

Obergefell at the Intersection of Civil Rights and Social Movements

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INTRODUCTION

A judicial decision striking down formalized discrimination marks a crucial moment for those it affects and, in some instances, for the surrounding society as well. The Supreme Court's ruling in *Obergefell v. Hodges* was unquestionably one of those instances.

In this Essay, I consider the distinct ways in which the civil rights and social movements for marriage equality helped give rise to a durable socio-political transformation, as reflected in the widespread acceptance of the Court's decision.¹ By drawing this civil rights/social movement distinction, I mean to separate efforts to achieve new rights from efforts to achieve greater acceptance or affirmation.² In the case of marriage equality, I argue that the

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1. See, e.g., Jennifer Agiesta, *Poll: Majorities Back Supreme Court Rulings on Marriage, Obamacare*, CNN, (June 30, 2015, 1:47 PM), <http://www.cnn.com/2015/06/30/politics/supreme-court-gay-marriage-obamacare-poll/> [<http://perma.cc/HP9D-26NX>]. Cf. Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967 (1997) (discussing the relationship between legal change and lasting societal change).

2. For extended definitions of social movements, see, for example, Tomiko Brown-Nagin, *Elites, Social Movements, and the Law*, 105 COLUM. L. REV. 1436, 1439 (2005) (defining social movements "as politically insurgent and participatory campaigns for relief from socioeconomic crisis

two movements—one focused primarily on law reform and the other on social change—had an unusually strong coalescence in their goals and desires. This coalescence enabled social changes to propel legal changes and vice versa.

Of course, the distinction between movements is not a sharp one, either in practice or theory. Many civil rights organizations are well aware of the need to lay social groundwork to make their claims winnable. Put another way, they recognize that success will turn on having the relevant interpretive community—whether judicial or legislative—see their claims as plausible.³ Generating this sense of plausibility often requires extralegal, social movement-type efforts.⁴

Yet much contemporary literature expresses concern and some skepticism when rights-oriented strategists help drive social movement advocacy. Concerns arise especially about the privileging of law, with the view that a rights-focused frame is inadequate to achieve lasting change in people’s day-to-day lives.⁵ To draw from Lani Guinier and Gerald Torres’s recent work, “alternative authoritative interpretive communities”—not just judges and legislators—are needed to produce substantive justice.⁶

The civil rights and social movements that propelled marriage equality and resulted in *Obergefell* arguably had a different, more productive type of interdependence that warrants further consideration in the literature. There

or the redistribution of social, political, and economic capital” (citation omitted but worth reading)); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2744 n.6 (2015) (defining social movements in the context of “contentious politics,” which include a focus on “mobiliz[ing] popular will . . . , build[ing] on networks of social solidarity, and [] find[ing] sites for narrative resistance in which to transpose/transport grievances into causes that resonate with the larger culture’s narratives of justice” (citing SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 1–9 (2d ed. 1998))).

3. On ideas of interpretive communities, see generally RONALD DWORKIN, *LAW’S EMPIRE* (1988); STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

4. See MARC SOLOMON, *WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS AND WON* (2014) (detailing state-by-state advocacy efforts); Suzanne B. Goldberg, *Multidimensional Advocacy As Applied: Marriage Equality And Reproductive Rights*, 29 COLUM. J. GENDER & LAW 1 (2015) (discussing the relationship between extralegal advocacy and litigation to secure marriage equality).

5. For extended discussion of these issues in the legal literature, see generally DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (2011); Tomiko Brown-Nagin, *supra* note 2; William Eskridge, *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); Orly Lobel, *The Paradox Of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 920 (2007); Reva Siegel, *Text in Contest: Gender and the Constitution From a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001); see also MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2012). For historical perspective, see, for example, Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256 (2005).

6. Guinier & Torres, *supra* note 2.

were tensions between the two, certainly, but also a mutuality, with each advancing the other.

For example, civil rights advocacy arguably made marriage imaginable for individuals who, for many decades, had been living in relationships largely outside of the law. When marriage moved from an evanescent pipedream (or, for others, a depressing embodiment of patriarchal authority⁷) to something realizable after a partial legal victory in Hawaii, individuals began to come together into a social movement that more strongly desired marriage and set it as a goal.

