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# MARRIAGE EQUALITY IN STATE AND NATION

Anthony Michael Kreis\*

## INTRODUCTION

A fourth-generation fisherman, Dennis Damon, looked like the stuff of fiction. He was an archetypical rugged Yankee individualist. Damon had an imposing physical stature with broad shoulders and a distinguishing mustache. His voice, deep and commanding, was saddled with a hard New England accent. At age sixty-one, Damon was in his fourth and final term in the Maine State Senate.<sup>1</sup> He represented a rural district surrounding Hancock and Knox counties—a district which, at one boundary’s end, was a mere seventy miles southeast of the Canadian border.<sup>2</sup>

In December 2008, Equality Maine and the Maine Women’s Lobby approached the unassuming Senator Damon to sponsor same-sex marriage legislation,<sup>3</sup> entitled “An Act To End Discrimination in Civil Marriage and Affirm Religious Freedom.”<sup>4</sup> The bill held the promise of becoming the first successfully enacted marriage equality legislation.<sup>5</sup> The Senator agreed to sponsor it.<sup>6</sup> The groups then made an additional request of Senator Damon. They requested that he assume the mantle of signing on as the bill’s lead sponsor.<sup>7</sup> The Senator from small-town Trenton replied, “You asked ten other people [first], huh?”<sup>8</sup>

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<sup>1</sup> Telephone Interview with Dennis Damon, Former Me. Senator (May 25, 2012) [hereinafter Damon Interview].

<sup>2</sup> See *id.*; Me. Senate Democrats, *Senator Dennis S. Damon*, MAINE.GOV, <http://senatedems.maine.gov/damon/district.htm> (last visited Mar. 2, 2014).

<sup>3</sup> Damon Interview, *supra* note 1.

<sup>4</sup> ME. REV. STAT. ANN. tit. 19-A, § 650 (repealed 2009).

<sup>5</sup> See generally Damon Interview, *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

At first blush, Senator Damon probably did not seem to be a likely standard-bearer for marriage equality. But for Equality Maine and the Women's Lobby, that *is* what made him ideal. One of the lobbyists responded, “[N]o, you’re the first choice . . . [Y]ou’re a man, you’re from a rural district, you’re of a certain age, and you’ve gained esteem in the legislature.”<sup>9</sup> What those lobbyists presumably did not know—and what the Senator would not publicly disclose for many months—was that Senator Damon’s daughter, Erin, was a lesbian.<sup>10</sup>

Senator Damon agreed to take the lead on the bill and so began Maine’s bumpy, three-year-long journey toward marriage equality.<sup>11</sup> But Senator Damon was not the only person in Augusta contemplating the merits of marriage equality. Quite to the contrary, Governor John Baldacci and his legal staff had begun an inquiry into the legal merits of marriage equality.<sup>12</sup> The Governor, a devout Roman Catholic, was privately wrangling to reconcile legal principles with his own faith.<sup>13</sup> State Senate President Libby Mitchell was also thinking about same-sex marriage in Maine, but from a unique vantage point, reflecting on her upbringing in segregated South Carolina.<sup>14</sup>

Nor were public servants in Maine the only New England trailblazers ready to make a mark on history. In neighboring Vermont and New Hampshire, legislators were contemporaneously contemplating a push for same-sex couples’ full marriage rights. In Vermont, future Vermont Supreme Court Justice Beth Robinson was working to bring a ten-year-long push for marriage equality to a close.<sup>15</sup> Coming off the heels of successfully enacting civil unions a short two years earlier in 2007, legislative leaders in New Hampshire were making preparations to finally win same-sex marriage rights.<sup>16</sup> These efforts would jumpstart a series of pitched battles in many more state legislatures for years to come in which a diverse body of predominantly

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<sup>9</sup> *Id.*

<sup>10</sup> *See id.*

<sup>11</sup> *See infra* Part III.

<sup>12</sup> Telephone Interview with John Baldacci, Former Governor of Me. (Nov. 26, 2012) [hereinafter Governor Baldacci Interview].

<sup>13</sup> *See id.*

<sup>14</sup> *See* Telephone Interview with Libby Mitchell, Former Me. Senate President (June 27, 2012) [hereinafter Mitchell Interview].

<sup>15</sup> *See Updated: Get to Know Vermont’s Next Supreme Court Justice Beth Robinson*, VERMONT.GOV (Nov. 11, 2013, 10:41 AM), <http://governor.vermont.gov/blog-meet-next-vermont-supreme-court-justice-beth-robinson>. Justice Beth Robinson’s participation in this project, importantly, was not in her capacity as a justice on the Vermont Supreme Court or as an advocate but rather as a historian reflecting on her personal experiences in Vermont.

<sup>16</sup> *See* Norma Love, *NH Panel Votes to Recommend Gay Marriage Repeal*, BOS. GLOBE (Oct. 25, 2011), [http://www.boston.com/news/local/new\\_hampshire/articles/2011/10/25/nh\\_panel\\_to\\_vote\\_on\\_gay\\_marriage\\_repeal\\_bill/](http://www.boston.com/news/local/new_hampshire/articles/2011/10/25/nh_panel_to_vote_on_gay_marriage_repeal_bill/) (describing New Hampshire’s development of legal recognition for same-sex couples).

citizen-legislators would come together to debate the merits of same-sex marriage from a wide ranging set of perspectives.<sup>17</sup>

Perhaps, more than anything else, these legislative crucibles in the aggregate paint a compelling narrative illustrating that which fundamentally animates the marriage equality movement. At its core, the social movement for civil marriage equality is a popular constitutionalist movement. Indeed, the marriage equality movement has been propelled by elected officials whom, while representing diverse interests, engage in a deliberative democratic process as informed statesmen, interpreting the Constitution and squaring a distilled analysis of popular opinion with constitutional values through a dual cooperative citizen-legislator educational process—a hallmark of popular constitutionalism.<sup>18</sup>

Scholars of popular constitutionalism, however, typically envision a system of governance where the ultimate “power to interpret (and *not* just the power to make) constitutional law . . . reside[s] with the people.”<sup>19</sup> For some scholars, this system of constitutional interpretation is a vision of a limited role for judicial review that rejects outright judicial supremacy.<sup>20</sup> That construction of judicial power strays from the canonized conceptualization of the judiciary’s role in American governance typically embraced by the legal academy.

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<sup>17</sup> After the Massachusetts Supreme Judicial Court ruled that Massachusetts was required to extend marriage rights to same-sex couples, *see infra* notes 56–60 and accompanying text, strong legislative efforts for marriage equality began in Maine, New Hampshire, New Jersey, New York, and Vermont, later followed by Delaware, Illinois, Maryland, Rhode Island, and Washington. *See Timeline: Same-Sex Marriage*, CNN (Oct. 22, 2013), <http://news.blogs.cnn.com/2012/10/18/timeline-same-sex-marriage/comment-page-1/> (detailing the sequence of events surrounding same-sex marriage litigation and legislation). Earlier efforts in California date back to 2005 and 2007 but were vetoed by Governor Arnold Schwarzenegger, citing a desire to wait out litigation pending in the California state courts. *Id.*; *see also* Dean E. Murphy, *Schwarzenegger to Veto Same-Sex Marriage Bill*, N.Y. TIMES (Sept. 8, 2005), [http://www.nytimes.com/2005/09/08/national/08arnold.html?\\_r=0](http://www.nytimes.com/2005/09/08/national/08arnold.html?_r=0) (noting Governor Schwarzenegger’s decision to veto a same-sex marriage bill in 2005); Jill Tucker, *Schwarzenegger Vetoes Same-Sex Marriage Bill Again*, S.F. CHRON. (Oct. 12, 2007), <http://www.sfgate.com/bayarea/article/Schwarzenegger-vetoes-same-sex-marriage-bill-again-2497886.php> (“In his veto message, the Republican governor said it is up to the state Supreme Court and then, if necessary, voters to alter Proposition 22, which defines marriage as between a man and a woman in California.”). Efforts were also made to enact marriage equality in Vermont in 2000. *See infra* Part I.

<sup>18</sup> *See generally* Larry D. Kramer, “*The Interest of the Man*”: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 VAL. U. L. REV. 697 (2006).

<sup>19</sup> *Id.* at 699.

<sup>20</sup> *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 175 (1999) (arguing for the elimination of judicial review in favor of legislative supremacy); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1360 (2006) (“[A]llowing decisions by courts to override legislative decisions on these matters fails to satisfy important criteria of political legitimacy.”).

One of the strongest critiques of popular constitutionalists' vision is that bottom-up, majoritarian-driven constitutional interpretation imperils the rights of minority groups to potential majority tyranny.<sup>21</sup> While an independent judiciary armed with the power of judicial review is an important safeguard for minority groups, the marriage equality movement<sup>22</sup> provides a case study for how basic elements of popular constitutionalism can work feasibly without subjecting minority groups to, as James Madison would describe it, a factionalized "common impulse of passion, or of interest, adverse to the rights of other citizens."<sup>23</sup>

Rather, the marriage equality movement demonstrates how proponents and opponents of social change alike can avail themselves of an open process in state legislatures and allow legislators to weigh clamors for change in public policy through their own constitutional interpretation. Courts adjudicating constitutional questions on issues previously subjected to intense legislative scrutiny, in turn, can then explore those well-reasoned constitutional interpretations for guidance. Such a process in which courts give due diligence to consensus-driven constitutional interpretation in the legislative process while robustly exercising judicial review embraces a balance of constitutional prerogatives once articulated by Justice Lewis Powell:

There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.<sup>24</sup>

In alignment with Justice Powell's opinion that courts must carefully balance democratic deliberation and judicial intervention on constitutional questions, the marriage equality movement has brilliantly fashioned itself for courts to assert their institutional role within the bounds of Powell's ideal. It is through the legislative looking glass, that judges can employ principles of popular constitutionalism *and*

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<sup>21</sup> See, e.g., Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 675–76.

<sup>22</sup> As Professor William Eskridge notes, "[P]opular constitutionalism can indeed contribute to the evolution of antidiscriminatory social norms—but it will decidedly not be an instrument for radical social change that helps minority groups. In most instances, I should expect popular constitutionalism to be more (rather than less) assimilationist than court-oriented constitutionalism." William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2406 (2002).

<sup>23</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>24</sup> *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring).

judicial restraint without giving life to fears that popular constitutionalism necessarily endangers minority rights. Indeed, judges would be wise to study the constitutional flavor of the legislative process when considering whether the fundamental freedom to marry extends to same-sex couples.

Parts I through VI of this Article will illustrate, state-by-state, the constitutional arguments most often used in early state legislative debates on marriage equality legislation and the extent of their prominence. Drawing from over one hundred interviews of key legislators, floor debates, and media accounts of each state's experience, these Parts will highlight what constitutional values legislators articulated and what constitutional framing most impacted outcomes in legislative processes. Part VII will then synthesize the various state-level legislative case studies by examining the commonalities and differences between the various states' legislative efforts.

The Article concludes by proffering how federal judges in forthcoming same-sex marriage litigation should employ lessons from state legislatures while considering whether the freedom to marry extends to same-sex couples. The Article will conclude with an analysis of the broader macro-level implications of that conclusion for popular constitutionalism, the role of courts in a democratic society with republican governance, and the tension between majority will and minority rights.

#### I. THE GREEN MOUNTAIN DECADE: VERMONT

Beth Robinson, Susan Murray, and Mary Bonauto sought the victory in Vermont's courts that narrowly evaded Evan Wolfson and same-sex marriage advocates a few years before in Hawaii: judicial recognition of same-sex couples' right to marry.<sup>25</sup> In December 1999, a mere three years after Congress enacted the Defense of Marriage Act, which defined marriage, for federal purposes, as the union between a man and a woman,<sup>26</sup> the Vermont Supreme Court was ready to rule on what recognition, if any, the state was required to afford gay and lesbian couples.<sup>27</sup> The constitutional question in *Baker* was whether Vermont could deny same-sex couples the rights, benefits, and responsibilities provided to heterosexual couples under the state constitution's

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<sup>25</sup> See generally Wendy Somera, *Baehr v. Miike*, 8 AM. U. J. GENDER SOC. POL'Y & L. 227 (2000) (describing the initial victories in Hawaii state court for same-sex couples seeking the freedom to marry and the subsequent state constitutional amendment permitting the limitation of marriage to heterosexuals).

<sup>26</sup> Defense of Marriage Act, 1 U.S.C. § 7 (2006) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.") *Id.* The Defense of Marriage Act was found unconstitutional as violative of the equal protection guarantees of the Fifth Amendment. See *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>27</sup> See *Baker v. State*, 744 A.2d 864 (Vt. 1999).

Common Benefits Clause,<sup>28</sup> originally adopted in 1777.<sup>29</sup> That constitutional provision, which predated the Federal Equal Protection Clause by nearly ninety years, was an eighteenth-century forerunner of the Fourteenth Amendment's equality-based protections. It read:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family or set of men, who are a part only of that community; and that the community hath an indubitable, unalienable and infeasible right, to reform, alter or abolish government, in such manner as shall be, by that community, judged most conducive to the public weal.<sup>30</sup>

Vermont's Common Benefits Clause was not the earliest Revolutionary-era constitutional provision of its kind, however. In fact, Vermont's benefits language was taken verbatim from Pennsylvania's 1776 constitution.<sup>31</sup> Massachusetts's 1780 constitution also contained equality-themed language, which in notable contrast to Vermont, was not cabined in terms of "benefits." It read: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."<sup>32</sup>

The justices of the Vermont Supreme Court's justices had the opportunity to make history in the advancement of sexual minority rights. But there was an open question as to the extent that the court would employ originalism and couch their constitutional analysis within eighteenth-century, Revolutionary-era American political thought—a philosophy that was deeply hued by the virtues of property ownership. The Vermont justices explicitly recognized this in *Baker*:

The historical origins of the Vermont Constitution thus reveal that the framers, although enlightened for their day, were not principally concerned with civil rights for African-Americans and other minorities, but with equal access to public benefits and protections for the community as a whole. The concept of equality

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<sup>28</sup> VT. CONST. of 1777, ch. I, art. 6.

<sup>29</sup> *Baker*, 744 A.2d at 867.

<sup>30</sup> VT. CONST. of 1777, ch. I, art. 6.

<sup>31</sup> Pennsylvania's Common Benefit Clause was removed when it adopted a new constitution in 1790. See *Baker*, 744 A.2d at 875.

<sup>32</sup> MASS. CONST. of 1780, pt. 1, art. I.



at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferments and advantages.<sup>33</sup>

Vermont's forefathers embraced a vision of equality radically different than contemporary America. Indeed, unlike the principles of socio-political equality that undergirds modern American political thought in wake of the Fourteenth Amendment and the Civil Rights Movement,<sup>34</sup> Vermont's constitutional drafters embraced a paradigm of equality in property.<sup>35</sup>

Vermont's justices handed down an opinion in *Baker* with a strong originalist flavor. The Vermont Supreme Court would not make the historical decision that the freedom to marry proponents had hoped for. Rather, the court unanimously held that there was a constitutional infirmity in denying same-sex couples the tangible benefits of marriage,<sup>36</sup> but split on the remedy.<sup>37</sup> The majority held "that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the State could do so through a marriage license is obvious. But it is not required to do so . . . ."<sup>38</sup>

Far from definitively resolving the issue, the court gave same-sex marriage advocates what Beth Robinson described as "neither an outright loss nor a win."<sup>39</sup> The justices punted the remedy to the political process and within a three-day time span, Robinson and the Vermont Freedom to Marry Task Force had to draw up a legislative strategy.<sup>40</sup> Vermont's same-sex marriage proponents suspected from the onset that any push for same-sex marriage rights would be an uphill battle. Their prognostication proved correct and legislators decided to make a more politically palatable decision and create a parallel institution to marriage called a "civil union"—a term coined in the Vermont Judiciary Committee.<sup>41</sup>

The outcome disappointed same-sex couples and their allies, but it did not surprise them. Robinson herself said that she "didn't expect marriage to pass"<sup>42</sup> but

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<sup>33</sup> *Baker*, 744 A.2d at 876.

<sup>34</sup> *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

<sup>35</sup> *See, e.g.*, VT. CONST. of 1776, ch. I, art. 2.

<sup>36</sup> *Baker*, 744 A.2d at 867.

<sup>37</sup> *See id.* at 898 (Johnson, J., concurring in part and dissenting in part).

<sup>38</sup> *Id.* at 887.

<sup>39</sup> Telephone Interview with Beth Robinson, Former Vt. Freedom to Marry Task Force Dir. & Vt. Supreme Court Justice (Sept. 14, 2012) [hereinafter Beth Robinson Interview].

<sup>40</sup> *See id.*

<sup>41</sup> Telephone Interview with Bill Lippert, Former Vt. House Judiciary Comm. Chairman (June 21, 2012) [hereinafter Lippert Interview].

<sup>42</sup> Beth Robinson Interview, *supra* note 39.



faced the difficult decision of whether they would “accept the blessing of civil unions.”<sup>43</sup> Robinson opined that accepting civil unions “was painful because [marriage equality advocates] were probably delaying [their] ability to come back and talk about marriage.”<sup>44</sup> Robinson’s observation was certainly correct, but even she could not foresee the political backlash that would envelop Vermont as a consequence of civil unions.

Black-on-white signs began to pop up throughout the state that said “Take Back Vermont.”<sup>45</sup> The civil union law engendered anger in large segments of Vermont’s population. As one “Take Back Vermont” supporter told *The New York Times*, “Civil unions are like the straw that broke the camel’s back.”<sup>46</sup> Many towns reported heightened tension including sprawling antigay graffiti.<sup>47</sup> Hostility in one town grew so great that the local newspaper printed an editorial signed by 168 locals lamenting that “a climate of fear [was] being created by people whose alarmist tactics discourage rational debate.”<sup>48</sup> The groups called for an end to “the divisiveness, hostility and mistrust we see overtaking our towns since the passage of the civil unions law.”<sup>49</sup>

The “Take Back Vermont” movement had a profound impact on the 2000 state elections. As a consequence of the severe backlash, Republicans took control of the Vermont House of Representatives for the first time in sixteen years.<sup>50</sup> The defeat in the Legislature, followed by rejection at the polls, sent shockwaves throughout Vermont political circles. For marriage equality advocates, the bruising experience required many years of rebuilding and recovering. As Beth Robinson reflected, “[T]he next 8 years was really a process of steadily doing the education, the groundwork, and the politics to turn the conversation back to a place where we could talk about marriage.”<sup>51</sup>

However, while the stinging series of legal and political defeats made the outlook for marriage equality grim, even in the typically progressive, though rural, state, the legal and political crucibles that advocates endured had important long-term effects. Bill Lippert, an openly gay six-year veteran of the Vermont House of

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Carey Goldberg, *Vermont Residents Split over Civil Unions Law*, N.Y. TIMES (Sept. 3, 2000), <http://www.nytimes.com/2000/09/03/us/vermont-residents-split-over-civil-unions-law.html>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 82 (2013) (noting that Republicans took a twenty-one seat majority in the Vermont House breaking consistent Democratic majorities since 1984).

<sup>51</sup> Beth Robinson Interview, *supra* note 39.

Representatives, in 1999 had become vice-chair of the House Judiciary Committee.<sup>52</sup> Of critical importance, Lippert was resolved to press on for marriage equality, stating that he “decided to stay in the legislature until [they] had full marriage equality.”<sup>53</sup> For other legislative leaders, the *Baker* decision marked the first time they were provoked to seriously contemplate the merits of marriage equality. Shap Smith, who would assume the Vermont House speakership in 2008, said, “I started to really think about [marriage equality] when Vermont was discussing the *Baker* decision.”<sup>54</sup> Similarly, House member David Zuckerman, who would become a primary sponsor of the 2009 legislation, recalled:

I was in the legislature when the Vermont Supreme Court made the *Baker* decision. Certainly, when that decision came down into the start of that January session [I had to consider the merits of same-sex marriage]. I supported marriage and not civil unions at the time. Prior to that, I don’t believe marriage equality was on my radar screen. But [the *Baker* decision] was the first time when I [could] put my finger on it and say I would work on marriage equality.<sup>55</sup>

#### A. Looking Beyond Baker

For all its shortcomings and limitations, the Vermont Supreme Court had achieved something remarkable through the *Baker* decision: it fueled conversations about sexual orientation-based rights and the need for the law to provide equality to nonheterosexuals. That conversation was boosted in 2004 by Vermont’s southern neighbor, Massachusetts. There, the Supreme Judicial Court, in *Goodridge v. Department of Public Health*,<sup>56</sup> became the first court in the United States to rule that fundamental freedom to marry—or not to marry—must apply equally to same-sex couples as it does heterosexual couples under the Massachusetts Constitution.<sup>57</sup> The court held:

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

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<sup>52</sup> See Lippert Interview, *supra* note 41.

