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# Evaluating Legal Activism: A Response to Rosenberg

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# EVALUATING LEGAL ACTIVISM: A RESPONSE TO ROSENBERG

DARA E. PURVIS\*

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## INTRODUCTION

The fight for same-sex marriage is one of the most divisive political issues in American society. As is the case for many other controversial political topics—racial desegregation and abortion, among others—the courts played an integral role in the campaign for same-sex marriage, as state supreme courts heard cases brought by activists and decided in favor of a legal right to marriage between two persons of the same gender. Only after the first few legal victories did the issue enter the political arena in full force, in vehement and often vitriolic attacks on same-sex marriage by conservative politicians that resulted in the federal Defense of Marriage Act as well as over a dozen state constitutional amendments prohibiting same-sex marriage. Supporters of same-sex marriage have begun to fight in the political sphere as well, but most of the major victories for same-sex relationships have been won in courts and later codified in law, while the opposition to same-sex marriage has been more aggressively and exclusively political, using the issue of same-sex marriage not only to pass laws and state constitutional amendments directly prohibiting same-sex marriage, but also using the issue to arouse the passion of voters to marshal support for a broad array of conservative issues and candidates.

The realms of the legal and the political overlap, but the dispute over same-sex marriage raises interesting and puzzling questions of exactly where the overlap occurs, and in what way—and how successfully—activists have tried to function in two spheres at once. As Ellen Ann Andersen notes, the legal and the cultural frames are “mutually constitutive,” the discourses and symbols of one shaping the understandings of the other.<sup>1</sup> Thus social movements working for political change use the language of legal rights when arguing for a change in social understandings, and as social understandings change the law generally follows.<sup>2</sup> The task of a legal activist, therefore, is

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<sup>1</sup> ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS* 13-14 (2005).

<sup>2</sup> *Id.*

to puzzle out how the give and take of mutually constitutive spheres will interact with specific cases and policy goals.

A threshold question is whether it is more effective to initiate a social movement in the legal or in the political sphere. Mark Tushnet argues that modern progressives consistently choose the legal sphere, explaining, "Liberals today seem to have a deep-rooted fear of voting. They are more enthusiastic about judicial review than recent experience justifies, because they are afraid of what the people will do."<sup>3</sup> Certainly in the context of same-sex marriage, the first legal battles took place before societal opinion began to turn. Even with the benefit of hindsight, however, the effect of fighting early battles in courtrooms rather than state legislatures or public discourse generally is difficult to identify. Conventional wisdom seems to be that as same-sex marriage became the subject of litigation in state supreme courts, conservative politicians seized upon the specter of gay marriage as fuel for their political fire, using public revulsion at the thought of widespread gay marriage to pass scores of laws against same-sex marriage and converting the public's opposition to same-sex marriage into support for conservative politics generally. Certainly there is some truth in this: in 2004, following the Massachusetts decision *Goodridge v. Department of Public Health* in November 2003 holding that to deny same-sex couples marriage violated the state constitution, thirteen states passed amendments to their state constitutions banning same-sex marriage in some form, sometimes banning any legal recognition of same-sex partnerships entirely.<sup>4</sup> Analysts also discussed the possibility that the issue of same-sex marriage was a significant factor, even a determinative one, in the presidential election that same year.<sup>5</sup>

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<sup>3</sup> MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 177 (1999).

<sup>4</sup> DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE 175 (2006).

<sup>5</sup> *E.g.*, Gregory B. Lewis, *Same-sex Marriage and the 2004 Presidential Election*, 38 POL. SCI. & POLS. 195, 195 (2005).

It is this circumstance that Gerald Rosenberg discusses in the second edition of *The Hollow Hope*, published this year.<sup>6</sup> The first edition, published in 1991, has become one of the most influential works in constitutional law and political science, mustering an extremely persuasive argument that progressives should not look to the courts to effect lasting and significant social change, as several limitations upon the courts' power to enforce change and their likelihood to sanction that change make it unlikely that the courts can be used as tools of progressive action. Rather, Rosenberg argues, activists should focus their efforts on the political branches of government, only using courts to supplement and cement political victories.

In the introduction to the second edition, which adds a fourth Part focused on same-sex marriage, Rosenberg explains the impetus for adding this topic to his discussions of civil rights, women's rights, and environmentalism:

I was standing in the ballroom of a hotel at the 1995 meeting of the American Association of Law Schools when a voice boomed out across the room, catching everyone's attention: "Rosenberg," the voice called out excitedly, "I've got you!" The speaker was a professor at Yale Law School from whom I had taken a class. After exchanging pleasantries, I asked him what he meant. He responded with one word: "Hawaii." . . . [T]he right to same-sex marriage was on the verge of being won nationwide through litigation. I knew, then, that I had to investigate the litigation effort to win the right to same-sex marriage.<sup>7</sup>

After several chapters of research and analysis, Rosenberg concludes that on the whole the same-sex marriage litigation movement has failed, and failed at least in part because activists chose to act through the courts rather than through the political branches—proving once again his overall

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<sup>6</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed., 2008).

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

argument. He argues that the gay marriage movement can be summarized as “one step forward, two steps back”<sup>8</sup> because activists “turned to courts too soon.”<sup>9</sup>

Rosenberg acknowledges that the picture is muddied, recognizing the “one step forward” of progress even as he argues that the net effect of the court cases has been negative. For example, in Massachusetts itself, not only did *Goodridge* secure the right to same-sex marriage, but the political and social context was changed: new interest groups were created as a result of *Goodridge*, and the legislative debate about same-sex marriage following the court’s decision clearly resulted in a shift among state legislators in favor of allowing it.<sup>10</sup> In the election following *Baker v. State*, the Vermont same-sex marriage case, legislative Democrats who passed a civil union law lost some electoral ground but retained a legislative majority, and Governor Howard Dean, who signed the bill into law, was reelected.<sup>11</sup>

Rosenberg’s analysis, however, is incomplete. He thoroughly examines the different responses of different groups of people to the cases—indeed, one of the most crucial elements of his analysis is what he terms the “stunningly successful countermobilization” against same-sex marriage.<sup>12</sup> Yet his examination of the legal activist groups fighting for same-sex marriage omits some important questions. For example, Rosenberg argues that such groups chose to commence lawsuits in pursuit of same-sex marriage too early, but fails to ask the threshold question of whether the activist organizations initiated the litigation or were drawn into legal processes set in motion by others. Rosenberg offers a common-sense definition of the goal of activist organizations, but does not examine his intuitive formulation of their demand and question whether other purposes are in play. And finally, Rosenberg identifies what he sees as catastrophic failures to integrate legal and

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<sup>8</sup> *Id.* at 368.

<sup>9</sup> *Id.* at 416.

<sup>10</sup> PINELLO, *supra* note 4, at 182.

<sup>11</sup> DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE 251, 260-61 (2004).

<sup>12</sup> ROSENBERG, *supra* note 6, at 417.

political activism, but fails to consider whether such integration has improved over time.

This Article will examine three of Rosenberg's central claims in the context of the fight for same-sex marriage. First, that activists seeking to advance same sex marriage erroneously chose the courts rather than the political arena to advance their goals. If progressive groups were largely drawn into litigation initiated by others, then the issue is at least clarified: would it have been better or wiser to ignore existing litigation, permitting legal defeat, in order to concentrate on more gradual political change. Second, that the goals of same-sex marriage activists can be assessed via a binary outcome-related standard: whether legitimization of same-sex marriage was achieved or failed. If Rosenberg has mischaracterized the objectives of the progressive movement regarding equal rights for gays, then his measurement of the success of the movement is called into doubt. Third, that the advocates for same-sex marriage failed to properly coordinate legal and political efforts. Even if this were true at the outset of organized attempts to effectuate same-sex marriage, if progressives learned over time to better meld litigation with political activism, Rosenberg's wholesale condemnation of the movement should be qualified.

Part I begins by discussing Rosenberg's theory, specifically the new sections of the second edition focusing on same-sex marriage, in order to identify elements of his arguments that will be tested in later Parts. Part II examines the question of whether legal activist groups should be understood to have independently brought lawsuits aimed at achieving same-sex marriage on their own initiative. Part III discusses the goals of such lawsuits, highlighting the subgroups in play and how their goals complicate Rosenberg's view. Part IV analyzes the coordination of both legal and political campaigns, and challenges Rosenberg's arguments that there was effectively no meaningful or successful coordination.



## PART I – ROSENBERG’S ARGUMENTS

Since 1991, when the first edition of *The Hollow Hope* was published, Rosenberg has provided a strong counterargument to the traditional, if perhaps facile, view of the Supreme Court as vindicating individual rights. Rosenberg famously argued that courts in fact do not and have never actually produced meaningful societal change. Rather, the place of courts in the history of reform movements is more limited and dependent on other branches. Courts can provide an official recognition of an evolving shift that is already taking place, can occasionally vindicate an argument with broad popular support that has not been acted on in the political branches, and can slow or stop reform movements in the political branches—but they cannot be the engine of change themselves.<sup>13</sup> In both *The Hollow Hope* and his later writings, Rosenberg offers various reasons for the court’s impotence: the lack of independent enforcement powers, dependence on the political branches for such enforcement and establishment of the judiciary itself through the appointments process, and reliance upon largely conservative precedents—among which he counts the Constitution—to support new rulings.<sup>14</sup>

Rosenberg does recognize that court action may have some impact on the political and social realms, but not in a way that activists intend: while court actions rarely mobilize supporters of progressive goals, incremental court decisions may motivate the opposition.<sup>15</sup> He believes that the cases asserting a right to same-sex marriage demonstrate the dangers of backlash, and the ultimate failure (and danger) of litigating too soon. For example, he summarizes the long-term

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<sup>13</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 338 (1991).

<sup>14</sup> *Id.* at 336-37; GERALD N. ROSENBERG, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 *DRAKE L. REV.* 795, 808 (2006).

<sup>15</sup> ROSENBERG, *supra* note 13, at 341. (Other scholars have fleshed out Rosenberg’s thesis, notably Michael Klarman’s work proposing a “Brown backlash thesis.” Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 *VA. L. REV.* 7, 85 (1994); see also MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004)).

consequences of *Baehr v. Lewin*, the Hawaii case that ultimately was resolved in a state constitutional amendment prohibiting same-sex marriage paired with a state law instituting a reciprocal beneficiaries system granting some of the legal benefits of marriage to same-sex couples:

[B]ecause same-sex marriage lacked much public or elite support, opponents were able to overturn it, and fairly easily. There was insufficient pressure from either the public or local or national elites to implement it. The majority of the pressure that was brought to bear came from opponents. Without broad support, there was nothing the Hawaii courts could do. Litigators could not overcome the constraints that limit the ability of courts to produce significant social reform.<sup>16</sup>

Rosenberg acknowledges that the ultimate resolution of the Vermont marriage case, which after being ordered into the state legislature led to the passage of a civil unions law without significant backlash. He explains this “mostly positive”<sup>17</sup> outcome as a consequence of Vermont’s lesser limitations upon judicial action, and the fact that the Vermont court did not order the state legislature to allow same-sex marriage outright, but left it to the legislature to craft a compromise middle ground such as civil unions.<sup>18</sup>

Interestingly, Rosenberg’s opinion on the Massachusetts case, *Goodridge v. Department of Public Health*, seems to have changed considerably over the last few years, during which he researched the new chapters for the second edition of *The Hollow Hope*. In 2006, Rosenberg declared in a symposium address that *Goodridge* was an example of a court decision that “backfired:” the activists pushing the fight for same-sex marriages forward had not built a movement that would persuade the larger population to support their victories and

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<sup>16</sup> ROSENBERG, *supra* note 6, at 344.

<sup>17</sup> *Id.* at 346.

<sup>18</sup> *Id.* at 347.

goal, and thus all the case accomplished in the political sphere was to spark a conservative backlash.<sup>19</sup> He said that the same sex marriage movement has been “a disaster” because interest groups did not coordinate their litigation strategies to achieve their common goal.<sup>20</sup> In *The Hollow Hope*, however, while he identifies a national backlash to *Goodridge*, such as President Bush calling for a constitutional amendment prohibiting same-sex marriage, he acknowledges that there did not seem to be a legislative backlash in Massachusetts following the decision.<sup>21</sup> Rosenberg identifies a few factors he believes led to the greater acceptance of the case, such as Massachusetts being a liberal state compared to the rest of the country and same-sex marriage not requiring any state funding to institute.<sup>22</sup> Notably, however, in the case of Vermont Rosenberg credits the Vermont State Supreme Court not ordering that the state legislature institute same-sex marriage as one factor contributing to the greater acceptance (and smaller backlash) within Vermont. In Massachusetts, however, while *Goodridge* simply handed the issue to the legislature, the court later sent the legislature an advisory opinion stating that marriage, not civil unions or domestic partnerships, was the only remedy that would remove the state constitutional violation. By Rosenberg’s own analysis, therefore, Massachusetts also had at least one factor that should have aggravated the backlash.

