

## **TAKING INITIATIVES: RECONCILING RACE, RELIGION, MEDIA AND DEMOCRACY IN THE QUEST FOR MARRIAGE EQUALITY**

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Election Days 2008 and 2009 proved to be largely disappointing ones for gay<sup>2</sup> rights advocates, and specifically supporters of civil same-sex marriage rights in the United States. Although Election Day 2008 brought the historic civil rights milestone of the election of the first African American president, it also brought with it the passage of statewide ballot initiatives targeting the gay and lesbian minority in four states. Voters stripped gays and lesbians of the civil right to marry in California, after all three branches of state government had affirmed the right and 18,000 Californian same-sex couples had exercised it.<sup>3</sup> Voters also prohibited gays and lesbians from adopting or serving as foster parents in Arkansas,

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<sup>2</sup> I will often use the term “gay” in this article as a synecdoche referring to gay men and lesbians in relation to same-sex marriage, and in certain other contexts to the broader lesbian, gay, bisexual and transgender (LGBT) community and civil rights movement.

<sup>3</sup> See *infra* notes 11–32 and related text.

prohibited the civil recognition of same-sex marriage in Arizona and banned both civil same-sex marriage and any “substantially equivalent” relationship in Florida.<sup>4</sup>

The Election Day 2009 results were more mixed overall, but no different with respect to same-sex marriage. Maine voters, who had been expected to make the state the first to uphold civil marriage equality through a ballot initiative, ended up voting in favor of a ban.<sup>5</sup> Maine’s defeat of same-sex marriage represented the thirty-first loss at the ballot box for same-sex marriage.<sup>6</sup> By contrast, voters in Washington State approved what was popularly referred to as an “everything but marriage” statute, granting same-sex couples many of the civil benefits of marriage while withholding the right to marry.<sup>7</sup>

Many in the gay civil rights movement reacted to the defeats of marriage equality at the ballot box with understandable alarm and frustration. Others responded with anger and misdirected blame. This Article aims to transcend the superficial analysis of what went wrong and why in the various ballot initiative battles, and turn towards an examination of the deeper lessons proponents of LGBT rights and marriage equality specifically should take from these defeats. My goal is not primarily to engage the theoretical and doctrinal arguments in favor of civil same-sex marriage rights, nor to reconsider whether the gay rights movement should have prioritized the pursuit of marriage equality in the first place.<sup>8</sup> Instead, proceeding from the premise that the struggle for marriage equality is

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<sup>4</sup> See *infra* notes 33–43 and related text.

<sup>5</sup> See *infra* notes 44–47 and related text.

<sup>6</sup> See Abby Goodnough, *A Setback in Maine for Gay Marriage, but Medical Marijuana Law Expands*, N.Y. TIMES, Nov. 5, 2009, available at <http://www.nytimes.com/2009/11/05/us/politics/05maine.html>.

<sup>7</sup> See *infra* notes 48–49 and related text.

<sup>8</sup> My colleague Nancy Polikoff has written powerfully and convincingly about the significant costs of the same-sex marriage movement to the legal recognition of family diversity in the LGBT and general communities. See NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 98–109 (2008); see also John D’Emilio, *The Marriage Fight is Setting Us Back*, GAY & LESBIAN REV., Nov–Dec 2006, available at <http://www.gltreview.com/issues/13.6/13.6-demilio.php> (arguing that the marriage equality movement has done more harm than good, both by “creat[ing] a vast body of new antigay law” and by counteracting the progress of feminist and gay rights movements in de-institutionalizing and de-centering marriage for everyone) (emphasis in the original).

constitutionally, politically and socially compelling,<sup>9</sup> this Article is a meditation on the tactical lessons embedded in the movement's recent electoral defeats, written so that those lessons might inform future plebiscitary campaigns that have at stake the basic rights of LGBT Americans.

With those ends in mind, Section I below provides an overview of what occurred in the various statewide ballot initiative battles in 2008 and 2009 and then describes the preliminary analyses of the reasons for the gay community's defeats. Section II presents five interrelated lessons that the movement should glean from these ballot initiative losses, which, if used to inform pro-gay campaign strategies going forward, should result in better outcomes at the polls. First, I discuss how and why the LGBT rights movement must remedy its failures by incorporating diversity—especially racial, ethnic and class diversity—in its institutional leadership. Second, I propose that the LGBT rights movement engage religious arguments and communities much more substantively and authentically, instead of ceding religious arguments and circumventing faith communities in favor of what may appear to be a more hospitable, putatively secular ground. Third, I examine the need for more LGBT people of color (POC)<sup>10</sup> to share our identities and family lives with other members of our respective POC communities. Fourth, I discuss the need for better and more proactive movement strategies to contend with the new atomized digital media environment, which poses difficult challenges in countering political misinformation, responding to anti-gay defamation and promoting public education. In the fifth part of this Section, I attempt to show that although the gay community's travails in the recent ballot initiative battles illustrate both the dangers of and constitutional infirmity inherent in direct democracy, more strategic and proactive engagement by the LGBT rights movement in direct democratic lawmaking may actually accelerate progress towards marriage equality, both by building favorable support for

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<sup>9</sup> For excellent arguments in favor of marriage equality for gay and lesbian Americans, *see generally* WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996) [hereinafter "ESKRIDGE"]; JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004); EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY* (2004).

<sup>10</sup> I refer to all LGBT ethnic and racial minority members—including Latinos/as—as "people of color" for ease of reference, acknowledging that the Latino/a community is comprised of individuals from all races. *See* OVERVIEW OF RACE AND HISPANIC ORIGIN, CENSUS 2000 BRIEF, U.S. DEP'T OF COMMERCE, (2001), at 1, *available at* <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>.

plebiscitary campaigns and by catalyzing support for legislative and judicial advances. Finally, Section III concludes by discussing the importance of patience and perspective in the movement for LGBT equality.

## I. WHAT HAPPENED AND WHY

### A. The 2008 and 2009 Election Day Results

#### 1. *California Proposition 8 (2008)*

In California, voters by a slim margin (52% in favor to 48% against) passed Proposition 8, a ballot initiative that amended the state constitution to prohibit same-sex marriage in the state.<sup>11</sup> Eighteen thousand same-sex couples had already married in California in the six months before Election Day 2008.<sup>12</sup> The outcome became all the more bruising to many gay and lesbian Californians when it was reported that Proposition 2, another statewide ballot initiative proposing to require more humane conditions for the caging of livestock, passed by nearly a two-to-one margin.<sup>13</sup>

California's path to the recognition and ultimate banning of same-sex marriage was an especially circuitous one. In 1971, California's Civil Code was amended to incorporate gender-neutral pronouns, defining marriage as "a personal relation arising out of a civil contract."<sup>14</sup> But in 1977, the Code was amended again to restrict marriage to opposite-sex couples by means of gender-specific language.<sup>15</sup> The voters themselves first

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<sup>11</sup> CAL. CONST. art. I, § 7.5 (Proposition 8 amended the California Constitution to add a new Section 7.5 in Article I, which reads: "[o]nly marriage between a man and a woman is valid or recognized in California"); Jessica Garrison, Cara Mia DiMassa & Richard C. Paddock, *Voters Approve Proposition 8 Banning Same-Sex Marriage*, L.A. TIMES, Nov. 5, 2008, at A1.

<sup>12</sup> Jesse McKinley, *California Couples Await Gay Marriage Ruling*, N.Y. TIMES, May 26, 2009, at A10 (18,000 same-sex couples "were married in California between June—when the legalization took effect—and Election Day in November.").

<sup>13</sup> Carla Hall & Jerry Hirsch, *Prop. 2 Unlikely to Hike Egg Prices*, L.A. TIMES, Nov. 6, 2008, at C1.

<sup>14</sup> CAL. CIV. CODE § 4100 (West 1971); *In re Marriage Cases*, 183 P.3d 384, 409 (Cal. 2008).

<sup>15</sup> CAL. FAM. CODE § 300 (Deering 2010) ("Marriage is a personal relation arising out of a civil contract between a man and a woman."); *see also In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006).

weighed in on same-sex marriage in 2000 by passing with a 61.4% to 38% margin Proposition 22, a statutory ballot initiative adding section 308.5 to the Family Code, which essentially restated the already existing statutory language restricting marriage to one man and one woman.<sup>16</sup> Then, in September 2005, California's legislature became the first in the nation to pass a bill recognizing the right of same-sex couples to marry without a court requiring it to do so.<sup>17</sup> Governor Arnold Schwarzenegger vetoed the bill later in the same month, reasoning that in light of Proposition 22, only a new ballot initiative or a state supreme court decision ordering the recognition of civil marriage for gay couples should reverse the results of the 2000 ballot initiative.<sup>18</sup> With a new state legislature elected in November 2006, a new bill providing for same-sex marriage in California was introduced in December 2006 and passed by both chambers (a forty-two to thirty-four vote in the Assembly and a twenty-two to fifteen vote in the Senate) in September 2007.<sup>19</sup> Governor Schwarzenegger again vetoed the bill, this time demanding that the California Supreme Court address the constitutionality of Proposition 22.<sup>20</sup>

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<sup>16</sup> William L. Jones, Cal. Secretary of State, Statement of Vote, 2000 Primary Election 153–55 (2000), available at [http://www.sos.ca.gov/elections/sov/2000\\_primary/measures.pdf](http://www.sos.ca.gov/elections/sov/2000_primary/measures.pdf).

<sup>17</sup> The California Senate approved the bill with a vote of twenty-one to fifteen, and the Assembly passed it with a vote of forty-one to thirty-five. *Id.*; see also Lynda Gledhill, *Legislature Approves Gay Marriage*, S.F. CHRON., Sept. 7, 2005, at A-1 (“The measure, which passed [in the assembly] with no votes to spare, marks the first time that a legislative body in the United States has approved a bill that legalizes gay marriage.”); Joe Dignan & John Pomfret, *California Legislature Approves Gay Marriage*, WASH. POST, Sept. 7, 2005, at A1.

<sup>18</sup> Margita Thompson, Gubernatorial Press Secretary, Statement on AB 849, Sept. 7, 2005, available at <http://gov.ca.gov/index.php?/press-release/1443/> (declaring that “the Governor believes the matter should be determined not by legislative action—which would be unconstitutional—but by court decision or another vote of the people of our state”); Lynda Glendale & Wyatt Buchanan, *Governor's Gay Rights Moves Please No One: Marriage Bill Vetoed, Partner Benefits Preserved*, S.F. CHRON., Sept. 30, 2005, at A1; Nancy Vogel & Jordan Rau, *Gov. Vetoes Same-Sex Marriage Bill*, L.A. TIMES, Sept. 30, 2005, at B3.

<sup>19</sup> Official California Legislative Information, Senate Floor Votes AB 43 (2007), available at [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0001-0050/ab\\_43\\_vote\\_20070907\\_1031AM\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_43_vote_20070907_1031AM_sen_floor.html); Official California Legislative Information, Assembly Floor Votes AB 43 (2007), available at [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0001-0050/ab\\_43\\_vote\\_20070605\\_0636PM\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_43_vote_20070605_0636PM_asm_floor.html).

<sup>20</sup> Arnold Schwarzenegger, California Governor, Statement of Veto on AB 43, Oct. 12, 2007, available at [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_0001-0050/ab\\_43\\_vt\\_20071012.html](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/ab_43_vt_20071012.html); Jill Tucker, *Schwarzenegger Vetoes Same-Sex Marriage Bill Again*, S.F. CHRON., Oct. 13, 2007, at B-2 (“[Schwarzenegger] said it is up to the state Supreme Court and then, if necessary, voters to alter Proposition 22, which defines marriage as between a man and a woman.”).

On May 15, 2008, in *In re Marriage Cases*, the California Supreme Court acted on six consolidated cases challenging the state's ban on same-sex marriage by striking down California statutes that restrict civil marriage to couples of different sexes, including the section incorporated by Proposition 22.<sup>21</sup> Writing for the 4-to-3 majority, Chief Justice Ronald M. George found that sexual orientation is a protected status requiring strict scrutiny of any state classifications on that basis. The Court held that the state's same-sex marriage ban violated the state's constitution both by denying gay Californians the "basic civil right" and the "equal respect and dignity" that is afforded by civil marriage recognition, and by violating its equal protection clause in doing so.<sup>22</sup>

Proposition 8's passage on November 4, 2008, marked the first time a ballot initiative banned same-sex marriage after the right to marry had been extended to and exercised by gay couples. In response to numerous state lawsuits filed challenging Proposition 8, the California Supreme Court upheld its constitutional validity in a May 26, 2009 decision, finding that it was a valid and enforceable amendment to the state's constitution.<sup>23</sup> The decision was not, however, a total defeat for proponents of same-sex marriage, insofar as it upheld the validity of the same-sex marriages entered into before Proposition 8's passage.<sup>24</sup>

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<sup>21</sup> *In re Marriage Cases*, *supra* note 14.

<sup>22</sup> *Id.* at 425–29, 444 (“[I]t is apparent under the California Constitution that the right to marry—like the right to establish a home and raise children—has independent *substantive* content, and cannot properly be understood as simply the right to enter into such a relationship *if (but only if)* the Legislature chooses to establish and retain it. . . . [T]he right to marry does obligate the state to take affirmative action to grant official, public recognition to the couple's relationship as a family as well as to protect the core elements of the family relationship from at least some types of improper interference by others.”) (emphasis in the original) (citations omitted).

<sup>23</sup> *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). Opponents of Proposition 8 had argued, *inter alia*, that Proposition 8 was an invalid ballot initiative since it revised and did not merely amend the state's constitution. *Id.* at 78. The court also acknowledged that Proposition 8 had no effect on the state's domestic partner registry available to same-sex couples, which provides relationship recognition similar to civil unions available in a number of other states. *Id.* at 76.

<sup>24</sup> *Id.* at 119–20 (explaining that Proposition 8 will be applied prospectively in keeping with well-established legislative and statutory interpretation principles).

Opponents of Proposition 8 encountered a more favorable initial result in a federal constitutional challenge brought by former Republican Solicitor General and conservative activist Theodore Olson in partnership with his *Bush v. Gore* counterpart David Boies.<sup>25</sup> On August 4, 2010, at the conclusion of a full trial, chief judge for the United States District Court for the Northern District of California Vaughn R. Walker struck down Proposition 8 as unconstitutional and thus unenforceable.<sup>26</sup> Among many findings of fact, Judge Walker noted that “Proposition 8 singles out gays and lesbians and legitimates their unequal treatment.”<sup>27</sup> He held that “Proposition 8 both unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation.”<sup>28</sup> Judge Walker repeatedly referred to the failure of the attorneys for Proposition 8 to support their claims with credible evidence. He wrote that “proponents presented no reliable evidence that allowing same-sex couples to marry will have any negative effects on society or on the institution of marriage.”<sup>29</sup> Unsurprisingly then, he concluded that “Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license” and “does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples.”<sup>30</sup> The Ninth Circuit Court of Appeals granted a stay of Judge Walker’s Order enjoining state officials from enforcing Proposition 8, pending the proponents’

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<sup>25</sup> Carol J. Williams, *Lawyers Challenge Prop. 8 In U.S. Court*, L.A. TIMES, May 28, 2009, at A6.

<sup>26</sup> *Perry v. Schwarzenegger*, No. C 09-2292 VRW, slip op. at 2, 135 (N.D. Cal., Aug. 4, 2010), available at <https://ecf.cand.uscourts.gov/cand/09cv2292/files/09cv2292-ORDER.pdf>.

<sup>27</sup> *Id.* at 93.

<sup>28</sup> *Id.* at 109.

<sup>29</sup> *Id.* at 126. Judge Walker noted that when he asked the attorney for the Proposition 8 supporters during oral argument on their motion for summary judgment to explain how allowing civil same-sex marriage would undermine procreative heterosexual marriage, the attorney replied, “Your honor, my answer is: I don’t know. I don’t know.” *Id.* at 9.

<sup>30</sup> *Id.* at 135.

appeal.<sup>31</sup> Most commentators predict that the case is destined to be decided by the Supreme Court.<sup>32</sup>

## 2. Arizona Proposition 102 (2008)

Arizona's ballot initiative proposing to amend the state's constitution to ban same-sex marriage passed by a larger margin—56% to 44%—than California's similarly worded Proposition 8.<sup>33</sup> Arizona Proposition 102 amended the Arizona Constitution by adding Article 30, which specifies that “[o]nly a union of one man and one woman shall be valid or recognized as a marriage in this state.”<sup>34</sup>

## 3. Arkansas Initiative 1 (2008)

In Arkansas, where in 2004 voters amended the state constitution to ban same-sex marriage or any other status “substantially similar” to marriage,<sup>35</sup> voters in 2008 went a big step further by prohibiting gay people from serving as adoptive or foster parents.<sup>36</sup> Initiative 1 was proposed by

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<sup>31</sup> Perry v. Schwarzenegger, No. 10-16696, *Order Granting Stay* (9th Cir. Aug. 16, 2010), available at [https://ect.cand.uscourts.gov/can/09cv2292/files/final\\_stay\\_order.pdf](https://ect.cand.uscourts.gov/can/09cv2292/files/final_stay_order.pdf).

<sup>32</sup> Robert Barnes and Sandhya Somashekhar, *Judge Strikes California Ban on Same-sex Marriage*, WASH. POST, Aug. 5, 2010, at A1.

<sup>33</sup> Press Release, Ariz. Secretary of State 2008 General Election—Ballot Measures Proposition 102, available at <http://www.azsos.gov/results/2008/general/BM102.htm>.

<sup>34</sup> Press Release, Ariz. Secretary of State 2006 Ballot Propositions Proposition 107, available at <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop107.htm> (text of proposition). Arizona voters rejected a 2006 anti-gay ballot initiative—Proposition 107—that would have amended the state's constitution to prohibit not only same-sex marriage, but also any other “legal status for unmarried persons . . . similar to that of marriage.” *Id.*; see also Press Release, Ariz. Secretary of State 2006 General Election—Ballot Measures Proposition 107, available at <http://www.azsos.gov/results/2006/general/BM107.htm> (results). Proposition 107's failure marked the first time an anti-gay ballot measure had lost at the polls. Mary Jo Pitzl, *Voters Approve Proposal to Ban Gay Marriage*, ARIZ. REPUBLIC, Nov. 5, 2008, at Special Section 15 (“In 2006, Arizona voters rejected a same-sex marriage amendment, making it the only state ever to turn down such a ban.”).

<sup>35</sup> ARK. CONST. amend. 83, §2; Cheryl Wetzstein, *Electorate Took Control of Defining Marriage*, WASH. TIMES, Nov. 4, 2004, at A10 (discussing successful ballot initiatives banning same-sex marriage in eleven states, including Arkansas).

<sup>36</sup> Press Release, Ark. Secretary of State, Proposed Amendments, available at [http://www.sos.arkansas.gov/elections/elections\\_pdfs/proposed\\_amendments/2007-293\\_Adopt\\_or\\_Foster\\_parent.pdf](http://www.sos.arkansas.gov/elections/elections_pdfs/proposed_amendments/2007-293_Adopt_or_Foster_parent.pdf) (Initiative 1 prohibited the adoption or fostering of a child by an individual “cohabiting with a sexual partner outside of a marriage which is valid under the constitution and laws of this state”); Press Release, Ark. Secretary of State, 2008 General Election Results for Proposed Initiative Act No. 1, available at [http://www.arkelections.org/index.php?ac:show:contest\\_statewide=1&elecId=181&contestId=5](http://www.arkelections.org/index.php?ac:show:contest_statewide=1&elecId=181&contestId=5) (the initiative passed by fifty-seven percent in favor and forty-three percent against); Bonnie Miller Rubin, *Adoption Ban Targets Gay Couples, Critics Say*, L.A. TIMES, Dec. 4, 2008, at A15 (although the amendment applies to both heterosexual and homosexual unmarried prospective adoptive and foster parents in Arkansas, proponents of the ballot initiative made it clear that its primary purpose was to discriminate against gay and lesbian Arkansans).



the so-called Arkansas Family Council Committee in response to a 2006 Arkansas Supreme Court ruling invalidating as unconstitutional a state administrative rule forbidding the placement of children with gay foster parents.<sup>37</sup> The State of Arkansas had justified the administrative ban on gay foster parenting as protecting “children’s moral and spiritual welfare,”<sup>38</sup> despite the fact that “Arkansas has three times as many children who need homes as people willing to adopt or foster them.”<sup>39</sup>

#### ***4. Florida Amendment 2 (2008)***

In Florida, Amendment 2 passed with 62% of the vote (60% being the minimum required for constitutional amendments by ballot initiative in

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<sup>37</sup> See *Dep’t of Hum. Services v. Howard*, 238 S.W.3d 1, 8 (Ark. 2006) (finding that the “driving force behind adoption of the regulation was not to promote the health, safety, and welfare of foster children, but rather based upon the Board’s views of morality and its bias against homosexuals. Additionally, DHS admits that ‘the regulation may protect the morals of our foster children’ but claims that it also protects the health, safety, and welfare of the foster children. . . . [T]here is no correlation between the blanket exclusion and the health, safety, and welfare of foster children. Thus, the only other underlying purpose behind the enactment of the regulation is morality”); Andrew DeMillo, *Arkansas Proposes Banning Gay Foster Parents*, N.Y. SUN, Aug. 26, 2008, available at <http://www.nysun.com/national/arkansas-proposes-banning-gay-foster-parents/84594/>.

<sup>38</sup> Associated Press, *Ark.: Gay Foster Parents Ban Protects Kids*, WASH. BLADE, June 15, 2006, available at [http://www.washblade.com/thelatest/thelatest.cfm?blog\\_id=7541](http://www.washblade.com/thelatest/thelatest.cfm?blog_id=7541); Jon Gambrell, *Rural voters, Christians back foster, adoption ban*, ARK. DEMOCRAT-GAZETTE, Nov. 5, 2008, available at <http://www.arkansasonline.com/news/2008/nov/05/rural-voters-christians-back-foster-adoption-ban/> (“Rural counties and evangelical voters fueled by a pulpit campaign pushed Arkansas into adopting one of the nation’s strictest bans on unmarried couples serving as foster or adoptive parents.”); Charles Frago, *Foster-Care Exclusions Gaining OK*, ARK. DEMOCRAT-GAZETTE, Nov. 5, 2008, at A1, A8.

<sup>39</sup> Robbie Brown, *Antipathy toward Obama Seen as Helping Arkansas Limit Adoption*, N.Y. TIMES, Nov. 9, 2008, at A26 (paraphrasing Brent Kincaid, campaign director at Arkansas Families First—the coalition opposing the ban).

the state).<sup>40</sup> As in California, pre-Election Day polls in Florida wrongly predicted the initiative's defeat.<sup>41</sup> Amendment 2 not only amended the Florida constitution to ban same-sex marriage, but also prohibited the recognition of any "other legal union that is treated as marriage or the substantial equivalent thereof."<sup>42</sup> This wording of Amendment 2 prompted concern amongst some observers that the amendment may affect the ability of same-sex couples to enter into private contractual arrangements intended to provide some of the protections otherwise provided by the civil marriage right.<sup>43</sup>

### 5. *Maine Issue 1 (2009)*

As in California and Florida in 2008, early polls in Maine predicted a victory for same-sex marriage supporters, but on November 4, 2009, 53% of Maine voters supported Question 1, thereby repealing the state law enacted in May 2009 that afforded same-sex couples the right to marry.<sup>44</sup> Maine Governor John E. Baldacci, who initially had opposed same-sex marriage rights, changed his mind to become the first governor in the nation to sign into law a same-sex marriage statute in the absence of a judicial

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<sup>40</sup> Florida Department of State Division of Elections, General Election Results, "Florida Marriage Protection Amendment," (2008), *available at* <http://election.dos.state.fl.us/elections/resultsarchive/DetailRpt.Asp?ELECTIONDATE=11/4/2008&RACE=A02&PARTY=&DIST=&GRP=&DATAMODE=>.

<sup>41</sup> Aaron Deslatte, *Poll: Voters Unswayed on Amendment 2*, ORLANDO SENTINEL, Nov. 1, 2008, at B1 (discussing several polls predicting that Amendment 2 would not achieve the sixty percent super-majority required for passage); Josh Hafenbrack, Mark Hollis, Rafael Olmeda & Patty Pensa, *Amendments Baffle Voters: Many Have No Idea How to Vote on State Issues*, SUN-SENTINEL, Nov. 3, 2009, at 1B (discussing voter confusion surrounding the proposed amendments).

<sup>42</sup> FLA. CONST. art. I, §27 (2009) ("Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.").

<sup>43</sup> See Jeff Kuerth, *Limited Partners*, ORLANDO SENTINEL, Dec. 1, 2008, at B1 ("The passage of Amendment 2 . . . underscores the patchwork of legal documents needed by gay and lesbian couples for some semblance of the rights and protections afforded married couples."); Jennifer Mooney Piedra, *Florida's Amendment 2 Marriage Vote: Are Domestic Partners At Risk?*, MIAMI HERALD, Oct. 26, 2008, *available at* <http://miamiherald.typepad.com/gaysouthflorida/2008/10/floridas-amendm.html>.

<sup>44</sup> See Maria Sacchetti, *Maine Voters Overturn State's New Same-Sex Marriage Law*, BOSTON GLOBE, Nov. 4, 2009, at M1.

mandate.<sup>45</sup> Unlike in California, no same-sex couples were able to avail themselves of the right to marry in Maine. Same-sex marriage opponents were able to gather enough signatures to place a repeal initiative on the ballot and to obtain a judicial stay of the effective date of the new statute before the election.<sup>46</sup> Maine Question 1 has the distinction of being the first ballot initiative to revoke a right to civil marriage for same-sex couples conferred voluntarily by democratically elected officials, with no involvement of “unelected judges” that same-sex marriage opponents pointed to in other states in order to rally support for anti-gay referenda.<sup>47</sup>

### **6. Washington State Referendum 71 (2009)**

Washington State provided a surprise victory for gay rights proponents on Election Day 2009, when Referendum 71 (“R-71”) passed with a 53%-to-47% margin—the first statewide ballot initiative to confer relationship recognition rights to gay citizens.<sup>48</sup> Popularly known as the “everything but marriage” initiative, R-71 asked voters to choose whether to approve or repeal the state’s legislative expansion of the domestic partnership statute to encompass almost all of the rights accorded to civil marriage.<sup>49</sup>

### **B. The Initial Hindsight Insights**

There has been no shortage of theories among media and political commentators for what went wrong for the gay community in the 2008 and 2009 ballot initiative battles. The focus of the postmortem analysis in 2008 was on California’s Proposition 8, especially since thousands of same-sex couples had already married in the state and the battle was the most expensive ballot initiative campaign ever waged in the United States. The

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<sup>45</sup> *Id.*

<sup>46</sup> See Bob Drogin, *Gay Marriage Opponents Are Winning in Maine*, L.A. TIMES, Nov. 4, 2009, at 14.

<sup>47</sup> See Sacchetti, *supra* note 44.

<sup>48</sup> Laura Onstot, *The Eastern Block; Slavic Immigrants Are The Most Visible Face of Opposition to Gay Marriage in Washington*, SEATTLE WKLY., Dec. 9, 2009, available at <http://www.seattleweekly.com/2009-12-09/news/the-eastern-block/>.

<sup>49</sup> Allan Brettman, *Washington Voters OK “Everything But Marriage” Law*, THE OREGONIAN, Nov. 3, 2009, available at [http://www.oregonlive.com/clark-county/index.ssf/2009/11/washington\\_referendum\\_71\\_on\\_gay\\_marriage.html](http://www.oregonlive.com/clark-county/index.ssf/2009/11/washington_referendum_71_on_gay_marriage.html).

fact that Proposition 8 had been trailing in the tracking polls, at times significantly, in the months and weeks before Election Day also attracted a significant amount of attention and curiosity.<sup>50</sup>

### 1. 2008

Many media commentators, including *The New York Times*, attributed the passage of Proposition 8 and the other anti-gay ballot measures to mobilization by conservative religious organizations, especially the Church of Jesus Christ of Latter-day Saints (the Mormons) and the Roman Catholic Church, by means of both significant institutional and individual financial support as well as extensive door-to-door canvassing by churchgoers.<sup>51</sup> The leaders of the “Yes on 8” campaign themselves credited their aggressive organizing and fundraising initiatives in the churches as giving them “a huge advantage” in advocating for passage of Proposition 8, with the Mormons “immensely helpful” in those efforts.<sup>52</sup>

Other media commentators ascribed the passage of Proposition 8 to African American and Latino/a voters.<sup>53</sup> For example, conservative

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<sup>50</sup> For a detailed analysis of Field Poll and other tracking data showing Proposition 8 losing in the months before Election Day 2008, see Karen Ocamb, *Special Investigation: Prop 8 Postmortem*, IN MAG., Nov. 25, 2008, at 18, available at [http://www.frontierspublishing.com/IN\\_archive/1121/special\\_reports/sprt1.html](http://www.frontierspublishing.com/IN_archive/1121/special_reports/sprt1.html). For example, on July 18, the Field Poll released results of a survey of likely voters showing that Proposition 8 would lose by a significant margin—fifty-one percent to forty-two percent—and also would lose among African Americans by a five-to-four margin. *Id.* at 22.

<sup>51</sup> Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 15, 2008, at A1. After Mormon Church leaders made a last-minute appeal to their congregations, five million dollars were raised and applied primarily to an aggressive advertising campaign in favor of Proposition 8. It was estimated that between eighty and ninety percent of early volunteers engaged in door-to-door campaigning in favor of the initiative were Mormons. *Id.* “The California measure, Proposition 8, was to many Mormons a kind of firewall to be held at all costs.” *Id.*

<sup>52</sup> Frank Schubert & Jeff Flint, *Passing Prop 8*, CAMPAIGNS & ELECTIONS, Feb. 2009, at 44. Schubert and Flint write that they “built a campaign volunteer structure around both time-honored campaign grassroots tactics of organizing in churches, with a ground-up structure of church captains, precinct captains, zip code supervisors and area directors; and the latest Internet and web-based grassroots tools.” *Id.* at 45. “Our ability to organize a massive volunteer effort through religious denominations gave us a huge advantage.” *Id.* at 44.

