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Publication Date

2010

Peer reviewed|Thesis/dissertation

Below the Radar: How Silence Saves Civil Rights

by

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A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Political Science

in the

Graduate Division

of the

University of California, Berkeley

Committee in Charge:

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Fall, 2010

Abstract

Below the Radar: How Silence Saves Civil Rights

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Doctor of Philosophy in Political Science

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In public discourse the notion of civil rights is intractably linked to litigation and the courts, a clear by-product of the Civil Rights Movement and other court-based rights battles. Yet, despite an abundance of court decisions, and a seemingly unflappable public sentiment that courts protect rights, scholars remain skeptical of the courts' ability to advance social change, particularly change that involves minority rights. These critics examine the degree to which court decisions are able to transform social norms, shift attitudes or modify public institutions and find that, while symbolically meaningful, many of the courts' most salient rights decisions did not result in significant policy changes. Students of the courts are left with the impression that, in the absence of the "sword and the purse," advocates who use the courts to advance the claims of unpopular minorities are vulnerable to opposition movements that can use majoritarian institutions to thwart civil rights efforts. While this is undoubtedly true in some, if not many instances, I examine one as-of-yet-unexplored tactic used by court-centered civil rights advocates to achieve substantive and significant, rather than merely symbolic, victories for their clients—that is the use of "below the radar" approaches to achieving or enforcing civil rights.

I start from the premise that much of the literature on backlash to court decisions ignores the many instances where disenfranchised minorities make measurable gains through the courts and have successfully withstood backlash. This literature, I argue, suffers from two problems. First, by focusing almost exclusively on constitutional issues, the scholars miss an opportunity to explore the transformative potential of statutory, administrative, or common law claims. (Melnick 1994). Second, and relatedly, by treating litigation as a single strategy (rather than a category of strategies linked by institutional setting), many scholars ignore the strategic choices made by interest groups and activists who use the courts—strategies deliberately designed to avoid backlash and promote successful implementation.

After summarizing the aftermath of a well-known instance of high-profile litigation, same sex marriage, this project introduces two policy arenas in which minority rights were advanced due in large part to the use of the litigation-based strategies designed to reduce the public's awareness of the case or issue and avoiding or diminishing backlash. In each of these two areas of law—same-sex parenting rights and group housing for the disabled—advocates use "below

the radar” tactics to keep their issue off the public agenda, thereby diminishing the risk of backlash.

Preface

I was just beginning my graduate program at Princeton when I first read Rosenberg's *The Hollow Hope*. Fresh off an intense three-year stint working in civil rights litigation, I was exhausted and beaten down by the vast number of individuals whose cases we could not pursue and even more troubled by the limited benefits accrued to those we did represent. Out of the hundreds of clients I had interviewed only a handful ever made it past the intake, an even smaller number went through mediation (and were resolved to some degree) and an infinitesimally small percentage actually had their day in court and secured a meaningful legal precedent. Surely there must be a better way, I mused. I entered graduate school to find out.

Rosenberg, and those from whom he borrowed and whom he inspired, relieved my anxiety. The nagging sensation that I was not up to the task of adequately or zealously defending the interests of my potential clients followed me from DC to New Jersey. Rosenberg, Scheingold, and the many other scholars whose work I surveyed during that first semester, let me off the hook. It was not me who was ill-prepared for the challenge of advancing civil rights, it was the entire judicial system. My naïve notions that *Brown v. Board of Education* actually desegregated schools, that my right to choose was born from a courageous decision in *Roe v. Wade*, were clearly just that... naïve notions. The scholars I studied argued that *Brown* did little to desegregate schools and actually spurred a backlash movement resulting in massive violence against African Americans. *Roe* actually halted a fairly active movement to increase access to abortions through state legislative modifications. I grasped onto this idea as firmly as I had previously championed the promise of litigation to my clients. As my fellow students, few of whom had any experience in litigation but many of whom had toyed with the idea of going to law school, grappled with the concept that these landmark civil rights decisions were indeed "hollow" I peppered the debates with anecdotes from my previous professional life. I even parlayed this growing animosity towards litigation as an avenue for rights into my research. It was truly cathartic.

When I embarked on my second graduate degree (the PhD) at UC Berkeley, having gained some distance from litigation and several years of experience in policymaking, I had developed a more balanced perspective on the idea of using the courts to pursue civil rights or social change. As it turned out, at least from my perspective, majoritarian processes of policymaking did not fare any better in helping disadvantaged groups protect their rights. I no longer felt short-changed by the inadequacies of the courts. Instead I felt bewildered as to how advocates ever were able to successfully secure civil rights in the United States (if at all). I began to research issues like school prayer, desegregation, and abortion to glean examples and ideas from the many scholars who both supported and opposed contentions that courts could not produce social change. I read the newspaper voraciously and followed state and federal caselaw to track modern civil rights struggles. I spoke with former colleagues from my previous life in litigation to keep abreast of any legal innovations in civil rights. When the Massachusetts Supreme Court decision in *Goodridge v. Department of Public Health* (2003), legalizing same sex marriage, was issued (and followed up with an almost instantaneous negative national reaction from President Bush and other candidates in the 2004 election) I thought I had my answer. *Goodridge* was poised to

be another *Roe*, a rallying point for an ever-expanding conservative movement, and a disappointment for the community it was meant to benefit. Backlash, it seemed, is just a forgone conclusion, when civil rights are pursued through the courts.

In 2006 I stumbled across an article in *USA Today* about same sex parenting, entitled “Drives to Ban Gay adoption Heat up in 16 States.” Conservatives were hoping to apply the winning strategies used to prevent same sex marriage to the issue of same sex parenting (which, according to the article, had been reviewed by several state courts). I followed the topic intensely, thinking that I had my second case study in, what was gearing up to be, my contribution to the literature cautioning against the use of the courts in the fight for civil rights. However, the 2006 elections came and went, and there was no mention of same sex adoption. The issue never made it to the ballot, in 2006, in any state¹. Same sex parents survived what many feared would be a same sex marriage-like assault on their relationships with their children. Despite their almost exclusive reliance on court decisions to secure rights for same sex parents and their children, advocates were spared the devastating losses at the polls (and the concomitant national debate). Well, clearly this case raised a much more interesting question: why was same-sex parenting immunized from backlash? And were there others like it?

The following chapters emerged from the questions raised by the surprising success of same sex parenting litigation. I endeavored to identify whether other litigation-focused civil rights advocates had been able to secure rights through the courts, without inspiring (or at the very least while withstanding) the backlash that seemed so prevalent in the story of U.S. court-based minority rights expansion. To that end, this project focuses on one primary question: How can we explain variation in the degree to which litigation-based, rights-expanding successes are either undermined by backlash or succeed in producing real, permanent change?

¹ Since 2006 only one state, Arkansas, has passed legislation limiting the ability of gay couples to adopt. Utah enhanced limitations on its adoption laws by imposing a preference to married adults over single adults.

Chapter I: Strategic Silence and the Policy Process

In 1839, in the small town of Bellevue, Iowa, Alexander Butterworth looked up from plowing to see two white men escorting a black man, without his consent, along the river. The two men had seized the freed slave named Ralph in order to return him to his owner. Ralph had negotiated a deal for his freedom with his owner five years prior, but was having difficulty raising the agreed-upon funds. His previous owner was, thus, seeking immediate payment in the form of Ralph's servitude. Recognizing that these individuals had less than good intentions Butterworth stopped plowing and set off to find the one individual he thought could help the apprehended man, Judge Thomas Wilson. Judge Wilson sat on the newly minted Iowa Supreme Court as an Associate Judge and also served as a District Court Judge. After hearing the story from Butterworth, the judge issued a writ of habeas corpus, which was used by the sheriff to apprehend the kidnappers before they left Iowa. Ralph and his two kidnappers were brought to the District Court where Judge Wilson asked that the matter be presented to the Supreme Court. *In re Matter of Ralph* (1839) became the first reported decision of the Iowa Supreme Court, and allowed Ralph to maintain his residence in Iowa as a freed slave. The Court argued that despite his debt, Ralph could not be considered a fugitive since his freedom had been negotiated with the consent of his owner. Stated Chief Justice Mason "It is a debt which he ought to pay, but for the non-payment of which no man in this Territory can be reduced to slaver."²

In re Matter of Ralph is among the earliest examples of what has become a tradition of using litigation to protect civil rights. Today, this tradition is stronger than ever. American courts have a long and enduring history of protecting minority rights and issuing decisions that have the potential to dramatically alter the way individuals, groups, and institutions function and interact. Practices that have become essential components of public life can be invalidated by judicial decree, while acts that suffer from public condemnation can safely continue under the cloak of legal protection. The Supreme Court has declared school desegregation unconstitutional, barred prayer in public schools, established a woman's right to choose to have an abortion, and protected the privacy rights of gay couples. At the state level, courts have continued to take the lead in many civil rights causes such as school funding reform, same sex marriage, and affordable housing development.

In public discourse the notion of civil rights is intractably linked to litigation and the courts, a clear by-product of the Civil Rights Movement and other court-based rights battles. As Epp (1998) suggests, by the 1960s "the Court...had proclaimed itself the guardian of individual rights of the ordinary citizen." (2) We learn from a young age about the courts' devotion to protecting the rights articulated in the Constitution and the Bill of Rights. By adulthood we associate the American judiciary with desegregation, free speech, and a woman's right to choose. And that imagery persists. In a 2001 survey commissioned by Justice at Stake, more respondents ranked as the number one task of courts and judges in their state, the protection of constitutional rights.

² John C. Parrish, "An Early Fugitive Slave Case West of the Mississippi River," *Iowa Journal of History and Politics*, Vol. VI, 1908, 88-95.

Over 50% of survey respondents believe that protecting constitutional rights and freedoms is the “single most important responsibility of courts and judges.”

Yet, despite an abundance of court decisions, and a seemingly unflappable public sentiment that courts protect rights, scholars remain skeptical of the courts’ ability to advance social change, particularly change that involves minority rights. These critics examine the degree to which court decisions are able to transform social norms, shift attitudes or modify public institutions and find that, while symbolically meaningful, many of the courts’ most salient rights decisions did not result in significant policy changes. *Brown* did not compel school districts to desegregate their schools. (Klarman 1994, 2005; Rosenberg 2008) Access to abortion services did not increase in the wake of *Roe*. (Rosenberg 2008) Legislative and administrative obstacles minimized the reach of state-level school funding decisions (Heise 1994; Reed 2003) and affordable housing (Haar 1996), and same-sex marriage rights have been eliminated in all but a handful of states (Rosenberg 2008). Students of the courts are left with the impression that, in the absence of the “sword and the purse,” advocates who use the courts to advance the claims of unpopular minorities are vulnerable to opposition movements that can use majoritarian institutions to thwart civil rights efforts. While this is undoubtedly true in some, if not many instances, I examine one as-of-yet-unexplored tactic used by court-centered civil rights advocates³ to achieve substantive and significant, rather than merely symbolic, victories for their clients—that is the use of “below the radar” approaches to achieving or enforcing civil rights.

I start from the premise that much of the literature on backlash to court decisions ignores the many instances where disenfranchised minorities make measurable gains through the courts and have successfully withstood backlash. This literature, I argue, suffers from two problems. First, by focusing almost exclusively on constitutional issues, the scholars miss an opportunity to explore the transformative potential of statutory, administrative, or common law claims. (Melnick 1994). While salient constitutional victories such as abortion and school desegregation are important examples of the courts’ foray into civil rights they are by no means representative. In the wake of the Civil Rights Act of 1964 and other civil rights statutes, much of the federal courts’ pro- civil rights docket has taken the form of protecting statutory gains made by minority groups. Yet political science and public law scholars have paid considerably less attention to these court cases and their effect on minority populations. Among disability rights attorneys, for instance, the Court’s decision in *Olmstead v. LC and EW* (1999), which argues that the ADA provides institutionalized mentally disabled patients, when they are deemed ready, with the right to live independently in smaller community-based settings, establishes an important foundation for elevating the treatment of mentally ill individuals in the United States.⁴ *Olmstead* has often been referred to as the *Brown v. Board of Education* of the disabled community.⁵ Despite its importance, it is has yet to be seriously studied by scholars of the courts. Similarly, although

³ The term “advocate,” at least in terms of this project, includes a wide array of individuals and groups involved in the legal battles to secure civil rights for disadvantaged communities.

⁴ President Obama recently issued a press release announcing his commitment to enforcing this “critical civil rights decision.”

⁵ Testimony of Assistant Attorney General Thomas E. Perez Before the Senate Committee on Health, Education, Labor, and Pensions on the ADA and *Olmstead* Enforcement, June 22, 2010.

regarded by many in the legal community as a landmark case, the Court's decision in *Griggs v. Duke Power* (1971), which argues that racially neutral promotion standards such as intelligence tests or high school diplomas, violate the Civil Rights Act of 1964 if they have no significant bearing on job performance and disparately impact a class of individuals protected under the Act, has received scant coverage in political science.

Second, and relatedly, by treating litigation as a single strategy (rather than a category of strategies linked by institutional setting), many scholars ignore the strategic choices made by interest groups and activists who use the courts—strategies deliberately designed to avoid backlash and promote successful implementation. As Epp argues, the story of civil rights advocacy in the United States is not about court decisions, but about the individuals and groups who pursue them.

Rights advocacy organizations...establish the conditions for sustained judicial attention to civil liberties and civil rights and for channeling judicial power toward egalitarian ends. (6)

Advocacy groups, regardless of whether they use the courts, the legislature, or administrative avenues for promoting their claims may choose to invite attention or shield their issue from the public, advance their arguments through adversarial or collaborative means, or may alter the frame depending on the audience. After summarizing the aftermath of a well-known instance of high-profile litigation, same sex marriage, this project introduces two policy arenas in which minority rights were advanced due in large part to the use of the litigation-based strategies designed to reduce the public's awareness of the case or issue and avoiding or diminishing backlash. In each of these two areas of law—same-sex parenting rights and group housing for the disabled—advocates use low profile tactics to keep their issue off the public agenda, thereby diminishing the risk of backlash.

The Decision to Litigate

During many points in our nation's history legislatures at the federal and state level were the primary engines of civil rights. Our current litigation-driven approach to rights did not begin until the 1940s, and was prompted by an increasing distrust of majoritarian institutions. (Dinan 1998) By the 1960s, according to Epp (1998), over 70% of the cases reviewed by the Supreme Court involved questions of "rights." This "strategic rights advocacy" developed as a result of "the support structure for legal mobilization:" lawyers, organizations and funding. (3) The "rights revolution," as Epp describes, has three prongs: judicial attention to rights; judicial expansion of rights; and the implementation of these rights. Court decisions provided advocacy organizations with bargaining power that they used to leverage a stronghold in the democratic process. However, there are costs to using litigation; while judges may be more responsive to the claims of disenfranchised minority groups, litigation requires a significant investment of time and resources. That coupled with the unpredictability of judicial decision-making renders litigation-based approaches to policymaking a bit of a gamble. Despite the costs, litigation may be relatively more accessible than other modes of policymaking for those who have invested resources and developed the skills to navigate the legal system. As Wasby suggests, interest

groups may choose to litigate rather than resolve policy problems through legislative means because “they are temporarily or permanently disadvantaged in terms of their abilities to attain successfully their goals in the electoral process.” (102). Groups who have invested considerable time in obtaining the skills necessary to game the legal system are not likely to perceive other venues as possible choices. For these groups, “litigation becomes part of the mindset,” the default mode of social change. (Wasby, 107).

Unlike the 1950s and 1960s, when legal strategies to advance civil rights were controlled by a handful of civil rights organizations, such as the NAACP Legal Defense Fund, current civil rights litigation is dispersed across hundreds of advocacy groups, thousands of attorneys and millions of individuals seeking to protect their rights. In many ways it is difficult to think of modern struggles for same sex marriage or fair housing rights as the product of an organized movement. Members of disadvantaged minority groups often decide to pursue a legal claim of their own volition, without the aid or approval of the leading advocacy groups in their community. This can result in advocacy groups playing catch-up to a legal strategy that is already in motion. For these groups and advocacy experts, the question is often not whether to litigate, but how to manage the litigation that is already underway.

Backlash

The literature on backlash to court decisions, much of it launched in the aftermath of controversial decisions on desegregation, abortion, and school prayer, is vast. (4) Yet, despite an abundance of scholarship on the topic, the concept of backlash remains vague and generally difficult to distinguish from general forms of opposition. As Cudd (2002) suggests “an event might not be any kind of backlash at all, but rather an event that follows another that is difficult to characterize as part of the same narrative of history.” (5) While scholars are quick to cite the potential for backlash in their admonishments of controversial or far-reaching court decisions (or to argue that these fears are unfounded or overblown), it is difficult to pinpoint from this scholarship exactly when one is witnessing an incidence of “backlash” versus the ordinary push-and-pull of the political process. For instance, in their recent article cautioning a more tempered perspective on “juricentric” backlash, Post and Siegel (2007) state that “backlash expresses the desire of a free people to influence the content of their Constitution” (376) and “can be understood as one of the many practices of norm contestation through which the public seeks to influence the content of constitutional law.” (382-383) While this definition both captures the sentiment behind backlash and classifies it as conventional and commonplace, it does little to help scholars identify what is and is not backlash. Is backlash simply the expression of disapproval? Or does backlash imply action? Does backlash require a large-scale revolt, or can a small group of community leaders initiate backlash? While a full exploration of the concept “backlash” is beyond the scope of this project I provide a brief review of some well-documented cases of what political scientists consider backlash in order to develop a measurable concept of backlash.

The most obvious place to launch a search for indicators of backlash is Klarman’s widely studied “backlash thesis.” Klarman (1994) describes the Southern resistance to court-mandated desegregation in *Brown v. Board of Education*. In addition to failing to promote school

desegregation, Klarman argues, *Brown* polarized opposition towards desegregation. Prior to *Brown* there existed the potential for incremental movement towards desegregation. The 1940s and early 1950s witnessed a wave of political and racial moderation in the South as enfranchised blacks formed coalitions with impoverished whites to elect politicians who supported desegregation and increased government spending on social services. In the aftermath of the landmark decision, coalition and compromise seemed out of the question. By emphasizing race over class, argues Klarman, *Brown* alienated the low-income whites who had worked with Southern blacks, compelled rural whites to require “racial conformity” from their white state officeholders, and pushed otherwise racially neutral white Southerners to adopt a “white supremacist” perspective in order to defend state sovereignty. (98) Where pre-*Brown* political candidates reached out to black voters through promises of desegregation, political appointments, and economic security, post-*Brown* candidates campaigned on segregation and racial unity. Even the moderates ushered into office by scores of black voters shifted their alliance away from racial moderation and towards segregation out of political necessity.⁶ With these electoral shifts came policy retrenchment. In addition to perpetrating violent attacks against black individuals, including children attending newly desegregated schools, segregationists pushed state and local governments to close schools, pass constitutional amendments supporting segregation, and impose fiscal penalties on schools engaging in desegregation (even if court-ordered). (Ball 2006) Backlash to *Brown*, then, included electoral, legislative, and personal attacks on Southern blacks.

While much of the backlash to *Brown* occurred at state and local levels, opposition to *Roe v. Wade* occurred at all levels of government and took on a variety of forms. Within a few years of *Roe*, and immediately after the Court upheld Connecticut legislation limiting Medicaid funding of abortions, Congress passed legislation restricting the use of Medicaid dollars to fund abortions. (Garrow 1994). At the local level, public and private hospitals refused to offer the procedure. Between 1973 and early 1974 an overwhelming majority of hospitals had never performed an abortion. As of May 1977, according to a Planned Parenthood study, 80 percent of public and 70 percent of private hospitals had yet to perform the procedure. (Rosenberg 2008). However, the formation of a pro-life movement dedicated to dismantling any gains produced by *Roe* is perhaps the best known and most influential “incident” of backlash to *Roe v. Wade*. The pro-life movement originated as a factious, loosely organized coalition of individuals, led by vocal religious leaders across multiple denominations. In 1973 the National Conference of Catholic Bishops called for the development of a grassroots organization to demand a constitutional amendment establishing a right to life. Two years later, in response to a defeated Senate bill that would have terminated Medicaid funding for abortions, New York Archbishop Terence Cardinal Cooke concluded that it was essential to “encourage the development in each Congressional district of an identifiable, tightly knit and well-organized pro-life unit.” (Garrow, 619) By 1978, five years after *Roe* the pro-life movement started to gain momentum and has continued to be at the center of electoral and legislative attempts at the local, state, and federal levels to limit or restrict access to abortions.

⁶ As Klarman describes, Faubus was the “first Arkansas governor to appoint blacks to the state Democratic Central Committee.” In 1956, Faubus succumbed to political pressure and campaigned on a segregationist platform. (104)

Anti-court backlash also consists of litigation-based methods. It goes without saying that higher courts have the potential to overrule decisions issued by lower courts. Less obvious, but equally commonplace, is lower court non-compliance with higher court decisions. Although philosophically bound to uphold Supreme Court decisions, in practice there are few incentives for state courts or lower federal courts to follow high court decrees. Murphy (1964) outlines four factors that contribute to lower court backlash: 1) the Supreme Court remands cases back to the lower courts for review and only a handful of remanded cases are re-evaluated by the Supreme Court; 2) remand instructions are often vague and simply follow the rule that “litigation be handled by further ‘proceedings not inconsistent with’” the opinion (p. 24); 3) lower courts are not professionally linked to the Supreme Court (the career paths of lower court judges are not tied to their cooperation with Supreme Court decisions) and, 4) lower court judges face similar ethical dilemmas to those faced by Supreme Court justices. “A judge who felt that policy endorsed by the Supreme Court in a given field was unwise, unconstitutional or unjust,” may decide to act in accordance with his own moral code or values. (p. 25)

Despite the norm of *stare decisis*, supreme courts (at both the state and federal level) can also commit acts of judicial backlash by limiting or reversing decisions issued by previous courts. Sullivan (1989) categorizes as backlash the Court’s decision in *City of Richmond v. J.A. Croson Co.* 443 US 193 (1979). Despite earlier rulings that supported affirmative action, the Court ruled that the City’s minority set-aside program violated the equal protection clause. Sullivan attributes the backlash to a rising tide of opposition toward affirmative action that had reached the sitting Justices. Unlike previous decisions on affirmative action, which subtly borrowed the rhetoric of “stigmatization” often used in anti-affirmative action arguments, *Croson* went one step further and cited as a primary concern the “resentment by the displaced.” (1622). As Sullivan points out, Scalia characterized affirmative action as “invidious...in practice [and] evil...in its effects” and Kennedy warned of its “corrosive animosities.” (Ibid.)

Finally, one can hardly study backlash in this day and age without discussing the destabilizing effects of the referenda process on the longevity of state court decisions. Particularly prominent in the public debate on same sex marriage, court decisions issued in states with active use of referenda to make policy are vulnerable to swift reversal at the polls. Although a landmark decision in legal terms, the California Supreme Court’s pro-same sex marriage ruling in *In re Marriage Cases* (2008) was in effect less than 6 months before it was reversed, as California voters adopted a constitutional amendment banning the practice. Reed highlights the importance of recognizing the difference between strategies of constitutional contestation under state constitutions and those appropriate for the federal level. As Reed (1990) explains, at the state level “legal mobilization through litigation and democratic mobilization through ballot initiatives form two wings of popular constitutionalism.” (890). For activists fighting, and courts ruling, in states where public officials and popular will are partners in the shaping of constitutional doctrine, “politics matters more than law.” (931) “Without that awareness,” Reed warns, “much political and legal energy may be unwisely spent or misdirected.” (929).

Based on these case studies, then, I define backlash as a type of reactive opposition-- one that couples outspoken oppositional *sentiment* with a course of *action* designed to reverse, limit the

reach or implementation of, or at least stem modifications to policies and practices mandated by a policymaking institution, in this case the courts. Backlash differs from general opposition in that backlash efforts are developed (and could credibly lead) to the decision's reversal or limitations on its implementation. Accordingly, backlash cannot be measured through the expression of public opinion alone—although public sentiment is certainly one important ingredient. Protests alone are not an indicator of backlash. Nor are flurries of editorials or newspaper articles bemoaning policies or court decisions. So, while studies on public responses to court decisions abound (Benesh 2006; Durr, Martin, and Wolbrecht 2000; Franklin and Kosaki 1989; Caldeira and Gibson 1992; Gibson, Caldeira, Spence 2003; Johnson and Martin 1998; Tanenhaus and Murphy 1981; Mondak and Smithey 1997; Persily, Citrin and Egan 2008) they do not explain why some unpopular court decisions produce so intense a public outcry that they spawn backlash movements, while others decisions maintain a peaceful coexistence with their opposition.

As demonstrated above, backlash to court decisions and precedent can take on a variety of forms—legislation, administrative rulings, judicial mandates, popular referenda, electoral losses (especially for state judges), business transactions, or simple noncompliance. These actions can be initiated at the local level, by school boards, zoning boards, private property owners, or at the state and federal levels of government. Murphy (1964) rightly points out that court decisions are vulnerable to reversal on a range of fronts. From lower courts to interest groups, judicial opinions are digested, interpreted, and implemented with little supervision by the issuing court. Court decisions can be “cherry-picked,” disregarded, or dismantled. Judges can be impeached or voted out of office for straying too far afield from the public's desires. Legislatures can move to limit funding or curtail jurisdiction to keep judges and courts in check. Zoning officials or administrators can refuse to follow the dictates of court decisions. Private actors can thwart attempts by disadvantaged populations to exercise their court-mandated rights.

Troubled by the looming presence of backlash, public law scholars have questioned the ability of the courts to advance decisions that buck majority will. (Andrews 2002; Klarman 2002, 2005; Ball 2006). They are skeptical of the courts' ability to maintain their legitimacy under the weight of public opprobrium or to encourage an unwilling majority to comply with a court-issued decision and thus promote meaningful social change. (Rosenberg 2008) And some fear the worst, a public push to overturn a court decision. A growing number of scholars are counseling judges to exercise caution in their decisions to review cases or when resolving legal controversies. While supporting full marriage equality for same sex couples, for instance, William Eskridge (2000) applauds decisions such as *Baker v. Vermont* (2000) for adopting an incremental approach and providing an opportunity for gay couples to receive the benefits of marriage under another name. He argues

law cannot liberalize unless public opinion moves, but public attitudes can be influenced by changes in the law. For gay rights, the impasse suggested by this paradox can be ameliorated or broken if the proponents of reform move step-by-step along a continuum of little reforms. (877)

Sunstein (2001) echoes Eskridge's call for incrementalism or "minimalism" and encourages judges to reduce the reach of their opinions by sticking to the case at hand, "avoid[ing] clear rules," and leaving room for the democratic process to shape the outcome. (ix) Social movement scholars argue that successful movements are likely to incite countermovements, particularly when movement victories are not decisive on all fronts. Specifically, judicial victories associated with movements, because courts lack the ability to implement or enforce policy decisions, may be more likely to inspire a countermovement. Opposition groups will use legislatures, ballot initiatives or develop public campaigns to overturn the decisions. (Andrews 2002)

However, this focus on backlash may obscure the benefits that courts provide to disadvantaged or unpopular minorities. Path dependence (Pierson 2004), constitutional doctrine and "adversarial legalism" (Kagan 2001) make it more likely that courts will take seriously the rights of minorities. In many ways, the constitutional doctrine of the 50s and early 60s that laid the groundwork for the civil rights movement made the courts' continued involvement in the "rights revolution" a foregone conclusion. As Epp argues, the Supreme Court's decisions regarding freedom of speech during the civil rights movement led to an application of freedom of speech doctrines to a large scope of activities. In order to continue to address racial discrimination the Court expanded the due process rights of the criminal defendants and welfare recipients. The Court's commitment to ending racism allowed similarly situated groups to reap the benefits of judicial doctrine. Finally, decisions that protected religious freedom and free speech led to the "right to privacy" that drives current debates on abortion. (Epp, 2005, 344). Court decisions are cumulative. Not only do courts practice the norm of *stare decisis*—allowing decisions to stand—but courts use existing doctrine to justify new decisions in the absence of clearly dispositive prior law. The considerable body of law developed at both the federal and state levels makes it likely that disenfranchised groups will continue to have success in the courts. Additionally, while concern for backlash is warranted, our singular focus on negative reactions to what are largely big, constitutional moments prevents us from appreciating the many instances where courts provide meaningful protections for unpopular minorities. Though public opposition may erode some rights gained through the courts, our history is filled with instances where court doctrine has emerged victorious in the struggle to advance civil rights (Burke 2001; McCann 1994). And even in cases such as same sex marriage, where the evidence seems to overwhelmingly support the notion that courts and judges should exercise caution, there is reason to believe that these court victories produced gains as well (Ball 2006; Keck 2009). Keck (2009) argues that despite constitutional amendments and statutes banning same sex marriage, pro-same sex marriage rulings in Hawaii and Massachusetts also helped to usher in increased economic benefits and partnership rights for gay and lesbian couples. In response to Rosenberg's skepticism over the Court's ability to produce social change, McCann (1992) asserts that court opinions provide messages, cues, and a shared language of "what is possible with the authority of the state" and can provide a game-changing resource in negotiations among and between individual, interest group, and state actors. Salokar (1997) finds that gay rights litigation acted as a "spark" to increase political participation and political activity among gays and lesbians. (399) The number of gay rights organizations as well as membership in previously existing organizations has increased in the aftermath of recent same sex marriage decisions. With an increased presence, argues Salokar, comes increased political power.

Even if we concede that backlash should be considered in the decision to litigate, we have yet to fully understand why some cases produce *Brown* or *Roe*-style backlash, and others are issued and implemented without a stir. The case studies included in this project indicate that visibility is an important predictor of backlash and have several things in common. First, they represent attempts to advance civil rights on behalf of unpopular minority groups: gays and lesbians and individuals who are either mentally or physically disabled. Second, each group achieved victory in the courts or through the use of court-produced precedent. However they differ in one important way: visibility. Within each of the populations represented in the project there are advocates who adopted strategies to increase public awareness of the issue and advocates who opted to minimize public awareness. Activists and organizations that maintained a low-profile presence while securing rights for their clients were less encumbered by backlash and were more likely to see positive legal victories transform into meaningful substantive gains for their clients.

Visibility

A policy's salience or visibility can drastically alter its contours and determine its success. Describing politics as "beginning from billions of conflicts," Schattschneider (1957) proposes that visibility to the public is likely to affect a conflict's outcome (939). Visibility expands the scope of conflict by enticing more individuals to enter the fray (Schattschneider 1957) and can transform social problems into political struggles (Lowi 1972). "Attention," argue Flemming, Wood and Bohte (1999) is fundamental to the policy process; it can "alter policymaking routines by disrupting the incremental and stabilizing tendencies of the underlying policy systems." (77) It stands to reason, then, that "visible" issues—causes that make headlines, receive continuous media coverage, or inspire public debate—have the potential to attract more negative attention and increase active opposition or backlash. Klarman (1994) attributes southern backlash to *Brown*, in part, to its visibility and salience.

Brown was an unambiguous, highly salient pronouncement that southern race relations were destined to change. It could not be ignored or discounted as gradual, diffuse, and less salient changes could be. (118)

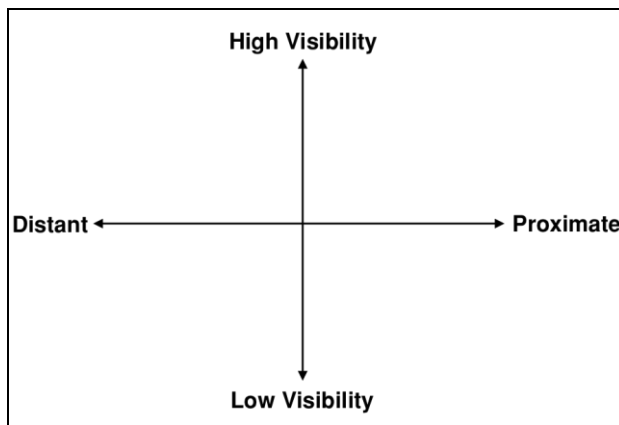
Successful backlash attempts (those that effectively limit or reverse the trajectory of court decisions) rely on some recognition of an organized "public will" that compels policymakers, activists, or administrators to either disregard or overturn legal victories. Visibility, therefore, through the media or other mechanisms (flyers, hearings, word-of-mouth) provides the first essential ingredient—a narrative for catalyzing a shared reaction among a group of, as-of-yet, unrelated individuals.

