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Transformative Events in the LGBTQ Rights Movement

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ABSTRACT

Obergefell v. Hodges, the 2015 Supreme Court case holding that same-sex couples had a constitutional right to marry under the Due Process Clause of the Fourteenth Amendment, was widely hailed in the media as a turning point for the LGBTQ rights movement. In this article, I contemplate the meaning of turning points. Social movement scholars have shown that specific events can, on rare occasion, alter the subsequent trajectory of a social movement. Such events have been termed 'transformative events.' I ask whether judicial decisions have the capacity to be transformative events and, if so, under what circumstances. I begin by developing a set of criteria for identifying a transformative event which I then apply to a handful of judicial decisions that, like Obergefell, have been described widely as turning points and/or watersheds in the struggle for LGBTQ rights. I show that judicial decisions do indeed have transformative capacities; that they can trigger dramatic and enduring shifts in social movements. In so doing, I add to the growing body of scholarship examining the relationship between judicial decisions and social movement progress.

INTRODUCTION

On June 26, 2015, the Supreme Court handed down *Obergefell v. Hodges*,[1] holding that same-sex couples had a constitutional right to marry under the due process clause of the Fourteenth Amendment. Media reporting on the case was quick to emphasize its historic significance. For example, a *New York Times* editorial published the day after the decision proclaimed that *Obergefell* belonged next to *Brown v. Board of Education*[2] and *Loving v. Virginia*[3] in the pantheon of "landmark Supreme Court decisions reaffirming the power and scope of the Constitution's guarantee of equal protection under the law."[4] Other contemporaneous reports and editorials echoed this assessment, variously referring to *Obergefell* as a "watershed,"[5]

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1 135 S. Ct. 2584 (2015).
2 347 U.S. 483 (1954).
3 388 U.S. 1 (1967).
4 Editorial, *Marriage Equality in America*, N.Y. TIMES, June 27, 2015, at 20.
5 Editorial, *Upholding the Rule of Law*, WASH. POST, July 1, 2015, at A18.

a "milestone,"[6] a "transformative event,"[7] and "a historic culmination of decades of litigation."[8]

While we academics are slower to produce text than journalists, an emerging body of scholarly writing likewise treats *Obergefell* as an extraordinary moment in the movement for LGBTQ rights. Jeremiah Ho calls the case "the watershed civil rights decision of our time."[9] Toni Jaeger-Fine also views *Obergefell* as a watershed,[10] while Loren L. Cannon argues that the decision is "a turning point in our nation's history and its recognition of the value of lesbian and gay identities and relationships."[11]

My aim in this Article is to take the language of turning points and watersheds seriously. Social movement scholars have argued that events can, on occasion, change the trajectory of social movements in enduring fashions. In the words of McAdam and Sewell, *transformative events* are "specific and systematically explicable transformations and re-articulations of the cultural and social structures that were already in operation before the event."[12] In essence, transformative events "produce radical turning points in collective action and affect the outcome of social movements."[13]

Social movement scholars have chiefly been interested in the capacity of transformative events to dramatically increase or decrease mass mobilization.[14] But Aldon Morris's case study of the Montgomery bus boycott shows that transformative events can have other enduring effects as well. While the boycott did indeed spark massive mobilization by the African American community in Montgomery, it also "introduced and perfected an effective tactic, catapulted a charismatic leader into the forefront of the movement . . . sustained a movement for a considerable period of time, and produced a victory" as well as "launch[ed] the modern civil rights movement."[15]

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6 Richard Wolf & Brad Heath, *Supreme Court Strikes Down Bans on Same-Sex Marriage*, USA TODAY (June 26, 2015, 10:05 AM), http://www.usatoday.com/story/news/nation/2015/06/26/supreme-court-gay-lesbian-marriage/28649319/.

7 Warren Richey, *Gay Marriage Ruling Leaves Debate About Religious Liberty Wide Open*, CHRISTIAN SCIENCE MONITOR (July 5, 2015), http://www.csmonitor.com/USA/Justice/2015/0705/Gay-marriage-ruling-leaves-debate-about-religious-liberty-wide-open.

8 *Gay Marriage: Supreme Court Extends Same-Sex Marriage Nationwide*, DENVER POST, June 26, 2015, at 0Z.

9 Jeremiah A. Ho, *Once We're Done Honeymooning: Incrementalism, and Advances for Sexual Orientation Anti-discrimination*, 104 KY. L. J. 207 (2016).

10 Toni Jaeger-Fine, *Marriage Equality in the United States: A Look at Obergefell and Beyond*, 3 REV. DE INVESTIGAÇÕES CONSTITUCIONAIS 7 (2016).

11 Loren L. Cannon, *Privileges, Priorities, and Possibilities After Marriage Equality*, NEWS. ON LGBTQ ISSUES IN PHIL. (Am. Philosophical Ass'n), 2015, at 2.

12 Doug McAdam & William H. Sewell Jr, *It's About Time: Temporality in the Study of Social Movements and Revolutions*, *in* SILENCE AND VOICE IN THE STUDY OF CONTENTIOUS POLITICS 89, 102 (2001).

13 Aldon Morris, *Reflections on Social Movement Theory: Criticisms and Proposals*, 29 CONTEMP. SOC. 445, 452 (2000).

14 *See generally* Miniya Chatterji, *The Globalization of Politics: From Egypt to India*, 12 SOC. MOVEMENT STUD. 96 (2013); David Hess & Brian Martin, *Repression, Backfire, and the Theory of Transformative Events*, 11 MOBILIZATION INT'L 249 (2006).

15 Morris, *supra* note 13 at 452–53.

The 1969 Stonewall Riots similarly show that transformative events can have multiple enduring effects on the history of a social movement. The riots certainly served as a catalyst for widespread mobilization. Approximately fifty gay-related organizations existed nationwide at the time of Stonewall; four years later such organizations numbered in excess of 800.[16] But the impact of Stonewall extended beyond sheer numbers. Many of the people mobilized in Stonewall's aftermath had cut their activist teeth in the civil rights, women's liberation, and antiwar movements. When they turned their attention to the cause of "gay liberation," they brought the tactical repertoires, organizational templates, and collective action frames they had acquired in those other movements with them. These included adopting the concepts of "coming out" and "gay pride" as a way of creating visibility, disrupting heteronormative cultural codes, and generating a new political identity; zaps and other disruptive direct action tactics; and the creation of safe spaces for political consciousness-raising.[17] The organizations, tactics, and collective action frames that emerged in the aftermath of Stonewall would form the backbone of lesbian and gay rights activism for decades to come. For these reasons, the Stonewall riots are commonly considered to mark the beginning of the modern LGBTQ rights movement. Transformative events, then, *may* generate dramatic shifts in mobilization levels but are not defined solely in relationship to mobilization. They may generate tactical innovations, alter political consciousness, foster organizational changes, and more.

It is important to differentiate here between *transformative* events and, for lack of a better term, *ordinary* events. Ordinary events are part of the life-blood of social movements. Activists form organizations (i.e., the Lambda Legal Defense and Education Fund, the nation's oldest and largest LGBTQ rights litigation organization)[18] or more loosely structured networks (i.e., Black Lives Matter)[19]. They partake in protests, meetings, lobbying, petition drives, and lawsuits. Accumulations of these ordinary events can have powerful effects over time. This work is extraordinarily important and nothing in this Article is meant to minimize it. *Transformative* events comprise, at best, a tiny fraction of all the events associated with a social movement. Nonetheless, their role as catalysts for radical change in the trajectories of social movements warrants our attention.

In this Article, I apply the concept of transformative events to a handful of judicial decisions, like *Obergefell*, that have been described widely as turning points

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16 JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 238 (1983).

17 For extended discussions of Stonewall's transformative effect on the LGBTQ rights movement *see generally* MARGARET CRUIKSHANK, THE GAY AND LESBIAN LIBERATION MOVEMENT (1992); MARC STEIN, RETHINKING THE GAY AND LESBIAN MOVEMENT (2012); Elizabeth A. Armstrong & Suzanna M. Crage, *Movements and Memory: The Making of the Stonewall Myth*, 71 AM. SOC. REV. 724 (2006); Verta Taylor & Nancy E. Whittier, *Collective Identity in Social Movement Communities: Lesbian Feminist Mobilization*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 104 (1992).

18 *About Us: Who We Are*, LAMBDA LEGAL, http://www.lambdalegal.org/about-us (last visited Apr. 1, 2017).

19 *About the Black Lives Matter Network*, BLACK LIVES MATTER, http://blacklivesmatter.com/about/ (last visited May 16, 2017).

and/or watersheds in the struggle for LGBTQ rights. I have multiple aims in doing so. First, I wish to broaden our understanding of the types of events that can have transformative capacities. Scholars have studied the transformative capacity of many types of events, including natural disasters, instances of government-directed violence, assassinations, military actions, government decrees, the emergence of new organizations, and the adoption of new collective action tactics.[20] They have not, as yet, considered judicial decisions as a category of transformative event. I correct this oversight. In so doing, I add to the growing body of scholarship examining the relationship between judicial decisions and social movement progress. Much of this literature has examined the wisdom and utility of using litigation to achieve social change.[21] My aim is somewhat different. I am not interested here in revisiting the "wisdom" debate. Instead, I am interested in considering when and why court decisions can trigger what McAdam and Sewell call "concentrated moments of political and cultural creativity."[22]

Second, I show that the transformative events framework generates seemingly counterintuitive results that drive home the multifaceted effects of judicial decisions. I apply the framework to four cases widely considered to be watersheds in the progress of the LGBTQ rights movement. In chronological order they are: *Baehr v. Lewin*,[23] the 1993 Hawaii Supreme Court decision requiring Hawaii to demonstrate a compelling interest in barring same-sex couples from marrying; *Romer v. Evans,*[24] the 1996 Supreme Court decision striking down a state constitutional amendment that repealed all existing gay rights laws and prevented the enactment of any such future laws; *Lawrence v. Texas*,[25] the 2003 Supreme Court decision striking down state sodomy laws, and *Goodridge v. Department of Public Health*,[26] the 2003 Massachusetts Supreme Judicial Court decision requiring Massachusetts to open marriage to same-sex couples. I show that *Baehr* and *Goodridge* both meet the definition of a transformative event but that *Romer* and *Lawrence* do not. Stated

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20 *See, e.g.*, Lorenzo Bosi, *Social Movement Participation and the "Timing" of Involvement: The Case of the Northern Ireland Civil Rights Movement*, 27 RES. SOC. MOVEMENTS, CONFLICTS & CHANGE 37 (2007); Sean Chabot & Stellan Vinthagen, *Rethinking Nonviolent Action and Contentious Politics: Political Cultures of Nonviolent Opposition in the Indian Independence Movement and Brazil's Landless Workers Movement*, 27 RES. SOC. MOVEMENTS, CONFLICTS AND CHANGE 91 (2007); Hess & Martin, *supra* note 14; Adam Moore, *The Eventfulness of Social Reproduction*, 29 SOC. THEORY 294 (2011); Karen Rasler, *Concessions, Repression, and Political Protest in the Iranian Revolution*, AM. SOC. 132 (1996); Stefania Vicari, *The Interpretative Dimension of Transformative Events: Outrage Management and Collective Action Framing After the 2001 Anti-G8 Summit in Genoa*, 14 SOC. MOVEMENT STUD. 596 (2015 REV.).

21 *See, e.g.*, MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2012); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2008); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. SOC. REV. 151 (2009).

22 McAdam & Sewell, *supra* note 12, at 102.

23 *See* 852 P.2d 44, 59 (Haw. 1993).

24 *See* 517 U.S. 620, 626–27 (1996).

25 *See* 539 U.S. 558, 578–79 (2003).

26 *See* 798 N.E.2d 941, 959–61 (2003).

differently, I show that *Baehr* and *Goodridge* were catalysts for transformative change in the larger LGBTQ movement in a way that *Romer* and *Lawrence* were not.

