

**Rights Discourse and the Mobilization of Bias: Exploring the Institutional Dynamics of the
Same-Sex Marriage Debates in America**

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Abstract: *This paper examines how conservative opponents of same-sex marriage have used rights discourse to construct an identity of themselves as victims of oppression, and construct gays and lesbians as dangerous and deviant “others.” I find that conservative rights discourse has been much more effective outside the courtroom, than in it. This finding is counterintuitive, given that rights discourse would seem to be well-suited for a legal environment. Conservative rights discourse is less effective inside the courtroom because these arguments often rely on implicit discriminatory stereotypes, or rest on claims that cannot be adequately supported with evidence. These shortcomings are frequently exposed under the scrutiny of dispassionate judicial actors. However, in a popular arena, they are free to operate with considerably less scrutiny. Here, rights discourse is used to mask discriminatory stereotypes and lend legitimacy to positions that would typically be rejected if made explicitly.*

The Obama administration made history recently by filing an amicus curiae brief in the upcoming case of *Hollingsworth v. Perry* which argued that California’s prohibition on same-sex marriage was unconstitutional. The announcement represents a shift from the president’s earlier position which was that, while he personally supports extending marriage rights to gay and lesbian¹ couples, individual states should be able to decide for themselves how to define marriage (Obama 2012). This announcement has generated excitement among many supporters of marriage equality and condemnation from its conservative² opponents.³ But even if the Court agrees with the administration’s position, a favorable decision in this case is unlikely to have much national impact, making it likely that same-sex marriage will continue to be decided on a state-by-state basis for the foreseeable future (Smith 2008).

These state-level debates over same-sex marriage are shaped dramatically by the institutional environments in which they occur. Conservatives have typically sought to prohibit same-sex marriage at the state level through the initiative or referendum process. Since 1998, 38 statewide ballot measures seeking to prohibit same-sex marriage have been put before voters—34 have passed.⁴ While the initiative and referendum process has been a crucial tool for conservative opponents of same-sex marriage, they have had more mixed results when debating this issue in elite-centered environments. Since 2003, proponents of marriage equality have successfully legalized same-sex marriage in ten states and in the District of Columbia through

¹ The “gay community” is made up of many diverse groups, including gay men, lesbians, bisexual persons, transsexual persons, and those who reject all of these labels. For the purposes of this paper, I use the phrase “gays and lesbians” when talking about this community generally. This is a stylistic decision and is not meant to minimize the distinctions apparent within this group.

² I use the terms “conservative” and “liberal” to refer to groups at opposite ends of the “left – right” political spectrum commonly used to describe the range of modern political ideologies in American politics.

³ This paper is focused specifically on conservative opponents of same-sex marriage, of which members of the Religious Right tend to be the most vocal. It is not meant to be indicative of conservative activists generally, as there are many conservatives who support marriage equality.

⁴ Voters in Maine approved an initiative in 2012 which actually legalized same-sex marriage in the state. Maine was the first state to consider such a proposal.

the actions of state courts and legislatures.⁵ While shifting the same-sex marriage debate to these more elite-centered environments does not guarantee victory for advocates of same-sex marriage,⁶ it is clearly their preferred strategy.

Why have conservatives had so much success opposing same-sex marriage in the popular arena and so much less success when arguing against marriage equality in elite-centered environments? In this paper, I answer this question by conducting in-depth comparative case studies of the same-sex marriage debates in California and Maine. I show that conservatives have been able to successfully oppose same-sex marriage in statewide ballot measure campaigns by advancing their own counter-rights discourse. They have used the discourse of parental rights and religious liberty to construct an identity of themselves as victims of oppression, and to construct gays and lesbians as oppressors. This discourse relies on implicit assumptions that gays and lesbians are “dangerous” and “deviant” others, whose selfish and excessive rights claims threaten the legitimate rights of the majority of Americans (Schacter 1994; Goldberg-Hiller & Milner 2003; Dudas 2008). Such logic builds on a longstanding conception of citizenship, which argues that individuals must prove they are deserving of equal rights by disciplining what are thought to be deviant sexual urges (Merry 2000: 221-257). While these arguments would be rejected by many if made explicitly, when masked by the secular discourse of rights, these implicit moral assumptions are free to operate at a subconscious level, feeding on latent stereotypes, and helping to foment popular opposition to same-sex marriage. In this way, rights discourse is used as a means of transforming arguments based on moral assumptions into

⁵ While California legalized same-sex marriage through state court decision in 2008 (*In Re Marriage Cases*), the law was later overturned by popular referendum. Same-sex marriage is currently illegal in the state.

⁶ While proponents of marriage equality have had more success debating this issue in elite centered environments, conservative opponents of same-sex marriage have won some victories in state courts and legislatures as well. Many state legislatures ratified DOMA laws defining marriage as between one man and one woman during the 1990s, and a number of state courts have ruled that same-sex marriage is not a fundamental right. See for example, *Hernández v. Robles* (N.Y. 2006) and *Andersen v. King County* (Wash. 2006).

something acceptable to a more secular audience (Schacter 1994: 289-290; Herman 1997: 115, 144; Hardisty 1999: 114).

While this rights discourse works well in a popular environment, these same rights-based arguments frequently become liabilities for conservatives once the debate over same-sex marriage moves inside of the courtroom. This is because institutions are more than just aggregate collections of individual preferences; they consist of norms and constraints which structure individual behavior and determine outcomes (Riker 1980; March & Olson 1984; Smith 1988; Gillman & Clayton 1999). I find, in particular, that the modern conception of law as an “arena of reason” (Fitzpatrick 1992; Darian-Smith 2010) has shaped courtroom procedures, ensuring that conservative rights claims will be subjected to a level of scrutiny inside of the courtroom that they do not receive in more popular arenas. Litigation has proved effective for advocates of gay and lesbian rights in part because the courtroom environment allows them to move beyond simple sound bites, and more effectively challenge the claims of their opponents (Gerstmann 1999; Andersen 2005: 143-174). Requirements such as the need to support arguments with evidence; to subject them to dispassionate⁷ scrutiny from experts; and to show how these laws further a legitimate, secular, government interest, all work to unmask the discriminatory stereotypes which underlie much conservative rights discourse. As a result, this rights discourse actually functions more effectively outside of the courtroom than in it.

A focus on how conservative opponents of same-sex marriage use rights discourse in different institutional environments can tell us much about how rights function in American politics. Rights have traditionally been understood as a tool that the politically powerless can, in

⁷ I do not mean to suggest here that elite actors are immune from outside influences. There is, for example, a considerable amount of scholarly work which documents how judicial behavior has been shaped by ideological preferences (see for example Segal and Spaeth, 1993). However, judicial elites are typically *more* dispassionate in their analysis of issues and evidence than an average citizen considering arguments made in the context of a ballot measure campaign.

theory, use to challenge status quo hierarchies and bring about social change (Scheingold 1974). Scholars have given considerable attention to the study of how advocates for social change mobilize the law toward such ends (Scheingold 1974; Zemans 1983; Burstein 1991; McCann 1994; Engel & Munger 2003). But there is nothing inherently “liberal” about rights. They are, instead, indeterminate or “contingent” resources (Scheingold 1974: 7). Rights are given meaning by the parties who seek to use them and by the institutional contexts in which they are advanced. They are also frequently sites of conflict. Instead of just liberal groups mobilizing rights discourse to bring about social change, cultural conflicts typically feature competing rights claims, with both parties seeking to depict the opposing party’s conception of rights as illegitimate.

