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Marriage Equality's Lessons for Social Movements and Constitutional Change

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MARRIAGE EQUALITY'S LESSONS FOR SOCIAL MOVEMENTS AND CONSTITUTIONAL CHANGE

WILLIAM N. ESKRIDGE JR.*

ABSTRACT

The marriage equality movement won its first state victory in 2003, and within a dozen years fifty states were handing out marriage licenses. The swiftness of the constitutional triumph was only possible because public opinion underwent a sea change in that period. Sexual and gender minorities achieved this remarkable turnaround once a critical mass, widely dispersed in the country, came out of their closets as committed couples (often raising children), and mainstream America found their stories more consistent with their own lives than they did a generation earlier. Other lessons of marriage equality's success, however, are how hard it is for a social movement to change longstanding norms and perspectives and how prejudice and stereotyping survive court victories and migrate to other issues and social groups.

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I. THE SWIFT VICTORY OF MARRIAGE EQUALITY

In 1967, the Supreme Court ruled in *Loving v. Virginia* that states could not constitutionally deny different-race couples the right to marry.¹ The same year, Thea Spyer proposed marriage to Edie Windsor, but neither expected their lifetime commitment to be recognized by the state the way Virginia had to recognize the marriage of Mildred Jeter and Richard Loving.² Also in 1967, Jack Baker proposed to Mike McConnell, who insisted that he wanted a real marriage, recognized by the state.³ So Jack enrolled in law school two years later, learned about marriage laws, and filed a lawsuit demanding constitutional recognition of their right to marry.⁴ Every judge to hear their case, and others like it in the 1970s, felt that *Loving* had no connection to relationships between “homosexuals.”⁵

In 1993, the Hawaii Supreme Court found the analogy to *Loving* persuasive. In *Baehr v. Lewin*, the court ruled that denying a woman (Ninia Baehr) the right to marry another woman (Genora Dancel) was discrimination because of sex, for the same reason that denying a Black woman (Jeter) the right to marry a white man (Loving) was discrimination because of race.⁶ On remand, the state trial court found that Hawaii could offer no reasonable justification for the discrimination,⁷ but the voters amended the state constitution before the state supreme court could confirm that

1. 388 U.S. 1, 12 (1967).

2. Robert D. McFadden, *Edith Windsor, Whose Same-Sex Marriage Fight Led to Landmark Ruling, Dies at 88*, N.Y. TIMES (Sept. 12, 2017), <https://www.nytimes.com/2017/09/12/us/edith-windsor-dead-same-sex-marriage-doma.html> [<https://perma.cc/2JT5-2H48>].

3. MICHAEL MCCONNELL WITH JACK BAKER AS TOLD TO GAIL LANGER KARWOSKI, THE WEDDING HEARD ‘ROUND THE WORLD: AMERICA’S FIRST GAY MARRIAGE 21-22 (2016).

4. *Id.* at 47, 65-66, 95-98.

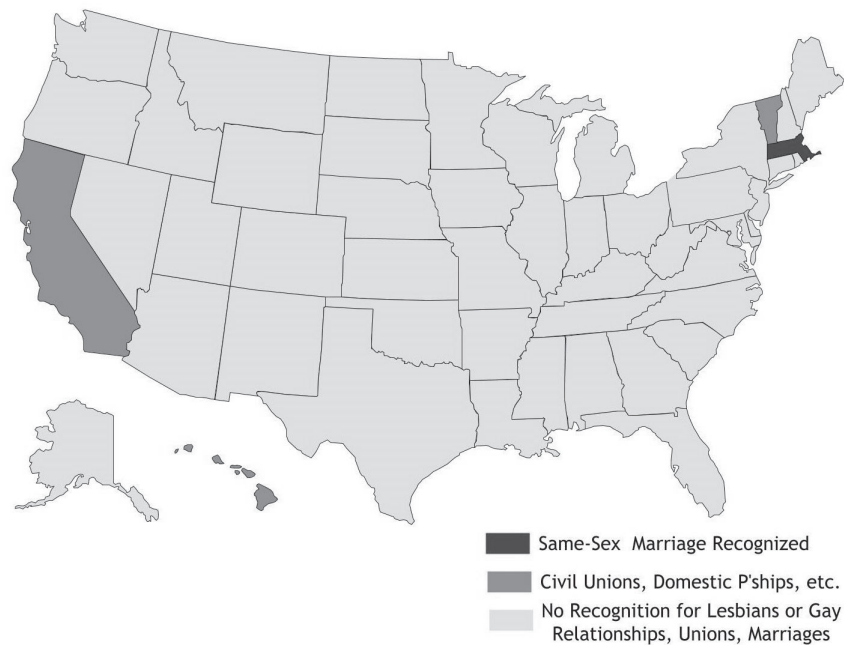
5. See *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); see also *Jones v. Hallahan*, 501 S.W.2d 588, 589-90 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974).

6. 852 P.2d 44, 68 (Haw. 1993) (reviewing the Court’s reasoning in holding that Virginia’s miscegenation statutes violated the Fourteenth Amendment and observing that “[s]ubstitution of ‘sex’ for ‘race’ and article I, section 5 [of the Hawaii Constitution] for the [F]ourteenth [A]mendment yields the precise case before us together with the conclusion we have reached”), *reaff’d and clarified*, 852 P.2d 74 (Haw. 1993).

7. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *21-22 (Haw. Cir. Ct. Dec. 3, 1996).

holding.⁸ It was not until November 2003 that any American jurisdiction officially extended civil marriage to same-sex couples, thanks to the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*.⁹ Because the mandate did not take effect for six months, the Commonwealth issued the first licenses on May 17, 2004.¹⁰ As Figure 1 below reveals, three other states recognized same-sex unions but not same-sex marriages.¹¹

Figure 1. Recognition of Same-Sex Marriages or Unions, May 2004



8. See HAW. CONST. art. I, § 23 (giving the legislature authority to restrict marriage to different-sex couples); *Baehr v. Miike*, 92 Haw. 634 (1999) (summarily reversing judgment for same-sex couples based on state constitutional amendment).

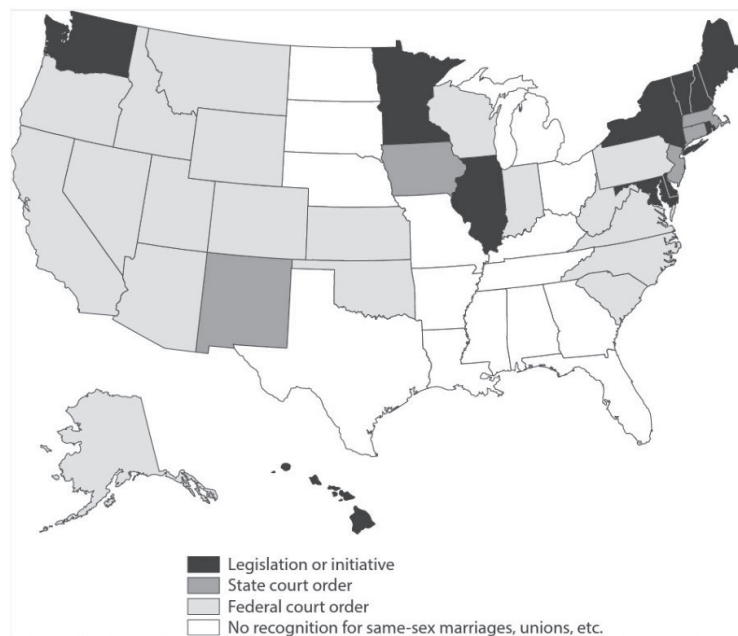
9. 798 N.E.2d 941, 968-69 (Mass. 2003), *aff'd* by Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004).

10. See Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 44 (2005).

11. See California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Stat. 3081 (providing comprehensive domestic partnership rights); Act of July 8, 1997, Act 383, 1997 Haw. Sess. Laws 1211 (providing for reciprocal beneficiaries, with three dozen rights and benefits of marriage); Act of Apr. 26, 2000, no. 91, 2000 Vt. Acts & Resolves 72 (providing for comprehensive civil unions).