<sup>53</sup> *Id.*

<sup>54</sup> Telephone Interview with Shap Smith, Speaker, Vt. House of Representatives (June 21, 2012) [hereinafter Speaker Smith Interview].

<sup>55</sup> Telephone Interview with David Zuckerman, Former Member, Vt. House of Representatives (June 25, 2012) [hereinafter Zuckerman Interview].

<sup>56</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>57</sup> *Id.* at 948–49.

that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.<sup>58</sup>

Unlike the *Baker* decision, where the Vermont Supreme Court was called to apply a constitutional provision emphasizing a property-based vision of equality,<sup>59</sup> the Massachusetts Constitution embraced a broader vision of equality aimed at undermining class-based discrimination<sup>60</sup>—much like the Federal Constitution’s Fourteenth Amendment guarantees *and* the type of constitutional guarantees that overwhelmingly motivated and undergirded same-sex marriage advocates’ thinking in the legislative process. Though the origin of the language is traceable to the original 1780 constitution, the equality provision of the Massachusetts Constitution was amended in 1976 to more fully mirror modern concepts of equality like those embodied in the Fourteenth Amendment’s Equal Protection Clause.<sup>61</sup>

The 1976 amendment to the constitutional article analyzed in *Goodrich* gender-neutralized the 1780 language and added, “Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”<sup>62</sup> Over time, the rationale supporting the Massachusetts court’s decision arguing for broad, socio-political equality for gays and lesbians would increasingly curry favor with legislators and the public.<sup>63</sup> Arguments grounded in the *Baker* property-centric philosophy would never garner long-term currency.

In the interim period between 2000 and 2009, courts in Connecticut, Iowa, and California joined Massachusetts and extended the freedom to marry to same-sex couples.<sup>64</sup> Vermont legislators carefully watched these developments. And, as a

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<sup>58</sup> *Id.* at 948.

<sup>59</sup> *See Baker v. State*, 744 A.2d 864, 869–70 (Vt. 1999).

<sup>60</sup> *Goodridge*, 798 N.E.2d at 948.

<sup>61</sup> *Compare* MASS. CONST. of 1780, pt. 1, art. I (“All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”), *with* MASS. CONST. pt. 1, art. I (“All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”).

<sup>62</sup> *See supra* note 61.

<sup>63</sup> *See* Telephone Interview with Evan Wolfson, Founder & Exec. Dir., Freedom to Marry (May 17, 2012) (noting that *Goodrich* “put some wind in the sails for the advocates”).

<sup>64</sup> *See In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (applying the California State Constitution); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 411 (Conn. 2008) (applying the Connecticut State Constitution); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (applying the Iowa State Constitution).

consequence, legislators reconsidered whether the equality guarantees of property afforded to same-sex couples in Vermont law squared with the type of equality embraced by the Federal Constitution and consistent with national values. Republican Heidi Scheuermann recounted that the Massachusetts decision provoked some thought on the issue: “Knowing we had civil unions, which at the time I thought they essentially gave all the rights and protections to gay and lesbian couples that marriage did, so I didn’t give it much thought. So after Massachusetts and Iowa, it came to the forefront more and more.”<sup>65</sup> In a similar vein, Speaker Shap Smith observed that in the aftermath of judicial decisions in other states legalizing same-sex marriage, “People [in Vermont] have seen what [marriage equality] looks like and realized it doesn’t harm anybody.”<sup>66</sup>

Ten years after *Baker* and four years after *Goodridge*, Vermont would wade into the same-sex marriage debate again. In the fall of 2008, Shap Smith knew he would become Speaker of the House the next year.<sup>67</sup> He also knew that the votes were there for marriage equality in both chambers of the legislature. For him, “[t]he question was whether the bill would be vetoed or not and [the members of the legislature] thought about it. It was not clear that the votes were [there] for an override.”<sup>68</sup>

Governor Jim Douglas’s predisposition towards marriage equality was unclear. A Republican, Governor Douglas had a tepid record on LGBT issues. In 2007, Douglas signed a landmark civil rights bill banning gender identity-based discrimination in public accommodations, housing, and employment.<sup>69</sup> That bill passed with a veto proof majority, however.<sup>70</sup> Mindful of that, Bill Lippert speculated that “maybe if there was a strong enough vote, he’d let it go.”<sup>71</sup> A possible glimmer of hope for advocates also rested in their knowing Douglas was a member of the LGBT friendly United Church of Christ.<sup>72</sup> But for some in the legislature, like Assistant House

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<sup>65</sup> Telephone Interview with Heidi Scheuermann, Member, Vt. House of Representatives (June 28, 2012) [hereinafter Scheuermann Interview].

<sup>66</sup> Philip Shishkin, *Vermont House Backs Gay Marriage*, WALL ST. J. (Apr. 3, 2009), <http://online.wsj.com/news/articles/SB123871484665384529>.

<sup>67</sup> Speaker Smith Interview, *supra* note 54.

<sup>68</sup> *Id.*

<sup>69</sup> *Vermont Governor Signs Non-Discrimination Bill Into Law*, HUMAN RIGHTS CAMPAIGN (May 22, 2007), <http://www.hrc.org/press-releases/entry/vermont-governor-signs-non-discrimination-bill-into-law#.Ufq1-mTwKPs>.

<sup>70</sup> *See id.*

<sup>71</sup> Lippert Interview, *supra* note 41.

<sup>72</sup> *See* VERMONT ELECTED OFFICIALS BIOGRAPHY BOOK 4 (2005), available at <http://vermont-elections.org/2005-2006BioBook/2005Statewide.pdf>. In 2005, the United Church of Christ adopted a resolution in support of same-sex marriage. *See* United Church of Christ, Equal Marriage Rights for All (July 4, 2005), available at <http://www.ucc.org/assets/pdfs/2005-equal-marriage-rights-for-all-1.pdf>.

Majority Leader Lucy Leriche, there was a lingering feeling of near certainty that the Governor would reject marriage equality.<sup>73</sup>

For Beth Robinson, Speaker Smith, and other advocates, the challenge in 2009 of securing a veto-proof majority was markedly different than the obstacles in the aftermath of *Baker* in 2000. The difficulties Robinson and the Task Force faced were twofold. First was the challenge of making the case that civil unions were insufficient substitutes for marriage:

We were in a different position because [of] the rhetorical conversation we were having. [We] were not moving from a place of nothing to a place of marriage. The challenge we had was persuading people that even in a world of civil unions that it was worth revisiting the conversation even though it was painful for the state the first time around.<sup>74</sup>

In addition to winning the Governor's support, a second hurdle was assuring legislators that marriage equality would not mobilize widespread opposition and political upheaval like civil unions had in 2000.<sup>75</sup> Former Representative Mark Larson, who, with David Zuckerman, introduced the 2009 marriage equality legislation,<sup>76</sup> was more concerned about framing the political implications of leading the nation in statutorily enacted marriage equality than he was about selling same-sex marriage:

The big concern was not that there was a pushback [sic] on the merits but on the political dynamic. We were concerned that because civil unions had been such a dramatic process, . . . people were worried that marriage equality would cause us to revisit all the trials and tribulations of passing civil unions. The challenge was trying to show people that it wouldn't be as bad as civil unions. We needed to continue the education. We just needed [to] convince people to stick to it.<sup>77</sup>

One successful tactic Robinson employed to highlight the importance of marriage and dispute that civil unions were a sufficient substitute for marriage was to

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<sup>73</sup> Telephone Interview with Lucy Leriche, Assistant Majority Leader, Vt. House of Representatives (June 26, 2012) [hereinafter Leriche Interview].

<sup>74</sup> Beth Robinson Interview, *supra* note 39.

<sup>75</sup> See Zuckerman Interview, *supra* note 55.

<sup>76</sup> Louis Porter, *Vt. House to Introduce Same-Sex Marriage Bill*, RUTLAND HERALD (Feb. 6, 2009), <http://www.rutlandherald.com/article/20090206/News04/902060326/1004/News03>.

<sup>77</sup> Telephone Interview with Mark Larson, Former Vt. State Representative (June 26, 2012).

have Vermonters write handwritten notes to legislators explaining the importance of inclusion and equality. Republican Minority Leader Patti Komline received one such letter that prompted her to support the legislation:

We got handwritten letters, which were powerful, from people. In fact I got one from a young man, who wrote he kept a bottle of pills under his bed and thought about killing himself every night. And how it felt to just be unaccepted and unwanted. And that really moved me and made me think. After that, I knew where I stood.<sup>78</sup>

Securing Leader Komline's support was crucial. As the House Republican's caucus leader, Komline signaled to rank-and-file members of her caucus that they could vote on the measure as a matter of conscience. Equally important, however, Komline had the ear of Governor Douglas.

### *B. Navigating the Legislative Gauntlet*

Few observers doubted the prospects for marriage equality's success in the Vermont Senate. In an interview, Claire Ayer, a Democrat and the Senate Majority Whip, said: "We had it all along because we had a 23–7 majority. It was a slam dunk in the Senate."<sup>79</sup> The Senate, under the leadership of future governor and then-Senate President Peter Shumlin, Majority Leader David Campbell, and Ayer, quickly pushed a same-sex marriage bill through their chamber. It sailed through the Senate by a vote of twenty-six to four.<sup>80</sup>

Soon thereafter, Governor Jim Douglas entered the fray, which he later described as "very contentious."<sup>81</sup> Two days after the Senate sent the bill to the House, Governor Douglas announced he would veto the legislation.<sup>82</sup> Given the large margin of victory in the upper chamber, Douglas's veto was practically irrelevant. But the concerns about the already unpredictable House now grew. At the time, Senate President Peter Shumlin perceived that the Governor's resistance was grounded in

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<sup>78</sup> Telephone Interview with Patti Komline, Former Republican Minority Leader, Vt. House of Representatives (June 26, 2012) [hereinafter Komline Interview].

<sup>79</sup> Telephone Interview with Claire Ayer, Member, Vt. Senate (May 28, 2012).

<sup>80</sup> 23 J. OF THE SENATE 445 (Vt. 2009).

<sup>81</sup> E-mail from Jim Douglas, Former Governor, Vt., to author (Nov. 26, 2012, 09:26 AM) (on file with author). It should be noted that Governor Douglas graciously declined to be interviewed.

<sup>82</sup> Bob Kinzel, *Same-Sex Marriage Advocates Work to Veto-Proof the Vote*, VPR (Mar. 27, 2009), [http://www.vpr.net/news\\_detail/84529/same-sex-marriage-advocates-work-to-veto-proof-vot/](http://www.vpr.net/news_detail/84529/same-sex-marriage-advocates-work-to-veto-proof-vot/).



the fear of a return to the tumultuous post-civil union era in Vermont's political history.<sup>83</sup> Shumlin appealed to Governor Douglas to reconsider his pledge:

That was a huge fight 9 years ago and what the governor seems to have missed is that Connecticut and Massachusetts allow marriage, now the New Hampshire House, I never thought I'd see this, passed it yesterday . . . I thought that the way the debate happened in the Senate was a reflection of how things have changed we saw folks who never would have voted for civil unions 9 years ago stand up and vote for this marriage equality bill.<sup>84</sup>

The first significant legislative test for the bill, where it would take a dramatically different shape altogether, was the House Judiciary Committee. One key Committee player, Republican Heidi Scheuermann, a thirty-eight-year-old Catholic representing a heavily French Catholic region of northern Vermont, was initially hesitant to the idea of moving on marriage.<sup>85</sup> Recalling the divisiveness of the "Take Back Vermont" movement and amassing challenges caused by the great economic recession of 2008, she doubted the wisdom of tackling marriage equality at all: "I thought at the time [that] we were doing something we didn't need to do and we needed to focus on the economic issues and face the recession. I was concerned about the contentiousness."<sup>86</sup>

But as she listened to testimony in the Judiciary Committee, Representative Scheuermann began to see the "inherent discrimination" underpinning the separate-but-equal status afforded to same-sex couples vis-à-vis civil unions.<sup>87</sup> However, Scheuermann had one overriding concern: same-sex marriage's implication on religious liberty. Scheuermann said: "[Religious liberty] was my most significant concern. I wanted to ensure that equality was there, but at the same time, I wanted to make sure that the language in the public accommodations act allowed [religious organizations] to keep doing the things they've always done."<sup>88</sup>

Beth Robinson had considered the issue of religious liberty within a constitutional paradigm, reemphasizing in the original draft of the legislation the constitutionally prescribed protections afforded by the First Amendment.<sup>89</sup> The original bill, however, did not provide greater religious liberty protections than constitutionally mandated. The first iteration of the Vermont law only restated that clergy could not be compelled to perform marriages "in violation of the right to religious liberty

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (internal quotation marks omitted).

<sup>85</sup> Scheuermann Interview, *supra* note 65.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Beth Robinson Interview, *supra* note 39.



protected by the First Amendment to the United States Constitution and by Chapter I, Article 3 of the Constitution of the State of Vermont.”<sup>90</sup> However, Robinson worked to address the concerns expressed by Scheuermann and amend the bill:

There’s the part in the [introduced] bill that we proposed that affirmed what the Constitution required that no clergy would be forced to perform a same-sex marriage against their will. There were a couple of specific issues that came up, and one was the meeting hall. In many small towns, the local church serves as the meeting hall. It came down to [Heidi Scheuermann,] who had a pastor in [her] district who feared they’d have to rent out their coffee hall for same-sex wedding services or receptions.<sup>91</sup>

Robinson, Scheuermann, and Chairman Lippert went back to the drawing board and crafted religious liberty protections that swept well beyond the minimal constitutionally demanded protections for the free exercise of religion.<sup>92</sup> Those religious liberty protections reaffirmed preexisting constitutional guarantees and foreclosed any threat of civil suits against members of the clergy for declining to perform same-sex marriages.<sup>93</sup> The new iteration of the legislation also provided exemptions for religious institutions and organizations from requirements to provide same-sex couples health insurance benefits.<sup>94</sup> The broadest protections came in the form of an exemption from the public accommodations law. The Vermont bill provided:

[A] religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities,

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<sup>90</sup> S. 115, 2009–2010 Leg. Sess. (Vt. 2009), *available at* <http://www.leg.state.vt.us/docs/2010/bills/Intro/S-115.pdf>.

<sup>91</sup> Beth Robinson Interview, *supra* note 39.

<sup>92</sup> *See* Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 885 (1990) (holding that otherwise valid laws of general applicability that incidentally interfere with the free exercise of religion are constitutionally permissible); *see also* Anthony Michael Kreis & Robin Fretwell Wilson, *The Overlooked Benefit of Minimalism: Perry v. Brown and the Future of Marriage Equality*, 37 N.Y.U. REV. L. & SOC. CHANGE 35, 39–40 (2013) (“Each state’s [same-sex marriage] law provides religious liberty protections to the clergy, but then reaches beyond guarantees given by the First Amendment. A core of protections has emerged for religious organizations and individuals who cannot celebrate or facilitate *any* marriage when doing so would violate their religious convictions.” (citations omitted)).

<sup>93</sup> VT. STAT. ANN. tit. 18, § 5144 (2011).

<sup>94</sup> *Id.* § 4501(b).

goods, or privileges is related to the solemnization of a marriage or celebration of a marriage.<sup>95</sup>

Scheuermann believed out of principle that robust religious liberty protections were a necessary feature of a marriage equality bill.<sup>96</sup> Others, however, saw the provisions in more practical terms. Chairman Lippert “thought it was more of a political compromise than anything else.”<sup>97</sup> As bill sponsor David Zuckerman saw it, “It certainly persuaded some people. It gave others cover.”<sup>98</sup> The Speaker had a loftier vision of the religious liberty language: “It was very important. People needed to really see that we were not requiring religions who didn’t think gay marriage was right that we weren’t going to force it on them.”<sup>99</sup>

On the aggregate level, the role of the religious liberty protections was rather simple. As Assistant Majority Leader Leriche said, “We couldn’t have done it without the religious liberty exemptions. If we could have, we would have, honestly. But we would not have been able to get enough votes without them.”<sup>100</sup> After wrangling over and drafting the bill’s religious liberty features, the Judiciary Committee sent the amended legislation to the House floor by a vote of eight to two.<sup>101</sup> On the House floor, debate was intense and deeply personal. While those voting “no” typically cast their reasoning in terms of tradition,<sup>102</sup> those expressing support did so with rhetoric focusing on equality, the Constitution, and invocations of Civil Rights Movement-era imagery. Kesha Ram, a twenty-two-year-old, first term representative and the only person of color in the Vermont House,<sup>103</sup> made a clear comparison to the Civil Rights Movement:

To say that Civil Unions offered the same rights as marriage is nothing less than saying once upon a time there are two drinking fountains that both dispense the same water. I vote yes to lift this final weight of off the shoulders of our otherwise free society.<sup>104</sup>

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<sup>95</sup> *Id.* § 4502(1).

<sup>96</sup> Scheuermann Interview, *supra* note 65.

<sup>97</sup> Lippert Interview, *supra* note 41.

<sup>98</sup> Zuckerman Interview, *supra* note 55.

<sup>99</sup> Speaker Smith Interview, *supra* note 54.

<sup>100</sup> Leriche Interview, *supra* note 73.

<sup>101</sup> Kesha Ram, *Legislative Update: Transportation, Budget, Marriage* (Mar. 31, 2009), <http://www.kesharam.org/?p=128>.

<sup>102</sup> *See, e.g., Vote Explanation History*, VT. STATE LEGIS. (2009), <http://www.leg.state.vt.us/HouseClerk/Roll%20Call%20Books/2009%20Roll%20Call/vote%20explanations.htm> (statement of Rep. Kilmartin).

<sup>103</sup> Nina Jacinto, *Young and Elected: Kesha Ram*, WIRETAP MAG. (June 22, 2009), <http://www.wiretapmag.org/stories/44280>.

<sup>104</sup> *Vote Explanation History*, VT. STATE LEGIS. (2009), <http://www.leg.state.vt.us/HouseClerk/Roll%20Call%20Books/2009%20Roll%20Call/vote%20explanations.htm> (statement of Rep. Ram).

In a press release building up to the debate, Ram invoked the Civil Rights Movement and specifically drew parallels between marriage equality and *Loving v. Virginia*<sup>105</sup>—the Supreme Court decision that finally recognized that the fundamental right to marry extended to interracial couples:

As the product of an interracial marriage myself, I cannot help but remember *Loving* and wonder how my life and that of President Obama would have been changed if the Supreme Court had not set a moral compass for marriage as a civil right forty years ago. We stand at a historical crossroads where lawmakers have the power to make bans on marriage due to sexual orientation as repugnant to our Constitution and our ethical code as bans on interracial marriage have become.<sup>106</sup>

Though Bill Lippert was the only openly LGBT member of the House in 2000, he was not alone in 2009. Openly lesbian Representative Suzi Wizowaty gave her first ever speech on the floor describing the pain induced by the necessity of asking her fellow legislators to give her rights.<sup>107</sup> Gay Representative Steve Howard talked about the struggle he endured as he came to grips with his sexual orientation. “I stand because nobody should be ashamed of how God made them,” Howard told the House.<sup>108</sup>

Jason Lorber, an openly gay member of the House, delivered an emotionally laden floor speech.<sup>109</sup> Lorber talked about his husband, Matthew, to whom he was married by a rabbi in the sect of Reform Judaism that he practiced, and their son Max.<sup>110</sup> Lorber recounted his painful struggle with the separate-but-equal status afforded by Vermont’s civil unions:

After we were married we sent our photo into the [*Burlington Free Press*]. And a while later we opened up the newspaper and we saw all the photos of the beautiful, beautiful couples who were married and it said “Weddings.” . . . and then there was our picture, too, under the banner “Civil Unions.” It was nice. It was

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<sup>105</sup> 388 U.S. 1 (1967).

<sup>106</sup> Keshia Ram, *Remembering Loving: On Civil Rights and Marriage Equality* (Mar. 19, 2009), <http://www.kesharam.org/?p=71>.

<sup>107</sup> Telephone Interview with Suzi Wizowaty, Member, Vt. House of Representatives (June 22, 2012).

<sup>108</sup> Andrew Sullivan, *Marriage Passes the House in Vermont*, DISH (Apr. 3, 2009), <http://dish.andrewsullivan.com/2009/04/03/marriage-passes-the-house-in-vermont/>.

<sup>109</sup> See Jason P. Lorber, *Gay Marriage: Why Can't They Just Say "Congratulations"?*, YOUTUBE (Aug. 26, 2009), <http://www.youtube.com/watch?v=2ssMphLGYIM>.

