
ARTICLES

BACKLASH POLITICS: HOW CONSTITUTIONAL LITIGATION HAS ADVANCED MARRIAGE EQUALITY IN THE UNITED STATES

WILLIAM N. ESKRIDGE JR.*

INTRODUCTION	276
I. COURTS AND THE STRUGGLE FOR MARRIAGE EQUALITY, 1970-2012.....	279
A. <i>Stage 1, Uphill Struggles: 1970-1996</i>	282
B. <i>Stage 2, Politics of Recognition Breaks Through: 1996-2008</i>	285
C. <i>Stage 3, From Backlash Toward Normal Politics: Post-2008</i>	288
II. THE POLITICS OF BACKLASH.....	292
A. <i>The Politics of Disgust: Backlash Triumphant, 1993-1996</i>	296
B. <i>Identity Politics: Backlash Subsides, 2000-2004</i>	300
C. <i>Normal Politics: Beyond Backlash, 2009-2013</i>	306
III. HOW CONSTITUTIONAL LITIGATION HAS ADVANCED MARRIAGE EQUALITY IN THE UNITED STATES	309
A. <i>The Transformation of Politics: Agenda-Setting, Reversing the Burden of Inertia, and Creating Conditions for Falsification of Stereotypes</i>	310
1. Agenda Setting.	310
2. Reversing the Burden of Inertia.....	312
3. Creating Conditions for Falsification of Stereotypes.	314
B. <i>The Transformation of Social Movement Agendas and Goals</i>	315
C. <i>Lowering the Stakes of Politics by Marginalizing Outlier Perspectives</i>	320

* John A. Garver Professor of Law, Yale Law School. An earlier version of this Article was delivered as the Distinguished Lecture at the Boston University School of Law. I appreciate comments from Linda McLain, Susan Koniak, Jim Fleming, and other participants in that event, as well as David Fontana.

INTRODUCTION

There are few issues that excite lawyers and law students more than same-sex marriage recognition. The sheer drama of the issue is hard to match. A generation ago, so-called “homosexuals” cowered in the closet, hated or scorned by most Americans and fearful that any open relationship would lead to loss of employment, social ostracism, loss of professional license (including the license to practice law), police harassment, and possibly even imprisonment and rape within prison. Today, lesbian, gay, bisexual, and transgender (LGBT) Americans in states like Massachusetts face little or no state discrimination and enjoy all the same legal rights and duties as straight persons. That equality extends to civil marriage in Massachusetts and eight other states, as well as the District of Columbia.¹ Another ten states recognize civil unions or their rough equivalent for same-sex couples.²

LGBT people have moved from outlaws to in-laws in a generation. That is as dramatic a change in fundamental social attitudes as this nation has ever seen. For lawyers, the gay rights movement ranks alongside the civil rights and women’s rights movements as one of the landmark social movements of the last century. Like those previous social movements, the gay rights movement has contributed to the ongoing transformation of family law and has successfully deployed constitutional litigation, as well as legislation to advance its agenda. Unlike the civil rights and women’s rights movements, however, most marriage equality litigation has been carried out under state constitutions rather than the U.S. Constitution, though that is rapidly changing. The gay marriage analog to the U.S. Supreme Court’s landmark decision in *Loving v. Virginia*³ is the Massachusetts Supreme Judicial Court’s 2003 decision in *Goodridge v. Department of Public Health*.⁴

This Article will provide an account of this constitutional success story but will also analyze a cautionary narrative. Specifically, I shall consider Gerald

¹ As of March 2013, jurisdictions granting marriage licenses to same-sex couples are, in order of their action, Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, the District of Columbia, New York, Maryland, Washington, and Maine. See NAT’L CTR. FOR LESBIAN RIGHTS, MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: AN OVERVIEW OF RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES WITHIN THE UNITED STATES 1-2 (2012).

² As of 2013, states recognizing civil unions or domestic partnerships with all the same rights and duties of marriage include, in order of their action, California, Colorado, New Jersey, Oregon, Nevada, Illinois, Delaware, Hawaii, and Rhode Island. Wisconsin recognizes domestic partnerships that do not give all the rights and benefits of marriage. See *id.* at 2-3; Lynn Bartels, *Colorado Civil Unions Bill Signed by Gov. John Hickenlooper at History Colorado Center*, DENVERPOST.COM, http://www.denverpost.com/breakingnews/ci_22841921/colorado-civil-unions-hickenlooper-takes-up-pen-sign (last updated Mar. 22, 2013, 8:30 AM).

³ 388 U.S. 1 (1967) (declaring state bars to different-race marriages unconstitutional).

⁴ 798 N.E.2d 941 (Mass. 2003) (interpreting the Massachusetts Constitution to require marriage equality for lesbian and gay couples).

Rosenberg's thesis that courts cannot effect social change, a thesis Professor Rosenberg has extended to the marriage equality litigation.⁵ His general argument is that "courts can almost never be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government."⁶ Consistent with conventional wisdom among legal academics, Rosenberg maintains that courts have neither the capacity nor the legitimacy to craft and implement complicated and far-reaching changes in social policy.⁷ His more distinctive point is that when courts innovate through recognition of important constitutional rights, they are not only ineffectual but counterproductive, because they deflect social movement energy from more productive channels and produce "backlash" from energized countermovements.⁸

Thus, in the 2008 edition of his book, *Hollow Hope*, Rosenberg argued that *Goodridge* and other state court decisions were incomplete "victories" that left lesbian and gay couples with only some of the thousands of marital rights enjoyed by married heterosexual couples.⁹ A primary reason for this was backlash: "As a result of litigation, same-sex marriage proponents face legislative and constitutional obstacles on both the state and federal level that did not exist before they turned to litigation," including the federal Defense of Marriage Act (DOMA), enacted as a direct response to Hawaii's constitutional litigation.¹⁰ While acknowledging that one might consider the combined results as "two steps forward, one step back," Rosenberg considered the results to be more accurately described as "one step forward, two steps back."¹¹

⁵ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 339-419 (2d ed. 2008) (extending the thesis of the book's earlier edition to the marriage equality decisions in Hawaii (1993), Vermont (1999), and Massachusetts (2003-2004)).

⁶ *Id.* at 422.

⁷ This longstanding wisdom is pursued more thoroughly by NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 123-50 (1994), and can be traced back at least as far as CARL A. AUERBACH ET AL., *THE LEGAL PROCESS: AN INTRODUCTION TO DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE, AND ADMINISTRATIVE AGENCIES* (1961) (considering workplace injuries as a problem courts are ill-equipped to tackle and exploring legislative and administrative alternatives).

⁸ ROSENBERG, *supra* note 5, at 427.

⁹ *Id.* at 352.

¹⁰ *Id.* at 365, 368.

¹¹ *Id.* at 368; *see also* Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 *DRAKE L. REV.* 795, 813 (2006) (arguing that marriage equality would have advanced more quickly if the social movement lawyers had never brought their cases or had lost all of them). For related versions of the highly pessimistic backlash thesis in this context, see John D'Emilio, *The Marriage Fight Is Setting Us Back*, 2006 *GAY & LESBIAN REV. WORLDWIDE* 10-11 (lamenting the LGBT rights movement's over-reliance on courts); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 *MICH. L. REV.*

Professor Rosenberg's learned analysis has been subjected to strong critique. My colleagues, Professors Linda Greenhouse and Reva Siegel, for example, take Rosenberg and other backlash theorists to task for their analysis of *Roe v. Wade*, which those theorists read as creating a tidal wave of pro-life opposition to a woman's right to choose abortion. One problem with this reading is that it gives too much weight to people's post hoc verbal responses to the abortion cases and invokes as examples of "backlash" events and developments that are better understood as complicated examples of normal politics.¹² The Greenhouse-Siegel point raises a deeper criticism, one that I pursue in this Article: neither Rosenberg nor his critics have articulated a theory that distinguishes "backlash" from "normal" politics. This Article suggests such a theory and then applies it to litigation advancing marriage equality. Contrary to Rosenberg, I conclude that constitutional litigation has significantly advanced the cause of marriage equality,¹³ but that such litigation advances the cause only if litigators minimize the risk of significant backlash, as the primary "movement" organizations have done.¹⁴

Part I begins with a brief history placing marriage equality litigation into its proper institutional context. Before 1999, constitutional marriage equality litigation tended to be disconnected from political grass-roots organizing and, as a result, was uniformly unsuccessful. The most successful litigation, in Hawaii, also yielded the worst backlash. Starting with the Vermont marriage litigation, however, constitutional politics has grown increasingly (but far from completely) indistinguishable from normal politics – which has correlated with greater success for marriage equality.

431, 459-73 (2005) (applying Rosenberg's backlash thesis to the Massachusetts marriage decision); and Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1217-23 (2009) (applying Rosenberg's backlash thesis to the California marriage decision, and contrasting it with California's 1948 decision requiring recognition of interracial marriages, which produced much less backlash).

¹² Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2076-86 (2011).

¹³ For some thoughtful critical responses to the backlash literature as applied to marriage equality litigation, I have learned the most from Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010), and Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & SOC'Y REV. 151 (2009). See also Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493 (2006); Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861 (2006).

¹⁴ By LGBT "movement" organizations, I am thinking of Gay and Lesbian Advocates and Defenders (GLAD); Lambda Legal Defense & Education Fund; the American Civil Liberties Union; and ad hoc but well-organized groups of experienced and dedicated LGBT litigators and their allies who came together to litigate marriage equality in Vermont, California, and other states.

Part II advances a theory of backlash that distinguishes it from normal politics. The politics of backlash is a politics where people invest their identities and often their feelings of disgust into particular preferences. Thus, identity politics that fuels important social movements such as the civil rights movement and, now, the LGBT rights movement, is a phenomenon where identity is an important motivator on both sides. If the LGBT rights movement engages in a politics of state recognition of the dignity of gay and transgendered people, its aspirations are met with resistance by individuals whose identity is formed in substantial part by the negation of full equality for those seeking it. To the extent the countermovement is motivated in a significant way by a politics of disgust, backlash will be intense and potentially violent. To the extent that the countermovement is motivated only by identity-based concerns, backlash will still be intense but not as hysterical and potentially violent.

The politics of backlash, as I am using the term, is risky for the polity as a whole and must be managed very carefully. To the extent a newly aggressive minority group triggers a politics of disgust, the polity needs to move slowly and incrementally as it recognizes the just claims of the minority. An immediate recognition of complete equality when the nation is intensely and hysterically divided could be disastrous for the political system as a whole. Even as the politics of disgust wanes, the body politic needs to be attentive to the divisiveness that identity politics creates on both sides. Although judicially recognized equality is not always more divisive than legislatively recognized equality, there is a particular danger that judges will move too fast in response to legitimate demands by the despised minority.

On the whole, the judiciary has managed the issue of marriage equality maturely and productively. Specifically, Part III sets forth the positive and underappreciated ways that courts have contributed to the advancement of marriage equality since 1999. I agree with Professor Rosenberg that a premature victory for marriage equality in the Hawaii courts from 1993 to 1996 was a mixed blessing, but I disagree with his assessment of the Vermont and Massachusetts marriage cases. I shall conclude with a discussion of subsequent marriage equality developments in light of the theory of backlash politics developed in this Article.

I. COURTS AND THE STRUGGLE FOR MARRIAGE EQUALITY, 1970-2012

Traditionally, the state has not issued marriage licenses to lesbian and gay couples, but after the Stonewall riots of 1969 thousands of such couples came out of the closet and demanded that states recognize their relationships as marriages or some other type of legal union.¹⁵ Some of these couples brought lawsuits challenging the constitutionality of their exclusion from civil marriage. Starting in the 1990s, gay rights organizations and litigation groups

¹⁵ ELLEN ANN ANDERSEN, *OUT OF THE CLOSET & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 23-25 (2005).

started planning a more systematic campaign for family law equality; these institutions worked both the political and the judicial process to advance these equality goals. In the twenty-first century, several litigation campaigns actually delivered marriage equality in different states. A number of books and dozens of law review articles have examined the people and issues involved in the marriage equality constitutional lawsuits.¹⁶ I refer the interested reader to the detailed accounts provided by this existing scholarship.

¹⁶ See, e.g., *id.* at 175-218 (Hawaii, Vermont, Alaska, and Massachusetts marriage litigation); WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 43-82 (2002) [hereinafter ESKRIDGE, EQUALITY PRACTICE] (Vermont marriage litigation); WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 42-50 (1996) [hereinafter ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE] (Hawaii and District of Columbia marriage litigation, with discussion of pre-1990 litigation); WILLIAM N. ESKRIDGE JR. & DARREN SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 21-31 (2006) (Minnesota, Hawaii, Vermont, and Massachusetts marriage litigation); JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 181-98, 218-23 (2012) (Vermont, California, Massachusetts, and New York marriage litigation); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 48-155 (2012) (Hawaii, Vermont, Massachusetts, Iowa, and Maine marriage litigation); ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 114-48 (2006) (DOMA and state marriage nonrecognition statutes); MICHAEL MELLO, LEGALIZING GAY MARRIAGE (2004) (Vermont marriage litigation); YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 217-27 (2002) (Hawaii, Vermont, Alaska, and Massachusetts marriage litigation); DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE 25-30, 41-45 (2006) (Hawaii, Vermont, and Massachusetts marriage litigation).

For articles and symposia analyzing particular state marriage equality litigation campaigns, see, in order of the development of the campaigns they address, Symposium, *Same-Sex Marriage: The Debate in Hawai'i and the Nation*, 22 U. HAW. L. REV. 1 (2000) (Hawaii marriage litigation); Kevin G. Clarkson, David Orgon Coolidge & William C. Duncan, *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213 (1999) (Alaska marriage litigation); *A Symposium on Vermont's Civil Unions*, 25 VT. L. REV. 1 (2000) (Vermont marriage litigation); Mary L. Bonauto, Goodridge in Context, 40 HARV. C.R.-C.L. L. REV. 1 (2005) (Massachusetts marriage litigation); Edward Stein, *The Story of Goodridge v. Department of Public Health: The Bumpy Road to Marriage for Same-Sex Couples*, in FAMILY LAW STORIES 27 (Carol Sanger ed., 2007) (Massachusetts marriage litigation); Arthur S. Leonard, *New York Recognition of a Legal Status for Same-Sex Couples: A Rapidly Developing Story*, 54 N.Y.L. SCH. L. REV. 479 (2010) (New York marriage litigation); Cummings & NeJaime, *supra* note 13 (California marriage litigation); William N. Eskridge Jr., *Foreword: The Marriage Cases, Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785 (2009) [hereinafter Eskridge, *Foreword: The Marriage Cases*] (California marriage litigation under the state constitution); and Suzanne B. Goldberg, Sarah Hinger & Keren Zwick, *Equality Opportunity: Marriage Litigation and Iowa's Equal Protection Law*, 12 J. GENDER RACE & JUST. 107 (2008) (Iowa marriage litigation).

The project of this Article is to situate the marriage equality movement within the larger context of social movement transformation of public law. Drawing from earlier work on social movements, I posit three stages for this movement.¹⁷ At each stage, constitutional litigation played important but different roles, and marriage equality victories carried with them vastly different consequences.

In Stage 1 – which took place from roughly 1970 through 1996 for sexual and gender minorities – the minority seeks to end active state persecution of its members and to secure some measure of equal treatment in American public life, but without substantial success.¹⁸ Initially, the majority responds to this nascent politics of recognition with reflexive fear and alarm that a disparaged minority has the asperity to seek a place at the table of American public life. The early responses to marriage equality litigation in the 1970s and 1980s were classic responses along these lines. That is, they were typically hysterical, knee-jerk responses by the majority, with at best tautological reasoning, that were expressive reaffirmations of traditional cultural identities – for example, “homosexual marriage” is wrong because marriage must be heterosexual. When Hawaii’s supreme court suggested that gay marriage might be recognized in that state, there was a powerful local backlash and a ferocious national one that set back the marriage equality movement in many respects.¹⁹

In Stage 2 – which took place from roughly 1996 through 2008 for sexual and gender minorities – the minority engages in a full-throated politics of recognition, which calls forth from the majority a full-throated politics of preservation; the politics of culture clashes characterizes this period.²⁰ Inspired by the Hawaii litigation’s vision of marriage equality, gay marriage activists in other states engaged in more clever institutional strategies and enjoyed greater public attention to the increasing number of committed lesbian and gay couples, many of them raising children.²¹ Although the movement made major advances, these developments consistently triggered significant backlashes as the traditionalist countermovement remained potent and engaged.