By the time President Barack Obama was inaugurated in January 2009, only Connecticut had joined Massachusetts as a marriage equality jurisdiction,¹² though nine states and the District of Columbia recognized civil unions, domestic partnerships, or reciprocal beneficiaries for same-sex couples.¹³ Between January 2009 and January 2015, the marriage equality map exploded, from two states to thirty-five states and the District of Columbia.¹⁴

Figure 2. Recognition of Same-Sex Marriages, January 2015



12. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 480-82 (Conn. 2008).

13. In addition to the three states in note 11, see also Omnibus Domestic Partnership Equality Amendment Act of 2008, D.C. Act 17-403, 55 D.C. Reg. 6758 (June 6, 2008) (providing comprehensive domestic partnership rights); Act to Promote the Financial Security of Maine's Families and Children, ch. 672, 2004 Me. Laws 2126 (some domestic partnership rights); Act of May 22, 2008, ch. 590, 2008 Md. Laws 4597 (some domestic partnership rights); Act of May 31, 2007, ch. 58, 2007 N.H. Laws 57 (civil unions); Act of Dec. 20, 2006, ch. 103, 2006 N.J. Laws 975 (civil unions); Oregon Family Fairness Act, ch. 99, 2007 Or. Laws 425 (comprehensive domestic partnership rights); Act of Apr. 20, 2007, ch. 156, 2007 Wash. Sess. Laws 616 (some domestic partnership rights).

14. Figure 2 is based upon WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, *MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS* app. 1, at 755-71 (2020) (listing the date for every state's recognition of same-sex marriages).

Figure 2 above reveals the path taken by each of those thirty-five states toward recognition of the freedom to marry for LGBTQ+ Americans. Notice that only five states secured marriage equality through state supreme court decisions interpreting state constitutions.¹⁵ More than double that number—eleven states and the District of Columbia—recognized marriage equality by statutes or a voter initiative adopted between March 2009 (Vermont) and November 2013 (Illinois).¹⁶ Between June 2013 and January 2015, a whopping nineteen states flipped after federal court orders: California when the Supreme Court in *Hollingsworth v. Perry* dismissed the appeal of a federal injunction,¹⁷ and the other eighteen states after the Court (on the same day) sustained Edie Windsor's challenge to federal marriage exclusions.¹⁸ By the time the Supreme Court granted review for the six lawsuits consolidated as *Obergefell v. Hodges* in January 2015, the marriage equality map included thirty-five states and the District of Columbia.¹⁹ There were only fifteen states resisting—about the same number and mostly the same states whose different-race marriage exclusions fell in *Loving v. Virginia*.²⁰

15. *Kerrigan*, 957 A.2d at 480-82; *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Garden State Equal. v. Dow*, 92 A.3d 336 (N.J. Super. Ct. Law Div. 2013); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003); *Griego v. Oliver*, 316 P.3d 865, 872 (N.M. 2013).

16. Act of May 7, 2013, ch. 19, 79 Del. Laws 1; Jury and Marriage Amendment Act of 2009, D.C. Act 18-70, 56 D.C. Reg. 3797 (May 6, 2009); Hawaii Marriage Equality Act of 2013, Act 1, 2013 Haw. Sess. Laws 1; Religious Freedom and Marriage Fairness Act, Pub. Act 98-0597, 2013 Ill. Laws 7141; Civil Marriage Protection Act, ch. 2, 2012 Md. Laws 9 (ratified by voters, 2012); Act of May 14, 2013, ch. 74, 2013 Minn. Laws 404; Act of June 3, 2009, ch. 59, 2009 N.H. Laws 60; Marriage Equality Act, ch. 95, 2011 N.Y. Laws 749; Act of May 2, 2013, ch. 5, 2013 R.I. Pub. Laws 15; Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, no. 3, 2009 Vt. Acts & Resolves 3; Act of Feb. 13, 2012, ch. 3, 2012 Wash. Sess. Laws 199 (ratified by voters, 2012); *see also* ME. SEC'Y OF STATE, MAINE CITIZEN'S GUIDE TO THE REFERENDUM ELECTION 5-7 (2012) (detailing Referendum Question 1 on the Maine 2012 ballot); ME. REV. STAT. ANN. tit. 19-a, § 650-A (West 2012) (codifying Maine Referendum Question 1).

17. 570 U.S. 693, 715 (2013).

18. *United States v. Windsor*, 570 U.S. 744, 750-52 (2013); *see* ESKRIDGE & RIANO, *supra* note 14, app. 1 at 755-71 (listing every state's date for recognizing same-sex marriages).

19. *See* *Obergefell v. Hodges*, 576 U.S. 644, 681-85 (2015) (listing, in an appendix, federal courts' constitutional decisions requiring marriage equality); Bill Chappell, *Supreme Court Declares Same Sex Marriage Legal in All 50 States*, NPR (June 26, 2015, 10:05 AM), <https://www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages> [<https://perma.cc/KEH4-H9R7>].

20. *Compare Timeline: Gay Marriage Chronology*, L.A. TIMES (June 26, 2015), <https://>

Several book-length treatments trace the path from *Baehr* to *Obergefell*, including my recent book *Marriage Equality: From Outlaws to In-Laws*, with Christopher Riano, which starts the story in 1967.²¹ From *Loving* to *Obergefell* is forty-eight years, almost two generations—so marriage equality certainly did not happen overnight. But the issue did not have much salience until the 1990s, and serious debate did not start until 2003, when the Supreme Court decriminalized consensual sodomy in *Lawrence v. Texas*²² and the Massachusetts Supreme Judicial Court delivered *Goodridge* five months later. Indeed, the twelve-year path from *Lawrence* to *Obergefell* looks very similar to the thirteen-year path from *Brown v. Board of Education*²³ to *Loving*: responding to social movements, the Supreme Court invalidated apartheid-like regimes (physical separation of the races and emotional separation of sexual outlaws) in the earlier decisions and then a decade later insisted on marriage equality that had been taboo for generations.²⁴

There are many differences, of course. The most salient is the brutality and violence undergirding apartheid and the different-race marriage bans—the foundation for the police brutality generating the Black Lives Matter movement.²⁵ Another difference is that when the Supreme Court decided *Loving*, very few Americans believed that different-race marriages were okay,²⁶ but as early as 2011 most

graphics.latimes.com/usmap-gay-marriage-chronology/ [https://perma.cc/W5D8-WQN5] (displaying each states' marriage equality status in January 2015 and at other points in time), with *Map—The Leadup to Loving*, ACLU, <https://www.aclu.org/other/map-leadup-loving> [https://perma.cc/3VD2-GT3U] (displaying a map of the remaining state miscegenation laws that *Loving* overturned).

21. See ESKRIDGE & RIANO, *supra* note 14; see also NATHANIEL FRANK, *AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA* (2017).

22. 539 U.S. 558, 578 (2003).

23. 347 U.S. 483 (1954).

24. See William N. Eskridge Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1088-1109 (2015).

25. See generally *50 Years Later, Interracial Couples Still Face Hostility from Strangers*, CBS NEWS (June 12, 2017, 10:40 AM), <https://www.cbsnews.com/news/50-years-loving-case-interracial-couples-still-face-hostility-from-strangers/> [https://perma.cc/WA33-CQ5K]; *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory/> [https://perma.cc/UL5G-E2UU].

26. See Lydia Saad, *Gallup Vault: Americans Slow to Back Interracial Marriage*, GALLUP (June 21, 2017), <https://news.gallup.com/vault/212717/gallup-vault-americans-slow-back-interracial-marriage.aspx> [https://perma.cc/F9M5-UJ8B].

Americans were okay with same-sex marriages.²⁷ And that volte-face came very rapidly for gay marriage. Though it was long opposed by 2-1 majorities, more than 60 percent of the American people supported marriage for same-sex couples in June 2015, when the Supreme Court decided *Obergefell*.²⁸ That is breathtaking speed. Pollsters say they have seen nothing like it in the history of polling.²⁹ The next Part will explain the remarkable success of marriage equality.

