

An Institutionalist Love Story: Marriage Equality in Washington State

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Abstract

Through an analysis of Washington State's marriage equality political and legal history, starting with *Singer v. Hara*, moving through federal and state developments and ending with Referendum 74, this paper argues that legal mobilization, regardless of whether it ultimately resulted in legal victories, had both direct and indirect effects on cause actors' attempts at social change. Further, it shows that the dichotomy often imposed on social movements- that of pursuing litigation or more democratic venues for social change- is a false dichotomy since legal and political mobilization build off each other creating new basis for legal claims and new constituencies, heightening expectations, raising issue salience, opening up new opportunities, creating institutional and public support for and de-radicalizing the change being advocated.

I. "WOULD IT KILL THEM TO BE HAPPY FOR US?"

Relaying a shared moment with a gay couple in 1997, Dan Savage, a gay man and writer for a weekly newspaper in Seattle, wonders why couldn't straight couples be happy for gay couples. He tells the story of being at Kerry Park, a park offering some of the best views of Seattle, when newlyweds were taking their wedding pictures.

As the bride and groom stood holding each other...the small crowd in the park began to applaud... People shouted, "Congratulations," as the newlywed couple climbed back into their limo. I was standing on the sidewalk, at the edge of the park, near a couple of guys that I knew... "We are always happy for them," he said. "Would it kill them to be happy for us?" (Savage, 2013 191)

This moment embodies the struggle for marriage equality in Washington State, as well as in the rest of the country. Gay and lesbian couples are fighting for the right to get married. They are fighting for the more than 1,000 federal benefits associated with the institution of marriage. However, it isn't just the right to marry that gay and lesbian couples fight for but also a broader social and cultural acceptance of them and their families. They seek social change through legal change. They want both the legal right to marry and the social expectation that straight couples be "happy for them." The tension, interaction and exchange between legal and social change is what this paper seeks to demonstrate, clarify and analyze.

The interaction between legal and social change has been the subject of heated debates in the past several decades. From Stuart Scheingold's *The Politics of Rights* and its discussion of law as both symbolic and ideological but also as a possible catalyst for political mobilization; to Gerald Rosenberg's *The Hollow Hope* and its argument that courts cannot bring about social change through favorable judicial decisions; to Michael McCann's *Rights at Work* and its focus on the indirect effects of legal mobilization; the debate has evolved from focusing on the value of rights discourses, to the direct effects of litigation, to finally both the direct and indirect effects of legal mobilization, broadly defined.

With few exceptions, the focus has been on legal victories- legal change- and whether they directly or indirectly cause social change. Further, the focus is on litigation: the arguments made in the case, the judicial decision and the policy and social changes stemming (or not) from that judicial decision.¹ The focus has been on whether *Brown* led to desegregated Southern schools or whether women have gained and retained the right to choose to have an abortion following *Roe*. Scholars have paid little attention to unsuccessful litigation- judicial decisions where the court decided against legal change. The assumption being that if we aren't sure if successful litigation can create social change, we can at least be sure that unsuccessful

¹ See McCann (1994) for an exception.

litigation won't. Furthermore, scholars have paid little attention to the entire legal mobilization leading to a particular case- looking at the first case arguing for the advocated change to the last policy implementation that enforces that right. In this project I seek to look at the complete history of a non-victorious legal mobilization effort.

Marriage equality laws developed, were challenged and changed at an accelerated pace in Washington State. In less than 13 years, the legislative declaration that marriage was only between a "man and a woman" was overturned with the expansion of marriage rights to same-sex couples. While not the first state to expand those rights to same-sex couples, Washington was the first to legislatively overrule its local Defense of Marriage Act (DOMA). This rapid development of law, triggered by and causing significant social change was in part due to the effective use of courts and legal mobilization by institutional and cause actors.

In this project I show how litigation as part of legal mobilization, regardless of whether it resulted in judicial victory, was a crucial factor in the development of marriage equality in Washington State. That it both directly, changing institutional behavior, and indirectly, changing social attitudes and political behavior, positively contributed to the comparatively rapid pace of state-level legal changes relating to marriage equality. Moreover, by showing that legal mobilization and its results became legislative tools, I show that the dichotomy between pursuing litigation or more democratic venues for social change is a false dichotomy since legal and political mobilization build off each other creating new constituencies, opening up new opportunities, as well as creating institutional and public support for and de-radicalizing the change advocated.

II. A WHOLE LOTTA HOPE

The issue of whether courts produce or inhibit social change is one recurrently and heatedly debated in socio-legal and legal scholarship. In *The Hollow Hope*, one of the early works on the topic, Rosenberg argues that "courts can almost never be effective producers of significant social reform" (2008, 338). *The Hollow Hope* sparked a lot of discussion and many prominent socio-legal and legal scholars have engaged with Rosenberg. Particularly, in the arena of LGBT rights, Pinello (2003, 2006), Andersen (2006), Eskridge (2002) and Keck (2009) have analyzed the development of pro-gay rights litigation through Rosenberg's framework and challenged the concept that courts are solely hollow hopes, while Posner (2013) and Klarman (2006, 2013) have pursued contemporary evidence to bolster Rosenberg's claim.²

² The term "gay" is being used as an all encompassing term for LGTB rights. This choice was made in order to incorporate the different terminology by the different citations with ease.

Analyzing some of the Supreme Court's most important constitutional cases, like *Brown v. Board of Education* and in the latest edition Hawaii Supreme Court's *Baehr v. Lewin* and Massachusetts Supreme Court's *Goodridge v. Dept. of Public Health*, Rosenberg finds that due to lack of judicial independence, lack of implementation powers and inability to develop appropriate policies, courts cannot be effective producers of significant social reform. Furthermore, he finds that legal victories have had no direct, as defined by changes in institutional behavior attributable to court action, nor indirect, as defined by changes in social attitudes and political behavior, effects in cause actors' attempts at social reform. Therefore, he concludes that legal mobilization "seldom bring[s] reform any closer" and often "strengthens the opponents of such change" (343, 342). Armed with this evidence, Rosenberg ends with a call to action, arguing that cause actors would more be more successful at effecting social change if instead of spending time and resources in counterproductive litigation they sought more democratic and political means of mobilizing citizens (343).

Likewise, Klarman argues that *Goodridge v. Dept. of Public Health's* most significant consequence "may have been the political backlash that it inspired. By outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance" (2005, 482). Further, interpreting *Goodridge* as ultimately a loss for same-sex marriage, Klarman concludes that "marriage rights will now be harder to secure for gays and lesbians" and even while acknowledging that "*Lawrence* and, to an even greater extent *Goodridge*, have dramatically raised the salience of gay-rights issues" and that "[S]ince *Goodridge*, though, same-sex marriage has constantly captured front-page newspaper headlines, and the issue received enormous attention during the 2004 presidential election campaign," he ultimately concludes that "the more people focus on [gay marriage], the less they support it" (474, citations omitted). However, Klarman does not go as far as Rosenberg in prescribing a more democratic path to social change, though he argues that "judicially mandated social reform may mobilize greater resistance than change accomplished through legislatures or with the acquiescence of other democratically operated institutions" (475). Yet, by not prescribing a path and arguing that "the demographics of public opinion on issues of sexual orientation virtually ensure that one day in the not-too-distant future a substantial majority of Americans will support same-sex marriage," Klarman seems to be arguing that LGBT activists should simply wait for this "not-too-distant-future" when same sex marriage has become culturally acceptable before pushing for legal change and recognition (484). While in his more recent book his conclusions about litigation and LGBT rights are more measured, Klarman still focuses his analysis on the political backlash ignited by *Baerh* and *Goodridge* and how gay marriage litigation has had collateral effects on politics and has impeded the realization of other objectives of the gay rights movement (2012).

Also building on Rosenberg's work and arguing for cause actors to wait for the inevitability of same-sex marriage, Posner argues that the judiciary has had an insignificant role in the rise of "homosexual marriage" since "the growing acceptance of homosexual marriage seems a natural consequence of the sexual revolution that began in the 1960s rather than an effect, even to a small degree, of litigation." Concluding that the "Stonewall Riots of 1969, which kicked off the movement for homosexual rights, owed nothing to the courts," he warns that "[I]t is too soon to tell whether *Windsor* will" provoke a backlash and therefore, courts might even have a counter-productive effect on marriage equality advances. Ultimately, Posner concludes that legal mobilization is just generally unimportant to significant social change.

