The "M" Word: An Analysis of Gay Marriage in the United States

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THE “M” WORD: 
AN ANALYSIS OF GAY MARRIAGE IN THE UNITED STATES

A SENIOR HONORS THESIS

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ABSTRACT

There is perhaps no issue more controversial in the so-called American culture war than that of gay marriage. In the last five years, four states have legalized same-sex marriages and several more appear poised to follow suit. This paper creates an analytical framework with which to evaluate the chances of successful gay marriage initiatives in any given state. Demographics, political institutions, and state-specific variables make up the three parts of the framework, which is then applied to three case studies in which gay marriage has already been addressed: Massachusetts, Vermont, and California. A fourth case, Maine, serves as a prediction state to test the validity of the framework. The paper’s conclusions indicate that, in the current political and cultural domain, there is a set of factors that tend to promote the legalization of gay marriage. The demographics of a population need to be such that they qualify as a “tolerant citizenry,” people who are hesitatingly accepting of gay marriage and can be persuaded to support that legalization. On the political side, a positive evaluation of gay marriage by the state supreme court that then passes on responsibility to the state legislature is the most conducive to legalization. The court provides the constitutional and legal grounds for gay marriage, while the legislature acts as an intermediary between the justices and the wider population. Finally, states in which the constitutions are difficult to amend, and which amendment procedures are controlled by the legislature, are the most likely to legalize gay marriage. The application of the framework to the three case studies illustrates this complex process.
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CHAPTER ONE: INTRODUCTION

“Culture war (n.) – a conflict between societies with different ideas, philosophies, beliefs, and behaviors.”
- Webster’s New Millennium Dictionary of English

“…The word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.¹
- Defense of Marriage Act, 1996

The United States seems to forever be in a state of conflict about who is entitled to what rights and legal protections under the law and this fight is frequently dubbed the American culture war. Political scientist Alan Wolfe sees the separation as one between “traditionalists, who want to get back to the old-time religion and old moral values, and more modern people, who are much more individualistic and kind of libertarian in their social views.”¹ Since the mid-1990s, gay marriage has stepped into the fray as a defining part of the American culture war, and the divide Wolfe identifies is the underlying separation between supporters and opponents of gay marriage. Fervent argument has resulted ever since Hawaii’s Supreme Court ruled in 1993 that same-sex couples were equally entitled to the
rights provided to couples of the opposite sex, thus marking the start of what would turn into
an ardent fight about morality, traditions, and equality.

The gay rights movement has evolved dramatically in the last few decades, from a public need to address the HIV stigma in the 1980s to the current effort to extend marriage rights to same-sex couples. The jump from acceptance to marriage is one that has come quickly and as a surprise to many, resulting in a substantial wave of backlash in a country that is more conservative about this sort of “moral issue” than many others. The language used by Anita Bryant and other anti-gay activists in the 1970s is echoed in many circles today, particularly those using a religious vocabulary to describe and justify their opposition. In fact, religion provides some of the most potent ammunition for opponents of gay marriage and other gay rights initiatives. Despite public opinion being solidly opposed to gay marriage and not particularly supportive of alternatives such as civil unions and domestic partnerships, gay advocacy groups have charged ahead, resulting in some clear successes and other obvious disappointments. For instance, Massachusetts represents possibility for advocates of gay marriage, while the passage of California’s Proposition 8 undermined the argument that gay marriage was not limited to the liberal Northeast.

On all of the battlefields of gay marriage-related initiatives, people have come together to oppose or support their sides of the issue and the results have been mixed across the country. At the heart of this issue is the question, what factors make a given state more or less conducive to achieving gay marriage? How have those factors come into play in states that have already, at least for now, addressed this issue? What states are likely to be in play in the near future and what are the expected outcomes? In essence, what does the future
of gay marriage in the United States really look like, and what does that say about this country?

These are the questions that this paper addresses, analyzing the direction, goals, and outcomes of the movement to achieve equal access to marriage for same-sex couples. The country has by and large clung to the traditional understanding of marriage as a union between a man and a woman only, as social conservatives have managed to dominate the discourse of this issue. The legal rationales for banning or supporting gay marriage have offered distinctly different understandings of the subject, such as whether or not marriage is an inherent right, how to define marriage, and what, if any, is marriage’s public function. On the other side, advocates for gay marriage have argued that banning gays from access to marriage is discriminatory, but opinion is divided among gay rights advocates because many think that civil unions rather than marriage would be a more effective step in moving the country in the direction of accepting the gay community and its right to marry. Challenges abound for both sides of the debate; the traditionalists, as the historically positioned side, have the benefit of arguing for the familiar. On the other side, supporters of gay marriage have a growing coalition of younger, modern citizens becoming more active in persuading the rest of the country that gay marriage is good. The Constitutional justification for extending marriage to gay couples seems to be a very strong one, which may ultimately be the deciding factor in how this saga turns out. Determining how and when acceptance of gay marriage will happen is central to this research; by examining certain factors and variables at any given time in a particular state, I gauge the likelihood of support for, and the success of, a gay marriage initiative. The goal of this paper is to examine what factors make popular and legal acceptance of gay marriage plausible in a given state as a means of evaluating the
strategies and circumstances necessary to legalize gay marriage. This paper assesses whether a distinctive and identifiable combination of demographic factors, political infrastructure, and state-specific variables raises the probability for or against gay marriage, and thus predicts the future of gay marriage in the state in question.

Like many other issues that struggle with a perceived right on the one hand, and conceptions of morality on the other, achieving same-sex marriage has already proved to be a monumental challenge, and organizers of the movement have managed to make it a legal right in four states: Massachusetts, Connecticut, and only recently, Iowa and Vermont. A handful of other states have civil unions, domestic partnerships, or similar protections for same-sex couples. But while a bare majority of people support civil unions (51% as of June, 2008), only thirty-eight percent of the populace supports gay marriage. In the past five or so years, national public opinion has not changed dramatically, but the opinion in different states is likely to vary considerably from national polls. Each state’s combination of demographics, political institutions, and other relevant variables will shape its response to the question of gay marriage.

Massachusetts was the first state to legalize gay marriage, by a decision of the state’s Supreme Judicial Court in 2003. There are still many people who cannot adjust to the legalization of same-sex marriage in Massachusetts but those people have been largely silenced over the past five years in many respects because none of the apocalyptic catastrophes that were anticipated came to pass. Four years later, Kevin Cullen, a columnist for the Boston Globe, wrote, “Some who oppose gay marriage are deeply principled. Others are bigots. But they share a common cause. Their cause in Massachusetts is dead. It's over. Get used to it.” The anti-gay marriage has little traction in the state and has turned its
attention to other states in the area. Nonetheless, what is now the status quo in Massachusetts is anything but in the rest of the country. Why did the effort to legalize same-sex marriage in Massachusetts work?

A precise set of circumstances had to exist that were conducive to the idea of gay couples getting married, and it had to be more than simply public opinion. While Massachusetts’s residents did indeed support the idea of same-sex marriage more strongly than the rest of the country, the opposition challenged and continues to challenge the idea in a number of capacities. Despite those efforts, however, there have been few successes for the anti-gay marriage groups. Thousands of gay couples have been married in Massachusetts since the Massachusetts Supreme Court ruled in favor of the plaintiffs in the now famous Goodridge v. Department of Public Health and the ruling took effect in 2004. Fourteen same-sex couples challenged the fact that only heterosexual couples could get marriage licenses from the Massachusetts Department of Public Health, effectively excluding them from getting married. The Court’s ruling determined that such a ban was unconstitutional and instructed the legislature to change existing marriage laws to accommodate that ruling.

The obvious answer to the question, “Why did this effort succeed?” is that the Court imposed its judgment and a generally receptive audience and legislature ensured its incorporation into the day-to-day of Massachusetts life. This gives way to the next question: Is the Bay State an anomaly, or the first of what will eventually be many states? In 2009, though universal gay marriage is still a long way off, the example of Massachusetts is looking more and more like a not-so-distant norm.

By developing a formula for potential success, I can explain successes and failures in states across the country as a means of analyzing the movement as a whole. Every state has a
particular combination of demographic characteristics, political institutions and infrastructure, social circumstances, and timing that determine the receptivity to certain issues, in this case, gay marriage. There are four characteristics or groupings within the demographic section of the framework: age, gender, religious affiliation, and political party.

I compare the public opinion numbers from national studies conducted by the Pew Research Center to the demographic data in each state’s census. For example, age groups show significant differences when it comes to feelings about homosexuals, gay marriage, gay adoption, etc. Younger people (18-29 years old) tend to be more accepting than the senior population (65+). In June 2008, fifty-two percent of the 18-29 group favored gay marriage, while only twenty four percent of the 65+ group felt the same. Forty percent and fifty-eight percent, respectively, opposed gay marriage in the same poll. Thus, it would seem a logical conclusion, at least taken alone, that states with large senior populations or, conversely, large young populations, would respond to the prospect of gay marriage in a negative or positive way, respectively. Voter turnout is a variable to consider when evaluating the demographic influence because if people do not show up at the polls, their relative demographic dominance will have little influence where issues of gay marriage are decided by voting.

In order to create this section of the framework, I use the most exhaustive public opinion research available on gay marriage, compiled by the Pew Research Center for People and the Press, and the Pew Forum on Religion and Public Life. Not only is Pew data well-known and respected, it is also the most consistent as far as gauging public opinion toward gay marriage over an extended period of time. Pew has recorded trends dating back to the 1980s and usually has a new poll every six months. As a result, I can study individual data sets as well as trends, giving me a more complete account of where gay marriage stands in
the United States today. Pew data also goes far beyond the four traits I have selected for my analytical framework, which may help me account for inconsistencies or surprising outcomes. In addition, Pew includes the four traits used in my framework in a large majority of the surveys, meaning that I have a substantial number of surveys and contexts to consider.

Using United States Census data from the 2000 census, I collected the gender and age data from the three case study states and one prediction state. Religious affiliation came from the Pew U.S. Religious Landscape Survey while Gallup’s “State of the States” series provided most of the political affiliation data.

Demographics cannot simply be considered in a vacuum: political opportunities, processes, and infrastructure all weigh heavily on the outcome of gay marriage initiatives. Opportunities come in many forms and serve both the opponents and advocates of the issue. The 2004 election, for instance, was a political opportunity for the anti-gay marriage movement to mobilize in response to and in conjunction with the re-election bid of George W. Bush. In February 2004, sixty-one percent of Republican voters strongly opposed gay marriage, and “half [of those Republican voters] would not vote for a candidate who disagree[d] with them on the issue, even if they agree[d] with the candidate’s position on most other matters.”

That sort of motivation, particularly in an election year, made the difference for the opposition; Karl Rove, Bush’s chief strategist, used the gay marriage issue to the Republican ticket’s success that year. As Karen O’Connor and Alixandra B. Yanus explain, “In 2004, eleven states had ballot measure proposing bans or limitations on same-sex marriage. Commentators argued that these measures were crucial to mobilizing Republican voters, and indeed, Bush won all of these states.” On other side of the issue, however, was way in which Massachusetts legislators chose to handle the issue; because of
the distinctive procedures for constitutional amendment in Massachusetts, legislators were able to vote not to put an amendment to ban gay marriage on the ballot. Political processes have also played an important role in determining the outcome of gay marriage efforts. Unique strategies must be developed on a state-by-state basis because of the different ways that the states use democratic institutions to determine law. Ballot initiatives, referenda, constitutional amendments, structure of the courts, and election rules will all affect the way in which gay marriage will be perceived and acted upon in the state in question. For example, Massachusetts’ constitution is extremely difficult to amend: to do so would take at least three years and require lawmakers passing the amendment in two successive legislative sessions before the amendment would be submitted to the people in ballot form. Other states’ constitutions are not nearly so difficult to change (or to reverse change), particularly those in which the legislature plays no role in the amendment process. Furthermore, most Americans do not support amending the United States Constitution: in 2006, the fifty-six percent who opposed gay marriage were split regarding amending the Constitution by about half (thirty percent for and twenty-four percent opposed). The hesitation to amend the United States Constitution is critical for the future of the gay marriage movement: a successful effort to define heterosexual marriage in the Constitution, while unlikely, would be devastating to the campaign for marriage equality. In any event, the strategy for advocates at this point remains focused on state-by-state action, and each state’s political structure and context will change the strategy when pushing for same-sex marriage.

The final part of the analytical framework deals with particular variables that might affect the outcome of a gay marriage initiative or decision. This includes previous voter opinions on issues of similar character (like abortion), outside influences (funding or
organization), and the timing (such as proximity to an election). This component will be the most diverse across the states because there is no guarantee that exigent factors would have played any role. I include this section as a counterpart to the other two because it would be intellectually unsound to examine demographics or political institutions in a vacuum. Underlying both of those components are real people, subject to influences and actions beyond what age or legal protocol dictates. An important instance of this outside influence occurred in November with California’s Proposition 8 initiative. Huge amounts of money were donated to both sides of the Prop 8 campaigns, particularly from the extremely anti-gay marriage Mormon Church. In fact, the New York Times explained, “the California measure, Proposition 8, was to many Mormons a kind of firewall to be held at all costs,” and as a result, the Prop 8 campaign raised more than $5 million dollars in a matter of days, mostly from Mormon-affiliated groups and individuals. This sort of external influence must be considered with the other data in order to generate an accurate portrayal of the circumstances in which gay marriage was addressed. The three parts making up the framework will then be taken as a whole and applied to case-study states to test its validity.

The actual application of the framework is very straightforward. For demographics, I compare the Pew national data to the numbers collected for each state. If the state has a large population of a group that generally opposes gay marriage, then there is at least one reason to argue the state is not gay marriage friendly. Evaluating all four traits will lead to a more complete picture of how the demographics of the state are likely to affect gay marriage there. The second part, political structures, requires a look at how gay marriage came up in a state, be it by referendum or in the judicial system. The way in which gay marriage became an issue of public action initially will then dictate how the political institutions will affect the
result of the initiative. A vote in the legislature might have a quite different outcome than a state Supreme Court ruling. Knowing how the political institutions function and what they consist of will allow for a more complete picture of the circumstances, from the people to the politics. The likelihood that more than just people or the political institutions would affect a gay marriage initiative incorporates the third part of the model: variables. By including a flexible and state-specific element of the framework I can develop a more complete analysis of what happened and why. If one did not know, for instance, that a huge influx of Mormon money went to the Prop 8 campaign in the last few days and the effects that money had, one would have a difficult time understanding why California voted the way it did. Looking at data that better contextualizes events relating to gay marriage allows for a stronger analytical framework and, consequently, more compelling conclusions to be drawn.

The structure of this paper is such that this chapter introduces the themes for the subsequent chapters, and the next chapter provides the background and historical information that explains the evolution of the gay rights movement, and the gay marriage movement more specifically. I will discuss the history of the gay rights movement as it has existed since the 1950s, as well as its goals along the way. In Chapter Three, I will explain in detail the process of developing my framework, why the factors considered are significant, the variables that will exist regardless of process, and how the interplay between all these factors says anything about the likelihood of gay marriage in the state in question. Chapter Four is the first case study: Massachusetts. In this chapter, I will discuss the Goodridge ruling, how it came to be and the subsequent responses, both political and social, to that decision. In the second part of the chapter, I will apply the framework to the Bay State and discuss the implications of its outcome for the broader gay marriage effort. Chapters Five and Six are
structured much like Chapter Four, with a brief history of Vermont and California, respectively, and their experiences with gay marriage and the application of the framework in those states. In Chapter Seven, I use the framework on a state that has not yet addressed gay marriage and make a prediction as to the outcome. I have chosen Maine because the state legislature will be considering a same-sex marriage bill in the next few months, making a prediction timely and relevant. Finally, Chapter Eight provides a conclusion of my research, theories, lessons drawn, and expectations about how this issue will evolve and change as it moves forward.

I chose gay marriage as my thesis topic for three main reasons. The first is because of its complexity: there is perhaps no “right” answer to the very difficult questions surrounding this issue because of the emotional, moral, and legal perspectives one can take in analyzing gay marriage. This range of viewpoints makes a productive dialogue between groups extraordinarily difficult. Furthermore, because many people feel so passionately about their perspective, finding a common language and space with which to take part in a moderate discourse continues to be nearly impossible. At the moment, there remains a wide chasm between advocates and opponents of gay marriage, and neither side is prepared to compromise on their beliefs. The second reason is how very relevant this issue is today, both here in Massachusetts and for the country as a whole. Advocates stormed onto the political stage and have since waged a very emotional and volatile war against opponents who are equally strong in their convictions. The 2008 election demonstrated mobilization on all sides of the debate in three states and led to the election of a President who publicly supports civil unions but not gay marriage. Clearly, gay marriage as a goal or threat, depending on how one sees it, is not going away as an issue. The third reason is a personal one: I believe the
right of gay couples to marry is a fundamental one and one that is fully consistent with American tenets of equality. What I seek to understand are the political factors that will favor or block legal progress toward this form of equality. Thus, my thesis asks when: when we as a society will catch up with the progress of human rights. And that is a question that, despite all of the surrounding ambiguity, difficulty, and sentiment, is worth asking.

The gay marriage movement will ultimately succeed in achieving equal rights for gays in the United States. It will not be an overnight process and there will be, and have been, casualties along the way. There is no question, however, that the American public has made strides toward acceptance of a community that has long felt excluded from the rest of the country, and I do not see any reason to think that trend will cease. While there may be reason to think success will take longer than hoped or anticipated, I am optimistic that tolerance and then acceptance are the future for the gay community. History has repeatedly shown that the culture war is dynamic, and that recognition that a certain outcome does not in fact bring the feared consequences, leads to a shift in the cultural paradigm. I hope that this paper illustrates that expanding marriage to same-sex couples will not undermine the fabric of American society to those who fear such an impact. It is appropriate, then, to consider this an analytical coming out of the closet.

2 Pew Research Center Publications, “Gay Marriage is Back on the Radar for Republicans, Evangelicals.” (June 12, 2008) Q. 35- “Do you strongly favor, favor, oppose, or strongly oppose allowing gay and lesbian couples to enter into legal agreements with each other that would give them many of the same rights as married couples?”


CHAPTER TWO:  
THE GAY RIGHTS MOVEMENT

“We as liberated homosexual activists demand the freedom for expression of our dignity and value as human beings through confrontation with and disarmament of all mechanisms which unjustly inhibit us: economic, social, and political.”  
_Preamble of the Gay Activists Alliance, 1969_

“If gays are granted rights, next we'll have to give rights to prostitutes and to people who sleep with St. Bernard’s and to nail-biters.”  
_Anita Bryant, 1977_

The gay rights movement is a relatively young social movement in American history. More accurately known as the GLBTQ movement (Gay, Lesbian, Bisexual, Transgender, and Queer), activists working towards a series of rights on behalf of the GLBTQ community have only been organized since the 1950s. This chapter provides the historical context of the gay rights movement and its evolution into a campaign for equal marriage rights. This specific goal was not on the radar of gay rights activists twenty years ago, and thus a better understanding of where that goal came from provides a foundation for the rest of this paper.

The gay rights movement timeline consists of a several distinct stages. Beginning with the first efforts to mobilize in the 1950s, it took activists more than a decade to define tentatively the character of the movement and its people. Each decade since has had a unique goal, creating the clearly demarcated phases of the movement’s growth. The 1970s were the
period of radical gay liberation politics; the AIDS epidemic provided the challenge of the 1980s; and the 1990s and 2000s have been characterized as a shift towards assimilating the gay and lesbian community into the more mainstream of American life. The efforts of the 21st century have been focused almost exclusively on achieving legal recognition of same-sex relationships and the rights and benefits afforded to heterosexual couples. The court-based approach dominated early on but in recent years activists have begun to recognize the need to couple the judicial strategy with a grassroots educational campaign to broaden support for gay marriage.

Homosexuality in the United States

The 1950s

For the better part of the early 20th century, gay men lived double lives, while lesbians were on the very fringes of society. Derogatory conceptions of gay men ranged from being sick and unclean to child predators. In New York City, the heart of underground gay culture, gay men consciously avoided appearing as the stereotypical gay man, one who was “mincing,” “giggling,” or “quivering.” In many respects, the gay community was a masked one, with men acting “straight” in their professional lives and only engaging in the gay subculture at night at well-concealed gay bars. In this period, both the government and media exploited social fears about the homosexual man and thus perpetuated the prejudices. To be openly gay was to be targeted in the 1950s, and David Eisenbach explains, “For the homosexual to feel free to remove his mask to his family, friends, and colleagues, society had to change its attitudes toward homosexuality.” To change society, however, would require a movement of individuals who face an enormous risk in revealing themselves to the wider public. In order to effect change, Edward Sagarin, writing under the pseudonym Donald
Webster Cory, published *The Homosexual in America*, in which he wrote about the “homosexual condition” from the perspective of the gay man, the first book of its kind. In the book, Cory writes:

> The homosexual is…locked in his present position. If he does not rise up and demand his rights, he will never get them, but until he gets those rights, he cannot be expected to expose himself to the martyrdom that would come if he should rise up and demand them. It is a vicious circle, and what the homosexual is seeking, first and foremost, is an answer to this dilemma.\(^4\)

By establishing a central objective for the movement, Cory’s work touched off the start of what would become, over the next decade, the gay rights movement. Indeed, Cory was arguably the first gay rights activist in this period.

The majority of the 1950s was spent trying to develop an identity for the movement and its activists. Gay men were found across all spectrums of society; they were black, white, rich, poor, powerful, and weak. Unlike the women’s movement or the black civil rights movement, which could root their cries of marginalization on a specific examples of oppression, since gays came from all walks of life, it was a real challenge to establish what exactly made them an oppressed group. In *Sexual Politics, Sexual Communities*, John D’Emilio explains that the challenge to the fledgling activists was to bring the gay and lesbian community together and actually form that cohesive minority. He writes:

> Before a movement could take shape, that process [of becoming a recognized minority] had to be far enough along so that at least some gay women and men could perceive themselves as members of an oppressed minority, sharing an identity that subjected them to systematic injustice…Thus activists had not only to mobilize a constituency; first they had to create one. The fact that most of them remained unaware of this task did not make it any less critical.\(^5\)

Two groups emerged to tackle this constituency-creation process, the Mattachine Society of New York and the Daughters of Bilitis (DOB). Several publications emerged in this decade to combat the negative portrayals of homosexual culture in the mainstream media. *One,*
C. Madigan

*Mattachine Review*, and *The Ladder* gave credibility to the movement’s goals and over the next several years, and branches of the Mattachine Society cropped up across the country. The challenge facing Mattachine and other activist groups continued to be about identity and by the end of the decade, the movement was essentially divided into two camps: a radical, Communist branch, and a group working toward more mainstream assimilation.⁶

The 1960s

By the early part of the 1960s, homosexuality and lesbianism (they were still seen as two separate entities) began to coalesce in a substantial minority group. At this point, the gay rights movement was known as the homophile movement, and activists were staging protests against police harassment and becoming involved in the Democratic Party. The surfacing of gay life in this period led to the possibility of redefining homosexuality and eradicating the image of the gay man as a criminal, sinner, or sickly person.⁷ Substantial progress was made in this regard, particularly with the help of social scientists and psychoanalysts, who challenged the negative notions supposedly intrinsic to homosexuality. These efforts, though productive, underscored the commitment to work within mainstream society’s boundaries, and until approximately 1965, both the Mattachine Society and DOB worked explicitly within an assimilation framework; they used legislative and legal mechanisms to promote an acceptance of homosexuality in the public domain.

By the mid-60s, however, a more radical agenda began to replace the inclusionary objectives of the earlier movement.⁸ The stirrings of a “sexual revolution” began to redefine the way in which society considered sexuality and an allegiance between the homophile movement and the broader sexual revolution was quite natural. The effort to get civil rights
for African Americans and other racial minorities also helped to define the homophile movement as an oppressed minority. At the end of the 1960s, the movement had a new identity and all it needed was an event around which it could rally.

On June 27, 1969 at the Stonewall Inn in Greenwich Village, New York, gay rights activists got their big event. The Stonewall Riots, as they quickly became known, mark the official start of an organized gay rights movement. In a brief memoir entitled, “The Big Bang,” Lillian Faderman recalls the Stonewall Riots:

[The] Stonewall Riots happened quite spontaneously, on the night after Judy Garland’s funeral, when, with their heightened emotions, the drag queens, along with a handful of butch dykes at the Stonewall Inn, came to the end of their patience with the police raids on Greenwich Village gay bars that had been harassing the patrons. However, at any other time the unrest at Stonewall might have been just that and…nothing more significant. But the historical moment was right: It was precisely time for the Big Bang. Stonewall was an icon that provided the drama that had been lacking to capture the gay and lesbian imagination.\(^9\)

The Stonewall Riots cemented the a new understanding of the gay rights movement, which emphasized “a positive gay identity and [relied] more on confronting and protest forms of collective action in pursuing civil rights.”\(^{10}\) With this new understanding of purpose, the movement entered the next decade with a distinctly different set of objectives.

The 1970s

The movement’s more radical identity made it better equipped to form alliances with contemporary social movements, particularly the black civil rights movement, the feminist movement, and the Vietnam anti-war movement. This also signified a rejection of the assimilationist goals of the early homophile groups. Indeed, the name “homophile movement” was dropped in favor of the Gay Liberation Front (GLF), implying a denunciation of heterosexual society and the limitations it placed on homosexual people.
The early founders of the GLF were plagued with semantic and organizational challenges, and throughout the 1970s, the GLF waged its battle to promote gay rights with only certain degrees of success. The GLF also embraced a violent radical platform and many of its members defected to form the Gay Activists Alliance (GAA) when the GLF leadership contemplated a donation to the Black Panthers. A splinter group in the wider gay rights movement was the radical lesbian feminists, who rejected patriarchal society and the conformities of mainstream society.  

