SEXUAL ORIENTATION, SOCIAL CHANGE, AND THE COURTS

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I. INTRODUCTION

The raging contemporary controversy about gay rights presents a tempting opportunity for testing claims and counterclaims about the ability of courts to produce social change. Commentary about whether the courts can, or should, lead on the issue of gay rights is fairly booming, especially in relation to same-sex marriage.[1] Ever since 1993, when the Hawaii Supreme

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1. *See, e.g.*, Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431 (2005); Jeffrey Rosen, *Immodest Proposal: Massachusetts Gets It Wrong on Gay Marriage*, NEW REPUBLIC, Dec. 22, 2003, at 19; Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994); Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578 (1997) (book review); Patrick Egan et al., *Gay Marriage, Public Opinion and the Courts* (2005) (unpublished working paper, on file with author), *available at* http://ssrn.com/abstract=800066.

Court announced that it was poised to legalize same-sex marriage,[2] courts have been one crucial part of the high-volume public debate about who may marry. The Supreme Judicial Court of Massachusetts's blockbuster decision in *Goodridge v. Department of Public Health*,[3] requiring the state to open marriage to same-sex couples,[4] elevated the role of the courts to even greater prominence. The case fueled charges—some from unpredictable ideological quarters—that the court had overreached, or at least acted imprudently.[5] And *Goodridge* was all the more salient because it came only a few months after *Lawrence v. Texas*,[6] in which the United States Supreme Court struck down Texas's sodomy law.[7] Or maybe it was the other way around—that is, perhaps *Lawrence* was more salient than it otherwise might have been because it was decided in the midst of the marriage controversy, and may well have been understood by the public to be a case that—as Justice Scalia had argued in dissent—implicated marriage itself.[8]

There is an emerging view of the role of courts in the sexual orientation domain that echoes Professor Gerald Rosenberg's landmark book, *The Hollow Hope*.[9] This view is distinctly skeptical about the prospects of courts accomplishing much reform in the area of gay rights.[10]

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2. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

3. Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941 (Mass. 2003).

4. *Id.* at 969–70.

5. For a sampling of this sentiment from ideologically diverse quarters, see Rosen, *supra* note 1, at 20; Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2109 n.102 (2005); Lynn D. Wardle, Goodridge *and 'The Justiciary' of Massachusetts*, 14 B.U. PUB. INT. L.J. 57, 82–85 (2004); Paul Starr, *Winning Cases, Losing Votes*, N.Y. TIMES, Jan. 26, 2005, at A17.

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

7. *Id.* at 578.

8. *Id.* at 604 (Scalia, J., dissenting) ("Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.").

9. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); *see also* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (2d. ed., Univ. of Mich. Press 2004) (1974).

10. *See, e.g.*, Klarman, *supra* note 1, at 445 (stating that the Supreme Court's decisions in *Brown* and *Lawrence* did not create social movements but simply supported movements that already had significant momentum); Rosen, *supra* note 1, at 21 ("In the United States, social revolutions are always won or lost in the court of

It should not be confused with normative critiques of "activist courts" made by those who object to same-sex marriage or other gay rights.[11] The skepticism inspired by *The Hollow Hope* is empirical in nature and often made by those evincing no particular hostility to gay rights.[12] The thinking goes roughly like this: courts cannot produce significant change, only legislatures can. Legislators, who are politically accountable, will act in ways that are consistent with public opinion. By contrast, courts may get out too far in front of public opinion and, when they do, backlash is sure to follow.

Against this background, count my Essay as a plea for caution and context. The question whether courts can, or do, produce social change on sexual orientation issues is a question that is, on closer analysis, too crude to be all that useful. I will suggest that rather than staking out broad claims or pursuing unbroken causal arrows, scholars ought to bring into focus the variability, contingency, and complexity that presents itself as we try to map the relationship between courts and social change in the area of gay rights. True, any romanticized picture of judges as countermajoritarian revolutionaries, single-handedly making public policy more progressive, is empirically unsustainable. But we should not replace one piece of mythology with another. The notion that the institutional properties of courts disable them from ever driving social change in a significant way has its own caricatured qualities.

I propose that we avoid either categorical account. The answer I suggest is less showy, but likely to have the virtue of being more accurate. I would like to suggest that we think small, not large. Or, if you like, that we go local, not universal. The simple answer to the question whether courts can produce social change on gay issues, in other words, is likely to be that there are no simple answers.

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public opinion; and the legalization of the culture wars is a sign of weakness rather than strength."); Sunstein, *supra* note 1, at 25 (stating if the Court were to vindicate all gay rights at once it would lead to severe political backlash); Sunstein, *supra* note 5, at 2085 ("The issue of same-sex marriage is best handled through democratic arenas and at the state level (plausibly including decisions of state courts)."). This view is addressed and criticized in JASON PIERCESON, COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA 1–20, 187–98 (2005).

11. *See, e.g.*, Edwin Meese III, *Challenges Facing Our Judicial System*, 3 AVE MARIA L. REV. 303, 313 (2005) ("[H]ow wrong the Court is when, through judicial activism, it takes away from proper legislative bodies these particular issues. In Massachusetts today we observe the same kind of judicial activism in regard to homosexual 'marriage.'").

12. *See, e.g.*, Klarman, *supra* note 1, at 459–73 (detailing the social backlash against same-sex marriage).

In this Essay, I make two basic points in support of the idea that we should be attentive to, but should not overstate, the institutional dimensions of social change in this area. First, there is some ambiguity about what social change means in this context. Different metrics for social change may push the inquiry in different directions. Second, there is significant variability in the realm of gay rights. I will point to examples suggesting that *both* courts and legislatures have produced significant change on sexual orientation questions, and that *both* courts and legislatures have generated backlash. I will devote the most attention to examples of courts producing significant reform because that is most germane to the skepticism about judicial efficacy in this realm that I seek to question. It is worth noting, however, that even a four-cell matrix of this kind may be too generalized, for when we talk about "effects" of judicial decisions or legislation, we must ask the question: effects upon whom? There is, in other words, likely to be variability within these cells because actions, like court decisions and legislation, do not affect all groups or interests in any single way. I will close by suggesting that all this variability suggests that scholars would do better to think about what factors explain particular reactions, rather than press stylized institutional pictures.