Like Rosenberg and Klarman, Posner looks at law and legal mobilization as wholly separate and independent of culture and social changes. For example, he argues that the "significance of judicial opinion...recedes further" if one looks at the change in social attitudes towards marriage equality. He explains that in 1988, the earliest public opinion polling on attitudes towards marriage equality, roughly 11% favored it. This number increased to 27% by 1996, then to 31% by 2003 and finally to about 50% by 2013. Posner predicts that approval will likely continue to rise but he provides no real explanation for these changes other than "generational differences." He completely rejects the idea that legal mobilization could have impacted social attitudes towards marriage equality (2013).³

In the most prominent response to Rosenberg, McCann, in *Rights At Work*, makes use of a broader legal mobilization approach, an approach grounded in political process models of social movements, that takes into account that "how law matters depend on the complex, often changing dynamics of the context in which struggles occur" and that "legal relations, institutions and norms tend to be double-edged, at once upholding the larger infrastructure of the status quo while providing limited opportunities for episodic challenges and transformations in that ruling order" (McCann 2006, 18). As such, McCann analyzes law and society as interconnected and multi-constitutive and argues that legal mobilization can lead to "a movement, generating public support for new rights claims and providing leverage to supplement other political tactics." Further, he asserts, "such indirect effects and uses of litigation may be the most important for political struggles by most social movements" (McCann 1994, 10).

3 Interestingly, though, the polling Posner uses to illustrate the insignificance of legal mobilization coincides with some of the major LGBT rights cases. *Romer v. Evans*, finding that animus towards LGBT people did not constitute rational basis for discrimination, was decided in 1996; *Lawrence v. Texas*, outlawing as-applied to homosexuals sodomy laws, was decided in 2003; and finally, *Windsor v. US*, overturning the federal DOMA, was decided in 2013. These legal victories were both a result of the change in social attitudes as they were part of the reason for that change. Actually, considering that polling on social attitudes towards LGBT people was inconsistent until recently, polling during those years was likely only done because of the contemporary legal mobilization. Thus showing that, if nothing else, legal mobilization creates salience and draws public attention to the cause being advocated.

Also challenging Rosenberg's claims and analyzing legal mobilization broadly, Eskridge, discussing gay right specifically, argues that the *Baehr* "contributed to the politics of recognition by stirring the aspirations of LGBT people everywhere in the country" (2002, 3). Similarly, Pinello argues that "*Goodridge* had a profound inspirational effect for the marriage movement, among elites and the grassroots, at home and beyond." Furthermore, Pinello, engaging directly with Rosenberg's claims, argues that his findings

Diminish the perception that courts are hollow hopes for significant social reform. With nearly all the other states and national policy makers at odds with its goal, the Massachusetts Supreme Judicial Court nonetheless achieved singular success in expanding the ambit of who receives the benefits of getting married in America, inspiring political elites elsewhere in the country to follow suit, and in mobilizing grassroots supporters to entrench their legal victory politically (2006, 192).

Finally, Pinello concludes that "*Goodridge* radicalized and coalesced the gay community like no other event since the advent of AIDS in the 1980s. Time and time again, same-sex couples volunteered in interviews across the nation that they never expected marriage to be available to them during their lifetime" (193).

More explicitly drawing on the legal mobilization approach, Andersen's *Out of the Closet and Into the Courts* argues that judicial decisions can contribute to social change by reconstructing the overall legal and political opportunity structures within which movements develop and battle (2005). Looking at Lambda Legal's national litigation strategies and their effect on the larger LGBT rights movement, Andersen concludes that "*Baehr* was neither a clear win nor a clear loss for gay rights advocates. Instead, the change it made in the structure of legal opportunities created space for action by multiple actors in multiple domains" (182). Likewise, Keck's "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights" more explicitly engages with Rosenberg's and Klarman's argument that "rights-based litigation strategies are ineffective at best and counter-productive at worst," and finds that "[T]he lesson of these historical episodes is that the effectiveness of legal mobilization is quite variable, depending on a variety of contextual factors, including political and legal opportunity structure and political and legal resources available to advocates" (2006, 182).

In their analyses of legal mobilization and LGBT rights, Eskridge, Pinello, Andersen and Keck all look at the national marriage equality efforts and how different state cases built off each other or impacted each other. Additionally, they all look at victorious litigation efforts and their consequences, the consensus being that non-victorious litigation effort either significantly hurts (Klarman, 37-39; Goldberg-Hiller 2005, 21-22) or have an insignificant effect on the cause being advocated (Klarman 2013, 115-118).

This research project engages with and contributes to the current literature applying socio-legal theories to LGBT rights-based litigation. It contributes to this literature in the following ways: first, I focus in-depth and comprehensively on one case, that of Washington State, from the very first litigation involving same-sex marriage claims to the vote that confirmed the expansion of marriage equality passed by the legislature. By looking at the context in which the marriage equality struggle is taking place, I can better understand how law matters and how “the messages disseminated by courts are received, interpreted and used by actors” (Galanter 1983, 136). While most studies have looked at the national marriage equality effort, marriage rights are often determined at the state level (*see Windsor v. US*). This means that while it is undeniable that *Baerh* in Hawaii impacted *Goodridge* in Massachusetts, there are dynamics that are inherent to the state of Massachusetts that made *Goodridge* a possibility and that made it different than civil unions and *Baker* in Vermont.

Second, it focuses on a non-victorious litigation effort, *Andersen v. King County*. Likewise, there are a number of advantages to focusing on a non-victorious case, the most important one being that while one expects to achieve the desired outcome when victorious in court, one does not expect to achieve the desired outcome when non-victorious, as such legal mobilization leading to social change in a non-victorious litigation effort is the more counter-intuitive case (Eckstein 1975).

Finally, Washington State is a particularly interesting case. It was one of the very first states to rule on the constitutionality of marriage equality. It was also one of the first states to pass a state-level Defense of Marriage Act as an outright response to Hawaii’s Supreme Court decision in *Baehr*, as opposed to part of electoral strategies in 2004 and 2006 when most other states passed their bans. And finally, institutional and cause actors were vocal and open about their strategy to getting to marriage equality. There were carefully calculated, publicly discussed and purposeful moves towards marriage equality spanning 6 years.

In summary, the main contribution of this research project is that I look in-depth and comprehensively at one case, that of Washington State, from the very first litigation involving same-sex marriage claims to the vote that confirmed the expansion of marriage equality passed by the legislature. By systematically looking at the legal history, court cases and legislation of same-sex marriage laws, and laws directly relevant to the development of marriage equality from 1974 to 2012 in Washington State this article follows the legal mobilization approach by looking at litigation as a part of a broader mobilization of legal strategies by cause and institutional actors, and by looking at judges as part of a larger political and social coalition of institutional actors. As such, I show how litigation, even a non-victorious one, can help bring about social reform.

III. AN ANALYZED HISTORY

It was 1974, with *Singer v. Hara*, when a Washington court first ruled that the exclusion of same-sex couples from the institution of marriage was constitutional. This was one of the first marriage equality cases in the country and became national precedent. *Singer* was decided around the same time as *Baker v. Nelson* where the US Supreme Court “dismissed for want of federal question” a challenge to the Supreme Court of Minnesota’s decision upholding that state’s exclusion of same-sex couples from the institution of marriage. A dismissal for “want of federal question” was equivalent to an upholding of the lower court’s decision.

Only five years after the Stonewall Riots, *Singer* was not appealed to the state’s Supreme Court as the social and political environment then was inhospitable to marriage equality claims. Actually, at the time *Singer* was decided, upwards of forty states still had in effect a ban on “sodomy,” or homosexual conduct, including Washington State. Its ban was only abolished two years after *Singer*. Institutional state actors in federal and state political institutions, and in courts and legislatures, agreed that marriage equality was an inconceivable and undesirable social and legal change. While there is no public polling from that time, the earliest polling, in 1988, showed that only 11% of the public were favorable to granting same-sex couples the right to marry. It is reasonable to assume that the numbers were at least as unfavorable in 1974.

