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## The Legal Mobilization Dilemma

Douglas NeJaime

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# THE LEGAL MOBILIZATION DILEMMA

*Douglas NeJaime\**

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## INTRODUCTION

*Perry v. Brown*, the federal lawsuit challenging Proposition 8—the California state constitutional amendment prohibiting marriage for same-sex couples—was filed in 2009.<sup>1</sup> At that time, it presented sweeping federal constitutional claims for marriage equality and sought to ultimately put those claims before the U.S. Supreme Court.<sup>2</sup> The suit defied the strategic vision of lawyers at the leading lesbian, gay, bisexual, and transgender (LGBT) legal organizations—Lambda Legal, the American Civil Liberties Union (ACLU), the National Center for Lesbian Rights (NCLR), and Gay & Lesbian Advocates & Defenders (GLAD). Those lawyers had attempted to keep the federal courts away from Proposition 8 and similar state laws.<sup>3</sup> Yet a new organization, the American Foundation for Equal Rights (AFER), filed the *Perry* suit. AFER’s effort boasted considerable support from elites and operated within an increasingly favorable legal and political environment.<sup>4</sup>

AFER’s well-resourced challenge to conventional movement wisdom materialized in large part *because* LGBT movement advocates had achieved so much success using a legal mobilization strategy—one that deployed litigation in conjunction with a range of other tactics and exploited the mobilizing and political potential of rights claims.<sup>5</sup> In this Article, I argue that understanding the *Perry* litigation through the lens of social movements exposes a tension in legal mobilization that movement advocates must confront and that scholarly

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<sup>1</sup> Complaint for Declaratory, Injunctive, or Other Relief, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW). Filed in district court as *Perry v. Schwarzenegger*, the case name changed to *Perry v. Brown* on appeal to the Ninth Circuit.

<sup>2</sup> Before this Article went to print, the Ninth Circuit panel decided the case on especially narrow grounds, resisting the plaintiffs’ invitation to consider whether same-sex couples enjoy a fundamental right to marry and whether sexual-orientation-based classifications merit heightened scrutiny for equal protection purposes. *See Perry v. Brown*, 671 F.3d 1052, 1076 (9th Cir. 2012). Instead, the court held that, because California maintains a separate domestic-partnership system that provides the state law rights and benefits of marriage to same-sex couples and because California voters eliminated same-sex couples’ existing right to marry, Proposition 8 fails even rational-basis review for equal protection purposes. *See id.* at 1086–90.

<sup>3</sup> ACLU ET AL., WHY THE BALLOT BOX AND NOT THE COURTS SHOULD BE THE NEXT STEP ON MARRIAGE IN CALIFORNIA (2009), available at [http://www.aclu.org/pdfs/lgbt/ballot\\_box\\_20090527.pdf](http://www.aclu.org/pdfs/lgbt/ballot_box_20090527.pdf).

<sup>4</sup> *See* Jesse McKinley, *Same-Sex Vote Unlikely in California*, N.Y. TIMES, June 13, 2011, at A15. Throughout this Article, I use the term “elites” to refer generally to nonmovement actors from political, legal, and cultural arenas, with resources and/or influence.

<sup>5</sup> For an elaboration of legal mobilization, see MICHAEL W. McCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 5–12 (1994); Michael McCann, *Law and Social Movements*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 506, 508 (Austin Sarat ed., 2004); and Frances Kahn Zeman, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690 (1983).

accounts have failed to fully capture: The same strategy that yields movement progress may channel tactical conflict into powerful litigation that threatens and redirects that strategy. This is what I term the *legal mobilization dilemma*. Successful legal mobilization facilitates threats to movement strategy coming not from the state or the countermovement but from forces inside or allied with the movement itself.<sup>6</sup> In identifying the origins and implications of the legal mobilization dilemma, this Article analyzes an unexpected cost of highly successful litigation-based strategies.

As scholars have long acknowledged, litigation represents an attractive option for groups disadvantaged in the political process.<sup>7</sup> The access provided by courts distinguishes litigation from other institutional tactics. Courts generally have an obligation to hear and consider a group's grievance, even when lawmakers do not provide a forum. And because courts enjoy some degree of independence, they may advance the group's cause even when political actors and the general public remain relatively hostile. Ultimately, a single judicial decision, positive or negative, may exert significant influence on the process of social change.

The openness and accessibility that make courts so appealing to movement activists also yield risks of movement conflict and fragmentation.<sup>8</sup> While litigation facilitates access to power for marginalized groups, it also allows individuals to speak on behalf of a group and bind other group members. Litigation contrasts with more group-oriented models of legislation and direct democracy, permitting individualized action less feasible in other institutional arenas.<sup>9</sup> Unlike the legislative process, where the legislative body (both formally and informally) recognizes and authorizes certain group representatives to influence debate, or the initiative process, where a ballot

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<sup>6</sup> I am not documenting the radical flank effect that other scholars have observed. *See, e.g.*, Catherine Albiston, Response, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 70–71 (2011), [http://www.uiowa.edu/~ilr/bulletin/ILRB\\_96\\_Albiston.pdf](http://www.uiowa.edu/~ilr/bulletin/ILRB_96_Albiston.pdf) (“Social-movement scholars have identified a radical flank effect in which the demands and actions of the radical actors within a social movement cause the state to grant the more moderate demands made by other actors because those demands seem reasonable in comparison.”). Instead, the movement actors I analyze share a goal (marriage equality) and generally view the specific tactic (litigation) favorably, but they disagree on the strategic deployment and timing of that tactic.

<sup>7</sup> *See, e.g.*, JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 22 (1978).

<sup>8</sup> At the same time, the fragmentation facilitated by litigation may diversify a movement by giving a voice and access to those outside the inner circle of movement leadership.

<sup>9</sup> *See* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1623–27 (1997).

initiative must attract signatures and funding, litigation is a relatively inexpensive way for an individual to access an official decision-making process with no requirement that the claimant truly represent the group.<sup>10</sup> While legislative lobbying and initiative campaigns require some level of movement consensus and coordination, litigation can be launched by almost any movement member at almost any time. And yet the mere act of filing suit may attract publicity and media attention for an organization or individual otherwise not considered a significant movement actor.<sup>11</sup> More importantly, a lawsuit may result in a judicial decision that affects other movement members and restricts the movement going forward.

As a general matter, litigation poses a threat when tactical disagreement arises; any single movement member can initiate a lawsuit that threatens to bind the entire movement.<sup>12</sup> But sustained and successful legal mobilization may make litigation an especially appealing and powerful option through which to contest movement strategy. By attracting constituent and elite support for court-centered tactics and by making litigation more viable as both a political and doctrinal matter, successful legal mobilization may channel tactical conflict into potent lawsuits that have the capacity to significantly redirect the movement's strategic trajectory.

In identifying and analyzing the legal mobilization dilemma, this Article brings together three bodies of scholarship. The first examines the role of cause lawyers representing social movements, specifically exploring the relationship between litigation and intragroup difference. Derrick Bell's seminal article, *Serving Two Masters*, analyzed the ethical issues raised by NAACP Legal Defense and Educational Fund (LDF) lawyers' work on school desegregation litigation.<sup>13</sup> In acknowledging the influence of class interests and donor pressure on lawyer goals and tactics, Bell exposed the tensions inherent in cause lawyers' representation of large, diverse groups.<sup>14</sup> He specifically encouraged lawyer restraint and prioritized responsiveness to client preferences.<sup>15</sup> While Bell focused on post-*Brown v. Board of Education*<sup>16</sup>

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<sup>10</sup> See *id.* at 1650.

<sup>11</sup> See MCCANN, *supra* note 5, at 58 ("One key to effective legal mobilization as a movement building strategy was the tremendous amount of mainstream media attention generated by dramatic early lawsuits.").

<sup>12</sup> See Rubenstein, *supra* note 9, at 1650 ("The individualist procedural rules thus create the very situation that gives rise to the group member disputes . . .").

<sup>13</sup> Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

<sup>14</sup> See *id.* at 489–91.

<sup>15</sup> See *id.* at 512.

litigation, Mark Tushnet explored ideological and strategic differences in the litigation campaign leading up to *Brown*.<sup>17</sup> Tushnet situated the centralization of litigation strategy, through LDF, as an important “political” solution to the problems of intragroup difference and strategic coordination.<sup>18</sup> William Rubenstein broadened the lens to include other movements and shifted attention toward the operation of group decision making, both among lawyers and constituents.<sup>19</sup> Rubenstein attended to the dangerous group-based effects of individual lawsuits<sup>20</sup> and proposed procedural and ethical solutions to the problems posed by the individualist model of litigation in the social movement context.<sup>21</sup> Scholarship that can broadly be described as cause lawyering work builds on and extends insights offered by Bell, Tushnet, and Rubenstein by focusing on the dynamics of intragroup difference within social movements and on the implications of such difference for the role of lawyers.<sup>22</sup>

A second body of scholarship, sociolegal work on legal mobilization, uncovers the impact of law and litigation on social movements.<sup>23</sup> Even as the legal mobilization perspective recognizes the constraints of court-centered tactics, it views the role of law expansively and sees litigation as a potentially powerful resource available to social movement actors.<sup>24</sup> While acknowledging that favorable judicial decisions may secure tangible rights and benefits for movement constituents, legal mobilization scholars devote significant attention

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<sup>16</sup> 347 U.S. 483 (1954).

<sup>17</sup> See MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 138–58 (1987).

<sup>18</sup> *Id.* at 157.

<sup>19</sup> See Rubenstein, *supra* note 9, at 1626.

<sup>20</sup> See *id.* at 1637–39.

<sup>21</sup> See *id.* at 1668–80.

<sup>22</sup> See, e.g., Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 838 (2008) (exploring the role of lawyers in negotiating the tension between individual clients, who may be “covering” stigmatized identities, and broader group-based interests); Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U. L. REV. 131, 134–36 (2011) (situating coordination—or lack thereof—of Supreme Court litigation within scholarly debates over litigation tactics and over lawyer responsiveness to client needs); Douglas NeJaime, Note, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.—C.L. L. REV. 511, 517–20 (2003) (locating representational ethics in LGBT rights litigation within scholarly debates over intragroup difference and over client representation).

<sup>23</sup> For the seminal work in this field, see MCCANN, *supra* note 5.

<sup>24</sup> See, e.g., *id.* at 10–11; see also CATHERINE R. ALBISTON, *INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE 13* (2010); Lisa Vanhala, *Social Movements Lashing Back: Law, Social Change and Intra-Social Movement Backlash in Canada*, 54 STUD. L. POL. & SOC. 113, 118–19 (2011).

to litigation's productive indirect effects.<sup>25</sup> Inside a movement, activists deploy litigation to mobilize and empower constituents and to aid fundraising.<sup>26</sup> Outside a movement, advocates use litigation to gain publicity, raise funds from foundations and allies, obtain leverage with government officials, convince the public, and influence elites.<sup>27</sup> While these benefits may emerge from legal victory, they may also result from the initial act of rights claiming and from the mere process of litigation.<sup>28</sup> In fact, advocates may even use litigation loss to raise consciousness, fundraise, and bargain with state decision makers.<sup>29</sup>

Finally, a third body of scholarship, social movement theory, emerges primarily from sociology (and, to a lesser extent, political science and related disciplines) and informs the theoretical framework applied by legal

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<sup>25</sup> See, e.g., ALBISTON, *supra* note 24, at 189–90; MCCANN, *supra* note 5, at 284–85; MICHAEL PARIS, FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM 9–10 (2010); Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do for, and to, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 1, 10–12 (Austin Sarat & Stuart A. Scheingold eds., 2006). For a review of some of the central contributions to this literature, see Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 609–12 (2009). In other work, I have set up a distinction between internal and external effects, distinguishing implications inside the movement from those outside the movement, to catalog the indirect benefits of litigation. See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969–1011 (2011). Catherine Albiston has carefully elaborated this distinction into a formal typology. See Albiston, *supra* note 6, at 64 tbl.1.

<sup>26</sup> See Albiston, *supra* note 6, at 64 tbl.1; see also STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 131 (1974); Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 25, at 145, 147; Michael W. McCann, *How Does Law Matter for Social Movements?*, in HOW DOES LAW MATTER? 76, 83–84 (Bryant G. Garth & Austin Sarat eds., 1998); Laura Beth Nielsen, *Social Movements, Social Process: A Response to Gerald Rosenberg*, 42 J. MARSHALL L. REV. 671, 680 (2009); Stuart A. Scheingold, *The Politics of Rights Revisited*, in GOVERNING THROUGH COURTS 193, 204 (Richard A.L. Gambitta et al. eds., 1981).

<sup>27</sup> See Albiston, *supra* note 6, at 64 tbl.1; see also HANDLER, *supra* note 7, at 30–31; MCCANN, *supra* note 5, at 10; GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 21–25 (2009); McCann, *supra* note 5, at 514.

<sup>28</sup> See MCCANN, *supra* note 5, at 280; SCHEINGOLD, *supra* note 26, at 49–53; Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 25, at 84, 92; Mary Bernstein et al., *The Challenge of Law: Sexual Orientation, Gender Identity, and Social Movements*, in QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW 1, 6 (Scott Barclay et al. eds., 2009); Susan M. Olson, *The Political Evolution of Interest Group Litigation*, in GOVERNING THROUGH COURTS, *supra* note 26, at 225, 227; William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1805 (1994) (reviewing CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993)).

<sup>29</sup> See NeJaime, *supra* note 25, at 983–1002. Albiston provides a formal typology, in which she separates the positive and negative effects that emerge from litigation wins, litigation losses, and merely “playing the [litigation] game.” See Albiston, *supra* note 6, at 66, 67 tbl.2.

mobilization scholars.<sup>30</sup> Social movement scholars analyze how movements materialize and operate, devoting attention both to processes of mobilization and to methods of persuasion and survival.<sup>31</sup> Social movement work generally distinguishes between confrontational tactics, including direct action, protest, and disruption, and institutional tactics, including legislative advocacy, electoral politics, and litigation; this work traditionally associates the former with more radical movement politics and the latter with movement moderation and co-optation.<sup>32</sup> Yet social movement scholars have devoted scant attention to the operation and effects of litigation, and therefore have left largely unexamined the field's underlying assumptions regarding court-centered tactics.<sup>33</sup>

In specifically exploring the role of litigation in tactical conflicts within movements, this Article seeks to bring scholarship on lawyering and legal mobilization more concretely to social movement work.<sup>34</sup> Social movement scholarship would benefit from additional empirical work on the relationship between litigation and movement mobilization to unpack, and perhaps qualify, underlying assumptions about institutional tactics. At the same time, sociolegal

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<sup>30</sup> See McCann, *supra* note 5, at 506 (“[Legal mobilization theory] merges a dynamic dispute-oriented, interpretivist understanding of legal practice with insights from social movement theorizing about collective action based on ‘political process.’” (citations omitted)); see also PARIS, *supra* note 25, at 19; Steven E. Barkan, *Political Trials and Resource Mobilization: Towards an Understanding of Social Movement Litigation*, 58 SOC. FORCES 944, 945 (1980).

<sup>31</sup> See, e.g., FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 4–5, 24 (1977); J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527, 528 (1983); David S. Meyer, *Protest and Political Opportunities*, 30 ANN. REV. SOC. 125 (2004); David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464 (1986).

<sup>32</sup> See, e.g., Hanspeter Kriesi, *The Organizational Structure of New Social Movements in a Political Context*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS* 152, 158 (Doug McAdam et al. eds., 1996); Suzanne Staggenborg, *The Consequences of Professionalization and Formalization in the Pro-Choice Movement*, 53 AM. SOC. REV. 585, 604 (1988).

<sup>33</sup> See Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 AM. J. SOC. 1201, 1203 (1991) (“Those interested in social movements see themselves as examining political behavior not directed into ‘proper channels’—that is, demonstrations, strikes, and boycotts, as opposed to election campaigns, lobbying, or legal proceedings.”).

<sup>34</sup> Joel Handler's foundational and highly influential work first bridged the gap between social movements and sociolegal studies, see HANDLER, *supra* note 7, yet did not yield sustained incorporation of social movement theory in legal scholarship or extensive work on litigation in social movement scholarship. As Edward Rubin argues, “Social scientists do not involve themselves in the technical, seemingly arcane details of legal doctrine, legislative drafting, or administrative rulemaking. And legal scholars do not venture into the chaotic, empirical world of mobilization, recruitment, political strategy, and organizational behavior.” Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 51 (2001).

work and legal scholarship can benefit from crucial insights from social movement theory. The legal mobilization framework derives from a theoretical perspective that draws on key social movement insights,<sup>35</sup> and legal scholars increasingly have used a social movement lens to understand constitutional culture and the effects of law on mobilization.<sup>36</sup> Even as a significant body of work now comes under the heading of law and social movements, theoretical concepts and empirical observations from social movement theory are rarely used to directly inform sociolegal analysis<sup>37</sup> and constitutional scholarship.<sup>38</sup>

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<sup>35</sup> See McCann, *supra* note 5, at 506.

<sup>36</sup> See, e.g., JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997) [hereinafter Balkin, *The Constitution of Status*]; Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); Risa L. Goluboff, *"We Live's in a Free House Such as It Is": Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

<sup>37</sup> Michael McCann has made a compelling case for more explicit interactions between these fields. See McCann, *supra* note 5, at 519. For notable examples of recent scholarship that links sociolegal work explicitly to social movement theory, see Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 HARV. C.R.—C.L. L. REV. 551, 553–72 (2011); Scott Barclay et al., *Two Spinning Wheels: Studying Law and Social Movements*, 54 STUD. L. POL. & SOC'Y 1, 2–5 (2011); Bernstein et al., *supra* note 28, at 7–12; Burstein, *supra* note 33, at 1202; Cummings & Rhode, *supra* note 25, at 613–15; Lynn C. Jones, *Exploring the Sources of Cause and Career Correspondence Among Cause Lawyers*, in THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 203, 203–04 (Austin Sarat & Stuart Scheingold eds., 2005); Anna-Maria Marshall, *Social Movement Strategies and the Participatory Potential of Litigation*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 25, at 164, 165–68; Stephen Meili, *Consumer Cause Lawyers in the United States: Lawyers for the Movement or a Movement unto Themselves?*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 25, at 120, 121; Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC. 1718, 1723–24 (2006); and Steven A. Boutcher, *Making Lemonade: Turning Adverse Decisions into Opportunities for Mobilization*, AMICI (Am. Sociological Ass'n, Wash., D.C.), Fall 2005, at 8, 8–9.

<sup>38</sup> But see Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871 (1999); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006); Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263

My contribution demonstrates that, with a more comprehensive turn to social movement theory, we can explicitly identify and analyze an otherwise-unobserved phenomenon in legal mobilization and gain a more nuanced understanding of the impact of institutional tactics on social movement activity.

Before proceeding, it is important to comment on methodology and to consider the broader applicability of my analysis. This Article uses the *Perry* litigation as a case study for contemplating the challenges that may flow from a successful legal mobilization strategy. In an effort to provide a rich, detailed account of the underlying events, I rely on a variety of materials, including judicial decisions, legal briefs, oral argument recordings, movement documents, organizational documents, media reports, interviews, and secondary academic sources. There are both benefits and limitations to this methodological approach. Even though I rely on an extensive set of materials, one could level reasonable challenges to my account.

Despite the highly detailed and context-specific nature of this case study, some of the key insights may be generalizable. That developments in the LGBT movement map onto observations made by scholars in a variety of movement settings suggests that advocates in other movements likely face the legal mobilization dilemma. More specifically, work on the role of litigation in the civil rights movement demonstrates that lawyers at LDF confronted disagreement over movement strategy, both from within the organization and from organizational outsiders.<sup>39</sup> Tushnet shows that, on several occasions, Thurgood Marshall and other leading LDF attorneys dealt with lawsuits that defied NAACP strategy and threatened the organization's control. For instance, Carter Wesley, a Texas lawyer, directly contravened Marshall's decision to abandon equalization suits and instead pursue a direct attack on segregation.<sup>40</sup> By forming a new organization, the Texas Conference for the Equalization of Educational Opportunities, and gaining the support of movement constituents in Texas, Wesley posed a direct, confrontational

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(2010); cf. SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *YALE L.J.* 804 (2008). For an insightful analysis of the lack of overlap between legal scholarship and social movement theory, see Rubin, *supra* note 34.

<sup>39</sup> Tushnet documents how, at one point, younger LDF lawyers favored a direct assault on segregation, while Thurgood Marshall continued to favor a more measured and incremental strategy. See TUSHNET, *supra* note 17, at 111.

<sup>40</sup> See *id.* at 107–08.

challenge to NAACP tactics.<sup>41</sup> Not only did Wesley's suit threaten to create damaging precedent, it also pushed a claim that appeared to contradict the NAACP's claims.<sup>42</sup> Marshall responded by attempting to integrate Wesley's strategy into pending NAACP suits, situating equalization as merely an alternative remedy for claims of discrimination.<sup>43</sup>

Similarly, Rubenstein notes how George Vaughn, a St. Louis attorney, filed a petition for certiorari in *Shelley v. Kraemer*, the now-famous restrictive covenant case,<sup>44</sup> against the advice of Marshall, who believed that the NAACP's position needed further development before presentation to the Supreme Court.<sup>45</sup> Vaughn had been involved in a conference convened by Marshall to discuss restrictive covenant cases and to coordinate strategy, but by the time Marshall convened the second conference on the topic and resolved to delay pushing the issue at the Supreme Court, Vaughn was already preparing *Shelley* for Supreme Court review.<sup>46</sup> Quickly responding, Marshall and his LDF colleagues took control of a similar case in Michigan and convinced the Court to consolidate it with *Shelley*.<sup>47</sup>

In addition to work on the civil rights movement, which has become paradigmatic in sociolegal and social movement scholarship, research on other movements would provide additional data with which to analyze the legal mobilization dilemma. For instance, litigation has been a significant contributor to the environmental movement's success.<sup>48</sup> Robust legislation authorized citizen suits, thus opening key avenues for litigation by environmental organizations.<sup>49</sup> According to Cary Coglianese's analysis, as the environmental movement attained insider status, advocates shifted away from sweeping lawsuits and "toward more routine, even defensive use of the courts."<sup>50</sup> Coglianese claims that the increasing institutionalization and professionalization of the movement correlated with movement activity

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

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 109.

<sup>44</sup> 334 U.S. 1 (1948).

<sup>45</sup> Rubenstein, *supra* note 9, at 1627–28.

<sup>46</sup> *Id.* at 1629.

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

<sup>48</sup> See Marshall, *supra* note 37, at 171 (“[E]nvironmental justice organizations turn again and again to litigation to pursue their goals.”).

<sup>49</sup> Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 98 (2001).

<sup>50</sup> *Id.* at 99.

seeking to preserve, rather than expand, the movement's earlier successes.<sup>51</sup> But with renewed activism among segments of the environmental movement, challenges to conventional strategy and objectives emerged.<sup>52</sup> Environmental activists mobilized constituents under new ideological visions and deployed litigation to advance these visions.<sup>53</sup> Indeed, Coglianese argues that some of the greatest challenges the environmental movement faces come from within its own ranks.<sup>54</sup>

Attention to movements on the Right could also shed light on the legal mobilization dilemma. As Reva Siegel shows, the anti-abortion movement has experienced ruptures over legal tactics targeting *Roe v. Wade*.<sup>55</sup> While many of the most established movement groups, including the National Right to Life Committee and Americans United for Life, favor the continued incremental diminishment of abortion rights, other organizations and movement leaders are urging a direct attack on *Roe*.<sup>56</sup> Without many opportunities for affirmative litigation, those encouraging a more aggressive approach have pushed controversial state legislative measures, such as fetal-heartbeat bills, that would prompt legal challenges.<sup>57</sup> As these state bills move forward, it will be important to see how movement leaders and organizations attempt to shape the ensuing litigation.<sup>58</sup>

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<sup>51</sup> See *id.* at 100–01.

<sup>52</sup> *Id.* at 105.

<sup>53</sup> See *id.* at 105–06.

<sup>54</sup> See *id.* at 107. Martha Davis's work on the welfare rights movement also provides relevant material. See MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973* (1993). Davis documents the conflict over litigation timing between a leading impact litigation organization, the Center on Social Welfare Policy and Law, and local legal-services lawyers. See *id.* at 62–63.

<sup>55</sup> See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694, 1709 (2008) (discussing intramovement disputes over how best to attack *Roe v. Wade*, 410 U.S. 133 (1973), and the right to abortion).

<sup>56</sup> See *id.*; see also Erik Eckholm, *Anti-Abortion Groups Are Split on Legal Tactics*, *N.Y. TIMES*, Dec. 5, 2011, at A1.

