THE CAPITAL OF TRUST:

JUDICIAL POWER, SOCIAL REFORM, AND THE CASE OF SAME-SEX MARRIAGE

by

ANTHONY MICHAEL KREIS

(Under the Direction of Richard L. Vining, Jr.)

ABSTRACT

A common belief often articulated in American political discourse is that judicial institutions are above the political fray, and courts can usher in sweeping social change as a result. Substantial political science research casts doubt on this romanticized ideal of courts. This dissertation posits a dialectal theory of courts where judicial institutions can legitimize and fuel social movements, but must also rely on outside actors to enhance their social reform efficacy. Under this theory, courts can be effective agents of social change by incrementally educating the public and encouraging movement in the political branches. A body of evidence marshaled from court rulings, legal filings, public opinion polling, interviews with elected officials, legislative histories, and media accounts detailing the same-sex marriage movement tests this theory. The dissertation concludes that the dialectical theory of judicial influence is supported by the evidence. Courts played a vital role in fueling the same-sex marriage movement, but they were not unbridled agents of social change because they relied on external forces to maximize their influence.

INDEX WORDS: Social change, social movements, judicial review, same-sex marriage, LGBT rights, marriage equality, civil rights, judicial review, judicial power

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DEDICATION

I dedicate this to my grandparents, especially my grandfather, Harold, who passed in February 2016. Though he only had a high school education, he raised me to think for myself and value the pursuit of knowledge. Without his encouragement, I would not be a first generational college graduate— much less be where I am today. I also dedicate this to my sister, Amanda.

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CHAPTER 1

INTRODUCTION

Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry. [1] -Alexander Bickel (1962)

The battle for same-sex marriage would have been better served if [same-sex couples] had never brought litigation, or had lost their cases. [2]

-Gerald N. Rosenberg (2005)

We draw down on a capital of trust, a deposit of trust. We spend that capital of trust, and we have to rebuild that capital. We have to put new deposits, new substance into this reservoir of trust.[3]

-Justice Anthony M. Kennedy (2015)

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

Americans' "attachment," as Gerald Rosenberg once described it,[5] to the portrayal of judges vindicating the rights of the repressed and the downtrodden fails to find wide-scale support in much of the literature studying courts.[6] Indeed, many political scientists criticize perceptions of dominant judicial power as detached from the historical realities of backlash and

resistance to judicial authority.[7] This raises the question: who is right about the role of courts in social change?

Recent social reform attempts have revived this question. Since early 1991, same-sex marriage advocates have systemically sought to use litigation as a tool for social change. That first attempt in the 1990s, a lawsuit in Hawaii state courts, was not isolated. Rather, it began a deliberate strategy that would manifest in the Hawaii litigation's unsuccessful conclusion in 1998. In the following years, litigation percolated in dozens of state and federal courts—sometimes successfully voiding same-sex marriage prohibitions, other times not.

However, neither courts nor the marriage movement more broadly acted in a vacuum. While litigation worked through the courts, same-sex marriage advocates labored to shift public opinion and enact legislation in state legislatures. This brings to the fore the same question long asked by political scientists: what is the impact of social reform-minded litigation? This dissertation will answer whether courts brought about, or substantially buttressed, social change with respect to the same-sex marriage. Did courts bring about the change, or did courts reflect the change after the fact? If the courts did lead the charge, why were courts effective?

In order to address these questions, this dissertation reviews the baseline question of courts and countermajoritarian action and then explores the theories and hypotheses of judicially motivated social reform that will frame the content of the study.

THE COUNTERMAJORITARIAN HURDLE

As a threshold matter, it is necessary to answer whether same-sex marriage litigation and judicial action arising from same-sex marriage litigation was at least plausibly countermajoritarian. If early action by courts was not contrary to public consensus or conceivably subject to severe public backlash—in other words, if the courts were following and

not leading the charge—then possible effects of litigation in the same-sex marriage context are muted. This question holds primacy despite the commonplace constructions of courts as counterweights to public will. Indeed, political science research has produced a substantial and convincing body of evidence that courts *do not* consistently act contrary to the public mood.

Alexander Bickel's articulation of the "countermajoritarian difficulty"[8]— the idea that courts often exercise the power of judicial review as a countervailing weight to majoritarian impulses—informs much of modern constitutional theory.[9] Bickel's closest rival to the claim of the most influential legal theorist, John Hart Ely, crafted a theory of judicial review which advocated for more exacting judicial review to correct for the political process' failures.[10] Importantly with respect to institutional power, Ely's theory ultimately sought to justify the exercise of countermajoritarian judicial behavior and implicitly adopted Bickel's claim that courts are countermajoritarian institutions. Scholars of history and political science have undermined this theory of judicial function.

Robert Dahl articulated a different vision of judicial power.[11] Contrary to the countermajoritarian problem, Dahl wrote of the Supreme Court that regular judicial turnover allows for new political regimes to appoint judges that render decisions consistent with the ideological preferences of the political branches. Thus, "the policy views dominant on the Court are never for long out of line with the policy views dominant among lawmaking majorities."[12] Therefore, according to Dahl, "it would appear, on political grounds, somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite."[13]

Dahl's theory has found support in contemporary historical literature. Jeffery Rosen's

historical analysis of the Court concludes "[T]he Supreme Court has followed the public's views about constitutional questions throughout its history."[14] Legal historian Michael Klarman surmised that the number of Supreme Court's countermajoritarian "interventions can best be described as marginal."[15] Other academics have made similar convincing arguments that courts are more apt to follow public opinion than act counter to it.[16]

Even if it is assumed that Dahl and his contemporaries are correct, slower turnover rates on the Supreme Court sometimes render the Court sluggish to reflect changing social and political moods. This trend notwithstanding, there is evidence that even without steady turnover in Court membership, public opinion influenced justices' opinions.[17] Whether by membership turnover or shifting preferences mirroring broader societal change, judicial review often ratifies the policy positions taken by the dominant coalition.[18] This majoritarian-ratification effect is amplified in those state courts where judges lack the type of insulation enjoyed by federal judges and must face voters in partisan elections, non-partisan elections, and retention elections.[19] There is little empirical evidence that courts routinely act contrary to popular will or fail to shift with the public's attitudes over time.

Turning to the subject of this study, it is crucial to assess whether same-sex marriage litigation emerged during a period of public opposition to same-sex marriage rights. Four early cases are instructive. First of these was the 1990 challenge to the District of Columbia's marriage laws followed by a challenge to Hawaii's same-sex marriage ban in 1991. In 1993, that latter case marked the first instance of a court giving favorable treatment to a freedom to marry claim by same-sex couples in *Baehr v. Lewin*. In 1996, a national poll by Gallup registered only 27 percent support for same-sex marriage support. In 1998, 69.2% of Hawaiians voted to amend the Hawaii Constitution to permit the legislature to restrict marriage to heterosexual couples. In

1998, a state trial court in Alaska ruled in similar fashion to the courts in Hawaii that "the state must...have a compelling interest that supports its decision to refuse to recognize the exercise of this fundamental right by those who choose same-sex partners rather than opposite-sex partners."[20] The court ruled for same-sex couples' freedom to marry. In 1998, Alaska voters amended the state constitution to block the advance of same-sex marriage. There, 68% of the voters supported an amendment to ban same-sex marriage in Alaska.

When the Massachusetts Supreme Judicial Court ruled in 2003 that the Massachusetts Constitution required equal marriage rights for same-sex couples as heterosexual couples in *Goodrich v. Department of Health*, it was the first full judicial victory for same-sex marriage plaintiffs.[21] The decision resulted in Massachusetts becoming the first same-sex marriage jurisdiction in 2004, a time when Gallup polling recorded just over 40 percent national support for same-sex marriage rights. Public opinion on the decision in the Old Bay State was deeply split and unstable. In 2003, two polls found support for same-sex marriage in Massachusetts outpaced opposition by small margins, 50-44 and 48-43. In the decision's wake in 2004, opposition swelled to 53 percent against 35 percent support. While the public mood vacillated, opposition from elected officials was significant. A majority of the members of the Massachusetts General Court and then-Governor Mitt Romney opposed the *Goodrich* decision. These snapshots suggest that the courts were running against national majoritarian currents on the marriage question.

More in-depth research on national public opinion and same-sex marriage reveals relatively stable, low levels of support for same-sex marriage before 2004. While the limited polling data presents a hurdle to capturing the public mood on same-sex marriage between the early 1990s and early 2000s, it was stable nationally with opposition between 55 and 65 percent

and support between 30 to 35 percent.[22] A 2005 study by Brewer and Wilcox proffered that "from the early 1990s to the present... there is no sign of a dramatic trend toward greater support."[23]

There is sufficient evidence to suggest, at a minimum that courts began to favor same-sex marriage litigation claims while substantial popular majorities opposed equal legal recognition of same-sex relationships and the coalitions supporting or opposing same-sex marriage were volatile and susceptible to shifting in response to the courts. A cursory review of polling data indicates that the aim of the study, to unearth the scope of judicial influence within the same-sex marriage and its outward effects, is worthwhile.

THE ROAD MAP

From here, the study will test hypotheses, assess counterfactual evidence, and marshal a body of evidence to relay the deep and complex story of the same-sex marriage movement. Chapter 2 will examine the existing literature investigating courts' impact on social movements and present hypotheses for testing.

Chapter 3 will examine the legal authorities and doctrinal developments related to same-sex marriage. It will detail the legal strategy and support-structures behind same-sex marriage litigation between 1990 and 2015. Chapter 4 will look at public opinion and how Americans' beliefs on relationship recognition for same-sex couples changed over time. Chapter 5 documents the legislative front and what bearing courts had on legislators considering marriage equality and vice versa. From there, Chapter 6 examines the roles executive actors and public administrators played throughout the same-sex marriage movement, assessing how judicial rulings affected their participation in same-sex marriage's progression. Finally, the dissertation will examine the evidence mustered that courts had a facilitative role in moving same-sex

marriage forward against facts indicating those changes could have plausibly occurred without judicial intervention.

All of the preceding chapters will uncover whether courts were a major animating factor in propelling same-sex marriage, helping to shape the political climate towards favoring same-sex relationship recognition and the extent to which courts relied on other movements and actors to be 'effective.' This study will shed new light on the important questions arising from debate on courts and social issues. This study has its roots, in part, in an endeavor to collect interviews, legislative histories and media accounts so that an important historical record for future scholars studying same-sex marriage might be made. While this endeavor is of importance in its own right, this record enables this study to rely upon a unique database, enriching this study of the same-sex marriage movement's shifting legal and political dynamics.

Additionally, this study has a vantage point unavailable to any authors to date. Daniel Pinello's first book on the marriage movement was published the same year *Lawrence v. Texas* and *Goodrich v. Department of Health* were decided. Pinello's second book came only three years later. Rosenberg's treatment of the marriage movement in 2008 was limited by its timing—the same year the California Supreme Court extended marriage rights to same-sex couples before a popular referenda gutted that decision and a year before any legislature enacted same-sex marriage legislation. While Robert Hume's examination of state courts in 2013 had the benefit of greater hindsight, it nevertheless was unable to capture the aftermath of *Windsor v. United States* and the subsequent developments that unfolded in state and federal court. No study has yet captured the interplay of state and federal courts on same-sex marriage and their joint impact on the development of the same-sex marriage movement. This study aspires to capture the full ramifications of same-sex marriage litigation and judicial intervention from the failed litigation

of the 1990s to the victories handed down for same-sex couples by the United States Supreme Court in 2013 and 2015.

Ultimately, readers should be able to glean from this study important lessons from the same-sex marriage movement about the reach of judicial power. First, readers should takeaway better insight of the scope to which courts were indispensable, inconsequential, or significant contributors in legitimizing, shaping and advancing same-sex marriage in the United States by engaging with the public and political actors in a deliberative, dialectic process of collaborative constitutionalism.

Second, readers should walk away with a better perspective of how the American civil rights experience has shaped American legal and political culture. Relatedly, this study may shed additional light on how the same-sex marriage movement may have further reinforced judicial supremacy as a result of political actors' calculations. [24] Finally, this study should give some additional insight and clarity into how judicial minimalism, patchwork judicial decision-making, passive judicial virtues, political backlash, and judicial federalism, work with respect to social reform.

CHAPTER 2

THEORIES OF LAW, COURTS, AND SOCIAL CHANGE

In 1986, the Chief Justice of the California Supreme Court, Rose Bird, faced an uphill battle in the polls. Bird was up for retention election and under fire for her strong opposition to the death penalty and other rulings expanding the rights of criminal defendants. Defiant until her defeat that November, Chief Justice Bird defended her judicial philosophy, though out-of-step with most Californians, as a positive benefit embedded in the judiciary's institutional design:

> Courts are an aristocratic institution in a democracy. That's the dilemma for an institution that has the function of reviewing the will of the people. We're bound to be "anti-majoritarian."[25]

The Chief Justice's vision of muscular judicial review running contrary to the political winds of the moment is in line with a romanticized understanding of courts. Many Americans adhere to this impression of courts as titans and guardians of rights and liberties normatively appealing and empirically true. Research is divided over whether this heroic understanding of courts and legal change is more myth than reality.

Academics have advanced a number of theories about courts and social change, some finding courts can shape public opinion, some finding courts lag behind the public, some finding courts are severely limited in their ability to shape society. In this chapter, I will lay out a range of theories concerning the ability of judicial actors to influence social change. From there, I will articulate a theory of courts and social change and a series of hypotheses to test that theory against courts' efficacy in influencing social change in the same-sex marriage movement.

THE CONSTRAINED COURT

In one of the most influential works studying social change, law, and courts, *The Hollow Hope*, Gerald Rosenberg proffered a seminal theoretical approach to study judicial influence—the Constrained Court model. Rosenberg articulates three constraints that limit the power of courts to effectuate social change and the conditions necessary for overcoming those limitations. Rosenberg's model and approach serve as the primary framework for this study.

Rosenberg's first constraint is concerned with the limited, enumerated nature of constitutional rights. Rosenberg writes, "The bounded nature of constitutional rights prevents courts from hearing or effectively acting on many significant social reform claims, and lessens the chances of popular mobilization."[26] This constraint can be overcome, however, if there is a sufficient amount of legal precedent for change.

Rosenberg's second constraint emerges from the separation of powers: courts lack "the necessary independence from the other branches of the government to produce significant social reform." If, however, there is substantial support for social reform from members of the legislative branch and the executive this constraint can be overcome.

Third, Rosenberg's model focuses on an implementation problem: the inability for courts to develop policies necessary to execute their orders. Two conditions must be present for this constraint to be overcome. First, there is either some support or at least insignificant opposition from the public. Second, a court ruling will be effective if there are positive incentives to induce compliance, costs to induce compliance, private marketplace providers, or administrators/officials whom are crucial for implementing a court's decision are willing to act.

Rosenberg's most recent edition of *The Hollow Hope*, published in 2008, tackles same-sex marriage. Concluding that the courts again failed to produce significant social reform,[27]

Rosenberg argues that early same-sex marriage litigation in Hawaii, Vermont, and Massachusetts was unsuccessful because it influenced only eight states to expand rights for same-sex couples and failed to achieve federal marriage recognition. While Rosenberg's study of marriage litigation came over 18 years after the initiation of litigation in Hawaii, the second edition of his seminal book followed the Massachusetts decision by less than four years.

Rosenberg's work on same-sex marriage litigation has received some criticism. Matthew Hall identifies three flaws in the new edition of the *Hollow Hope* and its examination of same-sex marriage.[28] First, Hall argues that Rosenberg fails to offer a single and clear standard of what constitutes success. Second, Rosenberg's level of analysis is inconsistent. Rosenberg examines the U.S. Supreme Court's impact and the Massachusetts Supreme Judicial Court's impact on a national scale, though the Massachusetts court's jurisdictional authority is exceptionally more limited. Rosenberg justifies the latter arguing that the Massachusetts litigation was ''an attempt to use the courts to produce policy change with nationwide impact.''[29] Finally, Hall critiques Rosenberg for ignoring the possibility that litigation may be more efficient for same-sex marriage advocates than legislative strategies.

Rosenberg's treatment is disproportionately focused on federal courts and, specifically, the United States Supreme Court. Generally, the institutional limitations articulated in the Constrained Court model can be applied to state courts with equal rigor. One institutional limitation unique to state courts, however, is the varying mechanisms available to amend state constitutions. This allows legislators and citizens to thwart the exercise of judicial power or overturn state constitutional decisions. Robert Hume noted that a court of last resort's social reform effectiveness is tied to degree that state's constitutional amendment processes is democratized. State court rulings where proposed state constitutional amendments can bypass

legislative processes altogether before popular ratification are less likely to withstand popular backlash than states with more restrictive amendment processes. Thus, as Hume notes, "State supreme court decisions are only as enduring as institutional conditions permit them to be."[30]

SUPPORT-STRUCTURES

Similar to Rosenberg's claim that litigation is successful provided court-centered campaigns can be sustained in the long term, other research drills deeper into the relationship between the organizational support undergirding litigation-based social reform efforts and their efficacy. Charles Epp offers a competing paradigm of rights making that takes this type of broad-based approach. The first three theories, Epp labels "the conventional interpretations," of rights revolutions are constitution-centered, judge-centered, and culture centered. The constitution-centered theory postulates that judicial institutions enforce a written document of rights, which in turn shapes popular culture.[31] Under this theory, judicial review is used to enforce bills of rights by invalidating public policy that violates constitutional guarantees— but only where individuals assert a clearly articulated constitutional guarantee specific to an enumerated right. Epp posits that judicial independence and enumerated rights enshrined in constitutional documents are not enough on their own for a rights revolution.

The second conventional approach offered by Epp is the judge-centered approach. Here, judges are responsible for safeguarding individual rights. Epp notes that this theory is a better fit where courts exercise docket discretion, like the United States Supreme Court. As Epp notes, "Under this theory, rights revolutions exist only where judges support civil liberties and civil rights and only after development of that support, and only on claims that judges clearly support."[32] Discretion notwithstanding, judicial actors still require actual cases and controversies to be brought before them. Because litigation is required to harness the power of courts to

effectuate change, Epp suggests this traditional approach is inadequate to capture how rights revolutions unfold.

The third theory is culture-centered. Under this approach, Epp notes, **"**Rights revolutions have occurred only where popular consciousness is widespread, only after development of popular rights consciousness, and only on those claims recognized in popular rights consciousness."[33] Epp's culture-centered approach mirrors similar themes articulated by Rosenberg's constrained court theory. Epp offers that constitutional rights are shaped by culture for three reasons. First, judges are byproducts of society and will make decisions that reflect social values and norms. Second, because courts rely on outside institutions and agents to implement decisions, they lack the institutional capacity to enforce decisions that run against popular opinion. Third, the decision to pursue litigation and the argumentation strategies in lawsuits are informed by cultural pressures and norms.

Epp offers an alternative theory for rights revolutions: the support-structure explanation. Epp argues that "widespread and sustained" litigation is "crucial" to a rights revolution.[34] However, effective legal mobilization requires an extensive investment of time, money, and expertise— resources that willing plaintiffs may not have. Because litigation requires the expenditure of these types of resources, Epps argues that rights revolutions come about where organized interests have a sufficient amount of resources to sustain litigation otherwise unavailable to potential plaintiffs. As Epp writes, "The fruits of constitutional rights victories are essentially 'public goods,' legal guarantees that benefit a population much broader than the immediate plaintiff seeking to create or expand the right."[35] Epp offers a snapshot in American legal history to illustrate this point:

> …the implementation of *Brown v. Board of Education*, the 1954 United States Supreme Court decision overturning racial segregation in public schools, depended in large part on

> a number of later cases (as well as support from Congress and the presidency). Widespread litigation, therefore, is crucial to a rights revolution.[36]

Epp's study hypothesized that if the traditional approaches on their own or together insufficiently explained a rights revolution, then the rights-support theory would. While Rosenberg's Constrained Court model overlaps many themes of Epp's work, it fails to test in isolation a larger piece of the social movement puzzle: the possibility that courts can be more effective agents of social change if robust, well-organized, and strategic support-structures are behind reform oriented litigation. The interaction between judicial institutions, the legal community, and social movements has been neglected by many scholars, as Paul Frymer articulated when he contended that what "scholars have not done, with few exceptions, is to see the legal system as a broader and meaningfully autonomous institution made up not only of judges, but also of lawyers, administrators, interest groups, and social movements, as well as the rules and procedures that guide the behavior and interests of these actors."[37] Frymer's call to think of the legal system in broader terms when studying social reform is an important one.

SALIENCY AND LEGITIMACY-CONFERRING INFLUENCE

Both Rosenberg and Epp place significant emphasis on the availability of resources and the impositions of costs with respect to social change. However, other research has focused on the impact of judicial legitimacy on social policy— the idea that court posses the ability to initiate societal reflection in, as Alexander Bickel labeled it, the "hue and cry" of the moment.[38] In short, legitimacy theory suggests that judges and courts have a unique capability of increasing popular support for public policy.

There is evidence from political scientists that, over time, court decisions are legitimized by public acceptance. Dahl first articulated legitimization theory, which advances that judicial institutions' reputation as apolitical guardians of the Constitution give courts symbolic gravitas

and a "unique legitimacy." Because courts are perceived as apolitical and held in high regard, courts can pull public opinion in the direction of their policy positions.[39] Dahl offers that the Supreme Court "can cast legitimacy on public policy and shape policy attitudes on even the most controversial issues."[40] This persuasive authority derives from the special apolitical symbolism embodied by the Court, which Gibson and Caldeira have summed up well:

> Exposure to legitimizing judicial symbols reinforces the process of distinguishing courts from other political institutions. The message of these powerful symbols is that "courts are different," and owing to these differences, courts are worthy of more respect, deference, and obedience— in short, legitimacy.[41]

Significant political science research has vindicated the legitimization theory in varying studies. The public has adopted Supreme Court decision outcomes because political actors have contributed to the legitimizing process by conceding the judicial decisions out of political expediency.[42] Page, Shapiro, and Dempsey found the public tends to resist federal courts' decisions when the public perceives the federal judicial negatively, validating the foundational principle of legitimization theory.[43] Research uncovered that legitimization is not a one-way ratchet. Wlezien and Goggin found that public opinion in support of abortion shifted along with the federal judiciary's decisions to let state abortion restrictions stand.[44]

Timothy Johnson and Andrew Martin investigated the extent to which Supreme Court decisions influence the public through legitimizing effects. They conclude that while the courts can influence the public when it initially rules on a salient issue, the court's capacity to influence the public diminishes in subsequent rulings on the same subject.[45] Joseph Ura modeled the relationship between Supreme Court opinions and the public's response finding that short-term backlash against its decisions are often temporally limited. Tom Keck has also challenged the idea that countermobilization fomented following successful same-sex marriage litigation.[46] Over time, opposition wanes and the public gravitates toward the Court's positions in the long-

run.[47] William Muir found that the Supreme Court's decision prohibiting school prayer spurred debate about the merits of school-sponsored prayer among public school educators and administrators.[48]

Franklin and Kosaki found that the Court could act as a "schoolmaster" by bringing the public toward the Court's positions while also spawning debate. Studying the effects of *Roe v. Wade* on public opinion, they found that while public support for abortions in the case of a mother's life grew, the public became more polarized on support for discretionary abortions:

> While we found evidence for the persuasive powers of the Court in the case of the health scale, reflected in a general increase in support for the Court's position, we also found that in the case of discretionary abortions the Court only increased differences among groups. In each of these cases it is clear that the Court's action had an impact- that the public responded to its decision. However, the public response is not a simple matter of increased support for the positions taken by the Court majority. This result offers a warning that efforts to consider the effect of the Court-- or other institutions-- on public preferences must not rely simply on aggregate support for policies as the sole measure of impact.[49]

Franklin and Kosaki's research was revisited in 2011 by Hanley, Solomone and, Wright. In their research, the three argued that the persuasive influence of the Supreme Court is broader than what political scientists have typically thought. Analyzing public attitudes in response to *Roe v. Wade*, the authors uncovered evidence that suggested that groups aware of the *Roe* decision were more supportive of abortion rights than persons in groups unaware of the *Roe* case.[50]

Rosenberg produced evidence to support his proposition that the courts failed to raise awareness or increase the saliency of particular issues. Rosenberg used the extent of media coverage on topics related to Supreme Court decisions as a metric for saliency. In their study of media coverage on issues before the Court, Bohte, Flemming and Wood found that measuring the amount of media coverage on a particular topic can fail to capture how the Supreme Court

influences the media.[51] Their study concludes, "…it is unlikely that when the Court speaks in cases involving important questions of the day that its voice is routinely ignored or goes unheard. Instead it may mean that as one of many voices calling for the media's attention, the stories about the decisions for related competing stories, only to have them replaced by subsequent events. The attention allocated to the issue area would thus remain stable even as the competition and source of stories change over time."[52]

More specific to the same-sex marriage context, a 2006 study by Stoutenborough, Haider-Markel, and Allen tested the legitimation theory and the ability of courts to shape public opinion on same-sex marriage.[53] In their study of four seminal gay rights cases, the authors concluded that Supreme Court decisions had a "significant impact" on public opinion regarding same-sex relations, but primarily when the decisions received media attention and had a broad policy impact.[54]

In a related study, Robert Hume crafted an experimental study to test legitimization theory.[55] Hume divided the respondents into three groups at random. One group was asked whether they would support a decision by their state legislature, the second group the same with respect to state courts, and the third group the same with respect to their governor. Hume found that state courts could be more effective than other institutions at increasing public support for government policies. However, courts' respective levels of independence conditioned the respondents' support for judicial decisions. The greater independence afforded to the court by a given method of retention, Hume found the greater legitimizing effect.

Hume's work is buttressed by efforts to capture whether the Iowa Supreme Court's decision to extend marriage rights to same-sex couples had a legitimizing effect. Kreitzer, Hamilton, and Tolbert[56] conducted a poll of Iowa registered voters prior to the Iowa

Supreme Court's decision. After the ruling, 60 percent of the original respondents were re-interviewed.[57] Their analysis found some evidence of public backlash. Approximately, a quarter of civil unions supporters moved against marriage rights, but overall support increased. The increase of support for same-sex marriage was particularly evident among Democrats, the non-religious, non-evangelicals, the more educated respondents, younger respondents, and respondents who had LGB friends and family.

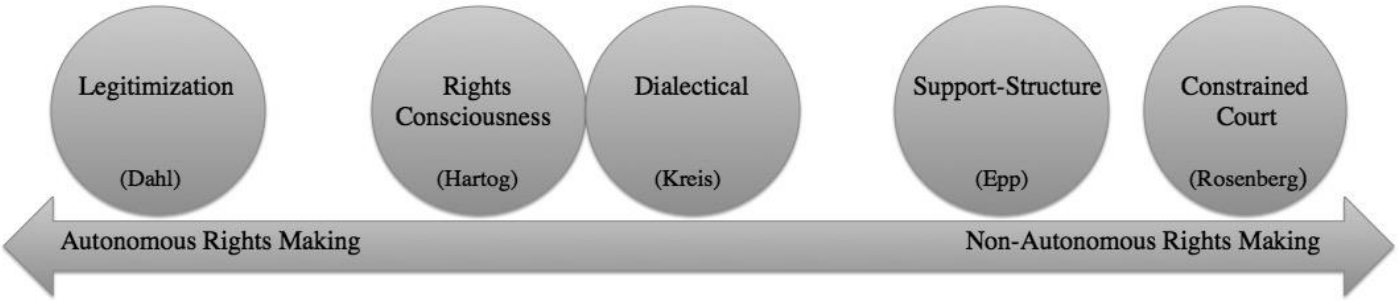


Figure 1: Theories of Judicial Influence and Social Change

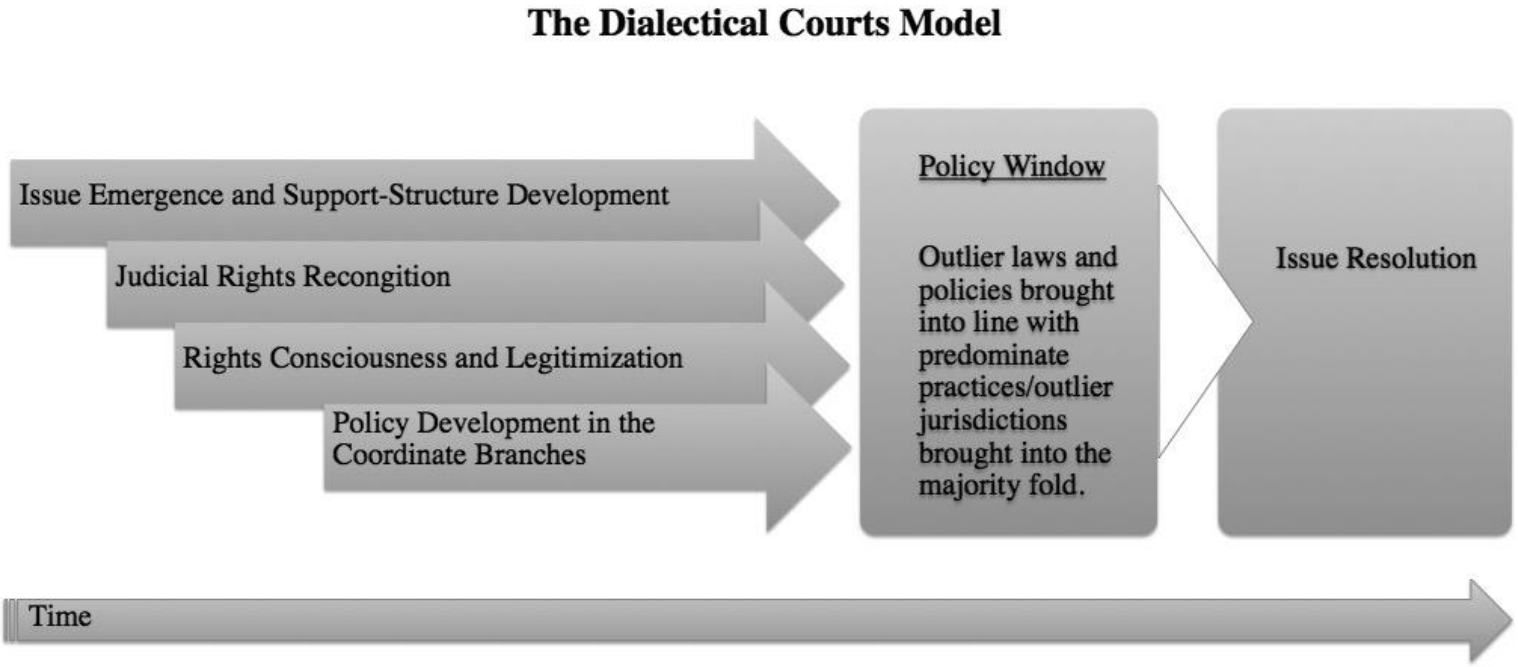


Figure 2: Model of the Dialectical Theory

The Dialectical Court

If the model of courts as constrained bodies and the theory of courts as legitimizing institutions are mutually exclusive, then courts' success in social reform is either because the political conditions were ripe for courts to overcome institutional limitations or the courts expended institutional capital and legitimized the judiciary's policy preferences. Discarding one theory for one over the other is unappealing. It cannot be true that courts are unrestrained institutions that have the luxury of throwing caution to the wind. All the while, compelling evidence supports the proposition that courts can act as legitimizing institutions even when judicial intervention fuels discordant responses.

The Constrained Court thesis cannot, on its own, explain judicial review's impact generally or its influence of same-sex marriage litigation because it oversimplifies reality.[58] The Constrained Court model is under-inclusive because it fails to capture adequately courts' sway in non-hierarchical relationships. A dynamic theory of courts as legitimizing institutions unrestrained by external conditions is even more implausible.

A better theoretical approach maps the structure of the Constrained Court model onto legitimization theory and expands the theory's scope to recognize the potential impact of rights consciousness and place greater emphasis on the broader legal community. (See, Figure 1). Rather than approaching Rosenberg's model as a set necessary conditions to be satisfied, I will consider them as variables that may enhance courts' underlying legitimizing function. In other words, if courts have a legitimizing effect that draws the public in courts' direction, whatever institutional goodwill courts transfer to a particular policy position is amplified the greater external constraints are relaxed. Synthesizing the constrained court, legitimization, and support-structure theories (Figure 2), six comprehensive hypotheses can be extracted for

examination. The first four of these hypotheses are derived from the Constrained Court theory. The final two hypotheses aim to fill the gaps left by the Constrained Court model.

The Precedent Hypothesis

The first hypothesis is derived from Rosenberg's leading constraint concerning the limited nature of constitutional rights in absence of guiding precedent. Rosenberg argues that risk adverse judges are unlikely to rule for constitutional claims that result in sweeping change. In the mid-1950s, for example, U.S. Supreme Court justices were especially conscious of the controversy ensnaring anti-miscegenation laws. Still reeling over school integration and aftermath *Brown v. Board*, Justice Frankfurter steered the Court away from taking up interracial marriage, and Justice Clark similarly urged restraint saying, "[o]ne bombshell at a time is enough."[59]

Rosenberg captures the essence of this thinking when he wrote that "courts, and the judges that compose them even if sympathetic to the social reform plaintiffs, may be unwilling to risk crossing" new and untested legal boundaries. Simply put, even judges empathetic to a cause will approach it with caution because, as California Supreme Court Chief Justice Rodger Traynor put it, "a judge must plod rather than soar."[60] Litigants cannot, therefore, demand drastic changes in the law without sound precedent. Successful social change must be incremental and "requires a lengthy strategy."[61] Consequently, it is expected to see that as civil rights doctrine is substantively liberalized and the number of liberal civil rights precedents increase, courts are more likely to rule in favor of same or similar civil rights claims.

To test this hypothesis, the dissertation will examine the impact of judicial decisions expounding the right to marry and addressing constitutional protections against sexual orientation discrimination on courts' ability to overcome the constraint of bounded rights. This

analysis will explore the impact of state and federal litigation arising not only from claims of sexual orientation discrimination, but also civil rights litigation more broadly stemming from claims of discrimination against other protected classes, namely race and sex discrimination.

The Support-Structure Hypothesis

Cases do not appear in courts "as if by magic."[62] Test cases must be manufactured and/or willing plaintiffs must come forward to press a claim. Undertaking litigation is demanding. Pursuing a case in court taxes financial resources, necessitates personal time commitments, and requires securing expert assistance. As a result, even the most passionate prospective plaintiffs hoping to use the courts for social reform may lack the assets and training needed to sustain litigation.

This barrier to access the courts is further complicated by the drawn out nature of social change and the judicial process. If courts tend to follow majoritarian impulses because judges are hesitant to broach intensely contested social topics, the necessity of social reform-minded litigants to act incrementally makes sense. More than added costs due to the prolonged process, haphazardly filed lawsuits pursued in hostile jurisdictions or prayers for extreme remedies could inflict serious harm on a social movement. As a consequence, the lack of centralized coordination is a serious liability for a social reform movement. Long-term litigation strategies aiming to foster national policy changes are complex and require a tremendous investment of resources and extensive coordination.

Here, the impact of same-sex marriage litigation should be greater due to strategic, well-organized support structures propping up litigation. Other social movements have been accused of weak grassroots efforts beyond the courts, muting the impact that litigation could have had to advance the movement's cause. Whether similar allegations can stick to same-sex marriage

advocates in the wake of pro-LGBT rights judicial decisions is worthy of examination. It is necessary to understand the organizational effectiveness of LGBT rights organizations to coordinate litigation, oversee the implementation of judicial edicts, execute public relations campaigns, and navigate the legislative process to push forward pro-LGBT rights legislation or block anti-LGBT legislation. As a result, the more robust interest group support undergirding social reform litigation is, observations should show the more effective litigation will be in advancing social change.

The Political Reinforcement Hypothesis

Even if social reform litigation is successful, courts cannot enforce compliance. Alexander Hamilton famously articulated this concept in Federalist 78. Hamilton argued that because the judiciary "has no influence over either the sword or the purse," courts have "neither FORCE nor WILL, but merely judgment."[63] Consequently, judges "depend upon the aid of the executive arm" to enforce their rulings.[64] Legislators can defund the implementation of judicial decisions, write statutes to undercut rulings, and refer constitutional amendments to strip courts of subject matter jurisdiction or simply overturn decisions. Without a modicum of support from the political branches, the judiciary's efficacy is imperiled. Testing this hypothesis requires two steps. First, an examination of same-sex marriage's support and opposition in the political branches before judicial decisions expanding same-sex relationship recognition is necessary. Here the dissertation will consider expressions of support for lesbian, gay, bisexual, and transgender (LGBT) rights through the enactment of statutory rights or the promulgation of pro-LGBT regulations, an assessment of the relevant jurisdiction's political climate through polling, media accounts, and interviews with state legislators. From there, the dissertation examines how the implementation of same-sex marriage was improved or harmed by legislative and executive

actors. The political reinforcement hypothesis predicts that the more support a judicial decision garners from legislative and executive actors by supportive measures including, but not limited to, advancing legislation and executive orders in line with the courts and blocking constitutional amendments to overturn court rulings, the more efficiently that judicially mandated policy is implemented.

The Administrative Implementation Hypothesis

Public policy's success depends on the effectiveness of administrative agencies and bureaucrats charged with day-to-day government operations. Reform-oriented litigation is no different. Successful plaintiffs require cooperation by public administrators. Unless costs are imposed or incentives are offered to induce compliance, litigants and judges rely on public administrators' willingness to give rulings effect on the ground. Here, a likely finding is that public administrators and officials crucial for implementation more readily adhered to judicial same-sex marriage mandates because they required only modest administrative changes and noncomplying persons would encumber significant financial penalties. Concerning marriage licensing, expanding eligibility to same-sex couples only required updating forms and other small ministerial changes. However, strong objections from particular public administrators could stymie compliance or hinder access to rights if the public officials charged with implementation refuse to comply. The administrative implementation hypothesis forecasts that the more support a judicial decision garners from public administrators, the more efficiently that judicially mandated policy is implemented.

The Rights Consciousness Hypothesis

Moving away from state actors, the dissertation will examine the impact of courts on the citizenry. If courts are effective agents are social change, judges should have the capacity to

rouse citizens to take action and fuel activist mobilization. In this sense, court rulings can provide the impetus for individuals to see a right in a legal claim that they never considered before or cause an individual to rethink his or her prior positions on the issue at hand. For those who are the direct beneficiaries of a ruling, a rights consciousness effect may induce those persons to take action and engage in the political process to demand more rights. Here, I anticipate that that those judicial decisions favoring same-sex relationship recognition increased same-sex marriage's saliency, giving rise to an increased consciousness of rights.

To test this hypothesis, the dissertation will examine the extent to which litigation may have affected media coverage, interviewing state legislators to unearth their thought process on LGBT issues, and what enacted legislation arose from the heightened attention litigation provided the LGBT rights movement. I will also evaluate evidence that judicial actors emboldened grassroots activists, elected officials, and organized interest groups by creating a more hospitable environment for social change advocacy. If this hypothesis is correct, the evidence should reflect a steady rise in pro-gay marriage advocates framing marriage equality as a constitutional right as courts intervene in the LGBT rights movement. If courts can raise an issue's prominence and inspire individuals to take action then judicial institutions can be effective vehicles of social change. The rights consciousness hypothesis expects that litigation will increase issue saliency and will subsequently give rise to a greater awareness of rights necessary to fuel social activism.

The Legitimization Hypothesis

While a rights consciousness effect should be seen soon after a decision is handed down, the public as a whole may require more time to debate and digest court rulings that have a profound impact on contested policy issues or social norms. If the public holds courts in high

regard as protectors of rights and liberties, judges should be able to tap into that institutional standing and confer legitimacy on the policy preferences reflected in their rulings. If evidence bears out indicating this hypothesis is correct, then the legitimization effect of courts will shift public attitudes towards greater acceptance of same-sex marriage and LGBT rights as the courts expand rights for sexual minorities. Polling data on both the national and state-level will serve as the primary source of evidence to test this theory. The dissertation will also compare states where same-sex marriage was judicially mandated and legislatively enacted same-sex marriage for evidence of similar or dissimilar public mood shifts in the wake of same-sex marriage legalization. In addition to public opinion, the dissertation will examine the impact of judicial rulings on government officials in the executive branch and public administrators.

As courts lend legitimacy to a policy by ruling in its favor, public officials in the legislative and executive branches should be more likely to take action to advance and expand that policy. Interviews with state legislators, media accounts, and other public statements may also reveal evidence of a legitimizing effect as public actors use judicial rulings to bolster their positions. The legitimization hypothesis predicts that courts' symbolic position as guardians of the Constitution bolsters courts' institutional legitimacy; thus public attitudes on policy positions will have a positive relationship with the ideological direction of judicial actors.

Data Collection and Methods

From the outset, the study faces a serious hurdle: social phenomena are complex. Demonstrating a causal relationship (or lack thereof) between social and political actors and judicial institutions is no easy task. It is difficult to isolate the relationship between courts and social reform, controlling for variables, to demonstrate a causal relationship between judicial action and social change.

This limitation is less troublesome in other areas of this study. Measuring direct compliance with same-sex marriage orders is easier to gauge. Public administrators charged with the marriage licensing process either comply with court edicts or they do not. Legislatures will enact legislation to evade compliance or they will not. Testing more attenuated indirect effects present a greater challenge, but potentially answers more far-reaching questions about the influence of courts. How do one state's courts influence other states' legislators? How might 50-year-old Supreme Court cases on racial discrimination impact thinking on same-sex couples? If public opinion shifts in a particular direction, to what extent is it attributable to courts over other actors? Are courts capable of more than blocking social evolution— can courts mobilize social movements? What effect do courts have by preserving the gains of social movements? This study of the same-sex marriage movement will explore courts' potential efficacy regarding both direct and indirect effects.

The effect of time is also thorny. While it is seemingly reasonable to assume that the shorter amount of time between two events indicates a stronger relationship between Event One and Event Two, this may not paint the entire or even an accurate picture. For example, an initial event, Event One, may have a greater impact on Event Three because of an intervening Event Two. Consequently, the study must avoid constructing narrow abstractions of events that fail to capture an accurate picture of social change, and the role courts have in it.

While this study will examine the national development of the same-sex marriage movement, particular attention will be paid to states that saw positive movement toward same-sex relationship recognition between 1996 and 2012. Of course, focusing on states that enacted same-sex marriage may be criticized as selecting the dependent variable. However, the design accounts for this particular critique of bias in two ways. First, this component of the study looks

explores the motivations of individuals affecting social change— to understand whether those motives were personal, political, economic, legal, etc. Though numerous jurisdictions adopted state constitutional prohibitions of same-sex marriage, these amendments had the practical effect of entrenching the status quo. The deliberations in states over state marriage amendments cannot go unaddressed but granular-level analyses in these states would yield less profit to help answer whether courts brought about or bolstered Americans' embrace of same-sex marriage.

In early relationship recognition states, interviews were conducted with lawmakers, governors, and major community stakeholders to construct a narrative of how same-sex marriage legislation successfully became the law of the land in states between 2009 and 2013. The interviews, however, are not the sole source of data. The study of these states will also report and analyze legislative language, media coverage, judicial decisions, state-level polling data, as well as referenda campaigns, and results to provide a holistic picture.

Interview procedures must sufficiently guard against biases and potential critiques that the interviews suffer from an inability to be generalized. Several considerations require attention concerning these interviews. First, all interviews are conducted with elected officials or public figures on matters of public concern, policy, and law. Thus, the ethical questions that might arise when interviewing members of the general public, such as privacy, harm, or interviewee vulnerability, do not arise. Second, the interviews should be structured to avoid the potential for bias. The interview questions are broadly constructed to encourage the interviewees to talk at length with minimal interruption and to avoid leading interviewers to make coached statements or conclusions.[65] Further, the information collected through interviews will be checked against information provided by other interviewers, media coverage, and recordings of public remarks.

It is necessary to construct what the data sources allow readers to glean from the

evidence, once collected, and what evidence indicate effectiveness or overcoming institutional barriers to effective judicially mandated social reform. The study's general approach will seek to replicate the methodological approach of Rosenberg's *Hollow Hope* and test an additional hypothesis that may fill any unexplained gaps between Rosenberg's Constrained Court Model and the body of evidence presented by examining legitimization and support-structure theories.

As noted, one metric of judicial efficacy is judicially motivated spikes in social awareness about the issue. Increased salience may reflect the extent of media coverage of same-sex marriage. Social media data may also provide important insight as to whether the court is raising issue awareness. Interview data may also prove insightful here— did the courts kick start public officials' contemplation of same-sex marriage?

The interview data and floor debate transcripts tease out the extent to which courts and legal norms influenced elected officials. Did legislators look to courts for leadership to sustain their votes for same-sex marriage legislation? And, if so, were the courts helping to shape their opinions or merely providing legitimizing cover? If the interview data relays that these elected officials grounded their votes for same-sex marriage based on political calculations, personal explanations, economic rationales, what does that suggest about the power of courts' capacity to appeal for social change?

If compliance measures the courts' efficacy, looking at the response of public officials and administrators is crucial. Resistance to implementing decisions, including executive branch officials employing evasive tactics like taking advantage of technicalities in federal court injunctive powers will be telling here. The other political branches' reactions here are also of import. Were elected officials induced to comply with judicial decisions? Were bills introduced to subvert or circumvent court decisions, including bills aimed at providing government

employees with religious exemptions to issuing same-sex marriage licenses or ending civil marriage altogether?

Public opinion data will elucidate whether the courts sparked a public backlash, spiked broader support, or had no impact on the public's mood on same-sex marriage. Other evidence may weigh against the courts' efficacy in turning the tides of public thought, including acts of civil disobedience or the mobilization of mass protest. Here too, the research must ask whether shifts in public opinion are the byproduct of generational change or increased receptiveness by elites as understood from a careful analysis of, among other things, polling, corporate policy data, and legislator biographic profiles.

Let us now turn to the data, construct a comprehensive narrative of the same-sex marriage movement, and examine judicially driven social reform efficacy.

CHAPTER 3

THE CONSTRAINT OF CONSTITUTIONAL LANGUAGE AND PRECEDENT

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

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

If judges act cautiously and require social reform-minded litigants to seek long-term and incremental change as a result, litigants must act strategically and be able to sustain a widespread campaign. Any nationwide social reform campaign requires a tremendous amount of financing, planning, and expertise. In the courtroom, plaintiffs must secure attorneys who have the

willingness and acumen to prosecute their claims— and then be flush with cash to pay private counsel. But, interest groups and impact litigation focused organizations can absorb these transaction costs. These groups can also devise long-term litigation blueprints to maximize their impact and likelihood of success. Support from the broader legal community is also important in this respect. While formal organizations, such a nonprofit legal groups, aid social reform litigation's success, the greater support from the legal community at large is also critical because prospective plaintiffs require members of the bar unaffiliated with civil rights groups to press their claims. The support structure hypothesis posits that organizational infrastructure is a necessary condition for litigation-focused social reform and tangential public activism to flourish.

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

The first ever recorded same-sex marriage case came in 1971 on the heels of the Supreme Court's 1967 ruling in *Loving v. Virginia*, which struck down state laws banning interracial marriage. The case, *Baker v. Nelson*, arose after a Minneapolis, Minnesota, court clerk denied a marriage license to Richard John Baker and James Michael McConnell. Minnesota law limited marriage rights to between "persons of the opposite sex." Baker and McConnell alleged

Minnesota's marriage law was constitutionally deficient, running afoul of the First, Eighth, Ninth, and Fourteenth amendments.

The couple was unsuccessful in the trial court and lost again in the Minnesota Supreme Court, which noted United States Supreme Court precedent offered no support for the couple's position. The Minnesota Supreme Court further opined, "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."[66] The couple unsuccessfully appealed to the United States Supreme Court. The Court summarily dismissed the couple's petition for want of a federal question.

The Kentucky Court of Appeals in 1973 rejected a couple's claim that the state's limitation of marriage to opposite-sex couples violated their due process right to marry and offended the prohibition of cruel and unusual punishment in *Jones v. Hallahan*. Proffering an argument untested in Minnesota, the couple further Kentucky marriage abridged their rights of religious free exercise of religion and association.[67] In a harsh rebuke of couple, the state court ruled "the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage." The Court rejected all remaining claims.

A 1974 case, *Singer v. Hara*, challenged Washington State's marriage law, claiming the prohibition of same-sex marriage offended the state constitution's Equal Rights Amendment in addition to federal constitutional violations. The Washington Court of Appeals readily dispensed with the couple's Eighth, Ninth and Fourteenth Amendment challenges. The state court ruled against the state constitutional claims, concluding on balance that the "the public interest in affording a favorable environment for the growth of children" outweighed the asserted marriage claim.

If a condition for judicial civil rights expansion is the preexistence of ample judicial precedent backing it, as the Minnesota Supreme Court noted, it was not satisfied. The plaintiffs in all three cases had thin case law from the United States Supreme Court— and courts more broadly— to buttress their legal arguments with respect to marriage rights. Notably, the Supreme Court in 1958 did rule in favor of a gay rights publication. In *ONE Inc. v. Olesen*, the Court rejected lower court rulings that permitted the Post Office's declaration that a pro-homosexual magazine was obscene *per se* and, thus, banned from postal distribution. While the Court's willingness to intervene in the government censorship of pro-gay literature is significant to the extant that it lifted state manufactured barricades to social change, *ONE Inc.* did not represent a substantial shift in doctrine that couples could readily use as ammunition against same-sex marriage blockades.

These 1970s era lawsuits failed to overcome the bounded rights constraint because they did not seek an incremental change in the law, as the precedent hypothesis predicts. Early litigants were stymied by the lack of precedent directly addressing the rights of bisexual, gay, and lesbian Americans. Take, for example, the fact that anti-sodomy laws were still on the books in an overwhelming majority of states— including states targeted for marriage litigation. While the Washington Legislature repealed the state's anti-sodomy law in 1976, the laws in Kentucky and Minnesota remained on the books until 1992 and 2001, respectively, when state courts invalidated them as incompatible with state constitutional guarantees. The first ruling by a state court striking down a law criminalizing same-sex sexual conduct did not come until 1980.

