THE DIVIDED STATES OF AMERICA: A COMPARATIVE CASE STUDY
OF SAME-SEX MARRIAGE IN THE UNITED STATES

A dissertation presented

by

Margaret Gram Crehan

to
The Law and Public Policy Program

In partial fulfillment of the requirements for the degree of

Doctor of Philosophy

in the field of

Law and Public Policy

Northeastern University
Boston, Massachusetts
December, 2013
THE DIVIDED STATES OF AMERICA: A COMPARATIVE CASE STUDY OF SAME-SEX MARRIAGE IN THE UNITED STATES

by

Margaret Gram Crehan

ABSTRACT OF DISSERTATION

Submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Law and Public Policy in the Graduate School of Social Sciences and Humanities of Northeastern University, December, 2013
Abstract

The issue of marriage equality is the same across the country. The outcome, on the other hand, is vastly different from state to state not to mention the federal government. What accounts for the different paths states have taken when it comes to recognizing or banning same-sex marriage? Some states have granted full marriage benefits to same-sex couples, some have passed a constitutional amendment banning same-sex marriage, and others have provided civil unions, which allot certain rights, but not full marriage rights, to same-sex couples. To shed light on the variety of ways states have handled this issue I have conducted a comparative case study of three states: California, Colorado and Massachusetts. Each has taken vastly different actions on the issue of same-sex marriage, and my comparative analysis explains how a state’s political culture, its legal traditions, and its networks of organized interests all influence the outcome of this pressing social issue.

I rely on three key theoretical frameworks: the Political Opportunity Structure developed by Sidney Tarrow and the Legal Opportunity Structure developed by Ellen Andersen and Social Movement theory. They provide a useful theoretical lens for studying the actions in, Colorado, Massachusetts and California. Within these frameworks are three major elements: Political Opportunity, Mobilization Structure and Framing Process. The decade-long tensions between the different levels of government, both state and federal, over same-sex marriage cannot be separated from the social movements responsible for bringing the issue to the fore. This requires that I include an analysis of the efforts by gay rights activists to secure same-sex marriage rights in state courts, federal courts, state legislatures and Congress. Adding to social movement theory, I include in my analysis a comparative study of the amicus briefs submitted in the two major same-sex marriage cases in Massachusetts and California. By examining the strategies employed by interest groups on either side of the issue, I aim to show how in these “divided states” important issues of social policy are being raised, debated and resolved.
Acknowledgments

I am so very grateful to everyone who supported and guided me throughout the process of completing this work. I want to thank the chair of my committee, Professor Michael Tolley, who provided timely feedback and encouragement. Your insight and patience made all of the difference to me in this process. I also thank the readers of my committee Professor Libby Adler and Professor Amílcar Barreto for their support and input. I want to thank the Director of the Law and Public Policy Program at Northeastern University, Professor Joan Fitzgerald, for her unwavering support of me and for the opportunity she gave me in teaching. I am grateful to my “Law, Policy, and Society” colleagues, especially Rosemary McAndrew, for all of what I learned from them. I also want to thank Kathie Simmons for going above and beyond for me throughout this process.

I want to thank Professor Cheryl Welch and Professor Jyoti Puri who helped shape my academic growth and interests. A special thanks to Professor Jill Taylor, a mentor and a friend who taught me more than I could imagine – you are missed. I am thankful to Northeastern University for their financial support throughout my doctoral studies. Thank you also to the individuals who shared their insights with me for this project.

Thank you to my wonderful friend, Jeanine Foley, your faith and patience was so very much appreciated. I would also like to thank all of the many close friends and loved ones who have granted me the good fortune of their time and support in this process. Your laughter and love was there when I needed it most. Thank you to my parents who taught me the value of knowledge and hard work but most importantly to never forget to laugh along the way.

This work is dedicated to my close friends, Carly Burton and Mo Berman, whose friendship and support meant the world to me during this process, whose generosity of spirit I admire deeply and whose loving relationship serves as a constant source of inspiration to me.
Table of Contents

Abstract 2
Acknowledgments 4

Table of Contents

Chapter 1: Introduction 9
   A. Plan of the Dissertation 11
   B. Background on Same-Sex Marriage 15

Chapter 2: Literature Review 34

Chapter 3: Research Methodology 58
   A. Research Questions/Hypotheses 58
   B. Research Design and Data Collection 58
      1. Data Collection Methods 60
         a. Research 60
         b. Interviews 61
   C. Case Selection: Choice of CO, MA and CA 63
      1. Lesbian and Gay Policy Differences 67
   D. Study Limitations 69

Chapter 4: Colorado: Shifting Landscape of Rights 73
   A. Current Status of Same-Sex Marriage in the State 73
      1. Brief History of SSM in Colorado 74
   B. Connection to Theory 77
      1. Framing 78
      2. Mobilization 79
   C. Shifting Public Opinion 80
   D. The Road to the Supreme Court 84

Chapter 5: Massachusetts: Making Legal History 88
   A. Current Status of Same-Sex Marriage in the State 88
      1. Brief History of Same-Sex Marriage in Massachusetts 89
   B. Connection to Theory 92
      1. Before Goodridge 94
      2. The Goodridge Case 98
         a. Role of Amicus Curiae 102
         b. Breakdown of Amicus Arguments and Court’s Response 105
      3. After Goodridge 110
      4. Framing 111
      5. Mobilization 113
Chapter 6: California: Battleground State

A. Current Status of Same-Sex Marriage in the State
   1. Brief History of Same-Sex Marriage in

B. Connection to Theory
   1. In re Marriage Cases
      a. Role of Amicus Curiae
         i. The Case
         ii. Arguments made by the parties
         iii. Breakdown of Amicus arguments
         iv. The Impact
   3. Prop 8
   4. Perry v. Schwarzenegger
   5. Framing
   6. Mobilization

C. Shifting Public Opinion
D. The Road to the Supreme Court

Chapter 7: Marriage Equality in Three States

A. Political Opportunity Structure
B. Comparative Analysis of Amicus Curiae
C. Framing
D. Mobilization
E. The Federal Defense of Marriage Act
F. Federalism

Chapter 8: Conclusion

Appendix A

Bibliography
CHAPTER 1

Introduction and Background on Same-Sex Marriage

We are in the midst of a showdown. Some would say it is over the definition of marriage, but the definition is not in question. Gays and lesbians, who have for the most part been raised by heterosexual parents know exactly what marriage is – and they want in. The fight is over which couples get to belong to this institution. Several thoughts come to mind, such as, why would anyone want to belong to an institution where some do not want them as a member? And, of course, the Groucho Marx take on it, “I don’t want to belong to any club that will accept me as a member.”¹ All joking aside, this last quote is meant to caution the reader that marriage is not the ultimate goal of the gay rights movement, nor should it be. Marriage will not set gays and lesbians free – free from the discrimination they face on a daily basis, free from being targets of hate crimes, free from having to pay for benefits that are available to married heterosexual couples. This work is not meant to advance the cause of marriage, nor is it meant to defile it. Instead it is meant to use this well-known institution to provide the reader with a better understanding of the way law and politics works in the United States. My comparative study takes as its focal point the issue of same-sex marriage in three states – Colorado, Massachusetts and California – and I seek to explain the variety of paths taken towards marriage equality in these “divided states.”

The issue of whether to grant same-sex couples the right to marry is the same across the country. The outcome, on the other hand, is vastly different from state to state not to mention the federal government. Like other legal issues with obvious ramifications on society, such as adoption, divorce, and abortion, states choosing different paths when it comes to marriage is problematic because people travel and move between states all the time. To be

married in one state and not another creates innumerable difficulties when trying to maneuver through life.

If we are the “United” States of America, why is it that states choose such different ways of handling this contentious issue? What accounts for the different paths states have taken when it comes to recognizing or banning same-sex marriage? Some states have granted full marriage benefits to same-sex couples, some have passed a constitutional amendment banning same-sex marriage, and others have provided civil unions, which allot certain rights, but not full marriage rights, to same-sex couples. To shed light on the variety of ways states have handled this issue I have conducted a comparative case study of three states: Colorado, Massachusetts and California. Each has taken vastly different actions on the issue of same-sex marriage. For example, Colorado has a Defense of Marriage Amendment which acts as a same-sex marriage ban. Massachusetts was the first state to allow same-sex marriage and has issued approximately 11,000 such licenses, and lastly, California, perhaps the most complicated, has gone from issuing same-sex marriage licenses to passing Prop 8 which banned same-sex marriage, and now, after a U.S. Supreme Court ruling they are once again issuing same-sex marriage licenses. These states also were chosen because they represent different geographical locations of the United States, they have different political cultures as indicated by the parties that control state government; they each have different law making processes, (some allowing popular initiative), and they represent three very different same-sex marriage outcomes.

In this study, the dependent variable is the state’s political and legal response to the issue of same-sex marriage. The independent variables are the state’s political cultures, the networks of interest groups for and against same-sex marriage, and their different law making processes. The key questions that motivated this research are: What factors accounted for the legal and political responses to same-sex marriage in California, Colorado and Massachusetts?
What factors influenced the strategic path taken by key interest groups on the issue of same-sex marriage?

In order to answer these questions, several qualitative methodologies were utilized, including research on legislative policymaking and court decisions and interviews with key actors involved in the issue. I examined the work of courts and legislatures by each state in this three state comparative case study, focusing on media accounts of the events, transcripts of public hearings, legislative debates (where available) and court opinions and filings, including briefs on the merits filed by the parties and amicus curiae briefs. Court records of the key cases identified the interested parties, such as attorneys for and against same-sex marriage, plaintiffs to the suit, as well other stakeholders such as amicus curiae. Several individuals central to the debate have been interviewed to gain a fuller appreciation of the context of the same-sex marriage developments in the states. These primary source materials provide rich context or what Clifford Gertz called “thick description,” to the developments in each state.

Plan of the Dissertation

The political actions and reactions sparked by the same-sex marriage controversy will be analyzed in terms of federalism, the separation of powers and social movement theory. I am interested in the tension between the national government and the people’s representation in state legislatures and the courts. I am also interested in how groups for and against marriage equality worked to achieve their goals. The events described in this chapter are current at the time of writing (December 2013). The challenge in writing this dissertation is that the topic is fluid and there are important changes almost daily. In order to answer the questions of the divergent paths taken by different states, I begin my analysis here with some background on the movement to establish same-sex marriage in the United States. Even if the U.S. Supreme Court
were to make marriage equality the law of the land, this work would still be important for what it reveals about law, politics and social movements in the United States.

In Chapter two, I review the literature on same-sex marriage paying particular attention to comparative case studies, which are the model for this dissertation. My own study is informed by Daniel Pinello’s work on the judicial treatment of lesbian and gay rights claims from 1981 through 2000. Pinello examines thirty-nine attitudinal, environmental, legal, and other factors that might help explain the outcomes of the 468 appellate court cases addressing gay civil rights claims during the last two decades. He concludes that in the spirit of the so called “new judicial federalism” state courts are far more likely to embrace gay rights under state constitutions than either federal or state courts seem willing to recognize under the U.S. Constitution. Writing before the lower federal courts decisions in the Hollingsworth v. Perry, the Prop. 8 case, he concluded that there is “virtually no empirically based reason to anticipate success for lesbian and gay litigants in federal fora as they are constituted currently or in the foreseeable future.”

Even though the U.S. Supreme Court limited its decision in Hollingsworth v. Perry (2013) to the right of same-sex couples to marry in California, the question remains whether and how other states will recognize the same right. This dissertation addresses these remaining questions in the concluding chapters.

Pinello published Gay Rights and American Law, just before the Supreme Court handed down its decision in Lawrence v. Texas (2003), the landmark case overruling Bowers v. Hardwick (1986) and recognizing a constitutional right within the concept of liberty within the due process clause, to engage in same-gender sexual activity. This decision has inspired gay rights litigation under different state constitutions, including the pivotal decision in Massachusetts called Goodridge v. Dept. of Health (2003). My research begins where Pinello left off, and I start with the hypothesis that the Lawrence case may actually discourage the effort

---

3 Ibid. p.146.
to find the right to same-sex marriage, in the spirit of the “new judicial federalism,” in state constitutional law and spawn new efforts to promote the rights of gays and lesbians generally in federal constitutional law. The U.S. Supreme Court’s decisions in Hollingsworth and Windsor may provide some guidance on this issue, a topic I address in the concluding chapter.

The other work by Daniel Pinello that I found instructive as a springboard for the development of my own research was his comparative case study on same-sex marriage in Massachusetts, California and Oregon. Pinello’s America’s Struggle for Same-Sex Marriage (2006) provides an account of what happened in several states during the time period when same-sex marriage was first legalized. Through interviews and first-hand accounts by pro-same-sex marriage groups, Pinello provides a valuable narrative of the events in several states during this time period. There are, however, important distinguishing features of my research. The first is my choice to interview individuals on both sides of the same-sex marriage issue. Second, Pinello’s work lacks a well-constructed analytical framework for studying the interest group, legislative and judicial activity around same-sex marriage. My study situates the actions in each state and the federal government within a legal mobilization framework that provides a more thorough and nuanced analysis of the entire process including interest group engagement in both the judicial and legislative processes. Lastly, my work covers the time period April 2003 to June 2013, from Lawrence v. Texas and Goodridge v. Massachusetts Dept. of Health in 2003 to Hollingsworth v. Perry and Windsor v. U.S. in 2013. During this ten year period, there was change happening in the United States, including the 2008 and 2012 presidential elections, the debate over marriage equality in many states and the acceptance of two important same-sex marriage cases for review by the U.S. Supreme Court.

Chapter three describes the specific theoretical framework for my study. I rely on the framework called Political Opportunity Structure and Legal Opportunity Structure developed by Daniel Pinello, America’s Struggle for Same-Sex Marriage (New York: Cambridge University Press, 2006)
Ellen Andersen in her pivotal work “Out of the Closets and Into the Courts.” It provides a useful theoretical lens for studying the actions in California, Colorado and Massachusetts. Within this framework are three major elements: Political Opportunity, Mobilization Structure, and Framing Process. The tension between the different levels of government, both state and federal, over same-sex marriage cannot be separated from the social movements responsible for bringing the issue to the fore. Therefore, I will include an analysis of the efforts by gay rights activists to secure same-sex marriage rights. The larger contextual framework, Social Movement Theory, will be useful in examining the strategies employed by interest groups on either side of the issue.

The body of literature that I will be informing includes legal and political mobilization on either side of the same-sex marriage issue. I also take into account the strength of the forces of resistance in each state and the legislative and judicial orientation of each state. This comparative model will reveal the variety of factors that lead to the success or failure of the attempt to gain legal recognition for same-sex marriage.

Chapters 4, 5 and 6 examine the experience of three states – Colorado, Massachusetts and California – in dealing with the same-sex marriage debate. Special attention will be devoted to the legislative and judicial developments in each state. The purpose of a comparative study is that one state’s experience may be used as a foil to understand better the experiences in another. The plan of the dissertation is for the shadows in one state to be illuminated by the light cast by the experiences in another state.

In Chapter 7, I bring together my findings from the case studies and situate them into the legal mobilization framework in an effort to explain what accounts for the variation in the states’ action on the issue of same-sex marriage. Lastly, in Chapter 8, I conclude my study highlighting the major findings within the relevant area of scholarship and offer some thoughts on what may
come next on the issue of marriage equality now that the U.S. Supreme Court has weighed in on the subject.

**Background on Same-Sex Marriage**

The Massachusetts Supreme Judicial Court’s decision in *Goodridge v. Dept. of Public Health (2003)*,\(^5\) rekindled a nationwide debate on the issue of same-sex marriage that arguably had begun in 1996 when Hawaii’s Supreme Court nearly ruled in favor of same-sex marriage. The Supreme Court of Hawaii did find that under the state’s equal protection clause, denying marriage licenses to same-sex couples constituted discrimination.\(^6\) But, before any ruling went into effect, Hawaii voters passed an Amendment to the state constitution that allowed the state to reserve marriage for opposite sex couples.\(^7\) But *Goodridge* was akin to a single shooting star in what was and continues to be a meteor shower of political action on this contentious issue in the United States. Although regulation of marriage has traditionally been left up to the states, in 1996, the federal government, responding to state court decisions, enacted legislation defining marriage as between a man and a woman only and providing for a state’s ability to refuse to recognize same-sex marriages performed in other states. This legislation, known as the Defense of Marriage Act,\(^8\) has come before the U.S. Supreme Court, raising issues of federalism and separation of powers.

The question of where to begin the analysis is difficult as it can no doubt be argued that getting to the historic place of same-sex marriage rights today has been influenced by the gay rights movement, the women’s rights movement, and the civil rights movement. The analysis could begin in 1971, when Jack Baker and Mike McConnell attempted to marry in Minnesota under the theory that since there was no specific prohibition against same-sex marriage, the

---

\(^7\) Hawaii State Constitution, Article I, section 23, Hawaii Legislative Reference Bureau.
legislature must have intended to allow it. Like the plaintiffs in *Goodridge*, which took place 30 years later, Baker and McConnell were denied a marriage license based on the fact that they were the same sex. They first brought suit in a lower Minnesota court claiming that the Minnesota Statute did not specifically require that the applicants be of different sexes. They also argued that if the Court found that the statute did have this intent, then it violated the First Amendment’s freedom of speech and association, the Eighth Amendment’s prohibition against cruel and unusual punishment, the Ninth Amendment’s un-enumerated right to privacy and the Fourteenth Amendment because there was a fundamental right to marry under the Due Process Clause and sex discrimination is contrary to the Equal Protection Clause. The trial court dismissed their claims and the couple appealed to the Minnesota Supreme Court.

The Minnesota Supreme Court first examined the statute itself and the common usage of the term “marriage” and found that other references were gender-specific and thus the statute did prohibit marriage between persons of the same-sex.\(^9\) The Court further found that the statute did not violate the Due Process clause because procreation and child rearing were central to the constitutional protection of marriage.\(^10\) The Court was equally un-persuaded by the Equal Protection argument and the reference made by the Plaintiffs in the U.S. Supreme Court decision in *Loving v. Virginia* (1967) striking down anti-miscegenation laws.\(^11\) The Court distinguished the cases finding that there is a clear distinction between a marital restriction based on race and one based on the fundamental difference in sex.\(^12\)

The Minnesota Court did not find any authority making the 9th Amendment binding to the states. And the Court dismissed, without discussion, the 1st and 8th Amendment claims. In ruling against them, the opinion by Justice Peterson of the Minnesota Supreme Court stated, “The institution of marriage as a union of man and woman, uniquely involving the procreation and

---


\(^11\) 388 U.S. 1 (1967).

\(^12\) *Baker* 191 N.W.2d at 187.
rearing of children within a family, is as old as the book of Genesis.” In utilizing the definition of language as derived from the book of Genesis, the Court drew the dividing line between religious or morality grounds versus individual rights claims that will come to signify the next several decade of jurisprudence on this issue.

Baker’s petition for a writ of certiorari from the U.S. Supreme Court was denied for failure to present a federal question. While this case may not seem pertinent, one could argue that because the U.S. Supreme Court did not decide the issue of same-sex marriage rights, this was an invitation to future litigants to explore the prospect of finding rights for same-sex couples to marry within state constitutions and getting them recognized by state courts. Such was, of course, the case in Goodridge v. Dept. of Public Health (2003) where the right of same-sex couples to marry was grounded in state constitutional law. If the Minnesota case is the place to begin the discussion of developments in this area in state constitutional law, the place to begin the analysis of federal constitutional law on the issue of same-sex marriage may very well be Loving v. Virginia (1967). In this case, which raised the question whether the State of Virginia could prohibit couples not of the same race from marrying, the U.S. Supreme Court concluded that marriage was a fundamental right. Justice Warren in his majority opinion stated, “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” Given the similarity between the old miscegenation laws and the bans on same-sex marriage today, it might be just a matter of time before the federal courts begin to recognize same-sex marriage as a fundamental right. Counsel for the litigants in the first two same-sex marriage cases before the U.S. Supreme Court have made argument in their briefs utilizing the Loving precedent. In Hollingsworth v. Perry (2013), respondents arguing in favor of same-sex marriage rights stated, “The right to marry has always

13 Id. at 186.
15 Loving v. Virginia, 388 U.S. 1 (1967)
16 Id at 12.
been based on, and defined by, the constitutional liberty to select the partner of one’s choice - not on the partner chosen.”

However, for the purposes of a comparative institutional approach, I am interested in explaining not only the ways in which institutions affect the definition of interests but also the structure of power relations among the actors. And so I begin the analysis with the state court decision on same-sex marriage that provoked Congress to enact the Defense of Marriage Act in 1996.

In December 1990, three couples, (notably without the support of a national LGBT legal agency), filed marriage applications at the Department of Health in Honolulu. The Department’s denial of their applications led to a legal battle that would last six years. In 1993, the Hawaiian Supreme Court ruled that in light of the Hawaii Constitution’s equal protection clause, which explicitly prohibits discrimination on the basis of sex, the lower court’s decision against the plaintiffs’ claims of discrimination was in error and remanded the case. The Court held that marriage was a fundamental right that triggered the highest standard of review – strict scrutiny. They stated further,

The statute pertaining to marriage in Hawaii is presumed to be unconstitutional unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute’s sex-based classification is justified by compelling state interests and (b) is narrowly drawn to avoid unnecessary abridgments of the applicant couple’s constitutional rights.

The weight given to the issue by the Hawaii Supreme Court and the heavy burden placed on the State led many civil rights advocates to see a victory in the distance. The case, however, was not retried until August 1, 1996. At the same time, the decision provoked the

19 Id. at 653.
20 Baehr v. Miike, 910 P. 2d 112 (1996), following his appointment as State Director of Health, Lawrence H. Miike was substituted for Lewin as defendant, which changed the name of the case to Baehr v. Miike.
wide-scale mobilization of opponents of same-sex marriage who feared a domino effect in their states based on the constitutional mandate — U.S. Constitution, Article 4 — that all states must grant “full faith and credit” to the actions of other states. The conservative onslaught took place at the federal and state level in the form of the Defense of Marriage Act (DOMA). In 1995, while the Hawaiian legislature considered the Court’s ruling in *Baehr v. Lewin*, two states, Utah and South Dakota, moved quickly to enact legislation, referred to as mini-DOMAs, in their respective states, prohibiting same-sex marriage. Passage was swift in Utah, however in South Dakota a local group of LGBT activists teamed up with the National Gay and Lesbian Task force to form Free Americans Creating Equal Status, to fight the measure. They battled religious conservatives in the state legislature twice seeing the defeat of the House Bill 1143 by the Senate Judiciary Committee. However, conservative legislators, backed by religious conservatives eventually prevailed and the Bill was signed into law by Governor William Janklow making South Dakota the second state to ban the recognition of same-sex marriages.

While the case was pending in Hawaii, voters fearing that the Hawaiian Supreme Court and their own state constitution had paved the way for homosexuals to marry, in 1998, approved a state constitutional amendment giving the state legislature in Hawaii, the right to restrict marriage to men and women only. This effort to overturn a decision by the state’s highest court by popular initiative will be repeated again by other states. This legislation had the effect of rendering any equal protection claim moot. Although the Hawaii case ended without solidifying same-sex marriage rights, Jason Pierceson, in his book “*Courts, Liberalism and Rights,*” contends that the litigation in Hawaii struck a political nerve. He states, “The report from the House Judiciary Committee cited the Hawaii litigation as the reason for the Congress’ action

---

noting the ‘nature of the orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers’.”

Although the report by Congress had mischaracterized the role of advocacy groups and erroneously alluded to a nationwide litigation strategy by gay rights groups, it is clear that both state and federal legislatures believed they were under judicial assault from state courts.

The Defense of Marriage Act (DOMA), characterized as “a bill to define and protect the institution of marriage,” had 118 co-sponsors. The legislative debate lasted for one day and ended with a 342-67 vote in the U.S. House of Representatives in favor of its enactment. The bill passed the U.S. Senate with a 85-14 vote. The law allows each state to deny any marriage-like relationship between persons of the same-sex that has been recognized in another state. Secondly, the law explicitly recognizes for purposes of federal law that marriage is “a legal union of one man and one woman as husband and wife” and by stating that spouse “refers only to a person of the opposite sex who is a husband or a wife”.

During the House debate over DOMA, Representative Barney Frank of Massachusetts addressed three key premises of pro-DOMA policy: that the judicial decision in Hawaii called for a hasty legislative response at the national level; that DOMA was legally necessary to protect the rights of states to determine their marriage policies; and that marriage was in need of protection from same-sex couples who desire formal commitment. Most importantly, Rep. Frank took issue with the timing of DOMA linking it to the coming Presidential election. He addressed the House stating,

…”First of all, we are told that this is not political. Now, people may understand why we do not speak here under oath. No one in the world believes that this is not political…The process in Hawaii, which

---

25 HR 3396, 104 Cong. 2nd Ses. 1996.
28 Ibid.
is still now going on, does not end until at the earliest, in late 1997 and probably 1998... Why, when the decision came in 1993 and the process will not end until 1997 or 1998, are we doing this 3 months before the [Presidential] election? Oh, it is not political, sure.30

As Frank suggested in his statement, President Clinton’s decision to sign DOMA into law on September 21, 1996, may have been influenced by the 1996 Presidential election, which was just a few months away.

In that same year, the U.S. Supreme Court decided in favor of gay and lesbian rights in the Colorado case Romer v. Evans (1996).31 In Romer, the Supreme Court struck down Colorado’s Amendment 2, which specifically denied gays and lesbians protection against discrimination. Writing for the majority, Justice Anthony Kennedy stated, “We find nothing special in the protections Amendment 2 withholds. These protections . . . constitute ordinary civil life in a free society.”32

While it is clear from the legislative record that DOMA’s enactment was prompted by the Hawaiian Court decision in Baehr, what is less known is the effect the Supreme Court’s decision in Romer had on legislative action. As historian Hadley Arkes points out, “What brought forth the Defense of Marriage Act was not anything percolating in Hawaii, but the anticipation that Romer v. Evans, in its potential to remodel our laws and unsettle our lives.”33 Arkes, who had testified before Congress on the necessity of a Defense of Marriage Act, pushed for a constitutional amendment following the Romer decision. However, he deferred to members of the Senate Republican Policy Committee and the House Judiciary Committee who believed that the best way to preserve traditional marriage was to simply define it in the Federal Code as between one man and one woman. The benefits of this type of legislation was that it could be passed by a

32 Ibid.
simple majority and unlike a constitutional amendment it needed only the President’s signature to become law.

The passage of DOMA, as Arkes argues, took the wind out of the sails of the *Romer* decision, “Romer v. Evans promised to be a powerful, portentous weapon in advancing the agenda of gay rights…” Instead, the passage of DOMA received a greater amount of nationwide media attention. Arkes states, “We were reminded that nothing compels the public attention in the same way as a legislative act – which was precisely why the legislatures, and not the courts, were thought to be the arena of citizenship and deliberation in the republic.” Although it had become clear that gays and lesbians could win in Court, at this time they could not win politically, in the court of public opinion. In fact, when President Clinton signed DOMA into law, 70 percent of the public opposed gay marriage.

Clinton tried to take the sting out of his endorsement of DOMA by simultaneously calling on Congress to pass the Employment Non-Discrimination Act, an act that would have extended employment discrimination protections to gays and lesbians in the workplace. He released this statement, quoted in relevant part, after signing DOMA into law,

> I also want to make clear to all that the enactment of this legislation should not, despite the fierce and at times divisive rhetoric surrounding it, be understood to provide an excuse for discrimination, violence or intimidation against any person on the basis of sexual orientation.36

Undoubtedly Clinton faced pressure from both sides of the same-sex-marriage debate. In fact, in 1993, gay activist and political consultant David Mixner, a longtime friend of Clinton who is credited with delivering the gay and lesbian vote to the president in 1992, was arrested outside the White House for demonstrating against the newly implemented "Don't Ask, Don't

---

34 *Id* at 3.
Tell" policy regarding gays and lesbians serving in the military. But considering the alternatives that election year for gay and lesbian voters, Bob Dole, the favored candidate of the Christian Right, Clinton did not take much of a risk in alienating gay voters.

Following the Hawaii same-sex marriage litigation, many states began enacting laws to prevent the recognition of same-sex marriage in their state. But after the national debate in 1996 over same-sex marriage had subsided, other states began moving in different directions on the issue of same-sex marriage rights. In Baker v. State of Vermont (1999), the Vermont Supreme Court mandated that the legislature pass a Civil Union Law providing same-sex couples many of the same advantages of married couples including rights under family law such as child custody, child support and alimony; rights to sue for wrongful death; medical rights/ family leave benefits; and joint state tax filing and property inheritance. Although this case did not create any new federal rights for same-sex couples, Vermont became the first state in the country to legally recognize civil unions between gay and lesbian couples.

Although the gay rights movement had gained a great deal of momentum at this point, activists were divided as to which issues deserved the most attention. On the state level, many activist groups lobbied local legislatures to have anti-sodomy laws, which were largely unused, taken off the books. Although anti-sodomy laws were not enforced, they served as a barrier for gay rights litigation because opponents of any such measures would argue that it was wrong to grant civil rights to groups whose conduct was illegal. Further, anti-sodomy laws were often used as a way to harass gays and lesbians keeping them in a continuous criminal class.