II. WHAT CONSTITUTES "SOCIAL CHANGE" IN THIS AREA?

When we ask whether courts can generate social change, there is a threshold ambiguity about what social change means in this context, and that ambiguity is at the heart of things. We surely need to know precisely what change we are assessing the ability of the courts to produce.

One possibility is that social change means moving the proverbial hearts and minds. The intuition is powerful that fundamental reform on gay rights issues will take hold only when broad swaths of the public begin to accept the equality of sexual minorities, or at least accept the idea that sexual minorities ought to be treated as equal citizens. But if that is what is on the table, there are good grounds to doubt the capacity of law *of any kind* to deliver that sort of change in any autonomous kind of way. There are reasons, that is, to doubt that either courts *or* legislatures alone are well-positioned to move public opinion on gay rights questions without other cultural forces operating as well.

Indeed, it is hard these days to find many observers who lay any strong claim to the idea that law alone can change hearts and minds. In fact, it is noteworthy that scholars on the left and right of the spectrum in relation to civil rights laws have largely converged on what I have elsewhere called "law skepticism"—that is, the sensibility that anti-

discrimination laws cannot themselves change people's attitudes about the groups such laws to protect.[13] Prominent scholars on the right ground their skepticism about the power of anti-discrimination laws in claims that such laws perversely produce a culture of victimology and are insufficiently attentive to the priority of changing civil society by promoting cultural assimilation.[14] Their counterparts on the left generally argue that the sort of equality that law can produce is too thin and formal to alter deep "'habits of mind[,]'"[15] and that the only efforts likely to bear significant fruit are those targeted at changing prevailing cultural representations about subordinated groups.[16] These patterns of thinking about civil rights law in general have surfaced in important books focusing on gay rights.[17]

This is not the place to sort out the particular claims made by the left and right about the limitations of anti-discrimination laws in general, or of gay rights laws in particular. But it is relevant to notice that pegging the benchmark for courts to generate social change at converting hearts and minds may capture the actual position of no one in this debate. Given that this law skepticism applies as much to statutory anti-discrimination laws as to judicial actions, we get no real purchase on the institutional question of courts versus legislatures if what we are really talking about is the efficacy of legal versus cultural strategies.

Moreover, a separate set of problems arises when social change is equated with movement in public opinion. One core question is temporal: how long a time frame should be allowed before public opinion is deemed to have settled on an issue? This question may loom particularly large in the gay rights area where public opinion seems to have steadily moved in the direction of greater tolerance over the years.[18] For example, we might be led to say very different things about the effect of *Goodridge* on public

13. Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 HARV. L. REV. 684, 686 (1997) (reviewing ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995) and URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION (1995)).

14. *Id.* at 711–14.

15. *Id.* at 715.

16. *Id.* at 715–16.

17. *See generally* ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995); URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION (1995).

18. For an overview of multiple public opinion polls on related issues, taken over a period of nearly thirty years, see AM. ENTER. INST., AEI STUDIES IN PUBLIC OPINION, ATTITUDES ABOUT HOMOSEXUALITY & GAY MARRIAGE (2006), http://www.aei.org/docLib/20050520_HOMOSEXUALITY0520.pdf.

opinion if we measure opinion one week, one year, or one decade after the decision.

Beyond the temporal puzzle, efforts to track the extent to which broad public sentiment has been changed—whether by courts, legislation, popular culture, or anything else—must surmount methodological obstacles. How exactly are we to know whether the proverbial hearts and minds have crossed over on a particular issue? Public opinion polling comes to mind, and there is surely something meaningful to be divined when results appear with consistency, over time, even with differently-worded questions.[19] But that is a big "if" for a number of reasons.

First, there can be substantial framing effects associated with how questions are worded.[20] This is readily apparent in the realm of gay rights. For example, in their comprehensive review of public opinion on same-sex marriage, Egan, Persily, and Wallsten note that public opinion on civil unions is highly sensitive to whether respondents are given "two options (civil unions or no legal recognition) or three (marriage, civil unions, or no legal recognition)."[21] They note that support for civil unions is considerably higher when it is the middle option in a three-question format.[22] For another example of framing effects, consider these questions in a May 2001 Gallup poll: In response to the question whether homosexual behavior is morally acceptable or morally wrong, 53% said morally wrong, and only 40% found such behavior morally acceptable.[23] However, in the same poll, the numbers roughly switch when the question is asked whether homosexual relations between consenting adults should be legal. As to that question, 54% said yes, whereas only 42% said such relations should be illegal.[24] Now, it may be that respondents are drawing a

19. The best and most comprehensive look at polling on same-sex marriage is Egan et al., *supra* note 1; *see also* Paul R. Brewer, *The Shifting Foundations of Public Opinion About Gay Rights*, 65 J. POL. 1208 (2003). For a comprehensive look at polling on a wide array of gay rights issues, see AM. ENTER. INST., *supra* note 18.

20. For a good overview on framing by the fathers of modern framing research, see Daniel Kahneman & Amos Tversky, *Choices, Values and Frames*, *in* CHOICES, VALUES AND FRAMES 1, 1 (Daniel Kahneman & Amos Tversky eds., 2000). For a succinct analysis of framing effects in public opinion and polling, see Larry M. Bartels, *Is 'Popular Rule' Possible?: Polls, Political Psychology, and Democracy*, BROOKINGS REV., Summer 2003, at 12. For deeper conceptual skepticism about the existence of public opinion that polls seek to capture, see JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION (1992).

21. Egan et al., *supra* note 1, at 40.

22. *Id.*

23. AM. ENTER. INST., *supra* note 18, at 4.

24. *Id.* at 5.

sharp distinction between morality and law here, but we can say, at a minimum, that these answers do not yield a clear picture of public beliefs about homosexuality.

