodridge* decision was successful because it opened marriage rights to same-sex couples at a time when severely limited recognition attempts would have dead-ended. Despite the intransigence of legislative leadership and weak odds of pro-recognition legislation passing without judicial intervention, *Goodridge* opponents could not rally a sufficient number of state legislators to submit a constitutional amendment for referendum. That outcome was not a foregone conclusion in January 2007 when opponents of *Goodridge* mustered twelve votes more than necessary to place an anti-gay marriage amendment on the ballot. The Massachusetts Supreme Judicial Court marriage ruling had staying power because legislative opposition was weak and softened over time. *Goodridge* was more effective when the legislature repealed residency requirements for marriage eligibility. These developments reflect what we should see if the political reinforcement thesis is correct.

The political reinforcement thesis and the Constrained Court model do not explain the Romney Administration's good faith implementation of *Goodridge*, notwithstanding Governor Romney's opposition to same-sex marriage. The shifts in legislators' votes on the proposed anti-same-sex marriage amendment may validate the political reinforcement thesis to the extent that political leadership ushered in unabashed support for marriage equality. There is some evidence of legitimization and rights consciousness in the statements provided by the legislators that flipped.

The ripple effect of Massachusetts' tussle with *Goodridge* and the merits of equal marriage rights touched numerous other states. Perhaps no state felt the impact of *Goodridge* more immediately than California. Though California wrestled with the issue long before the Massachusetts Supreme Judicial Court ruled in 2004, the combination of civil disobedience, legislation, and litigation brought the issue to a head in Massachusetts' wake.

D. California

California's first bout over same-sex marriage came in 1977. Six years earlier, the Legislature revamped the family law code by striking gendered language from the state's domestic relations statutes.³²¹ While the gender-neutral language was widely accepted as pertaining only to opposite-sex couples, legislation was introduced and enacted to define marriage as "a personal relation arising out of a civil contract between a man and a woman."³²²

³²¹ An Act of Dec. 14, 1971, 1971 Cal. Stat. 1748; see also *In re Marriage Cases*, 183 P.3d 384, 408 (Cal. 2008).

³²² 1977 Cal. Stat. 339; see also *In re Marriage Cases*, 183 P.3d at 409; Patricia A. Cain & Jean C. Love, *Six Cases in Search of a Decision: The Story of In Re Marriage Cases*, in *WOMEN AND THE LAW STORIES* 359 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).

Throughout the 1990s, a series of efforts were undertaken to establish enumerated rights for same-sex couples in the California Legislature. The first 1990s-era same-sex marriage bill died in 1991.³²³ In 1994, Assemblyman Richard Katz introduced AB 2810, which would have created a domestic partner registry.³²⁴ Registrants would have had conservatorship and medical decision-making rights, but Katz's bill was vetoed.³²⁵ The bill was reintroduced the following session and failed to secure a floor vote.³²⁶

As events unfolded in Hawaii in the mid-to-late 1990s, the question of same-sex marriage became more heated. While California law permitted only opposite-sex couples to marry under state law, California law governing recognition of out-of-state marriages was potentially favorable for same-sex couples. Section 308 of the California Code stated that "[a] marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state."³²⁷

Without a public policy recognition exception or an express prohibition of out-of-state same-sex marriages, the prospect of Hawaiian weddings exposing a large loophole in state law was too much for State Senator William "Pete" Knight.³²⁸ Knight offered two failed bills to close the "loophole."³²⁹ Knight and his allies turned to the state's initiative and referendum procedure. Knight's initiative, Proposition 22, which provided that only opposite-sex marriages were valid in California, passed in 2000 with over 60% of the vote.³³⁰

The first successful pro-recognition measure became law in 1999 (about two months prior to the *Baker* decision in Vermont³³¹) and provided domestic partners with hospital visitation rights, and health insurance coverage for state employees.³³² The scope of eligible domestic partners included same-sex couples and opposite-sex couples over sixty-two, who may not marry out of fear of losing social security benefits.³³³ The bill, AB 26, made no reference

³²³ Phillip Matier & Andrew Ross, *Same-Sex Marriage Effort Got Push from John Burton 24 Years Ago*, S.F. CHRON. (June 26, 2015), <http://www.sfchronicle.com/bayarea/matier-ross/article/Same-sex-marriage-effort-got-push-from-John-6352954.php>.

³²⁴ Assemb. B. 2810, 1993–1994 Leg., Reg. Sess. (Cal. 1994).

³²⁵ *Veto on Domestic Partners*, N.Y. TIMES, Sept. 12, 1994, at B11.

³²⁶ Complete Bill History, Assemb. B. 627, 1995–1996 Leg., Reg. Sess. (Cal. 1996), http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_0601-0650/ab_627_bill_history.html.

³²⁷ CAL. FAM. CODE § 308 (West 1992).

³²⁸ Ed Bond, *On the Issue: Irreconcilable Differences on Gay Marriage*, L.A. TIMES (Feb. 20, 1996), http://articles.latimes.com/1996-02-20/local/me-37971_1_gay-marriage.

³²⁹ *Same-Sex Marriage, Out-of-State Marriage: Bill Analysis on S.B. 54 Before the S. Judiciary Comm.*, 2009–2010 Leg., Reg. Sess., at 1 (Cal. 2009).

³³⁰ *Id.* at 1–2.

³³¹ *Baker v. State*, 744 A.2d 864 (Vt. 1999); see *supra* notes 69–74 and accompanying text.

³³² Assemb. B. 26, 1999–2000 Leg., Reg. Sess. (Cal. 1999) (enacted).

³³³ *Id.*

in either the legislative findings or the legislative counsel's analysis to the California Constitution, the United States Constitution, or any court decision.³³⁴

In 2001, the domestic partnership scheme was expanded.³³⁵ Domestic partners now had standing to bring tort claims, including wrongful death claims.³³⁶ In addition, the 2001 expansion granted a number of rights concerning medical care, sick leave, and insurance.³³⁷ The last expansion of the California domestic partnership statute came in 2003. That year, legislation was adopted that afforded domestic partners the presumption of rights and responsibilities equal to marriage.³³⁸ The 2003 legislation further recognized substantially similar relationships formed out-of-state.³³⁹ Unlike the organic legislation establishing domestic partnerships in 1999, the wholesale expansion included legislative declarations that the bill would "help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article 1 of the California Constitution by providing [rights for] all caring and committed couples" and "reduce discrimination on the bases of sex and sexual orientation . . . consistent with the requirements of the California Constitution."³⁴⁰

The 2003 expansion took effect in 2005, the same year the California Legislature first moved to legalize same-sex marriage.³⁴¹ However, the state's initiative and referendum process complicated legislators' push. California law does not allow for legislators to undo a statute enacted by initiative and referendum without submitting the legislative proposal for a popular vote.³⁴²

Assemblyman Mark Leno submitted a bill to legalize same-sex marriage in 2004.³⁴³ While Leno's legislation came in the wake of *Goodridge* and the decision by San Francisco Mayor Gavin Newsom to issue same-sex couples marriage licenses, the architects of the bill had devised the plan prior to Newsom's action. Leno, who—along with John Laird—became one of the first

³³⁴ *Id.*; *Domestic Partners, Health Insurance: Bill Analysis on Assemb. B. 26 Before the Assemb. Comm. on Health, 1999–2000 Leg., Reg. Sess.*, at 2 (Cal. 1999) (citing only the Unruh Civil Rights Act, the California Labor Code, and the California Code of Regulations as prohibiting discrimination based on sexual orientation or marital status).

³³⁵ NAT'L CTR. FOR LESBIAN RIGHTS, *THE EVOLUTION OF CALIFORNIA'S MARRIAGE AND DOMESTIC PARTNERSHIP LAW: A TIMELINE* (2010), http://www.nclrights.org/wp-content/uploads/2013/07/CA_Marriage__Domestic_Partner_Law_Timeline_Aug2010.pdf.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Assemb. B. 205, 2003–2004 Leg., Reg. Sess. (Cal. 2003) (enacted).*

³⁴⁰ *Id.*

³⁴¹ Gregg Jones & Nancy Vogel, *Domestic Partners Law Expands Gay Rights*, L.A. TIMES (Sept. 20, 2003), www.latimes.com/la-me-timelinegaymarriage-2003sep20-story.html.

³⁴² CAL. CONST. art. II, § 10(c).

³⁴³ See Robert Salladay, *Assembly Goes Slow on a Gay Marriage Bill*, L.A. TIMES (Apr. 2, 2004), <http://articles.latimes.com/2004/apr/02/local/me-marriage2> (documenting political progress on the roadblocks faced by proponents of Gay Marriage in the California legislature).

two openly gay men elected to the California Assembly in 2002,³⁴⁴ expressed that he was somewhat agnostic on the term “marriage” before events unfurled in Massachusetts. Indeed, Leno had an epiphany—a newfound rights consciousness—after processing the *Goodridge* opinion that led him to take the charge on equal marriage rights in California:

So, for many years as an activist and elected official, I always wanted the same rights benefits, privileges, and responsibilities of marriage, but I wasn’t always sure we should be fighting over a word. But, after reading the Massachusetts Supreme Court decision in 2003, my heart and mind were changed irrevocably. So in it, the Massachusetts High Court, not unlike the Vermont and Hawaii courts before it, they said that there was no justification for denying same-sex couples rights. But, the court went on to say that the only remedy to this identified discrimination is marriage and marriage alone. No other parallel construct would do. They said that there was no difference between the way same-sex couples love and that their love isn’t inferior. And that’s stuck with me and changed me. And at that point in November 2003, I was ready to fight a war over a word. Just a month before that, Governor Davis signed the domestic partner expansion. So, we set our sights on introducing it before Valentine’s Day in 2004.³⁴⁵

The timing of Newsom’s disobedience and Leno’s plan for legislation fused the parallel endeavors. As the *Los Angeles Times* reported, the marriage equality bill was seen as having significant ties to Newsom’s act of civil disobedience to issue marriage licenses contrary to state law:

Gay rights groups view the California legislation as part of a strategy that emerged when San Francisco began granting marriage licenses three months ago. Now, court cases are pending in New Jersey, Washington, Oregon, New York and California, and a federal constitutional amendment is up for debate in Washington, D.C.

....

“It’s a public conversation in all those arenas,” said Jennifer Pizer, senior staff attorney with the Lambda Legal Defense and Education Fund in Los Angeles. “In California, we have the particularly poignant example of couples who married in San Francisco. We have the Legislature doing its job and public opinion moving steadily toward equality.”³⁴⁶

³⁴⁴ See Margie Mason, *Bay Area Democrats May Become First Openly Gay Men in State Legislature*, BERKLEY DAILY PLANET (March 7, 2003), <http://www.berkeleydailyplanet.com/issue/2002-03-07/article/10588?headline=Bay-Area-Democrats-may-become-first-openly-gay-men-in-state-legislature-By-Margie-Mason-The-Associated-Press> (reporting on gay candidates running in California in 2002); John Myers, *Even Rivals Say Mark Leno Is One of Sacramento’s Most Accomplished Lawmakers. Now His Time is Up*, L.A. TIMES (Aug. 29, 2016, 12:05 AM), <http://www.latimes.com/politics/la-pol-sac-mark-leno-legislature-legacy-20160829-snap-htmstory.html> (referring to Leno as “one of the first two openly gay men elected to the Legislature”); John Laird, *California, 1985*, OUTHISTORY: OUT AND ELECTED IN THE USA: 1974–2004, <http://outhistory.org/exhibits/show/out-and-elected/early-1980s/john-laird> (last visited October 31, 2017).

³⁴⁵ Telephone Interview with Mark Leno, Cal. State Sen. (July 21, 2016).

³⁴⁶ Robert Salladay, *Gay Marriage Bill Expected to Die in Assembly*, L.A. TIMES (May 18, 2004), <http://articles.latimes.com/2004/may/18/local/me-marriage18> (outlining Democratic strategy on Gay Marriage legislation after efforts appeared to have been abandoned by the lawmakers).

Leno saw a windfall from Newsom's act of defiance, which shored up support among the openly gay members of the legislature. Considering the political ramifications and timing of marriage legislation, two of the five members of the California Legislature's LGBT caucus balked at Leno's decision to accelerate marriage equality. After thousands of same-sex couples flocked to San Francisco to marry, the cautious holdouts' concerns yielded to the excitement of the moment. Leno recalled:

I had awareness of what Gavin was thinking of doing as of Monday that week that we were going to introduce the bill. There was some discord among our LGBT caucus in Sacramento. Two of my colleagues wanted me to proceed. Two were not sure the votes were there. Because the marriage licenses were being issued, thousands and thousands of people had come to California. Those colleagues, after they saw it on television and were part of the thrill of it all, they had realized that they internalized the discrimination themselves. Marriage seemed like a dream, but then to see it in reality they took hold of themselves and were on board. What happened that weekend in San Francisco demystified it.³⁴⁷

That conversation continued throughout the remainder of the year, as the California Senate Judiciary Committee's official bill analysis from 2005 noted:

In 2004, several events once again brought to the forefront the issues of same-sex marriages, civil unions, and domestic partnerships. On February 24, 2004, President Bush endorsed the idea of an amendment to the U.S. Constitution to ban same-sex marriages in the country. This endorsement followed a flurry of events surrounding same-sex marriages, including the issuance of marriage licenses to same-sex couples in San Francisco the week before; the Massachusetts high court decision stating that only marriage—not civil unions—would provide same-sex couples equal protection under that state's constitution; the decision of the Canadian Supreme Court invalidating a prohibition against same-sex marriages . . .³⁴⁸

Leno's bill did not move out of committee. Between 2004 and 2005, Leno gained the support of the Assembly Speaker who wanted to pause Leno's push until a non-election year.³⁴⁹ When Leno introduced legislation for the 2005 session, the legislative findings emphasized the historic role California played in eradicating race-based marriage discrimination and tied the legislation to judicial decisions elsewhere:

The highest courts in three states have held that denying the legal rights and obligations of marriage to same-sex couples is constitutionally suspect or

³⁴⁷ Telephone Interview with Mark Leno, *supra* note 345.

³⁴⁸ CAL. S. JUDICIARY COMM., MARRIAGE: BILL ANALYSIS ON ASSEMB. B. 849, 2005–2006 Leg., Reg. Sess., at 4 (Cal. 2005), http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0801-0850/ab_849_cfa_20050718_105440_sen_comm.html (analyzing the bill “which would redefine ‘marriage’ in California as a union between two persons, making it gender-neutral and thereby permitting same-sex marriages in the state.”).

³⁴⁹ Telephone Interview with Mark Leno, *supra* note 345.

impermissible under their respective state constitutions. These states are Hawaii, Vermont, and Massachusetts.

California's discriminatory exclusion of same-sex couples from marriage violates the California Constitution's guarantee of due process, privacy, equal protection of the law, and free expression by arbitrarily denying equal marriage rights to lesbian, gay, and bisexual Californians.³⁵⁰

In the interim period, same-sex marriage advocates benefited from a state trial court ruling by Judge Richard Kramer striking down Proposition 22 as unconstitutional sex discrimination and an impermissible infringement of LGB Californians' fundamental right to marry under the state constitution.³⁵¹ Kramer's ruling was a boon for advocates, but opponents hoped to capitalize on the setback. As the *Washington Post* reported, Kramer would not have the final say on the matter because in addition to inevitable appeals, efforts were "already underway to amend the state's constitution to ban same-sex marriage."³⁵²

Opponents continued to fight equal marriage in the legislature, relying heavily on the argument that the welfare of children was threatened by married same-sex couples who could not raise children as successfully as opposite-sex parents. The California Senate Judiciary noted the "main argument offered in opposition" throughout hearings was the same "primary rationale that Hawaii, Vermont, and Massachusetts have offered in unsuccessful defense of their laws prohibiting same-sex marriage. . . ."³⁵³

In addition to child welfare justifications, the anti-gay marriage forces opposed the same-sex marriage bill because it subverted the will of the people as expressed in Proposition 22 and gave "added weight to Judge Kramer's rationale for striking down" Proposition 22.³⁵⁴

Judge Kramer's decision was part of the Legislature's analysis. However, legislators looked at the trend favoring LGB rights in California and beyond in the years leading up to 2005. The Assembly floor report vetted the trajectory of case law favoring relationship recognition for same-sex couples and sexual orientation nondiscrimination more broadly:

³⁵⁰ See Assemb. B. 849, 2003–2004 Leg., Reg. Sess. (Cal. 2003) (enacting the Religious Freedom and Civil Marriage Protection Act).

³⁵¹ Dean E. Murphy, *California Judge Voids Ban on Gay Marriage*, N.Y. TIMES (Mar. 15, 2005), www.nytimes.com/2005/03/15/us/california-judge-voids-ban-on-gay-marriage.html?mcubz=0.

³⁵² See Joe Dignan & Amy Argetsinger, *Calif. Judge Backs Same-Sex Marriage*, WASH. POST, Mar. 15, 2005, at A08 (reporting on the ruling made by San Francisco Superior Court Judge Richard A. Kramer, which overturned California's ban on same-sex marriage and diminished the likelihood of appeal).

³⁵³ CAL. S. JUDICIARY COMM., MARRIAGE: BILL ANALYSIS ON ASSEMB. B. 849, 2005–2006 Leg., Reg. Sess., at 15 (Cal. 2005), http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0801-0850/ab_849_cfa_20050718_105440_sen_comm.html.

³⁵⁴ *Id.* at 10.

Three state supreme courts have addressed the question of whether a state law that defines marriage so as to exclude same sex partners violates their respective state constitutions. . . .

. . . In *Romer v. Evans* (1996) the Court overturned . . . [a provision in] the Colorado Constitution to exclude lesbians and gay men from obtaining legal protection. More recently, in *Lawrence v. Texas* (2003), the U.S. Supreme Court struck down a state homosexual sodomy law So far, no state high court has found adequate justification under state law for treating homosexual couples differently than heterosexual couples in defining marriage, even under a constitutionally lenient “rational basis” test. This appears to be where California’s courts ultimately may arrive, as the trial court opinion in the coordinated marriage cases demonstrates.³⁵⁵

In September 2005, the California Senate approved Leno’s marriage bill 21-15.³⁵⁶ The California State Assembly followed on a 41-35 vote.³⁵⁷ The California Legislature was the first legislative body to bless same-sex marriage, but Governor Arnold Schwarzenegger vetoed the legislation citing Proposition 22.³⁵⁸ While the bill’s backers argued that Proposition 22 was intended to protect the state’s sovereignty and block out-of-state marriages, Schwarzenegger saw the measure as a wholesale preemption of same-sex marriage legislation.³⁵⁹

In rejecting supporters’ narrow abstraction of Proposition 22, the Governor’s position was that the only constitutional path to eliminating marriage discrimination was by another referendum or judicial fiat. “This bill simply adds confusion to a constitutional issue. If the ban of same-sex marriage is unconstitutional, this bill is not necessary. If the ban is constitutional, this bill is ineffective,” Schwarzenegger wrote in his veto statement to the Legislature.³⁶⁰ The Legislature forced the issue again in 2007, by passing another same-sex marriage bill.³⁶¹ By this time, same-sex marriage litigation had reached the California Supreme Court. Schwarzenegger rebuffed the Legislature and again vetoed the measure writing, “I maintain my position that

³⁵⁵ CAL. ASSEMB., CONCURRENCE IN SENATE AMENDMENTS: BILL ANALYSIS ON ASSEMB. B. 849, 2005–2006 Leg., Reg. Sess., at 6–7 (Cal. 2005).

³⁵⁶ *Id.* at 1; Cara DiPasquale & Scott Kleinberg, *California Senate Approves Bill Allowing Gay Marriage*, CHI. TRIB. (Sept. 2, 2005), http://articles.chicagotribune.com/2005-09-02/news/0509030008_1_gay-marriage-bill-same-sex-marriages-state-senate-approved-legislation.

³⁵⁷ CAL. ASSEMB., GOVERNOR’S VETO: BILL ANALYSIS ON ASSEMB. B. 849, 2005–2006 Leg., Reg. Sess., at 1 (Cal. 2005); see Nancy Vogel, *Legislature OKs Gay Marriage*, L.A. TIMES (Sept. 7, 2005), <http://articles.latimes.com/2005/sep/07/local/me-gaymarriage7> (“With no votes to spare, California’s lawmakers became the first in the United States to act without a court order to sanction gay marriages.”).

³⁵⁸ ARNOLD SCHWARZENEGGER, ASSEMBLY BILL VETO, Assemb. B. 849, 2005–2006 Leg., Reg. Sess. (Cal. 2005), http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0801-0850/ab_849_vt_20050929.html.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ Assemb. B. 43, 2007–2008 Leg., Reg. Sess. (Cal. 2007).

the appropriate resolution to this issue is to allow the Court to rule on Proposition 22.”³⁶² Seven months later, the California Supreme Court invalidated Proposition 22 as violative of the state constitution.³⁶³ Voters ratified a citizen-initiated constitutional amendment in November 2008 that overturned the state Supreme Court ruling.³⁶⁴

The California Legislature was more than willing to embrace equal marriage legislation before the state Supreme Court’s 2008 ruling, but failed because of insufficient support to override the Governor. Governor Schwarzenegger admonished legislators to defer to the courts or offer voters the option to consider equal marriage legislation through the referendum process. California voters ultimately blocked marriage equality at the ballot box in response to the state Supreme Court’s *In re Marriage Cases* decision. Even before marriage made headway in the legislature or courts, lawmakers succeeded in creating state-recognized relationship status for same-sex couples. Tracing the legislative history of these bills reveals that elected officials increasingly relied on constitutional law principles and rights-based language to frame efforts to support expanded relationship recognition for gay couples. This trajectory lends substantial weight to the rights consciousness hypothesis’ validity—an assessment that is corroborated by evidence laid out in the following section.