Another group also emerged in the 1970s: the National Gay Task Force, which conceived of itself as a gay ACLU or NAACP.

Away from protests, real progress was made by organizing the gay community into strong voting blocs and putting pressure on elected officials to recognize gays and gay rights. One of the crowning accomplishments of this decade was removing homosexuality from the American Psychiatric Association’s list of mental disorders in 1973, symbolically “curing” the gay community. One of its greatest failures was the inability to recognize how the mainstream media could have been used to promote gay liberation. Eisenbach notes, “By narrowing their focus to gay media, GLF could not reach enough closeted homosexuals or straights to challenge stereotypes and foster the cultural revolution that so many GLFers advocated.” Nonetheless, because each branch of the gay rights movement sought to define gay liberation differently and with different means, the lack of cohesion was a barrier to sweeping progress by any standard during the 1970s. At its most basic level, the tension continued to be about whether or not the movement ought to be centralized and bureaucratic, or about grassroots activism and politics outside of the mainstream.
The 1980s

The divisions with the gay liberation movement became even more pronounced during the 1980s when AIDS became the central focus of the GLF, GAA, and NGTF. After working so hard to remove the “sickness” stain from gay men, the AIDS epidemic swiftly undercut much of that progress. Those who wanted to deny the AIDS reality and those who felt that the only way to maintain the integrity of the gay community was to address the crisis head on, caused turmoil. In the early part of the decade, many gay activists decried those who were trying to draw attention to what was called Kaposi’s sarcoma, fearing that sickness and homosexuality would once again be linked. A fear that progress would be inhibited by illness overrode the efforts to address the disease in the early part of the 1980s. Felice Picano reflects on 1982:

Some of us…even as we nursed our loved ones and feared for ourselves, tried to awaken our community to the last thing it wanted to hear: that sex was killing us. Many activists had fought so long for gay rights that giving up anything won – sexual freedom, drugs, the right to go to bathhouses – was deemed as deadly as AIDS itself.¹⁵

A conscious effort was made to draw attention to the risks posed by unprotected sex and clearly marking the epidemic as a problem of disease and not a problem of sex, per se. This was an attempt to sustain the ‘liberation’ achieved while also protecting the people. In 1983, Richard Berkowitz and Michael Callen wrote, “If we are to celebrate our gayness and get on with gay liberation, we must stay healthy. To stay healthy, we must realize that the issue isn’t gayness or sex; the issue is simply disease.”¹⁶ Opponents of the gay liberation movement used the AIDS epidemic as an opportunity to shut down gay establishments – bathhouses in particular – as Governor Mario Cuomo of New York did in October, 1985. Gay activists were outraged that political officials “stigmatized identities (‘bathhouse sluts’) and places (‘AIDS dens’) instead of focusing on risky behaviors.”¹⁷ The different gay rights
organizations struggled with trying to simultaneously achieve their liberation goals and curb the AIDS epidemic.

By the end of the 1980s, the AIDS crisis had revealed that one clear route for gay liberationists existed going forward. Urvashi Vaid concludes, “There is no question that AIDS forced the LGBT movement to institutionalize, nationalize, and aggressively pursue the mainstream.” Consequently, the gay rights movement began to reconsider its rejection of assimilation and the use of mainstream political apparatuses to achieve inclusion in the wider American society. Unfortunately, this also led to a top-down structure of the movement instead of the grassroots activism of earlier years. This hierarchical configuration contrasted with that of its main opponent, the religious right, which was busy constructing a localized, ground-up power structure with which to combat what it perceived as the threat to traditional society. Thus, going into the 1990s, opponents of gay rights were better organized to promote their agenda, which effectively stalled the gay rights efforts of the 1990s as activists constructed and adjusted to the new model.

The 1990s and 2000s

The most recent stage of the GLBTQ movement is fundamentally rooted in assimilation into mainstream American society. The central battleground of that effort has had two parts: adding sexual orientation to anti-discrimination laws, and focusing on marriage equality. Many activists opposed the national hierarchy’s decision to use the courts to challenge marriage laws, arguing that the backlash would be so severe as to undermine any advances. The movement was not positioned to promote the marriage equality agenda in a more populist manner, and in 1993, Baehr v. Lewin was heard in Hawaii, resulting in a ruling
that determined excluding gay couples from marriage-associated rights was unconstitutional. The success was short-lived, when in 1996, the United States Congress passed the Defense of Marriage Act, instructing states that they did not have to recognize gay marriages in other states, and defining marriage as solely between one man and one woman. President Bill Clinton signed it into law shortly after it reached his desk. The DOMA was a direct response to Hawaii’s Supreme Court ruling. Not too long after, states began passing their own DOMAs. The religious right actively pushed for these state-based marriage initiatives, while gay rights advocates were not in a position to mobilize in opposition to them. The creation of civil unions in Vermont in 1999 led to another wave of DOMAs and state constitutional amendments banning gay marriage, which supporters of gay marriage were practically helpless to prevent. There is little evidence that GLBTQ activists did anything wide-spread or influential to fight the DOMAs and similar legislation. They took a let-it-happen attitude and then went ahead challenging those laws later.

It was not until June of 2003 that gay rights activists found reason to slowly mobilize from the ground-up. The United States Supreme Court had heard arguments in Lawrence v. Texas, a case that directly challenged the 1986 ruling in Bowers v. Hardwick, which upheld Texas sodomy laws. The court ruled that Bowers had been wrong when it was decided, a rare rebuff of stare decisis. While this ruling had nothing to do with gay marriage as such, Justice Scalia wrote in his scathing dissent that the majority ruling basically paved the road for gay marriage as the next natural step on the gay rights agenda. His conclusion was echoed by a large portion of the gay advocacy world, which took this pronouncement as a call to arms. Six months later, another landmark ruling would come down from one of the few states that did not have a DOMA, Massachusetts. Advocates targeted Massachusetts as a
prime location to challenge the so-called “traditional” definition of marriage. In November 2003, the Massachusetts Supreme Court ruled in Goodridge v. Department of Public Health that equal access to the institution of marriage was the right of all competent adults. In response to this ruling, states shored up their anti-gay marriage laws, many passing constitutional amendments banning gay marriage outright, another instance of ground-up backlash to top-down change. However, the Lawrence and Goodridge decisions have provided a strong impetus for proponents of gay marriage to mobilize for marriage equality. They have recognized that a grassroots educational effort to expose the wider public to the gay community will improve public opinion towards gay people and its wishes, and aid in the effort to assimilate into American culture.

Conclusion

The gay rights movement has had a dynamic character over the years and much of its work has gone towards counteracting negative stereotypes and prejudices directed at the gay community. Gay marriage is no exception; even though this new focus is more positive than compensatory, activists are still faced with the challenge of showing the mainstream public that the GLBT community or its desire to partake in civil marriage is not a threat to society, families, or traditional marriage. The rest of this paper will look at the various factors affecting the success of the gay marriage movement in the United States.

3 Eisenbach, Gay Power, 15.
6 D’Emilio, *Sexual Politics, Sexual Communities*, 83.
7 Ibid, 140.
8 Smith, *Gay and Lesbian Americans and Political Participation*, 74.
10 Smith, 75.
11 Smith, 78.
12 Eisenbach, 244.
13 Eisenbach, 133.
14 Smith, 78.
16 Richard Berkowitz and Michael Callen, Excerpt from *How to Have Sex in an Epidemic* in *Come Out Fighting*, 209.
19 Smith, 80.
“We’re here. We’re queer. Get used to it!”

“This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O’Connor seeks to preserve them by the conclusory (sic.) statement that “preserving the traditional institution of marriage” is a legitimate state interest. But “preserving the traditional institution of marriage” is just a kinder way of describing the State's moral disapproval of same-sex couples.”¹

For a society based on fundamental rights, the United States has lagged far behind other industrialized nations when it comes to issues of equality. Gay marriage is no exception. State-sanctioned gay marriage existed in only two states, Massachusetts and Connecticut, until the first week of April 2009, when Iowa and Vermont also legalized gay marriage. The vast majority of states not only do not recognize same-sex unions of any kind, they have made an organized effort to permanently exclude gay couples from the institution of marriage. Currently, forty-two states have a statute and/or a constitutional amendment defining marriage as the exclusive right of heterosexual couples. The remaining five are Massachusetts, New Jersey, New Mexico, New Jersey, Rhode Island, Iowa, Vermont, and Connecticut.¹ Most of the legislative and voter initiatives regarding gay marriage are

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products of the last decade, primarily following the example of the Defense of Marriage Act (DOMA), passed by Congress in 1996. The law provides that no state will be required to recognize same-sex marriages performed in another state, and provides an explicit definition of marriage as “a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex…”

In response to the federal DOMA, many individual states passed their own marriage acts, some more restricted than others, but all limiting access to marriage to heterosexual couples. The timeline of events indicates that most of the legislative initiatives were protectionist and out of concern for a change in the status quo. Over time, however, as people are more exposed to the “normalcy” of gay couples, there have been incremental but notable shifts in public opinion on matters of homosexuality, civil unions and gay marriage.

These shifts have manifested in judicial decisions, referenda, and bills before state legislatures, as well as among the populace. The public sphere and political sphere are inextricably connected and it is likely that as one becomes more open to the idea of inclusive marriage law, the other will follow, perhaps slowly but will follow nonetheless. The connection between these spheres of American life is the foundation for my framework of analysis of examining the likelihood gay marriage will be legalized in a given state. In fact, it is a defining characteristic of democracy, at least in theory, that the will of the populace will be reflected in its government, and vice versa. From this standpoint, the legal barriers in place against gay marriage are to be expected, because a majority of people is opposed to such marriages. This does not say anything about the constitutionality of people’s opinions or the laws that reflect those opinions, but it is not surprising that an emotional and controversial issue sparked such a quick and defensive reaction in the 1990s and again in
2004. A closer examination of the populations and political structures in states that have addressed gay marriage specifically (beyond a DOMA) shows that the ties between particular demographic groups and their feelings about gay marriage is quite strong, while policy consistently reflects these divides. These two components make up the first two parts of the framework I apply to four case studies as a method of examining gay marriage in the United States.

**Part I: Demographics**

The first part of the analytical framework focuses on demographic influences. It has been shown that groups of people that share certain demographic traits (a religious or gender affiliation, for example) tend to share the same opinions of gay marriage. With that observation in mind, determining the proportion of those groups in a state would give one a clearer idea of how receptive that population might be towards gay marriage. To determine which demographics to use in the model, I relied on the surveys collected by the Pew Research Center for the People and the Press (“Pew Center”), and the Pew Forum on Religion and Public Life (“Pew Forum”). Pew has conducted surveys about gay marriage and gay rights issues for more than two decades. I focused specifically on surveys that included gay marriage from the Pew Center and Forum that were conducted between 2003 and 2008, approximately fifteen surveys. While there was some diversity of the groups, characteristics, and other variables included in the surveys, four demographic groupings consistently appeared and showed unique perspectives within the groups themselves. On these grounds, I chose age, gender, religious affiliation, and political persuasion or party affiliation as the four central variables that affect how people view gay marriage.
The first variable, age, shows a general trend: younger people tend to favor gay marriage while older people tend to strongly oppose it. In May of 2008, fifty-two percent of people aged 18 to 29 were in favor of gay marriage, while forty percent were opposed. On the other end of the spectrum, in the same survey from May 2008, only twenty-four percent of people aged sixty-five years or older were in favor of gay marriage and fifty-eight percent were opposed. Pew includes the data for four age groups as well as the total population in this survey (Figure 3.1).³

<table>
<thead>
<tr>
<th>AGE</th>
<th>Favor</th>
<th>Oppose</th>
<th>Don't Know</th>
</tr>
</thead>
<tbody>
<tr>
<td>18-29</td>
<td>52%</td>
<td>40%</td>
<td>8%</td>
</tr>
<tr>
<td>30-49</td>
<td>40%</td>
<td>48%</td>
<td>12%</td>
</tr>
<tr>
<td>50-64</td>
<td>34%</td>
<td>51%</td>
<td>15%</td>
</tr>
<tr>
<td>65+</td>
<td>24%</td>
<td>15%</td>
<td>18%</td>
</tr>
<tr>
<td>Total</td>
<td>38%</td>
<td>49%</td>
<td>13%</td>
</tr>
</tbody>
</table>

Taking into consideration the fact that older people tend to oppose gay marriage in about the same proportion that the youngest bracket supports gay marriage is important when looking at the census data of a given state. If a state has a significant population of senior citizens, other factors being equal, then the state may be more likely to oppose gay marriage than support it (Figure 3.2).

Another notable element of the Pew age data is the “Don’t Know” category. The youngest bracket, and the most supportive, is the most confident about how they feel while the oldest bracket is the least sure. This would seem to reflect that the youngest part of the population has grown up with homosexuality as a more common and accepted reality than

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³ The way in which “age” is used in this paper refers to only voting-age members of the population. Thus, the youngest individuals are those eighteen years of age or older.
their older counterparts. As we saw in the second chapter, the gay rights movement is a relatively recent phenomenon, gaining strength in the 1980s when 18-29 year olds were either just born or still in elementary school.

They have likely been exposed to homosexuality and its related issues throughout their whole lives, making them more tolerant and accepting. In a 2003 Pew Center and Pew Forum survey, people who personally knew someone gay tended to have “more favorable attitudes” towards the gay population at large, while those who could not name any homosexual were the most negative towards homosexuality. People who have grown up in an environment or context in which homosexuality is part of popular culture or their day-to-day experiences, are more likely to support gay rights issues. This accounts for the discrepancy between the comfort levels of the younger bracket and the older brackets from the 2008 study and is highly relevant in looking at the state data for my case studies.
Gender

The second demographic trait in the model is gender, which shows a somewhat less-dramatic, but still significant divide, in opinion between men and women. In the most recent Pew data, men were far less in favor of gay marriage than their female counterparts. While only thirty-three percent of men favor gay marriage, forty-one percent of women are in favor. Further, more than half of men oppose gay marriage (53%) while a plurality of women (46%) is in opposition.\(^5\) Perhaps most interesting about the 2008 data is the changes in opinion among men and women since 2004, which show that women have become significantly less opposed to gay marriage. Men are only slightly less likely to be in opposition (Figure 3.3).

<table>
<thead>
<tr>
<th>GENDER</th>
<th>Favor 2004</th>
<th>Oppose 2004</th>
<th>Don't Know 2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>31%</td>
<td>57%</td>
<td>12%</td>
</tr>
<tr>
<td>Female</td>
<td>33%</td>
<td>56%</td>
<td>11%</td>
</tr>
<tr>
<td>Male</td>
<td>33%</td>
<td>53% (−4%)</td>
<td>14%</td>
</tr>
<tr>
<td>Female</td>
<td>41%</td>
<td>46% (−10%)</td>
<td>13%</td>
</tr>
</tbody>
</table>

Figure 3.3

The analysis that accompanied this survey pointed out that women were among four groups that had notable declines in opposition to gay marriage between 2004 and 2008. (The other groups were college graduates, white Catholics, and those aged 65 and older.) Although there is only a small difference, women also tend to register and turnout to vote at higher rates than men do, suggesting the possibility of a greater weight at the polls on this issue, at least in some regions of the country. In the 2006 congressional election, sixty-nine percent of eligible women registered to vote, while forty-nine percent showed up on the day of an election. Men, on the other hand, had a sixty-six percent registration and a forty-seven percent appearance at the polls.\(^6\) The controversial nature of gay marriage is such that even a
small advantage in the polls could have a significant impact on the outcome of a referendum vote or other ballot initiative. When activists on either side of a gay marriage campaign try to mobilize supporters of their position, that effort is ultimately limited by the size of the targeted group. As a result, demographic analysis provides a better picture of the constraints placed on activist groups and, therefore, on the potential of their mobilization efforts.

**Religion**

One of the most potent elements of the gay marriage debate is the impact that religion has on the character of the discourse. Individuals of particular faiths tend to reflect the ideas from their church, and this is most often in the form of opposition to gay marriage. There have been numerous examples over the last several years of religious leaders speaking out publicly regarding their understanding of what the Bible says about homosexuality, and study after study has shown that, above all other factors, religion has the most acute effect on one’s perception of homosexuality and gay marriage. This makes the potential for dialogue substantially more difficult for a number of reasons. Firstly, having a conversation in two different languages, one of God and the other of rights, is seldom productive. Both sides will talk past one another indefatigably, further alienating those who cannot make up their minds and making a productive conversation impossible. Secondly, religious beliefs do not necessarily equate to protection of equality under the constitution, and thus the mobilization and campaigning organized and funded by religious groups can often distort the legal and constitutional issues at hand. Finally, the lack of consensus in the wider religious communities about gay marriage is a significant part of the discussion, but is lost when better-funded and better-organized churches that oppose gay marriage are able to dominate the religious voice.
Certain denominations are especially vocal in their disapproval of homosexuality. Evangelical Protestants as a group have the highest levels of disapproval and the lowest levels of approval of gay marriage, a trend that has remained consistent over several years. Both black and white evangelical Protestants are staunchly opposed to gay marriage (79% and 81% opposed, respectively). White mainline Protestants have a markedly higher favorable opinion of gay marriage; in fact, more favor it than oppose it (Figure 3.4).

Evangelism clearly distinguishes the feelings of Protestants towards gay marriage in a way that no other singular factor in my framework does. As a result, states with a large number of evangelical Protestants will not only have a powerful voice of opposition from this group alone. A vocal, well mobilized, and well-funded group can have an impact on the public opinion in a given state, or even outside of that state’s borders. In fact, forty-nine percent of white, evangelical Protestants say that gay marriage is “very important” in their voting decisions, while only seventeen percent of mainline Protestants say the same. Evangelicals feel passionately about this issue personally and, perhaps more critically, as a voting issue, making their involvement weighty when it comes to addressing gay marriage initiatives.

Individuals and groups who feel very strongly about their stance are more inclined and more able to mobilize around that position, within their communities or across state borders.

Catholics share the feelings of ambiguity of white mainline Protestants in their opinions of gay marriage. This may be attributed to the message they hear at church, as well as how often they attend worship services. ABCNEWS polling shows that Catholics are less likely to attend church every week than Protestants, particularly Catholic men, only twenty-six percent of which attend weekly services, compared to forty-nine percent of Protestant men.
Furthermore, the same poll notes that church attendance tends to increase with age, suggesting a link between the opposition of older people and that of religious people.\(^9\)

Significant also is the fact that “those who attend worship services once a week or more are much more likely to oppose same-sex marriage (73%) than those who attend less often (43% opposed).”\(^10\) The link between religious involvement and exposure and opposition to gay marriage is striking and undeniable, making the size of religious populations in the case study states extremely significant.

Another faith group is the non-believers, a group that consists of those who identify themselves either as secular or unaffiliated. Perhaps unsurprisingly, this group shows far more support for gay marriage compared to the Catholics and Protestants. Fifty-eight percent of these people favor gay marriage, compared to thirty-two percent who are opposed, and ten percent who don’t know. The non-believers and their perspectives towards gay marriage are important to consider when examining the role of faith, and should not be excluded. While the secularists tend not to feel as strongly about their favorable opinions as the Protestants do about their opposition, awareness of this discrepancy is important for activists to acknowledge and incorporate into their strategies.
Political Affiliation

The final factor in looking at people’s groupings and affiliations is their political leanings. This is perhaps somewhat obvious, but there are a number of surprising elements to this part of the model. Immediately, one must realize that this issue is not as polarizing as it might seem; in fact, people across a large part of the political spectrum oppose gay marriage. There are five political identifications used in this section: conservative Republican, moderate/liberal Republican, Independent, conservative/moderate Democrat, and liberal Democrat. By and large, Republicans oppose gay marriage more than Democrats oppose it. The only group, in fact, that has majority support for gay marriage is the liberal Democrats. The next most supportive are Independents, with a plurality of forty-three percent in favor. Meanwhile, conservative Republicans oppose gay marriage at the same rate white evangelical Protestants do (Figure 3.5). Recognizing that this is a subject that deals far more with people’s understandings of traditions, personal comfort levels, and their lack of exposure to or education about gay marriage, than it is about politics, per se. There is a certain degree of circularity in this observation, given that Republicans, for example, are less likely to support gay marriage but not necessarily because they are Republicans. Rather, different experiences may lead to affiliate with the Republicans on this issue.

<table>
<thead>
<tr>
<th>POLITICS</th>
<th>Favor</th>
<th>Oppose</th>
<th>Don't Know</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cons. Republican</td>
<td>12%</td>
<td>81%</td>
<td>7%</td>
</tr>
<tr>
<td>Mod/Lib Repub.</td>
<td>22%</td>
<td>57%</td>
<td>21%</td>
</tr>
<tr>
<td>Independent</td>
<td>43%</td>
<td>43%</td>
<td>14%</td>
</tr>
<tr>
<td>Cons/Mod Dem.</td>
<td>37%</td>
<td>48%</td>
<td>15%</td>
</tr>
<tr>
<td>Liberal Democrat</td>
<td>75%</td>
<td>22%</td>
<td>3%</td>
</tr>
</tbody>
</table>

Figure 3.5
The Gallup Organization released a recent four-part report called “The State of the States,” in which it details a number of observations about the current political landscape of the United States. Using Gallup’s data and other Census data to look at political affiliation by state, I will look at the political character of the case study states as yet another component of this part of the model. Other factors to consider in this section are the level of intensity of this issue that individuals of each political party feel about this issue, and how and when they turn out to vote. Political mobilization and activism is tantamount to people’s party affiliations.

Margins of Error

Public opinion is bound to change and may be reflected differently from poll to poll. I take the numbers from Pew, Gallup, and the other resources at face value, meaning when I compare them to my own data, I do not explicitly account for the margins of error included in those polls. On average, no poll has a margin of error greater than +/- five percentage points. For the age section, the fact that the United States Census data does not group people together the same way that the Pew Center does forced me to adjust the groupings slightly. I had to make an 18+ group. The math for that adjustment is noted in the footnotes when this part of the framework is addressed for each case study. In the religion section, I realize that I only account for Protestants, Catholics, and non-believers. I am aware that there are many other religious denominations, many of which are pro-gay marriage and active in that belief. There is very little data about these other sects, however, and therefore I could not reliably include them in my analysis. Finally, when it comes to political affiliation, there is a greater
possibility that the data will be somewhat skewed based on voter turnout (or lack thereof) and general political engagement variability for which there is little or no available data.

**Part II: Political Structures**

Demographics cannot tell the entire story of how gay marriage initiatives have played out in the United States. The importance of institutions is tantamount, and activists on both sides of the issue recognize that an unmitigated will of the people is a myth. After any given court ruling, legislative vote, or referenda, those on the losing side cry foul on their opponents, citing abuses of power and system. In his 2004 State of the Union address, former President George W. Bush made a not-so-subtle jab at the Massachusetts Supreme Judicial Court Justices, calling on the people to amend the U.S. Constitution in the face of “activist judges [who] have begun redefining marriage by court order, without regard for the will of the people and their elected representatives.”

If an institution behaves in a way that results in an outcome that is displeasing to some, those people dismiss the effectiveness of institutions. When those same bodies act in their favor, however, those same people that regularly decry the institutions, suddenly reverse their earlier feelings and proclaim that this time, at least, the institution got it right. The frustration shown when the court or legislature acts contrary to one’s own agenda lends itself to how very important those institutions are, and thus they must be considered in conjunction with the people that they serve.

**State legislatures**

At some point, an initiative having to do with gay marriage will likely be brought up in a state’s legislature in some capacity. Each legislature has a certain role in the process, as
prescribed by the state’s constitution. A bill addressing gay marriage may be submitted
directly by a legislator, as is the case currently in Maine. If a popular initiative or referenda
is submitted, the legislature often acts as an intermediary or buffer between the popular
opinion and law. This was the case in Massachusetts and Vermont. Even a court decision is
bound to be taken up by the state at some point, by way of adjusting the language of previous
laws or implementing the means by which a decision can be implemented. In California,
however, the legislature acted independently of the courts and the people and did not interact
in any substantive way with the Proposition 8 process. Acting as the voice of people means
that legislators are often in the challenging position of having to answer to their
constituencies but also acting on their own consciences and obligations of office, a real test
for many elected officials to address.

Exactly how a state legislature will impact a gay marriage effort is unique to each
state, both in theory and in practice. Each state constitution has specific instructions guiding
legal initiatives, such as what percentage of the legislature is required to pass certain kinds of
laws or amendments, and deadlines for those votes. Both of these elements can be
significant, particularly on this issue. There is no question that gay marriage poses a real
moral conflict for people, particularly those entrusted to make decisions of consequence
about it. Thus, how many elected representatives are required to vote to pass a law or
amendment, as well as how much time they have to do it, may have practical consequences.
Outside of the constitutional guidelines, one must consider the actual people. The legislators
fit into certain demographic groups the same way that the wider population does, meaning
they are likely to have similar biases or opinions about gay marriage that would then affect
how they vote. In addition to their own sentiments, they must consider the demographics and
opinions of their own constituencies. This line of thought also carries into the political leadership of the legislature. A highly progressive or conservative leadership would likely impact how the rest of the officials vote, as they follow the Speaker’s lead, for example. When looking, then, at the role each state’s legislature played in gay marriage issues, there are both constitutional and practical realities to consider, all of which will have an impact on how the legislature ultimately acts.