<sup>53</sup> See, e.g., Cheryl Wetzstein & Jennifer Harper, *Blacks, Hispanics Nixed Gay Marriage*, WASH. TIMES, Nov. 8, 2008, at A01 (stating that the “record turnout of black and Hispanic voters . . . was instrumental in the passage of Proposition 8.”). Similarly, Dan Walters of the *Sacramento Bee* stated definitively that the higher than typical turnout of African American voters in support of Obama put Proposition 8 over the top: “[H]ad Obama not been so popular and had voter turnout been more traditional—meaning the proportion of white voters had been higher—chances are fairly strong that Proposition 8 would not have prevailed.” Dan Walters, *Pro-Obama turnout aided Proposition 8*, SACRAMENTO BEE, Nov. 11, 2008, at A3.

commentator Bill O'Reilly lauded African American Californians for passing Proposition 8: "It was the black vote that voted down gay marriage."<sup>54</sup> Some gay commentators also were quick to adopt a "blame the Blacks" mentality.<sup>55</sup> They were undoubtedly spurred by CNN's repeated references to its exit polls purporting to show that while most Whites and Asians voted against Proposition 8 (51% to 49%), 70% of African Americans and 53% of Latinos/as voted in favor of it.<sup>56</sup> For example, Dan Savage, a nationally renowned, openly gay commentator, argued that because "African American voters in California voted overwhelmingly for Prop 8, writing discrimination into California's constitution," he was "done pretending that the handful of racist gay white men out there . . . are a bigger problem for African Americans, gay and straight, than the huge numbers of homophobic African Americans are for gay Americans, whatever their color."<sup>57</sup>

Observers also concluded that the strong African American voter turnout for then-candidate Barack Obama skewed the results against Proposition 8, since most African Americans were assumed not to favor same-sex marriage.<sup>58</sup> President Obama himself wavered through the years in his commitment to marriage equality, initially expressing wholehearted support for civil same-sex marriage rights, but then opposing marriage equality once he became a candidate for national office.<sup>59</sup> Although he

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<sup>54</sup> Hendrik Hertzberg, *Eight is Enough*, NEW YORKER, Dec. 1, 2008, at 27, available at [http://www.newyorker.com/talk/comment/2008/12/01/081201taco\\_talk\\_hertzberg](http://www.newyorker.com/talk/comment/2008/12/01/081201taco_talk_hertzberg).

<sup>55</sup> Posting of Dan Savage to TheStrangerSLOG, [http://slog.thestranger.com/2008/11/black\\_homophobia](http://slog.thestranger.com/2008/11/black_homophobia) (Nov. 5, 2008, 9:55 EST) [hereinafter Black Homophobia].

<sup>56</sup> CNN Election Center 2008, California Proposition 8: Ban on Gay Marriage Results (Nov. 5, 2008), <http://www.cnn.com/ELECTION/2008/results/polls/#CAI01p1>.

<sup>57</sup> See Black Homophobia, *supra* note 55.

<sup>58</sup> See, e.g., Farhad Manjoo, *Props to Obama: Did He Help Push California's Gay-Marriage Ban Over the Top?*, SLATE, Nov. 5, 2008, <http://www.slate.com/id/2203912/>.

<sup>59</sup> In a 1996 Illinois Senate campaign questionnaire, Obama answered a question relating to same-sex marriage with an unequivocal endorsement of marriage equality: "I favor legalizing same-sex marriages, and would fight efforts to prohibit such marriages." James Kirchick, *Obama Said 'I Don't.' He May Just Mean It.*, WASH. POST, Aug. 2, 2009, at B2. Once he sought his U.S. Senate seat and entered the national stage, Obama changed his position on same-sex marriage but continued to claim support for LGBT rights generally. See *id.* (quoting Obama's deputy presidential campaign director Steve Hildebrand, an openly gay man, as stating "I do believe that in his heart of heart[s] he will fight his tail off until we've achieved full equality in the gay community.").

courted LGBT votes by characterizing himself as a “fierce advocate for gay and lesbian Americans,”<sup>60</sup> Obama in a 2004 editorial board meeting said “I’m a Christian” and “my religious beliefs say that marriage is something sanctified between a man and a woman”<sup>61</sup>—a statement that should confound observers with even a passing understanding of constitutional law and the exigencies of church/state separation.<sup>62</sup> Despite his opposition to same-sex marriage, President Obama came out against Proposition 8, quietly, and relatively late in the campaign.<sup>63</sup> Nevertheless, supporters of Proposition 8 capitalized on Obama’s widely known opposition to same-sex marriage by sending out a mass mailing and deploying “robocalls,” particularly targeting minority voters, that made it appear that Obama was in favor of the ballot initiative.<sup>64</sup>

Later studies of exit poll data examining much larger samples of the electorate concluded that the CNN estimate of 70% Black support was significantly inflated and that African American support likely was at 57–58%, whereas Latino/a support actually was higher than initially reported,

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<sup>60</sup> Jacqueline L. Salmon & Peter Slevin, *Obama Defends Call on Invocation: Importance of ‘Dialogue’ Cited in Explaining Choice of Conservative Minister*, WASH. POST, Dec. 19, 2008, at A04.

<sup>61</sup> David Mendell, *Obama Would Consider Missile Strikes on Iran*, CHI. TRIB., Sept. 25, 2004, at C1 (detailing then-U.S. Senatorial Candidate Obama’s remarks during a Chicago Tribune editorial board meeting and on a Chicago radio public affairs show covering issues important in his race against Republican candidate Alan Keyes).

<sup>62</sup> The President’s position has also provided cover for other putatively progressive politicians who have taken a stand against marriage equality. *See, e.g.*, Mike DeBonis, *Michael Brown Stands for Gay Marriage; Yvette Alexander Does Not*, WASH. CITY PAPER, Sept. 11, 2009, available at <http://www.washingtoncitypaper.com/blogs/citydesk/2009/09/11/michael-brown-stands-for-gay-marriage-yvette-alexander-does-not/> (quoting Washington, D.C., councilmember Yvette Alexander justifying her opposition to marriage equality by saying, “I stand where the president stands, that the definition of marriage is a union between a man and a woman.”).

<sup>63</sup> Manjoo, *supra* note 58 (noting that “Obama opposed Proposition 8, but only guardedly.”); *see also* Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 CONN. L. REV. 1523, 1532–33 (2009) (discussing Obama’s “contradictory positions” on marriage equality).

<sup>64</sup> *See* Hertzberg, *supra* note 54.

at 59%.<sup>65</sup> The data also eventually showed, despite initial reactions, that the pro-Obama voter surge among African American voters had no determinative effect on Proposition 8, and that, as political statistician Nate Silver put it, “[a]t the end of the day, Prop 8’s passage was more a generational matter than a racial one,” with the initiative losing in voters under the age of 65.<sup>66</sup> Religiosity (here defined as frequency of religious service attendance), age and party affiliation were shown to have contributed to Proposition 8’s passage in much more significant ways than race and ethnicity.<sup>67</sup>

In addition to the initial postmortem analysis focusing on the role of Mormons and the African American and Latino/a communities in passing Proposition 8, the gay movement’s criticism turned inwards and towards the tactical blunders of its own leadership. The movement’s conventional wisdom was that, perhaps lulled into complacency by overly optimistic tracking polls predicting Proposition 8’s decisive defeat, the pro-marriage equality side was outmaneuvered and outsmarted by opponents determined to win at any cost.<sup>68</sup> The proponents of the measure resorted to not-so-veiled appeals to the ancient slander of gays “recruiting” children and blanketing the airwaves with warnings about how the preservation of same-sex marriage in California would require kindergarteners to be taught about homosexuality.<sup>69</sup> Other campaign materials resorted to the scare tactic that

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<sup>65</sup> PATRICK J. EGAN & KENNETH SHERRILL, CALIFORNIA’S PROPOSITION 8: WHAT HAPPENED, AND WHAT DOES THE FUTURE HOLD? 3 (2009), available at [http://www.thetaskforce.org/downloads/reports/reports/pi\\_prop8\\_1\\_6\\_09.pdf](http://www.thetaskforce.org/downloads/reports/reports/pi_prop8_1_6_09.pdf).

<sup>66</sup> Posting of Nate Silver to FiveThirtyEight.com, <http://www.fivethirtyeight.com/2008/11/prop-8-myths.html> (Nov. 11, 2008, 15:47 EST).

<sup>67</sup> See EGAN & SHERRILL, *supra* note 65, at 2, 6 (concluding that the more prevalent support for Proposition 8 among African Americans “can largely be explained by African Americans’ higher levels of religiosity—a characteristic strongly associated with opposition to same-sex marriage” and that “much of the stronger support found for Proposition 8 among [African Americans and Latinos/as] is explained by their increased levels of attendance of religious services.”); see also Hutchinson, *Sexual Politics*, *supra* note 63, at 1538 (arguing persuasively, in light of the NGLTF Institute’s findings, that “the racial narrative fails to appreciate the importance of religion in shaping support for the measure” since “black and Latino support for Proposition 8 turned primarily on religiosity.”)

<sup>68</sup> See John Wildermuth, *LGBT groups unhappy with No on 8 Leaders*, S.F. CHRON., Jan. 25, 2009, at B1.

<sup>69</sup> An especially effective television advertisement depicted a kindergarten age girl arriving home from school and saying to her mother, “Guess what I learned in school today? I learned how a prince married a prince, and I can marry a princess.” David J. Jefferson, *How Getting Married Made Me an Activist*, NEWSWEEK, Nov. 24, 2009, at 54. The ACLU’s LGBT Project Director Matt Coles called it “a devastatingly effective piece” insofar as it “finally provided an answer to the question that we’ve put at the heart of our framing of the issue: how does my marriage hurt your family?” Matt Coles, *Prop 8: Let’s Not Make the Same Mistake Next Time*, HUFFINGTON POST, Feb. 26, 2009, [http://www.huffingtonpost.com/matt-coles/prop-8-lets-not-make-the\\_b\\_170271.html](http://www.huffingtonpost.com/matt-coles/prop-8-lets-not-make-the_b_170271.html).

the recognition of same-sex marriage would interfere with the rights of churches to restrict religious marital rights to opposite-sex couples and would jeopardize the favorable tax status of religious institutions that refused to perform or honor same-sex marriages.<sup>70</sup>

Not only was the “No on 8” campaign criticized for failing to do enough to debunk the misinformation spread by Proposition 8’s proponents, it also was faulted for mounting an advertising and public education campaign that was considered ineffectual and vague.<sup>71</sup> Most of the “No on 8” ads and literature “left gay people invisible” and “didn’t portray gay

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<sup>70</sup> See Hertzberg, *supra* note 54, at 2 (noting that the “Yes on 8” ads were dishonest in that “they implied that gay marriage would threaten churches’ tax exemptions, force church-affiliated adoption agencies to place children with gay couples, and oblige children to attend gay weddings”).

<sup>71</sup> See *id.*; see also Tim Dickinson, *Same-Sex Setback*, ROLLING STONE, Dec. 11, 2008, available at [http://www.rollingstone.com/politics/story/24603325/samesex\\_setback](http://www.rollingstone.com/politics/story/24603325/samesex_setback). An ad entitled “Conversation” exemplified the indirect and abstruse approach of the “No on 8” ads. It depicted two female friends looking at family pictures over cups of coffee and having the following exchange:

Woman 1: And here’s our niece Maria and her partner, Julie, at their wedding.

Woman 2: Listen. Honestly? I just don’t know how I feel about this same-sex-marriage thing.

Woman 1: No. It’s OK. And I really think it’s fine if you don’t know how you feel. But are you willing to eliminate rights and have our laws treat people differently?

Woman 2: No!

*Id.* Patrick Guerriero, who was hired to direct the “No on 8” campaign late in October, said of the campaign’s early ads: “Those ads were perfect, if there wasn’t an opponent.” *Id.*; see also Margaret Talbot, *A Risky Proposal: Is It Too Soon To Petition the Supreme Court on Gay Marriage?*, NEW YORKER, Jan. 18, 2010, at 45, 48, available at [http://www.newyorker.com/reporting/2010/01/18/100118fa\\_fact\\_talbot](http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot) (reporting that “[a]fter Proposition 8 passed, many gays and lesbians complained that the ads that political consultants had come up with for their side did not show any couples” and “did not counter the other side’s claim that gay marriage would now be taught in schools . . .”).



families.”<sup>72</sup> This was deemed an especially glaring omission considering that nearly one-third of Californian same-sex couples are raising children<sup>73</sup> and appeals for marriage equality that ‘put a face’ on gay families and their vulnerability to discrimination tend to move marriage equality opponents to change their minds.<sup>74</sup> Longtime gay rights activist Robin Tyler chided the failure of the “No on 8” media strategists to incorporate real gay families in the campaign’s advertising by drawing a comparison to Proposition 2, the initiative in favor of more humane living quarters for livestock that shared the ballot with Proposition 8, stating that, “[w]hen they were trying to pass Prop 2, did they hide the chickens?”<sup>75</sup> Whereas the “Yes on 8” side aired hard-hitting and effective (albeit misinforming and distorting) ads relying on strong emotional appeals, the anti-Proposition 8 ads focused on abstract principles of fairness, equality and freedom from discrimination.<sup>76</sup> Media consultant Eugene Holland posited that the “No on 8” media campaign was “too intellectual,” which “might have worked for some people, [but] wasn’t a strong enough argument against ‘They want our children.’”<sup>77</sup> The

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<sup>72</sup> Dale Carpenter, *Know on 8*, BAY AREA REP., Jan. 29, 2009, available at <http://www.indegayforum.org/news/printer/31713.html>.

<sup>73</sup> See Brief of *Amici Curiae* M.V. Lee Badgett and Gary J. Gates in Support of the Parties Challenging the Marriage Exclusion, at 13–14, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), Case No. S147999, available at <http://www.law.ucla.edu/williamsinstitute/publications/CA%20Marriage%20Amicus%20Brief.pdf> (reporting that over 70,000 Californian children have parents in same-sex couples and that “32.3% of same-sex couple households in California include children under 18.”); see also *In re Marriage Cases*, 183 P.3d at 433–44 (Cal. 2008) (discussing the prevalence of same-sex couples raising children in California).

<sup>74</sup> See Louis Weisberg, *Prop 8: What Went Wrong*, LOGO ONLINE NEWS, [www.365gay.com](http://www.365gay.com), Nov. 25, 2008, <http://www.365gay.com/living/prop-8-what-went-wrong> (surveying communications experts’ assessments that in-the-flesh appeals are much more effective than abstract arguments in favor of equality and fairness).

<sup>75</sup> See Dickinson, *supra* note 71.

<sup>76</sup> *Id.*; see also Hertzberg, *supra* note 54, at 27 (noting that “No on 8” advertisements “were timid and ineffective, focusing on worthy abstractions like equality and fairness, while the other side’s ads were powerfully emotional”); Weisberg, *supra* note 74 (noting that “critics say [“No on 8”] wrongly focused on intangible concepts such as discrimination and justice without offering a positive alternative argument for the morality of same-sex marriage”). Longtime gay media messaging expert Cathy Renna said, “I think the whole marriage debate in general has not been framed in a way that takes our relationships and our families out of more than a superficial or abstract context.” *Id.*

<sup>77</sup> Eugene Holland, *quoted in* Talbot, *supra* note 71, at 48. Bemoaning the relative invisibility of same-sex couples in the “No on 8” ads, Holland asked: “How can you have a campaign based on equality and then hide what it would look like? Can you send a clearer message that there is something to hide?” *Id.*

conventional wisdom was that the “No on 8” ads played fair and stayed positive, and the “Yes on 8” ads were unfair and appealed to base fears and bigotries that ultimately proved too powerful to counteract or at least neutralize before Election Day.

The “No on 8” campaign leaders also were faulted for not doing enough to communicate targeted, culturally sensitive messages to African American, Latino/a and Asian American communities in particular, effectively ceding much of this work to their counterparts in the “Yes on 8” operation. When Asian American LGBT organizations, seeing the neglect of their community by the “No on 8” campaign, attempted to purchase advertising in Chinese and Korean newspapers, they learned that “Yes on 8” had already been running ads urging readers to vote for Proposition 8 in those newspapers for several weeks.<sup>78</sup> The “No on 8” campaign was faulted for not doing enough to communicate to the African American community in particular that then-candidate Obama was opposed to Proposition 8, despite the misleading ads and mailers proliferated by the pro-Proposition 8 forces.<sup>79</sup> It also failed to marshal the significant support for marriage equality and opposition to Proposition 8 among notable African American community leaders, including NAACP board of directors chairman Julian Bond, Rev. Al Sharpton, Rev. Michael Eric Dyson, Coretta Scott King, Rev. Peter Gomes and most members of the Congressional Black Caucus.<sup>80</sup>

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<sup>78</sup> Richard Kim, *Marital Discord: Why Prop 8 Won*, NATION, Nov. 24, 2008, available at <http://www.thenation.com/doc/20081124/kim/print>.

<sup>79</sup> See *id.*; see also Paul Hogarth, *Why We Lost Prop 8: When Reactive Politics Become Losing Politics*, HUFFINGTON POST, Nov. 5, 2008, [http://www.huffingtonpost.com/paul-hogarth/why-we-lost-prop-8-when-r\\_b\\_141390.html](http://www.huffingtonpost.com/paul-hogarth/why-we-lost-prop-8-when-r_b_141390.html). Hogarth argued that “aggressive overtures needed to be made to [the African American] community, and there was no better messenger in this election for this group of voters than Barack Obama.” *Id.*

<sup>80</sup> Michael Crawford, *Rev. Al Sharpton on Marriage, Mormons and Prop. 8*, HUFFINGTON POST, Jan. 15, 2009, [http://www.huffingtonpost.com/michael-crawford/rev-al-sharpton-on-marria\\_b\\_158190.html](http://www.huffingtonpost.com/michael-crawford/rev-al-sharpton-on-marria_b_158190.html); see also John Lewis (D-GA), *At a Crossroads on Gay Unions*, BOSTON GLOBE, Oct. 25, 2003, at A15, available at [http://www.boston.com/news/globe/editorial\\_opinion/oped/articles/2003/10/25/at\\_a\\_crossroads\\_on\\_gay\\_unions/](http://www.boston.com/news/globe/editorial_opinion/oped/articles/2003/10/25/at_a_crossroads_on_gay_unions/). African American civil rights movement leader John Lewis declared that:

It is time to say forthrightly that the government’s exclusion of our gay and lesbian brothers and sisters from civil marriage officially degrades them and their families. . . . This discrimination is wrong. We cannot keep turning our backs on gay and lesbian Americans. I have fought too hard and too long against discrimination based on race and color not to stand up against discrimination based on sexual orientation.

*Id.*

The presence of “No on 8” on Spanish-language media also was criticized as inadequate and weak, with the campaign passing up an opportunity to air an advertisement—in Spanish—by United Farm Workers co-founder and Latina luminary Dolores Huerta.<sup>81</sup>

Although effective media messaging is critically important in elections, and especially ones involving ballot initiatives, most elections are won by mounting a better ground game: door-to-door and face-to-face canvassing appeals for support. Despite a war chest of \$38 million, which was as much or more than was raised by the other side,<sup>82</sup> the “No on 8” campaign expended comparably few resources in neighborhood-level campaigning and reportedly left the majority of minority neighborhoods untouched.<sup>83</sup> In contrast to “No on 8”’s top-down campaign, the “Yes on 8” campaign ran a bottom-up, grassroots-driven campaign that rivaled Obama’s celebrated presidential campaign in its ground operation, with 100,000 volunteers, visits to 70% of California households, campaign literature in forty languages, and the organized and engaged participation of the far-reaching network of churches and other religious institutions.<sup>84</sup>

While the dramatic reversal of same-sex marriage in California dominated the media coverage in the immediate aftermath of the election,

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<sup>81</sup> See Dickinson, *supra* note 71. Dickinson contends that some of the advertisements that the “No on 8” campaign did air with the intention of appealing to communities of color were muddled in message and, in some cases, made comparisons between the same-sex marriage ban in California and anti-miscegenation laws in the South and Japanese American internment during World War II that offended and angered the very audiences they were targeting. *Id.*

<sup>82</sup> See Weisberg, *supra* note 74.

<sup>83</sup> See Ocamb, *supra* note 50, at 24 (quoting activist and “No on 8” leader Gloria Nieto bemoaning the fact that there was “no walking [of] neighborhoods”); see also Dickinson, *supra* note 71, at 2 (quoting a Democratic consultant as saying that “No on 8” “had no ground game. They thought they could win this thing by slapping some ads together. It was the height of naiveté.”).

<sup>84</sup> See Dickinson, *supra* note 71 (noting that “Yes on 8” “deployed an army of more than 100,000 volunteers to knock on doors in every zip code in the state” and “visited 70 percent of all California households in person, and contacted another 15 percent by phone”); Schubert & Flint, *supra* note 52 (detailing the “Yes on 8” campaign’s massive canvassing efforts, which included 30,000 door-to-door canvassers in the first weekend alone, and campaign materials in more than forty languages).

as well as the subsequent postmortem analysis by same-sex marriage proponents, the 2008 losses for the gay community in Arizona, Arkansas and Florida were attributed to some of the same challenges faced by the “No on 8” campaign in California.<sup>85</sup> The gay equality proponents in those states were criticized for failing to frame the debate ahead of the opposition, failing to counter misinformation forcefully and early, and failing to engage religious and of-color communities thoughtfully and proactively in favor of equal rights for gay and lesbian families.<sup>86</sup>

## 2. 2009

Maine’s November 2009 passage of Issue 1, which repealed the state’s new law recognizing the civil right of gays and lesbians to marry, garnered significant attention and analysis, much of it comparing the Maine initiative battle with that of California the year before. Some of the initial reaction credited the “No on 1” coalition with running a well-organized campaign and applying some of the lessons learned in California, but noted that the initiative’s opponents again were outmaneuvered by an aggressive and motivated coalition of religious and conservative activist groups willing to resort to misinformation and messages appealing to anti-gay bigotry in order to rally support for the initiative.<sup>87</sup> The National Institute for Money

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<sup>85</sup> For example, in Florida, exit polls showed African Americans supported Amendment 2 at a rate eleven percentage points higher than non-Latino Whites. Press Release, Election Center 2008, Florida Amendment 2, Nov. 4, 2008, *available at* <http://www.cnn.com/ELECTION/2008/results/polls/#val=FLI01p1>.

<sup>86</sup> See, e.g., Robbie Brown, *Antipathy Toward Obama Seen as Helping Arkansas Limit Adoption*, N.Y. TIMES, Nov. 9, 2008, at A26 (noting that although opponents of the ban ran television ads, “conservatives mounted a grass-roots campaign, mainly through church groups, that framed the state’s case-by-case approach to adoption requests as an affront to traditional family values”); Charlie Frago, *Foster-Care Exclusions Gaining OK*, ARK. DEMOCRAT GAZETTE, Nov. 5, 2008, at A1 (noting that the so-called Arkansas Family Council, the proponent of the ban, relied on grassroots canvassing and appeals from the pulpit in promoting the ban, while opponents of the measure relied almost exclusively on television advertisements); Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1 (detailing efforts by anti-same-sex marriage forces to organize, at the grassroots level, minority and religious communities in Arizona, California and Florida).

<sup>87</sup> See Lisa Keen, *Two Steps Back: Maine Rejects Marriage*, BAY WINDOWS, Nov. 4, 2009, *available at* <http://www.baywindows.com/index.php?ch=news&sc=glbt&sc3=&id=98595&pf=1>; Posting of Dale Carpenter to Volokh Conspiracy, <http://volokh.com/2009/11/04/theres-always-next-year/> (Nov. 4, 2009 13:21 EST); Maine Voters Wipe Out Gay Marriage Law, <http://wockner.blogspot.com/2009/11/maine-voters-veto-gay-marriage-law-that.html> (Nov. 7, 2009 13:00 EST) (noting that “[t]he very well-run No on 1 campaign studied and learned from the failed Proposition 8 campaign last year in California. No on 8 didn’t use gay people in its television ads; NO on 1 did. No on 8 took too long to respond to the opposition’s scary TV ads; NO on 1 responded each time”).

in State Politics reported that while “No on 1” raised donations from over 10,000 individual donors, twelve times more than the initiative’s supporters, the initiative’s proponents had their effort “funded almost entirely by churches and conservative organizations.”<sup>88</sup>

Observers of the Maine results noted that the “Yes on 1” campaign hired the same consultants retained by California’s Proposition 8 proponents to direct the Maine strategy, leading unsurprisingly to the “Yes on 1” campaign’s adoption of many of the same deceptive advertising messages that worked for the Proposition 8 proponents in California.<sup>89</sup> The core message of the “Yes on 1” media effort was that if the initiative were not passed, “homosexual marriage [would be] taught in public schools whether parents like it or not” and “church organizations could lose their tax exemptions” for failing to perform or recognize same-sex marriages—claims that were readily debunked by legal scholars and the state’s governor himself.<sup>90</sup> As in California, anti-gay activists generated support for the Maine ballot initiative by appealing to some voters’ fear that allowing same-sex couples to marry civilly would pose a threat to their children. Also as in California, religious opponents to marriage equality led the charge by claiming that same-sex marriage victimized the faithful, particularly children raised in religious households. Candi Cushman of the conservative Christian advocacy organization Focus on the Family argued that “[t]he trend that we are seeing is homosexuality is being promoted more and more in school, and the increase in this is creating a hostile

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<sup>88</sup> TYLER EVILSIZER, NAT’L INST. ON MONEY IN ST. POL., THE MONEY BEHIND THE MAINE MARRIAGE MEASURE (2009), *available at*, <http://www.followthemoney.org/press/ReportView.phtml?r=404&em=68>.

<sup>89</sup> Joe Garofoli, *Maine Measure Rerun of Prop. 8*, S.F. CHRON., Oct. 8, 2009, at A1 (describing the “Yes on 1” media effort as “a virtual carbon copy of the California effort”).

<sup>90</sup> Susan Sharon, *Questions Raised about Accuracy of “Yes on One” Ads*, ME. PUB. BROADCASTING NETWORK, Sept. 22, 2009, <http://www.mpbn.net/News/MaineNews/tabid/181/ctl/ViewItem/mid/3475/ItemId/9093/Default.aspx> (quoting University of Maine Law School Professor David Cluchey as characterizing as a “red herring” the claim that churches could lose their tax exempt statuses); *see also* Bob Drogin, *Opponents of same-sex marriage leading in Maine polls*, L.A. TIMES, Nov. 4, 2009, at A14 (noting that “[Maine Governor] Baldacci and state education officials had insisted for weeks that nothing in the new law would require teachers to discuss marriage in schools.”).

environment for kids with Christian or socially conservative viewpoints.”<sup>91</sup> The Catholic Church in Maine, as it did in California, engaged in extraordinary efforts to fund support for the anti-gay ballot initiative, proliferate the proponents’ misleading messages and urge the faithful to vote for the initiative on Election Day as a religious duty.<sup>92</sup>

Despite limited efforts by the “No on 1” campaign to respond directly to what critics called “blatantly misleading fear-mongering” by Issue 1 proponents,<sup>93</sup> some observers criticized the opponents’ campaign for failing to do enough to counter the misinformation from the other side. In the face of “Yes on 1” advertising making specific, ominous and erroneous predictions about the fate of schoolchildren and the threat to the legal tax status and free exercise rights of religious organizations, the “No on 1” campaign opted to focus its advertising on amorphous messages stressing “Maine values” and “family, fairness and equality.”<sup>94</sup> Steve Hildebrand, Barack Obama’s deputy national campaign manager and an openly gay proponent for marriage equality, said of the successful repeal of marriage

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<sup>91</sup> Lisa Leff & David Sharp, *For Foes of Gay Marriage, Fear Wins Again*, STAR-LEDGER, Nov. 7, 2009, at 2.

<sup>92</sup> See Michael Clancy, *Church Gave to Bid to End Gay-Vow Law*, ARIZ. REP., Nov. 16, 2009, at 1; Chuck Colbert, *In Maine, Same-Sex Marriage is a Catholic Issue*, NAT’L CATHOLIC REP., Oct. 29, 2009, available at <http://ncronline.org/news/politics/maine-same-sex-marriage-catholic-issue>. The Portland Diocese alone collected and funneled \$550,000 in support of the ballot initiative, with Portland Bishop Richard J. Malone assuming the role of “primary leader in a highly visible and vocal campaign” in favor of the initiative. *Id.* Malone “spearhead[ed] a parish-based petition signature drive, . . . padded church bulletins with anti-gay marriage messages . . . [on] consecutive Sundays[, and . . . ] required that pastors throughout the diocese preach on traditional marriage.” *Id.* He also “produced a DVD, in which he stars” advocating support for the initiative and “direct[ing] that it be shown in all parishes.” *Id.*

<sup>93</sup> Leff & Sharp, *supra* note 91 (noting that initiative opponents ran broadcast advertisements featuring the state’s attorney general “who insisted that same-sex marriage has nothing to do with schools”).

<sup>94</sup> Daniel Chandler, *Marriage in Maine in Dead Heat*, NATION, Nov. 2, 2009, available at <http://www.thenation.com/doc/20091116/chandler>; see also *Why Are Maine + Washington’s Gays Playing It So Nice on TV?*, QUEERTY.COM, <http://www.queerty.com/why-are-maine-washingtons-gays-playing-it-so-nice-on-tv-20091013/> (criticizing “No on 1” campaign ads as “softball advertising” that is “troubling” since it counters pro-initiative ads that are “brash,” “hardball” and “simply invent facts”); see also Paul Schindler, *Bitterness and Determination*, CHELSEA NOW, Dec. 24, 2009, available at [http://chelseanow.com/articles/2009/12/24/gay\\_city\\_news/news/doc4af3750ac3921091608702.txt](http://chelseanow.com/articles/2009/12/24/gay_city_news/news/doc4af3750ac3921091608702.txt) (quoting gay rights activist Gareth Kirkby, saying “[y]ou’re losing by being nice. . . . [I]t would be a lot more honest . . . if the gay side’s ads kicked ass in exposing the lies, . . . and demanded equality instead of groveling.”).

rights in Maine: “We are fools to have spent all this money and time and not have defined the opponents. It’s not enough to answer their charges. We need to hit them back and not let up on it until voters don’t buy their lies anymore.”<sup>95</sup> Notably, because there are so few African Americans and Latinos in Maine, there was not the same scapegoating of minority communities on the heels of the Maine defeat as there was in the aftermath of Proposition 8’s passage. There also was scant attention paid to the fact that the marriage equality proponents’ loss in racially and ethnically homogenous Maine was by a *larger* margin than the loss in much more diverse California.

Because the media focus in 2009 was devoted principally to the battle and result in Maine, the Washington “everything but marriage” ballot initiative—R-71—did not receive the attention it deserved as the first conferral of relationship recognition rights to same-sex couples by means of statewide ballot initiative in history. The anti-marriage equality activists used the same messages that succeeded in California and Maine, but observers noted that the opponents’ efforts failed—and the pro-gay ballot initiative prevailed—likely because it did not address civil marriage specifically.<sup>96</sup> The gay rights victory in Washington also was credited to a media campaign mounted by opponents that was so extreme in its religiously inflected anti-gay rhetoric—characterizing the domestic partnership statute as violating “God’s mandate”—that it may have alienated more undecided voters than it recruited.<sup>97</sup> Although R-71 did not address marriage equality, its passage was historically significant and a

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<sup>95</sup> Andrew Sullivan, *No More Mister Nice Gays*, ATLANTIC.COM, Nov. 7, 2009, [http://andrewsullivan.theatlantic.com/the\\_daily\\_dish/2009/11/no-more-mister-nice-gays.html](http://andrewsullivan.theatlantic.com/the_daily_dish/2009/11/no-more-mister-nice-gays.html).

