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# Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena

Michael C. Dorf and Sidney Tarrow

*Since the 1980s, social movement scholars have investigated the dynamic of movement/countermovement interaction. Most of these studies posit movements as initiators, with countermovements reacting to their challenges. Yet sometimes a movement supports an agenda in response to a countermovement that engages in what we call “anticipatory countermobilization.” We interviewed ten leading LGBT activists to explore the hypothesis that the LGBT movement was brought to the fight for marriage equality by the anticipatory countermobilization of social conservatives who opposed same-sex marriage before there was a realistic prospect that it would be recognized by the courts or political actors. Our findings reinforce the existing scholarship, but also go beyond it in emphasizing a triangular relationship among social movement organizations, countermovement organizations, and grassroots supporters of same-sex marriage. More broadly, the evidence suggests the need for a more reciprocal understanding of the relations among movements, countermovements, and sociolegal change.*

## I. INTRODUCTION

Legal scholars have long appreciated that social movements drive much legal change (Scheingold 1974; McCann 1994, 2006; Eskridge 2001; Siegel 2008; Balkin 2011). At the same time, social movement scholars are increasingly aware of the law as part of the “opportunity structure” of movement activists (Hilson 2002; Boutcher 2010, 2013; Hajjar 2010; Prabhat 2011; de Fazio 2012; Vanhala 2012; Boutcher and Stobaugh 2013). Our work brings together social movement and legal scholarship to trace the dynamic relationship between an anticipatory countermobilization, a movement response, and the role of grassroots activists in triggering this response.

Although many scholars have recognized the role of countermovements, theoretical understandings of the relationship among law and social movements remain one-sided. In particular, little is known about the reciprocal relations between movements and countermovements in legal and political opportunity structures. This article

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examines in detail one dramatic change: the adoption of legal same-sex marriage as a policy goal by the LGBT rights advocacy community over the last two decades in the wake of the Defense of Marriage Act (DOMA 1996) and the wave of state-level constitutional amendments and mini DOMAs that followed. These policy changes were in large part the result of what we call the “anticipatory countermobilization” of a religious conservative countermovement *prior* to the determination of the LGBT community to mobilize on behalf of marriage equality.

We tell a story of strange bedfellows: we argue that it was not the gay and lesbian community that moved the issue of marriage equality to the top of the social policy agenda, but an archipelago of Christian conservative and “family values” groups responding to court rulings and legislation that were less threatening to traditional values than marriage equality was (Klarman 2012, 48–85; Stone 2012). By doing so, they reversed the commonly understood sequence of movement/countermovement interaction, whereby a movement for change triggers a countermovement that seeks to roll back policies advanced by those with whom they disagree. In this case it was the countermovement—by lobbying for the passage of laws and state initiatives preventing same-sex marriage—that launched the dynamic that led to the campaign for, and the growing approval of, same-sex marriage that we have seen in the past decade.

Our work supports the existing scholarship (as we explain below), but also goes beyond it in emphasizing a dynamic triangular relationship among social movement organizations, countermovement organizations, and grassroots supporters of same-sex marriage. We argue that DOMA and state initiatives triggered a “cycle of contention” that mobilized LGBT everyday activists to urge movement organizations to take up the cause of same-sex marriage. Ours is neither an elite nor a mass explanation of policy change, but an interactive model of elite-mass and movement-countermovement interaction.

Until about the mid-1990s, marriage was not a high priority for the LGBT movement. This was in part because there were many other issues to address, but also because of fear of overreaching in a country in which the majority’s religious beliefs militated against approval of same-sex marriage. However, the religious right had no such qualms: “Religious right activists,” writes Tina Fetner, “saw their opposition to same-sex marriage as an issue with strong cultural resonance and popular support” (2008, 110–11). They claimed that developments like the passage of local ordinances against discrimination would be the entering wedge for the legalization of same-sex marriage and, ultimately, for the destruction of the American family. Only in response to their efforts to ban same-sex marriage did the LGBT movement vigorously take up the question of marriage.

It is not news that movements for change produce countermovements against them, seeking stability or a rollback of the policies of which they disapprove. In a general sense, this was the case from the 1960s on, when movements for personal and group rights helped trigger a cultural countermovement in US politics, but in the particular case of same-sex marriage, it was the conservative *countermovement* that initiated this particular cycle of contention, *not* the LGBT movement itself.

But what was the “movement” and what was the “countermovement”? Along with most scholars of contentious politics, we define a movement as a *group of actors who seek to change the legal and/or social status quo* and a countermovement as *those who seek to preserve the status quo or to roll back recent changes to the status quo* (della Porta and Diani

1999; Tilly 2004; Meyer, Jenness, and Ingram 2005; Tarrow 2011). To be sure, movements and countermovements exist in a dialectical relationship and thus in some sense the actors who initiate any particular cycle of contention may be understood as the “movement,” while those who respond may be cast in the role of “countermovement.” In the present context, it might be said that a “movement” of social conservatives placed the issue of same-sex marriage on the public agenda and that an LGBT rights “countermovement” sought to counter the former’s efforts, but this formulation would confusingly invert the relationship between actors seeking social change and those who seek to reverse it.

We recognize an inevitable imprecision in these definitions. Since Heraclitus, philosophers and others have known that there is no truly stable status quo, and thus, ultimately, there can be no preservation of the status quo. Moreover, some nominally reactionary movements aim to “return” to a fictive past. Nonetheless, we regard the distinction between those who seek change and those who oppose it as important, in the context of same-sex marriage and other movements for legal and social reform. By drawing the line between movements and countermovements where we do, we highlight the natural expectation that movements—those who seek legal and/or social change—would generally be the ones to initiate cycles of contentious politics, whereas countermovements would generally be in the reactive role. And yet, that general pattern was not followed with respect to same-sex marriage.

The dynamic of a cycle of contention initiated by a countermovement has been recognized by other scholars who have worked on sexual politics (see Meyer and Staggenborg 1996, 1998; Fetner 2008; Klarman 2012; Stone 2012, 2013; Weiss 2013). As Tina Fetner writes: “Leaders in the religious right may have thought the issue of marriage would be an easy victory, given how important the symbolic aspects of marriage are to many people” (2008, 112). And, indeed, through the first decade of this century, the religious right won most of the electoral battles it began (Stone 2012, ch. 5).

However, this movement/countermovement dynamic did not remain at the elite level of the “social movement organization”: in the cycle of contention leading to the (thus-far-still-partial) success of the same-sex marriage movement, we found that ordinary gay and lesbian couples who had been creating lives for themselves at the grassroots put pressure on LGBT advocacy groups, pushing them to place marriage equality high on their agendas when conservative forces began to win public policy battles on the issue of same-sex marriage. In this article, we argue, first, that changes in the political opportunity structure drove the dynamic of same-sex marriage; second, that the strategic move of the anti-same-sex marriage lobby, passing anti-same-sex marriage laws at both the federal and state levels, triggered a reluctant LGBT movement to take action; and, third, that the decision to respond to the religious right’s challenge was activated by a grassroots mobilization of gay and lesbian couples, many of whom had been previously politically inactive in the movement. What largely began as a duel between movement organizations and countermovement organizations expanded into a triangular relationship involving everyday activists that helped nudge LGBT movement organizations into a commitment to marriage equality and thus to its dramatic recent successes. In closing, we summarize research by other scholars that reinforces the role of elite-mass interaction within the LGBT community.

Tina Fetner's book is the most relevant to the story we wish to analyze. Like Meyer and Staggenborg, Fetner showed how each opposing movement became part of the political and legal opportunity structure of the other, how they selectively used venues that would provide them with the best advantage, and how particular events either helped them mobilize a following or forced them to shift their attention to another venue.<sup>1</sup> But unlike Meyer and Staggenborg, Fetner (2008, 110–14) showed how a countermovement can put an issue on the agenda that the movement it opposes would not—on its own—have chosen to focus on. Fetner (112) showed that “this issue has also mobilized the lesbian and gay movement in response, including many lesbian and gay people who had not previously been involved in activism.”

Beyond the existing literature, the evidence for our argument comes from our own observations and a unique set of qualitative interviews we carried out in 2012 with prominent LGBT rights advocates and attorneys. These interviewees served both as respondents about their own roles in the process of movement/countermovement interaction and as informants about the general processes we examine. We begin in Part II with the theory of movement/countermovement dynamics as it has developed among students of social movements because we think this is an underexploited resource within legal scholarship. We then turn in Part III to a legal/political analysis of the case law that contributed to the changing opportunity structure for the LGBT movement, which is poorly understood by social movement scholars. In Part IV, we summarize what happened and, in general terms, propose why these changes occurred when they did. In Part V, we draw on our informant data to provide rich qualitative evidence for our hypotheses. In Part VI, we explore how our findings fit with evidence from the research of others whose work resonates with our findings.