State courts

A second political institution that has had an instrumental role, and perhaps the most controversial, in deciding gay marriage-related issues are the state courts, particularly the supreme courts. In Massachusetts, Connecticut, and Iowa, for example, the state supreme courts ruled that excluding same-sex couples from access to equal marriage violated the constitution, opening the door for those marriages to take place. In many situations, the courts have acted as restraints on the efforts of activists, providing the legal boundaries in which this issue will be decided. At lower levels, courts have heard arguments and served to gauge the viability of the issue in question, and sent the onus of action elsewhere. Initiatives have bounced from the people, to the courts, to the legislatures, and back again. The advocates of gay marriage tend to see state courts as an ally more so than opponents do, mainly because the courts, in theory, are required to decide on legal merit and not public opinion (though the dissenting justices in California may have suggested that public opinion is a legitimate concern). Opponents, on the other hand, know that they have public opinion in their favor (for the time being), and thus prefer to advocate putting the marriage question to the people. This dynamic is precisely where the “activist judges” mantra comes from in
Bush’s State of the Union address. The purpose of this paper is not to evaluate the legal arguments for and against gay marriage, but rather to place the institution responsible for making that decision within a framework that properly evaluates the players in the gay marriage debate. The courts are a political institution, and thus figure into my framework to see precisely what role they will play in the outcome of this debate.

An analysis of the courts has two basic parts to consider: the constitutional framework for the decisions, both majority and dissent; and the justices as political entities. The goal of the gay marriage effort is, specifically, to allow marriages between same-sex couples to be legally recognized by the state apparatus. Practically, this means equal recognition of the relationship and the rights afforded to married heterosexual couples. As a matter of principle, it means recognizing that homosexuals are equal to heterosexuals and ending the perceived discrimination against the former. The courts, as the country’s judiciary branch, clearly have a significant role in this process: interpreting pre-existing laws and deciding whether or not the advocates of gay marriage have a constitutionally legitimate claim. In my analysis, the majority and minority opinions of major gay marriage cases have been based on a few different legal rationales: right to privacy, right to marriage, deference to the people and legislatures, and the civil union alternative. The court may view these elements radically differently, either between states or within the court itself. These differences are accounted for by assessing the judiciary, particularly the high courts of the state, as political entities.

Justices get their jobs by either appointment or election. In either case, politics almost inevitably plays a part in the way in which a judge gets to the bench. This does not de facto translate into a politically biased judiciary by any means, but because there are some
prescriptions on court power, justices must at least consider their actions in the greater political context. In the case of justices appointed by the governor or other political leadership, a very conservative or very liberal governor might select appointees based on an ideologically similar background under the assumption that they would rule in a way the governor favors. Concerns about impeachment are also viable; if the judiciary radically departs from the will of the people, the possibility that a justice could be impeached exists, though there is a smaller likelihood of this. Finally, the justices themselves are the greatest question mark in this discussion. They could rule on seemingly political grounds, or deviate from previous tendencies on certain kinds of issues. There is no guaranteed way of predicting how a judge will rule, and that makes the court perhaps the most interesting element in the fight for marriage equality.

Political leadership

Those running a state government play a smaller role in determining the outcome of marriage initiatives, but they are important nonetheless. A state governor has a hand in dictating the flow of political processes in his or her state, and is in a position to lend support to either side of the effort. A governor also has to sign bills into law, meaning that a well-chosen veto could really throw a wrench into a given initiative, as Schwarzenegger proved in California. Leadership within the legislature is also important. Speakers of the House, for instance, make strategic choices about the schedule and content of House sessions, which can be instrumental in the success of a bill, as we will see in the chapter about Massachusetts. The leadership is also influential when it comes to assembling coalitions in support of or opposition to an initiative, particularly of junior legislators. The elected officials who are
willing to introduce and/or sponsor bills also qualify as political leaders, as they put their reputations on the line for an issue that is highly controversial and emotionally evocative. The individuals who act as political leaders may very well change the character of a debate in an irrevocable manner, affecting the long-term prospects of gay marriage in that state and beyond.

**Part III: Variables**

The third and final part of my model is about the variables in the pro and anti gay marriage movements. Simply put, an outcome cannot be determined by demographics and political institutions alone. Rather, there are unique pieces that, while perhaps tied to the first two parts of the framework, act independently and unpredictably. Time is the most obvious and perhaps most important variable to consider. When a bill or referenda is proposed matters, as does the timing of the next election, for instance. The election matters, as well. If it is a major election—one with notable positions to be filled—there may be a larger turnout, influencing the voter dynamic. This may also hold true for an election where gay marriage is only one of a number of issues about which a certain voter bloc feels passionately, potentially tipping the scales for or against the proposition in question. Social and financial capital are important variables to consider. The ways in which a group structures itself and mobilizes on a particular issue tend to determine how effective that group is at getting its position across. Bringing in the best minds and creating the most brilliant advertising scheme (among other things) requires money, and a lot of it. Opponents of gay marriage have proven particularly adept at fundraising, which may have tipped the scales in California in 2008. In the case study chapters, emphasis will be placed on three variables – timing, social capital, and
previous history of anti-discrimination laws – but other factors in state-specific scenarios will also be considered.

**Conclusion**

The analytical framework explained in this chapter consists of three fundamental parts: demographics, political structures, and variables. In order to see how this construction unfolds in practice, the rest of this paper will apply the model to four state case studies, the first three of which have already dealt with a specific gay marriage-related initiative, and ruled definitively on it. While the outcomes of these decisions are not set in stone, I chose the states included in part because of the unambiguous nature of the decisions at the time. Massachusetts has had gay marriage for the better part of five years now and there is little indication that things will change any time soon. More than a decade has passed since Vermont created civil unions as a legal alternative to marriage, and that state’s status quo has remained static over the years. California voted on gay marriage in the 2008 election, making their responses the most recent and the most dynamic. California passed Proposition 8 by only the slimmest of margins, leaving ample room for continued discourse and action on this issue. I will look at each state in turn and, using the model as a lens, analyze the gay marriage trajectory in order to determine what the right mix of factors is to legalize same-sex marriage.

The fourth case study in this paper is Maine, which currently has a DOMA, but is going to take up sponsored legislation sometime in the spring that would legalize same-sex marriage. If the effort succeeds, New England would be a sort of haven for gay couples, with all six of those states protecting same-sex unions in some capacity; Massachusetts,
Connecticut, Vermont, and Maine all with gay marriage, and the other states considering similar legislation. I will use my framework to predict how the Maine legislature will rule on the issue; thus, Maine is my prediction state. With the data and analysis from the four case studies, I will have a more complete picture of exactly what it will take to achieve marriage equality in this country.

4 Pew Research Center for People & the Press and The Pew Forum on Religion & Public Life, “Republicans Unified, Democrats Split on Gay Marriage; Religious Beliefs Underpin Opposition to Homosexuality.” (Survey conducted October 15-19, 2003. Published 18 November 2003.) Q. 34F1: “There is a lot more discussion about homosexuality these days. Who is the first homosexual person that comes to your mind? Just the first person that you can think of.” And Q. 35: “Do you have a friend, colleague, or family member who is gay?”
5 Pew, “Gay Marriage is back on the Radar for Republicans, Evangelicals.”
7 Pew, “Gay Marriage is back on the Radar for Republicans, Evangelicals.”
8 Ibid.
“Apparently, there were people in a Congressional district in Indiana who now expected me to produce a "radical homosexual agenda." And I didn't have one. I do have things I would like to see adopted on behalf of gay, lesbian, bisexual and transgender people: they include the right to marry the individual of our choice; the right to serve in the military to defend our country; and the right to a job based solely on our own qualifications. I acknowledge that this is an agenda, but I do not think that any self-respecting radical in history would have considered advocating people's rights to get married, join the army, and earn a living as a terribly inspiring revolutionary platform.”


The success of the gay marriage effort in Massachusetts in many ways defines and maintains the efforts to achieve legalization in the rest of the country. Though it is impossible say exactly what would have happened had the Massachusetts Supreme Court ruled against the plaintiffs, there is no doubt that ruling in their favor gave a boost to advocates. In effect, Massachusetts provided a surge in morale, an example of success, and a basis for showing the rest of the country that allowing gay marriage does not undermine the very fabric of society. Massachusetts was in some sense a fairly obvious place to push for marriage equality. There are few states that can match Massachusetts for progressivism, with its very liberal population and Democrat-dominated Congress and Supreme Court. The people tend to be well educated and not particularly religious, significant traits when dealing
with an issue such as gay marriage. The gay marriage effort in Massachusetts began with seven couples challenging the denial of marriage licenses from the state, resulting in the now-famous case, *Goodridge v. Department of Public Health*. After the Massachusetts Supreme Court ruled in favor of the couples, the issue was effectively passed on to the legislature for further action. Gay couples began getting married while opponents of the ruling collected signatures for two state constitutional amendments, both of which ultimately failed in the legislature. Currently, gay marriage has become a largely accepted fact in Massachusetts, and it seems unlikely that efforts to make it illegal will be successful or even promoted from now on. There is ample evidence that the example provided by Massachusetts led to the successful legalizations of gay marriage in Connecticut and Vermont. That successful outcome stemmed directly from the people of Massachusetts and its political institutions, and the second part of this chapter will analyze those factors at length, using the framework developed in Chapter Three. The events that make up the gay marriage timeline in Massachusetts are all specifically tied to the unique context in which they occurred, a clear product of the people and institutions that make up the Commonwealth of Massachusetts.

**Why Massachusetts?**

In 2001, seven Massachusetts same-sex couples went to their respective town clerks and applied for marriage licenses, which were denied. They subsequently sued the Massachusetts Department of Public Health, responsible for administering the marriage licenses, in Suffolk Superior Court. Superior Court Judge Thomas E. Connolly threw out the case, saying that there was no constitutional rationale for assuming marriage is a right.
Connolly wrote, “This court cannot conclude that a ‘right’ to same-sex marriage is so rooted in the traditions and collective conscience of our people that a failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither...is a right to same-sex marriage...implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.”

Connolly made clear that the issue was one for the legislature and not the courts, but the seven couples appealed to the Massachusetts Supreme Judicial Court, which agreed to hear the case.

The SJC’s willingness to hear the plaintiff’s case drew national and international attention. A number of state attorney generals from other states opposed the plaintiffs, including the AGs from Utah, Nebraska, and South Dakota, while many state bar associations supported them. Until 2003, same-sex marriage had become a back-burner issue in the early years of the 21st century. The Defense of Marriage Acts (DOMAs) had been passed, civil unions had been created in Vermont, and gay couples resorted to settling for alternatives to marriage. When the seven couples applied for marriage licenses, there had clearly been efforts set in motion by the law firm Gay and Lesbian Advocates and Defenders (GLAD), among others. On its website, GLAD explains the reasoning behind its decision to push for gay marriage in Massachusetts:

GLAD filed this suit in order to protect these couples, and in some cases, their children, with the legal framework of protections and obligations offered only by civil marriage. Massachusetts has a strong track record of civil rights leadership on many issues. Residents of Massachusetts know that gay and lesbian families are part of the fabric of the Commonwealth and the majority believes in fairness and equality for LGBT people. The state Constitution contains strong equality guarantees and the Court has consistently treated the Constitution as offering protections to minorities. The Legislature has also passed laws on issues of concern to LGBT people, including job protection, hate crimes, and student rights.
GLAD makes explicit that choosing the right mattered when it came to pressing forward with a marriage lawsuit. The explanation provided simply would not hold true in a large number of other states, particularly the legal and historical placement of civil rights found in Massachusetts. For the purpose of this paper, it is also significant that GLAD identifies both people and political institutions as equally important elements of its approach.

With the representation of the GLAD attorneys, the seven couples pressed forward and appealed Connolly’s ruling to the Supreme Judicial Court. A large number of amicus briefs were filed in the case by a diversity of individuals and groups, which provide insight about the positions taken by the opposing sides. One brief was filed by a coalition of anti same-sex marriage groups, led by the Massachusetts Family Institute (MFI), the leading opposition group to same-sex marriage legalization. Though the brief was filed after the SJC had ruled on Goodridge, its content helps clarify the argument against the plaintiffs. The brief’s argument has three tenets, the first of which is that “the Goodridge decision upsets the constitutionally mandated balance between legislature and courts,” which is a call to avoid the activism of judges and put the vote to the people.4 The MFI’s second point of opposition was that the instruction in the opinion “seems to direct the Legislature to graft a legal institution onto a social relationship for which it was not designed.”5 The logic here is that marriage was created to be a heterosexual institution, and that the construct of marriage defined as such does not apply to the “significantly different” relationships between same-sex couples.6 Finally, the MFI’s brief rejects the time frame of the court’s recommendation, arguing that the period allowed for deliberation by the legislature is “unrealistic.”7 MFI’s position is based on the fact that the 180-day recommendation was too short, and while they
do not say it, the group and its allies need more time to develop a petition for a constitutional amendment.

Another brief, written on behalf of a group of law professors in support of gay marriage, explained why the court should invalidate unconstitutional marriage laws. Much like the MFI brief, this amicus brief has a three-point argument as to why the court should indeed be involved in deciding the outcome of the gay marriage issue. Firstly, the brief argues that due to an obligation to evaluate the constitutionality of laws and a history of deciding issues of similar character, the court “should exercise its authority to declare the marriage statutes unconstitutional…” This point underlies a fundamental dispute between the two sides: one side sees marriage as equal for everyone and the other side views marriage as entirely different for heterosexual and homosexual couples; their constitutional understandings of the issue are rooted in this disagreement. The brief continues, arguing, “the Court should remedy the constitutional violation by extending marriage statutes to same sex couples.” This is the so-called activism conservatives have decried, but that proponents deem necessary to rectify the problem. The third component of the argument is that civil unions in the model of Vermont are an insufficient alternative to marriage, and this final point raises an essential problem of gay marriage. Are civil unions a constitutional alternative to marriage? The Massachusetts Supreme Judicial Court would subsequently answer that question in the negative.

Led by Chief Justice Margaret Marshall, the court ruled 4-3 that there are no constitutional grounds for excluding same-sex couples from marrying. In her decision, Marshall objected to the defense’s arguments about traditional marriage, procreation requirements, and raising children. In response to the accusation that the court was
overstepping its bounds and trespassing on the territory of the legislature, the Chief Justice wrote, “To label the court's role as usurping that of the Legislature…is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.”\textsuperscript{10} As a result of this conclusion, Marshall gave the legislature 180 days to accordingly change existing law to reflect the inclusive marriage definition in response to the court’s ruling. This final point was particularly outrageous to MFI and its allies, as they noted in the amicus brief they filed with the court. Nonetheless, on that Tuesday in November, the SJC markedly changed the marriage discourse both within Massachusetts and the wider United States.

After the ruling, opponents began organizing behind a proposed constitutional amendment to the Massachusetts state constitution that would establish marriage as between one man and one woman only. Led by the Massachusetts Family Institute, opponents of gay marriage said that “they [were] counting on a backlash to the legalization of same-sex marriages in Massachusetts to help them marshal public support” for the amendment.\textsuperscript{11} This strategy was a proven one: the Hawaii Supreme Court’s ruling in \textit{Baehr v. Lewin} in favor of same-sex couples resulted in the almost immediate passage of the Federal Defense of Marriage Act, and a number of state-level DOMAs, as well. The passage of the DOMA had support from both houses of Congress and President Clinton, and reflected their concerns about threats to the “traditional” institution of marriage, state rights, and moral issues. In 1996, Representative Bob Barr of Georgia, flanked by 117 co-sponsors to H.S. 3396, headed the effort to pass the Defense of Marriage Act, and he made no secret of the fact that the legislation was in direct response to Hawaii’s actions. The background information of the
bill from the House committee reads:

H.R. 3396 is a response to a very particular development in the State of Hawaii. As will be explained in greater detail below, the state courts in Hawaii appear to be on the verge of requiring that State to issue marriage licenses to same-sex couples. The prospect of permitting homosexual couples to “marry” in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.¹²

The response to the *Baehr* ruling illustrates two important dichotomies in the gay marriage discussion: action and reaction, and individuals and institutions. On the federal level, there was an outcry to Hawaii, which resulted in more severe and explicit marriage restrictions than existed before. In Massachusetts, opponents of gay marriage mobilized in response to the Court’s decision in *Goodridge* the same way, in the hopes of producing a constitutional amendment with the same prohibitive effect the DOMA did. This led to an interaction between people and various elements of the state apparatus, with all sides jostling for the advantage. As we will see, political institutions may have been decisive in determining the outcome, to the benefit of gay marriage supporters, in the aftermath of *Goodridge*.

The Massachusetts Family Institute, led by Kris Mineau and supported by then-Governor Mitt Romney, organized the effort to get a constitutional amendment to the people. Two amendments were proposed, the first of which created civil unions (a so-called “compromise amendment) and the second of which established marriage as exclusively for heterosexual couples. The Massachusetts legislature barely passed the first amendment in March 2004, which many lawmakers supported only because they felt that it was better than nothing. James H. Fagan, representative of Taunton, said after the vote, “This amendment stinks, but at least gives the people a chance to vote for something," a statement indicative of the discomfort and reluctance many legislators felt.¹³ As the time for the legislature to vote on this amendment drew closer, however, opponents of gay marriage felt that the likelihood
of passage was diminishing; moderate legislators changed their minds about supporting a marriage alternative, while more conservative legislators decided to support a more stringent amendment. Opponents proposed a new amendment, which read, “When recognizing marriages entered into after the adoption of this amendment by the people, the Commonwealth and its political subdivisions shall define marriage only as the union of one man and one woman.” The coalition of Voteonmarriage.org, which consisted of MFI, the Coalition for Marriage & Family, and Catholic Citizenship, submitted the amendment to Attorney General Thomas Reilly with more than double the required signatures before the December 7, 2005 deadline. Over the next two years, the marriage amendment was in political limbo, as we will see in the “Political Structures” section of this chapter.

As it stands now, gay marriage is an accepted (or for some, tolerated) part of life in Massachusetts. While the possibility still remains that an amendment banning gay marriage could be reintroduced, the likelihood of its passage is almost nil. The success of a gay marriage initiative in Massachusetts was due to a particular balance of citizens and political institutions working both together and in response to one another, in order to ensure the passage of such a landmark law. The rest of this chapter looks at those people and institutions, and how together they made possible gay marriage in Massachusetts.

**Applying the Framework**

**Demographics**

Massachusetts is often painted as a liberal haven, and with good reason. In the last ten presidential elections, Massachusetts has gone for the Democrat in eight of them, and barely going Republican in the other two, voting for Ronald Reagan both times. In a recent
Gallup study, Massachusetts ranked third behind the District of Columbia and Rhode Island as the most democratic state. The legislature consists of 200 members, 160 in the House and 40 in the Senate, and Democrats make up a supermajority in both. In fact, no other state has a Democratic majority as large as the one in Massachusetts. Thus, the “blueness” of Massachusetts is quite solid. This liberal leaning does not necessarily translate into unhesitating support of gay marriage, however. As the Pew surveys show, only thirty-seven percent of Conservative and Moderate Democrats support gay marriage, while forty-eight percent oppose it. This reality held true in Massachusetts, as well. A poll conducted by The Boston Globe in the spring of 2004 found that forty percent of those surveyed supported gay marriage, while forty-five percent either wanted to ban gay marriage outright or replace it with civil unions. This does not cast Massachusetts as wholeheartedly accepting of gay relationships. On the other hand, since that second group of gay marriage opponents is divided, this shows that a substantial plurality of Massachusetts residents were supportive of gay marriage, and a possible majority was at least supportive of legal homosexual relationships. This implies that there was at the very least a tendency toward tolerance and a population willing to consider the possibility of gay marriage. That fact is central to understanding how the process of achieving gay marriage successfully unfolded in Massachusetts: a tolerant citizenry that, despite their reservations, were not inclined to rashly oppose the possibility of gay marriage in their state.

The demographics of those people reflect that subtle tendency toward supporting or tolerating gay marriage. My framework uses age, religious affiliation, gender, and political persuasions as traits that have a significant impact on one’s feelings about gay marriage, and

\* 142 Democrats and 16 Republicans in the House. 35 Democrats and 5 Republicans in the Senate. A three-fifths supermajority would be achieved with 96 Representatives and 24 Senators.
in looking at the Massachusetts data from the 2000 Census, the picture is one of a hesitantly open population.

**Age**

As we saw in Chapter Three, gay marriage support follows a very consistent trend among different age groups, with younger people (18-29 year olds) supporting gay marriage at nearly twice the rate their older counterparts (65 and older) do. Among four different age groups, support for gay marriage falls as the surveyed groups get older, while opposition rises accordingly. The fact that the younger groups “don’t know” or are “unsure” at significantly lower levels than the older groups is also important to keep in mind when looking at Massachusetts-specific data. In Massachusetts, there is a substantial number of young people and a much smaller number of older people (Figure 4.1). More than half of the population is between eighteen and fifty-four, and a full forty percent are between eighteen and forty-four. This constitutes a potentially powerful voting bloc of people who tend to more accepting of gay marriage than other groups.

<table>
<thead>
<tr>
<th>Age Group</th>
<th>% of MA Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>18-34</td>
<td>23.70%</td>
</tr>
<tr>
<td>35-54</td>
<td>30.50%</td>
</tr>
<tr>
<td>55-64</td>
<td>8.60%</td>
</tr>
<tr>
<td>65+</td>
<td>13.50%</td>
</tr>
</tbody>
</table>

*Figure 4.1*

The oldest two groups, the 55-64 and 65+ groups, constitute just over twenty-two percent of the population. The youngest group outnumbers the eldest by ten percent, a difference of 645,954 people. This discrepancy is important for a number of reasons, one of the most important of which is voting. When all other factors are equal, the 65+ demographic
registers at nearly six times the rate of 18-24 year olds nationally, meaning that a larger number of young people have to register and vote in order to keep up with the older part of the population. Those who are 25-44, however, are twice as likely as the 18-24 year olds to register to vote, and they tend to reflect a tolerant position towards gay marriage (40% in favor, 48% in opposition). This still leaves tolerance or support ahead of opposition, albeit tenuously, in Massachusetts as far as age is concerned.

**Gender**

There is a significant discrepancy between men and women when it comes to their support of gay marriage, and the distance continues to grow, according to Pew surveys. The fact that a plurality or women favors gay marriage, while a majority of men oppose it, makes gender a demographic factor to consider. In addition, women tend to vote at a much higher rate than men do, giving them two characteristic advantages as far as supporting gay marriage goes. There is an approximately two percent difference (in the 2006 national elections) between male and female voter turnout nationally: 48.6% of women voted, compared to 46.2% of men. In Massachusetts, 51.8% of the population is female, compared to 48.2% male. When taken in conjunction, these two facts give the more supportive women a slight edge over the men in Massachusetts.

**Religious Affiliation**

More so than perhaps any other trait, religion determines an individual’s perception of and feelings toward gay marriage with rigidity and predictability. Surveys, studies, and polls all show that the more one attends church, particularly those of conservative
denominations, the more one believes homosexuality to be a choice, unnatural, and sinful, all of which lead to opposition to gay marriage. In fact, the demographic group that most staunchly opposes gay marriage is a religious one: evangelical Protestants. Religion in Massachusetts, or the lack thereof, undoubtedly influenced the terms and character of the gay marriage debate. While one Catholic organization was part of the Voteonmarriage.org coalition, and some other members of the church leadership spoke out, religious voices were unable to dominate the discussion. This may also be due to the fact that Massachusetts, as a state, is not particularly religious at all. In a survey that asked, “Is religion an important part of your daily life?” Gallup ranked Massachusetts fourth on the list of the top ten least religious states. It only fell behind New England neighbors Vermont, New Hampshire, and Maine, in that order.

In 2007, Pew conducted a landmark study of religion in the United States called the “U.S. Religious Landscape Survey,” which determined the way in which people identified themselves religiously. Using that data in comparison with specific surveys about gay marriage opinion, it is clear that Massachusetts was clearly well situated in terms of a gay marriage success when it came to religion. Of the five surveyed religions – evangelical Protestants, mainline Protestants, historically black Protestants, Catholics, and unaffiliated – Massachusetts ranks below the national average in the three most opposed religions, far above the national average for the ambivalent one, and is right about average for the fifth, and most supportive faith (Figure 4.2). Massachusetts has a small number of evangelical Protestants, particularly those that are white. This means that there is a smaller group able to mobilize for or against issues on explicitly religious grounds, or even vocalize a strong message to the wider public. The mainline Protestants, of which Massachusetts has a more
typical number, are far less opposed than their evangelical counterparts, which make them, at least in theory, less of an obstacle for a gay marriage initiative.

<table>
<thead>
<tr>
<th>Religion/Denomination</th>
<th>State</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evangelical Protestant</td>
<td>11%</td>
<td>26%</td>
</tr>
<tr>
<td>Mainline Protestant</td>
<td>15%</td>
<td>18%</td>
</tr>
<tr>
<td>Hist. Black Protestant</td>
<td>2%</td>
<td>7%</td>
</tr>
<tr>
<td>Catholic</td>
<td>43%</td>
<td>24%</td>
</tr>
<tr>
<td>Unaffiliated</td>
<td>17%</td>
<td>16%</td>
</tr>
</tbody>
</table>

**Figure 4.2**

Catholics’ feelings about gay marriage are very similar to those of mainline Protestants, and Massachusetts not only has a large population of Catholics, but is also a state that has been dominated by Catholic politicians for more than a century. A Catholic group was one of three making up the Voteonmarriage.org coalition supporting the gay marriage ban, and much of the Catholic leadership came out in vocal opposition as well. Nonetheless, many other Catholic broke rank with the diocese, and the two different approaches represent well the break within the wider Catholic population.

