Strategic Pragmatism Or Radical Idealism?: The Same-Sex Marriage And Civil Rights Movements Juxtaposed

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I. Introduction

The first ten years of the new millennium have been a momentous period in the area of gay rights. Beginning with Massachusetts in 2003, five states and the District of Columbia have legalized same-sex marriage. In February 2004, following Mayor Gavin Newsom’s announcement that the city of San Francisco would begin issuing marriage licenses to same-sex couples, more than 4,000 such couples traveled to San Francisco’s City Hall to wed. Though the San Francisco same-sex marriage moment came to an end just one month after it began, it made headline news across the nation and, for many gay and lesbian couples, made real the prospect of marriage in their lifetime. That same-sex marriage has become the central and most pressing issue on the gay rights agenda is itself evidence of major progress within the movement, and a prospect that would have seemed almost inconceivable just two decades ago.

5 Keck, supra note 3, at 164.
7 Margaret Talbot, A Risky Proposal: Is it Too Soon to Petition SCOTUS on Gay Marriage? THE NEW YORKER, Jan. 18, 2010, at 40 (“In 1993, few Americans had heard of same-sex marriage”); Keck, supra note 3, at 158 (“Time and again, same-sex couples volunteered in interviews across the nation that they never expected marriage to be available to them during their lifetimes.”).
Continuing in the tradition of most civil rights movements in this country, however, it
appears as though “every encouraging victory is soon followed by a troubling defeat.” In
response to concerns that the Supreme Court of Hawaii’s 1993 decision in *Baehr v. Lewin*,
which held that the State was required to show a “compelling interest” behind its prohibition
of same-sex marriage, would open the door to gay marriage, Congress passed, and President
Clinton signed into law, the Defense of Marriage Act (“DOMA”). DOMA defines marriage
for the purposes of all federal laws as “only a legal union between one man and one woman” –
thus prohibiting the federal government from recognizing the marriages of same-sex couples –
and allows for non-recognition of same-sex marriages by the States. Because marital status
affects a multitude of federal and state laws – indeed, the U.S. Government Accountability
Office estimates that more than 1,138 rights and protections are conferred to U.S. citizens by the
federal government alone upon marriage – the implications of DOMA for same-sex couples are
immense, and the Act has proved to be a major setback for the gay rights movement.

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10 *Id.* at 67.
17 Koppelman, *supra* note 13, at 3. Some examples of these consequences follow. Same-sex spouses may not file joint tax returns. Same-sex spouses are ineligible for the Family and Medical Leave Act, which provides unpaid leave to employees for “care of the spouse.” Same-sex spouses of federal employees are excluded from federal programs that compensate widows.
In the wake of the Massachusetts Supreme Judicial Court’s decision in *Goodridge v. Department of Public Health*\(^{19}\) in 2003, which legalized gay marriage in Massachusetts, opponents of same-sex marriage began to pursue an aggressive, two-part strategy to prevent a *Goodridge*-like decision from occurring elsewhere: first, pushing for a federal constitutional amendment outlawing gay marriage and second, launching state-by-state campaigns for the same.\(^{20}\) This strategy has proved overwhelmingly successful. In the wake of *Goodridge*, twenty-seven states passed constitutional amendments banning same-sex marriage within their borders.\(^{21}\) Though the House of Representatives voted down the Federal Marriage Amendment in 2006,\(^{22}\) that 237 Representatives thought the issue of gay marriage was sufficiently threatening to warrant an amendment to the Constitution is a powerful indicator of the strength of the opposition.\(^{23}\)

These resounding defeats have sparked a contentious debate within the gay rights movement over whether to take a more moderate approach in its quest for same-sex marriage, or whether to continue to aggressively push for full and immediate equality.\(^{24}\) This dissension over strategy is common within social movements, particularly where auspicious advancements are

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\(^{18}\) See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062, 2187 (2002) [hereinafter *Some Effects*] (DOMA “appeared to be a complete victory for the politics of preservation.”).


\(^{20}\) Ball, *supra* note 8, at 1512.


\(^{24}\) Broder & Seelye, *supra* note 6, at A1.
quickly followed by instances of disheartening regression.\textsuperscript{25} In Judge Stephen Reinhardt’s words, “[i]n every campaign for equal justice, tensions develop between strategic pragmatists and radical idealists.”\textsuperscript{26} It is therefore not surprising that much of the discord over strategy with regard to same-sex marriage mirrors the intense debates that occurred within and among organizations during the Civil Rights Movement in the 1950s and ‘60s.\textsuperscript{27}

This paper will examine the debate currently unfolding within the gay rights movement regarding the most effective strategy to adopt in pursuit of same-sex marriage. Much of the analysis keeps an eye toward the past, and, as other scholars in this field have done, suggests that the Civil Rights Movement holds important lessons for those working to achieve gay marriage rights today.\textsuperscript{28} However, this paper adds to the discourse an important observation: the circumstances surrounding same-sex marriage movement diverge in significant ways from those surrounding the Civil Rights Movement. In particular, the two movements differ with regard to their strength relative to their respective oppositions, their ability to capitalize on the moral force underlying the issue at hand, and their inherent capacities for effective coordination. Those working to achieve same-sex marriage should be cognizant of these distinctions, as they hold important implications for forging a successful strategy toward achieving marriage equality.

Part II of this paper sets forth the general arguments and strategic concerns of activists posited on either side of the larger debate over whether the most effective road to change is through, as Judge Reinhardt put it, “strategic pragmatis[m]” or “radical idealis[m].”\textsuperscript{29} Part III aims to capture the ways in which these arguments have unfolded in the specific context of the

\begin{footnotesize}
\begin{enumerate}
\item Ball, \textit{supra} note 8, at 1494.
\item Judge Stephen Reinhardt, \textit{Legal and Political Perspectives on the Battle Over Same-Sex Marriage}, 16 STAN. L. & POL’Y REV. 11, 16 (2005).
\item See, e.g., Ball, \textit{supra} note 8, at 1493-94; Reinhardt, \textit{supra} note 26, at 12, 16.
\item See, e.g., Ball, \textit{supra} note 8, at 1493-94; Reinhardt, \textit{supra} note 25, at 12,16.
\item Reinhardt, \textit{supra} note 26, at 16.
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same-sex marriage movement. Part IV compares the social forces surrounding and driving the same-sex marriage movement with those in the Civil Rights movement, focusing on the potency of the movements for change as compared to their respective opposition movements. Part V attempts to draw some lessons from these comparisons, and highlights the differences between the two movements and the implications that these differences have on the same-sex marriage movement’s capacity for national success. Part VI provides some brief suggestions about how the movement might best proceed.

II. THE DEBATE IN BROAD VIEW: THE PROPER COURSE OF SOCIAL CHANGE

Debates over strategy are a hallmark of major social movements, particularly where those movements face an opposition powerful enough to inflict demoralizing setbacks.\(^{30}\) Concerns that proceeding too slowly or conceding too much will cause the movement to become stagnant or toothless compete with fears that change brought on “too much, too fast, too soon”\(^{31}\) will cause harmful backlash that will be difficult to recover from. That divides tend to develop between those who would demand immediate and aggressive action, and those who would advocate for a more moderate and gradual approach, is, therefore, quite predictable.

The Civil Rights Movement was no exception to this trend. In the years leading up to its litigation of *Brown v. Board*, the NAACP pursued a moderate, incrementalist strategy.\(^{32}\) During this period, the NAACP “accepted the Plessy-defined terms of the debate—separate and equal—

\(^{30}\) Ball, *supra* note 8, at 1494.
\(^{31}\) *Id.* at 1521. Following President Bush’s reelection in 2004, Senator Diane Feinstein expressed exactly this sentiment regarding same-sex marriage, noting that it had “served as a rallying point to get conservative people to the polls.” *Id.*
as the controlling issue,“\textsuperscript{33} and its early efforts thus focused on campaigning for improvements to
the quality of black schools in the South.\textsuperscript{34} During the 1930s, the NAACP began to litigate
teacher pay equalization suits and to mount constitutional challenges to segregation in higher
education.\textsuperscript{35} It was not until the late 1940s that the NAACP adopted a strategy of direct and
aggressive attack on segregation in primary education.\textsuperscript{36}

This decision to challenge in its totality the apartheid-regime long treasured by white
Southerners and validated by the Supreme Court in \textit{Plessy v. Ferguson} was enormously
controversial.\textsuperscript{37} Many in the black community believed that it was too soon to bring a direct
attack on segregation.\textsuperscript{38} Black teachers and school administrators, who had formed an important
base of support for the NAACP’s prior litigation campaigns, were extremely nervous about the
NAACP’s decision to challenge segregation head-on.\textsuperscript{39} These voices of concern were so strong
that the NAACP delayed making a final decision on whether to litigate equalization or
desegregation in primary schools for a number of years.\textsuperscript{40}

The NAACP’s victory in \textit{Brown I} did not put an end to this discord over strategy. As
white Southerners mounted a campaign of “massive resistance” to the enforcement of
desegregation, the NAACP was faced with the choice to either press on demanding full and

\textsuperscript{33} \textit{Id.} at 23.
\textsuperscript{34} Eskridge, \textit{Some Effects, supra} note 18, at 2081.
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.}
newspaper in Houston, expressed frustration that “the N.A.A.C.P [was] fooling itself” in
thinking that a direct attack would “knock down segregation at one fell swoop.” \textit{Id.} (alterations
in original).
\textsuperscript{38} \textit{Id.} at 111.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 113.
immediate desegregation or to retreat to a more moderate position.\textsuperscript{41} Echoing the concerns of many in the black community, Thurgood Marshall’s own advisors sharply disagreed on the proper course of action.\textsuperscript{42}

The gay rights movement is facing a similarly crucial juncture in its campaign for same-sex marriage. Thus, though this section will focus on the more abstract set of arguments typically advanced by those on either side of the debate over the most effective strategy for social change, it will channel this discussion through an examination of the way that this tactical dissension played out during the Civil Rights Movement.

\textbf{a. Justice Now: Arguments in Favor of Aggressive and Immediate Action}

Two primary forces motivate those who favor aggressive demands for social change. The first of these is the principled belief that it is unjust to delay struggles for equality while waiting around for “the right moment.” The second is more squarely grounded in a series of pragmatic concerns regarding the potential setbacks that may result from too-sluggish or too-conciliatory action for change.

Dr. Martin Luther King, Jr. powerfully described the first of these concerns in his \textit{Letter from a Birmingham Jail}:

Frankly, I have never yet engaged in a direct action movement that was “well-timed,” according to the timetable of those who have not suffered…For years now I have heard the words “Wait!” … This “Wait” has almost always meant “Never.” It has been a tranquilizing thalidomide, relieving the emotional stress for a moment, only to give birth to an ill-formed infant of frustration. We must come to see with the distinguished jurist of yesterday that “justice too long delayed is justice denied.”\textsuperscript{43}

\textsuperscript{41} Ball, \textit{supra} note 8, at 1497.
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} Martin Luther King, Jr., \textit{Letter from a Birmingham City Jail}, in \textit{A Testament of Hope: The Essential Writings of Martin Luther King, Jr.} 289, 292 (James Melvin Washington, ed., 1986).
This line of argument is deeply rooted in fundamental notions of justice and fairness. Essentially, it asks how we – defined broadly as members of disadvantaged minorities, activists, and/or society as a whole – can possibly decide when the time is “right” to vindicate constitutionally-mandated rights. Adopting this stance in its brief to the Supreme Court in *Brown II*, the NAACP “questioned the view that ‘change in attitude must precede change in action.’”\(^{44}\) Kenneth Clark, a close advisor of Thurgood Marshall, cautioned that to wait for the attitudes of opponents of desegregation to change before agitating for the realization of the Court’s mandate in *Brown I* “would entail a long wait indeed.”\(^{45}\)

The second major concern of those on this side of the debate is comprised of a series of beliefs about the effects of delay and capitulation on the viability and potency of social movements. First is the view that demanding less than full equality implies pre-emptive surrender.\(^{46}\) This includes the concern that achieving a more moderate victory – for example, ensuring equalization rather than desegregation, or guaranteeing civil unions instead of same-sex marriage – will placate enough people that it will slow or even preclude the realization of actual equality under the law.\(^{47}\)

Second is the worry that delay will diminish the momentum of the movement. Just as “successful instances of rights-claiming often heighten expectations that further change is possible,” too little action can dampen expectations and sour the optimism that so often sustains

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\(^{44}\) Ball, *supra* note 8, at 1499.

