

Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign

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ABSTRACT

Beginning in the 1970s, the overwhelming success of anti-gay ballot questions made direct democracy the most powerful *bête noire* of the LGBT rights movement. It is thus deeply ironic that, more than any other factor, an electoral politics-style campaign led to the national mandate for marriage equality announced by the Supreme Court in *Obergefell v. Hodges*. This occurred because marriage equality advocates set out to change social and constitutional meanings not primarily through courts or legislatures, but with a strategy designed to win over moveable middle voters in ballot question elections. Successful pro-gay litigation arguments, followed by supportive reasoning in judicial victories, grew directly out of the messaging frames that tested best with voters. A new variation on popular constitutionalism was born.

The lawyers who led the marriage equality campaign succeeded by decentering litigation until after opinion polls registered majority support for allowing same-sex marriage. In developing and implementing this strategy, they were assisted by professionals skilled in communications research and enabled by large-scale, coordinated funding. These dimensions of the marriage equality effort both validate and contradict much of the law and society scholarship predicting that court-centered rights discourse will inevitably dominate law reform campaigns.

In this Article, I argue that the same-sex marriage campaign is likely to foreshadow sophisticated social change efforts in the future that look less like traditional impact litigation strategies and more like social marketing campaigns, one component of which may be constitutional interpretation. Whether this model has major potential for significantly progressive change will turn on its effectiveness for issues that involve claims for redistribution of material resources or greater openness in governance, challenges with which the marriage equality effort was not forced to engage.

In the marriage campaign, voter-tested messaging led to two major discursive innovations. The first was the jettisoning of rights arguments in favor of storytelling models that were grounded in emotions rather than rights. Advocates stopped enumerating the legal benefits of marriage and talked more about the bonds of commitment exemplified by same-sex couples. Second, ballot question campaign ads increasingly featured the construction of a storytelling arc centered on how opposition to same-sex marriage of older or more conservative voters could morph into acceptance (even if not endorsement) of it. These narratives guided conflicted, moveable middle voters (and others) along a path toward a different sense of moral awareness about homosexuality and same-sex

marriage than the manichean version of morality arguments used by conservatives. The new approaches were calibrated, tested, and refined for particular audiences, producing empirical evidence to support a new addition to the language of law: data-driven arguments.

The most significant limitations of this approach operated at the level of social and constitutional meanings. Several discursive pivot points that emerged from the messaging strategy led to the shrinkage of what might have been greater emphasis on the pluralism of family forms as the foundation for equality and liberty in the realm of personal relationships. These pivot points include:

- The shift from an equality frame based on analogies to other social minorities to a universalized sameness approach;
- The shift from an emphasis on the material consequences of being denied access to the legal incidents of marriage to an emphasis on commitment, child raising, and the relational and emotional motivations for wanting to marry; and
- The avoidance of arguments for “expanding” or “changing” marriage and the stress of the desire for “joining” marriage.

This new frame reassured moderate voters and judges that the traditional norms and practices associated with marriage were not being threatened, producing a kind of cultural interest conversion. This was brought about through a discourse that was mined from the rhetoric of popular constitutionalism but suffused with the resonance of respectability.

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Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can . . . do much to help it. While it lies there it needs no constitution, no law, no court to save it.

—Judge Learned Hand¹

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. . . . But do not celebrate the Constitution. It had nothing to do with it.

—Chief Justice Roberts²

INTRODUCTION

The inescapable tension at the heart of constitutionalism in a democracy is the endlessly contested border between law and politics. The legal realists exploded the myth that the two occupy pristinely distinct spheres, but scholars continue to debate whether and how contingent concepts such as liberty and equal protection can endure as both principled over time and relevant in the moment. Without precedent and reason, there can be no reliable rule of law. Yet without a robust and ingrained appreciation of liberty and equality among citizens, the rule of law is an empty formalism.

Constitutional change emerges from a process involving multiple actors inside and outside the formal legal arenas of courts and legislatures. Social movements produce change in the law. Even originalists accommodate interpretations of the U.S. Constitution that emerge over time. And so the debate continues over the proper role of judges, legislators, and the people themselves in fashioning and refashioning the meaning of the Constitution.

No contemporary issue has elevated questions of law and politics quite like the question of whether same-sex couples have a constitutional right to marriage. The U.S. Supreme Court's decision in *Obergefell v. Hodges*³ was preceded by massive social contestation outside of courts and legislatures, almost all of it involving social movements. The content of the arguments centered on moral

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1. LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 190 (Irving Dillard ed., 1952).
 2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting).
 3. 135 S. Ct. 2584.

and political questions that were frequently debated in electoral arenas, but were often framed in constitutional terms.

The story of the LGBT rights campaign illustrates that the influence of elections on minority rights is not limited to the direct substantive effect of changes in law nor to the results of litigation. To a greater extent than is known or understood, the campaign for marriage equality was shaped most powerfully by electoral politics, rather than by litigation or legislative battles. Most accounts begin with a mid-1990s court decision in Hawaii⁴ that provided the rationale for Republicans to force enactment of the Defense of Marriage Act (DoMA),⁵ under which the federal government refused to recognize same-sex marriages as valid under state law. The end came with two Supreme Court decisions: the first in 2013 ruling that DoMA was unconstitutional⁶ and the second, two years later, mandating that same-sex couples be allowed to marry in every state.⁷ In many ways, however, ballot questions had a greater influence on the campaign. What constitutes ordinary politics may not have a precise definition, but it surely includes election campaigns. Ballot questions, which are distinctive only in that the contestants are proposals to amend statutory or constitutional text rather than candidates, powerfully merge law and politics. At least as much as through legislative representation, direct democracy mechanisms profoundly influence the framing and social meaning of such concepts as rights, equality and fairness.

What was unique about the LGBT rights/marriage equality movement was that a definitive Supreme Court victory resulted from a campaign that de-emphasized litigation for most of its duration and was dominated until the final two years by ballot questions, most of which were forced by opponents. Advocates reconfigured the terms of debate in these ballot question elections based on opinion research results gleaned from average voters, and the messaging aimed at voters then formed the basis for non-electoral communication strategies, including the development of frames that ultimately entered the judicial arena.

This Article uses the same-sex marriage movement to examine contemporary social movement dynamics and the theories and mechanisms of constitutional change. It analyzes how the LGBT rights movement developed an innovative strategy for shaping legal discourse that sheds new light on the workings of what I

4. Baehr v. Miiike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997), *remanded from* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

5. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 (2012)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

6. *See Windsor*, 133 S. Ct. 2675.

7. *See Obergefell*, 135 S. Ct. 2584.

call polycentric constitutionalism, that is, the multiplicity of institutions, social practices, and specific bodies of knowledge that contribute to constitutional meaning. The strategy involved creating a campaign—essentially a national political campaign without a candidate—within a social movement.

Judges do not simplistically follow elections or public opinion polls, but they do not need to. They are seldom out of sync with public sentiment for an extended period of time because shifts in opinion and partisan dominance are embedded in the judicial selection process. However divisive and bitter, the partisan calculus of judicial appointments has locked together more tightly the political philosophy of federal judges with that of the executive branch and, to a lesser extent, the dominant views in Congress. There are occasional deviations from the party line among the Justices, just as there are among members of Congress across the street, but they are rare. And the rankly partisan nature of the judicial appointments process has normalized the sense that one of the ways in which elections will have consequences will be the outcome of constitutional interpretation on highly divisive issues.

This Article addresses both the impact of social movements on law and the impact of law on social movements. These influences operate in a feedback loop, and at the center of this recursive process with regard to same-sex marriage were anti-gay ballot questions. Their centrality to both sides eventually melded LGBT rights discourse with the discourse of popular constitutionalism in ways and to an extent that is unique in the history of civil rights movements.

Both sides in this contest rejected a durable border between law and politics and relied on its absence in their formulation of strategy. Conservative claims about gay rights became part of the Republican Party's use of cultural politics to grow its base. As part of their strategy to win a definitive marriage equality decision from the Supreme Court, lesbian and gay rights advocates learned that success in changing the law required winning elections. Because of the repeated ballot questions initiated by conservatives, often amendments to state constitutions, LGBT advocates had no choice but to compete in the electoral arena over questions of constitutional interpretation.

The marriage equality debate began as a struggle between two identity groups: lesbians and gay men on one side and religious conservatives on the other, both supported by their strongest allies. Each side began with a core cluster of arguments which it later modified. In the 1990s, conservatives supplemented their original morality-based claims with their own version of a secular rights

argument based on the “no special rights” trope,⁸ which handily mapped onto white backlash against civil rights protections for persons of color. Roughly a dozen years later, LGBT rights lawyers moved in the opposite direction and systematically de-emphasized rights claims in favor of emotive appeals wrapped in narrative.

Based on their experience in ballot question elections, marriage equality advocates built a new model for law-oriented social movements. The new strategy combined universalizing, rather than minoritizing, rhetoric with the technology and knowledges of national political campaigns. In the process, these advocates invented a form of public policy marketing that is poised to recur across the ideological spectrum and with regard to many different issues. The rhetorical foundation for the new organizational model was a legal and cultural argument built on sameness, positioning same-sex couples in ways that sought respect based on respectability.

The discursive strategy became assimilation in and through law, based on the convergence of cultural interests. Following signals from Justice Kennedy, their only possible fifth vote on the Court, marriage equality advocates eventually elevated sameness arguments over civil rights analogy-based reasoning, and developed a secular morality argument for those voters (and judges) in the movable middle, who hesitated to align themselves with either liberal pro-gay or sectarian anti-gay positions.⁹ Working with communications experts, advocates created messages that accommodated the conflicted emotions of their target audiences and modeled paths to acceptance of same-sex marriage. In effect, these messages redefined what it meant to be a good person, not only for the stigmatized gay outsider but also for the heterosexual majority decisionmakers.¹⁰

What began as a conflict within the terms of identity group politics evolved and expanded beyond the two minorities. A new cultural détente on accommodating homosexuality emerged with seemingly little disruption of heteronormativity, though perhaps with significant diminishment in the authority

8. See ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 155–58 (2005).

9. For Kennedy's vital position on the Court in the context of same-sex marriage, see Emma Green, *Gay Marriage Is Now a Constitutional Right in the United States of America*, ATLANTIC (June 26, 2015), <https://www.theatlantic.com/politics/archive/2015/06/gay-marriage-legal-in-the-united-states-of-america/396947/> [<https://perma.cc/U9WC-WUGR>], which notes that Justice Kennedy “has long been seen as the possible swing vote on gay marriage.” For a discussion on the sameness argument, see *infra* Part IV.A. For a discussion on the meaning of morality in the LGBT rights context, see *infra* Part I.B.

10. See *infra* notes 246–247 and accompanying text.

of organized religion to enforce traditional beliefs regarding sexuality.¹¹ The legal precedent that was established ended an exclusion, but it may provide little if any support for future claims that would require denaturalizing gender and disrupting patterns of sexualized racial oppression—two names for continuing hierarchies of subordination that marriage equality advocates dared not speak.¹²

In addition, the marriage equality campaign developed a new model for social movements in several respects. Structurally, the new model produced a hybrid organization geared to winning elections as well as law reform; strategically, its primary investment was in communications research and social marketing techniques; and politically, its discursive priority was in emphasizing how a minority group's norms and values were the same as those of the majority. These innovations, while successful in achieving nationwide marriage equality, likely will limit or channel the portability of the model into some social movements but not others.

The overall effort to legalize same-sex marriage produced a complex effort of many moving parts. This Article focuses on one important underacknowledged component.¹³ In Part I, I describe how voting on ballot questions played an extraordinarily significant role in the contestation over the social meanings of morality and equality in the campaigns for and against LGBT rights, far greater than in any other social movement in the United States. Popular votes on antidiscrimination and relationship recognition laws began in the mid-1970s and continue today. After the Supreme Court invalidated a form of ballot

11. Between 2007 and 2014, the percentage of Americans who self-identified as Christian dropped from 78.4 percent to 70.6 percent, and the proportion of “unaffiliated” increased from 16.1 percent to 22.8 percent. *America's Changing Religious Landscape*, PEW RES. CTR. (May 12, 2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/#factors-behind-the-changes-in-americans-religious-identification> [https://perma.cc/434T-C4ZU]. Although one cannot connect this development directly to debates over same-sex marriage, the correlation is strong. Disaffiliation reflects an increasing degree of popular distance from the sources of the strongest institutional opposition to marriage equality. The degree of religiosity has been strongly predictive of negative views about same-sex marriage. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH AND THE STRUGGLE FOR SAME-SEX MARRIAGE 170 (2013). Moreover, the youngest age cohorts were both some of the likeliest to support same-sex marriage and to be unaffiliated with faith groups. *Id.* at 199–200; *America's Changing Religious Landscape*, *supra*.

12. See *infra* text accompanying notes 274–276.

13. With all that has been written about direct democracy and separately about the constitutionality of discrimination based on sexual orientation, it is remarkable that relatively little legal scholarship has been published about the intersection of the two, given the important role that ballot questions have played on this issue. The same can be said about the intersection of social movements and elections. Doug McAdam & Sidney Tarrow, *Ballots and Barricades: On the Reciprocal Relationship Between Elections and Social Movements*, 8 PERSP. ON POL. 529, 532 (2010). In this Article, I address the interactions between election results and litigation related to the same issues, and thus hope to contribute to filling these gaps in the literature on law and social movements.

measure designed to block expansion of civil rights coverage to sexual orientation, the focus of conservatives turned to same-sex marriage.

Part II examines the new structure created by LGBT rights advocates to respond to the repeated losses on the marriage question. A leadership group consisting mostly of lawyers and legal organizations created a national political campaign model geared (increasingly over time) to winning elections. Lawyer dominance in the new structure and the implementation process of the groups' strategy are consistent with critiques of law-oriented social movement organizations, but the marriage equality example contradicts the assumption in much of the literature that the product of such dominance will necessarily have a juricentric focus.¹⁴ As a refinement of the existing critiques, I offer a five-point framework for assessing the structure and efficacy of social movement organizations that are frankly law-oriented. The five items in this metric address traditional questions of accountability and also accommodate new forms such as the quasi-political campaign mode.

Part III turns to issues of political discourse and social meaning, specifically how the framing of claims and the tropes of argumentation differ depending on context and what the consequences are of those differences. Again, I focus on the interplay between popular elections and broader message strategies. Both sides innovated in this realm. Conservatives invented the "special" rights versus "equal" rights trope, not in courts, nor in legislatures, but in ballot question campaigns.¹⁵ Seeking a non-moralistic argument to expand support beyond a religious base, they created a trope that moved from the state to the federal level and from pamphlets to briefs to judicial text. Pro-equality advocates moved from abstract to emotive arguments. Building on sophisticated communications research, they refined campaign messages into narratives that illuminated a path for conflicted voters toward making peace with the existence of same-sex marriage.

Part IV follows this process into litigation and the substance of law. Marriage equality advocates inserted election-tested themes into their briefs and arguments. Three pivot points emerged: prioritizing arguments based on sameness over analogies to minority rights; using commitment and children as symbols to support these sameness claims; and invoking a desire to join rather than change marriage. Together, these rhetorical devices provided marriage equality advocates with the ability to shift between universalizing and minoritizing discourses and to selectively invoke sameness or difference. They grew out of popular

14. Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1685–87 (2014).

15. See ANDERSEN, *supra* note 8, at 211.

discourse and proved extraordinarily successful before judicial audiences. One of the prices paid for such nimbleness, however, was the sacrifice of the full potential of equality arguments (at least in the abstract). This narrower scope of equality principles, in turn, left the suggestion of an affinity with raced respectability in its wake.¹⁶

Part V examines more deeply whether the marriage equality campaign succeeded in changing culture as well as law. I argue that marriage equality was achieved in large part because of interest convergence, which occurred in the cultural rather than the more typical material realm. The heterosexual majority had virtually nothing material at stake in the question of whether same-sex couples would be allowed to marry, and for LGBT persons, the issue was driven as much by a desire for social legitimation as tangible benefits. What emerged was not a new set of practices or policies with significant economic ramifications or a revised allocation of resources for governance, but a modified cultural detente, a renorming of homosexuality.

The ultimate outcome of the marriage equality campaign, of course, cannot be attributed solely to the effects of direct democracy or to the political campaign model that LGBT rights advocates created. This Article examines only one dimension of the movement strategies and the broader political and social changes that led to the Court's decision in *Obergefell v. Hodges*.¹⁷ I do not argue that the focus on ballot questions explains it all. Yet, it is true and deeply ironic that without the interplay between law and politics—between elite and popular interpretations of the Constitution which characterize ballot question debates and bedevil LGBT advocates—marriage equality likely would have taken far longer to secure.

Equality advocates recognized that marriage had its own “vocabulary,” containing a rich potential for claims of moral authority.¹⁸ This Article describes what occurred when the vocabulary of marriage intersected with the grammar of constitutionalism and the language of elections. Using these components, advocates constructed a new kind of machine to drive the marriage equality campaign, and in so doing, reconfigured the process for social change.

16. See *infra* text accompanying notes 274–276.

17. 135 S. Ct. 2584 (2015).

18. See, e.g., EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 6 (2004) (“[M]arriage is now the vocabulary we use to talk of love, family, dedication, self-sacrifice, and stages of life. Marriage is a language of love, equality and inclusion.”); Evan Wolfson, *Ten Years of Marriage, 10 Milestones to Celebrate: How We Got Here*, PRIDE MAG., June 2014, at 52, 54.

I. POPULAR CONSTITUTIONALISM AND LGBT RIGHTS

Popular constitutionalism—the study of how non-judicial actors, including ordinary citizens, interpret the Constitution—seeks to bridge the gap between law and politics as “the mechanism that mediates between constitutional law and culture.”¹⁹ Constitutional meanings emerge over time as the products of a wide variety of social practices. Judicial rulings add the power of the state to a particular interpretation in what is usually the most important and most visible point in the process. Accepting the supremacy of the judiciary in interpreting the Constitution, however, does not preclude recognizing and crediting the impact of citizen interpretations. The process of interpretation continues past the point of a court decision.

The domain of popular discourse about constitutionalism overlaps with arenas for popular engagement with ordinary politics and for more formal processes of lawmaking, a kind of Venn diagram of modes of constitutional deliberation. Many scholars have analyzed the extra-judicial effects of court decisions; in this Article, I examine the juridical effects of election campaigns, specifically how the language of elections can influence legal discourse and core concepts of constitutional law. My focus is on ballot questions that pose issues of constitutional dimension for direct citizen consideration such as in this case of equal rights for LGBT Americans.