<sup>57</sup> See Eckholm, *supra* note 56.

<sup>58</sup> Siegel's work with Linda Greenhouse also suggests possible implications for the legal mobilization dilemma on the pro-choice side of the abortion conflict. Siegel and Greenhouse document the lead-up to the Supreme Court's decision in *Roe*, showing that litigations were pending around the country, and courts were responding to both public-health and feminist frames in liberalizing abortion restrictions. *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING* 119–20 (Linda Greenhouse & Reva B. Siegel eds., 2010); Ruth Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments (March, 1971)*, in *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING*, *supra*, at 121, 122–25. While Women versus Connecticut and its lawyers, Nancy Stearns (from the Center for Constitutional Rights) and Catherine Roraback (who was involved in the *Griswold v. Connecticut*, 381 U.S. 479 (1965), litigation), led the effort in Connecticut, see *Women vs. Connecticut Organizing Pamphlet (Circa November 1970)*, in *BEFORE ROE V. WADE: VOICES THAT*

Of course, we should not expect to observe the legal mobilization dilemma in every movement context. For example, work on the disability rights movement points to conditions that, in some ways, defy the phenomenon observed in this Article. Michael Waterstone, Michael Stein, and David Wilkin's work on disability cause lawyers suggests that the presence of an omnibus federal statute—the Americans with Disabilities Act<sup>59</sup> (ADA)—along with the absence of strong constitutional protections,<sup>60</sup> may produce a movement trajectory that is not characterized by strong movement coordination of litigation.<sup>61</sup> In this context, disability cause lawyers pursue cases to enforce statutory rights and do so with an eye toward lower court victories and settlement.<sup>62</sup> On the other hand, Supreme Court litigation on disability rights features predominantly private, nonmovement lawyers pressing claims, often unsuccessfully, that seek to expand the ADA's coverage.<sup>63</sup> The lack of movement coordination may pose less risk than in other social movement contexts because the nature of cases seeking enforcement of statutory rights differs from “the high-stakes, preclusive nature of constitutional litigation.”<sup>64</sup> Exploring differences observed in the disability rights movement may provide crucial material with which to better understand how and why the legal mobilization dilemma materializes. Indeed, comparing the work of the environmental movement, for instance, to the disability rights movement in the wake of legislative victories could provide important insights into the role of coordinated legal strategies in movement development and into

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SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING, *supra*, at 167, 167–68, 224, two University of Texas Law School graduates, Sarah Weddington and Linda Coffee, filed what would become *Roe v. Wade* in Texas, see BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING, *supra*, at 224. To better assess the likelihood of the legal mobilization dilemma in this context, we would need to ask more questions about pro-choice movement coordination and tactical contestation. Cf. SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT 103–09 (1991) (discussing the increasing professionalization and formalization of the pro-choice movement, along with reliance on institutionalized tactics, single-issue organizations, and rotating leadership).

<sup>59</sup> 42 U.S.C. §§ 12101–12213 (2006 & Supp. II 2008).

<sup>60</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

<sup>61</sup> Michael Ashley Stein et al., *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1662 (2010) (reviewing BAGENSTOS, *supra* note 38).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See Michael E. Waterstone et al., *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287, 1347 (2012). Nonetheless, disability cause lawyers' attempts to derail unwanted Supreme Court litigation, see Stein et al., *supra* note 62, at 1676–77 (“[S]ome long-time disability cause lawyers have urged withdrawal or settlement of ADA cases granted certiorari, with a pair of victories.” (footnote omitted)), resonate with observations made in this Article.

the relationship between movement coordination and the legal mobilization dilemma.

Finally, an important qualification is necessary at the outset. The issues posed by the legal mobilization dilemma raise theoretical and empirical questions about movement boundaries. My analysis, to a great extent, situates lawyers at the main LGBT rights organizations as voices for the organized movement. The new organization, AFER, stands in contrast to these movement leaders. Yet as much as AFER emerged largely from individuals who had not previously taken leading roles in LGBT legal activity and had not worked for other LGBT social movement organizations,<sup>65</sup> the individuals who founded AFER understand themselves as part of the broader movement and situate the organization as a movement leader.<sup>66</sup> For purposes of this Article, I bracket questions about where the LGBT movement ends and allied or outsider support begins, leaving such questions for future work. Rather than focus on the dynamics between movement insiders and outsiders, I concentrate on the way in which successful legal mobilization strategies may prove particularly susceptible to tactical contestation. The argument I advance in this Article does not hinge on the question of movement definition.

Nonetheless, I make a distinction between clear movement strategy—the strategy coordinated by activists at LGBT rights organizations that have led the movement for many years—and challenges to that strategy by movement constituents and new movement organizations. When a same-sex couple brings a marriage suit against the advice of advocates at LGBT rights organizations, that couple clearly contravenes movement strategy. When an organization like AFER forms for the purpose of bringing litigation that the leading LGBT rights organizations explicitly refused to bring, that organization also contravenes movement strategy, even as it becomes part of the movement, lays claim to a leadership role, and redirects and thereby constitutes movement strategy.

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<sup>65</sup> It appears that only one AFER staff member was previously employed by an LGBT movement organization. See *Leadership*, AM. FOUND. FOR EQUAL RTS., <http://www.afer.org/about/leadership> (last visited July 5, 2012). Shumway Marshall, AFER's Online Director, did similar work at Equality California. *Id.*

<sup>66</sup> See *About Us*, AM. FOUND. FOR EQUAL RTS., <http://www.afer.org/about/the-foundation/> (last visited July 5, 2012) (“As the sole sponsor of the federal court challenge of California’s Proposition 8, . . . AFER is leading the fight for marriage equality . . .”). Through their challenge, AFER leaders became important movement actors. And AFER’s founder, Chad Griffin, was recently tapped to head the Human Rights Campaign, the most resource-rich LGBT rights organization. See Andrew Harmon, *Chad Griffin Named President of HRC*, ADVOCATE (Mar. 2, 2012, 2:52 PM), [http://www.advocate.com/News/Daily\\_News/2012/03/02/Chad\\_Griffin\\_Named\\_President\\_of\\_HRC/](http://www.advocate.com/News/Daily_News/2012/03/02/Chad_Griffin_Named_President_of_HRC/).

This Article proceeds in three parts. Part I focuses on legal mobilization as a coordinated LGBT movement strategy, specifically framing the pre-*Perry* strategy as an incremental state-based approach. The LGBT movement's national marriage-equality strategy seizes on the power of state-based change. The movement's state court litigation has contributed substantially to progress on marriage equality. The first comprehensive relationship-recognition regime was initiated by a state court,<sup>67</sup> and the first state to offer marriage to same-sex couples did so pursuant to a state supreme court order.<sup>68</sup> Even when litigation has not led directly to marriage or relationship rights for same-sex couples, it has served important publicity, public-education, and bargaining purposes for the movement.<sup>69</sup>

In Part II, I situate litigation as a potent vehicle for pressing strategic dissent and defying the incremental state-based strategy adopted by leading LGBT movement lawyers. First, I suggest why litigation is a particularly attractive form of activism for movement actors who seek to depart from the movement's coordinated strategy. Then I locate the *Perry* litigation within the trajectory of lawsuits that reflect tactical contestation. Suits contravening the movement's state-by-state approach have either targeted unfavorable states or pursued federal claims in federal courts. But while movement lawyers limited the impact of many earlier litigation-based threats to movement tactics, AFER's effort presents a far different scenario; it derives from a resource-rich organization, draws on high-profile, elite support, and boasts prestigious legal representation.

Understanding *Perry* relative to other controversial lawsuits points to the ways in which sustained legal mobilization may heighten both the likelihood of unwanted litigation and the threat to movement strategy posed by that litigation. To develop this account, Part III uses insights from social movement work to explain how successful legal mobilization may channel strategic contestation into especially potent litigation. As legal mobilization changes internal movement circumstances and external political and legal conditions, lawsuits that depart from coordinated movement strategy may emerge—and may do so with increased power and support. First, legal mobilization produced a key effect within the LGBT movement—increased mobilization around the legal right to marry. The battles over marriage that played out

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<sup>67</sup> See *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>68</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>69</sup> See Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1312 (2010).

largely through litigation mobilized constituents around the constitutional, rights-based concept of marriage as the key to LGBT equality. This mobilization created additional opportunities and increased support for activism and litigation aimed at securing the right to marry. Second, legal mobilization produced a key effect outside the LGBT movement—the mainstreaming of marriage equality and LGBT equality norms more generally. The movement’s legal mobilization strategy contributed to significant changes in attitudes toward marriage equality among private elites and state actors, and these changes created an environment supportive of a sweeping federal marriage lawsuit. Elite support allowed movement constituents to find new resources with which to pursue the central movement goal of marriage equality. And advocates now find more sympathetic elites in state government and in the federal judiciary. These elite alignments work together, such that the new movement organization, AFER, confronts more hospitable federal judges at both the district court and appellate court levels, and these judges must address and respond to the California state government’s opposition to Proposition 8. These judges are also equipped with crucial doctrinal developments, which have been produced by successful LGBT rights litigation and which create opportunities for more expansive pro-LGBT judicial decisions.

#### I. LEGAL MOBILIZATION AND MARRIAGE EQUALITY

In this Part, I situate the LGBT movement’s marriage-equality campaign as a largely state-based legal mobilization strategy. Attention to this state-centered approach demonstrates that movement lawyers use litigation in ways that seize on its potential and yet appreciate its limitations. Early marriage litigation focused on state law claims in states with favorable background conditions. Only recently have advocates pursued a limited federal litigation strategy, and in doing so, they have sought to specifically build on important state-based advances. Understanding the state-by-state strategy adopted by leading LGBT movement advocates aids the subsequent analysis of *Perry*, which directly opposed and challenged the incremental state-centered approach by pursuing a sweeping federal lawsuit for marriage equality.

In situating legal mobilization as a leading LGBT movement strategy, I am positioning lawyers as leading social movement activists. Contrary to common assumptions in scholarship on social movements, cause lawyering and legal mobilization scholars recognize that lawyers, in some movements, act as core activists, rather than merely as professionals who serve the movement with

technical expertise.<sup>70</sup> In the LGBT movement, lawyers, to a large extent, lead the movement.<sup>71</sup> This is not to say that nonlawyer activists do not also play central roles or that lawyers do not coordinate strategy with other movement activists. Instead, I am merely reflecting the reality that lawyers at resource-rich LGBT legal organizations play prominent roles in formulating and executing movement strategy.

#### A. *State-Based Legal Mobilization*

LGBT movement advocates have used a legal mobilization strategy to target individual states, but the state-based approach is part of a coordinated national strategy. Advocates pursue nationwide change by building progress state by state.<sup>72</sup> After the initiation of the modern marriage-equality movement in Hawaii,<sup>73</sup> lawyers at the main LGBT legal organizations attempted to cabin the issue of marriage equality at the state level. State courts have been key players, with the courts of Vermont<sup>74</sup> and Massachusetts<sup>75</sup> delivering significant victories early in the legal fight for relationship recognition. Since then, state courts in California,<sup>76</sup> Connecticut,<sup>77</sup> and Iowa<sup>78</sup> have announced same-sex couples' right to marry in sweeping terms, while other state courts

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<sup>70</sup> See, e.g., Barclay et al., *supra* note 37, at 11 (“Social movement theory is largely silent about lawyers who work with social movements. When lawyers appear in social movement studies, they are mostly characterized as hired guns who exhaust a movement’s scarce resources and who exert a conservatizing influence because of their apparent ‘elite’ status.” (citations omitted)); Jones, *supra* note 37, at 203–04 (“What is missing from these theoretical assumptions is the view of lawyers as ‘insiders’ or as rank-and-file activists.”).

<sup>71</sup> See CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 16 (Michael Bronski ed., 2010); Cummings & NeJaime, *supra* note 69, at 1240; Eskridge, *supra* note 38, at 466.

<sup>72</sup> Other social movements have successfully adopted a state-based approach. See, e.g., PARIS, *supra* note 25, at 2 (describing the state-based litigation campaign for educational rights after the movement’s loss at the U.S. Supreme Court); Justin R. Long, *Demosprudence, Interactive Federalism, and Twenty Years of Sheff v. O’Neill*, 42 CONN. L. REV. 585, 601–03 (2009) (describing the shift from federal to state litigation in the education context). Indeed, states historically have served as vital arenas for social movement mobilization and activism. See ELISABETH S. CLEMENS, THE PEOPLE’S LOBBY: ORGANIZATIONAL INNOVATION AND THE RISE OF INTEREST GROUP POLITICS IN THE UNITED STATES, 1890–1925, at 65–67 (1997); Emily Zackin, *Positive Constitutional Rights in the United States* 9–10 (Nov. 2010) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

<sup>73</sup> See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>74</sup> See *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>75</sup> See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>76</sup> See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

<sup>77</sup> See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

<sup>78</sup> See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

have turned back same-sex couples' claims.<sup>79</sup> State legislatures, which generally worked against marriage equality early on, have more recently taken a leading role in relationship-recognition reform, with lawmakers in Vermont,<sup>80</sup> New Hampshire,<sup>81</sup> and New York<sup>82</sup> passing marriage-equality legislation, and those in many other states codifying nonmarital-relationship recognition.<sup>83</sup> The Council of the District of Columbia also passed a marriage-equality law.<sup>84</sup>

While some scholars have questioned the positive impact of marriage-equality litigation,<sup>85</sup> legal mobilization scholars tend to view the effects of such litigation in a positive light. Acknowledging that court decisions spurred significant backlash and led to important setbacks, these scholars nonetheless contend that litigation contributed in important ways to LGBT rights in a number of states across multiple domains.<sup>86</sup>

In a careful and comprehensive analysis, Thomas Keck links the movement's legal mobilization strategy to specific LGBT advances.<sup>87</sup> He balances the regressive policy documented in more pessimistic accounts with progressive laws on relationship recognition adopted by a number of states and Washington, D.C., since the Hawaii litigation.<sup>88</sup> Keck explicitly connects incremental reform to court-centered strategies, arguing that marriage litigation produced, rather than foreclosed, the very possibilities for nonmarital-

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<sup>79</sup> See *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (en banc).

<sup>80</sup> VT. STAT. ANN. tit. 15, § 8 (West Supp. 2011).

<sup>81</sup> N.H. REV. STAT. ANN. § 457:1-a (Supp. 2011).

<sup>82</sup> N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2011).

<sup>83</sup> See, e.g., DEL. CODE ANN. tit. 13, § 201(a) (Supp. 2012); HAW. REV. STAT. ANN. § 572B-2 (West Supp. 2012); R.I. GEN. LAWS § 15-3.1-1(2) (Supp. 2012).

<sup>84</sup> D.C. CODE § 46-401(a) (Supp. 2012). At the time this Article went to print, state lawmakers in Washington and Maryland had passed marriage-equality legislation, but opponents were attempting to block the laws through voter initiatives. See Aaron C. Davis, *Gay Marriage Bill Approved by Md. Senate*, WASH. POST, Feb. 24, 2012, at A1; William Yardley, *House Vote Moves Washington State Closer to Gay Marriage*, N.Y. TIMES, Feb. 9, 2012, at A15.

<sup>85</sup> See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 415 (2d ed. 2008); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 482 (2005).

<sup>86</sup> See, e.g., Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 167-82 (2009); see also ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 216-18 (2005); DANIEL R. PINELLO, *AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE* 192-93 (2006).

<sup>87</sup> See Keck, *supra* note 86.

<sup>88</sup> See *id.* at 169.

relationship-recognition regimes.<sup>89</sup> In this view, litigation threatening marriage equality suddenly cast nonmarital recognition, including domestic-partnership and civil-union regimes, as a moderate, compromise position.<sup>90</sup> Keck also balances legislative setbacks with legislative victories on a variety of LGBT issues.<sup>91</sup> While the pace of anti-LGBT legislation picked up after key court victories, the pace of pro-LGBT legislation did as well, with many states passing antidiscrimination laws, hate-crime protections, and relationship-recognition statutes.<sup>92</sup> Public opinion tracks this progressive policy story, with polling data demonstrating increasing support among the general public for marriage equality and civil unions.<sup>93</sup>

When viewed through the legal mobilization lens, it becomes clear that LGBT rights advocates used litigation to obtain tangible and immediate results for constituents while also seizing on the extrajudicial effects of court-based strategies. To reap these indirect benefits, advocates pursued litigation at the same time that they deployed a range of other tactics, which worked in conjunction with litigation.<sup>94</sup> State-by-state legislative advocacy, in the shadow of marriage litigation, produced a variety of relationship-recognition regimes, ranging from designated beneficiaries to domestic partnerships, and civil unions to marriage. Some states that provided relationship rights to same-sex couples gradually expanded on those rights. For instance, after California enacted a fairly limited domestic-partnership scheme in 1999,<sup>95</sup> the legislature added to the rights and benefits attached to the domestic-partnership status,

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<sup>89</sup> See *id.* at 158–59; accord MARTIN DUPUIS, SAME-SEX MARRIAGE, LEGAL MOBILIZATION, & THE POLITICS OF RIGHTS 164 (2002).

<sup>90</sup> See Keck, *supra* note 86, at 158–59; see also Cummings & NeJaime, *supra* note 69, at 1246.

<sup>91</sup> See Keck, *supra* note 86, at 172 tbl.5.

<sup>92</sup> See *id.* at 171–75 & tbl.6.

<sup>93</sup> See *id.* at 165–67; see also Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1531–32 & n.285 (2006). More recent polling bolsters this claim. See, e.g., Carol J. Williams, *Polls May Sway Prop. 8 Case*, L.A. TIMES, May 23, 2011, at AA4.

<sup>94</sup> See Cummings & NeJaime, *supra* note 69, at 1312–18. This is consistent with observations made about cause lawyers more generally. See Scott L. Cummings, *Critical Legal Consciousness in Action*, 120 HARV. L. REV. F. 62, 67 (2007), <http://www.harvardlawreview.org/media/pdf/cummings.pdf> [hereinafter Cummings, *Critical Legal Consciousness*] (“[Public interest lawyers] operate across legal boundaries in a manner that suggests deep appreciation for the interplay between traditional legal activism and transformative political goals.”); Scott L. Cummings, *Law in the Labor Movement’s Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927, 1979–84 (2007) (describing a model of “[m]ulti-[l]evel [l]egal [a]dvocacy”).

<sup>95</sup> Act of Oct. 2, 1999, ch. 588, sec. 2, §§ 297–299.6, 1999 Cal. Stat. 4157, 4157–61 (codified as amended at CAL. FAM. CODE §§ 297–299.6 (West Supp. 2012)).

making incremental shifts in 2001<sup>96</sup> and 2003,<sup>97</sup> with the result of ultimately providing all of the state rights and benefits of marriage.<sup>98</sup> Advocates defended the domestic-partnership law in court even as they litigated the issue of marriage equality.<sup>99</sup> Moreover, some states providing the benefits and obligations of marriage under a nonmarital designation eventually provided marriage in name as well. Vermont<sup>100</sup> and New Hampshire,<sup>101</sup> for example, moved legislatively from a comprehensive civil-union statute to full marriage equality. Vermont's change occurred after a special commission determined that civil unions, which were obtained through litigation, did not in fact provide equal treatment to same-sex couples in a variety of settings.<sup>102</sup>

While litigation has produced important progress for the LGBT movement, lawyers for the movement recognize the risks and constraints of litigation and therefore approach courts with caution. They target states with favorable background conditions—pro-LGBT laws relating to antidiscrimination and parenting, potentially receptive judges and political leaders, and a difficult and lengthy process for amending the state constitution.<sup>103</sup> For instance, lawyers at GLAD brought suit in Massachusetts after careful consideration and based on a number of favorable indicators.<sup>104</sup> Massachusetts law protected lesbians and gay men from discrimination.<sup>105</sup> The state's high court had ruled favorably on the parental rights of same-sex couples.<sup>106</sup> And constitutional initiatives in Massachusetts require a constitutional convention and passage by the legislature, rather than merely signature gathering by citizen groups.<sup>107</sup>

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<sup>96</sup> Act of Oct. 14, 2001, ch. 893, 2001 Cal. Stat. 7283.

<sup>97</sup> California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, sec. 4, §§ 297.5, 2003 Cal. Stat. 1.

<sup>98</sup> *Id.* For a more thorough analysis of the process from 1999 to 2003, see Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1558–67 (2004).

<sup>99</sup> See Cummings & NeJaime, *supra* note 69, at 1287.

<sup>100</sup> See VT. STAT. ANN. tit. 15, § 8 (West Supp. 2011).

<sup>101</sup> See N.H. REV. STAT. ANN. § 457:1-a (Supp. 2011).

<sup>102</sup> See OFFICE OF LEGISLATIVE COUNCIL, REPORT OF THE VERMONT COMMISSION ON FAMILY RECOGNITION AND PROTECTION 26–27 (2008), available at [http://www.leg.state.vt.us/WorkGroups/FamilyCommission/VCFRP\\_Report.pdf](http://www.leg.state.vt.us/WorkGroups/FamilyCommission/VCFRP_Report.pdf).

<sup>103</sup> See Douglas NeJaime, *Convincing Elites, Controlling Elites*, 54 STUD. L. POL. & SOC'Y 175, 185–87, 193–98 (2011) (comparing the strategic decision making in Massachusetts with that in California).

<sup>104</sup> See Mary L. Bonauto, Goodridge in Context, 40 HARV. C.R.–C.L. L. REV. 1, 8–21 (2005).

<sup>105</sup> MASS. GEN. LAWS ch. 151B, §§ 3–4 (LexisNexis 2008).

<sup>106</sup> See Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993) (approving second-parent adoption in the context of a same-sex couple).

<sup>107</sup> MASS. CONST. amend. art. XLVIII, pt. IV, §§ 2–5; see also Bonauto, *supra* note 104, at 21.

In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court held that excluding same-sex couples from marriage violated the state constitution.<sup>108</sup> In a subsequent opinion, the court made clear that only full marriage rights would remedy the constitutional violation.<sup>109</sup> As lead attorney Mary Bonauto explains, *Goodridge* changed the Massachusetts landscape governing LGBT rights and marriage equality.<sup>110</sup> The decision mobilized movement members and altered the discussion in the state political arena.<sup>111</sup> Political elites suddenly had a state court decision to justify their support for marriage equality, and opponents had to work to contravene a Supreme Judicial Court decision and to alter the meaning of previously announced constitutional rights.<sup>112</sup> To avoid a constitutional amendment, LGBT rights advocates worked with sympathetic legislators to outmaneuver opponents and convince moderates to support the cause.<sup>113</sup> Over time, support for marriage equality increased among elites and the general public. Now, several years after the marriage-equality regime initiated by the state supreme court generated intense controversy and division, marriage appears safe from attack.<sup>114</sup>

While the Massachusetts litigation presents a promising picture of court-centered change, LGBT rights lawyers have at times adopted a strategy of litigation avoidance based on the background institutional and political conditions. In California, for instance, advocates consistently advised against marriage litigation and instead pursued a legislative and public-education strategy in conjunction with more limited claims in court.<sup>115</sup> Lawyers were concerned that, even if they could secure a state supreme court decision ordering marriage equality, a mobilized countermovement could reverse that result through the initiative process, which unlike in Massachusetts does not require legislative approval and moves very quickly. While movement lawyers were forced into litigation in California by events outside their control and ultimately prevailed at the California Supreme Court, their warnings proved

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<sup>108</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>109</sup> Ops. of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

<sup>110</sup> See Bonauto, *supra* note 104, at 31.

<sup>111</sup> See *id.* at 53.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.* at 53–54.

<sup>114</sup> State leaders support marriage equality. See Complaint at 22–23, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-11156-JLT); Matt Viser, *A Patrick Family Coming-Out*, BOS. GLOBE, June 13, 2008, at A1.