While a number of scholars have focused their attention on the growing conservative legal movement in America (Brown 2002; Heinz et al. 2003; Hacker 2005; Hatcher 2005; den Dulk 2006; 2008; Teles 2008; Southworth 2008), these scholars have tended to focus on actions which take place in a formal legal setting. In this paper, I expand on this foundation by exploring how conservatives have also sought to mobilize the law outside of these formal legal environments. Social movement organizers from both ends of the political spectrum often work to effect legal change without ever entering the courtroom, by using common understandings of the law to create frames of collective meaning that are favorable to their cause (Scheingold 1974; Engel 1984; Brigham 1987; 1996; McCann 1994; Ewick & Silbey 1998; Engel & Munger 2003; Haltom & McCann 2004; Dudas 2008; Siegel and Greenhouse 2010). Adopting this rights discourse creates a powerful sense of purpose and legitimacy for activists, allowing movement organizers to effectively mobilize supporters around a common identity of themselves as an aggrieved group. The results of this study indicate that conservative opponents of same-sex

marriage have been able to use rights in this way much more effectively in cultural conflicts that occur outside of the courtroom than in it. This finding is counterintuitive, given that the language of rights would seem to be well-suited for a legal environment.

I begin my analysis by outlining the data and methodology used for this study. I then present evidence from the same-sex marriage debates in California and Maine. Each of these case studies explores how these debates have been shaped by different institutional environments. In California, I compare and contrast the 2008 Proposition 8 campaign with the *Perry v. Schwarzenegger* trial (N.D. Cal. 2010). In Maine, I examine the passage of LD 1020 and the 2009 Question 1 Campaign. I find that conservative rights discourse featured prominently in both the Proposition 8 and Question 1 ballot measure campaigns. During both campaigns, conservatives used rights discourse to mobilize opposition to same-sex marriage by constructing an image of themselves as responsible citizens standing up for fundamental rights, and constructing gays and lesbians as deviant others advancing “excessive” and “unnecessary” rights claims. But opponents of same-sex marriage used rights discourse more infrequently when debating this issue in the courtroom and the state legislature. Conservative rights discourse had little impact on the debate over LD1020 because elected officials are encouraged to make decisions based on self-interested goals such as winning re-election (Mayhew 1974), not on notions of fundamental rights. During the *Perry v. Schwarzenegger* trial (N.D. Cal 2009) this rights discourse actually became a liability for conservatives as the discriminatory stereotypes which underlie these arguments were exposed under the scrutiny of more dispassionate judicial actors.

Data and Methods

This study utilizes interpretive textual analysis as a means of understanding the conservative response to same-sex marriage.⁸ Texts are used as the unit of analysis throughout the project. By “texts” I mean anything that has been written down or recorded in some way. This includes, for example, speeches that have been transcribed and made available to the public; amicus curiae briefs submitted in court cases; documents made available on organization websites; statements made before a legislative body; and television advertisements that have been used in statewide ballot measure campaigns.

I have chosen to use written texts as opposed to other forms of data, such as interviews, for both theoretical and practical reasons. This project is focused on understanding the implications of the rights discourse of conservative activists. Understanding these implications requires the researcher to focus on the text itself rather than attempting to determine the intentions of the author. This is because as soon as a speaker has finished speaking (or writing), she loses control of the meaning of her words, and the audience is free to interpret them however they see fit, regardless of intentions. Thus, when interpreting the meaning of a text it is more important to look to the text itself than it is to consider the motivations of the author who wrote it (Ricouer 1973: 113; Rabinow & Sullivan 1988: 13). This approach has practical benefits as well. Most anti-same-sex marriage activists are members of the Religious Right. These organizations tend to be selective about who they will agree talk to, and are often skeptical of the intentions of academic researchers who wish to interview them. The fact that same-sex marriage is an ongoing issue has made conservative activists even more reticent to discuss it publicly.

⁸ This project is theoretically and methodologically informed by interpretive social science. Scholarship that is oriented by an interpretive epistemology begins with the assumption that the meaning we give to the world is necessarily mediated by cultural and linguistic understandings and normative assumptions; and attempts to understand how this reality is socially constructed (McCann 1996: 463; Hawkesworth 2005: 31; Yanow 2005: 75).

This paper uses a comparative case study approach, which focuses on the same-sex marriage debates in California and Maine.⁹ California and Maine were selected for this study because both states have debated this issue in a wide variety of different institutional settings. In both states, proponents of marriage equality have legalized same-sex marriage through an elite-centered institution (the courts in California, the state legislature in Maine), and have then had the law overturned as a result of a popular ballot measure campaign.¹⁰ Thus, focusing on California and Maine provides a unique opportunity to analyze how institutional frameworks have impacted the way opponents of same-sex marriage think and talk about their cause, while holding other factors such as region, culture, and time-period constant.

Proposition 8

The Proposition 8 campaign was launched shortly after the California Supreme Court legalized same-sex marriage in 2008 (*In Re Marriage Cases*).¹¹ The measure sought to overturn the Court's decision by ratifying a constitutional amendment defining marriage as between one man and one woman. It was sponsored by the Protect Marriage Coalition—a loose alliance of conservative churches and political organizations—and directed by Schubert and Flint Public

⁹ Case studies were used for this project because meaning-construction is a complex, indeterminate, mutually constitutive, and hotly contested process. The complex nature of this process frustrates attempts to isolate the impact of individual variables, requiring that scholars instead explore how social, legal, and cultural norms work together to shape our understanding of the world (McCann 1996: 463; Rabinow & Sullivan 1988: 14). To account for this, I take a holistic approach; exploring debates over same-sex marriage by situating arguments in their proper historical, theoretical, and institutional contexts. Since all interpretations are necessarily partial and incomplete (McCann 1994: 14-16), I conduct multiple comparative case studies in order to ensure that my findings conform to rigorous scholarly standards.

¹⁰ Maine later legalized same-sex marriage as the result of a second ballot measure campaign in 2012.

¹¹ Proposition 8 was actually qualified for the ballot as a pre-emptive measure one month prior to the *In Re Marriage Cases* decision. The Court's decision changed Proposition 8 from an initiative that would have merely re-enforced the status quo, to one that would take newly won marriage rights away from same-sex couples. In order to reflect this change, then Attorney General Jerry Brown changed the title of the initiative from "Limit on Marriage" to "Eliminates Rights of Same-Sex Couples to Marry" (Ainsworth 2008). The move sparked outrage from the Yes on 8 Campaign, which thought the new title was prejudicial (Contra Costa Times 2008).