E. Vermont 2007–2009

In July 2007, Vermont House Speaker Gaye Symington and the President Pro Tempore of the Vermont Senate, Peter Shumlin, jointly created a commission charged with examining the status of same-sex couples and their families.³⁶⁵ That body, the Vermont Commission on Family Recognition and Protection (“Commission”), took testimony at eight hearings throughout the state and held a special ninth hearing on legal issues at the Vermont Law School.³⁶⁶ The Commission found that supporters of full marriage rights for same-sex couples believed that the civil union statute failed to comply with the Vermont Constitution’s equality mandate as articulated in *Baker*. The Commission’s official report also noted a common theme across the meetings:

³⁶² ARNOLD SCHWARZENEGGER, ASSEMBLY BILL VETO, Assemb. B. 43, 2007–2008 Leg., Reg. Sess. (Cal. 2007), http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_43_vt_20071012.html.

³⁶³ *In re Marriage Cases*, 183 P.3d 384, 398 (Cal. 2008).

³⁶⁴ Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. Times (Nov. 5, 2008), www.nytimes.com/2008/11/06/us/politics/06marriage.html?mcubz=0.

³⁶⁵ *Vermont Sets Open Process to Consider Gay Marriage*, BOS. GLOBE (Jul. 26, 2007), http://archive.boston.com/news/local/vermont/articles/2007/07/26/vermont_sets_open_process_to_consider_gay_marriage/.

³⁶⁶ OFFICE OF LEGIS. COUNCIL, REPORT OF THE VERMONT COMMISSION ON FAMILY RECOGNITION AND PROTECTION, at 2 (2008) (documenting the findings of hearings held by the Commission).

Witnesses often drew analogies between the civil union law and the U.S. Supreme Court's 1896 decision, *Plessy v. Ferguson*, in which the Court upheld the constitutionality of a state law imposing racial segregation in public accommodations (specifically, railroad passenger cars), provided the accommodations were equal. Frequently during this testimony, the Commission heard comments about second class citizenship, stigmatization, and "separate cannot be equal."³⁶⁷

In addition to recording the public's opinions on the legal nature of civil unions, Vermonters in support of equal marriage offered examples of ways they found civil unions unworkable. Participants explained during these meetings that civil unions required extra paperwork or additional explanations to others who did not understand them. Concerns were also expressed that civil unions were less portable across state lines than marriage.³⁶⁸ Though at the time only Massachusetts permitted same-sex couples to marry, Rhode Island and New York recognized out-of-state same-sex marriages as marriages.³⁶⁹ The Commission concluded that, taken as a whole, the "testimony reflects the evolution of attitudes in Vermont since the enactment [of civil unions] toward greater and more open acceptance of gays and lesbians in Vermont society, community, and public life."³⁷⁰

Opponents registered their views with the Commission, too. However, some anti-gay rights leaders urged social conservatives to not participate in Commission hearings because of perceived bias among those empaneled. Marriage opponent Craig Benson called the body a "kangaroo commission" because it was "the left having a dialogue with the far left."³⁷¹ Stephen Cable, the president of the opposition group Vermont Renewal, urged "Vermonters to boycott the hearings and pay no attention to the report" because it lacked bipartisan direction.³⁷²

Those who rejected same-sex marriage claimed that the civil union statute satisfied *Baker*, same-sex marriage failed to affect the purpose of the institution—raising children, and allowing same-sex nuptials contradicted biblical truths.

During the legal issues session of the Commission's meeting at Vermont Law School, Professor Greg Johnson and Professor Michael Mello, experts on civil unions, and Professor Peter Teachout, an expert on the Vermont Constitution provided testimony.³⁷³ Mello recommended the Commission

³⁶⁷ *Id.* at 7 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

³⁶⁸ *Id.* at 7–8.

³⁶⁹ *Id.* at 5, 19.

³⁷⁰ *Id.* at 5, 7–8, 14, 19.

³⁷¹ Daniel Barlow, *Vt. Panel Considers Same-Sex Nuptials*, RUTLAND HERALD (Aug. 24, 2007), <http://www.rutlandherald.com/articles/vt-panel-considers-same-sex-nuptials/>.

³⁷² *Id.*

³⁷³ OFFICE OF LEGIS. COUNCIL, *supra* note 366, at 17.

follow the lead of the Massachusetts Supreme Judicial Court when it rejected legislators' attempt to create civil unions for same-sex couples in lieu of marriage. Mello stated:

A more profitable enterprise would be to study the *effects* of civil unions as a substitute for marriage. This is precisely what the Massachusetts court did in *Goodridge II*. The court recognized that the good intentions of civil unions legislators were beside the point. The Commission should do so as well.³⁷⁴

Mello concluded that if the Vermont General Assembly failed to provide equal marriage to same-sex couples, it would provoke a second round of litigation challenging the constitutionality of civil unions. He predicted the Vermont Supreme Court would ultimately find the civil union regime impermissible under the Vermont Constitution, just as the Massachusetts Supreme Judicial Court rejected civil unions under the Massachusetts Constitution.³⁷⁵ Professor Johnson echoed Mello's call for the Commission to look to Massachusetts's example, explaining that that state's high court borrowed from the civil rights movement of the 1950s and 1960s to scold the Massachusetts Legislature's attempt to create marriage by another name for same-sex couples:

The dissimilitude between the terms "civil marriage" and "civil union" is not innocuous; it is considered a choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to a second-class status . . . The [civil union] bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits . . . The history of our nation has demonstrated that separate is seldom, if ever, equal.³⁷⁶

For his part, Professor Teachout examined the litigation in Massachusetts and litigation percolating in the Connecticut courts, parsing the different tools of interpretation and constitutional texts that might lead courts to reach various outcomes on the question of equal marriage versus civil unions.³⁷⁷ Teachout testified that while *Baker* mandated equality between same-sex couples and opposite-sex couples, the Vermont General Assembly had room under the decision to examine what constituted "equality" and take appropriate action.³⁷⁸

The Commission made a series of findings in its final report, most notably that extending marriage to same-sex couples would offer LGB Vermonters access to intangible benefits of significant consequence. In giving same-sex couples access to the terminology of martial relationships that hold "social, cultural and historical significance," the state would make a "strong statement of full inclusion."³⁷⁹ Further, the Commission found that affording same-sex couples equal marriage rights would likely "enhance the portability of the

³⁷⁴ *Id.* at app. F. at 51.

³⁷⁵ *Id.* at 22–23.

³⁷⁶ *Id.* at 18–19 (alterations in original) (emphasis omitted).

³⁷⁷ *Id.* at 20.

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 27.

underlying legal consequences of the status.”³⁸⁰ However, the Commission declined to recommend to the Vermont General Assembly whether to take action on legislation that would make marriage equality a reality.³⁸¹ The Commission nevertheless encouraged lawmakers to consider four issues before taking action including whether the legislature could change the tax filing system to ease the burden on civil union couples, what impact access to marriage would have on same-sex couples who had already entered into civil unions, whether same-sex couple child rearing had any scientifically verifiable impact on children, and what impacts the Massachusetts law had on LGB couples:

What has been the experience of the Massachusetts lesbian and gay couples who have married under Massachusetts law? Are these couples successfully obtaining all of the rights, privileges, and benefits of marriage—under Massachusetts law, federal law, and the laws of other states? Are their marriages more readily understood and more portable than a Vermont civil union?³⁸²

House Speaker Gaye Symington appointed Johannah Donovan to the Commission seat representing the House because Donovan was both a supporter of equal marriage and a devout Catholic. Though she pointed out that “*Baker* started the conversation,” marriage equality advocates benefited from the “right [legislative] leadership in the right places at that time.”³⁸³ One of leadership’s priorities was to continue that conversation by forming the Commission. The Commission’s work was a success in Donovan’s eyes because it offered a forum to exchange personal stories and bring added normalcy to marriage rights for same-sex couples. But, she explained that *Baker* paved the way:

Without *Baker* and without civil unions, we probably wouldn’t have gotten there. I remember people in my church coming up to me and saying, “We’re okay with civil unions but you don’t [] need to go to marriage.” And I said to them a few years back you were uncomfortable with civil unions and that the same would be true for marriage. It was all just part of an evolutionary process for people.³⁸⁴

Former House Judiciary Chairman Tom Little, who chaired the Commission, agreed that there was relatively little opposition expressed throughout the hearings. His pulse on Vermonters’ attitudes, like Donovan’s, indicated to him that equal rights for same-sex couples accrued legitimacy and opponents’ desire to fight another battle waned. Little said, “After civil unions were in effect for five or six years they said it isn’t that bad or the sky

³⁸⁰ *Id.*

³⁸¹ *Id.* at 28–29.

³⁸² *Id.* at 28.

³⁸³ Telephone Interview with Johannah Donovan, Vt. State Rep. (May 23, 2016).

³⁸⁴ *Id.*

doesn't fall or these are my neighbors, and so some of them just [] didn't want to fight another battle over it."³⁸⁵

Many Vermont legislators cautiously watched developments in Massachusetts and elsewhere in the wake of the *Baker* decision and subsequent civil union legislation. Between 2000 and 2009, courts in Connecticut, Iowa, and California joined Massachusetts and extended the freedom to marry to same-sex couples.³⁸⁶ The once "progressive" civil union law in Vermont now lagged behind and some elected officials began to rethink Vermont law in light of the new marriage rulings. At the same time, the pushback against marriage equality energized the Vermont Freedom to Marry Task Force. The success of Proposition 8 in November 2008, banning same-sex marriage in California, "was a real wake up call to us here in Vermont and it really helped motivate our people in the field," Beth Robinson said.³⁸⁷

State legislators paid attention to national developments, too. Republican Heidi Schuermann's consideration of equal marriage rights began with *Baker*, but her focus on the issue was heightened by momentum in other states. Schuermann said, "Knowing we had civil unions, which at the time I thought they essentially gave all the rights and protections to gay and lesbian couples that marriage did, [] I didn't give it much thought. So, after Massachusetts and Iowa, it came to the forefront more and more."³⁸⁸

House Speaker Shap Smith likewise observed that the judicial decisions legalizing same-sex marriage might have shifted the dynamic in Montpelier. "People here have seen what [marriage equality] looks like and realized it doesn't harm anybody," Smith said.³⁸⁹ Beth Robinson echoed a similar perspective, telling Fox News in 2009 that "the fact that we're not dealing with an unknown, that we can look at our neighboring states and see that families are stronger and nobody has lost anything, that makes it a lot harder for folks to argue against it here."³⁹⁰

After courts ruled in favor of marriage equality in California, Connecticut, and Massachusetts, in the fall of 2008, then-Speaker-designate Smith knew he had a sufficient number of votes to enact marriage equality in both chambers of the legislature. For him, "[T]he question was whether

³⁸⁵ Telephone Interview with Tom Little, *supra* note 166.

³⁸⁶ See *In re Marriage Cases*, 183 P.3d 384, 398 (Cal. 2008) (applying the California Constitution); *Kerigan v. Comm'r of Pub. Health*, 957 A.2d 407, 411 (Conn. 2008) (applying the Connecticut Constitution); *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009) (applying the Iowa Constitution).

³⁸⁷ Democracy Now, *In Historic Vote, Vermont Legislature Legalizes Gay Marriage (Video 2 of 2)*, YOUTUBE (Apr. 8, 2009), <https://www.youtube.com/watch?v=AvZih25IOR8>.

³⁸⁸ Telephone Interview with Heidi Schuermann, Vt. State Rep. (June 28, 2012).

³⁸⁹ Philip Shishkin, *Vermont House Backs Gay Marriage*, WALL ST. J. (Apr. 3, 2009, 12:01 AM), <http://www.wsj.com/articles/SB123871484665384529>.

³⁹⁰ Fox News, *Governor Sununu Discusses Same-Sex Marriage in New Hampshire*, YOUTUBE (Apr. 6, 2009), <https://www.youtube.com/watch?v=z31W-7XTsrw>.

the bill would be vetoed or not and we thought about it. It was not clear that the votes were for an override.”³⁹¹

Marriage equality advocates’ challenges were twofold. First, advocates had to persuasively demonstrate that civil unions were insufficient substitutes for marriage. On this point, Beth Robinson noted:

We were in a different position because the rhetorical conversation we were having. We were not moving from a place of nothing to a place of marriage. The challenge we had was persuading people that even in a world of civil unions that it was worth revisiting the conversation even though it was painful for the state the first time around.³⁹²

The second hurdle advocates needed to overcome was assuring legislators that marriage equality would not enflame social strife, like some perceived the civil union law did in 2000. Representative Mark Larson, who along with David Zuckerman introduced the 2009 marriage equality legislation, focused on a political messaging strategy to ease legislators’ nerves. Larson said that the Take Back Vermont episode in 2000 created lasting scars that required tending to: “We were concerned that because civil unions had been such a dramatic process, people were worried that marriage equality would cause us to revisit all the trials and tribulations of passing civil unions. The challenge was trying to show people that it wouldn’t be as bad as civil unions.”³⁹³

Few observers doubted the prospects for marriage equality’s success in the Vermont Senate. Claire Ayer, a Democrat and the Senate Majority Whip, had a good feeling about the odds in the Senate where members “generally voted on party lines.”³⁹⁴ Ayer said, “We had it all along because we had a 23-7 majority. It was a slam dunk in the Senate.”³⁹⁵ The Senate under the leadership of Senate President Peter Shumlin, Majority Leader David Campbell, and Ayer quickly pushed a same-sex marriage bill through their chamber. It won unanimous approval from the Senate Judiciary Committee and sailed through a 26-4 floor vote.³⁹⁶

Governor Jim Douglas weighed in after the Senate’s passage and committed to veto the legislation during the House’s deliberations. Governor Douglas’s announcement stoked fears that his premature intervention might destabilize the House’s work. Senate President Peter Shumlin implored the governor to reconsider by highlighting developments across the states:

³⁹¹ Telephone Interview with Shap Smith, *supra* note 247.

³⁹² Telephone Interview with Beth Robinson, *supra* note 72.

³⁹³ Telephone Interview with Mark Larson, Vt. State Rep. (June 26, 2012).

³⁹⁴ Telephone Interview with Clair Ayer, *supra* note 248.

³⁹⁵ *Id.*

³⁹⁶ See Abby Goodnough, *Vermont Senate Panel Approves Same-Sex Marriage Bill*, N.Y. TIMES (Mar. 20, 2009), <https://www.nytimes.com/2009/03/21/us/21vermont.html>; Bob Kinzel, *Same-Sex Marriage Advocates Work to Veto-Proof the Vote*, VT. PUB. RADIO (Mar. 27, 2009, 5:50 PM), http://www.vpr.net/news_detail/84529/same-sex-marriage-advocates-work-to-veto-proof-vot/.

That was a huge fight 9 years ago and what the governor seems to have missed is that Connecticut and Massachusetts allow marriage now the New Hampshire House I never thought I'd see this passed it yesterday . . . I thought that the way the debate happened in the Senate was a reflection of how things have changed we saw folks who never would have voted for civil unions 9 years ago stand up and vote for this marriage equality bill.³⁹⁷

Concerns about the House were unfounded. The House Judiciary Committee sent the legislation to the floor by an 8-2 vote.³⁹⁸ On the House floor, legislators in opposition offered robust defenses of tradition, while those in favor talked about constitutional rights, equality, and civil rights. Representative Kesha Ram compared civil unions to segregated drinking fountains.³⁹⁹ Gary Gilbert, a legislator from rural Fairfax, told the House that he was duty bound to vote in favor of the legislation no matter his personal views:

Simply because I, as an individual believe that marriage is a sacrament and chose to be married within a church, does not mean that everyone must have the same beliefs. . . . The choice to marry is a public declaration of a personal choice . . . I cannot deny the rights to others that I claim for myself. As a legislator, I must uphold the Vermont and U.S. Constitutions and my Oath of Office. I support this bill.⁴⁰⁰

The bill passed the House 94-52 and was promptly vetoed.⁴⁰¹ The next day, the House attempted to override, which would require an additional six votes. The veto override succeeded on a 100-49 vote.⁴⁰² It was only the seventh time a Vermont governor's veto was overridden.⁴⁰³ One of the additional votes came from Republican Richard Westman, who voted against the civil unions bill in 2000. When asked how he came to support equal marriage rights, Westman said he was "dragged along with the rest of society." He recalled:

I think the marriage legislation was anti-climactic because the die had been cast in many respects in *Baker*, and Vermonters had made a decision that we were going to recognize the rights of same-sex couples to marry. I think the *Baker* decision and civil unions and the incremental decisions we faced with health care and insurance and where same-sex couples fit had brought us to a place. I think that the jolting decision had been the one about civil unions and so what happened in other places [like Massachusetts

³⁹⁷ *Id.*

³⁹⁸ Ross Sneyd, *House Committee Endorses Same-Sex Marriage; Debate Set for Thursday*, VT. PUB. RADIO (Mar. 31, 2009, 4:37 PM), www.vpr.net/news_detail/84561/house-committee-endorses-same-sex-marriage-debate/.

³⁹⁹ VT. STATE CLERK OF H., VOTE EXPLANATION HISTORY, S. 115, 70th Sess. (2009).

⁴⁰⁰ *Id.*

⁴⁰¹ Keith B. Richburg, *Vermont Legislature Legalizes Same-Sex Marriage*, WASH. POST (Apr. 7, 2009, 2:23 PM), www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040701663.html.

⁴⁰² *Id.*

⁴⁰³ Ross Sneyd, *Vermont Legalizes Same-Sex Marriage*, VT. PUB. RADIO (Apr. 7, 2009, 5:54 PM), www.vpr.net/news_detail/84629/vermont-legalizes-same-sex-marriage/.

and Iowa] mattered a little less. Even with the people who were opposed there was an acceptance of the decision.⁴⁰⁴

In Vermont, advocates ushered in legislation for equal marriage after fourteen years of grassroots labor paired with litigation. When Bill Lippert and Beth Robinson were asked what factors made 2009 different from 2000, Lippert emphasized the importance of more openly LGB legislators who were able to tell their colleagues their stories.⁴⁰⁵ Lippert also noted the lifting was less heavy in 2009 because the baseline of support ballooned. During the post-*Baker* debate, only twenty-two members of the House supported full marriage recognition. In 2009, Lippert had fifty-nine co-sponsors.⁴⁰⁶

Despite benefiting from greater rank-and-file member enthusiasm, holding the House coalition together and overriding Governor Douglas's veto—the first overridden veto in nineteen years—were uphill challenges since advocates needed to expand their margin of victory. Robinson, for her part, pointed to the same-sex marriage decision in Iowa as an important factor that kept the coalition glued together. The *Varum* decision “really drove home the inevitability of full equality for same-sex couples,” she said.⁴⁰⁷ Robinson opined further that the “urge to closure” on the issue was an important boon for the override when legislators realized LGB Vermonters would not simply give up fighting for equal relationship recognition if the veto was sustained.⁴⁰⁸

F. Maryland

Two weeks before the Minnesota Supreme Court rejected Richard Baker and James McConnell's appeal challenging Minnesota's marriage laws,⁴⁰⁹ the Maryland Legislature Special Committee on Family Law and Domestic Relations (“Special Committee”) convened to consider a comprehensive list of concerns related to marriage eligibility.⁴¹⁰ The Special Committee's original agenda was limited to sundry issues, among them the clerks' ability to demand proof of age, the administration of blood tests, and the status of common law marriages.⁴¹¹ The only witness to testify before the Special Committee, the Maryland Association Clerks of Court President Vaughn Baker, raised the question of same-sex marriage.⁴¹²

⁴⁰⁴ Telephone Interview with Richard Westman, *supra* note 159.

⁴⁰⁵ Telephone Interview with Bill Lippert, *supra* note 244; Telephone Interview with Beth Robinson, *supra* note 72.

⁴⁰⁶ Democracy Now, *supra* note 387.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ See *supra* notes 36–41 and accompanying text.

⁴¹⁰ Frank Young, *Panel Ponders Same Sex Marriages*, EVENING CAPITAL (Annapolis, Md.), Sept. 27, 1972, at 1.

⁴¹¹ *Id.*

⁴¹² *Id.*

The Special Committee met again in October 1972. This time the agenda officially included same-sex marriage in addition to regulations concerning a woman's right to keep her maiden name after marriage. According to media reports at the time, no witnesses testified—either for or against—the same-sex marriage agenda item.⁴¹³ When the Maryland General Assembly convened in 1973, the body enacted Senate Bill 122, which limited valid marriages as those contracted between a man and a woman.⁴¹⁴ Maryland was the first state to expressly ban same-sex marriage.

The issue was dormant in Maryland's legislature until 2003, when a newly elected member of the House took the issue up with the hope of following Vermont's lead. Richard Madaleno was elected from Montgomery County to the House of Delegates. He was the first openly gay person elected to the Maryland General Assembly.⁴¹⁵ Madaleno, later elected to the Maryland Senate in 2006, recalled his first effort to move same-sex relationship recognition forward:

Vermont had just moved forward with civil unions and there was a lot of talk about civil unions. When I was first elected in 2002, one of the first bills I requested to draft was to take the Vermont civil unions approach and draft it. People were deathly afraid of it. We toyed around with the issue of Equality Maryland, which was then Free State Justice. I was on the Board of the group. The big goal of that group was to pass an anti-discrimination law, which we did in 2001 and then we had to deal with a referendum. The organization went through reorganization and we fumbled around a little bit until civil unions were the big thing on the table. And all of the sudden the Massachusetts Supreme Court suddenly allowed civil union[s] and the conversation moved from civil union[s] to marriage.⁴¹⁶

Unlike Massachusetts, however, Maryland's journey toward the freedom to marry met judicial defeat. Senator Madaleno recalled that legislative intransigence—made bleaker by Republican Governor Robert Ehrlich's opposition to equal marriage—made litigation appealing:

From 2002 to 2006, we had a Republican governor and several of our judges; we knew four of our seven judges on the Court of the Appeals would be retiring. So we decided to move on a court case because that seemed like the more likely route for getting something done than the legislature at that time, especially with a Republican governor. We figured with his approval ruling so high we couldn't move forward. At that time, we saw efforts in New York and Washington and the hope was maybe we could get some momentum with other states using the same logic.⁴¹⁷

⁴¹³ *Legislators Asked to View Name Game*, CUMBERLAND NEWS, Oct. 20, 1972, at 3.