### A. Choice of Timing

In Rosenberg’s conclusion to the new part discussing same-sex marriage, he assumes that legal activists had complete independence and control over the timing of the same-sex marriage lawsuits. Rosenberg summarizes simply that “activists for same-sex marriage turned to courts too soon in the reform process. . . . [L]itigation as a method of social reform is premature.”<sup>23</sup> In a law review article, Rosenberg argues that

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<sup>19</sup> ROSENBERG, *supra* note 1413, at 812-13.

<sup>20</sup> *Id.* at 824.

<sup>21</sup> ROSENBERG, *supra* note 6, at 349.

<sup>22</sup> *Id.* at 350-51.

<sup>23</sup> ROSENBERG, *supra* note 6, at 416.

Same-sex marriage proponents had not built a successful movement that could persuade their fellow citizens to support their cause and pressure political leaders to change the law. . . . The battle for same-sex marriage would have been better served if they had never brought litigation, or had lost their cases.<sup>24</sup>

Similarly, Rosenberg asserts in *The Hollow Hope*,

While I can understand the frustration felt by advocates of same-sex marriage, succumbing to the “lure of litigation” seems to have been the wrong move. . . . By litigating when they did, proponents of same-sex marriage moved too far and too fast ahead of the curve, leaping beyond what the American public could bear.<sup>25</sup>

For most lawsuits, it is true that the decision of when to file was made by the lawyers and clients involved. Because impact litigation is driven by lawyers, often using test plaintiffs sought out purely to satisfy the case and controversy requirement, for many if not most contexts of activist litigation it would be a fair assumption that the lawyers at activist organizations conducting the lawsuits chose when to file the case.

As to same-sex marriage, however, the assumption is worth questioning. This may not change the overall conclusions Rosenberg draws regarding the success of the litigation—it could be that the choice of timing of litigation was entirely out of the hands of legal activist organizations, but that would not alter the assessment of the overall effect of the litigation. Yet the threshold question of whether the groups actually chose to commence litigation too early is useful because it could modify one general inquiry Rosenberg’s arguments ask: “When, if at all, should activist groups use litigation to secure their normative or policy goals?” If his

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<sup>24</sup> ROSENBERG, *supra* note 14, at 813.

<sup>25</sup> ROSENBERG, *supra* note 6, at 419.

assumption that the activist groups are actually the relevant entity choosing to begin litigation is incorrect, the question could be modified to "If litigation is commenced, how can activist groups minimize the damage?"

### *B. Defining the Goal*

Two types of evaluations of the success of the gay marriage movement are possible. One is to simply say "I define the gay marriage movement as working toward gay marriage generally, and will assess the success of the movement accordingly." The other, which Rosenberg professes to perform, asks what the goals of the movement as set by the activists are and compares their accomplishments to their goals:

If the goal is improving the lives of gay men and lesbians, then there is a good deal to celebrate. On the other hand, if the goal of the litigation is marriage equality, then little has been achieved and major obstacles have been created. . . . In deciding which viewpoint is more accurate, I look to the litigants and litigators. Because their self-stated goal is marriage equality, the "one step forward, two steps back" view more accurately describes the situation.<sup>26</sup>

In this formulation, Rosenberg looks to the broadest goal of activists and considers that goal to be the motivating force behind all activism. This goal could be phrased as "achieve marriage for gays everywhere in the nation." In this formulation, the finish line is a society that has a stable and strong commitment to legally sanctioning gay marriage. This broad goal upon which Rosenberg evaluates the success of the movement, however, fails to take into account the multiple groups with different goals involved in the same court cases.

For example, there is the question of the political unit in which gay marriage is sought to be achieved. The most active and engaged legal activists doubtless do have a national

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<sup>26</sup> *Id.* at 368.

perspective, but this is not necessarily true of all groups involved. The cases were almost exclusively brought in state courts upon claims based in state law, often by state-centric activist organizations. This suggests that the success of state activists—as Rosenberg puts it, by “their self-stated goal[s]”—should be assessed on a state rather than a national level.

Rosenberg says that the limitations placed on state courts are larger than the limitations placed on federal courts.<sup>27</sup> For example, state court decisions only hold precedential value within that state, so any impact of a decision is limited from the outset.<sup>28</sup> Rosenberg also points out that because state judges do not have lifetime tenure, such judges have even less judicial independence than federal judges.<sup>29</sup> Furthermore, Rosenberg argues, the lack of independent enforcement power is even more limiting for state court judges, because the lower salience and awareness of state court decisions mean that elected officials can more safely ignore state court rulings without ill effects.<sup>30</sup> These limitations upon state court judges, however, are relevant because legal activists were fighting not on a national level, in national courts or even the Supreme Court, but exclusively in state courts. Rosenberg does not address the question of how the state-centric nature of the legal claims might change analysis of the goals and thus success of the movement overall.

Similarly, Rosenberg casts the goal as simply to “achieve marriage,” rather than an intermediate goal such as

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<sup>27</sup> ROSENBERG, *supra* note 6, at 340.

<sup>28</sup> *Id.* Rosenberg does not discuss the persuasive power of one state supreme court’s decision on another—most of the same-sex marriage claims are based in a state constitution’s equal protection clause, and because such clauses are often extremely similar in many state constitutions, one state supreme court interpreting the clause may look at the interpretations of other state supreme courts for background comparison. *E.g.*, *Lewis v. Harris*, 908 A.2d 196, 211 (N.J., 2006); *Lockyer v. City of San Francisco*, 95 P.3d 459, 488 (Cal. 2004); *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 345 (2003); *Baker v. State*, 744 A.2d 864 (1999). Given the small number of state supreme courts to have spoken on the question, however, any “soft” persuasive power of this sort is almost certainly minimal, and Rosenberg is correct that the more important formal power of precedent is strictly limited.

<sup>29</sup> ROSENBERG, *supra* note 6, at 340.

<sup>30</sup> *Id.*

“move closer to marriage” or even “put same-sex marriage on the agenda of gay rights organizations.” For example, Rosenberg repeatedly argues that “if same-sex marriage proponents had asked only for civil unions rather than marriage, they might have achieved more.”<sup>31</sup> He briefly addresses the larger question of whether the court cases made a smaller, more incremental change helping to create “a climate conducive to significant social reform,”<sup>32</sup> but argues that the final conclusion must be no. Despite opinion polls showing an “unmistakable rise” in public support for civil unions,<sup>33</sup> Rosenberg attributes the shift in opinion to “a changing culture”<sup>34</sup> and does not believe litigation played a role in the changing cultural attitudes. This view conflates a number of different groups that litigation efforts can speak to, including legal decision makers evaluating the purely legal arguments, broader society affected by the political argument accompanying a litigation strategy, and the base of support of activism that may or may not have considered same-sex marriage a goal that should be a priority for the overall gay rights movement. Each of these groups can be spoken to in different ways, and the goal with regard to each may have been different. By only asking whether the “self-stated goal” of “marriage equality” was achieved, Rosenberg may overlook important ancillary objectives by bundling them all into one “yes or no” measurement.

### *C. Coordinating Legal and Political Movements*

According to Rosenberg, while legal activists generally profess a commitment to a “multi-tiered strategy,” they do not put any such multiprong strategy in place, thus leading to the movement becoming “a disaster.”<sup>35</sup> Rosenberg argues that the legal campaigns for same-sex marriage have completely failed to take the larger picture, particularly political context, into account. He argues, “Forgetting the lessons of history, the

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<sup>31</sup> *Id.* at 417.

<sup>32</sup> *Id.* at 355.

<sup>33</sup> *Id.* at 405.

<sup>34</sup> *Id.* at 415.

<sup>35</sup> ROSENBERG, *supra* note 14, at 818, 824.

Progressive agenda was hijacked by a group of elite, well-educated and comparatively wealthy lawyers who uncritically believed that rights trump politics and that successfully arguing before judges is equivalent to building and sustaining political movements.”<sup>36</sup> Of progressive lawyers fighting for same-sex marriage, Rosenberg says,

One of the responses I often hear from progressive lawyers is . . . ‘Well, of course we are more sophisticated. This is part of a multi-tiered strategy.’ And I say, ‘Oh. Well, that’s interesting. What have you been doing on the rest of the strategy? What part of your budget goes to this?’ And they respond: ‘We are really not doing much now, but we are depending on other people.’ So I do not believe it.<sup>37</sup>

Rosenberg argues that legal activists have failed utterly to create a meaningful multi-tiered strategy. He does not seem to recognize any method of considering the political sphere other than direct organization aimed at legislatures and public opinion. For example, in a symposium in 2006, he argued:

[H]ere is the point: If you’re litigating, you cannot rely on the hope that there are going to be other groups having other strategies. If that is your theory, you’ve got to coordinate; otherwise you end up with the same-sex marriage situation, which I think has been a disaster. . . . I remember about ten years ago having a very heated discussion with Evan Wolfson, one of the main litigators. And he went on and on about how litigation is a last resort. We have to have a whole strategy, we have to invest most of our

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<sup>36</sup> *Id.* at 797.

<sup>37</sup> *Id.* at 818.



resources, and he hasn't done any of that. All he's done is litigate with disastrous results.<sup>38</sup>

Rosenberg further does not seem to recognize any meaningful differences in the amount of political organizing that accompanies later court cases as opposed to the earliest—in other words, whether the energy devoted to the multi-tiered strategy has increased over time. For example, while Rosenberg recognizes that the backlash to Vermont's same-sex marriage decision was significantly less than in other states and the work of the activists more successful, he attributes the success of gay marriage proponents solely to the greater powers of Vermont state courts and the moderate remedy required by the court's decision in *Baker v. State*.<sup>39</sup> He does not analyze the better planning by legal activists as a factor in their efforts.

## PART II – ATTRIBUTING CHOICE AND THE DECISION TO LITIGATE

This Part addresses the ability of legal activists fighting for same-sex marriage to independently decide when to bring lawsuits. As described in Part I, Rosenberg claims that the premature filing of lawsuits, as opposed to political action in legislatures or efforts to create more popular support for gay marriage, is a major reason why the litigation campaigns have not been successful. He further asserts that this untimely beginning to the litigation campaigns was an error in judgment of the lawyers involved as they “succumb[ed]” to the “lure of litigation” rather than waiting until the social and political conditions were better suited.<sup>40</sup> In this Part, this claim will be tested, to ask whether the legal activists fighting for same-sex marriage actually succumbed themselves, or whether they had less choice in the matter of timing.

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<sup>38</sup> *Id.* at 824.

<sup>39</sup> ROSENBERG, *supra* note 6, at 347.

<sup>40</sup> *Id.* at 419.

### A. *The Broader Context: Gay Legal Activism*

In order to analyze the position of the legal activist organizations involved in the fight over gay marriage, it is helpful to understand the broader context of how gay legal activist organizations developed and how they fit into the gay activist community generally. Most simply, litigation-oriented gay rights activist organizations were extremely slow to develop, and were often supplemented by action by private citizens who acted without coordination or consultation with activist groups.

The genesis of gay rights legal organizations supplementing the work of groups focused on political and social activism was marked by hesitation and delay. Other progressive legal organizations were unwilling to take on gay rights cases and causes until well after the gay rights movement had begun. For example, the ACLU issued a policy statement in 1957 affirmatively arguing that statutes outlawing sodomy were constitutional. The ACLU also supported discriminatory laws and actions such as federal regulations that banned homosexuals in the civil service. The ACLU spent a full decade on the conservative side of the gay rights issue, before beginning in the late 1960s to take a very small number of cases advocating for the rights of gay Americans.<sup>41</sup>

The first legal organization devoted to the rights of homosexuals, the Lambda Legal Defense and Education Fund, was founded by an attorney named Bill Thom. He filed the initial paperwork to obtain formal recognition for the group in 1972, thinking that the application would be a swift and rote approval—he had simply taken the application of a recently approved organization and replaced the relevant characteristic with “homosexual.” His application, however, was denied, and he had to appeal to the highest New York state court over a period of 18 months to successfully charter the organization.<sup>42</sup>

Even as Thom acted, other activists had already begun legal action in pursuit of gay rights. In the absence of a

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<sup>41</sup> ANDERSEN, *supra* note 1, at 18-19.

<sup>42</sup> *Id.* at 1-2.

centralized organization, individuals started striking out on their own. Indeed, the first lawsuit asserting a right to gay marriage was filed even before any legal activist organizations devoted to gay rights existed.