Notably, this social-movement interest in marriage did not turn only, or even primarily, on the rights associated with marriage. Instead, individuals and communities expressed a passionate desire for the social recognition and acceptance often associated with marriage.⁸ Their passion also prompted a sometimes vigorous disdain for civil unions and domestic partnerships that provided marriage-like benefits by another name.⁹

This dedication to visibility, safety and other forms of substantive justice beyond legally-authorized rights and benefits helped lay the groundwork with the supplemental interpretive community (the general public) that made law reform possible in the direct interpretive community (courts and legislatures). And the social movement's continuing desire for safety and visibility has given the LGBT civil rights movement its next set of directives to focus on antidiscrimination and antiviolence laws and resources.

Each, in other words, has propelled the other toward a broader vision of legal and social transformation than either a civil rights effort or a social movement could have conceived or realized on its own.

I.

THE SLOW COALESCENCE OF SOCIAL MOVEMENT DESIRE

Marriage was not always high on the list for the lesbian, gay, bisexual, and transgender communities as either a social-movement desire or a civil rights goal. In early, post-Stonewall days, the social organizing of LGBT people generally focused on liberation from the state, which many experienced as thoroughly oppressive in its formal rules and informally sanctioned

7. See, e.g., Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, reprinted in WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 683 (3d ed. 2008).

8. See, e.g., JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004); ANDREW SULLIVAN, SAME-SEX MARRIAGE: PRO AND CON (2004).

9. See *Marriage vs. Civil Union or Domestic Partnership*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/marriage-versus-civil-unions-domestic-partnerships-etc> [<http://perma.cc/KC6E-ZQXC>]. ("Civil union and domestic partnerships are a second-class status, and when people take on all the commitments and responsibilities of marriage they should not be treated like second-class citizens.").

brutality.¹⁰ Not surprisingly, marriage, a mechanism for inviting the state's engagement with an intimate relationship, was not even a fantasy for most, let alone an articulable desire or a legible goal.

Indeed, the early marriage lawsuits of the 1970s could be understood as less about a desire for relationship recognition itself than about highlighting pervasive antigay discrimination as a means of improving gay people's lives.¹¹ And courts' quick rejection of those claims reflected an incapacity to imagine that marriage was something gay couples actually wanted, much less something that could be granted to them by the state.¹²

Likewise, the expressed goals of emerging gay organizations, such as the Gay Activist Alliance, were focused broadly on "secur[ing] basic human rights, dignity and freedom for all gay people."¹³ While marriage certainly fell within this vision, so too did nearly all other goals gay people might have had at that time.¹⁴

Lesbian feminists similarly expressed a core interest in dignity, with visibility and safe spaces for community-building as lead priorities.¹⁵ Marriage, seen as a legal structure long associated with the oppression of women, was not desired by many.¹⁶ If anything, freedom from marriage was one of the appealing aspects of finding one's relationships disregarded by the law, though

10. See Eskridge, *supra* note 5, at 457 (detailing how the Stonewall riots in 1969 "transformed a homophile movement of several hundred earnest homosexuals into a gay liberation movement populated by tens of thousands of lesbians, gay men, and bisexuals who formed hundreds of new organizations demanding radical changes in the way gay people are treated by the state"); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1583 (1993) ("Overall, the defining characteristics of the gay movement in the immediate post-Stonewall years were its increasing visibility and the vitality of its more radical demands for the freedom to be different.").

11. See, e.g., Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1, 4 (2015) ("[M]arriage litigation in the wake of Stonewall had much more to do with gay liberation generally than with gay marriage specifically[.]"). Early marriage cases include, for example, *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973) (affirming lower court's rejection of the same-sex couple's marriage claim); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (same); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (same).

Some later marriage litigation also seemed prompted more by an interest in challenging discrimination than by a specific desire for the plaintiff couple to be allowed to marry. See, e.g., E-mail from Rex Wockner to author (Aug. 31, 2015, 3:48 EST) (on file with author) (describing strategy in *Wockner v. Cook Cnty. Clerk, Charge No. 1989CP0140* (Ill. Human Rights Comm'n Jan. 3, 1990)).