That said, visibility does not always produce backlash—nor is it bereft of benefits. On the contrary, "socializing" (Schattschneider 1957) interests can yield great rewards. (Downs 1972). Issue salience can increase knowledge and inspire political participation by allies of the reformers. (Weaver 1991, 66). Visibility is also a key ingredient to collective action. The more the public is mobilized into action to support the cause, the greater the likelihood for success. (Rohlinger 2002). After all, during the Civil Rights Movement, media exposure to the brutality

of white police officers toward young African American and white protesters provided the movement with a national stage upon which to state their case. (Croteau and Hoynes 2003; Roberts and Klibanoff 2007) Visibility can help to plant an issue firmly on the legislative agenda (McCombs 2006) or can lend a human face to an issue plagued by stereotypes and misperceptions. As Ball argues, extensive media coverage of same sex marriage “helped humanize lesbians and gay men by encouraging (at least some) skeptical Americans to better understand” same sex couples. (1533) In general, then, visibility creates opportunities for policy dialogues. As Meyer and Staggenborg suggest, advocates can “put an issue into play” by increasing its visibility through media attention, which in turn attracts policy elites, “thereby creating a ‘policy window’ for action.” (1996, 1635; see also Zald and Unseem 1987)

However, as some scholars point out, not all proposed policy changes are likely to garner *support* as a result of greater public exposure. Schattschneider (1957) suggests that policy agendas concerning equality and civil liberties such as freedom of speech may benefit from public participation but those involving “individualism, free private enterprise, localism, privacy, and economy” are more likely to succeed if less well-publicized. (941). Similarly, policies with a moral or religious undertone may catch the public’s attention. (Holzhacker 2007). In many instances, removing policy debates from the public domain is a smart strategy. As interest group theory suggests, there are circumstances where advocates’ interests are best served by “discretely lobbying policymakers” (Holzhacker 2007) and minimizing participation. (Lowi 1969).

Fig. 1: Soss and Schram’s General Framework for the Analysis of Mass Feedback Processes: Policy Visibility and Proximity of an Issue



Source: Soss and Schram, 121.

Soss and Schram (2007) develop a model for predicting how issue salience and policy distance may incite mass feedback toward a policy. (Fig. 1). Defining as policy distance the degree to which a policy will personally affect most individuals, they argue that low visibility, low proximity issues (items found in the lower left-hand corner) provide state actors and advocates with “maximum autonomy” to shape policy. Policies in this quadrant, (e.g., most modifications to the tax code) can be made with little public input and are unlikely to mobilize the public or

alter its attitudes. Policies with low visibility, but high proximity also provide policymakers with greater autonomy but are more likely than the former to shape behaviors and elicit public reactions in response to policy shifts. (121). High proximity and high visibility issues, those in the upper right quadrant, promote or provoke citizen feedback. These issues, through their proximity, influence or resonate with individuals in specific ways and, through visibility, increase the scope of their audience. Individuals can readily identify with the issues and can be moved into action through the use of cues, symbols, or anecdotes that “serve[] as object lessons.” (122)

The question then is whether advocates can alter either the visibility or the perceived proximity of an issue to increase their autonomy and decrease the likelihood of public interference. Hacker (2004) highlights the benefits of using covert tactics to modify the welfare state. The media’s focus on “large-scale legislative reform,” he argues, conceals the more common “decentralized and semiautonomous processes of alteration” of public policy (245) by bureaucrats and private providers of benefits. Advocates seeking court-issued policy decisions, particularly those involving the rights of unpopular minorities may find low-salience strategies especially useful. Significant constitutional rulings by the court, such as *Brown*, *Roe*, and *Goodridge*, are highly visible, and are thus more likely to incite opposition that may dismantle the decision and attack the courts. (Klarman 2005; Hoekstra 2000) Even a general focus by the media on specific minorities may do more harm than good. While minimizing public awareness may be difficult advocates can devise strategies that either diminish or delay public scrutiny. For example, disability rights advocates deliberately attempted to minimize media coverage of deliberation over and passage of the Americans with Disabilities Act out of fear that journalists would stereotype individuals with disabilities in ways that would hinder rather than further their cause. (Shapiro 1994; Krieger 2000)

The advocacy analyzed in this project comprises a range of different techniques for reducing or delaying public awareness in order to minimize the incident and effects of backlash. Advocates framed issues to steer the focus away from their policy proposals’ more controversial elements and towards ideas or reference points about which there is little disagreement. Some rested their legal claims on technical and lesser-known statutory, administrative, or common-law language rather than constitutional principles. The benefits of using constitutional language to articulate a legal argument—a common language that evokes shared values—can spark public interest and debate. The more technical a legal argument, or arcane its legal sources, the more difficult it is to convert into a 20-second sound-bite. Advocates also directly minimized awareness by choosing not to apprise the public of their intentions. Flyers, letters to policy elites, and information forums are often used by civil rights and social policy activists to garner local support for their cause and to dispel misperceptions. The more people know about the community, the idea goes, the less they will want to alienate its members. However, these modes of community notification and education have one simple drawback: they provide a tip-off of advocate intentions to those who remain opposed, giving the opposition ample time (and insider knowledge) to organize a backlash.

Statutory Interpretation

As mentioned above, many recent civil rights court victories have been achieved through the use of statutory interpretation. Legislation like the Civil Rights Act of 1964 (and its amendments), the Americans with Disabilities Act, and The Anti-Drug Abuse Act are just a few of the many statutes used by advocates and validated by courts to protect the rights of disadvantaged groups. Since the 1980s, statutory interpretation, argues Melnick, has played a significant role in shaping (and often expanding) the government's role in domestic policy. Melnick attributes the increased potential for statutory language to expand government protection and activity to four main factors: vague statutory language; few resources to guide statutory interpretation; frequent judicial review of highly charged issues that divide partisans, but often in the context of lower-visibility individual, context-specific disputes; and the difficulty of overturning judicial decisions.

Similar to constitutional cases, courts have developed a number of doctrines to interpret the equally vague proscriptions in statutory language—often to expand the scope of legislation to include acts and individuals not obviously covered. For example, as mentioned above, disparate impact theory widened the net of actions punishable under a number of civil rights statutes to include those with no obvious discriminatory intent. Developed shortly after the introduction of the Civil Rights Act of 1964, and often used in employment cases, disparate impact theory defines as discriminatory acts that are facially neutral but have a discriminatory impact on a protected class. To prove adverse or disparate treatment in housing and employment discrimination cases, courts not only permit direct evidence of discrimination but also permit indirect evidence through a three-pronged “burden-shifting” doctrine.⁷ After the plaintiff has first established a prima facie case of discrimination—consisting of evidence that the individual is a member of a protected class, an application was submitted for housing or employment for which the plaintiff was qualified, the application was rejected, and the employer or landlord continued to look for applicants after the plaintiff's application was rejected—the burden shifts to the employer or housing provider (the defendant). The defendant must articulate a “legitimate, nondiscriminatory reason” for the rejection—a doctrine that shares many aspects of the constitutional doctrine on substantive due process or equal protection. Finally, the plaintiff must prove that the reason articulated is simply pretext to mask the discrimination.

Although, in theory, cases based on statutory interpretation are more easily susceptible to reversal through legislation or referenda (legislatures simply need to draft a new law), Melnick argues that in practice this is no easy feat. The vague language of statutes at the heart of statutory interpretation is likely the result of deadlocked legislature unable to reach a consensus on the details of a law. It is unlikely that these legislatures would be able to organize enough of a majority to specify language that would effectively overturn the courts' interpretation.⁸ Additionally, explains Melnick, a win in court provides legislators on the “right” side with leverage to maintain the language as it is currently written. Court approval means these legislators will be even more likely to block any attempt to water down, modify, or reverse its

⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

⁸ Barnes (2004) finds that Congress is often able to implement legislative overrides of judicial decisions. However, when these decisions involve the rights of minority groups, overrides are less effective at diminishing judicial discretion.

current interpretation. In the end then, where possible, statutory interpretation offers advocates with ample legislative resources to make compelling arguments to advance rights. Additionally, the highly technical and complicated language of many statutes makes it less likely that these arguments can be whittled down for public consumption, thereby reducing visibility (and backlash.)

Framing

In many ways, considerations of framing and issue salience go hand in hand; a strong frame can capture the attention of the media, which in turn can shape public perceptions (Iyengar 2005)⁹. Framing is the process of “developing a particular conceptualization of an issue” (Chong and Druckman 2007, 104) or as Gamson et al (1992) suggests “a central organizing principle that holds together and gives coherence and meaning to a diverse array of symbols.” (384). Since most policies are multi-dimensional (Nelson and Kinder 1996), a policy’s frame can take on many different forms depending on the audience, the source of the frame, the political context, and the purpose. (Jenness and Broad 1994; Baumgartner and Jones (“policy image”) 1991). While some frames may be used to promote a shared understanding or inspire collective action (Bernstein 1997; Benford and Snow 2000) and civic responsibility, others may fuel opposition or countermovements.

Framing does not occur in a vacuum. Policy elites develop and alter frames in response to and in anticipation of opposition frames. The language and imagery adopted by advocates will ultimately confront competing frames in the race to capture the public’s attention. (Zald 1996; Rohlinger 2002; Esacove 2004; Brewer 2008). Consequently there are frames designed to keep an issue off the public’s agenda altogether. In her study of identity formation in the gay and lesbian communities, Bernstein (1997) finds that gays and lesbians interested in pursuing low-key tactics in order to pass anti-discrimination legislation in Oregon resisted “identity politics” and instead opted for an approach that had universal applicability. Similarly, frames can steer individuals to adopt a “group-centered” – rather than “individualistic” approach to thinking about policy. As Nelson and Kinder (1996) find, although individuals tend to develop policy opinions based on their attitudes toward the groups affected, framing determines the degree to which group-perceptions dictate public opinion. In other words, framing plays a pivotal role in determining *whether* and *how* individuals think about a policy issue (Brewer 2008), and it may be the difference between quiet disagreement with a policy position or active opposition.

While many frames are unique to a given policy domain, there are some frames that are borrowed, recycled, and reconstituted. Policy advocates may hope to piggyback off of the success of one frame or may hope to use a well-established frame as a heuristic device to fast-track buy-in from the public. The mere mention of a word, concept, or phrase by elites and the

⁹ In this project I am primarily concerned with deliberate use of specific frames by advocates as a strategy to reduce issue salience and public opposition. That said judges and courts play a critical role in the framing of judicial decisions. They often have a choice of frames presented to them by either party or through amicus curiae briefs. Judges may also use their own frames while explicating legal arguments.

media can call-to-mind entire histories, trigger emotions, and outline an array of policy alternatives and directions (Entman 1993; Nelson and Kinder 1996; Hertog and McLeod 2001). “Master” frames (Benson and Snow, 619) such as the rhetoric of rights, equality, and injustice will quickly resonate with the public.

To a large degree the very language of rights has its roots in legal doctrine. Borrowing from Judith Shklar, Scheingold asserts that the “myth of rights” is a “social perspective, which perceives and explains human interaction...in terms of rules and of the rights and obligations inherent in rules” (2004, 13). As guardians of the law, lawyers are the primary champions of this “myth.” Continues Scheingold, “the principal institutional mechanisms of the myth of rights is litigation.” Our distrust of legislatures requires us to look to courts to declare and realize rights and to “build[]...a just social order.” (14) The litigant driven, highly decentralized nature of American litigation—adversarial legalism (Kagan, 2001)—makes it easier for courts than their legislative counterparts to advance the rights of minorities. In many instances, judges are not subjected to the same electoral constraints as legislators. (Perry 1982; Kessler 1990). Therefore, the need to seek favorable majority outcomes is not as pressing in the courtroom as it is in state assemblies or senates. Furthermore, legal culture has embraced the language of rights. As Kagan argues, in the midst of the Warren Court era, a popular legal culture emerged that demanded “total justice” and its realization through judicial lawmaking -- “a distinctively American brand of activist government” that brought with it a network of activist lawyers. (Kagan, 2004, 31). Argues Epp, “rights revolutions have occurred only where and when and on those issues for which material support for rights litigation—rights advocacy organizations, supportive lawyers, and sources of funding—has developed.” (1998, 23).

However, it is because “rights” and “equality” have become so imbedded in the public discourse (and so inextricably linked with the courts) that individuals may be skeptical about their application to specific issues. Glendon (1991) castigates “rights talk” generally for placing a “damper on the processes of public justification, communication, and deliberation upon which the continuing vitality of a democratic regime depends.” (171) “Rights talk” has become a frame that tends to trigger conservative opposition and denunciation of ideological lawyers and “judicial activism.” Consequently, as the primary engines of the “myth of rights,” legal advocates and judges may find themselves the unwitting recipients of anti-rights backlash.¹⁰ Paris (2001) contends that legal modes of redress “‘reframe’ disputes in narrow and confining ways” and focus on the “myth of rights” at the expense of other more effective approaches. This, combined with the courts’ “lack of democratic legitimacy,” may render a litigation-based rights approach virtually toxic in some instances. (637). Individuals may also object to the use of “rights rhetoric” for specific communities. For instance, the use of a “rights” frame by gays and lesbians has shifted public attention from substantive issues such as employment discrimination or same sex marriage to more heated discussions about whether these issues rise to the level of a

¹⁰ Halton and McCann (2004) describe how media tort narratives have helped launch a campaign for tort reform and have generally contributed to negative perceptions of judges, lawyers, and courts.

“civil right.”¹¹ And for many, the very use of the word “right” by minority groups, conjures up notions that they are seeking “special benefits,” a surefire way to promote backlash.

Finally, in the legal context, frames stem largely from the textual resources used to support legal claims. For instance, a constitutional claim based on 14th amendment guarantees of due process and equal protection will be framed and perceived in a much different light than a legal argument based on common law or technical statutory provisions. While constitutional arguments tend to be the focus of court-centered scholarship and discourse, much of the work of the courts is based on technical statutory, administrative law and common law arguments. As Melnick (1994) argues, “one would be hard-pressed to find a major domestic policy area in which statutory interpretation by the federal courts did not play a significant role” in determining the scope of government activity (7). Similarly, Bernstein’s findings suggest that a “narrowly-tailored” strategy of policy formation and modification (as opposed to a public relations campaign based on principles and values) can often be the optimal strategy for policy change, depending on group resources and political environment. And like Hacker’s analysis of welfare retrenchment, rulings based on administrative, statutory, or common law language can significantly alter a policy’s direction or provide important protections for individuals and groups –while doing so at generally lower levels of political visibility than judicial decisions based on constitutional principles. Despite an abundance of public law scholarship on civil and minority rights, we know little about the comparative costs or benefits of using constitutional, statutory or common law frames to advance civil rights—particularly as it relates to backlash.

Public Deliberation

In addition to issue salience and framing, policy advocates may increase (or decrease) the scope of conflict by deciding whether to take their problems directly to the people. In response to the increased use of adversarial modes of dispute resolution, a new focus on collaboration has emerged. The bulk of research in this area involves case studies that analyze the degree to which collaborative forums offer more congenial policy-making environments that produce greater policy responsiveness. (Ansell and Gash 2008). While the findings are mixed at best, scholars and government actors alike sing the praises of public deliberation or stakeholder partnerships as the key to good policy design. (Chambers 2003; Carpini, Cook, and Jacobs 2004). In the views of its proponents, collaborative decision-making also boasts a host of long-term benefits such as increased civic engagement, broader tolerance for opposing viewpoints, and the bridging of different social identities. (Carpini, Cook, and Jacobs). However, just as issue salience has its drawbacks, so too can public deliberation pose risks to certain groups and policy proposals. While scholars and policy elites may perceive collaborative forms of decision-making as the answer to adversarialism, advocates for disadvantaged minority groups may view public deliberation as just another way to prematurely inform the opposition.

The Structure of this Project

¹¹ Steve Osunsami, “Are Gay Rights Civil Rights? Comparing Same Sex Marriage to Civil Rights Movement Draws Criticism,” ABC News, March 13, 2004.

This project uses theories of salience, framing, and public deliberation to examine why some court-centered strategies are able to successfully advance their clients' causes without confronting debilitating backlash. While I concede that in some instances court decisions may be constrained in their ability to produce meaningful advancements for disenfranchised communities, I argue that the current focus on big constitutional rights battles, which often promote extremism, ignores the myriad ways through which advocates pursue and gain legal rights and benefits for members of minority groups.

The case studies included in this project focus on efforts to secure rights for same sex couples or housing rights for the physically or mentally disabled. The focus on these two populations allows me to compare the outcomes of both high profile and low profile strategies on the incidence of backlash. Although each community achieved wins in court, the degree to which these victories were implemented and maintained rather than overturned varies. This variation, I argue, is linked to strategies adopted by advocates that shape the issue's visibility. Within each of these populations advocates either employed legal tactics that resulted in high levels of public awareness or pursued strategies to minimize visibility and decrease the level and success of backlash attempts. Through interviews with advocates and opposition elites I identify why specific strategies were chosen and how these choices influenced or impeded the frequency and success of backlash efforts. I review the major legal events, backlash attempts, and, to date, the ultimate outcome of these struggles. Finally, I analyze public attitudes toward and media coverage of these struggles to examine the influence of public opinion, issue salience, and media framing in promoting or preventing backlash attempts.

The first case study, described in chapter 2, provides an example of a typical high profile civil rights issue—same sex marriage—and analyzes progress toward, backlash and general opposition against, and coverage of same sex marriage court decisions between 1996 and 2006.¹² As of 2006, by which time 45 states had banned same sex marriage, only two state supreme courts had validated a same sex couple's right to marry: *Baehr v. Lewin* (1993) in Hawaii and *Goodridge v. Department of Public Health* (2003) in Massachusetts. Despite the fact that these cases were based on interpretations of state constitutions and had no precedential meaning in other states, many feared that Full Faith and Credit would require their validation in other states. Today, in addition to a federal ban on same sex marriage instituted in 1996, over 40 states ban the practice either through statute or constitutional amendment, many of which were passed through referenda in 2004 and 2006.¹³

¹² The analysis of both same sex marriage and same sex adoption focuses on the time period between 1996 and 2006 during which majority of the backlash against same sex marriage occurred and when threats of backlash against same sex parenting rights seemed peaked. However, each chapter provides updated information on court cases and policy progress through July 2010.

¹³ As of March, 2010, five states and the District of Columbia issue marriage licenses to same sex couples. This progress was achieved primarily through court decisions. New York, Maryland, and Rhode Island recognize same sex marriages from other states to some degree. A handful of states also provide "marriage-like" benefits to same sex couples through civil unions or domestic partnerships.

The topic of same sex marriage has enjoyed a high profile since the Hawaii Supreme Court's decision in 1993. Local and national media outlets devoted significant time and space to debating the merits and costs of marriage equality. Public officials at all levels of government, from school board to president, have weighed in on the issue in public debates, hearings, and campaign advertisements. In many respects it has become the *Roe* of the late 20th and early 21st century. It is not surprising that the pattern of backlash exhibited in the aftermath of state court decisions validating marriage equality is similar in many respects to that of *Brown* and *Roe*. A court issued a controversial decision benefitting an unpopular minority and the majority fought back...and won. What *is* remarkable, however, is that advocacy for same sex parenting rights, discussed in chapter 3, did not follow the same trend.

Same sex marriage offers a good counterpoint to the trajectory of same sex parenting rights in the United States. Unlike same sex marriage, gay rights advocates advancing same-sex-parenting rights managed to avoid the level of backlash witnessed on the marriage front. To date, 24 states have granted the non-biological parent of a child born into a same-sex couple legal status with respect to that child. Only 6 states have enacted measures to terminate the ability of gay individuals or couples to jointly adopt. In the aftermath of the 2003 Massachusetts Supreme Court decision in *Goodridge*, gay adoption and parenting advocates geared up for the battle to protect the gains they had made through the courts. However, this battle never came to fruition.

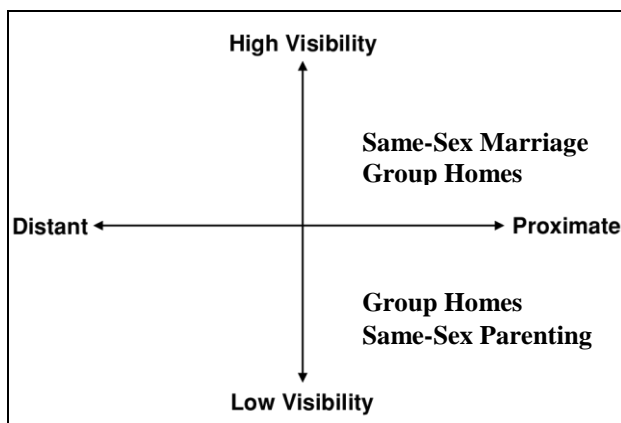
According to interviews, same-sex adoption and parental rights advocates opted to locate their legal arguments within the technicalities of family law despite calls from legal scholars to use a constitutional approach. Similarly, they opted for a legal frame that focused on children's rights rather than gay rights in order to "suppress difference," gain powerful political allies, and remove the hot button topic of homosexuality from the public's discussion of this issue. Accordingly, there is very little media coverage of same-sex adoption and parental rights cases between 1996 and 2006 despite the use of state supreme courts to advance these rights. When there is media coverage, while the subject of homosexuality emerges, this frame is complemented by a focus on children's rights and needs.

The lack of mobilized opposition cannot be attributed to a difference in opinion on adoption versus other hot-button issues concerning the gay community. Analysis of 2006 public opinion polls on same sex adoption and same sex marriage conducted by Pew reveal that 1) opinion during this time period of heavy backlash against same sex marriage is statistically equivalent or only marginally different—with a majority of individuals opposing both practices; 2) within states that passed ballot initiatives banning same sex marriage opinion on both same sex marriage and adoption is the same; and 3) the level of "strong opposition" on both issues is equivalent—meaning that the potential for mobilization against adoption exists. Additionally, multivariate analysis of opinion on same sex marriage and same sex adoption suggests that the structure of opinion on marriage is very similar to that of adoption, and that media coverage in particular plays a significant role in increasing opposition toward marriage.

We see a similar story in advocacy for disabled group housing, discussed in chapter 4. Despite the passage of the Fair Housing Act (FHA) and the Americans with Disabilities Act (ADA), both

of which require landlords and municipalities to make reasonable housing accommodations for disabled individuals, group home operators face significant barriers when trying to locate their group homes in single-family neighborhoods. The struggle has always found its way to the courts, and in the vast majority of cases courts have ruled in favor of the group homes. However, municipalities and organized property owners continue to block group homes from locating in their neighborhoods. Group home operators have differed in the approaches they use to protect the housing rights of their clients. Some choose to foster good relationships with potential neighbors and petition zoning boards or hold public hearings (prior to obtaining housing) to gain permission to live in single-family neighborhoods. If the petition is denied—most often due to public opposition—they sue the municipality. Others, firm in the belief that they are protected by vast federal court precedent, bypass the zoning process altogether or avoid notifying neighbors prior to obtaining housing. If sued by neighbors or local officials for violating zoning laws, they countersue under the Fair Housing Act or the ADA. Similar to the same-sex adoption case study where visibility was minimized, group home operators who sought to escape public awareness were able to withstand backlash and successfully obtain and maintain housing. That is, group home operators who elected to find and move into homes in residential neighborhoods without first seeking variances from the zoning board or conducting outreach to community members deliberately chose this method in order to avoid backlash from neighbors that would result in the loss of their home. These operators understood that choosing to conduct public outreach would incite public opposition, resulting in a protracted legal battle to protect their housing rights before they had a chance to move into the house and claim the residence as their own. Despite strong precedents that guaranteed their ultimate victory in court, a legal victory, absent any ownership claims on the house, would still render them homeless since the landlords or owners were under no obligation to keep the house available throughout the legal proceedings.

Fig. 2: Applying Soss and Schram’s Framework to Marriage, Parenting, and Housing Rights



To return to Soss and Schram's framework, then, the gay rights and group home case studies allow us to compare the incidence of backlash to high visibility issues with opposition to issues that have maintained a low profile. Same sex marriage exemplifies a high visibility, high proximity issue. Same sex parenting, alternatively offers insights into the merits of transforming what could be a high visibility issue into one that engenders little public interest. Similarly, the group home case study allows us to analyze the outcome of two different strategies: the first places the issue of disabled group housing rights in the upper right quadrant—promoting high local (and in some instances national) visibility. The second strategy employed by group home advocates minimizes visibility until after housing has been secured. The low visibility case studies, therefore, demonstrate the potential for court-based advocacy to successfully protect the rights and privileges of minority groups even in the presence of heavy public opposition. In both cases advocates deliberately chose lower visibility strategies in order to keep the issue below the radar of public political discourse. Gay rights advocates attempting to advance adoption and parental rights recognized the costs of employing social movement or mobilization tactics and instead chose low-visibility litigation tactics that were “narrowly tailored” to a specific policy goal in a particularized, case-by-case basis. Successful group home operators (those who were most likely to keep their homes) also acknowledged the pitfalls of public awareness and chose to circumvent zoning and other public proceedings, and went to court only after obtaining their housing. Was social reform achieved? It depends on the complex question of how one defines “success” in reform efforts. But against the litany of public law literature cautioning against the use of the courts to advance civil rights, the findings offer hope that the courts may still provide some solace for those vulnerable to the prejudices and whims of majority will.

Chapter 2: A Public Debate on Same Sex Marriage

In 1992 the issue of same sex marriage made its first real appearance on the national political stage when Pat Buchanan announced at the Republican National Convention that

There is a religious war going on in our country for the soul of America. We stand with [Bush] against the amoral idea that gay and lesbian couples should have the same standing in law as married men and women.

The RNC had recently adapted its platform to oppose granting sexual orientation protected class status under civil rights laws and to ban same sex marriage. During his acceptance speech Dan Quayle admonished the idea that “every lifestyle alternative is morally equivalent” and, in response to charges of “gaybashing” stated on *Good Morning America* that “most Americans think that lifestyle is wrong.”¹⁴ Gay and lesbian advocates feared that their community would be used by Republicans to strike fear in the hearts of conservative voters. “Never in the history of American politics have we seen such aggressive anti-gay campaigning,” argued a spokesperson from the National Gay and Lesbian Task Force.

President Bush and Dan Quayle have vilified and demonized gay people as a threat to patriotic, traditional American family values... The political establishment doesn't have the communists to kick around anymore. Then it was Willie Horton. That won't work this year, following the Los Angeles riots. That leaves gays and lesbians.¹⁵

Even though, at that time, no state had validated same sex marriage, the issue had been championed by the religious right as a call-to-arms against the moral decay of American society.

Not since the Supreme Court's ruling in *Roe v. Wade* had there been such a perfect storm of opportunity for conservative mobilization. In addition to striking a chord with members of the moral majority and others harboring discomfort with homosexuality, same sex marriage ignited a fierce defense of democratic values. Court-centered strategies used by gay couples may have added an extra layer of opposition to an already polarizing issue. (Jacobi 2006) Unlikely coalitions of straight Americans formed to oppose what were “seen as undemocratic courts and the too costly and illegitimate rights claims of an undeserving minority group.” (Rollins, 463 (reviewing Goldberg-Heller). Just as one's position on abortion has become the litmus test for commitment to traditional values, so to has one's position on same sex marriage. As early as 1992, presidential and vice presidential candidates (mostly Republican) sought to publicly clarify their animosity towards the legalization of homosexual unions. Even at the local level, political candidates used same sex marriage to disparage their opponents. In 1983 a candidate hoping to make a name for himself as the moral majority candidate for Virginia State Senate “accused” his

¹⁴ Christopher Connell, “Quayle Begins Battle for California,” *The Associated Press*, September 8, 1992.

¹⁵ Ellen Debenport, “Gays Fear They'll Be GOP's New Willie Horton,” *Capital Times*, August 19, 1992.

incumbent Democratic opponent of supporting homosexual marriage—much to the surprise of his opponent who had not really considered the issue.¹⁶

Like *Roe v. Wade*, and other landmark civil rights cases, the smattering of pro-same sex marriage cases are viewed as evidence, by political scientists, public law scholars, pundits, and politicians, of the courts' inability to advance social change. In the now age-old argument that pits legislative power against judicial review, some scholars cite the very public failure of same sex marriage court opinions to dismantle opposition in any but a few states as evidence of the courts' limited reach on issues that buck majority will. This chapter, which serves two purposes, provides a history of the evolution of same sex marriage in the United States and a discussion of its increased visibility and salience in national politics. First, the chapter demonstrates why same sex marriage litigation serves as a prime example of the type of high profile case that is often discussed by public law and political science scholars who question the potential for litigation to promote social change and caution its potential to provoke backlash. Second, the issue of same sex marriage will be revisited in chapter 3 as a source of comparison to the struggle for same sex parental rights in order to identify whether the low-profile strategy used by parenting advocates helped to reduce backlash.¹⁷

The Evolution of Same-Sex Marriage

As with many court-based movements, the high-profile fight to legalize marriage between same sex couples was launched from humble beginnings. Although many credit the *Baehr v. Lewin* plaintiffs as the first couples to test the limits of heterocentric marriage statutes, attempts to expand marriage to include same sex couples began in the early 1970s—although with little support from courts. In 1970 two gay men, Jack Baker and Michael McConnell asked the city of Minneapolis to validate their relationship with a marriage license. They were denied the license and appealed the decision to the state supreme court. The court dismissed the couple's statutory and constitutional claims, arguing that procreation and child-rearing were essential elements of marriage and thus validated state prohibitions on homosexual marriage. Childless heterosexual couples, asserted the court, were theoretical imperfections; their existence did not require the court to constitute a ban on same sex marriage as an equal protection violation.¹⁸ The couple appealed to the US Supreme Court. In October 1972 the Court refused to review the case.

Baker and McConnell were not new to the world of gay activism and were not easily discouraged. Baker had recently been elected student body president of the University of Minnesota-Twin Cities as a law student, making him the first openly gay individual elected

¹⁶ Celestine Bohlen, "Ex-Moral Majority Aide Seeks to Unseat Lynchburg Senator," *The Washington Post*, October 9, 1983, B1.

¹⁷ This project does not make any assertions as to whether gay marriage advocates had a choice of strategy to pursue. Rather this case study is used to illuminate a potential causal relationship that may exist between the tactics developed by same sex parenting advocates (to reduce opposition) and the noticeable lack of backlash to this issue.

¹⁸ *Baker v. Nelson* (291 Minn. 310, 1971).

student body president of any major university.¹⁹ While pursuing their Supreme Court appeals, the couple simultaneously pursued adoption as a strategy to gain mutual legal protections. In August 1971 a Minneapolis court approved the adoption of Jack Baker by Michael McConnell.²⁰ In 1972, the couple was married by a Methodist minister, and as many married couples do, decided to file joint tax returns that year. Three years later the couple received word from the IRS that they had misfiled their '72 and '73 tax returns as joint returns and were owed \$309 in tax savings under their readjusted status as two single men. The couple refused the refund and appealed the decision.²¹

Anthony Sullivan and Richard Adams successfully secured a marriage license from a Boulder, CO county clerk in April 1975, after the clerk had received approval from the District Attorney's office. Six other couples had received marriage licenses from the same clerk who later stated in an interview that the matter could be resolved simply by using the term "person" in lieu of any gender pro-nouns in the statute.²² The INS later invalidated the couple's license while pursuing deportation charges against Sullivan, an Australian citizen. In a letter to the couple, an INS official stated, "You have failed to establish that a bona fide marital relationship can exist between two faggots."²³ The letter was later rescinded and replaced with the following, more politically correct, language:

[the male partner in a homosexual relationship] cannot function as a wife by assuming female duties and obligations inherent in the marital relationship. A union of this sort was never intended by Congress to form a basis of a visa petition.²⁴

The couple lost their fight against deportation in several federal court challenges and left the United States in 1985.