This may strike some readers as odd, given that *Lawrence* marked the successful culmination of a several decade long effort to eradicate sodomy laws and that it also helped to lay the groundwork for the Supreme Court's decision in *Obergefell*. But it highlights the distinction between the direct and indirect effects of judicial decisions. *Lawrence* undeniably foreclosed an argument that had long stymied LGBTQ rights activists (namely that LGBTQ people were criminals by synecdoche, because the conduct that defined the class could be criminalized). The decision also, particularly via Justice Scalia's dissent, strengthened the argument that same-sex couples had a constitutional right to marry. In other words, *Lawrence* had powerful direct effects. *Lawrence* did not, however, have the indirect catalytic effect that Stonewall did. It did not prompt a radical shift in the level or nature of mobilization nor did it generate tactical innovations, alter political consciousness, foster organizational change, etc. For all of its undeniable importance, *Lawrence* was an "ordinary" event, not a transformative one.[27]

My final aim is to provide a framework for assessing two recent Supreme Court marriage equality decisions, *Obergefell v. Hodges* and *United States v. Windsor*.[28] This assessment is necessarily preliminary because transformative events are by their very nature interpretive. Stonewall did not "make" anything happen. It was merely a catalyst for individuals to make a particular series of choices. In fact, there were a number of LGBTQ-related riots in the years preceding Stonewall.[29] We remember Stonewall now not because it was qualitatively different as a riot, but because it was a spark that flared at the right moment: capturing the imagination of potential activists who had the numbers, the resources, the space, and the vision to capitalize on it. So what of *Obergefell* and *Windsor*? Can we see any evidence that they might be catalysts for radical change in the trajectory of the LGBTQ movement? Or are they "merely" important cases, like *Romer* and *Lawrence*?[30]

This Article proceeds as follows. In Part II, I draw on social movement scholarship to develop a list of criteria for determining whether or not a judicial decision is appropriately characterized as transformative. I make a few *a priori* assumptions at the outset. First, in order for a court decision to be classified as a transformative event it must clearly and measurably alter the capacity of that movement to effect social change. Second, the scope of this change must be both dramatic and proximate in time to the event itself. Third, the change must be enduring rather than transient. In Part III, I apply the concept of transformative

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27 It's worth noting again that ordinary events are the life-blood of social movements. That *Lawrence* is not classified as a transformative event should not be read to imply that the decision had little effect on the progress of the LGBTQ rights movement.

28 *See generally Obergefell*, 135 S. Ct. at 2584; United States v. Windsor, 133 S. Ct. 2675 (2013).

29 Elizabeth A. Armstrong & Suzanna M. Crage, *Movements and Memory: The Making of the Stonewall Myth*, 71 AM. SOC. REV. 724, 724–51 (2006).

30 Lawrence v. Texas, 539 US 558 (2003); Romer v. Evans, 517 US 620 (1996).

events to *Baehr*, *Romer*, *Lawrence*, and *Goodridge*. I take the lessons from Part III and apply them to *Windsor* and *Obergefell*[31] in Part IV.

I. IDENTIFYING TRANSFORMATIVE EVENTS

How do we know a transformative event has occurred? What criteria do we use to identify it? Social movement scholars examine activism at three different levels: the individual, the group, and the structural.[32] In this Part, I argue that significant, sudden, and enduring changes at any of these three levels may indicate the presence of a transformative event. I discuss each level in turn.

As a prelude to that discussion, I want to make the nature of my argument clear. I am *not* claiming that any particular change is either necessary or sufficient to mark the presence of a transformative event. Indeed, I have no fixed sense of how many changes are necessary in order to classify a judicial decision as transformative. In part, that is because the transformational nature of an event is, of necessity, an interpretive matter.[33] The changes that made the Montgomery Bus Boycott a transformative event in the civil rights movement share similarities and differences with the changes that made Stonewall a transformative event in the LGBTQ rights movement. To demand the presence of a specific benchmark, would be, I believe, inapposite. Instead, I proceed from the admittedly squishy perspective that events which result in wider and more dramatic changes fall more obviously into the class of transformative events.

A. Individual-Level Changes

Scholars exploring social movements at the individual level have primarily interested themselves in the factors that affect an individual's willingness to be active in a movement. The very concept of transformative events was first identified in the context of radical shifts in levels of mobilization over the course of the civil rights movement in the United States.[34] Is the concept of transformative events inextricably bound to changes in mobilization levels? I think not. Dramatic shifts in levels of mobilization around a particular cause are one way to identify a turning point in the history of a social movement, but we can certainly imagine a circumstance under which a movement's claims might become suddenly more—or less—successful without a corresponding shift in individual protest activity. Nonetheless, dramatic increases or decreases in mobilization offer us one way to determine whether *Obergefell* or any other court decision is properly treated as a transformative event in the history of the LGBTQ rights movement.

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31 *See generally Obergefell*, 135 S. Ct. at 2584; *Windsor*, 133 S. Ct. at 2675.

32 *See e.g.*, THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS (David A. Snow, Sarah Anne Soule, & Hanspeter Kriesi eds., 2004).

33 *See generally* Vicari, *supra* note 20 (containing and extended discussion of the interpretive nature of transformative events).

34 *See* Morris, *supra* note 14 at 452. *Contra* McAdam & Sewell, *supra* note 12 at 107.

B. Group-Level Changes

Social movement organizations (SMOs) are crucial elements of social movements. They are, in many ways, the building blocks of movements and scholars have devoted considerable attention to them. SMOs have many functions. They work to mobilize potential adherents and amass resources. They serve as points of communication within and across movements. They develop and deploy strategies and tactics. Both the Montgomery Bus Boycott and Stonewall are considered transformative events in part because of their group-level effects: among other things, they generated new tactics and propelled new leaders to the forefront of their movements.

Large-scale changes at the group level may also help to determine whether *Obergefell* and other court decisions are transformative events in the LGBTQ movement. Did a judicial decision spark SMOs within the LGBTQ rights movement to dramatically change their strategies and tactics for enacting social change? Did it enable groups to leverage significant additional resources (such as money) or, in the alternative, dramatically reduce the availability of resources to those groups? Was it a catalyst for the emergence of new organizations or, alternatively, the collapse of existing groups? Did it substantially change how existing organizations interacted with each other? Did it do any of these things in a way that measurably altered the capacity of the LGBTQ rights movement to effect social change? If so, that judicial decision might well be considered a transformative event in the history of the LGBTQ rights movement, even in the absence of dramatic changes in the level of mass mobilization.

C. Structural-Level Changes

Social movements do not act in isolation. They operate within specific social contexts. "Political opportunity structure" refers broadly to the institutional and socio-cultural factors that shape social movement options by making some strategies more appealing and/or feasible than others.[35] The core idea here is that changes in the structure of political opportunities may open or close spaces for political action. Scholars vary somewhat in their articulations of the dimensions of political opportunity structure. However, substantial agreement exists on three dimensions.

The first is *access to the formal institutional structure* of policy making: courts, legislatures, the executive branch, and the bureaucracy, both at the state and federal levels. Consider the mechanics of the judicial process shape access in a number of ways, including what issues may be litigated, who may litigate, and where such

35 *See generally* DOUG MCADAM, JOHN D. MCCARTHY & MAYER N. ZALD, COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS (1996); SIDNEY G. TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS (2011); Hanspeter Kriesi, *Political Context and Opportunity*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 67 (2004).

litigation may occur. Access to the legislature is shaped by a different set of factors, prominent among them the extent to which the party currently in control is sympathetic to a social movement's aims. A large body of scholarly work shows that access (or the lack thereof) to formal structures of government shapes the path of social movements.[36] I suggest here that one indicator that a judicial decision should be considered a transformative event is whether it radically and consequentially alters the capacity of a social movement to access one or more of the formal institutional structures of policy making.

The second dimension of political opportunity structure upon which there is general agreement is the *configuration of allies and adversaries.* Potential allies of a social movement include political parties, interest groups, other social movements, and domain experts (people with claims to expertise in a particular area), as well as policy makers and other types of public authorities. By generating political openness on their issues of concern, social movements almost always generate their own opposition.[37] A movement's potential adversaries include the same types of groups that form that movement's potential allies (parties, policy makers, and the like). The presence of allies and adversaries has been shown to significantly affect the progress and outcomes of social movements.[38] Because of this presence, a judicial decision that affects the alliance and adversary systems surrounding a social movement in a dramatic and enduring fashion might well be a transformative one.

The third broadly accepted dimension of political opportunity structure is the *configuration of elites with respect to relevant issues/challengers*. Elites, here, generally refers to actors who are in a position to exert some control over a particular policy domain. Importantly, policy domains are usually governed by multiple elites who may or may not agree with each other. When elites are united in opposition to a particular social movement claim, social movements generally have little chance of effecting change. But when elite configurations begin to shift—when fissures emerge between elites or when elites as a whole become more open to a movement claim—

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36 For example, Charles Brockett showed that the fortunes of peasant movements in Nicaragua and Honduras were influenced by their varying ability to gain access to the formal mechanisms of government. Charles Brockett, *The Structure of Political Opportunities and Peasant Mobilization in Central America*, 23 COMP. POL. 253, 261 (1991). *See also* Herbert Kitschelt, *Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies*, 16 BRIT. J. POL. SCI. 57, 58 (1986); Hanspeter Kriesi, *The Political Opportunity Structure of New Social Movements: Its Impact on Their Mobilization*, *in* THE POLITICS OF SOCIAL PROTEST: COMPARATIVE PERSPECTIVES ON STATES AND SOCIAL MOVEMENTS 167 (1995).

37 David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, AM. J. SOC. 1628, 1635 (1996).

38 Craig Jenkins and Charles Perrow, for example, found that the farm worker movement in the 1960s was more successful than its 1940s counterpart largely because of the existence of urban liberal allies in the latter period. *Insurgency of the Powerless: Farm Worker Movements (1946-1972)*, AM. SOC. REV. 249, 263 (1977). Similarly, William Gamson found that differential success rates on the part of fifty-three challenging groups were closely related to the availability of allies willing and able to support their claims. WILLIAM GAMSON, THE STRATEGY OF POLITICAL PROTEST (1975).

the ability of social movements to secure their goals increases.[39] A judicial decision that significantly alters elite alignments with respect to a social movement claim, then, might well be classified as a transformative event.

In addition to these three dimensions of political opportunity structure, social movement scholars generally agree that *existing cultural frames* shape the capacity of social movements to make persuasive arguments. A frame is an interpretive schematic that allows us "to locate, perceive, identify and label" aspects of an event in ways that make them meaningful.[40] Social movements seeking to effect change must "sell" (frame) their arguments about injustice in a way that makes sense to potential "buyers" (elites, allies, the media, the general public). They are constrained in doing so by the cultural frames that are available. For example, shortly after the Stonewall riots, a handful of same-sex couples filed lawsuits arguing that they had a right to marry.[41] These cases were all laughed out of court. In the words of one judge, "In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage."[42] For these judges, the set of meanings (frames) surrounding homosexuality existed in opposition to the set of meanings surrounding marriage.

The decades-long task facing marriage equality activists was to align the frames surrounding marriage and homosexuality so that they existed in congruence with each other rather than in opposition.[43] Stated differently, the story told by same-sex couples seeking to marry in the 1970s simply made no sense given dominant cultural understandings of the meanings of both homosexuality and marriage. The laborious task of marriage equality activists, then, was to encourage elites, allies, and the general public to reframe their understandings of both homosexuality and marriage so that the two concepts nested together comfortably.

Social movement scholars have shown that critical events can dramatically alter the availability or salience of particular frames in ways that affect the capacity of social movements to make persuasive claims. The terrorist attacks of September 11, 2001, for example, dramatically altered public perceptions of the threat posed by Muslims. [44] Among many other consequences, the 9/11 attacks increased the persuasiveness of the "Islam as anti-American" frame. Similarly, the emergence of the HIV/AIDS epidemic in the United States likewise altered public perceptions of

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39 *But see* Douglas NeJaime's, *Convincing Elites, Controlling Elites*, *in* SPECIAL ISSUE SOCIAL MOVEMENTS/LEGAL POSSIBILITIES 175 (2011) (arguing that elite support can sometimes inadvertently generate political and legal risks that can impede the ability of social movements to achieve their aims).

40 ERVING GOFFMAN, FRAME ANALYSIS 21 (1974).

41 *See e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971); Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974).

42 *Jones*, 501 S.W.2d at 590.

43 *See generally* Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611 (2000) (about frames and frame alignment processes).

44 *See generally, e.g.*, Gregory M. Maney, Patrick G. Coy & Lynne M. Woehrle, *Pursuing Political Persuasion: War and Peace Frames in the United States after September 11th*, 8 SOC. MOVEMENT STUD. 299 (2009).

the threat posed by gay men, increasing the salience of the "homosexuality as disease" frame in ways that advantaged opponents and disadvantaged proponents of gay rights.[45] The recent spate of documented African-American deaths at the hands of police officers has opened up a new space for conversation about institutionalized racism in the United States; civil rights activists are currently trying to leverage this new openness as they press for the dismantling of racist structures and attitudes. To the extent that judicial decisions produce dramatic alterations in the availability or persuasiveness of cultural frames, they might reasonably be classified as transformative events.