The final group, the unaffiliated portion, may consist of a variety of people with different opinions, although it is a logical assumption that without strong religious conviction in either direction, that these people would be somewhat less opposed to gay marriage than their more fervently religious counterparts. While unaffiliated does not necessarily translate directly to secular or atheist, it is important to note again here that those in the latter classifications are far more supportive than most when it comes to issues of gay rights.

* Notable among these are President John F. Kennedy and the rest of the Kennedy family; John Kerry; Thomas P. O’Neill; and Maurice J. Tobin.
Political Affiliation

In Massachusetts, blue is the rule: Democrats outnumber Republicans by nearly three-to-one. A person’s party is no guarantor as far as opinions about gay marriage go, but the leanings of Democrats in favor of marriage or marriage alternatives is markedly higher than those of Republicans. With a legislature dominated by a progressive party, the gay marriage ban had a more uphill battle than it likely would have had in more conservative legislatures. On the other hand, the two Democratic Speakers of the House, Tom Birmingham and Robert Travaglini, opposed gay marriage and only with a later combination of a pro-gay marriage Speaker, Senate President, and governor, did the ban ultimately get defeated in its second vote. While politics provides some indicator of opinion, it is by no means ironclad.

Political Structures

The political institutions played an instrumental role in how the gay marriage effort worked out in Massachusetts, particularly in conjunction with the demographics of the population. While the population as a whole generally leans in a progressive direction, the success of gay marriage cannot be attributed solely, or even mostly, to the sentiments of the people. Rather, the political institutions managed the issue in a way that coaxed the population into acquiescence and ultimately, acceptance. This political effort involved a uniquely constructed state constitution, a progressive group of Supreme Court justices, and a Democratic congress that, under the leadership of an active Speaker of the House, all made the legalization succeed. These political opportunities presented by Massachusetts are significant. The Supreme Court was willing to take a risk in ruling as it did for Hillary
Goodridge and the other plaintiffs on the case. Once it had made the decision, more politics came into play as opponents attempted to send the issue to the public for a vote. This involved two different proposed constitutional amendments, neither of which ever made it to the public for a vote because of the barriers in place in the Massachusetts constitution against easily amending it. The fact that an election took place during the legislative debate made an important difference for two reasons. Firstly, the election did not turn into a referendum on gay marriage, giving legislators more confidence in supporting the Goodridge ruling. Secondly, the election was significant because it brought more supportive representatives into government, as well as making a staunch proponent of gay marriage the new Speaker of the House. Without each of these institutional structures in place, gay marriage in all likelihood would be illegal under the Massachusetts constitution instead of being a highly touted example of tolerance and equal rights.

When the Supreme Judicial Court ruled in favor of the plaintiff’s in Goodridge, a series of legal and legislative reactions were put in motion. The ruling gave the legislature 180 days (from November 18, 2003) to change the existing marital laws to reflect the Court’s conclusion that gay couples have a constitutional right to marriage. There was very little for the legislature to interpret from the ruling, but the court’s instruction set off a firestorm of debate both within the legislature and among the people. According to the Massachusetts Constitution, in order to amend said document, there must either be a constitutional convention or a petition signed to make the legislature take up the amendment. On February 11, 2004, the legislature convened in a constitutional convention, lead by Senate President Tom Birmingham, an opponent of same-sex marriage. After a series of votes over the course of weeks, the legislature approved of the compromise amendment, making gay marriage
illegal but creating civil unions as an alternative by a margin of four votes: 105-92.\textsuperscript{26} This amendment had to be re-approved the following year in order to be set to the people for a vote; however, the following year, same-sex marriages had been happening for several months and the public seemed generally more accepting. In addition, more conservative lawmakers chose to support an alternative amendment, one that did not create civil unions and banned gay marriage outright.\textsuperscript{27} This, in effect, defeated the first amendment and set the stage for the more restrictive amendment to be taken up, but also allowed for more time for same-sex marriages to continue taking place. The new initiative was sponsored by citizens of the Commonwealth, meaning that it only required one quarter of the legislature to approve it in two consecutive years. If a lawmaker has sponsored the amendment, it would have required a simple majority in the constitutional convention. Instead of 101 votes, the amendment only needed fifty, a markedly smaller number and, theoretically, an easier number to achieve for supporters of the amendment.\textsuperscript{28}

The Massachusetts Family Institute, acting with two other groups in a coalition called voteonmarriage.org led the charge in getting the requisite number of signatures to put the amendment to the legislature. They submitted more than twice the required number to the Attorney General and the proposed amendment was then taken up by the legislature, under new leadership. The legislature continued to stall and opponents of the amendment supported the delay, until the Massachusetts Supreme Judicial Court ruled in \textit{Schulman v. Reilly} that the legislature did in fact have a constitutional obligation to vote on all voter initiatives by end the of the current session, effectively forcing the legislature to act.\textsuperscript{29} On the last day of the session, January 2, 2007, the legislature voted 134-62 to keep the amendment on the legislature’s agenda for the following year.\textsuperscript{30} Those intervening months, mandated by
the Massachusetts Constitution, proved to be vital for proponents of gay marriage, because the span allowed them time to mobilize opposition to the amendment. In addition, same-sex marriages continued in the meantime, giving the wider society, who were generally undecided or opposed, an opportunity to recognize that gay marriage was not the threat that activist opponents made it out to be.

While party affiliation does not necessarily translate into a given position on gay marriage, Democrats are still more likely to support it than not. Furthermore, a Democrat majority means that both the House and Senate leadership are Democrats as well, and in this case, both were pro-gay marriage. Under the leadership of Speaker of the House, Sal DiMasi, Senate President Therese Murray, and newly elected Governor Deval Patrick, lawmakers spent the five months between votes listening to constituents and lobbyists advocate for the defeat of the amendment. The groundswell that had begun with the compromise amendment continued, increasing in intensity between the two sessions. One of the nine legislators that switched votes between January and June rejected suggestions of trading votes or other dubious behind-the-scenes behavior. Representative Richard Ross, Republican of Wrentham, said, “Nine thousand of them have now married, who have blended into society, who have hurt no one. I just couldn't see exposing them to all of that stuff over the next two years. I know there's going to be a lot of folks that I need to apologize to in my district…Whatever happens I'm moving forward. I know I did the right thing.” Representative Ross’ attitude represents that of other lawmakers and people in the state. In addition, while people may have been opposed to allowing same-sex marriage, amending the constitution is a significant step, and that may have served as a deterrent for
some, making the SJC’s ruling that much more important in getting the process going because it framed the issue in a pro-gay marriage light.

The Supreme Judicial Court’s ruling gave proponents an opportunity to show that same-sex marriage would not undermine the moral foundations of society, nor have any other negative impacts on the day-to-day lives of Massachusetts residents. When one considers the ruling in conjunction with the requirements to amend the Massachusetts Constitution, the significance of the Court’s ruling is even more clear: attempting to amend the constitution took more than three years, during which same-sex couples were able to marry peacefully. The barriers in place forced the legislature to ensure that it was making the right decision and gave constituents the opportunity to evaluate the practical impact of gay marriage on their lives and make an informed, personal decision on those grounds. The change in public opinion toward this issue illustrates how important the two-consecutive-sessions rule was: in March 2005, 56% of Massachusetts adults supported gay marriage, compared to only 40% the year before. The difference in that period was that gay couples were allowed to marry before the legislature acted, allowing residents, many of whom were disposed to be tolerant, to adjust to the idea and accept it as a normal and acceptable part of life. This is just what the procedure intended: a so-called “scrutiny period” within the states’ constitutional framework. Without the SJC’s controversial ruling, an arduous constitutional amendment process, and a progressive body of lawmakers, there is little reason to think that gay marriage would be a legal and conventional part of Massachusetts society.
Variables

The third part of the framework considers variables, and Massachusetts certainly has a few unique traits that added to gay marriage’s success. Pew data shows, for instance, that better-educated people tend to be more supportive of same-sex marriages than those who are less educated. Massachusetts is home to a large concentration of some of the best colleges and universities in the world, which makes the Bay State a sort of intellectual haven. According to a 2004 study by the United States Census Bureau, 35.5% of people 25 and older are college graduates in Massachusetts, the highest rate for any state in the country. Professors at Massachusetts law schools, such as Laurence Tribe of Harvard, submitted amicus briefs on behalf of the plaintiffs. Another consideration is the fact that Massachusetts had sex-based hate crime legislation on the books before many other states, as well as benefits laws affording same-sex partners some of the same protections their heterosexual counterparts received in the workplace. This indicates that there was a pre-existing acknowledgment that all people are entitled to certain protections, regardless of their sexual orientation.

Conclusion

The successful bid to legalize gay marriage in Massachusetts leads to several observations about why it was, in fact, a success. There are three main factors that seem to have been the most influential: the positive initiation from the Supreme Judicial Court, the so-called “scrutiny period,” and a tolerant citizenry. When the SJC ruled in Goodridge, the legislature understood the ruling as mandating that marriage laws had to include same-sex couples. Consequently, the issue before the legislature was not about how to legalize same-
sex unions, but rather whether or not to amend the constitution to ban those relationships. Though opponents of Goodridge saw the amendment process as the only recourse available to them, many citizens and lawmakers saw that step as too extreme. In this way, the legislature acted as an intermediary between the people and the courts. Without such an explicit endorsement of same-sex unions from the SJC, it is unlikely that the Massachusetts legislature would have taken up the issue, or that it would have endorsed marriage rather than a domestic partnership alternative. The “scrutiny period” ensured that lawmakers would not act rashly on an emotional and controversial issue. Had an amendment gone right to the people for a vote, there is almost no question that it would have passed, dealing a setback to supporters of gay marriage. While some posit that the Massachusetts Constitution is still too easy to amend, in this case, the protections in place held. Finally, the people of Massachusetts proved to be tolerant and rational in their approach to the gay marriage issue. While they did not overwhemingly endorse the idea from the beginning, they too benefitted from a scrutiny period in which to consider the implications of same-sex marriage. Ultimately, the conclusion that many people drew was that gay marriage was not a threat to the stability of society, and as a result, active opposition to gay marriage is almost non-existent in Massachusetts today.

Since Goodridge, Connecticut, Iowa, and Vermont have legalized gay marriage, and several other states are considering following suit. Vermont dealt with a same-sex union initiative several years before Massachusetts, and in the process created an alternative system of benefits called civil unions. In the next chapter, Vermont’s experience with a same-sex union initiative will be considered on its own, as well as in comparison to Massachusetts’.
The comparison will be instructive in further understanding what makes marriage initiatives likely to succeed in other states.

5 Duncan, Brief of Amici Curiae-Massachusetts Family Institute, et al., 28.
6 Ibid, 28.
7 Ibid, 40.
20 U.S. Census 2000, “DP-1 Profile of General Demographic Characteristics-Massachusetts.”
23 2000 U.S. Census-Massachusetts.
25 2000 US Census-Massachusetts
27 Lewis, “Passage of Marriage Amendment in Doubt.”
28 Massachusetts Constitution, Article XLVIII, Part II, Section III-“Mode of Originating.”
33 Lewis, “Passage of Marriage Amendment in Doubt,” May 16, 2005.
34 Pew, “Gay Marriage Back on the Radar.”
“That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.”

-Common Benefits Clause of the Vermont Constitution, Chapter I, Article 7

“The entire state of Vermont has been talking about the place of gay and lesbian people within our community. I doubt that that has ever happened to this degree in any other political jurisdiction anywhere, ever. And that is a healthy thing.”

-William J. Lipper, D-Hinesburg, the only openly-gay Vermont legislator

No state in the country has had extensive protections for same-sex couples longer than Vermont has. In 1999, the Vermont Supreme Court heard arguments in Baker v. State, a lawsuit that challenged the prohibition of extending marriage certificates to same-sex couples. The court ruled in favor of the plaintiffs, invoking at Common Benefits Clause of the Vermont Constitution, setting off a debate in the Vermont legislature that surpassed Massachusetts’ in terms of negativity and passion. Vermont recognized gay unions as legal in the midst of the Defense of Marriage Amendment backlash gripping most of the rest of the country, and in spite of expressed opposition from a majority of the population. The timing of Vermont’s same-sex union debate makes the events more significant in the overall
discussion. The 1999-2000 period places Vermont in between the passage of the federal DOMA, and the sweeping success in Massachusetts from the Goodridge case. In this respect, Vermont marks the middle ground, both literally and figuratively. Furthermore, demographically Vermont is a sort of hybrid state in that there is a more rural and conservative part of population, as well as an imported, urban, liberal sector as well. These two groups of Vermonters clashed heatedly over the same-sex marriage issues. In some respects, Vermont’s demographics look very much like Massachusetts’ and yet markedly different as well. This demographic and political dichotomy paved the way for a highly contested debate, one that was fraught with animosity and tension from the start.

In this chapter, I will detail the timeline of events leading up to the Baker lawsuit, the case itself, and its legislative aftermath. Of particular note are the specific parts of the political process used, the response of the public, and the impact of the 2000 election on Vermont civil unions. In applying the framework, we will see “two Vermonts,” one far more conservative and traditional in its views of marriage than the other. The state supreme court provoked a legislative debate about how to address same-sex unions, which it did within the perimeters provided by the “tolerant citizenry.” Although the outcome of the gay marriage effort in Vermont resulted in civil unions and not marriage, the process there and in Massachusetts is similar and can be judged against each other because of the fact that both challenged the marriage norm at the time of the court decisions. Vermont created civil unions where none had existed before while Massachusetts was the first to legalize gay marriage. As the first states to take these first steps, their experiences are instructively compared. The third part of the framework – variables – addresses Vermont’s previous gay rights legislation and the advocacy of one openly gay legislator. The final part of this chapter
C. Madigan

looks specifically at the differences between Massachusetts and Vermont in order to identify the factors that led to the creation of new legal structures for same-sex couples in those states.

**Vermont: The First**

The approach Vermont took for dealing with gay marriage resulted in civil unions, a compromise between both ends of the gay marriage spectrum. On the one hand, same-sex couples are entitled to almost all of the benefits of heterosexual married couples, but on the other hand, they do not get to be married, per se. Civil unions have been viewed by the general public as a satisfactory alternative to gay marriage for quite some time, as Pew Forum surveys show that legal agreements giving same-sex couples the same rights as marriage are far more popular than marriage itself, particularly among groups likely to oppose gay marriages.¹ In *Baker v State*, the Vermont Supreme Court ruled that while all couples regardless of sex are entitled to the benefits of marriage, there was no fundamental right to marriage for same-sex couples unless the legislature created that right. The Vermont legislature then had to act accordingly, creating the designation of civil union as a way of making same-sex couples “spouses” under Vermont law.² For some, civil unions are an acceptable alternative, while others think that they perpetuate exclusion and discrimination. For instance, William Eskridge of Yale supports civil unions as one step in a process towards achieving full marriage rights.³ On the other hand, Michael Mello of the Vermont Law School argues that civil unions are not sufficient because separate is not equal.⁴ In Vermont, this divide between supporters of gay rights manifested itself among legislators and the wider population. Interestingly, the one openly gay member of the Vermont legislature supported the civil unions bill while it was in the House Judiciary Committee, while another straight
member opposed it because the bill, in his view, did not go far enough. There were, in fact, three types of people voicing their opinions about the legislature’s efforts: those who opposed any kind of same-sex unions, those who supported marriage exclusively, and those who were willing to compromise with civil unions.

On November 18, 1998, arguments began before the Vermont Supreme Court in *Baker v. State of Vermont*, filed on behalf of three same-sex couples that wished to marry. The arguments were a lively affair: “Seldom does the court become so immersed in the case before it…Lawyers had an hour to make their case. Normally they get half that, sometimes just a quarter. On Wednesday, they had to share it pretty much equally with the three men and two women in black robes,” who asked frequent questions and challenged attorneys for both sides. After about a month of deliberation, the court ruled that homosexual couples are entitled to the same legal benefits as heterosexual couples are. In the decision, written by Chief Justice Amestoy, the court concluded:

Under the Common Benefits Clause of the Vermont Constitution... plaintiffs may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.

The decision later points out that the court did not rule on whether or not the plaintiffs had a constitutional claim for marriage, but rather that they were constitutionally entitled to the benefits and protections of marriage. This was a crucial distinction because it allowed the legislature far more flexibility in its subsequent course of action. Professor Greg Johnson of Vermont Law School, who testified before both houses of the legislature when it took up the
issue, noted that the Vermont legislature had five possible options after *Baker.* Johnson observed that two of the options involved the legislature stalling on or avoiding the issue while appearing to be productive; two options were either the creation of civil unions or same-sex marriage; and the last was option the abolition of state involvement in religious marriage and instead providing civil marriage to all couples, straight and gay.

The first two options appeared never to be viable, while the abolition of marriage for heterosexual couples was also a non-option. Given the fervent opposition to the *Baker* ruling, the legislature had to tread carefully in how it chose to interpret and act upon the decision. A majority of Vermonters disagreed with the decision, and plurality supported a constitutional amendment defining marriage as between one man and one woman. It was in this environment of opposition that the House Judiciary Committee began debate about how to respond to *Baker* on February 9, 2000, voting 8-3 for an alternative legal structure that was not marriage. This turned into bill H. 847, drafted by the Chairman of the House Judiciary, Republican Thomas Little. Section 2 of the bill that passed the full House reads:

(a) The purpose of this act is to provide eligible same-sex couples the opportunity to receive the legal benefits and protections and be subject to the legal responsibilities that flow from civil marriage. Civil unions provide a legal status with the attributes and effects of civil marriage, so that state law conforms to the requirements of the Common Benefits Clause of the Vermont Constitution.

(b) This act also provides eligible blood-relatives or relatives related by adoption the opportunity to establish a reciprocal beneficiaries relationship so they may receive certain benefits and protections and be subject to certain responsibilities that are granted to spouses.

Though the bill still had to go through the Senate, the Vermont House of Representatives had just created the most extensive framework of legal protections for same-sex couples in the world.

The Senate Judiciary Committee received H. 847 and immediately talk began about the barriers to the bill’s success. By this point, opponents of *Baker* and the House’s civil
unions bill had organized into a vocal and aggressive group called Take It To The People, also known as TiP. According to their website, TiP promotes “traditional marriage” between a man as a woman, to provide “the most productive and nurturing environment for children.” The organization’s goals include educating the public on the value of traditional marriage, overturning laws that support gay unions, and working for state and federal legislation that reflect the will of the people. When the Senate Judiciary Committee took up H. 847, TiP began running ads that suggested the so-called gay agenda being promoted by the Vermont state government included cutting the defense budget to fund AIDS care and sex change operations, as well as using tax payer money to pay for artificial insemination for gays. Governor Howard Dean denounced the ads as “preposterous,” “asinine,” and “fatuous.” The ads serve as clear evidence of how vicious the debate over gay union rights had become in Vermont, as well as the opponents’ strategy used to start mobilizing like-minded voters if the institutions shifted the issue to the voters.

The Senate Judiciary began debate on the civil unions bill in a context of fierce debate, and immediately two of the six members said they were not supporting the bill; they were, instead, supporting a constitutional amendment banning same-sex unions. Over the course of three weeks, the committee heard from a wide array of witnesses on the issue, from within their own ranks and the community at-large. On April 10, 2000, the committee had come up with two slightly different drafts of a bill: one used the civil unions language of the House, and the other referred to the union as a “domestic partnership.” The date the bill would into effect was the same for both, and eight months later than the House’s proposed bill. In addition, the Senate bill included a residency requirement, which excluded same-sex couples from getting a civil union in Vermont if their home state did not recognize that
Perhaps more important than the substance of the changes themselves was the fact that a changed bill would have to go back to the House for a re-vote, and there was no guarantee that, given the upcoming election and pressures from opponents like TiP, that the bill would get the support again. Finally, the Senate Judiciary Committee referred its bill to the full Senate, along with two constitutional amendments. One amendment would overturn Baker by defining marriage as legally between a man and woman, as well as give the legislature exclusive authority over marriage-related issues. The other would simply have defined marriage as a heterosexual union, and thus not overturn the Vermont Supreme Court’s decision. The first amendment was defeated 21-9 and the second lost 17-13, while the actual civil unions bill was passed 19-11 on April 19, 2000, divided largely along party lines.

The different language in the Senate bill meant that it had to go back to the House for a final vote before it could become law. On Tuesday, April 27, the bill returned to the 150 legislators for a vote. The session opened at 10 am for debate and for the next three hours, mostly opponents of the bill dominated the dialogue. When it came time to vote again, a largely segregated audience – those with pink ribbons supporting same-sex unions, and those wearing white ribbons in support of “traditional” marriage – watched lawmakers vote. The final tally was 79-68 for the bill, with two representatives switching to “yes” from their March “no” votes. Some representatives who voted against the bill left the chamber after tallying their vote, knowing that the bill was going to be passed. The president of Take It To The People, Michele Cummings, responded, “The House's passage of this bill marks the close of only one chapter in our crusade to preserve traditional Vermont family values,” and the head of the Roman Catholic Diocese of Burlington, the Reverend Kenneth A. Angell,
grieved, “History was not made today, it was unmade…Centuries of cultural and religious respect for traditional marriage between a man and a woman have been undone.” On the other hand, two of the plaintiffs in the Baker case, Nina Beck and Stacy Jolles, were also in the gallery to watch the historic vote. Ms. Jolles turned to Ms. Beck and said, “C.U. me!” in response to the bill’s passage.

With that, H. 847, “An Act Relating to Civil Unions,” went to Governor Howard Dean’s desk that afternoon and was signed into law, marking the official creation of civil unions in Vermont. The battle was not over just yet, however, because the governor and all 180 lawmakers were up for election that November of 2000, and opponents of the civil unions bill promised to make bill the central issue of the election campaigns. Right after the House’s vote, Cummings, president of TiP, promised, “The next chapter begins tomorrow, when our organization meets to discuss the only opportunity Vermon ters are being given to express their will: the November elections.” Ruth Dwyer campaigned for the GOP gubernatorial nomination on an opposition to civil unions platform, and securing that nomination made it clear that the governor’s race would be about civil unions. As Michael Mello of the Vermont Law School observes, “the same was true of the races for the Vermont House and Senate. The Democrats held slim margins in both chambers. The Republicans saw civil unions as their chance to gain control.” And gain control they did, at least in the House. After election day, the Democrats clung to a two-vote lead in the Senate, and Dean barely defeated Dwyer to hold onto the governorship. In the House, however, Republicans resoundingly defeated Democrats, taking over 83 of the 150-seat House and gaining a 16-vote margin. Frank Bever of the Rutland Herald, called it a “GOP rout.” The new strength of Republicans gave opponents of the civil unions bill hope that it could be repealed, and the
following spring, the House tried to do just that. The representatives took various votes on either eliminating civil unions entirely or reducing the benefits associated with them. However, the Senate refused to consider taking up the issue, and by the end of the 2001 legislative session, civil unions legislation remained intact, effectively marking an end to the most intense efforts to eliminate same-sex unions.25

The effort to legalize same-sex unions in Vermont was far more controversial, and the outcome more tenuous, in Vermont than in Massachusetts. In using my framework to evaluate the factors that impacted this process, one can see a number of similarities and differences between the two states that seemingly had an impact on the different routes the legislatures took in responding to their respective supreme court’s rulings. There is a certain amount of overlap when it comes to demographics and politics, but Vermont proved to be unique in its handling of gay marriage initiatives, namely by inventing civil unions as a parallel construct. In the next section, I will look at the model’s application to Vermont, and then compare the data from the model to Massachusetts to determine which factor, or factors, resulted in one deciding to permit marriage and the other to create a marriage alternative.

Applying the Model

Demographics

In many respects, Vermont’s population looks very much like that of Massachusetts. The people are predominantly white, non-religious, and Democratic. Nonetheless, a majority of people opposed the ruling in Baker and fought passionately to prevent the legislature from legalizing marriage or civil unions for same-sex couples. It would seem that there are what Mello calls, “two Vermonts.” He writes:
The first Vermont consists of people whose families have lived here for generations. With many exceptions, this Vermont tends to be conservative, traditional, and rooted in the values of rural America. The second Vermont consists of...transplanted urbanites from places like Boston, New York City, or...Washington D.C. With many exceptions, this Vermont tends to be liberal, nontraditional, and rooted in the ethos of the city...On many issues...the two Vermonts coexist comfortably.26

One issue that brought out the rift between the two, however, was gay marriage. In looking at the population data for Vermont, one must keep in mind that appearances can be deceiving. The two different “kinds” of people in Vermont forced a different course of action than what would happen five years later in Massachusetts, despite surface similarities between the two states. Nonetheless, polling data from the month after the Baker ruling found that only 52% of respondents opposed the ruling which, though a majority, reflects the possibility for tolerance among the wider population, as was seen in Massachusetts. In fact, Del Ali, the president of Research 2000, which conducted the poll, said “If I’m lobbying for same-sex marriage, I’d look at Vermont as pretty good ground for getting equal rights, civil rights.”27 Significantly, the poll “found about two-thirds of Vermonters in the middle. They either agreed or disagreed with the court's ruling, but not strongly. And these people in the middle were about evenly divided: 32 percent agreed with the court and 34 percent disagreed.28 This flexibility or openness to change reflects the likelihood that, when provoked by law, the people were in a position to accept over time the new marriage paradigm, making the initiative ultimately successful. This is the “tolerant citizenry” concept that proved so crucial in Massachusetts. In response to the poll’s results, the chairman of the House Judiciary Committee, Thomas Little, said that he thought there a number of people on either extreme, but also that there “a vast pool of people somewhere in between.” Finally, one must keep in mind that Vermont’s actions on same-sex unions not only came on the heels of the federal DOMA and a nationwide backlash to Hawaii’s efforts, but also made
Vermont the first state to have protections for gay couples. It should be unsurprising that the people were more hesitant or opposed than the population is today (59% opposed to legalizing gay marriage in 2003 compared to 49% today).\(^{29}\)

**Age**

In the most recent census, more than half of Vermonters were between the ages of 18 and 54, and just over twenty percent were between 18 and 34.\(^{30}\) The generally more supportive young people make up a substantial bloc of the population, outweighing the oldest group by about nine percent. However, the youngest bloc of voters, aged 18-24, vote at a far lower rate than the rest of the state, particularly in Vermont. In fact, in the 2000 election, only 36% of 18-24 year olds turned up to vote, compared with 75% of those aged twenty-five and older. That is a 39% difference, eleven points higher than the national average in that election.\(^{31}\) This may explain, in part, why so many civil union-supporting Democrats lost their seats in the Vermont House in that election. Without the support of younger, more progressive voters, candidates had to face mostly older and more conservative voters in the election.