In Stage 3 – which began after 2008 for sexual and gender minorities – the minority’s politics of recognition gains a great deal of traction among the public at large, and that normative success transforms the political environment into one where “normal” politics increasingly overshadows “backlash”

¹⁷ See William N. Eskridge Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 467-78 (2001) (laying out three stages for social movements reflected in the history of the civil rights, women’s rights, and gay rights movements).

¹⁸ See *id.* at 468-71.

¹⁹ See *id.* at 474.

²⁰ See *id.* at 471-74.

²¹ See Cummings & NeJaime, *supra* note 13, at 1251-80 (detailing the strategy taken by California gay rights advocates in the wake of *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), and *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

politics.²² California's Proposition 8 referendum,²³ which marriage equality supporters narrowly lost, was a campaign where normal politics was starting to overtake backlash politics. At the national level, the reelection of President Barack Obama in 2012 was a landmark event for gay marriage. The President embraced marriage equality without triggering much of a backlash,²⁴ and the move helped him in the realm of normal politics as well.

A. *Stage 1, Uphill Struggles: 1970-1996*

One distinctive feature of litigation is that anyone who can find a willing lawyer has effective access to the judiciary and can demand that judges apply established legal and constitutional principles to new issues, such as same-sex marriage. Marriage license clerks can simply tell lesbian and gay couples that they do not qualify for a license, and legislators can ignore their petitions, but judges have to explain why committed lesbian and gay couples do not have the same civil-marriage rights and duties as straight couples. For a minority whose members were socially disparaged and politically toxic, courts were virtually the only forums where minority group members can seek decent treatment from the state.

Starting in 1971, isolated couples proud to be gay or lesbian marched into state courts, but that did not mean they could succeed even in that forum. For a generation, state judges told those couples that the state could exclude them from civil marriage. The reasons do not sound cogent today, because they were grounded in attitudes that are no longer universally held. Like most other Americans, judges believed that lesbian and gay couples were the opposite of family for a variety of reasons: they could not procreate and they did not form serious relationships similar to marriage with children.²⁵ According to the courts, discrimination was treating similar people differently, not treating different people, the "homosexuals," differently from "normal" people, the "heterosexuals."

Indeed, there was a deeper reason, not openly articulated by judges, for their universal rejection of marriage equality claims before 1993. Most states criminalized the sexual conduct, consensual sodomy, that would consummate a gay marriage.²⁶ Hence, lesbian and gay couples were presumptive criminals,

²² See Eskridge, *supra* note 17, at 475-77.

²³ For an overview of the referendum, see *Proposition 8*, L.A. TIMES, <http://www.latimes.com/news/local/prop-8> (last visited Mar. 7, 2013).

²⁴ See *infra* notes 131-134 and accompanying text.

²⁵ E.g., *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (holding that the exclusion of a gay couple from civil marriage is not discrimination because the nature of procreative marriage requires one man and one woman), *appeal dismissed*, 409 U.S. 810 (1972) (denying appeal for lack of a substantial federal question). Other early cases, making the same kind of nature-of-marriage argument, are noted in ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 16, at 48-50, 52-59.

²⁶ See *Bowers*, 478 U.S. at 192-95 & nn.5-6.

and the state was unlikely to provide its support to a relationship grounded in criminal conduct. Worse still, public law in this country had, since the 1930s, treated “homosexuals” as equivalent to “sex perverts” positively threatening to the American family. Gay people were not only a despised minority in the 1970s, but they were a minority whose despicability helped define straight people’s identity as righteous paragons of modern family values.²⁷

Under these conditions, no official in America could get away with issuing marriage licenses to lesbian and gay couples. One official who tried to do so was Cela Rorex, the County Clerk of Boulder, Colorado. Because the state marriage law was gender neutral, she issued marriage licenses to six lesbian and gay couples in March 1975, and was deluged with dozens of telephone calls objecting to her action, some of which included death threats. The state attorney general nullified the marriages authorized under Rorex’s licenses, and state and federal judges refused to recognize those marriages.²⁸ Other efforts to secure marriage licenses for committed lesbian and gay couples met a similar fate in the 1970s and 1980s.²⁹

The political climate only became more hospitable to gay marriage claims after the 1980s. More gay people than ever had come out of the closet, some in response to the Supreme Court’s splenetic decision in *Bowers v. Hardwick*,³⁰ and others as a consequence of the AIDS epidemic. Many of the newly uncloseted lesbians and gay men came out as couples, including couples raising children within their relationships. As the traditional association of “homosexuality” with predation and promiscuity began to give way to associations with family and commitment, interest in and support for legal marriage rights increased. A triggering event was Denmark’s recognition of lesbian and gay registered partnerships in 1989.³¹ If Danish couples could be legally wed, the reasoning went, why not here in America?

Ninia Baehr and Genora Dancel of Honolulu, Hawaii were one couple who thought this way; they and two other couples brought suit to overturn that state’s bar to gay marriage in 1990.³² National LGBT litigation groups discouraged the litigation, and the plaintiffs and their lawyers did very little grass-roots organizing to drum up interest in their cause (or political cover in

²⁷ This is the thesis of WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAW IN AMERICA, 1861-2003*, at ch. 7-8 (2008) (analyzing and explaining how the Supreme Court could have reached the decision it reached in *Bowers*, 437 U.S. 186).

²⁸ ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 16, at 55 (providing an account of the Rorex story).

²⁹ *Id.* at 49, 54-56.

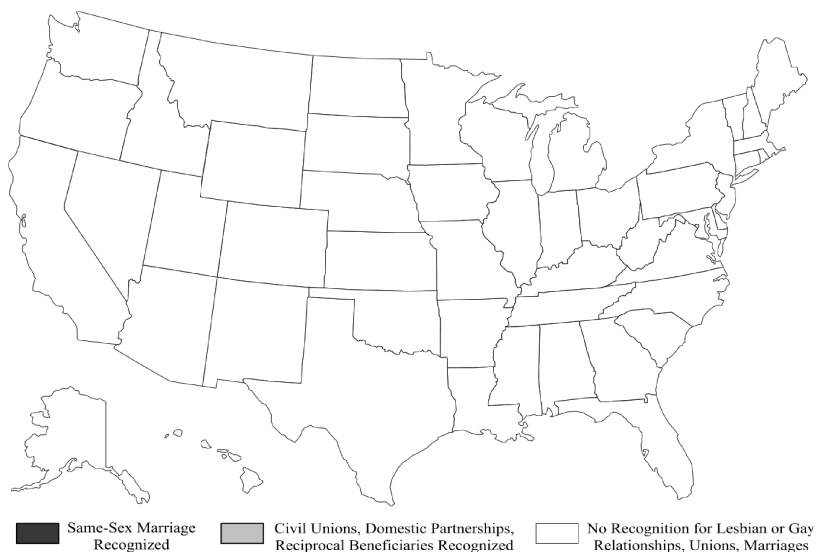
³⁰ 478 U.S. at 192-96 (upholding a state “homosexual conduct” law, but with reasoning grounded in an embarrassingly thin understanding of history and more than a few ignorant comments about the people whose lives were being evaluated).

³¹ THE DANISH REGISTERED PARTNERSHIP ACT NO. 372 (1989).

³² Brett P. Ryan, *Love and Let Love: Same-Sex Marriage, Past, Present, and Future, and the Constitutionality of DOMA*, 22 U. HAW. L. REV. 185, 200-05 (2000).

case they won).³³ To the surprise of the entire country, and perhaps the plaintiffs as well, the Hawaii Supreme Court in *Baehr v. Lewin* ruled that their exclusion was sex discrimination subject to strict scrutiny under the state constitution.³⁴ Although the court remanded the case for trial and therefore did not issue a final order, the political response was swift and overwhelmingly negative. The mere prospect of gay marriage in Hawaii set off a firestorm of anti-gay legislation in other states and at the national level with the enactment of the Defense of Marriage Act in 1996.³⁵ Even tolerant Hawaii reacted negatively: the legislature proposed, and the voters overwhelmingly adopted an amendment to the state constitution allowing the legislature to limit civil marriage to one man and one woman.³⁶ On the eve of the millennium, after a decade of sturm und drang on the issue of marriage equality, the nation was right where it had been for two hundred years: no state recognized same-sex marriages.

Map 1. State (Non)Recognition of Lesbian and Gay Unions - 1996 (DOMA)



³³ See *id.* at 205 n.137 (noting that national groups such as the Hawaii chapter of the ACLU and Lamda Legal Defense and Education Fund refused to assist in the litigation).

³⁴ *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), *clarified on reh'g*, 852 P.2d 74, 74-75 (Haw. 1993). The sex discrimination argument, by the way, had not been made by the plaintiffs' counsel and was suggested *sua sponte* by the court.

³⁵ For documentation of the backlash against *Baehr*, see Part II.A.

³⁶ David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 26-28 (2000); see also *id.* at 95-102.

B. *Stage 2, Politics of Recognition Breaks Through: 1996-2008*

The national as well as state rejection of marriage equality after *Baehr* did not stop the marriage equality movement. It did, however, teach putative leaders a valuable lesson: do not attempt constitutional equality litigation without grass-roots mobilization of your supporters and efforts to round up political allies in the event that you prevail. In other words, the LGBT social movement needed to have a flourishing and successful politics of recognition in place *before* mounting any new campaign for marriage equality, and its leaders needed to use the constitutional litigation as a focal point for grass-roots mobilization.

This was the strategy of Vermont's coalition supporting same-sex marriage that came together in the wake of *Baehr v. Lewin*. Beth Robinson, Susan Murray, and other leaders carefully surveyed the Vermont LGBT community and built up mainstream political support for marriage equality before initiating their state constitutional lawsuit for recognition of same-sex marriages.³⁷ Vermont was the perfect state for such a lawsuit because the LGBT community's politics of recognition had already enjoyed considerable political success: the state legislature had not only repealed its consensual sodomy law, but had also outlawed sexual orientation discrimination in the workplace and public accommodations³⁸ and had codified the state supreme court's decision allowing two persons of the same sex to jointly adopt children.³⁹ And, as compared to Hawaii and other western states, Vermont made it significantly harder to amend its state constitution, by requiring affirmative votes in the legislature in two successive sessions before a proposed amendment could be presented to the voters.⁴⁰

In December 1999 the Vermont Supreme Court ruled in *Baker v. State* that the exclusion of lesbian and gay couples from family law benefits and duties violated the state constitution but left it to the Vermont Legislature to craft a remedy.⁴¹ This creative remedy disappointed the plaintiffs and seemed to invite backlash, but legislators and the governor responded with some sympathy to lesbian and gay couples in early 2000. With the state divided between supporters and opponents of marriage equality, and with the opponents likely in the majority, the Vermont Legislature created a new institution for same-sex

³⁷ ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 45-48.

³⁸ See An Act Relating to Discrimination on the Basis of Sexual Orientation, 1992 Vt. Acts & Resolves No. 135 (amending numerous state laws, including the fair employment practices and public accommodations statutes, to prohibit discrimination on the basis of sexual orientation).

³⁹ In 1993 the Supreme Court of Vermont held that state law did not require termination of a natural mother's parental rights when her daughter was adopted by the mother's same-sex partner. *In re Adoption of B.L.V.B.*, 628 A.2d 1271, 1272 (Vt. 1993). This decision was codified in VT. STAT. ANN. tit. 15A, § 1-102.

⁴⁰ VT. CONST. ch. 1, § 72.

⁴¹ *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999).

couples and invested these “civil unions” with all the legal rights and duties of marriage.⁴² Although there was a great deal of public opposition to this compromise, it survived the 2000 election; efforts to repeal the civil union law or to amend the state constitution failed.⁴³ More than 8600 lesbian and gay couples, many from out of state, were joined in legal civil unions between 2000 and the beginning of 2008.⁴⁴

After Vermont, the next step, obviously, was to secure full marriage recognition. The Netherlands’ Parliament enacted marriage equality in that nation in 2001, followed swiftly by Belgium’s Parliament, but similar legislation stood no chance of being enacted in this country. Buoyed by the relative success of the Vermont litigation, in which they had participated, Gay and Lesbian Advocates and Defenders (GLAD) in Boston engaged in similar grass-roots and political groundwork before filing its own marriage equality lawsuit.⁴⁵ In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court, by a narrow four-to-three vote, agreed with GLAD’s advocate Mary Bonauto, and declared the state’s marriage exclusion a violation of the state constitution.⁴⁶

As in Vermont, the state supreme court’s decision weathered the inevitable attacks. Between 2004 and 2007, at the behest of Governor Mitt Romney, the legislature considered several proposed constitutional amendments seeking to override *Goodridge*; none of the proposals attracted enough legislative support to be presented to the voters.⁴⁷ In 2004 President George W. Bush and other

⁴² An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves No. 91. The law announced a state interest “to encourage close and caring families, and to protect all family members from the economic and social consequences of abandonment and divorce.” *Id.* § 1(3). The legislature further found that “many gay and lesbian Vermonters have formed lasting, committed, caring and faithful relationships with persons of their same sex,” *id.* § 1(9), and that recognizing these relationships through a new institution satisfied *Baker*’s equal-treatment requirement while at the same time giving “due respect for tradition and long-standing social institutions,” *id.* § 1(10).

⁴³ See ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 79-83.

⁴⁴ Keck, *supra* note 13, at 170 tbl.4 (reporting that Vermont issued licenses for 8616 civil unions between 2000 and the beginning of 2008). In 2009 Vermont replaced civil unions with full marriage equality. See An Act Relating to Civil Marriage, 2009 Vt. Acts & Resolves No. 3.

⁴⁵ Bonauto, *supra* note 16 (offering a detailed account of the *Goodridge* marriage equality litigation by the GLAD mastermind, Mary Bonauto).

⁴⁶ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003) (interpreting the Massachusetts constitution to require marriage equality for lesbian and gay couples). *Goodridge* was followed and reaffirmed by *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

⁴⁷ Pam Belluck, *Massachusetts Gay Marriage Referendum Is Rejected*, N.Y. TIMES, June 15, 2007, at A16 (providing a detailed account of the legislature’s last vote rejecting a voter-initiated proposal in which less than one-quarter of the legislators were willing to subject

Republican leaders pressed Congress to send a proposed Federal Marriage Amendment to the states for ratification,⁴⁸ but this proposal, too, went nowhere. Less than a majority of the Senate voted to cut off debate on the proposal, well short of the sixty votes required to cut off debate and even further from the two-thirds supermajority required by Article V.⁴⁹

Massachusetts started issuing marriage licenses to lesbian and gay couples on May 17, 2004.⁵⁰ More than 10,000 lesbian and gay couples received licenses from the state between 2004 and the beginning of 2008.⁵¹ As momentous a breakthrough as that event was, the married couples had rights primarily in Massachusetts, for most other states adopted nonrecognition laws and the federal government was required by DOMA to treat these married couples as unmarried.⁵² Indeed, in the wake of *Goodridge*, more states adopted amendments to their state constitutions to entrench the norm that marriage is limited to unions between one man and one woman. By 2006, forty-five states had statutory or constitutional bars to marriage equality, with most having both; almost all of these measures were a specific reaction to *Baehr*, *Baker*, and *Goodridge*.⁵³ Additionally, constitutional litigation for marriage equality failed to achieve its objectives in New York, New Jersey, Maryland, and Washington, a surprising parade of losses in states that were relatively gay-friendly and filled with lesbian and gay couples rearing children.⁵⁴ Likewise,

marriage equality to a constitutional referendum); *see also* KLARMAN, *supra* note 16, at 93-97 (same).

⁴⁸ *See* KLARMAN, *supra* note 16, at 87-88, 99, 103.

⁴⁹ For a detailed description and (sympathetic) analysis of the Federal Marriage Amendment and the history of Federal Marriage Amendment deliberation, see Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 U. ST. THOMAS L.J. 137, 142-73, 195-98 (2004). The Federal Marriage Amendment is cited as an important example of backlash politics by ROSENBERG, *supra* note 5, at 365-67.

⁵⁰ Yvonne Abraham & Michael Paulson, *Wedding Day: First Gays Marry; Many Seek Licenses*, BOS. GLOBE, May 18, 2004, at A1.

⁵¹ Keck, *supra* note 13, at 170 tbl.4.

⁵² For a snapshot of nonrecognition laws and constitutional amendments as of December 2011, see WILLIAM N. ESKRIDGE JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* app. 7, at 1139-41 (3d ed. 2011).