The Plaintiffs failed to litigate strategically, putting the cart before the horse, by asking courts to tackle marriage rights for persons whose intimate relations were subject to criminal prosecution. Even if the judges in these cases were sympathetic to the merits of equal marriage

rights, the litigants simply demanded too much of them. Despite these losses, a number of litigation-centered organizations formed over the next decade, including Lambda Legal (1973), the National Center for Lesbian Rights (1977), the Gay and Lesbians Advocates and Defenders (1978), and the American Civil Liberties Union's LGBT Project (1986). The absence of organizations dedicated to LGB legal issues or any assemble of a long-term strategy for targeted, incremental litigation did the movement no favors. The bungled marriage litigation in the 1970s was too aggressive and too uncoordinated to make headway. A more robust support-structure for LGB rights litigation may have avoided these ill-advised actions.

The Supreme Court addressed the criminalization of same-sex relations in 1986. In *Bowers v. Hardwick*, the Court turned away a challenge to a Georgia statute that criminalized sodomy. Writing for the Court, Justice White examined the precedent undergirding the right to privacy. White's majority opinion set aside same-sex couples' intimacy from the conduct protected in previous privacy cases that shielded interests in childrearing and education, intimate family relationships, procreation, marriage, and abortion. White wrote, "No connection between family, marriage, or procreation, on the one hand, and homosexual activity, on the other, has been demonstrated, either by the Court of Appeals or by respondent."[68] The Court, unwilling to find a substantive due process right to engage in same-sex sexual conduct, upheld the Georgia law.

Bowers was detrimental for LGB Americans. However, the *Bowers* Court noted that the case "raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state court decisions invalidating those laws on state constitutional grounds."[69] Indeed, a number of state courts did invalidate state anti-sodomy laws between 1986 and 1998. In 1992, the Kentucky Supreme Court was the first court of last

resort to invalidate a state sodomy statute under state constitutional grounds after *Bowers*. Between 1992 and 2002, five additional state high courts followed Kentucky's lead.[70]

As state courts began to strike down sodomy laws on state constitutional grounds, same-sex marriage advocates, led by Evan Wolfson, launched a challenge to Hawaii's same-sex marriage ban in *Baehr v. Lewin*.[71] In 1993, that case marked the first instance of a court giving favorable treatment to a freedom to marry claim by same-sex couples. In *Baehr*, the Hawaii Supreme Court determined that the Hawaii law limiting marriage between opposite-sex couples constituted sex-based discrimination and, thus, required the state trial court to use strict scrutiny to assess the law's constitutionality under the Hawaii Constitution. The Hawaii Supreme Court remanded to the trial court, now placing the burden on the state to rebut the presumptive unconstitutionality of Hawaii's marriage law. That litigation was mooted in 1998 after 69.2% of Hawaiians voted to amend the Hawaii Constitution to permit the legislature to restrict marriage to heterosexual couples, thus removing the statute regulating marriage from the ambit of the state constitution's equal protection clause.

That same year, a state trial court in Alaska ruled in similar fashion to the courts in Hawaii that "the state must...have a compelling interest that supports its decision to refuse to recognize the exercise of this fundamental right by those who choose same-sex partners rather than opposite-sex partners."[72] The court thus appeared poised to rule in favor of same-sex couples. Like Hawaii, in 1998, Alaska voters amended the state constitution to block the advance of same-sex marriage. There, 68% of the voters supported an amendment to outright ban same-sex marriage in Alaska.

While litigation percolated in Hawaii courts, the United States Supreme Court recognized for the first time that the Fourteenth Amendment's protections safeguarded against sexual

orientation discrimination. *Romer v. Evans* (1996) was the Supreme Court's first authoritative statement that the entanglement of state action with anti-gay animus is constitutionally impermissible.[68] The Court, applying rational basis review, invalidated a state constitutional amendment that repealed and prohibited all local policies that recognized homosexuals as a protected class.[69] The amendment prohibited any legislative, executive, or judicial action aimed at expanding protections based on sexual orientation.[70] The Court determined that "the amendment seems inexplicable by anything but animus toward the class it affects"[71] and concluded that animus did not constitute a rational basis for Colorado's state action.[72] Without any animus-free justification for walling off LGB Coloradans from the regular political process, the Court struck down Colorado's amendment for want of any rationale that could satisfy even the most minimal test of validity under the Equal Protection Clause of the Fourteenth Amendment.[73]

Beth Robinson, Susan Murray, and Mary Bunauto hoped for the victory in Vermont's courts that narrowly evaded Evan Wolfson a few years before in Hawaii. In December 1999, only three years after Congress enacted the Defense of Marriage Act in response to the Hawaii litigation, the Vermont Supreme Court prepared to rule on same-sex couples' freedom to marry, which the court recognized implicated "deeply-felt religious, moral, and political beliefs."[73]

The constitutional question in *Baker v. State* was whether the state of Vermont could deny same-sex couples the rights, benefits and responsibilities provided to married heterosexual couples under the Vermont State Constitution. The outcome rested on the Vermont justices' interpretation of the state constitution's Common Benefits Clause, which dated back to the state's 1777 constitution. It read:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; and not for the particular emolument or

> advantage of any single man, family or set of men, who are a part only of that community; and that the community hath an indubitable, unalienable and indefeasible right, to reform, alter or abolish government, in such manner as shall be, by that community, judged most conducive to the public weal.[74]

Vermont's Common Benefits Clause was not the earliest Revolutionary era constitutional provision of its kind. In fact, Vermont's benefits language was taken verbatim from Pennsylvania's 1776 constitution. Pennsylvania's clause, however, did not survive beyond 1790 when a new constitution was adopted. In contrast, other states' immediate post-colonial constitutions imbued similar equality-based verbiage like Pennsylvania and Vermont that did survive subsequent constitutional revisions. Massachusetts' 1780 constitution, for example, contained equality-themed language, which in notable contrast to Vermont was not cabined in terms of "benefits." It read:

> All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.[75]

The Vermont Supreme Court's justices were poised to make history in the advancement of sexual minority rights. But if they were to extend marital rights to same-sex couples, they would do so through a constitutional analysis that was an extension of 18th Century, revolutionary era American political thought— a philosophy that was deeply hued by the virtues of property ownership. The Vermont justices explicitly recognized this in *Baker*:

> The historical origins of the Vermont Constitution thus reveal that the framers, although enlightened for their day, were not principally concerned with civil rights for African–Americans and other minorities, but with equal access to public benefits and protections for the community as a whole. The concept of equality at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferments and advantages.[76]

Vermont's forefathers embraced a vision of equality radically different than contemporary America. Indeed, unlike the principles of socio-political equality that undergirds

modern American political thought in wake of the Fourteenth Amendment and the Civil Rights Movement, Vermont's constitutional drafters embraced a paradigm of equality in property.

Vermont's justices decided to hand down an opinion in *Baker* with a strong originalist flavor. The Vermont Supreme Court, purportedly hamstrung to adhere to Eighteenth Century thought, would not make the historic decision that the freedom to marry proponents wanted. The Vermont Supreme Court unanimously held there was a constitutional infirmity in denying same-sex couples marital rights, but split on the remedy. The majority opinion held, "We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the State could do so through a marriage license is obvious. But it is not required to do so . . ."[77] Far from definitively resolving the issue, the court gave what Beth Robinson would describe as "neither an outright loss nor a win."[78]

Precedential factors may account for the Vermont Supreme Court's Solomonic exercise. *Baker* was the first court decision to recognize same-sex relationships with finality. Thus, the Vermont Supreme Court treaded new ground for the entire nation with thin legal precedent concerning same-sex couples' rights. However, *Baker* was not the first time the Vermont Supreme Court was a trailblazer in family law rights for same-sex couples. Vermont was the first state in the nation to recognize second-parent adoption for same-sex couples in the 1993 case *In re* Adoption of B.L.V.B. & E.L.V.B. The Court never ruled on the constitutionality of the state's anti-sodomy law, which was repealed in 1977. Furthermore, *Bowers* remained good law. Even though *Bowers* was not a formal roadblock for full marriage recognition under the state constitution, it could not have been helpful. *Baker* does illustrate the "very caution of the judicial

process"[79] that leads judges to favor incrementalism, consistent with the precedent hypothesis' expectations.

In June 2003, the United States Supreme Court removed whatever obstacle *Bowers* presented to courts considering same-sex marriage litigation. In *Lawrence v. Texas*, the Court struck down anti-sodomy laws as violative of the Fourteenth Amendment's Due Process Clause, overturning *Bowers*. The Court found no rational basis to support animus-motivated sodomy prohibitions. Writing for the Court, Justice Kennedy concluded, "The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[80]

Remarkably, Justice Antonin Scalia, drew the relationship between the majority's decision and future litigation challenging same-sex marriage bans:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution?"[81]

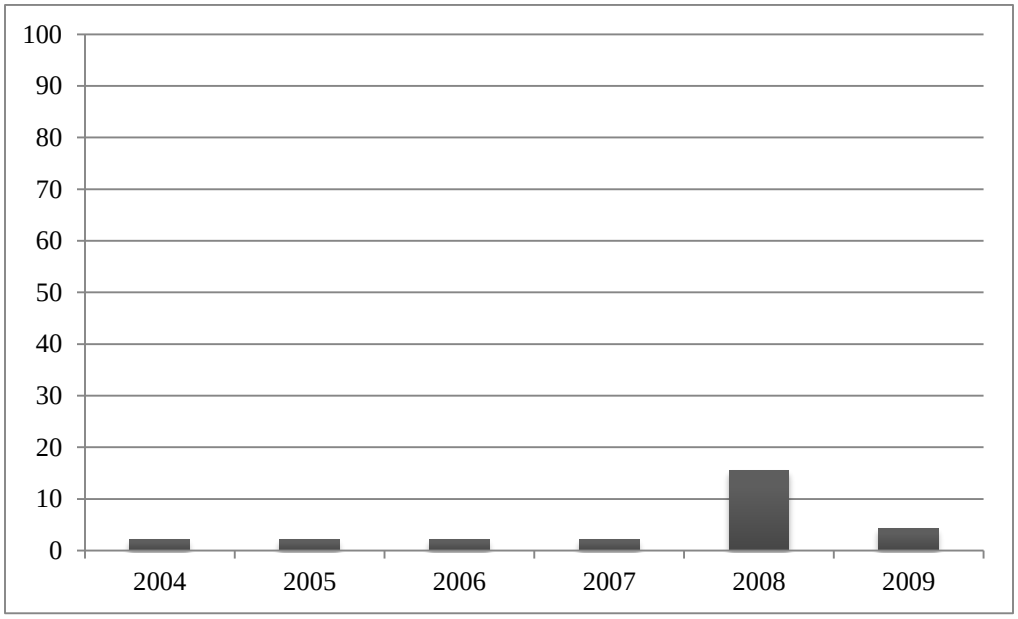
A few short months after *Lawrence*, the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Health* became the first court in the United States to rule that right to marry— or not to marry— must apply equally to same-sex couples as it does heterosexual couples under the Massachusetts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

> The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may

> not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.[82]

Unlike the *Baker* decision where the Vermont Supreme Court was called to apply a constitutional provision emphasizing a property-based vision of equality, the Massachusetts Constitution embraced a broader vision of equality aimed at undermining class-based discrimination— much like the federal Constitution's 14th Amendment guarantees *and* the type of constitutional guarantees that overwhelmingly motivated and undergirded same-sex marriage advocates' thinking in the legislative process. Though the origin of the language is traceable to the original 1780 Constitution, the equality provision of the Massachusetts Constitution was amended in 1976 to more fully mirror modern concepts of equality like that embodied in the Fourteenth Amendment's Equal Protection Clause.

Figure 3: Percentage of Americans Living in Judicially Mandated Same-Sex Marriage Recognition States



New York's struggle over same-sex marriages took an abrupt turn on February 24, 2004 when New Paltz, New York's mayor, Jason West, married 25 same-sex couples. Two days later, New York Attorney General Eliot Spitzer issued an "informal opinion" stating same-sex couples

should not have marriage licenses issued to them because the New York State Legislature did not intend for the Domestic Relations Law to cover same-sex couples. That series of events prompted a series of lawsuits challenging the constitutionality of New York's statute under the New York State Constitution at a time that few Americans lived in same-sex marriage states, as illustrated in Figure 3. In 2006, the New York Court of Appeals, the state's court of last resort, settled the dispute in *Hernandez v. Robles*. The Court ruled that limiting marriage rights to heterosexual couples did not violate the New York State Constitution's Equal Protection provision. The Court's majority concluded it was a decision left for Legislature:

> The dissenters assert confidently that "future generations" will agree with their view of this case. We do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives. We therefore express our hope that the participants in the controversy over same-sex marriage will address their arguments to the Legislature; that the Legislature will listen and decide as wisely as it can; and that those unhappy with the result—as many undoubtedly will be—will respect it as people in a democratic state should respect choices democratically made.[83]

In 2004, just prior to when the Massachusetts Supreme Judicial Court's ruling legalizing same-sex marriage took effect, Washington attorneys filed suit seeking a similar decision from the Washington Supreme Court. In 2006, the Washington Supreme Court rejected the plaintiffs' claim. The State Supreme Court, while noting same-sex marriage was a "subject of intense debate throughout the nation" and that "times are changing" with regard to public perspective on same-sex marriage, sexual orientation was not a suspect classification and "a person has a [no] fundamental right to a same-sex marriage."[84]

Like New York and Washington, Maryland's journey to the freedom to marry began with judicial defeat. In September 2007, the Maryland Court of Appeals ruled that because sexual orientation discrimination did not constitute a suspect class and because the denial of marriage

rights to same-sex couples did not implicate a fundamental right, the State of Maryland met its low burden under rational basis to limit marriage to heterosexual couples.[85]

In 2005, same-sex couples achieved a short-lived victory in federal court. In response to a constitutional amendment to the Nebraska Constitution banning same-sex marriage, advocates for equal marriage rights initiated a lawsuit claiming the law violated the Equal Protection Clause of the Fourteenth Amendment. Taking an incremental approach, the plaintiffs in *Citizens for Equal Protection, Inc. v. Bruning* did not challenge the validity of Nebraska's statutory definition of marriage, which limited licenses to opposite-sex couples. The legal theory devised by the plaintiffs centered on the political process and *Romer v. Evans*, asserting that the constitutional amendment imposed a targeted burden on same-sex couples advocating for same-sex marriage over that did not exist for other marriage policy advocates. The trial court ruled against the state, striking the constitutional amendment, but left the statutory marriage ban in place. The Court of Appeals for the Eighth Circuit subsequently reversed that ruling in 2006. The circuit precedent, though not a bar for district court judges sympathetic to arguments assailing the constitutionality of marriage exclusion laws head-on, was a handicap.

The next appellate court ruling on marriage was in 2012 by the United States Court of Appeals for the Ninth Circuit in *Perry v. Brown*.[86] The *Perry* litigation grew out of a well-funded organization named the American Foundation for Equal Rights that was created to support a federal court challenge Proposition 8.[87] That group, lead by Chad Griffin, secured high profile attorneys David Boies and Ted Olson to take up the federal case. In 2010, District Court for the Northern District of California considered a challenge to California's Proposition 8, an initiative and referendum proposal that successfully banned same-sex marriage in the state constitution and overturned a 2008 ruling by the California Supreme Court extending marriage

rights to same-sex couples on state constitutional grounds. Federal District Court Judge Vaughn Walker ruled that Proposition 8 violated same-sex couples' fundamental right to marry and contravened the equal protection guarantees of the Fourteenth Amendment.[88]

Governor Arnold Schwarzenegger and Attorney General Jerry Brown declined to appeal the ruling. The main interest group that worked to ratify Proposition 8 stood in the state's place on appeal. The Ninth Circuit issued a much narrower ruling that California's Proposition 8 could not take away, by popular referendum, a right already enjoyed by a minority group. In sidestepping the lower court's sweeping opinion, the appellate panel advanced a more gradual theory to seal the advent of same-sex marriage in California—the country's most populous state—but narrow its precedential impact to discourage Supreme Court review.[89]

Indeed, the State of California and the original plaintiffs vigorously opposed a cert grant to review the Ninth Circuit. In opposing the petition for certiorari, the City of San Francisco highlighted the need for additional litigation to shift through the "significant constitutional questions" implicated by same-sex marriage laws to "percolate[ ] in the courts such that the 'perspective of time' helps to shed more light on the weighty issues they present."[90] The City of San Francisco stressed in its brief in opposition to certiorari that the Supreme Court should not choke off debate seeing how "this case raises issues that are currently the subject of intense legislative and popular debate."[91] These positions reflect a gradualist approach to reform litigation.

The Supreme Court nevertheless granted certiorari in *Perry v. Hollingsworth* and managed to preserve a victory for LGB advocates without reaching the case's merits. The Court ruled that the pro-Proposition 8 citizen groups lacked standing to appeal the trial court decision. In doing so, the Supreme Court set aside the 2012 appellate ruling and left the original trial court

decision in place. California began to issue same-sex marriage licenses in June 2013. The precedent hypothesis predicts incremental decision-making of this kind because it brought the nation's most populous state into the equal marriage fold without immediately ending all state marriage laws excluding same-sex couples.

The same day *Perry* was decided, the Court ruled in a related marriage case, *Windsor v. United States*. In *Windsor*, the Supreme Court stuck down the Defense of Marriage Act, which was enacted by Congress to hedge against the potential effects of a judicial mandate requiring Hawaii to issue marriage licenses to same-sex couples in 1996. DOMA amended the federal Dictionary Act to define "marriage" and "spouse" to exclude same-sex couples in over 1,000 statutes and regulations. When it was enacted, DOMA had no real practical effect. No jurisdictions recognized same-sex marriage in 1996. Once Massachusetts issued same-sex marriage licenses in 2004, DOMA barred lawfully married same-sex couples from a wide array of federal benefits with respect to Social Security, housing, taxation, copyright, and veterans' affairs.

The Court in *Windsor* held that DOMA violated the equal protection guarantees incorporated in the Fifth Amendment. Writing for the majority, Justice Anthony Kennedy held upon "careful consideration" that DOMA had the purpose and effect of imposing inequality on married same-sex couples, rendering DOMA constitutionally deficient. Despite some commentators' predictions that the Court might opt for a pure federalism rationale or avoid the merits on standing, Justice Kennedy couched *Windsor*'s holding in a hybrid of substantive due process, equal protection, and federalism. The hybrid opinion did not cleanly articulate what level of scrutiny the Court applied.

Under the traditional formulation of substantive due process doctrine—fundamental rights and liberties—those that are deeply rooted in national history, tradition and conscience of the American people, the doctrine demand strict scrutiny. For other substantive due process guarantees that are not fundamental rights, courts apply the highly deferential rational basis review. The *Windsor* majority suggested the scrutiny applied was more exacting than traditional rational basis— and, indeed, courts, most notably the 9th Circuit in *SmithKline Beecham v. Abbott Labs*, interpreted *Windsor* as requiring heightened judicial scrutiny for sexual orientation discrimination claims. Justice Kennedy's failure to cleanly spell out the rationale underpinning the Court's opinion— particularly how same-sex marriage fits in with American history and tradition— opened the majority up to significant rebuke from 3 of the 4 dissenting justices in *Windsor* because the majority opinion suggested heightened scrutiny but did little more than flirt with the idea that the marriage recognition sought by DOMA's challengers was a fundamental right. In his dissenting opinion Justice Scalia wrote:

> The majority never utters the dread words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements [tying the Fifth Amendment and individual dignity] mean. *Yet the opinion does not argue that same-sex marriage is "deeply rooted in this Nation's history and tradition*," a claim that would of course be quite absurd.[92]

Writing for himself and joined in part by Justice Clarence Thomas, Justice Alito said that same-sex marriage was "not a difficult question of constitutional law." Justice Alito, like Justice Scalia, argued that same-sex marriage falls outside the boundaries of what constitutes a fundamental right. At the heart of Justice Alito's argument is that fundamental rights should be constructed at a granular-level:

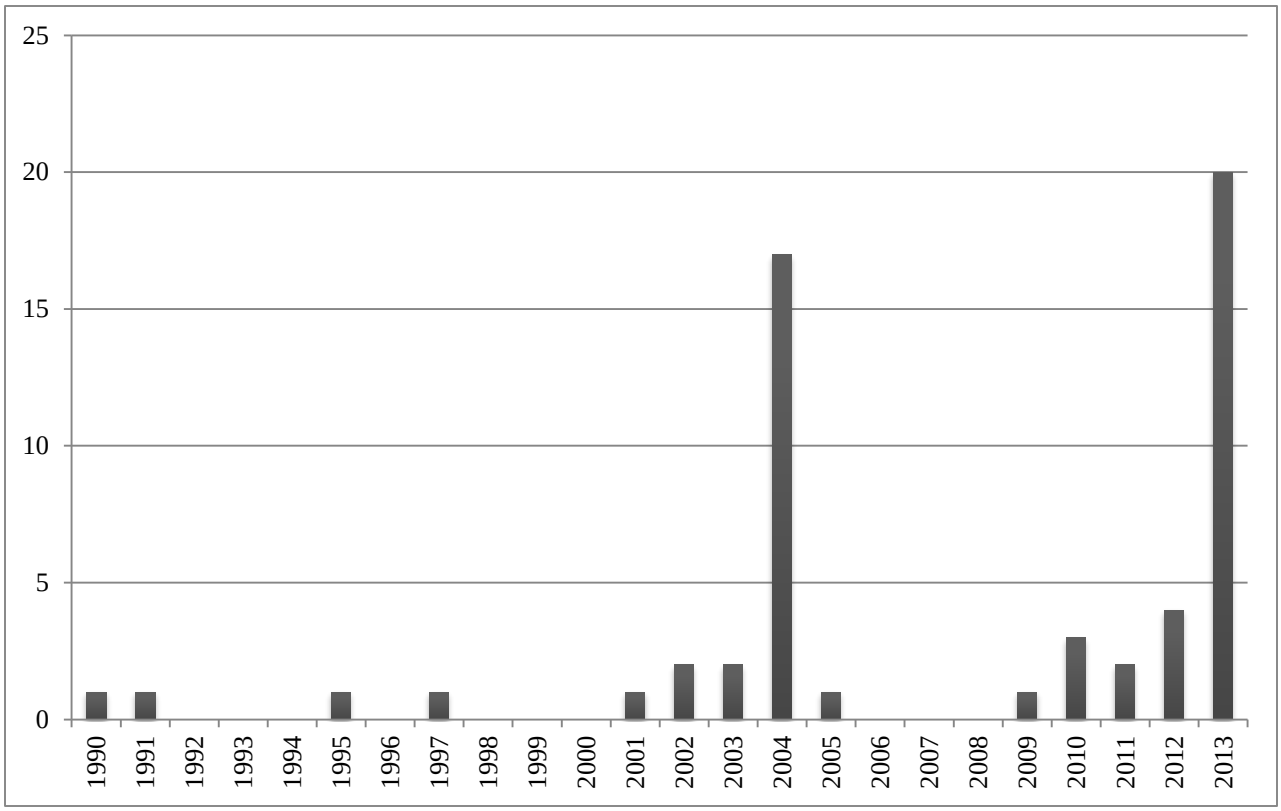
> It is beyond dispute that *the right to same-sex marriage* is not deeply rooted in this Nation's history and tradition. In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. Nor is the right to same-sex

> marriage deeply rooted in the traditions of other nations. No country allowed same-sex couples to marry until the Netherlands did so in 2000.[93]

This is not the first time that same-sex marriage litigation has been so narrowly assessed by judges. Cases in courts of last resort in the District of Columbia, Maryland, New Jersey, New York, and Washington all rejected claims that same-sex couples suing for marriage licenses were deprived of a fundamental right. In essence, these courts, like the *Windsor* dissenters, saw same-sex couples' right to marry claims as seeking to create a new fundamental right— *a right to same-sex marriage*. If the dissenters' interpretation of the *Windsor* majority is correct, then *Windsor* should be read as standing for the proposition that same-sex couples' freedom to marry should be concerned about the reasons advanced by the state to block the benefits conferred by marriage given the institution of marriage's purpose meaning irrespective of who is asking for the recognition. Importantly, for courts that were to examine claims after the decision, the *Windsor* majority rejected the rationale unpinning the decisions in New York, Washington, and Maryland.

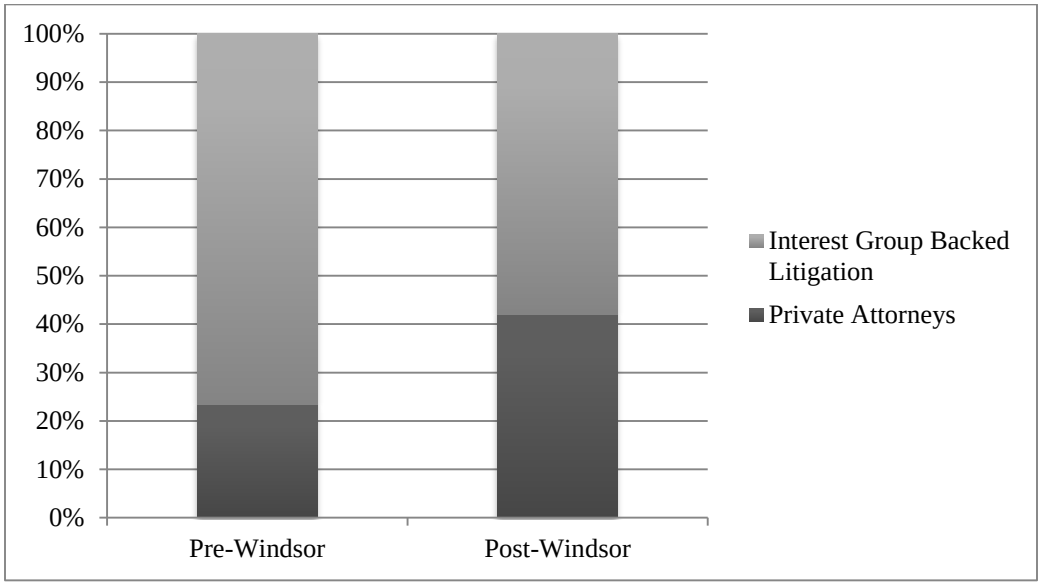
The Court's ruling in *Windsor* was a watershed moment. Despite the muddled rationale advanced by the majority to strike down the federal ban on same-sex marriage recognition, the decision's emphasis on the dignity of same-sex couples and role of children in marital homes headed by same-sex couples, signaled that the Court was poised to fully recognize and protect the rights of same-sex couples' families. If the precedent theory is right, *Windsor* should induce more lawsuits challenging discriminatory marriage laws and elicit strong responses in courts to more aggressively rule in favor of same-sex couples.

Figure 4: Newly Filed Same-Sex Marriage Litigation in State and Federal Court 2000-2014



Given the Supreme Court's implicit rejection of the reasoning relied upon by state courts rejecting same-sex marriage claims and the Court's emphasis on married same-sex couples' dignity to strike down the Defense of Marriage Act, it is not surprising a flood of new litigation cropped up in *Windsor*'s wake. In the last six months of 2013, 21 new state and federal court filings were initiated and another 28 were filed in 2014, all of which squarely attacked the constitutionality of banning same-sex marriage (Figure 4). By year's end, two state courts of last resort struck down state marriage laws excluding same-sex couples.

Figure 5: Same-Sex Marriage Litigation Support Structures 1990-2015



An interesting trend emerged after *Windsor*. As depicted in Figure 5, legal interest groups supported most of the litigation prior to June 2013. Private attorneys backed four of the 17 lawsuits filed before Windsor challenging same-sex marriage bans. Legal interest groups shouldered more lawsuits post-*Windsor* than they did during the entire 23-year span between the start of litigation in Hawaii and when *Windsor* was decided. However, private attorneys' share of the lawsuits was greater. After June 2013, private attorneys filed 24 lawsuits while 33 lawsuits were headed by litigation-oriented organizations. These numbers underscore the importance of support structures for sustaining the same-sex marriage litigation campaign in the long-term.

After the U.S. Supreme Court ruled in *Windsor*, married same-sex couples could avail themselves of federal benefits. Civil unions, like New Jersey offered to same-sex couples, were not recognized for federal purposes. Taking advantage of these new facts, litigants in New Jersey challenged state law for not complying with *Lewis v. Harris*, which required the state treat same-sex couples "equally" to opposite-sex couples.

In *Garden State Equality v. Dow*, a state trial court ruled that New Jersey's civil union law no longer comported with the New Jersey State Constitution's equal protection guarantees because the state's civil union law deprived committed same-sex couples the same benefits and privileges afforded to married same-sex couples by the federal government. New Jersey's governor, Christopher Christie, applied for a stay of the lower court's ruling to the New Jersey Supreme Court and was denied. With the New Jersey Supreme Court signaling a no win scenario for the Christie Administration, the trial court decision was not appealed and same-sex couples began obtaining marriage licenses in October 2013. In New Jersey, the *Windsor* decision had direct and immediate consequences

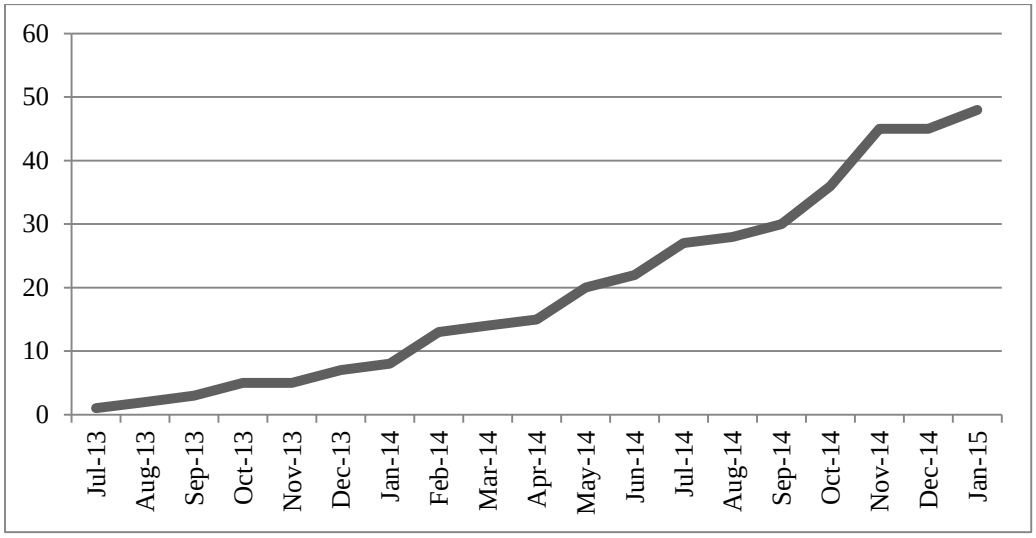
In New Mexico, the State Supreme Court struck down the state's marriage law on state constitutional grounds. Writing for a unanimous court, Justice Edward Chavez noted New Mexico ran afoul of state constitutional guarantees by irrationally denying couples both state and federal benefits:

> Excluding same-gender couples from civil marriage prevents children of same-gender couples from enjoying the security that flows from the rights, protections, and responsibilities that accompany civil marriage. There is no substantial relationship between New Mexico's marriage laws and the purported governmental interest of responsible child rearing. There is nothing rational about a law that penalizes children by depriving them of state and federal benefits because the government disapproves of their parents' sexual orientation.[94]

The day following the New Mexico decision, Federal District Court Judge Robert Shelley struck down neighboring Utah's Amendment 3, which banned same-sex marriage in *Kitchen v. Herbert*. Shelley was the first federal judge to invalidate a state's marriage law for excluding same-sex couples post-*Windsor*. In *Kitchen*, Judge Shelley held that the plaintiffs raised a substantial question of federal law over which court had jurisdiction. Shelley ruled that Amendment 3 denied same-sex couples' fundamental right to marry under the 14th Amendment's

Due Process Clause and violated the Amendment's Equal Protection Clause because Utah's purported interests in promoting responsible procreation and child-rearing did not rationally relate to Amendment 3.

Figure 6: Total State and Federal Post-*Windsor* Rulings Invalidating Marriage Laws



The *Kitchen* decision marked the beginning of a sharp uptick in federal court rulings holding same-sex marriage bans constitutionally infirm. Following Judge Shelley, district court judges in rapid succession voided anti-gay marriage laws, with appeals made to the 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th circuits. The evidence of the rapid increase of rulings striking down marriage laws is presented in Table 2 and Figure 6. The rate of court rulings indicates that judges are responsive to their colleagues' actions and feel freer to rule for social reform litigation when acting in concert with other judges. After Judge Shelby struck down Utah's constitutional amendment banning equal marriage federal judges felt little need to exercise restraint and ruled against marriage bans with regularity, as the precedent hypothesis expects.

Table 1: Equal Marriage Developments July 2013-May 2015

State	Ruling Date	Effective Date	Process	Case Name
New Jersey	27-Sep-13	21-Oct-13	State court decision	Garden State Equality v. Dow
Hawaii	13-Nov-13	2-Dec-13	State statute	-
New Mexico	19-Dec-13	19-Dec-13	State court decision	Griego v. Oliver
Oregon	19-May-14	19-May-14	Federal court decision	Geiger v. Kitzhaber
Pennsylvania	20-May-14	20-May-14	Federal court decision	Whitewood v. Wolf
Illinois	20-Nov-13	1-Jun-14	State statute	-
Indiana	4-Sep-14	6-Oct-14	Federal court decision	Baskin v. Bogan
Oklahoma	18-Jul-14	6-Oct-14	Federal court decision	Bishop v. Oklahoma
Utah	20-Dec-13	6-Oct-14	Federal court decision	Kitchen v. Herbert
Virginia	28-Jul-14	6-Oct-14	Federal court decision	Bostic v. Rainey
Wisconsin	4-Sep-14	6-Oct-14	Federal court decision	Wolf v. Walker
Colorado	9-Jul-14	7-Oct-14	State court decision	Brinkman v. Long
Colorado	23-Jul-14	7-Oct-14	Federal court decision	Burns v. Hickenlooper
Nevada	7-Oct-14	9-Oct-14	Federal court decision	Sevcik v. Sandoval
West Virginia	9-Oct-14	9-Oct-14	Suspended enforcement	-
North Carolina	10-Oct-14	10-Oct-14	Federal court decision	UCC v. Cooper
Idaho	7-Oct-14	15-Oct-14	Federal court decision	Latta v. Otter
Alaska	12-Oct-14	17-Oct-14	Federal court decision	Hamby v. Parnell
Arizona	17-Oct-14	17-Oct-14	Federal court decision	Majors v. Horne
Wyoming	17-Oct-14	21-Oct-14	Federal court decision	Guzzo v. Mead
Montana	19-Nov-14	19-Nov-14	Federal court decision	Rolando v. Fox
South Carolina	12-Nov-14	20-Nov-14	Federal court decision	Condon v. Haley
Florida	21-Aug-14	6-Jan-15	Federal court decision	Brenner v. Scott

Table 2: Federal Court Rulings Striking Down State Marriage Laws, Controlling for Circuit Precedent Post-*Windsor*

Federal District Court Decisions Upholding Same-Sex Marriage Bans Prior to Circuit Precedent	Federal District Court Decisions Voiding Same-Sex Marriage Bans Prior to Circuit Precedent
Louisiana, Puerto Rico	Arkansas, Alabama, Florida, Idaho, Indiana, Kentucky, Louisiana, Michigan, Missouri, Nebraska, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota Tennessee, Texas, Utah, Wisconsin.

As shown in Table 1, the federal courts were not unanimous in striking down state laws marriage laws after June 2013. In all the post-*Windsor* litigation, only three courts ruled in favor of laws excluding same-sex couples from marriage. Prior to *Windsor* federal courts in Hawaii and Nevada upheld laws restricting marriage to opposite-sex couples in 2012. In August 2014, Tennessee Circuit Court Judge Russell Simmons Jr. refused in *Borman v. Pyles-Borman* to grant a divorce to a same-sex couple lawfully married in Iowa. In turning the couple away, Judge Simmons upheld the state's same-sex marriage ban against a constitutional attack. Simmons was the first judge to uphold a state marriage law, breaking a near 14-month winning streak for same-sex marriage proponents. A two federal district courts joined Judge Simmons, upholding laws in Louisiana and Puerto Rico.

While state and federal trial courts continued to proceed with pending litigation, federal appellate courts started to weigh in, as well. In June 2014, the Court of Appeals for the Tenth

Circuit affirmed lower court rulings finding for same-sex couples in Utah and Oklahoma. The Fourth Circuit soon followed in July 2014, ruling against the Commonwealth of Virginia's exclusion of same-sex couples from marriage. On September 4, 2014, the Seventh Circuit ruled against Indiana and Wisconsin with remarkable speed— a mere nine days after oral arguments. Together, the five losing states petitioned to the United States Supreme Court for certiorari.

On October 6, 2014, the United States Supreme Court denied the five petitions for certiorari, leaving in place each appellate ruling. With those rulings now final, circuit precedent foreclosed any plausible defense of marriage laws in Colorado, North Carolina, South Carolina, West Virginia, and Wyoming. Over night, the Supreme Court increased the number of same-sex marriage jurisdictions from 20 to 31. The following day, the Court of Appeals for the Ninth Circuit reversed a pre-*Windsor* decision upholding Nevada's anti-marriage equality law and affirmed a ruling to strike down Idaho's marriage amendment. With this circuit precedent, 5 additional states were placed into the same-sex marriage column, totaling 36 jurisdictions. The short period after *Windsor*, courts in addition to a number of legislatures brought near national uniformity to the patchwork of laws that existed prior to June 2013. Table 2 records these developments.

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

consolidated Sixth Circuit cases turned on the court's determination that the Supreme Court's 1971 summary dismissal of *Baker v. Nelson* for want of a federal question remained good law.

Judge Martha Daughtrey authored a pointed dissent repudiating the majority's call for judicial restraint:

> . . . as it turns out, legalization of same-sex marriage in the "nineteen states and the District of Columbia" mentioned by the majority was not uniformly the result of popular vote or legislative enactment. Nine states now permit same-sex marriage because of *judicial* decisions . . . In addition, another 16 states have been or soon will be added to the list, by virtue of the Supreme Court's denial of *certiorari* [in federal appellate decisions overturning same-sex marriage bans]. Moreover, the 35 states that are now positioned to recognize same-sex marriage are comparable to the 34 states that permitted interracial marriage when the Supreme Court decided *Loving*. If the majority in this case is waiting for a tipping point, it seems to have arrived.[95]

With the Sixth Circuit creating a circuit split, the Supreme Court would have to take the case or reverse the opinion summarily. The Court granted the petitions for certiorari from the losing couples in January 2015 and designated James Obergefell as the lead petitioner. The appeal, now named *Obergefell v. Hodges*, was placed on the calendar for oral arguments in April 2015. On June 26, 2015, the Court ruled 5-4 that the fundamental right to marry extended to same-sex couples. Justice Anthony Kennedy authored the majority opinion. The opinion, fashioned without overly relying on complicated legalese (perhaps to distill it for easy public consumption) was a glowing ode to the institution of marriage and a validation of the same-sex couples seeking marriage rights. The opinion concluded:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."[96]

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

> Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions.[97]

Conclusion

The earliest same-sex marriage litigation failed to advance much, if any, measurable progress for same-sex couples or the movement for LGB rights more broadly. As a basic matter, the litigation failed to achieve a victory in each case. Even still, the litigation did not prompt any legislative movement to afford same-sex couples any relationship recognition— marriage or otherwise. States during the decade began to harden laws to ensure domestic relations law excluded same-sex couples. Maryland, Virginia, Florida, California, and Wyoming became the first states to expressly prohibit same-sex marriage between 1973 and 1977.

The 1970s era litigation failed because it emerged from nothing and then asked too much of judges. There was no sustained attempt to build favorable precedent safeguarding the most

basic legal rights of LGB persons before jumping to relationship recognition, nor was there any robust organizational prop up a protracted litigation campaign. This evidence is consistent with the Constrained Court and the hypotheses concerning the value of precedent and the necessity of support-structures.

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

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

Under the Constrained Court's precedent limitation, courts should more eagerly side with social reform plaintiffs as other rulings backing that outcome accumulate. The evidence is consistent with that expectation. The effectiveness of the signal *Windsor* sent to judges and lawyers to lay the groundwork to reign in discriminating marriage law states is evidenced by the sharp uptick in litigation filed in *Windsor*'s aftermath. Not only did the number of new filings

rise, but also private attorneys accounted for nearly double the proportion of those filing litigation post-*Windsor* than before June 2013. The increased share of litigation taken up by private attorneys suggests that the Supreme Court's precedent communicated to some that a tipping point had been reached where litigation would yield substantial attorneys fees. And, indeed, attorneys' fees in excess of $13.5 million were assessed against states that defended anti-same-sex marriage laws.

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

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

state constitutions before raising federal constitutional questions— a more time consuming and pricey tactic.

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

CHAPTER 4

PUBLIC RESPONSE

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

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

If the constrained court theory is right, then there should be no substantial gains in public acceptance of same-sex marriage or same-sex relationship recognition after successful litigation campaigns. If legitimization theory is accurate, observers should see significant gains in the public's mood favoring equal relationship rights after judicial intervention. Whatever gains LGB Americans made in garnering public support after victories in the courts, however, must be

dissected. If legitimization theory holds currency, alternative explanations for the public's warming toward same-sex relationships unrelated to judicial intervention should be discarded. In addition, this chapter will assess the hypothesis that judicial rulings gave rise to rights consciousness. The rights consciousness hypothesis predicts that courts can breathe life into an issue by bringing it to the fore of the public's consciousness allowing members of the public to understand. The analysis will examine state and national level polling data as well as electoral events to evaluate the conflicting claims on the question of legitimization.

Any attempt to parse the effect of litigation or court rulings on public opinion is a task fraught with methodological challenges. First, it is difficult to isolate the effects of litigation and judicial intervention from other developments in society more broadly. Second, as Gerald Rosenberg notes, the ordering of questions in a poll can influence polling outcomes. Polls that measure public support for civil unions in addition to marriage for same-sex couples may produce results that vary from polling that questions respondents squarely on marriage recognition. A third challenge is the limited polling data recorded in the 1990s and early 2000s on same-sex relationship recognition. With respect to state-level data, not all states are equal with respect of the body of data's robustness. For example, there are virtually no data capturing Vermonters' moods prior to the decision in *Baker v. State* in 1999. Other states, like California, have more reliably consistent polling data.

This chapter will begin examining Vermonters' response to the state high court's ruling that same-sex couples were constitutionally protected. From there, the chapter will delve into state polling data, national polling data, and zero in on the reverberation of same-sex marriage in Iowa.

Vermont

The Vermont Supreme Court was the first to rule with finality that same-sex couples were entitled to the equal rights under the state constitution. The Vermont Legislature's enactment of civil unions followed. Extensive polling data was not taken measuring Vermonters' support for civil unions or marriage for LGB people, limiting our understanding of *Baker*'s reception. One poll from August 2000 registered a majority of Vermonters (54 percent) in opposition to the new civil union law. If the Constrained Court Theory is correct, there should be signs that Vermonters' views were unmoved or turned against sexual orientation civil rights protections.[98] Conversely, if legitimization theory is correct in the short-term, we should see evidence that Vermonters embraced civil unions and the decision to more fully accept same-sex couples' rights.

On the surface, the Vermont Supreme Court's decision was not received warmly in the state. Indeed, the ruling in *Baker* public was heavily criticized and fomented an already bubbling movement to upset the political establishment. As the movement percolated, black-on-white signs cropped up throughout Vermont with a demand to "Take Back Vermont."[99] The *New York Times* reported on the host of issues that stoked the fires, in addition to same-sex couples' winning relationship recognition rights:

> Stop and inquire at houses displaying the signs in this poor farming and logging region of central Vermont, and the translation becomes clear: We are furious at our legislators for passing a law this spring letting gay couples be joined in marriage like civil unions. We are mad about property tax reform, and all the permits we need to log or build on our land, and all the other laws our politicians pass against our will. We want to vote them out in November. [100]

It bears noting that though a number of issues fed into the movement, the consensus seems to follow the assessment of one Take Back Vermont supporter who told the *New York Times*, "Civil unions are like the straw that broke the camel's back."[101] The movement began as a response to

two land use regulations, which severely restricted developers' rights in the state and limited the clear-cutting of wooded areas.[102] In 1997, the movement found an additional cause in fighting a law that created a statewide funding formula for education.[103] That law, Act 60, was bitterly resisted. In response, Vermonters filed 11 lawsuits were filed, privatized a local school, and refused to send property taxes to state officials.[104] The Take Back Vermont movement was described as a "simmering complaint over many issues,"[105] that the civil unions law emboldened. However, the Movement continued to rove for new targets throughout the 2000 election campaign, as one media account reported:

> Civil unions opened the vent, but now the backlash has found other targets. "Take Back Vermont" has come to mean take it back from the state Supreme Court, which ordered equity for gay couples, and from the legislators who refused to hold a referendum; from the environmentalists, big businesses, and those 40,000 New Yorkers and Bostonians who have second homes in Vermont.[106]

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

> I think if you look at the election cycle, the two years before civil unions, the education funding bill had passed. The Republicans had been on the downward slide for quite a long time. After they passed Act 60 [concerning education funding], the Republicans came back and picked up seats. The very next election cycle after civil unions, the Republicans picked up 10 seats. There was some combination of those two issues, which helped produce a Republican majority in the legislature. There was some feeling amongst some people on a host of issues that the place was getting out of control too fast.[107]

Despite having numerous grievances, some of the most hostile opposition was reserved for the civil unions law. Many towns reported heightened tension including sprawling anti-gay graffiti. Hostility in one town grew so great that the local newspaper printed an editorial signed by 168 locals lamenting that "a climate of fear [was] being created by people whose alarmist

tactics discourage rational debate."[108] The groups called for an end to "the divisiveness, hostility and mistrust we see overtaking our towns since the passage of the civil unions law."[109] These towns were not alone. As then-Governor Howard Dean recalled, Vermont was ensnarled in "the least civil public debate in the state in over a century."[110] Vermont was a tinderbox—so much so that officials feared that violence might be imminent and took precautionary measures. Dean wore a bulletproof vest during the campaign season. The Speaker of the House had an armed state trooper standing guard behind a curtain during the civil union debate.

Dean said civil unions were one of a number of issues feeding into conservative discontents but that civil unions "galvanized the right wing. The [Take Back Vermont] movement was discombobulated until that point. [Civil unions] scared a lot of people. When some group is lower in the pecking order is all of a sudden equal, that was a really an earthquake. It was the straw that broke the camel's back, but it was the biggest straw of them all."[111] Republican Tom Little echoed a similar theme offered in Dean's assessment:

> I'd frame it this way. It was clear to me then and now that it was all about civil unions, however the folks who were exercised by that included people who found common ground over property rights issues and gun control issues. But if you looked at a Venn diagram there were also people opposed to legislation who were not part of those other circles. I think it was a distinct motivation for some people.[112]

The Take Back Vermont movement metastasized during the run-up to the 2000 elections. Take Back Vermonters successfully primaried half of the ten Republican legislators who voted in favor of civil unions, including one 30-year incumbent.[113] Republicans took control of the Vermont House of Representatives for the first time in 16 years.[114] The battle for control of the House districts, a sign of the movement's intensity, may overstate its overall potency. The Vermont GOP exhibited signs of life throughout the 1990s. Republicans controlled the Vermont Senate in 1995 and 1996 by an 18-12 margin.[115]

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

As we will see in the following chapter, the Take Back Vermont movement scarred a number of key advocates for equal marriage and resonated within Vermont political circles for some years to come. The history of events indicates their response was more visceral than sober. There is evidence that the initial reactions to *Baker* in Vermont polarized the public, but little basis to conclude there was a groundswell of backlash to the civil union law. In fact, much of anti-civil union pushback in Vermont was bootstrapped onto other festering complaints rural Vermonters held against liberals. The record offers little support for the proposition *Baker* independently spurred a widespread adverse reaction in the electorate. But, there is no proof to substantiate a claim of legitimization, either.

State-Level Polling

Next, we will turn to state-level data in jurisdictions that saw successes in their respective courts of last resort, defining success as a ruling that required the state to issue licenses to same-sex couples. These states include California, Connecticut, Iowa, and Massachusetts. Of these states, California has the most extensive survey data. At least one longstanding polling firm, Field, has measured Californians' temperature as same-sex marriage as far back as 1977 and

with regularity since the 1990s. In addition to Field, the Public Policy Institute of California has consistently polled Californians' support for equal marriage rights.

