

2009

Sexual Politics and Social Change

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Recommended Citation

Hutchinson, Darren Lenard. "Sexual Politics and Social Change." *Connecticut Law Review* 41, no. 5 (July 2009): 1523-1547.

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CONNECTICUT LAW REVIEW

VOLUME 41

JULY 2009

NUMBER 5

Article

Sexual Politics and Social Change

DARREN LENARD HUTCHINSON

The Article examines the impact of social movement activity upon the advancement of GLBT rights. It analyzes the state and local strategy that GLBT social movements utilized to alter the legal status of sexual orientation and sexuality following the Supreme Court's ruling in Bowers v. Hardwick. Successful advocacy before state and local courts, human rights commissions, and legislatures fundamentally shifted public opinion and laws regarding sexual orientation and sexuality between Bowers and the Supreme Court's ruling in Lawrence v. Texas. This altered landscape created the "political opportunity" for the Lawrence ruling and made the opinion relatively "safe."

Currently, GLBT rights groups are following a similar strategy with respect to the pursuit of same-sex marriage. This Article evaluates that strategy and considers whether political opportunities for reform in GLBT rights exist on the national stage.

ARTICLE CONTENTS

I. INTRODUCTION	1525
II. SOCIAL MOVEMENTS, SEXUAL ORIENTATION, AND COURT DOCTRINE.....	1528
A. FROM BOWERS TO LAWRENCE: SOCIAL MOVEMENTS CREATE CHANGE.....	1528
B. LAWRENCE: CABINING JUSTICE.....	1530
III. RED VICTORIES AND BLUE EUPHORIA: AN ELECTION IS NOT A SOCIAL MOVEMENT	1532
A. LIBERAL ENTHUSIASM FOR PROGRESSIVE CHANGE	1532
B. WARNING SIGNS: KINKS IN THE NARRATIVE OF LIBERAL DOMINANCE	1535
C. SPLIT TICKET: GLBT RIGHTS AND THE NEW DEMOCRATIC DOMINANCE	1536
D. OBAMA’S BIG TENT: RICK WARREN AND GLBT RIGHTS	1539
IV. SOCIAL MOVEMENT ACTIVISM IN AN OBAMA ERA	1542
A. THE SUCCESS OF SAME-SEX MARRIAGE IN LIBERAL JURISDICTIONS SHOULD NOT DICTATE NATIONWIDE POLITICAL ACTIVITY	1542
B. NATIONAL POLITICAL OPPORTUNITIES.....	1543
V. CONCLUSION	1546



Sexual Politics and Social Change

DARREN LENARD HUTCHINSON*

I. INTRODUCTION

Social movements are essential for the achievement of legal and political change. A “social movement” is an organized and sustained political effort to alter the substance of policy and public opinion on matters of interest to the movement’s participants.¹ In recent years, a growing body of scholarship among constitutional law scholars examines the relationship between social movement activity and the evolution of Supreme Court doctrine. Reva Siegel, for example, connects changes in the Court’s treatment of sex-based discrimination to feminist organizing and shifting gender roles in the post-World War II era.² And Michael Klarman has written extensive accounts on the relationship between the Civil Rights Movement, Southern backlash, and progressive changes in the status of blacks before the law.³

The work of these scholars depicts Court doctrine in a much more complicated fashion than many traditional accounts, which contend that judicial review conflicts with democratic governance.⁴ Although Supreme Court justices are indeed unelected and have lifetime tenure, their rulings, particularly on matters of broad social concern, respond to Congress, the President and public opinion.⁵ Because social movements can impact the opinion of members of Congress, the President, the electorate, and individual judges, they can also indirectly and directly inform the

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¹ Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy and Supreme Court Politics*, 23 LAW & INEQ. 1, 73–74 (2005) (discussing social movements).

² See generally Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

³ See, e.g., MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004) (discussing limits on Supreme Court as an instrument of racial justice and linking most effective changes to politics and social movement actors).

⁴ Hutchinson, *supra* note 1, at 5–12 (discussing antidemocracy critiques of judicial review).

⁵ See generally Hutchinson, *supra* note 1, at 16 n.95 (listing numerous sources linking Supreme Court rulings with public opinion); Robert Post & Reva Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family Medical Leave Act*, 112 YALE L.J. 1943, 1984–2004 (2003) (discussing Congressional impact on Court’s treatment of sex-based discrimination); Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363 (discussing presidential influence on judicial elaboration of constitutional norms).

perspectives of courts and reshape constitutional law.⁶ Consequently, social movements have an important role in doctrinal evolution.

Social movements have lobbied for and effectuated political and doctrinal changes in the context of racial justice and gay, lesbian, bisexual and transgender (GLBT) rights.⁷ But to the extent that the public—or social movements themselves—embraces relatively moderate positions on matters related to race and sexuality, the Court will likely produce rulings that reflect a centrist perspective—even though the Court is often seen as a strong protector of disparaged social groups from majoritarian bias and maltreatment.⁸

In *Lawrence v. Texas*, for example, the Court anchored its ruling around dominant public opinion concerning GLBT rights, even as it reversed *Bowers v. Hardwick*, which reflected pernicious stereotypes of and distaste for same-sex intimacy.⁹ For example, the Court justified its decision to invalidate the state's antisodomy statute in part because most states had decriminalized sodomy by court rulings or statutory repeal.¹⁰ GLBT social movements played a central role in the decriminalization of sodomy because they litigated several of the state cases that overturned the statutes.¹¹ GLBT rights groups also developed relationships with state legislators who, seeking support from organized political organizations, took liberal stances on GLBT rights.¹² Thus, social movements influenced the outcome in *Lawrence* by engaging in political activity that fundamentally altered the legal status of GLBT individuals after *Hardwick*.

My current research considers the prospect for legal change in the area of sexual orientation jurisprudence and legislation in the near future. My interest in this topic reflects an ongoing appreciation of the impact of social and political factors upon Court doctrine. It also responds to changes in the nation's political landscape brought by the election of President Barack

⁶ See Siegel, *supra* note 2, at 1418 (“Over the course of American history, groups seeking constitutional change have worked to move one branch of federal or state government to dispute questions of constitutional meaning with another, in an effort to make dissenting constitutional claims audible, and ultimately, to secure for them the force of law.”).

⁷ William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 423–59 (2001) (discussing the role of law in fortifying social movement activity in antiracist, feminist, and gay, lesbian, bisexual, and transgender contexts).

⁸ See Hutchinson, *supra* note 1, at 32–72 (discussing majoritarian influences on Court's race and sexual orientation jurisprudence).

⁹ *Lawrence v. Texas*, 539 U.S. 558, 571–78 (2003), *rev'g Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁰ See *Lawrence*, 539 U.S. at 573 (“The 25 states with laws prohibiting the relevant conduct referenced in . . . *Bowers* . . . are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.”).

¹¹ See, e.g., Lambda Legal Defense and Education Fund, *Fighting Sodomy Laws With a Record of Success and Decades of Expertise*, <http://data.lambdalegal.org/pdf/199.pdf> (last visited May 1, 2009).

¹² See Kenneth D. Wald et al., *The Politics of Gay Rights in American Communities: Explaining Antidiscrimination Ordinances and Policies*, 40 AM. J. POL. SCI. 1152 (1996) (discussing state and municipal politics of gay rights organizations).

Obama and the “Democratic sweep” of Congress, state legislatures, and gubernatorial elections.