I have argued elsewhere that legal frames exist alongside cultural frames and that movements seeking to effect social change through litigation are constrained by both types of frames.[46] By legal frames, I mean the categories previously established by an amalgam of constitutional, statutory, administrative, common, and case law. Legal and cultural frames are mutually constitutive: cultural symbols and discourses shape legal understandings just as legal discourses and symbols shape cultural understandings.[47] But is a dramatic and enduring change in legal frames generated by a judicial decision enough, by itself, to classify that decision as a transformative event in the history of a social movement? I tend to think that the answer is no. Landmark legal decisions, such as *Brown v. Board of Education,*[48] *Griswold v. Connecticut,*[49] and the like, are not *ipso facto* transformative events, even though they may ultimately play crucial roles in advancing the goals of social movements. Transformative events are, by definition, catalysts for radical change in the trajectories of social movements. For a landmark decision to qualify as a transformative event we should expect to see changes in a movement's trajectory that are dramatic, enduring, and proximate in time to the decision itself.

To recap: Transformative events comprise a tiny subgroup of the universe of events that mark, shape, and sustain social movements. They differ from other "ordinary" events because they catalyze radical change in the trajectory of a social movement, change that clearly and measurably alters the capacity of that movement to advance its aims. Transformative events can only be recognized after the fact: they are identified not by their capacity to produce change but by actual change itself. This change can take many differ forms. The classic marker of a transformative event is a dramatic shift in mobilization. I have described several other markers, including changes in a movement's strategies and tactics, changes in its organizational forms and capacities, changes in its ability to access the institutions of government, changes in the configuration of elites, allies, and adversaries surrounding the movement, and

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45 *See* Josh Gamson, *Silence, Death, and the Invisible Enemy: AIDS Activism and Social Movement "Newness,"* 36 SOC. PROBS. 351, 359 (1989); Robert Padgug, *Gay Villain, Gay Hero: Homosexuality and the Social Construction of AIDS*, *in* PASSION AND POWER: SEXUALITY IN HISTORY 293, 295–96 (1989).

46 ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION (2006).

47 This is precisely why movements throughout American history have invoked legal norms and practices in their efforts to promote social change and conversely why shifting social norms have often been followed by shifting interpretations of what the law requires.

48 347 U.S. 483 (1954).

49 381 U.S. 479 (1965).

changes in the availability and salience of cultural frames. I have no requirement that a particular change must occur. Instead, I proceed from the assumption that events that inspire wider and more dramatic changes fall more obviously into the class of transformative events.

II. JUDICIAL DECISIONS AS TRANSFORMATIVE EVENTS

Scholars, journalists, and movement activists have been strikingly quick to argue that judicial decisions have played transformational roles in the struggle for LGBTQ rights, particularly in the context of marriage equality. In this Part, I apply the transformative events framework to four of the cases most widely depicted as watersheds: two Supreme Court cases, *Romer v. Evans* and *Lawrence v. Texas*, and two cases decided in state courts of last resort, *Baehr v. Lewin* and *Goodridge v. Dept. of Public Health*.

Baehr and *Romer* were litigated at roughly the same time during the 1990s. *Lawrence* and *Goodridge* similarly overlapped in the 2000s. Because of this overlap, I pair these cases in the following analysis. I show that all four cases were important to the progress of the LGBTQ rights movement but that only two had transformative qualities.

A. Baehr v. Lewin

In 1991, three same-sex couples filed a lawsuit in Hawaii arguing that they had a fundamental right to marry each other under the state's constitution. *Baehr v. Lewin* was dismissed by the trial court. On appeal, however, the Hawaii Supreme Court made history by becoming the first court in the nation to treat seriously the claim that same-sex couples had a constitutional interest in marrying each other.[50] The court ruled that the state's refusal to marry same-sex couples constituted sex discrimination and thus was subject to strict scrutiny under the constitution's equal rights amendment. The court reinstated the case and remanded it for a trial to determine if the state's rationale for limiting marriage to different-sex couples constituted a compelling state interest.

This decision—sometimes lumped together with the 1996 trial court holding in *Baehr v. Miike*[51] that Hawaii had failed to show even a rational basis for its exclusionary policy—is widely viewed as a watershed in the movement for LGBTQ rights.[52] And indeed, *Baehr v. Lewin* radically altered the terms of the debate around

50 Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993).

51 Baehr v. Miike, 80 Haw. 341, 910 P.2d 112 (1996).

52 Evan Wolfson, who then worked for the Lambda Legal Defense and Education Fund and was active in the case, wrote that *Baehr* was "nothing less than a tectonic shift, a fundamental realignment of the landscape, possibly the biggest lesbian and gay rights legal victory ever." Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. SOC. CHANGE 567, 572 (1993). While we might expect a litigator actively involved in a case to trumpet its significance, an array of scholars, journalists, and litigators uninvolved with the

LGBTQ rights. It inspired mobilization by both supporters and opponents of marriage equality. It forced LGBTQ rights groups to reorder their priorities and sparked the creation of new activist nodes within the movement. And it served as a catalyst for government repression, through the passage of laws specifically designed to stymie the progress of the LGBTQ rights movement. Let me unpack these conclusions.

In the words of William Rubenstein, *Baehr* made "the previously unthinkable suddenly real."[53] Prior to the decision, there had been severe intra-community tension over the value of pursuing marriage as a goal. As a result of this tension, none of the major LGBTQ rights litigation organizations had treated marriage as a priority. *Baehr* completely changed the calculus because it was a legal victory that needed to be defended. Lambda Legal Defense and Education Fund became co-counsel in *Baehr* after the 1993 decision. Lambda also established the Marriage Project, an umbrella organization within which LGBTQ rights activists could facilitate state-by-state political organization and public education about same-sex marriage, coordinate possible future legal challenges, and seek allies.[54] *Baehr* thus widened the scope of conflict around LGBTQ rights to include marriage equality, shifted the priorities of the major movement organizations, and sparked the creation of a new mechanism for intra-group cooperation.

The Marriage Project's emphasis on political mobilization reflected a recognition that the *Baehr* decision was both promising and dangerous for the LGBTQ rights movement. The Full Faith and Credit clause of the US Constitution generally requires that states recognize official acts and proceeding of other states.[55] However, states are exempted from recognizing marriages when doing so violates the "strong public policy" of the state.[56] The Marriage Project recognized that opponents

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case, also describe *Baehr* as a watershed victory. *Compare e.g.,* Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567, 574 (2009); Michael D. Sant'Ambrogio & Sylvia Ann Law, Baehr v. Lewin *and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705, 712 (2011); *and* Bennett Klein & Daniel Redman, *From Separate to Equal: Litigating Marriage Equality in a Civil Union State*, 41 CONN. REV. 1381, 1389 (2008). Others, however, have argued that *Baehr* was a watershed in terms of the significant damage it did to the LGBTQ rights movement. *Baehr*, the argument goes, inspired such a large backlash by forces opposed to marriage equality that it harmed the cause of marriage equality specifically and LGBT rights more generally far more than it helped. *See* ROSENBERG, *supra* note 21 at 343–44.

53 William B. Rubenstein, *The Myth of Superiority,* 16 CONST. COMMENT. 599, 618 (1999).

54 As part of the Marriage Project, Wolfson worked with Professor Barbara Cox at California Western School of Law to generate an analysis of the laws in each state in order to determine where activists were more likely to win marriage equality—and defend it against political backlash. The process of seeking experts in each state to draft an analysis had, as a secondary effect, the establishment of a fifty-state network of marriage equality activists. Personal Interview with Beth Robinson, Attorney, Lambda Legal (March 30, 2015) (on file with the author). *See also* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1254 (2010).

55 Article IV, Section 1 of the U.S. Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

56 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1988 AM. L. INST. 1971).

of marriage equality would try to carve "strong public policy" objections into laws across the nation.

They were right. Conservative groups such as the Family Research Council, Focus on the Family, and the Christian Coalition, and religious organizations such as the Mormon, Catholic, and many evangelical churches quickly came together to oppose marriage equality. In fact, opposition to marriage equality joined opposition to abortion rights as the two major public priorities of many conservative groups during the 1990s.[57] Opposition groups used *Baehr* as a focal point to lobby federal and state legislators to oppose marriage equality.[58] These lobbying efforts were extremely successful. By the time the trial court issued its decision in *Baehr* late in 1996, sixteen states had passed bills doing one or more of the following: explicitly defining marriage as a union between one man and one woman, prohibiting marriage between members of the same sex, and prohibiting recognition of same-sex marriages performed in other jurisdictions.[59] By 1998, the number of states with such laws had risen to thirty.[60]

Most strikingly, shortly before the trial on *Baehr* was to begin Congress passed—and President Clinton signed—the Defense of Marriage Act (DOMA), which (a) exempted states from the requirements of the full faith and credit clause insofar as it pertained to recognizing same-sex marriages performed in other states and (b) defined the words "marriage" and "spouse" to encompass only heterosexual couplings for all federal purposes.[61] The House of Representatives Report's conclusion stated that it was "both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage."[62]

Baehr thus served as a catalyst both for mobilization by adversaries and for government repression. Ironically, conservative mobilization around *Baehr* elevated the importance of relationship recognition to LGBTQ activists across the nation and resulted in a spate of grassroots organizing around the nation. Dozens of groups

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57 TINA FETNER, HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM (2008). Michael Dorf and Sidney Tarrow refer to this as the rise of an anticipatory countermovement. Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-sex Marriage into the Public Arena*, 39 L. & SOC. INQUIRY 449, 450 (2014).

58 David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, N.Y. TIMES, March 6, 1996, at A13; Adam Nagourney, *Christian Coalition Pushes for Showdown on Same-Sex Marriage*, N.Y. TIMES, May 30, 1996.

59 SEAN CAHILL, SAME-SEX MARRIAGE IN THE UNITED STATES: FOCUS ON THE FACTS 9 (2004). Utah passed legislation in 1995. Alaska, Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, Missouri, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Tennessee passed legislation in 1996.

60 *Id.* Arkansas, Florida, Indiana, Maine, Minnesota, Mississippi, Montana, North Dakota, and Virginia passed laws in 1997. Alabama, Hawaii, Iowa, Kentucky, and Washington passed laws in 1998.

61 Defense of Marriage Act (DOMA) 2(a), 28 U.S.C.A. § 1738C (West Supp. 1998).

62 *See* United States v. Windsor, 133 S.Ct. 2675, 2693 (2013) (internal citations omitted).

emerged around the nation to fight for marriage equality.[63] LGBTQ activists in those states scrambled to stave off marriage bans, but they consistently lost the battle to frame the issue in a way that resonated with legislators. In the 1990s, marriage equality was an issue pushed by its opponents far more urgently than by its proponents.[64]

While I have centered my analysis on events happening outside Hawaii, it is important to recognize that *Baehr* was a catalyst for events within the state as well. After the 1996 trial ruling, the state's legislature passed two bills. The first, called the "Reciprocal Beneficiaries" Act, gave dozens of legal and economic protections to couples, both homosexual or heterosexual, who were ineligible to marry.[65] The second bill authorized the people of Hawaii to vote on a constitutional amendment that would grant the legislature the power to restrict marriage to opposite-sex couples.[66] The proposed amendment was placed on the 1998 ballot.[67] Proponents and opponents of same-sex marriage engaged in massive campaigns to sway the vote on the upcoming ballot measure; roughly $1.5 million was spent by each side during the campaign.[68]As on the mainland, opposition to marriage equality won the day: voters approved the measure by a margin of more than two-to-one.[69] The Hawaii Supreme Court subsequently dismissed *Baehr*, ruling that the amendment had taken the marriage statute "out of the ambit of the equal protection clause of the Hawaii Constitution."[70]

In sum, the 1993 Hawaii Supreme Court decision and subsequent trial in *Baehr v. Lewin* profoundly, dramatically, and measurably changed the direction of the LGBTQ rights movement and altered its capacity to effect social change. It forced LGBTQ groups to reorder their priorities. It prompted organizational expansion and a new mechanism for existing groups to communicate with each other. It mobilized LGBTQ activists and their allies to fight against proposed legislation in thirty states across the nation and against a ballot initiative in Hawaii. It also signaled a possible

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63 FETNER, *supra* note 57 at 112. Marriage Equality USA, for example, originated as a direct response to the Defense of Marriage Act. See *Our History*, MARRIAGE EQUALITY USA, http://www.marriageequality.org/our_history (last visited Aug. 6, 2016).

64 *See* FETNER, *supra* note 57 at 94–96; Dorf & Tarrow, *supra* note 57 at 463.

65 Act 383, 1997 Haw. Sess. Laws 2786. The law offered about 60 state-level benefits to registered beneficiaries, including hospital visitation, family leave, health coverage, and inheritance. It fell far short, however, of the 160 or so state-level benefits offered by legal marriage in Hawaii. *Civil Unions,* PARTNERS TASK FORCE FOR GAY AND LESBIAN COUPLES (Mar. 6, 2011) http://www.buddybuddy.com/dphawa.html.