Furthermore, the presence of cause actors- particularly cause actors focusing on marriage equality- was modest. With the exception of the Mattachine Society -founded in 1950- and of the Gay Liberation Front- founded in 1969, *Singer* pre-dates most national LGBT organizations. While Lambda Legal and the Gay and Lesbian Task Force were founded around the same time as *Singer* and *Baker*, the Human Rights Campaign was only founded in 1980 and Freedom to Marry was founded in 2003. In Washington state, a statewide gay rights organization was temporarily founded in 1993. In 2003, former members of that organization permanently founded Equal Rights Washington, one the main organizations behind the grassroots organizing for both relevant Washington referendums.

A. NATIONAL CONTEXT, 1990-1996

The changes to the nature of legal recognition of same-sex relationships in Washington happened in the shadow of changes to the nature of legal recognition in the federal arena. Here, *Singer* is again important. On December 19, 1990, in Hawaii, three same-sex couples applied for marriage licenses. These three couples met all of the requirements under Hawaii’s law setting forth eligibility requirements for

marriage, except for the fact that they were all same-sex couples. All three applications were denied. The couples' legal challenge to that denial became *Baehr v. Lewin*.

Due to the lack of precedent in Hawaii, the Hawaiian Supreme Court had to reconcile its decision with the precedent established by both *Singer* and *Baker*. While it did not address *Baker* directly, the court did engage with *Singer*. Calling the decision in *Singer* an "exercise of tortured and conclusory sophistry," the court quickly dismissed the Washington state precedent to rule for the first time ever that excluding same-sex couples from marriage was discriminatory. *Baehr v. Lewin* was the first high court ruling in favor of marriage equality; however, it unleashed arguably the most significant backlash in the LGBT movement's history: Congress enacting, and President Clinton signing into law, the 1996 Defense of Marriage Act (DOMA).

In large part, the enactment of DOMA was a direct legislative response to *Baehr*. Labeling Hawaii's decision as the beginning of an "orchestrated legal assault being waged against traditional heterosexual marriage," and claiming it "threatened to have very real consequences on federal law," since the "redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits," Congress passed DOMA in order to both "preserve each State's ability to decide what constitutes a marriage under its own laws and to lay down clear rules regarding what constitutes a marriage for the purpose of federal law" (Gill, 377-378).

DOMA has two main provisions: (1) a choice of law provision, which states that,

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

And (2) a definitional provision which states that,

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.

These provisions acted to recognize, for the purpose of federal law, marriages as only between one man and one woman and to reaffirm that states were not required to recognize marriages from other states when they had strong public policies to the contrary. This Congressional act also empowered many states actors to enact "mini-DOMAs" - state-level DOMAs- declaring that they indeed had public policies against

recognizing same-sex marriages valid in other states (Koppelman 2010; Pinello 2006). Currently, 30 states have constitutional amendments restricting marriage to one man and one woman.⁴

However, there were positive consequences to *Baehr*. Prior to the Hawaiian Court's decision many cause actors fought for "marriage-like" rights but *Baehr* made marriage itself- not civil union, not domestic partnerships but marriage equality- a real possibility. *Baehr* provided legal basis for new marriage rights claims across the country. This was a newly found legal opportunity, one that cause actors could now fight for recognition under. Hawaii's Court acknowledgement that same-sex couples might have the right to marriage changed the public consciousness in regards to same-sex couples and triggered other states to re-consider their arguably discriminatory marriage laws.

B. MINI-DOMA

While *Baehr* emboldened both anti- and pro-gay rights state and cause actors to push for legislation addressing the issue of marriage equality in Washington State, the fight for LGBT rights never really stopped. As the Hawaiian case made its way to the its Supreme Court, in Washington, anti-gay cause actors were collecting signatures to put Initiatives 608 and 610 on the November 1994 ballot. Initiative 608 would have "forbidden state or local civil rights ordinances for gays and lesbians and would have barred public schools from presenting homosexuality as positive or normal," while Initiative 610, proposed concurrently in Washington, Oregon and Idaho, would have "barred gays from adopting, serving as foster parents, or getting custody of their own children in case of divorce. It would also have barred same-sex marriage." In Washington, both measures failed to collect enough signatures to make it to the ballot largely due to the efforts of two gay rights groups founded for the purpose of fighting these initiatives: Hands off Washington and Bigot Busters (Anti-gay rights Measure, 1994).

Buoyed by their victory in 1994, Hands Off Washington, an organization that became increasingly embedded in local politics, pushed for an anti-discrimination initiative that would amend the state's anti-discrimination law to include sexual orientation and gender identity. However, state actors, most notably Cal Anderson, the state's first openly gay member of the legislature, and other cause actors opposed the referendum (Savage, 2003). Eventually Hands off Washington was successful in putting it on the 1997 state ballot. Initiative 677 would have extended workplace protections to gays and lesbians but "[V]oters trounced

⁴ These are: Alabama (2006), Alaska (1998), Arizona (2008), Arkansas (2004), Colorado, Florida (2008), Georgia (2004), Hawaii (1998), Kansas (2005), Idaho (2006), Kentucky (2004), Louisiana (2004), Michigan (2004), Mississippi (2004), Missouri (2004), Montana (2004), Nebraska (2000), Nevada (2002), North Dakota (2004), North Carolina (2012), Ohio (2004), Oklahoma (2004), Oregon (2004), South Carolina (2006), South Dakota (2006), Tennessee (2006), Texas (2005), Utah (2004), Virginia (2006) and Wisconsin (2006).

Initiative 677” voting it down by 20 points (Turnbull, 2006). Like in 1995, Initiative 677 was a contentious issue even among pro-gay rights institutional and cause actors. Like Cal Anderson, Ed Murray, the only out legislator in 1997, was vocally opposed to the bill. Other cause actors, most notably former members of Bigot Busters, were also against the bill.

Opposition ranged from arguments that voting for civil rights is unconstitutional, to the belief that the public wasn’t ready to vote for such an initiative, as well as to the fact that the national DOMA and the newly elected Republican-majority were signs that significant social change in the direction of gay rights was unlikely. Further, opposition state actors argued that allowing for a legislative push for anti-discrimination would have been a better alternative and a viable political opportunity but “by handing conservative legislators those anti-gay rights numbers... [the] initiative scuttled any hopes of passing a comprehensive gay-rights bill in the legislature, a bill that had come within a single vote of passing in 1993 and 1994” (Savage, 2003). Hands off Washington was dismantled after the 1997 loss; however, its leadership continued to fight for LGBT people in Washington state and in 2003 they founded today’s main gay rights organization in the state: Equal Rights Washington (Westneat, 2009).

Earlier in 1997, Governor Michael Lowry, as one of his final acts, sponsored legislation to authorize legal recognition of same-sex relationships (House Bill 1203 and Senate Bill 5346). Democrat Ed Murray, then Representative Murray, presented these bills to Congress. The Republican majority kept the bills from coming to the floor. At that same time Lowry’s bills were being rejected, Republican senators were proposing a bill to ban same-sex marriages. Democratic legislators had, just the past year, defeated the proposed mini-DOMA; however, Republicans had taken over the legislature in intervening elections making passage of the exclusionary legislation certain. While the bill was guaranteed comfortable passage in the legislature, Gary Locke, governor elected in 1996 to replace Lowry, had repeatedly shared his “distaste” for the bill, though he had stopped short of vowing to veto it. It was unclear if the bill was vetoed, if there would be enough votes for an override (Amons, 1997).

The Washington legislature passed its mini-DOMA. Realizing that the Governor might veto the bill, proponents of the bill took time and effort to present the ban as nothing more than the current state of affairs and an attempt to protect the state’s legal precedent. The bill was proposed as simply, “codifying the existing case law [referencing *Singer*], that prohibits same-gender marriage in Washington” (HB 1130). Also, when explaining the intent of the bill, proponents explained that “[T]he court in *Singer v. Hara* held that the Washington state marriage statute does not allow marriages between persons of the same sex. It is the intent of the legislature by this act to codify the *Singer* opinion” (HB 1130). In the House Bill Report for DOMA, proponents reiterated that, “[T]he bill simply codifies law that marriage is and always had

been between a man and a woman.” It is important to note that while proponents sought to portray its mini-DOMA as nothing more than the codification of case law, the bill went beyond that since it not only restricted the definition of marriage, like *Singer*, but also forbade recognition of same-sex marriages from out of state, an issue outside of *Singer*’s scope.