## II. THE THEORY OF MOVEMENT/COUNTERMOVEMENT INTERACTION

In the 1980s, sociologists and political scientists began to pay attention to the interaction of movements and countermovements in episodes of contentious politics. The first to give equal importance to these interactions was sociologist Doug McAdam in his landmark 1983 article, “Tactical Innovation and the Pace of Insurgency.” McAdam had noticed that each time the authorities reacted to the civil rights movement's sit-ins, marches, and civil disobedience, the movement reacted with an innovation in its tactics. This dynamic kept the movement one step ahead of its antagonists and kept the attention of the media and of national political groups focused on its struggle.

Like most scholars of movement/countermovement interaction, McAdam regarded movements seeking to change the status quo as the *beginning* of cycles of movement/countermovement interaction. Indeed, it is the desire to change the status quo that defines a movement as a *movement*. By contrast, in the conventional narrative,

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1. For example, Fetner describes the importance of Anita Bryant's antigay campaign in Florida for the gay and lesbian movement as well as the *Roe v. Wade* decision for the pro-life movement (2008, 25–39).

*countermovements* are groups that mobilize against changes proposed by such movements. Thus, Clarence Lo (1982) and Meyer Zald and Bert Useem (1987) focused on countermovements' dependence on and reaction to an initiating movement, whether of the right or the left. They also argued that movements trigger reactions from rival countermovements. Zald and Useem characterized the resulting relationship as a "loosely coupled tango of mobilization and countermobilization in which the state can sometimes intervene on behalf of one side or the other" (Zald and Useem 1987, 252–53).<sup>2</sup>

But countermovements *against* legal and/or social change sometimes initiate cycles of contention too, challenging change movements to respond to their efforts. Because they argue for the status quo, countermovements initially achieve more success in the policy arena than do movements for social and/or legal change, which need to overcome inertia. But the successes of "anticipatory countermobilization" are often temporary because they can trigger social movements to mobilize against them, as we will show below and will argue more generally in our conclusions.

## Sexual Politics

A significant volume of research on movement/countermovement interaction has dealt with sexual politics. In two closely reasoned articles, David S. Meyer and Suzanne Staggenborg (1996, 1998) wrote about movement/countermovement interaction in conflicts over abortion.<sup>3</sup> Meyer and Staggenborg articulated the central role of "political opportunity structure" in the relationship between opposing groups. They specified three conditions leading to the emergence of countermovements: first, signs of success of the original movement; second, the perceived threat to some population as the result of this success; and third, the availability of influential allies to aid in oppositional mobilization (1996, 1635–43).

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2. Since Zald and Useem's and Meyer and Staggenborg's foundational studies, a number of other scholars have advanced our knowledge of movement/countermovement interaction in various sectors of public life. In the civil rights field, Kenneth Andrews showed how white citizens' councils in the South responded to the successes of the civil rights movement by creating "white flight" schools (2002); in case studies involving natural resources and animal exploitation, Andrew Austin (2002) has worked on the antienvironmental countermovement; Anders Blok (2008) has analyzed Japanese pro-whaling countermobilization and Lyle Munro (1999) has examined campaigns against animal liberation; in labor conflicts, Marc Dixon (2008) has analyzed right-to-work activism; in the Middle East, Samuel Peleg (2000) has explored how Israeli peace activists and settlers stimulated and motivated one another, while Alimi and Hirsch-Hoefler (2012) examined the interaction between Israeli settlers and Palestinians during the first Intifada; and in a study of antislavery, Art Budros (2011) has shown the contentious interaction between the Society of Friends and the Dutch Reformed Church in the revolutionary period in the United States.

3. In addition to the foundational work of Meyer and Staggenborg, important markers have been articles by Jocelyn Crowley (2009) on fathers' rights; Dina Rohlinger (2002) on the abortion debate; and especially by Tina Fetner (2008) and Amy Stone (2012) with respect to the LGBT rights movement. Stone's recent book focuses on how the extensive use of referenda and initiatives by the Christian right put the LGBT movement at a severe disadvantage, displacing resources from court and legislative strategies, but forcing the movement to develop electoral techniques it previously lacked (2012). At the same time, in response to defeats at the ballot box—like California's Proposition 8—LGBT activists developed a range of "cultural" protests that put their movement in a media spotlight and forwarded the cause of same-sex marriage among the public (see Taylor et al. 2009; Bernstein and Taylor 2013).

It was with respect to the *interaction* between movements and countermovements that their theory was most original: their key insight was that movements and countermovements become part of the political and legal opportunity structure of each other (Meyer and Staggenborg 1996, 1647). But both political and legal opportunity structures are capacious concepts:<sup>4</sup> which *aspects* of the opportunity structure are most likely to trigger a movement/countermovement interaction? Political power in the United States is highly fragmented. Separation of powers in the national government can frustrate a winning coalition's ability to translate electoral victory into legislation and much power resides in state and local governments. In such a system, movements or countermovements can shift the scale of the conflict or change venues when they suffer defeats (1648). Both federalism and separation of powers offer movements and countermovements a number of different venues in which to maintain their struggle (Meyer and Staggenborg 1998). Part of the dynamic we examine includes the strategic shift in scale of one actor or another from one level of the political system to another, and between the courts and the electoral system.

### Stages of the Interaction Cycle

We specify three critical aspects of the “movement/countermovement” interaction cycle.

*First*, and most generally, we see changes in the political and legal opportunity structure as largely responsible for shaping the interaction between the marriage equality and the traditional marriage forces.

*Second*, we initially see what we call “anticipatory countermobilization” on the part of the latter, leading to policy changes that led the LGBT movement to respond.

*Third*, we see grassroots pressure on that movement as partly or even largely responsible for pushing it toward a vigorous, and ultimately successful, campaign against the countermovement.

## III. THE STRUGGLE TO CHANGE THE LAW

The legal struggle over same-sex marriage did not begin with DOMA: a same-sex marriage case from Minnesota made it to the US Supreme Court as early as 1972, but it was treated by the justices as a curiosity not worthy of comment (*Baker v. Nelson*). The first serious debates about same-sex marriage came in the State of Hawaii when, in 1991, three same-sex couples sued the state on the basis of the state's constitutional provision guaranteeing equal protection (*Baehr v. Lewin* 1993). The case was sent back to a lower court, but before that court could rule on the constitutional issue, the state

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4. Political opportunity structure is a concept that has mainly been developed by scholars such as Peter Eisinger (1973), Doug McAdam (1999), Hanspeter Kriesi (1995), and Sidney Tarrow (2011). For an analysis of the static and dynamic specifications of this concept, see Gamson and Meyer (1996) and Tarrow (2011). The specifically *legal* forms of opportunity structure have been analyzed by Andersen (2005), Boutcher (2013), de Fazio (2012), Hilson (2002), McCann (1994), Prabhat (2011), and Vanhala (2012).



legislature passed a new law limiting marriage to opposite-sex couples and the voters amended their constitution to make clear that the legislature had the right to impose such a law (Fetner 2008, 110–11). So it would remain in Hawaii until the state's governor signed a bill that would make same-sex marriage legal beginning in December 2013.

Although *Baehr* excited LGBT activists all over the country, it was not the result of an organized campaign by the mainstream of the LGBT movement, which had, thus far, put marriage on the back burner of its concerns. But it sowed panic among social conservatives, who worried that—if same-sex marriage became legal in Hawaii—the Full Faith and Credit Clause of the US Constitution would require other states to recognize same-sex marriages from across the Pacific (Gerstmann 2008, 67, 197; Stone 2012, 31). *Baehr* was the trigger for the religious right to push for passage of state and national legislation declaring marriage to be “between one man and one woman.” It was mainly in response to this strategy that the US Congress, in 1996, passed DOMA. The national DOMA was followed by the passage of fifteen state-level DOMAs in 1995 and 1996. These state-wide laws were successful, not only in freezing progress in LGBT rights, but also in rallying conservatives and dividing liberal legislators—who mainly supported these laws, as did President Clinton with DOMA—from their gay constituents (Stone 2012, 31). To this point, the initiative mainly seemed to lie with the countermovement, while the LGBT movement seemed unable to adapt to the right's strategy of using popular referenda to advance its goals.