66 H.B. 117, 1997 Haw. Sess. Laws 2883.

67 *Hawaii 1998 Ballot Measures,* BALLOTPEDIA, https://ballotpedia.org/Hawaii_1998_ballot_measures (last visited Apr. 22, 2017).

68 The Mormon church was the largest donor to the pro-amendment side. The Human Rights Campaign was the largest donor to the anti-amendment forces. For an in-depth discussion of *Baehr*'s effects within Hawaii, *see generally* WILLIAM N. ESKRIDGE, EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 15–25 (2002)); Kathleen E. Hull, *The Political Limits of the Rights Frame: The Case of Same-Sex Marriage in Hawaii*, 44 SOC. PERSP. 207, 214 (2001).

69 *Hawaii Legislative Power to Reserve Marriage, Question 2,* BallotPedia, https://ballotpedia.org/Hawaii_Legislative_Power_to_Reserve_Marriage,_Question_2_(1998) (last visited Apr. 22, 2017).

70 Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *6 (Haw. Dec. 9, 1999).

fracturing of elite alignments among the judiciary. Recall that earlier attempts by same-sex couples to claim a constitutional right to marry had been laughed out of court. The 1993 and 1996 decisions in *Baehr* suggested that judges had become more receptive to relationship-based claims.

If *Baehr* signaled a possible fracturing of elite alignments among the judiciary, it showed no similar fracturing among legislative elites. The passage of the federal DOMA and thirty statewide mini-DOMAs within five years of the 1993 decision in *Baehr* did little *direct* harm to same-sex couples (after all, they could not marry anyway). But indirectly they signaled both the repressive power of the state and the emergence of a powerful countermovement intent on preventing the extension of marriage to same-sex couples.

B. Romer v. Evans

The entirety of *Romer v. Evans* took place during the litigation of *Baehr*. At stake in *Romer* was the constitutionality of Colorado's Amendment 2. The initiative, passed in 1992 after a bitter campaign, repealed all existing state and local provisions protecting lesbian, bisexual, and gay men from discrimination. It also prohibited the enactment of any future such provisions.[71] Nine days after voters passed Amendment 2, an assortment of legal groups, including Lambda Legal, the ACLU, and the newly-formed Colorado Legal Initiatives Project filed suit asking Colorado's district court to enjoin Amendment 2 from taking effect.

Romer took three years to work its way up to the US Supreme Court. The Court heard oral arguments on October 10, 1995, and issued an opinion on May 6, 1996. *Romer* thus came to the Supreme Court well after the Hawaii Supreme Court's 1993 ruling in *Baehr* but before the September 1996 trial in the case.[72] By a 6-3 majority, the Court struck down Amendment 2, ruling that was "born of animosity" toward lesbians and gay men. "A bare desire to harm a politically unpopular group," Justice Kennedy wrote, "cannot constitute a legitimate governmental interest."[73]

Romer, like *Baehr*, has been widely viewed as a watershed in the movement for LGBTQ rights.[74] There are a number of reasons for this assessment. First, *Romer*

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71 At the time of Amendment 2's passage, Aspen, Boulder, and Denver had gay rights ordinances protecting "individuals from job, housing, and public accommodations discrimination when that discrimination is based solely on sexual orientation." The Williams Ins., *Chapter 13: Voters' Initiatives to Repeal or Prevent Laws Prohibiting Employment Discrimination Against LGBT People, 1974-Present,* 5 (last visited Apr. 2, 2017), http://docplayer.net/29210418-Chapter-13-voters-initiatives-to-repeal-or-prevent-laws-prohibiting-employment-discrimination-against-lgbt-people-1974-present.html.

72 The federal DOMA was also passed in September 1996. Defense of Marriage Act, 28 U.S.C. §1738C (1996).

73 Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

74 As with *Baehr,* activists and journalists were quick to read *Romer* as re-writing the legal landscape of LGBT rights. *See* LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 235 (1998). But a number of academics also read *Romer* as transformational. *See* Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 67 (1996); Linda C. McClain, *From Romer v. Evans to United States v. Windsor: Law as a Vehicle*

was the first unambiguously pro-LGBTQ ruling to emerge from the Supreme Court. While *Bowers v. Hardwick*,[75] decided a mere nine years earlier, had drawn on moral disapproval of homosexuality to support its holding that the right of privacy did not extend to same-sex sex, the *Romer* majority recognized the animus toward LGBTQ people underlying Amendment 2 and explicitly repudiated it, suggesting that the Court had evolved in terms of its understanding of the sociolegal implications of homosexuality.

Second, *Romer* offered a roadmap of sorts to reverse *Hardwick*, courtesy of Justice Scalia's dissenting opinion. Justice Scalia had argued that if it was permissible for a state to make "homosexual conduct" a crime, then logically it was also permissible for a state to decline to bestow what he referred to as "special protections upon homosexual conduct."[76] But this logic chain was reversible. If, under *Romer*, Colorado's Amendment 2 could not pass constitutional muster, then surely sodomy laws were unconstitutional as well.

Third, *Romer* positioned lesbians and gay men as a group worthy of protection under the Equal Protection Clause, opening the possibility that other types of discriminatory laws might fall to equal protection challenges. As Louis Michael Seidman wrote at the time, *Romer* "gives litigants new ammunition to challenge a range of practices previously thought permissible, including the exclusion of gay people from a variety of antidiscrimination and social welfare measures, the military's "don't ask/don't tell" policy, and the prohibition on gay marriage."[77]

Described from a social movement perspective, then, *Romer* suggested that elite alignments among the judiciary were becoming more favorable to LGBTQ claims.[78] It offered a powerful new legal argument to LGBTQ rights advocates (that laws passed based on animus toward LGBTQ people were unconstitutional) and undercut the rationale for criminalizing same-sex sex. Yet despite these clear and important additions to the arsenal of LGBTQ rights activists, there is little evidence that *Romer* prompted a dramatic shift in mobilization or a dramatic, proximate, and measurable shift in most of the other markers of transformative events.

One obvious place to look is at changes in the organizational forms, capacities, or tactics of major LGBTQ organizations. *Romer* certainly increased the confidence of

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for Moral Disapproval in Amendment 2 and the Defense of Marriage Act, 20 DUKE J. GEND. L. & POL'Y 351, 411 (2013).

75 478 U.S. 186 (1985).

76 "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct. . . . And *a fortiori* it is constitutionally permissible for a State to adopt a provision *not even* disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing special protections upon homosexual conduct." *Romer*, 517 U.S. at 641 (emphasis in original) (citation omitted).

77 Seidman, *supra* note 74 at 68.

78 It is worth noting here four Colorado courts had taken a dim view of Amendment 2's constitutionality during the cases assent to the U.S. Supreme Court. Amendment 2 went to trial twice, once to determine whether it would be enjoined before it took effect (yes) and once to determine whether it served a compelling governmental interest (no). In each instance, the State appealed the unfavorable outcome to Colorado's Supreme Court. Both times, the state high court upheld the lower court decision.

LGBTQ advocacy groups that they could finally eradicate sodomy laws across the nation and they began searching for an appropriate test case.[79] But the case did not shift their priorities in the way that *Baehr* had. An intergroup coalition designed to eradicate sodomy laws had been formed years earlier (the Ad-Hoc Task Force to Eliminate Sodomy Laws, which eventually morphed into the Litigator's Roundtable).[80] Advocacy groups were already seeking to dismantle sodomy laws, using a state-by-state strategy. *Romer* opened up the possibility of a federal constitutional claim, but it did not change the biggest problem bedeviling advocacy groups: finding suitable plaintiffs who had actually been arrested for violating sodomy statutes. That continued to be a problem in *Romer's* aftermath. Nor did *Romer* cause any obvious change in the organizational forms, capacities, or tactics with respect to other issues. Advocates added *Romer* to their arguments, but there is no evidence that they fundamentally changed those arguments as a response to the decision, or that they reordered their priorities as a response to the decision. For all its undeniable value then, *Romer* did not generate changes in organizational forms or capacities, nor did it fundamentally alter the tactics of advocacy groups.

Another obvious place to look for transformative change is in mobilization by allies and adversaries around anti-gay ballot measures themselves. LGBTQ people have had their civil rights put to a popular vote more than any other group of citizens.[81] Amendment 2 was not the only anti-gay measure on the ballot in 1992. A similar measure in Oregon failed, while anti-gay opponents had tried and failed to place a measure on the ballot in Arizona.[82] The passage of Amendment 2 prompted a slew of attempts by anti-gay activists to use electoral strategies to roll back gay rights laws and/or prevent the passage of future such laws. Anti-gay activists succeeded in putting measures on the ballot in twenty localities in 1993.[83] They all passed. By 1994, there were active efforts to put statewide measures on the ballot in ten states, although only measures in Idaho and Oregon actually made it to the ballot, where both failed. Local measures were more successful. Citizens in Alachua County, Florida, Austin, Texas, and Springfield, Missouri repealed local antidiscrimination

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79 It was, in the words of one gay rights advocate, a "huge new tool" for attacking state sodomy laws on the federal level. ANDERSEN, *supra* note 46 at 124; MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 377 (2015).

80 ANDERSEN, *supra* note 46 at 85.

81 As Barbara Gamble has shown, nearly sixty percent of the initiatives and popular referenda that appeared on state-wide ballots in the years between 1959 and 1993 focused on the civil rights of LGBTQ people. Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POLIT. SCI. 245, 257 (1997).

82 The Oregon measure was known popularly as Measure 9. For in-depth discussions Measure 9 and other anti-gay ballot measures, ANDERSEN, *supra* note 46 at 143–44; Gamble, *supra* note 81 at 258–59; *see* STEPHANIE WITT & SUZANNE MCCORKLE, ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES 18–20 (1997).

83 Sixteen of those localities were in Oregon, which had a particularly well-organized adversary group: the Oregon Citizen's Alliance. A court blocked an attempt to place a measure on the ballot in Anchorage that year. *See* Faipeas v. Municipality of Anchorage, 860 P.2d 1214, 1221 (Alaska 1993).

ordinances, and citizens in ten of eleven Oregon localities passed measures designed to prevent the passage of any future gay rights measures.[84]

Did *Romer* shut down the use of popular initiatives and referenda to directly attack the rights of LGBTQ people? That would certainly constitute a major change in the capacity of the LGBTQ movement to achieve its aims. However, there is surprisingly little evidence that *Romer* made a significant difference. By 1995, efforts to use the ballot to repeal anti-discrimination laws and/or bar their passage were already waning. Maine had an initiative on the ballot that failed; voters in West Palm Beach, Florida refused to repeal a local gay rights ordinance.[85] The year 1996 saw only one repeal measure on the ballot—in Lansing, Michigan, where voters overturned a recently enacted gay rights measure.[86] Resort to the ballot as a tactic for stymying anti-discrimination provisions was thus waning even before *Romer* was decided. Moreover, adversaries have continued to resort to ballot measure to repeal gay rights laws since *Romer*, particularly in locations like Oregon and Maine with relatively strong adversary networks.[87]

Romer, then, seems to have had little direct influence on the tactics of antigay adversaries. Why not? The evidence suggests that adversary groups had already shifted the bulk of their attention from broad attacks against antidiscrimination laws to focused attacks on marriage equality. By the time *Romer* was decided, opposition groups were heavily lobbying state and federal legislatures to enact laws barring same-sex marriage. Recall that sixteen states passed mini-DOMAs in 1995 and 1996, in addition to the federal passage of DOMA in September 1996.[88] In short, the "concentrated moment[] of political and cultural creativity" sparked by *Baehr* had already transformed the adversary network surrounding LGBTQ rights.[89] Had *Romer* upheld Amendment 2, events might have played out quite differently. But, as it stands, *Romer* played an important role in changing the legal framework surrounding LGBTQ rights, but it did not spark a transformation in the larger LGBTQ rights movement—or its countermovement.