Further, proponents also argued that they were protecting Washington courts’ legal doctrine in highlighting the fact that *Baehr* expressly criticized *Singer*, and sharing their concern that “the current law is not a supreme court law and in affect actually does not cover the whole state as law” (Floor Remarks of Representative Thompson, sponsor of the bill, on House Bill 1130, February 4, 1998). Moreover, the legislature explained that codifying *Singer* was important in order to not only bolster state legal doctrine but also to clarify to other courts, including the Supreme Court, that the legislature backed *Singer*, “...so it is important that it is in our code. It’s important that it’s in our statute to give guidance to the court if a case comes before us” (Floor Remarks by Representative Sheehan on House Bill 1130, March 18, 1997). Governor Locke vetoed the state’s DOMA; however, the 1997 veto did not end debate on the Washington’s Defense of Marriage Act.

Anti-gay rights legislators again proposed the Defense of Marriage Act in 1998. Just like in 1997, proponents presented the bill as a collaborative effort between the legislature and the courts. “Persons of the same sex are prohibited from legally marrying in Washington... a Washington appellate court decision *Singer v. Hara*, held that the marriage statute does not allow marriage between persons of the same sex... The *Singer* court also held that prohibiting marriage between persons of the same sex does not violate the Equal Rights Amendment of the Washington Constitution or the Equal Protection Clause of the United States Constitution” (House Bill 1130, Clause 1, Section 2, 1998). Governor Locke again vetoed the bill; however, this time there were enough votes to override that veto.

The veto was overridden by both houses - with almost no discussion and no debate - aided by Democratic legislators who worried that if the issue was forced into the hands of the electorate in the upcoming election, it would bring out too many conservative voters in swing districts (Murakami 1997). Reluctance to allow for gay rights ballot initiatives, felt strongly enough that Democratic legislators backed the override of a Democratic Governor’s veto, illustrates the real concern that these ballot initiatives posed to progressive institutional actors. With the 20-point loss from the anti-discrimination initiative in mind, proponents of marriage equality were aware that in order for marriage equality legislation to pass and survive a popular vote, voters’ reluctance to approve minority-rights initiatives, particularly gay rights initiatives, had to be addressed. Further, it explains why the state DOMA was never challenged as a referendum (Westneat 2009).

Finally, unlike during the public debate concerning *Singer*, the LGBT movement was alive, ailing- after Initiative 677 failure and the dismantling of Hands off Washington, but alive- during the Defense of Marriage Act debate. This burgeoning social movement was directly mentioned and cautioned against on House Bill Report for Bill 1130. “We shouldn’t allow our moral standards or allow the concept of family to be distorted by a minority. The drive to legalize same-sex marriage is just a political agenda of the homosexual movement.”

C. NATIONAL CONTEXT, 2000-2006

After the state’s mini-DOMA passed, the next time that marriage equality became an issue was in 2006, with *Andersen v. King County*. However, between 1998 and 2006, there were important developments in the gay rights movement. First, in 2000, Vermont’s legislature, in a groundbreaking decision and following directions from the state’s Supreme Court, passed the country’s first civil union bill providing same-sex couples with “marriage-like” recognition for their relationships. This bill has since been expanded to full marriage equality. Second, in *Lawrence v. Texas*, the United States Supreme Court found sodomy laws, as applied to homosexuals, unconstitutional. This decision directly and overtly overruled the precedent set in *Bowers v. Hardwick*, which ruled that there was no fundamental right to homosexual sodomy. *Lawrence* followed in the steps of another pro-gay rights case, *Romer v. Evans*, which ruled that animus against a group of people -in this case, LGBT people- does not fulfill the rational basis constitutional level of scrutiny.

And finally, later in 2003, marriage equality arrived in Massachusetts when, in *Goodridge v. Department of Public Health*, that state’s Supreme Court decided that the denial of marriage licenses to gay and lesbian couples violated that state’s constitution. The court held there was no rational basis for this discrimination and gave the state six months to comply with its order. The court later explained, in response to an inquiry from the legislature, that civil unions were inadequate because they “would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits” (*Goodridge*, 1208). Massachusetts started issuing marriage licenses to same sex couples on May 17, 2004.

Since *Lawrence* and *Goodridge*, LGBT rights have evolved nation-wide. While most states have been reluctant to grant same-sex couples full marriage rights, some have attempted to implement institutions that are functionally equivalent to marriages in order to extend marriage-like protections to same-sex couples. Marriage-like rights extensions have allowed state actors to respond to cause actors in places where social attitudes would not have allowed for full marriage rights. These advancements in state law have lessened the impact of both the state and the federal DOMA. In states that have civil unions or domestic partnerships, same-sex couples are entitled to essentially the same state-granted rights as opposite sex cou-

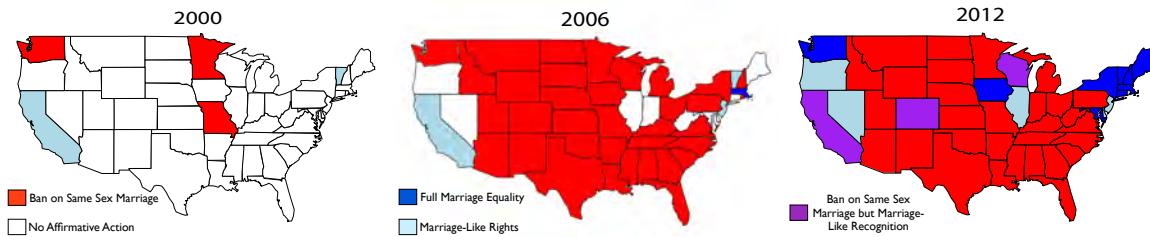


Figure 1. The maps above illustrate the development of same-sex marriage rights in three different time periods: 2000, 2006 and 2012. By 2000, few states, including Washington, had taken affirmative actions on the issue of same-sex marriage. Six years later, most states in the nation had acted on marriage equality. The majority had passed legislation or constitutional amendment to prohibit same-sex marriage as part of an electoral strategy to mobilize conservative voters during the 2004 and 2006 elections. Lastly, by 2012, while most states still have prohibitions, many have tried to accommodate same-sex couples with domestic partnership and civil unions and many others have passed full marriage equality laws.

ples. By the beginning of 2013, nearly a quarter of the population of the United States lived in a jurisdiction that recognizes same-sex relationships as marriages or their functional equivalent (Geidner, 2012).

Moreover, the most important consequence of states extending marriage or marriage-like rights to same-sex couples is that this has created a situation that did not exist before or immediately after DOMA's enactment: "a population of actually or constructively married couples whose rights are adversely affected by the statute. When it was enacted in 1996, DOMA's goal was to halt the recognition of same-sex relationships; however, the recognition of same-sex relationships has not stopped." It has progressed, albeit slowly, and now there are people, "not distant abstractions who are being deeply injured by DOMA's discriminatory provisions" (Koppleman, 933). This legal creation of a category of people, of a new constituency, able to make legal claims-be they married in Massachusetts, domestically partnered in Wisconsin or in a civil union in Vermont- increased the visibility of LGBT individuals and in turn increased the social acceptability of this community. This development assured the visibility of same-sex couples and their families, as well as helped change attitudes towards LGBT people as polling has shown that the main or at least a key factor in the rising support for gay marriage is the simple fact that more people are getting to know gay people (Dolan, 2013). Further, it changed the attitude of gays and lesbians who, noticing that institutional actors were increasingly willing to provide the rights and responsibilities associated with marriage, took advantage of that legal and political opportunity and pushed further for full marriage equality. And as social acceptability for LGBT people increased and political opportunities expanded, the gay community mobilized to fight for marriage equality and they have taken this fight to state legislatures and courts.

And to the courts they went. After years of continued challenges, Washington State's Defense of Marriage Act finally reached the state's Supreme Court in *Andersen v. King County*. *Andersen* is a consolidated case merging two lower court cases: *Andersen v. King County*, where eight couples, sought marriage licenses from King County and *Castle v. State*, where eleven gay and lesbian couples, some who wanted to marry a person of the same sex and some who were already married and wanted their marriages recognized in Washington.