II. SOCIETAL AND DEMOGRAPHIC EXPLANATIONS FOR MARRIAGE EQUALITY

Leading litigation and lobbying organizations deserve a lot of credit for securing nationwide marriage equality: Lambda Legal, GLAD, the American Civil Liberties Union (ACLU), the National Center for Lesbian Rights (NCLR), Freedom to Marry, Gill Action, the National LGBTQ Task Force, and the Human Rights Campaign (HRC). Together with state and local groups (such as Love Makes a Family in Connecticut, among dozens of others), these organizations created a well-coordinated campaign that encouraged local public relations and political networking campaigns, promoted impact lawsuits in gay-friendly jurisdictions, publicized the advantages of marriage equality in national and local media, developed in fits and starts effective messaging strategies, and ultimately built an

27. See Ruth Marcus, *The Good Politics of Gay Marriage*, WASH. POST (Dec. 8, 2011), https://www.washingtonpost.com/opinions/the-good-politics-of-gay-marriage/2011/12/08/gIQA1yaifO_story.html [https://perma.cc/F37M-56GR].

28. Janet Hook, *Support for Gay Marriage Hits All-Time High—WSJ/NBC News Poll*, WALL ST. J.: WASH. WIRE (Mar. 9, 2015, 6:32 PM), <https://blogs.wsj.com/washwire/2015/03/09/support-for-gay-marriage-hits-all-time-high-wsj-nbc-news-poll/> [https://perma.cc/9E3B-V745]; Justin McCarthy, *Record-High 60% of Americans Support Same-Sex Marriage*, GALLUP (May 19, 2015), <https://news.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx> [https://perma.cc/37GT-9J7H].

29. See Tanya Basu, *Why More Americans Accept Gay Marriage Than Ever*, ATLANTIC (Mar. 3, 2015), <https://www.theatlantic.com/politics/archive/2015/03/why-more-americans-accept-gay-marriage-than-ever/386707/> [https://perma.cc/K8K5-RE4F].

unstoppable momentum.³⁰ This account is accurate, but there is a simpler story as well.

Gaining a foothold in Massachusetts assured widespread acceptance for marriage equality, and the campaign to secure marriage in New England was a roadmap for winning marriage everywhere.³¹ While the “gayocracy”—the litigation and lobbying organizations noted above, gay media and celebrities, leading academics, and supportive business leaders and multimillionaires—emphasized systematic national efforts, the seeds of success were sown in Vermont by Beth Robinson, Susan Murray, and Mary Bonauto.³² Their plan was a feminist grassroots campaign for an idea they believed in. Each woman grew up in a culture that disparaged women generally and demonized “homosexuals and lesbians” in particular, each was inspired by feminist role models to step outside existing culture and see themselves as worthy human beings, and each knew that lesbians and gay men were just as capable of family relationships as everyone else.³³ For all of them, the *Baehr* decision in Hawaii raised the possibility that states might recognize those relationships—but not without a better-organized campaign.³⁴

After a series of meetings in Boston, Massachusetts and Ferrisburg, Vermont, Murray, Robinson, and Bonauto became what they termed “co-counsel for life,” with the goal to secure equal marriage rights in Vermont, a relatively gay-friendly jurisdiction.³⁵ Murray,

30. See, e.g., ESKRIDGE & RIANO, *supra* note 14, chs. 3-4 (Lambda Legal), chs. 7-9 (GLAD), ch. 11 (NCLR), ch. 13 (ACLU, Lambda, GLAD, NCLR, Task Force, Love Makes a Family), ch. 16 (Empire Pride, HRC, Freedom to Marry), ch. 18 (Task Force, Freedom to Marry, HRC), chs. 19-21 (GLAD, ACLU, Lambda Legal, NCLR); MARC SOLOMON, WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS—AND WON 79-83 (2015); Matt Coles, *The Plan to Win Marriage*, in LOVE UNITES US: WINNING THE FREEDOM TO MARRY IN AMERICA 100, 101-07 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2015) [hereinafter LOVE UNITES US]; Shannon Minter, *California Dreaming: Winning Marriage Equality in the California Courts*, in LOVE UNITES US, *supra*, at 145, 146-49, 153; Evan Wolfson with Adam Polaski, *Movement + Strategy + Campaign: The Freedom to Marry Winning Combination*, in LOVE UNITES US, *supra*, at 108, 109-15, 117.

31. See, e.g., Bonauto, *supra* note 10, at 23-29, 62-68.

32. For the account that follows, see *id.* at 23, and Mary L. Bonauto, *The Litigation: First Judicial Victories in Vermont, Massachusetts, and Connecticut*, in LOVE UNITES US, *supra* note 30, at 73, as well as ESKRIDGE & RIANO, *supra* note 14, at 171-226.

33. See ESKRIDGE & RIANO, *supra* note 14, at 171-226; Bonauto, *supra* note 10, at 2-8.

34. See Bonauto, *supra* note 32, at 73.

35. ESKRIDGE & RIANO, *supra* note 14, at 172-78.

for example, had already helped persuade the Vermont Supreme Court to recognize second-parent adoptions for lesbian and gay couples and had orchestrated a grassroots political movement that persuaded the legislature to codify that holding.³⁶ On the marriage issue, their plan was to find out what the small lesbian and gay community wanted and needed, to build up a core of activists and local support for a marriage conversation, to recruit allies in state government and work hard to elect friends and unseat foes, to explore potential support among religious and civic groups, and, only after doing all that, to bring an impact lawsuit populated by deeply committed and unthreatening couples.³⁷ They almost won. The Vermont Supreme Court surprised them with an opinion that unanimously invalidated the exclusion of same-sex couples from state family law but did not require marriage equality.³⁸ In 2000, the legislature enacted a law recognizing civil unions, with all the rights, duties, and benefits accorded marriage under state law.³⁹ The activists were deeply disappointed, but I celebrated their achievement as “equality practice,” a giant step toward marriage equality.⁴⁰ Three years later, Bonauto and GLAD orchestrated an impressive network of gay activists, religious leaders, lobbyists, grassroots organizers, and civil libertarians to win marriage equality in the Massachusetts marriage case and then protected it against a constitutional referendum between 2003 and 2007.⁴¹

Goodridge was the “Cinderella moment” for marriage equality. Statistician Nate Silver averaged the levels of polling support and opposition from 1996 to 2013, as graphically depicted below.⁴² His averages are revealing: support for marriage equality bumped up in

36. *In re Adoption of B.L.V.B.*, 628 A.2d 1271, 1275-76 (Vt. 1993), *codified by statute*, Adoption Act, no. 161, 1996 Vt. Acts & Resolves 262; *see also* ESKRIDGE & RIANO, *supra* note 14, at 171-76.

37. *See* ESKRIDGE & RIANO, *supra* note 14, at 171-79, 199-204.

38. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

39. Act of Apr. 26, 2000, no. 91, 2000 Vt. Acts & Resolves 72.

40. WILLIAM N. ESKRIDGE JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 148 (2002).

41. *See* Mary L. Bonauto, *Equality and the Impossible—State Constitutions and Marriage*, 68 *RUTGERS U. L. REV.* 1481, 1497-98, 1522 (2016).