C. Lawrence v. Texas

John Lawrence and Tyrone Garner were arrested on September 17, 1998, for having sex in Lawrence's apartment in violation of Texas's "Homosexual Conduct" law, which prohibited "deviate sexual intercourse with another individual of the same sex."[90] With Lambda Legal serving as their counsel, the men pleaded no contest to

84 Citizens of Alachua County, Florida also passed a measure barring the future enactment of laws preventing discrimination on the basis of sexual orientation.
85 AMY L. STONE, GAY RIGHTS AT THE BALLOT BOX 30–31 (2012).
86 *Id.*
87 *See* Todd Donovan, Jim Wenzel, & Shaun Bowler, *Direct Democracy and Gay Rights Initiatives After* Romer, *in* THE POLITICS OF GAY RIGHTS 161–90 (2000); STONE, *supra* note 85 at 30–31.
88 STONE, *supra* note 85 at 30–31.
89 McAdam & Sewell, *supra* note 12, at 102.
90 TEX. PENAL CODE § 21.06 (1973).

the charge and challenged the law, arguing among other things that it violated their right to privacy under the federal constitution.[91] Nearly five years later, on June 26, 2003, the US Supreme Court agreed. The government, according to the Court, had no business policing the intimate personal relationships of consenting adults: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[92]

Lawrence is all-but-universally described by legal scholars, journalists, and LGBTQ activists as a watershed moment in the movement for LGBTQ rights. In the words of Mark Spindelman, "Lawrence has variously been praised as an unmitigated victory for lesbian and gay rights, a turning point in our community's history, and the moment when we have gone from second-class political outcasts to constitutional persons with first-class rights."[93]

Lawrence is undeniably an important moment in the history of the American LGBTQ rights movement. It marked the final victory in a decades-long battle to decriminalize consensual same-sex relations, thereby cutting the legs out from under a pervasive argument for denying rights to LGBTQ people: their supposed criminality. It undercut the status-conduct distinction that had bedeviled much LGBTQ rights litigation. It made arguments for increased scrutiny of classifications based on sexual orientation more plausible, thereby providing a new mechanism for accessing the judicial branch. As *Romer* did, *Lawrence* indicated that the Court was evolving in terms of its understanding of the sociolegal implications of homosexuality. And, just as Justice Scalia's dissent in *Romer* provided a roadmap of sorts to invalidating sodomy laws, his dissent in *Lawrence* provided a roadmap for dismantling laws restricting marriage to different-sex couples. Justice Kennedy's majority opinion had taken pains to distinguish the issue of marriage equality from case at hand, noting that *Lawrence* did not "involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[94] Scalia was having none of it. Marriage equality, Scalia argued, was the inevitable result of *Lawrence's* logic: "What justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution' [as defined by the majority in *Lawrence*]?"[95]

But did *Lawrence* have a catalytic effect on the LGBTQ movement? Did it spark mobilization (or demobilization)? Did it spark a profound shift in the cultural frames

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91 Brief for Petitioner at 10, Scott v. Harris, 539 U.S. 558 (2003) (No. 02-1631), 2003 WL 152352.

92 Lawrence v. Texas, 539 U.S. 558, 578 (2003).

93 Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1615–16 (2004). *See also* Jill D. Weinberg, *Remaking Lawrence*, 98 VA. L. REV. IN BRIEF 61, 69–70 (2012) (describing *Lawrence* as "a case beyond law, representing a catalyst for sexual equality . . . the decision has little to do with actual doctrine, but instead is a case that is imbued with symbolic meaning and potential for claims-making.").

94 *Lawrence*, 539 U.S. at 578.

95 *Id.* at 604 (Scalia, J., dissenting).

surrounding either homosexuality or marriage equality? Did it affect the movement—or its countermovement—at an organizational level? The data are mixed.

Evidence of change comes from Gallup's longitudinal surveys of public opinion, which show that public support for decriminalizing gay sex decreased in the immediate aftermath of *Lawrence*, dropping somewhere between nine and twelve percentage points (from roughly sixty to fifty percent) depending on the specific timing of the survey.[96] James Stoutenborough and his colleagues argue that, when all other factors are taken into account, support for legalizing same-sex sex dropped by eight percentage points in the immediate aftermath of the Supreme Court decision.[97] Support for civil unions likewise faltered right after *Lawrence*, dropping nine points (from forty-nine to forty percent) in a set of Gallup polls conducted shortly before and after the decision.[98] These drops are significant, but they were also fairly transient. Support for civil unions bounced back within a year.[99] Support for decriminalization also began rebounding within a year of the decision, but it did not reach its pre-*Lawrence* level until 2007.[100]

Conservative activists and political elites certainly deployed the decision in their efforts to mobilize opposition to marriage equality.[101] In the immediate aftermath of the decision, both LGBTQ activists and their adversaries painted *Lawrence* as a revolutionary moment—akin to *Roe v. Wade* in terms of its ability to fire up a countermovement.[102] William Rubenstein, for example, opined that *Lawrence* would "mobilize opponents of same-sex marriage in ways we haven't seen."[103] Yet it is hard to find much evidence that *Lawrence* actually changed conservative tactics or resulted in significant new mobilization. The reinstitution of

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96 Gallup conducted two polls shortly before *Lawrence* was announced and two more polls shortly after. The question remained the same: "Do you think gay or lesbian relations between consenting adults should or should not be legal?" In the survey fielded between May 5–7, 2003, sixty percent of respondents thought gay and lesbian sex should be legal, while fifty-nine percent thought so in the May 19–21, 2003, survey. (The difference is substantively meaningless.) However, in the poll conducted from July 18–20, 2003, only fifty percent of respondents said gay and lesbian sex should be legal; the July 25–27 polls produced a result of forty-eight percent. GALLUP, GAY AND LESBIAN RIGHTS (2016), http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx.

97 James W. Stoutenborough, Donald P. Haider-Markel, & Mahalley D. Allen, *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POL. RES. Q. 419, 425 (2006).

98 Both polls asked respondents whether they would "favor or oppose a law that would allow homosexual couples to legally form civil unions, giving them some of the legal rights of married couples?" Forty-nine percent of respondents in the May 5–7, 2003, poll indicated that they supported civil unions. That number dropped to forty percent in the July 25–27 poll. GALLUP, *supra* note 96.

99 A Gallup poll conducted from March 5–7, 2004, found that fifty-four percent of respondents supported civil unions. This number dropped down to forty-nine percent in Gallup's May 2–4, 2004 poll. There is no obvious intervening event explaining this change. Results of both polls may well have been affected by the November 2003 decision in *Goodridge*. By May 2004, many respondents may have seen civil unions as a moderate compromise in the battle over marriage equality. GALLUP, *supra* note 96.

100 In a survey conducted from May 10–13, 2007, fifty-nine percent of respondents said that gay sex should be legal. *Id.*

101 Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N. Y. TIMES, July 6, 2003, at 8.

102 *Id.*

103 *Id.*

sodomy laws had not been a focus of countermovement actors prior to *Lawrence*.[104] And those actors had *already* been fighting to pass mini-DOMAs in states across the nation. Thirty-two states had mini-DOMAs on the books by the end of 2002. In the first five months of 2003—prior to the *Lawrence* decision—legislators in ten states had introduced bills designed variously to expand existing mini-DOMA laws or to create them in the first place.[105] The Federal Marriage Amendment was initially introduced in the 107th Congress in May 2002, where it died in committee.[106] It was introduced again in May 2003—before *Lawrence*— but no hearings were held until May 2004. Contemporaneous newspaper accounts indicate that scattered protests occurred, but there was nothing large or sustained.[107] It appears as if anti-gay adversaries largely utilized *Lawrence* to add weight to a set of claims they were already making.

In sum, *Lawrence* was the catalyst for some changes. It temporarily decreased popular support for both civil unions and the decriminalization of sodomy. It gave anti-gay activists additional support for their contention that same-sex marriage was an imminent threat. It also widened access to the federal courts by giving LGBTQ activists a potentially powerful new doctrinal argument. But compared to *Baehr* or *Stonewall*, it is hard to make a persuasive claim that *Lawrence* was a transformative event. Winning *Lawrence* did not prompt LGBTQ organizations to expand or otherwise significantly shift the scope of their activities; marriage equality had already been added to their portfolio.[108] Nor did it inspire a shift in organizational forms. The Ad-Hoc Task Force had already morphed into the Litigator's Roundtable, which continued to meet after *Lawrence*. The case did not notably affect mobilization

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104 Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 459 (2005).

105 Only the Texas bill was successful. *See* Kershaw, *supra* note 101.

106 The proposed text of the amendment read as follows: "Section 1. Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." H.R.J. Res 93, 107th Cong. (2d sess. 2002). The amendment's language was drafted by the Alliance for Marriage, Judge Robert Bork, and Professors Robert P. George (Princeton) and Gerard V. Bradley (Notre Dame Law School). *See* Alan Cooperman, *Little Consensus on Marriage Amendment: Even Authors Disagree on the Meaning of Its Text*, WASH. POST, Feb. 14, 2004, at A01.

107 Jeffrey Rosen describes one protest in front of a federal courthouse in North Carolina in which a pastor and about fifty of his followers arranged six coffins, each emblazoned with the name of a Supreme Court decision representing what Rosen called "a defeat for social conservatives in the moral and political clashes known as the culture wars." The sixth coffin was inscribed with Lawrence's name. Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES, Sept. 7, 2003, at 48.

108 During the course of the *Lawrence* litigation, LGBTQ rights activists "won" a marriage equality case in Vermont and filed marriage equality suits in two other states: Massachusetts and New Jersey. *Baker v. State*, the Vermont case, required that Vermont grant same-sex couples all the state-level rights and benefits of marriage, but left it up to the legislature to determine whether marriage should be opened to same-sex couples or whether an alternative institution should be devised. 744 A.2d 864, 867 (Vt. 1999). The legislature ultimately devised a separate institution, called civil unions. The Massachusetts case was *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 969 (Mass. 2003), about which there is more below. The New Jersey case was *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006). In 2005, the New Jersey Supreme Court issued a decision akin to Vermont's *Baker* and the New Jersey legislature followed Vermont's lead is creating a separate institution for same-sex couples. *Id*. at 200.

on behalf of LGBTQ rights. Perhaps it might have had wider effects, given more time to percolate. But six months after the Supreme Court handed down *Lawrence*, a new judicial decision dramatically altered the terms of debate surrounding LGBTQ rights, pushing *Lawrence* into the background.

D. Goodridge v. Department of Public Health

On November 18, 2003, the Massachusetts Supreme Judicial Court handed down *Goodridge v. Department of Public Health*, holding that the state's refusal to marry same-sex couples violated both the liberty and equality clauses of the Massachusetts constitution.[109] On May 17, 2004, as a direct result of *Goodridge*, Massachusetts became the first state in the nation to institute a formal regime of marriage equality.[110]

Response to *Goodridge* was swift. The decision inspired widespread mobilization with both supporters and opponents of the decision using the case as the centerpiece of their efforts to re-frame the cultural and legal meaning of marriage. It prompted the reconfiguration of elite alignments. It inspired a powerful new tactic to fight for LGBTQ rights. And like *Baehr, Goodridge* served as a catalyst for government repression through the passage of laws specifically designed to fence same-sex couples out of marriage.

Among the most significant repercussions of *Goodridge* was this: within a year of the decision, thirteen states had amended their constitutions to limit marriage to different-sex couples.[111] By the close of 2006, another ten states had added same-sex marriage bans to their constitutions.[112] (The phrase "same-sex marriage" ban is somewhat of a misnomer. Most of the amendments barred state recognition of any formal legal status for same-sex couples.) Although state and national LGBTQ rights groups mobilized to stop the bans, they were outmaneuvered by conservative groups, who tapped into both a fear of activist judges and of the *Goodridge* decision to argue that the bans were necessary to preserve "traditional" marriage.[113] Conservative activists were extraordinarily successful: all but one of the state-level amendments they backed passed—and by wide margins—ranging from a low of fifty-seven percent

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109 798 N.E.2d 941.

110 *Id.*

111 The thirteen states that amended their constitutions were Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. Legislatures initiated the amendment process in seven states; citizen petition drives started the ball rolling in the other six. ANDERSEN, *supra* note 46, at 234.

112 Louisiana and Texas amended their constitutions in 2005. Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin amended their constitutions in 2006. *See, e.g.*, *Gay Marriage Timeline,* PEWFORUM.ORG (Apr. 1, 2008) http://www.pewforum.org/2008/04/01/gay-marriage-timeline/.

113 Katharine Q. Seelye, *Conservatives Mobilize Against Ruling on Gay Marriage*, N.Y. TIMES, Nov. 20, 2003. The Rev. Gene Mills, an Assemblies of God minister spearheading the charge for a constitutional amendment in Louisiana, was very explicit about the framing strategies he employed: "We're casting this as: Either the people of Louisiana decide, or some federal or state court in another state decides." Alan Cooperman, *Gay Marriage Ban in Mo. May Resonate Nationwide*, WASH. POST, Aug. 5, 2004.

(Oregon) to a high of eighty-six percent (Mississippi).[114] These amendments clearly and measurably affected the capacity of the LGBTQ rights movement to affect their aims, both because the amendments closed off recourse to state constitutional claims and because they increased the barriers to legislative or electoral passage of relationship-recognition measures. LGBTQ rights activists would need to either repeal the newly-enacted amendments or convince the Supreme Court to strike them down as violating the federal constitution before the activists could try to win relationship recognition policies.