⁴¹⁴ David Goeller, *Dullest Legislature in Memory Ends Today*, DAILY TIMES (Salisbury, Md.), Apr. 10, 1973, at 6.

⁴¹⁵ See Lou Chibbaro, *Two 'Credible' Gay Candidates May Run for Md. Gov.*, WASH. BLADE (March 10, 2017), <http://www.washingtonblade.com/2017/03/10/richard-madaleno-maryland-guv/>.

⁴¹⁶ Telephone Interview with Richard Madaleno, Md. State Sen. (May 25, 2016).

⁴¹⁷ *Id.*

In September 2007, the Maryland Court of Appeals ruled that because sexual orientation discrimination did not constitute a suspect class and because the denial of marriage rights to same-sex couples did not implicate a fundamental right, the State of Maryland met its low burden under rational basis to limit marriage to heterosexual couples.⁴¹⁸ In response to the court's decision, the head of the statewide LGBT rights organization, Dan Furman-sky, Executive Director of Equality Maryland, announced two legislators would introduce marriage legislation in 2008 and said:

This court case has been more than just about using all branches of government to remedy discrimination. . . . It's been about educating legislators and neighbors about the harms faced by same-sex couples and their children because of the inability to marry. We fully intend to fight for fair and equal protection under the law for our families.⁴¹⁹

However, Maryland is a referendum state.⁴²⁰ And so with a legislative strategy came a serious risk that any legislative success could be overturned by popular referendum. Legislators devised a plan to cautiously lead the state toward equal marriage through a stealth education campaign and incremental policy changes. Now in the Maryland Senate, Madaleno and other LGBT activists mapped out a new plan of attack:

And once [the Maryland Court of Appeals] decision came down in 2007, that's when the focus came back to marriage and we decided to use a strategy [conceived] by lobbyists we called the "Bill and Bob strategy." Bill was the big bill we would pursue to get marriage. The Bob component was about starting to break down marriage into its various components. Because family law goes to one committee and we have few committees, we wanted to break it down. We wanted to break down marriage into various components so that every committee would have to hear testimony on the legislation. By 2010, my colleagues would say I'm so done with every year dealing with more and more gay bills.⁴²¹

In 2008, the General Assembly enacted legislation that created domestic partnerships, granting limited enumerated rights to non-married couples, both heterosexual and homosexual, provided they met a series of qualifications.⁴²² But as advocates predicted, marriage legislation was slow in the coming. Indeed, despite the liberal nature of the state, Maryland's stumbling block on marriage legislation came from portions of the state heavily populated by African-American communities, which staunchly opposed same-sex marriage.⁴²³

⁴¹⁸ *Conaway v. Deane*, 932 A.2d 571 (Md. 2007), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁴¹⁹ Sean R. Sedam, *Maryland's High Court Upholds Ban on Same-Sex Marriage*, GAZETTE (Sept. 18, 2007) (quotation marks omitted), http://ww2.gazette.net/stories/091807/montnew123618_32369.shtml.

⁴²⁰ MD. CONST. art. XVI.

⁴²¹ Telephone Interview with Richard Madaleno, *supra* note 416.

⁴²² 2008 Md. Laws Ch. 590.

⁴²³ See Aaron C. Davis, *Maryland Senate Passes Same-Sex Marriage Bill*, WASH. POST (Feb. 23, 2012), <https://www.washingtonpost.com/local/md-politics/maryland-senate-passes-same-sex-marriage->

The first major push for the main marriage bill came in 2011. That legislation successfully passed the Senate, but it was a number of votes short in the House. The House leadership decided to debate the legislation despite the lack of votes and then hold it over until the following year.⁴²⁴ The Speaker of the House and other members heading the efforts determined that they were more likely to sway indecisive members leaning against the legislation in 2012 if they were not forced to go on the record as opposing the legislation.⁴²⁵ In the interim year, advocates benefited from a more active role by Governor O'Malley and a successful pro-marriage movement in New York. "The Governor got fully engaged in the issue. Once it got passed in New York on a bipartisan basis that helped too," Speaker Michael Busch emphasized.⁴²⁶ The legislation was successful in 2012, passing the House of Delegates in a dramatic 72-69 vote, and then withstanding a popular referendum in the November election.⁴²⁷

In Maryland, a number of factors influenced the legislative process. A significant number of legislators viewed marriage equality legislation as an extension of civil rights, consistent with the rights consciousness thesis. However, New York legalizing same-sex marriage boosted advocates' push in 2012. Not only did key players in Maryland point to New York's landmark law as a reason for the state's progress, but also legislators used the New York Marriage Equality Act's religious exemptions as a pattern for Maryland's law.⁴²⁸ Litigation appears to have had the least impact on legislative developments in Maryland than in other states, perhaps due to the timing of legislation and the state's physical distance from jurisdictions with successful marriage litigation.

G. *Marriage Without Courts?*

Thus far, this section has offered evidence that courts wielded significant influence that benefited the marriage equality movement in state legislatures

bill/2012/02/23/gIQAfbaWR_story.html?noredirect=on&utm_term=.7924a893d94e.

⁴²⁴ See Sabrina Tavernise, *Same-Sex Marriage Bill Falls Short in Maryland*, N.Y. TIMES (Mar. 11, 2011), <https://www.nytimes.com/2011/03/12/us/12marriage.html>.

⁴²⁵ Telephone Interview with Michael E. Busch, Speaker, Md. House of Delegates (July 3, 2012).

⁴²⁶ *Id.*

⁴²⁷ See Sabrina Tavernise, *In Maryland, House Passes Bill to Let Gays Wed*, N.Y. TIMES (Feb. 17, 2012), www.nytimes.com/2012/02/18/us/maryland-house-approves-gay-marriage-measure.html; John Wagner et al., *Vote on Maryland Same-Sex Marriage Law is Close*, WASH. POST (Nov. 8, 2012), https://www.washingtonpost.com/local/md-politics/vote-on-maryland-same-sex-marriage-law-is-close/2012/11/07/35fac54-282f-11e2-96b6-8e6a7524553f_story.html?noredirect=on&utm_term=.6abba6f50fbc.

⁴²⁸ See John Wagner, *Md. Gov. O'Malley Inclined to Sponsor Same-Sex Marriage Bill*, WASH. POST (July 15, 2011), https://www.washingtonpost.com/local/dc-politics/md-gov-omalley-inclined-to-sponsor-same-sex-marriage-bill/2011/07/15/gIQAPf4uGI_story.html?utm_term=.0404ad321aaa&wprss=rss_maryland.

before *United States v. Windsor*.⁴²⁹ The record does not indicate that the courts alone were responsible for moving the cause forward. Rather, this section offers detailed analysis suggesting the courts were critical in moving legislatures and, as a consequence, the nation towards equal marriage. But, what if the courts failed to intervene? Would equal marriage rights for same-sex couples have come about absent litigation?

If pro-LGB state laws proliferated before same-sex marriage litigation, then it might be said that same-sex marriage would have advanced absent judicial intervention. Consider civil rights laws that protect against sexual orientation discrimination in employment, housing, and public accommodations. These laws are the best metric of policy trends because they do not implicate government-backed discrimination or constitutional claims. Thus, they are entirely discretionary policies.

Before 2003 when *Lawrence* and *Goodridge* were decided, only fourteen states enacted sexual orientation antidiscrimination laws.⁴³⁰ New Mexico became the fifteenth state with such a law in 2003.⁴³¹ A majority of Americans did not live in jurisdictions that adopted civil rights legislation prohibiting private LGB anti-discrimination until the Oregon Equality Act took effect in 2008.⁴³² Many of these laws lingered for years before they were successfully adopted. New York, for example, enacted the Sexual Orientation Nondiscrimination Act (“SONDA”) in 2002,⁴³³ though it was initially proposed in 1971 and died without seeing any action.⁴³⁴ SONDA first secured approval in the New York Assembly in 1993 only to meet a near decade of cold reception by the New York Senate.⁴³⁵ Similarly, legislation in Maryland failed for eight successful legislative sessions before passing in 2001.⁴³⁶

Before 1997, no state provided any statewide status to same-sex relationships. Few states saw any progression on relationship recognition before 1997 either. Before 1997, attempts to provide enumerated rights to non-

⁴²⁹ 133 S. Ct. 2675 (2013). For a discussion of *Windsor*, see *supra* notes 103–112 and accompanying text.

⁴³⁰ See JEROME HUNT, CTR. FOR AM. PROGRESS ACTION FUND, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES 3–4 (2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf (highlighting the fourteen states that had enacted sexual orientation antidiscrimination laws: California (1992), Colorado (1990), Connecticut (1991), Hawaii (1991), Maryland (2001), Massachusetts (1989), Minnesota (1993), Nevada (1999), New Hampshire (1997), New Jersey (1992), New York (2002), Rhode Island (1995), Vermont (1992), and Wisconsin (1982)).

⁴³¹ *Id.* at 3.

⁴³² Oregon Equality Act, 2007 Or. Laws. Ch. 100

⁴³³ HUNT, *supra* note 430, at 65.

⁴³⁴ *N.Y. Gay Rights Bill Passes*, N.Y. TIMES (Dec. 17, 2002), www.nytimes.com/2002/12/17/nyregion/ny-gay-rights-bill-passes.html?mcubz=0.

⁴³⁵ *Id.*

⁴³⁶ *Id.*

marital couples failed in Washington, D.C., California, and Hawaii.⁴³⁷ Congress blocked the District of Columbia's 1992 domestic partnership law that extended hospital visitation rights and insurance options for municipal employees until 2002.⁴³⁸ The California Legislature passed limited protections for unmarried couples including hospital visitation rights, property rights, and decision-making rights in the event of a partner's incapacitation.⁴³⁹ Governor Pete Wilson vetoed that bill.⁴⁴⁰ No state before *Baker* offered same-sex couples relationship recognition akin to marriage. No state prior to *Goodridge* extended the freedom to marry to same-sex couples. Thus, while a slow march progressed on civil rights protections in housing, employment, and public accommodations, these legislative victories were hard wrought.

Though no state gave formal sanction to same-sex relationships prior to 1996, a handful of jurisdictions did take important steps to provide tangible benefits to non-marital relationships, primarily for the domestic partners of municipal employees. The first high-profile attempt to extend limited benefits to same-sex domestic partners was in 1982.⁴⁴¹ That legislation was passed by the San Francisco City Council and vetoed by Mayor Diane Feinstein.⁴⁴² In 1985, Berkeley, California extended equal benefits to the non-marital partners of city employees.⁴⁴³ Three years later, Los Angeles offered sick and bereavement leave to unwed city workers in relationships, including same-sex couples.⁴⁴⁴

In July 1989, the New York Court of Appeals ruled 4-2 that the legal definition of a family included a same-sex couple under New York City's rent-control regulations.⁴⁴⁵ The court held that after considering a non-marital couple's exclusivity and longevity, emotional and financial commitment to one another, the manner in which they held themselves in public, and their routines of daily life, if it appeared that a couple functioned as a family it should be considered as such.⁴⁴⁶ Ruling for Miguel Braschi, who was in a same-sex relationship, the majority reasoned that the law's treatment of a

⁴³⁷ See ESKRIDGE, *supra* note 9, at 14–15 (discussing the failure to secure passage of a robust domestic partnership law in Washington, D.C.); *id.* at 23 (discussing similar failure in Hawaii); Jerry Gillam, *Panel Rejects Establishing Right to Breast-Feed in Pubic*, L.A. TIMES (Mar. 31, 1995), http://articles.latimes.com/1995-03-31/news/mn-49148_1_public-safety-committee (noting that the Judiciary Committee of the California Assembly rejected a measure which would have given same-sex couples the ability to register as domestic partners).

⁴³⁸ See ESKRIDGE, *supra* note 9, at 14–15.

⁴³⁹ *Id.* at 14.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 13.

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ Scott Harris, *Council OKs Leave for Unwed Partners*, L.A. TIMES (Oct. 6, 1988), articles.latimes.com/1988-10-06/local/me-4291_1_sick-leave.

⁴⁴⁵ *Braschi v. Stahl Ass'ns Co.*, 543 N.E.2d 49, 53–54, 61 (N.Y. 1989).

⁴⁴⁶ *Id.* at 53–54.

family “should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.”⁴⁴⁷

The attorney for the American Civil Liberties Union who argued on behalf of *Braschi*, William Rubenstein, said that the ruling “mark[ed] the most important single step forward in American law toward legal recognition of lesbian and gay relationships.”⁴⁴⁸ Indeed, the ruling had at least one important consequence. The New York State Division of Housing and Community Renewal promulgated a new rule to expand the *Braschi* rule statewide, marking the first time a statewide entity recognized a same-sex couple—along with other non-marital couples—as a family.⁴⁴⁹ State legislators announced their intentions to codify the rule in a state statute and celebrated the *Braschi* decision.⁴⁵⁰

The following week, New York City Mayor Ed Koch announced he would issue an executive order to expand benefits to the non-marital partners of city employees. Koch, however, emphasized that his executive order had “nothing to do with gay rights.”⁴⁵¹ Koch said that the “largest number of people eligible will be heterosexuals living together as couples but not married, elderly people living with companions, people who have a domestic relationship but not necessarily sexual relations.”⁴⁵² The move was nevertheless significant and, according to advocates at the time, well ahead of private companies.

In May 1989, San Francisco enacted an ordinance providing sick and bereavement leave to city employees’ domestic partners.⁴⁵³ That ordinance

⁴⁴⁷ *Id.* at 53.

⁴⁴⁸ Philip S. Gutis, *New York Court Defines Family to Include Homosexual Couples*, N.Y. TIMES (July 7, 1989), <http://www.nytimes.com/1989/07/07/nyregion/new-york-court-defines-family-to-include-homosexual-couples.html>.

⁴⁴⁹ Dennis Hevesi, *Court Extends ‘Family’ Rule to Rent-Stabilized Units*, N.Y. TIMES (Dec. 6, 1990), <http://www.nytimes.com/1990/12/06/nyregion/court-extends-family-rule-to-rent-stabilized-units.html> (quoting ACLU attorney William Rubenstein, who noted: “These state regulations are really the first we know of in the country in which a statewide authority has defined family in a such broad, meaningful and realistic manner, including the recognition of lesbian and gay families.”).

⁴⁵⁰ See Alexander B. Grannis, Editorial, *Apartments Rules Will Stop Landlords from Heartless Evictions; Legislative Inaction*, N.Y. TIMES (Jan. 10, 1990), <http://www.nytimes.com/1990/01/10/opinion/1-apartments-rules-will-stop-landlords-heartless-evictions-legislative-inaction-691590.html> (explaining how the *Braschi* decision influenced changes in housing regulations); Franz S. Leichter & William F. Passannante, Editorial, *To Free Nonmarried Couples from Legal Limbo*, N.Y. TIMES (Dec. 27, 1989), <http://www.nytimes.com/1989/12/27/opinion/1-to-free-nonmarried-couples-from-legal-limbo-898989.html> (declaring a state senator and a state assemblyman’s intent to introduce legislation to change the definition of family in rent-control laws to include domestic partners).

⁴⁵¹ Celestine Bohlen, *Koch Widens City’s Policy on ‘Family,’* N.Y. TIMES (July 10, 1989), <http://www.nytimes.com/1989/07/10/nyregion/koch-widens-city-s-policy-on-family.html>.

⁴⁵² *Id.*

⁴⁵³ Katherine Bishop, *San Francisco Grants Recognition to Couples Who Aren’t Married*, N.Y. TIMES, May 13, 1989, at A17.

was petitioned for referendum. Proponents of the domestic partner ordinance pledged to “quote the New York decision in their campaign literature during the fall referendum battle.”⁴⁵⁴ The campaign was unsuccessful. Despite voters rejecting the law in 1989, San Franciscans ratified a revised version of the policy in a 1990 referendum.⁴⁵⁵

Given the evidence in its totality, whatever favorable localized trends recorded for domestic partnerships prior to 1996 cannot be said to have been an emerging policy trend absent judicial influence.

H. The Legislative Response Before Windsor

Under the Constrained Court model of judicial efficacy, as articulated by Rosenberg, “[I]f judicial decisions supporting same-sex marriage can survive political backlash then . . . the judiciary’s lack of the power of implementation, does not come into play.”⁴⁵⁶ This metric of efficacy works to the extent that it measures the sustainability of judicial rulings in light of legislators’ political will to overturn them. That analysis, however, overlooks the extent to which legislators are either influenced by courts from other jurisdictions or civil rights case law that is tangentially related to the issue at hand.

The courts of last resort in Iowa, Massachusetts, New Jersey, and Vermont rendered decisions that were successful, in part, because there was sufficient strength in legislative leadership to resist calls to amend their respective state constitutions. Consistent with what the political reinforcement thesis predicts, the amount of political support for the underlying court decisions was proportional to the courts’ efficacy. The Massachusetts and Iowa decisions were the least dependent on support from the political branches because these courts left legislators no option but to accept equal marriage, defy the court, or embrace a constitutional amendment banning same-sex marriage. Conversely, the New Jersey and Vermont courts allowed the political branches to exercise some degree of discretion in crafting a remedy.

The significant role leadership played in these jurisdictions is hard to overstate. This is particularly true in Iowa and Massachusetts, where leadership repeatedly stymied attempts to attack pro-marriage equality rulings by blocking any votes on proposed constitutional amendments outright. By

⁴⁵⁴ Dick Polman, *Partners in Love But Not in Law*, PHILA. INQUIRER, July 30, 1989.

⁴⁵⁵ Compare Kevin Roderick & Victor Zonana, *3 Bay Area Gays Win Elections; Domestic Partners Law Approved*, L.A. TIMES (Nov. 8, 1990), articles.latimes.com/1990-11-08/news/mn-5391_1_domestic-partner (noting the passage of a domestic partners law in San Francisco), with Victor F. Zonana, *Gay Agenda Takes Beating—Even in San Francisco*, L.A. TIMES (Nov. 9, 1989), http://articles.latimes.com/1989-11-09/news/mn-1424_1_gays-san-francisco (reporting that San Franciscan voters “narrowly rejected a law that would have permitted unmarried “domestic partners” to register their relationships at City Hall).

⁴⁵⁶ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 350 (2d ed. 2008).

erecting a roadblock for marriage equality opponents, leadership allowed decisions to marinate with rank-and-file members and their constituents, weakening the opposition to court rulings. In Massachusetts pro-amendment organizers lost the wind in their sails within three years of *Goodridge* taking effect, and in Iowa formidable legislative resistance nearly dissipated within five years of *Varnum*. In these states, the courts' rulings had greater durability because knee-jerk constitutional amendments were unavailable.

While the legislative support reinforces the idea that courts' efficacy in social movements improves with greater legislative support, what fails to be addressed is the extent to which the courts helped tamp down opposition through a legitimization effect, aided by legislative stall tactics. In other states like New Jersey, the leadership helped galvanize support for same-sex marriage, where it had failed before. However, neighboring jurisdictions' advancement of equal marriage for LGB people also contributed to the shifting dynamics, particularly in New Jersey.

In Hawaii, Vermont and New Jersey, litigation advanced the ball by expanding relationship recognition for same-sex couples, albeit with mixed success. The initial bout of litigation in Hawaii prompted legislators to create a new state-recognized relationship status that provided limited rights and benefits, though without substantial long-term obligations, to same-sex couples. At the same time that Hawaiian legislators sanctioned LGB relationships, they also submitted a proposed state constitutional amendment to thwart the state supreme court from extending the freedom to marry. However, that amendment was less damaging to the movement than others because it neither prohibited marriage nor statuses substantially similar to marriage. By contrast, litigation in Alaska resulted in a total loss, where the litigation prompted a wholesale prohibition on same-sex marriage in the Alaska Constitution.

Importantly, Vermont gave life to the concept of enacting a substantially similar institution for same-sex relationship recognition after *Baker*. Vermont and New Hampshire also set an example for other states that civil unions could be used as a springboard for marriage legislation down the road. Prior to 2013, Washington legislators gradually expanded domestic partnership recognition to build support for equal marriage rights. Hawaii, Illinois, and Rhode Island also adopted civil union statutes prior to adopting marriage in 2013. Civil unions or similar state-recognized relationships in Connecticut, California, Colorado, Nevada, New Jersey, and Oregon provided important tangible benefits to same-sex couples until courts intervened to mandate equal marriage.

Prior to 2013, relationship recognition for same-sex couples in Hawaii, Vermont, Massachusetts, New Jersey, Connecticut, and Iowa was directly attributable to judicial intervention. While thousands of couples in California were able to avail themselves of marriage rights in the window between the California Supreme Court's decision and Proposition 8, California would not recognize same-sex marriage for nearly five years after voters constitutionally proscribed

it. Thus, the windfall of the California Supreme Court's decision extending marriage rights to same-sex couples yielded a benefit to some couples.

Courts shaped legislative developments in neighboring states. In Vermont, a number of key participants in the successful enactment of equal marriage traced their decision-making process back to the *Baker* decision. Numerous legislators in Vermont and New Hampshire looked to developments in Massachusetts in the aftermath of *Goodridge* in rationalizing their decision to support same-sex marriage. In Maine, the state's governor, who had previously expressed opposition to equal marriage, heeded the equal protection analysis of neighboring courts and his staff to support his decision to become the first governor to sign same-sex marriage into law.