To be sure, same-sex marriage advocates scored a partial victory in 1999 when the Vermont Supreme Court invalidated that state's opposite-sex-marriage-only law (*Baker v. State*). But even though the movement had carefully prepared the ground before filing suit (Klarman 2012, 75), the remedy was only partial: the Vermont legislature was given the choice of legalizing same-sex marriage or civil unions (Eskridge 2002), and after legislators opted for the lesser status of civil unions, they faced a backlash from voters who thought that even this went too far (Klarman 2012, 77–83). The LGBT rights movement was once again thrown on the defensive.

The initiative began to shift with a decision of the Supreme Court in 2003. In *Lawrence v. Texas*, the Court invalidated a Texas criminal statute that forbade sodomy (but only when performed by people of the same sex). Justice Anthony Kennedy's *Lawrence* opinion, like his 1996 opinion in the Court's first pro-gay-rights ruling, *Romer v. Evans*, was a landmark success for the LGBT movement. Kennedy's opinion in *Romer* did not say that discrimination against gays and lesbians was presumptively unconstitutional in the way that race discrimination is, but it did condemn the “animus” that the Court saw as motivating the decision of Colorado voters to strip gays and lesbians of the modest protection against discrimination that local ordinances had provided. Likewise in *Lawrence*, Kennedy did not expressly say that same-sex intimacy was a fundamental right akin to freedom of speech or even contraception but here, too, he left little doubt where his (and the Court's) sympathies lay. At the same time, however, Kennedy signaled that the Court was not quite ready to say that the Constitution protects a right to same-sex marriage. He pointedly noted that the case did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter” (*Lawrence*, p. 578).



Not everybody took the hint. Later that year, the Massachusetts Supreme Judicial Court relied on *Lawrence*'s logic, rather than on Kennedy's disclaimer, to find a right to same-sex marriage in the Bay State's Constitution (*Goodridge v. Department of Public Health*). For the first time in US history, a state's law gave recognition to same-sex marriage, not just to civil unions. The alarm that had been sounded by social conservatives in response to the Hawaii Supreme Court's civil union ruling a decade earlier had proven premature, but not unjustified.

Beginning in the middle of the decade, the debate over civil unions and same-sex marriage appeared to galvanize public opinion and especially LGBT activist groups. The result was that civil unions were largely left behind as the refuge of fence-straddling politicians. Three state courts followed the example of Massachusetts by finding a right to same-sex marriage under their state constitutions: California and Connecticut in 2008 (*In re Marriage Cases*; *Kerrigan v. Commissioner of Public Health*) and Iowa in 2009 (*Varnum v. Brien*). Meanwhile, same-sex marriage was made legal by legislation in four other states—Maine and Vermont in 2009; New Hampshire in 2010; and New York in 2011—and in the District of Columbia in 2010.

Not all those changes stuck, however. Referenda reversed the positive results in California and Maine, while Iowa voters' rejection of the justices who voted to legalize same-sex marriage left such marriages in that state in a precarious position. The California referendum, "Proposition 8," was then overturned by a lower court in *Perry v. Schwarzenegger* (2010), a ruling that the US Court of Appeals for the Ninth Circuit affirmed on narrow grounds (*Perry v. Brown* 2012). The US Supreme Court then held that the state's refusal to defend Proposition 8 had rendered the appeals court without jurisdiction, which had the effect of leaving in place the district court ruling (*Hollingsworth v. Perry* 2013).

On the same day that it unofficially invalidated Proposition 8, a different majority of the Supreme Court also officially invalidated the section of DOMA that defined marriage as opposite-sex marriage for federal purposes. Justice Kennedy wrote for the Court once again and once again he sent a somewhat mixed signal. Although his analysis spoke eloquently of the equal dignity to which same-sex couples are entitled, his opinion also heralded the traditional power of the states with respect to defining marriage (*United States v. Windsor* 2013). Paired with the procedural nonruling in the Proposition 8 case, the Court's opinion with respect to DOMA indicated that while a majority of the justices were sympathetic to the cause of same-sex marriage, they were not yet ready to guarantee a nationwide right to it.

The year 2013 was a remarkable one for same-sex marriage in the states as well. On January 1, same-sex marriage became legal in Maryland, as a result of changes approved in 2012. Rhode Island, Delaware, Minnesota, Hawaii, and Illinois all followed with marriage equality statutes of their own, although the Illinois law does not go into effect until the middle of 2014. Two federal district court rulings in late December 2013 expanded legalized same-sex marriage, at least pending appellate consideration. On the strength of the reasoning in the *Windsor* case, one judge ruled that Ohio was obligated to recognize same-sex marriages from other jurisdictions (*Obergefell v. Wymyslo*), while another judge invalidated Utah's same-sex marriage ban (*Kitchen v. Herbert*).

Meanwhile, court rulings catalyzed executive action in the states. Following *Hollingsworth*, California state officials announced that they would treat Proposition 8 as

a nullity and the most populous state in the union once again fully recognized same-sex marriages. In New Jersey, Republican Governor Chris Christie dropped his appeal of a state court ruling requiring full marriage equality after the state supreme court refused to stay the judgment pending appeal (*Garden State Equality v. Dow*).

In the meantime, the advantage on this issue that the socially conservative countermovement held in the electorate began to evaporate: in November 2012, for the first time ever, same-sex marriage was approved when put to a direct vote of the people. Referenda supporting same-sex marriage passed in Maryland, Washington, and Maine (where voters repudiated their 2009 ballot initiative), while Minnesota voters defeated a ballot initiative that would have written opposition to same-sex marriage into the state's constitution.

Political elites—reading the tea leaves of the polls, but also under pressure from politically astute LGBT advocates—soon began to favor legalizing same-sex marriage. Consider the “evolution” of President Barack Obama. As early as 1996, when running for the Illinois Senate, Obama appeared to endorse same-sex marriage. However, that changed when he came on the national stage. In 2004, as a candidate for the US Senate, Obama declared that marriage was “between a man and a woman”; in the 2008 campaign, his position had moved to support for civil unions. Early in 2012, Obama voiced support for same-sex marriage, a historic first. Putting the administration's lawyers where the president's mouth was, the Obama Justice Department, in a letter by Attorney General Eric Holder to Speaker of the House John Boehner, also announced that it could no longer defend DOMA in court. In addition to relying on the *Romer* case's “animus” theory, the Attorney General also maintained that sexual orientation should be treated like other invidious classifications, such as race and sex. In May 2012, Obama made his first clear expression of support at a campaign stop in Seattle, where he included “the freedom to love” along with tried and true elements of the American Creed:

We came together because we believed that in America, your success shouldn't be determined by the circumstances of your birth. If you're willing to work hard, you should be able to find a good job. If you're meeting your responsibilities, you should be able to own a home, maybe start a business. You should be able to give your kids the chance to do even better than you—no matter who you are, no matter where you come from, no matter what you look like, no matter what your last name, *no matter who you love*. (White House 2012, emphasis added)<sup>5</sup>

Obama was soon not alone; following his victory in the November 2012 elections, a number of senators and representatives announced that they too had “evolved.” By the time the Supreme Court heard oral arguments on DOMA and Proposition 8, fifty-four senators, 180 members of the House of Representatives, fifteen governors, and at least 117 mayors had declared themselves in favor of marriage equality.<sup>6</sup> In roughly

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5. Go to <http://www.whitehouse.gov/the-press-office/2012/05/10/remarks-president-campaign-event-seattle-wa> (accessed December 31, 2013). The term “no matter who you love” soon rippled across the Internet: as of August 5, 2013, there were 150,000,000 Google “hits” for the search terms “Obama” and “no matter who you love.”

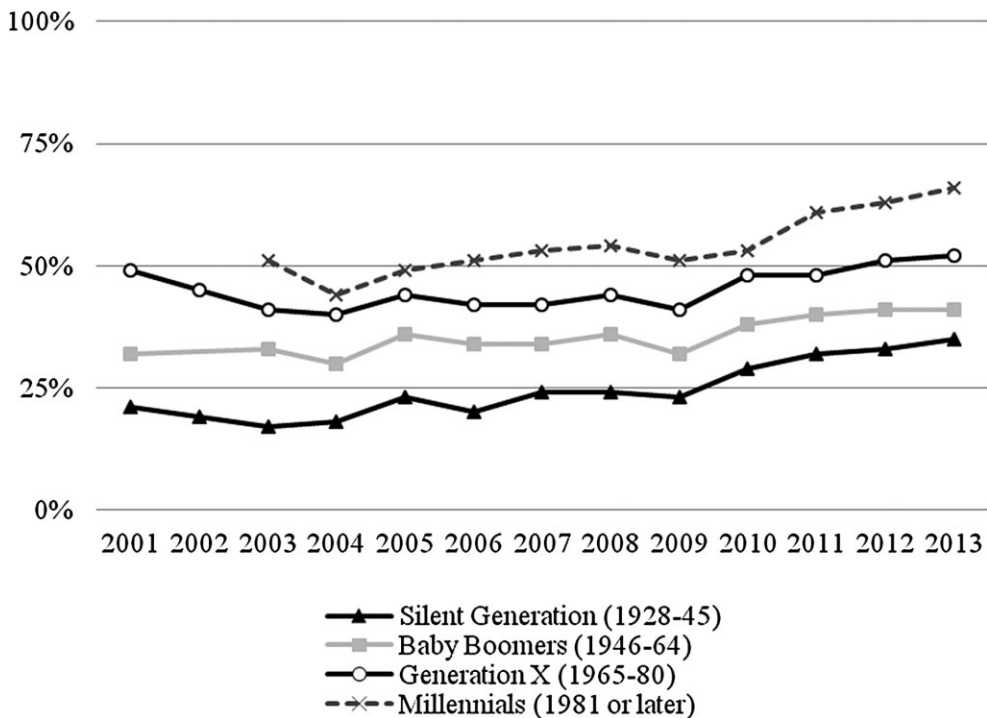
6. This possibly incomplete, and “evolving,” list comes from Wikipedia (n.d.).

two decades, same-sex marriage went from being a fringe cause to very mainstream. The question is “why?”