What began, in 1999, as a legal battle against a Texas anti-sodomy law was taken all the way to the U.S. Supreme Court. But unlike the Hawaii same-sex marriage case, the

---

39 Pierceson, 119.
plaintiffs, John Lawrence and Tyron Garner, were represented by Lambda Legal, a national gay rights organization. In later chapters I discuss more fully the difference that representation or assistance by a state or national organization may make for a particular claim. In the Lawrence case, plaintiffs were represented by Lambda Legal which brought with it considerable resources from financial to press and media momentum.

In 2003, the U.S. Supreme Court in *Lawrence v. Texas* overturned its prior ruling in *Bowers v. Hardwick* (1986) by holding that state anti-sodomy laws are unconstitutional. Justice Kennedy in his majority opinion stated, “Bowers was not correct when it was decided and it is not correct today.”41 In his repudiation of litigating morality, Kennedy, further stated, “We think our that our laws and traditions in the past half century … show an emerging awareness that liberty gives substantive protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”42 The Supreme Court in deciding *Lawrence* did more than strike down irrelevant laws but paved the way for further gains in the area of gay rights.

This brings us back to the *Goodridge* decision in which the Massachusetts court suggested that the U.S. Supreme Court’s reasoning in *Lawrence v. Texas* (2003) provided space for the recognition of rights of same-sex individuals in state law. Massachusetts Chief Justice Margaret Marshall, in discussing whether the Commonwealth could bar same-sex couples from civil marriage, stated,

> It is a question the United States Supreme Court left open as a matter of Federal law in Lawrence, where it was not an issue. There, the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one’s choice of an intimate partner. The Court also reaffirmed the central role that decisions whether to marry or have children bear in shaping one’s identity.43

---

41 539 U.S. at 560 (2003).
42 *Id* at 572.
43 *Goodridge* 798 N.E.2d at 948.
President George W. Bush weighed in on the Massachusetts Court decision in *Goodridge* by calling for a Defense of Marriage Amendment,

> On a matter of such importance, the voice of the people must be heard. Activist courts have left the people with one recourse. If we are to try to prevent the meaning of marriage from being changed forever, our nation must enact a constitutional amendment to protect marriage in America. Decisive and democratic action is needed, because attempts to redefine marriage in a single state or city could have serious consequences throughout our country.\(^{44}\)

President Bush’s call for a Constitutional Amendment concerning same-sex marriage when a change of this sort was impossible to achieve given the composition of the Congress at that time, seems like an odd choice. Arguably, it signaled to his right wing supporters that the federal DOMA was not enough to protect the institution of marriage, especially on the state level, so individuals should organize on the state level to pass mini-DOMAs or anti-gay rights amendments to state constitutions. Another way to interpret Bush’s call for a federal constitutional amendment centers on his upcoming re-election campaign – he sought to use the power of the oval office to show voters where he stood on the issue and the need for action which some have argued got out the vote and got him re-elected.

The reelection of President Bush to a second term of office and the Republican controlled Senate allowed for a new push against same-sex marriage. Yet the Conservative push for a Federal Marriage Amendment stands as an example of a policy paradox. The proposal for such an Amendment failed in the Senate by a vote of 49-48.\(^{45}\) But the same small group of conservative supporters were ready to send similar measures to the House. Apparently, the success of the measure mattered less than the publicity the issue raised for social conservatives. The failure to pass the proposed amendment was matched by the success

---


in raising the sense of alienation and anger which was then stoked for political ends by Conservative Republicans during Bush’s re-election campaign.

The same-sex marriage issue helped galvanize voters during the Bush re-election campaign. Bush supporters used the so-called problem of gay marriage to get people to vote. During the Presidential election of 2004, ballot measures to constitutionally ban gays from marrying, passed in 11 of 11 states. Republicans also took note of the national mood against same-sex marriage and exploited the fact that John Kerry was a Senator from Massachusetts, the state where the Goodridge decision took place. Utilizing the media, social conservatives attempted to align Kerry with same-sex marriage rights and judicial activism even though his stated position was that states should be able to decide for themselves on the issue.

Early in his second term, President Bush signaled that there were not enough votes for the amendment to pass the Senate. He did not indicate that the White House would aggressively push for an amendment, despite their repeated call for a constitutional amendment throughout 2004. Instead, the House voted for the Marriage Protection Act (MPA), backed by Bush, which would strip the federal court of jurisdiction over challenges to the Defense of Marriage Act and block access to the legal system for gays and lesbians. The text of the MPA stated in relevant part,

§ 1632. Limitation on jurisdiction
No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C of this section. 47

---

The bill was introduced in the House of Representatives in October, 2003, by John Hostettler (R–IN) and co-sponsored by Ron Paul of Texas. It was immediately referred to the House Committee on the Judiciary. The Act passed the House by a vote of 233 to 194. The Bill was introduced to the Senate in 2004, 2005, and again in 2007 but died in Committee. Efforts to revive the bill, most recently in 2011 have not been successful. As for the likelihood of this bill being enacted, a synopsis by the Congressional Research Service, a nonpartisan arm of the Library of Congress has diagnosed it as having a, “1% chance of being enacted.”

The issue of same-sex marriage has been raised in some way in every state in the United States. As of this writing, Massachusetts, Connecticut, California, Iowa, Vermont, New Hampshire, New York, Maine, Maryland, Washington and the District of Columbia have issued marriage licenses to same-sex couples. Rhode Island, Delaware Hawaii, Illinois and Minnesota passed same-sex marriage laws in 2013 but they have yet to take effect. New Jersey and Colorado allow civil unions; California, Oregon, Nevada, and Washington allow domestic partnerships; Hawaii, Maine, District of Columbia, and Wisconsin allow a more limited version of domestic partnership. All other states not mentioned above have either a state law or constitutional provision banning same-sex marriage.

As expected, the same-sex marriage issue also began its ascent to the Federal courts as the constitutionality of the Federal Defense of Marriage Act and of California’s Proposition 8 went before the U.S. Supreme Court in March 2013. In 2009, Massachusetts was the first state to file in federal court seeking to have DOMA ruled unconstitutional. In 2010, a District Court in Massachusetts ruled against DOMA, a

---

50 See Appendix 1 for breakdown of Same-Sex Marriage by state.
51 The California Supreme Court ruled in In Re Marriage Cases 43 Cal.4th 757 (2008) that same-sex couples have the right to marry in California. Proposition 8, which amended the California state constitution to define marriage as between one man and one woman, was passed on November 4, 2008.
decision that was upheld by a First Circuit Court of Appeals three-judge panel in May 2012. On the heels of this ruling, in June 2012, the Bipartisan Legal Advisory Group (BLAG), appointed by the Republican majority in the U.S. House of Representatives, filed an appeal asking the Court to reverse the lower court ruling. Normally a case such as this one would be litigated by the Attorney General of the U.S., however, the Obama administration stated that it would not defend DOMA.\(^\text{53}\)

In July 2012, Massachusetts Attorney General Martha Coakley responded to the BLAG’s appeal by filing suit asking the U.S. Supreme Court to uphold the recent appeals court decision striking down parts of the Defense of Marriage Act. The brief, in part, urges the court to strike down DOMA based on its interference in a State’s right to extend marriage equality to all of its citizens. The Plaintiffs in the case are seven same-sex married couples and three widowers who state that the law prevents them from filing joint federal tax returns or collecting survivor benefits from the Social Security retirement system, thus denying them equal protections under the U.S. Constitution.\(^\text{54}\)

The named Plaintiff in the case \textit{U.S. v. Windsor}, Edith Windsor, married her partner, Thea Spyer in Toronto, Canada in 2007. They reside in New York, a state that recognizes SSM. In 2009, Spyer died and left her estate to her wife. Because the federal government does not recognize SSM, Windsor was required to pay over $363,000 in federal estate taxes on her wife’s estate.

The \textit{Windsor} case began in 2010 in the United States District Court for the Southern District of New York. A Manhattan Federal Court Judge ruled that DOMA was unconstitutional in that it improperly interferes with the State’s right to regulate marriage. She ordered that Windsor


receive the tax refund due to her. Similar to the Massachusetts case discussed above, BLAG appealed the case to the U.S. Court of Appeals. Windsor’s attorney filed a petition of certiorari before judgment with the Supreme Court in July 2012, asking that they take the case prior to the Second Circuit’s review, because of the plaintiff’s poor health. But the U.S. Circuit Court proceeded with the case and upheld the lower court’s ruling. This was the first time a Federal Court of Appeals ruling utilized an intermediate level of scrutiny based on the classification of sexual orientation.

The U.S. Supreme Court granted certiorari in the case, and in addition to the main question being brought: whether section 3 of DOMA violates the equal protection clause of the U.S. Constitution, the Court also asked the parties to argue two other questions: whether the government's agreement with the Second Circuit's decision deprived the court of jurisdiction to hear the case, and whether BLAG has standing to bring the case. The second case that made its way to the Supreme Court concerned the constitutionality of Proposition 8, a ballot initiative passed in California in 2008 that effectively banned same-sex marriage in that state. In Chapter 7, I will examine these developments more fully.

In August 2010, Judge Walker of the U.S. District Court in San Francisco ruled in Perry v. Schwarzenegger that Prop. 8 violated the Due Process and Equal Protection provisions in the U.S. Constitution. The decision was upheld on appeal to the U.S. Court of Appeals for the Ninth Circuit. Proponents of Prop. 8 quickly appealed the decision to the Supreme Court on July 31, 2012, in the case then known as Perry v. Brown, now Hollingsworth v. Perry. Decisions by


58 704 F.Supp.2d 921 (N.D. Cal., 2010).
the U.S. Supreme Court in *Windsor v. U.S.* and *Hollingsworth v. Perry* are expected in June 2013.\(^59\)

Public opinion has changed concerning support for same-sex marriage in the United States. In 2010, 49 percent of Americans supported same-sex marriage, while in 2012 that number rose to 60 percent.\(^60\) Perhaps based in part on the changing views of Americans, in 2012, President Obama made front-page news with his statement in support of same-sex marriage. His endorsement came just before a controversial vote in North Carolina that would add a constitutional amendment defining marriage as existing only between a man and a woman. This contrasts with his originally stated stance against same-sex marriage but in support of civil unions for same-sex couples during the 2008 campaign. Interestingly, Vice President Joseph Biden was seen to have forced the President’s hand on the issue when he endorsed same-sex marriage a few weeks prior.\(^61\) In the 2013 State of the Union address, President Obama announced his administration’s plan to provide benefits of the same-sex partners of military service members.\(^62\)

The same-sex marriage issue is also an international one. In 2001, the Netherlands became the first country to allow same-sex couples to marry. Belgium followed suit in 2003. Between 2002 and 2004, courts in several Canadian provinces held that the opposite-sex definition of marriage was contrary to the Canadian Charter of Rights leading to the Canadian Supreme Court’s ruling in favor of same-sex marriage rights.\(^63\) In 2005, federal legislation provided for same-sex marriage to all of Canada.\(^64\) Same-sex marriage was legalized in Spain

\(^{59}\) See [http://www.reuters.com/article/2012/06/05/us-california-gay-idUSBRE8540XX20120605. last accessed March 5, 2013.](http://www.reuters.com)


\(^{63}\) *Re Same-Sex Marriage* 3 S.C.R. 698, 2004 SCC 79.

in 2005, in South Africa in 2006.65 And Norway, Sweden, Portugal, Iceland and Argentina have also legalized same-sex marriage between 2008 and 2010.66 In June 2012, Denmark legalized same-sex marriage. And in May 2013, France legalized same-sex marriage. The trend appears to be in favor of recognition of the rights of same-sex couples to marry.

Same-sex marriage provokes very different responses within members of society, which is mirrored in the vastly different laws and policies in place in the 50 different states of the union, on the federal level as well as internationally. The next chapter will review the literature on this subject paying specific attention to comparative studies.

CHAPTER 2

Literature Review

The previous chapter offered some background on the issue of same-sex marriage (SSM) in the U.S., particularly as it relates to law and public policy. The present chapter reviews the current state of research in this field. Some of the literature on SSM falls under the category of Gay and Lesbian Rights and/or the Gay and Lesbian movement. An important work on the Gay and Lesbian movement is Elizabeth Armstrong’s “Forging Gay Identities: Organizing Sexuality in San Francisco, 1950-1994.” Armstrong traces the lesbian and gay movement from its original roots in the 1950’s homophile organizations through the development of a gay identity movement. Throughout her historical account of the development of a gay and lesbian movement, she places the movement within a cultural-institutional approach to social movements. Armstrong argues that,

“The sudden decline of the New Left reduced conflict between racial and moderate strands of gay liberation by eliminating the viability of the more radical agenda. It was at this moment in the early 1970’s that gay activists integrated identity politics, interest group politics, and a growing commercial sexual subculture into a gay identity movement.”67

For the purposes of my specific area of study, I have separated out the topic of same-sex marriage from the larger gay and lesbian rights movement as it is a separate project.

The literature on same-sex marriage saw a remarkable increase following the Massachusetts Supreme Judicial Court’s decision in Goodridge v. Dept. of Public Health (2003) legalizing SSM in that state. It was not just the amount that was written on the subject that increased but the scope and breadth of the subjects of concern to the issue that saw a vast

increase. Since this is a fairly recent topic, there are few long-term studies and there are also, to
date, very few comparative studies, be it across states or nations.

In terms of a timeline of the issue, the Hawaii Supreme Court’s decision in
_Baehr v. Lewin_ in 1993 is considered by many scholars to be the first time the issue
was truly contemplated. And since this case gave rise to the enactment by the U.S.
Congress of the Defense of Marriage Act (DOMA) in 1996, it seems a good place to
start. The passage of DOMA, as I will detail in more depth, highlighted the federalism
aspects of the issue of SSM in the United States. Because the major shift in
attention to SSM took place after the _Goodridge_ decision of 2003, my major focus will
be on the literature from 2003 to the present. The impact of this decision on other
states, whether by the adoption of State DOMAs or the passage of SSM recognition
laws, shifted much of the focus in the legal literature away from a discussion of the
rights to marriage equality in the U.S. Constitution and in the state constitutions, rights
based on equal protection and due process, to the issue of the “full faith and credit”
clause.

Another pivotal moment came in 2008 when California took up the issue of
SSM. The issue received attention from the Court, the legislature, interest groups and
the population at large. At this time the issue of “full faith and credit” was re-visited and
the role of interest groups and grass-roots activism in California, which garnered a
great deal of media attention, was studied in the socio-politico-legal literature of this
time. Within the past few years, as the possibility of SSM coming before the U.S.
Supreme Court became more of a reality, the literature began to contemplate this in
several different ways. Constitutional issues were considered including the proper
role of the Courts and separation of powers.

Although several different paradigms are present in the academic literature on
SSM, for the purposes of my research I am mainly concerned with literature that incorporates aspects of socio-politico-legal, which falls within the overlapping part of Figure 1.1 below. The overarching theme of social movement study has within it concepts of political opportunity structure, legal opportunity structure, mobilization and framing and allows for a thorough case study analysis of SSM with particular attention given to the interaction among laws, policies and stakeholders.

Figure 1.1 Delineating focus areas of academic literature on same-sex marriage.

As stated previously, my research question is influenced by the work of Daniel R. Pinello who conducted a comparative case study tracing the sequence of events concerning same-sex marriage in Massachusetts, California and Oregon. His findings culminated in his work “America’s Struggle for Same-Sex Marriage” and highlighted some of the key differences among the states he studied between the years 2003 and 2005 in their path towards the legalization of same-sex marriage. Ellen Andersen points out in her review of his book, while his first person accounts of the same-sex marriage developments in the states he studies is telling, the work overall is mainly journalistic in nature. Pinello neglects to situate his findings in an

---

appropriate analytical framework. He states that he is interested in looking at the following, the role of the courts in a democratic society, participation by interest groups, and responsiveness of government to policy initiatives. However, again as Andersen suggests, he does not engage in the vast literature surrounding this topic.

Daniel Pinello, in his book “Gay Rights and American Law” conducted an empirical analysis of how American appellate courts over the last twenty years have addressed lesbian and gay rights claims. Pinello examines thirty-nine attitudinal, environmental, legal, and other factors that might help explain the outcomes of the 468 appellate court cases addressing gay civil rights claims during the last two decades. Pinello argues that the models he develops predict case outcomes “with reasonable degrees of accuracy”. He found that judges in southern states and those appointed by Republican presidents are not particularly accommodating of gay rights claims. He concludes that diversity in the judiciary with respect to age, gender, race, and religion substantially increases the likelihood of success for gay rights claimants. Pinelllo’s findings were beneficial to the development of my own framework of analysis for the three states I studied. I will discuss this in more length in Chapter 3.

The interaction between the three branches of government on both the state and federal level and the actions by interest groups and other stakeholders in the same-sex marriage debate provides a useful example for studying the ways in which the political process functions in the United States. Mary Lou Killian categorizes states on a continuum according to gay rights policy status in the areas of same-sex marriage laws, hate crime laws and anti-discrimination statutes. (See Table 1) As illustrated in Table 1, the three states that I examine, California, Colorado and Massachusetts, fall into distinct categories along this continuum in that they are

---

70 Id. at151.
what Killian refers to as “pro-gay” and “anti-gay states,” especially as it concerns same-sex marriage.

Killian situates what she considers to be key variables for explaining the various state responses to same-sex marriage within the relevant literature including morality politics, political culture, political ideology, interest groups and social movements, public opinion, state level-policymaking and policy diffusion. Her project was an ambitious one, though the presence or absence of the specific laws she cites does not seem to paint a full picture of what makes a state gay friendly or not. Her focus is mainly on the legal world – more specifically the presence or absence of specific statutes that would protect gays and lesbians from discrimination or enhance penalties for hate crimes. And while she also attempts to place each state in a specific category based on the presence of interest groups or social movements within the state, her study may fall victim to the “chicken and egg” phenomenon. That is, which came first, the law or the acceptance of gays and lesbians. Further, though useful in part, changes taking place in each state happen so frequently that the table became outdated within a year of being published.

Nonetheless, Killian’s study was useful to my research in that she delineated meaningful policy areas to focus on concerning gay rights in the specific states I studied. Further, her study was comprehensive of all 50 states which was useful in choosing the states for my comparative study.
Table 1. Sorting States According to Gay Rights Policy Status
Enhanced Laws Regarding Hate Crimes, Anti-Discrimination, and Same-Sex Marriage
(current as of July, 2003)\(^\text{72}\)

<table>
<thead>
<tr>
<th>Pro-Gay 3+/0-----------------2+/1- --------------------------1+/2- -------------------0/3- Anti-Gay</th>
</tr>
</thead>
<tbody>
<tr>
<td>+ Hate crime inc. gay +No anti-discrim laws + No Gay marriage ban</td>
</tr>
<tr>
<td>MASSACHUSETTS *</td>
</tr>
</tbody>
</table>

+ indicates a pro-gay rights stance
- indicates either an anti-gay rights stance or the absence of a pro-gay rights stance
* indicates existence of legislation specifically protecting gay students ("safe schools" law)
* indicates lawsuit pending regarding equal marriage rights for same-sex couples
# indicates court ruling prohibiting second-parent adoption by same-sex couples
(‘01, ’02) indicates year of enacted domestic partnership benefits for state employees
States in all CAPITALS have laws allowing for popular referendum and ballot initiative States in *italics* have either popular referendum or ballot initiative, but not both
States in bold have amended their state constitutions to prohibit same-sex marriage.

---

\(^{72}\) This table was reproduced from Killian, Mary Lou, “The Politics of Gay and Lesbian Marriage.”
Going back to the timeline of marriage equality I discussed above, Scott Barclay and Shauna Fischer set out to discover the factors at play in whether or not a state will legalize same-sex marriage in the period between 1990 and 2001, which is prior to the first state court decision legalizing same-sex marriage in 2003. Nonetheless, the specific factors they consider are illuminating. They include traditional state laws passed by a legislature and allowed to become law by the action or inaction of the Governor, the decisions of a state court that create binding law in the area, and the legal incorporation of the results of a referendum or initiative.

Barclay and Fischer differentiate their research from studies like Killian’s stating that the factors for or against antidiscrimination statutes in different states are different from the factors surrounding SSM laws. They base this difference on what they find to be “morality based” responses to SSM statutes versus antidiscrimination laws. Anti-discrimination laws, they contend, utilize the already existing civil rights frame and merely extend this, logically, to another disenfranchised group. They consider the morality-based response to SSM to stem from the way in religious institutions have shaped the marriage discourse. Secondly, they argue that there is much more at stake for the state when it comes to SSM laws – as opposed to antidiscrimination laws and further that the enactment of SSM laws require positive action by a state.

Barclay and Fischer’s findings challenge some commonly accepted beliefs in the research concerning the role that religiosity plays in shaping the debate at the local level over same-sex marriage debates. While their study is comprehensive of all 50 states and takes into account a wide range of demographic and political factors in each state, one variable that they could not account for – because it did not exist then – is legal precedent. Their study was from 1990 through 2001, when not only was there no State court decision in favor of same-sex

---

marriage but also the U.S. Supreme Court had yet to issue its ruling, striking down sodomy laws as unconstitutional, in *Lawrence v. Texas (2003)*. Arguably, the fact that in some states consensual sex between two adults was still criminalized (albeit rarely penalized), should have been one of the variables in their study. How could a state court or legislature, rule in favor of SSM, thereby sanctioning a relationship, when the underlying sexual behavior was still considered a crime in that state?

Although the study occurs before major cases were decided on SSM, Barclay and Fischer’s study specified the types of legislative interaction to focus on when studying policy actions that affect gays and lesbians. This helped me to hone in on the way the political process functioned and more specifically on the noteworthy action by the legislature in the three states I studied.

A few scholars have taken up the question why state constitutions differ when it comes to same-sex marriage. This is a central theme of my own research and I review two relevant articles that were integral in the development of my framework for my choice of states to study. Lupia, Krupnikov, Levine, Piston and Von Hagen-Jamar study the existence of state defense of marriage acts and find that the relationship between amendments and attitudes is weaker than previous research concluded.⁷⁴ In other words, the notion that states with restrictive attitudes about same-sex marriage will also have an amendment against it was not true across the board as previously indicated by past research. Instead, they found that variation in the procedural requirements in the ways that a state amends its constitution was the most important factor in the existence of SSM bans.

In, “Direct Democracy and Minority Rights: Same-Sex Marriage Bans in the U.S. States,” Daniel Lewis considers James Madison’s claim that direct democracy actually endangers

---

minority rights. Utilizing a comparative approach, Lewis analyzes same-sex marriage bans comparing direct democracy states to non-direct democracy states. His findings indicate that direct democracy states are much more likely to pass same-sex marriage bans.

I will be explaining how the presence or absence of direct democracy features in the states that are part of my study affects the outcome on SSM. Both articles, Lupia et al and Lewis, provide valuable insights into this relationship which I shall test in this project. Colorado and California have similar direct democracy whereas Massachusetts is more complex.

Fleischmann and Moyer looked at local support to ban same-sex marriage in 22 states during 2004 and 2006. Their analysis of county-level data sought to explain variation in local support for the amendments. The results of their regression analysis indicated that support for the amendments in both years was positively related to the proportion of a county that was evangelical or Republican but negatively related to its level of education and proportion of Catholics. These findings contrast sharply to the study by Lupia, et al, discussed above and yet are in line with the overall research in the field.

Of specific interest for my research is Fleischmann and Moyer's use of social movement theory and their use of political culture, opportunity culture, and mobilization capacity as independent variables. Political culture refers to “the dominant pattern of beliefs, values, symbolic expression and policy enactment influenced by states histories and shaping their current policymaking efforts.” This is a more in-depth approach to delineating states than simply stating their socioeconomic, geographic and political data.

Fleischmann and Moyer's findings bolster the viability of cultural explanations of public policy decisions. Also important is what they admit their data cannot address. Their model

75 Social Science Quarterly, 92, 2 (2011).

76 Arnold Fleischmann and Laura Moyer “Competing Social Movements and Local Political Culture: Voting on Ballot Propositions to Ban Same-Sex Marriage in the U.S. States” Social Science Quarterly 90 (2009).
performs well for identifying community characteristics, conditions and settings that might be favorable to either side in their campaigns. However, as they explain, their model "cannot analyze conflict in the trenches of day to day politics. There is a need to address specific mobilization strategies – to understand these processes a mix of quantitative and qualitative research strategies are needed."\(^7^7\)

Their findings bolstered my reliance on a mix of quantitative and qualitative research strategies to show a more complete picture of SSM in the three states under consideration.

An important area of scholarship that informs much of the research on same-sex marriage is social movement theory. Doug McAdams’ work on social movements argues for taking into account political opportunity, mobilizing structure and framing processes. The first examines the ways in which contextual possibilities, regime structures, and state responses shape the opportunities for movement action and effectiveness. The second focuses on movement structure itself, the organizational dynamics, action capacities, and strategic choices. The third, and the most recent addition to new social movement theory, privileges the framing of political agendas and the discourses through which movement goals are articulated and conveyed to the larger public and state actors.\(^7^8\)

Sidney Tarrow defines a social movement as collective challenges by people with common purposes and solidarity in sustained interactions with elites, opponents and authorities. He specifically distinguishes social movements from political parties and interest groups.\(^7^9\) The movement for same-sex marriage has come out of the broader gay rights movement creating large-scale mobilization both for marriage equality and against it by a Conservative Religious countermovement.

\(^7^7\) Id at 140.
\(^7^8\) Marco Giugni, Doug McAdam and Charles Tilly, eds., How Social Movements Matter (Minnesota: University of Minnesota Press, 1999).
\(^7^9\) Sidney Tarrow, Power in Movement: Collective Action, Social Movements and Politics, (Cambridge: Cambridge University Press, 1994).
Both McAdam and Tarrow’s theories are useful in that they present a framework within which to consider the role of social movements in a state’s policymaking decisions on same-sex marriage. In “The Global Emergence of Gay and Lesbian Politics,” Barry D. Adam, Jan Willem Duyvendak and André Krouwel, point out the ways in which the gay and lesbian movement has been neglected by social movement theory. In particular, they critique new social movement theory for privileging culture and identity and neglecting the ways in which gay and lesbian politics are closely linked to the state.  

There are three broad sets of factors shaping social movements: political opportunity, mobilization structure and framing processes. Each is complicated in its own way. Sidney Tarrow states, “Movements are created when political opportunities open up for social actors who usually lack them.” Tarrow further defines opportunity structure as, openness and accessibility of government, stability of existing political alignment, sympathetic local elites and capacity for stable alliances and coalition building with other groups. As a leading theorist on Political Opportunity Structure (POS), Sidney Tarrow traces the conceptual roots of POS beginning with Charles Tilly’s work “From Mobilization to Revolution,” wherein he put forward a “polity model” of collective action that he linked to the state. As Tarrow explains, Tilly’s European model was structural in nature and lacked the nuance of the workings of the political process, which Lipsky and Eisenger brought to POS in studies of social movements in the United States. Finally, Douglas McAdam put differing schools of thought together into a “political process model” of social movement mobilization tracing the development of the American Civil Rights movement to political, organizational and consciousness change. 

82 Id at 88.
83 Doug McAdam, Political Process and the Development of Black Insurgence (Chicago: University of Chicago Press, 1982).
In “States and Opportunities: The Political Structuring of Social Movements,” Tarrow suggests that instead of focusing on the universal cause of collective action, writers in this tradition should examine political structures as incentives to the formation of social movements. But he states that there are two ways of specifying political structures in relation to collective action: as cross-sectional and static structures of opportunity, and as intra-systematic and dynamic structures. Tarrow argues for considering the relationship between how states change and how this affects political opportunity as a dynamic one. He states that when states undergo changes this affects the ability for interest groups to utilize collective action strategies.

Tarrow addresses what he considers to be lacking in social movement study – to relate social movements to contentious politics and to politics in general. He states, “The irreducible act that lies at the base of all social movements, protests, and revolutions is contentious collective action.” This type of action takes place on the part of those “who lack regular access to institutions, who act in the name of stated claims, and who behave in ways that fundamentally challenge others or authorities.”

Grounded in other studies on same-sex marriage and the gay rights movement in general, Political Opportunity Structure (POS) and Legal Opportunity Structure (LOS) expanded upon by Ellen Andersen in her pivotal work “Out of the Closets and Into the Courts” provides a theoretical lens for studying state actions on SSM. The difference between POS and LOS, as Andersen explains, is the underlying frames that ground them. She discusses how movements that seek to effect change within the political system must rely on existing cultural stock to frame their claims. Whereas movements seeking to affect change within the legal system are

84 Doug McAdam, John D. McCarthy and Mayer N. Zald, eds., Comparative Perspectives on Social Movements (New York: Cambridge University Press, 1996) 41.
85 Id at 44.
86 Tarrow, 3.
87 Id at 6.
88 Id at 3.
constrained by the availability of cultural stock as well as by the availability of legal stock. In the words of Andersen,

They must articulate their claims so that they fall within the categories previously established by an amalgam of constitutional, statutory, administrative, common and case law. These laws shape the progress and outcome of movement claims in important ways.  

Andersen provides several examples of this differentiation in case law such as, under case law in Alaska, a partner’s sexual orientation is considered to be irrelevant in determining custody. However, in Missouri, courts have treated homosexuality as prima facie evidence of a parental unfitness. Andersen uses this example to show how, hypothetically speaking, a lesbian in Alaska would have maintained custody but were she living in Missouri, she would have lost custody of her children.