This Article considers whether the recent election has created a “political opportunity”¹³ for liberal social movements to create substantial changes in the legal status of GLBT individuals nationally and locally. Currently, debates over same-sex marriage dominate questions of gay and lesbian equality. Recent rulings by the highest courts in California,¹⁴ Connecticut,¹⁵ Iowa,¹⁶ and Massachusetts¹⁷ hold that state laws which prohibit same-sex marriage violate those states’ constitutions. Californians, however, amended the state constitution to reverse the court’s ruling,¹⁸ and voters in Florida and Arizona also passed constitutional amendments defining marriage in heterosexual terms.¹⁹ Although the issue of same-sex marriage warrants attention due to the important equal protection concerns it presents, in the past, pursuit of this right led to a political backlash that ultimately limited GLBT rights. Currently, advocacy for same-sex marriage—though successful in a few “blue” and “purple” states—does not present the optimal opportunity for GLBT-social movement success in terms of federal court litigation or legislation. Nevertheless, the attainment of same-sex marriage in states where the political opportunity for marriage equality exists could help reshape the landscape of national politics, just as the move to decriminalize sodomy altered national politics following *Hardwick*. These incremental changes could, therefore, support a long-term strategy that seeks to legalize same-sex marriage as a matter of federal constitutional law.

This Article takes a moderate or careful position on the prospect of progress in the area of GLBT rights and equality, and it encourages GLBT social movements to center their advocacy on political issues that present

¹³ See DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970* 41 (2d ed. 1999) (arguing that “any event or broad social process that serves to undermine the calculations and assumptions on which the political establishment is structured occasions a shift in political opportunities”); SIDNEY TARROW, *POWER IN MOVEMENT* 85 (1994) (“By political opportunity structure, I mean consistent—but not necessarily formal or permanent—dimensions of the political environment that provide incentives for people to undertake collective action by affecting their expectations for success or failure.”); see also Hutchinson, *supra* note 1, at 74 (“Political, social, economic, and cultural forces shape the potential success or failure of social movement activism. If an event or set of events disrupts political institutions and makes them more receptive to the agendas of social movements, then a “political opportunity” exists for successful activism.”).

¹⁴ *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008).

¹⁵ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008).

¹⁶ *Varnum v. Brien*, No. 07-1499, 2009 WL 874044, at *29 (Iowa Apr. 3, 2009).

¹⁷ *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

¹⁸ Jessica Garrison et al., *Election 2008: Gay Marriage; Nation Watches as State Weighs Ban; Prop. 8 Battle Drew Money and Attention from Across the U.S.*, L.A. TIMES, Nov. 5, 2008, at A1, available at LEXIS, News Library, LAT File.

¹⁹ Jay Hamburg, *Florida Bans Same-Sex Marriage*, ORLANDO SENTINEL, Nov. 6, 2008, at B1, available at LEXIS, News Library, ORSENT File; Mary Jo Pitzl, *Voters Approve Proposal to Ban Gay Marriage*, AZCENTRAL.COM, Nov. 5, 2008, available at <http://www.azcentral.com/news/election/azelections/articles/2008/11/05/20081105select-propositions.html>.

the greatest opportunities for progress. This Article proceeds in three parts. Part II examines the relationship between social movement political advocacy and litigation and the evolution of the legal status of GLBT persons. Part III argues that while the recent Democratic sweep in the United States electoral landscape suggests broad opportunities for liberal changes in the legal status of GLBT individuals, social movements should resist this idea. Although several commentators argue that the shifting political landscape indicates that a new liberal coalition has emerged in the country, this proposition is unsubstantiated and is called into question by several factors—including the success of anti-gay initiatives in states that voted for Democratic candidates. Part IV argues that progress on GLBT issues will depend upon the presence of a number of political and social factors that have historically led to legal and political change, including domestic and international political protest, economic concerns, and the desire of political elites to gain influence among voters and organized sectors of the electorate—including social movements. Part IV also argues that despite the legalization of same-sex marriage through judicial rulings and legislation in Iowa, Connecticut, Massachusetts and Vermont, these examples cannot serve as models for national action due to the unique political conditions in these states. Marriage equality advocates, however, should continue pursuing strategies in states where political opportunities for successful advocacy exist. This local strategy could serve as the basis for national change in the future. Finally, Part IV encourages GLBT social movements to consider whether the current decline in the economy presents an opportunity for them to challenge inequality with respect to important economic benefits and employment.

II. SOCIAL MOVEMENTS, SEXUAL ORIENTATION, AND COURT DOCTRINE

A. *From Bowers to Lawrence: Social Movements Create Change*

Bowers v. Hardwick was the first GLBT rights case decided by the Supreme Court. *Bowers* held that the constitution does not “confer upon homosexuals a right to engage in sodomy.”²⁰ In *Bowers*, the Court applied rational basis review and held that majoritarian notions of morality supplied a rational basis for the anti-sodomy statute.²¹

Because it only applied rational basis review and narrowly framed the liberty interest as “homosexual sodomy”—even though the law itself was sex-neutral²²—*Bowers* would later provide support for a broader set of

²⁰ *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986).

²¹ *Id.* at 196.

²² Thomas Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 651–52 (1987) (“The two courts below dealt with the statute in its entirety; they made no distinctions among categories of individuals subject to the prohibition on sodomy. The Supreme Court,

laws and policies that discriminated against or denied the liberty of GLBT people. In subsequent equal protection cases, for example, courts held that because *Bowers* permits criminalization of the “conduct that defines the class” of “homosexuals,” then gays and lesbians could not qualify as a suspect or quasi-suspect class.²³

The tone and substance of *Bowers* sent GLBT social movement actors away from the federal system and to the states. Social movement actors used state courts and legislatures as venues for advocating GLBT rights.²⁴ They also lobbied for the liberalization of corporate antidiscrimination and benefits policies. These efforts resulted in the development of antidiscrimination norms that protect GLBT individuals from discrimination and to the reform of policies that had traditionally distributed employee benefits based on concepts such as “marriage” that inherently discriminate against GLBT individuals.²⁵ The attainment of GLBT rights at the state and local level and in the private sector augmented the social status of gays and lesbians and helped to create an alternative view of constitutional law and sexuality that would later lead to the overruling of *Bowers*.²⁶

As a result of localized social movement advocacy, when the Court

however, characterized the case as one concerning ‘the fundamental rights of homosexuals,’ and specifically postponed the issue of the statute’s application to ‘other acts of sodomy.’”)

²³ See, e.g., *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (“It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. . . . If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.”).

²⁴ See Wald et al., *supra* note 12, at 1153–63 (discussing state and local politics of GLBT social movements).

²⁵ See Arthur S. Leonard, *The Gay Rights Workplace Revolution*, 30 HUM. RTS., Summer 2003, at 14, 16 (“By the 1990s, the National Gay and Lesbian Task Force was reporting that a substantial majority of the largest corporate employers had antidiscrimination policies, and in line with the newest thinking some of them were also covering gender identity.”); Jay Michaelson, *On Listening to the Kulturkampf, Or, How America Overruled Bowers v. Hardwick Even Though Romer v. Evans Didn’t*, 49 DUKE L.J. 1559, 1599 (2000) (“The corporate world has, in the last decade, accorded greater recognition to gay family units than ever before; according to a Human Rights Campaign report, at least 2,856 private and public employers offered domestic partner health coverage as of August 1999—compared with about two dozen in 1990.”).

²⁶ *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003), *rev’d Bowers v. Hardwick*, 478 U.S. 186 (1986) (“In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”).

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.

Id. at 573.

decided *Lawrence v. Texas*, the political and legal landscape concerning GLBT rights had changed substantially. For example, while more than half of the states criminalized sodomy when the Court decided *Bowers*, only thirteen did so when it issued its ruling in *Lawrence*.²⁷ Also, only four states, including Texas, criminalized same-sex sodomy when the Court decided *Lawrence*.²⁸

Furthermore, several foreign courts, including the European Court of Human Rights, had already invalidated anti-sodomy laws, which indicated to the Court that “Western civilization” had reached a new consensus regarding the appropriateness of laws that criminalized private adult consensual sexual relations.²⁹ In addition, while *Lawrence* does not explicitly rest on this fact, at the time of the ruling, opinion polls indicated that a majority of the public opposed the criminalization of adult consensual homosexual conduct.³⁰

These legal and political developments did not go unnoticed by members of the Court. Indeed, the majority opinion makes explicit reference to the fundamental changes in the nature of GLBT rights in the states and on the international stage that occurred between *Bowers* and *Lawrence*.³¹ The opinion also discusses changes in foreign law, which sparked a heated retort from Justice Scalia in his dissenting opinion.³² The strategic choice by pro-gay social movements to pursue GLBT rights within state and local governments helped to refashion the legal and political landscape regarding sexuality and sexual orientation, which made *Lawrence* a much “safer” ruling than *Bowers*.