Andersen and *Castle* were not marriage equality advocates' first attempt at getting marriage rights and recognition. In 2004, demonstrators marched on the office of county executive Ron Sims demanding that he issue marriage licenses to same-sex couples, as had happened recently in Portland and San Francisco. Sims refused, explaining that state laws forbade him from issuing such licenses; however, Sims was careful to note that he did not support the state's DOMA. Shortly after, Seattle's mayor issued an executive order directing all public contractors to recognize employee's out-of-state same-sex marriages (Klarman, 191). This was the context, this disordered and inconsistent context, in which the lower court decisions in *Andersen* and *Castle* were declared.

Both lower court decisions, *Andersen* and *Castle*, held that the exclusion of same sex couples from the institution of marriage was unconstitutional and both courts directly addressed the fact that their holding was directly counter to both legal precedent and legislative history. The court in *Andersen* addressed this issue stating that, "Court's favoring the equal rights of all citizens (as have courts in Vermont, Hawaii, Oregon, Massachusetts, British Columbia and elsewhere before it and in other jurisdictions to come) may place the judicial branch of government briefly at odds with the legislative. That this may be so is not at all regrettable. Rather, it is fully consistent with sound constitutional principle, with the wise structural design of our government and with the realities of the dynamic of healthy social progress" (*Andersen*, 13).

Similarly, the court in *Castle v. State* stated that, "[W]e elect three branches of one government and submit ourselves to their decisions. No one branch is the people. All branches taken together form one government: the community of the state of Washington. This case requires us to focus on who we are, and what we mean by community" (*Castle*, 1). Both cases were stayed pending review by Washington State's Supreme Court.

In June 2006, the Supreme Court overruled the lower court decisions and held that the state's DOMA was constitutional under the rational basis level of review due to the fact that it was rationally related to the state's interests in procreation and children's well-being (*Andersen v. King County*, 1). Nevertheless,

even as the court held DOMA constitutional, it went to great lengths to distance itself from both DOMA and its own decision.

The court started by stating that, “[I]t is important to note that the court’s role is limited in determining the constitutionality of DOMA and that our decision is not based on an independent determination of what we believe the law should be” (8). Further, citing Supreme Court Justice Stevens, the court continues, “a judge’s understanding of the law is a separate and distinct matter from his or her personal views about sound policy” (8). Moreover, it paradoxically emphasized that while it is not the “province of this court to pass on the merits of the arguments and studies presented to the legislature as it considered DOMA” it noted that what was taken as “unassailable truths” by the legislature have been “in fact assailed” by DOMA’s challengers (39).

Further, the court reiterated that the “rational basis standard is a highly deferential standard” and that this deference is based on “the separation of powers doctrine.” It also pointed out that while “all parties agree that the legislature has the authority to define marriage within constitutional limits,” the court noted that “the record is replete with examples as to how the definition of marriage negatively impacts gays and lesbians couples and children” (52). Furthermore, the court summarizing and reiterating its deferential stand towards DOMA explained that,

At the risk of sounding monotonous, we repeat that the rational basis standard is extremely deferential. There are many examples of laws upheld on rational basis grounds where strong policy arguments opposing such laws have been advanced. But legislative bodies, not courts, hold the power to make public policy determinations, and where no suspect classification or fundamental is at stake, that power is nearly limitless (39).

Lastly, the court concluded that “that there may be more just and humane ways to further the State’s interests but that the State has met its burden in demonstrating that DOMA meets the minimum scrutiny required by the constitution” (52).

Therefore, even as *Andersen* held the state’s mini-DOMA constitutional, it opened the door to the debate over marriage equality in Washington State. While a loss for marriage equality proponents, *Andersen* is incredibly important in the formation of the marriage equality movement in Washington due to the fact that even while holding it unconstitutional, the justices were clearly critical of the state’s DOMA.

After pages distancing themselves from their decision and from DOMA, the justices took head on the inherent injustice of the state’s DOMA. They explained that “the demographics of ‘family’ have changed significantly over the past decades.” Also, the court explained that they were also “acutely aware...that many day-to-day decisions that are routine for married couples are more complex, more agonizing, and

more costly for same-sex couples.” Moreover, the court stated that, “given the clear hardship faced by same sex couples evidenced in this lawsuit, the legislature may want to reexamine the impact of the marriage laws on all citizens of this state” (25). And, more importantly to the battles to come, the justices pointed out that, “[W]e see no reason, however, why the legislature or the people acting through the initiative process would be foreclosed from extending the right to marry to gay and lesbian couples in Washington.” This last statement was unnecessary and served no purpose other than to move the marriage equality battle in Washington from the courts back to the state legislature (6). But this time with a clear backing from the court.

Andersen represents the multi-faceted nature of legal decisions, particularly those affecting constitutional rights. First and foremost, the Court’s decision was narrow and deferent to the legislature. As Barclay points out in his study of judicial activism in the same-sex marriage cases, the court “explicitly defers the decision on the future possibility of same-sex marriage to the state legislature” (117). By declaring that the legislature had the authority and power to change the law, the court shows “judicial acquiescence to recent legislative action” (111). Furthermore, the Court took into account the social and political environment in which it was making its decision. In 2006, 10 states had bans on same-sex marriage in their ballots and all of them were successful; this following the 2004 elections, where 13 states, including its neighbor state Oregon, had passed bans on same-sex marriage. Most importantly, in 2006, only 30% of Washington voters supported marriage equality for gay and lesbian couples. A decision for marriage equality would go against not only the legislature but also national and regional trends and public opinion. Moreover, the legislature had just the passed the Andersen-Murray Anti-Discrimination law, expanding the anti-discrimination statute to include gender identity and sexual orientation, and there was an ongoing movement towards a ballot challenge of the new anti-discrimination law. A movement that would not doubt have been bolstered by a pro-gay rights decision. It is important to note that at the time *Andersen* was decided, no pro-gay rights ballot initiative (what the Anti-Discrimination referendum would have been) had ever been successful.

However, while the Court’s ultimate holding was cautious and deferential to the legislature, the Court was critical and defiant of the legislature’s DOMA and ultimately encourages the new legislature to change the law. As it will soon be shown, because of this the negative *dicta*, *Andersen* was used by proponents of marriage equality to support the extending of rights to same-sex couples. Furthermore, *Andersen* is a strong example of the rational and strategic decisions that Justices, particularly those in the highest point of judicial hierarchy, often make. Based on the language in *Andersen* the Washington State Supreme Court was critical of DOMA and clearly believed that it should no longer be law. However, declaring DOMA

unconstitutional at that time would likely not have settled the issue of marriage equality in Washington, as seen by *Baehr v. Lewin* and, more contemporaneously, in *In Re Marriage* in California.

In *In Re Marriage*, the California State Supreme Court held that the state's constitution required extending the right to marry to same-sex couples. In what has been described as a "political earthquake," *In Re Marriage* was followed by tens of thousands of same-sex marriages and a hundreds of thousands of anti-gay rights marriages signatures being collected to put the issue on the ballot. This led to Proposition 8, where by a margin of 4%, a constitutional amendment to ban same-sex marriages was approved by the voters (Nicolas and Strong 2013, 6). After five years, Proposition 8 and *In Re Marriage* are finally settled matter, but only after a narrow and jurisdictional United States Supreme Court decision.

By upholding the state's DOMA but criticizing it in *dicta*, the Washington State Supreme Court justices strategically espoused their true views on DOMA and, most importantly, provided the legislature with the tools to move forward with marriage equality. Additionally, it avoided an untimely ballot initiative as seen in the case of Proposition 8 (Washington state has the same ballot initiative clause in its state constitution).

Finally, the *Andersen* decision provided an illustration of the effect that the existence of same-sex couples has in the manner that marriage equality laws are developed. When *Singer* was decided, marriage equality was not a major social issue, there were few gay rights organizations and there was still significant stigma against gays and lesbians; therefore, the court engaged in no real discussion of the effects of excluding same-sex couples from the institution of marriage and easily reached a unanimous decision. In *Singer*, same-sex couples were merely "distant abstractions." However, by 2006, the picture had changed significantly and made it impossible for the court to ignore the real challenges that DOMA posed to real same-sex couples and the reluctant 5-4 decision in *Andersen* is illustrative of that debate.

While not a judicial victory, *Andersen* was the tipping point for marriage equality in Washington State. Even as a loss, the court was not a hollow hope for social reform but triggered - quite explicitly in this case- and removed barriers to other forms of political action, such as the Domestic Partnership Registries (both at the local and state level) and, eventually, the legislative repeal of DOMA.