In 1970, Jack Baker, the leader of a student group at the University of Minnesota called Fight Repression of Erotic Expression (FREE), the first gay-rights college student organization in the country, applied for a marriage license with his partner Mike McConnell.<sup>43</sup> The two appealed the decision to refuse them a license ultimately to the Supreme Court of Minnesota, but the court did not seem to find the issue a thorny one. In a perfunctory opinion, the court held that it was “unrealistic to think” that the term marriage could possibly mean anything other than the union of one man and one woman.<sup>44</sup> The Supreme Court of the United States rejected hearing an appeal that decision for “want of substantial federal question” a few months later.<sup>45</sup>

Baker and McConnell did not appear to have put significant thought into larger activist goals or strategy as to their application. Baker was a high-profile gay activist—he became the first openly gay student body president in 1971, led by campaign posters featuring a photo of him in a business suit and high-heeled pumps—but FREE had goals much broader (and arguably more basic) than focusing on same-sex marriage.<sup>46</sup> Indeed, Baker and McConnell’s goals may have been more simply personal than political, as the two went to another county after the Minnesota decision, quietly secured a marriage license using Baker’s gender-neutral legal first name “Pat,” and held a marriage ceremony which they still claim should be recognized as legally valid.<sup>47</sup>

Adding another wrinkle to their litigation “strategy,” and bolstering the conclusion that they were focused only on securing legal recognition of their specific relationship rather than any widespread political and social change, after the

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<sup>43</sup> MOATS, *supra* note 11, at 39-40.

<sup>44</sup> Baker v. Nelson, 291 Minn. 310, 311 (1971).

<sup>45</sup> Baker v. Nelson, 409 U.S. 810 (1971).

<sup>46</sup> MOATS, *supra* note 11, at 40.

<sup>47</sup> Doug Grow, *Gay-Marriage Pioneers, Again*, STAR TRIBUNE, May 20, 2004, at 2B.

Minnesota decision but before their second marriage license application Michael McConnell legally adopted Jack Baker.<sup>48</sup> Thus, at the time of their second marriage license application, Baker and McConnell were, in a strictly legal sense, applying for a marriage license between a father and son. This can be almost certainly be taken as conclusive evidence that the two were not concerned with the larger social and political messages in their action, as it seems inconceivable that an activist with any concern for the political appeal of his actions would not go out of his way to introduce incest into his claims! It is clear from the timing and from the execution of their legal activity, in any case, that Baker and McConnell had no litigation campaign behind them: they were simply two individuals choosing for personal reasons to use the courts as a means of securing a single marriage license.

### *B. Hawaii: Forcing Lambda's Hand*

By the 1990s, many activist legal organizations fighting for gay rights had been created, and Lambda Legal had become the leading group fighting for equality for gay Americans. A consensus as to whether marriage should be a primary objective, however, did not yet exist. In the late 1980s, a number of gay rights organizations—Lambda Legal, Gay & Lesbian Advocates & Defenders (GLAD), National Gay Rights Advocates, and the Lesbian Rights Project—joined informally in what members called “the Roundtable” to discuss whether gay rights groups should consider adding same-sex marriage to their agendas. Many activists felt strongly that it would not be a good idea to begin agitating for same-sex marriage. Indeed, one early participant described marriage as “one of the very few things over which people really fought.”<sup>49</sup> As of the early 1990s, the organizations could not reach agreement regarding the issue, and had not resolved to take any action in pursuit of same-sex marriage. A small group of gay couples in Hawaii, however, had different plans.

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<sup>48</sup> *Id.* Jack Baker's legal name at the time of the second marriage license application was Pat Lyn McConnell.

<sup>49</sup> PINELLO, *supra* note 4, at 24.

In the early 1990s, a small group of gay Hawaiians decided independently, without consultation or input from legal activist organizations, to try to secure their right to marry through the courts. Three couples, along with a few local supporters, contacted Evan Wolfson at Lambda Legal to inquire whether he would be willing to represent them through Lambda in a suit for marriage rights. Wolfson brought the matter to Lambda, and the leadership of the group had an intense internal debate about whether they should take the case. Lambda ultimately declined to represent the couples for two reasons: first, they still were not sure whether same-sex marriage was a goal that Lambda and other such groups should begin working towards; and second, they thought regardless of whether marriage was a worthy goal, the case would immediately lose in court. Lambda informed the couples that they declined to represent them, and the couples ultimately retained a local private lawyer. The lawyer had previously worked at the Hawaii branch of the American Civil Liberties Union, so had ties to local public interest groups, but was not working for such an organization at the time, nor did he formally conference with or otherwise plan any larger strategies alongside public interest organizations. So far as he conducted his own cases, he was entirely on his own. The only link to any gay rights organization in the early phase of the case, therefore, was Evan Wolfson, who had taken a personal interest in the outcome of the case and the couples who had sought him out. He therefore kept in informal contact with the plaintiffs and in the process of keeping in touch occasionally discussed the case with them and engaged in some very ad hoc brainstorming. A side benefit of his personal interest, as he described it later, was to ensure that Lambda—while not involved in the case whatsoever—was aware, at least in a small sense, of what was happening in the case and whether it might have any consequences for their own work.<sup>50</sup>

To the shock of Lambda Legal, which thought the case would be quickly disposed of and disappear, the case was taken up on appeal by the Hawaii state supreme court. Lambda was thus faced with the most high-profile gay rights case in recent

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<sup>50</sup> *Id.* at 25.

memory in Hawaii moving into the state supreme court with or without them. The unexpected success of the plaintiffs forced Lambda's hand. The discussion among Lambda's staffers debating whether to take the case themselves had been a contentious one, feeding into a larger disagreement about whether to pursue same-sex marriage as one of the goals of Lambda's larger work.<sup>51</sup> Declining to represent the plaintiffs in the case that became *Baehr v. Lewin* was not meant to be a final resolution against pursuing same-sex marriage, but to merely put off the larger issue by not getting involved with what the Lambda attorneys expected to be, like the Minnesota and Kentucky cases from the 1970s, effectively a nonstarter.

Once the case reached the Hawaii Supreme Court, however, it was apparent to all the attorneys at Lambda that "the stakes had become too high for Lambda to ignore."<sup>52</sup> To the extent Lambda could get involved at this point, it was playing catch-up. It had not been involved in the initial filing of the case, and had it been up to Lambda entirely, the case would not have been filed at all. But once the case was filed, and the Hawaii Supreme Court expressed a desire to decide the issue, Lambda felt it would be an even worse mistake to let the case be decided by the state supreme court without any input from the few organized legal gay rights groups in Hawaii. Lambda thus filed an amicus brief with the court, and eventually became lead counsel.

### C. Vermont: Town Hall Call for Action

In the 1990s Vermont had one small but active gay rights organization, the Vermont Coalition for Lesbian & Gay Rights (VCLGR). The state of Vermont has a long tradition of "town hall" type meetings, and VCLGR frequently held such open meetings for members to discuss various issues that might become goals for future action. Following *Baehr*, the VCLGR leadership held two such meetings to discuss same-sex marriage, but attendance and interest in the issue was extremely low, so the organization concluded same-sex

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<sup>51</sup> ANDERSEN, *supra* note 1, at 52-53.

<sup>52</sup> *Id.* ANDERSEN, *supra* note 1, at 53.

marriage was not a priority for Vermonters and decided not to devote staff time or effort to the topic. In the fall of 1995, however, another open meeting was heavily attended by VCLGR members who expressed strong desires to begin working on a same-sex marriage movement.<sup>53</sup> VCLGR was open to the possibility, unlike Lambda Legal had been, but took no independent action until its membership made it clear that there was a grassroots swell of support behind such activism.

At the very end of 1995, interested activists from within VCLGR created the Vermont Freedom to Marry Task Force to strategize and supervise further activism.<sup>54</sup> Attorneys ready to take on a test case, planning for the public relations and political aspects of a court case, specifically sought out test plaintiffs who would create a publicity-ready face for the litigation campaign and embody different possibilities of what same-sex couples looked like. The three couples who became the plaintiffs in *Baker v. State* suited the purpose perfectly: one male, one young female, and one older female couple.<sup>55</sup> The Vermont activists also reached out to other progressive groups across the country, both to take advantage of other lawyers' experiences and to think through the consequences of litigation both inside and outside of Vermont.

It therefore is fair to say that VCLGR, the gay rights organization in Vermont, had a reasonable amount of control over the filing of their lawsuit, although the VCLGR leadership did not act until a significant number of their members called for such action.

#### *D. Massachusetts: Litigation as Defense*

In Massachusetts, in contrast to both Hawaii and Vermont, the first mover on the question of same-sex marriage was the conservative side. In response to the court victories in Hawaii and Vermont, conservatives in Massachusetts began a political movement to amend the Massachusetts state

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<sup>53</sup> Susan M. Murray & Beth Robinson, *Laying the Groundwork: Early Organizing in Vermont*, in 3 DEFENDING SAME-SEX MARRIAGE: THE FREEDOM-TO-MARRY MOVEMENT 36 (Martin Dupuis & William A. Thompson eds., 2007).

<sup>54</sup> *Id.* at 37; see also MOATS, *supra* note 11, at 100.

<sup>55</sup> MOATS, *supra* note 11, at 106.

constitution to prohibit same-sex marriage; part of the national backlash Rosenberg discusses as such a disaster for supporters of equal rights for gays. The battle in Massachusetts thus not only began in the political sphere rather than the courts, but the force behind the activism came from the other side.

Importantly, gay activists in Massachusetts felt that they were losing in the political sphere. The liberal political leadership resisted conservative attempts to write a prohibition of same-sex marriage into the state constitution, but only through aggressive and calculated strategizing. For example, at the 2002 state constitutional convention, the same-sex marriage prohibition had enough signatures from Massachusetts voters to be acted upon by legislators and move into the formal amendment process. The Senate President, however, arranged to call upon a sympathetic colleague as the first order of business, having prearranged that the colleague would move to adjourn the convention, and Democrats would then vote to adjourn without having held any substantive discussion or votes on any constitutional amendments.<sup>56</sup> The scheme worked as planned, and state Democrats held together to adjourn the convention rather than potentially lose a vote on the issue of gay marriage.

In response to the conservative political action and the success of previous legal cases dealing with gay rights issues, GLAD decided to counter in the court and began putting together a legal case similar to those in Hawaii and Vermont. As in Vermont, GLAD sought out test plaintiffs, selecting seven couples who would present a sympathetic array.<sup>57</sup> GLAD filed the case in April 2001, suing the Department of Public Health for refusing to direct the county clerks to issue marriage licenses to same-sex couples.<sup>58</sup> The lawsuit in Massachusetts, therefore, was filed only as a response to conservative activism. GLAD therefore had little choice in the timing of the lawsuit, except to the extent that they could have refused to file. The political fight was in full swing, however, so it seems

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<sup>56</sup> MURRAY & ROBINSON, *supra* note 53, at 36.

<sup>57</sup> *Id.* at 41.

<sup>58</sup> *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 314 (2003).



unrealistic that GLAD could have refused to assist political activists in a battle already in progress.

*E. Oregon: Litigation Brought by County Government*

In Oregon, the fight over same-sex marriage began with sustained pressure by a number of same-sex local couples on the gay rights group Basic Rights Oregon, asking the organization to begin fighting for same-sex marriage.<sup>59</sup> Roey Thorpe, the Executive Director of Basic Rights Oregon, decided to take the suggestions of the group's members, but decided to pursue the argument by lobbying local government officials rather than filing a lawsuit, and to make the legal arguments directly to them rather than to a court. Thus, Thorpe met with two liberal Multnomah County commissioners and argued that, along the lines of the state constitutional arguments that had prevailed in Hawaii, Vermont, and Massachusetts, the Oregon state constitution might mandate that marriage licenses be issued to same-sex couples. The commissioners then asked Agnes Sowle, the county attorney, for her official evaluation of the county's legal position and whether the argument Thorpe put forward was valid.

Sowle was already aware of the cases in the other states, so had previously conducted some superficial research of the legal question as it would apply to Oregon state law and tentatively concluded that the county would be acting unconstitutionally to deny same-sex couples the right to marry.<sup>60</sup> As Sowle conducted further research, the pressure from local citizens began to increase: a few gay couples, spurred in part by San Francisco having started issuing marriage licenses to same-sex couples two weeks before,<sup>61</sup> had formally requested marriage licenses from the clerk's office. Their request had been denied, and it appeared that they might be preparing to file their own lawsuit. The Multnomah County chairwoman thus swiftly officially accepted Sowle's legal

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<sup>59</sup> David Austin, Tom Hallman, Jr., & Scott Learn, *The Marriage Brokers*, SUNDAY OREGONIAN, Mar. 7, 2004, at A1.