Even failed litigation had some net gains in the legislative process. Legislation to adopt same-sex marriage was sometimes introduced only after a state constitutional challenge to the state's domestic relations statute was rejected. In Washington, litigation influenced key actors in Washington's road to same-sex marriage, including the governor who defended the constitutionality of the state's marriage law. As the record indicates, legislators were motivated by a host of other factors in addition to courts, including personal connections with LGB persons, religious values, and experiences in other civil rights causes. For some legislators the inclusion of religious exemptions for religious institutions and organizations enabled them to support pro-LGB marriage laws. In a number of jurisdictions the presence of openly-LGB elected officials—particularly those in positions of leadership—shaped the climate in favor of equal marriage.

Legislators often looked to other jurisdictions and heavily relied on legal rationales to justify their positions to advance same-sex marriage legislation. In Maryland, numerous legislators pointed to New York's decision to legalize same-sex marriage in 2011 as a catalyst for action in Annapolis. Legislators in Maine, New Hampshire, and Vermont kept a watchful eye on events in one another's political circles while also keeping tabs on the fallout of equal marriage in Massachusetts. In the first jurisdictions to move on same-sex marriage, litigation increased the issue's saliency for many of the leaders on the marriage question.

One common denominator across all of these states is that the success of equal marriage legislation or sustaining equal marriage rulings was deeply tied to leadership. Litigation had a profound influence on legislative leaders in New England and was extensively cited in California. In some jurisdictions, like New York, general principles of equal protection were used to justify votes in favor of same-sex marriage. For the most part, these legislators did not speak specifically to any one state or case as motivating their vote. Nevertheless, it seems unlikely that constitutional arguments in favor of same-sex marriage would have carried the weight had courts routinely cast aside litigation, leaving same-sex couples without a single victory. Much

more common were legislators using civil rights cases from the 1950s and 1960s (typically *Brown v. Board of Education* and *Loving v. Virginia*) to legitimize their votes to legalize same-sex marriage. This rhetoric is evidence of rights consciousness. Legislators do not draw these connections to suggest same-sex marriage is simply good policy. Rather, proponents of equal marriage emphasized the bridge between *Brown*, *Loving*, and same-sex marriage to frame the issue as a matter of fundamental rights.

As with any legislative body, ascribing a single motive or a handful of motives to legislative action is a challenging task. Elected officials often used courts and constitutional principles to reinforce their decisions. As the interviews referenced above suggest, the two most important roles courts had were raising awareness about equal marriage rights and legitimizing supporters' invocations of a constitutionally mandated extension of the freedom to marry.

V. FORMS AND LIMITS OF EXECUTIVE AND ADMINISTRATIVE ACTION

After *Goodridge* was handed down in 2003,⁴⁵⁷ a flurry of activity followed in municipalities and executive branch offices across the nation. Local officials pressed the issue of same-sex marriage rights and statewide elected officials reacted to shifting political dynamics. This Part assesses the motivations for these localized sparks of activism and the longer-term impact they had between 2003 and 2012. In addition, this Part will examine the other executive and administrative action pursued by statewide officials to advance same-sex marriage in addition to the impact those policies had for the same-sex marriage movement. In this Part, we will use these developments to test the political reinforcement, administrative implementation, and rights consciousness hypotheses.

The Constrained Court Theory does not anticipate courts mobilizing individuals to assert rights or empower grassroots actors. Conversely, the rights consciousness thesis offers the competing vision that courts can make particular issues more salient. By bringing awareness to a rights-related claim and galvanizing others to make similar claims, courts can inject momentum into social reform movements. If this expectation materializes in the same-sex marriage movement, the evidence should indicate that executive actors and public administrators are induced or encouraged by litigation to advocate on behalf of same-sex couples' rights. If the Constrained Court Theory is right, then we should not see much movement within the immediate stretch of time that social reform litigation is taken up and/or resolved.

⁴⁵⁷ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). For a discussion of *Goodridge*, see *supra* notes 78–79.

Looking at states where litigation successfully dismantled discriminatory marriage laws, we can test the political reinforcement and administrative implementation hypotheses. Here, we should expect to see, consistent with the Constrained Court Theory, that the stronger the support from executive officers and public administrators, the more effective a court's ruling. Further, if the facts reveal evidence that elected officials' views on marriage shifted along with the courts, that pattern may be explained by legitimization theory. Finally, we should find that public administrators charged with the implementation of same-sex marriage adhered to judicial mandates because the court rulings required minor administrative adjustments and noncomplying persons would encumber significant financial penalties.

This Part will focus on the states where litigation successfully ended marriage discrimination against same-sex couples or where the status quo was disrupted. We will begin with the state that saw the greatest amount of post-*Goodridge* activity—California.

A. California

In 2004, San Francisco's newly elected mayor, Gavin Newsom, attended the State of the Union as a guest of Representative Nancy Pelosi. President George W. Bush's January 20 address fell within the 180-day window the Massachusetts Supreme Judicial Court created between its decision in *Goodridge* and the decision's effect. Perhaps the decision to legalize civil same-sex nuptials was already weighing on Newsom's mind. At least one media profile of Mayor Newsom suggested that after the Massachusetts decision in November 2003 "gay Californians urged their state's politicians to take similar steps" as the Massachusetts justices.⁴⁵⁸

Regardless of the extent to which Newsom was considering the merits of *Goodridge*, it was hardly an escapable topic at the 2004 State of the Union. Bush's speech sharply condemned the litigation attacking same-sex couples' exclusion from marriage and the Massachusetts decision to extend the freedom to marry:

A strong America must also value the institution of marriage. . . .

....

Activist judges, however, have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people's voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.⁴⁵⁹

⁴⁵⁸ Jonathan Darman, *SF Mayor Gavin Newsom Risks Career on Gay Marriage*, NEWSWEEK (Jan. 16, 2009, 7:00 PM), <http://www.newsweek.com/sf-mayor-gavin-newsom-risks-career-gay-marriage-78439>.

⁴⁵⁹ *Text of President Bush's 2004 State of the Union Address*, WASH. POST (Jan. 20, 2004), http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html.

That the Bush Administration considered using the State of the Union as a platform to denounce equal marriage rights for same-sex couples was no surprise given that 2004 was an election year. While Bush stopped short of endorsing a federal marriage amendment to the Constitution by the time of the State of the Union, Republican Senate Majority Leader Bill Frist of Tennessee had called for one.⁴⁶⁰ Senate Democratic Minority Leader Tom Daschle of South Dakota rejected a federal marriage amendment, supporting the existing provisions of the 1996 Defense of Marriage Act.⁴⁶¹ None of Bush's slate of potential Democratic opponents endorsed equal marriage, including Senator John Kerry,⁴⁶² who hailed from Massachusetts, and Howard Dean, who signed the Vermont civil union bill into law.⁴⁶³

Newsom took umbrage over President Bush's attack on equal marriage and the *Goodridge* decision. "I was at the State of the Union," he said, "and I felt a real resolve on this issue," Mayor Newsom would later tell the press.⁴⁶⁴ What Newsom could—or would—do remained an open question. According to a February 2004 interview with *The New York Times*, Newsom, who was a businessman prior to his foray into politics, did some basic legal research:

When Mr. Newsom returned to San Francisco, he said, he read the court decisions that authorized gay marriage in Massachusetts, as well as the United States Supreme Court ruling last year on sodomy. As he mulled those precedents and Mr. Bush's comments, he said, he became convinced that he had a moral obligation to open the doors to same-sex marriages.⁴⁶⁵

Within two weeks of his Washington, D.C. trip, he asked top staffers to consider if and how the city's clerks could issue same-sex marriage licenses. Newsom's staff began researching the question and collected a database of

⁴⁶⁰ See *Frist Backs Constitutional Ban on Gay Marriage*, USA TODAY (June 29, 2003, 3:34 PM), http://usatoday30.usatoday.com/news/washington/2003-06-29-frist-gay-marriage_x.htm# (discussing Senator Bill Frist's support for a constitutional amendment to ban same-sex marriage).

⁴⁶¹ Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2012); 28 U.S.C. § 1738C (2012)), *invalidated by* *Obergefell v. Hodges*, 135 S. Ct. 2584, (2015), and *United States v. Windsor*, 133 S. Ct. 2675 (2013); see Carl Hulse & David D. Kirkpatrick, *The 2004 Campaign: The Marriage Issue; Conservatives Press Ahead on Anti-Gay Issue*, N.Y. TIMES (July 9, 2004), <http://www.nytimes.com/2004/07/09/us/the-2004-campaign-the-marriage-issue-conservatives-press-ahead-on-anti-gay-issue.html> (explaining several senators' opposition to a federal marriage amendment).

⁴⁶² See Hulse & Kirkpatrick, *supra* note 461.

⁴⁶³ Marc Sandalow, *Dean Supports Gay Unions but Wavers on Saying 'I Do' / Presidential Hopeful Stresses Equal Rights Over Choice of Words*, SF GATE (Dec. 2, 2003, 4:00 AM), <http://www.sfgate.com/politics/article/Dean-supports-gay-unions-but-wavers-on-saying-I-2510382.php>.

⁴⁶⁴ Rachel Gordon, *The Battle Over Same-Sex Marriage / Uncharted Territory / Bush's Stance Led Newsom to Take Action*, SF GATE (Feb. 15, 2004, 4:00 AM), <http://www.sfgate.com/news/article/THE-BATTLE-OVER-SAME-SEX-MARRIAGE-Uncharted-2823315.php>.

⁴⁶⁵ Dean E. Murphy, *San Francisco Mayor Exults in Move on Gay Marriage*, N.Y. TIMES (Feb. 19, 2004), <http://www.nytimes.com/2004/02/19/us/san-francisco-mayor-exults-in-move-on-gay-marriage.html>.

legal documents, media reports, and other relevant materials while Newsom reached out to LGBT rights leaders.

On Monday, February 9, Newsom's senior aids met with representatives from the ACLU, the National Center for Lesbian Rights, and Equality California about the legal and political dynamics of the mayor's decision to marry same-sex couples. The group assembled talking points, centering on a position that denying same-sex couples marriage licenses was unconstitutional, and developed a strategy for implementation.⁴⁶⁶

The following day, Newsom's administration issued a letter to the San Francisco County Clerk, requesting she take appropriate action to issue marriage licenses without regard to applicants' sex or sexual orientation. Newsom's letter emphasized the existing protections safeguarded by the California courts and the California Constitution against sex and sexual orientation discrimination, as well as making non-specific references to court decisions in Hawaii, Vermont, and Massachusetts. Newsom wrote:

I swore to uphold the Constitution of the State of California. . . . The California courts have interpreted the equal protection clause of the California Constitution to apply to lesbians and gay men The Supreme Courts in other states have held that equal protection provisions in their state constitutions prohibit discrimination against gay men and lesbians with respect to the rights and obligations flowing from marriage. It is my belief that these decisions are persuasive and that the California Constitution similarly prohibits such discrimination.

Pursuant to my sworn duty to uphold the California Constitution, including specifically its equal protection clause, I request that you determine what changes should be made to the forms and documents used to apply for and issue marriage licenses in order to provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation.⁴⁶⁷

While Newsom's letter garnered media attention, the mayor did not offer a timeline for when he wanted to implement a plan of action to issue same-sex couples marriage licenses. Newsom only let two days lapse between his letter to the county clerk when San Francisco officials blessed the first same-sex weddings.⁴⁶⁸

The reaction among the local gay and lesbian community was euphoric. Their unbridled enthusiasm was on display for national consumption. Within the first nine days of San Francisco opening the doors to same-sex couples, more than 3200 couples received marriage licenses.⁴⁶⁹ According to Molly

⁴⁶⁶ See Gordon, *supra* note 464.

⁴⁶⁷ Letter from Gavin Newsom, Mayor of S.F., to Nancy Alfaro, S.F. Cty. Clerk (Feb. 10, 2004), <http://www.foxnews.com/story/2004/02/17/raw-data-sf-mayor-letter-to-county-clerk.html>.

⁴⁶⁸ See *State High Court May Get Same-Sex Marriage*, CNN (Feb. 24, 2004), <http://www.cnn.com/2004/LAW/02/23/same.sex.marriage/index.html?iref=mpstoryview> (noting marriages began on February 12, 2004).

⁴⁶⁹ *Mayor Defends Same-Sex Marriages*, CNN: LAW CENTER (Feb. 22, 2004, 10:51 PM), <http://www.cnn.com/2004/LAW/02/22/same.sex/>

McKay, the founder of Marriage Equality California, Newsom did for these couples what the LGB community had yet to achieve for themselves:

Newsom put same-sex couples on the radar screen of the nongay world in a way those couples had never been before. He allowed an opportunity to see real-life couples being impacted in a way that no paid-for advertising campaign or national gay and lesbian spokesperson could ever do. It was so real, and to have all these couples wrapping around the block, standing gout in the elements. . . .

It changed the nature of the debate.⁴⁷⁰

Newsom credited his decision to move forward on nondiscriminatory marriage licenses to George W. Bush's rejection of *Goodridge*. "We're reacting to the president's decision to use this as a wedge issue to divide people. I think what he's doing is wrong. It's hurtful," Newsom said.⁴⁷¹

President Bush returned the favor, floating to the media that as he marinated on whether to support a federal constitutional amendment banning same-sex marriage, he had a watchful eye on Newsom's civil disobedience. Less than a week after San Francisco began marrying same-sex couples, President Bush said:

I have watched carefully what's happened in San Francisco, where licenses were being issued even though the law states otherwise. I have consistently stated that if—I'll support law[s] to protect marriage between a man and a woman. And obviously these events are influencing my decision.⁴⁷²

Within a week, Bush endorsed enshrining opposite-sex marriage in the federal constitution.⁴⁷³

Openly gay Massachusetts Representative Barney Frank was unnerved by Newsom's defiance of state law, believing it would set back the marriage movement and energize conservatives in the lead up to the November 2004 elections. Indeed, eleven states backed state constitutional amendments banning same-sex marriage, which Frank blamed on San Francisco's "spectacle weddings."⁴⁷⁴ Frank believed if San Francisco had waited for court approval of same-sex marriages before issuing marriage licenses—as Massachusetts had—

⁴⁷⁰ DANIEL R. PINELLO, *AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE* 79 (2006).

⁴⁷¹ *Mayor Defends Same-Sex Marriages*, *supra* note 469.

⁴⁷² *President Bush Discusses Mass/San Francisco Marriage Issues*, WHITE HOUSE (Feb. 18, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/02/print/text/20040218-6.html>.

⁴⁷³ Elisabeth Bumiller, *Same-Sex Marriage: The President; Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES (Feb. 25, 2004), <https://www.nytimes.com/2004/02/25/us/same-sex-marriage-the-president-bush-backs-ban-in-constitution-on-gay-marriage.html>.

⁴⁷⁴ Dean E. Murphy, *Some Democrats Blame One of Their Own*, N.Y. TIMES (Nov. 5, 2004) (internal quotation marks omitted), http://www.nytimes.com/2004/11/05/politics/campaign/some-democrats-blame-one-of-their-own.html?_r=1.

that “there would have been some collateral damage” to Democrats’ electoral prospects and equal marriage efforts, but it would have been “a lot less.”⁴⁷⁵

While Barney Frank’s preferred approach favoring litigation may have been inevitable, it was now on a fast track. Organized interest groups had contemplated filing a lawsuit challenging California’s marriage laws before Newsom took action, and litigation was now certain to follow. Indeed, the “proceed with caution” approach to litigation all but evaporated between the events in Massachusetts and San Francisco.⁴⁷⁶ One noteworthy civil rights activist, Kate Kendell of the National Center for Lesbian Rights, said in 2004 that “California was in the queue” but that the group “probably would have waited another year or year and a half” had Mayor Newsom not intervened in the interim.⁴⁷⁷ Kendell told the *Washington Post* that “fate dealt a different hand.”⁴⁷⁸ When interviewed on the impact of the Massachusetts litigation on events in the Bay Area, Kendell said:

Had it not been for Massachusetts, even considering the President’s State of the Union in isolation, I don’t think the Mayor would have done what he did. Moreover, Bush might not have said what he did [in the State of the Union] without Massachusetts. After all, what else did his mentioning “activist judges” refer to?

I think that Mayor Newsom felt this was the way the issue was trending and that Massachusetts should not be out ahead of California. I think he felt that what he was doing was consistent with progressive ideology around equal protection of laws and full inclusion and fairness. The Massachusetts ruling provided a foundation for him to build on. It’s my suspicion that he would not have done what he did if there were a complete vacuum.⁴⁷⁹

San Francisco Board of Supervisors President Aaron Peskin backed up Kendell’s observation on the impact of *Goodridge*. “The Massachusetts state supreme court . . . decisions clearly gave Mayor Newsom license to commit an act of municipal civil disobedience in San Francisco[.]” he said.⁴⁸⁰

⁴⁷⁵ *Id.*

⁴⁷⁶ See William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 289 (2013) (explaining that California lawyers changed their “avoid-litigation” strategy and filed constitutional challenges after *Goodridge* was decided in May 2003, and Mayor Newsom began issuing hundreds of gay marriage licenses in February 2004); see also Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1281 (2010) (noting that Mayor Newsom’s decision to issue gay marriage licenses prompted lawyers to initiate constitutional challenges where they had previously “labored to carefully control the timing and nature of any marriage challenge”).

⁴⁷⁷ Joe Dignan, *Gay Couples Challenge Calif. Marriage Law*, WASH. POST (Dec. 23, 2004) (internal quotation marks omitted), <http://www.washingtonpost.com/wp-dyn/articles/A21052-2004Dec22.html>.

⁴⁷⁸ *Id.*

⁴⁷⁹ Pinello, *supra* note 274.

⁴⁸⁰ PINELLO, *supra* note 470, at 184 (internal quotation marks omitted).

When asked to rank the most important developments in the same-sex marriage movement between 2003 and 2004, Sherri Sokeland Kaiser, a deputy city attorney for the City and County of San Francisco, said:

[N]othing could be more important than having a state that legally provides marriage to same-sex couples on the basis of the very constitutional concerns that are being raised in many other states. [*Goodridge*] and the humanizing influence it's going to have as more and more couples in Massachusetts get married, and the sky doesn't fall, and marriage doesn't lose its meaning for anyone The more it just becomes an accepted and normal and really unremarkable event in Massachusetts, the more that's going to be an increasingly powerful example for other states, such as California, to follow.⁴⁸¹

Similarly, San Francisco Board of Supervisors President Aaron Peskin pointed to the primacy of judicial legitimization in the advancement of the same-sex marriage movement between 2003 and 2004. Peskin ranked *Goodridge* as the most important factor because it “ultimately started the domino effect of acceptability. San Francisco was important symbolically. But Massachusetts catalyzed judicial activism.”⁴⁸²

With Newsom and the Massachusetts justices interrupting the preexisting strategic plan for impact litigation in California, other legal support organizations prepared to step in and file litigation. Lambda Legal, for example, publicly offered to defend same-sex couples wanting to ensure the validity of their San Francisco marriages.⁴⁸³ The City also prepared to attack the state's domestic relations regime and filed suit alleging the exclusion of same-sex couples from marriage rights violated state constitutional rights, only ten days after city officials met with LGBT rights leaders.⁴⁸⁴

Anti-gay marriage organizations also prepared for litigation in wake of Newsom's provocation. The Proposition 22 Legal Defense and Education Fund and the Campaign for California Families requested judicial relief—an injunction binding the City from issuing more licenses to same-sex couples.⁴⁸⁵ Responding slowly, a state trial court refused to stop the marriages, finding the plaintiffs failed to demonstrate irreparable harm.⁴⁸⁶ Noticeably absent from the litigation up to this point was Attorney General Bill Lockyer, who vowed to defend the state's law but publicly aired his disagreement with

⁴⁸¹ *Id.* at 186 (third alteration in original).

⁴⁸² Pinello, *supra* note 274 (internal quotation marks omitted).

⁴⁸³ Lee Romney, *Defiant San Francisco Marries Dozens of Same-Sex Couples*, L.A. TIMES (Feb. 13, 2004), <http://articles.latimes.com/2004/feb/13/local/me-marry13>.

⁴⁸⁴ David Mattingly, *San Francisco Challenges State's Same-Sex Marriage Ban in Court*, CNN (Feb. 19, 2004), <http://www.cnn.com/2004/LAW/02/19/samesex.marriage/index.html?iref=mpstoryview>.

⁴⁸⁵ Francie Grace, *Judges Delay, Gay Marriages On*, CBS NEWS (Feb. 19, 2004, 10:31 PM), <http://www.cbsnews.com/news/judges-delay-gay-marriages-on/>.

⁴⁸⁶ *California Judge Denies Immediate Stay of Gay Marriages*, N.Y. TIMES (Feb. 20, 2004), www.nytimes.com/2004/02/20/national/california-judge-denies-immediate-stay-of-gay-marriages.html?_r=0.

its treatment of same-sex couples. Lockyer said that he “personally [did not] support policies that g[a]ve lesser legal rights and responsibilities to committed same-sex couples.”⁴⁸⁷

The day following Lockyer’s statement, Governor Schwarzenegger demanded Lockyer take action against city officials. That same day, Schwarzenegger told a gathering of Republicans:

We rely upon our courts to enforce our rule of law, but we’re seeing in San Francisco that the courts are dropping the ball.

....