Andersen goes on to explain the importance of case precedent in legal framing versus cultural framing. In terms of legal opportunity, the frames are somewhat limited to what came before – as either side of litigation on a gay rights claim utilizes case law they must show the relationship between the past to the present. In other words, a legal claim must adhere to the prior court’s framing of the issue to advance their outcome. Andersen uses the example of Roe v. Wade (1973), wherein the U.S. Supreme Court accepted the “privacy” frame by attorneys for Roe to reach its decision. Much of the litigation following this landmark case surrounds the state’s power to limit that privacy. If the right and thus the claim had been framed differently, then the litigation following this case would have been very different.

I agree with Andersen who points out that shifts in the legal stock can create (or foreclose) opportunities for movements to frame their claims successfully – which can be independent of the social stock. But as she states, neither do they exist completely

---

independent of each other. Legal and cultural frames do not exist in a vacuum nor is there necessarily a hierarchical relationship between them. Shifts in cultural norms may shape the legal frames. Take, for example, the reform of sodomy laws. In 2003, the U.S. Supreme Court in *Lawrence v. Texas* struck down all state sodomy laws, but just seventeen years prior, the U.S. Supreme Court ruled in favor of their constitutionality in *Bowers v. Hardwick*. Changes in the societal acceptance of homosexuality, as well as the grounds that supported the Court’s ruling in *Roe v. Wade*, affected the frame that the Court chose to utilize to in *Lawrence*, one of privacy.

Social Movement theory has been criticized for neglecting cultural and ideational aspects of social movements. Throughout the past decade there has been an emergence of movements rooted in “intimate aspects of human rights,” rather than socio-economic conditions. Often referred to as “new social movement theory”, Alberto Melucci argues that “the freedom which categorized industrial society has been replaced by the freedom to be.”

In her work on gay and lesbian social movements, Sheila Croucher contends that the gay and lesbian movement is often called the “quintessential identity-based social movement.” Under new social movement theory the state is not the target – civil society is.

The gap in the social movement literature, namely the role of contentious politics, is addressed in the 2009 study, “Culture and Mobilization: Tactical repertoires, Same-Sex Weddings, and the Impact on Gay Activism” by Taylor, Kimport, Van Dyke and Andersen.

Their study of SSM activism in 2004 in California builds upon two theoretical insights on social

---

94 Their study uses the individual as the unit of analysis but sampled at the couple level – sending two surveys to a household. They sent two surveys to a sample of 1,000 couple households in October 2006 and received at least one questionnaire from 311 households and 525 individual responses. Their closed-ended and open-ended questions looked at the mobilization effects of participating in the protest. They also conducted semi-structured interviews with five key informant activists from marriage equality organizations. Their dependent variable, subsequent activism, was studied by looking at whether participants were active in the SSM movement following the California Court’s ruling that the marriages were invalid.
movements – contentious politics and social constructionist perspectives to understand the
dynamics of cultural repertoires of contention. Their work draws a good deal from the work of
Charles Tilly, who considers the repertoire of contention to be the recurrent, predictable and
narrow “toolkit” of specific protest tactics used by collective actors to express their interests and
make claims on authorities.  

Tilly used the term “repertoire” to discuss the ways in which social movements increased
in the nineteenth century as a form of political contention directed at governments. Taylor
expands the definition of repertoire to include “the culturally encoded ways in which people
interact in contentious politics” or more simply “the forms of claims making that people use in
real-life situations.” This more current definition of the term repertoire fits well within the study
by Taylor, et al., of marriage as performance of political action and claims making. The authors
go on to define the social constructionist tradition in social movement literature which privileges
the formation of movements as organizations, submerged networks, and ideologically structured
challenges to various institutional authorities. The authors propose integrating both Tilly’s notion
of protest repertoires with social constructionists’ concerns with the structure, meaning, and
social psychological dynamics of political contention. By looking specifically at how culture is
borne out in the arena of political contention, they define the tactical repertoires as intentional
and strategic forms of claims-making. As an example, the collective actors are strategic in their
use of cultural rituals – such as weddings – to contest authorities and to pursue instrumental
and cultural goals.

Secondly, as the authors state – the tactical repertoires involve contestation in which
bodies, symbols, identities, practices and discourses are framed and deployed to target
institutional arenas including cultural codes and practices. The researchers studied the month

95 Verta Taylor, et al., “Culture and Mobilization: Tactical Repertoires, Same-Sex Weddings, and the
96 Id at 867.
97 Id at 868.
long same-sex marriages that took place in the public sphere in San Francisco as strategic collective action to challenge discriminatory marriage laws. This specifically relates to the framing process and the work by Snow and others discussed previously which discuss how movements mobilize by drawing on events or practices that are already meaningful in the dominant culture. They draw on what is meaningful to the dominant culture but put them into different contexts so they are, to use the words of Erving Goffman, “seen by the participants to be something quite else.”98 The same-sex weddings are clearly borrowing from cultural symbols and codes but at the same time reworking the practice to provide another meaning. Lastly, as the authors state, the supporters are mobilized by these tactical repertoires through the construction of a collective identity. In this sense the performance must be seen to have both an internal and external movement-building function. In building solidarity and collective identity, the actions also establish boundaries and define the relationship between collective actors and their opponents.

In studying the effect of the use of certain tactics on other social movements, Taylor, et al., look at the spillover to other aspects of the same campaign as well as to the development to new movements. As an example, they look at how McAdam points out that the civil rights movement spawned the student, anti-war and women’s movements. The way in which tactics from one campaign spreads to other locales is particularly interesting for my research as I am concerned with the actions in three states. As the researchers contend, social movement communities in the larger social movement sector supply the networks, master frames, and collective identities that allow new campaigns to emerge. I argue that the relationship is not linear. In other words, Massachusetts activists may have laid some of the master frames, but the frames are constantly evolving by locale and depending on the opponents strategies in the

---

given state. So, for example, in Massachusetts, SSM activists did not have the same worry about conservative religious groups involvement as activists did in Colorado.

Taylor et al., explain that the 2004 mass matrimony, the so-called “winter of love” at City Hall in San Francisco, was a spin-off of prior movements. There is much evidence to support this claim, especially when one considers the marriages that took place in Massachusetts were called the “summer of love.” Further, the action supported heightened mobilization, through the formation of networks and collective identity that would carry over into future actions. Taylor’s analysis addresses the gap in social movement literature and the importance of cultural repertoires and how they may impact future mobilization.

The issue of same-sex marriage, ubiquitous for the past ten years (it has been ten years since Goodridge), has provoked many books, including Nancy Cott’s “History of Marriage,” George Chauncey’s “Why Marriage” an historical study of the gay rights movement and the events leading up to same-sex marriage, and William Eskridge’s “A History of Same-Sex Marriage”, which analyzes the constitutional law issues in question. Several books have been published on the religious issues surrounding same-sex marriage from various perspectives, as well as the more practical aspects of marriage as it concerns gay parenting and adoption issues. However, there is a dearth of in-depth comparative case studies on this subject. My research utilizes the paradigm of social movement theory in an attempt to explain the outcomes of the political and legal developments in three states which have confronted the issue of SSM.

In her book, “Policy Paradox,” Deborah Stone states that, “rights work by mobilizing new political alliances, transforming social institutions, and dramatizing the boundaries by which communities are constituted.” She discusses the importance of the Court’s decision in Brown v. Board of Education (1954), that although school integration did not fully occur, “there was an official acknowledgement that the practice was wrong and that the case encouraged blacks to

---

consider themselves as part of a large group entitled to different kind of treatment.”100 Activist lawyers, as Stone puts it, help this process along by creating a new collective identity. As I will show later, in the case of same-sex marriage, the Massachusetts court decision in Goodridge had the same effect as did the U.S. Supreme Court’s decision in Brown. The degree that this case raised awareness of the desire for same-sex marriage rights and the way the plaintiff’s attorneys framed the legal issues, namely by emphasizing that the lack of such rights leads to legal vulnerability for couples who may be raising children, provided a perspective on the issue which humanized the struggle and worked to change public opinion. In her majority opinion in Goodridge Justice Marshall states,

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.\textsuperscript{101}

The movement for marriage equality utilized a bottom-up state approach to gaining rights. This strategy has been effective because some State Constitutions have been interpreted to provide for greater equality for its citizens than is now recognized under the 14\textsuperscript{th} Amendment of the U.S. Constitution. At the same time, this approach of turning to state constitutional law for recognition of marriage equality has been time-consuming, especially when one considers that the first such lawsuit for same-sex marriage rights occurred in Minnesota in 1970, over 40 years ago.

The paradox, which Stone describes, further illuminates this analysis when one considers the question of how a democracy based on majority rule can respect and protect minorities? Another question concerns how we can have universal laws and coherent policies yet foster different cultural beliefs and different ways of life? The role of public opinion in the

\textsuperscript{100} Ibid.
\textsuperscript{101} Goodridge at 331.
same-sex marriage debate is an important one in considering this paradox. Whether state court
decisions like Goodridge or legislative enactments like DOMA are shaped by and are helping to
shape the public’s opinion is a question that may be impossible to answer. A Pew Research Poll
conducted in August of 2005, found that 25 percent of Americans polled supported civil unions,
which would confer the rights for same-sex couples that married couples receive, while 35
percent favored same-sex marriage. This same poll found a majority of the public, 59 percent
stated that they were against gay marriage, but only 10 percent stated that they believed the
Constitution should be amended to ban gay marriage. However, a Pew Research Poll
conducted just five years later, in 2010, found that more Americans favor allowing gays and
lesbians to marry legally than did so in the prior years. The figures in 2010 state that 42 percent
favor same-sex marriage while 48 percent are opposed. In polls conducted in 2009, 37 percent
favored allowing gays and lesbians to marry legally and 54 percent were opposed. As the Pew
Research Center report states, for the first time in 15 years of Pew Research Center polling,
fewer than half oppose same-sex marriage.102 And this trend towards greater support of SSM
continued in 2011. In February and March, a Pew Research Center for the People & the Press
survey found about as many adults favored (45 percent) as opposed (46 percent) allowing
same-sex couples to marry legally, compared to two years prior when a 2009 Pew Research
survey found just 37 percent backed same-sex marriage while 5 percent opposed.103

In “Lawyers and Popular Culture,” Lawrence Friedman argues that American society is
built upon the notion of freedom that entails deference to rights. When rights are encroached or
impaired the public may become fierce champions of the rights of the individual against attacks
by the powerful. Institutions that stand up for minority rights, therefore, are perceived to be
legitimate and garner the public’s support. Friedman writes that, “for this reason, activist courts

occupy a central role in modern legal culture."\textsuperscript{104} Conservatives, however, find activist courts unsettling because, as Friedman contends, they are countermajoritarian – they act to usurp the roles of the other branches of government. But Friedman believes that even though courts have offended powerful interest groups, as illustrated in the backlash to the decisions in \textit{Brown v. Board of Education} and \textit{Roe v. Wade}, they nonetheless have a great deal of support among average citizens and in particular, by what he terms, society’s underdogs. This illustrates the importance that the shaping of the debate around same-sex marriage plays in influencing public opinion. Thus, naming a legislative act “the Defense of Marriage Act” or the “Marriage Protection Act” already sets up the moral majority as the underdog, as a group in need of protection from an immoral minority.

Friedman sees groups as result-minded and substance oriented. He believes the legitimacy of legal institutions lies in what the institutions do. He thus uses a descriptive analysis of legitimacy as opposed to a theoretical-philosophical-normative one. He believes an institution is legitimate if it is “seen” as that way by the relevant public. Therefore, in society, the legitimacy of judicial review or judicial activism, Friedman contends, is a question of public opinion and often the public is results-oriented, rights-centered and privacy-minded. If this notion is true, a rights-oriented legal strategy that builds upon prior case law encompassing homosexuality within liberty and privacy rights would seem to be a good choice.

However, utilizing a federalism perspective to view same-sex marriage reveals the inherent tensions between national power and states rights on controversial issues of law and morality. There has been much written on the issue of federalism and the issue of SSM. In her work, “Same-Sex Marriage and Federalism”, Nancy Knaeur considers the ways in which the Federalism allows states to implement different types of innovative programs. She cites to Justice Brandeis’ view of Federalism, “a single courageous State may, if its citizens choose,

serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.™

Knaeur explains the differences in states handling of same-sex marriage, from state recognition of marriage rights, to civil unions, to Constitutional bans against it, as evidence that federalism can be both progressive and conservative. Knaeur also points out the toll that the different levels of relationship recognition can have on the same-sex couples living in different jurisdictions in the U.S. I discuss Knaeur’s work in more depth in Chapter 7.

---

CHAPTER 3

Social Movement Strategies, Legal Opportunities and Same-Sex Marriage

I. Research Questions/Hypotheses

This research examines the ways three U.S states: Colorado, Massachusetts and California, handled the issue of same-sex marriage. A two-stage explanatory comparative case study was conducted to answer the following key questions about policy making in the sampled states: What factors accounted for the responses to same-sex marriage (SSM) in Colorado, Massachusetts and California? What factors influenced the strategic path taken by key interest groups on the issue of same-sex marriage? How did the Federal Defense of Marriage Act affect state policymaking on same-sex marriage? The theory underpinning this exploration rests heavily on social movement theory, as well as conceptualizations of political and legal opportunity structure.

II. Research Design and Data Collection

For my study I am interested in looking at interest groups on both sides of the policy issue, interactions between and among differing levels of policy making and analyzing the findings through different theoretical lenses. This strategy is in line with what Sarah Soule points out is lacking in studies of this nature. In her study of same-sex marriage bans in the U.S. from 1973-2000, Soule points out that in attempting to explain policy change theorists of social movement theory neglect to take into account rival models such as political opportunity structure and public opinion.\textsuperscript{106} For my research I interviewed key players in each state on both sides of

the same-sex marriage (SSM) debate and I studied several different avenues of policy change in order to attempt to explain the changes that have and continue to take place on this multi-layered policy issue.

As Winston Tellis points out in his “Introduction to the Case Study,” “the quintessential characteristic of case studies is that they seek a holistic understanding of cultural systems of action. Cultural systems of action refer to sets of interrelated activities engaged in by the actors in a social situation.”\textsuperscript{107} Policy actors in Colorado, Massachusetts and California each handled (and continue to handle) the issue of same-sex marriage differently, ranging from an all-out ban, to domestic partnership benefits to state legalization of SSM. In my interviews with members of the movement for SSM and the countermovement, I asked about the interrelated activities they participated in. The findings are discussed in depth in the separate state chapters.

Triangulation refers to a method of establishing accuracy and validity in a study by analyzing a research question from multiple perspectives.\textsuperscript{108} Of the differing types of triangulation, I utilize both data and theory triangulation. This refers to the different data sources I utilize such as interviews, legal cases and statutes, legislative records, media accounts, journal articles and policy papers. The aim is to increase the validity of each by considering the issue from each source. The other type of triangulation I utilize refers to the theoretical conceptions. I consider the same issue, the move towards same-sex marriage, from differing theoretical perspectives including social movement theory and political and legal opportunity structure. Further, these theories cross two different academic disciplines increasing the range of differing perspectives.

Within the context of social movement theory, I investigated the role that amici


played in shaping State court debates around same-sex marriage in a comparative context. I replicated a study by Susan Behuniak-Long, who investigated the role that amici played in shaping the U.S. Supreme Court’s debate around abortion.\textsuperscript{109} I utilized Behuniak-Long’s framework in the context of the California SSM case \textit{In re Marriage cases} (2010), and the Massachusetts SSM case, \textit{Goodridge v. Dept of Public Health} (2003). Interest groups on either side of the marriage equality issue submitted briefs to the court containing relevant legal and/or factual insights in an effort to sway the court one way or another in their decision-making. I discuss these comparative findings in more detail in the following chapters.

\textbf{Data Collection Methods}

I utilized two different forms of data collection for this study: research on legislative policymaking and court decisions and interviews with key actors involved in the SSM issue. As Robert Yin points out, “The essence of a case study...is that it tries to illuminate a decision or set of decisions: why there were taken, how they were implemented, and with what result.”\textsuperscript{110} A case study often utilizes a detailed investigation, with data collected over time of phenomena within its context in order to provide some analysis of the context and processes which in turn may illuminate the theoretical issues.\textsuperscript{111} I am interested in the decision-making by movement and countermovement actors over time within the context of each state’s handling of SSM. Analysis of the actions by interest groups and interested parties in each state, and a corresponding detailed investigation of state legal and legislative action on this issue, presents a broad complex picture that is further illustrative in a comparative context.

\textbf{Research}

I reviewed the legal actions and policymaking by each chosen state as they concern SSM through newspaper articles and online media accounts often reporting daily on the issue, transcripts of public hearings, legislative debates (when available) and court opinions including plaintiff and respondents briefs and amicus curiae briefs. The legislative policy search results included the names of legislators and how they voted on SSM issues. Court records identified the interested parties such as plaintiffs, respondents and attorneys for and against same-sex marriage, as well as other stakeholders who submitted amicus curiae or “friends of the court” briefs. Several of these individuals were chosen for interviews to create a thick description of the same-sex marriage debate in these three states.

I conducted two interviews per state, with several of the interviewees also working on the issue on the national level. The two-stage approach, research and then interviews, strengthened the study’s reliability and construct validity. The research both informed the interview question design and worked to corroborate the data collected through the subsequent interviews. The research established a timeline for relevant legislative and/or judicial state action on SSM and the interviews added context to the timeline and for what was happening behind the scenes during these processes. As discussed earlier, the theoretical propositions, specifically that of social movement theory and legal opportunity structure, under which the study was based, informed the data collection and interview process.

To unearth McAdams’ first element political opportunity structure, I reviewed the policy actions on SSM in each state, constructing a timeline of pertinent events. In the interview stage, I asked informants the following: 1. Describe the process in your state leading to the current State law/policy on same-sex marriage. This provided valuable insight into the regime structures and state responses to actions by proponents and opponents of SSM. The political opportunity structure (POS) element is explored in more detail in the theory section of this chapter.

In order to unearth the mobilizing structure at work in each state, McAdams’
second element, I researched legal records and newspaper and online accounts of 
SSM happenings to determine the established organizations or prior networks that 
helped the groups to mobilize. I also constructed interview questions to further 
elucidate this element such as: 1. Describe the process in your state leading to the 
current State law/policy on same-sex marriage. 2. What stands out as most pertinent 
– lead to shifts that occurred? 3. What role did you/your organization play in getting to 
the current policy? Another question that related to mobilizing structure is: 1. What 
specific strategies did you/your organization employ in support of or against same-sex 
marriage in your state? ^112

Lastly, in order to discover and discuss McAdams’ last element, framing of the political 
agendas and conveyance of articulated goals by movement actors, I asked key informants 
specific questions regarding the articulation of their goals to state actors and to the broader 
public. The specific and relevant strategies employed by attorneys and interest groups on either 
side of the SSM debate are not easily uncovered through research. The interview process 
allowed for this important element to surface. For example, each individual was asked: 1. What 
specific strategies did you/your organization employ in support of or against same-sex marriage 
in your state? 2. Which strategies do you think were most effective and why? 3. How did you 
use the media to articulate your goals?

There was also a degree of flexibility during the interviews to allow participants to share 
what they felt was relevant to the research. This aspect of the study is exploratory and 
descriptive in nature, the interviews are not a major component of the study. I do not seek to 
test a hypothesis in connection to SSM in each state but to explore the factors that were at play 
in the state’s actions on SSM.

^112 See Appendix 1 for a list of interview questions.
Case Selection: Choice of CA, CO and MA

The political interaction over same-sex marriage lends itself to a comparative case study methodological approach. This study examines the different branches of government at the state level, as well as the interaction of federal and state actions on this contentious issue. The comparative approach permits the examination of differing laws, policies, interest group strategy and societal response to same-sex marriage. The goal of the examination is to analyze patterns of similarities and differences and to identify causal links in an effort to explain the diversity of outcomes. California, Colorado and Massachusetts each handled the issue of same-sex marriage differently, ranging from an all-out ban, to domestic partnership benefits to the historic move of providing for same-sex marriage.

Each of these states can be classified differently according to the framework I developed which is set out below in Table 2. As illustrated, the three states that I studied, California, Colorado and Massachusetts fall into distinct categories in terms of: their friendliness towards gay rights (which also includes the absence of or existence of a defense of marriage act); presence and influence of anti-gay rights groups and gay rights groups in the state; legislative and judicial climate and availability of citizen initiative process (direct democracy). These are the factors that I found most relevant in explaining the different handling of SSM in that given state.

Table 2. Breakdown of three states affecting SSM

<table>
<thead>
<tr>
<th></th>
<th>California</th>
<th>Colorado</th>
<th>Massachusetts</th>
</tr>
</thead>
</table>

## Laws affecting Sexual Orientation

<table>
<thead>
<tr>
<th></th>
<th>Hate crimes law includes sexual orientation.</th>
<th>Hate crimes law includes sexual orientation.</th>
<th>Hate crimes law includes sexual orientation.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does not currently allow same-sex marriage.</td>
<td>Does not currently allow same-sex marriage.</td>
<td>Same-Sex marriage is legal.</td>
<td></td>
</tr>
</tbody>
</table>

## Interest Groups in the State

<table>
<thead>
<tr>
<th></th>
<th>Pro-SSM</th>
<th>Pro-SSM</th>
<th>Pro-SSM</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pro-SSM</strong></td>
<td>Equality California Let California Ring Courage Campaign California Faith for Equality</td>
<td>One Colorado</td>
<td>Massequality Gay and Lesbian Advocates and Defenders</td>
</tr>
<tr>
<td><strong>Anti-SSM</strong></td>
<td>Traditional Values Coalition</td>
<td>Anti-SSM</td>
<td>Anti-SSM</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Massresistance</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>The Family Research Institute Focus on the Family</td>
</tr>
</tbody>
</table>

## Direct Democracy

<table>
<thead>
<tr>
<th></th>
<th>Ballot initiative process goes to popular vote during the next general election.</th>
<th>Ballot initiative process goes to popular vote during the next general election.</th>
<th>Ballot initiative must be voted on by the legislature in two separate legislative sessions.</th>
</tr>
</thead>
</table>

## Political Climate

<table>
<thead>
<tr>
<th></th>
<th>Blue state</th>
<th>Blue State</th>
<th>Blue State</th>
</tr>
</thead>
</table>

---

113 Cal Pen Cod § 422.75 (2001).
114 Only same-sex marriages legally entered into on or before Nov. 4, 2008, in other states or countries will be recognized as marriages under California law. Same-sex marriages taking place in other states or countries after Nov. 4, 2008, will only be recognized as domestic partnerships.
115 In 2010, a federal court ruled in *Perry v. Schwarzenegger* that the Prop. 8 ban was unconstitutional. The decision was stayed pending appeal. In February 2012, the Ninth Circuit Court of California, in *Perry v. Brown*, upheld the decision. The decision was once again stayed pending appeal.
117 CO passed a designated beneficiary agreement law in July 1, 2009. In 2013, state lawmakers passed a civil unions law.
119 Colorado has historically been a red state, controlled by a Republican majority. However, in the 2012 election President Obama won this state and the Democrats took back control of the House. See http://data.denverpost.com/election/results/state-senate/2012/. Last accessed March 5, 2013.
The factor I uncovered that stood out as extremely pertinent to the legalization of SSM concerns the citizen initiative process, referred to as direct democracy in Table 2. In my research I noted the difference in the actual process by which regular citizens can begin a petition to have an issue brought to the general public for a vote. The major difference among the three states petition process concerns timing. That is, the time that it takes for a citizen initiated petition, once voted on, to become law.

Following the Massachusetts Supreme Judicial Court’s ruling in *Goodridge*,\textsuperscript{120} anti-SSM activists touting claims of “activist judges”, attempted to override the Court’s decision by using the ballot initiative process. In Massachusetts, such an initiative begins at the petition stage and must be voted on by the legislature in two separate legislative sessions. This is unlike the California system that allows a ballot initiative to go to popular vote during the next general election.\textsuperscript{121} Therefore, a court decision could be quickly overruled by the legislative process. This occurred in California in the form of Proposition 8.\textsuperscript{122}

All three states have the ballot initiative procedure, which is often termed “direct democracy.” However, unlike Massachusetts, in Colorado when citizens initiate legislation as a state statute or a Constitutional Amendment, all that is needed to pass it is a simple majority of votes. Organizers must collect signatures equal to 5 percent of the votes cast for the secretary of state in the previous election. For example, last year only 76,047 signatures were needed from the state’s 3.2 million registered voters to get an amendment on the ballot.\textsuperscript{123}

\textsuperscript{120} *Goodridge v. Dept. of Public Health* 798 N.E.2d 941 (Mass. 2003).
\textsuperscript{122} In May 2008, the Supreme Court ruled that the California law barring same-sex couples from marrying violated the state’s constitution. On November 4, 2008, voters approved, by a margin of 52% to 48%, a measure (Proposition 8) that defined marriage as one man and one woman, thereby excluding same-sex couples. See http://www.hrc.org/blog/entry/prop-8-decision-analysis. last accessed Nov. 2, 2010.
In California, the initiative process is only slightly more difficult to navigate. Citizens may place an amendment on the ballot by obtaining signatures equal to 8% of the votes cast in the last gubernatorial election. For example, in 2008, only 694,354 signatures were needed compared to an estimated population of 36,553,215.\textsuperscript{124} In Massachusetts, unlike California and Colorado, once a citizen-initiated petition is passed by the general electorate it becomes law. In Massachusetts, the petition is voted on and must pass two separate legislative sessions. The timing issue was also brought up by a few of the individuals I interviewed. I discuss this issue in more depth in the chapters on the state findings.

\textbf{Lesbian and Gay Policy Differences}

Compared to California and Massachusetts, Colorado is the least gay friendly state in terms of its policies towards gays and lesbians. In 1992, after widespread debate and door-to-door political canvassing, 54% of Colorado voters approved Amendment 2 by ballot initiative. This Amendment stated that homosexual orientation could not be a cause for a claim of discrimination.\textsuperscript{125} The bill, which was drafted by the Conservative Christian group Colorado for Family Values, was a response both to the increase in anti-discrimination ordinances being passed in municipalities across Colorado and to the same-sex marriage case pending in Hawaii at that same time.

Following the enactment of Amendment 2, civil rights groups and gay rights groups brought suit to have the Amendment ruled unconstitutional as a violation of equal protection rights. Although this Amendment would eventually be struck down by the U.S. Supreme Court, nonetheless, it shows a climate of hostility toward gay and


lesbian rights in Colorado. Further, in 2006, voters in Colorado approved language defining “marriage” in the state as being between one man and one woman, which became an Amendment to the Constitution. Although thirty one attempts have been made to legalize SSM, via the ballot initiative process, none have been successful.

Like Colorado, California voters passed a same-sex marriage ban. In March of 2000, Proposition 22 was adopted by a vote of 61.4% to 38%, adding § 308.5 to the California Family Code. The one-sentence addition explicitly defines the union of a man and a woman as the only valid or recognizable form of marriage in the State of California. In 2008, Prop 22 was ruled unconstitutional by the California Supreme Court’s decision from *In re Marriage Cases*. However, Prop. 8, a constitutional amendment titled “Eliminates Right of Same-Sex Couples to Marry Act,” appeared on the 2008 California general election ballot in November 2008, and passed with a 52 percent majority. This Amendment was brought as a citizen ballot initiative and effectively overruled the California Supreme Court’s decision from *In re Marriage Cases (2008)*, which stated that same-sex couples had a constitutional right to marry.

Despite several efforts by opponents of same-sex marriage, a defense of marriage act has never passed in the Massachusetts legislature. Arguably, this made Massachusetts a good choice for bringing a same-sex marriage case. As discussed above, after the precedent setting ruling in *Goodridge* opponents tried again to pass an Amendment to the Massachusetts Constitution which would have overruled the *Goodridge* decision. This “direct democracy” process in Massachusetts begins at the petition stage and must be voted on by the legislature in two separate legislative sessions. However, proponents of SSM were able to stop the legislation from

---

129 “Secretary of State Debra Bowen Certifies Eighth Measure for November 4, 2008, General Election” Secretary of State of California, June 2, 2008.
passing over the two year period and thus SSM remained legal in Massachusetts.

**Study Limitations**

Some of the disadvantages that have been noted about the case study method include the inability to draw cause and affect relationships to aid in further hypothesis. Further, the case study is lacking in internal validity or generalizability. At the same time, the restricted focus of the case study facilitates an in-depth and detailed understanding of the issue being studied. Though not generalizable in a statistical sense, the findings when linked to theory can become relevant to the understanding of phenomena. Further, case studies may aid in the understanding of complex inter-relationships. This analytical aim allows for the generalization of findings to theory.\(^{130}\) This methodological approach is most suited for the type of research being done, exploring state processes' and strategic actions by interest groups involved in the same-sex marriage debate. As such, this research seeks to fill a gap in the literature, which lacks a systematic comparative case study on same-sex marriage.

---

In this Chapter, I will survey the current status of marriage equality in Colorado, provide a brief history of the marriage equality issue in the state and link the legal and political responses to SSM to the underlying theoretical framework. Colorado has a history regarding lesbian and gay rights that is quite different from California and Massachusetts. Colorado Springs, Colorado, is home to Focus on the Family, the largest evangelical Christian organization in the U.S. Focus on the Family, is a national organization, and has as one of its main goals the preservation of traditional marriage. They are politically active in the state and nationally as evidenced by their $725,000 investment to the Prop 8 campaign in California. As discussed in the previous chapter, the Prop 8 campaign which sought to overturn same-sex marriage in the state by ballot petition, was a success, effectively ending SSM in California in 2008.