By 1977, Anita Bryant's campaign to send gays back into the closet was in full swing. The Florida legislature passed two bills curtailing the rights of homosexuals to marry each other or adopt children. California passed a law preventing clerks from issuing marriage licenses to gay couples. Anti-homosexual sentiments were a source of pride among the public officials leading the crusades. Boasts one Florida senator:

I would hope they would take this as a message that we are tired of you and wish you would go back in the closet. The problem in Florida is that homosexuals are surfacing to such an extent that they are infringing on average normal people who have a few rights too.²⁵

¹⁹ <http://special.lib.umn.edu/rare/trettersample.phtml>

²⁰ "The Law: Adopting a Lover," *Time Magazine*, September 6, 1971.

²¹ *New York Times*, January 5, 1972.

²² *New York Times*, April 27, 1975.

²³ *Associated Press*, March 15, 1979.

²⁴ *Associated Press*, March 15, 1979

²⁵ *Associated Press*, May 31, 1977

By the late 70s opponents were able to capitalize on anti-homosexual sentiments and fears of same sex marriage to obstruct the passage of the ERA in some states by arguing that the amendment would require the legalization of same sex unions. One Michigan gubernatorial candidate attempted to besmirch the character of ERA sponsors as “proponents of lesbian marriage, homosexual marriage.”²⁶ Even as Congress revisited the issue, and attempted to repackage the ERA in 1983, they had to contend with the specter of gay marriage as Phyllis Schlafly and other ERA opponents reminded conservative members of Congress and the public of the amendment’s slippery slope into same sex unions.

However, with the losses came a few victories. While Bryant and Schlafly waged their war against gays, several advances were being made on behalf of the gay community, interestingly from mainstream straight organizations. As one gay rights advocate describes of the 1980s advancements in California:

Nobody was even pushing that issue in the gay community in California. It was well-meaning straight people who took the debate away from us.²⁷

For instance, although the Episcopal Church expressly forbade priests from blessing homosexual unions, several factions within the Episcopal Church began to question this policy. Some even publicly fought the church, at great risk to their own positions within the church. In 1984 the Unitarian Universalist Fellowship became the first major denomination to publicly support gay unions.²⁸

Researchers began to view gay relationships as legitimate terrain for the study of intimacy rather than simply aberrant sexual behavior. In 1978 two researchers embarked on a study of the elements that lead to successful partnerships. The study included unmarried and married homosexual and straight couples.²⁹ City governments began to offer domestic partnerships to gay couples. Following Harvey Milk’s assassination, the San Francisco Board of Supervisors unanimously voted to offer city employees the same benefits to both unmarried as well as married couples, gay or straight.³⁰

Despite these advances, national gay rights groups remained silent on the subject of marriage—or displayed ambivalence about the appropriate course of action. While individual gay couples, such as a lesbian couple in Kansas in 1980³¹, continued to apply for wedding licenses, the gay community and its advocacy organizations were split. Some recognized the “symbolic as well as legal message”³² that marriage would provide gay and lesbian couples. As the Director of

²⁶ *Associated Press*, October 22, 1982.

²⁷ Philip S. Gutis, “Small Steps Toward Acceptance Renew Debate on Gay Marriage,” *The New York Times*, November 5, 1989

²⁸ *Associated Press*, June 29, 1984.

²⁹ Jane Brody, *The New York Times*, November 14, 1978

³⁰ *Associated Press*, November 10, 1982.

³¹ *United Press International*, October 3, 1980.

³² Gutis, 1989

Lambda Legal articulated, “Gay relationships will continue to be accorded a subsidiary status until the day that gay couples have exactly the same rights as their heterosexual counterparts.”³³ However others questioned whether striving for marriage equality was at best “assimilationist” and would render the gay community invisible or at worst would subject gay relationships to a sexist and oppressive institution. For instance, Lambda’s legal director was an outspoken skeptic of same sex marriage, and argued that it “will constrain us, make us more invisible, force our assimilation into the mainstream, and undermine the goal of gay liberation.”³⁴ It wasn’t until the mid 1980s when mainstream civil rights organizations entered the fight to expand marriage to same sex couples. In 1986 the American Civil Liberties Union became the first mainstream civil rights group to publicly announce its intention to pursue marriage equality for gay couples. Up until their announcement in October, the ACLU believed “that homosexuals should be treated equally by the law” but focused their advocacy efforts “on job discrimination, implying but not explicitly stating support of homosexual marriage.”³⁵

Even after the Supreme Court in Hawaii stood on the brink of legalizing same sex marriage gay rights activists and leaders remained publicly divided over the best way to proceed. Some felt that other issues needed to take priority. Argued the Deputy Director of the Gay and Lesbian Victory Fund,

with the number of issues that gays and lesbians and their friends and families have to face - health care, punishing hate crimes, ending workplace discrimination - I think that marriage is a little lower on the priority scale for a lot of people.³⁶

Others advocated for a more localized and incremental approach. Rep. Barney Frank, who had become openly gay in 1987, chastised the marriage “movement” and asserted that activists “made a mistake pushing for national gay marriage---its bad law and worse politics.” As Dan Pinello concludes

It’s no wonder these early lawsuits miscarried. Lone couples, unsupported by organized lesbian and gay interests, made ad hoc assertions of novel social and constitutional positions, often without the benefit of legal arguments orchestrated by seasoned advocates. (23)

The conservative movement capitalized on the gay community’s indecision. Opponents to gay marriage wisely characterized the isolated attempts by gay couples to secure marriage licenses as part of an organized machine designed by gay political elites to trample traditional values and promote an alternative lifestyle. In reality, the push for marriage among some gay couples was born out of the sincere efforts of gay individuals, many of whose partners were suffering from or had passed away from AIDS or who, themselves, were HIV positive, to secure health and

³³ Ibid.

³⁴ Ibid.

³⁵ Associated Press, October 28, 1986.

³⁶ Steven Vegh, “Marriage Ban Proposal Heading for Legislature” *Post Press Herald Maine Sunday Telegram*, February 8, 1997.

survivor benefits. By the mid-to-late 1980s, in anticipation of a potentially pro-gay Supreme Court ruling in *Bowers v. Hardwick*³⁷, the moral majority and conservatives in general had developed a series of rhetorical attacks on same-sex marriage. Although the Court ultimately upheld the Georgia statute that criminalized sodomy, many feared that a different decision would have opened a “Pandora’s Box of efforts to extend privacy rights to polygamy, homosexual marriage” and a whole host of evils.³⁸ In 1989, the Family Research Council, under the leadership of Gary Bauer, stood ready to defeat any attempt to legalize marriage for same sex couples. Bauer viewed marriage equality “as a major battleground of the 1990s;” any advancement on this issue would “undermine deeply held and broadly accepted ideas of normalcy.”³⁹ By the time the Hawaii Supreme Court weighed in, in 1993, and some mainstream gay rights organizations began to participate, the anti-gay marriage movement had already formed and was ready for battle.

Hawaii

It was not a foregone conclusion that Hawaii would become ground zero for the modern fight for marriage equality. As stated earlier, similar demands for marriage licenses date all the way back to the 1970s, and we know that at least 6 couples in Colorado succeeded in receiving these licenses. In the early 1990s several couples requested marriage licenses in Chicago and one couple asked a Washington, DC clerk to grant them a license. When denied, the DC couple took the issue to court. They secured representation from William Eskeridge—a Georgetown law professor and well known gay rights scholar—and argued that the denial violated the District’s human rights code, which outlawed discrimination based on sexual orientation. A DC Superior Court judge ruled that the issue needed to be clarified by the legislature, not a court, but found that, historically, there were specific gender-differences implied in the definition of marriage.⁴⁰ The couple appealed the case, sending DC government into a bit of a tailspin. DC corporate counsel argued that the denial was valid. However, the DC Human Rights Commission advised the city that the couple’s rights had been violated. It was the first time in its history that the Commission disagreed with DC corporate counsel.⁴¹ As the case made its way through the DC courts, Congress deliberated over a domestic partnership bill for the District, supported by DC public officials, including the mayor who had ran on a pro-gay rights agenda.

Gay couples in Texas were making headway as well. An Austin newspaper ran a paid announcement celebrating the recent nuptials of a lesbian couple.⁴² A state district judge overturned the state’s ban on same sex marriage. In fact, there was so much national buzz on the issue in 1992 that Dan Quayle weighed in during the presidential election stating that “so-called

³⁷ 478 U.S. 186 (1986)

³⁸ Stuart Taylor, Jr. “Supreme Court Hears Case on Homosexual Rights,” *The New York Times*, April 1, 1986, A24.

³⁹ Gutis, 1989

⁴⁰ Catherine Touns, “Judge Rejects Proposal by Gays,” *The Washington Times*, January 3, 1992.

⁴¹ “Same Sex Marriage Leads to Court Battle,” *Washington Times*, November 30, 1992.

⁴² “Newspaper Focus of Gay Marriage Flap,” *United Press International*, July 15, 1992.

gay marriage and...a heterosexual marriage are not the same thing and should not be treated as the same.”⁴³

Perhaps what made Hawaii different was simply a matter of luck. As Evan Wolfson, the attorney who managed to convince a still skeptical Lambda Legal to at least marginally support the case, recalls

There happened to be changes in the composition of the court, really just within a few months of the case making it there, that brought us a babyboomer bench that was ready to hear it. That was just a matter of luck. So one lesson is, sometimes you get lucky.
(Pinello, 27)

But the Hawaii Supreme Court’s ruling in May 1993 was a game-changer in the fight for marriage equality. Although the court fell short of granting marriage rights to same-sex couples and remanded the issue to the lower court review under a higher level of scrutiny, the court’s decision was treated as a sign of things to come—on both sides of the aisle. Conservatives panicked over what an affirmative gay marriage court ruling by a court of last resort would mean for other states. Would full faith and credit require other states to validate the gay marriages performed in Hawaii? Could traditional marriage really be dissolved by the opinion of a few state court judges? Gay rights advocates attempted to take control of the message as they sat on the precipice of marriage equality but faced a well-funded and tightly organized conservative coalition. But one thing was clear. Gone were the days of gay couples quietly marching to city hall to request a wedding license with a mere whisper in the headlines. Gay rights organizations were forced to take a stand. Wolfson, who had been one of few representatives from gay rights organizations on the front line of the Hawaii case, confronted elites in the gay community.

Whatever you thought before, the world had just changed. This is a major ruling. A court has said that, unless the government can why a good reason why same-sex couples shouldn’t be married, the state constitution requires it. Now is our time to make that case forcefully. (Pinello, 26)

From here on out, regardless of the final outcome in Hawaii, the issue would be fodder for political conservatives hoping to build a reputation among values voters, pundits interested in stirring the pot of political gossip, and progressives attempting to bring the realities of the gay lifestyle out of the closet and into the light of day.

Backlash

The celebration over the landmark decision in Hawaii proved short-lived in the wake of local and national backlash. The Hawaii legislature immediately crafted language providing, in their opinion, a compelling state interest for banning same sex marriage. Succumbing to pressure from state officials and conservative activists, Congress passed, and President Clinton signed

⁴³ Christopher Connell, “Quayle: Disagrees with Alternative Lifestyles ‘Not Gay-Bashing’” *The Associated Press*, August 21, 1992.

into law, the Defense of Marriage Act in 1996, which established a federal definition for marriage as between a man and a woman and permitted states to disregard same-sex marriages from other states. In 1998 Hawaiian voters responded to the court's decision by constitutionally removing gay marriage from the courts' jurisdiction. (Reed 1998). Recalls Wolfson, "Hawaii mounted this tremendous political resistance and counterattack and challenge that, on the ground there, we were completely unprepared to meet." (Pinello, 27)

Despite the backlash, gay couples continued their quest for marriage equality...and the courts began to respond. In 1998 a superior court judge in Alaska defined marriage as a fundamental right, requiring the state to provide a compelling reason for denying this right to same-sex couples.⁴⁴ Once again, backlash prevailed. Before the state's supreme court could weigh in, voters amended the constitution to ban gay marriage.⁴⁵ In 1999 Vermont became the third state to consider the issue. Perhaps seeing the writing on the wall, the court adopted a more cautious approach—one that worked with rather than against the legislature.⁴⁶ In its decision the court permitted the legislature to enact either same-sex marriage or "domestic partnerships" that would grant same-sex couples the same benefits as those enjoyed by their heterosexual counterparts. Four years later, in the aftermath of the U.S. Supreme Court's decision in *Lawrence v. Texas* (2003) (rendering anti-sodomy statutes that target gays and lesbians unconstitutional) the Supreme Judicial Court in Massachusetts granted same-sex couples the right to marry in *Goodridge v. Department of Public Health* (2003). Unlike the Vermont Court, the *Goodridge* Court left no room for civil unions. When asked by the Massachusetts Senate to advise the legislators as to whether civil unions were acceptable, the court provided an unequivocal "no." Reiterating arguments from their November ruling, the Justices characterized the denial of full marriage equality as an "exclu[sion] from the full range of human experience." In October 2006 the New Jersey Supreme Court followed Vermont's lead and ruled that same-sex couples are constitutionally guaranteed the "full rights and benefits enjoyed by heterosexual married couples." (*Lewis v. Harris* 908 A. 2d 196 - 2006).⁴⁷

The fight for marriage equality has proven to be a mixed bag of blessings and setbacks for the gay community and continues to be debated by activists and scholars alike. On the one hand, the

⁴⁴ *Brause and Dugan v. Department of Vital Statistics*, Feb. 27, 1998.

⁴⁵ Before 2004, four states used the ballot to either ban same-sex marriage or forbid the courts from legalizing the practice: Alaska, Nebraska, Nevada and Hawaii. (Christine Vestal, "Gay Marriage Ripe for Decision in 3 Courts," Stateline.org, March 1, 2007).

⁴⁶ Ruth Bader Ginsburg (1992) argues that the Roe Court made a mistake in moving ahead of, rather than working with, the legislature. She advocates for a more cautious approach—similar to that used in *Brown v. Board of Education*. Ruth Bader Ginsburg, "Speaking in a Judicial Voice," *New York University Law Review*, Vol. 67, No. 6, 1992.

⁴⁷ Since 2006 same-sex marriage has been legalized by legislatures or courts in California, Connecticut, Iowa, Maine, New Hampshire, Vermont, and the District of Columbia. New York, Maryland, and Rhode Island recognize same sex marriages from other states to some degree. California's same-sex marriage decision was overturned by a constitutional amendment banning same-sex marriage. Maine's legislative attempt to legalize same sex marriage was overturned at the ballot box.

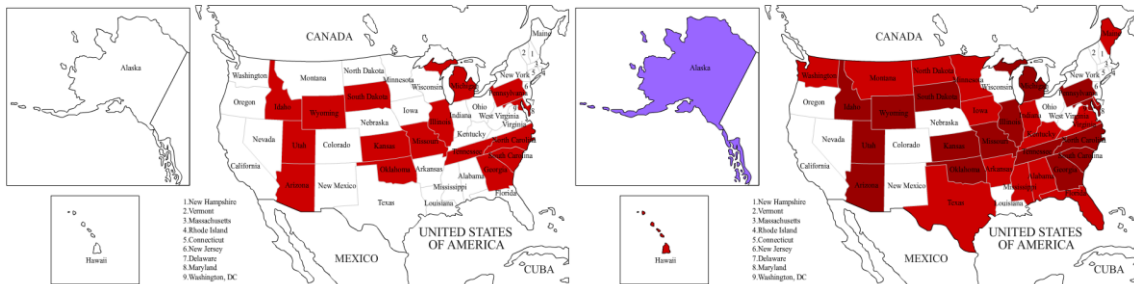
fact that as of 2010 13 states (and the District of Columbia) have extended full marriage benefits to gay couples (7 of which do so through civil unions, domestic partnerships, or the granting of benefits to out-of-state same-sex marriages) would have been thought inconceivable even 15 years ago. Consequently, we now have thousands of real couples attached to the issue of same sex marriage, which will severely constrain arguments that attempt to caste the issue of same sex marriage as irrelevant or its beneficiaries as marginal. Court victories have inspired gay couples in other states to demand marriage equality and have provoked a mass “outing” of gay couples in the form of protests and public nuptials. The polarized nature of same sex marriage debates, which pit progressive judicial opinions granting full marriage rights against calls to defend traditional marriage has rendered civil unions and domestic partnerships the moderate approach. (Keck 157-159)

Yet, these victories came at a huge loss to gay and lesbian individuals residing in a majority of the states, where neither marriage nor civil unions are an option, because of statutory and constitutional bans. Although any public discourse on the merits of granting same sex marriage is certainly a step toward at the very least tolerance of gay relationships, the highly negative tone of this discourse is surely taking its toll. While backlash should not be the sole measure of the gay marriage movement’s success, it certainly warrants analysis. As figures 1a-f demonstrate, between 1996, when Congress first passed the Defense of Marriage Act and 2000 the vast majority of states passed state-level DOMAs. As the gay marriage movement gained more steam, indirectly through *Lawrence v. Texas* and directly in response to *Goodridge*, states grew skeptical of their ability to safeguard traditional marriage through statutory language. Between 2004 and 2006 the second front of anti-gay marriage ballots hits the states in the form of constitutional bans. In total, by the end of 2006 gay marriage had been barred by either statute or constitutional amendment in 45 states.

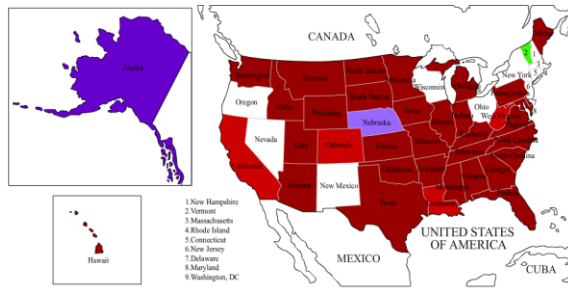
Fig. 1A-F: Progression of Anti- and Pro Same Sex Marriage Policies Across the United States: 1996-2006

A. 1996

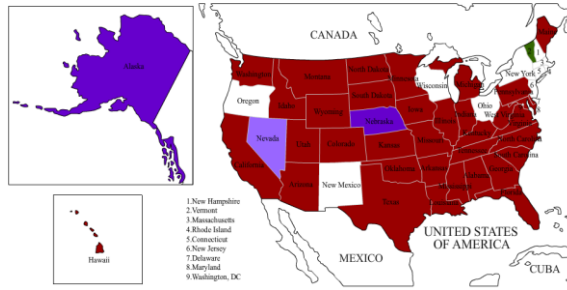
B. 1998



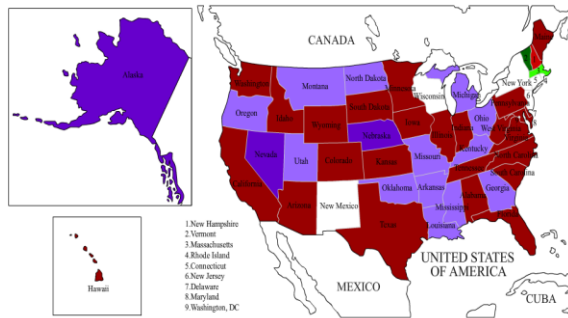
C. 2000



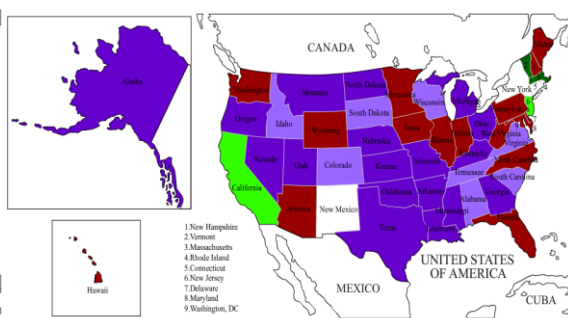
D. 2002



E. 2004



F. 2006



- New Statutory Bans
- New Constitutional Bans
- New Pro-Gay Cases/Statutes
- Existing Statutory Bans
- Existing Constitutional Bans
- Existing Pro-Gay Cases/Statutes

Public Opinion

Not surprisingly public opinion polls reflect the public's unwavering opposition to same sex marriage. As early as 1988, when only 12% of individuals polled supported same sex marriage, Americans have comfortably opposed these unions. While there has been great progress since 1988, and some instances where surveys reported close margins, as of a July 2006, 56 percent

still opposed the practice.⁴⁸ Recent polls indicate that a majority of the public still opposes same sex marriage.⁴⁹

According to a July 2006 nationwide survey conducted by The Pew Forum on Religion and Public Life, a majority of Democrats, Independents, and Republicans who have an opinion on same sex marriage oppose it—although a significantly larger percentage of Republicans (85%) oppose the practice relative to Democrats and Independents (52% of each).⁵⁰ Men and women are equally opposed to same sex marriage. Younger individuals are less opposed than older participants in the survey, as are white individuals relative to participants identifying as Black. A slim majority of college graduates opposes same sex marriage, while those who attend religious services at least weekly are overwhelmingly opposed (82%).

There are many factors that predict opposition to same sex marriage. For instance, Brewer (2008) finds that individuals with gay or lesbian acquaintances have higher levels of support for same sex marriage. I use the block recursive approach showcased in Egan et al's recent study of gay rights (Egan, Persily, and Wallsten 2008) to explore this issue further. This method allows us to identify the direct and indirect effects of specific variables on attitudes toward gay marriage. Explanatory variables are classified into a set of blocks or categories, which are causally linked. The blocks of variables are then assessed in stages, according to their position in the causal chain, until the model has been evaluated in full. Through this approach one can see how the addition of new independent variables may have an impact on the relationship between the previously tested variables and the dependent variable. For instance, in Model II we see that graduating from college is significantly associated with a decrease in support for same sex marriage. However, being a college graduate loses its significance in the final model, which includes one's opinion on whether sexual orientation can be changed.

Borrowing from Egan et al. I argue that the causal relationship between the independent variables and opinion on same-sex marriage is as follows: an individual forms their opinion about same-sex marriage through the lens of basic demographic variables such as their age, gender or race/ethnicity. The effects of these basic characteristics are then mitigated by long-term factors such as marital status, education, or whether and how often they attend religious services. A person's values and political orientation, measured by ideology, party affiliation, and whether they believe that the bible is the "word of God" also influence an individual's opinion (as measured in Model III), as does their opinion on other gay rights issues (see Table 1).

⁴⁸ Gallup reported 42/55 split between support and opposition in 2004. Pew found a 12-point spread between supporters and opposers in March, 2006. In July 2006, according to Pew, 35% of the public supported same sex marriage and 56% opposed it.

⁴⁹ "Majority Continues to Support Civil Unions; Most Still Oppose Same Sex Marriage," Pew Forum on Religion and Public Life, October 9, 2009.

⁵⁰ I use this survey because it is the most recent of two surveys commissioned during the 2004-2006 period when backlash against same sex marriage peaked that also asks participants to state their opinion on same sex adoption. I will compare opinion on these two issues in Chapter 3.

Table 1: Multivariate Analysis of Same Sex Marriage Opinion

	Model I	Model II	Model III	Model IV
Basic Demographics				
Age	***0.013 (0.002)	***0.010 (0.002)	***0.009 (0.003)	***0.010 (0.003)
White	*-0.142 (0.069)	-0.125 (0.072)	** -0.246 (0.081)	-0.235 (0.119)
Gender	** -0.150 (0.051)	***-0.267 (0.053)	***-0.264 (0.058)	** -0.267 (0.090)
Long Term Characteristics				
Married		*0.127 (0.055)	0.093 (0.059)	0.155 (0.090)
Collgrad		***-0.437 (0.054)	***-0.262 (0.060)	-0.117 (0.091)
Rel.attend.		***1.035 (0.069)	***0.500 (0.081)	**0.307 (0.120)
Political Views/Values				
Partyid			***0.514 (0.076)	***0.450 (0.114)
Ideology			***-1.214 (0.141)	***-1.185 (0.217)
Word of God			***1.153 (0.096)	***1.115 (0.150)
Beliefs about Gay Issues				
Gays can change				***0.496 (0.097)
N	1809	1781	1608	707

Source: Pew Forum on Religion and Public Life, July 2006 Survey

*p < .05; **p < .01; ***p < .001 (two tailed); items in parentheses are standard errors

The dependent variable, opinion on gay marriage, is scaled 0 to 1, with 1 representing strong opposition. Respondents were asked to state whether they strongly favor; favor; oppose; or strongly oppose same-sex marriage.⁵¹ The models are estimated using ordinal probit. For ease of interpretation I have included the “first differences” for the final model in Table 2. These coefficients should be interpreted as the shift in the predicted probability of strongly favoring, favoring, opposing, or strongly opposing same sex marriage with a shift from the minimum to the maximum value of the independent variable in question.⁵²

⁵¹ Respondents who answered “I don't know” were not included in the analysis.

⁵² The variable “age” uses a one standard deviation shift from the mean age, rather than a shift from the minimum to maximum age to interpret the variables impact on the dependent variable.

Model I indicates that white individuals and women are significantly less likely to oppose same-sex marriage. Older individuals are more likely to oppose the practice. Model II finds that being married and attending religious services increases one's likelihood of opposing gay marriage. A college graduate is less likely to oppose same-sex marriage. In the presence of these new variables the coefficient on race has become insignificant.

Identifying as a Republican increases opposition toward same-sex marriage (Model III). Classifying oneself as conservative and or believing that the bible is the "word of God" is more predictive of opposition to same-sex marriage than is identifying as liberal or believing that the bible is the word of man. Interestingly, race is now significant. Not surprisingly, feelings toward gays and lesbians on other policy issues strongly predict opinion on marriage between gays and lesbians. In this model (Model IV) we test the effect of an individual's belief about the mutability of sexual orientation on opinion toward same sex marriage. Much of the literature on same sex marriage argues that belief in the immutability of sexual orientation contributes to more liberal perspectives on a range of gay rights issues. That argument is supported here; support for same-sex marriage increases among individuals who believe that gays and lesbians cannot change their sexual orientation.

Table 2: First Differences Model IV

	Strongly Favor	Favor	Oppose	Strongly Oppose
Age ^a	-0.015	-0.044	0.010	0.050
White	0.020	0.064	-0.008	-0.076
Gender	0.026	0.073	-0.016	-0.082
Married	-0.015	-0.042	0.010	0.047
College Grad	0.011	0.032	-0.008	-0.036
Rel. Attendance	-0.031	-0.083	0.022	0.092
Party Id	-0.044	-0.122	0.028	0.138
Ideology	0.135	0.289	-0.083	-0.341
Word of God	-0.130	-0.274	0.087	0.317
Gays Can Change	-0.046	-0.134	0.024	0.155

^aCoefficients represent the shift in probability of strongly favoring, favoring, opposing, or strongly opposing same sex marriage when the independent variable shifts from the minimum to the maximum value for all variables except age. The coefficient on age is the shift in probability of being in one of the four categories of the dependent variable with a standard deviation shift from the mean age. A standard deviation shift in age is 16 years

As stated earlier, the values in Table 2 allow us to substantively interpret the findings in Model IV. For instance, a one standard deviation shift from the mean age of 51 increases the likelihood of strongly opposing same sex marriage by approximately 5 percentage points. Being female decreases the probability of strongly opposing same sex marriage by 8 percentage points. The likelihood of strongly opposing same sex marriage increases by 9 percentage points with a shift from never attending religious services to attending more than once per week. The analysis

suggests that party affiliation and ideology play a critical role in same sex marriage opinion formation. A shift from Democrat to Republican increases the probability of strongly opposing same sex marriage by 14 percentage points; likewise, a shift from very conservative to very liberal decreases strong opposition by 34. Interestingly, this shift in ideology only increases strong support for same sex marriage by 14 percentage points. Believing that the bible is the word of God has a similarly large effect, increasing the likelihood of strongly opposing same sex marriage by 32 percentage points (and decreasing the probability of either strongly favoring or favoring the practice by approximately 12 and 27 percentage points, respectively). Finally, supporting the notion that gays and lesbians can alter their sexual orientation increases strong opposition toward same sex marriage by 15 percentage points.

Table 3: The Effect of Opinion on Same Sex Adoption

		Strongly Favor^a	Favor	Oppose	Strongly Oppose
Age	**0.007 (0.003)	-0.005	-0.037	0.009	0.033
White	-0.155 (0.124)	0.006	0.046	-0.009	-0.044
Gender	-0.179 (0.090)	0.007	0.054	-0.014	-0.048
Married	0.053 (0.091)	-0.002	-0.016	0.004	0.014
Collgrad	0.013 (0.093)	-0.001	-0.004	0.001	0.004
Religious Attendance	**0.435 (0.159)	-0.020	-0.133	0.040	0.112
Party Id	**0.355 (0.117)	-0.015	-0.107	0.028	0.094
Ideology	*-0.556 (0.226)	0.025	0.168	-0.048	-0.145
Word of God	***0.797 (0.156)	-0.040	-0.238	0.076	0.202
Same Sex Adoption Opinion	***3.005 (0.183)	-0.334	-0.512	0.195	0.651
N	751				

^aCoefficients represent the shift in probability of strongly favoring, favoring, opposing, or strongly opposing same sex marriage when the independent variable shifts from the minimum to the maximum value for all variables except age. The coefficient on age is the shift in probability of being in one of the four categories of the dependent variable with a standard deviation shift from the mean age. A standard deviation shift in age is 16 years. *p < .05; **p < .01; ***p < .001 (two tailed); items in parentheses are standard errors

In chapter 3 I compare backlash against same sex marriage court rulings to that of same sex parenting. To facilitate this comparison, in Table 3, I test the effect of adding opinion on same sex adoption to the model on same sex marriage. Not surprisingly, and similar to the effect of

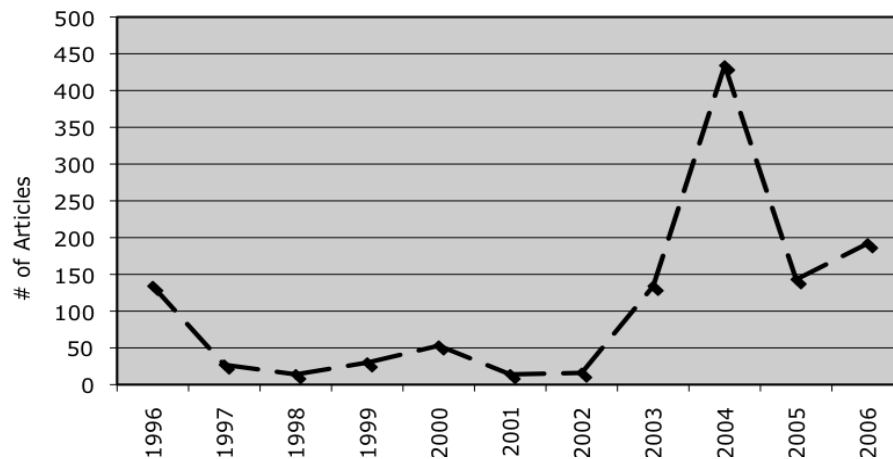
one's opinion on the mutability of sexual orientation, we find that opinion on same sex adoption is highly predictive of opinion on same sex marriage. In addition to its high significance we find that a shift from strong agreement to strong disagreement on same sex adoption results in a 65-percentage point increase in the likelihood of strongly opposing same sex marriage. The independent variables tested in Model IV retain their significance.

Media Coverage

Issue salience and framing are critical components of any successful backlash campaign. As stated in Chapter 1, visible campaigns or court decisions are more likely to incite opposition than are decisions or policies with low visibility. The media plays a big role in elevating issue salience, and helping individuals prioritize policy interests. (Iyengar and Kinder 1987; McCombs 2004). It goes without saying that same-sex marriage is a high profile issue. It has been difficult during the last two election cycles to turn on the television, read a newspaper or follow politics in general without hearing about national debates concerning gay marriage. This is not the case for all gay rights issues. Same sex adoption, for instance, has experienced very little coverage both at the national and local level.