Affairs— a public relations firm based in Sacramento California. Initially, the measure seemed destined to fail; early polling data showed Proposition 8 trailing amongst likely voters by as much as 17 points (Swift 2008). In order to overcome this deficit, proponents of Proposition 8 had to develop a message that would resonate beyond their Evangelical Christian base and connect with the more secular majority of California voters. The feedback they received from focus groups, surveys, and field polls convinced campaign organizers that, to appeal to these voters, they had to make them believe that allowing same-sex marriage to stand would have tangible consequences on their lives (Schubert & Flint 2009: 45). To do this, the campaign sought to frame opposition to same-sex marriage as necessary for “protecting children.”¹²

The argument that legalizing same-sex marriage would infringe on a parent’s right to “protect” their children from being taught about the subject in school became the defining issue of the Yes on 8 Campaign.¹³ The discourse of parental rights was sometimes used explicitly, and at other times made implicitly. Campaign posters read simply, “Yes on 8: Restoring Marriage and Protecting California Children” (ProtectMarriage.com 2008c). Supporters of Proposition 8 argued that if same-sex marriage were legalized, teachers would be compelled to teach students about it, regardless of the wishes of parents.¹⁴ A typical example of this argument appeared in the Official California Voters Guide:

¹² The decision to use the parental rights argument during the campaign was motivated in part by instrumental concerns, but that does not mean that these arguments do not represent sincerely held beliefs. Scholars who study the motivations of those who take up conservative cultural causes find that these individuals are motivated by a genuine belief in the worthiness of their cause (den Dulk 2006; 2008; Brown 2002; Hacker 2005; Southworth 2008).

¹³ While the decision to make the argument that same-sex marriage violates a parent’s right to control their child’s education the focal point of the Proposition 8 campaign was novel, these claims rely on the same implicit logic that gays and lesbians represent “threats” to children, which has been a mainstay of anti gay discourse since at least the 1970s (Fejes 2008).

¹⁴ Under California law, schools are required to talk about marriage, but only if they decide to teach sex education. Local school boards decide whether or not individual schools will teach sex education. Schools that choose to do so are required to disclose exactly what they are teaching students to parents, and parents have the right to exclude their child from those classes if they desire (California Department of Education, 2011).

If the gay marriage ruling is not overturned, TEACHERS COULD BE REQUIRED to teach young children there is *no difference* between gay marriage and traditional marriage. We should not accept a court decision that may result in public schools teaching our kids that gay marriage is okay. That is an issue for parents to discuss with their children according to their own values and beliefs. *It shouldn't be forced on us against our will...* while gays have the right to their private lives, *they do not have the right to redefine marriage* for everyone else. (Prentice et al. 2008)^{15 16}

A version of this argument also appeared in each of the Yes on 8 Campaign's television advertisements (ProtectMarriage.com 2008a; 2008b; 2008d; 2008e; 2008f). The campaign's initial advertisement entitled, "Whether you Like it or Not" featured a clip from San Francisco mayor Gavin Newsom's 2008 press conference reacting to the California Supreme Court's *In Re Marriage Cases* decision. In the clip, Newsome appears to be taunting opponents of same-sex marriage when he says, "...this door's wide open now. It's going to happen, whether you like it or not." The advertisement repeats this sound bite over and over in order to make the point that supporters of marriage equality are forcing acceptance of same-sex marriage on Californians against their will (ProtectMarriage.com, 2008d). The advertisement concludes by stating that since acceptance of gay marriage is now "mandatory" in California, "...people could be sued over personal beliefs, churches could lose tax exempt status, and gay marriage could be taught in public schools" (ProtectMarriage.com 2008d). Another advertisement, entitled "Finally the Truth," raised similar concerns. In this advertisement, foreboding music plays in the background as a narrator describes how a group of first graders in a California public school were taken to the wedding of their lesbian teacher as part of a "teachable moment." The advertisement concludes by stating that California law would require teachers to teach about same-sex marriage

¹⁵ The Yes on 8 Campaign had originally written that teachers "will" be required to teach same-sex marriage if Proposition 8 passed. The California Superior Court found the wording to be misleading, however, and insisted that the word "will" be changed to "could" (Egelko 2008).

¹⁶ Quotes used in this paper are transcribed exactly as they originally appeared. All emphasis is in the original text.

if it were to be legalized, and parents would have no right to opt-out of such instruction (ProtectMarriage.com 2008e).

This approach appeared to be effective. California voters approved Proposition 8 by a narrow margin, 52% to 48%. Exit polling data showed that the education issue was decisive for many voters who supported the measure (Garrison et al. 2008). According to Schubert and Flint, “[the opposition’s] failure to respond to the ‘consequences’ message (especially the education message) in a timely fashion ultimately led to their downfall” (Schubert & Flint 2009: 46).

In addition to having instrumental impact on the outcome of the campaign, this discourse also had constitutive impact on the identities of both conservative activists and gays and lesbians. Framing their opposition using the language of rights provided considerable legitimacy for opponents of same-sex marriage. Such rights discourse empowers individuals, enabling them to claim an identity for themselves as virtuous American citizens (Passevant 2002; Dudas 2008). Conservatives used this rights discourse to construct an image of themselves as an embattled minority group heroically standing up for their own civil rights, rather than as a recalcitrant majority stubbornly arguing against the rights of gays and lesbians. As one supporter argued during the campaign:

...The marriage controversy has been contaminated by the language of rights. We must remember there are other groups and other people who also have their own rights besides gays. We have to think about children, their right to be raised by a mother and a father. We have to think about religious groups that believe that marriage is an institution established by God who are right now are [sic] having their rights violated by the supposed rights of the gay portion of our society. (Miranda 2008: 53)

These views were echoed by other supporters as well. During the campaign, Jim Garlow, a pastor and vocal supporter of Proposition 8, argued that:

Rights have been crushed under every time same-sex marriage is legal [sic]. Some pastors have been threatened with jail. Many have been muzzled and silenced. Churches

have been threatened and intimidated and parents... and business persons as well... This is ultimately really not about marriage and homosexuality at its core. At its core is [sic] they have found a loophole hiding under the guise of civil rights by which they can put underfoot and crush underfoot the rights of every person who has a Biblical worldview. That is what is at stake. (Garlow, 2008, 45-46)

Adopting such a perspective personalizes opposition to same-sex marriage; transforming it from a fight to protect the somewhat abstract institution of marriage to a personal defense of one's individual rights. Using the discourse of rights in this way causes opponents of same-sex marriage to see themselves as "cultural warriors" fighting to preserve fundamental rights and values which are threatened by the "excessive" and "unnecessary" rights claims of gays and lesbians. According to this logic, rights are a zero-sum game in which demands for new rights necessarily come at the expense of existing ones. This understanding creates an inversion process, whereby gays and lesbians become the oppressors seeking to infringe on individual rights and conservatives become victims of oppression (Goldberg-Hiller & Milner 2003).