There are also reasons to wonder whether poll respondents understand what they are being asked. For example, polls appear to show substantial support for civil unions, even when controlled for the effects of different wording.[25] But it is unclear whether people know what a civil union is or what it entails. Egan, Persily, and Wallsten report that "question wording makes a difference, as respondents are less likely to understand words like 'civil unions' and 'domestic partnerships' than those specifying the types of rights such arrangements might confer . . . ."[26] Finally, the project of matching opinion change to something like a court decision is extremely difficult. As Egan, Persily, and Wallsten suggest, it may well be that opinion changes following a court decision reflect only the greater media coverage that such a decision generates, rather than any distinctive or reflective reaction by citizens to the fact that a *court* made a particular decision.[27] The authors allude to this point in the course of discussing the fact that public opposition to same-sex marriage rose in opinion polls at and after the time *Lawrence* was decided, even though that case concerned the decriminalization of sodomy (which polls suggested the public supported) and not same-sex marriage (which polls suggested the public opposed).[28] Their analysis does suggest some possible explanations for this temporary spike in public opposition to marriage.[29] One is that the marriage issue casts a long shadow, such that discrete gay issues that did not squarely concern marriage were nevertheless assimilated in respondents' minds to the marriage dispute.[30] A second is the sharp rise in media attention that a case like *Lawrence* caused.[31] All of this suggests the perils of trying to draw a clean line from a court decision to public opinion and of assuming that the effect of a court decision necessarily relates to the fact that a court has acted, as opposed to the fact that the case increased the salience of an issue through media coverage. In other words, the familiar bromide that correlation is not causation seems especially apt here.

Finally, even if we accept that changes in aggregate public opinion are

25. Egan et al., *supra* note 1, at 41.
26. *Id.* at 40.
27. *Id.* at 23.
28. *Id.* at 22–23.
29. *Id.* at 22–25.
30. *Id.* at 24.
31. *Id.* at 24–25.

significantly related to court action, we may miss an important piece of the story by looking only at aggregate shifts. Given how divisive gay rights issues are, and how intensely people on opposite ends of the spectrum of sentiment feel about these issues, we should expect court decisions to be greeted by divergent reactions, and to be understood, characterized, and deployed in different ways by different segments of the public.[32] These complex, interactive dynamics may ultimately suggest more than summaries of aggregate public opinion can about how an issue is likely to sort out over the long term.

These factors militate against making public opinion the singular, or even the central, metric analyzing social change. An alternative to a public centered approach is to follow Gerald Rosenberg, who framed the question in terms of the ability of the Supreme Court to generate significant policy change or social reform. Rosenberg trained his focus on the capacity of courts to take action that "broaden[s] and equalize[s] . . . the possession and enjoyment of what are commonly perceived as basic goods in American society."[33] His formulation must be adapted for our purposes because it would be unwise to focus only on the Supreme Court—given the active role of state courts in gay rights law. Taking Rosenberg's general approach, however, suggests that we ought to ask whether courts deciding questions in the gay rights arena have produced, or can produce, significant policy change or reform in any sort of autonomous way.

Once we leave the murky world of public opinion and reframe the inquiry about social change in terms of policy reform, the four-cell matrix I alluded to earlier becomes relevant. Let me suggest that there are examples in the gay rights area of *both* judicial and legislative actions leading to reform, and of *both* leading to backlash. These variations suggest that institutional considerations are not the only thing in play and that we need a thicker story of the dynamics that drive particular outcomes.

32. For a detailed discussion of different reactions to *Lawrence*, and *Goodridge*, see Egan et al., *supra* note 1, at 25–39.

33. ROSENBERG, *supra* note 9, at 4 (defining basic goods as "[r]ights and liberties, powers and opportunities, income and wealth," as well as "self-respect" (internal quotations omitted)); *see* Gerald N. Rosenberg, *Courting Disorder: Looking For Change in All the Wrong Places*, 54 DRAKE L. REV. (forthcoming Summer 2006).

III. COURTS SOMETIMES GENERATE BACKLASH AND SOMETIMES GENERATE SIGNIFICANT REFORM

Efforts to secure equal marriage rights for gay persons are often pointed to as evidence that a court that gets out too far ahead of public opinion can produce backlash.[34] That seems true enough if we understand backlash in terms of the policy response to a judicial decision. Since the Hawaii Supreme Court's 1993 decision in *Baehr v. Lewin*[35] put to the public the possibility of judicially authorized same-sex marriage,[36] there has been plenty of negative response. Between 1996 and 2005 twenty-three states passed "defense of marriage" laws that restricted marriage to opposite sex partners and denied recognition to any same-sex marriage performed elsewhere.[37] In 1996, Congress passed—and President Clinton signed—the Defense of Marriage Act, which defined marriage for purposes of federal law as between a man and a woman and purported to absolve states of any obligation they might otherwise have had to recognize a same-sex marriage performed elsewhere.[38] In addition, eighteen states have amended their state constitutions to incorporate "defense of marriage" provisions,[39] and, in some cases, to bar other forms of same-sex relationship recognition.[40] And, since *Goodridge*, more states have pursued constitutional amendments.[41] There have, of course, also been developments in the opposite direction. In addition to the opening of marriage in Massachusetts[42] and to the many municipal laws granting some domestic

34. *See, e.g.*, Klarman, *supra* note 1, at 459.

35. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

36. *Id.* at 57 (noting that if plaintiffs were successful in their equal protection claim "the State of Hawaii [would] no longer be permitted to refuse marriage licenses to couples merely on the basis that they are of the same sex").

37. Human Rights Campaign, Marriage/Relationship Recognition, http://www.hrc.org/Template.cfm?Section=Center&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=63&ContentID=17353 (last visited July 4, 2006) [hereinafter MARRIAGE/RELATIONSHIP RECOGNITION].

38. *See* 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738c (2000).

39. MARRIAGE/RELATIONSHIP RECOGNITION, *supra* note 37.

40. E.J. Graff, *Marital Blitz*, AM. PROSPECT, Mar. 2006, at 41.

41. *Id.* at 42, 44.