42. Nate Silver, *How Opinion on Same-Sex Marriage Is Changing, and What It Means*, *N.Y. TIMES: FIVETHIRTYEIGHT* (Mar. 26, 2013, 10:10 AM), <https://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/> [<https://perma.cc/3AHK-2QB5>].

the wake of the Defense of Marriage Act but then stagnated until Massachusetts started issuing marriage licenses in 2004.⁴³ Starting in 2004, support for marriage equality continuously ticked up about 2 percent a year, until it passed the opposition numbers in 2011.⁴⁴ Public support continued to climb every year between 2004 and 2009,⁴⁵ even though no new state issued marriage licenses until June 2008.⁴⁶ During that period, most states in the country voted by overwhelming margins for constitutional amendments banning same-sex marriage and even civil unions from recognition in their jurisdictions,⁴⁷ yet popular support for marriage equality continued to rise at the same steady pace.⁴⁸

So the simplest—and most powerful—story of the triumph of marriage equality is that winning a single state set in motion a social and political ripple effect that made same-sex marriage across the country possible in the short term and, in my view, inevitable in the longer term. That national marriage equality came in 2015 was the result of some lucky breaks, including the fact that Anthony Kennedy, rather than Robert Bork, succeeded Lewis Powell on the Supreme Court of the United States.⁴⁹

43. *Id.*

44. *Id.*

45. *Id.*

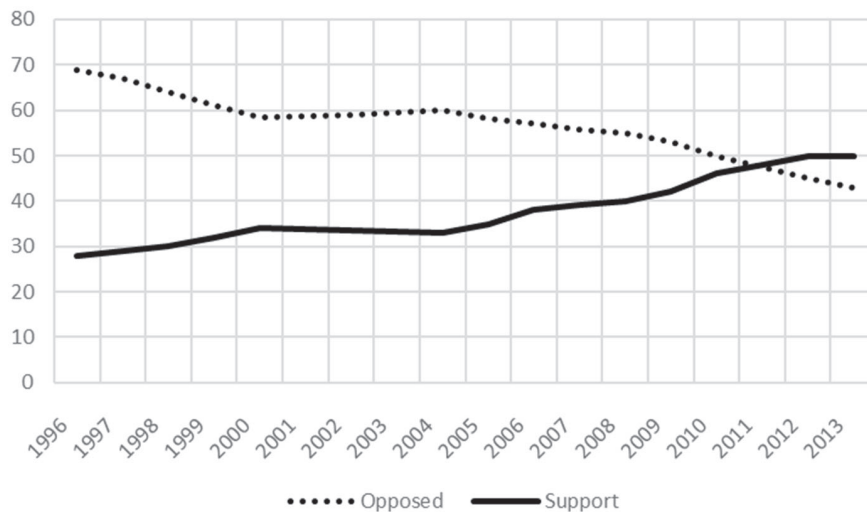
46. The state supreme court ruled that California had to extend marriage to same-sex couples, *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008), and licenses were issued the next month, see *The Freedom to Marry in California*, FREEDOMTO MARRY, <http://www.freedomtomarry.org/states/california> [<https://perma.cc/5GP9-NFHL>]. Proposition 8 terminated that process, see *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009), until it was invalidated and appeals exhausted on June 26, 2013, *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013).

47. See Bonauto, *supra* note 10, at 66.

48. Fig. 3.

49. Justice Bork would never have voted to overrule *Bowers v. Hardwick*, as Kennedy did in *Lawrence v. Texas*. See Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y. TIMES (Dec. 19, 2012), <https://www.nytimes.com/2012/12/20/us/robert-h-bork-conservative-jurist-dies-at-85.html> [<https://perma.cc/Q6BV-WU4G>]. On the other hand, Bork died in 2012, and if he had not resigned before 2007 (when the Democrats took the Senate until 2015) he would have been replaced by a younger liberal Justice. See *id.*; *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/4AFM-5QSR>]. Justice Kavanaugh, a conservative, now occupies the Bork-Kennedy seat. Tessa Berenson, *Inside Brett Kavanaugh's First Term on the Supreme Court*, TIME: LONGFORM (June 28, 2019, 11:46 AM), <https://time.com/longform/brett-kavanaugh-supreme-court-first-term/> [<https://perma.cc/5X8M-6D85>].

Figure 3. Silver's Polling Averages on Marriage Equality, 1996-2013



Source: Silver, *supra* note 42.

However the story is not quite that simple because there were preconditions to the increasingly favorable public reception of the Massachusetts beachhead. First, *Goodridge* would not have taken the movement anywhere, or not very far, if there had not been numerous lesbian, gay, bisexual, transgender, nonbinary, and other Massachusettans who were ready to tie the knot. Natural variation created a number of gender-nonconforming citizens for whom same-sex relationships were desirable, but what was critically important was the relative freedom those citizens felt to come out of the closet not only as LGBTQ+ but also as gender-nonconforming couples who wanted the public commitment that civil marriage offered.⁵⁰ State law facilitated the coming-out process by protecting them against discrimination in the workplace, housing, public accommodations, and credit.⁵¹ Many of those couples (including most of the seven

50. Cf. Wolfson & Polaski, *supra* note 30, at 115 (discussing the importance of visibility in the context of winning public support for the freedom to marry).

51. Act of Nov. 15, 1989, ch. 516, 1989 Mass. Acts 796; see Peter M. Cicchino, Bruce R.

plaintiff couples in *Goodridge*)⁵² were already rearing children within their committed unions, and, for those couples, marriage was a signal of commitment to their children as well as to one another.⁵³ That Massachusetts had followed Vermont in recognizing second-parent adoptions in 1993 was an important building block.⁵⁴

Second, *Goodridge* would not have changed public opinion anywhere if there had been demonstrably bad effects of marriage equality, such as dramatic costs or burdens imposed on fellow citizens. But when marriage was expanded to include sexual and gender minorities, there were only a modest number of people who suffered dignitary or family harms.⁵⁵ Importantly, the institution of marriage not only survived but flourished. Tens of thousands of couples and their children were delighted to become marital families, and these marriages proved to be as robust as those of different-sex couples.⁵⁶ There were enough marriage licenses to go around.

In *Goodridge*, and in subsequent cases, the main argument against marriage equality had been that it would change the social meaning of marriage so much that the institution, in sharp decline, would collapse altogether.⁵⁷ Massachusetts was a good setting to test that argument, as the marriage rate had steeply declined

Deming & Katherine M. Nicholson, Comment, *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549, 561 (1991).

52. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003).

53. See, e.g., *id.*

54. See *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993).

55. The most noted instances of harm were objections by some parents when schools discussed same-sex marriages. See *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008). Related was the decision by Catholic Charities to cease adoption placements rather than comply with the state antidiscrimination law. See U.S. CONF. OF CATH. BISHOPS, DISCRIMINATION AGAINST CATHOLIC ADOPTION SERVICES (2018), <https://www.usccb.org/issues-and-action/religious-liberty/upload/Discrimination-against-Catholic-adoption-services.pdf> [<https://perma.cc/JW6T-LPCQ>].

56. See Steven LeBlanc, *Numbers Show How Gay Marriage Has Fared in Massachusetts*, MASSLIVE (Mar. 24, 2019), https://www.masslive.com/news/2015/06/numbers_show_how_gay_marriage.html [<https://perma.cc/4N3Q-7RXB>] (observing that nearly twenty-six thousand gay couples wed in the decade after *Goodridge* and that "Massachusetts has maintained one of the lowest overall divorce rates of any state—both before and after gay marriage was legalized"). See generally ESKRIDGE & RIANO, *supra* note 14, at 638-40, 724-28 (noting marriage in Massachusetts and other states did fine in the wake of marriage equality).

57. See *Goodridge*, 798 N.E.2d at 995-96 (Cordy, J., dissenting); Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 403 (2009).

before 2004,⁵⁸ and so it was a test of the hypothesis that gay marriage would simply finish off the declining institution. Yet that is not what happened, as the table below reveals. Massachusetts' marriage rates had fallen dramatically between 1990 and 2003, from 7.9 marriages per 1000 persons to 5.6 marriages, a plunge of 29 percent.⁵⁹ That was even greater than the steep decline in national marriage rates, from 9.8 to 7.7.⁶⁰ *Goodridge* coincided with a reversal of that decline, in large part by adding more than six thousand same-sex couples to the marriage rolls in 2004.⁶¹ But the institution continued to do relatively well even after the initial bounce. While the national marriage rate continued to erode after *Goodridge*, the Massachusetts rate held relatively steady.⁶² Between 2016 and 2018, to my surprise, the Massachusetts marriage rate increased, even as the national marriage rate continued to decline.⁶³

58. CTRS. FOR DISEASE CONTROL & PREVENTION, MARRIAGE RATES BY STATE: 1990, 1995, AND 1999-2018, <https://www.cdc.gov/nchs/data/dvs/state-marriage-rates-90-95-99-18.pdf> [<https://perma.cc/J3X9-2BE3>] [hereinafter MARRIAGE RATES BY STATE].