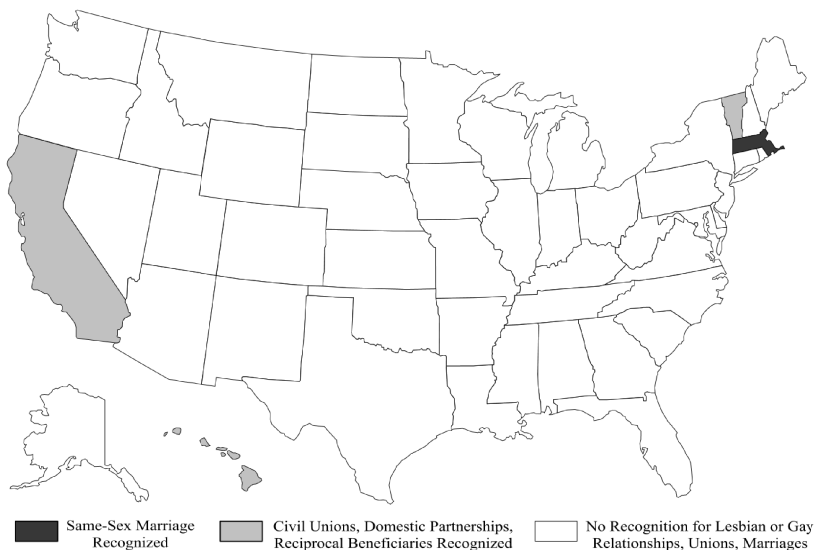
⁵³ ROSENBERG, *supra* note 5, at 362-63 (“[C]onservative groups began lobbying efforts . . . seeking laws defining marriage as a union between one man and one woman and refusing to recognize out-of-state marriages between same-sex couples. These efforts proved extraordinarily successful.”). For a state-by-state survey of family law, including laws and constitutional amendments limiting marriage to one man, one woman, see *In Your State*, LAMBDA LEGAL, <http://www.lambdalegal.org/states-regions> (last visited Mar. 7, 2013).

⁵⁴ Schacter, *supra* note 11, at 1172. For court decisions denying a state constitutional right for lesbian and gay couples to marry, see *Conaway v. Deane*, 932 A.2d 571, 637 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196, 211, 220-21 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 990 (Wash. 2006).

state legislatures remained unwilling to adopt marriage equality laws, with the notable exception of California, which had in 1999 created a new institution of “domestic partnerships,” and had in 2003 expanded domestic partnership to include almost all the legal rights and duties of marriage.⁵⁵

On the other hand, this period also witnessed a fairly steady increase in support for marriage equality, especially among younger Americans. By 2008 there were 10,000 married lesbian and gay couples in Massachusetts, and another 80,000 couples whose unions were recognized by other states as civil unions, reciprocal beneficiaries, and domestic partnerships.⁵⁶ After *Goodridge*, same-sex marriage was finally on the nation’s map. Notwithstanding setbacks, supporters of marriage equality were optimistic that other states would follow Massachusetts’ lead. And, soon enough, they did.

Map 2. State Recognition of Lesbian and Gay Unions - 2003



C. Stage 3, *From Backlash Toward Normal Politics: Post-2008*

In Canada, our neighbor to the north, the marriage equality movement advanced more rapidly through Stage 2 and into Stage 3, with the courts taking the lead, as in the United States. The Supreme Court of Canada ruled in 1999 that the government must provide lesbian and gay couples with the same legal

⁵⁵ 2003 Cal. Stat. ch. 421 (codified as amended at CAL. FAM. CODE §§ 297-299.6 (West Supp. 2013)).

⁵⁶ Keck, *supra* note 13, at 169, 170 tbl.4. Civil unions were recognized by Vermont and New Jersey, reciprocal beneficiaries by Hawaii, and domestic partnerships by California. *Id.*

rights and duties afforded straight married couples.⁵⁷ Not only did the decision not produce a large backlash, but it also inspired new marriage equality lawsuits. These lawsuits resulted in rulings by provincial courts of Ontario, Quebec, and British Columbia that the Canadian Charter of Rights required marriage equality.⁵⁸ The national Parliament enacted legislation establishing such equality in 2005.⁵⁹ A similar judicial declaration, followed by legislative codification, occurred in South Africa.⁶⁰

LGBT movement lawyers in California were watching these developments very closely. Unlike GLAD and the lawyers in New England, the California LGBT movement lawyers had opted against a constitutional litigation strategy. They avoided a constitutional litigation strategy because the California Constitution was easy to amend by a majority vote of the electorate – hence any decision by the California Supreme Court could be quickly overridden – and because the U.S. Supreme Court was still considered unlikely to endorse a federal constitutional claim.⁶¹ These lawyers secured a significant advance in 2003 when the California Legislature expanded the state domestic partnership law to vest almost all the same rights and duties of marriage. The movement lawyers’ “avoid-litigation” strategy changed, however, after *Goodridge* was decided in May 2003 and after San Francisco Mayor Gavin Newsom issued hundreds of marriage licenses to lesbian and gay couples in February 2004.⁶² In the course of events following Newsom’s game-changing fait accompli, San Francisco and LGBT litigation groups filed state constitutional objections to the state marriage exclusion.⁶³

In June 2008 the California Supreme Court issued its landmark opinion in the *Marriage Cases*.⁶⁴ Not only did the court invalidate the state’s discrimination against lesbian and gay couples, but Chief Justice Ronald

⁵⁷ *M. v. H.*, [1999] 2 S.C.R. 3 (Can.).

⁵⁸ See *Hendricks v. Quebec (Att’y Gen.)* (2004), 238 D.L.R. 4th 577 (Can. Que. C.A.); *EGALE Canada, Inc. v. Canada (Att’y Gen.)* (2003), 13 B.C.L.R. 4th 1 (Can. B.C. C.A.); *Halpern v. Canada (Att’y Gen.)* (2003), 65 O.R. 3d 161 (Can. Ont. C.A.).

⁵⁹ Civil Marriage Act, S.C. 2005, c. 33 (Can.). For an account of the constitutional litigation and the legislative response, see Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits*, 49 MCGILL L.J. 1143 (2004).

⁶⁰ *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) (S. Afr.); see also Civil Union Act 17 of 2006 (S. Afr.).

⁶¹ Cummings & NeJaime, *supra* note 13, at 1251-74 (providing a detailed account of the California LGBT movement lawyers’ legislation-focused strategy, up through 2004).

⁶² *Id.* at 1274-80 (recounting movement lawyers’ reception of Newsom’s decision); see *Lockyer v. City & Cnty. of S.F.*, 95 P.3d 459 (Cal. 2004) (invalidating Mayor Newsom’s marriage licenses).

⁶³ Cummings & NeJaime, *supra* note 13, at 1281-93 (detailing the origins of the California marriage equality litigation and its path to victory at the California Supreme Court).

⁶⁴ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

George's opinion for the divided court also ruled that sexual orientation is a suspect classification requiring strict scrutiny. Chief Justice George also applied the caselaw supporting a fundamental right to marry to support the plaintiffs' claims under the state constitution.⁶⁵ The year following the *Marriage Cases* was a breakthrough period for marriage equality. Applying heightened but not strict scrutiny, the highest courts in Connecticut and Iowa also struck down marriage discrimination laws under their state constitutions,⁶⁶ while the Vermont, New Hampshire, and Maine legislatures enacted marriage equality laws.⁶⁷ The Council of the District of Columbia enacted a marriage equality law in 2009, a measure that provoked criticism in Congress but was left alone to take effect in 2010.⁶⁸ In 2011 the New York Legislature enacted a marriage equality statute, with bipartisan support for the measure.⁶⁹

As with previous victories, there was political pushback. Most famously, in November 2008 the California voters overrode the state supreme court by adopting Proposition 8 to amend the California Constitution to limit marriage to one man, one woman.⁷⁰ Eventually, Proposition 8 triggered the ultimate marriage equality litigation: a lawsuit challenging the revised California Constitution as inconsistent with the Equal Protection Clause of the U.S. Constitution. After trial, District Judge Vaughn Walker issued a sweeping opinion striking down Proposition 8, and which, if followed to its logical conclusion, would require the invalidation of almost any other form of marriage discrimination denying lesbian and gay couples this fundamental right to marry based upon a suspect classification.⁷¹ The Ninth Circuit affirmed Judge Walker on very narrow grounds,⁷² and the supporters of Proposition 8

⁶⁵ *Id.* at 444-46.

⁶⁶ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

⁶⁷ Eskridge, *Foreword: The Marriage Cases*, *supra* note 16, at 1786 & n.9.

⁶⁸ Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. Reg. 1833 (Mar. 5, 2010) (codified at D.C. CODE § 46-401 (Supp. 2012)).

⁶⁹ Marriage Equality Act, 2011 N.Y. Sess. Laws ch. 95 (McKinney) (codified at N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2013)).

⁷⁰ For accounts of the Proposition 8 campaign, see Eskridge, *Foreword: The Marriage Cases*, *supra* note 16, at 1825-33; Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357 (2009); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 1004-11 (2011).

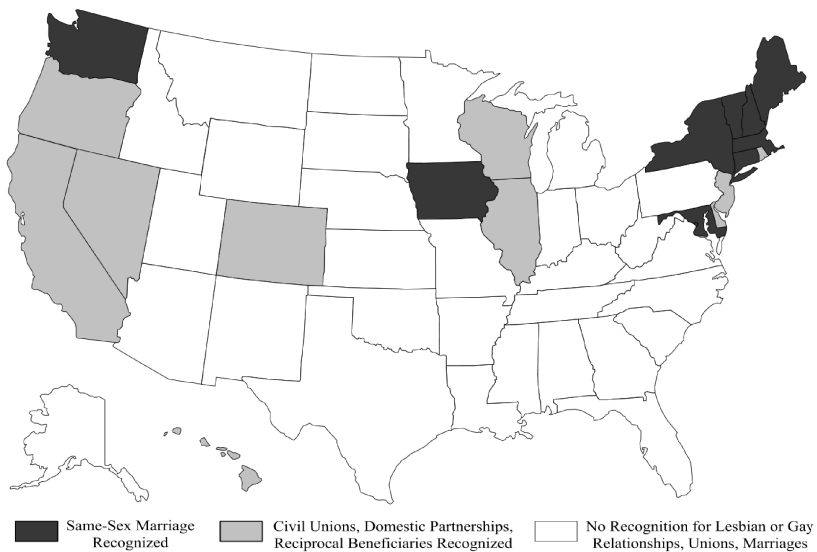
⁷¹ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *reh'g en banc denied*, 681 F.3d 1065 (9th Cir. 2012), *cert. granted sub nom., Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (mem.).

⁷² *Perry*, 671 F.3d 1052, *reh'g en banc denied*, 681 F.3d 1065 (9th Cir. 2012). The Ninth Circuit framed the issue before it quite narrowly, refusing to address whether a state *must* allow same-sex couples to marry. *Id.* at 1064 ("We need not and do not answer the broader question in this case, however, because California had already extended to committed same-sex couples [the right to marry], and Proposition 8's only effect was to take away that

sought review from the U.S. Supreme Court. The Supreme Court granted certiorari on December 7, 2012.⁷³

In 2009 Maine voters followed the lead of California voters and turned back marriage equality through a state initiative.⁷⁴ But in 2012 Maine voters revoked their earlier decision and supported a marriage equality initiative.⁷⁵ In the same election, the voters of Maryland and Washington agreed with their legislatures and endorsed earlier marriage equality legislation, which took effect in 2013.⁷⁶ The map below provides a portrait of how far marriage equality, or something close to it, has come today.

Map 3. State Recognition of Lesbian and Gay Unions - 2013



important and legally significant designation [This] allows us to address the amendment's constitutionality on narrow grounds.”).

⁷³ *Perry*, 133 S. Ct. 786. In addition to granting certiorari on the question presented, the Court also instructed the parties to brief the issue of whether the petitioners have Article III standing. *Id.*

⁷⁴ Michael A. Lindenberger, *Gay-Marriage Activists Look Ahead After Maine Defeat*, TIME (Nov. 4, 2009), <http://www.time.com/time/nation/article/0,8599,1934432,00.html>.

⁷⁵ Eric Eckholm, *In Maine and Maryland, Victories at the Ballot Box for Same-Sex Marriage*, N.Y. TIMES, Nov. 7, 2012, at 14.

⁷⁶ *Id.*; *Same-Sex Marriage Rivals Concede in Washington*, N.Y. TIMES, Nov. 9, 2012, at A17.

II. BACKLASH POLITICS

As previous scholarship affirms, every significant advance in marriage equality for lesbian and gay couples came over intense and widespread opposition; even the Vermont civil unions law faced tremendous opposition both before and after its enactment. The three major litigation victories for marriage equality – Hawaii in 1993, Massachusetts between 2003 and 2004, and California in 2008 – not only generated local political reaction but also responses nationwide. Based upon this evidence, Professor Rosenberg and others argue that marriage equality through constitutional litigation is subject to a powerful and typically overpowering politics of backlash.

There is much to be said for and against the Rosenberg thesis, but at the very least supporters and critics need to have a definition of backlash politics, and it would also be useful to have a theory of such politics. In this Part, I set forth a definition and theory that distinguish backlash politics from normal politics. I then apply this theory and definition to analyze the three periods laid out in Part I and to suggest the Supreme Court's proper role in the next decade.

Consider an obvious but neglected point. For the last generation, the local and national debates regarding marriage equality have involved three different kinds of politics. The politics and the debates are related, to be sure, but they create very different dynamics. The different kinds of politics can be distinguished based upon the central motivating factors for participants, the intensity they invest in the issue, and the types of arguments that are dominant.

The first kind of politics involves discussion of what is the best *policy* and how best to implement that policy. Such *normal politics* focuses on the consequences of different legal rules or regimes for different groups in society. Would marriage equality meet the needs of lesbian and gay couples? Their children? Should straight married couples be concerned that gay marriage will weaken the institution of marriage or discourage their children from entering into marital relationships? The ultimate question in normal politics is this: would overall social utility be advanced by offering lesbian and gay couples the same marriage rights long offered to straight couples? The consequentialist arguments that are the focus of normal politics typically, albeit not always, have these features: (1) participants seem motivated by tangible consequences of various policy options and (2) reveal medium-to-low emotional intensity as well as (3) relatively greater focus on facts and falsifiable predictions.

A second kind of political engagement is *identity politics*. The debate the United States has been having over marriage equality is what I would call a small “c” *constitutional* debate.⁷⁷ The constitutive issues in these debates

⁷⁷ By small “c” constitutional, I mean to distinguish this kind of public debate from the large “C” Constitutional debates about the meaning of the U.S. Constitution. See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 1-24 (2010); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (advancing the notion of our “thin” Constitution, the nontechnical one that engages the people of the United States).

involve the expression of different personal or community identities, such as traditional family values versus families we choose. Would recognition of lesbian and gay marriages finally create a polity where lesbian and gay citizens are given the equal and dignified treatment they deserve? Or would it instead create a polity that gives equal value to relationships – gay marriages – that are deeply inferior to the straight marriages long recognized and encouraged by the state? Does marriage equality devalue existing straight marriages? Or does it fulfill the inclusive potential of the evolving institution of civil marriage? The arguments that are the focus of such a small “c” constitutional debate typically, albeit not always, have these features: (1) participants seem motivated by intangible or symbolic consequences of various policy options and (2) reveal relatively higher emotional intensity as well as (3) relatively less focus on facts and falsifiable predictions.

The stakes tend to be higher in the small “c” constitutional debates than they are in the policy debates.⁷⁸ This is in part because the constitutional issues are more “personal” to voters and stakeholders than most policy issues tend to be. Because they are more personal, they tend to generate more intense emotions and to generate more spill-over effects beyond the particular issue in question, forming linkages to a broader normative vision for what government ought to be doing, or not doing, more generally.⁷⁹

The stakes are even higher in a third kind of political engagement, the *politics of disgust*.⁸⁰ Such a politics is triggered by primordial issues that are deeply tied to people’s feelings of disgust and contagion. For many Americans, opposition to gay marriage is fueled by personal revulsion against homosexuality and disgust for homosexual acts, and not merely by policy- or identity-based reasons. The politics of disgust is the most intense kind of politics, and the combustible feelings tied to it are sources of potential violence. Because disgust is typically an emotion that informs people’s identities, it also motivates people’s views about small “c” constitutional

⁷⁸ To be sure, some policy debates have high stakes; anything that involves redistribution of property, income, or assets tends to raise the stakes for Americans. But policy debates involving redistribution entail even higher stakes if the redistribution is accompanied by a constitutional redefinition of the polity’s expressive identity.