To conclude, *Andersen* was ultimately not entirely a loss to proponents of marriage equality.⁵ Bringing a challenge to DOMA, even while the law is upheld, was not a loss for proponents of marriage equality

⁵ It is important to note that I am not arguing that *Andersen* was received well by marriage proponents, the best illustration of the disappointment that *Andersen* represented to marriage equality proponents is the fact that Initiative 197, requiring married couples to "procreate" within the first couple of years of marriage, was started though not followed through by pro-gay rights individuals who were unconvinced by the reasoning in *Andersen* binding marriage to procreation.

in Washington. While it certainly was not a victory- by the end of two years of litigation DOMA was still law- it provided marriage proponents with a roadmap for their continued battle and a spotlight on their cause. Further, the Court also provided pro-marriage equality legislators with their fighting words and shortly after *Andersen*, the issue for same-sex marriage rights was taken by the legislature. A legislature armed with the clear support of the state's Supreme Court and taking up an issue with political and social salience, salience provided by *Andersen*. Knowing that there were pro-equality legislators- some of which were LGBT themselves with a personal interest in marriage equality, such as Ed Murray and Jamie Pedersen- waiting for an opening to push for marriage equality at a time when public opinion was still hostile to equal rights and most other states were amending their constitutions to prohibit same-sex marriages, the Supreme Court of Washington provided them with a cracked door.

E. WILL YOU ENTER INTO A REGISTERED DOMESTIC PARTNERSHIP WITH ME?

The Washington state Supreme Court knew that it was sending DOMA's faith to a pro-gay rights, if only slightly, legislature. Shortly before the Court handed down *Andersen*, this barely pro-gay rights legislature passed the Anderson-Murray Anti-Discrimination Bill by two votes. As promised, recently elected Governor Christine Gregoire, former state Attorney General, signed the bill into law on January 2006.

Debates on the statewide anti-discrimination bill were barely civil. Senator Swecker, a vocal opponent of LGBT rights, brought back Initiative 677 during the floor vote, "I'm going to join the sixty percent of voters in Washington who have already said they would come down against the idea of this bill. A few years ago the people voted on Initiative 677, which was a similar bill. It went down by a super-majority." However, one of the main debates revolved not necessarily on anti-discrimination laws but on the state's mini-DOMA. Swecker continued, "I also believe that the passage of this legislation places us on a slippery slope towards the legalization of gay marriage in our state...Yes, this bill has an amendment that it says it won't supersede state law related to gay marriage but are any of us really naive to think that the court won't take judicial notice of our actions as it prepares to issue a ruling on DOMA?" (Floor remarks for HSB 2661, January 27, 2006)

Similarly, Senator Mulliken argued that the anti-discrimination bill would open the floodgates for large numbers of other cases involving marriage equality. She explained, "[U]nder this proposed bill, even with the amended version, those who wish these relationships promoted and protected may have legal cause for action" (Floor remarks for HSB 2661, January 27, 2006). Senator Esser agreed, "[T]here's no doubt that this law was simply intended to provide assistance to those who are trying to overturn our state's Defense of Marriage Act." Though opponents of the bill warned of its possible impact on the state's

mini-DOMA, the bill passed. Interestingly, while there was an attempt to put the Anderson-Murray Anti-Discrimination Bill at the ballot through the referendum process, the challenge failed to get enough voter signatures to submit the request to the Secretary of State for authentication. The Court's decision in *Andersen* to uphold the constitutionality of DOMA, despite the new anti-discrimination law, likely swayed the efforts away from a challenge of the anti-discrimination law for it alleviated the concern that the anti-discrimination bill would likely lead to the demise of the state's DOMA.

After *Andersen*, taking up the fighting orders from the Supreme Court, the Washington legislature passed a domestic partnership conferring less than fifteen marriage rights to same-sex couples or seniors (62 years old and above) domestically partnered couples in 1997. On March 4, 2008, the legislature approved a bill expanding to domestic partnerships over 150 marriage rights and responsibilities ("Gov. Gregoire signs bill," 2008). On January, 2009, the legislature expanded the bill once again, passing an "everything but marriage" domestic partnership law; this put the domestic partnership law in equal footing with civil marriages.

Both the anti-discrimination bill and *Andersen* were part of the groundwork of the domestic partnership bill. Echoing the language in *Andersen* and the ideals of non-discrimination, Bill 5336, the 2007 Domestic Partnership Bill, was proposed not as a "repeal [of] the Defense of Marriage Act," but as a "remedy [for] some of that discrimination" (House Bill Report for HSB 5336). The subsequent two bills were also clear that "this bill is not marriage" and that the goal is to minimize legal discrimination against sexual minorities (HSB 5688, Final Senate Report). Further, as all three domestic partnership bills were careful not to directly repeal the state's DOMA and focused on the anti-discrimination aspect of the bill and on *Andersen's* language of "the hardships faced by same-sex couples," it allowed for Senators and Representatives who voted for DOMA and supported "traditional marriage" to vote for all three domestic partnership laws. *Andersen* provided sympathetic legislators with the reasoning they needed to both continue to state their support for the state's DOMA, as well as vote to expand the rights of same-sex couples.

For example, Senator Franklin started her floor speech by asking her colleagues to look around the chamber and recognize the diversity within, after pointing out that the chambers did not look this diverse 30 years ago, she proceeded to explain that, the issue of domestic partnership, like the issue of political accessibility, was about rights. She explained, "and it deals with rights. I support marriage, I supported DOMA...But benefits for those who have a committed relationship who live by the rules, who pay their taxes, who contribute to society, who do the same thing as we do, [they] should not be denied those benefits that we have. It is unfair, it is wrong" (Floor Remarks for HSB 5336, March 1, 2007). Similarly, Senator Haugen explained that, "I stand before you as a Christian who believes that marriage is between a man and

a woman... but I am also standing on this floor to support this bill” (Floor Remarks for HSB 5336, March 1, 2007). Even during the final expansion of the domestic partnership bill, the “everything but marriage” bill, Senator Franklin again explained that, “[T]o me, it is not marriage. Everyone knows that I do not support marriage. I do support equal rights for same sex couples” (Floor Remarks HSB 5688, March 10, 2009).

Not all legislators were convinced by the distinction between the domestic partnership bill and marriage equality. Senator Val Stevens, one of the most vocal opponents of marriage equality, stated in 2007 that “the goal is marriage equality. Domestic partnership is an incremental step to reach that goal...this is not about equal rights but about changing society” (Floor Remarks for HSB 5336, March 1, 2007). Further, during the debate for the 2009 expansion, she cautioned again, “[B]y any other words...this is same-sex marriage. Let it not be a mistake that is exactly what is happening here this evening. We are passing the overturning of DOMA” (Floor Remarks for HSB 5688, March 10, 2009). Still, it is significant that for what were ultimately close votes, some legislators felt free to vote for domestic partnership rights even as they had voted for and still supported DOMA.

It is also significant that in both chambers, the decision in *Andersen*, the decision upholding DOMA, was used as an explanation for the domestic partnership bill. During the 2007 debate in the House, Representative Petersen explained that, “[T]he Supreme Court did indeed say that this legislature has the power to reserve marriage to an union between a men and woman and in doing so it also commented that the legislature has worked a ‘grave injustice’ before it in the *Andersen* case last year...this bill doesn’t solve all of the problem that gays and lesbians face, but it is a start at addressing some of those injustices” (Floor Remarks for HSB 5336, April 10, 2007). In the same way, during the 2009 debate for the final expansion of the domestic partnership bill, Senator Murray explained that, “The good member from the 20th was correct when she described the process that the courts went through when they ruled DOMA constitutional but the courts also said the legislature should offer gay and lesbian citizens of this state a remedy, and that’s what we’re doing with this bill” (Floor Remarks for HSB 5688, March 10, 2009). By showing that the domestic partnership bills were actually complementary to the *Andersen* decision and, arguably, even to DOMA itself, the legislators positioned themselves as allied with the Court. Through its *dicta* in *Andersen*, the court was able to provide legislators a limited opportunity to transform the ruling order- it wasn’t marriage but it was “everything but marriage.”