59. *Id.*

60. SALLY C. CURTIN & PAUL D. SUTTON, CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STAT., MARRIAGE RATES IN THE UNITED STATES, 1900-2018, at 4 (2020), https://www.cdc.gov/nchs/data/hestat/marriage_rate_2018/marriage_rate_2018.pdf [<https://perma.cc/6D2S-BSU4>].

61. See MARRIAGE RATES BY STATE, *supra* note 58; LeBlanc, *supra* note 56.

62. Compare MARRIAGE RATES BY STATE, *supra* note 58, with CURTIN & SUTTON, *supra* note 60, at 4.

63. See MARRIAGE RATES BY STATE, *supra* note 58.

Table 1. Massachusetts Marriage Rates, Compared with
U.S. Rates, per 1000

Year	Mass. Marriage Rate	U.S. Marriage Rate	Mass. Marriage Rate as % U.S. Rate
1990	7.9	9.8	78%
1995	7.1	8.9	79%
2000	5.8	8.2	71%
2001	6.2	8.2	76%
2002	5.9	8.0	75%
2003	5.6	7.7	73%
2004	6.5	7.8	83%
2005	6.2	7.6	82%
2006	5.9	7.5	80%
2007	5.8	7.3	80%
2008	5.6	7.1	79%
2009	5.6	6.8	82%
2010	5.5	6.8	82%
2011	5.5	6.8	82%
2012	5.5	6.8	82%
2013	5.5	6.8	82%
2014	5.6	6.9	81%
2015	5.5	6.9	80%
2016	5.8	7.0	83%
2017	5.7	6.9	83%
2018	6.3	6.5	97%

Source: MARRIAGE RATES BY STATE, *supra* note 58.

From these data, I would not—could not—argue that marriage equality saved marriage or caused it to stabilize in the Bay State. Yet I insist that the data do falsify the argument that marriage equality would finish off a declining institution. The reason I include the more recent data is that, when the sky did not fall in Massachusetts, the “marriage will be dead” warnings took a hit, and critics fell back on more abstract, long-term arguments.⁶⁴ But the

64. See ESKRIDGE & RIANO, *supra* note 14, at 233-47 (tracing the evolution of the marriage equality debate between 2004 and 2007).

longer gay marriage has been normalized in Massachusetts, the more stable the marriage numbers have been—a pattern replicated in other states that accepted marriage equality early on.⁶⁵ Again, this is not conclusive proof but is decisive evidence against “the sky is falling” criticisms of marriage equality.

Third, *Goodridge* would not have had a big effect on public opinion if straight people had not been attentive to the many visible benefits and few demonstrable harms of marriage equality. Americans are not wild about changing cherished institutions, and that inertia had been the death knell for marriage equality in the 1970s through the 1990s.⁶⁶ But the mainstream “audience” for marriage equality was increasingly receptive in the 2000s, both because they came to know LGBTQ+ couples, including freshly married couples, and because they saw those marriages as not unlike their own marriages or those of their parents. Especially in liberal jurisdictions such as Massachusetts, Vermont, and Connecticut, the gay community had changed in ways that affected public perceptions: all three states protected sexual minorities from job and other forms of discrimination, Vermont and Connecticut provided domestic partnership benefits to state employees, and all three states allowed second-parent adoptions⁶⁷—measures that brought gay families out into the open. Just as LGBTQ+ families were revealing themselves to be more like traditional married families, straight families were becoming more like gender-nonconforming families: many couples were unmarried, both partners worked outside the home, and they were raising fewer children, often with the aid of assisted reproductive technologies.⁶⁸ The more knowledgeable

65. See tbl.1; ESKRIDGE & RIANO, *supra* note 14, app. 3 at 775-77.

66. Cf. Stein, *supra* note 57, at 410-11 (discussing common attitudes relating to procreation and marriage rights that persisted from the 1970s through the 1990s and formed an obstacle to marriage equality).

67. See GLAD: GLAD ANSWERS, MASSACHUSETTS: OVERVIEW OF LEGAL ISSUES FOR GAY MEN, LESBIANS, BISEXUALS AND TRANSGENDER PEOPLE 1, 23-24 (2018), <http://www.glad.org/wp-content/uploads/2017/01/ma-lgbt-overview.pdf> [<https://perma.cc/HZ5N-Z9UL>]; GLAD: GLAD ANSWERS, VERMONT: OVERVIEW OF LEGAL ISSUES FOR GAY MEN, LESBIANS, BISEXUALS AND TRANSGENDER PEOPLE 1, 27, 29 (2018), <https://www.glad.org/wp-content/uploads/2017/01/vt-lgbt-overview.pdf> [<https://perma.cc/D6E5-7DWP>]; GLAD: GLAD ANSWERS, CONNECTICUT: OVERVIEW OF LEGAL ISSUES FOR GAY MEN, LESBIANS, BISEXUALS AND TRANSGENDER PEOPLE 1, 26, 28 (2018), <https://www.glad.org/wp-content/uploads/2017/01/ct-lgbt-overview.pdf> [<https://perma.cc/6WPJ-Y4MH>].

68. See Stein, *supra* note 57, at 411.

straight families were about gay families and the more alike they were, the more open the straight audience was to the message that such couples wanted the option of marriage for the same reasons they did—love, commitment, and children.

So a social movement whose victory produces positive and indeed heartwarming consequences for a visible and widely dispersed group of beneficiaries (and here I include the parents, family, and friends of LGBTQ+ married partners) and does no harm to other people or to the community—that is a social movement that will have the wind at its back. Before the court decisions in Hawaii, Vermont, and Massachusetts, public decisionmakers were afraid to give gay marriage any kind of legitimacy. It was “off the wall.” But after *Goodridge*, things started breaking their way (though the losses dominated the victories for several years): LGBTQ+ people embraced their identity in social, familial, and professional environments, which personalized the issue for the increasing numbers of Americans who knew, worked with, and were related to gay people and couples. Once that happened, purely moral arguments against same-sex marriage (God does not approve, and these people do disgusting things) became “off the wall” and had to be replaced by “neutral” arguments based on the common good.⁶⁹ However, those common good, public policy arguments rang hollow when their predictions were falsified and the media populated the headlines with lesbian and gay couples with happy children.⁷⁰

III. LESSONS OF MARRIAGE EQUALITY FOR SOCIAL MOVEMENTS AND LAW REFORM

The model for law reform inspired by social movements is the NAACP Legal Defense and Educational Fund's litigation campaign to invalidate American apartheid.⁷¹ The marriage equality campaign

69. See ESKRIDGE & RIANO, *supra* note 14, at 248-53, 256-62, 320-26.

70. See, e.g., Lindsey Bever, *Children of Same-Sex Couples Are Happier and Healthier Than Peers, Research Shows*, WASH. POST (July 7, 2014, 5:48 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2014/07/07/children-of-same-sex-couples-are-happier-and-healthier-than-peers-research-shows/> [https://perma.cc/2EQ3-MF28].