\(^{45}\) *Id* at 1498.

\(^{46}\) Broder & Seelye, *supra* note 5.

long-running movements for change. Moreover, delay gives the opposition the space within which to grow and harden its campaign of resistance.

Third, and perhaps most salient, is the notion that demanding everything makes it more likely that the movement will gain something. Assertive agitation for change can “shift the spectrum of compromise in valuable ways,” and, in this way, “transform the agenda of the nation’s lawmakers.” Reaching for radical change can make opponents more willing to give ground on a more moderate goal – but one previously considered quite far-reaching – in order to placate the movement and dissuade its members from clamoring for a more complete revolution of social norms. Indeed, the NAACP’s decision to directly attack segregation was based, in part, on recognition that “relief in the form of equalization of facilities was subsumed under the request for an end to discrimination.” In other words, fighting for a total overhaul of the system made improvements to the current system more likely.

b. Wait Until the Time is Right: Arguments in Favor of Incremental Change

Those on the other side of the debate argue in favor of incremental change based largely on the twin premises that pushing too hard, too fast may have harmful effects on the movement and that incremental change is simply more effective. First, a premature campaign for equality runs the risk of either ending in a devastating defeat or gaining a victory that produces harmful

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48 Keck, supra note 3, at 157.
49 Ball, supra note 8, at 1498.
50 Keck, supra note 3, at 159. Though Keck’s article focuses on how aggressive litigation campaigns can achieve this valuable effect, his point is equally relevant to agitating for far-reaching legislative action as well.
51 Id. at 158-9.
52 Tushnet, supra note 37, at 109.
backlash. A loss in the Court or in Congress can significantly set back a movement; it takes much longer to get a good opinion if the Court must overturn itself, and legislative action moves even more slowly when the people have already spoken on an issue quite recently. On the other side of the coin, victories that too far outpace public opinion are potentially costly in the long-term, because they “mobilize opponents, undercut moderates, and retard the cause they purport to advance.” As Professor Michael Klarman has explained in his backlash thesis, such successes make the underlying issues more salient – for example, by making real the possibility that white schoolchildren might be taught by black teachers – and thus tend to awaken the antipathy of the opposition. This is particularly true where the victories command an overhaul of a long-standing tradition or social norm – such as southern segregation. Thus, the risk inherent with demanding full equality too quickly on an “‘unwilling populace’” is that it tends to encourage “majoritarian backlash via the ballot box.” Justice Ginsburg eloquently summed up this position when she stated, “[d]octrinal limbs too swiftly shaped, experience teaches, may prove unstable.”

53 Talbot, supra note 7.
54 Id.
55 Michael J. Klarman, Brown and Lawrence (And Goodridge), 104 Mich. L. Rev. 431, 482 (2005) [hereinafter Brown and Lawrence]. Although Klarman’s backlash thesis focuses on the backlash caused by judicial opinions, his conclusions are equally relevant to legislative action that outpaces public opinion. See also Jeffrey Rosen, How to Reignite the Culture Wars, N.Y. Times, Sept. 7, 2003, §6, at 48 (“[B]y cutting off [a national debate about abortion], the court in Roe had the effect of giving abortion rights advocates a false and complacent sense of victory; anti-abortion groups, by contrast, were energized – they suddenly felt like martyrs instead of mere losers.”).
56 Ball, supra note 8, at 1502 (citing William N. Eskridge, Jr., Equality Practice: Civil Unions and the Future of Gay Rights, 147-58 (2002) [hereinafter Equality Practice]).
The second primary contention of those who favor incremental change is that step-by-step action is simply a more effective means of securing real and sustainable equality.\textsuperscript{58} As Judge Reinhardt has explained:

[C]hange comes slowly in America. Once the initial step of sensitizing the public to the issue has been accomplished and the hard work of implementing social change has begun, progress is rarely the result of the efforts of ideological purists-those who would rather lose the battle than accept anything less than an immediate cultural revolution. The civil rights lawyers and activists who did the most to build a more just and equitable world were pragmatists. They devoted years, or even decades, of their lives to the painstaking work of strategic litigation and political action. The victories they won were often frustratingly incomplete, but the principles they established were the ones that translated most effectively into lasting and tangible social progress.\textsuperscript{59}

Incremental change provides the space within which the public – or at least a sizable portion of it – can evolve to a position wherein its interests align with that of the movement.\textsuperscript{60} By contrast, pushing too hard can frustrate meaningful dialogue on the issue and cause unnecessary polarization.\textsuperscript{61} Methodical change allows “public opinion to adjust gradually to the changes sought by social movements.”\textsuperscript{62}

Indeed, though many viewed the NAACP’s decision to directly attack segregation in \textit{Brown} as radical, it was anything but a brash decision. The NAACP spent years dismantling components of Southern apartheid – by bringing pay equalization suits and securing victories

\textsuperscript{58} See, e.g., Reinhardt, \textit{supra} note 26, at 12; Eskridge, \textit{EQUALITY PRACTICE}, \textit{supra} note 56, at 148.
\textsuperscript{59} Reinhardt, \textit{supra} note 26, at 12.
\textsuperscript{60} Eskridge, Equality Practice, \textit{supra} note 56, at 148 (“A process that is incremental and persuades people or their representatives of the acceptability or even desirability of minority rights is much more likely to stick. The incremental process will take a lot longer, but it will be more lasting.”).
\textsuperscript{61} Rosen, \textit{supra} note 55; Talbot, \textit{supra} note 7 (noting that \textit{Roe v. Wade} “interrupted a move toward abortion rights, and froze public opinion in two polarized camps.”).
\textsuperscript{62} Reinhardt, \textit{supra} note 26, at 14.
against segregation in higher education – before it decided to commence the Brown litigation.\footnote{Eskridge, Some Effects, supra note 18.}

In this way, rather than “challenge core social institutions,” Marshall and his team “methodically chipped away at discrimination.”\footnote{Reinhardt, supra note 26, at 14.} This approach of constructing a rich precedential framework upon which to mount the ultimate challenge to the system put opponents of desegregation in the precarious position of trying to uproot the multitude of careful seeds the NAACP had planted in the years leading up to Brown.\footnote{Id.}

\section*{III. The Debate in Context}

The gay rights movement, like other battles through history over individual rights, has made progress in fits and starts, in the culture and in the courts, in legislatures and in families. And like most political movements, it has always been riven with dissension on strategy and tactics, on questions of how far and how fast the movement can push without provoking a backlash.\footnote{Broder and Seelye, supra note 5, at A1.}

This dissension over strategy has been amplified by recent resounding defeats for the gay rights movement. In 2004, thirteen states passed constitutional amendments outlawing same-sex marriage.\footnote{Ball, supra note 8, at 1505.} In eleven of these referenda, the initiatives garnered at least sixty percent of the vote, with the numbers in many states approximating seventy-five percent.\footnote{Klarman, Brown and Lawrence, supra note 55, at 466.} In the aggregate, fourteen million Americans rejected same-sex marriage in a single election season.

In the wake of these stunning displays of opposition, leaders within the same-sex marriage movement have begun to reevaluate their strategies.\footnote{Brad Knickerbocker, Political Battles over Gay Marriage Still Spreading, CHRISTIAN SCI. MONITOR, Nov. 29, 2004, at 1.} Directors of the Human Rights Campaign (“HRC”), the nation’s largest gay rights organization, responded to these electoral

\begin{footnotesize}
\footnotetext{63}{Eskridge, Some Effects, supra note 18.}
\footnotetext{64}{Reinhardt, supra note 26, at 14.}
\footnotetext{65}{Id.}
\footnotetext{66}{Broder and Seelye, supra note 5, at A1.}
\footnotetext{67}{Ball, supra note 8, at 1505.}
\footnotetext{68}{Klarman, Brown and Lawrence, supra note 55, at 466.}
\footnotetext{69}{Brad Knickerbocker, Political Battles over Gay Marriage Still Spreading, CHRISTIAN SCI. MONITOR, Nov. 29, 2004, at 1.}
\footnotetext{70}{Broder and Seelye, supra note 5, at A1.}
\end{footnotesize}
defeats by acknowledging that the movement needed to “bow to political reality and moderate its message and its goals.”\textsuperscript{71} Others within the movement, however, have criticized the HRC for this display of what they view as “pre-emptive surrender.”\textsuperscript{72} Jonathan D. Katz, Executive Coordinator of the Larry Kramer Initiative for Lesbian and Gay Studies at Yale, commented, “[i]t is entirely characteristic for [the HRC] to believe that what is required is a sort of retrenchment and a return to a more moderate message. They are, of course, completely wrong.”\textsuperscript{73}

It is thus clear that major points of contention over strategy are looming large over the same-sex marriage movement.\textsuperscript{74} Indeed, a poll conducted by the Pew Forum in August 2009 showed that forty-five percent of supporters of same-sex marriage favor pushing hard for legalization, while forty-two percent want to pursue a more gradual strategy in order to avoid catalyzing the growth of an even more formidable opposition movement.\textsuperscript{75} This section will address the general arguments put forth by those on either side of this divide within the gay rights movement on the issue of same-sex marriage.\textsuperscript{76}

\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} This paper will focus primarily on the debate as it has unfolded among activists. However, these issues are also being debated in the academic world. \textit{Compare} Klarman, \textit{Brown and Lawrence}, \textit{supra} note 55, with Keck, \textit{supra} note 3, and Ball, \textit{supra} note 8.
\textsuperscript{76} This paper will cabin its analysis to those within the gay rights movement who believe that marriage is an important and legitimate goal, but who disagree about the best way to achieve it. It does not address the sizeable minority of gay and lesbian activists who disagree with the strategy of pursuing marriage itself. For a discussion of this position, see \textsc{Andrew Sullivan}, \textsc{Same-Sex Marriage Pro & Con: A Reader}, 117 (1997); \textsc{Nancy F. Cott}, \textsc{Public Vows: A History of Marriage and the Nation}, 225 (2000).
Before exploring the arguments, it is important to note that those on either side of the debate share some common ground. Both agree that social change requires legal and political action, as well as a robust social movement. The primary point of contention, therefore, is not over the kind of action that must be taken to ensure success, but rather over the speed and intensity with which these strategies should be deployed.

a. Marriage Now: The Case for Immediate and Aggressive Action

In a recent statement, Ted Olson, who is currently litigating the challenge to California’s Proposition 8, channeled Martin Luther King: “If people are suffering and being hurt by discrimination, and their children and families are [also being hurt] . . . then who are we as lawyers to say, ‘Wait ten years?” His co-counsel, David Boies, has voiced a similar response to those who say the challenge is coming too soon: “It can happen now, or we can lose another generation to discrimination.” The justice-based arguments of those who favor an immediate push for same-sex marriage reflect those of their predecessors in the Civil Rights Movement.