<sup>96</sup> See Onstot, *supra* note 48; Posting of Dan Savage to The (Seattle) Stranger SLOG, <http://slog.thestranger.com/slog/archives/2009/11/13/the-r-71-effect> (Nov. 13, 2009 9:12 EST).

<sup>97</sup> Brad Shannon, *Anti-R-71 Ads Invoke Biblical Images, ‘God’s Mandate’*, OLYMPIAN, Oct. 8, 2009, <http://www.theolympian.com/politicsblog/story/997515.html>. The Protect Marriage Washington coalition opposing the domestic partnership statute developed an ad with the following narration:

In the beginning, God created the heaven and the Earth, and formed man, and he made a woman and brought her to the man. Thus God established and defined marriage between a man and a woman. What God has joined together, let no man put asunder. Senate Bill 5688 violates God’s mandate.

*Id.*

tangible victory for gay and lesbian Washingtonians, as well as a positive harbinger for the national gay rights movement. As one gay activist and commentator noted, “domestic partnership rights are not marriage rights, and they’re not full equality, but they’re *something*.”<sup>98</sup>

## **II. THE ROAD AHEAD: DEEPER LESSONS FROM THE 2008 AND 2009 BALLOT INITIATIVE DEFEATS**

As detailed in the preceding section, the great majority of the media and the LGBT community’s postmortem analysis on what went wrong in the 2008 and 2009 unsuccessful initiative campaigns focused on the tactical blunders of the movement’s campaign leaders, and specifically the mistakes they made in framing the issues, responding to misinformation, and connecting with and swaying undecided voters. But these more recent plebiscitary losses also offer LGBT Americans larger lessons about how the movement could fight more effectively, or altogether forestall, popular ballot initiatives like those in Arizona, Arkansas, California and Florida in 2008 and Maine in 2009.

### **A. The Need for More Racial and Cultural Diversity in LGBT Movement Leadership**

One of the most significant lessons from its recent ballot initiative defeats is that the LGBT rights movement must respond more substantively to the lagging support for same-sex marriage in communities of color. Although the initial “blame the Blacks” knee-jerk reaction to the Proposition 8 results could be explained by inaccurate exit polls and their misleading interpretation, the fact remains that there is a persistent disparity in support for civil same-sex marriage between white and of-color communities. In Washington, D.C. the disparity is especially striking, with more than 8-to-1 support for marriage equality among whites, as compared to only 34% among African Americans.<sup>99</sup>

Some commentators, as noted above, attribute this disparity to the higher rates among African Americans and Latinos/as of regular church attendance and general religiosity, which are racially and culturally neutral predictors of marriage equality opposition. Other observers, like *New York Times* columnist Charles M. Blow, posit that among African American

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<sup>98</sup> Savage, *supra* note 96.

<sup>99</sup> Robert McCartney, *Same-Sex Marriage: Exploring the Racial Divide*, WASH. POST, Sept. 20, 2009, at C1.



women in particular, marriage “can be a sore subject” since they have the lowest rates of marriage and the highest rates of divorce.<sup>100</sup> As a result, Blow suggests that African American women “who can’t find a man to marry might not be thrilled about the idea of men marrying each other.”<sup>101</sup> African American columnist Tara Wall reflected this view in advocating support for California’s Proposition 8, reasoning that “[p]reserving traditional marriage is particularly important and relevant now, when...68 percent of black children are born out-of-wedlock.”<sup>102</sup> Still other observers emphasize the failure of the LGBT rights movement to invest the attention and resources needed over the long term to build meaningful dialogue with of-color communities.<sup>103</sup>

Although these hypotheses carry currency, they do not tell the whole story. A persistent impediment to winning more support for LGBT equality among communities of color is the failure of the LGBT movement itself to incorporate racial and ethnic diversity in its leadership and thus become a part of, instead of apart from, communities of color.<sup>104</sup> An

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<sup>100</sup> Charles M. Blow, *Gay Marriage and a Moral Minority*, N.Y. TIMES, Nov. 29, 2008, at A23.

<sup>101</sup> *Id.* Blow argues, therefore, that an especially effective message in support of marriage equality targeting African Americans, and especially women, would focus on the health consequences of the perpetuation of discriminatory marriage laws. With a soaring rate of HIV infections among closeted African American men, continuing to prohibit gay men from forming committed relationships supported by civil marriage protections is dangerous to both the health of those “down low” men, as well as that of the African American women who have sex with them. *Id.*

<sup>102</sup> Tara Wall, *A Mandate for Traditional, Not Gay, Marriage*, WASH. TIMES, Nov. 18, 2008, at A21 (“The goal is to strengthen, not cripple, marriage. Passively condoning illegitimacy, rewarding fatherlessness, [and] advocating same-sex marriage runs counterintuitive to that goal.”). Wall failed to explain how civil marriage equality for same-sex couples would “cripple” traditional marriages or reduce out-of-wedlock births in the African American community.

<sup>103</sup> See, e.g., Deborah Solomon, *Race Matters*, N.Y. TIMES, Aug. 2, 2009, at MM11 (quoting NAACP president Benjamin Todd Jealous, answering the question, “Why do you think [same-sex marriage is] such a divisive issue in the black community” with: “If gay rights groups want to change the opinion polls in the black community, they have to invest in it. It’s a long-term conversation.”).

<sup>104</sup> Commentator Lydia Edwards rightly observes that “If one is going to generalize . . . that homophobia is prevalent in many black communities, this may stem in part from the lack of visibility of African American LGBT people as leaders or prominent members of the community.” Lydia Edwards, *Commentary on Proposition 8: Much Ado About Nothing or A Wake Up Call to Do Something*, 5 MOD. AM. 50, 51 (2009).

underreported fact surrounding the defeat in California is that the leadership of the movement organizations that were most involved in the “No on 8” effort included little or no racial or ethnic diversity. Although the twenty-member Executive Committee of the “No on 8” campaign (“Equality for All”) was racially and ethnically diverse,<sup>105</sup> there is no disputing that the three principal coalition organizations at the helm of the “No on 8” efforts were headed by non-Latino/a whites.<sup>106</sup> The venerable California-based Williams Institute at UCLA School of Law, a think tank devoted to studying and sharing research concerning sexual orientation law and public policy, as of December 2009, had an all-white, non-Latino/a senior staff.<sup>107</sup> The Gill Foundation, a premier source of funding and technical resources for the LGBT movement (and a key player in the California marriage battle), also has an all-white, non-Latino senior staff.<sup>108</sup> And the five-member leadership team—the president and two sets of board co-chairs—of the largest LGBT civil rights organization in the nation, the Human Rights Campaign (HRC), which played an active tactical and funding role in opposing all of the Election Day 2008 and 2009 anti-gay ballot initiatives, is entirely white, non-Latino/a.<sup>109</sup>

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<sup>105</sup> Telephone Interview with Kate Kendell, Executive Director, National Center for Lesbian Rights (NCLR) (Feb. 24, 2010).

<sup>106</sup> The three largest California LGBT organizations responsible for steering the “No on 8” campaign were Equality California (led by Geoff Kors), the Los Angeles Gay & Lesbian Center (led by Lorri L. Jean) and the National Center for Lesbian Rights (led by Kate Kendell). *See* Equality California, Meet the Staff, <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKH&b=4026495> (last visited June 11, 2010); Los Angeles Gay and Lesbian Center, Management Biographies, [http://www.lagaycenter.org/site/PageServer?pagename=YC\\_Management\\_Biographies](http://www.lagaycenter.org/site/PageServer?pagename=YC_Management_Biographies) (last visited June 11, 2010); NCLR, About NCLR—Kate Kendell, Esq., [http://www.nclrights.org/site/PageServer?pagename=About\\_Staff\\_KateKendell](http://www.nclrights.org/site/PageServer?pagename=About_Staff_KateKendell) (last visited June 11, 2010).

<sup>107</sup> The Williams Institute, Williams Institute Staff, <http://www.law.ucla.edu/williamsinstitute/about/staff.html> (showing that all staff and affiliated scholars with “director,” “chair” or “distinguished scholar” in their titles are white, non-Latino) (last visited June 11, 2010).

<sup>108</sup> Gill Foundation, Staff Members, [http://www.gillfoundation.org/board/board\\_list.htm?profileType=staff](http://www.gillfoundation.org/board/board_list.htm?profileType=staff) (last visited June 11, 2010).

<sup>109</sup> The president of the Human Rights Campaign, Joe Solmonese, the co-chairs of its Board of Directors (Kenneth Britt and Mary Snider) and HRC Foundation co-chairs (Anne Fay and Marty Lieberman) are all white and non-Latino. *See* HRC, Who We Are—The Human Rights Campaign Board Members, [http://www.hrc.org/about\\_us/2520.htm](http://www.hrc.org/about_us/2520.htm) (last visited June 11, 2010); HRC, Joe Solmonese, [http://www.hrc.org/about\\_us/solmonese.asp](http://www.hrc.org/about_us/solmonese.asp) (last visited June 11, 2010); *see also* e-mail exchange between the Author and Rob Falk, HRC General Counsel (Aug. 27, 2009) (on file with author) (confirming identities of board of directors and foundation board co-chairs).

As HRC's first general counsel and legal director, and one of its board members and national diversity co-chair from 2002 through 2005, I observed firsthand how HRC has failed to attract and retain a sizeable cohort of leaders who would diversify its boards of directors and inject the perspectives of diverse communities into the organization's decision-making.<sup>110</sup> This challenge is made especially daunting by the manner in which the organization's board fundraising obligations are configured and enforced. Like most major nonprofits, HRC requires its board members to engage in significant fundraising efforts. In HRC's case, these requirements take for granted the board members' individual wealth or membership in wealthy social circles. Members of the board of directors are required to donate personally or raise \$50,000 per year, every year.<sup>111</sup> If a board member cannot donate that amount of money annually, he or she must raise it from third parties, but only in the form of solicited contributions of at least \$5000 from wealthy individuals. Smaller contributions, as well as funds raised from corporations, foundations, law firms or other non-individual funding sources—to which a less wealthy but lucratively networked minority board member may be closely connected—are not credited to the board member's annual \$50,000 "give or get" tally.<sup>112</sup>

The negative effects of this restrictive board fundraising policy at the nation's largest and most politically influential LGBT civil rights organization have ramifications across the LGBT movement. First, the policy discourages talented and nationally prominent but not independently wealthy persons of color and other minorities from serving on the board.<sup>113</sup>

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<sup>110</sup> I was elected to the national board of directors in 2002, after having served on the organization's senior staff (as general counsel and legal director) for five years. When I was hired to build the organization's legal department in 1997, I was its first and only senior Latino staff member and one of only two minorities on its senior staff.

<sup>111</sup> Interview with Susanne Salkind, Managing Director, HRC, Washington, D.C., (Aug. 16, 2009) (confirming that the HRC board of directors "give-or-get" rules, as described above, have not changed since my service on the HRC board from 2002 through 2006). In response to my request for HRC board diversity data (and specifically the number of people of color and Latinos/as on HRC's boards), Ms. Salkind replied that the organization considers that information confidential and therefore was not at liberty to release it.

<sup>112</sup> *Id.*

<sup>113</sup> Donna Rose, who succeeded me in the role of HRC board of directors diversity co-chair, told me that "it's no coincidence that the board co-chairs for diversity during my last year there were the only transgender board member [Donna], and the only person of color [David Wilson]." E-mail from Donna Rose, former Board of Directors Member, HRC (Aug. 26, 2009) (on file with author). Concerning the board's give-or-get obligation, Donna confirmed that "the amount was \$50K annually and only major [\$5000 and up] donors were counted towards that total. That, in and of itself, prevents board diversity." *Id.*

There are few people of color with adequate means or access to a circle of friends capable of donating \$5,000 or more annually to a national LGBT civil rights organization. Such restrictive board policies perpetuate HRC's longtime image as an exclusive bastion for elite white gays "steered by the rich and privileged among us."<sup>114</sup> The board policies contribute to a board of directors that lacks meaningful diversity. The board in turn sets policies and makes decisions for the organization, and influences the agenda setting of the broader movement, that fail to reflect or engage the views of the much more diverse LGBT community and the nation as a whole. Reporter Lou Chibarro notes, quite correctly in my experience, that at HRC's helm is an "inner circle" of wealthy "powerbrokers," all white and non-Latino/a, "who have played a key role in determining the organization's direction and tone for nearly twenty years."<sup>115</sup> It is not surprising, then, that it was only in the 1993–94 congressional election cycle that HRC and the National Gay and Lesbian Task Force, another national LGBT civil rights organization, began to conduct focus groups and polls of likely African American voters' views of gay people.<sup>116</sup>

My point is not that the leaders of the LGBT movement and its organizations are undeserving of or ineffective in their roles. Very much to the contrary, I have known many of these leaders as trusted colleagues and friends over many years and can vouch for their talent, dedication and selflessness. The problem is not with the individuals who are already within the LGBT leadership circles, but with who is absent. The paucity of diverse faces and voices atop many of the movement's key organizations, in both

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<sup>114</sup> URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY & LESBIAN LIBERATION* 219 (1995).

<sup>115</sup> See Lou Chibarro, Jr., *New HRC Boss Ties to 'Inner Circle,'* WASH. BLADE, Mar. 15, 2005, available at [http://www.washblade.com/print.cfm?content\\_id=5160](http://www.washblade.com/print.cfm?content_id=5160). It was widely known in the LGBT community that HRC executive director Elizabeth Birch was the partner of a member of this "inner circle," longtime HRC board member Hilary Rosen, who herself assumed the organization's helm on an interim basis in 2004. *Id.*; see also Sean Bugg, *Shake-up at HRC,* METRO WKLY., Dec. 2, 2004, available at <http://www.metroweekly.com/gauge/?ak=1355> (noting Hilary Rosen's interim appointment as HRC head).

<sup>116</sup> VAID, *supra* note 114, at 284. Vaid also notes that HRC organizing work in communities of color was minimal and under-resourced in light of the "massive effort" required to do it effectively. *Id.*

senior staff and board capacities, undermines the legitimacy and effectiveness of the agenda setting and messaging of these movement organizations, which purport to represent the entirety of the American LGBT community. It hampers the organizations' ability to attract diverse staff and members, and the movement's ability to converse meaningfully, respectfully and productively with communities of color and faith both within and adjacent to our own LGBT communities.<sup>117</sup> It deprives the organizations and the movement as a whole of the nuanced and sensitive decision-making and priority-setting that are often advantages of diverse decision-making bodies.<sup>118</sup> And it makes it more difficult for the movement to rid itself of the racism and xenophobia within its own ranks—dysfunctions that boiled over in the immediate aftermath of the Election Day 2008 losses in particular.<sup>119</sup>

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<sup>117</sup> Vaid wrote convincingly about the need for the LGBT movement to embrace intersectional politics and achieve civil rights for LGBT Americans through meaningful coalition building and recognition of diverse communities within and outside of our own movement. *See, e.g., id.* at 279–302 (discussing intersectional politics and multicultural coalition building).

<sup>118</sup> The U.S. Supreme Court itself has acknowledged that diversity, heterogeneity and “exposure to widely diverse people, cultures, ideas, and viewpoints” enrich not only educational enterprises, but a great number of social, commercial, governmental and cultural endeavors by making them more inclusive and reflective of and sensitive to the broader world. *Gutter v. Bollinger*, 539 U.S. 306, 321 (2003).

<sup>119</sup> There were episodes of protestors exhibiting blatant racism at gay community protests following the ballot initiative losses in California. *See* The N-bomb is Dropped on Black Passersby at Prop 8 Protests, <http://www.pamshouseblend.com/diary/8077/> (Nov. 17, 2008, 16:15:00 EST) (reporting on numerous racist attacks against African Americans by gay activists protesting Proposition 8); Open Memorandum from People for the American Way President Kathryn Kolbert to Progressive Allies and Journalists, People for the Am. Way Found. (Nov. 7, 2008), *available at* <http://67.192.238.59/multimedia/pdf/prop-8-memo.pdf> (decrying racist attacks against African Americans as retribution for Proposition 8's passage as “deeply wrong and offensive—not to mention destructive to the goal of advancing equality”). In addition, the surprising data that candidate Obama got significantly less support in the 2008 general election than 2004 Democratic presidential nominee Sen. John Kerry (D-MA) received in 2004—seventy-seven percent for Kerry and seventy-two for Obama—were interpreted by some astute observers as evidence that the broader LGBT electorate was not immune to the racism faced by America's first African American presidential nominee. *See, e.g.,* Posting of Alex Blaze to The Bilerico Project, [http://www.bilerico.com/2008/11/race\\_sexuality\\_and\\_proposition\\_8.php](http://www.bilerico.com/2008/11/race_sexuality_and_proposition_8.php) (Nov. 6, 2008, 15:00 EST) (analyzing electoral demographic data showing that like “the average resident of Appalachia or Arkansas,” lesbian, gay and bisexual voters (data were not available for transgender voters) “voted more for Kerry in 2004 than they did for Obama in 2008”); *see also* Posting of Nancy D. Polikoff to Beyond (Straight and Gay) Marriage, <http://beyondstraightandgaymarriage.blogspot.com/2008/11/its-young-people-stupid.html> (Nov. 8, 2008, 19:59 EST); Andrew Sullivan, *LGBT, GOP, Ctd.*, ATLANTIC.COM, Nov. 8, 2008, [http://andrewsullivan.theatlantic.com/the\\_daily\\_dish/2008/11/lgbt-gop-ctd.html](http://andrewsullivan.theatlantic.com/the_daily_dish/2008/11/lgbt-gop-ctd.html) (hypothesizing that the disparity in gay support between Kerry and Obama can be attributed to “Clintonian anti-Obama hate that wouldn't go away” among the “gay political establishment [that] fused itself with the Clinton campaign very early on” but also acknowledging that “racism may be more alive and well in the gay community than some of us want to believe”).

More diversity in the movement's leadership also would destabilize the arguments of gay rights opponents that suggest gay marriage is the conceit of white, wealthy gay activists who have nothing in common with African Americans and other oppressed minorities.<sup>120</sup> It would make it more difficult for the media and the academy to continue reinforcing the misconception that the LGBT community is distinct from, and not intertwined with, communities of color and faith, and that for many of-color LGBT Americans the two identities are inseparable.<sup>121</sup> In fact, the reality

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<sup>120</sup> See, e.g., McCartney, *supra* note 99 (quoting African American Baptist Bishop Harry Jackson as saying, “[y]ou see privileged white [gay] males in many situations trying to tell an underprivileged black single mother: My pain compared to your pain. That doesn’t connect”); Marcus Moore & Janel Davis, *Changing Blacks’ Tune on Same-Sex Marriage*, GAITHERSBURG GAZETTE, Oct. 26, 2007, available at [http://gazette.net/stories/102607/polinelw70022\\_32359.shtml](http://gazette.net/stories/102607/polinelw70022_32359.shtml) (quoting African American Baptist minister and Maryland State Delegate Emmett C. Burns Jr. arguing that “equating homosexuality and civil rights are [*sic*] not an equation as far as I’m concerned [*since*] [w]hites can hide their sexual preferences and still get all of the rights that society has to offer. I can’t hide my blackness and get the rights that I’m due, so to say that this is a civil rights issue upsets me to no end”); see also Barbara Smith, *Blacks and Gays: Healing the Great Divide*, in THE TRUTH THAT NEVER HURTS 124, 126 (1998) (noting that “thanks in part to the white lesbian and gay community’s own public relations campaigns, Black Americans view the lesbian and gay community as uniformly wealthy, highly privileged and politically powerful, a group that has suffered nothing like the centuries of degradation caused by U.S. racism”); Posting of Alvin McEwen to Pam’s House Blend, <http://www.pamshouseblend.com/diary/12793/> (Sept. 3, 2009, 8:00:53EDT) (discussing tactics by African American religious gay rights opponents relying on depicting LGBT leadership as exclusively white and wealthy and, therefore, “outsiders” to African American reality).

<sup>121</sup> For example, William Saletan suggests that the gay and African American communities are mutually exclusive—*i.e.*, that there are no Black gays—when he wrote that “Nov. 4 was a good day to be black. It was not a good day to be gay.” William Saletan, *Original Sin: Blacks, Gays and Immutability*, SLATE, Nov. 13, 2008, <http://www.slate.com/id/2204534/>. African American editorialist Tara Wall presumed the same false dichotomy stating that: “Black civil and religious leaders—rightfully—have expressed outrage at the gay community’s co-opting ‘civil rights’ to include gay sex. Blacks were stoned, hung, and dragged for their constitutional right to ‘sit at the table.’ Whites—gays or not—already had a seat at that table.” See Wall, *supra* note 102; see also Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”?; *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1368–72 (2000) (discussing how “[r]ace is often invoked by pro-gay and lesbian scholars who make comparisons between people of color and gays and lesbians,” prompting criticisms of “such comparisons for treating ‘people of color’ and ‘gays and lesbians’ as mutually exclusive groups, omitting gays and lesbians of color from analysis, and therefore implying a population of white gays and lesbians and heterosexual people of color”); Smith, *supra* note 120, at 125–31 (“The underlying assumption is that I should prioritize one of my identities [Black, woman or gay] because one of them is actually more important than the rest or that I must arbitrarily choose one of them over the others for the sake of acceptance in one particular community.”).

obscured in the recent ballot initiative battles is that many in the African American civil rights leadership have been ardent supporters of full marriage equality for gay Americans.<sup>122</sup> Moreover, various recent surveys and polls show that African Americans and Latinos/as generally have been more, not less, likely than white non-Latinos/as to support certain rights for gay Americans, including hate crimes protection, the freedom to adopt children and employment nondiscrimination protection.<sup>123</sup> More diversity in the movement's leadership also would sensitize it against drawing facile

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<sup>122</sup> Richard J. Rosendall, former president of the Gay and Lesbian Alliance of Washington, D.C., writes that "no group in Congress has a better pro-gay voting record than the Congressional Black Caucus." Richard J. Rosendall, *Time to Act*, METROWEEKLY, Sept. 27, 2009, at 22. Alice Huffman, president of the California NAACP chapter, responded to claims that gay marriage was not a civil right by saying: "The rights of gays and lesbians to marry is most certainly a civil rights issue of the first order. By refusing to overturn Proposition 8, the California Supreme Court deferred to a simple majority to eliminate equal protection rights for a disenfranchised minority. This is what the NAACP has fought about for over 100 years." Kamika Dunlap, *Same-Sex Marriage A Sensitive Issue in the Black Faith Community*, CONTRA COSTA TIMES, May 29, 2009. Julian Bond, NAACP national chairman, also has spoken out strongly in favor of marriage equality. See Joe Garofoli, *NAACP Weighs Support of Gays Who Want to Marry*, S.F. CHRON., July 16, 2009, at A7.

<sup>123</sup> A December 2008 Harris Interactive survey commissioned by the Gay and Lesbian Alliance Against Defamation (GLAAD) shows that Latinos/as were more supportive than white and African American respondents to allowing gays and lesbians to serve openly in the military. The same survey showed that "African Americans were among the most supportive segments for expanding hate crimes laws to cover gay and transgender people." GLAAD, HARRIS INTERACTIVE SURVEY, PULSE OF EQUALITY: A SNAPSHOT OF US PERSPECTIVES ON GAY AND TRANSGENDER PEOPLE AND POLICIES 7, 9, 22 (2008), available at <http://archive.glaad.org/2008/documents/harrispoll120308.pdf> [hereinafter "HARRIS INTERACTIVE SURVEY"]. In CNN's exit poll from the Arkansas Initiative 1 measure banning gay couples from adopting children, 54% of African Americans and 58% of whites were shown to support the ban. Press Release, CNN Election Center, Exit Polls: Ballot Measures—Arkansas Initiative 1: Ban on Gay Couples Adopting Children (Nov. 5, 2008), <http://www.cnn.com/ELECTION/2008/results/polls/#val=ARI01p1>; see also Keith Boykin, *Is Gay the New Black?*, BET, Dec. 28, 2008, [http://www.bet.com/News/Decision08/beheard\\_issues\\_IsGayTheNewBlack.htm](http://www.bet.com/News/Decision08/beheard_issues_IsGayTheNewBlack.htm) ("Despite black opposition to same-sex marriage, when you look at other LGBT issues (that don't concern marriage, sex or relationships), blacks are as likely—and in some cases more likely—to support pro-gay policies than whites are.").

and reductive parallels between the LGBT civil rights movement and the African American civil rights movement—comparisons that ultimately alienate many African American voters.<sup>124</sup>

In short, the diversification of the movement's leadership likely would lead to more widespread support for gay rights generally, and marriage equality specifically, in communities of color. It also would have the benefit of legitimizing the movement's broader agenda-setting with the needs and challenges of members of the LGBT community who are not within privileged white circles, leading perhaps to a better understanding among the movement leadership that "equality" means different things to different people in the broader movement. An accounting of the broader LGBT community's needs by a movement leadership that better represented the diversity of the broader community may not have prioritized the pursuit of formal marriage equality as the *über alles* objective of the movement, perhaps favoring instead the other more immediate material needs of the less privileged.<sup>125</sup> A more diverse leadership likely would be more receptive of, and responsive to, the argument that the pursuit of civil

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<sup>124</sup> See Catherine Smith, *Queer As Black Folk?*, 2007 WIS. L. REV. 379, 387 (2007) (discussing how comparisons between racism and homophobia "fail to persuade . . . particularly black heterosexuals" since they "invariably trigger counterarguments of difference, . . . disregard the racism and white privilege of white LGBT people as members of the white majority," and "ignore the privilege that heterosexuals—including black heterosexuals—enjoy as members of the majority."); see also Dunlap, *supra* note 122 ("There is a deep rift in the black community about comparisons between gays' struggle for marriage equality and the civil rights struggle of African Americans."); Richard Thompson Ford, *Analogy Lesson*, SLATE, Nov. 14, 2008, <http://www.slate.com/id/2204661> (discussing the imperfections in the analogies between the African American and gay civil rights movements); Saletan, *supra* note 121 (attributing the ineffectiveness of the racial analogy by gay rights activists to the widespread (mistaken) belief in the African American community that homosexuality is a choice whereas race is immutable); see also VAID, *supra* note 114, at 186–87 (discussing how "our use of racial analogies is suspect" and "may be too glib, because prejudice against us as gay people differs significantly from prejudice against people because of race"). On the other hand, there are fair parallels to be drawn between the gay rights and African American civil rights movements despite, as Barbara Smith writes, the lack of recognition of gay oppression by some of-color Americans: "Most Blacks have no idea . . . that we are threatened with the loss of employment, of housing, and of custody of our children, and are subject to verbal abuse, gay bashing, and death at the hands of homophobes." Smith, *supra* note 120, at 126.

<sup>125</sup> See Hutchinson, *supra* note 121, at 1369–70 (discussing the "prominence of same-sex marriage and military integration debates in gay and lesbian discourse" as "evin[c]ing] the extraordinary weight given to formal equality over material betterment" and giving little recognition to how "individuals who face structural barriers to social resources (e.g., institutionalized racism and poverty) require much broader social reform, including policies that eradicate the pervasive material conditions of inequality").



marriage recognition has come at a great cost to many LGBT community members by retarding progress towards more basic protections, by unleashing a ferocious, retrogressive backlash in more conservative states, and by foreclosing the legal recognition of alternative family forms.<sup>126</sup> It would undermine the tactics of anti-gay forces focused on exploiting divisions within the gay community along racial, socioeconomic and other lines.<sup>127</sup> It also would encourage more of-color LGBT Americans to engage with and move up through the leadership ranks in movement organizations.<sup>128</sup>

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<sup>126</sup> See POLIKOFF, *supra* note 8; see also Bil Browning, *GLADly Bending Over or All Coastal States Are Tops*, HUFFINGTON POST, Mar. 3, 2009, [http://www.huffingtonpost.com/bil-browning/gladly-bending-over-or-al\\_b\\_171417.html](http://www.huffingtonpost.com/bil-browning/gladly-bending-over-or-al_b_171417.html) (arguing that advances in the marriage equality movement have come at the expense of more basic protections—like housing and employment nondiscrimination, freedom from hate crimes and harassment, and access to public accommodations—in so-called “flyover” states between the more progressive coastal states).

<sup>127</sup> Veteran LGBT activist Suzanne Pharr wrote that “the religious Right works skillfully to divide us along fissures that already exist. It is as though they have a political seismograph to locate the racism and sexism in the lesbian and gay community, the sexism and homophobia in communities of color.” She writes, astutely, that although “the Right is united by their racism, sexism, and homophobia in their goal to dominate all of us, we are divided by our own racism, sexism, and homophobia.” Suzanne Pharr, *Racist Politics and Homophobia*, TRANSFORMATION, July/August 1993, *quoted in* Smith, *supra* note 120, at 125, 128.

<sup>128</sup> It bears noting that in 2007, I moved from the HRC board of directors to that of the Gay and Lesbian Alliance Against Defamation (GLAAD), another major national LGBT rights organization. I moved, in part, because the fundraising requirements for the GLAAD board of directors are significantly more flexible and accommodating of diversity than that of HRC. Whereas (as noted in Section III.A *supra*) HRC requires board members either to give or raise \$50,000 annually, in donations no smaller than \$5000, the GLAAD board counts donations from almost all sources and of any size towards board members’ respective obligations. Not surprisingly, the GLAAD board is significantly more diverse than HRC’s, and in 2009 we appointed Jarrett Barrios as the first ever Latino male president of any national LGBT rights organization. I served on the presidential search committee and recruited Mr. Barrios, a longtime friend and fellow Latino LGBT rights activist, into the candidate pool. See Press Release, GLAAD, Board of Directors Names Jarrett Barrios as President of GLAAD (June 17, 2009), *available at* <http://www.glaad.org/Page.aspx?pid=818>. Mr. Barrios, in turn, has hired an African American senior director for development. See Release, GLAAD, GLAAD Announces Jonathan Sandville as Chief Development Officer (March 22, 2010), *available at* <http://www.glaad.org/page.aspx?pid=1362>.

## B. Engaging, Instead of Circumventing, Communities of Faith

Linked to the lesson of the need for meaningful diversity in the LGBT movement's leadership is that of the movement's need for much more thoughtful and substantive engagement with communities of faith. Some commentators have argued that the most effective way for the LGBT movement to engage African Americans in particular is through churches, since, in the words of one lesbian African American activist, "social justice and religion are inextricably intertwined in the black community."<sup>129</sup> The Religious Right, in fact, has exploited the religious condemnation of gay men and lesbians to drive a wedge between us and straight people of color.<sup>130</sup>

The lack of effective outreach to communities of faith and religious leaders by the leaders of the campaigns opposing the recent anti-gay ballot initiatives was not altogether out of character for the LGBT movement. Homosexuality and homosexually-identified men and women,<sup>131</sup> after all, have long been vilified on religious grounds.