#### IV. HOW AND WHY DID IT HAPPEN?

We do not have a simple answer for how and why this shift occurred. We first summarize cultural, legal, and organizational explanations for this outcome, before turning to our own explanation. We will argue that it was through an interactive process of contentious politics that three factors came together to make marriage equality a mainstream issue in US politics.

*Culturally*, in a society in which attitudes toward homosexuality remained largely negative during the 1970s and 1980s (Calhoun 1999), over a short period of time, attitudes changed sufficiently for legislatures and judges in a number of states to approve of civil unions and marriages among LGBT couples (Yang 1997; Loftus 2001). And although younger Americans are friendlier to same-sex marriage than are older ones, this has not been a typical pattern of age-cohort change: studies have shown that similar percentages of Americans of all ages have changed their minds about homosexuality in the last two decades. Figure 1 reflects this cross-generational cultural change in attitudes.



**FIGURE 1.**  
**Changing Attitudes About Same-Sex Marriage, by Generation**

Source: The figure is reproduced from Pew Research Center Religion and Public Life Project (2012).

During this period, there was a sharp uptick in the appearance of the terms “same-sex marriage” and “gay marriage” in book publications, while the use of the more traditional term “homosexual marriage” remained virtually flat (Google n.d.). This was accompanied by the normalization of same-sex relationships in popular culture, especially television, where gay characters were portrayed as fundamentally no different from straight ones on sitcoms like *Will and Grace*, while being an out lesbian proved no obstacle to a successful career for TV personalities like Ellen DeGeneres.

*Legally*, the story of same-sex marriage in the United States is far from finished. The Supreme Court’s rulings in *Hollingsworth* and *Windsor* have already led to new litigation involving some of the many questions left open. It could be years before the Court holds that all states are constitutionally obligated to recognize same-sex marriage. Nonetheless, the writing does appear to be on the wall. Strikingly, all three of the Court’s gay-rights-friendly rulings—*Romer*, *Lawrence*, and *Windsor*—were authored, not by down-the-line liberals, but by Justice Anthony Kennedy, a moderate conservative who was appointed by President Reagan. So, too, it seems no accident, given the close connection between sexual orientation discrimination and gender stereotyping, that with one exception that was later reversed, no female justice voted against a gay rights claim in the Supreme Court. (The exception is Justice Sandra Day O’Connor, who voted with the majority to sustain a conviction for “homosexual sodomy” in *Bowers v. Hardwick*, in 1986, but she effectively reversed herself in the *Lawrence* case.) As the number of women on the Court has grown, so has the Court’s receptivity to LGBT rights claims.

*Organizationally*, gay and lesbian advocacy has continued to grow stronger and to gain more resources. Not only have traditional advocacy groups taken up the cause of LGBT rights, but new organizations like Freedom to Marry have appeared on the scene, nourished in part by the growing acceptance of LGBT persons in public opinion, but also by the financial clout of some sectors of the gay and lesbian community (Cummings and NeJaime 2010, 1307). While we cannot connect particular spurts in support to particular junctures in the history of the marriage campaign, we do find a sharp uptick in support for such advocacy groups as the Human Rights Campaign since the middle of the 1990s. Figure 2 traces contributions to HRC from 1994 to the present.

Cultural, legal, and organizational changes were all important sources of the progress of the same-sex marriage campaign, but they converged through the process of what we call “contentious politics.” By this term, we mean

episodic, public, collective interaction among makers of claims and their objects when (a) at least one government is a claimant, an object of claims, or a party to the claims and (b) the claims would, if realized, affect the interests of at least one of the claimants. (McAdam, Tarrow, and Tilly 2001, 5)

Roughly translated, the term refers to collective political struggle. It goes beyond the concept of “social movements” and enables us to see the same-sex marriage controversy as part of an interactive cycle of contention embedded in a broader political conflict structure, in which no single actor is privileged above any other, but in which different

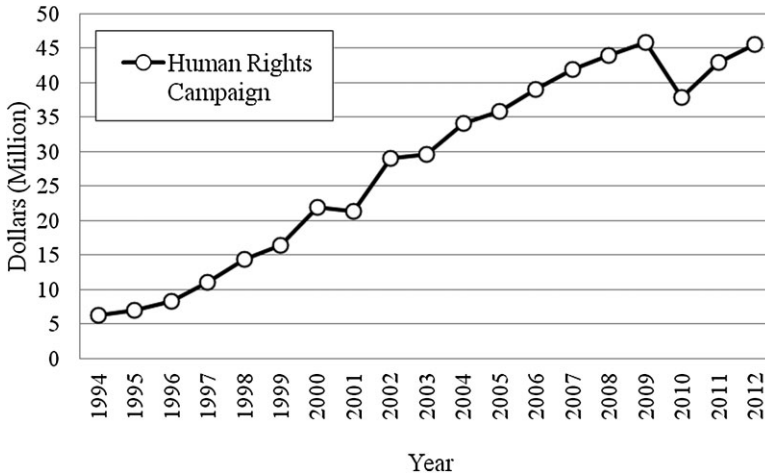


FIGURE 2.

**Annual Total Revenue of HRC (Human Rights Campaign), 1994–2012**

Note: The figures combine contributions to the Human Rights Campaign and Human Rights Campaign Foundation.

Source: Human Rights Campaign (n.d.).

actors take the initiative during different phases of the cycle.<sup>7</sup> We do not assume that the struggle between the cultural left and right began with DOMA, but that the conflict between supporters and opponents of marriage equality began a new cycle of contention initiated by the anticipatory countermobilization of the cultural right.

Not a popular issue in the activist community when the Hawaii efforts to legalize same-sex marriage came in the early 1990s, the matter entered the national domain indirectly through a triangular dynamic of movement/countermovement interaction.

*First*, in states with vigorous LGBT communities, a number of *non*-marriage-related enactments were passed—enactments like the Colorado gay-friendly local anti-discrimination ordinances that led to the antigay referendum ultimately invalidated in *Romer*—which offered parts of the LGBT movement a political opportunity.

*Second*, these modest successes led social conservative groups to mobilize at both the state and federal levels against the possibility of further such conquests. These conservative groups took their campaign to the federal level to secure the passage of DOMA. Encouraged by the swift success of DOMA and what they saw happening in sister states, state-level conservative groups lobbied their legislatures or resorted to referenda to adopt state constitutional amendments and laws banning same-sex marriage and civil unions.

*Third*, spurred by the onslaught of federal and state discriminatory legislation and constitutional enactments, increasing numbers of same-sex couples at the grassroots

7. “Contentious politics” includes social movements, as well as more institutional actors, but refers to the processes through which these actors interact, rather than to any particular actor. The concept derives from Charles Tilly’s work (especially Tilly 1995), and is laid out theoretically in McAdam, Tarrow, and Tilly (2001). On cycles of contention, see Koopmans (2004) and Tarrow (2011).

level—some of them with substantial financial resources—began to pressure the LGBT movement—which had previously shied away from the issue of marriage—to go to court and to mount electoral referenda against the growing tide of legislation and constitutional amendments privileging opposite-sex unions.

Sustained by incremental changes in public opinion, state courts and legislatures began to recognize same-sex marriage, in turn further energizing movement supporters and motivating opponents. An anticipatory countermobilization against change in marriage laws and practice appeared to have triggered a mobilization by a movement for change that had not been noticeably enthusiastic about the issue until pushed into action by its ideological opponents and supported by unexpectedly powerful grassroots pressure. While our research does not definitively prove or disprove this narrative, it lends support to the importance of this triangular relationship over time.