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77 See, e.g., Bob Egelko, Brown v. Board of Education: 50 Years Later, S.F. CHRONICLE, May 17, 2004, at A10 (quoting “veteran gay-rights litigator Evan Wolfson . . . ‘The tremendous resistance that followed Brown showed it’s not enough to win a legal victory,’ he said, stressing the need to organize politically and change public attitudes.”); Knickerbocker, supra note 69 (quoting Matt Foreman, executive director of the National Gay and Lesbian Taskforce: “If the movement had been thinking clearly, we would have had a political and public education strategy that preceded the legal strategy.”).
78 Proposition 8 amended the California Constitution, effective November 5, 2008, to state that only marriages between one woman and one man are valid and recognized in California. Deborah H. Wald, Dissolving Same-Sex Marital Unions in California, 32-WTR FAM. ADVOC. 22, 22 (2010).
79 Talbot, supra note 7.
Indeed, just as Thurgood Marshall chose to respond to mounting Southern resistance to desegregation after Brown I by pressing for the swift and comprehensive implementation of the Court’s mandate in that case, the lawyers who represented the plaintiffs in Goodridge made a similar choice.\textsuperscript{81} Though the Goodridge court decisively held that Massachusetts’ ban on same-sex marriage violated the State’s Constitution,\textsuperscript{82} its opinion was opaque on the question of whether the Constitution demanded full legal equality – i.e., marriage – or whether it would tolerate some lesser form of equality, such as civil unions.\textsuperscript{83} In its brief to the Massachusetts Supreme Judicial Court on this issue, Gay and Lesbian Advocate and Defenders (“GLAD”), echoed the NAACP’s brief to the Supreme Court in Brown II, stating that “[t]he constitutional commands of equality and liberty brook no compromise,” and thus that the only acceptable remedy was full marriage rights for same-sex couples.\textsuperscript{84}

The practical concerns of this group also parallel those of past social movements. First, many activists on this side of the debate believe that asking for less than full marriage equality would constitute a needless surrender to societal pressures. GLAD’s decision to demand marriage in the wake of Goodridge was based largely on its belief that civil unions create a “separate but equal” regime, which cements a societal perception of homosexual relationships as inferior.\textsuperscript{85} Many others within the gay rights movement share these concerns. Professor Barbara Cox has argued that civil unions are not only “inherently unequal,” but also unequal in the literal

\textsuperscript{81} Ball, supra note 8, at 1504.
\textsuperscript{83} Ball, supra note 8, at 1496.
\textsuperscript{84} Id. at 1504 (quoting Brief of Interested Party, Gay & Lesbian Advocates & Defenders, at 36 In re Request for an Advisory Opinion from the President of the Senate, 802 N.E.2d 565 (Mass. 2004) (No. 09163) [hereinafter Interested Party]).
\textsuperscript{85} Interested Party, supra note 84, at 41.
sense, as they may not prove as “portable” as same-sex marriages.\textsuperscript{86} One commentator illuminated this notion of “inherent” inequality in a recent blog post, responding to another reader who had written in favor of civil unions:

[I]f you truly believe that civil unions can be made equal to marriage, I would suggest that you propose to your girlfriend to not get married, but just civil unionized, and see if she agrees it’s equal. If it isn’t good enough for you, why should it be good enough for gays?\textsuperscript{87}

Ted Olson and David Boies’ challenge to Proposition 8 is similarly grounded in the notion that civil unions are “separate and unequal,” and that they therefore violate the Equal Protection Clause.\textsuperscript{88} Evan Wolfson, Executive Director of Freedom to Marry, has said of civil unions, “[w]e’ve gone down the path of two lines at the clerk’s office, or two drinking fountains, before. We’ve done separate and unequal; it was a mistake and should not be repeated.”\textsuperscript{89}

Certainly, many gay rights activists who take this view see civil unions as a step in the right direction, they just emphasize that such a legal arrangement is “no substitute for full equality.”\textsuperscript{90}

Second, activists who support the “legalization now” approach worry that a more protracted campaign will both unjustly delay equality and sap the movement of its vitality. In response to critics who have argued “not now, not today, not in front of this Supreme Court,” with regard to the Proposition 8 trial, David Boies has emphasized the danger that leaders within the gay rights movement who favor incremental change might become too conservative in their views on the “right time” to bring the case.\textsuperscript{91} Buttressing this concern is Boies’ presupposition

\textsuperscript{89} Johnson, \textit{supra} note 47, at 316.
\textsuperscript{90} Id. (quoting Evan Wolfson).
\textsuperscript{91} David Boies, Address at Harvard Law School (Nov. 5, 2009) [hereinafter Boies Address].
that it might be a very long time before there is a Supreme Court that the movement could be confident will decide the case in its favor.\textsuperscript{92} For this reason, he views the approach of going state-by-state as both too slow and likely to be ineffective. As Boies mused, if the movement cannot secure a victory in California, it’s not going to win in a lot of other states.\textsuperscript{93}

Third, activists on this side of the debate also share the belief of their predecessors that aiming for radical change makes moderate progress more acceptable to the public-at-large, and thus more to take hold. Boies argues that regardless of the outcome of the Proposition 8 trial, the case has the potential to move the gay marriage debate in a positive direction.\textsuperscript{94} In fact, he believes that the suit has already had this effect; in trying to define the marriage ban, the opposition has been forced into accepting a lot of other things that it might have been loath to accept if the movement had been more cautious. By strongly defining equality as including marriage, the movement has succeeded in narrowing what the opposition is fighting against.\textsuperscript{95}

This notion is demonstrably true. The depth of public support for same-sex marriage today was unthinkable prior to the litigation campaign.\textsuperscript{96} Equally striking is the momentous shift in public opinion with regard to civil unions. Support for civil unions rose from forty-five percent in 2003 to fifty-seven percent in 2009.\textsuperscript{97} Among those who oppose same-sex marriage, support for civil unions increased dramatically; rising from twenty-four percent to thirty-percent between 2008-2009 alone.\textsuperscript{98} Emphasizing the remarkableness of this shift in opinion, CNN political analyst

\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id; see also Keck, \textit{supra} note 3, at 159 (“Opponents of gay rights once fought these policies tooth and nail, but compared to equal marriage rights the prohibition of employment discrimination now seems significantly less threatening.”).
\textsuperscript{96} Keck, \textit{supra} note 3, at 167.
\textsuperscript{97} The Pew Forum, Majority Continues, \textit{supra} note 74.
\textsuperscript{98} Id.
William Schneider stated, “I remember saying not long ago that Howard Dean couldn’t be president because he’d signed a law creating civil unions in Vermont. Now that’s the moderate position.”  

b. Wait Until the People are Ready: The Case for an Incremental Approach to Achieving Same-Sex Marriage

As Professor Klarman has explained, many within the gay rights movement have begun to question “the strategic wisdom of pushing forward an issue that draws vehement opposition from nearly two-third of voters.” These critics protest that premature or overly aggressive action leads either to defeats that achieve nothing or set the movement back, or to “victories” that engender destructive backlash. After Olson and Boies announced their plans to launch the Proposition 8 litigation, a group of leading gay rights organizations – including the American Civil Liberties Union (A.C.L.U), HRC, and Lambda Legal, issued a statement condemning this action. Their reaction was based largely on the concern that “[a] loss now may make it harder to go to court later . . . It will take us a lot longer to get a good Supreme Court decision if the Court has to overrule itself.”

Equally worrisome to this group of activists is that, historically, victories that have stepped too far ahead of public opinion have had the counter-productive effect of mobilizing and growing the opposition. For example, following the Supreme Court’s 1972 decision in Furman v. Georgia, which led to a de facto moratorium on capital punishment in the United States,

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100 Klarman, *Brown and Lawrence*, supra note 55, at 472.
102 Talbot, *supra* note 7.
103 *Id*.
104 408 U.S. 238 (1972).
support for the death penalty rose from fifty percent to fifty-seven percent in just five months.\textsuperscript{105} By 1976, support for capital punishment stood at sixty-six percent, and thirty-five states had revived the death penalty within their borders.\textsuperscript{106} The vehement response of many states in response to \textit{Goodridge} and its progeny compounds this fear, as do the forceful sentiments of many leaders of the opposition.\textsuperscript{107} Understandably, activists worry that Gary Bauer, President of American Values, is telling the truth when he says that “‘[t]he more the movement demands the endorsement of the law and the culture, the more resistance there will be.”\textsuperscript{108}

These concerns are grounded squarely in reality. Activists and scholars alike tend to agree that gay marriage “awakene[ed] the ‘sleeping giant’ of the moral majority,” revitalized the Christian right, and had tangible negative effects for gay rights supporters on multiple series of elections.\textsuperscript{109} Gay rights scholar John D’Emilio’s reaction to this backlash captivates the sentiments of many same-sex marriage supporters: “The campaign for same-sex marriage has been an unmitigated disaster. Never in the history of organized queerdom have we seen defeats of this magnitude.”\textsuperscript{110}

\textsuperscript{105} Corinna Barrett Lain, \textit{Furman Fundamentals}, 82 WASH. L. REV. 1, 49 (2007).
\textsuperscript{106} Id. at 48-49.
\textsuperscript{109} See Rosen, supra note 55 (quoting attorney Mathew Staver, director of Liberty Counsel, a non-profit law firm that provides free legal assistance in defense of “Christian religious liberty, the sanctity of human life, and the traditional family.”); David D. Kirkpatrick, \textit{Conservatives Using Issue of Gay Unions as a Rallying Tool}, N.Y. Times, Feb. 8, 2004, at A1; Klarman, \textit{Brown and Lawrence}, supra note 55, at 467 (“opposition to same-sex marriage mobilized conservative Christians to turn out at the polls in 2004 in unprecedented numbers . . . “In closely divided states . . . same-sex marriage may well have determined the outcome of the presidential election.”). Klarman also notes that the issue of same-sex marriage “clearly provided the margin of victory for Republican senators in closely fought contests in states such as Kentucky and South Dakota. Id. at 468.
\textsuperscript{110} Keck, supra note 3, at 154.
For precisely this reason, a strong voice has emerged from within the gay rights movement in favor of civil unions as a “stepping-stone in the march towards marriage.” This contingent of the movement argues that civil unions provide space for the “gradual adjustment of antigay mindsets,” thus serving as a means of securing important rights without arousing the antipathy of opponents. On this view, once the public becomes comfortable with the existence of civil unions, the idea of same-sex marriage will appear much less radical.

Many activists in this camp also postulate that moving incrementally will produce a more meaningful brand of change. For example, same-sex marriage advocates in the nation’s capital “quietly stack[ed] up rights and responsibilities for same-sex couples to avoid soliciting an outcry from Congress.” This approach ensured that moving from domestic partnerships to marriage would simply be “the next logical step,” rather than a “big leap.” D.C. Council member Phil Mendelson explained the reasoning behind this methodical strategy: “To push too far, too fast would have created a backlash that would have been hard to overcome.” Supporters of same-sex marriage in Maryland, driven by concerns that the passage of a marriage equality law will shortly thereafter be followed by a referendum on the issue, are “stalling,” recognizing that voters have struck down gay marriage in every state where a popular vote was...

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111 Johnson, supra note 47, at 336.
113 Id.
115 Id.
116 Id.
Counting on the presumption that they will almost assuredly garner more public support in as little as six months, gay rights activists are hesitant to rock the boat. Surely, advocates of incremental change are also mindful of empirical data showing that a majority of Americans will support same-sex marriage in as few as five years. If public opinion is moving so swiftly in this direction anyway, the argument goes, why push the envelope?

IV. SETTING THE STAGE: THE SAME-SEX MARRIAGE AND CIVIL RIGHTS MOVEMENTS COMPARED

Debates over strategy do not occur in a vacuum; contextual factors can and should shape the terms of the discussion. Though the current strategic struggle within the same-sex marriage movement in many ways mirrors that which occurred during the Civil Rights Movement, there are some important differences between the two. Thus, while the strategy of acting aggressively on the issue of segregation proved successful – at least in securing a powerful message of racial progress from the Supreme Court – the same may not hold true with respect to gay marriage.

