ONE SEQUIN AT A TIME: LESSONS ON STATE CONSTITUTIONS AND INCREMENTAL CHANGE FROM THE CAMPAIGN FOR MARRIAGE EQUALITY

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"And now, I'm just trying to change the world, one sequin at a time."

—Lady Gaga[1]

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1. Vince Vega, *Meet Lady Gaga*, MYX (Jan 6. 2009), https://myx.abs-cbn.com/features/13170/miguel-escuetas-blue-monday [https://perma.cc/T8YZ-DWW3].

INTRODUCTION

When Brett Kavanaugh was nominated to the Supreme Court, civil rights groups raised the alarm, opposing his appointment for fear of the effect on civil rights progress.[2] Women's rights groups rallied outside the Supreme Court protesting Kavanaugh's nomination.[3] The NAACP issued a report opposing the nomination because Kavanaugh posed "a severe threat to civil rights."[4] The Lawyers' Committee on Civil Rights issued a long report, assessing Kavanaugh's record and concluding that it "raises serious concerns that he would weaken voter, anti-discrimination and environmental protections, limit reproductive rights and access to quality healthcare and insulate the President and the Government from the rule of law."[5] A coalition of more than 200 national civil rights organizations, under the umbrella of The Leadership Conference on Civil

2. Justice Kavanaugh's appointment faced substantial opposition due to the credible allegation of sexual misconduct by three women. *See Everything on Brett Kavanaugh, the Senate Vote and the Fallout*, N.Y. TIMES (Oct. 2, 2018), https://www.nytimes.com/2018/10/02/us/politics/kavanaugh-news-fbi-investigation.html [https://perma.cc/N48F-FWMT]. Additionally, many organizations opposed his nomination because of his record on civil rights issues. This article is concerned with the latter.

3. Tramon Lucas, *Women's Rights Organizations Object to Kavanaugh Nomination*, ASSOCIATED PRESS (Aug. 22, 2018), https://apnews.com/dd93769fee0f43509ea1d8263729bef9 [https://perma.cc/TF79-YF8F].

4. *Brett Kavanaugh Poses a Severe Threat to Civil Rights: The Senate Must Reject His Nomination*, NAACP (Aug. 31, 2018), https://www.naacp.org/wp-content/uploads/2018/09/NAACPKavanaughTPs.pdf [https://perma.cc/L9JH-2HHX].

5. LAW.' COMM. FOR C.R. UNDER L., REPORT ON THE NOMINATION OF JUDGE BRETT KAVANAUGH AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT 15–16 (2018), https://lawyerscommittee.org/wp-content/uploads/2018/08/Lawyers-Committee-Report-On-Judge-Kavanaugh.pdf [https://perma.cc/52HE-93G8].

and Human Rights, issued a statement opposing the nominations because "he would be the fifth and decisive vote to undermine many of our core rights and legal protections."[6]

Kavanaugh was nominated to replace Justice Anthony Kennedy, who announced his retirement on June 27, 2018.[7] At his announcement a lament rose among those on the political left because, for the better part of three decades, Kennedy was a key swing vote in cases protecting reproductive freedom, voting rights, and the rights of LGBTQ people.[8] The prospect of replacing Justice Kennedy with an even more conservative Justice legitimately stoked the fear that the Supreme Court would be unfriendly to civil rights claims for decades to come. As the Court's 2019 term progressed, court watchers saw the first signs that the Court was willing to overturn longstanding precedent, rolling back the civil rights progress of the late twentieth and early twenty-first centuries.[9]

It is no surprise that groups committed to the protection and expansion of civil rights and other progressive causes fear an increasingly conservative Supreme Court. Decades of decisions, including *Brown v. Board of Education*,[10] *Loving v. Virginia*,[11] *Roe v. Wade*,[12] *Frontiero v. Richardson*,[13] *Lawrence v. Texas*,[14] *Obergefell v. Hodges*,[15] and *Texas v. Johnson*,[16] fostered the conventional wisdom that federal court cases are an effective means of expanding individual rights through, among others, Equal Protection and Due Process claims under the Fourteenth Amendment to the U.S.

6. *Oppose the Confirmation of Brett Kavanaugh to the Supreme Court of the United States*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Sept. 3, 2018), https://civilrights.org/resource/oppose-the-confirmation-of-brett-kavanaugh-to-the-supreme-court-of-the-united-states/ [https://perma.cc/RU2S-X9KW].

7. Amy Howe, *Anthony Kennedy, Swing Justice, Announces Retirement*, SCOTUSBLOG (June 27, 2018, 2:23pm), https://www.scotusblog.com/2018/06/anthony-kennedy-swing-justice-announces-retirement/ [https://perma.cc/8H25-HU72].

8. *Id.*

9. *See generally* Todd Ruger, *'A Court Without a Middle': Supreme Court Term Signals Changes Ahead*, ROLL CALL (June 28, 2019), https://www.rollcall.com/news/congress/supreme-court-term-signals-bigger-changes-ahead [https://perma.cc/MWS3-3GZF].

10. 347 U.S. 483 (1954).

11. 388 U.S. 1 (1967).

12. 410 U.S. 113 (1973).

13. 411 U.S. 677 (1973).

14. 539 U.S. 558 (2003).

15. 135 S. Ct. 2584 (2015).

16. 491 U.S. 397 (1989).

Constitution.[17] Nevertheless, two things remain true, even in the face of so many important Supreme Court decisions expanding and defining civil rights protections. First, the Supreme Court has not been as consistently reliable an engine for progressive social change as many people tend to believe.[18] And second, despite the role federal claims play in the public imagination, federal court is not the only viable site for rights advocacy in a federalist system.

While federalism has generally been associated with conservative causes,[19] there is nothing inherently conservative about the relationship between the federal government and the states.[20] A basic tenet of our federalist system of government is that state and federal courts both have the ability to protect constitutional rights, and state constitutions may provide different and more extensive rights than those in the U.S. Constitution.[21] State constitutions are not just cloned versions of the U.S. Constitution.[22] They differ in origin, in language, and in underlying political philosophy.[23] The differences in politics, economy, and social structures in the eighteenth,

17. *See, e.g.*, Michele L. Jawando & Sean Wright, *Why Courts Matter*, CTR. AM. PROGRESS (Apr. 13, 2015), https://www.americanprogress.org/issues/courts/reports/2015/04/13/110883/why-courts-matter-2/ [https://perma.cc/38CC-6854].

18. For example, while the Court famously expanded individual rights under Chief Justice Earl Warren during the 1950s and 1960s, those rights were eroded during the 1970s and 1980s by the Burger and Rehnquist Courts. *See* Hon. John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 LOY. U. CHI. L.J. 965, 967–68 (2013) (noting concerns that, following Warren's tenure, the Court was becoming hostile to individual rights claims).

19. Erwin Chemerinsky, *Reconceptualizing Federalism*, 50 N.Y. L. SCH. L. REV. 729, 734 (2006); *see* Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, DEMOCRACY: J. OF IDEAS (Spring 2017), available at https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/ [https://perma.cc/M57Q-8RYU].

20. The term "states' rights" became synonymous with the political right during the 1950s and 1960s as conservatives turned to the states to fight the dismantling of Jim Crow laws and the Warren Court's expansion of civil rights. Gerken & Revesz, *supra* note 19. By the 1980s, "states' rights" were firmly connected to conservative ideology in the public imagination. Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 874 (2006). This remains true today. Gerken and Revesz, *supra* note 19.

21. Stewart G. Pollock, *Adequate and Independent State Grounds As A Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985).

22. G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 8 (2011).

23. *Id.*

nineteenth, and twentieth centuries all contributed to significant variation in individual state constitutions.[24]

State constitutions not only vary greatly from each other, but also from the U.S. Constitution—in age, in origin, and in language.[25] Some state constitutions pre-date the U.S. Constitution,[26] while the majority were adopted over the course of the nineteenth and twentieth centuries.[27] State courts can interpret their own state constitutional provisions and state legislatures have plenary authority to enact legislation without the constraints the U.S. Constitution places on Congress.[28] Thus, while states are often overlooked as sites for rights advancement, there is great potential for locating rights in state constitutions that go beyond those specified in the U.S. Constitution.

As great as the potential is for locating new or more robust rights in state constitutions, that potential has not yet become fully realized. In 1961, Justice William Brennan gave a lecture in which he asserted that state constitutions were independent sources of fundamental rights, separate from those protected by the U.S. Constitution.[29] This was the start of the New Judicial Federalism movement, as state court judges and academics began to take up the call to establish rights through state constitutions.[30] The movement grew during the 1980s, gaining the attention of some academics and judges, but never fully took hold, and federal civil rights litigation remained central in the public imagination."[31] In recent years, as conservatives have consolidated power in the federal government, and most particularly at the Supreme Court, progressives are once again turning to a more robust federalism at the state and

24. *Id.* at 10.

25. *See generally* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS (1st ed. 2009).

26. *Id.* at 36–39.

27. Tarr, *supra* note 22, at 9.

28. WILLIAMS, *supra* note 25, at 247. Note that while state legislatures play an important role in regulating conduct and expanding rights, this article will focus exclusively on the role played by courts.

29. Justice Brennan first articulated this idea in a 1961 speech and subsequently made it famous in his 1977 article, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). *See* Ann M. Lousin, *Justice Brennan's Call to Arms-What Has Happened Since 1977?*, 77 OHIO ST. L.J. 387, 387–88 (2016) (citing William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions As Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986)).

30. WILLIAMS, *supra* note 25, at 113–114.

31. See *infra* Section I.A.

local level.[32] As Yale Law School Dean and Professor Heather Gerken has noted, "[I]t is a mistake to equate federalism's past with its future."[33]

This article will consider the potential of state courts for civil rights advocacy at a time when opportunities for civil rights advancement in the federal courts may be shrinking rather than expanding. In particular, we will focus on judicial federalism and the ability of state courts to find state constitutional rights that go beyond the floor set by the U.S. Constitution. Because many attorneys and advocates do not come to their work with a grounding in state constitutional law, Part I will provide an overview of judicial federalism, reviewing its history, obstacles and the potential to establish rights under state constitutions.

Next, Part II will examine a period of a little less than a decade in the fight for marriage equality as a lesson in the efficacy of state constitutional law strategies at a time when federal courts seem closed to a particular kind of rights claim. Part II describes in detail the years immediately following the Supreme Court's decision in *Bowers v. Hardwick*,[34] which appeared to foreclose the possibility of winning a marriage equality argument under the U.S. Constitution. During a time in which LGBTQ rights advocates knew that the Supreme Court would be completely hostile to marriage equality claims, they turned to state courts and formed a strategy that leveraged carefully crafted state constitutional claims to achieve incremental marriage equality wins. Along the way, advocates learned valuable lessons about how to lay the groundwork for court success, how to select jurisdictions in which to bring claims, and how to avoid the pitfalls of court wins that are too easily undone by popular will. Part III will consider the lessons drawn from the marriage cases and the implications for other kinds of rights advocacy.

PART I.
JUDICIAL FEDERALISM: REINVIGORATING OF THE POWER OF STATE CONSTITUTIONS THROUGH STATE COURTS

It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a labora-

32. *See* Heather Gerken, *A New Progressive Federalism*, DEMOCRACY: J. OF IDEAS (Spring 2012), available at https://democracyjournal.org/magazine/24/a-new-progressive-federalism/ [https://perma.cc/ZS8T-7QYD].

33. *Id.*

34. 478 U.S. 186 (1986).

tory; and try novel social and economic experiments without risk to the rest of the country.[35]

The idea of states as laboratories of democracy is built in to the structure of federal constitutionalism and reflected in the Tenth Amendment, which provides that any powers not specifically delegated to the federal government are reserved for the states.[36] The relatively limited reach of the federal government and broad grant of power to the states encourages competition and experimentation in governance and the protection of rights.[37] This is at the heart of the potential for a progressive judicial federalism movement.

While federalism has always had the potential to advance liberal as well as conservative agendas, until recently, the term "states' rights" has primarily been associated with conservative, libertarian, and racist political agendas.[38] Southern states invoked states' rights to oppose the civil rights movement of the 1950s and 1960s.[39] For the last forty years, conservatives have sought to limit federal power over state and local governments as liberals sought to expand the regulatory power of the federal government.[40] There is nothing inherent in federalism that favors liberal or conservative causes, however, and in the judicial arena, the groundwork for a more progressive federalism has already been laid.[41]

A. Development of the "New Judicial Federalism"

The first major wave of state courts establishing rights beyond those secured in the U.S. Constitution took place in the 1970s and 1980s, as both state and federal courts recognized the ability of state courts to make these decisions.[42] The movement was spurred on by

35. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

36. U.S. CONST. amend. X.

37. *See* Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6 (2010) (identifying the generally accepted benefits of federalism).

38. *See, e.g.*, Gerken, *supra* note 32; Ilya Somin, *How Liberals Learned to Love Federalism*, WASH. POST (July 12, 2019), https://www.washingtonpost.com/outlook/how-liberals-learned-to-love-federalism/2019/07/12/babd9f52-8c5f-11e9-b162-8f6f41ec3c04_story.html?fbclid=IwAR1QDsjB0G0D—bjN7fxBACD4Xe6p8lEc-ADo9QoHHO183yCKVjtdzPGe5k&utm_term=.1151093993f7 [https://perma.cc/4HMX-YVHM].

39. Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33, 33 (2009).

40. *See* Somin, *supra* note 38.

41. *See, e.g.*, Gerken, *supra* note 32; Young, *supra* note 20, at 875.

42. Robert F. Williams, *Introduction: The Third Stage of The New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 213–14 (2003). There were some important

Supreme Court Justice William Brennan's now-famous Harvard Law Review article, *State Constitutions and the Protection of Individual Rights*.[43] Justice Brennan urged state courts to independently interpret the individual rights guarantees in their own constitutions, especially in areas where the Supreme Court's interpretation of the U.S. Constitution was narrow.[44] This call was taken up by numerous judges and academics, starting the movement dubbed "New Judicial Federalism."[45]

The movement was advanced significantly by the Supreme Court's decision in *PruneYard Shopping v. Robins*,[46] which held that state courts are free to adopt rights that are more expansive than those established in the U.S. Constitution, and the decision in *Michigan v. Long*,[47] which clarified that the Supreme Court will not review state supreme court decisions that are clearly based on an "adequate and independent state ground" such as an independent interpretation of the state constitution.[48] Following on these decisions, as well as decisions from California and New Jersey courts establishing rights under state constitutions, the New Judicial Federalism movement seemed poised to see in an expansion of state constitutional rights.[49]

B. Challenges to Judicial Federalism

Despite great early enthusiasm, the New Judicial Federalism movement was not as robust as it initially seemed it might be. Critics argued that the push for state constitutionalism was an instrumentalist attempt to advance a progressive agenda and avoid unpopular federal precedent.[50] But just as "states' rights" are not inherently conservative, there is nothing inherently liberal about state constitutions and the rights they protect.[51] Laws that reflect conservative

state cases before this, such as California's anti-miscegenation case, *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (unofficially reported as *Perez v. Lippold*), however scholars generally credit the first wave as beginning in the 1970s.

43. Brennan, *supra* note 29.

44. *Id.* at 493.

45. Williams, *supra* note 42, at 212 (citing G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169 (1998)).

46. 447 U.S. 74, 81 (1980).

47. 463 U.S. 1032 (1983).

48. *Id.* at 1041–42.

49. Williams, *supra* note 42, at 213–15.

50. *See* Hon. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1313 (2017).

51. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 176–77 (2018).

values and laws that reflect liberal values can just as easily be challenged—state constitutions merely provide an additional avenue for those challenges.[52] Concern about instrumentalism slowed the development of state constitutionalism, as did the difficulty of stepping out from under the shadow of federal constitutionalism, backlash, and general lack of understanding of the potential that state constitutions can have.