<sup>110</sup> *Id.*

nice to see our photo there. But I thought this is a shame. Why does it have to be off to the side? Why do we have to differentiate? Why do we have to say, “You are different?” Why can’t we just say “congratulations”?<sup>111</sup>

Once Lorber finished, the voting began, and the bill passed ninety-four to fifty-two.<sup>112</sup> The amended bill was then sent to the Senate where it was approved, without debate, and sent on to the Governor.<sup>113</sup> It was promptly vetoed.<sup>114</sup> The next day, the House would again have to reconsider the bill and attempt to override. If they were to be successful, marriage equality proponents had to hold onto all of their original supporters and pick up six more—assuming every member of the House voted.

There was deep skepticism among some Democrats that Republicans might waiver, derailing the entire enterprise. The Republican caucus leader never doubted where her people were, but he credited their commitment to the veto override, in some measure, to Governor Douglas.<sup>115</sup> Komline recalled Douglas telling her, “If anyone gives you a hard time with this, tell them to come to me.”<sup>116</sup> The Governor’s commitment to Komline was imperative from her view. “I know that . . . at least one of those Republican votes would have switched if that hadn’t happened,” she estimated.<sup>117</sup> Importantly, the Governor’s decision to allow legislators to carefully deliberate on same-sex marriage without the fear of partisan retribution positively facilitated the popular constitutionalism underway in Vermont.

There was great anticipation the morning of the override vote. Without modern electronic voting, the Vermont House took slow, alphabetical roll calls.<sup>118</sup> For supporters, the harrowing experience was made even worse by the fact that most of the uncertain votes were at the end of the alphabet<sup>119</sup>—any unexpected derivation in the vote count could have a domino effect and derail the entire enterprise. As the last

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<sup>111</sup> *Id.*

<sup>112</sup> S. 115, 2009–2010 Leg. Sess., The Vermont Legislative Bill Tracking System, <http://www.leg.state.vt.us/database/status/summary.cfm?Bill=S%2E0115&Session=2010> (last visited Mar. 2, 2014).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Speaker Shap Smith echoed Komline’s interpretation of the Governor’s subtle role in giving political comfort to Republican marriage equality supporters. *See* Speaker Smith Interview, *supra* note 54. “Some of the Republicans were concerned about voting against their Governor. But the Governor helped by saying he wouldn’t try to get them to sustain his veto.” *Id.*

<sup>116</sup> Komline Interview, *supra* note 78.

<sup>117</sup> *Id.*

<sup>118</sup> Beth Robinson Interview, *supra* note 39.

<sup>119</sup> *Id.*

vote came in—Zuckerman: Yea—same-sex marriage advocates would carry the day, overriding Governor Jim Douglas’s veto one hundred to forty-nine.<sup>120</sup>

The marriage equality movement in Vermont had all the hallmarks of Madisonian popular constitutionalism. For same-sex couples, marriage rights were far too long in the coming. However, in the ten years after the *Baker* decision, elected officials, citizens, and activists very ably articulated constitutional ideas as they availed themselves of an imperfect, but generally open political process and engaged in serious conversations on the merits of same-sex marriage.<sup>121</sup> In doing so, these various actors rejected eighteenth-century constructions of equality in property and extended to same-sex couples the protections of the antislavery ideals embedded in the Federal Constitution’s Fourteenth Amendment.

## II. THE CONCORD WALTZ: NEW HAMPSHIRE

New Hampshire’s state motto is “Live Free or Die.”<sup>122</sup> Attributed to New Hampshire native and Revolutionary War hero, General John Stark,<sup>123</sup> the motto is a manifestation of what New Hampshire Representative Mike Ball described as the “crusty, self-reliant, Yankee attitude.”<sup>124</sup> Notwithstanding whatever flowery descriptions are used to describe it, deep strands of libertarianism are sewn throughout the fabric of the Granite State’s political culture and constitution.<sup>125</sup> Indeed, unlike its neighbors, Vermont and Massachusetts, New Hampshire is far from a bastion of liberalism.<sup>126</sup> Standing out in stark contrast from much of New England, the State is historically

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<sup>120</sup> S. 115, 2009–2010 Leg. Sess., The Vermont Legislative Bill Tracking System, <http://www.leg.state.vt.us/database/status/summary.cfm?Bill=S%2E0115&Session=2010> (last visited Mar. 2, 2014).

<sup>121</sup> See Lippert Interview, *supra* note 41.

<sup>122</sup> *State Emblem*, NEW HAMPSHIRE ALMANAC, <http://www.nh.gov/nhinfo/emblem.html> (last visited Mar. 2, 2014).

<sup>123</sup> *Id.*

<sup>124</sup> Interview with Mike Ball, Member, N.H. House of Representatives (June 14, 2012) [hereinafter Ball Interview].

<sup>125</sup> The New Hampshire Constitution is the only state constitution that explicitly provides for a “right of revolution.” See N.H. CONST. pt. 1, art. 10 (“Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.”).

<sup>126</sup> Sean Sullivan, *New Hampshire’s Democratic Wave, Explained*, WASH. POST (Nov. 9, 2012), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/11/09/new-hampshires-democratic-wave-explained/> (quoting political scientist Dante Scala as describing New Hampshire voters as “small government voters”).

conservative-leaning and Republicans have a long-standing record of dominating state politics.<sup>127</sup>

Also contrasting neighboring Massachusetts and Vermont, same-sex marriage advocates never opted to press a constitutional claim in the courts. This, despite that the first two articles of the New Hampshire Constitution mirrored the equality-based rights language contained in the Massachusetts Constitution. The New Hampshire Constitution opens:

All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.<sup>128</sup>

The decision to not pursue judicial intervention set up New Hampshire as the first state to legislatively enact civil unions or marriage equality without judicial intervention.<sup>129</sup>

After a national wave of Democratic electoral victories in November 2006,<sup>130</sup> Republicans found themselves as the minority party in both chambers of the New Hampshire General Court.<sup>131</sup> However, these new majorities alone did not necessarily

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<sup>127</sup> Republicans controlled the Legislature for decades. Democrats held the governor's office for just 14 of the 98 years between 1899 and 1997. Reagan trounced Democrat Jimmy Carter here in 1980, winning 58 percent to 28 percent, and Reagan won the state again in 1984 over Democrat Walter Mondale. In 1988, Republican George H.W. Bush beat Democrat Michael Dukakis, 63 percent to 36 percent.

Ben Leubsdorf, *New Hampshire, Once a Republican Stronghold, Has Moved Slowly to the Middle*, CONCORD MONITOR (Nov. 6, 2012), <http://concordmonitor.com/home/2655386-95/state-hampshire-republican-democrat>.

<sup>128</sup> N.H. CONST. pt. 1, art. 1–2.

<sup>129</sup> Brian Early, *New Hampshire Lawmakers Approve Gay Civil Unions*, REUTERS (Apr. 26, 2007), <http://www.reuters.com/article/2007/04/26/us-usa-gays-newhampshire-idUSN2648255520070426>.

<sup>130</sup> See John M. Broder, *Democrats Gain Senate and New Influence*, N.Y. TIMES (Nov. 10, 2006), [http://www.nytimes.com/2006/11/10/us/politics/10elect.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2006/11/10/us/politics/10elect.html?pagewanted=all&_r=1&).

<sup>131</sup> See Norma Love, *N.H. House Flips Back Into Democratic Control*, BOS. GLOBE (Nov. 7, 2012), <http://www.boston.com/news/local/new-hampshire/2012/11/07/house-flips>



usher in conditions ripe for sweeping social legislation. The New Hampshire's House of Representatives has the distinction of being the largest state legislative body in the United States,<sup>132</sup> the significance of which is amplified by the state's relatively small population.<sup>133</sup> Indeed, because of this, House-level politics are quintessential retail politics since each member of the House represents a mere 3,500 constituents on average.<sup>134</sup> Thus, if the new Democratic majorities in the General Court were to make a move on legislation concerning same-sex relationship recognition, New Hampshire's elected officials would have to intimately engage with their constituents and thoroughly discuss any potential legislation with their friends and neighbors.

In 2007, openly gay member of the House, Jim Splaine, pressed for a civil union bill.<sup>135</sup> Despite having the atypical benefit of a liberal-leaning legislative majority in the House, Splaine was unsure the bill would make much progress.<sup>136</sup> Some Democrats were uneasy with civil union legislation and urged Splaine to give pause.<sup>137</sup> Splaine himself was not certain the bill could pass the chamber, but he introduced the measure because he "thought the discussion needed to be started."<sup>138</sup>

Splaine's civil union bill came up for a vote the first week of April.<sup>139</sup> However, Splaine had another challenge to overcome the week before. The House had a scheduled vote on a resolution for an amendment to the state constitution banning same-sex marriages.<sup>140</sup> The events on the day of the vote, March 28, 2007, would resonate with numerous legislators and galvanize support for his civil union bill.<sup>141</sup>

African-American Representative Carole Estes, a native Floridian, decided to speak against the proposed amendment. Estes delivered a masterful speech:

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-back-into-democratic-control/iAFM9n47MFqW05B8AT8FBI/story.html (highlighting that between 1922 and 2006 Republicans controlled the New Hampshire House); *see also* Leubsdorf, *supra* note 127 ("Democrats briefly took the state Senate in 1998, then took both chambers of the Legislature for four years following the 2006 election, with the GOP roaring back in 2010 to retake the State House.").

<sup>132</sup> *See* Sullivan, *supra* note 126.

<sup>133</sup> *See id.*

<sup>134</sup> *Id.*

<sup>135</sup> Telephone Interview with Jim Splaine, Former N.H. State Representative (May 29, 2012) [hereinafter Splaine Interview].

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *See* Sarah Liebowitz, *Lynch Says He Will Sign Civil Unions Bill—Governor: "It is a Matter of Conscience,"* CONCORD MONITOR (Apr. 20, 2007), <http://www.concordmonitor.com/article/lynch-says-he-will-sign-civil-unions-bill-0>.

<sup>140</sup> *See* Norma Love, *N.H. House Rejects Amendment Banning Gay Marriage,* RUTLAND HERALD (Mar. 29, 2007), <http://www.timesargus.com/apps/pbcs.dll/article?AID=/RH/20070329/NEWS03/703290370/1004/SPORTS>.

<sup>141</sup> *See, e.g.,* Telephone Interview with Melanie Levesque, Former N.H. State Representative (June 22, 2012) (recalling that she had felt moved by several floor speeches).



For the first 38 years of my life, my public actions were limited or impacted by constitutional or legislative fiat. Most of you have never had to deal with the actions that I dealt with every day. By law I could not go to a theater, I could not go to a library or a restaurant where whites were. In fact, I was 18 years old before I ever spoke to a white as an equal. I could not attend a first-class elementary or high school. I could not attend a public college. I could not try on any article of clothing, nor could I return it when it was purchased. By law I served in a segregated Air Force unit. In uniform I could not choose my seat on a bus or a train. I could not vote, nor could I marry the man I loved because he was white and I am not.

Over the last 30 years I have worked mightily to overcome the feelings of being less than, and irony of ironies, I am now asked to enshrine discrimination in the New Hampshire Constitution and force a total of 700 same-sex couples, who in fact have been enumerated by the 2000 U.S. census to become less than. For too many years, we have spent time believing that I was a second-class citizen. The laws told me so. I cannot perpetuate such a travesty.<sup>142</sup>

The House floor, typically abuzz with activity as 400 citizen legislators wander the floor, was silent as Estes spoke. Splaine said “a hush . . . spread throughout the Legislative Chambers during the first ten seconds of her comments. Some House members were walking to their seats from the backroom because the pending vote was about to occur, and I saw many just stop in mid-step, not wanting to miss a word.”<sup>143</sup> So captivating was her speech, the House erupted in applause and Estes received a standing ovation.<sup>144</sup> Soon thereafter a motion was made to kill the proposal, which passed on a bipartisan vote of 233 to 124.<sup>145</sup>

The momentum from the defeated anti-same-sex marriage resolution carried over into the next week. Splaine’s civil union bill went onto pass the House on April 4.<sup>146</sup> From there, it sailed through the Senate with little fanfare and was signed by Governor John Lynch making New Hampshire the first state to enact civil unions

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<sup>142</sup> Susan Ryan-Vollmar, *ENDA Shows Again That Straight Black Leaders Are with Us*, BAY WINDOWS (Nov. 14, 2007), <http://www.baywindows.com/enda-shows-again-that-straight-black-leaders-are-with-us-52444>.

<sup>143</sup> Splaine Interview, *supra* note 135.

<sup>144</sup> See *Making the Case*, BAY WINDOWS (Apr. 12, 2007), <http://www.baywindows.com/making-the-case-62126>.

<sup>145</sup> Love, *supra* note 140.

<sup>146</sup> Early, *supra* note 129.

without a judicial mandate.<sup>147</sup> Lynch was personally opposed to extending marriage to same-sex couples but supported the civil union legislation as a matter of “fairness and preventing discrimination.”<sup>148</sup> Though his bill was successful, Splaine’s mission was far from done. Like his counterparts in Vermont,<sup>149</sup> he was determined to make 2009 the year for marriage equality in New Hampshire. But, for the time being, he saw the civil union bill’s success as an important stepping-stone for full marriage rights:

Essentially, it is a marriage without the word. People are going to see that couples in relationships will become more stable, that it’s good for families, that it’s good for society. Then I think in a year or two or three or four, the people of New Hampshire will say, “Why not marriage with the word?”<sup>150</sup>

Splaine began his push for marriage equality in November 2008. His first task was to reach out to Governor Lynch. “I knew the Governor for 35 years, so I asked him to not veto it. Just keep an open mind.”<sup>151</sup> Also lobbying Governor Lynch was Representative Splaine’s greatest extrapolitical asset—a man of the cloth. Bishop Eugene Robinson, the first openly gay Episcopal bishop, was the Bishop of the New Hampshire Episcopal Diocese.<sup>152</sup> Bishop Robinson was involved in the civil union legislation in 2007 but had a drive to actively engage in the legislative process on the pending same-sex marriage bill.<sup>153</sup> The Bishop made a similar appeal to Governor Lynch but had a distinctive vision that he wanted to impart:

I think the particular role that I wanted to play, truth be told, was most of the arguments against equal rights for LGBT people come from religious people and religious institutions. It is very easy for people to get the impression that the religious right dominates the Christian viewpoint. I didn’t want the religious right to own the day.<sup>154</sup>

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<sup>147</sup> *See id.*

<sup>148</sup> *See* Liebowitz, *supra* note 139; *see also* Splaine Interview, *supra* note 135 (stating that the Governor was against the bill).

<sup>149</sup> *See supra* notes 50–51 and accompanying text.

<sup>150</sup> Pam Belluck, *Civil Unions Gain Ground as a Governor Vows Action: New Hampshire Nears a Milestone*, N.Y. TIMES, Apr. 20, 2007, at A14.

<sup>151</sup> Splaine Interview, *supra* note 135.

<sup>152</sup> Laurie Goodstein, *First Openly Gay Episcopal Bishop to Retire in 2013*, N.Y. TIMES, Nov. 7, 2010, at 32.

<sup>153</sup> *See* Telephone Interview with Reverend Eugene Robinson, N.H. Episcopal Diocese Bishop (Sept. 4, 2012) [hereinafter Bishop Robinson Interview] (recalling that he approached the Governor about the 2009 same-sex marriage bill).

<sup>154</sup> *Id.*

Not everyone was initially on board or equally excited as Splaine and Bishop Robinson. Splaine surmised that House leadership “wasn’t enthused” by his push.<sup>155</sup> There was fear on the part of some members that Splaine’s efforts would be destructive. One openly gay member, David Pierce, did not sign onto the bill when it was introduced. “I thought it was way too fast. [I thought it was] not going to pass and I thought it would set us back. We had just taken the majority and passed civil unions. And I didn’t sign on. And now I’m embarrassed by that now,” Pierce reflected.<sup>156</sup>

While the Governor mulled over the possibility of signing a marriage bill and House members contemplated the substance and ramifications of it, the work of conducting hearings was under way in the House Judiciary Committee.<sup>157</sup> Freshman Judiciary Committee member Rick Watrous recalled that it was in the Committee hearings where he was convinced to support marriage equality:

There were many gay and lesbian couples there asking for equal rights. Their parents were there speaking on behalf of their adult children. And it was very moving. And that’s when I started to really say to myself, “Well, why not?”<sup>158</sup>

But the “why not” rationale was perhaps an easier way to dismiss opponents’ lack of substantive reasons to oppose the bill for members like Watrous, who said that ultimately he “saw this as an equality under the Constitution issue. And why should these people not have the same equal rights as heterosexuals, simply because they had a different sexual orientation?”<sup>159</sup> The entire House Committee was not so easily convinced. The Committee passed the legislation without a recommendation deadlocked ten to ten<sup>160</sup>—an indication of how excruciatingly difficult efforts would be to get the measure through the House.

Representative John Cebrowski was the first to speak on the bill’s merits on the floor. He spoke in opposition. Cebrowski used a culinary analogy to describe his opposition: “A peanut butter and jelly sandwich can’t be anything but peanut butter and jelly. Creamy peanut butter and chunky peanut butter can never ever be a PBJ, as appealing a snack as marriage between a man and a woman is an appealing institution.”<sup>161</sup>

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<sup>155</sup> Splaine Interview, *supra* note 135.

<sup>156</sup> Telephone Interview with David Pierce, N.H. State Representative (May 31, 2012) [hereinafter Pierce Interview].

<sup>157</sup> See Katharine Q. Seelye, *Vermont Lawmakers Consider Same-Sex Marriage Bill*, N.Y. TIMES (Mar. 17, 2009), <http://www.nytimes.com/2009/03/18/us/18vermont.html>; Telephone Interview with Rick Watrous, N.H. State Representative (June 29, 2012) [hereinafter Watrous Interview].

<sup>158</sup> Watrous Interview, *supra* note 157.

<sup>159</sup> *Id.*

<sup>160</sup> Seelye, *supra* note 157.

<sup>161</sup> Transcription of Mar. 26, 2009 N.H. House Debate (on file with author) [hereinafter Mar. 26, 2009 N.H. House Debate].

The Representative was interrupted by a cacophony of rising murmurs from colleagues. Cebrowski's statement was met with harsh rebuke from a fellow Republican and openly gay member, Steve Vaillancourt, who extended Cebrowski's logic to interracial marriage opposition. "It wasn't until, as you've heard earlier, the Supreme Court affirmed in the *Loving* case in 1967 that blacks and whites could marry. Think of it, forty years ago, blacks and whites could not marry. I guess they wouldn't be considered peanut butter and jelly, huh?"<sup>162</sup> Other moderate members, who were still conflicted over their position, even as the floor debates progressed, were taken aback by Cebrowski's opening. One swing voter described it as "offensive."<sup>163</sup>

Vaillancourt's thematic approach, much like Jason Lorber's in Vermont,<sup>164</sup> framed his commentary within historical context to dispel any preconceptions of the legislators that civil unions, as a separate institution, could ever be truly equal.<sup>165</sup> Marriage equality supporters employed this framing repeatedly. Representative Gary Richardson told the House that he supported marriage equality "because separate but equal is not equal in marriage anymore than it is in school segregation."<sup>166</sup>

Another member, who recalled Carole Estes's oratory in 2007 with admiration, made a personal appeal to her colleagues. Melanie Levesque, an African American, married a white man.<sup>167</sup> She drew a parallel between the struggles for same-sex marriage to her own marriage: "I rise in support of HB 436 because discrimination of any kind is wrong. Would you believe that if I were traveling through Virginia in 1966 with my husband, that we would be thrown in jail because in 1966, just about 42 years ago, interracial marriage was illegal."<sup>168</sup>

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

Would you as a married person voluntarily give up your marriage license to downgrade it to a civil union license? Separate can never be equal. That is a fundamental American value. Civil unions are no exception to that rule. . . . When my children grow up to be old enough to understand what discrimination is they should not have to learn that they were the objects of it. They should not have to learn that their family was not accorded the full dignity, respect and protection of the law.<sup>169</sup>

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<sup>162</sup> *Id.*

<sup>163</sup> Telephone Interview with Cindy Rosenwald, N.H. State Representative (June 19, 2012) [hereinafter Rosenwald Interview].

<sup>164</sup> *See supra* notes 109–11 and accompanying text.

<sup>165</sup> *See* Mar. 26, 2009 N.H. House Debate, *supra* note 161.