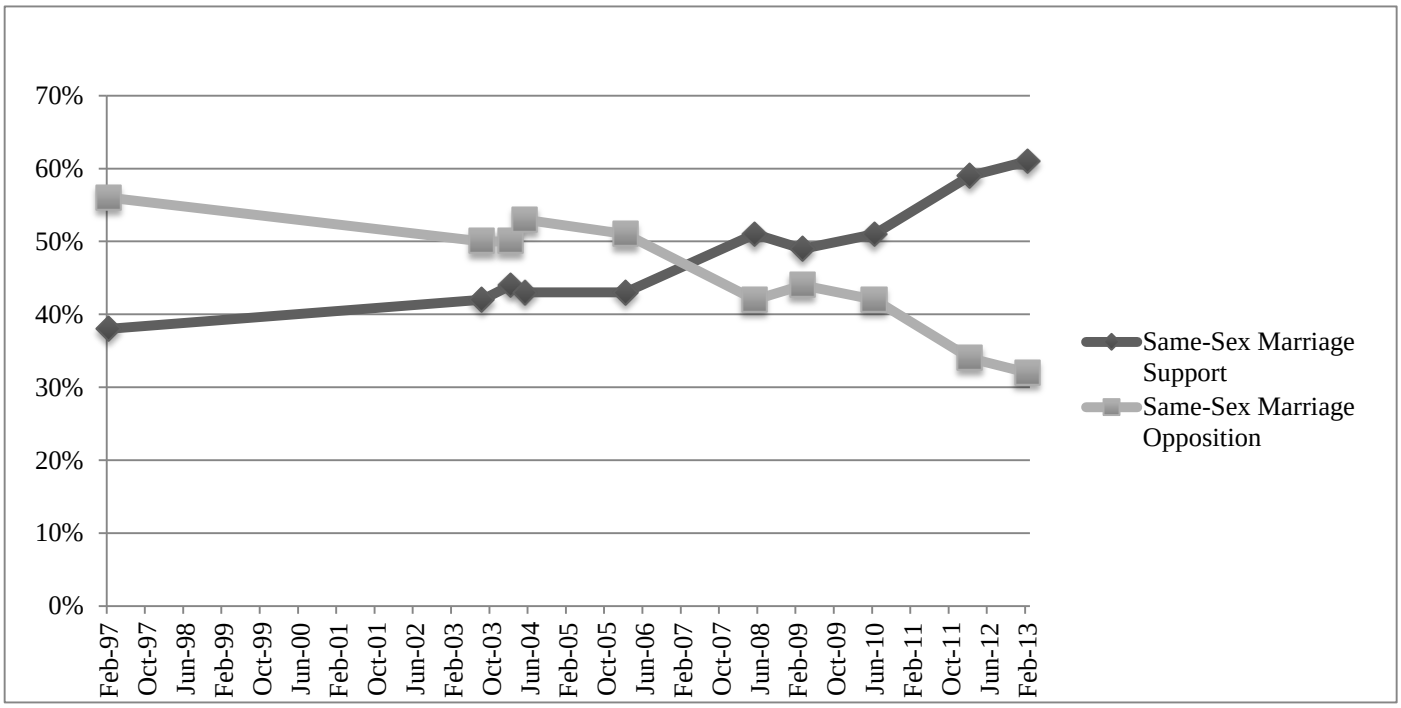


Figure 7: Same-Sex Marriage Attitudes in California (Field Poll)

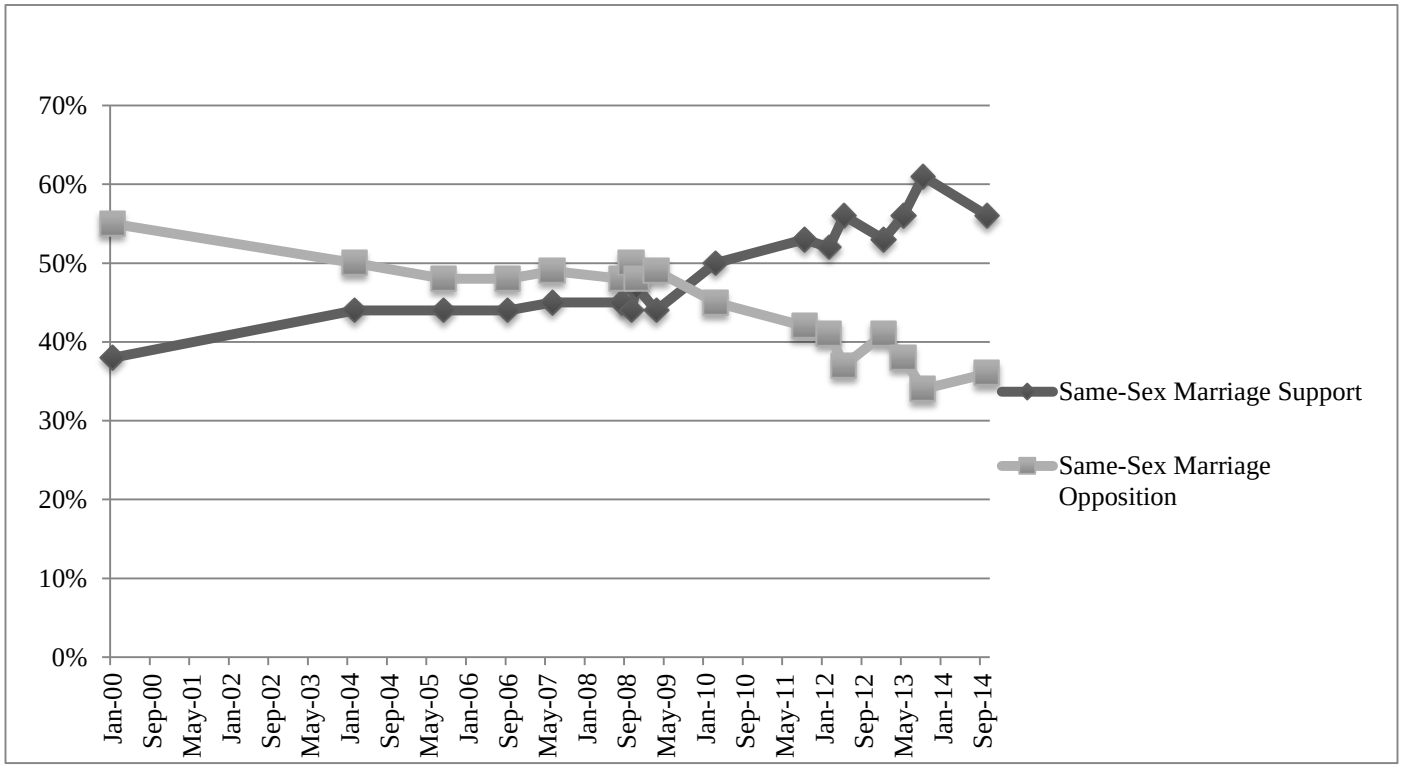


Figure 8: Same-Sex Marriage Attitudes in California (Public Policy Institute of California Poll)

Unfortunately, early polling data from Field is sporadic, but it is nevertheless worth noting (Figure 7). In 1977, a poll of Californians showed a cold reception for gay rights, only 28 percent of Californians supported extending marriage rights to same-sex couples. In the course of nearly a quarter century, the data exposes an uptick in support for equal marriage legalization, but no significant softening in opposition.

Polling data showing opposition to same-sex marriage in the high 50 to low 60 percentage range bore out in a 2000 California initiative to ban same-sex marriage (Figures 7 and 8). In 2000, California voters endorsed Proposition 22, also known as the Knight Initiative to enshrine into state family law that "only marriage between a man and a woman is valid or recognized in California." Proposition 22 won majority support in all but six of the state's 58 counties, with all six counties clustered in the San Francisco Bay Area. In all, Proposition 22 took 61 percent of the vote, with 38 of voters opposed. The defeat for equal marriage rights was resounding, but mapped onto the previous near-25 years of polling data.

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

Whatever the general public's disposition in May 2008, voters in November 2008 narrowly voted to overturn the California Supreme Court and banned same-sex marriage. The California Supreme Court was constrained by lukewarm support for same-sex marriage and the relaxed requirements for amending the California Constitution by initiative and referendum.

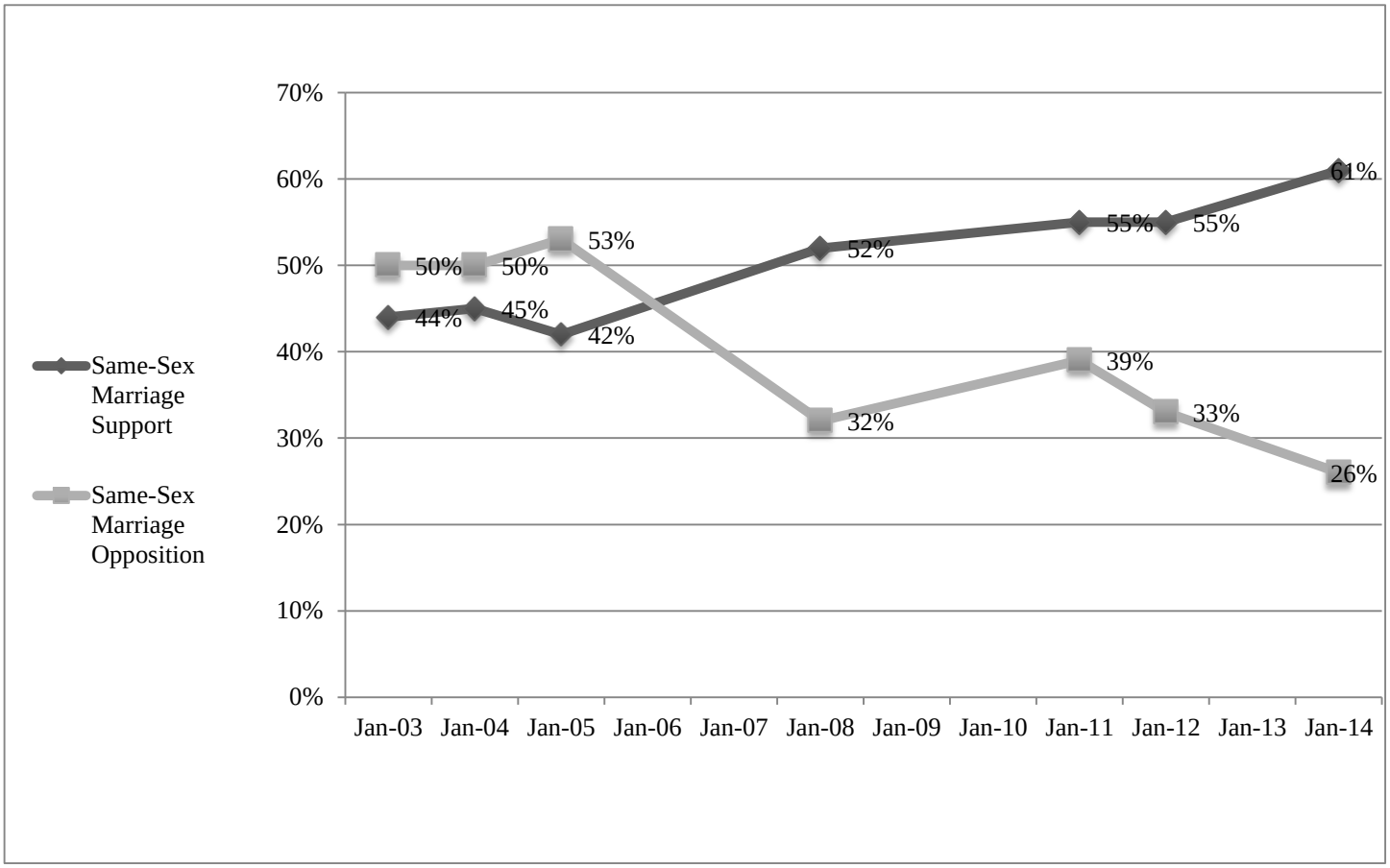
Despite that setback for equal marriage proponents, the voters' willingness to oppose gay and lesbian rights was softer in 2008 than 2000. Fifty-two percent of California voters opted to ban same-sex marriage, a near 10 percent drop from the 2000 vote. The geographic opposition to blocking marriage rights also shifted. In 2008, a total of 16 counties voted against Proposition 8. A small majority in Los Angeles County, the state's most populous county, opted to overturn the *In Re Marriage Cases* decision.

Among PPIC polls, support for same-sex marriage only cracked the 50 percent mark in March 2010 when the trial challenging Proposition 8 was underway. The polls show that public opinion stably opposed equal marriage rights for gays and lesbians and that stability showed signs of shifts somewhere between February 2006 and March 2010, during the heat of litigation. It is worth noting there does not appear to be evidence that the California Legislature's debate and subsequent passage of legislation in 2005 moved public opinion. Both polling firms' results in 2005 and the months following Governor Arnold Schwarzenegger's veto of the legislature's attempt to equalize marriage show stagnation in the public's response to the marriage question.

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

The high court may have enabled this backlash when it gave the Massachusetts General Court 180 days to enact legislation before *Goodridge* took effect.[116] The delay may have allowed for the stoking of opposition and building of tension as the dissolution of the stay drew nearer. Nearly a year after *Goodridge* took effect and same-sex couples married in the Bay State, the public warmed to the constitutionalization of same-sex marriage, with polling indicating slightly higher support for equal marriage in March 2005 than existed before the court ruled.

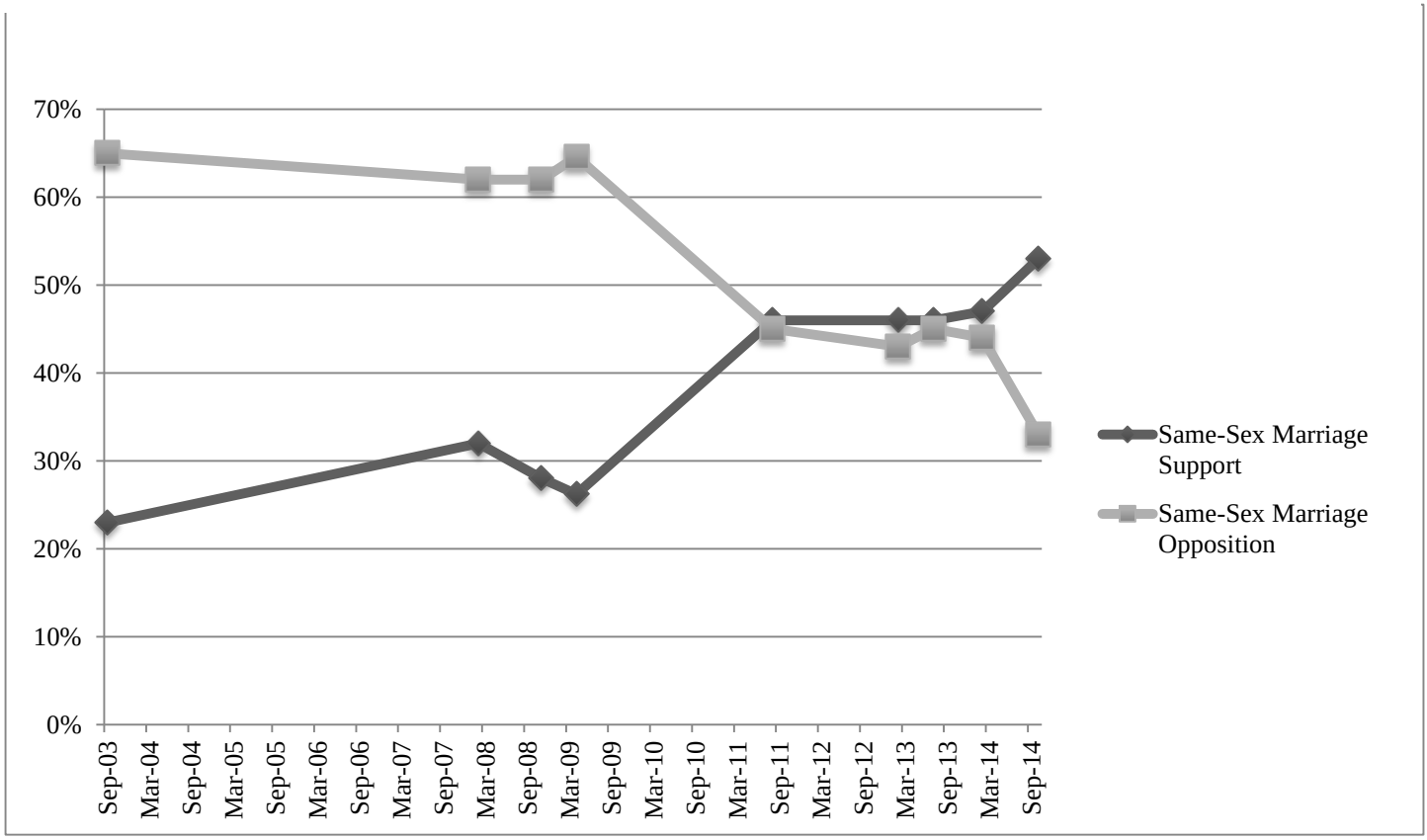
Figure 9: Same-Sex Marriage Attitudes in Connecticut



In Connecticut, three polls examined the level of support for gay marriage rights prior to the state Supreme Court ruling in *Kerrigan* in 2008 (Figure 9). Continuity was a hallmark across the polls taken in 2003, 2004, and 2005. Support for marriage lied in the low-to-mid 40s and opposition in the low 50s. The April 2005 poll showed the greatest amount of opposition and a small decline in public acceptance of same-sex marriage. Complicating analysis here, however, is the fact that no polling took place between April 2005 and December 2008. Thus, while there is a 10-point gap trending toward a pro-gay marriage position after *Kerrigan*, there is no hard

evidence to conclude the court caused it. However, it is reasonable to infer from the numbers that, at a minimum, the court's decision did not prompt a backlash.

Figure 10: Same-Sex Marriage Attitudes in Iowa



Like California, Iowa presents a more complicated landscape for analysis. As Figure 10 illustrates, three polls were taken in Iowa on same-sex marriage before *Varnum*, the first in September 2003. In the first poll in the field, respondents overwhelmingly objected to marriage for non-heterosexuals by a margin of 65 to 23. However, the next Iowa poll was not until 2008, placing that five-year span in a black box. By 2008, there was a small rise in the public's approval of same-sex marriage. That small gain of supporters was matched with a nearly equally

small sag in opposition, polling in 2008 showed 62 percent of Iowans rejected same-sex marriage.

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

Iowa Retention Elections

Majority support for same-sex marriage in Iowa came four years too late for three members of the Iowa Supreme Court who were responsible for the unanimous *Varnum* decision. In November 2010, three members of the Iowa Supreme Court, including Chief Justice Marsha Ternus, were up for retention election. If they did not earn majority approval at the ballot box, the voters would oust the justices and would be subsequently replaced by a new slate of judges selected by the governor from a list of individuals recommended by a merit commission. All three justices, Chief Justice Marsha Ternus, Justice Michael Streit, and Justice David Baker each received approximately 45 percent of the vote in favor of their continued tenure. For the first time in Iowa history, a judge failed to retain the requisite majority for retention.

The campaign to remove the three justices benefited from the convergence of a number of factors. First, in the short lag between *Varnum* and November 2010, Iowans remained cool to same-sex marriage. Second, 2010 marked the height of power for the Tea Party Movement and

conservative pushback against the Obama Administration, particularly the Affordable Care Act. That national trend notwithstanding, Iowa was unique in that conservatives' efforts to target judges in other states were unsuccessful. None of the judges targeted in Alaska, Colorado, Kansas, Illinois or Florida were unseated.

The most similar situation was in Alaska. The Alaska Supreme Court Chief Justice Dana Fabe faced opposition from religious groups because of her liberalism on social issues. The Chief's opposition was rooted in the Alaska Supreme Court's 2007 decision to overturn a parental notification abortion law. The religious opposition groups attacked her as an out-of-step liberal activist judge, pointing to her "rulings on abortion, gay marriage, benefits for same-sex partners of state workers, and prisoner rights."[117] The conservative groups failed as Fabe was retained with nearly 55 percent of voters' approval.

The misfortune that befell the Iowa Supreme Court membership did not trickle down to the trial court judge that struck the initial blow to Iowa's marriage laws. Of the 13 lower court judges in Polk County up for retention, the trial court judge that struck down the Iowa marriage ban, Judge Robert Hanson, earned the most "no" votes. Nearly 40,600 Polk County residents voted against Judge Hanson. No judge in Polk County, however, received less than 33,000 opposition votes. Ultimately, the more liberal Polk County electorate retained Hanson with 66 percent of voters favoring him on the bench.

In 2012, despite a targeted campaign Justice David Wiggins evaded the fate of his former colleagues and was retained with 54.5 percent of the vote. The other statewide judges up for retention, none of whom were involved with same-sex marriage, averaged 74.4 percent in favor of retention.

National Polling Data

In the 10-year span between March 1996 and May 2006, Gallup's polling on same-sex marriage indicated a 12-percentage point increase in support for same-sex marriage. Most of that early change occurred by February 1999 prior to *Baker*, *Lawrence*, and *Goodridge*, but after the Hawaii litigation, the Defense of Marriage Act's enactment, and *Romer v. Evans*. In March 2004, Gallup's Frank Newport observed that between 1999 and 2004 "little changed from responses to surveys."[118] In their review of same-sex marriage opinion trends, Brewer and Wilcox describe the period between 1988 and 2004 as one of "striking stability" where there was "no durable trend in public support" for same-sex marriage.[119] In 2006, Persily, Eagan, and Wallsten echoed Newport, Brewer, and Wilcox, determining that "support for the legalization of same-sex marriage has risen only slightly since 1996."[120] Rosenberg's treatment of polling data in 2008 fell in line with these earlier conclusions "public opinion data don't support the claim that litigation on behalf of same-sex marriage substantially increased support for it."[121]

Nationally, support for same-sex marriage was more muted between 2004 and 2009 than in states moving toward same-sex marriage rights, but it was not stagnant. Examining Gallup's data on the question (Table 3), opposition to same-sex marriage did not fall below 50 percent until May 2011, just weeks before New York's Governor Andrew Cuomo signed the Marriage Equality Act. Support for equal marriage failed to hit the 50 percent mark until May 2012. Increased support over the long term for same-sex marriage supports the expectations of legitimation theory. However, the lag in time between the first pro-LGB marriage rights rulings and rising levels of support makes the connection between the two slightly attenuated.

Table 1: National Attitudes on Same-Sex Marriage (Gallup)

Date	Should be valid	Should not be valid
October 1989	23	69
March 1996	27	68
February 1999	35	62
January 2000	34	62
June 2003	39	55
October 2003	35	61
December 2003	31	64
February 2004	34	62
March 2004	33	61
May 2004	39	59
July 2004	32	62
March 2005	28	68
April-May 2005	39	56
August 2005	37	59
May 2006	39	58
May 2007	46	53
May 2008	40	56
May 2009	40	57
May 2010	44	53
May 2011	53	45
December 2011	48	48
May 2012	50	48
November 2012	53	46
May 2013	53	45
July 2013	54	43
May 2014	55	42
May 2015	60	37

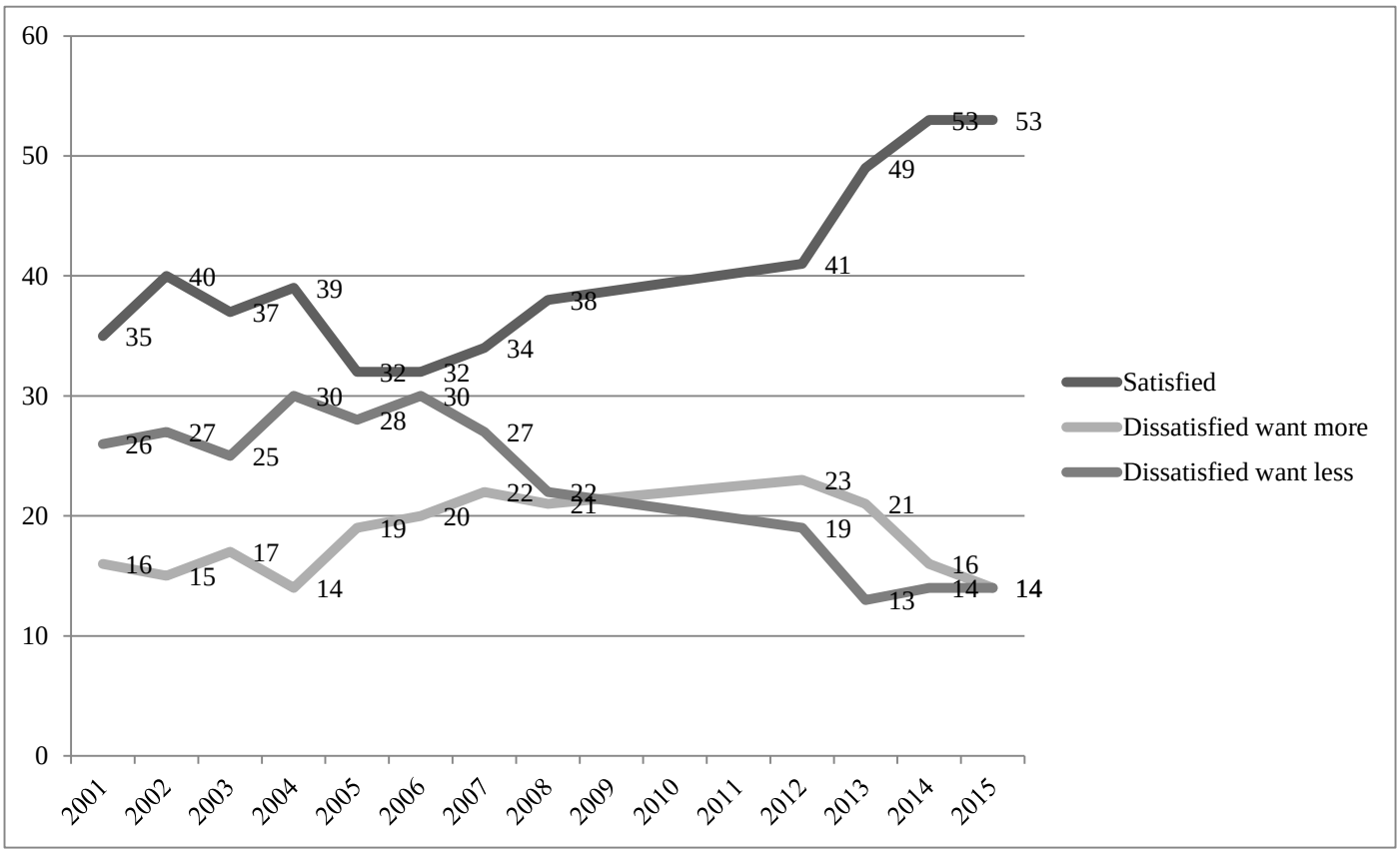
The relative stability in public opinion between the 1990s and early 2000s did not last. In the time between December 2003 after *Goodridge* was decided and May 2013 before the Supreme Court ruled in *Windsor*, public support for same-sex marriage rose from 31 percent to 53 percent. That trend— indicative of a legitimizing effect— continued after *Windsor*. In May

2015, Gallup recorded public support for same-sex marriage at 60 percent. The most significant period of change in the Gallup data was between March 2005 and May 2011. In 2005, support for same-sex marriage bottomed at 28 percent. Majority support for equal marriage was registered in the May 2011 Gallup poll. This time period was litigation intensive. Adding onto wins in Vermont and Massachusetts, LGB advocates scored victories for relationship recognition in California, Connecticut, Iowa, and New Jersey prior to any state legislatively adopted equal marriage rights for gay couples. Unsuccessful litigation concluded in the courts of last resort in Maryland, New York, Oregon, and Washington. In 2009, the first legislative enactments of equal marriage took place in Vermont and New Hampshire. Maine also passed same-sex marriage legislation that was rejected by voters prior to taking effect.

The two polls Gallup conducted with the shortest time gap between them were conducted in this period. Gallup's poll in May 2005 saw a 10-point increase in public support for recognition of same-sex marriage from March 2005. Opposition dropped 12 points in the May survey. The March poll registered the lowest amount of support for equal marriage since February 1999. In the interim that the two polls were in the field, Superior Court Judge Richard Kramer struck down California's same-sex marriage ban on March 15, 2005. None of Gallup's polls conducted in 2006 or after recorded American's support for same-sex marriage recognition below 39 percent. That single data point fails to find corroboration in polls in California (Figures 5 and 6) where there was little movement in the same time period.

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

Figure 11: Americans' Satisfaction Levels With Gay and Lesbian Social Acceptance (Gallup)



These data from Gallup recording whether Americans were satisfied or dissatisfied with the acceptance of gays and lesbians is telling (Figure 11). Prior to 2004, satisfaction levels remained fairly stable between 35 and 40 percent. Dissatisfaction with LGB acceptance began to shift in 2004. The number of Americans dissatisfied and wishing for less acceptance of sexual minorities peaked between 2004 and 2006, at the same time the largest rise in those dissatisfied and wanting more acceptance occurred. Indeed, the percentage of Americans voicing displeasure with the acceptance of gays and lesbians peaked in 2007, at 22 percent, in the midst of a

continuous decline of Americans wanting less acceptance of gays and lesbians that dwindled to 13 percent by 2016.

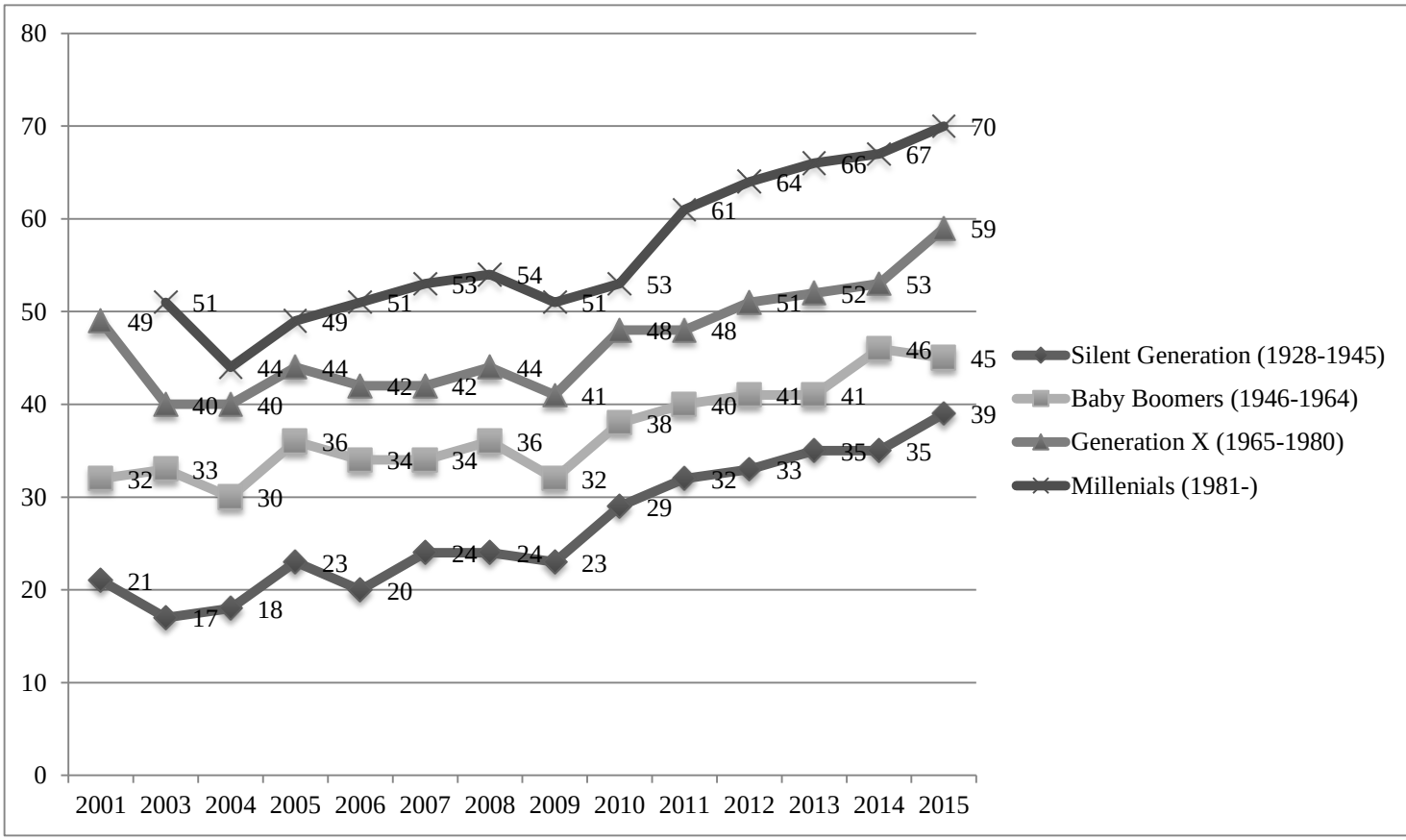
These data indicate that events between 2004 and 2008 caused disruption in Americans' mood on LGB issues. Between 2004 and 2008, no states took legislative action to advance same-sex marriage, though Connecticut (2005), New Jersey (2006), Washington (2006), and New Hampshire (2007) elected to provide civil unions or substantially similar state recognition. Statewide nondiscrimination legislation covering private entities also progressed during this time in Maine (2005), Illinois (2006), Washington (2006), Iowa (2007), and Oregon (2007).

If court rulings can arouse the passions of individuals to demand more acceptance and legal protections, then there should be a corresponding rise the number of Americans calling for greater acceptance of gays and lesbians after major judicial victories. The polling trend between 2004 and 2012 mirrors what the rights consciousness hypothesis predicts. Prior to 2004, there was little movement in the number of Americans clamoring for greater social approval of sexual minorities. Each year, the percentage of respondents in this category fell within a 3-point margin. After 2004, in the wake of *Lawrence*, *Goodridge*, and in the midst of marriage controversies in states across the nation, there is a discernable upward trend in the percentage of Americans wanting greater acceptance of gays and lesbians.

Equally interesting, this set of polling offers insight into the legitimization hypothesis' validity. If courts are legitimizing actors, then a decrease in Americans' expressing a preference for less tolerance of gays and lesbians despite a rise in legal protections for gays and lesbians, including rulings favoring same-sex marriage should be evident. If courts are incapable of moving the public in their direction as the Constrained Court Theory indicates, then little movement or a rise in the number of Americans expressing dissatisfaction with the growing

social embrace of LGB rights will be detected. Between 2003 and 2006, there is a small increase in the number of respondents expressing a preference for less social acceptance of gays and lesbians. After peaking in 2006 where it was 2 points shy of being the plurality position, the number of Americans holding a negative viewpoint of gay and lesbian tolerance dropped precipitously. By 2015, 14 percent of Americans reject the improved standing of gays and lesbians— halved from the 30 percent of Americans with that view in 2006.

Figure 12: Generational Support for Same-Sex Marriage (Pew Research)



A few demographic factors warrant exploration. First, the rise in the public's aggregate warming toward LGB rights could be due to generational replacement. Polling reveals distinct generational gaps in support for same-sex marriage (Figure 12). Younger Americans were more likely to support equal marriage. If younger Americans were more socially liberal, as their share

of the electorate rises one would expect to see the overall trend favor equal marriage rights. If favorable changes in the public's overall support for equal marriage rights are generational, claims that judicial legitimization is responsible for the shift are undermined.

Millennials born after 1981, for example, on average supported same-sex marriage double the rate of Americans born between 1928 and 1945. Baby Boomers, born between 1946 and 1964 were more supportive of same-sex marriage than the generation before, but less supportive of Americans born 1965 and later. Interestingly, however, support for same-sex couples rose among all these groups between 2001 and 2015. Support among all of these generational groups bottomed out between 2003 and 2004, but in the following years, each age group's increased level of support was steep. Support for LGB couples among the Silent Generation (persons born between 1928 and 1945) more than doubled between 2003 and 2015, while support among Millennials jumped 26 points.

Figure 13: Support for Same-Sex Marriage By Personal Knowledge of a Gay or Lesbian Person (USA Today/Gallup, May 2009)

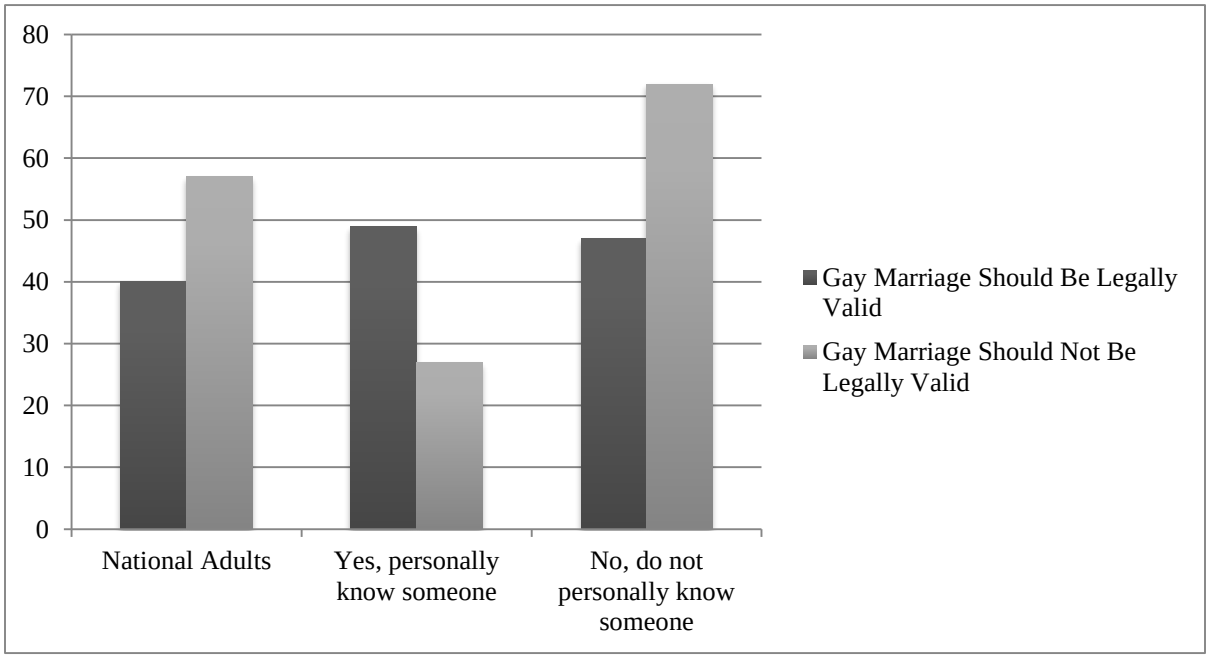


Figure 14: Number of Gay/Lesbian Acquaintances and Support for Same-Sex Marriage (Pew, May 2015)

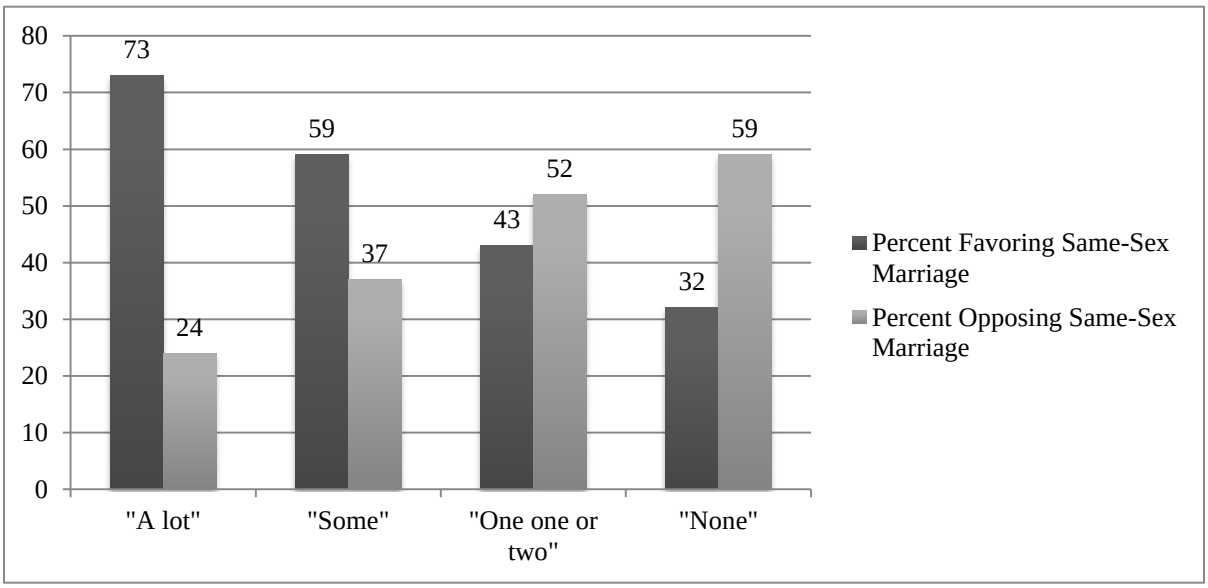
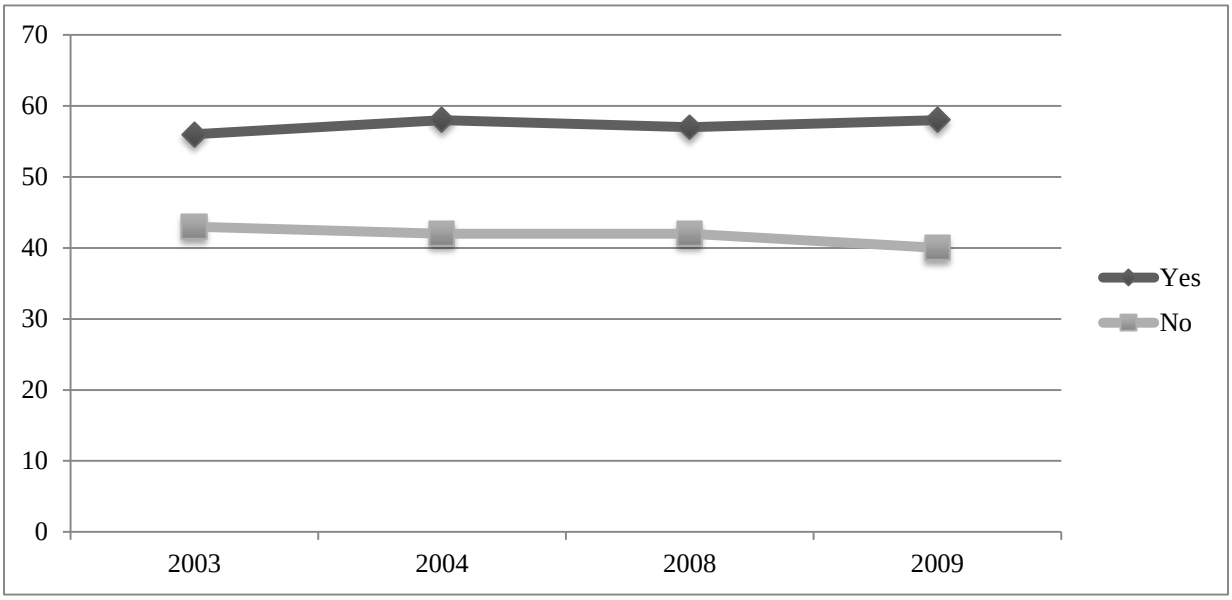


Figure 15: "Do you have any friends or relatives or coworkers who have personally told you that they are gay or lesbian? (Gallup)



Another consideration worth exploring is whether Americans were exposed to more LGB people between 2004 and 2009. One of the strongest arguments from scholars and pundits alike that judicial intervention in gay rights was unnecessary for the marriage movement's success is the number of openly LGB persons has risen over time, and the public's exposure to LGB persons softened opposition to marriage rights. As the interviews with legislators revealed, having openly friends, neighbors, and relatives seemed to be meaningful for those elected officials weighing the merits of marriage equality legislation. Polling shows that Americans who had openly LGB friends and relatives were more likely to support same-sex marriage (Figures 13, 14, and 15).

The causal link here, however, is unclear. On one hand, greater exposure to sexual minorities may well enhance the likelihood of one's support for sexual minority rights. On the other hand, it could also be true that persons with more liberal attitudes on sexuality may signal a receptiveness that induces LGB people to be open with those already socially liberal persons. One poll looking at the number of percentage of Americans who personally knew a LGB person in 2003, 2004, 2008, and 2009, did not show a significant shift in the number of Americans who had personal ties to openly LGB people.

Comparing polling data between 1992 and 2010 shows a sharp uptick in the number of Americans who knew someone gay or lesbian— 56 percent of Americans in 1992 did not know someone gay or lesbian (Table 4). By 2013, an overwhelming number of Americans personally knew a person who identified as gay or lesbian and nearly half of Americans had close family members or friends who were openly gay (Table 5).

Table 4: "Do you know someone who is gay or lesbian?" (CBS Poll)

	%Yes	%No
1992	42	56
2010	77	22

Table 5: "Do you know anyone personally who is lesbian or gay?" (Pew Poll, May 2013)

	% Yes	**% No**
Do you know anyone personally who is lesbian or gay?	87	12
Have close family members or friends who are gay or lesbian?	49	51
Know any gay or lesbians raising children?	31	61

Table 6: "What made you change your mind about same-sex marriage?" (Pew 2013)

Reasons Offered	**%**
Friends/family/acquaintances who are gay	37
Became more tolerant/older/studied more/more aware	25
World has changed/inevitable/more prevalent/doesn't hurt	18
Freedom to choose/love happiness	18
Equal rights	8
Morals/religious believes/only God can judge	5
Born that way	2
Other	6

When asked why they supported same-sex marriage rights in 2012 and 2013, polling responses suggest that personal relationships with LGB friends and family members impacted many Americans' views. In a 2013 Pew poll, 14 percent of respondents said they had once opposed equal marriage, but changed their mind. These respondents were then allowed to provide open-ended responses as to what caused them to change (Table 6). A 37 percent plurality

mentioned openly LGB friends, family members, and acquaintances as having some influence on their decision-making process. However, a significant number of the proffered factors included changing world events and an increasing awareness of same-sex marriage.

Table 7: "What are some of the reasons why you favor same-sex marriages?" (Gallup 2012)

Reason Offered	**%**
Equal rights/Everyone should have the same rights, freedoms	32
Personal choice/Love, happiness matters, not sexual orientation	32
Not my business/Not government's business to decide	14
Have friends/family who are gay/lesbian	9
Everyone is equal in God's eyes	5
Born that way	4
Medical, insurance, financial purposes	3
Need to separate church and state	2
Other	5
No opinion	5

Table 8: "If your view of marriage has changed, why?" (Gallup 2012)

Reason Offered	**%**
More accepting/tolerant now	35
More awareness/educated/Didn't understand before	18
Changed mind (nonspecific)	9
Not as big a deal now as in past	9
I'm against it/Not right	8
Believe they deserve a civil union but not marriage	5
Not my business/Respect their wishes/Don't care	5
Legal now in some places	4
Have friends/family that are gay	3
Other	3
No opinion	7

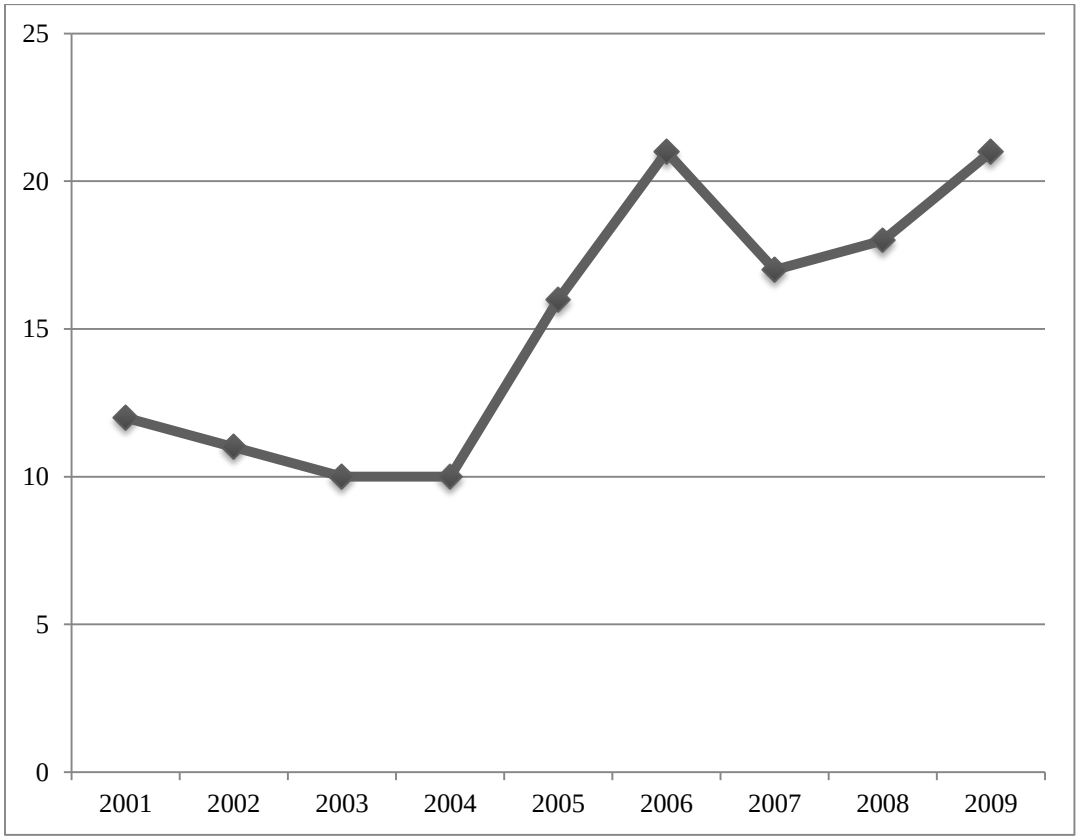
A 2012 Gallup poll also asked supporters of same-sex marriage the reason for their support (Table 7). The number of respondents that pointed to friends and family members failed to crack double digits at 9 percent. The top two justifications Gallup recorded for interviewees' same-sex marriage support referenced equal rights and personal happiness. As a follow up question, respondents who stated they changed their minds on same-sex marriage for open-ended rationales for their shift in opinion (Table 8). Mirroring the 2013 Pew results, generic responses of becoming more aware and tolerant were the top two reasons offered. Contrary to the Pew findings, only 3 percent of those polled mentioned close LBG friends, relatives, and acquaintances as impacting their change of heart. Thus, by the public's own account, personal connections alone were not overwhelmingly responsible for attitude shifts in favor of equal marriage.

Along similar lines, much is often made of the "*Will & Grace* Effect," a reference to the NBC sitcom that ran between 1998 and 2006 which featured openly gay characters. The idea being that exposure to openly LGBT fictional characters in popular media can help to acculturate the public to LGBT persons and soften opposition to LBGT rights. Rosenberg offered evidence of LGBT persons' increased media presence to reason that the rise of Americans' acceptance of same-sex couples and gay rights was unrelated to litigation.[122] This is a theme echoed by Vice President Joe Biden when he announced his support for same-sex marriage in 2012. "I think 'Will & Grace' did more to educate the American public than almost anything anybody has ever done," Biden remarked on *Meet the Press*. Noting the continued trend of programming in the later 2000s like *Sex and the City* and *Modern Family*, HBO entertainment president Michael Lombardo said, "TV has been a powerful influence because it brings the lives of gays and lesbians into people's homes and that has increased people's understanding."[123]

Indeed, there has been an upshot in openly LGBT characters on primetime broadcast networks. In the Gay & Lesbian Alliance Against Defamation's (GLAAD) annual study of openly LGBT characters in 2005, the organization found that 1.3 percent of all series regular characters on the six broadcast networks were LGBT. The number of regularly scripted primetime broadcast characters hit a record high of 4.4 percent in 2012.