**Gender**

Women tend to be more tolerant and supportive of gay rights issues than men are, but that divide was particularly acute in Vermont. In general, women support gay marriage in slightly larger numbers than their male counterparts, but only by a margin of about three percentage points. A survey conducted on behalf of the Rutland Herald in January 2005, however, revealed that men disapproved of the court’s ruling in greater numbers and more
fervently than women. Whereas 23% of men “strongly disapproved” of the Baker decision, and another 39% “disagreed,” women were evenly divided, 43% between agreeing and disagreeing with the ruling. Though less stark, the division also appeared when asked about support for a constitutional amendment to define marriage as between a man and a woman; a majority of men supported such an amendment (54%), while there was a statistically insignificant difference between women who opposed the amendment than who supported it (47% and 45% respectively).

**Religious Affiliation:**

At first glimpse, Vermont’s religious landscape appears to be highly conducive to tolerance for gay marriage initiatives.* In the 2009 Gallup survey measuring the religiosity of the fifty states, Vermont ranked as the least religious state in the country, based simply on the question, “How important is religion in your daily life?” Only 42% of Vermonters answered that question in the affirmative. Assuming that sentiment has not changed dramatically in the last decade, the lack of religious presence in Vermont is significant. This is not to say that religious leaders and organizations do not mobilize or have a substantial authority. In fact, one of the most vocal opponents of the civil unions bill was the head of the Roman Catholic Diocese of Burlington, the Reverend Angell. When the House passed the Senate’s version of the bill, Representative George R. Allard responded, “This is a sad, dark day for the state of Vermont, and may God help us all.” The Chairman of the Rutland City Democratic Party, in his letter of resignation, wrote:

> I believe the main purpose of marriage is the procreation of human life, God’s way of continuing the process of creation. I believe that true constitutional law

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* The Pew Religious Landscape Survey for Vermont also includes New Hampshire’s religious profile. This is unlikely to affect the Vermont data because New Hampshire and Vermont are so demographically similar.
must have its foundation in the moral law. Consequently, same-sex marriage is impossible both theologically and biologically...May almighty God have mercy on Vermont.”

Clearly, there was potent opposition from religious individuals and groups on this issue.

Vermont has a minimal religious profile. There is a low percentage of evangelical Protestants and high number of unaffiliated people, while having just above the national average of Catholics and mainline Protestants (Figure 5.1).

Unsurprisingly, given how white the state is, Vermont has almost no black Protestants, a very conservative group when it comes to issues of homosexuality, a product of both racial and religious opposition. A very small concentration of evangelical and historically black Protestants means that they are probably a minimal force within the state. Nonetheless, a Baptist minister from Williston sent out unsolicited letters to more than 81,000 Vermonters in March, 2000, in which he railed on the “radical Homosexual Lobby” and encouraged the recipient to contact his legislator and prevent that lawmaker from allowing “God’s sacred covenant between a man and a woman [to] be replaced by Vermont’s celebration of same-sex ‘unions.’” Even if the Biblical language did not necessarily resonate with people, the language of morals and tradition very likely did. This indicates that, despite the minimally religious population, the mere presence of passionately opposed individuals or churches can have a genuine impact on the debate. As Del Ali noted, “a real homophobic organization
with millions of dollars could really turn it into something ugly.”

Though predominantly drawn from religious beliefs, opposition to same-sex unions exists in all groups and consequently, opponents mobilize using a language that reaches out to all people who oppose same-sex unions, regardless of why.

In Vermont, the Catholics are the ranking faith of opposition, by sheer number and organization. The Reverend Kenneth Angell of the Burlington diocese was quoted frequently in newspaper articles when the Vermont legislature was debating the civil unions bill. Pressure from the religious community showed itself by way of lobbying, prayer vigils, and other religious demonstrations at the State House, and testimony to both houses of the legislature. On April 6, 2000, Representative Nancy Sheltra organized a rally in front of the state house, at which Republican presidential candidate Alan Keyes was due to speak. Keyes, a black Roman Catholic, compared homosexuality to rape, pedophilia, and adultery, shouting:

And if one of the moral principles is that "thou shalt not lie with a man as with a woman. It is an abomination," if one of the moral principles strictly enjoins against certain kinds of sexual behavior (adultery outside of marriage, whatever it might be), then if the government steps in and says, "No, you cannot show intolerance for that behavior," the government is, in fact, dictating the abandonment of religious conscience and belief. And in our society, the government has no legitimate authority to dictate in this area.

Using inflammatory religious rhetoric, Sheltra, Keyes, and Angell mobilized thousands of people into actively opposing the actions of their elected representatives, which translated into a political liability for many of them. In Vermont, conservative values are the most common, and even though they may not all be based explicitly in religious doctrine or ideas, by drawing parallels between the Bible and personally held perspectives on gay marriage and civil unions, religious leaders were able to shape the character of the opposition to the civil unions legislation.
Political Affiliation

Vermont is very Democratic state, although the people tend to be more moderate and conservative Democrats than perhaps are to be found in Massachusetts. In 2008, Democrats make up 58.9% of the state, compared with 26.2% of Republicans, making Vermont fourth most Democratic state in the union. Given that conservative and moderate Democrats support gay marriage at rate half that of their liberal counterparts, the Democratic majority in Vermont could be misleading. Only 37% of conservative/moderate Democrats favor gay marriage, while 75% of liberal Democrats are in favor and even 43% of Independents favor gay marriage.

It is instructive to look at the 2000 election in which Vermonters cast their ballots for a new president, as well as for the governor and all of the state senators and representatives. Of the fourteen counties, five voted for George W. Bush, although only one by a majority (Essex). Of those counties, four Vermont state senators cast votes in opposition to the civil unions bill, while the other four came from counties that voted for Al Gore. In Orange County, for example, Bush won a plurality of the vote and the county, while Senator MacDonald, who had voted for the civil unions bill was ousted. On the other hand, in Grand Isle, people voted for Bush but did not oust Senator MacDonald, another bill supporter, from office. This indicates that while Republicans tended to oppose the bill, there was by no means a definitive mandate from the GOP, which goes back to Mello’s observation about “two Vermonts.”

Party allegiances played a more significant role among the lawmakers themselves, particularly in the Senate. The bill, H.847, received a 10-1 vote out of the House Judiciary Committee, led by the Republican chairman; five Republicans, four Democrats, and one Progressive voted for it. On the other hand, on the Senate Judiciary Committee, the vote
was divided down party lines, four Democrats in favor, two Republicans against.\textsuperscript{46} In addition, of the nineteen votes in favor of the bill in the full Senate, seventeen of them were from Democrats and only two from Republicans.\textsuperscript{47} Finally, most of the representatives who lost their seats in the November election were Democrats who had supported the civil unions bill.\textsuperscript{48} Clearly, despite the fact that the vast majority of Vermonters identify as Democrats, many voted against their party in large part due to the lawmaker’s vote on the civil unions bill.

\textit{Political Structures}

There is no question that without support from Vermont political institutions, passage of a same-sex union bill would have had little or chance of success. After the \textit{Baker} ruling, 52\% of those polled opposed the decision, and there was almost three times as many people who “strongly disagreed” with it as there were people who “strongly agreed.”\textsuperscript{49} Despite fervent demonstrations from opponents, lawmakers went ahead with the instruction in the \textit{Baker} opinion to create some sort of legal protection for same-sex couples. The influence of political institutions can be seen at every step of the process from lawsuit to legislation to law. Firstly, \textit{Baker} was in the judicial system right after Hawaii rejected a referendum on gay marriage and on the heels of a national wave of Defense of Marriage Acts. Opposition to gay marriage was high, and given that widespread negativity, there was little motivation on behalf of more progressive lawmakers to challenge the marriage status quo. The fact that same-sex union rights were brought before the Vermont judiciary and not the legislature first is a significant political decision made by the proponents of same-sex unions. The legislature would have been far less likely to create civil unions or legalize gay marriage than a judicial body charged with evaluating the law and not answering the wider public.
The Vermont Supreme Court ruled in favor of the plaintiffs because of a clause that is unique to the Vermont Constitution: the Common Benefit Clause, which reads:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.\(^{50}\)

William Eskridge explains that the significance of this clause was due to “its distinctive history…which antedated the federal equal protection clause by almost one hundred years…[The Chief Justice] read the…clause as applying in generally the same way whatever the state classification,” and that included gender and sexual preference.\(^{51}\)

The *Baker* opinion, in an attempt to avoid accusations of judicial activism\(^*\), explained that the Court does “not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions.”\(^{52}\) Accordingly, the House Judiciary Committee began the process of writing H.847, led by the Republican chairman who supported civil unions. A Republican leader helped avoid partisanship in order to get the bill off the ground, which further set an example for the full chamber. After two hearings on the issue, the committee voted 8 to 3 to create some legal alternative to marriage for same-sex couples, recognizing the acute opposition to extending marriage to include gays. H.847 passed the committee 10 to 1, and as Mello explains, this action was quite courageous:

Given the volatile political aspects of the same-sex union question, one could

\(^*\) Several accusations of judicial activism were made from all parts of the state and country, as well as a genuine movement to impeach all of the justices in Chief Justice Amestoy’s majority. Nothing came of these efforts, however.
have understood the committee’s choice had it decided to do nothing more than what the state’s highest court had mandated: that legislators just follow the constitutional law of Vermont. The committee didn’t take that easy way out. To the contrary, Chairman Little said pointedly that his committee had passed H 847 because “it was the right thing to do.”

While it may not seem like a political structure per se, willingness to take a political risk on behalf of officials cannot be dismissed as irrelevant. Without the first efforts of the committee, the civil unions initiative would have died. The fact that the committee almost unanimously endorsed H 847, with Democrats, Republicans, and a Progressive speaking together, also probably sent a message to the rest of the House about the nature and significance of the bill. Having the bill begin in a small, bipartisan committee may have done wonders for its chances.

In the full House, there was far less consensus. The Vermont Constitution requires that every bill be voted on twice, and during the first vote amendments can be offered. While some of the more extreme amendments were defeated (both the amendment to ask Vermonters to vote on having a constitutional amendment and the amendment to legalize gay marriage were handily voted down), an amendment that said, “Marriage means the legally recognized union between one man and one woman” did pass. Although the bill already excluded same-sex couples from marriages, the amendment, in effect, added a DOMA to H. 847, and its addition added three votes for the bill. The amendment allowed lawmakers to comfort and to reaffirm to their constituents that “traditional” marriage was not, in fact, at risk. This was a tactic to both pass the bill and try to limit political collateral. If it were not for the two-part voting and amendment procedure, the civil unions bill may not have passed and gone on to the Senate.

Apprehension about the bill’s passage was much higher in the other chamber of the
Vermont legislature. Mello identifies “three factors [that] made the bill especially vulnerable in the Senate.” The first had to do with numbers: the Senate had thirty members as opposed to the one hundred and fifty members of the House, which “presented a smaller and more focused target against which opponents could direct their resources.” Secondly, the Senate had the power to propose constitutional amendments, which the House did not. Finally, the Senators had to take up the bill closer to election time.55 (Interesting, then, the Senate ultimately survived the 2000 election more intact than the House, maintaining its Democratic majority, while the House switched over to Republican control.) Initially, there was much higher optimism that the Senate would support the bill than there had been for the House, but as time had gone on, opposition had become more vocal and antagonistic. Supporters of the bill remained confident that it would pass, despite lobbying from opponents. Several constitutional amendments to ban or limit civil union benefits were proposed, though none gained much traction, because many senators felt that had the Vermont Supreme Court wanted the issue to disappear – the goal of a constitutional amendment – it would have ruled accordingly. Rather, “the state Supreme Court…was right to force the political process to grapple with the issue.”56 The Supreme Court put the issue to the other political structures with confidence that they would hold true to its ruling, in spite of heated opposition. The bill passed the Senate thanks to the leadership of Chairman of the Senate Judiciary, Richard Sears, who ensured that threats to the bill’s success were minimized by emphasizing “the duty of the legislature to comply with the Baker court’s mandate to equalize the rights of same-sex couples…”57 The fact that a charismatic and supportive leader chaired the Senate Judiciary Committee had an obvious impact on the rest of the Senate. Sears navigated the bill through the Senate, primarily because he was in the right position to do so. Whereas in
Massachusetts, Speaker of the House DiMasi supported the gay marriage bill, Chairman Sears took the civil unions bill through the Senate successfully. His decision to make the surface changes to the bill did not backfire, as the bill made it through a second House vote.

Opponents of the bill used a two-part strategy while the bill was in the Senate, linking the bill to the anti-gay marriage constitutional amendments, and getting small changes into it so that the bill would have go back for a vote by the House’s more tenuous coalition. The first part of the strategy failed but it partly succeeded in the second objective. The bill that went to the full Senate contained a number of superficial changes, which meant that if it passed the full Senate, it would have to go back to the House for approval. This was an attempt by the Judiciary Committee to appease opponents while not altering the character of the proposed legislation. Though ultimately a failure, the opposition’s strategy shows a genuine appreciation for the political structures at play in the debate over civil unions. Linking the amendments to the bill would make it far more controversial and potentially change its character, while knowing that the bill had less success in the House, they pushed to get it back there. While they did not agree with the outcome of the civil unions initiative, opponents clearly tried to use various political structures to their advantage during the debate and voting. Furthermore, after the bill’s passage, many of the same people worked to defeat the bill’s supporters at the ballot box in November in the hopes of repealing the bill. In the end, the political structures in place provided lawmakers enough protection to ensure the successful passage of the civil unions legislation, though many of them lost their jobs in the process. Without the affirmative support and directions from the Vermont Supreme Court acting on the basis of a unique constitutional clause, there is little reason to think that legislators would have challenged the “traditional” marriage paradigm. Because of the
challenge to that paradigm, though, lawmakers provided legal, institutionalized benefits to same-sex couples, an unprecedented step in the United States and the world.

Variables

There are two variables that may have tipped the scales in favor of same-sex union legislation in Vermont. The first is Vermont’s history of protecting personal rights. The Constitution of the State of Vermont lists a series of protected rights for individuals, ranging from “fundamental principles and virtues necessary to preserve liberty” and “all persons born free; their natural rights; slavery prohibited.” With a strong track record of protection for minorities and other marginalized people in society, Vermont’s tradition of strong rights helped lawyers and supporters of the civil rights bill argue their case. Secondly, the bill had William H. Lippert, a Democratic representative, a member of the House Judiciary Committee, and the only openly gay lawmaker in the Vermont legislature. Lippert made impassioned pleas throughout the debate process on behalf of himself, his family, and his fellow members of the GLBT community. In one memorable instance, before the full House was due to vote, Lippert stood before his colleagues and said, “Don’t tell me what a committed relationship is and isn’t…There is no love and no commitment greater than what I’ve seen and what I’ve known.” A conservative Republican colleague jumped up after Lippert concluded, saying, “I’ve just heard the greatest speech I’ve heard in my 30 years...And that’s why I’m glad to be friend of [Lippert] and that’s why I’m glad to be on his side.”

The Neighbors: Vermont and Massachusetts

A comparison between the Vermont and Massachusetts experiences with gay
marriage initiatives is highly instructive, as it helps develop a clearer idea of what factors are significant for a successful bid to legalize same-sex unions. To begin with the obvious, both states were firsts in how they dealt with the issue, one creating civil unions and the other extending marriage to gay couples. Both were groundbreaking and set examples for other states regarding the legal and political process, as well as the social consequences, or lack thereof. More specifically, however, three shared factors stick out: the role of the state supreme court, the Democratic legislature acting as an intermediary, and a tolerant citizenry.

The highest courts of both states provoked respective states: without their rulings in favor of extending legal benefits to same-sex couples, the legislators would have been highly unlikely to address the issue voluntarily. The judicial mandate forced the legislature into action and gave lawmakers something of an excuse to give to their constituents; they could say they did not want to take up the issue but that they were required to do so by law. This did not necessarily forgive their subsequent votes, but the courts’ decisions were paramount in the whole process. In an article for the New York Times about how effective courts are at bring about social change, one conservative legal expert explained the significance of the Vermont Supreme Court’s decision. Jay Sekulow argued:

Vermont's finding that gay couples were discriminated against could reasonably have led the justices to rule that gay couples should simply be granted marriage licenses. But the justices did not, though one dissenting justice said they should have. That reluctance…stemmed from the awareness that Vermonters were not ready for gay marriage -- and, according to public opinion polls, most particularly do not believe that the decision about gay marriage should be made by the courts rather than the people or the lawmakers.61

The same logic applies to what the court did in Massachusetts: push the legislature as far as it reasonably in a specific direction and let lawmakers take over. Without this initial nudge, though, I argue that efforts in both states would have failed. In Vermont, the state Supreme Court recognized the limits to the legislature’s willingness to challenge the marriage
paradigm and its patience paid off, first with civil unions as the legal equivalent of marriage, and now with the recent granting of full marriage to same-sex couples.

Secondly, both Massachusetts and Vermont had Democrat-dominated legislatures, in the Senate and in the House, willing and able to act as the buffer between the court and the people. The legislature acted as the rational body that kept the *Baker* ruling from going too far, and the people from acting on a backlash impulse. While political affiliation does not necessarily rule the day, Vermont’s partisan support for the civil unions bill is notable in particular. A different makeup of the legislature in either state could have changed the outcome of the initiative.

Finally, polls indicate that at the time of the respective Supreme Court rulings, the populations of both Vermont and Massachusetts were not exceptionally open to the idea of same-sex unions. In both states, only about two-fifths of the population supported the court rulings (38% in Vermont and 40% in Massachusetts) in polls right after the decisions came down. Furthermore, Vermont’s greater opposition is to be expected given that no other state could model successful same-sex unions. Nonetheless, once legislation took effect, people became less vocal about their opposition and slowly became more accepting of the new relationship paradigm. Four years after the civil unions bill passed in Vermont, forty percent supported marriage and thirty-seven supported civil unions, a dramatic increase. After only one year, Massachusetts saw a sixteen percent increase in support for gay marriage, from forty percent to fifty-six percent. Though they may not have been supportive at the time, people of both states clearly grew to accept the idea when they were presented with no other choice. In fact, Vermont’s legislature successfully legalized gay marriage in April 2009, a possibility that was absolutely unacceptable only a decade ago.
Though Vermont ultimately legalized gay marriage, Massachusetts did it right away. Why the two states had different outcomes, however, is due to two main factors: the legislature’s mandate from the court and the political backlash to the court’s decision. In the Goodridge decision, the Massachusetts Supreme Judicial Court ruled that there was no constitutional justification for excluding same-sex couples from marriage and that the legislature needed to adjust marriage statutes according to that ruling. Debate in the Massachusetts General Court was about a constitutional amendment to ban gay marriage, and not what to do about the SJC’s ruling. In Vermont, on the other hand, the Supreme Court said that under the Common Benefits Clause, it was unconstitutional to exclude same-sex couples from the legal benefits associated with marriage, and not necessarily marriage itself. The Vermont interpretation of the plaintiff’s case left the door open for a marriage alternative (i.e. civil unions or domestic partnerships); the Massachusetts SJC’s interpretation did not. This distinction is absolutely crucial. The Vermont legislature had more flexibility in dealing with the issue and allowed lawmakers to avoid the far more controversial marriage route, which Massachusetts lawmakers did not. In fact, the courts’ rulings also reflect an appreciation for the public opinion. In Vermont, the court did not “force” marriage upon an unwilling public, and thus avoided so severe a backlash as to undermine the initiative entirely. The SJC, on the other hand, felt comfortable making marriage the only option, aware that the only recourse was a constitutional ban that probably was unlikely to be supported. Both courts showed a subtle and nuanced acumen for the context in which their decisions were made, although the outcomes were slightly different.

The fact that the states did not produce the same same-sex union product is also a result of the opposition forces involved. Though we have seen that both states fell into a
realm of generally tolerant people, there were powerful, organized groups speaking out vocally about the courts’ decisions and the behavior of lawmakers in response. There was a far more outraged group in Vermont than in Massachusetts as far as political mobilization goes, which was in part a product of the specific issue, but also due to the timing. Vermont was arguably more “cutting edge” than Massachusetts because of when it went about addressing concerns of same-sex couples. The Baker ruling came right after the wave of DOMAs and Hawai‘i’s failure to secure benefits for same-sex couples. The country as a whole was not supportive of any state-sponsored effort to recognize gay relationships, and Vermont proved no different. Although civil unions passed the legislature, it was not without an often vicious fight by advocates on both sides of the issue. In Massachusetts, there was far less mobilization, which may have been do in part to the success of Vermont in dealing with the subject four years earlier. Backlash was less fervent in Massachusetts because the only avenue opponents had to pursue was the constitutional amendment, a route not every opponent of gay marriage supported. The different levels of opposition affected how much political risk lawmakers felt they were taking and, consequently, the direction in which they took the court’s ruling.

**Conclusion**

In a 2003 editorial published three days after the Goodridge decision, the Rutland Herald advised Massachusetts on five lessons it could take from Vermont’s experience with same-sex unions. The paper noted, “there is no escaping this issue,” and advised the people of Massachusetts to be respectful and tolerant, encourage dialogue, and to have a “willingness to forgo cheap political points…to promote a civil discourse that in the end will leave the state a better place.” There is truth to the paper’s recommendations beyond
Massachusetts and beyond gay marriage, as well. Vermont and Massachusetts’ cases show that timing is critically important in order to gain the support of the people and to have a (mostly) civil and productive conversation about the issues. A recognition that the issue is not going away works in the favor of advocates of gay marriage because it gives them the option and confidence to push forward, challenging marriage laws in courts across the country. This is not to say that a judicial approach should be undertaken haphazardly, as we will see next in California, but rather that by targeting of states that have tolerant citizenries, progressive legislatures, and tough constitutional amendment procedures in which to challenge those laws, advocates may have more achievements sooner rather than later, as the recent example of Iowa might show. Without the appropriate demographics and political structures, Massachusetts and Vermont would not be where they are today, with legal same-sex marriage.

When Vermont became the first place in the world to provide a structure of exhaustive legal benefits to same-sex couples, it ensured that gay marriage and its related issues were not going away in the United States. In recent years, the battle has moved to far larger and more complex states, in the hopes of building a coalition of supportive states, as well as giving legitimacy for a potential federal case. The gay marriage movement has had particular success in the Northeast, but suffered a setback in the November 2008 election when Proposition 8 to ban gay marriage in California was approved by voters. In the next chapter, we will see what precisely happened in California and what comparisons can be drawn between the Vermont and Massachusetts cases. From there, we will have an even greater understanding of the variables that seem to lead to successful same-sex union outcomes and those that do not.
8 Greg Johnson as quoted by Leslie Staudinger’s “VLS Community Participates in Same-Sex Marriage Debate” in Loquitur, Spring 2000, in Mello, Legalizing Gay Marriage, 74.
16 Constitution of the State of Vermont, Chapter II, Article 6.
17 HR. 0037 “Requesting the Senate to adopt a Constitutional Amendment defining marriage as a legally (sic) union between a man and woman,” and HR. 0035 “Constitutional Authority of the Vermont Supreme Court.” http://www.leg.state.vt.us/baker/baker.cfm Accessed March 16, 2009.
20 Hoffman, “House approves civil unions.”
22 Hoffman, supra 19.
23 Mello, 136.
25 Mello, 138.
26 Ibid, 18-19.
27 Hoffman, “Majority say no to same-sex benefits,” supra 9
28 Ibid.


32 Hoffman, supra 9.


34 Hoffman, supra 19.

35 Mello, 118.


37 Adam Lisberg, “Anti-Civil Union Mail Blitzes Vermont,” Burlington Free Press, April 5, 2000 as quoted in Mello, 91.

38 Hoffman, supra 19.


42 “2000 General Presidential Election Results-Vermont.”

43 Roll-call Vote Detail on H.847 supra 18.

44 “2000 General Election Results: State Senator,” from the Vermont Secretary of State.