12. See, e.g., *Baker v. State*, 744 A.2d 864 (Vt. 1999).

13. John D. Stinson, *Gay Activist Alliance Records, 1970–1983*, at 4 (1995) (unpublished manuscript) (on file with the N.Y. Pub. Library Archives), http://archives.nypl.org/uploads/collection/pdf_finding_aid/gaa.pdf [<http://perma.cc/9EW8-339E>].

14. See *id.* at 4–5 (describing the Alliance's goals).

15. See generally LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH CENTURY AMERICA* (1991).

16. See, e.g., Ettelbrick, *supra* note 7, at 14.

crises inevitably arose that prompted desires for some form of relationship recognition, even if not through marriage.¹⁷

Activism associated with the AIDS epidemic in the 1980s onward also did not express a strong desire for marriage.¹⁸ Instead, the lead desire was for visibility and, with that, expanded research and treatment options. It was not that relationship recognition was unimportant or undesired; to the contrary, community members knew well the stories of men whose longstanding relationships were disregarded, sometimes brutally, by biological family members of men who were sick or dying.

Family recognition emerged as a more definitively articulated desire later in the 1980s as the LGBT movement broadened its focus from visibility and recognition to formal demands for rights and safety. The first March on Washington, held in 1979, sought antidiscrimination protections and a repeal of antigay laws but none of its five lead demands was concerned with marriage.¹⁹ By the time of the second march, in 1987, relationship recognition made it to the forefront.²⁰ Still, marriage did not make the list as a specific goal nor presumably (though there is no data on this point) as a widespread desire. Even for the third march, in 1993, the formal demand was not marriage but rather a “definition of family [that] include[d] the full diversity of all family structures.”²¹

By this time, though, marriage had come more directly into focus as a potential movement goal through an active debate within the LGBT community, often along gender lines. Traveling the country to community forums, Tom Stoddard and Paula Ettelbrick captured the conflicting positions in dueling essays published in 1989: *Why Gay People Should Seek the Right to Marry* and *Since When is Marriage a Path to Liberation?*²²

17. *Id.*

18. For a general history of political activism in the early years of the AIDS epidemic, see RANDY SHILTS, *AND THE BAND PLAYED ON* (1987).

19. *National March on Washington for Lesbian & Gay Rights*, HOUSTON LGBT HISTORY, <http://www.houstonlgbthistory.org/banner1979d.html> [<http://perma.cc/GLC5-7B39>] (last visited Oct. 18, 2015).

20. See OUR DEMANDS: MARCH ON WASHINGTON FOR LESBIAN AND GAY RIGHTS (Oct. 11, 1987), <http://www.onearchives.org/wp-content/uploads/2015/02/Our-Demands-March-on-Washington-for-Lesbian-and-Gay-Rights-Oct-11-1987.pdf> [<http://perma.cc/8AG7-RWKL>]. For an argument about marriage’s centrality to broader family-recognition advocacy, see Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and its Relationship to Marriage*, 102 CAL. L. REV. 87 (2014).

21. *Platform of the 1993 March on Washington for Lesbian, Gay, and Bi Equal Rights and Liberation*, QUEER RES. DIRECTORY, <http://www.qrd.org/qrd/events/mow/mow-full.platform> [<http://perma.cc/AG4Z-K6Q4>] (last visited Oct. 18, 2015).

22. Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9, reprinted in RUBENSTEIN ET AL., *supra* note 7, at 678; Ettelbrick, *supra* note 7. As their titles suggest, these essays offered competing views of the costs and benefits of prioritizing marriage in the effort to secure lesbian and gay rights. For more on these essays and their role in the debate about marriage equality as an advocacy priority, see Suzanne B. Goldberg, *Why Marriage?*, in MARRIAGE

II.