## V. OUR RESEARCH

To investigate our thesis, we conducted interviews with ten current leaders of the LGBT movement who have been active in the movement since at least the early 1990s. All ten were trained as lawyers, although they performed a range of functions in the movement, including litigation, organizing, education, lobbying, and outreach. We asked our respondents whether the movement had become more focused on same-sex marriage over that time and why. We attempted to avoid planting our thesis in the minds of the respondents by waiting until after each interviewee had volunteered an explanation for the shift before seeking his or her views. We find suggestive support for all three elements of our thesis.

### Political Opportunity Structure

Although they may not use the term,<sup>8</sup> the concept of “opportunity structure” is familiar to every legal scholar who examines the impact of court decisions on social movements. We have already noted three examples of how key court decisions in the same-sex marriage story had an impact on the LGBT movement, its opponents, or both:

1. *Baehr* both put marriage on the agenda of a reluctant LGBT movement and “panicked” the antigay right (Stone 2012, 31) into pushing to pass DOMA at the national level and “little” DOMAs in the states.
2. *Romer* discouraged the right from trying to pass broadly antigay laws, leading the countermovement to turn to the narrower ground of opposing marriage, while encouraging the LGBT movement to believe that the courts might sustain more gay-friendly equal protection cases.

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8. The first use of the concept in legal studies goes back to Scheingold (1974). In addition, see Cummings and Nejaime (2010), as well as Keck (2009). Studies of how legal actions reshape the political opportunity structure can be found in the work of many scholars focusing on race. For examples, see Brown-Nagin (2005) and Guinier (2009). The concept has also been used in studies of gender (Mayeri 2004), class (Forbath 1991; McCann 1994), and nationality (Riddell 2004).

3. Finally, in *Lawrence*, the Court did not endorse same-sex marriage, but by declaring that it was no business of a state to forbid same-sex relationships between consenting adults, Justice Kennedy gave encouragement to advocates in Massachusetts to take same-sex marriage restrictions to court.

Our respondents pointed to a number of institutional factors they thought had played important roles in the LGBT movement's turn to make marriage a priority.<sup>9</sup> All said that the chief reason why the movement had not focused its energies on marriage sooner was that public opinion was not ready for it. One respondent said that in the early 1990s he did not think about the topic much. He supposed he was in favor, that it would be "great" to achieve marriage equality but that it was "pie in the sky" and was "not going to happen" (R4). Half pointed to the court cases in Hawaii and Vermont in the 1990s as important catalytic events because they demonstrated that legal actions that once seemed far-fetched had become possible winners. As one respondent said about the Hawaii case:

In 1993 *Baehr* demonstrated that a court could "get it". . . . Before bringing the x and y cases, we looked at case law along with other political and social factors to figure out when the right time was. (R2)

Another said:

[After *Baehr*] we realized that we might win in court. *Baehr* triggered a substantial shift in thinking about what was possible. (R5)

And a third said:

The Hawaii case ushered in a new day as a practical matter. (R6)

But it was not only court decisions that signaled the opening of political opportunities for the movement to adopt marriage as a goal. The decision by key public officials to open their city halls to marriage licenses for gay and lesbian couples sent important signals to advocates in the movement. As one respondent said:

First were [San Francisco Mayor] Gavin Newsom and New Paltz Mayor Jason West, who changed the calculus when they said they were going to do it. Andrew Cuomo's recent role made a great difference, less with the movement than with the political establishment. He is a consummate political opportunist, which makes it significant that he thinks of this as a positive opportunity for his future presidential campaign. (R3)

Another, more cynically, observed:

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9. Few argued that antimarriage sentiment in the LGBT movement was more than a marginal factor in holding back the marriage campaign. One, in fact, did not think any activists in the movement—as opposed to academics—were actively opposed to marriage equality (R5). However, several pointed to early opposition to marriage and one (R7) continues to oppose marriage vigorously for principled reasons.



The politicians were bell weathers rather than leaders. Even Gavin Newsom fits the same pattern: When he started issuing marriage licenses in San Francisco, he did so to shore up his left flank; now he has used that early stance to his advantage statewide. (R4)

### Anticipatory Countermobilization

This was the main thesis we brought to our research: we thought it was chiefly the anticipatory countermobilization of opponents to gay and lesbian rights in the mid-1990s—well before the issue of same-sex marriage became popular—that led LGBT activists, at first hesitantly, but then more forcefully, to mobilize around the issue of same-sex marriage. As DOMA sailed through a frightened Congress and was signed by a president who would soon have to confront a (heterosexual) sex scandal largely of his own making, and as conservative state legislatures were banning a practice that had not yet become popular, supporters of LGBT rights began to turn to an issue whose time, many feared, had not yet come. From an institution that few thought worthy of public discussion, marriage became a “contested truth” (Rodgers 1987) at the heart of US politics and jurisprudence.

By themselves, our interviews do not allow us to make definitive statements about the anticipatory countermobilization hypothesis—which is why we examine corroborative evidence in the next part—but even standing alone, the interviews were revealing. We find it significant that a majority agreed with the anticipatory countermobilization hypothesis, either spontaneously or after being asked about it. The respondents fell into three groups regarding this hypothesis. Three interviewees spontaneously volunteered response to anticipatory countermobilization as a very important factor in the shift. One observed:

Over time, it looked like the other side [opponents of LGBT rights] would pull out marriage as a “trump card” and so we had been in the awkward position of having to say that we don’t want marriage. . . . We filed in (state x) because we felt that our opponents were coming after us. They were organizing to get a petition for a state constitutional amendment banning same-sex marriage, so we wanted to get the case filed and decided before the amendment could occur. . . . There were right-wingers who, by failing to work with us and refusing to acknowledge that we had any of the rights of families, forced us to turn to the courts. (R2)

Another said:

After 2004, the right got to the point of saying in essence that the core of the argument for discrimination is that gay people are fundamentally different. That view is fundamentally shallow and if you can convince people that it is wrong, you have won half the battle. They did us a favor. . . . Once the right made constitutional amendments the issue, the movement needed to fight back. They successfully selected the ground for us. Attacking us with constitutional amendments was an attack on the community as much as against marriage. (R3)

And a third commented:

Both in the 90s and after *Lawrence*, there was more of a push to make marriage the central issue from the conservatives than from our side. . . . Marriage was what the other side wanted to talk about. . . . The right was already using marriage as a scare tactic. If we sat this fight out, that wouldn't change the national conversation. . . . If you want people to change their minds about a subject, first you need to get them talking about it. The right did that. (R4)

Five other interviewees agreed, or strongly agreed, with our hypothesis once we suggested it to them, after they had pointed to other factors. One said:

By the early 2000s, even before *Lawrence*, it [i.e., marriage] was just generally accepted by nearly everyone in the movement. . . . No one wanted to be seen as against marriage equality and thus allied with the anti-gay-rights [countermovement]. (R8)

Another observed:

What changed this view was, in the mid-90s after DOMA, when the backlash really took shape. It became clear that marriage was more than a legitimating issue. . . . The Moral Majority anti-gay-rights movement groups existed for decades. Their engagement with marriage started to crystallize. Right-wing anti-gay rhetoric increased the mobilization in the gay community. (R9)

A third opined:

Just as Anita Bryant caused gays to want to pour o.j. into the ocean, [measures opposing same-sex marriage] made people want to rebel. Marriage was not among the top issues in the 90s, but it has become a very popular thing to want to achieve gay marriage. There was an effort to get marriage and it was cleverly exploited by the right and it made every other battle harder. (R1)

And a fourth remembered:

Once we engaged with the opposition, it was on. With every political loss, it seemed more important to keep going. The intensity around this issue has built. Constantly ratcheted up. . . . The political losses have been highly motivating. . . . Prop 8 galvanized the community in California and nationally. It increased fundraising and political engagement. (R6)

The most analytical answer came from a fifth advocate, who, when asked if conservative opposition had played a role in the LGBT movement's taking up the marriage issue, replied:

The biggest thing that these groups did was to make the issue much more visible. They had more money and better organization, and by campaigning for DOMA [at the federal level] and first state laws and then state constitutional amendments,

they got people who previously had not thought much at all about same-sex marriage to start thinking about it. . . . The anti-movement inspired the pro-movement to become more active. It's easier to get people to push back against something awful like DOMA or the state law bans than to invest affirmatively in seeking a right to same-sex marriage. (R10)

In contrast, two of our interviewees thought that response to anticipatory countermobilization was not a major factor in the priority shift in the LGBT movement, although one of them acknowledged that "any movement is dynamic" and the other conceded that the mobilization of the religious right may have been no more than placing a "toe on the scale" (R7). But even this respondent admitted that the conservatives' strategy of using state-ballot initiatives to restrict LGBT rights "pushed the movement in the direction of gay marriage" (R7).