Epstein and Segal (2000) argue that issue salience (specifically in judicial politics) can be measured through mentions in the *New York Times*.⁵³ Using this approach we see that same-sex marriage receives a lot of public scrutiny. Figure 1 charts the number of articles on same-sex marriage published by *The New York Times* from 1996-2006. Coverage of same-sex marriage reaches into the hundreds—totaling 434 in 2004—during periods of high court activity.

Figure 2: *New York Times* Coverage: 1996-2006



⁵³ Epstein and Segal focus their study on the US Supreme Court—which is always more likely to draw attention in national newspapers when compared with state supreme courts. I attempt to address this issue by supplementing the New York Times analysis with local newspapers as well.

Table 4: Local Coverage Same-sex Marriage 1996-2006

Year	Marriage articles	Marriage editorials
1996	594	66
1997	186	32
1998	181	37
1999	192	45
2000	202	90
2001	76	21
2002	66	0
2003	919	387
2004	2631	524
2005	861	213
2006	1304	411

Source: Lexis Nexis; articles with same sex marriage, gay marriage or homosexual marriage in headline or lead paragraph

However, one drawback to relying exclusively on *New York Times* coverage of these issues is that, other than focusing on New York issues, the *New York Times* will prioritize issues with a national significance. State and local newspapers cover different topics than media outlets with a national audience. (State of the Media 2006). Table 4 reveals that same-sex marriage consistently receives significant attention at the local level.

On the one hand, increased media coverage could positively influence opinion towards same sex marriage. Just as familiarity with gay individuals increases support for gay unions, so too might exposure to gay couples through media coverage. However, media coverage could also have a negative effect on opinion formation, depending on the valence of the articles. Brewer finds that elite cues about same sex marriage significantly influence support for the issue. In disseminating these elite cues (most of which are negative⁵⁴), media coverage may negatively influence opinion formation.

To test this, I supplement the final model with a media coverage variable representing the square root of state level coverage on same sex marriage between July 2005 and June 2006—in other words, the year leading up to the survey (Appendix A).⁵⁵ Since states varied significantly in their coverage, in part due to variations in state level activity on the issue I also add a variable indicating whether or not same sex marriage was banned in the participant's state through initiative or referenda. Findings indicate that media coverage is positively and significantly related to opposition toward same-sex marriage. A shift from minimum to maximum values of the square root of media coverage yields a 15-percentage point increase in the probability of strongly opposing same sex marriage.

⁵⁴ In his analysis of media coverage of same sex marriage, Rosenberg (2008) finds, overall, that the tone is negative.

⁵⁵ This model includes a variable to control for number of newspapers per state. The variable for media coverage is the square root of the total number of articles on marriage in a given state between July 1, 2005 and June 30, 2006.

Salience in Politics

In addition to high levels of media coverage, same sex marriage has become a salient issue in national politics. As a rhetorical device during national election campaigns, same sex marriage has achieved the stature of abortion. For instance, an analysis of 2004 presidential campaign speeches of Bush and Kerry reveals that, for Bush, the issues of gay marriage and abortion go hand-in-fist. In all but two instances, where abortion is mentioned so too is gay marriage, with equal attention and intensity. In over 60% of his campaign speeches Bush reminds his audience that his administration

stand[s] for a culture of life in which every person matters and every person counts. We stand for institutions like marriage and family, which are the foundations of our society. We stand for judges who strictly and faithfully interpret the law. (Defending the War, York, PA, July 9, 2004)

Towards the end of the campaign he refers explicitly to Kerry's vote against the Defense of Marriage Act in the same breath as his vote against the Partial Birth Abortion Act.⁵⁶ And although the effect of same sex marriage on the outcome is still up for debate, its use as a catalyzing issue for "values voters" by Bush has had a tremendous impact on the progress of the issue itself. While the presence of ballot initiatives banning same sex marriage may not have altered the outcome of the 2004 election (see Smith, DeSantis, and Kassel 2006), the highly public debate on same sex marriage led by an incumbent president during a controversial re-election campaign likely influenced the trajectory of gay marriage policies across the states.

Opposition Strategies

The use of same-sex marriage as a catalyst for conservative voters, and the success of opponents to not only thwart state-level attempts to legalize marriage but to forestall any future effort through the use of constitutional amendments, can be credited in part to the development and use of sympathetic strategic frames. While the idea of marriage equality for same sex couples taps into issues of religion, morality, and values, elites opposed to same sex marriage have framed the debate as an issue of children's welfare. Focus on Family, the leading organization in the fight against same sex marriage, opposes the practice because it will confuse children about sexual orientation and will deny them the benefits of parents who are committed to each other over the long-term. James Dobson, the group's founder, explicitly asserts that gay marriage will lead to same-sex adoption, to an increase in the placement of foster care youth in gay households, and increased custody rights for gay parents.⁵⁷ In its arguments in *Goodridge*, the State of Massachusetts asserted that banning same-sex marriage helped to preserve child rearing in "two-parent biological families." During congressional hearings, supporters of the Defense of Marriage Act and the Federal Marriage Amendment argued that the mission of traditional

⁵⁶ Same sex marriage and abortion are equally absent in John Kerry's presidential campaign speeches.

⁵⁷ A review of Dobson's arguments can be found at www.familyfocus.org.

marriage, and therefore the primary justification for protecting the institution, is child rearing—and specifically child rearing by fathers and mothers. For instance, hearings on the Federal Marriage Amendment in 2004 highlighted the negative impact that same sex marriage would have on child well-being and family stability. In support of the amendment Senator Rick Santorum argued that

[m]arriage is about children. Marriage is about the glue that holds the basic foundational societal unit together, and that is the family. When we change the composition of that glue, we weaken the bonds of marriage and then we weaken the American family.⁵⁸

In their analysis of these hearings, Liu and Macedo (2005) find that two claims emerge: “traditional heterosexual marriage protects and fosters the well-being of children” and “same sex matrimony would spell the end of marriage itself.” (211) The absence of any backlash against the Supreme Court’s 2003 decision to deem unconstitutional laws that criminalize sodomy, argue Liu and Macedo, provoked same sex marriage opponents to frame their arguments in ways that would not condemn homosexuality, but would cast doubt on the merits of legalizing same sex marriage. Jay Sekulow of the American Center for Law and Justice frames the question as follows:

Social science, and human experience over hundreds of years, tells us marriage is best for the family, and especially for children. Children are hurt when either the father or the mother is absent... The question must therefore be settled: is the marriage of one man and one woman, and the hope of children it provides, the cornerstone of our welfare, of our liberties, and of our responsibilities as free people; and if so, must it be protected? (Federal Marriage Amendment Hearing, May 13, 2004)

Senator Steve Chabot concurs:

The thing that brings us here today, obviously, is the fact that many of us believe—in fact the overwhelming majority, I believe, in this country believes that marriage has always been a cornerstone of our society. It is an institution that is important, obviously for raising children; and it has always been recognized as a man and a woman. (Federal Marriage Amendment Hearing, May 13, 2004)

Policy entrepreneurs responsible for the overwhelmingly successful movement to constitutionally ban same-sex marriage at the state level similarly argued that traditional marriage should be preserved because “children do better with a mom and a dad.”⁵⁹ A recent

⁵⁸ “Federal Marriage Amendment Hearings July 12, 2004”, *Congressional Record*, 150, 95: S7903-S7932.

⁵⁹ This language appears in the “arguments in favor” section of Oregon’s 2004 initiative to constitutionally ban same sex marriage. However, similar arguments were made to support other

report issued by the Senate Republican Policy Committee warned that in the absence of constitutional protection for traditional marriage complicated child custody battles would ensue, particularly among gay couples who were married in “gay marriage states” and later moved to non-gay marriage states.⁶⁰ This risk to children’s welfare and family stability from same sex marriage is addressed in media coverage as well.⁶¹ Among a random sample of articles on same sex marriage, published between 1996 and 2006, that cited opposition arguments, a greater percentage mentioned either children’s or family welfare than any other frame, including those invoking “religion” or “tradition.”

Additionally, as suggested by Liu and Macedo, opponents went out of their way to defend themselves against allegations of discrimination. As President Bush articulated, in response to *Goodridge*, “Tolerance and belief in marriage aren't mutually exclusive points of view. I do believe in the sanctity of marriage. It's an important differentiation. But I don't see that as conflicting with being a tolerant person or an understanding person.”⁶² The editor of Catholic magazine encouraged Republican candidates and the White House to be mindful of the tone used in their efforts to defend traditional marriage.

There's a danger of overplaying it in the tone with which it's dealt. In defending the traditional notion of marriage, we should all avoid a condemning tone or a self-righteous one.⁶³

As the authors of policies validating same sex marriage, judges became the primary target of anti-same sex marriage vitriol. Opponents to same sex marriage consistently warned the American public of the perils of allowing unelected or unresponsive “activist” judges to handle an issue of such importance and extolled the virtues of legislative or popular decision-making as the most appropriate way to determine the outcome of marriage equality. Between 2001 and 2006 an annual average of 28% of the articles on same sex marriage in the sample contained anti-court rhetoric, the majority of which was delivered by anti-gay-marriage activists. Opponents argued that whatever the merits of same sex marriage, the courts should not be

state constitutional gay marriage bans.

http://www.sos.state.or.us/elections/nov22004/guide/meas/m36_fav.html

⁶⁰ “Massachusetts Court Expected to Legalize Same Sex Marriage: The Threat to Marriage from the Courts.” Senate Republican Policy Committee, July 29, 2003.

⁶¹ I created a random sample of 100 local newspaper articles on same sex marriage for each year between 1996 and 2006 (except for 2001 and 2002, years in which the population totals did not exceed 100.) The sample was derived from the population of articles pulled from Lexis Nexis through a key term search among headlines and lead paragraphs for the following phrases: “same-sex marriage,” “homosexual marriage,” “gay marriage” “lesbian marriage.” The search also required that the articles mention the term “court” to limit the content analysis to articles that mention court cases or court involvement generally.

⁶² Elisabeth J. Beardsley and Eric Convey, “Bush, O'Malley Back Marriage Amendment,” *Boston Herald*, December 17, 2003

⁶³ Linda Feldmann, “‘Culture Wars’ Pose Risks for Both Parties,” *The Christian Science Monitor*, November 20, 2003.

permitted to overwhelm legislative authority on the subject. James Dobson bemoaned the “oligarchy” of judges “determined to make all of us dance to their music.”⁶⁴ To promote her attempt to amend the constitution to outlaw same sex marriage, Representative Musgrave said she wanted “to let the people decide, not unelected judges who are virtually unaccountable to voters.”⁶⁵ Bush argued that he was forced to support a constitutional amendment because of the actions of “activist judges” on the Massachusetts Supreme Court. Lawyers in New Jersey and Maryland, in their attempts to thwart the legalization of same sex marriage in their respective states, argued in briefs that the question is not about the merits of same sex marriage, but rather the appropriateness of judicial involvement.⁶⁶ The issue, argued Maryland attorneys, is one best left to the “legislative forum.”⁶⁷

The coalition of “strange bedfellows” that characterizes opposition to same sex marriage, then, is in part a by-product of an artful campaign devised by conservative strategists to mobilize their base while also speaking to more mainstream voters. Couched in the rhetoric of tolerance promoted by Bush and other “compassionate conservatives,” mainstream heterosexual America could comfortably protect marriage without being discriminatory. Well-meaning voters could rely on children’s welfare to rationalize what would otherwise be viewed as a homophobic decision to oppose marriage equality. Supporters of a constitutional ban on same sex marriage could shield themselves from criticism by arguing that “activist judges” forced their hand. Indeed, rather than polarizing the issue, opponents to same sex marriage permitted Democrats to team with Republicans, moderates to join the ranks of conservatives, and the religious to join the agnostic to fight gay individuals in their attempts to seek marriage equality.

Advocacy Efforts

In many respects advocates for same sex marriage had to play catch-up to what seemed to be a highly controlled message supporting same sex marriage bans. As stated earlier, advocates at the national level were slow to join the ranks of same sex marriage supporters. Once they did, however, advocates argued fiercely that the issue of marriage equality was fundamentally about “gay rights.” One attorney in Louisiana described the state’s proposed constitutional amendment banning gay marriage as removing “rights that are inalienable and inviolate.”⁶⁸ “We want equal rights, not special rights,” argued a gay rights activist in Ohio after the state passed its

⁶⁴ Stephen G. Vegh, “Christian Group Fights the Law with the Law,” *The Philadelphia Inquirer*, November 27, 2003.

⁶⁵ Scott Lindlaw, “Bush Watching State Court Cases on Gay Marriages,” *The Associated Press*, July 31, 2003.

⁶⁶ Regarding New Jersey see Ben Nuckols, “Maryland’s Highest Court Hears Same Sex Marriage Arguments,” *The Associated Press*, December 5, 2006.

⁶⁷ Mary Otto, “As Md. Court Weighs Same Sex Marriage, Plaintiffs Hear Echoes of Previous Fight,” *The Washington Post*, December 4, 2006.

⁶⁸ “Courts Take a Look at Gay Amendment; Election Challenge Called Premature,” *Times-Picayune*, August 24, 2004.

amendment.⁶⁹ When questioned about gay marriage momentum in Washington, Matt Foreman of the National Gay and Lesbian Task Force stated “and if it's a Vermont-style civil-unions decision, the challenge will be getting the Legislature to do the right thing and give people full equal rights, not just a shadow version of that.”⁷⁰

Media analysis confirms the use of this frame. It appeared in a plurality of the articles analyzed in this project, on average 28% of the articles per year; in five of the years analyzed it appeared in over 30% of the articles. Gay marriage was also framed as a family issue, a problem of discrimination, and an issue that affects children, but at lower percentages—particularly between 2003 and 2006 where the percentage never surpassed 15%. Supporters frequently referenced the legal and financial benefits that accompany marriage recognition.

Implications

In 2010, the nation’s capital voted to legalize same-sex marriage. Rather than relying on sweeping litigation-based marriage reform, DC gay rights advocates opted for an incremental approach. Recognizing that marriage equality would be a tough sell to a Republican-controlled Congress (DC lacks home rule), advocates decided to piece together the rights and benefits of marriage over a period of several years in the hopes that marriage legalization would be pro forma, “just the logical next step.”⁷¹ With little of the fanfare that greeted same sex couples in Massachusetts, gay and lesbian couples in DC stood in line to receive their licenses and move one step closer to the culmination of an almost 20-year struggle.

Same sex marriage advocacy in the United States did not follow the incremental pathway chosen by DC advocates. Instead, the narrative about the struggle for marriage equality is laced with accusations of judicial activism and special rights. Did reliance on the courts, rather than on more representative policy-making bodies, doom same sex marriage advocates to suffer such significant setbacks? Does the story of same sex marriage provide the proverbial nail in the coffin of the courts’ ability to advance social change? Many would have us view same sex marriage as a sad but important lesson about the costs of court-centered approaches to advancing civil rights. Particularly at the state level, critics might argue, where many pro-civil rights court edicts must directly answer to the public will through referenda, advocates must use extreme caution when considering whether to use the courts to advance rights arguments on behalf of unpopular minorities. Had marriage advocates steered clear of the courts and become experts in public education and legislative negotiating, one could argue, we would see far fewer constitutional bans on same sex marriage. Or perhaps the “rights focused” rhetoric advanced by advocates for same sex marriage was no match against the opposition’s well-devised strategy to minimize criticisms of the “gay lifestyle” while vehemently opposing gay marriage. One study

⁶⁹ Barb Galbincea, “Marriage Ban Effect on Gays Varied; Some Flee, Others Battle in Courts Over Interpretation,” *The Plain Dealer*, November 29, 2005.

⁷⁰ Claudia Rowe, “Matt Foreman, National Gay and Lesbian Task Force,” *Seattle-Post Intelligencer*, August 13, 2005.

⁷¹ Ann E Marimow, “Same-Sex Marriage in DC Follows Advocates’ Long Fight,” *The Washington Post*, March 4, 2010.

on the topic finds that focus groups exposed to a “special rights” argument supporting same sex marriage tended to be more polarized than groups who discussed the issue in terms of equal rights. (Price, Nir, Cappella 2005).

In truth, we will never know for certain whether same sex marriage could have emerged as anything but a controversial, high-profile, and deeply opposed issue, had other strategies been used. First, the history of same sex marriage litigation, outlined in this chapter, reveals that the pro-marriage “movement” was largely set in motion, not through a carefully devised, tightly controlled strategy developed by advocates, but through the individual passions and demands of gay and lesbian couples who wanted their relationships to be accorded the same respect given to heterosexual couples. In many ways, then, the “movement” to promote same sex marriage was developed largely as a defensive strategy against an organized strategy, already underway, to preemptively bar the practice through statutory and constitutional bans at the state and federal level. Second, DC’s newly minted same sex marriage law may simply be a function of good timing. After all, in the past few years, a fair number of states in the Northeast have either legalized same sex marriage or recognize those performed in other states. What we do know, however, is that the court-focused battle over same sex parenting (detailed in Chapter 3)—although strikingly similar in terms of venue, issue, and level of negative opinion—followed a different tactical path and produced drastically different results, suggesting that ruling the courts out as viable players in the game of social change is premature at best.

Chapter 3: The Silent Struggle for Same-Sex Parental Rights

In 1996, amidst the fanfare of the Supreme Court's ruling in *Romer v. Evans* (1996) and the heated debate over the passage of the Defense of Marriage Act, four lesbians (one couple and two single women) went to court to seek custody of their children. K.M. and D.M. asked an Illinois Appellate Judge to reverse a ruling issued by a Cook County circuit court denying the couple's request to grant D.M. co-parental status over their 3-year-old daughter Olivia.⁷²

Through a process now commonly referred to as second parent adoption the non-biological or non-adoptive parent in a lesbian or gay relationship can seek legal recognition of their relationship with their children without requiring the biological or adoptive parent to relinquish their own legal status. The procedure has become one of many ways that gay couples, in the absence of marriage rights, provide a legal safety net for their children. In Pennsylvania, A.L. asked the Superior Court to grant her custody rights over the child she had raised since birth, but who was born to her former partner. Despite having left the child with A.L. for months on end the biological mother refused to acknowledge her relationship with A.L., and A.L.'s relationship with the child, and denied A.L. access to the child.⁷³ Rebecca Schroeder petitioned an Illinois Court to restore custody of her two children after a county judge transferred the children from Schroeder's care to their father's, out of concern for the "burden of social condemnation" caused by their mother's sexual orientation.⁷⁴

In many ways, the stakes for these parents, and the issues raised in their arguments, parallel those involved in the very public and hostile battle over same-sex marriage. As with gay couples seeking marriage rights, gay parents seek legal recognition for psychological, legal, and financial security—and out of a sense of justice. Opponents of both marriage and parental rights in the gay community argue that nothing less than the welfare of children and society are at stake when courts recognize gay relationships. Yet when K.M. and D.M. won their request for a second parent adoption, when A.L. was granted standing as an "equitable parent" over her former partner's child, and when Rebecca Schroeder regained custody over her two children they were greeted with little of the backlash or publicity given to Nina Baehr, her partner and the two other couples who requested marriage certificates in Hawaii around the same time. In fact, despite significant success in 24 states gay parents (and the advocates and organizations representing their interests) have confronted only a fraction of the obstacles encountered by gay marriage advocates who have only recently experienced a handful of victories. Many in the adoption community feared that 2006 would be a turning point for gay parents. By the end of 2006 gay marriage had been banned by either statute or constitutional amendment in 45 states, 24 of which were passed between 2004 and 2006. Many forecasted that, buttressed by successes on the marriage front, gay family opponents would turn their attention to same sex parenting. However,

⁷² Theodore Postel, "Adoption by Lesbian Couple," *Chicago Daily Law Bulletin*, March 22, 1996, P. 1.

⁷³ Martha Shirk, "Lesbian to Help Raise Boy; 'Equitable Parent' Idea Applied to Relationship of Woman, 2-Yr-Old." *St. Louis Post-Dispatch*, May 9, 1995, p. 1A.

⁷⁴ Christopher Wills, "Bisexual Mother Wins Custody Battle in Appellate Court," *The Associated Press*, December 18, 1996.

parental rights advocates have been able to contain backlash to a minimum. This chapter explores the strategies utilized, between 1996 and 2006, by advocates representing the struggles of gay parents to minimize the public's focus on their client's struggles in the hopes of also limiting backlash.⁷⁵

As described in Chapter 2, although the first case of same-sex marriage occurred in 1970 in Minnesota, the current battle over same-sex marriage gained national attention in 1996 when Bill Clinton signed the Defense of Marriage Act into law in the midst of his bid for a second term. The issue has remained salient in local and national campaigns for public office and during Supreme Court nominations. With such high levels of publicity centered on same-sex marriage, it is difficult to imagine how the gay community could advance any issue involving the family unit without attracting public attention and engendering backlash. And yet it has. As the nation swiftly and concisely blocked attempts to permit same-sex marriage, gay rights advocates were, simultaneously and inconspicuously, struggling for (and winning) same-sex adoption and parental rights⁷⁶ across the country. Despite enormous gains in this arena, backlash against this issue has remained localized and has been remarkably unsuccessful. Same-sex parenting advocates, by design, developed strategies to minimize public attention but maximize court victories. As this chapter will show, rather than pursuing a constitutional argument focusing on gay rights, many advocates framed the issue in terms of children's rights and employed a highly technical, incremental strategy grounded in family law doctrine to advance same-sex parenting claims.

Same-sex Parenting in the Courts

Efforts to secure parental rights for gay parents preceded the early years of the current same-sex marriage debate by 8 years but still remain active today. According to the Gay and Lesbian

⁷⁵ As stated in chapter 2, this case study in no way attempts to argue that gay marriage advocates had a choice of strategies to pursue. Unlike parenting advocates, marriage activists could not look to statutory language or common law to advance their issue. It is likely that gay parenting advocates had access to a broader range of low-salience strategies because of their access to family law or common law doctrine. The case study uses gay marriage as a proxy for what may have happened had gay parenting advocates adopted a high-salience strategy and to illuminate the following about gay parenting strategies: 1) backlash to gay parenting court victories was relatively (and astonishingly) low; 2) strategies used by parenting advocates were decidedly different from those used by marriage advocates; and 3) public opinion toward gay parenting does not explain the low levels of backlash.

⁷⁶ In this paper I use the term same-sex adoption to include both adoption specifically and parental rights generally. Parental rights include custody battles as well as second parent adoptions and birth certificate cases. According to a Family Research Council spokesperson, the pro-family movement sees the issues of same-sex adoption and second parent adoption or non-biological parental rights as similar issues. They approach these issues using similar arguments (Interview March 6, 2007).

Advocates and Defenders⁷⁷, gay and lesbian couples were first granted the ability to adopt in 1985, when a Multnomah County, Oregon circuit court validated a second-parent adoption to a lesbian couple.⁷⁸ Arguing that the legislature granted the court wide latitude in cases of adoption, same sex parenting advocates convinced the court that it was in the “best interest of the child” to permit the petitioners’ request.⁷⁹ In truth it is difficult to determine early court victories for gay parents as many second-parent, single, and joint adoptions were legalized in intimate family court settings with little attention beyond family and friends. In fact, in many instances the family court judges presiding over these adoptions kept their decisions to themselves. Recalls one adoption advocate of judges in Vermont,

“Many of the family court judges in the state kept the decisions to themselves without realizing that their colleagues were granting them as well. It was during an annual retreat that a few of them admitted to recognizing the adoptions.”⁸⁰

Washington granted similar adoptions in the mid- to late-1980s.⁸¹ In the 1990s through the early 2000s courts in Delaware⁸², the District of Columbia⁸³, Illinois⁸⁴, Indiana⁸⁵, Maryland⁸⁶, New Jersey⁸⁷, New York⁸⁸, Pennsylvania⁸⁹, and Vermont⁹⁰ agreed with advocates’ assertions that their

⁷⁷ Data in this section was collected from the Gay and Lesbian Advocates and Defenders Bibliography of Adoption Cases, June 21, 2006.

⁷⁸ *In re Adoption of M.M.S.A.* No. D8503-61930 (Or. Circuit Ct., Multnomah County Sept. 4, 1985). This is a slight underestimation because many of the adoption petitions granted by judges occurred without fanfare by local family court judges.

⁷⁹ For a complete review of cases on same sex parenting rights see Richman 2008.

⁸⁰ Interview with same-sex adoption attorney, March 8, 2007. In order to comply with requests for confidentiality, the interviewees in this project will remain anonymous.

⁸¹ *In re Adoption of (Child A and Child B)*, No. 88-5-00088-9 (Wash. Super. Ct., Spokane County

June 23, 1988); *In re Child 1 and Child 2*, No. 89-5-00067-7 (Wash. Super. Ct., Thurston County Nov. 16, 1989); *In re the Interest of E.B.G.*, No. 87-5-00137-5 (Wash. Super. Ct., Thurston County Nov. 16, 1989).

⁸² *In the Interest of Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001).

⁸³ *In the Matter of the Petition of L.S. and V.L. for the Adoption of a Minor (T.) and (M.)*, (D.C. Super. Ct. 1991); *In re M.M.D. & B.H.M.*, 662 A2d 837 (D.C. App. 1995).

⁸⁴ *In re Petition of K.M. and D.M. to Adopt Olivia M.*, 274 Ill. App.3d 189, 653 N.E.2d 888, 210 Ill. Dec. 693 (Ill. App. Ct. 1995); *In the Matter of the Petition of C.M.A. a/k/a C.M.W. and L.A.W.*, 306 Ill. App. 3d 1061, 715 N.E.2d 674, 239 Ill. Dec. 920 (Ill. App. Ct. 1999).

⁸⁵ *In re the Adoption of M.M.G.C., H.H.C., & K.E.A.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003); *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004); *In the Matter of Infant Girl: W, et al. v. Morgan Co. Fam. & Ch.*, 55 A 01-0506-JV-00289.

⁸⁶ *In re Petition of D.L.G. & M.A.H.*, No. 95179001/CAD, 22 Fam. L. Rep. (BNA) 1488 (Md. Cir. Ct., Baltimore City Jun. 27, 1996).

⁸⁷ *In the Matter of the Adoption of Two Children by H.N.R.*, 285 N.J. Super. 1, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995)

⁸⁸ *In the Matter of the Adoption of Evan*, 153 Misc. 2d 844, 583 N.Y.S.2d 997 (N.Y. Sur. Ct.,

state statutes permitted second-parent adoptions.⁹¹ In 2002 a Nebraska Supreme Court validated a second-parent adoption legalized in Pennsylvania and granted.

Additionally, a number of states have granted visitation or custody rights to non-biological former partners and required that they pay child support to the birth parent. In 1997 courts in Texas and North Carolina awarded visitation rights to the non-biological parent in a dissolved same-sex relationship. In 1999 through 2006 courts in California⁹², Colorado⁹³, Delaware⁹⁴, Indiana⁹⁵, Massachusetts⁹⁶, New Jersey⁹⁷, Pennsylvania⁹⁸, Rhode Island⁹⁹, and Washington¹⁰⁰ ruled that the non-biological parent in a same-sex relationship serves as a “de facto parent” and should be awarded visitation or custody rights, or should be required to pay child support, in the event of a break-up. A New Jersey superior court permitted a gay couple to jointly adopt their foster son, citing the “best interest of the child” standard.¹⁰¹ Courts in Indiana¹⁰² and Colorado¹⁰³ ruled in that an individual’s sexual orientation could not per se be used to deny a parent custody or visitation rights.

Gay parents have also received help from the courts in their attempts to acquire birth certificates reflecting their joint parental status. In 1998 an LA County court granted the first ever in utero

N.Y. County 1992); *In re Jacob, In the Matter of Dana*, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (N.Y. 1995); *In re Adoption of Carolyn B.*, 6 A.D.3d 67, 774 N.Y.S.2d 227 (N.Y.A.D. 4 Dep’t 2004).

⁸⁹ *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195 (Pa. 2002).

⁹⁰ *In re B.L.V.B. and E.L.V.B.* 628 A.2d 1271, 160 Vt. 368 (1993).

⁹¹ Counties in the following states also granted second parent adoptions: Alabama, Delaware, Iowa, Louisiana, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Rhode Island, Texas. However, Michigan no longer permits these adoptions.

⁹² *K.M. v. E.G.*, 37 Cal.4th 130 (Cal. 2005), time for grant or denial of rehearing extended to 11-10-05 (Sep 06, 2005); *Elisa B. v. Superior Court*, 37 Cal.4th108 (Cal. 2005)

⁹³ *In the Interest of E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004), cert. denied, 2004 WL 2377164 (Colo. 2004) (NO. 04SC528)

⁹⁴ *Chambers v. Chambers*, 2002 WL 1940145, No. CN00-09493. (Del. Fam. Ct. Feb. 5, 2002).

⁹⁵ *In re Parentage of A.B.*, 818 N.E.2d 126 (Ind.App. 2004).

⁹⁶ *E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E.2d 886, cert. denied, 528 U.S. 1005 (1999); *T.F. v. B.L.*, 442 Mass. 522 (2004).

⁹⁷ *V.C. v. M.J.B.*, 163 N.J. 200, 748 A.2d 539, cert. denied, 531 U.S. 926 (2000).

⁹⁸ *L.S.K. v. H.A.N.*, 2002 WL 31819231 (Super.Ct.Pa., 2002); *T.B. v L.R.M.*, 786 A.2d 913 (Pa. 2001).

⁹⁹ *Rubano v. DiCenzo*, 759 A. 2d 959 (R.I. 2000).

¹⁰⁰ *State of Washington on behalf of D.R.M. v. Wood*, 34 P.3d 887 (Wash. Ct. App., Div. 1, 2001); *In re the Parentage of L.B.*, 89 P.3d 271 (Wash. Ct. App. 2004).

¹⁰¹ Ronald Smothers, “Accord Lets Gay Couples Adopt Jointly,” *The New York Times*, December 18, 1997.

¹⁰² *Downey v. Muffley*, 767 N.E.2d 1014 (Ind. Ct. App. 2002).

¹⁰³ *In re Marriage of Dorworth*, 33 P.3d 1260 (Colo. Ct. App. 2001).

2nd-parent adoption, requiring that the county list both parents in a gay relationship on the birth certificate immediately.¹⁰⁴ In 2005 a NJ superior court¹⁰⁵ required both parents in a lesbian relationship to be listed on the birth certificate and a Virginia court¹⁰⁶ required the state to issue birth certificates for gay parents who adopted children out-of-state.¹⁰⁷

Adoption and parenting advocates suffered significant losses as well during this time period. For instance, a Missouri court ruled against a lesbian's petition to seek joint custody of her three children with her ex-husband. The Connecticut Supreme Court denied a second-parent adoption, arguing that the state statute only applied to married couples or children who were available for adoption.¹⁰⁸ However, in the same year legislation was introduced in the Connecticut House to permit second-parent adoptions. Utah imposed a ban on unmarried couples serving as foster parents. Arkansas passed explicit legislation preventing homosexuals (and heterosexuals who reside with homosexuals) from serving as foster parents. And of course, in perhaps the most highly publicized same-sex adoption case, the Supreme Court refused to grant cert to a Florida case in which several Florida families were suing the state because of legislation that denied gay individuals (or individuals living with gays or lesbians) the opportunity to adopt. In this case the Eleventh Circuit upheld the Florida ban.¹⁰⁹

Backlash

While the handful of gay marriage court victories was met with statutory and constitutional bans in 44 states between 1996 and 2006, efforts to advance same-sex adoption and protect parental rights for gay parents have not confronted the same level of backlash. (Figs. 1 & 2) Despite the 59 favorable court decisions during this period that have either overturned adoption bans, permitted adoption in the absence of state legislation, issued birth certificates listing both gay parents or granted parental rights to gay parents in child custody battles or through second-parent adoption, there have been only a handful of successful backlash events in this gay rights arena

¹⁰⁴ Justin Stoner, "Gay Parents," *City News Services*, June 17, 1998.