While we wait for the courts to act, it’s time for the City of San Francisco to start respecting state law. It is time for the city to stop traveling down this dangerous path of ignoring the rule of law.⁴⁸⁸

The California Attorney General subsequently filed with the California Supreme Court to enjoin San Francisco from issuing marriage licenses to same-sex couples.⁴⁸⁹

On March 11, 2004, the California Supreme Court halted marriages not expressly permitted by state law pending further resolution.⁴⁹⁰ Mayor Newsum and the City complied. In August, the California high court unanimously ruled San Francisco officials acted outside of their authority by refusing to enforce the family law code under the premise it was unconstitutional, since no court of competent jurisdiction struck down the licensing requirements.⁴⁹¹ The court ruled, 5-2, that because civil marriage contracts were clearly defined as between a man and a woman under state law and city officials acted beyond their authority, the nearly 4,000 same-sex licenses issued in the month that the city went unchecked were void.⁴⁹²

The outcome in this case, which is fundamentally one about municipal powers and statutory interpretation, is unremarkable because there was little doubt that municipal authorities lacked the power to alter domestic relations law. The real surprise is the degree to which the courts gave San Francisco officials slack to continue defying state law while litigation percolated. In some

⁴⁸⁷ Harriet Chiang & John Wildermuth, *Governor Demands End to Gay Marriage / Lockyer Told to Act Against S. F.’s Same-Sex Licenses*, SF GATE (Feb. 21, 2004, 4:00 AM), <http://www.sfgate.com/news/article/Governor-demands-end-to-gay-marriage-Lockyer-2793095.php> (internal quotation marks omitted).

⁴⁸⁸ Rusty Dornin & David Mattingly, *Same-Sex Marriages Break for Weekend*, CNN (Feb. 21, 2004, 6:43 PM) (internal quotation marks omitted), <http://www.cnn.com/2004/LAW/02/21/same.sex/>.

⁴⁸⁹ Evelyn Nieves & Michelle Garcia, *Calif. Court Won’t Halt Gay Marriages*, WASH. POST (Feb. 28, 2004), <http://washingtonpost.com/wp-dyn/articles/A13697-2004Feb27.html>.

⁴⁹⁰ *Lockyer v. City of San Francisco*, 95 P.3d 459, 467 (Cal. 2004).

⁴⁹¹ *Id.* at 464 (holding that “local officials in San Francisco exceeded their authority by taking official action in violation of applicable statutory provisions,” since “in the absence of a judicial determination that such statutory provisions are unconstitutional, local executive officials” lacked authority to issue same-sex marriage licenses).

⁴⁹² *Id.* at 499, 503.

sense, the unusual leeway comports with the notion of judges preferring incremental change as the precedent thesis states. Though the 4,000 licenses issued to same-sex couples in this window were not valid, the courts' complicity reads more like an attempt to nudge the public toward accepting equal marriage before constitutional challenges to state family law were decided on the merits.

Newsom's bold move was accompanied by the introduction of legislation during the second week of the San Francisco marriages in the California Legislature. State Assemblyman Mark Leno of San Francisco introduced a bill to legalize same-sex marriage in California.⁴⁹³ Leno also participated in the city marriage defiance movement and was deputized to perform marriages on behalf the city. He solemnized over 100 marriages.⁴⁹⁴ Leno described his legislative work as part and parcel to Newsom's defiance. "It's a one-two punch," Leno said.⁴⁹⁵ Leno nevertheless pledged to defer to the House Speaker's judgment on whether his bill would receive a hearing. The House Speaker's spokesman conveyed the Speaker's wishes to "wait to see how lower courts ruled on the constitutionality of gay marriage before deciding whether to allow Leno's bill a hearing."⁴⁹⁶

Leno, however, was not reacting to Newsom as much as he was acting in tandem—both men shared the same motivation stemming from the Bush Administration's hostility toward the *Goodridge* decision in Massachusetts. In fact, Leno made clear weeks before the San Francisco marriage rush that he was aghast over the State of the Union address and what he perceived as the politicization of equal marriage rights:

It was disgraceful for the president of the United States to pander to his radical right-wing supporters out of his own concerns for re-election This puts me and my community in the position of taking one of two actions: Either continually playing defense or taking proactive steps. Rather than playing defense and explaining why we don't need a constitutional amendment, this (legislation) moves forward in a positive fashion.⁴⁹⁷

⁴⁹³ Salladay, *supra* note 343.

⁴⁹⁴ See Jane Meredith Adams, *Gay Couples Line Up for Chance to Wed: In San Francisco, City Officials Issue First Licenses in US*, BOS. GLOBE (Feb. 13, 2004), http://archive.boston.com/news/specials/gay_marriage/articles/2004/02/13/gay_couples_line_up_for_chance_to_wed/ (reporting that Leno was among the first to officiate a same-sex marriage); see also Joe Dignan, *Way Out Front: Gavin Newsom's Isolation Signifies the Uneven Ripples of the Marriage Debate*, 3 GAY CITY NEWS (Feb. 26–Mar. 3, 2004), https://gaycitynews.nyc/gcn_309/wayoutfront.html (reporting that Leno had conducted over 150 ceremonies).

⁴⁹⁵ Rachel Gordon, *Newsom's Plan for Same-Sex Marriages / Mayor Wants to License Gay and Lesbian Couples*, SF GATE (Feb. 11, 2004, 4:00 AM) (internal quotation marks omitted), <http://www.sfgate.com/news/article/Newsom-s-plan-for-same-sex-marriages-Mayor-2824329.php>.

⁴⁹⁶ Maura Dolan & Lee Romney, *High Court Halts Gay Marriages*, L.A. TIMES (Mar. 12, 2004) (internal quotation marks omitted), <http://www.latimes.com/la-me-timelinegaymarriage-2004mar12-story.html>.

⁴⁹⁷ Rona Marech, *Leno to Counter Bush on Gay Marriage / Bill Would Recognize Licenses, Boost Benefits*, SF

For his part, Governor Schwarzenegger's position on same-sex marriage appeared to soften during the time that marriages continued in San Francisco contrary to state law. A week before the California Supreme Court stopped Newsom and his allies from issuing more licenses to same-sex couples, Schwarzenegger was a guest on Jay Leno's national evening program. When asked if he inherently opposed equal marriage rights for same-sex couples, the Governor responded, "No, I don't have a problem. Let the court decide. Let the people decide."⁴⁹⁸ He also expressed disagreement for calls to federally ban same-sex marriage by constitutional amendment. While the Governor's new tepid demeanor towards changing the state's domestic relations law fell well short of an endorsement, Newsom believed it was significant to the extent that it helped "soften the opposition."⁴⁹⁹

The most crucial executive action in California came in 2009. After the California Supreme Court ruled that the state constitution required equal marriage rights for same-sex couples, state voters initiated a constitutional amendment to overturn the decision. That initiative, Proposition 8, was successful on Election Day in November 2008. Governor Schwarzenegger opposed Proposition 8 prior to its ratification, calling it a "waste of time" and preferring to give deference to the state courts' judgment.⁵⁰⁰ The governor stopped short of endorsing equal marriage. Meanwhile, the state's attorney general, Jerry Brown, personally opposed Proposition 8, but pledged to defend it in the lead up to November 2008.⁵⁰¹

The proposition's success prompted days of protests by pro-LGBT Californians. Less than a week after voters backed the amendment to take away marriage rights from same-sex couples, Schwarzenegger expressed a change of heart on the merits on equal marriage. "It's unfortunate, obviously, but

GATE (Jan. 24, 2004, 4:00 AM) (internal quotation marks omitted), <http://www.sfgate.com/politics/article/Leno-to-counter-Bush-on-gay-marriage-Bill-would-2807553.php>.

⁴⁹⁸ Joe Mathews, Peter Nicholas & Nancy Vogel, *Governor Says Law Permitting Gay Marriage Would Be 'Fine,'* L.A. TIMES (Mar. 2, 2004) (internal quotation marks omitted), <http://articles.latimes.com/2004/mar/02/local/me-marry2>.

⁴⁹⁹ Dean E. Murphy, *Schwarzenegger Backs Off His Stance Against Gay Marriage*, N.Y. TIMES (Mar. 3, 2004), <http://www.nytimes.com/2004/03/03/us/schwarzenegger-backs-off-his-stance-against-gay-marriage.html> (internal quotation marks omitted).

⁵⁰⁰ John Marelius, *Same-Sex Marriage Ban 'Waste of Time'; Governor Vows Fight if Initiative on Ballot*, SAN DIEGO UNION-TRIB., (Apr. 12, 2008), <http://legacy.sandiegouniontribune.com/news/metro/20080412-9999-1m12gov.html> (internal quotation marks omitted); see also Maura Dolan, *Schwarzenegger Decides Against Defending Prop. 8 in Federal Court*, L.A. TIMES (June 18, 2009), <http://articles.latimes.com/2009/jun/18/local/me-gay-marriage18> (discussing Governor Schwarzenegger's view that a determination of the constitutionality of Proposition 8, a measure banning same-sex marriage, should be left to the discretion of the California courts).

⁵⁰¹ See *Jerry Brown Wants Proposition 8 Gay Marriage Ban Overturned*, MODESTO BEE (Dec. 19, 2008), <http://www.modbee.com/news/article3116539.html> (stating that California Attorney General Jerry Brown stated that even though he personally did not support Proposition 8, he would fight to uphold it).

it's not the end . . . I think that we will again maybe undo that, if the court is willing to do that, and then move forward from there and again lead in that area," the governor said.⁵⁰²

The American Foundation for Equal Rights funded a federal court challenge alleging Proposition 8 violated the U.S. Constitution's Fourteenth Amendment.⁵⁰³ That group, represented by David Boies and Ted Olson, backed the federal case. This is a noteworthy development that satisfies a condition of the support-structure hypothesis—the legal community elite staunchly supported same-sex couples' litigation. More than influential private practitioners attacking Proposition 8, the state's top executives refused to defend the law.⁵⁰⁴ Consequently, the same-sex marriage ban's defense was in the hands of intervening parties that supported the campaign backing Proposition 8. Schwarzenegger told the federal district court that the suit brought by two same-sex couples against the marriage amendment "presents important constitutional questions that require and warrant judicial determination."⁵⁰⁵ Taking a more aggressive track than the governor's relative neutrality, Attorney General Brown argued that Proposition 8 violated the fundamental rights of LGB couples.⁵⁰⁶

These critical decisions in 2009 and 2010, to not defend Proposition 8 and not appeal the decision striking it down, carried great significance. At trial, Proposition 8's proponents abjectly failed to produce any substantive defense of the law. Proponents offered only two witnesses to support the constitutional amendment—both witnesses were by all accounts ineffective and ill prepared.⁵⁰⁷

The thin amount of evidence presented in support of Proposition 8, despite Judge Vaughn Walker's prodding for a more vigorous defense, was damning. Judge Walker's 138-page ruling thoroughly dismantled the justifications proffered by the defense. Legal experts roundly expected the decision to survive the test of time. One high-profile Proposition 8 supporter concluded Walker's work product was too persuasive to be overturned, while same-sex marriage

⁵⁰² Michael Rothfeld & Tony Barboza, *Governor Backs Gay Marriage*, L.A. TIMES (Nov. 10, 2008), <http://articles.latimes.com/print/2008/nov/10/local/me-protest10> (internal quotation marks omitted).

⁵⁰³ Kate Mather, *Rob Reiner, Gay Marriage Activist, 'Elated' by Prop. 8 Ruling*, L.A. TIMES (June 29, 2013), articles.latimes.com/2013/jun/29/local/la-me-ln-activist-rob-reiner-elated-with-prop-8-ruling-20130629.

⁵⁰⁴ *Jerry Brown Wants Proposition 8 Gay Marriage Ban Overturned*, *supra* note 501.

⁵⁰⁵ Dolan, *supra* note 500 (internal quotation marks omitted).

⁵⁰⁶ *Jerry Brown Wants Proposition 8 Gay Marriage Ban Overturned*, *supra* note 501.

⁵⁰⁷ See, e.g., Maura Dolan, *Testimony Ends in Same-Sex Marriage Trial*, L.A. TIMES (Jan. 28, 2010), <http://articles.latimes.com/2010/jan/28/local/la-me-prop8-trial28-2010jan28> (noting that, during the "lopsided" same-sex marriage trial, a defense attorney admitted that his side was "out-gunned" because a number of defense witnesses made "critical" concessions or were unable to support the view that same-sex marriage hurts traditional marriage).

advocates celebrated the decision as a major turning point because of its dedication to detail.⁵⁰⁸ In the end, the state's nondefense proved dispositive for the litigation's outcome. The U.S. Supreme Court ruled in 2013 that the interveners lacked Article III standing to appeal Judge Walker's ruling.⁵⁰⁹

B. *The Emerging of National Civil Disobedience*

The ramifications of Newsom's civil disobedience rippled across the nation, consistent with the expectations of the rights consciousness thesis that predicts judicial rulings can help fuel an awareness of emerging legal claims and bring them into mainstream discourse. A number of mayors applauded Newsom. Chicago's Mayor Richard Daley said he had "no problem" with Cook County issuing same-sex marriage licenses.⁵¹⁰ Cook County Clerk David Orr refused to issue licenses to gay couples, though he personally supported marriage rights for gay couples. "We feel the law must change either by the Illinois General Assembly or by the [state] Supreme Court, as was done in Massachusetts," a spokesman for Orr said.⁵¹¹ Orr's withholding of licenses to gay couples drew protests to the Cook County Clerk's Office.⁵¹² Supporters of marriage equality held a sit-in on the first day that Massachusetts began marrying same-sex couples in May 2004.⁵¹³

In Manhattan, hundreds of LGB activists took to the streets and demanded the mayor take a position on marriage.⁵¹⁴ New York City Mayor Michael Bloomberg waded into the controversy offering strong support for civil unions, but left the door open to equal marriage. Bloomberg equivocated, "I think the term 'marriage' is what is polarizing people, and as I say, I've gone back-and-forth."⁵¹⁵

⁵⁰⁸ John Eastman, a conservative legal scholar and Proposition 8 supporter, said Judge Walker's opinion would sway the Supreme Court, saying, "I think Justice Kennedy is going to side with Judge Walker." Maura Dolan & Carol J. Williams, *Ban on Gay Marriage Overturned*, L.A. TIMES (Aug. 5, 2010), <http://articles.latimes.com/2010/aug/05/local/la-me-gay-marriage-california-20100805>.

⁵⁰⁹ *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

⁵¹⁰ *San Francisco Gay Weddings Excite Activists, Unsettle Politicians*, GAINESVILLE SUN, Feb. 20, 2004, at 6A (internal quotation marks omitted).

⁵¹¹ Kathryn Masterson, *Gay-marriage Backers Get Daley's Signature*, CHI. TRIB. (Oct. 29, 2004) (internal quotation marks omitted), http://articles.chicagotribune.com/2004-10-29/news/0410290156_1_gay-marriage-marriage-licenses-same-sex-marriage.

⁵¹² *Id.*

⁵¹³ *Id.*

⁵¹⁴ *See Gay Couples March on Manhattan*, CNN (Mar. 5, 2004), <http://www.cnn.com/2004/US/03/04/same.sex.main/> (describing unrest over denial of marriage licenses in New York City in March of 2004 for gay and lesbian couples).

⁵¹⁵ *NYC Mayor Favors Civil Unions, Not Gay Marriage*, NBCNEWS.COM, (Mar. 6, 2004, 3:24:36 PM), http://www.nbcnews.com/id/4397854/ns/us_news-same_sex_marriage/t/nyc-mayor-favors-civil-unions-not-gay-marriage/#.WXC9IYTythG (internal quotation marks omitted).

The rights consciousness chain reaction went beyond local leaders speaking out on equal marriage rights. Following the acts of municipal defiance in California, same-sex couples in other states took to the courts. In Washington, a King County Administrator encouraged couples that wanted to marry to file suit against him challenging Washington's marriage law.⁵¹⁶ On March 8, 2004, six couples applied for marriage licenses in King County and were denied at the direction of King County Administrator Ron Sims. Lambda Legal filed suit challenging the Washington law under state constitutional grounds the same day.⁵¹⁷

Later on March 8, Seattle Mayor Greg Nickels issued an executive order recognizing municipal employees who lawfully married a same-sex partner outside Washington.⁵¹⁸ Nickels also took the opportunity to propose an amendment to Seattle's nondiscrimination law.⁵¹⁹ The Mayor recommended the definition of "marital status" specifically be amended to include same-sex married couples.⁵²⁰ Nickels and his supporters hoped the city could then require equal benefits for gay and straight employees' spouses for private employers, but it was never adopted.⁵²¹

According to Lambda Legal's lead attorney on the case, Jamie Pedersen, who would play a significant role in advancing LGBT rights in the Washington Legislature, litigation was contemplated for some time in Washington. But, the *Goodridge* decision in Massachusetts and local efforts to issue marriage licenses pushed them to act earlier than originally planned. "The explosion of support for gay marriage across the country absolutely made us move faster. . . . The train was leaving the station and we could either be on it, or be chasing it," Pedersen said.⁵²²

⁵¹⁶ See Curt Woodward, *Gay Marriage Case Began with Unusual Call*, WASH. POST (Jul. 29, 2006, 2:56 PM), http://www.washingtonpost.com/wp-dyn/content/article/2006/07/29/AR2006072900485_pf.html (detailing the collaborative filing of strategic lawsuits against King County executive Ron Sims in order to challenge a Washington state ban on gay marriage).

⁵¹⁷ See *id.*; see also Gene Johnson, *Gay Seattle City Workers Get Boost*, BOS. GLOBE (Mar. 9, 2004), http://archive.boston.com/news/specials/gay_marriage/articles/2004/03/09/gay_seattle_city_workers_get_boost/; Kathy George, *Nickels Helps Out Same-Sex Marriage*, SEATTLE POST-INTELLIGENCER (Mar. 7, 2004, 10:00 PM), www.seattlepi.com/local/article/Nickels-helps-out-same-sex-marriage-1138886.php. (noting that Lambda Legal handled the suit along with the Northwest Women's Law Center).

⁵¹⁸ See Johnson, *supra* note 517 (describing Seattle Mayor Greg Nickels' decision to require the city's municipal employees' same-sex marriages to be recognized by the city).

⁵¹⁹ *Id.* State courts later affirmed Nickels' authority to issue an executive order recognizing same-sex marriages celebrated outside Washington. See *Leskovar v. Nickels*, 166 P.3d 1251, 1257 (Wash. Ct. App. 2007) (concluding that employee benefits are a local matter over "which the City exercises broad discretion," and affirming the dismissal of challenges to Nickels' executive order).

⁵²⁰ See George, *supra* note 517.

⁵²¹ *Id.*

⁵²² Claudia Rowe, *Seattle Gays Go to Court After Wedding Licenses Denied*, SEATTLE POST-INTELLIGENCER

A second lawsuit came on April 1 from the ACLU on behalf of eleven same-sex couples.⁵²³ ACLU representatives were more energized in 2004 to tackle same-sex marriage bans than before. “The time is much better now than it was a year or two ago,” ACLU Executive Director Kathleen Taylor said on the organization’s decision to file suit.⁵²⁴ While the rights consciousness effect is evidenced in Washington, it would have been muted but for the infrastructure that was in place to buttress LGBT litigation and advocacy. The ACLU and Lambda Legal were vital building blocks—these organizations operationalized the burgeoning post-*Goodridge*/post-San Francisco rights consciousness. As the support structure thesis predicts, these groups utilizing their resources and expertise were able to take swift action and tap into the new sense of urgency expressed by same-sex couples to have their rights vindicated.

The same day same-sex couples applied for marriage licenses in Washington, New Jersey officials in Asbury Park started to issue marriage licenses to same-sex couples.⁵²⁵ The deputy municipal clerk, Dawn Tomek, told reporters that she studied the state’s marriage law after a resident made an inquiry after marriages began in San Francisco. Finding that New Jersey law neither expressly permitted nor banned same-sex marriage, Tomek decided to act. “I went by the Constitutions of the United States and of New Jersey, both of which guarantee equal rights,” she said.⁵²⁶ The City backed Tomek, issuing a statement that issuing same-sex couples marriage licenses was “a matter of ‘fundamental civil rights.’”⁵²⁷

After two businesses days, ten couples completed license applications and waited for the seventy-two-hour waiting period to expire.⁵²⁸ Unlike in San

REPORTER, (Mar. 8, 2004, 10:00 PM) (internal quotations omitted), <http://www.seattlepi.com/local/article/Seattle-gays-go-to-court-after-wedding-licenses-1138971.php>.

⁵²³ *ACLU Files Lawsuit Seeking Marriage Equality for Same-Sex Couples in Washington State*, ACLU (Apr. 1, 2004), <https://www.aclu.org/news/aclu-files-lawsuit-seeking-marriage-equality-same-sex-couples-washington-state>.

⁵²⁴ Maureen O’Hagan, *King County Won’t License Gay Marriages*, SEATTLE TIMES (Mar. 4, 2004, 12:00 AM) (internal quotation marks omitted), http://old.seattletimes.com/html/localnews/2001870939_law04m.html.

⁵²⁵ See Johnson, *supra* note 517.

⁵²⁶ Robert Hanley & Laura Mansnerus, *Asbury Park Deputy Mayor Officiates at a Gay Marriage*, N.Y. TIMES (Mar. 09, 2004), http://www.nytimes.com/2004/03/09/nyregion/asbury-park-deputy-mayor-officiates-at-a-gay-marriage.html?_r=0 (reporting Asbury Park Deputy Clerk Dawn Tomek’s decision to start issuing marriage licenses to gay couples in New Jersey) (internal quotation marks omitted).

⁵²⁷ Joseph A. Gambardello, Kaitlin Gurney & Kristen A. Graham, *Shore Town is First in N.J. to Let Gays Marry*, PHILA. INQUIRER, Mar. 9, 2004, at A7 (explaining the foundations of Asbury Park’s issuance of marriage licenses to gay couples, despite that “state law does not yet officially authorize same-sex marriages.”).