45 Mello, 78.

46 Ibid, 105.


48 David Ross and Heather Rider as quoted in Mello, 134.

49 Hoffman, supra 9.

50 The Constitution of the State of Vermont, Chapter I, Article 7-“The Common Benefits Clause.”

51 Eskridge, Equality Practice, 53.

52 Baker Majority Opinion, 40.

53 Mello, 78.

54 Ibid, 83.

55 Ibid, 87.

56 Eskridge, 75.

57 Senator Richard Sears, April 18, 2000 as quoted in Eskridge, 76.

58 Mello, 108.

59 Vermont Constitution, Chapter I, Articles 18 and 1.


CHAPTER SIX: CALIFORNIA

“Our nation, historically bursting with generosity toward strangers, remains remarkably unkind toward its own. Just under our gleaming patina of inclusiveness, we harbor corroding guts. America, I tell you that it doesn’t matter how many times you brush your teeth. If your insides are rotting your breath will stink. So, how do you people choose which hate to embrace, which to forgive with a wink and a week in rehab, and which to protest? Where’s my copy of that rule book?”


It also is important to understand at the outset that our task in this proceeding is not to decide whether we believe, as a matter of policy, that the officially recognized relationship of a same-sex couple should be designated a marriage rather than a domestic partnership (or some other term/other term), but instead only to determine whether the difference in the official names of the relationships violates the California Constitution.

-California Supreme Court, In re Marriage Cases, 15 May 2008

The spotlight of gay marriage moved from Vermont in 2000, to Massachusetts in 2004, to out West in 2008, when opponents of gay marriage put Proposition 8 on the ballot, a measure that would amend the California Constitution to recognize only heterosexual marriages. Advocates recognized the symbolic importance of the outcome in California. For opponents of same-sex marriage, California represented a large and liberal state, in which a successful defeat of gay marriage could show the mainstream that only Northeast enclaves supported homosexual relationships. For supporters, on the other hand, California’s size and
generally liberal population made it a logical place to try and show that gay marriage was not something radical, limited to a few states only. In short, both sides desperately wanted to win in California in November. Activists on either side of the gay marriage debate were correct in placing so much importance on California as the next battleground for gay marriage. Its size gives it considerable weight when it comes to controversial issues, and though generally liberal, California is a very diverse and relatively bipartisan state, making it a compelling indicator of where people fall on certain issues. Proposition 8 was not the first time Californians voted on a gay marriage initiative; Proposition 22 in 2000 was California’s own Defense of Marriage Act, defining marriage as between a man and a woman only. The issue went back to the voters eight years later because in May 2008, the California Supreme Court ruled that exclusion of same-sex couples from marriage was unconstitutional. That ruling overturned the gay marriage ban and opened the door for thousands of couples to marry from May until November, when they once again lost were excluded. As of writing, the same justices who ruled in In re Marriage Cases have heard oral arguments from opponents of Proposition 8, who argue on a broad platform that the amendment is unconstitutional. How the justices will rule in those lawsuits is unclear but there is a very real possibility that they will not find for gay marriage. This chapter looks at how the gay marriage issue in California has played out, from ballot initiatives and court decisions, to an outspoken governor and charismatic mayor. Beginning with a brief history of gay marriage challenges in California, I will look primarily at the last ten years, during which a number of initiatives have taken place and affected the trajectory of the effort. After the contextual section will come the application of the analytical framework, revealing a state very different from Massachusetts and Vermont as regards demographics and political institutions. I will
also compare and contrast these three states in order to draw further conclusions about what matters the most in achieving gay marriage. Finally, based on those significant factors, I evaluate where California is headed, from the current oral arguments in the California Supreme Court and beyond.

**California: The Battleground State**

California did not specifically define marriage as between a man and a woman until 1977, when the legislature added language to Civil Code 4100 that made marriage a “personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary.” Prior to that change, the code simply read “a personal relation,” although it was assumed to mean heterosexual relations only. That change was relatively uncontroversial and was essentially ignored for the next twenty years. In 1999, California created domestic partnerships, which allowed same-sex couples to enter into a legal agreement recognized by the state. Initially, very few benefits were associated with the domestic partnerships, and interestingly, while most people have to be of the same sex to enter into such an agreement, an opposite sex couple over the age of sixty-two may also enter into the agreement.

This indicates a greater concern for stable households than for same-sex couples, but the legislation was nonetheless a step in the right direction for gay couples. Indeed, over time, the scope of the law has grown and now is very similar to the protections provided to married couples, although a few differences do remain, such as the requirement that same-sex couples must share a common residence, which does not apply to opposite-sex couples.

In 2000, opponents of same-sex marriage mobilized to put Proposition 22 to the people of California, a measure that would simply reaffirm the changes made in 1977 to
family law regarding the ability to marry in California. The purpose of the measure, according to supporters, was to ensure that California would not be forced to recognize same-sex marriages performed elsewhere. Led by Senator William Knight, Proposition 22 supporters included the Mormon and Catholic churches. Activists working for the initiative’s passage raised $10 million, $300,000 of which came from the Catholic church alone, compared to the opposition’s $6 million. In the days and weeks leading up to the vote, public opinion appeared close and undecided. In fact, one poll reported that only seven percent of voters had made up their minds about the issue in the week before the vote, while also showing that the bill had close to fifty percent support. On March 7, however, supporters of the bill won in a landslide, capturing just over sixty-one percent of the vote and reinforcing the exclusion of same-sex couples from marriage. The vast majority of California’s counties supported Prop 22, with the notable exception of the San Francisco area. Four counties – San Francisco, Alameda, Santa Cruz, and Marin – opposed Prop 22, and approximately thirty-nine percent of voters in the whole state followed suit. As a result of the vote, legislators added Section 308.5 to the Family Code, which read, “Only marriage between a man and a woman is valid or recognized in California.” While opponents of gay marriage thought that Prop 22 was an important validation of public opinion, from a legal standpoint, it was an unnecessary initiative that may have ultimately caused the anti-gay marriage movement far more headaches than intended.

The overwhelming support of Proposition 22 from California voters did not have a practical impact on the state because it was reinforcing previously codified law. The push did, however, bring the issue to the surface for many pro-gay marriage activists and gave them an opportunity to mobilize in response, an opportunity that may not have been available
had opponents of gay marriage not wanted to press the issue in the public sphere. Prop 22 seems to have done supporters of same-sex a favor, at least in some respects, by drawing attention to the issue and mobilizing supporters. Though relatively little happened immediately after Prop 22, in 2004, gay marriage came back into the public’s attention in one of the counties that voted against the initiative four years earlier: San Francisco. In response to President Bush’s State of the Union address, in which the president decried the gay marriage efforts of states like Massachusetts, newly-elected mayor of San Francisco, Gavin Newsom, decided that he would take it upon himself to challenge the California marriage laws. He coordinated the effort with the San Francisco-based National Center for Lesbian rights, and over the course of several weeks, Newsom quietly put the wheels in motion to administer marriage licenses to same-sex couples. The first ceremony was performed at 11:06 am on February 12, 2004 between Del Martin and Phyllis Lyon, a couple who had fought for lesbian rights for years and was about to celebrate the fifty-first anniversary of their relationship on Valentine’s Day.⁹

Newsom’s decision to permit gay marriage came after being in office for only twelve days and sparked a lively debate across the political spectrum. While he personally attributed his decision to Bush’s words in the State of the Union, it was also just another in a longer series of events: Proposition 22, *Lawrence v. Texas*, and the *Goodridge* ruling; a series of events that kept gay marriage in the public conscious. In many respects, gay marriage advocates have received attention without having to do anything drastic to gain it. In an article written in the midst of the San Francisco’s gay marriage melee, Carolyn Lochhead wrote, “Same-sex marriage -- considered so radical that mainstream gay rights leaders feared its emergence in an election year -- has gained a level of visibility that even its most ardent
proponents did not imagine just two months ago.”

Though the time may not have been right to do so, a handful of gay marriage proponents pushed the issue forward, from San Francisco to the California judiciary in only a few short weeks. Newsom’s actions sparked an intense response from the rest of the state and country, and on March 11, 2004, the California Supreme Court halted the marriages in San Francisco. In *Lockyer v. Newsom*, the state of California challenged the legality of Newsom’s actions, stating, “This proceeding is not about the constitutionality of same-sex marriage. It is not a litmus test on marriage or societal values. This case is about the proper role of public officials in carrying out their governmental duties.”

The court ruled that Newsom had, in fact, overstepped the legal bounds of his job but held true to the parameters of the *Lockyer* case, making no mention of the constitutionality of same-sex marriage, and deferring to the marriage laws on the books.

An effort to change those laws began in the 2005-2006 legislative session, when Assemblymen Mark Leno introduced Bill AB 19, which would have reverted to the pre-1977 definition of marriage, simply as a social contract between two people. This bill passed two committees but died in the legislature, falling four votes short of the required majority.

Leno introduced another bill shortly thereafter, AB 849, which did pass the Assembly by a vote of 41-35 on September 7, 2005, the first gay marriage legislation to be approved by a legislative body in the United States. Immediately, Governor Arnold Schwarzenegger threatened to veto the bill, arguing that the courts should decide the issue. In response, supporters of the bill delayed sending it to the Governor’s desk to give people time to lobby him to change his mind. With a deadline of September 23, gay rights groups planned activities that would “highlight various segments of the population that could be affected by the bill, such as gay senior citizens, children of gay parents and different ethnic minority
Despite their best efforts, Schwarzenegger, though supportive of other gay rights legislation, vetoed the bill as promised. In the end, the Governor’s efforts pleased few. Thom Lynch, head of the San Francisco Lesbian, Gay, Bisexual, and Transgender Center, scoffed, “This is a governor who ran as a progressive Republican, a socially moderate Republican, and this is just about politics. He's playing with people's lives for political gain…Words alone don't mean a lot.” On the other hand, Randy Thomasson, president of Campaign for Children and Families, raged, “It's outrageous that Arnold Schwarzenegger has signed other radical sexual agenda bills that undermine marriage and push the transsexual and homosexual agenda upon other Californians, without any regard for people's moral or religious values.” Clearly, the Assembly’s efforts to legislate the issue were not going to provide resolution to the gay marriage question.

While Mark Leno and his allies had worked to legalize gay marriage in the California legislature, the California judiciary was also addressing gay marriage. In September 2004, a series of cases challenging the marriage laws on behalf of several same sex couples were consolidated into one case. San Francisco Superior Court Judge, Richard Kramer, heard the argument, and on March 14, 2005, ruled in favor of the plaintiffs suing for gay marriage on the grounds that there was no state interest in keeping marriage an exclusively heterosexual institution, and that to do so would be a violation of the Equal Protection Clause of the California Constitution. Justice Kramer’s decision was tentative, meaning that it was not binding until reviewed further by an appellate court. In July, a three-judge panel heard arguments and in October, the state appeals court ruled in a 2-1 decision that homosexual couples have no right to marry in California, and extending that right to those couples would require lawmakers or the voters to do so. Presiding justice William McGuinness, said “We
believe it is rational for the Legislature to preserve the opposite-sex definition of marriage, which has existed throughout history and which continues to represent the common understanding of marriage in most other countries and states of our union.”¹⁹ In his dissent, Justice Anthony Kline argued that the majority ruling was circular and promoted further discrimination because the ruling “demeans the institution of marriage and diminishes the humanity of the gay men and lesbians who wish to marry a loved one of their choice.”²⁰

Divided as it was, the appellate court’s ruling was short-lived, as proponents of gay marriage took their fight to the state’s highest court, which unanimously agreed to hear arguments on the issue.

Nearly four years had passed between the California Supreme Court’s ruling that Mayor Gavin Newsom acted illegally when he authorized same-sex marriages in San Francisco, and the start of oral arguments for In re Marriage Cases in March 2008. In that time, approximately three thousand same-sex couples had married, and a bill that would have legalized gay marriage was passed by the Assembly and then vetoed by the governor. The seven-member Supreme Court appeared divided during oral arguments about whether to rule actively in favor of same-sex unions or to defer to the state legislature and/or the voters in determining how to deal with gay marriages. The justices challenged lawyers for both sides on a range of positions, from comparing gay marriage to interracial marriage, and the “traditional” structure of marriage and its function in society.

Three questions from the March 4th questioning illustrate the three main concerns of the court. Justice Carol Corrigan asked, “Is it for this court to decide or is it for the people of California to decide?” while Justice Kathryn Mickle Werdegar inquired, “Why is this the moment of truth as opposed to 10 years from now?”²¹ On the other hand, Justice Carlos
C. Madigan

Moreno leveled a potent charge at the Deputy Attorney General, “Are you saying that separate is equal here?” After hours of oral arguments, the court took another two months to issue its ruling. Led by Chief Justice Ronald George, a 4-3 majority struck down the 1977 marriage definition (Section 300) and Proposition 22’s added language (Section 308.5). In his 121-page opinion, Chief Justice George wrote:

In light of the conclusions we reach concerning the constitutional questions brought to us for resolution, we determine that the language of section 300 limiting the designation of marriage to a union “between a man and a woman” is unconstitutional and must be stricken from the statute, and that the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples.

In the dissenting opinion, the justices felt that the court had overstepped its bounds and violated the separation of powers principle. The dissenting justices opined:

…A bare majority of this court, not satisfied with the pace of democratic change, now abruptly forestalls that process and substitutes, by judicial fiat, its own social policy views for those expressed by the People themselves. Undeterred by the strong weight of state and federal law and authority majority invents a new constitutional right, immune from the ordinary process of legislative consideration. The majority finds that our Constitution suddenly demands no less than a permanent redefinition of marriage, regardless of the popular will.

(It appears that the dissenting justices do not consider the marriage question one of civil rights and/or that the popular will ought to be considered when affording certain groups civil rights.) Though powerful and encouraging for supporters of same-sex marriage, the legalization of gay marriage would prove short-lived, as opponents of the ruling submitted more than one million signatures for a ballot initiative to amend the California state constitution in the upcoming November election.

The California Secretary of State approved the language of Proposition 8 for the November ballot, immediately sparking a lawsuit by supporters of gay marriage who argued that the proposed amendment was in fact a constitutional revision, and therefore could not be
decided by the people alone.\textsuperscript{26} The California Supreme Court refused to hear the case, brought by Equality America, and in doing so removed the last legal recourse available to opponents of Proposition 8 to remove that initiative from the November ballot. Over the next four months, activists on both sides of the issue campaigned tirelessly on behalf of their position. In the beginning, it appeared that opponents of the initiative (supporters of gay marriage) had the upper hand. In July, a Field Poll showed that fifty-one percent of likely voters surveyed opposed Prop 8, compared to forty-two percent in support. Only seven percent of voters were undecided, which was deemed a very small number for so far in advance of the election, and a limited audience for the campaigns to persuade.\textsuperscript{27} By early October, opposition was at fifty-five percent, fourteen percentage points higher than support for the initiative. Only two weeks later, however, following intense advertising by Proposition 8 supporters, that difference had dropped to only eight percentage points.\textsuperscript{28} In the days leading up to the election, supporters of Proposition 8 put their hopes on getting a last-minute message out via the Sunday pulpit, they also hoped that their initiative would benefit from a last-minute surge, as seen with Proposition 22 in California and a gay-marriage ban in Wisconsin in 2002, in which far more opponents of gay marriage vote than the polls indicated. On the other side, opponents were banking on high turnout for Barack Obama putting the “No on 8!” side over the top.\textsuperscript{29}

Indeed, support for Proposition 8 was far higher than the polls had indicated, jumping from an estimated forty-four percent before the election and ultimately receiving more than fifty-two percent of the vote on November 4, 2008. Though less than the sixty-one percent approval Proposition 22 received in 2000, the result was sobering for supporters of same-sex marriage in California, who vowed to fight on despite the results. San Francisco Mayor
Gavin Newsom said of Prop 8’s supporters, “For those who are celebrating their success ... don’t be gleeful at the expense of human beings whose lives have been devastated by your point of view,” while Kim Buchanan, professor of constitutional law at the University of Southern California cautioned, “This fight is far from over ... and it's not unlikely that we'll see a group go to the ballot in the future in an attempt to enshrine the right to same-sex marriage in the Constitution...It's not going to be an easy battle, though, because there are committed people on both sides.”

Buchanan was quite right; different groups of supporters of gay marriage filed legislation within days of the election, challenging the legality of the initiative. Nonetheless, same-sex marriages were made illegal on November 5th, while those couples who had married in the months leading up to the election were left unsure of whether or not their marriages would continue to be recognized as valid.

As it currently stands, the approximately 16,000 couples that married between May and November will continue to have legally recognized marriages, while the California secretary of state gave permission to sponsors to begin collecting the nearly 700,000 signatures required to get such initiative that would undo Prop 8 on the ballot for 2010.

Meanwhile, oral arguments in front of the California Supreme Court began in March 2009. Many observers of the arguments speculate that the court will not overturn Proposition 8, despite the earlier ruling in favor of gay marriage. In an article for Time, Michael Lindenberger writes:

Even the lawyers who are asking the court to declare Prop. 8 invalid because it is more like a constitutional revision — which would require approval by lawmakers as well as by voters — conceded, when asked by the court, that there is essentially no precedent in the court's history that directly supports their position. “We have a pretty well established body of law pertaining to what is and what is not a revision, and those decisions do not give strong support to your position that the people couldn't do when they did when they invalidated or disagreed with one aspect of the marriage decision,” Kennard said. "Our past decisional law doesn't support the argument that the people couldn't do what they
did.\textsuperscript{32}

The court has up to ninety days to issue a ruling in the case, and while both Chief Justice Ronald George and Associate Justice Joyce Kennard apparently wish they could overrule Proposition 8, based on their questions to counsel from both parties, there is reason to believe that they will not. Though gay marriage was tantalizing close in California, the effort thus far has fallen short of its goal.

**Applying the Framework**

Why did California end up with such a different process and outcome than did Massachusetts and Vermont? Known for its progressive politics and colorful history, on the surface California was a strong, albeit risky, next-step for supporters of gay marriage. Several factors in all three parts of the framework – demographic, political structures, and variables – affected the outcome of the push for gay marriage, particularly the role the California Supreme Court played. California’s experience was also far more volatile in terms of its back-and-forth nature than Massachusetts or Vermont’s experiences, which meant that the process has occurred over a far longer period of time. While there is certainly a possibility that gay marriage can be re-legalized by voters in another election, for the time being, same-sex couples in California must accept domestic partnerships for legal recognition by the state. Interestingly, voters remained divided about the general idea of same-sex marriage after Proposition 8, particularly about the mechanism with which such marriages should be treated under the law. The Public Policy Institute of California (PPIC) noted that “Among those voting no on Proposition 8 in the November election, only 8% are opposed to same-sex marriage – an 11-point decline from [the] October pre-election survey.”\textsuperscript{33} That eight percent probably consists of people who, though they oppose gay marriage, do not want
to amend the constitution in order to do so. In addition, no other ballot measure put to California voters drew more than five percent of voters, compared to Prop 8’s sixty three percent. In essence, awareness of and support for gay marriage continues to increase in California, even with all of the setbacks.

The framework used to evaluate Massachusetts and Vermont demographics is slightly different for California because there is far more information about how different groups voted on Proposition 8 than there was regarding public opinion in either of the two Northeast states. In California, there is only 0.4% difference between the number of males and females, according to the 2000 Census and no polling data about the levels of support for the initiative for each gender. As a result, I have replaced gender in this chapter with a section that looks at race/ethnicity and socioeconomic factors that played a far more significant part in determining the outcome of Proposition 8 than gender. This will not affect the comparison between the three state case studies due to the fact that gay marriage initiatives never actually went to voters in either Massachusetts or Vermont.

Demographics

Age

Voter turnout among different age groups supported the previous asserted Pew conclusions that younger people tend to support gay marriage at a higher rate than older people do. The PPIC study used three groups, 18-34, 35-54, and 55+, and support for Proposition 8 increased with age. In each of the three groups, support for Prop 8 (against gay marriage) rose from 43% to 50% to 56% respectively, and opposition to it declined 57% to 50% to 44%, respectively. A further breakdown based on exit polling indicates that opposition was highest among 18-24 year olds (64%) and then 25-29 year olds (59%), as
compared to only 39% among those 65 and older. Interestingly, race did not appear to have a significant impact on support for Prop 8 among the different age groups. Although there was a slight difference between white 18-24 year-olds Latinos of the same age (67% and 59%, respectively), for example, that difference was smaller than many people anticipated after the election. Given that 25.4% of the California population was between eighteen-and-thirty-four in the 2000 Census, this is perhaps an indicator for supporters of same-sex marriage that the marriage ban from Prop 8 could be overturned.

Race & Socioeconomics

Immediately after the election, pundits began shouting that black voters had tipped the scale in favor of banning gay marriage. Andrew Pugno, general counsel of ProtectMarriage.com, said, “Really, Hispanic and black voters in California passed Proposition 8…Inner-city black neighborhoods voted stronger for Prop 8 than the Republican suburbs. An amazing analysis.” It was a particularly amazing analysis in that it was not actually accurate, as many commentators pointed out in the weeks following the election.

Hendrik Hertzberg of The New Yorker, wrote:

Some conservative commentators, who didn’t have much else to gloat about, dwelt lingeringly on what they evidently regarded as the upside of the huge, Obama-sparked African-American turnout. “It was the black vote that voted down gay marriage,” Bill O’Reilly, of Fox News, insisted triumphantly—and, it turns out, wrongly. If exit polling is to be believed, seventy per cent of California’s African-American voters did indeed vote yes on Prop. 8, as did upward of eighty per cent of Republicans, conservatives, white evangelicals, and weekly churchgoers. But the initiative would have passed, barely, even if not a single African-American had shown up at the polls.

Mark Balderasse, president of the Public Policy Institute of California, which conducted a more complete analysis after the election, observed, “Among both whites and non-whites, among non-college graduates and lower-income voters, Prop. 8 won. It seems to me that
some of what we attributed to race and ethnic differences really had to do with a socioeconomic divide in regard to same-sex marriage.” Indeed, 57% of college graduates opposed Prop 8, compared to only 31% of people with an attainment of high school or less. That difference was almost the same for income: 55% of those making $80,000 or more opposed the initiative, while 37% of people making less than $40,000 supported it. There is a certain element of circularity in this data, given that black and Hispanics are more likely to be low-income and have less education than their white counterparts, but attributing the success solely to race was simply inaccurate. A more complex dynamic within a general category of socioeconomics was the more compelling indicator of support for Proposition 8.

Religious Affiliation

As it proves to be in almost all circumstances related to gay marriage, religious affiliation was a strong indicator of a person’s position on Proposition 8. California is home to a substantial number of evangelical Protestants (18%), black Protestants (4%), and Catholics (31%), compared to the rest of the country. Evangelical Christians supported Prop 8 in higher numbers than any other surveyed group, with 85% in support, while Catholics also turned out in large numbers for the initiative at a rate of 60%. More generally, a strong religious commitment led to support of the measure, indicating that the aforementioned strategy of relying on the pulpit to garner support paid off. Indeed, “exit polls showed that the one-third of Tuesday's voters who attended church weekly supported the measure by an overwhelming 84 percent to 16 percent…” On the flipside, 79% of voters who said they had no religion opposed the measure, and those who said they never attended religious services showed 83% opposition to Prop 8. These findings are consistent
with opinions nationally and, more specifically, in Massachusetts and Vermont regarding religious affiliation and feelings toward gay marriage. Mark DiCamillo, director of the Field Poll, noted, “What the exit polls say is that religion trumps party affiliation when it comes to social issues.”

Political Affiliation

Political affiliation generally comes in on the heels of religion as an indicator of gay marriage support, and California was no exception to that trend. Political parties add an interesting dimension to a discussion of Prop 8 because the ballot measure coincided with an historic presidential election with many new voters flocking to the polls in support of Barack Obama. The Democratic Party was in some respect split between two of its most committed groups, minorities, particularly African-Americans, and gays. California’s outcome on Prop 8 best embodies the Pew data showing a marked difference between moderate Democrats and liberal Democrats in their support of gay marriage. “Liberal” did not mean Democrat on this issue: 65% of Democrats opposed Proposition 8, while 82% of self-described liberals opposed it. On the other hand, “Conservative” was much more likely to mean Republican, as 83% of conservatives supported Prop 8 and 77% of Republicans did also. Moderates and Independents were far more divided; the former split 52-48 in favor of Prop 8, while the latter split evenly 50-50.

There were several groups that broke ranks with party affiliation, as well. Exit polls showed that 94% of black voters in California voted for Obama, who had publicly supported the “No-on-8” position, and yet 70% supported the measure. Catholics also voted for Obama at a high rate (59%) but supported Prop 8 even more strongly, with 64% in favor of
banning gay marriage.\textsuperscript{48} Eighty-three percent of new voters supported Obama in the election and supported Proposition 8 62-38, compared with more experienced voters who only supported the measure 56-44.\textsuperscript{49} Though political party affiliation had substantial bearing on support for Proposition 8, it was certainly not definitive and was trumped by other characteristics in a several cases.