42. Human Rights Campaign, Massachusetts Marriage/Relationship Recognition Law, http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=27640&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited July 4, 2006) (giving a history of Massachusetts's recognition of gay marriage. *But see* MARRIAGE/RELATIONSHIP RECOGNITION, *supra* note 37 (noting that in March, 2006, the Massachusetts Supreme Court upheld a law denying gay marriage to out-of-state couples if the marriage would be void in their home state).

partnership benefits to same-sex couples,[43] Connecticut and Vermont have statewide civil union laws that grant comprehensive spousal rights to same-sex couples,[44] California has a statewide domestic partnership law that grants most spousal rights to same-sex couples,[45] and Hawaii, Maine, and New Jersey have statewide laws that provide some spousal rights to same-sex couples.[46]

One question to ponder is whether what followed the 1993 *Baehr* decision would have been all that different had it been the Hawaiian legislature, not the court, that ignited a national conversation about same-sex marriage. The same could be asked about *Goodridge*: what if the Massachusetts legislature had acted, not the state supreme court? This question may have been distinctly less hypothetical if, in the fall of 2005, Governor Arnold Schwarzenegger had chosen not to veto a bill passed by

43. *See generally* MARRIAGE/RELATIONSHIP RECOGNITION, *supra* note 37 (listing individual states policies on same-sex marriage).

44. Human Rights Campaign, Connecticut Marriage/Relationship Recognition Law, http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=28556&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited July 4, 2006) (stating that Connecticut created civil unions for same-sex couples in 2005); Human Rights Campaign, Vermont Marriage/Relationship Recognition Law, http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=27605&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited June 20, 2006) (stating that Vermont created civil unions for same-sex couples in 1999).

45. Human Rights Campaign, California Marriage/Relationship Recognition Law, http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=28673&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited July 4, 2006) (noting that California allows domestic partners such rights as hospital visitation, shared medical coverage, and the right to inherit).

46. Human Rights Campaign, Hawaii Marriage/Relationship Recognition Law http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=27582&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited July 4, 2006) (noting that among other rights Hawaii allows same-sex couples to inherit without a will, sue for wrongful death of a partner, and get hospital visitation); Human Rights Campaign, Maine Marriage/Relationship Recognition Law, http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=27577&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited July 4, 2006) (noting that Maine allows registered domestic partners to inherit without a will, make funeral arrangements for a deceased partner, and to be named guardian if their partner becomes incapacitated); Human Rights Campaign, New Jersey Marriage/Relationship Recognition Law, http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=27488&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited July 4, 2006) (noting that New Jersey allows both homosexual and heterosexual domestic partners over the age of sixty-two to have hospital visitation rights, to make medical and legal decisions for an incapacitated partner, and to obtain tax benefits and inheritance).

the California legislature instituting same-sex marriage—the first such bill passed by a legislature (and passed, by the way, without the direct pressure of any appellate ruling).[47] In any of these legislative scenarios, opponents would presumably have invoked the same specter of one state arrogantly nationalizing same-sex marriage and would have lodged similar substantive objections to such marriages. The precise *content* of the oppositional movement's message would presumably have varied because the idea of "judicial activism" has been a centerpiece of that movement's strategy. But while the courts have been an effective foil for those activists, it would surely misstate the opponents' objection to say that their complaint is merely procedural, and that they would cheerfully accept same-sex marriage if imposed by a state legislature.

It is also worth noting that the backlash to same-sex marriage seems to vary depending on whether the focus is on policy responses or public opinion. The widespread enactment of constitutional and statutory defense of marriage measures since the *Baehr* decision in 1993 evidences a pronounced policy backlash. But if we use public opinion as the relevant indicator, the story may be different. At least if the polls are correct, majorities still oppose same-sex marriage, but public support seems to have risen somewhat in the years since *Baehr* first put this issue on the map. In the Pew Research Center's consistently-worded polling questions, support for gay marriage increased from 27% in 1996 to 39% in 2006, while opposition dropped from 65% in 1996 to 51% in 2006.[48] This dynamic is even more clear with civil unions, which did not exist by that name before the Vermont legislature created them in 2000, but which, polls suggest, appear to command substantial and growing public support.[49] If the polls are correct and these opinion trends continue, it may one day be said that *Baehr* and *Goodridge* started a process that culminated in same-sex couples securing widespread relationship protections, whether through marriage or civil union.

Even if one views the policy sequelae to *Baehr* and *Goodridge* as lopsidedly negative for gay rights advocates, however, it does not follow that judicial action in support of gay rights will always play out in the same way. In fact, courts have led on certain gay rights issues by acting in the absence of broad public support. Consider the following three examples.

One example comes from the cases involving the recognition of gay

47. Graff, *supra* note 40, at 42.

48. Egan et al., *supra* note 1, at 22 fig.5.

49. *Id.* at 42 fig.14 (illustrating that the Pew polls show a substantial rise in support—from 42% in 2000 to 53% in 2005).

student groups on college campuses. Student groups formed on campuses even before the Stonewall Riots in 1969, which are often viewed as the kick off of the modern gay rights movement.[50] A student group formed at Columbia as early as 1967, followed in short order by groups at Cornell, N.Y.U., and Stanford.[51] It did not take long for colleges to bridle at this visible gay presence on campus. In 1972, the first court decision came in response to the University of Georgia's effort to deny a student group space to gather and hold a dance.[52] The district court held that the university was required to give the group space to meet,[53] invoking the Supreme Court's decision in *Healy v. James*.[54] *Healy* established that student groups have a First Amendment right to recognition that could not be denied based on an unsubstantiated fear of disruption.[55] In the wake of the Georgia case, several federal district and circuit courts came to similar conclusions on similar facts.[56] The Supreme Court never weighed in on these cases, although the University of Missouri's appeal from an order requiring it to formally recognize a gay student organization produced an opinion dissenting from the denial of certiorari. In that opinion, Justice Rehnquist memorably analogized homosexuality to the measles.[57] The fact that a Supreme Court Justice would make that rather inflammatory analogy captured the mood of the times, as did the First Circuit's observation in *Gay Students Organization of the University of New Hampshire v. Bonner*, that the University had relied on its "obligation and right to prevent activities which the people of New Hampshire find

50. PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 90–92 (2000).

51. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1608 (1993).