While this is an intuitively appealing theory, there is insufficient social science data to back up the proposition that exposure to fictional LGBT characters led to increased support for LGBT rights. Especially given that individuals are likely to self-select media and seek out confirmation bias in media choices,[124] there is reason to be skeptical of any attempt to overstate the impact of fictional characters on the public mood.

Figure 16: Regular LGB Fictional Characters on ABC, CBS, and NBC 2001-2009 (Garretson 2009)



However, it is important to acknowledge that the growing number of LGB characters in popular media rose over time, that long-term rise saw disturbances. It was not a foregone conclusion that positive fictional portrayals of sexual minorities in popular media would have continued to rise (Figure 16). Jeremiah Garreston highlighted a drop in prominently featured gay characters when controversy over same-sex marriage agitated the public mood:

> While it seems that further advances for lesbian and gay rights are certain in the future and that attitude liberalization will continue at its current pace, there are reasons to be more guarded. In addition to the possibility of the election of politicians unfriendly towards the rights of lesbians and gays….the clock can easily be rolled back on public support of gay rights directly. This came close very close to happening in 2004…
>
> Despite the explosion in the number of shows on TV with the creation of new networks, the number of characters on the big three networks shows a small decline from its high in 2001 and 2002. The same-sex marriage debate in 2003 and 2004 was concurrent with this decline.[125]

Secularization Trends

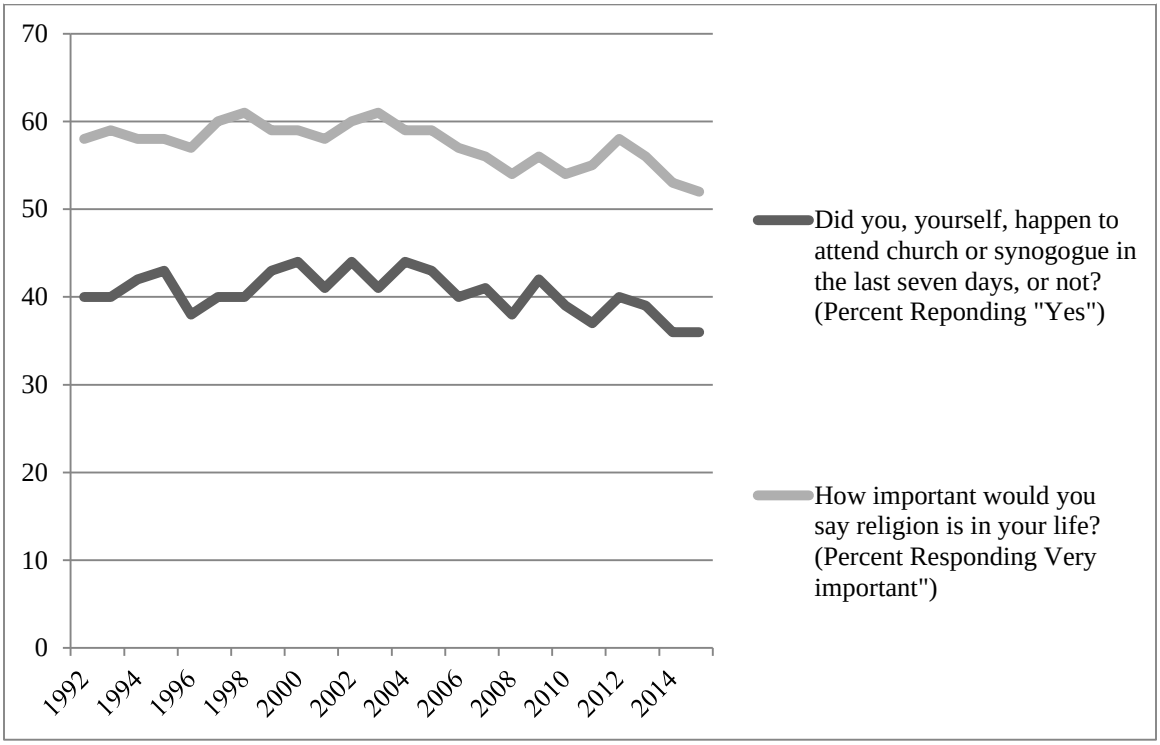
Table 9: "What are the reasons you oppose same-sex marriage?" (Gallup 2012)

Reason Offered	**%**
Religion/Bible says it is wrong	47
Marriage should be between a man and woman	20
Morally wrong/Have traditional beliefs	16
Civil unions are sufficient	6
Unnatural/Against the laws of nature	5
Undermines traditional family structure/Mother and father	5
Other	7
No opinion	4

The 2012 Gallup survey which asked respondents to offer explanations for their opposition to same-sex marriage were generally religious in nature. A 47 percent plurality of marriage equality opponents cited religion generally or the Bible as an explanation for their opposition. These numbers reflect the dominant narrative in state legislative and referenda

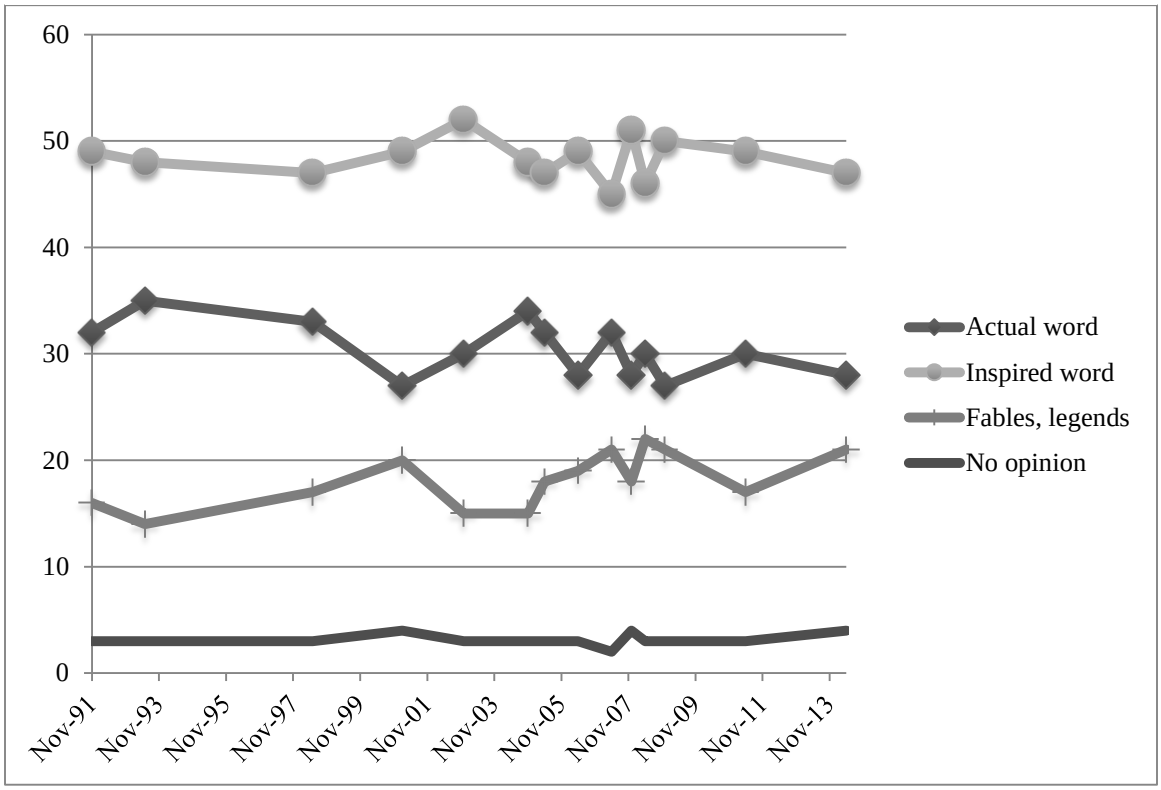
concerning equal marriage opposition. Could the rise in support for same-sex couples' freedom to marry be part of a broader of a secularizing America?

Figure 17: Religion in American Life (Gallup)



Polling data showing Americans' attendance at religious services and those who say religion plays an important role in their life reveals relative stability in the public's religious conduct. Americans who indicate they attended religious services within the last week, has hovered around the 40 percent mark between 1992 and 2014 (Figure 17). When asked if how important religion was in their lives, a majority of Americans ranked religion as being "very important" in their lives over this period. There is a slight, but noticeable downward trend between 2004 and 2008, with those describing religion as "very important" sliding from 61 percent to 54 percent.

Figure 18: Americans' Interpretation of Religious Scripture (Gallup)



The importance of religion in Americans' lives and religious observance practices are important indicators of Americans' religiosity, but it may fail to capture the ideological nature of their theology. Here, we can examine American attitudes on religious scripture— namely whether Americans believe scripture is the Word of God and the amount of permissible discretion in its interpretation (Figure 18). If there is a significant drop in Americans believing religious scripture must be taken literally or a significant rise in Americans that do not believe scripture is divinely inspired or derived, that underlying shift in public theology might have created the necessary breathing space for public mood shifts on homosexuality's acceptability. Here, too, there is relative stability.

Figure 19: Interpretation of Scripture, California (Pew)

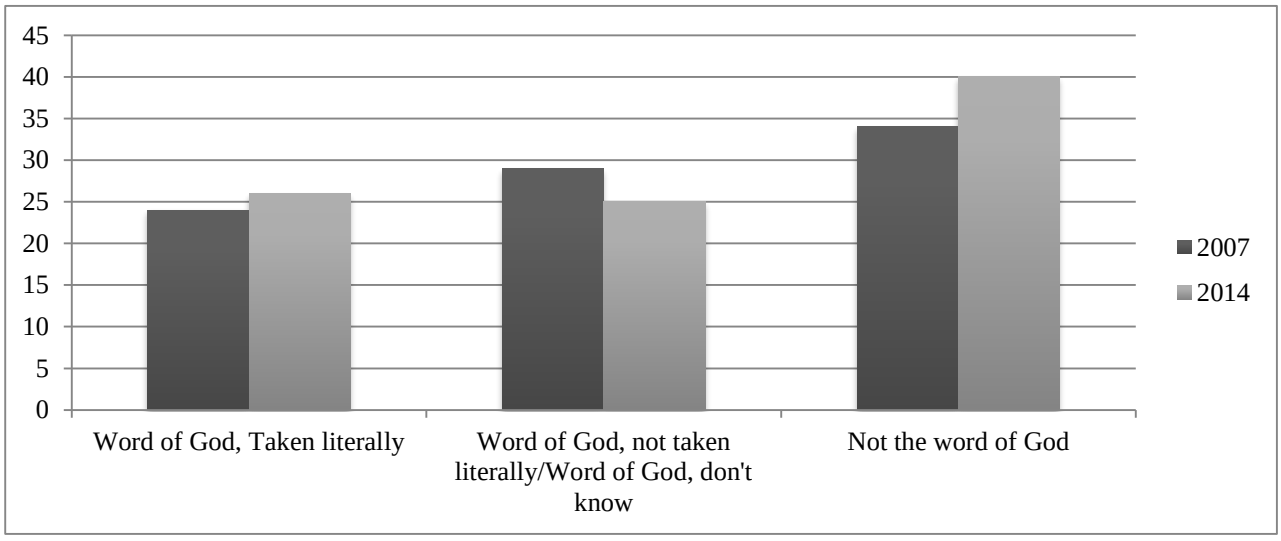


Figure 20: Belief in God and Acceptance of Homosexuality, California (Pew)

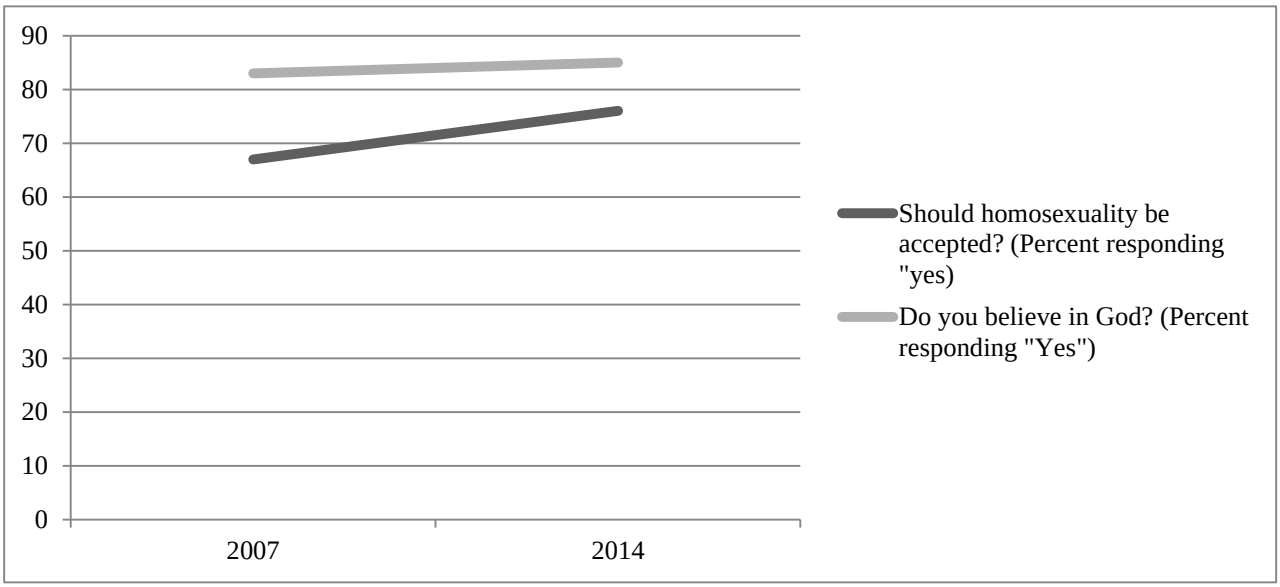


Figure 21: Interpretation of Scripture, Connecticut (Pew)

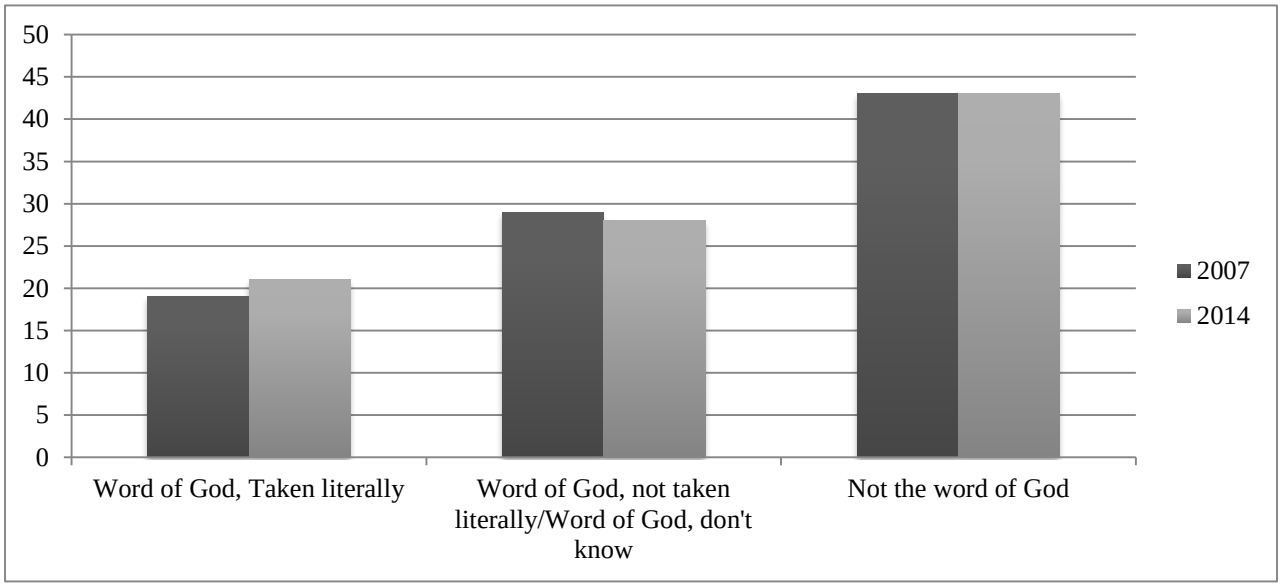


Figure 22: Belief in God and Acceptance of Homosexuality, Connecticut (Pew)

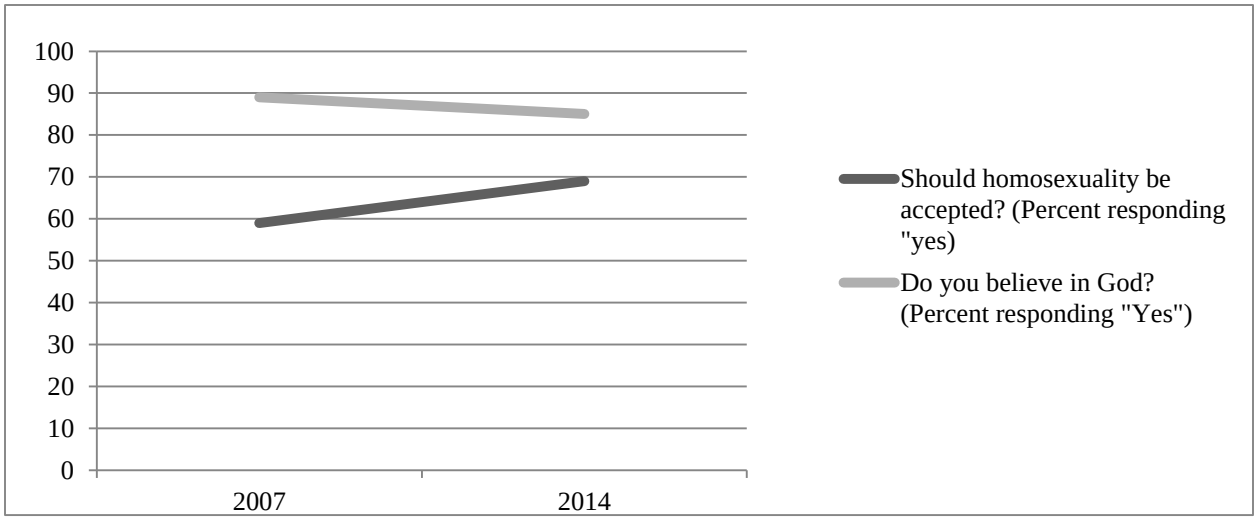


Figure 23: Interpretation of Scripture, Iowa (Pew)

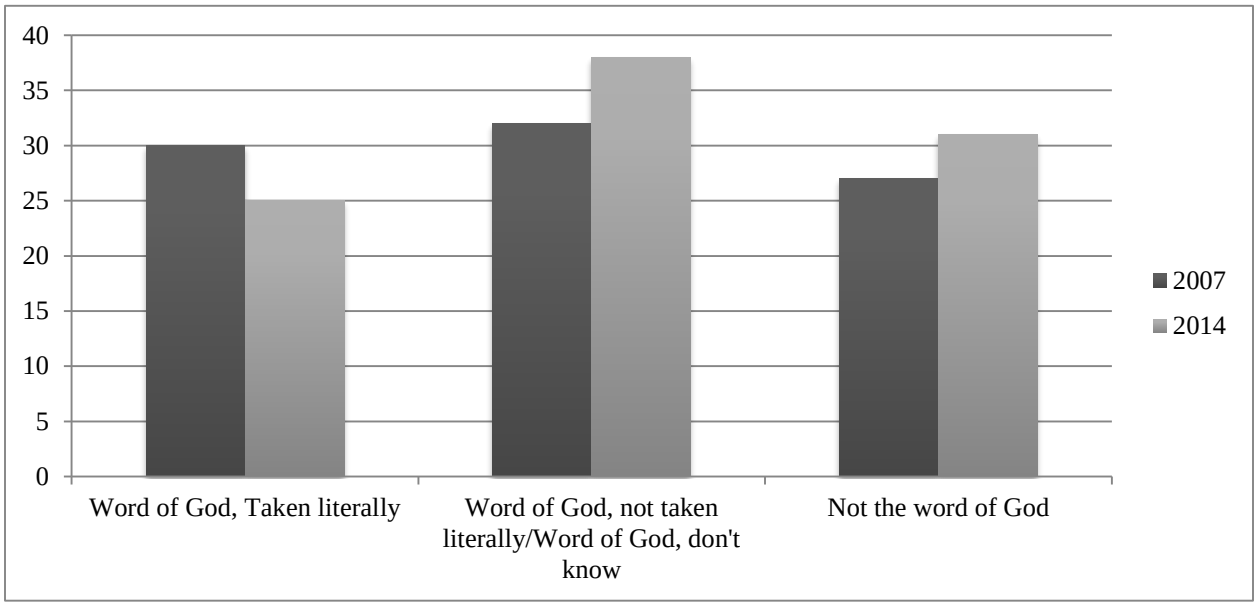
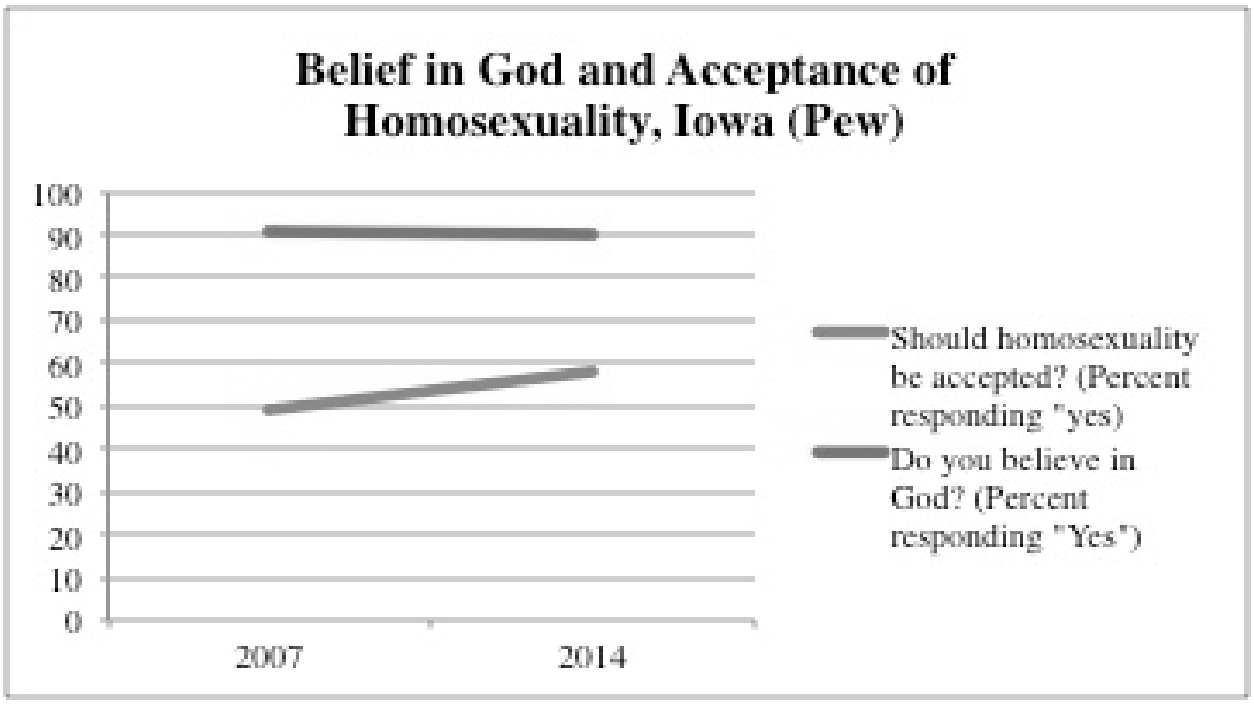


Figure 24: Belief in God and Acceptance of Homosexuality, Iowa (Pew)



Drilling down to the states these patterns hold (Figures 19-24). Culling the states where state courts of last resort ruled before 2009 for same-sex couples' freedom to marry, state residents' views on religious scripture and belief in a higher power are stable between 2007 and 2014. However, residents' views on homosexuality shifted in favor of LGB persons during this time period.

Conclusion

Measuring the cause-and-effect relationship between judicial decisions expanding same-sex marriage rights, and relationship recognition rights more generally is a difficult task. Nevertheless, the convergence of evidence offers credence to claims that the courts had a role in legitimizing same-sex marriage with the public. While state-level data collection was less robust than nationwide efforts, state court litigation appears to have disrupted stable levels of opposition and support in their wake, with the public mood trending toward the courts' decisions. These findings are contrary to what we should see if courts are unable to draw the public towards its views on divisive issues, as the Constrained Court model suggests.

National polling also reveals indicia of disruption, most noticeable between 2004 and 2008, and long-term acceptance of gay rights. As marriages began in Massachusetts and state court litigation picked up steam, the number of Americans satisfied with gay rights nosedived. In fact, the highest recorded percentage of Americans who were dissatisfied with the state of acceptance for gay and lesbians peaked in 2007. In 2008, the smallest amount of separation between Americans satisfied and unsatisfied (both those who wanted more and less acceptance of sexual minorities) was recorded. By 2016, Americans who were satisfied with acceptance of gays and lesbians or wanted greater acceptance outnumbered detractors 70 to 13 percent, a shift

from the 51 to 30 percent margin in 2004. This evidence is consistent with the rights consciousness hypothesis' expectations that rulings favoring same-sex marriage and rights for sexual minorities feeds a civil rights awareness that translates into more demands for expanded rights and acceptance.

If the Constrained Court Theory is correct, there should be no noticeable shift in public opinion after judicial victories. Conversely, if legitimization theory accurately captures the impact of litigation, we should discern significant shifts in the public's reception favoring civil rights for LGB persons in the wake of successful litigation. Given the paucity of data prior to 2000 on the state and national level and sporadic state-level polling, caution is warranted against overstating weight of evidence. Mindful of that and the general limitations on drawing conclusions from polling data, the Constrained Court Theory does not square with polling on either the state or national level. The polling between 1996 and 2004 shows little movement in the public's mood favoring same-sex marriage, but there are significant shifts in the direction of equal marriage advocates between 2005 and 2011 during which marriages continued in Massachusetts, more courts extended to same-sex couples the freedom to marry, and 2 states successfully enacted and implemented marriage equality legislation.

CHAPTER 5

STATE LEGISLATIVE RESPONSES: 1996-2012

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

We should expect to see, consistent with the principles outlined in the Constrained Court Theory, that the stronger the support from legislators, including blocking constitutional amendments to overturn a decision or enacting substantive legislation in support of a decision, the more effective a court's ruling. Testing the rights-consciousness hypothesis, we should expect to see that judicial rulings in favor of LGB rights and same-sex relationship recognition motivated elected officials to take action. Another important pattern we should see if the right-consciousness theory is valid is that successful litigation made the issue of LGB civil rights more salient, prompting legislators to consider the merits of enacting pro-LGB legislation.

In this chapter, I will examine the legislative activity that resulted in the status quo changing the years before the Supreme Court struck down the Defense of Marriage Act in *Windsor v. United States*. Some of these states advanced favorable legislation for same-sex couples without the threat of litigation and some responded to court orders to revise state domestic relations law to include same-sex couples. The primary goal in this chapter is to understand legislators' motivation and their varied responses to litigation and court decisions in their own state and across the country. To facilitate this end, the chapter will chronologically examine state legislative activity state-by-state.

HAWAII

Hawaii's same-sex marriage litigation was the first the United States that appeared poised for success. The Hawaii Supreme Court's instruction to the trial court that same-sex couples' marriage exclusion claim triggered strict scrutiny signaled that the advent of same-sex marriage recognition in Hawaii was a *fait accompli*. Upon remand, the trial court ruled against the state in December 1996. However, Judge Kevin Chang stayed his ruling despite believing the state's likelihood to prevail on the merits in the Hawaii Supreme Court was "not particularly tremendous."[126] That prognostication would hold true, of course, barring a constitutional revision to block same-sex couples from marriage rights.

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

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

Unlike marriage or marriage-like relationship recognition by the state, Hawaii's law created a relationship status that was easy to enter and almost as easy to exit. As William Eskridge argued, Hawaii's registry law "present[ed] [same-sex couples] with a bundle of *rights and benefits* [but] den[ied] them the *duties and obligations* associated with state-recognized marriage. That is, the state promised to honor reciprocal beneficiaries' rights to make decisions for one another and receive benefits but did not impose obligations on the couples."[127]

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

After the election of Neil Abercombie, a long-serving Democrat in the Hawaii Congressional delegation, to the Hawaii governorship, civil union legislation had the promise of becoming law. In January 2011, the Hawaii Senate voted 19 to 6 to and the House of Representatives 31 to 19 to enact civil unions. Abercombie signed the law, which became effective the following January. A little over a month after Governor Abercombie gave the nod to civil unions, the Lambda Legal/ACLU lawsuit was voluntarily dismissed.

Hawaii's same-sex marriage litigation was a mixed success. On one hand it raised the profile of same-sex marriage and was successful on the merits in the judicial process. Conversely, the litigation fell short because unsupportive legislators submitted a constitutional amendment for popular approval to foreclose it. The failure of same-sex marriage litigation in Hawaii is attributable to opposition in the Hawaii Legislature, as the political reinforcement hypothesis predicts. However, Hawaii's enactment of a state-sanctioned relationship status for same-sex couples illustrates a major step for same-sex couples' rights consistent with what we would expect to see if the rights consciousness hypothesis is correct. The events in Hawaii spurred action in other states, including Vermont. The chain of events that unfurled there between 1999 and 2000 culminated in the greatest single advancement of equal treatment for same-sex couples.

VERMONT

Beth Robinson, Susan Murray, and Mary Bunauto, sought the victory in Vermont state courts that escaped Evan Wolfson in Hawaii, but did so after a concerted effort to lay concrete organizational infrastructure to sustain litigation.[128] Inspired by the prospect of civil marriage for gay couples in Hawaii, Robinson and Murray helped for the Vermont Freedom to Marry Task Force in 1995.[129] That Task Force was a spinoff of the state gay rights organization, Vermont

Coalition for Gay and Lesbian Rights. That same year, a same-sex couple asked Robinson and Murray to represent them in a lawsuit challenging Vermont's marriage laws. Robinson and Murray hesitated to jump into litigation, hoping to form a network of support for any prospective litigation. The Task Force's mission was to train pro-equal marriage Vermonters to speak to their communities about same-sex marriage and participate in local events such as county fairs.

The early work of the Task Force was grassroots in nature and unrelated to any litigation until three same-sex couples approached Robinson and Murray and asked for legal assistance to challenge Vermont's marriage discrimination. Robinson and Murray, joined by co-counsel Mary Bunauto of the Gay and Lesbian Advocates and Defenders, filed suit on behalf of the couples in July 1997.

In December 1999, only three years after Congress enacted the Defense of Marriage Act and the Task Force began its work,[130] the Vermont Supreme Court was primed to rule on the permissibility of excluding same-sex couples from marriage rights. The precise constitutional question in *Baker v. State*[131] was whether the state of Vermont could deny same-sex couples marital rights, benefits and responsibilities provided to heterosexual couples under the Vermont State Constitution's Common Benefits Clause.[132] With the Court's majority ruling that state legislators could opt to provide all of the rights and responsibilities of marriage under another name without running afoul of the state constitution, the locus of the fight over equal marriage was placed squarely in the state legislature.

In placing responsibility for the controversy's "resolution" with the political branches, the high court gave what activist Beth Robinson described as "neither an outright loss nor a win."[133] In a short 3-day window, Robinson and the Vermont Freedom to Marry Task Force hastily drew up a legislative strategy.[134] Prior legislation concerning same-sex relationship recognition did

not fair well in the Vermont Legislature. Bills to enact domestic partnerships with limited visitation rights failed in 1992 and 1993 in the House Judiciary Committee.[135] Another bill creating domestic partnerships as a status equivalent to marriage in all but name failed in the 1993-1994 legislative session.[136] The only legislation addressing gay couples after 1994 was introduced in March 1999 to "clarify" the exclusion of same-sex couples from marriage rights.[137] That bill failed to come out of the House Judiciary Committee. No bill to recognize same-sex relationships was filed in the 1999-2000 session of the legislature before *Baker*.

Task Force members understood from the get-go that political reality dictated that equal marriage legislation was unlikely. Lacking an appetite to expand marriage, legislators created a parallel institution called a "civil union"— a term coined in the Vermont Judiciary Committee.[138]

The outcome disappointed same-sex couples' advocates, but it did not surprise them. Robinson herself said that she "didn't expect marriage to pass" but faced the difficult decision of whether they would "accept the blessing of civil unions."[139] Robinson opined that agreeing to civil unions "was painful because [marriage equality advocates] were probably delaying [their] ability to come back and talk about marriage."[140] Robinson's prognostication was correct. Politicians' perceptions of statewide political backlash that enveloped Vermont after the civil union law passed stymied the Task Force's efforts.[141]

Setbacks notwithstanding, some important developments cemented for same-sex marriage advocates' favor. Bill Lippert, an openly gay 6-year veteran of the Vermont House of Representatives, in 2000 was vice-chair of the House Judiciary Committee. After the civil union fight, Lippert resolved to press on for marriage equality and continue his service in the House. "I decided to stay in the legislature until we had full marriage equality," Lippert said.[142] For other legislative leaders, the *Baker* decision marked first time they were provoked to contemplate

seriously the merits of marriage equality. Shap Smith, who became the Vermont House Speaker in 2008, said, "I started to really think about [marriage equality] when Vermont was discussing the *Baker* decision."[143] A main sponsor of the 2009 marriage equality bill, Senator Claire Ayer, said that she first started thinking about marriage rights "when the decision in Vermont came down on the civil unions case."[144]

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

> I was in the legislature when the Vermont Supreme Court made the *Baker* decision. Certainly, when that decision came down into the start of that January session [I had to consider the merits of marriage equality]. I supported marriage and not civil unions at the time. Prior to that, I don't believe marriage equality was on my radar screen. But that [the announcement of *Baker*] was the first time when I can put my finger on it and say I would work on marriage equality.[145]

Before 2009, Zuckerman was also a co-sponsor of the first equal marriage bill. Zuckerman's colleague, David Deen, was also an early marriage supporter. Deen recalled, "I never really thought of marriage as being a civil right until the Supreme Court decision. I just had never thought of it. That's all. I had been friends with and part of a family with gay people since 1972. And then the [Vermont] Supreme Court decision came down and I saw it very differently."[146]

Other leading figures in Vermont considered the state Supreme Court's intervention as the beginning of their evolution toward supporting relationship recognition for same-sex couples. Speaker of the Vermont House Mike Obuchowski, a Democrat, said that "[i]t was the court decision in *Baker*" where he started thinking about same-sex couples' rights. "The fact that the *Baker* decision said that human beings rights were being violated was a great motivator for me. I tried to put myself in the plaintiffs' situation and decided I wouldn't want my rights violated," Obuchowski said.[147]

The Vermont House Judiciary Committee Chair, Republican Tom Little, also pointed to *Baker* as a watershed moment. Little played a pivotal role in both 2000 and 2009. Little authored the civil union law and later chaired the Legislature's Commission examining marriage rights for same-sex couples in the lead up to the 2009 legislative session. Little remembered that he was "aware of knew this decision was coming" and that it "was in the hopper for sometime in the Supreme Court and it seemed to be taking longer to get a decision out than typical for the court." During that waiting period, Little held meetings with Vermont Freedom to Marry Task Force members concerning their plans in the event they lost in the high court. Those meetings were part of a longer evolutionary process. Little explained:

> I never sought elected office with gay marriage or gay rights as one of my reasons for running. I was elected as a Republican. I always considered myself a supporter of equal rights, but I never had to focus on this particular bundle of rights over the course of my life. It was pretty much the litigation that brought it to my mind. … I read the Supreme Court decision and I agreed with it. The only defense the Attorney General put up was procreation, which turned out to be a pretty lame reason to hang the whole thing on. And I agreed with that so I thought the right thing to do was legislate to create a parallel status.[148]

Like Little, Governor Howard Dean credited the Vermont Supreme Court for bringing awareness to the inadequacies of family law. Dean said that issues concerning same-sex couples were not "on his radar" because the "life of a governor is not concerned with theoreticals." Dean did not publicly support marriage equality until 2009. But, he said that his gradual movement in favor of same-sex marriage could be traced to 1999. Dean recalled:

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

> didn't get, it was pretty obvious to me that it wasn't about sex it was about equal rights.[149]

The educative value that Howard Dean described reflects the expectations of the rights consciousness hypothesis. To be sure, Dean was not hostile towards same-sex couples or LGBT rights and was predisposed to embrace equal rights for same-sex couples. However, Dean's views were certainly shaped by the *Baker* litigation because the Vermont Supreme Court forced him to consider what he saw as an unthinkable prospect before the decision came down.

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

That *Baker* did not extend marriage eligibility to the LGB community in the short term made it less effective than if the Vermont Legislature had approved a marriage bill. Whatever its symbolic shortcomings, they should not detract from the unmistakable milestone of the Vermont civil unions legislation, which accorded marriage in all but name to same-sex couples. Importantly, nothing suggests that Vermont legislators were eager to expand any official status to same-sex couples prior to *Baker*. Michael Obuchowski, who held the Speaker post from 1995 to 2001, said that the momentum to act and protect gay couples "all generated from the court

decision." [150] All three domestic partnership bills introduced in the 1990s failed to gain traction. No bills were filed to address domestic relations and sexual minorities during the 1999-2000 session before *Baker*. Tom Little corroborated Speaker Obuchowski's assessment but went further:

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

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

The inadequacies of "separate-but-equal" institutions aide, the *Baker* decision helped put in place a few key stepping stones for the Task Force from which they could build a legislative leadership team and buttress a pro-marriage coalition. When the Task Force pushed for equal marriage legislation in 2009, these more subtle developments post-*Baker* proved indispensible.

MASSACHUSETTS

While the *Goodridge* decision in 2003 made Massachusetts a pioneer as the first jurisdiction to recognize same-sex marriage, the political branches had grappled with LGB rights for many years. Sixteen years after its initial introduction, the legislature enacted legislation in 1989 prohibiting sexual orientation discrimination in employment, housing, and public accommodations. That same year, however, legislators inserted language into the state budget blocking gay persons from becoming foster parents. That policy was met with a court challenge and ended in early 1990 during the administration of Governor Michael Dukakis.

The following year Republican Governor William Weld offered to meet with same-sex marriage advocates. Though Weld did not commit to backing same-sex marriage rights, in 1992 the governor extended some benefits to state employees' same-sex partners. Weld's progressive streak did not wane in 1996 despite his fellow partisans' fierce opposition to same-sex unions. As the national debate unfolded over Hawaii's same-sex marriage litigation, Weld pledged to recognize out-of-state same-sex marriages and criticized the Defense of Marriage Act. Weld argued DOMA was unconstitutional.

In 1998, the General Court (Massachusetts' legislature) advanced legislation that would allow Boston to establish domestic partnerships and formally recognize non-martial relationships for the purpose of affording limited, enumerated benefits to domestic partners. That legislation, however, was not limited to same-sex couples and was met by Republican Governor Paul Cellucci's veto pen. Cellucci opposed a domestic partnership scheme that included opposite-sex couples, believing it undermined the institution of marriage. Cellucci nevertheless welcomed domestic partnership legislation limited to same-sex couples.

In 1999, Democratic State Representative John Rogers filed House Bill 472, which read: "a purported marriage contracted between persons of the same sex shall be neither valid nor recognized in the Commonwealth."[151] With HB472 failing to gain traction, Rogers filed HB3375 in 2001 that contained similar, but more expansive, language that would foreclose local domestic partnerships, as well as prohibit Massachusetts from recognizing either same-sex marriages or out-of-state civil unions:

> Section 4A. A marriage is a civil contract and shall be defined as a legal relationship between one man and one woman, who consent to take each other exclusively as husband and wife, provided that each person has attained the age of 18 years, is of sound mind, and is not related by consanguinity whether by half of whole blood, not closer than the fourth degree.

> Section 4B. Any other relationship shall not be recognized as a marriage or its legal equivalent, or receive the benefits exclusive to marriage in the Commonwealth of Massachusetts as a matter of public policy.[152]

For same-sex marriage opponents and proponents in Massachusetts, 2001 was an active year. In April, seven same-sex couples filed suit in state court challenging the constitutionality of the Commonwealth's domestic relations laws to the extent the laws excluded same-sex couples from marriage rights. In July, Massachusetts Citizens for Marriage launched a campaign to amend the state constitution, banning same-sex marriage. The Massachusetts Constitution's constitutional amendment procedure allows citizens to submit proposals that meet a requisite number of petition signatures for the General Court's consideration in joint session. If the offered amendment receives 25 percent of the General Court members' approval, 50 votes in all, the proposal is submitted as a ballot question and is ratified by an affirmative majority vote.

Under the state constitution's prescribed procedures, the joint session is led by the President of the Massachusetts Senate. In 2002, Senate President Tom Birmingham convened a session on June 19, 2002, and immediately adjourned it for a month. Birmingham opposed Massachusetts Citizens for Marriage campaign and amending the constitution to restrict the marriage recognition to opposite-sex couples. Upon legislators' return on July 17, amendment opponents faced a likely defeat. Whip counts showed more than 50 favorable votes for the anti-gay proposal. Again, Senate President Birmingham moved for an immediate adjournment without a vote on the merits *per se* of the proposed amendment, which carried by a large margin of 137 to 53. Unsuccessful, proponents of the amendment turned back to the legislative process, offering a final pre-*Goodridge* anti-gay amendment push in April 2003. The effort failed to get any language out of committee.

In their totality, the legislative process before *Goodridge* was in a holding pattern as elected officials showed little desire to recognize same-sex partners. In part, this was a reflection of the socially conservative leadership in the House of Representatives and particularly the House Judiciary Committee. LGB rights activists held out little hope of seeing favorable legislation enacted, as openly gay Massachusetts State Representative Liz Malia reflected:

> Our discussions were mostly around domestic partnership benefits. And that had been the battle for the last few terms. The most we had really focused on – not that we didn't have aspirations to do civil unions or whatever – but we were finding it very difficult even to have, and thought we'd be very lucky to get to the point of having, an open debate on the floor to discuss domestic partnerships realistically.
>
> I think it's probably pretty fair to say that, with some intensive discussions with leadership, where we thought we would be able to move would be toward domestic partners, but with DOMA language. Those were the signals I thought we were getting from this leadership. In my mind, we were basically looking at civil unions. We were starting to have those discussions, but it was always with a caveat, as far as the opposition was concerned, with regard to the definition of marriage. That was the key step that always got in the way of coming to final agreement.
> I think that we had really hit a stalemate before the *Goodridge* decision arrived. We knew that the potential was out there and basically had decided that we couldn't compromise with a DOMA, with the definition of marriage. And that seemed to be as far as the leadership was willing to go. I think we were in neutral at that point in time.[153]

One member of the Massachusetts House Judiciary Committee in 2004, Representative David Paul Linsky, echoed Malia's grim outlook. Linsky estimated that some form of domestic partner legislation might have had support in the chamber, but was doomed because of opposition from House leadership. As for civil unions or marriage, Linsky said that but for *Goodridge*, Massachusetts would have had to wait. Without the Supreme Judicial Court's intervention, Linsky offered that a marriage bill "would never have gotten out of committee. Whether or not a formal vote were taken, the bill would not come out. At most, it would have been put into a "legislative study," which is a graveyard."[154]

When the Massachusetts high court handed down the *Goodridge* decision, the Court stayed the ruling for 180 days. A month after the Supreme Judicial Court's decision, the Massachusetts Senate submitted proposed legislation for the Court's advisory review. The language preferred to the Court created Vermont-styled civil unions. The following February, the Court opined that the Senate's proposal creating a subordinate civil union right for same-sex couples and preserving marriage for opposite-sex couples was constitutionality infirm, even if the distinction was in name only. The Court reasoned that creating a separate name for state recognition of same-sex couples' relationships relegated LGB persons "second-class status."[155]

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

The legislature met again in February to consider two proposed amendments to ban same-sex marriage. Ultimately, legislators defeated a proposed amendment to define marriage as the union of a man and a woman, but silent on civil unions, 94-103. In March, the General Court gave its blessing by a margin of 105-92 to an amendment that would foreclose same-sex marriage but establish civil unions. In addition, the amendment included a provision disallowing the federal government from recognizing civil unions as a marriage for federal benefits. The amendment now required majority approval by legislators in 2005, before it could be placed on the November 2006 ballot for ratification.

In the interim period, the Romney Administration prepared for implementation of *Goodridge*. One area of controversy arose over the 1913 law that disallowed out-of-state persons

to marry in Massachusetts if it was not legal for them to marry in their home state. Romney held the position that since no other state recognized same-sex marriage, out-of-state couples could not wed in the Old Bay State. In a forceful statement arguing for the strict application of the out-of-state validity requirement, Romney said, "Massachusetts should not become the Las Vegas of same-sex marriage. We do not intend to export our marriage confusion to the entire nation."[156] Attorney General Thomas Reilly posited that only those residents of states that affirmatively prohibited the recognition of same-sex marriage could be denied licenses under the 1913 statute. Ultimately, the decision rested with local town clerks. However, attorneys general in neighboring New York, Rhode Island, and Connecticut offered opinions that same-sex marriages solemnized in Massachusetts were not necessarily void.

As controversy brewed over non-residents' marriage applications, the Administration prepared to update the ministerial functions for licensing clerks. Governor Romney's legal counsel issued a memorandum instructing Justices of the Peace to resign if they were unwilling to perform same-sex marriages. The Administration rolled out new licensing forms, eliminating gendered language. Marriages began on May 17, 2004.

In September 2005, legislators were called upon to vote on the proposed constitutional amendment to ban same-sex marriage but create civil unions. The measure failed 157-39. Rank-and-file legislators backed away from the proposal, as did one co-sponsor of the amendment, Republican State Senator Brian Lees, who explained his decision, "Gay marriage has begun, and life has not changed for the citizens of the commonwealth, with the exception of those who can now marry. This amendment which was an appropriate measure or compromise a year ago, is no longer, I feel, a compromise today."[157]

Same-sex marriage opponents now returned to a voter initiated amendment process that

would require only 50 votes rather than a majority of legislators to submit the anti-gay marriage amendment to the voters. The anti-*Goodridge* forces collected 170,000 signatures, forcing another constitutional convention in 2006.

The joint session of the legislature adjourned twice without voting on the merits of the marriage prohibition by large margins. In July, legislators votes 100 to 91 to delay until November. In November, they voted to delay again by a vote of 109 to 87. Anti-gay marriage forces frustrated by legislators' lack of appetite to vote on the merits filed litigation to force a vote on the proposed amendment. Eventually, they were successful and secured 62 votes in favor of the ban in January 2007. A second constitutional convention would be necessary with the newly elected legislature.

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

When the convention reconvened for a mere 10 minutes in June 2007, gay marriage opponents garnered only 45 votes. The amendment's backers lost seven supporters through resignations and turnover once the new legislature convened, but also failed to hold onto prior supporters. A total of nine legislators including seven Democrats and two Republicans switched their votes. One Democratic lawmaker who switched his vote explained his very private decision was about protecting minority rights. Senator Michael Morrisey explained, "In the end it came down to the fact that we have to do what we think is the right thing and what we feel comfortable with. Protecting the rights of the minority is one of the things we have to do."[158]

Other lawmakers that flipped offered their concerns about taking away rights and greater exposure to LGB persons. “I couldn’t take away the happiness those people have been able to enjoy,” Representative Paul Kujawski explained.[159] Senator Gale Candaras, who voted for the amendment when she was a state representative, published an exhaustive explanation for her flip, writing:

> For me, what all this comes down to is this: Same gendered couples are taxpaying, law-abiding citizens, who are important community contributors, well-loved and well-respected by their families, friends, neighbors and employers. They deserve and are entitled to the same legal protections enjoyed by all others citizens of our state. This is the law of the Commonwealth, articulated by our Supreme Judicial Court in Goodrich v. The Department of Public Health, decided in November, 2003.
>
> Despite dire predictions, there has been no adverse societal impact from this decision and most people now express little concern about same gender marriage.[160]

The Massachusetts General Court struck one more blow to anti-*Goodridge* groups by dismantling the last remaining impediment in Massachusetts law barring many out-of-state gay couples from marrying. Massachusetts Senate repealed the 1913 statute mandating residency requirements for marriage license applicants by a unanimous voice vote. The Massachusetts House followed, voting to repeal by a large margin of 118 to 35. Democratic Governor Deval Patrick signed the repeal legislation in July 2008.

Though Massachusetts was the first jurisdiction to offer same-sex couples access to marriage in 2004, political leaders debated same-sex relationship recognition throughout the 1990s. The *Goodridge* decision was successful because it opened marriage rights to same-sex couples at a time when severely limited recognition attempts would have dead-ended. Despite the intransigence of legislative leadership and weak odds of pro-recognition legislation passing without judicial intervention, *Goodridge* opponents could not rally a sufficient number of state legislators to submit a constitutional amendment for referendum. That outcome was not a

foregone conclusion in January 2007 when opponents of *Goodridge* mustered 12 votes more than necessary to place an anti-gay marriage amendment on the ballot. The Massachusetts Supreme Judicial Court marriage ruling had staying power because legislative opposition was weak and softened over time. *Goodridge* was more effective when the legislature repealed residency requirements for marriage eligibility. These developments reflect what we should see if the political reinforcement hypothesis is correct.

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

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

CALIFORNIA

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

personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary."[161] The bill passed by large margins, 23-5 in the State Senate and 68-2 in the State Assembly. The first effort to reverse the 1977 amendment came in 1991 but died.

Throughout the 1990s, a series of efforts were undertaken to establish enumerated rights for same-sex couples in the California Legislature. In 1995, Assemblyman Richard Katz introduced AB627, which would have created a domestic partner registry. Registrants would have had conservatorship and medical decision-making rights. Katz's bill died in committee. A substantially similar bill also failed to secure a floor vote the following legislative session.