Opponents of same-sex marriage cultivated an image of themselves as victims of oppression throughout the Proposition 8 campaign. A number of the Yes on 8 Campaign's advertisements featured the story of Robb and Robin Wirthlin, a Massachusetts couple who complained that their son had been taught about same-sex marriage against their wishes while attending public school in 2006. The Wirthlins, along with David and Tonia Parker, filed suit in federal court arguing that allowing teachers to teach their children about same-sex marriage was an unconstitutional violation of their religious liberty. The court rejected their claim, however, finding that, "...exposure to ideas through the required reading of books [does] not constitute a constitutionally significant burden on the plaintiffs' free exercise of religion" (*Parker v. Hurley*, 1st Cir. 2008: 105). While the court rejected the Wirthlins' rights claims, this ruling did not dampen their belief that same-sex marriage infringes on their parental rights. In one television

advertisement produced by the Proposition 8 campaign, entitled “Everything to do With Schools,” the Wirthlins urged voters to help protect parental rights by voting “yes on 8.” In the advertisement, they expressed frustration with the court’s decision, stating that, “...we tried to stop public schools from teaching children about gay marriage but the Courts said we had no right to object or pull him out of class” (ProtectMarriage.com 2008b).

Framing their opposition to same-sex marriage using the discourse of fundamental rights caused the Wirthlins to see themselves as victims of intolerance. In another video produced for the Yes on 8 Campaign they reflected on the incident involving their son:

No longer is it ok to disagree... if you disagree with a particular lifestyle or behavior you are now wrong, you are now bigoted. It’s no longer a difference of opinion you are wrong... The tolerance that the gay community cries out for is not demonstrated to people who have differing points of view. There is no tolerance. The hate, the disparaging remarks, the hostility that we faced were so astonishing. (ProtectMarriage.com 2008g)

The Wirthlins were not the only ones who felt this way. During the campaign, Yes on 8 released a number of news reports detailing “verbal and physical assaults” made against members of the campaign. One article described how a supporter of Proposition 8 was “assaulted for expressing his opposition to same-sex marriage” and stated that, “...the attack shows that their opponents are not as tolerant and open-minded as they would like voters to believe. It’s outrageous that the No campaign calls themselves the voice of tolerance and moderation and wants people to feel bad for supporting Prop. 8... Clearly the man who attacked Jose is intolerant of those who support traditional marriage” (White & Brown 2008). Depicting themselves as “the real” victims of intolerance helped mobilize opposition to same-sex marriage by enabling proponents of Proposition 8 to see themselves as martyrs for a worthy cause.

In addition to constructing opponents as victims, the discourse of parental rights also constructs an image of gays and lesbians as deviant. The argument that parents should have the right to protect their children from being taught about same-sex marriage in schools rests on an implicit assumption that same-sex marriage is obscene and that gays and lesbians are sinful and threatening. The argument that gays and lesbians “threaten children” has been a longstanding refrain for anti-gay activists (Fejes 2008). When supporters of gay and lesbian rights succeeded in passing local gay rights ordinances in a handful of American cities during the 1970s, conservatives responded by working to repeal those laws through popular referendums. Their campaign was led by Anita Bryant and her organization Save Our Children, Inc. Bryant and her supporters argued that gay rights ordinances needed be repealed in order to prevent “homosexuals” from attempting to “recruit” children into their destructive lifestyle. During her initial campaign against Miami Dade County’s gay rights ordinance in 1977, Bryant argued that:

No one has a human right to corrupt our children. Prostitutes, pimps and drug pushers, like homosexuals have civil rights, too, but they do not have the right to influence our children to choose their way of life. Before I yield to this insidious attack on God and his laws and on parents and their rights to protect their children, I will lead such a crusade to stop it as this country has not seen before (as quoted in Clendinen & Nagourney 1999: 292).

While many conservative opponents of same-sex marriage continue to use such overtly religious and discriminatory language in private, this discourse is typically toned-down for ballot measure campaigns, which must appeal to a broader, more secular audience (Herman 1997: 115, 144). But while the public discourse of opponents of same-sex marriage may be more moderate, the implicit assumption that gays and lesbians want to corrupt children remains a central concern. The parental rights argument used during the Yes on 8 Campaign resonated with voters, in part, because it was able to tap into a palpable fear that legalizing same-sex marriage would make

children more tolerant of gays and lesbians and thus increase the likelihood that they might “choose” to become gay.¹⁷

One television advertisement used by the Yes on 8 Campaign, entitled, “It’s Already Happened” hints at this fear. In the advertisement, a little girl shows her mother a book she read in school called *The King and the King*, and says “I learned that a prince can marry a prince and I can marry a princess” (ProtectMarriage.com 2008a). The child puts particular emphasis on the second half of the sentence, “*I can marry a princess*,” suggesting that the real fear is not that children will learn about same-sex marriage in school, but that they may actually become gay themselves as a result. The advertisement concludes with the parent flashing her child a worried look and then having a stern conversation with her, the implication being that having a child marry someone of the same gender is an occurrence most parents would want to avoid. Another advertisement entitled “Have you Thought About it” makes a similar appeal. The advertisement suggests that legalizing same-sex marriage will harm children, concluding with a little girl innocently looking into the camera and asking, “...have you thought about what same-sex marriage means... to me?” (ProtectMarriage.com 2008f). If stated explicitly, the moral assumptions that undergird such arguments would appear abhorrent and repulsive to many moderate voters, who consider themselves to be otherwise tolerant people. But when masked by the secular discourse of rights, these underlying stereotypes go unnoticed, and as a result, the arguments that they support become more palatable. This discourse is particularly effective in the context of a ballot measure campaign, because most voters do not have the time or inclination to expose these arguments to the kind of scrutiny required to unmask the underlying

¹⁷ These fears suggest that members of “in groups” are motivated to demonize members of “out groups” not because they find their lifestyle to be revolting, but because they find it secretly attractive. A similar longing for what was perceived to be a more liberating and passionate lifestyle motivated earlier depictions of Indians as lazy and undeserving others as well (Slotkin 1973).

discriminatory stereotypes. However, when the debate over same-sex marriage moves to a courtroom environment, this discourse receives more scrutiny and, thus, becomes a liability for conservatives.

***Perry v. Schwarzenegger* (N.D. Cal. 2010)**

Six months after the passage of Proposition 8, the American Foundation for Equal Rights (AFER) brought suit in federal court challenging the law as a violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses. Their case, which would become *Perry v. Schwarzenegger*, made headlines both because it represented the first major federal challenge to prohibitions on same-sex marriage, and because it was led by two well-known attorneys from different ends of the political spectrum: Theodore Olson and David Boies. Since the State of California, represented by Governor Arnold Schwarzenegger, refused to defend the law, the sponsors of Proposition 8 were allowed to intervene as defendants in the case.¹⁸ This group was represented in court by the conservative legal organization Alliance Defense Fund (ADF).