At least in the abstract, ballot questions are “as near to a democracy as you can get.”²⁰ They represent the most fully majoritarian of all methods of political decisionmaking, save perhaps town meetings. Their deficits resound in pluralism rather than in democracy: the potential for harm to minorities, and the absence of procedural and structural devices to interrupt unreasoned, impulsive decisionmaking on emotional issues.²¹ These shortcomings operate in direct tension with the need for statesmanlike approaches to the management of intense values conflicts.

19. Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 983 (2004).

20. This was said by Justice Hugo Black during the oral argument in *Reitman v. Mulkey*, 387 U.S. 369 (1967). See Oral Argument at 47:22, *Reitman*, 387 U.S. 369 (No. 483), <https://www.oyez.org/cases/1966/483> [<https://perma.cc/8WHN-U9VV>], quoted in Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1506 (1990).

21. See Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1745–47 (2013); William N. Eskridge, *Foreword: The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785, 1843–51 (2009); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 247–51 (1997).

LGBT rights have been the focus of ballot initiatives and referenda more than any other civil rights issue.²² As a result, the gap between applicability of antidiscrimination norms to sexual minorities has been a product of the electoral arena to a unique extent in the United States. From the mid-1970s to 2009, voters in state and local elections have cast ballots almost one hundred and fifty times on some issue related to the rights of LGBT Americans.²³ This amounts to more than half of the voter questions that the “Religious Right” sought to place on ballots during that period.²⁴ On the marriage issue alone, citizens in thirty-six states have voted, sometimes more than once, on whether the law of marriage should exclude same-sex couples.²⁵

For almost all of this nearly fifty-year period, anti-equality forces won the great majority of gay-related ballot contests. In three studies of anti-gay ballot measures through 2001, approximately 73 percent passed.²⁶ The lopsided outcomes reinforced the minoritarian position of LGBT rights supporters and cemented the view that judicial rulings and legislative successes in favor of LGBT rights ran deeply counter to cultural norms. The Supreme Court invalidated a state constitutional amendment that singled out LGBT rights laws as requiring a higher level of popular support for enactment, and thereby slowed, but did not end, the conservatives’ use of ballot questions.²⁷ As demonstrated in this next Section, to win at the ballot box became the priority not just for LGBT groups generally, but for LGBT litigation and lobbying organizations as well.

A. The Role of Direct Democracy in the LGBT Rights Movement

The integration of direct democracy with representative government took hold in the United States in the late nineteenth and early twentieth century, driven

22. Gamble, *supra* note 21, at 257.

23. AMY L. STONE, *GAY RIGHTS AT THE BALLOT BOX*, at xv (2012).

24. *See id.* at 7 (reporting 31 percent of all ballot initiative attempts by the Religious Right during this time frame aimed to constrain or eliminate government support for LGBT persons and 25 percent of all ballot initiative attempts by the Religious Right involved reducing or repealing legal rights for same-sex couples).

25. Craig M. Burnett & Mathew D. McCubbins, *Marriage on the Ballot: An Analysis of Same-Sex Marriage Referendums in North Carolina, Minnesota, and Washington During the 2012 Elections*, 19 CHAP. L. REV. 1, 1–2 (2016).

26. STONE, *supra* note 23, at 4 (noting that “voters rejected LGBT rights in 70 percent” of 158 referenda and initiatives); *see also* Gamble, *supra* note 21, at 253 tbl.1, 258 (noting that 79 percent of the forty-three initiatives to restrict LGBT rights were approved); Donald P. Haider-Markel & Kenneth J. Meier, *Legislative Victory, Electoral Uncertainty: Explaining Outcomes in the Battles Over Lesbian and Gay Civil Rights*, 20 REV. POLY RES. 671, 676 (2003) (noting that over 71 percent of ninety antigay initiatives and referenda were successful).

27. *See Romer v. Evans*, 517 U.S. 620 (1996).

by populist farmer and worker interests in states in the Western half of the nation.²⁸ The trend for states to allow initiatives²⁹ and referenda³⁰ spread East, and today, they can be authorized to appear on the ballot in twenty-seven states.³¹ However, some states limit their application to statutory rather than state-constitutional revision, or require legislative clearance before issues are put before the voters,³² so the likelihood of their use varies significantly by location.³³

Beginning a few years before congressional adoption of comprehensive federal antidiscrimination law and in reaction to state and local civil rights gains by African Americans, the tactic of using methods of direct democracy to constrain advances in equality became a favored device for conservatives. The questions most often put before voters during that time first appeared in 1959 with “a wave of ballot box assaults in the area of fair housing and public accommodation laws.”³⁴ Using ballot questions to roll back advances for racial equality proved successful: Between 1963 and 1968, voters in California considered eleven referenda questions on fair housing law, one statewide and ten local, and adopted the anti-equality position in all but one.³⁵

When the constitutionality of these voter-adopted provisions came before it, the Supreme Court aligned the standard of review for ballot questions with the system of tiered review used to analyze legislative enactments.³⁶ A closely divided Court invalidated a California constitutional amendment that had effectively re-

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28. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 48–52 (1989); *see also* *Strauss v. Horton*, 207 P.3d 48, 84–85 (Cal. 2009) (providing an overview of this history).
 29. Initiatives allow voters to propose a state statute or constitutional amendment by submitting petitions containing the requisite number of signatures. CRONIN, *supra* note 28, at 2.
 30. Referenda allow voters to approve or reject a state statute or constitutional amendment that has already been enacted or endorsed by the state legislature. *Id.*
 31. John G. Matsusaka, *2015 Ballot Provisions*, in 48 COUNCIL OF STATE GOV'TS, *BOOK OF THE STATES* 307 (2016).
 32. INITIATIVE & REFERENDUM INST., UNIV. OF S. CAL., *COMPARISON OF STATEWIDE INITIATIVE PROCESSES* 1, http://www.iandrinstitute.org/docs/A_Comparison_of_Statewide_I_andR_Processes.pdf [<https://perma.cc/K3Q2-5CSD>].
 33. Matsusaka, *supra* note 31, at 308.
 34. Gamble, *supra* note 21, at 255.
 35. CRONIN, *supra* note 28, at 94. Derrick Bell described referenda as a “most effective” tactic to defeat efforts to achieve racial equality. Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 15 (1978).
 36. When referenda or initiatives drew distinctions based on race, the Court employed the same level of strict scrutiny as it applied to race-based classifications in statutes. *See Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1632, 1634–35 (2014) (discussing racial discrimination in the context of initiatives and later noting that classification on the basis of race is “inherently suspect”). When the distinction was facially neutral, did not specify a characteristic to which the Court applied heightened scrutiny, and was not the aim of a discriminatory purpose, the Court used a rational basis standard of review. *Id.* at 1640, 1647 (Scalia, J., concurring).

pealed an antidiscrimination law by creating a new right of any individual to rent or sell property to whomever he chose.³⁷ The Court found that the amendment relied on coded language to perpetuate race discrimination in housing. Two years later, in *Hunter v. Erickson*,³⁸ the Court struck down an amendment to the Akron city charter that both prevented implementation of an ordinance barring race discrimination in housing and required that future antidiscrimination ordinances be approved by popular vote as well as by the city council.³⁹ The *Hunter* decision united what became the two wings of equal protection review for ballot questions: whether the measure singled out race for adverse treatment, and whether it established different and more difficult procedures for future legislative protections for racial minorities.⁴⁰

After *Hunter*, the Court became more open to arguments that ballot measures which imposed a disparate racial burden were nonetheless presumptively legitimate because of their facial neutrality.⁴¹ Nonetheless, the Court has not retreated from its determination that a provision's adoption by popular vote does not immunize it from the same level of judicial review as measures adopted by a legislature.⁴² The Court thus disabled campaigns to establish or re-establish explicitly race-based classifications, but left ostensibly race-neutral measures in place. In response, conservative deployment of race-related ballot question campaigns shifted to issues such as affirmative action, where provisions impose discriminatory effects but eschew explicit references to race.

By the early 1990s, conservatives had begun to repeatedly use ballot questions to exclude sexual orientation protection from civil rights laws. A study by Barbara Gamble of votes held on multiple topics related to minority rights from 1959 to 1993 found that LGBT-related issues amounted to almost 60 percent of the total, by far the single most frequent basis.⁴³ Another study of anti-gay initiatives and referenda found that fifty-seven were put before voters at the state or local

37. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

38. 393 U.S. 385 (1969).

39. *Id.*

40. *See, e.g., Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 470, 474 (1982).

41. *See, e.g., Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (ruling that an amendment to the Michigan Constitution prohibiting affirmative action in public education, employment, and contracting was constitutional); *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982) (affirming the constitutionality of an amendment to the California Constitution prohibiting state courts from ordering busing to achieve desegregation unless doing so would be required by federal Constitution); *James v. Valtierra*, 402 U.S. 137 (1971) (upholding an amendment to the California Constitution requiring referenda on low-income housing projects).

42. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981) (“[V]oters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.”); *Hunter*, 393 U.S. at 392.

43. Gamble, *supra* note 21, at 250, 257.

level between 1974 and 1996. Of these, forty-five, or 77 percent, passed.⁴⁴ This is similar to Gamble's findings where of the forty-three ballot questions on an LGBT rights topic submitted for a vote during 1959 to 1993, 88 percent sought restrictions on rights and 79 percent of those prevailed.⁴⁵

The data on ballot questions closely tracks the history of the LGBT rights movement. Starting in the mid-1970s, local elected bodies adopted or added antidiscrimination protections for sexual orientation to municipal codes, a development that spread to state legislatures in the 1980s.⁴⁶ LGBT rights advocates deployed arguments based on the themes of civil rights, equality, and privacy to secure these laws, and generally used conventional organizing and lobbying methods.⁴⁷ Success in the municipal legislative realm in turn triggered the first referenda and initiatives, and launched the countermobilization on LGBT issues that became the seed of anti-gay campaigns with their emphasis on morality arguments.⁴⁸

During this period, popular votes on the rights of small, unpopular minorities operated in a kind of constitutional free-fire zone. By setting the rules of engagement for ballot questions along the lines of suspect classification doctrine, the Court channeled ballot question disputes focused on discrimination questions toward groups with the least judicial protection—virtually inviting disputes over issues such as LGBT rights and immigration. From a social movement perspective, this allowed for social hostility to be mobilized against unpopular minorities during the early stages of the civil rights lifecycle before the accretion of more political power or the recognition that a classification merited heightened scrutiny, which itself produced more solicitous judicial review. This provided conservatives the opportunity to use preemptive action to block the development of an understanding that certain issues come within the scope of civil rights claims. Lastly, it opened up nonlegal, openly animus-based arguments as fair game for lawmaking in the election context, where assessment of motivation would be

44. ANDERSEN, *supra* note 8, at 144–45 tbl. 11, 146. This data does not include “measures designed to prevent same-sex couples from legally marrying each other.” *Id.* at 143 n.2.

45. See Gamble, *supra* note 21, at 258.

46. See Michèle Finck, *The Role of Localism in Constitutional Change: A Case Study*, 30 J.L. & POL. 53, 69–71 (2014); Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905, 1907–08 (1993). By 1993, there were 126 cities and counties, in which approximately a quarter of the U.S. population resided, with antidiscrimination law that included protection for sexual orientation. Kenneth D. Wald et al., *The Politics of Gay Rights in American Communities: Explaining Antidiscrimination Ordinances and Policies*, 40 AM. J. POL. SCI. 1152, 1153, 1170 app. (1996).

47. See TINA FETNER, HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM 34–38 (2008).

48. Note, *supra* note 46, at 1908–09.

most difficult. After 1970, the number of ballot questions increased dramatically.⁴⁹

As LGBT-related ballot questions proliferated, electoral politics melded with the particular dynamics of popular constitutionalism. Unlike the interest-group model focused on the bargaining and compromise intrinsic to legislative processes, anti-gay arguments based on immorality dominated early initiative and referenda campaigns.⁵⁰ The immorality arguments had two parts: that homosexuality and elite control of decisionmaking on moral questions were both wrong.⁵¹

Yet describing the ballot question campaigns as solely morality debates misses a critically important dimension. They were also saturated with questions of constitutional meaning. Despite variations in the language of each proposition, voters “were likely to see the issue simply as gay civil rights.”⁵² Often the elections originated in an effort to repeal an antidiscrimination provision, thus generating debate over whether lesbian and gay rights were a legitimate example of civil rights.⁵³ Similarly, once the focal point for conservative campaigns became marriage, “[c]onstitutional equality served as a master frame for the movement.”⁵⁴

The ballot question context produced one of the most enduring and effective tropes for conservatives opposing legal protection for LGBT persons: that lesbian and gay rights constituted not equal rights but special rights. The term “special rights” effectively condensed the twin tropes of immorality and elitism. At the same time, it also implicitly mobilized the politics of resentment against gains by racial minorities and women to incorporate a group that assertedly was already privileged to the list of those who wanted benefits without earning them.⁵⁵ As described more fully below in Part II.B, the special rights formulation proved to be of lasting importance.

49. STONE, *supra* note 23, at 3 fig.1.

50. Donald P. Haider-Markel & Kenneth J. Meier, *The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict*, 58 J. POL. 332, 346 (1996).

51. See Shauna Fisher, *It Takes (at Least) Two to Tango: Fighting With Words in the Conflict Over Same-Sex Marriage*, in QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW 207, 224–25, 230 (Scott Barclay et al. eds., 2009).

52. Haider-Markel & Meier, *supra* note 26, at 677.

53. See, e.g., Daniel Levin, *The Constitution as Rhetorical Symbol in Western Anti-Gay Rights Initiatives: The Case of Idaho*, in ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES 33 (Stephanie L. Witt & Suzanne McCorkle eds., 1997).

54. Jeffrey Kosbie, *Beyond Queer vs. LGBT: Discursive Community and Marriage Mobilization in Massachusetts*, in THE MARRYING KIND?: DEBATING SAME-SEX MARRIAGE WITHIN THE LESBIAN AND GAY MOVEMENT 103, 115 (Mary Bernstein & Verta Taylor eds., 2013).

55. See Barry D. Adam, *The Defense of Marriage Act and American Exceptionalism: The “Gay Marriage” Panic in the United States*, 12 J. HIST. SEXUALITY 259, 269–72 (2003) (linking “special rights” argument to discourses of race and class).

Pro-LGBT equality groups responded to the flurry of ballot questions with attempts to sharpen their game in electoral politics.⁵⁶ An important success came in 1992 with the defeat of Proposition 9 in Oregon, which sought to bar coverage of sexual orientation discrimination from civil rights laws and to command education officials to recognize homosexuality as “abnormal, wrong, unnatural and perverse.”⁵⁷ Aided by increased fundraising, the No on 9 campaign embraced standard techniques such as polling, canvassing, data-tested advertising, and get-out-the-vote efforts, guided by professional political consultants.⁵⁸ The result was repeated in 1994 when Oregon conservatives fielded another differently-worded ballot question using the same idea.⁵⁹ The No on 9 campaign’s success made the Oregon approach a national model,⁶⁰ and later LGBT rights election campaigns were built on the lessons learned about use of the technologies of conventional electoral politics.⁶¹

At the same time that anti-equality forces in Oregon were framing a question for the 1992 ballot, social conservatives in Colorado sought to head off the addition of sexual-orientation protections to a state civil rights statute. They secured a place on the ballot for Amendment 2, a proposal to amend the state constitution that deployed both aspects of the strategy developed in the earlier campaigns against racial equality: Amendment 2 not only repealed local ordinances providing civil rights protections for lesbians and gay men, but also forbade adoption of any state or local law according rights to homosexuals except by further amending the state constitution, a far more burdensome process than legislative enactment.⁶² The conservative success in Colorado, together with a municipal-level victory in Tampa, Florida, prompted eighteen more ballot

56. In their early responses to anti-gay ballot questions, “inexperienced social movement organizations led disorganized campaigns to maintain lesbian and gay rights on shoestring budgets.” FETNER, *supra* note 47, at 85.

57. VOTERS’ PAMPHLET: STATE OF OREGON GENERAL ELECTION NOVEMBER 3, 1992, at 93 (1992), reprinted in Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”*: *The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 36 n.71 (1993).

58. See STONE, *supra* note 23, at 68–73.

59. Haider-Markel & Meier, *supra* note 26, at 684.

60. STONE, *supra* note 23, at 65–73, 78–79.

61. *Id.* at 78–79, 68–70, 96–101; see also Bob Meadow et al., *Using Conservative Values to Support Gay Rights: How Opponents Defeated Oregon’s Anti-Gay Rights Referendum in 1994*, in CAMPAIGNS AND ELECTIONS: CONTEMPORARY CASE STUDIES 196, 197–200 (Michael A. Bailey et al. eds., 2000); Harvey Pitman, *In Their Own Words: Conversations With Campaign Leaders*, in ANTI-GAY RIGHTS, *supra* note 53, at 87–93.

62. COLO. CONST. art. II, § 31b, *invalidated by* Romer v. Evans, 517 U.S. 620 (1996); see also *Romer*, 517 U.S. at 623–25.

questions in the 1993–94 election cycle, evenly divided between state and local contests.⁶³

Challenges to Amendment 2 brought significant judicial involvement into the constitutional arena regarding LGBT ballot questions for the first time. The Colorado Supreme Court invalidated Amendment 2 on the ground that, although it did not discriminate against a suspect class, it violated the fundamental right to participate equally in the political process.⁶⁴ When *Romer v. Evans*⁶⁵ reached the U.S. Supreme Court, that Court also struck down Amendment 2, but decided neither to adopt the Colorado Supreme Court's reasoning about political participation, which would have opened possibilities for more expansive intrusion into the practices of direct democracy, nor to declare sexual orientation a suspect classification, which would have extended strict scrutiny to a new and still politically weak group. Instead, Justice Kennedy's opinion for the Court invoked a *per se* equal protection analysis with few clear precedents, apparently grounded in rational basis review but in a more rights-protective form than the Court was willing to acknowledge.⁶⁶

However inscrutable its doctrinal moorings and despite its absence of a finding of suspect classification, the Court's decision in *Romer* had a powerful, albeit limited, political effect on the ground. It effectively stopped conservatives' efforts to adopt clones of Amendment 2 designed to cut off future state and local antidiscrimination provisions. Petitioning for such ballot questions was abandoned in Oregon and Idaho,⁶⁷ and traditional values groups eventually dropped the push for preclusive state constitutional amendments regarding antidiscrimination laws.⁶⁸ But in the same way that proponents of race-driven ballot questions moved from anti-integration efforts to using affirmative action as a lightning rod, anti-LGBT organizations turned to a new issue: marriage.