<sup>115</sup> See Cummings & NeJaime, *supra* note 69, at 1251–1300.

correct when voters approved Proposition 8 to prohibit marriage for same-sex couples.<sup>116</sup>

### B. *Federal Legal Mobilization*

As a key part of their cautious state-based litigation strategy, LGBT rights lawyers for many years attempted to keep controversies over relationship recognition away from federal judges. Their approach to federal courts, as compared to their initiation of litigation in select state courts, demonstrates that movement advocates see courts as important social-change agents at the same time that they recognize the risks of court-centered strategies given the position of courts in relation to other governmental actors and the public.<sup>117</sup> Indeed, movement lawyers are especially wary of approaching the U.S. Supreme Court with the general question of marriage equality—as the *Perry* lawyers attempt to do—when conservatives dominate the federal bench, the laws of a majority of states do not allow same-sex couples to marry, and national public opinion is split.<sup>118</sup>

Movement advocates are well aware of the risks of a Supreme Court loss. The 1980s witnessed perhaps the most devastating defeat for LGBT rights. In *Bowers v. Hardwick*, the U.S. Supreme Court upheld Georgia's antisodomy statute in a 5–4 decision at a time when twenty-five states still maintained such laws.<sup>119</sup> The decision facilitated continued discriminatory treatment of lesbians and gay men. Lawyers struggled to argue that the U.S. Constitution prohibited sexual-orientation discrimination while allowing criminal prohibitions on the conduct understood to define the group.<sup>120</sup> Consequently, LGBT rights lawyers looked in a more wholesale fashion to state courts and to state law claims.<sup>121</sup> They experienced considerable success, as eight of the eleven states

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<sup>116</sup> See *id.* at 1293–95.

<sup>117</sup> Movement lawyers' outlook on litigation resonates with Scott Cummings' idea of "constrained legalism," in which public interest lawyers "strategically deploy[] law in a way that is neither utopian in its hopes for legal reform nor rejectionist in its dismissal of legal avenues of transformation." Cummings, *Critical Legal Consciousness*, *supra* note 94, at 63.

<sup>118</sup> For a defense of a Supreme Court strategy on marriage equality, see Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755 (2011).

<sup>119</sup> 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>120</sup> See, e.g., *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ("If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious."). *But see* *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (invalidating Colorado's Amendment 2, which precluded sexual-orientation antidiscrimination protections, on equal protection grounds).

<sup>121</sup> See, e.g., *Boutcher*, *supra* note 37, at 12.

decriminalizing sodomy after *Bowers* did so through judicial decisions.<sup>122</sup> LGBT rights advocates familiarized state court judges with the discrimination faced by lesbians and gay men, often in the context of antisodomy laws, and these judges began to understand the constitutional dimensions of such discrimination. State courts used state constitutional law to gradually expand LGBT rights.<sup>123</sup> For instance, once a court found that the state constitution prohibited antisodomy laws, it might also find that lesbians and gay men deserved state-based parental rights or relationship recognition.<sup>124</sup>

While LGBT rights lawyers have focused largely on state-based activism, they are not entirely averse to federal litigation. In fact, one of their most important victories occurred at the U.S. Supreme Court. Led by Lambda Legal, the movement prevailed in the landmark *Lawrence v. Texas* case, which struck down criminal prohibitions on sodomy.<sup>125</sup> In overturning *Bowers*, *Lawrence* signified the vast progress of the movement over a period of less than twenty years. As a classic impact litigation victory, *Lawrence* rejected with one decision criminal prohibitions in thirteen states<sup>126</sup> and removed a significant barrier to the achievement of other rights, namely those in the family and workplace. Doctrinally, arguments for increased scrutiny for sexual-orientation-based classifications became more plausible, and the conduct–status distinction that had long harmed lesbians and gay men began to erode. Crucially, though, the *Lawrence* effort built on state-based advances, using important state law victories to frame federal constitutional claims and convince the Court to reverse its earlier decision.<sup>127</sup>

In light of movement developments post-*Bowers* and the long road from *Bowers* to *Lawrence*, it is unsurprising—even apart from the state law nature of marriage—that advocates turned exclusively to state courts and state law for

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<sup>122</sup> See, e.g., *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001); see also ANDERSEN, *supra* note 86, at 100–01; NeJaime, *supra* note 25, at 990–94.

<sup>123</sup> See NeJaime, *supra* note 25, at 991–94.

<sup>124</sup> See *id.* at 992–93. Montana provides an example of this trend. The Montana Supreme Court struck down the state’s antisodomy statute, see *Gryczan v. State*, 942 P.2d 112, 126 (Mont. 1997), before ruling unconstitutional the state university’s policy offering insurance benefits to different-sex, but not same-sex, couples, see *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004).

<sup>125</sup> 539 U.S. 558 (2003).

<sup>126</sup> See *id.* at 573, 578.

<sup>127</sup> NeJaime, *supra* note 25, at 992.

relationship recognition.<sup>128</sup> The favorable conditions that exist in many states contrast sharply with unfavorable federal law, including the Defense of Marriage Act<sup>129</sup> (DOMA), and a conservative federal judiciary, including a sharply divided Supreme Court.

But after working to stop federal DOMA suits by same-sex couples, the organized movement ultimately filed its own DOMA challenge in 2009. The carefully constructed and incremental federal litigation strategy targeting DOMA builds directly on significant state law advances. By leveraging state-level change to challenge the federal government's treatment of same-sex couples' state law marriages, the DOMA strategy depends on and seeks to extend state-based victories.<sup>130</sup>

GLAD's suit, *Gill v. Office of Personnel Management*, launched the first orchestrated movement attack on DOMA and did so in a limited way.<sup>131</sup> The suit targeted only section 3, which prohibits federal recognition of same-sex couples' marriages, and specified a fairly limited range of federal rights at stake.<sup>132</sup> Moreover, it addressed only Massachusetts married, same-sex couples, asking for a determination that DOMA was unconstitutional as applied to those couples.<sup>133</sup> Accordingly, the suit attempted to take the first big bite out of DOMA, but it did so without directly affecting the issue of same-sex marriage in most other states.<sup>134</sup>

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<sup>128</sup> See Michael McCann & Jeffrey Dudas, *Retrenchment . . . and Resurgence?: Mapping the Changing Context of Movement Lawyering in the United States*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 25, at 37, 54.

<sup>129</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006) and 1 U.S.C. § 7). Congress passed DOMA in 1996. Section 2 provides that states need not recognize marriages of same-sex couples from other states. *Id.* § 2. Section 3 prohibits the federal government from recognizing same-sex couples' valid state law marriages. *Id.* § 3.

<sup>130</sup> See *Windsor v. United States*, 797 F. Supp. 2d 320 (S.D.N.Y. 2011); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *aff'd sub nom. Massachusetts v. U.S. Dep't of Health & Human Servs.*, Nos. 10-2204, 10-2207, 10-2214, 2012 WL 1948017 (1st Cir. May 31, 2012); First Amended Complaint for Declaratory and Injunctive Relief at 2, *Pedersen v. Office of Pers. Mgmt.*, No. 10-1750-VLB (D. Conn. Jan. 14, 2011); see also *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), *aff'd*, 2012 WL 1948017.

<sup>131</sup> First Amended and Supplemental Complaint for Declaratory, Injunctive, or Other Relief and for Review of Agency Action, *Gill*, 699 F. Supp. 2d 374 (No. 09-10309-JLT) [hereinafter *Gill* Complaint].

<sup>132</sup> *Id.* at 5. The suit did not pursue broader and more complicated federal rights, such as those related to immigration.

<sup>133</sup> *Id.* at 2, 5.

<sup>134</sup> See David G. Savage, *Gay Marriage Brick by Brick*, L.A. TIMES, Mar. 3, 2011, at A13.

GLAD received a favorable decision from the district court.<sup>135</sup> With this result in hand, GLAD filed an additional suit in federal district court in Connecticut on behalf of Connecticut, Vermont, and New Hampshire married, same-sex couples.<sup>136</sup> On the same day, the ACLU filed a similar suit in federal district court in New York on behalf of New York married, same-sex couples.<sup>137</sup> These lawsuits provided an opening for LGBT rights advocates to pressure the Obama Administration to make good on its commitment to end DOMA's discriminatory treatment. While the Justice Department had been defending DOMA in *Gill* under a rational-basis theory,<sup>138</sup> the new litigation offered an opportunity to contest the appropriate level of scrutiny for DOMA's sexual-orientation-based classification because of the lack of Second Circuit precedent on the issue. Ultimately, the Obama Administration announced that such classifications merit heightened scrutiny under federal equal protection law and that section 3 of DOMA is accordingly unconstitutional.<sup>139</sup> Prompted by the new Justice Department position, Lambda Legal launched a DOMA challenge on the West Coast: Its lawyers refiled an employee-benefits case in federal district court in California to explicitly challenge DOMA.<sup>140</sup>

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<sup>135</sup> See *Gill*, 699 F. Supp. 2d at 377. Immediately before this Article went to print, the First Circuit affirmed that ruling. See *Massachusetts*, 2012 WL 1948017.

<sup>136</sup> See Complaint for Declaratory and Injunctive Relief, Pedersen v. Office of Pers. Mgmt., No. 10-1750-VLB (D. Conn. Nov. 9, 2010).

<sup>137</sup> See Complaint, *Windsor v. United States*, 797 F. Supp. 2d 320 (S.D.N.Y. 2011) (No. 10-CV-08435 (BSJ) (JCF)).

<sup>138</sup> Memorandum of Law in Support of Defendants' Motion to Dismiss at 3, *Gill*, 699 F. Supp. 2d 374 (No. 09-10309-JLT).

<sup>139</sup> Defendant United States' Memorandum of Law in Response to Plaintiff's Motion for Summary Judgment and Intervenor's Motion to Dismiss at 1, *Windsor*, 797 F. Supp. 2d 320 (No. 10-CV-08435 (BSJ) (JCF)); Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker of the U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>. The House of Representatives, through its Bipartisan Legal Advisory Group, hired former Bush Solicitor General Paul Clement to intervene in defense of DOMA. See Memorandum of Law of Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives in Opposition to Plaintiff's Motion to Strike, *Windsor*, 797 F. Supp. 2d 320 (No. 10-CV-08435 (BSJ) (JCF)). In another case, a federal bankruptcy court adopted the Justice Department's position in holding DOMA unconstitutional as applied to a married, California same-sex couple. *In re Balas*, 449 B.R. 567, 575-76, 579 (Bankr. C.D. Cal. 2011).

<sup>140</sup> See Second Amended Complaint at 1-2, *Golinski v. U.S. Office of Pers. Mgmt.*, 781 F. Supp. 2d 967 (N.D. Cal. 2011) (No. C 10-00257 JSW). The district court recently found DOMA unconstitutional. See *Golinski v. U.S. Office of Pers. Mgmt.*, No. C 10-00257 JSW, 2012 WL 569685, at \*26 (N.D. Cal. Feb. 22, 2012). Across the country, Lambda Legal is attempting to leverage state law progress in neighboring states. Just days after New York lawmakers passed marriage-equality legislation, lawyers filed a lawsuit in New Jersey state court that presents both state and federal constitutional claims. See Complaint for Declaratory and Injunctive Relief, *Garden State Equal. v. Dow*, No. L-001729-11 (N.J. Super. Ct. Law Div. June 29, 2011). The suit highlights the common nature of travel between New York and New Jersey and argues that same-sex couples in civil unions in New Jersey are relegated to an inferior status compared to their neighbors in New

The recent initiation of federal litigation, perhaps paradoxically, highlights the centrality of state-based change. LGBT rights lawyers have focused for several years on achieving relationship recognition at the state level. Only when some states allowed same-sex couples to marry and support for marriage-equality laws had increased significantly (particularly in those states) did advocates attempt to leverage state law advances for federal gains. The DOMA suits build on, rather than contravene, the coordinated state-based strategy. Instead of challenging marriage restrictions generally or presenting claims on behalf of unmarried, same-sex couples, the suits directly depend on state law advances. Indeed, advocates invoke states' traditional authority over marriage, arguing for federal deference to state law definitions.<sup>141</sup>

The recent federal litigation also demonstrates the role of court-centered tactics in advocates' arsenal and the position of courts in the broader political environment. Lawyers only pursued federal litigation when conditions at the state and federal levels, both inside and outside the courts, seemed favorable. With an increasingly receptive administration, more support for marriage equality from national political figures, and more states authorizing marriage for same-sex couples, lawyers could pursue DOMA litigation with more confidence that they could achieve a positive result in court and find adequate political support for that result.

## II. TACTICAL CONFLICT AND LITIGATION

In this Part, I distinguish litigation from other institutional tactics to show how it is uniquely suited to individual attempts to control or redirect movement strategy. I then locate *Perry* in the trajectory of litigation threats to the LGBT movement's coordinated, state-based legal mobilization approach. While movement lawyers have managed to minimize the impact of many unwanted lawsuits, *Perry* presents a new brand of litigation, featuring the support—from constituents, elites, and the courts—necessary to drive a large-scale suit.

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York. *Id.* at 2, 20–21. Indeed, a month after filing suit, Lambda Legal celebrated the first day of marriage for same-sex couples in New York by focusing on the New York–New Jersey disparity. See Press Release, Lambda Legal, Lambda Legal and Garden State Equality Celebrate Marriage in New York by Calling for Equality in New Jersey (July 24, 2011), available at [http://www.lambdalegal.org/news/pr/nj\\_20110724\\_calling-for-marriage.html](http://www.lambdalegal.org/news/pr/nj_20110724_calling-for-marriage.html).

<sup>141</sup> See *Gill* Complaint, *supra* note 131, at 11; see also Complaint at 22, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-11156-JLT).

### A. *The Power of Litigation*

While other institutional tactics generally require substantial organizational strength, significant funds, and a relatively high degree of community consensus, one individual, with little money and no community support, can initiate litigation. Once commenced, a lawsuit can generate a substantial amount of publicity even if the movement actors staging it lack name recognition and the community goodwill associated with established organizations.<sup>142</sup> Most importantly, one lawsuit, particularly with a Supreme Court resolution, can inflict tremendous legal and political damage. Of course, a single suit may also yield tremendous benefits. Win or lose, litigation is a high-stakes proposition.

First, any movement member can get into court and can do so without community support or substantial material resources. The individualist model of litigation, embodied in both procedural and ethical rules, contrasts sharply with more democratic, consensus-based models that characterize group decision making in other institutional arenas.<sup>143</sup> Procedural mechanisms allow an individual litigant to bring a claim that will affect the rights of a broad constituency.<sup>144</sup> And ethical rules instruct a lawyer to loyally represent the particular client's interest, with little consideration for the impact on other similarly situated group members.<sup>145</sup> One eager group member, perhaps with one willing lawyer, can set the movement on a new course by filing a lawsuit that raises a claim impacting the entire group. Indeed, as Rubenstein argues, "In the shadow of this legal regime, group disputes are exacerbated and constituencies are disharmonized."<sup>146</sup> That is, the individualist model of litigation may provoke and heighten movement conflict.

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<sup>142</sup> Social movement work recognizes the importance of media coverage. See Jenkins, *supra* note 31, at 546 ("Because mass media coverage is decisive in informing elites and mass publics about movement actions as well as in forming the morale and self-image of movement activists, the mass media are important actors in political conflicts.").

<sup>143</sup> See Rubenstein, *supra* note 9, at 1624–27.

<sup>144</sup> See *id.* at 1644.

<sup>145</sup> See MODEL RULES OF PROF'L CONDUCT pmb1. (2002) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *id.* R. 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . ."); *id.* R. 1.7(a) (defining conflicts of interest without mentioning the interests of other group members); see also Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 591 (1985); Rubenstein, *supra* note 9, at 1651–52. Indeed, ethical rules' more recent concern for organizational clients has not led to sustained consideration of social movement groups as clients.

<sup>146</sup> Rubenstein, *supra* note 9, at 1650.

Second, once commenced, litigation can garner significant attention.<sup>147</sup> Press outlets routinely report on new marriage lawsuits, even when no established organizations are behind them. For instance, recent suits in Minnesota<sup>148</sup> and Wyoming,<sup>149</sup> both of which emerged from outside the main movement channels, quickly received media coverage. With *Perry*, AFER has seized on the publicity generated by high-profile litigation (with high-profile lawyers). AFER representatives consistently appear on television and in print media.<sup>150</sup> The 2010 trial generated tremendous media attention, both for the organization itself and the underlying cause.<sup>151</sup> AFER continues to leverage the trial for publicity and fundraising purposes; for instance, AFER board member Dustin Lance Black has staged a play, performed by high-profile actors, based on the trial transcripts.<sup>152</sup>

Finally, with judicial resolution as the endgame, litigation threatens to bind other movement members and produce a result that may substantially harm the movement. Other tactics, such as lobbying, public education, and direct action, do not pose the same danger as a lawsuit with the prospect of a definitive, governing court decision. In fact, direct-action tactics that movement leaders do not endorse may actually help the movement achieve its more moderate goals.<sup>153</sup> But unlike disruptive protesters who may make LGBT rights litigators and legislative advocates seem more reasonable, unwanted marriage litigation

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<sup>147</sup> See MCCANN, *supra* note 5, at 58.

<sup>148</sup> See Elizabeth Dunbar, *Legal Fight to Lift Minnesota's Gay Marriage Ban Faces Tough Odds*, MINN. PUB. RADIO (June 3, 2010), <http://minnesota.publicradio.org/display/web/2010/06/03/fight-to-lift-gay-marriage-ban-faces-tough-odds/>.

<sup>149</sup> See Jeremy Pelzer, *Gay Marriage Lawsuit Worries Activists*, TRIB.COM (Aug. 29, 2010, 1:34 AM), [http://trib.com/news/local/article\\_20e70802-f2c2-52a1-b1e6-a0d7e8f89598.html](http://trib.com/news/local/article_20e70802-f2c2-52a1-b1e6-a0d7e8f89598.html).

<sup>150</sup> AFER lists its extensive appearances on its website. See *Press Coverage*, AM. FOUND. FOR EQUAL RTS., <http://www.afer.org/news/press-coverage/> (last visited July 5, 2012).

<sup>151</sup> See, e.g., Maura Dolan, *Proposition 8 Trial Turns Its Attention to Children*, L.A. TIMES, Jan. 16, 2010, at A11; Michelle Quinn & Gerry Shih, *Same-Sex Marriage Case, Day 8: Power and Prejudice*, N.Y. TIMES: BAY AREA BLOG (Jan. 21, 2010, 4:43 PM), <http://bayarea.blogs.nytimes.com/2010/01/21/same-sex-marriage-case-day-8-power-and-prejudice/>.

<sup>152</sup> See Patrick Healy, *Illuminating California's Proposition 8 Trial, Onstage*, N.Y. TIMES, July 18, 2011, at C3; Tina Daunt, *George Clooney to Star in Dustin Lance Black's Proposition 8 Play*, HOLLYWOOD REP. (Dec. 13, 2011, 8:01 PM), <http://www.hollywoodreporter.com/news/george-clooney-dustin-lance-black-prop-8-marriage-equality-272999>.

<sup>153</sup> See, e.g., Herbert H. Haines, *Black Radicalization and the Funding of Civil Rights: 1957–1970*, 32 SOC. PROBS. 31 (1984).

provides no foil to mainstream LGBT rights work. Instead, it simply represents a particular suit that movement leaders considered and rejected.<sup>154</sup>

The possibility of damaging precedent, particularly in federal courts, raises the stakes of litigation relative to ill-advised legislative advocacy or direct action.<sup>155</sup> Even if the lawsuit does not technically have preclusive effect, principles governing precedent and *stare decisis* bind courts that might consider the same claim (and thereby bind group members who might later raise that claim).<sup>156</sup> Courts are reluctant to challenge settled authority, and of course, a Supreme Court decision exerts a particularly powerful influence on other courts.<sup>157</sup> *Stare decisis* principles similarly constrain the Supreme Court, which generally reverses course only after several years.<sup>158</sup> Indeed, the relatively short road from *Bowers* to *Lawrence* was still seventeen long years.

A damaging precedent not only affects (and limits) social movement activity in the courts, it also influences other social-change tactics. In the wake of a Supreme Court loss on marriage equality, LGBT rights advocates would be forced back into state arenas.<sup>159</sup> But unlike the post-*Bowers* context, in which advocates could appeal to state lawmakers and judges, they instead would face a number of state constitutional amendments that restrict change to the initiative process.<sup>160</sup> Accordingly, advocates would have to return to state

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<sup>154</sup> See Cummings & NeJaime, *supra* note 69, at 1298–1300. It is not that movement advocates think they would necessarily lose at the Supreme Court. Rather, they understand the risk of loss as significant, and they have balanced that risk against the success of their incremental, state-by-state strategy.

<sup>155</sup> See SILVERSTEIN, *supra* note 27, at 66–70 (discussing the constraints inherent in legal advocacy because of the restrictive nature of precedent and *stare decisis* principles); cf. Burstein, *supra* note 33, at 1208 (“[T]he justification for studying appellate cases is not in their being a random sample but rather in their great importance . . .”).

<sup>156</sup> See Rubenstein, *supra* note 9, at 1646 (“The outcome of the initial action, though not preclusive of future litigations, will be authoritative precedent governing them. Hence each initial lawsuit will infringe upon the freedom of other community members . . .” (footnote omitted)); see also RICHARD D. FREER, CIVIL PROCEDURE § 1.2, at 21 (2d ed. 2009) (“When an appellate court makes a holding on a question of law, that holding is *precedential*. That means that it binds all lower courts within that judicial system on that question of law; no inferior court in that judicial system can take a different approach on that question of law.”).

<sup>157</sup> See FREER, *supra* note 156, § 1.2, at 21 (“Obviously, decisions by the United States Supreme Court bind all courts in the United States, federal and state, *on matters of federal law*.”); see also Rubenstein, *supra* note 9, at 1647.

<sup>158</sup> See FREER, *supra* note 156, § 1.2, at 21 (discussing examples showing that “*stare decisis* is not immutable” and that the Supreme Court may revisit earlier rulings when “relevant changes in law and society lead to the conclusion that precedent [should] be overturned”).

<sup>159</sup> See Douglas NeJaime, *Winning Through Losing: Life After Perry*, BALKINIZATION (Mar. 28, 2011, 6:00 AM), <http://balkin.blogspot.com/2011/03/winning-through-losing-life-after-perry.html>.

<sup>160</sup> See *id.*

ballot initiatives in the vast majority of states—an expensive and daunting proposition in most states.<sup>161</sup>

Ultimately, litigation's individualist quality differs substantially from other social-change tactics. The debate over an initiative to repeal Proposition 8 provides a fitting illustration of the significant differences between litigation and other institutional tactics. One movement member can file a lawsuit and thereby redirect movement strategy and energy to a great extent. One individual, however, generally cannot dictate nonlitigation institutional tactics. After Proposition 8's passage in 2008, lawyer and nonlawyer activists in California debated the merits of a repeal initiative, with various factions split between a 2010 and 2012 repeal effort.<sup>162</sup> Without sufficient movement support and fundraising ability, the organizations backing a 2010 initiative failed to raise sufficient funds to fuel the signature-gathering campaign necessary to qualify the initiative for the ballot.<sup>163</sup>

Recently, California activists renewed the initiative debate to determine whether they should seek to put a repeal proposition on the 2012 ballot.<sup>164</sup> The most recent debate over a repeal effort took into account the *Perry* litigation, which at the time had been delayed on standing issues.<sup>165</sup> Equality California, the state's leading LGBT legislative advocacy organization, commenced an effort to gauge community sentiment on a ballot initiative.<sup>166</sup> Unlike in the litigation context, where a single individual may end community debate and defy community consensus,<sup>167</sup> Equality California's effort recognized that a repeal initiative could not move forward without substantial support from community members, including major donors.<sup>168</sup> The organization conducted a series of town-hall meetings, which featured leading LGBT activists.<sup>169</sup> In these meetings, Equality California solicited input from movement constituents and polled attendees regarding a 2012 repeal effort.<sup>170</sup> The organization also sent surveys to constituents, seeking their opinions on the wisdom and viability

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<sup>161</sup> *See id.*

<sup>162</sup> *See* Carla Marinucci, *Key Group to Push Repeal of Ban in '12*, S.F. CHRON., Aug. 13, 2009, at D1.

<sup>163</sup> *See* Maura Dolan, *Prop. 8 Repeal Not on Ballot*, L.A. TIMES, Apr. 13, 2010, at AA5.

<sup>164</sup> *See* Karen Ocamb, *Equality California Town Hall in WeHo Split on Repealing Prop 8*, LGBT POV (May 24, 2011), <http://www.lgbtpov.com/2011/05/equality-california-town-hall-in-weho-split-on-repealing-prop-8/>.

<sup>165</sup> *See id.*

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

<sup>167</sup> *See* Rubenstein, *supra* note 9, at 1637–38.

<sup>168</sup> *See* Ocamb, *supra* note 164.