⁷⁹ There is a similarity here between these personal, identity-based issues and “primordial” issues that political scientists warn can be toxic for the democratic process because their “stakes” are too high. *E.g.*, ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* 36-37 (1991) (“[G]overnments must be able to govern, and this implies that they must be able to prevent some demands from reaching the public sphere and certainly that they cannot tolerate all important groups having veto power over public policy.”); *see also* STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 202-08, 222-27 (1995) (advocating “gag rules” to lower the stakes of primordial conversations in the context of church-state entanglement).

⁸⁰ William N. Eskridge Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 *FLA. L. REV.* 1011 (2005).

issues. The politics of disgust is a form of identity politics that is particularly intense, and potentially more violent.

Of course, any given issue can generate normal politics among one group of citizens, identity politics among another group, and a politics of disgust among yet another. Marriage equality has that feature, and some Americans toggle back and forth among the three kinds of politics. Thus, individuals may make relatively calm, fact-based arguments in favor of their preferred policy if they are writing letters to newspaper editors, while making more personal and emotional arguments if they are discussing the issue in church or at a gay rights center. An important contrast is the role of names and symbols. For policy discussions, a name usually makes little difference, while in constitutional debates a name can make all the difference. Thus, from a policy perspective, there may not be a documented difference between “marriage” and “civil unions,” that is, a new institution with identical legal rights and duties as marriage, but from a constitutional perspective the difference in nomenclature can be critically significant.⁸¹ Small “c” constitutional politics are often symbolic or expressive politics, where the battle is over what message the government should be sending the people.⁸²

Backlash politics, as I am using the term, starts with a widespread perception that an issue is, for many and perhaps most voters, one of small “c” constitutional significance and is not just a policy issue. The politics of backlash is mobilized if the government takes a position that is an affront to the issue-based identities of a significant minority, or even more so a majority, of the population.⁸³ The politics is even more intense if a significant number of citizens find the government favoring minorities they deem to be disgusting and impure. The extent and success of the countermobilization also depends in part upon whether political entrepreneurs – political parties, important officials, and private associations – seize upon the issue and devise smart legal counterattacks. The extent and success of the countermobilization further

⁸¹ See *In re Marriage Cases*, 183 P.3d 384, 434-35 (Cal. 2008) (discussing the dignity effects of providing lesbian and gay couples with “domestic partnerships” and straight couples with “marriage”).

⁸² Compare Richard H. Pildes & Richard G. Niemi, *Expressive Harms*, “Bizarre Districts,” and *Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993) (arguing that an expressive theory of law justifies judicial concern over “bizarrely” shaped electoral districts), with Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000) (providing a thoughtful but critical examination of expressive theories of law).

⁸³ If a small “c” constitutional issue intensely but *evenly* divides the polity, the conventional wisdom among political scientists, with whom I agree, is that it is politically disastrous for the government to declare a final winner, and final loser, on the divisive issue. The leading citation is ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 93-99 (1956) (arguing that the political system cannot produce a satisfactory result where two large factions vehemently disagree over an issue that both rank highly in their value systems).

depends upon whether the group advantaged by the government position is able to mount a successful counter-backlash.

As Professor Rosenberg and other theorists maintain, recent successes achieved by the marriage equality movement have generated a significant backlash politics.⁸⁴ It is important, however, to qualify the assertions of backlash theorists in ways that they have neglected. To begin with, the backlash politics following marriage equality advances are not as pervasive or intense as these theorists have posited. Instead, there has been a highly dynamic backlash politics, with the key variable being public attitudes toward sexual and gender minorities. Are most citizens disgusted by the minority that is now being treated equally, or less unequally? Do most citizens believe that they have been disrespected by the state and that their identities are threatened when the minority is treated the same (or almost the same)? Or do most citizens feel sympathy for the minority, even as many feel that change should come about slowly?

Thus, the early politics of marriage equality was dominated by disgust-based backlash, as “homosexuals” were considered strange and disgusting characters by most Americans. This perception fueled fear and intense dislike, leading to a highly charged symbolic reaction such as the passage of DOMA and other measures. As LGBT persons and families became better known to a larger portion of the population, there has been more of a balance between the politics of backlash and normal policy-oriented politics. In jurisdictions where gay people and families are accepted on truly equal terms with straight people and families, the politics of backlash appears only at the margins.

A second qualification that must be made to backlash theories is that they have been too one-sided.⁸⁵ That is, the backlash politics has had some tangibly pro-gay consequences as well as anti-gay ones. For example, when backlash politics produces public policy through statutes and judicial decisions, the public justifications are often outrageously poor. Bootless reasoning and scapegoating may get the job done in the short term, but they can be counterproductive to opponents of equality in the longer term. Thus, political entrepreneurs such as Speaker Newt Gingrich and President Bill Clinton jumped on the DOMA bandwagon, accepting the policy argument that gay marriage would undermine the institution and joining a symbolic politics whereby gay people were scapegoated for the decline of marriage in this country. The policy argument has been exposed as scandalously contrary to both fact and reason,⁸⁶ and the scapegoating argument has galvanized

⁸⁴ See, e.g., ROSENBERG, *supra* note 5, at 361-82, 415-19.

⁸⁵ This concern is rapidly abating, as some voices for backlash theory have recently taken back many of their concerns. See *infra* note 136.

⁸⁶ E.g., ESKRIDGE & SPEDALE, *supra* note 16, at 169-202 (analyzing carefully and proving as false the argument that marriage equality would undermine marriage); Laura Langbein & Mark A. Yost Jr., *Same-Sex Marriage and Negative Externalities*, 90 SOC. SCI.

supporters of marriage equality and discredited opponents among young people, who are dismayed by canards such as this.

Third, and most tentatively, there is reason to doubt that equality advances through courts always generate a significantly more virulent form of backlash politics. The theory of backlash politics advanced in this Article suggests that there will be negative reactions to any advance in minority rights, regardless of which institution makes the equality-advancing move. Thus, the person who is personally disgusted by “homosexuals” or whose religious identity is tied to traditional marriage as the only state-sanctioned union, will be just as outraged by marriage equality delivered by a legislature as the same policy announced by a court. While opponents of marriage equality give some emphasis to undemocratic decisionmaking when judges impose marriage equality, there is still no hard evidence that the level of affront and outrage is always higher simply because a court rather than a legislature recognizes same-sex marriages.

This is not to say that institutional forum does not make a difference. It does, but not primarily for the reasons advanced by backlash theorists. The main difference institutional forum makes involves timing of the public debate. Because there are so many vetogates blocking controversial measures, legislatures tend to advance marriage equality in smaller steps and only after most voters have come to support or acquiesce in it; courts, by contrast, find it harder to avoid controversial issues and are more prone to jump the gun when such issues are presented. That risk, however, has been greatly ameliorated by the experience the nation has had with marriage equality. As early as the Vermont and Massachusetts marriage litigations, movement lawyers and judges have understood that marriage equality cannot arrive too far ahead of public opinion supporting or acquiescing in marriage equality. Also, in both states, legislatures helped prepare the way for marriage equality by enacting anti-discrimination laws that made it safer for LGBT persons to be out of the closet and openly engaged in a same-sex union, partnership, or marriage. Ironically, for properly “managed” marriage equality campaigns, courts have typically been more in tune with public opinion than legislatures have been (a point suggested to me by Professor David Fontana).

A. *The Politics of Disgust: Aggressive Backlash Triumphant, 1993-1996*

The justices on the Hawaii Supreme Court who decided that the state’s exclusion of same-sex couples from civil marriage violated the state constitution were simply applying strict legal logic as well as the constitutional policy of the state’s equal rights amendment, which required strict judicial scrutiny of any kind of state-imposed gender roles. But the prospect of recognizing lesbian and gay partnerships as “marriages” appalled most Americans, and was swiftly rebuffed even in tolerant Hawaii. The politics in Hawaii was an amalgam of normal, identity, and disgust politics. Thus, *Baehr*

Q. 292 (2009) (using empirical analysis to demonstrate that marriage equality has no negative effects on marriage as an institution).

motivated the Hawaii Legislature to pass, and the voters to ratify, a constitutional amendment allowing the legislature to limit marriage to one man, one woman. But it also motivated the legislature to create, for the first time in American history, an institution for recognition of lesbian and gay families, namely, the reciprocal beneficiaries law adopted as part of the 1997 compromise that placed the marriage amendment on the ballot for the voters.⁸⁷

The backlash outside of Hawaii was an impressive example of the politics of disgust, as well as an intense identity politics.⁸⁸ If Hawaii had ever started issuing marriage licenses, choice of law rules allowed other states not to recognize those marriages in their jurisdictions.⁸⁹ But a large number of Americans were emotionally upset that disgusting “homosexuals” would be given marriage rights or that “traditional marriage” would be sacrificed. Most of these people were also alarmed at contagion: the possibility that impure “homosexual” couples would get married in Hawaii and then travel to their jurisdiction and establish a beachhead for the dreaded “homosexual agenda.” The power of this politics of disgust and identity was revealed by the actions of many states to head off marriage recognition even without final action by Hawaii or any other state. Thus, between 1993 and 2004, thirty-seven states passed statutes – or, in three cases, constitutional amendments – defining marriage as limited to one man and one woman, banned recognition of any same-sex marriage performed in another state, or, typically, did both.⁹⁰ Such laws were classically expressive, reaffirming the electorate’s commitment to traditional marriage and family values, and were adopted with virtually no public debate or organized opposition.

The sweeping nature of state repudiation of *Baehr*, even before it could have conceivably affected family law in other states, reflected not only the exceedingly lopsided opposition to gay marriage,⁹¹ but also the intense and

⁸⁷ 1997 Haw. Sess. Laws 383, *discussed in* ESKRIDGE, *EQUALITY PRACTICE*, *supra* note 16, at 23-25.

⁸⁸ ROSENBERG, *supra* note 5, at 364-65.

⁸⁹ ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 94-126 (2002).

⁹⁰ Nonrecognition statutes were passed in 1995 by North Carolina and Utah; in 1996 by Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Louisiana, Michigan, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Tennessee; in 1997 by Arkansas, Indiana, Maine, Minnesota, Mississippi, Missouri, Montana, North Dakota, and Virginia; in 1998 by Alabama, Iowa, Kentucky, and Washington; and in 2000 by California, Colorado, Texas, and West Virginia. *See In Your State*, *supra* note 53; *see also* ESKRIDGE, *EQUALITY PRACTICE*, *supra* note 16, at 28 n.*. Nonrecognition constitutional amendments were adopted in Alaska in 1998, in Nevada in 2000, and in Nebraska in 2002. *See* Joseph F. Morrissey, Lochner, Lawrence, and Liberty, 27 GA. ST. U. L. REV. 609, 668-69 (2011) (listing all state same-sex-marriage-related statutes and constitutional amendments).

⁹¹ One pre-*Baehr* poll from 1988 pegged support for same-sex marriage at twelve percent of Americans, with seventy-three percent opposed, most of them strongly so. *See* Schacter, *supra* note 11, at 1193.

deeply held views that many people harbored about this issue, based upon feelings of disgust and upon one's identity as a religious person committed to traditional marriage. Importantly, the swift action by so many states reflected political entrepreneurship by the Republican Party, which deployed the issue as a wedge between the Democratic Party and its traditional Roman Catholic and Southern Baptist constituents.⁹² The importance of GOP sponsorship of the anti-gay-marriage stance was revealed most dramatically at the federal level, in the presidential election of 1996.

Republicans had won significant majorities in both chambers of Congress in 1994, and the intense popular disagreement with *Baehr* inspired the GOP congressional leadership to sponsor a federal response that would attract anti-gay voters to its candidates and would put President Clinton and his party in a tough spot.⁹³ Unfortunately for both gay people and Republicans, President Clinton did not hesitate to turn against the LGBT voters who had provided most of his margin of victory in 1992.⁹⁴ With his endorsement, most of the Democrats in Congress voted with virtually all of the Republicans to pass the Defense of Marriage Act (DOMA).⁹⁵ DOMA authorizes state laws refusing to recognize out-of-state gay marriages⁹⁶ and provides that every federal statute and regulation involving marriage or spousehood shall never be construed to include gay marriages.⁹⁷

DOMA was a symbolic, backlash statute and had little connection to federal policy: (1) there were no gay marriages to head off when the law was adopted, nor was there a serious prospect of any such law; (2) the authorization for state nonrecognition laws was completely unnecessary, as normal choice of law precepts guaranteed that states opposed to gay marriage would not have to recognize such marriages entered into in sister states; and (3) the exclusion of same-sex marriages from more than 1100 federal statutory and regulatory provisions was tremendously overbroad and reflected virtually no serious statute-by-statute policy analysis. For example, dozens of the regulations affected by DOMA are those heading off conflicts of interest by federal officials: if one's spouse has an interest in a controversy, the officeholder is

⁹² See *id.* at 1205-07 (emphasizing the importance of GOP entrepreneurship in creating the giant backlash against marriage equality after *Baehr*).

⁹³ See Editorial, *Unfinished Business: The Defense of Marriage Act*, N.Y. TIMES (July 2, 2011), http://www.nytimes.com/2011/07/03/opinion/sunday/03sun1.html?_r=0.

⁹⁴ President Clinton received forty-three percent of the vote, with a margin of victory against Former President H.W. Bush of approximately six percent. FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 92: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 9 (1993), available at <http://www.fec.gov/pubrec/fe1992/federaelections92.pdf>.

⁹⁵ Pub. L. No. 10-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)). See generally KOPPELMAN, *supra* note 89 (describing, analyzing, and critiquing DOMA).

⁹⁶ 28 U.S.C. § 1738C.

⁹⁷ 1 U.S.C. § 7.

required to recuse herself from taking part in a decision. By excluding lesbian and gay spouses from these recusal requirements, DOMA unwittingly undermines good government.⁹⁸ The legislative debates surrounding DOMA were dominated by the politics of disgust, where legislators expressed hatred or disapproval of disgusting “homosexuals,” but also included a great deal of discussion grounded in identity politics and even normal politics.

Professor Jane Schacter joins Professor Rosenberg in maintaining that the power of the anti-marriage backlash following *Baehr* reflected popular outrage against “judicial activism,”⁹⁹ but the evidence suggests that concern with judicial activism was, at best, a secondary motivation for DOMA, the most sweeping anti-gay measure in American history. The congressional response was focused entirely on the possibility that Hawaii, or some other state, might soon recognize same-sex marriages, and not on the precise mechanism for such recognition. There is every reason to believe that a marriage recognition law passed by the Hawaii Legislature would have had similar consequences in Washington D.C., as the Hawaii Supreme Court’s decision in *Baehr*.¹⁰⁰ In other words, political rhetoric notwithstanding, backlash against a *court* decision people do not like is not necessarily different than backlash against a *political* decision people do not like. I believe this is especially true for decisions that trigger a disgust-centered backlash.

This point can, cautiously, be generalized, based upon a highly informative experimental analysis by Professors David Fontana and Donald Braman.¹⁰¹ They found that the institutional decisionmaker – court versus legislature – had some, but not determinative, effect on people’s reactions to a governmental decision on a controversial issue they cared about. Specifically, the authors found that a court decision supporting, for example, marriage equality would not change people’s minds about how they felt on this issue but would mobilize both supporters and opponents of marriage equality, with the latter mobilized somewhat more than the former.¹⁰² I would qualify the Fontana and Braman thesis in this way: how stakes-raising and polarizing the judicial decision would be depends in large part on how intensely and how evenly divided the body politic was before the decision. When most people are invested in the symbolism of the status quo, there will be much more of a backlash, as there was in Hawaii in 1993, than when people feel less intensely and are more evenly divided, as they were in California in 2008.

⁹⁸ See *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 13 n.8 (1st Cir. 2012).

⁹⁹ Schacter, *supra* note 11, at 1208-12.

¹⁰⁰ Indeed, a statute actually adopted by the legislature would have set off more fire alarms among traditionalists and partisan entrepreneurs, as it would have represented a final decision by state officials rather than the preliminary decision handed down in *Baehr*.

¹⁰¹ David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731 (2012).

¹⁰² *Id.* at 766-67.