LAW AS A LEVER FOR SOCIAL MOVEMENT ENGAGEMENT

Interestingly, it was a legal decision that spurred the social movement desire for marriage. When the Hawaii Supreme Court ruled that denying marriage to same-sex couples was a form of sex discrimination in violation of the State's Equal Rights Amendment,²³ marriage came into focus as something more than theoretical. Although again, there is no data set showing how lesbians and gay men felt about marriage either before or immediately after that ruling, seeing marriage within reach surely made it more desirable.

Ironically, the passage of the Defense of Marriage Act (DOMA) in 1996²⁴ might have contributed to gay people's desire for marriage as well. Though Congress enacted DOMA well before any state allowed same-sex couples to marry, the positioning of marriage as a threat to the nation²⁵ reinforced that marriage was within the realm of possibility.

So, too, did several new cases brought by couples seeking the right to marry. A marriage lawsuit filed in Vermont in 1997 resulted in civil unions three years later, the first-ever state-sanctioned relationship recognition for same-sex couples.²⁶ This, in turn, led many gay and lesbian couples to ponder the option of a Vermont civil union of their own²⁷ and to consider, even more sharply, their desire for—and entitlement to—marriage. The Massachusetts Supreme Judicial Court's 2003 ruling, which mandated marriage equality in the State,²⁸ made marriage seem even more attainable for those living elsewhere.

Still, it is important not to overstate the link between these developments and the dramatic increase in the social movement desire for marriage that came later.²⁹ What had happened in Massachusetts did not seem transferrable to other

AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 227–28 (Marsha Garrison & Elizabeth S. Scott eds., 2012).

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

24. 28 U.S.C. § 1738C (1996).

25. See United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (quoting the House of Representatives report's conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H.R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage" (internal citations omitted)).

26. Baker v. State, 744 A.2d 864 (Vt. 1999).

27. I remember traveling to Vermont for a civil union shortly after they were authorized and being surprised by how deeply I was moved when the officiant announced that, by the power vested in her by the State of Vermont, my two friends were now in a legally recognized civil union.

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

29. In my own work representing John Lawrence and Tyrone Garner in their challenge to Texas's "homosexual conduct" law, which began in 1998, marriage was a distant backdrop presence, at best. Though the Supreme Court would ultimately rely on its 2003 decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), as a significant precedent to support *Obergefell*'s conclusion that states must allow same-sex couples to marry, few in 2003 would have predicted that marriage equality would become the law of the land a dozen years later.

states—a skepticism borne out by numerous legislative and litigation defeats in the years that followed.³⁰

III

SOCIAL MOVEMENT DESIRE AS A PROMPT FOR LEGAL ACTION

As losses piled up in court, the social movement might have given up on lawyers and turned to other issues. But instead, writers proclaimed their desire for marriage in popular publications³¹ and marriage-centered grassroots organizations began sweeping the nation.³²

Social movement activism and conversation in turn helped shape a landscape that would be more fertile for litigation. Organizations like OneIowa, for example, began their work intensely in the mid-2000s, with a mission of educating the State about the importance of marriage for lesbian and gay couples.³³ Freedom to Marry, the nation's leading organization focused on public education and advocacy, had a more law-oriented focus from the start, with the goal of Supreme Court victory, but it conceived its role as focused on “the hard work of changing hearts and minds.”³⁴ Its work not only facilitated litigation and legislative victories but also energized growing numbers of lesbian and gay couples to want marriage equality for themselves and to support, encourage, and demand more civil rights-oriented advocacy on their behalf.³⁵

30. MARC SOLOMON, *WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS AND WON* (2014). Solomon's book provides an excellent exploration of the interaction between the civil rights and social movements for marriage.

31. For illustrative, general-audience-oriented books, see RAUCH, *supra* note 8; EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY* (2005); SULLIVAN, *supra* note 8.

32. *About Us*, MARRIAGE EQUALITY USA, <http://www.marriageequality.org/about> [<http://perma.cc/CUE7-DXM6>] (last visited Oct. 18, 2015). Marriage Equality USA, founded in 1996, identified itself as having “the largest volunteer-driven, grassroots organization of its kind engaged in education, training, organizing, action, and coalition building to win equal marriage rights and protections for LGBTQ couples and their families.” *Id.* State-based marriage equality chapters as well as other non-law-focused movement organizations provided many opportunities for LGBT and allied individuals to get involved in raising awareness, educating their communities about the transformation they sought.