As events unfolded in Hawaii in the mid-to-late 1990s, the question of same-sex marriage became more heated. While California law permitted only opposite-sex couples to marry under state law, California law governing recognition of out-of-state marriages was potentially favorable for same-sex couples. Section 308 of the California Code stated that a "marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state."[162] Without a public policy recognition exception or an express prohibition of out-of-state same-sex marriages, the prospect of Hawaiian weddings exposed a large loophole in state law. State Senator William "Pete" Knight's two legislative attempts to close the out-of-state "loophole" failed. Knight and his allies turned to the state's initiative and referendum procedure. Knight's initiative, Proposition 22, which provided that only opposite-sex marriages were valid in California, passed in 2000 with over 60 percent of the vote.

The first successful measure in 1999 (about two months prior to the *Baker* decision in Vermont) provided domestic partners with hospital visitation rights, and health insurance

coverage for state employees. The scope of eligible domestic partners included same-sex couples and opposite-sex couples over 62 who may not marry out of fear of losing social security benefits. The bill, AB26, made no reference in either the legislative findings or the legislative counsel's analysis to the California Constitution, the United States Constitution, or any court decision.[163]

In 2001, the domestic partnership scheme was expanded. Domestic partners now had standing to bring tort claims, including wrongful death claims. In addition, the 2001 expansion granted a number of rights concerning medical care, sick leave, and insurance. The last expansion of the California domestic partnership statute came in 2003. That year, legislation was adopted that afforded domestic partners the presumption of rights and responsibilities equal to marriage. The 2003 legislation further recognized substantially similar relationships formed out-of-state. Unlike the organic legislation establishing domestic partnerships in 1999, the wholesale expansion included legislative declarations that the bill would "help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article 1 of the California Constitution by providing [rights for] all caring and committed couples" and "reduce discrimination on the bases of sex and sexual orientation…consistent with the requirements of the California Constitution."[164]

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

Assemblyman Mark Leno submitted a bill to legalize same-sex marriage in 2004. Leno's

legislation came in the wake of *Goodridge* and the decision by San Francisco Mayor Gavin Newsom to issue same-sex couples marriage licenses, however the architects of the bill's plans predated Newsom's action. Leno, who the first openly gay man elected to the California Assembly in 2002 along with John Laird, expressed that he was somewhat agnostic on the term "marriage" before events unfurled in Massachusetts. Indeed, Leno had an epiphany—a newfound rights consciousness— after processing the *Goodridge* opinion that lead him to take the charge on equal marriage rights in California:

> So for many years as an activist and elected official, I always wanted the same rights benefits, privileges, and responsibilities of marriage, but I wasn't always sure we should be fighting over a word. But after reading the Massachusetts Supreme Court decision in 2003, my heart and mind were changed irrevocably. So in it, the Massachusetts High Court, not unlike the Vermont and Hawaii courts before it, they said that there was no justification for denying same-sex couples rights. But, the court went on to say that the only remedy to this identified discrimination is marriage and marriage alone. No other parallel construct would do. They said that there was no difference between the way same-sex couples love and that their love isn't inferior. And that's stuck with me and changed me. And at that point in November 2003, I was ready to fight a war over a word. Just a month before that, Governor Davis signed the domestic partner expansion. So we set our sights on introducing it before Valentine's Day in 2004.[165]

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

> Gay rights groups view the California legislation as part of a strategy that emerged when San Francisco began granting marriage licenses three months ago. Now, court cases are pending in New Jersey, Washington, Oregon, New York and California, and a federal constitutional amendment is up for debate in Washington, D.C….
>
> "It's a public conversation in all those arenas," said Jennifer Pizer, senior staff attorney with the Lambda Legal Defense and Education Fund in Los Angeles. "In California, we have the particularly poignant example of couples who married in San Francisco. We have the Legislature doing its job and public opinion moving steadily toward equality."[166]

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

> I had awareness of what Gavin was thinking of doing as of Monday that week that we were going to introduce the bill. There was some discord among our LGBT caucus in Sacramento. Two of my colleagues wanted me to proceed. Two were not sure the votes were there. Because the marriage licenses were being issued, thousands and thousands of people had come to California. Those colleagues, after they saw it on television and were part of the thrill of it all, they had realized that they internalized the discrimination themselves. Marriage seemed like a dream, but then to see it in reality they took hold of themselves and were on board. What happened that weekend in San Francisco demystified it.[167]

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

> In 2004, several events once again brought to the forefront the issues of same-sex marriages, civil unions, and domestic partnerships. On February 24, 2004, President Bush endorsed the idea of an amendment to the U.S. Constitution to ban same-sex marriages in the country. This endorsement followed a flurry of events surrounding same-sex marriages, including the issuance of marriage licenses to same-sex couples in San Francisco the week before; the Massachusetts high court decision stating that only marriage - not civil unions - would provide same-sex couples equal protection under that state's constitution; the decision of the Canadian Supreme Court invalidating a prohibition against same-sex marriages.[168]

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

> In 1948, the California Supreme Court became the first state court in the country to strike down a law prohibiting interracial marriage. It was the only state supreme court to do so before the United States Supreme Court invalidated all those laws in 1967. The California Supreme Court held that "marriage is . . . something more than a civil contract subject to regulation by the state; it is a fundamental right of free men...Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws."
>
> The highest courts in three states have held that denying the legal rights and obligations of marriage to same-sex couples is constitutionally suspect or impermissible under their respective state constitutions. These states are Hawaii, Vermont, and Massachusetts. California's discriminatory exclusion of same-sex couples from marriage violates the California Constitution's guarantee of due process, privacy, equal protection of the law, and free expression by arbitrarily denying equal marriage rights to lesbian, gay, and bisexual Californians.[169]

In the interim period, same-sex marriage advocates benefited from a state trial court ruling by Judge Richard Kramer striking down Proposition 22 as unconstitutional sex discrimination and an impermissible infringement of LGB Californians' fundamental right to marry under the state constitution. Kramer's ruling was a boon for advocates, but opponents hoped to capitalize on the setback. As the *Washington Post* reported, Kramer would not have the final say on the matter because in addition to inevitable appeals, an effort was "already underway to amend the state's constitution to ban same-sex marriage."[170]

Opponents continued to fight equal marriage in the legislature, relying heavily on the argument that the welfare of children was threatened by married same-sex couples who could not raise children as successfully as opposite-sex parents. The California Senate Judiciary noted the "main argument offered in opposition" throughout hearings was the same "primary rationale that Hawaii, Vermont, and Massachusetts have offered in unsuccessful defense of their laws prohibiting same-sex marriage…"[171]

In addition to child welfare justifications, the anti-gay marriage forces opposed the same-sex marriage bill because it subverted the will of the people as expressed in Proposition 22 and gave "added weight to Judge Kramer's rationale for striking down" Proposition 22.[172]

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

> Three state supreme courts have addressed the question of whether a state law that defines marriage so as to exclude same sex partners violates their respective state constitutions. Importantly, in each case, the court has ruled in favor of the same-sex couples. Finally, two cases from the U.S. Supreme Court decided by 6-3 majorities, have recently addressed issues relevant to the pending bill. In Romer v. Evans (1996) the Court overturned Colorado's Amendment 2, which would have amended the Colorado Constitution to exclude lesbians and gay men from obtaining legal protection. More recently, in Lawrence v. Texas (2003), the U.S. Supreme Court struck down a state homosexual sodomy law on the ground that the "liberty" protected by the Fourteenth Amendment includes private, consensual adult sexual relations. The Court did not need to decide whether gay men and lesbians have a constitutional right to marry, and the Court expressly left that question open. So far, no state high court has found adequate justification under state law for treating homosexual couples differently than heterosexual couples in defining marriage, even under a constitutionally lenient "rational basis" test. This appears to be where California's courts ultimately may arrive, as the trial court opinion in the coordinated marriage cases demonstrates.[173]

In September 2005, the California Senate approved Leno's marriage bill 21-15. The California State Assembly followed giving the bill favorable consideration on a 41-35 vote. The California Legislature was the first legislative body to bless same-sex marriage, but Governor Arnold Schwarzenegger vetoed the legislation citing Proposition 22. While the bill's backers argued that Proposition 22 was intended to protect the state's sovereignty and block out-of-state marriages, Schwarzenegger saw the measure as a wholesale preemption of same-sex marriage legislation.

In rejecting supporters' narrow abstraction of Proposition 22, the governor's position was

that the only constitutional path to eliminating marriage discrimination was by another referendum or judicial fiat. "This bill simply adds confusion to a constitutional issue. If the ban of same-sex marriage is unconstitutional, this bill is not necessary. If the ban is constitutional, this bill is ineffective," Schwarzenegger wrote in his veto statement to the Legislature.[174] The Legislature forced the issue again in 2007, by passing another same-sex marriage bill. By this time, same-sex marriage litigation had reached the California Supreme Court. Schwarzenegger rebuffed the Legislature and again vetoed the measure writing, "I maintain my position that the appropriate resolution to this issue is to allow the Court to rule on Proposition 22."[175] Seven months later, the California Supreme Court invalidated Proposition 22 as violative of the state constitution. Voters ratified a citizen-initiated constitutional amendment in November 2008 that overturned the state Supreme Court ruling.

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

NEW JERSEY

Like California, New Jersey was an early leader in both enacting nondiscrimination protections for the LGB community and limited same-sex relationship recognition. The Garden State declared sexual orientation a protected class in 1993 and created domestic partnerships in 2004. Same-sex couples and older couples of the opposite sex over the age of 62 were eligible for the state domestic partnership. The domestic partnership statute provided limited healthcare and property rights. However, the domestic partnership law provided substantially fewer rights and benefits to couples availing themselves of the law than marriage.

The domestic partnership law came nearly two years after Lambda Legal filed litigation in state court, challenging the exclusion of same-sex couples from marriage rights. Lower courts were not favorable for the plaintiffs. The state trial court ruled against the couples in November 2003 and the intermediate appellate court affirmed the trial court, 2 to 1, in June 2005. The state supreme court rejected those decisions.

In October 2006, the New Jersey Supreme Court ruled unanimously in *Lewis v. Harris* that same-sex couples were entitled to equal relationship recognition. However, the court split, 4 to 3, on the remedy. The majority adopted the Vermont Supreme Court position in *Baker* that the New Jersey Legislature must either provide equal marriage rights to same-sex couples, or create a parallel institution like civil unions. The dissenting justices sided with the Massachusetts Supreme Judicial Court, believing equal marriage was the only remedy to cure the constitutional injury.

For one powerful Democratic leader, Senator Raymond Lesniak, the *Harris* decision prompted him to sponsor legislation to provide equal marriage rights to same-sex couples. Lesniak recalled:

> I've always been a supporter of gay rights, going back to when we amended the law against discrimination to include sexual orientation. But, that was it. I was just a supporter. I was never an advocate…. I called [the executive director of Garden State Equality] and congratulated [him] on the big win. He said, "no, its not marriage. It's a loss." I shared the conversation with my girlfriend, Selina Cowell, who was on the board of Garden State Equality, and she said, "No, he's right its not the same thing."
>
> And that's when I realized how important it was to allow same-sex couples to marry. It's practical. But it's also societal, and getting society to fully accept gays and lesbians. I called up Senator Weinberg and said I wanted to be your co-prime sponsor. And we worked daily and tirelessly on conferences with Senator Baroni and Governor Corzine's Josh Seitz, trying every single thought as to how we'd get the votes.
>
> And we we're hoping for a miracle that never showed up. We were hoping that maybe some Republican or a Democrat might have a son or a daughter tell them, I'm gay and this is important to me, and turn that vote and turn that tide. But that never came. The Legislature opted to enact civil unions, which Governor Jon Corzine signed into law that December. [176]

The 2006 civil union statute was criticized for non-compliance. The New Jersey State Bar Association raised concerns that because the public did not widely understand civil unions, or the legal precedent that required them to be treated as functional marriage equivalents, By May 2007, the New Jersey Division on Civil Rights received some 270 inquiries from civil unionized couples questioning the permissibility of allegedly denied benefits by employers and/or insurers, according to a report published by the *Star-Ledger*. Only two formal complaints were registered with the New Jersey Division of Civil Rights by June 2007, however. After Democratic Governor Jon Corzine lost his reelection bid to Christopher Christie in November 2009, Corzine offered to sign an equal marriage bill into law and remedy these concerns. That bill never made it out of the Senate, failing 20 to 14 on the floor in a January 2010 lame duck vote.

Senator Lesniak, who was the Marriage Equality Act's lead sponsor along with Senator Loretta Weinberg, saw the defeat as a regrettable but crucial step:

> It was beneficial, when I looked and saw 14 on the board, I looked at Senator Sweeney, I looked at him, and he put his down. I said, "The vote fails, close the board." And immediately, Senator Sweeney came over to me and said, "I let you down. I let myself down. It won't happen again.[177]

Two years later, the New Jersey Legislature made another push for marriage equality. This time, however, they worked under the veto threat of Governor Christie, who stood in opposition of the marriage legislation. In 2012, Senate President Stephen Sweeney took charge of the mission to navigate the bill through his chamber. Sweeney noted that his work was easier because his colleagues has the opportunity to look at other jurisdictions that embraced full marriage rights for same-sex couples. Sweeney recalled, "A lot has changed over just the last two years. Other states and countries had enacted same-sex marriage laws and people saw that the world did not come to end. In fact, they saw that nothing changed at all, except for those couples that had waited so long to get married. That understanding showed a lot of folks that it was okay to support this issue."[178]

The Marriage Equality Act passed the Senate 24 to 16 and the Assembly 42 to 33. Governor Christie vetoed the bill, instead calling for a statewide referendum. When New Jersey Senate leaders were asked why the legislation's fortunes changed between January 2010 and early 2012, many of them pointed to other jurisdictions progress on the issue.

The bill's longtime and most visible sponsors, Senator Weinberg and Senator Lesniak, credited the steady hand of Senate leadership for the victory and highlighted the impact of New York's 2011 equal marriage law. Weinberg said, "The time made a big difference. The most important was the important was the evolution of our Senate President, Steve Sweeney. He not only supported the bill, but provided the leadership. I think after New York, we saw that the world didn't fall a part. Cathedrals didn't close."[179]

Senator Lesniak echoed his co-sponsor's assessment of the landscape. "The key reason

why we got the votes this time was because of leadership of Senator Sweeney and New York was a huge boost—we had the cover of our state to the north approving of marriage equality and having a fair number of Republicans supporting it as well," Lesniak observed.[180]

While leaders in the House and Senate worked to secure a sufficient number of votes for a veto override, the United States Supreme Court's decision in *Windsor v. United States* did heavy lifting in New Jersey. Because New Jersey offered same-sex couples no marriage recognition, but the federal government would recognize same-sex marriages for federal benefits in *Windsor*'s wake, Mercer County Superior Court Judge Mary C. Jacobson ruled that the state must allow same-sex couples to marry in order to comply with *Lewis v. Harris*. Governor Chris Christie appealed the trial court ruling and applied for a stay. The New Jersey Supreme Court agreed to hear the Christie Administration's appeal, but unanimously denied the stay request. With the New Jersey Supremes signaling a likely defeat on the merits, Governor Christie withdrew his appeal and New Jersey became a same-sex marriage recognition state in October 2013.

CONNECTICUT

Connecticut's Supreme Court ruled in October 2008, in *Kerrigan v. Department of Health*, that the state could not deny equal marriage rights to same-sex couples under the state constitution. The Connecticut legislature, like in California, signaled serious support for same-sex marriage rights and LGB rights long before the decision. In 1991, Connecticut was one of the first states to enact civil rights protections to safeguard against sexual orientation discrimination.

Relationship recognition for same-sex couples garnered substantial legislative support prior to the Supreme Court's ruling *Kerrigan*, but after litigation began. On the heels of their success in Massachusetts, GLAD filed a lawsuit in state court in August 2004 challenging the

state's exclusion of same-sex couples from marriage.

The following spring, Connecticut became the fourth state after Vermont, Massachusetts, and California, to offer serious recognition to same-sex couples' relationships. In April 2005, Republican Governor Jodi Rell signed civil union legislation into law. Though the civil union legislation afforded same-sex couples with the same tangible benefits available by marriage, the legislation took the added step to define marriage as limited to a union of a man and woman. The 2005 law altered the question before state courts: did separate-but-equal relationship recognition comport with the equal protection guarantees of the Connecticut Constitution? A July 2006 Superior Court judge ruled in the affirmative, writing:

> Civil union and marriage in Connecticut now share the same benefits, protections and responsibilities under law. ... The Connecticut Constitution requires that there be equal protection and due process of law, not that there be equivalent nomenclature for such protection and process.[181]

While GLAD appealed the lower court ruling, State Senator Andrew McDonald and State Representative Michael Lawlor announced House Bill 7395 to grant full marriage rights to the LGB community. That bill passed the joint Judiciary Committee on a 27 to 15 vote in April 2007. The legislation failed to make it to a floor vote under the threat of a veto from Governor Rell.

After the *Kerrigan* decision came down, the General Assembly scrubbed the code of gendered language concerning marriage and incorporated limited public accommodations exemptions for objecting religious institutions and organizations from any requirement that they facilitate marriages inconsistent with their faith. That effort sailed through the House by a vote of 100 to 44 and the Senate by a vote of 28 to 7. Governor Rell signed the legislation soon thereafter, codifying *Kerrigan* in the state code.

IOWA

When the Iowa Supreme Court ruled in *Varnum v. Brien* in April 2009, Iowa became the first state in the Midwest to recognize same-sex marriage. Iowa, however, had enacted progressive legislation less than two years before to protect Iowans from sexual orientation discrimination in employment, public accommodations, credit, housing and education.

That legislative achievement notwithstanding, the Democratic controlled legislature was not necessarily open to extending marriage rights to same-sex couples.

A 2008 *Des Moines Register* poll of state legislators recorded 123 of 150 members of the legislature opposing marriage equality.[182] After the state district court judge stuck down Iowa's anti-same-sex marriage law, House Republicans attempted to advance a constitutional amendment to foreclose the litigation. The Iowa Constitution can be amended if a proposed amendment receives a majority vote in each chamber of the legislature for two consecutive sessions. If a proposed amendment attains the required legislative support, it is then placed on the ballot and ratified if it secures a majority approval.

While the *Des Moines Register* legislator count looked grim for same-sex marriage advocates, it was not clear whether there was sufficient political will to move forward with a constitutional amendment. The first indication that pro-amendment forces faced an uphill battle came while the marriage case was set to be appealed to the Iowa Supreme Court. House Republican Leader Christopher Rants utilized a parliamentary tactic to force a proposed same-sex marriage ban out of committee for a floor vote. Rants' move failed on a 50 to 46 party line vote.[183]

After *Varnum* was handed down, political leaders' reactions were mixed. Senate Majority Leader Michael Gronstal, a Democrat, rejected any attempt to overturn the decision, "We're just going to say no to amending our Constitution and putting discrimination into our Constitution."

Gronstal issued a joint statement with the Democratic Speaker of the House, Pat Murphy, "When all is said and done, we believe the only lasting question about today's events will be why it took us so long. It is a tough question to answer because treating everyone fairly is really a matter of Iowa common sense and Iowa common decency. Iowa has always been a leader in the area of civil rights." Governor Culver's response was more neutral in tone. "The next responsible step is to thoroughly review this decision, which I am doing with my legal counsel and the attorney general, before reacting to what it means for Iowa," Culver said.

On the other side of the aisle, calls for a constitutional amendment to reserve marriage for opposite-sex couples were swift. Republican Senate Minority Leader Paul McKinley said, "Though the court has made their decision, I believe every Iowan should have a voice on this matter and that is why the Iowa Legislature should immediately act to pass a constitutional amendment that protects traditional marriage, keeps it as a sacred bond only between one man and one woman and gives every Iowan a chance to have their say through a vote of the people."

State Representative Dave Heaton called for an amendment, but also acknowledged a need to offer some form of relationship recognition to same-sex couples. Heaton said on the matter, "I firmly believe marriage should be between a man and a women but at the same time, I believe we should address these issues," Heaton said. "I would rather recognize a civil union than to have same-sex marriage."

Throughout the remainder of the 2009-2010 legislative session, Leader Gronstal and Speaker Murphy stymied votes on an anti-*Varnum* amendment. In 2010, Democrats lost their House majority. In February 2011, the House approved Joint Resolution 6 by a vote of 62-37. Once again, the Democratic leadership in the Senate blocked any movement on the resolution.

By 2014, the obituaries on pro-amendment efforts were written. Republican House

Speaker Kraig Paulsen, a *Varnum* detractor, offered lukewarm support for the idea of pursing a marriage amendment, telling the *Des Moines Register*, "It still makes sense to me that Iowans should have a chance to decide which direction they want to go." Speaker Paulsen, however, gave little in terms of a firm commitment to hammer an amendment through if political dynamics changed in the Senate.

As late as 2014, Governor Terry Branstad maintained his opposition to the Iowa Supreme Court's decision. Meanwhile, The Republican Iowa Senate Minority Leader Bill Dix was cautious and refused to comment. The *Des Moines Register* summarized it, "Five years after the Iowa Supreme Court's *Varnum v. Brien* decision struck down a state law banning same-sex marriage, the issue has all but fallen off the political agenda."[184]

VERMONT 2007-2009

In July 2007, by joint action of the Speaker of the outgoing Vermont House of Representatives, Gaye Symington, and the President Pro Tempore of the Vermont Senate, Peter Shumlin, created a commission charged with examining the status of same-sex couples and their families. That body, the Vermont Commission on Family Recognition and Protection, took testimony at eight hearings throughout the state and held a special ninth hearing on legal issues at the Vermont Law School. At each hearing, legislative counsel Michele Childs explained the legal history leading to the state's civil union state to the public and described the legal status of same-sex couples across the nation.

The Commission found that supporters of full marriage rights for same-sex couples believed that the civil union statute failed to comply with the Vermont Constitution's equality mandate as articulated in *Baker*. The Commission's official report also noted a common theme across the meetings:

> Witnesses often drew analogies between the civil union law and the U.S. Supreme Court's 1896 decision, Plessy v. Ferguson in which the Court upheld the constitutionality of a state law imposing racial segregation in public accommodations (specifically, railroad passenger cars), provided the accommodations were equal. Frequently during this testimony, the Commission heard comments about second class citizenship, stigmatization, and "separate cannot be equal."[185]

In addition to recording the public's opinions on legal nature of civil unions, Vermonters in support of equal marriage offered examples of ways they found civil unions unworkable. Participants explained during these meetings that civil unions required additional explanations to others who did not understand them or extra paperwork. Concerns were also expressed that civil unions were less portable across state lines than marriage. Though at the time only Massachusetts permitted same-sex couples to marry, Rhode Island and New York recognized out-of-state same-sex marriages as marriages. The Commission concluded that, taken as a whole, the "testimony reflects the evolution of attitudes in Vermont since the enactment [civil unions] toward greater and more open acceptance of gays and lesbians in Vermont society, community, and public life."[186]

Opponents registered their views with the Commission, too. However, some anti-gay rights leaders urged social conservatives to not participate in Commission hearings because of perceived bias among those empaneled. Marriage opponent Craig Benson called the body a "kangaroo commission" and because it was "the left having a dialogue with the far left."[187] Stephen Cable, the president of the opposition group Vermont Renewal, urged "Vermonters to boycott the hearings and pay no attention to the report" because it lacked bipartisan direction, he argued.[188]

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

During the legal issues session of the Commission's meetings at Vermont Law School, Professor Greg Johnson and Professor Michael Mello, experts on civil unions, and Professor Peter Teachout, an expert on the Vermont Constitution. Mello recommended the Commission follow the lead of the Massachusetts Supreme Judicial Court when it rejected legislators' attempt to create civil unions for same-sex couples in lieu of marriage. Mello stated, "A more profitable enterprise would be to study the effects of civil unions as a substitute for marriage. This is precisely what the Massachusetts court did in Goodridge II. The court recognized that the good intentions of civil unions legislators were beside the point. The Commission should do so as well."[189]

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

> The dissimilitude between the terms "civil marriage" and "civil union" is not innocuous; it is considered a choice of language that reflects a demonstrable assigning of same-sex,

> largely homosexual, couples to a second-class status...The [civil union] bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits...The history of our nation has demonstrated that separate is seldom, if ever, equal."[190]

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

The Commission made a series of findings in its final report, most notably that extending marriage to same-sex couples would offer LGB Vermonters access to the intangible benefits that were of significant consequence. In giving same-sex couples access to the terminology of martial relationships that hold "social, cultural and historical significance," the state would make a "strong statement of inclusion." Further, the Commission found that affording same-sex couples equal marriage rights would likely "enhance the portability of the underlying legal consequences of the status." However, the Commission declined to recommend to the Vermont General Assembly whether to take action on legislation that would make marriage equality a reality. The Commission did nevertheless encourage lawmakers to consider four questions before taking action including additional consideration of easing tax filings, research on same-sex couple child rearing, and took care to point to Massachusetts:

> What has been the experience of the Massachusetts lesbian and gay couples who have married under Massachusetts law? Are these couples successfully obtaining all of the rights, privileges, and benefits of marriage – under Massachusetts law, federal law, and the laws of other states? Are their marriages more readily understood and more portable than a Vermont civil union?[191]

House Speaker Gaye Symington appointed Johannah Donovan to the Commission seat representing the House because Donovan was both a supporter of equal marriage and a devout Catholic. Though she pointed out that "*Baker* started the conversation," marriage equality advocates benefited from the "right [legislative] leadership in the right places at that time."[192] One of leadership's priorities was to continue that conversation by forming the Commission. The Commission's work was a success in Donovon's eyes because it offered a forum to exchange personal stories and bring added normalcy to marriage rights for same-sex couples. She explained:

> We heard stories from kids talking about their two mothers. And we heard stories from couples that had been together for decades. It was really incredible. There was only one thing that remains in my mind that was negative. It happened in Rutland on a Saturday afternoon. One man stood up and gave up a very hateful, anti-gay speech and I remember being just shocked. Overall, it was just a fascinating experience. But, as people attended those meetings and to have them hear those stories was very helpful. Without *Baker* and without civil unions, we probably wouldn't have gotten there. I remember people in my church coming up to me and saying, "We're okay with civil unions but you don't know need to go to marriage." And I said to them a few years back you were uncomfortable with civil unions and that the same would be true for marriage. It was all just part of an evolutionary process for people.[193]

Former House Judiciary Chairman Tom Little, who chaired the Commission, agreed that there was relatively little opposition expressed throughout the hearings. His pulse on Vermonters' attitudes, like Donovan's, indicated that with time equal rights for same-sex couples accrued legitimacy and opponents' desire to fight another battle waned. Little said:

> At one point, three members of my committee said, "Tom, we keep waiting to hear the rational testimony in opposition of this committee. All we hear are people who are hateful or citing religious text. When will we hear the reasonable opposition?" I said, "I think its possible the reason you're not hearing the testimony is because there is no reasonable opposition." After civil unions were in effect for 5 or 6 years they said it isn't that bad or the sky doesn't fall or these are my neighbors, and so some of them just they didn't want to fight another battle over it.[194]

Many Vermont legislators cautiously watched developments in Massachusetts and elsewhere in the wake of the *Baker* decision and subsequent civil union legislation. Between 2000 and 2009, courts in Connecticut, Iowa, and California joined Massachusetts and extended the freedom to marry to same-sex couples.[195] The once "progressive" civil union law in Vermont now lagged behind and some elected officials began to rethink Vermont law in light of the new marriage rulings. At the same time, the pushback against marriage equality energized the Vermont Freedom to Marry Task Force. The success of Proposition 8 in November 2008, banning same-sex marriage in California, "was a real wake up call to us here in Vermont and it really helped motivate our people in the field," Beth Robinson said.

State legislators were paying attention to national developments, too. Republican Heidi Schuermann recounted that case law development across the country provoked her to rethink the status of Vermont Law. Schuermann was not in the House during the civil union debate and in her second term when the marriage debate came to a head. Schuermann's attention on equal marriage rights was more gradually cultivated in comparison to some of her House colleagues present for the *Baker* debate. Schuermann said, "Knowing we had civil unions, which at the time I thought they essentially gave all the rights and protections to gay and lesbian couples that marriage did, so I didn't give it much thought. So after Massachusetts and Iowa, it came to the forefront more and more."[196]

House Speaker Shap Smith likewise observed that the judicial decisions legalizing same-sex marriage might have shifted the dynamic in Montpelier. "People here have seen what [marriage equality] looks like and realized it doesn't harm anybody," Smith said.[197] Beth Robinson echoed a similar perspective telling Fox News in 2009 that "the fact that we're not dealing with an unknown, that we can look at our neighboring states and see that families are

stronger and nobody has lost anything, that makes it a lot harder for folks to argue against it here."

After courts ruled in favor of marriage equality in California, Connecticut, and Massachusetts, in the fall of 2008, then-Speaker Designate Smith knew the sufficient number of votes to enact marriage equality in both chambers of the legislature. For him, "the question was whether the bill would be vetoed or not and we thought about it. It was not clear that the votes were for an override."[198]

Republican Governor Jim Douglas history on LGBT issues was thin. In 2007, Douglas signed a landmark civil rights bill banning gender identity discrimination in public accommodations, housing, and employment.[199] That bill, however, also passed with a veto proof majority.[200] Mindful of that, Bill Lippert speculated that "maybe if there was a strong enough vote, he'd let it go."[201] Some advocates were hopeful because Douglas was a member of the LGBT friendly United Church of Christ.[202] But for some legislators, like Assistant House Majority Leader Lucy Leriche, the presumption was that Governor Douglas would veto any marriage equality bill that reached his desk.[203]

The challenge for the Task Force and marriage equality advocates in 2009 were twofold. First, advocates had to persuasively demonstrate that civil unions were insufficient substitutes for marriage. On the this point, Beth Robinson noted:

> We were in a different position because the rhetorical conversation we were having. We were not moving from a place of nothing to a place of marriage. The challenge we had was persuading people that even in a world of civil unions that it was worth revisiting the conversation even though it was painful for the state the first time around.[204]

One tactic Robinson used to explain the importance of marriage and dispel the idea that civil unions were sufficient was a letter writing campaign. Robinson had Vermonters pen handwritten notes to legislators explaining the importance of marriage to the everyday life of

LGB persons. Republican Minority Leader Patti Komline received one of those letters, which Komline suggested factored significantly in her decision to support a same-sex marriage bill:

> We got handwritten letters, which were powerful, from people. In fact I got one from a young man, who wrote he kept a bottle of pills under his bed and thought about killing himself every night. And how it felt to just be unaccepted and unwanted. And that really moved me and made me think. After that, I knew where I stood.[205]

As minority leader, Komline's support was a major boost for the Task Force's efforts. As the House Republican's caucus leader, Komline signaled to rank-and-file members of her caucus that they could support the measure. Equally important, however, Komline had a direct line to her co-partisan, Governor Douglas.

The second hurdle advocates needed to overcome was assuring legislators that marriage equality would not enflame social strife, like some perceived the civil union law did in 2000. Representative Mark Larson, who along with David Zuckerman introduced the 2009 marriage equality legislation, focused on a political messaging strategy to ease legislators' nerves. Larson said that the Take Back Vermont episode in 2000 created lasting scars that required tending to:

> The big concern was not that there was a pushback on the merits but on the political dynamic. We were concerned that because civil unions had been such a dramatic process, people were worried that marriage equality would cause us to revisit all the trials and tribulations of passing civil unions. The challenge was trying to show people that it wouldn't be as bad as civil unions. We needed to continue the education. We just needed convince people to stick to it.[206]

Few observers doubted the prospects for marriage equality's success in the Vermont Senate. Claire Ayer, a Democrat and the Senate Majority Whip, had a good feeling about the prospects in the Senate where members "generally voted on party lines."[207] "We had it all along because we had a 23-7 majority. It was a slum dunk in the Senate,"[208]Ayer said. The Senate under the leadership of Senate President Peter Shumlin, Majority Leader David Campbell, and Ayer quickly pushed a same-sex marriage bill through their chamber. It won unanimous

approval from the Senate Judiciary Committee and sailed through the chamber on a 26-4 floor vote.

Governor Jim Douglas weighed in after the Senate's passage and committed to veto the legislation during the House's deliberations. Given the large margin of victory in the upper chamber and Democratic supermajority, Douglas' veto was irrelevant. His announcement caused some consternation among supporters who feared Douglas' premature intervention destabilized efforts in the House. Senate President Peter Shumlin appealed to Governor Douglas to reconsider his position. Taking to the media for his plea, Shumlin highlighted same-sex marriage progress in neighboring states:

> That was a huge fight 9 years ago and what the governor seems to have missed is that Connecticut and Massachusetts allow marriage, now the New Hampshire House, I never thought I'd see this, passed it yesterday... I thought that the way the debate happened in the Senate was a reflection of how things have changed we saw folks who never would have voted for civil unions 9 years ago stand up and vote for this marriage equality bill.[209]

The first significant legislative test for the bill in the House was in the House Judiciary Committee. One Judiciary Committee member, Republican Heidi Schuermann, was a 38-year-old Catholic representing a heavily French Catholic region of northern Vermont. Schuermann was hesitant to support the marriage bill and was nervous about a second coming of the Take Back Vermont movement. "I thought at the time we were doing something we didn't need to do and we needed to focus on the economic issues and face the recession. I was concerned about the contentiousness," she said.[210]

But as Schuermann listened to testimony in Committee, she concluded the Vermont civil union law was "inherent discrimination."[211] However, Schuermann had one serious concern that she had hoped to address before giving her blessing to bill. Religious liberty, Schuermann said,

"was my most significant concern. I wanted to ensure that equality was there, but at the same time, I wanted to make sure that the language in the public accommodations act allowed [religious organizations] to keep doing the things they've always done."[212]

Advocates considered the rights of religious objectors to same-sex marriage and restated the protections afforded by the First Amendment for clergy to perform marriages consistent with their faith in the legislative text. The first iteration of the Vermont law stated clergy could not be compelled to perform marriages "in violation of the right to religious liberty protected by the First Amendment to the United States Constitution and by Chapter I, Article 3 of the Constitution of the State of Vermont."[213] Thus, the original bill did not afford greater religious liberty protections than constitutionally mandated; specifically it did not touch on whether religious organizations could lawfully deny providing accommodations and facilities for same-sex couples' weddings. However, Beth Robinson worked to address the concerns expressed by Schuermann. Robinson said:

> There's the part in the [introduced] bill that we proposed that affirmed what the Constitution required that no clergy would be forced to perform a same-sex marriage against their will. There were a couple of specific issues that came up, and one was the meeting hall. In many small towns, the local church serves as the meeting hall. It came down to [Heidi Schuermann] who had a pastor in [her] district who feared they'd have to rent out their coffee hall for same-sex wedding services or receptions.[214]

Robinson, Schuermann and Chairman Lippert then crafted religious accommodations. Those accommodations reaffirmed constitutional rights of clergy and exempted religious institutions and organizations from requirements to provide same-sex couples health insurance benefits. The new provisions also created a carve out in the state's public accommodations law. The Vermont bill provided:

> [A] religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services,

> accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage or celebration of a marriage.[215]

Schuermann believed out of principle that robust religious liberty protections were a necessary feature of a marriage equality bill. Others, however, saw the accommodations as a pragmatic exercise of politics. Chairman Lippert "thought it was more of a political compromise than anything else."[216] Bill sponsor David Zuckerman said "[i]t certainly persuaded some people. It gave others cover."[217] House Speaker Smith saw the added accommodation language in a more virtuous light. "It was very important. People needed to really see that we were not requiring religions who didn't think gay marriage was right that we weren't going to force it on them,"[218] Smith said. Assistant Majority Leader Leriche was the most blunt, saying, "We couldn't have done it without the religious liberty exemptions. If we could have, we would have, honestly. But we would not have been able to get enough votes without them."[219]

After wrangling over the scope and limits of the religious exemptions, the Judiciary Committee sent the amended legislation to the House floor by a vote of 8-2. On the House floor, debate was intense and deeply personal. While those voting no typically cast their reasoning in terms of tradition, those expressing support did so with rhetoric focusing on equality, the Constitution, and invocations of Civil Rights Movement-era imagery. Kesha Ram, a 22-year-old, first term representative and the only person of color in the Vermont House, made the clearest comparison the Civil Rights Movement:

> To say that Civil Unions offered the same rights as marriage is nothing less than saying once upon a time there are two drinking fountains that both dispense the same water. I vote yes to lift this final weight of off the shoulders of your otherwise free society.[220]

In a press release building up to the debate, Ram invoked the Civil Rights Movement and specifically drew parallels between marriage equality and *Loving v. Virginia*— the Supreme

Court decision that finally recognized that the fundamental right to marry extended to interracial couples:

> As the product of an interracial marriage myself, I cannot help but remember *Loving* and wonder how my life and that of President Obama would have been changed if the Supreme Court had not set a moral compass for marriage as a civil right forty years ago. We stand at a historical crossroads where lawmakers have the power to make bans on marriage due to sexual orientation as repugnant to our Constitution and our ethical code as bans on interracial marriage have become.[221]

Gary Gilbert, a legislator from rural Fairfax told the House that he duty bound to vote in favor of the legislation no matter his personal views:

> Simply because I, as an individual believe that marriage is a sacrament and chose to be married within a church, does not mean that everyone must have the same beliefs. Others may choose a civil marriage ceremony, a civil union, a different church, or nothing at all. These alternatives have absolutely no affect on my marriage, my faith, or my individual commitment to my wife and family. They cost me nothing. The choice to marry is a public declaration of a personal choice made by a couple that loves and is committed to care for each other. As a person, I cannot deny the rights to others that I claim for myself. As a legislator, I must uphold the Vermont and U.S. Constitutions and my Oath of Office. I support this bill.[222]

Bill Lippert was the only openly gay member of the House in 2000, but he was not alone in 2009. Suzi Wizowaty, a lesbian, gave her first speech on the House floor describing the pain caused by the necessity of asking her fellow legislators for rights.[223] Steve Howard, another openly gay member, talked about the struggle he endured as he came to grips with his sexual orientation. "I stand because nobody should be ashamed of how God made them," Howard told his colleagues.[224]

Jason Lorber, another openly gay member of the House, delivered an emotional speech.[225] Lorber talked about his husband, whom he married in a religious ceremony, and their son. In what numerous legislators referenced as the most moving speech of the day (but none

describing as dispositive of their votes), Lorber recounted his painful struggle with the separate-but-equal status afforded by Vermont's civil unions:

> After we were married we sent our photo into the [*Burlington*] *Free Press*. And a while later we opened up the newspaper and we saw all the photos of the beautiful, beautiful couples who were married and it said "Weddings." … and then there was our picture, too, under the banner "Civil Unions." It was nice. It was nice to see our photo there. But I thought this is a shame. Why does it have to be off to the side? Why do we have to differentiate? Why do we have to say, "You are different?" Why can't we just say "congratulations?"[226]

Lorber's speech was the last before the bill passed 94-52. The amended bill was agreed to by the Senate without debate and promptly vetoed. The next day, the House reconsidered the bill and attempt to override. To be successful, marriage equality proponents needed to hold onto each of the bill's original supporters and pick up 6 more if every member voted.

There was deep skepticism among some Democrats that Republicans might waiver. Those fears were unfounded, which the Republican caucus' leader credited to Governor Douglas' unwillingness to pressure House Republicans to sustain the veto.[227] Komline recalled Douglas telling her, "If anyone gives you a hard time with this, tell them to come to me."[228] The Governor's commitment to Komline was imperative from her perspective. "I know that at least one of those Republican votes would have switched if that hadn't happened," she estimated.[229] The veto override was successful on a 100-49 vote.

One of the six additional votes came from Republican Richard Westman. Westman, a member of the House since 1983, voted against the civil unions bill in 2000. When asked how he came to support equal marriage rights, Westman said he was "dragged along with the rest of society." While he could not point to any particular moment where his views started to evolve, he

> I think the marriage legislation was anti-climatic because the die had been cast in many respects in *Baker* and Vermonters had made a decision that we were going to recognize

> the rights of same-sex couples to marry. I think the *Baker* decision and civil unions and the incremental decisions we faced with health care and insurance and where same-sex couples fit had brought us to a place. I think that the jolting decision had been the one about civil unions and so what happened in other places [like Massachusetts and Iowa] mattered a little less. Even with the people who were opposed there was an acceptance of the decision.[230]

There was one conspicuous absence in the 150-member body. Representative Sonny Audette was the only member of the House to not show up for the override vote. Audette voted against the bill the day before. A Burlington Democrat, Audette was 77-years-old and a devout Catholic. On the floor, Audette's explanation for his vote was simple: "I voted no but I respect people for who they are and not their sexual orientation."[231] Immediately after the vote, Audette walked over to openly gay Representative Jason Lorber, consequently also from Burlington, while they lingered on the House floor.[232] Audette, who Lorber described as teary-eyed and visibly shaken, shook Lorber's hand and returned to Burlington.[233] When questioned about his absence, Audette said health reasons precluded his return to Montpelier. Jason Lorber was skeptical of that explanation, offering, "That's what he told the press. But, in my heart I know a different story. That's the power of personal relationships."[234] While Lorber believes his speech had influence on Audette's decision not to return, there is no hard evidence to back up his claim.

Johannah Donovan agreed that by 2009 it "came down to personal stories for some of those legislators" on the fence. "I don't really think the civil rights thing made the difference. We spoke of it. But it was the personal stories that carried the day," she said. Donovan pointed to Audette as one example of how personal connections were dispositive of some legislators' decisions. A number of pro-equal marriage House members were tasked to follow persuadable and undecided colleagues to track and give counsel to during the course of session. Donovan was assigned to Audette and cultivated a friendship with him in the process. "He was terribly

conflicted because he felt empathy but just couldn't get over his religious beliefs. He came down it a case of gout before the override vote. I encouraged him to stay home. And he did," she recalled.[235]

In Vermont, advocates ushered in legislation for equal marriage after 14 years of grassroots labor paired with litigation. When Bill Lippert and Beth Robinson were asked what factors made 2009 different from 2000, Lippert emphasized the importance of more openly LGB legislators who were able to tell their colleagues their stories. Lippert also noted the lifting was less heavy in 2009 because the baseline of support ballooned. During the post-*Baker* debate, only 22 members of the House supported full marriage recognition. In 2009, Lippert had 59 co-sponsors.

Despite benefiting from greater rank-and-file member enthusiasm, holding the House coalition together and override Jim Douglas' veto— the first overridden veto in 19 years— was an uphill challenge since advocates needed to expand their margin of victory. Robinson, for her part, pointed to the same-sex marriage decision in Iowa as an important factor that kept the coalition glued together. The *Varnum* decision "really drove home the inevitability of full equality for same-sex couples," she said. Robinson opined further that the "urge to closure" on the issue was an important boon for the override for legislators who realized LGB Vermonters would not simply give up fighting for equal relationship recognition if the veto was sustained.

NEW HAMPSHIRE

Unlike in other New England states, same-sex couples never filed a constitutional challenge to New Hampshire's exclusion of same-sex couples from marriage. This, despite that the first two articles of the New Hampshire Constitution mirrored the equality-based rights language contained in the Massachusetts Constitution.[236] The decision to not pursue judicial

intervention set up New Hampshire as the first state to legislatively enact civil unions or marriage equality without judicial intervention.

Dissimilar from its neighbors, Vermont and Massachusetts, New Hampshire is far from a bastion of liberalism. The state has a historically conservative/libertarian streak and Republicans have a long record of dominating state politics.[237] However, after a national wave of Democratic electoral victories in November 2006, Republicans were the minority party in both chambers of the 2007 New Hampshire General Court session.

Wasting no time with a left-of-center majority, openly gay member of the House Jim Splaine pressed for a civil union bill.[238] That legislature's ideological leaning notwithstanding, Splaine was unsure the bill would progress.[239] Some Democrats were concerned that the bill could sink their electoral prospects in 2008 and urged Splaine to give pause to civil unions.[240] Placing his reservations and the admonitions of his colleagues aside, Splaine introduced the measure because he "thought the discussion needed to be started."[241]

Splaine's civil union bill was up for a vote the first week of April. However, the week before the House would vote on a resolution to amend the state constitution and ban same-sex marriage. The events on the day of the vote, March 28, 2007, would resonate with numerous legislators and galvanize support for his civil unions bill. In particular, a number of legislators pointed to African-American Representative Carole Estes speech against the proposed amendment as a transformative movement:

> I am 68-years-old and a native Floridian. For the first 38 years of my life, my public actions were limited or impacted by constitutional or legislative fiat. Most of you have never had to deal with the actions that I dealt with every day. By law, I could not go to a theatre; I could not go to a library, or a restaurant where whites were. In fact, I was 18 years old before I ever spoke to a white as an equal. I could not attend a first class elementary or high school. I could not attend a public college. I could not try on any article of clothing nor could I return it when it was purchased. By law, I served in a

> segregated Air Force unit. In uniform, I could not choose my seat on a bus or a train. I could not vote, nor could I marry the man I loved because he was white and I am not.
>
> … Over the last 30 years, I have worked mightily to overcome the feeling of being less than. An irony of ironies, I am now asked to enshrine discrimination in the New Hampshire Constitution, and force a total of 700 same-sex couples who in fact have been enumerated by the 2000 U.S. census to become less than. For too many years, we have spent time believing that I was a second-class citizen. The laws told me so. I cannot perpetuate such a travesty . . .[242]

The House floor, typically abuzz with activity as 400 citizen legislators make rounds on the House floor, was silent as Estes spoke. Splaine said "a hush that spread throughout the Legislative Chambers during the first 10 seconds of her comments.[243] Some House members were walking to their seats from the backroom because the pending vote was about to occur, and I saw many just stop in mid-step, not wanting to miss a word."[244] The House erupted in applause and Estes received a standing ovation once she stepped from the well. The House killed the proposal by a 233 to 124 vote.

The momentum from the proposed same-sex marriage ban carried over into the next week. Splaine's civil union bill went passed the House on April 4th. From there, it sailed through the Senate and signed into by Governor John Lynch. New Hampshire was the first state to enact civil unions without a judicial mandate. Lynch was said that while he personally remained opposed to same-sex marriage, he supported the civil union legislation as a matter of "fairness and preventing discrimination."[245] Like his counterparts in Vermont, Splaine saw civil unions as a stepping-stone for full marriage rights:

> Essentially, it is a marriage without the word. People are going to see that couples in relationships will become more stable, that it's good for families, that it's good for society. Then I think in a year or two or three or four, the people of New Hampshire will say, 'Why not marriage with the word?'[246]

Splaine began his push for marriage equality in November 2008. His first reached out to Governor Lynch. "I knew the Governor for 35 years, so I asked him to not veto it. Just keep an

open mind," Splaine said.[247] Bishop Eugene Robinson, the first openly gay Episcopal bishop, was the Bishop of the New Hampshire Episcopal Diocese and also lobbying Governor Lynch. Bishop Robinson hoped to impart to Lynch that religious communities were not of one mind on same-sex marriage, a message he continued to disseminate throughout the legislative process. Robinson explained:

> I think the particularly role that I wanted to play, truth be told, was most of the arguments against equal rights for LGBT people come from religious people and religious institutions. It is very easy for people to get the impression that the Religious Right dominates the Christian viewpoint. I didn't want the Religious Right to own the day.[248]

Splaine was worried about the Governor, but had additional concerns because House leadership was "not enthused" by his push.[249] Like members expressed during the civil union debate, some Democrats feared that Splaine's efforts would prove electorally destructive. One openly gay Democratic House member, David Pierce, did not sign onto the bill when it was introduced. "I thought it was way too fast. I thought it was not going to pass and I thought it would set us back. We had just taken the majority and passed civil unions. And I didn't sign on. And now I'm embarrassed by that now," Pierce reflected.[250]

While the governor mulled over signing a marriage bill, hearings began in the House Judiciary Committee. Freshman Judiciary Committee member Rick Watrous recalled that it was in the Committee hearings where he was convinced to support marriage equality:

> There were many gay and lesbian couples asking for equal rights. Their parents were there were speaking on behalf of their adult children. And it was very moving. And that's when I started to really say to myself, "Well, why not?"[251]

But the "why not" rationale was perhaps an easier way to dismiss opponents' lack of substantive reasons to oppose the bill for members like Watrous who said that ultimately he "saw this as an equality under the Constitution issue. And why not should these people have the same equal rights as heterosexuals, simply because they had a different sexual orientation?"[252] The

entire Judiciary Committee was not equally convinced and deadlocked 10-to-10— an indication of how excruciatingly difficult efforts would be to get the measure through the House. On March 26th, the House debate commenced.