<sup>166</sup> *Id.*

<sup>167</sup> *See id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

After a series of parliamentary inquiries, Speaker Terie Norelli called the vote. At the time she called the question, Speaker Norelli recalled the hall was filled with “a lot of tension” even though “[a] lot of people thought it didn’t have a chance.”<sup>170</sup> As Speaker, Norelli could see vote tallies before the members. She looked down at the final numbers before they were announced—182 in favor and 183 against.<sup>171</sup>

Then came a motion to table the bill that failed 56 to 310.<sup>172</sup> Then, a motion came to permanently kill the bill. That motion also failed by a vote of 177 to 189.<sup>173</sup> The Speaker was confident that after two successive attempts to defeat the legislation, the legislation would likely pass.<sup>174</sup> The only thing standing between the bill lingering in limbo and successfully moving onto the Senate was a motion to reconsider—but parliamentary procedure required a member voting on the prevailing side make that motion.<sup>175</sup>

Cindy Rosenwald voted in the negative on the initial vote, but she was not fully confident that her decision was the correct one.<sup>176</sup> She considered the issue, looking to Massachusetts, and concluded that “the sky hadn’t fallen” there because of same-sex marriage.<sup>177</sup> For her, Massachusetts’s experience with marriage equality rendered the boisterous arguments presented by opponents of the bill that same-sex marriage would lead to disastrous social consequences unconvincing.<sup>178</sup> Rosenwald was sympathetic of same-sex couples’ challenges without the protection and dignity of equal marriage rights, but her constituents’ wishes were not so clear. She described her constituency as equally divided among Democrats, Republicans, and Independents and having “a high proportion of elderly French Catholics.”<sup>179</sup> Deciding to err on the side of caution and channel her constituency’s wishes, she planned to vote no.<sup>180</sup> But, Rosenwald would emerge from the fog of the hectic parliamentary confusion to save the bill:

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<sup>170</sup> Telephone Interview with Terie Norelli, N.H. Speaker of the House (July 3, 2012) [hereinafter Speaker Norelli Interview].

<sup>171</sup> HB436 Roll Calls, New Hampshire General Court—Bill Status System, [http://www.gencourt.state.nh.us/bill\\_Status/Roll\\_calls/Billstatus\\_billrollcalls.aspx?lsr=8&sy=2009&sortoption=&txtsessionyear=2009&txbillnumber=hb436](http://www.gencourt.state.nh.us/bill_Status/Roll_calls/Billstatus_billrollcalls.aspx?lsr=8&sy=2009&sortoption=&txtsessionyear=2009&txbillnumber=hb436) (last visited Mar. 2, 2014) [hereinafter HB436 Roll Calls].

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See Speaker Norelli Interview, *supra* note 170.

<sup>175</sup> See Rosenwald Interview, *supra* note 163.

<sup>176</sup> See *id.* (recalling that clergy support of the bill caused her to question her belief that supporters did not desire gay marriage as a religious institution).

<sup>177</sup> *Id.*

<sup>178</sup> See *id.*

<sup>179</sup> *Id.*

<sup>180</sup> See *id.* (noting that when she eventually decided to support gay marriage legislation it was to “vote [her] own mind rather than channel [her] constituents”).

I felt like I was sleepwalking. Because as soon as the vote happened, I thought, okay, I know that my speaker is going to want to reconsider it. I know that I can move it because I voted on the prevailing side. So I walked up to the podium and said to the speaker, I will move on reconsideration.<sup>181</sup>

Rosenwald made the motion and the final vote on HB 436 was called. For her part, Rosenwald would vote in the negative again, but her position did not prevail.<sup>182</sup> In a stunning, rapid, and unexpected twist of fate, the legislation passed in the House of Representatives 186 to 179.<sup>183</sup> Steve Vaillancourt suspected those last few votes came from sympathetic legislators who needed to muster the political courage to vote in favor:

I think what really did it was the vote was so really close. I think a lot of people didn't want to vote [for] it because they thought it was going to lose. But then when a few Democrats and a couple of maverick Republicans realized that they could go out on a limb. I talked to a couple of people who had voted against it and they had swayed their minds.<sup>184</sup>

The prospects in the Senate were murky.<sup>185</sup> For one, few thought that the Senate would ever see a bill come to the chamber from the House.<sup>186</sup> Secondly, the partisan margins were much closer in the Senate, fourteen Democrats and ten Republicans.<sup>187</sup> Making matters more complicated, the Senate Judiciary Committee, voting three to

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<sup>181</sup> *Id.*

<sup>182</sup> On the final version of the bill, Rosenwald voted in the affirmative. She noted that the religious liberty provisions and family discussions influenced her switch:

When it came back from the Senate in 2009, the Governor had said he'd sign it, and there were amendments, so I reconsidered it. In the meantime in 2009, I switched my vote. I thought I should vote my own mind rather than channel my constituents. And I was speaking with my son at the time, who was in college, and said he said "Mom, they elect you for your judgment."

*Id.*

<sup>183</sup> HB436 Roll Calls, *supra* note 171.

<sup>184</sup> Telephone Interview with Steve Vaillancourt, N.H. State Representative (May 31, 2012) [hereinafter Vaillancourt Interview].

<sup>185</sup> See Abby Goodnough, *Vote in Doubt as a Senate Takes Up Gay Marriage*, N.Y. TIMES, Apr. 16, 2009, at A20.

<sup>186</sup> See Vaillancourt Interview, *supra* note 184 (opining that many House members voted "no" at first because they believed the bill would fail by a wide margin).

<sup>187</sup> Abby Goodnough, *New Hampshire Senate Narrowly Approves New Version of Same-Sex Marriage Bill*, N.Y. TIMES, Apr. 29, 2009, at A16.

two, recommended to kill it.<sup>188</sup> The Democratic chair, Deb Reynolds, voted against the measure saying that New Hampshire was not “there yet.”<sup>189</sup> Reynolds’s position was promptly met by fierce resistance, notably from the *Concord Monitor*’s editorial board, “If that’s the best argument the chairwoman of the Senate Judiciary Committee can make, then the full Senate should have no trouble rejecting the committee’s recommendation and quickly passing the gay marriage bill tomorrow.”<sup>190</sup> The editors rejected the arguments offered for giving pause to the legislation including the position that the existing civil union statute was sufficient enough to delay consideration of marriage equality:

New Hampshire’s civil unions law took effect in January 2008. Since then, more than 600 same-sex couples have taken advantage of it, thereby winning many of the same rights as those given to married couples. But is there a compelling reason for state law to create separate institutions for gay couples and straight couples? As African-American activists in the 1960s proved so conclusively, separate but equal is a lie.<sup>191</sup>

The bill’s failure or success in the Senate would rest in the hands of Senate Majority Leader Maggie Hassan. Luckily for marriage equality advocates, there was no better patron of their bill than she. Hassan, who would become governor in 2013,<sup>192</sup> had thought about marriage equality for some time: “I started to think about it when the Massachusetts Supreme [Judicial] Court legalized it [in 2004].”<sup>193</sup> Her father, Dr. Robert C. Wood, a political scientist and adviser to Presidents John F. Kennedy and Lyndon Johnson,<sup>194</sup> fueled a passion for civil rights in her.<sup>195</sup> She was a member of a United Church of Christ congregation that was welcoming of same-sex couples and had no personal religious qualms over the matter.<sup>196</sup> But Hassan smartly recognized that while she had no personal difficulty squaring marriage equality with her religious beliefs, others struggled:

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<sup>188</sup> *Id.*

<sup>189</sup> Concord Monitor Staff, *Pass Gay Marriage Bill and End Discrimination*, CONCORD MONITOR (Apr. 28, 2009), <http://www.concordmonitor.com/article/pass-gay-marriage-bill-and-end-discrimination>.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Katharine Q. Seelye, *From Congress to Halls of State, in New Hampshire, Women Rule*, N.Y. TIMES, Jan. 1, 2013, at A1, A13.

<sup>193</sup> Telephone Interview with Maggie Hassan, N.H. Senate Majority Leader (July 9, 2012) [hereinafter Hassan Interview].

<sup>194</sup> See Douglas Martin, *Robert Wood, Education Expert, Dies at 81*, N.Y. TIMES (Apr. 5, 2005), <http://www.nytimes.com/2005/04/05/education/05wood.html>.

<sup>195</sup> Hassan Interview, *supra* note 193.

<sup>196</sup> *Id.*



As it came over to the Senate, we were very conscious of the fact that it was a personal vote for every senator. We didn't take a caucus position on the matter. So my overall attitude was to keep us all focused on the economic and budget challenges we had and create some space for senators to think about it.<sup>197</sup>

As other senators considered the bill, Hassan drafted an amendment that she offered on the floor during debate.<sup>198</sup> The amendment illustrated a clear separation of religious and civil marriages under the solemnization requirements.<sup>199</sup> The amendment clarified that the solemnization of marriages could be accomplished through either civil ceremony or a religious ceremony.<sup>200</sup> It stripped the gender neutral language in the House bill, providing that each party to a marriage be designated "bride," "groom," or "spouse."<sup>201</sup> The floor amendment assuaged Senator Deb Reynolds's concerns.<sup>202</sup> Reynolds joined twelve of the thirteen remaining Democrats and the measure passed thirteen to eleven.<sup>203</sup> The real question now was Governor Lynch. Thus far, Jim Splaine, Bishop Robinson, and others had successfully kept the Governor from preempting the legislative process and announcing his position, unlike Governor Douglas in Vermont.<sup>204</sup>

Governor Lynch announced that if the legislature added religious liberty protections, like those contained in Vermont and Connecticut, he would sign the bill.<sup>205</sup> Governor Lynch explained, "New Hampshire's great tradition has always been to come down on the side of individual liberties and protections. . . . But following that tradition means we must act to protect both the liberty of same-sex couples and religious liberty."<sup>206</sup> Lynch proposed that religious organizations receive explicit protections from any requirement to participate in same-sex marriages. "If the legislature passes this language, I will sign the same-sex marriage bill into law. If the legislature doesn't pass these provisions, I will veto it."<sup>207</sup> The legislature complied with Lynch's

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<sup>197</sup> *Id.*

<sup>198</sup> *See id.*

<sup>199</sup> Goodnough, *supra* note 185.

<sup>200</sup> Michael McCord, *Sen. Maggie Hassan Key to Passage of Gay Marriage Bill*, SEACOAST ONLINE (May 1, 2009), <http://www.seacoastonline.com/articles/20090501-NEWS-905010329>.

<sup>201</sup> *Id.*

<sup>202</sup> *See* Goodnough, *supra* note 185.

<sup>203</sup> *See* McCord, *supra* note 200.

<sup>204</sup> *See* Splaine Interview, *supra* note 135; *supra* notes 81–84 and accompanying text.

<sup>205</sup> Abby Goodnough, *New Hampshire Pact Near on Same-Sex Marriage*, N.Y. TIMES (May 14, 2009), <http://www.nytimes.com/2009/05/15/us/15marriage.html>.

<sup>206</sup> Press Release, Governor John Lynch, Governor Lynch Statement Regarding Same-Sex Marriage Legislation (May 14, 2009), available at <http://webcache.googleusercontent.com/search?q=cache:http://archive.is/5yG9i>.

<sup>207</sup> *Id.*

request and the bill was signed into law.<sup>208</sup> Same-sex couples could wed beginning January 1, 2010.<sup>209</sup>

Conservative Republicans swept elections across the nation in November 2010.<sup>210</sup> New Hampshire was no exception to the trend. Democrats not only lost control of both chambers, but also faced a Republican supermajority in each house in 2011.<sup>211</sup> Among the first agenda items for some Republicans was repealing the 2009 same-sex marriage law. Representative David Bates took little time to introduce a repeal bill that claimed its purpose to further New Hampshire's "unique, distinct, and *compelling interest* in promoting stable and committed marital unions between opposite-sex couples so as to increase the likelihood that children will be born to and raised by both of their natural parents."<sup>212</sup> A number of observers, including the newly elected Republicans, anticipated the effort might be successful. Indeed, the Judiciary Committee's recommendation in October 2012, by an eleven to six margin, to repeal the State's marriage equality law gave credence to those observers' intuition.<sup>213</sup>

In the interim between the Judiciary Committee's favorable report of the repeal bill and the full House's consideration of it, the U.S. Court of Appeals for the Ninth Circuit decided *Perry v. Brown*,<sup>214</sup> in which the court was called to decide on the constitutionality of California's Proposition 8.<sup>215</sup> Proposition 8 was an amendment to the California State Constitution that banned same-sex marriages after the California State Supreme Court ruled the state could not deny marriage rights to same-sex couples.<sup>216</sup> The *Perry* panel held that Proposition 8 violated the Equal Protection Clause of the U.S. Constitution because it resulted in "the deprivation of an existing

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<sup>208</sup> "No religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall be required to participate in a ceremony solemnizing marriage in violation of the religious beliefs of such organization, association, or society." N.H. REV. STAT. ANN. § 457:37 (2011).

<sup>209</sup> *Id.* § 457:1.

<sup>210</sup> *Republicans Exceed Expectations in 2010 State Legislative Elections*, NAT'L CONFERENCE OF STATE LEGISLATORS (Nov. 3, 2010), <http://www.ncsl.org/press-room/republicans-exceed-expectations-in-2010.aspx> ("Republicans now hold about 3,890, or 53 percent, of the total state legislative seats in America, the most seats in the GOP column since 1928. The GOP will now control at least 54 of the 99 state legislative chambers, its highest number since 1952.").

<sup>211</sup> Kevin Landrigan, *Not Same Old NH House Lynch Recalls from 2006*, NASHUA TELEGRAPH (Nov. 4, 2010), <http://www.nashuatelegraph.com/news/898422-227/not-same-old-nh-house-lynch-recalls.html>.

<sup>212</sup> H.B. 437, 162d Gen. Court, Reg. Sess. (N.H. 2011) (emphasis added).

<sup>213</sup> Tom Fahey, *Repeal of Same-Sex Marriage Advances*, N.H. UNION LEADER (Oct. 25, 2011), <http://www.unionleader.com/article/20111026/NEWS06/710269989>.

<sup>214</sup> 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012), *and vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

<sup>215</sup> *Perry*, 671 F.3d at 1063.

<sup>216</sup> *Id.* at 1066–67.

right without a legitimate reason.”<sup>217</sup> The New Hampshire House considered the marriage repeal bill a little over a month after the Ninth Circuit’s decision and rejected the bill overwhelmingly.<sup>218</sup> Many of the representatives voting in opposition echoed the same rationale employed in the *Perry* decision for rejecting repeal.

As one member of the Republican caucus described it, many members of the House grounded their arguments in constitutional rationales.<sup>219</sup> Most of the constitutional arguments followed the *Perry* decision’s logic. One Republican House member opposing repeal said, “[The LGBT community] already had these rights and . . . we shouldn’t take away a privilege that [they had enjoyed] for a number of years. A lot of people thought that was a strong argument.”<sup>220</sup> While some conservative legislators described it as a privilege, others described it in slightly different terms, stating that if the repeal bill was successful “a right . . . would be taken away. And that was wrong.”<sup>221</sup> For one Republican leader of the anti-repeal movement, the impropriety of taking away a right was amplified by the fundamental nature of marriage:

To be quite honest, it was the idea that a body of the government, giving a certain amount of privileges to a group of people and then tak[ing] them away, playing ping pong with their lives, which depended on who held the majority in the legislature. . . . How could I look myself in the eye and subscribe to [the call for marriage equality repeal] and still call myself a defender of constitutional liberties?<sup>222</sup>

While a majority of the Republicans eventually voted against the repeal, many were sure to emphasize that their vote was not support for same-sex marriage. One member, Karen Umberger, voted against the marriage equality bill in 2009 and against the repeal bill in 2012.<sup>223</sup> “I felt very strongly that if the Legislature had given something to people that we should not take that away. Now, does that change my position on gay marriage? No,” Umberger said.<sup>224</sup>

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

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<sup>217</sup> *Id.* at 1076.

<sup>218</sup> Norma Love, *NH House Kills Gay Marriage Repeal Bill*, BOS. GLOBE (Mar. 21, 2012), [http://www.boston.com/news/local/massachusetts/articles/2012/03/21/nh\\_house\\_weights\\_gay\\_marriage\\_repeal\\_vote/](http://www.boston.com/news/local/massachusetts/articles/2012/03/21/nh_house_weights_gay_marriage_repeal_vote/).

<sup>219</sup> Telephone Interview with Seth Cohn, N.H. State Representative (Sept. 10, 2012).

<sup>220</sup> Telephone Interview with Mark Warden, N.H. State Representative (Aug. 31, 2012).

<sup>221</sup> Telephone Interview with Marie Sapienza, N.H. State Representative (Aug. 27, 2010).

<sup>222</sup> Telephone Interview with Jennifer Coffey, N.H. State Representative (June 4, 2012).

<sup>223</sup> Telephone Interview with Karen Umberger, N.H. State Representative (Aug. 29, 2012).

<sup>224</sup> *Id.*

engaging the repeal bill's sponsor.<sup>225</sup> Representative Robbins directly questioned Representative Bates on how he squared his framing of his pro-repeal campaign as protecting the sanctity of marriage in a fashion parallel to the landmark Supreme Court decision in *Griswold v. Connecticut*,<sup>226</sup> which described the institution of marriage as "intimate to the degree of being sacred."<sup>227</sup> That opinion invalidated a state statute prohibiting married couples from purchasing birth control<sup>228</sup> and was relied upon in striking down abortion prohibitions in *Roe v. Wade*.<sup>229</sup> Representative Robbins recalled, "We sat and talked about the bill and I said it seemed ironic that he was using some language with *Griswold*, given he's pro-life."<sup>230</sup>

The lead organizer of Republicans opposing the marriage equality repeal bill was Representative Michael Ball. Representative Ball was not a native of New Hampshire.<sup>231</sup> Indeed, his family had long-standing ties in the Deep South.<sup>232</sup> Representative Ball's motivation for building a coalition to defeat repeal efforts was animated largely by his experience in the South:

I agreed that it was appropriate from the standpoint, a basic liberty standpoint, that all citizens deserve equal protection under the law and we can't utilize the government to discriminate. It was in 1950s and 1960s in Georgia and Florida [wanted to discriminate against] black people and it's wrong to do it against another group now. I grew up in a segregated elementary school in Orlando, Florida. So I remember first hand what it was like to grow up around government discrimination. I saw that. And my family is from South Georgia. And [I remember] talking to my grandfather who worked in [the Georgia towns of] Thomasville and Valdosta during the Depression. And he was criticized for having his black workers ride in the front of his truck. And my grandfather saw them as being just like him.<sup>233</sup>

Similar to Vermont, the dominant themes undergirding marriage equality's legislative success were constitutional arguments touching on fundamental rights,

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<sup>225</sup> Telephone Interview with David Robbins, N.H. State Representative (Sept. 6, 2012) [hereinafter Robbins Interview].

<sup>226</sup> 381 U.S. 479 (1965).

<sup>227</sup> *Id.* at 486.

<sup>228</sup> *Id.* at 485–86.

<sup>229</sup> 410 U.S. 113, 152 (1973) (citing *Griswold* when discussing the Court's recognition of a fundamental right to privacy).

<sup>230</sup> Robbins Interview, *supra* note 225.

<sup>231</sup> See Ball Interview, *supra* note 124 ("I grew up in a segregated elementary school in Orlando, Florida.").

<sup>232</sup> See *id.*

<sup>233</sup> *Id.*

equal protection, and religious freedom.<sup>234</sup> Though achieved within a shorter time frame than Vermont, the architects of New Hampshire's same-sex marriage push employed similar tools of popular constitutionalism in the period between enacting civil unions and winning equal marriage rights for same-sex couples to educate legislators and the public and garnering sufficient support for same-sex marriage. The wisdom of their approach was validated in 2012 when against all odds and conventional political analysis, the Republican-dominated House overwhelmingly rejected an attempt to repeal same-sex marriage and leave committed same-sex couples out in the cold.<sup>235</sup>

### III. LESSONS IN TRIUMPH, DEFEAT, AND VICTORY: THE STORY OF MAINE

At the same time that Vermont and New Hampshire were considering presenting marriage equality legislation, activists in Maine were encouraging legislative leaders to do the same.<sup>236</sup> Unlike the other two states, Maine had not enacted civil unions prior to the introduction of marriage equality legislation.<sup>237</sup> Thus, counting votes proved more difficult because there was no prior vote to use as a baseline metric of support. In Maine, passage was all but assured in the lower chamber.<sup>238</sup> The Senate was of more concern, but advocates were nevertheless hopeful that pro-marriage equality forces would prevail.<sup>239</sup> The real questions were (1) who would sponsor the bill and (2) would the Governor sign the bill? The Governor had never publicly supported same-sex marriage. And although Governor Baldacci had supported sexual orientation nondiscrimination legislation in 2005, he simultaneously rejected the notion that he supported same-sex marriage.<sup>240</sup> In 2005, the Governor said, "I have publicly and consistently said I do not support same-sex marriage and I would not support same-sex marriage."<sup>241</sup> The Governor's support was an absolute necessity

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<sup>234</sup> See *supra* notes 163–69, 199–202, 219–22 and accompanying text.

<sup>235</sup> Love, *supra* note 218.

<sup>236</sup> Abby Goodnough, *A Push Is on for Same-Sex Marriage Rights Across New England*, N.Y. TIMES (Apr. 4, 2009), <http://www.nytimes.com/2009/04/05/us/05marriage.html?page-wanted=all>.