33. *History*, ONEIOWA, <http://oneiowa.org/about/history> [<http://perma.cc/JDJ2-3A98>] (last visited Oct. 18, 2015). Later in 2005, the year that One Iowa was founded, advocates filed the lawsuit that ultimately led to marriage equality in the State. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

34. *About Freedom to Marry*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/about-us> [<http://perma.cc/7BD9-G4DQ>] (last visited Oct. 18, 2015).

35. Some local elected officials were so moved by couples' interest in marriage that, in the mid-2000s, they sought to grant marriage licenses to same-sex couples even though they lacked authority to do so. See SUZANNE B. GOLDBERG, *AND JUSTICE FOR ALL? LITIGATION, POLITICS, AND THE STATE OF MARRIAGE EQUALITY TODAY* (2006) (describing marriages granted in San Francisco, Ithaca, New York City, and elsewhere), https://www.acslaw.org/sites/default/files/Goldberg_-_Justice_for_All_-_Marriage_Equality.pdf [<http://perma.cc/Y3NB-RHAL>].

IV.

CIVIL RIGHTS AND SOCIAL MOVEMENT SYNERGY

The tag-team relationship between the marriage-focused civil rights and social movements amplified dramatically in the couple of years preceding *Obergefell*. With every new victory in a court or legislature, more gay couples—and more non-gay allies—loudened their call for marriage.

Perhaps the best evidence for this is the change in public opinion. Shortly before the oral argument in *Windsor v. United States*, polls showed a new high in levels of popular support for same-sex couples' marriage rights.³⁶ This shift, leveraged by the social and civil rights movements moving in tandem by this point, brought even more people to the side of marriage equality.

Accompanying this opinion shift was a raft of judicial opinions in the wake of *Windsor*, nearly all of which concluded that states must allow same-sex couples to marry.³⁷ By the time of the oral argument in *Obergefell*, these legal shifts were joined by a new vigor in public support for marriage equality,³⁸ making the legal victory seem almost inevitable.³⁹

V

REFLECTING FORWARD

As scholars consider how best to situate the movement for marriage equality, it might be tempting to suggest that its synergy between the civil rights and social movements is limited to particular situations where a group faces a formal barrier to full civic and social participation, like the exclusion from marriage. But I think that would be too narrow a view.

Instead, even within LGBT-focused advocacy, there is good reason to think that mutual leveraging will continue. The social movement empowered by *Obergefell*'s success now envisions other changes that had been similarly unimaginable years earlier. Among them are the defeat of popular faith-based exemptions and a reduction in violence and discrimination against transgender individuals. For these issues and others, a desire for acceptance and full

36. Jon Cohen, *Gay Marriage Support Hits New High in Post-ABC Poll*, WASH. POST (Mar. 18, 2013), <http://www.washingtonpost.com/news/the-fix/wp/2013/03/18/gay-marriage-support-hits-new-high-in-post-abc-poll> [http://perma.cc/72C9-Z4PF].

37. See *Obergefell v. Hodges*, 135 S. Ct. 2804, 2608–10 (2015).

38. *Changing Attitudes on Gay Marriage*, PEW RESEARCH CTR. (July 29, 2015), <http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage> [http://perma.cc/R7L3-AS6D]. Corporations also joined the marriage equality bandwagon in numbers that had been unimaginable even a couple of years earlier. Emily Cadei, *How Corporate America Propelled Same-Sex Marriage*, NEWSWEEK (June 30, 2015, 6:16 AM), <http://www.newsweek.com/2015/07/10/shift-corporate-america-social-issues-become-good-business-348458.html> [http://perma.cc/NMQ8-RMGN].

39. Still, despite powerful public, political, and commercial support for marriage equality, it bears noting that *Obergefell* was decided five-to-four, the narrowest of margins.

participation rooted in a social movement may once again inspire further action—and success—in the civil rights domain.