B. *Identity Politics: Backlash Subsides, 2000-2004*

The Fontana and Braman thesis, as revised above, provides an excellent way to understand the marriage debate in Vermont from 1999 to 2000. Recall that the Vermont Supreme Court insisted upon equal legal treatment but also held back from issuing a final ruling on the issue of marriage equality. The Vermont Legislature took up the issue and made the final decision in favor of civil unions, and the backlash in that state was mainly against the legislature and not against the court. But the anti-marriage equality backlash was not nearly as powerful as had been the case in Hawaii after *Baehr*. There are probably several reasons for this: (1) *Baehr* had already produced the primary backlash nationwide; (2) Vermonters in 2000 were more gay-accepting and less gay-disgusted than the national population and perhaps even the Hawaiian voters had been in 1993-1996;¹⁰³ and, critically (3) the compromise did not go so far as marriage equality. The analysis in this Article provides a framework for understanding why legalizing civil unions was a brilliant strategic move: it created a wedge between the politics of disgust and identity politics. Vermonters motivated primarily by disgust were alarmed by any advance for despised “homosexuals,” but Vermonters motivated by identity politics were not nearly as alarmed by civil unions as they would have been by marriage equality. Because gay-skeptical Vermonters fell more in the latter category, the debate was less acrimonious and did not divide the state for long.

Vermont was a turning point in the politics of backlash against the marriage equality movement, and one reason was institutional: by sending the issue to a legislative process that the court knew would engage in a serious debate,¹⁰⁴ the Vermont Supreme Court’s action engaged the people of Vermont in a far-reaching, small “c” constitutional debate about what kind of society and values the people wanted. By requiring a public debate in a small state where people would be able to engage the legislature directly, the supreme court put pressure on opponents to deemphasize the politics of disgust that had dominated congressional debate in 1996 and to emphasize policy- and identity-based arguments. Indeed, the legislative debates regarding the civil unions law were among the most normatively engaged debates I have read, with opponents as well as supporters of the new institution making heartfelt, and usually quite respectful, constitutional claims about the society they wanted for their beloved state.¹⁰⁵ Consistent with my model of backlash politics, the opponents of the civil unions statute did not give up. Supported by a Republican Party capitalizing on a potential wedge issue in a state that was trending toward the

¹⁰³ David Goodman, *A More Civil Union*, MOTHER JONES, <http://www.motherjones.com/politics/2000/07/more-civil-union> (last visited Feb. 16, 2013).

¹⁰⁴ Chief Justice Amestoy, the author of the Vermont Supreme Court’s opinion in *Baker v. State*, was the state attorney general before being named to the court and so was intimately familiar with the legislature.

¹⁰⁵ ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 57-80 (analyzing in detail the legislative debates leading up to the Vermont civil unions law).

Democrats, the “Take Back Vermont” movement sought removal of all officials responsible for the controversial law.

Initially, Take Back Vermont had a fair degree of success, as five Republicans who supported the law were defeated in the GOP primary, and the party nominated Take Back Vermont supporter Ruth Dwyer for governor.¹⁰⁶ It is remarkable, however, that the backlash did not have as much bite in November 2000. The Republicans did take over the Vermont House of Representatives but not the Senate, which remained strongly pro-civil union. Governor Howard Dean, a strong civil unions supporter, was reelected, with Dwyer receiving fewer votes in 2000 than she had received when she ran against Dean in 1998.¹⁰⁷ The biggest electoral winner, ironically, was Senator James Jeffords, a pro-civil unions Republican who won an overwhelming reelection and, in May 2001, left the Republican Party, in part because of its intolerant stances on social issues.¹⁰⁸

In retrospect, it appears that the local backlash against the civil unions law hit its high point in the middle of 2000 and receded after that, substantially replaced by normal politics in a remarkably short period of time. When Governor Dean retired in 2002 and was replaced by a Republican, the new governor, James Douglas, announced that the civil unions law should remain in place. In 2009 the Vermont Legislature passed a marriage equality law over Governor Douglas’s veto.¹⁰⁹ Given the relatively placid reaction to the new law, it is likely that most Vermonters either shared the constitutional vision of marriage equality or, if opposed, did not view lesbian and gay marriages as deeply threatening to their own identities; disgust against gay people had virtually disappeared from public discourse. The reason for the change in public opinion is that the thousands of civil unions had no terrible effects on the state, and more traditionalist Vermonters softened their views when they met, socialized, and worked with openly lesbian or gay colleagues and their spouses.

Like Vermont in 2000, Massachusetts in 2003 was a gay-tolerant state when the state supreme court interpreted the state constitution to require marriage equality. Yet there was a backlash politics at least as strong as that felt by Vermont supporters. As one of the participating justices, Roderick Ireland –

¹⁰⁶ See Elizabeth Mehren, *Voters Oust 5 Who Backed Vt. Civil Union Law*, L.A. TIMES (Sept. 14, 2000), <http://articles.latimes.com/2000/sep/14/news/mn-20942>.

¹⁰⁷ ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 81-82. Dean earned 52% of the vote, Dwyer 38%, and 10% went to a third-party progressive candidate who supported marriage equality, not just civil unions. *Id.* at 81.

¹⁰⁸ In a further irony, Jeffords’ departure from the GOP handed the U.S. Senate over to the Democrats, who ran the Senate between May 2001 and January 2003. See Dan Morgan, *Sen. Jeffords Says He Plans to Step Down*, WASH. POST (Apr. 21, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A4481-2005Apr20.html>.

¹⁰⁹ An Act Relating to Civil Marriage, 2009 Vt. Acts & Resolves No. 3; see also Katharine Q. Seelve, *Vermont Lawmakers Consider Same-Sex Marriage Bill*, N.Y. TIMES (Mar. 17, 2009), <http://www.nytimes.com/2009/03/18/us/18vermont.html>.

now the Chief Justice – recalls, traditionalists took *Goodridge* as a personal affront to themselves, their religious faith, and the society they thought they lived in.¹¹⁰ A large minority, perhaps even a majority, of Massachusetts citizens felt intensely and personally that the decision was wrong for them and for the state. Moreover, political entrepreneurs seized upon the issue for strategic purposes. Specifically, Massachusetts Governor Mitt Romney positioned himself as the leader of the anti-marriage equality countermovement and supported various constitutional amendments to override the court. With an eye on his planned presidential bid in 2008, gay marriage was precisely the Etch A Sketch pivot that Governor Romney needed to reposition himself as a “severe conservative” to secure the GOP nomination for the nation’s highest office.¹¹¹ Pursuing the same strategy, the governor also revived a 1913 statute barring Massachusetts from issuing marriage licenses to out-of-state couples whose home states would not recognize their unions.¹¹²

Under my theory, Governor Romney nonetheless played an important role in lowering the stakes of politics surrounding the gay marriage issue. It is critically important that he led the opposition to marriage equality but – as far as I can tell – avoided the rhetoric of disgust; his opposition rested upon a moderate version of identity politics and normal politics. Also important was the fact that opponents of marriage equality felt they had a high-ranking champion who pressed their interests and was able to ameliorate the impact of the decision through his invocation of the 1913 law.

As was the case after *Baehr*, the reaction to *Goodridge* was more intense in other states and at the national level, where the politics of disgust still retained a constituency and gay people were less acceptable. The Republican Party at both the national and state level sought to consolidate its strong electoral position with appeals to traditionalist opponents of marriage equality outside Massachusetts. Thus, the Federal Marriage Amendment, which had languished on the back benches of the House of Representatives in 2002 and 2003,

¹¹⁰ Roderick L. Ireland, *In Goodridge’s Wake: Reflections on the Political, Public, and Personal Repercussions of the Massachusetts Same-Sex Marriage Cases*, 85 N.Y.U. L. REV. 1417, 1417 (2010) (describing the “extreme public backlash that followed the same-sex marriage cases . . . through the personal lens of his own experience dealing with the extreme reaction to *Goodridge*”).

¹¹¹ Etch A Sketch is a toy that allows the user to create an image with magnetic filings on a screen; by shaking the toy, the user can eliminate the old image and then create a new one. In 2012, one of the governor’s campaign advisers suggested, in a rare moment of political candor, that once Governor Romney secured the GOP presidential nomination by presenting himself as a “severe conservative,” he could start over as a moderate for the general election, just like the Etch A Sketch toy. Michael D. Shear, *For Romney’s Trusted Adviser, ‘Etch A Sketch’ Comment is a Rare Misstep*, N.Y. TIMES (Mar. 21, 2012), http://www.nytimes.com/2012/03/22/us/politics/etch-a-sketch-remark-a-rare-misstep-for-romney-adviser.html?_r=0.

¹¹² See *Cote-Whitacre v. Dep’t of Pub. Health*, 844 N.E.2d 623, 651-52 (Mass. 2006) (upholding the 1913 law but interpreting it narrowly).

suddenly found “soaring” support after *Goodridge*.¹¹³ President George W. Bush endorsed it in his State of the Union Address in January 2004, and GOP Representatives and Senators flocked to co-sponsor the measure.¹¹⁴ Moreover, local Republicans across the nation engineered almost a dozen anti-marriage constitutional initiatives on state ballots in 2004 as a direct response to *Goodridge* and *Baker*, for those decisions were tangible evidence that state supreme courts could impose gay marriage or civil unions upon a political system that would not have acted otherwise. The voters endorsed the initiatives in November 2004, almost all of them by huge margins.¹¹⁵

While backlash politics was mighty powerful in 2004, it was not as powerful as the main theorists have suggested and much less powerful than the backlash after *Baehr*. The reason for the less severe backlash was a marked decline in the politics of disgust. As increasing numbers of Americans were becoming familiar with committed lesbian and gay couples, even the most vocal opponents of gay marriage, Governor Romney and President Bush, distanced their opposition from the politics of disgust and identity and tried to shroud their advocacy as purely a matter of normal politics. Additionally, identity politics opposing gay marriage lost some of its edge once Massachusetts started handing out marriage licenses to lesbian and gay couples in May 2004, with no reported ill effects and with every heterosexual marriage intact. Ann and Mitt Romney had likely never been happier and surely suffered no personal problems because lesbian and gay couples were raising children in marital relationships such as theirs.

Accordingly, backlash alarmists, who had plenty of material for their case in the 1990s, have had to stretch the evidence to find dramatic examples of political backlash after May 2004. For example, Professor Rosenberg ominously claims that presidential candidate John Kerry “might well” have lost Ohio, and with it the presidency, in his 2004 challenge to President George W. Bush because an anti-gay-marriage initiative on the Ohio ballot brought out so many unexpected Bush voters.¹¹⁶ Even by its own terms, to say that a result “might well” have hinged on a turnout variable is no argument that there was a significant backlash. There were, literally, hundreds of reasons Kerry “might well” have lost Ohio, including the fact that Kerry himself was from Massachusetts, whose candidates have throughout American history demonstrated a dismal record attracting votes in Ohio.¹¹⁷ More seriously,

¹¹³ Wardle, *supra* note 49, at 143 (stating that “support for the Federal Marriage Amendment soared” after *Goodridge* and the Supreme Court’s decision in *Lawrence*).

¹¹⁴ *Id.*

¹¹⁵ James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES (Nov. 4, 2004), <http://www.nytimes.com/2004/11/04/politics/campaign/04gay.html>.

¹¹⁶ ROSENBERG, *supra* note 5, at 382; *see also* KLARMAN, *supra* note 16, at 111 (arguing that “the outcome of the [2004] election quite possibly turned on gay marriage”).

¹¹⁷ Ohio has a virtually unbroken tradition of voting *against* Massachusetts-based candidates for President, starting with former Secretary of State and then-President John

political scientists think that Kerry's campaign foundered, not on the gay marriage issue, but on the highly effective, and grossly inaccurate, "Swiftboat Ads" created by wealthy GOP donors.¹¹⁸ Rosenberg seems to think that the existence of an anti-marriage initiative on the Ohio ballot in 2004 brought out enough new voters to sink Kerry in that state, but this argument rests upon unsupported speculation that has been specifically refuted by a rigorous analysis of the 2004 election data by MIT political scientists Stephen Ansolabehere and Charles Stewart III.¹¹⁹

Moreover, the fact remains that Vermont after 2000 and Massachusetts after 2004 turned back the politics of backlash; civil unions survived in Vermont, which later transformed them into marriages in 2009, and marriage equality survived in Massachusetts. When the Connecticut Supreme Court ruled that marriage equality was constitutionally required in 2008,¹²⁰ the politics of backlash was vastly more muted than it had been a few years before in neighboring Massachusetts, and the Connecticut Legislature codified the court's ruling by statute the following year.¹²¹

To be sure, gay marriage continued to be highly controversial in the four years between 2004 and 2008, with supporters still losing more court cases than they won. In 2006 and 2007, the highest courts in Maryland, New York, New Jersey, and Washington – all gay-friendly jurisdictions – rejected marriage equality claims under their state constitutions,¹²² while in 2008 and 2009 the highest courts in California, Connecticut, and Iowa accepted such

Quincy Adams, who lost Ohio to Senator Henry Clay in 1924 and to former Senator Andrew Jackson in 1928, later continuing with Senator John Kennedy losing Ohio to Vice President Richard Nixon in 1960, with Governor Michael Dukakis losing Ohio to Vice President George H.W. Bush in 1988, with Senator John Kerry losing Ohio to President George W. Bush in 2004, and recently triggering a concession speech from former Governor Mitt Romney, who lost Ohio to President Barack Obama in 2012. The only time in its history that Ohio voted for a Massachusetts-based presidential candidate was in 1924, when President and former Massachusetts Governor Calvin Coolidge won the state in his national landslide victory. See UNITED STATES PRESIDENTIAL ELECTION RESULTS, <http://usellectionatlas.org/RESULTS/> (last visited Jan. 18, 2013).

¹¹⁸ Kate Zernike, *Kerry Pressing Swift Boat Case Long After Loss*, N.Y. TIMES (May 28, 2006), http://www.nytimes.com/2006/05/28/washington/28kerry.html?pagewanted=all&_r=0.

¹¹⁹ Stephen Ansolabehere & Charles Stewart III, *Truth in Numbers: Moral Values and the Gay-Marriage Backlash Did Not Help Bush*, BOSTON REV., Feb.-Mar. 2005, at 40, 40.

¹²⁰ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008).

¹²¹ An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Acts No. 09-13 (Reg. Sess.).

¹²² *Conaway v. Deane*, 932 A.2d 571, 608 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196, 211 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006); *Anderson v. King's Cnty.*, 138 P.3d 963 (Wash. 2006).

claims.¹²³ The California Supreme Court's narrow four-to-three decision in the *Marriage Cases* was particularly significant, for the court overruled both legislative statutes as well as a popular initiative in 2000 entrenching marriage as limited to different-sex couples. Predictably, there was a political response, and the electorate overrode the court in November 2008 when they narrowly approved Proposition 8 by a 52%-to-48% vote, amending the California Constitution.¹²⁴

There are several important lessons to be learned from the Proposition 8 campaign. First, the campaign mobilized backlash politics, but at a much lower level of intensity than Vermont and Massachusetts had seen in 2000 and 2004, and than California itself had seen in previous anti-gay initiatives.¹²⁵ Indeed, in their public campaign, supporters of Proposition 8 departed from the gay-bashing, disgust-based politics of earlier initiatives and depicted gay people as nice neighbors and friends who had the option of entering into domestic partnerships, which the proponents implicitly supported.¹²⁶ Both supporters and opponents were engaged by identity-based small "c" constitutional energy, but the stakes were lower than before. The Proposition 8 campaign was generally overshadowed by the presidential race between Senator Barack Obama and Senator John McCain, both of whom said as little as possible about gay marriage and had voted against the Federal Marriage Amendment.¹²⁷ Ironically, the Proposition 8 campaign reflected the dynamics of backlash politics in the new millennium. Even opponents of gay marriage have renounced public appeals to the politics of disgust; identity politics is now the focus of opposition, with its intensity declining every year; and the normal-politics arguments against marriage equality are becoming vanishingly thin, as

¹²³ *In re Marriage Cases*, 183 P.3d 384, 400 (Cal. 2008); *Kerrigan*, 957 A.2d at 412; *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009).

¹²⁴ Randall C. Archibold & Abby Goodnough, *California Voters Ban Gay Marriage*, N.Y. TIMES (Nov. 5, 2008), <http://www.nytimes.com/2008/11/06/us/politics/06ballot.html>.

¹²⁵ Specifically, previous anti-gay initiatives in California had directly invoked lurid stereotypes of predatory, child-molesting "homosexuals" (the 1978 anti-gays-in-schools initiative) and of gay people as selfish and anti-family (the 2000 anti-marriage initiative), which were abandoned for a gentler campaign in 2008 that emphasized gay people as friends and neighbors who could manage quite well with domestic partnerships. See Eskridge, *Foreword: The Marriage Cases*, *supra* note 16, at 1825-34 (documenting the contrasts between the various anti-gay referenda).