<sup>169</sup> *See id.*

<sup>170</sup> *See id.*

of a 2012 ballot initiative.<sup>171</sup> Because of the vast human and financial resources necessary to fuel an initiative campaign, Equality California asked survey participants whether they would “commit to volunteering with a campaign” and whether they would “provide financial support” for the campaign.<sup>172</sup>

Recognizing the need for “major funders” in addition to broad-based community support,<sup>173</sup> Equality California focused on whether individuals, foundations, and labor organizations could and would fund a campaign.<sup>174</sup> LGBT philanthropist Tim Gill noted that it would be “really silly” to start the initiative process without thinking through its financial viability.<sup>175</sup> And major donor David Bohnett, who gave more than one million dollars to the “No on 8” campaign, reportedly said that public support for repeal would need to be around sixty percent in reliable polls before he would consider funding an initiative.<sup>176</sup> Labor unions, which contributed substantially to the “No on 8” effort, expressed similar concerns.<sup>177</sup>

Ultimately, Equality California announced that it would not pursue repeal in 2012.<sup>178</sup> In its year-end report, the organization explained its decision:

As we considered whether to go back to the ballot, we examined a number of factors, including input from supporters and movement leaders, the current political climate, other potential ballot measures that could impact a marriage campaign, whether a campaign could secure the necessary funding, the capacity of the movement to execute a campaign, current public support for marriage in California, the risks and impact of a potential ballot measure loss, the

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<sup>171</sup> See E-mail from Andrea Shorter, Deputy Dir. of Marriage & Dir. of Coals., Equal. Cal., to author (May 17, 2011, 14:53 CST) (on file with author) [hereinafter Shorter E-mail].

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

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

<sup>174</sup> See Ocamb, *supra* note 164 (recapping a town-hall-meeting discussion).

<sup>175</sup> *Id.* (internal quotation marks omitted).

<sup>176</sup> *Id.*

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

<sup>178</sup> See Torey Van Oot, *California Gay-Rights Group Won't Seek Repeal of Prop. 8 in 2012*, SACRAMENTO BEE CAPITOL ALERT BLOG (Oct. 5, 2011, 10:54 AM), <http://blogs.sacbee.com/capitolalertlatest/2011/10/california-gay-rights-group-wont-seek-repeal-of-prop-8-in-2012.html>. After Equality California announced its decision, Love Honor Cherish, as it did in 2010, attempted to move forward with its own repeal initiative. See Robin Wilkey, *Proposition 8 Repeal Approved for Signature Gathering*, HUFFINGTON POST (Dec. 20, 2011, 5:38 PM), [http://www.huffingtonpost.com/2011/12/20/proposition-8-repeal-approved-signature-gathering-n\\_1161104.html](http://www.huffingtonpost.com/2011/12/20/proposition-8-repeal-approved-signature-gathering-n_1161104.html).

*Perry v. Brown* legal challenge to Proposition 8 and many more factors.<sup>179</sup>

Specifically pointing to the expensive nature of a repeal initiative, Equality California noted that “we could not win without access to significant funding; the cost of a campaign could exceed \$40 million.”<sup>180</sup>

In the end, a Proposition 8 repeal initiative *requires* significant support from the community, both for volunteers and funds, as well as substantial support from LGBT donors and allies. Unlike litigation, it is virtually impossible for one individual to break from the group and single-handedly undertake an initiative campaign in California.

Equality California’s explanation of its decision not to pursue repeal also illustrates the interaction between litigation and other movement tactics, specifically showing how litigation, even without community consensus, can redirect movement strategy.<sup>181</sup> A lawsuit may divert resources and political energy away from other tactics, including those that might enjoy greater community support.<sup>182</sup> With the initial post-Proposition 8 repeal debate focused on a decision between 2010 and 2012, the underlying assumption seemed to be that, in the absence of a 2010 effort, the movement would pursue a 2012 campaign.<sup>183</sup> But movement advocates in California were forced to put aside their repeal effort because attention and resources had shifted to the *Perry* litigation. An initiative would struggle to attract the necessary funding when a lawsuit seems poised to achieve the same result. Advocates revisited a potential ballot initiative only when the *Perry* litigation was sidetracked to the California Supreme Court on standing issues.<sup>184</sup> Even then, it became clear that a repeal effort would likely not garner the required resources while the

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<sup>179</sup> EQUAL. CAL., BUILDING A STATE OF EQUALITY: 2011 YEAR-END REPORT 3 (2011), available at <http://www.eqca.org/atf/cf/%7B34f258b3-8482-4943-91cb-08c4b0246a88%7D/2011REPORT.PDF>.

<sup>180</sup> *Id.*

<sup>181</sup> Social movement work has emphasized that opponents “drain resources and restrict movement opportunities.” Wayne A. Santoro & Gail M. McGuire, *Social Movement Insiders: The Impact of Institutional Activists on Affirmative Action and Comparable Worth Policies*, 44 SOC. PROBS. 503, 504 (1997). Yet movement allies may also sap resources and confine the movement to particular avenues for reform. See NeJaime, *supra* note 103, at 176.

<sup>182</sup> See ROSENBERG, *supra* note 85, at 302; Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 949 (2007).

<sup>183</sup> See Memorandum from Geoff Kors, Exec. Dir., Equal. Cal., and Marc Solomon, Marriage Dir., Equal. Cal., to Equality California Members (May 26, 2009), available at <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=5190603>.

<sup>184</sup> See Shorter E-mail, *supra* note 171.

litigation continued.<sup>185</sup> As Equality California explained, “[T]he *Perry v. Brown* legal challenge to Proposition 8 has provided hope that the freedom to marry can be restored in California and create a legal precedent to protect marriage without the potential risks and expense of a multi-million dollar campaign in these very trying economic times.”<sup>186</sup>

### B. *Lawsuits Challenging Coordinated Movement Strategy*

Strategic choices are often hotly contested within movements.<sup>187</sup> While LGBT rights advocates have relied on a fairly coherent and unified strategy,<sup>188</sup> they have not been immune to internal tactical disputes or to challenges emerging from outside the movement leadership.<sup>189</sup> Unwanted lawsuits have represented some of the most potent and dangerous strategic challenges. Movement advocates, including lawyers and nonlawyers, have responded in ways that attempt to limit the negative potential of such litigation.

Throughout the course of the LGBT movement, advocates have confronted constituents and lawyers contravening movement strategy and pressing marriage claims in court. In fact, the early-1990s Hawaii litigation that initiated the modern marriage-equality movement began against the advice of LGBT rights lawyers and was driven by same-sex couples and their private attorney.<sup>190</sup> As compared to the *Perry* litigation, it was less well-resourced and brought at a time when the political environment was generally unfavorable. It was also brought in state court under state law, thus limiting its doctrinal reach.<sup>191</sup> Same-sex couples in Hawaii sought representation by Lambda Legal and the ACLU, but both organizations declined, believing such a suit was

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<sup>185</sup> See McKinley, *supra* note 4.

<sup>186</sup> EQUAL. CAL., *supra* note 179, at 3.

<sup>187</sup> E.g., William A. Gamson & David S. Meyer, *Framing Political Opportunity*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS, *supra* note 32, at 275, 275–76; Hanspeter Kriesi, *Political Context and Opportunity*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 67, 78 (David A. Snow et al. eds., 2004); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2068–69 (2008). Social movement scholars David Meyer and Suzanne Staggenborg identify “arenas, tactics, and demands” as key elements of strategy. David S. Meyer & Suzanne Staggenborg, *Opposing Movement Strategies in U.S. Abortion Politics*, 28 RES. SOC. MOVEMENTS CONFLICTS & CHANGE 207, 212 (2008).

<sup>188</sup> See ANDERSEN, *supra* note 86, at 42 (pointing to the Litigators’ Roundtable as a mechanism to “achiev[e] intergroup consensus about legal strategies” in the LGBT movement); Cummings & NeJaime, *supra* note 69, at 1269–70 (documenting strategy meetings among leading California advocates).

<sup>189</sup> See NeJaime, *supra* note 103, at 184; Rubenstein, *supra* note 9, at 1635–39.

<sup>190</sup> See Rubenstein, *supra* note 9, at 1637.

<sup>191</sup> See *id.* at 1638.

premature.<sup>192</sup> The couples retained a private attorney, Bill Woods, to represent them, but Woods withdrew at the urging of movement lawyers.<sup>193</sup> Their second attorney, Dan Foley, moved forward with the case.<sup>194</sup> Lambda Legal's Evan Wolfson, unable to convince his organization to have a formal role in the litigation until after the state supreme court decision, informally advised Woods as the case made its way up the appellate chain.<sup>195</sup>

In an unexpected ruling, the Hawaii Supreme Court ordered the trial court, on remand, to subject the marriage law's different-sex requirement to strict scrutiny under the state constitution, based on the law's sex-based classification.<sup>196</sup> In response, Hawaii voters passed a constitutional amendment authorizing the legislature, which had already voted to reserve marriage for different-sex couples, to resolve the issue.<sup>197</sup> Congress passed DOMA to prohibit federal marriage recognition and to authorize the states to refuse to recognize same-sex marriages from other states.<sup>198</sup> All of this was done before a single same-sex couple in the United States had a legally valid marriage. One lawsuit, brought by a few same-sex couples with representation by a single, private-practice lawyer, substantially altered the course of the LGBT movement and single-handedly changed the national conversation on LGBT rights. In addition to producing important effects that would drive the marriage-equality campaign, this one lawsuit fueled a powerful countermovement response to limit the rights of same-sex couples, both at the state and federal levels.<sup>199</sup>

Ever since the Hawaii litigation, challenges to coordinated movement strategy on marriage have plagued movement leadership.<sup>200</sup> Same-sex couples have contravened the movement's state-by-state strategy by litigating either in unfavorable states or in federal court. I will address each type of lawsuit separately because they pose varying degrees of risk and reward.

Some same-sex couples have filed state court suits arguing that state marriage restrictions violate state constitutional law. To the dismay of

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<sup>192</sup> See DUPUIS, *supra* note 89, at 49–50.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*; see also ANDERSEN, *supra* note 86, at 178.

<sup>195</sup> See BALL, *supra* note 71, at 172–73.

<sup>196</sup> Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993).

<sup>197</sup> HAW. CONST. art. I, § 23.

<sup>198</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006) and 1 U.S.C. § 7).

<sup>199</sup> See Cummings & NeJaime, *supra* note 69, at 1250–52.

<sup>200</sup> See KATHLEEN E. HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW 211 (2006).

movement advocates, these suits have sprung up in states with hostile judiciaries, unfavorable laws, inhospitable legislatures, and generally unsympathetic voters. For instance, recent litigation in Minnesota<sup>201</sup> prompted advocates there to publicly express disapproval of the procedural tactic while underscoring their substantive agreement with the plaintiffs' claims. A new organization, Marry Me Minnesota, was formed for the purpose of filing a lawsuit challenging Minnesota's statutory marriage restriction.<sup>202</sup> The state's established LGBT advocacy organizations responded by urging constituents to avoid litigation in the state; these groups relied on statements by leading national groups, including Lambda Legal, the ACLU, and NCLR, outlining the dangers of litigation in most states.<sup>203</sup> The Minnesota Supreme Court had already rejected a federal marriage claim in the 1970s during the first wave of same-sex-marriage litigation.<sup>204</sup> Advocates feared that the current Minnesota Supreme Court, with many justices nominated by Republican Governor Tim Pawlenty, would adapt the earlier decision's reasoning to the state constitutional claims and thereby give the earlier decision renewed force.<sup>205</sup> Furthermore, activists feared that a marriage suit would provoke conservative legislators and other countermovement forces.<sup>206</sup> Their fears were warranted: the legislature, under Republican control, advanced a constitutional amendment banning same-sex marriage.<sup>207</sup> If voters approve the amendment and thereby constitutionalize a ban that had been only a matter of statutory law, LGBT rights advocates will have a more difficult time making legislative progress on relationship recognition.

Yet for all the costs posed by ill-advised state court suits asserting exclusively state constitutional claims, such suits remain relatively cabined. While they may be damaging in the state, as both a doctrinal and a political matter, unfavorable decisions do not dictate other states' doctrinal interpretations and do not threaten a Supreme Court decision on marriage. Accordingly, advocates express substantially more concern with federal

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<sup>201</sup> See *Benson v. Alverson*, No. 27-CV-10-11697 (Minn. Ct. App. Jan. 23, 2012).

<sup>202</sup> See *About Us*, MARRY ME MINN., <http://www.marrymeminnesota.org/aboutus.html> (last visited July 5 2012).

<sup>203</sup> See *OUTFRONT MINNESOTA ET AL., STATEMENT REGARDING LEGAL STRATEGIES TO ACHIEVE MARRIAGE EQUALITY*, available at <http://www.outfront.org/files/pg59/Joint%20Statement%20OFM,%20RF,%20P515.pdf>.

<sup>204</sup> See *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (en banc).

<sup>205</sup> See *Dunbar*, *supra* note 148.

<sup>206</sup> *Id.*

<sup>207</sup> See Bob von Sternberg, *Gay Marriage Amendment Moves Closer to the Ballot*, STAR TRIB. (Minneapolis, Minn.), May 12, 2011, at 1A.

litigation than with state litigation. Federal suits evoke greater anxiety because such suits pose more precedential significance and are less cabined doctrinally and politically.

Same-sex couples have brought federal challenges both to state marriage restrictions and to DOMA. By asserting federal constitutional claims on behalf of same-sex couples, these suits threaten far-reaching precedent and Supreme Court review. Some of these challenges have been filed in particularly unfavorable jurisdictions, such as in states with no valid, state law marriages of same-sex couples and in generally conservative federal circuits.<sup>208</sup>

Lawyers at LGBT legal organizations have derailed these unwanted lawsuits with some success. If they are not able to convince the lawyers or parties to forego litigation,<sup>209</sup> they may attempt to participate formally in the case. Such participation allows the movement lawyers to explain to the court how and why it can avoid a ruling on the merits. In *Smelt v. County of Orange*, a California same-sex couple sued in federal district court after they were denied a marriage license.<sup>210</sup> The court confronted significant threshold questions, including whether the plaintiffs, who were not married under California state law, had standing to challenge DOMA<sup>211</sup> and whether the federal court should abstain from deciding the constitutionality of California's marriage restriction while the state courts were considering the same question.<sup>212</sup> The district court held that the plaintiffs could challenge section 3 of DOMA and rejected the federal constitutional claims on the merits.<sup>213</sup> The

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<sup>208</sup> See, e.g., *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 864 & n.3 (C.D. Cal. 2005), *aff'd in part and vacated in part*, 447 F.3d 673 (9th Cir. 2006); Pelzer, *supra* note 148 (detailing a suit filed in federal court in Wyoming). Against the advice of movement lawyers, Ellis Rubin challenged DOMA in federal court in Florida, see *Taylor v. Sullivan*, No. 04-22024-ALTONAGA, 04-22024-BANDSTRA, 2004 WL 3142552 (S.D. Fla. Dec. 14, 2004); Christopher Lisotta, *Going Solo Against DOMA: As One Florida Lawyer Challenges the Federal Marriage Ban, Some Gays Would Like Him to Back Off*, *ADVOCATE*, June 22, 2004, at 27, even after the Court of Appeals for the Eleventh Circuit had shown particular hostility to LGBT rights claims, see *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (rejecting a constitutional challenge to Florida's ban on adoption by lesbians and gay men); *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc) (rejecting the lesbian plaintiff's constitutional claims when the Georgia attorney general withdrew her offer of employment because of her private religious ceremony with her same-sex partner).

<sup>209</sup> See David J. Garrow, *Toward a More Perfect Union*, *N.Y. TIMES*, May 9, 2004, § 6 (Magazine), at 57 ("I have tried to plead with lawyers not to get overly ambitious about going into court and challenging the federal Defense of Marriage Act . . ." (quoting GLAD lawyer Mary Bonauto) (internal quotation marks omitted)).

<sup>210</sup> *Smelt*, 374 F. Supp. 2d at 864.

<sup>211</sup> *Id.* at 870–71.

<sup>212</sup> *Id.* at 865–70.

<sup>213</sup> *Id.* at 880.

plaintiffs appealed to the Ninth Circuit, at which point NCLR and Lambda Legal, representing Equality California, moved to intervene.<sup>214</sup> The interveners claimed the Ninth Circuit should not consider the merits, arguing that the district court “erred in refusing to abstain as to the entire proceeding” and in finding that the plaintiffs “had standing to challenge section 3 of DOMA.”<sup>215</sup> The Ninth Circuit accepted both the standing and abstention arguments,<sup>216</sup> thus foreclosing a substantive Ninth Circuit opinion and potential Supreme Court review.<sup>217</sup> Ultimately, movement advocates successfully avoided an appellate ruling on the merits in a case riddled with substantive and procedural problems. Even when successful, though, participation in federal litigation for the purpose of preventing a substantive ruling requires significant movement resources and energy.

### C. *The Perry Litigation*

In the wake of Proposition 8’s passage, LGBT movement leadership, including movement lawyers, urged constituents to avoid federal litigation.<sup>218</sup> After they unsuccessfully challenged Proposition 8 in the California Supreme Court in *Strauss v. Horton*—in which they argued that the initiative constituted a revision, rather than an amendment, to the California Constitution<sup>219</sup>—California advocates again encouraged movement members to avoid a federal lawsuit and instead to work through the state political system to achieve marriage equality. In a joint statement, they argued that the movement “need[s] to go back to the voters.”<sup>220</sup> Noting that “it is tempting to at least try a federal lawsuit first,” they claimed that litigation is “a temptation we should resist.”<sup>221</sup>

Yet Chad Griffin, a gay political strategist, had formed a new organization, AFER, to initiate just such a lawsuit. AFER announced the *Perry* filing soon

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<sup>214</sup> See Opening Brief of Proposed Intervenor Equality California, *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006) (No. 05-56040).

<sup>215</sup> *Id.* at 3.

<sup>216</sup> See *Smelt*, 447 F.3d at 686.

<sup>217</sup> At the end of 2008, the couple in the earlier *Smelt* federal litigation filed a state court challenge to DOMA, which was removed to federal court. The court eventually dismissed the suit on jurisdictional grounds. See Order Granting Defendant’s Motion to Dismiss at 7, *Smelt v. United States*, No. SACV 09-00286 DOC (MLGx) (C.D. Cal. Aug. 24, 2009).

<sup>218</sup> See ACLU ET AL., MAKE CHANGE, NOT LAWSUITS (2009), available at [http://www.aclu.org/pdfs/lgbt/camarriage\\_joint\\_20080609.pdf](http://www.aclu.org/pdfs/lgbt/camarriage_joint_20080609.pdf).

<sup>219</sup> 207 P.3d 48 (Cal. 2009).

<sup>220</sup> ACLU ET AL., *supra* note 3, at 1.

<sup>221</sup> *Id.*

after the *Strauss* decision.<sup>222</sup> Griffin, along with lawyer Ted Olson, had previously approached advocates at the leading California LGBT rights organizations.<sup>223</sup> Those organizations refused to pursue the case, warning that such a strategy was simply too risky.<sup>224</sup> Later, in a letter to leading LGBT rights lawyers, Griffin highlighted the tactical conflict, noting that, “[i]n public and private, you have made it unmistakably clear that you strongly disagree with our legal strategy.”<sup>225</sup> AFER moved forward with the litigation on its own, with legal representation by Olson and his famous former adversary David Boies.<sup>226</sup>

While movement lawyers originally decided not to intervene directly in the litigation, their decision changed when the Olson–Boies team resisted District Judge Walker’s push for an evidentiary hearing.<sup>227</sup> AFER opposed the motion to intervene and worried about the ramifications of the movement lawyers’ involvement: “Having gone to such great lengths to dissuade us from filing suit and to tar this case in the press, it seems likely that your misgivings about our strategy will be reflected—either subtly or overtly—in your actions in court.”<sup>228</sup> The court denied the motion to intervene,<sup>229</sup> but the motion, to some extent, increased the Olson–Boies team’s receptiveness to a full trial.<sup>230</sup> Without a formal role in the litigation, lawyers at LGBT legal organizations influenced the case through amicus briefing<sup>231</sup> and behind-the-scenes advice.<sup>232</sup> Ultimately, LGBT movement lawyers and AFER attempted to put their disagreements behind them because, as long as the suit was moving forward, both wanted it to succeed.<sup>233</sup>

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<sup>222</sup> See Cummings & NeJaime, *supra* note 69, at 1299.

<sup>223</sup> See Letter from Chad H. Griffin, Bd. President, Am. Found. for Equal Rights, to Kate Kendell, Exec. Dir., Nat’l Ctr. for Lesbian Rights et al. (July 8, 2009) [hereinafter Griffin Letter], available at <http://www.dailyjournal.com/Files/Server/djicetext/MediaKit/CalLaw/48417553.pdf>.

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

<sup>225</sup> *Id.*

<sup>226</sup> Olson and Boies famously opposed one another in *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), following the contested 2000 presidential election.

<sup>227</sup> See Cummings & NeJaime, *supra* note 69, at 1300–01.

<sup>228</sup> Griffin Letter, *supra* note 223.

<sup>229</sup> See *Perry v. Schwarzenegger*, ACLU N. CAL. (Oct. 25, 2010), [http://www.aclunc.org/cases/active\\_cases/perry\\_v.\\_schwarzenegger.shtml](http://www.aclunc.org/cases/active_cases/perry_v._schwarzenegger.shtml) (“The motion to intervene was denied . . .”).

<sup>230</sup> See Cummings & NeJaime, *supra* note 69, at 1301.

<sup>231</sup> See, e.g., Brief of Amici Curiae American Civil Liberties Union et al., *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010) (No. C 09-2292 VRW).

<sup>232</sup> Movement lawyers connected the Olson–Boies team with key experts. See Cummings & NeJaime, *supra* note 69, at 1302.

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

Unlike earlier challenges, the *Perry* litigation features a well-resourced and professionalized organization—with strong constituent support, substantial fundraising capabilities, and top-notch legal representation—that can sustain and drive such a large-scale case. These factors make it more difficult to stop the case yet also increase the potential upside of the litigation. Movement lawyers are confident in the ability of AFER’s legal team, which boasts extensive trial and Supreme Court experience.<sup>234</sup> They also know that AFER and its lawyers are determined to reach the Supreme Court, specifically on the question of same-sex couples’ federal constitutional right to marry. While the *Perry* suit was sidetracked on standing issues, AFER suggested that, if the case ended without a Supreme Court decision on the merits, the group would pursue another lawsuit.<sup>235</sup>

The next Part analyzes how exactly the *Perry* litigation materialized and what role the movement’s successful legal mobilization strategy played. Despite the prevalence of internal disagreement over litigation strategy, this phenomenon has received relatively scant attention in the scholarly literature on both legal mobilization and social movements.<sup>236</sup> Legal mobilization scholars have analyzed the possibilities and limitations of court-centered strategies, but they have not provided sustained analysis of litigation-based expressions of tactical conflict. Social movement scholars have explored important conflicts emerging from both inside and outside movements. They have demonstrated that countermovement threats divert resources and force movement responses while also benefiting the movement organizationally.<sup>237</sup> And they have documented the radical flank effect, observing that radical challenges within movements may benefit the more moderate movement

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<sup>234</sup> See *id.* at 1300.

<sup>235</sup> See Sam Stein, *Same-Sex Marriage Legal Dream Team May Not Get Case Before Supreme Court*, HUFFINGTON POST (July 18, 2011, 6:12 AM), [http://www.huffingtonpost.com/2011/05/18/same-sex-marriage-supreme-court\\_n\\_863715.html](http://www.huffingtonpost.com/2011/05/18/same-sex-marriage-supreme-court_n_863715.html) (“Boies, for his part, reiterated that the ultimate objective was to get a decision by the U.S. Supreme Court determining that any law abridging marriage was an infringement on the equal protection [sic]. If that were to happen, he said, ‘the issue would be fully resolved,’ across all states.”). At the time this Article went to print, the Ninth Circuit panel had issued an extremely narrow ruling finding Proposition 8 unconstitutional, see *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), thereby decreasing the likelihood of Supreme Court review and drastically reducing the chance of a broad Supreme Court ruling in *Perry* on same-sex couples’ right to marry. See Maura Dolan & Carol J. Williams, *Divided Court Rejects Prop. 8*, L.A. TIMES, Feb. 8, 2012, at A1.

<sup>236</sup> For discussions in cause lawyering work, see TUSHNET, *supra* note 17; Bell, *supra* note 13; and Rubenstein, *supra* note 9.

<sup>237</sup> See, e.g., STAGGENBORG, *supra* note 54, at 125; McKinley, *supra* note 4.

factions by increasing their legitimacy, resources, and access to power.<sup>238</sup> Yet social movement scholars largely have neglected litigation and legal mobilization and have not explored the type of movement conflict addressed here.<sup>239</sup> The movement actors share the goal of marriage equality but disagree on tactics, specifically temporal considerations regarding a federal-litigation strategy.