B. Direct Democracy and Marriage

Within a few months of *Romer v. Evans*, and ostensibly because of a state trial court decision in Hawaii, which found that the state had failed to satisfy a

63. KIMBERLY B. DUGAN, *THE STRUGGLE OVER GAY, LESBIAN, AND BISEXUAL RIGHTS: FACING OFF IN CINCINNATI* 8 (2005).

64. *Evans v. Romer*, 854 P.2d 1270, 1284–86 (Colo. 1993).

65. 517 U.S. 620.

66. *See Romer*, 517 U.S. at 632–33.

67. STONE, *supra* note 23, at 72–73, 74.

68. *See FETNER*, *supra* note 47, at 98–99; STONE, *supra* note 23, at 33–34.

compelling interest standard to justify its marriage exclusion,⁶⁹ Congress enacted the Defense of Marriage Act (DoMA),⁷⁰ signaling that LGBT rights debates had moved to a new level. On the issue of same-sex marriage, politics quickly swallowed law in at least three dimensions: partisan mobilization, advocacy technologies, and strategic prioritization.

1. Partisan Mobilization

The partisanship was not subtle. DoMA emerged from a Republican-controlled Congress just prior to the 1996 election, thereby forcing President Clinton and every Democratic member of Congress either to anger the pro-LGBT segment of the party's base by supporting it, or to alienate the middle-of-the-road voters who objected to same-sex marriage by opposing it.⁷¹ Within the Republican Party, conservatives organized to prioritize the marriage issue, and pressured each candidate in that year's Iowa primary to "sign a pledge opposing same-sex marriage."⁷² Conservatives seized the opportunity to reinvigorate their use of LGBT issues to "mobilize the[ir] base," and resuscitated the device of a preclusive state constitutional amendment.⁷³

From 1990 until 2014, propositions centered on marriage dominated the arena of statewide votes on civil rights issues. During that period, there were fifty-three statewide votes on LGBT-related issues, of which forty-three involved same-sex marriage. These votes occurred in thirty-five states. By comparison, during the same period, there were twenty-one statewide ballot questions in fourteen states involving race, gender or both; and twenty-six votes in fifteen states on proposals related to immigration.⁷⁴

69. Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997), *remanded from* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

70. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2012)).

71. Craig A. Rimmerman, *The Presidency, Congress, and Same-Sex Marriage*, in *THE POLITICS OF SAME-SEX MARRIAGE* 273, 276–78 (Craig A. Rimmerman & Clyde Wilcox eds. 2007); Richard Socarides, *Why Bill Clinton Signed the Defense of Marriage Act*, *NEW YORKER* (Mar. 8, 2013), <http://www.newyorker.com/news/news-desk/why-bill-clinton-signed-the-defense-of-marriage-act> [<https://perma.cc/8NVX-Q7MC>].

72. SARA DIAMOND, *NOT BY POLITICS ALONE: THE ENDURING INFLUENCE OF THE CHRISTIAN RIGHT* 169 (1998).

73. Bayliss J. Camp, *Mobilizing the Base and Embarrassing the Opposition: Defense of Marriage Referenda and Cross-Cutting Electoral Cleavages*, 51 *SOC. PERSP.* 713, 715–187 (2008).

74. The data in this paragraph comes from my own compilation based on multiple sources. The number of marriage-related votes includes one that addressed domestic partnership laws (Colorado 2006) and two that featured questions on both marriage and antidiscrimination laws (Idaho 1994 and Washington 2009). The remainder of the LGBT-related issues addressed solely antidiscrimination coverage.

Only a semantic distinction separates state constitutional amendments to bar same-sex marriage from the design of Colorado's Amendment 2 to prevent expansion of civil rights protections. But in a world in which popular votes against affirmative action were legitimate because they did not directly and explicitly burden a suspect class in the way that the first anti-civil rights voter initiatives did, popular votes to restrict same-sex marriage did not trigger the narrowly-defined circle of civil rights protection.

Whether constitutional or statutory in its aim, each campaign about marriage generated an episode of popular constitutional contestation and interpretation. Populist mobilization against marriage equality, and the extent to which it dovetailed with Republican efforts to appeal to socially conservative voters, peaked in the November 2004 election.⁷⁵ Same-sex marriage questions were on the November ballot in eleven states, and conservative leaders claimed credit for President Bush's re-election.⁷⁶ With each state that adopted or more deeply inscribed its ban on same-sex marriage, the sense deepened that Americans intended marriage to exist as a naturalized institution, grounded in religion, and functioning as a natural right a priori to the state.

2. Technologies of Advocacy

During the same period, pro-equality groups led the increasing use of election-campaign-oriented tools of advocacy in litigation, the second bleed from politics into law. Even the possibility of a ballot question shaped litigation strategy. Attorneys at Gay and Lesbian Advocates and Defenders (GLAD) selected Vermont as the jurisdiction for the first lawsuit brought by a national organization to overturn a state ban on same-sex marriage in part because amending the Vermont Constitution required multiple legislative votes before a question could go before voters.⁷⁷ After Vermont, GLAD lawyers saw the prospect of litigating marriage in Massachusetts as a partly defensive move, necessitated by plans of an anti-gay group to put the issue before voters. GLAD believed that acting affirmatively through litigation would offer the best chance to control framing of the issue and to stop momentum for a popular vote.⁷⁸ A few years later, in analyzing whether a Midwestern state would be ripe for a marriage challenge, "the most

75. See FRANCES FITZGERALD, *THE EVANGELICALS: THE STRUGGLE TO SHAPE AMERICA* 491–94, 497–500 (2017).

76. *Id.* at 505–06.

77. Mary L. Bonauto, *The Litigation: First Judicial Victories in Vermont, Massachusetts, and Connecticut*, in *LOVE UNITES US: WINNING THE FREEDOM TO MARRY IN AMERICA* 71, 73–74 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016).

78. *Id.* at 79.

important factor” behind the decision by Lambda Legal attorneys to file suit in Iowa was that its process for amending the state constitution by ballot question was the most cumbersome of any state in the region.⁷⁹

GLAD’s challenges to marriage exclusions in Vermont⁸⁰ and Massachusetts⁸¹ pioneered the use of the technologies of electoral politics, especially polling and voter canvassing, as central components of marriage-equality litigation. GLAD worked in tandem with the Vermont Freedom to Marry Task Force, and began laying the groundwork in 1995 for the lawsuit filed in 1997. In both states, activities included training volunteers for public speaking in favor of marriage equality, designation of a media team, and town halls and open meetings to test the level of support for litigation and to build infrastructure for broader public education efforts once it was filed.⁸²

After *Goodridge v. Department of Public Health*,⁸³ in which the Massachusetts Supreme Judicial Court invalidated the state policy of denying marriage licenses to same-sex couples on state constitutional grounds, GLAD’s chief concern became blocking the effort by opponents to put a state constitutional amendment on the ballot that would effectively erase the decision. Although advocates engaged with legislators and others in multiple ways, polling and field operations were central. Bonauto and others involved in the *Goodridge* litigation had not stopped polling or sending canvassers door to door when the case had been filed, nor did they stop when the decision was issued.⁸⁴ The possibility of a voter referendum to reverse *Goodridge* did not finally die until 2007.⁸⁵

GLAD’s emphasis on non-litigation activities in the early marriage cases largely flew under the radar, although it is unlikely that publicizing them would

79. Camilla Taylor, “*Our Liberties We Prize*”: *Winning Marriage in Iowa*, in LOVE UNITES US, *supra* note 77, at 131, 132–33; *see also* STONE, *supra* note 23, at 131.

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

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

82. ANDERSEN, *supra* note 8, at 197; Scott Barclay & Anna-Maria Marshall, *Supporting a Cause, Developing a Movement, and Consolidating a Practice: Cause Lawyers and Sexual Orientation Litigation in Vermont*, in THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 171, 187–89 (Austin Sarat & Stuart A. Scheingold eds., 2005); Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 28–30 (2000); *cf.* MARC SOLOMON, WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS—AND WON 84–86, 107, 129 (2014) (discussing town meetings and canvassing experiences in Massachusetts); VT. FREEDOM TO MARRY TASK FORCE, MARRIAGE SPEAKING POINTS (1996) (on file with the author).

83. 798 N.E.2d 941.

84. NATHANIEL FRANK, AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA 142–43 (2017).

85. *See* Pam Belluck, *Bid to Ban Gay Marriage Fails in Massachusetts*, N.Y. TIMES (June 14, 2007), <http://www.nytimes.com/2007/06/14/us/154cnd-gay.html>.

have rebutted the opposition's contention that gay marriage was sought by a privileged few in the refined chambers of elite judges. Each victory in court legitimized the arguments for equality that advocates made outside of court, but also reinforced the trope that this was a battle between an already advantaged minority on one side and ordinary, that is, heterosexual, people on the other.

3. Strategic Prioritization

The importance of ballot questions in antidiscrimination and marriage equality efforts shaped the internal dynamics of the movement as well as the broader legal and political landscape. The dominance of electoral politics effectively resolved internal disputes over movement directions and tactics. Some fissures were particular to marriage; others were continuations of tensions that had surfaced in earlier rounds of ballot question campaigns. All occurred in multiple jurisdictions to a greater or lesser extent. In each instance, the resolution of the movement's internal tensions in electoral politics carried over into litigation, and eventually into substantive law.

The first tension grew out of the ideological paradox of same-sex marriage: It simultaneously embodies conservative norms and radical change. To traditionalists, especially those with a strong affiliation to a conservative religious faith, the idea of two men or two women marrying seemed an extremist, liberal, secular travesty, a violation of natural law.⁸⁶ To some progressives, especially feminists and sex-radical gay men, the idea of expanding the scope of an institution steeped in gendered practices and linked to the legitimation of some forms of consensual sex but not others seemed misguided at best and retrogressive at worst.⁸⁷ Arguing for a right to marry triggered attacks from equality supporters⁸⁸ as well as traditionalist opponents.⁸⁹ The need to persuade voters who skewed

86. See Mark Strasser, *Natural Law and Same-Sex Marriage*, 48 DEPAUL L. REV. 51, 54–56 (1998).

87. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 87–92 (First Harvard Univ. Press paperback ed. 2000) (1999); Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1, 12–17 (2015); see NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 107–09 (2008); see, e.g., Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9, 14.

88. Mary Bernstein & Verta Taylor, *Introduction: Marital Discord: Understanding the Contested Place of Marriage in the Lesbian and Gay Movement*, in *THE MARRYING KIND?*, *supra* note 54, at 1, 8–22 (outlining the arguments against marriage within the LGBT movement); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 90–91, 104–12 (2014) (providing historical context to the different marriage arguments by the LGBT community).

89. There is a voluminous literature opposing marriage equality from outside the LGBT community. See, e.g., Sherif Girgis et al., *What Is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245 (2011).

conservative channeled advocates into addressing the former concern and managing the latter.

Defensive instincts in the face of hostility also played a part. Debates in popular media over same-sex marriage morphed into arguments about the morality of homosexuality. This slippage mobilized LGBT rights supporters, who would have preferred a different battle, to support the marriage-equality campaign. Queer family politics, which had emphasized legal protection for a variety of relationship forms and were central to earlier stages of the LGBT movement, were gradually overshadowed by the politics of marriage.

The correlative strategic and tactical tension concerned questions of which methods of voter persuasion should be emphasized.⁹⁰ LGBT-rights advocates had argued among themselves since the 1970s and 1980s about whether the primary goal in ballot question contests should be winning the specific election or—especially if victory at the polls seemed unlikely—creating or strengthening a movement infrastructure that would outlast the campaign and could be in place for future projects. The first approach suggested more emphasis on strategies derived from elections, including voter canvassing, polling, hiring professional campaign staff, and building a get-out-the-vote machine for the one-time mobilization characteristic of elections.⁹¹ The other longer-term strategy sought to foster ongoing coalitions and use communications resources, such as advertising, to feature same-sex couples and their children as part of a project to make hesitant voters more comfortable with LGBT people.⁹²

This strategic dispute was indirectly a manifestation of ideological splits between more mainstream and more radical advocates.⁹³ Increased professionalization of campaign methods made success in elections more likely, but its assimilationist message contributed to the impression that gay translated into white and middle-class.⁹⁴ Internal debates proliferated over “evasive messaging,” especially with regard to arguments related to children⁹⁵ and the hesitancy to feature openly lesbian and gay persons in advertisements.⁹⁶ These internal

90. FETNER, *supra* note 47, at 96–97.

91. STONE, *supra* note 23, at 51–54.

92. *Id.* at 77, 82–83.

93. Leachman, *supra* note 14, at 1680–83.

94. See STONE, *supra* note 23, at 51–55, 158–61; see, e.g., DUGAN, *supra* note 63, at 56–64 (2005) (discussing the identity tensions in the LGBT movement in Cincinnati).

95. STONE, *supra* note 23, at 146–47.

96. Cf. DUGAN, *supra* note 63, at 103. This remained a sore point. Historian Michael Klarman noted: “Images of same-sex couples [marrying in San Francisco] were quickly broadcast . . . across the country and enabled conservatives to mobilize grassroots campaigns for state constitutional amendments to bar gay marriage.” KLARMAN, *supra* note 11, at 191. He argues: “The West

conflicts persisted, but were increasingly sidelined as the stakes in the marriage debate heightened.

In retrospect, one can see that 2003 marked the beginning of extraordinary acceleration and sophistication in marriage equality politics. In June of that year, the Supreme Court decided *Lawrence v. Texas*,⁹⁷ ruling that states could not prohibit same-sex sodomy.⁹⁸ Justice Scalia signaled in his dissent that the greatest danger for conservatives lay in the conceptual path to same-sex marriage that had been adopted by the majority.⁹⁹ The *Goodridge* opinion issued in November appeared to validate his warning. President George W. Bush issued a statement condemning *Goodridge*, and vowing “to do what is legally necessary to defend the sanctity of marriage.”¹⁰⁰ He followed up a few months later in his 2004 State of the Union address with a call to enact a federal constitutional amendment to limit the definition of marriage.¹⁰¹ *The New York Times* reported that 55 percent of Americans supported an amendment to the U.S. Constitution to “allow marriage only between a man and a woman.”¹⁰²

Facing a rapidly escalating debate, the American Civil Liberties Union (ACLU) commissioned opinion research to inform both long-term and short-term strategy on marriage, then convened GLAD and other legal groups to

Coast marriages [of early 2004], more than the *Goodridge* decision that inspired them, ignited the powerful backlash of [November] 2004.” *Id.* at 192.

97. 539 U.S. 558 (2003).

98. *Id.*

99. *Id.* at 604–05 (Scalia, J. dissenting) (“This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.”).

100. Pam Belluck, *Same-Sex Marriage: The Overview; Marriage by Gays Gains Big Victory in Massachusetts*, N.Y. TIMES (Nov. 19, 2003), <http://www.nytimes.com/2003/11/19/us/same-sex-marriage-overview-marriage-gays-gains-big-victory-massachusetts.html>; *President Defends Sanctity of Marriage*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Nov. 18, 2003), <https://georgewbush-whitehouse.archives.gov/news/releases/2003/11/20031118-4.html> [<https://perma.cc/E5CE-JBHD>].

101. *President George W. Bush: Address Before a Joint Session of the Congress on the State of the Union*, AM. PRESIDENCY PRO., <http://www.presidency.ucsb.edu/ws/index.php?pid=29646> [<https://perma.cc/L54H-X64W>] (presenting a transcript of President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 20, 2004)) (“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.”). President Bush continued to express his support for a federal constitutional amendment throughout 2004 and into 2006. William C. Duncan, *Speaking Up for Marriage*, 32 HARV. J.L. & PUB. POL’Y 915, 925–29 (2009).

102. Katharine Q. Seelye & Janet Elder, *Strong Support Is Found for Ban on Gay Marriage*, N.Y. TIMES (Dec. 21, 2003), <http://www.nytimes.com/2003/12/21/us/strong-support-is-found-for-ban-on-gay-marriage.html>.

discuss the results and how best to move forward.¹⁰³ The report from the Belden Russonello media relations firm advised advocates to focus on the one-third of voters “neither consistently supportive nor consistently opposed to gay marriage.”¹⁰⁴ It also provided the first indication that advocates needed to “chang[e] the frame from gays to marriage.”¹⁰⁵ Its top recommendation for a “message concept” stressed emotive associations focused on themes of commitment,¹⁰⁶ a major shift from the emphasis placed on the rights arguments that had been used until that point.¹⁰⁷

Conservatives responded to the 2003 victories in *Lawrence* and *Goodridge* with a renewed emphasis on ballot questions, coordinated with President Bush’s campaign for re-election.¹⁰⁸ On election day 2004, voters in eleven states amended their constitutions to bar same-sex couples from marriage after voters in two additional states had similarly prohibited same-sex marriage earlier in the year.¹⁰⁹ Even in Oregon, where movement leaders believed they had their only plausible chance of success based on the sophistication of local advocates, voters amended the state constitution.¹¹⁰

C. Polycentric Constitutionalism

Ballot questions and other mechanisms of direct democracy¹¹¹ constitute only one arena for the evolution of constitutional meaning, but they were a highly salient force for LGBT-related issues. They also illustrate the fundamental

103. See BELDEN RUSSONELLO & STEWART, LIVE AND LET MARRY: COMMUNICATING TO PERSUADABLE VOTERS ABOUT MARRIAGE RIGHTS FOR GAY COUPLES, FINDINGS FROM TEN FOCUS GROUPS (2003) (on file with author).

104. *Id.* at 3.

105. *Id.* at 5.

106. *Id.* at 11.

107. For example, in the 1996 Vermont Freedom to Marry talking points, which contain suggestions for arguments that volunteers should emphasize in speaking to voters, the first two “basic themes” stressed the large number of legal benefits and protections that flow from marriage, and the discriminatory nature of “government interference with a couple’s choice to marry.” VT. FREEDOM TO MARRY TASK FORCE, *supra* note 82, at 6–9.