¹²⁶ See ESKRIDGE & HUNTER, *supra* note 52, at 1123-38 (reprinting the ballot materials and a funny cartoon that were the centerpiece of the Yes-on-8 campaign in California). There were unofficial efforts, such as robo-calls, on the part of some supporters of Proposition 8 to invoke the old politics of disgust. Because most of those efforts were below the media radar, it is hard to tell exactly how significant they were and what effect they had on people's votes.

¹²⁷ See Scott Conroy, *Palin Breaks with McCain on Gay Marriage Ban*, CBSNEWS.COM (Oct. 20, 2008, 9:56 AM), http://www.cbsnews.com/8301-502443_162-4531945-502443.html.

proponents stretch the bounds of plausibility with every new line of argument (after previous arguments have failed to gain traction).

Another lesson from the Proposition 8 campaign is that our federalist system offers identity-based groups multiple forums in which to press their small “c” constitutional agenda. The structure and rules of the forums for public debate make a big difference in the short term. Thus, in California, marriage equality advocates had secured legislative approval in both 2005 and 2007, but legislation was blocked when GOP Governor Schwarzenegger successfully vetoed both bills. Then, marriage equality supporters trumped the Governor with a constitutional decision from the state supreme court. That decision was, in turn, trumped by Proposition 8, through which the voters amended the state constitution. In my view, the best response by supporters of marriage equality would have been to advance a new initiative in 2012 to revoke Proposition 8. Instead, however, a group of straight supporters brought a new lawsuit, *Perry v. Schwarzenegger*, to overturn Proposition 8 as inconsistent with the U.S. Constitution. The plaintiffs have, thus far, prevailed on narrow grounds in the Ninth Circuit,¹²⁸ and the U.S. Supreme Court will review the case in the 2012 Term. The availability of both small “c” as well as large “C” Constitutional claims means that the stakes will remain potentially quite high.

C. *Normal Politics: Beyond Backlash, 2009-2013*

Governor Andrew Cuomo of New York, elected in 2010, and President Barack Obama, elected in 2008 and reelected in 2012, are significant political entrepreneurs who have helped move marriage equality away from backlash politics and toward normal politics. Legislatures are notoriously slow to meet new social needs, and no legislature in the country has been as gridlocked for as long as the New York Legislature.¹²⁹ Yet in 2011 Governor Cuomo, assisted by a brief period in which his party controlled both chambers, persuaded decisive bipartisan majorities to enact marriage equality legislation.¹³⁰ Predictably, backlash politics was mobilized, but with Republicans themselves divided on the issue, it had little resonance at either the state or national level.

Also highly significant was President Obama’s volte-face in 2012. Previously a supporter of civil unions but not full marriage rights for same-sex couples, the President, in an interview on May 9, 2012, announced that he supported marriage equality.¹³¹ Polls taken after his announcement suggested that this stance would neither garner nor lose the President large numbers of

¹²⁸ *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), cert. granted sub nom. Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (mem.).

¹²⁹ Mark Z. Barabak & Richard Simon, *N.Y. Takes Legislative Gridlock to a New Level*, L.A. TIMES, July 6, 2009, at A14.

¹³⁰ For a thoughtful account of the New York Legislature’s debate in 2011, see FLEMING & McCLAIN, *supra* note 16, at 199-206.

¹³¹ *Civil Rights*, WHITE HOUSE, <http://www.whitehouse.gov/issues/civil-rights> (last visited Jan. 18, 2013).

votes in the November 2012 election against probable Republican nominee Mitt Romney.¹³² Reflecting his party's platform, Governor Romney, who had led the fight against marriage equality and even civil unions in Massachusetts, continued to oppose marriage equality. But that issue was virtually absent from Romney's campaign speeches and commercials, and was never discussed in the four presidential and vice-presidential debates.¹³³ President Obama's decisive reelection was far from a referendum on gay rights, but it is worth noting that his margin of victory was less than the vote margin by which he is estimated to have bested Governor Romney among LGBT voters.¹³⁴ Political parties notice results like these, and quietly respond to them.

As in 2004 and 2008, marriage equality was on the ballot in several states in 2012. In Minnesota, the voters considered an amendment to the state constitution to bar same-sex marriages, but in Maine, Maryland, and Washington initiatives offered the voters an opportunity to *endorse*, rather than *veto*, marriage equality. Remarkably, voters in Minnesota rejected the anti-marriage equality position, and voters in Maine, Maryland, and Washington endorsed marriage equality.¹³⁵ With these victories, not only did three more states join the growing number of jurisdictions supporting marriage equality, but they did so after civil electoral campaigns that reflected lower stakes and, by implication, much less backlash than the country had seen in 2004.

In short, 2012 was the watershed year for the backlash politics against marriage equality. In that year, the issue moved decisively toward normal politics rather than backlash politics for the nation as a whole. Perhaps reflecting events that are now too clear to deny, some prominent adherents to the Rosenberg backlash hypothesis published pieces in 2012 expressing belated optimism that marriage equality is an idea whose time is more swift in coming than backlash theorists had confidently assumed just a few years ago.¹³⁶ I have long argued that marriage equality is inevitable, as the arguments

¹³² Trudy Ring, *Poll: Majority of Voters Unaffected by Obama Marriage Stance*, ADVOCATE.COM (May 11, 2012, 5:41 PM), <http://www.advocate.com/politics/election/2012/05/11/obama-marriage-equality-statement-will-not-change-many-votes>.

¹³³ Alan Greenblatt, *During Debates, Silence on Some Issues Was Deafening*, NPR (Oct. 23, 2012, 4:07 PM), <http://www.npr.org/blogs/itsallpolitics/2012/10/23/163488809/during-debates-silence-on-some-issues-was-deafening>.

¹³⁴ Micah Cohen, *Gays Support Buoyed Obama, as the Straight Vote Split*, N.Y. TIMES, Nov. 16, 2012, at A21 (reporting an empirical survey showing that Obama won seventy-six percent of the gay vote, while Romney carried only twenty-two percent).

¹³⁵ Alana Semuels, *Voters in Maine, Md. OK Gay Marriage: Long Losing Streak for Measure Broken*, CHI. TRIBUNE, Nov. 7, 2012, at C15.

¹³⁶ See Cass R. Sunstein, *The Lincolnian View of Same-Sex Marriage*, BLOOMBERG (Nov. 12, 2012, 6:31 PM), <http://www.bloomberg.com/news/2012-11-12/lincoln-the-justice-s-and-same-sex-marriage.html> (expressing optimism that marriage equality is fast-approaching, notwithstanding the domination of backlash fears in the author's earlier scholarship). Notably, Professors Fleming and McClain urged Sunstein to adopt this more optimistic approach, observing that others such as Klarman had retreated from his worries

against it do not bear serious examination.¹³⁷ This point has had special resonance with younger Americans who overwhelmingly support marriage equality, many of them quite zealously.

That backlash politics is in decline does not mean that it has been obliterated, however. Sixty percent of North Carolina voters endorsed an anti-marriage constitutional amendment in May 2012,¹³⁸ and there is every reason to believe that large numbers of Americans in the South, the border states, much of the Midwest and plains states, and the Rocky Mountain states continue to view this issue as small “c” constitutional and fundamental to their identities. Even in jurisdictions where gay marriage is largely accepted, the politics of disgust remains a concern. Specifically, anti-gay “hate groups” have proliferated both nationwide and in marriage equality jurisdictions in the last decade.¹³⁹ While most of the organizations considered by progressives to be “hate groups”¹⁴⁰ do not advocate violence against LGBT persons, there has been a strong surge in violence targeted against sexual and gender minorities since 2003 and 2004, especially in jurisdictions recognizing gay marriage.¹⁴¹

Nor does the foregoing analysis mean that backlash politics cannot return to the national arena, perhaps with a vengeance. If the respondents in *Hollingsworth v. Perry* can persuade the U.S. Supreme Court to affirm the

about anti-gay backlash. FLEMING & MCCLAIN, *supra* note 16, at 228-32. Compare KLARMAN, *supra* note 15 (voicing greater optimism about marriage equality litigation in 2012 than previously), with Klarman, *supra* note 11 (expressing a pessimistic account of marriage equality litigation in 2005).

¹³⁷ See ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 16, at 123-83 (arguing in 1996 that the Equal Protection Clause ultimately requires state recognition of same-sex marriages).

¹³⁸ Elizabeth Hartfield, *Amendment One North Carolina: Anti-Gay Marriage Measure Passes*, ABC NEWS BLOGS (May 8, 2012, 9:33 PM), <http://abcnews.go.com/blogs/politics/2012/05/amendment-one-north-carolina-anti-gay-marriage-measure-passes/>.

¹³⁹ *The LGBT Civil Rights Backlash*, DAILY KOS (Sept. 30, 2012, 6:28 AM), <http://www.dailykos.com/story/2012/09/30/1137309/-The-LGBT-Civil-Rights-Backlash-with-graphs>.

¹⁴⁰ Evan McMorris-Santoro, *Family Research Council Labeled “Hate Group” by SPLC over Anti-Gay Rhetoric*, TALKING POINTS MEMO (Nov. 24, 2010, 11:18 AM), <http://tpmdc.talkingpointsmemo.com/2010/11/family-research-council-labeled-hate-group-by-splc-over-anti-gay-rhetoric.php> (“What we’re saying is these [anti-gay] groups perpetrate hate – just like those [racist] organizations do.”).

¹⁴¹ Neil Broverman, *Anti-LGBT Violence Up Significantly*, ADVOCATE.COM (July 11, 2011, 4:05 PM), <http://www.advocate.com/news/daily-news/2011/07/12/lgbt-violence-significantly> (reporting a dramatic surge in anti-LGBT violence, including a twenty-three percent increase in murders of LGBT people and a thirteen percent increase in total violence from 2009 to 2010); *The LGBT Civil Rights Backlash*, *supra* note 139 (documenting that anti-LGBT violence is particularly on the rise in states that have recognized marriage equality).

Ninth Circuit on the broad grounds they advocate,¹⁴² every state in the country would have to recognize lesbian and gay marriages sooner rather than later. This result would significantly raise the stakes of the gay marriage debate at the national as well as local level. While the conventional wisdom is that the Supreme Court will not require marriage equality in all jurisdictions this year, the idea is one whose time is coming more rapidly than anyone thought possible at the turn of the millennium.

III. HOW CONSTITUTIONAL LITIGATION HAS ADVANCED MARRIAGE EQUALITY IN THE UNITED STATES

The foregoing analysis supports the hypothesis I advanced a decade ago: marriage equality is possible in a jurisdiction that has already taken steps to accept gay people, first, as noncriminals, then, as equal citizens, and finally, as people capable of forming families and raising children.¹⁴³ This “equality-practice” model works because jurisdictions that freed gay people early on from the presumptive criminality of consensual sodomy laws, and then protected them against workplace and other forms of discrimination, are jurisdictions where more citizens will be openly LGBT and will feel freer to form open relationships and raise children. And where there is a greater number of openly LGBT persons and families, there is a greater demand for marriage equality and an increasingly muted opposition. Every year there are more out LGBT people in America, more openly lesbian and gay partnerships and legal marriages, more children being raised in those families, and fewer people dedicated to excluding those families from civil marriage.

Have courts contributed to the advance of marriage equality? In my view, the answer is yes. Although Professor Rosenberg concedes that litigation and courts have advanced marriage equality in some states, he has not publicly backtracked on his claim that, on balance, resort to courts has not been productive for proponents of marriage equality.¹⁴⁴ It is hard to prove him right or wrong, because there are so many variables and so little empirical data. At the very least, however, I can show that he and the other backlash theorists

¹⁴² See Brief for Appellees at 39-105, *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (No. 10-16696) (arguing that forbidding gay marriage violates due process and equal protection).

¹⁴³ William N. Eskridge Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 *MCGEORGE L. REV.* 641, 647-48 (2000) (discussing the “step-by-step” approach to recognizing marriage equality, including decriminalization, equalization, and then recognition). Most political scientists put the idea in polling terms: once a critical mass of voters is open to gay marriage, the political system will usually respond in some way. See, e.g., Patrick J. Egan, Nathaniel Persily & Wallsten, *Gay Rights*, in *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 234, 234-60 (Nathaniel Persily et al. eds., 2008) (exploring the relationship between demographics and the increasing support for gay rights).

¹⁴⁴ ROSENBERG, *supra* note 5, at 415-19.

have not recognized the practical effects of judicial decisions on the advancement of marriage equality.

A. *Transformation of Politics: Agenda Setting, Reversing the Burden of Inertia, and Creating Conditions for Falsification of Stereotypes*

Conceptually, the primary objection to the Rosenberg backlash analysis has been that it understates courts' capacity to serve as a catalyst for social change. This was historian David Garrow's response to Rosenberg's exceedingly negative analysis of the effect of *Brown v. Board of Education* on American public policy. Garrow argued that while it is appropriate to emphasize, as Rosenberg does, the ways in which white backlash to desegregation complicated American politics and constitutional remediation, that does not excuse analysts from giving due emphasis to the ways in which landmark cases such as *Brown* transformed politics and contributed to our country's ultimate repudiation of apartheid and its values.¹⁴⁵ Likewise, *Baehr*, *Baker*, and *Goodridge*, as well as subsequent court cases, transformed constitutional politics in ways that go beyond backlash.

1. Agenda Setting

The biggest contribution courts have made to marriage equality is to elevate the issue on the public law agenda.¹⁴⁶ In contrast to the parliamentary systems in Europe and Canada, our system of state and federal legislation is designed to make passing legislation on any controversial matter very difficult.¹⁴⁷ No matter how persuasive a case LGBT people presented for family recognition in the 1990s or early 2000s, the response would have been silence; legislators have the luxury of ignoring even the best-justified proposals and an incentive to do so when they would otherwise alienate a significant number of voters.

By contrast, courts generally cannot ignore legal and constitutional claims, and claims resting upon plausible justifications cannot be dismissed without a

¹⁴⁵ David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151, 152 (1994).

¹⁴⁶ ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 3 ("The same-sex marriage lawsuit in [Hawaii] was agenda-seizing: it contributed to the politics of recognition by stirring the aspirations of GLBT people everywhere in the country, while at the same time fueling the politics of preservation by providing it with an easy object for mobilization on behalf of traditional family values."); Keck, *supra* note 13, at 157 (arguing that litigation "often heighten[s] expectations that further change is possible").

¹⁴⁷ Unlike the parliamentary system, legislation in the American system must be ratified by two differently constituted legislative chambers and then presented to a chief executive who might veto it, as Governor Schwarzenegger did in 2005 and 2007. In addition to these constitutional vetoes, there are other "vetogates" in America. See William N. Eskridge Jr., *Vetogates and American Public Law*, J.L. ECON. & ORG. (2012), <http://jleo.oxfordjournals.org/content/early/2012/04/19/jleo.ews009.full.pdf+html?sid=b4b0a488-0ed3-4fd2-9d46-e83b8dcbadbf>.

statement of reasons grounded in established legal and constitutional principles. In the United States, those established constitutional principles include the “fundamental right to marry,” which cannot be denied to couples without a strong justification.¹⁴⁸ Especially in jurisdictions where judges have already been treating LGBT claimants with respect, courts will sympathize with committed same-sex couples who want the same legal benefits and duties authorized for straight couples by the marriage laws.

When courts validate equality claims by same-sex couples, as they increasingly have done in the last decade, they raise marriage equality higher up on the public agenda. The increased salience of marriage equality is in part due to backlash politics: lesbian and gay couples, as well as their allies, are excited about the equality advance, while traditionalists invested in the norm of one man, one woman marriage are energized into opposition.¹⁴⁹ Typically, there are numerous political forums for opponents of marriage equality: state referenda and initiatives to amend state constitutions, Congress, and the federal process for amending the U.S. Constitution. As *Baehr* taught us, gay marriage in one state creates political discourse in other states and in the nation’s capital. But *Baehr* also inspired thousands of LGBT activists and their straight allies to initiate lawsuits and political activity to seek the right to marriage in other states. Without the commotion surrounding *Baehr*, the plaintiffs in *Baker* would not have acted when they did, and without the limited success of *Baker*, GLAD would not have pressed *Goodridge* as early as it did.¹⁵⁰

The increased visibility that judicial decisions have given to marriage equality has been highly significant beyond its inspiration of new waves of marriage activists. For one thing, it has revolutionized the English language. Before *Baehr*, there was no term for committed relationships between persons of the same sex: “gay marriage” was, literally and linguistically, an oxymoron. Once LGBT people came out of the closet as romantic couples, critics have struggled to deny or disparage their relationships or to impose some kind of descriptive – but also prescriptive – terminology upon those relationships.¹⁵¹ In my lifetime, our society has moved from a language where marriage always

¹⁴⁸ See ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 16, at 124-37 (explaining that denying same-sex couples the right to marry is constitutionally problematic because substantive due process and equal protection claims are supported by the Supreme Court’s declaration that marriage is a fundamental right.). This was the alternate holding of *Loving v. Virginia*, 388 U.S. 1, 10-11 (1967). Indeed, the Supreme Court even protected convicted prisoners against being denied the fundamental right to marry in *Turner v. Safley*, 482 U.S. 78, 96 (1987).