Of course, the small sample size reflects the qualitative nature of our inquiry. Nonetheless, the results were largely supportive of our initial hypothesis. The eight interviewees who either volunteered or agreed with our hypothesis regarding anticipatory mobilization were well positioned to observe and participate in the dynamic relationship between the LGBT rights movement and the social conservative countermovement during the relevant period.

Nor does our hypothesis tend to glorify the role of the LGBT leadership during the relevant period and thus render our results suspect on grounds of self-serving recollections by our respondents. If anything, our hypothesis undercuts any such glorification, as it portrays the LGBT leadership as charting a course in response to external opposition, rather than setting its own agenda. In fact, several respondents implicitly or explicitly criticized the movement for its unwillingness to take up the controversial issue of marriage sooner. For example:

The LGBT organizations were NOT in the vanguard, grassroots groups were in the vanguard. . . . The legal groups said it was a bad idea, with the exception of a group in Hollywood. It was grassroots groups that led the way. (R3)

### Grassroots Pressure

The advantage of using an open-ended, flexible interview schedule, as we did, was that it allowed our respondents to offer views of their own and gave us the chance to support or reject Fetner's hypothesis about the importance of grassroots pressure on LGBT movement organizations (2008, 112). It was only in the course of our interviews that spontaneously offered opinions by a number of our respondents made us more aware of the role of ordinary gay and lesbian citizens that Fetner highlighted in her research. A large proportion of respondents spontaneously stated that even before same-sex marriage was widely regarded as a realistic possibility, LGBT rights organizations were approached by gay and lesbian couples seeking help in securing a right to marry. As one respondent said:

In the early 90s, it began to change. At the end of the day it's about the people and people were lining up to get their licenses. . . . It was like people lining up for grain

at silos. Once the people rise up, forget about institutions. The minute those lines started happening, I got convinced. You can't imagine the consternation in the Democratic Party when SF gay couples started lining up for marriages. . . . It was from the people, it was a populist movement. As people started coming out in large numbers, it was like a revolution. Then they wanted to couple, then they wanted to have kids, file joint tax returns and have the state say yes. (R1)

A second observed:

The experience of living with AIDS and then with more and more gay and lesbian couples raising families brought home to more people the importance of recognition for family rights. That led to pressure from the grass roots as well as from the top. (R2)

And a third remembered:

Prop 8 made people angry and upset. They got involved. It definitely led to more donations. (R6)

How did the LGBT organizations respond to this grassroots pressure? Faced with the delicacy of the marriage issue, we learned that they at first routinely told such couples that the law could not help: For example, one advocate said that callers were told that the prohibition on marriage was unfair and frustrating but that there was no realistic possibility of winning a case seeking a legal right to same-sex marriage. Indeed, bringing such a case could be counterproductive if it led to bad rulings that would then have precedential effect. "When these constituents learned that we couldn't help," this respondent concluded, "some of them got angry" (R6).

But our respondents also stressed that the continuing pressure from same-sex couples seeking to marry made LGBT groups attentive to any changes in the legal, political, or social climate that might make lobbying, litigation, or other activism around marriage potentially successful. Meanwhile, they were facing an opponent—the coalition of socially conservative groups—that was forcing the issue onto referenda and initiatives in state after state (Stone 2012, 10–12). Two interviewees noted that same-sex marriage provided fund-raising opportunities, but the donations from supporters of same-sex marriage appear to have ripened only after the movement had come to embrace the goal of legal same-sex marriage.

As a result of our interviews, we concluded that pressure from the grassroots, at least partly triggered by the aggressive campaigns from the movement's opponents, was an important link between the organized LGBT movement's original reluctance to raise same-sex marriage as an issue and its decision to take it up as a major campaign cause.

## VI. DISCUSSION

The interviews we conducted for this study provide a window on what was happening within the LGBT rights movement from the mid-1990s through 2012 but,

as noted above, they do not enable us to make a definitive assessment of our hypotheses regarding the LGBT movement's priority shift to support marriage equality. What we can say with confidence is, first, that friendly court decisions and dramatic support by highly visible politicians offered the movement the political opportunity to move toward marriage. Second, the interviews gave us confidence in our hypothesis regarding anticipatory countermobilization from the right leading to greater support for marriage in the LGBT movement. And, third, a grassroots cohort was at least partly responsible for the movement's adoption of marriage equality as a goal.

We are comforted in our conclusions by research by other scholars that resonates with our results. We have already cited the path-breaking work of Tina Fetner, which helped inspire our work. Recent studies by Amy Stone and by Verta Taylor and her collaborators also show how the repertoire of the LGBT movement was expanded in its response to anticipatory countermobilization.

### **From the Courts to the Ballot**

In her systematic study of religious right ballot initiatives, Stone (2012) offers evidence that the LGBT movement initially found itself at a deep financial and popular disadvantage when facing the well-financed and professionalized campaigns against LGBT rights from the right. This imbalance both led to serious reversals in many state and local campaigns and forced the movement to divert financial and personnel resources to election campaigns that might have been used in other venues. "Between 1974 and 2009," writes Stone, "the Religious Right placed 146 anti-gay ballot measures on the ballot, using direct democracy to successfully fight LGBT legislative gains on both the state and local level" (2012, xv; see also Stone 2013).

In responding to this onslaught of ballot measures, LGBT organizations developed a set of tactics such as disciplined political messaging, preballot legal challenges, professional polling, voter identification by volunteers, and getting out the vote. "The campaign tactics make it possible for local community groups to evolve into effective professional campaigns, devoted to a win on election day and a victory against the Religious Right" (Stone 2012, xx). In findings that are strikingly resonant with McAdam's (1983) findings about movement/countermovement interaction in the struggle for racial equality, each time the countermovement escalated its tactics, the new tactics became more dominant (Stone 2012, xxiii). If we can infer a conclusion from Stone's work, it would be that the LGBT movement's response to the countermovement's ballot campaigns was not only to devote its attention to the issues its opponents had raised—increasingly, same-sex marriage—but to learn how to combat these initiatives on a terrain—election ballots—it had not chosen.

### **Same-Sex Wedding Protests**

These campaigns were mostly run at the local level, which brings us to a second strand of research that we think supports our findings: that experience in combating the attacks of the countermovement helped spur and consolidate a grassroots movement on

behalf of marriage on the part of gay and lesbian couples. The research of Verta Taylor and her collaborators shows that an unusual form of public performance—the “same-sex wedding protest”—accompanied Gavin Newsom’s decision to grant marriage licenses in California (Taylor et al. 2009). Based on far more systematic interviewing and surveys than we have attempted, these scholars report two salient results about grassroots activism following countermovement mobilization in California.

First, nearly half their respondents who participated in the same-sex wedding protests in San Francisco reported that “after their marriages were invalidated, they channeled their activism away from other causes, such as LGBT and women’s rights activism, into the marriage equality movement to defend the legality of the San Francisco marriages in the face of anti-gay opposition” (883). Second, in addition to redirecting activism in San Francisco to marriage, the initial marriage protest ignited a state-wide campaign for marriage equality in California.

Other researchers’ work is now becoming publicly available (see, e.g., Bernstein and Taylor 2013). But we are encouraged that the research by Stone and by Taylor and her collaborators triangulates with our own findings to suggest how political opportunities, movement/countermovement interaction, and grassroots activism combined in mobilizing the LGBT movement to fight for marriage equality.

## VII. CONCLUSIONS

We first developed our central hypothesis about the importance of anticipatory countermobilization from unsystematic observations during the two-decade period from the early 1990s to 2012. Our interviews provided substantial external confirmation of the importance of this phenomenon, although they also pointed to other important factors. Our interviews also prompted us to draw a number of inferences.

First, we note the importance of the legalization of American cultural life. Although such factors as increasingly positive portrayals of LGBT Americans in film and television no doubt played an important role in the shifting attitudes of Americans, activists themselves reported responding to judicial decisions that demonstrated what was possible. A court operates as a “forum of principle” (Dworkin 1981, 516–18) in which split-the-difference compromises such as civil unions may prove unsustainable over the long run. Thus the courts first held out the possibility of a home run like *Roe v. Wade* and then when they delivered partial victories—as in the Hawaii and Vermont cases—they encouraged both sides to redouble their efforts. But whether winning in court, losing in court, or doing a little of both, US social movement activists may be tempted to frame their broader argument in terms of principles that beget the articulation of counterprinciples, rather than as pragmatic compromises.