Goodridge also prompted some elite political actors to come out in support of marriage equality. In early 2004, San Francisco, Portland, Oregon, and a handful of other localities began issuing marriage licenses to same-sex couples, continuing to do so until they were ordered to cease by courts, state attorneys general, and other authoritative interpreters of state law.[115] These actions exposed the existence of fissures in the prevailing political opportunity structure around LGBTQ rights, indicating a new openness to the argument that same-sex couples were deserving of legal protections. And, indeed, political elites in several localities took unprecedented steps to indicate their openness to marriage equality in the aftermath of *Goodridge*. The San Jose City Council, for instance, voted in March 2004 to recognize the same-sex marriages of city employees.[116] Seattle's mayor issued the same policy via executive order.[117] And in April 2004 the Maine Legislature created a domestic partnership registry establishing same-sex partners as next-of-kin for purposes of medical decision-making, funeral arrangements, and inheritance.[118]

The Massachusetts Supreme Judicial Court decision also indirectly triggered the adoption of a new tactic in the LGBTQ rights movement: the wedding wave. When San Francisco and Portland opened marriage to same-sex couples, the response was extraordinary. Thousands of same-sex couples applied for licenses, waiting for hours, days, and even weeks. By marrying, they put themselves and their relationships on the front lines of a cresting debate over the meaning of marriage and the role of lesbians and gay men in the American polity. They did so despite the evident legal, political, and social instability surrounding same-sex marriage in both locales at the time. Studies of the couples in both locations show that the weddings are appropriately classed as protest actions: intentional episodes of claims-making by

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114 The lone exception was a proposed amendment in Arizona, which appears to have been defeated because voters feared that its wording was broad enough to remove state benefits from elderly, unmarried couples. A more narrowly worded marriage ban passed by a wide margin in 2008. *See, e.g.,* Stephanie Simon, *South Dakota Scraps Abortion Bill*, L.A. TIMES, Nov. 8, 2006.

115 *See generally* DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE (2006).

116 *San Jose Recognizes Gay Marriage,* CHI. TRIB., Mar. 10, 2004, http://articles.chicagotribune.com/2004-03-10/news/0403100284_1_gay-marriage-marriage-licenses-same-sex.

117 Claudia Rowe, *Seattle Gays Go To Court After Wedding Licenses Denied*, SEATTLE POST-INTELLIGENCER, Mar. 8, 2004, http://www.seattlepi.com/local/article/Seattle-gays-go-to-court-after-wedding-licenses-1138971.php.

118 Me. Rev. Stat. Ann. tit. 22, § 2710 (2009).

participants with a history of activism in a variety of other social movements.[119] Wedding waves became a prominent feature of the marriage equality movement and lines of same-sex couples patiently waiting to marry and then emerging triumphantly with marriage licenses in hand became some of the movement's most iconic imagery.[120]

In essence, *Goodridge* was a match lit above a tinderbox.[121] As did *Baehr* before it, the decision galvanized oppositional forces to lobby legislatures and conduct ballot campaigns across the nation and thereby forced LGBTQ activists to spend significant amounts of time and energy responding to the threat of incipient marriage amendments. The success of counter-movements activists significantly shifted the structure of political opportunities surrounding marriage equality, shutting off access to state constitutional arguments and placing a huge new barrier in the way of electoral and legislative tactics. But *Goodridge* also signaled a fracturing in the alignment of political elites. While many legislative and executive branch actors worked to create a moat around "traditional" marriage, some took actions to show their support for at least some forms of relationship recognition, opening up possibilities for gains in some locations even while shutting down progress in others. This fracturing, in turn, triggered the creation of an iconic new tactic in the battle for marriage equality: the wedding wave.

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119 Verta Taylor, Katrina Kimport, Nella Van Dyke & Ellen Ann Anderson, *Culture and Mobilization: Tactical Repertoires, Same-Sex Weddings, and the Impact on Gay Activism*, 74 AM. SOC. REV. 865, 865–90 (2009).

120 All of this on top of the fact that *Goodridge* expanded the legal definition of marriage in Massachusetts to include same-sex relationships. There is indirect evidence to suggest that the sheer existence of married same-sex couples may have helped shift cultural frames surrounding same-sex marriage. By the end of 2004, more than 6,100 same-sex couples had married in Massachusetts. Over the next several years, public support for marriage equality rose faster in Massachusetts than in other states. See Andrew R. Flores & Scott Barclay, Public Support for Marriage for Same-sex Couples by State, Williams Inst. (2013), https://escholarship.org/uc/item/5640q32g.pdf; Andrew R. Flores & Scott Barclay, *Trends in Public Support for Marriage for Same-sex Couples by State: 2004-2014*, WILLIAMS INST. (2015), http://escholarship.org/uc/item/7d66v2mt.pdf (last visited Dec 30, 2016).
Moreover, the political furor in Massachusetts to subvert *Goodridge* abated significantly within two years of the decision. In March 2004, state legislators had voted to begin the lengthy process of amending the state's constitution to limit marriage to different-sex couples while creating civil unions for same sex couple. The proposed amendment passed by a vote of 105 to 92. In September 2005, when the amendment came up for the required second vote, it failed by a margin of 157 to 39, after only two hours of debate. According to media reports, many legislators had changed their mind about the amendment after witnessing the impact, or lack thereof, of same-sex couples getting married. The attitude shift of Senate Republican Leader Brian Lees, who had cosponsored the amendment in 2004, is indicative: "Gay marriage has begun, and life has not changed for the citizens of the commonwealth, with the exception of those who can now marry." Pam Belluck, *Massachusetts Rejects Bill Eliminate Gay Marriage*, N.Y. TIMES, Sept. 15, 2005. Senate Majority Leader Frederick E. Berry was even more succinct in explaining his change of heart. Said he, "There were no earthquakes." Raphael Lewis, Key Senators Break from Travaglini Amendment, BOSTON GLOBE, Sept. 7, 2005, http://www.boston.com/local/articles/2005/09/07/key_senators_break_from_travaglini_amendment.

121 ANDERSEN, *supra* note 46, at 219.

III. EVALUATING THE TRANSFORMATIVE POTENTIAL OF THE SUPREME COURT'S RECENT MARRIAGE JURISPRUDENCE

Between 2013 and 2015, the Supreme Court handed down two landmark marriage equality decisions: *United States v. Windsor*[122] and *Obergefell v. Hodges*.[123] *Windsor* involved the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), which defined the words "marriage" and "spouse" to encompass only heterosexual couplings for all purposes of federal law.[124] The plaintiff in the case, Edie Windsor, had been required to pay a significant estate tax after her wife died because the Internal Revenue Service, citing Section 3, refused to grant her the estate tax exemption available to heterosexual spouses. The *Windsor* majority ruled that "the principal purpose and necessary effect of [Section 3] are to demean those persons who are in a lawful same-sex marriage" [125] in violation of Fifth Amendment guarantees. On June 26, 2013, the Supreme Court ruled that the federal government was required to recognize marriages between people of the same sex. The *Windsor* majority ruled that "the principal purpose and necessary effect of [Section 3] are to demean those persons who are in a lawful same-sex marriage"[126] in violation of Fifth Amendment guarantees.[127]

Two years to the day after deciding *Windsor*, the Supreme Court handed down *Obergefell v. Hodges*, a challenge to the constitutionality of state laws barring same-sex couples from marrying. Such laws, the Supreme Court ruled, violated the fundamental right of same-sex couples to marry under the Fourteenth Amendment.[128] Justice Kennedy penned the majority decision, just as he had in *Romer, Lawrence*, and *Windsor*. "Under the Constitution," he wrote, "same-sex

122 *Windsor*, 133 S.Ct. at 2675.

123 *Obergefell*, 135 S.Ct. at 2584.

124 Defense of Marriage Act (DOMA) 2(a), 28 U.S.C.A. 1738C (West. 1998).

125 U.S. v. Windsor, 133 S.Ct. at 2695. *See also id.* at 2695–96 ("DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.")

126 *Id.* at 2695; *See also id.* at 2695–96 ("DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.").

127 The same day it handed down *Windsor*, the Supreme Court sidestepped an opportunity to decide whether state governments were required to recognize marriages between people of the same sex. *Hollingsworth v. Perry* was a challenge to the constitutionality of Proposition 8, an amendment to California's constitution that expressly limited marriage to different-sex couples. 133 S.Ct. 2652 (2013). The Court dismissed the case on a procedural issue, finding that the party defending the constitutionality of California's amendment lacked standing to appeal the federal district court's initial ruling that the amendment was unconstitutional. The functional result was to bring marriage equality to California, the nation's most populous state. Two years later, in *Obergefell*, the Court would definitively answer the question it ducked in *Perry*.

128 Obergefell, 135 S.Ct. at 2597–605.

couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right."[129]

Obergefell was widely hailed as an extraordinary moment in the movement for LGBTQ rights.[130] At its most basic level, the ruling struck down marriage bans in the thirteen states that still had them on the books. More broadly, it marked the culmination of over twenty years of movement (and counter-movement) activism around marriage equality, activism that had turned the concept of same-sex marriage from an oxymoron to a reality.

But notwithstanding its obvious importance as both a legal matter and a social movement success, can *Obergefell* be considered a transformative event? Did it prompt a radical shift in the level or nature of mobilization, generate tactical innovations, alter political consciousness, foster organizational change and/or provoke changes in the configuration of elites, allies, and adversaries? Or is *Obergefell* more like *Lawrence v. Texas*—a landmark ruling that marked the culmination of over three decades of concerted efforts to vanquish sodomy laws but that did not catalyze radical change in the trajectory of the larger LGBTQ rights movement?

My read of the evidence is that *Obergefell* is best understood as *part* of a larger transformative event rather than as a singular event. Transformative events do not need to operate at a singular moment in time. The Montgomery Bus Boycott, for instance, took over a year from start to finish. The unfolding of the HIV/AIDS epidemic throughout the 1980s is likewise seen as a transformative event for the American LGBTQ rights movement, prompting as it did a radical shift in movement priorities, the generation of new movement tactics, the mass mobilization of activists, and the creation of new organizations.[131] I argue that *Windsor* and *Obergefell* operated as the two end points of a singular transformative event rather than as two separate events. In the pages to follow, I explain my reasoning.

From a social movement perspective, *Windsor*'s primary effect on the LGBTQ rights movement was in providing a key of sorts with which to access the federal courts. Prior to *Windsor*, the great majority of the LGBTQ rights groups had been hesitant to bring a direct attack on the federal constitutionality of same-sex marriage bans, worrying that if they pushed too far too fast they would lose.[132] *Windsor* changed the calculus. Justice Kennedy's rationale for striking down Section 3 of DOMA provided powerful ammunition for arguing that state constitutional bans on same-sex marriage were likewise unconstitutional. If a federal law refusing to

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129 *Id.* at 2602.

130 *See supra* text accompanying notes 4–11.

131 For examinations of the transformative effects of the HIV/AIDS epidemic on LGBTQ activism, see generally Deborah B. Gould, Moving Politics: *Emotion and ACT UP's Fight Against Aids* (2009); Gamson, *supra* note 45; Amin Ghaziani, Verta Taylor & Amy Stone, *Cycles of Sameness and Difference in LGBT Social Movements*, ANNU. REV. SOCIOL. (2016), http://www.annualreviews.org/doi/abs/10.1146/annurev-soc-073014-112352.

132 Cummings & NeJaime, *supra* note 54; Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 683–87 (2012).

recognize same-sex marriages was demeaning to same-sex couples, surely state laws limiting marriage to different-sex couples were also demeaning to same-sex couples. If DOMA "instruct[ed] all federal officials, and indeed all persons with whom same-sex couples interact[ed], including their own children, that their marriage [was] less worthy than the marriages of others,"[133] surely state constitutional bans did the same.

> Yet again, Justice Scalia's dissenting opinion laid out a roadmap for future litigation: By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court's declaration that there is no legitimate purpose served by such a law, and will claim that the traditional definition has the purpose and effect to disparage and to injure the personhood and dignity of same-sex couples.[134]

After *Windsor*, Lambda Legal, Gay and Lesbian Advocates and Defenders (GLAD), the ACLU, LGBT Project, and the National Center for Lesbian Rights (NCLR) moved quickly to do something they had never done before—file direct federal challenges to the constitutionality of marriage bans. They were joined by same-sex couples around the nation acting independently of any social movement organizations. Within a year of the *Windsor* decision, every state marriage ban was under legal attack.

These legal challenges were extraordinarily successful. The day *Windsor* was handed down, twelve states and the District of Columbia had instituted (or were in the process of instituting) marriage equality regimes.[135] In the two years between *Windsor* and *Obergefell*, *twenty-four* additional states opened marriage to same-sex couples, all but two of them in direct response to judicial mandates.[136] The first twenty courts to hear marriage equality challenges post-*Windsor* unanimously ruled

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133 U.S. v. Windsor, 133 S.Ct. 2675 (2013).