108. Michael J. Klarman, Brown *and* Lawrence (*and* Goodridge), 104 MICH. L. REV. 431, 467–70 (2005).

109. See ARK. CONST. amend. 83, § 1; GA. CONST. art. I, § 4 ¶I; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A); MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; UTAH CONST. art. I, § 29. All were on the November 2004 ballot, except for Louisiana and Missouri, where the votes occurred earlier in 2004. *Same-Sex Marriage Bans Winning on State Ballots*, CNN (Nov. 3, 2004), <http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage> [<https://perma.cc/9555-H7SV>].

110. STONE, *supra* note 23, at 134–36.

111. Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1097–98 (2005).

polycentrism of American constitutionalism along two axes. Political power and state authority are not concentrated in one or even a small number of government institutions, but are widely dispersed both vertically through federalism and horizontally through separation of powers. Second, although formal mechanisms of subsidiarity exist, the reality of legal change is often more a function of network-style iterations than of top-to-bottom mandate, involving non-state as well as state actors.

The multiple power centers of American governance create a plethora of intervention points where lawyers can apply pressure, as well as an interactive process for constitutional change. The Supreme Court stands alone in its authority to interpret the Constitution, but it also a widely accepted political reality that the Court does so in tandem with signals from a variety of sources, what Justice Ginsburg called “a dialogue with other organs of government, and with the people as well.”¹¹²

The fullness of constitutional meaning cannot be understood through only case law or important statutes. It is not the product of only one or two sets of processes, nor the creation only of the judiciary. This complexity and openness of U.S. constitutional discourse created the pockets of contestation where Americans debate the equality of LGBT persons as citizens with respect to a universe that may have been constituted by the formal apparatus of law or not (such as the policies adopted by private workplaces and faith groups). Ballot question elections were the most significant of these pockets.

The drive to enact antidiscrimination laws covering sexual orientation both thrived and foundered in this polycentric universe, and polycentricity was the curse that later became the savior of the marriage equality movement. Operating in this dense legal and cultural ecosystem, social movements contribute directly to the construction of constitutional meaning. But the influence does not all flow in one direction from movement action to the various venues for lawmaking. As the ballot question focus shifted from antidiscrimination law to marriage, something new happened. A particular form of lawmaking—direct democracy—drove the creation of a new model of social movement.

II. STRUCTURE: A NEW SOCIAL MOVEMENT MODEL

During 2004, a quarter of the states banned same-sex marriage. In response, ten leaders of LGBT rights organizations gathered for a two-day strategy summit

112. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992).

in a Jersey City airport hotel in May 2005.¹¹³ Almost all were lawyers, most from litigation organizations; participation was by invitation only. The meeting arose from a decision by LGBT rights advocates and the leading funders for the movement to rethink the marriage strategy, with the understanding that a number of funders would work collaboratively to support an effort that was more cooperative among the advocacy groups.¹¹⁴ By the time the meeting ended, the participants had adopted a new strategy to achieve same-sex marriage. The agreement was embodied in *Winning Marriage: What We Need to Do*¹¹⁵ (hereafter *Winning Marriage I*), which was modified at a meeting five years later by a slightly larger set of organizational representatives in *Winning Marriage: The Path Forward*¹¹⁶ (hereafter, *Winning Marriage II*).

The goal of the new phase of the marriage equality movement that *Winning Marriage I* called for was to create the social conditions under which institutions with Supremacy Clause power could be persuaded to act. The strategy of both *Winning Marriage* documents was derived from a particular historical understanding of why certain civil rights movements had succeeded: that the Supreme Court and Congress function as consolidators, rather than creators, of new social norms, “[d]espite widespread beliefs to the contrary.”¹¹⁷ Based on that understanding, Matt Coles of the ACLU and the other authors¹¹⁸ expected federal law to “foster[] the eventual national resolution” to allow same-sex marriage, but only after it became socially acceptable and legally valid in many states.¹¹⁹

113. Interview with Matthew Coles, Former Deputy Legal Dir. & Dir. of Ctr. for Equal., ACLU (July 10, 2015); see also FRANK, *supra* note 84, at 208–09; SOLOMON, *supra* note 82 at 95–96; cf. DAVID LEWIS, PROTEUS FUND, HEARTS & MINDS: THE UNTOLD STORY OF HOW PHILANTHROPY AND THE CIVIL MARRIAGE COLLABORATIVE HELPED AMERICA EMBRACE MARRIAGE EQUALITY 4–5 (2015) (discussing a summit of 26 national LGBT leaders in Denver in 2005).

114. Interview with Matt Coles, *supra* note 113; FRANK, *supra* note 84, at 207–08; cf. LEWIS, *supra* note 113, at 5 (discussing the strategy at the 2005 Denver summit).

115. MICHAEL ADAMS ET AL., WINNING MARRIAGE: WHAT WE NEED TO DO (2005), <https://s3.amazonaws.com/s3.documentcloud.org/documents/2108219/final-marriage-concept-paper.pdf> [<https://perma.cc/GRF8-L98L>].

116. MATT COLES ET AL., WINNING MARRIAGE: THE PATH FORWARD (2010) (on file with author).

117. ADAMS ET AL., *supra* note 115, at 14.

118. Coles was asked to lead the project and serve as primary drafter. The content of *Winning Marriage I* and *Winning Marriage II* also reflected the views of Evan Wolfson, head of Freedom to Marry. Interview with Matt Coles, *supra* note 113; SOLOMON, *supra* note 113, at 95. See generally LEWIS *supra* note 113, at 2 (noting Wolfson founded Freedom to Marry).

119. ADAMS ET AL., *supra* note 115, at 14.

A. *Winning Marriage I: A Movement/Campaign Hybrid*

Winning Marriage I called for a coordinating organization, separate from all existing groups, to execute state-specific plans and strategies, “[m]uch like a national candidate campaign.”¹²⁰ Although *Winning Marriage I* acknowledged important roles for legislatures and, to a lesser degree, courts, it argued that the essential goal was “winning the public.”¹²¹ “[S]uccess will depend on our ability to mount sweeping public education, field and political efforts”¹²² Strikingly, litigation was de-emphasized, contradicting the conventional wisdom of much law and society scholarship that litigation will play a central role in any social movement.¹²³ Also striking was the group adoption of an election campaign as its core, primary strategy.

Winning Marriage I sought to create a tipping point specifically for the Supreme Court, where final and complete success would be achieved. The authors proposed a state-by-state approach in which advocates would seek to shift states into greater levels of legal recognition for same-sex couples. They sought to achieve full equality in the most hospitable states and, in other states, provision of all of the rights and duties under state law (a status usually called civil union), allowance of a lesser number of rights and duties (usually called domestic partnership) or more narrowly focused improvements in legal protections for same-sex couples.¹²⁴

Winning Marriage I also identified an intermediate goal: ten states with marriage, ten states with a civil union type status of full recognition, ten states with other relationship or civil rights, and twenty states for which the goal was “climate change.”¹²⁵ The group believed that this target could be met in fifteen to twenty years, that is, by 2020 or 2025.¹²⁶ The 10/10/10/20 goal was flexible—the specific dates and which states would go into which buckets were approximate—but clear enough to allow for measurement. And, if it could be achieved, it might indicate that it was safe to bring a full-on challenge to the Supreme Court.

120. *Id.* at 9.

121. *Id.* at 2–3. Coles has noted: “For change in a republic to be real and to endure, the people have to accept it. That insight, not universally shared at the time, was central to the ultimate winning strategy.” Matt Coles, *The Plan to Win Marriage*, in LOVE UNITES US, *supra* note 77, at 100, 106.

122. ADAMS ET AL., *supra* note 115, at 2.

123. See Leachman, *supra* note 14, at 1687, 1693–95.

124. For a description of the various statuses other than marriage, see WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 719–21 (3d ed. 2011).

125. ADAMS ET AL., *supra* note 115, at 3.

126. *Id.* at 6.

The Winning Marriage project created a new model for cause lawyering and marked a turning point in the sophistication of advocacy. It built on two earlier versions of an incrementalist concept for law reform. The NAACP Legal Defense Fund achieved fame for the systematic march-to-Georgia-style approach to test litigation in its desegregation campaign, winning a series of Supreme Court decisions that culminated in *Brown v. Board of Education*.¹²⁷ More recently, it has become commonplace for public interest organizations to eschew litigation-only strategies and instead deploy multiple modes of advocacy that integrate lobbying and public education.¹²⁸ With this newer approach, different zones of law can form the cutting edge at different times and in different jurisdictions, allowing for versatility in identifying the most receptive institutions for new interpretations of law.

Winning Marriage I took the multi-modal strategy for legal change to a third stage. Although the ultimate goal was highly specific and quite narrow—to end an exclusion through identified specific intermediate legal achievements, the method behind the strategy was to give muscle and meaning to clichés about the power of “the court of public opinion” in ways that could be elaborated both discursively and organizationally. *Winning Marriage I* incorporated election campaigns focused on issues rather than candidates into the menu of venues that the movement would prioritize, and it baked election victories into its core metric of success. This step had cascading effects. Central to the Winning Marriage effort was using multiple substantive and emotional messages (not just legal or quasi-legal arguments), which could be micro-targeted to specific audiences, and using metrics of success—such as opinion poll numbers, interactions with voters, and get-out-the-vote results—that were drawn from the operations of a political campaign.

The Winning Marriage strategy was not new in fostering work in multiple venues and at both federal and state levels. By this point, LGBT rights advocates had been engaged in a broad range of efforts, with multiple forms of advocacy, covering many issues, and meeting semi-annually to plan broad strategies and

127. JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 85–87, 112–15 (1994); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994). See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

128. ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 515–20 (2013); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2046–48 (2008).

major litigation.¹²⁹ What was different in *Winning Marriage I* was the combination of placing “the primary goal of changing the way people think . . . at the forefront” of a “national campaign to win marriage”¹³⁰ with elections as the central barometer of success.

The participants in the Jersey City meeting realized that this approach would not be easy, inexpensive, or familiar. Communications expertise would be at the core. To secure and manage the necessary finances and other resources, *Winning Marriage I* called for creation of a central organization with no focus other than legalizing same-sex marriage. The groups represented at the meeting agreed to cooperate in its creation and governance. The result would be a new entity capable of “launch[ing] significant new efforts in field, public education, electoral and other political work, and fundraising.”¹³¹

Drawing on what the advocates had learned from opinion research, *Winning Marriage I* identified the public education goal as securing support of the “movable middle” of the population often prioritized by candidates for office. “First and foremost, we need to learn how to create conventional wisdom on marriage both by crafting the content of that wisdom and engineering the structures that effectively disseminate it across our target audiences (i.e. the ‘movable middle’).”¹³² Most of the marriage-related opinion research that had been done had been geared to defeating particular ballot measures in particular locations. *Winning Marriage I* called for major additional investments to research how to move public opinion more broadly on the underlying issue of same-sex marriage.¹³³ “Continuous measurements of the efficacy of our public education efforts is resource intensive but critical.”¹³⁴

The marriage equality campaign became the first to meld social marketing with an election-style nationwide political campaign. Opinion research, especially, became increasingly sophisticated, as consultants moved beyond polling and focused on expanding their understanding of the emotional motivators that inhibited moveable middle voters from supporting same-sex marriage.¹³⁵ Patterns

129. Kevin M. Cathcart, *The Sodomy Roundtable*, in LOVE UNITES US *supra* note 77, at 51, 53–54; Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1312–18 (2010).

130. ADAMS ET AL., *supra* note 115, at 5, 8.

131. *Id.* at 6.

132. *Id.* at 7.

133. “The trouble was, research of this scope and quality was expensive—an initial investment was 10 times the cost of a typical statewide poll.” LEWIS, *supra* note 113, at 8.

134. ADAMS ET AL., *supra* note 115, at 7.

135. See, e.g., Molly Ball, *The Marriage Plot: Inside This Year’s Epic Campaign for Gay Equality*, ATLANTIC (Dec. 11, 2012), <https://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot-inside-this-years-epic-campaign-for-gay-equality/265865> [<https://perma.cc/3BK8-2TYX>]

began to emerge. Rights talk appealed to liberals who were the core supporters of equal marriage rights. More feedback came in to support the decision to use themes based on “love, commitment, fairness, and freedom” for the not-yet-persuaded.¹³⁶ The legal arguments that had initially dominated public outreach by LGBT rights groups began to give way. Litigators began talking about using “fairness” rather than “equality” and focusing on “the moral values of commitment, love, family, children, community, dignity, and respect.”¹³⁷ The changes in legal discourse outside the courts eventually migrated from press conferences, speeches and media projects into litigation documents and judicial text.¹³⁸

Using lessons learned from increased opinion research and message testing, GLAAD and the Movement Advancement Project published a forty-page guide for advocates titled *Talking to the Moveable Middle About Marriage* (hereafter *Talking to the Middle*) in January 2008.¹³⁹ *Talking to the Middle* reaffirmed the need to substitute emotionally textured arguments for rights claims, but it also deeply analyzed voter psychology. Consistent with a survey that drew widespread attention within the advocacy community, in which 57 percent of respondents believed that gay people “did not share their basic values,”¹⁴⁰ *Talking to the Middle* described an overarching belief among moderate voters that “gay people aren’t like me.”¹⁴¹ Describing these voters as more fearful of change than biased against LGBT people, *Talking to the Middle* advised:

If gay people weren’t seen as outsiders, including gay people in marriage would be less problematic. To address this outsider status, we need to help Americans think about gay people as part of the community. Communications [should] emphasize common ground . . . In terms of marriage, this means talking about marriage in a way that echoes how straight Americans talk—and think—about marriage.¹⁴²

(discussing the work of Amy Simon, a California-based pollster who conducted a statewide survey on “the underlying emotional dynamics that were driving the voters who were ‘in the middle’ on gay marriage”).

136. *Messaging, Messengers and Public Support*, FREEDOM MARRY, <http://www.freedomtomarry.org/pages/Messaging-Messengers-and-Public-Support> [<https://perma.cc/AS5E-V7AD>].

137. Jon W. Davidson, *Keynote Address: Winning Marriage Equality: Lessons From Court*, 17 YALE J.L. & FEMINISM 297, 299, 307 (2005).

138. *See infra* Part V.

139. GAY & LESBIAN ALLIANCE AGAINST DEFAMATION & MOVEMENT ADVANCEMENT PROJECT, *TALKING TO THE MOVABLE MIDDLE ABOUT MARRIAGE* (2008) [hereinafter *TALKING TO THE MIDDLE*] (on file with the author).

140. LEWIS, *supra* note 113, at 8.

141. *TALKING TO THE MIDDLE*, *supra* note 139, at 3.

142. *Id.* at 4.

The document described another overarching belief among moderate voters: that “gay people don’t need more rights.”¹⁴³ Same-sex couples could live together and execute wills and other documents to address property questions regardless of whether they were married. *Talking to the Middle* argued that debates about rights, benefits, and legal protections missed the point: People in the middle “don’t think of marriage as a legal institution . . . [It] is more about relationship *validation* than legal protections.”¹⁴⁴ Voters heard arguments about unequal benefits as a Trojan Horse for securing social validation that gay relationships were on equal moral footing with heterosexual ones.

Equality advocates seemed to face a paradox. Arguments about rights made them appear to be selfish: “[I]f we only talk about rights and protections, we risk reinforcing the misperception that gay people don’t enter marriage in the same spirit as straight people.”¹⁴⁵ On the other hand, too much talk about social legitimacy and validation of their relationships threatened voters who feared that marriage as an institution was already on the decline and resisted what they saw as the further devaluation that would be caused by ending the exclusion. *Talking to the Middle* recommended careful selection of which concrete harms to emphasize: the right to visit a partner who is in the hospital or to take leave from work to care for a sick partner.¹⁴⁶ Infringement of these rights hampers “the ability of committed couples . . . to take care of and be responsible for each other.”¹⁴⁷

Talking to the Middle also incorporated a fundamentally new understanding about ambivalent voters drawn from research. It explained that many were not hostile or unfamiliar with LGBT people; they wanted to do the right thing, but were deeply conflicted over what that was.¹⁴⁸ Helping voters resolve this conflict by reassurance and emphasis on shared experiences and values, rather than by trying to persuade them to change their minds based on logic or rationality, became one of the most important strategies in the same-sex marriage movement.

In seeking to operationalize the *Winning Marriage I* game plan, advocates traveled a Byzantine path from election day 2004 to election day 2008. Conservatives continued their rejuvenated ballot question onslaught, and by 2008, voters in eleven additional states had amended their state constitutions to ban same-sex marriage.¹⁴⁹ For equality advocates, following *Goodridge v. Department*

143. *Id.* at 3, 7.

144. *Id.* at 7.

145. *Id.*

146. *Id.* at 8.

147. *Id.*

148. *Id.* at 3.

149. See generally ALA. CONST. art. I, § 36.03; ARIZ. CONST. art. 30, § 1; COLO. CONST. art. II, § 31; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; S.C. CONST. art. XVII, § 15; S.D.

of *Public Health*,¹⁵⁰ there were only litigation losses¹⁵¹ until the months immediately prior to the 2008 election, when the highest courts of California¹⁵² and Connecticut¹⁵³ ruled that exclusionary laws were unconstitutional on state law grounds. The biggest legislative successes were to come in 2009 when Vermont stepped up from civil union recognition to full marriage recognition and in winning full marriage legislation in New Hampshire.¹⁵⁴ Overall, the most successful legislative strategy during this period produced laws that created new non-marriage relationship categories, such as civil unions, in ten states and the District of Columbia.¹⁵⁵ Public opinion polls continued to register modest increases in support for marriage or for other legal recognition of same-sex couple relationships.¹⁵⁶

These ups and downs paled, however, by comparison to the attention given to California's Proposition 8, which sought to amend the state constitution to specify that marriage could exist only between a man and a woman, effectively overturning the litigation victory that year.¹⁵⁷ Given the ease of ballot access in California, both sides had expected that a referendum on marriage equality would be forthcoming after the court's ruling. Preparation for the ballot question began before the court ruled, and massive resources fueled the contest. Few understood that Proposition 8 also provided an acid test of the electoral politics model that had been adopted by the *Winning Marriage I* summit in 2005. When voters adopted Proposition 8 with a 52 to 48 percent margin,¹⁵⁸ the loss of marriage equality in California stunned the movement.

CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

150. 798 N.E.2d 941 (Mass. 2003).

151. See, e.g., *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Li v. State*, 110 P.3d 91 (Or. 2005) (en banc); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (en banc).

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

153. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

154. See generally N.H. REV. STAT. ANN. § 457:1-a (Supp. 2016); VT. STAT. ANN. tit. 15, § 8 (2010).

155. Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 169 (2009). This is not to say that adoption of domestic partnership or other alternative status laws, usually at the municipal level, were easy or uncontested. Like marriage equality proposals, these laws were the target of numerous ballot question initiatives. *Id.* at 180–81.

156. *Id.* at 165–67, 165 tbl.2, 166 tbl.3.

157. DEBRA BOWEN, CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2008: OFFICIAL VOTER INFORMATION GUIDE 128 (2008) (providing the language of Proposition 8: "Only marriage between a man and a woman is valid or recognized in California"). Proposition 8 was adopted and added to the California Constitution at CAL. CONST. art. I § 7.5.

158. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, (Nov. 5, 2008), <http://www.nytimes.com/2008/11/06/us/politics/06marriage.html>.

B. *Winning Marriage II: Regrouping After Armageddon*

Advocates responded to Proposition 8 by doubling down on their efforts to develop a strategy that would succeed in electoral arenas. The same group of strategists as in 2005 was joined by representatives of four foundations and convened again in late March 2010 to revise their strategy.¹⁵⁹ Again, while the new strategy agreement, *Winning Marriage II*, addressed multiple venues for advocacy, elections loomed largest. “As long as marriage has lost every popular vote, it w[ould] be almost impossible to build a sense that the nation is ready for it.”¹⁶⁰ Participants recommitted to prioritizing the arenas where “we have made the least progress”: public persuasion and national field capacity.¹⁶¹ “Any idea that the 2005 paper gave too much emphasis to public persuasion ought to have been dispelled by the 2008 election for good.”¹⁶²

The advocates gathered for the *Winning Marriage II* summit revisited the tipping point metaphor from *Winning Marriage I*, understood as the key to “get[ting] the Court ready for marriage.”¹⁶³ In *Winning Marriage II*, they faced three variables that had not been factors in 2005. First, by 2010, the number of states where there was no state constitutional amendment that blocked same-sex marriage and often a marriage-equivalent status as well had diminished, which narrowed the number of states that could be put into play for step-ups in the 10/10/10/20 model. Second, the authors feared that the federal constitutional challenge to Proposition 8, which they had failed to prevent,¹⁶⁴ could reach the Supreme Court before the justices were ready to strike down exclusions as unconstitutional, thus setting back the entire effort.¹⁶⁵ The third new factor was as positive as the first two were negative. The hostile executive branch of 2005 had been replaced by an administration supportive of LGBT rights, creating unforeseen possibilities for progress at the federal level.

With this new mix of danger and opportunity, the authors of *Winning Marriage II* paid even greater attention than they had in *Winning Marriage I* to finding the tipping point, the moment when they could present the ultimate question to the Court with the greatest likelihood of success. By 2010, the

159. See MATT COLES ET AL., *supra* note 116; see also FRANK, *supra* note 84, at 277.

160. MATT COLES ET AL., *supra* note 116, at 15.

161. *Id.* at 4.

162. *Id.*

163. *Id.* at 17.

164. CHEN & CUMMINGS, *supra* note 128, at 1311.

165. MATT COLES ET AL., *supra* note 116, at 10.

authors realized that the “legal profession and judges in particular may be ahead of America on civil rights and sexual orientation.”¹⁶⁶ But specificity proved elusive:

If the Supreme Court believes that despite the somewhat slow pace of political change, the country as a whole is ready for marriage, we may be able to persuade it to act when half the states or a little more still don't allow either marriage or full partnership . . . [But] the Court would have to believe that a strong majority of Americans not only supported marriage, but believed that denying it is deeply wrong.¹⁶⁷

The most obvious marker for a tipping point would be when a majority of states recognized same-sex marriage (and perhaps other fully equivalent statuses).¹⁶⁸ But the existence of state constitutional amendments barring same-sex marriage in more than half the states put this point far into the future without the federal courts stepping in, and the Winning Marriage group believed that the courts were not yet ready to rule in their favor. Advocates began framing the tipping point to be when major opinion polls repeatedly found that a majority of the population agreed with marriage equality for same-sex couples.

The group entered what turned out to be the final phase of the Winning Marriage campaign with a recommitment to developing “deeper strategies aimed at ultimate persuasion”¹⁶⁹ and to working even more collaboratively.¹⁷⁰ “The research and experience we have from ballot campaigns, legislative efforts, and past public education campaigns needs to be collected and actively shared.”¹⁷¹ The plan was to use the pooled information to generate “template messages, talking points, and approaches for local, state and national organizations.”¹⁷²

The investment in elevating the sophistication of communications research had begun soon after Proposition 8,¹⁷³ but an even more massive ramping up of resources and work followed the 2010 summit. Freedom to Marry, the non-litigation advocacy group founded by Evan Wolfson, expanded its role as the

166. *Id.*

167. *Id.*

168. Loosely grounded in constitutional history, this definition of a tipping point alludes to cases like *Loving v. Virginia*, 388 U.S. 1 (1967), or *Lawrence v. Texas*, 539 U.S. 558 (2003), when the Court invalidated a practice that most states had already abandoned.

169. MATT COLES ET AL., *supra* note 116, at 12.

170. See Thalia Zepatos, *The Marriage Movement's Secret Weapon: Radical Cooperation*, HUFFPOST (June 26, 2015, 2:48 PM), http://www.huffingtonpost.com/thalia-zepatos/the-marriage-movements-se_b_7665696.html [<https://perma.cc/T392-W263>].

171. MATT COLES ET AL., *supra* note 116, at 13.

172. *Id.*

173. FRANK, *supra* note 84, at 276–77.

central campaign organization called for in *Winning Marriage I*.¹⁷⁴ Funders increased their support.¹⁷⁵

What emerged was a network architecture that linked research, testing, state affiliates, litigators, lobbyists, and media, with Freedom to Marry at the hub. The different organizations involved in the effort, although often rivals, agreed to share the results of opinion polls and surveys.¹⁷⁶ Consultants tested and analyzed ideas for messages that emerged from the opinion surveys, measuring their impact both as to content and as to the effects of different speakers.¹⁷⁷ Advertising was created to target not only the movable middle as a whole, but also specific segments of the middle.¹⁷⁸ Approaches that seemed promising were deployed across many types of communications from television ads to talking points for lobbyists to canvassers in multiple states or at the federal level. To expand its on-the-ground presence and assist in coordination and building coalitions, Freedom to Marry added state-level affiliates.¹⁷⁹

The long-sought breakthrough in an electoral arena came in the fall 2012 election, when marriage equality advocates surprised even themselves by winning all four marriage questions on the November ballot in Maine, Maryland, Minnesota, and Washington.¹⁸⁰ Expertise, technology, and resources gelled to create sophisticated campaigns in each state. Knowing that movable middle voters were conflicted, strategists switched from using canvassers primarily to identify supporters for later get-out-vote-efforts to a model of “conversation canvassing” in which hundreds of paid and volunteer staff members went door-to-door seeking to explain to voters why same-sex couples wanted and needed marriage.¹⁸¹ Pro-equality groups were able to respond to opponents’ advertising with precision and speed. Within a day after the ad that had been crucial to persuading Californians to vote for Proposition 8 had been broadcast in Minnesota, the

174. *Id.* at 277–78.

175. *Id.*

176. *Messaging, Messengers and Public Support*, *supra* note 136.

177. Ball, *supra* note 135.

178. *Id.*; SOLOMON, *supra* note 82, at 234 (describing the filming of speakers from diverse backgrounds endorsing same-sex marriage).

179. See Josh Zeitz, *The Making of the Marriage Equality Revolution*, POLITICO MAG. (Apr. 28, 2015), <http://www.politico.com/magazine/story/2015/04/gay-marriage-revolution-evan-wolfson-117412> [<https://perma.cc/QRV3-9ZM6>].

180. See SOLOMON, *supra* note 82, at 263–64; Adam Liptak, *States’ Votes for Gay Marriage Are Timely, With Justices Ready to Weigh Cases*, N.Y. TIMES, (Nov. 7, 2012), <http://www.nytimes.com/2012/11/08/us/supreme-court-to-begin-weighing-gay-marriage-cases.html> (noting that Maine, Maryland and Washington approved the legality of gay marriage and Minnesota defeated a proposed constitutional amendment banning gay marriage).

181. See SOLOMON, *supra* note 82, at 235–36, 241–45; see also LEWIS, *supra* note 113, at 12; Ball, *supra* note 135.

marriage equality response was on the air.¹⁸² Equality supporters spent an estimated \$42 million on the campaigns in the four jurisdictions.¹⁸³

Seven months after the 2012 election, the judicial breakthrough came. In *United States v. Windsor*,¹⁸⁴ the Supreme Court ruled that DoMA was unconstitutional. After *Windsor*, the movement changed its focus from winning elections to litigation. Lawsuits were filed in every state that barred same-sex marriage.¹⁸⁵ The Civil Marriage Collaborative directed a greater portion of financial support to financing the litigation.¹⁸⁶ Nonetheless, the public education campaign did not cease. Ballot-question-style advertising was mounted in some locations where the state law was being litigated, even when there was no election pending.¹⁸⁷

In many ways, *Windsor* itself was the tipping point, at least for lower court judges who read the opinion as a clear signal that marriage equality was rapidly approaching.¹⁸⁸ Judge Richard Posner's change of heart illustrates the dramatic pre- and post-*Windsor* difference. In 1997, Judge Posner had written that "[p]ublic opinion may change . . . but at present it is too firmly against same-sex marriage for the courts to act."¹⁸⁹ In a decision invalidating state exclusionary laws in 2014, he wrote that the state's only rationale for the exclusion "is so full of holes that it cannot be taken seriously."¹⁹⁰

When the same-sex marriage debate returned to the Supreme Court in *Obergefell v. Hodges*, the question of whether a tipping point had occurred was a central issue, although not framed in those terms. Section IV of Justice Kennedy's opinion for the Court rebutted the argument in Chief Justice Roberts' dissent that the Court should allow more time for consideration of the constitutional

182. SOLOMON, *supra* note 82, at 251–52.

183. Ball, *supra* note 135.

184. 133 S. Ct. 2675 (2013).

185. Appendix A to the Court's opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), lists forty-five U.S. District Court decisions and three decisions of the highest state courts on the constitutionality of the marriage exclusion that had been decided since the issuance of the decision in *Windsor*. *Obergefell*, 135 S. Ct. at 2608 app. a.

186. LEWIS, *supra* note 113, at 15.

187. Cf. Molly Ball, *How Gay Marriage Became a Constitutional Right*, ATLANTIC, (July 1, 2015), <https://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052> [<https://perma.cc/S9HV-2FCB>]; *Messaging, Messengers and Public Support*, *supra* note 136.

188. Of the forty-seven post-*Windsor* decisions listed in the Appendix to *Obergefell*, only four upheld a law excluding same-sex couples from marriage. See *Obergefell*, 135 S. Ct. at 2608 app. a.

189. Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?* 95 Mich. L. Rev. 1578, 1585 (1997) (reviewing WILLIAM N. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996)).

190. *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir. 2014).

validity of exclusions of same-sex couples to percolate in the political branches.¹⁹¹ In justifying judicial intervention based on the degree of democratic deliberation that had already occurred, Justice Kennedy pointed to “referenda, legislative debates, and grassroots campaigns.”¹⁹² The Court also cited the “enhanced understanding of the issue” reflected in the “arguments now presented . . . as a matter of constitutional law.”¹⁹³ The Court was ready to decide.

C. Movements, Campaigns, and Metrics

The lawyers who adopted the Winning Marriage strategy statements saw marriage equality as a project within the bigger movement and utilized an election campaign model to create and guide their work. The result was a highly sophisticated mobilization toward the goal of winning marriage equality at the ballot box in order to create a strong enough tipping point to bring about a victory in the Supreme Court. To my knowledge, there has been no other example of the self-conscious construction of this hybrid: an election-style campaign designed for issue-based advocacy.

There is no magic definition for the distinction between a social movement and a campaign. A reasonable distillation of several versions in the sociological literature would define a social movement as a broad, long-range effort to change fundamental aspects of social relations, whereas a campaign generally targets a more specific goal to be achieved in a shorter time of intense activity.¹⁹⁴ Consistent with that definition, I use “movement” in reference to the effort to win legal and social equality for LGBT Americans.

191. *Compare Obergefell*, 135 S. Ct. at 2605–06 (“There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. [M]any of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question.”), *with id.* at 2624, 2628 (Roberts, C.J., dissenting) (“[P]eople are in the midst of a serious and thoughtful public debate . . . [It] must be allowed to continue.”).

192. *Id.* at 2605 (majority opinion).

193. *Id.*

194. See Suzanne Staggenborg & Josée Lecomte, *Social Movement Campaigns: Mobilization and Outcomes in the Montreal Women’s Movement Community*, 14 MOBILIZATION 163, 164 (2009). Evan Wolfson describes marriage equality as a campaign within the LGBT rights movement. See *Transcript of April 26, 2013 Symposium Keynote Discussion Between Evan Wolfson and Olatunde Johnson*, 45 COLUM. HUM. RTS. REV. 846, 851 (2014) [hereinafter *Keynote Discussion*] (“[D]riving that movement, guiding that movement, generating that movement is . . . a central campaign that is going out of business when this is done.”). On this understanding, a campaign could be one component of a broader movement or be a stand alone mobilization, such an election campaign.

In this Part, I analyze how the marriage equality campaign's organizational model shaped its role as an actor in the arena of popular constitutionalism. I examine how its internal processes and its relationship to the broader LGBT constituency and movement raise questions of accountability, an especially acute question in the context of mass organizing. In much of the literature, the normative and instrumental components of accountability blur together. To consolidate these perspectives, I posit a holistic metric that is designed specifically for law-oriented cause efforts. Finally, I suggest that the political marketing model of the marriage equality campaign will become more common in future social movements.

1. Lawyers as Leaders

In the literature about accountability in social movements, social scientists have argued that efforts aimed primarily at changes in law, led by lawyers, suffer from a kind of gravitational pull that produces agendas that favor the concerns of elites, strategies constrained by legal doctrines, and outcomes that bear little resemblance to the ambitious visions of those in the movement whose involvement tends toward protest and direct action.¹⁹⁵ To the same effect, because the methods associated with electoral politics have developed in the far more common context of individual candidates running for office than of ballot questions, elections are regarded as inadequate mechanisms for creating meaningful or structural change, and are associated with episodic projects lacking a larger perspective than the stakes posed by each separate contest.¹⁹⁶ For both law reform efforts and election campaigns, the demands of appealing to somewhat conservative segments of the public—like judges, legislators, or the movable middle—often undercut efforts to prioritize inclusivity across race and class lines.¹⁹⁷ It is not difficult, nor would it be entirely wrong, to critique the marriage equality campaign as merely an example that illustrates the harshest of these observations. A small group, mostly lawyers, determined that marriage would become the priority issue of the LGBT rights movement. The lawyers who led the Winning Marriage group brought with them a familiarity with fundraising and strategic thinking that are often found in litigation groups.¹⁹⁸ These skills

195. Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 74–76 (2011); see, e.g., Tomiko Brown-Nagin, *Elites, Social Movements, and the Law*, 105 COLUM. L. REV. 1436, 1472–73, 1480–82, 1512–15 (2005).

196. COLIN CROUCH, *POST DEMOCRACY* 15–19 (2004).

197. STONE, *supra* note 23, at 156–61.

198. See Leachman, *supra* note 14, at 1705–27.

supported and strengthened the focus on marriage as the primary movement priority. And questions about the perceived whiteness of the effort and the reasons for it persisted.¹⁹⁹ All of these actions related to accountability (or its lack) in some aspect of goal definition: in selecting which issues to focus on, in defining the scope and depth of what would constitute success, and in portraying the movement's constituency through the prism of particular goals.

Some scholars believe that efforts such as the marriage equality campaign or even the broader goal of securing equal rights for LGBT persons should not be categorized as social movements at all. The more traditional approach to defining social movement is functional, stressing mobilization to achieve goals by targeting some aspect of a political system.²⁰⁰ More recently, Tomiko Brown-Nagin has argued that politicized legal campaigns and social movements comprise different categories of collective effort. Genuine social movements are unique in that they are grounded in participatory, rather than indirect or representative democracy.²⁰¹ They seek change through activism that occurs outside formal structures, using tactics that are "protest-oriented and disruptive of the normal course of politics."²⁰²

Brown-Nagin's perspective reflects not only the understanding that movements oriented primarily toward legal change exhibit recurring shortcomings, but also that de-marginalization should start at home insofar as social movements are concerned. In other words, the strong likelihood that a lawyer-led or law-focused movement will either increase, or at best not decrease, the internal stratification within a constituency amounts to more than a flaw. Instead, this particular shortfall signals a missing definitional element to the components of a broad movement to change what matters most. Unless a movement is oriented to enhancing the participation and power of the most disadvantaged within a community, it simply lacks the potential to bring about significant change in social relations.

This more demanding view of social movements strikes me as normatively important as a guideline for lawyers and non-lawyers alike. I agree that lawyers

199. See, e.g., Darren Lenard Hutchinson, "Gay Rights" for "Gay Whites"?: Race, Sexual Identity and Equal Protection Discourse, 85 CORNELL L. REV. 1358, 1370–71 (2000); R. A. Lenhardt, *Integrating Equal Marriage*, 81 FORDHAM L. REV. 761, 766–68 (2012).

200. See, e.g., Michael W. McCann, *How Does Law Matter for Social Movements?*, in HOW DOES LAW MATTER? (Bryant G. Garth & Austin Sarat eds., 1998) 76, 77–78 (agreeing with Sidney Tarrow's definition of a social movement as mostly involving an "attempt to mobilize [a constituency] in direct action in relation to a target of influence in the political system" (quoting SIDNEY TARROW, *STRUGGLING TO REFORM: SOCIAL MOVEMENTS AND POLICY CHANGE DURING CYCLES OF PROTEST* 7 (1983))).