### III. LEGAL MOBILIZATION'S CHANNELING EFFECTS ON TACTICAL CONFLICT

A movement using a legal mobilization strategy can, in one sense, be too successful for its own good, especially when tactical disagreement arises. Successful legal mobilization may channel tactical contestation into litigation: By laying the groundwork for constituent mobilization, elite support, and receptive courts, legal mobilization may provoke especially powerful lawsuits that threaten and destabilize the strategic plans of other movement actors.<sup>240</sup>

Using a typology gleaned from legal mobilization scholarship,<sup>241</sup> I separate out effects that are internal and external to the movement. I argue that legal mobilization helped to create the conditions both inside and outside the LGBT movement that opened space for AFER's litigation-driven challenge to coordinated movement strategy and control. The internal/external typology I use in significant ways tracks social movement theory's three major theoretical frameworks, which provide key insights for understanding the legal mobilization dilemma.<sup>242</sup> First, the resource mobilization approach focuses on

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<sup>238</sup> See, e.g., Haines, *supra* note 153, at 31 (“[R]adicalization of segments of the black community had the net effect of improving the resource bases of more moderate civil rights organizations by stimulating previously uninvolved parties to contribute ever increasing amounts of financial support.”).

<sup>239</sup> See Burstein, *supra* note 33, at 1203 (noting that most scholars stop exploring social movements when they begin effectively using legal channels).

<sup>240</sup> This claim builds on the insights of William Eskridge, whose work on identity-based social movements shows that “law channels not just [movement] strategies . . . but their discourses as well. As law channels the movements’ discourses, law changes those discourses, and those movements.” Eskridge, *supra* note 38, at 460. I am not arguing that other mobilization strategies may not produce conditions conducive to a powerful lawsuit redirecting movement strategy; in fact, other strategies may produce some of the same effects on which AFER has seized. Instead, I am pointing to particular attributes and effects of the legal mobilization strategy and explaining how those attributes and effects have facilitated AFER’s court-centered movement challenge.

<sup>241</sup> See Albiston, *supra* note 6, at 64 (noting that distinguishing between internal and external effects is useful for organizing the debate over litigation and social change); NeJaime, *supra* note 25, at 969 (discussing the internal and external effects of litigation loss).

<sup>242</sup> See DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970*, at 58–59 (2d. ed. 1999) (“Rather than focusing exclusive attention on factors internal or external to the movement, the [political process] model describes insurgency as a product of both.”); David S. Meyer,

structural factors within movements and yet relates movement functioning to how movement actors and organizations attract and mobilize external resources, including elite support and funding.<sup>243</sup> Next, the political process model shifts attention toward the interaction of internal and external conditions for movement progress; mobilization and organizational capacity allow the movement to exploit structural governmental features and seize on changing political alignments to advance its cause.<sup>244</sup> Finally, framing theory reflects the cultural turn in sociology by drawing attention to movement actors' interpretive choices and the strategic and constitutive effects of those choices.<sup>245</sup> In framing issues, social movement actors mobilize constituents and construct movement identity (internal effects),<sup>246</sup> and make their case to elites and the general public (external effects).<sup>247</sup>

All three social movement perspectives shed light on the *Perry* litigation and the legal mobilization dilemma that it illustrates. While social movement work has left litigation undertheorized,<sup>248</sup> such work helps to explain the

*Opportunities and Identities: Bridge-Building in the Study of Social Movements*, in SOCIAL MOVEMENTS: IDENTITY, CULTURE, AND THE STATE 3, 18 (David S. Meyer et al. eds., 2002) (“To understand tactical choice, we need to look at movement activists from both the outside (what tactics are encouraged or discouraged by state policies) and from the inside (what activists consider legitimate or effective).”).

<sup>243</sup> See Haines, *supra* note 153, at 32 n.1 (“The resource mobilization perspective stresses the dependence of protest groups on the resources available from third parties.” (citations omitted)); Rhys H. Williams, *The Cultural Contexts of Collective Action: Constraints, Opportunities, and the Symbolic Life of Social Movements*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 187, at 91, 94 (explaining the resource mobilization focus “on structural factors such as membership, money, organization, and other material resources”).

<sup>244</sup> See Meyer, *supra* note 31, at 125 (“[T]he context in which a movement emerges influences its development and potential impact . . . .”); Williams, *supra* note 243, at 95 (“Political process scholars maintain, and rightly so, that the societal environments in which aggrieved groups exist both affect their capacities to gather resources, and affect the efficacy of their use of those resources once gathered.”). Political process theory in social movement scholarship is not to be confused with political process work in constitutional theory. For an explanation of the latter, see Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1370–72 (2011).

<sup>245</sup> See David A. Snow et al., *supra* note 31, at 464 (“By *frame alignment*, we refer to the linkage of individual and SMO [social movement organization] interpretive orientations, such that some set of individual interests, values and beliefs and SMO activities, goals, and ideology are congruent and complementary.”); see also Pedriana, *supra* note 37, at 1721 (“[T]he process through which movements mobilize ‘symbols, claims, and even identities in the pursuit of activism’ is generally known as *framing*.” (citations omitted) (quoting Williams, *supra* note 243, at 93)); Williams, *supra* note 243, at 93 (discussing framing theory).

<sup>246</sup> See Williams, *supra* note 243, at 94 (discussing the internal effect of framing on movement culture).

<sup>247</sup> See Shauna Fisher, *It Takes (at Least) Two to Tango: Fighting with Words in the Conflict over Same-Sex Marriage*, in QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW, *supra* note 28, at 207, 208 (discussing the external effect of social movement framing).

<sup>248</sup> See Pedriana, *supra* note 37, at 1721–22 (“[L]aw and legal institutions have not been central components of social movement theory . . . .”).

positive impact of litigation strategies at the same time that it points to litigation's channeling effects.<sup>249</sup> That all three perspectives contribute, in essential ways, to an understanding of the legal mobilization dilemma suggests that major insights from each perspective are crucial to theorizing social movements.<sup>250</sup> Indeed, viewing social movement theory through the lens of legal mobilization uncovers the relationships among the resource mobilization, political process, and framing perspectives. An analysis of *Perry* shows that the boundaries among mobilizing structures, political opportunities, and frames blur as social movements interact and overlap with elite allies, the general public, the media, and the state.

More specifically, this Part relies on social movement concepts to identify the effects produced by legal mobilization that facilitated AFER's strategic contestation, channeled that contestation into litigation, and rendered that litigation threatening to other movement actors' coordinated strategy. First, as to activity within the movement, court-centered strategies mobilized constituents around the central issue of marriage equality, which had been framed largely in constitutional, rights-based terms. This mobilization encouraged organizational founding aimed at marriage equality and wedded to increasingly institutional tactics; in AFER's case, the organization focuses solely on the legal right to marry and does so through litigation. Second, as to changes outside the movement, successful legal mobilization mainstreamed marriage equality, increasing the salience of the issue and convincing state and private elites to support same-sex couples' right to marry. Elite support in particular allowed movement constituents to find new resources with which to pursue marriage equality. Furthermore, successful legal mobilization produced a more open and favorable political opportunity structure, in which courts and legal actors play central roles. New movement organizations and activists seize on the increasing number of state actors—including government officials and federal judges—sympathetic to marriage equality and use doctrinal developments to encourage those state actors to advance the cause.

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<sup>249</sup> Some sociological scholars have used social movement insights to shed light on cause lawyering and legal mobilization. *See, e.g.*, Marshall, *supra* note 37, at 165–68 (contextualizing the discussion of litigation's possibilities within the social movement literature on the demobilizing and deradicalizing effects of institutional and conventional tactics); Meili, *supra* note 37, at 121 (using the political process model to analyze consumer cause lawyering).

<sup>250</sup> *See* MCADAM, *supra* note 242, at vii (attempting to reconcile the three leading social movement perspectives); Jenkins, *supra* note 31, at 527 (identifying “[a] multifactor model of social movement formation . . . , emphasizing resources, organization, and political opportunities”).

## A. *Marriage-Equality Mobilization*

### 1. *Mobilizing Around the Legal Right to Marry*

Marriage-equality litigation mobilized constituents and raised consciousness around marriage as a legal, rights-based issue.<sup>251</sup> This mobilization has contributed to significant positive developments, including greater movement momentum and increased financial support. Yet at the same time that the legal fight for marriage equality—and particularly the back-and-forth movement-counter-movement battle in California—increased the salience of the issue among movement constituents, it contributed to a narrowing effect on movement goals and tactics.<sup>252</sup>

While legal frames have been marginalized in social movement work, law and legal symbols serve as important frames for social movement actors.<sup>253</sup> Law functions as a “master frame,”<sup>254</sup> and rights-based discourse has particular appeal for social movement advocates.<sup>255</sup> As Amy Kapczynski observes in her

<sup>251</sup> Cf. Barclay et al., *supra* note 37, at 9 (“Law can . . . shape the experiences of movement activists and constituents. The articulation of these experiences using legal categories, most notably ‘rights,’ and the use of legal strategies can shape the collective experience of members and constituencies of social movements.” (citations omitted)).

<sup>252</sup> See HULL, *supra* note 200, at 56 (noting that some lesbians and gay men see the issue of same-sex-relationship recognition as part of the evolution of the movement while others see it as an assimilationist trend).

<sup>253</sup> ANDERSEN, *supra* note 86, at 24; Bernstein et al., *supra* note 28, at 1; Pedriana, *supra* note 37, at 1724; cf. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 8 (1983) (“Law is a resource in signification . . .”).

<sup>254</sup> Pedriana, *supra* note 37, at 1725; David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 133, 139 (Aldon D. Morris & Carol McClurg Mueller eds., 1992); accord JOHN BRIGHAM, *THE CONSTITUTION OF INTERESTS: BEYOND THE POLITICS OF RIGHTS* 2–3 (1996) (explaining the importance of legal language and practices to movement activity); PARIS, *supra* note 25, at 25 (“Legal ideas and doctrines can structure politics in [the] first place by setting the terms of political debate and parameters of action, and they can provide discursive resources for reshaping meanings.”); Kapczynski, *supra* note 38, at 816–18 (discussing the framing power of law and legal symbols). Here, the insights from legal mobilization and cause lawyering scholarship find common ground with constitutional theory. See, e.g., Balkin & Levinson, *supra* note 36, at 1078 (“[T]he movement from ordinary politics to constitutional politics is seamless, for many Americans have little idea of the exact contours of constitutional doctrine and tend to associate the Constitution with whatever they regard as most right and just.”).

<sup>255</sup> See Barclay et al., *supra* note 37, at 3 (“[L]aw provides a symbolically rich medium that social movements use to construct and to circulate meaning both within the movement and in their relations with actors outside the movement.”); Eskridge, *supra* note 38, at 422 (“[L]aw helped define the contours of the minority group itself, gave the group both incentives and forums in which to resist their stigmas, and provided dramatic events and campaigns that helped turn a reform movement into a mass social movement.”); Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303, 319–24 (2009) (demonstrating the power of rights claims for both the LGBT rights and Christian Right movements).

insightful use of framing theory in legal scholarship, legal language allows “social actors to frame problems and solutions in particular ways and to ‘align’ their frames with those used by potential adherents and bystanders.”<sup>256</sup> Frames are important not merely at the mobilization stage but also as the movement makes demands on the state and attempts to attract support from elites and the general public.<sup>257</sup>

LGBT advocates framed marriage equality as a basic legal (and constitutional) right.<sup>258</sup> And the legal right to marry came to embody the more general quest for LGBT equality,<sup>259</sup> which had long been demanded in the language of rights.<sup>260</sup> As Nancy Polikoff has shown, legal recognition of same-sex couples’ marriages, rather than other family law solutions, became the remedy to the unequal treatment of lesbians and gay men and their families.<sup>261</sup> Advocates linked their marriage claims to the myriad legal rights and benefits connected to marriage.<sup>262</sup>

The legal right to marry also became a powerful marker of social and cultural equality. Once a state like California offered the state law rights of marriage through a domestic-partnership regime, marriage itself became a cultural symbol of full equality.<sup>263</sup> As sociologist Kathleen Hull has demonstrated, lesbians and gay men connect legal relationship recognition to

<sup>256</sup> Kapczynski, *supra* note 38, at 814; accord Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659, 663 (2003); Pedriana, *supra* note 37, at 1728. Legal scholar Samuel Bagenstos also relies on framing theory to explore the success of the “independence frame” in both unifying the disability rights movement and appealing to conservatives as potential movement allies. See BAGENSTOS, *supra* note 38, at 27–32.

<sup>257</sup> See Meyer & Staggenborg, *supra* note 187, at 214 (“Demands are necessarily framed[] and targeted at authorities or opponents . . .”).

<sup>258</sup> See Fisher, *supra* note 247, at 218 (showing empirically that marriage-equality proponents predominantly “frame same-sex marriage using the language of rights”).

<sup>259</sup> As Shannon Gilreath puts it, “Once upon a time there was a Movement . . . then there was Marriage.” Shannon Gilreath, *Rebuttal, Arguing Against Arguing for Marriage*, 159 U. PA. L. REV. PENNUMBRA 28, 35 (2010), <http://www.pennumbra.com/debates/pdfs/Marriage.pdf>. As William Eskridge argues, a strategy based on constitutional rights claims “empowers the movement, moderates over the radicals, and channels the movement’s discourse in assimilative directions.” Eskridge, *supra* note 38, at 423.

<sup>260</sup> See BRIGHAM, *supra* note 254, at 50.

<sup>261</sup> See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 107–09 (2008).

<sup>262</sup> See *id.* at 100–07.

<sup>263</sup> See HULL, *supra* note 200, at 116 (“[S]ome people in same-sex relationships assign a unique cultural power to the law of the state, the power to render their relationships socially normal and culturally equal to the commitments of married heterosexual couples.” (citation omitted)).

the cultural acceptance of same-sex relationships.<sup>264</sup> The legal and cultural dimensions are so intertwined that the legal fight for marriage also signifies the push for social equality.<sup>265</sup>

In California specifically, the issue of marriage equality was framed and debated largely in legal and constitutional terms. Courts adjudicated constitutional rights claims, and other governmental branches weighed in on marriage equality in specifically constitutional language. In February 2004, San Francisco's mayor, Gavin Newsom, began issuing marriage licenses to same-sex couples based on his interpretation of the California constitution's equal protection guarantee.<sup>266</sup> The Massachusetts Supreme Judicial Court's *Goodridge* decision, which declared a state constitutional right for same-sex couples to marry, and President Bush's subsequent call for a federal constitutional amendment banning same-sex marriage motivated Newsom.<sup>267</sup> The California Supreme Court stopped Newsom and invalidated the marriages licensed up to that point, but the court reserved the constitutional question of marriage equality for subsequent litigation.<sup>268</sup> The constitutional issue worked its way through the state courts, ending with a California Supreme Court decision holding that same-sex couples enjoy a fundamental right to marry under the state constitution and that the state's separate domestic-partnership system violated equal protection principles.<sup>269</sup> The state constitutional right to

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<sup>264</sup> See *id.* at 126 ("Although rights and equality were important ways of talking about the value of legal marriage, study participants were just as likely to talk about it in the language of social legitimacy and validation."); accord Kimberly D. Richman, *By Any Other Name: The Social and Legal Stakes of Same-Sex Marriage*, 45 U.S.F. L. REV. 357, 372 (2010) (discussing how legal recognition of marriage for same-sex couples served as social validation).

<sup>265</sup> See HULL, *supra* note 200, at 148 ("[M]ost study participants who perceived symbolic benefits flowing from state recognition of same-sex marriage assumed a causal relationship between official law and broader social beliefs and attitudes."); see also Mary Bernstein, *The Contradictions of Gay Ethnicity: Forging Identity in Vermont*, in SOCIAL MOVEMENTS: IDENTITY, CULTURE, AND THE STATE, *supra* note 242, at 85, 103 ("Whereas both internal and external processes influence the construction of identity and identity politics, it is also the result of activists' strategic responses to interactions with the law, the state, and other social movements."); Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 HARV. L. REV. 684, 687 (1997) (reviewing ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995), and URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION (1995)) (emphasizing the relationship between law and culture in the gay-rights context).

<sup>266</sup> Sylvia A. Law, *Who Gets to Interpret the Constitution?: The Case of Mayors and Marriage Equality*, 3 STAN. J. C.R. & C.L. 1, 6 (2007).

<sup>267</sup> *Id.* at 5.

<sup>268</sup> *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004).

<sup>269</sup> *In re Marriage Cases*, 183 P.3d 384, 401-02 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

marry, as interpreted by the court, included not only substantive rights and benefits but also equal respect and dignity for family relationships.<sup>270</sup>

In May 2008, lesbians and gay men in California celebrated the state supreme court's *Marriage Cases* decision, and roughly 18,000 California same-sex couples married in its wake.<sup>271</sup> At the same time, the movement campaigned against Proposition 8, which sought to amend the state constitution to prohibit marriage for same-sex couples. The state supreme court's decision directly influenced how the ballot initiative was presented to voters.<sup>272</sup> Attorney General Jerry Brown redrafted the initiative title to make clear that it "eliminated" an existing constitutional right.<sup>273</sup>

Proposition 8 directed a huge supply of movement resources and constituent attention toward the marriage-equality issue in California. Individuals, organizations, and corporations around the country poured more than forty million dollars into the "No on 8" campaign.<sup>274</sup> The "Yes on 8" campaign also spent roughly forty million dollars,<sup>275</sup> and the initiative passed with fifty-two percent of the vote.<sup>276</sup> Proposition 8 formally amended the equal protection clause of the California constitution to exclude the right to marry for same-sex couples. A subsequent state court challenge—in which movement lawyers argued that Proposition 8 constituted a revision, rather than an amendment, to the state constitution—failed.<sup>277</sup>

The entire debate in California had been framed around the constitutional right to marry—from Mayor Gavin Newsom's constitutional interpretation and reliance on *Goodridge*, to the state court litigation, to the Proposition 8 initiative and subsequent state court challenge. Even now, efforts in California aim to restore the legal right to marry for same-sex couples by either altering the state constitution to repeal section 7.5 or convincing the federal courts to invalidate the amendment under the U.S. Constitution.

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<sup>270</sup> *Id.* at 401.

<sup>271</sup> Jesse McKinley, *Same-Sex Married Couples in California Await Court's Ruling*, N.Y. TIMES, May 26, 2009, at A10.

<sup>272</sup> Cf. Ziegler, *supra* note 38, at 285 ("[A] blockbuster decision may also encourage officials and social movement leaders to focus on the result and justification offered by the court.").

<sup>273</sup> Bob Egelko, *Judge Refuses to Order Change in Prop. 8 Title—Backers File Appeal*, S.F. CHRON., Aug. 9, 2008, at B1.

<sup>274</sup> Cummings & NeJaime, *supra* note 69, at 1294.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 1295; Maloy Moore, *Tracking the Money: Final Numbers*, L.A. TIMES (Feb. 3, 2009, 6:21 PM), <http://www.latimes.com/news/local/la-moneymap,0,2198220.htmlstory>.

<sup>277</sup> *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

The fact that California same-sex couples were able to marry after the landmark *Marriage Cases* decision only to later see that right taken away by the voters may have highlighted the deprivation of the right and made the sense of loss more acute. The aftermath of Proposition 8 witnessed a significant outpouring of constituent outrage and increased mobilization.<sup>278</sup> This mobilization was aimed primarily at the legal right to marry—only one of many movement priorities. Rallies around California focused on marriage equality, and activists led boycotts of businesses that contributed to the “Yes on 8” campaign. The leading LGBT legislative advocacy group in the state, Equality California, set to determining when repeal efforts would be viable.<sup>279</sup> The intensity surrounding marriage equality did not end at California’s borders. In cities around the country, lesbians and gay men and their supporters rallied for the legal right to marry.<sup>280</sup> While the marriage issue had become a leading LGBT priority in the years preceding Proposition 8, the intense battle in California brought the marriage-equality debate to a fever pitch. And while LGBT activism featured grassroots efforts and direct action, such activism targeted the legal right to marry as the key to LGBT equality and did so in the specific language of constitutional rights.<sup>281</sup>

Even though marriage litigation played a crucial role in mobilizing the movement around the legal right to marry, it is important to emphasize that a range of factors have made marriage the primary issue. The increasing centrality of marriage is not simply the result of calculated decision making by movement leadership or of constituent consensus. In fact, much of the California marriage litigation was driven by elite allies and countermovement forces, rather than by internal movement activity.<sup>282</sup> Internal and external drivers interact in powerful ways. As I discuss in Part III.B, the mainstreaming of LGBT rights and buy-in by private and public elites narrowed the range of possible goals and increased attention on a generally acceptable priority.<sup>283</sup> In essence, elites channeled movement activity toward more moderate and

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<sup>278</sup> See Cummings & NeJaime, *supra* note 69, at 1296.

<sup>279</sup> Press Release, Equal. Cal., Equality California Announces Community Town Halls, Polling to Discuss Possible Repeal of Prop 8 in 2012 (Apr. 4, 2011), available at <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=6493233&ct=9315031>.

<sup>280</sup> See Cummings & NeJaime, *supra* note 69, at 1296.

<sup>281</sup> Cf. Reed, *supra* note 38, at 899 (“The constitutionalization of a conflict through initiative politics affects the type of mobilization and its intersection with other political actors and institutions.”).

<sup>282</sup> See Cummings & NeJaime, *supra* note 69, at 1308–10.

<sup>283</sup> The conventional social movement account claims that “goal transformation inevitably takes the direction of greater conservatism—the accommodation of the [social movement organization’s] goals to the dominant societal consensus.” Kriesi, *supra* note 32, at 156.

consensus issues. In addition, a highly responsive countermovement, which viewed marriage as the endgame, contributed to increasing LGBT activity around marriage. With single-issue organizations like the National Organization for Marriage fighting LGBT rights advocates on every front,<sup>284</sup> the Christian Right movement has devoted significant attention and resources to the marriage fight. LGBT rights advocates, of course, must respond. A strong countermovement focused on a particularly important issue limits the original movement's ability to push a multi-issue agenda.<sup>285</sup>

## 2. *Formally Organizing Around the Legal Right to Marry*

Greater mobilization around the legal right to marry within the LGBT movement base opened up space for additional organizations dedicated to marriage.<sup>286</sup> This internal mobilization interacted with the external mainstreaming of the social movement norm, discussed in Part III.B, to produce a narrowing effect on both issues and tactics.<sup>287</sup> As social movement scholarship demonstrates, greater formalization and professionalization, and a corresponding reliance on institutional tactics, benefit the movement with greater resources and legitimacy at the same time that they moderate the movement's demands and tactics.<sup>288</sup>

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<sup>284</sup> See *About NOM*, NAT'L ORG. FOR MARRIAGE, [http://www.nationformarriage.org/site/c.0mL2KeN0LzH/b.3479573/k.E2D0/About\\_NOM.htm](http://www.nationformarriage.org/site/c.0mL2KeN0LzH/b.3479573/k.E2D0/About_NOM.htm) (last visited July 5, 2012).

<sup>285</sup> See STAGGENBORG, *supra* note 58, at 122 (observing this phenomenon in the reproductive rights movement); see also Colin Barker & Michael Lavalette, *Strategizing and the Sense of Context: Reflections on the First Two Weeks of the Liverpool Docks Lockout, September–October 1995*, in SOCIAL MOVEMENTS: IDENTITY, CULTURE, AND THE STATE, *supra* note 242, at 140, 143 (“[S]trategizing is an *interactive or relational* process: what we decide to do is affected by what others are deciding and doing.”).

<sup>286</sup> McAdam argues that, “[f]or the movement to survive, insurgents must be able to create a more enduring organizational structure to sustain insurgency. Efforts to do so usually entail the creation of formally constituted organizations to assume the centralized direction of the movement previously exercised by informal groups.” MCADAM, *supra* note 242, at 54.

<sup>287</sup> As Amy Kapczynski convincingly shows in the intellectual property context:

As groups begin to succeed in changing law, . . . these successes may promote some strands of the movement over others. To the extent that less disruptive reform efforts are likely to have more success, they may begin to take center stage in the movement. This is yet another way to understand law as a constitutive force in the dynamics of political mobilization.

Kapczynski, *supra* note 38, at 876.

<sup>288</sup> See Kriesi, *supra* note 32, at 156 (“*Institutionalization* implies a whole set of transformations in the course of which an SMO [social movement organization] becomes more like a party or an interest group. This set includes the stabilization of an SMO's resource flow, the development of its internal structure, the moderation of its goals, the conventionalization of its action repertoire, and its integration into established systems of interest intermediation.”).