<sup>60</sup> Austin ET AL., *supra* note 59, at A1.

<sup>61</sup> PINELLO, *supra* note 4, at 107.

opinion as to the county's legal obligations after Sowle sent it to her, and as of March 3 the clerk's office began issuing marriage licenses to same-sex couples.<sup>62</sup>

After securing the licenses and holding ceremonies, however, the couples had to forward their documents to the State Registrar for the state's records of marriages. The registrar's office disagreed with Sowle's opinion regarding the state constitution versus statutes, and refused to register the documentation of the same-sex marriages.<sup>63</sup> In response, a lawsuit was filed against the state by Multnomah County itself, along with nine same-sex couples, Basic Rights Oregon, and the ACLU.<sup>64</sup>

The action in Oregon was therefore not begun through the courts. Multnomah County began issuing same-sex marriage licenses as the result of a lobbying effort by Basic Rights Oregon. The case moved into the courts only after the local and state governments clashed, and the lawsuit was itself filed by Multnomah County. The legal activist organizations in Oregon therefore did not actually make the decision to litigate.

#### *F. New Jersey: Dual Political and Legal Action*

From the beginning of efforts in pursuit of same-sex marriage in New Jersey, political and legal activist efforts were intertwined. For example, five gay professors at Rutgers University filed suit in 1997 arguing that they should be given the same legal rights with respect to their partners as married heterosexual couples were given.<sup>65</sup> The suit failed, but sparked some increased lobbying activity around legal recognition of same-sex relationships. This lobbying in turn affected Lambda's internal discussions prior to early 2002 whether to file a new lawsuit patterned after the successful cases in other states. As legal activists debated this possibility, the organization planned explicitly to "complement the work

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<sup>62</sup> Austin ET AL., *supra* note 59, at A1.

<sup>63</sup> *Li v. State*, 110 P.3d. 91, 94 (Or. 2004).

<sup>64</sup> *Id.*

<sup>65</sup> Laura E. Pople, *Grassroots Organizing: Lessons from the Garden State*, in 3 DEFENDING SAME-SEX MARRIAGE 52-53, *supra* note 53, at 51, 56. (Martin Dupuis & William A. Thompson eds., 2007).

already being done in the state and to work with local entities in doing so.”<sup>66</sup>

Oddly, the carefully crafted dual-track activism initially created precisely the opposite result as in other states. In the trial court, Lambda Legal lost; the court rejected its claims that state law mandated legal recognition of same-sex relationships.<sup>67</sup> Only two months later, however, as the appeal to the trial court’s decision was still pending, the state legislature passed and the governor swiftly signed into law a statute creating domestic partnerships.<sup>68</sup> The law granted a limited set of rights to same-sex domestic partners; less than the civil unions of Vermont but more than the reciprocal beneficiaries of Hawaii.<sup>69</sup> Despite the domestic partnership law, however, Lambda Legal pressed forward with its appeal to its trial court defeat, which resulted in a decision that eventually secured the right to civil unions, which provided even more protections and rights than the extant domestic partnerships.

As in Vermont, therefore, the activists in New Jersey did have at least some control over the filing of their lawsuit, although their strategy was so integrated with the simultaneous political actions that the legal activists were not acting entirely independently.

### *F. California*

In February 2004, San Francisco Mayor Gavin Newsom engaged in an “historic act of civil disobedience” and ordered the clerk’s office to begin sanctioning gay marriages.<sup>70</sup> The California state laws were clear; while in 1999 the state

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<sup>66</sup> *Id.*

<sup>67</sup> See *Lewis v. Harris*, 378 N.J. Super. Cr. App. Div. 259, 263 (2005). The trial court’s opinion was unpublished.

<sup>68</sup> Pople, *supra* note 65, at 55.

<sup>69</sup> David M. Stauss, Note, *The End or Just the Beginning for Gay Rights under the New Jersey Constitution?: The New Jersey Domestic Partnership Act, Lewis v. Harris, and the Future of Gay Rights in New Jersey*, 36 RUTGERS L.J. 289, 306-307 (2004).

<sup>70</sup> Rachel Gordon, *S.F. Defies Law, Marries Gays*, S.F. CHRON., Feb. 13, 2004, at A1.

legislature passed a domestic partnership bill into law, in 2000 California voters passed Proposition 22, also known as the Knight Initiative, specifying that marriage was only between a man and a woman.<sup>71</sup> Newsom explained his actions, made only one month after he took office, as the consequence of his oath to uphold California's constitution at his inauguration: he argued that to deny same-sex couples the right to marry violated the California state constitution.<sup>72</sup>

Newsom's order did not stand for very long: two conservative groups filed suit to secure injunctions halting the marriages within hours of the first license being issued,<sup>73</sup> and within a month the marriages stopped under court order.<sup>74</sup> In August, the Supreme Court of California made a ruling on the merits and made the injunction permanent, ruling that until courts determined that it was a violation of the California state constitution to issue marriage licenses only to heterosexuals, the county clerk and Mayor had to follow the marriage statutes as written.<sup>75</sup> The court's opinion further specified that the marriage licenses that had been issued had no legal significance.<sup>76</sup> It did note that its opinion did not "reflect any view" on the issue of "the substantive question of the constitutional validity of California's statutory provisions limiting marriage to a union between a man and a woman."<sup>77</sup>

The City and County of San Francisco then filed an action, along with several same-sex couples who had been married following Newsom's order as well as activist organizations, raising the substantive issues that the court said were not before it in the case evaluating the propriety of Newsom's order itself.<sup>78</sup> As in Oregon, the court battle became

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<sup>71</sup> PINELLO, *supra* note 4, at 95.

<sup>72</sup> Rachel Gordon, *Newsom's Plan for Same-Sex Marriages*, S.F. CHRON., Feb. 11, 2004, at A1.

<sup>73</sup> Harriet Chiang, Rachel Gordon, & Steve Rubenstein, *Mad Dash to S.F. City Hall to Say 'I Do'*, S.F. CHRON., Feb. 14, 2004, at A1.

<sup>74</sup> Bob Egelko, *Court Halts Gay Vows*, S.F. CHRON., Mar. 12, 2004, at A1.

<sup>75</sup> *Lockyer v. City and County of San Francisco*, 33 Cal. 4<sup>th</sup> 1055 (2004).

<sup>76</sup> Dean Murphy, *California Court Rules Gay Unions Have No Standing*, N.Y. TIMES, Aug. 13, 2004, at A1.

<sup>77</sup> *Lockyer*, 33 Cal. 4<sup>th</sup> at 1069.

<sup>78</sup> *In re Marriage Cases*, S147999, May 15, 2008, available at <http://www.courtinfo.ca.gov/opinions/archive/S147999.PDF>.

one between different units of government, local versus state. Yet unlike Oregon, gay rights organizations had no part in the actions leading to the litigation, as they had not been involved in Newsom's decision to order the clerk's office to issue marriage licenses to same-sex couples. At the point at which the City and County as well as private citizens were filing lawsuits, therefore, gay rights organizations were in a similar position as Lambda Legal was in Hawaii, as the case would move forward whether they were involved or not.

### *G. Conclusions*

Rosenberg's claim that lawyers conducting litigation in pursuit of same-sex marriage made erroneous affirmative choices as to the timing of their cases is revealed as only partially accurate. In Hawaii, Lambda Legal had actually chosen not to represent the plaintiffs and not to be involved in the litigation whatsoever. It was only once the plaintiffs, represented by an independent attorney, reached the state supreme court that Lambda Legal made the choice to become directly involved in the litigation, already in progress. As Lambda Legal entered the case, moreover, their choice was not whether or not to pursue the appeal—the appeal to the Hawaii Supreme Court was going forward with or without them. The question was only whether a case with the potential to affect the rights of gay Hawaiians would be conducted entirely independently by a private attorney or with the assistance of a prominent gay rights public interest legal organization. This clearly is not the choice Rosenberg is concerned with when asking whether same-sex marriage litigation was filed too soon.

In Vermont, the efforts of activist groups were driven by pressure from private citizens. The case is not so stark as in Hawaii—private citizens had not actually sought out their own private representation and filed lawsuits—but the pressure of their actions is important nonetheless. The membership of the VCLGR showed intense interest in the prospect of working toward same-sex marriage. It is true that the VCLGR leadership could possibly have gone to their members and explained that they did not believe the time was ripe for such a campaign, but given the intense interest and the utility of

continuing a recent and successful campaign in support of gay adoption rights to another measure protecting the rights of gay families, it is clear that the legal activists faced considerable pressures and incentives pushing them toward filing a test lawsuit.

In Massachusetts, the conservative opponents to same-sex marriage moved first, by attempting to pass an amendment to the state constitution prohibiting same-sex marriage entirely. After one attempt was derailed by procedural maneuvering, supporters of same-sex marriage knew that conservative political efforts were being met with some success—while the liberals had successfully blocked the first amendment attempt, conservatives would no doubt again obtain the required number of signatures to make a second attempt at constitutional amendment. As they countered the political action, therefore, filing a lawsuit in an attempt to open up a second and potentially more sympathetic front was a natural choice. After all, the court case had the potential to derail the political amendment effort no matter its resolution: if the Massachusetts Supreme Court found that there was no right to same-sex marriage or recognition of same-sex relationships, why would conservatives need to pass a constitutional amendment saying so? Even a loss in court would deflate the political movement, and might prevent the harm of a strongly-worded amendment prohibiting all legal recognition of same-sex relationships rather than only prohibiting same-sex marriage *per se*.

In Oregon, the legal activists initially chose to lobby local government rather than file a court case. The lawsuit was filed by Multnomah County only after the state government refused to recognize marriage licenses issued to same-sex couples. Similarly, in California a maverick political leader took matters into his own hands, and generated a legal dispute as to the propriety of his actions as well as the underlying issue of same-sex marriage under the California state constitution. At that point, groups in Oregon and California were confronted with the same situation as Lambda in Hawaii: the case was moving forward with or without them.

Of the campaigns Rosenberg discusses, the only state in which activists truly had full agency of whether and when to file a lawsuit was New Jersey. Probably not coincidentally, New Jersey is also the state in which the legal and political lobbying efforts were most integrated and supportive. As discussed above, the New Jersey chapter of Lambda Legal consciously chose to file a lawsuit to “complement the [political] work already being done in the state.”<sup>79</sup> The political and legal efforts worked simultaneously and complementarily throughout, as legal and political resolutions alternated.

It thus appears that Rosenberg’s claim that legal activists chose to file too soon is not accurate. For the most part, legal activists did not choose to file at all—certainly in Hawaii, they had no choice in the timing of the case. In all but one of the other state same-sex marriage litigation battles, the decision of when to file was greatly influenced by other factors. The claim that legal activists resolved to file lawsuits at an inappropriately premature time, therefore, is not true.

### PART III – THE WRONG GOAL

As discussed in Part I, Rosenberg conceives of the goals of same-sex marriage activists as “marriage equality.”<sup>80</sup> I have spelled out what Rosenberg considers the components of marriage equality, for ease of analysis, as “to achieve marriage for gays everywhere in the nation.” This Part will assess whether the goals of same-sex marriage activists can be summarized in this binary of whether same-sex marriage was achieved. The evaluation of the accuracy of the goal will be provided in two Sections, questioning both whether marriage equality is an appropriate finish line (“achieve marriage for gays”) and whether tallying the state of legal recognition of same-sex relationships nationwide is an appropriate measure of marriage equality (“everywhere in the nation”).

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<sup>79</sup> Pople, *supra* note 65, at 56.

<sup>80</sup> ROSENBERG, *supra* note 6, at 368.

### A. "Achieve Marriage for Gays"

In evaluating the success of the movement for same-sex marriage, Rosenberg argues that partial progress is not a victory:

If the goal is improving the lives of gay men and lesbians, then there is a good deal to celebrate. On the other hand, if the goal of the litigation is marriage equality, then little has been achieved and major obstacles have been created. . . . In deciding which viewpoint is more accurate, I look to the litigants and litigators. Because their self-stated goal is marriage equality, the 'one step forward, two steps back' view more accurately describes the situation.<sup>81</sup>

#### 1. *Is There Only One Goal?*

A threshold question to the general inquiry of whether gay activists have succeeded in attaining same-sex marriage is whether the same-sex marriage movement can be understood to have a single identifiable goal. Rather than simply working toward achieving gay marriage legally, different groups within the movement may have different goals speaking to different entities, expressing different messages, and performing different functions.