71. See generally JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* (2018); SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 2* (2011); RICHARD

learned a great deal from that model, and the success of the latter movement confirms and deepens many of the lessons learned from the earlier movement, as well as from the social movements supporting and opposing abortion choice.⁷² An overarching lesson is this: because deeply held emotional commitments to the status quo usually trump cognitive arguments and abstract appeals to equality or justice, it is hard for a social movement to change public opinion or generate big changes in law. A lot has to come together for big changes to happen: favorable demographic and economic developments, mobilization of the group's widely dispersed members who agree that they are being treated unjustly, the recruitment of unaffiliated allies, political organization at the local and national levels, enormous funding to create smart, emotion-packed campaigns and media attention, and a great deal of luck.⁷³ Even at the Supreme Court, whose members have life tenure, a social movement often cannot win great constitutional victories, such as *Brown v. Board of Education*, *Roe v. Wade*, and *Obergefell v. Hodges* without the support of popular opinion, usually secured through a strategically smart grassroots and media campaign addressed to a receptive socioeconomic climate.⁷⁴

The foregoing points are the conventional wisdom, to which I subscribe. Below I consider some other, less obvious lessons suggested by these movements.

KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (rev. ed. 2004); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* (1994); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1364-65 (1988); William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2396-97 (2002); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1289 (1991).

72. See generally MARY ZIEGLER, *ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT* (2020); DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994).

73. See *supra* Part II.

74. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 13-15 (2009). See generally PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008).

A. Lesson One: Intensity and Dispersion of Group

Even if it is just a minority of the population, a social group that is both strongly motivated to change the law (because the law affects their lives in harmful ways) and widely dispersed throughout society is in the best position to succeed in law reform. From the beginning of American apartheid regimes, Black Americans had strong incentives to change the law but were successfully repressed on the local level and had insufficient political traction at the national level. The civil rights movement won some constitutional victories notwithstanding their political marginalization, but an important condition for ending American apartheid was Black migration to the North and the rise of modest Black political power that, for example, was critical to the elections of Harry Truman and John F. Kennedy as presidents.⁷⁵ Other racial and ethnic groups—such as nineteenth-century Italian and Irish immigrants—encountered massive discrimination and ghettoization when they arrived, only to achieve political influence through collective action and gradual integration into local, and then national, politics.⁷⁶

Marriage equality illustrates how a social group can emerge from a new kind of ghetto (a psychic and normative one) through a different process (“coming out of the closet”) but with similar political dynamics: earning political traction, followed by strategically applying pressure on judicial, legislative, and executive officials.⁷⁷ For gay people, unlike for racial and ethnic minorities, political visibility was an epistemic rather than geographic migration. (For all these minorities, political visibility was also normative: we are not degraded, we are good human beings.) There have long

75. On the critical role of the Black vote in the 1948 election, see DAVID MCCULLOUGH, *TRUMAN* 713 (1992) and JENNIFER SCANLON, *UNTIL THERE IS JUSTICE: THE LIFE OF ANNA ARNOLD HEDGEMAN* 1-2 (2016), for an explanation of the key role of Hedgeman and other civil rights activists in Truman’s election. On the critical role of the Black vote in the 1960 election, see TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, at 377-78 (1988) and James H. Meriwether, “Worth a Lot of Negro Votes”: *Black Voters, Africa, and the 1960 Presidential Campaign*, 95 *J. AM. HIST.* 737, 737-38 (2008).

76. See, e.g., LINDA DOWLING ALMEIDA, *IRISH IMMIGRANTS IN NEW YORK CITY, 1945-1995*, at 3 (2001); Stephen S. Hall, *Italian-Americans Coming into Their Own*, *N.Y. TIMES MAG.* (May 15, 1983), <https://www.nytimes.com/1983/05/15/magazine/italian-americans-coming-into-their-own.html> [<https://perma.cc/3GTT-ZH5M>].

77. See Hall, *supra* note 76.

been sexual and gender nonconformists, but they lived and engaged in activities confined to the closet, a ghetto of secrecy and hiding.⁷⁸ The big advances in LGBTQ+ rights have been occasioned by increased numbers coming out of the closet as sexual and gender nonconformists.⁷⁹ What I call “pop-up homosexuals” were key to ending the outlaw regime of *Bowers v. Hardwick*,⁸⁰ and once many came out of the closet as LGBTQ+ couples raising children in all walks of life and all over America, marriage equality was possible as well.⁸¹ On the eve of the Supreme Court’s decision in *Windsor*, the DOMA case, more Americans supported marriage equality than opposed it.⁸² One-third of those who had changed their minds said it was because someone close to them had come out as lesbian or gay; almost a fifth said it was because they perceived that national attitudes had changed.⁸³

The closet can be a revolving door, however. I once believed that the pro-choice stance on abortion would sweep the field because women are both strongly affected by such laws and widely dispersed in society, and because women (unlike LGBTQ+ persons) constitute a majority of the voting public. So long as women substantially and vocally agree on an issue, such as the illegitimacy of sexual harassment, that issue has great political and judicial traction.⁸⁴ But that has never been the case with abortion: there are about as many women as men who are pro-life.⁸⁵ Ironically, just as tens of

78. See Bonnie J. Morris, *History of Lesbian, Gay, Bisexual and Transgender Social Movements*, AM. PSYCH. ASS’N (2009), <https://www.apa.org/pi/lgbt/resources/history#> [https://perma.cc/6Z83-7KYM].

79. See ESKRIDGE & RIANO, *supra* note 14, at 5.

80. 478 U.S. 186 (1986).

81. See, e.g., ESKRIDGE & RIANO, *supra* note 14, at 662.

82. See *Growing Support for Gay Marriage: Changed Minds and Changing Demographics*, PEW RSCH. CTR. (Mar. 20, 2013), <https://www.pewresearch.org/politics/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics/> [https://perma.cc/9KEX-NDBC].

83. See *id.* See generally Daniel DellaPosta, *Gay Acquaintanceship and Attitudes Toward Homosexuality: A Conservative Test*, SOCIUS, No. 4, 2018, at 1; Michael J. Rosenfeld, *Moving a Mountain: The Extraordinary Trajectory of Same-Sex Marriage Approval in the United States*, SOCIUS, No. 3, 2017, at 1.

84. See Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1003 (2015).

85. See “Pro-Choice” or “Pro-Life,” 2018-2019 Demographic Tables, GALLUP, <https://news.gallup.com/poll/244709/pro-choice-pro-life-2018-demographic-tables.aspx> [https://perma.cc/G263-R8R5].

thousands of LGBTQ+ persons and couples were coming out of the closet, women who had secured abortions retreated into their own closets, and other women (including “Jane Roe”) were coming out with stories of regretting their abortions.⁸⁶ As Carol Sanger has recently argued, the secrecy surrounding abortion decisions and the people who make them is a key reason for the misunderstandings and tensions surrounding this issue.⁸⁷ As a result of the newly closeted discourse, most Americans say they do not know a woman who has had an abortion and believe that it is a very risky procedure.⁸⁸ The latter belief floors me: as a purely medical procedure, abortion is much safer for women than childbirth.⁸⁹

The recent constitutional politics of abortion have strongly reflected this dynamic of coming out as both normative and public. After losing their campaign to overrule *Roe v. Wade* in the 1990s, leading pro-life organizations relied heavily on arguments that abortion was bad for women’s physical and emotional health.⁹⁰ Key to that strategy were the stories popularized by “Operation Outcry,” in which thousands of women like Norma McCorvey (“Jane Roe” in *Roe v. Wade*) and Sandra Cano (the plaintiff in *Doe v. Bolton*) came out of the closet as women who had secured abortions and regretted them deeply.⁹¹ Conversely, pro-choice advocates and organizations

86. Norma Leah Nelson McCorvey (Jane Roe’s real name) was the plaintiff in *Roe v. Wade*, then an abortion-regret speaker for the right to life, but at the end of her life she retracted her pro-life positions and claimed that she had been a paid advocate for the pro-life narrative of abortion regret. See AKA JANE ROE (Vice Studios et al. May 22, 2020) (movie containing her deathbed confession).

87. CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA, at xi, 62-63 (2017); David E. Pozen, *The Abortion Closet (with a Note on Rules and Standards)*, 35 COLUM. J. GENDER & L. 161, 163-64 (2017).

88. See Sarah Kliff, *We Polled 1,060 Americans About Abortion. This Is What They Got Wrong.*, VOX (Feb. 29, 2016), <https://www.vox.com/a/abortion-statistics-opinions-2016/poll> [<https://perma.cc/CU2D-YKUC>].