<sup>237</sup> *Id.*

<sup>238</sup> See Susan M. Cover, *A Change of Heart on Gay Marriage*, PORTLAND PRESS HERALD (Dec. 27, 2010), [http://www.pressherald.com/news/A-change-of-heart-on-gay-marriage\\_2010-12-27.html?pagenum=full](http://www.pressherald.com/news/A-change-of-heart-on-gay-marriage_2010-12-27.html?pagenum=full).

<sup>239</sup> See Telephone Interview with Larry Bliss, Former Me. State Senator (July 3, 2012) [hereinafter Bliss Interview] ("Once we were sworn in and seated, we were the majority, I'm a pretty open and out guy. Once it was introduced, I knew because of that the senators in the majority party would support it even without minority support. I was very uncertain about the People's Veto.").

<sup>240</sup> Cover, *supra* note 238.

<sup>241</sup> *Id.*

because it was a certainty given the Legislature's composition that there would not be veto-proof majorities in favor of same-sex marriage.<sup>242</sup>

In the Senate, the biggest threat to the bill came from pro-equality-leaning members who might opt for a similar approach to New Hampshire and Vermont and adopt civil unions. Like the arguments seen in other state legislative bodies, the Maine Senate robustly debated civil unions and marriage utilizing the language of *Plessy v. Ferguson*<sup>243</sup> and *Brown v. Board of Education*<sup>244</sup> to make the case for same-sex couples' marriage rights.<sup>245</sup> One senator, Deborah Simpson, rejected the idea of pursuing civil unions. Senator Simpson said:

The Constitution says that we all have equal protection under the law so to find some other way to get that protection, a different kind of protection, seems profoundly unfair. Separate but equal [was] struck down for the public school system because it is fundamentally unfair to do something differently. To treat one class of citizen differently is nothing but unfair and unequal.<sup>246</sup>

Once again, a legislator with deep Southern roots would weigh in on the civil unions issue. Senate President Libby Mitchell, who was raised in the segregated South, saw same-sex marriage through the lens of her memories of Jim Crow.<sup>247</sup> But, her legal education also informed her views on same-sex marriage:

I went to law school very late in life. In fact, I often joke I got my law degree the same year I got my Medicare card. But in law school, the partner of Mary Bonato [sic] in law school taught me. And [a] law student asked, "What's wrong with civil unions?" And she said, "What part of equality don't you understand?"<sup>248</sup>

The Senate rejected calls for civil unions in favor of full, equal marital rights.<sup>249</sup> But for Maine legislators and Governor Baldacci, the largest hurdle to overcome was a reconciliation of personal religious beliefs and civil marriage equality. In a show of force not seen in the other New England states, the Catholic Bishop for the

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<sup>242</sup> Abby Goodnough & Katie Zezima, *Gay Marriage Advances in Maine*, N.Y. TIMES (May 5, 2009), <http://www.nytimes.com/2009/05/06/us/06marriage.html>.

<sup>243</sup> 163 U.S. 537 (1896).

<sup>244</sup> 347 U.S. 483 (1954).

<sup>245</sup> See 124th Leg., Reg. Sess., J. OF THE SENATE S-530 (Me. 2009) (comparing the same-sex marriage issue to separate but equal laws).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at S-529.

<sup>248</sup> Mitchell Interview, *supra* note 14.

<sup>249</sup> See Goodnough & Zezima, *supra* note 242.



Diocese of Portland, which covers all of Maine, wrote each Catholic member of the Maine Senate.<sup>250</sup> As Senator Dennis Damon recalled, “A good friend of mine, a Catholic Senator from Bangor, got a handwritten letter from the Archbishop of [Portland,] Maine. As it turns out, the other Catholic members of the Senate received similar posts.”<sup>251</sup> Those letters were prominently debated at length on the Senate floor. Senator Nancy Sullivan spoke on the Senate floor about the letters, but within a constitutional framework:

Today I stand before you, not as a Christian, not as a happily married heterosexual woman; I stand before you as a legislator, as you are. Now I have a different criteria to meet. When we were all sworn in we promised to uphold the Constitution of the State of Maine and of the nation. I pledged to uphold that Constitution, that premise of life, liberty, and the pursuit of happiness. The tenant of the separation of church and state. Every single argument I have heard against this bill is based on religion, the very thing that started our country when the Puritans came here seeking religious freedom from the Church of England.<sup>252</sup>

As it would turn out, the House and the Senate passed the bill and it went to Governor Baldacci, to whom the bill was delivered in atypical form—in person by the Senate President and Senator Damon directly from the floor after the Senate approved.<sup>253</sup> Governor Baldacci signed it less than an hour after it was presented to him, despite his 2005 remarks and the strong opposition of his own faith’s clergy.<sup>254</sup> But for Governor Baldacci, by removing himself from the doctrinal constraints of the Catholic Church and discussing the legal merits of marriage equality in constitutional terms, he decided to sign the bill:

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

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<sup>250</sup> Damon Interview, *supra* note 1.

<sup>251</sup> *Id.*

<sup>252</sup> 124th Leg., Reg. Sess., J. OF THE SENATE S-531 (Me. 2009).

<sup>253</sup> See Damon Interview, *supra* note 1; Mitchell Interview, *supra* note 14.

<sup>254</sup> Cover, *supra* note 238.



Catholic people but I had to think of all people. It was an evolving maturing process.<sup>255</sup>

Though Baldacci became the first governor to sign a same-sex marriage law in the United States, the victory would not be very long lasting. Mainers collected the requisite number of signatures necessary to place the statute up for referendum, known as a People's Veto.<sup>256</sup> In November 2009, a majority of Mainers voted to overturn the law.<sup>257</sup> Same-sex couples did not have marriage rights until 2012 when a majority of voters supported an initiative to recognize same-sex marriage.<sup>258</sup>

Maine's experience is telling. While like its neighbors, Maine's legislators couched their support for marriage equality as fulfilling a constitutional mandate,<sup>259</sup> Maine's initial attempt to legislate same-sex marriage unfolded in a vastly different manner than the events in New Hampshire and Vermont in three ways. First, Maine was the only state of the three states in 2009 to enact same-sex marriage legislation that did so without the need of bipartisan support.<sup>260</sup> Second, the debates were mostly devoid of the types of robust conversations about religious liberty seen in New Hampshire and Vermont.<sup>261</sup> Finally, unlike their New England colleagues, Maine did not take the intermediary step of enacting civil unions prior to same-sex marriage, despite the likelihood of a potential People's Veto—a feature of Maine governance not held in common among the three states.<sup>262</sup> To be sure, to fault those elected officials for rejecting civil unions in favor of full equality for same-sex couples is improper. However, Maine's Legislature exemplifies how popular constitutionalism can work, despite set-backs, over time. Indeed, although that bold initial effort proved unsuccessful, the public hearings, legislative debates, and private conversations about extending the fundamental right of marriage to same-sex couples that came about as a result of the 2009 legislation certainly laid important groundwork for same-sex marriage advocates' ultimate success in 2012.

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<sup>255</sup> Governor Baldacci Interview, *supra* note 12.

<sup>256</sup> Me. Sec'y of State, *People's Veto of Bill to Allow Same-Sex Marriage Certified by Secretary of State Matthew Dunlap for November Ballot* (Sept. 2, 2009), <http://www.maine.gov/sos/news/2009/certified-peoples-veto.htm>.

<sup>257</sup> Maria Sacchetti, *Maine Voters Overturn State's New Same-Sex Marriage Law*, BOS. GLOBE (Nov. 4, 2009), [http://www.boston.com/news/local/maine/articles/2009/11/04/maine\\_voters\\_overturn\\_states\\_new\\_same\\_sex\\_marriage\\_law/](http://www.boston.com/news/local/maine/articles/2009/11/04/maine_voters_overturn_states_new_same_sex_marriage_law/).

<sup>258</sup> *2012 General Election Results for Maine*, BANGOR DAILY NEWS (Nov. 14, 2012), <http://maineelections.bangordailynews.com/>.

<sup>259</sup> See *supra* notes 245–49 and accompanying text.

<sup>260</sup> See Cover, *supra* note 238.

<sup>261</sup> Compare Mitchell Interview, *supra* note 14 (“I don't think [religious liberty exemptions] would have made any difference at that point. I think the issue was much deeper than that.”), with *supra* notes 88–101 and accompanying text (Vermont), and *supra* notes 198–209 and accompanying text (New Hampshire).

<sup>262</sup> See Goodnough, *supra* note 236; see also Bliss Interview, *supra* note 239 (expressing a concern for a potential people's veto).

## IV. THE CUOMO EFFECT: NEW YORK

The Empire State's struggle over same-sex marriage came to a head in early 2004 when Jason West, Mayor of New Paltz, New York, married twenty-five same-sex couples.<sup>263</sup> Two days later, Eliot Spitzer, who was Attorney General at the time, issued an "informal opinion" stating same-sex couples should not have marriage licenses issued to them because the New York State Legislature had not intended for the Domestic Relations Law to cover same-sex couples.<sup>264</sup> As the political temperature was rising over same-sex marriage, a series of lawsuits were initiated challenging the constitutionality of New York's statute under the New York State Constitution.<sup>265</sup> In 2006, the New York Court of Appeals settled the dispute in *Hernandez v. Robles*.<sup>266</sup> The Court ruled that limiting marriage rights to heterosexual couples did not violate the New York State Constitution's equal protection provision.<sup>267</sup> The Court's majority concluded it was a decision left for the Legislature:

The dissenters assert confidently that "future generations" will agree with their view of this case. We do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives. We therefore express our hope that the participants in the controversy over same-sex marriage will address their arguments to the Legislature; that the Legislature will listen and decide as wisely as it can; and that those unhappy with the result—as many undoubtedly will be—will respect it as people in a democratic state should respect choices democratically made.<sup>268</sup>

In the wake of the Court of Appeals' opinion in the following legislative session in 2007, the New York Legislature began seriously considering marriage equality

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<sup>263</sup> Thomas Crampton, *Spitzer and New Paltz Mayor Meet About Gay Marriages*, N.Y. TIMES (Mar. 12, 2004), <http://www.nytimes.com/2004/03/12/nyregion/spitzer-and-new-paltz-mayor-meet-about-gay-marriages.html>.

<sup>264</sup> N.Y. Attorney General Eliot Spitzer, Informal Op. 2004-1, *The Language of the New York State Domestic Relations Law Indicates that the Legislature Did Not Intend to Authorize Same-Sex Marriages* (Mar. 3, 2004), available at <http://www.ag.ny.gov/sites/default/files/opinion/I%202004-1%20pw.pdf>.

<sup>265</sup> Thomas Crampton, *In a Lawsuit, Same-Sex Couples Say New York State Ruined Their Wedding Plans*, N.Y. TIMES (Apr. 8, 2004), <http://www.nytimes.com/2004/04/08/nyregion/in-a-lawsuit-same-sex-couples-say-new-york-state-ruined-their-wedding-plans.html> (noting there were three different lawsuits initiated by same-sex couples challenging New York's domestic relations law).

<sup>266</sup> 855 N.E.2d 1 (2006).

<sup>267</sup> *Id.* at 12.

<sup>268</sup> *Id.* (citation omitted).

legislation.<sup>269</sup> However, its prospects looked dim since conservative leaning Republicans from upstate New York controlled the Senate.<sup>270</sup> Despite the support from Governor Eliot Spitzer and success in the Assembly, the Senate Majority Leader, Joseph Bruno, killed the bill.<sup>271</sup>

In 2009, marriage equality advocates appeared to have an opening. For the first time in forty-three years, conservatives lost control of the New York Senate.<sup>272</sup> Democrats held a narrow thirty-two to thirty majority in the Senate and Governor David Paterson supported marriage equality.<sup>273</sup> But political turmoil would doom the bill. Five months into Democratic control, two Democratic senators joined the Republicans, thus giving them control of the Senate, because they were purportedly displeased with party leadership and the treatment of their earmark requests.<sup>274</sup> Some media suspected the possibility of same-sex marriage legislation successfully passing through the Senate amplified the instability.<sup>275</sup> The Democrats promised to remove their leader, Malcolm Smith, from the post to bring back one senator, leaving the Senate split thirty-one to thirty-one.<sup>276</sup> With the balance of power delicately hanging in the balance, same-sex marriage opponent Rubén Díaz threatened Governor Paterson if he put the marriage bill on the floor, he would jump the party ship, join the Republicans and thwart the bill.<sup>277</sup> Senator Diane Savino recalled that the whole saga undermined any momentum for a same-sex marriage bill:

[W]e had 4 senators who decided to shakedown the leadership and force the Malcolm Smith to pay them off. And they wanted

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<sup>269</sup> Nicholas Confessore, *Spitzer Plans to Introduce Bill Legalizing Gay Marriage*, N.Y. TIMES, Apr. 23, 2007, at B1.

<sup>270</sup> *See id.*

<sup>271</sup> Danny Hakim, *Drunken Drivers May Face Two New Felony Charges*, N.Y. TIMES, June 20, 2007, at B6.

<sup>272</sup> Bruce Lambert, *Suburban Democrats Crave State Senate Clout*, N.Y. TIMES, Dec. 14, 2008, at L16.

<sup>273</sup> *See* Ken Rudin, *Was Same-Sex Marriage the Impetus for N.Y. Senate Switch?*, NPR NEWS (June 8, 2009, 4:40 PM), [http://www.npr.org/blogs/politicaljunkie/2009/06/was\\_samesex\\_marriage\\_the\\_impet.html](http://www.npr.org/blogs/politicaljunkie/2009/06/was_samesex_marriage_the_impet.html).

<sup>274</sup> Danny Hakim & Jeremy W. Peters, *Albany G.O.P. Wrests Control of the Senate*, N.Y. TIMES, June 8, 2009, at A1, A25.

<sup>275</sup> *See, e.g.*, Jeremy W. Peters & Danny Hakim, *Republicans Seize Control of State Senate*, N.Y. TIMES (June 8, 2009, 3:50 PM), [http://cityroom.blogs.nytimes.com/2009/06/08/revolt-could-imperil-democratic-control-of-senate/?\\_r=1](http://cityroom.blogs.nytimes.com/2009/06/08/revolt-could-imperil-democratic-control-of-senate/?_r=1) (“One source of contention among Democrats recently has been Mr. Smith’s support for same-sex marriage. Senator Rubén Díaz Sr., a Democrat from the Bronx, has been outspoken in his insistence that legislation allowing gay couples to marry not be allowed to come to a vote. Some had speculated he might leave the Democratic Party if Mr. Smith were to allow a vote.”); Rudin, *supra* note 273.

<sup>276</sup> Danny Hakim & Jeremy W. Peters, *In Albany, Democratic Rebel Returns, Leaving Senate in a Knot*, N.Y. TIMES, June 16, 2009, at A1, A18.

<sup>277</sup> Telephone Interview with David Paterson, Former Governor of N.Y. (May 22, 2012) [hereinafter Paterson Interview].

positions for themselves. It was a terrible start to our majority. And all these interest groups who waited so long, they had little appetite for managing their expectations despite having volatility in the conference. And it wasn't just LGBT groups. But the Republicans had tremendous discipline [to block Democratic initiatives]. They had lost 43 years of majority, now lost, and they were going to do everything to exploit our weaknesses and unify against us. But the LGBT groups demanded we brought the bill to floor. And if it failed it failed.<sup>278</sup>

Though successful once again in the lower chamber,<sup>279</sup> advocates failed in the Senate when it was brought to a vote.<sup>280</sup> Human Rights Campaign's senior strategist for the 2011 push, Brian Ellner, described that the 2009 failure was not only a result of crippling political paralysis but also an anemic movement.<sup>281</sup> In a telephone interview, Ellner described what he saw as a more systemic problem in New York:

It didn't feel like anything was happening in 2009 in the media and economic capital in the country and you wouldn't know it. There was no ad campaign. No statements from celebrities or prominent New Yorkers. There was no effort to change voters' minds. There was no big broad movement. Even in states where there were losses like Maine and California there was a movement. It was like a tree falling in the wilderness. It was a bunch of lobbyists trying to do an Albany deal.<sup>282</sup>

Ellner's motivation to create a movement and the support of a newly elected, strong-willed governor in Andrew Cuomo, despite the challenges of a Republican controlled Senate,<sup>283</sup> paved a path for same-sex marriage's success. That success was forged by, as Senator Malcolm Smith described it, a "great discussion on the content

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<sup>278</sup> Telephone Interview with Diane Savino, N.Y. State Senator (June 22, 2012).

<sup>279</sup> Jeremy W. Peters, *Assembly Passes Gay Marriage Bill; Senate Fight Awaits*, N.Y. TIMES, May 13, 2009, at A24.

<sup>280</sup> Jeremy W. Peters, *New York Senate Turns Back Bill on Gay Marriage*, N.Y. TIMES, Dec. 3, 2009, at A1.

<sup>281</sup> See Telephone Interview with Brian Ellner, Former Human Rights Campaign Senior Strategist, Campaign for N.Y. Marriage (July 17, 2012) [hereinafter Ellner Interview].

<sup>282</sup> *Id.*

<sup>283</sup> See Telephone Interview with Fred Thiele, N.Y. Gen. Assemblyperson (Oct. 18, 2012) [hereinafter Thiele Interview] ("One of the great ironies of this, is that in 2009 the Democrats controlled the Senate and it failed and in 2011 the Republicans controlled the Senate and it passed. It defied conventional wisdom. But I think the leadership there was the key factor. His willingness to work with Dean Skelos was important. And to his credit, Senator Skelos allowed the members of his conference to vote on their own beliefs.").

of the bill, including the severability clause and the religious liberty issues” and “bipartisanship cooperation.”<sup>284</sup> The broad-based and robust public discourse over constitutional values and traditions was essential for the New York Marriage Equality Act’s success in 2011.

Unlike Maine, New Hampshire, and Vermont, which all rank among the four whitest states in the country, New York is among the most diverse states in the United States.<sup>285</sup> New York’s population has the third highest proportion of African Americans north of the Mason-Dixon Line.<sup>286</sup> And while prominent African-American legislators and white legislators with personal memories of the painful experience of Jim Crow were influential in shaping the debates in New England,<sup>287</sup> the connection between the Civil Rights Movement and LGBT rights was more contentious in New York, especially given the higher levels of resistance to same-sex marriage from the African-American community in 2011.<sup>288</sup> That division was a source of inner turmoil for African-American marriage-equality advocates like Former Governor David Paterson. Governor Paterson explained:

When I think historically, the people who were hated the most, at times, were the whites, who helped lead the civil rights movement. I did get to feel that pain. At times, I was rejected by the black community by asking to do for others what others have done for us. I don’t know if those in the LGBT community knew what pain and difficulty that caused me. But that pain was mitigated by going to the Gay Pride parade just a two days after the bill had finally passed and seeing so many happy faces that had never truly seen justice.<sup>289</sup>

Some legislators were hesitant to draw the parallel between racial discrimination and discrimination on the basis of sexual orientation given the weaker support from

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<sup>284</sup> Telephone Interview with Malcolm Smith, Former N.Y. State Senate Majority Leader (May 24, 2012) [hereinafter Malcolm Smith Interview].

<sup>285</sup> OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, U.S. CENSUS BUREAU 18 (Mar. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> (noting non-white populations in Maine, New Hampshire, and Vermont were each less than ten percent and New York’s over forty percent).

<sup>286</sup> *Id.*

<sup>287</sup> See, e.g., *supra* notes 233, 247–48 and accompanying text.

<sup>288</sup> See, e.g., Frank Bruni, *Race, Religion and Same-Sex Marriage*, N.Y. TIMES, Nov. 1, 2011, at A27 (“Last April, as the successful push for same-sex marriage in New York picked up speed, a survey of state voters by the Siena College Research Institute found that 62 percent of white voters and 54 percent of Latino voters favored it. Only 46 percent of black voters did.”).

<sup>289</sup> Paterson Interview, *supra* note 277.

the African-American community.<sup>290</sup> The lead sponsor of the bill in the lower chamber, Daniel O'Donnell, shifted his rhetorical posture. "I heard the clergy base in the African-American community didn't like hearing about civil rights. In 2007 and 2009, I stopped talking about rights and more about equality. The Senate leadership warned me about that and so I avoided that language in 2009," O'Donnell recalled.<sup>291</sup> O'Donnell's rhetorical shift was politically important, but many legislators who shared in his view nevertheless spoke on same-sex marriage on the same plane as civil rights.<sup>292</sup> With time, many black members of the New York Legislature eventually assumed the mantle of articulating the connection between LGBT rights and racial civil rights.<sup>293</sup> Kevin Parker, an African-American state senator from Brooklyn, recounted his personal journey on the civil rights connection to marriage equality:

It took me a little longer to get through the civil rights issue. We aren't responsible for legislating morality. That's the church's role. In a lot of ways, that's what lead me to realize this was a civil right. That simply, marriage is a contract. So from a state perspective, it's a very different thing than marriage from a religious perspective. It doesn't matter to us. Get engaged. Get a blood test. Get the contract. And that's how I got to it as a civil rights issue. So how do you deny these folks access to contracts even if you abhor the behavior?<sup>294</sup>

The bill's language itself and legislators tied marriage equality for same-sex couples with *Loving v. Virginia*.<sup>295</sup> In fact, the sponsor memo for 2011 New York legislation referenced *Loving*, explaining that "[t]he 'freedom to marry' is, in the

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<sup>290</sup> Telephone Interview with Daniel O'Donnell, N.Y. State Assemblyperson (June 4, 2012).