52. Wood v. Davison, 351 F. Supp. 543 (N.D. Ga. 1972).

53. *Id.* at 549.

54. Healy v. James, 408 U.S. 169 (1972).

55. *Id.* at 190–91.

56. Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 368 (8th Cir. 1988); Gay Student Servs. v. Tex. A&M Univ., 737 F.2d 1317, 1334 (5th Cir. 1984); Gay Lib v. Univ. of Mo., 558 F.2d 848, 857 (8th Cir. 1977); Gay Alliance of Students v. Matthews, 544 F.2d 162, 165–66 (4th Cir. 1976); Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 662 (1st Cir. 1974); Student Coal. for Gay Rights v. Austin Peay State Univ., 477 F. Supp. 1267, 1274 (M.D. Tenn. 1979).

57. Ratchford v. Gay Lib, 434 U.S. 1080, 1084 (1978) (Rehnquist, J., dissenting) ("From the point of view of the University, however, the question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined.").

shocking and offensive."[58] These cases were decided before any major shift in public opinion on gay rights, and before gay rights advocates had scored many legal victories at all.

By interpreting the First Amendment to require that universities recognize and provide space to gay student groups, courts helped to establish a visible gay presence on college campuses. Student activism was the driving force in establishing this presence, but the substantial string of litigation victories was necessary to counter the recalcitrance of several universities. This was no small accomplishment. Coerced gay invisibility has historically been a central part of gay inequality.[59] And, these cases facilitated not only visibility, but subsequent student and university activism in support of a broader range of non-discrimination policies.[60] Consequently, the reform facilitated by these decisions was, in other words, both tangible and consequential.

A second early example of court action concerns civil service employment. As with the campus cases, judicial action on this occurred before the gay rights movement had gained much public traction. Indeed, the pathbreaking decision in *Norton v. Macy*[61] was argued in the D.C. Circuit six months before the Stonewall Riots, and decided only four days after that event.[62] In *Norton*, the D.C. Circuit established the nexus

58. Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 661 (1st Cir. 1974).

59. Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361, 366–69 (1997) (discussing the beginnings of the gay rights movement, the virulence of some anti-gay discrimination, and the associated fears of coming out).

60. *See* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1532–33 (2001) (noting the success of groups in invoking First Amendment protection for gay rights organizations and arguing that "[t]he rise of gay equality and public visibility coincided—not coincidentally, however—with the rise of vigorous protection for First Amendment freedom, especially the freedom of association"); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy,* Nomos*, and Citizenship*, *1961–1981*, 25 HOFSTRA L. REV. 817, 883 (1997) (arguing that the growth of gay student groups on campus following these cases provided "emotional and social support for lesbian and gay youth at a critical period in their lives," enabled "valuable educational and social functions benefiting the larger university and local community . . . and often served as centers for local reform," and led to the enactment of numerous campus and municipal non-discrimination ordinances that were spearheaded by student and university support); Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1695 (1993) (noting legal success of student organization cases).

61. Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

62. The case was decided July 1, 1969, four days after the June 28, 1969,

standard for dismissal of a civil servant, requiring a specific showing of "'cause [for dismissal] as will promote the efficiency of the service.'"[63] In the case, Norton was discharged from his position as a budget analyst at NASA for immoral conduct after he made a homosexual advance to a stranger he had picked up in his car at Lafayette Park.[64] With the exception of this single incident, the record contained no evidence of public homosexual conduct.[65] The court rejected the idea that immoral conduct alone necessarily compromised an employee's ability to do the job, and held that the agency must show a specific connection between the evidence against the employee and the efficiency of the service.[66] The agency's claim that Norton's sexual orientation would bring about possible public scandal which might cause embarrassment to the department was deemed by the court to be too attenuated.[67]

Norton was limited in what it held, especially since later cases narrowed it in some respects,[68] and left uncertain its applicability to an employee who came out on the job.[69] But its main holding went on to be codified in civil service rules.[70] The decision thus made an enduring—if

uprising in Greenwich Village. *See id.*

63. *Id.* at 1162.

64. *Id.* at 1162–63.

65. *Id.*

66. *Id.* at 1165–66.

67. *Id.* at 1167.

68. Later cases allowed for a presumed nexus where there was no explicit showing of any connection between the disputed behavior and the efficiency of the service. The basis for this narrowing was sketched out in Judge Tamm's dissent in Doe v. Hampton, 566 F.2d 265, 274 (D.C. Cir. 1977). *See also* Phillips v. Bergland, 586 F.2d 1007, 1011 (4th Cir. 1978) (allowing presumption where the "misconduct . . . is entirely unrelated to the employee's work").

69. While *Norton* involved the private conduct of a federal employee, *Singer v. U.S. Civil Service Commission* dealt with a situation of an openly gay and widely publicized federal employee. 530 F.2d 247 (9th Cir. 1976). The court upheld Singer's dismissal because it found that the dismissal was not merely because of his homosexuality, but because he "openly and publicly flaunt[ed] his homosexual way of life" while identifying himself as a member of a federal agency. *Id.* at 251. The court applied the nexus standard of *Norton*, but found that the public nature of Singer's homosexuality distinguished his case. The Supreme Court later vacated the Ninth Circuit decision and remanded upon the request of the Solicitor General for a consideration under new regulations. Rhonda R. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311, 317–18 (1981). The Ninth Circuit then remanded the case back to the agency, where it was ultimately decided that Singer's behavior did not affect the efficiency of the service. *Id.*; WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER AND THE LAW 786 (2d ed. 2004).