Though the same group responsible for engineering the Proposition 8 campaign would also be responsible for defending the law, the arguments used to frame their opposition to same-sex marriage in court were considerably different from those used during the ballot measure campaign. The defense began its case by arguing that the court should summarily dismiss the suit. It justified this position first by arguing that *Baker v. Nelson* (1972), a case in which the Minnesota Supreme Court ruled that same-sex marriage was not a fundamental right, provided a

¹⁸ A brief crafted by Schwarzenegger's attorney stated that the case posed "interesting constitutional questions" and that the State would "like to remain neutral on the issue" (Mennemeier 2009). A separate brief filed by Jerry Brown, who was the State's Attorney General at the time, actually argued that Proposition 8 should be found unconstitutional (Brown 2009).

binding precedent (ADF 2009a: 13-18; 2009b: 2; 2010: 36).¹⁹ They also argued that the case should be dismissed because the court lacked the jurisdiction to decide an issue with such important moral and political implications. They contended that such questions were more appropriately decided by a legislative body or a statewide ballot measure (Cooper 2010a: 70-71; 2010b; ADF 2009a: 52-56; 2009b: 7-8). In making this argument, the defense relied heavily on the case of *Washington v. Glucksberg* (1997), in which the Supreme Court unanimously declined to recognize a fundamental right to physician assisted suicide, because it thought it was an issue more appropriately decided “by the political process.”²⁰

The substance of the defense’s case focused on the argument that the state had a vital government interest in prohibiting same-sex marriage because the “traditional” family structure provides the best environment for the raising of children (ADF 2009a: 59-71; 2009b: 10; Cooper 2010a; 2010b; Blankenhorn 2010; Thompson 2010a). It argued that expanding the definition of marriage to include same-sex couples would “deinstitutionalize” marriage by treating “alternative” family structures the same as traditional opposite-sex ones. This would weaken the power of marriage as an institution designed to create stable two-parent family environments and, ultimately, lead to more children being raised outside of this structure (Cooper 2010a; 2010b; Blankenhorn 2010). These arguments rest on an assumption that gays and lesbians are unable to provide the same kind of stable family environment that opposite-sex couples can. Marriage is about disciplining one’s sexual urges and committing to a long-term, monogamous sexual relationship. Conservatives who oppose same-sex marriage do so in part

¹⁹ The case was automatically appealed to the U.S. Supreme Court, but the Court declined to consider it “for want of a substantial federal question.” This summary dismissal technically makes the Minnesota Supreme Court’s decision binding precedent. However, some have argued that summary dismissals should not be given the same precedential weight as a typical decision, and should instead be evaluated more as a denial of cert than as a decision on the merits (Harvard Law Review Board 1980: 1274).

²⁰ Judge Vaughn Walker was ultimately unconvinced by this argument. He found that since marriage is a fundamental right (*Loving v. Virginia*, 1967) the Court has a responsibility to decide this issue.

because they believe that gays and lesbians lack the ability to discipline themselves in this way.²¹ This speaks to a concept of citizenship as a product of discipline, in which rights are only given to individuals who prove they are capable of controlling their sexual urges (Merry 2000: 221-257). Many conservatives believe that gays and lesbians can be justifiably denied the right to marry because they are, by nature, irresponsible, dangerous, and deviant (Sprigg & Dailey 2004; Sprigg 2007). During the trial, the defense repeatedly argued that a person's sexual orientation is not an immutable characteristic (ADF 2009b: 5; Nielson 2010). This suggests that gays and lesbians can earn marriage rights by disciplining themselves, suppressing their sexual urges, and becoming straight.²²

The defense relied primarily on the testimony of David Blankenhorn to provide support for these arguments.²³ Blankenhorn is the author of two books on marriage: *Fatherless America* (1996) and *The Future of Marriage* (2007). He is also the President of the Institute for American Values, a socially conservative "think tank." Blankenhorn testified that legalizing same-sex marriage would deinstitutionalize marriage, causing fewer children to be raised in stable family units with two biological parents (Blankenhorn 2010). However, during *voire dire*, the plaintiffs argued that Blankenhorn should not be considered an "expert" because he had no degree in a related field, had never taught a College or University course on the topic, had never published any peer-reviewed work, and had never conducted any empirical research on the subject (Boies

²¹ Many on the left also oppose same-sex marriage because they believe that gays and lesbians should not be forced to discipline themselves in this way in order to earn the acceptance and rights which are given to married couples. They believe that forcing gays and lesbians conform to a "heterosexual" lifestyle unfairly brands those who choose not get married as deviant. (Warner 1999; Acey et al. 2006).

²² The idea that sexual orientation is a "choice" is fundamental to the worldview of many conservatives who believe it is their mission to help gay individuals overcome their "sin" (Sprigg, 2007). Many Christian organizations offer "reparative" or "conversion" therapy, which is designed to help gays and lesbians manage their "sexual urges." The Church of Latter Day Saints, for example, does not even recognize the term "gay," instead referring to gays and lesbians as "those who struggle with same-gender attraction" (Holland 2007).

²³ Blankenhorn has since renounced his opposition to same-sex marriage and is now working to create a coalition of gay and straight people with a mutual interest in strengthening the institution of marriage (Oppenheimer, 2013).

2010).²⁴ His opinion was ultimately given no consideration by the court because Judge Vaughn Walker found that he failed to meet the definition of an expert on marriage and that he had contradicted much of his own testimony during cross examination (*Perry v. Schwarzenegger*, N.D. Cal 2010: 945-950). In contrast to the defense, the plaintiffs called nine expert witnesses from top academic institutions to testify in support of their positions. Three of these experts refuted Blankenhorn's testimony directly, testifying that he had misrepresented the existing literature and that there was no evidence to suggest that children who are raised in same-sex households are in any way worse-off than those raised by opposite-sex couples (Peplau 2010; Lamb 2010; Badgett 2010).

While the Protect Marriage Coalition had made the parental rights argument the focal point of the Proposition 8 campaign, the defense attempted to downplay this argument during the trial. It only mentioned the issue of parental rights once as part of a long list of "potential state interests" provided in its trial brief (ADF 2009b: 7). The defense worked hard to keep arguments used during the campaign out of the courtroom altogether. It argued that determining the motivations of voters who voted for a ballot measure was an "inappropriate question for judicial inquiry" (Cooper 2010c: 17); and filed for, and eventually received, a protective order restricting the plaintiff's access to internal campaign documents (ADF 2009c). This seemed to be a calculated decision designed to avoid discussing some of the implicit moral assumptions that undergird the parental rights argument. The shift in tactics did not go unnoticed by the plaintiffs, however. In his closing argument, Olson argued:

It is revealing, it seems to me, that the deinstitutionalization message is quite different from the thrust of the proponents' Yes on 8 election campaign. That, in the words they

²⁴ Blankenhorn has an M.A. in Comparative Social History from the University of Warwick. Both of his books were published through his organization, neither was subjected to the peer review process. Blankenhorn based his conclusions on his own reading of the existing scholarly literature, and discussions with experts in the field.

put into the hands of all California voters, focused heavily on: Protect our children from somehow learning that gay marriage is okay... That was not a very subtle theme that there is something wrong, sinister or unusual about gays, that gays and their relationship are not okay, and decidedly not suitable for children, but that children might think it was okay if they learned about gays getting married like normal people. For obvious reasons, the "gays are not okay" message was largely abandoned during the trial in favor of the procreation and deinstitutionalization themes. (Olson 2010: 2964)

Despite the defense's best efforts to shift the debate away from the issue of parental rights and onto the issue of procreation during the trial, arguments made during the Proposition 8 campaign ultimately could not be kept out of the courtroom. The plaintiffs made the parental rights argument used by the Yes on 8 Campaign a focal point of their case. They used expert testimony to unpack the discriminatory stereotypes embedded within these arguments, and showed that Proposition 8 was not motivated by a legitimate government interest, but by a discriminatory intent. The plaintiffs called a number of expert witnesses who testified that the notion that same-sex marriage should not be taught in public schools using age-appropriate methods such as children's books and fairy tales, creates the impression that being gay is dirty, deviant, and immoral behavior not fit to be discussed around children, and perpetuates the idea that gays and lesbians are dangerous (Chauncey 2010; Meyer 2010; Segura 2010). Prohibiting the discussion of same-sex marriage in the classroom stigmatizes gays and lesbians by creating a clear double-standard that says children cannot be taught about same-sex marriage, but can be exposed to traditional definitions of marriage, which are frequently depicted in books and fairy tales read to children of all ages, and rarely raise objections from parents (Chauncey 2010). Experts also testified that advertisements used during the campaign implied that exposure to same-sex marriage would encourage more children to become gay or lesbian themselves and that parents should fear such an occurrence (Segura 2010). The defense countered by arguing that advertisements used during the campaign which stated a need to "protect children" were not

motivated by animosity towards gays and lesbians, but instead a sincere and legitimate desire to allow parents to control their children's moral education (Thompson 2010b; Raum 2010). It never attempted to deny the moral implications of these arguments, however.