1. Reluctance to Exercise Independent State Interpretation

Faced with interpreting state constitutional provisions for the first time, state court judges can use all the tools available in any legal analysis, such as text, history, political information, and related precedent.[53] As a legal matter, state judges are not required to consider federal precedent.[54] There is no question that state courts have the final authority to interpret their own constitutions.[55] And equally, the state courts are free to adopt rights that are more expansive than those established in the U.S. Constitution.[56] But the idea that "constitutional law" is the law of the U.S. Constitution as interpreted by the Supreme Court of the United States loomed so large that, for decades, state court judges didn't even contemplate locating independent rights in their own constitutions.[57] State courts have deferred to federal constitutional doctrine in two important ways. First, they have often deferred to federal jurisprudence when interpreting state constitutions. And second, they have often deferred to the federal constitutional claim itself, choosing to resolve mixed state and federal constitutional cases by resolving the

52. *Id.*

53. Hon. Randall T. Shepard, *The Renaissance in State Constitutional Law: There Are A Few Dangers, but What's the Alternative?*, 61 ALB. L. REV. 1529, 1530 (1998). *See also* State v. Jewett, 500 A.2d 233, 235 (Vt. 1985) (outlining the approaches to state constitutional interpretation using historical, textual, comparison to similar jurisdictions, and analysis of social and economic information).

54. Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 959 (1985).

55. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism,* 28 HASTINGS CONST. L.Q. 93, 100 (2000).

56. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 74 (1980). *See also* Liu, *supra* note 50, at 1313 (arguing that there is no legal barrier to state court judges identifying state constitutional rights more expansively than those identified in the federal constitution).

57. *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 11–12 (1995) ("Many of us had grown so federalized, so used to the Supreme Court of the United States as the fount of constitutional wisdom, that we barely remembered that our state even had a constitution.").

federal claim and failing to address the state claim at all. These two forms of federal deference have often combined to create a sort of brake on the acceleration of independent state constitutional jurisprudence.

When state constitutional provisions appear substantially similar to those in the U.S. Constitution, state courts are not obligated to interpret their own constitutional provisions to be coextensive with the federal provisions. However, state judges have struggled over whether and when to diverge.[58] Faced with lawsuits asserting rights under both the federal and state constitutions, the majority of state court judges have adhered to federal standards at least to some degree.[59] The unstated premise when state court judges use federal precedent is that U.S. Supreme Court interpretation of federal constitutional rights is presumptively correct for interpreting analogous state constitutional provisions.[60]

State courts interpreting their own constitutional provisions to be consistent with equivalent federal provisions is called the "lockstep" approach.[61] Wisconsin Supreme Court Justice Shirley Abrahamson identified this approach in 1985, noting that "[s]ome states appear to be adopting, apparently in perpetuity, all existing or future United States Supreme Court interpretations of a federal constitutional provision as the governing interpretation of the parallel state constitutional provision."[62] A majority of state courts use the lockstep method, not only finding that their state constitutional provisions have the same meaning as federal provisions, but also using U.S. Supreme Court jurisprudence to analyze claims.[63]

A number of other states use the deferential "interstitial" approach, in which the court first ascertains whether the claim can be resolved under the U.S. Constitution. If the federal claim protects

58. Liu, *supra* note 50, at 1312.

59. WILLIAMS, *supra* note 25, at 140–50.

60. *Id.* at 135.

61. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 339–40 (2011). For a detailed review of the lockstep approach and the many permutations it takes, see WILLIAMS, *supra* note 25, at 193–210. *See also* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & M. L. REV. 1499, 1502 (2005) (noting that a clear majority of cases follow, rather than diverge from, federal constitutional doctrine).

62. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1166 (1985).

63. Blocher, *supra* note 61, at 339–40. *See also* Williams, *supra* note 61, at 1502 (noting that a clear majority of cases follow, rather than diverge from, federal constitutional doctrine).

the asserted right, the state court will not reach the state constitutional claim.[64] If the U.S. Constitution does not protect the right being asserted, then the court can look to the state constitution to fill the gaps.[65] Under the interstitial approach, courts place the burden on the party advancing a state claim to show that the state constitutional provision calls for a separate analysis because of its language, history, or intent.[66] The courts that use this method identify the circumstances, or factors, that justify interpreting the state constitution more broadly than the U.S. Constitution and analyze whether those circumstances are present in the case before the court.[67] The factor method has been critiqued by a number of scholars for creating a presumption of correctness for federal precedent despite no basis for doing so.[68] Nonetheless, state courts continue to use this method, and some have even refused to consider state constitutional claims if the factors were not properly briefed and argued.[69]

In interpreting state constitutional provisions with no federal analog, state judges should face no constraint in methodology. Nonetheless, some state courts interpret even these independent provisions using the "doctrinal vocabulary" developed for federal constitutional analysis by the U.S. Supreme Court.[70] State court judges facing independent interpretation of their own constitutions have to contend with a lack of precedent for independent analysis, existing precedent that defers to or parallels federal precedents and the "gravitational pull" of U.S. Supreme Court precedent.[71] Thus, despite the lack of constraint on state interpretation, state court judges have been hesitant to do so.

Not all states have been uniform in their approaches, adopting different approaches at different times and with different types of claims, but the general resistance to exercise independent state constitutional analysis has obviously slowed the development of judicial federalism.

64. SUTTON, *supra* note 51, at 182 (citing State v. Sanchez, 350 P.3d 1169, 1173 (N.M. 2015)). States including California, Connecticut, Illinois, New Jersey, Pennsylvania, and Washington have used this approach. *Id.*

65. Blocher, *supra* note 61, at 340.

66. Lousin, *supra* note 29, at 393.

67. WILLIAMS, *supra* note 25, at 146.

68. Liu, *supra* note 50, at 1314–15.

69. WILLIAMS, *supra* note 25, at 152 (citing Forbes v. City of Seattle, 785 P.2d 431, 433–43 (Wash. 1990) (and multiple additional cases)).

70. Blocher, *supra* note 61, at 339 (2011) (quoting Hans A. Linde, *E Pluribus––Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 186 (1984)).

71. SUTTON, *supra* note 51, at 184–185.

2. Political Backlash

Another factor that slowed the growth of judicial federalism was backlash to some of the independent decisions made by state courts. This backlash occurred through the political process, in which voters expressed objection through both judicial elections and state constitutional amendment.

In some states with judicial elections, judges who participated in independent state constitutional interpretation have been challenged and critiqued on that basis.[72] This had an obvious chilling effect on judges' willingness to extend constitutional protections into new territory in states where judges are chosen through the electoral process.

Backlash also took the form of state constitutional amendments designed to reverse decisions in which state courts established state constitutional rights that went beyond the limits of the U.S. Constitution.[73] In comparison to the U.S. Constitution, state court constitutions are easier to change to varying degrees, resulting in a greater likelihood that a state constitution could be changed to undo a state judicial interpretation.[74] Not only did this reversal slow the progress of establishing rights through state constitutions, but knowledge of the possibility could affect a court's willingness to establish rights beyond the federal floor.

The ease of changing state constitutions means that state constitutions have been more responsive to political concerns at different points in history.[75] While this malleability created potential for identifying rights not protected by the U.S. Constitution, it also posed some unique challenges to state court judges in interpreting their own constitutions, since a state constitution can be changed to undo a state judicial interpretation.[76] State court judges became aware of the possibility that their decisions could be overturned by

72. Williams, *supra* note 42, at 217 (noting that campaigns were mounted against judges associated with independent state interpretations in California and Oregon).

73. *Id.* at 216. *See infra* Section II.C.1 at 122-31.

74. Tarr, *supra* note 22, at 15 (stating that while the federal constitution has remained largely the same and has been amended only 27 times in over 200 years, state constitutions have been changed or amended an average of once for every year since their adoption).

75. Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 277–79 (1994).

76. Tarr, *supra* note 22, at 15.

voters through the constitutional amendment process.[77] Some scholars have suggested that there is a correlation between the ease or difficulty of amending the state constitution and court's willingness to establish rights independent of those guaranteed by the U.S. Constitution.[78]

3. Lack of State Constitutional Knowledge

One of the biggest obstacles to developing state constitutional law to expand rights has been judges' and lawyers' lack of familiarity with state constitutional claims.[79] Judicial interpretation of state constitutional provisions protecting individual and collective rights is a relatively new development in American legal history. Although state constitutions were originally intended to be the primary vehicle for protecting individual rights, over time the U.S. Constitution replaced them in this role.[80] At the start of the new judicial federalism movement, very few state supreme courts had interpreted the provisions of their own constitutions asserting the rights of the people extending beyond those protected in the U.S. Constitution, and state constitutional law continues to be underdeveloped to this day.[81] Until the late twentieth century, judicial interpretation of state constitutional rights provisions received virtually no scholarly treatment and was not taught in law schools.[82]

77. Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73, 101–03 (2001). Chief Judge Amestoy noted this paradox in the context of guaranteeing the right legal recognition of same-sex unions. *Id.* at 102 (citing Baker v. State, 744 A.2d 864, 888 (Vt. 1999)).

78. *See, e.g.*, Schlam, *supra* note 75, at 270–71 (1994). The ease of amending state constitutions poses additional obstacles to judges, who must interpret amended provisions in light of how they were changed from previous versions. The changes to state constitutions over time mean that state court judges must also reconcile provisions that may reflect the different political perspectives at the time of adoption. Finally, when judges are inclined to look to analogous provisions from other states for guidance, they must take into account the differences in origin and interpretation of the provision in each originating state. *See also* Tarr, *supra* note 22, at 15.

79. Hon. Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1304 (2019) (noting that state constitutional provisions "remain unfamiliar to and often ignored by lawyers, scholars, and judges.").

80. Blocher, *supra* note 61, at 331.

81. Loretta H. Rush & Marie Forney Miller, *Cultivating State Constitutional Law to Form A More Perfect Union-Indiana's Story*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 377, 379 (2019).

82. Justice Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153, 1155 (1992).

At least one state court judge has acknowledged that analyzing a state constitutional provision that has never been subject to judicial scrutiny can be daunting, given the breadth of information that might be necessary to determine its meaning.[83] The combination of lack of expertise in state constitutional interpretation and familiarity with federal constitutional interpretation likely also contributed to reluctance to engage in independent state constitutional analysis.[84]

Public awareness of state constitutions was low at least until the 1980s, and many lawyers were also ill-informed about state constitutions and brought few claims on that basis.[85] In cases challenging the validity of state or local laws, lawyers tend to bring only a federal claim, even where a claim could be made under the state constitution.[86] Courts in many states will not reach the state constitutional issue if it is not clearly presented as a distinct claim.[87] In addition, not all state courts will analyze the state claim before proceeding to the federal claim.[88] As reflected by the lockstep approach, many judges do not think it appropriate or are not willing to develop an independent state constitutional jurisprudence.

As a result of all these challenges, scholars in the 1990s declared the accomplishments of the New Judicial Federalism movement to be modest at best, and some went so far as to call it a failure.[89] Despite this grim pronouncement, there has been progress and a slow move towards a progressive judicial federalism.

C. Judicial Federalism: Looking Forward

Despite the criticisms, state courts have not stopped the project of interpreting their own constitutions and, over time, the potential

83. *See* Shepard, *supra* note 53, at 1540.

84. Blocher, *supra* note 61, at 339; *see also* Liu, *supra* note 79, at 1315.

85. Shepard, *supra* note 53, at 1533–34; *see also* Linde, *supra* note 70, at 166.

86. *See* SUTTON, *supra* note 51, at 8 (noting the rarity of dual federal and state challenges during his 15 years on the federal bench and 3 years as State Solicitor of Ohio). *See also* James Gardner, *The Failed Discourse of State Constitutions*, 90 MICH. L. REV. 761, 780 (1992) (noting the infrequency of state constitutional claims in state courts); Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN L. REV. 1695, 1700 (2010) (noting that states do not have a tradition of using their state constitutions to provide rights because of the infrequency of state constitutional claims).

87. Williams, *supra* note 42, at 220 (citing cases from Arizona, Arkansas, Connecticut, Idaho, Illinois, Indiana, Texas, Vermont, Washington, and Wyoming).

88. Lousin, *supra* note 29, at 390.

89. Liu, *supra* note 50, at 1311 (citing Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. Rev. 271, 271 (1998) and Gardner, *supra* note 86).

for interpreting state constitutions to provide more expansive rights than those in the U.S. Constitution has become more widely understood and accepted.[90]

Despite the obstacles, some jurists have embraced judicial federalism. While some state courts have protected civil rights under their own constitutions using federal frameworks, others have gone even further and conducted fully independent analysis. A number of academics and judges have called for state court judges faced with both federal and state claims to resolve the case under the state claim first.[91] This approach, dubbed the "primacy" approach, was first embraced by Hans Linde while a law professor and put into practice when he became a justice on the Oregon Supreme Court.[92] Using the primacy approach, the court engages in federal constitutional analysis only after denying relief to the claimant on independent state constitutional grounds.[93]

Primacy treats the state constitution as an independent source of fundamental rights, not dependent on federal constitutional interpretation.[94] Under this approach, courts look first to their own constitutional text, state history, and structure, with federal law assuming the role of persuasive authority, equivalent to the precedent in other state courts.[95] As Washington Supreme Court Justice Robert F. Utter has suggested, under the primacy model, "federal law and analysis are not presumptively correct."[96] The advantage of the primacy approach is that even in claims that may succeed under the federal provision, state judges are able to diverge from federal precedent and articulate rights in a way that may be broader or otherwise freer from constraints imposed by federal law.

After the initial backlash to the judicial federalism movement, a number of state courts began to express willingness to independently locate rights in state constitutions. Some recent examples include the Pennsylvania Supreme Court striking down a congressional redistricting plan under the Pennsylvania Constitu-

90. Williams, *supra* note 42, at 219.

91. Schlam, *supra* note 75, at 288–89. To date, Oregon, Maine, and New Hampshire have adopted this approach on a regular basis, while other courts have done so occasionally. *See* SUTTON, *supra* note 51, at 179.

92. SUTTON, *supra* note 51, at 178–179; WILLIAMS, *supra* note 25, at 140–41.

93. Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 837–38 (2011).

94. Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1027–28 (1985).

95. *Id.*

96. *Id.*

tion[97] and the Kansas Supreme Court establishing a right to abortion under the Kansas Constitution's Bill of Rights.[98] In some states, the courts have developed jurisprudence on the meaning of state constitutional provisions guaranteeing access to public education, to the degree that "today education is a fully evolved state constitutional right."[99]

State courts have increasingly become willing to deviate from federal constitutional analysis, even where federal precedent is well-developed.[100] For example, the Arkansas Supreme Court developed an independent analysis of the exclusionary rule, despite previously indicating it would follow the Supreme Court's Fourth Amendment interpretation.[101] Several state courts diverged from federal Equal Protection analysis and developed their own framework for analyzing claims under state equality clauses.[102] In addition, some state courts have developed independent constitutional analysis in the area of privacy, particularly in cases involving the impact of technology on privacy concerns.[103]

Courts engaging in independent analysis contribute to a more robust body of state constitutional law and enrich constitutional jurisprudence.[104] As more courts engage in independent analysis, a more developed body of precedent is then available, not only to other states, but also the U.S. Supreme Court.[105] In identifying state constitutional rights that are more extensive than those provided in the U.S. Constitution, state courts enhance the protection of civil liberties.[106] Thus the promise of progressive federalism grows.

The development of judicial federalism over the past decades shows, at least theoretically, that advocates might be able to turn to state courts to seek expansion of recognized rights and recognition of new rights. Despite the reluctance of some courts, there is no legal or procedural obstacle to asking courts to resolve state consti-

97. League of Women Voters of Pa. v. Commonwealth, 175 A.3d 282 (Pa. 2018).

98. Hodes & Nauser v. Schmidt, 440 P.3d 461 (Kan. 2019).

99. Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education As A Federally Protected Right*, 51 WM. & M. L. REV. 1343, 1349 (2010).

100. Williams, *supra* note 42, at 221.

101. *Id.* (citing State v. Sullivan, 74 S.W.3d 215, 222 (Ark. 2002)).

102. *Id.* at 222 (pointing to Indiana, Vermont, Minnesota, Alaska, and Idaho as examples).

103. Lousin, *supra* note 29, at 405.

104. Rush & Miller, *supra* note 81, at 380–81.

105. *Id.* at 381.

106. *Id. See also* SUTTON, *supra* note 51, at 179.

tutional claims. But what does it actually look like in practice to turn away from a hostile Supreme Court and attempt to expand rights protections in state court? As rights advocates, we know the most famous stories behind the most well-known civil rights campaigns brought in federal court—the *Roes*, the *Browns*, and the *Obergefells*. What we tend to know less about are the rights campaigns that either began in state courts or ran their entire courses there.