Throughout all three domestic partnership bills, opponents of gay rights acted on their certainty that they were “following the people’s will” and continuously called an immediate referendum on all of the domestic partnership bills. Their certainty was well grounded as, by 2009, same-sex marriage proponents

were 1 for 33 at the ballot box.⁶ Opponents of the bill always pointed out the obvious reluctance of gay rights proponents to accept the referendum amendment. Senator Benton started the 2007 domestic partnership debate by proposing a referendum amendment and explain that, they, as opposed to the proponents of gay rights, “we’re not afraid of the voters” (Floor Remarks by Senator Benton for HSB 5336, March 1, 2007). Representative Anderson, during the 2009 debate challenged his colleagues by saying, “[A]re we afraid of that[referendum]? Why wouldn’t we ask them [the voters]?” (Floor Remarks for HSB 5688, April 15, 2009). Such was the certainty of how a referendum would be decided that Representative Roache declared at the end of the 2009 debate that, “a referendum will not pass” (House Floor Remarks for HSB 5688, April 15, 2009).

It did, though, pass. But before discussing Referendum 71, it is worth taking the time to understand the larger incremental process in which the domestic partnership bills were embedded. Additionally, the first victory for gay rights in the legislature did not and politically speaking, could not have come, from marriage-like legislation. Instead, it came in the form of an anti-discrimination bill that provided the basis and justification for the domestic partnership laws. These registries were not an attempt to undo DOMA but a short-range solution to the discrimination suffered by same-sex couples. Here, again *Andersen* is important. By forcing ambitious litigation on marriage equality, advocates were able to open up the middle, as in, by pushing the policy envelope ambitious litigation cleared up space for legislative progress thus removing barriers to legislative action (Keck 2009). The efforts in *Andersen* opened up the middle- it did not undercut moderates- and de-radicalized the idea of providing same-sex couples’ relationships some legal recognition.

Even before the anti-discrimination bill was proposed, pro-equality legislators planned to bring pro-gay rights bills incrementally. This incrementality was not accidental but a purposeful strategy by pro-gay rights institutional state actors. They were open about this plan, at times using it to recruit reluctant progressive legislators to vote for the incremental initiatives. It was well known by legislators and came up several times during the debate on domestic partnership; it often came up often as an accusation of “cheating” and “tricking” the public and other legislators into agreeing with the smaller bills, even while the proponents knew that these bills were never their goal. As Senator Stevens explained as she handed out the talking points from the proponents of the first domestic partnership bill, “I have handed out to you a piece a paper that lays out what the sponsors believe is this bill, [reading from the talking points] the goal is marriage equality, domestic partnerships are an incremental step to reach that goal” (Floor Remarks by

⁶ In 2006, Arizona voters rejected an anti-marriage equality amendment. This bill would have also prohibited same-sex domestic partnerships and outlawed current and existing straight couples’ domestic partnerships. A narrower bill targeting only same-sex couples was approved by Arizona voters in 2008.

Senator Stevens on HSB Bill 5336, March 1, 2007). Likewise, and in more and explicit detail, Representative Schoesler outlined the plan during the final debate on domestic partnership, accusing the proponents of the bill of lying to the public. He explained,

The one thing in deciding how you vote in this particular bill, I know there has been a lot of talk on the fact that this isn't about gay marriage and what-not, this is about other things. And when you look at just the particulars in one particular bill, I think the view can be a little distorted. I think its intent for me is very very important so I would recommend for people to sort of step away and take the aerial view, the 10,000 feet view to establish the intent of what this legislation is for... About three years ago or four years ago, I had a visit to my office from one of the proponents of this particular bill, not this particular bill but the issue of gay marriage, and he shared with me that afternoon the fact that the people of Washington state are not ready for gay marriage, and he knew that, but he also knew that he had a plan on how he could bring that to the table even though people aren't ready for it. And he explained it to me that it wasn't going to be that one piece of legislation, it was going to be incremental steps, legislation after legislation, to position us and get us there... And here we are a couple of years later and things are unfolding exactly as he described it. Incremental progress, bill after bill, again, not the big marriage bill, but all the rest that he talked about...I think outside of this body people aren't getting that.

This incrementality served not only to get votes from reluctant progressives, not only to get votes from DOMA supporters who also supported limited rights for same-sex couples, and not only to slowly introduce the public to gay rights but also to thwart any conversation of marriage equality before the proponents for marriage equality were ready for it. Continuously opponents of marriage equality attempted to bring out the fact that the goal was marriage and continuously they were cut off and interrupted as the marriage equality debate was outside the scope of the legislation (Floor Remarks on HSB Bill 5336, March 1, 2007). Furthermore, this incrementality also served as evidence that pro-gay rights legislation was harmless. As anti-gay rights legislators predicted devastating consequences to LGBT rights bills- such as, endangerment to freedom of religion or speech, homosexuality being taught in schools, rampant and out of control cross-dressing, and in some more absurd cases, the end of times- proponents of the bills were quick to point out that, "its been 7 years since we passed the anti-discrimination bill and we've had no problems" (Floor Remarks by Senator Murray on HSB Bill 6239, February 1, 2012)

This incremental movement by different institutional actors had two different and important accomplishments: first, for two years, tens of thousands of same-sex couples entered into public and visible legal relationships, becoming a class of people impacted by DOMA and discriminated against by the state- thus creating new constituencies invested in the continued existence and expansion of legal recognition of same-sex partnerships; second it allowed the general public to get accustomed to same-sex families and to

grow to believe that extending marriage rights to same-sex couples was not only right but also harmless, as the domestic partnership laws had led to no social and political catastrophe.

While not a strategy that should be universally adopted, incrementality has been particularly successful in social justice issues where social and cultural norms also have to change in order for a particular advocated reform to become a legal reality. In the case of same-sex marriage, the incrementality allowed for and influenced the cultural change that eventually led to the upholding the referendums that upheld marriage equality. The changes in law were dependent on the pace cultural changes, just as the cultural changes were influenced and shaped by the legal advancements. It is unclear whether the social acceptance that followed the domestic partnership bills and *Andersen* would have just happened if cause actors had simply waited for it to happen naturally or happened as fast if they had waited for generational changes. This broad concept of legal mobilization, including ambitious litigation, changed social attitudes and political behavior and allowed for successful ballot initiatives and expanding legislation leading to full marriage equality.

And here is where *Andersen*'s deferential decision is again significant. California also attempted an incremental approach to marriage equality. There was an initial domestic partnership bill that was expanded from limited rights to "everything but marriage" rights. However, before a legislative move for marriage equality, the court declared that the constitution required marriage, thus leading to the lengthy battle about Proposition 8. While opponents of marriage equality in Washington warned about the courts deciding on marriage equality through judicial fiat, at times directly calling on the experience from California, "the state will likely be subjected to lawsuits by same-sex partners demanding the courts impose same-sex marriage, as happened recently in California prior to Proposition 8," the challenges never came (Floor Remarks by Senator Holmquist on HSB Bill 5688, March 10, 2009). The Court had already spoken on the issue of marriage (See *Andersen*).

Further, challenges to the domestic partnership bills also never came. In 2009, the Wisconsin legislature enacted a domestic partnership law that, similar to Washington's first and second domestic partnership bills, extended limited rights to same-sex couples. Like Washington, Wisconsin has a "one man, one woman" legal definition of marriage. And it was this discrepancy, "one man, one woman" definition as a backdrop to marriage-like recognition of same-sex couples that led to *Appling v. Doyle*. The case in Wisconsin has been going through the courts for years. Having first been filed in 2009, the case has been up to the Supreme Court and back down for further litigation. More recently, at the end of 2012, an intermediate court found the domestic partnership law constitutional. Here in Washington, the domestic partnership law

was not challenged in court. Again, the court had also already spoken on the issue of domestic partnership (See *Andersen*).

Though protected from a judicial challenge, the “everything but marriage” domestic partnership bill was challenged at the ballot. As expected, anti-gay rights organizations were able to gather enough signatures to put the newly expanded domestic partnership law on the November 2009 ballot and it became Referendum 71.⁷ As is the rule, Referendum 71 asked citizens to approve or reject the law passed by the legislature. A “yes” vote on the referendum was a vote to uphold the expansion of the domestic partnership law. The ballot initiative was approved by a vote of 53.15% to 46.85%. This marked the first time in the United States that voters approved a statewide ballot measure that extended rights to LGBT people. It is important to note that when Referendum 71 passed, Washingtonians opposed same-sex marriage by 50% to 43%. “[T]he willingness of gay activists to accept a compromise short of marriage almost certainly was critical to their victory in November” (Klarman, 147).