¹⁴⁹ See *supra* note 146 and accompanying text.

¹⁵⁰ ANDERSEN, *supra* note 15, at 183-84, 197-98; see also PINELLO, *supra* note 16, at 190-93; Keck, *supra* note 13, at 157-58.

¹⁵¹ See generally Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story About Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385 (1999) (making many brilliant observations about language, marriage, and gay marriage).

meant one man, one woman, to a language where gay “marriage” was a special case or a contested term, to a language where marriage equality means same-sex as well as different-sex *without* the quotation marks.

To the extent that marriage equality litigation has contributed to the normalization of gay marriage as a viable phrase, it has changed the way people speak and even think about LGBT persons generally. Indeed, even the resulting backlash politics has contributed to this linguistic evolution. Early discourse disparaging gay “marriage” – as no different from marrying your cat, for example – was an acknowledgment that *some people* viewed lesbians and gay men as “married,” a notion that was inconceivable to Americans in the 1950s. Even more important, as the politics of backlash has evolved, its adherents have adopted a kinder, gentler oppositional rhetoric that openly acknowledges that lesbian and gay couples can be “partners” who can be deemed “spouses” by the law.¹⁵² When traditionalist and even homophobic persons start talking about lesbian and gay “partnerships” and even “spouses,” much of the struggle for marriage equality has been won.

2. Reversing the Burden of Inertia

Inertia in our political system disadvantages minorities, who usually do not have the clout to move their agenda through the legislative process, especially if there is intense opposition. Courts are more attentive to minority claims, but judges have neither the clout nor the legitimacy to impose an important social change upon a polity that is unwilling to accept it. There is, however, a large policy space where a minority cannot secure legislation granting its members legal rights and benefits, but the minority and its allies can block efforts to take away rights or benefits that a court or agency grants its members. The question in politics, as in law, is who bears the burden of inertia? If the minority bears the burden, it will not be able to secure rights. If those disparaging the minority bear the burden, the minority will be able to keep rights its members have been granted.

This is the proper way to understand the Hawaii, Vermont, Massachusetts, and California marriage equality decisions. Indeed, it is clear that this is the way the judges themselves understood what they were doing: they were *reversing the burden of political inertia*. Because courts were able to do so, LGBT persons emerged with greater rights. Astonishingly, this was true even for the Hawaii marriage litigation, as disastrous as it was on so many fronts. The Hawaii Legislature had no interest in creating legal rights for same-sex couples in 1993, but that changed once the *Baehr* litigation placed marriage equality on the public law agenda. To be sure, the political process reacted negatively, but in 1997 the legislature did create a new institution granting

¹⁵² This was precisely the move made by the supporters of Proposition 8, in their hallmark cartoon starring the marital family of Tom and Jan, who really like their partnered neighbors Dan and Michael. See ESKRIDGE & HUNTER, *supra* note 126, at 1097-1105 (providing copies of Yes-on-8 materials, including cartoons).

rights to same-sex couples, reciprocal beneficiary status.¹⁵³ This was the first time in American history that a state granted some of the rights of marriage to lesbian and gay couples.¹⁵⁴ In 2010 Hawaii created yet another new institution, civil unions, which granted all the legal rights and duties of marriage to same-sex couples.¹⁵⁵ Even more recently, Hawaii has begun considering marriage equality legislation.¹⁵⁶

Vermont is a more successful example of reversing the burden of inertia, because the court and the legislature worked very effectively as a team. The Vermont Supreme Court's decision in *Baker* explicitly kicked to the Vermont Legislature the issue of marriage equality.¹⁵⁷ The legislature responded in 2000 with the landmark civil unions law and in 2009 with a marriage equality law.¹⁵⁸ It is inconceivable that Vermont would have moved so swiftly toward marriage equality if *Baker* had not reversed the burden of inertia and provoked the legislature to create civil unions, and if *Goodridge* had not created an example of marriage equality in a neighboring state.

Massachusetts and California represent another variation of the burden-of-inertia idea. The supreme courts of both states construed the state constitution to require marriage equality.¹⁵⁹ This was a bigger reversal of the burden of inertia in Massachusetts than in California, for those wishing to amend the state constitution in California bear a lighter burden than those in Massachusetts.¹⁶⁰ Nonetheless, in both states the supreme court opinions were not the final word on marriage equality. After exhaustive debate, Massachusetts opponents could not meet their higher burden, while in California they were able to meet their lighter burden with the passage of Proposition 8. Proposition 8, in turn, shifted the burden of political inertia back to the supporters of marriage equality. But a new litigating group responded with a further trumping move when they initiated the *Perry* litigation.

¹⁵³ HAW. REV. STAT. § 572C-1 (2010).

¹⁵⁴ *Hawaii's Domestic Partners Law a Bust; Relatively Few Sign up for Country's Broadest Benefits Package*, WASH. POST, Dec. 25, 1997, at A14 ("Hawaii became the first state to extend broad rights to domestic partners in July . . .").

¹⁵⁵ HAW. REV. STAT. § 572B-1 (Supp. 2012).

¹⁵⁶ Although the Hawaii Legislature declined to consider a bill to legalize gay marriage, "the bill remains 'alive' through 2014," and has the support of Hawaii Governor Abercrombie. *Statement from Hawaii United for Marriage*, HAW. UNITED FOR MARRIAGE, <http://hawaiiunitedformarriage.org/statement-from-hawaii-united-for-marriage/> (last visited Mar. 7, 2013).

¹⁵⁷ *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999).

¹⁵⁸ VT. STAT. ANN. tit. 15, § 1204 (2010).

¹⁵⁹ *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

¹⁶⁰ Compare CA. CONST. art. XVIII, §§ 1-4, with MASS. CONST. art. XLVII, cl. IV, §§ 1-5.

3. Creating Conditions for Falsification of Stereotypes

In my view, reversing the burden of inertia and the publicity surrounding such reversal would not have advanced the cause of marriage equality if only a few lesbian and gay couples had gotten married or if many of those couples did so as a joke or as a publicity stunt. As of 2013 every New England state except Rhode Island recognizes same-sex marriages. Thousands of committed lesbian and gay couples have joyously celebrated their nuptials in these states, and they have enjoyed all the happiness and sadness of American families in the new millennium. This has sparked a revolution in American understandings about LGBT people, family law, and marriage itself.

This revolution would not have been possible so soon if courts had not created conditions for falsifying anti-gay prejudices and stereotypes. Anti-gay prejudice is deeply founded upon the stereotype that “homosexuals” are selfish, predatory, and promiscuous, precisely the opposite of “married” heterosexuals.¹⁶¹ In the 1990s most Americans did not take “gay marriage” seriously because they did not believe “homosexuals” were interested in lifelong committed relationships and in rearing children. Although this was patently false in the 1990s, it is only in the new millennium, with marriage equality spreading swiftly through the country, that the connection between LGBT people and family has sunk in for many Americans.¹⁶²

It is a cliché, but a valid truth, that a person’s homophobia is ameliorated by knowing and working with a lesbian or gay person.¹⁶³ Likewise, a person’s hostility to gay marriage is usually ameliorated or even negated by knowing, working with, or being related to a lesbian or gay person married to someone of the same sex and raising children in the joint household. With tens of thousands of lesbians and gay men now married, and about a third of them raising children, there are now every year millions of micro-interactions between straight people and married lesbian or gay people.

Once the stereotype of gay people as anti-family erodes, support for marriage equality ought to increase and opposition ought to become milder.

¹⁶¹ See, e.g., Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205, 232 (1993) (listing some common homosexual stereotypes of “homosexuals”).

¹⁶² Susan Page, *Poll: Attitudes Towards Gays Shifting Fast*, USA TODAY (Dec. 5, 2012, 5:02 PM), <http://www.usatoday.com/story/news/politics/2012/12/05/poll-from-gay-marriage-to-adoption-attitudes-changing-fast/1748873/> (reporting the results of a pair of USA Today/Gallup polls demonstrating increasing support for gay marriage, and providing as an explanation for the change in attitudes on the issue that “[n]early eight in 10 adults say they know a relative, friend or co-worker who is gay, and most describe that relationship as a close one. In the survey of gay men and lesbians, 73% say they are generally open about their sexual orientation with other people; 26% say they aren’t.”).

¹⁶³ See FLEMING & MCCLAIN, *supra* note 16, at 205 (supporting this idea by explaining how New York Governor Cuomo was moved by the number of gay couples who sought him out and by his girlfriend, whose brother is gay).

Consistent with this hypothesis – but by no means “proving” the hypothesis – public support for marriage equality has steadily increased since LGBT lawyers started winning marriage equality cases. Before 1988, gay marriage was not even worth polling, as pretty much everyone in the country had given it little thought. When polling did commence in 1988, only twelve percent of respondents supported the idea. But in less than a decade after polling began, during the greatest anti-marriage backlash and the enactment of DOMA, more than twice as many Americans supported the idea.¹⁶⁴ As statistician Nate Silver has documented, opposition to marriage equality declined from almost 70% to 60% between 1996 and 2004 and collapsed to less than 50% by 2012, while support rose slightly between 1996 and 2004 and topped 50% in some polls by 2012.¹⁶⁵ Significantly, Silver’s statistical averages reveal that support for marriage equality did not falter in the wake of DOMA, did not suffer after *Baker*, and ultimately soared after *Goodridge*.¹⁶⁶

To be sure, the leading backlash theorists concede that the United States today is more accepting of LGBT persons and supportive of gay marriage than it was at the turn of the millennium, but they claim that “these changes are not primarily the result of litigation. Rather, they are the result of a changing culture.”¹⁶⁷ Yet the changing culture is itself a product of social movement litigation, a point not only suggested by the foregoing history and analysis, but also by empirical work done by Professor Thomas Keck.¹⁶⁸

B. *Transformation of Social Movement Agendas and Goals*

Critics have argued that marriage equality litigation has strongly affected the agenda of the LGBT rights social movement, crowding out other priorities and

¹⁶⁴ See Keck, *supra* note 13, at 165 tbl.2 (documenting the relatively steady advance of public support for marriage equality, notwithstanding claims of backlash theorists); Schacter, *supra* note 13, at 865-68 (critically analyzing the polling data on this issue).

¹⁶⁵ Nate Silver, *Support for Gay Marriage Outweighs Opposition in Polls*, N.Y. TIMES (May 9, 2012, 4:52 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/05/09/support-for-gay-marriage-outweighs-opposition-in-polls/>.

¹⁶⁶ Compare Frank Phillips, *Majority in Mass. Poll Oppose Gay Marriage*, BOS. GLOBE (Feb. 22, 2004), http://www.boston.com/news/local/articles/2004/02/22/majority_in_mass_poll_oppose_gay_marriage/?page=full (finding that fifty-three percent of the sample opposed gay marriage), with *Massachusetts Voters Happy with Gay Marriage*, PUB. POL’Y POLLING (Mar. 27, 2012), <http://www.publicpolicypolling.com/main/2012/03/massachusetts-voters-happy-with-gay-marriage.html> (reporting that only thirty-one percent of voters in Massachusetts think there should be no legal recognition of gay marriage).

¹⁶⁷ ROSENBERG, *supra* note 5, at 415; see also John D’Emilio, *Some Lessons from Lawrence*, in *THE FUTURE OF GAY RIGHTS IN AMERICA* 3, 12 (H.N. Hirsch ed., 2005) (“[T]he Supreme Court follows rather than leads.”); Klarman, *supra* note 11, at 484-85 (“The shift in public opinion on this issue . . . may suggest that the growing power and pervasiveness of popular culture is likely to cause public attitudes on sexual orientation to shift faster than racial and gender attitudes changed in preceding generations.”).

¹⁶⁸ See Keck, *supra* note 13.

even other forms of relationship recognition.¹⁶⁹ In my view, this is a misleading charge. Its fundamental error is that it views LGBT movement lawyers' priorities in simplistic terms, as though lurching from one issue to another. As Ellen Andersen has demonstrated, since the 1970s LGBT movement lawyers have acted with an evolving agenda that presses multiple issues in multiple institutional contexts all the time.¹⁷⁰ And there has always been a unifying idea for LGBT movement lawyers: sexual and gender minorities are decent human beings who ought to be treated with the same dignity and given the same legal rights as all other Americans. Marriage equality is not only an extension of this core principle, but also has worked to advance the other items on the so-called "homosexual agenda."

Thus, marriage equality litigation has not squeezed out the primary goals of the LGBT rights movement. Before 1989 the movement fought for sodomy reform, anti-discrimination and hate crime laws, and the rights to raise and adopt children. It is true that marriage equality has eclipsed these other goals in the public's mind, but it is also true that during the period of marriage equality's dominance the LGBT rights movement has achieved many of its goals, well ahead of schedule. Political scientist Thomas Keck summarized the progress of gay rights between *Baehr* in 1993 and the California *Marriage Cases*: while twenty-three states criminalized consensual sodomy in 1993, none did so in 2008; while eleven states had hate crimes laws that included sexual orientation and gender identity, thirty-two had them in 2008; and while eight states had sexual-orientation employment nondiscrimination laws, twenty had them in 2008.¹⁷¹

Professor Keck's point is that marriage equality failed to retard progress toward gay rights across the board. I would go further to argue that marriage equality litigation actually had the effect of accelerating progress toward equality for LGBT persons. The most dramatic example of this acceleration is the demise of consensual sodomy laws. *Bowers v. Hardwick*, the infamous Supreme Court decision upholding such laws in 1986, rested importantly on the Court's surmise that, because there was no connection between "homosexuality" and family, its previous privacy precedents involving relationships, family, and marriage were completely off point.¹⁷² Concurring, Justice Lewis Powell – the critical fifth vote to save sodomy laws – wrote in an

¹⁶⁹ See, e.g., Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1549 (1993); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9, 14; *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, BEYONDMARRIAGE.ORG, 1-4 (July 26, 2006), <http://www.beyondmarriage.org/BeyondMarriage.pdf>.

¹⁷⁰ ANDERSEN, *supra* note 15, at 27-57 (providing an excellent history of the Lambda Legal Defense & Education Fund, Inc., the leading LGBT litigation organization and a major force behind both sodomy reform and marriage equality litigation).

¹⁷¹ Keck, *supra* note 13, at 174-75 & tbl.6.

¹⁷² *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

unpublished draft: “[Homosexual] sodomy is the antithesis of family.”¹⁷³ It was later marriage equality litigation that established the connection that the Supreme Court majority in *Bowers* could not imagine. And I believe it made a difference in the resolution of subsequent constitutional sodomy litigation.

The District of Columbia was the initial *mise-en-scène* for the marriage “frontlash,” illustrating how the anti-gay rights movement backed away from antidiscrimination and sodomy opposition in preparation for a battle over marriage equality. Congress has plenary authority over the liberal District and has commonly used its authority to disapprove of the District’s pro-gay legislation. For instance, in 1981 the Democratic-controlled House of Representatives vetoed the District’s effort to reform its sex crime law simply because the reform would have decriminalized consensual sodomy.¹⁷⁴ Anticipating DOMA, in 1992 the Democratic-controlled Congress barred the District from funding its new domestic partnership law.¹⁷⁵ In 1993, however, the District enacted another law decriminalizing consensual sodomy.¹⁷⁶ This time, despite full authority to override or defund the law, Congress was silent, even as the *Baehr* backlash was building. The new law took effect on July 1, 1994.¹⁷⁷ This was a Congress containing Republican Senators Jesse Helms, of North Carolina, and Trent Lott, of Mississippi, two of the most anti-gay legislators in American history.¹⁷⁸ And yet not a single GOP lawmaker made a public move to recriminalize homosexual sodomy in the nation’s capital. I understand from inside-the-beltway sources that the GOP leadership made a decision to give gays a pass on consensual sodomy, as they started to train their guns on the emerging gay marriage issue.¹⁷⁹

The same strategy played out in almost all the constitutional sodomy litigation after *Baehr*: religious and political groups opposed to same-sex marriage did not want to appear anti-gay across the board, and so they

¹⁷³ ESKRIDGE, *supra* note 27, at 276 (alteration in original) (quoting Powell’s unpublished draft of the concurring opinion he ultimately issued).