89. See Genevra Pittman, *Abortion Safer Than Giving Birth: Study*, REUTERS (Jan. 23, 2012, 5:20 PM), <https://www.reuters.com/article/us-abortion/abortion-safer-than-giving-birth-study-idUSTRE80M2BS20120123> [<https://perma.cc/34VG-K4R9>].

90. See ZIEGLER, *supra* note 72, at 123, 143-45, 174-75.

91. See *Gonzales v. Carhart*, 550 U.S. 124, 156-60 (2007) (relying on abortion-regret stories and citing Brief of Sandra Cano et al. as Amici Curiae Supporting Petitioners at 22-24, *Gonzales*, 550 U.S. 124 (No. 05-380), 2006 WL 1436684); Kathleen Cassidy, *Post-Abortive Women Attack Roe v. Wade*, AT THE CENTER (Jan. 2001), <https://www.atcmag.com/Issues/ID/16/Post-Abortive-Women-Attack-Roe-v-Wade> [<https://perma.cc/L4MF-8QKN>]; Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1641-47 (2008).

have called for more women to come out of the closet and talk openly about how securing an abortion early in their lives was a positive experience and enabled them to advance their lives and help their families.⁹² The recent movement to “Shout Your Abortion” has brought many pro-choice women out of the closet, while at the same time provoking countervoices from women who are critical or regretful.⁹³ For the reproductive freedom movement to have success on abortion issues, the marriage equality campaign suggests that the movement’s leaders need a massive campaign of public education and, more important, that its grassroots participants need to come out of the abortion closet with their freedom-based stories.

B. Lesson Two: Freedom, Interest Convergence, and Unexpected Messengers

Forty years ago, Derrick Bell maintained that *Brown* was inspired less by white people’s empathy with injustices faced by Black people and more by “interest convergence.”⁹⁴ During the Cold War, it was no longer in the interest of white America to sustain an apartheid system reviled almost everywhere else in the world.⁹⁵ So segregation by law was struck down, to great fanfare, while de facto segregation survived, with less fanfare.⁹⁶ The lesson: a government cannot force people apart forever, but it is hard for the government to force an unwilling majority to embrace and associate with a minority. *Obergefell* fits the interest convergence model: judges were willing to stop the states from branding gay people as outlaws

92. See ZIEGLER, *supra* note 72, at 196-97; SANGER, *supra* note 87, at 215-16; Katha Pollitt, *There’s a Reason Gay Marriage Is Winning, While Abortion Rights Are Losing*, NATION (Apr. 22, 2015), <https://www.thenation.com/article/archive/theres-reason-gay-marriage-winning-while-abortion-rights-are-losing/> [<https://perma.cc/GHP7-CBGH>].

93. See *Abortion Is Normal. Our Stories Are Ours to Tell. This Is Not a Debate.*, SHOUT YOUR ABORTION, <https://shoutyourabortion.com/shrill/> [<https://perma.cc/AJ5F-3PYR>]; Tamar Lewin, *#ShoutYourAbortion Gets Angry Shouts Back*, N.Y. TIMES (Oct. 1, 2015), <https://www.nytimes.com/2015/10/02/us/hashtag-campaign-twitter-abortion.html> [<https://perma.cc/4DWQ-6Z7L>] (describing the origins of #ShoutYourAbortion and responses by countertweeters).

94. See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

95. See *id.*; Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 150-51 (2011).

96. See generally *How Segregation Survived*, EQUAL JUST. INITIATIVE, <https://segregationinamerica.eji.org/report/how-segregation-survived.html> [<https://perma.cc/Q47J-P6BT>].

before they were willing to embrace them as potential in-laws, because many “tolerant” people wanted to keep gays at arm’s length. A bare majority of the Court delivered marriage rights to gay people only after straight people changed their minds about gays in the family and saw it as in their interest to expand marriage.⁹⁷

But notice that the Supreme Court’s opinion did not exactly confirm “marriage equality” so much as a “freedom to marry” for sexual and gender minorities.⁹⁸ To the extent that a social movement can persuade mainstream Americans that its members are being denied basic freedoms, its message will be successful—and likely much more successful than if the movement relies on the rhetoric of equal protection.⁹⁹ *Brown* and *Loving*—the twin pillars of the constitutional legacy of the civil rights movement—were both freedom cases: Topeka told white as well as Black parents that their children could not go to the same schools,¹⁰⁰ and Virginia told the Lovings they were criminals because they were lawfully married in the District and dared to move back to Caroline County.¹⁰¹ Overstating just a little, so long as the marriage movement’s tag line was “marriage equality,” it was annihilated at the polls—but when supporters substituted “freedom to marry” in the November 2012 ballot initiatives, the social movement swept the field.¹⁰² That rhetorical shift was also reflected in the Kennedy opinion for *Obergefell*.¹⁰³ Perhaps learning from this successful strategy, in the wake of *Obergefell* critics of marriage equality have scored legal victories when they have brought sympathetic plaintiffs—wedding vendors and religious adoption services—to complain that the state was

97. See PROTEUS FUND, HEARTS & MINDS: THE UNTOLD STORY OF HOW PHILANTHROPY AND THE CIVIL MARRIAGE COLLABORATIVE HELPED AMERICA EMBRACE MARRIAGE EQUALITY 2-3, 12-13, 16 (2015).

98. See *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015).

99. See ESKRIDGE & RIANO, *supra* note 14, at 493-94, 511.

100. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 486-88 (1954).

101. See *Loving v. Virginia*, 388 U.S. 1, 2-3 (1967).

102. See, e.g., GRASSROOTS SOLUTIONS, “CONVERSATION CAMPAIGN” CREATES PATH TO VICTORY 3 (2013) (describing a shift in messaging to emphasize “love, commitment, and personal freedom” and a subsequent marriage equality victory at the Minnesota polls); see also ESKRIDGE & RIANO, *supra* note 14, at 493-94, 511.

103. See *Obergefell*, 576 U.S. at 665-67.

denying their freedom to follow the dictates of conscience.¹⁰⁴ Live and let live.

In the current abortion debate, most Americans support *Roe v. Wade* because they do not think the government should take away a woman's right to choose and are nervous about allowing the state to interfere in doctor-patient relationships.¹⁰⁵ Pro-life groups tend to lose cases when they deny pregnant women the freedom to choose and doctors the freedom to help them.¹⁰⁶ They tend to win cases when they focus on the liberty interests of parents, religious providers of medical services or health insurance, and pregnant women themselves; for pregnant women in particular, such liberty interests have included disclosures that facilitate what the state considers "informed consent" and, nowadays, to abortion clinics that have medical credentials deemed important by the state.¹⁰⁷

A corollary of interest convergence theory is that constitutional changes that ostensibly *redistribute* rights, power, or resources away from mainstream Americans face a huge uphill climb.¹⁰⁸ So long as straight Americans believed that "gay marriage" would hurt them as parents or as church members, they were strongly opposed; only after some of these folks reconsidered their view that they were losing something did the freedom to marry gain ascendancy.¹⁰⁹ Similarly, affirmative action that is perceived as redistributing jobs, benefits, and power to persons of color is politically toxic and now constitutionally suspect—but the majority can be persuaded to

104. See, e.g., Ariane de Vogue, *Supreme Court Rules for Colorado Baker in Same-Sex Wedding Cake Case*, CNN (June 4, 2018, 5:01 PM), <https://www.cnn.com/2018/06/04/politics/masterpiece-colorado-gay-marriage-cake-supreme-court/index.html> [<https://perma.cc/59HP-XMRH>].

105. See *Roe v. Wade: The Constitutional Right to Access Safe, Legal Abortion*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/abortion/roe-v-wade> [<https://perma.cc/Y9QK-GPSQ>].

106. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845-46 (1992).