As compared to California and Massachusetts, Colorado is the least gay friendly state in terms of its policies. Only recently did the state begin to include sexual orientation in its hate crime laws, and recently some limited anti-discrimination laws were passed. But the state has a same-sex marriage ban in place. These provision differ from Massachusetts, which has included sexual orientation in its hate crime laws for many years, has anti-discrimination laws, and provides for same-sex marriage. California includes sexual orientation in its hate crime laws, has anti-discrimination laws but also has a same-sex marriage ban, like Colorado, in place. An important similarity among the three states, which I will explore in more detail,

---

concerns their political process. All three states allow for both popular referendum and ballot initiative.

**Current Status of Same-Sex Marriage in the State**

At the time of this writing, Colorado has a Defense of Marriage Act in place. Colorado’s Amendment 43, “The Definition of Marriage Act,” was voted on in the 2006 general election and was an initiated Constitutional amendment. The "Definition of Marriage Act" amended the Colorado Constitution by adding a new section, Section 31, to Article II. Section 31 reads, "Only a union of one man and one woman shall be valid or recognized as a marriage in this state."¹³²

**Brief History of Same-Sex Marriage in Colorado**

While there is no recognition of SSM, Colorado recently passed a bill legalizing Civil Unions for same-sex couples.¹³³ This followed several years of attempts by LGBT groups who faced an uphill battle against a larger, more politically connected and well known opponent in what at times became harsh, bitter debates in the legislature and in the court of public opinion.

As a precursor to the civil union bill, in 2009, LGBT groups succeeded in passing a designated beneficiary agreement law.¹³⁴ These agreements grant limited rights, such as funeral arrangements and death benefits for same-sex partners and are not limited to same-sex couples. In Colorado, SSM proponents have had to find creative ways to work around the defense of marriage act to secure some basic civil rights for their relationships.

---

The LGBT Social Movement has historically been splintered by different issues, different ideology, and different fights for a number of different rights. There is no central governing body for the movement itself – there are now, in large part because of the SSM movement, state and national organizations with a visible infrastructure that are for the most part aligned. Although there have been some actions toward SSM recognition in Colorado, strategically other things have been more important, more advantageous and more doable. While it is certainly not a gay-friendly state when it comes down to marriage rights for LGBT people, Colorado does have five LGBT protection laws in place.\textsuperscript{135}

Colorado’s recent past sets the stage for its current stance on SSM. Fearing a possible ruling in favor of SSM by the Hawaii State Supreme Court, opponents of SSM in Colorado began working on a measure to protect traditional marriage in their state. In 1992, after widespread debate and door-to-door political canvassing, 54 percent of Colorado voters approved by ballot initiative Amendment 2. The Amendment stated that homosexual orientation was not a protected status, and no claim of discrimination could be based on such status.\textsuperscript{136} The bill was drafted by the Conservative Christian group Colorado for Family Values in response to the increase in anti-discrimination ordinances being passed in municipalities across Colorado and the pending Hawaii SSM case.

Following the enactment of Amendment 2, civil rights groups and gay rights groups brought suit to have the Amendment ruled unconstitutional as a violation of equal protection rights. The trial court granted a preliminary injunction to stay enforcement of Amendment 2, and an appeal was made to the Supreme Court of Colorado.\textsuperscript{137} The Colorado State Supreme Court held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because

\begin{itemize}
\item \textsuperscript{136} See http://www.now.org/nnt/08-95/colorado.html. last accessed March 5, 2009.
\end{itemize}
it infringed upon the fundamental right of gays and lesbians to participate in the political process.\textsuperscript{138}

The case was appealed to the Supreme Court and in 1996, in \textit{Romer v. Evans}, the Court struck down the Amendment but on a rationale different from that adopted by the State Supreme Court. The U.S. Supreme Court refused to apply strict scrutiny to the law and instead found the Amendment unconstitutional under rational basis review.\textsuperscript{139} Although this case was hailed as a victory for gay rights it was a bittersweet win. The Court, in failing to recognize gays and lesbians as a suspect class, which would have prompted the application of strict scrutiny, set a precedent that would affect future gay rights cases. The Supreme Court’s ruling in \textit{Romer} was nearly eclipsed by the swift enactment of the Federal Defense of Marriage Act, occurring at the same time.

Despite Amendment 2 being ruled unconstitutional, in 2006, voters in Colorado approved language defining "marriage" in the state as being between one man and one woman, which became an Amendment to the Constitution. This state DOMA passed with a margin of 55\% in support and 44.9\% against.\textsuperscript{140} Although 31 attempts have been made to legalize SSM, via the ballot initiative process, none have been successful.\textsuperscript{141} There has so far not been any meaningful political opportunity for LGBT groups to push for SSM in their state.

Similar to California’s Prop. 8, a great deal of funding from proponents and opponents alike went into passing Colorado’s DOMA, titled Amendment 43. But, despite having triple the amount of money, proponents of SSM were not able to stop it from being passed. The breakdown of the financial support for the 2006 Amendment included: $1,376,486 contributed by opponents of SSM such as Focus on the Family.

\begin{itemize}
  \item \textsuperscript{138} \textit{Evans v. Romer} 854 P. 2d 1270 (Colo. 1993).
  \item \textsuperscript{139} \textit{Romer v. Evans} 517 US 622.
  \item \textsuperscript{140} See http://www.glbtcolorado.org/renderContent.aspx?contentId=209. last accessed June 2, 2012.
and $5,459,145 contributed to the campaign against Amendment 43.\textsuperscript{142} The most significant contributor to the No on Amendment 43 campaign was the Gill Action Fund who gave $3,626,884.\textsuperscript{143}

\textit{Connection to Theory}

While Colorado demonstrates what it means to have a strong, organized anti-SSM presence in the state, history tells us this wasn’t always true. As Constitutional scholar William Eskridge points out in his book “Equality Practice,” cleavages in the assumed heteronormative system existed decades ago. In 1975, Cela Rorex, the Court Clerk in Boulder, Colorado with the approval of the District Attorney, issued marriage licenses to same-sex couples.\textsuperscript{144} Granted Colorado, through a decision issued by the State Attorney General, refused to recognize any of the marriages, but nonetheless this action, which occurred some 35 years ago, shows an early fissure in what many consider an impenetrable wall.

What this example also illustrates, especially for the purposes of my study, is that the decision to issue marriage licenses to same-sex couples has and continues to come from many different levels of government; from clerk’s offices to Mayor’s offices; from lower State Courts to legislatures. And yet what makes it “stick” – that is, allows the decision to continue unabated and prevents it from being overturned, is a complex matter that differs by State and is best examined and illustrated in a comparative state model.

\textit{Framing}

With little opportunity to push for same-sex marriage, proponents of marriage equality turned their attention to passing a designated beneficiary law. To get the law passed, LGBT

\textsuperscript{143} Ibid.
groups changed their frame – it was no longer the right for same-sex couples to marry, in fact
the word marriage was never used in pushing for the legislation. Instead the law was framed as
a new tool for estate planning – the images on the website for the new law included an elderly
man in a wheelchair with someone who appears to be his son and a woman of color with her
two small children. The Center, which was at the forefront of this new law also changed their
mobilization strategy by reaching out to other disenfranchised groups who would stand to
benefit from the designated beneficiary law and working with these groups to make this law
happen. This included groups on aging and different organizations working for the rights of
people of color. This new tool was billed as a low cost way to plan ones estate including
inheritance, and other protections related to health care and medical emergencies. That same-
sex couples might benefit from this new law was never mentioned which arguably helped it
pass.

The passage of a designated beneficiary law serves as an example of what Tarrow
considers an important aspect of collective action. As he states, when bold new movements
make claims on elites that parallel the grievances of those with less daring and less initiative,
who may be resource poor it opens up new possibilities. Further, collective action shows
opponents weakness and uncovers new formerly passive allies both within and without the
system. And lastly it can pry open institutional barriers through which new demands can pour.¹⁴⁵

Mindy Barton also makes the important point that the state struggle is impacted and
informed by the national SSM movement and strategy and that this is also true for anti-SSM
groups in the state. For example, in 2010, two citizens, Stu Allen of Lakewood and Hallie
Atencio of Denver, began to investigate the process for amending the Colorado Constitution via
petition. The ballot measure that would change the Colorado Constitution to recognize marriage
as a union between two consenting adults. A "review and comment" session, one of a number

¹⁴⁵ Tarrow, 53.
of legalities to go through to get a measure on the ballot, took place on February 9, 2009. However, as Ms. Barton stated, “After strategic meetings of National SSM coalitions, Stu Allen was asked not to go forward with the ballot initiative.” Ms. Barton stated that the political will was not there and it would have resulted in a loss. The political will was measured through polling data and surveys specific to the issue of SSM. The citizen was persuaded to hold off on the petition process and professional courtesy dictated that anti-SSM lawyers were told in advance that SSM advocates would not be pursuing this measure.

As Ms. Barton stated, any LGBT organization working in the state must pay attention to the state and citizens of that state within which they operate. For example, she now works closely with religious organizations such as; the anti-defamation league, the Interfaith Alliance and Soulforce and the Centers very active PFLAG chapter has a large coalition of communities of faith. This is a shift from how things used to be. Members of the Center speak at many religious events and no longer use the term “religious right” to define their opponents. Ms Barton stated that there are many religious LGBT citizens and even fairly right wing, conservative individuals who are pro-LGBT rights so they don’t use that term because it tends to alienate these people.

Interestingly, as Ms. Barton discussed, the anti-SSM groups in Colorado have also changed their tactics beginning with what she calls “re-branding.” Colorado Springs-based Focus on the Family is a 501(c)(3) founded in 1977 by the Reverend James Dobson to promote family values from a Christian perspective. Focus on the Family Action is a 501(c)(4) created in 2004 to serve as Focus on the Family's political arm. The latter recently changed its name to

---

146 Interview with Mindy Barton, Aug. 2009.
147 The acronym PFLAG stands for Parents, families and friends of Lesbians and Gays. There are active chapters of this group in several cities and towns in Colorado.
148 Interview with Barton, Aug. 2009.
CitizenLink. Some possible reasons for this change concern the investigation a few years ago by Citizens for Responsible Ethics in Washington and Americans United for Separation of Church and State. Focus on the Family was accused of violating 501(c)(3) rules by endorsing candidates for office. However, after a year-long Internal Revenue Service audit in 2007, the organization was exonerated.

Clearly, coalition building was effective for both sides of the SSM debate in Colorado. Sidney Tarrow considers coalition building and the ways a group can increase their opportunities by expanding their repertoires. The collective action by a group may take the form of that which is already culturally known to them. An excellent example of this is the mobilizing structures in pro-life movements across the US. The pro-life movement is ideologically aligned with the anti-SSM movement and is very powerful in Colorado.

Focus on the Family, and other pro-life organizations in Colorado are largely parish-based organizations with a large lower-middle class constituency that perform direct-action campaigns and door to door canvassing. The individual I interviewed is a member of a pro-life, anti-SSM organization in Colorado. He discussed the pro-life movement as ideologically aligned with the anti-SSM movement stating that it is for the most part the same people. He discussed the ways in which his organization and other Conservative evangelical organizations at the center of both the pro-choice and anti-SSM movement simply went back to their roots when it came to activism in Colorado against SSM.

In the case of Colorado, the analogy to the Pro-Life movement is well-placed. Several of the interest groups in this state are already formed to the end of eliminating the right to abortion – which in some ways makes the battle against same-sex marriage easier because

---

152 Tarrow, 53.
the infrastructure already exists. By infrastructure I am speaking in terms of organizations that already exist, have their 501-C status, funding sources, large base of support, mailing lists and websites already constructed around a pro-family concept that simply needed to add content regarding their opposition to SSM. This is not the same path for LGBT groups in the state because the pro-choice movement is not necessarily aligned with the pro-SSM movement, let alone the LGBT movement. While there may be many liberal pro-choice members sympathetic to the SSM cause there is no true alignment. The examples above of either sides actions demonstrates both the importance of existing political alignments, the opportunity for coalition-building as well as the importance of mobilizing strategies.

Conservative organizations in Colorado are at home in the open political opportunity of U.S. politics. As Mindy Barton discussed, Focus on the Family, the primary anti-gay rights organization in Colorado is a very large corporation with an expansive direct marketing strategy. This is compared to relatively small budgets of pro-SSM groups in the state. An attempt by proponents of SSM at a ballot initiative which needs 72,000 signatures and which costs $3 per signature to obtain was too costly especially considering the odds were stacked against them with the presence of a Defense of Marriage Amendment already in their Constitution. This is despite the fact that the Center put forward poll results in December 2008 by Harris Interactive that showed that 83% of Colorado adults believe gay and lesbian couples should either be able to marry, have all the same rights as marriage, or be able to form domestic partnerships.\textsuperscript{154}

In 2011, proponents of SSM utilized a political opportunity and attempted to pass a civil unions bill. The political opportunity came in the form of sympathetic local elites including, Governor John Hickenlooper, who openly supported LGBT rights as Mayor and several pro-SSM democratic senators. In February 2011, Colorado State Senator Pat Steadman and State Representative Mark Ferrandino, who are both openly

gay, brought forward a Civil Union Bill. The Act addressed: financial responsibility of partners, medical decision-making and treatment, inheritance, ability to designate a partner as retirement beneficiary, ability to adopt the child of one's partner, insurance of partner, family leave benefits, responsibility of conservator, guardian, or personal representative. Further, it was available for straight or gay couples and it had a religious exemption added which stated that no religious official would be forced to officiate a civil union if it was against their beliefs.

Although it had strong support in the Senate, passing 23-12, when the bill moved to the Republican controlled House it was sent to the House Judiciary Committee. At this time, large-scale protests saw proponents and opponents of the bill clashing outside of the statehouse. I attended the over eight hours of public testimony by SSM proponents and opponents of the bill before the House Judiciary Committee. Lesbian and gay men testified of the necessity of the protections for their families that were included in the bill, while opponents of the bill often quoted Bible scripture, stating that homosexuality is a sin. The Alliance Defense Fund, led the opposition to the bill framing the civil union bill as something that would lead to SSM in Colorado. Further, testimony was heard from the Family Research Institute’s Dr. Paul Cameron, despite the fact that his medical theories about homosexuality have been condemned by most of the major medical organizations in the U.S. His theories relate to homosexuals as perpetrators of child sexual abuse who also have reduced life expectancies.

Strategically, proponents of the bill made sure to frame the rights as legal protections for their family and emphasized that it would not confer “marriage” and it

---

155 For more information on CO Senate Bill 11-172 see http://e-lobbyist.com/gaits/view/270225.
would keep the traditional definition of marriage in tact in the state. Nonetheless, the
House Judiciary voted against the Act 5-6 on party lines.\textsuperscript{157} The Democrats who
brought the bill forward were disappointed that it went to the House Judiciary
Committee stating that if the bill had gone to the House floor for a vote they had the
necessary votes to get it passed. The majority of Republicans on the House Judiciary
Committee, who voted against the measure, were from Colorado Springs, the home
base of Focus on the Family.

An attempt was made in 2011 to bring a ballot proposal as an initiated
Constitutional Amendment to legalize SSM in Colorado. If it had passed the
Amendment would have overturned the 2006 Amendment banning SSM in the state
but it would not in and of itself legalize SSM. The petition was brought by a college
student named Mark Olmstead who stated that he thought attitudes had shifted in
Colorado from 2006 on the issue of gay marriage. However, after attempting to gather
the 85,000 signatures needed to bring the petition, activists working with Olmstead
abandoned their efforts. One of the reasons they cited was the lack of assistance
from statewide gay rights groups. Interest groups in the state were not behind the
petition because they did not agree with the strategy. One Colorado released a
statement saying that they did not support the initiative because while the initiative
would overrule the ban, it would not allow gays to marry because Colorado only
allows one issue per ballot question. Instead, this organization stated they would
continue to work towards having the legislature pass a Civil Union Bill.\textsuperscript{158}

As mentioned previously, in 2013, SSM proponents were finally able to pass a
Civil Union law in Colorado.\textsuperscript{159} Some possible reasons for this include the 2012 state

election results. Democrats in Colorado campaigned on the promise that they would work towards getting a civil union law passed. Democrats won over control of the House and Senate and the Democratic Governor John Hickenlooper, who expressed support for the law in prior years, signed it into law. This is a dramatic shift in a state that has very Conservative roots and easily passed a DOMA in 2006.

Mobilization

For Sydney Tarrow what stands out in defining social movements is the contentious politics that are based on underlying social networks and resonant collective action frames and which develop the capacity to maintain sustained challenges against powerful opponents.\textsuperscript{160} Taking a look at Colorado, we see a dynamic relationship between interest groups wherein each side is not only aware of the other's actions but often times is countering them. Though advocates for SSM in Colorado have not had any meaningful political opportunities to push for same-sex marriage they have protested their lack of rights. As part of their diverse political agenda they have relied on grass root activism lending itself to protests such as the sit-ins at the clerk’s office by members of Soulforce.\textsuperscript{161} The action, which included the request for a marriage license for a same-sex couple, followed the California Supreme Court decision to uphold Prop 8 and landed all five of the protesters in jail.

In an interview with Mindy Barton, Legal Director for the gay, lesbian, bisexual and transgender Center (The Center) in Colorado interesting aspects of political and legal opportunity, mobilization and framing process comes to light. The Center of Colorado is the only statewide, nonprofit community center dedicated to providing support and advocacy for

\textsuperscript{161} Soulforce is committed to nonviolent resistance to bring freedom to LGBTQ people from religious and political oppression. See http://www.soulforce.org. last accessed April 3, 2012.
Colorado’s LGBT population. With the understanding that no political or legal opportunity existed to push for SSM, LGBT groups aligned themselves with minorities and elder communities to pass the designated beneficiary agreement law which went into effect on July 1, 2009. These agreements grant limited rights, such as estate planning, death benefits for same-sex partners, and health care decision-making. As Mindy Barton noted, there was surprisingly little or no opposition from anti-SSM groups in the passage of this law.

**Shifting Public Opinion**

Like many other states trending towards favoring SSM rights, the majority of Colorado voters now favor same-sex marriage. A 2012 poll indicated that 53 percent of Colorado voters favored legalizing SSM with 40 percent saying it should be illegal. When asked about Civil Unions, the margin is 62 percent in favor to 32 percent against. Only time will tell whether this shift in public opinion will have an effect on the passage of SSM in Colorado.

**Chapter Summary**

In this Chapter, I unearthed the dynamics behind the policy regarding same-sex marriage in Colorado utilizing a variety of qualitative methodologies including research on legislative policymaking and court decisions and interviews with key actors involved in the issue. I reviewed the legal actions and policymaking in Colorado as it concerns SSM through media accounts of the events, transcripts of public hearings, legislative debates (where available) and court briefs, including court opinions and amicus curiae briefs.

There have not many meaningful opportunities for proponents of marriage equality to push for same-sex marriage in Colorado. As discussed above, Colorado Springs, Colorado, is

---

home to Focus on the Family, the largest evangelical Christian organization in the U.S. Focus on the Family is a national organization, and has as one of its main goals the preservation of traditional marriage. Because Colorado has a Defense of Marriage Amendment in place, SSM proponents have utilized other means of obtaining rights, first through a designated beneficiary law and most recently through passage of a Civil Union law.

CHAPTER 5

Massachusetts: Making Legal History
In this Chapter, I will survey the current status of marriage equality in Massachusetts, provide a brief history of the marriage equality issue in the state and link the legal and political responses to SSM to the underlying theoretical framework. Massachusetts was the first state to recognize same-sex marriage in the United States making it an important state for a comparative case study on this subject.

Current Status of Same-Sex Marriage in the State

Same-sex marriage is currently legal in Massachusetts. Massachusetts became the first state in the U.S. to legalize SSM with the landmark Supreme Judicial Court’s ruling in Goodridge v. Dept. of Public Health on May 14, 2003. Since then approximately 16,000 same-sex marriages have taken place in Massachusetts.

Brief History of SSM in Massachusetts

In 2001, at the state level in Massachusetts, after staving off Defense of Marriage Act legislation, Gay and Lesbian Advocates and Defenders brought a lawsuit seeking same-sex marriage rights. In 2003, the Massachusetts Supreme Judicial Court ruled that barring gays and lesbians from marrying violated the state constitution. Chief Justice Margaret Marshall, writing for the majority stated, “To deny the protections, benefits, and obligations conferred by civil marriage” to gay couples was unconstitutional because it denied “the dignity and equality of all individuals” and made them “second-class citizens.”

The ruling sparked a large-scale national debate and, as in the Hawaii State Court decision, the state legislature met to attempt to bifurcate the Court’s decision. Due in large part to the widespread lobbying efforts of organizations like MassEquality, which at the time was a

---

165 Goodridge, 798 N.E.2d at 951.
coalition of several gay rights groups, no legislative action was taken and the Supreme Judicial ruling went into effect in May of 2004.

My research uncovered much of what was happening behind the scenes at this time as well as the time period prior to the filing of the Goodridge case. I move now to discussing the same-sex marriage happenings in Massachusetts in connection with the theory that informed my methodological approach.

**Connection to Theory**

Utilizing Doug McAdams’ framework on social movements including taking into account political opportunity, mobilizing structure and framing processes, I begin by analyzing some of the behind the scenes SSM happenings in Massachusetts. Both Political Opportunity Structure (POS) and Legal Opportunity Structure (LOS) are helpful in analyzing the strategies of the interest groups on either side of the SSM issue. POS is interested in the access to formal institutional structures within the political arena. Similarly, LOS considers the access to formal institutions within the legal arena.

As Sidney Tarrow explains, movements arise as the result of new or expanded opportunities, they signal the vulnerability of the state to collective action thereby opening up opportunities for others, the process leads to state responses which in one way or another produce a new opportunity structure.166 There was no one path to SSM in Massachusetts, instead interested parties on both sides of this issue pursued many different avenues within the political arena, the courts, and the court of public opinion. Further, the timeline of events is not a simple linear one with cause and effect being easily explainable. Nor did the issue begin in the legal arena with the filing of the successful Goodridge case. Rather, as I detail below, the complicated path to the legalization of SSM in Massachusetts took many twists and turns as

---

new opportunities opened and closed for both sides of the debate. Importantly, the foundation was laid in Massachusetts for the possibility of SSM years prior to the *Goodridge* decision as I now detail.

**Before Goodridge**

To understand the legalization of SSM in Massachusetts it is important to examine the time period prior to the landmark SSM decision. In order for the Court to rule the way it did several factors had to be accounted for in terms of prior legislation. For example, if there were a Defense of Marriage Amendment to the Massachusetts Constitution this may have preempted the Courts ability to rule in favor of same-sex marriage rights. Attempts were made, prior to the *Goodridge* decision being enforced, to pass a DOMA. Massachusetts, like California and Colorado, allows direct participation of the electorate through voter initiative. However, unlike California, the process includes participation by the legislature at different intervals. The individuals I interviewed, on either side of the SSM debate in Massachusetts, discussed the importance of the legislative process as integral to keeping SSM legal.

In Massachusetts, In order to amend the state constitution, it is necessary for an amendment first to receive sufficient support at two state constitutional conventions (a joint meeting of the General Court, i.e. the House of Representatives and the Senate) held during two successive two-year sessions, before going before the voters in a referendum. An amendment put forward by legislators needs a majority (101 out of 200) at two constitutional conventions and an amendment put forward by petition needs a 25 percent vote (50 out of 200) at two constitutional conventions.\(^{167}\) This legislative process illustrates the vulnerability of the state to the legal strategy that in turn opened up a new political opportunity for gays and

lesbians. I discuss this process in more detail later in this chapter - I turn now to a discussion of the events in the state prior to the filing, in 2001, of the Goodridge case.

In an interview with Brian Camenker, President of MassResistance, a pro-family organization that is against same-sex marriage, he stated that in Massachusetts, prior to 2000, the issue of SSM was so fringe that even liberals wouldn’t discuss it. The Conservative organization, Parent’s Rights Coalition, that he was a member of prior to 2000, tried unsuccessfully, at different times, to pass Defense of Marriage Act legislation. However, as he stated, he was against this strategy because he felt that this move made SSM a legitimate issue to talk about and at that time nobody was talking about it.  

He cites the easy passage on the federal level of a Defense of Marriage Act in 1996, as proof that SSM was an unpopular and fringe concept. In fact, lending more weight to his observation is the fact that President Clinton, who was considered a liberal democrat, signed DOMA into law. Arguably, Camenker’s observation is accurate – the swift turn of events from a topic so fringe that it was not even spoken about to it becoming legal in such a short period of time is quite notable and illustrates, as I will discuss, multiple aspects of social movement theory in action.

But there is much more to the story of how gay and lesbian activists defeated Defense of Marriage legislation in Massachusetts. In an interview with Arline Isaacson, co-chair of the MASS Gay & Lesbian Political Caucus and a proponent of SSM, she stated that the work that went on before the Goodridge lawsuit was filed (and ultimately lead to SSM in Massachusetts) cannot be over-stated. Isaacson points out that the Gay and Lesbian Political Caucus had been around for four decades, since 1973, fighting for the rights of gays and lesbians in Massachusetts. The work that her organization, and others, did on gay and lesbian rights in Massachusetts made it a fertile ground for SSM litigation. For example, in 1989 her organization

168 Interview with Brian Camenker, Aug. 2009.
was pivotal in the passage of a comprehensive anti-discrimination law prohibiting sexual orientation discrimination in the areas of employment, housing, public accommodations, credit and services.\footnote{Mass. Gen. Laws, chap. 151B, See http://www.glad.org/rights/massachusetts/c/anti-discrimination-law-in-massachusetts/. Last accessed May 15, 2012.} Massachusetts was the second state in the nation to pass such legislation.

The work done by gay and lesbian organizations in Massachusetts laid the foundation for SSM rights which is made clear by the Court’s own reasoning in \textit{Goodridge}. Chief Justice Marshall states that one argument put forward by amici against SSM is that prohibiting marriage by same-sex couples reflects community consensus that homosexual conduct is immoral. But she contends that Massachusetts has a strong affirmative policy of preventing discrimination on the basis of sexual orientation. She cites to the existence of the Massachusetts General Law which prohibits discrimination against homosexuals in employment, housing, credit and services, public accommodation as well as the existence of a hate crimes statute, the decriminalization of sodomy and the prior case law allowing for custody to homosexual parents.

As discussed previously, the first element of Tarrow’s conception of Political Opportunity Structure concerns the openness and accessibility of government to the group seeking social change. From this openness of government comes the possibility for collective action. LGBT activists working together to pass non-discrimination legislation saw the benefit of collective action a decade before the push for SSM. As Tarrow explains, collective action shows opponents weaknesses and uncovers new, formerly passive, allies both within and without the system. And lastly, it can pry open institutional barriers through which new demands can be made.\footnote{\textit{Id.} 51.}

Another important example of early gay and lesbian activism in Massachusetts, clearly linked to the SSM movement, was the work Isaacson’s organization did to overturn policies prohibiting gays and lesbians from being foster parents. As she stated, “We eventually won the
right to be foster parents by policy and regulation. That was critical in what happened later during the marriage fight. It was resolved 20 years earlier and culturally it was resolved." The ability of gays and lesbians to be foster parents is relevant to what would come later in the lawsuit for SSM rights as part of the legal strategy included seeking protection for gay and lesbian families. I will discuss this in more detail later in this chapter.

Isaacson further discussed the way in which the foster care issue was framed by gays and lesbians as being relevant to creating bipartisan support to defeat the measure. She discussed the role one legislator had in creating consensus with the most conservative people in his district. He framed the issue to his constituents as needing caretakers for babies with AIDS and kids desperate for homes and that, as far as he was concerned someone willing to take a sick kid and nurture them are doing Gods work. Isaacson stated,

He turned the whole audience around. He framed it in a way they could relate to. As a good Christian thing to do. They could nod their heads – ‘Yeah I guess he is right - these babies, Somebody has to take care of them.’ Cracks in the concrete of people’s minds.”

In referencing mobilization, Isaacson related the way that LGBT organizations mobilized in the early days stating,

All those bills cut a pathway years before marriage was a distant possibility in anyone’s mind. One other variable in the 80’s and 90’s one of the things the LGBT community did pretty well and then we replicated in the marriage fight was involvement in elections. We did it as extensively in the marriage fight. Simple arithmetic. If they supported us we would support them. My organization would have endorsement meetings and we would do mailings to people’s homes.”

This last sentiment also refers directly to Tarrow’s second element of POS, the stability of existing political alignments. Arguably, the relationships that LGBT activists built in their early

---

171 Interview with Arline Isacson, Sept. 2009.
172 Ibid.
173 Ibid.
struggles for rights and their consistent involvement in elections over time mattered then and would matter later on in the struggle for SSM rights.

The ways in which mobilization and framing of the issue mattered was also discussed by Brian Camenker from the perspective of his work in the early days fighting against same-sex marriage. He stated that one of the organizations that he worked with used very weak arguments against same-sex marriage because they were afraid of being called bigots. He stated, “They said every child needs a mother and father and that’s the reason we are doing this. Very weak argument. They were too afraid to discuss the real issue – homosexuality.”174 Nonetheless at this time there were some legislative gains being made by anti-SSM activists. As soon as the Goodridge decision was announced anti-SSM activists worked diligently to overturn the ruling by amending the Constitution. Attempts were made in 2004 to pass an amendment that would have substituted civil unions for same-sex marriage but it failed as moderates abandoned it and more conservative republicans supported a proposed ballot initiative that would have banned SSM outright without allowing for civil unions. The next move was a ballot initiative sponsored by voteonmarriage.org which read in part, “When recognizing marriages entered into after the adoption of this amendment by the people, the Commonwealth and its political subdivisions shall define marriage only as the union of one man and one woman.”175 This never passed the requisite legislative process which I will discuss at greater length.