⁵²⁸ See Kaitlin Gurney & Kristen A. Graham, *A Dash to Get Married: Asbury Park Is Defying the State on Same-sex Weddings*, PHILA. INQUIRER, Mar. 10, 2004, at A01 (documenting controversy between Asbury Park officials who married gay couples and officials who insisted that doing so would constitute a misdemeanor under New Jersey state law).

Francisco, however, local LGBT rights activists were not included in the decision-making process. Nevertheless, Lambda Legal and New Jersey Lesbian and Gay Coalition expressed support, issuing a joint statement that said, “Our organizations . . . support and congratulate all the jurisdictions across the country that have taken this courageous action, including Asbury Park.”⁵²⁹

In neighboring Pennsylvania, New Hope City Council members passed a resolution asking Bucks County officials to issue same-sex marriage licenses. Because the city had no authority to issue licenses, there was little the council could do, but members told the media that they had started discussing the issue in the weeks after Gavin Newsom’s order to the San Francisco County Clerk.⁵³⁰

1. *Oregon*

Civil disobedience by municipal action soon came to Portland, Oregon. Oregon law was peculiar in that it defined marriage as “a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age.”⁵³¹ The use of “by” as opposed to “between” suggested an opening might exist for same-sex couples to avail themselves of marriage rights under existing law. However, the Oregon domestic relations statute also made repeated references to marriage by using the term “husband and wife.”⁵³²

Opponents of marriage equality hoped to foreclose efforts by same-sex couples to take advantage of Oregon courts or the state legislature in the wake of *Goodridge* to legalize gay nuptials. A campaign to amend the Oregon Constitution failed in 1999, but *Goodridge* reignited the debate.⁵³³

On the heels of Gavin Newsom’s stand on marriage and after hearing equal marriage opponents were initiating a petition to amend the state constitution to ban gay marriage rights, the head of the state’s largest LGBT rights organization, Basic Rights Oregon, approached Multnomah County

⁵²⁹ Rudy Larini & Mary Jo Patterson, *Asbury Park Weds 2 Men, a First in N.J.*, STAR-LEDGER, Mar. 9, 2004, at 1 (alteration in original).

⁵³⁰ See Rosa Salter, Pervaiz Shallwani & Joanna Poncavage, *New Hope Backs Gay Marriage*, MORNING CALL (Mar. 11, 2004), http://articles.mcall.com/2004-03-11/news/3519459_1_same-sex-marriage-gay-marriage-issue-marriage-licenses (stating that New Hope City Council members started discussing issuing same-sex marriage licenses in the weeks after San Francisco did).

⁵³¹ OR. REV. STAT. § 106.010 (2018), *invalidated by* Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (2014); see also *Oregon County Issues Same-Sex Marriage Licenses*, CNN (Mar. 3, 2004), <http://www.cnn.com/2004/US/West/03/03/same.sex.marriage/index.html>.

⁵³² See, e.g., OR. REV. STAT. § 106.041(1) (2013) (“All persons wishing to enter into a marriage contract shall obtain a marriage license from the county clerk upon application, directed to any person or religious organization or congregation authorized by ORS 106.120 to solemnize marriages, and authorizing the person, organization or congregation to join together *as husband and wife* the persons named in the license.” (emphasis added)).

⁵³³ PINELLO, *supra* note 470, at 105.

officials and encouraged action.⁵³⁴ Seeing an opportunity to take advantage of the statutory ambiguity, on March 3, 2004, same-sex marriage licenses were issued in Multnomah County—one day after opponents filed to begin circulating petitions in support of a constitutional ballot initiative.⁵³⁵ Multnomah County Attorney Agnes Sowle justified the County's position:

The Oregon Constitution prohibits the county from discriminating against same-sex couples when they are applying for marriage licenses because that kind of discrimination based on gender and based on sexual orientation is not allowed in Oregon.⁵³⁶

Six days later, County Circuit Judge Dale Koch rejected an application to enjoin the county from continuing to issue same-sex couples marriage licenses.⁵³⁷ Judge Koch's ruling allowed nearly 3,000 gay and lesbian couples to secure marriage licenses from the county in hand.⁵³⁸

In the interim, elected officials quickly sought advisory opinions on the legal status of same-sex marriage in Oregon. The Democratic leader in the Oregon Senate, Kate Brown, requested an opinion from legislative counsel.⁵³⁹ The opinion focused on a 1998 Oregon appellate court decision, *Tanner v. Oregon Health Sciences University*, which held that the state could not deny insurance benefits to state employees in same-sex relationships.⁵⁴⁰ In *Tanner*, the court ruled sexual orientation was a suspect class:

Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been

⁵³⁴ See Taylor Clark et al., *Inside Portland's Velvet Revolution: How Gay Marriage Went from Idea to Reality*, WILLAMETTE WEEK (Mar. 9, 2004), <http://www.wweek.com/portland/article-3009-inside-portlands-velvet-revolution.html>.

⁵³⁵ See Renée LaChance, *Nothing Left to Lose: A Look at Oregon's Fight for Same-Sex Marriage*, PQMONTHLY (Feb. 27, 2014), <http://www.pqmonthly.com/nothing-left-lose-look-oregons-fight-sex-marriage/18687> (chronicling the timeline of marriage rights in Oregon between 1993 and 2014, including Multnomah County's issuance of marriage licenses beginning on March 3, 2004); Elections Div., Or. Sec'y of State, *Initiative Number 150: Constitutional Definition of Marriage*, INITIATIVE, REFERENDUM AND REFERRAL SEARCH, http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20040150..LSCYYMARRIAGE (documenting petition for amendment to Oregon constitution titled: "Only Marriage Between One Man And One Woman Is Valid Or Legally Recognized As Marriage," which was filed on March 2, 2004).

⁵³⁶ *Oregon County Issues Same-sex Marriage Licenses*, CNN (Mar. 3, 2004, 2:12 PM), <http://www.cnn.com/2004/US/West/03/03/same.sex.marriage/>.

⁵³⁷ JASON PIERCESON, COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA 157 (2005).

⁵³⁸ William McCall, *Oregon Supreme Court Voids Same-Sex Marriage Licenses*, WASH. POST (Apr. 15, 2005), www.washingtonpost.com/wp-dyn/articles/A55056-2005Apr14.html.

⁵³⁹ Letter from Greg Chaimov, Or. Legislative Counsel, to Kate Brown, Or. Senator, (Mar. 8, 2004) (on file with ACLU Oregon), http://www.aclu-or.org/sites/default/files/Lit_Li_Other_LegCounsel3_02_04.pdf.

⁵⁴⁰ *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998).

and continue to be the subject of adverse social and political stereotyping and prejudice.⁵⁴¹

The legislative counsel letter emphasized that the Oregon courts' jurisprudence was more favorable to claims of sexual orientation discrimination than many states. "Even the Supreme Judicial Court of Massachusetts, which has ordered that state to make marriage available to same-sex couples, does not treat homosexuals the same as racial minorities and religious adherents," the letter highlighted.⁵⁴² The letter also detailed two Oregon state court cases where the courts ruled LGB persons and same-sex couples were fit parents.⁵⁴³ Assessing the legal landscape in Oregon and nationally, the legislative counsel opinion concluded the Oregon Constitution compelled equal marriage rights for LGB Oregonians.⁵⁴⁴

Democratic Governor Ted Kulongoski asked the state's attorney general for an opinion on the Multnomah County marriages.⁵⁴⁵ Attorney General Hardy Meyers offered a more muted opinion than the state's legislative counsel, on March 12. Meyers ultimately concluded that the exclusion of same-sex couples from marriage rights had improbable odds in surviving judicial scrutiny: "[T]he Oregon Supreme Court would likely conclude that withholding from same-sex couples the legal rights, benefits, and obligations that—under current law—are automatically granted to marriage couples of the opposite sex likely violates Article I, section 20 of the Oregon Constitution"⁵⁴⁶

With the attorney general opinion concluding the Portland clerks were acting contrary to state law, Governor Kulongoski urged clerks to abide by the male-female requirements of state family law.⁵⁴⁷ The governor, along with the attorney general, pledged to expeditiously bring the constitutional question to state's highest court.⁵⁴⁸ "There is only one body in this state that can give us a definitive ruling on whether this is constitutional or not, and

⁵⁴¹ *Id.* at 447.

⁵⁴² Letter from Gregory A. Chaimov, Or. Legislative Counsel, to Kate Brown, *supra* note 539, at 2 (citing *Goodridge v. Dept. of Pub. Health*, 440 Mass. 309, 331 (2003)).

⁵⁴³ *Id.* at 4 (citing *Collins and Collins*, 183 Or. App. 354, 359 (2002) (holding that a "court cannot consider parents' homosexual relationship when deciding custody arrangement"); then citing *Ashling v. Ashling*, 42 Or. App. 47, 50 (1979) (finding that "for purposes of deciding custody and visitation, homosexuals and heterosexuals [should be] held to same standard of behavior.")).

⁵⁴⁴ *See id.* at 1 (stating that "the answer is yes" with regards to whether "state law requires a county clerk to license the marriage of a same-sex couple).

⁵⁴⁵ Letter from Hardy Meyers, Attorney Gen., State of Or., to Ted Kulongoski, Governor, State of Or. 11 (Mar. 12, 2012), https://aclu-or.org/sites/default/files/Lit_Li_Other_AttnyGeneral3_12_04.pdf.

⁵⁴⁶ *Id.*

⁵⁴⁷ *See Oregon Attorney General: Gay Marriage Illegal*, CNN (Mar. 12, 2004), <http://www.cnn.com/2004/LAW/03/12/oregon.gay.marriage/> (noting that the governor of Oregon stressed that same-sex marriage licenses should not be issued in the state until the state Supreme Court ruled on the issue).

⁵⁴⁸ *Id.*

that entity is the Oregon Supreme Court,” Kulongoski said.⁵⁴⁹ In the interim, Kulongoski offered support for civil unions, stating, “I believe that every citizen in this state is entitled to the same rights, privileges, responsibilities as every other citizen.”⁵⁵⁰

On March 24, the ACLU and Basic Rights Oregon filed suit challenging the permissibility of the state’s marriage law under the Oregon Constitution.⁵⁵¹ On April 20, 2004, Judge Frank Bearden ordered the county officials to halt same-sex marriage licenses.⁵⁵² Bearden also mandated the state treat the 3022 same-sex marriage licenses already issued by the county as valid.⁵⁵³ As appeals percolated, opponents of equal marriage campaigned on the ballot proposal to ban same-sex marriage in state constitution.⁵⁵⁴ Voters approved that measure in November 2004.⁵⁵⁵

Though the amendment’s backers put their campaign in motion before the Portland licenses were issued, they believed they capitalized on the clerks’ disregard for state law. Kelly Clark, counsel for the Oregon’s Defense of Marriage Coalition, suggested that average Oregonians had “always worried that there might be some secret gay agenda.”⁵⁵⁶ Pointing to the events in Portland, Clark said, “And, lo and behold, there was a secret gay agenda.”⁵⁵⁷

On April 14, 2005, the Oregon State Supreme Court decided in *Li v. State* that the newly adopted constitutional amendment mooted the question of equal marriage rights.⁵⁵⁸ The court further ruled that Multnomah County lacked authority to remedy a perceived state constitutional violation and all same-sex marriage licenses were therefore void.⁵⁵⁹

⁵⁴⁹ *Id.* (internal quotation marks omitted).

⁵⁵⁰ *Id.* (internal quotation marks omitted).

⁵⁵¹ Matthew Preusch, *Oregonians Look to One Suit to Settle Gay Marriage Issue*, N.Y. TIMES, Mar. 25, 2004, at A16 (noting that Oregon’s same-sex marriage issue was to be decided in a single lawsuit filed in Portland, Oregon).

⁵⁵² *Li v. State*, No. 0403-03057, 2004 WL 4963162 (Or. Cir. Ct. Apr. 20, 2014) (order directing Oregon to record the marriage of same-sex couples and enjoining Multnomah County from issuing further licenses to same-sex couples without declaring a prevailing party).

⁵⁵³ *Id.*; see also Lynn Marshall & Elizabeth Mehren, *Oregon Judge Puts Hold on More Gay Marriages*, L.A. TIMES (Apr. 21, 2004), <http://www.latimes.com/la-me-timelinegaymarriage2004apr21-story.html>.

⁵⁵⁴ KLARMAN, *supra* note 168, at 107–8 (detailing the efforts of same-sex opponents and proponents to lobby for and against a constitutional amendment referendum).

⁵⁵⁵ See William McCall, *Oregon Supreme Court Voids Same-Sex Marriage Licenses*, WASH. POST, Apr. 15, 2005, at A03 (noting that the Oregon Supreme Court in part relied on the fact that Oregon voters voted in favor of a constitutional amendment banning same-sex marriage to reach its decision).

⁵⁵⁶ Sarah Kershaw, *Oregon Supreme Court Invalidates Same-Sex Marriages*, N.Y. TIMES (Apr. 15, 2005), <http://www.nytimes.com/2005/04/15/us/oregon-supreme-court-invalidates-samesex-marriages.html>.

⁵⁵⁷ *Id.*

⁵⁵⁸ *Li v. State*, 110 P.3d 91, 98 (Or. 2005) (en banc) (holding that the newly adopted constitutional amendment further limited the state constitutional scope of marriage in Oregon).

⁵⁵⁹ See *id.* at 101–02 (stating that the county overstepped its authority in issuing marriage licenses to same-sex couples).

The Oregon Supreme Court also rejected litigants' calls to determine whether civil unions were required under the state constitution because the issue was not raised in lower courts.⁵⁶⁰ However, less than twenty-four hours before *Li* was decided, Governor Kulongoski forwarded legislation to enact civil unions and ban discrimination in housing and employment on the basis of sexual orientation.⁵⁶¹ The Kulongoski Administration was unfazed by the Oregon Supreme Court's decision. The Administration's spokesman reiterated, "The state's position from the outset was that the fundamental issue was whether or not same-sex couples were entitled to the rights and privileges of marriage, not just the institution of marriage itself."⁵⁶²

The omnibus civil unions-nondiscrimination bill, SB 1000,⁵⁶³ prompted the first vote ever on same-sex unions in the Oregon Legislature.⁵⁶⁴ It passed the Oregon Senate with 19 votes.⁵⁶⁵ Opponents generally cast it as an attempt to subvert the marriage amendment and "overturn the will of the voters."⁵⁶⁶ Opponents also often referred to civil unions as "gay marriage" by another name.⁵⁶⁷

Despite the public's expressed opposition to equal marriage in the prior election by a margin of 57 to 43%, polling offered a more nuanced picture.⁵⁶⁸ One poll found 49% of Oregon voters supported civil unions at the time SB1000 was under debate.⁵⁶⁹ That poll also registered 30% of Oregon voters opposed to civil unions, with 21% undecided.⁵⁷⁰ Still, the public was divided and so, too, was the legislative response. The Republican Oregon House Speaker refused to hear a civil unions bill, though some GOP House leaders offered to advance Hawaii-styled reciprocal beneficiaries legislation.⁵⁷¹

⁵⁶⁰ See *id.* at 102 (holding that "[t]hese appeals do not require us to explore the full range of actions from which a governmental official might choose in vindicating that official's personal constitutional vision.").

⁵⁶¹ Todd Simmons, *Civil Compromise*, ADVOCATE, May 24, 2005, at 17 (noting that less than 24 hours before *Li*'s ruling, Oregon Governor Kulongoski "introduced a bill to create civil unions.").

⁵⁶² Kershaw, *supra* note 556.

⁵⁶³ S.B. 1000, 73d Legis. Assemb., Reg. Sess. (Or. 2005).

⁵⁶⁴ Charles E. Beggs, *Committee Sends Civil-Union Bill to Full Oregon Senate*, SEATTLE POST-INTELLIGENCER (June 23, 2005, 10:00 PM), <http://www.seattlepi.com/local/article/Committee-sends-civil-union-bill-to-full-Oregon-1176772.php>.

⁵⁶⁵ *Id.*

⁵⁶⁶ *Oregon Senate OKs Civil Unions Bill*, FOX NEWS (July 9, 2005), <http://www.foxnews.com/story/2005/07/09/oregon-senate-oks-civil-unions-bill.html>.

⁵⁶⁷ Niki Sullivan, *Oregon Senate Panel Passes Bill to OK Civil Unions*, SEATTLE TIMES (June 8, 2005, 4:29 PM), <http://www.seattletimes.com/seattle-news/oregon-senate-panel-passes-bill-to-ok-civil-unions/>.

⁵⁶⁸ Brad Cain, *Civil Union Bill Passes Oregon Senate*, SPOKESMAN-REVIEW (July 10, 2005), <http://www.spokesman.com/stories/2005/jul/10/civil-union-bill-passes-oregon-senate/> (quoting statistics).

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

⁵⁷¹ *Historic Civil-Union Vote Set in Senate*, STATESMAN JOURNAL, June 8, 2005, at 15.

Governor Kulongoski, undeterred, wanted to take action and keep the issue of LGBT rights alive. Kulongoski issued an executive order to form a commission charged with studying the state of equal rights in Oregon.⁵⁷² The Governor explained the motivation behind his reinvigorated civil rights agenda:

After Oregon passed this constitutional amendment [banning] same-sex marriage, which I campaigned against [in 2004], I think everyone thought the political process would go dead on this issue. I put it back in the next legislative session two months after the election because I didn't want it to go dead. I like the task force because I don't want a political vacuum to be generated. I want the public to care about the debate.⁵⁷³

The governor and his task force held hearings across the state and worked to craft legislation,⁵⁷⁴ which was passed in 2007.⁵⁷⁵ Instead of using the term “civil union” as advocates had in 2005, the 2007 legislation created “domestic partnerships.”⁵⁷⁶ The domestic partnership legislation, which was coupled with anti-discrimination legislation, passed with bipartisan support.⁵⁷⁷

As a near immediate outgrowth of the Oregon marriage defiance, same-sex couples galvanized efforts to secure marriage-like status and anti-discrimination protections—first introduced in 1973—in housing, public accommodations, jury service, foster parenting, state institutions, public schools, and employment.⁵⁷⁸

2. *New Mexico*

The emergence of a rights consciousness effect was short lived in one New Mexico county. On February 20, 2004, Sandoval County, New Mexico, Clerk Victoria Dunlap started issuing same-sex marriage licenses.⁵⁷⁹ Dunlap, a Republican, was prompted to act after a phone call from a member of the public:

⁵⁷² Or. Exec. Order No. 06-03, (Feb. 9, 2006), http://www.oregon.gov/gov/Documents/executive_orders/eo0603.pdf.

⁵⁷³ Sean Kennedy, *Q&A Gov. Ted Kulongoski*, ADVOCATE, Mar. 28, 2006, at 6.

⁵⁷⁴ See, e.g., Sarah Lemon, *Task Force Discusses Equality*, MAIL TRIB. (Sept. 22, 2006), www.mailtribune.com/article/20060922/news/309229988 (reporting on one of the Task Force's regional meetings).

⁵⁷⁵ *Domestic Partners Bill Approved*, L.A. TIMES (May 3, 2007), <http://articles.latimes.com/2007/may/03/nation/na-gayrights3>.

⁵⁷⁶ *Id.* (explaining that “domestic partnership” would allow same-sex couples to enter into contractual relationships giving them the same state law benefits of married couples).

⁵⁷⁷ *Id.* (noting that the Oregon bill passed with unanimous support from the Senate's majority Democrats and two Republicans who joined).

⁵⁷⁸ DONALD P. HAIDER-MARKEL, OUT AND RUNNING: GAY AND LESBIAN CANDIDATES, ELECTIONS, AND POLICY REPRESENTATION 104 (2010).

⁵⁷⁹ Christopher Lisotta, *Bringing Marriage to New Mexico*, ADVOCATE, July 6, 2004, at 20; see also Susan Montoya Bryan, *Same-Sex Couples Marry in Sandoval County*, ALBUQUERQUE J. (Feb. 20, 2004), <http://www.abqjournal.com/news/state/apwed02-20-04.htm>.

I had a person call and ask if we did perform same-sex marriages. And I said as of yet we had not but I would look into it. I had one of my staff members ask an attorney, and [County Attorney David Mathews] said that we had to issue the licenses. We could not prohibit anyone based upon sex.⁵⁸⁰

Mathews told Dunlap that New Mexico's marriage law did not mention sex-based requirements for parties to a marriage, though a 1961 statute establishing the statewide marriage license form did make reference to male and female applicants.⁵⁸¹ In 1973, New Mexico outlawed sex-based discrimination, Mathews said.⁵⁸² Dunlap stated that she would continue to issue marriage licenses to same-sex applicants until she received an opinion from the State Attorney General directing her not to.⁵⁸³

"This has nothing to do with politics or morals. . . . If there are no legal grounds that say this should be prohibited, I can't withhold it. . . . This office won't say no until shown it's not permissible," Dunlap said.⁵⁸⁴ Clerks in neighboring Santa Fe and Bernalillo counties disagreed and declined to follow Dunlap, believing the law was clear.⁵⁸⁵ "My position is I took an oath to uphold the law, not change the law," said Rebecca Bustamante, Santa Fe County Clerk. "I wouldn't do it because I just don't think I can."⁵⁸⁶

Unlike in other states, New Mexico Attorney General Patricia Madrid took swift action to put a stop to Dunlap's reading of state law. On the same day Dunlap started issuing licenses, Madrid issued an advisory letter that the licenses were "invalid under state law." The Sandoval County Clerk's Office heeded the Attorney General's advice after the 66 licenses were issued.⁵⁸⁷

In 2004, the New Mexico Attorney General's Office offered clerks little room to engage in disobedience. By 2011, the Office's tone was markedly different. Now headed by Attorney General Gary King, the Attorney General's Office responded to an inquiry from State Representative Al Park concerning the status of marriages contracted by same-sex couples outside of New Mexico. The formal opinion concluded:

While we cannot predict how a New Mexico court would rule on this issue, after review of the law in this area, it is our opinion that a same-sex marriage that is valid under the laws of the country or state where it was consummated would likewise be found valid in New Mexico.⁵⁸⁸

⁵⁸⁰ Lisotta, *supra* note 579.