107. See ZIEGLER, *supra* note 72, at 93-94, 114, 116-17, 192-96; Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2539-40 (2015). For examples of successful freedom-based arguments for pro-life organizations, see *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), in which the Court found in favor of religious liberty claims, and *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-36 (8th Cir. 2008), for a decision upholding aggressive informed consent law.

108. See Bell, *supra* note 94, at 522-23.

109. See ESKRIDGE & RIANO, *supra* note 14, at 647.

accept “diversity” if needed to make institutions (such as the police, firefighters, the armed forces, or universities) work better.¹¹⁰ Likewise, in the abortion debate, equality arguments have had a double edge. Obviously, rules prohibiting or limiting abortion choice discriminate against women as a class, but constitutional strategies emphasizing sex discrimination and unfairness to women highlight the perception (some argue fact) that men are losing rights, power, or decision-making input.¹¹¹

To be successful in actually changing the law, the social movement needs to persuade mainstream Americans that they are not losing anything significant. A corollary of this lesson is one that freedom-to-marry strategists deployed in state campaigns: “unexpected messengers,” namely older, traditionally married straight couples recounting their journey from disbelief or skepticism toward acceptance and even enthusiasm for their daughter or close friend to have the choice to marry her beloved.¹¹² The more surprising the messenger, the more effective the journey story. I viewed dozens of ads and videos created for the 2012 ballot campaigns, and the most compelling was “Kriesel,” which helped freedom to marry defeat a constitutional amendment in Minnesota.¹¹³ A conservative Republican, Representative John M. Kriesel, was a veteran whose speech to fellow legislators endorsed same-sex marriage because a fellow Minnesotan had been the first openly gay soldier to die in combat.¹¹⁴ Corporal Wilfahrt died to save his colleague, and Kriesel, a fellow combat officer, could not say Wilfahrt did not have the right to marry.¹¹⁵

110. See *Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003).

111. Cf. Juliana Menasce Horowitz & Ruth Igielnik, *A Century After Women Gained the Right To Vote, Majority of Americans See Work to Do on Gender Equality*, PEW RSCH. CTR. (July 7, 2020), <https://www.pewsocialtrends.org/2020/07/07/a-century-after-women-gained-the-right-to-vote-majority-of-americans-see-work-to-do-on-gender-equality/> [https://perma.cc/8AL6-6BD9].

112. See ESKRIDGE & RIANO, *supra* note 14, at 487.

113. See Sasha Aslanian & Eric Ringham, *Eighteen Months to History: How the Minnesota Marriage Amendment Was Defeated—Money, Passion, Allies*, MPR NEWS (Nov. 9, 2012, 6:30 PM), <https://www.mprnews.org/story/2012/11/09/marriage-how> [https://perma.cc/5DKF-9WUR].

114. See Michael McIntee, *Rep. Kriesel's Full Speech on Gay Marriage, Bucking the GOP*, YOUTUBE (May 22, 2011), <https://www.youtube.com/watch?v=0WyYRA4aZSI> [https://perma.cc/WHS6-JNDV].

115. See *id.*

In a similar spirit, Katha Pollitt suggests that pro-choice campaigns need to persuade putative fathers, grandparents, uncles, and brothers that the whole family is harmed when women are denied the freedom to control their own bodies.¹¹⁶ And those men need to speak out—not only about why it is important to them that their wives, daughters, nieces, and sisters are denied needed freedom, but also about why it is bad for families in general and men in particular.¹¹⁷

C. Lesson Three: The Hydraulics of Prejudice and Stereotypes

A final lesson is tentative, disturbing, but potentially important: what we have learned from all these social movements, including marriage equality, is that private prejudice and stereotyping are slower to change than public rhetoric and legal rights. Decades ago, Charles Lawrence introduced the legal literature to the concept of “unconscious racism,” the notion that even people who consciously and even enthusiastically support diversity and equal rights typically harbor unconscious racist tropes that affect their actions.¹¹⁸ Implicit bias explains how a culture that explicitly rejects racism and supports nondiscrimination and integration can also generate brutal police action against Black persons at seven times the rate against white persons.¹¹⁹ The murder of George Floyd that set off weeks of protests¹²⁰ is only the tip of the racist iceberg more than two-thirds of a century after *Brown*.

Theorists such as Elisabeth Young-Bruehl suggest an explanation: prejudice and stereotyping serve the emotional needs of many people, and different neuroses can be associated with different

116. See Pollitt, *supra* note 92.

117. See *id.*

118. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987); see also Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1016-17 (1988); Lincoln Quillian, *Does Unconscious Racism Exist?*, 71 SOC. PSYCH. Q. 6, 7 (2008) (finding that unconscious racism does exist).

119. See Richard A. Oppel Jr. & Lazaro Gamio, *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html> [<https://perma.cc/SFJ3-A8ZW>].

120. See *id.*

prejudices.¹²¹ Thus, the racist and the homophobe, contrary to liberal thinking, are not dysfunctional, drooling idiots. Not only are they functional people but their hysteria in dealing with “dirty” sexual feelings that they have is often ameliorated by displacing their hysterical emotions onto a polluted other group, such as Blacks or LGBTQ+ people.¹²²

What that means for law is that great constitutional victories such as *Brown*, *Roe*, and *Obergefell* will not, on their own, stamp out prejudice; and even conscious efforts to respect and enforce equal rights will often be undermined by actions that are driven by unconsciously biased motivations. This reality underwrites the famous public-private distinction in American constitutionalism: even the most determined constitutional egalitarian allows discrimination in private sanctuaries—the home and the family, the church and the synagogue, the Boy Scouts—because the law cannot reach those sanctuaries at a reasonable cost and because the backlash would threaten the rule of law itself.¹²³

Just as *Brown* and *Roe* initiated rather than ended a constitutional conversation, so *Obergefell* was not the final word on the status of LGBTQ+ people in American society, nor was it even the final word on marriage equality. States like Texas still defy the *Obergefell* holding that same-sex married couples must be treated the same by the state as different-sex married couples.¹²⁴ Five years after *Obergefell*, Justices Thomas and Alito recently objected to the Court’s “undemocratic” and “atextual” constitutional reasoning and lamented the pervasive loss of “religious liberty.”¹²⁵ They ominously suggested that the majority had created a “problem” that only a new majority could “fix.”¹²⁶

121. See ELISABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* 27 (1996).

122. See *id.* at 33-35.

123. See Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361, 367-68 (1993).

124. *Pidgeon v. Turner*, 538 S.W.3d 73 (Tex. 2017) (reversing trial court judgment upholding requirement that spousal benefits programs for government workers include same-sex married couples).

125. *Davis v. Ermold*, 141 S. Ct. 3 (2020) (Thomas, J., concurring in denial of certiorari).

126. *Id.* All three of the post-*Obergefell* Justices adhere to “original public meaning.” See, e.g., Ian Millhiser, *Originalism, Amy Coney Barrett’s Approach to the Constitution, Explained*, VOX (Oct. 12, 2020, 8:30 AM), <https://www.vox.com/21497317/originalism-amy-coney-barrett-constitution-supreme-court> [<https://perma.cc/3NBW-F5XD>] (“Originalism, in Barrett’s words,

* * *

Social movement campaigns for equal treatment and freedoms for traditionally disparaged groups never end. Robust social movements are discouraged by constitutional rebuffs like *Bowers v. Hardwick* and emboldened by landmark constitutional victories such as *Obergefell v. Hodges*—but neither rebuffs nor victories terminate the social, political, or even legal debates over the status of those groups. How well a social group does in the arenas of public opinion and the judiciary depends critically on how well its members and leaders adapt to the evolving debate. That is the ultimate takeaway from marriage equality's deceptively swift constitutional triumph, and it is a lesson that the participants in reproductive freedom and affirmative action debates would do well to internalize.

is the belief that 'constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative.'"). Although I have demonstrated that the original public meaning of the Equal Protection Clause supported marriage equality, *see* Eskridge, *supra* note 24, I doubt that any of the three new Justices would have voted that way in *Obergefell*.