This section will examine the unique framework within which the same-sex marriage movement is operating, and the ways in which this political and social landscape may influence which strategy will prove most effective today. While the analysis will focus primarily on the current movement, it will also make some comparisons to the Civil Rights Movement.

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118 Id.
120 See Talbot, supra note 7.
a. The Power of the Movements and their Oppositional Counterparts

i. The Numbers Compared

A clear majority of Americans today opposes same-sex marriage.\textsuperscript{121} This opposition is robust nationwide; states as politically and demographically diverse as California, Texas, Oregon, and Ohio have all approved measures amending their state constitutions to ban gay marriage in recent years.\textsuperscript{122} However, despite this appearance of uniform resistance, there are regions where support for or opposition to same-sex marriage is particularly strong.

New England has proved to be the “nucleus of the same-sex marriage movement.”\textsuperscript{123} Four of the five states that have legalized same-sex marriage – Massachusetts, Connecticut, Vermont, and New Hampshire – are located in the region.\textsuperscript{124} Rhode Island does not allow gay marriage, but three of the major candidates running in the State’s 2010 gubernatorial race have publicly promised to support a bill allowing same-sex marriage if elected, thus suggesting that legalization may not be too far off in yet another New England state.\textsuperscript{125} In May 2009, Maine became the first state to legalize gay marriage through the legislative process with a governor’s


\textsuperscript{122} Bans on Same-Sex Marriage, supra note 21.

\textsuperscript{123} Times Topics, supra note 2.

\textsuperscript{124} Id.

signature, rather than following a judicial ruling.\textsuperscript{126} Though voters repealed this measure just six months later, the legislature’s decision to take such bold action indicates that Maine is not too far afield from its neighbors on the issue.\textsuperscript{127}

Similar movement is taking hold in the remainder of the Northeast. Had former New Jersey Governor Jon Corzine prevailed in New Jersey’s 2009 gubernatorial race, the state would have legislatively legalized gay marriage.\textsuperscript{128} New York recognizes same-sex marriages performed in other states,\textsuperscript{129} and gay marriage supporters are hopeful that they can secure legalization in the State as early as 2011.\textsuperscript{130}

The Deep South, by contrast, has emerged as a bastion of resistance to same-sex marriage.\textsuperscript{131} Polling expert Nate Silver has predicted that while a majority of states would support same-sex marriage by 2012, only a “handful of states” in the Deep South would do so by 2016, with Mississippi being the last one to come around in 2024.\textsuperscript{132} Further, whereas public opinion is evenly split or slightly higher in favor of gay marriage in the East and West, sixty percent of Southerners oppose gay marriage, while only thirty-one percent support it.\textsuperscript{133}

Certainly, other pockets of support and resistance exist outside of these regions. In North Dakota and Montana, for example, voters rejected same-sex marriage by margins of seventy-

\begin{footnotesize}
\begin{enumerate}
\item[Dwyer, supra note 109.]
\item[Id.]
\item[Silver, Iowa and Gay Marriage, supra note 125.
\item[Id.]
\item[Id.
\item[The Pew Forum, Majority Continues, supra note 74.
\end{enumerate}
\end{footnotesize}
three and sixty-seven percent, respectively.\textsuperscript{134} Oklahoma’s same-sex marriage ballot measure, which passed with seventy-six percent of the popular vote,\textsuperscript{135} not only outlawed gay marriage, but also made it a crime to issue a marriage license to a same-sex couple.\textsuperscript{136}

Conversely, in April 2009, the Iowa Supreme Court legalized same-sex marriage,\textsuperscript{137} and in December of 2009, Mayor Adrian Fenty signed same-sex marriage into law in Washington, D.C.\textsuperscript{138} Maryland’s Attorney General announced in February 2010 that, effective immediately, the State would recognize same-sex marriages performed elsewhere, and ordered state agencies to confer upon gay couples the same rights they were awarded by the state in which they were married.\textsuperscript{139} A poll conducted in California in March 2010, less than a year and a half after California voters approved a constitutional ban on gay marriage, showed that a majority of Californians now favors marriage equality.\textsuperscript{140}

In even more dramatic ways than views on gay marriage, opinions on desegregation in the \textit{Brown} era were heavily correlated with geography. In 1956, while only a slight majority supported the Supreme Court’s decision in \textit{Brown}, sixty-one percent of whites in the North

\begin{footnotes}
\item[135] \textit{Id}.
\end{footnotes}
favored desegregation.\textsuperscript{141} Conversely, only sixteen percent of Southern whites during this period believed that blacks and whites should be able to attend the same schools, while eighty percent were opposed.\textsuperscript{142}

Even within the South, the scope and intensity of opposition largely depended on latitude.\textsuperscript{143} Though almost all white Southerners wanted to preserve segregation,\textsuperscript{144} hardcore resistance was overwhelmingly concentrated in the six states of the Deep South.\textsuperscript{145} In that region, ninety percent of whites opposed \textit{Brown} in 1956.\textsuperscript{146} The relative success – or lack thereof – of desegregation efforts in different parts of the South is also powerful evidence of the varying intensity with which residents of these regions sought to preserve the status quo of traditional race relations.\textsuperscript{147} In the years immediately following \textit{Brown}, seventy percent of school districts in the states of the Upper South had at least some biracial classrooms.\textsuperscript{148} By contrast, in 1964, a full ten years after \textit{Brown}, scarcely more than one percent of black children in the Deep South attended integrated schools.\textsuperscript{149}

\textsuperscript{143} \textit{Id.} at 88 (Criticizing the notion that the “white South” was uniformly racist and defiant with respect to \textit{Brown} as “flawed.”).
\textsuperscript{145} Patterson, \textit{supra} note 149, at 89.
\textsuperscript{146} Webb, \textit{supra} note 150.
\textsuperscript{147} \textsc{Neil R. McMillen, Citizens’ Council: Organized Resistance to the Second Reconstruction}, 93 (1994) (discussing how the “[juxtaposition of adamant defiance [in the Deep South] with comparatively swift compliance in the peripheral South dramatized the great variety of the region.”)
\textsuperscript{148} Patterson, \textit{supra} note 149, at 75.
\textsuperscript{149} \textit{Id.} at 113. Resistance varied not only in intensity, but also in kind. In the “Black Delta” area of Mississippi, for example, white leaders “vehemently opposed desegregation,” but were skeptical about the tactics of the Klu Klux Klan and other violent racist groups. \textit{Id.} at 89.
The current polling data with respect to the issue of gay marriage differs in key ways from that which existed regarding desegregation. Though the most vehement and persistent resistance has come from the Southern States, opposition to gay marriage is much more widely dispersed throughout the country. This poses a challenge for supporters of same-sex marriage, who cannot cast the opposition as a group of outliers in the way that the leaders of the Civil Rights Movement – and the media covering the movement – branded the states of the Deep South. Further, even though most white southerners staunchly opposed desegregation in the pre-\textit{Brown} era, that the majority of their fellow Americans did not share this view was crucial for a number of reasons. For one thing, it gave the Supreme Court the support it needed to issue its opinion in \textit{Brown}. For another, once \textit{Brown} was decided, it forced President Eisenhower to stand behind desegregation, despite his personal struggles with the decision. Finally, the withdrawal of national businesses from dealings with southern partners over the segregation issue added an element of economic pressure to the equation.

That a decisive majority of Americans continues to oppose gay marriage makes it less likely that the Supreme Court or Congress will take decisive action toward legalization. Further,

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\textsuperscript{150} See Piccalo, \textit{supra} note 142.


\textsuperscript{152} See Patterson, \textit{supra} note 149, at 65. Justice Reed, the last holdout on the Court with respect to \textit{Brown} commented on his ultimate change of heart, “There was an air of inevitability about it all.” \textit{Id}.


\textsuperscript{154} Klarman, \textit{Brown and Racial Change, supra} note 159, at 49-50.
this statistical balance make it acceptable—and, in many ways, advantageous—for politicians across the nation to publicly oppose gay marriage.\textsuperscript{155}

ii. Inside the Numbers: Organization, Intensity of Preference, and Demographic Stratification

Statistics regarding support for and opposition to gay marriage do not tell the whole story; the true picture is more nuanced. Though only a minority of Americans favors same-sex unions, support for this position is growing steadily. Some polls have shown that since November 2003, support for same-sex marriage has increased by eight percentage points.\textsuperscript{156} However, despite this momentum, or, more likely, because of it, the organized opposition to same-sex marriage has also grown at a tremendous rate during this period. As the threat of legalized gay marriage has become increasingly real, many conservative organizations have made the issue their foremost priority, and many new organizations have sprung up for the sole purpose of resisting what they view as an assault on one of society’s most important institutions.\textsuperscript{157} In May 2003, twenty-six conservative organizations united to form The Arlington Group for the purpose of devising a unified strategy for defeating gay marriage and other “forces of secularism.”\textsuperscript{158} The coalition now houses sixty-one organizations and counts sixty million

\textsuperscript{155} See discussion infra Part IV.c.ii.
\textsuperscript{157} See, e.g., THE POLITICS OF SAME-SEX MARRIAGE 139 (Craig A. Rimmerman & Clyde Wilcox, eds., 2007) (discussing the formation of the Marriage Amendment Project in 2004, designed to lobby for a federal Constitutional ban on gay marriage); Kirkpatrick, supra note 111 (quoting Richard Land, president of the Ethics and Religious Liberty Commission of the Southern Baptist Convention: “I have never seen anything that has energized and provoked our grass roots like this issue, including Roe v. Wade.”).
\textsuperscript{158} Russell Shorto, Russell Shorto, What’s Their Real Problem with Gay Marriage? (It’s the Gay Part), N.Y. TIMES MAGAZINE, June 19, 2005, at 37
members nationwide. Long-standing Christian conservative organizations have also contributed substantial resources to this cause in recent years. For example, Focus on the Family ("FOF"), which boasts a global membership of 220 million, now offers counseling for “unwanted same-sex attractions,” provides links to publications which explain such things as “what’s wrong with letting same sex couples marry,” and encourages readers to study its “Ten Persuasive Answers to the Question ‘Why not Gay Marriage?’”

The gay rights movement has also recently turned its attention to the marriage issue, and many new organizations have emerged with the predominant goal of legalizing same-sex marriage in the United States. For example, Lambda Legal, the nation’s oldest legal-based gay rights organization, headed Hawaii’s same-sex marriage litigation in the 1990s, and in 1996, a group of activists formed Marriage Equality USA, an organization “solely committed to securing the right to civil marriage for same-sex couples.”