The LGBT movement's greatest period of organizational founding occurred at another pivotal, law-centered moment in the movement's history—the wake of the *Bowers* loss. Similar to the mobilization around marriage after the passage of Proposition 8, *Bowers* produced massive demonstrations.<sup>289</sup> Movement activists used the loss to drive fundraising that aided existing organizations and supported new organizations specifically aimed at overturning antisodomy laws.<sup>290</sup> Likewise, in recent years, organizations have emerged—at both the state and national levels—aimed at achieving marriage equality. Many state-level organizations, such as New Yorkers United for Marriage<sup>291</sup> and California's Love Honor Cherish,<sup>292</sup> emerged in states with favorable political environments. Freedom to Marry, formed in 2003 by former Lambda Legal lawyer Wolfson, coordinates efforts on a national scale.<sup>293</sup>

Unlike many other new organizations targeting marriage equality, AFER organized in opposition to, rather than in coordination with, existing movement organizations and professional movement leadership.<sup>294</sup> Griffin, a gay political consultant and strategist in Los Angeles, approached LGBT leaders at the main California legal organizations about bringing a federal lawsuit challenging Proposition 8.<sup>295</sup> When they advised against the litigation, Griffin moved forward independently and recruited to AFER high-profile colleagues, including some from the entertainment industry.<sup>296</sup> While some of AFER's founders had contributed to LGBT rights work,<sup>297</sup> they had not occupied leadership roles at movement organizations.<sup>298</sup> With AFER, wealthy, connected movement members decided to formally organize around marriage equality outside of existing movement channels. Yet they created an

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<sup>289</sup> Boutcher, *supra* note 37, at 10–11.

<sup>290</sup> *Id.*; NeJaime, *supra* note 25, at 985–86.

<sup>291</sup> See Michael Barbaro, *Behind Gay Marriage, an Unlikely Mix of Forces*, N.Y. TIMES, June 26, 2011, at A1.

<sup>292</sup> See *About LHC*, LOVE HONOR CHERISH, <http://lovehonorcherish.org/about-lhc/> (last visited July 5, 2012).

<sup>293</sup> *About Freedom to Marry*, FREEDOM TO MARRY, <http://www.freedomtomarrry.org/pages/about-us> (last visited July 5, 2012). Wolfson played a major role in the successful effort to pass marriage-equality legislation in New York. See Michael Barbaro, *With Cuomo's Help, Groups Mobilize for Gay Marriage Bill*, N.Y. TIMES, Apr. 20, 2011, at A18.

<sup>294</sup> New Yorkers United for Marriage, for instance, was formed as an alliance of established LGBT rights organizations. See Barbaro, *supra* note 293.

<sup>295</sup> See *supra* notes 222–25 and accompanying text.

<sup>296</sup> See *Leadership*, *supra* note 65 (indicating that AFER's Board includes gay screenwriter Dustin Lance Black and gay producer Bruce Cohen).

<sup>297</sup> See, e.g., Tina Daunt, *Brad Pitt Puts Up to Fight Prop. 8*, L.A. TIMES, Sept. 18, 2008, at E2 (explaining that Chad Griffin coordinated entertainment-industry efforts to defeat Proposition 8).

<sup>298</sup> See *supra* note 65 and accompanying text.

organization and chose an institutional tactic consistent with the professionalized organizational structure and tactical repertoire of the most powerful segments of the LGBT movement.

Professionalized and formalized organizations, many of which are legal groups, lead the LGBT movement.<sup>299</sup> LGBT legal organizations, which have engineered and implemented the movement's successful legal mobilization strategy, generally have hierarchical and formal structures<sup>300</sup> and employ elite-credentialed, full-time professional staff.<sup>301</sup> As sociologist Sandra Levitsky has shown, legal organizations in the LGBT movement enjoy a disproportionate amount of movement resources and control movement decision making to a significant degree.<sup>302</sup> These organizations also enjoy access to elites, government officials, and the media that less resource-rich and professionalized groups do not.<sup>303</sup> In short, the LGBT movement has coalesced around a highly formalized and professionalized organizational structure, with legal organizations at its core.

In the tradition of other leading movement organizations, Griffin created a professionalized organization with which to pursue the goal of marriage equality through litigation. The organization has a board of directors and an advisory board.<sup>304</sup> Its staff includes a communications director, development director, research and communications manager, project director, online director, and research associate.<sup>305</sup> And, of course, the organization retains two high-profile, high-powered lawyers, Olson and Boies, to implement its legal strategy.<sup>306</sup>

### 3. *Litigating the Right to Marry*

Social movement theory recognizes the narrowing effects that movement institutionalization can have not only on issues but also on tactics. Formalized

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<sup>299</sup> See NeJaime, *supra* note 25, at 973–74. Social movement scholarship recognizes that, “as social movements develop over time, they often become more and more institutionalized.” David A. Snow et al., *Mapping the Terrain*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS*, *supra* note 187, at 3, 8.

<sup>300</sup> See Levitsky, *supra* note 26, at 154.

<sup>301</sup> See Cummings & NeJaime, *supra* note 69, at 1253–54.

<sup>302</sup> See Levitsky, *supra* note 26, at 157–58; accord Bernstein et al., *supra* note 28, at 10 (“[W]hen they have superior resources, cause lawyers may sometimes determine a movement’s strategies and priorities.” (citation omitted)).

<sup>303</sup> See Levitsky, *supra* note 26, at 157.

<sup>304</sup> *Leadership*, *supra* note 65.

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

<sup>306</sup> *Id.*

and professionalized social movement organizations are more likely to use institutional than confrontational tactics,<sup>307</sup> and institutional tactics, including litigation, may moderate the movement's frames and goals.<sup>308</sup> In this sense, AFER's prioritization of litigation follows logically from its organizational structure and substantive agenda, which in many ways reflect the legacy of the LGBT legal organizations AFER is challenging.

Yet several factors may have influenced AFER's choice of litigation as its primary tactic. Unlike many other single-issue organizations in the movement, AFER does not prioritize deference to other movement organizations.<sup>309</sup> Its use of litigation offers a prime tactic for the organization to strike out on its own, rather than coordinate strategy with other movement actors. Groups like Love Honor Cherish and the Courage Campaign attempted to defy more established movement organizations, such as Equality California and Lambda Legal, by pursuing a Proposition 8 repeal initiative—an institutional tactic—aimed at the 2010 ballot. But without broad-based movement consensus and donor commitment, these organizations were unable to raise the necessary funds and garner the constituent support needed to qualify the initiative for the ballot.<sup>310</sup> AFER, on the other hand, can pursue litigation without movement consensus.

The ability of movement members to strike out on their own with litigation is mirrored by the ability of a single judge to strike out in favor of the movement's cause. At least at the federal level, litigation's reliance on relatively insulated elites makes it a compelling strategy for activists. Indeed,

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<sup>307</sup> See Kriesi, *supra* note 32, at 158 (“[F]ormalized and professionalized SMOs tend to engage in institutionalized tactics and typically do not initiate disruptive direct-action tactics.”); Staggengborg, *supra* note 32, at 604 (noting “[t]he tendency of formalized SMOs to engage in more institutionalized strategies and tactics than informal SMOs”).

<sup>308</sup> See Albiston, *supra* note 6, at 74 (“[S]everal scholars have shown how litigation as a social movement tactic can deradicalize both the message and the objectives of a movement.”).

<sup>309</sup> See Chuleenan Svetvilas, *Anatomy of a Complaint: How Hollywood Activists Seized Control of the Fight for Gay Marriage*, CAL. LAW., Jan. 2010, at 20, 22 (providing Nan Hunter's statements on AFER's independence and its lack of coordination with LGBT movement organizations). In arguing that elite patronage “channeled” the black civil rights movement into professional social movement organizations, Craig Jenkins and Craig Eckert distinguish between professional organizations with roots in the movement—what they call indigenous organizations—and those that spring from elite patronage and “political entrepreneurs” without roots in the movement—-independent organizations. See J. Craig Jenkins & Craig M. Eckert, *Channeling Black Insurgency: Elite Patronage and Professional Social Movement Organizations in the Development of the Black Movement*, 51 AM. SOC. REV. 812, 827–28 (1986). They show that, in the black civil rights movement, indigenous organizations supported the central movement organizations while independent organizations pursued agendas that conflicted with movement leaders' decisions. *Id.* at 827.

<sup>310</sup> See Dolan, *supra* note 163. Love Honor Cherish also pursued a 2012 repeal initiative, even after Equality California made a decision not to do so. See Wilkey, *supra* note 178.

other social movements upon which the LGBT movement modeled itself used litigation as a key social-change strategy, looking to independent federal judges as important rights protectors.<sup>311</sup> And AFER understands its strategy as part of the American tradition of civil rights litigation. Its lawyer, Olson, has compared *Perry* to *Loving v. Virginia*,<sup>312</sup> the Supreme Court decision invalidating laws against interracial marriage.<sup>313</sup> Even Judge Reinhardt, in his concurrence in the Ninth Circuit decision certifying the standing question to the California Supreme Court, located the *Perry* case and its purpose in the same category as *Brown v. Board of Education* and *Roe v. Wade*.<sup>314</sup>

Nonetheless, the organized LGBT movement's successful and far-reaching legal mobilization strategy influenced, both directly and indirectly, AFER's choice of litigation tactics. LGBT rights, and marriage equality in particular, have been framed in a legal—indeed, constitutional—way, suggesting that courts are appropriate—and perhaps necessary—venues for reform. Courts have been the state decision makers most receptive to LGBT rights claims, and courts were the first official actors to offer broad, authoritative support to the modern marriage-equality movement.<sup>315</sup> Courts have played, and continue to play, an essential role in the quest for LGBT equality. In California, the governor twice vetoed marriage-equality legislation;<sup>316</sup> it was the California Supreme Court that produced marriage equality as a constitutional right, only to have that right eliminated through the ballot-initiative process.<sup>317</sup> In the choice between courts and majoritarian politics, at least in California, courts seem more hospitable.<sup>318</sup>

While I am not making a causal claim about legal mobilization and subsequent lawsuits challenging movement strategy, the trajectory of marriage equality suggests that the LGBT movement's legal mobilization strategy, while highly sophisticated and multidimensional, built movement support for court-centered tactics in a way that channeled subsequent activism into litigation. And as I show in the next section, movement advocates' successful legal

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<sup>311</sup> See NeJaime, *supra* note 255, at 321.

<sup>312</sup> 388 U.S. 1 (1967).

<sup>313</sup> See Margaret Talbot, *A Risky Proposal*, NEW YORKER, Jan. 18, 2010, at 40, 40, 42 (documenting Olson's comparisons to *Loving* and the civil rights struggle).

<sup>314</sup> *Perry v. Schwarzenegger*, 628 F.3d 1191, 1200 (9th Cir. 2011) (Reinhardt, J., concurring).

<sup>315</sup> See ANDERSEN, *supra* note 86, at 173–74.

<sup>316</sup> See Cummings & NeJaime, *supra* note 69, at 1290.

<sup>317</sup> See *id.* at 1293–95.

<sup>318</sup> See *id.*

mobilization strategy changed the external environment significantly, in ways that increased the appeal and viability of a federal marriage lawsuit.

## *B. Mainstreaming Marriage Equality*

In this section, I focus on what I term “the mainstreaming of marriage equality”—and LGBT equality more generally—which the movement’s legal mobilization strategy has helped to produce.<sup>319</sup> By mainstreaming, I mean that the movement has both gained public traction and attracted the sympathy of elites and governmental actors.<sup>320</sup> The mainstreaming of marriage equality, along with a general norm of LGBT equality, has opened up significant avenues for activism, including additional legal channels. Whereas movement leaders had long worked within the limited spaces amenable to LGBT rights claims, advocates now find substantially greater support from the general public and from elites, including state actors. Legal actors have been some of the most receptive state actors, and constitutional doctrine has evolved to reflect increasing support for LGBT equality. As I show in this section, AFER has appealed to elites for organizational support and has seized on a political opportunity structure increasingly receptive to recognition of same-sex couples’ legal right to marry.

### *1. Attracting Elites*

Successful legal mobilization increased the salience of the marriage-equality issue and convinced elites and ordinary citizens to support the cause.<sup>321</sup> Elite support in particular allowed movement constituents to find new resources with which to pursue the central movement goal of marriage equality. Elites, who are often seen as drivers of policy changes and public-

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<sup>319</sup> See ANDERSEN, *supra* note 86, at 201 (explaining how state supreme courts adjudicating marriage claims “fomented widespread change in the cultural framing of marriage by forcing the issue of same-sex marriage into mainstream consciousness”); HULL, *supra* note 200, at 205 (“[M]ovement gains may not translate directly into public support for legal recognition of same-sex couples, but their cumulative indirect effect in changing perceptions of the status of gays and lesbians in American society should not be underestimated.”).

<sup>320</sup> Kathleen Hull links LGBT legal gains to growing cultural visibility when discussing “the political and cultural mainstreaming of gays.” See HULL, *supra* note 200, at 7. My concept of mainstreaming also resonates with Jack Balkin’s work on the interaction between social movements and constitutional law and adjudication. See Balkin, *The Constitution of Status*, *supra* note 36, at 2342 (“Few legal elites thought sexual orientation could be a suspect classification until social movements began to change their political imaginations.”).

<sup>321</sup> See NeJaime, *supra* note 103, at 181–83.

opinion shifts,<sup>322</sup> provide access to their connections and networks.<sup>323</sup> While elite support includes both private and state actors, I focus first on private elites. The next subsection addresses elite government support through the lens of political opportunity.

Legal mobilization scholars have shown that litigation-based strategies may garner elite support, and such support is vital to a movement's success, helping the movement to raise funds, earn legitimacy, and bargain with powerful private and governmental actors.<sup>324</sup> This position runs counter to the classic account in social movement scholarship, which provides a more pessimistic view of elite support, drawing attention to its narrowing and co-optive effects.<sup>325</sup> More recent social movement scholarship qualifies the conventional account, instead demonstrating that access to elites, which corresponds to movement professionalization and formalization, may contribute to social movement progress and survival.<sup>326</sup> Together, these strands of scholarship present a complicated and contingent view of elite support as both important to a movement's development and threatening to that movement's more expansive agenda.<sup>327</sup> Accordingly, we might expect to see elite support fuel and sustain the LGBT movement at the same time that it influences goals and tactics in a generally conservative direction.

AFER has capitalized on the support of cultural, political, business, and legal elites. First, AFER has seized on support from cultural elites who had

<sup>322</sup> See Adam Liptak, *A Tipping Point for Gay Marriage?*, N.Y. TIMES, May 1, 2011, at WK3. Indeed, Lawrence Baum and Neal Devins argue that Supreme Court Justices are more responsive to the views of elites than to those of the general public. See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010).

<sup>323</sup> See STAGGENBORG, *supra* note 54, at 153 (emphasizing the importance of “persons with connections to wealthy individuals, legislators, professionals, and other influential people and organizations”).

<sup>324</sup> See, e.g., Keck, *supra* note 86, at 164; Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984–1995*, 26 LAW & SOC. INQUIRY 631, 633–36 (2001).

<sup>325</sup> See MCADAM, *supra* note 242, at 27 (“[E]lite involvement in social protest may more often contribute to the demise of a movement than to its success.”); PIVEN & CLOWARD, *supra* note 31, at xi (“[I]t is not possible to compel concessions from elites that can be used as resources to sustain oppositional organizations over time.”).

<sup>326</sup> See Staggenborg, *supra* note 32, at 597 (“[F]ormalized SMOs [social movement organizations] are the usual beneficiaries of foundation funding and other elite contributions. Consequently, formalized SMOs are able to maintain themselves—and the movement—over a longer period of time than are informal SMOs.” (citations omitted)).

<sup>327</sup> See DUPUIS, *supra* note 89, at 9 (claiming that elite support aided the marriage-equality cause but also pointing out that litigation tactics “attract support from middle-class and corporate contributors who would be unlikely to support more radical or disruptive types of activity”); MCADAM, *supra* note 242, at 27 (“[E]lite/movement linkages reflect a trade-off between benefits obtained and costs incurred.”).

otherwise not been fully activated in legal advocacy for marriage equality. For instance, AFER board members include Hollywood figures Rob and Michele Reiner; while the couple had long devoted themselves to children's advocacy, they are now active fundraisers for marriage equality.<sup>328</sup> And AFER's high-profile benefits have featured prominent entertainment figures and celebrities.<sup>329</sup>

Second, AFER has garnered support from political and business elites across the ideological spectrum.<sup>330</sup> By focusing on a single goal—marriage equality—and by pursuing that goal through a professionalized and formalized organization that relies on an institutional tactic, AFER has attracted support from moderates and conservatives who might refuse to identify with (or might actually reject) the broader and more progressive agenda of LGBT movement organizations.<sup>331</sup> Paul Singer, a high-profile Republican donor and hedge-fund CEO, is a prominent supporter, along with PayPal founder Peter Thiel.<sup>332</sup> The organization's Advisory Board is co-chaired by Robert Levy, chairman of the libertarian Cato Institute, and John Podesta, president of the left-leaning Center for American Progress.<sup>333</sup> The liberal and conservative pairings universalize and depoliticize marriage equality in an attempt to attract more support for the cause.<sup>334</sup>

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<sup>328</sup> See *Leadership*, *supra* note 65.

<sup>329</sup> See, e.g., Rebecca Keegan, *Elton John Fetes Crowd at Ron Burkle's Estate in Support of Prop. 8 Court Challenge*, L.A. TIMES MUSIC BLOG (Jan. 20, 2011, 2:44 PM), [http://latimesblogs.latimes.com/music\\_blog/2011/01/elton-john-fetes-crowd-at-ron-burkles-estate-in-support-of-prop-8-court-challenge.html?cid=6a00d8341c630a53ef0147e1cc3b35970b](http://latimesblogs.latimes.com/music_blog/2011/01/elton-john-fetes-crowd-at-ron-burkles-estate-in-support-of-prop-8-court-challenge.html?cid=6a00d8341c630a53ef0147e1cc3b35970b). Social movement scholars have noted that celebrity support can function as an important moral resource. See Bob Edwards & John D. McCarthy, *Resources and Social Movement Mobilization*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 187, at 116, 125.

<sup>330</sup> Here, I refer to political elites who are prominent *nongovernmental* actors. Rather than include state officials in the category of political elites, I refer here only to elite policy players, including many *former* state officials.

<sup>331</sup> See MCADAM, *supra* note 242, at 28 (“Co-optation can occur either in advance of elite support, as the organization seeks to modify its operation in such a way as to make itself ‘acceptable’ to elite sponsors, or after receipt of support, as a condition of continued backing.”).

<sup>332</sup> Peter Lattman, *Gay Marriage Gets Boost from Wall Street*, N.Y. TIMES DEALBOOK (Sept. 23, 2010, 9:20 AM), <http://dealbook.nytimes.com/2010/09/23/gay-marriage-gets-boost-from-wall-street/>.

<sup>333</sup> See *Leadership*, *supra* note 65.

<sup>334</sup> See Nicholas Confessore & Michael Barbaro, *Wealthy Donors to G.O.P. Are Providing Bulk of Money in Gay Marriage Push*, N.Y. TIMES, May 14, 2011, at A15. AFER's deployment of diverse ideological leaders bolsters accounts in social movement work. See Aldon D. Morris & Suzanne Staggenborg, *Leadership in Social Movements*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 187, at 171, 189 (“Social movement leaders drawn from outside of the challenging group are valuable because they may be anchored in social networks otherwise unavailable to the challenging group . . .”); Williams, *supra* note 243, at 105 (emphasizing the importance of “[c]redibility” for “the frame content and those who proffer it”).

Not only do elites provide important rhetorical support for AFER and its cause, but they also help raise substantial funds in relatively short periods of time,<sup>335</sup> and these funds fuel AFER's litigation campaign. The organization has targeted two elite epicenters—Los Angeles on the West Coast and New York on the East Coast. A star-studded fundraiser in Beverly Hills featured a concert by Elton John and raised roughly three million dollars in a single night.<sup>336</sup> Prominent Republican political figures Ken Mehlman, Bill Weld, and Christine Todd Whitman, along with business leaders Thiel and Singer, co-hosted a New York fundraiser.<sup>337</sup> AFER's resource-rich support base has a mutually reinforcing relationship to the organization's institutional tactics.<sup>338</sup> Wealthy elites in politics, law, and business donate money to support AFER's litigation tactics, which work within established channels.<sup>339</sup>

As much as AFER has garnered attention from Hollywood to Wall Street, its most significant and high-profile support comes from the legal elite. LGBT rights work, including marriage equality, increasingly has garnered support from the legal profession. This ties to the movement's early use of courts and its appeal to constitutional rights claims. The LGBT movement's legal mobilization strategy provided significant opportunities for large law firms and high-profile lawyers to become involved in LGBT rights advocacy. Marriage-equality work in particular has played a prominent role in large-firm pro bono practice and is touted by major firms for recruitment purposes.<sup>340</sup> Indeed, Justice Scalia has complained that elite lawyers, law schools, and law firms have taken sides in the culture wars and have outpaced public opinion on LGBT rights.<sup>341</sup> While elite lawyers and law firms have frequently worked on behalf of marriage equality, lawyers at LGBT rights organizations nonetheless

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<sup>335</sup> See MCADAM, *supra* note 242, at 27.

<sup>336</sup> Andrew Harmon, *Elton John Rocks for Equality*, ADVOCATE (Jan. 20, 2011, 11:35 AM), [http://www.advocate.com/News/Daily\\_News/2011/01/20/Elton\\_John\\_Rocks\\_for\\_Equality/](http://www.advocate.com/News/Daily_News/2011/01/20/Elton_John_Rocks_for_Equality/).

<sup>337</sup> Bennett Roth, *Pro-Gay Groups Find New Allies in the GOP*, ROLL CALL (Sept. 22, 2010, 12:00 AM), [http://www.rollcall.com/issues/56\\_28/-50098-1.html](http://www.rollcall.com/issues/56_28/-50098-1.html).

<sup>338</sup> See John D. McCarthy et al., *Assessing Public, Media, Electoral, and Governmental Agendas, in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS, *supra* note 32, at 291, 305 (“[T]he greater the resources of groups, the more they will employ ‘insider’ tactics (e.g., lobbying, litigating) . . .”).

<sup>339</sup> See Meyer & Staggenborg, *supra* note 187, at 233 (“[T]he availability of apparently powerful institutional allies encourages institutionally oriented strategies . . .”).

<sup>340</sup> See Dale Carpenter, *How the Law Accepted Gays*, N.Y. TIMES, Apr. 29, 2011, at A27. From a resource mobilization perspective, elite lawyers are seen to provide resources based on their professional skills and status, which yield access to power and money. See Jones, *supra* note 37, at 203.

<sup>341</sup> See *Lawrence v. Texas*, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 652–53 (1996) (Scalia, J., dissenting).

have initiated and directed those suits. The *Perry* litigation represents a new direction as elite lawyers at large firms initiated the (fee-generating) suit without the direct involvement of movement lawyers and, more surprisingly, in direct contravention of their advice.

AFER's representation by Olson and Boies produces important benefits, both in and out of court. These high-profile lawyers bring the resources of their large law firms to the table. While they did not take the case on a pro bono basis (attesting to the financial resources of AFER), they have donated some portion of their legal services.<sup>342</sup> Moreover, they assembled expert litigation teams at Gibson, Dunn & Crutcher and Boies, Schiller & Flexner; these teams can rely on the vast resources and professional staff of their large, national law firms. Olson and Boies have taken to the airwaves and received coverage in high-profile print media. The day the filing was announced featured a press-conference broadcast by cable news outlets followed by an appearance on *Larry King Live*.<sup>343</sup> Olson and Boies have since appeared in the *New York Times*,<sup>344</sup> the *New Yorker*,<sup>345</sup> and *TIME*,<sup>346</sup> among other prominent press outlets.<sup>347</sup> And by explicitly making the “[c]onservative [c]ase for [g]ay [m]arriage,” Olson appeals to conservatives in a way that LGBT movement lawyers and liberal elite allies cannot.<sup>348</sup>

## 2. *Influencing the Political Opportunity Structure*

Finally, and perhaps most significantly, legal mobilization has produced a more open and favorable political opportunity structure, both inside and

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<sup>342</sup> See Svetvilas, *supra* note 309, at 24–25.

<sup>343</sup> See Larry King Live—May 27, 2009, AM. FOUND. FOR EQUAL RTS., <http://www.afer.org/media/larry-king-live-may-2-2009/> (last visited July 5, 2012).

<sup>344</sup> See, e.g., Jesse McKinley, *Bush v. Gore Foes Join to Fight Gay Marriage Ban*, N.Y. TIMES, May 28, 2009, at A1.