Rosenberg argues that the initial victories in same-sex marriage litigation awakened a considerable backlash from opponents to gay marriage. He is correct to have identified the opponents as one group that paid attention to the same-sex marriage cases, but he overlooks the other groups also affected. As such a case is filed, it speaks simultaneously to several different groups, and in order to be successful must convey a different message to each. The most obvious, first-level message a case must express is a legal argument to the legal elites actually ruling on the litigation. Second, such cases speak to the activist base of support of the organizations

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<sup>81</sup> *Id.*



conducting the litigation, and in the case of same-sex marriage, invested individuals often used litigation as a way of forcing same-sex marriage onto the agenda of legal activist organizations. The case should convey a more popular—a nonlegal—message to the broader public who will read about the case, but not be familiar with or be persuaded by the doctrinal legal arguments. Finally, the case will express a message to its core opponents. Each of these messages can have different goals as well as different messages and strategies.

*a. Arguments to the Legal Elites*

The process of choosing legal arguments is, even apart from any political concerns, one of careful strategy. Ellen Ann Andersen explains how litigators must draw their arguments from an array of viable possibilities: ““they must articulate their claims so that they fall within the categories previously established by an amalgam of constitutional, statutory, administrative, common, and case law.”<sup>82</sup> A lawyer, in other words, may not simply make the argument he believes to be true. Most litigators arguing that protection of equal rights enshrined in state constitutions, for example, undoubtedly believe that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution signifies equality of gay and lesbian Americans, no matter what the Supreme Court says. The work of a lawyer, however, is very different than the work of a judge, and thus the lawyer must pick and choose her arguments from what she evaluates to be viable legal claims.

Note that this does not mean the lawyer must choose her arguments solely from what is currently accepted legal doctrine. If that were so, legal activism would be impossible. Rather, the most challenging skill for an activist lawyer is anticipating what doctrinal shifts a court will be hospitable to, and presenting that court with an argument persuasive enough to shift them a step or two in the direction the lawyer desires.

For an activist lawyer thinking only of the courtroom, this process might counsel aggressive legal arguments and

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<sup>82</sup> ANDERSEN, *supra* note 1, at 12.

strategies. Such singleminded determination can be seen in the case of Jack Baker of Minnesota discussed above, who simultaneously argued that his marriage license obtained using gender-neutral first names should be considered valid by the government and arranged for his partner to legally adopt him in order to attain some universally-accepted legal status.<sup>83</sup> His legal arguments may have been sincere, if too far of a stretch for the court to accept—but the adoption proceeding meant that he was arguing for governmental recognition of a relationship that was, at least in technical terms, incestuous.

In contrast, the modern lawsuits kept multiple audiences and purposes in mind. The arguments based in state law were calculated to succeed, as federal constitutional claims were clear losers. After *Baehr* proved the success of a claim based in the state constitution, later groups generally patterned their arguments after its winning template.

Stuart Scheingold argues that casting social and political goals in terms of legal rights gives greater legitimacy to the goals, because the concept of rights connotes entitlement to those rights. Rights in the public mind, he argues, mean fairness and justice, rather than simply governmental largesse.<sup>84</sup> It is important, therefore, that the suits for same-sex marriage were crafted in the language of equal rights. The work of the lawyer, therefore, is trying to cast the right to same-sex marriage as a broad right rather than a narrow one. This was a primary dynamic in the shift from *Bowers v. Hardwick* to *Lawrence v. Texas*: the right at stake was defined very differently in each case. In *Bowers*, homosexuals not being criminally prosecuted for sexual activity taking place in the privacy of their own bedroom was described as the right to sodomy.<sup>85</sup> By contrast, in *Lawrence*, the same right was described as a general right to privacy.<sup>86</sup> How narrowly a right

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<sup>83</sup> See *supra* notes 43-48 and accompanying text.

<sup>84</sup> STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974).

<sup>85</sup> *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (“The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . .”).

<sup>86</sup> *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (“We conclude the case should be resolved by determining whether the petitioners were free as adults to

is drawn therefore influences whether a court accepts the right as established and whether society considers the right to be an entitlement or a special privilege.

The litigation in Hawaii established the pattern which later cases in pursuit of same-sex marriage would follow. The case *Bowers v. Hardwick*,<sup>87</sup> issued seven years before, had rejected claims to gay rights based in the Fourteenth Amendment: the decision characterized a gay man's challenge to Georgia's statute prohibiting sodomy as asserting a "fundamental right to engage in homosexual sodomy,"<sup>88</sup> and roundly rejected any such right. The case did not deal with gay marriage in any way, but it was clear that if sodomy prohibitions were deemed constitutional, prohibitions of same-sex marriage similarly would be upheld. The *Baehr* plaintiffs therefore grounded their legal claims in the Hawaii state constitution rather than the federal constitution, claiming that denying same-sex couples the right to marry violated their right to privacy and equal protection under the Hawaii state constitution.<sup>89</sup>

The goal of the lawyers in such cases, therefore, is not simply "to achieve marriage for gays," although that was certainly part of their motivation. The message as expressed in legal terms means that the goal is not simply the policy result that same-sex marriage was recognized in law, but that courts recognized a legal right of gays and lesbians to receive recognition of their intimate relationships in the same way that heterosexual relationships were recognized by the government. Evaluating whether a legal right was recognized therefore changes the evaluation: while same-sex marriage outright was not accomplished in states other than Massachusetts and California, all the other states discussed above did recognize a legal right to legal recognition of homosexual relationships. From the point of view of the legal message, the goal—establish

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engage in the private conduct in the exercise of their liberty under the Due Process Clause of the *Fourteenth Amendment to the Constitution.*")

<sup>87</sup> *Bowers v. Hardwick*, 478 U.S. at 186.

<sup>88</sup> *Id.* at 191.

<sup>89</sup> *Baehr v. Lewin*, 74 Haw. 530, 539-40 (1993).

a right to legally-sanctioned homosexual relationships—is both different and was more fully realized.

*b. Arguments to the Base of Support*

Another type of message, with accompanying and different goal, is the communication speaking to an activist movement's core supporters. The difficult position of Lambda Legal in Hawaii illustrates the real conflict within the gay rights movement about whether marriage was—and is—a goal that the movement as a whole should devote considerable effort to. A significant number of gay rights activists either did not want to prioritize marriage or actually opposed seeking gay marriage rights at all.<sup>90</sup> For example, some activists argue that “marriage is a rotten institution” that “involves hierarchies that have systematically subordinated women's personal, economic and social interests to those of men.”<sup>91</sup> For some gay activists, homosexual relationships “offer unique possibilities for the construction of egalitarian relationships” very different than what they conceive heterosexual marriages to be.<sup>92</sup> Some activists see marriage as a worthy goal, but simply do not believe that it will realistically be accomplished in the foreseeable future, and thus activism should focus on more attainable measures.<sup>93</sup>

An activist court case therefore speaks to members of the activist movement as to how important, how appropriate, and how achievable a specific goal is. As discussed in Part II, in many cases the legal activist groups conducting lawsuits had not independently chosen to bring the cases. Rather, individual citizens had forced the issue by beginning their own independent campaigns. The individual activists taking action on their own thus not only worked toward achieving same-sex

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<sup>90</sup> See Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535 (1993).

<sup>91</sup> William N. Eskridge, Jr. *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1486 (1993).

<sup>92</sup> JEFFREY WEEKS, BRIAN HEAPHY & CATHERINE DONOVAN, *SAME-SEX INTIMACIES: FAMILIES OF CHOICE AND OTHER LIFE EXPERIMENTS* 109 (2001).

<sup>93</sup> Tyler & Thayer, *supra* note 58, at 14-15.

marriage, but successfully pushed same-sex marriage onto the agenda of gay rights organizations. Their goal was not simply “achieve marriage for gays,” but “make same-sex marriage a priority for gay rights groups.”

In the case of Hawaii, for example, the activists within Lambda Legal were skeptical of same-sex marriage as a goal for gay rights organizations. By independently filing the case, the plaintiffs demonstrated both to the Hawaii Lambda Legal and other activists across the country that at least one vocal contingent of gay activists wanted the right to marry very much, and that their arguments had a chance of succeeding.

The arguments chosen in the course of the litigation may affect how successful this “preaching to the choir” message is. For example, Jonathan Rauch has argued repeatedly that gay marriage would civilize homosexual males.<sup>94</sup> That argument would likely at best fail to motivate most gay activists, and at worst anger them and cause them to associate marriage with hostile judgment and condemnation of homosexuality. Casting the argument in terms of rights, however, makes marriage universal. Perhaps more importantly, rights are understood as symbolic affirmations of the worth and equal value of a particular group, even by group members with no desire to exercise a particular right. In this sense, because litigation by necessity is more likely to put forward broad rights-based arguments rather than pure policy considerations, litigation may intrinsically make the activist base more supportive of the goal.

Furthermore, Rosenberg does not acknowledge the positive effect that a backlash from opponents to same-sex marriage sometimes has on supporters. As Vermont activists inspired by the litigation in Hawaii planned their own lawsuit, for example, the lawyers preparing the case held a screening of a conservative video made in Hawaii arguing for a state constitutional amendment prohibiting gay marriage.<sup>95</sup> The Vermont activists screened the video in order to show their

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<sup>94</sup> Jonathan Rauch, *For Better or Worse?*, in *SAME-SEX MARRIAGE: PRO AND CON: A READER* 169 (Andrew Sullivan ed., 1997). Rauch’s essay contains the memorable line, “For taming men, marriage is unmatched.” *Id.* at 177.

<sup>95</sup> Murray & Robinson, *supra* note 53, at 39.

supporters “what the opposition was saying about us,” as a means of preparing themselves for likely counterarguments within Vermont.<sup>96</sup> The activists found that the video inspired their supporters to further action<sup>97</sup>—seeing the backlash in one state provoked more activism in another.

The goal of same-sex marriage litigation is thus also a message from one subgroup of activists to the larger activist population. In this sense, moreover, the activists desiring to make same-sex marriage a priority for the gay rights movement were overwhelmingly successful, as marriage is one of the main agenda items for every national gay rights organization.<sup>98</sup>

### *c. Message to the Public and Opponents*

Finally, the broadest message—and broadest goal—of a litigation campaign is with regard to people uninvolved in the course of the lawsuits that are not already among the movement’s core. Some members of the public will already be opposed to the goals of the litigation movement; Americans across the country who had already firmly decided they were against same-sex marriage. These people responded to news of litigation victory in Hawaii by originating the backlash that Rosenberg found so powerful.

Opponents will be difficult, if not impossible, to win over. The vast undecided middle of the ideological spectrum, however, may be convinced—thus the need, as Rosenberg correctly points out, to complement legal activist campaigns with politically persuasive activism. In Vermont, for example, legal activists held speaker’s training sessions for lawyers who would be called upon to discuss the court case to the media, including the admonition to remember the audience, believing one-third was already with them, one-third would always

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 40.

<sup>98</sup> See, e.g., “Marriage & Relationship Recognition,” Human Rights Campaign.org, <http://www.hrc.org/issues/marriage.asp>; “Marriage, Relationships and Family Law,” Lambda Legal.org, <http://www.lambdalegal.org/our-work/issues/marriage-relationships-family>.

oppose them, and to focus on the one-third “winnable middle.”<sup>99</sup> To the extent that activists have effectively given up on convincing opponents to support their aims, therefore, the goal with regard to opponents might well be to minimize their awareness of the issue.

In these messages to the broadest swathe of Americans, activists have a goal most similar to Rosenberg’s formulation: convince the “winnable middle” of the desirability of marriage equality. It is this belief in the policy goal that makes Rosenberg’s focus “solely . . . the effectiveness of courts in producing significant social reform.”<sup>100</sup> Therefore, within the focus of Rosenberg’s work, the standard should be whether the net effect of the court cases was to improve the lives of gay men and lesbians, or whether the minds of Americans were changed to be more in favor of gay rights than before. In this rubric, if conservative Americans remained conservative, and even if it led to backlash in states that would never have liberalized their laws, the litigation campaigns did no harm. Yet if they contributed to a more permissive attitude and even legislative structure in other states that were more moderate, then the litigation campaign achieved measurable goals.

Finally, the message to the general public might be intentionally made in strong terms as a rhetorical or tactical strategy, believing that asking for a higher goal such as marriage will make attainment of an intermediate goal, such as domestic partnerships or civil unions, easier. Rosenberg criticizes the pursuit of marriage itself as a tactical error, stating that “if same-sex marriage proponents had asked only for civil unions rather than marriage, they might have achieved more.”<sup>101</sup> Rosenberg seems to imply that asking for marriage enraged opponents of gay marriage more than asking for civil unions would have, but he does not offer evidence as to this point.

Surveys have consistently indicated that there is more support among Americans for civil unions than for same-sex

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<sup>99</sup> Murray & Robinson, *supra* note 53, at 38.