This article offers a snapshot of a little over a decade in the campaign for marriage equality as an example of what it looks like when judicial federalism is put to the test in the real world. As the following section describes, marriage equality advocates in the period between *Bowers v. Hardwick*[107] and *Goodridge v. Dep't of Health*[108] (1986–2004) used an incremental, state-by-state strategy that deliberately avoided a hostile federal landscape and instead used innovative approaches to state constitutional law to pry open the door to relationship recognition for same-sex couples. This is by no means the only example of a successful state constitutional law strategy, but it is a recent one, and one in which an initial reliance on state-by-state victories led to an almost shockingly swift nationalization of the recognition of the right of same-sex couples to marry.

PART II.
THE CAMPAIGN FOR MARRIAGE EQUALITY – 1991-2004

In the years immediately following the U.S. Supreme Court's gratuitously hostile ruling in *Bowers v. Hardwick*, LGBTQ rights litigators managed to continue to advance the rights of their community by shifting from federal litigation to a nearly exclusive focus on state constitutional law. It is that shift, the thinking that accompanied it, and the first three cases that arose from it—*Baehr v. Lewin*, *Baker v. State*, and *Goodridge v. Dep't. of Public Health*—that is the focus of this section.

A. In the Shadow of Bowers

In the 1970s and 1980s, the nascent[109] legal arm of the LGBTQ rights movement recognized that sodomy laws posed an enormous

107. 478 U.S. at 186 (1986).

108. 798 N.E.2d 941 (Mass. 2003).

109. Lambda Legal Defense and Education Fund was founded in 1973, which was also the year that the ACLU began its first project devoted to sexual privacy. ACLU's LGBT Rights Project was formally founded in 1984. *See* Patricia A.

obstacle to the legal equality of members of the LGBTQ community. This was not simply because they created conditions in which community members could be jailed for engaging in private, consensual sexual conduct—although that would have been bad enough. Rather, the continued criminalization of many forms of non-procreative sexual conduct relegated LGBTQ people to the role of "status criminals" who, as de facto outlaws, could be subjected to various forms of legal discrimination.[110] Thus, litigators in the 1970s and 1980s sought out a case with a straightforward fact pattern through which sodomy laws could be definitively ruled unconstitutional.[111]

In 1986, the Supreme Court dealt a severe blow to the movement when it issued its decision in *Bowers v. Hardwick*, a case that

Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1584–1587 (1993). GLAD, the organization that brought the Vermont, Massachusetts, and Connecticut same-sex marriage challenges, was founded in 1978. *History*, GLAD, https://www.glad.org/about/history/ [https://perma.cc/TNR2-R233] (last visited Dec. 4, 2019). The National Center for Lesbian Rights, which litigated the California same-sex marriage case, was founded in 1977. *Mission & History*, NAT'L CTR. FOR LESBIAN RTS., http://www.nclrights.org/about-us/mission-history/ [https://perma.cc/7RKZ-H3KW] (last visited Dec. 4, 2019).

110. Associating homosexuals with sodomy and thus with criminal activity had been at the core of earlier governmental action against gay men and lesbians. Raids on gay bars were often justified on grounds that criminal activity might result where gay persons congregate. The 1950 Senate Subcommittee report recommending that all homosexuals be dismissed from government service relied in large part on the fact that same-sex sexual conduct was both criminal and immoral. Persons who engaged in such conduct were presumed to be morally weak and thus unfit for employment in responsible positions. So long as consensual same-sex sodomy remained a crime, these justifications for discrimination against gay people were more difficult to attack. The role played by sodomy laws in anti-gay discrimination in the 1980s was much the same as in earlier decades. It was not the risk of prosecution for sodomy that concerned gay men and lesbians. Rather, it was the risk of being branded as a criminal once one's sexual orientation became known. So long as gay men and lesbians were presumed to engage in acts of criminal sodomy, employers could argue that they should not be forced to hire criminals and landlords could argue that they should not be forced to rent to criminals. Cain, *supra* note 109, at 1587–88 (internal citations omitted).

111. *See* Ellen Ann Andersen, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283, 297–98 (1998) (internal citations omitted) ("Some members of the ACLU's Georgia affiliate began searching for a good test case to challenge Georgia's sodomy law in 1977. They did not find one until Michael Hardwick was arrested in 1982. During the five intervening years, they were unable to find a single instance of a conviction for sodomy that was not the result of a plea bargain agreement in which a more serious charge (such as rape) was dismissed in return for a guilty plea on the sodomy charge. As it turns out, in fact, Michael Hardwick was the first person to be arrested in the State of Georgia for adult, private, consensual same-sex conduct in nearly 50 years.").

advocates had hoped would give the Court a vehicle to announce that sodomy statutes violated the U.S. Constitution.[112] *Bowers* was brought by a Georgia ACLU affiliate attorney, and became a focal point of litigation strategy discussion for the newly-formed Ad Hoc Task Force to Challenge Sodomy Laws.[113] *Bowers* determined that the 14th Amendment did not require states to legalize various forms of private, consensual sexual conduct.[114]

The holding of *Bowers* alone would have been a dramatic loss for LGBTQ advocates. But the majority opinion was exceptionally demoralizing. It reframed the issue—which, given the language of the challenged statute *should* have been a broad question about sexual freedom regardless of sexual orientation[115]—as the very narrow, and at the time much more farfetched-seeming, question of whether the U.S. Constitution requires states to legalize *gay sex* specifically.[116] By framing the issue so narrowly, the majority opinion

112. Bowers v. Hardwick, 478 U.S. 186, 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

113. Cain, *supra* note 109, at 1613 ("By 1985, the Task Force had become an official project of Lambda Legal Defense and Education Fund. National meetings of gay rights litigators included Wilde and attorneys from other ACLU affiliates in states possessing sodomy statutes. Wilde credited the Lambda project with providing a 'legal think tank and a central place to discuss constitutional theory and litigation strategies.'") (internal citations omitted). The Ad Hoc Task Force represents an early manifestation of a decision by nationally focused LGBTQ rights litigators to coordinate across organizations. That approach has persisted to this day—each year, attorneys from groups representing LGBTQ litigants gather at a Roundtable where national strategy is discussed and debated. *See* Kevin M. Cathcart, *The Sodomy Roundtable: How Dispelling Discriminatory Sex Laws Led to Marriage Equality*, OUT (June 23, 2016), https://www.out.com/art-books/2016/6/23/sodomy-roundtable-how-dispelling-discriminatory-sex-laws-led-marriage-equality [https://perma.cc/A7ZZ-JJLH].

114. "[W]e granted the Attorney General's petition for certiorari questioning the holding that the sodomy statute violates the fundamental rights of homosexuals. We agree with petitioner that the Court of Appeals erred, and hence reverse its judgment." *Bowers*, 478 U.S. at 189.

115. The challenged Georgia statute did not prohibit only same-sex sexual conduct. Rather, the challenged provision provided that: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . . (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . ." Thus, the statute forbade oral or anal intercourse *regardless of the gender of the participants*. *Id.* at 188 n.1.

116. According to the majority, "The issue presented is whether the Federal Constitution confers a fundamental right *upon homosexuals* to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Id.* at 190 (emphasis added). Justice Blackmun's strong dissent, joined by Justices Marshall, Brennan, and Stevens, devotes most of its content to a critique of the majority's framing, noting that "the

rhetorically cut off LGBTQ people from the broader community of Americans whose sexual practices diverge from the strictly procreative, and then emphatically rejected the idea that Constitutional principles might afford that unique—and reviled—group any dignity.[117]

LGBTQ rights litigators understood the Court's decision in *Bowers* to mark a very serious setback in the fight for LGBTQ equality. That decision made it abundantly clear that the majority of the U.S. Supreme Court was not receptive to even the most basic liberty or equality claims of LGBTQ Americans. Thus, any federal litigation seemed likely to dead-end. Movement lawyers sought, there-

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Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens." *Id.* at 200 (Blackmun, J., dissenting).

117. Chief Justice Burger's concurrence doubled down on this framing, and seems drafted entirely to underscore the contempt with which the 1986 iteration of the Supreme Court viewed LGBTQ Americans' claims of equality and liberty. It is worth reading in its entirety, so we offer the reader its entire text here:

> I join the Court's opinion, but I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy. As the Court notes, *ante*, at 2844, the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. *See* Code Theod. 9.7.6; Code Just. 9.9.31. *See also* D. Bailey, Homosexuality and the Western Christian Tradition 70–81 (1975).
>
> During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, Commentaries. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.
>
> This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.

Bowers, 478 U.S. at 196–97 (Burger, C.J., concurring).

fore, to regroup and attempt to find workarounds to this new and very daunting obstacle, and new goals toward which to strive.[118]

The decision to turn the movement's attention to relationship recognition litigation was hardly reached by consensus. Rather, the question of whether same-sex marriage ought to be a goal of the movement had been in contest for decades. Some in the movement were of the opinion that the goal of sexual liberation was fundamentally at odds with a goal of attaining legal relationships identical in structure to those of monogamous straight people. Others believed that recognition of same-sex relationships was a vital part of the basic dignity of community members.[119]

To further complicate matters, the federal courts had been emphatically closed to same-sex marriage litigation since long before *Bowers v. Hardwick* shut the door on federal claims to a constitutional right to queer sexual privacy. In 1970, Jack Baker and Michael McConnell had attempted to obtain a marriage license in Hennepin County, Minnesota, and had been turned away.[120] They sued in state court, alleging that the refusal to issue them a license violated their constitutional rights. They lost all the way to the Minnesota Supreme Court, which examined their claims and found that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[121] But even though the couple recalls that one of the Minnesota Supreme Court Justices turned his chair around in disgust during oral argument on the couple's claims,[122] at least that court *examined* those claims. When the couple brought their appeal to the U.S. Supreme Court in 1972, they received even more dismissive treatment—an

118. Cain, *supra* note 109, at 1617 ("*Hardwick* was a major setback in the fight to end discrimination against gay men and lesbians. As a result, gay rights litigators, in the post-*Hardwick* era, have been forced to develop constitutional arguments that circumvent the *Hardwick* holding.").

119. *See, e.g.*, Tom B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9 (advocating, despite the historically oppressive nature of marriage, for the inclusion of the right to marry as a pillar of the gay rights movement); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9 (arguing that same-sex marriage is a patriarchal institution that undermines the goals of the gay and lesbian civil rights movement).

120. Erik Eckholm, *The Same-Sex Couple Who Got a Marriage License in 1971*, N.Y. TIMES (May 16, 2015), https://www.nytimes.com/2015/05/17/ us/the-same-sex-couple-who-got-a- marriage-license-in-1971.html [https://perma.cc/2TSB-JZVJ].

121. Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971).

122. Eckholm, *supra* note 120.

unsigned, one-sentence opinion that stated merely, "The appeal is dismissed for want of a substantial federal question."[123]

B. Considering State Courts as a Strategy for Progressive Change

Clearly, if LGBTQ people wanted their relationships recognized, they would have to go to state courts to make that happen, at least for the foreseeable future. But experts were unsure in the late 1980s and early 1990s whether state court litigants would be any more successful than Baker and McConnell had been before the U.S. Supreme Court in 1972.[124] Mary Bonauto, who has directed New England regional advocacy group GLAD's (GLBTQ Advocates and Defenders) Civil Rights Project since 1990 (and who acted as counsel on same-sex marriage litigation in Vermont, Massachusetts, and Connecticut, and ultimately argued *Obergefell v. Hodges* before the U.S. Supreme Court)[125] has generously chronicled her recollections of movement strategizing in several transcribed speeches and journal articles. She recalls that she and other experts believed that public opinion in the early and mid 1990s had not yet advanced to a point where marriage litigation would likely find success in a state court.[126] According to Bonauto, GLAD had consequently "turned down requests for representation in such cases several times."[127]

But beneath the reasonable hesitance around the selection of same-sex marriage as a marquee goal of the LGBTQ rights movement, litigators in the 1980s and 1990s could hear a steady hum of need emanating from Americans experiencing legal erasure of their most vital relationships. Bonauto explains, "My own experience with GLAD's intake calls demonstrated over and over again that many of the people who called us with legal problems could

123. Baker v. Nelson, 409 U.S. 810, 810 (1972), *overruled by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

124. A tiny number of state courts had already weighed in on this issue around the same time as *Baker v. Nelson* was decided (and gay couples had lost). *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

125. *Mary Bonauto Biography*, GLAD, https://www.glad.org/staff/mary-bonauto/ [https://perma.cc/SY6Z-9TUB] (last visited Dec. 9, 2019).

126. Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 21–22 (2005) ("The real question was when would LGBT people denied marriage rights get a fair hearing in court, in the legislature, and in public opinion in Massachusetts. As the above history shows, with each passing year, the increase in support for ending discrimination against LGBT people by non-LGBT people became phenomenal. This increase was essential because, as Rev. Dr. Martin Luther King, Jr. explained, no minority can succeed without the assistance of the majority.") (internal citations omitted).

127. *Id.* at 21.

trace their problems to nonrecognition of their relationships."[128] Bonauto's hesitancy to bring relationship recognition litigation was in tension with her acknowledgement that "[t]he bottom line was that most state laws providing protections and responsibilities used marital status as a factor and the private sector often imitated what it saw in the state government. GLAD could and did litigate around the edges, but many important protections were simply off-limits to LGBT families without marriage and without the appellation of 'spouse.'"[129]

C. Bringing Litigation in State Courts: Hawaii, Vermont, and Massachusetts

1. Hawaii: Victory, Then Defeat

The question of whether to litigate toward marriage equality was partially answered by individual litigants in Hawaii, who in 1991 decided to bring a marriage lawsuit using state constitutional theories.[130] Lawyers at national LGBTQ rights groups were not united in support of the litigation, but ultimately Evan Wolfson, then at Lambda Legal, joined the litigation as counsel.[131] That case, which began its life as *Baehr v. Lewin* but was finally retired, several years later, as *Baehr v. Mikke*,[132] demonstrates both the promises and pitfalls of state constitutional litigation, and provides important lessons for progressives today.

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128. *Id.*

129. *Id.* at 22 (internal citations omitted).

130. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1638 (1997).

131. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 569 n.6 (1995) (quoting co-counsel Evan Wolfson, who had long supported marriage equality as a movement goal, "*Baehr* was initially brought in 1991 by Honolulu attorney Daniel R. Foley of the law firm of Partington & Foley, after national organizations such as Lambda proved internally deadlocked and unwilling to take the case. Lambda remained supportive and involved behind the scenes, filed an amicus brief, and, after a change in ideology and regime, was again invited to enter the case. I am now co-counsel with Dan Foley."). *See also The Freedom to Marry in Hawaii: A Victory 20 Years in the Making*, FREEDOM TO MARRY BLOG (Nov. 9, 2013), http://www.freedomtomarry.org/blog/entry/20-years-in-the-making-hawaii-stands-on-the-verge-of-the-freedom-to-marry [https://perma.cc/756C-N6Y6].

132. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *superseded by state constitutional amendment* HAW. CONST. art. I, § 23.

The Hawaii litigants challenged the state's marriage law, which did not permit same-sex marriage,[133] using the Hawaii Constitution as their primary weapon. The litigants charged that the state marriage statute violated provisions of the Hawaii Constitution which either do not exist in the U.S. Constitution at all, or are articulated differently.[134] First, the plaintiffs alleged that the marriage law violated a specific provision in the Hawaii Constitution that expressly provides a right to privacy that is subject to strict scrutiny when curtailed.[135] The litigants also alleged a violation of the Hawaii Constitution's equal protection clause, which, although containing similar language to the Fourteenth Amendment, is different in that it makes specific mention of the term "civil rights" and enumerates specific protected classes, in which "sex" is included.[136]

133. *Id.* at 44 ("Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS § 572–1 restricts the marital relation to a male and a female.").

134. *Id.*

135. HAW. CONST. art. I, § 6 (1978) ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."). *See generally* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1424–25 (1992) (internal citations omitted) ("The states of Montana (1972), Alaska (1972), California (1972), Hawaii (1978) and Florida (1980) all took the not insignificant step of grafting Griswold-Roe type privacy provisions onto their own state constitutions, locking that right into place so that it became insulated from future federal upheaval. Montana and Hawaii went so far as to include 'compelling state interest' language a-la-Griswold-Roe, essentially constitutionalizing the multiple-tiered standard of judicial scrutiny developed under the Fourteenth Amendment, making that an explicit component of their own constitutional jurisprudence. Thus, ironically, Roe-type privacy is now more secure under a number of state constitutions than it is in the federal system which created it.").