B. *Lawrence: Cabining Justice*

Although public opinion and the structure of state law on the issue of sodomy made *Lawrence* a safer ruling than *Bowers*, the Court nevertheless cabined its decision in order to limit its reach and to protect the Court’s legitimacy from erosion due to a potential conservative political backlash.³³ The Court, for example, stated that its ruling did not involve a claim of a right to legal recognition of GLBT relationships,³⁴ nor did it

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See id.* (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 21 (1981)).

³⁰ Neil A. Lewis, *Conservatives Furious Over Court’s Direction*, N.Y. TIMES, June 27, 2003, at A19, available at LEXIS, News Library, NYT File (observing that polls show that majority of Americans support legalizing consensual, adult homosexual conduct).

³¹ *See Lawrence*, 539 U.S. at 571–73.

³² *Id.* at 598 (Scalia, J., dissenting).

³³ I have analyzed this issue in a prior publication. *See Hutchinson, supra* note 1, at 40–58 (discussing conservative dimensions of *Lawrence*).

³⁴ *See, e.g., Lawrence*, 539 U.S. at 567 (arguing that antigay sodomy statutes “seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals”); *id.* at 578 (noting that its ruling “does not

involve public sex or prostitution.³⁵ The Court also strained to describe the case as involving sex that was potentially part of an “enduring” “personal bond”³⁶ between the petitioners (who had actually been involved in a casual escapade). The Court attempted to create “respectable” gay “intimacy” by implying an intimate relationship between the parties without going far enough to legitimize same-sex marriage and invite criticism of its ruling.³⁷

Predictably, Justice Kennedy, the moderate voice on the Court, authored *Lawrence* (and *Romer v. Evans*). As some political scientists have argued, public opinion tends to have the “most pronounced” impact upon judicial moderates.³⁸

The Court’s effort to distance *Lawrence* from same-sex marriage, however, was unsuccessful. After the ruling, public support for same-sex marriage decreased dramatically—even though the Court disclaimed the notion that *Lawrence* would lead inevitably to judicial recognition of same-sex marriage.³⁹ Public support for same-sex marriage fell once again after the Massachusetts Supreme Judicial Court invalidated the state’s ban on same-sex marriage in *Goodridge v. Department of Public Health*, an opinion which explicitly cites to *Lawrence*.⁴⁰ Conservatives effectively used the rulings to mobilize voters against GLBT rights.⁴¹ Accurately predicting that the cases presented a political opportunity for conservative activism, President George W. Bush made same-sex marriage a campaign

involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter’); *id.* at 585 (O’Connor, J., concurring) (observing that “other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group”).

³⁵ *Id.* at 567 (arguing that sodomy laws affect “the most private human conduct . . . in the most private of places, the home”); *id.* at 569 (“Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private.”); *id.* at 578 (distinguishing *Lawrence* from other factual settings where states could presumably regulate sexuality, including “public conduct or prostitution”).

³⁶ *Id.* at 567 (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).

³⁷ Hutchinson, *supra* note 1, at 44–49.

³⁸ William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 197 (1996) (observing that “the impact of public opinion is most pronounced for the more moderate justices”).

³⁹ See Adam Liptak, *Gay Vows, Repeated from State to State*, N.Y. TIMES, Apr. 11, 2009, at WK1, available at LEXIS news library, NYT file (“When the Supreme Court, in *Lawrence v. Texas* in 2003, struck down a Texas law making homosexual sex a crime, public support for same-sex marriage—a question not directly implicated by the decision—dropped sharply.”).

⁴⁰ See *id.* (“Five months [after *Lawrence*], the Supreme Judicial Court of Massachusetts issued its decision allowing same-sex marriages, causing public support for such marriages to fall further. It did not recover to pre-*Lawrence* levels until 2005.”).

⁴¹ See Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1511 (2006) (“Conservative groups reached out to supporters [following *Lawrence* and *Goodridge*] with a sense of urgency and determination because, as they saw it, the institution of marriage was in great peril. These groups were quite successful in encouraging scores of conservatives across the nation to organize and become politically involved on the issue of marriage.”).

issue in the 2004 election by proposing a constitutional amendment banning same-sex marriage.⁴² Conservatives introduced similar measures in state legislatures.⁴³ Although the federal amendment effort failed, many political commentators believe that opposition to same-sex marriage caused a surge in voter participation among social conservatives, particularly in key swing states where voters considered initiatives banning same-sex marriage on Election Day 2004.⁴⁴ Thus, the backlash to same-sex marriage could have possibly secured Bush's reelection.

In order to avoid setbacks such as the 2004 anti-gay backlash, GLBT activists must locate and exploit political opportunities for national and local policy reform. This approach necessarily requires GLBT activists to resist assuming that a broadened landscape for change exists merely due to the success of Democrats in the 2008 election cycle.

III. RED VICTORIES AND BLUE EUPHORIA: AN ELECTION IS NOT A SOCIAL MOVEMENT

A. *Liberal Enthusiasm for Progressive Change*

The Democratic candidates took contradictory stances on questions of GLBT rights during the 2008 election. Because progressives are an important base within the Democratic Party, the party's candidates needed to take liberal positions on GLBT rights. Nevertheless, public opposition to same-sex marriage and the successful manipulation of this issue by President Bush in 2004 caused Democratic candidates to oppose marriage equality, even as they expressed support for other GLBT issues.

None of the leading Democratic presidential contenders supported the legalization of same-sex marriage.⁴⁵ President Barack Obama stated that he opposes same-sex marriage, but that he supports equal "benefits" for same-sex couples.⁴⁶ It appears, however, that Obama may have indeed expressed support for same-sex marriage during his 1996 campaign for a seat in the Illinois legislature.⁴⁷

⁴² *Id.* at 1512–13 (discussing President Bush's support of constitutional prohibition of same-sex marriage).

⁴³ *Id.*

⁴⁴ *Id.* at 1515 ("Furthermore, the conventional wisdom immediately after the election was that issues of values and morality in general, and same-sex marriage in particular, played an important role in the presidential race, especially in Ohio, the state that ended up deciding the election.") (citation omitted).

⁴⁵ Ben Smith, *Dem Hopefuls Oppose Same-Sex Marriage*, POLITICO, Aug. 10, 2007, <http://www.politico.com/news/stories/0807/5320.html>.

⁴⁶ Perry Bacon Jr., *Democratic Candidates Address Gay Rights*, WASH. POST, Aug. 9, 2007, at A7, available at LEXIS news library, WPOST file.

⁴⁷ Jason Linkins, *Obama Once Supported Same-Sex Marriage 'Unequivocally'*, HUFFINGTON POST, Jan. 1, 2003, http://www.huffingtonpost.com/2009/01/13/obama-once-supported-same_n_157656.html.

Despite his current opposition to same-sex marriage, Obama has said that he opposes efforts within states, such as California's Proposition 8, to define marriage in heterosexual terms.⁴⁸ Obama also stated during his presidential campaign that he opposes and would seek (if elected) the repeal of the Defense of Marriage Act (DOMA) and "Don't Ask, Don't Tell" (DADT).⁴⁹

Despite these contradictory positions, GLBT rights groups strongly endorsed Democratic candidates. Democrats generally have much better voting records on GLBT equality issues.⁵⁰ Furthermore, because many GLBT individuals support Democrats and because most liberals support GLBT rights, GLBT social movements will likely have greater opportunities for success if they press Democratic politicians, rather than Republicans, for legal change.