The defense's inability to keep the parental rights argument out of the courtroom shows that courts are not closed institutions that can be studied in isolation, but instead that they are frequently influenced by activities which take place outside of their walls. Framing opposition to same-sex marriage using the discourse of parental rights was an effective strategy for conservatives during the Yes on 8 Campaign in part because it allowed them to expand the scope of the conflict and draw in more moderate, secular voters who may not have voted in favor of Proposition 8 otherwise. But expanding the "scope of the conflict" can have negative consequences as well. According to Schattschneider, "so great is the change in the nature of any conflict likely to be as a consequence of the widening involvement of people in it that the original participants are apt to lose control of the conflict altogether" (Schattschneider 1960: 3). Once an argument has been advanced, its author loses control of it, resulting in unpredictable and often negative consequences for its proponents. While the parental rights argument helped conservatives to pass Proposition 8, it became a serious liability for them once this debate moved to the courtroom environment.

Judge Walker's decision was a resounding victory for the plaintiffs. He found that the defense failed to support its assertions with credible evidence. In light of the defense's deficiencies, and the overwhelming amount of evidence presented by the plaintiffs, Walker concluded that he must reject the defense's claim that Proposition 8 advances an important state interest, finding instead that the law was motivated by an illegitimate discriminatory intent (*Perry v. Schwarzenegger*, N.D. Cal 2010). This decision was appealed to the 9th Circuit Court

of Appeals. The Court upheld Walker's ruling that marriage is a fundamental right that cannot be denied to individuals based on sexual orientation; but it limited the scope of the ruling to the state of California (*Perry v. Brown*, 9th Circ. 2012). Conservatives appealed the decision to the Supreme Court, which has granted review. The case, now *Hollingsworth v. Perry*, is scheduled to be heard in the upcoming term.

LD 1020

New England has long been at the forefront of the push for marriage equality. Vermont became the first state to allow same-sex couples to enter into civil unions with rights equivalent to marriage in 2000 (*Baker v. Vermont*, Vt 1999), and Massachusetts became the first state to legalize same-sex marriage three years later (*Goodridge v. Dept. of Public Health*, Mass 2003). In 2008, Gay and Lesbian Advocates and Defenders (GLAD) sought to honor the five year anniversary of the *Goodridge* decision by launching the "Six by Twelve Campaign" to legalize same-sex marriage in each of the six New England states by 2012 (GLAD 2008).²⁵ Efforts to legalize same-sex marriage in Maine gained traction after the 2008 election in which Democrats won five seats in Maine's House of Representatives, and two seats in the State Senate. These gains gave the party relatively comfortable majorities of 95-55 in the House and 20-15 in the Senate (MacFarland 2008). In light of these victories, Democratic leadership decided the time was right to push for legislation legalizing same-sex marriage, and introduced LD 1020, "An Act to End Discrimination in Civil Marriage and Affirm Religious Liberty."

²⁵ The Six by Twelve campaign quickly yielded results. Vermont, Maine, and New Hampshire all signed legislation legalizing same sex marriage during a three month period in 2009. But the movement has seen some setbacks since then. Mainers repealed their marriage law in November of 2009, and attempts to pass legislation legalizing same-sex marriage in heavily Catholic Rhode Island have been thus far unsuccessful.

Opponents of marriage equality began organizing in opposition to LD 1020 immediately. Initial opposition to same-sex marriage in Maine was led by local religious leaders. Shortly after LD 1020 was introduced the most prominent religious leader in Maine, Bishop Richard Malone of the Roman Catholic Dioceses of Portland, denounced the push to extend marriage rights to same-sex couples, and announced that the church would be active in opposition to it.²⁶ Marc Mutty, Director of Public Policy for the Portland Dioceses, was chosen to chair “Stand for Marriage Maine,” the primary organization dedicated to opposing LD 1020. This organization was co-founded by Reverend Bob Emrich, an evangelical pastor who founded the “Maine Marriage Alliance,” an organization opposed to same-sex marriage; Emrich also directed the “Maine Jeremiah Project,” a coalition of protestant pastors dedicated to promoting a variety of socially conservative causes in the state.

Opponents of same-sex marriage realized that it was going to be difficult to prevent LD 1020 from being passed, given the large Democratic majorities in the state legislature. As a result, they launched a two-pronged strategy of opposing the bill, while at the same time preparing for a referendum campaign to repeal the legislation (should it pass). Leaders encouraged those citizens who opposed LD 1020 to write letters asking their representatives to vote against the bill. They recommended that citizens send a “simple statement” such as, “Please protect traditional marriage by voting ‘no’ on Senator Damon’s bill” (Maine Marriage Alliance 2009).²⁷ These organizations also worked behind the scenes to lobby legislative officials they thought may be susceptible to persuasion. At the same time, conservative leaders held rallies and began building a volunteer network in anticipation of a possible referendum campaign.

²⁶ More than 29% of Mainers identify as Catholic, making it the largest religious denomination in the state, with more than 200,000 devoted followers (Pew 2011).

²⁷ LD 1020 was sponsored by Senator Dennis Damon (D-Trenton).

State legislators who argued against LD 1020 echoed many of the same concerns raised by activists in previous campaigns against same-sex marriage. Most expressed fears that legalizing same-sex marriage would undermine the moral foundation of American society (Raye 2009: S-512-S-513; Westin 2009: S-515; Celli 2009: H-398-H-399; Bickford 2009: H-402; Briggs 2009: H-402; Thibodeau 2009: H-404; Chase 2009: H-406-H407; Curtis 2009: H-411). A few also raised concerns that the law would infringe on religious liberty or parental rights (Courtney 2009: S-516; Curtis 2009: H-411). During the House debate on LD 1020, Representative David Burns (R-Whiting) offered a speech that touched on many of these familiar themes:

... Marriage between one man and one woman is a basic building block of a strong society and we must keep it intact. Madam Speaker, I don't believe that this is about love and equality. I believe that it is in fact about recognition and the legitimization of habits and lifestyles of a tiny segment of our society for selfish and personal needs... we have already passed laws in this state to adequately protect civil rights and rightfully so. Most of us accept gay and lesbian people on their own personal merits, and enjoy and respect our relationships with them accordingly. I am no exception to that. What we do disdain [sic] is the destruction of the institution of marriage. That's what this bill is all about... Already there have been attacks on religious freedom in Massachusetts, New Mexico, New Jersey, California, Georgia, and Canada that I am aware of. Right here, where we live, there will be more of the same... Where will it stop? I promise you that it'll not stop here. This will have a far reaching and negative impact on our children, parents, education, religion and our economy. (Burns 2009: H-400-H-401)

Despite the efforts of the bill's opponents, the Senate narrowly ratified LD 1020 by a largely partisan vote of 20-15. One Democrat voted against the bill and one Republican voted for it. The House followed the Senate's lead and ratified the bill 89-58 (with 4 absent). Six Republicans voted for the legislation and twelve Democrats voted against it. Democratic Governor John Baldacci promptly signed the bill into law the next day.