<sup>291</sup> *Id.*

<sup>292</sup> Telephone Interview with Janet Duprey, N.Y. State Assemblyperson (Oct. 5, 2012) ("[F]or the Senators who decided to vote for it who spoke to me, I [think they] went through the same type of process that I did. It was very personal. But it is more global in the sense that if you believe in civil rights and that all people are created equally, then you'll extend the same marriage rights to everyone."); Telephone Interview with José Rivera, N.Y. State Assemblyperson (July 16, 2012) (describing same-sex marriage as "a basic civil right"); Telephone Interview with Jose Serrano, N.Y. State Senator (July 12, 2012) [hereinafter Serrano Interview] ("It's always been something I've considered from a civil rights perspective. It amazed me that there are two sets of rules in society."); Thiele Interview, *supra* note 283 (describing same-sex marriage as a "civil rights issue" akin to sex and race based rights).

<sup>293</sup> See generally Carlos A. Ball, *Reason for Hope: Black Legislators and Same-Sex Marriage*, HUFFINGTON POST (Jan. 8, 2010, 3:50 PM), [http://www.huffingtonpost.com/carlos-a-ball/reason-for-hope-black-leg\\_b\\_416027.html](http://www.huffingtonpost.com/carlos-a-ball/reason-for-hope-black-leg_b_416027.html) (noting that African-American senators were beginning to vote in favor of same-sex marriage).

<sup>294</sup> Telephone Interview with Kevin Parker, N.Y. State Senator (July 10, 2012).

<sup>295</sup> 388 U.S. 1 (1967).



words of the United States Supreme Court, ‘one of the vital personal rights essential to the orderly pursuit of happiness by free people.’”<sup>296</sup> The bill itself stated that it was the intent of the legislature to ensure that the “fundamental human right” to marry was protected for same-sex couples.<sup>297</sup> But the *Loving* theme continued in floor speeches. *The New York Times* described one Senator’s use of *Loving* to undergird his decision to vote for marriage equality:

“It was not until 1967 before my son could marry Senator Griffo’s daughter if he wanted to, or Senator Lanza’s family member,” said Mr. Adams, who is black, referring to Joseph A. Griffo and Andrew J. Lanza, white Republican senators who ultimately voted against the bill. “It was an abomination for interracial couples to fall in love; it would destroy the institution of marriage. This is exactly what we heard then.”<sup>298</sup>

While some talked about marriage equality and *Loving*, others talked about the alternative of civil unions, but dismissed them as a relic of the logic found in *Plessy v. Ferguson*.<sup>299</sup> Senator Craig Johnson in his 2009 floor speech said, “Why not a civil union? Well, colleagues, that creates simply a separate but equal system and it doesn’t work.”<sup>300</sup> Other senators, without delving into specific parallels, simply declared a vote for marriage equality as mandated by the U.S. Constitution. Two years before, in 2009, Senator Pedro Espada rose in the chamber and simply said: “It is constitutionally correct to vote yes.”<sup>301</sup>

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

As an instructive moment, what was most memorable was when I showed up to meet Russell Simmons. He said, “What the fuck took you so long? I’ve been a long time supporter.” I think it showed we don’t always ask for help and we’ve made some wrong

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<sup>296</sup> Sponsor’s Memorandum, 2011 Legis. Bill Hist. N.Y. A.B. 8354 (July 1, 2011).

<sup>297</sup> Marriage Equality Act, ch. 95 § 2, Reg. Sess. (N.Y. 2011).

<sup>298</sup> Michael M. Grynbaum, *From the Floor and the Heart, Senators Make an Issue Personal*, N.Y. TIMES, Dec. 3, 2009, at A41.

<sup>299</sup> 163 U.S. 537 (1896).

<sup>300</sup> N.Y. Senate, *NYS Senate Craig Johnson Speaks on the Marriage Equality Bill*, YOUTUBE (Dec. 2, 2009), [http://www.youtube.com/watch?v=2YfELI5n\\_LQ](http://www.youtube.com/watch?v=2YfELI5n_LQ).

<sup>301</sup> N.Y. Senate, *NYS Senator Pedro Espada, Jr. Speaks on the Marriage Equality Bill*, YOUTUBE (Dec. 3, 2009), <http://www.youtube.com/watch?v=FLZcpV3clHo>.



assumptions. We haven't maybe worked with Russell Simmons or Julian Bond or Rev. Sharpton, as soon as we should have. . . . To get the NAACP and Jay-Z and others, it helps. I think people fail to recognize how important these people are.<sup>302</sup>

When it came to analyzing the legal merits of the Marriage Equality Act, many members of the New York Legislature did their own equal protection "analysis."<sup>303</sup> Importantly, key Republicans, who would eventually join a coalition of Democrats to push the bill through the Senate in 2011, conducted some of the most exacting constitutional analyses of all the chamber's members. The first Republican to publicly support the bill, Senator Jim Alesi, described his vote in 2009 as influenced by politics.<sup>304</sup> But by 2011, he recalculated his perspective on same-sex marriage. Senator Alesi described his thought process:

I really look at it from the standpoint of fairness and the viability of a same-sex relationship, and seeing it has the same value of a heterosexual relationship. I moved from there to the legal aspect. [To avoid] just justifying something on your personal feelings, I moved to the law. There really was no reason why [we] shouldn't provide same-sex marriage because we were disallowing equal protection. But it's a blend of how I feel emotionally and the law. In 2009, I promised myself if I ever had the chance to vote for [or] against[, I would] never let politics influence my decision again.<sup>305</sup>

On the Senate floor, members described the reasons for their vote in support of the 2011 Marriage Equality Act. Senator Stephen Saland, one of the key undecided votes, said on the Senate floor, "I have to define doing the right thing as treating all

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<sup>302</sup> Ellner Interview, *supra* note 281.

<sup>303</sup> Though this section primarily addresses the Equal Protection analysis weighed by legislators on marriage equality versus no recognition for same-sex couples, other legislators who previously expressed support for civil unions but opposed same-sex marriage similarly scrutinized their position through a paradigm flavored by an equal protection theme. Take, for example, Assemblymember Sandy Galef, who said:

The first time it came to a vote, I was okay with civil unions. I thought it would provide equality from what I knew at the time. So, I voted no on the marriage vote. . . . [Two years later] I got reports from New Jersey that reported on whether civil unions in New Jersey were working. And they said that they were not. People still didn't understand what civil unions were. It was a status lacking marriage.

Telephone Interview with Sandy Galef, N.Y. State Assemblyperson (July 13, 2012).

<sup>304</sup> Telephone Interview with Jim Alesi, N.Y. State Senator (June 5, 2012).

<sup>305</sup> *Id.*

persons with equality and that equality includes within the definition of marriage.”<sup>306</sup> Another last minute swing senator, Mark Grisanti, said, “I cannot legally come up with an argument against same-sex marriage. Who am I to say that someone does not have the same rights that I have with my wife, who I love, or that have the 1300-plus rights that I share with her?”<sup>307</sup>

Equal protection, however, was not the only constitutional value at issue in New York. Like New Hampshire and Vermont, religious liberty issues were at the forefront of the debate. A number of Republicans including Senators Kemp Hannon, Andrew Lanza, Greg Ball, Stephen Saland, and others negotiated with Governor Andrew Cuomo over language that would protect religious institutions and organizations from public accommodations requirements to facilitate same-sex marriages.<sup>308</sup> Senator Andrew Lanza said to *The New York Times*, “The concern that I have expressed, and others have expressed, is that we don’t want to create a vehicle that will allow anyone to make a challenge, to erode, what I think is a fundamental American freedom, and that is the freedom of expression when it comes to religion.”<sup>309</sup>

Senator Lanza and the Republican delegation that was actively working on religious liberty issues were not alone in their thinking on the matter. Democratic members of the all-important Senate saw the value in crafting statutory language to foreclose the possibility that same-sex marriage could embroil religious institutions and religiously affiliated organizations arising from public accommodations non-discrimination lawsuits for refusals to facilitate same-sex marriages.<sup>310</sup> Democratic Bronx Senator Jose Serrano, like his suburban Republican colleagues, saw protecting religious liberty as an important policy aim that furthered constitutional values.<sup>311</sup> Senator Serrano said:

I believe the government needs to act separate from the church  
and church teachings. It was a basic principle of the Founding

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<sup>306</sup> Winston Gieseke, *N.Y. Marriage Vote: Words from the Floor*, ADVOCATE (June 25, 2011), <http://www.advocate.com/news/daily-news/2011/06/25/ny-marriage-vote-words-floor?page=full>.

<sup>307</sup> N.Y. Senate, *Senator Mark Grisanti Speaks on Same-Sex Marriage Bill*, YOUTUBE (June 24, 2011), <http://www.youtube.com/watch?v=zEfN26t5yk8>.

<sup>308</sup> Constructing statutory language to clearly separate religious entities with civil marriage was not novel in New York. Assemblyperson Deborah Glick sought to accomplish that with a 2004 bill that would have issued privatized marriage and granted civil unions to heterosexual and homosexual couples. *Deborah Glick’s Neighborhood Update* (N.Y. 66th Assembly Dist. In Action, New York, N.Y.), April 2004, at 2–3, available at [http://assembly.state.ny.us/member\\_files/066/20040407/](http://assembly.state.ny.us/member_files/066/20040407/). Assemblyperson Glick wanted to make the point that marriage equality, at its core, was “a civil and not religious matter.” Telephone Interview with Deborah Glick, N.Y. State Assemblyperson (June 1, 2012).

<sup>309</sup> Nicholas Confessore & Danny Hakim, *Cuomo Is Urged to Alter Same-Sex Marriage Bill*, N.Y. TIMES, June 17, 2011, at A28.

<sup>310</sup> Serrano Interview, *supra* note 292.

<sup>311</sup> *Id.*

Fathers to have a government based on human rights and not encumbered by church doctrine that people nevertheless have the right to practice in their own homes and churches.<sup>312</sup>

After days of wrangling over the accommodations' content, Republican Senator Kemp Hannon of Long Island spoke on the floor to introduce an amendment to the bill that would include protections for religious institutions and other religiously affiliated organizations.<sup>313</sup> "We had looked at the basis for statutes on marriage in this state, the rational basis that the state has acted upon, and we looked at the unique context that these religious exemptions have with the right that is going to be granted by the main bill,"<sup>314</sup> Hannon explained to the chamber.

Prior to the adopted amendment, the bill contained a single exemption that mirrored preexisting protections in the First Amendment for clergy from any requirements to solemnize or celebrate marriages inconsistent with their religious faith.<sup>315</sup> The amendment expressly allowed religiously affiliated groups to refuse "to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage."<sup>316</sup> In addition, the amendment expressly protected covered religious objectors from private suit, organizations from being "penalize[d]" by the government for such refusals through, for example, the loss of government grants, religious organizations from requirements to provide housing designated for married individuals<sup>317</sup> to married same-sex couples, and individual employees "being managed, directed, or supervised by or in conjunction with" a covered entity from suit for refusal to facilitate a marriage.<sup>318</sup> Finally, the amendment was nonseverable.<sup>319</sup>

As *The New York Times* reported, the religious liberty language "proved to be the most microscopically examined and debated—and the most pivotal—in the battle over same-sex marriage."<sup>320</sup> Members of both chambers and across partisan lines in the legislature described the religious liberty protections in terms ranging from "critical"<sup>321</sup>

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<sup>312</sup> *Id.*

<sup>313</sup> Danny Hakim, *Exemptions Were Key to Vote on Gay Marriage*, N.Y. TIMES, June 26, 2011, at 20N ("Republicans . . . want[ed] religious organizations and affiliated groups to be protected from lawsuits . . . [and] any penalties by state government.").

<sup>314</sup> *New York State Senate Transcript*, N.Y. STATE SENATE (June 24, 2011, 6:22 PM), <http://open.nysenate.gov/legislation/api/1.0/html/transcript/regular-session-06-24-2011>.

<sup>315</sup> Confessore & Hakim, *supra* note 309.

<sup>316</sup> Marriage Equality Act, ch. 96 § 1(10-b)(1), 2011 Reg. Sess. (N.Y. 2011).

<sup>317</sup> Marriage Equality Act, ch. 96 § 1(10-b)(1, 2), § 2(1-a), 2011 Reg. Sess. (N.Y. 2011).

<sup>318</sup> *Id.* at ch. 96 § 1(10-b)(1).

<sup>319</sup> *See* Hakim, *supra* note 313.

<sup>320</sup> *Id.*

<sup>321</sup> Telephone Interview with Tony Avella, N.Y. State Senator (July 19, 2012).

to “important”<sup>322</sup> to “profound.”<sup>323</sup> The religious liberty accommodations were praised by the executive director of the New York Civil Liberties Union who said that the final version of the New York Marriage Equality Act was “in keeping with our country’s principles of religious freedom.”<sup>324</sup> Echoing that sentiment was the pro-same-sex marriage umbrella organization, New Yorkers United for Marriage, which issued a press release stating, “The amended Marriage Equality legislation protects religious liberties without creating any special exceptions that would penalize same-sex couples or treat them unequally. The legislation strikes an appropriate balance that allows all loving, committed couples to marry while preserving religious freedom.”<sup>325</sup>

#### V. THE WISDOM OF INCREMENTALISM: WASHINGTON

*By passing this bill we can protect that fundamental right [of marriage].*<sup>326</sup>

In the same year Massachusetts’s Supreme Judicial Court became the first in the nation to rule that same-sex couples had a state constitutional right to marry, Washington attorneys filed suit seeking a similar decision from the Washington Supreme Court.<sup>327</sup> In 2006, the Washington Supreme Court rejected the plaintiffs’ claim.<sup>328</sup> The State Supreme Court, while noting same-sex marriage was a “subject of intense debate throughout the nation”<sup>329</sup> and that “times are changing”<sup>330</sup> with

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<sup>322</sup> Malcolm Smith Interview, *supra* note 284.

<sup>323</sup> Telephone Interview with Teresa Sayward, N.Y. State Assemblyperson (Oct. 12, 2012). Senate Majority Leader Dean Skelos also stated in a press release that after many hours of deliberation and discussion over the past several weeks among the members, it has been decided that same sex marriage legislation will be brought to the full Senate for an up or down vote. The entire Senate Republican Conference was insistent that amendments be made to the Governor’s original bill in order to protect the rights of religious institutions and not-for-profits with religious affiliations.

*Statement from Senate Majority Leader Dean Skelos on Same Sex Marriage Legislation*, N.Y. STATE SENATE (June 24, 2011), <http://www.nysenate.gov/press-release/statement-senate-majority-leader-dean-skelos-same-sex-marriage-legislation>.

<sup>324</sup> Hakim, *supra* note 313.

<sup>325</sup> Nicholas Confessore & Michael Barbaro, *Consensus Reached on Religious Exemptions in Gay Marriage Bill*, N.Y. TIMES (June 24, 2011), <http://cityroom.blogs.nytimes.com/2011/06/24/albany-leaders-reach-consensus-on-religious-exemptions-for-marriage-measure/>.

<sup>326</sup> *Senate Floor Debate*, TVW (Feb. 1, 2012, 6:00PM), [http://tvw.org/index.php?option=com\\_tvwplayer&eventID=2012020049](http://tvw.org/index.php?option=com_tvwplayer&eventID=2012020049) (statement of Sen. Steve Litzow).

<sup>327</sup> *Washington Judge OKs Same-Sex Marriage*, NBC (Aug. 4, 2004), <http://www.nbcnews.com/id/5603590/ns/politics/t/washington-judge-oks-same-sex-marriage/#.UgAm3mTwKPs>.

<sup>328</sup> See *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006) (plurality opinion).

<sup>329</sup> *Id.* at 990.

<sup>330</sup> *Id.*

regard to public perspective on same-sex marriage, sexual orientation was not a suspect classification and “a person has [no] fundamental right to a same-sex marriage.”<sup>331</sup>

The same year of that decision, one of the attorneys working on the behalf of the same-sex couples, Jamie Pedersen, was elected to the Washington State House of Representatives.<sup>332</sup> Pedersen took the seat previously held by openly gay Ed Murray, who vacated the seat after a successful bid for the State Senate.<sup>333</sup> 2006 was a busy year for LGBT rights in Washington State but not winless. Before Washington’s highest court ruled against same-sex couples, the Legislature enacted a sexual orientation nondiscrimination law prohibiting discrimination in places of public accommodations, housing, and employment.<sup>334</sup>

Opponents of that legislation linked the pending efforts for same-sex marriage recognition and the antidiscrimination law.<sup>335</sup> Senator Dan Swecker said, “The passage of this legislation puts us on a slippery slope towards gay marriage. The two are linked. . . . Are any of us naive enough to think the court won’t take notice?”<sup>336</sup> Notwithstanding the Washington high court’s rejection of same-sex marriage, Senator Swecker’s belief was not wholly misguided. Indeed the civil rights legislation was used as a foundational building block for legislators to educate the public on issues impacting the LGBT community and same-sex couples.<sup>337</sup> Once the *Andersen* decision was handed down, Pedersen and Murray hashed out a strategy. The Senate’s lead strategist, Senator Murray, said in a telephone interview:

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

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<sup>331</sup> *Id.*

<sup>332</sup> *Rep. Jamie Pedersen’s Biography*, WASH. STATE LEGIS. H.R., <http://housedemocrats.wa.gov/roster/rep-jamie-pedersen/biography/> (last visited Mar. 2, 2014).

<sup>333</sup> *Legis. Profile: Sen. Ed Murray, D-43rd District, Seattle*, BOARD ADVOCACY PROJECT, <http://www.boardadvocacy.org/information/get-informed/documents/SenatorEdMurray.pdf> (last visited Mar. 2, 2014).

<sup>334</sup> Chris McGann, *A Long-Awaited Win for Gay Rights: Senate OKs State Anti-Bias Bill*, SEATTLE POST-INTELLIGENCER (Jan. 27, 2006), <http://www.seattlepi.com/local/article/A-long-awaited-win-for-gay-rights-Senate-OKs-1194195.php#ixzz2PJdJrRuH>.

<sup>335</sup> *See id.*

<sup>336</sup> *Id.*

<sup>337</sup> *See Telephone Interview with Edward Murray*, Wash. State Senator (Aug. 20, 2012).

bills three years in a row, to *educate the public* on what marriage was really about and who gay families were.<sup>338</sup>

And so the decision was made to begin with a limited domestic partnership registry to “provide some concrete rights for LGBT families and build a record of winning.”<sup>339</sup> From the registry, it was the duo’s hope that they could push for a parallel institution, like civil unions, and finally achieve marriage rights.<sup>340</sup>

In 2007, the Legislature successfully passed the domestic partner registry, which provided same-sex couples of any age or opposite-sex couples in which one partner is over sixty-two years old, with eleven enumerated rights.<sup>341</sup> Again, in 2009, as per the master plan, the Legislature pushed to expand the registry to domestic partnerships that were commonly referred to as “everything but marriage.”<sup>342</sup>

Notably, the new legislation would provide significant additional rights for same-sex couples including, but not limited to, a right to use sick leave to care for a domestic partner, to unemployment and disability insurance benefits, and to the same insurance coverage provided to married heterosexual couples.<sup>343</sup> Rights related to adoption, child custody, and child support not provided for in the first iteration of the domestic registry were provided in the expanded legislation.<sup>344</sup> While the supporters of same-sex couples’ rights did not have to face the challenge of a voter-initiated referendum on the previous legislation, opponents to the “everything but marriage” law successfully garnered enough signatures to challenge the 2009 bill.<sup>345</sup>

In November of that year, the voters of Washington became the first electorate to popularly sustain a positive enactment of law benefiting same-sex couples.<sup>346</sup> The head campaign advocate for the domestic partnership law, Laurie Jenkins, who became a member of the Washington House in 2010,<sup>347</sup> credited the incremental

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<sup>338</sup> *Id.* (emphasis added).

<sup>339</sup> Telephone Interview with Jamie Pedersen, Wash. State Representative (July 19, 2012) [hereinafter Pedersen Interview].