The electoral success of the Democratic candidates—especially President Obama—has caused many liberals to embrace the possibility of fundamental progressive change. The Democratic primaries had already created the foundation for these arguments. The progressive Left argued that Obama was the preferred candidate who could move the party away from "triangulation" and moderate politics.⁵¹ Many liberals also believed that the election of a black candidate would substantially alter the status of United States race relations and even usher in a post-racial society.⁵²

After Obama defeated McCain, including wins in several southern states, many commentators argued that his election marked a fundamental shift in the nation's ideological makeup. A new "Great Society Coalition" of traditionally liberal people of color, educated professionals, women,

⁴⁸ John Wildermuth, *Obama Opposes Ban on Gay Marriage*, S.F. CHRON., July 2, 2008, at A1, available at LEXIS news library, SFCHRN file.

⁴⁹ See, e.g., *Civil Rights*, THE WHITE HOUSE, http://www.whitehouse.gov/agenda/civil_rights/ (last visited Apr. 21, 2009) (listing Obama's opposition to "Don't Ask, Don't Tell," and DOMA's unequal distribution of benefits to GLBT versus heterosexual couples). Recently, however, the Department of Justice defended the constitutionality of DOMA, despite Obama's stated opposition to the law. See http://a.abcnews.go.com/images/Politics/motion_memo_dismiss_filed.pdf.

⁵⁰ See HUMAN RIGHTS CAMPAIGN, CONGRESSIONAL SCORECARD: MEASURING SUPPORT FOR EQUALITY IN THE 110TH CONGRESS 4–14, http://www.hrc.org/documents/Congress_Scorecard-110th.pdf (discussing voting records of Congressional democrats on "gay" issues).

⁵¹ Obama received endorsements from several progressive organizations. See MoveOn.org, *MoveOn Endorsement Throw Progressive Weight Behind Barack Obama*, <http://moveon.org/press/pr/obamaendorsementrelease.html> (last visited Apr. 21, 2009); ProChoiceAmerica.com, *NARAL Pro-Choice America Endorses Sen. Barack Obama*, http://www.prochoiceamerica.org/elections/election-pr/pr_05042008_obamaendorsement.html (last visited Apr. 21, 2009). Obama also defeated Hillary Clinton among "self-described liberal" voters. See Jennifer Parker, *Obama Big Winner in N.C., Clinton Ekes Out Ind. Win*, ABC NEWS, May 7, 2008, <http://abcnews.go.com/Politics/Story?id=4802414&page=1> ("Obama has typically fared better among younger voters, people with higher-education, self-described liberals, and African Americans.").

⁵² Paul Street, *Barack Obama's White Appeal and the Perverse Racial Politics of the Post-Civil Rights Era*, DISSIDENT VOICE, June 16, 2007, <http://dissidentvoice.org/2007/06/barack-obama%E2%80%99s-white-appeal-and-the-perverse-racial-politics-of-the-post-civil-rights-era/> (arguing that Obama appealed to whites who want to submerge issues of prolonged racial inequality).

gays and lesbians, and younger voters would use its electoral power to place liberal Democrats in state and national offices and to secure the passage of progressive policies that would substantially alter American politics.⁵³

Liberal commentators have also begun to eulogize the Republican Party and social conservatism. Even before Obama's victory, *New York Times* columnist Frank Rich opined that "the G.O.P. looks more like a nostalgic relic than a national political party in contemporary America. A cultural sea change has passed it by."⁵⁴ Rich predicted that a "national rout in 2008 just may be that Republican Party's last stand."⁵⁵

Following the election, Jonathan Alter of *Newsweek* wrote a similarly hopeful, but more guarded, column called "We're Heading Left Once Again."⁵⁶ Alter asserts that Obama "would have a fighting chance to move the country to a new place, or at least one we haven't seen for a while. Leftward ho!"⁵⁷

Richard Cohen, a writer for the *Washington Post*, encouraged liberals to "Party Like It's 1964."⁵⁸ Cohen asserted that Bush and McCain have "constructed a mean, grumpy, exclusive, narrow-minded and altogether retrograde Republican Party."⁵⁹ Accordingly, the GOP has earned its fate: life in the "political wilderness."⁶⁰

Following the election, *New Republic* writer John Judis welcomed the return of "America the Liberal."⁶¹ Judis argued that:

The rise of [women, people of color, and professional liberals] within the post-industrial economy has brought in its wake a new political worldview. Call it "progressive" or "liberal" or even "Naderite". . . . [P]rofessionals are the vanguard of the new progressive majority. Their sensibility is reflected in the Democratic platform and increasingly in the country as a whole. . . . Professionals are generally liberal on civil rights and women's rights; committed to science and

⁵³ Phillip Klinkner & Thomas Schaller, *LBJ's Revenge: The 2008 Election and the Rise of the Great Society Coalition*, 6 FORUM 1, 3–5, 15 (2008), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1269&context=forum>.

⁵⁴ Frank Rich, *The Grand Old White Party Confronts Obama*, N.Y. TIMES, Feb. 17, 2008, http://www.nytimes.com/2008/02/17/opinion/17rich.html?_r=1&th&emc=th.

⁵⁵ *Id.*

⁵⁶ Jonathan Alter, *We're Heading Left Once Again*, NEWSWEEK, Oct. 18, 2008, <http://www.newsweek.com/id/164503>.

⁵⁷ *Id.*

⁵⁸ Richard Cohen, *Party Like It's 1964*, WASH. POST, Oct. 21, 2008, at A17, available at <http://www.washingtonpost.com/wp-yn/content/article/2008/10/20/AR2008102002292.html>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ John B. Judis, *America the Liberal*, THE NEW REPUBLIC, Nov. 19, 2008, at 20, available at LEXIS, News Library, NEWRPB File.

to the separation of church and state; internationalist on trade and immigration; skeptical of, but not necessarily opposed to, large government programs; and gung-ho about government regulation of business, especially K Street lobbyists.

Many are children of the 1960s and '70s—heavily influenced by Martin Luther King Jr., Betty Friedan, Gloria Steinem, and Nader—but their views are clearly reflected in succeeding generations of college-educated Americans, particularly the “millennials” who grew up during the administrations of Bill Clinton and George W. Bush. UCLA’s annual study of incoming college freshmen across the country found in 2006 that 28.4 percent identified themselves as “liberal”—the highest percentage since 1975.⁶²

Judis also contends that, while Bush exploited terrorism to implement laws and policies that restrained civil liberty, “seven years removed from September 11, liberal views have re-emerged with a vengeance. Now, the coming recession seems likely to push voters even further left.”⁶³

B. *Warning Signs: Kinks in the Narrative of Liberal Dominance*

Several kinks immediately emerged in the political landscape that would test the enthusiasm among progressives concerning the prospect for change. First, on the night of Obama’s victory, California passed Proposition 8, a constitutional amendment that reverses a ruling of the California Supreme Court which invalidated the state’s prohibition of same-sex marriage.⁶⁴ Although Obama won the state by more than twenty percentage points, the largest margin of any candidate since World War II,⁶⁵ Proposition 8 garnered support from a slight majority of voters. The conservative measure also performed comfortably within black and Latino communities,⁶⁶ whose support for Obama greatly exceeded his support among other voters in the state.⁶⁷

Also, the presidential election returns revealed that Obama failed to

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See, e.g., Garrison et al., *supra* note 18.

⁶⁵ Justin Ewers, *Obama Wins by Historic Margin in California*, U.S. NEWS & WORLD REP., Nov. 5, 2008, available at <http://www.usnews.com/articles/news/campaign-2008/2008/11/05/obama-wins-by-historic-margin-in-california.html>.

⁶⁶ See <http://www.cnn.com/ELECTION/2008/results/polls/#val=CAI01p1> (listing exit polling showing support for Proposition 8 among African-American voters at 70% and among Latino voters at 53%).