The US tendency toward legalization of political conflict coexists with the fractured nature of legal authority that we noted in Part III. We would hazard a guess that together, the two phenomena tend to increase the frequency, duration, and intensity of movement/countermovement tangos. At the very least, the ability of the LGBT movement to leverage success in court into success in more popular fora undercuts the sort of claims made by strong critics of litigation-focused reform strategies (Rosenberg 2008).

Court victories not only can serve as catalysts for political achievements (Greenberg 1968, 1522); they can also set in motion interactions among both elites and grassroots players in movements and countermovements that lead to legal and practical change. All these dynamics appear to have been in play in the legal struggle for LGBT rights (Keck 2009; Cummings and NeJaime 2010, 1329–30).

Second, our interviews supported the conclusion that same-sex marriage has come to stand for the LGBT rights movement as a whole. That would have been surprising to most LGBT activists two decades ago—and it dismays some such activists even today (see the debate in Bernstein and Taylor 2013)—but in retrospect it is hardly surprising. Social conservatives placed same-sex marriage on the public agenda in order to mobilize those Americans who were at most willing to tolerate LGBT Americans against the implications of full equality (Dorf 2011). Once formulated in those terms, the LGBT movement could not realistically choose to sit on the sidelines.

Third, our confirmation of the important, though not exclusive, role that anticipatory countermobilization played in leading the LGBT rights movement to champion same-sex marriage led us to wonder whether sociological accounts of movement/countermovement dynamics ought to be revised to include the dynamics of anticipatory countermobilization. At the least, this could be a fertile field for comparative research. We would guess that evidence of anticipatory countermobilization would most likely be found in movements concerning social issues, broadly defined, because such issues tend, by their nature, to be polarizing. For example:

- Did segregationists' invocation of miscegenation spur civil rights activists to embrace interracial marriage at an earlier point than might otherwise have been expected?
- Did the pro-life movement's efforts to ban so-called partial-birth abortion lead the pro-choice movement to define the targeted procedures as within the ambit of the abortion right it sought to protect?
- Has the gun rights movement in the United States been led to adopt ever-more absolutist positions by the gun-control countermovement's backing of measures such as waiting periods and an assault weapons ban?

We do not wish to prejudge the answers to these and other questions. Anticipatory countermobilization *can* lead a movement to rally around the cause that the countermovement attacks in anticipation, but it also can lead movement leaders to distinguish their cause from the one under attack. For example, the modesty of the US labor movement in the post–World War II United States relative to Europe's can be understood as partly a reaction against the strength of US anticommunism: rather than embrace a radical agenda, labor leaders were often at pains to renounce one (Fordham 1998, 133). Likewise, when opponents of the Equal Rights Amendment warned that it would lead to women being drafted into the military, some women's rights activists responded by distancing themselves from that position, rather than embracing it (Mansbridge 1986, 62).

Finally, we hope that our suggestive finding that grassroots pressure was at least partly responsible for nudging the LGBT movement to support marriage rights will encourage social movement scholars and legal scholars to examine the movement/countermovement logic to include vertical relations within movements.



## REFERENCES

- Alimi, Eitan, and Sivan Hirsch-Hoefler. 2012. Structure of Political Opportunities and Threats and Movement-Counter-movement Interaction in Segmented Composite Regimes. *Comparative Politics* 44 (3): 331–49.
- Andersen, Ellen Ann. 2005. *Out of the Closets and into the Courts*. Ann Arbor: University of Michigan Press.
- Andrews, Kenneth T. 2002. Movement-Counter-movement Dynamics and the Emergence of New Institutions: The Case of “White Flight” Schools in Mississippi. *Social Forces* 80 (3): 911–36.
- Austin, Andrew. 2002. Advancing Accumulation and Managing Its Discontents: The U.S. Anti-Environmental Counter-movement. *Sociological Spectrum* 22 (1): 71–105.
- Balkin, Jack. 2011. *Living Originalism*. Cambridge, MA: Harvard University Press.
- Bernstein, Mary, and Verta Taylor, eds. 2013. *The Marrying Kind: Debating Same-Sex Marriage Within the Lesbian and Gay Movement*. Minneapolis: University of Minnesota Press.
- Blok, Anders. 2008. Contesting Global Norms: Politics of Identity in Japanese Pro-Whaling Counter-mobilization. *Global Environmental Politics* 8 (2): 39–66.
- Boutcher, Steven A. 2010. Mobilizing in the Shadow of the Law: Lesbian and Gay Rights in the Aftermath of *Bowers v. Hardwick*. *Research in Social Movements, Conflict and Change* 31:175–205.
- . 2013. Lawyering for Social Change: Pro Bono Publico, Cause Lawyering and the Social Movement Society. *Mobilization* 18 (2): 179–96.
- Boutcher, Steven A., and James E. Stobaugh. 2013. Law and Social Movements. In *The Wiley-Blackwell Encyclopedia of Social and Political Movements*, ed. David A. Snow, Donatella Della Porta, Bert Klandermans, and Doug McAdam, Vol. 2, 683–87. New York: Blackwell.
- Brown-Nagin, Tomiko. 2005. Elites, Social Movements, and the Law: The Case of Affirmative Action. *Columbia Law Review* 105 (5): 1436–1528.
- Budros, Art. 2011. Explaining the First Emancipation: Social Movements and Abolitions in the US North, 1776–1804. *Mobilization* 16 (4): 439–54.
- Calhoun, Cheshire. 1999. Making Up Emotional People: The Case of Romantic Love. In *The Passions of Law*, ed. Susan A. Bandes, 217–40. New York: New York University Press.
- Crowley, Jocelyn Elise. 2009. Fathers’ Rights Groups, Domestic Violence and Political Counter-mobilization. *Social Forces* 88 (2): 723–56.
- Cummings, Scott L., and Douglas NeJaime. 2010. Lawyering for Marriage Equality. *UCLA Law Review* 57 (5): 1235–1331.
- de Fazio, Gianluca. 2012. Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States. *International Journal of Contemporary Sociology* 53 (1): 3–22.
- della Porta, Donatella, and Mario Diani. 1999. *Social Movements: An Introduction*. Oxford: Blackwell.
- Dixon, Marc. 2008. Movements, Counter-movements and Policy Adoption: The Case of Right-to-Work Activism. *Social Forces* 87 (1): 473–500.
- Dorf, Michael C. 2011. Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meaning. *Virginia Law Review* 97 (6): 1267–1346.
- Dworkin, Ronald. 1981. The Forum of Principle. *New York University Law Review* 56:469–518.
- Eisinger, Peter K. 1973. The Conditions of Protest Behavior in American cities. *American Political Science Review* 67 (1): 11–28.
- Eskridge, William N., Jr. 2001. Channeling: Identity-Based Social Movements and Public Law. *University of Pennsylvania Law Review* 150 (1): 419–525.
- . 2002. *Equality Practice: Civil Unions and the Future of Gay Rights*. New York: Routledge.
- Fetner, Tina. 2008. *How the Religious Right Shaped Lesbian and Gay Activism*. Minneapolis: University of Minnesota Press.
- Forbath, William E. 1991. *Law and the Shaping of the American Labor Movement*. Cambridge, MA: Harvard University Press.
- Fordham, Benjamin O. 1998. *Building the Cold War Consensus*. Ann Arbor: University of Michigan Press.