The colonial sodomy laws that criminalized and assigned the death penalty to "the detestable and abominable vice of buggery" were secularized versions of biblical proscriptions initially enforced by the

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<sup>129</sup> Jasmyne Cannick, Op-Ed., *The Gay/Black Divide*, L.A. TIMES, Nov. 8, 2008, at A23, available at <http://www.latimes.com/news/opinion/la-oe-cannick8-2008nov08,0,3295255.story>. "To many blacks, civil rights are grounded in Christianity—not something separate and apart from religion but synonymous with it. To the extent that the issue of gay marriage seemed to be pitted against the church, it was going to be a losing battle in my community." *Id.*

<sup>130</sup> See Sean Cahill, *Black and Latino Same-Sex Couple Households and the Racial Dynamics of Antigay Activism*, in JUAN BATTLE & SANDRA L. BARNES EDS., *BLACK SEXUALITIES: PROBING POWERS, PASSIONS, PRACTICES, AND POLITICS* 243, 244 (2010) (discussing how "[f]or two decades, the religious right has sought to pit gay and lesbian people against people of color and to portray the two communities as mutually exclusive.").

<sup>131</sup> Although homosexuality, of course, has forever been a part of the human condition, *homosexuals*—i.e., men and women embracing a gay or lesbian identity—emerged as a distinct urban subculture during the upheaval in the American family, urban and industrial life during World War II. See JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940–1970*, 23–39 (1983) [hereinafter "SEXUAL POLITICS, SEXUAL COMMUNITIES"] (detailing how the relocation of men and women away from remote and rural extended family homes to defense industry jobs in urban centers allowed those who were homosexual to establish intimate bonds and develop individual and community identities as gay people).

Roman Catholic Church.<sup>132</sup> Chief Justice Warren Burger's concurrence in 1986's infamous (and since overturned) *Bowers v. Hardwick*, which upheld the constitutionality of criminal sodomy proscriptions, justified the "condemnation of [homosexual] practices" by noting that they were "firmly rooted in Judeo-Christian moral and ethical standards."<sup>133</sup> In the Supreme Court's 2003 *Lawrence v. Texas* majority opinion that overturned *Bowers*, Justice Kennedy observed that the longtime condemnation of homosexuality "has been shaped by religious beliefs."<sup>134</sup> Other courts have rejected claims for marriage equality by referring to biblical passages and religious injunctions purportedly condemning homosexuality.<sup>135</sup> It was such religious, anti-gay animus that was responsible for the passage of the 1996 Defense of Marriage Act (DOMA), which *inter alia* prohibits the Federal government from recognizing same-sex marriages licensed by individual

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<sup>132</sup> See WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003, 16–17 (2008) (discussing biblical and religious origins of colonial era sodomy laws); see also SEXUAL POLITICS, SEXUAL COMMUNITIES, *supra* note 131, at 14 ("Colonial legal codes, drawn either directly from the Bible or from the theologically influenced English buggery statute of 1533, prescribed death for sodomy, and in several instances courts directed the execution of men found guilty of this act.").

<sup>133</sup> *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.").

<sup>134</sup> *Lawrence v. Texas*, 539 U.S. 558, 570 (2003) (also noting that "conceptions of right and acceptable behavior, and respect for the traditional family" also contributed to the condemnation of homosexuality).

<sup>135</sup> See, e.g., *Dean & Gill v. DC*, 1992 WL 685364 (D.C. Super. Ct.) (June 2, 1992). D.C. Superior Court Judge Shellie Bowers upheld the D.C. ban on same-sex marriage by reasoning that "We are a religious people whose institutions presuppose a Supreme Being" and that the D.C. Marriage Act is based on a "societal concept of marriage . . . that happens historically to be reflected in the Bible." *Id.* at \*7. Bowers reasoned that the Establishment Clause would not be violated merely because legislators viewed "same-sex marriages [as] morally repugnant (even if this belief were of religious origin)." *Id.* The Minnesota Supreme Court in 1971 invoked the Book of Genesis as justification for upholding the state's restriction of civil marriage to the "union of man and woman." *Baker v. Nelson*, 291 Minn. 310, 312 (1971). And in 1980, the U.S. District Court for the Central District of California upheld the Immigration and Naturalization Service's denial of a citizen's application to claim a same-sex partner as a marital spouse because, in part, contemporary civil law of marriage is rooted in ecclesiastical law, and "[c]anon law in both Judaism and Christianity could not possibly sanction any marriage between persons of the same sex because of the vehement condemnation in the scriptures of both religions of all homosexual relationships." *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980).

states.<sup>136</sup> The House Judiciary Committee justified DOMA by referring to “a collective moral judgment about human sexuality” that “entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”<sup>137</sup> Moreover, religiously inflected anti-gay rhetoric has long been used to promote anti-gay ballot initiatives throughout the United States.<sup>138</sup>

More recently, anti-gay political activists opposing marriage equality have appealed to religious opposition to homosexuality when advocating for legislative and constitutional bans on same-sex marriage.<sup>139</sup> Many faith communities continue to be receptive to such appeals. The Pope, who protested the civil recognition of same-sex marriage as an “attack” on humanity,<sup>140</sup> is not alone among faith leaders in condemning civil marriage equality for gay men and lesbians themselves in the strongest of terms.<sup>141</sup> One prominent religious leader in Washington, D.C., said of gay men and lesbians: “They should burn.”<sup>142</sup> Some faith communities have recently attracted attention for their endorsement of outright physical abuse of gay and transgender people, exemplified most starkly by the violent

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<sup>136</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

<sup>137</sup> House Judiciary Committee Report for the Defense of Marriage Act, *see* H. R. REP. NO. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905-47.

<sup>138</sup> *See* KAREN M. HARBECK, GAY AND LESBIAN EDUCATORS: PERSONAL FREEDOMS, PUBLIC CONSTRAINTS 39–81 (1997) (providing an excellent, detailed history of the use of religious anti-gay opprobrium to generate support for anti-gay referenda prohibiting, *inter alia*, the hiring of gay and lesbian schoolteachers).

<sup>139</sup> *See, e.g.*, MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 335 (2008) (discussing how “a common justification offered for policies denying gays and lesbians equality in marriage and other areas of public life is a religious reason, namely, the prohibition on homosexual acts in *Leviticus* (20:13, where males are forbidden to ‘lie with a man as with a woman’)”) [hereinafter LIBERTY OF CONSCIENCE]; *see also* WOLFSON, *supra* note 9, at 106 (noting that “many opponents of the freedom to marry claim their opposition rests on religious grounds”).

<sup>140</sup> Julie Bolcer, *Pope Calls Gay Marriage an “Attack,”* THE ADVOCATE, Jan. 11, 2010, <http://www.advocate.com/printArticle.aspx?id=105331>.

<sup>141</sup> *See, e.g.*, McCartney, *supra* note 99 (quoting Baptist deacon Ulysses Marshall, in attendance at a September 2009 rally against same-sex marriage in Washington, D.C., saying that civil same-sex marriage is “perpetrating a fraud against God” and, in reference to gay people, “[t]hey’re sinners. They should burn.”).

<sup>142</sup> *Id.*

“exorcism” performed in Connecticut to rid a purportedly effeminate sixteen-year-old boy of “homosexual demons,”<sup>143</sup> and by the involvement of American evangelical leaders in the promotion of an “anti-homosexuality” bill in Uganda that would impose draconian penalties, including execution, on homosexual conduct.<sup>144</sup>

Beyond serving as an issue of theological and doctrinal concern for religious organizations, opposition to same-sex marriage and gay rights generally has become a significant mobilizing tool for politically invested religious-right organizations that have largely failed to gain traction, or have altogether ceded victory, in other fronts of the culture wars.<sup>145</sup> Some observers credited then-President George W. Bush’s support of the Federal

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<sup>143</sup> Kristen Hamill, *Video of Church’s ‘Casting Out’ Gay ‘Demon’ In Teen Sparks Anger*, CNN, June 25, 2009, <http://www.cnn.com/2009/US/06/25/connecticut.gay.exorcism/index.html> (“The boy writhes uncontrollably on the floor, but the church members remain calm, if increasingly loud. They’re trying to drive a ‘demon’ out of him.”); see also Leonard Pitts, *‘Homosexual demon’ conjured up by ignorance*, ATLANTA J. CONST., July 2, 2009, at 14A (noting that such fundamentalist “exorcisms” of gay youth “happen all the time” and describing a portion of the exorcism, which was captured on tape and uploaded to YouTube.com, in this way: “A woman fans a towel at the writhing boy. At one point, the child, limp and unresisting as a sack of flour, is held upright and vomits into a bag. Someone on a piano plays gospel chords in the background”).

<sup>144</sup> See Editorial, *Uganda: Unjust and Infamous*, THE GUARDIAN, Dec. 5, 2009, available at <http://www.guardian.co.uk/commentisfree/2009/dec/05/gay-rights-uganda-wretched-law/print>. The Ugandan bill contains such illusory claims as, “same sex attraction is not an innate and immutable characteristic.” *Id.*; see also Jeffrey Gettleman, *After Americans Visit, Uganda Weighs Death for Gays*, N.Y. TIMES, Jan. 4, 2009, at A1, available at <http://www.nytimes.com/2010/01/04/world/africa/04uganda.html?pagewanted=print> (noting that human rights advocates attribute the proposed bill to the visit of three American evangelical Christian anti-gay activists, who gave presentations to “thousands of Ugandans” about how homosexuals can be converted to heterosexuality, “how gay men often sodomized teenaged boys,” and how the goal of gays is “to defeat the marriage-based society and replace it with a culture of sexual promiscuity”).

<sup>145</sup> See James Kirchick, *Gay Marriage Still Linchpin Issue for Evangelicals*, POLITICO, Jan. 15, 2009, <http://www.politico.com/news/stories/0109/17448.html> (positing that “[i]n a country that has rejected much of its agenda, the Christian right sees the battle over gay marriage as the last issue where it can play a politically significant role”). Mathew Staver, head of the Christian Right organization Liberty Counsel, characterized opposition to same-sex marriage as a powerful cause upon which to organize and build broad coalitions: “This is an issue that . . . transcends political ideology, religious affiliations, races and time and history. It brings people together who wouldn’t ordinarily be sitting at the same table together.” Lisa Leff, *Anti-Gay Marriage Plan to Go on the Road*, CONN. POST ONLINE, Nov. 7, 2008, at 1.

Marriage Amendment<sup>146</sup> and his campaign's collusion with Religious Right efforts in favor of ballot initiatives banning same-sex marriage in eleven states in 2004 with helping him win reelection despite his low popularity ratings.<sup>147</sup> Others have noted that the Religious Right has come to depend on vitriolic activism against same-sex marriage as a powerful fundraising ploy, proving more lucrative than traditional philanthropic and charitable appeals.<sup>148</sup>

Given this history of religiously rooted activism against gay people generally, and same-sex marriage specifically, it is not surprising that the LGBT movement leadership, with few exceptions, has stayed clear of religious institutions, communities of faith and religiously-inflected rhetoric when advocating for LGBT equality, opting instead for almost exclusively secular outreach and community engagement. With the exception of a few isolated and modestly-funded programs,<sup>149</sup> the LGBT movement has not actively sought to enlist these arguments and perspectives in its struggle for equality. The movement has opted for religious containment over engagement. A recent and vivid example of this religious circumscription is the "Dallas Principles," which is a list of eight "guiding principles" in the

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<sup>146</sup> See Ronald Brownstein, *Bush Urges Same-Sex Marriage Ban*, L.A. TIMES, Feb. 25, 2004, at A18 (noting that Bush's endorsement of Federal Marriage Amendment—which would have amended the U.S. Constitution to ban the civil recognition of same-sex marriage nationally—was a calculated effort to solidify the then-president's conservative base in advance of the election).

<sup>147</sup> See Dana Hull, *Gay-Marriage Opposition Seen as Factor Aiding Bush*, SAN JOSE MERCURY NEWS, Nov. 4, 2004, at 13A (noting that the backlash against same-sex marriages in Massachusetts and San Francisco "played a huge role in mobilizing evangelical Christians to the polls, particularly in the battleground state of Ohio"). Phil Burrell, who led the effort to place an anti-same-sex marriage initiative on the November 2004 ballot in Ohio, registered 54,500 new voters and mailed 2.5 million pieces of campaign literature to 17,000 churches, stated the ballot initiative work "delivered Ohio for President Bush." *Id.*; see also Stevenson Swanson, *Amendments to Ban Practice Pass Handily in 11 States*, CHI. TRIB., Nov. 3, 2004, at C8 (discussing Bush supporters' hope that anti-gay ballot initiatives in three battleground states of Michigan, Ohio and Oregon, would drive conservative voters, likely to vote for Bush, to the polls).

<sup>148</sup> See, e.g., David Sessions, *Fear Factor: When Evangelical Organizations Use Homophobia and Political Dishonesty to Get Members to Contribute*, PATROL MAG., Dec. 7, 2009, available at <http://www.patrolmag.com/times/1895/fear-factor>.

<sup>149</sup> An especially talented and promising LGBT rights activist engaged in religious activism is Rev. Harry Knox, who was appointed by the Human Rights Campaign as its first director of a new Religion and Faith Program in 2005. David Yonke, *Another Voice on Religion and Gays*, THE BLADE, Jan. 7, 2006 ("Harry Knox wants to show the world there's another side to the debates over religion and sexuality.").

movement's work in support of full LGBT equality. The list was devised in May 2009 by twenty-four prominent LGBT movement leaders from across the country at a conclave in Dallas, TX, prompted in part by the Election Day 2008 setbacks.<sup>150</sup> The group's fourth principle, which is the only principle addressing communities of faith, is: "Religious beliefs are not a basis upon which to affirm or deny civil rights."<sup>151</sup>

This isolationist resistance towards religion hurts more than it helps LGBT causes, especially in broad-scale campaigns—such as the recent ballot initiative fights—where it is critically important to appeal to, and connect with, popular majority sentiments. It fails to come to terms with the reality that the United States, unique among the developed world, remains a nation where the putative secularity of government coexists with, and in some ways is legitimated by, a culture and society that still celebrates religious practice and pluralism. The nation christened by John Winthrop as the "city on a hill" in his sermon on the *Arbella* shortly before it landed in what would become Massachusetts,<sup>152</sup> became what, two centuries later, Alexis de Tocqueville observed was a nation where "politics and religion were in accord" and where "freedom sees in religion the companion of its struggles and its triumphs, the cradle of its infancy, the divine source of its rights."<sup>153</sup> Another two centuries later, not much has changed in what British commentator G.K. Chesterton called "a nation with the soul of a church."<sup>154</sup>

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<sup>150</sup> See Cynthia Laird, *Dallas Group's Push for Equality*, BAY AREA REP., Sept. 10, 2009, available at <http://www.ebar.com/news/article.php?sec=news&article=4180>.

<sup>151</sup> The Dallas Principles, [http://www.thedallasprinciples.org/The\\_Dallas\\_Principles/Home.html](http://www.thedallasprinciples.org/The_Dallas_Principles/Home.html) (last visited June 11, 2010).

<sup>152</sup> GARRY WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS 207–08 (1990). Winthrop, who was to become the governor of the Massachusetts Bay Colony, said, "We shall find that the God of Israel is among us when ten of us shall be able to resist a thousand of our enemies. . . . For we must consider that we shall be as a city upon a hill, the eyes of all people are upon us." *Id.*

<sup>153</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 43–44, 275 (Harvey C. Masfield & Delba Winthrop eds. & trans., University of Chicago Press 2000). Tocqueville observed that "Americans so completely confused Christianity and freedom in their minds that it is almost impossible to have them conceive of the one without the other. . . ." *Id.* at 280–81; see also Richard Parker, *Progressive Politics and Visions and, Uh, Well . . . God, in WHAT'S GOD GOT TO DO WITH THE AMERICAN EXPERIMENT?* 56–58 (E.J. Dionne Jr. & John J. DiIulio, Jr. eds., 2000) (discussing the observations of Winthrop, Karl Marx and Tocqueville on America's religiosity and religious identity).

<sup>154</sup> KENNETH D. WALD, RELIGION AND POLITICS IN THE UNITED STATES 55 (2003).

In the United States, religion remains a potent and central source of cultural and political currency.<sup>155</sup> Whereas with modernization came secularity in most of the industrialized West, the United States experienced a contrary trend. Even as the nation entered the twenty-first century, it continued to cultivate a proliferation of religious expression, the growth of new sects and a continuing centrality of religion in the nation's political life.<sup>156</sup> An April 2009 *Newsweek* poll, in fact, concluded that "the U.S. remains a deeply religious land," with Americans' rate of religiosity and attitudes concerning faith changing very little in the last two decades.<sup>157</sup>

The LGBT movement's hands-off approach to religion also fails to acknowledge that faith communities in the United States have had a powerful voice and played catalytic roles in other civil rights movements, including movements comprised of people whose oppression—like that of gay men and lesbians—was justified and exacerbated by appeals to religious dictates. The Atlantic slave trade was defended throughout its

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<sup>155</sup> *Id.* at 1–22 (noting how the United States, unlike other industrialized nations, did not lose its religious vitality as it became more modernized). Wald also notes that "[b]y all the normal yardsticks of religious commitment—the strength of religious institutions, practices, and belief—the United States has resisted the pressures toward secularity. Institutionally, churches are probably the most vital voluntary organization in a country that puts a premium on 'joining up.'" *Id.* at 8; see also JEFFREY F. MOYER, MYTHS IN STONE: RELIGIOUS DIMENSIONS OF WASHINGTON, D.C. 8 (2001) (documenting how religious symbolism permeates the nation's capital itself, making "Washington . . . a fusion of the secular and sacred, a uniquely modern blend of politics and religion.").

<sup>156</sup> David Brooks, *How Niebuhr Helps Us Kick the Secularist Habit: A Six-Step Program*, in ONE ELECTORATE UNDER GOD?: A DIALOGUE ON RELIGION & AMERICAN POLITICS 67 (E.J. Dionne Jr., Jean B. Elshtain & Kayla M. Drozdz eds., 2004). Dispelling the theory that secularization goes hand-in-hand with modernization, political analyst David Brooks writes: "[t]he human race does not necessarily get less religious as it grows richer and better educated. We are living through one of the great periods of scientific progress and creation of wealth. At the same time, we are in the midst of a religious boom." *Id.*; see also Gary Orfield, *Introduction: Religion and Racial Justice*, in RELIGION, RACE, AND JUSTICE IN A CHANGING AMERICA 9–10 (Gary Orfield & Holly J. Lebowitz eds., 1999) (discussing numerous studies showing how "religion retains a strong hold in American life" and "retains a powerful shaping influence and is an important source of legitimacy for views about society and justice").

<sup>157</sup> Daniel Stone, *One Nation Under God?*, NEWSWEEK, Apr. 7, 2009, available at <http://www.newsweek.com/id/192915> (finding that belief in a "spiritual being" remains at approximately 90%, changing little over the last two decades, with 78% responding that prayer was "an important part of daily life"—a 2% increase from 1987—and 87% responding that religion was "very important" or "fairly important" to them).



history by references to biblical and Koranic verses condoning slavery.<sup>158</sup> The nation's largest Protestant denomination—the Southern Baptist Convention—was founded in 1845 to preserve the religious standing of slaveholding Baptists in the face of growing opposition to slavery on the part of Baptist church leaders based in northern states.<sup>159</sup> In more modern times, a Virginia judge in 1958 enforced the state's miscegenation statute against the Lovings—a statute later invalidated by the Supreme Court in the landmark *Loving v. Virginia*—by reasoning that God “did not intend for the races to mix.”<sup>160</sup>

Despite this sordid history of the use of religion as a powerful tool for the oppression of minorities, it was the faith community and religious appeals that fueled the African American civil rights movement, the enactment of the Civil Rights Act of 1964 and other major social justice victories.<sup>161</sup> In fact, Bayard Rustin, an African American gay man, helped

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<sup>158</sup> See HUGH THOMAS, *THE SLAVE TRADE: THE HISTORY OF THE ATLANTIC SLAVE TRADE 1440–1870* 28–30, 36, 451, 798 (1997); KEVIN PHILLIPS, *AMERICAN THEOCRACY* 142 (2006) (noting that “[w]hen Yankee abolitionists escalated their attacks on slavery, southern clergymen marshaled their own scriptural defense—taken from Exodus 20–21, Matthew 10:24, Ephesians 6:5–6, and others—with passages from the Bible that acknowledged or even supported slaveholding”); PETER W. WILLIAMS, *AMERICA’S RELIGIONS: TRADITIONS AND CULTURES* 268–69 (1990) (discussing how in the 1840s, in light of rising predominantly Northern religious opposition to slavery, Southern evangelical “[c]lergy became active in defending slavery on biblical grounds—for instance, by reading God’s curse on Noah’s son Ham and his descendants as involving the black race (Genesis 9:25)”).

<sup>159</sup> See JON BUTLER, GRANT WACKER & RANDALL BALMER, *RELIGION IN AMERICAN LIFE: A SHORT HISTORY* 181 (2003) (discussing how the Southern Baptist Convention was founded “primarily to protect slaveholders’ rights in the church”).

<sup>160</sup> The Caroline County trial court judge suspended the one-year sentence against the Lovings for violating the state’s interracial marriage ban on the condition that they leave and not return to Virginia for twenty-five years, reasoning:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

*Loving v. Virginia*, 388 U.S. 1, 3 (1967).

<sup>161</sup> Vice President Hubert Humphrey declared that the Civil Rights Act of 1964 “could never have become law” without the activism of the Southern Christian Leadership Conference and other religious organizations and individuals. CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* 5 (2002) (citing numerous examples of how “[r]eligious citizens played a central role in the civil rights movement”); see also Martha Minow, *Governing Religion, in ONE ELECTORATE UNDER GOD?* 144, 147 (E.J. Dionne Jr., Jean B. Elshtain & Kayla M. Drozdz eds., 2004) (noting that the “civil rights movement depended upon the ideas and social networks of the African American churches and on the congregations of the many religions that joined the cause” and that Dorothy Day’s Catholic Worker activism sparked the 1960s War on Poverty); Robin W. Lovin, *Religion, Civil Rights, and Civil Community, in RELIGION, RACE, AND JUSTICE IN A CHANGING AMERICA* 67 (Gary Orfield & Holly J. Lebowitz eds., 1999) (describing how the “civil rights movement of the early 1960s marked a high point for religious leadership in the transformation of American society,” and that “[b]eginning in the period of racial unrest that followed World War I, Protestant, Jewish, and Roman Catholic religious groups worked together to improve race relations, end segregation, and erase the results of past discrimination”).

Rev. Martin Luther King, Jr., and other civil rights leaders catalyze and popularize the African American civil rights movement by harnessing the organizing power and idealism of evangelical Christianity.<sup>162</sup> Writing generally about religion's role in governance, Professor Martha Minow argues that in the United States in particular, "religiously inflected arguments and perspectives" have brought "critical and prophetic insight and energy to politics and public affairs."<sup>163</sup>

The gay movement's isolationist approach to religion also concedes too much. Despite the anti-gay messages communicated by some of the loudest religious voices, the reality is that faith and anti-gay animus are not coextensive. Communities of faith, and religions themselves, are not immune to change. Dominant religious traditions and denominations in the United States have in common significant and sometimes rapid change in doctrinal orientation, often reflecting the evolution of the nation's cultural and social milieu.<sup>164</sup> A religious sect's apparent intransigence on an issue in

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<sup>162</sup> See DAVID L. CHAPPELL, A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW 54–59 (2004). Chappell documents how "[t]he black movement's nonviolent soldiers were driven not by modern liberal faith in human reason, but by older, seemingly more durable prejudices and superstitions that were rooted in . . . a prophetic tradition that runs from David and Isaiah in the Old Testament through Augustine and Martin Luther to Reinhold Niebuhr in the twentieth century." *Id.* at 3. He concludes that "black southern activists got strength from old-time religion, and while supremacists failed, at the same moment, to muster the cultural strength that conservatives traditionally get from religion." *Id.* at 8.

<sup>163</sup> Minow, *supra* note 161, at 147. Political philosopher Michael Walzer agrees, positing that religion, *inter alia*, "brings a sense of radical hope [to politics], the belief that large-scale transformations and reversals are possible." Michael Walzer, *Drawing the Line: Religion and Politics*, in THINKING POLITICALLY: ESSAYS IN POLITICAL THEORY 147, 154 (2007) (noting that religion "brings a discipline for the long march: this-worldly asceticism, methodical work for the cause, determination, endurance, and obedience.").

<sup>164</sup> See LIBERTY OF CONSCIENCE, *supra* note 139, at 337. Professor Nussbaum argues that modern Judeo-Christian religious sects "do not read the Bible ahistorically" and "ignore some prohibitions . . . as the legacy of another era, and they consider only a part of what they read as lasting moral insight applicable to their own time," using the evolving treatment of women as congregants as well as worship leaders as an example. *Id.* On the other hand, the change in a religion's doctrine can evolve retrogressively, as evidenced by the fact that the presently gay-hostile Roman Catholic Church had not always been opposed to homosexuality and actually embraced and celebrated homosexual relationships in ancient times. See generally JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY (1980). Notably, today the Catholic laity is known to be significantly more supportive of gay rights, and civil same-sex marriage recognition, than the church's leadership. See, e.g., Press Release, Rutgers Eagleton Poll, New Jersey Catholics Support Gay Marriage, Protestants Oppose, (Dec. 9, 2009), <http://news.rutgers.edu/medrel/news-releases/2009/12/new-jersey-catholics-20091209>.

one era can give way to a different, equally passionate view with the passage of time and the acquisition of experience and a better understanding of the people and issues involved.<sup>165</sup> At present, as Professor Martha Nussbaum correctly observes, “[t]here is no single religious position on these [same-sex] unions in America today” and stances on marriage equality in institutional religions run the gamut from strongly supportive to strongly opposed.<sup>166</sup> Rabbi David Saperstein, Director and Counsel of the Religious Action Center of Reform Judaism, posits that “[f]ifty years from now, most religious communities will look back with astonishment on the controversy over same sex relations the way we do today on yesterday’s bans on miscegenation.”<sup>167</sup> Even where a sect’s anti-gay doctrines and

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<sup>165</sup> The celebrated late historian John Boswell reminds us, for example, that “it is now as much an article of faith in most European countries that Jews should not be oppressed because of their religious beliefs as it was in the fourteenth century that they should be. . . .” BOSWELL, *supra* note 164, at 6.

<sup>166</sup> MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW 131 (2010). Professor Nussbaum provides a helpful and telling accounting of contemporary religious positions on marriage equality:

Some denominations—Unitarian Universalism and Reform and Conservative Judaism—have endorsed marriage for same-sex couples. Others, such as the Protestant Episcopal Church of the United States, have taken a friendly position toward these unions. Presbyterians, Lutherans, Methodists are divided on the issue at present, and American Roman Catholics, both lay and clergy are divided, although the church hierarchy is strongly opposed. Still other religions (Southern Baptists, the Church of Jesus Christ of Latter-Day Saints) seem strongly opposed as a body to the recognition of such unions.

*Id.*

<sup>167</sup> Posting of David Saperstein to On Faith Blog, [http://newsweek.washingtonpost.com/onfaith/panelists/david\\_saperstein/2007/08/](http://newsweek.washingtonpost.com/onfaith/panelists/david_saperstein/2007/08/) (Aug. 24, 2007, 9:16 EST) (“We have reached a point in American society where the obvious is clear: neither my marriage nor anyone else’s is threatened by two loving individuals of the same sex. And it is increasingly difficult for religious leaders to envision that the loving God of the Universe does not welcome such faithful relationships.”). Bishop John Shelby Spong, the former Episcopal Bishop of Newark, is even more optimistic about the pace of change in the faith communities’ attitudes towards same-sex marriage: “[i]n 25 years we will be embarrassed that we had to jump through these hoops to bring justice to our world for gay and lesbian couples.” Posting of John Shelby Spong to On Faith Blog, [http://newsweek.washingtonpost.com/onfaith/panelists/john\\_shelby\\_spong/2009/06/](http://newsweek.washingtonpost.com/onfaith/panelists/john_shelby_spong/2009/06/) (Jun. 24, 2009, 10:34 EST).

intolerant leaders appear immovable, the views of the faithful may be fluid or even, in some cases, in diametrical opposition to that of its hierarchy. For example, whereas the Catholic Church's patriarchy is staunchly opposed to marriage equality, the Catholic faithful is much more amenable. In fact, of the eight states where more than 50% of the public supports marriage equality, six are states with the highest proportion of Catholics in the nation.<sup>168</sup> Notably, in Maine, a large number of prominent lay Catholics joined efforts to place newspaper advertisements and engage in other highly visible efforts to support civil marriage equality and oppose Maine Issue 1.<sup>169</sup>

The avoidance of religious engagement by the LGBT movement has not allowed us to catalyze this potential rapprochement with many religious authorities. As illustrated by the recent ballot initiative defeats, it also has hampered the movement's ability to counter the misinformation of the anti-gay forces who themselves did a much better job of reaching out to faith communities. Notably, a Center for American Values 2006 survey showed that support for marriage equality increased by 12% when likely voters were assured that no religious institution would be required to perform such marriages.<sup>170</sup> The gay rights movement's lack of meaningful religious outreach made it difficult to make this distinction clear in the recent ballot initiative battles and to counter the misinformation from the anti-same-sex marriage forces—often and powerfully proliferated by

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<sup>168</sup> Cathy Lynn Grossman, *States with More Catholics More Favor Gay Rights*, USATODAY, July 29, 2009, available at <http://content.usatoday.com/communities/religion/post/2009/07/68495644/1> (discussing the findings of Mark Silk, director of the Greenberg Center for the Study of Religion in Public Life at Trinity College).

<sup>169</sup> See Colbert, *supra* note 92 (noting that “more than 140 of the state’s high-profile business, legal, and civil leaders have placed newspaper ads, giving voice to a Catholic case for same-sex civil marriage” and that “more than 500 Catholics signed a declaration of support for same-sex marriage”).

<sup>170</sup> See ROBERT P. JONES, PH.D. & DAN COX, CTR.FOR AM. VALUES IN PUB. LIFE, AMERICAN VALUES SURVEY INITIAL REPORT 23 (2006), available at <http://media.pfaw.org/pdf/cav/AVSReport.pdf>.

churches themselves—alleging that a same-sex marriage ban was necessary to preserve the right of churches not to marry gay couples.