<sup>100</sup> ROSENBERG, *supra* note 6, at 5.

<sup>101</sup> *Id.* at 417.

marriage.<sup>102</sup> For example, the Pew Forum asserts that, according to a series of surveys, since July 2005 the majority of Americans support civil unions, while as of August 2007 only 36% of Americans support same-sex marriage.<sup>103</sup> To the extent that more Americans support civil unions than support same-sex marriage, therefore, it seems reasonable that by numbers alone, the issue of gay marriage creates more opponents than does the prospect of civil unions.

Moving beyond the question of whether civil unions or same-sex marriage has more supporters, however, when assessing support for civil unions versus same-sex marriage survey data indicates that whether both options are on the table affects the support for civil unions. For example, surveys by Pew and Gallup indicate that support for civil unions is higher if a person was first asked their opinion about gay marriage than if they were only asked about civil unions.<sup>104</sup> One analysis summarizes that people are more likely to support civil unions if they are allowed to first express opposition to same-sex marriage.<sup>105</sup> This comports with the actual resolutions of several of the marriage lawsuits: state legislatures passed domestic partnership or civil union schemes as a compromise between activists demanding marriage on one side and opponents fighting gay marriage on the other. Court decisions holding that some sort of relationship recognition was necessary, but not mandating marriage itself, seemed to have

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<sup>102</sup>*E.g.*, *Support for Civil Unions Rises, Yet Sharp Divisions Remain*, ABC NEWS, available at <http://abcnews.go.com/images/PollingUnit/1050a3SocialIssues.pdf> ; CNN.com Election 2004, CNN.com, <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html>;

<sup>103</sup> David Masci, *A Stable Majority: Most Americans Still Oppose Same-Sex Marriage*, PEW FORUM, April 1, 2008, <http://pewforum.org/docs/?DocID=290>.

<sup>104</sup> Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 *LAW & SEXUALITY*. 11, 32-33 (2006); See Also, *Revisiting Gay Marriage vs. Civil Unions* GALLUP, May 11, 2004, <http://www.gallup.com/poll/11662/Revisiting-Gay-Marriage-vs.-Civil-unions.aspx>; See Also *Religious Beliefs Underpin Opposition to Homosexuality*, PEW FORUM, , <http://pewforum.org/docs/?DocID=37..>

<sup>105</sup> Paul R. Brewer & Clyde Wilcox, *Same-Sex marriage and Civil Unions*, 69 *PUB. OP. Q.* 599, 600, 603 (2005).



shifted the playing field in legislatures by making an intermediate step such as civil unions the moderate position rather than an extreme progressive flank.

The goal with regard to the general public and legislatures might therefore be simply some kind of progress, while the message expressed pushes further. Rosenberg's claim to assess the goals of the same-sex marriage movement on their own terms, justifying a binary evaluation of whether marriage was achieved for same-sex relationships, would therefore be inaccurate as to the actual goals of the activists. Their goals could simply be, as Rosenberg evaluates movements generally, social change.

## 2. *How Far Forward?*

In addition to the multiplicity of goals, furthermore, a binary evaluation of whether marriage was achieved or not does not take into account any progress—in many cases substantial progress—that was nonetheless short of marriage outright. A full evaluation of the accuracy of Rosenberg's claim that same-sex marriage activists have failed should therefore take a more complete assessment of the results of such litigation campaigns into account.

### a. *Hawaii: Reciprocal Beneficiaries, but Backlash*

In *Baehr v. Lewin*, the Hawaii state supreme court held that while the right to privacy under the Hawaii constitution did not encompass a fundamental right to same-sex marriage,<sup>106</sup> under the state constitution's equal protection clause denying marriage to same-sex couples was a classification on the basis of sex.<sup>107</sup> Tying the alleged state constitutional violation to sex rather than sexual orientation meant that under Hawaii's state constitution, the marriage law was subjected to strict constitutional scrutiny.<sup>108</sup> The court thus set up an extremely high standard for the government to

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<sup>106</sup> *Baehr v. Lewin*, 74 Haw. 530, 550 (1993).

<sup>107</sup> *Id.* at 561.

<sup>108</sup> ESKRIDGE, *supra* note 51, at 19.

meet in defending its denial of marriage licenses to same-sex couples. The court then remanded the issue to the trial court to give the state an opportunity to try to meet that high standard.

Once the case was remanded, news that Hawaii's courts would soon be forcing the state to solemnize the marriages of scores of homosexual couples exploded into the media. William Eskridge described the reaction to the court's decision as an "apocalyptic sensation," triggering "a stampede to isolate [Hawaii] and its judiciary."<sup>109</sup> Lambda successfully argued in the trial court that the state could not justify not granting marriage licenses to same-sex couples,<sup>110</sup> but as the court battles raged on, an immense influx of conservative funding and manpower successfully lobbied for and passed a state constitutional amendment prohibiting same-sex marriage,<sup>111</sup> so the state supreme court subsequently held that the constitutional amendment effectively reversed that decision.<sup>112</sup> Ironically, one of the measures meant to prevent same-sex marriage outright provided some measure of protection for same-sex couples in the wake of the state constitutional amendment, as the legislature had passed the Reciprocal Beneficiaries Act in July 1997 in an attempt to demonstrate that the state did not in fact discriminate on the basis of sex. The law remained on the books after the constitutional amendment settled the marriage question with finality, although it has been gutted of many of the more tangible rights.

#### *b. Vermont: Civil Unions*

The Vermont state supreme court's decision was slightly less rigid than the Hawaii court's decision in *Baehr*. Although the court's precise motivations are unclear, the decision also seemed conscious of the larger context—and potential volatility—of the issue. Again the plaintiffs grounded their

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<sup>109</sup> *Id.* at 26.

<sup>110</sup> *Baehr v. Miike*, 80 Haw. 341 (1996).

<sup>111</sup> Haw. Const. art. I, §23.

<sup>112</sup> *Baehr v. Miike*, 92 Haw. 634 (1999); See Also 1999 Haw. Lexis 391 (1999).

claims in the Vermont state constitution rather than the federal constitution, and again the state supreme court found that under the state constitution, to deny same-sex couples the “common benefits and protections” of marriage was discriminatory.<sup>113</sup> Rather than order any specific relief, however, the court claimed to “suspend[]” its ruling’s effect “to permit the Legislature to consider and enact legislation consistent with the constitutional mandate described” in the decision.<sup>114</sup> This delegation to the legislature was startling to most participants in the litigation—one of the attorneys for the plaintiffs recalled not even being sure whether they had won or lost the case at first.<sup>115</sup>

After considerable legislative debate, the Vermont legislature eventually voted to create a civil unions bill, which was then signed into law by then-Governor Howard Dean. There was surprisingly little backlash to the law within Vermont, especially as compared to the furor in Hawaii, and Vermont continues to provide civil unions today.

### *c. Massachusetts: Marriage*

Again, in Massachusetts the legal arguments in favor of same-sex marriage won, but as in Vermont, the court delayed action in order to allow the legislature to act. The court rejected the government’s justifications for limiting marriage to heterosexual couples, holding that the government had “failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.”<sup>116</sup> The court remanded the case back to the trial court in order to enter a judgment consistent with the supreme court’s finding that the government had not justified restricting marriage licenses to heterosexual couples, but stayed entry of the judgment for one hundred eighty days “to permit the Legislature to take such action as it may deem appropriate in light of this opinion.”<sup>117</sup>

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<sup>113</sup> *Baker v. State*, 170 Vt. 194, 197 (1999).

<sup>114</sup> *Id.* at 229.

<sup>115</sup> MOATS, *supra* note 11, at 4.

<sup>116</sup> *Goodridge*, 440 Mass. at 312.

<sup>117</sup> *Id.* at 344.

Unlike Vermont, however, the legislative discussion was constrained explicitly by the court's opinion as to what would ameliorate the state constitutional inequality. Upon request from the state senate, the court issued an advisory opinion that specified that an intermediate step, such as domestic partnerships or civil unions, would still violate the state constitution, because under such a regime homosexual couples would be treated differently than heterosexual couples.<sup>118</sup> While the court at least formally gave the issue over to the state legislature, therefore, the legislature was effectively bound. The legislature only had the opportunity to deal with the question for six months before the court's decision went into effect, and the court further told the legislature that it would strike down as unconstitutional anything less than issuing marriage licenses. In the face of this, the state legislature did not act, and pursuant to the state supreme court's judgment, Massachusetts began issuing marriage licenses to same-sex couples in May 2004.<sup>119</sup>

*d. New Jersey: Domestic Partnerships and Civil Unions*

As discussed in Section II.F. above, in New Jersey simultaneous political and legal activism led to a series of reforms. As a case filed by Lambda Legal was pending asserting a right to same-sex marriage, the state legislature passed a bill creating a system of domestic partnerships.<sup>120</sup> In 2006, Lambda then won its case in the state supreme court.<sup>121</sup> In a close parallel to other such state supreme court victories, the court held that "denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts" violated the New Jersey state constitution.<sup>122</sup> As in previous cases, the court gave the state legislature an opportunity—180 days—to pass a statute

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<sup>118</sup> Opinions of the Justices to the Senate, 440 Mass. 1201, 1209-10 (2004).

<sup>119</sup> Cece Cox, *To Have and to Hold—Or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States*, 14 *LAW & SEXUALITY* 1, 23 (2005).

<sup>120</sup> Pople, *supra* note 65, at 55.

<sup>121</sup> *Lewis v. Harris*, 188 N.J. 415, 423 (2006).

<sup>122</sup> *Id.* at 423.

ameliorating the violation. The court gave more directions to the legislature than in Vermont, but less than in Massachusetts. It explicitly noted that the state legislature did not have to allow same-sex couples to marry, but did specify requirements such as that civil unions must be as easy to enter into as marriage.<sup>123</sup>

In response, a marriage bill was introduced into the New Jersey state legislature, but was essentially ignored by other representatives.<sup>124</sup> Once a civil unions bill was introduced, however, it passed quickly and quietly.<sup>125</sup> Interestingly, legislators left the domestic partnerships statute in effect, probably because domestic partnerships were also open to heterosexual partners if over the age of sixty-two.<sup>126</sup> Thus, New Jersey now offers a limited spectrum of legally-recognized relationships: domestic partnerships, providing “some, but not all of the rights and obligations of marriage” to same-sex and elderly heterosexual couples, civil unions providing “substantially all of the rights and benefits of marriage” to same-sex couples, and marriage to heterosexual couples.<sup>127</sup>

### *e. Oregon: Legal Defeat, Political Victory*

In Oregon, Multnomah County asserting its right to issue marriage licenses won in the trial court and the case was appealed to the Oregon Supreme Court. The fight then began

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<sup>123</sup> *Id.* at 463.

<sup>124</sup> Thomas Hoff Prol, *New Jersey's Civil Unions Law: A Constitutional "Equal" Creates Inequality*, 52 N.Y.L. SCH. L. REV. 169, 178 (2007).

<sup>125</sup> See *N.J. Lawmakers OK Civil Unions, Not Same-Sex Marriage*, CNN.COM, Dec. 14, 2006, <http://www.cnn.com/2006/POLITICS/12/14/same.sex/index.html>.

<sup>126</sup> Joanna Grossman, *The New Jersey Domestic Partnership Law: Its Formal Recognition of Same-Sex Couples, and How It Differs from Other States' Approaches*, FINDLAW.COM, Jan. 13, 2004, <http://writ.news.findlaw.com/grossman/20040113.html>. The law included elderly heterosexual couples on the theory that elderly citizens sometimes choose not to marry because of how marriage would affect their pension, Social Security, or other such retirement plans. *Id.*

<sup>127</sup> Op. N.J. Att'y Gen., No. 3-2007 (Feb. 16, 2007) at 2, available at <http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf>.

on two fronts, as the Oregon Defense of Marriage Coalition, which had intervened to become a party in the litigation, simultaneously sponsored Measure 36,<sup>128</sup> an amendment to the Oregon state constitution prohibiting same-sex marriage that was passed by voters during the pendency of the Oregon Supreme Court appeal.<sup>129</sup> The Oregon Supreme Court then issued a ruling finding that the marriage licenses issued before the amendment were not issued pursuant to state law, and that the amendment firmly settled the question against permitting same-sex marriage for the future.<sup>130</sup> In an interesting recent twist however, in early 2008 the Oregon state legislature passed a law creating a system of domestic partnerships.<sup>131</sup>

*f. California: Tentative Victory*

The example of California is too recent to meaningfully assess, but following the decision invalidating marriage licenses issued to same-sex couples following Mayor Gavin Newsom's order, several couples who had obtained such licenses as well as the City and County of San Francisco filed a lawsuit addressing the substantive question of whether the California state constitution allowed prohibiting marriage for same-sex couples. On May 15, 2008, the California Supreme Court held that the state constitution did mandate that marriage be extended to homosexual as well as heterosexual couples.<sup>132</sup> At least temporarily, therefore, the right to marry has been won in California for same-sex couples. A political battle which all observers predict will be fierce and closely-fought has already begun, however, to add a state constitutional amendment banning same-sex marriage to the

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<sup>128</sup> PINELLO, *supra* note 4, at 116.