On the opposite end of this, Isaacson discussed the framing of the possible Amendments by opponents as having been helpful to the pro-SSM side. She states that in Massachusetts, her organization was able to stop a defense of marriage act from passing because of the way it was framed. She stated that LGBT activists were able to keep the

174 Interview with Camenker, Aug. 2009.
proposed legislation from coming to a vote in the legislature because the other side was overreaching and greedy. This last issue, the gains being made by SSM activists is also reflective of POS in that it created opportunities for protest groups. Isaacson stated,

It was harder to stop an initiative petition because they only need 25% of the legislature to support them and we need 3/4 of the legislature to support us. Once we knew they were filing the initiative in 2001 they produced the wording and Mary (Banauto)\textsuperscript{176} and I listened to it and we realized they were overreaching - partner benefits and everything! We said thank God. We could go to reasonable legislatures and say: ‘I know you hate marriage but this goes too far.’ It allowed us to appeal to legislator’s hearts without the road block of their mind.\textsuperscript{177}

The way the anti-SSM activists framed their proposed legislation, as not even allowing for civil unions, went too far for many legislators in Massachusetts who were sympathetic to gays and lesbians, which in turn allowed for SSM to occur. The way issues are framed by either side as well as the mobilization process matters in terms of opening up political and legal opportunities for interest groups. This was clear in the time period before the Goodridge case was filed and integral in the time period after the case was decided. This is an example of the final element in Tarrow’s conception of POS, the existence of sympathetic local elites.

In fact, one of the ways LGBT activists were able to put off the vote on SSM for 7 years was by arguing that the other side went too far in trying to preclude gay and lesbian couples form having any type of partner recognition or benefits. The legislature in Massachusetts, as Isaacson discussed, may have been against SSM but many were open to some benefits and protections being available to same-sex couples such as health insurance for their children and hospital visitation.

\textsuperscript{176} Mary Bonauto is a Civil Rights Attorney at Gay and Lebsian Advocates and Defenders in MA. was lead counsel in Goodridge v. Dept. of Public Health, which resulted in the Massachusetts Supreme Judicial Court's landmark decision that prohibiting civil marriage for same-sex couples is unconstitutional. She is currently leading GLAD's challenge to the constitutionality of Section 3 of the Defense of Marriage Act (DOMA) in two cases in federal court.

\textsuperscript{177} Interview with Arline Isacson, Sept. 2009.
The fact that no defense of marriage act legislation existed prior to the *Goodridge* case was filed in 2001, mattered for a new political and legal opportunity to arise. Isaacson was privy to the legal strategy by SSM proponents on the national and state level. She discussed the fact that SSM proponents, including activists and attorneys around the country were holding conference calls to explore the question of seeking marriage rights and the best state to try the case. She stated that the variables that mattered most in terms of the choice of state were; the wording of state constitutions most favorable to their position, what the supreme courts looked like in those states and lastly, what she refers to as the cultural climate in the state.

Following extensive research into these factors by state, Isaacson stated that Massachusetts became the top choice for bringing a case for SSM. The Massachusetts Constitution was very liberal, the Supreme Judicial Court and the cultural climate was positive in terms of LGBT rights. And further, Isaacson stated,

> It was determined they’d have the best shot in Massachusetts. We had already won battles to not be fired, evicted and to be parents. All those combined made this the best place. One thing that was not good was the initiative petition process. I was against filing it because I knew we couldn’t kill a defense of marriage act in the legislature. The only reason we won was we avoided having a vote on it. We put the vote off for 10 years. By putting off votes on it we were able to get to a point where the culture had changed enough, we were able to get married and nothing changed for people.\(^\text{178}\)

*The Goodridge Case*

The original *Goodridge* case was filed on April 11, 2001 by Gay and Lesbian Advocates and Defenders, on behalf of several same-sex couples who had been denied marriage licenses by the Massachusetts Department of Health. Judge Thomas Connolly of the Superior Court ruled in favor of the Department finding that that the wording of the Massachusetts marriage statute, G.L. c 207, and other marriage statutes, precluded an interpretation for including persons of the same sex. Justice Connolly also held that prohibiting same-sex marriage

\(^{178}\) Interview with Isaacson, Sept. 2009.
rationally furthers the Legislature's legitimate interest in safeguarding the 'primary purpose' of marriage, 'procreation.' This would later be disputed by Chief Justice Margaret Marshall in her majority opinion in *Goodridge v. Dept. of Mental Health* (2003).  

Plaintiffs appealed the Superior Court's decision to the Massachusetts Supreme Court. The Attorney General of Massachusetts, Tom Reilly, argued that the Court should defer to the legislature on the issue of marriage and further, that because same-sex couples could not procreate, they could not accomplish the main object of marriage as historically understood. Interestingly, the Attorney General was making this procreation argument to Chief Justice Margaret Marshall who despite being married for over 20 years had no children.

Petitioners argued that because nothing in the marriage licensing law prohibits same-sex couples from obtaining marriage licenses, that the Court could determine that the statute permits same-sex couples from marrying. The Court did not find any merit to this argument. The Petitioner’s second argument, to which the Court agreed, concerned whether the marriage exclusion violated the Massachusetts Constitution.

The Court framed the analysis of whether the marriage restriction violated the Massachusetts Constitution in two ways, “Does it offend the Constitution's guarantees of equality before the law? Or do the liberty and due process provisions of the Massachusetts Constitution secure the plaintiffs' right to marry their chosen partner?” In a 4-3 decision, the Court ruled, “Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.” The Court then gave the State Legislature 180 days to take such action as they deemed appropriate before issuing marriage licenses.

---

179 *Goodridge* 331.
181 *Goodridge* 342.
182 *Id.* at 312.
As I discussed previously, Legal Opportunity Structure (LOS) expanded upon by Ellen Andersen, provides a theoretical lens for studying state actions on SSM. As Andersen explains, movements seeking to effect change within the legal system are constrained by the availability of cultural stock as well as by the availability of legal stock. Andersen states, “They must articulate their claims so that they fall within the categories previously established by an amalgam of constitutional, statutory, administrative, common and case law. These laws shape the progress and outcome of movement claims in important ways”.  

Andersen explains the importance of case precedent in legal framing versus cultural framing. In terms of legal opportunity, the frames are somewhat limited to what came before – as either side of litigation on a gay rights claim utilizes case law they must show the relationship between the past to the present. In other words, a legal claim must adhere to the prior court’s framing of the issue to advance their outcome. Andersen rightly points out that shifts in the legal stock can create (or foreclose) opportunities for movements to frame their claims successfully – which can be independent of the social stock. In the case of Goodridge, the issue of same-sex marriage was one of first impression for the Court. Further, there was no Defense of Marriage Amendment in the Massachusetts Constitution limiting the Court’s ability to act.

There was, however, legal precedent at the U.S. Supreme Court level, holding that marriage is a fundamental right, which the Goodridge Court relied on in their holding. The U.S. Supreme Court has taken up the case of marriage in other contexts, which the Goodridge Court cited including,

The right to marry is not a privilege conferred by the State, but a fundamental right that is protected against unwarranted State interference. See Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (“the right to marry is of fundamental importance for all individuals”); Loving v. Virginia, 388 U.S. 1, 12 (1967) (freedom to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men" under due process clause of Fourteenth Amendment); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (marriage is one of "basic civil rights of man"). See also Turner v. Saflley, 482 U.S. 78, 95-96 (1987) (prisoners' right to

---

marry is constitutionally protected).”184

Andersen also discusses the role that shifts in cultural norms may play in shaping legal frames. An example of this, which affected the SSM case, is the change in sodomy laws in the U.S. In 2003, the Supreme Court in Lawrence v. Texas struck down all state sodomy laws, but just 17 years prior, the Supreme Court ruled in favor of their constitutionality. The Goodridge Court cited Lawrence in their decision stating, “moral disapproval with no other valid State interest, cannot justify law that discriminates against groups of persons.”185

The Goodridge Court discusses the fact that same-sex marriage has not previously been addressed by a Massachusetts Appellate Court and further that it is a question that the U.S. Supreme Court left open in the Lawrence case. In referencing Lawrence, Chief Justice Marshall states,

There, the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner. The Court also reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity.186

The Supreme Court's decision in Lawrence, which came just prior to Goodridge, provided legal stock for SSM advocates to rely on in shaping their claim as well as for the Court in supporting their decision.

But what the Court ultimately relies upon was the Massachusetts Constitution which is, as Justice Marshall states, “…more protective of individual rights and less tolerant of government intrusion into the protective spheres of private life.”187 Further, the Court held that, “The individual liberty and equality safeguards of the Massachusetts Constitution protect both

184 Goodridge 798 N.E.2d at 945.
186 Marshall quoting Lawrence at 2481
187 Goodridge 331
"freedom from" unwarranted government intrusion into protected spheres of life and "freedom to" partake in benefits created by the State for the common good."\textsuperscript{188} Finding both freedoms at issue in the case, the Court moves to an analysis of the State’s regulatory authority stating that the Massachusetts Constitution requires it not be, “arbitrary and capricious, and it must, at the very least, serve a legitimate purpose in a rational way.”\textsuperscript{189}

Utilizing a rational basis standard of review the Court considers the State’s three reasons for prohibiting same-sex couples from marrying, providing a "favorable setting for procreation"; ensuring the optimal setting for child rearing, which the department defines as "a two-parent family with one parent of each sex;" and preserving scarce State and private financial resources.\textsuperscript{190} First, the Court finds that the marriage statute does not require that applicants state their intention or ability to procreate. Second, the Court states that while the welfare of children is a paramount State interest, nonetheless, the marriage restriction does not further this interest. The Court finds that many of the plaintiffs have children and that providing more protections for their family would promote their welfare. And third, the State argued that same-sex couples were more financially independent than married couples and less in need of the public marital benefits such as tax advantages, etc. The Court held that an absolute ban on same-sex marriage bears no rational relationship to this economic goal. The Court found that the broad assumption by the state concerning same-sex couples financial independence was erroneous and further that the marriage laws do no require a demonstration of dependence for bestowing marital benefits. In responding to the Plaintiffs relief, Justice Marshall states,

\begin{quote}
We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs' constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships. It advances the two legitimate State interests the department has identified: providing a stable setting for child rearing and conserving State resources.\textsuperscript{191}
\end{quote}

\textsuperscript{188} Id at 329.
\textsuperscript{189} Id. at 330.
\textsuperscript{190} Id. at 331.
\textsuperscript{191} Id. at 344.
The Role of the Amicus Curiae in Goodridge

The amicus curiae or “friends of the court,” are interested parties who submit briefs to the court containing relevant legal and/or factual insights in an effort to sway the court one way or another in their decision-making. They are not party to the case but have an interest in the outcome.

Susan Behuniak-Long investigated the role that amici played in shaping the Supreme Court’s debate around abortion.\textsuperscript{192} I utilized Behuniak-Long’s framework in the context of the California SSM case, and apply it here to the Massachusetts SSM case, \textit{Goodridge v. Dept of Public Health} (2003). The lead attorney in \textit{Goodridge}, Mary Bonauto, discussed the role that amicus curiae briefs played in the Court’s decision in her article, “Goodridge in Context.”\textsuperscript{193} The Massachusetts Supreme Judicial Court publicly solicited amicus briefs by interested parties in 2002. The Court received 11 supporting plaintiffs and 15 supporting the State for a total of 26 amicus briefs. In the Table below I have listed the briefs on either side of the SSM debate.

\begin{table}[ht]
\centering
\begin{tabular}{|l|c|}
\hline
\textbf{Sponsor of Amicus Brief} & \textbf{Total Sponsors} \\
\hline
1. Boston Bar Association & 2 \\
2. Civil Rights Organizations & 25 \\
3. Professors of Constitutional Law & 9 \\
4. Professors of the History of Marriage, Families and the Law & 26 \\
5. Professors of Expressions and Constitutional Law, et al. & 22 \\
6. International Human Rights Organizations & 36 \\
7. Massachusetts Bar Association & 1 \\
\hline
\end{tabular}
\caption{11 Briefs in Support of Plaintiffs}
\end{table}

9. The Massachusetts Psychiatric Society et al 11
10. The Professors of Remedies 20
11. Monroe Inker and Charles Kindregan 2

**Table 7  **15 Briefs in Support of Defendants

<table>
<thead>
<tr>
<th>Sponsor of Amicus Brief</th>
<th>Total Sponsors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Agudath Israel of America et al</td>
<td>2</td>
</tr>
<tr>
<td>2. The Free Market Foundation</td>
<td>1</td>
</tr>
<tr>
<td>3. The Ethics and Religious Liberty Commission, et al.</td>
<td>11</td>
</tr>
<tr>
<td>4. The Honorable s</td>
<td>5</td>
</tr>
<tr>
<td>5. Joseph Ureneck</td>
<td>1</td>
</tr>
<tr>
<td>6. The Marriage Law Project</td>
<td>4</td>
</tr>
<tr>
<td>7. The Massachusetts Citizens Alliance, et al.</td>
<td>2</td>
</tr>
<tr>
<td>8. The National Legal Foundation</td>
<td>1</td>
</tr>
<tr>
<td>9. Utah, Nebraska and South Dakota</td>
<td>3</td>
</tr>
<tr>
<td>10. Professors and Advisors of Law</td>
<td>15</td>
</tr>
<tr>
<td>11. The Common Good Foundation</td>
<td>4</td>
</tr>
<tr>
<td>12. Massachusetts Family Institute</td>
<td>8</td>
</tr>
<tr>
<td>13. The National Association for Research and Therapy of Homosexuality, Inc. et al</td>
<td>12</td>
</tr>
<tr>
<td>14. Professors of Law and Philosophy</td>
<td>17</td>
</tr>
<tr>
<td>15. The Catholic Action League of Massachusetts</td>
<td>1</td>
</tr>
</tbody>
</table>

**Table 8  **First Sponsors Categorized


<table>
<thead>
<tr>
<th>Petitioners</th>
<th>Totals</th>
<th>Respondents</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>5,11</td>
<td>Individual</td>
<td>4,14</td>
</tr>
<tr>
<td>Citizens Groups</td>
<td>2,6,</td>
<td>Citizens Groups</td>
<td>1,12,15</td>
</tr>
<tr>
<td>Professional</td>
<td>1,7,9</td>
<td>Professional</td>
<td>8</td>
</tr>
<tr>
<td>Public Interest Law</td>
<td>3</td>
<td>Public Interest Law</td>
<td>8</td>
</tr>
<tr>
<td>Government</td>
<td></td>
<td>Government</td>
<td>9,1</td>
</tr>
<tr>
<td>Peak Organizations</td>
<td>8,1</td>
<td>Peak Organizations</td>
<td>6,4</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td>Other</td>
<td></td>
</tr>
</tbody>
</table>

*Breakdown of Amicus Arguments and the Court’s Response*

I have discussed the Goodridge case in detail above, and now detail the arguments made by the amici on either side of the case. I have broken down the arguments made by amici on each side of the case as follows:

*Issue 1- Traditional Marriage should be upheld based on history*

The Court, in their holding, discussed some of the arguments made by the State and elaborated on by amici such as: the fact that allowing same-sex couples to marry will trivialize or destroy the institution of marriage as it has historically been understood. In response the Court finds that the plaintiffs seek only to be married not to abolish the institution of marriage. Further, the Court finds that recognizing the right to marry a person of the same sex will no more diminish the institution of marriage than recognizing the right to marry a person of a different race.

As was the case with the historians amicus brief in *Lawrence v. Texas (2003)*, historians submitted an amicus brief providing the Massachusetts Judicial Court with the many ways that marriage has changed throughout history concerning eligibility, rights and responsibilities and termination of the marriage.

*Issue 2- Interstate Conflict*
Another amici argument that the Court dismisses concerns the possibility of interstate conflict. The Court states that they are merely according Massachusetts residents the full measure of protection available under the Massachusetts Constitution and that under the Federal system each state’s Constitution allows their own determination of the issue in their state.

Issue 3- Religion and Morality

The Court also address amici arguments that suggest that prohibiting marriage by same-sex couples reflects community consensus that homosexual conduct is immoral. In response, the Court points to the many affirmative policies that Massachusetts has for preventing discrimination based on sexual orientation.194

Religion also played a role in amicus briefs on either side of the issue. Several religious organizations wrote a brief against same-sex marriage. But many religious groups also came out in support of same-sex marriage. As Mary Bonauto points out in her work, there were two amicus briefs, one by historians and one by clergy that focused on the civil nature of marriage in Massachusetts. They also showed the Court that faiths are divided in their support of SSM. Bonauto states that these amici may have influenced the way the Court chose to word the issue in the case as, “Whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage.”195

Bonauto also argues that the amici may have helped steer the Court to the proper reference for answering the question of SSM rights. The Court, in its holding reference the fact that different religions have different strongly held views concerning same-sex marriage. But that the proper reference for the Court in answering the question rests in the Massachusetts Constitution only. They then cite to the Supreme Court’s decision in Lawrence v. Texas (2003)

194 Goodridge 341.
195 Bonauto, 35
stating: “Our obligation is to define the liberty of all, not to mandate our own moral code.”

Issue 4- Marriage is for procreation and childrearing

The arguments made by the Commonwealth, mirrored in several amicus briefs centered on the procreative purpose of marriage. But, as Bonauto points out, this was refuted by an amicus who was one of the authors of a treatise on Massachusetts family law. He discussed in his brief how both the traditional and modern reading of Massachusetts family law, stating that none of them consider procreation as the primary purpose of marriage. Further, that marriage is available to individuals despite their choice to procreate or not.

Several amici in support of Respondents, including the National Association for Research and Therapy of Homosexuality, Focus on the Family, Jews Offering New Alternatives to Homosexuality and others, argued that same-sex marriage was detrimental to the welfare of children. They argued that male and female role models were best for children and that sanctioning same-sex marriage would send a confusing message to children about proper gender roles. The Court discussed the welfare of children stating, “Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy.” The Court explains that the composition of a family varies from household to household and finds that Massachusetts has moved towards strengthening this modern family in a myriad of ways.

Issue 5: Prior precedent of race is not analogous to sexual orientation

Another tactic of the defendants and their amici, that Bonauto also discusses, is their attempt to distinguish same-sex marriage bans from interracial marriage bans that were struck down in the state case Perez v. Sharpe(1948) and the Supreme Court case, Loving v. Virginia (1967). This was important because it was tied to the Plaintiffs argument. This argument was

196 Goodridge 343.
197 Brief of Amicus Curiae for Religious Groups, Individuals and a Fraternal Organization in Support of Defendants at 35. Goodridge (No. SJC-08860)
198 Goodridge, 334
refuted by the 25 civil rights organizations, including groups fighting for the rights of people of color, that signed on as amici in support of SSM. In making the analogy between miscegenation laws and same-sex marriage bans, amici argued that denying civil marriage to same-sex couples is as morally indefensible as denying two persons of different races from marrying. The Court sided with Plaintiffs on this issue, they relied on the *Perez* and *Loving* decisions, clearly equating discrimination against race with discrimination against sexual orientation. The Court stated,

> In this case, as in Perez and Loving, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in Perez and Loving, sexual orientation here. As it did in Perez and Loving, history must yield to a more fully developed understanding of the invidious quality of the discrimination.¹⁹⁹

**Issue 7: Constitutional Interpretation and separation of powers**

There were Constitutional law scholars on both sides of the issue who submitted amicus briefs. Amici in support of Defendants utilized an historical analysis of jurisprudence to argue that no right to same-sex marriage exists, nor is it compatible with the intent of the framers. They also rely on a slippery slope argument, stating that if the right to marry someone of the same-sex exists then there would be no limit thus leading to marriage between siblings. Lastly arguments were made concerning the proper role of the Court and the importance of adhering to the legislature for marriage policy.

In contrast, scholars of Constitutional law advanced the argument that the Court could properly offer a remedy to Plaintiffs within the context of the Massachusetts Constitution and that this was the proper venue for such an adjudication. Other constitutional arguments concerned the liberty and equality found in the Massachusetts Constitution and the applications of both rational basis and strict scrutiny standards of review.

---

¹⁹⁹ *Goodridge*, 958.
As Bonauto notes, there was a great deal of interest in the outcome of the Goodridge case, as evidenced by the fact that the Court received more amicus briefs than in any other case in its history.200 Throughout their decision the Court responds to several amici arguments. Regardless of whether the Court ultimately agrees or disagrees with the amici, it nonetheless shows that these “friends of the court” are influential and may affect the outcome of the case.

After Goodridge

As discussed previously, the final element in Tarrow’s conception of POS concerns the existence of sympathetic local elites. To discuss this element further, I examine the circumstances following the 2003 Massachusetts Supreme Judicial Court ruling in favor of same-sex marriage rights. The ruling re-ignited national debate and, as in the Hawaii State Court decision, the Massachusetts state legislature attempted to overrule the Court’s decision. Following the Goodridge ruling, the Court gave the Legislature 180 days to take appropriate action. The Senate then asked the court for an advisory opinion on the constitutionality of a proposed law that would bar same-sex couples from civil marriage but would create civil unions as a parallel institution, with all the same benefits, protections, rights and responsibilities under law.201 In February, the Court answered, “segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or preserve” the governmental aim of encouraging "stable adult relationships for the good of the individual and of the community, especially its children."202 Following this the state of Massachusetts began issuing licenses in May 2004.

Massachusetts, like California and Colorado, allows direct participation of the electorate through voter initiative. However, unlike California, the process includes participation by the

200 Bonauto, 34.
legislature at different intervals. It would have taken a minimum of three years for opponents of SSM to amend the Constitution to overrule the Court’s decision. In order to amend the state constitution, it is necessary for an amendment first to receive sufficient support at two state constitutional conventions (a joint meeting of the General Court, i.e. the House of Representatives and the Senate) held during two successive two-year sessions, before going before the voters in a referendum. An amendment put forward by legislators needs a majority (101 out of 200) at two constitutional conventions and an amendment put forward by petition needs a 25 percent vote (50 out of 200) at two constitutional conventions.\textsuperscript{203}

A petition for a ballot initiative amendment was certified as valid on September 7, 2005 by Massachusetts Attorney General Thomas Reilly.\textsuperscript{204} VoteOnMarriage.Org, an anti-SSM organization, collected 170,000 signatures before the December 7, 2005 deadline; 65,825 were required. The amendment was challenged in court, based on a provision in the Massachusetts Constitution (Article 48, Section 2), which prohibits the use of an initiative petition for "reversal of a judicial decision."\textsuperscript{205} In July 2006, the Massachusetts Supreme Judicial Court ruled unanimously that the amendment did not constitute "reversal" of a judicial decision, given that the proposed amendment sought to define only those marriages performed after it was enacted.\textsuperscript{206} The first Constitutional Convention vote on the petition amendment was scheduled for July 12, 2006,\textsuperscript{207} but was postponed until November 9, 2006 to take place after the next state elections.\textsuperscript{208} On November 9th, 2006 the Legislature voted to recess the Constitutional Convention until January 2nd.

\textsuperscript{205} See http://www.mass.gov/legis/const.html. last accessed May, 5 2012.
Framing

For Tarrow what stands out in defining social movements is the contentious politics that are based on underlying social networks and resonant collective action frames and which develop the capacity to maintain sustained challenges against powerful opponents. This definition resonates most with my examination of the movement for and against SSM in the U.S. where there is a social movement and a countermovement happening simultaneously.

Mobilization

Mobilization by SSM opponents and proponents in Massachusetts at this time was non-stop and targeted towards the legislature and the general public. An amendment that would forbid same-sex marriage, establish civil unions for same-sex couples conveying the same rights and responsibilities as marriage, and convert existing same-sex marriages into civil unions passed the first constitutional convention by a slim margin. During this time SSM proponents lead by the group MassEquality, lobbied lawmakers throughout the state. Specific efforts consisted of setting up meetings between legislators and gay families putting a face to the issue and was said to have an important impact in increasing the number of sympathetic local elites to their cause. Arline Isaacson stated that during this time period SSM activists took their message of “We are just like you” to the media as well as to the Statehouse. She also stated that there was much more money and more professionalism at this time period versus her prior activist work in the eighties and nineties. Brian Camenker, whose organization mobilized against SSM at this time, also stated that the SSM movement had more money and were able to position the media to their advantage. He called it “the perfect storm” that SSM advocates had the judicial branch and the legislature on their side.

209 Tarrow, Power in Movement 13.
The second Constitutional Convention on the issue convened in June 2007. Prior to this meeting, local political leaders who supported SSM including; House Speaker Salvatore F. DiMasi, Senate President Therese Murray, and Governor Deval Patrick spent time lobbying state representatives and state senators who had previously supported the amendment but signaled that they were open to changing their positions. Constituents also impacted the lawmaker’s vote. In an article in the Boston Globe, Massachusetts State Rep. Paul Loscocco, a Republican, who was one of several dozen lawmakers who changed their minds on the vote, discussed why he decided to vote against a SSM ban. The change, he stated, is reflective of society at large, “I can’t tell you how many calls I got from people saying, ‘I called you before and now my grandson is gay -- now they’re a couple -- now I’ve changed my mind and I want you to vote the other way’.” The existence of sympathetic local elites made it possible for the Supreme Judicial Court’s decision to stay in effect in Massachusetts which has now seen approximately 13,000 same-sex marriages take place. Delaying the vote on SSM in the Massachusetts legislature proved to be an effective way to keep SSM legal. As Isaacson rightly stated, “Time is a friend to the gay community and to same-sex marriage.”

On the Federal level, following the Goodridge decision, President Bush, in a press conference from the oval office, weighed in on the Massachusetts Court decision in Goodridge, calling for a Defense of Marriage Amendment. Perhaps fearing that the Defense of Marriage Act was not strong enough to withstand judicial scrutiny, just weeks before the general election in 2004, Sen. Wayne Allard, a Republican from Colorado, re-introduced the Federal Marriage Amendment (FMA) in the U.S. Senate. Twenty-four Republicans joined in introducing the amendment,

---

212 Interview with Isaacson.
indicating that the constitutional amendment was a priority for the Republican leadership in the Senate. Making it clear that their action was a response to prior judicial decisions, Congressman Tom Delay stated, “It’s unfortunate that this step is being forced on us by the courts, but that is exactly what is happening.” The Federal Marriage Amendment never received the needed support and was dropped. However, as I mentioned previously, in the 2004 election of Bush vs. Kerry, eleven states had defense of marriage acts on their ballots which many have argued prompted a larger conservative turnout prompting Bush’s re-election.

**Shifting Public Opinion**

At the time that the Goodridge case was decided in 2003, public opinion in the U.S. was against same-sex marriage. According to a Pew Research Center Poll, in 2003, 58 percent of Americans opposed SSM, with only 32 percent in favor. Although Massachusetts has always polled favorably higher than the rest of the U.S. on SSM, nonetheless the majority of Massachusetts residents did not support the legalization of SSM at this time.

There has been a marked shift in public opinion on this issue within a relatively small amount of time. A June 2012 Public Policy Polling survey found that 62 percent of Massachusetts voters thought same-sex marriage should be legal, while 30 percent thought it should be illegal and 8 percent were not sure. A separate question on the same survey found that 88 percent of respondents supported legal recognition of same-sex couples, with 58 percent supporting same-sex marriage, 30 percent supporting civil unions, 11 percent opposing

---

all legal recognition and 2 percent not sure. Further, though the country remains divided, support for SSM has grown across the board. In a Pew Research poll from 2012, 49 percent of respondents said they favored allowing gays and lesbians to marry legally and 40 percent were opposed. Just four years prior, in 2008, only 39 percent were in favor with 52 percent opposed.

**The Road to the Supreme Court**

Massachusetts was the first state to legalize same-sex marriage and the first state to take on the Federal Defense of Marriage Act (DOMA). In 2009, Gay and Lesbian Advocates and Defenders (GLAD), the attorneys from *Goodridge*, filed suit in Federal Court in Massachusetts challenging DOMA. GLAD argued in *Gill et al. v. Office of Personnel Management (2012)* that section 3 of DOMA defining marriage as a “legal union between a husband and a wife” violated the equal protection clause of the U.S. Constitution.

In that same year, Attorney General Martha Coakley filed suit in Federal Court in Massachusetts challenging the Constitutionality of DOMA based on 10th Amendment grounds. Both cases were successful and were then appealed by the Department of Justice. In February 2011, Attorney General Eric H. Holder Jr. announced that he and President Obama had concluded that the law was unconstitutional and unworthy of defense in court, though he added that the administration would continue to enforce the

---


Further, in 2011, 133 House Democrats filed an amicus brief in support of the plaintiffs in both cases. Interestingly, the brief was signed by members of Congress who had originally voted for DOMA in 1996. An amicus brief in support of the plaintiffs were also filed by seventy major employers including Microsoft and Starbucks, stating that DOMA forces their companies to unfairly discriminate against gay and lesbians employees.224

A Federal Appeals Court heard the case in 2012 and in an unprecedented move, the Department of Justice refused to defend DOMA under any level of scrutiny.225 On May 31, 2012, the Court unanimously affirmed the prior Court’s ruling, prompting appeal by the House’s Bipartisan Legal Advisory Group (BLAG) and its lawyer, Paul Clement.226

All of the cases against DOMA were consolidated into Windsor v. United States, brought by the ACLU. The United States Supreme Court heard oral arguments March 27, 2013 against the Defense of Marriage Act (DOMA) as well as the California marriage case concerning Prop 8, in Hollingsworth v. Perry.227 The Supreme Court issued their ruling on these two cases in June 2013. I discuss these cases in more detail in Chapter 7.