¹⁰⁵ Wayne Parry, "Lesbian wins full co-parenting rights to partner's newborn daughter," *The Associated Press*, May 26, 2005.

¹⁰⁶ Alan Cooper, "Court: Give Birth Certificate to Gay Parents," *Richmond Times Dispatch*, April 23, 2005.

¹⁰⁷ In 2002, the American Academy of Pediatrics weighed in with a megastudy, arguing that children who are raised in same-sex households fare no better or worse than those in heterosexual households. American Academy of Pediatrics, Policy Statement, *Pediatrics* Vol. 109 No. 2 February 2002, pp. 339-340.

¹⁰⁸ *In re Adoption of Baby Z.*, 247 Conn. 474, 724 A.2d 1035 (1999).

¹⁰⁹ It should be noted that on several occasions the Supreme Court also refused to hear arguments that would overturn state rulings supporting adoption and parental rights for gay parents. It is likely that their refusal is less a statement about their position on the issue and more a reflection of their position on federalism and state police powers.

during this time period.¹¹⁰ For instance, in May of 2004 Oklahoma passed legislation preventing out-of-state gay adoptions from being recognized in the state. This legislation was later ruled in violation of Full Faith and Credit by Oklahoma courts. In September of that year, Michigan’s Attorney General issued an opinion preventing couples married in Massachusetts from jointly adopting in the state. Finally, in March of 2006 Catholic Charities in a number of cities terminated their adoption programs to avoid complying with city or state ordinances requiring “orientation-neutral” adoption procedures.

Fig. 1 Progression of Anti- and Pro-Same-Sex Parenting Policies Across the United States

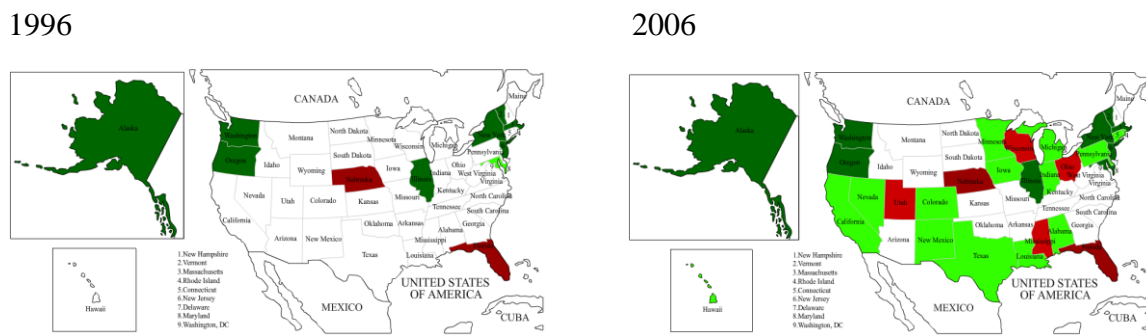
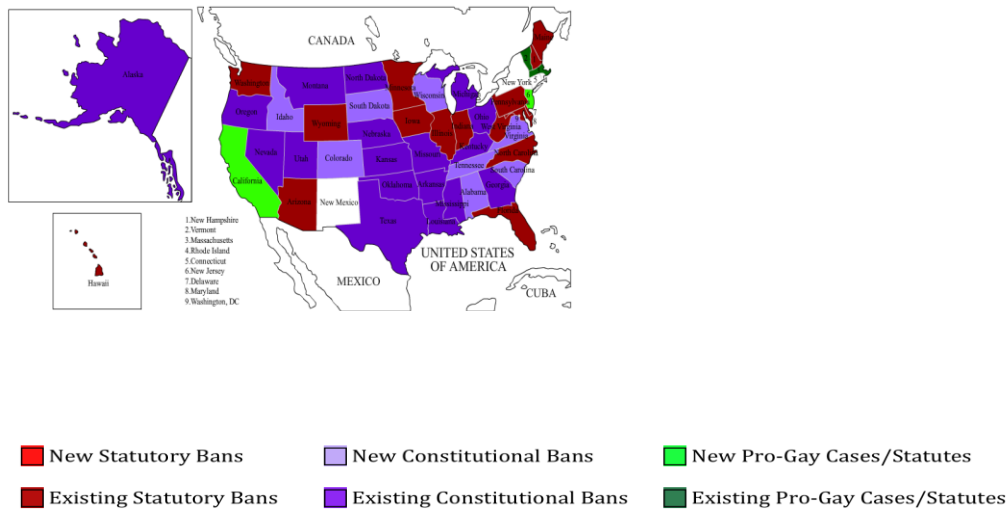


Fig. 2 State of Anti- and Pro-Same-Sex Marriage Policies in United States 2006



¹¹⁰ Per the definition of backlash articulated in Chapter 1, these events include only those instances when a court case is overturned through legislation, ballot initiative or court case. They do not include court decisions that ruled against gay parents initially.

This minimal backlash came as a surprise to policy advocates on both sides of the issue. In the aftermath of the 2004 election—and the 13 newly-minted constitutional bans on gay marriage—gay rights organizations braced themselves for the attacks on same-sex adoption. A USA Today article warned of the impending slaughter and described the issue as the “second front in the culture wars that began during the 2004 elections over same-sex marriage”.¹¹¹ This article appeared on the websites of many gay rights organizations as a call to arms. However, this “second front” was dismantled before it got off the ground. Legislation died in committee.¹¹² Proposed ballot initiatives never made it to the ballot. All the while family, appellate, and state supreme courts continued to grant adoptions and recognize parental rights for gay parents. To be sure, some attempts were close (legislation preventing non-custodial parents from seeking custody or visitation rights passed in the Utah legislature in 2006 but was vetoed by the governor)—and aggressive campaigns were mounted by anti-gay rights organizations¹¹³—but few were enacted.¹¹⁴

Media Coverage

The discussion in Chapter 2 highlighted the high-profile nature of same-sex marriage using local and national media coverage as an indicator of public awareness and issue visibility. Conversely, coverage of same-sex parenting has been relatively scarce. Through analysis of both the level and character of national and local media coverage we can understand how issue salience (or a lack thereof) may contribute to the success of backlash campaigns.

Continuing the *New York Times* analysis introduced in Chapter 2 we see that same-sex marriage receives much more public scrutiny than cases concerning same-sex adoption or parental rights. Figure 3 compares the number of articles on same-sex marriage or same-sex adoption/parental rights published by *The New York Times* from 1996-2006. Coverage on same-sex adoption remains consistently low, despite numerous court victories for same-sex adoption advocates. At the local level we see that same-sex marriage consistently receives vastly more attention than same-sex adoption in articles, editorials, commentaries and letters to the editor. (Table 1.)

¹¹¹ Andrea Stone, “Drives to Ban Gay Adoption Heat up in 16 States,” *USA Today*, Feb 20, 2006

¹¹² In 2004 8 proposed pieces of legislation curbing gay adoption or parental rights were introduced in six states. Oklahoma’s statute was the only one enacted. In 2005, 14 proposals were introduced in six states. In 2006, 19 proposals were introduced in 10 states, only Utah’s successfully passed in the legislature.

¹¹³ Not only did gay rights organizations and gay rights supporters defend against the “pro-family” initiatives but they introduced gay parenting legislation as well. In 2004, 2005 and 2006 2, 3 and 5 pieces of pro-gay parenting legislation were introduced in state legislatures during each year, respectively.

¹¹⁴ In November 2008 Arkansas voters banned adoption for unmarried couples.

Figure 3: New York Times Coverage: 1996-2006

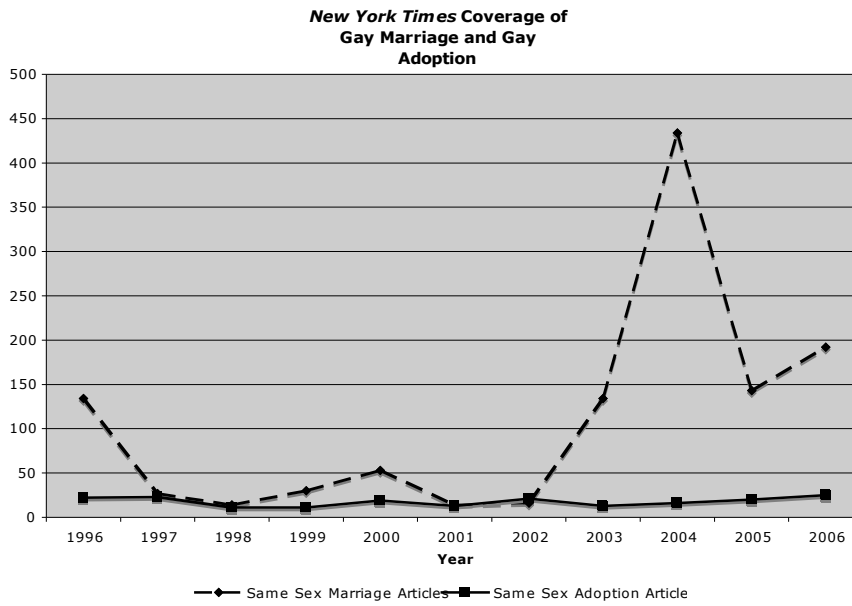


Table 1: Same-sex Marriage and Adoption Local Coverage

Year	Marriage articles	Parenting Articles	Marriage editorials ¹¹⁵	Parenting Editorials
1996	594	20	66	2
1997	186	30	32	7
1998	181	12	37	4
1999	192	55	45	6
2000	202	36	90	1
2001	76	38	21	8
2002	66	51	0	15
2003	919	34	387	3
2004	2631	92	524	12
2005	861	99	213	14
2006	1304	44	411	7

¹¹⁵ This figure includes editorials, commentaries, and letters to the editor.

Coverage of same-sex marriage and same-sex adoption not only differs quantitatively but also substantively. As we discussed in chapter 1, frames may be used by elites to inspire a variety of responses. Advocates hoping to promote collective action may choose frames that resonate or impassion the public. Alternatively, as in the case of same sex parenting, advocates may opt for frames that limit public reaction and issue visibility. Journalists, in turn, use these narratives (or in some instances develop their own) to promote readership while presenting a balanced perspective. In short, the media not only influences the level of attention paid to a specific issue but can shape how individuals think about these issues by choosing to highlight or ignore particular frames promoted by elite actors. (Terkildsen and Schnell 1997).

I compare a sample of marriage articles with the population of adoption articles along several dimensions to identify whether and to what degree these topics differ in terms of the type of coverage they receive and the narratives used.¹¹⁶ Expanding the analysis in Chapter 2, each article is analyzed to address the following: framing; number of supporters and opponents used as sources; subject; mention of an out-of-state case; mention of legal/financial benefits; describing the issue as one involving states' rights; and discussion of courts/judges.¹¹⁷

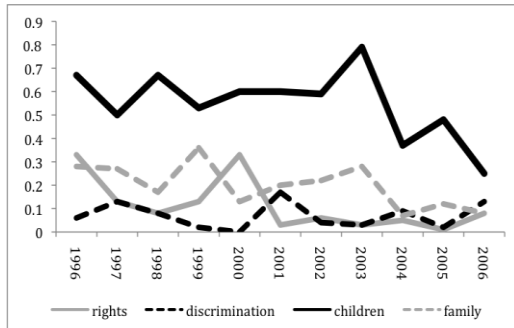
Unlike pro-gay marriage arguments, which framed the issue as one involving “gay rights,” arguments supporting same-sex parenting framed the issue primarily in terms of children (55%) and family (20%) (Fig. 3)—similar to advocates opposing same-sex marriage. On average gay rights appeared in only 11% of the articles each year (compared with 28% in same sex marriage articles) with occasional peaks in 1996 and 2000. Similar to same sex marriage supporters, parenting advocates talked about the specific benefits that accompany legal validation of parent-child relationships, but at a lower rate than marriage supporters. (Fig. 4)

¹¹⁶ The population of articles on same-sex adoption/parenting was compiled using the following terms: “same-sex adopt! or parent!” “gay adopt! or parent!” “homosexual adopt! or parent!” “lesbian adopt! or parent!” This search required the mention of the term “court” and also stipulated that “same-sex marriage” “gay marriage” or “homosexual marriage” not appear in the article in order to avoid repetition among the datasets.

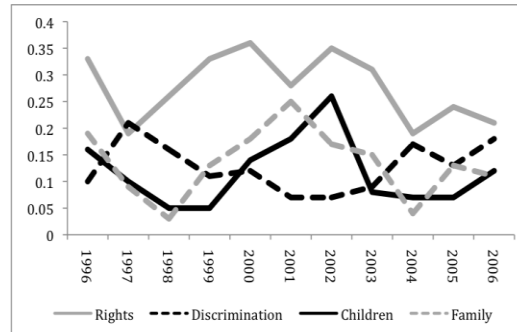
¹¹⁷ Framing was analyzed using the following coding scheme. I noted each time an article mentioned gay rights, discrimination, gay-bashing, children, children's rights/welfare, family, family values, tradition, religion, implications for society, and whether the issue creates a slippery slope. I also took note of each time the article discussed the policy in terms of legal/financial benefits or as a states' rights issue. To analyze how courts and judges were discussed I noted each mention of the courts or judges, coded whether the statements characterized courts or judges in a negative or positive light, and categorized the specific descriptions. I also noted each time an article mentioned a court case outside of the newspaper's media market. Articles appearing in national sources or the wire services were excluded from this portion of the analysis.

Fig. 4: Advocate Frames

4a. Percentage of Parenting Articles



4b. Percentage of Marriage Articles



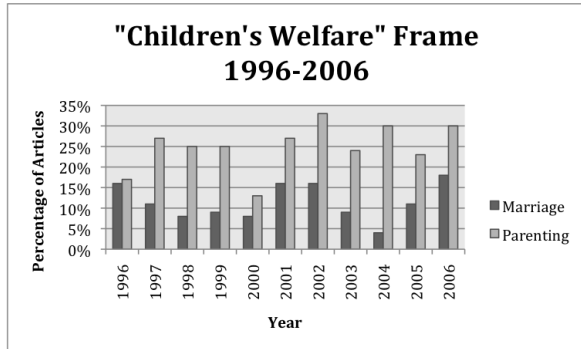
The analysis reveals that advocacy against same sex marriage and same sex parental rights used similar frames. Arguments opposing same-sex marriage discussed the issue primarily as one involving children (11%) and family (11%) as did arguments against same-sex parenting (11% and 25% respectively). (Figs 5a-d). For instance, the Family Research Council opposes same-sex adoption on the belief that children should be raised by a mother and a father and that children do best in married traditional families (March 6, 2007 Interview). Other frames used to oppose both same-sex marriage and parenting include religion, family values, tradition, societal harm. There are a few somewhat notable differences. Same-sex parenting opponents discussed the issue in terms of the rights of birth mothers and argued that gay parenting was simply gay marriage by proxy. Arguments opposing same-sex marriage highlighted states' rights as one important element of the debate.¹¹⁸ In general however, the frames used by policy entrepreneurs and interest groups attempting to ban gay marriage or gay adoption are, in many important ways, virtually indistinguishable.

Media coverage also differed in terms of *who* was featured. Same-sex marriage articles tended to equally showcase advocates and opponents of same-sex marriage. However, parenting articles quoted fewer opponents than supporters. Supporters of same-sex parenting were two to three times more likely to appear in parenting articles when compared to opponents. It is possible that this somewhat skewed reliance on supporters of same sex parenting as sources sends the message to readers that the issue is not highly contested, thereby reducing their interest in the topic.

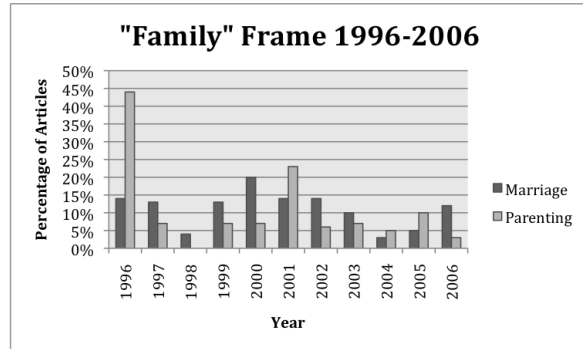
¹¹⁸ Although on its own it is difficult to believe that the states' rhetoric caused the significant gap in backlash, it does have the potential to inspire lukewarm opponents of same sex marriage to join the ranks of individuals who actively banned the practice. What is interesting, however, is that this argument was not used by opponents of same sex parenting rights.

Fig. 5: Opposition Framing

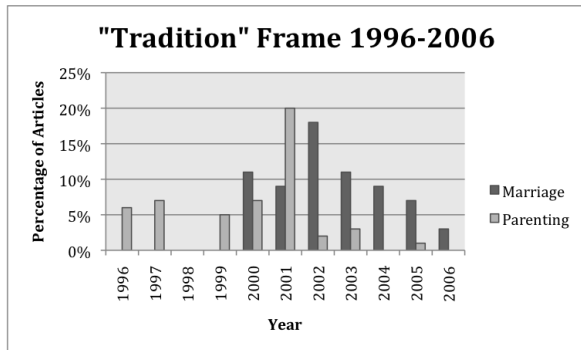
5a.



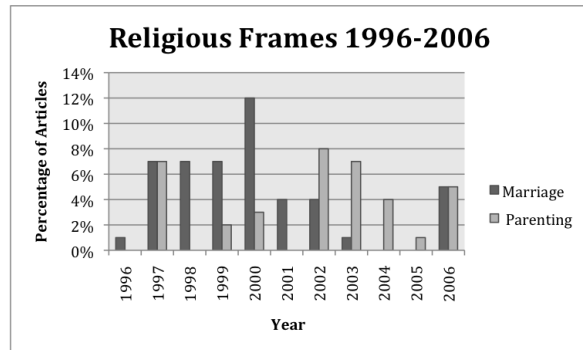
5b.



5c.

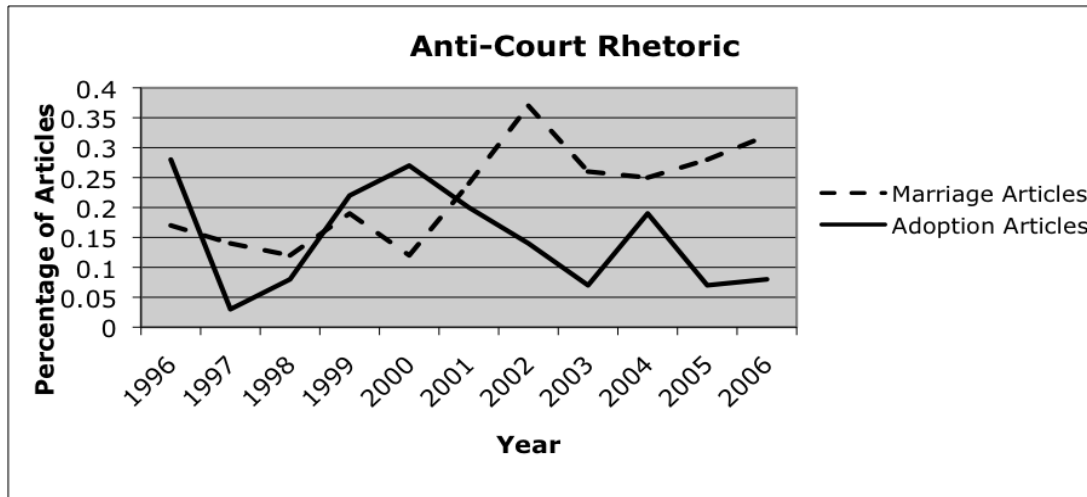


5d.



Articles also differed in their inclusion of anti-judicial rhetoric. Not surprisingly, aside, from gay and lesbian couples, judges bore the brunt of anti-same sex marriage rhetoric and activity. Activist judges were perceived as instigating, or at the very least, validating the assault on traditional marriage and majoritarian values. As we saw in chapter 2, media coverage conveyed the anti-judicial sentiments of elite actors trying to ban same sex marriage. Same sex parenting articles differed from same sex marriage coverage with respect to the quantity and tone of anti-judicial rhetoric. Between 1996 and 2001 articles on same-sex parenting were more likely to include anti-judicial rhetoric than were articles on same-sex marriage. However, starting in 2001, gay marriage articles containing anti-court language outnumbered anti-court gay parenting articles (Fig. 6). Coverage also differed in terms of the source of anti-judicial rhetoric. In the marriage articles anti-gay marriage activists were often responsible for court-centered criticism while in the parenting articles it was judges who delivered court critiques through dissenting opinions in the parenting articles.

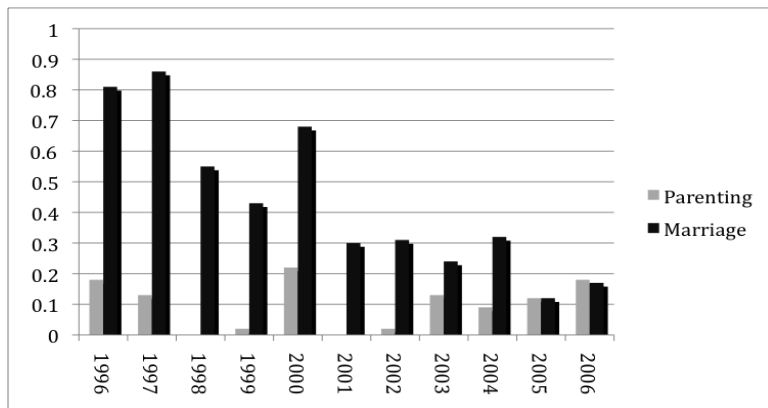
Fig. 6 Anti-Court Rhetoric



Likewise the type of rhetoric differed as well. In the case of same-sex marriage, early articles described the courts as “forcing” or “threatening” states to accept same-sex marriage. Opponents justified the passage of state DOMAs by arguing that states were “protecting” their citizens from the Hawaii Supreme Court. They described judges as “legislating from the bench,” “arrogant,” “too liberal,” and as a “danger to democracy.” In 1998 opponents began to regularly accuse the courts of “legislating from the bench” and admonish them for “overstepping their bounds.” They argued that the issue should be left to the state legislatures. By 1999 opponents started to refer to judges as “judicial tyrants” or “judicial activists,” accused them of “creating law,” and called for measures to remove same-sex marriage from the courts’ jurisdiction.¹¹⁹ In 2003 opponents added to this rhetoric the notion that citizens should determine the contours of this debate rather than the courts and censured the courts for “creating divisiveness” and becoming “too politicized.” Anti-judicial rhetoric in discussions of same-sex marriage has continued along this vein through 2006. In the same-sex parenting articles, anti-judicial rhetoric took on a more muted tone. Courts were primarily criticized for “creating policy” “legislating from the bench” and were sometimes described as behaving “irresponsibly.” While, these critics encouraged the use of legislatures over courts to resolve the issue of same-sex parental rights, judges were rarely referred to as “activists” or “tyrants”, and measures to curb their involvement in the issue were not mentioned. During the entire period of the study the term “judicial activist” was used three times to describe judicial involvement in same sex parenting rights, which is somewhat surprising given the quantity and scope of cases promoting these rights.

¹¹⁹ A few same-sex marriage supporters began to lose confidence in the courts and referred to some judges as “wimps.”

Fig. 7 Media Market Coverage



Finally, despite the large number of cases on same-sex parental rights, overall, significantly fewer articles covered cases outside of their newspaper’s media market. Out-of-media-market coverage peaks in 2000, where 22% of the articles discussing cases mention decisions outside of their media market. (Fig. 7) However, in 1996 through 2000 the percentage of marriage articles covering out-of-media market cases ranges between 43% and 86%. By 2005, newspapers had diminished coverage of out-of-media-market cases in the realm of same-sex marriage to 12%, on par with parenting articles.¹²⁰ High out-of-media-market coverage may have exaggerated the success and, therefore, the “threat” of marriage equality. Despite the presence of far fewer marriage cases, coverage of out-of-state opinions raised public awareness and increased the significance of the handful of gay marriage victories. Likewise, low out-of-media-market coverage in the realm of same sex parenting minimizes the breadth and pace of judicial victories. Not only are readers provided limited information about cases in their own cities and states, but they also remain ignorant of significant progress on the issue in other locations across the country.

In sum, same-sex marriage and parenting coverage differs in several important ways that may illuminate why parenting advocates confront less backlash. Media coverage of same-sex marriage is abundant, is inclined to represent supporting and opposing perspectives equally, pits gay rights against the interests of children and family, highlights the issue as one involving states’ rights, is anti-judicial, and is likely to cover out-of-media-market cases. On the other hand, parenting articles are relatively scarce, are inclined to quote supporters over opponents, and frame both sides as a children’s rights and family issue. While still critical of judicial involvement, gay parenting articles are less likely to disparage courts and judges as judicial activists and generally present these criticisms as the products of judicial dissents. Cases on

¹²⁰ In light of the large number of ballot initiatives resulting from three court victories on same-sex marriage, understanding the degree to which adoption cases are covered beyond their jurisdiction may give us some insight into why backlash was less prominent relative to same-sex marriage.

same-sex parenting, although in greater supply when compared with same-sex marriage, are less likely to receive coverage outside of their media market (and therefore less likely to be used as fodder for a state-by-state campaign to restrict gay parenting rights.)

Public Opinion on Marriage and Adoption

Does public opinion explain the dearth of backlash towards gay adoption court victories? It is possible that the public has a higher tolerance for gay parenting than the rhetoric against same-sex marriage would suggest. Similar to public support of civil unions (to which a slim majority of the public lends its support), it is conceivable that a large enough margin of the public forgives gay family structures that are not marriage. While the topic of same-sex adoption has been relatively under-researched by public opinion scholars (in part because of low salience), the July 2006 Pew survey referenced in Chapter 2 provides an interesting snapshot of individual attitudes toward gay marriage and adoption. Results indicate that 52% of the public opposes adoption by gays and lesbians, while a slightly higher majority, 58%, oppose marriage. That is, only a marginally higher percentage of individuals strongly oppose marriage relative to adoption (Table 2).

Table 2: Opinion on Same-sex Marriage and Adoption¹²¹

	Gay ¹²² Marriage	Gay ¹²³ Adoption
Strongly favor	10.28	10.74
Favor	22.32	30.12
Oppose	26.36	28.31
Strongly Oppose	31.35	23.29

Source: Pew July 2006

In order to probe the data more deeply I merge two Pew surveys, one conducted in March and the other in July of 2006, to create a megapoll of individuals who provided their opinion on both gay marriage and adoption.¹²⁴ Again, over half of the respondents oppose both marriage and adoption, 62% and 56% respectively (Table 3). However, level of opposition appears to be

¹²¹ These totals include individuals who chose “I don’t know” or refused to answer the question.

¹²² The question was worded as follows: “Do you strongly favor, favor, oppose, or strongly oppose allowing gays and lesbians to marry legally?”

¹²³ The question was worded as follows: “Do you strongly favor, favor, oppose, or strongly oppose allowing gays and lesbians to adopt children?” It should be noted here that the question does not seem to cover other same-sex parental rights. However, to date no survey questions regarding same-sex parental rights other than adoption have been asked on a national survey.

¹²⁴ A March 06 poll asks half of their respondents their opinion on marriage and all of their respondents their opinion on adoption. The July poll does the opposite. Merging these two datasets into a megapoll results in a sample size of individuals roughly equivalent to one poll conducted by Pew but comprised of respondents who were asked both questions.

statistically equal.¹²⁵ Roughly half of all gay marriage or adoption opponents strongly oppose the practice.

Table 3: Megapoll Opinion on Same-sex Marriage and Adoption¹²⁶

	Gay Marriage	Gay Adoption
Strongly favor	10.72	11.95
Favor	27.10	32.22
Oppose	29.42	28.87
Strongly Oppose	32.76 ¹²⁷	26.96
Mean Opinion in Ballot States	65.78 ¹²⁸	59.69

Source: Pew Religion and the Press March and July 2006 survey data

The megapoll provides a large enough sample to compare public opinion on marriage and adoption in states that banned gay marriage through the ballot process. As stated earlier, in 2006 many predicted that gay adoption would meet its demise. Since gay marriage opponents so skillfully used the ballot process to dismantle gay marriage court victories, adoption advocates forecasted a string of defeats at the ballot box. As one same-sex marriage opponent articulated "Now that we've defined what marriage is, we need to take that further and say children deserve to be in that relationship."¹²⁹ In fact, in 2006, ballot initiatives or legislation banning same-sex adoption or limiting gay parental rights had been initiated in 19 states. Only 1 passed, and was eventually vetoed.¹³⁰ Inaction on the adoption front could be explained by diverging opinion on the two issues within ballot states. However, data from the megapoll suggests that, within states that banned same-sex marriage through the ballot process, opinion on marriage and adoption is statistically equivalent. Of the 789 respondents in ballot states, in 2006 roughly 60% oppose both practices.¹³¹ Individuals residing in ballot states strongly oppose adoption and marriage at equal rates.

¹²⁵ 95% confidence intervals indicate that there is no statistical difference between level of opposition toward gay marriage and adoption.

¹²⁶ These figures do not include individuals who chose "I don't know" or refused to answer the question. It is for this reason that the percentages are slightly higher than the Pew July 2006 data.

¹²⁷ The number of strong opponents of marriage and adoption are equal at the .05 level.

¹²⁸ Opinion toward same-sex marriage and same-sex adoption is equal among residents of states in which same-sex marriage bans were passed through the initiative process at the .05 level.

¹²⁹ Stone, 2006.

¹³⁰ Equality from State to State 2006, Human Rights Campaign.

¹³¹ A slightly (but significantly) smaller majority opposes same sex marriage or adoption in states that did not ban same sex marriage through the initiative process (57% and 53% respectively).

Table 4: Block Recursive Models of Opinion on Same-sex Adoption

	Adoption Model I	Adoption Model II	Adoption Model III	Adoption Model IV	Adoption Model V
Age	***0.009 (0.002)	***0.007 (0.002)	*0.005 (0.002)	0.004 (0.003)	0.004 (0.003)
White	-0.132 (0.092)	-0.074 (0.097)	-0.110 (0.111)	-0.070 (0.117)	-0.060 (0.117)
Gender	***-0.256 (0.071)	***-0.327 (0.074)	***-0.330 (0.080)	**-.0261 (0.086)	**-.0265 (0.086)
Married		*0.148 (0.075)	*0.161 (0.082)	0.158 (0.087)	0.157 (0.087)
Collgrad		***-0.502 (0.076)	***-0.064 (0.083)	***-0.290 (0.087)	***-0.285 (0.087)
Rel.attend.		***0.672 (0.092)	0.121 (0.110)	0.085 (0.116)	0.084 (0.116)
Partyid			**0.300 (0.105)	*0.262 (0.111)	*0.260 (0.111)
Ideology			***-1.304 (0.200)	***-1.292 (0.213)	***-1.300 (0.213)
Word of God			***1.106 (0.134)	***0.902 (0.146)	***0.885 (0.147)
Gays can change				***0.482 (0.094)	***0.474 (0.095)
Ballot state					*0.174 (0.083)
N	921	905	813	732	732

Source: Pew Forum on Religion and Public Life, July 2006 Survey

*p < .05; **p < .01; ***p < .001 (two tailed); items in parentheses are standard error

Another way of testing the relationship between opinion on same-sex marriage and adoption is to analyze the structure of opinion on each issue. To that end, I use the models from Chapter 2 to analyze same sex adoption (Table 4). Model I indicates that although race has a direct effect on same sex marriage opinion formation, it is not a factor in opinion on same-sex adoption. But similar to marriage, being male or older increases one’s likelihood of opposing same-sex adoption. We find, in Model II that all three of the factors, having a college education, being married, and attending religious services significantly influences opinion on both marriage and

adoption. An individual with a college education is less likely to oppose same-sex adoption, while a person who attends religious services is likely to oppose the practice.

Party identification, ideology, and believing that the bible is the “word of God” each significantly influences opinion on same-sex marriage. In the adoption analysis each of the three variables is significant as well. Ideology and believing the bible is the “word of God” have a similarly significant effect on opinion toward adoption as does voting Republican. However, religious attendance is no longer significant.