70. *See* ESKRIDGE & HUNTER, *supra* note 69, at 786 (discussing the

limited—contribution to the law governing federal employees.[71] The case also undermined the traditional nostrum, still prevalent when *Norton* was decided, that homosexuality alone made an employee unfit for government service.[72]

A third example of courts producing significant reform is in the area of second-parent adoption. That term refers to adoption by someone who has no biological or previously recognized legal connection to a child, but is co-raising the child with the lawful parent and seeks to assume the legal obligations of parenthood.[73] Judicial interpretation of adoption statutes has driven this legal concept, which arose as courts across the country were petitioned by families in which two persons of the same sex—for the most part, women—had decided to rear a child together. In these cases, there has generally been no opposition to the functional parent's request to adopt and, indeed, it is typically undisputed that adoption would serve the child's best interests.[74] The problem arises, however, because adoption laws usually require that the rights of all existing parents to the child be terminated before any adoption may proceed. But in this scenario the lawful parent does not wish to terminate her relationship with the child, but only to facilitate her partner's parental relationship—as is commonly done in step-parent adoptions.

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codification of *Norton*'s holding in 5 C.F.R. § 731.202(b) (1975); *see also* 5 C.F.R. § 731.202(b)(10) (1978) (prohibiting discrimination "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others").

71. *See* Cain, *supra* note 51, at 1579 (counting among early victories in gay rights movement federal employees' challenges to their dismissal for homosexuality); John Barry Kelly II, Recent Development, *Federal Employment of Homosexuals: Narrowing the Efficiency Standard*, 19 CATH. U. L. REV. 267, 275 (1969) ("After *Norton*, the Commission may not justify the exclusion of homosexuals on the ground that such conduct is contrary to the dominant conventional norms."); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 824–25 (1979) (arguing that *Norton* and *Singer* significantly improved the position of gay employees by requiring courts and the Civil Service Commission to find a nexus before terminating employment).

72. *See* CAIN, *supra* note 50, at 105 (quoting a 1963 internal Civil Service Commission memo stating "that 'persons . . . [who] . . . have engaged in or solicited others to engage in homosexual . . . acts with them without evidence of rehabilitation are not suitable for Federal employment'").

73. *See* Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933 (2000). For an influential early article, see Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

74. Schacter, *supra* note 73, at 941–42.

Because adoption statutes were not written with this family form in mind, courts asked to grant these adoptions have confronted a dilemma. One interpretive choice has been to apply the statutes literally, in which case the adoption might well be denied because the biological parent has not relinquished parental rights and the child, therefore, can be seen as unavailable for adoption.[75] The other choice has been to use various rules of construction or analogies (such as to step-parent adoption) to construe the adoption statutes broadly. Such a construction, advocates have argued, vindicates the central purpose of adoption statutes by promoting a child's best interests because adoption provides additional legal, financial, and emotional security for the child.

Beginning at least as early as 1985, trial courts in Oregon and Alaska construed their respective state adoption statutes to permit second-parent lesbian adoptions.[76] In the years that followed, second-parent adoptions have become much more widely available. Appellate courts in seven states, as well as the District of Columbia, have allowed second-parent adoption, as have trial courts in fifteen additional states.[77] Three states now authorize second-parent adoption by statute,[78] and in two of these states—California and Vermont—a favorable appellate ruling preceded the eventual codification. Appellate courts have rejected second-parent adoption in only four states.[79] Thus, in twenty-four states, gay or lesbian parents can obtain a second-parent adoption in all or at least part of the state.[80]

Judicial affirmation of second-parent adoption predated the contemporary same-sex marriage controversy, which began in earnest with the Hawaii Supreme Court's 1993 decision. Given that the marriage

75. It is worth noting that there are textual arguments that can be used to avoid the mandatory termination of all parental rights. *See id.* at 938–39.

76. Elizabeth Zuckerman, Comment, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 731 n.8 (1986).

77. *See* NAT'L GAY AND LESBIAN TASK FORCE, SECOND-PARENT ADOPTION IN THE U.S. (2005), http://www.thetaskforce.org/downloads/secondparentadoptionmap.pdf (noting that appellate courts have approved second-parent adoptions in California, District of Columbia, Illinois, Indiana, Massachusetts, New York, New Jersey, and Pennsylvania, and that trial courts have granted such adoptions in Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas, and Washington).

78. *Id.*

79. *See id.*

80. *See id.*

controversy has often been framed in terms of the asserted effects of gay parenting on children,[81] it is striking that the second-parent adoption cases have produced nothing like the opposition that has greeted same-sex marriage decisions. Indeed, not a single state court decision granting a second-parent adoption has been overturned by legislation.[82] Yet, the consequence of a second-parent adoption is, precisely, to create a new social category—the two-parent gay or lesbian family—and to raise the profile of that family. In the wake of state court decisions on second-parent adoption, schools, doctors' offices, neighborhoods, and citizens around the country have interacted with this new, legally recognized family form.[83] And the effects are not always strictly local. As I have argued elsewhere, a nationally-distributed wire story about an early second-parent adoption decision in New York, by sending an affirming representation of a lesbian family into the public discourse, "help[ed] to build the important, if elementary, idea that the words 'lesbian and gay' and 'family' can stand in something other than oxymoronic relation to one another."[84] That engagement was made possible by a court taking the lead on this question.

Concededly, each of these three examples—campus recognition, civil service employment, and second-parent adoption—reflects incremental, not revolutionary, change. Perhaps none of these context are as consequential as legalizing same-sex marriage would be. But they need not be equally dramatic in order to matter. Social change is not achieved in

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81. *See, e.g.*, Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parenting*, 1998 U. ILL. L. REV. 253, 255–56.

82. Second-parent adoption might be understood to raise different questions than so-called public adoptions, in which there is no existing relationship between the child and the would-be adoptive parent(s). With respect to adoption laws more generally, three states—Florida, Mississippi, and Utah—have express bans on adoption by gay persons, with four more states—Nebraska, Arkansas, Missouri, and New Hampshire—having de facto policies or laws restricting gay adoption. *See* Amanda Paulson, *Several States Weigh Bans on Gay Adoptions*, CHRISTIAN SCI. MONITOR, Mar. 15, 2006, at 2. Several other states have introduced anti-adoption measures recently, but the issue "has proved less galvanizing than gay marriage." *Id.* Public opinion polls suggest more support for adoption rights than for marriage. *See id.* (quoting Andrew Kohut, director of the Pew Research Center for the People and the Press, as saying (after the March 2006 poll) that gay adoption "[is] not nearly as inflammatory as gay marriage").