136. HAW. CONST. art. I, § 5 (1978) ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."). A number of state constitutions have equality clauses that differ from the Equal Protection Clause of the Fourteenth Amendment. Several states adopted a version of the Equal Rights Amendment modeled on the proposed federal amendment, which prohibits sex discrimination. Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1201–02 (2005). Many other state constitutions have some version of an "equal privileges" clause, including Arizona, Arkansas, California, Connecticut, Indiana, Iowa, Kentucky, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. These clauses express a vision of equality, prohibiting government from granting privileges that do not equally benefit all. Shannon Mariotti, *The New Progressive Federalism: Common Benefits, State Constitutional Rights, and Democratic Political Action*, 41 NEW POL. SCI. 98, 107 (2019).

The Hawaii marriage litigation was initially successful. In 1993, the Hawaii Supreme Court made history in *Baehr v. Lewin* when, in a plurality opinion, it ruled that the state statute preventing same-sex couples from marrying was "presumed to be unconstitutional" under the state constitution's rights provision unless it could be shown that the statute could satisfy strict scrutiny.[137] In so doing, the opinion carefully examined both the state privacy right claim and the state equal protection claim. The opinion's treatment of both claims provides fascinating insights into the way in which some state courts approach the relationship between state constitutions and enmeshed federal doctrine.

First, the Hawaii litigants were not successful in persuading the court that the fundamental right to privacy inexorably led to a fundamental right to same-sex marriage. The *Baehr* court first examined the intent of the participants in Hawaii's constitutional convention in including the right-to-privacy provision, noting that the participants had explained the inclusion as a sort of cementing of the unenumerated right that had been established by federal Constitutional doctrine.[138] The *Baehr* court reasoned that, since the privacy right had been firmly rooted in federal doctrine, and there was no Hawaii doctrine that addressed the contours of the fundamental right to marry, it should therefore look to federal constitutional doctrine for guidance.[139] The court then acknowledged that federal case law had established that marriage is a fundamental right that flows from the right to privacy, but then declined to inter-

137. *Baehr*, 852 P.2d at 48.

138. *Id.* at 55 (quoting Comm. Whole Rep. No. 15, 1 Proceedings, at 1024 (internal citations omitted)) (asserting the stated purpose as follows: "By amending the Constitution to include a separate and distinct privacy right, it is the intent of your Committee to insure that privacy is treated as a fundamental right for purposes of constitutional analysis. . . . This right is similar to the privacy right discussed in cases such as *Griswold v. Connecticut . . . Eisenstadt v. Baird, . . . Roe v. Wade,* etc. It is a right that, though unstated in the federal Constitution, emanates from the penumbra of several guarantees of the Bill of Rights. Because of this, there has been some confusion as to the source of the right and the importance of it. As such, it is treated as a fundamental right subject to interference only when a compelling state interest is demonstrated. By inserting clear and specific language regarding this right into the Constitution, your Committee intends to alleviate any possible confusion over the source of the right and the existence of it.").

139. *Baehr*, 852 P.2d at 55 ("The issue in the present case is, therefore, whether the 'right to marry' protected by article I, section 6 of the Hawaii Constitution extends to same-sex couples. Because article I, section 6 was expressly derived from the general right to privacy under the United States Constitution and because there are no Hawaii cases that have delineated the fundamental right to marry, this court . . . looks to federal cases for guidance.").

pret its own constitutional provision to include a fundamental right to *same-sex* marriage, a variety of marriage that the court could not imagine was in the minds of the U.S. Supreme Court when it had articulated the right in the first place.[140] Thus, with respect to the privacy claim, the Hawaii Supreme Court leaned heavily on federal doctrine in the absence of its own developed jurisprudence on the meaning and scope of the right to marry.

The *Baehr* litigants were, however, successful in making their equal protection argument in large part due to the Hawaii Constitution's textual diversion from the language of the 14th Amendment. As noted above, Article 1, Section 5 differs from the U.S. Constitution in that it enumerates specific protected classes, in which "sex" is included alongside race, religion, and ancestry.[141] In addition, the Hawaii Constitution contains a separate Equal Rights Amendment, not present in the U.S. Constitution.[142] For this claim, the Hawaii Supreme Court had to make two determinations: 1) whether the restriction of legal marriage to opposite-sex couples only amounted to a sex-based classification, and if so, 2) the appropriate level of scrutiny to which sex-based classifications ought to be subject.

The Hawaii Supreme Court was able to confidently hold that the restriction of marriage to opposite-sex couples amounted to a sex-based classification, asserting that "[r]udimentary principles of statutory construction render manifest the fact that, by its plain language, [the marriage statute] restricts the marital relation to a male and a female."[143] Next, the *Baehr* court analyzed whether sex-based classifications were subject to heightened or strict scrutiny under the Hawaii Constitution—a question that had remained unresolved. In so doing, the court again closely examined federal doctrine, this time the U.S. Supreme Court's fractured decision in *Frontiero v. Richardson*, in which members of the Court had disagreed on the level of scrutiny that ought to apply to sex-based classifications.[144]

140. *Id.*

141. HAW. CONST. art. I, § 5 (1978) ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.").

142. HAW. CONST. art. I, § 3 (1978) ("Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section.").

143. *Baehr*, 852 P.2d at 60.

144. 411 U.S. 677 (1973).

In order to resolve the issue, the Hawaii court engaged in an unusual kind of thought experiment as to how the members of the Supreme Court hearing *Frontiero* would likely have voted had the Equal Rights Amendment been ratified at the time. It ultimately concluded that, had the U.S. Constitution contained an Equal Rights Amendment like the one in the Hawaii Constitution, the *Frontiero* plurality that had voted in favor of strict scrutiny would have been a robust majority.[145] The court thus remanded the case for further findings of fact on whether the state could proffer reasons for the sex-based classification that would pass strict scrutiny.[146]

Initially, national LGBTQ rights groups were thrilled by the victory in *Baehr* and readied themselves to attack Hawaii's justifications for restricting marriage to opposite-sex couples on remand.[147] According to Bonauto, the outcome buoyed her sense of the possible. "It was a turning point for me. I believed that the battle for marriage was 'on' and we had to win or we might never have another chance in my lifetime."[148] National advocates believed that the next wave of litigation was likely to involve couples who would travel to Hawaii, marry, and then sue in their home states for recognition of

145. *Baehr*, 852 P.2d at 64 (the *Baehr* court found that, under their reading of Justice Powell's concurrence in *Frontiero* in conjunction with the plurality opinion, "had the Equal Rights Amendment been incorporated into the United States Constitution, at least seven members (and probably eight) of the *Frontiero* Court would have subjected statutory sex-based classifications to 'strict' judicial scrutiny.").

146. *Id.* at 68.

147. It has been common for decades for national LGBTQ rights groups to collaborate on litigation. Since the early 1980s, LGBTQ rights movement lawyers have gathered twice a year at the LGBT Civil Rights Litigators' Roundtable, which is co-organized by Lambda Legal, GLAD, ACLU, and the National Center for Lesbian Rights. The purpose of the Roundtable is to coordinate litigation campaigns around LGBTQ rights, and to collaborate with other LGBTQ impact litigators regarding litigation strategy and issue prioritization. It is a critical mechanism for agenda setting within the LGBT rights movement. *See* Nancy D. Polikoff, *Updating the LGBT Intracommunity Debate Over Same-Sex Marriage: Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS U. L. REV. 529, 535 (2009). This close collaboration often results in efficient cooperative effort in specific litigation efforts, where one group will represent a litigant (usually as co-counsel with a firm or local counsel) while others will co-author amicus briefs in support of the litigation. *See* Mary L. Bonauto, *Equality and the Impossible-State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481, 1491–92 (2016) ("Dan Foley in Hawaii, now joined on appeal by Evan Wolfson from Lambda Legal, was working toward a trial on the State's justifications in the state courts.").

148. Bonauto, *supra* note 147, at 1491–92.

those marriages.[149] It was then that a state constitutional strategy began to take shape, as rights groups began to investigate which states would be the most promising ones in which to launch a first wave of marriage recognition litigation. Some states in New England began to attract particular attention, for reasons that will be explained further *infra*.[150]

However, even as the *Baehr* litigants were preparing to return to the trial court for further factfinding, a fierce national backlash erupted that had both statewide and national repercussions. At the federal level, Congress—horrified by the prospect of legally wed same-sex couples suing for marriage recognition nationally[151]—introduced the federal Defense of Marriage Act, which had two purposes. According to the House Report on the legislation, "the first [purpose] is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses."[152] DOMA contained two operative sections. The provision known as Section 2 explicitly permitted states to refuse to acknowledge same-sex mar-

149. *Id.* at 1492 ("Many in the movement anticipated that couples would go to Hawaii and return home. But unlike others who married elsewhere, we assumed we would have to challenge public and private discrimination against those marriages. As part of a national research project involving the LGBTQ legal groups and lawyers, GLAD collaborated with attorneys in the six New England states to examine the legal and policy landscape in each state and determine how to tee up a recognition case.").

150. *Id.* ("As part of a national research project involving the LGBTQ legal groups and lawyers, GLAD collaborated with attorneys in the six New England states to examine the legal and policy landscape in each state and determine how to tee up a recognition case. GLAD, and some of those attorneys, also took a deeper look that included state constitutional analyses and history. It is fair to say that I fell seriously in love with the Massachusetts Constitution at that point. The big picture from some of the New England states was encouraging.").

151. The House Report on the proposed legislation gets across very plainly the degree of dread that the Hawaii litigation invoked in the hearts of Congress. *See* H.R. REP. NO. 104-664, at 2 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2906 ("H.R. 3396 is a response to a very particular development in the State of Hawaii. As will be explained in greater detail below, the state courts in Hawaii appear to be on the verge of requiring that State to issue marriage licenses to same-sex couples. The prospect of permitting homosexual couples to 'marry' in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.").

152. *See* H.R. REP. NO.104-664, at 2 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

riages entered into validly elsewhere, and the provision known as Section 3 defined "marriage" for all federal purposes as being a union exclusively of one man and one woman.[153] DOMA was passed into law in 1996.[154]

At the state level, the reaction to *Baehr* was similarly one of shock and an immediate attempt to shore up the institution of marriage as open only to heterosexual couples. As Professor Jane Schacter notes,

> The nationalization of the conflict was highly successful. In 1995, two years after the Baehr decision and before the Hawaii trial court had even ruled on remand, Utah passed a law declaring marriages between same-sex couples to be void. Between 1995 and November 2003 . . . an additional thirty-six states followed Utah's lead and passed measures restricting marriage for same-sex couples in one way or another, and the measures generally passed by wide margins. The dominant form was a statute, passed by a state legislature, that defined marriage within the state as between one man and one woman, banned recognition of any same-sex marriage performed in an-

153. David W. Dunlap, *Congressional Bills Withhold Sanction of Same-Sex Unions*, N.Y. TIMES (May 9, 1996), https://www.nytimes.com/1996/05/09/us/congressional-bills-withhold-sanction-of-same-sex-unions.html?searchResultPosition=3 [https://perma.cc/R6UC-HX5F] ("State-by-state skirmishes over prospective marriage rights for lesbians and gay men escalated into a national battle today with the introduction in Congress of bills that would deny Federal recognition of same-sex marriages if they were ever legalized. The bills, introduced by Senator Don Nickles, Republican of Oklahoma, and Representative Bob Barr, Republican of Georgia, would also absolve states of the obligation to recognize same-sex marriages performed in other states. That gets to the heart of conservatives' concern that if Hawaii sanctions same-sex marriage in the next few years—which is considered a possibility because of a pending court case there—gay couples from around the nation will fly to the islands to be wed legally and then return to their home states to claim the benefits of civil marriage.").

154. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). Section 3 of DOMA was codified at 1 U.S.C.A. § 7 ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.") and overruled by U.S. v. Windsor, 570 U.S. 744 (2013). Section 2 of DOMA was codified at 28 U.S.C.A. § 1738C ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.") and overruled by Obergefell v. Hodges, 135 S. Ct. 2584, 2584 (2015).

> other state, or did both. A few of these initial measures diverged from the norm: a handful were constitutional amendments enacted by voters, and five others were either statutory or constitutional measures that went beyond marriage per se to impose broader restrictions on partner recognition.[155]

But in the face of this furious backlash, Hawaii courts were still tasked with determining whether their state's ban on same-sex marriage could satisfy strict scrutiny. In late 1996, after DOMA had already been signed into law, a Hawaii trial court determined that the State of Hawaii had in fact failed to justify its sex-based classification under strict scrutiny, and held the state's prohibition on same-sex marriage to be unconstitutional under the Hawaii Constitution.[156]

That victory, however, was short-lived. In order to understand the series of events that undid the litigation win in *Baehr*, one ought to possess a basic knowledge of how state constitutions can be changed by popular vote. States have a wide variety of methods for amending their constitutions, and all but one involve a popular vote.[157] State constitutions can be revised[158] and amended through methods ranging from constitutional conventions through voter-generated initiatives.[159] The most common method of amendment is amendment proposed by the state legislature and ratified by popular vote.[160] Another eighteen states allow constitutional amend-

155. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1185–86 (2009) (internal citations omitted).

156. Baehr v. Miike, No. CIV. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 87 Haw. 34, 950 P.2d 1234 (1997), and r*ev'd*, 92 Haw. 634, 994 P.2d 566 (1999), *for text, see* No. 20371, 1999 WL 35643448 (Haw. Dec. 9, 1999).

157. *See* WILLIAMS, *supra* note 25, at 26 (noting that only Delaware allows for constitutional amendment without a vote of the people).

158. Revision refers to the process of replacing the entire constitution, rather than amending a discrete portion of it. Revisions are accomplished via constitutional convention, voter initiation, or some combination. Some state constitutions require periodic review for the necessity of revision. G. Alan Tarr & Robert F. Williams, *Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1076–78 (2005). Voters can call for constitutional convention through a referendum, though since the 1990s, these referenda have largely failed. Robert F. Williams, *Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901, 904–05 (2011).

159. John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, 71 MONT. L. REV. 395, 395 (2010).

160. At least 90% of state constitutional amendments have been proposed by the legislative mechanism. Between 1996 and 2003, voters ratified 655 amendments, seventy-six percent of all those proposed by legislatures. Tarr & Williams,

ment through direct voter initiative, requiring voters to obtain sufficient signatures to place the amendment on the ballot.[161]

Amending or revising the Hawaii State Constitution is a relatively simple process as compared to some state constitutional amendment processes,[162] and can be accomplished by a proposal from a constitutional convention or by the legislature that is then referred to the public for a vote.[163] If the legislature wishes to put an amendment to the public for a vote, they must first pass the language through both houses by a two-third majority.[164] The public may then vote on the amendment in the next general election, where a majority of all votes cast is sufficient to pass the amendment.[165]

The year after the trial court held the Hawaii same-sex marriage prohibition to be unconstitutional, the Hawaii legislature (which had struggled with the question of how to approach the issue)[166] proposed a state constitutional amendment that would reserve the power to define marriage for the legislature, thus taking the question out of the hands of the judiciary.[167] The legislature

supra note 158, at 1092. A few states allow amendments proposed by a constitutional commission, convened in a variety of different methods. *Id.* at 1094–97 (identifying temporary commissions, permanent commissions and periodic required commissions all as means of proposing constitutional amendments in various states).

161. *Id.* at 1100–01 (identifying a wide variety of approaches involving number and distribution of signatures and the time frames in which the process must be accomplished).

162. Compare with the process for amending the Massachusetts Constitution, *infra* Section II.C.iii.

163. HAW. CONST. art. XVII, § 1 (1978).

164. HAW. CONST. art. XVII, § 3 (1978) ("[t]he legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions").

165. This is slightly different in a special election. HAW. CONST. art. XVII, § 2 (1978) ("The revision or amendments shall be effective only if approved at a general election by a majority of all the votes tallied upon the question, this majority constituting at least fifty per cent of the total vote cast at the election, or at a special election by a majority of all the votes tallied upon the question, this majority constituting at least thirty per cent of the total number of registered voters.").