As with same sex marriage, support for same-sex adoption increases among individuals who believe that gays and lesbians cannot change their sexual orientation. The final model introduces a variable measuring exposure to anti-same sex marriage ballot initiatives on opinion toward same-sex marriage or adoption. The variable, a dummy indicating whether the state featured an initiative or referenda on the ballot banning same sex marriage at any point through 2006, significantly influences opinion toward both issues. Residing in one of these “ballot” states significantly increases one’s likelihood of opposing same-sex marriage or adoption.

Table 5: First Differences for Ordinal Probit Analysis of Opinion on Same Sex Adoption

	Strongly Favor	Favor	Oppose	Strongly Oppose
Age ^a	-0.009	-0.019	0.009	0.019
White	0.008	0.016	-0.007	-0.016
Gender	0.034	0.070	-0.034	-0.070
Married	-0.021	-0.041	0.021	0.041
College Grad	0.039	0.074	-0.029	-0.074
Rel. Attendance	-0.011	-0.022	0.011	0.022
Party Id	-0.034	-0.069	0.034	0.069
Ideology	0.197	-0.287	-0.160	-0.324
Word of God	-0.129	-0.213	0.119	0.223
Gays Can Change	-0.059	-0.126	0.056	0.130
Ballot State	-0.023	-0.046	0.023	0.046

^aCoefficients represent the shift in probability of strongly favoring, favoring, opposing, or strongly opposing same sex marriage or adoption when the independent variable shifts from the minimum to the maximum value for all variables except age. The coefficient on age is the shift in probability of being in one of the four categories of the dependent variable with a standard deviation shift from the mean age. A standard deviation shift in age is 16 years.

As with the analysis in Chapter 2, we can substantively interpret the effect of these variables on same sex adoption. We see similar shifts in opinion on same sex adoption as we did with marriage. (Table 5) Gender yields a decrease in strong opposition towards same sex adoption as it does with same sex marriage. Being female decreases the probability of strongly opposing same sex adoption by 7 percentage points. While education is not significantly related to opinion on same sex marriage, those with a college degree are 7 percentage points less likely to strongly oppose same sex adoption than are individuals who do not possess a college degree. Identifying as Republican increases the probability of strongly opposing same sex adoption by 7 percentage points and, as with same sex marriage, a shift to “very liberal” decreases strong opposition by 32

percentage points. Believing that the bible is the “word of God” increases strong opposition by 22 percentage points, almost as high as its effect on strong opposition to same sex marriage (31 percentage points). And believing that sexual orientation can change increases strong opposition by 13 percentage points (roughly equal to its effect on same sex marriage.) Finally, residing in a state that banned same sex marriage through the ballot process increases strong opposition to same sex adoption by 5 percentage points. Overall, opinion on same sex marriage and same sex adoption are structurally similar.

We can also test the similarities between opinion on gay adoption and gay marriage by evaluating how an individual’s opinion on same sex marriage influences their opinion on same sex adoption. If opinion on gay marriage explains a large portion of opinion on adoption then public opinion alone cannot explain the backlash puzzle. As stated earlier, according to the megapoll, of the individuals who were asked questions about marriage and adoption 62% and 56% oppose marriage and adoption respectively. Respondents in the July survey who were asked both questions also oppose both at high rates. Sixty-three percent oppose same-sex marriage and 57% oppose adoption. Of those who oppose adoption, 73% oppose marriage. Similarly, 77% of gay marriage opponents oppose adoption. As the model in Chapter 2 demonstrates, strongly opposing adoption increases an individual’s likelihood of strongly opposing same-sex marriage by 65 percentage points. Similarly, strongly opposing same sex marriage increases the probability of strongly opposing adoption by 52 percentage points. (Table 6) When opinion on gay marriage is added to the model on adoption, the effects of age, gender, marital status, and party identification lose their significance. Education remains a significant predictor of opinion on adoption, accounting for a 6-percentage point decrease in strong opposition, and the effects of ideology remain high on strong opposition (18 percentage points).

The public appears to be just as opposed to same-sex adoption as they are to same-sex marriage during a year in which same-sex marriage advocates were dealt crushing blows at the ballot box. The megapoll indicates that marriage and adoption opponents share equal levels of opposition. And residents within states that banned same-sex marriage through the ballot process are just as opposed to same-sex adoption as they are marriage. In terms of the structure of opinion, the block recursive approach reveals several similarities between opinion on same-sex marriage and adoption. In early models, opposition to marriage and adoption is positively affected by an individual’s age and gender. Long-term characteristics are statistically significant predictors of opinion on same-sex marriage and adoption as are an individual’s political views and values. Perhaps most importantly, opinion on same sex marriage is the largest predictor of opinion on same sex adoption.

However, there are some differences that should be noted. Race is a significant factor in early models of same-sex marriage opinion, and although “word of God” significantly predicts opinion toward both same sex marriage and same sex adoption, religious attendance remains significant only for opinion on same-sex marriage. Conversely, having a college degree remains a significant predictor of opinion toward same-sex adoption, but loses its significance in predicting opinion on gay marriage. That said, while these differences should be recognized there is reason to doubt that they fully explain the huge variations in backlash between same sex marriage and same sex adoption.

Table 6: The Effect of Opinion Toward Same Sex Marriage on Same Sex Adoption Opinion

	Oprobit Coefficients	Strongly Favor	Favor	Oppose	Strongly Oppose
Age	0.001 (0.003)	-0.001	-0.007	0.004	0.004
White	-0.099 (0.122)	0.005	0.033	-0.016	-0.022
Gender	-0.125 (0.088)	0.007	0.042	-0.022	-0.027
Married	0.075 (0.089)	-0.004	-0.025	0.013	0.016
Collgrad	**-.0285 (0.091)	0.017	0.095	-0.053	-0.059
Religious Attendance	-0.065 (0.122)	0.003	0.022	-0.011	-0.014
Party Id	0.090 (0.116)	-0.005	-0.030	0.016	0.019
Ideology	***-.0866 (0.222)	0.056	0.275	-0.153	-0.177
Word of God	**0.413 (0.153)	-0.024	-0.136	0.076	0.085
Same Sex Marriage Opinion	***3.050 (0.185)	-0.447	-0.423	0.345	0.524
Ballot state	0.070 (0.086)	-0.004	-0.023	0.012	0.015
N	751				

Source: Pew Forum on Religion and Public Life, July 2006 Survey

*p < .05; **p < .01; ***p < .001 (two tailed); items in parentheses are standard errors

Gay Adoption Strategies

Legal Doctrine

As we have seen, public attitudes and opposition framing cannot entirely explain the disparity in levels of backlash between same-sex marriage and same-sex parenting rights. Interviews with gay rights advocates and opponents confirm the primary hypothesis of this project: silence is the winning strategy in the battle for same-sex parental rights. Advocates of gay parenting rights designed strategies to achieve the low issue salience evident in the media analysis above.

The issue of whether or not to constitutionalize same-sex adoption has been debated considerably by gay rights advocates. People in favor of establishing constitutional protections for same-sex parents point to the often arbitrary and inconsistent rationales used to deny or

support same-sex adoption petitions. Although there have been rulings in favor of same-sex adoption, the argument goes, parental rights vary significantly by state and, often, within states. This legal uncertainty renders gay parents “second class citizens” with respect to their ability to have a legally recognized relationship with their child (Michael 2004). The parent-child relationship, argue advocates, is too important and too fundamental to allow any room for its denial. Additionally, inconsistency in litigation only breeds more litigation. In the absence of a constitutional decree declaring either the right to adopt or that gay parents can litigate under equal protection, gay parents will continue to shoulder the heavy costs of litigation (Colorado 2005). Others refer to the lack of codified language explicitly granting same-sex adoption or parental rights. This, coupled with the fact that statutory decisions (compared with constitutional rulings) are easier to overturn legislatively, requires that same-sex adoption decisions obtain a stronger legal foundation (ibid.). Finally, reviewing same-sex adoption cases in purely statutory terms invites more room for judicial discretion and judicial ideology to play a role in decisions (Pustilnik 2002). As state statutes differ and remain agnostic about the fate of same-sex parents, judges have the opportunity to weigh the sexual orientation of petitioners against the “best interest of the child”¹³² as much or as little as they want.

However, according to interviews with same-sex adoption advocates, it was a conscious and deliberate decision to advance same-sex adoptions within the context of statutory language, common law, and family law and to keep the issue off the public radar.¹³³ As one article explains,

lawyers have found that when it comes to the controversial subject of adoption by gay and lesbian parents, keeping out of radar range of both the media and the legislature has been the best way to challenge traditional notions of what constitutes a family.¹³⁴

As of 2006, all successful attempts to secure same-sex parental rights (either through traditional adoption, second parent adoption, or custody/visitation) had been accomplished without constitutional support. On the few occasions where gay rights organizations used constitutional language to bolster their argument the case either failed or was framed (where petitioners used both statutory and constitutional language) solely in terms of statutory claims (Schacter 2000). The most highly publicized adoption decision, *Lofton v. Secretary of Fla. Dept. of Children and Families*, in which advocates challenged the constitutionality of Florida’s ban on gay adoption, is

¹³² Most courts use the “best interest of the child” standard when determining the outcome of adoption petitions.

¹³³ During the course of my research on this topic I have interviewed 10 individuals who either served as attorneys on major gay adoption cases or are representatives of gay rights or pro-family groups. Additionally, one of the individuals is a Republican political consultant and another is a scholar on same-sex marriage. To remain in compliance with human subjects review I have not provided identifying characteristics of the interviewees in this paper. However, additional information about the interviews is available upon request.

¹³⁴ Stacey Winakur, *The Daily Record*, July 8, 2000, p. 1.

considered a failure among gay adoption advocates because of its departure from statutory reasoning.¹³⁵ One prominent gay adoption attorney stated:

Meanwhile you get the horrible Florida case, which is constitutional. The story is because it was a frolic of its own by the ACLU it didn't bring in children and it pursued a constitutional approach on behalf of gay parents.

Gay rights advocates would have preferred, the lawyer commented, “a statutory approach or a constitutional claim on behalf of the kids” (March 8, 2007 Interview).

Initially, when adoption advocates first started advancing adoption rights for gay parents—and when gay rights groups took up the issue—the goal was to keep the issue at the lower court level to reduce public attention. In Vermont, for instance, where adoptions are handled by probate court, judges had been granting same-sex couples adoptions on an individual basis without creating any fanfare. As stated above, judges “confessed” to granting these adoptions only in the comfort of judicial retreats in the 1990s. In fact, the issue landed on the state Supreme Court’s agenda because one probate court judge strategically refused to grant an adoption petition filed by a lesbian couple in order to encourage its review (and its validation) by the state’s highest court. The judge felt the timing was right (Attorney interview, March 8, 2007).

Advocates took advantage of the fact that trial court judges, typically, finalized adoptions. Recalls one attorney, the approach was

to keep it quiet and get as many granted at the trial level before getting an appellate decision. In California, this was twenty years after gays had been adopting. Approximately 20,000 kids would be impacted. (March 22, 2007 Interview).

When California gay rights advocates were confronted with an opportunity to take even a statutory claim to the state’s highest court, they hesitated. “Why rock the boat?” argued one California attorney. “People were getting adoptions through random judges in the state.” In the end they made their pitch to the court using “statutory interpretation of adoption laws and the history of interpretation.” By design, the approach was “very technical” (March 8, 2007 Interview).

In many ways the structure of same-sex adoption lends itself to an incremental, below-the-radar approach. As one same-sex marriage scholar argues:

some of this is political tactics and some of this is the structure of the issue. Same-sex adoption has never been dealt with as a rights issue for gays. Gay marriage is inevitably a rights issue, which makes compromise harder. However, it wouldn't be on the radar if it hadn't been a rights issue (March 9, 2007 Interview).

¹³⁵ The United States Supreme Court ultimately refused to grant cert. and let stand the appellate court’s ruling in favor of the Florida statute.

Relatedly, by keeping the focus on statutes or family law, particularly in the early days, advocates could make claims on behalf of individual couples rather than on behalf of the entire gay community. Decisions in the custody arena, for instance, “depend on the child’s circumstances, needs, perceptions, and passage of time” (Attorney interview, March 8, 2007). As one spokesperson from the National Center for Adoption Law & Policy explained, the issue was framed as an “individual concern, not a gay rights issue” (March 6, 2007 Interview). This served to both keep the argument within judges’ comfort zones¹³⁶, by minimizing the potential scope of their decisions, and to make the decision seem as unremarkable as other adoption decision in terms of salience.

Both gay rights advocates and opponents consider the issue’s low salience as critical to its success. A staff person at Basic Rights Oregon attributes the organization’s success with gay adoption, in part, to the fact that “BRO was able to keep the issue below the radar” (March 5, 2007 Interview). A staff member at the Family Research Council confirmed that the issue was “not high on the radar for pro-family conservatives” (March 6, 2007 Interview).

Children’s Rights

Interviews also confirm the deliberate use of a children’s rights rather than gay rights frame to decrease the potential for backlash. Before gay marriage was even a thought, recalls one attorney, the basic principles of these early adoption cases were simple:

The issue was if one woman invites another woman to share parenting and the nonbiological parent agrees, and during this period the child perceives the person as a parent, there has to be some way for the court to protect the child’s relationship with the nonbiological mother. The relationship between the parents doesn’t matter (March 8, 2007 Interview).

This remained true when advocates began seeking second parent adoptions.

There was a more determined effort to use the court to determine these relationships while the couple was together. People really weren’t thinking about marriage. Again, we focused on children’s rights (Ibid.).

On the few occasions when gay parenting cases made the press, advocates consistently reminded the public of what was truly at stake. As one attorney described:

The court is now going to decide whether children born to same-sex parents must be given the same legal protections as children born to straight parents.¹³⁷

¹³⁶ The case-by-case nature of family law cases, as well as the “best interest of the child” standard grants judges wide latitude to consider the character of each individual claimant. This gives judges the opportunity to minimize the importance of the claimant’s sexual orientation.

¹³⁷ Bob Egelko, “Court to set rules for parental disputes between gays,” *San Francisco Chronicle*, September 2, 2004, p. B3.

And judges used this frame in their decisions. One judge noted in his opinion that

[t]his case is not about gay and lesbian rights. This case is not about gay marriage. This case is not about gay adoption. What this case is about is whether or not a child is better off in this rather uncertain world with as many people as possible taking an interest in the child, both financially and emotionally.¹³⁸

Steering the conversation away from gay parental rights and toward children's needs was a strategic move commented one Republican political strategist.

There has always been among people who work in adoption a concern for what is best for the child. Among these people, having kids grow up in a loving home is better, regardless of demographics (February 26, 2007 Interview).

A spokesperson from Family Pride, a pro-gay family organization, explained:

Conversations about adoption bans surround real children and involve real children, rather than parental rights. The needs of the children has helped decrease backlash (March 20, 2007 Interview).

The Family Research Council stated that the issue was low on the "radar for pro-family conservatives" because of the "confusing rhetoric of same-sex adoption, the media bombarding the public with images of happy gay couples taking in disadvantaged kids" and the argument that "this kind of family is better than no family" (March 6, 2007 Interview).

Not only did the children's welfare frame help minimize attention but it attracted legitimizing allies in the children's welfare arena. A National Center for Adoption Policy & Law spokesperson stated:

[between same-sex marriage and adoption] the difference is that children are involved. There is a recognition that children should have homes and children in the public system need homes. People are willing to put aside their own views on type of home. Organizations like mine, the APA and all major players are opposed to categorical bans (March 6, 2007 Interview).

Finally, advocates argued that negative adoption or parenting decisions would only strip children of their right to have a *legal*, rather than an *actual* relationship, with their parents. Remarkd one attorney, "kids are living with the families regardless of the decision. So you will be leaving the kids vulnerable. It is not about recognizing the parental relationship" (March 22, 2007 Interview).

¹³⁸ Geoffrey Fattah and Deborah Bulkeley, "Custody ruling may affect other cases," *Deseret Morning News*, December 10, 2004.

Conclusion

In 2006 Human Rights Campaign warned in a report on GLBTQ legislation “we expect that attacks in [same-sex parenting] will continue to increase.” (State to State 2006, 16) In 2007 bills advancing same-sex parenting rights outnumbered those limiting parenting rights almost 3 to 1. Only 4 anti-gay parenting measures were introduced (1 of which passed).¹³⁹ (State to State 2007, 16-17). That same year Colorado passed second parent adoption legislation and the District of Columbia passed legislation to treat “de facto parents” as parents in cases of custody. In 2008, only three anti-gay parenting bills were considered. The only measure to pass (through the initiative process) was a ban on non-married couples adopting in Arkansas. And finally, gay adoption advocates revisited the Florida ban, this time taking a page out of their own playbook. Advocates argued that the ban violated Florida’s Adoption and Safe Families Act of 1997, and that the ban infringed upon children’s equal protection rights. A Miami-Dade circuit court judge agreed. (*In re Gill*)¹⁴⁰ It seems that gay adoption advocates have weathered the storm.

The evidence discussed in this chapter (and in chapter 2) suggests that the two deliberate strategies utilized by same-sex adoption advocates to reduce public awareness protected court victories from the torrent of backlash so common in the struggle for same sex marital rights between 1996 and 2006. Gay rights organizations (and family court judges) made a concerted effort to keep the adoption decisions out of the public eye. This was facilitated, in part, by supporting their positions with statutory or family law doctrine that permitted judges to review petitions on a case-by-case basis, and by removing “gay rights” from the equation, choosing instead to frame their arguments in terms of children’s welfare. This redirected conversations about the issue away from negative gay stereotypes and toward the neutral or positive discussions regarding children’s rights. Without the controversial focus on gay rights, newspapers lost interest. With decreased public focus, the potential for backlash was reduced.

This research has several important implications. First, for civil rights activists, the decision to “go constitutional” should not be automatic. Although the benefits of constitutionalizing issues for minority groups are clear (decreased ambiguity, increased standardization across the states, decreased potential for judicial discretion¹⁴¹) there are costs associated with constitutionalizing rights (and benefits to using statutory, administrative, or common law) as this case study demonstrates.¹⁴² Constitutional approaches to controversial issues will likely result in high

¹³⁹ This Utah legislation gives priority to married couples in foster child placement but permits placement with a single adult if it is in the best interests of the child. (State to State 2007, 37).

¹⁴⁰ This judge was demoted from her position as the top administrative judge of Miami-Dade’s juvenile courts shortly after the decision was issued. (Associated Press, “Miami judge who struck down gay adoption ban demoted,” July 14, 2009.)

¹⁴¹ We should remember that decreased judicial discretion is not always a plus. In the case of same-sex adoption, evidence seems to indicate that a constitutional ruling could serve to decrease a judge’s discretion to grant, rather than oppose, a bid for same-sex adoption.

¹⁴² Some may argue that advocates had no choice but to adopt a constitutional approach to advance same-sex marriage. This paper in no way argues that marriage advocates had a choice. Rather, I argue that, where there is a choice, as there was with same-sex adoption, advocates may

profile cases. With increased public salience the potential for backlash is greater. While policy advocates may issue a winning argument on behalf of a minority group, as we witnessed with same-sex marriage, a carefully mounted and strongly supported opposition can swiftly dismantle any constitutional claim.¹⁴³ Second, civil rights activists who represent “unpopular minorities” can secure court victories by focusing on their clients’ rights, but this rights rhetoric carries a high risk of provoking opposition. To avoid backlash, where possible, advocates could consider reframing the issue to focus on a less controversial population or use less polarizing language, as gay parental rights advocates did by shifting attention toward children’s welfare over gay rights.

For political science and public law scholars, this research leads one to question the degree to which strategies used by advocates can influence the way the public perceives a policy-making institution. The content analysis revealed a sharp difference in the level and type of anti-judicial rhetoric included in stories on same-sex parental rights when compared with same-sex marriage articles. Although research on the United States Supreme Court indicates that institutional support for the Court remains high despite highly visible unpopular rulings such as *Bush v. Gore*, there is reason to believe that state courts and judges may be more vulnerable to public attacks on the judiciary, particularly in states with judicial elections. (Gibson, Caldeira, and Spence 2003)

Finally, and perhaps most importantly, the current debate concerning legislatures v. courts misses an important component of judicial decision-making. While it may be the case, as Rosenberg suggests, that courts are limited in their capacity to achieve social change, the Melnickian (1994) notion of statutory interpretation, coupled with an artful avoidance of “new rights” arguments (on behalf of unpopular groups), may provide a valid alternative for those seeking to minimize backlash. Although some may not regard these gay parenting decisions as advancing social change, for the millions of gay parents and their children who face a highly organized and well-funded opposition, these decisions have provided as monumental a victory as *Brown* did for school desegregation and *Roe* did for abortion.

want to consider the potential for backlash when using constitutional rather than statutory alternatives.

¹⁴³ The presence of ballot initiatives makes this even easier. For a discussion on this topic see Reed (1990).

Chapter 4: Group Homes in Gridlock

Since the passage of the 1988 amendments to the Fair Housing Act, which prohibits housing discrimination against individuals with disabilities, the politics surrounding the location of group homes has pitted local government against state and federal agencies, property owners against local officials, and neighbor against neighbor. Local, state and federal officials constrained by partisan pressures and electoral concerns, and committed to a tradition of local control over zoning, have been frequently unwilling or unable to support group home operators, despite abundant statutory and doctrinal support for disabled residents. Shielded from these pressures, courts have often been the only venue available to group home residents and operators to protect their rights. That said, legal victories have not offered a panacea to the rampant NIMBYism surrounding group home location. Even the Supreme Court has had difficulty contending with zealous property owners and locally elected officials (LEOs) attempting to secure electoral victories at the expense of housing stability for group home residents. The Court's landmark 1995 decision ruling that municipalities could no longer apply different zoning standards to group homes and families (*City of Edmonds v. Oxford House*) has failed to adequately shield group home participants from having to continue to litigate. While, many believed the Court's ruling would add clarity to a body of law that had been deeply contested by providers and zoning officials and further complicated by inconsistent court rulings, in its aftermath group homes have continued to face mounting opposition by communities and city officials. This antagonism towards group home operators and residents continues despite Supreme Court mandates and state commitments to house individuals with severe mental illness, who should not be institutionalized, in community living arrangements.

Yet, group homes are on the rise and rapidly becoming a fixture in many single-family neighborhoods. How do group homes locate stable housing for their clients in light of extensive opposition? Some group home providers have fired their attorneys, boxed up their legal texts, and dusted off their sneakers to start canvassing the neighborhoods in search of supporters. Rather than taking their opponents to court, some group home providers have opted to take them to lunch, hoping that relationship-building will provide a much-needed respite from the fighting and, ultimately allow them to move into their homes. These advocates and providers focus on the benefits of collaboration, through which stakeholders, both public and private, have an opportunity to iron-out their grievances through discussion and negotiation. Proponents of collaboration argue that, through an open dialogue, stakeholders engage in direct, deliberate, consensus-oriented and reciprocal exchanges in order to resolve and manage policy conflicts. (See Ansell and Gash 2007). Unlike more adversarial approaches, which focus on a "winner-takes-all" perspective that may serve to solidify, rather than alleviate, opposition, collaborative strategies help to "transform adversarial relationships into more cooperative ones." (Ansell and Gash, 5).

However, some advocates opt for a more stealth approach to improve housing stability for group home residents. Group home providers who couple a legal rights-based strategy with one that expressly eschews notification and transparency have had significant success securing and maintaining housing for their clients—leading some to argue that public education serves only

one purpose—to give the opposition a head start. Group home operators in this camp rent or purchase their homes before notifying their neighbors or securing zoning variances. While they still may end up in court—or may confront opposition—they do so having already acquired their property. Similar to same sex parenting advocates, then, advocates employing “below the radar” approaches to securing single family housing for their clients, reduced the incidence and effect of backlash, and successfully protected their clients’ housing rights.

What is a Group Home?

Depending on the context and audience the term "group home" can produce different, and extreme, interpretations. Some view group homes as any single-family dwelling used to house a small number of unrelated persons, such as students. Others have used the term to include halfway houses for recently paroled felons, or recovery homes for sex offenders. According to the Departments of Justice (DOJ) and Housing and Urban Development (HUD), group homes are defined as "housing occupied by groups of unrelated individuals with disabilities."¹⁴⁴ Aside from that rather vague definition, group homes differ in many respects. Some rent, while others choose to—or are required to—own. Some require three to four bedrooms, while others resemble small apartment complexes with 10 or 15 units.

Group homes vary in terms of the populations they serve. While the DOJ definition characterizes residents as disabled in some way, the term “disability” encompasses a broad range of conditions from moderate or severe physical, mental, developmental disabilities to individuals recovering from addiction. Often the population determines what type of facility is required. Those with physical handicaps might require structural accommodations. Group home residents with severe mental illness generally reside in secured residential treatment facilities (SRT). Conversely, many sober-living houses are able to simply rent their properties from private landlords or mental health agencies. However, as this case study will demonstrate, the decision to go stealth is not strongly correlated with the type of group home. Providers who own their properties are just as likely to opt out of notification as are renters—even when renovations are required. Those serving the elderly are no less inclined to employ stealth tactics than are providers working with recovering addicts.¹⁴⁵ What ties these group homes together is a belief that their clients have a legal right to housing and that acquiring the property prior to alerting neighbors and officials can be the difference between housing security and homelessness.

The Evolution of Legal Rights for Group Homes

¹⁴⁴ Joint Statement of the Department of Justice and the Department of Housing and Urban Development, August 18, 1999.

¹⁴⁵ There was no significant difference in strategy between the populations included in the study, nor was there a difference between operators who rent or buy. Operators building homes were more likely to seek zoning approval before they secured their housing (due to strict regulations governing new construction) however, many elected to purchase the property prior to seeking zoning approval.

Prior to the 1988 amendments to the Fair Housing Act, groups not covered by the Fair Housing Act had a difficult time convincing the Supreme Court to intervene in matters concerning zoning. The Court has remained true to the precedent established in *Euclid v. Ambler* 272 U.S. 365 (1926) to give municipalities wide latitude in determining the use and character of their neighborhoods. Fifty years later, in *Village of Belle Terre v. Boraas* 416 U.S. 1 (1974) the Court upheld a zoning ordinance that placed restrictions on the number of unrelated individuals living in one housing unit.

That said, the Court did provide some protections for group home operators in the years preceding the passage of the 1988 amendments. In *Moore v. East Cleveland* 431 U.S. 494 (1977), the Court invalidated a local ordinance that restricted the definition of “family” to specific types of related individuals. Eight years later the Rehnquist Court invalidated a City of Cleburne ruling that prevented the opening of a group home for mentally retarded individuals based on a city zoning ordinance.¹⁴⁶

The Fair Housing Amendments Act of 1988 (FHAA) paved the way for group homes to aggressively combat discriminatory zoning practices by adding disability to the list of categories previously designated as “protected classes” under the FHA¹⁴⁷ and thus providing group home residents with significant statutory shelter. While the Act is not explicit with respect to group home coverage it contains several provisions that have been interpreted favorably by the courts to protect group home residents from opposition. Specifically, it is unlawful:

1. To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap.¹⁴⁸
2. To discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap.¹⁴⁹

Discrimination includes:

a refusal to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling¹⁵⁰

¹⁴⁶ *City of Cleburne vs. Cleburne Living Center* 473 U.S. 432 (1985). Although the Court refused to classify the mentally retarded as a quasi-suspect class requiring heightened review, the Court invalidated the ordinance using the rational basis test.

¹⁴⁷ The Act originally established protections from housing discrimination on the basis of race, color, religion, national origin, sex, handicap and familial status "in the sale, rental, and financing of housing and to assure fair housing practices."

¹⁴⁸ Title 42 Section 3604 (f)(1)

¹⁴⁹ Title 42 Section 3604 (f)(2)

¹⁵⁰ Title 42 Section 3604 (f)(3)(B).

Handicap includes any "physical or mental impairment which substantially limits one or more of such person's major life activities." A handicap individual, according to the amendments, is someone who has "a record of having such an impairment," or someone "being regarded as having such an impairment."¹⁵¹

Faced with mounting opposition from property owners and locally elected officials the bill's drafters included a number of important caveats. First, the term "handicap" excludes "current, illegal use of or addiction to a controlled substance."¹⁵² Second, none of the amendments' provisions "limits the applicability of any reasonable local, state or Federal restrictions regarding the maximum number or occupants permitted to occupy a dwelling."¹⁵³ Third, reasonable accommodations are not required for "an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."¹⁵⁴ Finally, a request for reasonable accommodations can be denied if the request "impose[s] an undue burden or expense on the local government" or if the "proposed use create[s] a fundamental alteration in the zoning scheme."

Despite this important legislative victory, interpreting the Act's edicts remained a challenge—particularly as it related to group home advocacy. For one, advocates were unclear about the precise definition of handicap and how it could be used to protect the rights of individuals living in group homes.¹⁵⁵ Additional questions arose as to whether the reasonable accommodations provisions would apply to zoning—the primary obstacle to group home location. Providers, along with attorneys from HUD and DOJ searched for cases to test these provisions. As one housing rights attorney recalls:

1988 was a time when lawyers had more time to set their own agenda. I had subscribed to the Chicago Tribune and had been reading it daily. I read a headline that said 'FHA Amendments to Provide New Safeguards for Group Homes.' I immediately flew to Chicago to meet with the people quoted in the article.¹⁵⁶

It became apparent in a few early victories that the courts would interpret the amendments broadly—looking not only at the specific language of the act but also at the spirit and intent of the law, derived in part from its legislative history (which included language referring to group homes.)¹⁵⁷ *Baxter v. City of Belleville* 720 F. Supp. 720 (S.D. Ill. 1989) put to rest many of the uncertainties that group home providers had over the applicability of the amendments to their cause. Baxter was denied a special use permit by the Belleville Zoning Board to open a hospice

¹⁵¹ Title 42 Section 3602 (h)(1-3).

¹⁵² *Ibid.*

¹⁵³ Title 42 Section 3607 (b)(1).

¹⁵⁴ Title 42 Section 3604 (f)(9)

¹⁵⁵ Sober living providers were also supported by the passage of the Anti-Drug Abuse Act of 1988. This act required states to provide sober living group homes with a loan to establish group homes for recovery.

¹⁵⁶ Interview with fair housing attorney, May, 2010

¹⁵⁷ Interview with fair housing attorney, May, 2010.

care facility for individuals with AIDS. Despite skepticism over whether Congress had intended to include zoning under the policies regulated by the amendments¹⁵⁸ attorneys decided to argue the case under the reasonable accommodations provision. To defend Baxter's right to open the hospice in a residential neighborhood advocates had to convince the district court judge that 1) having AIDS or being HIV positive constituted a handicap under the amendments 2) denying Baxter the special use permit to open the group home gave him standing to sue and 3) the city could not elude responsibility under the "health or safety" provision of the amendments. Relying heavily on legislative history, the court agreed with plaintiffs that individuals with AIDS and those who test positive for HIV are considered handicap under the amendments, the group home should be considered a dwelling as defined by the Fair Housing Act, denial of the special use permit constituted a violation of the amendments that was not justified by the "health or safety" provisions in this instance, and Baxter, as the proprietor of the group home, has standing to sue.

US v. Southern Management Corporation 955 F. 2d 914 (4th Circuit, 1992) resolved the question of coverage for individuals in recovery when the court unequivocally interpreted the legislation to include recovering drug addicts and alcoholics under the definition of handicap. The major point of contention in the case was whether or not "addict" as used in the Fair Housing Act meant a current or recovering addict. The court argued that the structure of the sentence "current, illegal use of or addiction to a controlled substance" makes it unclear whether or not the word "current" applies only to "illegal use" or to "addiction" as well. Is an addict someone who once used an illegal substance but no longer uses it, or is it restricted to those who are in the midst of using the substance? The court deferred to the more clearly written language in the Americans with Disabilities Act, which had been amended in 1990, shortly before the court heard the case. Specifically the ADA states that the category of handicap includes, anyone who "has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer engaging in such use;" and anyone who is "participating in a supervised rehabilitation program and is no longer engaging in such use." (*US v. Southern Management Corporation* 955 F. 2d 914).