\textit{Political Structures}

In California, the most notable factor when considering how the political structures influenced the gay marriage effort is the political structure \textit{absent} from the process: the legislature. Indeed, though lawmakers tried to pass various bills, the issue was directly in the hands of the people for the vast majority of the time. The legislature has played very little role in gay marriage, though it was responsible for creating limited domestic partnerships for same-sex couples. Initiatives relating to gay marriage started with the people and then went to the courts, and then back to the people. The legislature’s actions on this issue were essentially tangential to the real proceedings that actually determined whether or not gay marriage would be legalized. The courts played a passive role in gay marriage proceedings, ruling on the smallest scope of the issue possible. Although the Supreme Court effectively legalized gay marriage in response to the Prop 22 challenge, it repeatedly refused to buttress that position by ruling explicitly for gay marriage or including the state legislature in deciding how the state should deal with the issue. The hesitation to rule consistently in favor of gay marriage undermined the Supreme Court’s ability to move the state toward same-sex marriage. Instead, the issue rested almost exclusively with the people and their particular feelings on gay marriage, which, like the vast majority of the country, were not favorable.
Beginning with Proposition 22, California voters reinforced existing marriage laws to say that only those between a man and a woman were recognized by the state of California, bringing to the fore the issue of same-sex marriages. The overwhelming support for the measure served to reiterate the intolerance for gay marriage, but it also provided supporters of gay marriage an opportunity to gauge how steep the road before them actually was. In addition, the Prop 22 vote indicated in which counties support for gay marriage was highest, and of particular note was San Francisco County. When Gavin Newsom was elected mayor of San Francisco four years later, he was clearly aware of San Francisco’s history of gay activism and position on Proposition 22, and thus when he decided to challenge marriage laws, he did so in the most supportive context possible. Nonetheless, backlash from far less supportive counties and the rest of California was swift and fierce. While daring, it appears that Newsom’s actions may have done more harm than good to the cause overall. By forcing the issue, Newsom caused an emotional stir in the rest of the state and emotional voters tend not to be as rationale or tolerant as they might ordinarily be. Supporters of Proposition 8 later used Newsom as the face of their campaign when he officiated at the wedding of a Lesbian teacher, who brought her first-graders along to the ceremony. Professor of political communications at California State University Sacramento, Barbara O’Connor, observed, “His pictures have become the rallying cry for Prop. 8. It's unfortunate for him, and it's unfortunate for the anti-Prop. 8 campaign…I don't know that I would change his behavior, because he's representing his constituency, and he's been totally consistent in his position. But he's become everyone's worst nightmare.” While one can respect his political charisma and willingness to do what he and the majority of his constituents thought was the right
thing, the choice to permit giving marriage licenses to same-sex couples was strategically flawed and politically detrimental to the state-wide effort because he acted independently and without a legal mandate to do so.

The California Supreme Court’s ruling in 2008 in *In re Marriage Cases*, which ruled that Proposition 22 and laws barring same-sex marriages were unconstitutional, magnified the negative impact of Newsom’s choice to issue marriage licenses to gay couples. Unsurprisingly, opponents of gay marriage rallied against the decision, submitting nearly double the requisite signatures for a November ballot measure to amend the California state constitution. Backers of the decision challenged the legality of such a measure on the grounds that it qualified as a constitutional revision, and not simple an amendment. San Francisco City Attorney Dennis Herrera explained the difference:

> We're saying that the process for putting Prop. 8 on the ballot was fundamentally flawed…For the electorate to change the nature of the equal protections clause of the California Constitution, it would require a constitutional revision. That means that you need a two-thirds vote of the Legislature before you can even put it on the ballot -- that's not what happened in November. Prop. 8 was instead treated as a constitutional amendment and brought directly to the voters…Prop. 8 also drastically altered the structure of state government; it stopped the courts from applying the equal protection clause of the California Constitution to a protected class of citizens, those being gay folks.51

Later in the interview, Herrera explained how little exists by way of legal guidelines for making such a distinction, which makes the challenge to convince the California Supreme Court that much more difficult. When opponents of putting Prop 8 on the ballot made this argument, the court demurred. Had the court made the inclusion of the legislature as part of the process, it would have been far more difficult to pass a measure like Proposition 8, especially given the fact that the state legislature had shown support for gay marriage previously. Though there was no guarantee of how many people would vote for Proposition
8, and there was no constitutional obligation to do so, the court could have made it far more challenging to make gay marriage unconstitutional under California law.*

California’s highest court acted within its purview in refuting the constitutional revision claim, which highlights the deeper and perhaps more important issue of the ease with which the state constitution can be amended. Unlike Vermont and Massachusetts, California law does not necessarily require legislative input for constitutional amendments. In both Vermont and Massachusetts, however, that involvement was critical for a successful legalization of same-sex unions. Without a representative body working as an intermediary between the people and the law, gay marriage had a much smaller chance of success. There was no “scrutiny period,” either, in which those charged with deciding on gay marriage could process and reconsider their position and not simply act emotionally or rashly. Though constitutional and democratic by most definitions, allowing the vote to go straight to the people without any checks on their power seems contrary to the ideals of protecting the minority from the tyranny of the majority. In an Opinion piece for the San Diego Union-Tribune, the authors write:

Consider that the groups behind a pending initiative amending the California Constitution to ban gay marriage welcomed the Supreme Court ruling, saying it would "ignite" voters who pushed Proposition 22 to easy passage eight years ago. Even before the ruling, supporters of the proposed constitutional amendment had no trouble gathering 1.1 million signatures, all but ensuring its placement on the November ballot. The result is likely to be an imposition of the ban on gay marriage in the state constitution and a return to the status quo. The Proposition 22 ban was an initiative statute, not part of the constitution...We think it's difficult to believe a sweeping court ruling is the best way to resolve the gay-marriage question...A case can be made that an evolution of incremental change driven by changing public perceptions is preferable.\(^5\)

This position has gained much traction among a variety of different supporters of gay rights,\(^*\)

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\(^*\) Oral arguments on this issue took place in March 2009 and the California Supreme Court, at time of writing, had yet to rule on the merits of the constitutional revision argument.
but to apply it to all cases is at best foolish and at worst ignorant of context. In Massachusetts and Vermont, the high court decisions required the generally tolerant citizenry to become even more accepting of a new marriage paradigm. The courts were able to do this because of how difficult constitutional amendments would be and because their rulings were directed at the legislatures first and voters second. In California, the generally tolerant citizenry was ripe for conditioning, but the court did not have the fallback of a legislative buffer between its ruling and the wider public. Without all three, gay marriage has failed in California, at least for the time being.

Variables

A few factors in particular led to the success of Proposition 8 and the successful bid to make gay marriage unconstitutional. First, the candidacy of Barack Obama dramatically increased the number of new and minority voters in California, and both groups overwhelmingly supported Prop 8. Despite Obama’s own position against Proposition 8, groups that voted in large numbers for him did not hesitate to vote against his position for themselves. Another major factor was financing. On October 18, 2008, campaigns for and against Prop 8 had raised a combined $56 million, making it the most expensive social-issue election issue in American history. By the day of the election, however, the combined total raised by the two campaigns was $83 million, a twenty-seven million dollar increase in just over two weeks, and much of it went to the “Yes-on-8” campaign. Members of the Mormon Church were the biggest donors, with estimates that they spent $20 million in support of the gay marriage ban. The huge influx of money for both campaigns made it possible to run expensive advertising campaigns, including the one of Mayor Newsom’s participation in
“teaching” homosexuality to young students. Though there was substantial outcry about the
honesty of the “Yes-on-8” claims, they were nonetheless effective at communicating to
voters that their families, and ergo society at large, would be threatened by gay marriages. A
final variable that set California apart was its sheer size. California is not a small state in the
Northeast that can claim a relatively homogenous population and to be a gay enclave. Gay
marriage in California would have a far wider impact on the rest of the country than
Massachusetts or Vermont could, and as a result, more people were willing to fight for their
position in a way that they might not in other states. When these three variables are
considered in conjunction with the demographic and political structures that impacted the gay
marriage effort in California, one gets a clearer picture about which factors matter the most in
achieving legalization of same-sex marriage.

**East Coast v. West Coast**

California did not succeed in legalizing gay marriage because the state Supreme
Court did not mandate gay marriage in its ruling, and therefore did not positively initiate
same-sex unions in Massachusetts and Vermont. Furthermore, the citizens were charged
with voting on an emotional issue without the legislature acting as an intermediary between a
controversial court ruling and a direct vote from the people. In Massachusetts, the legislature
ensured that the amendment to ban gay marriage did not reach the people, and in Vermont,
with even more strict guidelines for constitutional amendment, the legislature protected the
rights of same-sex couples. In both states, the action of the legislature provided the “scrutiny
period,” in which the citizens could adjust to the reality of having legal recognition of gay
relationships rather than acting immediately on their objections. This period did not occur in
California, and the state Supreme Court did not provide such a scrutiny period or the legislative intermediary though it could have done so. Three potent variables – an historic election, vast amounts of money, and the size of California – all supported the implications of the demographic and political structures. The variables credited with affecting the outcome of the vote were mostly negative, and these variables simply did not exist for the cases in Massachusetts and Vermont. As for who or what really pushed the issue onto the main stage in each of these states, the Massachusetts Supreme Judicial Court and the Vermont Supreme Court both mandated action from the legislature in protecting same-sex unions, which the California Supreme Court did not do. Further, the California court did not do all it could have done to add that extra legislative step in the process for further consideration. Finally, there was no Mayor Newsom in Massachusetts or Vermont that prematurely forced the issue into the public arena and caused serious backlash. The state supreme courts in both the Bay State and the Green Mountain state were responsible for addressing gay marriage and were far less vulnerable targets than Newsom proved to be. In sum, the political process, demographic considerations, and external influences in California proved to be far too much for gay marriage, whereas in the two New England States, those various factors were far better situated to ensure the legal recognition and protection of same-sex unions.

Conclusion

Supporters of gay marriage in California are working to get enough signatures to put gay marriage back on the 2010 state ballot, this time in support of legalization. If they succeed and the amendment passes, there will no doubt be further lawsuits and objections
from opponents of such a change. Passage of a constitutional amendment legalizing gay marriage in 2010 will have taken ten years of active and passionate work from both sides of the issue, and may continue on for many years. There is little doubt that California will indeed legalize gay marriage in the not-so-distant future, but questions remain as to whether or not the path it took was the most efficient or effective not only legalizing such marriages, but also cultivating a society that actually accepts them, as people now do in Massachusetts and Vermont. Demographically, California is far more diverse than many states and thus has to account for a variety of different viewpoints on the issue, a real social challenge. The political structures are not conducive to dealing with controversial issues that affect society at large on a deeply emotional level. If the examples of Massachusetts and Vermont are any indication, if the California Supreme Court does indeed rule that Prop 8 amounted to a constitutional revision and thus needs the approval of the legislature, chances for legalization of gay marriage will soar. If not, gay marriage will eventually make it back to the people for another vote and perhaps next time, or the time after, Proposition 8 will be reversed.

1 California Civil Codes: Family Code, Section 300, Part A.
2 California Civil Codes: Family Code, Section 297, Part 3 (B).
3 “Comparison of Marriage vs. Domestic Partnerships in California” by Let California Ring. As cited in “Consideration of State Proposition 8: Limit on Marriage Amendment, City Managers of the City of Hayward, California, 4.
8 California Civil Codes: Family Code, 308.5.
11 Bill Lockyer, Attorney General of the United States, vs. City and County of San Francisco, et. al. Supreme Court of the State of California, S122923, 2.
14 Wyatt Buchanan, “A Day After Assembly’s OK, Schwarzenegger Pledges to Kill Same-Sex Marriage Bill,” San Francisco Chronicle, September 8, 2005.
16 Gledhill and Buchanan, “Governor’s Gay Rights Moves Please No One.”
20 Egelko, “Same-Sex Marriage Ban Upheld in Ruling.”
22 Egelko, “Court Appears Split.”
23 Majority Opinion, In re Marriage Cases, S147999, Supreme Court of the State of California, Filed May 15, 2008, 121.
24 Dissenting Opinion, In re Marriage Cases, California Supreme Court, 5-6.
26 Howard Mintz, “Court Lets Stand Initiative on Same-Sex Marriages,” San Jose Mercury News, July 17, 2008.
28 John Wildermuth, “Prop. 8 gaining ground in poll; Same-sex marriage ban's foes losing their comfortable lead,” San Francisco Chronicle, October 23, 2008.
34 PPIC, 2008,
39 Mike Swift, “Education and income were strong factors in vote against gay marriage,” San Jose Mercury, December 3, 2008.
40 PPIC, 2008.
41 Pew Religious Landscape Survey.
43 PPIC, 2008.
44 Wildermuth, supra 30.
45 Ibid.
46 PPIC, 2008.
48 Wildermuth, supra 30.
50 Erin Allday, “Like it or Not, Newsom Has Become the Face of Prop. 8; Mayor Plays an Unwitting Role for Backers of Gay Marriage Ban,” San Francisco Chronicle, October 14, 2008.
53 John Wildermuth, “Money pours into effort to defeat Proposition 8; Fundraising surge follows polls showing lead for same-sex marriage ban,” San Francisco Chronicle, October 25, 2008.
54 Jessica Garrison and Joanna Lin, “Mormons’ Prop 8 Aid Protested; Gay-rights activists criticize the church for its role in helping to pass California's ban on same-sex marriage,” Los Angeles Times, November 7, 2008.
“Marriage is the legally recognized union of two people. Gender-specific terms relating to the marital relationship or familial relationships…must be construed to be gender-neutral for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law or any other source of civil law.”

- **An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom**

“Picture a country where you could lose your job for expressing moral reservations about homosexuality—or even worse, where the public voicing of such opposition could be a crime. You do not have to imagine such an Orwellian land: it is increasingly becoming a reality in the United States of America. This has long been the goal of radical gay activists.”

- **Timothy J. Dailey, “The Other Side of Tolerance,” for the Family Research Council**

The most enterprising part of this work is contained in this chapter: my prediction state. The other three case studies have all addressed the issue of gay marriage directly, and while there may be more to be done, all of them have made some sort of ruling that holds as law for the time being. The Maine legislature voted back in 1997, at the height of DOMA votes, to ban gay marriage. The issue is back on the table, however, as the Maine legislature prepares to consider a bill sponsored by Representative Dennis Damon that would legalize same-sex marriages and recognize those same-sex marriages from other states. This issue could be decided in the next few months, making Maine a natural choice as the state with
which to test my framework. Maine is not alone in the Northeast when it comes to considering gay marriage legislation; New Hampshire, Rhode Island, New York, and New Jersey are all at varying stages of considering legislation that would legalize gay marriage, and Vermont just legalized gay marriage, the first to do so by legislative process. The two most northern states appear to be the most likely to pass such legislation in the next several months. As of writing, New Hampshire has already passed a version of a same-sex marriage bill in one of the chambers of the legislature, though its governor has publicly expressed opposition to gay marriage. In Maine, the bill sponsored by Rep Damon has sixty additional sponsors from both the House and Senate, while Governor Jim Baldacci, though opposed to gay marriage, has not publicly announced how he would respond to such a bill. Much like every other state that has become a marriage battleground, activists on both sides of the issue are gearing up for lobbying, media campaigns, and demonstrations on behalf of their position. Given the immediacy of the Maine bill and the potential for New England to be an example of tolerance, Maine was the logical choice to test out the application of my framework on a state that has a Defense of Marriage Act and only minimal protections for same-sex couples in its Domestic Partnership Registry. Determining the outcome of the current same-sex legislation is a two-part process, one institutional and one demographic. On the institutional end, the Maine legislature is charged with passing the proposed gay marriage bill, which it can do without fear of causing a backlash in the form a constitutional amendment to ban such unions because in Maine only the legislature can initiate amendments to the constitution. From a demographic standpoint, the people may override the legislature’s action on the bill in the form of a “people’s veto.” If opponents of gay marriage can collect enough signatures to place such a veto on the ballot, voters can repeal
the bill and force the issue back to the legislature. In Maine, the institutional and
demographic factors have some interplay but will mostly operate independently of each other
on the gay marriage bill.

**Maine and Massachusetts: Together Again?**

On January 14, 2009, Representative Dennis Damon, Democrat of Trenton, and about
seventy supporters gathered on the steps of the Maine State House for a press conference. 
Damon announced his intention to sponsor a bill legalizing same-sex marriage in Maine,
asserting, “Some have asked if this is the right time. To them, I say, this legislation is long overdue.”

Whether because of elections or other legislative responsibilities, timing is
always a concern with gay marriage. Many people question the timing of Damon’s bill
because they feel that the economic crisis ought to take center stage in Maine’s 124th
legislative session, while others wonder if the people of Maine are ready to accept gay
marriage in their state. (Interestingly, a recently published study by researchers at the
Williams Institute documents the economic benefits that legalizing gay marriage would have
for Maine. They conclude “allowing same-sex couples to marry in Maine is a gain of
approximately $60 million to Maine’s businesses and workers, and $3.6 million in state and
local government revenues over the next three years.”

LD 1020, as “An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom,” is known, has to overcome
several hurdles before it would become law. The first is approval from both the Maine
House and the Senate, and then support from the governor. In addition, Maine has a unique
constitutional construct called the “people’s veto,” in which voters can veto a piece of
legislation in an election. In 2005, the Maine legislature passed a law to protect gays and
lesbians from discrimination in employment, housing, education, public accommodation, and
credit, which went to the people in a referendum. The repeal was rejected, 55% to 45%, but this ultimate passage masks the fact that it took ten years and three votes for the anti-discrimination bill to actually become law.³ All indicators show that an effort to repeal any gay marriage legislation in a people’s veto is almost guaranteed, which very much affects any prediction of the outcome of Damon’s bill.

In 1997, Maine passed its own Defense of Marriage Act, which stated simply, “Persons of the same sex may not contract marriage.”⁴ Same-sex marriage became the fifth marriage prohibition according to Maine law, in the company of polygamy and degrees of consanguinity. A group called Concerned Maine Families assembled more than 60,000 signatures to put the one-man, one-woman definition of marriage before the legislature, resulting in the DOMA.⁵ After that, same-sex union issues were largely sidelined until 2004, when the Maine legislature considered and passed legislation creating domestic partnerships. The 2004 law, “An Act to Promote the Financial Security of Maine’s Families and Children,” created a domestic partnerships registry which allowed same-sex couples to register their relationship and receive some of the benefits civilly married heterosexual couples did. All parties involved were quick to point out that domestic partnerships do not qualify as marriage. In the document provided by the Department of Health & Human Services regarding the instructions and information for domestic partnerships, there is a large red exclamation point, drawing one’s attention to a notice. The notice reads:

It is important to remember that a registered domestic partnership is NOT the same as a marriage and does not entitle partners to rights other than those for which the registry was intended. This registry is intended to allow individuals to have rights of inheritance as well as the rights to make decisions regarding disposal of their deceased partners remains.⁶
In many instances, politicians have argued that a non-marriage alternative for same-sex couples is sufficient, but in Maine, lawmakers and other government officials made it abundantly clear that domestic partnerships were not the same thing. Furthermore, unlike Vermont’s civil unions that afforded all the rights of marriage to gay couples but without the title, Maine’s registry does not create an equal alternative to marriage.

Despite the limited nature of the domestic partnerships legislation, a backlash from staunchly anti-gay marriage activists occurred. In 2005, Representative Brian Duprey, Republican from Hampden, introduced LD 1294, a constitutional amendment, to the legislature. The text read:

Only a union between one man and one woman may be a marriage valid in or recognized by this State and its political subdivisions. This State and its political subdivisions may not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.7

Not only would the amendment have banned gay marriage, it would also have done away with domestic partnerships and civil unions, barring same-sex couples from any legal protections under Maine law. Opposition to the bill came from some high places, including Attorney General Steven Rowe, who argued, “This ... is, I believe, contrary to the concepts of freedom, fairness, human dignity and equality upon which our state constitution is based.” He further warned “that the change could undermine existing state statutes such as those protecting unmarried victims of domestic violence and those granting domestic partner benefits to unmarried couples.”8 Unlike a change to state law that only requires a simple majority, two-thirds of the legislature would have had to vote in favor of an amendment in order for it to then go to the people for a vote. The House voted 88-56 against the bill, a landslide defeat and making the Senate’s 19-15 defeat almost irrelevant.9
Three years later, Representative Damon introduced his bill that would legalize gay marriage entirely, a move that is simultaneously a strong message of advocacy for gay couples, but also one that may result in a backlash in the form of a people’s veto. Unlike in California, voters cannot amend the constitution on their own and, given the legislature’s rejection of such an amendment three years ago, it is highly unlikely that one would succeed now. Opponents of same-sex marriage failed to find a legislator to sponsor another amendment but plan to try again for 2010. In fact, as of right now, it appears quite likely that LD 1020 will pass both the House and Senate, given how many sponsors have signed on. The remaining question marks are the potential for a governor or people’s veto. A public hearing on the bill is scheduled for April 24, 2009, after which the legislature will take up debate.

Applying the Model

Demographics

New England states are often grouped together by similar demographic landscapes. Maine looks very much like Vermont and Massachusetts in its population makeup, particularly when it comes to religion and political party membership, as well as a more general connection between age and religious affiliation. There is no public opinion polling data at the time of writing, and thus the demographic model is applied without parameters ordinarily provided by that information. An analysis of the overlapping demographic data will determine whether there is reason to believe that Maine has the “tolerant citizenry” required to successfully legalize gay marriage. The interactions between age, gender, religion, and politics that tend to be generally accepting of gay marriage appear to hold true
in Maine, meaning a logical conclusion to draw is that Maine has a tolerant citizenry, much like those in Massachusetts and Vermont.

**Age**

In order to account accurately for age trends in Maine, I adjusted the data from the 2000 Census by factoring in the fact that a ten-year age difference is substantial when considering public opinion towards gay marriage. Individuals who were ten in 2000 are now of voting age, and they came of age over a period in which two neighboring states legalized same-sex unions in a very public way. According to a Pew survey, support for gay marriage is dramatically improved when someone has in some capacity been exposed to an individual who identifies as GLBTQ. In Massachusetts, a huge jump in support for gay marriage occurred once such nuptials actually began taking place and people saw that there were no adverse societal effects. The common variable between the Pew findings and the Massachusetts results is that exposure to homosexuality, broadly defined, increases support for gay rights, particularly gay marriage. Consequently, fifteen percent of the voting-age population witnessed same-sex unions taking place across the border for much of their teen and early adult years. Lee Swislow, executive director of Gay and Lesbian Advocates and Defenders, explains, “One of the advantages of New England is that we share geography and media markets, so folks in other states have seen marriage in Massachusetts for five years and can see the good. I think the efforts build on each other. What happens in one state inspires folks in other states…” There is good reason to think that the sharing to which Swislow refers has improved the likelihood that gay marriage will be legalized in Maine and other New England states.
With the adjusted figures based on the 2000 Census data, Maine has a different age breakdown than Massachusetts and Vermont. The difference in the number of young and old people is far less stark; the 18-32 year old group is only 19.7% of the population, while the oldest group, those who are 68 and older, makes up 16.8%.\textsuperscript{12} This difference of less than three percent compares to differences of more than ten percent in Massachusetts and nearly nine percent in Vermont. Voter pattern data has indicated that younger people are less likely to vote than older people, which gives the generally anti-gay marriage, older population a greater voice at the polls. The age bloc of 33-52 year olds constitutes the largest portion of the population at 29.1% and the 53-67 year old bloc makes up 20.5%.\textsuperscript{13} These two in-between segments of the population are likely, then, to be targeted by the two campaigns, both because of their size and diversity of the opinions within the groups.

**Gender:**

The number of men and women in Maine makes for a less-clear indicator of how gay marriage is perceived and thus how it could be received by the Maine public if the legislature legalizes it. In 2000, women made up a slightly larger portion of the population – 51.3% than the men, which is consistent with the other three case studies. If national public opinion data holds for Maine, as well as the fact that women are more likely to vote than males, a potential people’s veto could be posed with a real challenge from a gender-based perspective. Another interesting gender issue pertains to the genders of same-sex couples in Maine. According to the “Census Snapshot” of Maine by the Williams Institute, there are more lesbian couples than male gay couples in Maine, with the former representing 56% of same-sex couples and the latter 44%.\textsuperscript{14} In national opinion surveys, men are more tolerant of lesbians than of gay men and thus the greater number of lesbian couples may serve to boost
overall support for same-sex marriage. I am inclined to think that gender will be the least influential aspect of demography in the case of a people’s veto in Maine, but it is very much worth considering as part of a larger picture.

Religious Affiliation:

As expected, religion, or a lack thereof, matters in Maine as it did in Massachusetts, Vermont, and California. Trinity College sociologist, and co-director of a survey for USA Today on gay marriage in New England, Barry Kosmin, observes, “Given that 25% of GenX (those ages 29 to 42) and GenY (ages 18 to 28) are nones [have no expressed religion affiliation], this is where we are headed. It's a standoff between young people with a tremendous sympathy for civil rights and what appears to be biblical injunctions from religion.” Neither religion nor age demographics definitively indicate the outcome of a same-sex initiative, but as Kosmin and others point out, public opinion is trending in the direction of acceptance and not the other way around.

Maine, like much of New England, is not particularly religious. The Gallup survey rated Maine as third on the least religious states list, behind Vermont and New Hampshire and one ahead of Massachusetts. Evangelical Protestants, black and white, make up about 15% of the population, a number well below the national average of 26%, while Maine also has more mainline Protestants (26%) than the national average (18%). While California and Massachusetts had more than thirty percent of their populations identify as Catholic, Maine has 29% Catholics (Figure 7.1). Finally, the unaffiliated group or, as Kosmin calls them, “nones,” make up a substantial part of the Maine population, far more than Massachusetts.
Figure 7.1

<table>
<thead>
<tr>
<th>Religion/Denomination</th>
<th>Maine</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evangelical Protestant</td>
<td>15%</td>
<td>26%</td>
</tr>
<tr>
<td>Mainline Protestant</td>
<td>26%</td>
<td>18%</td>
</tr>
<tr>
<td>Hist. Black Protestant</td>
<td>&lt;.5%</td>
<td>7%</td>
</tr>
<tr>
<td>Catholic</td>
<td>29%</td>
<td>24%</td>
</tr>
<tr>
<td>Unaffiliated</td>
<td>25%</td>
<td>16%</td>
</tr>
</tbody>
</table>

Religion continues to be a rallying cry for opponents of same-sex marriage. Tony Perkins is the president of the Family Resource Council in Washington D.C., an offshoot of James Dobson’s Focus on the Family. At an opposition protest, Perkins opened the event with a prayer that began, “This is not our battle, Lord, it is your battle. We are simply reporting for duty.”