Perhaps more telling than the numbers of individuals and organizations on either side of the issue is the fact that, on the whole, the minority of Americans that does support gay marriage simply does not feel as strongly about it as does the majority that opposes it. According to a 2004 poll, of the two-thirds of Americans who oppose same-sex marriage, thirty-four percent assert that they would not vote for a candidate who did not share their view. Among

Evangelical Christians, fifty-five percent adopt this stance.\textsuperscript{163} By contrast, only six percent of Americans who favor same-sex marriage would be willing to make it a campaign issue.\textsuperscript{164}

All of these statistics are made increasingly complex when broken down into unique sociological categories. Though most associations appear to be fairly weak between demographics and views on same-sex marriage,\textsuperscript{165} two particular characteristics – age and religiosity – are highly correlated with opinions on the subject.\textsuperscript{166} Indeed, views on same-sex marriage are so tied to age – with younger generations supporting it in vastly higher numbers than older Americans\textsuperscript{167} – that scholars, political commentators, and activists alike have suggested that same-sex marriage is practically “inevitable” in the near future.\textsuperscript{168} Perhaps more

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\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Race and class do have some bearing on views on same-sex marriage. 63\% of blacks and Hispanics, ordinarily Democratic constituencies, supported the Federal Marriage Amendment. Klarman, \textit{Brown and Lawrence}, supra note 55, at 226. In California, the failure of the same-sex marriage movement to gain the support of African Americans had significant implications for the outcome of the Proposition 8 referendum. A widely used exit poll during the 2008 election indicated that 70\% of black voters voted yes on Proposition 8, as compared with 49\% of whites. Jessica Gresko, \textit{In D.C., Blacks were Crucial to Gay Marriage Debate}, \textsc{The Associated Press}, Mar. 2, 2010. Recognizing this, activists involved in the effort to legalize gay marriage in D.C. “heavily courted the city’s majority-black population,” explaining that, “outreach to African-Americans wasn’t part of the campaign. It was the campaign.” \textit{Id}. However, black opposition to same-sex marriage is much more attributable to religious devotion than to any notion of racial identity or consciousness. See Joe Bergeron, \textit{Examining Determinants of Support for Same-Sex Marriage}, Presented at the annual meeting of the American Political Science Association, Washington, 8 (Sept. 1-4, 2005), available at, \url{http://www.allacademic.com/meta/p_mla_apa_research_citation/0/4/2/0/6/pages42066/p42066-1.php}. Though higher income levels have a “liberalizing influence” on attitudes toward gay marriage, the correlation is fairly weak. \textit{Id.} at 14, 21.
\textsuperscript{166} Bergeron, supra note 173, at 17.
\textsuperscript{167} Talbot, \textit{supra} note 7 (reporting that 58\% of Americans aged 18-34, but only 22\% of Americans over 60, support gay marriage).
\textsuperscript{168} See, e.g., Opinion: Freakonomics Blog, \textit{Is Legal Same-Sex Marriage Inevitable?} \textsc{N.Y. Times}, Apr. 9, 2009, \url{http://freakonomics.blogs.nytimes.com/2009/04/09/is-legal-same-sex-marriage-inevitable/}; Klarman, \textit{Brown and Lawrence}, supra note 55, at 486; Jones, \textit{supra} note 80; Silver, Fact and Fiction, \textit{supra} note 164 (“the smart money is that gay marriage will reach majority status too at some point in the 2010s.”).
striking than the profundity of this generational divide on the issue of gay marriage is the fact that support for gay marriage among young Americans has the power to transcend ideological lines. 169 A 2010 study conducted by UCLA’s Higher Education Research Institute showed not only that 65% of college freshmen supported same-sex marriage, but also that this support existed among even a large number of students classified as “far-right.”170 Both the ideological gap between young and old and cross-political support among young people are largely the result of the fact that knowing someone who is gay is a powerful determinant of views on gay marriage.171 Fifty-eight percent of Americans aged 18-34 have a family member or close friend who is gay, as compared to only thirty-three percent over sixty five.172

Religiosity is also an “exceptionally strong determinant” of opposition to gay marriage.173 Of the 160 million Americans who self-identify as religious, seventy-six percent of these – or roughly 121.6 million people – believe that homosexuality is wrong.174 Not surprisingly, therefore, more than seventy percent of Christians who attend church services “weekly or more,” oppose same-sex marriage.175 An overwhelming majority of evangelical Christians, who

169 Talbot, supra note 7.
171 See Rutten, supra note 99; Lipka, supra note 178 (quoting Evan Wolfson: “Young people who know gay people, talk with them, and examine why marriage matters in the lives of real people move in support.”).
172 CNN Poll, supra note 127.
173 Bergeron, supra note 173, at 21.
175 The Pew Forum, Majority Continues, supra note 74.
comprise forty-four percent of the population, state that their pastors address homosexuality and gay marriage in church, and that they strongly discourage it.176

These significant attitudinal divides down religious lines are largely the product of successful efforts of opponents of gay marriage to frame the issue as a deeply moral one.177 The same-sex marriage movement –perhaps in an effort to detract from these moral undertones of the debate – has largely shied away from this religious and moralistic rhetoric, relying instead on a more dispassionate language of equality.178

By contrast, religion played a more dualistic role during the Civil Rights Movement. Segregationists adopted reverential rhetoric in their “crusade for white supremacy,” organizational meetings took on an overtly religious tone,179 and opponents of Brown looked to the Bible in their attempts to justify segregation as “divine law.”180 However, unlike the opposition to the same-sex marriage movement, segregationists did not gain the official sanction of their churches.181 On the contrary, there was a substantial split between white Southerners

176 Id.
177 See Shorto, supra note 166 (explaining that many activists who oppose same-sex marriage view their resistance as carrying out God’s will); Chuck Colson, Gay Marriage v. Religious Freedom, THE CHRISTIAN POST, Mar. 8, 2010, http://www.christianpost.com/article/20100308/gay-marriage-v-religious-freedom/. After Catholic Charities decided to stop funding all married couples in order to avoid having to fund same-sex married couples in D.C., church-goers decried having to choose between “church teaching and ministering to the city’s neediest residents.” Id.
178 See discussion infra Part IV.b.ii.
179 McMillen, supra note 155, at 124, 175.
and their religious institutions on the desegregation issue.\textsuperscript{182} As one ardent segregationist lamented to Senator Strom Thurmond in a 1955 letter, “[b]y now it should be evident to the pro-segregation forces that their real opponent in the fight to provide for the preservation of the white race in America is the so-called Christian religion.”\textsuperscript{183} Despite their frustrations with the Church, however, those vying to preserve segregation recognized the need to gain some cultural and moral legitimacy.\textsuperscript{184} To their dismay, they never secured this stamp of approval, and, on the whole, religion turned out to be “utterly disappointing to the segregation movement.”\textsuperscript{185}

The Civil Rights Movement’s efforts to harness the power of religion proved much more successful. Much like their opponents, members of the movement grasped the importance of “having God – and his spokesmen – on their side.”\textsuperscript{186} Unlike their opponents, however, civil rights supporters realized this goal. In the weeks following \textit{Brown}, the 10,000 messengers of the Southern Baptist Convention endorsed the Supreme Court’s decision.\textsuperscript{187} Their counterparts in the Catholic, Methodist, and Presbyterian Churches quickly followed suit, and black churches became the institutional center of the Civil Rights Movement.\textsuperscript{188} During the Selma March, led by Martin Luther King, Jr., more than 450 white religious leaders gathered in the city to show their support.\textsuperscript{189} By labeling this march a “pilgrimage,” “the black press and leading rights workers . . . invested it with religious, and not just political, significance.”\textsuperscript{190} Indeed:

\begin{footnotes}
\item[182] Chappell, \textit{supra} note 189, at 137.
\item[183] \textit{Id.} at 142.
\item[184] \textit{Id.} at 145.
\item[185] \textit{Id.} at 137.
\item[186] Dailey, \textit{supra} note 188, at 160.
\item[187] \textit{Id.} at 160-1.
\item[188] \textit{Id.} at 161, 152.
\item[189] \textit{Id.} at 168.
\item[190] \textit{Id.}
\end{footnotes}
It was King’s genius to see that in the matter of racial equality the teaching of the Christian Bible are on all fours with the promise of the Constitution and its amendments. With one brilliant stroke, he transformed what had been a legal struggle into a spiritual one, and lost nothing in the bargain.\footnote{Id. at 172 (quoting The New Yorker writer Loius Menand).}

This was crucial to the success of the movement, as the battle over segregation could not have been won solely through political channels. Once the Civil Rights Movement entered the streets, the struggle became largely about gaining cultural legitimacy.\footnote{Chappell, supra note 189, at 145.} The leaders and foot soldiers of the Civil Rights Movement shifted the debate in their favor by demonstrating their willingness to endure tremendous suffering in the name of equality, and thus moving white Americans outside of the South to clamor for national action on the issue.\footnote{See Kenneth B. Clark, The Civil Rights Movement: Momentum and Organization, DAEDELUS, 255 (1966) (“The development of philosophical support” for the movement and its method of nonviolent protest “appeal[ed] to the conscience of the Negro and white.”).} Thus far, gay rights activists have not been able to inspire this kind of national agitation. Certainly, the supports of gay rights responded with outrage and protest to the passage of Proposition 8 and other similar bans on gay marriage.\footnote{See, e.g., Jessica Garrison, Angrier Response to Prop. 8 Arises, L.A. TIMES, Nov. 13, 2008, at A1 (detailing protests after passage of Prop. 8); Susan Jacobson, More than 1,000 Protest Gay-Marriage Ban at City Hall, ORLANDO SENTINEL, Nov. 16, 2008, at B2 (detailing protests after passage of Amendment 2 in Florida); Karissa Marcum, 200 Protest Ban on Gay Marriage, DENVER POST, Sept. 25, 2006, at B2 (detailing protests against Amendment 43 in Colorado).} However, these expressions of outrage have been largely confined to those who already support gay rights; the movement has been less successful at convincing undecideds of the potency of their claims for equality.\footnote{See, e.g. Susan Sharon, Maine Gay Marriage Vote Looks Tight, NATIONAL PUBLIC RADIO, Oct. 20, 2009, http://www.npr.org/templates/story/story.php?storyId=113943323 (“Most people have a set opinion on [gay marriage] . . . So this campaign isn’t really to win hearts and minds, or to shape opinion”).} Thus, though momentum is shifting toward increasing acceptance of same-sex marriage, the movement is not – at least at this moment – prevailing in the culture war.
b. Preserving Tradition Versus Expanding Equality: The Underlying Forces Driving the Movement and the Opposition

Those who support gay marriage and those who oppose it are motivated by two quite different sets of beliefs and concerns. The movement is fighting to secure what it views as a fundamental right for members of its minority. The tone taken by many gay rights organizations has thus centered on such notions as equal rights, justice, and fairness. The opposition, however, is struggling to preserve what it views as a fundamental cornerstone of society. Much of its rhetoric, therefore, has focused on appeals to traditional values and to the “sanctity” of marriage, which it feels are being attacked by the gay-rights movement and other secular forces. To further explore these underlying concerns, this section will examine some of the primary arguments that have been advanced both in support of and against the legalization of same-sex marriage.

i. Why Not Gay Marriage: Tradition, Religion, and Protecting Our Children

In many ways, conventional marriage has become “a synecdoche for everything valued in

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196 See, e.g., Human Rights Campaign, Marriage & Relationship Recognition, http://www.hrc.org/issues/marriage.asp (“All families deserve the ability to protect themselves with basic legal rights … [and] [o]nly marriage can provide families with true equality”); Marriage Equality USA, The Organization, http://www.marriageequality.org (“Marriage Equality, Inc. began . . . with a handful of activists believing that same-sex couples should have the freedom and the right to civil marriage.”).
197 See id.
198 See, e.g., National Organization for Marriage, About NOM, http://www.nationformarriage.org (“NOM is a nonprofit organization with a mission to protect marriage . . . with a focus on developing new strategies for increasing influence in the Northeast and West Coast, where marriage is most under threat”); The Covenant Marriage Movement, A Word from our Chairman, http://www.covenantmarriage.com/aboutus.php (“In a day when marriage is under attack, God is rallying His people to join Him in upholding marriage as He has always purposed it to be . . . Marriage has always been intended to be between one man and one woman.”).
199 See id.
the American way of life.”

The prospect of gay marriage, therefore, is not just a threat to traditional marriage, but to traditional society as a whole.

Evalena Gray, an activist from Maryland, summed up widely shared sentiments among those who oppose gay marriage: “The threat to traditional marriage will affect our society more than any other issue that’s come up . . . We’re just fighting with everything we have.”

The Jeremiad-esque tone that many leaders within the opposition have adopted is suggestive of the underlying concerns fueling their resistance to gay marriage. The primary arguments that opponents of same-sex marriage advance illuminate the nature of these driving forces.