Religious disengagement also has kept the movement from amplifying the voices of notable religious leaders who speak forcefully in favor of full equality and take to task other religious leaders who work against it. For example, Rev. Al Sharpton—who as a supporter of marriage equality complained of not having been enlisted by the California “No on 8” campaign—said at Atlanta’s Tabernacle Baptist Church on January 11, 2009:

It amazes me when I looked at California and saw churches that had nothing to say about police brutality, nothing to say when a young black boy was shot while he was wearing police handcuffs, nothing to say when they overturned affirmative action, nothing to say when people were being [relegated] into poverty, yet they were organizing and mobilizing to stop consenting adults from choosing their life partners. . . . There is something immoral and sick about using all of that power to not end brutality and poverty, but to break into people’s bedrooms and claim that God sent you.<sup>171</sup>

Pastor Dennis Meredith, who founded the pro-gay Alliance of Affirming Faith-Based Organizations in Atlanta and hosted Rev. Sharpton, rightly said that “[s]omewhere there has to be a religious voice to counter the other religious voices that preach intolerance.”<sup>172</sup>

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<sup>171</sup> Nick Cargo, *Sharpton: Church uses money and power to prosecute gays but ignores poverty*, PAGEONEQ, Jan. 13, 2009, <http://pageoneq.com/news/2009/sharpton0113.html>. Michael Crawford, *Rev. Al Sharpton on Marriage, Mormons and Prop. 8*, HUFFINGTON POST, Jan. 15, 2009, at 1, available at [http://www.huffingtonpost.com/michael-crawford/rev-al-sharpton-on-marria\\_b\\_158190.html](http://www.huffingtonpost.com/michael-crawford/rev-al-sharpton-on-marria_b_158190.html). Sharpton also spoke of the hypocrisy of some anti-gay religious leaders: “I am tired . . . of seeing ministers who will preach homophobia by day, and then after they’re preaching, when the lights are off they go cruising for trade.” *Id.* More recently, Rev. Desmond Tutu spoke out forcefully against brutally anti-gay legislation proposed in African nations including Uganda, Rwanda and Burundi. He wrote: “[g]ay, lesbian, bisexual and transgendered people are part of so many families. They are part of the human family. They are part of God’s family. And of course they are part of the African family. [ . . . ] No one chooses to be gay. Sexual orientation, like skin color, is another feature of our diversity as a human family.” Desmond Tutu, *Love all God’s Children, Straight or Gay*, WASH. POST, Mar. 12, 2010, at A19.

<sup>172</sup> Matt Schafer, *Open and Affirming*, S. VOICE, Jan. 9, 2009, available at <http://www.sovo.com/2009/1-9/locallife/feature/9655.com>.

Religiously-inflected arguments in favor of LGBT equality, of course, should not take the place of formal equality claims. In its April 2009 decision recognizing the right of same-sex couples to marry, the Iowa Supreme Court got it right when it concluded that “civil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals.”<sup>173</sup> Yet although not legally dispositive, these religiously-rooted appeals are of central importance in a persistently religious nation where gay equality, in most states, is ultimately adjudicated at the ballot box instead of the courtroom. In light of how politics and religion remain yoked in American public life, religiously-rooted arguments in favor of full LGBT equality can carry great currency in the extrajudicial public debates. This is especially true in discussions surrounding the civil marriage right, which necessarily carries with it society’s endorsement and recognition of the union as an important social institution.

The LGBT movement’s reticence to deploy these arguments also has hampered it strategically and kept it from reflecting the full diversity of its own community. Rather than speaking as a uniformly anti-gay monolith, the faith community is in the process of altering its approach to issues such as homosexuality, with mainstream faiths increasingly recognizing and advocating in favor of full equality—including in both the marriage *right* and *rite*—for gay people.<sup>174</sup> The attempts of certain religious leaders to conflate gayness with a rejection of faith<sup>175</sup> are belied by the many LGBT

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<sup>173</sup> Varnum v. Brien, 763 N.W.2d 862, 905 (Iowa 2009).

<sup>174</sup> See NUSSBAUM, *supra* note 139, at 337. Professor Nussbaum notes that “[d]ifferences of opinion concerning the morality of homosexual conduct and its implications for the ordination of clergy and the institution of marriage are intense within more or less every Judeo-Christian denomination” and that “one can see clearly . . . that there is no single Judeo-Christian position on such questions.” *Id.* She points out that Reconstructionist and Reform Jews “permit and perform same-sex marriages,” that Unitarian/Universalists do the same and “also lobbied against the proposed [federal] constitutional amendment.” *Id.*; see also, WOLFSON, *supra* note 9, at 106–07. Wolfson, the executive director of Freedom to Marry and a long time marriage equality proponent, notes that “many opponents of the freedom to marry claim their opposition rests on religious grounds” but acknowledges that “many people might not realize that religions actually differ on this issue.” *Id.* (noting that “hundreds of religious leaders in Massachusetts, from Baptists to Buddhists and from Episcopalians to Jews, have signed that state’s ‘Declaration of Religious Support for the Freedom of Same-Gender Couples to Marry’”); Mary Fuchs, *Preaching Equality: Church’s Mission: Providing an Inclusive Community*, STAR LEDGER, Nov. 22, 2009, at 21 (profiling Unity Fellowship Church in New Brunswick, NJ, whose “political mission . . . has become the legalization of same-sex marriage in New Jersey”).

<sup>175</sup> Fundamentalist Christian minister J.D. Loveland defended his opposition to a gay-friendly “pride night” at a San Diego Padres baseball game by exclaiming, “[w]e’re not anti-gay. We’re anti-anti-Christian.” Scott LaFee, *Boycott of Gay Pride Event at Padres Game Fizzles*, SAN DIEGO UNION-TRIB., July 9, 2007, at B-1.

Americans who, like the majority of straight Americans, regard faith and religious tradition as centrally important in their lives. Keeping the faith community and religion at arms' length has kept the movement from marshalling to their fullest potential powerful arguments, legal and otherwise, rooted in religious morality and the free exercise right *in favor of* marriage equality as both a legal and moral imperative.<sup>176</sup> Perhaps even more detrimentally, it has helped perpetuate the false meme that powerful religious arguments exist only on the anti-gay side of the debate. As the Massachusetts Supreme Judicial Court rightly observed in *Hillary Goodridge v. Department of Public Health*, religious opinion on the question of civil marriage equality is divided between the two camps, with numerous faith communities across the United States advocating in favor of gay rights and civil same-sex marriage specifically.<sup>177</sup>

The LGBT rights movement is not alone among progressive movements in preferring to avoid religious engagement. Professor Alan Wolfe theorizes that this religion-avoiding disposition is endemic to contemporary liberalism generally and is rooted in John Rawls's assertion that modern pluralistic society must marginalize religion and the faithful in

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<sup>176</sup> See, e.g., Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005) (arguing that "the gay rights movement may have missed a critical opportunity" to "make a positive moral case for gay sex and gay couples" and to "argue that 'gay is good'"); Bishop John Shelby Spong, *Blessing Gay and Lesbian Commitments*, in SAME-SEX MARRIAGE: PRO AND CON—A READER 67, 69 (Andrew Sullivan ed., 1997) ("If the conveying of blessing and official approval is the church's to give, then surely that can be given to any relationship of love, fidelity, commitment, and trust that issues in life for the two people involved."); see also ESKRIDGE, *supra* note 9, at 193–217 (Appendix) (excerpting numerous letters from faith leaders in support of marriage equality in D.C. sent to Hon. Shellie Bowers, the trial judge in the landmark 1991 Dean and Gill v. D.C. case).

<sup>177</sup> *Hillary Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 312 (2003). The Court reasoned:

Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us.

*Id.*

order to ensure rationality in public deliberation.<sup>178</sup> Wolfe posits that this is an excessively reductive view that unfairly and inaccurately paints all adherents to religious belief as irrational, illiberal, and incapable of engaging in productive discussions and collaborations towards political equality. It is, in his words, “myopic for liberals to treat religious believers as if they are the enemy of everything that liberals ought to uphold.”<sup>179</sup> Rather than preserving rationality in public debate, we distort public discussion of LGBT rights by marginalizing arguments and voices—*pro* and *con*—that are rooted in religious and moral convictions.<sup>180</sup>

On the other hand, the need for the LGBT rights and other progressive movements to do more to engage communities of faith does not mean that religiously rooted arguments get a free pass from the scrutiny of public deliberation. In engaging with religious arguments and faith leaders, the LGBT movement not only should listen and learn, but also inform and teach. In a political sphere where religion has assumed a more militant, prominent and dispositive role, the customary, polite forbearance from scrutiny of religiously-rooted arguments is no longer tenable.<sup>181</sup> I agree with conservative political analyst David Brooks’s exhortation that “recovering secularists” must “acknowledge that we have been too easy on religion” and that, instead of “avert[ing] one’s eyes” from the injustices advocated in the name of religion, society “has to . . . separate right from wrong.”

Brooks’s exhortation is especially pertinent to the gay rights movement’s kid-glove handling of the religious institutional activists who played such central roles in mounting, funding and advocating in favor of the anti-gay ballot initiative efforts. The large institutional religious forces supporting the anti-gay referenda in 2008 and 2009 were spared of all but the most superficial scrutiny. For example, marriage equality proponents

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<sup>178</sup> ALAN WOLFE, *THE FUTURE OF LIBERALISM* 180–81 (2009).

<sup>179</sup> *Id.* at 184–85. “Liberal society . . . benefits directly from the presence of citizens whose religious beliefs encourage them to reflect on the question of human purpose; these are exactly the kind of reflective, imaginative, and serious people that a liberal society craves.” *Id.*

<sup>180</sup> Professor Michael J. Sandel argues convincingly that “[a] more robust public engagement with our moral disagreements could provide a stronger, not a weaker, basis for mutual respect. Rather than avoid the moral and religious convictions that our fellow citizens bring to public life, we should attend to them more directly—sometimes by challenging and contesting them, sometimes by listening to and learning from them.” MICHAEL J. SANDEL, *JUSTICE* 268 (2009).

<sup>181</sup> See Brooks, *supra* note 156, at 70 (“Because we [incorrectly] assumed that religion was playing a diminishing role in public affairs, we patronized it.”).



avoided making an issue out of the compromised authority and questionable credibility of the Mormon and Catholic Churches in matters of civil rights and the protection of children. Both institutions provided a significant amount of funds and logistical support to the anti-gay campaigns. The Mormon Church in particular bankrolled much of the misleading “Yes on 8” advertising and field organizing that was directed at African American faith communities.<sup>182</sup> Proposition 8 opponents, however, opted against pointing out that as recently as 1978, the Mormon Church banned African Americans from its lay priesthood and church leadership and barred African Americans from entering temple marriages, on the belief that Blacks were cursed by God.<sup>183</sup> Similarly, little was made of the dubious standing of the Catholic Church in promoting the California and Maine anti-gay referenda and endorsing and proliferating propaganda aimed at instilling in voters a fear of the predatory indoctrination of schoolchildren by “homosexual activists.” This, when the Church, in the words of one Catholic diocese spokesperson and priest, “has lost all moral authority” in light of the rampant and long-concealed child sexual abuse among its priestly ranks.<sup>184</sup> As openly gay entrepreneur and philanthropist Mitchell

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<sup>182</sup> See, e.g., *supra* notes 51–52.

<sup>183</sup> See RICHARD ABANES, ONE NATION UNDER GODS: A HISTORY OF THE MORMON CHURCH 355–73, 420–22 (2003). Abanes alleges that “Mormonism and racism have for many years been synonymous terms to persons well acquainted with Latter-day Saint beliefs.” *Id.* at 356. Abanes contends that until 1978, Mormon Church leadership officially taught that “Blacks could not hold the priesthood because they were an inferior race ‘cursed with a black skin.’” *Id.* at 359 (quoting Joseph Fielding Smith, president of the Mormon Church between 1970 and 1972). Accordingly, Blacks were denied the priesthood, were viewed as being incapable of “reproduc[ing] families in eternity like white Mormons,” and “were effectively barred from assuming any position in the Latter-day Saint hierarchy” until 1978. *Id.*

<sup>184</sup> George Jackson, “Church Has Lost All Moral Authority,” IRISH TIMES, Dec. 6, 2009, available at <http://www.irishtimes.com/newspaper/ireland/2009/1128/1224259619955.html> (quoting Derry (Ireland) Diocese spokesperson, Fr. Michael Canny, who added: “[t]he church at this state has no credibility, no standing and no moral authority”). Between January 2002 and February 2002 alone, 700 Catholic priests and deacons in the United States were removed from their posts in light of accusations of child sexual abuse. See Press Release, U.S. Conf. of Catholic Bishops, 700 Priests Removed Since January 2002 (Feb. 27, 2004), available at <http://www.usccb.org/comm/archives/2004/04-040.shtml>. See generally MARY GAIL FRAWLEY-O’DEA, PERVERSION OF POWER: SEXUAL ABUSE IN THE CATHOLIC CHURCH (2007) (noting that since 1950, more than 4300 Catholic priests in the United States have been the subject of child sexual abuse claims); Daniel Burke, *U.S. Bishops Assert Their Authority*, WASH. POST, Nov. 21, 2009, at B2 (discussing the U.S. Conference of Catholic Bishops’ activism against civil marriage equality, *inter alia*, and paraphrasing Peter Isely, board of directors member of the Survivors Network of those Abused by Priests (SNAP), as “accus[ing] the bishops of focusing on politics while largely ignoring lingering problems from the abuse scandal.”).

Gold memorably put it to me, “the problem in Maine was that the people who ran the pro-same-sex marriage campaign kept insisting that we didn’t want to ‘pick a fight’ with the churches, but in reality the fight had already been picked—by them.”<sup>185</sup>

Evidence of the promise of what engagement with religious opponents to marriage equality can yield can be found in the pathbreaking example of the work of Equality Utah, the statewide LGBT civil rights organization, in the aftermath of Proposition 8. As commentator Andrew Sullivan stated, the organization decided to “call the LDS bluff” when the Mormon Church authorities, in advocating for the passage of Proposition 8, claimed to be motivated by their interest in preserving “traditional marriage,” and not by a desire to obstruct other civil protections for gay men and lesbians. In the aftermath of Proposition 8’s passage, Equality Utah approached the Mormon Church with a request that it officially endorse an unprecedented antidiscrimination ordinance in Salt Lake City, protecting gay men and lesbians from employment and housing discrimination.<sup>186</sup> The Church agreed to the endorsement, and the ordinance passed with strong legislative and public support as a result.<sup>187</sup>

In sum, the religious circumvention approach adopted by much of the LGBT rights movement, although understandable given the religious rooting of much anti-gay opprobrium, has not served it well. The movement must do more to engage religious leaders and communities, enlisting the ones that already support our equality and introducing ourselves to and starting genuine dialogue with those who do not. We should do this work not only because communities of faith are the source of much anti-gay animus, but also because the LGBT rights movement—as with most civil rights movements—has powerful and influential supporters within the ranks

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<sup>185</sup> E-mail from Mitchell Gold to author (Jan. 9, 2009) (on file with author).

<sup>186</sup> Andrew Sullivan, *The Mormon Move*, ATLANTIC, Nov. 12, 2009, [http://andrewsullivan.theatlantic.com/the\\_daily\\_dish/2009/11/the-mormon-move.html](http://andrewsullivan.theatlantic.com/the_daily_dish/2009/11/the-mormon-move.html).

<sup>187</sup> *Id.* Sullivan lauded the Church’s decision as “an immensely important and positive step and places the Mormon [C]hurch in a far more positive and pro-gay position than any other religious group broadly allied with the Christianist right.” *Id.* He rightly concedes, however, that the Church’s public statement justifying its endorsement of the ordinance was “lamentably inflammatory” in its rhetoric against marriage equality: “[t]he church supports these ordinances because they are fair and reasonable and do not do violence to the institution of marriage.” *Id.*

of the faithful, and can engage that support to catalyze progress towards marriage and full LGBT equality.

### **C. Needing to Come Out As LGBT People of Color**

Another key lesson to be gleaned from the recent ballot initiative losses is that those of us who are gay or lesbian as well as African American, Latino/a and members of other racial and ethnic minorities must accelerate our rates of coming out. We must more readily introduce ourselves to our respective communities as openly gay individuals deserving of full equality. Although, as discussed above, the LGBT movement leadership must do more to engage communities of color, those efforts will be of limited effectiveness unless the gay and transgender members of those communities challenge homophobia and transphobia from within our extended families, houses of worship and neighborhoods, simply by being honest and open about ourselves and our families as we go about our everyday lives.

The size of the racial and ethnic minority LGBT community, like the overall minority population in the United States, has grown in recent years. Contrary to the rich, white and male archetype propounded by LGBT rights opponents, the LGBT community is increasingly brown and black, and represents all socioeconomic classes. The 2005–06 U.S. Census Bureau's community survey figures show that approximately one-quarter of individuals in same-sex California couples are Latino/a.<sup>188</sup> A more recent study finds that one-third of these same-sex couples have at least one Latino/a partner, and that 70% of those couples are raising children with significantly lower family incomes than straight counterparts.<sup>189</sup> Among all American same-sex couples, approximately 14% are African American, with lower median incomes but a higher likelihood than white counterparts to raise children.<sup>190</sup> It is these individuals, in fact, that have the most to gain from civil relationship recognition and the many protections that it affords, yet their voices are rarely heard and their families are scarcely seen in the same-sex marriage debate.

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<sup>188</sup> CHRISTOPHER RAMOS & GARY J. GATES, WILLIAMS INSTITUTE, CENSUS SNAPSHOT: CALIFORNIA'S LATINO/LATINA LGB POPULATION (2008), *available at* <http://www.law.ucla.edu/williamsinstitute/publications/CASnapshotLatino.pdf>.

<sup>189</sup> WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 217–218 (2006).

<sup>190</sup> *Id.* at 217.

As members of racial and ethnic minorities, LGBT persons of color typically are born into families that share our minority identity and are thus ready to cultivate in us the skills and defenses required to cope with the challenges posed by our mutual marginality. By contrast, those of us who also are gay or transgender are born into alien and sometimes dangerous territory.<sup>191</sup> Although coming out usually is not an option for racial or ethnic minorities for whom race and ethnicity is not concealable, it typically is a choice for those born gay or transgender, and many have chosen to stay silent.<sup>192</sup> Nevertheless, coming out remains the most powerful act that a lesbian or gay person can undertake to influence the perspectives, and ultimately the votes, of those around them on issues relating to LGBT equality.

A 2009 USA Today/Gallup poll found that respondents who personally know someone lesbian or gay (as a friend, relative or coworker) were significantly more likely to support equal rights—including the freedom to marry—for lesbians and gay men.<sup>193</sup> By contrast, those who replied that they did not know someone gay or lesbian were, by a large margin, opposed to marriage equality.<sup>194</sup> Gallup concluded that “the data do make a strong case that knowing someone who is gay or lesbian fosters more accepting attitudes on many of the issues surrounding gay and lesbian relations today.”<sup>195</sup> Other studies reach similar conclusions.<sup>196</sup> The family

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<sup>191</sup> See M. Rosario, E. Schrimshaw, E. Hunter, & L. Braun, *Sexual Identity Development Among Lesbian, Gay, and Bisexual Youths: Consistency and Change Over Time*, 43 J. SEX RES. 46, 46 (2006). The authors observe that “[t]he development of lesbian, gay, or bisexual (LGB) sexual identity is a complex and often difficult process. Unlike members of other minority groups (e.g., ethnic and racial minorities), most LGB individuals are not raised in a community of similar others from whom they learn about their identity and who reinforce and support that identity. Rather, LGBT individuals are often raised in communities that are ignorant of or openly hostile toward homosexuality.”

<sup>192</sup> For an excellent analysis of the commonalities in passing and closeting across race and sexual orientation, see Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873 (2006).

<sup>193</sup> Lymari Morales, *Knowing Someone Gay/Lesbian Affects Views of Gay Issues*, GALLUP POLL, May 29, 2009, available at <http://www.gallup.com/poll/118931/knowning-someone-gay-lesbian-affects-views-gay-issues.aspx> (among respondents who said they did not personally know someone gay or lesbian, 72% opposed same-sex marriage and 27% said it should be legal, whereas among respondents who personally know someone gay, 49% favored legalization of same-sex marriage and 47% opposed it).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* This finding should not have come as a surprise to longtime gay activists. For example, several months before the Gallup Poll results were released, ACLU LGBT and AIDS Project Director Matt Coles, wrote: “Research has shown that the single most effective way to change people’s minds on LGBT issues is through one-to-one conversations, between either gay people or solid allies and their friends and family. . . . People have to hear about discrimination from a personal perspective, not as an abstract principle.” Coles, *supra* note 69. Writing about the importance of straight allies, Coles said: “[W]hen people hear about what it’s like to be gay from friends and family members, they change their thinking. People who’ve been supportive get personally involved. And people who were conflicted become supporters.” *Id.*

<sup>196</sup> See, e.g., HARRIS INTERACTIVE SURVEY, *supra* note 123, at 8 (noting that of the respondents who said “they have become more favorable toward gays and lesbians in the past five years,” fully 79% attributed that evolution of opinion to “knowing someone who is gay or lesbian”).

lives of several notable public figures bear this out. That the otherwise staunchly conservative former Vice President Dick Cheney is a strong supporter of same-sex marriage rights (stronger, in fact, than the putatively progressive President Obama) can, no doubt, be explained by his close relationship with his openly lesbian daughter Mary Cheney.<sup>197</sup> In a June 2009 press conference where he insisted that same-sex couples should be free to enter any kind of legal union they desire, including civil marriage, he said, “[a]s many of you know, one of my daughters is gay, and it is something we have lived with for a long time in our family.”<sup>198</sup>

Another Republican politician, San Diego, CA mayor Jerry Sanders, initially promised to oppose same-sex marriage and veto a City Council motion supporting civil marriage equality, but then abruptly reversed his position in a tearful September 2007 press conference, citing that he could not in good conscience continue to oppose same-sex marriage when his daughter and several members of his personal staff are gay. He said, “[i]n the end, I couldn’t look any of them in the face and tell them that their relationships, their very lives, were any less meaningful than the marriage I share with my wife, Rana.”<sup>199</sup> Much more recently, the members of the Icelandic parliament in June 2010 voted unanimously to extend civil marriage rights to same-sex couples, no doubt influenced by their individual

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<sup>197</sup> See Dan Eggen, *Cheney Endorses Gay Marriage on a ‘State-by-State Basis,’* WASH. POST, June 2, 2009, at A03 (quoting Cheney as stating that “people ought to be free to enter into any kind of union they wish, any kind of arrangement they wish.”). Cheney noted that marriage law traditionally has been the province of states, and said “I think that is the way [same-sex marriage] ought to be handled, on a state-by-state basis”).

<sup>198</sup> *Id.*

<sup>199</sup> Jennifer Vigil, *Sanders Changes Mind on Gay Marriage*, SAN DIEGO UNION TRIB., Sept. 20, 2007, at A-1.

and collective relationships with the nation's prime minister—Johanna Sigurdardottir—the world's first openly gay national leader.<sup>200</sup>

Some of the relative invisibility of LGBT people of color in the fight for marriage equality may have to do with the lack of diversity in movement organizations, as discussed above, and with reductive and over-simplistic (“gays are white and people of color are straight”) media depictions of what in reality is a motley LGBT community. Some of it also may have to do with how LGBT people of color tend to rate freedom from hate crimes and employment discrimination and other protections as significantly more acute policy concerns than the freedom to marry.<sup>201</sup> But some of the relative paucity also is attributable, indubitably, to our own decisions not to come out to ourselves, our larger families, our faith communities, our neighbors and the greater world.<sup>202</sup> In fact, the higher support for same-sex marriage bans among African American and Latino/a communities may have some correlation with the persistence of closeting and what is popularly referred to as “down low” culture among Black and Latino men in particular, in which men who have sex with other men still refuse to identify themselves as anything but straight.<sup>203</sup>

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<sup>200</sup> See *Iceland Passes Gay Marriage Law In Unanimous Vote*, REUTERS, June 11, 2010, available at <http://www.reuters.com/article/idUSTRE65A3V020100611>.

<sup>201</sup> HUMAN RIGHTS CAMPAIGN FOUNDATION, AT THE INTERSECTION: RACE, SEXUALITY AND GENDER 13 (2009), available at <http://www.hrc.org/issues/equalityforward.asp> [hereinafter HRC FOUNDATION, AT THE INTERSECTION SURVEY] (noting that only 60% of surveyed LGBT people of color rated marriage equality as “very important,” compared to “very important” ratings of 80% for “protecting people from individuals who commit violence against LGBT people,” and “making sure LGBT people cannot be fired solely because they are LGBT”).

<sup>202</sup> See Michelle Garcia, *Battle for the Black Vote*, ADVOCATE, Oct. 24, 2008, available at [http://advocate.com/News/Daily\\_News/2008/10/24/Battle\\_for\\_the\\_Black\\_Vote/](http://advocate.com/News/Daily_News/2008/10/24/Battle_for_the_Black_Vote/) (quoting National Black Justice Coalition member Jasper Hendricks noting that many gay and lesbian African Americans “sit in churches and listen to. . . negative messages and don’t question it” while still “play[ing] influential roles in the church, like being a deacon or a minister, but they still sit and listen to their pastor” deliver antigay sermons); see also Devon Thomas, *City Leaders Discuss Homophobia in Detroit*, MICH. DAILY, Feb. 4, 2004, available at <http://www.michigandaily.com/content/city-leaders-discuss-homophobia-detroit> (noting that “[m]any gay blacks remain silent about their sexual orientation” and “[r]eluctance to acknowledge homosexuality [is] an issue prevalent to the black community and the high numbers of HIV and AIDS cases among black men and women are interconnected issues. . .”).

<sup>203</sup> See Onwuachi-Willig, *supra* note 192, at 893–94 (discussing “down low” culture, attributed in part to how the “gay” labels “do not fit within conceptions of maleness in the black community” leading to men “caught in the act of sleeping with other men . . . still refus[ing] to define themselves as anything other than heterosexual”).

In a pathbreaking survey of African American, Asian-Pacific Islander and Latino/a LGBTs whose findings were released in August 2009, significantly less than half of respondents reported having come out to their faith leaders (34%), children (45%), father (46%) and even one aunt or uncle (49%). Only 59% reported having come out to their healthcare provider and 63% to their own mother.<sup>204</sup>

The persistence of the closet in of-color LGBT communities likely has some culturally specific motivators. To some African Americans, being an out Black gay person is perceived as race-negating since homosexuality is viewed in some community circles primarily as a foreign and mostly European phenomenon.<sup>205</sup> As theorized by religious studies professor Anthony P. Pinn, same-sex marriage, specifically, may appear as posing yet another threat to the already beleaguered traditional African American family, already coping with a low prevalence of marriage.<sup>206</sup> In my own Cuban American heritage, which is not outside of the Latino norm, the anti-gay oppression leaning heavily against the closed closet door is rooted in an intensely patriarchal society that polices polarity in gender expression—valorizing femininity in women and *machista* masculinity in men, and penalizing transgressions in these roles, especially by effeminate homosexual men or *maricónes*.<sup>207</sup>

Whatever its cultural or socioeconomic roots, the relative lack of visible lesbian and gay individuals and couples within minority communities has retarded the progress in those communities towards accepting, embracing and insisting on the equality and dignity of those community members. Writing about the effect of this invisibility in her own

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<sup>204</sup> HRC FOUNDATION, AT THE INTERSECTION SURVEY, *supra* note 201, at 20.

<sup>205</sup> See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1473–74 (2000); Onwuachi-Willig, *supra* note 192, at 893–94 (quoting the celebrated late Black gay writer and documentarian Marlon T. Riggs as writing, “[a] strong, proud, ‘Afrocentric’ black man is resolutely heterosexual. . . . I cannot be a black gay man because, by the tenets of black macho, a black gay man is a triple negation”). *Id.* at 892 n.103.

<sup>206</sup> Brian Westley & Gillian Gaynair, *Gay Activists See Signs of Progress Among Blacks for Their Cause*, STAR-LEDGER, May 21, 2009, at 45 (quoting Professor Pinn as positing that “[f]rom their perspective, anything that runs contradictory to [the] understanding of the nuclear family poses a threat”).

<sup>207</sup> See, e.g., IAN LUMSDEN, *MACHOS, MARICONES AND GAYS: CUBA AND HOMOSEXUALITY* 115 (1996) (noting that even “[h]omosexuals whose gender identity more closely resembles that associated with heterosexual males suffer less discrimination, but in the final analysis they too are considered to be *maricones*”).

community, African American lesbian thinker Barbara Smith posits that “it is that much easier for the Black community to oppose gay rights and to express homophobia without recognizing that these attacks and the lack of legal protections affect its own members.”<sup>208</sup> Without exemplars of color to counter, by word and deed, the prevalent misconceptions about gay Americans—*e.g.*, that gayness is an exclusively white/Anglo disorder, that gay rights have no relation to civil rights, that gay people are not discriminated against and that almost all gay people are rich<sup>209</sup>—it is not surprising that, as Miami Herald columnist Leonard Pitts, Jr. states, the of-color community “still regards gay as a dirty secret not to be spoken in open company.”<sup>210</sup>

#### D. The Need for New Strategies for New Media

As discussed in Section I, the relatively vague and weak traditional broadcast and print media advertisements run by marriage equality proponents to counter the more specific and hard-hitting, albeit misleading, anti-gay ads were faulted soon after Election Day 2008 and 2009 as contributing to the LGBT community’s losses at the polls.<sup>211</sup> A deeper lesson from the ballot initiative losses is that the LGBT rights movement must do more to counter misinformation, disinformation and defamation in new digital media as well as in the increasingly outmoded traditional media. It also must find more and better ways to harness the power of digital media to deliver positive messages and enlist supporters who otherwise would be outside of its physical reach.

It is a truism that the Internet and, specifically the blogosphere, has become a central substrate for political activism and campaign communications. President Barack Obama’s aggressive digital campaign

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<sup>208</sup> Smith, *supra* note 120, at 126.

<sup>209</sup> See *id.* at 111, 113–14 (discussing several in-group “misconceptions and attitudes which [Smith] find[s] particularly destructive because of the way they work to isolate the concerns of lesbians and gay men”).

<sup>210</sup> Leonard Pitts, Jr., *Blacks Must Confront Their Homophobia*, MIAMI HERALD, May 10, 2009, available at <http://natomaslbgtq.wordpress.com/2009/05/15/leonard-pitts-jr-blacks-must-confront-their-homophobia/> (“It is no coincidence the community that has yet to make a safe place for its gay members to openly be who they are . . . is also the community that accounts for half of all AIDS diagnoses in this country . . . . We are long overdue to wake up, grow up and speak up to tell the truth openly and without fear. We are dying in this silence.”).

<sup>211</sup> See *supra* notes 71–81 and accompanying text.



strategies, in fact, were credited with giving him a significant advantage over his less media savvy opponent.<sup>212</sup> The 2008 presidential election was as much a coming of age of the Internet as the dominant political medium as the 1960 presidential election was the turning point for television. John F. Kennedy's ability to be telegenic and his strategic use of the then-new medium were credited with his victory over then Vice President Richard M. Nixon, who during televised debates against Kennedy came across as uncomfortable and tense.<sup>213</sup> Similarly, in the 2008 presidential campaign then-candidate Obama ran an Internet-fueled campaign that depended heavily on an interactive official campaign website and third-party websites and blogs for grassroots organizing, voter registration, campaigning and, most significantly, fundraising; whereas his opponent, Senator John McCain (R-AZ), had a much less extensive web presence, relied primarily on traditional campaign media strategies, and lost.<sup>214</sup> More recently, the surprise upset victory of Senator Scott Brown (R-MA) was credited in large part to his campaign's extensive and strategic use of digital media to organize, fundraise, generate "earned" media and proliferate his campaign's message across all platforms, including traditional print and broadcast media.<sup>215</sup>

There is no disputing, as well, that the Internet has supplanted the unidirectional, non-interactive and narrowly mediated broadcast media with unprecedented opportunities for citizens to gather and exchange information on a multiplicity of politically oriented sites.<sup>216</sup> Citizen journalists have used the Internet to expose government corruption, shed light on stories

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<sup>212</sup> See David Talbot, *The Geeks Behind Obama's Web Strategy*, BOSTON GLOBE MAG., Jan. 11, 2009, at 24; Catherine Elsworth, *U.S. Election 2008 Fought Out Over the Internet*, DAILY TELEGRAPH, Nov. 5, 2008, at 5.