Chapter Summary

---

In this Chapter, I provided a timeline of relevant events in Massachusetts leading to the historic move of legalizing same-sex marriage in the state. I researched the strategies by interest groups on either side of the debate and the dynamic interaction between different branches of the government and connected it to the Political Opportunity Structure, the Legal Opportunity Structure and Social Movement theory.

I examined the period of time before the Goodridge decision, during which proponents of marriage equality were able to stop a same-sex marriage ban from being enacted. I reviewed the Goodridge decision and included an analysis of the amicus briefs in the Goodridge case, shedding light on the role that amicus played in the Court’s decision. I also discussed the time period following the Goodridge decision, especially as it connected to framing and mobilization by interest groups.
CHAPTER 6

California: Battleground State

In this Chapter, I will survey the current status of marriage equality in California, provide a brief history of the marriage equality issue in the state and link the legal and political responses to SSM to the underlying theoretical framework.

Political and legal action concerning same-sex marriage rights in California has dominated the media over the past few years. The strategies by interest groups, dynamic interaction between the branches of government and the particular media culture there, after all it is home to Hollywood, created a whirlwind that continues today. Although marriage falls under a State’s purview its implications to the entire U.S. via “full faith and credit” and federal precedents taking place in California, keep this state in the spotlight. California, despite its being considered a liberal state, nonetheless does not presently allow same-sex marriage, which makes its inclusion in a comparative study particularly interesting.

As stated in Chapter 3, as part of the two-stage comparative case study, I set specific guidelines for data collection and analysis. The guidelines were constructed from the theories grounding my research. Such theoretical underpinnings were instrumental in choosing the methodological tools most useful in answering my specific set of research questions. The gap in the literature on SSM, as referenced in Chapter 2, was also important in formulating my research design. To date, within social movement literature, there has been comparative case study done on the issue of SSM in the U.S.

I researched the issue of SSM in California via newspaper articles and online media accounts, transcripts of public hearings, legislative debates (when available) and court opinions which also included plaintiff and respondents briefs and amicus curiae briefs. The research was helpful in providing a timeline of relevant events in California as well as identifying
several key individuals involved on either side of the SSM debate. I interviewed at least one key informant on either side of the debate, for a total of 2 interviews. The interviews provided valuable insights not un-coverable by research alone.

California has a reputation of being more liberal than any other state in the union. Some reasons for this are the historically high integration of different racial and ethnic groups throughout the state. This is due to its location as a highly trafficked international port state. The hippie movement of the 1960’s began in San Francisco before spreading to the East Coast. Further, California is home to Hollywood, the hub of the entertainment industry in the U.S., where celebrities and artists abound. This liberal label is evidenced by the fact that California was the first state to rule against miscegenation laws in *Perez v. Sharpe (1948)*. This landmark case struck down laws against interracial marriage in the state. This ruling came in 1948 some 19 years before the Supreme Court ruled on this issue in *Loving v. Virginia*.

**Current Status of Same-Sex Marriage in the State**

At the time of this writing same-sex marriage is legal in California. The process was re-opened in July of 2013, following the Supreme Court ruling in *U.S. v. Perry (2013)*. Prior to this ruling, there was a same-sex marriage ban in place for several years. However, there were same-sex married couples living in California who were married during a brief opening up of the institution and prior to the passage of Prop 8. In the process to legalize same-sex marriage proponents of SSM claimed a victory when in February 2012, the Ninth Circuit Court of California ruled that Proposition 8, a voter initiative passed in 2008, which effectively banned SSM, was unconstitutional. This, however, has not meant that California has begun re-issuing marriage licenses to same-sex couples. Rather, the judgment was stayed pending further appeal. That

---

228 32 Cal. 2d 711, 198 P. 2d 17 (Cal. 1948).
229 388 U.S. 1 (1967).
appeal made its way to the U.S. Supreme Court and oral arguments were heard in March 2013. Based on oral arguments it wasn’t clear whether the Court would respond to the constitutional issues presented or if they would rule on technical grounds that the party bringing the case lacked standing to appeal the original decision. The Court ruled that the proponents of Prop 8 were not the proper parties to appeal the Trial Court decision before the Court. This ruling had the effect of leaving in place the Trial Court ruling which overturned the Prop 8 ban on constitutional grounds. I will discuss this ruling in more detail later in this Chapter.

**Brief History of SSM in California**

The first time the SSM issue was considered, even tangentially, was in 1971 when legislation was enacted to replace gendered pronouns within the definition of marriage, with gender-neutral pronouns. The California Civil Code § 4100 defined marriage as “a personal relation arising out of a civil contract, to which the consent of the parties capable of making that contract is necessary.” This definition did not mean to be inclusive of same-sex couples, and it was uniformly interpreted as including only opposite-sex partners. However, the legislature noted the ambiguity in the language and considered the existing law to be unclear as to whether partners of the same-sex could legally wed. To remove the ambiguity, legislation was passed to prohibit persons of the same-sex from entering lawful marriage. The Civil Code was amended to define marriage as “a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary.”

The first meaningful action taken on SSM in California wasn’t until the primary elections in March of 2000 when Proposition 22 was adopted by a vote of 61.4% to 38%, adding § 308.5

---

to the Family Code. The one-sentence addition explicitly defines the union of a man and a
woman as the only valid or recognizable form of marriage in the State of California. This code
resembled the 1977 Amendment referenced earlier. Proposition 22 was authored by State
Senator William J. Knight, and the measure was named by opponents the “Knight initiative”.

As justification for this Act, proponents cited Section 308 of the Family
Code that provided for the recognition by California of marriages contracted out of state if the
marriage was valid in the state of origin. Proponents of Proposition 22 warned that this would
force Californians to recognize same-sex marriages performed in other states. Proposition 22
closed this “loophole” and is referenced as California’s Defense of Marriage Act (DOMA),
mirroring the Federal DOMA passed in 1996. 233

The next major shift in SSM rights took place on Feb 12, 2004 when
Mayor Newsom announced his decision to instruct the San Francisco County Clerk’s office to
issue marriage licenses to same-sex couples. Although approximately 4,000 marriage licenses
were handed out, the Supreme Court of California ruled that the Governor lacked proper
authority to do this and voided the marriages. 234 Several lawsuits came after this decision and
against the state government seeking to legalize SSM in the state. The cases were consolidated
into In re Marriage Cases and the California Supreme Court issued its ruling in favor of SSM in

At this time, opponents of SSM were simultaneously preparing a voter initiative,
Proposition 8, to override the Court’s decision. The ballot initiative, which was a Constitutional
Amendment eliminating the right to SSM in the state was slated for the coming November 2008

233 See http://www.rslevinson.com/gaylesissues/features/collect/election/blknigh01.htm. last accessed
Nov. 4, 2011.
234 Rona Maresh, "The Battle Over Same-Sex Marriage: One Year Later," San Francisco Chronicle,
election and passed with a 52% majority.\textsuperscript{235} The California Supreme Court heard challenges to Prop 8 in 2009, but upheld the Amendment in \textit{Strauss v. Horton}. However, the more than 18,000 marriages that took place before Prop 8 was passed remained valid.

The next major challenge came via the American Foundation for Equal Rights who filed suit in U.S. District Court for Northern District of California challenging Prop 8 under the U.S. Constitution in \textit{Perry v. Schwarzenegger (2010)}. The Court ruled in 2010, that Prop 8 was unconstitutional and violated the Equal Protection and Due Process clauses of the U.S. Constitution. This decision was appealed to the U.S. Supreme Court and oral arguments were heard in March 2013. As stated above, the majority ruled that the proponents of Prop 8 were not the proper parties to appeal the Trial Court ruling. Based on technical grounds, the original decision of the California Trial Court, which ruled Prop 8 unconstitutional, was upheld.

My research uncovered much of what was happening behind the scenes at this time as well as the time period prior to the passage of Prop 8. I move now to discussing the same-sex marriage happenings in California in connection with the theory that informed my methodological approach.

\textit{Connection to Theory}

As discussed previously, within social movement theory are three broad sets of factors that shape social movements: political opportunity structure (POS), framing process and mobilization. The first element of POS concerns the openness and accessibility of government to the group seeking social change. In an interview with Molly McKay, then Director of Marriage Equality California, a pro-SSM organization, she provided an excellent example of POS in action. The first important and un-planned action that put the issue of SSM on the radar in California began in the Mayor’s office. In 2004, the newly elected Mayor of San Francisco, 

Gavin Newsom, while in Washington D.C., attended the State of the Union Address by President George W. Bush. Mayor Newsom was invited to attend by Congresswoman Nancy Pelosi, whose congressional district included much of San Francisco. During his State of the Union address, President Bush ridiculed the Massachusetts Supreme Judicial Court’s ruling in Goodridge vs. Dept of Health (2003) calling them “activist judges” who were, “…forcing their arbitrary will upon the people.” Bush stated that only alternative left to the people would be the Constitutional process. Mayor Newsom was upset by President Bush’s speech, which he considered to be divisional and promoting discrimination. Following the President’s speech, Newsom contacted Steve Kawa, his Chief of Staff and a gay man and told him he wanted to do something.236

Mayor Newsom announced on Feb 12, 2004 his decision to instruct the San Francisco County Clerk’s office to issue marriage licenses to same-sex couples, a move that surprised just about everyone. In the days and weeks that followed, in what was termed the “Winter of Love”, the institution of marriage was opened to same-sex couples, and the clerk’s office saw 4,037 same-sex couples marry.237 The first couple to receive a license were Phyllis Lyon and her partner of 51 years, Del Martin. This is the same couple later chosen as named plaintiffs in the ensuing lawsuit over SSM in California.

Opponents of SSM immediately went to Court to request a temporary restraining order to halt the issuance of marriage licenses. However, the Trial Court held that the two groups, the Campaign for California Families and the Alliance Defense Fund, did not demonstrate the necessary irreparable injury by the continued issuance of licenses. The stay finally came when California Attorney General Bill Lockyer petitioned the California Supreme Court. The Attorney General argued, and the Court agreed, that the Mayor lacked the requisite authority to decide that a state statute was unconstitutional absent a Judicial determination of the issue. The Court

236 Interview with Molly McKay, July 2009.
237 Dan Pinello, America’s Struggle for Same-Sex Marriage. (Cambridge: University: Cambridge, 2006).
pointed out that they were not ruling on the underlying constitutional equal protection and due process issues concerning whether marriage can be restricted to heterosexual couples.\(^{238}\) This language by the Court implied a possible legal opportunity for SSM proponents, one that they would soon utilize.

Political Opportunity Structure is interested in the access to formal institutional structures within the political arena. Legal Opportunity Structure (LOS) looks at the access to formal legal structures in the state. Ellen Andersen in her book, “Out of the Closets and Into the Courts”, locates the difference between POS and LOS, in the underlying frames that ground them. Movements that seek to effect change within the political system must rely on existing cultural stock to frame their claims. Whereas movements seeking to effect change within the legal system are constrained by the availability of cultural stock as well as by the availability of legal stock.\(^{239}\) Shifts in the legal stock can create (or foreclose) opportunities for movements to frame their claims successfully – which can be independent of the cultural stock. But as she states, they do not exist completely independent of each other either. Legal and cultural frames do not exist in a vacuum nor is there necessarily a hierarchical relationship between them. Shifts in cultural norms may also aid in shaping legal frames.\(^{240}\)

**In re Marriage Cases**

The Supreme Court of California consolidated all of the cases filed against the state government and in favor of SSM in the case *In re Marriage Cases*. On May 15, 2008, following a 4-3 decision by the California Supreme Court, California became the second state in the U.S. to allow same-sex marriage.\(^{241}\) The Court held California legislative and initiative measures that

---


\(^{240}\) *Id* at 211.

\(^{241}\) *In re Marriage Cases* 43 Cal.4th 757 (2008).
limited the right to marry to opposite sex couples violated the Constitutional rights of same-sex couples. In his holding, Chief Justice Ronald George cited the 1948 California Supreme Court ruling in Perez v. Sharpe as precedent. Further, he held that marriage is a basic civil right that cannot be withheld from same-sex couples and that strict scrutiny applies because like race or gender, sexual orientation is a protected class.\textsuperscript{242}

The California Supreme Court was the first high court in the U.S. to utilize a strict scrutiny analysis for sexual orientation. The Massachusetts Court holding in Goodridge was based on a rational basis standard. Taking into account legal opportunity structure, it is informative to look at the framing of the right by the Plaintiffs that the Court relied heavily upon in their holding. The Plaintiff’s utilized prior legal precedent by citing Perez v. Sharpe stating that that case did not allow for a “right to interracial marriage” but instead, the constitutional right at issue in Perez was the importance to an individual of the freedom “to join in marriage with the person of one’s choice.”\textsuperscript{243} In their holding, the Court emphasized their reliance on this particular framing of the legal right. This LOS was particularly relevant because it was decided by the California Supreme Court, making it binding legal precedent in that state.

\textit{The Role of Amici in the California Same-Sex Marriage Case}

It has been a longstanding tradition in American jurisprudence to allow for the participation of amicus curiae, or “friends of the court”, to offer legal and/or factual insights in legal proceedings even though they are not party to the case. Though they are not party to the lawsuit and their findings do not become part of the official record they generally have some interest in the outcome and can be seen as “lobbying” the Court to their way of thinking. These insights come in the form of briefs submitted by these interested parties containing relevant facts that, they hope, will sway the court.

\textsuperscript{242} \textit{Ibid.}
\textsuperscript{243} \textit{In re Marriage Cases}, 51.
one way or another in their decision-making. A great deal of interest surrounded the amicus brief submitted by George Chauncey and several other influential historians in *Lawrence v. Texas (2003)*. The brief, which included a history of sodomy in the United States, figured prominently in Justice Anthony Kennedy's majority opinion.

The role of amicus briefs in landmark U.S. Supreme Court cases has been well documented, including the analysis by Susan Behuniak-Long whose study, “Friendly Fire: Amicus Curiae and Webster v. Reproductive Health Services”, investigates the role of the 78 amicus briefs submitted in informing and shaping the Court’s debate around abortion.\(^\text{244}\) However, the role of amicus curiae participation in state high courts has been studied less. As Songer and Kursten note in their study, “The Success of Amici in State Supreme Courts,” there has been less attention to and analysis of the participation of amici on the State Supreme Court level.\(^\text{245}\) This is despite the fact that there has also been an increase in amici participation at the state level. Lee Epstein also studied amici participation on the State court level extensively and notes that the increase in participation is based on State Supreme Courts’ willingness to act as policymakers and the increase in conservatism at the federal court level pushing interest groups to utilize State courts.\(^\text{246}\)

I have replicated Behuniak-Long’s study, and examine whether the insights gained by examining the practice in the federal courts apply to state courts in a study of the role of amici in California’s same-sex marriage case, *In re Marriage Cases (2008)*. I reviewed the 45 amicus briefs submitted by interest groups and other interested parties in an effort to determine what role they played in helping to form and shape the debate on same-sex marriage at the state court level.

---


As in Behuniak-Long’s study, I am interested in looking at who filed amicus briefs and whether they had an impact on the Court’s decision. In her study, she first placed the organizations that filed into groups related to whether they were part of a larger group or filing as an individual and then placed them into categories as to the type of organization they can be defined as such as citizen based, public interest law, etc. Next, she analyzed what was argued by amici and whether it was similar to or different from what was argued by the parties to the case. Following this, she placed the briefs into three categories based on their purpose and whether they: repeat the arguments made by the parties to the case; provide specialized or technical knowledge to the court; or are what she calls, risktakers who may be appealing to an emotional argument. Lastly, she completes a content analysis to determine whether the Court utilized the amici arguments and which Justices focused on which briefs. I replicate Behuniak-Long’s study and determine: who the amici are; what they argued; how their arguments differed from what the parties argued, if at all; whether the amici are mentioned by the Court, and to what end. As Behuniak-Long contends, it is not simply a matter of whether the amici are on the winning or losing side of the case, because even if the Court refutes their argument this shows an influence that these “friends of the court” have in shaping the debate.

**The Case**

The Supreme Court of California consolidated all of the cases filed against the state government and in favor of SSM in the case *In re Marriage Cases*. On May 15, 2008, following the 4-3 decision by the California Supreme Court, California became the second state in the U.S. to allow same-sex marriage. The Court held that California legislative and initiative measures that limited the right to marry to opposite sex couples violated the Constitutional rights of same-sex couples. The parties to the case include, Petitioners: City and County of San Francisco, Joshua Rymer et al, Robin Tyler et al. and Gregory Clinton, et al. The Respondents  

---

include: the State of California, Governor Schwarzenegger, et al., Proposition 22 Legal Defense & Education Fund and Campaign for California Families, et al.

There were 45 amicus briefs filed in the California Supreme Court case *In re Marriage Cases*. And both Petitioners and Respondents submitted briefs to the Court in response to the amici brief filings. The California Supreme Court in its majority decision takes up the usefulness of these “friends of the court” briefs in a footnote to their decision, stating,

> Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties. Among other services, they facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions.  

The Court went on to highlight some of the organizations who submitted briefs including: members of the state Legislature, commercial, religious, and mental health groups, bar associations, and law professors. And they pointed out the fact that religious groups were divided in their support of the respective parties in this proceeding.

I have listed the amici on either side of the case in the Tables below.

**Table 3  30 Briefs in Support of Petitioners**

<table>
<thead>
<tr>
<th>Sponsor of Amicus Brief</th>
<th>Total Sponsors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. California NAACP</td>
<td>1</td>
</tr>
<tr>
<td>2. NAACP Legal Defense and Educational Fund, Inc.</td>
<td>1</td>
</tr>
<tr>
<td>3. The Civil Rights Clinic at Howard University School of Law</td>
<td>1</td>
</tr>
<tr>
<td>4. MALDEF and Other Civil Rights Organizations</td>
<td>8</td>
</tr>
<tr>
<td>5. Asian American Bar Associations and Pacific Islander Groups</td>
<td>63</td>
</tr>
<tr>
<td>6. California Cities and Counties</td>
<td>19</td>
</tr>
<tr>
<td>7. Religious Organizations and Religiously</td>
<td>417</td>
</tr>
</tbody>
</table>

---

248 *In re Marriage Cases* 22.
249 *Id at 23.*
<table>
<thead>
<tr>
<th>Affiliated Individuals</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>8. American Psychological Association</td>
<td>5</td>
</tr>
<tr>
<td>9. American Psychoanalytic Society</td>
<td>3</td>
</tr>
<tr>
<td>10. Bar Associations</td>
<td>5</td>
</tr>
<tr>
<td>11. Bar Association of San Francisco</td>
<td>1</td>
</tr>
<tr>
<td>12. Santa Clara County Bar Association</td>
<td>1</td>
</tr>
<tr>
<td>13. California Legislators</td>
<td>16</td>
</tr>
<tr>
<td>14. Family Law Professors</td>
<td>23</td>
</tr>
<tr>
<td>15. International Human Rights Clinic, University of Toronto</td>
<td>7</td>
</tr>
<tr>
<td>16. Professors Kathleen Sullivan and Pam Karlan</td>
<td>2</td>
</tr>
<tr>
<td>17. Professor William Eskridge</td>
<td>1</td>
</tr>
<tr>
<td>18. Professor Jesse Choper</td>
<td>1</td>
</tr>
<tr>
<td>19. Professor Joseph Grodin</td>
<td>1</td>
</tr>
<tr>
<td>20. Professor M.V. Lee Badgett &amp; Senior Research Fellow Gary J. Gates</td>
<td>2</td>
</tr>
<tr>
<td>21. American Academy of Matrimonial Lawyers</td>
<td>3</td>
</tr>
<tr>
<td>22. Legal Momentum, ERA, California Women’s Law Center</td>
<td>6</td>
</tr>
<tr>
<td>23. Southern Poverty Law Center</td>
<td>1</td>
</tr>
<tr>
<td>24. Equal Justice Society</td>
<td>1</td>
</tr>
<tr>
<td>25. Council for Secular Humanism and Center for Inquiry</td>
<td>2</td>
</tr>
<tr>
<td>26. Out and Equal</td>
<td>2</td>
</tr>
<tr>
<td>27. Anti-Defamation League &amp; LGBT Community Centers</td>
<td>12</td>
</tr>
<tr>
<td>28. GLAD and The Equality Federation</td>
<td>2</td>
</tr>
<tr>
<td>29. National Gay and Lesbian Task Force</td>
<td>1</td>
</tr>
</tbody>
</table>
Table 4  **15 Briefs in Support of Respondents**

<table>
<thead>
<tr>
<th>Sponsor of Amicus Brief</th>
<th>Total Sponsors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Knights of Columbus</td>
<td>1</td>
</tr>
<tr>
<td>2. Judicial Watch, Inc.</td>
<td>1</td>
</tr>
<tr>
<td>3. American Center for Law &amp; Justice</td>
<td>4</td>
</tr>
<tr>
<td>4. African-American Pastors in California</td>
<td>1</td>
</tr>
<tr>
<td>5. Coverdale (John) et al.</td>
<td>7</td>
</tr>
<tr>
<td>6. Kmiec (Douglas W.) et al.</td>
<td>6</td>
</tr>
<tr>
<td>7. National Legal Foundation</td>
<td>1</td>
</tr>
<tr>
<td>8. Becket Fund for Religious Liberty</td>
<td>1</td>
</tr>
<tr>
<td>9. California Ethnic Religious Organization for Marriage</td>
<td>1</td>
</tr>
<tr>
<td>10. Church of Jesus Christ of Latter-Day Saints et al.</td>
<td>4</td>
</tr>
<tr>
<td>11. Pacific Justice Institute</td>
<td>1</td>
</tr>
<tr>
<td>12. Jews Offering New Alternatives to Homosexuality et al.</td>
<td>3</td>
</tr>
<tr>
<td>13. United Families International et al.</td>
<td>3</td>
</tr>
<tr>
<td>14. Wilson (James Q.) et al., Legal and Family Scholars</td>
<td>14</td>
</tr>
<tr>
<td>15. Leland Traiman and Steward Blandon</td>
<td>2</td>
</tr>
</tbody>
</table>

Table 5  **First Sponsors Categorized**

<table>
<thead>
<tr>
<th></th>
<th>Petitioners</th>
<th>Totals</th>
<th>Respondents</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>16,17,18,19,20</td>
<td>5</td>
<td>Individual</td>
<td>5,6,15</td>
</tr>
<tr>
<td>Citizens Groups</td>
<td>1,2,4,7,22,23,2</td>
<td>13</td>
<td>Citizens Groups</td>
<td>1,2,3,4,8,10,12,13</td>
</tr>
</tbody>
</table>
An interesting finding in Behuniak-Long’s study that is consistent with my findings concerns the filings by multi-issue interest groups versus single-issue interest groups. Behuniak-Long found that amici filing in support of appellants, (for the Missouri statute and the overturning of Roe), were often single-issue organizations. Some of the organizations included: Catholics United for Life, et al., and American Family Association. Their strategy encompassed filing individual amici briefs as well as a larger number of briefs. Whereas, amici filing in support of appellees, (and against the restrictive law), were mainly multi-issue organizations including: the American Civil Liberties Union et al., and Planned Parenthood Federation, et al. As Behuniak-Long explains, appellees strategy consisted of favoring coalition forming wherein each group argued points most in line with their interests and expertise.  

In comparison to the amici filings in *In re Marriage Cases (2008)*, the amici filing in favor of Respondents, and against SSM, like the appellants in *Webster*, were mainly single-issue organizations who opted for a similar strategy of submitting individual briefs as opposed to collaborative briefs. The amici filing in support of Respondents included: African-American Pastors in California and Church of Jesus Christ of Latter-Day Saints, et al. The briefs submitted in favor of Petitioners, and in support of SSM, were often multi-issue organizations including: the

---

250 Behuniak-Long, Friendly Fire, 263.
American Civil Liberties Union, Anti-Defamation League, et al., and the American Psychological Association, et al.

In reviewing the amount of amicus briefs filed, and their sponsors, it is clear that the Petitioners had many more organizations supporting their cause than did the Respondents. While there were 30 amicus briefs in favor of SSM and 15 against and as the Table above details in terms of sponsors signing on to the briefs, there were 624 amici in favor of SSM compared to only 50 against.

**Arguments made by parties to the case**

The issue before the Court in *In re Marriage Cases (2008)* differed from other state Court cases that took up the issue of SSM because, as the Court stated, California had in place a domestic partnership law that provided virtually all the same rights as marriage. The question was whether the failure to designate the official relationship of same-sex couples as marriages violated the California Constitution. Respondents put forward a diverse array of arguments against same-sex marriage. The State of California, in their brief, argued that under a rational basis standard the marriage laws satisfy equal protection because the State may preserve traditional marriage while affording the same benefits to same-sex couples through the domestic partnership law. As they discussed in their brief, the right being decided about is in substance not form and the term “marriage” is not necessary because domestic partnership is available which provides same-sex couples all of the same fundamental rights. The Court in their decision weighed the existence of the domestic partnership law utilizing several amicus briefs that laid out exactly what rights and benefits are available through this law. The Court ultimately found that by not using the official family relationship term, the equal dignity and respect that is a core element of the constitutional right to marry is not being given to same-sex couples. And further,
that not allowing same-sex couples the right to marry sets these couples apart as second-class citizens.

In his work, “Defining Marriage in California: An Analysis of Public and Technical Argument,” Edward Schiappa looks at the arguments made by the parties in In re Marriage Cases (2008) as well as the amicus curiae. The four main lines of argument that he concluded received the most attention by both sides included: 1. Equal protection, 2. Marriage as a fundamental interest, 3. The role of judicial review and separation of powers, and 4. Competing definitions of marriage.\textsuperscript{251} The parties did not spend much time in oral argument or in their briefs arguing that same-sex marriage will lead society down a path towards incestuous or polygamous marriage nor did they spend much time on the religious freedom argument. These two arguments have been made in prior state law cases on the issue of same-sex marriage. However, the argument concerning religious freedom was taken up by three of the amici for respondent which I discuss in the next section.

The main points argued in the brief by Governor Arnold Schwarzenegger was that the marriage law does not discriminate based on gender because it does not favor one gender over another. And, both the State and Governor also argued that the any change in the status of marriage should be left up to the legislative process. The Proposition 22 Legal Defense and Education Fund (the Fund) and the Campaign for California Families (Campaign) argued mainly procedural matters in their briefs based on a request for declaratory relief. The Trial Court had originally ruled that the Fund and the Campaign had adequately stated claims for declaratory relief concerning the constitutionality of the marriage laws. However, the Supreme Court of California disagreed and ruled that both parties cases should have been dismissed because they lacked standing.

The Fund argued that the only family that can be encompassed by the Constitutional right to marry is one headed by a woman and man and that marriage is linked to procreation. The Court addressed the procreation argument ultimately finding that a person physically unable to bear children still has a constitutional right to marry. The Fund also argued that removing the relationship between marriage and procreation would “send a message” to the public that it is immaterial that a child be raised by their biological mother and father. To this argument, the Court stated that an interpretation of the, “Constitutional right to marry simply confirms that a stable two parent relationship, supported by the state’s official recognition and protection, is equally as important for the numerous children in California being raised by same-sex couples, as for those being raised by opposite sex couples.” The Court then cited directly to an amicus brief filed by M.V. Lee Badgett and Gary Gates, in support of Petitioner, providing Census data for lesbian and gay couples raising children in California.

Petitioner City of San Francisco’s main arguments revolved around the separate but unequal status of the domestic partnership law in California. Further, they argued that the marriage ban was not rationally related to a legitimate government interest. And that limiting marriage to opposite sex couples violates same-sex couples “right to marry” as guaranteed by privacy, free speech and due process of the California Constitution. Additionally, they argued that banning same-sex marriage violates the equal protection clause of the California Constitution. The bulk of Petitioner Clinton’s argument was for the Court to utilize strict scrutiny in analyzing the marriage ban because sexual orientation fits within a suspect class. Petitioners also argued for a strict scrutiny analysis based on the fact that the ban discriminates on the basis of sex (or gender) and based on sexual orientation and lastly that it impinges on a fundamental right. The Court disagreed with Petitioners argument that it is sex or gender

252 In re Marriage Cases, 78.
discrimination but instead found that the ban discriminated against sexual orientation which they stated triggered a strict scrutiny analysis.

The Court’s response to amici throughout their decision seems to provide a glimpse into how they will decide the case. In their reasoning as to the type of discrimination that the California marriage statute imparts, that it is not just disparate treatment but separate “classification”, they cite the American Psychological Association (APA) brief in support of same-sex marriage. The Court utilizes the language by the mental health organizations that participated in the APA brief in finding that sexual orientation is not merely an individual characteristic but a relational one that is an essential component of personal identity. The Court also finds that, “In addition to sexual behavior, these bonds encompass nonsexual physical affection between partners, shared goals and values, mutual support, and ongoing commitment.” This line of reasoning underlies the Court’s finding that same-sex couples should be entitled to enter into a marriage as part of a fundamental liberty interest.