166. *See* Jane Gross, *After a Ruling, Hawaii Weighs Gay Marriages*, N.Y. TIMES (Apr. 25, 1994), https://www.nytimes.com/1994/04/25/us/after-a-ruling-hawaii-weighs-gay-marriages.html?searchResultPosition=5 (describing debate in Hawaii regarding same-sex marriage after initial ruling in Baehr) [https://perma.cc/B8AU-PAPS].

167. Haw. Sess. Laws H.B. 117 (1998).

passed the amendment, which was then put to the voters and passed in November of 1998 by a wide margin.[168] The next year, the Hawaii Supreme Court, which had stalled in its enforcement of marriage equality pending the outcome of the amendment process, officially ended the *Baehr* litigation by admitting that the passage of the constitutional amendment had rendered Hawaii's same-sex marriage ban constitutional.[169]

2. Vermont and Massachusetts: Regrouping from Hawaii

i. Strategizing Around State Constitutions

In the wake of Hawaii, advocates regrouped and began to consider how to keep momentum going, while still avoiding a trip to the U.S. Supreme Court that could set the movement back by decades. According to Mary Bonauto, advocates concluded that "the movement's only real option, although it felt bold or even perilous at the time, was to file a carefully chosen case, or cases, premised on state constitutional claims. This would allow us to cabin the litigation to a particular state where we had the best chance of success, and then this 'breakthrough' would show the rest of the nation what it looked like when same-sex couples were able to join in marriage."[170] Bonauto hoped "that judicial wins would lead to other wins, including legislative victories. Over time, we would develop a patchwork where some states allowed marriage, even as others didn't, and get to a point where we could ask for a national resolution. As the final arbiter in our national system, that most likely means the Supreme Court, because people should be treated equally by their government, and have this freedom of choice nationwide, no matter where they live."[171]

In the quote above, Bonauto suggests that certain states' constitutions were more amenable to marriage equality claims than others. There are two important reasons why a state's constitution

168. Steven A. Holmes, *The 1998 Elections: State by State—West; Hawaii,* N.Y. TIMES (Nov. 5, 1998), https://www.nytimes.com/1998/11/05/us/the-1998-elections-state-by-state-west-hawaii.html?searchResultPosition=9 [https://perma.cc/JK78-ZJTX]. Litigation in Alaska that was initially successful, but at an earlier stage than Hawaii's, fell prey that same year to a state constitutional amendment banning same-sex marriage. *See generally The Freedom to Marry in Alaska,* FREEDOM TO MARRY, http://www.freedomtomarry.org/states/alaska (last visited Feb. 6, 2020) [https://perma.cc/4SN9-WUE8].

169. Baehr v. Miike, No. 20371, 1999 WL 35643448, at *1 (Haw. Dec. 9, 1999).

170. Bonauto, *supra* note 147, at 1494.

171. Mary Bonauto & James Esseks, *Marriage Equality Advocacy from the Trenches,* 29 COLUM. J. GENDER & L. 117, 120 (2015).

might offer an especially good chance at advancing such a claim. First, a constitution might contain rights provisions that differ textually from the U.S. Constitution. A number of state constitutions do include rights provisions different from those found in the U.S. Constitution. This includes states that adopted close analogs to the 1776 Pennsylvania Constitution's Common Benefits Clause,[172] and numerous other state constitutions that contain some variant of an "equal privileges" clause.[173] Those provisions could be construed by state courts to offer protections greater than that of the U.S. Constitution and thus would be promising in an environment in which the U.S. Constitution had only once, and very recently, been seen to provide even the most minimal protections to LGBTQ citizens.[174]

Second, a state judiciary might use an interpretive approach to the rights provisions in its constitution that is not in lockstep with the U.S. Supreme Court. As described *supra*, some state judiciaries give great (and sometimes inexplicable) deference to federal rights jurisprudence, while others have a more independent judicial philosophy. Given the reticence of the Supreme Court in the 1980s and 1990s to interpret the U.S. Constitution to afford equality and dignity to LGBTQ people, advocates needed to find jurisdictions whose courts would not feel compelled to treat LGBTQ people with disdain simply because federal doctrine seemed to permit it.

The strategy that Bonauto outlines also assumes the necessity of holding gains. If *Baehr* had taught the movement one lesson, it was that even a creative litigation strategy built on a provision of a state constitution that differed from the U.S. Constitution would not create lasting change if it sparked a backlash. The ability to quell that backlash involved two components. First, advocates would need to select jurisdictions where amending the state constitution was as difficult as possible. As noted *supra*, on one end of the spectrum, some state constitutions can be easily amended by a simple ballot initiative.[175] In other states, the proposed amendment must be approved by the legislature before a popular vote. Others have

172. Mariotti, *supra* note 136, at 100–101.

173. *Id.*

174. Romer v. Evans, 517 U.S. 620 (1996).

175. LGBTQ populations had already experienced the use of ballot initiatives to deny them rights and roll back legislative gains, so the community was already aware of the danger of states with an easy initiative and referendum process. For a thorough exploration of the interplay between anti-LGBTQ ballot initiatives and the advancement of LGBTQ rights, *see* Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. Rev. 1662, 1676 (2017).

even more restrictive requirements for amendment.[176] A preferable jurisdiction would be one where amending the state constitution could not be achieved simply by placing an initiative on the ballot and subjecting it to a vote in the next general election.

Second, advocates would need to embark on a public education campaign before litigation was filed that would explain the harms being wrought on real people by marriage inequality. Hopefully, that campaign would create supporters of the campaign who would help to blunt the effects of campaigns to undo litigation gains. These supporters would ideally consist of ordinary, civically engaged citizens, but also state legislators. Those legislators would serve as a bulwark against marriage equality opponents' attempts to influence legislators to propose constitutional amendments that might undo marriage equality litigation gains.

With this rubric in place, LGBTQ rights advocates were able to develop a plan forward—and that plan ran straight through New England.

ii. Litigating in Vermont

Mary Bonauto documented the reasons for litigators' identification of Vermont as a jurisdiction in which marriage litigation could be successful. At the outset, she noted, advocates observed that the state's judicial and legislative branches seemed to be friendly to the LGBTQ community. The judiciary had already made favorable rulings on behalf of LGBTQ couples.[177] And importantly, the Vermont state legislature was unlikely to attempt to undo favorable litigation. It had taken an early stand on behalf of LGBTQ people, repealing its sodomy law, enacting a statewide nondiscrimination law, including sexual orientation as a protected class in its state hate crimes law, and refusing to pass a "mini-DOMA" even after federal DOMA was signed into law.[178]

Vermont also had a mobilized LGBTQ community that was willing to engage in significant legwork to change public opinion in favor of marriage equality before the first pleading was ever filed. As

176. After decades of making the amendment process easier, the pendulum swung and states began to make the citizen-initiated amendment process more difficult. *See* John Dinan, *Twenty-First Century Debates and Developments Regarding the Design of State Amendment Processes*, 69 ARK. L. REV. 283, 293–94 (2016).

177. Bonauto, *supra* note 147, at 1499 ("In 1993, at a time of widespread ignorance about gay people as parents, Vermont's Supreme Court decided the first appellate case approving of second-parent adoption, allowing unmarried same-sex couples to both be legal parents of their children") (citing *In re* B.L.V.B., 628 A.2d 1271 (Vt. 1993)).

178. *Id.* at 1499–500.

Beth Robinson, an attorney-activist and Vermonter who was an architect of the Vermont litigation strategy[179] observed, "All the great case citations in the world won't get you to your goal if the political and educational context is wrong. Judges don't live in a vacuum, and every judicial decision is subject to some sort of political response, whether it be statutory, executive, or constitutional. It's not enough to win the battle of the case if you go on to lose the war."[180]

Of vital importance to the analysis was the question of Vermont's state constitution, including the text of the document itself, the state's constitutional jurisprudence, and the ease with which it could be amended. First, the text of the constitution itself figured heavily into advocates' identification of Vermont as a favorable jurisdiction. The Vermont State Constitution includes a vital component not present in the U.S. Constitution—the Common Benefits Clause. The Common Benefits Clause asserts that the purpose of government is for the good of the whole, rather than of specific individuals or classes of individuals.[181] Modeled after the clause in the radically democratic 1776 Pennsylvania constitution (which in turn drew on the Virginia Declaration of Rights),[182] Vermont's Common Benefits Clause reads as follows:

179. Robinson is currently a Vermont Supreme Court Justice. *See generally Honorable Beth Robinson*, VERMONT JUDICIARY, https://www.vermontjudiciary.org/people/honorable-beth-robinson [https://perma.cc/M39P-5EKJ].

180. Beth Robinson, *The Road to Inclusion for Same-Sex Couples: Lessons from Vermont*, 11 SETON HALL CONST. L.J. 237, 241 (2001).

181. G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 856 (1991).

182. The Pennsylvania Constitution of 1776 was drafted twelve years before the federal constitution and is considered by historians to be the most radically democratic of the Revolutionary War era state constitutions, fostering a highly egalitarian approach to government. THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 3 (Ken Gormley et al. eds., 2004). The Declaration of Rights in the 1776 Pennsylvania Constitution became the model for similar declarations in other state constitutions. *Id. See also* Williams, *supra* note 77, at 81. The Pennsylvania Common Benefits Clause was written to ensure both that government is obligated to provide for "common benefit" of the people and that no people should receive privileges beyond those extended to the general community. *See* Baker v. State, 744 A.2d 864, 875 (1999) (citing Va. Declaration of Rights art. IV). *See also* Mariotti, *supra* note 136, at 105. The Pennsylvania Clause provides "[t]hat Government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community; And that the community hath an indubitable, unalienable and, indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal." PA. CONST. of 1776 Declaration of Rights, art. V.

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.[183]

In addition to the constitution itself, advocates were also impressed by Vermont's broad approach to state constitutional interpretation, which permits historical analysis, the adoption of interpretations of similar provisions by "sibling" jurisdictions, and use of economic and sociological materials.[184] They were also heartened by Vermont's acknowledgements that the Vermont Constitution predated the U.S. Constitution and that its judiciary rejected the theory of original intent as an interpretive approach.[185]

The Vermont Constitution, advocates also noted, is not as easy to amend as some other state constitutions—including the Hawaii Constitution. Hawaii requires single passage through both houses by a two-thirds majority[186] and then a public vote on the amendment in the next general election, in which a majority of all votes cast is sufficient for passage.[187] Vermont, on the other hand, only permits constitutional amendments to be introduced once every four years.[188] Amendments must be proposed by the Vermont Sen-

183. VT. CONST. ch. I, art. VII.

184. Bonauto, *supra* note 147, at 1499–500 (citing State v. Jewett, 500 A.2d 233, 233 (Vt. 1985)).

185. *Id.* at 1500.

186. HAW. CONST. art. XVII, § 3 (1978) ("[t]he legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions").

187. HAW. CONST. art. XVII, § 2 (1978).

188. "At the biennial session of the General Assembly of this State which convenes in A.D. 1975, and at the biennial session convening every fourth year thereafter, the Senate by a vote of two-thirds of its members, may propose amendments to this Constitution, with the concurrence of a majority of the members of the House of Representatives with the amendment as proposed by the Senate. A proposed amendment so adopted by the Senate and concurred in by the House of Representatives shall be referred to the next biennial session of the General Assembly; and if at that last session a majority of the members of the Senate and a majority of the House of Representatives concur in the proposed amendment, it shall be the duty of the General Assembly to submit the proposal directly to the voters of the state. Any proposed amendment submitted to the voters of the state in accordance

ate and approved by a two-thirds majority of that body before being referred to the House for passage by a majority.[189] If approved once by both houses, the proposed amendment must be approved by a simple majority again in the *next* biennial legislative session before being put to the voters.[190] It is thus baked into the process that amending the Vermont Constitution takes *at least*[191] two years and two different legislatures. Not only does this process provide more opportunities for a proposed amendment to fail, as Bonauto notes, the slow pace of amendment "would give us time to complete the litigation before facing any possible amendment proposal."[192] Advocates decided that Vermont would be the next step. And as it turned out, all of the ingredients identified above proved vital to the success of the first litigation in the history of the United States that actually resulted in marital benefits being offered to same-sex couples.

As a first phase to the execution of the Vermont strategy, grassroots activists in Vermont held off on litigation. As Beth Robinson recalled, "[I]n 1995 we actually passed up the opportunity to take on a freedom to marry case. Instead, along with a number of other committed volunteers, we formed the Vermont Freedom to Marry Task Force. For a year and a half before the *Baker* litigation came along, Task Force volunteers took every opportunity to speak to churches, civic associations, gay and lesbian organizations, community leaders, and anyone else willing to offer us an open mind and a chance to engage."[193]

By 1997, marriage equality advocates decided that it was time to file. In July 1997, Beth Robinson and Robinson's law partner Susan Murray at Langrock, Sperry & Wool—a Vermont firm with deep community ties—sued Vermont with co-counsel Mary Bonauto and GLAD on behalf of three same-sex couples who were denied marriage licenses from their town clerks.[194] The couples sought "a declaratory judgment that the refusal to issue them a license violated

with this section which is approved by a majority of the voters voting thereon shall become part of the Constitution of this State." VT. CONST. ch. II, § 72.

189. *Id.*

190. *Id.*

191. Assuming that the amendment is first proposed in a second year of a two-year legislative session that also corresponds with the four-year cycle for proposed amendments, and that the next legislature approves that amendment in the next year.

192. Bonauto, *supra* note 147, at 1501.

193. Robinson, *supra* note 180, at 241–242.

194. *Id.* at 243.

the marriage statutes and the Vermont Constitution."[195] Among other arguments, the plaintiffs made an argument based on Vermont's Common Benefits Clause. The crux of the Common Benefits argument was that the provision was violated by a marriage law that reserved the panoply of rights and protections afforded to married couples to heterosexual couples only.[196] The couples lost at trial and, by 1999, the case had come before the Vermont Supreme Court.

The Vermont Supreme Court, given this opportunity, did not shy away from an opportunity to explore the power of its state constitution to recognize rights possibly less readily identified under the U.S. Constitution and its accompanying jurisprudence. In fact, after dispensing with a single statutory construction argument, the *Baker* court determined that it would resolve the entire matter under an analysis of the state's Common Benefits Clause, noting that "[a]lthough plaintiffs raise a number of additional arguments based on both the United States[197] and the Vermont Constitutions, our resolution of the Common Benefits claim obviates the necessity to address them."[198]

The *Baker* majority[199] began its analysis by stressing that "it is the Common Benefits Clause of the Vermont Constitution we are construing, rather than its counterpart, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."[200] It then laid forceful claim to a separate intellectual birth-

195. Baker v. State, 744 A.2d 864, 867–68 (Vt. 1999).

196. *Id.* at 870 ("[Plaintiffs] note that in denying them access to a civil marriage license, the law effectively excludes them from a broad array of legal benefits and protections incident to the marital relation, including access to a spouse's medical, life, and disability insurance, hospital visitation and other medical decision making privileges, spousal support, intestate succession, homestead protections, and many other statutory protections.").

197. It is unclear what the Vermont Supreme Court refers to here, as the plaintiffs' opening appellate brief records the issues presented for review to the Supreme Court as follows: "(1) Do Vermont's marriage statutes, construed in light of their purposes and constitutional limitations, require Appellee towns to issue marriage licenses to the Appellants? (2) Does the Vermont Constitution permit the State to deny Appellants the freedom to marry their respective chosen partners?" *See* Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker Et Al. in* Baker Et Al. v. State of Vermont, 5 MICH. J. GENDER & L. 409, 415 (1999).

198. *Baker*, 744 A.2d at 870.

199. This article will focus on the majority opinion in Baker only. For a thorough treatment of Baker's two concurrences, see Lawrence Friedman and Charles H. Baron, Baker v. State *and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125, 147 (2001).