<sup>345</sup> See, e.g., Talbot, *supra* note 313.

<sup>346</sup> See, e.g., Michael A. Lindenberg, *Olson's Gay Marriage Gambit: Powerful but Risky*, TIME (June 4, 2009), <http://www.time.com/time/nation/article/0,8599,1902556,00.html>.

<sup>347</sup> Social movement scholarship stresses the importance of movement leaders' use of the media for framing purposes. See William A. Gamson, *Bystanders, Public Opinion, and the Media*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 187, at 242, 242–43, 251; Morris & Staggenborg, *supra* note 334, at 186.

<sup>348</sup> Theodore B. Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK, Jan. 18, 2010, at 48; accord Svetvilas, *supra* note 309, at 23 (“[Olson's involvement] could make same-sex marriage be seen as a nonpartisan issue—forget bipartisan.” (quoting Chad H. Griffin, Board President, American Foundation for Equal Rights) (internal quotation mark omitted)).

outside the courts.<sup>349</sup> First, litigation by LGBT rights lawyers has influenced elite alignments in states across the country, pushing more elected officials to support the cause.<sup>350</sup> In California, the back-and-forth battle over marriage equality, which involved multiple rounds of litigation, facilitated significant changes in the positions of key government officials.<sup>351</sup> Second, the federal courts have become increasingly receptive to LGBT rights claims and have seized on important doctrinal developments to further expand the rights of same-sex couples. AFER has capitalized on the increasing number of state actors—including government officials and federal judges—sympathetic to marriage equality and has asked these actors to use evolving constitutional principles to advance the cause.

As leading social movement theorist Doug McAdam explains, political process scholarship has coalesced around the following dimensions of political opportunity:

1. [t]he relative openness or closure of the institutionalized political system[;]
2. [t]he stability or instability of that broad set of elite alignments that typically undergird a polity[;]
3. [t]he presence or absence of elite allies[; and]
4. [t]he state's capacity and propensity for repression.<sup>352</sup>

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<sup>349</sup> Cf. Bernstein et al., *supra* note 28, at 10 (“The current configuration of political elites and the path set by prior political organizing become structural features of the state that shape and are influenced by court decisions.”). In his study of the day-labor movement, Scott Cummings notes that, “[b]ecause the legal campaign has occurred over a nearly twenty-year period, its effectiveness has been influenced . . . by changes in the political and legal environment.” Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617, 1692 (2011).

<sup>350</sup> See NeJaime, *supra* note 103, at 186–94.

<sup>351</sup> See *id.* at 190.

<sup>352</sup> Doug McAdam, *Conceptual Origins, Current Problems, Future Directions*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS*, *supra* note 32, at 23, 27. Similarly, Mark Wolfson explains that the political opportunity structure

describe[s] the political environment in which a movement operates and with which it interacts. It includes the degree of openness of the formal political structure to advocacy efforts, the nature of alignments between powerful ‘elites,’ actual alliances between movements and these elites, and the state’s ability and inclination to repress a movement.

MARK WOLFSON, *THE FIGHT AGAINST BIG TOBACCO: THE MOVEMENT, THE STATE, AND THE PUBLIC’S HEALTH* 5 (2001) (citations omitted). Social movement scholars have criticized the concept of political opportunity structure for becoming increasingly capacious and imprecise. See, e.g., Kriesi, *supra* note 187, at 68–69.

The political opportunity structure, therefore, includes both “the formal institutional or legal structure of a given political system” and “the more informal structure of power relations that characterize the system at a given point in time.”<sup>353</sup> Drawing on McAdam’s work on political opportunity, my analysis locates changing political alignments within a federalist system by focusing on interactions between federal courts and state governments. However, I expand on social movement theory, which largely has overlooked the complexities of court-based interactions, by situating judges and doctrine as key features of the political opportunity structure.<sup>354</sup>

By focusing on governmental actors’ increasing cooperation and identification with the LGBT movement, I am pointing to potential movement–state overlap.<sup>355</sup> In this sense, my analysis follows from recent social movement work arguing that “we cannot merely label the state as political opportunity because movement–state intersections mean that some state-based political opportunities are in fact parts of the movement itself.”<sup>356</sup> The state is composed of individuals who are influenced by movement advances and may include movement actors.<sup>357</sup> Wayne Santoro and Gail McGuire, for instance, criticize resource mobilization theory to the extent that it understands movement actors and political elites as distinct categories that do not overlap.<sup>358</sup> Instead, they identify actors within political institutions who pursue social movement goals as institutional activists, a category that blurs the traditional movement–state distinction.<sup>359</sup>

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<sup>353</sup> McAdam, *supra* note 352, at 26; accord Kriesi, *supra* note 32, at 160; Sidney Tarrow, *States and Opportunities: The Political Structuring of Social Movements*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS*, *supra* note 32, at 41, 54.

<sup>354</sup> As Edward Rubin argues, social movement scholarship has failed to address “the substance of litigation and law reform efforts, the specific legal arguments that advocates for social movements advance in judicial proceedings, and the specific statutory language that they propose in legislative lobbying.” Rubin, *supra* note 34, at 47. For an important exception to this oversight in social movement scholarship, see ANDERSEN, *supra* note 86.

<sup>355</sup> See WOLFSON, *supra* note 352, at 13 (“The state is not limited to being an external force that acts on, or is acted upon by, the movement, but is in fact an integral part of the movement.”).

<sup>356</sup> LEE ANN BANASZAK, *THE WOMEN’S MOVEMENT INSIDE AND OUTSIDE THE STATE* 196 (2010).

<sup>357</sup> See WOLFSON, *supra* note 352, at 189 (“The term ‘interpenetration’ is bidirectional, reflecting my observation that the state and movement organizations have a symbiotic relationship that involves both mutual influence and mutual benefit.”).

<sup>358</sup> See Santoro & McGuire, *supra* note 181, at 503.

<sup>359</sup> *Id.* at 504.

The political opportunity structure is dynamic, and the movement itself is active in shaping that structure for its advantage.<sup>360</sup> That government officials and judges, many of whom have been public servants for several years, are now more willing to take pro-LGBT positions suggests that there is a significant cultural component to political opportunity. Movements do not merely respond to exogenous changes; instead, they shape elite alignments and sentiment.<sup>361</sup> The mainstreaming of LGBT equality produced by LGBT rights activism influences state actors, who are not immune from the effects of large-scale social and cultural shifts. In this regard, my analysis again follows the lead of recent social movement work that takes the cultural turn in sociology to an understanding of political opportunity.<sup>362</sup>

Recognizing that state actors are not merely targets in the political opportunity structure but rather active, engaged participants with their own motivations and constraints points to certain consequences of state involvement.<sup>363</sup> Recent work showing both how movements enter the state and how the state may become an important movement force attempts to understand the implications of movement–state overlap for goals and tactics.<sup>364</sup> While state actors may at times use confrontational tactics, they are generally limited in their choice of tactics and range of goals. State allies might have an especially significant impact on policy outcomes because of their power and access,<sup>365</sup> but they may also be expected to rely on institutional means to pursue moderate objectives.<sup>366</sup> Therefore, work with and reliance upon these state actors might channel the movement toward less disruptive tactics and

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<sup>360</sup> See McAdam, *supra* note 352, at 37 (pointing out “the typically fluid, reciprocal, unpredictable, and crucially important relationship of social movements to structures of political opportunity”).

<sup>361</sup> See BANASZAK, *supra* note 356, at 20 (“[T]he story of insider feminist activists is not one of a group within civil society capturing the bureaucracy but of a more synergistic relationship between state and civil society where the state is not immune to large scale social forces.”).

<sup>362</sup> See Gamson & Meyer, *supra* note 187, at 279 (“Opportunity has a strong cultural component . . .”).

<sup>363</sup> See BANASZAK, *supra* note 356, at 187 (“[W]e can better understand *all* social movements if we view the movement–state intersection as a central theoretical concept with identifiable dimensions . . .”).

<sup>364</sup> See Lee Ann Banaszak, *Inside and Outside the State: Movement Insider Status, Tactics, and Public Policy Achievements*, in ROUTING THE OPPOSITION: SOCIAL MOVEMENTS, PUBLIC POLICY, AND DEMOCRACY 149, 154 (David S. Meyer et al. eds., 2005) (explaining the impact of movement–state overlap “on the development and tactics of the movement as well as on state–movement interactions and their outcomes”).

<sup>365</sup> See Santoro & McGuire, *supra* note 181, at 505 (“Institutional activists are important in policy outcomes because of their direct access, influence, and control over government resources.” (citations omitted)).

<sup>366</sup> See *id.* at 504 (“[I]nstitutional activists [are] social movement participants who occupy formal statuses within the government and who pursue movement goals through conventional bureaucratic channels.”).

goals. Legal actors might emerge as important elites,<sup>367</sup> and litigation might present a particularly attractive avenue for movement–state interactions.<sup>368</sup> Ultimately, state support might track the complicated picture of elite support more generally.<sup>369</sup>

*a. State Government Officials*

Successful legal mobilization by the organized LGBT movement contributed to a more open and favorable political opportunity structure. Many state actors now see lesbians and gay men as good citizens, committed partners, and loving parents. What were once considered controversial positions are now mainstream ideas held by those at the highest levels of government. Legal mobilization played a substantial role in validating LGBT equality norms and gaining the support of state (and often legal) actors.<sup>370</sup>

In California, marriage-equality litigation contributed to a dynamic and increasingly favorable political opportunity structure that included new elite alignments. Openings first emerged in local government. San Francisco Mayor Gavin Newsom initiated the marriage-equality effort in California, itself a response to *Goodridge* and President Bush’s call for a federal marriage amendment.<sup>371</sup> Newsom’s actions invited litigation by Christian Right organizations and the state attorney general.<sup>372</sup> The City and County of San Francisco defended Newsom’s position and eventually filed its own constitutional challenge to the statutory marriage prohibition.<sup>373</sup> With the issue of marriage equality firmly in the courts, LGBT rights lawyers at Lambda Legal, NCLR, and the ACLU filed litigation of their own and challenged the state’s marriage restriction up to the California Supreme Court.<sup>374</sup>

The California attorney general defended the marriage restriction, yet in doing so made limited and circumspect arguments. The state did not offer procreation and parenting as justifications, even though those rationales had

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<sup>367</sup> See WOLFSON, *supra* note 352, at 13 (identifying the Minnesota Attorney General as a “state agency that is heavily involved, in a proactive way, in tobacco control advocacy”).

<sup>368</sup> See *id.* at 209.

<sup>369</sup> See *id.* at 200 (pointing to the “double-edged nature of state involvement in movements: access to a wide variety of resources (including expertise, money, legitimacy, and influence) is counterbalanced by constraints on the selection of goals, strategies, and tactics”).

<sup>370</sup> See NeJaime, *supra* note 103, at 188–90.

<sup>371</sup> See Law, *supra* note 266, at 5–6.

<sup>372</sup> See Cummings & NeJaime, *supra* note 69, at 1281.

<sup>373</sup> *Id.* at 1281–82.

<sup>374</sup> See *id.* at 1282–84.

figured prominently (and, at times, successfully) in earlier defenses of marriage restrictions in other states.<sup>375</sup> The state's unwillingness to argue from procreation and childrearing makes sense as a matter of demographic reality; as the Williams Institute has shown, and as Chief Justice George pointed out, approximately thirty percent of same-sex couples in California are raising children.<sup>376</sup> Yet recognition of demographics cannot solely account for this shift; after all, states in which procreation arguments figured prominently also had significant numbers of children being raised by same-sex couples.<sup>377</sup> The state's reluctance to argue from procreation and childrearing also makes sense in light of California's pro-LGBT legal landscape. The domestic-partnership statute provides practically all the substantive benefits and obligations of marriage,<sup>378</sup> and state court decisions recognize the ability of lesbians and gay men to parent effectively.<sup>379</sup> Yet, other states with pro-LGBT laws and policies advanced arguments based on procreation and childrearing.<sup>380</sup> Instead, the California attorney general's carefully limited arguments show the influence of LGBT mainstreaming and suggest that increasingly pro-LGBT actors occupied positions inside the state.

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<sup>375</sup> See *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (accepting justifications based on accidental procreation and dual-gender parenting); HULL, *supra* note 200, at 166 (discussing such arguments by the State of Vermont).

<sup>376</sup> *In re Marriage Cases*, 183 P.3d 384, 433 n.50 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

<sup>377</sup> In New York, for instance, the state relied primarily on the connection between different-sex marriage and procreation. See *Hernandez*, 855 N.E.2d at 30 (Kaye, C.J., dissenting). In upholding the state's marriage restriction, the *Hernandez* majority responded to the state's arguments by concluding that "the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home." *Id.* at 8 (majority opinion). These child-welfare arguments figured prominently even though a significant percentage of same-sex couples in New York were raising children. Indeed, Chief Judge Kaye noted in her dissent that "tens of thousands of children are currently being raised by same-sex couples in New York." *Id.* at 32 (Kaye, C.J., dissenting). And Lambda Legal pointed out in its brief that, according to the 2000 United States Census data on New York same-sex couples, "[o]ver 34% of . . . lesbian couples and 21% of . . . gay male couples [we]re raising children in their homes." Brief for Plaintiffs-Appellants at 86, *Hernandez*, 855 N.E.2d 1 (No. 103434/04).

<sup>378</sup> CAL. FAM. CODE § 297.5 (West Supp. 2012)

<sup>379</sup> See, e.g., *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005).

<sup>380</sup> Again, New York is illustrative. The State advanced, and the court credited, arguments based on procreation and childrearing even as Lambda Legal attorneys argued that a significant body of pro-LGBT law in New York undermined the State's reliance on such arguments. See Brief for Plaintiffs-Appellants, *supra* note 377, at 87 ("Court precedents fostering and protecting the bonds between lesbian and gay parents and their children confirm New York's firm view that gay people are no different than anyone else in their fitness as parents.").

At oral argument before the California Supreme Court, procreation and childrearing were not mentioned until social-conservative advocacy groups participated.<sup>381</sup> Justice Kennard noted at length that the petitioners presented a fairly unified front, while those defending the marriage restriction were in seeming disarray.<sup>382</sup> Kennard distinguished between “the state entities,” which included the attorney general’s office and the Governor’s attorney, and “the private entities,” which included two social-conservative groups, the Proposition 22 Legal Defense and Education Fund and the Campaign for California Families.<sup>383</sup> As Justice Kennard and her colleagues probed further, it became clear that the state entities were willing to submit only three (relatively thin) arguments in favor of the state’s marriage restriction: tradition, legislative primacy, and the will of the people.<sup>384</sup> They were unwilling to argue that the marriage restriction furthered responsible procreation, ensured an optimal environment for raising children, or protected marriage between different-sex couples. Understanding the narrowness of the State’s position explains why the private entities clung so fiercely to a place in the litigation; they needed to put before the court substantive arguments that they saw as justifying the restriction on marriage yet not advanced by the State’s attorneys. The inconsistencies between the state and private entities serve as first-hand evidence of the mainstreaming and institutionalization of LGBT equality norms.

After a favorable ruling by the California Supreme Court and the subsequent passage of Proposition 8, Lambda Legal, NCLR, and the ACLU challenged the initiative in the state supreme court as a constitutional revision, rather than a mere amendment.<sup>385</sup> A revision would have required legislative approval before a vote.<sup>386</sup> Advocates argued that Proposition 8 altered the meaning of equal protection and usurped the judiciary’s constitutional function.<sup>387</sup> At this point, the State moved more decisively to a pro-LGBT position. The same attorney general, Jerry Brown, who defended the marriage

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<sup>381</sup> See Douglas NeJaime, *The California Marriage Case and the Mainstreaming of Gay Rights*, JURIST (Mar. 10, 2008), <http://jurist.law.pitt.edu/forumy/2008/03/california-marriage-case-and.php>.

<sup>382</sup> See *Broadcasts*, CAL. COURTS, <http://www.courts.ca.gov/2961.htm> (last visited July 5, 2012) (follow “In re Marriages Cases” hyperlink).

<sup>383</sup> See NeJaime, *supra* note 381.

<sup>384</sup> See *Broadcasts*, *supra* note 382.

<sup>385</sup> See Amended Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief; Memorandum of Points and Authorities, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (No. S168047) [hereinafter *Strauss Amended Petition*].

<sup>386</sup> See CAL. CONST. art. XVIII, §§ 1–2.

<sup>387</sup> *Strauss Amended Petition*, *supra* note 385, at 23, 35.

restriction in the *Marriage Cases* litigation, joined the LGBT rights side in *Strauss v. Horton*.<sup>388</sup> Brown cited the California Supreme Court's *Marriage Cases* decision as providing the rationale for doing so.<sup>389</sup> He claimed that a constitutional amendment could not eliminate a fundamental right without a compelling justification, and no such justification existed for Proposition 8.<sup>390</sup> In other words, the earlier LGBT rights legal triumph influenced the state attorney general in a more pro-LGBT direction and furnished the doctrinal basis—a constitutional fundamental right—for his new position.

AFER and its lawyers were well aware of Brown's pro-marriage-equality position (as well as Governor Arnold Schwarzenegger's similar, but more recent, position) at the time they were considering a federal lawsuit challenging Proposition 8. Brown's shift in *Strauss* laid the groundwork for his pro-LGBT position in *Perry*, in which he answered the complaint by admitting that Proposition 8 is unconstitutional under the U.S. Constitution.<sup>391</sup> Schwarzenegger similarly refused to defend California's constitutional provision in *Perry*.<sup>392</sup> The actions of Brown and Schwarzenegger isolated the official proponents of Proposition 8.<sup>393</sup> Brown followed up his trial court actions with his refusal to appeal the district court decision invalidating the amendment,<sup>394</sup> thereby creating the standing issue that sidetracked the litigation and brought the California Supreme Court back into the conversation.<sup>395</sup> As Governor, Brown maintained his position, and his successor in the Attorney General's Office, Kamala Harris, carried forward Brown's refusal to defend the initiative. Harris argued to the California Supreme Court that proposition proponents did not have standing to defend the initiative in the absence of the state's defense.<sup>396</sup> Therefore, aside from some conservative county government entities, opposition to the marriage-equality

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<sup>388</sup> See Answer Brief in Response to Petition for Extraordinary Relief at 5–6, *Strauss*, 207 P.3d 48 (No. S168047).

<sup>389</sup> *Id.* at 5.

<sup>390</sup> *Id.*

<sup>391</sup> Answer of Attorney General Edmund G. Brown Jr., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW).

<sup>392</sup> Maura Dolan, *Gov. Won't Defend Proposition 8*, L.A. TIMES, June 18, 2009, at A4.

<sup>393</sup> See NeJaime, *supra* note 103, at 191.

<sup>394</sup> Maura Dolan & Carol J. Williams, *Brown Again Says Prop. 8 Should Be Struck Down*, L.A. TIMES, June 13, 2009, at A13.

<sup>395</sup> *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011).

<sup>396</sup> Brief of Attorney General Kamala D. Harris as Amicus Curiae, *Perry v. Brown*, 52 Cal. 4th 1116 (2011) (No. S189476). The California Supreme Court ultimately concluded that, under California law, when state officials refuse to defend an initiative, the proposition proponents have the authority to defend the initiative and appeal an adverse decision. See *Perry*, 52 Cal. 4th 1116.

cause in California at this point emerges solely from the organized countermovement, rather than from the state. In California, the LGBT movement has obtained insider status.<sup>397</sup>

*b. Federal Judges*

Not only has AFER seized on openings offered by California government officials, but the organization has also benefited from a more hospitable federal judiciary. The federal bench has not become more liberal as a general matter or more Democratic; in fact, quite the opposite is true.<sup>398</sup> Yet, federal judges, who are influenced by broader cultural shifts,<sup>399</sup> have become increasingly sympathetic to LGBT equality claims. Indeed, Republican appointees have issued some of the most important recent decisions.<sup>400</sup>

In this sense, it is important to consider judges as part of the political opportunity structure and as resources upon which movements rely.<sup>401</sup> Understanding courts and judges as part of the political opportunity structure suggests that doctrinal development constitutes an important component of that structure.<sup>402</sup> LGBT rights advocates' legal mobilization strategy created doctrine favorable to lesbians and gay men. Judges at both the state and federal levels have been increasingly willing to use these doctrinal openings to expand

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<sup>397</sup> Similar observations have been made in other movement contexts. See STAGGENBORG, *supra* note 58, at 77 (documenting the way in which the women's movement successfully advanced toward political "insider" status); Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006) (describing a process by which the state adopts a particular brand of feminism).

<sup>398</sup> See McCann & Dudas, *supra* note 128, at 38; see also Rhode, *supra* note 187, at 2037.

<sup>399</sup> See Schacter, *supra* note 244, at 1399–1400 (situating judges in the broader political and cultural contexts in which they operate).

<sup>400</sup> See Joshua Green, Editorial, *GOP Judges Back Gay Marriage*, BOS. GLOBE, July 15, 2010, at A19. As Suzanne Goldberg argues, "[C]ourts are inescapably involved in absorbing, evaluating, and influencing changes to popular judgments regarding social groups." Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1961 (2006) (footnote omitted).

<sup>401</sup> See ANDERSEN, *supra* note 86, at 10 ("The elites in [the legal opportunity structure] are generally judges."); STAGGENBORG, *supra* note 58, at 134 (arguing that the Reagan Administration's "most potent weapon against abortion . . . was its ability to alter the composition of the courts, including both the lower federal courts and the Supreme Court, through judicial appointments"); Rhode, *supra* note 187, at 2037 (discussing courts as part of the political opportunity structure); see also BALKIN, *supra* note 36, at 217 (relating the composition of the judiciary to the contingencies of other levers of political power).

<sup>402</sup> Cf. ANDERSEN, *supra* note 86, at 13 (positioning "the doctrinal framework" in the legal opportunity structure); PARIS, *supra* note 25, at 233 ("In the language of social movement scholars, legal framing options and choices within legal doctrines and court processes should be conceptualized as a species of political opportunity.").

LGBT rights.<sup>403</sup> Indeed, the courts frequently have outpaced the legislative process.<sup>404</sup> With significant constitutional development on sexual-orientation equality and sexual liberty, and with individual judges sympathetic to movement claims, advocates have found the judiciary to be the most receptive branch for LGBT rights claims.

In the 1990s, state courts began to announce important equality rights regarding the formal recognition of same-sex relationships.<sup>405</sup> More recently, state courts have held, under state constitutional law, that the fundamental right to marry includes lesbians and gay men and that sexual orientation merits heightened scrutiny for equal protection purposes.<sup>406</sup> On the federal level, *Lawrence* recognized a protected liberty interest in same-sex intimacy and affirmed the dignity of lesbians and gay men.<sup>407</sup> Lower federal courts have elaborated on *Lawrence* in cases challenging the military's "Don't Ask, Don't Tell" policy, finding that restrictions on private, adult, same-sex intimacy should be subjected to a heightened form of scrutiny for substantive due process purposes.<sup>408</sup> DOMA litigation has permitted a federal district court, relying on both *Lawrence* and *Romer v. Evans*,<sup>409</sup> to find that the federal government's denial of recognition to valid state law marriages violates federal equal protection principles.<sup>410</sup> In other words, key judicial decisions have established doctrinal principles that create openings for LGBT rights advocacy in the courts, including at the federal level. An important advance on one issue provides the doctrinal (and moral) basis for subsequent advances.

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<sup>403</sup> As Robert Post argues, "It is precisely because constitutional law is not autonomous from culture that constitutional law properly evolves as culture evolves." Post, *supra* note 36, at 83; accord Eskridge, *supra* note 38, at 499; Eskridge, *supra* note 36, at 2066.

<sup>404</sup> See John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, N.Y. TIMES, Dec. 9, 2004, at A1 ("The legal strategy to win marriage rights is a decade ahead of the political strategies to educate the public and the legislatures . . . ." (quoting Matt Foreman, Executive Director, National Gay and Lesbian Task Force) (internal quotation marks omitted)); Eskridge, *supra* note 38, at 447.

<sup>405</sup> See, e.g., *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>406</sup> See, e.g., *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009).

<sup>407</sup> 539 U.S. 558 (2003).

<sup>408</sup> See *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008); *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010), *vacated per curiam as moot*, 658 F.3d 1162 (9th Cir. 2011).

<sup>409</sup> 517 U.S. 620 (1996).

<sup>410</sup> See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *aff'd sub nom.* *Massachusetts v. U.S. Dep't of Health & Human Servs.*, Nos. 10–2204, 10–2207, 10–2214, 2012 WL 1948017 (1st Cir. May 31, 2012).