⁵⁸¹ See Montoya Bryan, *supra* note 579.

⁵⁸² *Id.*

⁵⁸³ *Id.*

⁵⁸⁴ *Id.* (second alternation in original) (internal quotation marks omitted).

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.*

⁵⁸⁷ See Michael Martinez, N.M. Halts Brief Run of Same-Sex Marriages, CHI. TRIB. (Feb. 21, 2004), http://articles.chicagotribune.com/2004-02-21/news/0402210205_1_marriage-licenses-same-sex-marriages-state-law-defines-marriage.

⁵⁸⁸ Office of N.M. Att'y Gen., Opinion Letter No. 11-01, at 1 (Jan. 4, 2011).

3. *New York*

On Tuesday, February 24, 2004, President Bush announced his support for a federal constitutional amendment prohibiting same-sex marriage. Bush cited the events unfolding in San Francisco as partial motivation for his decision to take action on what he called “the most fundamental institution of civilization,” but it triggered additional pushback in New York.⁵⁸⁹ On Friday, February 27, 2004, New Paltz Mayor Jason West drew national attention when he began marrying same-sex couples.⁵⁹⁰

When West became mayor in June 2003, same-sex relationship recognition was one of the many items on his agenda. He took no action on gay rights during the remainder of the year. While the national debate unfolded after same-sex unions started in Massachusetts, West told the National Conference on Organized Resistance in January 2004 that he wanted to marry same-sex couples as a newly minted mayor.⁵⁹¹ West was emboldened by Mayor Gavin Newsom’s refusal to discriminate against same-sex couples, the mandates of state law notwithstanding. “San Francisco is absolutely an inspiration and made it clear we also wanted to stand up to President Bush,” he said.⁵⁹² But, West’s thinking on equal treatment for same-sex couples began in the months after the *Baker* decision in Vermont—long before the post-State of the Union tussle. “The first time I recall [contemplating equal marriage for same-sex couples] was in 2000, I ran as a protest [state legislative] candidate for the Green Party just after Vermont had legalized civil unions. That was the first time it came on my radar as civil unions,” West said.⁵⁹³

On Monday, February 23, 2004, West asked the New Paltz clerk if she would issue marriage licenses to same-sex couples. The clerk declined. After President Bush threw his support behind the proposed federal amendment, West announced he would follow Mayor Gavin Newsom’s lead and start solemnizing wedding ceremonies. Though West had started to take the necessary steps to illegally marry same-sex couples prior to George W. Bush’s constitutional reform announcement, West said that Bush “gave me even more conviction in marrying same-sex couples.”⁵⁹⁴

⁵⁸⁹ *President Bush’s Remarks on Same-Sex Marriage*, N.Y. TIMES (Feb. 24, 2004), <http://www.nytimes.com/2004/02/24/politics/president-bushs-remarks-on-samesex-marriage.html?mcubz=0&r=0>.

⁵⁹⁰ Justin Silverman, *N.Y. Village Mayor Jumps into Same-sex Marriage Fray*, SF GATE (Feb. 28, 2004, 4:00 AM), <http://www.sfgate.com/news/article/N-Y-village-mayor-jumps-into-same-sex-marriage-2816347.php>.

⁵⁹¹ See Robert Kolker, *The Marrying Kind*, N.Y. MAG. (Mar. 15, 2004), http://nymag.com/ny-metro/news/politics/columns/statepolitic/n_10018/.

⁵⁹² Silverman, *supra* note 590.

⁵⁹³ Telephone Interview with Jason West, Mayor of New Paltz, N.Y. (May 10, 2016).

⁵⁹⁴ Jonathan Wald, *Mayor Vows to Keep Marrying Same-Sex Couples*, CNN (Mar. 2, 2004), <http://www.cnn.com/2004/US/Northeast/03/02/ny.samesex.marriage/>; see also Kolker, *supra* note 591.

As West began marrying same-sex couples in rural New Paltz, a political firestorm came about in New York. Eventually, West was enjoined by a state court from continuing to marry same-sex couples, but other New York elected officials, like Ithaca Mayor Carolyn Peterson, looked for ways to contribute and bring the issue of LGB rights to the fore.⁵⁹⁵

Peterson recognized that the marriages in New Paltz were merely symbolic because the Department of Health would refuse to file them, but hoped to seize the opportunity to pursue litigation.⁵⁹⁶ Peterson announced in March that the city would coordinate a campaign to send same-sex couples' unsigned marriage applications to the state Health Department.⁵⁹⁷ Once the Health Department rejected the application, Ithaca officials would provide legal assistance and work to file a lawsuit challenging the state's marriage laws.⁵⁹⁸

On March 3, 2004, New York Attorney General Eliot Spitzer weighed in, providing an informal opinion on the status of relationship recognition for same-sex couples in New York. In response to an inquiry from the Town of Olive concerning the ministerial obligations of clerks, the Attorney General's Office replied that New York clerks must not issue marriage licenses to same-sex couples because the legislative intent behind the state's domestic relations law was to never to permit sex-blind marriages. Though the controlling statute did not authorize clerks to issue marriage licenses to same-sex couples, the opinion pointed out that "serious constitutional concerns" were raised by the statute's discriminatory effect.⁵⁹⁹

The City of Cohoes requested the Attorney General's Office opine on the validity of same-sex marriages entered into from out-of-state or parallel state recognized relationship statuses, like civil unions. The opinion concluded that New York common law "presumptively require[d] that" same-sex couples' out-of-state civil unions were recognized under state law.⁶⁰⁰

New York was the first state to signal it would treat out-of-state same-sex marriages as valid, although the Attorney General's opinion did not carry the force of law. Later in 2004, concrete steps were made to adhere to the principle of comity laid out by Spitzer's office. In October 2004, the New

⁵⁹⁵ See Thomas Crampton, *Court Says New Paltz Mayor Can't Hold Gay Weddings*, N.Y. TIMES (June 8, 2004), <https://www.nytimes.com/2004/06/08/nyregion/court-says-new-paltz-mayor-can-t-hold-gay-weddings.html>; Thomas Crampton & Michelle York, *Hoping Courts Will Address Same-Sex Marriage, Ithaca Begins Accepting Licenses*, N.Y. TIMES (Mar. 2, 2004), <http://www.nytimes.com/2004/03/02/nyregion/hoping-courts-will-address-same-sex-marriage-ithaca-begins-accepting-licenses.html>.

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.*

⁵⁹⁸ *Id.*

⁵⁹⁹ N.Y. Att'y Gen., Informal Op. No. 2004-1 on Same-sex Marriages Under the New York State Domestic Relations Law at 4, 16 (Mar. 3, 2004).

⁶⁰⁰ *Id.* at 1, 16.

York State Comptroller announced the state's retirement system would recognize same-sex marriages lawfully performed outside New York.⁶⁰¹ New York City Mayor Bloomberg followed suit in November 2004. Bloomberg issued a statement on the expansion of benefits:

A few weeks ago, I asked the Corporation Counsel to advise me on whether the City's five pension systems could be expanded to recognize same-sex marriages, legally entered into in other jurisdictions as well as Vermont civil unions. Today the Corporation Counsel has advised me that such recognition is legal and just. I am forwarding the opinion to my representatives on the boards of the City's five pension systems and directing them to introduce resolutions to ensure that parties to these relations are treated in the same manner as parties to opposite-sex marriages.⁶⁰²

By 2006, the New York Court of Appeals rejected the numerous constitutional claims pressed in state courts to dismantle the state's sex-conscious marriage law.⁶⁰³ While the New York Legislature hemmed and hawed over legislation to legalize same-sex marriage, New York Governor David Paterson took a significant step by issuing an executive memorandum recognizing New Yorkers' same-sex marriages performed outside of the state.⁶⁰⁴

While recognition of marriages across state lines is historically noncontroversial, the lengths states went to block gay, lesbians, and bisexuals from marrying out-of-state and returning home seeking recognition was unprecedented. On one hand Paterson's move should have been of little cause for celebration, but on the other it was the most sweeping affirmation of LGB equality available barring legislative action. LGBT rights groups responded with great favor to the gubernatorial directive.

Paterson's move was seen, at least by the New York Civil Liberties Union ("NYCLU"), as a response to NYCLU litigation in state court, *Martinez v. County of Monroe*.⁶⁰⁵ The case arose from the refusal of Monroe Community College, a county-backed institution, to extend benefits to the same-sex spouse of a college employee.⁶⁰⁶ The New York appellate court ruled that a same-sex marriage celebrated in Canada should be recognized in New York

⁶⁰¹ Michael Cooper, *Pension System Recognizes Gay Spouses*, N.Y. TIMES (Oct. 14, 2004), www.nytimes.com/2004/10/14/nyregion/pension-system-recognizes-gay-spouses.html?_r=0.

⁶⁰² Michael R. Bloomberg, *Statement by Mayor Michael R. Bloomberg On Pension Benefits for Spouses in Same-sex Marriages*, NYC (Nov. 17, 2004), <http://www1.nyc.gov/office-of-the-mayor/news/309-04/statement-mayormie-of-the-mayor/news/309-04/statement-mayor-michael-bloochael-bloomberg-pension-benefits-spouses-same-sex-marriages#/0>.

⁶⁰³ *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006).

⁶⁰⁴ Jeremy W. Peters, *New York Backs Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, at A17.

⁶⁰⁵ 850 N.Y.S.2d 740 (N.Y. App. Div. 2008); see also *NYCLU Victory Prompts Gov. Paterson to Recognize Marriages Between Lesbian and Gay Couples*, NYCLU (May 28, 2008), <https://www.nyclu.org/en/press-releases/nyclu-victory-prompts-gov-paterson-recognize-marriages-between-lesbian-and-gay>.

⁶⁰⁶ *Id.* at 741.

because the Canadian marriage did not violate New York public policy.⁶⁰⁷ On May 6, 2008, New York's court of last resort rejected an appeal on procedural grounds.⁶⁰⁸ On May 29, 2008, David Nocenti circulated the memorandum to all state agencies' counsel, writing:

In *Martinez*, the Fourth Department held that legal same-sex marriages performed in other jurisdictions are "entitled to recognition in New York in the absence of express legislation to the contrary." This decision is consistent with the holdings of several lower courts. . . .

In light of these decisions, agencies that do not afford comity or full faith and credit to same-sex marriages that are legally performed in other jurisdictions could be subject to liability.⁶⁰⁹

LGBT civil rights groups greeted the Paterson Administration's pronouncement with celebration. Susan Sommer of Lambda Legal welcomed the clarity the Paterson Administration brought to the state bureaucracy saying, "It shouldn't be the burden of each lesbian or gay couple to have to advocate before an agency every time a new issue comes up."⁶¹⁰

Donna Lieberman of the New York Civil Liberties Union called the memorandum "a milestone."⁶¹¹ Lieberman embraced the stability the Administration's policy brought. "For the first time, couples in New York who have never known true security for their families will be officially entitled to treatment by our state government that respects their rights. They should now finally get a taste of the family protections other married couples and their children enjoy," Lieberman said in a press release.⁶¹²

Others saw it as milquetoast measure. Alan Van Capelle, executive director of Empire State Pride Agenda questioned what he saw as a "temporary, but necessary fix for a longer-term problem."⁶¹³ Van Capelle asked, "If you're going to treat us as equals, why don't you just give us the marriage license?"⁶¹⁴ For Governor Paterson's part, he saw it as an opportunity to take the courts' decisions and use them to drive life into his agenda and enact marriage equality legislation. Paterson recounted:

⁶⁰⁷ *Id.* at 743.

⁶⁰⁸ *Martinez v. Cty. of Monroe*, 889 N.E.2d 496, 496 (N.Y. 2008) ("Motion for leave to appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.").

⁶⁰⁹ Memorandum from David Nocenti to All Agency Counsel (May 14, 2008), <http://www.nycbar.org/pdf/memo.pdf>.

⁶¹⁰ Peters, *supra* note 604, at A17 (internal quotations omitted).

⁶¹¹ *NYCLU Victory Prompts Gov. Paterson to Recognize Marriages Between Lesbian and Gay Couples*, N.Y. ACLU (May 28, 2008), www.nyclu.org/news/nyclu-victory-prompts-gov-paterson-recognize-marriages-between-lesbian-and-gay-couples.

⁶¹² *Id.* (internal quotation marks omitted).

⁶¹³ Peters, *supra* note 604.

⁶¹⁴ *Id.* (internal quotation marks omitted).

I felt like we should just continue to work on the legislation. I didn't want to get dragged into the marriage equality fight. I wanted to be leading it. And I think Governors Spitzer and Pataki supported it, but it just wasn't a top priority. I came from relative obscurity, but this, for me, was the first personal light that showed who I was and what I stood for.⁶¹⁵

4. *Rhode Island*

Given Rhode Island's proximity to Massachusetts and requirements under Massachusetts law restricting marriage licenses to out-of-state couples whose home state would recognize the marriage,⁶¹⁶ the question of whether LGB Rhode Islanders could marry in Massachusetts was a significant one. In September 2006, a state superior court judge in Massachusetts ruled that same-sex couples that lived in Rhode Island could marry in Massachusetts.⁶¹⁷

On February 1, 2007, Jack Warner, Commissioner of the Rhode Island Board of Governors for Higher Education, wrote to Attorney General Patrick Lynch asking whether the Board of Governors should recognize as married state employees who had participated in same-sex marriage ceremonies lawfully performed in Massachusetts. Lynch examined state law and concluded that Rhode Island law would recognize an out-of-state marriage unless a marriage conflicted with the public policy of the state.⁶¹⁸

As of 2007, Rhode Island had only enacted legislation expressly rejecting bigamous and incestuous marriages, as well as those "contracted" where one of the parties was incompetent to enter a marriage.⁶¹⁹ Lynch also examined nondiscrimination protections embedded in Rhode Island law, which proscribed invidious discrimination against LGB Rhode Islanders in public accommodations, credit, housing, and employment. Rhode Island law also allowed same-sex couples to adopt children.⁶²⁰

Given the state's favorable landscape for sexual minorities, Lynch concluded that state entities should recognize lawful same-sex marriages from Massachusetts.⁶²¹ "Rhode Island will recognize same sex marriages lawfully performed in Massachusetts as marriages in Rhode Island. Therefore, we

⁶¹⁵ Telephone Interview with David Paterson, Former Governor of N.Y. (May 22, 2012).

⁶¹⁶ See *supra* note 294 and accompanying text (discussing 1913 Massachusetts law banning marriage of out-of-state couples who could not be legally married in their state of domicile).

⁶¹⁷ *Cote-Whitacre v. Dep't of Pub. Health*, No. 04-2656, 2006 WL 3208758 at *1, *4 (Mass. Super. Ct. Sept. 29, 2006) (holding that there was not any positive law that forbid same-sex couples from marrying in Rhode Island).

⁶¹⁸ Letter from Patrick C. Lynch, R.I. Attorney Gen., to Comm'r Jack R. Wagner (Feb. 20, 2007).

⁶¹⁹ *Id.*

⁶²⁰ *Id.*

⁶²¹ *Id.*

advise the Board of Governors that it should accord marital status to its employees who were lawfully married in Massachusetts under the ruling of that state's highest court in *Goodridge* . . .” the opinion concluded.⁶²²

When interviewed about his formal opinion, Attorney General Lynch said, “This is about Rhode Island citizens who entered into a valid, legally recognized same-sex marriage and returned here to live and work. . . . There is no way, no law, no constitutional provision and, in my estimation, no right to allow the denial of basic human rights.”⁶²³

When Lynch's opinion came down in 2007, Rhode Island Governor Donald Carcieri, a Republican, opposed same-sex marriage.⁶²⁴ Lynch's opinion lacked binding authority, only an act of the legislature or an executive order from Governor Carcieri could give it the force of law.⁶²⁵ Despite lacking the force of law, a number of Rhode Island agencies intended to follow the Attorney General Opinion including the agency that requested the opinion.⁶²⁶ Though it never materialized, Lynch posited that the opinion might prompt new developments, saying, “Perhaps litigation will flow from it.”⁶²⁷

Lynch's action was important for Rhode Islanders hoping to marry in Massachusetts, but it also was cited in the run up to Vermont's same-sex marriage debate as a reason to extend marriage rights to LGB Vermonters. One of the main arguments in favor of moving away from civil unions was that the term marriage was more portable across state lines.⁶²⁸ With neighboring Massachusetts and nearby Rhode Island offering to recognize same-sex marriages, the portability argument held more weight.

In 2012, Governor Lincoln Chafee issued an executive order that the state would recognize out-of-state same-sex marriages.⁶²⁹ As a consequence, same-sex couples married outside of Rhode Island gained equal access to insurance markets, state employment benefits, presumptions of parentage, tax exemptions, and property rights.⁶³⁰ Though Chafee wanted to push

⁶²² *Id.*

⁶²³ Katie Zezima, *Rhode Island Steps Toward Recognizing Same-Sex Marriage*, N.Y. TIMES, Feb. 22, 2007, at A19 (internal quotation marks omitted).

⁶²⁴ *Id.*

⁶²⁵ *Id.*

⁶²⁶ *Id.*

⁶²⁷ *Id.* (internal quotation marks omitted).

⁶²⁸ See *supra* note 368 and accompanying text (discussing debate in Vermont about civil unions versus equal marriage rights).

⁶²⁹ *Rhode Island Order on Gay Unions*, N.Y. TIMES, May 15, 2012, at A17.

⁶³⁰ See Adam Martin, *Rhode Island Recognizes Everyone's Same-Sex Marriage But Its Own*, ATLANTIC (May 14, 2012), <https://www.theatlantic.com/national/archive/2012/05/rhode-island-recognizes-everyones-same-sex-marriages-its-own/328152/>.

same-sex marriage legislation through, he faced an uphill battle with conservative Democrats in the Senate.⁶³¹ Like Governor Paterson in New York, Chafee hoped to use an executive order to move the ball on marriage and communicate his support for an equal marriage bill. Chafee said:

The previous governor was staunchly anti-marriage equality. I put it in my inaugural address and I said [legislating equal marriage] is something I wanted to do in Rhode Island. We open our doors here to everyone. I couldn't get it passed my first year, so this was a fall back. I wanted to send a message.⁶³²

5. *Maryland*

In early 2009, openly gay Maryland State Senator Richard Madaleno wrote to Maryland Attorney General Douglas Gansler about the legal effect of same-sex marriages contracted outside in same-sex marriage jurisdictions.⁶³³

At this point in time O'Malley supported civil unions, but had yet to endorse equal rights for LGB Marylanders.⁶³⁴ Gansler's opinion and O'Malley's response would take on potentially greater importance because neighboring Washington, D.C., was considering enacting a marriage equality law. In December 2009, Mayor Adrian Fenty signed marriage equality legislation that would take effect after a 30-work-day period for mandatory Congressional review.⁶³⁵ With Congress refusing to block same-sex nuptials in the District, same-sex couples were eligible to marry on March 3, 2010.⁶³⁶

On February 23, 2010, Gansler published his formal opinion on the status of out-of-state marriages contracted by gay and lesbian couples.⁶³⁷ Gansler responded to Madaleno's inquiry as to whether Maryland Governor Martin O'Malley could follow New York's lead and issue an executive order mandating comity be given to out-of-state marriages.⁶³⁸ Gansler was careful

⁶³¹ See Katharine Q. Seelye, *The Last Holdout in New England, Rhode Island Weighs Gay Marriage*, N.Y. TIMES (Jan. 23, 2013), <http://www.nytimes.com/2013/01/24/us/politics/rhode-island-weighs-gay-marriage-as-the-last-holdout-in-new-england.html?mcubz=0>.

⁶³² Telephone Interview with Lincoln Chafee, Former Governor of R.I. (May 6, 2016).

⁶³³ Aaron C. Davis & John Wagner, *Maryland to recognize gay marriages from other places*, WASH. POST, Feb. 25, 2010, at A01.

⁶³⁴ *Id.*

⁶³⁵ Stefanie Dazio, *Same-Sex Marriage in D.C.: A Timeline*, WASH. POST (Feb. 24, 2012), https://www.washingtonpost.com/blogs/the-buzz/post/same-sex-marriage-in-dc-a-timeline/2012/02/24/g1QAZoFTYR_blog.html?utm_term=.bee213028f12; Ian Urbina, *Nation's Capital Joins 5 States in Legalizing Same-Sex Marriage*, N.Y. TIMES, Mar. 4, 2010, at A20.

⁶³⁶ *Marriage*, MAYOR'S OFFICE OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, & QUESTIONING AFF., <https://lgbtq.dc.gov/page/marriage> (last visited Mar. 28, 2018); see also Dazio, *supra* note 635; Urbina, *supra* note 635.

⁶³⁷ *Marriage—Whether Out-of-State Same-Sex Marriage that is Valid in the State of Celebration May Be Recognized in Maryland*, 95 Op. Md. Att'y Gen. 3, 3 (2010).