<sup>340</sup> *Id.*

<sup>341</sup> These included hospital visitation, medical decisionmaking, authorization to receive health information about a partner, administration of a deceased partner’s estate, death certificate recognition, access to autopsy reports, control and disposition of a partner’s remains, wrongful death suit standing, inheritance rights without wills, couple burial rights, and health benefits for public employees. *See* Substitute S.B. 5336, 60th Leg., Reg. Sess. (Wash. 2007).

<sup>342</sup> *See* Chris Grygiel & Monica Guzman, *New Gay Rights Law Being Approved By Voters*, SEATTLE POST-INTELLIGENCER (Nov. 2, 2009), <http://www.seattlepi.com/local/article/New-gay-rights-law-being-approved-by-voters-891382.php>.

<sup>343</sup> *Id.*

<sup>344</sup> *See id.*

<sup>345</sup> *Id.*

<sup>346</sup> *See* Rachel La Corte, *Voters Approve ‘Everything but Marriage’ Bill*, KOMO NEWS (Nov. 5, 2009), <http://www.komonews.com/news/local/69333537.html>.

<sup>347</sup> Kim Bradford, *State Rep. Laurie Jenkins Kicks Off Re-election Campaign*, NEWS TRIB. (May 3, 2012, 3:47 PM), <http://blog.thenewstribune.com/politics/2012/05/03/state-rep-laurie-jenkins-kicks-off-re-election-campaign/>.



approach for the campaign's success. Jinkins said, "What helped us maintain Referendum 71 was that we had done this incremental[ly]. [The public] had gotten use[d] to it and got to see pieces of it work."<sup>348</sup> With the victory of R71, the scene was set for marriage legislation. The election returns proved vitally important. Legislators could consider marriage legislation by looking at their district's returns on R71 as a metric for their district's mood on marriage equality. But the incremental approach was profoundly important for legislators as well, particularly more conservative members. Senator Rodney Tom recalled, "The big question was whether any Republicans could cross their Party line and that was the key. Those relationships had been built over years. And the step-by-step approach was important to getting us there."<sup>349</sup> House Speaker Frank Chopp stated it simply: "It helped people digest it."<sup>350</sup>

Governor Christine Gregoire first grappled with the merits of marriage equality while as Attorney General of Washington while the *Andersen* case was litigated.<sup>351</sup> "I couldn't find an argument that could legitimately believe it was constitutional. Though the court thought it was constitutional, I disagreed with it," she recalled.<sup>352</sup> But with the State's high court punting the matter to the legislative process, Gregoire's thinking on the issue shifted. Now, she thought about the constitutional rights of same-sex couples, but was very mindful of religious liberty issues.<sup>353</sup> Governor Gregoire concluded that New York's approach was ideal:

I looked at what New York had done. I worked with our gay community. I told them that [including New York styled religious liberty protections] was the only way I would introduce the bill. There were some people who wanted to compromise on that in the future. But I said, no, that this was in part a reflection of my evolution on the issue, and it wasn't comprisable.<sup>354</sup>

The exemptions would prove to be critical in Olympia as they were in Albany. Representative Jamie Pedersen recalled that in addition to ensuring the Governor's support that "[f]or every 1 of the 5 votes that we ended up getting that we weren't certain of we got because of those robust exemptions."<sup>355</sup> Indeed, like in other states, the religious liberty protections were of critical importance. But the debate over

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<sup>348</sup> Telephone Interview with Laurie Jinkins, Wash. State Representative, Exec. Dir., Pro-R71 Campaign (Nov. 27, 2012).

<sup>349</sup> Telephone Interview with Rodney Tom, Wash. State Senator (Oct. 18, 2012).

<sup>350</sup> Telephone Interview with Frank Chopp, Speaker, Wash. State House of Representatives (Oct. 9, 2012).

<sup>351</sup> Telephone Interview with Christine Gregoire, Governor of Wash. (July 27, 2012) [hereinafter Gregoire Interview].

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> Pedersen Interview, *supra* note 339.



constitutional values and same-sex marriage included a broader discussion on the interplay between religion and the government and constitutional history.<sup>356</sup>

For Senator Cheryl Pflug, there was no “compelling reason” not to enact same-sex marriages.<sup>357</sup> Senator Pflug’s constitutional analysis went further than invoking the language of strict scrutiny, but she also couched her support for same-sex marriage legislation with a larger constitutional history. On the floor, Senator Pflug told the Senate:

When they wrote our Constitution, [the Founding Fathers knew] that if you did not tolerate difference [or] believe differently . . . you were again under someone else’s definition of what was right or true or good. And so, our Bill of Rights was born. And then it grew. . . . When our country was born, many times men looked at women and saw chattel. One race looked at another and saw slaves. And we looked at each other and we struggled and we grew. . . . Tradition, the way it’s always been is [often] comfortable . . . for the majority but not . . . the minority.<sup>358</sup>

As Senator Pflug’s floor speech suggests, the race analogy was not left untouched in the Washington debate. In Washington, like in every state that created a parallel institution for marriage, the legislature had to squarely address whether their state’s separate domestic institution was a sufficient substitute for marriage.<sup>359</sup>

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

I’m married to someone from the Philippines. We were married in 1968. I had to deal with the same kinds of things about same gender marriage. It’s not right. I heard that God made us different colors and that I shouldn’t have married outside my race. It was a big, difficult decision to make, because I understood what that was like.<sup>360</sup>

However, unlike Cheryl Pflug and Debbie Regala, Mary Margaret Haugen struggled with the legislation. Haugen was from a moderate district and regularly

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<sup>356</sup> Telephone Interview with Cheryl Pflug, Wash. State Senator (Aug. 23, 2012).

<sup>357</sup> *Id.*

<sup>358</sup> *Senate Floor Debate*, TVW (Feb. 1, 2012, 6:00 PM), [http://tvw.org/index.php?option=com\\_tvwplayer&eventID=2012020049](http://tvw.org/index.php?option=com_tvwplayer&eventID=2012020049).

<sup>359</sup> *See, e.g.*, Gregoire Interview, *supra* note 351.

<sup>360</sup> Telephone Interview with Debbie Regala, Wash. State Senator (Sept. 4, 2012).

attended a church that opposed same-sex marriage.<sup>361</sup> While she had voted in favor of the “everything but marriage” law, the seventy-one-year-old legislator’s district rejected it during the referendum.<sup>362</sup> Uneasy with the extending the term marriage to same-sex couples, Senator Haugen raised the issue at a number of town hall-style meetings in her district. During one meeting, Senator Haugen encountered a same-sex couple who were legal domestic partners and expressed to her that it was difficult to communicate their legal status without showing documentation.<sup>363</sup> For her, that experience helped her to understand that domestic partnerships were separate and unequal:

I was raised in a time when marriage was between a man and a woman. I stumble over that. . . . I had voted for [the everything but marriage bill], but I’m so hung up on the word marriage. But, when people told me that they had to carry a card around saying that they were in a domestic relationship, it was like you had to carry around your license. I didn’t know about that before town meetings. I don’t carry cards around showing I’m married. That wasn’t all-but marriage. It just wasn’t equal.<sup>364</sup>

Senator Haugen was the deciding vote that assured the bill’s victory. For her, it was the realization that separate-but-equal institutions were a fiction and that the Washington legislation could redress that wrong—but not at the expense of religious objectors, like her own church, that won her decisive vote that assured the legislation’s success.<sup>365</sup>

## VI. THE ANNAPOLIS CRUCIBLE: MARYLAND

Like New York and Washington, Maryland’s journey to the freedom to marry began with judicial defeat. In September 2007, the Maryland Court of Appeals ruled that because sexual-orientation discrimination did not constitute a suspect class, and because the denial of marriage rights to same-sex couples did not implicate a fundamental right, the State of Maryland met its low burden under rational basis to limit

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<sup>361</sup> Telephone Interview with Mary Margaret Haugen, Wash. State Senator (July 16, 2012).

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> William Yardley, *Washington: Gay Marriage Wins a Crucial Backer*, N.Y. TIMES (Jan. 23, 2012), [http://www.nytimes.com/2012/01/24/us/washington-gay-marriage-wins-a-crucial-backer.html?\\_r=0](http://www.nytimes.com/2012/01/24/us/washington-gay-marriage-wins-a-crucial-backer.html?_r=0) (“[Washington] appeared likely to become the seventh to allow gay couples to marry, after a state senator[, Mary Margaret Haugen,] who had previously said she was undecided announced her support on Monday for a marriage bill moving through the Legislature.”).

marriage to heterosexual couples.<sup>366</sup> Like Washington, Maryland was a referendum state.<sup>367</sup> And so with a legislative strategy came a legitimate risk that any legislative success, which on its own terms was far from assured, would be overturned by popular vote.

In 2008, the General Assembly enacted legislation that created domestic partnerships, granting limited enumerated rights to nonmarried couples, both heterosexual and homosexual, provided they met a series of qualifications.<sup>368</sup> But marriage legislation was slow in the coming. Indeed, despite the liberal nature of the state, Maryland's stumbling block on marriage legislation came from portions of the state's heavily populated by African-American communities, which staunchly opposed same-sex marriage.<sup>369</sup>

The first major push for marriage legislation came in 2011. That legislation successfully passed the Senate, but was a number of votes short in the House.<sup>370</sup> The House leadership decided to debate the legislation despite the lack of votes and then hold it over until the following year.<sup>371</sup> The Speaker of the House and other members heading the efforts determined that they were more likely to sway indecisive members leaning against the legislation in 2012 if they weren't forced to go on the record opposing same-sex marriage.<sup>372</sup> In the interim year that followed, legislators met with their constituents to discuss marriage equality, worked with Governor O'Malley to improve religious liberty protections, and reflected over the debate in the 2011 session.<sup>373</sup> The legislation was successful in 2012, passing the House of Delegates in a dramatic

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<sup>366</sup> *Conaway v. Deane*, 932 A.2d 571 (Md. 2007), *opinion extended after remand*, 2008 WL 3999843 (Md. Cir. Ct. Jan. 7, 2008).

<sup>367</sup> MD. CONST. art. XVI, § 1 (2013) ("The people reserve to themselves power known as The Referendum, by petition to have submitted to the registered voters of the State, to approve or reject at the polls, any Act, or part of any Act of the General Assembly, if approved by the Governor, or, if passed by the General Assembly over the veto of the Governor.").

<sup>368</sup> S.B. 566, 425th Leg., 2008 Reg. Sess. (Md. 2008).

<sup>369</sup> John Wagner, *Same-Sex Marriage Bill Passes Maryland House of Delegates*, WASH. POST (Feb. 17, 2012), [http://www.washingtonpost.com/local/dc-politics/same-sex-marriage-bill-passes-maryland-house-of-delegates/2012/02/17/gIQARk7XKR\\_story.html](http://www.washingtonpost.com/local/dc-politics/same-sex-marriage-bill-passes-maryland-house-of-delegates/2012/02/17/gIQARk7XKR_story.html).

<sup>370</sup> See Annie Linskey & Julie Bykowicz, *Md. Senate Approves Same-Sex Marriage*, BALT. SUN (Feb. 24, 2011), [http://articles.baltimoresun.com/2011-02-24/news/bs-md-same-sex-senate-debate-thursday20110224\\_1\\_gay-marriage-marriage-legislation-civil-marriage-protection-act](http://articles.baltimoresun.com/2011-02-24/news/bs-md-same-sex-senate-debate-thursday20110224_1_gay-marriage-marriage-legislation-civil-marriage-protection-act).

<sup>371</sup> Telephone Interview with Michael E. Busch, Speaker, Md. House of Delegates (July 3, 2012) [hereinafter Busch Interview].

<sup>372</sup> See, e.g., *id.*; Telephone Interview with Luke Clippinger, Md. State Delegate (Nov. 19, 2012) [hereinafter Clippinger Interview]; Telephone Interview with Kathleen Dumais, Md. State Delegate (May 29, 2012) [hereinafter Dumais Interview].

<sup>373</sup> See, e.g., Telephone Interview with Jon S. Cardin, Md. State Delegate (Nov. 13, 2012); Clippinger Interview, *supra* note 372.

seventy-two to sixty-seven vote,<sup>374</sup> and then withstanding a popular referendum in the November election.<sup>375</sup>

The two-year-long legislative battle over marriage equality in Maryland echoed similar themes from other states' experiences. Three major themes emerged from Annapolis. First, many legislators in Maryland that were uncertain of their position on marriage equality eventually supported the legislation after they carefully considered evidence presented to them by citizen testimony.<sup>376</sup> Second, legislative proponents of same-sex marriage seriously considered and debated constitutional-law precedent and constitutional history to advance their position.<sup>377</sup> Third, concerns over the impact marriage equality would have on religious liberty played a pivotal role in shaping the contours of the marriage debate in Maryland, demonstrating that legislators seriously contemplated and weighed two important and, at times, conflicting, constitutional values.<sup>378</sup>

In 2011, Senator Jim Brochin, a moderate Democrat from Baltimore County and a member of the Senate Judiciary Committee, supported civil unions.<sup>379</sup> He thought that civil unions would sufficiently address the concern of same-sex couples having equal rights. Marriage, on the other hand, was another question—he opposed it.<sup>380</sup> But as he listened to testimony in the Senate Judicial Proceedings Committee, Senator Brochin assessed the merits of the marriage equality legislation with a rational-basis-like approach.<sup>381</sup> After peeling off all the arguments against same-sex marriage as unfounded, Senator Brochin was left with the conclusion that the bill's opponents had little to offer but antigay animus:

I was sitting next to Senator Raskin right before the hearing and he says I'll have Bill Clinton call you [to talk about same-sex

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<sup>374</sup> Wagner, *supra* note 369.

<sup>375</sup> Erik Eckholm, *In Maine and Maryland, Victories at the Ballot Box for Same-Sex Marriage*, N.Y. TIMES (Nov. 7, 2012), <http://www.nytimes.com/2012/11/07/us/politics/same-sex-marriage-voting-election.html>.

<sup>376</sup> See, e.g., Telephone Interview with Ana Sol Gutierrez, Md. State Delegate (Sept. 20, 2012) [hereinafter Gutierrez Interview].

<sup>377</sup> See, e.g., Telephone Interview with Jamie Raskin, Md. State Senator (July 12, 2012).

<sup>378</sup> See, e.g., Gutierrez Interview, *supra* note 376; Telephone Interview with Jolene Ivey, Md. State Delegate (Sept. 5, 2012) [hereinafter Ivey Interview].

<sup>379</sup> Telephone Interview with James Brochin, Md. State Senator (June 4, 2012) [hereinafter James Brochin Interview].

<sup>380</sup> *Id.*

<sup>381</sup> See *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring) (“[A] bare desire to harm [a] group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (invalidating a Colorado state constitutional amendment blocking local jurisdictions from enacting sexual orientation nondiscrimination laws as lacking a rational government interest and “inexplicable by anything but animus toward the class it affects”).

marriage]. And I said, “I love Bill Clinton[.] He reminds me why I’m a Democrat[.] but don’t bother, I’m not changing my mind.” But then the opponents will come up. And I thought the opponents would just have a problem with the word “marriage.” But the opponents only had to attack homosexuality. I turned to Raskin and said, “I’m done. I’m done with this.” And at that time we were stuck at 20 votes. And he said, “What are we kidding?” I said to him, “And if you think I’m going to stand on the Senate floor and side with this crap you have another thing coming.”<sup>382</sup>

Jim Brochin was not the only legislator to carefully weigh the evidence laid before him in committee hearings and to change his position. In Maryland, perhaps more than in any other state, the committee hearings proved to be the most effective tools for changing legislators’ minds.

In 2011, the Speaker of the House of Delegates assigned the same-sex marriage legislation to the Judiciary Committee.<sup>383</sup> However, it was not clear in 2012 that with a new roster, there were sufficient votes on the Judiciary Committee to pass the legislation to the floor.<sup>384</sup> As a consequence, the Speaker assigned the Civil Marriage Equality Protection Act jointly to the Judiciary Committee and the Health and Government Operations Committee.<sup>385</sup> One member, Delegate Ana Sol Gutierrez, described the Speaker’s decision as “brilliant because it expanded the kind of insight and questions and broadened the discussion to make the issue much more understandable and supportable.”<sup>386</sup> Indeed, numerous Judiciary Committee members who had grappled with legislation on domestic partnerships, civil unions, and same-sex marriage for months on end, had become entrenched in their own perspectives, hardened over drawn out, bitter fights. One delegate said:

In [2012], my Chair said he wouldn’t vote for it as he had in [2011]. So we didn’t have the votes there. [But, the testimony] was critical for the two Republicans. It was the first time that members of that Committee had heard the testimony. What we had become immune to was the vitriol and hate that came from the anti-equality side. It is so over the top and extreme that the moderate Republicans were put off from it. They saw it with

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<sup>382</sup> James Brochin Interview, *supra* note 379.

<sup>383</sup> Annie Linskey, *House Committees Send Same-Sex Marriage Bill to Floor*, BALT. SUN (Feb. 15, 2012), [http://articles.baltimoresun.com/2012-02-15/news/bs-md-same-sex-marriage-house-panel-20120214\\_1\\_marriage-bill-sam-arora-tiffany-alston](http://articles.baltimoresun.com/2012-02-15/news/bs-md-same-sex-marriage-house-panel-20120214_1_marriage-bill-sam-arora-tiffany-alston).

<sup>384</sup> In the joint hearing, eleven of the twenty-one Judiciary Committee members voted against the same-sex marriage bill. *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> Gutierrez Interview, *supra* note 376.

fresh eyes. It was procedurally crucial to have the members of the other Committee hear the testimony but morally as well to expose them to that.<sup>387</sup>

One of those Republicans, Wade Kach, was a long time thirty-eight-year-member of the House of Delegates.<sup>388</sup> Kach hailed from suburban Baltimore.<sup>389</sup> In 2010, Kach campaigned on a platform that included an opposition to same-sex marriage.<sup>390</sup> For Kach, a retired public school teacher, same-sex marriage went against his lifetime understanding of what marriage meant.<sup>391</sup> However, as he sat in the Government Operations Committee hearing, he took particular interest in testimony concerning a Maryland judicial decision arising from a joint adoption petition from a same-sex couple that was denied.

The thing that really got my attention was a child who was the child of a same-sex couple . . . the first judge that the couple had gone to would not allow both parents to adopt the child, so they were raising money to go to another judge. And I thought, my goodness, should there be a death, there is really no way to determine inheritance or the like. There are no protections for the child. If one partner left the relationship, there's no requirement for child support or child visitation, which is important. Those children didn't have equal rights as others.<sup>392</sup>

Delegate Kach's attentiveness to that testimony framed his decision to support the same-sex marriage legislation. A year before, Kach said he would have voted against same-sex marriage.<sup>393</sup> But, after he was presented with an abundance of evidence at the Government Operations hearing, Delegate Kach believed the evidence compelled him to change his position.<sup>394</sup>

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<sup>387</sup> Telephone Interview with Jeff Waldstreicher, Md. State Delegate (Aug. 17, 2012); *see also* Dumais Interview, *supra* note 372 (“As it turned out, some of us who had heard the testimony may have been immune, but this was a whole new committee that had not heard this testimony. And two Republican members of that committee, and I didn't think about it, until I watched the faces of those committee members.”).

<sup>388</sup> Telephone Interview with A. Wade Kach, Md. State Delegate (Nov. 30, 2012) [hereinafter Kach Interview].

<sup>389</sup> A. Wade Kach, *Maryland State Delegate*, MD. STATE ARCHIVES (Aug. 14, 2013), <http://msa.maryland.gov/msa/mdmanual/06hse/html/msa12250.html>.

<sup>390</sup> Kach Interview, *supra* note 388.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* Interestingly, Kach was never thought to be a “winnable” member of the House by some members. *See* Clippinger Interview, *supra* note 372 (“We got people like Wade Kach who we really never thought we would get.”).



But more than just legislative hearings, members of the House of Delegates were swayed by a large presence of openly LGBT members of the House. In 2009, the Maryland General Assembly had only four gay or lesbian members—none of them persons of color.<sup>395</sup> By 2012, there were seven, including the only African-American member of the LGBT caucus, Delegate Mary Washington.<sup>396</sup> These members—Luke Clippinger, Bonnie Cullison, Richard Madaleno, Maggie McIntosh, Heather Mizeur, Peter Murphy, and Mary Washington—gave a substantial amount of life to the legislation’s efforts.<sup>397</sup> But, like those testifying to members of the legislative committees, these members’ stories were impactful. Through their close knit working relationships, they conveyed their personal feelings on the legislation to members sitting on the fence.<sup>398</sup> This, too, was a key piece of same-sex marriage’s legislative success in Maryland. As Delegate Shane Robinson simply put it, “Without openly gay members it would not have happened.”<sup>399</sup>

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

American University Professor of Law and State Senator Jamie Raskin began thinking about same-sex marriage as a constitutional issue long before it came to the fore of the public consciousness.<sup>400</sup> Senator Raskin said that his argument for marriage

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<sup>395</sup> See Telephone Interview with Mary Washington, Md. State Delegate (Dec. 3, 2012).