201. Brown-Nagin, *supra* note 195, at 1503–04.

202. *Id.* at 1505.

may fail to realize “the impact of their expertise on their imagination.”²⁰³ But it is surely true that non-lawyer leadership is no guarantee of either enhanced accountability or more ambitious reach in goal-setting. The much more problematic barrier is the tension between this approach and the kind of highly professionalized and expensive techniques that were evident in the same-sex marriage campaign and that other movements may seek to replicate.

2. Assessing Law-Oriented Cause Efforts

Regardless of category or nomenclature, I offer the following set of queries as a metric for assessing strengths and weaknesses in outcomes for a law-oriented cause effort:

1. Did the movement or campaign achieve the material or tangible changes in law that were its primary goal and then follow up with steps to implement and embed those changes to protect them from countermovement responses?
2. In the internal dynamics of the movement or campaign, were there mechanisms for accountability and deliberation to create broad and diverse support within the relevant constituency or political group for its goals and strategies?
3. Did the work of the movement or campaign enhance the power and voice of those within its constituency?
4. Did the strategies of the movement or campaign include mechanisms to maintain mobilization and momentum for future efforts, including responses to possible backlash?
5. Did the overall effect of the work of the movement or campaign change the surrounding social culture as well as the law?²⁰⁴

Of these five metrics, all except the third point would be consistent with efforts on both the political left and right.

For several of these queries, it is too soon to fully evaluate the marriage equality campaign. In the immediate aftermath of *Obergefell*, resistance to same-sex marriage has been limited to individual service providers or government officials who object to same-sex marriage and proposals from conservative advocacy groups for religious exemptions that would permit them to refuse to

203. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2801 (2014).

204. See Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 986–87 (1997).

provide such services.²⁰⁵ The question of whether *Obergefell* survives in robust or only formalistic terms will probably turn on whether conservative religious groups can successfully draw on a sufficient institutional base for resistance, in a way comparable to how the public school administrative structure created the infrastructure that supported the efforts of Southern school officials to undercut desegregation plans. Similarly, it is too early to assess the maintenance of momentum at this time. The next two Parts of this Article address the dynamics and impact of the discursive strategies that grew out of the marriage equality campaign, which relate to the third issue of internal movement stratification and the fifth culture-shifting question. I return to address those dimensions of movement advocacy in Part V.

It is not too soon, however, to consider the standard criticism of litigation-oriented groups and strategies: They crowd out other approaches, thereby weakening the more radical potentials of those movements and strengthening a juricentric concept of rights. The analysis of the marriage equality campaign strategy in this Article both validates and contradicts this conclusion. The marriage equality effort was led by lawyers, heavily advised by experts in different fields, with results that were both predictable (de-radicalizing the politics of family and cementing the leadership role of lawyers) and surprising (de-centering of litigation in movement strategy and relying on a non-law frame for public argument). Advocacy went forward in multiple arenas, but the model used by marriage equality advocates to reconfigure the effort was a national political campaign with a litigation arm. Litigation over federal constitutional claims—the old test case model from the 1960s and 1970s—took center stage only as an end-game strategy.

3. Looking to the Future

What the future holds for the structure of legal and political initiatives is unclear. The most difficult challenges for a social movement involve policy changes that would benefit persons perceived as most different from the white middle-class norm and that would entail redistribution of resources from those with more to those with less. The marriage equality campaign succeeded in surmounting the first of these barriers by renorming the LGB²⁰⁶ constituency to

205. See, e.g., *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert granted sub. nom* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. June 26, 2017); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *Gifford v. McCarthy*, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), *appeal docketed* No. 17-108 (U.S. July 21, 2017).

206. I omit the "T" from the standard abbreviation because the normative adjustment with regard to marriage focused specifically on same-sex couples, regardless of gender identity.

fit a conventional model of couples, and it did not confront redistribution questions.

In its structure, the marriage equality campaign may come to be seen as an early example of a particular type of social change effort: a methodologically versatile, professionally managed, expertise-rich, and well-funded public policy campaign with limited, measureable goals for change. One can imagine such efforts growing out of civil rights/equality movements on behalf of other constituencies, from web-based efforts built around virtual as well as in-person protests; from candidate campaigns driven more by a shared agenda organized around a particular cluster of issues than the identity of the candidate; or from coordinated efforts to enact, repeal or amend major legislation. The success of the marriage equality campaign has already drawn considerable interest from other movements.²⁰⁷

As with the marriage campaign, the structures to which such efforts will be held accountable likely will not take the form of mass organizations with active memberships, but instead will consist of those with the resources to invest in the particular project. This continues a trend in which civil society organizations increasingly depend on professional staff with the diminishment of meaningful member involvement.²⁰⁸ Resource providers will include individual donors, charitable foundations, and other political actors of all ideological stripes—a sector of the public interest law world that likely will continue to accrue greater power and influence.²⁰⁹ Management of donors may become a standard part of a cause lawyer's job description. Perhaps the most consequential question is whether aggregated funding decisions can be marshaled to support significantly redistributive policy changes.

Public interest lawyering has long required a mix of organizing, resources, constituency mobilization, and public education, as well as litigation and lobbying strategies. The marriage equality example demonstrates that the level of sophistication in all these realms has increased exponentially. Election campaigns now live or die by their expertise in microtargeting messages and audiences.²¹⁰ Large-scale litigation efforts are beginning to face the challenge of having to do the same.

207. See, e.g., *Keynote Discussion, supra* note 194 (transcribing a speech before a symposium on the right to housing that suggested the audience could “draw lessons” from the marriage equality effort).

208. Theda Skocpol, *Associations Without Members*, *AM. PROSPECT*, July–Aug. 1999, at 66, 66.

209. See DAVID CALLAHAN, *THE GIVERS: WEALTH, POWER AND PHILANTHROPY IN A NEW GILDED AGE 7* (2017) (“Not only do philanthropists indeed have more power than ever before . . . but that influence is likely to grow far greater in coming decades.”).

210. SASHA ISSENBERG, *THE VICTORY LAB: THE SECRET SCIENCE OF WINNING CAMPAIGNS 12–13* (2012) (“The campaign world’s most sophisticated new thinking about who votes and why . . . has naturally turned to the individual as the fundamental unit of our politics.”).

III. SOCIAL MEANINGS: THE BATTLE FOR DISCURSIVE SPACE

Constitutional meaning is conventionally thought to be created through a melding of its doctrinal foundations, continuous interpretation, popular understandings, and judicial enforcement. Most scholarly literature remains vague on *how* exactly new constitutional meanings are constructed. Opinion polls may show a shift from position A to position B on a given issue, and social movements can generate new understandings of empirical facts as attitudes change about a constituency.²¹¹ But what is essential to juridical interpretation is change in the elements of a constitutional compound—elements such as the components of a definition of equality and liberty, the kinds of harm that are cognizable, and which public concerns constitute a legitimate goal in regulating a particular institution.

There has been relatively little work identifying how bottom-up processes have constructed constitutional meaning.²¹² For popular constitutionalists, key questions remain unanswered: “What will the people themselves talk about, and how will they talk about it, when they serve as the ultimate interpreters of the Constitution?”²¹³ Other questions persist as well, questions about the quality of decisionmaking, the influence of social movements and the role of constitutional discourse in debates outside formal judicial arenas.

The process that emerged from ballot question elections related to LGBT rights provides a granular account of meaning construction. Elections became a laboratory for testing legal arguments, and, to a limited but noticeable extent, litigation strategy took on attributes of a political campaign.

A. Cultures of Institutional Discourse

Institutions of governance provide venues for the deliberation and resolution of conflicting norms and policies and the emergence of new constitutional meanings. This Article primarily concerns two such institutions: decisions by voters and decisions by courts. These provide a stark contrast to each other in

211. Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1988–94 (2006); *id.* at 1992 (“A recent report . . . which concluded that marriage by same-sex couples serves . . . children’s best interests would not likely have been produced absent societal changes sparked by the social movement for marriage equality.” (footnote omitted)).

212. An exception is Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

213. James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377, 1398 (2005).

how rules, norms, and social meanings are constructed.²¹⁴ In the context of same-sex marriage, the dynamic and ultimately congruent process by which these two sharply different contexts produced new meanings was unique.

Voters and judges speak in distinctly different voices. Voters take no oath to preserve, protect, and defend the Constitution, nor can they be expected to. In elections, politics and perceptions of self-interest legitimately take precedence over constitutional principle. Factual assertions are largely unpoliced and no formal process exists for deliberation. Each side seeks to mobilize its base and persuade the undecided, using increasingly sophisticated market-tested methods. The arguments used by each side are widely broadcast, but the decisions by individual voters are guaranteed the anonymity of the voting booth. Outcomes are all or nothing. Opinion surveys, deduction, and statistical analysis are the methods used for understanding the results, to the extent that explanations can be discerned. Voting based on bias and misinformation is frequent. It is, to paraphrase Churchill, the worst process for governance except for all the others.²¹⁵

Judges, on the other hand, are not only accorded the freedom to reach counter-majoritarian results, but are charged with doing so when necessary to correct for distortions of the democratic process, including those that render minorities unable to participate effectively, or in the face of blatantly arbitrary action. Judges must provide reasoned and public explanations for their actions. They operate within professional constraints of precedent and analogy, and employ a highly structured process for the determination of facts. Argumentation occurs in public, but often is not widely disseminated. Judges may, and frequently do, press the parties for compromise and settlement.

The marriage equality campaign—with its iterative and continuous interactions between politics and law, the electoral and judicial venues—illustrates points of convergence and difference between the two realms. In both locations, adversaries sought to meld and change the competing social and constitutional meanings of marriage and equality. This effort engaged both pro-equality and anti-gay advocates in the process of synthesizing master frames related to those two concepts with a variety of localized epistemological systems specific to other realms, such as religion, race, and ethnicity.

214. The legislative process falls somewhere between the two: more mediated than direct democracy, but less mediated than judicial decisionmaking. *See generally*, Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1555–58 (1990); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 *COLUM.L. REV.* 1454, 1494–1508 (2000).

215. Winston Churchill, Speech before the House of Commons (Nov. 11, 1947), in 7 *WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963*, at 7566 (Robert Rhodes James ed., 1974) (“[D]emocracy is the worst form of Government except all those other forms that have been tried from time to time.”).

The most powerful component that election campaigns and judicial texts share (and what legislative processes usually lack) is narrative. In the marriage equality campaign, advocates reached voters in the movable middle by using elements of narrative, embodying issues in characters, constructing a story arc, and depicting the resolution of the conflict. By its own description, “Freedom to Marry became a story-telling machine.”²¹⁶ Later, working within the constraints of legal argumentation and doctrine, advocates brought a number of the lessons learned from election campaigns into their litigation strategy. The frames constructed for elections became the frames that dominated the theater of litigation.

B. Evolution on the Right

Both LGBT rights advocacy groups and anti-gay conservative organizations have shifted their rhetorical strategies in response to changes by their adversaries,²¹⁷ in law, in electoral efficacy, and in the interaction of the legal and political arenas.

In the electoral arena, early anti-gay arguments emphasized moral deviance. Anti-equality groups, relying on what Murray Edelman called “condensation symbols,”²¹⁸ used messages designed to evoke disorder, decay, disease, and moral chaos, and, specifically with regard to children, recruitment and corruption.²¹⁹ Conservatives relied on “regimes of clarity” in which certain text would trigger reactive emotions that could drive voter decisions.²²⁰

Two ballot question campaigns in 1992 produced the first major division among conservatives in their framing strategies. In Oregon, they emphasized the traditional morality and disgust arguments. In Colorado, advocates of Amendment 2 developed an argument based on rights in order to appeal to more moderate voters. This decision led to the first articulation of the “equal rights,” “no special rights” theme.²²¹ The conservatives’ failure in Oregon and success in Colorado strengthened the nationwide appeal of the latter strategy.²²²

216. *Messaging, Messengers and Public Support*, *supra* note 136.

217. See FETNER, *supra* note 47, at 34–35.

218. MURRAY EDELMAN, *THE SYMBOLIC USE OF POLITICS* 6, 8 (1964) (“Condensation symbols evoke the emotions associated with the situation. . . . [They are] emotion in impact, calling for conformity to promote social harmony, serving as the focus of psychological tensions.”).

219. See Ralph R. Smith, *Secular Anti-Gay Advocacy in the Springfield, Missouri, Bias Crime Ordinance Debate*, in *ANTI-GAY RIGHTS*, *supra* note 53, at 95, 99–102.

220. Katie Oliviero, *Yes on Proposition 8: The Conservative Opposition to Same-Sex Marriage*, in *THE MARRYING KIND?*, *supra* note 54, at 167, 180–83.

221. See FETNER, *supra* note 47, at 84; DIDI HERMAN, *THE ANTI-GAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 112–14 (2007); STONE, *supra* note 23, at 22.

222. HERMAN, *supra* at 146; STONE, *supra* note 23, at 24–25.

Campaign materials in Colorado explicitly used case law indicators for suspect class status to distinguish sexual orientation from other bases for classifications which are targeted by civil rights laws. The main pamphlet implied that special rights for some communities were acceptable because of the economic consequences of discrimination that they suffered and characteristics over which they had no control. In addition, conservatives argued that racial status was not defined by conduct, and was associated with political powerlessness, all in contrast to homosexual orientation.²²³ Although equality advocates never won a popular ballot campaign with a rights-based argument, this version of a rights argument worked for conservatives. “Equal rights—No special rights!” was credited with the success of an anti-gay measure in a moderate state such as Colorado,²²⁴ and it was successfully used again in later locations²²⁵ as recently as the debates that led up to a 2015 referendum.²²⁶

For the conservatives, it was the judiciary that rejected their version of a rights claim. The Supreme Court—having ducked the question of suspect classification for sexual orientation—nonetheless explicitly rejected the claim that antidiscrimination laws created preferences that benefitted the groups enumerated in the law for protection.²²⁷ In the universe of civil rights laws referenced in *Romer v. Evans*,²²⁸ the listing of protected characteristics is nominalist rather than normative; the enumeration functions to concretize and mark boundaries.²²⁹ The dissenting justices, however, did adopt the special rights argument,²³⁰ treating it as a given that antidiscrimination laws constitute “special treatment” and “preferential treatment.”²³¹

Forthright reliance on morality as a legitimate basis for state prohibition of homosexuality as a legal argument ended with the Supreme Court’s ruling in *Lawrence v. Texas*,²³² holding that enforcement of a moral code could not, by itself,

223. ESKRIDGE & HUNTER, *supra* note 124, at 108, 1098–99; EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION 93–114 (1999).

224. See GERSTMANN, *supra* note 223, at 102–03; Sharon E. Debbage Alexander, *Romer v. Evans and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination in America*, 6 TEX. F. C.L. & C. R. 261, 277, 279 (2002).

225. See, e.g., Equality Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261, 267–68 n.4 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996).

226. See *Williams v. Parker*, 843 F.3d 617, 619 n.3 (5th Cir. 2016).

227. *Romer v. Evans*, 517 U.S. 620, 626–27 (1996).

228. 517 U.S. 620.

229. *Id.* at 628.

230. *Id.* at 637–40 (Scalia, J., dissenting).

231. *Id.* at 638.

232. 539 U.S. 558 (2003).

justify criminalization of sexual practices between two persons of the same sex.²³³ Nonetheless, allusions to religious claims and mobilization of conservative Christian supporters have continued.²³⁴ Indeed, today's religious liberty arguments for exemptions from antidiscrimination laws allow conservatives to return to that original core argument and identity.

From the anti-equality point of view, the genius of the “no special rights” slogan is its plasticity with regard to race politics and its usefulness in appealing to white backlash. Framing LGBT antidiscrimination protections as special rights drew on the broader backlash against civil rights laws, especially affirmative action remedies.²³⁵ As Robert Chang and Jerome Culp have written: “Special rights’ is always a code word for the racialization of equal protection.”²³⁶ In both the sexual orientation and race contexts, specialness connotes the assertion of entitlement to advantageous treatment and remedies particular to the privileged group. Beyond the tangible unearned benefits of special rights lies the implication of an exemption from the cultural and moral norms to which everyone else must conform.²³⁷

A study by social scientists of the vitality of the “no special rights” trope in 2011 illustrates its continuing power. The survey, conducted by the University of Washington, polled in-state voters, using one of three prompts before querying whether respondents supported an antidiscrimination law that included sexual orientation.²³⁸ One prompt reiterated the importance of equality in U.S. history; the second stated that equality is already guaranteed and asserted that minority groups are seeking special rights; and the third asked only for agreement or disagreement with a statement about support for civil rights inclusion of sexual orientation.²³⁹ The study found that the equal rights frame failed to increase

233. *Id.* at 571.

234. See, e.g., Mary Ziegler, *The Terms of the Debate: Litigation, Argumentative Strategies, and Coalitions in the Same-Sex Marriage Struggle*, 39 FLA. ST. U. L. REV. 467, 499–503 (2012); cf. DUGAN, *supra* note 63, at 49–56 (describing the Christian Right's movements against LGBT civil rights in Cincinnati in the 1990s).

235. ANDERSEN, *supra* note 8, at 158–59, 172–23; GERSTMANN, *supra* note 223, at 102–03; cf. Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 303–07 (1994).

236. Robert S. Chang & Jerome McCristal Culp Jr., *Nothing and Everything: Race, Romer, and (Gay/Lesbian/Bisexual) Rights*, 6 WM. & MARY BILL RTS. J. 229, 239 (1997).

237. Jonathan Goldberg-Hiller & Neal Milner, *Rights as Excess: Understanding the Politics of Special Rights*, 28 L. & SOC. INQUIRY 1075, 1077–79 (2003).

238. See generally Erin M. Adam & Betsy L. Cooper, *Equal Rights vs. Special Rights: Rights Discourses, Framing, and Lesbian and Gay Antidiscrimination Policy in Washington State*, 42 L. & SOC. INQUIRY 830 (2017).

239. *Id.* at 840.

support for the extension of antidiscrimination law, but that the special rights did decrease that support.²⁴⁰

The most surprising finding was that respondents who opposed legal recognition for same-sex couples²⁴¹ were more likely to oppose antidiscrimination protection after hearing an equal rights prompt than after hearing a special rights prompt.²⁴² The authors suggest that the impact on conservatives of hearing an equal rights argument, associated with liberalism, is the opposite of persuasion; it is more likely to incite enhanced opposition.²⁴³

The conservative version of a rights argument—the “equal rights” but “no special rights” theme—mirrored and reversed the terms of the rights claims relied on by LGBT equality advocates. The “no special rights” approach that resulted has failed so far in court, but is still used at the level of popular discourse, as is its sibling concept, the unfairness of affirmative action. Whether this concept will play a future role in constitutional law is also too soon to know.