The question of whether and to what degree municipalities must make reasonable accommodations to maximum occupancy restrictions has been more difficult to resolve. Maximum occupancy restrictions block the location of group homes in two ways: 1) by establishing a maximum number of residents permitted to occupy a single family residence and 2) by defining whether single family residences must be limited to related individuals. In 1991 the Department of Justice filed suit against the City of Audubon for using zoning ordinances to prevent a sober living group home from locating in a single-family neighborhood. The house had been rented on numerous occasions to groups of law students and other unrelated persons in the area. The District Court ruled against the borough noting comments made by the Mayor during a July, 1990 meeting with concerned citizens where he responded:

¹⁵⁸ Ibid.

the minute that I found out about it I shared the same sentiments as the residents on Vassar Road. And Unfortunately there is nothing more that I would like to do than to just come in and just tell these people you have until noon to get out of town.¹⁵⁹

Conversely, one year later the 11th Circuit ruled, in *Elliott v. City of Athens* 960 F. 2d 975 (11th Circuit, 1992), that the Fair Housing Act did not apply to the city's ordinance limiting only the number of *unrelated* persons occupying a dwelling. In this case The Potter's House, an alcohol and drug rehabilitation center, had entered into negotiations to purchase two single-family dwellings in Athens.¹⁶⁰ The organization planned to house 12 residents, exceeding the eight-person occupancy cap. The owner of the property approached the Planning Department to inquire about rezoning the property to allow the organization to obtain the lease. While planning officials could not find any evidence that the group home would place a burden on the infrastructure of the neighborhood they refused to rezone the house. They argued that "the rezoning would set a negative precedent for the neighborhood and would constitute spot zoning." The lower court ruled that the occupancy cap was exempt under the Act and the 11th Circuit upheld that decision.

In 1994 the 9th Circuit took an opposing position on a similar set of facts in *Edmonds v. Washington State Building Code Council*. The case involved Oxford House, a substance abuse recovery house that had seen more than its fair share of days in court. In 1990 Oxford House rented a home and moved into a single-family neighborhood in Edmonds. In an effort to alleviate potential anxieties from neighbors, an Oxford House resident handed out flyers to the community explaining the facility. Despite the flyers, neighbors complained. In response, the city investigated the house and found that they were in violation of the city's occupancy restrictions for people inhabiting single-family homes. According to a city ordinance, occupants of single-family dwellings must meet the definition of family:

An individual or two or more persons related by genetics, adoption or marriage, or a group of five or fewer persons who are not related by genetics, adoption or marriage.¹⁶¹

The City issued criminal citations against both the owner of the property and Oxford House. Edmonds sued Oxford House in Federal District Court to obtain a ruling that the city's occupancy restriction was exempt under the Fair Housing Act. Oxford House filed a counterclaim against the city, stating that Edmonds was in violation of the Act by refusing to make reasonable accommodations. The Department of Justice filed a similar suit against Edmonds (which was consolidated with Oxford House's case). The District Court, following the law established by the 11th Circuit in *Elliott*, ruled in favor of Edmonds. On appeal, the 9th Circuit reversed the decision, stating that a maximum occupancy restriction was only exempt under the Fair Housing Act if it applied to all occupants, not simply those who are unrelated. To resolve the apparent confusion the Supreme Court, four years after the case was first filed in District Court, agreed to hear the case.

¹⁵⁹ *United States v. Borough of Audubon*, 797 F. Supp. 353 (D.N.J. 1991).

¹⁶⁰ The buildings were on the same lot.

¹⁶¹ *City of Edmonds v. Washington State Building Code Council*, 115 S. Ct. 417 (1995)

The Court upheld the 9th Circuit's decision, stating that maximum occupancy restrictions are exempt under the Fair Housing Act only if they are enacted to "prevent overcrowding of a dwelling." Ordinances implemented to "preserve the family character of a neighborhood" by focusing on "composition of households" rather than on absolute total number of occupants, as Edmonds did by only placing occupancy limits on unrelated persons, are not exempt. Despite this victory, since the Court's decision at least 77 court decisions have been issued involving group home sitings, over 400 incidents of opposition toward group home location have been reported in local newspapers¹⁶², and, according to the organization's attorneys, Oxford House has been involved in over 100 cases against municipalities.¹⁶³

Group Home Backlash

Where backlash to same sex family rights, both marriage and parenting, comes in the form of legislation, court cases, and ballot initiatives, backlash to group home location is localized. The most common method for blocking the location of a group home is through zoning ordinances. Regardless of whether group home providers rent or own the properties they will likely be asked to apply for a zoning variance to live in a single-family neighborhood. The ordinance may impose a cap on the number of unrelated individuals living in a single-family residence--typically ranging from 4 to 8, classify a group home as a business or boarding house, or require the provider to request an exemption from minimum spacing requirements between group homes¹⁶⁴. Maximum occupancy restrictions place hardships on group homes that require some minimum number of individuals to live in the group home as part of the treatment and in order to reduce costs. Classifying group homes as businesses or halfway houses often results in operators being forced to relocate to neighborhoods zoned as business or mixed-use—denying residents the treatment benefits of living in a single-family neighborhood. Spacing requirements significantly limit options for group homes and result in extensive delays as providers attempt to locate homes or properties in neighborhoods with few group homes (an increasingly difficult task in a post-*Olmstead* world that has spurred on an increased production of community living arrangements). Courts have ruled that cities are expected to make reasonable accommodations to these zoning regulations to allow group homes to reside in single family neighborhoods without imposing too many modifications to group home treatment plans.

While zoning processes per se may not be discriminatory, zoning boards and city officials may succumb to community opposition and deny the group home zoning requests. There are formal methods for gathering community input. Some cities may require public hearings as part of their zoning processes or may permit the public to attend zoning hearings. Communities may also

¹⁶² According to a Lexis-Nexis search of newspaper articles discussing group home sitings between 1996 and 2006.

¹⁶³ Melinda Tuhus, "When Sober Houses Become Part of the Neighborhood," *New York Times*. March 17, 2002.

¹⁶⁴ Many cities and states have drafted legislation to limit the proximity of group homes to each other in order to avoid saturation. Many courts have argued that a denial of an exemption constitutes a violation of the reasonable accommodations doctrine under the FHA.

contact their elected representatives, draft a petition, or organize a community association and file a lawsuit against the group home. A 1997 survey of group home opposition found that 82% of neighbors who opposed group home location made their opinions known through public hearings, 58% through contact with their locally elected officials, 30% through the media, 21% in a petition, and 6% by filing a lawsuit. (National Law Center 1997, iii). Pressure to comply with community opposition may be so great that zoning and city officials revoke a zoning variance that has already been issued. Sioux Falls officials, for example, issued a conditional use permit for a sober living group home only to withdraw it a few weeks later (after the group home had already purchased the property). Community members filed a petition protesting the permit, inducing the city to deny the permit in a re-vote.¹⁶⁵

With increasing court decisions ruling against zoning ordinances some cities and communities have used other mechanisms to create obstacles for group homes. A Massachusetts community attempted to block the location of a group home for four disabled adults in their neighborhood by blocking a construction permit to build a fire escape.¹⁶⁶ An Albuquerque Mayor attempted to pull the license of a rehabilitation center for recovering alcoholics operating a group home, despite the fact that the home complied with all state mandated licensing requirements.¹⁶⁷ Residents in Greenwich, CT argued that a group home for mentally ill individuals should not locate in their neighborhood because they had concerns about the group home's septic system.¹⁶⁸ Momence, Ill. shut off the water supply to two group homes for the developmentally disabled managed by Good Shepherd Manor two days before the Bishop was scheduled to arrive for their opening.¹⁶⁹

Community members may also employ more surreptitious means for thwarting group home providers, including convincing sellers to back out of negotiations with group homes. Homeowners in a suburban New York community succumbed to neighborhood pressure and withdrew their offer to sell their home to a group home operator serving developmentally disabled adults.¹⁷⁰ Neighbors have organized to gather funds or identify another individual to rent or purchase the property before the group home completes their contract with the sellers or landlords. In 1994 a 6th Circuit Court argued that neighbors did not violate the Fair Housing Act when they contributed funds to purchase a property away from a group home. The Court argued that this acted constituted "normal economic competition." During the same year a District Court in Nebraska held that a lender who knowingly provided a loan to an individual to purchase a home for the purpose of prohibiting a group home had violated the Fair Housing Act.

¹⁶⁵ Associated Press, "Lawsuit Filed Over Refusal to Permit Group Home," January 23, 2004.

¹⁶⁶ Lauren Markoe, "Good Neighbors; Group Home Finds Peace in Braintree," *The Patriot Ledger*, June 28, 1996, P. 11c

¹⁶⁷ Michael Davis, "Village Won't Try to Prevent Group Home," *Albuquerque Journal*, June 13, 2002, P. 1

¹⁶⁸ John Christoffersen, "Proposed Home for Mentally Ill Sparks Long Legal Battle," Associated Press, March 16, 2002.

¹⁶⁹ "Good Shepherd Manor Sues City of Momence for Discrimination against Disabled," PR Newswire, May 4, 2001.

¹⁷⁰ Donald Bertrand, "Group Home Plan Thwarted," *Daily News*, May 15, 1996, p. 1

Three years later a Pennsylvania court argued that a buyer who is attempting to interfere with the sale of a property to a group home provider, in order to prohibit their location in a single-family neighborhood, is not engaging in “normal economic competition” and is liable under the FHA.¹⁷¹

Often this opposition occurs despite county, state, and federal mandates to increase the use of group homes. Congress passed the Anti-Drug Abuse Act of 1988 to expand group homes for recovering alcoholics. In 1999 the Supreme Court ruled in *Olmstead v. L.C.* that states must release mentally ill patients from psychiatric settings if they are able to thrive in community placements. To fulfill their “Olmstead obligation” states are supporting and developing group homes for the mentally ill, putting them at odds with city officials.

Organizational Structure, Culture and Legal Tactics

As stated earlier, group homes come in all shapes and sizes. Variation in organizational structure (whether organizations rent or buy, whether they develop properties or acquire existing properties) can have implications for the strategic choices they face and make when attempting to site group homes in single-family neighborhoods. Generally group homes can be classified in the following manner: renters, owners, and developers. Organizations whose finances, mission, and structure require renting rather than purchasing homes may face fewer municipal and procedural constraints than organizations who purchase property or develop homes. In theory, a group home that rents simply has to identify a landlord willing to rent to the residents and then move their residents into the home. Renting properties typically takes very little time and requires very little paperwork. Any zoning issues that a renter may face can be resolved after residents have moved in.

Organizations that purchase property have to follow a more rigorous process in securing loans, negotiating with the current owners, and transferring deeds. If group homeowners require modifications to the existing structure (to allow for more parking, accommodations for disabled individuals, more living space) they may be required to apply for a permit, which involves city input. However, unlike renters, owners have greater housing security. They are not dependent upon the whims of landlords. Group home operators who develop properties are forced to interact with city and zoning officials to a much higher degree. Not only do individual projects require the blessing of the city, but cooperation with city officials will facilitate the development of future projects. When developers operate locally, their reputation among city officials is critical. Explains one fair housing scholar

If you have to get a discretionary permit from government you are asking them for a discretionary land use permit and for money. Generally the developers don’t want to bite the hand that feeds them. There are innumerable ways that government can deny you a permit where there won’t be any legal recourse. Generally their first strategic issue is what city do they want to site in. They know the staff at city council and planning

¹⁷¹ Michael Allen, Fair Housing Information Sheet #3, www.bazelon.org.

council.—jurisdictional choice. They want to avoid litigation—they don't want to get a reputation for being adversarial.¹⁷²

Public Opinion

Group home operators may face different constraints because of the populations they serve. For instance group homes serving elderly individuals may, in theory, face less opposition than a house serving mentally ill individuals or recovering drug addicts. If this were true, the ability of group home providers to secure stable housing for their clients may be more contingent on client population and less on the legal tactics they choose. There are few surveys that measure relative preferences in society for housing that serves the elderly, mentally ill, recovering alcoholics/drug addicts, or physically disabled. However, the few that do exist suggest that, in the abstract, individuals privilege certain disabled populations over others. A meta-analysis of public opinion studies toward disabled groups, conducted in the 1990s, finds that attitudes toward disabled individuals are hierarchical. Physical ailments are preferred more than are “sensory impairments and physical deformities, which are in turn more tolerable than the brain-related problems of mental retardation and cerebral palsy.” (Dear, Straw, Wilton 199_, 12). Mentally ill individuals occupy the middle of the hierarchy, while the lowest tier is comprised of “parolees, troubled adolescents, drug users, alcoholics, and people with HIV-AIDS—groups who are frequently perceived to be deviant rather than disabled,” responsible for their circumstances, and viewed as potentially threatening. (12).

These studies, however, do not specifically address the willingness of individuals to share their communities with each of these disabled populations. It is conceivable that, while individuals may have sympathy for the physically disabled and elderly (two groups who appear at the top of the hierarchy), they may still vigorously object to living in close proximity to these groups. According to a report issued by the National League of Cities in response to the growing NIMBYism around group home location

By and large, local elected officials have acknowledged the need for, and permitted the siting of, group homes for people with mental and physical disabilities and foster care group homes for children. The same officials have expressed greater concerns about group homes for people recovering from addiction and those for juvenile offenders. (Whitman and Parnas, iii)

This attitude is echoed among participants in the 1996 General Social Survey segment on mental health. A random sample of 1344 adults were organized into 5 groups and asked to consider a vignette that described an individual and the difficulties they are having struggling with either depression, schizophrenia, drug addiction, or alcohol addiction. The fifth group is presented with a description of someone who is generally struggling but who is not suffering from mental illness or addiction. Participants are asked to answer a range of questions after hearing the vignette, one of which probes whether or not they would support a group home helping people in

¹⁷² Interview with group home scholar, May, 2010.

the same circumstances as the individual described in the vignette. The question reads as follows:

How willing would you be-- definitely willing, probably willing, probably unwilling, or definitely unwilling—to have a group home for people like [the person described] opened in your neighborhood

Table 1. Willingness to have a group home in neighborhood

	Definitely Willing	Probably Willing	Probably Unwilling	Definitely Unwilling
Alcoholism	0.15	0.42	0.22	0.22
Major Depression	0.20	0.49	0.16	0.15
Schizophrenia	0.22	0.45	0.22	0.11
Drug Addiction	0.15	0.33	0.26	0.27
No Problem	0.27	0.45	0.14	0.13

Source: General Social Survey, 1996; mean levels of support for group homes between individuals receiving either the alcoholism or drug addiction prompt and individuals receiving either of the three other prompts are significant at $p < .05$.

Participants in the survey were least likely to support and most likely to oppose a group home serving recovering drug addicts and alcoholics relative to group homes serving individuals suffering from depression or schizophrenia. Over half of the participants who received the drug addiction prompt and over 40% of those receiving the alcoholism prompt would be opposed to such a group home.

Multivariate analysis reveals that receiving the drug addiction or alcoholism prompt is a significant predictor of one’s opposition to a group home in their neighborhood, while the schizophrenia or depression prompt produces no significant effects. (Appendix B). Participants receiving these prompts are more likely to oppose a group home than are respondents who received the “no problem” prompt. Receiving the drug addiction or alcoholism prompt increases one’s likelihood, relative to receiving the “no problem” prompt, of strongly opposing the location of a group home in their neighborhood by 16 or 11 percentage points, respectively. These findings remain true when controlling for party identification, ideology, race, gender, income, religion, and whether the participant owns their own home. Not surprisingly, being conservative, having a high income, and owning a house also significantly predict opposition to group homes.

Media Coverage

Yet, analyses of media coverage and court opinions regarding group home location produce different results and suggest that public opinion surveys may overestimate the effect of population on support for group homes. In the aftermath of the Edmonds decision through 2006

there have been 426 separate instances of group home opposition reported in local newspapers. While public opinion data predicts that group homes for individuals with HIV/AIDS, recovering substance abusers, and emotionally disturbed youth will top the list of reported incidents, Table 2 demonstrates that group homes serving troubled youth or individuals with developmental disabilities each account for more incidences of opposition relative to other group homes, including those housing recovering alcoholics and drug addicts.¹⁷³ We see similar patterns in the 77 group home cases that have been resolved through court decisions between 1996 and 2006.¹⁷⁴ As Table 3 indicates, housing providers serving the elderly have been involved in more legal battles since the Court's 1995 *Oxford House* decision than any other type of group home operator. In total, this data suggests that, although recovering substance abusers and the mentally ill may engender more hostility in the abstract than the elderly, *all* group home providers should be concerned about the effects of NIMBYism on their ability to locate housing. Even nuns are not immune to opposition. One Missouri neighborhood organized opposition against a group of nuns seeking a variance to occupy a house in their single-family neighborhood. Granting the variance, argued neighbors, would set bad precedent.

If one group home is allowed, then there is little legal leverage for the residents to prevent the proliferation of boardinghouses and other group homes, which are legally, specifically and originally excluded from the boulevard by its developers.¹⁷⁵

Table 2: Opposition toward Group Home Sitings 1996-2006 by Population

Population	Number of Incidences
Troubled Youth	98
Mentally Retarded/ Developmentally Disabled	85
Recovering Alcoholics/Drug Addicts	56
Mentally Ill	49
Alzheimer's/Elderly	46
Physically Disabled	9
AIDS/HIV	8

Source: Lexis Nexis local newspapers in U.S.

¹⁷³ It should be noted that between 2004 and 2006 incidences of opposition toward group homes serving emotionally disturbed youth and the developmentally disabled have decreased while opposition toward group homes for recovering drug addicts or the mentally ill has increased. (Appendix C)

¹⁷⁴ This does not include cases which were filed but were resolved through consent decrees or mediation, or where the suit was subsequently dropped.

¹⁷⁵ Letter to the Editor, *Riverfront Times*, Feb 2, 2000.

Regardless of the type of population served and whether group homes rent, purchase, or develop their properties, most group home advocates operate under the assumption that they will have to confront some level of opposition that may result in backlash as they attempt to open their house in a single-family neighborhood. Explained one operator, when asked about the prospects of finding an alternate site for her home: “If I tried to find a neighborhood that didn't have objections, I would be spinning around for the next 50 years.”¹⁷⁶

Table 3: Group Home Cases 1996-2006 by Population

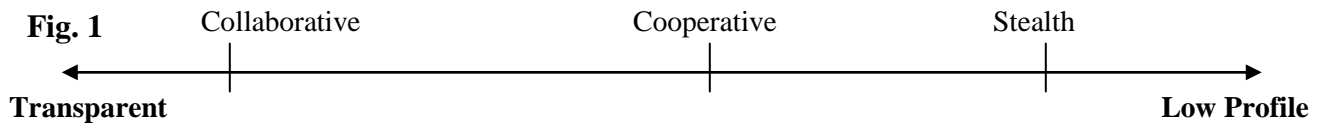
Population	Number of Incidences
Elderly	22
Mentally Ill	16
Recovering Alcoholics/Drug Addicts	14
Developmentally Disabled	9
General disabilities	8
Youth	6
HIV/AIDS	2

Source: Bazelon Center for Mental Health, Digest of Cases, March 2006

Advocacy Strategies

The question for these operators, then, is how best to minimize or manage the opposition. Group home operators employ a variety of strategies to overcome these obstacles, ranging from fully transparent and public strategies through which neighbors and public officials are apprised of the group home’s intention to set up shop before the property has been rented, purchased, or built to more low-profile and stealth strategies where group home operators rent or purchase the property without first notifying neighbors or officials and stand ready to invoke their legal rights if the need arises. (Fig. 1) These choices may in part depend on the level of regulatory oversight required by the city and the level of need of the population being served (often these two factors are endogenously related). For instance, a housing provider for the elderly may elect to build (or purchase and renovate) a house for their clients rather than rent in order to have the freedom to make modifications to accommodate the physical limitations of their residents. This provider will likely need building permits and a variety of amenities from the city in order to construct the home. Conversely, a group home for recovering substance abusers can rent or purchase, will typically require few if any modifications to the property, and therefore will require little from the municipality. The developer who opts to build will likely choose to be (and in many ways is forced to be) more transparent and forthcoming than the operator who can simply rent or purchase a home.

¹⁷⁶ Peter Simon, “Proposal For Group Home Draws Mixed Reviews,” Buffalo News, March 15, 1996, P. 5B.



In general, group home providers can be organized along a continuum, from transparent to low profile, in terms of their approaches to group home opposition (see Fig. 1). Media and case analyses reveal three archetypical organizations that exist along this continuum, which I refer to as collaborative, cooperative, and stealth. Collaborative organizations work closely with city officials and community residents to make sure that all stakeholders involved in the siting decision are comfortable. These organizations go out of their way to notify neighbors of their intention to locate in their neighborhood, typically by sending letters to homeowners' associations and holding informal meetings. Collaborative organizations will also work closely with zoning officials prior to purchasing or renting the property to secure all permits, variances, and exemptions. Collaborative organizations employ a variety of tactics to gain the support of community residents. While they use the law and may even invoke their "rights", these organizations tend to avoid litigation at all costs. To be sure, all group home strategies are grounded in litigation or the precedent established through prior litigation. Over sixty percent of the articles on group home location published between 1996 and 2006 mention the courts and, on average, 40% of the articles covering group home opposition during the same time period indicated that the conflict either wound up in court or was resolved through legal precedent. Collaborative organizations, however, use the law to educate and the courts as a last resort. Tim Iglesias describes these organizations as attempting to "manage" group home opposition, rather than "overcoming" it. This entails:

- “1) respect[ing] the legitimate concerns of the local community and neighborhood; 2) respect[ing] the rights of current and prospective residents whom it desires to serve; and 3) advanc[ing] the prospects of future affordable housing proposals in that community. (Iglesias, 79)

This approach, argues Iglesias, focuses on establishing points of agreement between the provider, city officials, and community residents. Rather than resorting to litigation or employing legal tactics at the back end, collaborative organizations use the law at the front end to follow protocol for group home development, to educate stakeholders and to negotiate their position. (80). In the event that communities remain unyielding in their opposition, truly collaborative organizations will look for alternate locations and begin the process anew. Iglesias suggests that group home providers who develop units (rather than purchase or rent existing units) may be more likely to use collaboration to manage opposition, particularly if they require an ongoing relationship with city officials for future projects. Pine Street Inn, a housing provider in Boston, planned to purchase and develop a duplex in a single-family neighborhood to house homeless men with disabilities. In order to receive zoning variances and construction permits the city required PSI to hold public hearings. In preparation for the hearing, staff

conducted intensive door-to-door canvassing...in order to 1) meet the majority of residents and explain the project; 2) answer questions about all aspects of the project; and 3) determine the extent of initial opposition. (Allen 2002, 1)

The neighborhood eventually wrote a strong letter in support of the project.

Cooperative organizations will either notify neighbors or work with zoning officials prior to procuring their home, but will not do both. They want to be perceived as acting in good faith, but they also have concerns about being too forthcoming with their intentions. These providers will follow zoning procedures, attend public hearings, apply for zoning variances, and accept conditional uses to the extent that these constraints do not significantly impede their ability to provide treatment, but they will engage in a portion of these activities after the property has been acquired. In the event that they are denied the variances, cooperative organizations will take their claims to court.

Stealth organizations will purchase or rent their properties and avoid any contact with neighbors. Like cooperative group homes, some stealth operators are willing to apply for variances if required, but will only do so after securing the property. A small group will apply if forced to do so by the city. Some operators simply skirt the zoning process all together arguing that the requirements are discriminatory. If forced to apply for zoning these operators head straight to court¹⁷⁷.

Cooperative and stealth providers are guided by practical as well as philosophical motivations. From a practical standpoint, providers want to obtain a house and move their clients in as quickly and efficiently as possible. If they go through the zoning process before procuring a house they stand to lose the property; zoning procedures often last several months and can last up to several years, especially if appeals are involved. For organizations that rent this is particularly problematic. It is unlikely that a landlord would be willing to forfeit rent for the duration of the zoning process in order to support the group home residents. Philosophically, these providers feel that it is their right to locate in any single-family neighborhood without needing to ask for permission. As one provider articulated "the facility is a residence...and the two residents and 24-hour staff qualify as a family. Zoning approval isn't needed."¹⁷⁸

The stealth philosophy is best exemplified in its pioneering organization, Oxford House. In October 1975 Oxford House opened its first home out of sheer necessity. A group of recovering alcoholics, only sober for a short time, had just learned that their halfway house was closing.

¹⁷⁷ This option is becoming more difficult. The 7th Circuit ruled in *U.S. v. Village of Palatine* 37 F. 3d 1230 1994 that "in a case such as this, where plaintiff's sole argument is that the Village failed to make a reasonable accommodation under the Act, the Village must be afforded an opportunity to make such an accommodation pursuant to its own lawful procedures--unless it is clear that the result of such procedures is foredoomed, which is not the case here--before plaintiff will have a ripe claim."

¹⁷⁸ Pat Dawson, "Group Home Residents Ok for Now," Pittsburgh-Post Gazette, November 14, 1996, P. E7.

Among them was Paul Molloy, who had recently served as Republican Counsel for the Senate just prior to entering a treatment program. The residents negotiated with the landlord, a recovering alcoholic, to take over the lease. The first Oxford House was born.

The organization's primary concern was finances. Because the men had squandered their incomes on drinking and drug abuse, and had only a limited recent work history, they could afford little rent. In order to cover the rent they opened the house to a larger number of residents and shared bedrooms. The cost of a supervisor, they decided, was too much--even if it was divided among 10-12 people. Using the halfway house rules as a guide the men established a concrete system for maintaining the house through group supervision.¹⁷⁹

The first home, in Silver Spring, Maryland, housed 13 people--enough to cover all of the expenses as well as create a fund to open a new Oxford House in the area. During its first 13 years 20 Oxford Houses opened up in the Washington, DC area. In 1988 the Oxford House Service Board was formed to provide technical assistance to people starting their own Oxford House.¹⁸⁰ Today there are approximately 1200 houses in operation nationwide.¹⁸¹

Oxford House has served an integral role in the group home community, not only for the services they offer, but also for the precedent they have established in the courts by testing the language of the Fair Housing Act. Oxford House has been unwavering in its commitment to the following principles: 1) they require at minimum 6-8 tenants in order to operate their facilities; 2) they only rent, in order to keep costs down; 3) they locate their homes in "good neighborhoods;" and 4) they move into their homes prior to getting zoning approval. Additionally, Oxford House serves as the ideal representative of the group home community. They serve recovering substance abusers, an unpopular group, but continue to maintain exceptionally high success rates. The program boasts an 80% recovery rate for all participants¹⁸²--even though approximately 76% of the residents have relapsed in previous programs.¹⁸³

Oxford House's demand for placing 6-8 (and often 10-12) residents in each home has been a source of contention for the municipalities in which they choose to locate. Officials argue that if Oxford House would simply reduce the number of residents per house to comply with local occupancy restrictions the claims against them would be dropped. However, Oxford House argues that having at least 6-8 residents in each house is a crucial component of the program's success. It is not simply an issue of cost-reduction; with fewer residents the quality of care could be jeopardized. Joseph Page, of the Missouri Department of Health explains that more residents

¹⁷⁹ Any person suspected of substance abuse would be brought before each of the members of the house for a vote. If a majority of the residents believe that substances were used the person is evicted immediately. www.oxfordhouse.org

¹⁸⁰ The Oxford House Manual, p. 1-10, www.oxfordhouse.org

¹⁸¹ Oxford House Website, www.oxfordhouse.org

¹⁸² Ibid.

¹⁸³ William H. Freivogel, "West Coast Case To Affect Oxford House Havens Here," *St. Louis Post-Dispatch*, March 2, 1995, 5B.

helps increase early realization of relapses and new members can more easily find someone to relate to. It also increases the chances of recovery and provides more opportunities for people to find a role model.¹⁸⁴

Oxford House's need to locate their homes in "good neighborhoods" adds another important dimension to the group home controversy. Most people do not have a problem with locating drug treatment or sober living centers in multi-family or commercial zoned areas. Some have even argued that because the group homes are a business they ought to locate in commercially zoned areas. But Oxford House is unyielding on this issue. As Molloy argues the "the rental homes must be located in 'good residential neighborhoods' to put distance between the participants and commercial zones with liquor stores and areas associated with alcohol and drug abuse."¹⁸⁵

Finally, the most controversial aspect of Oxford House's mission is their commitment to establishing homes without prior zoning approval, a practice that was criticized by the 7th Circuit in 1994 (*US v. Village of Palatine* 37 F.3d 1230). Oxford House argues that the process of applying for a zoning variance is discriminatory in and of itself. Residents are subjected to ridicule, facilities may become unavailable, and there is a high likelihood that the variance will not be granted. As Steve Polin, attorney for Oxford House, explains

It's been our experience based--in similar zoning disputes that we have been in with other communities that public hearings before zoning boards has [sic] a very deleterious and detrimental effect upon the recovery of the residents. It's been our experience that neighbors who object to the presence of a group of unrelated recovering addicts and alcoholics come and forcibly object their--voice their objections to this....The residents are then singled out for I think what would be unfair public scrutiny. Many times if they are required to testify they must identify themselves....And it has been our experience that when having to apply for a special use permit it creates a great deal of uncertainty and anxiety about what the future of their home will be, and the relapse rate increases as a result of those (*United States v. City of Palatine* 1993 U.S. Dist. Lexis 13814)

However, despite the court's ruling requiring group homes to apply for zoning variances before bringing the matter to court, many group homes, including Oxford House, continue this practice, feeling that it offers the best chance to obtain housing for their clients. Since the 7th Circuit's decision, several courts have revisited the issue. A Pennsylvania Court ruled that a "lengthy, costly, and burdensome" zoning process constitutes a reasonable accommodations violation. Additionally, if municipalities have a practice of opposing group homes or if the zoning process is "foredoomed" providers may bring their argument to court without applying for a variance. (Whitman 1999, 9).

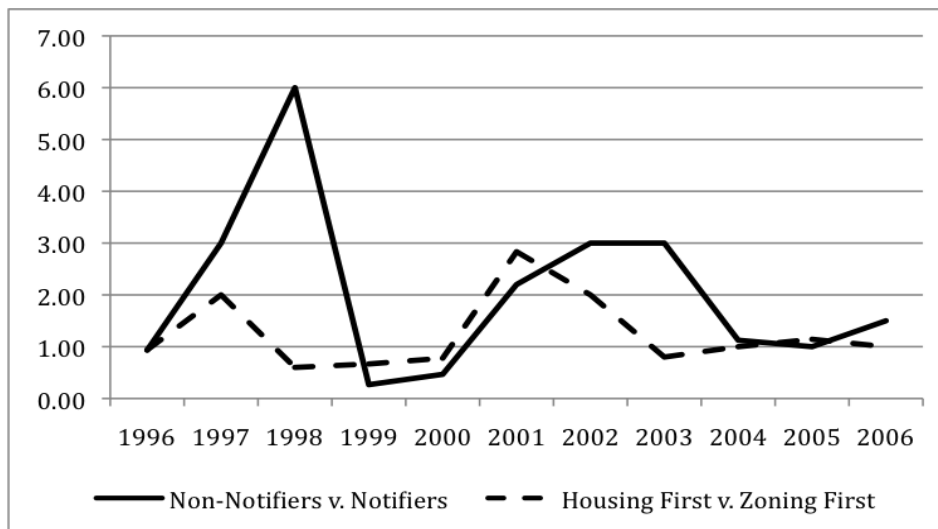
¹⁸⁴ Barb DePalma, "Two Groups Urging Change In Occupancy Ordinance," *St. Louis-Post Dispatch*, November 11, 1993, Zone West p. 1.

¹⁸⁵ H. Jane Lehman, "Supreme Court To Hear Case On Group Home; Oxford House Challenges Limits On Residents as Discriminatory," *The Washington Post*, December 17, 1994, p. E1.