First, many opponents of gay marriage argue that expanding marriage rights to include same-sex unions will weaken or demean the institution of marriage as a whole. During the House debate over DOMA, Illinois Congressman Henry Hyde, “explode[d] with indignation” at the possibility that gay marriage might someday be legal for precisely this reason. He explained:

People don’t think that the traditional marriage ought to be demeaned or trivialized by same-sex unions. If two men want to love each other, go right ahead . . . But don’t take marriage, which for centuries has been a union between a man and a woman, and certainly is in this country, and try to say that what you’re doing is American.

A second prominent argument put forth by opponents of gay marriage postulates that

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200 Cott, supra note 76, at 219.
201 See quotations infra note 211.
202 Shorto, supra note 166.
203 See, e.g., Klarman, Brown and Lawrence, supra note 55, at 465 (quoting James Dobson: “Banning a miracle, the family as it has been known for more than five millennia will crumble, presaging the fall of Western civilization itself”); Colson, supra note 185 (“Christians no longer have the luxury of sitting idly by while religious freedom, the sanctity of human life, and the institution of marriage come under more assault”).
204 Sullivan, supra note 76, at 225.
205 Id.
allowing same-sex marriage will lead to a loosening of society’s morals. This argument is based partly on the concern that expanding the definition of marriage in any way will have the effect of expanding it indefinitely. At a House Judiciary Committee hearing on DOMA, conservative scholar Hadley Arkes remarked, “on what ground would the law say no to people who profess that their love is not confined to coupling, but woven together in the larger ensemble of three or four.” Arizona Senate hopeful J.D. Hayworth recently wondered aloud, with respect to the Massachusetts Supreme Court’s defining marriage as the “establishment of intimacy,” “how dangerous is that? . . . I guess that would mean if you really had affection for your horse, I guess you could marry your horse.” Bryan Simonaire, an outspoken opponent of gay marriage, further cautioned, “Once you start [gay marriage], you could have a 45-year-old-man wanting to marry a 9-year-old boy. That could be O.K. in 20 years.”

Another of these slippery-slope concerns is that allowing gay marriage will hasten the spread of disease and other alleged consequences of homosexual relations. To this end, Chuck Hurley, President of Iowa Family Policy Center, recently declared that “homosexual activity” is “more dangerous for individuals who engage in it than is smoking. . . . The secondhand impacts of certain homosexual acts are arguably more destructive, and potentially more costly to society, than smoking.”

A third argument frequently espoused is that gay marriage is bad for children. In the

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206 Id. at 277.
208 Shorto, supra note 166.
209 Id. (quoting Maryland pastor Brian Racer, “Look what has happened in the decades since . . . the acceptance of the gay lifestyle as normal. Viruses have mutated. STDs have spread.”).
months leading up to Oregon’s referendum on gay marriage, for example, the State’s defense-of
marriage-coalition advised voters that “gay sex would be taught in schools and a ‘gay lifestyle’
would be taught to kindergartners.”211 Similarly, same-sex marriage opponents in Maine ran
television and radio ads stating that if gay marriage was legalized, schools would start teaching
kids that such unions were equal to marriage.212 In its “Ten Persuasive Answers to the Question
‘Why not gay marriage?’” FOF explains that “[s]ame-sex marriage will subject a generation of
children to the status of lab rats in a vast, untested social experiment.”213

Many of these concerns parallel those espoused by opponents of desegregation in the
post-Brown era. This ideological alignment is largely attributable to the fact that the concerns of
both groups emerged in response to a sense that a fundamental societal value – racial separation
in one case and marriage in the other – had come under attack. Underlying much of the
resistance to segregation was the concern that desegregation would lead to miscegenation, which
would, in turn, lead to a diluting of the “purity of the races” and produce an “inferior product.”214
Like the arguments that gay marriage will lead to polygamy, bestiality, and/or socially
acceptable child molestation, this slippery-slope argument was based on the fear that “the
quickest way to the bedroom was through the schoolhouse door.”215

Further, just as gay rights opponents are concerned that expanding marriage rights will
upset tradition and weaken the institution of marriage, opponents of desegregation worried that
integration would subvert traditional power relationships and eliminate white “cultural

211 Sarah Wildman, Wedding-Bell Blues, The American Prospect, Nov. 21, 2004, at 39,
212 Sharon, supra note 203.
213 Glenn T. Stanton, Ten Persuasive Answers to the Question . . . ‘Why Not Gay Marriage?’”
214 John G. Culhane, Uprooting the Arguments against Same-Sex Marriage, 20 Cardozo L. Rev.
1119, 1168 (1999).
215 McMillen, supra note 155, at 185.
superiority.” As the University of Virginia’s *Cavalier Daily* reported in the wake of *Brown*, “we feel that the people of the South are justified in their bitterness concerning this decision. To many people this decision is contrary to a way of life and violates the way they have thought since 1619.

ii. Why Gay Marriage: Legal Equality and Personal Dignity

Unlike their opponents, the leaders of the same-sex marriage movement have largely shied away from discussion of marriage as it relates to tradition and religion. Certainly, there are pockets of emotional and moralistic rhetoric within the movement, and the arguments most commonly advanced in favor of gay marriage are predicated on notions of equality and justice. However, the language of the movement has largely fallen on the side of restrained appeals to these notions of equality and justice rather than on high-minded demands for their realization. Examining the two primary arguments made in favor of gay marriage illustrates this point.

First, proponents of gay marriage argue that the States have an obligation to recognize same-sex unions because failing to do so violates the constitutional principles of due process and equal protection. In their challenge to Proposition 8, for example, David Boies and Ted Olson argue exactly this: that singling out same-sex couples for denial of the right to civil marriage violated their rights to legal equality and due process. The equal protection claim alleges that Proposition 8 “treats similarly situated people differently by providing civil marriage to

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219 See, e.g., Sullivan, *supra* note 76, at 228 (quoting Florida Congressman John Lewis).
220 See infra note 229.
222 Perry Complaint, *supra* note 229, at 1.
heterosexual couples, but not to gay and lesbian couples,” thus relegating same-sex couples to the “separate-but-unequal” status of “domestic partner[s].” The due process claim contends that restricting marriage, along with all of the legal benefits it offers, to opposite-sex couples “stigmatiz[es] gays and lesbians, as well as their children and families,” and denies same-sex couples “the same dignity, respect, and stature afforded officially recognized opposite-sex family relationships.”

Second, gay marriage supporters assert that denial of marriage equality is a “massive affront to the human dignity” of the LGBT community and, therefore, that society cannot fulfill its “promise of equality” for all citizens until it ends its discrimination on the basis of sexual orientation. On this point, proponents of same-sex marriage argue that granting marriage rights to same-sex couples would be “a recognition of basic American principles, and would represent the culmination of our nation’s commitment to equal rights.”

The arguments advanced in support of same-sex marriage are similar to those that the NAACP relied on in its litigation of Brown. In their brief to the Supreme Court, Thurgood Marshall and his team argued that because the Fourteenth Amendment “precludes a state from imposing distinctions or classifications based on race,” the State of Kansas could not consider race in “affording educational opportunities to its citizens.” Further, much like Olson and Boies argued in their complaint in Perry that denial of equal marriage rights had a stigmatizing effect on same-sex couples and their families, the NAACP argued in 1952 that the segregation of

223 Id. at 8, 1.
224 Id. at 8.
225 Bonauto, supra note 101, at 7.
226 Olson, supra note 88.
227 Id.
229 Id.
schools had a stigmatizing effect on black children, which led to “the retardation of [their] intellectual development and distortion of [their] personalit[ies].”

However, though the legal arguments advanced in support of same-sex marriage parallel those put forth in support of desegregation, the current movement has thus far struggled to capitalize on the impassioned rhetoric that proved central to the success of the grassroots component of the Civil Rights Movement. Martin Luther King and other leaders of the movement worked to “develop and articulate a philosophical rationale for the movement, [and] an ideology to support [their] strategy.” The same-sex marriage movement has relied on arguments strikingly similar to those advanced by the leaders of the Civil Rights Movement. However, unlike the Civil Rights Movement, the gay marriage movement has thus far largely failed in its attempts to use this powerful rhetoric to advance its cause. In the wake of recent defeats, some within the movement are re-evaluating their prior refusals to engage with the opposition on the religious and moral terms of the debate.

At a conference following the 2004 election, a group of political scientists and legal scholars examined the future prospects for gay marriage litigation in light of the 2004 campaign. One panelist argued that “the lesson of the 2004 election” was that progressives erred in failing to frame the issue of same-sex marriage as one grounded in “morality and faith.” Other conference participants agreed, emphasizing that “a systematic, coherent, strategic response’ to religious Americans and their ‘moral values’ concerns” was necessary if

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230 Id.
232 Clark, supra note 201, at 255.
233 See Bergeron, supra note 173, at 24-5.
234 Id. at 24.
235 Id.
gays and lesbians hoped to prevail in the battle for marriage rights. There was widespread agreement that “morality, faith, and religious arguments need[ed] to be used in addition to equality arguments in order to frame a winning strategy for same-sex marriage.”

c. Coordination and Mobilization: The Roles of Institutional Support, Collective Identity, and Politics

The different concerns motivating those on opposing sides of the struggle over same-sex marriage have led each group to adopt different organizational approaches. In addition to these strategic choices, the movement and the opposition have grown from different social and political landscapes. This section will examine the ways in which different background conditions and institutions, varying levels of political support, and competing organizational strategies have affected each side’s respective capacities for coordination.

i. The Origins of the Same-Sex Marriage Movement and the Rise of the Opposition

The presence of pre-existing institutions and organizations is often crucial in setting the stage for the successful coordination of new social movements. The gay rights movement has few such roots, as it is primarily a creature of the latter half of the twentieth century. The years immediately following World War II saw the first stirrings of a nascent homosexual consciousness, and it was during this period that the gay bar emerged as the meeting place of this consciousness.

236 Id. at 25.
237 Id.
239 Eskridge, Some Effects, supra note 18, at 2159.
budding collective identity.\textsuperscript{240} Gay bars furnished an “all-gay environment where patrons dropped the pretension of heterosexuality,” fomented a not only shared, but also public, gay identity, and provided the reassurance that if trouble arose, the consequences would be shared by the group.\textsuperscript{241}

During the Cold War, government-sponsored oppression of homosexuals had the paradoxical effect of “br[eka]king the silence that surrounded the topic of homosexuality,” and thus making it easier for gays and lesbians to identify and connect with one another.\textsuperscript{242} However, it was not until the sexual revolution of the 1960s brought the discussion of homosexuality into the public sphere that this burgeoning gay subculture converged with the newly forming rights movement.\textsuperscript{243} Between the 1960s and the late 1970s – partly in response to the Stonewall riots of 1969\textsuperscript{244} – membership in “homophile” organizations grew from a mere 5,000 to 500,000.\textsuperscript{245} By 1973, there were 800 such organizations, and by the end of the decade, there were thousands.\textsuperscript{246} The same-sex marriage movement was borne out of this broader struggle for gay rights. Indeed, many of the groups working to secure marriage rights for gays

\textsuperscript{240} John D’Emilio, Sexual Politics, Sexual Communities, 24, 32 (1983) [hereinafter Sexual Politics].
\textsuperscript{241} Id. at 32-33.
\textsuperscript{242} Id. at 52.
\textsuperscript{243} Id. at 147, 176.
\textsuperscript{244} Id. at 232-333. On June 27, 1969, policemen raided the Stonewall Inn, a gay bar in Greenwich Village. As police attempted to clear the bar, patrons fought back and the scene “became explosive.” Over the next few days, organizers launched a series of violent protests against the government-sanctioned oppression of gays and lesbians. Id. Stonewall is often seen as the catalyst for the emergence of the modern gay rights movement. See John D’Emilio, The World Turned: Essays on Gay History, Politics, and Culture, 82-83 (2002) [hereinafter World Turned].
\textsuperscript{245} D’Emilio, Sexual Politics, at 219, 238.
\textsuperscript{246} Id. at 238.
and lesbians today have their roots in the post-Stonewall gay rights revolution of the 1970s.  