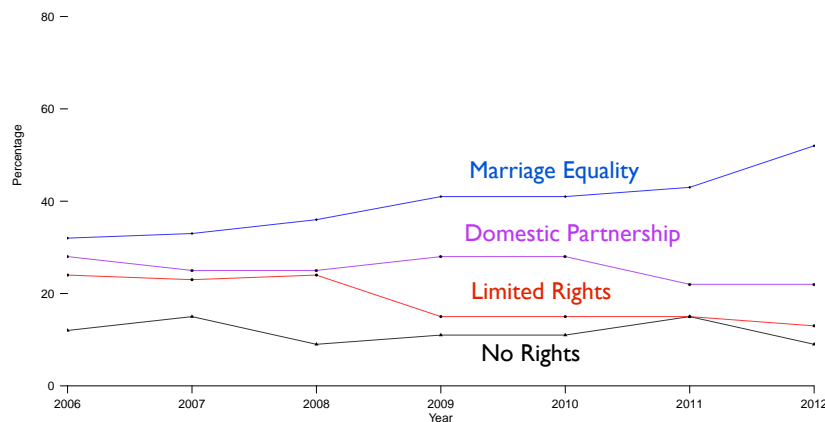
This victory was significant for two main reasons. First, it was a turning point for marriage equality ballot initiatives. Prior to Referendum 71, marriage equality had been defeated in all of the 33 ballot initiatives that had been proposed. However, since Referendum 71, the record has been 4-1, with marriage equality emerging victorious in the past two elections cycles. Second, it emboldened the local marriage equality battle, which had been reluctant to propose a full marriage equality bill since it feared it would be defeated at the ballot. The conservative Senators and Representatives were right, proponents of marriage equality were scared of the public, they were scared of the terrible record gay rights had in the ballot but Referendum 71 heightened their expectations and gave them hope that marriage equality could find success in the ballot.

F. MARRIAGE EQUALITY

Andersen was a tool for LGBT institutional actors. It created opportunities in the legislature by opening up the institutional and social space for domestic partnership laws and by providing sympathetic but reluctant legislators with the means to expand rights to same-sex couples. Further, it brought salience to the issue of marriage. At the time when *Andersen* was decided only 30% of Washingtonians supported same-sex marriage; however, *Andersen* opened the middle for the domestic partnership laws which created a constituency of visible same-sex couples who were discriminated by their government. By the end of 2009, with the assistance of the incremental push for marriage equality, the support for marriage equality had

⁷ While there was an attempt to challenge the 2008 domestic partnership bill in the ballots, proponents of that referendum failed to gather enough votes to move the issue to the ballot.

Which is the appropriate level of recognition for same-sex couples?



Washington State Polling

Figure 2. The figure above shows public opinion in Washington State from Andersen to Referendum 74. While mostly supportive of gay rights, marriage equality was slow to gain the support of the Washington public.

increased by 11 points, with 41% of Washingtonians favoring marriage equality. By the end of 2012, three years after the “everything but marriage” was upheld, 55% of Washingtonians supported marriage equality (Freedom to Marry, 2012).

Following the public’s lead, on January 4 of that year, Governor Gregoire announced her newfound support for same-sex marriage citing the shifts in public opinion and arguing that it would be the logical development of the domestic partnership bills (LaCorte, 2013). Both Governor Gregoire and proponents of marriage equality described the bill as just another incremental step to equality arguing that marriage equality was the obvious and rational step after the “everything but marriage” law. Gov. Gregoire explained that,

Until 2006, Washington lesbian, gay, bisexual and transgender citizens were denied basic protections from discrimination. It was that year that I signed a law banning discrimination based on sexual orientation in employment, housing and other areas. A year later, I signed a law creating domestic partnerships for same-sex couples, along with a number of rights enjoyed by married couples. And the year after that, I signed a law expanding those rights even more. Then in 2009, voters approved Referendum 71, which expanded the domestic partnership rights of same-sex couples. It was a notable achievement in our long journey, but it still left same-sex couples with a different status...Now it’s time for all of us to stand up for equality in Washington (Governor Gregoire’s speech, 2013).

Similarly, Senator Murray closed the debate in the Senate Floor by explaining that, “what has changed, since that first domestic partnership bill” is that “the citizens of Washington State have come to understand that lesbian and gay families are their neighbors and their friends” (Floor Remarks on HSB 6239, February 2, 2012). Likewise, introducing the bill in the House, Representative Pedersen also stated that, the past several years of legislation on gay rights was a “deliberate process of moving this state towards fair treatments of gay and lesbian couples and their families” (Floor Remarks on HSB 6239, February 8, 2012). Also, illustrating the importance of Referendum 71, partially in response to the call for an immediate referendum, Pedersen reminded his colleagues that, “voters in the state of Washington became the first in the country to uphold, in Referendum 71, these protections for our citizens” (Floor Remarks on HSB 6239, February 8, 2012).

Like the domestic partnership law, the marriage equality bill was also challenged in the ballot box, as Referendum 74. The law was upheld by voters in the November 6, 2012 election by a final margin of 7.4% (53.7% approve, 46.3% reject), the largest margin ever in a ballot initiative upholding gay rights. Referendum 74 and ballot initiatives in Maine and Maryland, marked the first time that marriage equality rights were approved at the ballot. With the approval of Referendum 74, the state’s mini-DOMA has been overturned. Not only has Washington state expanded marriage rights to include same-sex couples but it has also vowed to recognize same-sex marriages from other jurisdictions. Currently, fifteen states and the District of Columbia extend full marriage rights to same-sex couples. These states are: Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Washington.

IV. CONCLUSION

In Washington State, a negative judicial precedent helped make marriage equality a reality. The path to marriage equality wasn’t linear or particularly direct- a judicial loss and three domestic partnership bills later- however, institutional and cause actors were able to create change through legal mobilization. Washington state’s development of marriage equality law demonstrates that legal mobilization, in this case *Andersen*, while not the victory that marriage equality supporters hoped for, was a crucial factor in creating new political opportunities and increased widespread support and tolerance leading to marriage equality. Lastly, it demonstrates that litigation or more democratic venues for social change are not dichotomous options but in fact complement each other in the creation of social change.

Since marriage equality became a reality in Washington State, the political opportunities for marriage equality nation-wide have changed significantly. After continuous challenges, the Supreme Court of

the United States overturned the federal DOMA. In *Windsor v. United States*, the Court ruled that if states decide to give same-sex marriage licenses, the federal government couldn't recognize heterosexual marriages but refuse to recognize same-sex unions, effectively overruling Section 3 of DOMA. *Windsor* has been lauded as the beginning of the end of same-sex marriage bans across the country (Aravosis 2013).

Currently, there is active marriage equality litigation in thirteen states with many more being planned by LGBT organizations. However, while legal victories would be ideal, they are not necessary. At an August 2013 ACLU open meeting in Seattle, an attorney associated with the efforts to challenge marriage equality bans explained that “[W]e are going to lose some of these lawsuits- it is the reality- but it will help us on the long run. This is part of the 50-state strategy.” Litigation as a part of a broader legal mobilization campaign and as a deployable legal strategy, can both directly and indirectly effect social change; and this is also true of non-victorious litigation. There is no choice between a political or legal strategy, in order to effect social change, cause and institutional actors need to pursue both strategies. There is no choice between legislative and judicial venues, engaged social and cause actors understand that both are needed in order to bring about social change.

Savage ends his book by writing about his own marriage. He describes how moved he was to be able to marry his partner in his home state and concludes by explaining that,

The most moving moment came after our ceremony. A huge crowd had gathered on the steps outside city hall... The names of each newly married couple were announced to the crowd as they exited the building. Each time the crowd burst into applause and cheers, throwing rice and flower petals. People shouted, ‘Congratulations.’ And almost all of the well-wishers gathered outside city hall on that glorious gray day were straight people.”

Same-sex couples in Washington State have both the legal right to marry; however, they have much more than that, there is the social expectation that straight couples and same-sex couples alike will be happy for them (210).

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