<sup>213</sup> Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 41 (2009) (discussing Kennedy-Nixon debates); ALAN SCHROEDER, PRESIDENTIAL DEBATES: FORTY YEARS OF HIGH-RISK TV 3-4, 14, 99 (2000) (noting that while on television Kennedy seemed "calm and nerveless," Nixon came across as "tense, almost frightened, at turns glowering and, occasionally, haggard-looking to the point of sickness").

<sup>214</sup> See Jennifer Buske, *GMU Analyst Offers Insight on McCain's 'Big' Mistakes*, WASH. POST, Nov. 27, 2008, at PW03.

<sup>215</sup> Mindy Finn & Patrick Ruffini, *Out of the Wilderness, Onto the Web*, WASH. POST, Jan. 24, 2010, at B1.

<sup>216</sup> See Varona, *supra* note 213, at 39-46 (discussing online citizen activism); Lili Levi, *A New Model for Media Criticism: Lessons from the Schiavo Coverage*, 61 U. MIAMI L. REV. 665, 690-94 (2007) (providing an excellent overview of the new centrality of the blogosphere in the contemporary media and specifically journalistic landscape).

underreported or not covered at all by the commercial mainstream media and expose the failings of the mainstream media themselves.<sup>217</sup> For the LGBT community, the Internet has afforded isolated individuals the ability to transcend distance and hostile physical surroundings to engage in community building, political activism and fellowship through online fora.<sup>218</sup>

The Internet and its seamless interoperability with inexpensive digital recording devices also has blurred the line between “outsider” and “insider” spaces in politics, exposing what candidates and elected officials say to receptive likeminded insiders but would never dare express to general audiences. Oklahoma State Representative Sally Kern learned this hard lesson after giving a speech to supporters and prospective donors in which she compared gay people to a cancer and warned that gays and lesbians were a bigger threat to America than “terrorism and Islam” because, among other outlandish claims, “they’re going after, in schools, [two]-year olds.”<sup>219</sup> A surreptitiously made recording of the speech attracted national mainstream media attention and widespread condemnation and ridicule shortly after it was posted to YouTube.<sup>220</sup>

All is not well for democracy, however, in the new digital media environment. The pre-digital media era was one of limited, highly mediated

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<sup>217</sup> See Varona, *supra* note 213, at 39–40.

<sup>218</sup> See Brian Stelter, *Campaign Offers Help to Gay Youths*, N.Y. TIMES, Oct. 18, 2010, available at <http://www.nytimes.com/2010/10/19/us/19video.html> (reporting that the YouTube “It Gets Better” campaign, which features thousands of user-generated videos “intended to help gay teenagers who feel isolated and who may be contemplating suicide” has “caused some teenagers to ask for help”); Jose Antonio Vargas, *Gay Bloggers’ Voices Rise in Chorus of Growing Political Influence*, WASH. POST, Feb. 24, 2009, at C1 (discussing how “the still relatively small gay political presence online is rebooting the gay rights movement in a decentralized, spontaneous, bottom-up way”); Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 162 (2003) (discussing the Internet’s provision of “a virtual community that constitutes an emotional lifeline” for gay individuals without social support systems in their physical localities); Note, *Communities Virtual and Real: Social and Political Dynamics of Law in Cyberspace*, 112 HARV. L. REV. 1586, 1592–94 (1999) (noting the ability of LGBT Internet sites, among other identity-based sites, “to facilitate sustained and meaningful interaction among members”).

<sup>219</sup> Michael McNutt, “I’m Not Going to Apologize,” OKLAHOMAN, Mar. 20, 2008, at 10A.

<sup>220</sup> See Shannon Muchmore, *Anti-Gay Remarks Blasted*, TULSA WORLD, Mar. 14, 2008, at A1. For additional examples of the Internet’s ability to invade putatively “insider” political spaces, see Varona, *supra* note 213, at 41–42.

and non-interactive content choices driven by scarcity of radiofrequency spectrum.<sup>221</sup> But with that mediation and scarcity came the benefit of professional filtering, fact-checking, and journalistic trust and credibility as the prevailing currency. The once highly-rated evening newscasts were points of common local or national focus. When celebrated CBS anchor Walter Cronkite declared, “that’s the way it is,” his many millions of viewers believed him and, usually, with good reason. Today the scarcity in the new digital ecology is not of spectrum or “channels” but of audience and focus across the universe of websites, niche cable and satellite channels, and other digital content providers.<sup>222</sup>

The linear and capacity-limited “old media” required viewers and listeners to sit through content that they would not ordinarily seek but that was good for them to digest as citizens in a democracy (*e.g.*, coverage of local and national public affairs of topical importance) in order to access the content that did interest them greatly (*e.g.*, sports and entertainment fare). Although this structure led to an assimilationist homogeneity in broadcast content, it also ensured the common exposure of the electorate to a diversity of opinions and viewpoints with currency and credibility in the marketplace of ideas.<sup>223</sup> Whereas old media faced a scarcity of spectrum (channels) and an abundance of audience, today there is an abundance of spectrum and a scarcity of audience, attention and journalistic filtration.<sup>224</sup> This atomization of focus and audience has led to a fragmentation of the online community into balkanized partisan enclaves of the likeminded—a dynamic that Professor Cass Sunstein calls “Neighborhood Me” or the “Daily Me.”<sup>225</sup>

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<sup>221</sup> See Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J. L. SCI. & TECH. 1, 64–66 (2004) (discussing the failure of free over-the-air broadcasting to deliver the electronic free marketplace of ideas that early regulators intended).

<sup>222</sup> See generally, Varona, *supra* note 213, at 58–61 (discussing the dysfunctions of new digital media as democratic tools). See also Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1392 (2004) (“Today, the scarce resource is attention, not programming.”).

<sup>223</sup> See Varona, *supra* note 213, at 63–67.

<sup>224</sup> See generally Goodman, *supra* note 222.

<sup>225</sup> See CASS R. SUNSTEIN, REPUBLIC.COM, 3, 23 (2001); see also CASS R. SUNSTEIN, REPUBLIC.COM 2.0 63–64 (2007) (“New technologies, emphatically including the Internet, make it easier for people to surround themselves . . . with the opinions of likeminded but otherwise isolated others, and to insulate themselves from competing views. For this reason alone, they are a breeding ground for polarization, and potentially dangerous for both democracy and social peace.”)

The serendipity of old media has been replaced by the insularity of ideologically self-reinforcing digital echo chambers, catering to narrow interests and allegiances and not especially welcoming of dissent or diversity of opinion. Although a prevalent meme is that the Internet is a utopia of free expression and democratic deliberation, in reality the Internet—which was privatized in 1992 and now is almost entirely under private control and thus outside of the First Amendment’s reach<sup>226</sup>—has become a dystopia of private censorship, fragmentation and misinformation.<sup>227</sup> The outlandish and baseless but persistent claims made about President Barack Obama’s parentage and place of birth,<sup>228</sup> as well as his administration’s efforts to reform health insurance,<sup>229</sup> vividly exemplify the Internet’s propensity towards fueling and viralizing disinformation.

The fragmentation of the digital media landscape was starkly (and perhaps absurdly) illustrated by the conservative American Family Association news website, OneNewsNow.com, which offers visitors “news from a Christian perspective.”<sup>230</sup> The site’s owners are against gay rights of

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<sup>226</sup> See Varona, *supra* note 213, at 33–34 (discussing the Internet’s privatization).

<sup>227</sup> *Id.* at 53–58, 67–72 (discussing the prevalence of private censorship and misinformation on the internet); see also Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1130 (2005) (providing an excellent analysis of how the privatization of the internet led to today’s state of affairs, where “there are essentially no places on the Internet where free speech is constitutionally protected”); DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* (2007) (analyzing the problem of online defamation and the tensions between digital expression and privacy).

<sup>228</sup> Blogs and sites propagated the lies that Obama had radical Muslim ties, and that he is secretly a Muslim born in Kenya. See James Barron, *9 Jewish Leaders Say E-Mail Spread Lies About Obama*, N.Y. TIMES, Jan. 16, 2008, at A20; Bryan Bender, *Soldiers warned not to forward chain e-mail about Obama*, BOSTON GLOBE, Jan. 20, 2008, at A16; Robert Farley, *Alleged Obama Birth Certificate from Kenya is a Hoax*, ST. PETERSBURG TIMES, Aug. 2, 2009, at Politifact.com section. Internet rumors about Sarah Palin’s son, Trig, also generated a great deal of internet rumor mongering. See Colin McMahon, *Internet Rumors about 2 Births Just Won’t Die*, CHI. TRIB., Dec. 6, 2008, at C2 (“If you want to dive into the sea of falsehoods, conjecture and circumstantial evidence sloshing around out there, just do a Google search on the words ‘birth certificate’ and then add the name Obama or Palin.”).

<sup>229</sup> See Peter Wallsten, *A Feverish Use of Google*, L.A. TIMES, Sept. 4, 2009, at A25 (describing online advertising and social networking efforts by the Obama Administration to counter misinformation concerning health insurance reform proposals, including the rumor that it included provisions for “death panels”).

<sup>230</sup> OneNewsNow, <http://www.onenewsnow.com/general.aspx?id=1202> (last visited June 11, 2010).

any sort and, in fact, avoid using the term “gay” at all, claiming that it puts homosexuality “in a positive light.” The site’s newsfeed replaces all instances of the term “gay” with “homosexual” in all stories originating with the Associated Press, resulting in a story about Olympic sprinter Tyson Gay (who is not, in fact, gay) being retitled “Homosexual Eases Into 100 Final at Olympic Trials,” and all references to the runner being changed to “Tyson Homosexual.”<sup>231</sup>

It was the atomized and fragmented digital media that fueled much of the misinformation around the recent anti-gay ballot initiatives. In California, for example, a number of websites and blogs popular with conservatives and Christian fundamentalists urged their readers to support Proposition 8 by making baldly false claims, like: “churches may have their tax exempt status challenged or revoked if they publicly oppose same-sex marriage”; “ministers who preach against same-sex marriages may be sued for hate speech and risk government fines”<sup>232</sup>; and “Prop 8’s leading opponents have been very public for a long time about their goal of teaching schoolchildren about gender orientation at very young ages” and “have openly promoted strategies for overcoming or circumventing parental objections to such teaching.”<sup>233</sup> The popular blogger “California Crusader” argued that “if Proposition 8 does not pass, teachers will be required by law . . . to teach about not just sex between a man and a woman, but between a man and a man or between a woman and a woman.”<sup>234</sup> And the site [www.1man1woman.net](http://www.1man1woman.net), which was set up to promote Proposition 8, advanced the erroneous claims that gay people are twelve times more likely than straights to sexually abuse children, and that the legalization of same-sex marriage will lead to the normalization of incest and polygamy in California.<sup>235</sup>

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<sup>231</sup> Al Kamen, *I Feel Pretty and Witty and . . . What?*, WASH. POST, July 2, 2008, at A13.

<sup>232</sup> What is Proposition 8, <http://www.whatisprop8.com> (last visited June 11, 2010).

<sup>233</sup> Posting of Lowell Brown to Hedgehog Blog, [http://hedgehogcentral.blogspot.com/2008\\_10\\_01\\_archive.html](http://hedgehogcentral.blogspot.com/2008_10_01_archive.html) (Oct. 28, 2008, 22:39 EST).

<sup>234</sup> Why I Support Proposition 8, <http://californiacrusader.wordpress.com/2008/10/10/in-support-of-proposition-8/> (Oct. 10, 2008).

<sup>235</sup> *Perry v. Schwarzenegger*, No. C 09-2292 VRW, slip op. at 22, 135 (N.D. Cal., Aug. 4, 2010), available at <https://ecf.cand.uscourts.gov/cand/09cv2292/files/09cv2292-ORDER.pdf>.

Although other more progressive blogs worked to counter some of these distortions,<sup>236</sup> it is unlikely—given the blogosphere’s ideological balkanization—that the same readers who read the untruths in the right-wing blogs were then confronted with the retorts on the more progressive sites. In addition, because of the prevalence of private censorship in the blogosphere, as well as the self-silencing on the part of dissidents on these sites, it is unlikely that comments challenging and correcting the misinforming blog posts had an adequately remedial effect.

In light of this new atomized digital media reality, it is clear that the LGBT rights movement must do more to migrate more of its activism to the digital realm. Some well-funded groups have created online tools to send messages promoting or opposing certain pieces of legislation to elected officials, and have launched new sites aimed, for example, at “expos[ing] the lies and fear tactics of anti-LGBT voices and counteract[ing] them with respectful dialogue and grassroots action.”<sup>237</sup> Other collections of LGBT activists have launched websites assembling publicly available identities of individuals who signed petitions to place anti-gay initiatives on the ballot or contributed funds towards their passage.<sup>238</sup> These largely responsive and passive online efforts, however, are not enough. Since the Internet has emerged as the dominant platform for political activism and communication, the LGBT movement must go beyond using it as a tool to organize ourselves and instead use it as a powerful way to introduce ourselves, thoughtfully, to fellow citizens who do not yet know or who misunderstand us.

Chris Hughes, the openly gay co-founder of Facebook and the principal coordinator of then-candidate Obama’s social networking site ([my.barackobama.com](http://my.barackobama.com)) said in August 2009 that the LGBT movement has not yet begun to exploit the power of the Internet and digital networking to present to the world “a chorus of individuals who are united, focused, organized, [and] seizing a political moment in order to pull it together in a political movement.”<sup>239</sup> Hughes opined that “what’s missing right now” in

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<sup>236</sup> See, e.g., California Proposition 8: Outlawing Gay Marriage, <http://blueherald.com/2008/10/ca-proposition-8-outlawing-gay-marriage/> (Oct. 28, 2008 19:07 EST).

<sup>237</sup> Human Rights Campaign, End the Lies: About, <http://www.hrc.org/endthelies/about.html> (last visited June 11, 2010).

<sup>238</sup> See Steve Lawrence, *Federal Judge: Anti-Gay Marriage Donors Must Be Public*, CALIFORNIAN, Jan. 29, 2009, at News section.

<sup>239</sup> Michael Joseph Gross, *Hope and History*, ADVOCATE, Aug. 5, 2009, available at [http://www.advocate.com/Politics/Commentary/Hope\\_and\\_History/](http://www.advocate.com/Politics/Commentary/Hope_and_History/). “Hughes says no leaders of any national gay organizations have asked for his help or advice about how to create virtual mechanisms for creating publicity and leveraging action. Think about that. Not asking this guy for help is like having Marie Curie as your chemistry lab partner and letting yourself flunk out of school.” *Id.*

the LGBT movement's online presence is "[a] well-organized movement of people who tell their own stories loudly, together, diversely . . . ." He is right.

### **E. Reconciling the Dangers and Opportunities of Direct Democracy**

The 2008 and 2009 ballot initiative disappointments for the LGBT movement were the latest in an extensive history of the use of direct democratic mechanisms to stall or retard the gay community's progress towards full legal equality and social incorporation.<sup>240</sup> Stanford University political scientist Gary Segura has noted that "[t]here is no group in American society who has been targeted by ballot initiatives more than gays and lesbians."<sup>241</sup> The landmark 1994 Supreme Court case *Romer v. Evans*, in fact, resulted from a successful effort to amend the Colorado Constitution by popular referendum (Amendment 2) in order to prohibit any government entity in the state from enacting or promulgating any statutory or regulatory protections against sexual orientation discrimination.<sup>242</sup> As noted by Judge Stanley F. Birch, Jr., in 1997, "[t]he import of *Romer*" was to identify "what the Supreme Court considers not to be a rational basis for discrimination against homosexuals."<sup>243</sup> The *Romer* Court "rejected the state's rationale" for Amendment 2, "declaring that 'animosity toward the class' of

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<sup>240</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating under the Equal Protection Clause Colorado's Amendment 2, adopted by means of a popular referendum, which prohibited all government entities in the state from taking any legislative, executive or judicial action designed to prohibit discrimination on the basis of sexual orientation); ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES 137–48 (2006) (discussing, *inter alia*, state constitutional referenda banning same-sex marriage from 1993 onwards); POLIKOFF, *supra* note 8, at 90–97 (discussing the backlash to marriage equality decisions from the 1993 *Baehr v. Lewin* Hawaii Supreme Court victory onwards). Referenda and ballot initiatives were used extensively by anti-gay forces in the 1970s to repeal legal protections for lesbian and gay citizens or, in the case of 1977's Proposition 6 (the "Briggs Initiative") in California, to prohibit gay men and lesbians from serving as school teachers. For an impressive and exhaustive history and analysis of these efforts, see HARBECK, *supra* note 138, at 39–81.

<sup>241</sup> Bob Egelko, *Gays Lack Political Power, Trial Witness Says*, S.F. CHRON., Jan. 20, 2010, at C3.

<sup>242</sup> *Romer*, 517 U.S. at 623–25.

<sup>243</sup> *Shahar v. Bowers*, 114 F.3d 1097, 1126 (11th Cir. 1997) (Birch, J., dissenting).

homosexuals is not a legitimate basis for state action”<sup>244</sup> even when undertaken pursuant to direct democratic means.

In the case of California, however, Proposition 8’s success was especially jarring since it marked the first time a ballot initiative had banned same-sex marriage after the right already had been exercised by many same-sex couples.<sup>245</sup> Activists regarded Proposition 8, and the California Supreme Court’s reticence to overturn it, as potentially an ominous harbinger of future efforts by anti-gay forces to rally the anti-gay prejudice of popular majorities in order to strip gays and lesbians of other already-recognized rights, such as adoption, as happened in Arkansas in 2008.<sup>246</sup>

The anti-gay 2008 and 2009 ballot initiatives provided abundant evidence of the dangers posed by direct democracy to unpopular and marginalized minorities especially. It was because of these dangers that the federal Constitution’s framers avoided any instrumentalities of direct or plebiscitary democracy in national government, opting instead for a system of representative government, the selection of a president through an electoral college instead of popular vote, and, originally, no direct public role in the selection of senators.<sup>247</sup> The framers’ low regard for direct democracy was exemplified rather vividly by Benjamin Franklin’s famous quip that “democracy is two wolves and a lamb voting on what to have for lunch.”<sup>248</sup> James Madison wrote that the federal representative system of

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<sup>244</sup> *Id.*, quoting *Romer*, 517 U.S. at 634. Colorado’s rationale for Amendment 2 included “respect for other citizens’ freedom of association, and in particular the liberties of landlords and employers who have personal or religious objections to homosexuality.” *Romer*, 517 U.S. at 635.

<sup>245</sup> See Evan Wolfson, *Will the California Supreme Court Strike Down Prop 8, Or ‘Willy-Nilly Disregard’ Its Duty?*, HUFFINGTON POST, Mar. 30, 2009, [http://www.huffingtonpost.com/evan-wolfson/will-the-california-supre\\_b\\_180720.html](http://www.huffingtonpost.com/evan-wolfson/will-the-california-supre_b_180720.html). (speaking in support of the Proposition 8 appeal, Wolfson argued, “Never before has the Court allowed a fundamental right to be voted away from a targeted minority.”).

<sup>246</sup> The lead counsel for the pro-marriage equality side in the California marriage cases and the Proposition 8 appeal, Shannon Minter, said “[p]eople that do not like our community can come back at us and take other rights as well. They certainly have not been shy about doing that in other states.” Nicole C. Brambila, *Prop. 8 Opponents Dissect Defeat*, THE DESERT SUN, Nov. 26, 2008, available at <http://www.mydesert.com/article/20081126/NEWS01/811260312>.

<sup>247</sup> Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 247 (1997), available at <http://www.jstor.org/stable/2111715> (discussing how “[t]he framers of the United States Constitution adopted a representative system of government to filter the majority will.”).

<sup>248</sup> BILL MOYERS, MOYERS ON DEMOCRACY 314 (2008).



government was designed to keep the “confusion and intemperance of the multitude”<sup>249</sup> from polluting national governance.

### ***1. The Origins and Intended Benefits of Direct Democracy***

Notwithstanding the American federal government’s antipathy towards it, direct democracy is one of the oldest forms of government and it continues to attract popular appeal. The ancient Athenians pioneered participatory self-government and early American colonial governments incorporated popular decision-making in the form of town meetings.<sup>250</sup> True modern-era plebiscitary lawmaking appeared in the thirteenth century in Switzerland, and was revived six centuries later in the form of several national referenda and then, most notably, in 1848 with the incorporation of a statute referendum mechanism in the new Swiss federal constitution.<sup>251</sup> Inspired by positive reports from the Swiss experiments, American populists and progressives advocated aggressively for the incorporation of direct democratic mechanisms—and most commonly referenda and citizen-generated ballot initiatives<sup>252</sup>—in state constitutions. Between 1898 and

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<sup>249</sup> THE FEDERALIST NO. 10, at 43 (James Madison) (Cambridge University Press 2003). Madison warned that “[i]t is of great importance in a republic not only to guard the society against the oppression of rulers, but to guard one part of society against the injustice of the other part” especially since “[i]f a majority be united by a common interest, the rights of the minority will be insecure.” THE FEDERALIST NO. 51, at 265 (James Madison) (Yale Univ. Press 2009). Fellow framers Alexander Hamilton and John Jay also referred to the dangers of popular or “pure” democracy in advocating representative democracy in the *Federalist Papers*. See JOHN HASKELL, DIRECT DEMOCRACY OR REPRESENTATIVE GOVERNMENT: DISPELLING THE POPULIST MYTH 17 (2001). Not all of the Founders were against direct democratic mechanisms, however. Although a champion of republicanism, Thomas Jefferson also extolled the virtues of popular involvement in lawmaking, favored the legislative referendum, and incorporated into his 1775 Virginia state constitution draft the requirement that voters approve of the constitution in a statewide referendum before it can take effect. Dennis Polhill, *Democracy’s Journey*, in THE BATTLE OVER CITIZEN LAWMAKING 8–9, 12 (M. Dane Waters ed., 2001). Once president, however, Jefferson warned against the dangers of the majoritarian will. In his first inaugural address (1801), he exclaimed, “Bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate would be oppression.” WILLIAM SAFIRE, LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY 802 (1997).

<sup>250</sup> See HASKELL, *supra* note 249, at 50–51.

<sup>251</sup> Jean-François Aubert, *Switzerland*, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 39–40 (David Butler & Austin Ranney eds., 1978).

<sup>252</sup> In the United States, the terms “referendum” and “ballot initiative” are used interchangeably in common parlance, but have particularized legal meanings. A referendum “is an arrangement whereby a measure that has been passed by a legislature does not go into force until it has been approved by the voters (in some specified proportion) in an election,” whereas a ballot initiative “is an arrangement whereby any person or group of persons may draft a proposed law or constitutional amendment and, after satisfying certain requirements of numbers and form, have it referred directly to the voters for final approval or rejection.” Austin Ranney, *United States of America*, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 67 (David Butler & Austin Ranney eds., 1978). For a detailed table listing the various kinds of initiative and referenda mechanisms in the state systems accommodating direct democratic governance, see *id.* at 71–72.

1918, twenty-three states incorporated some sort of direct democratic mechanism by either constitutional amendment or statute.<sup>253</sup>

Proponents of ballot initiatives and referenda cite a number of advantages to direct popular lawmaking. Direct democratic mechanisms purportedly provide an external check on the system of checks and balances in state government, empowering citizens to take back the reins of government when elected officials fail to act in the public interest or ignore constituent preferences in favor of those of moneyed special interests.<sup>254</sup> Initiatives and referenda were intended to guarantee that government – which, after all, is delegated its authority by the people themselves – reflects the public's policy choices over the narrower and often self-serving, or in some cases corrupt, interests of public officeholders.<sup>255</sup> It also was hoped that direct democratic mechanisms would generate greater levels of popular engagement in the political process.<sup>256</sup> They indeed have regularly boosted voter turnout when especially contentious issues are presented to the public for decision.<sup>257</sup>

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<sup>253</sup> See HASKELL, *supra* note 249, at 52–54. For a detailed history of the adoption of state-level initiative and referendum provisions across the United States, see Polhill, *supra* note 249, at 12–15.

<sup>254</sup> See Polhill, *supra* note 249, at 9.

<sup>255</sup> See HASKELL, *supra* note 249, at 12–13, 34–36.

<sup>256</sup> M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 3, 6–7 (2003). Examples of influential state-level reforms instituted by means of initiative and referenda include the incorporation of term limits for elected officials, the abolishment of poll taxes, the adoption of campaign reform provisions, and the limitation or end of affirmative action hiring and contracting by government entities. *Id.* at 7.

<sup>257</sup> *Id.* at 5, 7 (discussing how controversial ballot initiatives can significantly increase voter participation); Caroline Tolbert & Daniel Bowen, *Electoral Supply and Demand: Direct Democracy Campaign, Political Interest, and Participation*, in DIRECT DEMOCRACY'S IMPACT ON AMERICAN POLITICAL INSTITUTIONS 35–38, 46–47, 50–51 (Shaun Bowler & Amihai Glazer eds., 2008) (documenting evidence from recent elections demonstrating increased voter turnout when certain ballot initiatives are presented to the electorate).

## 2. Criticisms of Direct Democracy

Dysfunctions in direct democratic governance abound. Researchers have demonstrated that instead of providing a populist check on the influence of special interests, the initiative process has been to a great degree co-opted by lobbyists, with the vast majority of contributions to most initiative campaigns now coming from special interest groups.<sup>258</sup> Ballot initiative campaigns have become powerful tactical tools for partisan politics, which, it was hoped, they would allow voters to circumvent. They are used to influence elections for public office by forcing candidates to take politically dangerous stands on controversial initiatives placed on the ballot by an opponent's supporters.<sup>259</sup> They also are used to catalyze turnout among a certain component of the electorate, as happened with the Republican strategy in 2004 of placing anti-same-sex marriage initiatives on the ballots in key battleground states where candidate George W. Bush's reelection was uncertain without the additional turnout among conservative voters.<sup>260</sup>

Direct democracy lacks the safeguards of thoughtful deliberation and close attention to policy choices and their consequences that are more often found in representative democracy.<sup>261</sup> It can undermine and distort the political system and the work of elected officials, sometimes stalling or derailing necessary legislation.<sup>262</sup> Critics contend that ordinary citizens, who

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<sup>258</sup> See, e.g., K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045, 1048 (2007) (discussing a study showing that over two-thirds of all initiative campaign contributions in California are generated by special interest organizations); see also Robert M. Stern & Tracy Westen, *Proposition Overload*, L.A. TIMES, Nov. 10, 2008, at A19 (noting that in 2006 alone, \$330 million was spent in California by supporters and opponents of initiatives placed on the ballot that year).

<sup>259</sup> DuVivier, *supra* note 258, at 1049–50.

<sup>260</sup> See *id.*

<sup>261</sup> See Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 401–02 (2003) (discussing how the Framers avoided direct democracy in favor of a representative structure to “ensure that lawmaking was the product of thoughtful deliberation by elected representatives, rather than the passions or narrow self-interests of the people.”).

<sup>262</sup> David Butler & Austin Ranney, *Theory, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY* 34 (David Butler & Austin Ranney eds., 1978).

do not have the time, expertise or other qualifications to make direct lawmaking decisions,<sup>263</sup> have made infamously bad decisions in the past through the initiative process<sup>264</sup> and lack any accountability for such bad decisions.<sup>265</sup>

Arguing in favor of representative over direct self-government, John Stuart Mill reasoned that “the public at large remain without information and without interest on all the greater matters of [governmental] practice; or, if they have any knowledge of them, it is but a *dilettante* knowledge.”<sup>266</sup> Although intended to reflect the people’s will, direct democratic mechanisms instead are democratic in name only, often doing the “work of the unelected, and largely unaccountable, special interest groups that draft, finance, and lobby on behalf of the measures.”<sup>267</sup> They have become a cost-effective tool for wealthy special interests to circumvent the legislative process and use ballot initiatives to instantiate their policy preferences in the guise of popular lawmaking,<sup>268</sup> preying on the inattention, ignorance or inexperience of voters.<sup>269</sup>

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<sup>263</sup> *Id.* Butler and Ranney also note that initiatives and referenda are faulted for not being capable of achieving a true democratic consensus following thoughtful discussion, and instead delivering “forced decisions” that neither accurately reflect nor communicate the value judgments and intensity or belief of voters. *Id.* at 35.

<sup>264</sup> *See, e.g.,* DuVivier, *supra* note 258, at 1050 (describing Colorado Amendment 41 (2006), a successful initiative promoted as “an effort to clean up government” by banning gifts to public officials of more than fifty dollars in value, which as a result of inartful and overly simplistic wording had the inadvertent and deleterious effect of making it illegal for professors of state universities to collect Nobel Prize monetary awards and for state employees to receive educational scholarship funds for their children).

<sup>265</sup> *See* Staszewski, *supra* note 261, at 399.

<sup>266</sup> JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 38 (Currin W. Shields ed., 1958). Contemporary observers of the state of the nation’s intellectual health and capacity for intelligent self-governance are even less charitable than Mill. *See, e.g.,* RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* (1962) (examining the nature and sources of American anti-intellectualism and the mediocrity of public education); SUSAN JACOBY, *THE AGE OF AMERICAN UNREASON* (2008). Jacoby writes, “America is now ill with a powerful mutant strain of intertwined ignorance, anti-rationalism, and anti-intellectualism.” *Id.* at 2. She notes that “[t]wo thirds of Americans cannot name the three branches of government or come up with the name of a single Supreme Court justice.” *Id.* at 299.

<sup>267</sup> Staszewski, *supra* note 261, at 399.

<sup>268</sup> Lillian B. Rubin, *Let the People Speak: Rethinking the Initiative Process*, *DISSENT*, 5–9 (Fall 2009), available at <http://www.dissentmagazine.org/article/?article=1960> (“[T]he intended purpose of the initiative movement—to give the people a direct voice in framing legislation—turned into a tool for any special interest with enough money and resources to buy its way onto the ballot and sell its cause to an often misinformed, disinformed, and overwhelmed voting public.”).

<sup>269</sup> Steven W. Marlowe, *The Initiative Process in Washington: Implications and Effects*, 24 SEATTLE U. L. REV. 1035, (2001).