Outcomes

Findings suggest that the “below the radar” approach employed by stealth providers like Oxford House and, to a lesser degree, cooperative group home operators, results in a higher incidence of stable housing. I track the outcomes of 324 instances of opposition toward group home location reported in local newspapers between 1996 and 2006.¹⁸⁶ On average group homes that elected not to notify neighbors prior to renting or purchasing their home outnumbered those who chose to notify approximately 2 to 1. (Fig. 2) Group homes operators that secured housing before seeking a zoning variance or permit only slightly outnumbered operators who sought approval before procuring their house. A plurality of group homes (40%) in the sample can be described as collaborative.¹⁸⁷ These group homes opted to be fully transparent and both notify and seek zoning approval prior to obtaining their houses. Thirty percent of the sample can be classified as stealth. These group homes neither notified nor sought zoning approval prior to securing their housing. A remaining 27% were cooperative and were willing to either skip notification or forgo the zoning process, and proceed with renting or purchasing the house or property.¹⁸⁸

Fig. 2: Ratios Comparing the Incidence of Group Home Strategies



This figure represents ratios of non-notifiers to notifiers and ratios of group homes who rent or purchase their homes first compared with operators who apply for zoning variances before renting or purchasing.

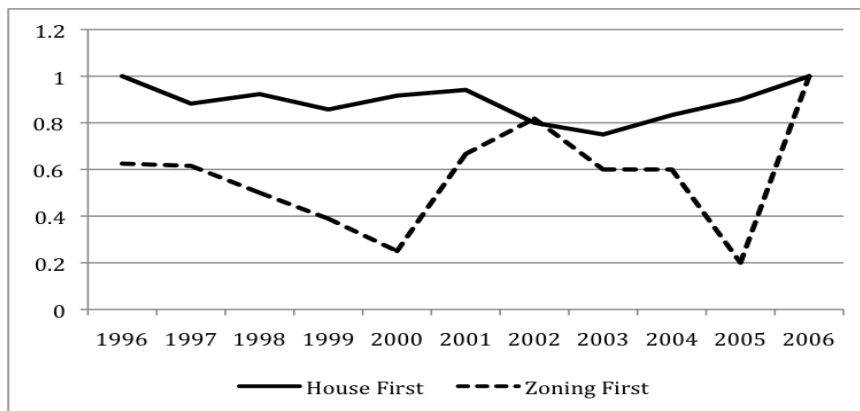
¹⁸⁶ I chose these incidences because newspaper coverage included information about the strategies used by group home providers.

¹⁸⁷ This group includes articles for which the articles indicated that the group homes either notified or received zoning approval first but where the article did not include information on both strategies. In other words, where information about notification was available, information about zoning approval was not, and vice versa.

¹⁸⁸ This group includes group home articles where only one of the strategies described was a low-profile strategy, but not both. The group home either skipped notification or obtained housing prior to seeking zoning approval, but not both.

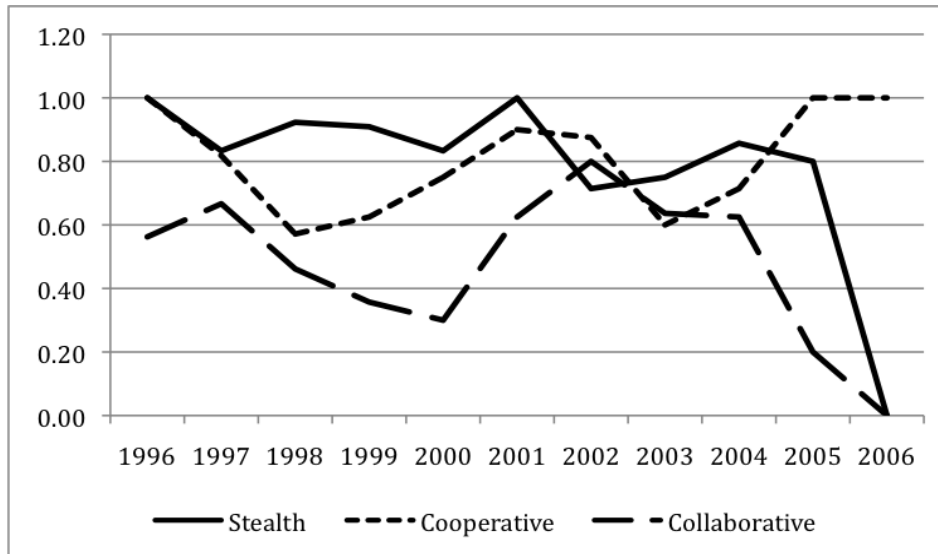
Of the total number of incidents reviewed, 284 reported outcomes. Group homes with positive outcomes resolved any problems they experienced with neighbors or municipalities and were able to keep their home. A negative outcome is one in which the group home operator was unable to keep their house as a result of community or municipal opposition. Between 1996 and 2006, over 200 group home operators were able to keep their homes. Seventy-five group homes ended up losing their bid for housing. As stated earlier, low profile tactics are highly correlated with successful outcomes. Group home operators who notified neighbors first had a lower success rate than group homes that held off on notifying neighbors until after the property was procured. Sixty-three percent of notifiers with a reported outcome held onto their homes, compared to 80% of non-notifiers. Similarly, group homes that chose to secure their property prior to seeking zoning approval had more positive outcomes, with 89% keeping their homes compared to 54% of those who first sought zoning approval. (Fig, 3)

Fig. 3: Annual Success Rates by Group Home Types



We see a similar pattern among collaborative, cooperative, and stealth organizations. (Fig. 4) Collaborative organizations kept their group homes in just over 50% of the incidents for which there was a reported outcome. Cooperative group homes held onto their homes 80% of the time, and stealth organizations—those maintaining the lowest profile—had an 87% success rate. Annually, group homes using the collaborative approach lag behind both cooperative and stealth organizations in each year except 2001 and 2002. These findings support a 1990 study of opposition to group homes for the mentally ill in Maryland. Providers employing a “low profile” approach, which the authors defined as “the advance purchase or rental of housing” prior to notifying neighbors, experienced less opposition compared to providers who focused on public education and community organizing. (Wenocur and Belcher 1990, 321)

Fig. 4. Annual Success Rates by Group Home Type



The housing-first approach permits group home residents to obtain housing immediately and allows providers and advocates to engage in drawn out zoning proceedings and court battles while holding onto their homes. Even if collaborative organizations are able to obtain city approval for their group home, they may, in the end, lose the property to other prospective buyers or renters. While court decisions such as *Palatine* have ruled that providers must apply for zoning variances, they seem to be agnostic about whether providers are required to apply *before* they move into the property.

The drawback to this approach is heightened community opposition. In addition to harboring negative feelings toward the group home because of the populations they serve, community members may feel more inclined to fight the home if the group proceeds without first asking for community input. As one community member argued when he found out about his neighbor's intentions of opening a group home for developmentally disabled children:

We think that the Common Council (the neighborhood association) should decide whether or not it's wise to have a coed home for kids ages 6 to 17 that would contain a home for juvenile delinquents.¹⁸⁹

However there is reason to believe that notifying the community before moving in may place group homes at a disadvantage. As one developer suggests "telling the neighborhood too far in advance only gives them more time to be mad and angry." (Allen 2003, 16) This, in turn, could lead to organized opposition, which will likely produce more obstacles for providers. More

¹⁸⁹ Sydney Schwartz, Dispute over Group Home Lands in Court," *South Bend Tribune*, August 7, 2005, P. A1

importantly, notification may adversely affect the well-being of potential residents. One group home provider argued that notification could “go both ways. I don’t personally think it’s a good thing. I think it could stigmatize the household.”¹⁹⁰ Echoes another, “We don’t make a big presentation because of the stigma” of mental illness.¹⁹¹

Anecdotal evidence suggests that once group homes move into neighborhoods, residents typically learn to accept their presence.

Generally what happens is that people who do live close to (group homes) get to the point where they become friends with the people who live there or they don’t even notice that they’re there.¹⁹²

Operators argue that experience, not notification, makes all the difference. “You can’t just tell people that things will be okay,” counsels one group home operator. “They just need to live through it and find out that we are decent neighbors.”¹⁹³

While there may be an initial increase in opposition to the group home that employs the stealth approach (particularly if they go to court), it is likely that their presence in the community will help to promote collegiality between residents and opponents. Stealth organizations often employ the same community-building tactics used by collaborative organizations; they simply use them after the dust has settled and housing has been secured. For instance, Oxford House encourages its residents to meet their neighbors and to communicate openly with their neighbors about their time in recovery. Despite their more adversarial approach, studies of Oxford House indicate that community members regard Oxford House residents as “good neighbors.” They receive high approval ratings relative to other neighbors.¹⁹⁴

Conclusion

The case of group housing for the disabled shows that litigation can significantly advance rights, even for the most controversial groups and contentious causes. The heavy stream of litigation and the courts’ generally pro-group home interpretation of the 1988 amendments helped providers secure housing for a range of disabled residents, suffering from a variety of afflictions. Collaborative organizations used legal precedent to educate squeamish neighbors and defensive

¹⁹⁰ Beth Kaiman, “Coming Home; It’s Not Always Easy, But More Of The Mentally Ill Are Moving Into Established Neighborhoods,” *Portland Press Herald*, November 6, 1997, p. 4e.

¹⁹¹ Randall Higgins, “Neighbor Opposition Grows to Magnolia House in Cleveland,” *Chattanooga Times Free Press*, April 17, 2000, p. B2.

¹⁹² Quote by Pat Craig, Texas Department of Mental Health and Mental Retardation. Mike Todd and Karen Warren, “Not in My Back Yard,” *Austin American-Statesman*, January 6, 1995,

¹⁹³ Ellen Dockham, “Tension: Group Home Pits People Vs. Property,” *Winston-Salem Journal*, May 1, 2003, p. 1.

¹⁹⁴ Joseph Ferrari et al, “This is My Neighborhood: Comparing United States and Australian Oxford House Neighborhoods,” *Journal of Prevention & Intervention in the Community*, Vol. 31, No. 1-2, 2006, p. 39-47.

zoning officials. Litigation may encourage collaboration where opposition is entrenched. Protracted litigation involving senior housing in Wall Township, New Jersey resulted in a consent decree where the provider would not only provide senior housing but also low-income housing for the township.¹⁹⁵ Litigation, or just threatened litigation, gives city officials a way to comply with group home rights without betraying constituent desires. As one city supervisor explained to his constituents, after reading through cases where residents and municipalities opposed group homes, “I can’t find one that ever won.”¹⁹⁶ Approximately 15% of the incidents included in this study were resolved through the mention of legal precedent, most often by city attorneys.

Litigation may lead to immediate legislation or modifications to zoning ordinances in order to avoid further conflicts in court. Lincoln, Nebraska officials considered altering their zoning policies to avoid continued litigation with a group home provider serving developmentally disabled clients.¹⁹⁷ Case law in general can be used as a guide for city officials when drafting legislation. In the aftermath of the *Edmonds* decision some cities revisited their zoning ordinances to come into compliance with the Fair Housing Act.¹⁹⁸ A city attorney in New Orleans used group home case law to place officials on notice about their discriminatory zoning ordinances.¹⁹⁹ And there is reason to believe that the Members of Congress who drafted the 1988 amendments wanted disabled individuals to use the courts. The legislation developed a system for administrative judges at HUD to review cases, extended the statute of limitations to file a private claim, and removed the limit on punitive damages. Recent court cases have the potential to make the process for obtaining a zoning variance to locate a group home in a single-family neighborhood even more litigation driven. Until recently collaborative organizations could choose if and when to introduce legal arguments into their negotiating tactics with city officials. The 3rd Circuit, in an opinion co-authored by Justice Alito, argued in 2002 that group home providers must first make their fair housing claims during zoning hearings in order to present those arguments in court. (*Lapid Laurel v. Township of Scotch Plains* 284 F.3d 442 2002).

The findings of this study confirm those discussed in chapter 3: litigation can play a pivotal role in the advancement of civil rights, particularly, as in the case of controversial issues, when litigation is coupled with strategies to reduce public awareness. The precedent established through group home litigation was significantly enhanced when paired with the below-the-radar approach used by cooperative and stealth organizations. These organizations cloaked themselves

¹⁹⁵ *Sunnyside Manor v. Township of Wall*

¹⁹⁶ See Jim McKeever, “DeWitt Decides Against Legal Challenge Over Group Home,” *The Post-Standard*, March 10, 2005, p. 6 and Scott Sandline, “Limits on Group-Home Populations may be Dismantled,” *Albuquerque Journal*, May 25, 1995, P. C1.

¹⁹⁷ Joan Crabb, “Lincoln Considers Zoning Change for Group Homes,” *The Pantagraph*, September 3, 2002, P. A4

¹⁹⁸ Bruce Finley, “Denver Re-thinking Group-Home Law,” *The Denver Post*, May 17, 1995, P. B-1

¹⁹⁹ Bruce Egger, “Group Housing Bans are Targeted: N.O Attorney Says Many may be Illegal,” *Times-Picayune*, July 20, 2004, P. 1.

in the court-mandated notion that their homes were no different from any other single family home, and opted for strategies that, while politically unpopular, gave them the best chance for securing and maintaining their homes. As with same sex parenting rights, advocates recognized that shielding their intentions to locate in a single family neighborhood from either neighbors or zoning officials delayed (and in some cases prevented) backlash by property owners, zoning boards, and public officials. Court precedent provided the legal grounds upon which providers could base their attempts to secure housing in single-family neighborhoods. Low profile tactics—in this case postponing public involvement until after housing was secured—minimized the potential for backlash to interfere with the realization of these court-mandated housing rights.

Chapter 5: Some Final Thoughts

As with any research project, the findings here raise more questions than they answer. Some of the implications stemming from this research project paint a positive picture of the courts and the reliance on litigation by advocates to advance civil rights. Others offer a somewhat skeptical or guarded perspective, highlighting the costs associated with the tactics discussed. The findings, rather than dispelling, could be read to endorse skepticism about the use of litigation to pursue civil rights in this country.

The first, and most obvious implication from this research is that the courts can be effective allies in the struggle for civil rights and social change...at least sometimes. From a practical perspective this means that all is not lost for civil rights litigators. A litigation-focused strategy that spanned decades and encompassed more than half of the nation's states produced significant rights for gay parents --rights that had been denied to many gay couples in countries where same sex marriage was legal. And, for the most part, those rights have endured. Relying on courts and legal doctrine to secure single family housing helped untold numbers of mentally and physically disabled individuals to secure housing despite the growing epidemic of NIMBYism. How? By coupling these court-focused strategies with tactics designed to reduce public awareness.

Does this mean that the courts will always, or even mostly, advance the rights of the disadvantaged? No. One need look no further than *Ledbetter v. Goodyear Tire & Rubber Co.* (2007)--where the Court limited valid pay discrimination complaints filed under the Civil Rights Act to those that cover incidences that occurred within 180 days prior to the filing of a complaint—to see that courts can read statutes in ways that limit rather than expand statutory rights. *Olmstead* offers an even more relevant example: disagreements between community housing providers, NIMBYism, and a dearth of housing supply are conspiring against the fulfillment of *Olmstead's* promise of independent living for the mentally disabled.

It is important to remember, however, that, by constitutional design, no policymaking venue or strategy is an effective producer of civil rights law (or any law for that matter). In the institutionally fragmented American political structure, policymaking is meant to be difficult. No group or interest will consistently prevail in the battle for government protection. Our system of checks and balances invites opposition and welcomes dissent. The potential for backlash, therefore, is lurking behind every policy initiative regardless of strategy or venue. Every minority rights advocate, whether legislative, grassroots, or litigation-focused, will have to confront the specter of backlash in their quest for the holy grail of stronger civil rights policy. And in most cases—regardless of venue—the fight will continue, morph, and shift well past any single policy decision as movements grow and circumstances change.

Secondly, and relatedly, this project adds balance to the specific literature on backlash and the more general scholarship on the courts and social change. While the findings presented here do not dismiss evidence of backlash to *Roe* and *Brown.*, and do not discount the set-backs of the same sex marriage movement discussed in chapter 2, they supply a different perspective to a literature that, as Post and Siegel (2007) suggest, is soaked in “excessive despair”. (374) In a sea

of scholarship that attempts to dismiss the potential for the courts to place the rights of the few over the whimsy of the many, it is refreshing to talk about the wins—the court victories that are not simply symbolic but actually enhance the lives of disadvantaged individuals. The children of gay parents across the country now carry the protections of two legally recognized parents because a few entrepreneurial lawyers and a smattering of courageous family court (and later higher court) judges decided to read gay families into the longstanding traditions of family law. Mentally and physically disabled individuals are able to enjoy the security, stability, and quietude (save the occasional angry protester) of living in a single family neighborhood because advocates placed the protection of their clients’ court-granted housing rights over the demands of property owners, zoning boards, and public officials to have an immediate say in the housing process. Did these groups encounter opposition? Of course. As long as homophobia exists there will always be attempts to limit the rights of gay families to live with the same comforts as heterosexual families. There will always be property owners who fall prey to the call of NIMBYism. But in these case studies backlash did not prevail.

Third, thinking about courts or litigation as a single policy strategy denies scholars the opportunity to explore how interest groups and advocates deliberate over how to litigate, whether or when to litigate, and how to prepare for a decision’s implementation. As these case studies demonstrate, for many advocates the decision is not simply how to win the argument in court, but how to translate those arguments into substantive gains. For some sex parenting advocates that meant framing the argument in terms of children’s welfare and relying on statutory or common-law (rather than constitutional) reasoning. In the realm of group housing, for some, these considerations translated into a “housing first, notify later” approach. While most group home providers agreed on the importance of neighborly collaboration, they differed over when to invite the public into the fold. Those who waited won.

However, as with many policy advances, these wins come at a cost. Reducing visibility and seeking to shield issues and arguments from the public domain, as the advocates in these case studies did, may produce unintended consequences. As outlined in Chapter 1, visibility sometimes has its benefits. A system of government that often privileges majority opinion requires advocates at some point to take their issue to the people. Consequently, since policymaking often boils down to a numbers game (number of votes, number of interest groups, number of seats) it behooves advocates to seek out the support of as many people as possible. The more people that come to recognize that the children of gay parents require the same legal protections as the children of straight parents, the less likely that laws such as those in Florida and Arkansas banning same sex adoption will continue to pose a threat. Similarly, as more property owners become aware of the existence and benefits of group homes (and the potential for them to be good neighbors), fewer zoning boards and public officials will make an issue out of group home location. *Invisibility* only delays these longer-term goals.

Consider this hypothetical: what would American race relations today be like had *Brown v. Board of Education*, or, more importantly the protests of the Civil Rights Movement, been shielded from public view? Perhaps Blacks in the South would have secured some localized victories, but as a society we would have been deprived of the opportunity to acknowledge and learn from the atrocities of Jim Crow. Journalist George B. Leonard describes the national

awakening that occurred through televised coverage of movement protests and brutality as “the senses of an entire nation becoming suddenly sharper, when pain pours in and the resulting outrage turns to action.” (Carson et al. 1991, 213.) Without this coverage, we would have lived in ignorance destined to repeat the same behavior. Much of the movement organizing among non-Southern liberals would have been stunted and minimized to those “in the know.” Many who joined the movement were moved into action by television footage. Recalls Ruth Morris,

We watched the news and then we went in and sat down and were eating dinner... Our dining room is warm and gay and we were sitting down to a very good dinner. We felt sort of guilty about being there enjoying ourselves after what we had just seen on TV. We both said it at the same time, it just seemed to come out of the blue: Why are we sitting here? Then I said, “I’ll pack,” and Bull said, “I’ll call for reservations.” (Carson et al. 1991, 216)

In the absence of a national dialogue on *Brown*, its progeny, and the highly publicized protests demonstrating the depravity of Jim Crow, coalition-building across Blacks and whites would have been delayed at best, and quite possibly inconsequential. The national grief that turned Martin Luther King’s death into the passage of the ’68 Civil Rights Act, may have been relegated to a sad side note of American history. King was fully aware of the risks of publicity, but also recognized that in its absence, white Americans would remain ignorant to the realities of southern racism. Visibility promoted action; action leads to change. Visibility also helped to humanize abstract concepts such as lynching and Jim Crow—realities not experienced by most individuals outside of the South. It was this awareness that prompted Mamie Till Bradley to allow *Jet Magazine* to run a photograph of her son’s, Emmitt Till’s, badly deformed face stemming from his brutal attack and murder by Southern lynchers. (Hampton and Fayer 1990)

Publicity can lend a human face to an issue plagued by stereotypes and misperceptions. Shapiro (1994), for example, argues that the “stealth” approach used by disability advocates during the passage of the ADA may have created a perfect storm of backlash against the landmark legislation. While members of Congress were able to hear first-hand how discrimination against the disabled exacerbates their physical or psychiatric challenges, ordinary American citizens (many of whom would be subject to the law’s provisions as employers, retail owners, and landlords) had little understanding of the legislation or the reason for its passage. In the realm of same sex marriage, images of gay nuptials and stories of gay couples planning their weddings served to demystify the realities of gay relationships. Extensive coverage meant that straight individuals could no longer turn a blind eye towards gay relationships; images of middle-aged and middle class women and men in classic wedding attire contradicted perceptions of gays and lesbians as promiscuous and sexually deviant.

For gay rights, in particular, the idea of minimizing public awareness may, in the extreme, be viewed as another step back into the closet. Visibility was, in fact, a crucial component of the gay rights movement. Harvey Milk, the first elected gay public official, viewed the decision to come out not just as a personal decision but as a political action, a statement of protest.

Gay people, we will not win our rights by staying silently in our closets...We are coming out. We are coming out to fight the lies, the myths, the distortions. We are coming out to tell the truths about gays, for I am tired of the conspiracy of silence, so I'm going to talk about it. And I want you to talk about it. You must come out. Come out to your parents, your relatives. (San Francisco Gay Pride Parade 1978)

Invisibility, for gay people, may mean acquiescing to those whose tolerance hinges on ignorance. Visibility has encouraged gay individuals and couples to demand access to benefits that heterosexuals take for granted. Discontent to have their visibility defined through movies and sitcoms, gay individuals have come out to demand relationship recognition through domestic registries and civil unions, seek equality in employment, and push for hate crimes legislation. For gay youth, the collective visibility of the gay movement means increased safety, support, and acceptance. Gay youth are coming out earlier than in previous generations, prompting a new infrastructure among gay rights organizations that deals specifically with the needs of gay youth (a concept unheard of among previous generations, where coming out occurred in adulthood.)²⁰⁰ Yet despite these advances, misperceptions about gay families persist, particularly regarding the raising of children. States continue to argue that marriage should be privileged to heterosexuals for procreation and child-rearing. However, according to 2000 Census data close to 40% of gay couples between the ages of 22 and 55 are raising children. While low visibility tactics help these families access significant legal benefits, such as health care coverage for their children, custody rights for non-biological parents, and hospital visitation rights, in the long-run it may stall public support for and comfort with children raised by gay parents. Will the low-profile, one-step-at-a-time same sex parenting struggle inspire an equally slow-dripping but nonetheless devastating backlash and confirm Shapiro's predictions of the costs of stealth policymaking? Or will this approach serve to normalize the recognition of same sex family rights. It seems unlikely that trends indicating an increased comfort with gay families—echoed in television and big-screen portrayals of gay couples have children—will dissipate or reverse themselves, but only time will tell.

For the mentally and physically disabled, although the decision to covertly move into single-family neighborhoods may, in the short-term, help improve housing stability, it may come at the expense of community support. It may be true, as Oxford House contends, that their stealth tactics do not impair their relationships with neighbors. Some would argue that for the disabled in general, and particularly individuals in recovery and those with mental illness, the decision to avoid public awareness may only serve to prolong tensions and perpetuate stereotypes. However, it is hard to envision a better approach to shoring up support for group housing for the disabled than to become our friends and neighbors and argue their cause from the comforts of their backyard during a barbecue or over a beer rather than through an impersonal and often adversarial zoning board hearing.

Perhaps the strategy that works best is a mixed approach—one that couples visibility in one realm, with low-profile tactics in another. It is quite possible, for instance, that same sex parenting advocates were able to shield their issue from the public eye by capitalizing on the

²⁰⁰ “Coming out in middle school,” *National Public Radio*, September 29, 2009.

high profile nature of same sex marriage. Public distraction over the possibility of same sex marriage rendered family court rulings over custody battles irrelevant and insignificant. By the time state supreme courts weighed in on the issue, gay parents had been enjoying rights for over a decade, and the conservative movement had placed all of their faith in an expanding anti-same-sex marriage campaign. As the nation turned their attention toward *Goodridge*, landmark parenting decisions such as *Elissa B. v. Superior Court* went unnoticed.

The same could be true for the group housing debate. Court precedent on fair housing laws stem from all three types of group home providers: stealth, cooperative, and collaborative. While stealth and cooperative group home providers engaged in litigation after securing their homes, collaborative providers—those who sought zoning rulings and notified the public prior to obtaining housing—risked their housing. Yet the legal precedents they secured benefit everyone in the disability community. Furthermore, the losses experienced by collaborative providers at the hands of discriminatory zoning providers, irate property owners, and career-driven public officials, exposed to many courts (and to even more providers) the consequences of discriminatory zoning practices.

In the end, our assessment of the tactics presented in this project, come down to goals. Should advocates sacrifice the substantive goals achieved by individual plaintiffs in low visibility case-by-case litigation to the pursuit of wholesale social policy changes that affect everybody? Will we feel better as a country for having publicly and meaningfully debated the issue of gay rights even if it means denying gay couples many of the rights they request? Or is it better to slowly string together a collection of court victories gathered over decades and across towns, counties and states to help gay parents have a legal connection to their kids that matches their emotional commitment? Is it good policy to invite public participation into the (for most people) private decision to rent or purchase a home in order to allow property owners to have a stake in the development of their neighborhoods? Or should we hide the disabled under the cloak of fair housing law and move them into neighborhoods under the dark of night? While this project makes no assessment or prediction as to the best course of action, the findings suggest that current discussions about the role of litigation in advancing civil rights are incomplete at best.

Appendix A: Media Coverage and Public Opinion on Same Sex Marriage

		Strongly Favor^a	Favor	Oppose	Strongly Oppose
Age	**0.007 (0.003)	-0.005	-0.038	0.010	0.033
White	-0.142 (0.125)	0.005	0.043	-0.008	-0.039
Gender	-0.170 (0.090)	0.007	0.052	-0.013	-0.045
Married	0.053 (0.091)	-0.002	-0.016	0.004	0.014
Collgrad	0.020 (0.094)	-0.001	-0.006	0.002	0.005
Religious Attendance	**0.338 (0.124)	-0.015	-0.104	0.032	0.087
Party Id	**0.358 (0.117)	-0.015	-0.109	0.028	0.095
Ideology	*-0.554 (0.227)	0.024	0.168	-0.048	-0.144
Word of God	***0.835 (0.154)	-0.041	-0.249	0.081	0.210
Same Sex Adoption Opinion	***3.033 (0.185)	-0.336	-0.514	0.196	0.654
Ballot state	0.171 (0.091)	-0.007	-0.052	0.014	0.045
Media coverage	*0.024 (0.012)	-0.022	-0.171	0.035	0.157
N	751				

Source: Pew Forum on Religion and Public Life, July 2006 Survey

*p < .05; **p < .01; ***p < .001 (two tailed); items in parentheses are standard errors

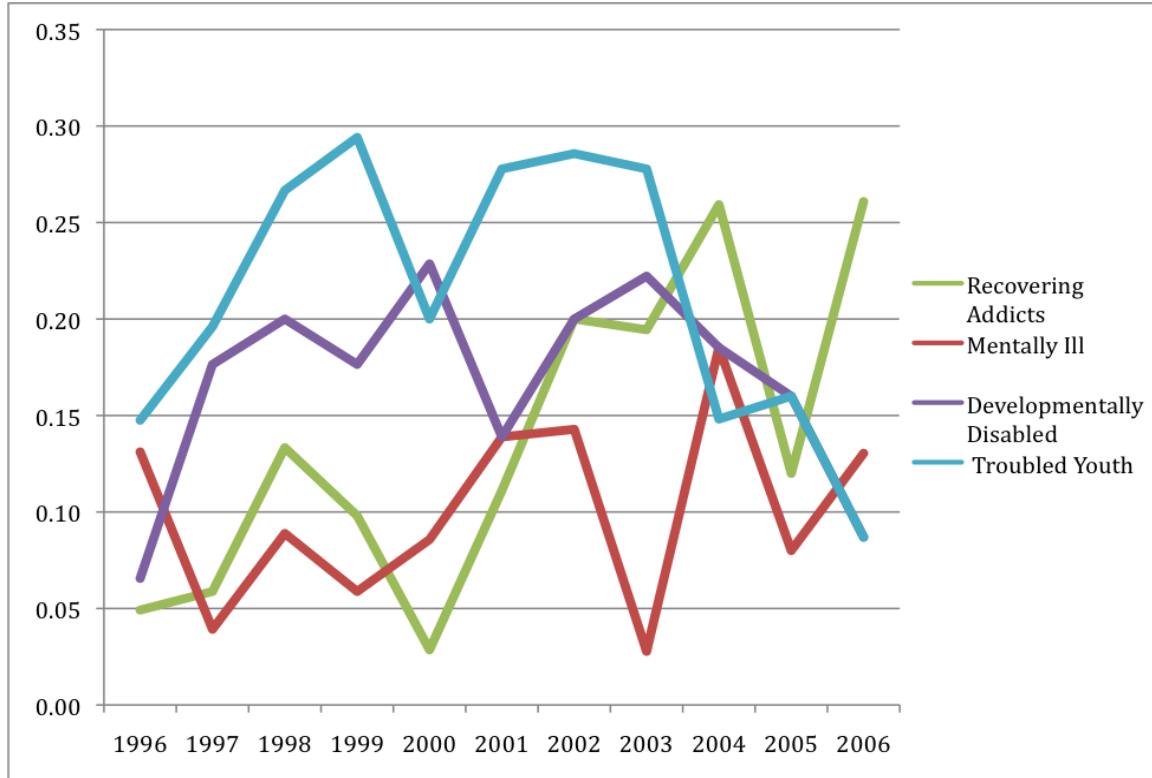
Appendix B: Group Home Opposition Multivariate Analysis

	Probit Coefficients	Def. Willing ^a	Prob. Willing	Prob. Unwilling	Def. Unwilling
Drug Problem ^b	***0.58 (0.16)	-0.13	-0.10	0.06	.16
Alcoholic	**0.42 (0.15)	-0.10	-0.07	0.05	.11
Depressed	0.24 (0.14)	-0.06	-0.03	0.03	0.06
Schizophrenic	0.15 (0.15)	-0.04	-0.02	0.02	0.04
Homeowner	**0.25 (0.09)	-0.07	-0.03	0.04	0.06
Income	*0.04 (0.02)	-0.03	-0.01	0.01	0.02
Party ID	-0.01 (0.02)	0.01	0.01	-0.01	-0.01
Race	0.03 (0.08)	-0.01	-0.01	0.01	0.01
Political Views	*0.08 (0.03)	-0.13	-0.05	0.07	.11
Gender	-0.04 (0.08)	0.01	0.01	-0.01	-0.01
Religious Attendance	*-0.03 (0.02)	0.07	0.03	-0.04	-0.06
Improve with Treatment	0.06 (0.06)	-0.05	-0.03	0.02	0.05
Improve on their Own	0.01 (0.05)	-0.01	0.00	0.00	0.01
N	725				

^aCoefficients represent the shift in probability of strongly favoring, favoring, opposing, or strongly opposing same sex marriage when the independent variable shifts from the minimum to the maximum value for all variables except income. The coefficient on income is the shift in probability of being in one of the four categories of the dependent variable with a standard deviation shift from the mean income. * p<.05; ** p<.01; *** p<.001 two-tailed.

^bThe first three items represent shifts relative to receiving the “no problem” prompt.

Appendix C: Incidents by Population 1996-2006



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