- Gamson, William A., and David S. Meyer. 1996. Framing Political Opportunity. In *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*, ed. Doug McAdam, John D. McCarthy, and Mayer N. Zald, 275–90. Cambridge: Cambridge University Press.
- Gerstmann, Evan. 2008. *Same-Sex Marriage and the Constitution*. New York: Cambridge University Press.
- Google. n.d. Google Books Ngram Viewer. [https://books.google.com/ngrams/graph?content=homosexual+marriage%2Cgay+marriage%2Csame-sex+marriage&year\\_start=1990&year\\_end=2008&corpus=17&smoothing=3&share=&direct\\_url=t1%3B%2Chomosexual%20marriage%3B%2Cc0%3B.t1%3B%2Cgay%20marriage%3B%2Cc0%3B.t1%3B%2Csame%20-%20sex%20marriage%3B%2Cc0](https://books.google.com/ngrams/graph?content=homosexual+marriage%2Cgay+marriage%2Csame-sex+marriage&year_start=1990&year_end=2008&corpus=17&smoothing=3&share=&direct_url=t1%3B%2Chomosexual%20marriage%3B%2Cc0%3B.t1%3B%2Cgay%20marriage%3B%2Cc0%3B.t1%3B%2Csame%20-%20sex%20marriage%3B%2Cc0) (accessed December 31, 2013).
- Greenberg, Jack. 1968. The Supreme Court, Civil Rights and Civil Dissonance. *Yale Law Journal* 77 (8): 1520–44.
- Guinier, Lani. 2009. Courting the People: Demosprudence and the Law/Politics Divide. *Boston University Law Review* 89 (2): 539–61.
- Hajjar, Lisa. 2010. Lawyers, Litigation, and the U.S. Anti-Torture Campaign. Paper presented at the Annual Meeting of the American Political Science Association, September 2–5, Washington, DC.
- Hilson, Chris. 2002. New Social Movements: The Role of Legal Opportunity. *Journal of European Public Policy* 9 (2): 238–55.
- Human Rights Campaign n.d. HRC Story. <http://www.hrc.org/the-hrc-story/annual-reports> (accessed July 31, 2013).
- Keck, Thomas M. 2009. Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights. *Law & Society Review* 43 (1): 151–86.
- Klarman, Michael J. 2012. *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*. New York: Oxford University Press.
- Koopmans, Ruud. 2004. Protest in Time and Space: The Evolution of Waves of Contention. In *The Blackwell Companion to Social Movements*, ed. David A. Snow, Sarah A. Soule, and Hanspeter Kriesi, 19–46. Malden, MA: Blackwell.
- Kriesi, Hanspeter. 1995. The Political Opportunity Structure of the New Social Movements: Its Impact on Their Mobilization. In *The Politics of Social Protest*, ed. J. Craig Jenkins and Bert Klandermans, 167–98. Minneapolis: University of Minnesota Press.
- Lo, Clarence Y. H. 1982. Countermovements and Conservative Movements in the Contemporary U.S. *Annual Review of Sociology* 8:107–34.
- Loftus, Jeni. 2001. America's Liberalization in Attitudes Toward Homosexuality, 1973 to 1998. *American Sociological Review* 66 (5): 762–82.
- Mansbridge, Jane. 1986. *Why We Lost the ERA*. Chicago, IL: University of Chicago Press.
- Mayeri, Serena. 2004. Constitutional Choices: Legal Feminism and the Historical Dynamics of Change. *California Law Review* 92 (3): 755–839.
- McAdam, Doug. 1983. Tactical Innovation and the Pace of Insurgency. *American Sociological Review* 48 (6): 735–54.
- . 1999. *Political Process and the Development of Black Insurgency, 1930–1970*. Chicago, IL: University of Chicago Press.
- McAdam, Doug, Sidney Tarrow, and Charles Tilly. 2001. *Dynamics of Contention*. New York: Cambridge University Press.
- McCann, Michael W. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago, IL: University of Chicago Press.
- . 2006. *Law and Social Movements*. Burlington, VT: Ashgate.
- Meyer, David S., Valerie Jenness, and Helen Ingram. 2005. *Social Movements, Public Policy, and Democracy in America*. Minneapolis: University of Minnesota Press.
- Meyer, David S., and Suzanne Staggenborg. 1996. Movements, Countermovements, and the Structure of Political Opportunity. *American Journal of Sociology* 101 (6): 1628–60.
- . 1998. Countermovement Dynamics in Federal Systems: A Comparison of Abortion Politics in Canada and the United States. *Research in Political Sociology* 8:209–40.
- Munro, Lyle. 1999. Contesting Moral Capital in Campaigns Against Animal Liberation. *Society and Animals* 7 (1): 35–53.

- Peleg, Samuel. 2000. Peace Now or Later? Movement-Countermovement Dynamics and the Israeli Political Cleavage. *Studies in Conflict and Terrorism* 23 (4): 235–54.
- Pew Research Center Religion and Public Life Project. 2012. Changing Attitudes About Same-Sex Marriage. <http://features.pewforum.org/same-sex-marriage-attitudes/slide2.php> (accessed December 31, 2013).
- Prabhat, Devyani. 2011. After 9/11: Guantánamo and the Mobilization of Lawyers. *Studies in Law, Politics and Society* 54:213–59.
- Riddell, Troy Q. 2004. The Impact of Legal Mobilization and Judicial Decisions: The Case of Minority-Language Education Policy in Canada for Francophones Outside Quebec. *Law & Society Review* 38 (3): 583–609.
- Rodgers, Daniel T. 1987. *Contested Truths: Keywords in American Politics Since Independence*. New York: Basic Books.
- Rohlinger, Dina A. 2002. Framing the Abortion Debate: Organizational Resources, Media Strategies, and Movement-Countermovement Dynamics. *Sociological Quarterly* 43 (4): 479–507.
- Rosenberg, Gerald. 2008. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago, IL: University of Chicago Press.
- Scheingold, Stuart. 1974. *Politics of Rights: Lawyers, Public Policy and Political Change*. New Haven, CT: Yale University Press.
- Siegel, Reva B. 2008. Dead or Alive: Originalism as Popular Constitutionalism in Heller. *Harvard Law Review* 122 (1): 191–245.
- Stone, Amy L. 2012. *Gay Rights at the Ballot Box*. Minneapolis, MN: University of Minnesota Press.
- . 2013. Winning for LGBT Rights Laws, Losing for Same-Sex Marriage: The LGBT Movement and Campaign Tactics. In *The Marrying Kind: Debating Same-Sex Marriage Within the Lesbian and Gay Movement*, ed. Mary Bernstein and Verta Taylor, 135–66. Minneapolis: University of Minnesota Press.
- Tarrow, Sidney. 2011. *Power in Movement*, 3rd ed. New York: Cambridge University Press.
- Taylor, Verta, Nella Van Dyke, Katrina Kimport, and Ellen Ann Andersen. 2009. Culture and Mobilization: Tactical Repertoires, Same-Sex Weddings, and the Impact on Gay Activism. *American Sociological Review* 74 (6): 865–86.
- Tilly, Charles. 1995. *Popular Contention in Great Britain, 1758–1834*. Cambridge, MA: Harvard University Press.
- . 2004. *Social Movements, 1768–2004*. Boulder, CO: Paradigm.
- Vanhala, Lisa. 2012. Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK. *Law & Society Review* 46 (3): 523–56.
- Weiss, Meredith L. 2013. Prejudice Before Pride: Rise of an Anticipatory Countermovement. In *Global Homophobia: States, Movements, and the Politics of Oppression*, ed. Meredith L. Weiss and Michael J. Bosia, 149–73. Champaign: University of Illinois Press.
- White House. 2012. Remarks of President Obama at a Campaign Event in Seattle, WA. <http://www.whitehouse.gov/the-press-office/2012/05/10/remarks-president-campaign-event-seattle-wa> (accessed December 31, 2013).
- Wikipedia. n.d. Same-Sex Marriage Status in the United States by State. [http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_status\\_in\\_the\\_United\\_States\\_by\\_state](http://en.wikipedia.org/wiki/Same-sex_marriage_status_in_the_United_States_by_state) (accessed December 31, 2013).
- Yang, Alan S. 1997. Trends: Attitudes Toward Homosexuality. *Public Opinion Quarterly* 61 (3): 477–507.
- Zald, Mayer N., and Bert Useem. 1987. Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement. In *Social Movements in an Organizational Society*, ed. Mayer N. Zald and John David McCarthy, 247–71. New Brunswick, NJ: Transaction Books.

## CASES CITED

- Baehr v. Lewin*, 852 P.2d 44 (1993).  
*Baker v. Nelson*, 409 U.S. 810 (1972).  
*Baker v. State*, 744 A.2d 864 (1999).

*Bowers v. Hardwick*, 478 U.S. 186 (1986).  
*Garden State Equality v. Dow*, 79 A.3d 1036 (NJ 2013).  
*Goodridge v. Department of Pub. Health*, 798 N.E.2d 941 (2003).  
*Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).  
*In re Marriage Cases*, 183 P.2d 384 (Cal. 2008).  
*Kerrigan v. Commissioner of Pub. Health*, 957 A.2d 407 (Conn. 2008).  
*Kitchen v. Herbert*, \_\_\_ F.Supp.2d \_\_\_, 2013 WL 6697874 (D. Utah, Dec. 20, 2013).  
*Lawrence v. Texas*, 539 U.S. 558 (2003).  
*Obergefell v. Wymyslo*, \_\_\_ F.Supp.2d \_\_\_, 2013 WL 6726688 (S.D. Ohio, Dec. 23, 2013).  
*Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).  
*Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).  
*Roe v. Wade*, 410 U.S. 113 (1973).  
*Romer v. Evans*, 517 U.S. 620 (1996).  
*United States v. Windsor*, 133 S. Ct. 2675 (2013).  
*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

## STATUTES CITED

Defense of Marriage Act, 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1996).