⁶⁷ See <http://www.cnn.com/ELECTION/2008/results/polls/#val=CAP00p1> (listing exit showing support in California for Barack Obama among African-American voters at 94% and among Latino voters at 74%).

win a majority of white votes nationally,⁶⁸ repeating an unbroken trend for Democratic presidential contenders that began after the 1964 election (and the enactment of the Civil Rights Act of 1964).⁶⁹ Obama also failed to win a majority of white votes in eleven “blue states,” and he only won a slight majority of white votes in five other blue states, including California, Connecticut, and his home state of Illinois.⁷⁰ Furthermore, black and Latino voters fueled Obama’s victory in key states that other Democrats had lost in recent elections, including Nevada, New Mexico, Ohio, Florida, Virginia, Indiana and North Carolina.⁷¹ McCain, by contrast, received votes primarily from whites and men, and more specifically from white men.⁷² Thus, rather than proving the liberal idea that the United States has transcended race, voter behavior in the 2008 presidential election suggests that racial and gender cleavages remain important elements of the nation’s political and social culture.

C. *Split Ticket: GLBT Rights and the New Democratic Dominance*

The passage of Proposition 8 caused an immediate rift in liberal celebrations of Obama’s election victory. Many supporters of same-sex marriage protested the passage of Proposition 8 and criticized blacks, Latinos, and white religious voters who supported the measure.⁷³ These divisions, however, predated the passage of Proposition 8.

Even many pro-GLBT advocates remain conflicted over same-sex marriage. The marriage equality movement, as several critics have observed, suffers because it privileges nuclear family arrangements, accepts the problematic conditioning of important social resources (like health care) upon marriage, marginalizes the poor and people of color by

⁶⁸ See <http://www.cnn.com/ELECTION/2008/results/polls/#val=USP00p1> (listing exit showing support for Barack Obama among White voters nationwide at 43%).

⁶⁹ David Paul Kuhn, *Polls: White Support for Obama at Historic Level*, POLITICO.COM, Oct. 24, 2008, available at LEXIS, Newsfile POLTCO.

⁷⁰ See <http://www.cnn.com/ELECTION/2008/results/polls/> (exit polling showing support for Barack Obama among White voters at 52% in CA, 51% in CT, IA, IL, and MI, 50% in CO, 49% in NJ, 48% in PA, 47% in MD, 46% in OH, 45% in IN and NV, 42% in FL and NM, 39% in VA, and 35% in NC).

⁷¹ See *id.* (exit polling showing support for Barack Obama among African-American and Latino voters, respectively, at 94% and 76% in NV, N/A and 69% in NM, 97% and N/A in OH, 96% and 57% in FL, 92% and 65% in VA, 90% and 77% in IN, and 95% and N/A in NC).

⁷² See <http://www.cnn.com/ELECTION/2008/results/polls/#USP00p1> (exit polling showing support for John McCain at 57% among White Men voters).

⁷³ See Wyatt Buchanan, *Gays See Chance for Progress; ELECTION 2008/The Battle Over Same-Sex Marriage; Participants in Anti-Prop. 8 Movement Hope to Turn Protests into Wider Push for Equality*, SAN FRAN. CHRON., Nov. 15, 2008, at A1 (describing efforts to organize nationwide protests over Proposition 8); Jessica Garrison & Joanna Lin, *Mormons’ Prop. 8 Protested; Gay-rights Activists Criticize the Church for Its Role in Helping to Pass California’s Ban on Same-sex Marriage*, L.A. TIMES, Nov. 7, 2008, at B1 (reporting protests targeting Mormons in California); Karl Vick & Ashley Surdin, *Most of California’s Black Voters Backed Gay Marriage Ban; 53% of Latinos Also Supported Proposition 8*, WASH. POST, Nov. 7, 2008, at A03 (analyzing support for Proposition 8 among black and Latino communities).

advocating marital households as the most desirable settings for childrearing, and stigmatizes gay male sexuality by describing marital sex as optimal and suggesting that marriage could harness gay men's sexual passions and "civilize" them.⁷⁴ Despite these important concerns, marriage equality remains fundamentally an argument about the inappropriateness of state action that sanctions, facilitates or manifests heterosexism. The prohibition of same-sex marriage rests on pernicious stereotypes of GLBT individuals and upon the privileging of heterosexuality.⁷⁵ As such, despite the limitations and problems of the same-sex marriage movement, the attainment of marital equality represents a valid—yet often overvalued—dimension of GLBT social movements.

Recent opinion polls, however, demonstrate that nearly 70% of the nation opposes the legalization of same-sex marriage.⁷⁶ Moreover, the passage of Proposition 8 demonstrates that this opposition extends to even the bluest jurisdictions—not only to deeply conservative areas of the country. Many political commentators—and perhaps GLBT social movement actors themselves—failed to appreciate the ideological diversity of Democratic voters. Their lack of understanding of this issue prevented them from engaging in the specialized activism and outreach that could have potentially diminished support for the discriminatory constitutional amendment among persons of color.⁷⁷

The United States electorate holds diverse political viewpoints. Even voters who traditionally favor one political party or candidate over another do not necessarily share the same positions on substantive issues, and even if they reach similar positions they may do so for different reasons. Blacks and Latinos tend to support Democratic candidates because of the party's stronger support for civil rights and economic justice relative to the Republican Party, but these groups often endorse socially conservative positions on issues such as abortion and GLBT rights.⁷⁸ The influence of

⁷⁴ See Hutchinson, *supra* note 1, at 46–49 (discussing conservative views of same-sex marriage).

⁷⁵ See, e.g., Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 240 (2008) ("[O]ur stereotypes and homophobia have typically resisted the notion of gay men as partners and parents. This is evident in the resistance to gay marriage and gay adoption."); Justin T. Wilson, *Preservationism, Or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 678 (2007) ("[D]enying same-sex couples access to a genuinely secular definition of civil marriage perpetuates bigotry and homophobia at a tangible cost to these couples and their families.").

⁷⁶ See Press Release, CBS News Poll, The Public's Views on Same-Sex Marriage (June 15, 2008) (stating thirty percent of polled Americans favor same-sex marriage).

⁷⁷ Some proponents of Proposition 8 made explicit appeals to black voters. CBS Evening News, *Gay Marriage Opponents "Thank" Obama*, CBSNEWS.COM, <http://www.cbsnews.com/stories/2008/10/05/eveningnews/main4502738.shtml>.

⁷⁸ Maxine Burkett, *Strategic Voting and African-Americans: True Vote, True Representation, True Power for the Black Community*, 8 MICH. J. RACE & L. 425, 457 (2003) ("Though many Blacks have a tendency toward social conservatism, that is, with respect to issues outside of social justice and civil rights . . . their resistance to the Republican Party remains a 'curious historical anomaly.'"); Kim Geron & James S. Lai, *Beyond Symbolic Representation: A Comparison of the Electoral Pathways and*

religion in black and Latino communities explains these groups' embrace of social conservatism. Nevertheless, many blacks and Latinos compromise their views on socially conservative issues in order to endorse Democratic candidates. By contrast, white evangelicals tend to prioritize socially conservative issues in their electoral decisions, which explains their support for Republican candidates, despite the GOP's general opposition to progressive class and labor policies that could benefit poor whites.⁷⁹

The inclusion of Proposition 8 on the California ballot did not require blacks and Latinos to engage in political compromise: They could vote for Obama *and* vote to ban same-sex marriage. And they did so in great numbers. Up to 70% of black voters and 53% of Latino voters supported Proposition 8,⁸⁰ while over 94% and 74% of these groups voted for Obama, respectively.⁸¹ Although some surveys show much smaller black support for Proposition 8,⁸² the two groups nevertheless "split" their tickets by endorsing the "liberal" candidate while embracing the conservative position on same-sex marriage.