Just as the same-sex marriage movement grew out of the larger gay rights movement, organized opposition to gay marriage is much the product of the rise of the Christian Right, which also had its major beginnings in the 1970s. Further, just as Stonewall served as the turning point for advocates of gay rights, the passage of an ordinance in Dade County, Florida, prohibiting discrimination on the basis of sexual orientation served as the catalyst for the Christian Right’s antigay activism. By the 1980s, such activism had become central to the group’s mission, and by the next decade, the Christian Right had become one of the most powerful social forces in the country. That this explosive growth occurred at the same time that the threat of gay marriage was on the rise is no coincidence; the same-sex marriage issue awakened the “sleeping giant” of the fundamentalist conservative movement and gave its members a new focus that “seemed likely to stir more passions than the fight against abortion rights or for prayer in schools.”

Thus, both the same-sex marriage movement and its oppositional counterpart are in their infancies, born recently of only slightly riper social movements. However, despite the fact that both movements began from roughly the same starting blocks, the same-sex marriage movement

247 For example, Lambda Legal was founded in 1973 and the Human Rights Campaign was founded in 1980.
248 See Didi Herman, The Antigay Agenda: Orthodox Vision and the Christian Right, 1, 4 (1997) (“[T]he opposition to gay rights is led, invigorated and inspired by Christians, and the Christian faith.”).
250 Herman, supra note 257, at 4-5.
251 Rosen, supra note 55.
252 Rimmerman, supra note 258, at 128.
suffers from decisive disadvantages with regard to its organizational capacity. First, the prevalent perception that homosexuality is “wrong” has historically discouraged many gays and lesbians from “coming out,” let alone becoming active participants in an assertive rights movement. Indeed, much of the gay rights movement’s early struggles to organize were due to the fact that prior to the late 1960s, members of the gay community were functionally invisible to one another, hidden by the “vast silence” that enveloped the issue of homosexuality.

For this reason, Professor Bruce Ackerman has labeled homosexuals an “anonymous minority.” Because they can keep their minority status hidden by “staying in the closet,” gays and lesbians do not share the unique organizational benefits that other minority groups enjoy through the formation of “pressure groups,” which both create incentives for members of the minority to join the cause and impose costs on those who do not. Two key facilitators of effective pressure groups are the characteristics of discreteness and insularity. Because discrete minorities cannot hide their minority status or “exit” the minority group, the only way to affirmatively respond to discrimination is to complain about it. Thus, membership in a discrete minority is likely to induce organization. Insularity further cultivates collective action against discrimination by breeding sentiments of group solidarity, imposing sanctions upon potential dissenters from the movement, and decreasing the costs of coordination by capitalizing on pre-existing organizations and other established channels of communication.

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253 See D’Emilio, Sexual Politics, supra note 253, at 57.
254 Id.
255 Id. at 125.
256 Bruce A. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 731 (1985).
257 Id. at 724.
258 See id. at 716.
259 Id. at 730.
260 Id.
261 Id. at 725-26.
The leaders of the Civil Rights Movement benefited from the fact that African Americans are both a discrete and insular minority, and thus have no choice to “exit” the group.\textsuperscript{262} During the Montgomery Bus Boycott, for example, blacks who decided they did not want to join the boycott were ostracized by fellow members of the black community.\textsuperscript{263} Because associating with whites was not a plausible option, this was a stiff social penalty, and one that surely compelled some members of the group to join the effort despite their initial hesitance.\textsuperscript{264}

By contrast, members of the gay community are neither discrete nor insular. Their ability “to wear the mask of heterosexuality”\textsuperscript{265} poses a unique organizational problem for the gay rights movement: “somehow the group must induce each anonymous homosexual to reveal his or her sexual preference to the larger public and to bear the private costs this public declaration may involve.”\textsuperscript{266} Professor Ackerman has explained this challenge:

> Although some, perhaps many, homosexuals may be willing to pay [the price of “coming out”], the fact that each must individually choose to pay it means that this anonymous group is less likely to be politically efficacious than is an otherwise comparable but discrete minority. For, by definition, discrete groups do not have to convince their constituents to ‘come out of the closet’ before they can engage in effective political activity.\textsuperscript{267}

The opposition to the same-sex marriage movement is also not a discrete or insular group, and thus, by Professor Ackerman’s measure, has few sticks or carrots at its disposal in

\textsuperscript{262} Id. at 730.
\textsuperscript{263} Michael J. Klarman, Lecture at Harvard Law School (Oct. 14, 2009).
\textsuperscript{264} Id.
\textsuperscript{265} D’Emilio, Sexual Politics, supra note 253, at 57 (quoting DONALD WEBSTER CORY, THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH, 14 (1951).
\textsuperscript{266} Ackerman, supra note 265, at 731.
\textsuperscript{267} Id. at 731.
order to induce people to join its ranks.\textsuperscript{268} However, the fact that no stigma attaches to participation in the group removes a significant barrier to organization, and one that remains in place for the gay rights movement.

Second, because gay men and women “reflect[ ] the diversity of the American population,” the bond fostered by their shared sexual identity can easily be lost amidst other demographic, cultural, and philosophical differences.\textsuperscript{269} Certainly, the experience of being gay in America produces some semblance of a common identity, particularly because many gays and lesbians have faced discrimination as a result of their status as homosexuals. Indeed, the gay rights movement took off largely in response to government-sanctioned persecution; “scandals and police assaults kept homosexuality in the news,” and this shared oppression heightened the group’s collective “sense of grievance that fed a political consciousness.”\textsuperscript{270} However, because the gay community is diverse and diffuse, and because its members can avoid the social opprobrium that comes with their minority status by choosing to hide that status, this shared identity is not always sufficiently resilient to overcome other differences that exist within the group.\textsuperscript{271}

This notion of a collective group identity played a key role in facilitating the organization of African Americans during the Civil Rights Movement. Of course, the black community is also internally diverse. However, there are two primary differences between the black community of the 1950s and the gay community of 2010. First, African Americans in the South in the middle of the century simply were a more homogeneous community than is the gay

\begin{footnotes}
\item[268] Because many members of the opposition are linked by shared faiths, social values, and participation in religious organizations, the group is somewhat insular.
\item[269] D’Emilio, \textit{Sexual Politics}, supra note 253, at 75.
\item[270] \textit{Id.} at 195 (describing the rise of the gay rights movement in San Francisco).
\item[271] \textit{Id.} at 75.
\end{footnotes}
community today. Segregation virtually ensured that blacks remained isolated from other social and ethnic groups, and the denial of educational and other opportunities for mobility meant that most southern blacks fell into the same socio-economic category as well. Second, African Americans have suffered significantly more persecution than has the gay community in this country. Though gays and lesbians have faced considerable discrimination, African Americans have been much more violently oppressed; having suffered through more than a century of slavery and, at the commence of the Civil Rights Movement, another hundred years under the tyranny of Jim Crow. This tremendous shared history of repression, coupled with the relative homogeneity of the southern black community, may have been powerful enough to overcome whatever divides did exist in the black community on the eve of the Civil Rights Movement.

ii. Political Support

In large part because a majority of Americans continues to object to the expansion of marriage rights, opponents of same-sex marriage have significantly more official political support for their position than do those who support it. The Democrat National Committee (“DNC”) is clearly the more gay-rights-friendly of the parties. Of the nineteen U.S. Senators, thirty-eight U.S. Representatives, and five Governors who publicly support gay marriage, all but one are Democrats; the sole non-Democrat who holds this position is an Independent Senator

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273 Ball, supra note 8, at 1516.
274 Id.; Eskridge, Some Effects, supra note 18, at 2072.
from Vermont.\textsuperscript{275} However, more than forty percent of Democrats oppose marriage rights for same-sex couples, and during his 2008 campaign, President Obama stated that he opposed gay marriage for religious reasons.\textsuperscript{276} Political commentators have questioned the sincerity of this opposition, recalling a February 1996 statement by then state legislative candidate Obama in which he endorsed same-sex marriage.\textsuperscript{277} However, even if the President’s reported change in position on the marriage issue is due to strategic considerations rather than a genuine change of heart, this suggests that supporting gay marriage remains a political liability even among Democratic constituencies. Indeed, fear of alienating social conservatives has prevented many liberal politicians from taking a firm stance on the issue.\textsuperscript{278} For example, groups trying to fight Ohio’s anti-gay marriage amendment in 2004 received only vague and empty responses from Democratic politicians, and it became apparent that the Party wanted to “keep [its] hands off” the issue.\textsuperscript{279}

By contrast, nearly ninety percent of Republican legislators not only oppose same-sex marriage, but so strongly oppose it that they voted in favor of the Federal Marriage Amendment.\textsuperscript{280} Immediately following \textit{Goodridge}, President Bush pledged his support to do “what [wa]s legally necessary to defend the sanctity of marriage,” and a group of Republican

\textsuperscript{277} Egelko, \textit{supra} note 285.
\textsuperscript{278} Wildman, \textit{supra} note 219.
\textsuperscript{279} \textit{Id}.
\textsuperscript{280} House Vote, \textit{supra} note 23 (showing that 202 republicans voted “yea” and 27 voted “nay”); U.S. Senate Role Call Votes 109\textsuperscript{th} Congress – 2\textsuperscript{nd} session, available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00163#position.
Congressmen quickly drafted and began circulating the Federal Marriage Amendment.\textsuperscript{281} During the same Ohio election during which proponents of gay marriage received no support from their party, opponents of gay marriage had the express support of the Republican National Committee ("RNC").\textsuperscript{282} During the months leading up to the election, the RNC peppered Ohioans with mailings urging that "‘one vote’ could ‘protect marriage,’” and President Bush delivered a radio address in which he chastised the *Goodridge* Court for "send[ing] a message to the next generation that marriage has no enduring meaning," thus imploring voters to support bans on gay marriage in their states.\textsuperscript{283}

In some ways, the current balance of political power between opponents and proponents of gay marriage parallels that which existed during the Civil Rights Movement. In the wake of *Brown*, ninety percent of the Southern Congressional delegation signed the "Southern Manifesto," in which they denounced the decision and vowed to use "all lawful means to bring about [its] reversal . . . and to prevent the use of force in its implementation."\textsuperscript{284} Southern politicians immediately launched staunch campaigns of resistance, which included such drastic measures as school boycotts and school closures.\textsuperscript{285} In a famous display of resistance, Alabama Governor George Wallace declared in his inaugural address, "I draw the line in the dust and toss the gauntlet before the feet of tyranny, and I say, ‘Segregation now! Segregation tomorrow! Segregation forever!’"\textsuperscript{286} Further, though President Eisenhower accepted the Supreme Court’s ruling in *Brown*, as he was bound to do, he did not support it. As he stated, “The Supreme Court

\begin{footnotes}
\item[281] Klarman, *Brown and Lawrence*, supra note 55, at 460; Ball, *supra* note 8, at 1493.
\item[284] Ogletree, *supra* note 161, at 19; Patterson, *supra* note 149, at 98.
\item[285] Patterson, *supra* note 149, at 75, 78, 92.
\item[286] Id. at 94.
\end{footnotes}
has spoken, and I am sworn to uphold their-the constitutional processes in this country, and I am trying. I will obey.” 287 Privately, however, he was much more critical: “I do not believe that prejudices . . . will succumb to compulsion. . . . Federal law imposed upon our States . . . would set back the cause of race relations a long, long time.” 288

However, despite this vehement opposition from the South and rather weak support from the President, African Americans managed to carve out an advantageous niche for themselves in the political process. By staying out of the pocket of both parties, and thus ensuring that both Democrats and Republicans would have to vie for their support, Northern black voters played a crucial role in getting civil rights on the national agenda. 289 The political balance of power today stands at the opposite pole. Though the Democratic Party has been an overwhelming disappointment to same-sex marriage hopefuls, the Party can afford to maintain its tenuous stance on the issue, as there is little chance that supporters of gay marriage will defect to the Republican Party.