200. *Baker*, 744 A.2d at 870.

right, asserting that it was "altogether fitting and proper that we do so."[201] The court then noted that the Common Benefits clause was almost a century older than the Fourteenth Amendment and reminded readers that the Vermont Constitution itself is "not a mere reflection of the federal charter. Historically and textually, it differs from the United States Constitution. It predates the federal counterpart, as it extends back to Vermont's days as an independent republic. It is an independent authority, and Vermont's fundamental law."[202]

Having thus justified divergence from federal constitutional analysis, the *Baker* majority called for a system of analyzing Common Benefits claims that differs from federal Equal Protection doctrine. It held that courts ought to "first define that 'part of the community' disadvantaged by the law," then "examine the statutory basis that distinguishes those protected by the law from those excluded from the state's protection," and last, "look next to the government's purpose in drawing a classification that includes some members of the community within the scope of the challenged law but excludes others."[203] In so doing, the *Baker* majority rejected adherence to the familiar framework of tiered levels of scrutiny, and also declined to use a highly deferential form of rational basis review.

With respect to tiered scrutiny, the majority held that:

> The concept of equality at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferments and advantages . . . . The language and history of the Common Benefits Clause thus reinforce the conclusion that a relatively uniform standard, reflective of the inclusionary principle at its core, must govern our analysis of laws challenged under the Clause. Accordingly, we conclude that this approach, rather than the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment, shall direct our inquiry under Article 7.[204]

In this context, the majority rejected the deferential form of rational basis review that would be familiar to most attorneys.[205] In-

201. *Id.*

202. *Id.* (quoting State v. Badger, 450 A.2d 336, 347 (1982)).

203. *Id.* at 878–79.

204. *Id.* at 876–78.

205. As Katie Eyer points out, "the canonical account of rational basis review is a bleak one for those challenging the constitutionality of government action: a doctrine which is extraordinarily deferential and will virtually never result in gov-

stead, the *Baker* majority described a kind of sliding scale, in which the intensity of scrutiny is never zero, but becomes more searching the more onerous the distinction. The court held that:

> We must ultimately ascertain whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose. Consistent with the core presumption of inclusion, factors to be considered in this determination may include: (1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive.[206]

The *Baker* majority then engaged in the analysis that it had described. It found that anyone wishing to enter into a marriage with a person of the same sex was prohibited from doing so based on the plain language of Vermont's marriage statute.[207] Next, it examined the state's proffered reason for excluding same-sex couples from marriage, which the state described as "furthering the link between procreation and child rearing."[208] The majority found a significant logical disconnect between the rationale and the law itself, noting that many opposite-sex couples (who were permitted to marry) did *not* have children, while many same-sex couples (who were not permitted to marry) *did*.[209] Finally, it balanced the state's rationale against the importance of the benefits being withheld from same-sex couples, finding that "[t]he legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of

ernment action being overturned." Katie R. Eyer, *The Canon of Rational Basis Review*, 93 Notre Dame L. Rev. 1317, 1319 (2018). However, she also posits that this "canonical account" is incomplete and inaccurate, and that federal rational basis review doctrine is actually far more complex, variable, and presents greater possibility than the conventional wisdom allows. *Id.*

206. *Baker*, 744 A.2d at 878–79.

207. *Id.* at 868 (finding that, "[a]lthough it is not necessarily the only possible definition, there is no doubt that the plain and ordinary meaning of 'marriage' is the union of one man and one woman as husband and wife.").

208. *Id.* at 881.

209. *Id.* The state also made the strange sub-argument that, because same-sex couples might have to resort to assisted reproductive methods in order to become parents, permitting them to marry would weaken the perception that procreation and child rearing were linked. *Id.* at 882. The court was unimpressed with the logic of this argument, noting that the primary consumers of assisted reproductive technology are heterosexual couples—who were permitted to marry. *Id.*

sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned."[210] The *Baker* court concluded that, "[c]onsidered in light of the extreme logical disjunction between the classification and the stated purposes of the law—protecting children and 'furthering the link between procreation and child rearing'—the exclusion falls substantially short of this standard."[211]

The fact that the Vermont Supreme Court had held that it violated the state constitution to withhold the benefits of marriage from same-sex couples was a major win for marriage equality advocates. However, the remedy required by the Vermont Supreme Court fell short of the goal of full marriage equality. The court did not require that the state issue marriage licenses. Instead, it gave an edict to the Vermont Legislature to come up with *some* kind of a solution that would give identical rights and benefits to same-sex couples—but that solution did *not* have to be marriage per se.[212] The Vermont Legislature took the court's invitation and enacted the nation's first civil union law, under which same-sex couples could enjoy all of the rights and responsibilities of marriage while still being prohibited from the *name*.[213]

iii. Litigating in Massachusetts

Following *Baker*, LGBTQ rights advocates had to determine how to keep momentum going, while avoiding the kind of massive backlash and serial setbacks that the Hawaii litigation had sparked. According to Mary Bonauto, advocates considered several criteria, including the organization and mobilization of the Commonwealth's LGBTQ community, the relative friendliness of the branches of state government to LGBTQ concerns, the text of its constitution, the judiciary's approach to interpreting it, and the ease—or lack thereof—with which the Massachusetts Constitution could be revised or amended.

Massachusetts was a jurisdiction whose LGBTQ community was well-organized and visible. Non-LGBTQ Massachusetts residents,

210. *Id.* at 884.

211. *Id.*

212. *Baker*, 744 A.2d at 847 ("We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the State could do so through a marriage license is obvious. But it is not required to do so.").

213. Carey Goldberg, *Vermont Gives Final Approval to Same-Sex Unions*, N.Y. TIMES (Apr. 26, 2000), https://www.nytimes.com/2000/04/26/us/vermont-gives-final-approval-to-same-sex-unions.html [https://perma.cc/VB3M-D4GF].

Bonauto recounted, were aware that they had LGBTQ friends and neighbors, and Massachusetts media considered LGBTQ-centered topics to be "legitimate and newsworthy issues."[214] In addition, the Massachusetts LGBTQ community was unafraid to openly advocate for its issues in the courts and in the community, and legal organizations had raised awareness by "sharing the stories of families harmed by the denial of marriage rights and developing educational materials for distribution to non-lawyers."[215] In terms of social and political climate, "the Commonwealth of Massachusetts was as ready as any place in the country to struggle fairly with the question of whether LGBT people should be denied marriage rights."[216]

Additionally, where concerns of the LGBTQ community were raised, all of the branches of Massachusetts government had proven themselves fairly amenable to addressing them. In 1989, far before it was politically expedient to do so, the Massachusetts legislature (called the General Court) had passed a law forbidding discrimination on the basis of sexual orientation.[217] In 1993, it had again protected LGBTQ people, this time in the context of schools.[218] And it had regularly blocked advancement of bills that would have statutorily limited marriage to one man and one woman.[219] Bonauto also pointed out the concern shown toward the LGBTQ community by Massachusetts' executive branch during the 1990s, including the governor, the state police, and the Massachusetts Bay Transit Authority.[220] And importantly, Massachusetts courts were not afraid to be on the forefront of case law establishing the rights of same-sex parents.[221]

Massachusetts' constitution is different from the U.S. Constitution in a few relevant respects. Like Vermont's constitution, the Massachusetts Constitution contains liberty and equality guarantees that differ textually from those in the U.S. Constitution and are arranged differently within the document.[222] The Massachusetts Con-

214. Bonauto, *supra* note 126, at 9.

215. *Id.* at 9–10.

216. *Id.* at 10.

217. *Id.*

218. *Id.* at 11.

219. *Id.* at 18–19.

220. Bonauto, *supra* note 126, at 11–13.

221. *Id.* at 14 (citing Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); Adoption of Susan, 619 N.E.2d 323 (Mass. 1993)).

222. *See* Lawrence Friedman, *Ordinary and Enhanced Rational Basis Review in the Massachusetts Supreme Judicial Court: A Preliminary Investigation*, 69 ALB. L. REV. 415, 416 n.6 (2006) ("Compare MASS. CONST. pt. I, art. I ('All men are born free and equal'), MASS. CONST. pt. I, art. VI ('No man, nor corporation or association of

stitution contains a broad Declaration of Rights that includes the provision that "[a]ll people are born free and equal and have certain natural, essential and unalienable rights; among which may be . . . seeking and obtaining their safety and happiness."[223] As in Hawaii's Constitution, this section of the Massachusetts Constitution also enumerates specific protected classes and includes sex within those classes, requiring that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."[224] Taken together, LGBTQ advocates were interested in how those provisions "speak to equality, anti-privileging, liberty, and due process."[225]

When it came to the state constitutional interpretation question, advocates "believed in the Massachusetts Constitution as a strong guarantee of individual rights and privacy."[226] They determined that Massachusetts' Supreme Judicial Court had historically "interpreted the Declaration of Rights robustly, including in criminal defense, jury selection, free speech, effective assistance of counsel, sex discrimination, and reproductive justice contexts."[227] Marriage equality advocates were also interested in Massachusetts because of its specific approach to rational basis review. Although Massachusetts courts interpreting the equality provisions of the Massachusetts Constitution typically use the familiar federal tiered-

men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community . . . .'), MASS. CONST. pt. I, art. VII ('Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor or private interest of any one man, family or class of men . . . .'), MASS. CONST. pt. I, art. X ('Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws.'), *and* MASS. CONST. pt. I, art. XII ('And no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land.'), *with* U.S. CONST. amend. XIV, § 1 ('No State shall. . . deny to any person within its jurisdiction the equal protection of the laws.')").

223. MASS. CONST. pt. I, art. I.

224. *Id.*

225. Bonauto, *supra* note 147, at 1502–03.

226. Bonauto, *supra* note 126, at 25.

227. Bonauto, *supra* note 147, at 1503.

scrutiny framework,[228] they have not been constrained by a highly deferential form of rational basis review[229]:

> Rational basis in Massachusetts is not an empty exercise: to determine whether a law is arbitrary or capricious, or has become so, requires reviewing courts to "look carefully at the purpose to be served" by challenged laws and to sustain those laws only when 'an impartial lawmaker could logically believe that the classification would serve a legitimate purpose that transcends the harm to members of the disadvantaged class.[230]

The Massachusetts Constitution is also difficult to amend and the process is complex. Under Massachusetts' system, either the legislature or a group of citizens propose the amendment.[231] If proposed by citizens, it is then referred to the Attorney General to ensure that the proposed amendment is not improper in form or substance.[232] If appropriate, the Attorney General then refers the matter to the Secretary of the Commonwealth, who then prepares signature forms. Proponents of the amendment must then collect about 80,000 signatures, and only then is the proposed amendment referred to the legislature.[233] Proposed constitutional amendments must then be voted for by 25% of both houses in two consecutive legislative sessions before the amendment can be voted on by the

228. Friedman, *supra* note 222, at 416–17 ("Though the provisions of the Massachusetts Declaration of Rights express the commitment to equality differently than the Equal Protection Clause of the Fourteenth Amendment, the Massachusetts courts have traditionally applied the federal equal protection framework when addressing claims raised under the state constitution.") (internal citations omitted).

229. *See Id.* at 415.

230. Bonauto, *supra* note 126, at 26 (citing English v. New Eng. Med. Ctr., 541 N.E.2d 329, 333 (Mass. 1989) (quoting Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 452 (1985) (Stevens, J., concurring))).

231. MASS. CONST. art. XLVIII, pt. IV ("Section 1. Definition. - A proposal for amendment to the constitution introduced into the general court by initiative petition shall be designated an initiative amendment, and an amendment introduced by a member of either house shall be designated a legislative substitute or a legislative amendment.").

232. MASS. CONST. art. XLVIII (improper amendment topics include many topics involving the contraction or restricting of individual rights, as well as those specifically reversing decisions of the judiciary).

233. Office of Attorney General Maura Healey, *The Initiative Petition Process*, https://www.mass.gov/info-details/the-initiative-petition-process [https://perma.cc/D5K8-DRNB] (last visited Dec. 9, 2019).

general public.[234] The Massachusetts government website makes it plain to readers that this process is, by necessity, quite slow.[235]

The difficulty of amending the Massachusetts Constitution was an important strategic consideration for advocates because anti-marriage activists had begun to organize around a state constitutional amendment banning marriage equality; advocates knew that even if an amendment had not been proposed before litigation was filed, one would certainly be forthcoming within a very short time after a suit was initiated.[236] In the post-*Baehr*, post-*Baker* era, then, the decision of where to file would increasingly be affected by whether one could beat the buzzer; winning litigation would show the state's residents that the world would not stop spinning upon the achievement of marriage equality *before* a state constitutional amendment would preclude that world from ever coming into being.[237]

In April 2001, the state constitutional race began when GLAD filed *Goodridge v. Department of Public Health* in a Massachusetts state trial court in Boston.[238] Predictably, anti-LGBTQ activists in the state began the constitutional amendment process almost immedi-

234. *Id.*

235. *Id.* ("[A] proposed constitutional amendment submitted in August of 2019 would have to be approved by 25% of legislators in 2020 and 2021 before appearing on the ballot in November 2022.").

236. Bonauto, *supra* note 126, at 26–27 (internal citations omitted) ("Another factor sped the timing of the decision to litigate: we knew we would soon be on the defense in a constitutional amendment campaign. The Massachusetts Citizens Alliance, later known as Massachusetts Citizens for Marriage, was planning to come straight at the marriage issue with a citizen initiative to place an anti-LGBT marriage amendment on the ballot by November 2004. In order for the measure to advance, it needed the support of 50 of 200 legislators in a joint session. At GLAD, we knew no ballot campaign on marriage had yet been won and we assumed the issues would be framed in a way favorable to our opponents, putting LGBT people and families on the defense. In short, we calculated that the signature gathering process would succeed, that 50 or more legislators would support it, and that we would likely be facing a ballot measure in 2004.").

237. The strategic use of constitutional amendments reached critical mass just in time for the 2004 presidential election, when Republicans successfully used anti-marriage initiatives to drive Republican voters to the polls in critical swing states. In that year, eleven state constitutional amendments were on the ballot, and all but two passed by at least 60% margins. *See* James Dao, *Same-Sex Marriage Issue Key to Some GOP Races*, N.Y. TIMES (Nov. 4, 2004), https://www.nytimes.com/2004/11/04/politics/campaign/samesex-marriage-issue-key-to-some-gop-races.html [https://perma.cc/Y496-DUB8].

238. Julie Flaherty, *Massachusetts: Gay-Marriage Lawsuit Filed*, N.Y. TIMES (Apr. 13, 2001), https://www.nytimes.com/2001/04/13/us/national-briefing.html?searchResultPosition=5 [https://perma.cc/G64H-GGNM].

ately thereafter.[239] The *Goodridge* litigation involved fourteen plaintiffs from different areas of Massachusetts.[240] The plaintiffs' lives together told sympathetic, broadly relatable stories of long, committed relationships, mutual care of children and elderly parents, gainful employment, and community service.[241] All had attempted to obtain marriage licenses and were denied the ability to do so by town and city clerks who interpreted the Commonwealth's marriage law (which did not expressly prohibit same-sex marriage) as restricting marriage to heterosexual couples exclusively.[242]

The *Goodridge* plaintiffs made two major arguments. First, they argued that the county clerks already had the power to issue marriage licenses because the marriage laws of the Commonwealth did not explicitly prohibit same-sex marriage. Second, they made the argument that the Commonwealth's denial of their right to marry offended the numerous provisions in the Massachusetts Constitution that address liberty and equality principles. Regarding the state constitutional claims, plaintiffs alleged violation of articles 1, 6, 7, 10, 12, and 16, and Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution.[243] At trial, the court dismissed all claims against the state, and the matter was directly appealed to the Massachusetts Supreme Judicial Court, which agreed to hear the case.[244]

239. Bonauto, *supra* note 126, at 20 (quoting H.B. 4840, 182d Leg., Reg. Sess. (Mass. 2002)) ("The amendment, which came to be known as H.B. 4840, provided that: 'It being the public policy of this Commonwealth to protect the unique relationship of marriage in order to promote, among other goals, the stability and welfare of society and the best interests of children, only the union of one man and one woman shall be valid or recognized as a marriage in Massachusetts. Any other relationship shall not be recognized as a marriage or its legal equivalent, nor shall it receive the benefits or incidents exclusive to marriage from the Commonwealth, its agencies, departments, authorities, commissions, offices, officials and political subdivisions. Nothing herein shall be construed to effect an impairment of a contract in existence on the effective date of this amendment.'").

240. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

241. Complaint, Goodridge v. Dep't of Pub. Health, 2001 WL 35920963 (Mass. Super. 2001) (No. 01-1647 A).

242. *Id. See also Goodridge*, 798 N.E.2d at 952 ("nothing in [the] licensing law specifically prohibits marriages between persons of the same sex").

243. Complaint, *Goodridge*, 2001 WL 35920963 (Mass. Super. 2001) (No. 01-1647 A). *See also Goodridge*, 798 N.E.2d at 950.

244. *Goodridge*, 798 N.E.2d at 951 (noting that the trial court had held that "the marriage exclusion does not offend the liberty, freedom, equality, or due process provisions of the Massachusetts Constitution, and that the Massachusetts Declaration of Rights does not guarantee 'the fundamental right to marry a person of the same sex,'" and further, that the Legislature's interest in safeguarding procreation was rationally related to prohibiting same-sex marriage).

The Supreme Judicial Court first dispensed with the statutory construction argument, holding that "the undefined word 'marriage' . . . confirms the General Court's intent to hew to the term's common-law and quotidian meaning concerning the genders of the marriage partners."[245] It then moved on to the state constitutional claims.

The sections of the Massachusetts Constitution invoked by the *Goodridge* plaintiffs and analyzed by the court[246] provide broad liberty and equality guarantees. Most are part of the constitution's Declaration of Rights. Article 1 provides a broad statement of rights that specifies certain protected classes.[247] Article 6 declares an anti-privilege philosophy.[248] Article 7 is analogous to the Vermont Common Benefits Clause and is worded similarly.[249] Article 10 provides, in relevant part: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws . . . ."[250] The *Goodridge* plaintiffs also identified Part II, Article 4, as embodying due process guarantees that were offended by the same-sex marriage policy.[251]

245. *Id.* at 952–53.

246. Although the plaintiffs invoked articles 12 and 16, the court declined to rule based on them, so they will not be discussed here. *Id.* at 950 n.8.

247. "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." MASS. CONST. pt. 1, art. I.

248. "No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public" MASS. CONST. pt. 1, art. VI.

249. "Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it." MASS. CONST. pt. 1, art. VII.

250. MASS. CONST. pt. 1, art. X.

251. In their Motion for Summary Judgment at trial, the plaintiffs identified as relevant the section of Part 2, Article 4 that "provides in part that the General Court has power 'to make, ordain, and establish, all manner of wholesome and reasonable Orders, laws, statutes and ordinances. . . so as the same be not repugnant to or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same'" Plaintiff Motion For Summary Judgement at n.8, *Goodridge*, 2001 WL 35920963 (No. 01-1647 A).

The *Goodridge* majority began its state constitutional analysis by noting that the plaintiffs had raised claims that sounded in both liberty and equality principles and by acknowledging the significant overlap in the two concepts.[252] The court then went on to stress the importance of the liberty interest in marrying, noting that, "[b]ecause civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion."[253] The court then concluded that the right to marry, if it is to mean anything, must logically contain within it the right to marry the person of one's choosing. In so deciding, the *Goodridge* court invoked not only the U.S. Supreme Court in *Loving v. Virginia*, but also the California Supreme Court's decision in *Perez v. Sharp*.[254]

Having laid that groundwork for the liberty interest at stake, the Massachusetts Supreme Judicial Court, like the Vermont Supreme Court in *Baker*, unequivocally declared its own power to diverge from federal jurisprudence, even though it was not relying (as had the Vermont court) on a provision that significantly diverges from the U.S. Constitution. The court asserted:

> The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, *even where both Constitutions employ essentially the same language*. That the Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal Constitution is not surprising. Fundamental to the vigor of our Federal system of government is that 'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.[255]

The court then went on to explain the standards for rational basis review in Massachusetts in both the equal protection and due process contexts, since it considered the two analyses to be inextricably linked in the same-sex marriage context. In Massachusetts, the court observed, due process rational basis analysis "requires that statutes 'bear[ ] a real and substantial relation to the public health,

252. *Goodridge*, 798 N.E.2d at 953.

253. *Id.* at 957.

254. *Id.* at 958 (citing Perez v. Sharp, 198 P.2d 17, 17 (Cal. 1948) and Loving v. Virginia, 388 U.S. 1, 6 (1967)).

255. *Id.* at 959 (emphasis added) (internal citations omitted).

safety, morals, or some other phase of the general welfare.' "[256] The rational basis test for equal protection claims in Massachusetts requires that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."[257]

Having set out those standards, the Massachusetts Supreme Judicial Court then analyzed—and eviscerated—the Commonwealth's proffered reasons for the prohibition on same-sex marriage, and did so using a rational basis review standard.[258] Those reasons were "(1) providing a 'favorable setting for procreation'; (2) ensuring the optimal setting for child rearing, which the department defines as 'a two-parent family with one parent of each sex'; and (3) preserving scarce State and private financial resources."[259]

First, the *Goodridge* majority flatly rejected the Commonwealth's foundational premise that, as the appellate court had held, the "primary purpose" of marriage is procreation.[260] The majority noted a host of logical inconsistencies inherent in that argument, including the fact that couples are not required to demonstrate fertility in order to wed, the fact that a marriage is still valid in the Commonwealth even if unconsummated, and the Commonwealth's public policy of facilitating access to assisted reproductive technology regardless of the marital status of the would-be parents.[261] As the majority put it, "[t]he 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage."[262]

The *Goodridge* majority was equally unimpressed with the Commonwealth's second rationale that restricting marriage to opposite-sex couples ensured an "optimal setting" (i.e. a family with married heterosexual parents) for child-rearing. The majority observed that the Commonwealth had actually enacted public policies that cut

256. *Id.* at 960 (quoting Coffee–Rich, Inc. v. Commissioner of Pub. Health, 204 N.E.2d 281 (Mass. 1965)).

257. *Id.* (quoting English v. New England Med. Ctr., 541 N.E.2d 329 (Mass. 1989)).

258. The majority did not find it necessary to decide whether to use a heightened form of scrutiny because it found that the Commonwealth's proffered reasons for denying marriage to same-sex couples did not pass rational basis review. 798 N.E.2d at 961.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 962.

directly against this rationale, including striving to eliminate the stigma of illegitimacy and constructing family law principles that do not privilege marriage, sexual orientation, or gender.[263] The majority also stated the obvious—that prohibiting same-sex couples from marrying does absolutely nothing to encourage opposite-sex couples to wed—and thus concluded that there was no rational relationship between the marriage statute and the proferred reason for its exclusion of same-sex couples.[264]

Finally, the *Goodridge* majority rejected the Commonwealth's assertion that the same-sex marriage prohibition conserved state resources. Again, the majority did not offer this rationale much deference and felt free to draw its own conclusion that the Commonwealth's premise that same-sex couples tended to be less financially dependent upon one another (and thus less in need of the financial benefits that marriage provides) was simply without basis in fact.[265]

After disposing of the Commonwealth's primary rationales (and several ancillary rationales advanced by various *amici*), the majority struck down the marriage prohibition, stating:

> The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.[266]

The *Goodridge* decision was a 4-3 vote, and the majority opinion drew both a concurrence and three separate dissents. Notably, Justice Sosman's dissent pointedly disagreed with the majority's approach to rational basis review and essentially accused the majority of intellectual dishonesty, asserting that "[a]lthough ostensibly applying the rational basis test to the civil marriage statutes, it is abundantly apparent that the court is in fact applying some undefined stricter standard to assess the constitutionality of the marriage statutes' exclusion of same-sex couples."[267]

263. 798 N.E.2d at 963.

264. *Id.* at 1001.

265. *Id.* at 964.

266. *Id.* at 968.

267. *Id.* at 980 (Sosman, J., dissenting). Professor Lawrence Friedman has suggested that Massachusetts state courts actually use an "enhanced" form of rational basis review when the government action "implicate[s] or restrict[s] an in-

The Massachusetts story does not end there, however. The *Goodridge* court granted a period of 180 days to "permit the Legislature to take such action as it may deem appropriate in light of [its] opinion."[268] Recall that in Hawaii, the legislature had responded to *Baehr* by passing a state constitutional amendment through the legislature to be put to the voters. In Vermont, the state legislature did not block the effect of *Baker* through an amendment, but also labored to create a solution that stopped short of full marriage equality. In Massachusetts, however, the interplay between the legislature and the judiciary resulted in a different, and history-making, solution.

The Massachusetts legislature was not necessarily excited about becoming the first state to offer full and equal marriage rights to same-sex couples. Consequently, members of the Massachusetts Senate proposed a bill that would, like Vermont, offer same-sex couples civil unions, but not full marriage equality.[269] The Senate then did something that students of federal law might be confused by: it asked for—and received—an advisory opinion from the Massachusetts Supreme Judicial Court as to the constitutionality of the proposed civil unions bill.[270] The Massachusetts Constitution, as it turns out, is one of only a handful of state constitutions that permits advisory opinions.[271] It specifically provides that "[e]ach branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."[272]

In February 2004, the Massachusetts Supreme Judicial Court issued its advisory opinion, rejecting the civil unions bill. The court was unequivocal in its rejection of a two-track system of marriage rights, asserting:

> Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-

terest that the courts deem important but that does not rise to the level of a fundamental personal interest." Friedman, *supra* note 222, at 418 (explaining why the Massachusetts Supreme Judicial Court's ruling in *Goodridge* was consistent with past cases employing this "enhanced" rational basis review).

268. 798 N.E.2d at 970.

269. *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

270. *Id.*

271. *See generally* Jonathan D. Persky, *"Ghosts That Slay": A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155, 1166 (2005) (identifying advisory opinions as an experiment in democracy initiated by Massachusetts).

272. MASS. CONST. pt. 2, ch. 3, art. II.

> sex couples to a different status. The holding in *Goodridge*, by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal.[273]

The legislature had voted down a proposed state constitutional amendment, so no such option would be presented to voters in 2004.[274] Opponents of full marriage equality were still trying to push through an amendment when the advisory opinion was issued, but understood that the lengthy amendment process meant that it would not be presented to voters until long after the 180 day stay in the original *Goodridge* decision had expired.[275] A round of furious legal maneuvering ensued, all of which proved fruitless, and on May 17, 2004, Tanya McCloskey and Marcia Kadish became the first same-sex couple to legally marry in the United States.[276]

Obviously, the litigation campaign for marriage equality did not end on the steps of Cambridge City Hall with Tanya McCloskey and Marcia Kadish's spring wedding. In the years immediately following *Goodridge*, marriage equality advocates continued to push state courts, with spotty success. The New Jersey Supreme Court answered the marriage equality challenge by holding for the plaintiffs but, like Vermont, ruling that civil unions were sufficient.[277] Washington, New York, and Maryland handed litigants devastating losses.[278] But the state constitutional tide turned in 2008, when California's highest court overturned the state's marriage ban[279] and

273. *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

274. For details on the procedure that led to the failure of the amendment, see Bonauto, *supra* note 126, at 20–21.

275. *Id.* at 52. Opponents of marriage equality fought for years more to bring a constitutional amendment before the public for a vote, but once couples were permitted to marry, support in the legislature waned and the issue eventually died. *See generally* Anthony Michael Kreis, *Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution*, 20 U. PA. J. CONST. L. 871, 918–921 (2018).

276. Victoria Whitley-Berry, *The 1st Legally Married Same-Sex Couple "Wanted to Lead by Example"*, NAT'L PUB. RADIO (May 17, 2019), https://www.npr.org/2019/05/17/723649385/the-1st-legally-married-same-sex-couple-wanted-to-lead-by-example [https://perma.cc/9TEN-AUZM].

277. Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

278. Andersen v. King Cty., 138 P.3d 963 (Wash. 2006); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Conaway v. Deane, 932 A.2d 571 (Md. 2007).

279. *In re* Marriage Cases, 183 P.3d 384, 419–29 (Cal. 2008) (finding the right to marry could not be denied to same-sex couples under the California Constitution's privacy and equality clauses). As discussed further *infra*, the California judi-

the Connecticut Supreme Court ruled that the state's civil union law was insufficient.[280] And in 2009, the Iowa Supreme Court became the first in the nation to rule unanimously in favor of marriage equality.[281] By this point, state legislatures had begun to proactively take up marriage equality and civil union legislation.[282] Public opinion on same-sex marriage finally reached a tipping point in 2011, where a greater share of Americans favored same-sex marriage than opposed it.[283]

It was just at the moment of that national tipping point that the marriage equality litigation campaign became a federal one. In 2009, Edith Windsor's same-sex partner died, and even though they had been legally married in New York, Windsor found herself the recipient of a $363,053 federal estate tax bill, since DOMA's Section 3 required that she be taxed under federal law as though she was a legal stranger to the decedent and not her widow.[284] Edith Windsor challenged DOMA in federal court, and in June 2013, the U.S. Supreme Court finally struck down DOMA's requirement that the federal government ignore valid same-sex marriages.[285] The *Windsor* decision unleashed a flood of federal litigation that sought to once and for all locate a right to same-sex marriage in the U.S. Constitution. By 2015, the Court had done so in *Obergefell v. Hodges*.[286]

Since *Windsor* and *Obergefell*, the focus of attention given to the marriage equality movement has tended to be placed on those U.S. Supreme Court cases and their outcomes. But to tell the story of marriage equality without including the state constitutional law

cial victory led to a state constitutional amendment, which led to a flurry of litigation that ultimately resulted in the U.S. Supreme Court's decision in *Hollingsworth v. Perry*, which essentially resolved nothing beyond the question of whether proponents of a California initiative have standing to defend that initiative on appeal. 570 U.S. 693, 715 (2013).

280. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (finding the civil union statute violated the Due Process and Equal Protection clauses of the Connecticut Constitution).

281. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (using federal Equal Protection analysis to invalidate the state marriage statute under the Iowa Constitution's Equal Protection Clause).

282. *See generally A Timeline of the Legislation of Same-Sex Marriage in the U.S.*, GEORGEOWN L. LIB., https://guides.ll.georgetown.edu/c.php?g=592919&p=4182201 [https://perma.cc/8VMY-LW73] (last visited Jan. 14, 2020).

283. *Attitudes on Same Sex Marriage*, PEW RES. CTR. (May 14, 2019), https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/ [https://perma.cc/KE5U-E6BM].

284. United States v. Windsor, 570 U.S. 744, 744 (2013).

285. *Id.*

286. 135 S. Ct. 2584 (2015).

cases that came first fundamentally misapprehends how such a significant change occurred. That incomplete story inaccurately places the U.S. Supreme Court at the vanguard of rights recognition and again buries the critical role of incremental changes based on state constitutional law. In fact, the momentum created by *Baehr*, *Baker*, and *Goodridge*—both the state constitutional litigation and the public education efforts that accompanied the litigation—reshaped the legal landscape and public opinion, thus facilitating the federal suits that followed. Without the era of state constitutional marriage equality litigation, the *Windsor* and *Obergefell* Courts would likely have operated in 2013 and 2015 in a political environment in which same-sex marriage was still so farfetched as to be virtually unthinkable. Instead, when the Court heard those cases they were confronted, at least in part, by plaintiffs who were *already validly married*.[287] The importance of that fact should not be overlooked.

PART III.
LESSONS LEARNED FROM MARRIAGE EQUALITY

The new lineup of the Supreme Court may present challenges to rights litigators across a broad spectrum of issues. As the Court issues opinions that may become increasingly conservative, progressive advocates may find themselves in a position quite similar to that faced by LGBTQ rights litigators post-*Bowers*. However, as marriage equality advocates demonstrated, significant gains may be made using state court strategies in precisely those political moments. The marriage equality campaign's strategy in the period described *supra* should be instructive to anyone considering how to successfully leverage a state-based litigation campaign for progressive change in an era with an indifferent or hostile Supreme Court. Broken down, that campaign required both a big-picture, nationalized strategy combined with a surgical choice of specific jurisdictions in which to launch litigation.