Although many persons within the GLBT community responded to these statistics by condemning black and Latino voters, their anger was somewhat misplaced. First, singling out blacks and Latinos obscures the broader support for the measure across racial groups. Second, the racial narrative fails to appreciate the importance of religion in shaping support for the measure. Religiosity—not race—was the strongest factor that determined whether or not a voter supported the measure, and black and Latino support for Proposition 8 turned primarily on religiosity.⁸³

Policy Priorities of Asian American and Latino Elected Officials, 9 *ASIAN L.J.* 41, 57 (2002) ("In the general population, Latinos identified themselves as predominantly moderate to conservative. . . . This apparent difference between the leaders and the led may not be as great as it appears at first glance because most Latinos self-identify themselves as socially conservative, but support a liberal social agenda.").

⁷⁹ See Mark Silk, *Defining Religious Pluralism in America: A Regional Analysis*, 612 *ANNALS AM. ACAD. POL. & SOC. SCI.* 64, 74 (2007) ("Over the next quarter century [following 1980], white evangelicals moved decisively into the Republican camp and became the source of the party's activist core. Parachurch organizations like the Moral Majority and Christian Coalition and evangelical churches themselves emerged as important agents of political mobilization for the GOP—comparable across the Bible Belt to the role organized labor has played for the Democratic party in the industrial heartland since the 1930s.").

⁸⁰ Vick & Surdin, *supra* note 73.

⁸¹ Election Center 2008, <http://www.cnn.com/ELECTION/2008/results/polls/#val=CAP00p1> (last visited Apr. 17, 2009).

⁸² PATRICK J. EGAN & KENNETH SHERILL, *NAT'L GAY & LESBIAN TASK FORCE, CALIFORNIA'S PROPOSITION 8: WHAT HAPPENED, AND WHAT DOES THE FUTURE HOLD?* 2 (2008).

⁸³ See *Id.* (arguing that "black support for Proposition 8 can largely be explained by African Americans' higher levels of religiosity—a characteristic strongly associated with opposition to same-sex marriage"); *id.* at 6 ("The analysis shows that African Americans and Latinos were stronger supporters of Proposition 8 than other groups . . . but not to a significant degree after controlling for religiosity. . . . That is, much of the stronger support found for Proposition 8 among these groups is explained by their increased levels of attendance of religious services.").

Nevertheless, race is not entirely irrelevant to the analysis. Pro-GLBT and antiracist groups suffer from strained relations, despite the fact that both groups could benefit from the strengthening of antidiscrimination law and policy.⁸⁴ Culturally, homophobia within communities of color and racism among white GLBT people account for much of the conflict. Also, many persons of color believe that despite the historical progress on questions of civil rights, the law has not eliminated structural causes of inequality.⁸⁵ Blacks fear that including other categories of protection in civil rights law will diminish attention paid to their vulnerable status.

By contrast, GLBT advocates often invoke racial analogies to argue that gays and lesbians should receive the same civil rights protection that blacks and other persons of color *already enjoy*. The analogy represents a legitimate effort to generate empathy for victims of homophobia and to navigate a legal culture that favors arguments rooted in precedent. This approach, however, fuels conflict between the two groups because people of color disagree with the implication that the law already sufficiently protects them from discrimination and inequality, and their own stereotypes of GLBT people causes them vehemently to resist comparisons of heterosexism and racism.⁸⁶

D. Obama's Big Tent: Rick Warren and GLBT Rights

The discontent among GLBT individuals over the success of Proposition 8 increased after Obama selected conservative minister Rick Warren to deliver the invocation at his inauguration.⁸⁷ Warren is a best-selling author of *The Purpose Driven Life* and the minister at the Saddleback Church in Lake Forest, California.⁸⁸ He is a popular evangelical with a reputation for embracing humanitarian causes, but who, nevertheless, holds clearly conservative positions on social issues.⁸⁹

Warren campaigned in favor of California Proposition 8—although he recently denied doing so.⁹⁰ Prior to the passage of Proposition 8, Warren stated during an interview that in addition to opposing same-sex marriage, he does not support incestuous marriage, marriages between adults and

⁸⁴ See Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 295–98 (2001) (discussing the problems that arise from tension between antiracist and GLBT social movements).

⁸⁵ *Id.* at 293.

⁸⁶ *Id.* at 293 n.37.

⁸⁷ Alexander Mooney, *Obama's Inaugural Choice Sparks Outrage*, CNN.COM, Dec. 18, 2008, <http://www.cnn.com/2008/POLITICS/12/17/obama.warren/index.html>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Julia Duin, *Warren Waver on Prop 8 Stuns Leaders*, WASHINGTONTIMES.COM, Apr. 11, 2009, <http://washingtontimes.com/news/2009/apr/11/warren-waver-stuns-leaders/>.

children, and polygamy.⁹¹ He later said that he views all of these “relationships,” including same-sex marriage, as moral equivalents.⁹²

The Human Rights Campaign, the nation’s largest advocate for GLBT rights, sent an “Open Letter” to Obama, criticizing him for inviting Warren to speak at the inauguration.⁹³ In the face of a growing political furor, Obama issued a public statement defending his invitation to Warren. Obama said that including Warren in the inauguration would bolster his effort to reach across the aisle and include all voices at the table:

I’ve . . . said . . . that it is important for America to come together, even though we may have disagreements on certain social issues. . . . [W]e’re not going to agree on every single issue, but what we have to do is to be able to create an atmosphere . . . where we can disagree without being disagreeable and then focus on those things that we hold in common as Americans.

During the course of the entire inaugural festivities, there are going to be a wide range of viewpoints that are presented. And that’s how it should be, because that’s what America’s about. That’s part of the magic of this country, is that we are diverse and noisy and opinionated.⁹⁴

Obama’s explanation for selecting Warren obscures the fact that the vast majority of the public—including Obama himself—opposes the legalization of same-sex marriage. A CBS poll released in June 2008 finds that only 30% of Americans favor legal recognition of same-sex marriage.⁹⁵ Another 28% favor “civil unions,” while 36% oppose any legal recognition of same-sex intimate relationships.⁹⁶ The poll shows the greatest level of support for same-sex marriage since 2004 when CBS began surveying public opinion on this issue.⁹⁷ The paltry number of Americans who endorse same-sex marriage actually represents an improvement over the recent past.

Public opinion on this subject varies slightly with political party

⁹¹ Beliefnet.Com, Video Interview with Rick Warren, *available at* <http://www.beliefnet.com/Video/Beliefnet-Interviews/Rick-Warren/Rick-Warren-Interview-On-Gay-Marriage-And-Divorce.aspx>.

⁹² *Id.*

⁹³ Joe Solmonese, President, Human Rights Campaign, Letter to Pres-Elect Obama on Choice of Rev. Rick Warren To Deliver Invocation at 56th Presidential Inauguration (Dec. 17, 2008), <http://www.hrc.org/11793.htm>.

⁹⁴ Lynn Sweet: The Scoop from Washington, http://blogs.suntimes.com/sweet/2008/12/presidentelect_obama_defends_i.html (Dec. 18, 2008, 12:02 EST).

⁹⁵ CBS NEWS, THE PUBLIC’S VIEWS ON SAME-SEX MARRIAGE (2008), *available at* <http://www.cbsnews.com/htdocs/pdf/MAYB-GAYMARRIAGE.pdf>.

⁹⁶ *Id.*

⁹⁷ *Id.*

affiliation, but strong majorities of both major parties oppose same-sex marriage. The poll finds that only 36% of Democrats and 14% of Republicans support the legalization of same-sex marriage.⁹⁸ Similarly, only 34% of independent voters support same-sex marriage.⁹⁹ Other major polling data confirm these results.