Conservative rights discourse played a more muted role in the debate over LD 1020 than it has in other institutional environments. While rights discourse was utilized by opponents of LD 1020, it was not a major focal point, and both the constitutive and instrumental implications of this language were greatly diminished by the institutional norms and constraints present in the legislative environment. Instead, partisan concerns and a desire to win re-election had a much greater impact on whether or not legislative and executive officials supported same-sex marriage. These concerns are particularly prevalent in New England, where a tradition of strong political parties and a legacy of machine politics encourage party discipline (Lockard 1959; Doyle & Milburn 1981). Few legislative officials crossed party-lines during the debate over LD 1020, and those who did stated that they did so because they felt that it was what their constituents wanted, not out of a desire to protect fundamental rights. Senator Chris Rector (R-Knox), who voted for LD 1020, explained his vote as follows:

I've sought input from all and received literally thousands of constituent e-mails, phone calls, letters, postcards, and comments in public places. When asked, I've expressed my desire for as much input from my district as possible so I can effectively serve my role as Senator for that district... In the end the constituent responses I have received are overwhelmingly on one side of this issue and I believe my first responsibility is to reflect the views of the vast majority of my constituents. (Rector 2009: S-516)

Senator Troy Jackson (D-Aroostook), who voted against the bill, had a similar explanation for his vote. According to him, "I voted the way I did and I have to live with that. As the Senator from Knox, Senator Rector, said, he voted the way his constituents, a majority of them, did and I voted the way I thought the majority of my constituents did" (Jackson 2009: S-519). These quotes indicate that legislators take seriously the arguments of their constituents, and that it is possible to convince at least some of them to cross party-lines when considering the issue of same-sex marriage. However, it is not the content of the arguments offered by constituents

which seems to matter, but the volume of opinions on one side of the issue that is most likely to convince a legislative official.

Most of the arguments made by legislative officials during the debate over LD 1020 seemed to be meant more as a means of explaining their actions to voters than as attempts to convince other legislators to vote a certain way. Representative Doug Thomas (R-Ripley) bluntly expressed this sentiment, “I don't expect to change anyone's mind, so this is going to be short... But when future generations look back and wonder what happened to the great State of Maine, I want there to be no doubt where the Representative from Ripley stood. I stand against this proposal” (Thomas 2009: H-396). Representative Mark Eves (D-North Berwick) expressed a similar desire to have his views written into the historical record, “when history is read, I want to be on the record as supporting civil rights so that my grandchildren and great-grandchildren can know for certain that I was on the right side of history” (Eves 2009: H-403). Legislative officials in Maine were aware that same-sex marriage is a highly salient issue—one that many of their constituents have strong feelings about, and one that they would most likely have to answer for during their re-election campaigns. Representative Mike Thibodeau (R-Winterport) expressed this point when he rather ominously reminded House members that “each one of us will go back home to our communities and they'll know how we feel about this issue” (Thibodeau 2009: H-404).

Question 1

Stand for Marriage Maine gathered the necessary 55,000 signatures to qualify a measure seeking to repeal LD 1020 for the 2009 ballot in just four weeks. Proponents of “People’s Veto Question 1” modeled their strategy after the successful 2008 campaign to pass Proposition 8 in

California. They even hired Schubert and Flint Public Affairs, the same California-based public relations firm that had successfully engineered the passage of Proposition 8, to craft the campaign's message. As was the case in California, early polls showed the effort to repeal the law trailing, with 52% opposed and 43% in favor (Wickenheiser 2009). But proponents of Question 1 were able to overcome this early deficit: Mainers ultimately voted in favor of repealing LD 1020 by a margin of 53% to 47%.

The Question 1 Campaign in Maine focused primarily on the issue of parental rights, even re-using many of the same advertisements that had run in support of Proposition 8. One advertisement entitled "It's Already Happening" offered many of the standard arguments. It stated that, "Gay activists throughout the nation are pushing homosexual marriage across New England... They want gay friendly books in daycare facilities and to appoint gay advocates in every school building... Gay marriage will be taught in Maine schools unless we vote yes on Question 1" (Stand for Marriage Maine 2009e). In another advertisement entitled "Safe Schools" a narrator argues that "gay activist" teachers are trying to persuade young children to believe that same-sex marriage is acceptable, "...before they are old enough to have been convinced there is another way of looking at life." The advertisement concludes with the narrator stating, "Vote Yes on Question 1 to prevent homosexual marriage from being pushed on Maine students" (Stand for Marriage Maine 2009b). These advertisements suggest that efforts to legalize same-sex marriage are part of a larger plan to "indoctrinate" children into believing that being gay is normal, against the wishes of their parents. Arguments like these rest on the implicit assumption that parents should have the right to object to such instruction. Similar arguments were made elsewhere in the campaign as well (Stand for Marriage Maine 2009a; 2009c; 2009d; 2009f). These arguments resonated with a majority of voters by framing

opposition to same-sex marriage as necessary for protecting fundamental rights. They also tapped into fears that legalizing same-sex marriage would cause children to become more tolerant of gays and lesbians, increasing the likelihood that they may choose to become gay themselves.

Framing their opposition using the discourse of rights had constitutive impact on the identity of proponents of Question 1. Adopting this discourse caused conservatives to see themselves as a vulnerable population whose rights were under attack. Supporters of Question 1 often complained that signs and other campaign materials were being stolen or vandalized by their opposition, and that campaign workers were being harassed and threatened (Muty 2009a). These incidents were seen as evidence that conservatives were the true victims of intolerance and discrimination. In an interview with a columnist for the *Portland Press Herald*, Muty said that as a result of these acts of harassment and intimidation, “we feel like the minority that’s being discriminated against. We are being treated like pariahs everywhere we go” (as quoted in Nemitz 2009). In reality, these acts were, by proponents of Question 1’s own admission, isolated incidents, the acts of “fringe groups” and not the “organized opposition” (Nemitz 2009).²⁸ But, despite this reality, the perception of conservatives as victims persisted.

One incident involving Don Mendel, a high school guidance counselor and social worker in Maine, was seen by many as evidence that advocates of marriage equality sought to “silence” and “punish” those who expressed opposition to same-sex marriage. During the campaign, Mendel appeared in a Yes on 1 television advertisement where he argued that if Question 1 failed same-sex marriage would be taught in public schools (Stand for Marriage Maine 2009b). After the advertisement aired, the Maine Department of Professional and Financial Regulation

²⁸Most of the signs that disappeared were not actually stolen at all, but removed by the Department of Transportation because they had been placed in “restricted areas” (Adams 2009).

received a request that Mendel be stripped of his license to practice social work in the state.