83. Jane S. Schacter, *"Counted Among the Blessed": One Court and the Constitution of Family*, 74 TEX. L. REV. 1267, 1270 (1996).

single fell swoops. These decisions played a readily-observable role in bringing about significant changes to longstanding practices.

IV. LEGISLATURES SOMETIMES GENERATE SIGNIFICANT REFORM AND SOMETIMES GENERATE BACKLASH

Just as we have seen examples of judicial action producing different results, we can also observe such variability with respect to legislatures.

Consider first an important example of legislatively-driven reform—the repeal of sodomy laws. Repeals began in 1961 when Illinois eliminated its law.[85] By the end of the 1970s, twenty more states had repealed their laws.[86] Most of the time, the repeal generated little resistance or opposition, although this was not invariably the case.[87] These repeals were vitally important to lesbian and gay people because of the powerful effects of sodomy laws. Such laws have operated both symbolically (by essentially criminalizing gay identity) and practically (by imposing an array of collateral legal consequences based on the criminalization of sodomy). Judicial action on the state and federal level to declare sodomy laws unconstitutional came only after this legislative repeal movement had begun.[88]

But the idea that gay rights measures originating in the legislative (as opposed to the judicial) arena will be immune from backlash does not hold up. Consider the long running campaign to secure passage of statutory protection against discrimination based on sexual orientation. Since the 1970s, gay rights advocates have sought to add sexual orientation to statutes outlawing discrimination in employment, housing, public accommodations, and other realms.[89] Advocates have, however, frequently had to win twice: first in the legislative arena, and then in fighting back a ballot measure to repeal the law. This pattern dates to Anita Bryant's campaign in the 1970s to repeal a Dade County anti-discrimination law.[90]

84. William N. Eskridge, Jr., Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 662.

85. *Id.* at 663.

86. *Id.* at 664 (describing the strong opposition to legislative repeal in California, Idaho, and Arkansas).

87. *See* Eskridge, supra note 85, at 675 (surveying state court decisions invalidating sodomy laws); Lawrence v. Texas, 539 U.S. 558 (2003).

88. *See* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 286–90 (1994) (discussing state laws banning discrimination based upon sexual orientation).

89. *Id.* at 284.

Following Bryant's "Save Our Children" campaign, gay rights supporters regularly faced local and state ballot measures designed to either repeal an enacted anti-discrimination law or to preclude the future enactment of such a law.[91] Indeed, this pattern persisted until the Supreme Court finally put a stop to it, or at least was widely understood to have done so, in *Romer v. Evans*.[92] The legislative pedigree of anti-discrimination laws, in other words, has not immunized them from backlash. Seventeen states have now enacted statewide anti-discrimination laws,[93] so the oppositional tactics have not had the same broad effect as we have seen with the anti-marriage initiatives. But that still leaves the vast majority of states with anti-discrimination statutes that do *not* cover sexual orientation.[94] And, these ballot measures often unleashed ugly campaigns that shaped public debates and consumed considerable resources.[95]

Another way to turn the prism on this issue is to say that those skeptical of judicial efficacy in the gay rights arena may be making a contestable implicit assumption that when public opinion supports change, change will, in fact, be pursued by politically accountable legislators. The legislature-as-locus-for-social-change view, in other words, seems to presume some degree of legislative responsiveness to public opinion. But this assumption is itself problematic.

In any kind of a general sense, the idea of robust legislative accountability and responsiveness is, as I have argued elsewhere, overstated.[96] In ways specific to the gay rights issue, it is relevant to note that there are areas in which polls suggest that public opinion strongly supports gay rights measures that have not been enacted.[97] If the polls are

90. *Id.* at 283–85.

91. Romer v. Evans, 517 U.S. 620 (1996). I qualify this description of *Romer* because a Sixth Circuit decision after *Romer* held that a city charter amendment that prevented the enactment of a local gay civil rights law was constitutional, notwithstanding *Romer*, and the Supreme Court denied certiorari in the case. Equal. Found. v. City of Cincinnati, 128 F.3d 289, 301 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998).

92. HUMAN RIGHTS CAMPAIGN, STATEWIDE ANTI-DISCRIMINATION LAWS & POLICIES (2006), http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14821.

93. *Id.* Additional states have policies protecting public employees from such sexual orientation discrimination, but these policies do not apply more generally.

94. *See* Schacter, *supra* note 89, at 286–94 (discussing backlash at the ballot box and state debates over gay civil rights).

95. Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 755–60 (2004).

96. *See, e.g.*, AM. ENTER. INST., *supra* note 18, at 11 (providing support for the

to be credited, strong majorities appear to support both gays serving in the military[98] and the enactment of laws protecting gay people from discrimination in the workplace.[99] In a 2005 *Boston Globe* poll, 79% favored gays serving openly in the military, with 18% opposed.[100] Similarly, a 2004 *Los Angeles Times* poll found 72% favored laws banning job discrimination against gay people and only 18% opposed.[101] These results may, of course, be subject to some of the characteristic problems with polls in this area.[102] But two points are noteworthy: both results are consistent with the findings in other polls,[103] and the margins are sufficiently lopsided to make it less likely that the results are dead wrong as far as bottom-line findings. Despite the public sentiment apparently reflected in these polls, however, Congress has shown no sign of moving on either front, and most state legislatures have declined to add sexual orientation to the list of protected classifications covered by existing anti-discrimination statutes.[104]

This disconnect suggests that the legislative branch cannot always be counted on to reflect, or to act consistently, with public opinion. Further, the disconnect supports the notion that the institutional question of who decides is not necessarily the driving factor. Legal scholars, long obsessed with the countermajoritarian difficulty, may be fetishizing the issue of courts versus legislatures. Gay rights questions are hotly contested issues. The people who feel the most strongly about the issues tend to occupy opposite ends of the political spectrum.[105] The case of military policy and

proposition that a majority believe gays should have equal employment opportunities).