Despite the populists' hope that ballot initiatives and referenda would spur civic engagement and popular political participation across the country, the nation has gone markedly in the opposite direction, with Americans feeling more alienated and disengaged from their communities, civic life and the political system.<sup>270</sup> As Professor Bryan Douglas Caplan recently concluded, the average American voter's ignorance, irrationality and disengagement render them altogether incompetent to make good policy decisions through direct democratic means.<sup>271</sup>

An especially prominent criticism against direct democratic mechanisms is that they have been used repeatedly to further the oppression and marginalization of minority communities. Professor Erwin Chemerinsky observes that "[t]ime and again, initiatives are used to disadvantage minorities: racial minorities, language minorities, sexual orientation minorities, political minorities."<sup>272</sup> A telling statistic is that

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<sup>270</sup> See MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 4–6, 340 (1996) (bemoaning American civic disengagement and lost sense of community and common enterprise). See also ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (detailing the decline in American political and civic participation and loss of "social capital" necessary to sustain a strong democracy).

<sup>271</sup> See BRYAN DOUGLAS CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES 1–3, 8–9 (2007). The average American has a poor knowledge of basic civics, with roughly half of Americans not aware that each state has two senators, and more than half unable to name their Representative. *Id.* at 8. A September 2009 study from Public Policy Polling also found that 42% of Republicans believed that President Barack Obama "was not born in the US" and that 25% of Democrats "think George W. Bush had something to do with 9/11." Press Release, 'Public Policy Polling, Obama's Approval Steady, Sept. 23, 2009, available at [http://www.publicpolicypolling.com/pdf/surveys/2009\\_Archives/PPP\\_Release\\_National\\_9231210.pdf](http://www.publicpolicypolling.com/pdf/surveys/2009_Archives/PPP_Release_National_9231210.pdf); see also WALTER LIPPMANN, THE PHANTOM PUBLIC 138–39, 145 (1925) (discussing the incompetence of the public at large to engage in competent governance, the need to avoid creating a "meddlesome tyranny" of majoritarian democracy, and concluding that "[t]he public must be put in its place, . . . so that each of us may live free of the trampling and the roar of a bewildered herd").

<sup>272</sup> Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 294 (2007). See also Richard B. Collins, *How Democratic Are Initiatives?*, 72 U. COLO. L. REV. 983, 994 (2001); Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latino/a and Immigrant Communities*, 96 CAL. L. REV. 1259, 1261 (noting that "[i]n modern times, direct democracy has regularly injured racial minorities, gays and lesbians, immigrants, non-English speakers, and the poor").

although the overall rate of passage of substantive ballot initiatives and referenda is low (33%), voters overwhelmingly approve measures that seek to prohibit the legislative enactment of new civil rights protections or to repeal existing protections.<sup>273</sup> According to Professor Derrick Bell, this discriminatory effect of direct democratic mechanisms “has diminished the ability of minority groups to participate in the democratic process,” rendering the initiative or referendum the “most effective facilitator of . . . bias, discrimination, and prejudice which has marred American democracy from its earliest day.”<sup>274</sup> In addition, although a principal purpose of judicial review is the protection of the rights of minorities from the prejudiced passions of the majority, direct democracy has proved to be especially corrupting to judicial independence in those states—like California—where the judges themselves serve at the voters’ mercy.<sup>275</sup> Judges who wish to retain their seats will avoid overruling the very voters who will decide their fate at reelection time.

Unsurprisingly then, ballot initiatives and referenda mechanisms have long been criticized as unconstitutional or at least constitutionally problematic. Some scholars argue that state direct democratic mechanisms violate the federal Constitution’s Guarantee Clause (Article XIV, Section 4), which states that “The United States shall guarantee to every State in this Union a Republican Form of Government.”<sup>276</sup> Others argue that direct

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<sup>273</sup> See Gamble, *supra* note 247, at 248.

<sup>274</sup> Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 14–15 (1978).

<sup>275</sup> See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1584 (1990); Douglas H. Hsiao, *Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic*, 41 DUKE L.J. 1267, 1278 (1991) (“The judges themselves are constrained by time and their interest in maintaining either their seats (in the case of elected state judges) or the public respect for the institution of the judiciary.”). In an especially notorious case, California Chief Justice Rose Bird, in office from 1977, lost a popular reconfirmation vote in 1986 due to what commentators characterized as public resentment against her vote four years earlier to invalidate Proposition 8 (popularly known as the “Victim’s Bill of Rights”). See Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1226 (2005), citing *Brosnahan v. Brown*, 651 P.2d 274, 290 (Cal. 1982) (Bird, C.J., dissenting).

<sup>276</sup> See, e.g., Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807, 810 (2002) (“Republican lawmaking, the argument goes, is lawmaking only through legislative representatives. Lawmaking by plebiscite renders the government a democracy rather than a republic. Hence, opponents conclude, there is little constitutional place for citizen law-making in the American union.” [internal footnotes omitted]). See also Hans A. Linde, *When Initiative Lawmaking is Not “Republican Government”*: *The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 41–43 (1993).

democratic mechanisms undermine the Constitution's aims by circumventing its institutional safeguards against majoritarian tyranny.<sup>277</sup> Moreover, many scholars insist that due to the constitutional infirmities of plebiscitary democracy, the state referenda and initiative mechanisms should be significantly reformed and, at a minimum, subjected to heightened judicial review.<sup>278</sup>

Judges, too, have lamented the problems inherent in plebiscitary lawmaking. In an October 2009 speech before the American Academy of Arts and Sciences, California Chief Justice Ronald M. George, the author of the May 2008 opinion overturned by Proposition 8, blamed the state's ballot initiative process for creating a "dysfunctional state government" and instantiating the "dangers of direct democracy" in the state's lawmaking system.<sup>279</sup> The California ballot initiative system—which has resulted in over 500 state constitutional amendments or revisions in the twentieth century, twenty-two measures on the 2008 ballot for San Francisco alone, and a state budget chronically on the brink of bankruptcy—has garnered so much criticism that there have been calls for a state constitutional

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<sup>277</sup> Chemerinsky, *supra* note 272, at 304–06 (arguing against the constitutionality of initiatives that target minorities); Hsiao, *supra* note 275, at 1267 ("The power of direct democracy lies in its rhetorical 'feel'; it 'looks' and 'sounds' like it is part of our constitutional fabric. Who can really disagree with power in the hands of the people? But direct democracy warps our republican constitutional scheme while cloaking itself behind the cloth of its vocabulary: democracy and popular sovereignty.").

<sup>278</sup> See, e.g., Chemerinsky, *supra* note 272, at 305–06 (advocating for strict scrutiny for direct democratic measures targeting minorities); Johnson, *supra* note 272, at 1291–96 (proposing heightened judicial review of ballot measures that target minorities); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and 'Disclosure Plus'*, 50 UCLA L. REV. 1141 (2003) (proposing specific reforms to promote more informed voting on ballot measures); Marvin Krislov & Daniel M. Katz, 17 CORNELL J.L. & PUB. POL'Y 295, 320–25 (2008) (surveying proposals involving judicial review of direct democratic mechanisms); Ethan J. Leib, *Can Direct Democracy Be Made More Deliberative?*, 54 BUFF. L. REV. 903 (2006) (proposing the incorporation of more deliberative components to popular decision-making); Glenn C. Smith, *Solving the "Initiatory Construction" Puzzle (and Improving Direct Democracy) by Appropriate Refocusing on Sponsor Intent*, 78 U. COLO. L. REV. 257 (2007).

<sup>279</sup> Susan Ferriss, *California Chief Justice Criticizes Initiative Process*, SACRAMENTO BEE, Oct. 10, 2009, at 3A (bemoaning how "[c]hickens gained valuable rights in California the same day that gay men and women lost them").

convention to make it harder to place initiatives on the ballot.<sup>280</sup> In other states with low-threshold ballot initiative mechanisms, there also have been longstanding demands for the incorporation of structural buffers, such as the requirement that initiatives to amend the state constitution first garner majority approval of the legislature,<sup>281</sup> as is the law in Iowa, Massachusetts and New Hampshire (all of which recognize same-sex marriage),<sup>282</sup> or a prohibition of ballot initiatives that would violate antidiscrimination laws, as in the District of Columbia.<sup>283</sup>

The Election Day 2008 and 2009 anti-gay ballot measures exemplify the dangers and dysfunctions inherent in direct democracy. I agree with critics who argue that the use of ballot initiatives to restrict the civil rights of a beleaguered minority, as exemplified by the recent anti-gay initiatives, are inherently antidemocratic and contrary to our constitutional traditions.<sup>284</sup> The civil rights of LGBT Americans, or those of any other minority, should never be decided by popular vote.<sup>285</sup> Nevertheless, despite

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<sup>280</sup> Rubin, *supra* note 268, at 7–8.

<sup>281</sup> See, e.g., Priscilla F. Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L. ANN. 135, 137–41 (1981); Bill Jones, *Initiative and Reform*, in THE BATTLE OVER CITIZEN LAWMAKING, 217, 226–28 (M. Dane Walters ed.) (discussing ballot initiative reform proposals); Maimon Schwarzschild, *Direct Democracy: Popular Initiatives and American Federalism, Or, Putting Direct Democracy In Its Place*, 13 J. CONTEMP. LEGAL ISSUES 531, 542, 553–59 (2004) (discussing reform and structural ideas for tempering direct democracy).

<sup>282</sup> See Keith J. Weinstein, *Gay-Marriage Fight Heads to New Jersey*, WALL ST. J., Nov. 7, 2009, at A4. See, e.g., MASS. CONST., art. XLVIII (delineating the protracted legislative approvals—including bicameral passage in the two consecutive years before placement on the ballot—required for initiatives to amend the state constitution).

<sup>283</sup> See Tim Craig, *D.C. Board Turns Away Ballot Initiative*, WASH. POST, Nov. 18, 2009, at B3 (discussing the decision by D.C. Board of Elections and Ethics to reject a proposed ballot initiative banning same-sex marriage as a violation of the D.C. Human Rights Act, which prohibits, *inter alia*, discrimination on the basis of sexual orientation as well as ballot initiatives that would contravene the Act).

<sup>284</sup> In his 2004 testimony before the Massachusetts Senate in support of civil marriage equality, the Rev. Peter Gomes, Harvard professor and theologian, put this objection most eloquently: “[t]he danger in the seemingly ‘democratic’ process of the popular vote is that the principle of inalienable human rights is now subject to the actions of the majority; we are a nation of laws, and not of referenda at the fundamental level of human and civil rights.” Quoted in WOLFSON, *supra* note 9, at 113.

<sup>285</sup> See *id.*, quoting further from Rev. Gomes’s testimony:

Suppose a referendum was the instrument used by a white slave-holding majority in the old South to define the social and legal position of African Americans? Well, they did, and we know the answer to that hypothetical. . . . And what of Mormons, Jews, and any other minority subject to the legislative whim of a well-organized majority designed to consecrate the status quo? Consequences: As our court has opined as recently as last week: “separate is hardly ever equal.”

*Id.*



its many infirmities, state-level direct democracy is here to stay for the foreseeable future, and the LGBT rights movement must come to terms with it in a more engaged and strategic manner. Moreover, what has not been adequately discussed in the wake of the recent ballot initiative losses is that, despite its formidable harms and constitutional infirmities, direct democracy presents marriage equality proponents with important and useful opportunities for progress.

### ***3. Silver Lining Opportunities of Direct Democracy***

Gay and lesbian Americans initially resorted to the courts as the only recourse for protection from the majority's anti-gay bias, prompting gay rights opponents to accuse judges of antidemocratic judicial activism when they adopted pro-equality arguments.<sup>286</sup> Over the last decade or so, legislatures and elected executive branch officeholders in many states have proved to be more receptive to the movement's claims, undermining the anti-gay activists' opposition to gay rights as the product of judicial activism and "legislating from the bench." It is now popular support for marriage equality that is the sole remaining obstacle to civil marriage rights in states—like California and Maine—where the three branches of government have already expressly or tacitly endorsed marriage equality. In those and many other states, the levels of popular support for gay rights

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<sup>286</sup> See Jonathan Rauch, Op-Ed., *Same-Sex Marriage: A year full of challenges; Evolving politics, enduring fundamentals*, L.A. TIMES, Dec. 27, 2009, at A38, available at <http://articles.latimes.com/2009/dec/27/opinion/la-oe-rauch27-2009dec27> ("Opponents were fond of arguing that the gay-marriage movement was not just wrongheaded but antidemocratic."). In his dissent in *Lawrence v. Texas*, Justice Scalia vituperated against the Court for causing "a massive disruption of the current social order" by having "taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed." 539 U.S. 558, 591, 602 (2003) (Scalia, J., dissenting). He wrote: "[w]hat Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand new 'constitutional right' by a Court that is impatient of democratic change." *Id.* at 603. He further stated that "[o]ne of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion." *Id.* at 604.

generally and marriage equality specifically indicate that direct democracy may soon work *in favor* of LGBT equality.

Although anti-gay ballot measures pass almost every time they are placed before voters, the thin margins of victory for some of the recent anti-gay ballot initiatives, and the success with Referendum 71 in Washington, demonstrate that the movement is approaching a tipping point in popular support in some important states. In Washington, D.C., where the first same-sex marriages were licensed by the District government in March 2010, poll results from summer 2009 showed that approximately 65% of respondents would vote in favor of legalization of the right to marry if the question somehow would have been put to voters.<sup>287</sup> Clear majorities support same-sex marriage in Maryland, New York and Rhode Island, three states where same-sex marriage has not yet been legalized, and 2009 survey results show same-sex marriage within five or fewer percentage points of majority support in many key states that have not yet legalized it, including Colorado, Nevada, Hawaii, New Mexico, New Jersey, Oregon and Washington State.<sup>288</sup>

The pace of the shift in public opinion towards support for marriage equality is accelerating.<sup>289</sup> The results of recent polls, in fact, suggest that popular support for gay relationships generally and same-sex marriage specifically has crossed the 50% mark. In May 2010, Gallup reported that 52% of survey respondents regard “gay/lesbian relations” as morally acceptable.<sup>290</sup> In August 2010, CNN and Opinion Research Corporation

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<sup>287</sup> Mike DeBonis, *Vote on It: The Liberal Case for Putting Gay Marriage on the Ballot*, WASH. CITY PAPER, Sept. 11, 2009, at 6 (2009) (“Maybe there is one instance where you put civil rights up to a vote. And that circumstance is when civil rights would win. In a blowout.”). An earlier poll found the margin slimmer, but with a clear majority of D.C. voters (54%) favoring marriage equality. See McCartney, *supra* note 99.

<sup>288</sup> See Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367, 373 (2009), available at [http://www.columbia.edu/~jrl2124/Lax\\_Phillips\\_Gay\\_Policy\\_Responsiveness\\_2009.pdf](http://www.columbia.edu/~jrl2124/Lax_Phillips_Gay_Policy_Responsiveness_2009.pdf) (providing public opinion estimates based on surveys assessing support for a variety of gay rights, including same-sex marriage).

<sup>289</sup> Nate Silver, *Opinion on Same-Sex Marriage Appears to Shift at Accelerated Pace*, FiveThirtyEight.com, Aug. 12, 2010, available at <http://www.fivethirtyeight.com/2010/08/opinion-on-same-sex-marriage-appears-to.html> (discussing how support for same-sex marriage is accelerating at such a pace that “it has become increasingly unclear whether opposition to gay marriage still outweighs support for it.”).

<sup>290</sup> Lydia Saad, *Americans' Acceptance of Gay Relations Crosses 50% Threshold*, Gallup, May 25, 2010, available at <http://www.gallup.com/poll/135764/americans-acceptance-gay-relations-crosses-threshold.aspx>.

released results from their nationwide telephone poll showing that 52% of respondents “think gays and lesbians should have a constitutional right to get married and have their marriage recognized by law as valid.”<sup>291</sup>

Much of the shift in popular support for marriage equality can be attributed to how the idea of “same-sex marriage has been mainstreamed.”<sup>292</sup> Political consultant Bill Carrick notes that “[h]istory is headed in a very pro-gay-marriage direction, and it probably is going to happen in a much shorter time than anybody imagines.”<sup>293</sup> In California alone, the four-point margin of victory for Proposition 8 was anemic compared to the more than twenty-three-point margin of Proposition 22 (the initial ballot initiative to statutorily ban same-sex marriage) just eight years earlier.<sup>294</sup>

Demographic data from the ballot initiative failures also show that the marriage bans’ days are numbered, with younger voters supporting marriage equality at significantly higher rates than older voters. For example, precinct-level results from Maine’s Issue 1 revealed that the initiative failed by enormous margins in the state’s college towns, where polls attract much younger-than-average voters at the polls.<sup>295</sup> A May 2009 nationwide Gallup poll showed that eighteen to twenty-nine-year-olds favor marriage equality by a 59%-to-37% margin, whereas respondents who were over sixty-five oppose same-sex marriage by an even greater margin.<sup>296</sup>

These results are consistent with other poll findings showing that a principal predictor of support for marriage equality is whether one believes

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<sup>291</sup> CNN/Opinion Research Corporation August 6-10, 2010 Telephone Poll Results, Aug. 11, 2010, *available at* <http://i2.cdn.turner.com/cnn/2010/images/08/11/rel11a.pdf>, at 3 (46% responded negatively and 2% had no opinion).

<sup>292</sup> Rauch, *supra* note 286.

<sup>293</sup> Quoted in Dickinson, *supra* note 71. Carrick emphasizes that “[t]he speed at which this issue is moving is unprecedented in my personal political experience.” *Id.*

<sup>294</sup> See *supra* notes 16–24 and accompanying text.

<sup>295</sup> See Adam Bink, *Maine Election Results Thread*, OPENLEFT.COM, Nov. 3, 2009, <http://www.openleft.com/diary/15823/maine-election-results-thread> (noting that the margins were 81% No to 19% Yes at the polls associated with the University of Maine-Orono campus, 63% No to 37% Yes in Brunswick (the location of Bowdoin College), and 54% No to 46% Yes at Farmington, home to a satellite University of Maine campus).

<sup>296</sup> Jeffrey M. Jones, *Majority of Americans Continue to Oppose Gay Marriage*, GALLUP, May 27, 2009, *available at* <http://www.gallup.com/poll/118378/majority-americans-continue-oppose-gay-marriage.aspx> (also showing that respondents over the age of sixty-five oppose same-sex marriage by a margin of 66%-to-32%).

that there is little or no choice involved in sexual orientation—65% of those believing that people do not choose to be gay supporting marriage equality, compared to only 15% of those who believe it is a choice.<sup>297</sup> In contrast to their parents' and grandparents' generations, young Americans are growing up in a social milieu that is significantly more inclusive of gay and lesbian people, leading to a much better understanding of the functionally immutable nature of sexual orientation and, consequently, a generational hostility to anti-gay discrimination.<sup>298</sup> Sociologist Melissa Embser-Herbert calls the up-and-coming cohort of voters "the 'Will & Grace' generation . . . They've grown up seeing gay people on TV and having friends in tenth-grade come out."<sup>299</sup>

More generally, analysis of polling results and voter trends shows that anti-gay activists are facing progressively tougher odds of passing anti-gay measures through ballot initiatives, and that by 2012 roughly half of the fifty states would vote against a same-sex marriage ban.<sup>300</sup> This trend towards marriage equality appears irreversible. Recent research shows that when Americans change their mind on this issue, it is in the direction of favoring same-sex marriage rights, and that once Americans favor marriage

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<sup>297</sup> Press Release, Quinnipiac University, Gays in the Military Should be Allowed to Come Out, U.S. Voters Tell Quinnipiac University National Poll; Key is Belief that Being Gay is By Choice or By Birth, (Apr. 30, 2009), *available at* <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1292>; *see also* Gregory Lewis, *Does Believing Homosexuality is Innate Increase Support for Gay Rights?*, 4 POL'Y STUD. J. 669–90 (2009) (summarizing results from a study of twenty-four national surveys since 1974, concluding that there is a strong correlation between the belief that sexual orientation is innate with support of civil rights for gay Americans).

<sup>298</sup> *See* Ben Smith, *Is Gay Marriage 'Inevitable?'*, POLITICO, Dec. 9, 2009, <http://www.politico.com/news/stories/1209/30377.html> (quoting pollster Diane Feldman as positing that "[t]here's a lot of things that go along with support for same-sex marriage—attitudes such as awareness that people are born gay," with younger voters' "underlying attitudes about gay people and gay rights . . . very different" from those of older voters).

<sup>299</sup> Matthew B. Stannard, *Obama Will End 'Don't Ask' Policy, Aide Says*, S.F. CHRON., Jan. 14, 2009, at A1; *see also* Talbot, *supra* note 71, at 42 ("People who went to high schools where there were gay-straight alliances, had friends who shared their coming-out stories, and grew up in a culture populated with gay celebrities simply feel more comfortable with the idea of same-sex couples marrying.").

<sup>300</sup> Nate Silver, *Will Iowans Uphold Gay Marriage?*, FIVETHIRTYEIGHT, Apr. 3, 2009, <http://www.fivethirtyeight.com/2009/04/will-iowans-uphold-gay-marriage.html> (political prognosticator Nate Silver's regression model analysis concludes that "voter initiatives to ban gay marriage are becoming harder and harder to pass every year" and that "[b]y 2016, only a handful of states in the Deep South would vote to ban gay marriage, with Mississippi being the last one to come around in 2024").

equality, they tend not to revert back to favoring discrimination at a later time.<sup>301</sup> In fact, the social stigma is shifting from those who come out as gay or lesbian to those who would discriminate against them. Discussing the growing popular intolerance for anti-gay animus, legal journalist Linda Greenhouse noted that whereas “lesbians and gay men have left the closet to assert their equal rights as citizens, their adversaries seem to be running for a closet of their own.”<sup>302</sup> Marriage equality is becoming a demographic, and thus democratic, inevitability.

#### ***4. Cultivating and Harnessing Public Opinion***

While protecting the constitutional rights of minorities from the prejudices of the broader electorate is a seminal institutional role for the judiciary, winning LGBT rights by means of direct democracy has obvious and not-so-obvious advantages over courthouse victories. Gaining rights at the ballot box instead of in the courthouse disarms anti-gay forces intent on fanning the flames of backlash against countermajoritarian court decisions viewed by some as appeasing liberal elites at the expense of popular policy preferences.<sup>303</sup> Democratically won rights have the air of legitimacy and permanence that a countermajoritarian court decision lacks. As Professor Evan Gertsmann argues, “the Court frames its orders in terms of decrees, which are poorly suited for bringing about democratic dialogue or a genuine change of the public’s heart.”<sup>304</sup>

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<sup>301</sup> See Smith, *supra* note 120, at 2 (discussing demographic trends showing, *inter alia*, that “support for same-sex marriage is just part of a bundle of attitudes unlikely to change with age”); Talbot, *supra* note 71, at 42 (characterizing public opinion research results showing that “[w]hen people change their mind on this issue, they tend to change it toward marriage equality.”).

<sup>302</sup> Posting of Linda Greenhouse to N.Y. TIMES Opinionator Blog, <http://opinionator.blogs.nytimes.com/2010/01/14/into-the-closet/?pagemode=print> (Jan. 14, 2010, 21:34 EST) (discussing efforts by anti-gay activists to bar video coverage of the non-jury trial in the federal constitutional challenge to California Proposition 8, and to block public disclosure of the 138,000 signers of the petition in Washington State that led to the failed Referendum 71 ballot initiative permitting voters to veto the state’s domestic partnership statute).

<sup>303</sup> See ESKRIDGE, *supra* note 132, at 378–79 (discussing how “winning in court is less important than persuading your neighbors,” particularly since court victories like *Lawrence* “might undermine gay rights . . . by lulling gay people into believing that the culture war has been won, or that victory is just around the corner after more constitutional litigation.”).

<sup>304</sup> EVAN GERTSMANN, SAME SEX MARRIAGE AND THE CONSTITUTION 160 (2008).

It is in working for equality in direct democratic contexts that gay and lesbian Americans introduce ourselves to neighbors we might not otherwise get to know, personifying to these neighbors the inequality and discrimination that would be easily dismissible abstractions to those unacquainted with openly gay people, and ultimately garnering the broad societal understanding and acceptance that are unattainable through judicial activism alone. Civil marriage, after all, confers not only the formal legal rights that come with the marriage license, but also a mark of cultural and social recognition and endorsement lacking in most other legal relationships. As Massachusetts Chief Justice Margaret Marshall put it in her opinion for the majority in *Goodridge*, because civil marriage is both a “deeply personal commitment” as well as “a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family,” there are “three partners to every civil marriage: two willing spouses and an approving State.”<sup>305</sup> Professor Charles Fried similarly characterized civil marriage as “a kind of civil blessing asked of the population as a whole.”<sup>306</sup> Thus, a same-sex couple married civilly following the democratic endorsement of marriage equality may live in a social milieu materially more embracing and supportive than one where the right to marry is rightly recognized by the state’s highest court.<sup>307</sup> In addition, the democratic preservation or outright conferral of civil marriage rights to same-sex couples, as a powerful symbol of social acceptance and hallmark of gay equality, would serve as a catalyst for efforts in support of LGBT equality in other areas, including protection from discrimination in employment, housing, public accommodations and family law.

Even more important is that the retail political grassroots work required to shift public opinion towards support for marriage equality and other LGBT rights—including but not limited to the work described in the subsections above—would also yield benefits far beyond helping preserve

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<sup>305</sup> *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 321–22 (2003).

<sup>306</sup> CHARLES FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT* 141 (2007).

<sup>307</sup> Journalist Jonathan Rauch articulated this argument especially well in 2004:

“Law is only part of what gives marriage its binding power; community support and social expectations are just as important. In a community that looked on same-sex marriage with bafflement or hostility, a gay couple’s marriage certificate, while providing legal benefits, would confer no social support from the heterosexual majority.”

Jonathan Rauch, *A More Perfect Union*, ATLANTIC MONTHLY, Apr. 2004, at 88.

those rights against anti-gay ballot initiatives and referenda. A pathbreaking 2009 Columbia University study by political scientists Jeffrey R. Lax and Justin H. Phillips, in fact, revealed that public opinion on gay rights not only drives direct democratic outcomes, but also motivates legislative and executive policymaking that theoretically should be more insulated from the popular will.<sup>308</sup> Contrary to conservatives' common complaint that gay rights advances in courts and legislatures are imposed against the popular preference in order to mollify elite special interests, Professors Lax and Phillips concluded that the state-level, mostly legislative conferral of a variety of rights to gays—including marriage, civil union, adoption rights and employment discrimination protections—has been *responsive* to popular majoritarian support for those rights. Instead of the political branches leading public opinion on gay rights, public opinion has been in the lead all along. Moreover, disproving the popular complaint among gay rights opponents, Lax and Phillips found that where there is an incongruence between public opinion and policymaking by elected officials, the resultant policies have gone against the interests of gay citizens: “[m]ajority will is not trumped by pro-gay elites—rather, opinion and policy are disconnected in a way that works *against* the interests of gays and lesbians.”<sup>309</sup> In other words, pro-gay policymaking has lagged, not led, public opinion. Almost invariably, pro-gay public opinion leads to pro-gay representative lawmaking.

Public opinion also drives much judicial decision-making. Although the protection of minority rights against majoritarian prejudices is a seminal (albeit contested) institutional role of the courts,<sup>310</sup> there is a

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<sup>308</sup> Lax & Phillips, *supra* note 288, at 382–83.

<sup>309</sup> *Id.* at 383 (“In other words, we do not find any evidence suggesting a consistent pro-gay bias in policy making, as is often argued by opponents of gay rights. Nor is there evidence that governmental elites override conservative opinion majorities (although government ideology does independently affect policy where liberal majorities exist).”).

<sup>310</sup> See, e.g., *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1937) (recognizing a “narrower scope for operation of the presumption of constitutionality” where courts examine the validity of “statutes directed at particular religious . . . or national . . . or racial minorities,” and calling for the application of “more searching judicial inquiry” upon statutes rooted in “prejudice against discrete and insular minorities”); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 2 (1980) (noting that “the Court must exercise [its] power in order to protect individual rights, which are not adequately represented in the political processes”); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* ch. XV (1835) (discussing, *inter alia*, the importance of an independent judiciary in protecting minority rights); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 135 (1980) (arguing that the judiciary’s role in protecting the rights of minorities to political representation and engagement “lies at the core of our system”); Joan Schaffner, *The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy*, 54 AM. U. L. REV. 1487, 1518 (2005) (discussing the widely recognized role of the judiciary as “primary protector of individual rights, and the sole protector of the rights of the ‘minority’”). *But see* ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986) (1962) (describing the “counter-majoritarian difficulty” inherent in courts making decisions contrary to the democratically articulated popular will).

reticence among judges from across the ideological spectrum to issue decisions contrary to the discernible public will—what Alexander Bickel famously called the “counter-majoritarian difficulty.”<sup>311</sup> William Rehnquist, then a law clerk to Justice Robert Jackson, infamously wrote in a 1952 memorandum entitled “A Random Thought on the Segregation Cases” that “*Plessy v. Ferguson* was right and should be reaffirmed” since, among other things, “it was not part of the judicial function to thwart public opinion except in extreme cases” and the matter of segregation was “not one of

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<sup>311</sup> See BICKEL, *supra* note 310, at 16. See also BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 381 (2009) (concluding that the Supreme Court “ultimately is accountable and responsive to the will of the people.”). Professor Friedman explained that judges concern themselves with public opinion because:

[T]hey do not have much of a choice . . . if they care about preserving the Court’s institutional power, about having their decisions enforced, about not being disciplined by politics. Americans have abolished courts, impeached one justice, regularly defied Court orders, packed the Court, and stripped its jurisdiction. If the preceding history shows anything, it is that when judicial decisions wander far from what the public will tolerate, bad things happen to the Court and the justices.

*Id.* at 375.



those extreme cases.”<sup>312</sup> Rehnquist retained his aversion to countermajoritarian decisions once appointed to the Supreme Court.<sup>313</sup>

Ten years before Rehnquist authored his memorandum to Justice Jackson, Gallup asked in a poll whether the Japanese Americans confined to detention camps during World War II should be permitted to return to their homes at the conclusion of the war. Over 100,000 Japanese Americans were relocated to the camps solely because of their Japanese descent. A large majority of those polled—34% to 48%—opposed allowing the return of the interned Japanese Americans and instead favored their deportation.<sup>314</sup> These poll results help explain how two years later, in the 1944 *Korematsu v. United States* case, a six-member majority of the Supreme Court rejected a constitutional challenge to the internment program.<sup>315</sup> *Korematsu* can be characterized not only as an instance of the Court’s capitulation to the wartime demands of the Executive Branch, but also a reflection of strong, albeit racist, public opinion.

Unsurprisingly, favorable public opinion has played a dispositive role in judicial cases involving LGBT rights. For example, two landmark, but conflicting, gay rights precedents illustrate what Prof. Barry Friedman calls a “screamingly evident case of the Court’s running right along the tracks of public opinion.”<sup>316</sup> Two-thirds of the American people favored statutes criminalizing consensual homosexual sex when, in the 1986 *Bowers*

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<sup>312</sup> *Hearings on the Nomination of Justice William Hubbs Rehnquist Before the Subcomm. on the Judiciary*, 99th Cong., 2d Sess. (1986), quoted in MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 190 (1994). He continued:

To the argument made by Thurgood not John Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are.