While the Department never acted on the complaint, members of the Yes on 1 Campaign used the incident to stoke fears that opponents of same-sex marriage could be punished for their political views. According to Mutty:

It is ironic that those who claim tolerance as their highest value prove themselves to be so intolerant that they would go so far as to threaten a father's career and put his family's future at risk. This latest attack highlights the true agenda of those who demand that marriage be redefined... This threat to Don and his family's livelihood is proof that those who demand marriage be redefined seek to punish and silence those who disagree. (Mutty 2009b)

The incident was made into a radio advertisement produced by the Question 1 campaign which told Mendel's story and argued that if same-sex marriage were legalized those who disagree would be "silenced" (Stand for Marriage Maine 2009g).

Proponents of marriage equality attempted to counter the message of the Yes on 1 Campaign by using statements from legal experts and government officials to "debunk" their arguments. During the campaign, Maine's Attorney General Janet Mills issued a report which dismissed the same-sex marriage/education connection. She pointed out that Maine's education laws allow locally elected school boards to determine the exact content of each district's curricula and that there is no requirement that teachers teach students anything about marriage. She also pointed out that the law requires that parents be allowed to opt out of instruction that conflicts with sincerely held religious beliefs and that instruction on same-sex marriage would fall into that category (Mills 2009).

Proponents of Question 1 sought to discredit these statements by depicting government officials who offered support for LD 1020 as elite advocates of same-sex marriage offering "biased" analyses. They dismissed Mills' report as "...a shameless political ploy by supporters

of homosexual marriage” (Cover 2009b). Mutty argued that it, “...has not even a shred of [sic] pretense of independence or objectivity... It's a shame that Maine's top lawyer is using her good office for such a transparent political stunt” (Muttu 2009c). The campaign never disputed any of the facts of Mill’s report, or offered any substantive evidence to counter her arguments, however. In fact, Mutty himself later admitted to, and even expressed regret over, the Yes on 1 Campaign’s use of “hyperbole” with regard to the education issue. In one interview released after the campaign had concluded, Mutty noted that, “we use a lot of hyperbole and I think that's always dangerous... You know, we say things like 'Teachers will be forced to (teach same-sex marriage in schools)!’ Well, that's not a completely accurate statement and we all know it isn't, you know?” (as quoted in Nemitz 2011).

Despite these facts, the No on 1 Campaign was never able to effectively counter the rights claims advanced by its conservative opponents. The impact of these expert reports was muted by the fact that most average citizens did not have the time or inclination to read them. While the reports were discussed in a few local newspaper articles written for a more popular audience, these short articles merely included a few quotes from them juxtaposed with rebuttal arguments offered by the opposition (Cover 2009a; 2009b). They did not include much of the analysis or evidence offered by the experts to support their opinions. This format made the arguments look more like simple differences of opinion than factual statements. This resulted in a disconnect between what elites know to be true about an issue and how it is perceived by the general public (Haltom & McCann 2004).

Though opponents of Question 1 attempted to counter the parental rights claims advanced by the Yes on 1 Campaign at a factual level, the moral logic behind the argument that children must be protected from being taught about same-sex marriage in school went largely

uncontested. This strategy proved problematic because these arguments are not based on a dispassionate examination of the issue, but instead appeal to a particular notion of morality designed to generate a visceral, emotional response. Instead of disputing this moral logic, opponents of Question 1 actually gave credence to it by vehemently insisting that same-sex marriage would not be taught in schools—an argument which seems to imply that such an occurrence would, in fact, be a bad thing.

Conclusion

In this paper, I have explored how conservative opponents of same-sex marriage have used rights discourse to construct an identity of themselves as victims of oppression, and construct gays and lesbians as dangerous and deviant others. I have found that this process of identity construction has played out differently in different institutional environments. Conservative rights discourse has been much more prevalent, and much more effective, when used in the popular arena of a ballot measure campaign than it has been when used in the more elite centered environments of the courtroom or the state legislature. This debate has been structured by the different institutional norms and constraints present in these environments. Rights discourse functions well in the popular arena of a ballot measure campaign; it lends legitimacy to the conservative cause by masking underlying discriminatory stereotypes and framing opposition to same-sex marriage as necessary for protecting fundamental rights. This discourse has less of an impact in the legislative environment, where elected officials are encouraged to make decisions based on a narrow set of self interests, not on notions of fundamental rights. In the courtroom environment, this discourse can actually become a liability

for conservatives because the discriminatory stereotypes which underlie these arguments are frequently exposed under the scrutiny of more dispassionate judicial actors.

The results of this study show that conceptions of individual rights that have been advanced by conservative opponents of same-sex marriage have continued to thrive outside of the courtroom despite the fact that they have been dismissed by formal legal actors. My findings complicate conventional understandings of legal mobilization, which tend to preference the activities of judicial actors. Favorable legal decisions are often thought to aid movements for social change that take place outside of the courtroom by boosting morale, lending legitimacy to social causes, and leading members of social movements to begin thinking and talking about their plight in terms of fundamental rights (Scheingold 1974; McCann 1994; Engel and Munger 2003). Unfavorable legal decisions are often thought to undermine these movements by repudiating existing conceptions of the law and killing alternative legal meanings that develop outside of the courtroom (Cover 1983). But, "...the deployment of legal claims is not always a one-way process in which government officials impose their vision of law on a passive population (Lovell 2006: 285). Conservatives have always treated formal legal actors with a great deal of skepticism, particularly with regard to what they consider to be moral or cultural issues. This approach seems to inoculate them against unfavorable judicial decisions, which are easily dismissed as "judicial activism," allowing their alternative legal conceptions to continue to flourish outside of the courtroom.

The results of the 2012 elections suggest that putting marriage equality on the ballot no longer guarantees victory for opponents of same-sex marriage. While one state (North Carolina) did ratify a constitutional amendment defining marriage as between one man and one woman in 2012, three states (Washington, Maryland, and Minnesota) rejected anti-same-sex marriage

ballot measures, and one state (Maine) ratified an initiative which actually legalized same-sex marriage. While these outcomes may seem promising for proponents of marriage equality, there is a danger in reading too much into the results of one election. Exit polling data shows that those who saw marriage equality as a “rights-based issue” were substantially more likely to vote against same-sex marriage than those who did not (Hatalsky and Trumble, 2012). This suggests that using rights discourse to oppose same-sex marriage in ballot measure campaigns remains an effective strategy for conservatives. These patterns seem likely to persist in the future.

Proponents of marriage equality have relied on the legislative process to legalize same-sex marriage in New York, Washington, and Maryland, and have used litigation to challenge same-sex marriage in two high profile cases set to come before the Supreme Court this term:

Hollingsworth v. Perry and *United States v. Windsor*. Conservatives continue to oppose these efforts by placing the issue of same-sex marriage before voters in statewide ballot measure campaigns. This suggests that both proponents and opponents of same-sex marriage understand the institutional dynamics of this debate.

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