**Breakdown of Amicus Arguments**

I have broken up the arguments and counter-arguments by the amici into different categories:

*Issue 1- Traditional Marriage should be upheld based on history*

Almost every amicus brief in favor of Respondents position argued that history and the long-standing tradition of marriage between a man and a woman should be upheld. On the contrary, the Unitarian Universalist’s brief in support of Petitioners, argued that historically there has been acceptance of marriages between people of the same-sex and that the lack of evidence of same-sex marriage historically goes to prove the discrimination against this group. Amici for Petitioner also argued that the historical reference to the meanings of marriage be it

---

253 *Id.* at 94.
contractual status or benefits to children, prove the importance of this institution and the need for same-sex couples to be a part of it.

**Issue 2: This issue should be resolved through the legislature not the Courts.**

The issue of judicial review was taken up by the parties to the suit as well as several amici such as a brief by four major religious groups: The Church of Jesus Christ Latter Day Saints, California Catholic Conference, the National Association of Evangelicals, and the Union of Orthodox Jewish Congregations of America. In their brief they argued that it is within the strong traditions of California for people to be actively involved in fashioning public policy and that the issue of public policy should not be resolved by the Court but left to the democratic process. The Court in it's holding discussed the issue of judicial review stating that the question of access to civil marriage is not one of social policy but of constitutional interpretation which is within the Court's authority to decide.255

**Issue 3: Prior precedent of race is not analogous to sexual orientation**

Several amici in support of Respondents distinguished the present marriage ban and the prior court rulings in *Perez* (1948) and *Loving* (1967). The former, a California Supreme Court case and the latter, a U.S. Supreme Court case, striking down anti-miscegenation laws. African American Pastors in California, in their amicus brief, distinguished the race-based classifications that were struck down by the Courts as different than sexual orientation because as they argued laws defining marriage between a man and a woman are rooted in biology and reproduction.

**Issue 4: Marriage is for procreation and childrearing**

In their brief in favor of Respondents, the amici The Church of Jesus Christ of Latter Day Saints, laid out a number of arguments that were very similar to the parties briefs such as: the importance of the democratic process by which the marriage law was approved, reasons why strict scrutiny should not apply, and lastly, the importance of the traditional family for

---

255 *Id* at 110.
childrearing. They cited to another amici brief, by James Q. Wilson, et al., concerning the many problems children raised in single parent or fatherless households face. James Q. Wilson and the legal and family scholars that signed on to the amicus brief, argued at length that the purpose of marriage is procreation.

The Court dismissed this reasoning however as fundamentally flawed. They stated that although the institution may have historically existed to promote a stable relationship for procreation, nonetheless the constitutional right to marry is not only available to those individuals who choose to procreate.

**Issue 5: Religious freedom**

African American Pastors of California, as well as other religious organizations who supported Respondents, argued that their freedom of religion would be impinged by allowing same-sex couples to marry because they would be forced to reform their views and teachings on homosexuality. Adding to this, The Becket Fund for Religious Liberty, submitted an amicus brief arguing that religious institutions will be sued in civil court for refusing to treat legally married same-sex couples as morally equivalent to married men and women. To the contrary, amici for Petitioners, the Council for Secular Humanism and Center for Inquiry, argued that because the marriage ban that is in place is grounded in religious belief, that runs afoul of the establishment clause of the U.S. and California Constitutions.

In responding to the religious freedom argument the Court stated that allowing same-sex couples to marry will not infringe on the freedom of religion and no religious organization will be required to solemnize a marriage that is against their beliefs. Amici for Petitioners included 417 religious organizations and religiously affiliated individuals who supported extending marriage rights to same-sex couples. And the Court noted in their decision that religious groups were divided in their support of the same-sex marriage.

---

256 *Id* at 117.
**Issue 6: Domestic Partnerships are not enough**

There were several amici in support of the Petitioners, whose briefs were devoted to explanations of the differences between marriage and domestic partnership, including several Bar Associations. This was a strategic move as the Court considered the issue to be whether the state could impose the term “marriage” to opposite sex couples and “domestic partnerships” to same-sex couples. In other words, whether the failure to designate the official relationship of same-sex couples as marriage violated the California Constitution. In seeking to answer this question, the Court considered what rights were available to same-sex couples through the domestic partnership law.

**Issue 7: Marriage is valuable and harm is caused by not allowing same-sex couples to marry**

Several amici for Petitioner took up the issue of appreciable harm to same-sex couples and the children of these couples who are not being afforded the right to marry. The National Gay and Lesbian Task Force, in their brief, discussed the social value of marriage and the fact that same-sex couples are not allowed access sets them apart as inferior. The Court in their holding seemed to agree with both the value of civil marriage as well as the appreciable harm to same-sex couples and their families if they are excluded.

In her study, Behuniak-Long placed the amicus briefs she reviewed into three categories based on their purpose and whether they: repeat the arguments made by the parties to the case; provide specialized or technical knowledge to the court; or are what she calls, risk-takers who may be appealing to an emotional argument. This delineation is appropriate and useful to my present study of the amicus filing in *In re Marriage Cases (2008)*. The first, endorsement briefs mainly repeat the arguments by the parties. There were several amici who made the same arguments in their briefs as either Petitioner or Respondent, including many of the bar associations who reiterated the Petitioners arguments. The second type, providing specialized or technical support were part of the Court’s decision in varying degrees. The Court cited M.V.
Lee Badget’s amicus brief that included Census data on same-sex couples raising children in California. And the Court relied on the amicus brief by the American Psychological Association, et al., in defining sexual orientation and in expanding upon the right that is at stake as relational and concerning the right to choose one’s partner.

One amicus organization, Jews for an Alternative to Homosexuality, et al., who supported the Respondents, fit into all three categories, they argued against the suspect classification of sexual orientation because they stated this would stigmatize the many Californians who had changed their homosexual orientation. And further, they argued that gays and lesbians are not politically powerless. This seems to endorse the Respondents argument while adding an emotional or risk-taking element in stating that harm would be caused to those individuals who they claimed changed their homosexual orientation.

Another unique amicus brief on the Respondents side came from a same-sex couple raising children in California, Leland Traiman and Stewart Blandon. The main thrust of their argument which falls partly under endorsement as well as risk-taker is that domestic partnership is sufficient and that providing for marriage rights creates a backlash to the gay and lesbian community.

The Impact

While clearly tailoring their decision to the issues presented by the parties to the suit directly, the Court also responded directly to the amici often within the lengthy footnotes of their decision. In one instance, the Court stated that they would not respond to a procedural issue raised in an amicus brief submitted by the Pacific Justice Institute.257 This makes sense as matters such as these are generally more appropriately raised by either Petitioner or Respondent directly. And further, the Court did address this claim made by Respondent directly.

257 The Pacific Justice Institute questioned the right of the City to maintain a declaratory judgment action challenging the validity of the state’s marriage statutes. For a more lengthy discussion see In re Marriage Cases 43 Cal. 4th 757 (2008), 21.
The Court compiled a lengthy response to an issue raised by the amicus curiae American Center for Law and Justice (ACLJ). The ACLJ cited natural law theorist John Rawls who states that one of the essential functions of the family “is to establish the orderly production and reproduction of society and of its culture from one generation to the next” and that “[r]eproductive labor is socially necessary labor”.\textsuperscript{258} The ACLJ, who are against same-sex marriage, used this line of reasoning to back their claim that the purpose of marriage is procreation and therefore it should not be available to same-sex couples.

In response, the Court, extended the cited work of Rawls to its conclusion which worked against the ACLJ’s position. The Court pointed out that Rawls did not believe a “particular form of family (monogamous, heterosexual, or otherwise) was required so long as it is arranged to fulfill these tasks effectively and does not run afoul of other political values.”\textsuperscript{259} The Court continued citing Rawls:

This observation sets the way in which justice as fairness deals with the question of gay and lesbian rights and duties, and how they affect the family. If these rights and duties are consistent with orderly family life and the education of children, they are, ceteris paribus [all other things being equal], fully admissible.\textsuperscript{260}

In reviewing the amici briefs submitted to the Court, 30 of which were in favor and 15 against SSM, I was struck by the similarity of reasoning between the amicus brief submitted by Constitutional scholar William Eskridge and the Court’s legal reasoning. In his brief to the Court, Eskridge argues against the State’s position and for a finding of sex discrimination that should be subject to strict scrutiny under the legal precedent \textit{Sail'er Inn (1971)}\textsuperscript{261} and for the extension of the legal precedent in \textit{Perez (1948)}. Alternatively, he advances the idea that if it is not sex

\textsuperscript{259} Id at 163.
\textsuperscript{260} In \textit{re Marriage Cases}, 163.
\textsuperscript{261} Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1 (1971)
discrimination then it is discrimination based on sexual orientation triggering strict scrutiny in light of the state’s record of persecution.\footnote{262} After analyzing the sexual discrimination claim, the Court ultimately holds that the California marriage statute discriminates on the basis of sexual orientation which they find to be a “suspect class” triggering a strict scrutiny analysis.\footnote{263} This was the first high court in the U.S. to apply a strict scrutiny analysis to sexual orientation.

Further, in the Court’s holding they relied heavily on \textit{Perez}, focusing on the substance of the constitutional right at issue in that case and extending it to the present case; the importance to the individual to have the freedom to “join in marriage with the person of one’s choice.”\footnote{264} This is by no means surprising and Petitioner’s brief in support of same-sex marriage also relied heavily on \textit{Perez} to support their claim.

In conclusion, clearly, the California Supreme Court had enough legal precedent and factual evidence to support its holding. It is interesting to note, however, the relevance of the arguments advanced by amici and the ways in which these “lobbyists” may have influenced the Court’s decision. These “friends of the court” both educate the Court on social issues and provide legal reasoning that can hold sway in the Court’s decision. For interested groups and interest parties alike it is a valuable tool whose popularity only continues to grow.

The question of the existence of a Defense of Marriage Act is also notable. The California Court could rule this way because there was no Constitutional Amendment banning SSM, instead Proposition 22 was a part of the Family Code, and was not in the Constitution itself. Following this ruling was a rush to the clerk’s office where over 18,000 marriages took place in what was hailed as “the summer of love.”\footnote{265}

\footnote{262 Brief for William N. Eskridge p. 59, \textit{In re Marriage Cases} 43 Cal. 4\textsuperscript{th} 757 (2008).}
\footnote{263 \textit{In re Marriage Cases} 10.}
\footnote{264 \textit{In re Marriage Cases} 51. (emphasis in original)}
\footnote{265 See http://www.freedomtomarry.org/states/entry/c/california. last accessed July 10, 2012.}
Prop. 8

Before the ink was dry on the Court’s decision, opponents of same-sex marriage quickly went to work to override the decision. In truth, they had already been working on a way to overturn the Court’s decision, if it went against them. I unearthed this particular interest group strategy in an interview with one of the Attorneys for the Appellants, Robert Tyler, General Counsel for Advocates for Faith and Freedom. He also pointed out what he considered to be a strategy of proponents of SSM. He stated that then Attorney General Jerry Brown, who some might consider a “sympathetic local elite”, changed the name of Proposition 8 (Prop. 8) to make it less likely to pass. Proponents of Prop. 8, such as the organization Protect Marriage, originally titled the initiative “the California Marriage Protection Act.” They filed suit against the Attorney General for changing the name of Prop. 8 just prior to it going to the ballots, to “Eliminates Right of Same-Sex Couples to Marry Act.” Protect Marriage claimed that this was the first time a negative term, such as “eliminates” had been used in the 50 year history of statewide ballot measures.

There were several other, similar lawsuits, over such things as the wording of the booklets that went along with the ballot. In this instance, opponents of Prop. 8 argued that the ballot booklet overstated the fact that children would be taught that same-sex marriage was the same as traditional marriage. The Court agreed and ordered that the wording of the booklet be limited. But the name of the ballot remained the same.

Prop. 8, a constitutional amendment titled “Eliminates Right of Same-Sex Couples to Marry Act,” appeared on the 2008 California general election ballot in November 2008, and

267 Interview with Robert Tyler, June 2009.
passed with a 52% majority. This Amendment was brought as a citizen ballot initiative and effectively overruled the California Supreme Court’s decision from *In re Marriage Cases*, which stated that same-sex couples had a constitutional right to marry.

A great deal of attention was being paid to the Prop. 8 initiative all across the nation. Most notably was the large scale mobilizing effort by the Mormon Church, who provided institutional and volunteer support and raised over $25 million for the “Yes on 8” campaign being run by Protect Marriage in California.

The collective action component regarding SSM concerns both sides as they fight for eminence. The second element of POS, stability of existing political alignments comes into play in the context of SSM, specifically with the groundswell of activism that took place in California to pass Proposition 8. As stated earlier, the largest contributor to the Prop. 8 campaign, the Mormon Church, also known as, Latter Day Saints (LDS) ran the show by raising nearly $25 million from its members. Although LDS took the lead in California, they were backed by several large national organizations such as the Colorado based organization Focus on the Family which gave $623,000 to “Yes on 8” and the Mississippi based American Family Association (AFA) which gave $500,000. These national organizations were already aligned politically in the fight against SSM in other U.S. states and proved to be the stable political alliance that the SSM opponents needed to pass Prop. 8.

After its passage, a majority of politicians in California including: Governor Arnold Schwarzenegger, U.S. senators, Dianne Feinstein and Barbara Boxer, and congresswoman Nancy Pelosi, came out in support of SSM and against Prop. 8. In fact, the Democrat-controlled state Legislature took a legal stand against the law, passing a nonbinding resolution declaring

---

that voters alone did not have the right to amend the Constitution in this case. The resolution asserted that Prop. 8, is an improper revision to the California Constitution because it strips a minority group of a constitutionally protected right by only a majority vote.271

The strategies of the key interest groups involved in the large scale fight against Prop. 8 in California came under a great deal of scrutiny following its passage. This issue was addressed in my interview with Molly McKay, then National Media Director for Marriage Equality USA, who worked previously for Marriage Equality California. She stated that the “No on 8” campaign did not utilize the interest groups in the state that had already been working on the SSM issue. Further, that the strategy to use real same-sex couples images and stories, which she believed had been effective before, was not taken up by the national organizations behind the “No on 8” campaign. Instead they relied on professional consultants and, as Ms. McKay stated, they did not even involve the grassroots organization Marriage Equality California.272 This resonates with the aspect of the framing process that is so integral to a social movements success. Using real couples, some with children, who are seeking the right to marry, it could be argued, might resonate with the larger citizenry because marriage and family has a shared cultural meaning.

Same-sex marriage advocates acted swiftly to attempt to have Prop. 8 overturned by the Court. The California Supreme Court consolidated the different cases into one and took up the question of the constitutionality of Prop. 8 in the case Strauss v Horton (2009). The Court ruled in favor of Prop. 8, holding that it was an amendment to the Constitution not a revision and was valid as enacted.273 This was the specific question before the Court and it had significance because if it were a revision it would need the vote of 2/3 of each house of the state legislature to pass. As an amendment it was enough that Prop. 8 had the requisite signatures required to

272 Interview with Molly McKay, June 2009.
pass. In their decision, the Court went so far as to signal that other states and the federal
government have more rigorous processes for making changes to their Constitutions than
California does which in essence tied their hands.274

Interestingly, then California Attorney General Jerry Brown’s brief in the Prop. 8 case laid
out reasons why the Petitioner’s arguments were invalid, but he also went a step further. Most
of his arguments were straightforward and expected, he argued that it was an Amendment and
not a revision and was valid as enacted. However, he also asked the question, “Is the initiative-
amendment power wholly unfettered by the California Constitution’s protection of the People’s
fundamental right to life, liberty and privacy?”275 He argued that since the Court held In re
Marriage Cases (2008) that there was a constitutional right to same-sex marriage, that this
should impose the strict scrutiny analysis on the Court in deciding whether Prop. 8 abridges that
right. Attorney General Brown’s argument goes to the heart of the initiative process – whether it
can abrogate a fundamental right. This question was taken up by many Constitutional scholars
at the time.

The “direct democracy” element of the California Constitution constitutes an openness
and accessibility to government that ties into Political Opportunity Structure. California allows
direct participation of the electorate by initiative, referendum, recall, and ratification. This direct
democracy component exists in eighteen states, including Massachusetts and Colorado.
However, it is important to note that there are differing degrees of involvement of the legislature
in each state. Arguably, the openness and accessibility of California’s government was an
integral part of the passage of Prop. 8, which ended SSM in that state.

In an interview with Maggie Gallagher, the head of the anti-SSM National Organization
On Marriage, concerning this very concept, she discussed the factors that stand out as most

______________________________
274 Ibid.
275 For a more in depth analysis of Attorney General Brown’s brief see Vikram Amar and Alan
important to the ways in which these three states have legislated on same-sex marriage. She stated, “The biggest single difference is how open the system is to ordinary voters. If Massachusetts had had a referendum process, as California does, Massachusetts would not have gay marriage.”  

As discussed in Chapter 3, the second element of POS concerns uncovering new formerly passive allies, and utilizing existing political alignments. The protesting group puts issues on the agenda that other groups identify with showing the usefulness of collective action that in turn expands opportunities for others to participate. An interesting example of this element is illustrated in the next legal action to take place in California on SSM.

**Perry v. Schwarzenegger**

Days before the *Strauss* decision, the American Federation for Equal Rights filed suit in the U.S. District Court for Northern California to challenge Prop. 8 on behalf of same-sex couples. The attorneys, David Boies and prior U.S. Solicitor General Theodore Olsen were formerly on opposing sides in the case of *Bush v. Gore (2000)*.277 The main SSM proponents up until this point, the A.C.L.U., Human Rights Campaign, LAMDA Legal and the National Center for Lesbian Rights had originally gained the right to SSM in California through litigation, were against the filing of this suit stating that it was not the right timing for a Federal challenge. Nonetheless, these formerly passive allies, convinced of the merits of the equal protection and due process arguments, proceeded with the case.

In an interview with Robert Tyler, General Counsel for Advocates for Faith and Freedom, an anti-SSM organization, he discussed this particular legal action. He stated that officials such as Governor Schwarzenegger and then California Attorney General Jerry Brown, refused to do their jobs, which was to defend Prop. 8. In fact, they successfully

---

276 Interview with Maggie Gallagher, July 2009.
petitioned the Court to be removed as defendants. Instead, the group that originally proposed Prop. 8, Protect Marriage, was allowed by the Court to intervene to defend the law.\textsuperscript{278}

In August of 2010, a federal court ruled in \textit{Perry v. Schwarzenegger}\textsuperscript{279} that the SSM ban was unconstitutional. The ruling, by U.S. District Judge Vaughn Walker, stated that there was no rational basis for singling out gays and lesbians for denial of marriage licenses.\textsuperscript{280} The decision was stayed pending appeal. In February 2012, the Ninth Circuit Court of California, in \textit{Perry v. Brown}, upheld the decision.\textsuperscript{281} This did not mean that marriage licenses were being issued again in California, the decision was stayed pending appeal.

The aforementioned offers many examples of the elements of social movement theory, most notably, that of political opportunity structure, legal opportunity structure, mobilization and framing processes. As I discussed in Chapter 2, some of the gaps in social movement literature include an examination of the role of contentious politics, and the cultural and ideational aspects of social movements. This is expounded upon by Fleischmann and Moyer who conducted a regression analysis of county level data to explain variation in local support for SSM bans in 22 states during 2004 and 2006. Their findings bolster the viability of cultural explanations of public policy decisions. However, as they state, their quantitative model doesn’t address the conflict that exists in day to day politics or specific mobilization strategies.\textsuperscript{282}

The mix of quantitative and qualitative research I conducted was useful in addressing some of the gaps in the literature. I move now to a discussion of some distinct examples of contentious politics, and the cultural and ideational aspects of

\textsuperscript{278} Interview with Robert Tyler, June 2009. \\
\textsuperscript{279} 704 F.Supp.2d 921 (N.D. Cal., 2010). \\
\textsuperscript{280} Following the decision, opponents of SSM argued that because Justice Vaughn Walker was gay, he should have recused himself from the case. \\
\textsuperscript{281} No. 10-16696 (9th Cir. February 7, 2012). \\
mobilization and framing strategies by both proponents and opponents of SSM.

Framing

Opponents of SSM were successful in their mobilization and framing strategies as evident from the passage of Prop. 8. The Mormon Church tapped into highly resonant religious and cultural meanings of marriage through their advertising. In one television commercial, church members appealed to the public to preserve traditional families. In other ads, Church leaders warned that SSM would ruin society and endanger souls and asked church members to mobilize to pass Prop. 8. Another successful mobilization strategy by the Mormon Church leading to the passage of Prop. 8 was to use a form of collective action culturally known to them – in this case asking for contributions during religious services. Further, asking church members to go door-to-door to collect the required signatures to put Prop. 8 on the ballot, tapped into an already pertinent cultural repertoire, the active service requirement for members of the Mormon Church.

Mobilization

Backing up a bit from the timeline of SSM in California, LAMDA Legal Defense and Education Fund, a national organization for LGBT rights, sponsored Freedom to Marry Day in February 1998. On that day, Molly McKay and her partner Davina Kotulski went to City Hall to attempt to marry. When they were denied a license they decided to make it an annual event. This denial along with the passage of Prop. 22, which I discussed earlier, prompted Molly McKay and her partner to create

---

Marriage Equality California (MECA). MECA was dedicated to fighting for SSM in California and along with organizing the annual protest at the clerk’s office, organized individuals across the state, and educated the public about discriminatory marriage laws in place. The National Freedom to Marry Day, a contentious political protest also utilized cultural aspects of marriage. Same-sex couples wore wedding gowns and tuxedos and lined up in City Halls throughout the U.S. to demand the right to marry.

In their study on culture and mobilization, discussed in Chapter 2, Taylor et al interviewed several leaders of social movement organizations who considered the San Francisco marriage protest a catalyst that led to rapid and large-scale mobilization of the marriage equality movement. One month after the protests ended the two major organizations in San Francisco, Equality California and Marriage Equality California joined forces under the Equality California banner to combine grassroots tactics with legislative and legal action.285

Another prime example of the ways in which cultural and ideational aspects impact mobilization and framing strategies within the SSM movement occurred once again at City Hall in San Francisco. In 2004, when the San Francisco County Clerk’s office began issuing marriage licenses to same-sex couples the national media took note and soon images of hundreds of couples waiting in line to be married began appearing all over the news. A national campaign was created on the internet to show support for these couples called “Flowers from the Heartland.” The cultural and ideational aspects of marriage was clearly something people across the U.S. could relate to as flowers, wedding bouquets and cards, congratulating the new couples,

poured in from people all over the world.\textsuperscript{286}

**Shifting Public Opinion**

There has been a dramatic shift in public opinion on SSM in California since Prop. 8 was passed. Polling as recent as February 2013 has found that registered voters in California now favor SSM by a 2-1 margin. The data shows that 61\% favor SSM and 32\% oppose it.\textsuperscript{287} As discussed earlier, Prop. 8 passed by a very slim margin of 52\% and it seems it passed during a time when views were shifting in favor of SSM.\textsuperscript{288}

The shift has been linked to the change in Latino voters’ attitudes toward SSM. Latinos make up 38\% of California’s population and in 2008, when Prop. 8 was being voted on, they were split on the issue of SSM at 50\% support. Just three years later, support for SSM by this group has risen to 56\% in favor of state recognition of SSM.\textsuperscript{289}

**The Road to the Supreme Court**

As mentioned previously, in May 2009, Conservative Republican Theodore B. Olsen and Democrat David Boies, brought suit in Federal Court in California against Prop 8 on behalf of American Foundation for Equal Rights. They did not begin the suit with the support of leading gay rights organizations, such as, the A.C.L.U., Human Rights Campaign, LAMDA Legal and the National Center for Lesbian Rights. In fact, these groups issued a statement condemning the suit because, as they stated, “the “Supreme Court typically does not get too far ahead of


\textsuperscript{289} See http://www.huffingtonpost.com/2013/03/01/californoia-latinos-favor-_n_2789185.html. last accessed April 10, 2013.
either public opinion or the law in the majority of states.” The strategy of these gay rights
groups was to fight for SSM state by state and because they had lost the Prop 8 battle at the
polls that was where they focused their efforts. What these groups especially feared was a
loss at the Supreme Court level pushing their fight back decades. As in the case of Bowers v.
Hardwick, in 1986, when the Supreme Court upheld Georgia’s sodomy statute. It was not until
17 years later, in the case of Lawrence v. Texas, that gay rights advocates had the opportunity
to once again challenge the sodomy laws this time successfully. The Supreme Court does not
like to overrule itself thus making a loss on the issue of SSM potentially very damaging to the
nation-wide grassroots effort.

Nonetheless, the case proceeded and in August 2010, a Federal Court ruled in Perry v.
Schwarzenegger that the SSM ban was unconstitutional. In his ruling, openly gay U.S. District
Judge Vaughn Walker, stated that there was no rational basis for singling out gays and lesbians
for denial of marriage licenses. The decision was stayed pending appeal. In February 2012, the
Ninth Circuit Court of California, in Perry v. Brown, upheld the decision. This has not meant
that marriage licenses are being issued again in California, the decisions were stayed pending
appeal.

In July 2012, proponents of Prop 8 appealed the decision to the U.S. Supreme Court.
The Supreme Court agreed to hear this case, now titled Hollingsworth v. Perry, along with
several challenges to DOMA from other states. Arguments began in March 2013 with a decision
in June 2013. The Supreme Court, in an unlikely alignment of Justices, ruled that the because
the California State officials had declined to appeal the trial court’s decision against them, the

292 704 F.Supp.2d 921 (N.D. Cal., 2010).
293 No. 10-16696 (9th Cir. February 7, 2012).
proponents of Prop 8, who were appealing the decision, were not the proper party before the Court. In essence, the Court was therefore unable to issue a ruling, and instead sent the case back to the Trial Court, which had previously ruled that Prop 8 was unconstitutional. The unlikely alignment of Justices included: Chief Justice Roberts wrote the majority opinion and was joined by Justice Scalia, and Justices Ginsburg, Breyer, and Kagan. The four dissenters, Justice Kennedy and Justices Thomas, Alito and Sotamayor stated that they would have ruled on the constitutionality of Prop 8. 295

The framing and mobilization of the SSM issues in California continue to rival that of any other state, most likely due to the celebrity culture within the state. After the passage of Prop 8, proponents of SSM put together a play focused on the original court case and a musical with a cast of many famous celebrities that went viral on the Internet and was viewed by millions of people around the world. 296

Chapter Summary

My research findings paint a complex picture of SSM in California and support the theoretical propositions under which my methodology was based. The research established a timeline for relevant legislative and/or judicial state action on SSM while the in-depth interviews created context for the timeline and for what was happening behind the scenes during these processes. The findings illuminated aspects of social movement theory and contextualized contentious politics, and cultural and ideational aspects of mobilization and framing strategies by both proponents and opponents of SSM. The amicus study that I conducted added a relevant layer of understanding of interest group strategy and influence on the state court process.

CHAPTER 7

Marriage Equality in Three States: America in Miniature?

This three-state study of same-sex marriage in the United States revealed some similarities and differences in the handling of this issue. The focus of this comparative study was on action taken by proponents and opponents of marriage equality in each branch of state government; various enactments including statutes, ballot initiatives and constitutional amendments; the development of litigation and public relations strategies by various interest groups; and last, but by no means least important, the public’s reaction to changes in same-sex marriage law and policy. My in-depth analysis of the experiences of these three states seeks to explain the variety of observed results. Colorado, Massachusetts and California each handled the issue of same-sex marriage differently, including the enactment of an all-out ban, the creation of domestic partnership benefits, and the historic move toward providing for same-sex marriage.

In this chapter I place the comparative findings in a framework of federalism and show how much the issue of marriage equality in the United States is intertwined with the nature of American federalism. The findings are also used to inform various aspects of the theories on social movements and the instrumental use of law to achieve social change. My research on same-sex marriage was informed by Doug McAdams’ work on social movements including: political opportunity, mobilizing structure and framing processes. This research adds to social movement theory through a systematic comparative case study that explores the strategic actions by interest groups involved in the same-sex marriage debate, in turn illuminating the role of social movements in a state’s policymaking decision on same-sex marriage. My study situates the actions in each state and the federal government within a legal mobilization
framework to provide a nuanced analysis of the entire process including interest group engagement in both the legal and political processes.

As discussed previously, Colorado, Massachusetts and California were chosen for the following reasons: they represent different geographical locations of the United States, they have different political cultures as indicated by the parties that control the state government, they each have very different law making processes, some allowing popular initiatives, and they represent three very different same-sex marriage outcomes. In this study, the dependent variable is the state’s political and legal responses to the issue of same-sex marriage. The key questions that motivated this research are: What factors accounted for the legal and political responses to same-sex marriage in California, Colorado and Massachusetts? What factors influence the strategic path taken by key interest groups on the issue of same-sex marriage? I was also interested in how the Federal Defense of Marriage Act affected state policymaking on same-sex marriage, if at all.

**Political Opportunity Structure**

The importance of political opportunity structure to proponents of SSM is evidenced from their strategy, in 1997, to bring suit in Vermont for same-sex marriage rights. In the article, “Toward a More Perfect Union”, Mary Bonauto, Attorney for Gay and Lesbian Advocates and Defenders, and lead counsel in Goodridge, is interviewed about the strategic choice of Vermont for beginning the slow process of securing same-sex marriage rights. As she discusses, Vermont’s Court was sympathetic to gay rights, as shown by a landmark second-parent adoption ruling in favor of a same-sex couples in 1993. Further, the Vermont state Constitution is difficult to amend making any legal victory for SSM proponents difficult to

---

overturn. The Vermont Supreme Court ruled in favor of same-sex couples’ rights in *Baker v. Vermont* (2000) but sent the case to the legislature which enacted Civil Unions, granting the same legal rights to same-sex couples but without the use of the term marriage.