<sup>129</sup> Caleb W. Langston, Comment, *Fundamental Right, Fundamentally Wronged: Oregon's Unconstitutional Stand on Same-Sex Marriage*, 84 OR. L. REV. 861, 861 (2005).

<sup>130</sup> *Li*, 338 Ore. at 398.

<sup>131</sup> *See Law for Same-Sex Couples is Signed in Oregon*, TIMES UNION, May 10, 2007, at A10.

<sup>132</sup> *In re Marriage Cases*, S147999, May 15, 2008, available at <http://www.courtinfo.ca.gov/opinions/documents/S147999.PDF>.

ballot in November, so the ultimate outcome is too tentative at the moment to predict with certainty.<sup>133</sup>

*g. Backlash*

What of Rosenberg's "stunningly successful countermobilization?"<sup>134</sup> It is true that, in addition to the immediate response after *Baehr* discussed above, some political backlash took place across the country. In the wake of *Goodridge*, thirteen states passed state constitutional amendments prohibiting same-sex marriage.<sup>135</sup> Such state constitutional amendments often go even further than merely specifying that marriage is only legally valid when between one man and one woman, and prohibit legal recognition of marriage-like relationships between same-sex couples. For example, in Arkansas, the state constitution now prohibits a "legal status for unmarried persons which is identical or substantially similar to marital status."<sup>136</sup> Georgia states that "[n]o union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage."<sup>137</sup> Utah's amendment provides that "[n]o other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."<sup>138</sup> The backlash thus arguably put same-sex couples in states that passed such amendments in a worse position: middle-ground routes such as lobbying for a system of domestic partnerships or civil unions were closed off to them, and even some of the private regimes set up to try to approximate some of the legal benefits of marriage were potentially threatened.<sup>139</sup>

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<sup>133</sup> John Wildermuth, *Next Test for Same-Sex Marriage*, S.F. CHRON., May 26, 2008, at A1.

<sup>134</sup> ROSENBERG, *supra* note 6, at 417.

<sup>135</sup> Cox, *supra* note 119, at 48.

<sup>136</sup> ARK. CONST. of 1874, amend. 83, § 2.

<sup>137</sup> GA. CONST. art. I, § IV, para. 1.

<sup>138</sup> UTAH. CONST. art. I, § 29, cl. 2.

<sup>139</sup> For example, some gay rights groups provide guidance regarding how to privately institute as many of the legal benefits of marriage as possible through private contract. Lambda Legal Defense & Education Fund, *Life Planning: Legal Documents and Protections for Lesbians and Gay Men* (1998),  
available at

The most restrictive amendments, however, passed in states that already were hostile to any legal recognition or even toleration of same-sex relationships. The constitutional amendments do close off the state law-based arguments for same-sex marriage, so make suits such as those successful in Massachusetts and Vermont untenable. Yet it is difficult to realistically assign fault to activists for the step backward in a state like Utah, where there is absolutely no possibility in the near future that any state recognition or protection of same-sex relationships will be forthcoming. It is difficult to assess how much of an effect constitutionalizing the issue has—how much more difficult it will be to work toward same-sex marriage in Utah with the issue written into the state constitution. It may simply have raised the bar of how much political action would be necessary to allow same-sex marriage through legislative means. The extreme language of such codifications, however, may also have strengthened federal law claims, opening a different potential avenue to legal challenge.<sup>140</sup>

In the states passing amendments immediately following *Goodridge*, all but one already had both an explicitly heterosexual definition of marriage in state statutes, which would have strengthened opposition to legal arguments that marriage should be understood as an equal right by providing proof that marriage had been a historically heterosexual institution; and a state defense of marriage provision specifying same-sex relationships, from marriage to domestic partnerships, of other states would not be recognized.<sup>141</sup>

The achievements of activists not only in securing same-sex marriage outright, but also intermediate steps such as civil unions, thus defy a binary assessment of the success of the

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<http://www.lambdalegal.org/sections/library/lifeplanning.pdf>. Depending on how comprehensive such a plan is, some of the particularly stringent state constitutional amendments could threaten enforcement of such private contracts.

<sup>140</sup> See Dara E. Purvis, *The Right to Contract: Use of Domestic Partnership as a Strategic Alternative to the Right to Marry Same-Sex Partners*, 28 WOMEN'S RTS L. REP. 145 (2007).

<sup>141</sup> See Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 LAW & SEXUALITY REVIEW. 11, 11, 44 (2006).



battle for marriage equality as a simple tally of whether states allow same-sex marriage.

B. *“Everywhere in the Nation”*

In assessing whether Rosenberg’s claim to evaluate the success of the same-sex marriage movement on a national scale, one complicating factor is the participation of different political units in the dialogue. Although Rosenberg does not make this argument explicitly, his characterization of legal activists in a few locations awakening a widespread national backlash against gay marriage implies that he thinks that part of the problem was a smaller unit awakening a larger, more powerful one: activists won a victory at the state level in Hawaii, but enraged a national community of conservative opponents that then not only spread a backlash to other state levels in the state constitutional amendments prohibiting same-sex marriage, but channeled a national backlash into such actions as the federal Defense of Marriage Act, President Bush’s calls for a federal constitutional amendment forbidding gay marriage, and exploitation of same-sex marriage in the 2004 national elections.

Rosenberg is obviously correct that a state-level action caused reactions at both the national level and at the state level in other distant states. He allows for a single category of same-sex marriage litigation inspiring pro-gay marriage activism: “supporters of same-sex marriage who held elective office” taking independent action,<sup>142</sup> such as Mayor Gavin Newsom’s attempts to allow gay marriage in San Francisco.<sup>143</sup> Rosenberg argues that every state marriage case prompted backlash across the country that should be taken into account in evaluating the success of the movement generally. This focus on national backlash when evaluating the success of state-level efforts, however, may not be accurate as to the goals of the state-level efforts.

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<sup>142</sup> ROSENBERG, *supra* note 6, at 360.

<sup>143</sup> See Rachel Gordon, *San Francisco Defies Law, Marries Gays*, SAN FRANCISCO CHRONICLE, Feb. 13, 2004, at A1.

In Massachusetts, for example, Rosenberg at least initially believed that litigation had been “a disaster.”<sup>144</sup> Yet within Massachusetts, gay marriage has become popularly accepted.<sup>145</sup> *Goodridge* did not trigger a successful backlash on the state level. Rosenberg claims to judge legal activists by their own terms—he uses this argument to justify terming anything less than outright marriage a failure. But he seems to consider all the legal activists working in every state a single entity when determining his goal for pro-same-sex marriage activists. It is undoubtedly true that Lambda Legal lawyers in Hawaii hope that the right to same-sex marriage will be achieved nationwide. But by “their own terms” of the lawsuit filed in Hawaii state court on Hawaii state law claims, at least their immediate goal is merely achieving the right to same-sex marriage in Hawaii. By this logic, the goals of activists should be defined more specifically as to the actions they take, and evaluated accordingly.

Obviously, even a successful local or state action can prompt backlash elsewhere in the country. It is not this Article’s argument that activism should be evaluated entirely piecemeal and individually. But it stretches the bounds of neutral analysis to only recognize the broadest definition of “victory” while acknowledging every negative consequence that might be tied to litigation. Rosenberg defines victory for same-sex marriage litigation extremely narrowly, but lumps all the negative responses to the litigation together into an amorphous and intimidating single backlash movement. This is not to say that the activists achieved their goals entirely—but it does indicate that Rosenberg’s definition of the national goal is too generalized. In order to effectively evaluate the success of the movement, the goal should be understood to take into account the different scopes of action.

#### PART IV – COORDINATING LEGAL AND POLITICAL

Rosenberg argues that legal activists lack any strategy as to political action to support victories won in court.

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<sup>144</sup> ROSENBERG, *supra* note 613, at 338.

<sup>145</sup> See Jacobi, *supra* note 141, at 39-41.

Rosenberg has characterized such an absence as a complete failure to organize or devote resources to political activism in addition to legal battles:

One of the responses I often hear from progressive lawyers is . . . 'Well, of course we are more sophisticated. This is part of a multi-tiered strategy.' And I say, 'Oh. Well, that's interesting. What have you been doing on the rest of the strategy? What part of your budget goes to this?' And they respond: 'We are really not doing much now, but we are depending on other people.' So I do not believe it.<sup>146</sup>

Rosenberg paints legal activists with a broad brush as lacking political organization and strategy. He claims that the advocates for same-sex marriage failed entirely to coordinate legal and political efforts. This was likely true at the very beginning of legal campaigns, as the backlash to *Baehr v. Lewin* indicates. If progressives improved their political and legal coordination in later cases, however, Rosenberg's general assessment should be qualified.

#### A. *Hawaii: Unprepared and Ill-Equipped*

Rosenberg's analysis of legal activists working toward same-sex marriage as completely ineffectual against a powerful conservative backlash is clearly accurate as to Hawaii. Clearly, the plaintiffs who brought the case and activist groups such as Lambda and the ACLU who became involved afterwards, did not anticipate the political battle that arose and had no strategy to combat it.

In contrast, opponents to gay marriage across the country were spurred into action much more than supporters. Gay activists across the country did not seem to have any political response to an explosive backlash when the news from Hawaii prompted congressional representatives to introduce

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<sup>146</sup> ROSENBERG, *supra* note 6, at 818.

the Defense of Marriage Act,<sup>147</sup> specifying that no state had to recognize the same-sex marriage granted by another state and forbidding the federal government from recognizing same-sex marriages. Indeed, the bill swiftly passed by extremely wide margins.<sup>148</sup>

Hawaii is the obvious example of virtually no political planning or activism, but it is also the obvious example of legal activists having little planning time at all, since the case was essentially thrust upon them already in progress. It is thus perhaps understandable that they did not also contemplate a larger political campaign. In states in which the legal activists exercised more agency, however, more political planning took place.

### *B. Vermont: Organization and Allies*

As *Baehr* came out in Hawaii, Vermont was embroiled in a controversy regarding adoption by gay parents that involved simultaneous legal and political action, meaning that as gay marriage entered the political debate connections between legal and political activists were already relatively strong. Adoption by gay parents had been one of the issues that gay rights activists began to pursue in the 1990s, although the issue was pursued first in the courts. In 1993, the Vermont Supreme Court became the first in the country to approve second-parent adoption by a same-sex partner,<sup>149</sup> as the state legislature worked on a general reform of state adoption laws. After the state court's decision, several state legislators unsuccessfully attempted to add amendments to the law forbidding homosexuals to adopt.<sup>150</sup> The adoption battle had several important effects. One consequence of the existing adoption battle was that *Baehr* was not the first spectre of a claim to an important social institution—parenthood rather than marriage—that Vermont citizens were confronted by. To the extent some of the backlash to *Baehr* on the national level

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<sup>147</sup> Pub. L. No. 104-199, 110 Stat. 2419 (.1996).

<sup>148</sup> *Id.* ESKRIDGE, *supra* note 51, at 39.

<sup>149</sup> *In re B.L.V.B.*, 628 A.2d 1271, 1271 (Vt. 1993).

<sup>150</sup> MOATS, *supra* note 11, at 97-99.

was shock, therefore, the impact was blunted in Vermont. Second, Vermont was simply distracted from the marriage issue by the arguments about adoption in which it was already embroiled. Finally, the lines for a battle over same-sex marriage had already been drawn: activists on both sides of the homosexual adoption debate were mobilized and had already fought several battles in the legislature and in the courts.