Representative John Cebrowski was the first to speak on the bill's merits, in opposition. His colorful remarks on House Bill 436 would prove to be memorable to legislators. "A peanut butter and jelly sandwich can't be anything but peanut butter and jelly. Creamy peanut butter and chunky peanut butter can never ever be a PB&J, as appealing a snack as marriage between a man and a woman is an appealing institution," Cebrowski told his colleagues.[253]

The Representative was interrupted by a cacophony of rising murmurs from colleagues. Cebrowki's statement was met with harsh rebuke from a fellow Republican and openly gay member, Steve Vaillancourt, who extended Cebrowski's logic to interracial marriage opposition. "It wasn't until, as you've heard earlier, the Supreme Court affirmed in the *Loving* case in 1967 that blacks and whites could marry. Think of it, 40 years ago, blacks and whites could not marry. I guess they wouldn't be considered peanut butter and jelly, huh?"[254] Other moderate members, who were still conflicted over their position, even as the floor debates progressed, were taken aback by Cebrowski's opening. One swing voter described it as "offensive."[255]

Vaillancourt, like Jason Lorber in Vermont, hoped to dissuade legislators that civil unions, as a separate institution, could ever be equal through historical parallels. Marriage equality supporters relied on this framing regularly. One member told the House that he supported marriage equality "because separate but equal is not equal in marriage anymore than it is in school segregation. Separate but equal is not equal in marriage anymore than it is in school segregation."[256]

Another member invoked Carole Estes' 2007 speech in a personal appeal to her colleagues to give equal marriage favorable consideration. Melanie Leveseque, an African-American, was married to a white man. She drew a link between the struggle for same-sex marriage to her own marriage. " I rise in support of HB 436 because discrimination of any kind is wrong. Would you believe that if I were traveling through Virginia in 1966 with my husband, that we would be thrown in jail because in 1966, just about 42 years ago, interracial marriage was illegal," Leveseque offered.[257]

The last floor speech on the legislation's merits came from David Pierce. Pierce spoke to the House about what marriage equality would mean for himself, his partner of 20 years, and two daughters:

> Would you as a married person voluntarily give up your marriage license to downgrade it to a civil union license? Separate can never be equal. That is a fundamental American value. Civil unions are no exception to that rule. . . . When my children grow up to be old enough to understand what discrimination is they should not have to learn that they were the objects of it. They should not have to learn that their family was not accorded the full dignity, respect and protection of the law.[258]

After a series of parliamentary inquiries, Speaker Terri Norelli called the vote. At the time she called the question, Speaker Norelli recalled the hall was filled with "a lot of tension" even though "[a] lot of people thought it didn't have a chance."[259] As Speaker, Norelli could see vote tallies before the members. She looked down at the final numbers before they were announced— 182 in favor and 183 against. Hastily offered motions aimed to bury and kill the bill followed. A motion to table the bill failed 56 to 310. A motion to deem the bill "inexpedient to legislate," and kill it for the session subsequently failed: 177-189. The Speaker was confident after two attempts to plow the legislation under were defeated, the legislation could pass if a motion to reconsider was offered. Parliamentary procedure, however, required a member voting on the prevailing side make that motion.

Cindy Rosenwald voted against the initial vote, but struggled with the vote.[260] She considered the issue, looking to Massachusetts, and concluded that "the sky hadn't fallen" there because of same-sex marriage.[261] For her, the arguments presented by opponents of the bill were less than convincing. Rosenwald was sympathetic towards the bill's merits, but her district's leanings were less clear. She described her constituency as equally divided among Democrats, Republicans, and Independents, with "a high proportion of elderly French Catholics."[262] She erred on the side of political caution and planned to vote no.[263] Rosenwald ultimately saved the bill. She remembered the experience:

> I felt like I was sleepwalking. Because as soon as the vote happened, I thought, okay, I know that my Speaker is going to want to reconsider it. I know that I can move it because I voted on the prevailing side. So I walked up to the podium and said to the Speaker, I will move on reconsideration.[264]

Rosenwald made the motion and the final vote on HB 436 was called. Rosenwald again voted against the bill, but now she was on the losing end.[265] In a stunning, rapid, and unexpected twist of fate, the legislation passed the House of Representatives 186-179. Steve Vaillancourt suspected those last few votes came from sympathetic legislators who needed to muster the political courage to vote in favor:

> I think what really did it was the vote was so really close. I think a lot of people didn't want to vote for it because they thought it was going to lose. But then when a few Democrats and a couple of maverick Republicans realized that they could go out on a limb. I talked to a couple of people who had voted against it and they had swayed their minds.[266]

The prospects in the Senate were murkier given the Democrats' smaller margin of control.[267] The Senate consisted of 14 Democrats and 10 Republicans. The legislation had trouble in Committee. The Senate Judiciary Committee, 3-2, recommended to kill it. The Democratic Committee chair, Deb Reynolds, voted against the measure saying that New Hampshire was "not there yet."[268] Reynolds' position was promptly met by fierce resistance,

notably from the *Concord Monitor*'s editorial board, "If that's the best argument the chairwoman of the Senate Judiciary Committee can make, then the full Senate should have no trouble rejecting the committee's recommendation and quickly passing the gay marriage bill tomorrow."[269] The editors rejected the arguments offered for giving pause to the legislation including the position that the existing civil union statute was sufficient enough to delay consideration of marriage equality:

> New Hampshire's civil unions law took effect in January 2008. Since then, more than 600 same-sex couples have taken advantage of it, thereby winning many of the same rights as those given to married couples. But is there a compelling reason for state law to create separate institutions for gay couples and straight couples? As African-American activists in the 1960s proved so conclusively, separate but equal is a lie.[270]

The bill's failure or success in the Senate rested with Senate Majority Leader Maggie Hassan. Hassan, who would become governor in 2013, thought about marriage equality for some time. Hassan pointed to *Goodridge* as the beginning of her decision-making process, saying, "I started to think about it when the Massachusetts Supreme [Judicial] Court legalized it [in 2004]."[271] Her father, Dr. Robert Cordell Wood, a political scientist and adviser to presidents John F. Kennedy and Lyndon Johnson, fueled in her a passion for civil rights. She was a member of a United Church of Christ congregation that was welcoming of same-sex couples and had no personal religious qualms over the matter. But, Hassan said that while she had no personal difficulty squaring marriage equality with her religious beliefs, she observed others struggle:

> As it came over to the Senate, we were very conscious of the fact that it was a personal vote for every senator. We didn't take a caucus position on the matter. So my overall attitude was to keep us all focused on the economic and budget challenges we had and create some space for senators to think about it.[272]

As other senators considered the bill, Hassan drafted an amendment that she offered on the floor during debate. The amendment clarified the separation of religious and civil marriages

under the solemnizations requirements by explicitly articulating that the solemnization of marriages could be accomplished through either civil ceremony or a religious ceremony. The Hassan amendment also stripped the gender neutral language in the House bill, providing that "[e]ach party to a marriage shall be designated 'bride,' 'groom,' or 'spouse.'" The floor amendment assuaged Senator Deb Reynolds' concerns. She joined 12 of the 13 remaining Democrats in support of the measure, which passed 11-13.

Soon thereafter, Governor Lynch announced that if the legislature added religious liberty protections, like those contained in Vermont and Connecticut, he would sign the bill.[273] "New Hampshire's great tradition has always been to come down on the side of individual liberties and protections. . . . But following that tradition means we must act to protect both the liberty of same-sex couples and religious liberty," the Governor said in a press release.[274] Lynch proposed that religious organizations receive explicit protections from any requirement to participate in same-sex marriages. "If the legislature passes this language, I will sign the same-sex marriage bill into law. If the legislature doesn't pass these provisions, I will veto it."[275] The legislature complied with Lynch's request and the bill was signed into law. Same-sex couples could wed beginning January 1, 2010.

Conservatives swept elections across the nation in November 2010 and New Hampshire was no exception. Democrats lost control of both statehouse chambers, and Republicans secured a supermajority in the House and Senate.[276] Among the first agenda items for some Republicans was a repeal of the 2009 same-sex marriage law. Representative David Bates took little time to introduce a repeal bill that claimed its purpose to further New Hampshire's ". . . unique, distinct and compelling interest in promoting stable and committed marital unions between opposite-sex couples so as to increase the likelihood that children will be born to and raised by both of their

natural parents."[277] A number of observers, including the newly elected Republicans anticipated the effort might be successful. Indeed, the Judiciary Committee's recommendation in October 2012, by an 11-6 margin, to repeal the state's marriage equality law backed that assessment.[278] However, perhaps significantly, Republican leadership did not move the repeal bill until 2012.

In the interim between the Judiciary Committee's favorable report and the full House's consideration, the United States Court of Appeals for the Ninth Circuit decided *Perry v. Brown*, in which the court was called to decide on the constitutionality of California's Proposition 8.[279] Proposition 8 was an amendment to the California State Constitution that banned same-sex marriages after the California State Supreme Court ruled the state could not deny marriage rights to same-sex couples. The *Perry* panel held that Proposition 8 violated the Equal Protection Clause of the United States Constitution because it resulted in ""the deprivation of an existing right without a legitimate reason."[280] The New Hampshire House considered the marriage repeal bill little over a month after the Ninth Circuit's decision and rejected it overwhelmingly. Many of the representatives voting in opposition echoed the same rationale employed in the *Perry* decision for rejecting repeal. This argument formed the basis of a *New York Times* editorial calling on New Hampshire legislators to reject David Bates' bill:

> State legislators in New Hampshire, who are on the verge of writing government-sanctioned discrimination back into state law, might want to take a look at a powerful ruling on marriage equality by the federal appeals court in San Francisco.
>
> A three-judge panel on the court ruled 2 to 1 that the California ban on same-sex marriage, known as Proposition 8, was unconstitutional because it singled out a minority group and took away a right — the right to marry — that had been granted to them by the State Legislature "without a legitimate reason for doing so."
>
> The judges said the United States Constitution "simply does not allow for" laws that are intended only to "lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples."[281]

As one member of the Republican caucus described it, most members of the House grounded their arguments in constitutional, traditional, and libertarian reasoning.[282] Most of the constitutional arguments followed the *Perry* decision's reasoning. One Republican House member opposing repeal said, "[The LGBT community] already had these rights and that we shouldn't take away a privilege that we they enjoying for a number of years. A lot of people thought that was a strong argument."[283] While some conservative legislators described it as a privilege, others described it in slightly different terms stating that if the repeal bill was successful "a right that would be taken away. And that was wrong."[284] For one Republican leader of the anti-repeal movement, the improperness of taking away a right was amplified by fundamental nature of marriage:

> To be quite honest, it was the idea that a body of the government, giving a certain amount of privileges to a group of people and then take them away, playing ping pong with their lives, which depended on who held the majority in the legislature. . . . .How could I look myself in the eye and subscribe to [the call for marriage equality repeal] and still call myself and call myself a defender of constitutional liberties?[285]

While a majority of the Republicans eventually voted against the repeal, many were sure to emphasize that their vote was not support for same-sex marriage. Representative Karen Umberger was one such member who voted against the marriage equality bill in 2009 and against the repeal bill in 2012. "I felt very strongly that if the Legislature had given something to people that we should not take that away. Now, does that change my position on gay marriage? No," Umberger said.[286] While this theme, paralleling the constitutional analysis in *Perry*, was a dominant one, it is less clear that state representatives connected *Perry* to the New Hampshire legislation directly as had the *New York Times* and other media outlets.

Constitutional and rights-based arguments were not confined to the public hearings or floor speeches. Republican House member, David Robbins, questioned the bill sponsor,

Representative Bates, on how he squared his framing of the sanctity of marriage in a fashion parallel to the landmark Supreme Court decision in *Griswold v. Connecticut*. Robbins pointed out that the Supreme Court described the institution of marriage as "intimate to the degree of being sacred" in *Griswold*.[287] That opinion invalidated a state statute prohibiting married couples from purchasing birth control and was relied upon in striking down abortion prohibitions in *Roe v. Wade*. Representative Robbins recalled, "We sat and talked about the bill and I said it seemed ironic that he was using some language with *Griswold*, given he's pro-life."[288]

The lead organizer of Republicans opposing the marriage equality repeal bill was Representative Michael Ball. Representative Ball was not a native of New Hampshire. Indeed, his family had long standing ties in the Deep South. Representative Ball's motivation for building a coalition to defeat repeal efforts was animated largely by his experience in the South:

> I agreed that it was appropriate from the standpoint, a basic liberty standpoint, that all citizens deserve equal protection under the law and we can't utilize the government to discriminate. It was in 1950s and 1960s in Georgia and Florida wanted to [discriminate against] black people and its wrong to do it against another group now. I grew up in a segregated elementary school in Orlando, Florida. So I remember first hand what it was like to grow up around government discrimination. I saw that. And my family is from South Georgia. And [I remember] talking to my grandfather who worked in [the Georgia towns of] Thomasville and Valdosta during the Depression. And he was criticized for having his black workers ride in the front of his truck. And my grandfather saw them as being just like him.[289]

Thus, not unlike prior experiences in New Hampshire and elsewhere in New England, first hand experience encountering racial discrimination in the Deep South profoundly moved key legislators to take decisive action to promote LGBT equality.

MAINE

At the same time that Vermont and New Hampshire considered marriage equality legislation, activists in Maine encouraged legislative leaders to follow suit. Unlike Vermont and New Hampshire, Maine did not create civil unions prior to introducing marriage equality

legislation. Passage was all but assured in the liberal lower chamber. The Senate was of more concern to advocates.[290] Activists' concerns focused on who sponsor the bill and the governor's position— Governor Baldacci never publicly supported same-sex marriage. In 2005, Governor Baldacci supported sexual orientation nondiscrimination legislation, but simultaneously rejected extending marriage rights to same-sex couples. "I have publicly and consistently said I do not support same-sex marriage and I would not support same-sex marriage,"[291] Baldacci said in 2005. Garnering the Governor's support was an especially crucial hurdle to jump because same-sex marriage activists did not believe they could secure veto proof majorities. By 2009, the governor indicated that he was more opened minded on extending relationship statuses to same-sex couples while mindful of the events unfolding throughout New England. Baldacci told the press the day following the Vermont marriage bill veto that he would "listen to what's taking place in our neighboring states, learn as part of that process, but at the same time [have an] independent process in evaluating" proposed legislation in Maine.

In the Senate, the biggest threat to a marriage bill came from pro-equality-leaning members who might opt for incrementalism and adopt civil unions. The Senate robustly debated civil unions and marriage, with numerous invocations of *Plessy v. Ferguson* and *Brown v. Board of Education*. One senator, Deborah Simpson, rejected civil unions out of hand. Senator Simpson said, "The Constitution says that we all have equal protection under the law so to find some other way to get that protection, a different kind of protection, seems profoundly unfair. Separate but equal were struck down for the public school system because it is fundamentally unfair to do something differently. To treat one class of citizen differently is nothing but unfair and unequal."[292]

Senate President Libby Mitchell also opposed civil unions. Mitchell said her opposition to creating a parallel institution to marriage for same-sex couples stemmed from a law school discussion on marriage equality:

> I went to law school very late in life. In fact, I often joke I got my law degree the same year I got my Medicare card. But in law school, the partner of Mary Bonauto in law school taught me. And law student asked, "What's wrong with civil unions? And she said, "What part of equality don't you understand?"[293]

As Senate rejected calls for civil unions in favor of full equal marital rights, religious opposition to the legislation spiked. In a show of force not seen in the other New England states, the Catholic Bishop for the Diocese of Portland, which includes the entire state, wrote each Catholic member of the Maine Senate. Senator Dennis Damon recalled, "A good friend of mine, a Catholic Senator from Bangor, got a handwritten letter from the Bishop of [Portland] Maine. As it turns out, the other Catholic members of the Senate received similar posts."[294] Those letters were prominently debated at length on the Senate floor. Senator Nancy Sullivan spoke on the Senate floor about the letters within a constitutional framework:

> Today I stand before you, not as a Christian, not as a happily married heterosexual woman; I stand before you as a legislator, as you are. Now I have a different criteria to meet. When we were all sworn in we promised to uphold the Constitution of the State of Maine and of the nation. I pledged to uphold that Constitution, that premise of life, liberty, and the pursuit of happiness. The tenant of the separation of church and state. Every single argument I have heard against this bill is based on religion, the very thing that started our country when the Puritans came here seeking religious freedom from the Church of England.[295]

Once the House and the Senate passed the bill, Senate President Mitchell and Senator Damon left the floor and personally delivered the bill to Governor Baldacci. Governor Baldacci signed it less than an hour after it was presented to him despite his 2005 remarks and the strong opposition of clergy. But for Baldacci, a Catholic, his decision-making process required him to remove himself from the doctrinal constraints of the Church and think of the legal merits of marriage equality. He decided to sign the bill:

> When Pat Ende, my legal counsel, came in he said "You know, John, this issue has changed. The more you look into it, when you think about the Equal Protection of the law and how it impacts these families by not having marriage. It is important." I kept thinking of President Kennedy. I'm a practicing member of the Catholic Church and had been an altar boy and I realized how important the church is in my life. But I don't represent just Catholic people but I had to think of all people. It was an evolving maturing process.[296]

While the Governor became the first governor to sign a same-sex marriage law in the United States, the victory was short lived. Mainers collected the requisite number of signatures necessary to place the statute up for referendum, known as a People's Veto.[297] In November 2009, a majority of Mainers voted to overturn the law.[298] Same-sex couples did not have marriage rights until 2012 when a majority of voters supported an initiative to recognize same-sex marriage.

NEW YORK

Though same-sex marriage bills were introduced in 2001 and early in 2003,[299] same-sex marriage advocates had little momentum until 2004. The state's gay rights leaders hoped the *Goodridge* decision would dislodge the entrenchment. State Senator Thomas Duane greeted the Massachusetts decision as "helpful to the legislative process."[300] Duane predicted that, like Massachusetts, "same-sex marriage [would] be recognized in New York."[301] Alan Van Capelle, the executive director of the statewide gay rights group, Empire State Pride Agenda, said *Goodridge* should serve as a catalyst for action. "This decision should be a wakeup call for New York. For those folks in Albany who think they're leading, they're not. They're falling behind," he said.[302]

Van Capelle's call to action was realized shortly in New Paltz after the mayor commenced marrying same-sex couples and Attorney General Eliot Spitzer's offered guidance that New York would recognize gay couples marriages contracted in Massachusetts.[303] Spitzer's

concurrent demand that clerks not issue same-sex couples marriage licenses prompted a lawsuit challenging the constitutionality of New York law under the New York State Constitution. In 2006, the New York Court of Appeals settled the dispute in *Hernandez v. Robles*, ruling that limiting marriage rights to heterosexual couples did not violate the New York State Constitution's Equal Protection provision. The Court's majority concluded it was a decision left for Legislature:

> The dissenters assert confidently that "future generations" will agree with their view of this case. We do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives. We therefore express our hope that the participants in the controversy over same-sex marriage will address their arguments to the Legislature; that the Legislature will listen and decide as wisely as it can; and that those unhappy with the result—as many undoubtedly will be—will respect it as people in a democratic state should respect choices democratically made.[304]

After the Court of Appeals' decision, legislators introduced marriage equality legislation again in 2007. However, its prospects looked dim since conservative leaning Republicans from Upstate New York controlled the Senate. Despite the support from Governor Eliot Spitzer and success in the Assembly passing by an 85-61 vote, Republican Senate Majority Leader Joseph Bruno killed the bill.

In 2009, marriage equality advocates appeared to have an opening. For the first time in 43 years, conservatives lost control of the New York Senate. Democrats now held a narrow 32-30 majority in the Senate and Governor David Paterson supported marriage equality. But political turmoil would doom the bill. Five months into Democratic control, two Democratic senators joined the Republicans, giving them control of the Senate. The defecting senators said were displeased with party leadership and the treatment of their earmark requests.[305] Some media suspected the possibility of same-sex marriage legislation successfully passing through the Senate amplified the instability.[306] The Democrats promised to remove their Leader Malcolm

Smith from the post to bring back one senator, leaving the senate split 31-31. With the balance of power delicately hanging in the balance, same-sex marriage opponent Ruben Diaz threatened Governor Paterson if he put the marriage bill on the floor, he would jump the party ship, join the Republicans and thwart the bill. Senator Diane Savino recalled that the whole saga undermined any momentum for a same-sex marriage bill:

> . . . . we had 4 senators who decided to shakedown the leadership and force the Malcolm Smith to pay them off. And they wanted positions for themselves. It was a terrible start to our majority. And all these interest groups who waited so long, they had little appetite for managing their expectations despite having volatility in the conference. And it wasn't just LGBT groups. But the Republicans had tremendous discipline [to block Democratic initiatives]. They had lost 43 years of majority, now lost, and they were going to do everything to exploit our weaknesses and unify against us. But the LGBT groups demanded we brought the bill to floor. And if it failed it failed.[307]

As it would turn out, the bill, though successful once again in the lower chamber, failed in the Senate when brought to a vote. Human Rights Campaign's senior strategist for 2011 push, Brian Ellner, described that the 2009 failure was not only a result of crippling political paralysis but also an anemic movement. In a telephone interview, Ellner described as what he saw as a more systemic problem in New York:

> It didn't feel like anything was happening in 2009 in the media and economic capital in the country and you wouldn't know it. There was no ad campaign. No statements from celebrities or prominent New Yorkers. There was no effort to change voters' minds. There was no big broad movement. Even in states where there were losses like Maine and California there was a movement. It was like a tree falling in the wildness. It was a bunch of lobbyists trying to do an Albany deal.[308]

Ellner's motivation to create a movement, the support of a strong-willed Governor Andrew Cuomo, and the challenges of a Republican controlled Senate[309] paved a path for same-sex marriage's success forged by, as Senator Malcolm Smith described it, a "great discussion on the content of the bill, including the severability clause and the religious liberty issues" and

"bipartisanship cooperation."[310] The broad-based and robust public discourse over constitutional values and traditions was essential for the New York Marriage Equality Act's success in 2011.

Unlike Maine, New Hampshire, and Vermont which all rank among the four whitest states in the country, New York ranks among the most diverse states in the United States. New York's population has the third highest proportion African-Americans among north the Mason-Dixon Line. And while prominent African-American legislators and white legislators with personal memories of the painful experience of Jim Crow were influential in shaping the debates in New England, the connection between the Civil Rights Movement and LGBT rights was more contentious in New York, especially given the higher levels of resistance to same-sex marriage from the African-American community in 2011. That division was a source of inner turmoil for African-American marriage equality advocates like Former Governor David Paterson. Governor Paterson explained:

> When I think historically, the people who were hated the most, at times, were the whites, who helped lead the civil rights movement. I did get to feel that pain. At times, I was rejected by the black community by asking to do for others what others have done for us. I don't know if those in the LGBT community knew what pain and difficulty that caused me. But that pain was mitigated by going to the Gay Pride parade just a two days after the bill had finally passed and seeing so many happy faces that had never truly seen justice.[311]

Some legislators were hesitant to draw the parallel between racial discrimination and discrimination on the basis of sexual orientation given the weaker support from the African-American community. The lead sponsor of the bill in the lower chamber, Daniel O'Donnell, shifted his rhetorical posture. "I heard the clergy base in the African-American community didn't like hearing about civil rights. In 2007 and 2009, I stopped talking about rights and more about equality. The Senate leadership warned me about that and so I avoided that language in 2009," O'Donnell recalled.[312] O'Donnell's rhetorical shift was politically important, but many

legislators shared in his view nevertheless spoke on same-sex marriage on the same plane as civil rights.[313] With time, many black members of Legislature eventually articulated the connection as O'Donnell and others had. Senator Kevin Parker, an African-American member from Brooklyn, recounted his personal journey on the civil rights connection to marriage equality:

> It took me a little longer to get through the civil rights issue. We aren't responsible for legislating morality. That's the church's role. In a lot of ways, that's what lead me to realize this was a civil right. That simply, marriage is a contract. So from a state perspective, it's a very different thing than marriage from a religious perspective. It doesn't matter to us. Get engaged. Get a blood test. Get the contract. And that's how I got to it as a civil rights issue. So how do you deny these folks access to contracts even if you abhor the behavior?[314]

The bill and senators discussing unabashedly connected marriage equality for same-sex couples with *Loving v. Virginia*. The 2009 bill opened with a citation to *Loving*, stating that *"*[t]he 'freedom to marry' is, in the words of the United States Supreme Court, 'one of the vital personal rights essential to the orderly pursuit of happiness by free [people].'"[315] The bill then stated it was the intent of the legislature to ensure that the freedom to marry extended to same-sex couples. The 2011 echoed this by declaring, "Marriage is a fundamental human right." But the *Loving* theme followed onto floor speeches. The *New York Times* described one senator's use of *Loving* to undergird his decision to vote for marriage equality:

> It was not until 1967 before my son could marry Senator Griffo's daughter if he wanted to, or Senator Lanza's family member," said Mr. Adams, who is black, referring to Joseph A. Griffo and Andrew J. Lanza, white Republican senators who ultimately voted against the bill. "It was an abomination for interracial couples to fall in love; it would destroy the institution of marriage. This is exactly what we heard then.[316]

While some talked about marriage equality and *Loving* others talked about the alternative of civil unions, but dismissing them as a relic of the *Plessy v. Ferguson* era. Senator Craig Johnson in his floor speech said, "Why not a civil union? Well, colleagues, that simply creates a separate but equal system and it doesn't work."[317] Other senators, without delving into specific

parallels simply declared a vote for marriage equality as mandated by the U.S. Constitution. Senator Pedro Espada rose in the chamber and simply said, "It is constitutionally correct to vote? Yes."[318]

Over time, the hesitation to invoke the Civil Rights Movement subsided and the intensity of opposition from the African-American community waned. But as Brian Ellner described it, that progress was not achieved easily but by building a movement and reaching out to the African-American community about the importance of LGBT equality. As Ellner described:

> As an instructive moment, what was most memorable was when I showed up to meet Russell Simmons. He said, "What the fuck took you so long? I've been a long time supporter." I think it showed we don't always ask for help and we've made some wrong assumptions. We haven't maybe worked with Russell Simmons or Julian Bond or Rev. Sharpton, as soon as we should have. . . . To get the NAACP and Jay-Z and others, it helps. I think people fail to recognize how important these people are.[319]

When it came to analyzing the legal merits of the Marriage Equality Act, many members of the New York Legislature did their own equal protection "analysis." Take, for example, Assemblymember Sandy Galef, who said, "The first time it came to a vote, I was okay with civil unions. I thought it would provide equality from what I knew at the time. So, I voted "no" on the marriage vote. . . . [Two years later] I got reports from New Jersey that reported on whether civil unions in New Jersey were working. And they said that they were not. People still didn't understand what civil unions were. It was a status lacking marriage." [320]

Importantly, key Republicans who would eventually join a coalition of Democrats to push the bill through the Senate in 2011 conducted some of the most exacting equality-based analysis of all the chamber's members. The first Republican to publicly support the bill, Senator Jim Alesi, described his vote in 2009 as influenced by politics. But by 2011, he recalculated his perspective on same-sex marriage. Senator Alesi described his thought process:

> I really look at it from the standpoint of fairness and the viability of a same-sex relationship, and seeing it has the same value of a heterosexual relationship. I moved from there to the legal aspect. To avoid just justifying something on your personal feelings, I moved to the law. There really was no reason why shouldn't provide same-sex marriage because we were disallowing equal protection. But it's a blend of how I feel emotionally and the law. In 2009, I promised myself if I ever had the chance to vote for against never let politics influence my decision again.[321]

On the Senate floor members described the reasons for their vote in support of the 2011 Marriage Equality Act. Senator Stephen Saland, one of the key undecided votes said on the Senate floor, ". . .I have to define doing the right thing as treating all persons with equality. And that equality includes within the definition of marriage."[322] Another undecided vote, Senator Mark Grisanti, said, "I cannot legally come up with an argument against same-sex marriage. Who am I to say that someone does not have the same rights that I have with my wife, who I love, or that have the 1300-plus rights that I share with her?"[323]

Equal protection, however, was not the only constitutional value at issue in New York. Like New Hampshire and Vermont, religious liberty issues were at the forefront of the debate. A number of Republicans including senators Kemp Hannon, Andrew Lanza, Greg Ball, Stephen Saland, and others negotiated with Governor Andrew Cuomo over language that would protect religious institutions and organizations from public accommodations requirements to facilitate same-sex marriages.[324] Senator Andrew Lanza said to *The New York Times*, "The concern that I have expressed, and others have expressed, is that we don't want to create a vehicle that will allow anyone to make a challenge, to erode, what I think is a fundamental American freedom, and that is the freedom of expression when it comes to religion."[325]

Senator Lanza and the Republican delegation actively working on religious liberty issues were not alone in their thinking on the matter. Democratic members of the all important Senate saw the value in crafting statutory language to foreclose the possibility same-sex marriage could

embroil religious institutions and religiously affiliated organizations arising from public accommodations nondiscrimination lawsuits for refusals to facilitate same-sex marriages. Democratic Bronx Senator Jose Serrano, like his suburban Republican colleagues, saw protecting religious liberty as an important policy aim that furthered constitutional values. Senator Serrano said, "I believe the government needs to act separate from the church and church teachings. It was a basic principle of the Founding Fathers to have a government based on human rights and not encumbered by church doctrine that people nevertheless have the right to practice in their own homes and churches."[326]

After days of wrangling over the issue, Republican Senator Kemp Hannon of Long Island spoke on the floor to introduce an amendment to the bill that would include protections for religious institutions and other religiously affiliated organizations. "We had looked at the basis for statutes on marriage in this state, the rational basis that the state has acted upon, and we looked at the unique context that these religious exemptions have with the right that is going to be granted by the main bill,"[327] Hannon explained to the chamber.

Prior to the adopted amendment, the bill contained a single exemption that mirrored preexisting protections in the First Amendment for clergy from any requirements to solemnize or celebrate marriages inconsistent with their religious faith. The amendment expressly allowed religiously affiliated groups to refuse to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage. In addition, the amendment expressly protected covered religious objectors from private suit, organizations from being "penalize[d]" by the government for such refusals through, e.g., the loss of government grants, religious organizations from requirements to provide "housing designated for married individuals" to married same-sex couples, and individual employees "being managed, directed,

or supervised by or in conjunction with" a covered entity from suit for refusal to facilitate a marriage. Finally, the amendment was non-severable.

As *The New York Times* reported, the religious liberty language ". . . proved to be the most microscopically examined and debated — and the most pivotal — in the battle over same-sex marriage."[328] Members of both chambers and across partisan lines in the legislature described the religious liberty protections in terms ranging from "critical"[329] to "important"[330] to "profound."[331] That The executive director of the New York American Civil Liberties Union said that the final version of the New York Marriage Equality Act was " . . . in keeping with our country's principles of religious freedom."[332] Echoing that sentiment was the pro-same-sex marriage umbrella organization, New Yorkers United for Marriage, which issued a press release stating, "The amended Marriage Equality legislation protects religious liberties without creating any special exceptions that would penalize same-sex couples or treat them unequally. The legislation strikes an appropriate balance that allows all loving, committed couples to marry while preserving religious freedom."[333]

WASHINGTON

Political expediency is one thing, but I couldn't betray those folks.[334]

By passing [this] bill we can protect that fundamental right [of marriage].[335]

In the same year Massachusetts' Supreme Judicial Court became the first in the nation to rule same-sex couples had a state constitutional right to marry, Washington attorneys filed suit seeking a similar decision from the Washington Supreme Court. In 2006, the Washington Supreme Court rejected the plaintiffs' claim. The State Supreme Court, while noting same-sex marriage was a "subject of intense debate throughout the nation" and that "times are changing"

with regard to public perspective on same-sex marriage, sexual orientation was not a suspect classification and "a person has a [no] fundamental right to a same-sex marriage."[336]

The same year of that decision, one of the attorneys working on the behalf of the same-sex couples, Jamie Pederson, was elected to the Washington State House of Representatives. Pederson was took the seat held by openly gay Ed Murray who vacated the seat in a successful bid for the State Senate. In Washington, 2006 was a busy year for LGBT rights but not winless. Before Washington's highest ruled against same-sex couples, the Legislature enacted a sexual orientation nondiscrimination law prohibiting discrimination in places of public accommodations, housing and employment.

Opponents of that legislation linked the pending efforts for same-sex marriage recognition and the antidiscrimination law. Senator Dan Swecker told the *Seattle Times*, "The passage of this legislation puts us on a slippery slope towards gay marriage. The two are linked. ... Are any of us naive enough to think the court won't take notice?"[337] Notwithstanding the Washington high court's rejection of same-sex marriage, Senator Swecker's belief was not wholly misguided. Indeed the civil rights legislation was used a foundational building block for legislators to educate the public on the LGBT community and same-sex couples. Once the *Anderson* decision was handed down, Pederson and Murray began hashing out a strategy. The Senate's lead strategist, Senator Murray, said in a telephone interview:

> [T]he model that was developed [employed lessons from the] 29 years [it took] to pass civil rights protections for LGBT people in 2006. . . . We would reach out to business about how LGBT folks contributed to the state. We hadn't brought business on board until then. And it was successful there. But, we are a referendum state. I was very concerned that if we won in the Legislature, we needed to win at the ballot. A lot of people wanted to move on marriage in 2007. But we wanted to pass individual bills three years in a row, to *educate the public* on what marriage was really about and who gay families were.[338]

And so the decision was made to begin with a limited domestic partnership registry to "provide some concrete rights for LGBT families and build a record of winning."[339] From the registry, it was the duo's hope that they could push for a parallel institution, like civil unions, and finally achieve marriage rights.

In 2007, the Legislature successfully passed the domestic partner registry, which provided same-sex couples of any age or opposite-sex couples in which one partner is over 62-years-old, with 11 enumerated rights.[340] Again, in 2009, as per the master plan, the Legislature pushed to expand the registry to domestic partnerships that were commonly referred to as "everything but marriage."

Notably, the new legislation would provide significant additional rights for same-sex couples including, but not limited to, a right to use sick leave to care for a domestic partner, to unemployment and disability insurance benefits, and to the same insurance coverage provided to married heterosexual couples. Rights related to adoption, child custody and child support not provided for in the first iteration of the domestic registry were provided in the expanded legislation. While the supporters of same-sex couples' rights did not have to face the challenge of a voter-initiated referendum on the previous legislation, opponents to the "everything but marriage" law successfully garnered enough signatures to challenge the 2009 bill.

In November of that year, the voters of Washington became the first electorate to popularly sustain a positive enactment of law benefiting same-sex couples. The head campaign advocate for the domestic partnership law, Laurie Jinkins, who become a member of the Washington House in 2010, credited the incremental approach for the campaign's success. Jinkins said, "What helped us maintain Referendum 71 was that we had done this incremental. [The public] had gotten use to it and got to see pieces of it work."[341] With the victory of R71,

the scene was set for marriage legislation. The election returns proved vitally important. Legislators could consider marriage legislation looking at their district's returns on R71 as a metric for their district's mood on marriage equality. But the incremental approach was profoundly important for legislators as well, particularly more conservative members. Senator Rodney Tom recalled, "The big question was whether any Republicans could cross their Party line and that was the key. Those relationships had been built over years. And the step-by-step approach was important to getting us there. "[342] As House Speaker Frank Chopp simply stated it: "It helped people digest it."[343]

Governor Christine Gregoire first "grappled" over the merits of marriage equality while she was Attorney General of Washington while the *Anderson* case was litigated. "I couldn't find an argument that could legitimately believe it was constitutional. Though the court thought it was constitutional, I disagreed with it," she recalled.[344] But with the state's high court punting the matter to the legislative process, Gregoire's thinking on the issue shifted. Now, she thought about the constitutional rights of same-sex couples, but was very mindful of religious liberty issues. Governor Gregoire concluded that New York's approach was ideal:

> I looked at what New York had done. I worked with our gay community. I told them [including New York styled religious liberty protections] was the only way I would introduce the bill. There was some people who wanted to compromise on that in the future. But I said, no, that this was in part a reflection of my evolution on the issue, and it wasn't comprisable.[345]

The exemptions would prove to be critical in Olympia as they were in Washington. Rep. Jamie Pederson recalled that in addition to insuring the Governor's support that "[f]or every 1 of the 5 votes that we ended up getting that we weren't certain of we got because of those robust exemptions."[346] Indeed, like in other states the religious liberty protections were of critical

importance. But the debate over constitutional values and same-sex marriage included a broader discussion on the interplay between religion and the government and constitutional history.

For Senator Cheryl Pflug "there was no compelling reason not to" enact same-sex marriages.[347] Senator Pflug's constitutional analysis went further than invoking the language of strict scrutiny, but also couched her support for same-sex marriage legislation with a larger constitutional history. On the floor, Senator Pflug told the Senate:

> When they wrote our Constitution, [the Founding Father's knew] that if you did not tolerate difference or believe differently you were again under someone else's definition of what was right or true or good. And so, our Bill of Rights was born. And then it grew. . . . when our country was born many times men looked at women and saw chattel. One race looked at another and saw slaves. And we looked at each other and we struggled and we grew. . . . tradition, the way its always been is often comfortable for the majority but not the minority.[348]

As Senator Pflug's floor speech suggests, the race analogy was not left untouched in the Washington debate. In Washington, like in every state that created a parallel institution for marriage, Washington's Legislature had to squarely address whether that separate institution was a sufficient substitute for marriage.

Senator Debbie Regala drew the parallels from the civil rights movement directly because she felt that she had suffered the indignity of stigmas attached to interracial marriage during the *Loving* era:

> I'm married to someone from the Philippines. We were married in 1968. I had to deal with the same kinds of things about same gender marriage. It's not right. I heard that God made us different colors and that I shouldn't have married outside my race. It was a big, difficult decision to make, because I understood what that was like.[349]

However, unlike Cheryl Pflug and Debbie Regala, Mary Margaret Haugen struggled with the legislation. Haugen was from a moderate district and regularly attended a church that opposed same-sex marriage. While she had voted in favor of the "everything but marriage" law, the 71-year-old legislator's district rejected it during the referendum.[350] Uneasy with the

extending the term "marriage" to same-sex couples, Senator Haugen raised the issue at a number of town hall style meetings in her district. During one meeting, Senator Haugen encountered a same-sex couple who were legal domestic partners who expressed to her that it was difficult to communicate their legal status without showing documentation. For her, that experience helped her to understand that domestic partnerships were separate and unequal:

> I was raised in a time when marriage was between a man and a woman. I stumble over that. … I had voted for [the everything but marriage bill], but I'm so hung up on the word marriage. But, when people told me that they had to carry a card around saying that they were in a domestic relationship, it was like you had to carry around your license. I didn't know about that before town meetings. I don't carry cards around showing I'm married. That wasn't all-but marriage. It just wasn't equal.[351]

Senator Haugen was the deciding vote that assured the bill's victory. For her, it was the realization that separate-but-equal institutions were a fiction and that the legislation could redress that wrong— but not at the expense of religious objectors, like her own church, that won her decisive vote.

MARYLAND

Two weeks before the Supreme Court rejected Richard Baker and James McConnell's appeal challenging Minnesota's marriage laws, the Maryland Legislature Special Committee on Family Law and Domestic Relations met in Annapolis. The Special Committee convened to consider a comprehensive list of concerns related to marriage license applications and eligibility.[352] The Committee's original agenda was limited to sundry issues, among them clerks' ability to demand proof of age, the administration of blood tests, and the status of common law marriages. The only witness to testify before the Special Committee, the Maryland Association Clerks of Court President Vaughn Baker, raised the question of same-sex marriage to the Committee. The Committee declined to tackle the issue during that September 1972 meeting, however members acknowledged that it was an issue to keep under consideration.

The Committee met again in October 1972. This time the agenda officially included same-sex marriage in addition to regulations concerning women's right to keep their maiden name after marriage. Laws like these were under increased scrutiny as Maryland voters were poised to ratify an amendment to the state constitution's Declaration of Rights prohibiting sex-based discrimination, which they did in November 1972. According to media reports at the time, no witnesses to testified— either for or against— the same-sex marriage agenda item.[353] When the Maryland General Assembly convened in 1973, the body enacted Senate Bill 122, which limited valid marriages as those contacted between a man and a woman.[354] Maryland was the first state to expressly ban same-sex marriage.

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

> Vermont had just moved forward with civil unions and there was a lot of talk about civil unions. When I was first elected in 2002, one of the first bills I requested to draft was to take the Vermont civil unions approach and draft it. People were deathly afraid of it. We toyed around with the issue of Equality Maryland, which was then Free State Justice. I was on the Board of the group. The big goal of that group was to pass an anti-discrimination law, which we did in 2001 and then we had to deal with a referendum. The organization went through reorganization and we fumbled around a little bit until civil unions were the big thing on the table. And all of the sudden the Massachusetts Supreme Court suddenly allowed civil union and the conversation moved from civil union to marriage.[355]

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

> From 2002 to 2006, we had a Republican governor and several of our judges; we knew 4 of our 7 judges on the Court of the Appeals would be retiring. So we decided to move on a court case because that seemed like the more likely route for getting something done than the legislature at that time, especially with a Republican governor. We figured with his approval ruling so high we couldn't move forward. At that time, we saw efforts in New York and Washington and the hope was maybe we could get some momentum with other states using the same logic.[356]

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

> This court case has been more than just about using all branches of government to remedy discrimination," he said. ''It's been about educating legislators and neighbors about the harms faced by same-sex couples and their children because of the inability to marry. We fully intend to fight for fair and equal protection under the law for our families.[357]

However, like Washington, Maryland was a referendum state. And so with a legislative strategy came a legitimate risk that any legislative success, which was far from assured, would be overturned by popular referendum. Legislators devised a plan to cautiously lead the state toward equal marriage through a stealth education campaign and incremental policy changes. Now in the Maryland Senate, Madeleno and other LGBT activists mapped out a new plan of attack:

> And once [the Maryland Court of Appeals] decision came down in 2007, that's when the focus came back to marriage and we decided to use a strategy by a lobbyists we called the "Bill and Bob strategy." Bill was the big bill we would pursue to get marriage. The Bob component was about starting to break down marriage into its various components. Because family law goes to one committee and we have few committees, we wanted to break it down. We wanted to break down marriage into various components so that every

> committee would have to hear testimony on the legislation. By 2010, my colleagues would say I'm so done with every year dealing with more and more gay bills.

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

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

The two-year-long legislative battle over marriage equality in Maryland echoed similar themes from other states' experiences. Three major themes emerged from Annapolis. First, many legislators in Maryland that were uncertain of their position on marriage equality eventually supported the legislation after they carefully considered evidence presented to them by citizen testimony. Second, legislative proponents of same-sex marriage seriously considered

and debated constitutional law precedent and constitutional history to advance their position. Third, concerns over the impact marriage equality would have on religious liberty played a pivotal role in shaping the contours of the marriage debate in Maryland, demonstrating that legislators seriously contemplated and weighed two important and, at times, conflicting, constitutional values.

In 2011, Senator Jim Brochin, a moderate Democrat from Baltimore County and member of the Senate Judiciary Committee, supported civil unions. He thought that civil unions would sufficiently address the concern of same-sex couples having equal rights. Marriage, on the other hand, was another question. But as he listened to testimony in the Senate Judicial Proceedings Committee, Senator Brochin assessed the merits of the marriage equality legislation with a rational basis like approach— after peeling off all the arguments against same-sex marriage as unfounded, Senator Brochin was left with conclusion the bill's opponents had little to offer but anti-gay animus:

> I was sitting next to Senator Raskin right before the hearing and he says I'll have Bill Clinton call you. And I said, "I love Bill Clinton he reminds me why I'm a Democrat but don't bother, I'm not changing my mind." But then the opponents came up. And I thought the opponents would just have a problem with the word "marriage." But the opponents only had to attack homosexuality. I turned to Raskin and said, "I'm done. I'm done with this." And at that time we were stuck at 20 votes. And he said, "What are you kidding?" I said to him, "And if you think I'm going to stand on the Senate floor and side with this crap you have another thing coming."[358]

Jim Brochin was not the only legislator to carefully weigh evidence laid before him in committee hearings to change his mind. In Maryland, the committee hearings, perhaps more than in any other state, proved to be the most effective tools for changing legislators' minds. However, Brochin was primed to support full marriage rights after a 2008 Maryland Court of Appeals ruling that rejected *de facto* parentage recognition for the non-biological lesbian mother of a child after the mothers' relationship ended. Brochin said after that case, he started to think

more on same-sex couples' rights and asked himself, "What kind of Senator would I want to be? What type of legacy would I leave?"

In 2011, the Speaker of the House of Delegates assigned the same-sex marriage legislation to the Judiciary Committee. However, it was not clear in 2012 that with a new roster, there were sufficient votes on the Judiciary Committee to pass the legislation to the floor. As a consequence, the Speaker assigned the Civil Marriage Equality Protection Act jointly to the Judiciary Committee and the Health and Government Operations Committee. One member, Delegate Ana Sol Guiterrez, described the Speaker's decision as "brilliant because it expanded the kind of insight and questions and broadened the discussion to make the issue much more understandable and supportable."[359] Indeed, numerous Judiciary Committee members who had grappled with legislation on domestic partnerships, civil unions, and same-sex marriage for months on end, had become entrenched in their own perspectives, hardened over drawn out, bitter fights.

> I sit on the Judiciary Committee; I've been dealing it with six years now. In [2012], my Chair said he wouldn't vote for it as he had in [2011]. So we didn't have the votes there. It was critical for the two Republicans. It was the first time that members of that Committee had heard the testimony. What we had become immune to was the vitriol and hate that came from the anti-equality side. It is so over the top and extreme that the moderate Republicans were put off from it. They saw it with fresh eyes. It was procedurally crucial to have the members of the other Committee hear the testimony but morally as well to expose them to that.[360]

One of those Republicans, Wade Kach, was a long time 38-year-member of the House of Delegates. Kach hailed from suburban Baltimore. In 2010, Kach campaigned on a platform that included an opposition to same-sex marriage. For Kach, a retired public school teacher, same-sex marriage went against his lifetime understanding of what marriage mean. However, as he sat in the Government Operations Committee hearings, he took particular interest in testimony

concerning a Maryland judicial decision arising from a joint adoption petition from a same-sex couple that was denied.

> The thing that really got my attention was a child who was the child of a same-sex couple . . . the first judge that the couple had gone to would not allow both parents to adopt the child. So, they were raising money to go to another judge. And I thought, my goodness, should there be a death, there is really no way to determine inheritance or the like. There are no protections for the child. If one partner left the relationship, there's no requirement for child support or child visitation, which is important. Those children didn't have equal rights as others.[361]

Delegate Kach's attentiveness to that testimony was a watershed moment in his decision to support the same-sex marriage legislation. A year before, Kach said he would have voted against same-sex marriage. But, after he was presented with an abundance of evidence at the Government Operations hearing, Delegate Kach believed the evidence compelled him to change his position.[362]

But more than just legislative hearings, members of the House of Delegates were swayed by a large presence of openly LGBT members of the House. In 2009, the Maryland General Assembly had only 4 gay or lesbian members— none of them persons of color. By 2012, there were 7 including the only African-American member of the LGBT caucus, Delegate Mary Washington. These members, Luke Clippinger, Bonnie Cullison, Richard Madeleno, Maggie McIntosh, Heather Mizeur, Peter Murphy, Mary Washington gave a substantial amount of life to the legislation's efforts. But, like those testifying to members of the legislative committees, these members' stories were impactful. Through their close knit working relationships, they also brought their personal feelings on the legislation to members sitting on the fence.[363] This, too, was a key piece of same-sex marriage's legislative success in Maryland. As Delegate Shane Robinson simply put it, "Without openly gay members it would not have had happened. "[364]

These members shaped a broader discussion about same-sex couples, sexual orientation, equality and the law. Together, constituent interaction, open legislative debate, and backroom discussions formed a broad conversation about the appropriateness of same-sex marriage legislation. The debate was not a back-and-forth over the merits of same-sex marriage as a policy or sincerely held personal belief, but rather it was a deeply rooted in assessment of constitutional history and tradition.

University of Maryland Professor of Law and State Senator Jamie Raskin began thinking about same-sex marriage as a constitutional issue long before it came to the fore of the public consciousness. Raskin traced his support back to the *Bowers* decision, which prompted him to weigh the merits of extending relationship recognition to same-sex couples.[365] Senator Raskin said that his argument for marriage equality was always a "secular, constitutional argument" and that same-sex marriage was "a matter of basic constitutional equality.[366] Senator Raskin had publicly made that constitutional argument prior to his election to the chamber. In 2006, while same-sex marriage litigation was pending in the Maryland courts, in his capacity as a law professor, Raskin testified against a proposed state constitutional prohibition of same-sex marriage. One exchange between then-Professor Raskin and Senator Nancy Jacobs during the hearing on the amendment was given heavy attention in the press:

> At the end of his testimony, Republican Senator Nancy Jacobs said: "Mr. Raskin, my Bible says marriage is only between a man and a woman. What do you have to say about that?" Raskin replied: "Senator, when you took your oath of office, you placed your hand on the Bible and swore to uphold the Constitution. You did not place your hand on the Constitution and swear to uphold the Bible."[367]

Others asked similar questions. Delegate Anne Kaiser used this type of argumentation in 2012 when she asked on the House floor, "What are the legal bases for opposing marriage equality?"[368] Another delegate recast this same idea articulated by Raskin and Kaiser in clear

constitutional terms, "Equal protection under the law . . . transcends how we feel in our hearts."[369] Echoing the idea the legislators should remove their personal religious beliefs but focus on a constitutional analysis, Delegate Pam Biedle said, "Whether I like it or not shouldn't matter. It's not my religious belief. It's not my decision. Just like interracial marriage. It's a right."[370]

Many members of the Maryland General Assembly were arguing for and weighing the merits of marriage equality in terms of constitutional mandates. However, the most prominent component of the constitutional debate was over parallels or lack thereof between same-sex marriage prohibitions and interracial marriage proscriptions. Given Maryland's unique position of having the greatest number of African-American residents of any state outside of the Deep South, this connection was hotly debated by proponents and opponents of the legislation— a large number of who were socially conservative African-American legislators.

For some legislators, the argument was Maryland-centric. Delegate Jolene Ivey recalled that one reason she supported civil marriage for same-sex couples was that she saw it was a civil right that was not unlike the right her black father and white mother wanted in the 1950s. Ivey said her parents could not live in Maryland prior to the late 1960s because their marriage was not valid.[371] Delegate Shane Robinson noted that one member of the legislature in 2012, Senator Norman Stone took part of the 1967 debate over legislation that would repeal Maryland's anti-miscegenation law. Delegate Robinson thought the lesson from that history was important to consider: "1967 wasn't so long ago," Robinson said, "But you think about that and it seems crazy that you can't marry interracially."[372]

Some legislators used explicit references to *Loving v. Virginia* to illustrate their belief that the constitutional rights of interracial couples should apply with equal force to same-sex

couples.[373] House of Delegates Speaker Michael Busch saw same-sex marriage as an extension of the civil rights movement he witnessed as a college student in Philadelphia.[374] However, unlike Busch and many white liberals in the Maryland House of Delegates who viewed LGBT rights as a nature extension of the civil rights movement in the 1950s and 1960s, there was far more division among the African-American legislators despite their common ideological and partisan affiliations. In 2011, one of the most outspoken same-sex marriage opponents in the House was African-American Delegate Emmett Burns, an activist during the civil rights movement. Burns had qualms with the comparison for same-sex couples' marriage rights being compared to racial civil rights for primarily two reasons. Burns disputed that the level of discrimination against same-sex couples rose to the same level of vitriol and violence as it had in the Deep South during the civil rights movement and he disputed the immutability of same-sex attraction.[375] A fellow African-American member of the House of Delegates, Keiffer Mitchell addressed Delegate Burns' position head-on and used it to reject calls for civil unions and announce his support for same-sex marriage:

> I believe that this is the civil rights issue of our generation. … [My constitutants] have asked me to support civil unions. And I did think about that. No, I was not victimized by German Shepherds or water cannons. I was not turned away at the ballot box. The generation before me went through that battle. . . . when you think about civil unions . . . I think back on separate but equal. . . . When we talked about civil unions, it's just like the Jim Crow laws of separate but equal there was a stigma placed on African-Americans who were thought to be less than."[376]

Like in New York, religious exemptions were a central part of the debate over marriage legislation in Maryland. When Maryland legislators introduced marriage legislation in 2008, the Senate and House bills contained clergy-only religious exemptions. Those bills died in committee. In 2009, identical exemptions were included in legislation introduced and again died in committee. In 2011, the Maryland House of Delegates adopted the same clergy exemption

when legislators reintroduced a marriage equality bill. The companion bill in the Senate added exemptions for religious organizations from government penalty for refusal to solemnize or celebrate a marriage.