Given the nature of public opinion, no major presidential candidate endorsed the legalization of same-sex marriage.¹⁰⁰ Democrats Barack Obama, Hillary Clinton, John Edwards, Joe Biden, and Bill Richardson¹⁰¹ and Republicans Rudolph Giuliani, Fred Thompson, Mitt Romney,¹⁰² John McCain, Mike Huckabee,¹⁰³ and Ron Paul¹⁰⁴ all opposed same-sex marriage during their presidential campaigns. Advocates of Proposition 8 made computerized calls to black voters that broadcast Obama's public statements expressing his personal opposition to same-sex marriage (despite his opposition to Proposition 8).¹⁰⁵

Because Obama, Warren, and the vast majority of Americans oppose the legalization of same-sex marriage, Warren's participation in the inauguration did not augment the diversity of political viewpoints. Instead, Warren's presence allowed Obama to portray himself as either a moderate or "agreeable" progressive so that he could maximize political support for his policies and reelection bid. Although this is a smart political strategy for President Obama, it leaves open the question of the extent to which this approach will shape actual policy on GLBT rights. Furthermore, if Obama has accurately read the political pulse of the nation in deciding to pick an anti-gay speaker for his inauguration, then GLBT social movements must consider what role, if any, marriage politics can play in national equality debates. The Warren controversy likely reveals that national politicians can safely oppose same-sex marriage, even if some local politicians cannot.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Smith, *supra* note 45 (claiming that "[t]he leading Democratic presidential candidates all but apologized for their failure to support same-sex marriage").

¹⁰¹ See *id.* (detailing each candidate's attempts to explain their opposition to same-sex marriage).

¹⁰² Pam Belluck & Katie Zezima, *A 1913 Law Dies to Better Serve Gay Marriages*, N.Y. TIMES, July 16, 2008, at 1.

¹⁰³ *FACTBOX: Republican Candidates and Religion*, REUTERS, Oct. 19, 2007, <http://www.reuters.com/article/topNews/idUSN2735498820071019?pageNumber=2&virtualBrandChannel=0>.

¹⁰⁴ Election Center 2008: Candidates, <http://www.cnn.com/ELECTION/2008/candidates/ron.paul.html> (last visited on Apr. 16, 2009).

¹⁰⁵ *Final Push for Prop. 8 Stirs Controversies—On Both Sides*, SACRAMENTO BEE, Nov. 4, 2008, <http://www.sacbee.com/static/weblogs/capitolalertlatest/016689.html>.

IV. SOCIAL MOVEMENT ACTIVISM IN AN OBAMA ERA

A. *The Success of Same-Sex Marriage in Liberal Jurisdictions Should Not Dictate Nationwide Political Activity*

Because most of the public disapproves of same-sex marriage, GLBT equality movements must carefully consider when and where to press for reform. Presently, pro-GLBT activists have pursued a smart strategy that seeks judicial or legislative recognition of same-sex marriage in liberal states that already have substantial laws and policies that prohibit discrimination against GLBT individuals.

The achievement of same-sex marriage in Connecticut and other liberal states, however, will not necessarily lead to similar rulings in federal courts and in states that do not have established legal traditions protecting GLBT individuals from discrimination. Although national opinion polls demonstrate that the public strongly disfavors same-sex marriage, in Connecticut, a slight majority of the public supports same-sex marriage.¹⁰⁶ The divided *Kerrigan* decision mirrors the closely divided political opinion on the subject within the state. And while Governor Jodi Rell initially aligned with Republicans and opposed same-sex marriage, she has publicly stated that she does not oppose the *Kerrigan* decision and that she will not launch an effort to reverse the ruling by constitutional amendment.¹⁰⁷

The GLBT political strategy of keeping marriage equality litigation and legislation within the state system mirrors the successful approach that social movements pursued after the *Bowers* decision. By engaging in political action that substantially altered the legal status of GLBT people and public opinion on gay rights issues across the nation, GLBT social movements created a political opportunity for the Supreme Court to invalidate sodomy laws in *Lawrence*.¹⁰⁸ The pursuit of same-sex marriage in state and local politics could ultimately result in federal recognition of marriage equality. Given the substantial public opposition to the legal recognition of same-sex marriage, however, GLBT social movement actors should continue advancing this particular equality concern primarily within state and local political and judicial venues.

¹⁰⁶ See *Connecticut Voters Back Same-Sex Marriage, Quinnipiac University Poll Finds; Rell Approval Holds As Dodd, Lieberman Scores Drop*, QUINNIPIAC UNIV., Dec. 17, 2008, <http://www.quinnipiac.edu/x1284.xml?ReleaseID=1243&What=&strArea=%3B&strTime=0> (showing that 52% of Connecticut voters supported the decision legalizing same-sex marriage).

¹⁰⁷ See Michael Levenson & Gregory Hladky, *Conn. Ruling Allows Same-Sex Marriage*, BOST. GLOBE, Oct. 11, 2008, at A1 (stating that Governor Rell is an opponent of same-sex marriages but will abide by the state supreme court's decision).

¹⁰⁸ See *supra* text accompanying note 24.

B. National Political Opportunities

Since Obama's inauguration, GLBT social movements have also pursued a sophisticated federal or national strategy that involves placing pressure on President Obama to embrace GLBT equality and to seek judicial relief in areas where public opinion would likely support court rulings that favor GLBT litigants. Specifically, GLBT social movement actors have attempted to highlight the unequal distribution of federal benefits and employment, and they have largely avoided efforts to legalize same-sex marriage as a matter of federal law or court doctrine.

For example, Gay and Lesbian Advocates and Defenders (GLAD), the organization that litigated *Goodridge*, has filed a federal lawsuit on behalf of 15 gay and lesbian individuals from Massachusetts.¹⁰⁹ The litigation challenges the constitutionality of DOMA.¹¹⁰ All of the plaintiffs became legally married in Massachusetts following *Goodridge*. DOMA however, defines "marriage" in heterosexual terms for purposes of federal law.¹¹¹ Consequently, same-sex married partners do not qualify for federal benefits or rights that normally attach to marriage. Accordingly, same-sex married partners cannot jointly file federal taxes, do not qualify for survivor benefits under social security or federal pensions, cannot include a spouse in a health plan for federal workers, and do not qualify for many other federal rights and privileges reserved for married individuals. Although many of these benefits should not rest exclusively—if at all—on marriage, DOMA explicitly discriminates against "married" GLBT individuals and therefore presents serious constitutional questions.

The Massachusetts plaintiffs seek only to invalidate DOMA's restriction of federal benefits to opposite-sex couples.¹¹² They have not asked the court to rule that prohibiting same-sex marriage violates the Constitution.¹¹³ The fact that the case does not seek "marriage" rights, but only federal benefits, could make it politically "safe." Because the vast majority of the public disagrees with the legalization of same-sex marriage, it is unlikely that a court—especially the conservative Supreme Court—would issue a ruling striking down laws that prohibit same-sex marriage.¹¹⁴

The litigation also implicates economic rights and benefits, which could enjoy wider public support due to the severe economic downturn.

¹⁰⁹ Jonathan Saltzman, *Same-Sex Spouses Challenge US Curbs*, BOSTON.COM, Mar. 3, 2009, http://www.boston.com/news/local/breaking_news/2009/03/samesex_spouses.html?p1=Well_MostPop_Emailed4.

¹¹⁰ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2000) (prohibiting same-sex marriage) and 1 U.S.C. § 7 (2006) (defining "marriage")).

¹¹¹ 1 U.S.C. § 7 (2006) ("[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife . . .").

¹¹² Saltzman, *supra* note 109.

¹¹³ *Id.*

¹¹⁴ *See supra* Part II (discussing congruence of court rulings and public opinion).

The 2008 elections turned in large part on the negative performance of the economy under the stewardship of President Bush.¹¹⁵ GLAD carefully chose plaintiffs whose experiences, as stated in a press release, could appeal to public vulnerability during the current economic crisis. The plaintiffs include:

Nancy Gill (51) and Marcelle Letourneau (47) of Bridgewater: Nancy has been a postal worker for more than 21 years, but as a federal employee she is unable to provide for Marcelle the health benefits that her co-workers' spouses readily receive. Nancy and Marcelle have 2 children. . . .

Melba Abreu (53) and Beatrice Hernandez (47) of Boston: Both Cuban-Americans, they are unable to file federal tax returns jointly and lose thousands of dollars each year. Because of that inequity, their dream of owning their own business has been deferred. . . .