**PART V: STRATEGY IN CONTEXT**

The balance of power between the same-sex marriage movement and its opposition is simply different than was the balance between the Civil Rights Movement and its opponents. First, that a clear majority of Americans opposes same-sex marriage is a major impediment to national progress on the issue. In a country where thirty-nine states have legislative prohibitions – twenty-seven of these being constitutional bans – on gay marriage, states that provide full marriage equality are, and will continue to be seen as, outliers by the rest of the country. This was not the case in the years leading up to Brown, during which a majority of Americans – and,

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287 Ogletree, supra note 161, at 19.
288 Patterson, supra note 149, at 81.
North of the Mason-Dixon line, a large majority – favored desegregation. The South was thus the clear outlier, and this provided the leaders of the Civil Rights Movement, the national government, and the Supreme Court with the support they needed to attempt to overhaul a centuries-old system of racial apartheid.

The current demographic calculus – as it stands in contrast to that of the 1950s – has significant implications for the immediate future of the same-sex marriage movement. The legislature acts as a representative of the people, so it comes as no surprise that most of its members have been unwilling to take a more progressive stance on gay marriage than that taken a majority of his or her constituency. The legislature’s voter-driven hesitancy to take a strong stance in favor of gay marriage is surely further bolstered by the fact that, unlike African Americans during the 1950s and 1960s, supporters of gay marriage have little political power. Supporters of gay marriage are significantly less likely than their opponents to withhold their vote for a candidate who does not share their view on the issue. Further, aside from simply staying home on Election Day – which would likely just lead to the seating of even stauncher opponents to same-sex marriage – gay rights supporters have nowhere to run to outside of the DNC. That Democratic politicians can feel confident that their failure to support gay marriage will not cost them much come election season puts the gay rights movement at a major disadvantage in terms of its capacity to leverage any support out of the legislature.

Though the Supreme Court is insulated from direct political pressures, it is still composed of nine individuals who are, by virtue of living in twenty-first century America, exposed to the shared values, political preferences, and social mores of the time. Further, that many of the Justices are aware of and concerned about the potential for backlash that ensues when they step

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290 Klarman, Brown and Lawrence, supra note 55, at 480.
too far ahead of public opinion suggests they may not be willing to do so on the marriage issue. Justice Ginsburg’s reaction to the tremendous backlash in public opinion following the Court’s decision in *Roe v. Wade* captures this apprehension. Though Justice Ginsburg acknowledges that the Court has the power to put its stamp of approval on and encourage social change, she has cautioned against judicial action that too far outpaces public opinion. In her words:

> With prestige to persuade, but not physical power to enforce, with a will for self-preservation and the knowledge that they are not a ‘bevy of Platonic Guardians,’ the Justices generally follow, they do not lead, changes taking place elsewhere in society. But without taking giant strides and thereby raising a backlash too forceful to contain, the Court, through constitutional adjudication, can reinforce or signal a green light for social change.  

Any inclination that the Justices might already feel toward judicial prudence might further be heightened by the fact that public opinion is strongly and rapidly shifting in favor of same-sex marriage. The Court may not want to upset this natural progression, for fear of causing unnecessary backlash. On this point, the contrast between *Brown* and *Roe* is striking. Certainly, the Court’s decision in *Brown* was courageous. However, it was not, as Justice Ginsburg has noted, “an altogether bold decision.”  

In the pre-*Brown* era, the NAACP methodically laid a series of important stepping-stones toward desegregation. This preparation, combined with such factors as the economic and social integration of the nation, the international implications of white supremacy during the Cold War, and the impact that World War II had on black attitudes and racial norms, made racial change in America a “virtual inevitability” by 1954. Though public opinion was similarly shifting in favor of legalizing abortion during the early 1970s, there

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292 *Id.* at 1207.
293 *Id.*
was no pre-\textit{Roe} analog to this laying of groundwork.\textsuperscript{295} Further, the breadth of the \textit{Roe} decision far eclipsed the median of public opinion on the issue.\textsuperscript{296} Thus, rather than simply officially endorsing a social change already in motion, the Court’s action in \textit{Roe} interrupted the country’s progression toward abortion rights and stymied national debate on the issue.\textsuperscript{297} By making pro-life groups feel “like martyrs instead of mere losers,” the Court’s far-reaching decision in \textit{Roe} set the stage for anti-abortion activists to unleash a fervent opposition movement.\textsuperscript{298}

With the memory of \textit{Roe} still fresh in the Justices’ memories, and the vehement response to \textit{Goodridge} still unfolding, it is unclear whether, even if there are five votes on the Court to uphold gay marriage, those Justices would be willing to take such bold action. As legal scholar and political commentator Jeffrey Rosen has explained, “The history of the Court’s interventions in the culture wars suggests that judges should thwart the will of the majority only when the principled constitutional arguments for doing it are so overwhelmingly clear and convincing that they are easily intelligible to those who disagree.”\textsuperscript{299} By Rosen’s calculations, the constitutional case for gay marriage does not meet this burden; even many supporters of civil unions who believe that gays and lesbians deserve equal rights feel that there are “differences between gay and straight unions that merit a semantic distinction.”\textsuperscript{300}

Second, that the leaders of the gay rights movement have largely avoided miring themselves in the moral terms of the debate is a major departure from the approach that the leaders of the Civil Rights Movements took toward desegregation. And, as many within the

\textsuperscript{295} Ginsburg, \textit{supra} note 57, at 1205.  
\textsuperscript{296} \textit{Id}. (“[T]he \textit{Roe} decision left virtually no state laws fully conforming to the Court’s delineation of abortion regulation still permissible.”); Rosen, \textit{supra} note 55 (\textit{Roe} struck down abortion laws in 46 states).  
\textsuperscript{297} Talbot, \textit{supra} note 7.  
\textsuperscript{298} Rosen, \textit{supra} note 7.  
\textsuperscript{299} \textit{Id}.  
\textsuperscript{300} \textit{Id}.  

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same-sex marriage movement have recognized, this has likely cost the movement more than it has benefitted it.\textsuperscript{301} As was true during the Civil Rights Movement, the same-sex marriage movement not only needs to win legislative and/or judicial battles, but also needs to prevail in the “culture war,” if it truly hopes to be a sustainable movement.

Religion is a central feature of the “culture wars” of the twenty-first century, and religion has thus far proved to be “one of the strongest barrier[s] against the gay rights movement.”\textsuperscript{302} Unlike the leaders of the Civil Rights Movement, who assumed immense power through their religious rhetoric and support from religious institutions, the same-sex marriage movement has not leveraged the discourse of morality in its favor. This failing has important, if not predictable, ramifications. Faith-based opposition to same-sex marriage is surely strengthened by the fact that the overwhelming majority of discourse relating religion to the same-sex marriage movement is condemnatory.\textsuperscript{303} Further, in a country where more than half of the population self-identifies as “religious,” and nearly three-quarters of this group believe that homosexuality is morally wrong, it should come as no surprise that more than half of the population continues to oppose gay marriage.\textsuperscript{304}

Third, unlike the participants of the Civil Rights Movement – who were united not only by their shared racial identity, but also by a powerful history of oppression – the gay community is fractured along class, ethnic, philosophical, geographical, and racial lines. That gays and lesbians make up neither a discrete nor insular group is certainly not fatal to the movement’s capacity for successful organization, but it does provide at least a partial explanation for why the movement has struggled to unite its members. The history of persecution that the gay

\textsuperscript{301} See, e.g., Bergeron, supra note 173, at 24-5.  
\textsuperscript{302} Brammer, supra note 184, at 1020.  
\textsuperscript{303} Id. at 1021  
\textsuperscript{304} Id.
community has faced in the past, and the persistent discrimination that it faces today has the potential to be the catalyst for this synthesization. However, as discussed in Part IV.c.i., this oppression does not rise to the level suffered by African Americans in the pre-\textit{Brown} era, and many gays and lesbians have avoided overt discrimination by “staying in the closet.”

Further, there simply are more differences within the contemporary gay community than there were in the pre-\textit{Brown} southern black community. The combination of these factors, combined with the fact that those who oppose same-sex marriage have a vastly stronger intensity of preference than do those who support it, suggests that the leaders of the gay rights movement may have to find more creative solutions to overcome the differences that divide their ranks than did the leaders of the Civil Rights Movement, who could count on intrinsic forces within the black community to provide an added impetus toward unification.

\textbf{VI. CONCLUSION}

The distinctions between the political and social landscapes of the same-sex marriage movement and the Civil Rights Movement hold significant implications for the gay marriage movement’s capacity to effect immediate national change. Of course, it is important to bear in mind Dr. King’s cautionary assertion that it is easy for outsiders who are not themselves the object of oppression to tell those struggling for change, “wait.” However, it seems apparent that because of dramatic age-related disparities in opinion on the gay marriage issue, “only an unforeseeable event of enormous magnitude could disrupt the movement” toward marriage equality.\footnote{Klarman, \textit{Brown and Lawrence}, supra note 55, at 487.} Thus, in this instance, justice delayed need not mean justice denied.

Further, “waiting” does not require a dramatic interruption of the movement’s current efforts. Instead, the “waiting” period can include progress on meaningful and necessary pre-
requisites to national progress on the marriage issue, such as the expansion of education campaigns about gay marriage and channeling resources to judicial and legislative action to expand non-marriage rights for gays and lesbians, such as the passage of the Employment Non-Discrimination Act (“ENDA”). Many of the gay rights organizations currently leading the struggle for marriage equality are already deeply committed to these alternative and complimentary strategies.\textsuperscript{306} However, perhaps these efforts should be made a higher priority. As Matt Foreman, executive director of the National Gay and Lesbian Taskforce, explained in the wake of the 2004 election defeats, “If the movement had been thinking clearly, we would have had a political and public education strategy that preceded the legal strategy.”\textsuperscript{307}

Before GLAD filed the \textit{Goodridge} lawsuit, for example, it had pursued a long-term public education campaign within Massachusetts and had worked toward the legalization of civil unions in Vermont; both of which cloaked the marriage issue in the rhetoric of “fundamental humanity and equal citizenship,” that the Massachusetts Supreme Judicial Court adopted in its opinion in \textit{Goodridge}.\textsuperscript{308} These pre-marriage litigation efforts, coupled with the fact that a majority of Massachusetts residents supported same-sex marriage in 2003, are likely the primary reason why there was less post-\textit{Goodridge} backlash within Massachusetts than there was throughout much of the rest of the country.\textsuperscript{309}

In light of the near inevitability of majoritarian support for same-sex marriage within the next half-decade, and of the immense national backlash that followed \textit{Goodridge} and its kin,

\begin{flushleft}
\textsuperscript{307} Knickerbocker, \textit{supra} note 69.
\textsuperscript{308} Bonauto, \textit{supra} note 101, at 2.
\textsuperscript{309} Ball, \textit{supra} note 8, at 1502-03. (Explaining that fifty percent of Massachusetts residents expressed support for same-sex marriage immediately after Goodridge, while thirty-eight percent expressed disapproval).
\end{flushleft}
perhaps GLAD’s pre-litigation strategy should serve as a model for nation-wide action. This steady equalization of rights for gays and lesbians will not only provide space within which public opinion can organically grow in support of marriage equality, but will also make it more difficult, when the time comes, for the Court or the legislature to deny same-sex couples total equality before the law. Once there is a more solid bedrock of equal rights for gays and lesbians, it will become clear to the Court that there is only one answer to Justice Scalia’s “rhetorical question in Lawrence: “[W]hat [remaining] justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the [l]iberty protected by the Constitution’?”310 None.