When the House considered legislation in 2012, delegates started with a new piece of legislation headed up by Governor Martin O'Malley. In an attempt to "pick up additional support in the House of Delegates," O'Malley's bill expanded the exemptions from the previous year's Senate bill to include religiously affiliated social services agencies and fraternal societies.[377] Speaker Busch observed that the new accommodations allowed some legislators to change their positions between 2011 and 2012. Speaker Busch said:

> We didn't want to inhibit any religious organization from practicing their beliefs. One of the issues was the adoption issue. We wanted to make sure we didn't impede on the Catholic Church for adoption services. We had a clearer initiative in 2012 and I know for a fact that for two or three delegates [including religious exemptions] was an important component in their decision to vote for it.[378]

Republican Wade Kach cast one of the decisive votes that pushed the 2012 bill over the mark. Representative Kach, said that "without the religious liberty provisions, I would not have voted for the bill."[379] Another key swing voter, Delegate John Olszewski, a "was worried about churches that did not want to perform same-sex marriages."[380] When reflecting on his decision-making process between 2011 and 2012, Olszewski said his pro-equal marriage vote was solidified because of "the attention to the religious institution protections."[381]

In Maryland, a number of factors influenced the legislative process. A significant number of legislators viewed marriage equality legislation as an extension of the civil rights, consistent with what the rights consciousness hypothesis predicts. However, New York legalizing same-sex marriage boosted advocates' push in 2012. Not only did key players in Maryland point to New York's landmark law as a reason for the state's progress, but also legislators patterned the New

York Marriage Equality Act's religious exemptions for Maryland law. Litigation appears to have had the least impact on legislative developments in Maryland than in other states, perhaps due to the timing of legislation and the state's physical distance from jurisdictions with successful marriage litigation.

Marriage Without Courts? A Counterfactual Analysis and an Alternative Theory

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

Public Policy Trajectories

Table 2: Sexual Orientation Employment Nondiscrimination Statutes 1973-2003

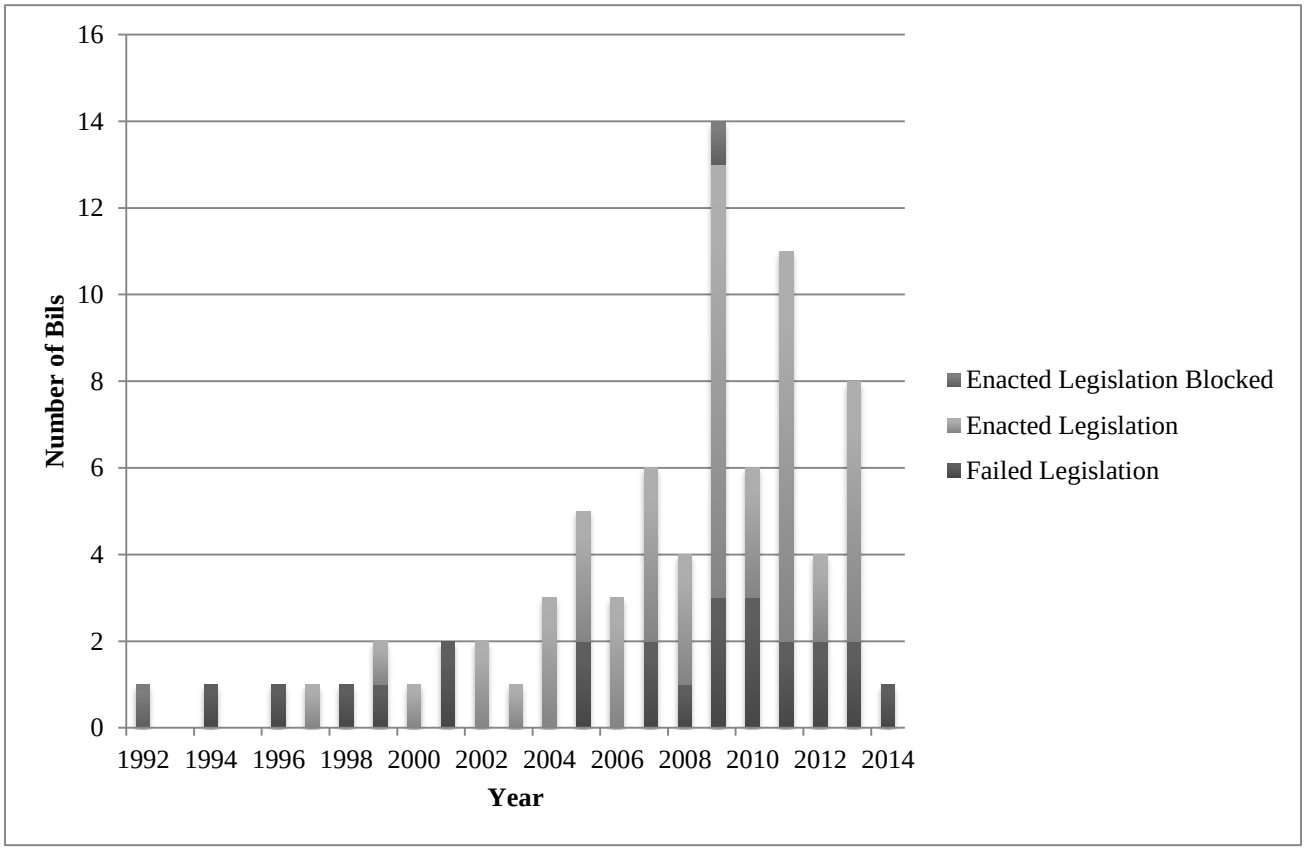
Jurisdiction	Year Sexual Orientation Employment Law Enacted	Marriage Before *Windsor*?
District of Columbia	1973	Yes, by legislation
Wisconsin	1982	No (state constitutional ban)
Massachusetts	1989	Yes, by judicial decision
Connecticut	1991	Yes, by judicial decision
Hawaii	1991	No
California	1992	Judicial Decision (only 2008)
New Jersey	1992	No
Vermont	1992	Yes, by legislation
Minnesota	1993	Yes, by legislation
Rhode Island	1995	Yes, by legislation
New Hampshire	1998	Yes, by legislation
Nevada	1999	No (state constitutional ban)
Maryland	2001	Yes, by legislation
New York	2002	Yes, by legislation

First, I will examine the proposition that pro-LGB rights legislation on the state-level was already on the rise, indicating same-sex marriage may have come about without judicial intervention. Consider civil rights laws that protect against sexual orientation discrimination in employment, housing, and public accommodations. These laws are the best metric of policy trends because they do not implicate government-backed discrimination or constitutional claims. Thus, they are entirely discretionary policies.

Before *Lawrence* and *Goodridge* were decided, only 14 states enacted sexual orientation antidiscrimination laws. A majority of Americans did not live in jurisdictions that adopted civil rights legislation prohibiting private LGB anti-discrimination until the Oregon Equality Act took effect in 2008. Many of these laws lingered for years before they were successfully adopted. While these leading states listed in Table 10 enacted nondiscrimination protections over 29 years, 10 of the 14 recognized same-sex marriage between November 2003 and June 2013.

New York, for example, enacted the Sexual Orientation Nondiscrimination Act [SONDA] in 2002, though it was initially proposed in 1971 and died without seeing any action. SONDA failed on a floor vote in the lower chamber in 1983 but was successful in 1993 only to meet a near decade of cold reception by the New York Senate. Similarly, legislation in Maryland failed for eight successful legislative sessions before passing in 2001.

Figure 25: Statewide Recognition Legislation Receiving a Floor Vote 1992-2014



Before 1997, no state provided any statewide status to same-sex relationships. Few states saw any progression on relationship recognition before 1997 either. Figure 25 depicts the number of bills introduced between 1992 and 2014 to confer statewide recognition status that received at least one chamber floor vote. Before 1997, attempts to provide enumerated rights to non-marital couples failed in Washington D.C., California, and Hawaii. Congress blocked the District of Columbia's 1992 domestic partnership law that extended hospital visitation rights and insurance options for municipal employees until 2002. The California Legislature passed limited protections for unmarried couples including hospital visitation rights, property rights, and decision-making rights in the event of a partner's incapacitation. Governor Pete Wilson vetoed

that bill. No state before *Baker* offered same-sex couples relationship recognition akin to marriage. No state prior to *Goodridge* extended the freedom to marry to same-sex couples. Thus, while a slow march progressed on civil rights protections in housing, employment, and public accommodations, these legislative victories were hard wrought.

Though no state gave formal sanction to same-sex relationships prior 1996, a handful of jurisdictions did take important steps to provide tangible benefits to non-marital relationships, primarily for the domestic partners of municipal employees. The first high-profile attempt to extend limited benefits to same-sex domestic partners was in 1982. That legislation was passed by the San Francisco City Council and vetoed by Mayor Diane Feinstein. In 1985, Berkeley, California extended equal benefits to the non-marital partners of city employees. In the first four years of the policy, only 15 percent of enrollees were same-sex partners. Three years later, Los Angeles City Council offered sick and bereavement leave to city workers.

In July 1999, the New York Court of Appeals 4 to 2 ruled that the legal definition of a family included a same-sex couple under New York City's rent-control regulations. The Court held that if, after a determination of a non-marital relationship's exclusivity and longevity, a couple's emotional and financial commitment to one another, the manner in which a couple held themselves in public, and routines of daily life, a couple that functioned as a family should be considered as such. Ruling for Miguel Braschi, who was in a same-sex relationship, the majority reasoned that the law's treatment of a family "should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life."[382]

The attorney for the American Civil Liberties Union who argued on behalf of Braschi, William Rubenstein, said that the ruling "mark[ed] the most important single step forward in American law toward legal recognition of lesbian and gay relationships."[383] Indeed, the ruling

had at least one important consequence. The New York State Division of Housing and Community Renewal promulgated a new rule to expand the *Braschi* rule statewide, marking the first time a statewide entity recognized a same-sex couple—along with other non-marital couples— as a family.[384] State legislators announced their intentions to codify the rule in state statute and celebrated the *Brachi* decision.[385]

The following week, New York City Mayor Ed Koch announced he would issue an executive order to expand benefits to the non-marital partners of city employees. Koch, however, emphasized that his executive order had "nothing to do with gay rights." Koch said that the "largest number of people eligible will be heterosexuals living together as couples but not married, elderly people living with companions, people who have a domestic relationship but not necessarily sexual relations."[386] The move was nevertheless the significant and, according to advocates at the time, well ahead of private companies.

In May 1989, after San Francisco enacted an ordinance providing sick and bereavement leave to city employees' domestic partners. That ordinance was petitioned for referendum. Proponents of the domestic partner ordinance pledged to "quote the New York decision in their campaign literature during the fall referendum battle."[387] The campaign was unsuccessful. Despite voters rejecting the law in 1989, San Franciscans ratified a revised version of the policy in a 1990 referendum. Given the evidence in its totality, whatever favorable localized trends recorded for domestic partnerships prior to 1996 cannot be said to have been an emerging policy trend absent judicial influence.

POLICY DIFFUSION: AN ALTERNATIVE THEORY?

Policy diffusion scholarship is concerned with how governmental actors look to other public actors outside their jurisdiction as models for public policy and subsequently elect to

implement the same or similar policies. Two ideas are central to the study of policy diffusion. First, state-to-state policy adoptions are not independent events removed from interstate influence. Second, policy diffusion processes flow from incremental learning. The rationale and mechanics of policy diffusion, however, are varied. Among the reasons governments may adopt their neighbors' policies are to improve competition, to correct for lessons learned from other jurisdictions, to imitate, or to comply with some coercive force.[388] Other factors influence governments to laws and practices including ideologically similarity between governments[389] and policy salience.[390] Notably, this is a condition that diffusion theory holds in common with legitimation theory.

Early studies on policy diffusion across the states largely focused on spatial models of geographic clustering, the idea being that governments in close proximity to one another would be more likely to adopt each other's policies.[391] Using event history analysis and by controlling for internal factors influencing the adoption of a particular public policy, scholars have provided evidence that geographic neighbors systematically embrace similar policies.[392] Canon and Baum found that diffusion by regionalism was without evidentiary support.[393] However, the emphasis and focus on geography has diminished in a world of advanced technology, increased mobility, and rapid dissemination of information.[394] Shipan and Volden summarized the effect of technological advances on the traditional use of regionalism as a metric for measuring policy diffusion: "Whereas prior policy makers may have been limited to learning only from the experiences of nearby neighbors, today's sophisticated politicians and administrators have a much greater capacity to look far and wide for useful solutions to policy problems."[395]

In a policy diffusion analysis of state-level policy adoptions, the primary challenge is uncovering whether spatiotemporal policy adoptions have a causal connection and are not the

result of independent intra-state conditions. Second, if evidence of causality exists, it is imperative to then identify the mechanisms through which diffusion has taken place. By employing policy diffusion analysis, it may then be possible to explore whether judicial actors influenced governments outside of their jurisdiction to adopt same-sex marriage and whether federalism allows for courts to have greater efficacy in social reform.

Policy diffusion does not, however, explain the first round of legislative enactments of same-sex marriage. There is nothing in the record to suggest that legislators embraced same-sex marriage as a way to compete with other states or regain an economic foothold over neighboring equal marriage jurisdictions. The geographical relationship is also thin. Though true that the successful legislation was clustered in New England, elected officials in California were impacted by events in Massachusetts. Activists in Vermont pointed to developments in California and Iowa as having some influence in the final hours of debate on marriage equality in Montpelier. Maryland legislators benefited from momentum in New York. To the extent that incremental learning patterns were exhibited, it was present in the development of religious liberty exemptions to public accommodations laws embedded within marriage bills. However, that type of learning curve does explain the broader state-to-state shift on equal marriage. Thus, policy diffusion cannot explain the development same-sex marriage in any way not otherwise accounted for by the rights consciousness hypothesis or the legitimization hypothesis.

THE LEGISLATIVE RESPONSE BEFORE *WINDSOR*

Under the Constrained Court model of judicial efficacy, as articulated by Rosenberg, "if judicial decisions supporting same-sex marriage can survive political backlash then…the judiciary's lack of the power of implementation, does not come into play."[396] This metric of efficacy works to the extent that it measures the sustainability of judicial rulings in light of

legislators' political will to overturn them. That analysis, however, overlooks the extent to which legislators are either influenced by courts from other jurisdictions or civil rights case law that is tangentially related to the issue at hand.

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

The significant role leadership played in these jurisdictions is hard to over state. This is particularly true in Iowa and Massachusetts, where leadership repeatedly stymied attempts to attack pro-marriage equality rulings by blocking any votes on proposed constitutional amendments outright. By erecting a roadblock for marriage equality opponents, leadership allowed decisions to marinate with rank-and-file members and their constituents, weakening the opposition to court rulings. In Massachusetts pro-amendment organizers lost the wind in their sails within three years of *Goodridge* taking effect, and in Iowa formidable legislative resistance nearly dissipated within five years of *Varnum*. In these states, the courts' rulings had greater durability because knee-jerk constitutional amendments were unavailable.

While the legislative support reinforces the idea that courts' efficacy in social movements improves with greater legislative support, what fails to be addressed is the extent to which the

courts helped tamp down opposition through a legitimization effect, aided by legislative stall tactics. In other states, like New Jersey, the leadership helped galvanize support for same-sex marriage, where it had failed before. However, neighboring jurisdictions' advancement of equal marriage for LGB people also contributed to the shifting dynamics, particularly in New Jersey.

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

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

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

However, the paths toward equal marriage rights and variables impacting that legal development varied in the other states. Certainly, the influence of judicial actors on neighboring states can be easily overstated. Courts shaped legislative developments in neighboring states. In Vermont, a number of key participants in the successful enactment of equal marriage traced their decision-making process back to the *Baker* decision. Numerous legislators in Vermont and New Hampshire looked to developments in Massachusetts in the aftermath of *Goodridge* in rationalizing their decision to support same-sex marriage. In Maine, the state's governor who had previously expressed opposition to equal marriage heeded the equal protection analysis of neighboring courts and his staff to support his decision to become the first governor to sign same-sex marriage into law.

Even failed litigation had some net gains in the legislative process. Legislation to adopt same-sex marriage was introduced only a state constitutional challenge to the state's domestic relations statute was tried. In Washington, litigation influenced key actors in Washington's road to same-sex marriage, including the governor who defended the constitutionality of the state's marriage law. As the record indicates, legislators were motivated by a host of other factors in addition to courts, including personal connections with LGB persons, religious values, and

experiences in other civil rights causes. For some legislators, the inclusion of religious exemptions for religious institutions and organizations were dispositive of their support for pro-LGB marriage laws. In a number of jurisdictions the presence of openly-LGB elected officials— particularly those in positions of leadership— shaped the climate in favor of equal marriage.

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

One common denominator across all of these states is that the success of equal marriage legislation or sustaining equal marriage rulings was deeply tied to leadership. Litigation had a profound influence on legislative leaders in New England and was extensively cited in California. In some jurisdictions, like New York, general principles of equal protection were used to justify votes in favor of same-sex marriage. For the most part, these legislators did not speak specifically to any one state or case as motivating their vote. Nevertheless, it seems unlikely that constitutional arguments in favor of same-sex marriage would have carried the weight had courts routinely cast aside litigation, leaving same-sex couples without a single victory. Much more common, were legislators using civil rights cases from the 1950s and 1960s (typically *Brown v. Board* and *Loving v. Virginia*) to legitimize their votes to legalize same-sex marriage. This rhetoric is evidence of rights consciousness. Legislators do not draw these connections to suggest same-sex marriage is simply good policy. Rather, proponents of equal

marriage emphasized the bridge between *Brown*, *Loving*, and same-sex marriage to frame the issue as a matter of fundamental rights.

As with any legislative body, ascribing a single motive or a handful of motives to legislative action is a challenging task. Elected officials often used courts and constitutional principles to reinforce their decisions. From interview data, the most important role courts had in states looking to enact equal marriage without judicial pressure prior to 2013 was to raise awareness about equal marriage rights and legitimize invocations by supporters that constitutional mandates demanded extending the freedom to marry.

CHAPTER 6

EXECUTIVE AND ADMINISTRATIVE ACTION

After *Goodridge* was handed down in 2003, a flurry of activity followed in municipalities and executive branch offices across the nation. Local officials pressed the issue same-sex marriage rights and statewide elected officials reacted to shifting political dynamics. Chapter 6 assesses the motivations for these localized sparks of activism and the longer-term impact they had between 2003 and 2012. In addition, Chapter 6 will examine the other executive and administrative action pursued by statewide officials to advance same-sex marriage in addition to the impact those policies had for the same-sex marriage movement. In this Chapter, we will use these developments to test the political reinforcement, administrative implementation, and rights consciousness hypotheses.

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

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

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

California

In 2004, San Francisco's newly elected mayor, Gavin Newsom, attended the State of the Union as a guest of Representative Nancy Pelosi. President George W. Bush's January 20th address fell within the 180-day window the Massachusetts Supreme Judicial Court created between its decision in *Goodridge* and the decision's effect. Perhaps the decision to legalize civil same-sex nuptials was already weighing on Newsom's mind. At least one media profile of Mayor Newsom suggested that after the Massachusetts decision in November 2003 "gay Californians urged their state's politicians to take similar steps" as the Massachusetts justices.[397]

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

freedom to marry:

> A strong America must also value the institution of marriage. I believe we should respect individuals as we take a principled stand for one of the most fundamental, enduring institutions of our civilization.
>
> Congress has already taken a stand on this issue by passing the Defense of Marriage Act, signed in 1996 by President Clinton. That statute protects marriage under federal law as the union of a man and a woman, and declares that one state may not redefine marriage for other states.
>
> Activist judges, however, have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people's voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.
>
> The outcome of this debate is important, and so is the way we conduct it. The same moral tradition that defines marriage also teaches that each individual has dignity and value in God's sight.[398]

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

Newsom took umbrage over President Bush's attack on equal marriage and the *Goodridge* decision. "I was at the State of the Union," he said, "and I felt a real resolve on this issue," Mayor Newsom would later tell the press. What Newsom could— or would— do remained an open question. In a February 2004 interview with *The New York Times*, Newsom,

who was a businessman prior to his foray into politics, did some basic legal research:

> When Mr. Newsom returned to San Francisco, he said, he read the court decisions that authorized gay marriage in Massachusetts, as well as the United States Supreme Court ruling last year on sodomy. As he mulled those precedents and Mr. Bush's comments, he said, he became convinced that he had a moral obligation to open the doors to same-sex marriages.[399]

Within two weeks of his Washington, D.C. trip, asked top staffers to consider if and how the city's clerks could issue same-sex marriage licenses. Newsom's staff began researching the question and collected a database of legal documents, media reports, and other relevant materials while Newsom reached out to LGBT rights leaders.

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

The following day, Newsom's administration issued a letter to the San Francisco County Clerk, requesting she take appropriate action to issue marriage licenses with regard to the applicants'' sex or sexual orientation. Newsom's letter emphasized the existing protections safeguarded by the California courts and the California Constitution against sex and sexual orientation discrimination as well as making non-specific references to court decisions in Hawaii, Vermont, and Massachusetts. Newsom wrote:

> Upon taking the Oath of Office, becoming the Mayor of the City and County of San Francisco, I swore to uphold the Constitution of the State of California. Article I, Section 7, subdivision (a) of the California Constitution provides that "[a] person may not be . . . denied equal protection of the laws." The California courts have interpreted the equal protection clause of the California Constitution to apply to lesbians and gay men and have suggested that laws that treat homosexuals differently from heterosexuals are suspect. The California courts have also stated that discrimination against gay men and lesbians is invidious. The California courts have held that gender discrimination is

> suspect and invidious as well. The Supreme Courts in other states have held that equal protection provisions in their state constitutions prohibit discrimination against gay men and lesbians with respect to the rights and obligations flowing from marriage. It is my belief that these decisions are persuasive and that the California Constitution similarly prohibits such discrimination.
>
> Pursuant to my sworn duty to uphold the California Constitution, including specifically its equal protection clause, I request that you determine what changes should be made to the forms and documents used to apply for and issue marriage licenses in order to provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation.

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

The reaction among the local gay and lesbian community was euphoric. Their unbridled enthusiasm was on display for national consumption. Within the first three days of San Francisco opening the doors to same-sex couples, more than 1800 persons were married. According to Molly McKay, the founder of Marriage Equality California, Newsom did for these couples what the LGB community had yet to achieve for themselves:

> Newsom put same-sex couples on the radar screen of the nongay world in a way those couples had never been before. He allowed an opportunity to see real-live couples being impacted in a way that no paid-for advertising campaign or national gay and lesbian spokesperson could ever do. It was so real, and to have all these couples wrapping around the block, standing gout in the elements…It changed the nature of the debate…There were all these lesbian and gay couples in long-term committed relationships, with their children, with their parents, with family there celebrating, and who'd been together at least as long as most nongay couples... And the sky didn't fall, and the world didn't end, and we didn't see a spike in the divorce rates of heterosexual couples.[400]

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

said.[401]

President Bush returned the favor, floating to the media that as he marinated on whether to support a federal constitutional amendment banning same-sex marriage, he had a watchful eye on Newsom's civil disobedience. Less than a week after San Francisco began marrying same-sex couples, President Bush said, "I have watched carefully what's happening in San Francisco, where licenses were being issued, even though the law states otherwise. I have consistently stated that I'll support law to protect marriage between a man and a woman. Obviously these events are influencing my decision."[402] Within a week, Bush endorsed enshrining opposite-sex marriage in the federal constitution.

Openly gay Massachusetts Representative Barney Frank was unnerved by Newsom's defiance of state law, believing it would set back the marriage movement and energize conservatives in the lead up to the November 2004 elections. Indeed, 11 states backed state constitutional amendments banning same-sex marriage, which Frank blamed on San Francisco's "spectacle weddings." Frank believed that had Massachusetts been left alone to implement same-sex marriage and litigation was filed in other states, that "there would have been some collateral damage" to Democrats' electoral prospects and equal marriage efforts, but it would have been "a lot less."[403]

While Barney Frank's preferred approach favoring litigation may have been inevitable, it was now on a fast track. Organized interest groups had contemplated filing a lawsuit challenging California's marriage laws before Newsom took action, litigation was now certain to follow. Indeed, the "proceed with caution" approach to litigation all but evaporated between the events in Massachusetts and San Francisco.[404] One noteworthy civil rights activist, Kate Kendell of the National Center for Lesbian Rights, said in 2004 that "California was in the queue" but that the

group “probably would have waited another year or year and a half" had Mayor Newsom not intervened in the interim. Kendell told the *Washington Post* "fate dealt a different hand."[405] When interviewed on the impact of the Massachusetts litigation on events in the Bay Area, Kendell said:

> Had it not been for Massachusetts, even considering the President’s State of the Union in isolation, I don’t think the Mayor would have done what he did. Moreover, Bush might not have said what he did [in the State of the Union] without Massachusetts. After all, what else did his mentioning “activist judges” refer to?
>
> I think that Mayor Newsom felt this was the way the issue was trending and that Massachusetts should not be out ahead of California. I think he felt that what he was doing was consistent with progressive ideology around equal protection of laws and full inclusion and fairness. The Massachusetts ruling provided a foundation for him to build on. It’s my suspicion that he would not have done what he did if there were a complete vacuum.[406]

San Francisco Board of Supervisors President Aaron Peskin backed up Kendell’s observation on the impact of *Goodridge*. “The Massachusetts state supreme court decisions clearly gave Mayor Newsom license to commit an act of municipal civil disobedience in San Francisco,” he said.[407]

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

> …nothing could be more important than having a state that legally provides marriage to same-sex couples on the basis of the very constitutional concerns that are being raised in many other states. [*Goodridge*] and the humanizing influence it’s going to have as more and more couples in Massachusetts get married, and the sky doesn’t fall, and marriage doesn’t lose its meaning for anyone. . . . The more it just becomes an accepted and normal and really unremarkable event in Massachusetts, the more that’s going to be an increasingly powerful example for other states, like California, to follow.[408]

Similarly, San Francisco Board of Supervisors President Aaron Peskin, pointed to the primacy of judicial legitimatization in the advancement of the same-sex marriage movement

between 2003 and 2004. Peskin ranked *Goodridge* as the most important factor because it "ultimately started the domino effect of acceptability. San Francisco was important symbolically. But Massachusetts catalyzed judicial activism."[409]

With Newsom and the Massachusetts justices interrupting the preexisting strategic plan for impact litigation in California, other legal support organizations prepared to step in and file litigation. Lambda Legal, for example, publicly offered to defend of same-sex couples wanting to ensure the validity of their San Francisco marriages. The City also prepared to attack the state's domestic relations regime and filed suit alleging the exclusion of same-sex couples from marriage rights violated state constitutional rights, only 10 days after city officials met with LGBT rights leaders.

Anti-gay marriage organizations also prepared for litigation in wake of Newsom's provocation. The Proposition 22 Legal Defense and Education Fund and the Campaign for California Families requested judicial relief, an injunction binding the City from issuing more licenses to same-sex couples. The state trial court refused to stop the marriages, finding the plaintiffs failed to demonstrate irreparable harm. Noticeably absent from the litigation up to this point was Attorney General Bill Lockyer, who vowed to defend the state's law but publicly aired his disagreement with its treatment of same-sex couples. Lockyer said that he "personally [did not] support policies that give lesser legal rights and responsibilities to committed same-sex couples."[410]

The day following Lockyer's statement, the governor demanded Lockyer take action against city officials. That same day, Schwarzenegger told a gathering of Republicans, "We rely upon our courts to enforce our rule of law, but we're seeing in San Francisco that the courts are dropping the ball.... While we wait for the courts to act, it's time for the City of San Francisco to

start respecting state law. It is time for the city to stop traveling down this dangerous path of ignoring the rule of law." The California Attorney General subsequently filed with the California Supreme Court to enjoin San Francisco from issuing marriage licenses to same-sex couples.

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

The outcome in this case, which is fundamentally one about municipal powers and statutory interpretation, is unremarkable because there was little doubt that municipal authorities had the power to alter domestic relations law. The real surprise is the degree to which the courts gave San Francisco officials slack to continue defying state law while litigation percolated. In some sense, the unusual leeway comports with the notion of judges preferring incremental change as the precedent hypothesis states. Though the 4,000 licenses issued to same-sex couples in this window were not valid, the courts' complicity reads more like an attempt to nudge the public toward accepting equal marriage before constitutional challenges to state family law were decided on the merits. It reflects the idea articulated by

Newsom's bold move was accompanied by the introduction of legislation during the

second week of the San Francisco marriages in the California Legislature. State Assemblyman Mark Leno of San Francisco, introduced a bill to legalize same-sex marriage in California. Leno also participated in the city marriage defiance movement and was deputized to perform marriages on behalf the city. He solemnized nearly 100 marriages. Leno described his legislative work as part and parcel to Newsom's defiance. "It's a one-two punch," Leno said. [411] Leno nevertheless pledged to defer to the House Speaker's judgment on whether his bill would receive a hearing. The House Speaker's spokesman conveyed the Speaker's wishes to "wait to see how lower courts ruled on the constitutionality of gay marriage before deciding whether to allow Leno's bill a hearing."[412]

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

> It was disgraceful for the president of the United States to pander to his radical right-wing supporters out of his own concerns for re-election. This puts me and my community in the position of taking one of two actions: Either continually playing defense or taking proactive steps. Rather than playing defense and explaining why we don't need a constitutional amendment, this (legislation) moves forward in a positive fashion."[413]

For his part, Governor Schwarzenegger's position on same-sex marriage appeared to soften in the time marriages continued in San Francisco contrary to state law. The Governor shifting stance on equal marriage rights cannot be neatly compartmentalized by any one of the hypotheses. However, the legitimization hypothesis and the rights consciousness hypothesis can explain Schwarzenegger's inching closer to supporting equal marriage. First, the evidence of Schwarzenegger's increasing support on the merits is consistent with the legitimization

hypothesis, suggesting the governor became more comfortable with equal marriage over time in wake of court rulings expanding marriage rights. Second, the rights consciousness effect did significant lifting here. The governor's gradualism on the merits of marriage equality was secondary to the courts by his own admission. Schwarzenegger's initial response to the brewing marriage controversy was an acknowledgment of the primacy of the courts, suggesting that same-sex couples were asserting a valid claim to a right that the courts were properly entertaining.

Just a week before the California Supreme Court stopped Newsom and his allies from issuing more licenses to same-sex couples, Schwarzenegger was a guest on a Jay Leno's national evening program. When asked if he inherently opposed equal marriage rights for same-sex couples, the governor responded, "No, I don't have a problem. Let the court decide. Let the people decide."[414] He also expressed disagreement for calls to federally ban same-sex marriage by constitutional amendment. While the governor's new tepid demeanor towards changing the state's domestic relations law fell well short of an endorsement, Newsom believed it was significant to the extent that it helped "soften the opposition"[415]

The most crucial executive action in California came about in 2009. After the California Supreme Court ruled that the state constitution required equal marriage rights for same-sex couples, state voters initiated a constitutional amendment to overturn the decision. That initiative, Proposition 8, was successful in on Election Day in November 2008. Governor Schwarzenegger opposed Proposition 8 prior to its ratification, calling it a "waste of time" and preferring to give deference to the state courts' judgment.[416] The governor stopped short of endorsing equal marriage. Meanwhile, the state's attorney general, Jerry Brown personally opposed Proposition 8, but pledged to defend it in the lead up to November 2008.[417]

The proposition's success prompted days of protests by pro-LGBT Californians. Less than a week after voters backed the amendment to take away marriage rights from same-sex couples, expressed a change of heart on the merits on equal marriage. "It's unfortunate, obviously, but it's not the end. I think that we will again maybe undo that, if the court is willing to do that, and then move forward from there and again lead in that area," the governor said.[418]

The American Foundation for Equal Rights funded a federal court challenge alleging Proposition 8 violated the U.S. Constitution's Fourteenth Amendment. That group, represented by David Boies and Ted Olson, backed the federal case. This is a noteworthy development that satisfies a condition of the support-structure hypothesis— the legal community elite staunchly supported same-sex couples' litigation. More than influential private practitioners attacking Proposition 8, the state's top executives refused to defend the law. Consequently, the same-sex marriage ban's defense was in the hands of intervening parties that supported the campaign backing Proposition 8. Schwarzenegger told the federal district court that the suit brought by two same-sex couples against the marriage amendment "presents important constitutional questions that require and warrant judicial determination."[419] Taking a more aggressive track than the governor's relative neutrality, Attorney General Brown argued that Proposition 8 violated the guarantees of the Fourteenth Amendment.

These critical decisions in 2009 and 2010, to not defend Proposition 8 and not appeal the decision striking it down, carried great significance. At trial, Proposition 8's proponents abjectly failed to produce any substantive defense of the law. Proponents offered only two witnesses to support the constitutional amendment— both witnesses were by all accounts ineffective and ill prepared.[420]

The thin amount of evidence presented in support of Proposition 8, despite Judge Vaughn

Walker's prodding for a more vigorous defense, was damning. Judge Walker's 138-page ruling thoroughly dismantled the justifications proffered by defense. Legal experts roundly expected the decision to survive the test of time. One high profile Proposition 8 to concluded Walker's work product was too persuasive to be overturned, while same-sex marriage advocates celebrated the decision as a major turning point because of its dedication to detail.[421] In the end, the state's nondefense proved dispositive for the litigation's outcome. The U.S. Supreme Court ruled in 2013 that the interveners lacked Article III standing to appeal Judge Walker's ruling.

The Emerging of National Civil Disobedience

The ramifications of Newsom's civil disobedience rippled across the nation, consistent with the expectations of the rights consciousness hypothesis that predicts judicial rulings can help fuel an awareness of emerging legal claims and bring them into mainstream discourse. A number of high profile mayors applauded Newsom, most notably the mayors of Chicago and Salt Lake City. Chicago's Mayor Richard Daley said he had "no problem" with Cook County issuing same-sex marriage licenses.[422] Cook County Clerk David Orr refused to issue licenses to gay couples, though he personally supported marriage rights for gay couples. "We feel the law must change either by the Illinois General Assembly or by the [state] Supreme Court, as was done in Massachusetts," a spokesman for Orr said.[423] Orr's withholding of licenses to gay couples drew protests to the Cook County Clerk's Office. Supporters of marriage equality held a sit in on the first day that Massachusetts began marrying same-sex couples in May 2004.

In Manhattan, hundreds of LGB activists took to the streets and demanded the mayor take a position on marriage.[424] New York City Mayor Michael Bloomberg waded into the controversy offering strong support for civil unions, but left the door open to equal marriage. Bloomberg equivocated, "I think the term 'marriage' is what is polarizing people, and as I say,

I've gone back-and-forth."[425]

The rights consciousness chain reaction went beyond local leaders speaking out on equal marriage rights. Following the acts of municipal defiance in California, same-sex couples in other states took to the courts. In Washington, King County Administrator encouraged couples that wanted to marry to file suit against him challenging Washington's marriage law.[426] On March 8, 2004, six couples applied for marriage licenses in King County and were denied at the direction of King County Administrator Ron Sims. Lambda Legal filed suit challenging the Washington law under state constitutional grounds the same day.

Later on March 8th, Seattle Mayor Greg Nickels issued an executive order recognizing municipal employees who lawfully married a same-sex partner outside Washington.[427] Nickels also took the opportunity to propose an amendment to Seattle's nondiscrimination law.[428] The Mayor's recommended the definition of "marital status" specifically include same-sex married couples. Nickels and his supporters hoped the city could then require equal benefits for gay and straight employees' spouses for private employers, but it was never adopted.

According to Lambda Legal's lead attorney on the case, Jamie Pedersen, who would play a significant role in advancing LGBT rights in the Washington Legislature, litigation was contemplated for some time in Washington. But, the *Goodridge* decision in Massachusetts and local efforts to issue marriage licenses pushed them to act earlier than originally planned. "The explosion of support for gay marriage across the country absolutely made us move faster…The train was leaving the station and we could either be on it, or be chasing it," Pederson said.[429]

A second lawsuit came on April 1 from the ACLU on behalf of 11 same-sex couples. ACLU representatives were more energized in 2004 to tackle same-sex marriage bans than before. "The time is much better now than it was a year or two ago," ACLU Executive Director

Kathleen Taylor said on the organization's decision to file suit.[430] While the rights consciousness effect is evidenced in Washington, it would have been muted but for the infrastructure that was in place to buttress LGBT litigation and advocacy. The ACLU and Lambda Legal were vital building blocks— these organizations operationalized the burgeoning post-*Goodridge*/post-San Francisco rights consciousness. As the support structure hypothesis predicts, these groups utilizing their resources and expertise were able to take swift action and tap into the new sense of urgency expressed by same-sex couples to have their rights vindicated.

The same day same-sex couples applied for marriage licenses in Washington, New Jersey officials in Asbury Park started to issue marriage licenses to same-sex couples. The deputy municipal clerk, Dawn Tomek, told reporters that she studied the state's marriage law after a resident made an inquiry after marriages began in San Francisco. Finding that New Jersey law neither expressly permitted or banned same-sex marriage, Tomek decided to act. "I went by the Constitutions of the United States and of New Jersey, both of which guarantee equal rights," she said.[431] The City backed Tomek, issuing a statement that issuing same-sex couples marriage licenses was a matter of "fundamental civil rights."[432]

After two businesses days, ten couples completed license applications and waited the 72-hour waiting period to expire.[433] Unlike in San Francisco, however, local LGBT rights activists were not included in the decision-making process. Nevertheless, Lambda Legal and New Jersey Lesbian and Gay Coalition expressed support, issuing a joint statement that said, "Our organizations ... support and congratulate all the jurisdictions across the country that have taken this courageous action, including Asbury Park."[434]

Across the Delaware in neighboring Pennsylvania, New Hope City Council Members passed a resolution asking Bucks County officials to issue same-sex marriage licenses. Because

the city had no authority to issue licenses, there was little the council could do, but members told the media that they had started discussing the issue in the weeks after Gavin Newsom's order to the San Francisco County Clerk.[435]

Oregon

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

Opponents of marriage equality hoped to foreclose efforts by same-sex couples to take advantage of Oregon courts or the state legislature in the wake of *Goodridge* to legalize gay nuptials. Efforts to amend the Oregon Constitution failed in 1999, but *Goodridge* reignited marriage ban supporters. The founder and director of Oregon Family Council, a main opponent of same-sex marriage, said:

> Massachusetts was on the verge of legalizing same-sex marriage, not through the people but through the courts. So the question came up, if Massachusetts legalizes same-sex marriage, how do we deal with the fact that Oregonians may be able to go to Massachusetts, get married, come back to Oregon, and then we have a situation in Oregon where there's this debate about whether these marriages should be recognized.[436]

On the heels of Gavin Newsom's stand on marriage and after hearing equal marriage opponents were initiating a petition to amend the state constitution to ban gay marriage rights, the head of the state's largest LGBT rights organization, Basic Rights Oregon, approached Multnomah County officials and encouraged action.[437]

Seeing an opportunity to take advantage of the statutory ambiguity, on March 3, 2004,

same-sex marriage licenses were issued in Multnomah County— one day after opponents filed to begin circulating petitions in support of a constitutional ballot initiative.[438] Multnomah County Attorney Agnes Sowle justified the County's position:

> The Oregon Constitution prohibits the county from discriminating against same-sex couples when they are applying for marriage licenses because that kind of discrimination based on gender and based on sexual orientation is not allowed in Oregon.[439]

Six days later, County Circuit Judge Dale Koch rejected an application to enjoin the county from continuing to issue same-sex couples marriage licenses. By the time Judge Koch ruled, nearly 1,700 gay and lesbian couples had a marriage license from the county in hand.

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

> Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.[440]

The legislative counsel letter emphasized that the Oregon courts' jurisprudence was more favorable to claims of sexual orientation discrimination than many states. "Even the Supreme Judicial Court of Massachusetts, which has ordered that state to make marriage available to same-sex couples, does not treat homosexuals the same as racial minorities and religious adherents," the letter highlighted. The letter also detailed two Oregon state court cases where the courts ruled LGB persons and same-sex couples were fit parents.[441] Assessing legal landscape in Oregon and nationally, the legislative counsel opinion concluded the Oregon Constitution

compelled equal marriage rights for LGB Oregonians.

Democratic Governor Ted Kulongoski asked the state's attorney general for an opinion on the Multnomah County marriages. Attorney General Hardy Meyers offered a more muted opinion than the state's legislative counsel, on March 12. Meyers ultimately concluded that the exclusion of same-sex couples from marriage rights had improbable odds in surviving judicial scrutiny:

> [T]he Oregon Supreme Court would likely conclude that withholding from same-sex couples the legal rights, benefits, and obligations that— under current law – are automatically granted to marriage couples of the opposite sex likely violates Article I, section 20 of the Oregon Constitution....[442]

With the attorney general opinion concluding the Portland clerks were acting contrary to state law, Governor Kulongoski urged clerks to abide by the male-female requirements of state family law. The governor, along with the attorney general, pledged to expeditiously bring the constitutional question to state's highest court. "There is only one body in this state that can give us a definitive ruling on whether this is constitutional or not, and that entity is the Oregon Supreme Court,"Kulongoski said. In the interim, Kulongoski offered support for civil unions, stating, "I believe that every citizen in this state is entitled to the same rights, privileges, responsibilities as every other citizen."[443]

On March 24, the ACLU and Basic Rights Oregon filed suit challenging the permissibility of the state's marriage law under the Oregon Constitution. On April 20, 2004, Judge Frank Bearden ordered the county officials to halt same-sex marriage licenses. Bearden also mandated the state treat the 3,022 same-sex marriage licenses already issued by the county as valid. As appeals percolated, opponents of equal marriage campaigned on the ballot proposal to ban same-sex marriage in state constitution. Voters approved that measure in November 2004.

Though the amendment's backers put their campaign in motion before the Portland

licenses were issued, they believed they capitalized on the clerks' disregard for state law. Kelly Clark, counsel for the Oregon's Defense of Marriage Coalition, suggested that average Oregonians had "always worried that there might be some secret gay agenda."[444] Pointing to the events in Portland, Clark said, "And, lo and behold, there was a secret gay agenda."[445]

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

The Oregon Supreme Court also rejected litigants' calls to determine whether civil unions were required under the state constitution because the issue was not raised in lower courts. However, less than 24 hours before *Li* was decided, Governor Kulongoski forwarded legislation to enact civil unions and ban discrimination in housing and employment on the basis of sexual orientation.[446] The Kulgonoski Administration was unfazed by the Oregon Supreme Court's decision. The Administration's spokesman reiterated, "The state's position from the outset was that the fundamental issue was whether or not same-sex couples were entitled to the rights and privileges of marriage, not just the institution of marriage itself."[447]

The omnibus civil unions-nondiscrimination bill, SB 1000, prompted the first vote ever on same-sex unions in the Oregon Legislature.[448] It passed 19 to 10 in the Oregon Senate. Opponents generally cast it as an attempt to subvert the marriage amendment and "overturn the will of the voters."[449] Opponents also often referred to civil unions as "gay marriage by another name."[450]

Despite the public's expressed opposition to equal marriage in the prior election by a margin of 57 to 43 percent, polling offered a different picture. One poll found 49 percent of

Oregon voters support civil unions at the time SB1000 was under debate. That poll also registered 30 percent of Oregon voters opposed to civil unions, with 21 percent undecided.[451] Still, the public was divided and so, too, was the legislative response. The Republican Oregon House Speaker refused to hear a civil unions bill, though some GOP House leaders offered to advance Hawaii-styled reciprocal beneficiaries legislation.

Governor Kulgonoski, undeterred, wanted to take action and keep the issue of LGBT rights alive. Kulgonoski issued an executive order to form a commission charged with studying the state of equal rights in Oregon.[452] The Governor explained the motivation behind his reinvigorated civil rights agenda:

After Oregon passed this constitutional amendment [banning] same-sex marriage, which I campaign against, I think everyone thought the political process would go dead on this issue. I put it back in the next legislative session two months after the election because I didn't want it to go dead. I like the task force because I don't want a political vacuum to be generated. I want the public to care about the debate.[453]

The governor and his task force held hearings across the state and worked to craft legislation, which was introduced in 2007. Instead of using the term "civil union" as advocates had in 2005, the 2007 legislation created "domestic partnerships." The domestic partnership legislation passed the Oregon House 34 to 26 and the Oregon 21 to 9. In addition, the Legislature enacted civil rights protections for LGBT Oregonians, though those nondiscrimination provisions were in a stand-alone bill, unlike 2005.

As an near immediate outgrowth of the Oregon marriage defiance, same-sex couples galvanized efforts to secure marriage-like status and anti-discrimination protections— first introduced in 1973— in housing, public accommodations, jury service, foster parenting, state

institutions, public schools, and employment.

New Mexico

The emergence of a rights consciousness effect was short lived in one New Mexico County. On February 20, 2004, Sandoval County, New Mexico, Clerk Victoria Dunlap started issuing same-sex marriage licenses. Dunlap, a Republican, was prompted to act after a phone call from a member of the public:

> I had a person call and ask if we did perform same-sex marriages. And I said as of yet we had not but I would look into it. I had one of my staff members ask an attorney, and [County Attorney David Mathews] said that we had to issue the licenses. We could not prohibit anyone based upon sex.[454]

Mathews' told Dunlap that New Mexico's marriage law did not mention sex-based requirements for parties to a marriage, though a 1961 statute establishing the statewide marriage license form did make reference to male and female applicants. In 1973, New Mexico outlawed sex-based discrimination, Mathews said. Dunlap made subsequent inquires with state officials after consulting Mathews, but moved ahead to issue licenses after she made little headway.

"This has nothing to do with politics or morals. If there are no legal grounds that say this should be prohibited, I can't withhold it.... This office won't say no until shown it's not permissible," Dunlap said. Clerks in neighboring Santa Fe and Bernalillo counties disagreed and declined to follow Dunlap, believing the law was clear. "My position is I took an oath to uphold the law, not change the law," said Rebecca Bustamante, Santa Fe County clerk. "I wouldn't do it because I just don't think I can."[455]

Unlike in other states, New Mexico Attorney General Patricia Madrid took swift action to put a stop to Dunlap's reading of state law. Madrid issued an advisory letter on the same day Dunlap started issuing licenses that the licenses were "invalid under state law." The Sandoval County Clerk's Office heeded the Attorney General's advice after the 66 licenses were issued.

In 2004, the New Mexico Attorney General's Office offered clerks little room to engage in disobedience. By 2011, the Office's tone was markedly different. Now headed by Attorney General Gary King, the Attorney General's Office responded to an inquiry from State Representative Al Park concerning the status of marriages contracted by same-sex couples outside of New Mexico. The formal opinion concluded:

> While we cannot predict how a New Mexico court would rule on this issue, after review of the law in this area, it is our opinion that a same-sex marriage that is valid under the laws of the country or state where it was consummated would likewise be found valid in New Mexico.[456]

Suzanna Martinez, the state's Republican governor, opposed same-sex marriage and declined to take formal action on Attorney General King's opinion.

New York

On Tuesday, February 24, 2004, President Bush announced his support for a federal constitutional amendment prohibiting same-sex marriage. Bush cited events unfolding in San Francisco as partial motivation for his decision to take action on what he called "the most fundamental institution of civilization," but it trigged additional pushback in New York. On Friday, February 27, 2004, New Paltz Mayor Jason West drew national attention when he began marrying same-sex couples.

When West became mayor in June 2003, same-sex relationship recognition was one of the many items on his agenda. He took no action on gay rights during the remainder of the year. While national debate unfolded on same-sex unions after events in Massachusetts, West spoke at the National Conference on Organized Resistance in January 2004 that he wanted to marry same-sex couples as a newly minted mayor. West was emboldened by Mayor Gavin Newsom's refusal to discriminate against same-sex couples, the mandates of state law notwithstanding. "San Francisco is absolutely an inspiration and made it clear we also wanted to stand up to President

Bush," he said.[457] But West's thinking on equal treatment for same-sex couples began long before the post-State of the Union tussle in the months after the *Baker* decision in Vermont. "The first time I recall [contemplating equal marriage for same-sex couples] was in 2000, I ran as a protest [state legislative] candidate for the Green Party just after Vermont had legalized civil unions. That was the first time it came on my radar as civil unions," West said.[458]

On Monday, February 23, 2004, West asked the New Paltz clerk if she would issue marriage licenses to same-sex couples. The clerk declined. After President Bush threw his support behind the proposed federal amendment, West announced he would follow Mayor Gavin Newsom's lead and start solemnizing wedding ceremonies. Though West had started to take the necessary steps to illegally marry same-sex couples prior to George W. Bush's constitutional reform announcement, West said that Bush "gave me even more conviction in marrying same-sex couples."[459]

As West began marrying same-sex couples in rural New Paltz, a political firestorm came about in New York. Eventually, West was enjoined by state court from continuing to marry same-sex couples, but other New York elected officials looked for ways to contribute and bring the issue of LGB rights to the fore. Mayor Carolyn Peterson of Ithaca was barraged by emails and phone calls in the wake of events in New Paltz.