C. Reframing Same-Sex Marriage

As we have seen, after the main focus of ballot questions turned to marriage, equality advocates shifted emphasis away from the rights arguments that had cemented support among non-gay liberals in an effort to appeal to voters generally. They relied on research that focused on the underlying, unspoken fears of the movable middle. To combat these fears, they constructed ads using a narrative structure that responded to emotions as much as ideas, using elements of narrativity—the creation of characters, the construction of a storytelling arc and the depiction of conflict being resolved.

The single most important communication change was the adoption of the “journey story,” which became known as “J stories.”²⁴⁴ J story ads featured family members and other non-gay messengers telling the story of how they changed their minds about same-sex marriage. The focus was less on the arguments and more on the process of changing one’s mind. The speakers identified themselves with demographic groups not usually associated with predictably liberal positions: clergy members, Republicans, grandparents, elder veterans. J story ads became marriage equality’s not so secret weapon.

240. *Id.* at 846.

241. The survey included an earlier question about legal recognition of same-sex couples in order to establish a marker for general ambivalence about LGBT rights. *Id.* at 841–42.

242. *Id.* at 846.

243. *Id.* at 849–50.

244. *Messaging, Messengers and Public Support*, *supra* note 136 FREEDOM TO MARRY.

In addition to an alternative narrative, the J story ads provided morality tales that countered the other side's prescriptive discourse. Opponents' morality arguments had been based on a simple, but traditional, and credible story: My religion taught me that homosexuality was wrong and that being a good person requires that I condemn it.²⁴⁵ J story ads introduced a story of epiphany, similar to the lyrics to "Amazing Grace": I was taught that homosexuality was wrong, but now I see that my gay friends and family need and deserve the same chance at a happy life that I have.²⁴⁶

J story ads did not engage morality debates head on. The speaker did not argue that homosexuality was good, but communicated how the *viewer* could be a good person without changing her opinions completely. J story ads were geared less to persuading people to endorse same-sex marriage than persuading them that the time had come to allow it. The goal was to develop paths that let movable middle voters use their own values, whatever those were, to manage their conflicted feelings and reject campaigns to block marriage equality.

In the most important J story of all, President Obama's, the focus was on how his conversations with others, especially his wife and daughters, had led to his change of heart. In a May 2012 interview, journalist Robin Roberts asked, "Mr. President, are you still opposed to same-sex marriage?" His response, suggested if not literally scripted by advocates,²⁴⁷ began: "[O]ver the course of several years, as I talk to friends and family and neighbors. When I think about members of my own staff who are incredibly committed, in monogamous relationships, same-sex relationships, who are raising kids together."²⁴⁸

During the course of the exchange, President Obama mentioned talking with his wife Michelle, daughters Malia and Sasha, and friends and neighbors seven times; religious beliefs five times; same-sex couples "raising kids together" four times; and monogamous same-sex relationships and problems with hospital visitation rights three times each. He did not mention access to material benefits such as Social Security spousal survival payments even once, nor did he use the language or concept of equality.

245. Religion was consistently cited as the basis for opposition to same-sex marriage. See generally *Religious Beliefs Underpin Opposition to Homosexuality*, PEW RES. CTR. (Nov. 18, 2003), <http://www.pewforum.org/2003/11/18/religious-beliefs-underpin-opposition-to-homosexuality> [<https://perma.cc/FBQ5-253Z>].

246. A number of the videos archived on the Freedom to Marry web page are examples of J stories. See *TV Ads and Online Videos*, FREEDOM MARRY, <http://www.freedomtomarry.org/video> [<https://perma.cc/PT4L-37CT>].

247. FRANK, *supra* note 84, at 269–73.

248. *Transcript: Robin Roberts ABC News Interview With President Obama*, ABC NEWS (May 9, 2012), <http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043> [<https://perma.cc/6PJ4-7PR3>].

The J story approach provided marriage equality advocates with their first credible version of a morality argument, one built (knowingly or not) on what Walter Fisher called the “narrative paradigm.”²⁴⁹ Fisher recognized that individuals were often more persuaded by stories than by formal logic.²⁵⁰ He posited two characteristics of narrative-based decisionmaking: narrative probability, the degree to which a story is internally coherent, and narrative fidelity, the degree to which a story fits with other stories known to the audience.²⁵¹ “The operative principle of rationality is *identification* rather than deliberation.”²⁵² Fisher’s paradigm encompasses what today we might call the crowd sourcing of cultural cues and referents, a process that engages and thereby tends to lock in the audience in the acts of creation and interpretation of public moral arguments.²⁵³

The J stories also provided closure, a central component of narrative: Each was “an account about how and why the events occurred as they did. . . . The demand for closure ‘is a demand for moral meaning.’”²⁵⁴ In these ads, the journey process itself constituted the moral principle or point of the story, an appropriation and realignment of norms that proved to be more effective than a head-on argument about which understanding of the substantive content of “morality” was superior.

By the time the question of marriage equality reached the Supreme Court, both sides had developed versions of morality and rights arguments.

IV. (SAME-SEX) MARRIAGE AND (JURISGENERATIVE) PROCREATION

In the world of electoral politics, the choices for framing and language are open. In the world of litigation, however, the discursive field is constrained by doctrine. For anti-equality advocates, the need to fit their normative arguments into doctrine shrank their discursive options because they could not invoke traditional or majoritarian morality as the constitutional basis for a defense of an exclusion. They were left with rights arguments that either made no sense (harms to heterosexual spouses) or were, at best, not ripe (fears about future infringements on the rights of religious conservatives). The LGBT rights advocates, on the other hand, having translated their rights arguments into emotive

249. WALTER R. FISHER, HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE, AND ACTION 47, 57–59, 62–64 (1987).

250. *Cf. id.* at 48.

251. *Id.* at 64.

252. *Id.* at 66.

253. *Id.* at 68–69.

254. Patricia Ewick & Susan Silbey, *Narrating Social Structure: Stories of Resistance to Legal Authority*, 108 AM. J. SOC. 1328, 1341 (2003).

language, then translated them back into law, thus expanding their rhetorical repertoire. This Part traces how arguments developed for electoral campaigns made their way into litigation.

Lawyers serve as a type of translator: fitting the needs of their clients into legally legible concepts and advocating for changes in, or enforcement of, the law in ways that will benefit those clients. When the facts indicate, an eviction can become a breach of contract; a lost job can become a claim of discrimination. But there is a catch. The power associated with the discourse of law (and the credibility that flows from the social advantages of having lawyers as spokespersons) may mean that what begins as a radical challenge to hierarchy—for example, tenants should have the right to bargain collectively with landlords over rent and conditions—not only becomes translated into a legal claim, but also reduced to one.

For marriage equality, translation of popular discourse into legal discourse did not have a conventional reductive effect. The greatest contribution to shaping a new social meaning of marriage came not from a formal framework of law, but from the popular version of constitutional discourse that had been extensively analyzed, molded and deployed as a result of the focus on elections in the Winning Marriage strategy. These frames made their way into briefs²⁵⁵ and oral arguments at multiple levels, including the Supreme Court.²⁵⁶

There were three critical junctures between the reframed discourse of marriage as developed by the Freedom to Marry coalition and constitutional doctrine. At each point, the frame of arguments designed for popular elections migrated back into the language of judge-made law. What may have seemed on the surface like a conventional, if superbly executed, litigation strategy also imported the products of direct democracy.

A. Equal Protection: Treating Like Alike

No principle is more central to equal protection law than the command that like must be treated alike. If a group has traditionally been treated so adversely by the legal system that its functioning in normal majoritarian politics has been

255. In *Bourke v. Beshear*, 135 S. Ct. 1729 (2015), the companion case to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the ACLU's brief for the parties stated in the first paragraph of its Introduction: "[Petitioners] come together here to make no extreme demands. Instead, they ask merely to be treated like everyone else . . ." Brief for Petitioners at 2, *Bourke*, 135 S. Ct. 1729 (No. 14-574), 2015 WL 860741, at* 2.

256. Oral argument in *Obergefell v. Hodges* began as follows: "The intimate and committed relationships of same-sex couples, just like those of heterosexual couples, provide mutual support and are the foundation of family life in our society." Transcript of Oral Argument at 4, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), 2015 WL 1929996, at *4.

impaired, the Supreme Court has recognized that judicial protection is appropriate. Alternatively, if a group has not been pervasively disadvantaged, the Court asks only whether the classification in question bears a rational relationship to a legitimate state interest.

Whether heightened scrutiny should be applied to classifications based on sexual orientation has long been a point of dispute. In ballot-question elections, both sides used descriptions of the criteria for suspect class status as arguments that LGBT persons should or should not be included in the equality precepts of civil rights governance or in the structure of the institution of marriage. The Supreme Court consistently, if implicitly, has declined to utilize the more protective constitutional standard to test sexual orientation classifications.²⁵⁷ In both electoral arenas and in the federal judiciary, therefore, lesbians and gay men had been deemed insufficiently analogous to racial and religious minorities and women to justify heightened scrutiny.

Nevertheless, LGBT rights lawyers won an equal protection decision in *Romer v. Evans*²⁵⁸ and an equality-inflected Due Process Clause decision in *Lawrence v. Texas*,²⁵⁹ prior to the Supreme Court decisions in the marriage cases. LGBT rights lawyers had become accustomed to deploying the rational basis argument successfully, despite its weakness, by highlighting the improper nature of the state's interest.²⁶⁰ Lower courts were left to wonder which of the established tests applied to sexual orientation classifications.²⁶¹

The discursive strategy of reducing otherness, which was developed for elections, provided a third option, neither heightened scrutiny nor the upgraded rational basis test: sameness. Advocates stressed that same-sex couples were, in their essence, not only like different-sex couples but were essentially the same. On this understanding, the same-sex couples' entitlement to a remedy, and indeed their social legitimacy, derived not so much from being an historically downtrodden minority nor from the mean-spirited motivations behind the exclusionary laws, but from their sameness to the heterosexual, heteronormative majority.

257. See, e.g., *Obergefell*, 135 S. Ct. at 2603–04; *United States v. Windsor*, 133 S. Ct. 2675 (2013).

258. 517 U.S. 620 (1996).

259. 539 U.S. 558 (2003).

260. See Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 889 (2012) (“Proving that a law is based on unconstitutional animus is virtually the only way an equal protection plaintiff can prevail under [the] deferential and increasingly common standard [of rational basis review].”).

261. See, e.g., *Smithkline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 480–84 (9th Cir. 2014).

This is not to say that advocates for marriage equality failed to assert a conventional claim for heightened scrutiny of the gay exclusion from marriage. But as is evident from Justice Kennedy's opinion for the Court, sameness won the day. Recognition of LGBT persons as a social minority and assertions about malevolent state interests are absent.²⁶² Among the discursive strands that advocates put before the Court as options for grounding the opinion, Justice Kennedy did not use the minority analogy, and conflated commonality with sameness.

The conflation is a matter of degree rather than kind, but it is nonetheless telling. I recognize that the concepts of commonality and sameness exist on a continuum rather than as anchors for a dichotomy. In analyzing other classifications under the Equal Protection Clause, courts often stress commonality: attributes that the majority and minority share. At the same time, however, in race and sex discrimination cases, the Supreme Court has recognized differences at the core of its analysis, including in the criteria for suspectness.²⁶³ A mixed discourse of difference, commonality, and equivalence permeates equal protection jurisprudence. For example, the only acceptable rationale for affirmative action policies is their function in sustaining diversity,²⁶⁴ and the Court has noted that some inherent differences between the sexes can be "grounds for celebration."²⁶⁵ A comparable acknowledgement of difference is absent from the opinions in *United States v. Windsor*²⁶⁶ and *Obergefell v. Hodges*.²⁶⁷

Whether done consciously or not, the threading of a sameness trope throughout the litigation allowed marriage equality advocates to escape from the trap of needing suspect class analysis. In the past, advocates had stressed the argument that lesbians and gay men were discriminated against because of difference from the majority and similarity to other minorities, and therefore should

262. See, e.g., *Obergefell*, 135 S. Ct. at 2594 ("[I]t is the enduring importance of marriage that underlies the petitioners' contentions. This . . . is their whole point."); *id.* at 2599 ("This is true for all persons, whatever their sexual orientation."); *id.* at 2600 ("The right to marry thus dignifies couples who 'wish to define themselves by their commitment to each other.'" (quoting *Windsor*, 133 S. Ct. at 2689)); *id.* at 2601 ("There is no difference between same- and opposite-sex couples with respect to this principle . . ."); *id.* at 2602 ("Same-sex couples, too, may aspire to the transcendent purposes of marriage . . .").

263. See, e.g., *Frontiero v. Richardson*, 411 U.S. 667, 684 (1973) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." (footnote omitted)); *Brown v. Bd. of Educ.*, 347 U.S. 483, 489–90 (1954) (cataloguing the differences in the quality of schools that white children experienced compared to Black children before ultimately finding an equal protection violation).

264. See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208 (2016).

265. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

266. 133 S. Ct. 2675.

267. 135 S. Ct. 2584.

receive heightened scrutiny. Now, in response to the success of their argument frames developed for elections and to the lack of precedent for heightened scrutiny, they argued that this group should be treated the same because they are the same. This approach also left their opponents in a bind. Had the Court given more credence to conservatives' arguments against sameness, equality advocates could have flipped the not-same arguments to become the basis for recognition as a minority and heightened scrutiny review, but the Court did not take that path.

In this way, LGBT advocates successfully deployed both assimilationist and minoritizing discourses. Perhaps a deeper, more authentic level of social acceptance—based on variation in sex and gender culture as well as sameness—would have been gained through a minoritizing discourse, but it was lost in the “no difference” arguments that grew out of electoral strategies. In opting for this new approach in its opinion, the Court generated a legitimacy, as well as an understanding of equality, heavily grounded in sameness.

B. Commitment and Children

What gave the treating-same-the-same approach to equal protection its strongest punch were two non-legal tropes derived from communications research that made their way into the briefs of the marriage equality advocates: the prioritization of love and commitment over material benefits as the reason for desiring to marry, and the appropriation of children's welfare to justify the expansion of marriage.

Frankly emotive language started to become more prominent in briefs after the initial Belden Russonello survey research findings that urged its use in ballot question campaigns. In a Lambda brief filed in 2006, for example, the opening pages resonate with aspirational universalizing language:

Marriage remains a dream for many Americans, including for plaintiffs, a vision of what can be for two people and their family, with commitment, love and patience. . . . Plaintiffs want to marry their unique partners, to have and to hold them, under the shelter of New Jersey's marriage laws, until death do they part. Everyone knows what that means.²⁶⁸

In California a year later, the merits brief filed by the National Center for Lesbian Rights, joined by several other LGBT rights organizations, cited record

268. Reply Brief of Plaintiffs-Appellants at 3, 4–5, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. 58,389), 2006 WL 6850898, at *3, *4–5.

evidence, developed during earlier stages of the lawsuit, in support of the following facts:

Each couple wishes to marry in order to express their profound love and commitment to one another. Those who are parents also seek an end to the state's harmful messages to their children that there is something unworthy about their parents, and something illegitimate about their family. In addition, as lesbian and gay couples, they hope to reduce their legal and social vulnerability.²⁶⁹

In its consideration of whether the California statute barring same-sex marriage violated the state constitution, the state supreme court asked the parties to brief several supplemental questions related to whether state law was compelled to recognize marriage in any form. In responding to a question about whether any constitutionally guaranteed substantive attributes were intrinsic to marriage, plaintiffs' counsel affirmed that their clients wished to secure access to the legal rights and obligations of marriage:

Much more fundamentally, however, they wish to marry for the same reason that most people do: because they deeply love their partners and wish to express their love and commitment, and to publicly join their lives together, in the way that marriage—and only marriage—makes possible. They also wish to participate in the shared life of the community [in an institution that] they and others view not only as a fundamental human right, but as a fundamental dimension of human experience and belonging.²⁷⁰

When the question of the constitutionality of the exclusion reached the U.S. Supreme Court, the briefs filed on behalf of same-sex couples repeatedly wove the lessons learned from popular constitutional discourse into more traditional legal arguments. The summary of argument invoked the concerns of same-sex couples “who seek to make a binding commitment in the unique institution of marriage.”²⁷¹

269. Respondents' Opening Brief on the Merits at 12, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (citations omitted), http://www.courts.ca.gov/documents/05Rymer_Opening_Brief_on_the_Merits.pdf [https://perma.cc/DZQ3-WV6H].

270. Respondents' Supplemental Brief at 18, *Marriage Cases*, 183 P.3d 384 (No. S147999), 2007 WL 2733221, at *18. Later in the same brief, counsel described “[t]he cases that establish a right to marry [as] not premised on particular tangible benefits, but upon the majestic status of the marital relationship itself. . . . The command of the constitution is for the state to affirm and support the human capacity for love and commitment, not merely to distribute legal rights.” *Id.* at 36.

271. Brief for Petitioners at 19, *DeBoer v. Snyder*, 135 S. Ct. 2584 (2015) (No. 14-571), 2015 WL 860740, at *19.

The first two paragraphs of the argument section in this brief combined both commitment and children:

Marriage is a commitment like no other in society. It announces to the world a union that society understands. It grounds couples. It is a vow, recognized by the State, to stay together when times are hard. It provides a social safety net of reciprocal responsibility for the less affluent of two spouses—security for homemakers and stay-at-home parents—in the event of death or divorce.

Marriage brings stability to families. It tells children that they have, and will always have, two parents. . . . Marriage brings dignity to adults and children alike.²⁷²

Although same-sex couples raising children would seem to count among the family formations in which two cannot be assumed to be the correct number of persons functioning as parents,²⁷³ marriage equality advocates successfully framed arguments related to children around an emphasis on sameness to the imagined norm rather than pluralism in childrearing structures. Among the plaintiffs in the cases consolidated in *Obergefell*, same-sex couples raising children were significantly over-represented in number and more likely to be white than in the LGBT population at large.²⁷⁴ Thus the sameness was with a particular form of family, which was implicitly framed as a superior environment for children compared to unmarried or single parent households.²⁷⁵

Whether the legalization of same-sex marriage will contribute to the greater social legitimacy of family formations other than the married biological parent model, despite the rhetorical construction of lesbian and gay parents in the litigation as mimicking predominantly white, middle-class heteronormative structures, is one of the many questions remaining open after *Obergefell*.²⁷⁶

272. *Id.* at 22.