134 *Id.* at 2710. (Scalia, J., dissenting); *See also id.* at 2709 (Scalia, J., dissenting). "In my opinion, however, the view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by bare desire to harm couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status." *Id.*

135 Judicial decisions had precipitated marriage in three of those states (Massachusetts, Connecticut and Iowa). Voters in an additional three states had implemented marriage equality via the ballot (Maryland, Washington, and Maine). Three states and the District of Columbia had instituted marriage equality via legislative action (Vermont, New Hampshire, and New York). Three additional state legislatures had voted to open marriage to same-sex couples prior to *Windsor*, but the laws did not go into effect until after *Windsor* was decided.

136 Illinois and Hawaii passed marriage equality legislatively. New Mexico, Oregon, Pennsylvania, Indiana, Oklahoma, Utah, Wisconsin, Virginia, Colorado, Kansas, Nevada, West Virginia, North Carolina, South Carolina, Alaska, Idaho, Wyoming, Arizona, Montana, Florida, and Alabama all opened marriage to same-sex couples in response to judicial decisions. I omit California from this list because of its unique circumstances. *See* U.S. v. Windsor, 133 S.Ct. 2675 (2013).

in favor of the same-sex couples bringing suit.[137] By the time the Supreme Court accepted *certiorari* in *Obergefell*, more than forty courts had interpreted *Windsor* to stand for the proposition that same-sex couples had a constitutional right to marry, including the Fourth, Seventh, Ninth, and Tenth Circuits. Only a handful of courts disagreed.[138] The Sixth Circuit was one of those courts; its decision would become the vehicle for the Supreme Court to directly address the question of whether same-sex couples had a constitutionally protected interest in marrying.[139]

On its own merits, then, *Windsor,* bears several markers of a transformative event. It was the catalyst for a torrent of federal litigation. Some of this litigation was spearheaded by LGBTQ rights organizations, who shifted their legal tactics for pursuing marriage equality as a consequence of the potentially powerful new doctrinal argument supplied by *Windsor*. Other litigation was brought by same-sex couples acting independently, inspired by *Windsor*'s promise. These lawsuits were overwhelmingly successful, suggesting that *Windsor* may have altered the legal frames surrounding marriage so greatly that it shifted the configuration of judicial elites with respect to the validity of same-sex marriage bans—although it is also possible that judicial elites would have interpreted the federal Constitution to require marriage equality even in the absence of *Windsor*.[140]

Other post-*Windsor* shifts in the trajectory of the LGBTQ rights movement, however, are more appropriately attributed to the *Windsor-Obergefell* line of cases than to *Windsor* alone. Legislative data, for instance, indicate that *Windsor* and its progeny triggered a shift in strategy by opponents of marriage equality. In the immediate aftermath of *Windsor*, adversaries began pushing for the passage of so-called marriage refusal bills. These bills varied in their specifics. Some permitted public officials to opt out of performing marriages or issuing marriage licenses based on religious beliefs.[141] Others allowed commercial and/or religious entities to refuse to provide wedding-related services based on religious beliefs.[142] Marriage refusal

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137 The specific claims raised varied from case to case. In some instances, plaintiffs argued that they had a constitutional right to marry *e.g.*, Kitchen v. Herbert, 961 F. Supp. 2d 1181 (2013). In others, plaintiffs argued that the state must recognize marriage licenses from out of state. *E.g.,* Bourke v. Beshear, 996 F. Supp. 2d 542 (2014). One case revolved around whether Ohio had to recognize a valid same-sex marriage on a death certificate. *E.g.,* Obergefell v. Wymyslo, 962 F Supp 2d 968 (2013).

138 *See* Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (2014)(District Court for the Eastern District of Louisiana); Borman v. Pyles-Borman, No. 2014CV36, 2014 WL 4251133, at 1* (Tenn. Cir. Ct. 2014); Conde-Vidal v. Garcia-Padilla, 54 F. Supp. 3d 157 (2014)(District Court for Puerto Rico).

139 *See* DeBoer v. Snyder, 772 F. 3d 388 (2014), the Sixth Circuit consolidated and reversed pro-marriage equality decisions from four states within the circuit: Kentucky, Michigan, Ohio, and Tennessee.

140 *Windsor* also indirectly affected the positions of scattered political elites. Governor Tom Corbett of Pennsylvania, for instance, was an opponent of marriage equality who had vowed to defend Pennsylvania's marriage ban against constitutional attack. However, he ultimately chose not to appeal a lower court ruling striking down the ban in light of *Winds.* Jon Delano*, Gov. Corbett Won't Appeal Same-Sex Marriage Case*, CBS NEWS (2014), http://pittsburgh.cbslocal.com/2014/05/21/gov-corbett-wont-appeal-same-sex-marriage-case//.

141 The ACLU keeps an updated list of marriage refusal bills. *ACLU Marriage Refusal Bills*, https://www.aclu.org/other/past-anti-lgbt-religious-exemption-legislation-across-country?redirect=other/anti-lgbt-religious-exemption-legislation-across-country#mrealtedref16.

142 *Id.*

bills were introduced in three states in 2013,[143] four states in 2014,[144] sixteen states in 2015,[145] and twenty-four states in 2016.[146] While *Windsor* may have been the catalyst for the earliest bills, later bills were likely a response to *Windsor's* progeny; the great majority of the bills came from states where marriage equality was the product of the *Windsor-Obergefell* line of cases.

The *Windsor-Obergefell* line of cases may also have prompted opponents of LGBTQ rights to re-center their efforts from fighting to maintain a particular conception of marriage and toward fighting to maintain a particular conception of gender. Organized efforts to derail laws protecting individuals from discrimination on the basis of gender identity became more prominent after *Windsor*.[147] In late 2014, for example, Houston voters repealed a new city ordinance expanding antidiscrimination protections to transgender people. In early 2015, citizens in Springfield, Missouri took to the ballot box to repeal a newly-enacted ordinance prohibiting discrimination on the basis of sexual orientation and gender identity.[148] Bills to repeal state and local measures prohibiting discrimination on the basis of gender identity were introduced in two states in 2015[149] and thirteen states during the first half of 2016.[150] Rhetoric about the dangers of laws prohibiting discrimination on the basis of gender identity commonly focused on transgender bathroom usage, with a particular emphasis on the specter of sex predators in sex-segregated spaces.[151]

Evidence of a direct link between the increased focus on "bathroom bills" and the *Windsor-Obergefell* line of cases is circumstantial at this point; correlation is not causation. But the shift makes intuitive sense. As Tina Fetner has detailed, conservative groups seized the issue of same-sex marriage in the 1990s because they saw it as "an issue with strong cultural resonance and popular support," one that would galvanize a broad constituency opposed to "changing one of the nation's most

143 Hawaii, New Mexico, and Washington.

144 Hawaii, Kansas, South Carolina, South Dakota, and Utah.

145 Alabama, Arkansas, Florida, Kentucky, Louisiana, Maryland, Michigan, Montana, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and Virginia.

146 Alaska, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Missouri, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, Ohio, Oklahoma, South Carolina, Tennessee, Virginia, Washington, Wyoming.

147 Prior to *Windsor,* there were a small handful of scattered attempts to repeal such laws. See Kristen Schilt & Laurel Westbrook, *Bathroom Battlegrounds and Penis Panics*, CONTEXTS (Aug. 20, 2015), https://contexts.org/articles/bathroom-battlegrounds-and-penis-panics/. The ACLU keeps an updated list of state laws barring discrimination on the basis of gender identity. States barring discrimination in employment and/or public accommodations on the basis of gender identity as of January 1, 2017, are California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Illinois, Massachusetts, Maryland, Maine, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, and Washington. More than 200 localities have similar ordinances. *Id.*

148 Sarah Parvini, *Springfield, Mo., Voters Repeal LGBT Anti-Discrimination Law*, L.A. TIMES (April 8, 2015), http://www.latimes.com/nation/la-na-missouri-antidiscrimination-law-20150408-story.html.

149 Oklahoma and Wisconsin.

150 Illinois, Indiana, Kentucky, Louisiana, Minnesota, Mississippi, New York, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and Washington.

151 Schilt & Westbrook, *supra* note 147.

cherished and emotionally laden institutions."[152] With the *Windsor-Obergefell* cases taking marriage largely off the table, opponents of LGBTQ rights needed another focus to mobilize their base. Bathroom bills were an obvious choice. As Schilt and Westbrook detail, the historical conflation of transgender people with sexual predators combined with the widespread belief that women and children are vulnerable subjects who need protection from predatory men make measures that permit transgender people to access sex-segregated spaces particularly fraught. As with same-sex marriage in the 1990s, bathroom bills are an "issue with strong cultural resonance and popular support."[153]

At issue here is not whether opponents shifted focus to bathroom bills when same-sex marriage lost its utility: they did. It is whether this shift can be directly linked to the *Windsor-Obergefell* line of cases rather than, say, the increasing public support for marriage equality. A full answer will require access to the internal deliberation of opposition groups, access that is not available now—and may never be available. The suddenness of the shift from mobilizing against marriage equality to mobilizing against laws prohibiting discrimination on the basis of gender identity after *Windsor-Obergefell*, however, offers strong circumstantial evidence of the cases' importance.

Another shift in the trajectory of the LGBTQ rights movement is clearly attributable to *Obergefell* itself, namely a change in the organizational field surrounding LGBTQ rights. Freedom to Marry—the most visible marriage equality group and a major funder of various marriage equality campaigns—shut its doors in February 2016. The choice was deliberate. Evan Wolfson, the organization's president, announced that Freedom to Marry would discontinue operations in a *New York Times* op-ed piece published the same day the Court decided *Obergefell*.[154] State-level Freedom to Marry groups also closed down[155] as did the American Foundation for Equal Rights, an organization formed with the specific goal of sponsoring *Hollingsworth v. Perry*, the challenge to the constitutionality of California's marriage ban.[156] At least one LGBTQ rights group with a wider portfolio of interests also disbanded in the aftermath of *Obergefell*: Empire State Pride Agenda, a New York-centered advocacy group.[157] Empire State Pride Agenda noted in a press announcement that "fundraising challenges naturally coincide with mission victories," but it stressed that its decision was "mission-driven rather than being

152 FETNER, *supra* note 57, at 111.

153 *Id.* at 110–11.

154 Evan Wolfson, *Evan Wolfson: What's Next in the Fight for Gay Equality*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/opinion/evan-wolfson-whats-next-in-the-fight-for-gay-equality.html.

155 Neal P. Goswami, *Marriage equality group to disband*, RUTLAND HERALD (January 1, 2016), http://rutlandherald.com/article/20160101/NEWS03/160109963.

156 *Another LGBT Rights Group to Shut Down,* WASH. BLADE: GAY NEWS, POL., LGBT RTS. (Aug. 5, 2015), http://www.washingtonblade.com/2015/08/05/another-lgbt-rights-group-to-shut-down/.

157 Jesse Mckinley, *Empire State Pride Agenda to Disband, Citing Fulfillment of Its Mission*, N.Y. TIMES, (December 12, 2015), http://www.nytimes.com/2015/12/13/nyregion/empire-state-pride-agenda-to-disband-citing-fulfillment-of-its-mission.html.

about whether or not the Pride Agenda can remain fiscally solvent."[158] Equality Maryland, however, directly cited budget shortfall issues when announcing that the organization would stay open but sharply curtail its operations in the aftermath of *Obergefell*.[159]

This shift in the organizational field surrounding LGBTQ rights raise questions that we do not yet have the data to answer but that will speak more fully to *Obergefell*'s radiating effects. To what extent has winning marriage equality hampered the ability of LGBTQ advocacy groups to raise funds? Lambda Legal listed contributions totaling roughly $16.2 million in 2014 while the Human Rights Campaign reported roughly $28.8 million. Will they be able to maintain the enthusiasm of their donors now that marriage equality has largely disappeared as an issue around which to raise funds?[160] Their capacity for mobilizing donors in the absence of marriage equality may well determine which groups survive and which do not.

In a related vein, will the activists who fought so hard to win marriage equality turn their efforts to other important issues facing LGBTQ people, including the need to secure protections from discrimination in employment, housing, and public accommodations on the basis of sexual orientation and gender identity? Will they instead turn their efforts to other causes? Or will they recede to private life? The fight for marriage equality was, in its later years, an emotionally compelling issue for many "ordinary" LGBTQ people, as the persistence of weddings waves indicates. Will those people demobilize now in *Obergefell*'s aftermath? The answers to these questions will color our assessment of *Obergefell*'s ultimate impact on the LGBTQ rights movement.