Massachusetts was the first state to recognize same-sex marriage in the United States. As discussed in Chapter 5, proponents of SSM utilized several aspects of political opportunity structure (POS), especially openness and accessibility of government, stability of existing political alignments and sympathetic local elites. In an interview with Arline Isaacson, she pointed out that the foundation for the extension of SSM rights was laid prior to the *Goodridge* case being filed.299 Her organization, the Massachusetts Gay and Lesbian Political Caucus had been around for four decades, fighting for the rights of gays and lesbians since 1973. The work that this organization, and others, did on gay and lesbian rights in Massachusetts, including stabilizing political allies, made it a fertile ground for SSM litigation. The Massachusetts Gay and Lesbian Political Caucus lobbied legislators for decades prior to the *Goodridge* decision on a variety of issues important to the LGBT community including anti-discrimination legislation. The organization also participated in political campaigns, providing support to candidates that promised to be open to issues that were important to their gay and lesbian constituents.

As Isaacson pointed out, Massachusetts was chosen by proponents of same-sex marriage for bringing suit for several reasons including: the Massachusetts Constitution has broad protections for individual liberty and limits on government intrusion, there was no state law or constitutional amendment banning same-sex marriage, the state legislature was controlled overwhelmingly by Democrats, and the political climate was favorable in terms of other rights available to gays and lesbians. Several of these factors mattered as evidenced by Justice Margaret Marshall in her majority opinion in *Goodridge* where she points out, “The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than

299 Interview with Isaacson, Sept. 2009.
the Federal Constitution." Proponents of SSM seized the political and legal opportunity available to them in 2001 to bring suit for same-sex marriage rights.

This was also true, but with opposite results, in Colorado, where opponents of LGBT rights had operated largely unopposed for several decades. Due to the power that groups opposing SSM had in the state legislature and their support from largely sympathetic state court judges, there were fewer opportunities for LGBT groups to push for SSM in Colorado. Instead, SSM proponents set their sights on passing a designated beneficiary law. After the 2012 elections, when Democrats took over power in the State government, this led to a new political opportunity and an openness and accessibility of government within which SSM proponents were able to pass a Civil Union law.

Unlike Colorado, in California and Massachusetts, the groundwork for marriage equality was laid over time. As discussed in Chapter 6, sympathetic local elites such as San Francisco Mayor Gavin Newsom, opened up the institution of marriage in California to same-sex couples in 2004. The action by the Mayor was ruled to be an impermissible use of his authority by the State Court, but proponents of SSM persevered and brought suit for SSM rights. The way the right was framed by the plaintiffs in *In re Marriage Cases* (2008), turned out to be important since the California Supreme Court relied heavily upon their view of the legal issues in its holding. Legal Opportunity Structure (LOS), which I have discussed previously, was also important in this case. The plaintiffs utilized prior legal precedent by citing *Perez v. Sharpe* (1948) a California State Supreme Court case overturning interracial marriage bans. Plaintiffs utilized the *Perez* holding stating it was not simply allowing for a “right to interracial marriage” but instead granting the freedom “to join in marriage with the person of one’s choice.” In its holding, the California Supreme Court relied on this particular framing of the legal right. The

---

300 Goodridge 798 N.E.2d at 945.
302 *In re Marriage Cases*, 43 Cal.4th at 759.
influence of the Perez case was profound and it is the key to understanding how this unique legal opportunity was taken.

**Comparative Analysis of Amicus Curiae**

Based on a comparison of the amicus briefs submitted in the two main same-sex marriage cases, *Goodridge v. Dept. of Health* (2003) and *In re Marriage Cases* (2008), differences in strategies by SSM proponents and opponents become evident. There were more amicus briefs filed in *In re Marriage* than *Goodridge* with many more organizations signing on as parties to the briefs. Many of the same organizations filed in each case, but some of the main amicus arguments made in *Goodridge* in 2003, were less prevalent in *In re Marriage* in 2008. Most notably, the argument that homosexuality is immoral which was advanced by several religious organizations in *Goodridge*, was less common in *In re Marriage*. Instead, the religious argument against SSM in the California case revolved around religious freedom to not have to marry same-sex couples. This move away from the morality argument may be reflective of the changing nature of acceptance of gays and lesbians, especially in the time period between 2003 and 2008. Another difference in amici arguments in favor of same-sex marriage in *In re Marriage* that was not prevalent in *Goodridge* concerns the welfare of children if their same-sex parents cannot legally marry. While there where amicus in favor of Plaintiffs in *Goodridge* who made the argument that same-sex marriage was productive to the children of these families, in *In re Marriage* the Court specifically cited to the amicus brief in support of Petitioners who provided Census data for lesbian and gay couples raising children in California.

Unlike *Goodridge*, the opening up of the institution of marriage to same-sex couples through a Court decision in *In Re Marriage* did not last. Based on the stability of existing political alignments, openness and accessibility of government by way of the initiative process and wide-
scale mobilization by opponents of SSM proved successful in their push for the passage of Prop. 8. This brings me to another important factor – the ballot initiative process.

What stood out as a pertinent difference in each state’s response to SSM, mentioned by several of the interviewees, was the ballot initiative process. In both Colorado and California, the process was the same, but in Massachusetts this “direct democracy” process begins at the petition stage and requires a vote by the legislature in two separate legislative sessions. Maggie Gallagher, former President of the National Organization for Marriage, an anti-SSM group stated, “The biggest single difference is how open the system is to ordinary voters. If Massachusetts had had a referendum process, as California does, Massachusetts would not have gay marriage.”303 After the precedent-setting ruling in Goodridge, opponents were able to get the needed signatures at the petition stage, but proponents of SSM mobilized to stop the legislation from passing and thus SSM remained legal in Massachusetts.

Table 9 below details the comparative state responses to same-sex marriage in each state as well as whether there was federal court action taken in each state.

<table>
<thead>
<tr>
<th>State</th>
<th>State Law Ban</th>
<th>Constitutional Amendment or Ballot Initiative</th>
<th>State Court Action</th>
<th>Federal Court Action</th>
</tr>
</thead>
</table>

303 Interview with Maggie Gallagher, Sept. 2009.
305 Following the in re Marriage Cases decision and the opening up of civil marriage to gay and lesbians, opponents of same-sex marriage began a ballot initiative that overrode the State Court’s decision. The Proposition passed by a vote of 52.24% in favor and 47.76% against. See http://www.leginfo.ca.gov/.const/article_1. last accessed March 12, 2013.
306 Perry v. Schwarzenegger 628 F.3d 1191, (9th Cir. 2011).
As the table above illustrates, looking at the three states in a comparative context, some key factors begin to emerge that may account for the different outcomes on same-sex marriage. There was no state ban or Constitutional Amendment in Massachusetts prohibiting same-sex marriage which in turn allowed for state court action leading to same-sex marriage rights. Further, proponents of same-sex marriage in Massachusetts and California have been successful in the federal court arena. This is in contrast to Colorado where there is both a state law ban and a Constitutional Amendment banning same-sex marriage precluding any political or legal opportunity for pushing for same-sex marriage in that state.

**Framing**

A recent addition to social movement theory concerns the framing of political agendas and the discourses through which movement goals are articulated and conveyed to the larger public and state actors. The frame utilized by proponents of SSM in Massachusetts and California was the same – the idea that gays and lesbians are “just like you,” are families with

---

307 Colorado law requires a marriage to be between one man and one woman. Colorado will not recognize as valid same-sex marriages performed outside of Colorado, even if the marriage were legal under the jurisdiction where it was performed.

308 The Colorado Amendment banning same-sex marriage in the state began as a ballot initiative and passed by a vote of 55.02% in favor and 44.98% against. See http://www.leg.state.co.us/lcs/0506initrefr.nsf/0/23380a98467c22d48725715b00529593?OpenDocument. last accessed March 12, 2013.

309 Following Goodridge and the opening up of civil marriage to gay and lesbians, opponents of SSM, in 2005, gathered the necessary signatures for an Amendment banning SSM. The Amendment passed the first round of the Legislature in January 2005 but was defeated in the Second round by a vote of 151 to 45.


children who need protection, and are deserving of equal rights. In Colorado, however, the frame utilized by proponents of SSM was different. Perhaps because opponents of SSM held majorities in the state legislature and often had a sympathetic governor, the issue was framed in religious and moral terms and called for the exclusion of gays and lesbians from the institution of marriage. Proponents of SSM did not use the term “marriage” in attempting to secure rights. The designated beneficiary law, which was a steppingstone to Colorado’s Civil Union law, never refers to same-sex couples or the term “marriage.” In fact, the text of the Civil Union law which was recently passed in 2012, specifically states, “The Colorado Civil Union Act does not alter the public policy of this state, which recognizes only the union of one man and one woman as a marriage.”

The biggest opponent of same-sex marriage in Colorado is Focus on the Family, the largest evangelical Christian organization in the U.S. As discussed in Chapter 4, LGBT groups in the state adopted a religious frame of their own, organizing around the Soulforce which seeks, “Freedom from religious and political oppression for ALL of God’s children.” Further, LGBT activists in Colorado modified their frame and stopped using the term “Religious Right” to identify their opponents. They did this so as not to alienate LGBT persons and possible allies who were affiliated with religious groups. Becoming more inclusive of religious groups helped expand their base of support and increased their visibility in different communities.

\textit{Mobilization}


\footnote{See http://www.soulforce.org/. last accessed March 12 2013.}
Massachusetts and California both had state court rulings in favor of SSM rights, which in turn led opponents to seek to overturn the rulings through the initiative process. But the framing and mobilization, at this juncture, by proponents of SSM in California and Massachusetts was different and led to different results. As stated previously, after the Goodridge decision proponents of SSM were able to stop a vote on a Constitutional Amendment that would have banned SSM and over time they were able to defeat the ban altogether in the legislature. Proponents of SSM in Massachusetts utilized a grassroots strategy, reaching out to local and state legislators by scheduling meetings between LGBT families and their representatives. This strategy made an impact on legislators as evidenced from some of the reasons state representatives gave for changing their vote.” One Massachusetts State Senator, James E. Timilty, a Democrat, who had originally voted for a SSM ban, after meeting with same-sex families stated, “When I looked in the eyes of the children living with these couples, I decided that I don't feel at this time that same-sex marriage has hurt the Commonwealth in any way.”

In contrast, in California, proponents of SSM on the national level received criticism from state and local organizations for the way the No on Prop 8 campaign was run. In an interview with Molly McKay, former director of Marriage Equality California (MECA), she stated that the framing and mobilization of the No on Prop 8 campaign was responsible for the loss. Following the passage of Prop 8, her organization, which had merged with another to become Marriage Equality USA (MEUSA), conducted a survey and held community forums concerning the No on 8 campaign. McKay stated in a report issued by MEUSA that the national campaign failed to “utilize the grassroots community to its potential” and was “run by political consultants.” She stated further that the national strategy did not show the racially and religiously diverse face of the community and that it also did not show any of rural California. She also criticized the

choices made of where to run advertisements stating that this too figured into the loss – as few advertisements aired in rural areas of California. She specifically pointed out that the No on 8 campaign lacked a visible presence of LGBT families which, as discussed earlier, seemed to make all the difference in Massachusetts.

Legal mobilization in Colorado differed from the experiences of Massachusetts and California. Soulforce of Colorado directly confronted the Christian organizations that are against LGBT rights, most recently through what they call Equality Rides. They mobilize through what they term “relentless nonviolent resistance.” In April 2012, five members of Soulforce’s “Equality Ride” were arrested while visiting Colorado Christian University, where they were promoting LGBT acceptance.316 They also directly engaged their opponents with a visit to Focus on the Family on the same ride.

The power that the Conservative Christian presence has enjoyed in Colorado may be shifting. Maggie Gallagher summarized the strategies of her organization on the state and national level in the following way,

Find the people who care about marriage, organize them into a politically effective force. It’s not rocket science. We have a majority of people. What social conservatives have lacked is effective models for organization. Most Christian conservative organizations are not organizations that have the culture and skills to effect politics directly.317

The Federal Defense of Marriage Act

One of the questions I considered in my research concerned the effect, if any, the Federal Defense of Marriage Act (DOMA) had on state policymaking on same-sex marriage. It was a question I asked in the interviews and one I researched when looking at the legislative

317 Interview with Gallagher, June 2010.
history of state laws on SSM in Colorado, Massachusetts and California. The constitutionality of DOMA was recently challenged by proponents of SSM before the U.S. Supreme Court.

**Federalism**

Following the passage of DOMA, many states followed suit passing their own “mini-DOMAS” as state laws or Constitutional Amendments. In an interview with Mindy Barton, she discusses the presence of a Colorado law banning same-sex marriage which eventually led to the passage of a Defense of Marriage Act as a Constitutional Amendment. Although, as she stated, having a ban on same-sex marriage written into the Constitution precluded an opportunity to mobilize through the courts or legislature for same-sex marriage, it did not preclude pushing for civil unions. As Ms. Barton discussed, there were prior amendments put before the House that would have also banned civil unions but the Amendment that eventually passed did not specifically ban civil unions. This kept open a legal opportunity for LGBT activists to mobilize, as they did in 2012, to pass a Civil Union law.

In Massachusetts, SSM proponents mobilized to stop passage of a Defense of Marriage Act in the years prior to Goodridge (2003). The fact that there was no Defense of Marriage Act in Massachusetts allowed for a legal opportunity to bring suit for same-sex marriage rights. After the court ruled in favor of SSM in Goodridge, proponents of SSM once again mobilized to stop a Defense of Marriage Act which, in 2004, received the requisite votes to move forward. This DOMA would have precluded SSM but allow for civil unions. The measure was defeated in the next legislative session, in 2005, by a vote of 157-39.\(^\text{318}\)

As in the case of Massachusetts, there was no Defense of Marriage Amendment in California allowing for the legal mobilization of SSM proponents to bring a case for SSM rights. Although proponents were successful in the State Court, the ruling in Re Marriage Cases (2008)

was overturned by Prop 8. Prop 8, a Defense of Marriage Amendment, banned same-sex marriage in the state. The constitutionality of Prop 8 is currently before the U.S. Supreme Court.

As discussed previously, two federal appeal courts struck down DOMA, paving the way for the U.S. Supreme Court to consider hearing the case. The U.S. Supreme Court granted certiorari in *U.S. v. Windsor* (2012) and in addition to the main question, whether section 3 of DOMA violates the equal protection clause of the U.S. Constitution, the Court also considered whether the government's agreement with the Second Circuit's decision deprived the court of jurisdiction to hear the case, and whether the Bipartisan Legal Advisory Group (BLAG) had standing to bring the case.319 The second case that the Supreme Court decided to hear concerns the constitutionality of Prop 8, the ballot initiative passed in California in 2008 that effectively banned same-sex marriage in that state.

In March 2013, oral arguments were presented in both the DOMA and Prop. 8 case. The role of federalism in the SSM cases is evident from the Justices themselves. During oral argument in the Prop 8 case, Justice Anthony Kennedy, considered the possible swing vote for the issue, expressed his federalism-based concerns in the following way, “The question is whether or not the federal government under our federalism scheme has the authority to regulate marriage.”320 And in the DOMA case, Justice Sonia Sotomayor asked, “What gives the federal government the right to be concerned at all about what the definition of marriage is?”321 The Federalism argument goes even deeper when we consider the fact that the Obama Administration decided that it would not defend DOMA.

In July 2013 the U.S. Supreme Court issued rulings in both cases, *Windsor v. United States* and *Hollingsworth v. Perry*. Both decisions were hailed as a victory for proponents of

same-sex marriage and both were considered to bolster state sovereignty. In *Windsor*, the U.S. Supreme Court struck down Section 3 of the Defense of Marriage Act as unconstitutional under the Equal Protection clause of the Fifth Amendment. Section 3 of DOMA defines marriage as: “only the legal union between one man and one woman as husband and wife.” In their decision, the Court noted that the definition and regulation of marriage has traditionally fallen under the purview of the states.

In *Hollingsworth v. Perry*, the Court rules that because California State officials had declined to appeal the trial court’s decision against them, the proponents of Prop 8, who were appealing the decision, were not the proper party before the Court. The Court therefore was unable to issue a ruling, and instead sent the case back to the Trial Court, which had previously ruled that Prop 8 was unconstitutional. This has meant that same-sex marriage is once again legal in California.

The success by proponents of SSM in both cases before the U.S. Supreme Court was tied to the distaste for Federal involvement in marriage, considered by many to be a state issue. Federalism relates both to the limits on the federal government in areas traditionally left or reserved to the states expressed by the Tenth Amendment to the U.S. Constitution and the ability of states to set their own laws and policies on such matters as marriage. The Tenth Amendment does not specifically outline what areas should be left up to state regulation but family law, including marriage, has traditionally been considered one such arena.

In his article, “Abandoning Bedrock Principles? The Musgrave Amendment and Federalism,” John Bash discusses the ways in which state sovereignty, an historical component of the development of the United States, remains integral to the American republic despite the increasing interconnectedness of the states. As he argues,

---

despite the fact that conservatives have often championed states’ rights, especially in the context of moral issues such as abortion, when it comes to same-sex marriage, they have reversed course and favored a national solution in the form of DOMA.\textsuperscript{324} This is in large part due to what conservatives have hailed as the rise of judicial activism, in such cases as \textit{Goodridge} (2003). However, Bash finds the move towards a national solution for defending marriage as misplaced. As Bash points out, federalist principles are advantageous,

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.\textsuperscript{325}

Further as Bash argues, federalism supports democratic principles by encouraging citizen involvement in law-making processes. This is evident in the states that I studied where direct citizen participation affected the outcome of each state’s stance on SSM. In California, after the decision in \textit{In Re Marriage Cases} (2008), legalizing SSM in the state, citizens were able to go directly to the general electorate to vote on the issue, ultimately overturning the Court’s decision. This accessibility of government is also available to proponents of SSM, who could initiate a petition to over turn Prop 8.

In her work, “Same-Sex Marriage and Federalism,” Nancy Knauer states, “Federalism provides states the freedom to experiment with novel solutions to pressing social issues.”\textsuperscript{326} She cites to Justice Brandeis’ view of Federalism, “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”\textsuperscript{327} Massachusetts was such a laboratory, with a Constitution that provided

\textsuperscript{325} \textit{Id.} at 988.
\textsuperscript{327} Knauer discussing \textit{New State Ice Co. v. Liebmann}, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
for more protection of individual rights. This state turned out to be the correct state for experimenting on the issue of same-sex marriage rights with no real risk to other states. As Knaeur rightly points out, states have not been uniform in their handling of SSM with the vast majority of state’s banning SSM and prohibiting recognition of out of state same-sex marriages.

Knaeur contends that federalism is not by nature progressive and has been used historically to uphold such things as the discriminatory Jim Crow Laws. She considers federalism an imperfect institutional choice because the state level protections sought by SSM proponents are not portable and are vulnerable to being overturned through majoritarian measures, as evidenced in California by Prop 8.

Knaeur discusses the real life impact of this vulnerability to same-sex couples and families, four out of five of whom live in a jurisdiction without relationship protections. Knaeur identifies the 1138 federal statutory provisions that give rise to various marital benefits such as joint tax rates and social security spousal benefits. She states that before DOMA was enacted, there was no federal definition of marriage and the validity of marriage was left to the states to determine. As Knaeur argues, the validity of DOMA under the Full Faith and Credit Clause of the U.S. Constitution is in question and may very well be answered this coming June 2013 by the U.S. Supreme Court.

Nonetheless, the diverse handling of same-sex marriage by the three states I studied, supports Brandeis’ original vision of Federalism, for states to act as laboratories for social experiments. Whether choosing to pass a Defense of Marriage Amendment that leaves open the possibility for civil unions in Colorado; providing same-sex marriage rights via a judicial determination in Massachusetts; or utilizing the petition process to overturn same-sex marriage rights in California, each state has determined their own course of action on this issue.

---

328 Id. at 106
329 Id. at 103.
CHAPTER 8

Conclusion

The purpose of this research was to shed light on what accounts for the different paths Colorado, Massachusetts and California have taken when it comes to recognizing or banning same-sex marriage. To illustrate the variety of ways states have handled same-sex marriage, I conducted a comparative case study. The three states I studied have handled and continue to handle the issue of SSM differently, from granting full marriage benefits to same-sex couples, to passing a constitutional amendment banning same-sex marriage, to providing civil unions, which allot certain rights, but not full marriage rights, to same-sex couples.

I began by surveying the literature on legal mobilization and social movements. Specifically, I explored the framework called Political Opportunity Structure (POS) developed by Sidney Tarrow and Legal Opportunity Structure developed by Ellen Andersen and Social Movement theory. They provide a useful theoretical lens for studying the actions in California, Colorado and Massachusetts. Within POS are three major elements: Political Opportunity, Mobilization Structure and Framing Process.

The legal world of gay and lesbian rights claims appears to change almost daily as new cases are filed using various legal theories and Courts hand down decisions on same-sex marriage claims. Comparing the key factors at play in the legal strategies and decisions of the three states to be studied, and the current federal law and Supreme Court cases relevant to this issue, can offer insight into other state’s currently navigating this bumpy terrain. The interaction
between the three branches of government, interest groups and other stakeholders in the same-sex marriage debate provides a useful example for studying the ways in which the political process functions. As discussed previously, the vast amount of policymaking around this issue changes daily as states, private institutions and individuals try out new policies and get rid of old policies around marriage and rights.

I conducted interviews with key informants on either side of the SSM issue in each state and situated the strategies within the theoretical framework of POS, LOS and Social Movement theory. Differences in strategies, political process and SSM outcomes became apparent thus shedding light on the underlying variables I studied. The findings inform various aspects of the theories on social movements and the instrumental use of law to achieve social change. My comparative study of amicus filings in the two major SSM cases in Massachusetts and California adds to the literature on social movement theory by highlighting an important avenue for interest groups to sway court decision in their favor. All of these findings also reveal the ways in which contextual possibilities, regime structures, and state responses shape the opportunities for movement action and effectiveness, as set forth in McAdam’s work on social movements. Whether or not a same-sex marriage ban has been enacted also affects the strategic choices of the interested parties. For example, prior to suing the Massachusetts Department of Health for same-sex marriage rights, advocates spent their resources stopping a same-sex marriage ban from being enacted in the legislature. Taking a comparative perspective, this differs from the strategic possibilities in Colorado, where two different same-sex marriage bans may figure prominently in the inaction at the Judicial and legislative level on same-sex marriage rights.

This research adds to social movement theory through a systematic comparative case study that explores the strategic actions by interest groups involved in the same-sex marriage debate, in turn illuminating the role of social movements in a state’s policymaking decision on same-sex marriage. My study situates the actions in each state and the federal government
within a legal mobilization framework to provide a nuanced analysis of the entire process including interest group engagement in both the legal and political processes.

The movement for marriage equality utilized a bottom-up state approach to gaining rights. This strategy has been effective because some State Constitutions have been interpreted to provide for greater equality for its citizens than is now recognized under the 14th Amendment of the U.S. Constitution. At the same time, this approach of turning to state constitutional law for recognition of marriage equality has been time-consuming, especially when one considers that the first such lawsuit for same-sex marriage rights occurred in Minnesota in 1970, over 40 years ago.

The institution of marriage is a socially held value crossing class and cultural norms. Socially held values concerning the traditional definition of marriage lends itself to some form of legislation and makes sense in light of the weight that marriage plays in society. As the Court stated in *Goodridge*, “Marriage brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits.”

Same-sex marriage raises countless legal, political and societal implications as this issue continues to be debated in courtroom, on legislative floors, in hearings and among individuals world-wide. The stakeholders are numerous and include gay and lesbian couples wishing to marry, children of gay and lesbian parents, religious groups who stand in opposition, politicians, and corporations and other organizations employing gays and lesbians, to name just a few.

Although the issue of SSM has received a great deal of attention in the past few years, few comparative state studies have been conducted on this issue. The interdisciplinary approach to this subject and the empirical analysis I utilized uncovered the paths used by different groups to accomplish their policy goals. Through interviews, I uncovered the reasons SSM advocates on the national level chose to turn to the Courts in Massachusetts to pursue

---

their goals. This legal strategy was also successfully utilized in California by SSM proponents. However, unlike Massachusetts, the legal strategy was more vulnerable to the petition process in California and through interviews I unearthed the pertinent factors leading to the success by SSM opponents in turning to voters via the petition process to pass a same-sex marriage ban.

Through interviews and legislative research, I unearthed the fact that proponents of SSM in Colorado, knowing that they did not have any meaningful opportunity to push for marriage – utilized a successful legislative strategy to advance civil unions. The reasons highlight the theory which grounded my study - legal and political opportunities opened up when democrats won control over the House and Senate in Colorado. And having already established an ally in Democratic Governor John Hickenlooper, who expressed support for the law in prior years, the civil union law was passed. This is truly remarkable given Colorado’s Conservative history and anti-LGBT sentiment leading up to the passage of Amendment 2 and the easy passage of a Defense of Marriage Amendment. My research supports Tarrow’s proposition that the relationship between how states change and how this affects political opportunity is a dynamic one. He states that when states undergo changes this affects the ability for interest groups to utilize collective action strategies.331 This was certainly the case in Colorado.

Further, the data collection on specific legislative and judicial changes occurring in these specific states as the comparative amicus study I conducted, adds to what Tarrow considers to be lacking in social movement study – to relate social movements to contentious politics and to politics in general.332 This systematic comparative case study on the issue of same-sex marriage contributes substantially to the literature on policymaking and social movement theory. The content analysis I conducted on the state and national newspapers, interest group policy briefs and information on their websites, also provides information useful to a discussion of what McAdams considers integral to social movements, the framing of political agendas and the

331 Id at44.
332 Tarrow, 3.
discourses through which movement goals are articulated and conveyed to the larger public and state actors. In order to fully discover and discuss the framing of the political agendas and conveyance of articulated goals by movement actors, I asked key informants, members of interest groups on either side of the same-sex marriage debate, specific questions regarding their purposeful articulation of their goals to state actors and to the broader public. I tracked same-sex marriage litigation for the three states via each state court’s website. Similarly to the legislative policy search results, the court record identifies the interested parties, attorneys for and against same-sex marriage, as well as amicus curie or “friend of the court’ briefs. I studied the amicus briefs submitted to the Court in the two major SSM cases, Goodridge (2003) and In re Marriage cases (2008) to ascertain the legal strategies employed and to see the effect these parties have on the outcome of the case.

The same-sex marriage issue continues to be litigated, legislated and negotiated on the national and international level. The U.S. Supreme Court issued opinions on the Constitutionality of the Defense of Marriage Act and Prop 8, strengthening my underlying proposition – that it is within the “divided states” that the ultimate resolution of marriage equality will fall. But regardless of the Court’s decision, studying this issue presents a complex picture of the dynamic relationship between federalism, the American political process, legal mobilization and social movement theory.
Appendix A – Interview Talking Points

Northeastern University, Law and Public Policy program
Name of investigator: Margaret “Gram” Crehan
Title of Project: The Divided States of America: A Comparative Case Study of Same-Sex Marriage in the U.S.

1. Overview of the research study, discussion of purpose of study and Consent form

2. Background Information
   - Brief introduction
   - What type of work do you do, length of employment (in office), mission goals of org. /or legislative platform
   - What is your official position on same-sex marriage

3. Timeline of events re: LGBT Rights and Same-Sex marriage (SSM) in the state
   - What is the current status of LGBT rights and SSM in your state (for example is there a hate crime statute that includes sexual orientation, is there an employment non-discrimination act)
   - Describe the process in your state leading to the current State law/policy on same-sex marriage
   - What stands out as most pertinent – lead to shifts that occurred
   - What role did you/your organization play in getting to the current policy

4. Strategies
   - What specific strategies did you/your organization employ in support of or against same-sex marriage in your state
   - Which strategies do you think were most effective and why
   - How did you use the media to articulate your goals
   - What role, if any, did the existence of a State Defense of Marriage Act make in process
   - What role, if any, did the existence of a Federal Defense of Marriage act play in your state’s current policy concerning SSM

5. Future Work
What direction do you see you/ your organization going in re: SSM
What do you see as pros/cons of this direction

6. Anything we haven’t covered that you think is pertinent

Bibliography


Brief of Amicus Curiae for Religious Groups, Individuals and a Fraternal Organization in Support of Defendants. Goodridge


Hawaii State Constitution, Article I, section 23, Hawaii Legislative Reference Bureau.


In re B.L.V.B. 160 Vt. 368 (1993).

In re Marriage Cases 43 Cal.4th 757 (2008).

Interview with Arline Isacson, Sept. 2009.

Interview with Brian Camenker, Aug. 2009.

Interview with Maggie Gallagher, Sept. 2009.

Interview with Mindy Barton, Aug. 2009.

Interview with Molly McKay, July 2009.

Interview with Robert Tyler, June 2009.


Perez v. Sharpe 32 Cal. 2d 711, 198 P. 2d 17 (Cal. 1948).


Perry v. Schwarzenegger 628 F.3d 1191, (9th Cir. 2011).


Re Same-Sex Marriage 3 S.C.R. 698, 2004 SCC 79.

Reilly, Peter J. “Seventy Major Employers Line up against DOMA.” Forbes Nov. 4, 2011.


Sail'er Inn, Inc. v. Kirby 5 Cal.3d 1 (1971).