*Id.*

<sup>313</sup> Asked whether the members of the Court are able “to isolate themselves from the pressure of public opinion,” Rehnquist replied: “we are not able to do so and it would probably be unwise to try.” FRIEDMAN, *supra* note 311, at 371.

<sup>314</sup> *Id.* at 373. Shockingly, 3.8% of survey respondents favored executing the detainees. *Id.*

<sup>315</sup> 323 U.S. 214 (1944).

<sup>316</sup> FRIEDMAN, *supra* note 311, at 359. Friedman adds that “[i]t was also a good example of the difference mobilization against Supreme Court decisions could make.” *Id.*

*v. Hardwick* case, the Supreme Court upheld those statutes. When the Court overruled *Bowers* in the 2003 *Lawrence v. Texas* decision, approximately 60% of Americans *opposed* the criminal prohibitions.<sup>317</sup>

Judicial concerns related to countermajoritarianism are not exclusive to conservatives. Moderates and progressives also have embraced the need to restrain judicial review from too easily countermanning the public will. Justice Sandra Day O'Connor posited that because courts "don't have standing armies to enforce opinions" they "rely on the confidence of the public in the correctness of those decisions." Consequently, courts "have to be aware of public opinions and of attitudes toward our system of justice, and . . . try to keep and build that trust."<sup>318</sup> Judge Richard Posner, who has declared that he is not opposed to same-sex marriage rights in his home state,<sup>319</sup> has cautioned against prematurely relying on "the heavy artillery of constitutional rightsmaking" before "allowing the matter [of same-sex marriage] to simmer for a while."<sup>320</sup> "Sophisticates," he wrote, "aren't always right . . . and judges must accord considerable respect to the deeply held views of the democratic majority."<sup>321</sup>

It therefore should not have come as a surprise to observers familiar with this judicial reticence to countermand the public will that known liberal California Supreme Court Justice Joyce L. Kennard, having earlier voted with the majority in favor of marriage equality, suggested during oral argument in the Proposition 8 appeal that overturning the initiative on constitutional grounds would cause the court to "willy-nilly disregard the

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<sup>317</sup> *Id.* at 359–60; see also Adam Liptak, *In the Battle Over Gay Marriage, Timing May Be Key*, N.Y. TIMES, Oct. 27, 2009, at A14, available at [http://www.nytimes.com/2009/10/27/us/27bar.html?\\_r=1](http://www.nytimes.com/2009/10/27/us/27bar.html?_r=1) (discussing the role of public opinion in the *Bowers* and *Lawrence* dyad).

<sup>318</sup> FRIEDMAN, *supra* note 311, at 371,

<sup>319</sup> See Richard A. Posner, *The Law and Economics of Gay Marriage*, in UNCOMMON SENSE 17, 20 (2009) ("Although personally I would not be upset if Illinois (where I live) or any other state decided to recognize homosexual marriage, I disagree with contentions that the Constitution should be interpreted to require state recognition of homosexual marriage on the ground that it is a violation of equal protection of the laws to discriminate against homosexuals by denying them that right.").

<sup>320</sup> Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1585–86 (1997).

<sup>321</sup> *Id.* at 1586.

will of the people.”<sup>322</sup> It also is true, and not easily forgotten by marriage equality advocates, that countermajoritarian court and legislative decisions run the risk of popular backlash capable of ramifying across related areas and in other parts of the country. *Goodridge*, the 2004 Massachusetts marriage decision, is credited with prompting successful constitutional ballot initiatives in many other states which banned not only marriage but also civil union, domestic partnership and similar relationship recognition.<sup>323</sup>

In sum, the LGBT rights movement, and advocates for marriage equality specifically, are well-served by coming to terms with the reality that the “people’s veto” and other direct democratic mechanisms, however constitutionally infirm or suspect, are an important component of the lawmaking apparatus of most states. Although ballot initiatives and referenda have been used repeatedly to marginalize and oppress sexual and gender minorities, gay and lesbian Americans are reaching unprecedented levels of social acceptance and inclusion in the fabric of many communities. In many states, we no longer are limited to turning to the judiciary as the only branch of government that may be receptive to our demands for fairness and nondiscrimination. The historic Washington State ballot initiative victory is a harbinger of direct democratic victories to come. By

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<sup>322</sup> Maura Dolan, *Ruling on Proposition 8*, L.A. TIMES, Mar. 6, 2009, at A1.

<sup>323</sup> See GERTSMANN, *supra* note 304, at 195–96. It bears noting, however, that I do not subscribe to Gerald N. Rosenberg’s contention that it is futile and counterproductive for unpopular minorities, especially lesbians and gay men, to rely on the courts to achieve legal reform and mobilize social change. See GERALD N. ROSENBERG, *THE HOLLOW HOPE*, 355–419 (2d ed. 2008). Rosenberg insists that “litigation as a means of obtaining the right to same-sex marriage has not succeeded” and that “activists for same-sex marriage turned to courts too soon in the reform process.” *Id.* at 415–16. Rosenberg is right to caution activists on the risks of popular backlash against countermajoritarian court decisions and of overconfidence in the judiciary as a catalyst for social change. But contrary to his assessment, the movement’s pursuit of marriage equality in the courts—especially when the judiciary was the only branch of government amenable to its claims—has enabled it to assert its constitutional claims with clarity and force in neutral public fora, thereby helping frame and catalyze public discussion over the long term far beyond the contours and specific resolutions of individual cases, with very influential and beneficial wins along the way (e.g., California, Iowa and Massachusetts). Success in the litigation strategy of any social movement must be measured not by raw test case win-loss ratios alone, but by assessing how the litigation strategy has interplayed with allied strategies to reform legislation and regulation, to elect fair-minded allies to public office, and favorably affect public opinion. For a discussion of similar criticisms of Prof. Rosenberg’s thesis, see Wayne D. Moore, *Review: The Hollow Hope: Can Courts Bring About Social Change (2nd ed.)*, by Gerald N. Rosenberg, 18 LAW & POLITICS BOOK REVIEW 1045-1054 (2008), available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/rosenberg1108.htm>.

engaging our larger communities in sustained and earnest dialogue and putting into place the lessons discussed in the subsections above, we may succeed at persuading our neighbors—and not just judges and legislators—to recognize our full citizenship. And in doing this important work to advance LGBT rights in the court of public opinion, we create an atmosphere more conducive to favorable decisions in legislatures and courts of law.

### III. CONCLUSION—AND A NOTE ABOUT PATIENCE AND PERSPECTIVE

There is no question that the 2008 and 2009 anti-gay ballot initiative results in California, Arkansas, Arizona, Florida and Maine were painful setbacks to the LGBT rights movement and the quest for marriage equality specifically. These defeats and the events that surrounded them, however, revealed much by way of progress and promise.

In addition to the advances in public opinion detailed above, the last eighteen months have brought significant legislative and judicial strides for the LGBT rights movement. Within months of Election Day 2008, same-sex marriage was recognized legislatively in Vermont, which had concluded that its pioneering civil unions statute was inadequate,<sup>324</sup> Maine,<sup>325</sup> and New Hampshire.<sup>326</sup> Same-sex couples in Connecticut began to exercise their right to marry on November 12, 2008.<sup>327</sup> The District of Columbia Council passed a bill recognizing civil same-sex marriage in Washington, D.C., on December 15, 2009, by a vote of eleven to two, making DC the sixth state-level jurisdiction (not including Maine), and first such jurisdiction south of the Mason-Dixon line, to legalize same-sex marriage in the United States.<sup>328</sup>

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<sup>324</sup> See Sally Pollak, *On the Street, People Exuberant Over Vote*, BURLINGTON FREE PRESS, Apr. 8, 2009, at 1A.

<sup>325</sup> See Sacchetti, *supra* note 44; Ray Routhier, *Same-Sex Weddings May Be Blissful for State Economy*, PORTLAND PRESS HERALD, May 9, 2009, at A1.

<sup>326</sup> Tom Fahey, *Same-Sex Marriage Law Signed*, UNION LEADER (Manchester, NH), June 4, 2009, at 1 (noting that the same-sex marriage law would become effective January 1, 2010).

<sup>327</sup> Daniela Altimari, *Moods of a Milestone: A Variety of Emotions as Same-Sex Marriage Licenses Become Available Today*, HARTFORD COURANT, Nov. 12, 2008, at A1.

<sup>328</sup> Tim Craig, *D.C. Council Approves Same-Sex Marriage*, WASH. POST, Dec. 16, 2009, at A1. See also Keith L. Alexander & Ann E. Marimow, *For Gays, a D.C. Day to Treasure*, WASH. POST, Mar. 4, 2010, at A1 (noting that although “Congress and the White House could have killed the [marriage equality] bill,” neither opted to do so).

This was an especially notable achievement, since most of the D.C. Council Members and 54% of Washington's population are African American,<sup>329</sup> challenging the knee-jerk assumption that marriage equality is unattainable in majority-minority communities. Despite the high-profile failures of marriage equality bills in the New York Senate in December 2009 and in the New Jersey Senate in 2010,<sup>330</sup> a record number of bills recognizing same-sex marriage were introduced in state legislatures across the country in the 2009-2010 legislative sessions.<sup>331</sup>

The last 18 months also brought significant progress for marriage equality in the courts. The Iowa Supreme Court on April 3, 2009 issued a remarkably forceful and unanimous decision in favor of civil same-sex marriage recognition. In *Varnum v. Brien*, the court overturned the state's ten-year-old same-sex marriage ban, emphasizing that the gay and lesbian plaintiffs had "commonalities shared with other Iowans" in wanting to form devoted and committed relationships, raise families and contribute to society.<sup>332</sup> The Iowa court stressed the religious roots of much of the opposition to civil same-sex marriage and the illegitimacy of religious dogma as justification for the gay marriage ban.<sup>333</sup> Reasoning that "civil

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<sup>329</sup> See U.S. CENSUS BUREAU, 2006–2008 AMERICAN COMMUNITY SURVEY, DISTRICT OF COLUMBIA FACT SHEET (2008), available at <http://bit.ly/15FPBX>; District of Columbia Council, <http://www.dccouncil.washington.dc.us/aboutthecouncil> (last visited July 6, 2010).

<sup>330</sup> Jeremy W. Peters, *New York Senate Turns Back Bill on Gay Marriage*, N.Y. TIMES, Dec. 3, 2009, at A1.

<sup>331</sup> *N.J. Senate rejects bill legalizing gay marriage*, STAR-LEDGER, Jan. 7, 2010, available at [http://www.nj.com/news/index.ssf/2010/01/nj\\_senate\\_rejects\\_bill\\_legaliz.html](http://www.nj.com/news/index.ssf/2010/01/nj_senate_rejects_bill_legaliz.html); see also Mary L. Bonauto & Evan Wolfson, *Advancing the Freedom to Marry in America*, ABA HUM. RTS., Summer 2009, at 12.

<sup>332</sup> *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009). Professor Katherine Franke, in also observing that the court "makes every effort to situate the marriage case within the context of local Iowan values," posits that "[w]hat they're saying here is this: don't think we're doing this because of some carpet-bagging gay rights lawyers from Lambda Legal in New York—we're just taking the next step in a road that is distinctly local and Iowan." Posting of Katherine Franke to Gender & Sexuality Law Blog, <http://blogs.law.columbia.edu/genderandsexualitylawblog/2009/04/04/> (Apr. 4, 2009).

<sup>333</sup> The court recognized that although "religiously motivated opposition to same-sex civil marriage shapes the basis for legal opposition to same-sex marriage," in reality "other equally sincere groups and people in Iowa and around the nation have strong religious views that yield the opposite conclusion." *Varnum*, 763 N.W.2d at 904–05. As a result, the court observed that the state's "constitution does not permit any branch of government to resolve these types of religious debates and entrusts to courts the task of ensuring government avoids them." *Id.* at 905.

marriage must be judged under . . . constitutional standards of equal protection and not under religious doctrines or the religious views of individuals,” the Court concluded that those constitutional “principles require that the state recognize both opposite-sex and same-sex civil marriage.”<sup>334</sup> That a Midwestern state supreme court, far from the reputedly progressive and gay-friendly coasts, unanimously and so unequivocally insisted on marriage equality will doubtlessly prove to be a landmark, watershed moment in the history of the LGBT rights struggle.<sup>335</sup>

In addition to D.C. and the five states that now issue civil same-sex marriage licenses, a growing number of jurisdictions recognize same-sex marriages licensed by other states.<sup>336</sup> As of October 2009, 40% of Americans live in jurisdictions that either license or recognize same-sex marriage (not including California).<sup>337</sup> Other signs that the nation is undergoing a paradigmatic shift towards acceptance of same-sex marriage include the many statements of support for marriage equality from its past opponents. Former President Bill Clinton, who in 1996 signed the Defense of Marriage Act into law, now supports same-sex marriage.<sup>338</sup> Former Representative Bob Barr (R-GA), a lead DOMA co-sponsor, now favors its repeal, as does Representative Earl Blumenauer (D-OR), who now characterizes his vote in support of DOMA as “the worst vote of my political career.”<sup>339</sup> DOMA itself is on increasingly weakened ground. On

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<sup>334</sup> *Id.* at 905–06.

<sup>335</sup> ACLU LGBT Rights Project Director Matt Coles posited that the Iowa Supreme Court’s “deeply practical rationale for insisting that marriage exclusions either be based on rigorous logic and evidence or be struck down” and the opinion’s “down-to-earth honesty” will “make this a deeply influential opinion.” Matt Coles, *The Legal Importance of the Iowa Marriage Decision*, HUFFINGTON POST, Apr. 9, 2009, [http://www.huffingtonpost.com/matt-coles/the-legal-importance-of-t\\_b\\_184038.html](http://www.huffingtonpost.com/matt-coles/the-legal-importance-of-t_b_184038.html).

<sup>336</sup> Bonauto & Wolfson, *supra* note 331, at 13 (noting that the District of Columbia, New Mexico, New York and Rhode Island now recognize interstate same-sex marriages).

<sup>337</sup> *Id.*

<sup>338</sup> Michael Tracey, *Bill Clinton Backs Same-Sex Marriage*, NATION, July 14, 2009, <http://www.thenation.com/doc/20090720/tracey/print>.

<sup>339</sup> See Kerry Eleveld, *Changing Their Tune on DOMA*, ADVOCATE, Sept. 16, 2009, [http://www.advocate.com/politics/Washington\\_d\\_c\\_/changing\\_their\\_tune\\_on\\_doma/](http://www.advocate.com/politics/Washington_d_c_/changing_their_tune_on_doma/); Earl Blumenauer, *Proudly Changing My Position on DOMA*, HUFFINGTON POST, Sept. 15, 2009, [http://www.huffingtonpost.com/rep-earl-blumenauer/proudly-changing-my-posit\\_b\\_287689.html](http://www.huffingtonpost.com/rep-earl-blumenauer/proudly-changing-my-posit_b_287689.html).

July 8, 2010, U.S. District Judge Joseph Tauro in Boston ruled in *Gill v. Office of Personnel Management* that the statute unconstitutionally encroaches on the right of the Commonwealth of Massachusetts “to determine who is eligible to marry.”<sup>340</sup> According to the court, Congress enacted DOMA “for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves” and “such a classification, the Constitution clearly will not permit.”<sup>341</sup>

Steve Schmidt, the 2008 presidential campaign manager to Senator John McCain (R-AZ), an opponent of same-sex marriage rights, has urged the Republican Party to favor the right to marry for gay couples.<sup>342</sup> Ken Mehlman, campaign manager for President George W. Bush’s successful reelection effort in 2004 and chairman of the Republican National Committee from 2005 to 2007, came out as gay and as an advocate for marriage equality in August 2010.<sup>343</sup> Joe Bruno, the former Republican majority leader of the New York Senate, and former Maryland governor Parris Glendening, have both reversed their strong opposition to same-sex marriage rights.<sup>344</sup> And although LGBT movement activists and observers raised concerns about the timing of the David Boies/Ted Olson federal

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<sup>340</sup> *Gill v. Office of Personnel Management*, No. 09-10309-JLT, slip. op. at 32 (D. Mass. filed July 8, 2010), available at <http://www.glad.org/uploads/docs/cases/2010-07-08-gill-district-court-decision.pdf>.

<sup>341</sup> *Id.* at 38.

<sup>342</sup> Mr. Schmidt notes that “having a gay sibling” has “definitely impacted my views on these issues.” Dana Bash, *McCain Campaign Manager: GOP Should Back Same-Sex Marriage*, CNN, Apr. 17, 2009, <http://edition.cnn.com/2009/POLITICS/04/17/schmidt.log.cabin/index.html>.

<sup>343</sup> Michael Luo, *Former G.O.P. Leader Says He Is Gay*, N. Y. TIMES, August 25, 2010, at A16, available at [http://www.nytimes.com/2010/08/26/us/politics/26mehlman.html?\\_r=1&scp=1&sq=mehlman&st=cse](http://www.nytimes.com/2010/08/26/us/politics/26mehlman.html?_r=1&scp=1&sq=mehlman&st=cse).

<sup>344</sup> See Parris Glendening, Letter to the Editor, BALT. SUN, Aug. 27, 2009, available at [www.baltimoresun.com/news/opinion/readersrespond/bal-ed.le.letters270aug27,0,852311.story](http://www.baltimoresun.com/news/opinion/readersrespond/bal-ed.le.letters270aug27,0,852311.story) (concluding “I was wrong!” to have “believed ‘marriage should be between a man and a woman.’” To the contrary, “[a]llowing same-gender couples to join in the institution of marriage, and to experience the commitment and security of being legally married, does nothing to diminish or alter the institution of marriage itself. It does, however, promote healthy, stable families”); Bonauto & Wolfson, *supra* note 331, at 13 (noting that Bruno, who previously “had single-handedly blocked [the NY same-sex marriage bill] in 2007–08,” has reversed himself and was recently quoted as saying, “Life is short, and we should all be afforded the same opportunities and rights to enjoy it”).

constitutional challenge of Proposition 8 in *Perry v. Schwarzenegger*,<sup>345</sup> it is a notable advance for the marriage equality movement to have a nationally prominent conservative, such as Olson, arguing forcefully in favor of marriage equality, insisting that “same-sex marriage is an American value.”<sup>346</sup>

Marriage aside, the last year has brought with it significant strides across the nation in non-marital relationship recognition rights for gays and lesbians, with the democratic conferral of domestic partnership rights in Washington State the most prominent of these developments.<sup>347</sup> Election Day 2009 also saw the election of openly gay leaders to key political positions in states that are otherwise hostile to LGBT rights: Annise Parker became the mayor of Houston, TX, the nation’s fourth largest city, and Charles Pugh became the Detroit City Council President.<sup>348</sup> Parker and Pugh are two of the now 445 openly gay elected officials across the country—188 more than in 2002.<sup>349</sup> The year capped a decade of significant advances for gay rights. Between 2000 and 2009, the number of states prohibiting anti-gay discrimination in employment and other activities increased from twelve to twenty-two (an 83% improvement), with 88% of the Fortune 500 prohibiting sexual orientation discrimination in 2009, compared to 51% in 2000.<sup>350</sup>

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<sup>345</sup> See, e.g., Talbot, *supra* note 71, at 41–42 (noting the skepticism of a number of gay rights movement leaders and scholars, including Professor William Eskridge, who explains his pessimism about the likelihood that the suit will ultimately prevail by reasoning that “[a] question that so evenly but intensely divides the country is not one that should be decided by the courts nationwide”); Adam Liptak, *In Battle Over Gay Marriage, Timing May Be Key*, N.Y. TIMES, Oct. 29, 2009, at A14, available at [http://www.nytimes.com/2009/10/27/us/27bar.html?\\_r=1](http://www.nytimes.com/2009/10/27/us/27bar.html?_r=1) (quoting Professor Andrew Koppelman as saying that he has “trouble getting to one” Supreme Court Justice that Mr. Olson “could count on” for support).

<sup>346</sup> See Theodore B. Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK, Jan. 18, 2010, available at <http://www.newsweek.com/id/229957/output/print> (“Legalizing same-sex marriage would . . . be a recognition of basic American principles, and would represent the culmination of our nation’s commitment to equal rights.”).

<sup>347</sup> Ashley Surdin, *Benefits for Same-Sex Partners Are Expanding*, WASH. POST, Nov. 27, 2009, at A4.

<sup>348</sup> James C. McKinley, Jr., *Gay Candidates Get Support That Causes May Not*, N.Y. TIMES, Dec. 28, 2009, at A17.

<sup>349</sup> *Id.*

<sup>350</sup> MOVEMENT ADVANCEMENT PROJECT—HAAS FUND, A DECADE OF PROGRESS ON LGBT RIGHTS (2009) <http://www.lgbtmap.org/file/a-decade-of-lgbt-progress.pdf> (noting as well that “[t]he percentage of the U.S. population living in states banning discrimination based on sexual orientation soared from 24.5 percent to 44.1 percent, an 80 percent increase.”).



Despite such significant progress, there is no disputing that opposition to same-sex marriage remains pervasive and deeply entrenched in many parts of the United States. It is also true, as exemplified by the campaigns in favor of the recent anti-gay ballot initiatives, that opponents of marriage equality are taking extreme and even desperate measures to retard or reverse progress towards marriage equality. Yet this formidable backlash against the accelerating progress towards universal marriage equality should not take the movement entirely by surprise in light of how predecessor movements (*e.g.*, African American civil rights, women's and reproductive rights) faced similar popular backlashes in the aftermath of judicial and legislative victories.<sup>351</sup> Deep and durable social change is iterative, incremental and slow.

The backlash to marriage equality progress also was to be expected in view of the significance of civil marriage rights to the lives of lesbian and gay Americans, as well as what they represent to opponents of LGBT equality. The rightful conferral of the dignitary as well as legal benefits of civil marriage upon same-sex couples secures the position of lesbian and gay Americans in the nation's community life. It counteracts the cultural and social marginalization of gay and lesbian Americans and, in turn, marginalizes those anti-gay activists and arguments that seek to perpetuate stigmatization of and discrimination against gay people. Some same-sex marriage opponents are against marriage equality not because they adhere to a principled conceptualization of marriage as requiring a heterosexual union, but because they correctly see civil marriage as the final frontier in the struggle for the full social and cultural enfranchisement of lesbian and gay Americans.<sup>352</sup> In fact, some anti-gay activists mince no words when

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<sup>351</sup> See, *e.g.*, FRIEDMAN, *supra* note 311, at 242–48, 321–30 (discussing backlashes to, *inter alia*, *Brown v. Board of Education* and *Roe v. Wade*).

<sup>352</sup> Andrew Sullivan makes this argument most eloquently and convincingly:

The truth about civil marriage—why it is the essential criterion for gay equality—is that it alone explodes this core marginalization and invisibility of gay people. It alone can reach those gay kids who need to know they have a future as a dignified human being with a family. It alone tells society that gay people are equal in their loves and in their hearts and in their families—not just useful in a society with a need for talented or able individuals whose private lives remain perforce sequestered from view.

Andrew Sullivan, *The Pain in Maine II*, ATLANTIC, Nov. 4, 2009, [http://andrewsullivan.theatlantic.com/the\\_daily\\_dish/2009/11/the-pain-in-maine-ii.html](http://andrewsullivan.theatlantic.com/the_daily_dish/2009/11/the-pain-in-maine-ii.html).

they explain their opposition to marriage equality as rooted not in any principled concern for the marital institution, but in how the recognition of civil same-sex marriage rights for gay people would catalyze “the acceptance and normalization of homosexuality” in the culture.<sup>353</sup> Much of the opposition to marriage equality, having little to do with marriage and almost everything to do with gay social acceptance, is thus pretextual and therefore especially intractable.

Proponents of marriage equality thus would be well-served by viewing the 2008 and 2009 ballot initiative results with wide-angle perspective, patience and resolve. We find ourselves still in the middle of what remains a long struggle towards full civil equality for LGBT Americans. It is a struggle that, like those of the movements before it, progresses in fits and starts, encountering setbacks and breakthroughs along the way. Warning against both resignation at the heels of defeat as well as false optimism in the face of progress, Rev. Dr. Martin Luther King, Jr., noted that “[c]hange does not roll in on the wheels of inevitability, but comes through continuous struggle.”<sup>354</sup> The LGBT rights movement is now in that long incremental interim stage in which King’s movement found itself when he observed that “[w]e stand today between two worlds—the dying old order and the emerging new.”<sup>355</sup>

It will take more time and struggle for the emergent new order of full LGBT equality to take hold. Near-miss failures like those in the 2008 and 2009 ballot initiatives can be necessary steps along the path to decisive popular victories. In Maine, for example, voters narrowly vetoed state

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<sup>353</sup> See Brian Camenker, *How Same-Sex ‘Marriage’ Affects Massachusetts*, MASSRESISTANCE, Oct. 20, 2008, [www.massresistance.org/docs/marriage/effects.of.ssm.pdf](http://www.massresistance.org/docs/marriage/effects.of.ssm.pdf) (characterizing same-sex marriage as “a hammer to force the acceptance and normalization of homosexuality on everyone”); see also Press Release, Maine Family Policy Council, Press Conference Sheds Light on Same-Sex Marriage Debate, (Oct. 28, 2009), available at [http://mainefamilypolicycouncil.com/artman/publish/State\\_House\\_4/Press\\_Conference\\_Sheds\\_Light\\_on\\_Same\\_Sex\\_Marriage\\_Debate.shtml](http://mainefamilypolicycouncil.com/artman/publish/State_House_4/Press_Conference_Sheds_Light_on_Same_Sex_Marriage_Debate.shtml) (noting that some same-sex marriage opponents view marriage equality as being “really about the acceptance and normalization of homosexuality.”); Peter Wood, *What’s So Civil About Civil Unions*, NAT’L REV., Feb. 17, 2004, available at <http://www.nationalreview.com/comment/wood200402170856.asp> (positing that “the gay-marriage debate is fundamentally about making homosexual behavior a fully accepted and legitimate part of American life”).

<sup>354</sup> STEPHEN B. OATES, LET THE TRUMPET SOUND: A LIFE OF MARTIN LUTHER KING, JR. 100 (1994).

<sup>355</sup> *Id.*

statutes prohibiting sexual orientation discrimination in 1997 and again in 2000, before letting a broader statute prohibiting not only sexual orientation discrimination, but also discrimination motivated by gender identity, pass in 2005.<sup>356</sup> That only four years later marriage equality in Maine was achieved legislatively, and nearly ratified by ballot initiative, are telling indicators of the LGBT movement's trajectory and acceleration.

In this long era of transition towards universal marriage equality in the United States, same-sex marriage will benefit from what Justice Brandeis called "one of the happy incidents of the federal system[,] that a . . . courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>357</sup> Absent a federal mandate, same-sex marriage proponents likely will live with a variety of approaches to addressing same-sex relationship recognition across the nation as states learn from one another's experiences, and gradually move towards marriage equality on paths and at speeds dictated by local circumstances.<sup>358</sup>

While it is promising that full civil rights for LGBT Americans will come with time and natural generational replacement, it is cold comfort to the many same-sex couples living day-to-day with the disabilities inflicted by discriminatory treatment. But the speed of progress towards universal marriage equality is not preordained. It is not unalterable. The strategic movement initiatives discussed in Section II will help catalyze that progress and deliver marriage equality sooner to more Americans. The effectiveness of the movement's responses to direct democratic challenges to legislative and judicial advances towards marriage equality, as well as the extent of the proactive work the marriage equality movement does to shift public opinion its way, will do much to determine how quickly marriage equality will become a pervasive American value and a universal reality.

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<sup>356</sup> See Sacchetti, *supra* note 44; Jeff Tuttle, *Debate Over Gay Rights Law Intensifies*, BANGOR DAILY NEWS, Oct. 15, 2005, at C1; *Chronology of Maine's Gay-Rights Legislation*, ME. SUNDAY TELEGRAM, Feb. 18, 2001.

<sup>357</sup> *New St. Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>358</sup> See Jonathan Rauch, *A More Perfect Union: How the Founding Fathers Would Have Handled Gay Marriage*, ATLANTIC MONTHLY, Apr. 2004, at 88. But see Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism Is Not the Main Event*, 17 TEMP. POL. & CIV. RTS. L. REV. 387, 388 (2008) (disagreeing with the federalist approach to same-sex relationship recognition, characterizing it *inter alia* as an "accident of jurisdiction").

To tip the popular balance in favor of full LGBT equality, the movement must do more to diversify its ranks and to have its leadership reflect the motley makeup of its broader communities. The movement must enlist more support among communities of faith, and recognize the powerful roles religious voices have played in past civil rights movements and still can play in the struggle for full LGBT equality. Just as religion has fueled and perpetuated anti-gay discrimination, it can play a decisive role in its amelioration and ultimate demise. We must thus embrace the challenge to introduce ourselves to the religious leaders and communities that, for now, misunderstand or even fear us, but may in time be prophetic advocates of full civil equality for LGBT people. The movement also must do more to empower religious and/or of color LGBT Americans to assume visible roles in their respective communities of faith and color as lesbian, gay or transgender members deserving of full equality. And we must more effectively harness the power of digital media to counter anti-gay defamation and misinformation, as well as to educate those to whom our lives and families appear remote and foreign.

More generally, the marriage equality movement must broaden its focus to encompass the atomization of its mission and the democratization of the debate. What was at first a struggle necessarily confined to courtrooms later drew advocates and supporters among elected officials in legislatures throughout the country, and now finds itself at the center of popular discourse and the subject of plebiscitary democracy. With this broadening of the LGBT rights debate to encompass the public at large must come a broadening of the movement's work towards changing the hearts and minds of not just hundreds of judges, or thousands of state and federal legislators, but of all Americans.

This is not to say that subjecting the fundamental rights of the beleaguered gay and lesbian minority to popular vote is not constitutionally troubling. It is. The denial or repeal of those rights through direct democratic mechanisms should be subjected to the strictest of judicial scrutiny. Despite these constitutional concerns, direct democratic lawmaking is a central fixture in the legislative apparatus of most states and will continue to affect the lives of lesbian and gay Americans. But that reality is not an altogether negative one. The historic 2009 victory of Referendum 71 in Washington State proves that same-sex relationship recognition does not always fail when put to a popular vote. And the final vote splits in the 2008 and 2009 anti-gay ballot initiatives show that we are approaching a tipping point in democratic, popular support for marriage equality. The movement is on the precipice of historic marriage equality victories achieved through direct democratic means.

With the ballot initiative losses have come gains in public support and an investment and engagement in the debate by straight allies. The various ballot initiatives provided an opportunity for millions of citizens to assert a public position in favor of marriage equality, and ultimately, to feel the sting of anti-gay animus by having their votes countermanded by majorities favoring discrimination. These voters now have the proverbial 'skin in the game.' Moreover, the work of changing public opinion writ large not only would help marriage equality and other LGBT rights prevail at the ballot box, but also catalyze progress towards LGBT equality in the courts and legislatures as well. Engaging strategically and energetically in the retail politics of direct democracy may not just deliver formal legal equality, but also may achieve the elusive communitarian acceptance that can only come from publicly introducing ourselves and our families, and in the process changing our neighbors' hearts and minds, and votes.

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