The marriage equality strategy initially required a shift in thinking. Instead of deliberately driving *towards* the Supreme Court with the hope of making wholesale change nationally, the strategy deliberately *avoided* that moment. There are two reasons why this

287. This was true in *Windsor*, where Edith Windsor and her deceased partner had married in New York after marriage equality became available in that state through legislation. *Windsor*, 570 U.S. at 744. It was also true for some of the plaintiff couples in *Obergefell*, a case which consolidated several circuit-level appeals. Some of the *Obergefell* plaintiffs were validly married in marriage equality states, but could not have those marriages recognized in the states in which they currently resided. *Obergefell*, 135 S. Ct. at 2594–2595.

makes sense. First, as many observers have pointed out, the Supreme Court has historically been deeply uncomfortable in a position at the vanguard of social change.[288] Thus, even where federal constitutional doctrine may provide a clear path to victory, the Court is often unwilling to be the first to walk it. And second, incremental wins—although bearing the obvious and massive downside of leaving individuals in conservative states behind—also give fence-sitters an opportunity to become less resistant to social change before that change becomes ubiquitous.[289]

Next, the marriage equality strategy envisioned a steady building of progress that turned on a few early litigation victories in certain promising states. The strategy then envisioned that those initial victories would spur further shifts in public opinion as a world containing the reality of same-sex marriage continued to spin mostly normally for the rest of society. And that, advocates hoped, might encourage friendly legislatures to begin a new phase of affirmative state legislation that would establish marriage equality without the need for litigation.

If successful, the end result after several years of incremental progress would be a nation in which a growing number of states affirmatively embraced marriage equality, a shrinking percentage of the populace opposed it, and an environment that was closer to what the Court had faced when it finally took cert in *Loving* than when it had refused to do so a decade earlier in *Naim v. Naim*.[290] The Court, then, would be tasked not with undertaking a massive social experiment, but instead with securing the rights of those citi-

288. For example, in 1955 the Supreme Court refused to hear *Naim v. Naim*, a case that challenged Virginia's anti-miscegenation statute. 350 U.S. 891 (1955) (vacating an earlier grant of certiorari due to alleged inadequacies in the record and failure of parties to bring the constitutional questions properly before the Court). The Court waited a dozen years before revisiting the same statute in *Loving v. Virginia*, 388 U.S. 1, 6 (1967). As Kenji Yoshino put it, "[i]n other words, the Court waited for the nation to catch up with a principle it had already embraced. At the time *Naim* was decided, fewer than half the states permitted interracial marriage. By the time *Loving* was decided, thirty-four states did so. The Court was much more comfortable washing out the sixteen outliers than in taking out a majority of the states." Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527, 539 (2012).

289. Famously, Justice Ruth Bader Ginsburg has suggested that *Roe v. Wade*, 410 U.S. 113 (1973), might have been decided in too sweeping a manner. *See* Debra Cassens Weiss, *Justice Ginsburg:* Roe v. Wade *Decision Came Too Soon*, ABA J.: DAILY NEWS (Feb. 13, 2012, 12:29 PM), http://www.abajournal.com/news/article/justice_ginsburg_roe_v._wade_decision_came_too_soon [https://perma.cc/8HS5-P3SK].

290. 350 U.S. 891 (1955), *cert. denied*, 350 U.S. 891 (1955).

zens in the most conservative states who faced oppression that had come to seem backward and increasingly anomalous.

This strategy proved to be a very successful one, providing key initial victories that kept the conversation on marriage equality going, showing the nation what a world with same-sex marriage looked like, and holding off on a single gamble at the Supreme Court that could have easily become a loss on the scope of *Bowers*. We suggest that advocates wishing to advance a progressive litigation agenda in this new era should take the following important lessons from this phase of the marriage equality movement.

A. Lay the Groundwork, and Understand Your Amendment Process

First and foremost, advocates today who are considering a state constitutional strategy must gain a deep understanding of two interlinked conditions in any state in which they are considering litigation: public opinion toward the litigation aims and the ease of amendment of the state's constitution. No matter how favorable the language of the state constitution, an unpopular judicial decision that can be easily reversed through voter amendment will undermine the rights advocates seek to establish. Thus, neither opinion polls nor relative difficulty of amendment should be considered without the other.

As Mary Bonauto put it, "State-specific analysis had to accompany . . . more general points. Where did we have the best chance to win in court, gain public support, and block any negative legislation or ballot measure? Even before filing, what public education capacity could we develop and with whom?"[291] She noted:

> [W]e started litigation under state constitutions, some of which are more rights-protective than the U.S. Constitution, and where state courts would not have to worry about whether they were in or out of step with the Supreme Court. And for GLAD, it's always been extremely important to make sure that all three branches of government and the all-important 'court of public opinion' participated in the discussion. Not just when the case was filed, but beforehand.[292]

The Hawaii experience offers a rich lesson in the importance of gauging the state's culture and attitudes before plunging into litigation that might prove arduous, costly, and ultimately destabilizing or even damaging, while netting no tangible benefit to the plaintiffs themselves. Marriage equality litigators learned a hard les-

291. Bonauto, *supra* note 147, at 1495.

292. Bonauto & Esseks, *supra* note 171, at 120.

son when the court victory in *Baehr* came too early for a state legislature and public that was insufficiently supportive of the aims of the litigation.

They learned that same lesson again, but even more painfully, in 2008. In that year, California's Supreme Court ruled that a state statute banning same-sex marriage violated the California Constitution, even though California allowed same-sex couples to enter into marriage-like domestic partnerships.[293] However, California's constitution is notoriously amendment-friendly and may be initiated without legislative involvement.[294] Therefore, anti-marriage activists could leverage a populist anti-same-sex-marriage initiative strategy in a state with a pro-LGBTQ state government but soft popular support for same-sex marriage.[295] And in fact, they did exactly that, in an outrageously expensive and bitter initiative campaign that ended up costing somewhere between $70 and $85 million dollars,[296] and which resulted in a short-lived victory for anti-marriage activists.

The proposed amendment, known as Proposition 8, passed with about 52% of the vote, but was immediately challenged in a spate of both state and federal litigation.[297] The federal litigation challenged the constitutionality of Proposition 8, and a federal district court found that the marriage prohibition violated the U.S. Constitution.[298] That case ended with a whimper when the Supreme Court determined that the group who had appealed the District Court's ruling lacked standing to do so.[299] Consequently, marriage equality finally arrived permanently in California in

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

294. *See* Connor O'Mahony, *If a Constitution is Easy to Amend, Can Judges be Less Restrained? Rights, Social Change, and Proposition 8*, 27 HARV. HUM. RTS. J. 191, 198 (2014) (discussing how the "hyper-malleability" of California's Constitution led to the passage of Proposition 8).

295. At the time, only about 44% of Californians supported same-sex marriage. Sonja Petek, *Just the FACTS: Californians' Attitude Toward Same Sex Marriage*, PUB. POL'Y INST. OF CAL. (July 2014), https://www.ppic.org/publication/californians-attitudes-toward-same-sex-marriage/ [https://perma.cc/R54A-RCB5].

296. O'Mahony, *supra* note 294, at 211.

297. *Timeline: Proposition 8*, L.A. TIMES (Nov. 30, 2012), https://www.latimes.com/local/la-prop8-timeline-story.html [https://perma.cc/CX2A-LTWC].

298. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010). The State of California refused to defend Proposition 8 when it was challenged. *See, e.g.*, Attorney General's Answer to Complaint in Intervention, *Perry*, 704 F.Supp.2d 921 (N.D. Cal. 2009) (No. 09-CV-2292 VRW) (admitting in Answer that "Proposition 8 violates the federal constitutional rights of lesbians and gay men by denying them marriage licenses").

299. Hollingsworth v. Perry, 570 U.S. 693, 715 (2013).

2013—five years and probably close to $100 million after the California Supreme Court had issued its ruling.[300]

Less-than-majority support for same-sex marriage mattered less in Vermont and Massachusetts, at least in part, because their state constitutions are more difficult to amend than California's. Thus, the kind of public education campaign that is required in a state with a difficult amendment process might be a bit different, focusing less on gaining support over a majority threshold and more on reducing the intensity of opposition and building whatever support can reasonably be gained. But the public education campaigns, particularly the one in Vermont, were seen by advocates as crucial to the success of the litigation campaign. Recall that before litigating in Vermont, activists spent almost two years building a public education campaign.

Progressive advocates should identify the ease of amendment of their respective state constitutions, and weigh that factor against popular support for their cause. If advocates decide to litigate in a particular state, they are well-advised to work with state and local grassroots activists to engage in a public education and messaging campaign well before litigation is filed.

B. Look for Provisions That Don't Exist in the U.S. Constitution

As the Hawaii and Vermont litigation demonstrates, provisions in state constitutions that have no U.S. Constitutional analog can be incredibly useful to rights litigators. As advocates gain familiarity with state constitutions, they may find irrelevant-seeming provisions that actually make excellent advocacy tools.

It is not hard to identify state constitutional provisions with no federal analog. In addition to provisions like the common benefits clauses that predate the U.S. Constitution, many state constitutions contain rights provisions developed long after the U.S. Constitution was ratified. Examples include equal rights amendments, which were modeled on the proposed federal Equal Rights Amendment[301] and an explicit right to privacy, adopted in reaction to federal Supreme Court jurisprudence.[302] Many state constitutional rights provisions are significantly more detailed than those in the

300. *Timeline of California's Prop 8*, NBC L.A., https://www.nbclosangeles.com/news/local/timeline-california-proposition-8-212382141.html [https://perma.cc/8ZMC-NWZ5] (last visited June 25, 2014).

301. Wharton, *supra* note 136, at 1201–02.

302. *See generally* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1424–25 (1992) (internal citations omitted).

federal Constitution.[303] For example, state provisions addressing the relationship between church and state contain much more detailed guidance than the general language in the First Amendment to the United States Constitution.[304] Thus, while some state constitutional rights provisions appear similar to the federal Bill of Rights, the variety in type and language of many provisions can be wide-ranging and significant, with great potential for supporting rights claims.

C. Understand Your State's Interpretive Approach

Advocates should also familiarize themselves with a state judiciary's interpretive approach to its constitution. Of particular importance is the question of whether the state is willing to independently analyze provisions with analogs in the U.S. Constitution and, if not, the degree to which the court adheres to federal constitutional jurisprudence. A state court that acts in lockstep with the Supreme Court may arrive at very different results than a state court that exercises independent judgment while using the federal vocabulary. The importance of knowing your state's approach is plainly illustrated by *Goodridge*. Superficially, that court engaged in a traditional, tiered-scrutiny analysis, where it applied rational basis review that *sounded* much like that engaged in by federal courts. And yet, Massachusetts courts appears to, at least occasionally, treat rational basis review with a level of rigor that exceeds at least the traditional conception of federal rational basis review. Understanding this might have been the difference between deciding to litigate in Massachusetts and deciding that its likely reliance on rational basis review meant certain defeat. Identifying the state court's interpretive approach should play an important role in both deciding to bring the case and crafting arguments with the greatest likelihood of success.

CONCLUSION

While bringing federal civil rights litigation is challenging, incrementally building a national movement based on state constitutional litigation may be even more daunting. It requires an understanding of multiple constitutions, multiple approaches to interpretation, and multiple structures for amending those constitutions. It also requires an understanding of the social and political conditions on the ground in multiple jurisdictions.

303. Tarr, *supra* note 181, at 852–853.
304. *Id.*

But despite its difficulties, state constitutional litigation *can* provide a method for building incremental change and public awareness of issues in a political environment in which a big win at the Supreme Court simply isn't coming. When the Supreme Court recently invoked the political question doctrine to avoid ruling on whether and when partisan gerrymandering violates the U.S. Constitution, many non-lawyers (and even some lawyers) lamented that the ruling was the end of the line for representative democracy.[305] Yet that ruling did not undo an earlier Pennsylvania Supreme Court case that found partisan gerrymandering unconstitutional under the Free and Equal Elections Clause of the Pennsylvania Constitution[306]—in fact, it made that decision into a blueprint for other states to follow.[307]

State constitutional litigation can also provide a means for locating rights that are widely recognized, but not protected under the U.S. Constitution. The right to an education, for example, while not included in the U.S. Constitution,[308] *is* considered a fundamental human right, and is included in both the 1948 Universal Declaration of Human Rights[309] and many state constitutions.[310] Public education advocates have pushed vigorously in state courts for both equal access to education and a baseline level of educational adequacy under their state constitutions.[311]

State constitutions can also provide an important backstop in the event that the Supreme Court rolls back existing precedent protecting civil rights. Civil rights advocates increasingly fear that the Court has become more willing to ignore *stare decisis* and overturn

305. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

306. League of Women Voters v. Commonwealth, 178 A.3d 737, 824–25 (Pa. 2018).

307. Jonathan Lai, *U.S. Supreme Court: Partisan gerrymandering is a political issue that federal courts can't touch*, PHILA. INQUIRER (June 27, 2019), https://www.inquirer.com/politics/pennsylvania/supreme-court-gerrymandering-decisions-affect-pa-20190627.html [https://perma.cc/RR8K-ZPC2].

308. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

309. *See generally Right to Education*, U.N. EDUC., SCI. AND CULTURAL ORG., https://en.unesco.org/themes/right-to-education [https://perma.cc/9QVM-YCGN].

310. For a useful 50-state chart, see Emily Parker, *Constitutional Obligations for Public Education*, https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf [https://perma.cc/K5YV-CNK4].

311. Dana Goldstein, *How Do You Get Better Schools? Take the State to Court, More Advocates Say*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/us/school-segregation-funding-lawsuits.html [https://perma.cc/D25S-NE3Y].

existing precedent in a number of areas touching on civil rights.[312] Chief among these fears is the fear that the court will undo or at least scale back *Roe v. Wade*[313] to the point that women will lose federal protection for reproductive freedom.[314] Yet this same year, the Kansas Supreme Court found the right to abortion was protected by section 1 of the Kansas Constitution's Bill of Rights—and some other state courts have held comparably.[315] Thus, even were the Supreme Court to reverse *Roe* entirely, state courts could, in some places, remain a bulwark in retaining women's right to choose whether to continue a pregnancy.

And in some constitutions, rights can be found that are unique to the state's history. In 2019, for example, the Hawaii Supreme Court found that the State was required under its own constitution to make all reasonable efforts to provide access to Hawaiian immersion education.[316] There is little hope of locating such a right in the U.S. Constitution, but Hawaii's experiences with colonialist erasure of indigenous culture led its Supreme Court to not only require that such an education be made more widely available, but to open its opinion with the following quote: "The language of a people is an inextricable part of the identity of that people. Therefore, a revitalization of a suppressed language goes hand in hand with a revitalization of a suppressed cultural and political identity."[317]

For all of these reasons, there is real hope for progress to be found in the strategy of, in the immortal words of Lady Gaga, "chang[ing] the world one sequin at a time" through state constitu-

312. Robert A. Klain, *We Need to Prepare for a Complete Reversal of the Role the Supreme Court Plays in Our Lives*, WASH. POST (June 11, 2019, 5:22 PM), https://www.washingtonpost.com/opinions/we-need-to-prepare-for-a-complete-reversal-of-the-role-the-supreme-court-plays-in-our-lives/2019/06/11/b492d894-8c5b-11e9-adf3-f70f78c156e8_story.html [https://perma.cc/QKN7-AKYR].

313. Roe v. Wade, 410 U.S. 113 (1973).

314. Editorial, Roe v. Wade *is at Risk. Here's How to Prepare*, N.Y. TIMES (Jan. 21, 2019), https://www.nytimes.com/2019/01/21/opinion/roe-wade-abortion.html [https://perma.cc/D8GN-WTT5].

315. Hodes & Nauser v. Schmidt, 440 P.3d 461, 461 (2019).

316. Clarabal v. Dep't of Educ., 145 Haw. 69 (2019). *See also* HAW. CONST. art. X, § 4 (1978) ("The State shall promote the study of Hawaiian culture, history and language. The State shall provide for a Hawaiian education program consisting of language, culture and history in the public schools. The use of community expertise shall be encouraged as a suitable and essential means in furtherance of the Hawaiian education program.").

317. *Clarabal*, 145 Haw. at 69 (quoting Shari Nakata, *Language Suppression, Revitalization, and Native Hawaiian Identity*, 2 CHAP. DIVERSITY & SOC. JUST. F. 14, 15 (2017)).

tional litigation.[318] The authors ask that advocates considering rights litigation think beyond the federal courts and the currently bleak-seeming political moment. As the marriage equality movement teaches us, even in the darkest of times rights advocacy can continue to advance incrementally, and that incremental change can build into something truly ground-shaking, in a remarkably short period of time.

318. Vega, *supra* note 1.