In striking down Proposition 8 after an extensive trial in *Perry*, Judge Walker relied heavily on doctrinal developments at both the state and federal levels. First, key state law advances for lesbians and gay men provided the framework with which Walker could reject the Proposition 8 proponents' purported objectives.<sup>411</sup> Procreation and childrearing, Walker reasoned, could not form the basis for Proposition 8 because California courts had recognized the equal parental rights of lesbians and gay men, and California family law had become formally gender neutral.<sup>412</sup>

Second, significant constitutional developments created space for Walker to find Proposition 8 unconstitutional. He relied on federal constitutional principles, and the analogous reasoning of the California Supreme Court interpreting state constitutional law, to find that same-sex couples possess a fundamental right to marry and that sexual orientation has all of the markers of a suspect classification.<sup>413</sup> Yet instead of applying strict scrutiny to the marriage claim—a move that would have been unprecedented in the federal courts—Walker applied a rigorous form of rational-basis review.<sup>414</sup> In doing so, he took his lead from Justice Kennedy's landmark decisions in *Romer* and *Lawrence* as well as from Justice O'Connor's *Lawrence* concurrence.<sup>415</sup> While rational-basis review is traditionally deferential, Walker applied a more demanding form. Echoing Kennedy's *Romer* analysis, Walker found that Proposition 8 singled out same-sex couples solely for the purpose of labeling them inferior, and he rejected any purported state interest in asserting the superiority of heterosexuality.<sup>416</sup> O'Connor's equal protection analysis in *Lawrence* bolstered this reasoning.<sup>417</sup> Moreover, Walker invoked *Lawrence* to affirm the dignity of same-sex relationships and stake out the equal status of same- and different-sex couples.<sup>418</sup> Of course, *Romer* and *Lawrence* did not involve same-sex marriage (or relationship recognition). In fact, Kennedy included limiting language in *Lawrence* to note that the case did not implicate the formal recognition of same-sex relationships,<sup>419</sup> and O'Connor suggested that the state could assert the traditional definition of marriage as a legitimate

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<sup>411</sup> See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1000–01 (N.D. Cal. 2010), *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

<sup>412</sup> See *id.* at 921, 958, 968–69.

<sup>413</sup> *Id.* at 993–94, 996–97.

<sup>414</sup> *Id.* at 997.

<sup>415</sup> *Id.* at 1002–03.

<sup>416</sup> *Id.* at 1003.

<sup>417</sup> *Id.* at 1002.

<sup>418</sup> *Id.*

<sup>419</sup> 539 U.S. 558, 578 (2003).

governmental interest to defend a marriage restriction.<sup>420</sup> But while *Romer* and *Lawrence* did not provide precedent that dictated the result in *Perry*, the opinions provided the doctrinal openings and moral sentiment that allowed a sympathetic federal judge to move the law in a more expansive direction and to thereby further protect same-sex couples.<sup>421</sup>

On appeal, the Ninth Circuit panel affirmed Walker's ruling, doing so on the narrowest grounds available.<sup>422</sup> In his opinion for the court, Judge Reinhardt relied extensively on *Romer*, both as a factual and doctrinal matter. He found "Proposition 8 . . . remarkably similar to Amendment 2,"<sup>423</sup> the Colorado law in *Romer* that repealed and prohibited antidiscrimination protections for lesbians and gay men.<sup>424</sup> "Like Amendment 2," Reinhardt reasoned, "Proposition 8 denies 'equal protection of the laws in the most literal sense,' because it 'carves out' an 'exception' to California's equal protection clause, by removing equal access to marriage, which gays and lesbians had previously enjoyed, from the scope of that constitutional guarantee."<sup>425</sup> Quoting *Romer*, he claimed that, if no legitimate state interest exists to support Proposition 8, "we must infer that it was enacted with only the constitutionally illegitimate basis of 'animus toward the class it affects.'"<sup>426</sup> Like Walker, Reinhardt found that California's pro-LGBT laws rendered the purported interests in procreation and childrearing untenable.<sup>427</sup> He was left to conclude, again quoting *Romer*, that "'the inevitable inference [is] that the disadvantage imposed is born of animosity toward,' or, as is more likely with respect to Californians who voted for the Proposition, mere disapproval of, 'the class of persons affected.'"<sup>428</sup> Ultimately, "[l]ike Amendment 2, Proposition 8 is a classification of gays and lesbians undertaken for its own sake."<sup>429</sup> This, Reinhardt announced, the Equal Protection Clause will not tolerate.<sup>430</sup> Again, while *Romer* did not involve relationship recognition for same-sex couples, the decision articulated a sexual-orientation-equality principle in the context of

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<sup>420</sup> *Id.* at 585 (O'Connor, J., concurring in the judgment).

<sup>421</sup> *See Post, supra* note 36, at 108.

<sup>422</sup> *Perry v. Brown*, 671 F.3d 1052, 1063–64 (9th Cir. 2012).

<sup>423</sup> *Id.* at 1081.

<sup>424</sup> *See Romer v. Evans*, 517 U.S. 620, 624 (1996).

<sup>425</sup> *Perry*, 671 F.3d at 1081 (citation omitted) (quoting *Romer*, 517 U.S. at 633, and *Strauss v. Horton*, 207 P.3d 48, 61 (Cal. 2009)).

<sup>426</sup> *Id.* at 1082 (quoting *Romer*, 517 U.S. at 632).

<sup>427</sup> *See id.* at 1086–90.

<sup>428</sup> *Id.* at 1093 (quoting *Romer*, 517 U.S. at 634).

<sup>429</sup> *Id.* at 1094.

<sup>430</sup> *Id.* at 1095.

anti-gay initiatives. Sympathetic federal judges could apply that principle to new contexts in which state initiatives harmed lesbians and gay men.<sup>431</sup>

In this sense, the doctrinal framework is part of the changing political opportunity structure upon which advocates seize when they consider making demands by claiming rights in court. As Robert Post argues in his insightful analysis of the relationship between culture and the development of constitutional law, controversial constitutional decisions may gradually become common wisdom. *Lawrence*, for instance, “increasingly acquire[s] an aura of legality as it is imbricated within a chain of judicial decisions that treat [it] as a legitimate judgment.”<sup>432</sup> Moreover, the principles of such decisions begin to apply in new situations; pro-LGBT decisions (like *Romer* and *Lawrence*) provide the logic for additional pro-LGBT decisions (like *Perry*).<sup>433</sup> For social movement activists, then, constitutional developments are resources that can be mobilized for change. The influence of constitutional pronouncements does not end with the instant case; instead, advocates seize on such pronouncements as part of their ongoing work both inside and outside the courts.

AFER has placed its hopes in a potentially sympathetic Supreme Court, with Justice Kennedy as the crucial swing vote.<sup>434</sup> AFER’s optimism springs from the movement’s successful litigation in *Romer* and *Lawrence*, which provided Kennedy with opportunities to demonstrate his commitment to sexual-orientation equality and to develop doctrinal bases on which to later rest a marriage-equality ruling.<sup>435</sup> AFER is hoping that Kennedy will take the invitation furnished by the lower federal courts to apply *Romer* and *Lawrence* to marriage recognition and move the law forward with respect to LGBT

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<sup>431</sup> Like Walker, Reinhardt also found *Lawrence* instructive, relying on both Kennedy’s majority opinion and O’Connor’s concurrence. *See id.* at 1095.

<sup>432</sup> *See Post, supra* note 36, at 108.

<sup>433</sup> *See id.* (“[*Lawrence*] will grow in legal authority as future decisions manifest respect for *Lawrence*’s principles, as the Court appeals to the logic of those principles to control the outcome of cases, and as *Lawrence*’s logic is used to orient the ongoing development of the law.”).

<sup>434</sup> *See Stein, supra* note 235.

<sup>435</sup> *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). Post’s point about *Lawrence* seems especially critical here: The Court, led by Justice Kennedy, entered “the national debate about the status of homosexuality in a manner that stresses the positive value of nondiscrimination while preserving the Court’s options in deciding how far it is willing to go in striking down legislation adversely affecting homosexuals.” Post, *supra* note 36, at 101.

rights.<sup>436</sup> In fact, in their respective opinions, both Reinhardt and Walker seemed to be speaking to Kennedy.<sup>437</sup>

Understanding the way in which social movement advocates specifically target judges suggests that judges themselves function as elite allies whom movements seek to activate.<sup>438</sup> Not only does this view find a theoretical grounding in scholarship on movement–state overlap,<sup>439</sup> but it also resonates with Jack Balkin and Sanford Levinson’s influential theory of “partisan entrenchment.”<sup>440</sup> Federal judges “are temporally extended representatives of particular parties, and hence, of popular understandings about public policy and the Constitution.”<sup>441</sup> They enact constitutional (and political) views that social movements and political parties have been honing in the background.<sup>442</sup> Social movement actors articulate constitutional visions and attempt to persuade political leaders that those visions are correct; if they are successful, political leaders endorse the movement’s claims and eventually appoint judges who share some of the movement’s constitutional positions.<sup>443</sup> This is not to say that judges are doing politics, instead of law.<sup>444</sup> Rather, it is to suggest that constitutional change and political and social mobilizations are so intertwined that, in interpreting and applying legal doctrine, judges are influenced by—and, in turn, influence—notions about constitutional meaning that originate outside the courts.<sup>445</sup>

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<sup>436</sup> Of course, AFER has been pushing claims that ask for much broader substantive due process and equal protection holdings than reliance on *Romer* and *Lawrence* would suggest.

<sup>437</sup> See Dolan & Williams, *supra* note 235; John Schwartz, *In Same-Sex Ruling, an Eye on the Supreme Court*, N.Y. TIMES (Aug. 4, 2010), <http://www.nytimes.com/2010/08/06/us/06assess.html>; see also Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 981 (2011).

<sup>438</sup> Post argues that because culture and constitutional law are in a dialogical relationship, judges cannot work as “neutral observer[s]” but must instead “intervene[] in culture wars.” Post, *supra* note 36, at 84 (quoting *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting)) (internal quotation marks omitted); accord BALKIN, *supra* note 36, at 63 (explaining that social movements “attempt[] to change attitudes (especially elite attitudes) about what the Constitution means, and hence influence[] judicial decisionmaking, because judges are largely drawn from elites”).

<sup>439</sup> While social movement work on movement insiders makes passing reference to judges, see BANASZAK, *supra* note 356, at 199 (“Movement–state intersections can occur in the form of elected officials, judges, and nongovernmental organizations pulled into the state.”), it does not offer sustained treatment of judges as institutional activists.

<sup>440</sup> Balkin & Levinson, *supra* note 36, at 1067.

<sup>441</sup> *Id.*

<sup>442</sup> See *id.* at 1075.

<sup>443</sup> See BALKIN, *supra* note 36, at 31, 71.

<sup>444</sup> See JACK M. BALKIN, *LIVING ORIGINALISM* 333 (2011).

<sup>445</sup> See BALKIN, *supra* note 36, at 201–02.

Going further, countermovement activists increasingly frame judges ruling favorably on marriage equality not simply as institutional allies but as social movement insiders embedded in the state.<sup>446</sup> Immediately after Judge Walker's decision, Proposition 8 supporters made much of the judge's sexual orientation, suggesting that pro-gay forces had found a gay judge to decide their claim.<sup>447</sup> When Walker confirmed his same-sex relationship, Proposition 8 proponents moved to vacate his trial court decision, arguing that he should have recused himself.<sup>448</sup> Marriage-equality supporters, media commentators, and ethics experts rightly criticized the motion to vacate,<sup>449</sup> but did not recognize the blurred line between the movement and the judiciary that the dispute revealed. Even though, as the district court held,<sup>450</sup> a gay judge should not recuse himself from a marriage case, advocates may benefit from the opportunity to present their claim to a decision maker who shares movement members' identity and who understands firsthand the movement's grievances.

Similarly, before oral argument at the Ninth Circuit, Proposition 8 proponents sought to disqualify Judge Reinhardt.<sup>451</sup> Reinhardt's wife, Rimona

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<sup>446</sup> For scholarship pointing toward the social movement connections of judges, most notably those on the federal bench and specifically on the Supreme Court, see Baum & Devins, *supra* note 322, at 1541–42 (identifying Supreme Court Justices with both liberal and conservative movement organizations); and Siegel, *supra* note 38, at 1347 (“Justice Scalia and other avatars of the Reagan revolution regularly employ the language of originalism to exhort Americans to mobilize against the Court and seek constitutional change without the intermediation of constitutional lawmaking.”). On a related note, some scholars have analyzed the practices and beliefs of Supreme Court Justices who had careers as social movement lawyers. See, e.g., WASBY ET AL., *DESEGREGATION FROM BROWN TO ALEXANDER: AN EXPLORATION OF SUPREME COURT STRATEGIES* (1977); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010); Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010).

<sup>447</sup> *Judicial Bias Is Alleged in a Ruling on Marriage*, N.Y. TIMES, June 14, 2011, at A12; Press Release, Nat'l Org. for Marriage, National Organization for Marriage Decries Federal Court Decision Invalidating Proposition 8; Calls on the Supreme Court and Congress to Protect Americans' Right to Vote for Marriage (Aug. 4, 2010), available at <http://www.nationformarriage.org/site/apps/nlnet/content2.aspx?c=omL2KeN0LzH&b=5075189&ct=8569893>.

<sup>448</sup> See Defendant-Intervenors Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and ProtectMarriage.com's Motion to Vacate Judgment, *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119 (N.D. Cal. 2011) (No. C 09-02292 JW).

<sup>449</sup> See Plaintiff-Intervenor City and County of San Francisco's Opposition to Defendant-Intervenors' Motion to Vacate Judgment, *Perry*, 790 F. Supp. 2d 1119 (No. C 09-02292 JW); State Defendants' Opposition to Motion to Vacate Judgment, *Perry*, 790 F. Supp. 2d 1119 (No. C 09-02292 JW); Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc. et al. in Opposition to Proponents' Motion to Vacate Judgment, *Perry*, 790 F. Supp. 2d 1119 (No. C 09-02292 JW); Editorial, *Fit to Rule on Same-Sex Marriage*, N.Y. TIMES, May 4, 2011, at A28.

<sup>450</sup> *Perry*, 790 F. Supp. 2d 1119.

<sup>451</sup> See Appellants' Motion for Disqualification, *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011) (No. 10-16696).

Ripston, had been head of the ACLU of Southern California at the time the organization submitted an amicus brief at the district court with other pro-LGBT public interest organizations.<sup>452</sup> And her organization had taken a public position in favor of marriage equality and against Proposition 8.<sup>453</sup> Reinhardt did not recuse himself, largely based on a separation between the views of a judge and his spouse.<sup>454</sup> Interestingly, he noted that, normally, when the ACLU of Southern California files an amicus brief in the Ninth Circuit proceeding, he refuses to serve on the panel.<sup>455</sup> While the ACLU of Southern California had filed an amicus brief at the district court, it did not file at the Ninth Circuit, instead leaving that task to the institutionally separate ACLU of Northern California.

The experiences with both Judges Walker and Reinhardt suggest that social movement activists do not see judges as impartial outsiders. They are not, as Chief Justice Roberts claimed, neutral “umpires,” “call[ing] balls and strikes.”<sup>456</sup> Rather, judges are, at a minimum, part of a dynamic political opportunity structure in which they function as sympathetic or hostile elites. And in the eyes of some activists, judges are more than that; they are social movement actors embedded in the state, using their elite institutional positions to enact the constitutional, political, and moral vision pushed by the movement with which they identify. Of course, the knowledge that one has allies or fellow movement members on the federal bench makes litigation tactics more attractive. Again, institutional allies and elite support may, quite reasonably, channel movement activity into institutional tactics and moderate goals.

#### CONCLUSION—MANAGING THE DILEMMA

This Article attempts to bring social movement theory to sociolegal scholarship on litigation tactics to identify an important phenomenon—the legal mobilization dilemma. AFER’s movement challenge was made possible,

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<sup>452</sup> See Brief of Amici Curiae ACLU Foundation of Northern California et al., *Perry*, 630 F.3d 909 (No. 10-16696) [hereinafter *Perry* Brief of Amici Curiae].

<sup>453</sup> Press Release, Nat’l Ctr. for Lesbian Rights, Federal Judge: Prop 8 Unconstitutional (Aug. 4, 2010), [http://www.nclrights.org/site/PageServer?pagename=press\\_Prop8FederalChallenge080410](http://www.nclrights.org/site/PageServer?pagename=press_Prop8FederalChallenge080410); Matt Coles et al., *Prop 8: Focusing on the Wrong Question*, ACLU S. CAL. (July 14, 2009), [http://www.aclu-sc.org/news\\_stories/view/102830/](http://www.aclu-sc.org/news_stories/view/102830/).

<sup>454</sup> *Perry*, 630 F.3d at 911–12.

<sup>455</sup> *Id.* at 916 n.8.

<sup>456</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr., J., D.C. Circuit).

in part, because of the movement's successful legal mobilization: LGBT movement lawyers' productive use of court-centered tactics changed the landscape in ways that permitted a new organization, AFER, and its famous lawyers, Olson and Boies, to initiate a powerful litigation campaign that challenged the coordinated state-based movement strategy. In other words, while the LGBT movement's legal mobilization strategy can boast great success, viable challenges to that strategy emerge precisely because of such success.

Why pursue legal mobilization at all if one's success may ultimately contribute to one's downfall? The outlook is nowhere near that grim. Rather than simply turn over the reins to AFER, LGBT movement advocates integrated the litigation into their state-based approach.<sup>457</sup>

In their amicus role in *Perry*, lawyers at Lambda Legal, NCLR, and the ACLU tried to persuade the courts to limit the reach of the case by viewing the substantive issues in a limited, fact-specific way. They argued that the particular situation in California is unique, and as a result, a holding in the case should not directly implicate the laws of (most) other states.<sup>458</sup> They claimed that, because California actually eliminated the right of same-sex couples to marry and maintained a domestic-partnership system solely to differentiate same- and different-sex couples, the courts need only apply rational-basis review to find Proposition 8 unconstitutional.<sup>459</sup> The California-specific factual and doctrinal reframing attempts to provide the best opportunity for a denial of certiorari by the Supreme Court, a favorable decision by the Court if it takes the case, and the least destructive aftermath if the Court decides against the plaintiffs.

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<sup>457</sup> Rubenstein and Tushnet make similar observations in the civil rights context. Rubenstein notes how Marshall reacted to Vaughn's work on *Shelley* by pursuing another restrictive covenant case and seeking consolidation at the Supreme Court. See Rubenstein, *supra* note 9, at 1629–30. Tushnet explains how Marshall positioned equalization, the remedy pursued by Wesley, as merely an alternative in more far-reaching attacks on segregation. See TUSHNET, *supra* note 17, at 109.

<sup>458</sup> *Perry* Brief of Amici Curiae, *supra* note 452, at 1 (“While *amici* also agree that Proposition 8 violates the federal guarantees of equal protection and due process, *amici* submit this brief to emphasize the *singular nature of the case* presented by Proposition 8, and the *California-focused analysis* that accordingly is warranted. *Amici* therefore address only the question of whether, *in light of the particular circumstances of this ballot measure*, plaintiffs are likely to succeed on the merits of their equal protection claim.” (emphases added)).

<sup>459</sup> See *id.* at 9–11. The City and County of San Francisco, a plaintiff-intervenor in *Perry*, also urged the court to follow this narrow, California-specific path. See Plaintiff-Intervenor-Appellee City and County of San Francisco's Response Brief, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (Nos. 10-16696, 11-16577).

This approach has met with success. In holding Proposition 8 unconstitutional, the Ninth Circuit panel relied on the extremely narrow grounds articulated by the LGBT movement lawyers.<sup>460</sup> And the court's extensive reliance on *Romer* echoed the rational-basis arguments pressed by the movement organizations.<sup>461</sup> In the immediate wake of the ruling, commentators noted the effects on AFER's Supreme Court strategy. Now, as movement advocates had hoped, the Court could avoid the case or issue a narrow ruling limited to California.<sup>462</sup>

In keeping with their belief that federal litigation builds on—and, in fact, depends on—state-based advances, LGBT movement advocates also continue to pursue state-level change to create a more favorable national landscape. This effort relies on both legislation and litigation. In California, advocates secured passage of SB 54, which recognizes the marriages (for state law purposes) of same-sex couples married in other states before passage of Proposition 8.<sup>463</sup> At the same time, advocates obtained comprehensive (nonmarital) relationship recognition in additional states and achieved marriage equality in New York.<sup>464</sup> Lambda Legal's recent state court challenge in New Jersey seeks to secure marriage equality in that state.<sup>465</sup> These efforts ensure that, when the Supreme Court ultimately confronts the marriage issue, there will be, as compared to when *Perry* was filed, more states with relationship recognition for same-sex couples and many more same-sex couples in marriages and other legally recognized relationships.

Movement lawyers' response to *Perry* underscores the risks of the legal mobilization dilemma, as activists redirect energy and resources toward litigation they wanted to avoid. But their response also highlights the

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<sup>460</sup> See *Perry*, 671 F.3d at 1063–64.

<sup>461</sup> See *id.* at 1093–95. For their reliance on *Romer*, see *Perry* Brief of Amici Curiae, *supra* note 452, at 11–21. Other amicus briefs, most notably a brief filed by a group of constitutional law professors led by William Eskridge, argued that *Romer* should guide the analysis in *Perry*. See, e.g., Brief of Amici Curiae, Professor William N. Eskridge Jr. et al. in Support of Appellees, *Perry*, 671 F.3d 1052 (Nos. 10-16696, 11-16577).

<sup>462</sup> See Dolan & Williams, *supra* note 235.

<sup>463</sup> CAL. FAM. CODE § 308(b) (West Supp. 2012).

<sup>464</sup> See N.Y. DOM. REL. LAW § 10-a (McKinney 2011). At the time this Article went to print, lawmakers in Washington and Maryland had passed marriage-equality laws, but opponents were pursuing voter initiatives to block the laws from taking effect. See Davis, *supra* note 84; Yardley, *supra* note 84.

<sup>465</sup> See Complaint for Declaratory and Injunctive Relief, *supra* note 140. More recently, Lambda Legal has filed marriage-equality lawsuits in Nevada federal court and Illinois state court. See Complaint for Declaratory and Injunctive Relief, *Sevcik v. Sandoval*, No. 2:12-cv-00578 (D. Nev. Apr. 10, 2012); Complaint for Declaratory and Injunctive Relief, *Darby v. Orr*, No. 12CH19718 (Ill. Cir. Ct. May 30, 2012).

adaptability and resilience of their legal mobilization strategy.<sup>466</sup> Rather than pack up and go home, advocates at leading LGBT rights organizations have integrated the suit into their tactical repertoire.<sup>467</sup>

Even as movement leaders react to what they see as the dangers of AFER's litigation, they acknowledge the benefits that may come with AFER's additional resources, publicity efforts, and ideologically diverse and politically connected support base. Future research should address not only the threats inherent in the legal mobilization dilemma but also the potential gains. How might the AFER litigation aid the movement? How might it provoke important discussions about strategy and the role of courts? How might it diversify the movement both demographically and ideologically? Answering these questions demands consideration of movement definition. Who is a movement insider? Where does the movement end and allied support begin? What roles do allies and supportive elites play in a movement's trajectory?<sup>468</sup> This Article's elaboration of the legal mobilization dilemma suggests the need for research analyzing legal mobilization's influence on movement boundaries.

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<sup>466</sup> Much social movement scholarship focuses on changing movement strategy in response to countermovement action and the state. *See, e.g.*, Meyer & Staggenborg, *supra* note 187, at 231. But movement actors also change strategy based on internal and allied activity.

<sup>467</sup> Analyzing the LGBT movement response bolsters recent scholarly accounts of public interest lawyers' sophisticated and multidimensional approach. *See, e.g.*, Scott Barclay & Anna-Maria Marshall, *Supporting a Cause, Developing a Movement, and Consolidating a Practice: Cause Lawyers and Sexual Orientation Litigation in Vermont*, in *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE*, *supra* note 37, at 171, 184; Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 *BERKELEY J. EMP. & LAB. L.* 1, 6 (2009); Cummings & NeJaime, *supra* note 69, at 1241–42; Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 261, 276 (Austin Sarat & Stuart Scheingold eds., 1998); Rhode, *supra* note 187, at 2046–49; Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 *B.U. PUB. INT. L.J.* 469, 472–73 (1999); Stein et al., *supra* note 62, at 1685–91; Waterstone et al., *supra* note 64 (manuscript at 43–46).

<sup>468</sup> I addressed some of these issues in an earlier article, *see* NeJaime, *supra* note 103, at 203–04, but more work needs to be done on the general question of movement boundaries.