273. Recognition of this in the legal literature dates back at least to Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

274. Nancy D. Polikoff, *Concord With Which Other Families?: Marriage Equality, Family Demographics, and Race*, 164 U. PA. L. REV. ONLINE 99, 99, 107–08 (2016) (“Although only 16–18% of same-sex couples are raising children, about 69% of the plaintiff couples in the combined cases that made up *Obergefell* were parents. . . . Five of the 22 individuals in the 11 plaintiff-parent couples (23%) were people of color, yet 34% of individuals in same-sex couples raising children are people of color.” (footnotes omitted)).

275. See Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER & SOC. POL’Y & L. 387 (2012) (exploring “the marriage equality movement’s use of illegitimacy as a means of bolstering claims for same-sex marriage” and arguing that this “further marginali[z]ed less normative forms of kinship and belonging”).

276. Compare Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1256–57 (2016) (positing that by accepting the argument that having unmarried parents

C. A Unitary Fundamental Right: Joining, Not Changing

When the first challenges to the marriage exclusion based on sexual orientation were brought in the 1970s, courts responded in brief opinions declaring that persons of the same sex who sought to marry presented a claim that was self-evidently different from the situation of two heterosexuals wanting to marry.²⁷⁷ The courts relied on a naturalized understanding of marriage as inherently contingent on gender difference. The definitional tautology that same-sex marriage cannot be marriage haunted equality advocates up to and through the final stages of *Obergefell*, when it formed a major basis for Chief Justice Roberts' dissent.²⁷⁸

No recommendation from the communications research was more important to claims made either in litigation or popular discourse than the emphasis on the desire of same-sex couples to “join” marriage rather than alter it. For example, in the challenge to Proposition 8, plaintiffs' counsel told the Supreme Court that their clients agreed with opposing counsel “that marriage is a unique, venerable, and essential institution. They simply want to be part of it.”²⁷⁹ The primary brief in *Obergefell v. Hodges*, after arguing based on the experience of Massachusetts that “same-sex couples are strengthening marriage, not harming it,”²⁸⁰ concludes with these words:

[E]nding the exclusion of same-sex couples from the freedom to marry no more changes the nature of marriage than *Loving* did, and it no more changes the nature of marriage than women's suffrage changed

harms children, the Court has made it more difficult for all nonmarital families to secure recognition and rights), with Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1237 (2016) (arguing that in striking down the ban on marriage, courts implicitly validated the model of functional families put forth by other LGBT rights advocates seeking to achieve parental recognition outside of marriage).

277. *E.g.*, *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. 1974).

278. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612–15 (2015) (Roberts, C.J., dissenting) (“The universal definition of marriage as the union of a man and a woman is no historical coincidence.”).

279. Brief for Respondents at 3, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 648742, at *3. Other examples include the Tenth Circuit brief in the post-*Windsor* challenge to marriage exclusions filed in Utah, in which the summary of argument stated: “Plaintiffs do not seek a new right to same-sex marriage. . . . Plaintiffs seek the same freedom to marry enjoyed by all other Utah citizens.” Brief of Plaintiff-Appellees at 16, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (No. 13-4178), 2014 WL 897509, at *16.

280. Brief for Petitioners, *supra* note 271, at 43.

voting or the end of segregation at lunch counters changed eating in public.²⁸¹

The point arose in oral argument as well, in the following exchange between Mary Bonauto and Chief Justice Roberts:

Bonauto: [H]ere we have a whole class of people who are denied the equal right to be able to join in this very extensive government institution that provides protection for families.

CJR: Well, you say join in the institution. The argument on the other side is that they're seeking to redefine the institution. . . . [I]f you succeed, that core [historical] definition will no longer be operable.

Bonauto: I hope not, Your Honor, because of what we're really talking about here is a class of people who are, by State laws, excluded from being able to participate

CJR: No. My question is, you're not seeking to join the institution, you're seeking to change what the institution is. The fundamental core of the institution is the opposite-sex relationship²⁸²

The genuine question here is not whether tens of thousands of couples would decide to marry because they were driven by a sleeper cell mentality focused on attacking the beachhead of traditional marriage.²⁸³ What the join-versus-change theme occludes by its superficiality is whether or the extent to which same-sex marriage will deepen or accelerate the demographic changes in the institution that are already occurring.²⁸⁴ As Robin West describes the changes that have already occurred as transformative:

The content of [contemporary] marriage is discretionary. The . . . partners author it themselves—they produce the marriage. . . . The institution of marriage does not, any longer, produce “husbands” and “wives.” Rather, husbands and wives produce marriages, and of a wide variety of forms.²⁸⁵

The question of whether same-sex spouses will produce yet greater variety in the form of marriage is still on the table, and it is an important one for the political and social meanings, not the legal definition, of marriage.

281. *Id.* at 64.

282. Transcript of Oral Argument, *supra* note 256, at 5–6.

283. When surveyed, same-sex couples give a variety of reasons for wanting to marry. KATHLEEN E. HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW 14–15, 200–01 (2006).

284. See Nan D. Hunter, *The Future Impact of Same-Sex Marriage: More Questions Than Answers*, 100 GEO. L.J. 1855 (2012).

285. ROBIN WEST, MARRIAGE, SEXUALITY AND GENDER 19 (2007).

D. Summary

All of these discursive overlaps with constitutional doctrine carry more weight in a liberty analysis than an analysis focused on equality. All tend to put the institution, rather than the exclusion, at the center of the discussion. Thus it should be no surprise that the *Obergefell* opinion is primarily grounded in due process and liberty concepts, as were both *Windsor* and *Lawrence*, in contrast to the dominance of equality doctrine in *Loving*.²⁸⁶ The near absence of Equal Protection Clause reasoning suggests a degree of discomfort with invalidating discrimination against all persons in the excluded group.

V. CULTURAL INTEREST CONVERGENCE

Derrick Bell's insight that social and political gains for disadvantaged minorities are unlikely to occur unless the dominant majority perceives those gains to be in their self-interest has become one of the most powerful precepts in critical race theory.²⁸⁷ It has been applied to many social justice efforts other than race,²⁸⁸ including to the LGBT rights movement generally²⁸⁹ and the marriage equality campaign specifically.²⁹⁰ With regard to marriage equality, the dominant interests being served are not necessarily material or political in the traditional sense, as in the case of other movements. Marriage as a resource is not susceptible to the pressures of scarcity, nor are its benefits valuable only to a small number of privileged persons. Rather, the convergence is primarily cultural and discursive.²⁹¹

The processes for changing law and changing culture both involve the construction of meanings and of forging new conceptual paths for understanding

286. As Courtney Joslin reminds us: "The editors of the *Harvard Law Review* . . . wrote in 1980: 'the *Loving* opinion stopped short of a clear statement of a right to marry in *Loving*, for the reasoning depended largely on the racial character of the classification.'" Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 BOSTON U. L. REV. 425, 456 (2017) (quoting *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1249 (1980)).

287. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

288. Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 154-55 (2011).

289. E.g., Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 L. & INEQ. 117 (2012).

290. E.g., Neo Khuu, Comment, *Obergefell v. Hodges: Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights*, 64 UCLA L. REV. 184 (2017).

291. Business interests also came to support a pro-equality position as part of their diversity campaigns and outreach to labor markets and consumers. See Richard Socarides, *Corporate America's Evolution on L.G.B.T. Rights*, NEW YORKER (Apr. 27, 2015), <http://www.newyorker.com/business/currency/corporate-americas-evolution-on-l-g-b-t-rights> [https://perma.cc/WR2M-9NXC].

our society, our places in it, and the consequences of our normative commitments.²⁹² Interactions between law and culture prod us to generate new versions of “the stories we tell ourselves about who we are.”²⁹³

Analyzing interest convergence in the realm of culture raises questions that differ from those most relevant to struggles over more concrete interests. As a point of comparison, one powerful reason why the interests of some U.S. political elites reinforced and enabled successes of the civil rights movement was the need during the Cold War to refute criticism of American capitalism as racist, in competing with the Soviet Union to win allies in newly independent nations in Asia and Africa.²⁹⁴ Although recognition of LGBT rights may signal cultural cosmopolitanism, a valuable commodity in the increasingly globalized economy, it does not carry the same kind of national security implications as does racial equality.

Focusing on the cultural realm illuminates other dimensions of convergence that have been less frequently analyzed in prior scholarship, but are nonetheless important. Bell’s original critique, for example, called out civil rights lawyers for failing to understand how invested certain white elites were in ending segregation in the South. But Bell did not imply that the NAACP lawyers joined in arguing this point. The discursive strategies developed and deployed by the marriage equality campaign, on the other hand, raise issues of intentional strategy more than oversight.

The question of whose interests are in play also differs when cultural, rather than material, interests converge. Bell’s argument points to specific elite groups among both African Americans and whites who had much to gain in tangible ways from integration. The issue is more complex for marriage. Although there is no definitive measure of support among LGBT Americans for according top priority to marriage as the movement’s primary goal, there is no question that the support was widely shared.²⁹⁵ The universalist premise of access to marriage

292. Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 42 (2001).

293. Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CALIF. L. REV. 1465, 1484 (2006).

294. See Derrick A. Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 12 (1976). The amicus brief on behalf of the United States in *Brown v. Board of Education*, 347 U.S. 483 (1954), argued that “[r]acial discrimination furnishes grist for the Communist propaganda mills.” Brief for the United States as Amicus Curiae at 6, *Brown*, 347 U.S. 483 (No. 1), 1952 WL 82045, at *6, quoted in Bell, *supra*, at 12 n.30. Bell’s identification of this factor became the kernel of a book: MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

295. Kathleen E. Hull and Timothy A. Ortyl, *Same-Sex Marriage and Constituent Perceptions of the LGBT Rights Movement*, in *THE MARRYING KIND?*, *supra* note 54, at 67, 87 fig.2.3; see also PATRICK J. EGAN ET AL., *FINDINGS FROM THE HUNTER COLLEGE POLL OF LESBIANS*,

and the emotional power of its cultural associations led to demonstrations and demands for equality in marriage that outstripped support within the LGBT constituency for other issues of equal treatment. As blocking same-sex marriage grew more prominent among conservative causes, skeptics within the LGBT constituency recognized that it had become the leading litmus test for equal citizenship, whether they sought that or not.

For the mass of non-gay supporters of marriage equality, there simply was no material gain or loss at stake. Compare the marriage equality effort with the effort to prioritize more categories of family forms and to diminish the power of marriage as a monopolistic legal institution. Contemporary cause campaigns fall into two broad categories: those that seek to represent the interests of a constituency and those that seek to press for structural change—a representation model and an ideological model. Although the two are not mutually exclusive, identity group politics produces movements and campaigns that seek to win changes that advance the interests of a particular constituency, while the ideological group seeks change that moves the society toward greater adherence to a particular philosophy.

The reason that the broader family reform effort did not achieve dominance as a movement strategy or produce its own campaign may be that it lacked the necessary mobilization potential. The broader-than-marriage focus was less exciting within the LGBT constituency than a single issue drive to end the marriage exclusion, around which so much invective and emotion had clustered. At the same time, the goal of adding non-marriage options was insufficiently salient for sympathetic non-gay couples.²⁹⁶ Thus the goal of broader family law modernization and a de-emphasis of marriage did not have the support necessary to succeed under either a representation or ideological model (at least not yet).

What was at stake for the movable middle was the preservation of cultural norms and traditional practices, even as the institution of marriage was being democratized around them. In response, the Winning Marriage collaborators devised a strategy, based on cultural rather than logical principles of persuasion,

GAYS AND BISEXUALS: NEW DISCOVERIES ABOUT IDENTITY, POLITICAL ATTITUDES, AND CIVIC ENGAGEMENT (2008), <https://pdfs.semanticscholar.org/10af/dbc6036715c497938627dfb8d1642b60ef8f.pdf> [<https://perma.cc/P29R-TFF6>] (reporting that slightly more than 50 percent of LGB respondents rated securing marriage rights as an extremely important issue for LGB persons); PEW RESEARCH CTR., A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 64–74 (2013) (finding that 74 percent of LGBT respondents strongly favored legalization of same-sex marriage but were less likely than other Americans to want to marry).

296. Robin West argues that even for supportive heterosexual feminists, marriage as an institution that can be reinvented by each couple often just “works.” WEST, *supra* note 285, at 140.

that was designed to reassure moderate voters that these norms and practices were not being threatened. The opponents' argument was that different-sex couples would be less likely to marry if the exclusion of same-sex couples ended. Not only did this claim lack any form of support—cultural, logical or empirical—but it was implausible to the point of absurdity.²⁹⁷

In their reconstruction of difference and sameness arguments, marriage equality advocates were dancing on the thin line that separates a claim for equal respect from a plea for respectability. Seeking “to join marriage” implicitly refuted the stereotypes of hypersexuality associated with gay men, and required silence as to the possibility that same-sex partners would “produce marriages” in ways that would be significantly or visibly different from the traditional image of the institution.

In these ways, marriage equality advocates enlisted in, or were swept into, a broader respectability politics, a term coined by historian Evelyn Higginbotham in describing the efforts of African American churchwomen roughly a hundred years ago.²⁹⁸ Higginbotham analyzed respectability discourse as combining elements of racial uplift, social conformity, community self-policing, and protest of injustice.²⁹⁹ The implicit contrast between a more modest and pragmatic response to systemic racism and a vision of liberation remains acute in African American politics,³⁰⁰ and it is not difficult to see an analogy in the debates over marriage within the LGBT community. In both contexts, respectability is marked by the vision of households characterized by economic self-sufficiency and marital procreation, with an absence of other socially visible sexuality. Using Cathy Cohen's theory of patterns of marginalization,³⁰¹ ending the marriage

297. None of the dissenting opinions in *Obergefell* relied on it. Justice Alito's dissent could go only so far as to repeat his argument from *Windsor* that the future of marriage, if it included same-sex couples, contained unknowns. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting).

298. See generally EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT: THE WOMEN'S MOVEMENT IN THE BLACK BAPTIST CHURCH, 1880–1920, at 185–87* (1993).

299. *Id.*

300. Compare, e.g., Fredrick C. Harris, *The Rise of Respectability Politics*, *DISSENT*, Winter 2014, at 33 (criticizing President Obama and other African American politicians for placing too much emphasis on uplift and race-neutral politics), with Randall Kennedy, *Lifting As We Climb: A Progressive Defense of Respectability Politics*, *HARPER'S MAG.*, Oct. 2015, at 24 (arguing that it is “an essential fact [that] any marginalized group should be attentive to how it is perceived”).

301. CATHY J. COHEN, *THE BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS 32–77* (1999) (postulating that there are four patterns of marginalization: categorical, integrative, advanced, and secondary).

exclusion signaled the acceptance of gay presence in dominant institutions.³⁰² Although a “truly progressive step,” this form of marginalization is also contingent on adoption of dominant norms.³⁰³ Securing it in turn produces “secondary marginalization,” in which more privileged members of marginal groups exercise various forms of power over less privileged members, such as those who do not meet the metrics for respectability.³⁰⁴

This is not to argue that all marriage equality supporters, or all same-sex couples who have married, experienced the issue as chiefly one of respectability. Marriages and other ceremonies may symbolize and perform a political demand for an expansion of rights at the same time that they incorporate more traditional customs. In her study of commitment ceremonies before marriage was legal, sociologist Kathleen Hull concluded that the ceremonies signified a transfer of cultural power to the couples involved, and therefore constituted “a form of political resistance even if not self-consciously political.”³⁰⁵ Same-sex marriage remained both radical and conservative to the end.

CONCLUSION

Social movement actors confront a complex polycentric force field of power and must navigate the constraints of the broader political context. If one believes that the campaign to win same-sex marriage could have been more radically liberatory in its conception of constitutional equality, one has to look beyond internal structural questions about the campaign itself. Like the early twentieth century labor movement, one has to understand “what lessons from the arenas of politics, lawmaking, and social reform, and what engagements with state policy and state power” produced the suppression of instincts for more radical change.³⁰⁶ The paradox of popular constitutionalism is that its grassroots, bottom-up focus—exemplified in the impact of the ballot question elections on the marriage equality effort—may drive a movement or campaign to adopt a safer, more conservative discursive strategy than [progressives] would wish.

302. *See id.* at 63 (“Advanced marginalization signals at the very least a symbolic opening of dominant society. Where once formal exclusion was the law of the land, legal segregation and institutional subordination of marginal groups is removed under advanced marginalization.”).

303. *Id.*

304. *Id.* at 70–73.

305. HULL, *supra* note 283, at 199.

306. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 4 (1991).

The Supreme Court's decision in *Obergefell v. Hodges*³⁰⁷ did not change the legal meaning of marriage, but it did signal that a change had occurred in its social meaning. The contestation over LGBT rights, especially marriage, within the venues of direct democracy—specifically ballot questions—and the outcomes secured through the combination of direct democracy and the judiciary were essential to that change. Although there were many more losses than victories in elections framed around LGBT equality, the battles also led to innovations in the forms and strategies for collective action in the realm of litigation.

The dynamics of direct democracy changed the debates over same-sex marriage in ways that narrowed the channels of argument into more traditional and conservative terms. One caution for progressive popular constitutionalists who seek to redirect power away from courts may simply be the aphorism to be careful what you wish for. For the marriage equality campaign, the result was success in achieving its goal of marriage equality, but with a troublesome political valence embedded in the outcome.

After several decades of seeking heightened scrutiny for sexual orientation classifications, LGBT rights litigators won what had seemed their least possible victory without securing recognition that antigay discrimination was constitutionally suspicious. Doctrinally, if not politically, securing access for same-sex couples to marriage was a modest step, the extension of what has long been recognized as a fundamental right. That it was modest does not mean that it was easy. What remains unsettling about the constitutional import of *Obergefell* is its subordination of equality to liberty analysis through a jurisprudence of sameness. This, perhaps, is what passes for civil rights in a post-civil rights world.

307. 135 S. Ct. 2584 (2015).