97. *Id.* at 14.

98. *Id.*

99. *Id.*

100. *Id.*

101. *See supra* notes 18–27 and accompanying text.

102. In a 2005 Gallup poll, 76% of respondents said that gay people should be hired for military service, while only 22% were opposed. AM. ENTER. INST., *supra* note 18, at 12. In other Gallup polls between 2001–2003, majorities of 72%–80% favored allowing gays to serve in the military, with 18%–23% opposed. *Id.* In these polls, the question of service in the armed forces was put to respondents as part of a list of occupations for which gays should or should not be eligible. With respect to job discrimination, Gallup and PSRA/Newsweek polls asking respondents whether homosexuals should have equal rights in terms of job opportunities between 2003–2005 reflected favorable majorities between 87%–88%, with only 10%–11% answering in the negative. *Id.* at 11.

103. The picture is different on the federal versus the state level. None of the major federal anti-discrimination statutes cover sexual orientation. By contrast, seventeen states have enacted statewide statues banning discrimination based on sexual orientation. *See generally* Schacter, *supra* note 89.

104. Egan et al., *supra* note 1, at 27–28, 28 fig.10.

the case of anti-discrimination laws suggest that those organized against sexual orientation equality have often been able to block policy change, even in areas where broad public opinion seems to be strongly supportive of change.

V. CONCLUSION

Courts and legislatures have both played active roles in the ongoing campaign for sexual orientation equality, as have ballot measures and more diffuse cultural processes. Mapping causal relationships is no small task in an area where multiple forces are acting simultaneously and interacting dynamically. I have suggested that we resist the conclusion that the institutional question of who decides is the only relevant factor to account for in assessing the capacity of law to drive social change in this arena. The old conventional wisdom valorizing courts is flawed, but so is any new conventional wisdom that courts are necessarily and always ineffective in producing genuine change on gay rights issues.

A more productive inquiry would be to begin to focus on what might explain why particular judicial and legislative actions lead to policy reform or backlash.[106] That inquiry should be far more systematic than anything I can offer in this brief Essay, but let me suggest some factors that might bear exploration.

What might explain the fact that legislatures encountered little resistance in repealing sodomy laws, but were often met with ballot measures to wipe out enacted anti-discrimination laws? Some have suggested that sodomy repeals may have been aided by the fact that they were typically part of a package of repeals related to the Model Penal Code, rather than as free-standing measures about sexuality alone.[107] Adding sexual orientation to anti-discrimination laws may be a more visible, and therefore a more controversial, proposal. Another factor to consider is that claims characterizing anti-discrimination laws covering sexual orientation as "special rights" have proven potent in triggering what I have argued to be latent anxiety about more traditional civil rights laws, such as those banning race discrimination.[108] These hypotheses might

105. For a recent effort in this direction focusing on the multiple ways in which court action can shape political debates, see PIERCESON, *supra* note 10, at 1–20.

106. *Id.* at 70. *See generally* Donald P. Haider-Markel & Kenneth J. Meier, *The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict*, 58 J. POLITICS 332 (1996).

107. Schacter, *supra* note 89, at 300–07 (exploring the coded rhetoric of special rights).

provide a starting point, but nuanced exploration of the dynamics associated with each of these legislative efforts would be indispensable.

Similar questions can be asked about why courts have sometimes seem to generate real policy change and other times to trigger policy backlash. It is unconvincing to lay it all at the door of public opinion. There is little reason, for example, to suspect that there was significant public support for protecting gay governmental employees in 1969 when *Norton* was decided, or for recognizing gay campus groups in the 1970s, or for second parent adoption beginning in the mid-1980s. There are recent signs that public opinion may be moving in a more supportive direction, on adoption, but the state of play on that issue is uncertain. Indeed, one might reasonably speculate that opponents of same-sex marriage will at some point target same-sex adoption, given the claims these opponents have made about what is best for children.[109]

Perhaps the difference, to date, between adoption and marriage relates simply to the greater salience and media attention paid to the marriage litigation. This seems like a promising line of analysis, for how court decisions are received in the public domain necessarily depends upon what politicians, citizens, activists, and others make of them. Same-sex marriage litigation has been greeted by its opponents with a simple message: judicial activism.[110] The political forces organized against marriage equality have deployed that message effectively. As a matter of irony, it should be noted that opponents of gay rights have themselves sometimes resorted to the courts to invalidate or restrict democratically-enacted legislation that they dislike. For example, the Boy Scouts of America, as well as the organizers of the Boston St. Patrick's Day Parade, have looked to unelected federal judges to restrict the reach of state anti-discrimination legislation that had been read by the state courts to compel gay inclusion.[111] Setting aside the issue of whether the First Amendment questions in those cases were correctly decided, it is notable as a descriptive matter that gay rights advocates did not cry "judicial activism" in response, for example, to the Supreme Court's reliance in *Dale* on a doctrine of expressive association that does not appear in the text of the Constitution. Presumably, the lack of that response reflects, in part, a tactical awareness among gay rights advocates that stoking the short-term fires of opposition to perceived judicial activism is not in the long term

108. *See generally* Paulson, *supra* note 82.

109. *See, e.g.*, Meese, *supra* note 11, at 308.

110. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 559 (1995).

interests of a movement that has looked to courts to identify and protect the constitutional rights of sexual minorities. Or perhaps gay rights advocates felt it was more effective to lobby local officials to limit the Boy Scouts' access to public property so long as they maintained their exclusionary policy.[112] Whatever the reason, however, the point remains that responses to a judicial decision will necessarily be shaped by how that decision is portrayed and deployed by advocates. Probing those responses and dynamics in a way sensitive to contextual factors, rather than pursuing institutional absolutes, presents a promising direction for future research.

111. *See, e.g.*, Maura Dolan, *Refusal to Subsidize Scouting Is Upheld*, L.A. TIMES, Mar. 10, 2006, at B1.