After *Baker v. State* shifted the question of same-sex marriage in Vermont into the legislature, the activism changed entirely from legal to political. Even though the legal argument had, at least in principle, been won by proponents of same-sex marriage, moving the argument into the political branches changed both the arguments and the advocates. Rather than the legal, rights-based arguments presented in court, the legislature debated the policy implications of various proposals. In Hawaii, as the issue moved from legal to political forums the supporters of same-sex marriage were ill-equipped and unprepared to counter conservative advocacy. In Vermont, by contrast, the players were already in place. This was partly due to the previous battles over gay adoption, but the Vermont Freedom to Marry Task Force had also envisioned the battle for public support that same-sex marriage would face, so had at least begun to strategize media and political campaigns. Additionally, from the outset of the case the lawyers involved, determined to learn from Hawaii's mistakes, strategized how to best present their case to the public. For example, VCGLR held speaker's training sessions for lawyers who would be called upon to discuss the court case to the media, with quite clear talking points: (1) remember your audience (the "winnable middle"), (2) don't lose self-control when arguing, and (3) speak to people's hearts as well as their heads.<sup>151</sup>

Vermont same-sex marriage advocates also had an important political leader in the legislature; Bill Lippert. Lippert, a member of the House of Representatives, was the only openly gay state legislator, and knew early in his political career that he would likely have an opportunity to affect laws protecting or restricting gay rights in Vermont. Five years before, he had taken a position on the House Judiciary

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<sup>151</sup> Murray & Robinson, *supra* note 53, at 38.

Committee specifically because he thought that committee would give him the most power over the progress of laws affecting gay rights.<sup>152</sup> At the time that same-sex marriage was handed to the legislature by the state supreme court, Lippert was the ranking Democrat on the committee and served as Vice Chairman, giving him considerable power. Proponents of same-sex marriage thus had an extremely influential and well-placed advocate in the legislature just as the issue became active. Vermont therefore had two very important factors affecting the fight over same-sex marriage: a support structure of existing gay rights organizations in place and well-positioned supporters in the legislature with considerable agenda control.

Despite the better preparedness of proponents of same-sex marriage, however, the debate was still extremely contentious. The House of Representatives took on the issue first, and from the beginning involved the public in a very direct way, meaning that the grassroots support for the legal activism was extremely important as those ground-level supporters had direct input in the political debate. The Chairman of the Judiciary Committee, where the first debate was held, sent a memo to committee members asking them to not publicly take a position on the issue until after a series of public hearings were held.<sup>153</sup> The committee then held a series of town hall-style meetings, where over one hundred members of the public testified each time.<sup>154</sup> The grassroots organization of bringing supporters of same-sex marriage out to speak at such meetings was therefore crucial in reaching the committee members.

After a long and impassioned debate, the committee eventually voted to create a system of civil unions, rather than marriage outright.<sup>155</sup> The full House then similarly voted—because Vermont requires multiple readings and votes on a single bill before it becomes law, voted more than once. The Senate subsequently passed a civil unions bill almost identical to the House version, the House endorsed the Senate's bill, and

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<sup>152</sup> *Id.* at 20-21.

<sup>153</sup> *Id.* at 155.

<sup>154</sup> *Id.* at 164-79.

<sup>155</sup> *Id.* at 188.

Governor Dean signed it into law—uncharacteristically, without any publicity or supporters of the bill present for the signing.<sup>156</sup>

As Rosenberg acknowledges, the backlash felt in Vermont was extremely small compared to the reaction in Hawaii. Conservative politicians did try to capitalize on the issue: the slogans “Take back Vermont” and “Remember in November” became popular as bumper stickers to remind Vermont citizens to vote against legislators who had voted for the civil unions bill.<sup>157</sup> Some Democrats did lose their seats, but the effect was relatively small. The Senate remained controlled by a Democratic majority, although by a smaller margin than before, and Governor Dean was reelected.<sup>158</sup>

The lesser backlash of Vermont, therefore, is due to more than the structural factors Rosenberg identifies that do not give any credit to the preparedness of Vermont activists for political and social campaigns. The political resolution of was due in no small part to the greater readiness of activists across the state. One reason for the greater preparedness was the recent history of other legal and political battles concerning the rights of gay Vermont citizens. Another, however, has to do with the support within the activist community for the lawsuit. In Vermont, as considered in Section II.C, the lawsuit was not brought until a groundswell of support among interested VCGLR members made it clear that the community of politically active gay or pro-gay rights Vermont citizens wanted such a case filed. Obeying the wishes of the public meant that when the state supreme court handed the issue over to the legislature, that same group of active citizens who pushed for the case were ready to actively lobby their representatives to pass a statute supporting gay relationships in some form. Finally, the legal activists organized attorneys involved in the case to present an appealing, persuasive argument for the lawsuit and a support structure of political organizers and well-positioned allies in the legislature worked together to

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<sup>156</sup> *Id.* at 242.

<sup>157</sup> *Id.* at 251.

<sup>158</sup> *Id.* at 260-61.

carry the movement forward once it moved into the political arena.

### C. *Massachusetts: The Importance of Allies*

As in Vermont, gay activists in Massachusetts had engaged in political battles over gay rights issues in the state legislature prior to the same-sex marriage case. For example, the Massachusetts Gay and Lesbian Political Caucus successfully lobbied in 1989 to add sexual orientation to the list of protected characteristics in state laws prohibiting discrimination in government employment.<sup>159</sup>

As outlined above, the debate over same-sex marriage in Massachusetts began with a strong conservative effort to prohibit same-sex marriage in the state constitution. An extremely well-organized group of allies in the state legislature, however, took extremely aggressive measures to prevent the amendment from passing, using procedural maneuvers to avoid a vote that the progressive politicians were worried they would lose.

The delay orchestrated by Massachusetts state legislators gave the legal activists time to file and win *Goodridge*. Once the debate moved into the legislature after the initial decision, moreover, state senators asked for an advisory opinion from the court as to whether marriage or an intermediate option such as civil unions was mandated by *Goodridge*, and after the court's opinion stating that only marriage would remedy the state constitutional violation, the legislature allowed the court's opinion instituting marriage 180 days after the decision was issued to go into effect.

After Massachusetts began issuing marriage licenses to same-sex couples, there were several attempts to reverse the court's decision through the political process. Conservatives in Massachusetts proposed several amendments to the state constitution in attempts to supersede *Goodridge*. At the next convention to discuss possible amendments to the state constitution, legislators debated the issue, but again political allies fought strenuously against such efforts.

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<sup>159</sup> PINELLO, *supra* note 4, at 34.



The fact that the question had been decided as a legal matter provided further sources of argument for sympathetic legislators. In other words, the characterisation of the issue as a question of legal rights rather than policy preferences affected how the legislators thought of the propriety of action through the political process. For example, one State Senator argued in debate, "We are talking about equality, and that is why we should not put this on the ballot. This is not a tax matter for the ballot. This is about rights. . . . Popular votes are no way to protect fundamental rights."<sup>160</sup>

Furthermore, the Massachusetts electorate seemed to support the concept of same-sex marriage: in an intervening election following the first state convention after licenses were issued to homosexual couples, how legislators up for reelection had voted on whether to allow same-sex marriage licenses did not seem to have any impact on whether they kept their seat or were defeated.<sup>161</sup> Faced with voter apathy on the issue, the next vote on a constitutional amendment to prohibit same-sex marriage failed by a vote of one hundred fifty-seven to thirty-nine, and the issue has been effectively settled ever since.<sup>162</sup>

As Rosenberg points out, Massachusetts is a politically liberal state, so it is unsurprising that there was less opposition to same-sex marriage than in less hospitable locations. The debate over same-sex marriage within Massachusetts was strongly, probably determinatively, affected by strong support and activism by political allies. Indeed, activists were able to file the case only because political allies held off a strong attempt to amend the state constitution. Massachusetts thus is an example of very strong political support within the legislature for the legal activism.

#### *D. Oregon: Political Victory to Legal Defeat to Political Victory*

Rosenberg does not discuss the example of Oregon in detail in *The Hollow Hope*, in part because the most recent developments took place over the last few months and thus

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<sup>160</sup> PINELLO, *supra* note 4, at 65.

<sup>161</sup> *Id.* at 69-71.

<sup>162</sup> *Id.* at 71.

were probably too recent to put into print. The multiplicity of the efforts within the state, however, indicate that activists continue to improve the integration of political and legal activism.

The first battle in Oregon, as summarized in Section II.E, began as grassroots pressure on Basic Rights Oregon, moved into internal government action with the Multnomah County commissioners and attorney, then to the legal arena with the subsequent court case between different levels of state and local government, where it was defeated. The effort began, however, with lobbying local government leaders rather than a lawsuit, and won over those leaders to the extent that it was the county government that filed the lawsuit.

In the last few months, however, the Oregon state legislature passed a law instituting domestic partnerships.<sup>163</sup> Progressive state legislators had introduced such bills before, but had been stymied by conservative legislators until the 2007 legislative session.<sup>164</sup> After the bill was signed into law and was scheduled to take effect, conservative activists attempted to put a referendum on the public ballot repealing the law, but failed to secure the required number of signatures. A group of conservative activists then sued to challenge the actions of election officials who rejected some signatures, but lost in court.<sup>165</sup> The law thus took effect on February 4, 2008, and within a month over 1300 same-sex couples had registered as domestic partners with the state.<sup>166</sup> While Rosenberg was unable to include the recent Oregon developments in his book, therefore, the domestic partnership law provides strong evidence that the movement for same-sex marriage increasingly integrates legal and political efforts.

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<sup>163</sup> Ashbel S. Green, *Civil Unions Get the Nod in Oregon*, OREGONIAN, Feb. 2, 2008, at A1.

<sup>164</sup> *Law for Same-Sex Couples is Signed in Oregon*, TIMES UNION, May 10, 2007, at A10.

<sup>165</sup> Green, *supra* note 163.

<sup>166</sup> Bill Graves, *About 1,300 in Oregon Register for Civil Unions*, OREGONIAN, March 3, 2008, at E3.

*E. New Jersey: Integrated, Alternated Achievements*

The New Jersey movement for same-sex marriage is an example of a nearly entirely integrated legal and political campaign. As the New Jersey chapter of Lambda Legal discussed whether to file a lawsuit patterned after other successful cases, it decided to work explicitly to prevent a defeat as in Hawaii. Therefore, the activists borrowed the practice of town meetings from Vermont, and held a series of public meetings run by a professional consultant aimed at raising public awareness and creating an educational and persuasive message in support of same-sex marriage.<sup>167</sup>

The integration carried forward into the alternating resolutions in the legal and political arenas. After Lambda lost its case in the trial court,<sup>168</sup> but before the appeal was decided, the state legislature passed into law a domestic partnerships statute.<sup>169</sup> After victory in the state supreme court,<sup>170</sup> moreover, the state legislature under direction from the court passed a civil unions bill.<sup>171</sup>

In many ways, New Jersey is precisely what Rosenberg claims the modern same-sex marriage movement lacks. The campaign within New Jersey took advantage of the momentum and lessons learned from earlier examples. The activists worked simultaneously within the political and legal spheres, and were able to win incremental battles in both. The political and legal strategies were entirely integrated and become interdependent, as the civil unions bill was passed under the order of the New Jersey Supreme Court.

## CONCLUSION

Rosenberg argues in the updated *Hollow Hope* that the litigation movement for same-sex marriage has been close to an

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<sup>167</sup> *Id.*

<sup>168</sup> See *Lewis v. Harris*, 378 N.J. Super. 168, 175-76 (2005). The trial court's opinion was unpublished.

<sup>169</sup> Pople, *supra* note 65, at 55.

<sup>170</sup> *Lewis v. Harris*, 188 N.J. 415, 463 (2006).

<sup>171</sup> *N.J. Lawmakers OK Civil Unions, Not Same-Sex Marriage*, CNN.COM, Dec. 14, 2006, <http://www.cnn.com/2006/POLITICS/12/14/same.sex/index.html>.

abject failure, prompting far more negative action in the form of backlash across the country than winning any victories. He claims that this failure is the consequence of legal activists choosing to move the battle over same-sex marriage into the courts too quickly, that the success of such activists can be measured via a dichotomy of whether or not same-sex marriage was achieved, and that activists have not successfully integrated political activism into their legal actions.

This Article has examined each of these claims in depth and tested their validity, and in each case has demonstrated that Rosenberg's assertions should at least be significantly qualified. Legal activists often did not choose to file lawsuits, but joined lawsuits already in progress or were pushed into action by existing political fights. Activists worked for same-sex marriage generally, but also served related but distinct goals such as affecting activist agendas, and chose to express their goals in strong terms as a rhetorical strategy rather than an expression of "marriage or bust." Legal activists, thrust into the fight over same-sex marriage, did entirely lack political organization initially, but as the fights have continued have learned from previous mistakes and demonstrate increasing sophistication and success in their political activism and coordination.

Rosenberg's claims as to same-sex marriage, therefore, might be restated to account for a more nuanced understanding of the historical record. This amending of his assertions regarding same-sex marriage does not disprove his overall thesis that legal activism will not by itself produce lasting social change, nor does it deny that elements of the same-sex marriage debate support his argument. The strength of that support, however, is affected by the imprecision of his theses, and to the extent that strong examples can also be marshaled that entirely contradict his claims, examples from within the same-sex marriage debate also provide strong evidence against portions of his general arguments.