Herbert Burtis (78) of Sandisfield: Herb, a 78-year-old musician and teacher, lost his spouse after 60 years together, including the last 13 when John battled Parkinson's disease. Herb's already limited income is severely reduced because he is denied the \$700 month that would come with Social Security survivor benefits. . . .

Randell Lewis-Kendell (52) of Harwich Port: Randy lost Rob, his spouse and partner of 30 years, to cancer in 2007. A shopkeeper on Cape Cod, Randy struggled to pay for Rob's funeral expenses because the federal government denied him the \$255 benefit it provides all other bereaved spouses. When Randy turns 60, he will not be eligible for Rob's higher Social Security benefit. . . .¹¹⁶

Another interesting political dimension of the anti-DOMA litigation concerns President Obama, whose position on the subject has been somewhat inconsistent. During his campaign for Senate in 2004, Obama wrote a letter to the *Windy City Times*—a GLBT-themed newspaper in Chicago—that takes a firm stance supporting gay rights issues. In the letter, Obama says he has always opposed DOMA, and he promises to vote to repeal the statute if elected:

For the record, I opposed DOMA [the Defense of

¹¹⁵ Barbara Bradley Hagerty, *Exit Polls Link Obama Victory to Economic Fears*, NPR.ORG, Nov. 4, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=96599102>.

¹¹⁶ Press Release, Gay & Lesbian Advocates & Defenders, GLAD Files Lawsuit Challenging Denial of Critical Federal Benefits to Married Same-Sex Couples (Mar. 3, 2009), available at <http://www.glad.org/uploads/docs/press-releases/2009-03-03-DOMA.pdf>.

Marriage Act] in 1996. It should be repealed and I will vote for its repeal on the Senate floor. I will also oppose any proposal to amend the U.S. Constitution to ban gays and lesbians from marrying. This is an effort to demonize people for political advantage, and should be resisted. . . .¹¹⁷

Although the 2004 letter states that Obama opposed the enactment of DOMA in 1996 and that he would vote to repeal it, a few months earlier in 2003, Obama completed a candidate's questionnaire in which he stated that he *did not* support the repeal of DOMA.¹¹⁸ In 2007, Bill Burton, a campaign spokesperson, tried to explain the shift, saying that "after hearing from gay friends who relayed to Obama how hurtful it was for the bill to be law, Obama supported its repeal."¹¹⁹ But this does not explain how he could oppose DOMA in 1996, support it in 2003, and oppose it in 2004.

During his presidential campaign, Obama took a position favoring the "complete repeal" of DOMA, including the clause that purports to authorize states to deny full faith and credit to same-sex marriages valid under the laws in other states.¹²⁰ But in 2004, he stated that the full faith and credit clause does not require a state to honor out-of-state marriages that its own law prohibits.¹²¹

As for his current position, the WhiteHouse.Gov website contains the following language regarding DOMA:

Obama also believes we need to repeal the Defense of Marriage Act and enact legislation that would ensure that the 1,100+ federal legal rights and benefits currently provided on the basis of marital status are extended to same-sex couples in civil unions and other legally-recognized unions. These rights and benefits include the right to assist a loved one in times of emergency, the right to equal health insurance and other employment benefits, and property rights.¹²²

This position, which supports the equal provision of federal benefits to

¹¹⁷ *Letters: Obama on Marriage; Gay Games*, WINDY CITY TIMES, Feb. 11, 2004, available at <http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=4018> (ellipses in original).

¹¹⁸ Posting of Chris to Citizen Crain, http://citizenchris.typepad.com/citizenchris/2007/06/a_gay_oopsie_fo.html (June 6, 2007, 7:23 EST).

¹¹⁹ *Id.*

¹²⁰ *Would Obama Position Spread Same Sex Marriage?*, Aug. 10, 2007, available at <http://blogs.abcnews.com/politicalradar/2007/08/would-obama-pos.html>.

¹²¹ *Id.*

¹²² WhiteHouse.gov, The Agenda: Civil Rights, http://www.whitehouse.gov/agenda/civil_rights/ (last visited Apr. 19, 2009). During the final editing of this Article, the White House website was amended to delete language indicating that Obama favors the repeal of DOMA. See WhiteHouse.gov, Issues: Civil Rights, http://www.whitehouse.gov/issues/civil_rights/. Subsequently, the Obama administration submitted a brief in a California litigation which defends the constitutionality of DOMA. See DOJ brief, *supra* note 49.

same-sex and opposite-sex married couples, is precisely the litigants' argument in the Massachusetts lawsuit. Accordingly, the case could test Obama's position on the subject. If Obama believes that DOMA is abhorrent and that it should be repealed, then presumably he could direct Attorney General Holder to seek a resolution of the case (such as a stay or settlement) while he works with Congress to repeal the statute.

GLBT social movements could also seek the implementation of employment protections, such as the Employment Nondiscrimination Act (EDNA)¹²³ and the repeal of DADT—the controversial policy that prohibits openly gay and lesbian individuals from serving in the military.¹²⁴ President Obama has already expressed opposition to DADT, and he also supports ENDA.¹²⁵ Social movement activity that focuses on employment discrimination during a time of high unemployment might generate greater public support.

V. CONCLUSION

The *Kerrigan* decision, along with court rulings in Massachusetts and Iowa and legislation in New Hampshire and Vermont, indicates evolution on the issue of GLBT equality. GLBT social movements have pursued an effective strategy that seeks judicial and legislative recognition of same-sex marriage in liberal states in order to reshape the legal and political landscape of GLBT rights prior to advocating the issue in federal courts or in Congress.¹²⁶ This is the same legal strategy that social movements employed in order to alter the legal status of GLBT persons after the *Bowers* decision. This strategy played a large role in the Supreme Court's eventual invalidation of sodomy laws.

Connecticut is not a “bellwether” state on the subject of same-sex marriage. Unless liberal social movements carefully choose what issues to pursue in national politics and which ones to advocate in state and local jurisdictions, they could provoke a massive political backlash against GLBT rights. Given the strong public opposition to same-sex marriage, this issue seems appropriately pursued in state courts and legislatures. But the widespread public vulnerability due to the current economic crisis might present political opportunities for GLBT social movements to press

¹²³ Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007) (proposing a Federal prohibition of discrimination against employees on the basis of sexual orientation or gender identity).

¹²⁴ 10 U.S.C. § 654 (2006) (prohibiting any homosexual or bisexual person from disclosing his or her sexual orientation while serving in the United States armed forces).

¹²⁵ WhiteHouse.gov, *supra* note 122.

¹²⁶ During the completion of this Article, famous litigators David Boies and Ted Olson filed a lawsuit on behalf of California residents which argues that Proposition 8 violates the federal Constitution because it denies due process and equal protection to gays and lesbians. *See* <http://www.msnbc.msn.com/id/30955704/>. The filing of this lawsuit, which has angered many GLBT advocates, *id.*, goes squarely against the analysis of this Article.

issues that are more pointedly linked to economic health and which do not as easily provoke moralistic and religious opposition. Social movement activity that highlights employment discrimination and denial of important federal benefits, for example, might engender greater public support for GLBT equality during a time of great economic distress. Litigation that challenges DOMA's denial of federal benefits to legally married same-sex couples places the issue of GLBT economic vulnerability in public discourse.

Finally, GLBT social movement actors must resist believing that the success of Democratic politicians will necessarily translate into "victories" for GLBT causes. The passage of Proposition 8 despite Obama's historic victory in California demonstrates that Democratic voters take complicated positions (like all other voters) and that they can embrace social conservatism *and* vote for liberal candidates. The controversy surrounding Rick Warren demonstrates that Democratic politicians will cater to moderate or even conservative interests if doing so could benefit them politically. The Obama administration's recent decision to defend the constitutionality of DOMA also demonstrates that political calculations will continue to lead "liberal" politicians to embrace conservative positions. Social conservatism and triangulation among Democrats can lead to conflict and political losses, but social movement strategies that take into account the complex political choices of voters and politicians could help to diminish or prevent such setbacks in the future.