<sup>396</sup> See Sabrina Tavernise, *In Maryland, House Passes Bill to Let Gays Wed*, N.Y. TIMES (Feb. 17, 2012), [http://www.nytimes.com/2012/02/18/us/maryland-house-approves-gay-marriage-measure.html?\\_r=0](http://www.nytimes.com/2012/02/18/us/maryland-house-approves-gay-marriage-measure.html?_r=0) (quoting Delegate Keiffer Mitchell, “I know that for the seven openly gay colleagues, if they are able to have the same rights as my wife and I have, then I know that my . . . vote was the right vote.”).

<sup>397</sup> See *House of Delegates: Delegates by Name*, MD. MANUAL ONLINE (Nov. 19, 2013), <http://msa.maryland.gov/msa/mdmanual/06hse/html/hseal.html>; *Senate: Senators by Name*, MD. MANUAL ONLINE (Oct. 8, 2013), <http://msa.maryland.gov/msa/mdmanual/05sen/html/senal.html>.

<sup>398</sup> Delegate Sheila Ellis Hixson profoundly summed this idea up saying, “It was part of an educational process. They are people. You can have a drink with them. Shop with them. Argue and debate with them. Exposure to gay people gave people a comfort level that they weren’t hoisting a different lifestyle than everyone else in Maryland.” Telephone Interview with Sheila Ellis Hixson, Md. State Delegate (Sept. 25, 2012).

<sup>399</sup> Telephone Interview with Shane Robinson, Md. State Delegate (May 21, 2012) [hereinafter Shane Robinson Interview].

<sup>400</sup> Telephone Interview with Jamie Raskin, Md. State Senator (July 12, 2012) (“I first started thinking about it in law school in 1987, at that time *Bowers* was handed down. I remember thinking that was a terrible decision and that there was no rational basis for excluding gay folks from the institution of marriage.”).



equality was always a “secular, constitutional argument”<sup>401</sup> and that same-sex marriage was “a matter of basic constitutional equality.”<sup>402</sup> Senator Raskin publicly made that constitutional argument prior to his election to the chamber. In 2006, while same-sex marriage litigation was pending in the Maryland courts, in his capacity as a law professor, Raskin testified against a proposed state constitutional prohibition of same-sex marriage.<sup>403</sup> One exchange between then-Professor Raskin and Senator Nancy Jacobs during the hearing on the amendment was given heavy attention in the press:

At the end of his testimony . . . [R]epublican Senator Nancy Jacobs [said]: “Mr. Raskin, my Bible says marriage is only between a man and a woman. What do you have to say about that?” . . . Raskin replied: “Senator, when you took your oath of office, you placed your hand on the Bible and swore to uphold the Constitution. You did not place your hand on the Constitution and swear to uphold the Bible.”<sup>404</sup>

Others asked similar questions. Delegate Anne Kaiser used this type of argumentation in 2012 when she asked on the House floor, “What are the legal bases for opposing marriage equality?”<sup>405</sup> Another delegate recast this same idea articulated by Raskin and Kaiser in clear constitutional terms, “Equal protection under the law . . . transcends how we feel in our hearts.”<sup>406</sup> Echoing the idea that legislators should remove their personal religious beliefs but focus on a constitutional analysis, Delegate Pam Beidle said, “Whether I like it or not shouldn’t matter. It’s not my religious belief. It’s not my decision. Just like interracial marriage. It’s a right.”<sup>407</sup>

Many members of the Maryland General Assembly argued and weighed the merits of marriage equality in terms of constitutional mandates. However, the most prominent component of the constitutional debate was over parallels or lack thereof between same-sex marriage prohibitions and interracial marriage proscriptions.<sup>408</sup> Given Maryland’s unique position of having the greatest number of African-American residents of any state outside of the Deep South,<sup>409</sup> this connection was hotly debated by proponents and opponents of the legislation.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> See Gene Stone, *A Rare Moment of Sense*, HUFFINGTON POST (Mar. 15, 2006), [http://www.huffingtonpost.com/gene-stone/a-rare-moment-of-sense\\_b\\_17347.html](http://www.huffingtonpost.com/gene-stone/a-rare-moment-of-sense_b_17347.html).

<sup>404</sup> *Id.*

<sup>405</sup> Transcript of Md. House of Delegate Floor Debate (Feb. 17, 2012) (on file with author) [hereinafter Feb. Md. House Debate].

<sup>406</sup> *Id.*

<sup>407</sup> Telephone Interview with Pam Beidle, Md. State Delegate (June 8, 2012).

<sup>408</sup> See Feb. Md. House Debate, *supra* note 405.

<sup>409</sup> See, e.g., SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 9 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

For some legislators, the argument was Maryland-centric. Delegate Jolene Ivey recalled that one reason she supported civil marriage for same-sex couples was that she saw it as a civil right that was not unlike the right her black father and white mother wanted in the 1950s.<sup>410</sup> Ivey said her parents could not live in Maryland prior to the late 1960s because their marriage was not legal in that state.<sup>411</sup> Delegate Shane Robinson noted that one member of the legislature in 2012, Senator Norman Stone, took part in the 1967 debate over legislation that would repeal Maryland's antimiscegenation law.<sup>412</sup> Delegate Robinson thought the lesson from that history was important to consider. "1967 wasn't so long ago," Robinson said, "But you think about that and it seems crazy that you can't marry interracially."<sup>413</sup>

Some legislators used explicit references to *Loving v. Virginia* to illustrate their belief that the constitutional rights of interracial couples should apply with equal force to same-sex couples.<sup>414</sup> House of Delegates Speaker Michael Busch saw same-sex marriage as an extension of the civil rights movement he witnessed as a college student in Philadelphia.<sup>415</sup> However, unlike Busch and many white liberals in the Maryland House of Delegates who viewed LGBT rights as a natural extension of the civil rights movement in the 1950s and 1960s, there was far more division among the African-American legislators despite their common ideological and partisan affiliations.<sup>416</sup> In 2011, one of the most outspoken same-sex marriage opponents in the House was African-American Delegate Emmett Burns, an activist during the civil rights movement.<sup>417</sup> Burns had qualms with the comparison for same-sex couples' marriage rights being compared to racial civil rights for primarily two reasons. Burns disputed that the level of discrimination against same-sex couples rose to the same level of vitriol and violence as it had in the Deep South during the civil rights movement<sup>418</sup> and he disputed the immutability of same-sex attraction.<sup>419</sup> A fellow African-American

<sup>410</sup> Ivey Interview, *supra* note 378.

<sup>411</sup> *Id.*

<sup>412</sup> Shane Robinson Interview, *supra* note 399.

<sup>413</sup> *Id.*

<sup>414</sup> *See, e.g.*, Telephone Interview with Lisa Gladden, Md. State Senator (Sept. 10, 2012).

<sup>415</sup> Busch Interview, *supra* note 371.

<sup>416</sup> *See, e.g.*, Editorial, *Obama Could Make the Difference on Gay Marriage*, BALTIMORE SUN (June 20, 2011), [http://articles.baltimoresun.com/2011-06-20/news/bs-ed-obama-gay-marriage-20110620\\_1\\_gay-marriage-full-fledged-marriage-civil-unions](http://articles.baltimoresun.com/2011-06-20/news/bs-ed-obama-gay-marriage-20110620_1_gay-marriage-full-fledged-marriage-civil-unions).

<sup>417</sup> *Id.*

<sup>418</sup> "If same-sex marriage is to be equated with the civil rights movement that I know . . . show me your Birmingham, Alabama, where high-pressure water hoses were turned on us, so powerful they knocked the bark off trees." *Id.*

<sup>419</sup> I am a black man, an African-American. I cannot change my color, nor do I wish to do so. Those who are gay can disguise their propensity. Even in this legislature, 50 or 100 years ago gays and lesbians were here because they could disguise who they were. I was not here because I can never disguise who I am.

*Id.*

member of the House of Delegates, Keiffer Mitchell, addressed Delegate Burns's position head-on and used it to reject calls for civil unions and announce his support for same-sex marriage:

I believe that this is the civil rights issue of our generation. . . . [My constituent] have asked me to support civil unions. And I did think about that. No, I was not victimized by German Shepherds or water cannons. I was not turned away at the ballot box. The generation before me went through that battle. . . . when you think about civil unions . . . I think back on separate but equal. . . . When we talked about civil unions, it's just like the Jim Crow laws of separate but equal there was a stigma placed on African-Americans who were thought to be less than.<sup>420</sup>

## VII. THE EMERGING CONSTITUTIONAL CONSENSUS

Between 2000 and 2012, robust debates on the enactment of same-sex marriage legislation were had in state legislative bodies throughout the country, in which legislators proved themselves to be discerning consumers of the constitutional canon.<sup>421</sup> Same-sex marriage proponents heavily relied on constitutional analyses of the First Amendment and the Fourteenth Amendment to advance their arguments in favor of marriage equality.<sup>422</sup> While legislators sometimes invoked constitutional precedents by name to make their case in favor of same-sex marriage, others distilled constitutional history and tradition into a more generic argument citing general principles of equality and often drawing from the language of *Brown v. Board's* rejection of "separate but equal," or making parallel comparisons to the historical prohibitions of interracial marriages and *Loving v. Virginia*.<sup>423</sup> As a result, the open political process in these states ultimately led to the rejection of civil unions and full embrace of same-sex marriage rights.

Another dominant feature of these legislative efforts was the extended efforts to consider and balance two compelling societal interests in the American plural democratic society—marriage equality and religious liberty.<sup>424</sup> Through the legislative

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<sup>420</sup> Feb. Md. House Debate, *supra* note 405.

<sup>421</sup> See generally Elizabeth M. Glazer, *Civil Union Equality*, 2012 CARDOZO L. REV. DE NOVO 125.

<sup>422</sup> See generally, e.g., David B. Cruz, "Just Don't Call it Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001); Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 ALB. GOV'T L. REV. 552 (2012).

<sup>423</sup> *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>424</sup> To be clear, not all religious believers object to same-sex marriage. In fact, some denominations allow ministers to choose whether to marry same-sex couples, resulting in

process, each of these states crafted nuanced laws that recognize same-sex marriage and include important protections for the religious liberty of those who adhere to a purely heterosexual view of marriage.<sup>425</sup> While civil same-sex marriages standing alone cannot be said to constitute a state-imposed restriction of religious liberty, legislators took great care to assess the relationship between same-sex marriage legislation, preexisting non-discrimination law, and constitutional precedent to guarantee that marriage equality legislation would not infringe on religious liberty. In doing so, each of the states provided greater protections for religious liberty than constitutionally required.

In short, despite the large and many differences in these states' social culture, political environment, and structure of governance, broad consensus has emerged from these states that same-sex marriage legislation is the fulfillment of a latent, but inevitable, constitutional command. Thus, from town halls, floor speeches, personal conversations, expert testimony, and tenacious advocacy emerged statutory manifestations of what legislators ultimately concluded was constitutionally commanded by the Fourteenth Amendment's substantive guarantee protecting the fundamental freedom to marry and its safeguards demanding equal protection under the law.<sup>426</sup>

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internal divisions over whether to perform same-sex marriages. *See, e.g.*, Shaila Dewan, *True to Episcopal Church's Past, Bishops Split on Gay Weddings*, N.Y. TIMES, July 19, 2011, at A1 (noting that in New York City, two out of five Episcopalian dioceses allow same-sex couples to be wed in church); *Churches Debate: May Clergy Marry Gays?*, USA TODAY (July 17, 2011), [http://www.usatoday.com/news/religion/2011-07-17-gay-marry-clergy-churches\\_n.htm](http://www.usatoday.com/news/religion/2011-07-17-gay-marry-clergy-churches_n.htm).

<sup>425</sup> These jurisdictions include Connecticut, the District of Columbia, Iowa, New Hampshire, New York, Massachusetts, and Vermont. *See, e.g.*, CONN. GEN. STAT. § 46b-22b (2013); D.C. CODE § 46-406(c)–(e) (2013); MD. CODE ANN., FAM. LAW § 2-406(g) (LexisNexis 2013); N.H. REV. STAT. ANN. § 457:37 (2013); N.Y. DOM. REL. LAW § 10-b (McKinney 2013); VT. STAT. ANN. tit. 18, § 5144 (2013); WASH. REV. CODE § 26.04.010 (2013).

<sup>426</sup> *See* *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003) (“[T]he substantive force of the liberty protected by the Due Process Clause . . . afford[s] constitutional protection to personal decisions relating to marriage . . . .”); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (“Choices about marriage, family life, and the upbringing of children are . . . sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (“[T]he decision to marry is a fundamental right . . . .”); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[T]he right to marry is of fundamental importance for all individuals.”); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977) (noting that marriage is an individual decision that cannot be abridged by “unjustified government interference”); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (emphasizing that the Court has “consistently acknowledged” that marriage and family life are protected by the Due Process Clause of the Fourteenth Amendment); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971) (describing

## CONCLUSION

The independence of the judiciary is a cherished and oft-espoused feature of the American system of governance. In insulating Article III judges from the direct subjugation of popular will, it is said that federal judges are well equipped to serve as guardians of minority rights in the face of majority resistance to those rights.<sup>427</sup> This notion of judges as the protectors of minority groups, given teeth through judicial review, raises questions of legitimacy because, as John Hart Ely wrote, “When a court invalidates an act of the political branches on constitutional grounds . . . it is overruling their judgment, and normally doing so in a way . . . not subject to ‘correction’ by the ordinary lawmaking process.”<sup>428</sup> This question of legitimacy—or as Alexander Bickel called it, the “counter-majoritarian” difficulty<sup>429</sup>—animates much of the

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marriage as a “fundamental human relationship”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (discussing the long held societal importance of marriage); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (articulating marriage as “one of the basic civil rights of man”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“Without doubt, [the Due Process Clause] denotes . . . the right . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (“Marriage . . . [is] the most important relation in life . . .”).

<sup>427</sup> See generally John Ferejohn & Larry D. Kramer, *Judicial Independence in a Democracy: Institutionalizing Judicial Restraint*, in *NORMS AND THE LAW* 161, 164 (John N. Drobak ed., 2006) (noting that “majoritarian pressures are especially threatening to judicial independence in a republic”); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 *DUKE L.J.* 1335, 1362 (2001) (“The reasons that undergird the need for judicial independence primarily stem from concerns espoused by those who believe the Constitution is designed to protect minorities.”); Douglas Laycock, *Constitutional Theory Matters*, 65 *TEX. L. REV.* 767, 770 (1987) (“[T]heories [of judicial review generally] recognize that democracy generally protects the majority from government abuse but does much less to protect minorities and individuals from government abuse. Our Constitution addresses this problem by creating judicially enforceable constitutional rights, most of which are stated in broad terms.” (citations omitted)); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 *CAL. L. REV.* 1159, 1186 (1982) (“Ultimately, if there is to be any protection against the courts becoming imbued with a ‘mob’ psychology in time of crisis, it is the nation’s long tradition of judicial independence and widespread recognition of the role of the courts as protectors of minority rights against majoritarian oppression.”).

<sup>428</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4 (1980).

<sup>429</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962). Despite criticism that courts regularly act against majoritarian wishes, there is important political science scholarship that finds courts often follow trends in public opinion. See, e.g., Micheal W. Giles, Bethany Blackstone & Richard L. Vining, Jr., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 *J. POL.* 293 (2008); Kevin T. McGuire & James A.

criticism levied at the court by supporters of a vision of popular constitutionalism that rejects judicial supremacy. This type of criticism arose in response to the U.S. Supreme Court's decisions in *United States v. Windsor*<sup>430</sup> and *Perry v. Hollingsworth*,<sup>431</sup> which found the so-called Defense of Marriage Act unconstitutional and permitted the continuation of same-sex marriages in California.<sup>432</sup>

But, for those who are concerned about judicial legitimacy *and* the need for vigorous protection of minority groups' rights, the outright rejection of judicial supremacy is rightfully unappealing and unnerving. Madisonian popular constitutionalism may provide a small, but important, step toward resolving the majority will–minority rights tension. The state legislative debates surrounding same-sex marriage provide a pathway for principally deferring to the state legislative processes without the dangers of subordinating minority rights to a blind acquiescence to legislative judgment.

If it is to be embraced at all, popular constitutionalism cannot be a theory of strict adherence to pure popular sovereignty and factional movements marked by knee-jerk and unrefined arguments. Nor should it be a theory of judicial review and constitutional evolution that displaces courts as a line of defense against minority repression. Indeed, courts can play a vitally important dialectical role in popular constitutional movements. The marriage equality experience evidences how courts can act as republican schoolmasters, in which through years of jurisprudence, judicial institutions educated political actors about principles of equality, freedom, and nondiscrimination. If courts are to employ popular constitutional principles as a method to enhance their understanding of constitutional questions before them, in a manner mirroring the way in which political actors learn from courts, they should do so only when those emerging values pass through the Madisonian gauntlet. The products of Madisonian popular constitutionalism are useful for courts to consider because they are well-reasoned and have been refined through a thoughtful, mediated percolation in the political branches where non-entrenched, broadly representative actors contemplate constitutional law seriously. Thus, a theory of constitutional truth can emerge from these types of popular constitutional movements that are worthy of courts' consideration.

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Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993).

<sup>430</sup> 133 S. Ct. 2675 (2013).

<sup>431</sup> 133 S. Ct. 2652 (2013).

<sup>432</sup> See Ryan T. Anderson, Op-Ed., *Supreme Court Got It Wrong on Gay Marriage*, CNN (June 26, 2013), <http://www.cnn.com/2013/06/26/opinion/anderson-gay-marriage> (“In its ruling on California’s Proposition 8 (which defined marriage in that state as the union of one man and one woman), the Supreme Court declared that the citizen group that sponsored the initiative didn’t have standing to defend the state constitutional amendment that millions of Californians voted to pass.”).



Those states, however, where the political process stymies this serious Madisonian-style popular constitutionalism should not be given judicial deference in light of their flagrant desire to enshrine discrimination to the greatest possible extent. To borrow from John Hart Ely, those states where the political process suffers from a paralyzing malfunction and Madisonian popular constitutionalism as a result is impossible, should not be given serious weight by courts when assessing the constitutionality of their acts. Ely wrote:

Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.<sup>433</sup>

States that have prohibited the recognition of same-sex marriages within their state constitutions changed the political calculus for same-sex couples and their allies. Indeed, these states imposed a tremendous additional burden on same-sex marriage advocates who face heightened hurdles—including necessitating supermajority votes in state legislatures and winning popular votes—that foreclose the possibility that they may avail themselves of the political branches to seek social change without special impediments. In doing so, these states have walled off their legislators from any need to engage in serious debate over the merits, constitutional or otherwise, of same-sex marriage. The entire political process is thereby rigged, effectively guaranteeing any small possibility of change is stymied and the political will to debate is choked off.

This is not to say that in those states where the process is not so poisoned by political ill will and discrimination so firmly entrenched within state constitutions, that same-sex marriage legislation would be imminently successful. Maine, Maryland, New York, and Vermont all evidence this point as equally well as West Virginia and Wyoming.<sup>434</sup> None of the states in the former group made successful attempts to enact same-sex marriage without first failing and efforts in the latter group of states have been unsuccessful to date. Indeed, an open process alone does not guarantee success but it does allow for a continuing dialogue and fosters a brand of popular constitutionalism that Madison envisioned.

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<sup>433</sup> ELY, *supra* note 428, at 103.

<sup>434</sup> As of January 2014, these states do not have same-sex marriage, but do have state constitutions free of provisions banning same-sex marriages.

Through the legislative looking glass, courts can glean a popular understanding of constitutional provisions that have survived “the best test of truth” that underpins the “theory of our Constitution.”<sup>435</sup> In these states where same-sex marriage has prevailed, marriage equality has triumphed in mustering “the power . . . to get itself accepted in the competition of the market.”<sup>436</sup> But even more so than merely triumphing in these states’ political and social marketplaces, its authors, sponsors, and supporters viewed marriage equality legislation as fulfilling an implicitly demanded, yet-to-be judicially articulated, constitutional guarantee of equal protection and fundamental marriage rights. As state and federal courts continue to assess the constitutional merits of challenges to state same-sex marriage bans, judges should give ample consideration to robust constitutional dialogue in state legislative bodies. In doing so, judges can enhance their own understanding of how same-sex marriage naturally fits within American constitutional history and tradition and bolster opinions extending constitutional protections to same-sex couples without ceding claims of furthering republican virtues to same-sex marriage opponents.

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<sup>435</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>436</sup> *Id.*