⁶³⁸ *Id.* at 3.

to distinguish the difference between New York and Maryland, noting that Governor Paterson's administrative advisory was in response to court decisions mandating equal recognition for marriages celebrated outside of New York.⁶³⁹ Maryland had no similar case that would support executive action.⁶⁴⁰

The Attorney General's opinion did, however, make clear that Maryland historically accepted non-Maryland marriages that were otherwise prohibited from being contracted in the state. The opinion described a 1916 decision, *Fensterwald v. Burk*, where the Maryland high court gave force to a marriage between an uncle and niece who married legally in Rhode Island to circumvent Maryland law.⁶⁴¹

After examining the state's legal backdrop on LGB rights issues, which protected Marylanders against sexual orientation discrimination, recognized same-sex couples' right to adopt children, and afforded limited domestic partner benefits to same-sex couples, Attorney General Gansler concluded the state's public policy did not disfavor recognizing same-sex marriages.⁶⁴² The Attorney General's Opinion concluded:

While the matter is not free from all doubt, in our view, the Court is likely to respect the law of other states and recognize a same-sex marriage contracted validly in another jurisdiction. In light of Maryland's developing public policy concerning intimate same-sex relationships, the Court would not readily invoke the public policy exception to the usual rule of recognition.⁶⁴³

Governor O'Malley ordered state agencies to align policies with the Gansler opinion.⁶⁴⁴ The Department of Budget and Management included married same-sex couples in the Department's paid-leave and employee-benefit policies.⁶⁴⁵ The Board of Regents of the University System of Mary-

⁶³⁹ *Id.* at 6–7.

⁶⁴⁰ *Id.* at 7.

⁶⁴¹ *Fensterwald v. Burk*, 98 A. 358, 358, 360 (Md. 1916) (holding that, as a general rule, if a marriage is valid in another state it will be valid in Maryland, unless the union falls into two limited exceptions); *see also* 95 Op. Md. Att'y Gen. at 32.

⁶⁴² 95 Op. Md. Att'y Gen. at 39–43, 54.

⁶⁴³ *Id.* at 54.

⁶⁴⁴ Aaron C. Davis & John Wagner, *Maryland to Recognize Gay Marriages from Other Places*, WASH. POST, (Feb. 25, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/24/AR2010022405686.html>.

⁶⁴⁵ *See* MD. DEPT. OF BUDGET AND MGMT., SAME SEX DOMESTIC PARTNER AND SAME SEX SPOUSE FAQ'S (Aug. 2010), <http://dbm.maryland.gov/benefits/Documents/SameSexDP-SpouseFAQs.pdf> (last updated Aug. 2010) (describing how employee and welfare benefit programs began to covering same-sex domestic partners for specific benefits of state employment); Md. Dept. of Budget and Mgmt., *U.S. Supreme Court Rules the Defense of Marriage Act (DOMA) is Unconstitutional—What Does That Mean to YOU?*, (Sept. 11, 2013, 5:07 PM), <http://dbm.maryland.gov/benefits/Pages/newsdisplay.aspx?CID=13> (describing the ways Maryland's Employee and Retiree Health and Welfare Benefits Program updated their healthcare guidelines to account for same-sex couples, including with regard to Flexible Spending Accounts and enforcing HIPPA special enrollment rights).

land ordered that its policies be revamped to ensure that they were “consistent with the advice given by the Office of the Attorney General.”⁶⁴⁶ The Department of Health and Mental Hygiene adopted a policy allowing the non-biological mother of an infant born to her spouse, the natural mother, to be listed as a parent without court order.⁶⁴⁷

C. Conclusion

Executive and administrative actors responded to *Lawrence* and *Goodridge* in substantive acts and symbolic acts of disobedience. A number of factors complicate any attempt to glean an understanding of the motivation behind these actions. However, timing, contemporary statements, and reflective interview statements suggest that the Supreme Court striking down state sodomy laws and the Massachusetts decision ending marriage discrimination played a central role in fomenting national protests and setting off chain reactions.

Among the more important early actions taken by state executives were the opinions rendered by the attorneys general in New York and Rhode Island. The Rhode Island and New York opinions were necessary solely because of *Goodridge* and an attempt to bring clarity on the eligibility of New Yorkers and Rhode Islanders to marry in Massachusetts. Cabining lawfully married same-sex couples to Massachusetts residents due to the preexisting 1917 residency requirement law would have limited the reach of *Goodridge*. However, the neighboring attorneys general amplified the impact of *Goodridge* by ensuring it was a regional phenomenon. If a metric of *Goodridge*’s success is the tangible benefits accrued by LGB persons, then it was more valuable because it yielded spillover benefits in neighboring states. Indeed, same-sex couples married in Massachusetts could obtain direly needed recognition and marital benefits in these states. Because these actions did not occur within a single jurisdictional hierarchy, they do not provide insight to the political reinforcement hypothesis.

The chain of events described in this section gives credence to the rights consciousness thesis and legitimization hypothesis. Governors and state attorneys general legitimized *Goodridge* and further legitimized same-sex marriage by buttressing the portability argument that was prominent in Vermont’s marriage debate between 2007 and 2009. Further, these executive orders and attorney general opinions made same-sex marriage more salient—an important factor in the rights consciousness analysis—and

⁶⁴⁶ UNIV. SYS. OF MD. BD. OF REGENTS, CLARIFICATION OF THE DEFINITION OF “SPOUSE” IN BOR POLICIES (Sep. 17, 2010), <http://www.usmd.edu/BORPortal/Materials/2010/FB/20100917/6f.pdf>.

⁶⁴⁷ Letter from Geneva G. Sparks, State Registrar and Deputy Dir., Vital Statistics Admin., Md. Dept. of Health and Human Servs., to Birth Registrar (Feb. 10 2011), http://data.lambdalegal.org/in-court/downloads/exec_md_20110210_ss-spouse-instructions-to-facilities.pdf.

would not have been possible without *Goodridge* and subsequent spread of equal marriage jurisdictions.

These opinions also boosted efforts to legalize same-sex marriage in Vermont. Of the many arguments put forward in Vermont to abandon civil unions for equal marriage, the concept of “portability” was among the most cited. Proponents of marriage equality often derided the unwieldy language encumbering civil unions, which required lengthy explanations to non-Vermonters and carried hurdles for civil unionized couples seeking out-of-state recognition. The merits of that argument would have been far weaker in 2007—when they were first prominently raised—without *Goodridge*. The portability argument gained even more credibility with New York and Rhode Island welcoming out-of-state gay marriages.

In New York, Governor Paterson’s Administration took Eliot Spitzer’s attorney general opinion one step further by directing state agencies to recognize same-sex marriages lawfully contracted out-of-state. Paterson’s directive was issued nearly three years before the state legalized equal marriage. The Paterson Administration’s undertaking to bring all state agencies under a uniform policy was a reaction to an intermediate appellate court decision mandating a county recognize an out-of-state gay marriage. In one sense, the executive branch made *Martinez* more effective by lending the weight of executive authority and mandating uniform statewide compliance. Thus, because the New York courts had a friend in a sympathetic governor, the *Martinez* decision’s efficacy was magnified. Had the Paterson Administration shrugged at *Martinez*, same-sex couples would have had to potentially challenge any out-of-state marriage recognition denials on an agency-by-agency basis.

In another sense, *Martinez* and the executive letter it prompted thrust the merits of legalizing same-sex marriage into the media and bubbling conversations about enacting marriage equality. The Paterson Administration used *Martinez* to bring additional gravitas to the campaign for equal marriage, though it would not come to pass for three years. Thus, while *Martinez* and the prod to take executive action in its wake lowered administrative barriers for same-sex couples seeking equal treatment by state agencies, it did little to galvanize pro-marriage forces in New York political circles.

The media attention Paterson’s move garnered trickled down to Maryland where it induced an inquiry from a state senator to the attorney general whether Maryland law could achieve a similar result. The Maryland Attorney General’s 2010 opinion that Maryland law compelled the same result as New York was the second positive advancement for same-sex marriage rights below the Mason-Dixon. That opinion took on greater importance once the District of Columbia successfully waited out the congressional review period on the District’s marriage equality law and same-sex marriages commenced. After Gansler’s opinion a number of state agencies expanded the rights, priv-

ileges, and benefits of marriage to same-sex couples wedded in other jurisdictions—a position later ratified by the Maryland courts with finality in 2012.

Unlike these aforementioned developments, the record evidences that many of the pivotal developments in this time period were *ultra vires* acts of civil disobedience by municipal officials. These instances of rouge behavior seem to be by-and-large born out of a mindset preexisting *Goodridge* that discrimination against LGB people was morally wrong. Those engaging in acts of civil disobedience saw the moral objection towards discrimination as a necessary but singularly insufficient condition for resistance to the law. This observation is substantiated by the repeated linking of unlawful marriage licenses to principles of constitutional equality and judicial directives mandating equal treatment of gays, lesbians, and bisexuals.

More than invoking constitutional and legal principles, the bold moves made by elected officials across the country set litigation in motion. Organized interest groups planned on targeting California for litigation, but took to the courts well before they had originally anticipated in response to developments in San Francisco. Litigation in New York, Oregon, and Washington can be linked directly to rebellious local officials—all three lawsuits, however, were unsuccessful. Importantly, that litigation was swiftly organized, filed, and prosecuted because the necessary support-structures were already in place to undergird it. Similarly, the second round of litigation out of California in federal court was bolstered by a well-funded organization formed for the express purpose of supporting marriage litigation.

Ultimately, the high courts in New York and Washington rejected same-sex couples' constitutional claims while the Oregon Supreme Court was stripped of subject matter jurisdiction to rule on same-sex couples' claims. Notably, the effort to remove same-sex marriage from Oregon's state courts predated Multnomah County issuing same-sex marriage licenses, but the effort to amend the state constitution was an outshoot of *Goodridge* backlash. The great, but unsurprising, failure in the Oregon litigation was the litigants' inability to persuade the Oregon Supreme Court to rule on the merits and mandate civil unions under state constitutional law in 2005. Oregon arguably saw the largest single legislative advancement of LGBT rights as a whole in this period, although falling short by having marriage removed from the regular political and judicial processes.

In their totality, the events in *Goodridge*'s aftermath polarized Americans' opinions on same-sex relationships, but not because the Massachusetts Supreme Judicial Court caused this result alone. The decision to extend full marriage rights to LGB people in Massachusetts was met with rebuke by grassroots social conservatives and some conservative elites, including President George W. Bush. That criticism, in turn, helped to fuel efforts by Gavin Newsom to celebrate same-sex unions through extralegal means. Newsom's actions in San Francisco subsequently fanned unsuccessful efforts to amend

the federal constitution to ban same-sex marriage. In the short term, *Goodridge* sparked a structural shift in elites' approach to state recognition of same-sex relationships. This pattern of change is predicted by legitimization theory.

The positive yields and newly created burdens was a mixed bag for the marriage movement. In this vein, what constitutes "success" is important here. As Rosenberg argued from the vantage point of 2008:

If the goal is improving the lives of gay men and lesbians, then there is a good deal to celebrate. On the other hand, if the goal of the litigation is marriage equality, then little has been achieved and major obstacles have been created.⁶⁴⁸

Focusing squarely on marriage equality as the metric of victory in 2008, Rosenberg, described this early stage as "one step forward, two steps back."⁶⁴⁹ Historian John D'Emilio straightforwardly called this period "a disaster" for the marriage campaign.⁶⁵⁰ Their assessments were not unfounded at the time. Indeed, in the aftermath of whatever gains the LGBT community made in terms of marriage, the community lost to the extent that 27 state constitutions removed marriage from the legislative and judicial process for same-sex couples. Granted, the numbers alone by 2008 looked bleak. But, these evaluations were astray for two reasons. First, implicit in these assessments is that every victory and every defeat is equally weighty. Second, they failed to capture and appreciate (given their relatively limited hindsight) the smaller cracks each and every act of court-inspired disobedience opened.

Indeed, what is lost in sweeping claims of defeat in assessing this period on its own, is that courts induced executive actors to press their cause in the court of public opinion and keep the issue alive,⁶⁵¹ lay the groundwork for litigation, and leverage the dynamics of federalism to move the ball on marriage. Equally important, in nearly every case of mass civil disobedience or executive action, relevant actors used judicial opinions and jurisprudential rationales to legitimize their actions and, perhaps transitively, enhance the validity of the equal marriage rights cause, too. This signals that the courts gave rise to a consciousness of rights that disobedient actors used as justification for their defiance thereby legitimizing their own push for same-sex marriage.

Taken as a whole, many these early developments would not likely have occurred *but for Goodridge*. Indeed, Gavin Newsom's actions in San Francisco

⁶⁴⁸ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 368 (2d ed. 2008).

⁶⁴⁹ *Id.*

⁶⁵⁰ John D'Emilio, *Will the Courts Set Us Free?: Reflections on the Campaign for Same-Sex Marriage*, in *THE POLITICS OF SAME SEX MARRIAGE* 45 (Craig A. Rimmerman & Clyde Wilcox eds., 2007).

⁶⁵¹ This is consistent with other research on elite-driven coverage of Supreme Court decisions. See generally Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in *CONTEMPLATING COURTS* (Lee Epstein, ed., 1995) (arguing that significant public ignorance of the Court often means that executive actors can successfully pursue their issues through other avenues even after losses in courts).

while animated by mixed motivations—including *Lawrence* and *Goodridge* in addition to President Bush’s response to *Goodridge*—would not have happened without the Massachusetts litigation. The ripple effect of Newsom’s civil disobedience in New York helped stoke litigation.

More vitally yet, state officials’ response to fomenting acts of disobedience led to a clarification of New Yorkers’ eligibility to marry in Massachusetts before same-sex marriages commenced there, which also later buoyed efforts to move away from civil unions in Vermont. Undoubtedly, supportive officials in state executive branches boosted whatever efficacy *Goodridge* had in expanding tangible benefits to same-sex couples and moving the public towards accepting marriage equality. These officials were under no binding obligation to lend support or take the mantle of *Goodridge* to move equal marriage forward. The Constrained Court Theory does not sufficiently take into account non-hierarchical relationships and cannot explain developments between neighboring sovereigns. Contrary to legitimization skeptics, the marriage movement gained profound momentum from *Goodridge* and the chain of spinoff events it caused.

CONCLUSION: THE DIALECTICAL COURTS

Do courts influence society? This question was at the heart of the Sixth Circuit’s decision in *DeBoer v. Snyder*.⁶⁵² While upholding four same-sex marriage bans, Judge Jeffrey Sutton waxed philosophical on the role of courts and social change, writing, “For all of the power that comes with the authority to interpret the United States Constitution, the federal courts have no long-lasting capacity to change what people think and believe about new social questions.”⁶⁵³ This Article examined Judge Sutton’s claim by assessing the extent to which social reform-minded litigation and courts brought marriage equality into the American mainstream.

Originating in the 1970s and gaining steam in the 1990s, same-sex marriage advocates used social reform litigation as a vehicle to advance LGB rights. The first round of litigation in the 1970s fell on deaf ears, but litigants made significant headway in the 1990s. Americans overwhelmingly opposed same-sex couples’ freedom to marry early on. That opposition quickly evaporated, however, within fifteen years of Vermont enacting civil unions. Courts and lawyers were largely responsible.

For all it gets right, the Constrained Court Theory suffers because it is an oversimplification of reality. It does not adequately account for non-hierarchical relationships and interstate interactions. The theory fails to incorporate courts’ legitimization power or leave room for a judicially

⁶⁵² 772 F.3d 388 (6th Cir. 2014).

⁶⁵³ *Id.* at 417.

inspired rights consciousness effect. The account presented in this Article evidences these shortcomings.

Among the many takeaways is that *precedent matters*. Judges are risk adverse and, therefore, are hard-pressed to recognize new, emerging rights in the absence of precedent. Conversely, judges are liberated to act swiftly and sweepingly when they are empowered by precedent to rule in favor of an asserted right. When same-sex couples first initiated marriage litigation in the 1970s, they were all but laughed out of court. The first marriage plaintiffs' non-strategic litigation placed the cart before the horse. These plaintiffs' haphazard efforts failed to dismantle sodomy statutes or consider constitutional challenges to regulations over same-sex sexual conduct before approaching the marriage question. The legal landscape shifted over time as courts struck down anti-sodomy laws and legislatures liberalized restrictions on private sexual conduct. Ultimately, the Supreme Court's condemnation of federal marriage discrimination in *Windsor v. United States* relaxed the precedential constraint considerably and freed judges to dismantle discriminatory state marriage laws in short order.

Once courts warmed to same-sex couples and recognized their freedom to marry, those decisions were dependent on the political branches to reinforce the decisions and public administrators to implement the necessary reforms. Same-sex marriage rulings were successful because there was insufficient opposition in state legislatures to enact bills to undercut the decisions or refer constitutional amendments to overturn them. Similarly, governors' resistance to early court rulings was muted. Because they were the first governors to face the issue head on, Howard Dean and Mitt Romney had the greatest latitude to try to thwart the Vermont Supreme Court and Massachusetts Supreme Court, respectively. The Romney Administration, which was the most publicly opposed to same-sex marriage, took affirmative steps to ensure the smooth implementation of the *Goodridge* decision in early 2004. Public administrators and officials crucial for implementation fell in line with the courts' mandates.

Evidence supports the thesis that *courts legitimized same-sex marriage*. The public's acceptance of same-sex marriage was quick as the courts expanded rights for LGBT Americans. This remarkable rise in support was noticeable on the state and national level but is not explained away by changes in religious attitudes or personal connections with openly gay people. Nor can these changes be chalked up to generational replacement as every generational cohort's support for same-sex marriage increased while litigation percolated and legislation progressed.

Most significantly, *courts possessed an ability to spark a newfound awareness* in observers of same-sex couples' demands for equality as a fundamental, constitutional right. Herein lies the greatest finding of courts' power to influence social movements and the political process—a phenomenon that cannot be

understood within a constrained court. From legislators in Vermont authorizing same-sex relationship recognition to Gavin Newsom defying state law to grassroots organizers forming new civil rights groups, courts induced persons to take action to demand equal rights for the LGB community. Court rulings increased same-sex marriage's salience, fueled the passions of untold numbers of Americans (both in favor and against equal marriage), and manifested an evolved consciousness of rights.

Any conclusion that courts were the sole reason for the movement's success is too sweeping. Postulations that courts were ineffective or insignificant in same-sex marriage's advancement run contrary to the record. *Litigation and courts played an indispensable role in the early success of same-sex marriage.* The *Baker* and *Goodridge* courts accelerated the spread of relationship recognition by opening the door to an alternative step toward equal marriage and demonstrating the non-harm caused by expanding the freedom to marry. *Goodridge* sparked a chain of events that reverberated in states for years after it was handed down. Federalism and the diffusion of family law across states allowed same-sex marriage's rapid spread.

When political actors are induced to take the mantle of a court ruling and advance an issue, like state attorneys general or local municipal officials, the power and efficacy of the courts are enhanced. The decisions in *Baker* and *Goodridge* shaped the political process in Vermont and New Hampshire. Litigation raised marriage equality's profile and fueled a consciousness of rights that placed same-sex marriage and interracial marriage on the same civil rights plane. *Courts played an important part in dislodging the institutional inertia working against same-sex couples by inspiring a new understanding of rights and legitimizing same-sex couples' efforts.* Given public officials' overestimation of the public's opposition to same-sex marriage,⁶⁵⁴ these early victories are all the more remarkable.

The courts' legitimizing power is not without limitations or costs. Regarding courts' legitimacy-conferring function, there are two important takeaways. First, while courts can expend institutional capital to draw a weary public towards judges' preferred positions, they will more successfully win over the public if aided by outside actors. Second, the emergence of discordant views and the polarization of opinions in the short-term wake of a controversial judicial decision should not surprise observers of judicial politics. Scholars should properly understand this as a step in the legitimization process.

⁶⁵⁴ Cf. David E. Broockman & Christopher Skovron, *What Politicians Believe About Their Constituents: Asymmetric Misperceptions and Prospects for Constituency Control*, 1, 18 (Vanderbilt University Conference on Political Representation: Fifty Years After Miller and Stokes. Working Paper, 2013), http://www.vanderbilt.edu/csdi/miller-stokes/08_MillerStokes_BroockmanSkovron.pdf (describing a conservative bias in politicians' perceptions of their constituents views in reference to issues such as health care and same-sex marriage, particularly among conservative politicians).

Courts' legitimizing power benefits from the aid of the political branches. If executives, legislators, and bureaucrats uniformly work to suffocate a judicial ruling quickly, they may be able to snuff out judicial progress. By constitutional design, rapid responses to shut down a decision are not possible in many jurisdictions, which helps court decisions have staying power.⁶⁵⁵ This was the instance in Massachusetts where the constitutional amendment process takes place over multiple years versus California where the state constitution can be amended in short order.

Courts' ability to risk institutional integrity on any given issue benefits from strategic lawyering, which can most easily come about through organizational coordination. As the marriage movement's development demonstrates, the power of courts was harnessed for maximum benefit, in part, because legal interest groups carefully targeted friendly jurisdictions. More than just expertise for impact litigation venue selection, organization-supported litigation is crucial in the early stages of impact litigation where the prospect of attorneys' fees is uncertain.⁶⁵⁶

In the long run, courts can be effective agents of social change, but no court is an island and the danger of overreach is real. Judges must be strategic when investing courts' capital of trust. Courts are but one set of actors in the American polity and are most effective when the political branches support them. Judicial institutions are well suited for an active, but dialectical role, in mediating social change between the political branches, federal and state government, and the general public. Yes, courts can "appeal to men's better natures [and] call forth their aspirations."⁶⁵⁷ Judges can reflect higher republican principles and educate the public on deeply contested matters, but not without cost. Even judicial schoolmasters require the assistance of friendly hands.

⁶⁵⁵ See ROBERT J. HUME, COURTHOUSE DEMOCRACY AND MINORITY RIGHTS: SAME-SEX MARRIAGE IN THE STATES 198 (2013) (describing how courts often have institutional resources that lend them an ability to levy a sustaining, transformative impact on even the most controversial areas of policy).

⁶⁵⁶ See Epp, *supra* note 31, at 19 (arguing that certain support-structures that facilitate a centralized coordination of a case are critical in the early stages of an impact litigation to ensure that haphazardly filed lawsuits or extreme remedies will not derail a social movement that often depends on expert credibility from the start); see also *supra* note 32 and accompanying text.

⁶⁵⁷ Bickel, *supra* note 1, at 26.