Peterson recognized that the marriages in New Paltz were merely symbolic because the Department of Health would refuse to file them, but hoped to seize the opportunity to pursue litigation. Peterson announced in March that the city would coordinate a campaign to send same-sex couples' unsigned marriage applications to the state Health Department. Once the Health Department rejected the application, Ithaca officials would provide legal assistance and work to file a lawsuit challenging the state's marriage laws.[460]

On March 3, 2004, New York Attorney General Eliot Spitzer weighed in, providing an informal opinion on the status of relationship recognition for same-sex couples in New York. In response to an inquiry from the Town of Olive concerning the ministerial obligations of clerks, the Attorney General's Office replied that New York clerks must not issue marriage licenses to same-sex couples because the legislative intent behind the state's domestic relations law. Though the controlling statute did not authorize clerks to issue marriage licenses to same-sex couples, the opinion pointed out that "serious constitutional concerns" were raised by the statute's discriminatory effect.[461]

The City of Cohoes requested the Attorney General's Office opine on the validity of same-sex marriages entered into from out-of-state or parallel state recognized relationship statuses, like civil unions. The opinion combed through state law:

> In general, New York common law requires recognizing as valid a marriage, or its legal equivalent, if it was validly executed in another state, regardless of whether the union at issue would be permitted under New York's Domestic Relations Law. The only exceptions to this rule occur where recognition has been expressly prohibited by statute, or the union is abhorrent to New York's public policy. The abhorrence exception is so narrow that only marriages involving "polygamy or incest in a degree regarded generally as within the prohibition of natural law" have been deemed abhorrent by the courts. . . .
>
> Applying this New York common law rule of recognition, the only New York court to have addressed the question recently held that a party to a Vermont civil union must be treated as a "spouse" … and therefore could bring a wrongful death action… The court concluded that New York's public policy does not preclude recognition of Vermont unions in light of the expansive benefits and protections afforded same-sex couples under the laws of the State…
>
> … the issue of recognizing same-sex unions from other jurisdictions presents a distinct legal question. Consistent with the holding of the only state court to have ruled on this question, New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law. . . .[462]

New York was the first state to signal it would treat out-of-state same-sex marriages as valid, although the Attorney General's opinion did not carry the force of law. Later in 2004,

concrete steps were made to adhere to the principle of comity laid out by Spitzer's office. In October 2004, the New York State Comptroller announced the state's retirement system would recognize same-sex marriages lawfully performed outside New York. New York City Mayor Bloomberg followed suit in November 2004. Bloomberg issued a statement on the expansion of benefits:

> A few weeks ago, I asked the Corporation Counsel to advise me on whether the City's five pension systems could be expanded to recognize same-sex marriages, legally entered into in other jurisdictions as well as Vermont civil unions. Today the Corporation Counsel has advised me that such recognition is legal and just. I am forwarding the opinion to my representatives on the boards of the City's five pension systems and directing them to introduce resolutions to ensure that parties to these relations are treated in the same manner as parties to opposite-sex marriages. This will enables us to extend benefits, such as in the case of accidental death, to spouses of City employees who are legally married, regardless of their sexual orientation.[463]

By 2005, the New York Court of Appeals rejected the numerous constitutional claims pressed in state courts to dismantle the state's sex-conscious marriage law. While the New York Legislature hemmed and hawed over legislation to legalize same-sex marriage, New York Governor David Paterson took a significant step to defend LGB New Yorkers' marriages performed outside of the state.

While recognition of marriages across state lines is historically noncontroversial, the lengths states went to block gay, lesbians, and bisexuals from marrying out-of-state and returning home seeking recognition was unprecedented. On one hand the Paterson's move should have been of little cause for celebration, but on the other it was the most sweeping affirmation of LGB equality available barring legislative action. LGBT rights groups responded with great favor to the gubernatorial directive.

Paterson's move was seen, at least by the New York Civil Liberties Union, as a response to NYCLU litigation in state court litigation, Martinez v. County of Monroe.

The case arose from the refusal of Monroe Community College, a county-backed institution, to extend benefits to the same-sex spouse of a college. Losing at the trial court in 2006, the couple was victorious on appeal in February 2008. The New York intermediate court of appeals ruled in *Martinez* that a same-sex marriage celebrated in Canada should be recognized in New York because the Canadian marriage did not violate New York public policy. On May 6, 2008, New York's court of last resort rejected an appeal on procedural grounds. On May 29, 2008, David Nocenti circulated the memorandum to all state agencies' counsel, writing:

> In Martinez, the Fourth Department held that legal same-sex marriages performed in other jurisdictions are "entitled to recognition in New York in the absence of express legislation to the contrary." This decision is consistent with the holdings of several lower courts. See, e.g., Godfrey v. Spano, 15 Misc.3d 809 (Sup. Ct. Westchester Cty. 2007), appeal pending (2d Dep't); Godfrey v. Hevesi, 2007 N.Y. Misc. LEXIS 6589 (Sup. Ct. Albany Cty. Sept. 5, 2007). The Martinez court also found that the failure to recognize such marriages may violate the New York Human Rights Law.
>
> …In light of these decisions, agencies that do not afford comity or full faith and credit to same-sex marriages that are legally performed in other jurisdictions could be subject to liability. [464]

LGBT civil rights groups greeted the Paterson Administration's pronouncement with celebration. Susan Sommer of Lambda Legal welcomed the clarity the Paterson Administration brought to the state bureaucracy saying, "It shouldn't be the burden of each lesbian or gay couple to have to advocate before an agency every time a new issue comes up."[465]

Donna Lieberman of the New York Civil Liberties Union called the memorandum "a milestone." Lieberman embraced the stability the Administration's policy brought. "For the first time, couples in New York who have never known true security for their families will be officially entitled to treatment by our state government that respects their rights. They should now finally get a taste of the family protections other married couples and their children enjoy," Lieberman said in a press release.

Others saw it as milquetoast measure. Alan Van Capelle, executive director of Empire State Pride Agenda questioned what he saw as a "temporary, but necessary fix for a longer-term problem." Van Capelle asked, "If you're going to treat us as equals, why don't you just give us the marriage license?"

For Governor Paterson's part, he saw it as an opportunity to take the courts' decisions and use them to drive life into his agenda and enact marriage equality legislation. Paterson recounted:

> I felt like we should just continue to work on the legislation. I didn't want to get dragged into the marriage equality fight. I wanted to be leading it. And I think Governors Spitzer and Pataki supported it, but it just wasn't a top priority. I came from relative obscurity, but this, for me, was the first personal light that showed who I was and what I stood for.[466]

Rhode Island

Given Rhode Island's proximity to Massachusetts and requirements under Massachusetts law restricting marriage licenses to out-of-state couples whose home state would recognize the marriage, the question of whether LGB Rhode Islanders could marry in Massachusetts was a significant one. In September 2006, a state superior court judge in Massachusetts ruled that same-sex couples that lived in Rhode Island could marry in Massachusetts.

On February 1, 2007, the Rhode Island Board of Governors for Higher Education Commissioner Jack Warner wrote to Attorney General Patrick Lynch asking whether the Board of Governors should recognize state employees in same-sex marriages lawfully performed in Massachusetts as married. Lynch examined state law and concluded that Rhode Island law would recognize out-of-state marriage unless a marriage conflicted with the public policy of the state.

As of 2007, Rhode Island had only enacted legislation expressly rejecting bigamous and incestuous marriages, as well as those "contracted" where one of the parties was incompetent to

enter a marriage. Lynch also examined nondiscrimination protections embedded in Rhode Island law, which proscribed invidious discrimination against LGB Rhode Islanders in public accommodations, credit, housing, and employment. Rhode Island law also allowed same-sex couples to adopt children.

Given the state's favorable landscape for sexual minorities, Lynch concluded that state entities should recognize lawful same-sex marriages from Massachusetts.[467] "Rhode Island will recognize same-sex marriages lawfully performed in Massachusetts as marriages in Rhode Island…Therefore, we advise the Board of Governors that it should accord marital status to its employees who were lawfully married in Massachusetts under the ruling of that state's highest court in Goodridge…" the opinion concluded.

When interviewed about his formal opinion, Attorney General Lynch said, "This is about Rhode Island citizens who entered into a valid, legally recognized same-sex marriage and returned here to live and work. There is no way, no law, no constitutional provision and, in my estimation, no right to allow the denial of basic human rights."

When Lynch's opinion came down in 2007, Rhode Island Governor Donald Carcieri, a Republican, opposed same-sex marriage. Lynch's opinion lacked binding authority, only an act of the legislature or an executive order from Governor Carcieri could give it the force of law. Despite lacking the force of law, a number of Rhode Island agencies intended to follow the Attorney General Opinion including the agency that requested the opinion. Though it never materialized, Lynch posited that the opinion might prompt new developments, saying, "Perhaps litigation will flow from it."

Lynch's action was important for Rhode Islanders hoping to marry in Massachusetts, but it also was cited in run up to Vermont's same-sex marriage debate as a reason to extend marriage

rights to LGB Vermonters. One of the main arguments in favor of moving away from civil unions was that the term marriage was more portable across state lines. With neighboring Massachusetts and nearby Rhode Island offering to recognize same-sex marriages, the portability argument held more weight.

In 2012, Governor Lincoln Chafee issued an executive order that the state would recognize out-of-state same-sex marriages. As a consequence, same-sex couples married outside of Rhode Island gained equal access to insurance markets, state employment benefits, presumptions of parentage, tax exemptions, and property rights. Though Chafee wanted to push same-sex marriage legislation through, he faced an uphill battle with conservative Democrats in the Senate. Like Governor Paterson in New York, Chafee hoped to use an executive order to move the ball on marriage and communicate his support for an equal marriage bill. "The previous governor was staunchly anti-marriage equality. I put it in my inaugural address and I said [legislating equal marriage] is something I wanted to do in Rhode Island. We open our doors here to everyone. I couldn't get it passed my first year, so this was a fall back. I wanted to send a message," Chafee said.[468]

Maryland

In early 2009, openly gay Maryland State Senator Richard Madeleno wrote to Maryland Attorney General Douglas Gansler about the legal effect of same-sex marriages contracted outside in same-sex marriage jurisdictions. In addition to requesting an opinion on recognizing same-sex marriages, Madeleno specifically asked Gansler assess whether Maryland Governor Martin O'Malley could follow New York's lead and issue an executive order mandating comity be given to out-of-state marriages.

At this point of time O'Malley supported civil unions, but had yet to endorse equal rights

for LGB Marylanders. Gansler's opinion and O'Malley's response would take on potentially greater importance because neighboring Washington, D.C., was considering enacting a marriage equality law. On December 18, 2009, Mayor Adrian Fenty signed marriage equality legislation that would take effect after a 30-work-day period for mandatory Congressional review. With Congress refusing to block same-sex nuptials in the District, same-sex couples were eligible to marry on March 9, 2010.

On February 23, 2010, Gansler published his formal opinion on the status of out-of-state marriages contracted by gay and lesbian couples. Gansler was careful to distigush the difference between New York and Maryland, noting that Governor Paterson's administrative advisory was in response to court decisions mandating equal recognition for marriages celebrated outside of New York. Maryland had no similar case that would support executive action.

The Attorney General's opinion did, however, make clear that Maryland historically accepted non-Maryland marriages that were otherwise prohibited from being contracted in the state. The opinion described a 1916 decision, *Fensterwald v. Burk*, where the Maryland high court gave force to a marriage between an uncle and niece who married legally in Rhode Island to circumvent Maryland law.

Determining that the marriage in question was not incestuous, the court refused to void it for want of consistency with Maryland public policy. Gansler also explained Maryland courts accepted the validity of out-of-state common law marriages though Maryland did not permit them under state family law.

After examining the state's legal backdrop on LGB rights issues, which protected Marylanders against sexual orientation discrimination, recognized same-sex couples' right to adopt children, and afforded limited domestic partner benefits to same-sex couples, Attorney

General Gansler concluded the state's public policy did not disfavor recognizing same-sex marriages. The Attorney General's Opinion concluded:

> While the matter is not free from all doubt, in our view, the Court is likely to respect the law of other states and recognize a same-sex marriage contracted validly in another jurisdiction. In light of Maryland's developing public policy concerning intimate same-sex relationships, the Court would not readily invoke the public policy exception to the usual rule of recognition. You have posed the question in the abstract, but, of course, context matters. For example, to the extent that a particular matter is governed by federal law, the federal Defense of Marriage Act, which limits marriage for federal purposes to opposite-sex couples, would prevent recognition of the marriage for that particular purpose.[469]

O'Malley responded to the Attorney General's letter stating, "I expect all state agencies to work with the Attorney General's office to ensure compliance with the law."[470] State agencies soon took action to bring policies into line with the Gansler opinion. The Department of Budget and Management included married same-sex couples in the Department's paid-leave and employee-benefit policies.[471] The Board of Regents of the University System of Maryland ordered that its policies be revamped to ensure that they were "consistent with the advice given by the Office of the Attorney General."[472] The Department of Health and Mental Hygiene adopted a policy allowing the non-biological mother of an infant born to her spouse, the natural mother, to be listed as a parent without court order.[473] In 2012, prior to the state's adoption of same-sex marriage, the Maryland Court of Appeals ruled (consistent with the Gansler opinion) that public policy exception did not apply to same-sex marriages celebrated lawfully out-of- state in *Port v. Cowan*.

Conclusions

In this chapter, I examined shifts in the status quo after the courts ruled for the rights of same-sex couples to test the right consciousness, legitimization, political reinforcement, and administrative implementation hypotheses. The evidence laid out from the states where courts of

last resort constitutionally extended marriage rights to same-sex couples and in those where acts of disobedience were carried out to protest the denial of same-sex marriage rights, lend support for each of the hypotheses.

The moves executive and administrative actors took in response to *Lawrence* and *Goodridge* included both substantive acts of tangible consequence and symbolic acts of mass civil disobedience. A number of factors complicate any attempt to glean an understanding of the motivation behind these actions. However, timing, contemporary statements, and reflective interview statements suggest that the United States Supreme Court's decision striking down state sodomy laws and the Massachusetts decision ending marriage discrimination played a central role in fomenting national protests and setting off a chain reaction that greatly shaped— for better and for worse— the same-sex marriage movement.

Among the more important early actions taken by state executives were the opinions rendered by the attorneys general in New York and Rhode Island. The Rhode Island and New York opinions were necessary solely because of *Goodridge* and an attempt to bring clarity on the eligibility of New Yorkers and Rhode Islanders to marry in Massachusetts. Cabining lawfully married same-sex couples to Massachusetts residents due to the preexisting 1917 residency requirement law would have limited the reach of *Goodridge*. However, the neighboring attorneys general amplified the impact of *Goodridge* by ensuring it was a regional phenomenon. If a metric of *Goodridge*'s success is the tangible benefits accrued by LGB persons, then it was more valuable because it yielded spillover benefits in neighboring states. Indeed, same-sex couples married in Massachusetts could obtain direly needed recognition and marital benefits in these states. Because these actions did not occur within a single jurisdictional hierarchy, they do not provide insight to the political reinforcement hypothesis.

The chain of events described in this chapter gives credence to the rights consciousness hypothesis and legitimization hypothesis. Governors and state attorneys general legitimized *Goodridge* and further legitimized same-sex marriage by buttressing the portability argument that was prominent in Vermont's marriage debate between 2007 and 2009. Further, these executive orders and attorney general opinions made same-sex marriage more salient— an important factor in the rights consciousness analysis— and would not have been possible without *Goodridge* and subsequent spread of equal marriage jurisdictions.

These opinions also boosted efforts to legalize same-sex marriage in Vermont. Of the many arguments put forward in Vermont to abandon civil unions for equal marriage, the concept of "portability" was among the most cited. Proponents of marriage equality often derided the unwieldy language encumbering civil unions that required lengthy explanations to non-Vermonters and carried hurdles for civil unionized couples seeking out-of-state recognition. The merits of that argument would have been far weaker in 2007 when they were first prominently raised without *Goodridge.* The portability argument gained even more credibility with New York and Rhode Island welcoming out-of-state gay marriages.

In New York, Governor Paterson's Administration took Eliot Spitzer's attorney general opinion one step further by directing state agencies to recognize same-sex marriages lawfully contracted out-of-state. Paterson's directive was issued nearly three years before the state legalized equal marriage. The Paterson Administration's undertaking to bring all state agencies under a uniform policy was a reaction to an intermediate appellate court decision mandating a county recognize an out-of-state gay marriage. In one sense, the executive branch made the court decision in *Martinez* with respect to giving comity to same-sex couples more effective by lending the weight of executive authority and mandating uniform statewide compliance. Thus,

because the New York courts had a friend in a sympathetic governor, the *Martinez* decision's efficacy was magnified. Had the Paterson Administration shrugged at *Martinez*, same-sex couples would have had to potentially challenge any out-of-state marriage recognition denials on an agency-by-agency basis.

In another sense, *Martinez* and the executive letter it prompted thrust the merits of legalizing same-sex marriage into the media and bubbling conversations about enacting marriage equality. The Paterson Administration used *Martinez* to bring additional gravitas to the campaign for equal marriage, though it would not come to pass for three years. Thus, while *Martinez* and the prod to take executive action in its wake lowered administrative barriers for same-sex couples seeking equal treatment by state agencies, it did little to galvanize pro-marriage forces in the New York political circles that suffered from more systemic leadership crisis.

The media attention Paterson's move garnered trickled down to Maryland where it induced an inquiry from a state senator to the attorney general whether Maryland law could achieve a similar result. The Maryland Attorney General's 2010 opinion that Maryland law compelled the same result as New York was the second positive advancement for same-sex marriage rights below the Mason-Dixon. That opinion took on greater importance once the District of Columbia successfully waited out the congressional review period on the District's marriage equality law and same-sex marriages commenced. After Gansler's opinion a number of state agencies expanded the rights, privileges, and benefits of marriage to same-sex couples wedded in other jurisdictions— a position later ratified by the Maryland courts with finality in 2012.

Unlike these aforementioned developments, the record evidences that many of the pivotal developments in this time period were *ultra vires* acts of civil disobedience by municipal

officials. These instances of rouge behavior seem to be by-and-large born out of a mindset preexisting *Goodridge* that discrimination against LGB people was morally wrong. Those engaging in acts of civil disobedience saw the moral objection towards discrimination as a necessary but singularly insufficient condition for resistance to the law. This observation is substantiated by the repeated linking of unlawful marriage licenses to principles of constitutional equality and judicial directives mandating equal treatment of gays, lesbians, and bisexuals.

More than invoking constitutional and legal principles, the bold moves made by elected officials across the country set litigation in motion. Organized interests planned on targeting California for litigation, but took to the courts well before they had originally anticipated in response to developments in San Francisco. Litigation in New York, Oregon, and Washington can be linked directly to rebellious local officials— all three lawsuits, however, were unsuccessful. Importantly, that litigation was swiftly organized, filed, and prosecuted because the necessary support-structures were in already place to undergird it. Similarly, the second round of litigation out of California in federal court was bolstered by a well-funded organization formed for the express purpose of supporting marriage litigation.

Ultimately, the high courts in New York and Washington turned back constitutional claims on the merits and Oregon's Supreme Court was stripped of subject matter jurisdiction by a state constitutional amendment banning same-sex marriage— an effort that predated public acts of defiance in Multnomah County but was an outshoot of *Goodridge* backlash. The great, but unsurprising, failure in the Oregon litigation was the litigants' inability to persuade the state supreme court to rule on the merits and mandate civil unions under state constitutional law in 2005. Oregon arguably saw the largest single legislative advancement of LGBT rights as a whole in this period, although falling short by having marriage removed from the regular political and

judicial processes.

In their totality, the events in *Goodridge*'s aftermath polarized Americans' opinions on same-sex relationships, but not because Massachusetts Supreme Judicial Court caused this result alone. The decision to extend full marriage rights to LGB people in Massachusetts was met with rebuke by grassroots social conservatives and some conservative elites, including President George W. Bush. That criticism, in turn, helped to fuel efforts by Gavin Newsom to celebrate same-sex unions though extralegal means. Newsom's actions in San Francisco subsequently fanned unsuccessful efforts to amend the federal constitution to ban same-sex marriage. In the short term, *Goodridge* sparked a structural shift in elites' approach to state recognition of same-sex relationships. This pattern of change is predicted by legitimization theory.

The positive yields and newly created burdens was a mixed bag for the marriage movement, which should be seen a part of a broader movement for LGBT rights. In this vein, what constitutes "success" is important here. As Rosenberg argued from the vantage point of 2008:

> If the goal is improving the lives of gay men and lesbians, then there is a good deal to celebrate. On the other hand, if the goal of the litigation is marriage equality, then little has been achieved and major obstacles have been created.[474]

Focusing squarely on marriage equality as the metric of victory in 2008, Rosenberg, described this early stage as "one step forward, two steps back." Historian John D'Emilio straightforwardly called this period "a disaster" for the marriage campaign.[475] Their assessments were not unfounded at the time. Indeed, in aftermath of whatever gains the LGBT community made in terms of marriage, the community lost to the extent that 27 state constitutions removed marriage from the legislative and judicial process for same-sex couples. Granted, the numbers alone by 2008 looked bleak. But, these evaluations were astray for two reasons. First, implicit in these

assessments is that every victory and every defeat is equally weighty. Second, they failed to capture and appreciate (given their relatively limited hindsight) the smaller cracks each and every act of court-inspired disobedience opened.

Indeed, what is lost in sweeping claims of defeat in assessing this period on its own, is that courts induced executive actors to press their cause in the court of public opinion and keep the issue live,[476] lay the groundwork for litigation, and leverage the dynamics of federalism to move the ball on marriage. Equally important, in nearly every case of mass civil disobedience or executive action, relevant actors used judicial opinions and jurisprudential rationales to legitimize their actions and, perhaps transitively, enhance the validity of the equal marriage rights cause, too. This signals that the courts gave rise to a consciousness of rights that disobedient actors used as justification for their defiance thereby legitimizing their own push for same-sex marriage.

Taken as a whole, many these early developments would not likely have occurred but for *Goodridge*. Indeed, Gavin Newsom's actions in San Francisco while animated by mixed motivations— including *Lawrence* and *Goodridge* in addition to President Bush's response to *Goodridge*— would not have happened without the Massachusetts litigation. The ripple effect of Newsom's civil disobedience in New York helped stoke litigation.

More vitally yet, state officials' response to fomenting acts of disobedience led to a clarification of New Yorkers' eligibility to marry in Massachusetts before same-sex marriages commenced there, which also later buoyed efforts to move away from civil unions in Vermont. Undoubtedly, supportive officials in state executive branches boosted whatever efficacy *Goodridge* had in expanding tangible benefits to same-sex couples and moving the public towards accepting marriage equality. These officials were under no binding obligation to lend

support or take the mantle of *Goodridge* to move equal marriage forward. The Constrained Court Theory does not sufficiently take into account non-hierarchical relationships and cannot explain developments between neighboring sovereigns. Contrary to legitimization skeptics, the marriage movement gained profound, though bridled, momentum from *Goodridge* and a chain of spinoff events that are traceable back to Massachusetts.

CHAPTER 7

CONCLUSION: THE DIALECTICAL COURTS

Dating back to the 1970s and gaining steam in the 1990s, same-sex marriage advocates used social reform litigation as a vehicle to advance the cause of LGB rights. While the first round of litigation in the 1970s fell on deaf ears, litigants made significant headway during the 1990s. Same-sex couples' freedom to marry claims received favorable consideration in Hawaii and Alaska state courts, though voters subsequently voided those gains. The first sustained victory came in 1999 after the Vermont Supreme Court ordered legislators to recognize same-sex couples' relationships. Judicial wins aside, same-sex marriage advocates were running against the grain of public opinion. As these initial victories piled up, so too did defeats— 32 state constitutions were amended to prohibit same-sex marriage between 1998 and 2012.

Americans overwhelmingly opposed same-sex couples' freedom to marry during these early years. That opposition quickly evaporated over the decade-and-a-half between the *Baker* decision and when the United States Supreme Court ruled in *Obergefell v. Hodges* that the constitutional freedom to marry— or not to marry— extended with equal force to same-sex couples. During this timespan legislatures, governors, municipal officials, and public administrators also played significant roles to progress and invigorate the LGB rights movement and the cause of marriage equality.

How important were courts though in this process? Do courts matter in social movements? These questions concerning the institutional capacity of courts are of significant

academic interest now, but judges pronounced their theories on these questions in the heat of marriage litigation. These questions were at the heart of the United States Court of Appeals for the Sixth Circuit's decision in *DeBoer v. Snyder*. In upholding same-sex marriage bans in four states, the Sixth Circuit was the only appellate court to reject same-sex couples' freedom to marry after the Supreme Court sloughed off the Defense of Marriage Act in 2013.

Judge Jeffrey Sutton waxed philosophical on the role of courts and social change:

> This is a case about change—and how best to handle it under the United States Constitution. From the vantage point of 2014, it would now seem, the question is not whether American law will allow gay couples to marry; it is when and how that will happen.[477]

Concluding that same-sex marriage was an improper question for judicial resolution, the court refused to constitutionalize same-sex marriage and emphasized the need for judicial restraint and democratic deference. The Sutton opinion echoed the basic premise of a constrained court theory, writing, "For all of the power that comes with the authority to interpret the United States Constitution, the federal courts have no long-lasting capacity to change what people think and believe about new social questions."[478] This dissertation set out to answer the question raised by Judge Sutton in the *DeBoer* opinion—what impact did social reform-minded litigation and courts have in bringing marriage equality into the American mainstream?

The findings show that the Constrained Court Theory captures much of courts' capacity to act as agents of social reform. The support for same-sex marriage provided by the public, precedent, the political branches, and public administrators impacted the success of same-sex marriage rulings before *Windsor v. United States*. The more these extra-judicial actors embraced marriage equality, the more successful and enduring marriage rulings. That outcome is consistent with the essence of the Constrained Court Theory's basic principles and the hypotheses offered in this dissertation to test controls on judicial power.

For all it gets right, the Constrained Court Theory suffers because it is an oversimplification of reality. Rosenberg's Constrained Court model does not adequately account for non-hierarchical relationships and interstate interactions. The theory fails to incorporate courts' legitimization power or leave room for a judicially inspired rights consciousness effect. The account presented in this dissertation evidences these shortcomings.

Among the many takeaways, is that precedent matters. Judges are risk adverse and courts are constrained. Judges, therefore, are hard-pressed to recognize new, emerging rights in the absence of supporting precedent. Conversely, judges are liberated to act swiftly and sweepingly when they are empowered by precedent to rule in favor of an asserted right. When same-sex couples first initiated marriage litigation in the 1970s they were all but laughed out of court. The first marriage plaintiffs' non-strategic litigation placed the cart before the horse. These plaintiffs' haphazard efforts failed to dismantle sodomy statutes or consider constitutional challenges to regulations over same-sex sexual conduct before approaching the marriage question. The legal landscape shifted over time as courts struck down anti-sodomy laws and legislatures liberalized restrictions on private sexual conduct. Ultimately, the Supreme Court's condemnation of federal marriage discrimination in *Windsor v. United States* relaxed the precedential constraint considerably and freed judges to dismantle discriminatory state marriage laws in short order.

Some some-sex couples eyed marriage rights while their very existence was criminalized. Moving from criminalization to full citizenship in the courts necessitated diligent and sustain work. The cause of equal marriage for same-sex couples as part of the LGBT rights movement was no exception. Without litigation-oriented organizations like the American Civil Liberties Union, Lambda Legal, Gay and Lesbian Advocates and Defenders, and other advocacy groups, it is hard to imagine the campaign in and out of the courts for LGBT rights advance with great

speed. These organizations offered coordination and structure necessary to sustain a social reform movement that relied on the courts aggressively.

Once courts warmed to same-sex couples and recognized their freedom to marry, those decisions were dependent on the political branches to reinforce the decisions and public administrators to implement the necessary reforms. Same-sex marriage rulings were successful because there was insufficient opposition in state legislatures to enact bills to undercut the rulings or refer constitutional amendments to overturn them. Similarly, governors' resistance to early court rulings were muted. Because they were the first governors to face the issue head on, Howard Dean and Mitt Romney had the greatest latitude to try to thwart the Vermont Supreme Court and Massachusetts Supreme Court, respectively. The Romney Administration, which was the most publicly opposed to same-sex marriage, took affirmative steps to ensure the smooth implementation of the *Goodridge* decision in early 2004. Like the Romney Administration, public administrators and officials crucial for implementation fell in line with the courts' mandates.

All of these aforementioned findings are consistent with the Constrained Court. However, additional evidence was produced supporting the hypothesis that courts legitimized same-sex marriage. Indeed, the American public's acceptance of same-sex marriage was quick as the courts expanded rights for LGBT Americans and recognized same-sex couples' freedom to marry. This remarkable rise in support was noticeable on both the state and national level, but is not explained away by changes in the public's religious attitudes or personal connections with openly gay people. Nor can these changes be chalked up to generational replacement as every generational cohort's support for same-sex marriage increased while litigation percolated in the courts and legislation considered.

Most significantly, courts possessed an ability to spark a newfound awareness in observers of same-sex couples' demands for equality as a fundamental, constitutional right. Herein lies the greatest finding of courts' power to influence social movements and the political process— a phenomenon that cannot be understood within a constrained court. From legislators in Vermont authorizing same-sex relationship recognition to Gavin Newsom defying state law to grassroots organizers forming new civil rights groups, courts induced persons to take action to demand equal rights for the LGB community. Court rulings increased same-sex marriage's salience, fueled the passions of untold numbers of Americans (both in favor and against equal marriage), and manifested an evolved consciousness of rights.

The movement to secure same-sex couples' freedom to marry was vulnerable between 1993 and 2013 but accrued monumental gains. In the movement's infancy, same-sex marriage advocates snatched defeat from the jaws of victory in Hawaii. There, sympathetic judges placed Hawaii close to recognizing same-sex marriage. Opposition forces coalesced in response and pushed for a state constitutional amendment that took same-sex marriage out of the judicial process. It also galvanized support for the Defense of Marriage Act on the federal level. Soon thereafter, equal marriage litigation gained a foothold in Vermont and Massachusetts. Though the years immediately following *Baker* and *Goodridge* looked bleak for same-sex marriage advocates, their fortunes shifted drastically between 2008 and 2009. By 2009, legislatures started to take up equal marriage legislation while litigation continued to work its way through the judicial process. Campaigns in legislative chambers and courts benefited from a strong network of support from litigation-oriented nonprofit organizations, as the support structure hypothesis predicted. Indeed, in states where litigation was unsuccessful and failed to produce equal marriage, key players in the litigation transitioned their work into the political process.

There is no better example of this than Vermont where the Vermont Freedom to Marry Task Force served not only as the vehicle for litigation, but also as the infrastructure for activism in the Vermont Legislature for nearly a decade.

Any conclusion that courts were the sole reason for the movement's success is too sweeping. Postulations that courts were ineffective or insignificant in same-sex marriage's advancement run contrary to the record. An abundance of evidence supports the proposition that litigation and courts played an important role in the early success of same-sex marriage. The *Baker* and *Goodridge* courts accelerated the spread of relationship recognition by opening the door to an alternative, incremental step toward equal marriage and demonstrating the non-harm caused by expanding the freedom to marry's reach, respectively. *Goodridge* sparked a chain of events that reverberated in states for years after it was handed down, most significantly in California, New York, Oregon, and Washington. Federalism and the diffusion of family law policy across state lines allowed for same-sex marriage's early success.

When political actors are induced take the mantle of a court ruling and advance an issue, like state attorneys general or local municipal officials, the power and efficacy of the courts are enhanced. The decisions in *Baker* and *Goodridge* helped to shape a political process in Vermont and New Hampshire hospitable to marriage equality legislation. In these state's legislatures (and others), litigation raised marriage equality's profile and fueled a consciousness of rights that placed same-sex marriage and interracial marriage on the same civil rights plane. Courts played an important part in dislodging the institutional inertia working against same-sex relationship recognition by inspiring a new understanding of rights and legitimizing same-sex couples' efforts across numerous jurisdictions. Given public officials' overestimation of the public's opposition to same-sex marriage,[479] these early legislative victories are all the more remarkable.

The courts' legitimizing power is not without limitations or costs. Regarding courts' legitimacy-conferring function, there are two important takeaways. First, while courts can expend institutional capital to draw a weary public towards judges' preferred positions, but will more successfully win over the public if aided by outside actors. Second, the emergence of discordant views and the polarization of opinions in the short-term wake of a controversial judicial decision should not surprise observers of judicial politics. Scholars should properly understand this as a step in the legitimization process.

Courts' legitimizing power benefits from the aid of the political branches. If executives, legislators, and bureaucrats uniformly work to suffocate a judicial ruling quickly, they may be able to snuff out judicial progress. Rapid responses to shut down a decision are not possible in many jurisdictions by constitutional design, which helps court decisions have staying power.[480] This was the instance in Massachusetts where the constitutional amendment process takes place over multiple years versus California where the state constitution can be amended in short order.

Courts' ability to risk institutional integrity on any given issue benefits from strategic lawyering, which can most easily come about through organizational coordination. As the marriage movement's development demonstrates, the power of courts was harnessed for maximum benefit, in part, because legal interest groups carefully targeted friendly jurisdictions. More than just expertise for impact litigation venue selection, organization-supported litigation is crucial in the early stages of impact litigation where the prospect of attorneys' fees is uncertain.[481]

In the long run, courts can be effective agents of social change, but no court is an island, and the danger of overreach is real. Judges must, therefore, be strategic as to when and where they invest their courts' capital of trust. Courts are but one set of actors in the American system

of governance and are most effective when the political branches support the judiciary. Judicial institutions are well suited for an active, but dialectical role, in meditating social change between the political branches, between the federal and state government, across state lines, and with the general public. Yes, courts can "appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry."[482] Judges can reflect higher republican principles and educate the public on deeply contested matters, but their professorial endeavors come at a cost. Even judicial schoolmasters require the assistance of friendly hands.

APPENDIX A

State	Case Name	Initial Counsel of Record	Year Filed	Court Filed
Alabama				
	Searcy v. Bentley	Private Counsel	2014	Federal
	Strawser v. Strange	NCLR	2014	Federal
	Hard v. Bentley	South Poverty Law Center	2014	Federal
	Aaron-Brush v. Bentley	ACLU	2014	Federal
	Hedgepeth v. Davis	Private Counsel	2015	Federal
	Strawser v. Strange II	ACLU, NCLR, SPLC, Americans United for Separation of Church and State	2015	Federal
Alaska				
	Brause v. Bureau of Vital Statistics	Private Counsel	1995	State
	Hamby v. Parnell	Private Counsel	2014	Federal
Arizona				
	Standhardt v. Superior Court	Private Counsel	2003	State
	Connolly v. Brewer	Private Counsel	2014	Federal
	Majors v. Horne	Lambda Legal	2014	Federal
Arkansas				
	Wright v. Smith	Private Counsel	2014	State
	Jernigan v. Crane	Private Counsel	2014	Federal
	Frazier-Henson v. Walther +	Private Counsel	2015	State
California				
	City and County of San Francisco v. State of California	Government	2004	State
	Woo v. Lockyer	NCLR	2004	State
	Clinton v. California	Private Counsel	2004	State
	Tyler v. California	Private Counsel	2004	State
	Perry v. Hollingsworth	American Foundation for Equal Rights	2009	Federal
Colorado				
	Burns v. Hickenlooper	Private Counsel	2014	Federal
	Brinckman v. Long	Private Counsel	2014	State
	McDaniel-Miccio v. Colorado	Private Counsel	2014	State
Connecticut				
	Kerrigan v. Commissioner of Public Health	GLAD	2004	State
District of Columbia				

	Dean v. District of Columbia	Private Counsel	1990	State
Florida				
	Wilson v. Ake	Private Counsel	2004	Federal
	Sullivan v. Bush*	Private Counsel	2004	Federal
	Berman v. Wilkin*	Private Counsel	2004	State
	Clayton v. Ake*	Private Counsel	2004	State
	Ash v. Forman*	Private Counsel	2004	State
	Kelley v. Green*	Private Counsel	2004	State
	Merritt v. Gardner*	Private Counsel	2004	State
	Higgs v. Kolhage*	NCLR	2004	State
	Armstrong v. Brenner	ACLU	2014	Federal
	Pareto v. Ruvin	NCLR, Equality Florida	2014	State
	Brassner v. Lade	Private Counsel	2014	State
	Huntsman v. Heavilin	Private Counsel	2014	State
Georgia				
	Inniss v. Aderhold	Lambda Legal	2014	Federal
Hawaii				
	Baehr v. Lewin	Private Counsel	1991	State
	Young v. Lingle	ACLU, Lambda Legal	2010	State
	Jackson v. Abercrombie ++	Private Counsel	2011	Federal
Idaho				
	Latta v. Otter	NCLR	2013	Federal
Illinois				
	Lee v. Orr	Lambda Legal	2012	Federal
Indiana				
	Morrison v. Sadler	ACLU	2002	State
	Baskin v. Bogan	Lambda Legal	2014	Federal
	Love v. Pence	Private Counsel	2014	Federal
	Midori Fujii v. State of Indiana	ACLU	2014	Federal
	Bowling v. Pence	Private Counsel	2014	Federal
	Hoenigman v. Pence	Private Counsel	2014	Federal
Iowa				
	Varnum v. Brien	Lambda Legal	2005	State
Kansas				
	Marie v. Moser	ACLU	2014	Federal
Kentucky				
	Bourke v. Beshear	Private Counsel	2013	Federal
	Love v. Beshear	Private Counsel	2013	Federal
Louisiana				
	Robicheaux v. George	Private Counsel	2013	Federal
	Costanza v. Caldwell	Private Counsel	2013	State

	Forum for Equality Louisiana v. Barfield	Forum for Equality Louisiana, Lambda Legal	2014	Federal
Maryland				
	Conaway v. Deane	ACLU, Equality Maryland	2004	State
Massachusetts				
	Goodridge v. Dept. of Health	GLAD	2001	State
Michigan				
	DeBoer v. Snyder	Private Counsel	2012	Federal
	Caspar v. Snyder +	ACLU	2014	Federal
Minnesota				
	Benson v. Alverson	Private Counsel	2010	State
Mississippi				
	Campaign for Southern Equality v. Bryant	CSE	2014	Federal
Missouri				
	Lawson v. Kelly	ACLU	2014	State**
	Barrier v. Vasterling	ACLU	2014	State
	Missouri v. Florida	Government	2014	State
Montana				
	Donaldson v. State of Montana ++	ACLU	2010	State
	Rolando v. Fox	ACLU	2014	Federal
Nebraska				
	Citizens for Equal Protection v. Bruning	ACLU, Lambda Legal	2003	Federal
	Waters v. Heineman	ACLU	2014	Federal
Nevada				
	Sevcik v. Sandoval	Lambda Legal	2012	State
New Jersey				
	Lewis v. Harris	Lambda Legal	2002	State
	Garden State Equality v. Dow	Lambda Legal	2011	State
New Mexico				
	Griego v. Oliver	ACLU	2013	State
New York				
	Hernández v. Robles	Lambda Legal	2004	State
	Shields v. Madigan	Private Counsel	2004	State
	Samuels v. New York State Department of Health	ACLU	2004	State
	Seymour v. Holcomb	Private Counsel	2004	State
	Kane v. Marsolais	Private Counsel	2004	State
North Carolina				
	Fisher-Borne v. Smith	ACLU	2012	Federal

	General Synod of the United Church of Christ v. Cooper	CSE	2014	Federal
	Gerber v. Cooper	ACLU	2014	Federal
North Dakota				
	Ramsay v. Dalrymple	Private Counsel	2014	Federal
	Jorgensen v. Montplaisir	Lambda Legal	2014	Federal
Ohio				
	Obergefell v. Hodges	Private Counsel	2013	Federal
	Henry v. Hodges	Lambda Legal	2014	Federal
Oklahoma				
	Bishop v. Smith	Private Counsel	2004	Federal
Oregon				
	Li and Kennedy v. State of Oregon	ACLU, Basic Rights Oregon	2004	State
	Geiger v. Kitzhaber	Private Counsel	2013	Federal
	Rummell v. Kitzhaber	ACLU, Basic Rights Oregon	2013	Federal
Pennsylvania				
	Whitewood v. Wolf	ACLU	2013	Federal
	Palladino v. Corbett	Private Counsel	2013	State
	Cucinotta v. Commonwealth	Private Counsel	2013	State
	Ballen v. Corbett	Private Counsel	2013	State
South Carolina				
	Bradacs v. Haley	Private Counsel	2013	Federal
	Condon v. Haley	Lambda Legal	2014	Federal
South Dakota				
	Rosenbrahn v. Daugaard	Private Counsel	2014	Federal
Tennessee				
	Tanco v. Haslam	NCLR	2013	Federal
Texas				
	DeLeon v. Perry	Private Counsel	2013	Federal
	Goodman and Bryant v. Debeauvoir	Private Counsel	2015	State
Utah				
	Kitchen v. Herbert	Private Counsel	2013	Federal
	Evans v. Herbert +	ACLU	2014	Federal
Vermont				
	Baker v. State	Vermont Freedom to Marry Task Force, GLAD	1997	State
Virginia				
	Harris v. Rainey	ACLU, Lambda Legal	2013	Federal
	Bostic v. Rainey	AFER	2013	Federal

Washington				
	Anderson v. Sims	Lambda Legal	2004	State
	Castle v. State	ACLU	2004	State
West Virginia				
	McGee v. Cole	Lambda Legal	2013	Federal
Wisconsin				
	Wolf v. Walker	ACLU	2014	Federal
	Halopka-Ivery v. Walker	Private Counsel	2014	State
Wyoming				
	Courage v. Wyoming	Wyoming Equality, NCLR	2014	State
	Guzzo v. Meade	Wyoming Equality, NCLR	2014	Federal

* Voluntarily dismissed by plaintiffs
** Filed in state court, removed to federal court
\+ Demanding recognition of marriage licenses issued before earlier rulings striking down marriage laws were stayed
++ Asserting state constitutional right to civil union-like relationship recognition

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(1) At what point did same-sex marriage first appear on your radar? What were your initial thoughts on it as a matter of law and public policy?
(2) When and why did you first support marriage equality? What types of considerations informed your decision?
(3) What influenced same-sex marriage legislation's success in your state? What do you think lead to prior legislative efforts' defeat?
(4) For legislators sitting on the fence, what, if any, factors do you think proved decisive in their decision-making process?

(5) Describe to me the scene in the chamber during the vote. What strikes you as most memorable?

[66] Baker v. Nelson, 291 Minn. 310, 312 (1971).

[67] This argument was not novel in marriage litigation. Free exercise challenges were also used to attack anti-miscegenation laws. In 1948, a Los Angeles County Clerk denied Andrea Perez, who was white, and Sylvester Davis, who was black, a marriage license, citing California's interracial marriage prohibition. As Roman Catholics, they claimed the racially restrictive marriage laws impermissibly abridged their religious freedom.[67] The California Supreme Court struck down the marriage law, but rejected the religious liberty claim in favor of a Fourteenth Amendment analysis in *Perez v. Sharp*.

[68] Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

[69] Ibid., 190.

[70] Commonwealth v. Wasson, 842 S.W.2d 487, 500 (Ky. 1992); Jegley v. Picado, 80 S.W.3d 332, 353-54 (Ark. 2002); Powell v. State, 270 Ga. 327, 336 (1998); Gay & Lesbian Advocates & Defenders v. Att'y Gen., 436 Mass. 132, 133 (2002); Gryczan v. State, 283 Mont. 433, 456 (1997); Campbell v. Sundquist, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996).

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[87] Created in 2009 for the express purpose of challenging Proposition 8, AFER took in 3.4 million in revenue in its first year. American Foundation for Equal Rights. 2009 Return of Organization Exempt From Income Tax. http://www.afer.org/wp-content/uploads/2011/03/2010-03-31_AFER_IRS-990.pdf.

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

[89] The campaign in 2008 surrounding Proposition 8 was the most expensive social issue campaign in United States history, racking up $74 million in campaign expenditures.

[90] City and County of San Francisco's Brief in Opposition at 23 Hollingsworth v. Perry, No. 12-144 (U.S. Aug. 24, 2012), 2012 WL 3724711.

[91] *Ibid*. at 24.

[92] United States v. Windsor, 133 S. Ct. 2675, 2706-2707 (2013).

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[94] Griego v. Oliver, 316 P.3d 865, 888 (N.M. 2013).
[95] DeBoer 2014, 435.
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would seem to exclude same-sex couples. It is not reasonable to argue that this language negates the lengthy discussion by the court of why denying marriage to gays and lesbians is constitutionally impermissible."
http://archive.boston.com/news/globe/editorial_opinion/oped/articles/2003/11/30/misreading_the_sjc_on_gay_marriage/ "Another news account echoed this observation, The court delayed implementation of its decision for six months to give legislators time to take "appropriate" action. Debate ensued about what legislation the court intended; the stay is long enough for a law allowing civil unions to be passed, but not long enough to adopt a constitutional amendment. An amendment reserving marriage for heterosexual couples couldn't be finalized until 2006, because it would have to be approved by the Legislature in two consecutive sessions, and then sent to the voters for ratification."
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[228] Komline Interview.
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[231] Vote Explanation History 2009.
[232] Lorber Interview.
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[235] Donovan Interview.
[236] All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.
All men have certain natural, essential, and inherent rights - among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

[237] Republicans controlled the Legislature for decades. Democrats held the governor's office for just 14 of the 98 years between 1899 and 1997. Reagan trounced Democrat Jimmy Carter here in 1980, winning 58 percent to 28 percent, and Reagan won the state again in 1984 over Democrat Walter Mondale. In 1988, Republican George H.W. Bush beat Democrat Michael Dukakis, 63 percent to 36 percent.
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[257] Ibid.
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[259] Norelli Interview.
[260] Rosenwald Interview.
[261] Ibid.
[262] Ibid.
[263] Ibid.
[264] Ibid.
[265] Rosenwald voted for the final version of the bill. She noted that the governor's mandated religious liberty provisions and personal family discussions influenced her switch:

> "When it came back from the Senate in 2009, the Governor had said he'd sign it, and there were amendments, so I reconsidered it. In the meantime in 2009, I switched my vote. I thought I should vote my own mind rather than channel my constituents. And I was speaking with my son at the time, who was in college, and said he said "Mom, they elect you for your judgment." Rosenwald interview.

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[285] Coffey, Jennifer. Telephone interview with author. June 4, 2012.
[286] Umberger, Karen. Telephone interview with author. August 29, 2012.
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[307] Savino, Diane. Telephone interview with author. June 22, 2012.
[308] Ellner, Brian. Telephone interview with author. July 17, 2012).
[309] Thiel, Fred. Telephone interview with author. October 18, 2012. "One of the great ironies of this, is that in 2009 the Democrats controlled the Senate and it failed and in 2011 the Republicans controlled the Senate and it passed. It defied conventional wisdom. But I think the leadership there was the key factor. His willingness to work with Dean Skelos was important. And to his credit, Senator Skelos allowed the members of his conference to vote on their own beliefs."
[310] Smith, Malcolm. Telephone interview with author. May 24, 2012.
[311] Paterson, David. Telephone interview with author. May 22, 2012.
[312] O'Donnell, Daniel. Telephone interview with author. June 4, 2012.
[313]. "It's always been something I've considered from a civil rights perspective. It amazed me that there are two sets of rules in society." Serrano, Jose. Telephone interview with author. July 12, 2012. Marriage for same-sex couples is "a basic civil right." Rivera, Jose. Telephone interview with author. July 16, 2012. Same-sex marriage as a "civil rights issue" akin to sex and race based rights. Fred Thiel Interview. "For the Senators who decided to vote for it who spoke to me, I they think went through the same type of process that I did. It was very personal. But it is more global in the sense that if you believe in civil rights and that all people are created equally, then you'll extend the same marriage rights to everyone."). Duprey, Janet. Telephone interview with author. October 5, 2012.
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[330] Malcolm Smith Interview.
[331] Sayward, Theresa. Telephone interview with author. October 12, 2012. Senate Majority Leader Dean Skelos also stated in a press release that "After many hours of deliberation and discussion over the past several weeks among the members, it has been decided that same sex marriage legislation will be brought to the full Senate for an up or down vote. The entire Senate Republican Conference was insistent that amendments be made to the Governor's original bill in order to protect the rights of religious institutions and not-for-profits with religious affiliations." Skelos, Dean. "Statement from Senate Majority Leader Dean Skelos on Same Sex Marriage Legislation." New York State Senate. June 24, 2011. http://www.nysenate.gov/press-release/statement-senate-majority-leader-dean-skelos-same-sex-marriage-legislation.
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[339] Pederson, Jamie. Telephone interview with author. July 19, 2012.
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[350] Haugen, Mary Margaret. Telephone interview with author. July 16, 2012.
[351] Ibid.
[352] Frank Young, Panel Ponders Same Sex Marriages, The Capitol (Annapolis) Sept. 27, 1972, 1.
[353] Legislators Asked to View Name Game, The Cumberland News, October 20, 1972, 3.
[354] David Goeller, Dullest Legislature In Memory Ends Today, The Daily Times, (Salisbury, MD) April 10, 1973 6
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[371] Ivey, Jolene. Telephone interview with author. September 5, 2012.
[372] Shane Robinson Interview.
[373] Gladden, Lisa. Telephone interview with author. September 10, 2012.
[374] Busch, Michael. Telephone interview with author. July 3, 2012.
[375] "If same-sex marriage is to be equated with the civil rights movement that I know … show me your Birmingham, Alabama, where high-pressure water hoses were turned on us, so powerful they knocked the bark off trees." "I am a black man, an African-American. I cannot change my color, nor do I wish to do so. Those who are gay can disguise their propensity. Even in this legislature, 50 or 100 years ago gays and lesbians were here because they could disguise who they were." Quoted in Kreis 2014, 804.
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[379] Wade Kach Interview.
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