Representative Richard Cebra, R-Naples, implored the crowd to “put on the armor of God.” This language of a divine fight is a compelling rallying cry for opponents of same-sex marriage, particularly when used in conjunction with more secular language of traditions, family values, and the good of society. Religious organizations constitute a large part of the mobilization apparatus for the opposition in Maine, called the Maine Marriage Project. The project encompasses various denominations of evangelicals, the Roman Catholic diocese, and other conservative Christian groups. The presence of the Christian-based opposition movement is unmistakable in Maine, but may be offset by a few variables. In the Vermont media during the civil unions debate, newspapers quoted at length religious leaders and religious-affiliated individuals who opposed the creation of civil unions. In the Maine public discourse, there are two notable differences. Firstly, there are fewer indications that a huge movement has rallied around the cause based on religious persuasion alone. In my analysis, there is simply a less confident religious voice in Maine than there seemed to be in Vermont, the state with the most-similar religious profile. Secondly, there is
a strong coalition of clergy in Maine that supports gay marriage and does so publicly and actively. A vocal theological opposition did not appear in any meaningful way in the three previous case studies, and this is a significant difference. Another important consideration that is not unique to Maine is the limitations of the religious message to reach undecided and non-religious people. Religion will have its potent role in the Maine gay marriage debate, but will likely taper out as the younger and less religious replace the older and more religious members of society.

Political Affiliation:

There is good reason to think that Maine, like Vermont, is home to two different kinds of people: the “two Maines” phenomenon, if you will. The first Maine is conservative and traditional, while the second is liberal and progressive. Some observers also note a libertarian streak in the upper Northeast states with a tradition of respecting the individual rights of others.21 For this reason, political party affiliation can be misleading, as it was in Vermont. The Democrats in both these states are very likely to be moderate and conservative democrats, a group that views gay marriage unfavorably. In the 2006 election, just under one million Mainers voted and that total was almost evenly divided into Democrats, Republicans, and Un-enrolled (Independents), with a smaller number of people voting for the Independent Green party.22 The ‘un-enrolled’ group was in fact the largest bloc, indicating that using party affiliation per se as a gauge for gay marriage support would be deceptive in Maine. Political persuasion could be leveraged in the case of a people’s veto (assuming the law passes) if the Republican and conservative Democratic lawmakers who voted for LD 1020 go back to their constituents and explain to them why they voted as they did. This could act like
the “scrutiny period” for the Massachusetts legislature, in which opinions and ideas are exchanged, but for the people who would vote to reverse a gay marriage law instead of the legislature. On the other hand, the same leverage could be used to mobilize voters of similar political party identification to vote to repeal a gay marriage law in a people’s veto. In either case, political affiliation could affect gay marriage law, particularly after its passage.

**Political Structures**

Unlike in the other three case studies, the Maine Supreme Court has not been particularly involved in the gay marriage debate, which means that the political structures of concern for this part of the model are Maine’s legislature and its constitutional procedures. The Maine House of Representatives has 151 members in the 124th session: ninety-five Democrats, fifty-five Republicans, and one Un-enrolled member. The Senate has thirty-five members, with twenty Democrats and fifteen Republicans. Democratic control of both houses means that the leadership of both chambers also Democratic, and the Speaker of the House, Hannah Pingree, is a co-sponsor of the gay marriage bill. The Senate President, Elizabeth Mitchell, has not taken a public stance on the bill, but given a strong civil libertarian trend and previous advocacy for gay rights, it is not unreasonable to conclude that Mitchell will support the gay marriage bill. Of the sixty co-sponsors to Damon’s gay marriage bill, eight are Democratic senators, while the other fifty-two are representatives, fifty of whom are Democrats. The only Republican representatives sponsoring the bill are Robert W. Nutting of Oakland and Meredith N. Strang-Burgess of Cumberland. The partisan nature of the sponsorship of the bill may not be identical when it comes to the actual vote, but the party divisions are nonetheless telling.
Maine’s domestic partnership provisions are extremely limited, which indicates that Representative Damon’s bill challenges the marriage paradigm profoundly. Unlike Vermont’s gay marriage legislation, which is based on a strong civil unions foundation, Maine is essentially acting on the examples set by Massachusetts, Vermont, and Connecticut. In other states, the lack of pro-gay marriage mandate from a supreme court would make the passage of such legislation less likely, but because Maine is so close to the gay marriage states, the proximity may offset the lack of court intervention. Other New England states with similar demographic and political profiles have provided an example to Maine, which in some respects gives the Maine legislature reason to act on the Massachusetts Judicial Court decision in Goodridge. California has a distinctly different set of demographic and political factors than those of New England states, meaning that it needed its own judicial mandate, while Maine can “adopt” the mandate from Goodridge. The legislature runs less of a risk in supporting the gay marriage law on these grounds, assuming it is addressed this session, because any lawmakers up for re-election will have more than a year’s buffer in between a yea vote and that 2010 election. In addition, because legislators will not have to be conducting their own campaigns at the close of the session, they can actively work on behalf of whatever position they took on LD 1020 in between a vote and a potential people’s veto. As mentioned in the “political affiliation” section, this buffer could provide a scrutiny period for voters so that they would not vote to repeal the gay marriage bill. Of course, if it does not pass the legislature, a scrutiny period for the people would be unnecessary.

At this point, there is very little evidence of how lawmakers will vote on LD 1020, with the exception of its sixty sponsors. While a few others have come out in support of or opposition to the bill, a complete picture of where each lawmaker falls is not available. A
telling remark from Kris Mineau of the Massachusetts Family Institute indicates what the future of the bill might be. In an interview he noted, “There’s no doubt that [gay marriage advocates are] making progress in the legislatures. They have wisely targeted the New England states, because of their progressive stance on social issues.”

Mineau’s observation buttresses the earlier argument that Maine and other New England states have adopted the Goodridge position as their own, thus making a legislative approach rather than a judicial one not only feasible but also potentially successful. Given the number of sponsors, House and Senate leadership support of the bill, and the Democratic advantage in the legislature, LD 1020 has a good chance of passage. The possibility exists that Governor Jim Baldacci could veto the bill, but there is insufficient evidence at this point to make such a speculation.

In Maine, it is highly unlikely that a constitutional amendment to ban gay marriage would pass because it would require a two-thirds vote by both houses of the legislature before going to the people for ratification. Fifty-three representatives, including the main sponsor Damon, support gay marriage openly as indicated by their willingness to co-sponsor LD 1020. With 151 members, fifty-three opponents of such an amendment already puts a two-thirds majority out of reach, if barely, without considering how many more may support the gay marriage bill later. There is no process for citizen-initiated amendments to the constitution in Maine, leaving such a revision entirely up to a legislative body that does not appear poised to do so. Thus, the remaining option to ensure gay marriage remains illegal in Maine would be to use the people’s veto. Article IV, Section 17 of the Constitution of Maine establishes the people’s veto:

Upon written petition of electors, the number of which shall not be less than 10% of the total vote for Governor cast in the last gubernatorial election preceding the filing of such petition, and addressed to the Governor and filed in the office of the Secretary of State by the hour of 5:00 p.m., on or before the 90th day after the
recess of the Legislature... requesting that one or more Acts, bills, resolves or resolutions, or part or parts thereof, passed by the Legislature but not then in effect by reason of the provisions of the preceding section, be referred to the people...

In short, people submit an application to gather the requisite number of signatures in order to get the issue at hand on a ballot to be voted upon by the population-at-large.¹

Opponents of the anti-discrimination legislation that would have offered certain protections to gay people, employed this tactic successfully for several election cycles. If there is one variable likely to derail the gay marriage law, I anticipate that the people’s veto would be it. The veto does not have the weight of the more permanent constitutional amendment, and thus people can vote strictly on the issue and not on the constitutional implications. Opponents of gay marriage can argue compellingly that the veto is a profoundly democratic mechanism, while not irrevocably impeding the legalization of gay marriage. This gives advocates of such legislation the ability to continue an educational and lobbying campaign for gay marriage, as they did with the anti-discrimination bill, until they achieve success in both the legislature and among the populace. While there will undoubtedly be disaffected parties at some point in this process, people’s veto is perhaps the best way of ultimately legalizing gay marriage because it creates a consensus among the legislature and the population.

Variables

Though it has already been briefly discussed, the shared media outlets for New England undoubtedly affected the willingness of lawmakers to address gay marriage in Maine. Many Massachusetts newspapers are widely distributed outside of the Bay state, and

¹ The 2006 Gubernatorial Election would provide the basis for the 10% rule. There were 550,865 votes cast for governor that year, which means that 5,587 signatures would be required to place a people’s veto on the ballot in 2010.
thus Mainers would have been aware of the extensive coverage of Goodridge and its aftermath. Similarly, the events in Maine and other New England states get back to Massachusetts residents, the vast majority of whom have comfortably settled into the new marriage paradigm. The exchange of experiences between these states is perhaps unique to New England and increases the chances that as one does, so too will the others. Another variable may be the aforementioned recently released report from the Williams Institute about the economic benefits of legalizing gay marriage. In a time of severe economic concerns, a law that would bring in funding without cost to the state is appealing, perhaps even to those who would have been hesitant to support same-sex marriages, or at least want to address the issue as soon as possible to move onto other items.

**Conclusion and Prediction**

The gay marriage issue in Maine shares some important traits with Vermont and Massachusetts dealt with the same challenges. In all three states, the legislatures were the primary architects of same-sex union legislation and provided the necessary buffer between the courts and the people to successfully legalize gay marriage. The barriers in place to prevent constitutional amendments all rested with the legislatures, which were unwilling to so dramatically preserve heterosexual marriage when the issue came before them. The similar demographic profiles, particularly with regard to religion, are another commonality between these three states. These profiles provide the foundation for the “tolerant citizenry,” which acclimated to same-sex unions in Massachusetts and Vermont, and very well may react similarly in Maine, though that will not be known until polls and surveys are conducted. The only reason Maine may not legalize same-sex unions outright is because it has a people’s
veto, a political tool not available to residents of Massachusetts and Vermont. This veto is more reminiscent of the California Proposition 8 rejection of gay marriage, though the consequences of the Maine veto are not as permanent or extreme.

Maine will legalize gay marriage this legislative session and opponents of the law will gather enough signatures to put a people’s veto on the ballot for the next election. At this point, I have insufficient data to venture a definitive guess on the outcome of the people’s veto, and there are strong reasons to believe in either possible outcome. For opponents of gay marriage, they are sufficiently passionate and organized to assemble the requisite number of signatures and get the issue to the ballot and then allow people to vote for themselves. Proponents of gay marriage, however, can take comfort in the fact that it is very difficult to get so many signatures in only ninety days, and there would be time for a “scrutiny period,” during which activists could work to persuade people not to repeal the law. Ultimately, I think a veto will be on the next ballot and depending on how activists use the intervening time, the veto will either barely pass and then be defeated when the legislature reapproves gay marriage, or proponents of gay marriage will defeat the veto the first time. In either case, gay marriage will be legal in Maine by 2012.

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1 Susan M. Cover, “Activists Lobby for Same-Sex Marriage; A Maine Lawmaker Introduces a Bill that Defines Marriage as the Union of Two People, Rather Than a Man and Woman,” Kennebec Journal, January 14, 2009.
2 Christopher Ramos, M.V. Lee Badgett and Brad Sears, “The Economic Impact of Extending Marriage to Same-Sex Couples in Maine.” The Williams Institute, UCLA, February 2009, 3.
5 M.D. Harmon, “Ban on Same-Sex Unions Going to the Legislature for a Vote; Don’t Be Surprised if it gets Approved There,” Portland Press Herald, February 7, 1997.
6 Maine Department of Health and Human Services, “Instructions and Information For the
7 LD 1294, Amendment to Constitution Article IX, Section 24. 122nd Legislative Session of the Maine Legislature.
10 Pew Research Center for People & the Press and the Pew Forum on Religion & Public Life, “Republicans Split, Democrats Split on Gay Marriage; Religious Beliefs Underpin Opposition to Homosexuality,” November 18, 2003. Q.34Fi: There is a lot more discussion about homosexuality these days. Who is the first homosexual person that comes into your mind? Just the first person you can think of? Q.35: Do you have a friend, colleague, or family member who is gay?
13 United States Census: Maine.
15 Pew, “Republicans Unified, Democrats Split on Gay Marriage,” November 18, 2003. Q.30: Would you say your overall opinion of [gay men or lesbian women] is very favorable, mostly favorable, mostly unfavorable, or very unfavorable?
19 Judy Harrison, Same-Sex Marriage Foes Rally in Capital; Bill's Supporters Create; Silent Witness' Outside,” Bangor Daily News, February 26, 2009.
20 Harrison, “Same-Sex Marriage Foes Rally in Capital.”
27 The Constitution of Maine, Article IV, Section 17: Proceedings for a People’s Veto.
CHAPTER EIGHT:
CONCLUSION

“I have no doubt we shall win, but the road is long, and red with monstrous martyrdoms.”
   -Oscar Wilde in a letter to George Ives

“The world only spins forward. We will be citizens. The time has come.”
   -Prior Walker in Tony Kushner’s Angels in America

Less than a week after Iowa became the first state outside of New England to legalize gay marriage, Vermont became the first state in the country to do so by legislative action and not a judicial mandate. Evan Wolfson, executive director of Freedom to Marry, the national advocacy group behind gay marriage, responded to the week’s events in an article for the New York Times: “Contrary to the claims made by the opponents of equality, it’s not just judges, it’s not just the coasts, and it’s not just going away.” Many people who oppose gay marriage do no conceive of themselves as “opponents of equality,” but rather traditionalists who do not see why same-sex couples ought or need to be married when marriage, for all of recent history, has been between a man and a woman. This viewpoint seems to be losing ground, however, and Wolfson’s observation that gay marriage initiatives are beginning to succeed regardless of where or by what means, marks the start of a genuine shift to a new, more inclusive definition of marriage. The country is a long way away from national
legalization of marriage, but every state that has gay marriage is dropping a stone into a pool with far-reaching ripples.

**Summary of Findings and Conclusions**

The goal of this paper was to understand what states are more likely to legalize gay marriage. To this, I used a framework of analysis that employed a number of factors related to the subject. The first part dealt with demographics, and four particular traits that have been shown to affect how groups with those characteristics generally feel about gay marriage. Based on national public opinion data from the Pew Research Center and the Pew Forum on Religion and Public Life, I determined that age, gender, religious affiliation, and political party affiliation were the four demographic traits that were both consistently tracked and likely to have variation of opinion toward gay marriage. Age data indicates that younger people are more supportive of gay marriage and as people get older, they become generally less supportive. When it comes to gender, women are surprisingly more supportive of gay marriage than men are. By far the most influential demographic trait is religious affiliation, particularly for evangelical Christians. Pew studies repeatedly show that religion is the driving force behind most opposition to gay marriage, and no group of any demographic identification matches the opposition of evangelical Protestants in this regard. The final trait, political party affiliation, indicates that conservative Republicans are more likely to oppose gay marriage and feel strongly about their opposition, while the only political group in which a majority supports gay marriage is liberal Democrats. With these groupings and trends in mind, I next considered political structures and their role in the gay marriage process.
Political institutions are the second part of the framework, and can be state courts, legislatures, elected officials, or constitutions. The state supreme courts were the most obvious institution to consider, given that in each case study, the state supreme court was directly involved in the outcome. As the government arm charged with interpreting matters of the constitution, upon which much of the gay marriage argument rests, initiatives to legalize same-sex marriages will be deeply tied to the courts. The state legislatures are usually involved as well, though to varying degrees. Lawmaking is the purview of the legislature, and thus laws and amendments related to gay marriage will probably end up in the legislature somehow. The leadership of different elected officials, from Speakers of the House to governors, often steers an initiative in a direction it might not have gone and changes the ultimate result. Finally, the procedures established by the state constitutions for lawmaking, court authority, and amendment processes provide the foundation upon which the gay marriage battle is waged. In many cases, slight differences between one state’s constitution and another’s can have a profound effect on the outcome.

Finally, there are state-specific variables that also change the character of a gay marriage initiative. These variables are the third part of the framework and provide a flexible context in which to consider the demographics and political structures. Not every state addresses gay marriage in the same environment or with the same tools that the others do, and this variables section accounts for those differences. A handful of factors could be in play, including timing, finances, particular individuals, and/or geographic location.

To test the framework, I used three case studies – Massachusetts, Vermont, and California – and compared the processes in those states with their respective outcomes. What emerged was a series of interrelated factors that seemed to make gay marriage more
likely to be legalized than to be defeated or banned. In Massachusetts, the state Supreme Judicial Court ruled in Goodridge v. Public Health that there was no constitutional rationale for excluding same-sex couples from marrying, and mandated that the legislature re-write the state’s marriage laws to include same-sex couples in whatever way it saw fit to do so. In response to the ruling, a backlash from the people resulted in a signed petition for the legislature to consider a constitutional amendment that would ban gay marriage. Over the course of more than three years, the legislature stalled and then finally voted the amendment down in the second of two consecutive legislative sessions. Since then, same-sex marriages have become a largely accepted part of life in Massachusetts with no adverse consequences. Vermont did not legalize gay marriage the first time it was given a chance to, and instead created a parallel construct called civil unions, which afforded all of the benefits associated with marriage to same-sex couples without the title. There was vicious argument in the public sphere about the civil unions law while lawmakers debated it, and after it was passed, many of the supportive lawmakers were voted out of office because of their votes. (Despite the backlash, however, civil unions remained the law until recently, when the state legislature legalized full marriage for same-sex couples.) A ban on gay marriage is still in effect in the third case study, California, which voted in November 2008 to add a clause to the California constitution that made marriage strictly between one man and one woman. Proposition 8 came in response to a California Supreme Court ruling that the state Civil Code, which also limited marriage to between one man and one woman, was unconstitutional. Opponents of gay marriage gathered enough signatures to put the issue to the people, who voted in favor of Proposition 8’s ban on same-sex marriages.
Applying the framework to the accounts from those three states allowed me to identify the factors that impacted the outcome of the particular gay marriage initiative. By comparing those factors from all three states, several commonalities revealed themselves. In the two states that legalized same-sex unions, Massachusetts and Vermont, the state supreme court initiated the legalization and gave the legislature minimum leeway to interpret the legal consequences of those rulings. Furthermore, the rulings indicated that the next step rested with the legislatures. In California, on the other hand, the ruling in *In Re Marriage Cases* did not specifically endorse gay marriage or involve the legislature. Rather, the court left the door open for the people to amend the constitution by ballot initiative alone. Without the legislature acting as an intermediary between the courts and the people, Californians were free to act on their emotional and defensive opposition to gay marriage, whereas the legislature would have been obligated to consider a broader range of issues had it been involved. Furthermore, an affirmative ruling on gay marriage from the state supreme court makes two demographic realities into less of a liability for the pro-gray marriage campaigns. The first is that the group that is most likely to support gay marriage, young people, is also the least likely to vote, and people who support gay marriage also tend to feel less strongly about their position, while opponents tend to feel very strongly about their position.

Another related factor is that of state constitutional amendment procedures. In Massachusetts and Vermont, to amend the state constitutions would require legislators to support such an amendment in two and four consecutive legislative sessions, respectively. Those are stringent requirements, unlike in California, where an amendment can be included by a simple majority vote of the people and bypass the legislature altogether. Had the California Supreme Court ruled that adding the marriage amendment to the constitution
qualified as a constitutional revision rather than just an amendment, and therefore must also pass the legislature, gay marriage would still be legal there. All three case studies had progressive, Democrat-led legislatures with officials that proved at least hesitatingly open to same-sex unions. In Iowa, where the supreme court just ruled that gay marriage was legal, there is also a two-consecutive sessions rule for constitutional amendments, and one that can only be initiated by the legislature, which appears unlikely to do so. Based on this evidence, it is logical to conclude that in order to increase a gay marriage initiative’s likelihood of success, advocates should target states with Democratic legislatures, progressive supreme court justices, and stringent requirements for constitutional amendments that keep the issue away from the people as long as possible. The longer that individuals have time to adjust to the idea of gay marriage, my “scrutiny period,” the more likely it is that they will accept those unions.

Giving people time to reconcile their views of gay marriage with a new reality only works when a sufficient number of people are disposed toward acceptance. A state with a large number of evangelical Christians and conservative Republicans is unlikely to docilely come to terms with gay marriage just because the state courts said they should. Of course, a state with such a staunchly traditionalist character probably would not have progressive justices or liberal legislatures, so that scenario is highly improbable. In more moderate or liberal states, however, people still generally do not support gay marriage in large numbers, but it seems that if approximately forty-percent (no less than thirty-eight percent) of the people are supportive and a large percentage is unsure, a state has the demographic profile of a “tolerant citizenry.” A tolerant citizenry tends to be cautiously open to the idea of gay
marriage or, because the people are unsure, can become accepting when they see that there are no negative ramifications for their families or society-at-large.

The Next Steps

Based on the conclusions drawn from the three case studies, I made a prediction about what would happen in Maine, where the state legislature is holding hearings in April 2009 about a proposed bill that would legalize gay marriage. For Maine, and Vermont’s legislation that fully legalized gay marriage, Goodridge is an adopted court ruling. Their own courts did not have to positively initiate gay marriage proceedings because Massachusetts, Vermont, and Maine are so similar that the ruling of one could act as a surrogate to the others. Consequently, Maine was able to go straight to the legislative process where chances are good that the bill will pass. Democrats are the majority in both chambers and the Democratic leadership supports the bill. If the bill passes the legislature, it may face two hurdles: a veto from the governor or a people’s veto. In the case of the latter, opponents of the gay marriage bill could gather enough signatures in the ninety days after the bill passes to put the issue to the people. A majority vote to repeal would mean that the legislature, if willing, would have to take the bill up again. The process would repeat until opponents fail to get enough signatures or a veto is voted down. Regardless of the precise steps, I believe Maine will legalize gay marriage by 2012.

As for the rest of the country, Iowa may prove to be a critical turning point in this process because it represents a new frontier for the gay marriage discourse. Iowa is not in New England which, though obvious, marks a move away from the “gay enclave” talk that opponents of gay marriage use to isolate the Northeast’s openness to same-sex couples. By
the end of 2012, I anticipate that all of New England will have fully legalized marriage for same-sex couples, as will California, New York, and New Jersey. The supreme court-to-legislature-to acceptance model is by no means the only route but it is has proven to be successful in the current political and cultural domain. As more states expand marriage laws, however, there will be less of a need for courts to act as the provocateurs of these issues. The New England example is a microcosm of this effect: Massachusetts served as an example to its demographically and politically similar neighbors. That trend will continue and I would not shy from guessing that by 2018, at least fifty percent of states will have legalized gay marriage.

State-recognized marriages would mean much more if the federal government also recognized them and thereby provided those couples with the rights and benefits associated with marriage. Though legally married same-sex couples receive state benefits, they are still excluded from more than one thousand federal marriage benefits. From this standpoint, marriage is largely symbolic for gay couples. As far the government is concerned, their relationships do not exist, and marriage and civil unions amount to the same entity; neither is recognized as legally valid by federal law. On March 3, 2009, Gay and Lesbian Advocates and Defenders, the firm responsible for Goodridge, Baker, and several other gay rights lawsuits in New England states, filed the paperwork in Boston’s Federal District Court to challenge Section 3 of the federal Defense of Marriage Act. According to GLAD’s website:

Section 3 of DOMA applies to the federal government only. It overrides a state’s determination that a same-sex couple is married and says that they are not married for purposes of all federal laws and programs, even though the federal government has always deferred to state determinations of marital status. Under this law, “the word ‘marriage’ means only the legal union of a man and a woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” This lawsuit challenges the federal government's denial of marriage-related protections and benefits to legally
married Massachusetts same-sex couples, protections and benefits that are available to all other legally married couples.²

This lawsuit does not challenge the DOMA in order to force all states to have gay marriage but rather would require the federal government to recognize those marriages in states that have legalized them. If this lawsuit succeeds, it would dramatically change the nature of gay marriage for same-sex couples and move the country towards legalization. By choosing only to challenge Section 3, GLAD recognizes that the Supreme Court is probably not prepared to rule for universal gay marriage and a premature challenge would do far more harm than good.

Conclusion

There are lessons to be drawn from this paper about gay marriage, as such, and I have laid those out at length. In many respects, though, gay marriage is just one example of how politics and people, or perhaps more broadly, culture, interact in the United States. The way in which different states have dealt with gay marriage speaks volumes about the very nature of American democracy. Which comes first, political institutions or culture? Which defines or leads the other? They both march in close step, of that one can be sure. One cannot get too far out of line without being reigned in by the other. Ultimately, though, it strikes me that institutions lead culture; they must always be just a little more ahead so that culture is constantly called to become more aware and more inclusive. Brown v. Board challenged deeply-seated tenets of American society because the political institutions recognized that, left up to the people, segregation and discrimination against black people would continue far longer than it already had. Opponents of gay marriage have almost exhausted their resources; they cannot conceivably make gay marriage any more illegal than it already is,
which means that the only way for the pendulum to swing is toward equal marriage. There cannot be a decisive push by all of American political institutions to make that change happen, and many political bodies are far from willing or able to do that right now. But in the right places, with the right people, institutions are laying the groundwork for the realization of another civil right in the United States of America.

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