¹⁷⁴ H.R. Res. 208, 97th Cong. (1981); 127 CONG. REC. 22,764-79 (1981) (reprinting debates concerning the resolution and ultimately recording the vote as 281 in favor of disapproval, 119 against, and 32 not voting, resulting in a veto which sustained the criminalization of sodomy in the District).

¹⁷⁵ District of Columbia Appropriations Act, 1993, Pub. L. No. 102-382, 106 Stat. 1422 (1992). Every D.C. appropriations law between 1992 and 2003 included a similar bar.

¹⁷⁶ Anti-Sexual Abuse Act of 1994, § 501(b), 42 D.C. Reg. 53, 62 (Jan. 6, 1995).

¹⁷⁷ See ESKRIDGE, *supra* note 27, at 277-78.

¹⁷⁸ Examples of these Senators’ anti-gay stances abound. See, e.g., Derrick Z. Jackson, Op-Ed, *Clinton Tests Lott on Gay Ambassador*, BOS. GLOBE, Jan. 15, 1999, at A19 (offering examples of anti-gay statements by Lott and Helms in which gay Americans are compared to sex addicts and kleptomaniacs and referred to as “sickening”).

¹⁷⁹ Even more remarkably, when the Republicans won their next sweeping victory in congressional races in 2010, they took control of Congress right after the District of Columbia recognized same-sex marriages; yet there was no serious effort by the Republicans to override the District’s move. See *supra* note 68 and accompanying text.

abandoned or muted their public opposition to sodomy reform in order to focus their energies against any expansion of marriage.¹⁸⁰ Thus, in the late 1990s in the Georgia and Arkansas sodomy lawsuits, the Southern Baptist Convention and other anti-gay groups remained on the sidelines as conservative southern courts invalidated their states' consensual sodomy laws as inconsistent with state constitutional precepts.¹⁸¹ In 1998 when the Rhode Island Legislature repealed its consensual sodomy law, and in 2002 when the Massachusetts Supreme Judicial Court construed its sodomy law to be inapplicable to consensual activities, the Roman Catholic Church likewise remained on the sidelines.¹⁸² In none of these reform efforts did the Baptist Convention or the Catholic Church alter their moral rejection of consensual sodomy or homosexual activities, but neither did they work to preserve the anti-gay status quo. In my view, these examples illustrate how marriage equality not only expanded rather than contracted the LGBT agenda, but also contracted rather than expanded the traditional-family-values (TFV) agenda toward gay people.

The effect of marriage equality was most apparent in 2003 when the Supreme Court overruled *Bowers* in *Lawrence v. Texas*.¹⁸³ Dozens of amicus briefs sought to inform the Justices' deliberations in the case, and it is remarkable how many "conservative" groups filed briefs in support of the LGBT challengers. Arguing for constitutional invalidation of the Texas Homosexual Conduct Law were not only briefs from the libertarian Cato Institute, the pro-gay Log Cabin Republicans, and former GOP Senator Alan Simpson's Republican Unity Coalition, but also a brief signed by twenty-nine churches, arguing from a faith-based human dignity perspective.¹⁸⁴ Notably

¹⁸⁰ For early and explicit public suggestions along these lines, see RICHARD A. POSNER, *SEX AND REASON* 309-14 (1992) (arguing that sodomy law reform is inherently different than the positive enactment of marriage equality laws because the former would only signal that homosexual relationships are not criminal while the latter would "plac[e] a stamp of approval" on the relationships, an act which the author holds to be unjustified and misleading); John M. Finnis, *Law, Morality, and Sexual "Orientation,"* 69 NOTRE DAME L. REV. 1049, 1052-53, 1075-76 (1994) (distinguishing an outdated ideology which sought to wholly criminalize homosexuality from a newer ideology which sees regulation of private activity as bad but control of activities in the "public realm" as proper, ultimately concluding on this basis that outlawing truly private acts (sodomy) is different from restricting entrance into a public relationship (marriage)).

¹⁸¹ ESKRIDGE, *supra* note 27, at 290-92 (recounting the facts and resolution of *Powell v. State*, 510 S.E.2d 18 (Ga. 1988), the 1998 litigation which overruled Georgia's consensual sodomy statute); *id.* at 294-98 (describing the preparation for and procedural history of *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002), Arkansas litigation occurring from 1998 to 2000 and resulting in that state's decriminalization of consensual sodomy).

¹⁸² *Id.* at 292-93.

¹⁸³ 539 U.S. 558, 566-67, 578 (2003) (overruling *Bowers*, in part based upon that decision's failure to appreciate that consensual sodomy could be the basis for a personal "relationship" and an "enduring" bond).

¹⁸⁴ ESKRIDGE, *supra* note 27, at 321.

absent were briefs opposing constitutional sodomy reform from the Roman Catholic Church, the Southern Baptist Convention, and the Church of Jesus Christ of the Latter-Day Saints. This was no indication that any of these prominent religious institutions acquiesced to or agreed with a constitutional right to engage in consensual sodomy, but their silence was evidence that these faith groups had refocused their efforts onto the marriage issue and, as part of that process, had abandoned their earlier strong public opposition to sodomy reform.¹⁸⁵

On the eve of *Goodridge*, with the *Baehr* backlash still fresh and the *Baker* backlash still unfolding, a very conservative Supreme Court freed lesbians, gay men, and bisexuals from their status as presumptive criminals in *Lawrence*. And the reasoning of that decision reveals, on its face, the direct effect of the marriage equality movement on evaluation of its constitutional sodomy claim. Justice Kennedy's majority opinion started with a bang by denouncing the manner in which the *Bowers* Court had framed the constitutional issue as simply a right to engage in certain conduct:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes

¹⁸⁵ This shift in position was not simply political, especially in the case of the Roman Catholic Church. Since the 1970s the Church had taken the position that discrimination against gay people because of their sexual orientation was morally wrong. NAT'L CONFERENCE OF CATHOLIC BISHOPS, TO LIVE IN CHRIST JESUS (1976), reprinted in *HOMOSEXUALITY AND THE MAGISTERIUM: DOCUMENTS FROM THE VATICAN AND U.S. BISHOPS 1975-1985*, at 9 (John Gallagher ed., 1986) (offering an excerpt from a 1976 Catholic publication stating that "[h]omosexuals, like everyone else, should not suffer from prejudice against their basic human rights"); Letter from the Congregation for the Doctrine of the Faith to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons, para. 10 (Oct. 1, 1986), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_198_61001_homosexual-persons_en.html. As constitutional challenges made it increasingly clear that state sodomy laws only had bite as instruments of civil discrimination against gay people, however, the traditional Catholic support for consensual sodomy laws became more equivocal. See, e.g., Finnis, *supra* note 180, at 1051-53 (suggesting, in an article written by a leading Catholic intellectual, that consensual sodomy laws might be repealed for the practical reason that sodomy is a private act outside the accepted purview of state regulation, but still advocating against laws which would support or suggest agreement with homosexuality in a public forum). To have "gone after" gay people on both sodomy and marriage was a stance that likely did not appeal to the Church leadership in the United States and, in my view, explains why the Church was largely silent on sodomy reform.

do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.¹⁸⁶

If there were any doubt that marriage equality litigation was implicated in *Lawrence*, it was removed by Justice Scalia's explosive dissenting opinion. Like an Old Testament prophet, Justice Scalia foresaw and lamented that the Court's reasoning, which assured gay people a constitutional right to engage in consensual private relations, also logically should assure them of the right to marry.¹⁸⁷ Stoically, the Court ignored Justice Scalia's thundering prophesy.

C. *Lowering the Stakes of Politics by Marginalizing Outlier Perspectives*

Consider a final way in which constitutional litigation has advantaged LGBT persons as well as, I submit, TFV persons and the country as a whole. As I have suggested in this Article, backlash politics is tied to issues that implicate people's heartfelt identities and their intense devotion to expressive symbols of public values. Ultimately, it is the issue and the state's resolution of that issue that are most important, not the forum in which the issue is resolved. As political scientists have long opined, the democratic process cannot resolve small "c" constitutional issues that *intensely* and *evenly* divide the polity. To declare a group as the winner for such issues not only provokes a politics of backlash but threatens the viability of the democratic process.¹⁸⁸

This is the central reason why the Federal Marriage Amendment was a terrible idea; it would have declared TFV Americans the winners and disrespected LGBT Americans. It is also the central reason why the Supreme Court should decide the appeal in *Perry* on narrow grounds, either dismissing the appeal on grounds of standing or affirming the Ninth Circuit based upon its reasoning that the take-back of important marriage rights did not satisfy the rational basis standard. Declaring a national constitutional right to marriage equality now would declare LGBT Americans the winners and would disrespect many TFV Americans. The best way for the democratic process to deal with small "c" constitutional issues that intensely but evenly divide the polity is to allow local compromises and continued debate until the political culture itself reaches some kind of rough consensus.

The more general point is that the governmental process must not raise the stakes for small "c" constitutional issues, as they are already too high. This is a dynamic process. In 1993, *Baehr* was a judicial blunder both because neither the state of Hawaii nor the country was ready to engage in a policy debate about same-sex marriage, and because the Republican Party, with a big boost from the Clinton Administration, fanned irrational fears that Hawaii would

¹⁸⁶ *Lawrence*, 539 U.S. at 567. I cannot name another Supreme Court majority decision that disrespected a precedent of the Court by disparaging the previous Court's statement of the legal or constitutional issue at suit.

¹⁸⁷ *Id.* at 602-05 (Scalia, J., dissenting).

¹⁸⁸ DAHL, *supra* note 83, at 93-99; *cf.* PRZEWORSKI, *supra* note 79, at 37.

become a center for national gay marriage. By leaving the remedy to the legislative process, *Baker* was a smarter move, as it managed to mitigate high-stakes opposition, while still advancing what the judges considered to be an important constitutional principle. The *Goodridge* Court ran a large risk of raising the stakes of the still-fresh marriage equality issue by insisting on marriage equality, but the risk was ameliorated by Massachusetts's affirmative history of support for gay rights and by the extensive processes made available for opponents to engage on this issue. The California *Marriage Cases* ran a much lower risk of harmful stakes-raising because gay marriage had already been normalized for many citizens and because opponents had an immediate and effective outlet for their political pushback. In 2013 the U.S. Supreme Court will be running a significant risk of raising the stakes of gay marriage if it issues an opinion all but requiring all states to recognize marriage equality. Further, there is no pressing need for Supreme Court action, in contrast to the situation in *Goodridge*, for the issue to continue its "progress" toward broader public acceptance or acquiescence.

Conversely, the government ought to do what it can to lower the stakes for small "c" constitutional issues, and I maintain that courts can and do play a modest but potentially productive role in this regard.¹⁸⁹ Consider a few examples that bear on marriage equality. For small "c" constitutional issues, the stakes get higher when an impassioned or prejudiced majority demonizes and imposes major harms on a minority in a robust and public politics of disgust. Especially when the minority is a productive group of decent people, it is insanity for a country to allow this to happen.¹⁹⁰ In *Romer v. Evans*,¹⁹¹ the Supreme Court struck down a sweeping anti-gay initiative that rested upon lurid claims about "homosexuals" and that seemed to carve LGBT people out of the ordinary protections entailed by the rule of law.¹⁹² The unmistakable message of *Romer* was that TFV zealots who insisted on demonizing gay people ran the risk that judges would strike down their proposals based on

¹⁸⁹ William N. Eskridge Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L.J.* 1279 (2005).

¹⁹⁰ I do not believe it is far-fetched to say that Spain's persecution and then expulsion of the Jews in the fifteenth century, and France's persecution and then expulsion of the Huguenots in the seventeenth century were not only unjust to the persecuted minority but calamitous for those countries. See generally NORMAN ROTH, *CONVERSOS, INQUISITION, AND THE EXPULSION OF THE JEWS FROM SPAIN* (1995); Keith P. Luria, *Conversion and Coercion: Personal Conscience and Political Conformity in Early Modern France*, 12 *MEDIEVAL HIST. J.* 221 (2009). Persecuting and imprisoning gay people during the anti-homosexual Kulturkampf of 1947 to 1961 was, in my view, harmful to America for similar reasons. See generally William N. Eskridge Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 *VAND. L. REV.* 419 (1997).

¹⁹¹ 517 U.S. 620, 635-36 (1996).

¹⁹² For a brilliant analysis of the prudence and caution underlying this decision, which sounds radical and visionary in tone, see Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 *SUP. CT. REV.* 67.

Romer's rejection of anti-gay "animus" as a defensible basis for modern legislation or, as in *Romer*, voter initiatives. The politics of disgust, at least as applied to LGBT people, was thus rendered unconstitutional.

Romer and the cultural shifts it reflected contributed to a kinder, gentler dialectic on the part of TFV organizations and supporters. Handed down in May 1996, just as Congress was debating DOMA, *Romer* had an immediate effect on national political discourse about gay marriage. After *Romer*, most DOMA supporters found it necessary to present their arguments as part of a genuine policy debate and not just an exercise in denigrating lesbian and gay couples. Hence, the House Judiciary Committee Report explicitly discussed *Romer* and explained why DOMA was motivated by important policy goals and not by disapproved "animus."¹⁹³

Romer also exercised an important influence on voter initiatives to bar same-sex marriages. The 2000 and 2008 anti-gay-marriage equality initiatives in California left the state's domestic partnership law in place, with the initiatives' supporters toning down their rhetoric and abandoning the intemperate gay bashing common to earlier anti-gay initiatives in both California and other western states.¹⁹⁴ The contribution of *Romer* to a more civilized and less incendiary discourse about an important small "c" constitutional issue is perhaps modest, but it is nonetheless solid and illustrates how the Court has contributed to lowering the stakes of marriage equality politics.

Zealots supporting gay rights are also sometimes intemperate in their rhetoric regarding religion-based opposition. Just as many TFV Americans have strongly negative feelings about gay people, many LGBT Americans have strongly negative feelings about religious institutions. One fear that religious persons and organizations have is that marriage equality will impose upon churches the duty to perform gay marriage ceremonies or, more plausibly, to provide marital benefits to lesbian and gay persons who are their employees. Legislatures have tried, with some success, to ameliorate traditionalist backlash by exempting religious institutions from the implications of marriage equality, such as waiving requirements that same-sex spouses be included in an employees' health insurance benefits package.¹⁹⁵ The ability to accommodate the most important needs of faith-based communities is one reason why legislatures are, generally, better institutions to deliver marriage equality in most states where that is possible as a political matter.

¹⁹³ H.R. Rep. No. 104-664, at 31-33 (1996).

¹⁹⁴ Eskridge, *Foreword: The Marriage Cases*, *supra* note 16, at 1824-33, 1834 tbl.2 (tracing the evolution of anti-gay rhetoric in California initiatives in both narrative and graphical form).

¹⁹⁵ See Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1433-45 (2012).

Interestingly, the U.S. Supreme Court has set forth a barrier to the possibility that marriage equality and other pro-gay measures will authorize the state to intercede against anti-gay “animus” within religious institutions. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, a unanimous Supreme Court ruled that the Free Exercise Clause requires the federal government to exempt religious “ministers” and other officials from the requirements of anti-discrimination laws.¹⁹⁶ Under *Hosanna-Tabor* religious organizations are probably protected from sacrificing their religious principles as regards lesbian and gay ministers and other officials: churches can decline to hire such individuals, can discharge employees they discover to be lesbian or gay, and can very probably decline to provide such persons with marriage-based benefits even if retained as employees.¹⁹⁷ Although the reach of the decision’s ministerial exemption remains unclear, it is apparently quite broad.¹⁹⁸ In my view, *Hosanna-Tabor*, like legislative exemptions, has the salutary effect of lowering the stakes of marriage equality by providing normative room for traditionalists to avoid its implications in their religious sanctuaries.

¹⁹⁶ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012).

¹⁹⁷ *Id.* (ruling that the “ministerial exception” applies to employment discrimination cases and leaving open for future consideration the full scope of its application).

¹⁹⁸ *See id.* at 711-16 (Alito, J., concurring) (articulating a broad understanding of who might be a “minister” falling under this constitutionally required exemption).