No matter the answers to these questions, however, it seems clear that the *Windsor-Obergefell* line of cases should be classified as a transformative event in the LGBTQ rights movement. *Windsor* dramatically changed the terms of the debate around marriage equality. It prompted a change in tactics by the major LGBTQ litigation organizations and unleashed a torrent of litigation, litigation that was overwhelmingly successful. *Windsor* might have shifted the configuration of judicial elites with respect to the issue of marriage equality or it may simply have made visible a shift that had already taken place. In either event, in the two years between *Windsor* and *Obergefell*, marriage equality advanced rapidly across the nation, a stunning cascade of shifts in the legal status of same-sex couples. The *Windsor-Obergefell* line of cases in turn prompted tactical shifts among opponents of LGBTQ rights. It sparked a rear-guard action in the form of a new emphasis on marriage refusal bills. It may well have prompted opponents to develop a new target: laws that prohibit discrimination on the basis of gender identity, particularly in the context of

158 Trudy Ring, *Empire State Pride Agenda to Disband*, THE ADVOCATE 2015, http://www.advocate.com/politics/2015/12/12/empire-state-pride-agenda-disband (last visited Aug 9, 2016).

159 Equality Maryland to remain open, curtail operations, WASH. BLADE: GAY NEWS, POL., LGBT RTS. (Aug. 3, (2015), http://www.washingtonblade.com/2015/08/03/equality-maryland-to-remain-open-curtail-operations/.

160 1099 forms for Lambda Legal and HRC provided courtesy of guidestar.org. *Lambda Legal Defense and Education Fund,* GUIDESTAR, https://www.guidestar.org/profile/23-7395681 (last visited May 17, 2017).

sex-segregated spaces. *Obergefell*, in turn, has already triggered shifts in the organizational field surrounding LGBTQ rights and may well have additional radiating effects over time.

It is also worth noting that the *Windsor-Obergefell* line of cases radically changed the lived experiences of same-sex couples—and their children—in every state in the nation. *Windsor* gave legally married same-sex couples access to the plethora of federal rights, benefits, and protections of federal law. *Obergefell*, together with the torrent of judicial decisions occurring in *Windsor*'s shadow, opened legal marriage up to same-sex marriage in thirty-seven states. These marriages gave same-sex couples who chose to enter into them all the state-level rights, benefits, and protections of marriage in addition to the federal protections guaranteed by *Windsor*.

This is no small change. The legal consequences of marriage encompass a very broad range of economic and familial issues.[161] But the meaning of marriage extends far beyond its practical legal effects. Marriage *means* many things, so many that the term is difficult to define in any holistic sense. It is both a status and a contract, both public and private.[162] It has religious and cultural significance. It is intimately connected to American conceptions of citizenship, both historically and in the modern day.[163] It is a source of identity and social status.[164] Weddings are rituals that evoke meanings beyond the event itself.[165] Among other things, they are a key rite of passage into adulthood in the modern Western context.[166] They stimulate moral attachment to the existing social order through the iterative and collective expression of social values and emotions.[167] They are also the centerpiece of what Ann Swidler calls the "mythic culture of love;" the moment when "true love" is affirmed by the joining together of two individuals who will, in the most perfect form of the myth, live happily ever after.[168]

The *Windsor-Obergefell* line of cases gave same-sex couples across the nation access to marriage in all these dimensions. And that may be the most transformative effect of all.

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161 Ellen A. Andersen, *The Gay Divorcee: The Case of the Missing Argument*, QUEER MOBILIZATIONS LGBT ACTIVISTS CONFRONT L. 281–319 (Scott Barclay et al. eds. 2009); *See generally* KIMBERLY D. RICHMAN, LICENSE TO WED: WHAT LEGAL MARRIAGE MEANS TO SAME-SEX COUPLES (2013); David L. Chambers, *What if? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447–91 (1996).

162 Nancy F. Cott, *Giving Character To Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century*, *in* U.S. HIST. AS WOMEN'S HIST.: NEW FEMINIST ESSAYS 107–21 (Linda Kerber, Alice Kessler-Harris, & Kathryn Kish Sklar eds., 1995).

163 CHESHIRE CALHOUN, FEMINISM, THE FAMILY, AND THE POLITICS OF THE CLOSET: LESBIAN AND GAY DISPLACEMENT: LESBIAN AND GAY DISPLACEMENT 127 (2000); Cott, *supra* note 162, at 111; Jyl Josephson, *Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage*, 3 PERSP. POL. 269, 270 (2005).

164 KATHLEEN HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW 132 (2006); RICHMAN, *supra* note 161.

165 STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE 40 (2006); ELIZABETH FREEMAN, THE WEDDING COMPLEX: FORMS OF BELONGING IN MODERN AMERICAN CULTURE 189 (2002).

166 Joseph R. Gusfield & Jerzy Michalowicz, *Secular Symbolism: Studies of Ritual, Ceremony, and the Symbolic Order in Modern Life*, ANN. REV. SOC. 417–35 (1984).

167 *See generally* JEFFREY C. ALEXANDER, BERNHARD GIESEN & JASON L. MAST, SOCIAL PERFORMANCE: SYMBOLIC ACTION, CULTURAL PRAGMATICS, AND RITUAL (2006); Taylor et al., *supra* note 119, at 868.

168 ANN SWIDLER, TALK OF LOVE: HOW CULTURE MATTERS 218 (2013).

CONCLUSION

The great bulk of scholarship examining the relationship between judicial decisions and social movement progress has focused on the wisdom and utility of turning to litigation as a mechanism for achieving social change. I take a different approach in this article. I am interested in exploring the capacity of judicial decisions to create turning points in the trajectory of social movements.

Social movements can be conceptualized as a concatenation of events: protest actions, meetings, boycotts, lawsuits, lobbying, the creation of new organizations, the dissolution of organizations, and so on. These events mark, shape, and sustain social movements and as they accumulate they can have powerful effects. The great majority of these events are what we might term ordinary or regular—part of the standard ebb and flow of social movements. On rare occasion, however, a singular event—or a closely connected series of events—can radically alter the capacity of a social movement to effect social change. Social movement scholars refer to these events as transformative events.

Intriguingly, for all its use as a concept, a more precise definition of transformative events remain elusive. Social movement scholars have primarily interested themselves in the capacity of transformative events to dramatically shift mobilization levels among a movement's adherents. Yet existing scholarship makes it clear that transformative events can have effects ranging far beyond individual mobilization. On an individual level, transformative events can dramatically increase mobilization—or demobilization. On a group level, they can prompt the creation of new organizations—or the collapse of existing ones. They can spark new alliances or damage existing ones. They can spark major changes in strategies and tactics. Such group-level effects can spread to the universe of movement adversaries as well. On a structural level, transformative events can dramatically alter the political opportunity structure within which a movement operates, variously opening up or closing down windows for action. Transformative events can also dramatically affect the capacity of social movements to frame their arguments in ways that are culturally persuasive. One of the aims of this article has been to specify the multiple ways that transformative events can affect the trajectories of social movements.

Social movement scholars have shown that many different types of events have the capacity to be transformative, but they have not yet examined judicial decisions as a potential type of transformative event. This article fills that gap. I draw on six judicial decisions involving LGBTQ rights to reach this conclusion: four US Supreme Court decisions (*Romer v. Evans, Lawrence v. Texas, United States v. Windsor* and *Obergefell v. Hodges*) and two decisions from state courts of last resort (Hawaii's *Baehr v. Lewin* and Massachusetts' *Goodridge v. Department of Public Health*). My reason for choosing these cases to examine was simple: I picked cases that were widely described as landmarks, turning points, or watersheds in the movement for LGBTQ rights.

My findings show that judicial decisions can indeed catalyze radical change in the trajectory of a social movement, change that measurably alters the capacity of a

social movement to effect its aims in a fashion that is dramatic, enduring, and proximate to the decision itself. *Baehr* and *Goodridge* clearly operated as pivots in the trajectory of the LGBTQ rights movement. *Baehr* dramatically changed the terms of the debate around LGBTQ rights, forcing rights groups to reorder their priorities to accommodate the goal of marriage equality. The decision sparked the creation of new activist nodes within the movement and sparked mobilization, particularly among opponents of marriage equality. *Baehr* also served as the catalyst for government repression, as opponents of marriage equality successfully promoted the passage of laws specifically designed to stymie the progress of the LGBTQ rights movement.

Goodridge shared several features in common with *Baehr*. Like *Baehr*, *Goodridge* galvanized opponents of LGBTQ rights, who moved quickly to lobby states to amend their constitutions to fence same-sex couples out of marriage. The passage of state-level constitutional amendments in turn placed significant new hurdles in the path of activists seeking marriage equality. But *Goodridge* also revealed a new fracture in the alignment of political elites. Political actors in several localities took steps to show their support for marriage equality. Most prominently, San Francisco and Multnomah County, Oregon, began permitting same-sex couples to obtain marriage licenses, a practice they continued until forced to desist by state courts. This fracturing opened up possibilities for rights gains in some locations even while other locations were actively working to stem the possibility of relationship recognition for same-sex couples. It also triggered the creation of an iconic new tactic in the battle for LGBTQ rights: the wedding wave.

In both *Baehr* and *Goodridge* then, the effects of a judicial ruling radiated far beyond the courtroom walls, with measurable, proximate, significant, and enduring consequences for the LGBTQ rights movement. Although the reverberations of the *Windsor-Obergefell* line of cases cannot yet be fully measured, it is already evident that these cases have also altered the trajectory of the LGBTQ rights movement. The *Windsor-Obergefell* cases share several similarities with *Baehr*. Both dramatically changed the terms of the debate around LGBTQ rights. Both provoked tactical shifts among LGBTQ rights organizations as well as opponents of LGBTQ rights. And both inspired changes in the organizational field surrounding LGBTQ rights, with *Baehr* acting as the impetus for the creation of new activist nodes and *Obergefell* acting as the impetus for several LGBTQ rights groups to close their doors. The most obvious distinction between the two transformative events is also worth noting. *Baehr* marked the emergence of a major new battleground in the struggle over LGBTQ rights; *Obergefell* marked its successful resolution.

My findings also show that landmark decisions are not, in and of themselves, transformative events. *Romer v. Evans* and *Lawrence v. Texas* are inarguably important moments both in terms of the progress of the LGBTQ rights movement and in terms of the development of equal protection (*Romer*) and privacy law (*Lawrence*). *Romer* was the first Supreme Court case to position lesbians and gay men as worthy of protection under the Equal Protection Clause—and the first to recognize and repudiate anti-gay animus as a legitimate basis for law-making. *Lawrence* marked

the final victory in a decades-long battle to decriminalize consensual same-sex relations, thereby cutting the legs out from under a pervasive argument for denying rights to LGBTQ people: their supposed criminality.

But there is little empirical evidence that either case actually changed the *trajectory* of the LGBTQ rights movement in a significant, measurable, and enduring fashion. I find no evidence that winning either case generated major changes in the organizational forms, capacities, or tactics of major LGBTQ organizations. Nor did losing these cases appear to significantly alter the tactics of opposition activists. There is no persuasive evidence that *Romer* or *Lawrence* affected levels of individual mobilization.

The cases certainly did suggest an increasing level of judicial receptivity to LGBTQ rights claims. They also gave LGBTQ rights litigators new legal arguments to add to their arsenal, which they quickly did. But this seems insufficient, in and of itself, to categorize a judicial decision as transformative. Compare *Romer* and *Lawrence* to *Windsor*. All three decisions indicated judicial receptivity to an LGBTQ rights claims and all three decisions gave LGBTQ rights activists access to powerful new legal arguments. Only *Windsor* engendered measurable levels of additional legal mobilization by individual activists. Only *Windsor* inspired tactical shifts among LGBT rights organizations. And only *Windsor* prompted opponents of LGBTQ rights to turn to new strategies to limit rights gains. There is no one defining criterion of a transformative event, a definitional imprecision that inevitably leads to arguments about marginal cases. I have proceeded from the assumption that events that inspire wider and more dramatic changes in the trajectory of a social movement fall more obviously into the class of transformative events. From this perspective, *Romer* and *Lawrence* have little claim to be considered transformative events.

I want to make it clear that I am not making the claim that transformative events are the sole or even the most important engine of social change. Transformative events are outliers. They are only a tiny proportion of all the events that occur over the course of a movement and to place undue emphasis on them at the cost of the quieter work of social movements risks a distorted understanding of what social movements do and how and why they progress in the particular way that they do. On the other hand, to ignore transformative events is to miss the fact that there are, on occasion, moments that can fundamentally shift the trajectory of social movements. The *Windsor-Obergefell* line of cases—and *Baehr* and *Goodridge* before it—is one such moment.